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Judiciary Committee
February 22, 2008

[LB832 LB942 LB943 LB1015 LB1025]

The Committee on Judiciary met at 1:30 p.m. on Friday, February 22, 2008, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB1015, LB1025, LB832, LB942, and LB943. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Ernie Chambers; Vicki McDonald; Amanda McGill; Dwite Pedersen; Pete Pirsch; and DiAnna Schimek. Senators absent: None.

SENATOR ASHFORD: Good afternoon, everybody. I think we're going to get started because it's Friday and that's as good a reason as I can think of. Senator Nantkes is here to introduce her bill, LB1015. Senator McGill is here; Senator Schimek is here; Senator McDonald is here; I am here; Senator Pedersen is here; Jonathan Bradford, the clerk, is here; Stacey Trout is legal counsel, so everybody is here that needs to be here. Senator Nantkes. We have five bills. We have a light system for those of you who have not been before us. It doesn't apply to Senator Nantkes but it does to everybody else. But when you see...we would ask you to confine your remarks to about three minutes. We will give you a little orange light that will tell you to kind of start summing up, and the red light will eject you from the chair. (Laugh) Anyway, Senator Nantkes, thanks for coming. LB1015. [LB1015]

SENATOR NANTKES: Good afternoon, Chairman Ashford, members of the committee. My name is Senator Danielle Nantkes, that's D-a-n-i-e-l-l-e and N-a-n-t-k-e-s, and I represent the "Fightin' 46th Legislative District." I'm here today to introduce LB1015. This bill was brought to me by the Nebraska Trial Attorneys Association, who has an attorney here today who practices within this field of workers' comp and is available to answer any specific questions about this legislation. Quite simply, this bill would clarify statutes that apply comparative fault to cases brought under Section 48-118, and in actions in which at least one responsible party has been granted immunity from civil liability pursuant to state statute. With that, I'm happy to answer any questions that the committee may have, but in order to provide an appropriate example for those following me I'll try and adhere voluntarily to the limits as set forth by this committee. And in all candor, this is not an area which I have any personal experience in practicing within and I really think that your questions may be better suited for people with firsthand knowledge that will be following me here today. [LB1015]

SENATOR ASHFORD: Well, comparative negligence is a topic near and dear to my heart, Senator Nantkes, so I'm glad that you brought it to us, and we'll reserve any questions for others, I guess, unless does someone have a question of Senator Nantkes? Okay. Are you going to stick around or...? [LB1015]

SENATOR NANTKES: Actually I am going to waive my closing and need to head back to Appropriations Committee. As you know, the Forecasting Board is meeting as we

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Speak, so it's a busy day. [LB1015]

SENATOR ASHFORD: Well, let us know what it says, will you? [LB1015]

SENATOR NANTKES: Thank you. [LB1015]

SENATOR ASHFORD: Okay. First proponent. And Senator Steve Lathrop has joined us, from Omaha, so welcome to him. [LB1015]

BRITANY SHOTKOSKI: (Exhibit 1) Good afternoon. Britany Shotkoski. I am here on behalf of the Nebraska Association of Trial Attorneys. I did bring with me a handout which is actually the committee notes from back in 1991 when we adopted comparative fault, and I believe, Senator Ashford, that would be something that you would be very familiar with. I would first like to clarify with respect to this bill that it's not...its purpose is not necessarily to change the existing law but rather to clarify what was originally intended by the Legislature when it adopted the comparative fault statutes. The portion of the committee record that was just handed out to you includes both the introductory statement and then also notes... [LB1015]

SENATOR ASHFORD: Just...excuse me. May I stop? This isn't my signature. (Laugh) No, I'm kidding. No, go ahead. I...(laugh)...it's my name but not my signature, but go ahead. [LB1015]

