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LATHROP: Well, good morning, everyone. My name is Steve Lathrop. I represent Legislative District 12 in Omaha, and I chair the Judiciary Committee. I'm going to read-- read a little bit of something before we start so everybody knows kind of what the ground rules are in the Judiciary Committee. Committee hearings are an important part of the legislative process. Public hearings provide an opportunity for legislators to receive input from Nebraskans. This important process, like so much of our daily lives, is complicated by COVID. To allow for input during the pandemic, we have some new options for those wishing to be heard. I would encourage you to consider taking advantage of the additional methods of sharing your thoughts and opinions. For complete details on the four available options, go to the Legislature's Web site at nebraskalegislature.gov. We will be following COVID-19 procedures this session for the safety of our committee members, staff, pages, and the public, and we ask those attending our hearings to abide by the following procedures. Due to social distancing requirements, seating in the hearing room is limited. We ask that you enter the hearing room when it is necessary for you to attend bill hearings in progress. Bills will be taken up in the order posted outside the hearing room. The list will be updated after each hearing to identify which bill is currently being heard. The committee will pause between each bill to allow time for the public to move in and out of the hearing room. We request that you wear a face covering while in the hearing room. Testifiers may remove their face covering during testimony to assist the committee and transcribers with clearly hearing and understanding the testimony. The pages will be sanitizing the front table and chair between testifiers. When public hearings reach seating capacity or near capacity, the entrance will be monitored by a sergeant at arms, who will allow people to enter the hearing room based upon seating availability. Persons waiting to enter a hearing room are asked to observe social distancing and wear a face covering while waiting in the hallway or outside the building. The Legislature does not have the availability of an overflow room this year for hearings which may attract many testifiers and observers. For hearings with large attendance, we request only testifiers enter the hearing room. We also ask that you please limit or eliminate handouts. Due to COVID concerns, we're providing two options this year for testifying at a committee hearing. First, you may drop off written testimony prior to the hearing. Please note that the following four

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requirements must be met to qualify to be on the committee statement: First, submission of written testimony will only be accepted the day of the hearing between 8:30 and 9:30, in this room; 2) Individuals must present the written testimony in person and fill out a testifier sheet; 3) The testifier must submit at least 12 copies; 4) Testimony must be a written statement, no more than two pages single-spaced, or four pages double-spaced, in length. No additional handouts or letters from others may be included. This written testimony will be handed out to each member of the committee during the hearing, and will be scanned into the official hearing transcript. And as always, persons attending public hearings will have an opportunity to give verbal testimony. On the table inside the doors, you will find yellow testifier sheets. Fill out a yellow testifier sheet only if you're actually testifying before the committee, and please print legibly. Hand the yellow testifier sheet to the page as you come forward to testify. There is also a white sheet on the table if you do not wish to testify, but would like to record your position on the bill. The sheet will be included as an exhibit in the official hearing record. If you are not testifying or submitting written testimony in person and would like to submit a position letter for the record, all committees have a deadline of 12:00 noon, the last workday before a hearing. Position. Letters will only be accepted by way of the Judiciary Committee's email address, posted on the Legislature's Web site, or delivered to the-- my office prior to the deadline. Keep in mind that you may submit a letter for the record or testify at a hearing, but not both. Position letters will be included in the hearing record, as exhibits. We will begin each bill hearing today with the introducer's opening statement, followed by proponents of the bill, then opponents and, finally, by anyone speaking in the neutral capacity. We will finish with a closing statement by the introducer, if they wish to give one. We ask that you begin your testimony by giving us your first and last name, and spell them for the record. If you have copies of your testimony, bring up at least 12 copies, and give them to the page. If you are submitting testimony on someone else's behalf, you may submit it for the record but will not be allowed to read it. We will be using a three-minute light system. When you begin your testimony, the light on the table will turn green. The yellow light is your one-minute warning. And when the light-- the red light comes on, we ask that you wrap up your final thought and stop. As a matter of committee policy, I'd like to remind everyone the use

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of cell phones and other electronic devices is not allowed during public hearings, though senators may use them to take notes or stay in contact with staff. At this time, I'd ask everyone to look at their cell phone and make sure it's in the silent mode. And a reminder: Verbal outbursts or applause are not permitted in the hearing room. Since we have gone paperless this year, the Judiciary-- in the Judiciary Committee, senators will instead be using their laptops to pull up documents and follow along with each bill. You may notice committee members coming and going. That has nothing to do with how they consider the importance of the bill under consideration. Senators may have other bills to introduce in other committees or other meetings to attend to. This year, in addition to the three-minute light system, because we have a significant volume of bills and a limited amount of time to hear all those bills, then we are allowing 30 minutes for proponents and 30 minutes for opponents. So if there's a lot of you that are all here to testify in support of something, you may want to coordinate that. And with that, I'll have the members of the committee introduce themselves, beginning with Senator DeBoer.

DeBOER: Good morning, everyone. My name is Wendy DeBoer. I represent District 10, which is Bennington and parts of northwest Omaha.

BRANDT: Good morning. I'm Tom Brandt. I represent Legislative District 32: Fillmore, Thayer, Jefferson, Saline, and southwestern Lancaster County.

PANSING BROOKS: Good morning. Patty Pansing Brooks, Legislative District 28, right here in the heart of Lincoln. And I'm Vice Chair of the committee.

SLAMA: Julie Slama, District 1: Otoe, Nemaha, Johnson, Pawnee, and Richardson Counties.

McKINNEY: Good morning. Terrell McKinney, District 11: North Omaha.

GEIST: Good morning. Suzanne Geist, District 25, which is the east side of Lincoln and Lancaster County.

LATHROP: Thank you. Assisting the committee today are Laurie Vollertsen, our committee clerk, and Neal Erickson, one of our two legal counsel. Our pages this morning are Evan Tillman and Mason

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Ellis, both students at UNL. This morning we are doing something that we do in this-- commonly do in this committee. We are having combined hearings on four different bills. We're having two hearings. The first bill that we'll take up will be a combined hearing of Senator Briese's LB139 and my LB52. When that hearing has been completed, we will take up a combined hearing with Senator Wayne's LB71 and my LB54. And for that reason, the Vice Chair will be running the show this morning. With that, we'll begin our hearings.

PANSING BROOKS: Thank you. So this opens the joint hearing on LB-- on legislative bills LB52 and LB139. Senator Briese, would you like to start?

BRIESE: Thank you and good morning, Vice Chair Pansing Brooks and members of the Judiciary Committee. I'm Tom Briese, T-o-m B-r-i-e-s-e, and I represent Legislative District 41. I'm here today to present for your consideration LB139. As they struggle to recover from the impact of the pandemic, our businesses, our educational institutions, our healthcare providers, our schools are faced with the threat of unwarranted, needless lawsuits. And I believe it's incumbent upon us, as policymakers, to do what we can, to do everything we can to facilitate our state's recovery from this pandemic. Implementing the protections found in LB139 is one very substantial step that we can take to help with this recovery. It can provide a level of confidence for our business owners to reopen, and it can help our economy to recover. So what are we doing with this bill? In a nutshell, this bill would require that, for claims based upon COVID exposure, a plaintiff must prove, by clear and convincing evidence, that the defendant's conduct constituted gross negligence or willful misconduct, and that the plaintiff's injuries were significant. It's reasonable, commonsense legislation made necessary by this pandemic. It raises the bar ever so slightly to provide some protection and peace of mind for our businesses, education, and healthcare providers. And I would note that over 20 states have implemented some sort of similar legislation. There's also proposed legislation at the federal level that hasn't been passed, that does some of the very same things. And so what else does this legislation do? In Section 6, it does bring some additional healthcare claims, beyond COVID exposure claims, within the parameters of this bill. And this is an effort to keep our healthcare providers whole. And it recognizes the importance of our healthcare provider-- providers to our battle with COVID. It also provides a two-year

Does not include written testimony submitted prior to the public hearing per our COVID-19 response protocol

statute of limitations for COVID-related claims. And I would submit to you that's ample time for any plaintiff, and, at the same time, it can provide some peace of mind for our businesses and others. It provides a safe harbor for our businesses, healthcare providers, schools, and others in Section 4. There it provides, in adherence to public health guidance, protects them from liability. In doing so, the bill prioritizes public safety by incentivizing those individ-- those folks to adhere to such guidance. And let's be clear about what this bill does not do. It doesn't protect bad actors. Anything beyond simple negligence is culpable, actionable. It doesn't impact the employer-employee relationship otherwise covered by workman's comp. Typically, workman's comp is the exclusive remedy in those relationships. It doesn't impact that, and that's outside of the reach of this bill, and that's made clear in Section 7. And this is not tort reform. This sunsets for causes of action arising after December 31, 2022, or one year after the end of the state of emergency, whichever is later. It's simply a reasonable response to extraordinary circumstances brought to us by this once-in-a-century pandemic. And it does not apply retroactively-- retroactively, excuse me. It only applies to causes of action arising after the effective date of the bill. Initially, I would have preferred retroactive application, and we looked at retroactivity. And several states have applied their legislation retroactively. And I know what the federal-- proposed federal-- federal legislation does also. But based on research, we feel retroactive application of the altered-- of the altered standard of care may be problematic. It could raise substantive due process concerns. And retroactive application of the altered evidentiary burden is of similar concern, but maybe not of equal concern. You know, we've been faced with, again, a once-in-a-century pandemic, something we hope we don't have to deal with much longer, something we hope we don't have to deal with again. Our businesses have struggled. Our schools, our healthcare providers have struggled, as well. And we need to respond to help our businesses, our schools, our healthcare providers, and others to rebound from the impact of this pandemic. And I submit to you that this is reasonable, commonsense legislation that can help our state recover from this event. And with that, I would be happy to answer any questions. Thank you.

PANSING BROOKS: Thank you, Senator Briese. Questions? Yeah, Senator DeBoer.

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DeBOER: Thank you, Senator Briese, for bringing the bill to us today. I'm a little concerned here about the-- the higher standard here, this gross negligence standard, so I'd like to make some legislative history. I've heard several cases of folks who said their employer told them, don't get tested, because if you get tested and you're positive, then you come in and it's a problem. But if you don't get tested, then it's fine. Would that count as gross negligence?

BRIESE: Great question, Senator. But that would be up to the finder of fact. I'm not in a position to determine or to make that call. That would be a question of fact for the jury or the trial judge, whoever the fact finder would be. So I don't know what-- do I have an opinion on that? Not, not particularly. But again, that would be a factual question, whether that would constitute gross negligence.

DeBOER: See, that becomes my concern then about this. So if we can't say that even telling your employees don't come in or get tested to find out once you've been exposed, then that seems to be a much wider gulf in between regular negligence and some standard of gross negligence there.

BRIESE: No, no, and I agree. What you've described sounds problematic to me, but-- but again, that would be a question of fact.

DeBOER: You and I will have to talk about this if this is going to go to the floor, but this would be something I think we would need to establish, that there are certain kinds of behaviors which we would consider within that gross negligence.

BRIESE: OK, fair enough.

DeBOER: So that question I have for you. Has this been a problem? Have there been-- I was looking around and I saw that there was one example of a class action lawsuit in a cruise ship in Australia and a couple of cases in Canada. But I haven't seen any other examples of cases here. And you said there are over 20. There were, in fact, by the end of the year, 22 cases of states that have adopted some sort of COVID immunity.

BRIESE: Yes.

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DeBOER: That clearly doesn't leave us as an outlier. So there are still many states where these actions are being brought. Has there been any actions brought?

BRIESE: I believe there'll be testifiers following me that will probably describe the level of activity in this arena. But I do understand there have been a considerable number of workman's comp cases brought in Nebraska relative to COVID exposure. And to me, that's indicative of the potential for these type of cases also. And so with a statute of limitation that gives plaintiffs considerable time to file suit, oftentimes they're not filed immediately anyway. You know, they have time to be filed. I assume those suits will be forthcoming. But let's be clear, it's the threat of the suits, also, that we're dealing with here. Perception is reality. And we have a business community, an education community, a medical community that is truly concerned about this. And their perception of the threat needs to be addressed, also. Their perception of the threat thwarts economic activity in our state, I would submit.

DeBOER: Yeah. I mean, I would say that there's probably-- this is-- and this is not meant to be snarky, but it does seem like there's a lot of threats going around right now. This is just one amongst many that people have to fear right now. Are there other attorneys who are behind you that are going to testify? 'Cause then I'll ask some of them my questions [INAUDIBLE].

BRIESE: I-- I'm not sure, but I'll be here to close if--

DeBOER: OK.

BRIESE: --you have further questions.

DeBOER: All right, thanks.

BRIESE: Yeah.

PANSING BROOKS: Senator Brandt.

BRANDT: Thank you, Chairwoman Pansing Brooks. Thank you, Senator Briese, for bringing this bill. Is-- are-- when you reference bad actors, is that gross negligence?

Does not include written testimony submitted prior to the public hearing per our COVID-19 response protocol

BRIESE: Yes. Yes. Gross negligence or beyond, sure.

BRANDT: OK, and then I guess I'll go a little more granular, and maybe use a real life example. So a business does not provide personal protective equipment to an employee-- maybe-- maybe in a store, gloves and mask or maybe in a meatpacking plant, it could be more than that. Is that a bad actor?

BRIESE: Is that a bad-- that would-- again, that would maybe go back to Senator DeBoer's question on it'd be a question of fact, trying to determine what constitutes gross negligence, what constitutes willful misconduct. So to me, that's a question of fact, in particular on the gross negligence issue.

BRANDT: OK. But the bill would not prevent that from going to-- going forward.

BRIESE: Right. To-- to the extent it is outside of the workman's comp relationship. And your--you know, the example you provided there, I'd have to think about the interplay between this and workman's comp. But sure.

BRANDT: OK, thank you,

PANSING BROOKS: Senator McKinney.

McKINNEY: Thank you, Senator Briese. Page 5, Section 6, line 14-22 says: In addition to liability-- liability protections provided in Sections 3, 4, and 5 of this act, a healthcare provider, healthcare facility or first responder shall not be held a civil action, seeking recovery for any injuries or damages for causing or contributing to, directly or indirectly, a minimal medical-- medical condition of an individual as a result of acts or omissions while providing or arranging healthcare, unless the plaintiff can prove, by clear and convincing evidence, that the healthcare provider, healthcare facility or first responder engaged in gross negligence or willful misconduct. I guess my concern is, what if a healthcare provider acts negligent? I just feel like-- I have a grandmother, she's currently in a nursing home. She has-- she has had COVID-19. What if somebody in that facility acts negligent? Would the individual in that facility be escaping a malpractice suit because they didn't act grossly negligent?

Does not include written testimony submitted prior to the public hearing per our COVID-19 response protocol

BRIESE: That's a great question, Senator. In an effort to protect our healthcare providers, keep our healthcare providers whole, and recognize the importance of our healthcare providers to our-- to the bed-- excuse me, to the battle that we face with this pandemic and moving forward, we've provided them the same-- afforded them the same protections as others here. And so it would require a showing beyond mere negligence, and that's an inter-- a great point, too, you bring up about nursing homes. I read the other day in The World Herald that sometime in the last three weeks there has been an 80 percent reduction in cases in nursing homes. And so we've turned the corner there, it would seem. And again, this only applies prospectively. Events that happened prior to the effective date of this act, causes of action arising before the effective date of this act are not impacted by this. So it only applies going forward,--

McKINNEY: I understand.

BRIESE: So that should lessen your concern there, I would think.

McKINNEY: I just think it'd get tricky. You know, what if a family is, you know-- my-- my grandmother is not well off, so she probably can't afford an attorney to fight this case. And it'd be hard to prove gross negligence. I'm just afraid that somebody acts negligent, and my grandma is, you know, injured or she could be-- she could die, and--

BRIESE: Sure.

McKINNEY: --my family couldn't do anything about it because, basically, this is a malpractice exemption.

BRIESE: Yes, yeah. And true, it does-- I-- I appreciate your concerns, and it does raise the bar. It does raise the bar for plaintiffs. But that-- that is the purpose of this, to help our healthcare community, our education community, our business community recover from this. And again, it only applies prospectively. And I would submit to you that, you know, relative to nursing homes, I think the narrative, going forward, is probably going to change from one of COVID exposure in nursing homes to the financial stability of our nursing homes, especially out in rural Nebraska, and the financial integrity of those folks and nursing home shortages, things of that sort. I think the

Does not include written testimony submitted prior to the public hearing per our COVID-19 response protocol

narrative will shift, going forward, because of the vaccine, because of the changing dynamics of the pandemic.

McKINNEY: I just think there probably should be some type of balance to not only protect our healthcare workers, who I agree have done an exceptional job throughout this pandemic, but we also have to protect the citizens who are most vulnerable, as well. Thank you.

BRIESE: Yeah, fair-- fair statement. Thank you.

PANSING BROOKS: Any other questions? I have a question. So has there been an onslaught of cases, Senator Briese, that you are trying to react to?

BRIESE: Not particularly. Probably goes back to Senator DeBoer's question. Again, folks behind me will probably describe the magnitude of the threat, the magnitude of the risk, but an onslaught-- I couldn't characterize anything I've heard of as an onslaught.

PANSING BROOKS: And I certainly haven't read anything in the news that would be characterized as an increase. So I think the problem is, it's almost creating a type of immunity because it's making it more difficult for common people to be able to sue or to respond to negligent treatment. It feels like it would lower the standards of excellence in our healthcare systems and in our businesses.

BRIESE: Sure. And I would be reluctant to characterize it as immunity, but it is lowering the standard of care, raising the bar. It is raising the evidentiary standards. So true, it is raising the bar ever so slightly for potential plaintiffs here, in an effort to-- and again, these are extraordinary circumstances we've been faced with and, you know, again, something we hope we don't have to live through again.

PANSING BROOKS: And, and those--

BRIESE: And, you know, and it's an emergency-- it's a response, in my view, to extraordinary circumstances. And it's going to sunset. It's not-- it's not going to be ongoing. And again, it's only applied prospectively. Things that occurred, positive action that arise-- that arose prior to the effective date of this act will not be impacted.

Does not include written testimony submitted prior to the public hearing per our COVID-19 response protocol

PANSING BROOKS: So it just-- anyway, thank you very much.

BRIESE: And I did want to reiterate, though, an adherence to public health-- public health guidance does provide a safe harbor for these entities and individuals, and that will encourage adherence to public health guidelines. And so that-- that is a step here. But you know, again, safety first. That will encourage adherence to public health guides. It should make our citizens safer, and that kind of goes back partially-- partly to Senator McKinney's question, I would submit.

PANSING BROOKS: How-- how do you believe it will make our citizens safer?

BRIESE: Because they're afforded a safe harbor in this bill, if they adhere to public health guidance. And so they're incentivized by this bill to say, oh, that's a public health guidance; I'd better follow that. And [INAUDIBLE].

PANSING BROOKS: OK. When you talk in Section--

BRIESE: I'd have to find it again.

PANSING BROOKS: Section 2-- or Section 1-- Section 2, para-- line-- it's on page 2, lines 14-17. It says "or by executive order." Would that include a mayoral order?

BRIESE: That-- that is a good question. Other statutory authority or executive order, I have to think about that. Good question, though.

PANSING BROOKS: OK. All right, thank you for bringing this bill. And I see no further questions, so we will start with proponents.

BRIESE: Thank you.

PANSING BROOKS: Thank you. And--

BRANDT: [INAUDIBLE].

PANSING BROOKS: No. Oh no, sorry. We have to do-- yeah, sorry. All right. Now we need to-- now we need to get Senator Lathrop's bill, LB139.

Does not include written testimony submitted prior to the public hearing per our COVID-19 response protocol

NEAL ERICKSON: No, it's LB52.

BRANDT: LB52.

PANSING BROOKS: It's LB52. Oh, that's another gaffe. OK, LB1-- LB52, sorry. Welcome, Senator Lathrop.

LATHROP: Thank you, Vice Chair Pansing Brooks and members of the Judiciary Committee. My name is Steve Lathrop, L-a-t-h-r-o-p. I represent District 12. That includes Ralston and parts of southwest Omaha. I'm here today to introduce LB52. LB52 is really a simple bill. It's a simple approach, it simply says that no person shall be liable for-- in-- in a civil action for an injury or death resulting from an alleged exposure to COVID-19. And you may ask yourself, why would Lathrop be introducing an immunity bill? 'Cause if you've been around here for a while, you know that I've generally been opposed to immunities. And the reason I introduce this bill is so that we could have a conversation about this topic and because, if our hearing today demonstrates that we have a problem-- and I don't think that's a given-- but if it demonstrates that we have a problem, then I'd rather give immunity than to introduce into our tort jurisprudence the elements of Senator Briese's bill. And I'll take a minute to explain a couple of things. First of all, I've tried to do a little bit of research, and as-- as you may know, I am myself a trial lawyer and a member of the Nebraska Association of Trial Attorneys. I can't find one lawyer that's taken one of these cases; and there is a reason for that. To-- to bring a case based on COVID-- a COVID exposure-- and let's take a Starbucks. I go into Starbucks, and two days later I come out and I test positive. Now, I may have been-- because-- because you don't have symptoms for so long, it's really difficult to track where you got it. Right? You don't know if you got it from your spouse, if you got it from Starbucks, if you ran over to work and you were at work, if you got it at work, if your wife got it at work and brought it home. It's-- it is literally impossible to establish where you got this unless it's in a congregate setting. So if you're in a nursing home, if you're in a penitentiary, perhaps if you were hospitalized for back surgery and you came out of the hospital with COVID, other than congregate living, establishing the relationship between an exposure and your illness and you contracting it, is very near impossible, in my judgment, as a matter of proof. But if you were to-- and it is for that reason that I've not heard of a single one of these

Does not include written testimony submitted prior to the public hearing per our COVID-19 response protocol

cases, not-- not a lawsuit filed, nor a letter written to a business saying: I intend to bring a claim, let me know who your insurance carrier is, or have your lawyer call me. As I-- as I said when I started my bill, it was a straight up immunity. It would just provide for immunity from COVID claims. And to me, that is a broader immunity that's even stronger than what Senator Briese has done in LB139. And I'd rather have that than a bill that introduces into our tort jurisprudence a couple of things that are foreign to our tort law in Nebraska. One is the idea that we are going to increase the standard of proof. Increasing the standard of proof to clear and convincing is generally something we do in fraud cases. We don't do it for any injury case. You don't have to prove anything in a malpractice action, in an auto action, in a premises liability action, by clear and convincing evidence. Introducing that into our tort jurisprudence is problematic, and I'd rather have a full-on immunity than to introduce that into our tort jurisprudence. The other-- the other thing about LB139 that is foreign to our tort law is the idea that you have to have a certain level of injury to bring a claim. So when we do that and we say you have to have this much injury before you have a justiciable claim, we're introducing something that has no place in Nebraska. Nowhere do we do that in Nebraska. Some states do it with their no-fault auto insurance, where if you have smaller claims, you go through one process. If you have bigger claims, you go through another process. It is completely foreign and, to me, violates the open courts provision of our own constitution. Shortening the statute of limitations, the only statute limitations that we do at two years are wrongful death-- so if you die from a COVID exposure, it's already a two-year claim-- or medical malpractice, professional negligence. Otherwise the premises liability-- and this would be a claim for premises liability-- I come on to the Starbucks and I got-- my claim is I got a COVID exposure and led to my illness. That's a four-year statute. So what we've done in LB139, which I find troubling-- and I would rather have full-on immunity than to introduce shortening the statute of limitations-- every time you want to have protections, increasing the-- the-- or lowering the standard of care and increasing the standard of proof to gross negligence, requiring a certain level of injury and then, perhaps to me, most offensive, in-- increasing the burden of proof on an element in a case. And so with that today, I'm looking forward to hearing people testify about the need for this. Where is the-- where is the fear coming from? Because as I talk to

Does not include written testimony submitted prior to the public hearing per our COVID-19 response protocol

colleagues that try these cases, that bring injury cases-- and by the way, the World Herald had a story about a place in Maine, and they talked about the fact that that is an outlier. People aren't bringing these claims. But if they are, then let's talk about immunity for everyone, because I'd rather do that than introduce the elements of tort reform that are found in LB139. With that, I'll answer any questions you may have.

PANSING BROOKS: Thank you, Senator Lathrop. Questions? Senator DeBoer.

DeBOER: So I asked Senator Briese if there were any lawyers who were going to come up after him. And here one is. So--

LATHROP: I know a little bit about the topic.

DeBOER: I think I'll ask you a question. One of the things that I want to know about is that this is all prospective and not retroactive. Can you speak to why it's not retroactive--

LATHROP: Yes,--

DeBOER: --immunity?

LATHROP: --I can. And by the way, I worked with Senator Briese, and we had a number of conversations with Senator Briese and folks from the Chamber of Commerce. And that bill originally had retroactivity. I did some research, and we have a Nebraska Supreme Court case that says you can't-- you can't retroactively impair somebody's tort action. It is a vested right. And once it becomes a vested right, which happens at the time of the injury, we can't take it away. The federal government can. They have a different standard in the U.S. Constitution. But our state-- the interpretation of our state constitution doesn't permit us to retroactively take away somebody's vested right in a cause of action.

DeBOER: OK, thank you.

PANSING BROOKS: Any other questions? Senator McKinney.

McKINNEY: Thank you. Senator Lathrop, as you know, everyone doesn't believe in wearing a mask, and there's people that, probably in this room today with COVID19, knowingly. I guess my concern is, what if

Does not include written testimony submitted prior to the public hearing per our COVID-19 response protocol

somebody knowingly exposes people to COVID-19? Where is the-- how can we hold them accountable?

LATHROP: So knowingly, ex-- if this bill were to pass, if my bill passed, there would be no cause of action. If I knowingly expose someone-- let's say that I, I just got my test results, I feel a fever, I'm coughing like crazy, And I go into Target with no mask, and I find somebody waiting in line and go up and deliberately cough on them, I think you could bring a cause of action under LB139, but not under LB52.

McKINNEY: That's-- that's what concerns me, is that there are people who don't listen to the CDC, don't follow health mandates and, honestly, just don't care. And we're going to allow them immunity for being reckless. And that's what-- that's what concerns me.

LATHROP: I completely understand.

McKINNEY: Thank you.

PANSING BROOKS: I see no other questions. Thank you, Senator Lathrop. We're going to have proponents on both bills. We are hoping that you will clarify which bill you are testifying for, or if you are testifying for both bills. And I'd like to-- we'd like to see a show of hands of how many are going to testify as proponents and see-- how many proponents are there? 'Cause the room's pretty full. One, two, three, four, five, six, seven-- OK. And how many opponents? OK, all right. We should be able to handle that without-- sometimes we go to a half an hour per side, but I think we should be able to handle that with everybody. So thank you. Welcome.

MARK SCHORR: Good morning, Vice Chair Senator Pansing Brooks and members of the Judiciary Committee. My name is Mark Shorr; that's M-a-r-k S-c-h-o-r-r. I'm a practicing attorney. I'm a partner in the Erickson Sederstrom Law Firm here in Lincoln. And I also serve as a member of the board of directors for the Nebraska Chamber of Commerce and Industry. I testify today, on behalf of the Nebraska Chamber, in support of LB139, but I'm also here today on behalf of the following organizations: the Greater Omaha Chamber of Commerce; the Lincoln Chamber of Commerce; the Nebraska Medical Association; the League of Nebraska Municipalities; the American Property Casualty Insurance

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Association; HyVee Grocery Stores, the Nebraska Insurance Information Service, and the Nebraska Trucking Association, along with many others, which make up more than 60 statewide organizations and groups which form the coalition supporting LB139. That list is attached in your packets, and I encourage you to read it for yourself. In response to the COVID-19 pandemic throughout the year 2020, over 20 states and the District of Columbia have enacted specific legislation to address liability concerns raised by healthcare providers, governmental entities, businesses, hospitals-- the hospital industry, and schools, as well as a whole myriad of religious and nonprofit organizations. This year, as state legislatures are now in session, and as the country is emerging from the pandemic, many other legislative initiatives are being considered and passed into law. Here in Nebraska, as in other states, we are easing restrictions on social and economic activities. However, as we continue to reopen the state, there is continued fear and legitimate concerns over the issue facing COVID-19 claims and liability from not only individuals who are opening their businesses again, but also to organizations, religious organizations, their patrons, as well as individuals. While some legal commentators believe that claims against a person for a COVID-19 illness would be very difficult to prove, particularly with community spread and, therefore, less likely for claims to be brought, the economic burden that is placed on individuals and organizations of having to defend or settle these claims without any insurance coverage would be unsustainable. And there is a tremendous cost involved in defending against claims for COVID liability. We're finding many businesses and organizations already have, or will be having upon renewal, commercial and other insurance exclusions with regard to pandemic coverage. Included in your handouts is a letter from First Insurance Group, the Harry Koch Company, highlighting these insurance concerns. We're also seeing a growing wave of advertising and threatened lawsuits appearing across the country. And the fear of litigation is a looming threat. A recent article referenced 176,000 ads brought soliciting people to bring COVID claims, at a cost of \$35 million, just to run those ads. So we believe that while lawsuits may ultimately be unsuccessful, there is a tremendous fear of the cost involved. LB39 is a very middle ground approach, which we believe provides reasonable protections. It's largely based on Iowa law, but is also-- includes elements of Michigan law, Massachusetts, Nevada, and the District of Columbia. It's very--

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PANSING BROOKS: Thank you, Mr. Schorr. We have to keep to our light system. Can you just quickly wrap up, please?

MARK SCHORR: Yes. The bill is very targeted. It hits only three areas: healthcare providers, premises, and there's a general safe harbor for individuals and organizations that adhere to all state and federal laws. What it doesn't do is, it doesn't jeopardize workers' safety. Workers' comp is still in place. It doesn't provide absolute immunity and it doesn't protect-- protect bad actors. So--

PANSING BROOKS: Thank you.

MARK SCHORR: --I would encourage you to review everything in the packet. And with that, I'd open it up for questions.

PANSING BROOKS: Thank you. Any questions? Senator Slama.

SLAMA: Thank you, Madam Vice Chairman-- Chairperson, sorry. And thank you very much for being here today. I appreciate your perspective. I do have a few questions on LB139, based on a couple of the concerns we've heard thus far. So when we're dealing with cases in a situation like COVID, do you have concerns that there haven't been any cases brought yet? Or would we expect like some sort of lag before those are actually brought?

MARK SCHORR: Thank you for the question. In my experience, you would see a time lag. You would not see cases brought immediately, such as we would have in an auto accident situation, I would expect that we do not know yet what the level of cases that may be brought here in Nebraska may be, and I think the fact that the insurance companies are already notifying insurers that COVID claims will not be covered is a-- is a very big factor there.

SLAMA: And something my small business owners in my district have raised to me is the potential costs of litigation, should one of these cases arrive and happen to them. Could you quantify for me if one of these cases were to happen to a small business, what kind of cost, because they normally don't cover-- don't have insurance that would cover costs associated with this type of litigation. How much would that be running, like the mom-and-pop shops on Main Street?

MARK SCHORR: It's a-- the cost of litigation is a very tough issue--

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SLAMA: Yeah.

MARK SCHORR: --because so many cases end up being resolved in mediation. But if one of these cases were brought and were to go all the way through to trial and appeal up through the Nebraska Supreme Court, that could be anywhere from 30 to 50000 dollars all the way up to 80 to 100 thousand dollars.

SLAMA: OK. And one thing that was brought up a little bit earlier, with regards to LB52, but I do think it's relevant as a concern that's been brought on LB139. Can you talk a bit to the minimum medical condition requirement and why that was necessary?

MARK SCHORR: That is there so that somebody who is simply told they have to quarantine or they've been exposed or somebody that has a very mild case that has to sit at home for ten days and recover from COVID, would not meet the standard of somebody who could bring a claim here. It would have to be somebody who suffered, at a minimum, hospitalization all the way up through death. So the feeling, I believe, that Senator Briese had, and a number of the groups that helped have input-- and-- and again, this is modeled after, not only the Iowa statute, but Michigan, Massachusetts, Nevada and the District of Columbia, the thought is that, in order to bring a claim and have potential liability, someone would have to have suffered a serious injury that required hospitalization or something more serious. And what this is really designed to do is to give a comfort level to people in opening up their businesses, and opening up their churches, and opening up nonprofit organizations, and opening up public venues to be able to get the economy moving again, get people back employed again, and-- and-- and not be in fear that if somebody contracts COVID within your premises, that you're going to be hit with lawsuits.

SLAMA: Um-hum. All right. Thank you very much.

PANSING BROOKS: Any other questions? OK, sorry. Senator DeBoer.

DeBOER: Oh.

PANSING BROOKS: OK?

McKINNEY: Yes.

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DeBOER: Thank you very much for testifying. So you said that there haven't been a lot of lawsuits, but you have heard. Can you tell me again, 'cause I kind of couldn't hear? There have been a lot of advertisements?

MARK SCHORR: Yes. I have not seen them yet here in Nebraska. But we typically do see, with other types of tort claims. But across the country, we're starting to see, over the past six months, huge amounts of money being spent on advertisements and marketing to potential claimants to bring cases against organizations they think were responsible for them contracting COVID.

DeBOER: So as I understand it, sort of the biggest concern is the frivolous lawsuits. Right? This is not for the people who are bad actors. This is the frivolous lawsuits that is sort of the biggest concern?

MARK SCHORR: Well, no. The concern is that organizations and-- and people that have opened their premises to the public, businesses can have some degree of protection in-- in opening up and starting to move the economy again--

DeBOER: Protect--

MARK SCHORR: --without being threatened by all these lawsuits.

DeBOER: So protection from the lawsuits,--

MARK SCHORR: Right.

DeBOER: --from-- but the concern would be that it's protection, not from valid lawsuits, for bad actors, but from frivolous lawsuits. I mean--

MARK SCHORR: From all lawsuits. And let's remember that written right into this bill is the fact that there is an absolute immunity, and people that will have protection will be individuals or organizations that are already complying with all public health directives and all federal and state guidance on how to have your premises open safely, with COVID.

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DeBOER: I get that and I appreciate that about the bill. But what I'm-- what I'm asking is, I'm hearing-- and maybe it wasn't from you, but from others-- that the concern is these frivolous lawsuits, that there are going to be a lot of companies that are worried that there's going to be a lot of lawsuits. And so the question that I asked Senator Briese was about the factual pattern where somebody says to their employees: Don't get tested, just come on in. If you don't get tested, then we don't know that you haven't. And so then we're arguably complying with the CDC guidelines because we don't know that you have it. Right? And I've heard that this has happened. This is one of the concerns that I have. So what I'm saying is, if that is a fact-specific question, if that is something that we're putting up to the trier of fact to figure out, then aren't we opening up the possibility for frivolous lawsuits still, even notwithstanding LB139? And wouldn't LB52 be a-- or whatever the number is--LB52 be a-- a better way of stopping frivolous lawsuits, if that's our concern?

MARK SCHORR: Well, I mean, our coalition is neutral on LB52, because our bill does not provide absolute immunity. We-- we still allow for lawsuits where, as you say, somebody engages in willful misconduct or gross negligence. Having an employer say that to the employees would arguably constitute willful misconduct, and this would not provide immunity. But as pointed out by Senator Briese-- and I didn't get through all of my remarks-- this does not cover employer-employee relationships. That is subject to the exclusive remedy under workers' compensation. And if somebody is-- is injured, any injury or illness contracted in the-- or suffered in the course of employment is-- is covered by workers' compensation, without these immunities.

DeBOER: I appreciate that about the bill, too. But my fact pattern that I was describing would be, you say to your employees, come in any way and then a third party gets-- contracts the disease.

MARK SCHORR: Correct.

DeBOER: Yeah. So--

MARK SCHORR: I don't think this bill would provide immunity in that situation because that would be willful misconduct.

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DeBOER: OK, so we still would-- would have the potential that some of our small businesses would have to go through some lawsuits to figure out which actions, which fact patterns exactly fit within which. Is that-- is that accurate?

MARK SCHORR: Well, again, in order for them to be exposed to a lawsuit, an individual, to be covered and be able to bring a lawsuit, would have had to have suffered that minimum medical condition that created hospitalization or death.

DeBOER: So--

MARK SCHORR: And then if that lawsuit were brought, it would be a fact issue as to whether the owner of that premises or business or organization, nonprofit organization, had engaged in willful misconduct.

DeBOER: Yeah. So I do have a question about this minimum-- minimum medical condition, as well. One of the things, because COVID is so new, is that we don't really know what the long-term effects of this disease are going to be.

MARK SCHORR: Correct.

DeBOER: So what if I get a mild version of the case and then later develop symptoms which lead to my hospitalization later? Would that be covered under this bill?

MARK SCHORR: It-- it-- it could be. Yes, it could be. But again, anything that results in inpatient hospitalization-- and your statute of limitations would run from the date you discovered that you had that minimum medical condition.

DeBOER: So my statute would run-- I'd like to make--

MARK SCHORR: From the day you were hospitalized, assuming this bill had not-- assuming this bill-- if this bill sunsets at the end of 2022, or under the other provisions in the sunset provision, then of course, this qualified immunity would not be in place.

DeBOER: OK, but arguably the-- well, yes. OK. But the medical-- minimum medical condition. So let's imagine that I have this disease,

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but I have a light case, and something happens down the road. I guess where I'm most concerned is with children, because there are many cases of children getting-- I think it's called MIS-C-- the multi-system inflammatory syndrome, which comes up later. So they have mild cases and then later there's pretty severe consequences for them, particularly if it's not caught. Is there a way we could write this bill that would better sort of reflect and be very clear about the fact that if there is an injury which develops later, that that would still be within the minimum medical condition provisions?

MARK SCHORR: I suppose that could be done, but again, if that child-- that child was, you know, may still have a claim at some point. But again, it's written today so that the run-of-the-mill minor case of COVID-- and again, it's COVID-19-- if-- if the child's condition is considered COVID-19, they would still be subject to the bill.

DeBOER: So that's sort of the problem, is that the COVID-19 leads to the MIS-C. So this is the-- I don't know if you've heard about this-- this is-- there's been a couple of kids in Nebraska who've had this.

MARK SCHORR: Yes.

DeBOER: So it's the-- the COVID-19. They have a very mild case of the COVID-19. Sometimes they don't even know they had it. And then later they develop this different disease, this different condition. I guess it's a condition. And so I just wanted to know if we could clarify to make sure that those folks were included within serious health condition.

MARK SCHORR: Again, the bill was drafted with a threshold before someone would have a claim, because this is an unprecedented pandemic. And the flip side to having some sort of immunity would be that nobody ever reopens their venue or their business until this is gone. So this is designed to pre-- give a degree of protection. It's a balancing provision to give some degree of protection to premises owners and other types of organizations so they can continue to operate within the COVID pandemic environment.

DeBOER: I understand that. I'll-- I'll talk to Senator Briese and see if maybe we can make sure that those-- those cases are for sure within the purview of this-- this case. One of the concerns that I've heard

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people express is that the CDC guidelines, the safe-- for the safe harbor provisions, the CDC guidelines have been changing the medical conditions or the-- the-- the directed health measures have been changing rather quickly. How would we handle a situation where we don't really know what the directed health measures were in a particular moment? And should we-- should we have a situation where we say that a business owner doesn't have to immediately comply, but has like a window of time in which to comply with those measures, so for example, if a directed health measure changes on a Thursday and someone is going to bring a claim alleging liability on that Friday, should those business owners have to have complied with the directed health measure from the day before?

MARK SCHORR: In order for a defendant in one of these claims, whether it's a business owner or a nonprofit organization or any other type of entity covered, in order for them to try and take advantage of that safe harbor provision, the-- I believe the burden would be on the business owner or the defendant to establish that they were reasonably complying with all federal and state directives, and local health directives, CDC guidelines, and local departments of health guidance.

DeBOER: So if they're off by a day, then they arguably wouldn't have the advantage?

MARK SCHORR: When you see if they're off by a day, so are you asking, if the guidance changes on a Wednesday and somebody believes they contracted COVID on a Thursday, you know, I think-- I think there would be a matter of reasonableness. But again, it would be up to the defendant, in one of these cases, to establish that they were complying with the established local health directives, as well as state and federal guidance.

DeBOER: I think we maybe should look at, maybe, making that a little more, as long as they've reasonably complied, so that they have the opportunity to say: We tried to make the changes, but we didn't have time to make them yet.

PANSING BROOKS: OK.

DeBOER: OK, thank you.

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PANSING BROOKS: Senator-- Senator McKinney, please.

McKINNEY: I guess my comment or my-- my question, you-- you mentioned that, you know, businesses want to get back to normal, basically. And-- and my concern is that, 1) the business community in the state of Nebraska has completely neglected my district. Individuals in my district are most at risk to COVID-19 and other health disparities because of this. And I feel like this is a conversation of putting dollars over people. I just feel like that this-- this bill creates immunity for individuals to act negligent, but you cannot prove it if this is passed. And not every business during this pandemic has acted A1 and up to standard; that's-- that's just the honest truth. And we're going to protect bad actors. And are we putting dollars over people? What's the rush if: 1) we don't know the long term effects of this virus; 2) we have zero protections for the most vulnerable currently, we're not distributing the vaccine to the most vulnerable-- vulnerable communities currently anyway? Or it's just a lot that is going on that's not talked about. So are we putting dollars over people?

MARK SCHORR: I don't believe so, Senator McKinney. And we need to remember that this doesn't just cover businesses. This covers nonprofits, religious organizations, public venues, the hospital industry, the schools. It also covers governmental entities. So I think it's designed to give a reasonable degree of protection to all those types of individuals and entities to be able to try to return to life as normal, and not be threatened with the costs of defending all-- a whole bunch of lawsuits. Now, it's set up as a balancing act. So, you know, bad actors are not protected here, people that engage in willful misconduct. It isn't just gross negligence. The standard is also willful misconduct. So if an entity or a nonprofit organization or a governmental subdivision engages in willful misconduct, they would not have any of the immunity protections of this bill.

McKINNEY: OK. For the first question, why isn't the Chamber-- or maybe you are-- pushing the Governor to make sure that communities like District 11 and other high poverty communities in this state are getting the vaccine?

MARK SCHORR: You know, the organizations that I'm testifying on behalf of don't have the authority to dictate where the vaccine goes. That's

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all through the state and the local health departments. And there's-- I think they're following, to my knowledge, a national order of the vaccines. They're in Category 1b now, which is the vulnerable people that are elderly and suffer from underlying conditions. But again, that's-- that's really not a subject of this bill. And I don't think any of the organizations I'm appearing on behalf of have the ability to direct where the vaccine goes.

McKINNEY: I know they don't have the ability to direct where it goes, but there's power in numbers and there's strength in people. I think the Chamber should be calling the Governor every day and utilizing every member of the Chamber to contact the Governor to protect the most vulnerable. If we're in a rush to open up and provide immunities, let's make sure that the most vulnerable are protected if we do open up. And we're acting under the premise that before the pandemic, everything was good and we lived a great life, and the good life in Nebraska was for all Nebraskans, which is not true. There are a lot of people who were facing health disparities prior to this pandemic, who were in poverty prior to this pandemic, that I would love to see you guys do more to help and assist. And one of those ways is to contact the Governor's office and push him to make sure that the most vulnerable populations in this state are protected, if we're going to push to move forward and open up.

MARK SCHORR: I will pass-- I-- I've carefully listened to your comments and I will pass them along to the management of the-- of the State Chamber and try to pass them along to the other organization. I'm testifying on behalf of.

McKINNEY: Thank you.

MARK SCHORR: Thank you, Senator.

PANSING BROOKS: Senator Morfeld.

MORFELD: Thank you for coming today. And I missed which firm you're with. I'm assuming you do a lot of defense work.

MARK SCHORR: Yeah, primarily in the labor and employment area.

MORFELD: OK.

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MARK SCHORR: And-- and my-- a lot of my involvement with the Chamber is in the Labor Relations Council.

MORFELD: OK, thank you. That's good background. I guess-- so on one hand, as somebody who runs an organization and operates programs in schools and what would probably be considered high-risk-type environments, I understand the concern that business owners and other nonprofit leaders have in this-- in this regard. I guess when COVID happened, I sat down with my senior leadership team and I said: We need to follow all of the state and federal guidelines. What are we doing in order to do that and put together a plan? We did that for the health and safety. And you know, as an attorney, too, I-- I thought we also need to be doing this so that we can shield ourselves from liability beyond, obviously, just taking care of the people that we serve. One of my concerns is that this could serve as a disincentive to do those things because, when we think about these things, we think about incentives, disincentives with the law. I'm having a hard time-- I'm having a hard time understanding exactly how somebody would even bring a claim under the reasonable standard that we currently have, and be able to prove that. Can you walk me through how somebody would successfully-- and I haven't heard of anybody being sued yet, you know, in my nonprofit circles or, you know, even in the business circles that I-- that I operate in. I'm having a hard time figuring out how somebody would even bring a successful claim and pinpoint getting the virus back to a specific business or entity, given the nature of the virus. So what I'm trying to get to is, is there an actual problem? How would they prove that, in your experience, that type of claim?

MARK SCHORR: I think the fact that there's an actual problem is evidenced by the number of states. Again, this bill is patterned after Iowa--

MORFELD: So-- So sir.

MARK SCHORR: And--

MORFELD: I-- I appreciate that other states have passed things. Other states pass things all the time that I disagree with--

MARK SCHORR: Right.

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MORFELD: --and I don't think are needed. What I'm trying to get to is, how would somebody successfully prove?

MARK WHITEHEAD: Well--

MORFELD: What would that look like in a courtroom? I-- I--

MARK SCHORR: They would try-- they would have to try. They would have to go in and file a claim and say: I believe I contracted COVID in either this business or this venue, at this church, at this, you know, public, you know, in this nonprofit office or-- or what have you, and then I believe the reason I contracted COVID is because they weren't taking reasonable steps to comply with local health directives or with CDC guidelines or with, since we're here in Lincoln, the Lincoln-Lancaster Public Health Department. And they would go in, and they would file a claim and try to say: I was damaged and harmed because of the negligence of this employer, because they didn't provide a safe environment or this-- not-- not an employer, that would be work comp-- but this business did not provide a safe environment. It opened its premises to the public, and it didn't take reasonable steps to ensure the safety of its customers.

MORFELD: So they-- they would-- they would be able to-- say they were able to prove that. But then, wouldn't they have to also prove that they actually contracted the virus as a result of that, or not?

MARK SCHORR: Yes, they'd have-- there'd be a causation factor there.

MORFELD: So wouldn't that be extremely difficult to-- to prove, I mean, given the nature of the virus? Just the--

MARK SCHORR: Yes, it could. But meanwhile, all these organizations in the coalition that is supporting this bill could be faced with a myriad of lawsuits that are not covered by insurance, and they would be spending tens and hundreds of thousands of dollars defending these claims. What this bill is, is-- is a balancing act, so middle ground to provide a degree of protection, not blanket immunity, but a degree of protection to give a comfort level to these Nebraska organizations as they cope with the pandemic the way we all do, and as they try to move forward, in some sense of normalcy, to open up their venues, and

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their businesses, and their stores, and their churches, and everything else.

MORFELD: No. No, I appreciate the discussion. Thank you, sir.

MARK SCHORR: Yeah. Thank you, Senator Morfeld.

PANSING BROOKS: I see no further questions. Thank you, Mr. Schorr. Next proponent? And please remember to-- when you hand in your testifier sheet, would you clearly indicate on the sheet if you're testifying on one or both bills? And also, I hope that we can work to keep our questions a little bit short 'cause we have so many testifiers. So we want to give the people a chance to speak. Welcome.

EMILY MOTTO BOTTORF: Good morning, Vice Chairperson Pansing Brooks and the members of the Judiciary Committee. My name is Emily Motto Bottorf, E-m-i-l-y B-o-t-t-o-r-f. I'm an attorney at Baylor Evnen Law Firm. I'm here in support of LB139, and I'd say we're neutral to LB52 at this point in time. I'm the president of the Nebraska Defense Counsel Association, and I'm here on their behalf. I'm not a paid lobbyist. I just wanted to highlight a couple of points. Obviously, there is a whole room, behind me, of people who want to speak on this issue. Obviously, as the Chamber and others have echoed, we want to encourage educational institutions, religious organizations, businesses, healthcare providers, retailers to open, and operate, and continue to operate safely. One thing I think is important to comment on, from the defense bar perspective and from a legal perspective, is that our current body of law, and-- and negligence, and premises liability is simply not a good fit for these lawsuits. It would leave individuals, businesses, healthcare providers vulnerable to very expensive litigation. At the same time, these businesses and individuals and healthcare providers can't take steps to protect themselves and others as they can in this arena normally. These lawsuits are not akin to motor vehicle accident cases in which I have control over my car, and when I make a mistake and hit someone, it's pretty easy to figure out why. This is not the same as imposing on an owner or an occupier of land, the duty to monitor their premises for potholes or other conditions, ice and snow. As we've learned with this virus, you can spread it without knowing you have it. You may be a reasonably careful person, you may be washing your hands, wearing a mask. You may still get the virus. You still may give others the

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virus, and we still just don't fully understand it. And so I think LB139 really tries to strike that balance between not protecting those bad actors, but protecting individuals who really can't do certain things to protect others from getting this virus because of the-- how this virus operates. And just a further comment on the cost of litigation and the prevalence. You know, without litigation like LB139, it wouldn't be terribly difficult to survive a motion to dismiss right now on a claim such as this. And I think that's what Senator Morfeld was trying to ask about a little bit. But you know, just to be able to initiate a lawsuit like this could be very costly. And then that person would be able to do discovery and potentially find an expert. And I-- and I do think there are experts that would testify in this regard. I think Plaintiff A did contract the virus from this, you know, reasonably from this situation. I think you'd be able to find an expert that would say that. One thing that I looked at this morning on Hunton, Andrews, and Kurth, which is an international law firm Web site, they have in the United States 8,500 pending COVID lawsuits. That's in the areas of wrongful death, retail employment, real property, civil rights. So I-- I know we're not feeling it here, but I think that they're there, and I think that it could come here. I will wrap up; I see that I have the yellow light. And-- and I think, as was pointed out earlier, I don't think it's clear how these claims will overlap with various types of insurance, which could potentially expose individuals and businesses not just to the claims, but to the expensive defense of the claims. So for those reasons, NDCA supports LB139. And I thank you for your time.

PANSING BROOKS: Thank you, Ms. Motto Bottorf. Senator DeBoer.

DeBOER: Thank you very much for testifying. I want to talk about this-- this frivolous lawsuits piece. I think you-- you made some-- some clarity there. And I want to know if this bill, LB139, which in this case is quite distinguishable from LB52, solves the issue of frivolous lawsuits. Because what I was trying to point out-- previous testifiers-- is that it's still a very fact-specific question. And so we're still going to have to go through those facts, specific questions. So does this actually solve the problem of frivolous lawsuits, in your opinion? And if so, can you tell me how?

EMILY MOTTO BOTTORF: I think it does because, as I was pointing out with regard to our current body of law, with negligence premises

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liability, without a bill like this, it would be much easier to just initiate the lawsuit. If we're just talking about gross negligence or willful conduct as being that initial bar, that we'll keep out a lot of, sort of, really gray-area situations where, let's see if we can find an expert, let's see what the documents show when we subpoena these various entities and see if we can build a case. I mean, sometimes that's how these cases operate now. We think we might have a claim, so let's go for it. I think, when we're starting from a different level, it does kick out some of those. I mean, sure, you may have what could be considered a frivolous lawsuit down the road that alleges gross negligence, and we-- we'd get to the same result, but I think it will keep the numbers significantly less.

DeBOER: And the other question is-- Senator Slama had asked a question about what a lawsuit costs, and there was a discussion of if it goes up to the Supreme Court and all of that. If something is going up to the Supreme Court on appeal, it's probably a fairly close-- close question. It's probably not a frivolous lawsuit. Is that true?

EMILY MOTTO BOTTORF: It would completely depend on what the issue on appeal is. If somebody is appealing the fact that it was dismissed right out of the gate or somebody is appealing some abnormality--

DeBOER: OK.

EMILY MOTTO BOTTORF: --that happened at trial, you know, it really could just depend. It may speak to the merits of it, but it may not, unfortunately.

DeBOER: OK. But likely, if we're going through a case to that extent-- I mean, we're not going to have tons of these cases going up to the-- through the appellate system in Nebraska. So for the most part, they're not going to cost in that \$100,000 range. They're going to be a much smaller amount, probably.

EMILY MOTTO BOTTORF: It's going to depend, to me, on who the defendant is. I mean, if you're suing Starbucks versus suing your mom-and-pop shop, to me that's going to depend on litigation costs. So that would be pretty fact-specific to me. I mean, 'cause even your run-of-the-mill motor vehicle accident case can run \$30,000 in defense costs before you go to trial. So it really can depend.

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DeBOER: OK, that's helpful. You know what? I'm going to let Senator Pansing Brooks ask someone else if they have questions, and I will see if I can figure out if I have any more.

PANSING BROOKS: Does-- does anybody else have another question? Senator DeBoer, did you have another?

DeBOER: Oh, one more, the minimum medical standard conditions piece. Senator Lathrop, in his introduction to LB52, suggested that there might be a problem with the open courts provision. Could you speak to that provision? If we're saying that there's-- there is tort liability and-- but it only kicks in if you have a certain level of injury, it seems to me that that is unlike other-- other kinds of tort liability. And can you speak to how that might not violate, or will violate, the open courts provision?

EMILY MOTTO BOTTORF: Sure. I haven't looked at that specific overlap. I mean, what I will say is we always, in any lawsuit, require a plaintiff to have suffered some type of damage. And depending on what theory they're suing under, that's going to-- that's going to vary. I mean, if we're talking about a person who was exposed and had to, you know, sit at home, but doesn't have hospital bills or-- or certain things, I mean, I think, yes, we are establishing a threshold here, which is not unlike other areas where you do have to have at least some damage to have a colorable claiming.

DeBOER: So we could say, without that provision of the minimum medical condition provision, you'd still have to establish that you have damages.

EMILY MOTTO BOTTORF: Some, potentially. I mean, it would depend on, again, what-- what theory somebody is suing under.

DeBOER: So then, this does seem sort of like an outlier.

EMILY MOTTO BOTTORF: Well, I think that it just-- again, it's another sort of step in keeping out somebody from saying: I had to sit at home for two days. I wasn't, you know, potentially very sick. I think, again, it's just another threshold to make sure that we're just letting in claims that really should come through-- that really should take the time of the court, take the expense of the parties.

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DeBOER: And-- and I don't disagree with that statement. But I-- I would also say that, at least from what you're saying right now, it does sound like an outlier in tort law.

EMILY MOTTO BOTTORF: To have--

DeBOER: To have a minimum standard that's above just damages, to have a minimum standard that says you have to have at least this amount of damages. We can talk about that later, but--

EMILY MOTTO BOTTORF: Sure.

DeBOER: Thank you.

EMILY MOTTO BOTTORF: Thank you for your questions.

PANSING BROOKS: Thank you for coming. Any further questions? Thank you.

EMILY MOTTO BOTTORF: Thank you.

PANSING BROOKS: Next proponent? Welcome.

MARK WHITEHEAD: Good morning.

PANSING BROOKS: Morning.

MARK WHITEHEAD: Senator Pansing Brooks, members of this committee, my name is Mark Whitehead. I'm here to testify in favor of LB139. We thank Senator Briese for introducing this. I'm a petroleum marketer here in Lincoln, which is just a fancy way of saying I pump gas for a living. I am a past chairman and board member of the Nebraska Petroleum Marketers and Convenience Store Association, of which I am representing today, as well as the Nebraska Grocers' Association; we're speaking on their behalf, as well. I've done a great deal of testimony on a variety of different issues in the past, and I always go back to saying that I haven't always done-- in the retail energy business, we do not create demand, we meet demand. We don't have the luxury of wondering what if, or what could have been, or whatever. I usually use that in the context of a pipeline or a different variety of different issues, but I think it's incredibly appropriate for this particular issue. All Hades broke loose in the middle of March. People

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didn't know what was happening. It was-- it was devastating. The uncertainty was incredible. And that's gone almost the full year that we-- brings us to today, where there's a lot of different opinions on what COVID is, how best to deal with it. It's a continuing, changing environment on what opinions are and what perceived reality is, as well. In both the retail petroleum business and the grocery business, we did not have the luxury of locking ourselves in a closet, closing our doors. We had to be there. People did not stop driving. People did not stop eating. People did not stop drinking beer, ironically enough. We are-- have been-- have been exposed and we have been out there every single day. And I'm incredibly proud of the associates who have served our industries, putting themselves out there. We have met CDC guidelines to the best extent we can. Early on plastic petitions, if you recall back to the first of April, which was only a couple of weeks in, it was a good idea-- wasn't mandated, but virtually every retailer immediately put up plastic shields within their places of business. We have done the best job we can to serve our customers through these times because, again, we are providing services that they need every single day. And we're doing it to the best of our ability, and meeting guidelines of local, as well as state and federal guidelines as we do it. Senator Morfield, if I could real quickly, your-- your question earlier on-- on suits. To this extent, that brings up the crux of this issue. It is incredibly difficult to prove liability. People have got incredibly high emotions as to what happens in that sort of thing. And this provides a level of protection. Be glad to answer any kind of questions that any of you might have.

PANSING BROOKS: Thank you, Mr. Whitehead. Any questions? Senator Brandt.

BRANDT: Thank you, Chairwoman Pansing Brooks. Thank you, Mr. Whitehead, for testifying today. And maybe you're the guy to answer my question. You employ a lot of people in retail, and you have a lot of employees. So let's say your competitor doesn't have enough personal protective equipment for their employees, and one of those employees would catch COVID. It's probably going to be a reasonable assumption, and they could have got it from anywhere. We can always-- we can always say that about this disease. But if an employer does not follow the guidelines because maybe they couldn't get PP, or something of that nature, that would make him a bad actor under this law, would it not?