BRITANY SHOTKOSKI: Okay. Well, I apologize. It's still the committee notes, including the...and, in particular, I'd refer you to the summary that was prepared that is contained on pages 2, 3, and 4 of what I just handed out. Section 9 clarifies what was intended by this bill. Just by way of history, prior to the enactment of the comparative fault statutes, the employer's negligence was not considered in a third-party liability negligence accident unless the employer's negligence was the sole proximate cause of the accident. Under those circumstance where the employer's negligence was the sole proximate cause of the accident that was found to be the fault of the employer and any third parties would not be held liable. When the Legislature adopted comparative fault, if you look at Section 9 of what was intended here, and I believe that's on page 3 of the handout, there was not intended to be any change in what was the existing law at this time. However, the adoption of the comparative fault statutes has created some confusion in this area among the various courts in the state, and the purpose of this bill is to clarify that the employer's negligence is still not to be considered in any third-party action. The basis for that is the bedrock principles of the exclusivity bar contained in the workers' compensation statute. Employers in this state, there is limited liability with respect to any accidents, is limited to the workers' compensation statute. In other words, the employer can't be sued by the employee for negligence. Their remedy is work comp. The purpose of this bill is to clarify that and to provide some guidance to the court that that was what was intended previously, what was intended after the adoption of

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comparative fault, and certainly what is intended going forward. There are several problems created by the current system and the multiple rulings we're getting from courts with respect to what was intended here, not the least of which being defendants in a third-party litigation suit when you've got a work comp case frequently are not in defending themselves, so you end up with a disproportionate portion of liability attributed to that employer. Their only purpose for being in litigation currently is to protect their subrogation interest. Our statutes are set up to control, specifically with 48-118, the allocation of negligence between employers and employees, and this adoption, like I said, is intended solely to clarify the law. With that, I see that my time is up. I would be happy to entertain any questions that the committee may have, and urge you to move this bill out of committee and pass this so that we can correct this confusion in this area of the law. [LB1015]

SENATOR ASHFORD: Any questions? Senator Lathrop. You were there those days. [LB1015]

SENATOR LATHROP: I just started to get involved when this was...when you were down here doing this great work on comparative fault. Essentially, if I understand what the problem is, is that when a worker gets hurt, they can't make a claim for negligence against their employer only for work comp benefits, is that right? [LB1015]

BRITANY SHOTKOSKI: Exactly. [LB1015]

SENATOR LATHROP: And so in the comparative fault mix, which is determining out of 100 percent of all fault arising out of some kind of an auto accident or an industrial accident, in the determination of 100 percent of all fault, the employers being included, even though the employee can't collect from it. [LB1015]

BRITANY SHOTKOSKI: Exactly. That's precisely the problem and that this is intended to remedy. [LB1015]

SENATOR LATHROP: Okay. And what we want to do with this bill or the intent of the bill is to take the employer out of the mix in determining what is or where 100 percent of the fault comes from, because statutorily they don't have to pay damages. [LB1015]

BRITANY SHOTKOSKI: Precisely. [LB1015]

SENATOR LATHROP: Okay. Thank you. [LB1015]

BRITANY SHOTKOSKI: Any further questions? Thank you. [LB1015]

SENATOR ASHFORD: I don't believe so. Thanks. Next proponent? Opponent? How many opponents do we have? Okay. Good afternoon. [LB1015]

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BOB LANNIN: Good afternoon. My name is Bob Lannin. I'm an attorney here in Lincoln. I practice with the law firm of Shively and Lannin. I'm appearing here today on behalf of the board of directors of the Nebraska Defense Counsel Association. We have some concerns and reservations as it relates to this bill, at least as presently drafted. First off, as I see in the bill it says that the comparative negligence statute shall not apply to an action under the Nebraska Workers' Compensation Act. It already doesn't. I mean, the Workers' Compensation Act is liability without fault. I think what was intended to be said there was to a third-party action under 48-118. Even if that were to be amended though, I think there are some concerns. Our whole purpose and concept in going forward with comparative negligence was to put all possibly negligent parties before the finder of fact or a jury for an allocation of their negligence based upon 100 percent. If you had an employer with a grossly deficient workplace, but other individuals such as suppliers, delivery persons, installers, several defendants, and you kept the employer's negligence out of there, you would, in effect, be having a double recovery, because the jury would not hear about that negligence but it would instead only be deciding based upon the parties that are there to the lawsuit. So I think there are some problems related to the fact that, you know, in workers' comp there is a subrogation interest. But under 48-118 there is the equitable division by the district court in the event of any recovery, so I think to the extent there would be a loss to, in the third-party action the judge could always keep that in mind in the equitable apportionment, so. The second concern we have relates to the final language of the statute that discusses "nor to any person or entity against whom recovery is barred by a statutory grant of immunity from liability." I think we should itemize just exactly what we're talking about here, what exactly is the various immunities we're talking about. For example, the one that would come to mind to me would be the guest statute. Do we not want to have that type of recovery or prohibition? If so, we should itemize what they are, and not simply, you know, guess at what a statutory grant of immunity is. I see my time is almost up so I'll just take any questions there are. [LB1015]

SENATOR ASHFORD: Any questions of Bob? Yes, Senator Lathrop. [LB1015]

SENATOR LATHROP: Does the defense...is it the Defense Research Institute, is that the name of the organization? [LB1015]

BOB LANNIN: My organization is the Nebraska Defense Counsel Association. [LB1015]

SENATOR LATHROP: Okay. The Nebraska Defense Counsel, do they have a problem with the underlying proposition that an employer who cannot be liable in tort to his employee should be excluded from the mix in determining what 100 percent...who is...who is involved in coming up with 100 percent of fault for a mishap of one kind or another? [LB1015]

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BOB LANNIN: Yes, just because...you know, for example, the example I gave that if you have a grossly negligent employer and then you leave that out and say the other nominal defendants are maybe 20 percent at fault, the jury is never going to hear of that, of what the employer's work conditions were, because they are out of the case, and therefore you could essentially tag the nominal defendants for 100 percent of the bill. So, yes, we do have a problem with it. [LB1015]

SENATOR LATHROP: Okay. Does your group include folks that do workers' comp defense? [LB1015]

BOB LANNIN: Some, but... [LB1015]

SENATOR LATHROP: Okay. Would your group be in favor...rather than have this bill, would your group simply be in favor of denying the employer any subrogation right in the event that they are included in the mix of who comes up with 100 percent of fault? [LB1015]

BOB LANNIN: That's certainly a fair...you know, that way you are going to defend the employer from potentially double-dipping then, so I think that's a fair compromise. [LB1015]

SENATOR LATHROP: So you think you can speak for your group and they would be okay with no recovery in the event that they have any responsibility for the accident? [LB1015]

BOB LANNIN: I think that's a fair compromise, yes. [LB1015]

SENATOR ASHFORD: Good. Got that wrapped up. Thanks, Bob. [LB1015]

BOB LANNIN: Thank you. [LB1015]

SENATOR LATHROP: Well, maybe we do and maybe we don't. That's... [LB1015]

SENATOR ASHFORD: Any other opponents? Neutral testifiers? Okay. I think Senator Nantkes has waived, so we'll go to the next bill which is Senator McGill, LB1025. How many testifiers do we have on LB1025? Okay. [LB1015]

SENATOR MCGILL: All right. Hello, Senator Ashford, fellow members of the Judiciary Committee. I'm Senator Amanda McGill and I represent the 26th District in northeast Lincoln. I was brought this bill by the Nebraska Domestic Violence and Sexual Assault Coalition. The federal Office on Violence Against Women and the Department of Justice Reauthorization Act of 2005 added a new certification requirement for Violence Against Women Act grants regarding judicial firearms notification-related federal gun control

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laws. In order to continue to receive over \$1 million in grant funds, Nebraska must certify compliance with the new requirement, showing evidence that its judicial administrative policies and practices include notification to domestic violence offenders of the requirements delineated in Section U.S. Code and any applicable-related federal, state, or local laws. The certification requirement calls for conformity with the Brady Handgun Violence Prevention Act, which prohibits individuals subject to protection orders from purchasing or otherwise being provided firearms, and requires that alleged offenders of all domestic violence-related misdemeanors receive firearms notification. The Brady Act also requires that alleged defenders have sufficient notice and an opportunity to challenge an order and the related firearms prohibitions through a scheduled hearing. LB1025 will bring Nebraska into compliance with the grant certification requirements by requiring that firearms notification be given to alleged offenders of all domestic violence-related misdemeanors, firearms notification be given on protection order forms, and hearings be set for all protection orders to provide respondents with the opportunity to challenge orders and the related firearms prohibitions. The current protection order process in Nebraska does not require that judges schedule hearings. Currently, respondents may request hearings or judges may set them at their discretion. This is the most controversial provision in the proposed legislation, in that courts are concerned about the impact on their dockets, and victim advocates have concerns about safety provisions for victims who face their abusers in court. Testimony that follows will address these issues. The proposed changes will protect over \$1 million that come to Nebraska for coordinated response to victims of domestic violence. These dollars have provided for significant improvements in the system response for victims across our state, supporting specialized positions, and integrating the work of law enforcement, victim advocacy, prosecution, courts, probation, and batterers' intervention programs. Loss of these funds would have an immediate, noticeable impact on local response for victims, compromising victim safety and defender accountability across our state. Like I said, there are several people here behind me who will be testifying on this issue, but I would be happy to entertain questions, as well. [LB1025]