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MARK WHITEHEAD: I believe so. Certainly to the extent that we've gotten-- Whitehead Oil Company has well over 300 associates. We're incredibly concerned about the safety of, not only our customers, but our associates. This is an entry-level position that they are in within the retail industry and, as such, I admire them a great deal coming in. Our track record has been incredibly good, as it relates to COVID. Far and away, the majority of the people-- I think we've had about 20 cases out of our over 300-plus. All but three of those, and even possibly the three, were all contracted away from our retail businesses. And the one location that might have had-- that had several at that one location, we immediately closed the store, we immediately cleaned, and we-- and the next morning we brought in professional people to come in and clean. The next morning we operated-- we opened up with brand new staff, and we did not have a single case of recidivism and in that association. But specifically to your case, I don't think that anybody has got ill will towards either their associates or their customers. We're doing the best job we can. To Senator Morfeld's comments that I alluded to earlier, it is incredibly difficult to figure out or prove anything, in terms of where contraction took place. This is highly emotional, especially if you've lost a loved one in the process. We get two to three comments per week from concerned people. People have got incredibly strong opinions. And-- and it wouldn't take much for-- if they had a tragic loss within their family, to look for different places to place the blame. And in this particular case, as impossible as it is to lay blame on a single location, they're going to-- they're going to throw something up against the wall to see what sticks. And this kind of protection, as much as anything else, would prevent frivolous lawsuits because, regardless of our position, we have to hire lawyers to defend ourselves.

BRANDT: All right. Thank you.

PANSING BROOKS: Any other questions? Thank you, Mr. Whitehead.

MARK WHITEHEAD: Thanks.

PANSING BROOKS: Welcome.

JERRY STILMOCK: Madam Vice Chair, thank you. Jerry Stilmock, J-e-r-r-y, Stilmock, S-t-i-l-m-o-c-k, members of the committee,

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testifying on behalf of the Nebraska National Federation of Independent Business, in support of LB139. We're pushing the time limit. I wanted to make sure I had an opportunity to come up and voice my support on behalf of my client. Small businesses have struggled. They've done everything they have to keep their doors open. We just believe that LB139 would be a way to assist them so they wouldn't have to go to the expense of lawsuits. One of the benefits I had of listening to the questions-- and I don't want to drone on. I want to voice my support and allow those behind me to be able to testify because I understand that-- I don't understand all the things you do. But I understand your schedule for this morning. Substantial compliance, Senator DeBoer, is what came to mind as you asked the question. Thursday, the executive order, whatever--

DeBOER: Yeah.

JERRY STILMOCK: --declaration went in, substantial compliance is in the statute now. And it-- it allowed me to look while I was-- if I was up in the chair, it would have been difficult for me to find it. But I was able to find it in the statute-- and excuse me-- in the legislative bill. And it addresses that issue of substantial compliance once the federal or state or executive orders is issued. So I think there's-- there's that ability for the trier of fact to say yes. You also asked a very good question of-- as well as the other questions asked by the senators-- the question of: Is this going to stem the tide? You know, we just want something out there. Right now., we are-- we are exposed. We want something that would be able to provide some level of protection. Senators, on behalf of my client, I'd ask you to advance LB139. Thank you.

PANSING BROOKS: Thank you. Any other questions for Mr. Stilmock? Thank you for coming today.

JERRY STILMOCK: Thank you.

PANSING BROOKS: Next proponent?

ANDY HALE: Thank you.

PANSING BROOKS: Welcome.

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ANDY HALE: Thank you, Vice Chair Pansing Brooks, members of the Judiciary Committee. I am Andy Hale, A-n-d-y H-a-l-e, and I am vice president of advocacy for the Nebraska Hospital Association. And I'd like to thank you for this opportunity to present this testimony. And the NHA supports both LB52 and LB139. As the COVID-19 pandemic impacted our states, our hospitals sprang into action to respond. Throughout the crisis, our hospitals and health systems have continued to work around the clock to provide high quality care to communities across the state. There were many unknowns at the beginning of this pandemic. Through no fault of their own, our members struggled with lack of personal protective equipment, the PPE that you've heard about, lab tests, ventilators, lack of beds, especially in the intensive care units, and overall lack of adequate staffing. Our hospitals have also had to deal with delaying care, like elective procedures and elective surgeries that would have taken place under normal circumstances, but were paused because of the state and federal directives. Many of our policies, procedures, and protocols were altered. Through all of this, our members responded heroically, and despite these-- or despite these daunting challenges. We need to provide our hospitals and the over 44,000 employees the peace of mind that comes with protection from civil liability. They need a sense of calm so that they continue to provide great quality care without the worry of being sued. As previous testifiers have mentioned, at least 20 other states have already passed similar legislation, with many more considering it, as well as the United States Congress. So I would like to thank Senators Lathrop and Briese for bringing this legislation, and ask the committee to advance both bills.

PANSING BROOKS: Thank you, Mr. Hale. Any questions for Mr. Hale? On behalf of all of us, we are grateful for the work the hospitals are doing. It has been heroic. We are all highly aware of that. And it's not the goal of anybody for you all to be sued. It's just-- we-- but we're just very grateful for the continuing effort to protect our communities. Thank you.

ANDY HALE: Thank you very much, Senator.

PANSING BROOKS: Next proponent? Thank you. Welcome.

HEATH BODDY: Good morning. Vice Chair Pansing Brooks and members of the Judiciary Committee, my name is Heath Boddy; that's H-e-a-t-h

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B-o-d-d-y. I'm the president and CEO of the Nebraska Healthcare Association, and, on behalf of our 423 nonprofit and proprietary skilled nursing facilities and assisted living communities, I'm here today to testify in support of LB139. This bill would provide liability protection for certain Nebraska businesses, as we've heard this morning, and this includes nursing and assisted-living facilities. I'd also like to point out this bill does not provide protection for situations that involve gross negligence or willful misconduct by healthcare providers. These providers are facing a liability insurance crisis. According to the American Health Care Association, nationally, liability insurance premiums have jumped from 50 to 200 percent as insurance-- insurers attempt to cover their perceived risk related to COVID liability. These increases will result in a lack of coverage. Providers have experienced significant cost increases in revenue losses during the pandemic, and are now facing increases in liability insurance premiums, COVID exclusions, and the inability to renew liability coverage. These factors, combined with the risk of civil lawsuits without insurance covers-- coverage, could be devastating. I'd like to address a couple of claims that you may have heard which are more fully outlined in your handout. First, it is inaccurate that oversight was halted during the pandemic. The reality was, Centers for Medicare and Medicaid Services changed the priority order of specific surveys, based on the evolving lessons from the pandemic. However, surveys based on complaints of possible harm to residents or infection control concerns remain the top priority. Nursing facilities also received infection control surveys throughout as they were triggered by a facility outbreak, which was defined as only one newly identified COVID case. Second, it's inaccurate that COVID could not have entered the building if everything was done right. COVID is an invisible, deadly, and highly transmittable virus. The only way to have zero risk would have been to eliminate all human contact, which isn't an option. The reality was, the infection control direction from state and federal authorities changed constantly, and, as more was learned about how the virus was transmitted. Said plainly, we all learned together. Additionally, for months, team members had to deal with shortages of personal protective equipment and COVID testing supplies. Facility team members went above and beyond to protect health and safety of their residents. Were mistakes made? Of course; they're human. However, these team members, despite the risk to their own health and that of their family members, continued to show up

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every day to care for these Nebraskans. If you know somebody who works in long-term care, then you know they don't do it for the money. They do it because they feel it's their calling. We owe these team members this legislation and need to send them a message that we understood their situation was impossible, and they did everything they could to protect the residents in their care. And I urge you to advance LB139. I'd be happy to try to answer any questions.

PANSING BROOKS: Thank you, Mr. Boddy. Any questions for Mr. Boddy? Again, we're all grateful for the work that you're doing. We know it's an impossible task. We-- we're very grateful. And please, let your association know.

HEATH BODDY: Thank you, Senator.

PANSING BROOKS: Thank you. Next proponent? Welcome.

COLBY COASH: Thank you, Chairwoman Pansing Brooks, members of the Judiciary Committee. For the record, my name is Colby Coash, C-o-l-b-y C-o-a-s-h, and I represent the Nebraska Association of School Boards, here to testify in support of LB139. My testimony also reflects the support of both the Nebraska Council of School Administrators and the Nebraska Rural Community Schools Association. First, we want to thank all the teachers, paraprofessionals, classified staff, substitute administrators, school board members, and community leaders for their performance since the beginning of the pandemic. They've all stepped up in many ways and performed many duties to support the health, well-being, and education of our students. Education leaders have worked very hard in providing a good education for students and creating safe environments for those students and the adults. Most schools have had some or all students in person-- in in-person classrooms since the beginning of the school year. We believe there's a strong public policy reason to have students in the classroom with their teachers. Kids in schools are getting fed, and they're placed in a positive environment that is critical to their development. LB139 provides very targeted liability protection for schools, as we work with health experts to keep the schools open. One of the organizations the NASB is responsible for is ALICAP, which provides liability insurance for 175 school districts and ESUs across the state. ALICAP works with re-insurance companies to provide liability protection for its members. However, due to the global nature of the pandemic, the

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reinsurance companies are not able to provide coverage for COVID, based on claims against schools. As a result, schools have no liability coverage for any claims made against them as a result of COVID. This lack of coverage and the ever-changing expectations adds a barrier to keeping schools open. The targeted approach of LB139 helps remove that barrier to keeping kids-- keeping schools open for all students. Schools will continue to work with state and local health authorities to make sure they're doing what is necessary to keep schools open and safe. 139 does not give schools a free pass to operate in a way that is unsafe, and we would not advocate for legislation that would do so. It does allow schools to find a balance between staying open and meeting public's expectations to provide a safe environment for students and staff. We do appreciate Senator Briese, and our partners in the Chamber, and others who have worked with us in the drafting of this legislation, and their leadership. And we look forward to working with the Judiciary Committee on this bill. Thank you.

PANSING BROOKS: Thank you, Senator Coash. Any questions for Senator Coash? I have one. So you're saying that you don't want to avoid any responsibility, and I understand that. Of course, the teachers are doing amazing work. And, you know, we've heard a lot about the teachers needing vaccines, that they need to be given higher priority, which I believe should happen.

COLBY COASH: Yeah.

PANSING BROOKS: You know, it-- I guess my concern is that-- that too often, if something isn't required or if there isn't some sort of incentive, there are-- and people are saying bad actors-- but there are a number of people that just go to the lowest common denominator. If it's not required to provide masks, then they're not going to do it because there's a cost to that. So I just-- I have a concern about, you know, wandering the-- the world of this higher standard and not expecting, on the same instance, there has to be a balance. There has to be a balance that businesses and organizations are held to a standard that is appropriate, that is important for the safety of-- of our community members, i.e., your workers. But you know, to-- to say that they're basically free of any requirement to-- to protect their employees because it's important that business goes forward-- and I agree it's important business goes forward. That is the most important

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thing for our society. But our people are also the most important thing for our society. So I don't know if you have a comment on that.

COLBY COASH: Well, I understand your comments and your concerns. As we looked at this and we looked at what schools are doing, we believe this bill does strike that balance. And schools across the state are following the guidelines that are put in front of them, whether it's a local or a state-- a state guideline. We just feel that this bill helps that public policy to keep schools open, and gives that level of protection that will allow schools to say: We feel like we can continue to do what we're doing under the guidelines that are out there, and we can keep kids in school where they belong.

PANSING BROOKS: In the case of schools where-- where teachers might be asked to go back sooner than they would feel safe, and in rural areas-- 'cause you're representing NRCSA-- in-- in rural areas where they may not have the capacity to pay for PPE equipment and other things to keep their teachers safe, how-- what do you do about that? Do you just say: Well, we can't afford it, but we're going to go ahead and educate the kids anyway and put the teachers at risk and, because other schools in Lincoln can afford it, we're just going to go ahead 'cause that's the standard?

COLBY COASH: Well, we are grateful for a lot of the federal support that has come down for schools, which has helped provide for a lot of that funding to keep-- keep schools safe. Lots of dollars have been spent across the state on things like barriers and protective equipment for schools. And we think-- but for that, many schools might not have been able to stay open or reopen as they did.

PANSING BROOKS: Thank you, Senator Coash.

COLBY COASH: Thank you.

PANSING BROOKS: Any other questions? Thank you for coming today. Next proponent? Welcome.

DALLAS JONES: Thank you. Good morning. My name is Dallas Jones, D-a-l-l-a-s J-o-n-e-s. I'm here on behalf of the Lincoln Independent Business Association and the Nebraskans for Workers' Compensation Equity and Fairness, in support of LB139. So I'll keep my comments

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short this morning, but I did want to reiterate that a critical function of LB139 is that it protects small businesses. Just one lawsuit can wipe out the small business. The cost of funding a legal defense is often more than what many businesses can afford in normal times, let alone during an economic crisis caused by the pandemic. Now, while we haven't seen a flood of lawsuits as a result of COVID, this-- this bill deals with the threat of a possibility of the flood to come in the future. So as our state begins to open up, we must keep in mind that the threats of lawsuits would make it difficult for businesses to reopen, and that litigation could lead some to close permanently. An important aspect, also, to consider with this bill, is that it does not affect the rights or limits on the Nebraskans' Workers' Compensation Act. Thus, the liability issues between employers and employees remains under the purview of the workers' compensation law. So small businesses struggling to keep their doors open should not be required to weigh the risk of liability for serving customers against continuing to serve the public. So to put it simply, this bill protects people for doing their jobs. So with that, I'd urge the Judiciary Committee to pass LB139 out of-- out of committee, and I would be happy to take any questions.

PANSING BROOKS: Thank you, Mr. Jones. Any questions for Mr. Jones? I don't see any. Thank you for coming today.

DALLAS JONES: Thank you.

PANSING BROOKS: Any other proponents? Proponents? OK, I don't see any proponents, so we will go to opponents. Any opponents? Welcome.

JONATHAN URBOM: Thank you, Madam Vice Chairwoman. My name is Jonathan Urbom, J-o-n-a-t-h-a-n; last name is U-r-b-o-m. I'm an attorney here in Lincoln, and I'm testifying in opposition to LB52 and LB139, on behalf of the Nebraska Association of Trial Attorneys. Miss Motto, in her testimony in support of LB139, discussed the complaint tracker from an international law firm called Hunters [SIC], Andrews and Kurth. She mentioned that there were over 8,000 pending cases nationally. In looking at that complaint tracker, which tracks complaints, by state, related to COVID-19. As of February 16 of this year, Nebraska HAS only had 26 lawsuits filed in connection with COVID-19. Of those 26 cases that have been filed in Nebraska, 10 are civil rights matters involving public safety measures, such as group

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gathering limitations, and stay-at-home orders, and business closures. There are 6 labor and employment cases, 5 contract disputes, 2 consumer cases, and only 1 miscellaneous tort case. Nebraska is not unique in the minimal amount of COVID-19 litigation related to exposure. But nationally, what we're seeing is the vast amount of COVID-19 litigation is related to insurance and contract disputes, not exposure and personal injury. Nebraska does not have a COVID-19 litigation problem that requires immunity provisions or an increased higher standard. The second issue is with the language, particularly in LB139. That injects foreign terms into Nebraska's civil justice and tort system that aren't seen there otherwise. LB139 creates a higher standard of care with willful misconduct or gross negligence. Essentially, someone would have to almost knowingly and intentionally, purposely or with complete reckless disregard, cause an injury. It also creates a heightened burden of proof for-- for a claimant under that bill, as opposed to, more likely than not or by the greater weight of the evidence, a claimant would have to prove by clear and convincing evidence, which is a heightened standard. Additionally, there is the minimum injury standard, which is no-- which is not seen anywhere in Nebraska law either. For those reasons, we would ask that the-- or we would oppose LB52 and LB139. Thank you.

PANSING BROOKS: Thank you, Mr. Urbom. Any questions for Mr. Urbom? I-- I do have a question. I'm wondering, are there other forms of action that rise to that level? Can you give us an example of anything that we've-- we've got in our statutes that rises to that level or of that [INAUDIBLE]?

JONATHAN URBOM: For the gross negligence--

PANSING BROOKS: Yes.

JONATHAN URBOM: --and willful misconduct? The thing that comes to mind is, under the Nebraska Workers' Compensation Act, if a plaintiff is injured in the course and scope of their employment, they can be denied benefits if they were grossly negligent or willfully-- or engaged in willful misconduct. Essentially, a lot of those cases deal with someone being intoxicated or under the influence of drugs. It's a very high standard.

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PANSING BROOKS: Thank you. And I guess I'm just trying to figure out, so the heightened burden of proof, can you explain that just a little bit, too?

JONATHAN URBOM: Yes. So there's really three different burdens of proof in Nebraska. The highest level is in criminal cases where we have beyond reasonable doubt. Generally, in civil cases, we have what's called greater weight of the evidence, or more likely than not. This bill contains language on the burden of proof of clear and convincing evidence. The only place I'm aware of that being in Nebraska law is in fraud cases, which I believe Senator Lathrop mentioned earlier. But it is a heightened burden of proof above the greater weight of the evidence.

PANSING BROOKS: Yes, thank you. I'm glad to be reminded of that. So thank you very much. Any-- I see no further questions. Thank you for coming today.

JONATHAN URBOM: Thank you.

PANSING BROOKS: Further opponents? Opponents? Welcome.

FELICIA HILTON: Thank you. Thank you, Vice Chairwoman Brooks-- Pansing Brooks and members of the Judiciary Committee. My name is Felicia Hilton. I am the government relations director for the North Central States Regional Council of Carpenters. We are opposed to the bill, although we do--

PANSING BROOKS: Could you-- I'm sorry, Ms. Hilton. Could you spell your name for the--?

FELICIA HILTON: Oh. F-e-l-i-c-i-a H-i-l-t-o-n-- sorry about that.

PANSING BROOKS: Thank you.

FELICIA HILTON: Although right now we are opposed to LB139, although we do appreciate the exemption for the workers-- employees and their employers, to basically be able to deal with this through workers' comp, the issue of COVID, we do have concerns about the changing of the actual threshold. So right now we know that they're-- outside of the one case that was just mentioned, that the civil cases have not really been a factor here in Nebraska. We are concerned about the

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changing the standard of proof and the threshold for a claim. But no lawyer, I just want to say that we feel as though the bill is somewhat of an overreach. We do believe that the current law does protect businesses from these types of suits if they were to come about. We don't believe that the standard of proof should have to change at all. We think that that could still protect a business. We just think that it is somewhat of an overreach and a little bit of projection that, you know, people are going to make claims in this way, when we haven't seen it happen. And so we would just like to say that we think that the-- the standard of proof makes it difficult for a regular person to really have a chance in court to-- to basically prove their case, because they've changed the standards of proof and the threshold of the claim. And we just feel like, if you're an everyday Joe and someone were to be negligent in this case, that the current law would protect the business and the person, and that it's a fair enough tort system to be able to work through any litigation in this case. And to change it would be-- it might give liability to the business, but it really puts the burden on the average person to really be able to go to court and state their case, and have to prove willful-- and the willful negligence of-- and misconduct of a business would be really hard for the regular person. And we just think the current standard would do just that and would resolve the issue.

PANSING BROOKS: Thank you, Ms. Hilton. Any questions? Senator Slama.

SLAMA: Thank you, Madam Vice Chairperson, and thank you very much for coming here today. Just to just to kind of clarify your position on this bill, to make sure I'm following it correctly, so on one hand, these lawsuits aren't happening, but on the other hand, we don't want to change the standards so that when these lawsuits do come along, that the average person can seek remedy. Is that correct?

FELICIA HILTON: That is correct. And that is-- that's-- this-- this would-- the threshold is so high, it would really, I think, prohibit the person from being able to do it. And I think that's the goal of the bill, to stop that. And-- but I do think the current law is-- will do the-- the same thing, I think it still has enough of a threshold where you can clearly see if it were frivolous.

SLAMA: Um-hum.

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FELICIA HILTON: And I just don't believe that this causes-- or at least COVID-19, and even though it's temporary-- I just don't believe that the threshold itself and changing the standard of proof is what is necessary to defend-- or for a business to defend themselves against this type of lawsuit. I just feel like the regular person, considering what COVID has done to the country, to the loss of life, I do think that the regular person should have the opportunity to go to court and not have to, in a civil case, not have to have standards that meet the criminal case, like with the the standard of clear and convincing evidence is pretty much beyond a reasonable doubt. And I think that for a working, you know, regular person, that that is a really high standard, in this case, of COVID-19.

SLAMA: Thank you.

PANSING BROOKS: Thank you, Ms. Hilton. Any other questions? Thank you for coming down today. Any further opponents? Welcome.

TODD STUBBENDIECK: Vice Chair, members of the committee, my name is Todd Stubbendieck; that's T-o-d-d S-t-u-b-b-e-n-d-i-e-c-k, and I'm the state director of AARP Nebraska. On behalf of our more than 195,000 members, AARP Nebraska opposes LB139, the COVID-19 Liability Protection Act, and any other legislative proposals which would grant immunity related to COVID-19 for nursing homes, assisted living, and other long-term care facilities. AARP has long fought for the rights of residents in nursing homes and other residential care. This includes the rights of residents and their families to seek legal redress to the courts, to hold facilities accountable when residents are harmed, neglected or abused. During the pandemic, nursing homes and other residential care facilities have faced unprecedented challenges. It is undeniable that these residents have borne the brunt of this terrible disease. According to the COVID Tracking Project by The Atlantic, 1,003 nursing home residents have died as a result of COVID-19 in Nebraska. This accounts for 50 percent of all the deaths in our state. Let me be clear. My heart goes out to the frontline workers in our nursing facilities who have been struggling to keep their residents safe. Many of them have become like their own families. Many facilities have done very well, but some have not. While there may be circumstances beyond facilities' controls for which they should not be held responsible, pursuing a nurse-- nursing home neglect or abuse case in court is already not easy to do. In Nebraska,

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there are existing barriers to accessing the courts in cases like these, including protections from frivolous lawsuits. No family who has lost a loved one due to neglect or abuse pursues this course of action lightly. I'm concerned about the impact LB139 would have on nursing home residents. Section 3 of the bill would remove any liability from a long-term care facility unless the selection relates to a minimum medical condition. The bill defines a minimum medical condition as a diagnosis of COVID-19 that requires inpatient hospitalization or results in death. The family must then prove, by clear and convincing evidence, that the damage is a result of gross negligence or willful misconduct. This is a particularly high evidentiary standard and appears to remove any accountability from a nursing home provider, as long as the resident wasn't hospitalized or died. This would seem to incentivize facilities not to send nursing home residents who are sick to the hospital for care. That is a dangerous precedent that we should not set. As the committee considers LB139, AARP Nebraska urges you not to strip away the rights and protections of nursing home residents. Simply put, long-term care facilities are not like other businesses and should not be treated so. I appreciate the opportunity to offer comments today, and I'm happy to answer any questions.

PANSING BROOKS: Thank you, Mr. Stubbendieck. Any questions? Senator Slama.

SLAMA: Thank you, Madam Vice Chairperson, and thank you very much for being here today. I-- I appreciate your comment that nursing homes are-- and I am just paraphrasing here-- are a unique kind of business. But aren't they a business, too? And shouldn't they have similar liability protections to other businesses? There are businesses that exist with similar-- similar liability protections in this bill to nursing homes. So why would you exclude them?

TODD STUBBENDIECK: I would exclude them, given the nature of the people that they're protecting. I am particularly concerned with this minimum medical standard that we have here. The decision to go to the hospital is not necessarily one that's made by the resident themselves. You know, that's a-- that's a different set of circumstances that we're talking about, and a different set of population of people that we're talking about here.

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SLAMA: But isn't that a strict set of protocols that the nursing home it's obliged to follow in order to stay certified or avoid liability in the first place? That's something that's already in place. Isn't that correct?

TODD STUBBENDIECK: I would hope that they're following those [INAUDIBLE].

SLAMA: Yeah. All right. Thank you.

PANSING BROOKS: Any further questions? Senator DeBoer.

DeBOER: I apologize because I missed part of your testimony. I had to introduce a bill in another committee. But I just heard this exchange that you had with Senator Slama, and it rose a question for me. The medical-- minimum medical standard, is it the practice that, in a nursing home, if someone were very sick, for example, would they always be transferred to the hospital?

TODD STUBBENDIECK: So I'm not a nursing home administrator. I'm probably not qualified to answer that question. Heath might be better prepared to answer that sort of question of that sort of thing. What I do know, again, is it's not always the resident's choice about going to the hospital.

DeBOER: OK. All right. Thank you.

PANSING BROOKS: Any other questions? Thank you for coming today, Mr. Stubbendieck.

TODD STUBBENDIECK: Thank you.

PANSING BROOKS: Any further proponents-- or opponents? Thank you, opponents. Welcome.

SHAYLA REED: Welcome, thank you. Good morning, Madam Vice Chair and members of the Judiciary Committee. My name is Shayla Reed, S-h-a-y-l-a R-e-e-d. I'm a personal injury attorney, and my entire law firm is devoted to protecting victims from nursing home abuse and neglect; that's all that we do. And I want to start off by saying I've not filed a single lawsuit, nor have any intent to file any lawsuit against any nursing home here in the state of Nebraska, on the basis

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of a COVID death or exposure. I oppose-- I'm here to testify against LB52 and LB139, on behalf of the Nebraska Association of Trial Attorneys, for two reasons. First, there's no compelling evidence for either bill. And second, both bills are dangerous, particularly to nursing home residents, as Senator McKinney so aptly pointed out. I would ask you members, when you're looking at this bill, to pay close attention to the effects that it would have, specifically on nursing home residents, especially with the COVID environment, they have-- bear the brunt of this pandemic more than anybody, and this would lessen protection for them. So if you consider, for one moment, tearing down the walls of safety that are there to protect them, you have to do it with the most compelling and strongest of reasons, the most compelling and strongest pile of evidence. And what you've already heard-- and I think both sides admit-- there's just not this evidence of a tidal wave of litigation that's coming against businesses right now. There's no evidence of a tidal wave of litigation that's been filed against nursing homes. I think everybody who testified agreed, these are difficult cases to prove. It's hard to pinpoint exactly where somebody contracted the COVID virus and to trace it back. They're very difficult cases to prove anyway. There's a huge disincentive to bring these cases. I'm seeing that myself. If I can't prove where the person got it, I can't bring that case. But what I also want to point out that nobody's really talked about is that the current standard of care adapts to an emergency and already adapts for this type of pandemic. The judge or the jury would be asked: Would a reasonable nursing home, in same or similar circumstances, act in this way? It takes into account what the existing circumstances are. So something that may have been negligent five years ago in a nursing home may not constitute negligence during the COVID pandemic. If there was an unavoidable shortage of staffing or shortage of PPE, that is already built into the standard of care. I agree with Senator Lathrop. We're talking about overhauling our tort system when the one that we have is fine. It offers protections for those who need it. It takes into account the circumstances while promoting the protection of our most vulnerable citizens in society. And I would also remind you, it's not just vulnerable elderly residents in nursing home. It's disabled children, it's immune-compromised childrens on trachs. This is our most vulnerable group. And so I ask that you judge these bills by looking particularly towards them.

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PANSING BROOKS: Any questions? Yes, Senator-- Senator DeBoer.

DeBOER: Senator Reed-- or Ms. Reed, thank you for being here.

SHAYLA REED: Thank you.

DeBOER: We've heard that there is a concern that there will be a glut of these lawsuits coming, and that there have been, in fact, advertisements trying to sort of drum up plaintiffs. What reassurance could we give business owners that there isn't going to be a glut? You know, it hasn't happened yet, but what will say that it won't happen in the future?

SHAYLA REED: We haven't seen the advertising that have come here, but also the current standard of care would account for that. It weeds out the frivolous lawsuits. The standard of care is what a reasonable nursing home or reasonable business would do under the same or similar circumstances. And built in that, you can take into account we're in the middle of an emergency, we're in the middle of a crisis, we have limited staff, we have limited PPE. As long as a business or in-- my emphasis is on nursing home-- is doing what a reasonable nursing home would do, is complying with the CDC guidelines to the best of their ability and the circumstances that they face. There should not be this glut of frivolous lawsuits. And I think they said all this advertising-- none of it is here. I mean, yes, there may be, you know, national advertisers across the nation, but the problem is not here, nor do we have any reason to believe it's coming here. These are extraordinarily difficult cases to prove. Just like any infection case, they're difficult to prove.

DeBOER: But couldn't-- couldn't a family, sort of in the throes of grief, they've lost Grandma-- whatever-- they want to know why, they want to have somebody to blame, you know, those sorts of things. Couldn't they try to, then, bring a lawsuit just to give themselves a little peace in that way? And couldn't we see a bunch of these lawsuits happen? And maybe they don't get past dismissal, but they are brought. I mean, I think the concern is not so much that they'll be won, but that they'll be brought. What protections do we offer in the law already to stop that from happening?

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SHAYLA REED: Well, there would be an immediate-- there's motions for summary judgment. If you can't come forward, you have to prove negligence and causation. And even if you have negligence, if you can't prove that that particular act led to this particular person contracting COVID, and they required hospitalization or died, then the case will not survive summary judgment.

DeBOER: Why--

SHAYLA REED: And we share the concern of the other gentleman who spoke. I've seen this where they don't send the person on to the hospital. They know that they're going to be exposing themselves to potential liability. It chills them from sending a person to the hospital. And there's no clear, fast guideline. They have discretion on when to send a resident to the hospital. If they see this blanket umbrella immunity protection, as long as a person doesn't go to the hospital or dies on their watch, I'm very concerned they have a real incentive not to transfer people who need medical care to a hospital.

DeBOER: So you said that you wouldn't bring one of these cases, you don't plan to bring one of these cases. Why is that?

SHAYLA REED: Because I haven't found a case where I could prove causation. I have heard cases, many cases about, you know, poor staff saying we're begging for more PPE. I have heard from a nurse who said I had symptoms. I wanted to get tested, but the nursing home told me, do not get tested 'cause once we have that official record, we'll be in violation of CDC. You come on back in. And that exposes not only the nursing home residents, but all the good people working in the nursing home. I mean, it is a terrible situation-- and all those people that they go home to. We need to hold the line. We need to hold the line with respect to the safety of our most vulnerable residents, and certainly not turn our back to them without a shred of evidence of this overwhelming problem.

DeBOER: So even with some evidence, whatever it is of them saying, don't get tested, come in anyway, you still wouldn't bring the case?

SHAYLA REED: No, I wouldn't, because I still wouldn't have the proof of causation. It is a hard hurdle to prove, even with a negligent standard of care. And they're trying to propose a double barrier. Not

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only is it a higher standard to prove, with clear and convincing evidence, now we have to show willful. We have to show some knowledge, which is very difficult, in most cases, to prove. And it also, arguably, would give business owners, nursing home owners an incentive not to be in the know. All the nursing home owner has to say is: Well, I didn't know that people weren't wearing their PPE all the time; nobody told me that. They would have an incentive not to become aware, not to supervise closely, because they can be pointed to as somebody with knowledge, and that gets them on the hook under this bill. So the less I know, the better. And that's dangerous for, not only the residents, but the workers, customers. It's another deadly incentive that this bill promotes, in my opinion.

DeBOER: Thank you.

SHAYLA REED: Yeah.

PANSING BROOKS: Senator Brandt.

BRANDT: Thank you, Miss Reed, for testifying today. So if we put a carve-out in just for assisted living and nursing homes, would that make the bill acceptable to you?

SHAYLA REED: Not to me, because we're talking about overhauling a perfectly good tort standard. I think that we should hold all businesses to what a reasonable business would do in the same or similar circumstances. You're still talking about a significant and drastic overhaul of tort liability. It's not called for, and especially in the absence of some overwhelming need. And you're going to preclude a lot of good people from access to accountability against certain business owners that need to be--

BRANDT: And I guess the only reason I bring that up is, is over 900 of the deaths out of the 2,000 we've had in Nebraska, are from nursing homes.

SHAYLA REED: Exactly.

BRANDT: And so it is-- it is the one category that was probably impacted the most by this. So OK. Thank you.

SHAYLA REED: Thank you.

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PANSING BROOKS: Any other questions? Senator Slama.

SLAMA: Thank you very much. And thank you very much for being here. I-- I find some of your language very concerning, especially when it comes to nursing homes and understanding the burden that they have been placed under, when you're referring to deadly incentives they have under this bill. I just wanted to clarify, with your explanation about tort liability, nursing homes aren't in the business of killing Grandma. If they decide, under this bill, that Grandma doesn't somehow need to go to the hospital, and Grandma dies as a result of that, this wouldn't exempt the nursing home from that liability, would they? [INAUDIBLE].

SHAYLA REED: No. You're absolutely right. In extreme cases, not sending her to the nursing home, if she dies anyway, they're on the hook.

SLAMA: Um-hum.

SHAYLA REED: But if she survives COVID and suffers, and doesn't get hospital care, but suffers and survives, that's in their incentive. There is an incentive not to transfer them out to the hospital.

SLAMA: There's an incentive to, but the-- I just struggle with the logic that a nursing home would gamble and go: Well, Grandma is not doing well. She should probably go to the hospital, but I don't know. What-- I'd be willing to bet 50/50 that she's going to survive. Like to me, I think that the liability concerns are still there, and I don't think LB139 erases that. But that's just a disagreement we have that I wanted to get on the record.

SHAYLA REED: Well, and-- and your point is well taken. At some point, if she's so bad, they need to cover themselves by getting her to the hospital. And I understand that. But I can tell you from my 20 years of experience, I have exactly-- I mean, it is a business. And when a business owner of a nursing home starts putting profit over people, I do see things like this, where somebody has a stage 4 pressure wound and they delay getting them to the hospital because they know the hospital is going to call Adult Protective Services on them. It's shocking what I see, and there's no clear and fast line that requires them when to send somebody to the hospital. I'm very concerned that

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there will be some situations where the person is not sick enough to require, you know, may not be on death's door, but there's some incentive here not to get people medical care that they otherwise would need.

SLAMA: So would you argue that that incentive and any potential loss of life or harm that could come as a result of that potential exceeds the risk of cases that you say don't exist, in terms of people seeking to sue nursing home facilities as a result of their conduct during COVID?

SHAYLA REED: I'm not sure what you mean. I'm sorry.

SLAMA: I-- on one hand, you're saying that there's an incentive there of putting profit over people. Grandma has COVID, we're not going to send her to the hospital. Do you think those cases will be more common than the liability that nursing homes could be exposed to, that insurance coverage-- there's a gap in insurance coverage-- that doesn't cover the cost for litigation when it comes to COVID-19 litigation. Do you see that incentive happening more often than those potential cases?

SHAYLA REED: That's-- that's a good question. That is hard to predict because,--

SLAMA: OK.

SHAYLA REED: --like I said, these-- these are still hard cases to prove.

SLAMA: Sure.

SHAYLA REED: So we are going to be talking about the more extreme cases. But I think, especially-- and I mean, even take the case where, you know, Grandma does eventually go to the hospital and die. I mean, all the nursing home owner has to say is: Well, we didn't know she was in that bad of a shape. I mean, you got to show that it was willful, that it was intentional. I didn't know that people weren't always wearing their gloves when they were taking blood. I didn't know. It's so easy for them to say: I don't know. And then it's a hard standard to prove. And so, no, I think we're going to miss out on potential cases where, you know, good cases where they should be held

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accountable, or you create this incentive where they can be lax about their procedures.

SLAMA: Um-hum.

SHAYLA REED: But all they have to say, and I hear it day in, day out, you know: I didn't know. I didn't know my nurses weren't wearing their PPE all the time. So good luck proving that I was acting willfully. You're never going to get to that standard; it's too high. I just think it-- this really sells out, especially, nursing home residents without a compelling reason.

SLAMA: Those discussions are why we have attorneys. Thank you.

SHAYLA REED: Thank you.

PANSING BROOKS: I see no further questions. Thank you, Ms. Reed.

SHAYLA REED: Thank you.

PANSING BROOKS: Any further opponents? No? Any-- any neutral testifiers? OK. Senator Briese, would-- would you like to close? [INAUDIBLE].

BRIESE: Thank-- Thank you again, everyone, and I want to thank everyone for coming and testifying on both sides, in particular. It's great to air this out and-- and hear from our testifiers today. And again, thanks; thanks to everyone. We heard a lot about the need for this legislation. And I don't really want to reiterate that. I think the testifiers did a-- did a great job there. But there were a couple concerns that I wanted to address. And I-- I heard someone suggest that, you know, this is going to disincentivize folks from taking precautions. And I don't think it's going to do that at all. If I'm a business owner out there, just because LB139 passes for an education institution or healthcare facility, I'm not going to be any less careful with the people I have a responsibility to protect. If my behavior rises to the level of gross negligence, I'm still going to be on the hook. And I'm not going to know where that behavior rises into gross negligence until the trier of fact gets ahold of it. And so I'm still going to have to be careful. It's not going to make people just go out there and roll the dice. Someone else suggested, you know, we're really tweaking areas of civil liability here, and that's unwise

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to do so, that we're essentially overhauling our tort system. We've got to remember, this thing sunsets; this is not tort reform. The trial lawyers need to remember this is not tort reform. It's going to sunset. And I want to point out again, I think I mentioned it earlier that the feds and several states-- the federal proposed legislation, and several states have passed legislation that moves the evidentiary standard to clear and convincing. Most of the states that have done anything have altered the standard of care. And then Iowa provides for the minimum injury requirement. And it was also suggested it's difficult to prove causation. Well, you know, under typical negligence lawsuit, the burden is preponderance of the evidence. What is preponderance of the evidence? That's more likely than not. I would submit that that is a fairly low standard. And difficulty in proving it, I-- again, I'm not going to harbor an opinion on that, but it is a fairly low standard, more likely than not, and that can be met. And several have said that Nebraska doesn't have a problem. There's no-- no compelling need for this. But we've heard from a lot of folks today that suggest otherwise, that they disagree with that, that there is a compelling problem. But if we don't have an imminent threat of these lawsuits on their way, what's the harm in putting this in place and giving some of our residents peace of mind in this area? And it was also suggested we're talking about blanket immunity for nursing homes. I heard that statement somewhere. Well, no, no. LB139 has nothing to do with blanket immunity. LB52 might, but LB139 doesn't. But to conclude, you know, much of what we do in this body is about weighing competing interests, finding common ground. And I heard that statement from several of the proponents today. I heard the phrase "middle ground." And-- and that's what we're trying to do here, is find a middle ground on this issue. Remember, we're not applying it retroactively. It's only prospective application. If we were pushing for retroactivity, that would not be consistent, in my view, with-- with an effort to find middle ground. And we're not pushing-- with LB139, we're not pushing for complete immunity. Instead, we're working for middle ground. And the committee has to decide, you know, where-- are we going to step up in this area to try to support our business community, try to support our education providers, our healthcare providers, and others to recover from the pandemic? And if we decide we want to go that route, then we have to decide. Do we go the route of complete immunity or do we strive for the middle ground that is presented and available here in LB139? Thank you.

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PANSING BROOKS: Thank you. Senator Briese. Any questions for Senator Briese? Senator DeBoer.

DeBOER: Just one, sorry.

BRIESE: Sure.

DeBOER: Senator Briese, would you work with me on doing something so that syndromes which result out of COVID--

BRIESE: Pardon me.

DeBOER: --so syndrome's which result out of COVID can be dealt with? Because I think that's something that this does miss.

BRIESE: Yeah, that's a great question. I-- it sounds like a bar exam question. How do you handle that, and how do you put the statute of limitations in place there? Cause of action typically arises at the time of injury, but-- or when a reasonable person would be aware of their injury. Well, when you have the initial injury, which would be, presumably in most cases, the exposure here-- when the exposure occurs, cause of action, one would think would arise then, but when you have this latent syndrome that doesn't manifest itself for months or years, a person would have to research that a little bit and assure ourselves that the cause of action doesn't arise until that injury becomes apparent or the extent of the injury becomes apparent. So I'm not sure of the answer to that. But it is something that should be addressed, I believe,--

DeBOER: OK.

BRIESE: --or we need to assure ourselves that it is addressed, because something that manifests itself rises to the de minimis level required of this bill when it does rise to that level. One should still have the ability to take action, it would seem to me. But that's a good point.

DeBOER: All right. Thank you.

PANSING BROOKS: Thank you, Senator. Briese. I see no further questions. So we'll ask that now Senator Lathrop come and testify on LB130 [SIC]--

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BRIESE: Thank you very much.

PANSING BROOKS: Thank you very much. And while Senator Lathrop is coming up, we-- in-- during this combined hearing for LB39 [SIC], there were 22 letters of-- and of those, there were 20 that were proponents, and there were 2 in opposition. On LB52, there were 4 letters. Three of them were proponents and 1 was in opposition. In addition, there were 21 written testimony letters, which I will read to you. OK, Jon Cannon, with NACO, is a proponent; Jerry Stilmock, from the Nebraska Bankers Association, who is also here today.

LAURIE VOLLERTSEN: [INAUDIBLE].

PANSING BROOKS: OK, yeah. [INAUDIBLE]. Sorry, we're having a little confusion here. OK, on-- on LB139, Jon Cannon, from NACO, wrote testimony; on LB139, . Jerry Stilmock wrote proponent testimony; on LB139, Tom Venzor wrote proponent testimony; on LB139, Lynn Rex wrote proponent testimony; on LB139, Lori J. Meyers, from the Nebraska AFL-CIO, wrote opponent testimony; on LB139, Greg [SIC] Anthone, from DHHS, wrote proponent testimony; on LB139, Marcia Mueting-- Mueting, from the Nebraska Pharmacists Association, wrote proponent testimony; on LB139, Greg Adams, from the Nebraska Community Colleges Association, wrote proponent testimony; on LB139, Korby Gilbertson wrote proponent testimony, representing Enterprise Rent-A-Car Company, the Nebraska Realtors Association, Nebraska Telecommunications Association, Pinnacle Bank, Woodmen of the World Life Insurance Society and subordinate entities; on LB139, Kent Rogert wrote proponent testimony, LeadingAge Nebraska; on LB139, Julia Plucker wrote proponent testimony from the Nebraska Credit Union League; on LB139, Heath Mello wrote proponent testimony from the University of Nebraska; on LB139, Angela Amack wrote opponent testimony for IBEW and Building Traders-- or Trades; and on LB139, Angela Amack wrote opponent testimony for the Nebraska Professional Firefighters Association; on LB139, Jason Hayes wrote opponent testimony from the NSEA; on LB1-- on LB52 and LB139, Tony-- Anthony Vargas wrote proponent testimony for the Nebraska Association of Service Providers; on LB52, Jon Cannon wrote proponent testimony on behalf of NACO; on LB52, Julia Plucker wrote proponent testimony on behalf of Nebraska Credit Union League; and on LB52, Angela Amack wrote opponent testimony on IBEW and Building Trades-- I think we already said that one-- and the Nebraska Fire-- oh; and LB52, Angela Amack wrote pro--

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opponent testimony on behalf of Nebraska Professional Firefighters Association. So it's the two different bills, that's why we're getting repeat people.

LATHROP: All right.

PANSING BROOKS: OK. Senator Lathrop, would you like to close?

LATHROP: Yeah. When I did my introduction, I indicated that I offered this bill so that I could participate in the conversation and be involved in what needs to be the solution, if there's a problem. If there's a problem is the part that I've been waiting for. We've had over 400,000 people die in this country from COVID. We've had 198,000 COVID claims in Nebraska, if I-- my information is correct-- I Googled that while I was sitting, listening to the testimony-- 2,146 deaths in Nebraska from COVID. And then I listened to the list of people represented here today, as in favor of-- interestingly, not my bill, but LB136 [SIC]. It's like every business in the state. Every business organization, every hospital, every school-- everybody. Every organization that's a company, a school district, was represented here today. Not one person, not one person came in here today to say there's been a claim. Not one of the businesses represented by the 25 or so business organizations that came in here, represented today, said: I have somebody that got a letter from a lawyer about one of these cases-- not one. You know, we ought to engage the machinery of government when there's a problem, and I listened to Dallas Jones, who spoke, I think, for LIBA and the Work Comp Equity and Fairness people. And I think he summed it up. There's a fear of the threat of a possibility. That's what it is, there's fear. And you know what? I'm wondering who's creating the fear? Where's the fear coming from? It isn't the lawyers that filed these cases, 'cause none of them are filing these cases. None of them are sending letters that I represent somebody that's been involved in a COVID exposure. And there's a reason for that. The reason is that the burden of proof and the standard of care that currently exists, and has existed for hundreds of years in this country, is great enough in these kind of cases to not bring one. No one has brought a claim. COVID has been around for a year. Probably when you needed immunity the most or some different standard of care is when we knew the least about it. And when you need that kind of protection, liability protection, the least is when community spread is where it's at. You can't-- you can't trace where

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this is coming from now. And none of these bills will help anybody who may have a claim before the date this passes and becomes law. So unless it passes with the emergency clause, is prioritized, heard, and signed, it-- the whole thing's probably going to be past us. It's concerning-- it's concerning that we're here over the fear of the threat of a possibility, and somebody is creating that fear. It sounds to me like people have gotten a letter from their insurance company. Going forward, we're going to put an exclusion. Well, maybe you need to be down at the banking committee talking about what they ought to mandate in liability policies, if you think it's a real threat. But for all the organizations represented here today, all the people whose-- who provided written testimony, no one has indicated, not one single claim-- none. That's my takeaway. Now, we heard that a lot of states are offering bills. Some states have passed them. They may have different liability laws. Some places you can sue if an employer-- normally in Nebraska, you can't sue your employer under any circum-- under any circumstance for an injury that happens at work. Some states have a different rule. Maybe there's liability in those states for gross negligence, and-- and people that work at a packing house or something might have some kind of a class action. That's not the law in Nebraska, though. I haven't heard a reason to pass either bill. That's my close, and I'll be happy to take any questions.

PANSING BROOKS: Thank you, Senator Lathrop. Any questions for Senator Lathrop on his bill? No. Thank you. And that closes the hearing on L-- on LB52 and LB139. The next bill is another combined hearing of LB71, Senator Wayne's bill, and LB54, Senator Lathrop's bill. We'll take a moment to let the room change over. OK, so this will open the hearing on legislative bills LB54 and LB71. Senator Lathrop will open-- do his opening on LB54. Welcome, Senator Lathrop.

LATHROP: Thank you, Madam Vice President. My name is Steve Lathrop--

PANSING BROOKS: Oh, thank you.

LATHROP: --L-a-t-h-r-o-p. I'm the state senator from District 12, and I'm pleased today to be presenting for the committee's consideration LB54. LB54 relates to tort liability for a political subdivision. I need to give a little background on this one. So in this country, government, it's a tradition or a legal principle that the European founders of the country brought with them the notion of sovereign

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immunity. The king could not be sued. That-- that is a fundamental principle of tort law in the United States. It's true at the federal level, the state level, and at the level of the school district or a city, generally political subdivisions. The federal government and state government, as well as political subdivisions, all have a Tort Claims Act. The Tort Claims Act essentially says that government waives sovereign immunity except in certain circumstances, so they carve out some circumstances as exclusions of the waiver of sovereign immunity. One of those exclusions was the subject of a case decided by the Nebraska Supreme Court this last September. I want to tell you a little bit about it and then tell you what the bill is about. In Moser v. State, there was an inmate named-- I think his name was Terry Berry, who was placed in a cell. Now this-- this guy, Terry Berry, was a very, very talkative-- I'll say annoying-- personality, and he was double bunked with the person who's-- who was ill tempered, in there for a very serious crime, and known to be a violent person. He protested placing him in there. By the way, he was just about to be released. Placing him in that cell violated the Department of Corrections' own regulations. Well, he's in there and he was annoying, apparently, at least annoying to the individual that strangled the life out of him and killed him. Terry Berry's family, the personal representative named Moser, brought a lawsuit for the wrongful death of this individual. In deciding that, the court concluded that there was immunity based upon Section 7 of the State Tort Claims Act, and Section 7 is known as-- or paragraph 7 of the State Tort Claims Act, is known as the intentional tort waiver-- the intentional tort exception to the waiver of sovereign immunity. And basically it says that while the state waives sovereign immunity in every case, you can sue us just like individuals, you can't sue us for our intentional torts. So if I work there, if I work at a school district and I punch a kid, no liability on the part of the school district because the Political Subdivision Tort Claims Act, intentional tort exception to the waiver of sovereign immunity would say we still have sovereign immunity on that issue. Terry Berry's claim, or the Moser claim, was based upon the negligent failure to protect someone to whom you owed a duty of care. OK? The negligent failure to protect somebody to whom you owed a duty of care, this is a real broad principle and I'll talk about it in just a second. But what the court concluded-- and by the way, they had to-- they had to distinguish Nebraska's approach to considering this issue from a decision made by the United States

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Supreme Court on nearly identical language in the Federal Tort Claims Act, but the court concluded that if there is an intentional tort anywhere involved in the injury, even if the state was negligent in allowing it to happen, then there's no liability, immunity attaches, and you can't sue the state. Now, when that decision came out, a lot of people probably thought, well, it's an inmate and I'm not all that worried about inmates because they know it's a rough-and-tumble world over at the Department of Corrections. But here's where it's a problem, because that-- that in-- that interpretation of the intentional tort exception to the waiver of sovereign immunity plays out in schools and foster care and places with children, so consider this, or-- or in a nursing home, as long as we're talking about nursing homes. If-- if I send my daughter to the public school, for example-- well, I'll give you a real, live example, because it happened at Fontenelle School. They had a teacher at Fontenelle School that other teachers and the administrator knew were inappropriately touching small children-- they're like kindergarten and first graders on the playground. Nobody did anything about it for a long time, so other children got hurt after they could have done something. So they negligently failed to protect a child from an-- a situation where they could get injured. That can happen in foster care. So the effect of the decision in Moser is that school districts, HHS, they don't have any duty any longer to protect children or people to whom they owe a duty of care from the intentional acts of others. So that could be-- where could that play out? It could play out if a teacher sees a kid being bullied or sexually harassed at the high school by another student and doesn't do anything about it and it continues, no liability because that sexual harassment and assault, those are intentional torts and would be covered by the exception to the waiver of sovereign immunity as interpreted by our Supreme Court. I think the decision is very consequential for children. If a municipality runs a nursing home or the county runs a nursing home and there is a nurse beating up a patient at the nursing home and they know about it and don't stop it, there's no liability now that the Moser decision is the law of the land in Nebraska. Last thing I'll say about it, this bill would change that and say the intentional tort exception still exists, but it doesn't apply in those situations where the state or a political subdivision has been negligent in the failure to protect someone to whom they owed a duty of care. Think children; think children at a school; think children in foster care. Would it apply to

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Terry Berry's circumstance? Yes, it would. But you have to have that relationship between the state actor and the victim to create liability, and they have to have an opportunity or notice to do-- to know that they have-- let me say that differently. They have to be negligent in their failure to protect somebody from an unreasonable risk of harm. So the court invited the Legislature to review the language in that decision. They said, if you want a different outcome, you got to have the Legislature provide it for you. And as a consequence, I'm here today and Senator Wayne is. We have slightly different approaches, but we're-- we're after the same outcome.

PANSING BROOKS: Thank you, Senator Lathrop. Any questions for Senator Lathrop? I don't see any. Thank you very much. OK, and now we'll have Senator Wayne's opening on LB71. Welcome, Senator Wayne.

WAYNE: Thank you, Vice Chair Pansing Brooks and members of the Judiciary Committee.

PANSING BROOKS: Thank you.

WAYNE: As-- I won't go into all the facts that Senator Lathrop already went into, but what I'm handing out for the committee is one case that affected parts of Omaha deeply, and it was Destacia Straughn's case. And this is a case where if you'll just-- don't have to read any farther than the first page. Omaha Police declined to arrest this young man on at least seven different charges the day before and hours before his girlfriend was assaulted. He stole her car. He was picked up and dropped off about four or five blocks, less than a mile away from where he was picked up from, which was at her apartment, and he was able to return and murder her and shoot five other people. And this case has progressed since 2015 up until the Moser case came out. And when that decision came out, Omaha Police or city of Omaha immediately called a hearing and said, according to Moser, we're no longer-- the political-- we're no longer-- we're immune from it, we're no longer liable, and so the case was immediately dismissed. So the different approach that Senator Chairman Lathrop and I have is mine provides for a five-year look back. And the reason is, is I-- I was researching the best I can on Justice, and then I believe yesterday you had the Clean Slate Act and you kind of heard the issues with Justice. It's really hard to research cases on there, but there appeared to be, across the state, about ten of these cases that I've

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saw where they started around 2015 and were going through the process, and then after Moser they're all being dismissed. So these families have spent millions of dollars, some of them. Some of them have spent countless hours going through the legal process. And then Moser, which I believe, if you look at the federal statute, which our language mirrors, and I would tell you to read the dissenting Opinion for Justice Miller-Lerman, who talks about what I think is right, that the court misinterpreted or reinterpreted the statutes incorrectly. But they did, and all justices invited the Legislature to fix it, and that's what we're trying to do here today. The other part of my bill that's different than Senator Lathrop's bill is, two years ago, 2017-- '18, actually, we passed, out of this committee, LB729. And if you'll recall, that was-- I think the only person here would have been Senator Pansing Brooks and Morfeld. It was where a young woman-- a young family adopted a kid and they asked the person over and over, the state rep-- social worker, over and over about the mental health and the sexual abuse or anything this child may or may not have. And the caseworker lied, misrepresented the facts, and that child ended up sexually assaulting one of their own kids. And they sued and the court said: dismissed. Well, we fixed that. But at the committee hearing, there were actually two different bills, myself and Burke-- Senator Harr. It came to the floor and there wasn't a lot of debate on the floor because the committee made a pretty strong statement saying that if a child is in the care of the state and we are negli-- negli-- if we misrepresent the health, the education background, or the medical background of a child in placement or adoption, that the state could be liable. Well, there have been a couple decisions since then that have basically said that only applies to an adoptive parent, and that was never the intent of the Legislature, because we have kids who go to YRTC who come back home, and they're oftentimes not told the truth about their mental health or they're put on drugs. And that was the whole entire committee's discussion of why they added the amendment, but we didn't have a floor debate so there isn't a legislative history because it was clear to everybody at that time-- and in fact, only myself and, at the time, Watermeier-- Senator Watermeier spoke on it, and it sailed through 48-0 because it was clear that-- we believed, at the time, if a child is in the state's custody, whoever that parent, legal guardian, we owe a duty to that parent and legal guardian to maintain their health, make sure we at least provide records of their health and their education status, and their mental health status, not

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just physical health. Well, because of how the court has been ruling, judges are taking that very narrowly to say: Well, it only applies to adoption cases. And that was never the case when this committee sent it out. It was also to any placement and to any parent. It could be a guardian, not just the adoptive parent. So my language clarifies-- clarifies that, and that starts on page 7, to fix that bill. But I do want to point out there's an interesting thing when I look at the fiscal note. If they go back the last six years, according to DA-- DAS, it is found that in the last six years, claims that meet the criteria outlined in this bill is approximately \$98 million. So that tells you something interesting about what DAS thinks, that they were actually negligent, 'cause-- just 'cause I put on a complaint, I'm suing them for \$10 million, like in the case of Moser, doesn't mean a jury is going to find \$10 million for the political subdivision. But the fact that they think that they're liable for \$98 million tells this committee, and tells me that there's \$98 million that justice went unserved to those families, where the state was liable and chose not to. I'll tell you, for another opinion you might want to read is Edwards v. Douglas County. And this case is interesting 'cause it's unclear of whether the duty actually was there, but this was a young lady who was held hostage and shot, and her two brothers were actually killed. And the brothers called 911 multiple times, and it took about 45 minutes before 911 actually dispatched officers to the residence. So there was an issue of whether they had a duty or not, but the Supreme Court said, we won't even get there because it's a third party and it's an assault so, sovereign immunity, they don't have subject matter jurisdiction. That's the issue, is, if there's a duty, which I believe there was in Moser and I definitely believe there was in Straughn, we owe it to the people we represent to make sure that those individuals, and in this case the state, are held liable. It's really that simple. The Supreme Court has asked us or invited us to change it if we don't like it, and we're asking this committee to do so. And I'm asking this committee to provide a look back, because these people have spent years going through the process, getting ready for trial. And there's one in western Nebraska I'm particularly thinking of, where it was a kid and sexual assault, and it's been four years and they finally were getting ready to go to trial and it was dismissed three months ago on the same grounds. That's countless of hours, countless of resources, hundreds of thousands of liability as far as expert witnesses for a decision that everybody relied on, Doe, when

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filing these cases. What's ironic is, if an officer does that same thing, rely on a case or law that even may have been overturned, we still allow that evidence in and we still allow it to proceed because it was a good-faith re-- reliance on an improper law, but we don't have the same thing for these families. I'll answer any questions.

PANSING BROOKS: Anybody have any questions for Senator Wayne? I don't see any. Thank you, Senator Wayne.

WAYNE: Thank you.

PANSING BROOKS: And how many are speaking in-- as proponents? Again, these two bills are merged. One, two, three, OK. And how many opponents? OK, so we're just trying to get through this, this last one. Sorry that you've all had to wait so long because the last hearings were pretty long together. So OK, let's take opponent-- or proponents, and if you could tell which bill that you are speaking about, proponents. Yeah. And let us know which you're-- you're here to testify on or if you're here to testify on both. Thank you. Welcome.

LOREE WOODS: Good day now, Senator Vice Chair-- Senator Pansing Brooks and members of the Judiciary Committee. I'm here to support LB54.

PANSING BROOKS: Could you lean forward a little bit closer? Sorry. Thank you.

LOREE WOODS: Is that better?

PANSING BROOKS: Yeah. And spell your name for us, please.