SENATOR ASHFORD: Any questions of Senator McGill? Thanks, Amanda . [LB1025]

SENATOR MCGILL: All right. Thank you. [LB1025]

SENATOR ASHFORD: First proponent. Welcome back. [LB1025]

MARK YOUNG: Thank you. Good afternoon. My name is Mark Young, M-a-r-k Y-o-u-n-g. I'm the Hall County Attorney and am here today on behalf of the Hall County Attorney's Office and the Nebraska Association of County Attorneys. Ordinarily, senators, when I'm before you, I'm oftentimes in a neutral position, but I've got to tell you, right up front, I've got a dime in this game. Hall County is lucky enough to have a grant that funds a victim witness advocate--a victim advocate who is bilingual, who does

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remarkable work on behalf of the victims of domestic and other sorts of violence in Hall County--and I would hate to see her be lost to the community, and there is no way we could afford to do it without it. I would also...I know that judges are concerned about the impact on their dockets of having to schedule a hearing, but it struck me, in preparing to come down here, that in every other kind of hearing or every other kind of law that comes into a courthouse in Nebraska, it seems to me that there has to be some sort of hearing set. No one gets divorced even if it's a default divorce without having a hearing. Even in small claims court, before you get a default judgment there has to be at least somebody has to show up and ask for that judgment. Protection orders ought to be a big deal. They ought to be strictly enforced and they ought to be taken seriously in the community and in the court system, and I would propose that moving forward with this bill would emphasize to people asking for protection orders and the people who are the respondents of protection orders that it is a serious matter with the full attention of the state and the authorities of the state behind it. In terms of the number of hearings that will actually go forward, I suspect that over time the number of hearings is not going to be that much greater than it is today; and, in fact, it's hard to predict but I suspect there will some protection orders that will not be applied for as word of this provision gets out. I see my time is almost up. I would urge you to advance this bill and I would be happy to answer any questions. [LB1025]

SENATOR ASHFORD: Any questions of Mark? Yes, Senator Chambers--and welcome. I didn't announce your coming here. [LB1025]

SENATOR CHAMBERS: That's quite all right. I would have made my presence known soon enough. Thank you though. Mr. Young, on page 3 and again on page 9, when it talks about the notification by the court, the word "may" is used. The court will notify the one who is convicted "that it may be a violation of federal law." Is the word "may" rather than "shall", with reference to it being a violation of federal law, based on the notion that it may not, in fact, be a violation of federal law? [LB1025]

MARK YOUNG: Senator, I...in reading that language, I guess I would suggest that language is there to suggest to the individual that that court is not advising them about what is going to happen in another court, but to give them notice that they may be subject to other penalties in case some provision of the federal statute changes. [LB1025]

SENATOR CHAMBERS: But it doesn't say that a person may be amenable to some kind of charge or sanction in another court. We're talking about the conduct itself, not the consequences of it, but that the conduct may be in violation. If it may be, it also may not be. It's a word that doesn't state that it is a violation of federal law. [LB1025]

MARK YOUNG: Point well taken, Senator. It could easily be "shall" in that sentence, I think. [LB1025]

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SENATOR CHAMBERS: Okay. And I'm just trying to get clarification. Now, the first part talks, it seems to me, about the movement of this weapon in interstate commerce. Then we get to the second part where it says, beginning in line 20 on page 3, "or to receive any firearm or ammunition which has been shipped or transported." We're still, though, saying receiving it may be a violation of the law but not that it definitely is. How is the person to know that ammunition was shipped or transported in interstate commerce? [LB1025]

MARK YOUNG: I think that would be subject...that would be something that would certainly be a defense, potentially, in the federal court proceeding. [LB1025]

SENATOR CHAMBERS: But since we're being told that this is to correspond to federal law, if I understood the testimony correctly, is this the way the federal legislation reads, do you know? [LB1025]

MARK YOUNG: I'm not sure, Your Honor...or Senator. (Laughter) [LB1025]

SENATOR CHAMBERS: I'll accept that. (Laugh) [LB1025]