LOREE WOODS: Yes. My name is Loree Woods, spelled L-o-r-e-e W-o-o-d-s. I'm here today urging support for LB54 on behalf of my special-needs daughter, Taylor Woods. My attorney, Eric Brown, will also be testifying in support of LB 71, which addresses similar subjects. Unfortunately, LB54 and LB71 have become very personal to me and my family because they-- they-- because they remedy the recent Supreme Court decision of Moser v. State that left my daughter with no recourse after she was sexually assaulted by another student, as a result of Lincoln Public Schools' negligence. Taylor was born March 28, 1997, with special challenges. She was the most sweet, exciting, happy, fearless, loving, and outgoing baby. And no surprise to me, she was similarly growing into a strong, beautiful, and trusting young

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lady with a contagious laugh and plans for her future-- graduate, get a job, move into an apartment with her staff and "peeps." To facilitate her finding future employment, like special-- like many of the special-needs students at Lincoln Public Schools, Taylor participated in the Vocational Opportunity in Community Experience Program, The VOICE Program, on October 10, 2016, Taylor's life changed forever. On that day, LPS experienced a staff shortage at the VOICE program site, Abel Hall, on the University of Nebraska-Lincoln campus. LPS knew the VOICE program would be understaffed on October 10th, 2016, but it still proceeded without meeting their staffing needs, ill-equipped to deal with a group of special-needs students. As a result of the understaffing, four students were left unattended, including Taylor and another student with an IEP required-- who required constant supervision due to a history of inappropriate touching, inappropriate language, personal space issues, and general misbehavior. This student, who propensibly-- whose propensity for inappropriate touching and behavior warranted and required constant supervision, took my daughter to the 13th floor of Abel Hall and sexually assaulted her. Taylor fought back her attacker the best she knew how, telling him: No, you're hurting me, you're bullying me. The tragedy iron-- the irony of this is that the VOICE program was supposed to assist Taylor in becoming a more independent adult. Instead, the assault that arose out of LPS's negligence will always hold Taylor back. For it to come to such a formative point in her life in an environment where she trusted those tasked to protect her, it especially damaged her well-being and development. She continues to experience daily triggers of PTSD flashbacks, physical and mental pain. Thanks to the support, and endless hours of research by our attorney, Eric Brown and his staff, fondly known as Team Taylor, we put together a solid case confirming what we knew all along: Lincoln Public Schools' negligence resulted in the tragic, life-changing sexual assault to my daughter. Unfortunately, within mere weeks of scheduled mediation and with the promise-- or prospect of justice for our daughter finally coming to light, such dreams were completely crushed by the Supreme Court's just-- decision in Mercer vs. the State. As a result, the decision-- of the decision, LPS escaped any real accountability for their negligence in allowing my daughter to be sexually assaulted. I'm not an attorney, I'm just a mom. It shouldn't take a law degree to realize that state district should not be immune to the negligence allowed to be-- for it to have a sexual assault

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occur. To be clear, changes in the statute will not affect our outcome Taylor's case-- of Taylor's case. However, I promised myself and Taylor to fight for those without a voice or the ability to fight back, to ensure that no child, parent, or family has to go through what we've been through again. I know in my heart, and I hope in yours, that LB54 may also be known as Taylor's law. Justice through the court system was not allowed to her. However, change can, and it must, happen. At this point, this is the only justice for Taylor and others can occur is through-- is through legislation like LB54. I strongly encourage you support of LB54 to secure the protection of our most vulnerable population--

PANSING BROOKS: Ms. Woods, are you almost-- I'm sorry, but--

LOREE WOODS: Yep. I have like one more line.

PANSING BROOKS: OK. Thank you.

LOREE WOODS: I'm sorry.

PANSING BROOKS: No.

LOREE WOODS: --population, as well as a sense of peace to restore to Taylor and our family.

PANSING BROOKS: Thank you. I'm sorry. We have a system and we have to--

LOREE WOODS: Yeah. And I'm sorry I wasn't paying attention to [INAUDIBLE].

PANSING BROOKS: That's OK. We're grateful for your courage to come, and thank you for telling your story. Are there--

LOREE WOODS: Any-- I would be happy to take any questions.

PANSING BROOKS: --any questions? We're sorry for what your daughter experienced and went through and the trauma that you have as a parent, walk-- seeing her go through such-- such trauma.

LOREE WOODS: Thank you. Thank you for your time. Have a good day.

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PANSING BROOKS: Thank you. Thank you very much. OK, another proponent. And I'm sorry, we're just trying to keep to the light system. We have an Executive Committee hearing going on right now for two of us, but we want to stay and complete this, so-- welcome.

ERIC BROWN: Good-- good morning, Vice Chairperson Pansing Brooks and this committee. I will try to cut out much of my content of what's being passed out for purposes of time. And so I will try to get through this as quickly as possible. My name is Eric Brown, E-r-i-c B-r-o-w-n. I am a shareholder in private practice at the Law Firm of Atwood, Holsten, Brown, Deaver, Spier, and Israel. I'm also an adjunct professor at the Nebraska College of Law. Similar to Senator Lathrop, I handle injury cases about half tort and about half in workers' compensation. I'm here to-- on behalf of Taylor Woods, Loree Woods, and also as a concerned member of this state. As you can tell from Loree's testimony on LB54, she has been, and continues to be, a remarkable mother and advocate for Taylor, who has special needs. The negligence of LPS resulted in Taylor's sexual assault by another male special-needs student with a history of inappropriate touching, who, according to his own long-term IEP manager, never should have been left alone with anyone, let alone Taylor. And they could have divided the groups that morning into three or into two. But they-- even though-- because they were short staffed-- they usually had three groups, but they were short staffed, that was the easy remedy. They even talked about in deposition, and they simply did not do it. As a result, Taylor was sexually assaulted. For those of you who have had the pleasure of working in the world of the Political Subdivision Tort Claims Act and its companion, State Tort Claims Act, for several years, you'll recognize that Taylor's case bears striking similarities to Moser's pres-- predecessor, Doe v. Omaha Public Schools-- and in fact, I assumed that we were on all fours with the Doe decision at the time that we filed the case and moved forward with discovery. It was only, as Loree indicated, a few weeks before a scheduled mediation with the school district that Moser came down, and I believe Loree and Taylor became two of the first victims of the Supreme Court's short-sightedness. We were-- we ended up-- I think the reality is, we would have been punted on summary judgment by the school district's lawyer, who I don't-- I don't-- I don't have any blame for the school district. They're supposed to zealously represent their client, and with all defenses. But the value of the claim went significantly down.

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And so we ended up resolving the claim for a fraction of what it was worth for the reason that we would have been beaten on summary judgment. By remedying the Moser decision, it will bring Nebraska in line with the vast majority of the other states who have decided this-- within my materials talk about states such as Iowa, Mississippi, and Louisiana. In short, the Moser decision was jarring, from a legal and moral perspective. And we must look where it leaves some of the most vulnerable victims of sexual assault and negligence who are entrusted to the supervision of government, similar to what Senator Lathrop discussed. My reading of Edwards and Moser-- Edwards as a case right after Moser. My reading of those is that, indeed, the Legislature-- or the Supreme Court is-- has asked the Legislature, invited them to address this issue. I see that my time is up. May I briefly summarize--

PANSING BROOKS: Yes.

ERIC BROWN: Or-- or finish? Thank you. I think just the reality that post-Moser, there is no state law-- that leaves us with no state law remedy in these types of sexual assault cases, and that's shocking. And I just think it's not right, from a moral standpoint. It's a-- it's a minor tweak, I think, because these cases are decided by district court judges. Right? They're not jury cases. There's no huge risk of some inherent cut against, you know, floodgates or runaway juries or anything else of that nature. And so we're not-- it's not opening up some huge area of law. It's simply going back to the way the law was since the Doe case was decided in 2007. I'm open for any questions, should you have any.

PANSING BROOKS: Thank you, Mr. Brown. Anybody have a question for Mr. Brown? Senator Brandt.

BRANDT: Thank you, Vice Chair Pansing Brooks. Thank you, Mr. Brown, for your testimony. We've got a fiscal note on this of-- like Senator Wayne indicated, of \$98 million dollars. And I think they just simply did some calculations on what the liability is on suits like this. But you didn't mention you did have some remedy. It wasn't near what you had hoped for. And this is maybe a little technical, but I just wonder if our people that did the fiscal cliff took that into account, that maybe the fiscal note isn't as high as what they determined it to be because there is some offset to that.

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ERIC BROWN: I don't know.

BRANDT: I don't either. I-- So I guess I-- I came in here with the assumption there is no remedy. But it sounds like a lot of these cases there would be a lot smaller remedy?

ERIC BROWN: Well, it-- it-- ours was not. We were not going to draw seven figures, likely, from a district court judge on this. And I had the difficult burden. There was no SANE or rape kit or anything else of that nature. And so it makes it difficult sometimes from a-- not the burden of proof standpoint, but just that I couldn't prove that there was sexual assault with penetration, that type of thing. So it was a-- it should not have happened. It was significant. I think, even in speaking with the mediator, Tim Engler, who does this a lot, he had kind of a value that was very similar to mine, and we ended up settling for about a third. You know, I was able to implore the school district to just do the right thing. And I'm glad that we got that result, but it was-- it was a fraction of what it should've resulted in.

BRANDT: Right. And the reason I bring it up is, we're swamped right now with these fiscal notes, and they do the best that they can. But sometimes we can go back and point out that maybe this isn't as severe as what you're portraying it, because you've got to factor in this. And they're pretty good about revising-- revising that. So really, the main difference between Senator Wayne's bill and Senator Lathrop's bill is the five-year look back?

ERIC BROWN: I'm not-- and I have not researched that issue at all. I probably would lean more toward Senator Lathrop's bill without the look back, but I don't have a strong position on that--

BRANDT: OK.

ERIC BROWN: --where ours has been resolved.

BRANDT: OK. Thank you.

ERIC BROWN: Thank you.

PANSING BROOKS: Thank you. Any other questions? Thanks for coming today, Mr. Brown.

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ERIC BROWN: Thank you.

PANSING BROOKS: Additional proponents? Welcome.

JONATHAN URBOM: Thank you, Madam Chairwoman.

PANSING BROOKS: Go ahead. Thank you.

JONATHAN URBOM: Jon Urbom, J-o-n U-r-b-o-m. I am here to testify in support of LB54 and LB71, on behalf of the Nebraska Association of Trial Attorneys. As the proponents have discussed thus far, our Supreme Court last year reversed course on Nebraska law, regarding the intentional tort exception to the waiver of sovereign immunity in the Moser case. They essentially decided that if there is an assault anywhere in the equation, it doesn't matter how egregious the negligence of the state was or the government entity was in basically contributing to that assault as, if there's an assault in there, there is no claim. I don't think that this is what is just for Nebraskans, and I certainly don't think that this is what the Legislature originally intended. To do nothing to correct this would result in tragic and-- and severe consequences to some of our most vulnerable and susceptible individuals. Examples of where this can occur would be with Child Protective Services failing to disclose some behavioral past sexual assault of a foster child they placed in a home with-- with a family with small children, where those children were subsequently assaulted because the family did not have notice of those prior-- those prior devious acts. Another situation is in, you know, youth sports or in team sports, that there's volunteer coaches that come in, and oftentimes there are inappropriate-- or not oftentimes, but there is the occasion where there is inappropriate contact between coaches and players. And administrators and teachers notice that, but they choose not to do anything about it because the easier thing to do is just kind of sweep it under the rug. In those situations where we've gotten notice and there is negligence on behalf of the government, which facilitates these later assaults, batteries, and intentional torts, I think it's-- it's necessary for the Legislature to correct that so that there is some recourse for these victims. In both the Moser and Edwards case, Justice Lindsey Miller-Lerman wrote dissenting Opinions. At the end of the Edwards case dissent, she asked a number of questions, which I think are very pertinent. Should a government's liability for its earlier negligence depend on the type

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of crime a third party later commits? What is the incentive for good 911 hygiene if 911 negligence can be obliterated by the later criminal act of a third party? Finally, and the most uncomfortable question she posed, what if 911 dawdled while your daughter was being sexually assaulted at gunpoint? I think that LB54 and LB71 help to solve these issues and provide recourse for the victims of these instances. Thank you.

PANSING BROOKS: Thank you for coming, Mr. Urbom. Questions? We're grateful you're here. Thank you. Next proponent? Proponent? OK, do we have any opponents? Opponents? Welcome. You can go ahead.

RYAN WIESEN: Good afternoon, Vice Chair Senator Pansing Brooks and members of the Judiciary Committee. My name is Ryan Wiesen; first name is spelled R-y-a-n, last name is spelled W-i-e-s-e-n. I am an assistant city attorney for the city of Omaha, and I am here in opposition to LB54 and LB71. I've also been asked to indicate that the city of Lincoln and that the League of Nebraska Municipalities also join the city of Omaha in its opposition to these bills. The purpose of sovereign immunity is to protect taxpayer dollars and resources. If this-- if these bills are passed, they will expose the city of Omaha and other political subdivisions to liability for the criminal acts of people over whom the city has no control over. This puts our officers in a no-win situation and removes needed discretion from them. On the one hand, there's been a lot of discussion recently about police reform or about community policing-- policing and arresting fewer people. But this bill encourages law enforcement to arrest individuals because, if a police officer encounters someone and doesn't arrest that individual, and then that individual goes on and, four hours later or two hours later or a week later, commits a criminal act, the victim of that crime can sue the city and those officers and allege that the officer should have done more to protect them. And there's just no way for an officer to be able to look into the mind of an individual who is planning-- or may not even be planning at that point-- to commit a criminal act, and then days later goes on and commits a crime. This will only encourage unwarranted and needless lawsuits, which will tie up the courts and waste taxpayer dollars and resources in defending them. And I want to spend a little bit of time talking in particular about the Straughn cases and correcting some errors that Senator Wayne stated to this committee. First and foremost of those was that we had an actual trial in the Straughn cases. There

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were three related lawsuits filed, and the city didn't immediately call up a hearing after the Moser case was decided. We had a two-day trial in Douglas County District Court before that case, and a district court issued a six-page opinion in that case. And in that case, the district court did a negligence in duty [INAUDIBLE], and held, quote: In our case, the court finds that the actions of the police were reasonable while Mr. Loyd was in their custody. Mr. Loyd is the individual who committed the criminal acts of murder against Destacia Straughn and her two-year-old child. The court found that there was no duty and that the police officers acted reasonably. Then at the end, the court included a couple of paragraphs that said: also there has been this other case that's happened and this is also [INAUDIBLE]. So the assertion that there was negli-- negligence on behalf of the city of Omaha and its employees in the Straughn case is-- is factually incorrect. And it's also factually incorrect that we didn't have a trial and that we didn't have judicial view over the incident. I would also like to point out in the handout that I had, that in that case there was a deposition that was taken. And I asked one of the parties why she did not sue the person who was responsible for shooting her, Mr. Loyd. And her attorney objected to that question, but then went on and answered it, and he said: He's broke and he's spending life in the penitentiary. He'll never be-- you can't get blood from a turnip. So I see my red light is on. If I could finish my thought?

PANSING BROOKS: Yes, so if you could wrap it up. Yeah.

RYAN WIESEN: Thank you, Senator. And so again, this case is about squeezing-- or these bills are about squeezing blood from a turnip. It's about plaintiffs' attorneys attempting to find someone to get money from when the person who actually perpetrated the act is judgment-proof, is in prison and has no sources of income. And that is why the city opposes these bills, because attempts to seek taxpayer dollars for acts of third parties that the city has no control over.

PANSING BROOKS: OK, thank you. Any questions for Mr. Wiesen? Any questions? Thank you for coming today.

RYAN WIESEN: Thank you, Senator.

PANSING BROOKS: Appreciate it. Additional opponents? Welcome.

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JAMES SMITH: Welcome, thank you. Madam Vice Chairman, members of the committee, I'm James D. Smith, S-m-i-t-h. I appear on behalf of the Nebraska Attorney General's Office. I am a senior assistant attorney general. I've worked in the Attorney General's Office, in about every supervisory capacity there is or staff position there is, for the past 26 years. I speak in opposition to both LB54 and LB71. The bills seek to overturn the Nebraska Supreme Court's decision last year in Moser v. State concerning the state's sovereign immunity for intentional torts. I was the attorney who represented the state of Nebraska at the Supreme Court in the Moser case. LB54 has four major flaws. First flaw is it has the potential for an unlimited and major financial adverse impact-- adverse impact on Nebraska taxpayers. As noted by the DAS financial impact statement, the Moser's case's state tort claim sought damages of \$10 million, and that's for only one case. The fiscal impact statement on LB71, which has retroactive provisions, points out that there would have been \$98 million in claims that would be at least impacted during that same time period for the retroactivity under LB71. The second flaw of-- of LB54 and also LB71 is, there is no cap on monetary damages to be paid by the state under the State Tort Claims Act. Other statutes have caps on money damages. The Political Subdivision Torts Claim Act, interestingly enough, has a cap. The Medical Malpractice Act has a cap, and the Wrongful Conviction Act all have caps on money damages. Although the federal Torts Claims Act has no specific damages capped, Nebraska isn't the federal government. We don't-- we must have a balanced budget and we can't print money like the federal government can. Third flaw about LB54 and the other bill is that it can make the state of Nebraska and its taxpayers financially responsible for crimes committed by criminals. The Attorney General opposes the state having to pay damages for crimes committed by criminals. I would say LB54 is drafted much better than LB71, but LB54 does have two drafting flaws. One, the phrase "duty of care" regarding the state's liability is not defined. When waiving the state's liability to be sued and pay damages, the bill should precisely define what is duty to care. Is duty to care all the statutory duties imposed in all other statutes that place some duty or obligation on the state to protect the public? Is it some general duty to protect and safeguard everyone from harm? It doesn't define duty of care. The second statutory drafting problem I have with LB54 is, it does not-- it uses the phrase "direct result" rather than the established legal phrase "proximate cause" that's used in tort

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litigation. If we're going to go down this route, I would suggest using standard legal terminologies, as well defined under tort law. The additional comments that I would have on LB-- and I can't tell since I'm colorblind. Am I on the red light?

PANSING BROOKS: Yes, so if--

JAMES SMITH: May I be allowed to [INAUDIBLE]--

PANSING BROOKS: --you could just quickly wrap up.

JAMES SMITH: --this up? OK, thank you. LB71 is much more broad-- breathtakingly broad-- than the other one. LB71, as an example, could encourage officers to arrest and jail people rather than officers risking being negligent when enforcing the law, just in case the criminal might commit another crime when not in custody. I don't know that we want to encourage officers to make more arrests and jail people. The-- LB71, has a significant problem with the retroactive provision. It brings back dead cases from six years ago, has a Lazarus effect, thus, or a second bite at the apple. I do have a concern that that bill appears to have an apparent financial interest, conflict of interest of the senator who introduced it, which may explain the retroactive language. Senator Wayne has a lawsuit he filed in Buffalo County, entitled Houston v. State CI20-315, the lawsuit made a variety of claims against DHS for misrepresentation and deceit, all of which the judge ruled were barred by the state tort claim sovereign immunity. Senator Wayne's LB71, unlike LB54, has the retroactive language that brings back from the dead the provision at Section 6 for his specific case, as defined by Section 5 of his bill. With that, if there are questions.

PANSING BROOKS: Thank you. Does anyone have any questions? Yes, Senator Brandt.

BRANDT: Thank you, Vice Chair Pansing Brooks, and thank you, Assistant AG Smith, for testifying today. So you heard on the opening that this is a good faith effort by the Legislature to do what the Supreme Court has asked us to do to give some definition to this problem. In a way, your testimony gives definition to the problem. So if on LB54 there would be a cap to limit the financial impact to the state, and if you

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could put a definition of duty of care and direct result into the bill, would that satisfy the Attorney General's Office?

PANSING BROOKS: I think the Attorney General still has a problem with the basic focus of the bill, is that, yes, criminals commit horrendous crimes, and making the state taxpayers then ultimately responsible for the damages that those criminals impose on individuals, as to whether that is properly the taxpayers' burden, it's--

BRANDT: So let me back up for a second.

JAMES SMITH: Sure.

BRANDT: When you're talking about criminals, are we talking about actions that happened inside of one of our penitentiaries, or are we talking about something that happens outside of that and then they are subsequently convicted and become a criminal?

JAMES SMITH: It can be all of that. It's not just in the penitentiary. It's not defined that way. It's-- it can be defined as just basically failure to protect when the state has some duty of care and third parties commit a-- essentially a crime that's not necessarily in the penitentiary-- it can be on the street, it could be in the house, it could be anywhere. And that's obviously one of the concerns about the financial impact it has on taxpayers. And it's a matter of just public policy as to, are we-- is the state of Nebraska going to open that door on state sovereignty? How far are you going to open the door? How are you going to define how far the door is open? And then, are you going to put limits on the financial-- of the financial effects?

BRANDT: Yeah, I don't know if you can answer this or not, but is-- are all 50 states unique in how they handle this? Is Nebraska the norm? Is Nebraska the exception, particularly with our surrounding states?

JAMES SMITH: I really can't address all of the states because I haven't done that survey. I do know Nebraska's Tort Claims Act is modeled after the federal Tort Claims Act. The Moser case does explain how our Supreme Court distinguished our State Toward Claims Act from the federal act. And I think I've pointed out the federal act. It doesn't have any cap either, but then the feds can print as much money as they want. They don't have to have a balanced budget.

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BRANDT: Right. Thank you.

JAMES SMITH: Sure.

PANSING BROOKS: Further questions? I just-- I just want to talk about the-- the part that I have the most umbrage with is-- is that the state shouldn't pay for the crimes of criminals. And I mean, under that theory, it seems to me you just let all the inmates be in there together, let them fight each other, kill each other off, and the state has no problem with that.

JAMES SMITH: Well, I wouldn't say the state doesn't have a problem, 'cause the criminals are going to be responsible for the crimes that they do commit.

PANSING BROOKS: But-- but the state has--

JAMES SMITH: And so you're saying--

PANSING BROOKS: no--

JAMES SMITH: --but--

PANSING BROOKS: --problem-- no problem with the fact that they didn't protect the people. These are lives, 96 percent of whom come back out into our society. And yet you're saying that the state has no responsibility to keep them safe and to protect them.

JAMES SMITH: I'm saying when it comes to the state's immunity from being sued as to the state being financially responsible to the individuals that are harmed, you would be opening the door, obviously, on that. And then the question is: How are you going to define it? How far are you going to open it? What's the financial impact? I would-- one point I would want to make, the LB71 and the DAS's \$98 million financial impact, those are for claims it actually made under the statute, as written. I would expect those-- many claims wouldn't have been even filed because it was known that sovereign immunity limited those type of claims. If you open that door, you could see that that \$98 million could be a conservative figure. And I acknowledge it's a policy issue but, you know, it seems like every year the Legislature tries to deal with taxes and reducing taxes and everything. This bill seems to go in the opposite direction. I get your point, Senator, but

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it's a policy issue as to: Are we going to open the door? How are we going to define it? How much are we going to pay for? What's it going to cost?

PANSING BROOKS: Thank you for coming to testify today.

JAMES SMITH: I'm sorry, I couldn't hear.

PANSING BROOKS: Thank you for coming to testify today.

JAMES SMITH: OK. Thank you very much.

PANSING BROOKS: Um-hum. Any other opponents? Seeing none, any-- and anybody in the neutral? OK. And Senator Wayne isn't here. Senator Lathrop, would you like to close? And I'll read in the testifiers in a minute. Senator Lathrop.

LATHROP: You ready for me?

PANSING BROOKS: We're ready for you.

LATHROP: OK, good. Well, thank you for sticking around and participating in the hearing. I know we had a long morning. Let me do-- let me just say a couple of things in response to the opposition testimony. So you heard, I think, both of them say, but I remember the city attorney saying the city will be liable for acts committed by people over whom they have no control. And that's a great talking point, but it misses the point. There are people to whom we owe a duty of care. If I'm running the jail, I have a duty to make sure the people that I incarcerate are safe. If I run a school, I have a duty to make sure that people that attend the school are safe. They can't slip and fall. I can't feed them unwholesome food. Right? If I run the Beatrice State Developmental Center, I owe a duty of care to the people who reside there. If I run a nursing home, the Veteran's Home, all of these different places where I owe a duty of care to people who are in my care, if they slip and fall and I-- and I violate that duty of care, I'm responsible for it. The cases that we are talking about-- and most of them are going to be assaults, and a big share of them are going to be sex assault cases. Right? They are not liable under this amendment except when they violate the duty of care owed to someone in a particularly-- in a particular relationship, so someone under my care, as an example. The-- the duty of care in LB54 is something

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already-- already established in tort law. Who is the duty of care owed to? For political subdivisions in the state of Nebraska, it's people to whom you have a special relationship. It's not everybody in the world. This isn't creating tort-- a political subdivision tort liability that's a strict liability for everybody out there that gets hurt by a criminal. The-- Mr. Smith indicated, well, there's no caps on damages. There have never been caps on damages for the state of Nebraska. That's not a defect in this bill; it's current law. By the way, all we're doing is turning the clock back to before the court decided Moser in September 2020. So a couple of things about that. This isn't opening the floodgates. It's not creating stuff they haven't seen before. It's going back to the way things were before September 2020. The-- I-- I do want to talk-- and I know Senator Wayne is here-- but I can't pass up this chance to-- to talk about the fiscal note in his case. You need to understand, if I'm going to file a claim against the state of Nebraska-- say I have somebody and one of those forms, trucks, runs into my client and turns them into someone with a persistent brain injury. The first step in that process is to file a claim. Now what-- what's the value of that claim? If I make it too low, I can never get more. So everybody puts some big number in there to make sure that it's high enough to cover what may be all the damages when somebody gets done treating them. So to take the sum of those things, add them up and say that's going to be the consequence, is extremely disingenuous. Speaking of that, in the fiscal note on my file-- or in my-- my bill, the Attorney General's Office said: Well, if you pass this bill, we'll have to hire another Attorney General. Now wait a minute. This bill, this-- this decision was decided in September. Unless they let somebody go after that decision, they don't need to hire anybody more. All we're doing is going back to the same cases that prevailed before. And by the way, a whole bunch of them have been dismissed in the meantime. So when we think about the people that we're talking about and, you know, I was here when-- when the Catholic Church was under fire-- and a lot of different places were-- for sexual assaults that people didn't realize they had until they were adults. And there's a phenomenon where people bury that memory and it shows up in their adulthood. We expanded the statute of limitations so those folks could make claims. All we're doing here is saying if someone in a special relationship with a state organization or a political subdivision, someone that state or a school or a city owes a duty of care to, gets hurt because they didn't do something a

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reasonable person would do to stop that criminal act that causes the injury, that's all this does. And it's taking us back to the law before September 2020. And it's kids, it's the people at the Beatrice State Developmental Center, it's people at the Vets' Home, it's people at a nursing home, it's the kids in our school, it's the kids in foster care, and it's the families of the foster care parents who-- who take a child, and they've been misled about the propensity of that child to injure somebody. These are important kinds of claims. And liability makes people careful, and no liability makes people careless. For that reason, I would encourage your support of LB54.

PANSING BROOKS: Thank you, Senator Lathrop and Senator Wayne. Any other questions for Senator Lathrop? I don't see any. Senator Wayne is here, and while he's coming up, I will announce that we had-- on LB71, we had zero letters from proponents, one letter from an opponent, and zero letters of neutral. On LB54, we got no-- no written letters. And then for the-- for the testifiers-- for the testifiers who dropped off testimony in lieu-- or letters in lieu of testimony, we have: LR54 written-- on-- on LB54, Jason Hayes was a pro-- wrote a proponent testimony on behalf of the NSEA; on LB71, Brandy Johnson wrote an opponent letter on behalf of the Nebraska Intergovernmental Risk Management Association; on LB71, Colby Coash wrote opponent testimony on behalf of the Nebraska Association of School Boards; on LB71, Jon Cannon wrote opponent Letter on behalf of NACO, Nebraska Association County Officials; on LB54, Brandy Johnson wrote an opponent letter on behalf of the Nebraska Intergovernmental Risk Management Association; on LB54, Colby Coash wrote opponent testimony on behalf of the Nebraska Association of School Boards; on LB54, Jon Cannon wrote opponent testimony on behalf of the-- NACO, the Nebraska Association of County Officials. Those are all the letters. Senator Wayne.

WAYNE: Thank you. I'm only here because my integrity was called out, and I got to believe if-- if I was white, that wouldn't have happened; I'm going to say it like that. So there is a case I am involved with which raised the issue. But let's talk about the logistics of what would happen if this bill-- if my look back actually went through. It would be 90 days 'cause there's no emergency clause, no-- I'm not sure what it will go through. My-- we would already have a trial date, and the fact of bringing a brand new claim to a party who's still part of a party, I don't even know how to do that. And the actual claim is a medical malpractice claim against two doctors in the Kearney area, of

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which the kid happened to be at YRTC. So you have to file something against all parties 'cause you don't know the relationships of who's working for what. YRTC and the state is not the main focus, hasn't been the main focus. But as an attorney, I would be derelict of my duties if I-- not knowing the contractual relationship, I didn't include the state. I don't have to fill a conflict out until this bill gets to the floor. We are not voting on anything, I'm not voting on anything. In fact, two years ago on the regional transit, I filled out a conflict because I had a potential litigation. I have always filled out conflict forms, and that actually had nothing to do with the actual bill. But I didn't want the perception that, if we give them taxing authority, somehow my bill was settled, which it's not. It's still in the process of-- we don't even have a trial date. We just started in the process of discovery and just got ordered to mediation. But that would be like, Senator Brandt, you coming here, introducing-- introducing a property tax or a meat inspection bill, and you have cows and you sell them. And for then to come here and say, well, you're conflicted out and attack your integrity is-- is damn wrong. Every AG bill that comes out that they're a part of, we're going to have a long discussion. Senator Hilgers, I hope you're watching this 'cause this just destroyed where I'm at in this body. And if you or somebody else can't fix it, it's going to be a problem. And that's all I have to say.

PANSING BROOKS: Thank you, Senator Wayne. Any additional questions for Senator Wayne? Seeing none, that closes the hearings on LB54 and LB71, closes the hearing for this morning. We will resume our hearings at 1:30 today. Thank you.

PANSING BROOKS: Good afternoon and welcome to the Judiciary Committee. My name is Patty Pansing Brooks. I represent Legislative District 28, right here in the heart of Lincoln, and I am Vice Chair of the Judiciary Committee. Committee hearings are an important part of the legislative process. Public hearings provide for an opportunity for legislators to receive input from Nebraskans. This important process, like so much of our daily lives, is complicated by COVID-19. To allow for input during the pandemic, we have some new options for those wishing to be heard. I would encourage you to strongly consider taking advantage of the additional methods of sharing your thoughts and opinions. For complete details on the four options available, go to the Legislature's website at nebraskalegislature.gov. We will be

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following COVID-19 procedures this session. For the safety of our committee members, staff, pages, and the public, we are-- we ask those attending our hearings to abide by the following procedures. Due to social-distancing requirements, seating in the hearing room is limited. We ask that you enter the hearing room only when it is necessary for you to attend the bill hearing in progress. The bills will be taken up in the order posted outside the hearing room. The list will be updated after each hearing to identify which bill is currently being heard. The committee member-- the committee will pause between each bill to allow time for the public to move in and out of the hearing room. We request that you wear a face covering while in the hearing room. Testifiers may remove their face covering during testimony to assist the committee and transcribers in hear-- in clearly hearing and understanding the testimony. Pages will sanitize the front table and chair between testifiers. When public hearings reach seating capacity or near capacity, the entrance will be monitored by a sergeant at arms who will allow people to enter the room based upon seating availability. Persons waiting to hear-- waiting to enter a hearing room are asked to observe social distancing and wear a face covering while waiting in the hallway or outside the building. The Legislature does not have the ability, due to the HVAC project, of an overflow room for hearings which attract many testifiers and observers. For hearings with a large attendance, we request only testifiers enter the hearing room. We also ask that you please limit or eliminate handouts. Due to COVID concerns, we are providing two options this year for testifying at a committee hearing. First, you may drop off written testimony prior to the hearing. Please note that four requirements must be met to qual-- to be able to qualify on the committee statement. One, submission of written testimony will only be accepted the day of the hearing between 8:30 a.m. and 9:30 a.m. in the Judiciary hearing room, 1113. Two, individuals must present their written testimony in person and fill out a testifier sheet. Three, the testifier must submit at least 12 copies. Four, testimony must be a written statement no more than two pages, single spaced or four pages, double spaced in length. No additional handouts or letters from others may be included. This written testimony will be handed out to each member of the committee during the hearing and will be scanned into the official hearing transcript. This testimony will be included on the committee statement if all of those preceding requirements are met. And second, in-person

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testimony. As always, persons attending a public hearing will have an opportunity to give verbal testimony. On the table inside the doors, you will find the yellow test-- testifier sheets. Fill out the yellow testifier sheet only if you are actually testifying before the committee. Please print legibly. Hand the yellow testifier sheet to a page as you come forward to testify. There's also a white sheet on the table if you do not wish to testify, but would like to record your position on a bill. This sheet will be included as an exhibit in the official hearing record. If you are not testifying or submitting written testimony in person and would like to submit a position letter for the official record, all committees have a deadline of 12 p.m., noon, the last workday before the hearing. Position letters will only be accepted via the Judiciary Committee's email address posted on the Legislature's website or delivered to the Chair's office prior to the deadline. Keep in mind that you may submit a letter for the record or testify at the hearing, but you may not do both. Position letters will be included in the hearing record as exhibits. We will begin each bill hearing today with the introducer's opening statement, followed by the proponents of the bill, then opponents, and finally by anyone wishing to speak in the neutral capacity. We will finish with a closing statement by the introducer, should they wish to give one. We ask that you begin your testimony by giving us your first and last names and spell them for the record. If you have a copy of your testimony, please bring up at least 12 copies and give them to the page. If you are submitting testimony on someone else's behalf, you may submit it for the record, but will not be allowed to read it. We will be using a three-minute light system. To begin-- when you begin your testimony, the light on the table will turn green. The yellow light is your one-minute warning and when the red light comes on, we ask you to wrap up your final thought and stop. As a matter of committee policy, I would like to remind everyone that the use of cell phones and other electronic devices are not allowed during public hearings, though senators may use them to take notes or stay in contact with staff. At this time, I would like to-- I would ask for everyone to look at your cell phones and make sure that the phones are on silent mode. A reminder that verbal bursts or applause are not permitted in the hearing room. Such behavior may be cause for you to be asked to leave the hearing. Since we have gone paperless this year in judic-- in the Judiciary Committee, senators will instead be using their laptops to pull up documents and follow along on each bill. You may notice

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committee members coming and going. That has nothing to do with the importance of the bills being heard, but senators may have bills to introduce in other committees or have other meetings to attend. So now I'd like to have the members of the Judiciary Committee introduce themselves, starting with Senator Geist.

GEIST: Oh, yes. Good afternoon. Suzanne Geist and I represent District 25, which is the east side of Lincoln and Lancaster County.

McKINNEY: Good afternoon. Terrell McKinney. I represent District 11, north Omaha.

PANSING BROOKS: Thank you.

BRANDT: Good afternoon. Senator Tom Brandt, Legislative District 32: Fillmore, Thayer, Jefferson, Saline, and southwestern Lancaster Counties.

DeBOER: Good afternoon, everyone. My name is Wendy DeBoer. I represent District 10, which is Bennington and parts of northwest Omaha.

PANSING BROOKS: And assisting the committee today are Laurie Vollertsen, our fabulous committee clerk. Neal, Neal Erickson is here today as our legal counsel, another fabulous person, and we have two, we have two pages today. One is Ashton Krebs, who is a student at UNL, and the other is Noa Snyder, who is a student at Doane, so thank you. And with that, we will begin today's hearing with LB160, Senator Wayne, after that long intro.

WAYNE: Thank you. My name is-- thank you, Vice Chair Pansing Brooks. My name is Justin Wayne, J-u-s-t-i-n W-a-y-n-e, and I represent Legislative District 13, which is north Omaha and northeast Douglas County. For the record, I have one medical malpractice case. This bill may affect it somehow. I don't know how yet, but I'm sure if the AG is here, he'll tell you it will. I might have one potential one too, in the future, just for the record. So I have an amendment that I'm going to pass out. This is the framework-- where I'm trying to go. The long and the short of it is this bill I'm asking the committee to hold at this time. There is-- I, I met with the opposing sides who will be coming up here, but one of the key reasons is that there's an actuarial study being done that should be released this spring on the

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fund and so without that, raising it now, not knowing how the fund is projected to perform or at least survive, seems a little premature. But the reason why this is important is-- and I'm just going to give you a scenario, which always stuck in my head. If I get up and I take a shot of vodka, maybe a couple of shots, and I drive and I hit somebody, I'm not capped. But if I happen to be a doctor on that same trip, I, I tell the rescue squad I'm OK and I continue to work and I perform something under my license, something within the hospital while I'm still drunk, I'm capped. But if I leave and hit somebody, I'm not. The reason that's weird to me is that the license should mean more than somebody just on the street where it's capped. And I understand the reasons. There are many states who do have caps and the reasons are it's supposed to control medical costs, but the states that do not have caps, research hasn't shown that the costs have dramatically increased. There are a few states, such as Alabama and a couple other ones, where the Supreme Court has ruled these such caps unconstitutional. I think what you'll hear from opposing sides, because the cost of Medicare has gone up and we're only capped at \$2.5 million, a couple of surgeries and a, and a long stay, particularly at a-- maybe a rehab facility, you can reach that cap very quickly. So the reason why it's important from a state's perspective is particularly when you talk about catastrophic events. And I'll talk a little bit about my amendment and then I'll, I'll leave and I'll, I'll be in Revenue for a while, so I won't be able to, to close. But the reason why it's important is because oftentimes if it's over \$5 million or even \$2 million, but oftentimes if it's over a \$5 million judgment, that person or that individual had catastrophic loss. And what ends up happening is that person goes on Medicaid anyway, so the state end up paying for that person because of some type of negligence. And that typically happens when it's a wrongful-- something happens with a birth, something happens at an early age to a child where we know that expenses are going to at least be there for another ten years as a child and then as an adult, it's going to go for the rest of their life. So I used to characterize this as the, the greatest tax incentive we've ever provided to industry because you're talking hundreds of millions to doctors and hospitals over the lifetime of people who are on Medicaid because the cap was in place. And so I'll explain that again. Typically, what happens if a person is injured over their lifetime, you project out. And there was a case in Bellevue not too long ago where the judgment was \$12 million and that

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was reduced to \$2.5 million because of the cap. And there was a case in Omaha, but the reason it was \$12 million, part of it's pain and suffering, but part of it is future medical costs. And if you can't afford and you don't have insurance for future medical costs, particularly when it's a young child, you go on Medicaid. And so the state pays for that negligent action throughout that individual's life and that's just the facts. Nobody can dispute that. Even the other side can't dispute that. So I think there's going to have to be an increase and what I'm looking at and what the amendment before you is, is some type of cap on what we would call regular medical malpractice, if that's really a word, but in the cases of catastrophic-- if the court or the jury finds that it's a catastrophic image-- injury, then there would be a higher cap. And the issue is going to be how do you pay for it? So what I tried to do is entice the opponents by lowering some of their premiums, etcetera, but with-- not knowing today what the fund-- without that analysis of what the fund looks like, there is that issue of how do you pay for it? If there's multiple catastrophic-type injuries, it could eat up the fund very quickly. Again, personally, I'm not in favor of caps at all, but within the system that I think we could actually pass legislation, we'll probably have to keep some caps and just up it. And with that, I'll answer any questions.

PANSING BROOKS: Thank you, Senator Wayne. Any questions for Senator Wayne? Senator Brandt.

BRANDT: Thank you, Chairwoman Pansing Brooks. Thank you, Senator Wayne, for bringing this. When we talk about a cap, that's just on actual damages because Nebraska doesn't have punitive?

WAYNE: Well , we don't have punitive damages. I have a bill for that. We can talk about that the next-- at the other hearing, but, but it's actually-- it's total, it's total damages, so whatever-- you can't go above \$2.5 million right now. It's just-- that's, that's your cap. You're down \$2.5 million. So if you got-- let's just say insurance-wise-- and talking-- so you got \$1 million and I have a, I have a claim, not a medical malpractice, but she was injured and because she was diabetic, her wounds didn't heal correctly so that she had multiple rehabs and she has roughly \$800,000 in, in medical bills. So typically, if you try to settle that, you're going to try to settle at the-- double or triple the medical bills. You're already past the

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cap. Now it's not a medical malpractice lawsuit and there's other factors that we won't get to, probably even \$1 million on that case, but I'm just giving you a general scenario. It could really-- you can get to \$1 million and \$2.5 million very quickly.

BRANDT: I find it interesting, your comment about the state being on the hook. Do you have any, any numbers to, to-- I know what you're saying. Do you have any numbers to back that up?

WAYNE: So--

BRANDT: So, I mean, if you have-- if you had a young person, a one or two-year-old, that you would need intensive care for 80 years, it would be an incredibly high number. But I mean, do we know today what that number is?

WAYNE: No, so due to privacy, I, I can't give you the complete data. I could-- I mean, I can tell you and you can Google-- there's a couple of cases out of Omaha, which they hit the cap and all those individuals are on, on medical-- on Medicaid now, those two, two kids, and their bills are roughly-- and I just know because I know them personally. I wasn't the attorney on the case, but those bills are roughly 6-- \$600,000 a year. If you project that from a one-year-- from birth and their life expectancy is still 65-- or actually this one is 6-- that's, that's a significant amount of dollars in Medicaid that we have to pay.

BRANDT: Yeah, times how many individuals in the state.

WAYNE: That's just it. Like, we don't know. And so these suits are often-- and you say real complicated system I think on purpose, kind of like TEEOSA, but so the hospital's on the hook or the doctor's on the hook for \$500,000. The rest of it is actually the state, this fund, and they kind of negotiate where it is. But we already have a fund in the state, which the industry pays into-- we're not putting dollars in-- they're paying into and that's-- the issue is if you got a \$12 million case and you have five of those and the fund only has \$50 million or \$60 million in it, then the fund is gone, so how do you-- what do you do anyway? So it, it pretty much eliminates the cap, so it's a, it's an interesting--

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BRANDT: But there is no free lunch. I mean, you're going to drive rates up on, on providers, are you not?

WAYNE: That's the argument, but the states that don't have caps still have the same-- roughly the same medical costs. But, but the issue is who should bear the costs, right? I mean, the real issue is does the state pick up the tab for the, for the rest of it-- for the rest of the-- that child's life or should the person who actually negligently performed something pick it up?

BRANDT: Except the reality is the, the customer of the doctor, all the customers of that hospital or that clinic are the ones that will bear the cost to pay for his malpractice insurance.

WAYNE: True, but in farming, you're not capped either and so all the farmers bear the cost of when somebody gets sued on something negligent they do and it could be millions and millions of dollars. You bear that cost on your premium.

BRANDT: It's, it's not an equal comparison. OK, thank you.

WAYNE: Well, nothing's equal when it comes to farming, I guess, in the, in the Legislature.

BRANDT: That's right.

PANSING BROOKS: OK, Senator Geist.

GEIST: Would you just discuss a little bit about the fund? I'm not aware of-- I-- maybe I should be, but I don't know about the fund. Is someone coming behind you--

WAYNE: One of the fund-- one person who knows about the fund is a lot-- is-- I'm-- some-- yeah, one of them will be able to talk about it a little bit more. We just-- yeah, I'll let them talk about it.

GEIST: OK, OK, thank you.

WAYNE: I know how it works, but I'm not good at explaining it--

GEIST: OK.

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PANSING BROOKS: Thank you--

WAYNE: --like TEEOSA.

PANSING BROOKS: OK, no further questions. Thank you, Senator.

WAYNE: Thank you and I will not be here for waiving, but they all have a copy-- most of them have a copy of the amendment and that's kind of where I'm going. They'll probably still be opposed to it, but I think we'll get somewhere.

PANSING BROOKS: Thank you, Senator Wayne. OK, we want to-- we would like to know how many are here today to testify on this bill. Could you raise your hand, either proponent or opponent, to-- because we need to call the senator on the next bill, so thank you for telling us. OK, proponent. Do we have proponents on this bill? OK, then opponents, do we have any opponents on the bill? Welcome.

MICHELLE WALSH: Good afternoon, members of the Judiciary Committee. My name is Dr. Michelle Walsh, M-i-c-h-e-l-l-e W-a-l-s-h. I have been a pediatrician here in Lincoln for more than 22 years. I am the current president of the Nebraska Medical Association, testifying in opposition of LB160. The NMA has been an advocate for the Hospital-Medical Liability Act and the Excess Liability Fund since its inception in 1976, when it was created as a response to physicians and medical malpractice liability insurers leaving the state due to a negative tort environment. Since that time, the NMA has approached the fund with two goals in mind: one, ensuring that the fund remain solvent and two, ensuring medical liability insurance remains affordable and available. The NMA has serious doubts about the first goal, ensuring the fund remains solvent, if LB160 were to become law. The administration of the fund by the Department of Insurance is an intricate, actuarial calculation based on potential claims, the result of the previous claims, the amount of participants, and the cost of each physician's malpractice insurance premium. Therefore, altering the underlying requirements necessary-- necessitate thoughtful, deliberate-- deliberation and the ability to run actuarial scenarios. We do not believe the changes set forth in LB160 were conducted in such a manner with a focus towards long-term sustainability. A viable fund guarantees there is money available for claims made in an injured party. Losing this fund to insolvency means that injured patients

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would also lose the guarantee that they would be made whole under a successful medical liability claim. Additionally, increasing liability caps under the act will likely result in increase in frequency of claims and the associated defense cost of these claims, regardless of the merit. This result not only can impact the solvency of the fund by increasing both the number of claims and the amount of payouts, but it also negatively impacts medical liability insurance in the state. By significantly increasing professional liability costs to practice in Nebraska, recruitment of healthcare providers into the state will be negatively hindered and Nebraska will have a difficult time competing for these providers with other states who might have a more favorable environment. This will in turn have a disproportional and harmful impact on the areas-- to healthcare in rural and underserved areas, which the state and healthcare community has been working so hard to try and improve. For these reasons, the Nebraska Medical Association respectfully requests the committee not to advance LB160. I'd be happy to answer any questions.

PANSING BROOKS: Thank you very much, Dr. Walsh. Senator DeBoer.

DeBOER: Thank you, Vice Chairwoman Pansing Brooks. Thank you for testifying. One of the things that I have always heard is that Nebraska has relatively low medical malpractice liability costs or insurance costs. I've heard that in the context of saying that's one of the reasons why there are a lot of medical practitioners and we have a, a vibrant medical practitioner community, for lack of a better term. So can you vet that for me? Is that a true claim? Do we have lower than average medical malpractice insurance costs in Nebraska?

MICHELLE WALSH: I know that a few years back, I was talking to a neurosurgeon who used to practice in Kansas City and I don't know if his malpractice was in Missouri side or the Kansas side, but that was one of the reasons why he came to Nebraska. He was paying \$450,000 a year just for malpractice insurance that didn't include anything else. And so that was one of the big reasons he came here, so I do think that is a draw for Nebraska.

DeBOER: So if he paid \$450,000 wherever he was, do you have a sense of where he-- what he would pay in Nebraska?

MICHELLE WALSH: That-- I can't tell you for--

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DeBOER: But it would be significant--

MICHELLE WALSH: I'm a pediatrician, so I don't do brain surgery.

DeBOER: --significantly less, you think?

MICHELLE WALSH: Oh, it would be way less. Yeah--

DeBOER: OK.

MICHELLE WALSH: --that's what he said. He said it was significantly less. He said it was definitely worth leaving his family, uprooting everybody, and coming to Nebraska to do that.

DeBOER: OK, that's what I had heard is that we have significantly lower than average and that that's-- and the-- one of the reasons that we have because when I lived in Chicago, I could not get a doctor for anything and they said it was because their, their insurance was too high.

MICHELLE WALSH: Yes.

DeBOER: OK, thanks.

PANSING BROOKS: Any other questions? Senator Geist.

GEIST: So you already educated me a little bit on the fund--

MICHELLE WALSH: Yes.

GEIST: --but could-- like, where does it reside? How is it used? Who decides when it's drawn upon? Can you answer those kinds of things?

MICHELLE WALSH: I can try.

GEIST: OK.

MICHELLE WALSH: So there is an amount of the fund and so if it's under that cap, then it's drawn out of that fund. We always make sure that fund is solvent, that there's money in that fund for any sort of malpractice or anything like that. Now if there's some sort of catastrophic event, then we have to readjust and premiums do have to go up.

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GEIST: OK.

MICHELLE WALSH: That occurred several years ago. There was an incident. It was a hepatitis B outbreak that they-- things needed to be adjusted at that time, but then it guarantees that when there is a malpractice event, then the patient will receive payment then.

GEIST: So that just regularly comes out of a physician's payment, is that how that works?

MICHELLE WALSH: Physicians do pay into that--

GEIST: OK.

MICHELLE WALSH: --and I, I, I don't know all the specifics about it. I apologize for that--

GEIST: Oh no, that's all right.

MICHELLE WALSH: --but essentially, we-- yes, we pay into that so that the fund is solvent. So that way, if there is any malpractice suits, then it will come out of that fund.

GEIST: Is that common in every state or is that done everywhere?

MICHELLE WALSH: No, it's really not that common.

GEIST: OK.

MICHELLE WALSH: I am actually not from Nebraska--

GEIST: OK.

MICHELLE WALSH: --and so when I was looking at different places to practice, that was actually one of the reasons I decided on Nebraska also.

GEIST: Interesting, OK, thank you.

PANSING BROOKS: Any other questions? I don't see anything. Thank you for--

MICHELLE WALSH: Thank you.

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PANSING BROOKS: --coming, Dr. Walsh. OK, additional opponents?
Welcome.

ANDY HALE: Thank you, Vice Chair Pansing Brooks, members of the Judiciary Committee. My name is Andy Hale, A-n-d-y H-a-l-e, and I'm vice president of advocacy for the Nebraska Hospital Association and I am in opposition to LB160 and the proposed amendment that Senator Wayne just introduced. Medical lawsuit abuse is driving up healthcare costs and driving good doctors out of practice of medicine, leaving patients without the care they need when they need it. Many doctors are cutting back on high-risk and life-saving services, relocating to states with more patient-friendly liability laws, retiring early, or leaving the practice of medicine altogether. A recent survey done by OB-GYNs found that nearly 50 percent have altered their practices due to the fear of lawsuits, with many saying they are accepting fewer and fewer high-risk patients. Our hospitals often struggle with attracting and retaining physicians. There is already a workforce shortage in Nebraska, particularly in rural Nebraska when it comes to physicians. Sixty-six of Nebraska's counties have been deemed medically underserved, 13 of Nebraska's 93 counties have no primary care physician, 44 counties do not have any OB-GYN physicians, 78 counties have no practicing psychiatrist. On top of that, nearly one-fifth of physicians in Nebraska are more than 60 years old and nearing retirement age. The healthcare workforce shortage affects both Nebraska's physical health and its economic health. Lack of care impedes the ability of communities throughout the state to draw and hold residents and the businesses that employ them. This issue has only become more exasperated during the pandemic. States could better recruit and retain doctors if they knew their legal liability was limited. The elimination of caps will translate into increased insurance premiums for physicians, hospitals, and healthcare official-- healthcare professionals. If this bill is passed, it will also result in significant higher, higher liability costs, which in turn will drive up the care [SIC] of healthcare. I urge you in this committee to oppose LB60 [SIC] and the amendment and I will answer any questions.

PANSING BROOKS: Thank you for being here, Mr. Hale. Any, any questions for Mr. Hale? Senator Brandt.

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BRANDT: Thank you, Vice Chair Pansing Brooks. Thank you, Mr. Hale, for testifying. Your statistics are dead on in rural Nebraska. We're, we're losing a tremendous amount of medical professionals and really never had the psychiatric professionals to start with. The previous testifier stated we do enjoy low malpractice costs in Nebraska. Is that a fair statement?

ANDY HALE: I would agree with that, correct.

BRANDT: So really tying it to what's happening in rural Nebraska, I would say the two today probably are not that related, are they?

ANDY HALE: I think they are related. I think when you look at attracting and retaining a workforce, I think that's one of the questions I want to know is how is the liability insurance? What is it going to cost to practice? They're using Dr. Walsh's example about having a, a physician relocated from Kansas City here. I think it's part of the issue, but there's certainly other issues that are involved.

BRANDT: Because if we have these low rates today, we should be able to fill all those spots in rural Nebraska, so I guess my argument is there's, there's a lot more going on there than meets the eye beside, beside the mal-- and I understand--

ANDY HALE: Sure.

BRANDT: --what, what issues we face in, in the rural communities, but I guess I just sort of wanted to make that point. I don't know if you have anything else to contribute to that?

ANDY HALE: No, I would agree. I mean, there's a variety of issues of, of why we're not doing a better job of getting people to rural parts of the state. I'll make reference to-- Senator Stinner has LB421, which is a bill in the Appropriations Committee that will allocate \$3 million this year and next fiscal year to rural physicians to help pay down the debt or-- the debts of student loans and so-- there's also initiative-- the governor is doing LB390, which is helping licensure from outside of other states. Senator Blood and Senator Kolterman have done a great job with compacts and so we are working on those other issues of what we're doing. And, you know, there's rural housing and,

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and so many other things that occur that we need to do better in rural parts of the state.

BRANDT: Sure. Well, thank you.

ANDY HALE: Thank you, Senator.

PANSING BROOKS: Thank you. Any other questions? Seeing none, thank you for coming--

ANDY HALE: Thank you, Senator.

PANSING BROOKS: --Mr. Hale. Thank you. Any other opponents? Opponents? OK, anybody in the neutral? Seeing nobody in the neutral and Senator Wayne waived closing. I want to just say that there were-- there was one-- 55? There were 55 letters in opposition to this bill and one written testimony in lieu of, of, of verbal testimony and that was by Korby Gilbertson on LB160. She was an opponent and representing Boys Town. And so with that, we close the hearing on LB160 and open the hearing on LB259, Senator Halloran. Welcome. Don't you miss the Judiciary Committee, Senator Halloran?

HALLORAN: Senator-- Vice Chair Pansing Brooks, I can't tell you how much I've missed it.

PANSING BROOKS: Gosh, you're always truthful.

HALLORAN: There are, there are things I miss.

PANSING BROOKS: Welcome.

HALLORAN: Thank you. Good afternoon, Vice Chair Pansing Brooks and members of the Judiciary Committee. For the record, my name is Senator Steve Halloran, S-t-e-v-e H-a-l-l-o-r-a-n, and I represent the 33rd Legislative District. I'm here today to introduce LB259, which would authorize civil action for damages sustained by public safety officers for the following reasons: injury of the officer, (2) diminishment of the officer's civil rights, or (3) the filing of a false complaint against an officer. This bill identifies a new cause of action for our public safety officers, including firefighters, employees in our correctional facilities and YRTCs, police officers, probation officers, and DHHS employees who work with dangerous sex offenders.

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Currently, the cause of action for an officer would be libel, slander, or tortious interference, which occurs when one person intentionally damages someone else's contractual or business relationships with a third party, causing economic harm. These options have a very steep bar for the officers to prove damages. LB259 gives the officer a recourse option that is more equitable. In my conversations with law enforcement officers, they have expressed a clear need for this legislation. Our public safety, safety officers are asked to put themselves in difficult and dangerous situations for the good of the public welfare every day. Those individuals should also be protected and this bill ensures that they have the tools necessary to do so. Members of the committee, I thank you for your time and I will now answer any questions you may have on LB259.

PANSING BROOKS: Thank you, Senator Halloran. First question, Senator DeBoer.

DeBOER: Thank you, Vice Chairwoman Patty Pansing Brooks. Senator Halloran, thank you for being here introducing the bill. I just don't-- I, I don't necessarily understand all of it yet, so could you give me-- I know. Could you answer some clarifying questions? One, what is the, the abridgment of officer's civil rights arising out of the officer's performance of official duties? What is that-- what are you envisioning there?

HALLORAN: Well, I think we all understand what civil rights-- we're all, we're all protected as individuals. And those same civil rights-- 1964 civil rights law was passed-- specifically, you know, whether someone's civil rights were abused in regard to discriminating for, for their, for their race, gender, and so forth.

DeBOER: So who's doing the-- who's abridging the civil rights?

HALLORAN: Well, in the course of action of the law officer in upholding the law, whatever that example might be, if the person that they might be arresting who would abridge their civil rights.

DeBOER: So the, the, the arrestee would abridge the civil rights of the, the officer?

HALLORAN: Law enforcement officer or first responders or--

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DeBOER: Can you get-- I'm sorry. I'm not-- I'm really not trying to be dense on purpose. I'm really just dense naturally. So could you tell me what that looks like? I mean, what, what's an example of what that would look like? How would a person who's being arrested abridge someone's civil rights that is arresting them?

HALLORAN: Well, in the same fashion anyone might violate your civil rights. You can use, you can use any kind of examples of anyone's abridgment of their civil rights and just transfer it to this. This is very specific to the officer. So in the course of arresting someone, someone, someone-- you know, someone that uses sland-- slanderous language in regard to-- or language that's just unbecoming in, in regard to civil rights of a law officer, in regard to maybe remarks about their race, remarks about their gender.

DeBOER: That isn't-- is that, is that a civil rights violation? I don't think that, that falls within the 1964 civil rights laws. You can say things. That, that would possibly be a hate speech cause of action, possibly--

HALLORAN: Possibly.

DeBOER: --but that would not be a civil rights cause of action, particularly since the person who's being arrested is not in power in that situation, so-- OK, that-- I'll see if I can find out more information from you later, so we don't--

HALLORAN: OK, we can get off the mike and talk about that.

DeBOER: Yeah, we-- so I don't belabor the point. But who do you imagine is, is generally being sued here? These are-- this is a cause of action that is going to be by the police officer of the public? Because if it's against their, if it's against their superior or something like that, wouldn't it-- if they were injured-- and physically in the case of a physical injury-- wouldn't that be a workers' comp claim?

HALLORAN: Well, it may be and it does-- but it shouldn't preclude civil action on the part of a law officer if they're hurt or harmed in the course of action of arresting someone, for example, or if there's a protest and a brick is thrown and it's proven who threw the brick in

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they're-- cause physical damage. If that happened in, in the real world for any of us, there would be the potential for a civil lawsuit for damages.

DeBOER: Not against the-- not against our employer, but just against the person who threw the brick or something.

HALLORAN: Right.

DeBOER: OK.

HALLORAN: The person who did the damage to the officer or the first responder or a DHHS employee in the course of dealing with sex offenders and so forth.