SENATOR ASHFORD: That might just stick, Senator Chambers. [LB1025]

MARK YOUNG: I'm as scared here as I am in front of the Supreme Court and for the same reasons. I believe this is language that has been mandated by the provisions of the federal law as being their take, if you will, on their statutory scheme. [LB1025]

SENATOR CHAMBERS: Would...suppose they said something like--by the way, I'm not opposed to this idea of people who have been convicted of domestic violence being prohibited from owning a firearm, possessing it, or doing anything with it, so I don't even want that to be a part of what I'm asking if somebody thought that was what I'm getting at, because I think if a man pops a woman then they ought to go ahead and cut off the hand that did the popping, but that's just to show how strongly opposed I am to...or it could be a woman doing it to a man. Suppose the language said something like, the court shall provide notice that the person may be prosecuted--well, I don't want to try to find the language--but in being fair in terms of the way the law operates, we're talking about something which, if it is a violation of federal law, would probably be considered criminal. [LB1025]

MARK YOUNG: Yes. [LB1025]

SENATOR CHAMBERS: And in order to be guilty of a crime, a person must have notice. And the person should not be prosecuted for committing a crime without being required to know whether that which is simply possessed had moved in interstate

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commerce, because many people don't know that and I don't know how they are to know. If you receive the firearm or the ammunition, it doesn't say possess it, but I guess maybe you presume that if the person receives it there is also possession, but it doesn't say that. You could have received it and passed it on to somebody else, and at the time you are charged you don't even have it. You didn't do anything with it. You didn't know that it was moved in interstate commerce, and you could find it in your house and you'd say, I better get rid of this. So it had been...it had moved in interstate commerce. You had received it because you've got it but you haven't done anything with it. And I'm not saying you have to give an answer to me. I'm just letting you know that I see difficulty with the language even though it says you get a million dollars if you put something like this in the statute. But that's all that I would have. Thank you, Mr. Young. [LB1025]

MARK YOUNG: Thank you, Senator. If I may respond just real quickly. [LB1025]

SENATOR CHAMBERS: Oh, sure. [LB1025]

MARK YOUNG: Just my one thought would be, in some ways this is a classic notice statute to suggest to somebody who has been convicted or is the respondent in a protection order, that you ought to be asking those questions before you come into possession of a firearm or ammunition. That would be my one thought on this language. [LB1025]

SENATOR CHAMBERS: But let's go beyond that. I think a law should have meaning, and when it's a criminal law it's backed by the coercive power of the state. If you violate it the state can punish you. Now, whether a prosecutor would charge or not is not what I'm getting at, but the fact that on this language that could happen unless, in fact, it is not a violation of federal law to have this ammunition that moved in interstate commerce. The judge can just say it and wash his hands, and say, well, the law said I have to do it so I'm going to tell you this. And if the defense lawyer said, well, Your Honor, is it, in fact, a violation of federal law? And the judge says, well, I don't know and I don't have to know; all I have to do is tell you that it may be and it's for you to find out. And I guess the judge could say that. [LB1025]

MARK YOUNG: Because it would be something outside of the jurisdiction of our state courts to make those decisions. [LB1025]

SENATOR CHAMBERS: Um-hum. [LB1025]

MARK YOUNG: Maybe in some ways this is analogous to the notice, the very wise notice provision put into Nebraska law that informs defendants at their arraignment that if they plead guilty or are found guilty of a criminal case, they may be subject to deportation or other sanctions based on their status. That would be my only thought. [LB1025]

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SENATOR CHAMBERS: But there you are talking about a consequence of an act which itself is criminal. [LB1025]

MARK YOUNG: Yes. [LB1025]

SENATOR CHAMBERS: This is where we don't know whether it's criminal or not. I just don't want even somebody who has been convicted of a crime to be misled by the court in terms of these warnings. But I don't want to drag it out because I think I made the point that's troubling me and I'm not looking for you to give a definitive answer, but thank you anyway. [LB1025]

MARK YOUNG: Thank you. [LB1025]

SENATOR ASHFORD: Senator Schimek. [LB1025]