DeBOER: OK, I think I understand now. Thank you.

HALLORAN: Um-hum.

PANSING BROOKS: Any other questions? I guess just a follow-up, so it does say also you can bring the civil action against a corporation or the head of an organization. Well, you just said that it could be an individual who threw a brick, but how does it apply to a corporation?

HALLORAN: Well, if that person that threw the brick was in connection with an organization, then that organization, that organization could be drawn into the civil suit damages.

PANSING BROOKS: OK, thank you very much. Any other questions? Thank you, Senator Halloran. I think that's it. We'll take proponent testimony now.

HALLORAN: OK.

PANSING BROOKS: Are you going to stay close?

HALLORAN: How about proponents?

PANSING BROOKS: Pardon me?

HALLORAN: How about proponents?

PANSING BROOKS: I just said proponents--

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HALLORAN: Oh, excuse me.

PANSING BROOKS: --sorry, it's hard to hear.

HALLORAN: Since there was some kind of-- some changes in the schedule a little bit--

PANSING BROOKS: Yes?

HALLORAN: --I was expecting the Fraternal Order of Police, but they are not going to be able to make it, so--

PANSING BROOKS: OK.

HALLORAN: --but that's fine.

PANSING BROOKS: Thank you.

HALLORAN: Um-hum.

PANSING BROOKS: Are you going to stay to close?

HALLORAN: I, I will, yeah.

PANSING BROOKS: OK, thank you. So now could we have a show of hands of how many people are going to be testifying either proponent or opponent or neutral on this bill? If you could raise your hands? We just need to get the next bill up and going. OK, well, proponents? OK and the Fraternal Order of Police was coming is what Senator Halloran said. Opponents, any opponents? Nope, anybody in the neutral? OK, do I have the information? OK and there are no letters, either proponents, opponents, or-- there's no written testimony, excuse me, but there are three letters that are proponent letters. Zero opposition and zero neutral. So with that, Senator Halloran, would you like to close? OK, Senator halloran close-- waives closing and so that will close the hearing on LB259. Thank you, Senator Halloran.

HALLORAN: Thank you.

PANSING BROOKS: OK, and next, we have the hearing-- do we know where Senator-- OK, I think we're going to just stand at ease a moment because Senator Slama is, is coming. Senator Slama, thank you.

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SLAMA: You are moving efficiently today.

PANSING BROOKS: We are, so welcome back.

SLAMA: Thank you very much--

PANSING BROOKS: So this is--

SLAMA: --and thank you for your patience.

PANSING BROOKS: We now open the hearing on LB326. We want to get a feel for who's here to testify. If you could raise your hand, whether you're here to testify as a proponent, opponent, neutral? OK, so about three people, I think. OK, thank you very much.

SLAMA: All right. Good afternoon, Madam Vice Chairperson and members of the Judiciary Committee. My name is Julie Slama, J-u-l-i-e S-l-a-m-a, and I represent District 1 in southeast Nebraska. I am here today to introduce LB326, which would change the standard of liability during vehicular pursuits when certain circumstances are met. Nebraska is the only state in the country that imposes strict liability on political subdivisions for injuries suffered by third parties as a result of a police pursuit. Under both the Nebraska Political Subdivisions Tort Claims Act and the State Tort Claims Act, any public entity employing a law enforcement officer whose actions are the proximate cause of any death, injury, or property damage suffered by an innocent third party is strictly liable for and must pay for these damages irrespective of any fault or negligence on the part of the officer. Innocent third party is not defined in statutes, so the courts have judicially constructed a definition to mean any person who has not promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel and one who has not sought to be apprehended in the fleeing vehicle. The bill lightens the burden strict liability places on our political subdivisions, which disincentivizes--- which currently as it stands, disincentivizes law enforcement from participating in pursuit-- pursuits that may neutralize a serious threat to public safety for fear of the costs of strict liability. However, immunity is granted only when certain requirements are met by the law enforcement agencies and only when the fleeing vehicle is the one who causes injury to an innocent third party. The bill does not completely remove our provision of strict

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liability. It merely tweaks it. There have been instances in which political subdivisions have been held liable for injuries to innocent third parties where the officer was not even slightly at fault. We see this in the 2006 case of Staley vs. Omaha. In this case, an officer attempted to conduct a traffic stop after witnessing a driver, Mr. Barnes, acting recklessly. As he began to pursue, Barnes fled. The pursuit reached speeds ranging from 50 to 70 miles per hour. After seeing Barnes nearly hit another car and deciding that the pursuit could pose a risk to the public, the officer decided to cease the pursuit. He slowed down his cruiser and turned off his flashing lights. Although at this point the pursuit ceased, Barnes continued at high speeds for at least half a minute before running a stop sign and hitting another vehicle. The Supreme Court of Nebraska held the city of Omaha liable for the injuries of the passenger of the vehicle Barnes hit, citing that the police pursuit was the proximate cause of the wreck. This means that even though the officer was actively-- had actively ended the pursuit for the public safety, they were still held liable. The city ended up paying nearly \$3 million in taxpayer money to this passenger. To be sure, situations such as this are a tragedy. In a perfect world, no one would have to suffer any injuries while on the road. We should be holding people accountable for their actions, though. Fleeing drivers who cause injuries to others are already held criminally liable under Statute 28-905. Under LB326, if the pursued caused injuries while fleeing from law enforcement, they would also be held civilly liable for any damages that they cause. LB326 would not simply grant blanket immunity to political subdivisions. If a pursued vehicle injures a third party, political subdivisions would still be held liable in these situations if the pursuing officer was negligent in their duties. Also, LB326 would require the creation of a written policy and training for law enforcement agencies to be granted this immunity. The specifics of this policy and training is based off of police pursuit law in California. The policy that law enforcement agencies must create includes when a pursuit can take place, what can take place during a pursuit, when to discontinue a pursuit, and much more. Each law enforcement official must read these procedures and sign a certification that they have read and understand these policies. If the law enforcement official does not follow these policies, they are negligent in their duties and the political subdivision would then be strictly liable for any subsequent injuries. Law enforcement agencies would also be required to train their

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officers in the standard spelled out in the written policy. The training would be conducted on an annual basis to each officer who might be involved in a vehicular pursuit and would be conducted by either the Nebraska Law Enforcement Training Center or by a program that is approved by the Nebraska Police Standards Advisory Council. Training has been effective in decreasing pursuits that end in an injury to an innocent third party. From data compiled between 2010 and 2019, the Lincoln and Omaha police departments both reported that they had not had a pursuit in-- end in an injury to a party in at least the last two years. The Lincoln Police have not had an injury happen to a third party in a pursuit since 2012. In Omaha, the number of total police pursuits has increased by 47 percent from 2010. However, the injuries to innocent third parties have dramatically decreased. This is due to concerted efforts of the OPD to train their officers well in regards to police pursuits. With the extra policy requirements in LB326 and the required annual training of officers, injuries should continue to decrease. I would like to address the amendment that I have happily forgotten to hand out. I will pass it out now. Thank you so much. This is just a very minor tweak, tweak. AM17 changes the language of Section 1, subsection 14. It is a slight modification in the language that clarifies that both EMS personnel and firefighters are included in this legislation, just a small technical change. Finally, I would like to reiterate LB326 does not eliminate the potential for liability when the pursuing officer's vehicle causes an injury to a third party, but simply removes a harsh strict liability standard that is not used in any other state in our country. Concerns about our state's harsh strict liability statutes keeping our law enforcement officers from doing their job is one that is shared-- been shared with me by law enforcement officers and political leaders from communities both urban and rural, some even in my own district. Similar legislation was brought by my predecessor, former senator and current public service commissioner, Dan Watermeier, and advanced from this committee to General File. I'm hopeful we can advance this needed legislation to the floor for this full body's consideration. Thank you very much for your consideration of LB326. I would be happy to answer any questions that you may have.

LATHROP: I don't see any questions.

SLAMA: All right--

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LATHROP: Thanks.

SLAMA: --thank you very much.

LATHROP: First proponent. If you're in favor of the bill, you may come forward.

STEVE CERVENY: Chairman Lathrop, senators of the Judiciary Committee, my name is Steve Cerveney, S-t-e-v-e C-e-r-v-e-n-y. I'm a captain with the Omaha Police Department, 505 S. 15th Street, Omaha, Nebraska, 68102. I oversee the criminal investigations section. The Omaha Police Department supports this proposed measure. Under LB326, liability remains in place regarding an officer's direct actions while involved in a vehicle pursuit and third-party individuals would still have any damages they sustained covered from collision with agency property. Currently, however, Nebraska is the only state that has a strict liability statute for law enforcement pursuits. Other states allow their courts to review each pursuit brought in front of them and determine whether actions were reasonable. The current law has evolved to often include potential suspects who are also in the fleeing suspect vehicle as third parties who bring suit due to the strict liability statute. Some of these specific situations were directly caused by the suspect driver's actions and the other involved individual's decision to take part in criminal activity and flee to evade arrest. Incidents such as these can cost the Nebraska taxpayer up to \$1 million for each case. Overall, the amount of money paid out for damages resulting from a criminal pursuit is trending downward locally and nationally. We believe this is because of precautionary measures implemented by law enforcement agencies within the last decade or so. Some of these measures include the use of police helicopters, improved policies and training, and higher levels of scrutiny from police officers in command regarding the appropriateness and safety of vehicle pursuits. Pursuits are a deterrent against violent crime. LB326 would allow law enforcement to apprehend those violent fugitives who would otherwise believe they can get away with brutal acts because of a strict liability statute. Thank you.

LATHROP: Any questions for our officer? Senator McKinney.

McKINNEY: Thank you. I'm just curious. I might-- I may be wrong, but I, I've always thought that if a pursuit happened in a residential

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area, the department directs the officer in pursuit to stand down. Is that still the case?

STEVE CERVENY: Often, often.

McKINNEY: I'm just-- how-- so in 2020, how many, how many pursuits occurred?

STEVE CERVENY: There were-- if you let me refer here-- in 2020, we had-- the Omaha Police Department had 87 pursuits.

McKINNEY: 87?

STEVE CERVENY: 87.

McKINNEY: OK, have, have you had any this year?

STEVE CERVENY: Yes, but I'm not sure where we're at number wise for 2021 so far.

McKINNEY: OK.

STEVE CERVENY: I can, I can get that number and, and get it to you.

McKINNEY: I guess one thing that I'm thinking about, what if-- just what if somebody is in pursuit and the passenger is a minor? The, the passenger is somebody being held, held against her will. I'm just curious. Where is the-- who is at fault there?

STEVE CERVENY: So that's a-- that's something that we take very seriously and has resulted-- situations like that, it resulted in some of the things I mentioned. Better-- much better policies and training and other precautionary measures to take factors into account that we, we have to weigh very seriously the safety of the public, the individuals involved, the suspect and any other individuals, as well as the officers. And if those risks outweigh the need to apprehend someone, a suspect, then we discontinue that pursuit. And, and by far, most pursuits that are initiated are, are terminated or canceled for reasons like that. Certainly, if we're aware of a situation like that, we would, we would not pursue in most all circumstances unless that individual was in danger and, and then we would have to.

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McKINNEY: All right, thank you.

STEVE CERVENY: Thank you.

LATHROP: Senator Geist.

GEIST: Yes, Captain, thank you for your testimony and I wonder if you would speak a bit to what kind of training officers receive for pursuit and then what you see would be different if this bill should be enacted?

STEVE CERVENY: So some of the, the training that we take part in is annual training through the department. It, it includes a review of the policy, which is an 18-page pursuit policy as part of the, the policies and procedures manual. Each officer has to read through that and sign off that they understand it annually, as well as we have in-service training that we have every year as well and that involves high-risk driving and, and pursuit training actually on a track.

GEIST: OK and would this bill change that at all?

STEVE CERVENY: This bill would help make that uniform across the state.

GEIST: OK.

STEVE CERVENY: So we-- the Omaha Police Department has taken measures that-- to ensure that we go above and beyond training when it comes to pursuits. We have the ability to do that, thankfully, with, with instructors and trainers and the ability to review the policy and put the training on. So this, this would help make that uniform across the, across the state, which would, which would be very beneficial.

GEIST: Thank you.

LATHROP: Senator Pansing Brooks.

PANSING BROOKS: I'm, I'm sort of confused because I thought we had a bill a couple of years ago on trying to limit and encourage limiting a high-speed chase and I thought that best practices were to attempt to limit high-speed chase. Isn't that-- is that correct?

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STEVE CERVENY: Yes, that, that would be accurate. We-- like, like I said, we need to weigh out the risks versus the need to apprehend someone and if the risks outweigh that need, then, then we don't take part in the pursuit or it's, it's canceled.

PANSING BROOKS: OK, have you, have you seen studies on how effective those high-speed chases are? I mean, possibly some people want the thrill of the chase.

STEVE CERVENY: They-- I, I have seen studies and it's, it's actually much more effective to, to employ other measures in terms of apprehension. There-- it's, it's a higher apprehension rate and I don't have the, the exact numbers or statistics, but generally, you have a higher apprehension weight-- rate if you back off and utilize, utilize a helicopter or use some other tactics, which encourage the suspect to stop and exit the vehicle and, and allows officers to apprehend them.

PANSING BROOKS: OK, so some of the things I was reading, Captain, just said that, that with that-- higher rates. I, I've heard at 71 percent or I read that it was 71 percent apprehension rate in some of the studies, that they are not sure whether or not the, the apprehension was because somebody stopped voluntarily or because either the, the vehicle was disabled or there was a crash. And so that rate is, is a final rate of, of-- but we're not sure the value of the fact that if there's a crash and another car is involved, if that's, that's worth that risk.

STEVE CERVENY: If it's worth the risk?

PANSING BROOKS: Yeah.

STEVE CERVENY: Right, so our outlook would be that it's only-- the risk of an, of an accident is, is, is-- the, the risk of an accident would only be outweighed-- is if we had a violent individual who is a safety risk to the public and, and they needed to be apprehended. And if, if that's not the case, then usually the pursuit, like I said, is, is canceled.

PANSING BROOKS: OK, and so this bill asks for immunity from prosecution, is that correct, for the police?

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STEVE CERVENY: Yes--

PANSING BROOKS: It's a type of immunity and so-- and we've just--

STEVE CERVENY: --from liability.

PANSING BROOKS: Pardon me?

STEVE CERVENY: For-- it would relieve officer-- an officer of the liability as well or make them immune? Is, is that what you were asking?

PANSING BROOKS: Yes--

STEVE CERVENY: Yes.

PANSING BROOKS: --immune from prosecution or for any acts, like, if somebody was killed in a, in a crash as a result of a high-speed chase.

STEVE CERVENY: So it would-- it's my understanding that it would make, it would make the officer immune from civil action--

PANSING BROOKS: OK.

STEVE CERVENY: --but they could still be-- if, if their actions were deemed to be criminal, they can still be prosecuted.

PANSING BROOKS: Right, but if they're, if they're negligent and a bystander is killed, that family could not bring a civil action against someone?

STEVE CERVENY: Right.

PANSING BROOKS: That's correct?

STEVE CERVENY: It would-- they could bring it against the individual who was fleeing, right--

PANSING BROOKS: OK.

STEVE CERVENY: --which is something we go to extreme measures to prevent through, through precautionary actions.

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PANSING BROOKS: OK, that's just-- my concern is that there's no discussion of, of working to use every other opportunity possible and using every other means possible and it's just blanket saying these people have no recourse really. This-- the bystanders are who I'm really most concerned about or the person who's running from a traffic violation or something. I mean, we have kids and people that do not want to be caught and decide they're going to make a stupid decision and, and run away from you.

STEVE CERVENY: So-- and I can assure you in a situation like that, for a traffic violation, a pursuit would not be allowed.

PANSING BROOKS: It would not be allowed?

STEVE CERVENY: It would not be-- right, it would not be allowed because if, if the all-- if the officer only had knowledge of a traffic violation at the time, they would not be allowed to continue with a pursuit.

PANSING BROOKS: So who makes the decision about a pursuit?

STEVE CERVENY: Well, the officer is supposed to and if they don't, it's monitored closely by command and, and the command officers would terminate that pursuit.

PANSING BROOKS: So it might not be allowed, but they may not ask, right?

STEVE CERVENY: The officer has-- if the officer wants to engage in a pursuit, he has to relay that information immediately. And there are certain guidelines and requirements that they have to report, such as the reason for the pursuit, the description, the speeds, traffic, pedestrians, all kinds of factors that, that they have to report. If they don't, then that-- there, there's not enough information for the command officer to, to weigh or make a decision, so they'll terminate that pursuit and cancel it.

PANSING BROOKS: Oh.

STEVE CERVENY: If that happens, the officer has to shut down all emergency equipment and turn around and go the opposite way.

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PANSING BROOKS: So that just took you about 10 to 15 seconds to explain to me, so it seems like those same seconds could be used in trying to give this information to a senior officer, get the information back that they're supposed to stop it. So I guess that's my concern is, is if the-- if there's somebody-- I mean, maybe it needs to be for a certain level of felony or-- but it is concerning. And I know you're an amazing officer. I know that you have people that you work with--

STEVE CERVENY: Thank you.

PANSING BROOKS: --that you are really good. We're only worried about--

STEVE CERVENY: Sure.

PANSING BROOKS: --the bad actors, so-- who decide they're going to take this person down no matter what. So anyway, that's my concern. Thank you very much.

STEVE CERVENY: Thank you.

LATHROP: I do have some questions for you. I have had some of these cases. In full disclosure, I have no pending police chase cases. But just to be clear, the law enforcement officer isn't personally liable. It's the political subdivision that has the liability, am I right?

STEVE CERVENY: Right.

LATHROP: So if you engage in the chase and we have strict liability, the, the city of Omaha, in your particular circumstance, would be the responsible party and not you?

STEVE CERVENY: Yes.

LATHROP: OK and you talked about the training that you undergo to drive carefully in one of these chases, all of you. Even in LB51, we provide for more training for a law enforcement officer on the tracks so that they can deal with the high speed, right?

STEVE CERVENY: Right, absolutely.

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LATHROP: Except the guy that you're chasing doesn't have any of that training--

STEVE CERVENY: Correct, correct.

LATHROP: --and that person, more often than not-- and by the, by-- the overwhelming majority of the time, doesn't have any financial responsibility. Would you agree with that?

STEVE CERVENY: I would say that's accurate.

LATHROP: So if you're driving a vehicle that you've stolen and you're now being chased by the police, there is no coverage on that vehicle because you're not driving it with permission and exclusion in the auto policy, so many of these chases--- and they are conducted at high speed very often, am I right?

STEVE CERVENY: Sure, yes.

LATHROP: We're not talking about people observing the traffic ordinances while you're following them.

STEVE CERVENY: Correct.

LATHROP: It's the people that are running stop signs, engaging in high speed, trying to leave the scene or get away from law enforcement, and then they oftentimes run into things, right? They'll go through a red light and broadside somebody at a, at a stoplight, for instance. Not an uncommon into a police chase, would you agree with that too?

STEVE CERVENY: The-- right, that's not uncommon. However, I would say that it's, it's been very, it's been very rare the past few years. We had-- we-- the Omaha Police Department had one third-party injury last year and the two prior years, which would be 2018 and '19, there were zero--

LATHROP: OK.

STEVE CERVENY: --and I, and I think that's directly related to--

LATHROP: You're talking us out of thinking you need this right now, but I'm, but I'm pleased that you had that few. But when, when you do

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and when this bill comes into play, it is because as you pursue somebody, they've run into somebody and caused an injury, right--

STEVE CERVENY: Right.

LATHROP: --or we wouldn't be here talking about the bill.

STEVE CERVENY: Absolutely.

LATHROP: OK. Now the person who is injured still needs medical care, still going to lose wages, still going to have-- they're out a lot of things, not just the, the loss of their normal life, but they're out medical expenses and they're out wages and maybe they can never work again depending upon their injuries. That happens too, right?

STEVE CERVENY: Yes.

LATHROP: So is there a benefit to the people of the city of Omaha when you do one of these chases?

STEVE CERVENY: There, there would be a benefit to taking a, a violent offender off the street to, to protect the public or a repeat offender who, who may be committing high-dollar crimes over and over again--

LATHROP: Sure.

STEVE CERVENY: --to, to protect.

LATHROP: You wouldn't, you wouldn't chase them unless you thought it was benefiting the public safety.

STEVE CERVENY: Right.

LATHROP: OK, so the challenge that I have with this idea that, that, that we should repeal this is what we're saying effectively is some-- somebody-- and in, in the case of one of my clients who ended up dying just coming home from a play practice, a junior high school gets hit by somebody being chased-- now that person-- you're asking us to say it benefits the people of the city of Omaha, but we don't want the people of the city of Omaha to pay for what happens in these things. We just want the guy that gets hit and that's, that's the reason-- this is something Senator Chambers passed a long time ago--

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STEVE CERVENY: Sure.

LATHROP: --and the rationale isn't any different than, in my judgment, eminent domain. So if I'm going to take part of your front yard to widen the street in front of your house, you're-- you expect to be compensated because we're benefiting the people in Omaha. And now we're talking about taking something more important than, you know, a, a part of your land that you own to build a street or a roadway or some improvement for the public good. We're taking part of somebody's life and hand them a bunch of bills and a bunch of lost wages and then saying to them, you bear the brunt when in fact, it was all done for the benefit of the citizens of the community. That's my concern and you're, you're-- I know you guys take this personally and, and it is. It's about taking care of the person who's paying the price for something that benefits the public.

STEVE CERVENY: Absolutely. Those are important points and they weigh heavily on our minds and, and affect everything we do to plan and train and respond appropriately when those situations arise.

LATHROP: I know and I, I appreciate what you guys do. Senator McKinney.

McKINNEY: Thank you, thank you. My question, if an officer does act reckless or is found to be criminally liable, how often are they even held liable?

STEVE CERVENY: In terms of, in terms of vehicle pursuits only?

McKINNEY: Just in general, how often are police officers held criminally accountable ever?

STEVE CERVENY: That, that is information I'll have to verify with, with-- in terms of the-- with Omaha, I'll have to verify that with the county attorney's office, but there, there have been a few recently.

McKINNEY: Because it's-- I, I could be wrong and you could be completely right, but from my understanding, it's hard to hold an officer criminally accountable. It's very difficult and when you look at situations around the country, it rarely happens and I'm just concerned about that.

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STEVE CERVENY: Yeah, I, I agree. That's something that we, we have to do. If, if an officer is acting in a-- commits a crime or engages in criminal activity or behavior, they have to be held accountable, absolutely, and we take that very serious. We've had incidents that-- internally that we've investigated criminally and forwarded information. We work closely with, with the county attorney's office on, on that, regarding matters like that. And absolutely, we can't have law enforcement involved in criminal behavior or activity. Absolutely, I agree.

McKINNEY: All right, thank you.

LATHROP: OK, I don't see any other questions. Thanks for being here.

STEVE CERVENY: Thank you. I appreciate it.

LATHROP: Any other proponent testimony? Seeing none, anyone here to testify in opposition to LB326? You may come forward.

JASON AUSMAN: Good afternoon, Chairman Lathrop, members of the Judiciary Committee. My name is Jason Ausman. I'm here on behalf of NATA in opposition to LB326. Our current police chase liability laws-- law is sound for two reasons. One, it deters what is known to be a highly dangerous activity and two, if the choice is made by law enforcement to pursue, our current law recognizes a social or societal contract that says if society is to benefit from the chase, then an innocent third party, a bystander that's injured or killed by this choice, is able to recover for his or her loss. The first topic, deterrence of a known danger, this past Monday, the Journal Star published an op ed piece written by Andy Sibbersen, who is the current president of NATA. And this op ed piece highlights the dangers associated with police chases and I'll share with you some of that data. According to a 2017 U.S. Department of Justice report, between 1996 and 2015, a 20-year period, an average of 355 persons, or about one a day, was killed annually in police pursuit-related crashes. So this special report touches only on deaths. It does not discuss other types of injury, some of which obviously is very serious, but about one person a day nationally dies in these type of pursuits, many of whom are obviously innocent third parties. According to this same study, 45 percent of the reported police chases reach speeds of over 70 miles an hour and almost a quarter of these chases exceeded 90

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miles an hour. Fleeing suspects, suspects crashed their vehicles in 15 percent of these pursuits. And to your point earlier, Senator Brooks, it doesn't take long for these wrecks to take place. I think two-thirds of them resulted in a wreck in under three minutes or under three miles, OK? We have to ask ourselves why is, why is this happening? Perhaps there may be some justification in these chases if they routinely resulted in the apprehension of a violent criminal. According to this same DOJ study, almost 70 percent of all police chases were initiated because of routine traffic violations such as speeding or other minor moving violations. Less than 10 percent of these chases resulted in the-- at or were attempts to apprehend a violent felon.

LATHROP: Mr. Ausman, the light's red.

JASON AUSMAN: I--

LATHROP: It's like the Court of Appeals here, except less time.

JASON AUSMAN: Yeah.

LATHROP: Let's see if anybody has any questions for you.

JASON AUSMAN: My apologies. Thank you.

LATHROP: No, that's all right. That's right. Any questions for Mr. Ausman? Senator Pansing Brooks.

PANSING BROOKS: Could, could you just finish up those last statistics that you were saying?

JASON AUSMAN: Yes, Senator Brooks, what I was going to do is contrast Nebraska's statistics with what we are seeing nationally and during the same 20-year time frame in which almost one person was killed a day by a police chase, Nebraska had only 29 fatalities resulting from police chases. And yet again, we ask ourselves why are we below the, the national standard? I think that this police chase liability bill, which has been effect-- in effect since 1981, provides that added deterrence.

PANSING BROOKS: Thank you.

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JASON AUSMAN: That was it for my statistics.

LATHROP: Any other questions? I do not see any. Thanks for being here.

JASON AUSMAN: Thanks.

LATHROP: Good to see you. Anyone else here to testify in opposition?
Good afternoon.

CATHY TRENT-VILIM: Good afternoon. Mr. Chairman, members of the committee, my name is Cathy Trent-Vilim. I'm an attorney from Omaha, Nebraska, and several years ago, I had--

LATHROP: Wait one second. Two things--

CATHY TRENT-VILIM: Oh, I'm sorry.

LATHROP: --you're going to have to spell your last name--

CATHY TRENT-VILIM: Yes, yes.

LATHROP: --and then speak really clearly--

CATHY TRENT-VILIM: OK.

LATHROP: --if you're going to wear the mask, which is fine, but it's hard to hear.

CATHY TRENT-VILIM: Sure. My last name is spelled T-r-e-n-t-V-i-l-i-m. As I said, I'm an attorney from Omaha, Nebraska, and several years ago, I had the privilege of representing someone named Brian Werner. When Brian was in his late 20s, he was a passenger in a vehicle where the driver, instead of getting pulled over for doing 76 in a 60-mile-an-hour zone on a rural highway in the middle of nowhere, decided he was going to flee. The driver topped speeds of 110 miles an hour and less than a minute after the deputies notified his dispatch that he was in pursuit, the, the vehicle went from blacktop to gravel. The driver immediately lost control. The vehicle flipped end over end several times and ejected both drivers. Brian fractured his T9, which means he's now in a wheelchair and has no feeling below his diaphragm. The driver, who was even younger than Brian, has been in a permanent vegetative state ever since and resides in a nursing home. None of

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that had to happen. It involved a bad decision by a driver, coupled with the bad decision by a deputy that forever changed the lives of two Nebraskans and their families. But at least Brian got some level of compensation. He certainly wasn't fully compensated because he hit the, the \$1 million cap, so even he was left to shoulder some of the burden, notwithstanding the fact that he got a judgment. But the reality is that he shouldn't have been left to, to burden any of it. In this country, as, as the Chairman said, we say that if the government deprives you of property, your life, or your liberty, that the government must compensate the victims, and yet LB326 does the exact opposite. It seeks to push the entire burden of a death or an injury to the innocent bystander who wasn't even involved in the accident or the pursuit or wasn't involved in the pursuit. Society bears the costs one way or the another because without recourse, as again, the senator pointed out, most often, they don't have insurance. These folks end up on Medicaid or they end up on disability because they've suffered severe and disabling injuries. For us, LB326 is the equivalent of a legislative whiplash. We would go from strict liability to 100 percent immunity with, with only a few minimal requirements having to be met. LB326 is a bad idea for a number of reasons. You've already heard from Mr. Ausman the number of, of accidents and deaths that occur. One-third of the people who are injured as a result of, of a police pursuit are innocent bystanders, 29 percent of those folks are people who were hit while they were driving another vehicle, and 4 percent weren't in, weren't in a vehicle at all. One percent involve officers. In fact, one officer is killed every six to eight weeks on average. Police pursuits generally start because you have a very young man, a teen or someone in their early 20s, who decides to flee. And in fact, the peak age for fatalities involving pursuits is 22 years old. You have officers who have to make a very split-second decision. They're trained to catch lawbreakers and so you're asking them to go against their instincts by not pursuing them. Because there are more minorities that are involved in police pursuits, the fatalities disproportionately also affect minorities.

LATHROP: OK, thank you for that testimony. Let's see if there's any questions. Senator Pansing Brooks.

PANSING BROOKS: Could you tell me the number-- the percentage again of the people that are innocent-- are bystanders?

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CATHY TRENT-VILIM: Sure. One-third of people who are injured are considered innocent bystanders, 29 percent of them are people who were injured, who were in another vehicle that was hit by the fleeing vehicle, and 4 percent are people who weren't in a vehicle at all.

PANSING BROOKS: One-third. OK, thank you.

LATHROP: I see no other--

CATHY TRENT-VILIM: Can I just make one very quick point about policies?

LATHROP: Very brief--

CATHY TRENT-VILIM: OK.

LATHROP: --because we, we enforce the-- you know what? We better not. If you've given us written testimony-- the difficulty is when I start making exceptions, then--

CATHY TRENT-VILIM: Sure.

LATHROP: --then everybody--

CATHY TRENT-VILIM: I understand.

LATHROP: --is expecting-- OK, Senator Brandt.

BRANDT: Thank you, Chairman Lathrop. I would love to hear about policies.

CATHY TRENT-VILIM: Sure.

LATHROP: Yeah, that's the question exception.

CATHY TRENT-VILIM: Thank you. Thank you, Senator. The point I wanted to make about policies is LB326 is kind of based on this faulty assumption that if you have a policy, that that's going to decrease the, the frequency of accidents. In fact, every state law enforcement agency, every highway patrol agency in the entire country already has a written policy involving pursuits; 96 percent of local law enforcement agencies already have written policies on pursuit-- in pursuits. Even communities with less than 10,000 people, 96 percent of

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those folks already have written policies. A written policy isn't-- doesn't do anything and when you're talking to someone whose loved ones either been killed or seriously maimed or injured, you know, saying you comply with, with with a policy that really doesn't require anything doesn't really accomplish a whole lot, so--

BRANDT: All right.

CATHY TRENT-VILIM: Thank you, Senator.

BRANDT: Thank you.

CATHY TRENT-VILIM: Thank you, Mr. Chairman.

LATHROP: OK. Thank you. Anyone else here in opposition? Seeing no one, anyone here in the neutral capacity? I see none, Senator Slama, you may close.

SLAMA: I'll waive.

LATHROP: And we have three position letters, all proponents, and we have written testimony as follows from Jon Cannon with NACO. They are a proponent of the bill, as is Jerry Stilmock with Nebraska State Volunteer Firefighters and Fire Chiefs Association. Senator Slama waives close. That brings us to I think my bill, right?

PANSING BROOKS: Welcome, Senator Lathrop, and this opens the hearing on LB53. Welcome.

LATHROP: Thank you, Vice Chair Pansing Brooks and members of the Judiciary Committee. My name is Steve Lathrop, L-a-t-h-r-o-p, and I represent District 12 in Ralston and southwest Omaha. I'm here to introduce a bill dealing with what we call the crisis standard of care. After this morning, I don't think there's much doubt in anyone's mind where I stand on immunity bills, but this-- the bill that I bring today or this afternoon is different than an immunity bill, but it does relate to lawsuits and the standard of care. So when the pandemic hit and we all watched in the evening news the reports of how many COVID cases there were and how many empty beds we had-- and we watched New York initially deal with having to set up tents and use auditoriums as hospitals and we saw Governor Cuomo plead for ventilators, right? The crisis standard of care is about what happens

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when we have a catastrophe of some kind. It's not just a pandemic, but in this bill, it is about COVID-19. And we probably dodged the bullet and you may think, well, we don't really need this bill, but the, but the concern is for the next pandemic or the next plane crash or the next mass casualty event. What do we do if you are a care provider and your facility has been overrun? If you can't get to people and provide them care, are you subject to being sued for not observing the standard of care with respect to the treatment of more people than you can possibly care for? And it does one other thing because the triage thing probably is already covered by the standard of care. Did you act as a reasonable doctor or hospital under the same or similar circumstances? Picking and choosing who you're going to care for, probably already covered. What makes this unique are two things. What if you have a bunch of people on ventilators who aren't going to make it, but they're still alive and you have people who might benefit from the ventilator, but you can't get to them? These are the kinds of medical decisions no one wants to make and if you are a care provider, you don't want to be the person making it. And so what the crisis standard of care is about is helping healthcare have a system in place for dealing with what if we're overrun at the front end or, or what if we have people in the waiting room we can help, but the, the facilities are tied up with people who aren't going to make it? Not something we really want to think about, but something that could have been a reality here. And in fact, it probably was a reality in Los Angeles just not that long ago. The crisis standard of care is about one other thing that's important. If you're in the emergency room physician and you have to go in and, and make that decision yourself, just-- you're using your own judgment, this person is coming out of the ICU and into the hallway where they're going to expire, the crisis standard of care sets up a panel and lets a panel make this decision so that it is made ethically, it is made free from things like someone's socioeconomic status, race, and, and the kinds of considerations that a free society doesn't want to have enter into the decision to terminate care for someone to provide capacity for someone who's going to make it. This bill relates to COVID-19. My expectation, and you'll hear testifiers behind me talk about the need for this, my expectation is that this will become something that is amended to deal with mass casualty events in a broader, in a broader setting, setting up some kind of a task force, something like that, to establish the crisis standard of care. Right now, Nebraska has-- I'll, I'll, I'll

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just say people can disagree with me. We plagiarized the Massachusetts standard of care, made some adaptations for Nebraska, and that's really probably because we were caught a little bit off guard and so this is an opportunity for us to think through those sort of-- how does healthcare deal with mass casualty events or the next pandemic? And with that, I would appreciate your support of the bill and look forward to answering any questions you might have.

PANSING BROOKS: Thank you, Senator Lathrop. Any questions for Senator Lathrop? I guess, I guess I have one. So what happens-- I mean, you've got the state of emergency declared by the Governor. What about in particular cities? Does that, does that initiate the standard of care if, if cities have determined it's an emergency?

LATHROP: So it's not so much about whether-- the crisis standard of care is about lowering the standard of care, doing something that doesn't meet the standard of care because of the circumstances. And this is a conversation I had with Senator Howard when this topic first came up. The crisis standard of care may be necessary in Omaha because all of our hospitals are overrun and we can't transport people to other hospitals in Columbus or Des Moines or Sioux City or other places. We just can't handle it. But they may be fine out in Scottsbluff, but it's not practical to expect we can get people who are at the hospital door in Omaha up to Scottsbluff or down to Kansas City. So it's-- in my estimation, it's going to be driven by the circumstance. Are you overrun? And if you're overrun, overrun necessarily includes I can't get these people to somewhere else.

PANSING BROOKS: OK.

LATHROP: Does that answer your question?

PANSING BROOKS: It does.

LATHROP: OK.

PANSING BROOKS: Thank you, Senator Lathrop. OK, we will take proponents, proponents. Welcome. Go ahead.

RACHEL LOOKADOO: Thank you. Good afternoon, Vice Chair Pansing Brooks and members of the Judiciary Committee. Thank you for holding this important hearing today. My name is Rachel Lookadoo, R-a-c-h-e-l

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L-o-o-k-a-d-o-o, and I'm the director of legal and public health preparedness for the Center for Preparedness Education at the University of Nebraska Medical Center. Today I'm testifying on behalf of Nebraska Medicine and not the University. Nebraska Medicine supports LB53 and we are grateful to Senator Lathrop for his leadership on this issue and for working with us to understand the challenges providers have faced during the COVID-19 pandemic. The COVID pandemic stretched our collective healthcare resources to their limits. On November 20, Nebraska hit a peak of 987 hospitalizations. At this time, hospitals across the state were on the verge of implementing crisis standards of care. Crisis standards of care occur when healthcare resources that are normally accessible, things like ventilators, PPE, hospital beds, adequate staff, quickly become depleted or scarce. This could be due to a public health emergency like COVID or a natural or manmade disaster. In these crises, the decision-making framework for allocating scarce resources changes in a way that moves away from conventional standards when resources are not scarce towards crisis standards, which focuses on maximizing benefits to society by minimizing potential harm and maximizing benefits that usually come in the form of saving the most lives. When enacting crisis standards of care, healthcare facilities will use triage teams to remove the responsibility for difficult allocation decisions from bedside clinicians. These allocation decisions are based on nondiscriminatory frameworks that do not consider patient characteristics, with no bearing on how much benefit is likely to occur. This framework also provides reasonable accommodations for people with disabilities and establishes a process to appeal any decisions to withdraw life-sustaining treatment. We appreciate Senator Lathrop's ongoing engagement and have provided the following recommended framework to him for an amendment. First, in order to increase public trust in the process and to avoid perceptions of unfairness or preferential treatment, it is highly recommended that the state of Nebraska adopt a statewide all hazards crisis standards of care plan. DHHS should maintain and update this plan. Second, to provide legal immunity to healthcare providers in facilities whose ability to provide care is impacted due to a public health emergency or a disaster declaration as long as they follow the state-adopted crisis framework. During the darkest days of COVID, healthcare providers had to make very difficult ethical decisions without great clarity or legal protection. This approach would set out a clear

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framework and give them protection if they follow the state framework. Thank you. I'm happy to take any questions.

PANSING BROOKS: Thank you, Ms. Lookadoo. Does anybody have any questions? Senator DeBoer.

DeBOER: So right now, this is written so that the Governor would have to declare not just an emergency, but that the, the crisis standards of care where applicable. So in a-- in the amendment that you imagine, would that be a similar sort of circumstance where there would have to be a declaration of an emergency and then some additional declaration that the crisis was--

RACHEL LOOKADOO: I think it would just be served by the declaration of an emergency. I think we saw with COVID, when the Governor declared an emergency there, there were provisions in that declaration saying that certain waivers would occur. So I think we envisioned if there's a declaration, then also there would be that statement of crisis standards of care being activated.

DeBOER: And could this-- because it might be local instead of this-- where the whole state is, potentially at least, equally affected or something like that, could it be instead of the Governor, but it could be any public health official or, or how would you envision who would be the sort of triggering official to declare the state of emergency enough to, to trigger these?

RACHEL LOOKADOO: I think that would likely be the Governor. I think even with public health emergencies-- and I hope I'm remembering correctly, but I think even the Governor is who declares those as well, so I-- that's, that's how I envision that, but--

DeBOER: OK. Thank you.

RACHEL LOOKADOO: Um-hum.

PANSING BROOKS: Any further questions for Ms. Lookadoo? Seeing none, thank you for coming.

RACHEL LOOKADOO: Thank you very much.

PANSING BROOKS: Most fun name of the session.

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RACHEL LOOKADOO: Thank you.

PANSING BROOKS: Further proponents?

MICHELLE WALSH: Good afternoon, again, Vice Chair Pansing Brooks and members of the Judiciary Committee. My name is Dr. Michelle Walsh, M-i-c-h-e-l-l-e W-a-l-s-h. I've been a pediatrician here in Lincoln for more than 22 years. I am also the current president of the Nebraska Medical Association testifying in support of LB53 and we'd also like to thank Senator Lathrop for recognizing the need for this bill after the past year spent in a pandemic. Healthcare professionals undergo training on proper triage and crisis management. My colleagues and I have received extensive training on how to save lives. However, we have not received guidance on how to decide which patients should receive care and when should not receive care due to resource availability. This past fall, these discussions took place due to the shortage of resources stemming from the strain placed on the health system from COVID-19. We were terrifyingly close to having to implement a plan to ration care. The NMA board of directors have voted unanimously to endorse the drafted crisis standards of care plan because as physicians, we recognize how necessary it is to have a plan in place to ensure the fair, equitable, and just rationing of care and resources. We are very thankful this plan never had to be implemented, but it shows the reality of just how quickly a crisis can occur and it is vital to be prepared for that crisis. LB53 would provide clear and consistent guidance for allocating scarce healthcare resources, should a disaster or public health emergency occur again. Having a plan in place takes enormous stress off of frontline healthcare workers who want to save lives, as they will not be obligated to be the decision maker in these circumstances. Rather, the guidance will provide for a well-vetted process to make those difficult decisions. The Nebraska Medical Association respectfully requests the committee to advance LB53 for the full Legislature to pass the bill so that Nebraska can be prepared for the next time we face a health crisis. Thank you and I'm happy to answer any questions.

PANSING BROOKS: Thank you, Dr. Walsh. Any questions? Senator DeBoer.

DeBOER: Does the NMA agree that this might be broadened to a general scope of any time there's a crisis rather than just the bill as written, which is a COVID-specific one?

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MICHELLE WALSH: Yes, because we don't know if this would be a tornado that wipes out all of Omaha. There's going to be some other type of-- something that comes through. It was just necessary at the time in November when the numbers were so high. Literally, Bryan Hospital was probably one bus crash away from closing. And then so if you were having a heart attack, you were in a car accident, it wouldn't matter. There wasn't available services. So that's when we had to meet and decide what do we do if this COVID crisis gets any worse?

DeBOER: And is this something that you also foresee is triggered by the Governor declaring an emergency--

MICHELLE WALSH: Yes.

DeBOER: --or is there some other way it might be triggered?

MICHELLE WALSH: I, I would perceive more the Governor declaring an emergency and I'm sure that whatever entity needs that, then they would talk to the Governor. So if it only occurred that Lincoln was affected by that tornado, but Omaha was doing great-- if we can have our resources in Omaha, we want to use those resources. We want to use Kearney, Crete, any surrounding communities that we can. We don't want to have to implement this--

DeBOER: Right.

MICHELLE WALSH: --but it became that bad in November that we thought we were going to have to.

DeBOER: OK, thank you.

PANSING BROOKS: Thank you. Any other questions? I don't see any. Thank you for coming, Dr. Walsh.

MICHELLE WALSH: Thank you.

PANSING BROOKS: Next proponent.

ANDY HALE: Thank you again, Vice Chair Pansing Brooks. My name is Andy Hale, A-n-d-y H-a-l-e, and I am vice president of advocacy for the Nebraska Hospital Association and we are in support here today on LB53. As our hospitals filled up to capacity last fall, a plan was

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needed. What if there are more patients needing critical resources than hospitals can accommodate? What would happen if medical resources could not meet increased demand and the rationing of, of care was required? Who would receive those resources and maybe more importantly, who would not? How are those decisions going to be made? These are the fundamental questions addressed in a crisis standard of care plan. The purpose of the crisis standard of care is to provide guidance for the triage and application of services for critically ill patients in a public emergency when a public health emergency creates a demand for critical care resources that outstrips the supply. In November of last year, a working group representing clinical, legal, and ethical perspectives was convened to create a plan to focus on the healthcare surge. As a result, the Nebraska Medical Emergency Operations Center was established with one of its goals to create and implement a crisis standard of care. Nebraska was one of 13 states that did not currently have a state-backed crisis standard of care. Nebraskans need to be assured, regardless of where they live or where they seek care, that treatment they are receiving is equitable, consistent, and fair. Hospitals must ensure that critical resources are conserved, distributed efficiently and ethically. The bill would provide a clear and consistent guidance for the allocation of scarce healthcare resources during a catastrophic disaster. It will also entrust the Governor with the authority to establish this, this plan. NHA would like to thank Senator Lathrop for bringing this legislation. We ask the committee to advance the bill. I'd be happy to answer any questions.

LATHROP: Thank you, Mr. Hale. Senator McKinney.

McKINNEY: Thank you. My, my question, the mortality rate for black women in pregnancies is disproportionately high. And when I think about this, I'm just concerned that-- well, I would hope that you have some measures in place to make sure that somebody from my community isn't-- or if this was to happen, it wouldn't have a disproportionate effect on communities of color. Historically, the, the medical profession hasn't been the best with communities of color, so what do you have in place now to ensure-- what best practices do you have now to ensure that those, those disproportionalities change?

ANDY HALE: I can assure you, Senator, here in the state of Nebraska, that we treat all Nebraskans equally, the same. Actually, all

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individuals-- oftentimes, people that come into our facilities don't have insurance, maybe-- may not even be citizens here of the United States and we still provide care to all of them. And so everyone to us is a patient. We consider really everyone the same. As far as going the extra mile that maybe you're talking about, I know our hospitals, especially in those communities you're talking about that maybe have a racial disparity, I think they continue to do outreach into those areas. But I can assure you that, that everyone is going to be cared for when they come to one of our hospitals.

McKINNEY: OK. I mean, I understand care, but being someone that, you know, grew up in the black community, my mom, my sister, and my family, I've heard a lot of stories of, you know, negatives as, as far as going to the hospital, going to the doctor, getting healthcare, a lot of negatives. And I just want to be assured that if this was to pass, that there are some things in, in place to make sure that there won't be disproportionate effects.

ANDY HALE: I can, I can assure you that, that, again, everyone would be treated equally. Again, regardless of ability to pay, regardless, regardless of citizenship, regardless of color, status, means in the community, everyone that walks through our door gets treated equally.

McKINNEY: All right, thank you.

ANDY HALE: You're welcome. Thank you.

PANSING BROOKS: Any other questions? Senator Brandt.

BRANDT: Thank you, Vice Chair Pansing Brooks. It seems a little odd that this bill isn't in the HHS community [SIC] because we're talking about standards of care, but there's probably a reason it showed up here. Most hospitals have a crisis standard today, do they not?

ANDY HALE: Well, let me answer your first part of the question. Maybe Senator Lathrop could address that in closing. I think it ended up here because of-- the liability issue is how it ended up on your doorstep here in the Judiciary. To answer that, initially hospitals had their own definition of crisis standard of care and what we wanted was one uniform crisis standard of care. For instance, if you had a hospital in, in Geneva that was following their plan, but maybe the

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hospital down the road in Hebron did something different, I think that would open up yourself for liability because you would say why is Hebron hospital doing one thing, when up the road in Geneva was doing something completely different? And so when we worked this fall with Ms. Lookadoo, who was here previously testifying, we wanted a uniform plan. So we have a plan that the NHA, the hospital association, the NMA, Nebraska Medicine, and UNMC all agree on. So we do have one crisis standard of care now. We just need this bill to have the Governor be able to implement that.

BRANDT: OK because essentially, you could have a standard crisis of care among yourselves today if you would all agree?

ANDY HALE: Correct, yeah--

BRANDT: OK.

ANDY HALE: --and so we do. We have one right now that is there, but we need, as Senator Lathrop in his introduction talked about, the immunity from liability and then we need to be able to have that implemented. Initially, when Senator-- former Senator Howard, Chair of the HHS Committee, as you know, brought this up with Senator Lathrop and our group, we approached the Governor and the Attorney General and they didn't believe they had the authority to go ahead and implement this, so this would probably give them that tool to do it as well. To Senator DeBoer, I think with, with your question, I think we're comfortable with the Governor being the one to implement it. I think as you go down in local municipalities, it might muddy the waters a little bit, but I, I would think having the Governor, having somebody be in charge, similar to state emergencies-- so I'm sorry, Senator Brandt.

BRANDT: All right, thank you.

ANDY HALE: Thank you.

PANSING BROOKS: Any other questions? Thank you, Mr. Hale. Appreciate you coming.

ANDY HALE: Thank you, Senator.

PANSING BROOKS: Next proponent. Welcome.

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KATIE ZULKOSKI: Good afternoon. Senator Pansing Brooks, members of the Judiciary Committee, my name is Katie Zulkoski, Z-u-l-k-o-s-k-i, testifying today in support of LB53 on behalf of the Nebraska Emergency Medical Services Association, or NEMSA. NEMSA is an association of career and volunteer emergency responders. We have a statewide membership and they're made up of licensed emergency medical responders, emergency medical technicians, advanced emergency medical technicians, and paramedics. We want to echo the other testifiers in thanking Senator Lathrop for addressing this issue. As you have heard today, the crisis standard of care talked about would also impact the work of emergency medical providers. The crisis standard of care would lay out standards that EMS professionals are to use in very limited-- what we hope are very limited times of crisis. EMS professionals are, in statute today, already afforded liability protections for when they're providing public emergency care. That-- there was-- statute reference for that is in 38-1232. However, the language uses rendering in good faith standard and does not contemplate the difficult instances contemplated under this crisis standard of care. According to the crisis standard of care implemented under the bill, there could be instances where emergency care is not provided. As long as EMS professionals are acting in accordance with the crisis standard of care laid out for our state, we believe that EMS professionals should have clear liability protection afforded under the bill. We request your committee includes this protection as the bill moves forward by including the EMS providers in the definition of healthcare providers under the bill. And with that, I'm happy to answer any questions.

PANSING BROOKS: Thank you, Ms. Zulkoski. Anybody have questions? Thanks so much for coming. Next proponent, proponent. OK, we'll move to opponents. Next opponent. Welcome.

JASON AUSMAN: Thank you. Good afternoon, again, Vice Chair Pansing Brooks and members of the committee. My name is Jason Ausman, last name is spelled A-u-s-m-a-n, testifying here this afternoon in opposition to this bill on behalf of NATA. Not surprisingly, any time we see an immunity provision, it's going to get our attention. Immunity provisions allow carelessness, carelessness causes injury, and the question then is who's left to bear the burden? That is the primary reason we are here in opposition. Reading this bill, I would also offer that I believe that the crisis standard of care is baked into the ordinary standard of care, the definition of which is what a

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reasonably prudent medical care provider would do under the same or similar circumstances in the same or similar communities. Given the triage decisions that are made, it would appear that the issues in the crisis standard is baked into the already existing standard of care. With that said, certainly the impetus of this bill is very serious. We've heard the complexities involved with some of the medical decision-making that has been taking place as a result of COVID. We understand that, we recognize that, and I think I can speak on behalf of NATA in saying that given the seriousness of the issues, we would be open to continue communication to see if we can't find some common ground here with this issue. With that, I would be happy to answer any questions.

PANSING BROOKS: Thank you, Mr. Ausman. Any questions from Mr. Ausman? I guess my question is have you spoken with Senator Lathrop and tried to work this through already?

JASON AUSMAN: I have not. As a matter of fact, this was recently brought to our attention and I, I was scratching my head a little bit with this bill, Senator Lathrop, but I assure you that the, the lines of communication hopefully will be open, open and we'll explore them, so--

PANSING BROOKS: That sounds great.

JASON AUSMAN: Yeah.

PANSING BROOKS: Thank you very much. Thank you for coming today.

JASON AUSMAN: Thank you.

PANSING BROOKS: Any further opponents, opponents? OK, anybody in the neutral? We've got a couple of neutral testifiers. Welcome.

GARY ANTHONE: Hello. Vice Chair Pansing Brooks and members of the Judiciary Committee, my name is Dr. Gary Anthone, G-a-r-y A-n-t-h-o-n-e, and I am the chief medical officer and director of the division of public health within the Department of Health and Human Services. I'm here to testify in a neutral position on LB53, which will provide immunity for healthcare providers acting in conformance with the November 2020 crisis standard of care document pertaining to the COVID-19 state of emergency. In September of 2020, a public health

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fusion cell was created to coordinate efforts and support mass communication efforts across the COVID-19 pandemic response. Additionally, a group of state healthcare coalitions and hospital leaders was convened to provide surge plan updates to the fusion cell, including development of a draft crisis standard of care plan. This plan was intended to provide guidance to health system and individual healthcare entity-- entities during the crisis. On November 22, 2020, the authors presented a crisis standard of care planning guidance for the COVID-19 pandemic to the Governor's Office and DHHS for review. During the time of this review, DHHS and the Governor discovered that the Governor did not possess the statutory authority to develop or authorize a crisis standard of care document. However, the Governor and the department recommended the implementation of these standards be determined by medical professionals and healthcare systems. We believe medical decisions should be made based on the applicable standard between the treating entities and not by using arbitrary standards mandated by the state. Hospitals and providers should be free to adopt the guidance in the standard crisis standard of care document if they choose to do so without a state mandate. Thank you for the opportunity to testify today. I'd be happy to answer any questions.

PANSING BROOKS: Thank you, Dr. Anthone. Does anybody have a question for Dr. Anthone? Senator Brandt.

BRANDT: Thank you, Vice Chair Brooks. Thank you, Dr. Anthone, for testifying today, particularly in the neutral capacity. I really appreciate that. You heard a previous testifier, Mr. Hale, say that their hospital association that represents all hospitals in the state want the standard of care so that they have it the same for all their hospitals and now you're saying in your testimony that what we've got is fine. Am I-- did I hear this wrong?

GARY ANTHONNE: As, as it stands right now, what we have is working. As everybody has mentioned, the applicable standard of care that a reasonable and prudent physician would do under same or similar circumstances should apply to this also.

BRANDT: So you don't want the Governor to have the power to declare an emergency for a crisis standard of care?

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GARY ANTHONE: I'm, I'm not saying I do or don't want that-- him to have that power, but at this time, he does not have that power or authority.

BRANDT: But this would give him that power and authority?

GARY ANTHONE: Not in-- not to our knowledge. This would not give him that power.

BRANDT: OK, thank you.

PANSING BROOKS: Any other questions? I guess I have a question. Is there language that you think would provide him with that power? Is, is that what--

GARY ANTHONE: The way we understand it, it would need legislative work to be done.

PANSING BROOKS: But you don't think this does that?

GARY ANTHONE: Pardon me?

PANSING BROOKS: You don't think this bill does that?

GARY ANTHONE: No, this does not give the Governor statutory authority to, to draft a document or to authorize a document.

PANSING BROOKS: OK, thank you for coming here to testify today. Any other neutral testifiers? Neutral testifiers? So-- OK, so I-- let's-- Senator Lathrop, would you like to close? And while you're coming up, I will just say that on LB53, we had two proponents position letters, zero opponents, and zero neutral. And then we had two written testifiers on LB53. Marcia Mueting for the Nebraska Pharmacists Association is a proponent and-- on LR-- LB53. Kristen Hassebrook from the Nebraska Chamber is also a proponent. Thank you. You may close.

LATHROP: OK, thank you. I don't know how many senators actually understood how close we were to having a special session to deal with this topic in December. When we got to Thanksgiving, everybody didn't listen to Dr. Fauci and the other public health experts that said don't get together and then we saw a bump. That bump turned into a mess out in Los Angeles. It's become a problem out in New York. It was

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almost a real problem here and this bill was intended to be the bill we could pass if it became a problem. Like, this was going to get passed in a hurry and it-- is it perfect? No. And by the way, I agree with both Dr. Anthone and with Mr. Ausman about the standard of care. I called, I called lawyers that defend these things and defend malpractice, two lawyers that I know, and they said, you know, even in a crisis, the, the traditional standard of care set up in our Medical Liability Act would cover it because it takes into account circumstances. But what, what that liability piece doesn't cover is the-- having a process in place so that the, the doctor at the bedside doesn't have to make the call. It's being made by people who are guided by a set of standards. And Senator McKinney, the standards that we have that this refers to, I've read them and they, they require that the panel make a decision and not take into account race, religion, perceived socioeconomic status, so I'm on the same level as Walter Scott and the, the person who is an immigrant is on the same level with any other citizen in the, the state. And that's important because they, they work into that document and into this process the ethics that you want them to. You have medical ethics people involved in setting these criteria for who gets the care and who doesn't get the care and it is definitely, definitely done in a way that is-- where, where no consideration is given to things like race, religion, perceived social status. Going forward, since it appears from the numbers-- to me, at least-- that we've dodged a bullet on COVID-19-- hopefully we'll get enough vaccinations that we're not going to have a run on the hospital that look like we were going to experience in December. Going forward, this is going to be about two things: establishing, establishing the standard of care so the panels are involved in making those decisions based upon thought-out, thought-out concepts and criteria from input from the medical ethics people, from the lawyers, from consumers, and, and also providing that panel who can make the decisions so that the doctor doesn't have to say-- make that call. And I think that really is, really is the important piece of this whole idea of the crisis standard of care. And really, at the end of the day, I don't know that we change the liability all that much, but providing for that, that opportunity to consider all the circumstances. Because today it's a pandemic, but tomorrow it might be a tornado or it might be a plane crash or we could be bringing people in for the NExT project, right? That becomes a, a center where we're

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bringing people in for disasters. It may very well become something we need to have in place.

PANSING BROOKS: Thank you. Any questions for Senator Lathrop? Senator Brandt.

BRANDT: Thank you, Vice Chair Pansing Brooks. Senator Lathrop, on, on line 4 of the bill, "the care is provided during the COVID-19 state of emergency." Why don't we just strike COVID-19 so that this is, in effect, the care provided during a state of emergency?

LATHROP: So what I'd like to do is spend some more time on the language before we, before we pass it and, and have it be applicable or consider what should be in it, not just from COVID-19 pandemic point of view, but from-- what if it's a tornado? What if, you know, five years from now, we, we have a, a disaster center at the Med Center and, and that bring in planeloads of people there? So I think there's a lot of things to consider before we try to move this bill.

BRANDT: Because the other thing is lines 16 through 21 specifically address powers of the Governor: state of emergency, statutory authority, executive orders, and the Governor declares. So does that grant him the power to do that?

LATHROP: It would if the bill were there. He could say--

BRANDT: OK, so if this bill was passed, he would have--

LATHROP: Yep--

BRANDT: --that authority--

LATHROP: --you--

BRANDT: --to do that.

LATHROP: --you could.

BRANDT: Thank you, that answered my question.

LATHROP: All right, OK.

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PANSING BROOKS: Any other questions? I don't see any. Thank you, Senator Lathrop, and that closing the hearing on LB53 and closes our hearings for today. Thank you.

LATHROP: Thank you.