SENATOR SCHIMEK: Yes, thank you, Mr. Chairman. I'm kind of puzzled by the process because I don't understand this process. But once the judge has given this notice, then the administrator's office creates a notification and sends out the notification? Oh, no, that's just to notify all the judges. Okay. So once the order has been issued...it looks to me as if there is a pretty big time lag here. If it's ex parte, it's the evidentiary hearing shall be scheduled not more than 30 days after service of such order, and if it's not issued ex parte it's 14 days after the filing. I don't get this exactly. We're talking about somebody here who is accused or found guilty, convicted, of a domestic assault, and yet we're waiting all that time to give them...? Could you explain the process a little bit to me. [LB1025]

MARK YOUNG: I'll try, Senator. [LB1025]

SENATOR SCHIMEK: Thank you. [LB1025]

MARK YOUNG: The first part of the bill talks about, in the conversation I was just having with Senator Chambers, focuses on individuals who are convicted of domestic abuse in the criminal process. [LB1025]

SENATOR SCHIMEK: Right. [LB1025]

MARK YOUNG: The second part of LB1025 addresses the protection order process. There would be a protection order...my reading of the bill would be there would still be, as there is now, a protection order in place if it's granted ex parte during that 30-day period. And 30 days is probably...under...on page 4, it may be issued ex parte, and if it's issued ex parte within 30 days there has to be a hearing scheduled. So the protection order is in place to protect the... [LB1025]

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SENATOR SCHIMEK: Okay. [LB1025]

MARK YOUNG: Okay? And then under the other one, I think the 14 days is there to speed up the process because there isn't a protection order in place under that provision. [LB1025]

SENATOR SCHIMEK: I see. Okay, that helps. I was getting the two confused and making it one process. I didn't quite get it. Thank you. [LB1025]

SENATOR ASHFORD: Yes, Senator Chambers. [LB1025]

SENATOR CHAMBERS: Mr. Young, I forgot to ask a question, the answer to which I think I know. This language in and of itself does not impose a duty on the judge to determine or discover whether this would be a violation of federal law, in fact. [LB1025]

MARK YOUNG: That would be my reading of it, Senator; yes. [LB1025]

SENATOR CHAMBERS: Okay. Now this is where you are going to help me like you helped Senator Schimek. Would the possession of a firearm or ammunition itself be a violation of the protection order--or would a judge have to say that it is? [LB1025]

MARK YOUNG: I...and my pause is I'm trying to picture the protection order form as it currently stands in my mind. I don't believe, under state law, possession of a firearm while you have a protection order is a separate criminal offense, and that's not one of the enjoined activities on the protection order. [LB1025]

SENATOR CHAMBERS: Okay. Now let's go to the point where the person has been convicted of domestic assault. Is a person who has been convicted of domestic assault allowed to own or possess a firearm? [LB1025]

MARK YOUNG: If, under state law,... [LB1025]

SENATOR CHAMBERS: Um-hum. [LB1025]

MARK YOUNG: ...if it is a misdemeanor, I believe they are still allowed to possess a firearm. If they're convicted of a domestic assault--which would be a felony, of course--they would not. [LB1025]

SENATOR CHAMBERS: Okay. My final question now, because we are dealing with state and federal law, the order...the notice is given only with reference to federal law, so if there were a violation it would be up to the federal prosecutor to bring the charge. The state is through, once it gives this notification. It's almost like telling your child, don't

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go in that dark room because there is a ghost under the bed. Okay. I think I understand now what is going on here even though I'm a little troubled by it, but I see it clearer. Thank you. [LB1025]

MARK YOUNG: Thank you. [LB1025]

SENATOR ASHFORD: Senator Lathrop. [LB1025]

SENATOR LATHROP: Just one quick question. I see that the bill requires that the judge give notice to the person following sentencing, and I am wondering if it doesn't make more sense for, in addition to that, the judge shouldn't be required to give them...or advise them of this consequence if they're going to take a plea from them. Literally, you could have a guy taking a plea, thinking he's just getting out from under something in an expedient manner, and then the next thing you know, he can't even keep his own guns. [LB1025]

MARK YOUNG: You know, that makes sense to me. I don't think that would change what we need to do to protect the VAWA funding, Senator. As a one-time defense lawyer, I know that's a question I was often asked by clients, how it was going to affect their possession of a shotgun or something. [LB1025]

SENATOR LATHROP: They may choose not to plea or go ahead and have a trial. [LB1025]

MARK YOUNG: Sure. It would be like the notice on the impact on immigration status; in that sense, have the same effect perhaps. [LB1025]

SENATOR LATHROP: Thanks. [LB1025]

SENATOR ASHFORD: Mark, just one question. This funding is funding that is made available to other...to Grand Island, but also to other areas of the state, correct? [LB1025]

MARK YOUNG: Yes. [LB1025]

SENATOR ASHFORD: And this is vital funding in your opinion? [LB1025]

MARK YOUNG: It is very vital funding. [LB1025]

SENATOR ASHFORD: And is it important, in your opinion, that this language be in statute as soon as possible, or how critical is it? [LB1025]

MARK YOUNG: I think it's really critical. I can only speak for, firsthand, about what this

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funding that we get means to us, and it means a lot, particularly as our community changes and we get a more transient population--a population that's perhaps less sophisticated and knowledgeable. Having a victim advocate who can walk them through is just priceless. [LB1025]

SENATOR ASHFORD: So there is some risk if we don't get this. [LB1025]

MARK YOUNG: I think there is tremendous risk. [LB1025]

SENATOR ASHFORD: Thank you. And just as an aside as we're getting to the end of our hearings, I appreciate the candor by which you have represented your association this year,... [LB1025]

MARK YOUNG: Thank you. [LB1025]

SENATOR ASHFORD: ...and your willingness to be forthcoming with information has helped us in some very difficult issues, so your association should be proud of the way you've represented them before this committee. [LB1025]

SENATOR CHAMBERS: And would that every person who represents that association conduct himself or herself in the way that you did. [LB1025]

MARK YOUNG: Thank you, Senator. [LB1025]

SENATOR ASHFORD: Thanks, Mark. Next proponent. Go ahead. [LB1025]

KIM TAYLOR-RILEY: Good afternoon. My name is Kimberly Taylor-Riley, Mr. Chairman, and I am here...I will spell my last name. It's T-a-y-l-o-r, hyphen, R-i-l-e-y. I am here as a representative of the Nebraska Attorney General's Office. I am the Violence Against Women Act prosecutor for the Attorney General's Office, and I am here this afternoon to speak with you in favor of LB1025. The effect of LB1025, very briefly put, is that it establishes due process for all of the litigants. What happens currently is that a petitioner can come in, make a request for a protection order, and have that protection order entered on an ex parte basis, meaning without notice to the other side. At that point there may or may not be a hearing and there may or may not be another order that issues. What this bill would do is ensure that every time there is a protection order entered, either on an ex parte basis or after a hearing, that there is an actual date and time scheduled for hearing, that the respondent is made aware of it, that the court is made aware of it, and that there is a time set down for them to come in and be heard. Whether or not that time is utilized or not doesn't make any difference, because what the feds require is that we set the matter for hearing. They don't necessarily require that there be a hearing, meaning that the litigants appear and that the court be heard on the record, but that there be the matter set down, that everybody

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is aware of it, that there is a place and time for it to occur, and that it happens or it doesn't happen, and then a final order is issued. Why we need to do this is because in Nebraska, as we understand it, approximately 90 percent of the protection orders that are entered presently are ex parte orders. So approximately 90 percent of the victims of domestic violence are carrying around, presently, a protection order that says, in big letters on the top, ex parte. When you go outside of our jurisdiction, however, there are some states that are reticent to enforce an ex parte protection order because of the lack of notice in hearing. The purpose of having a protection order is to ensure that our victims are safe wherever they go because they have that protection order in hand. If we're issuing protection orders that say ex parte that do not have hearings, then we haven't accomplished our goal. Ultimately, we had to certify to the federal government that we were providing this notification; and as I understand it, the Crime Commission has done so. We have done that notification through printing the warning on the protection order itself so everyone gets served with it and it's physically there. We are also going to be notifying persons when they come in for presentence investigation through the probation office. So those are the two methods that we're providing the notice to: misdemeanor--people who are convicted of misdemeanors, and to respondents in protection order matters. I see my time is up, so if there are questions I'll field those now. [LB1025]

SENATOR ASHFORD: Thanks, Kim. Any questions? Yes, Senator. [LB1025]

SENATOR CHAMBERS: She can go first. [LB1025]

SENATOR SCHIMEK: It's okay. [LB1025]

SENATOR ASHFORD: Go ahead, Senator Schimek. [LB1025]

SENATOR SCHIMEK: I just wanted to say, did she have much left to say, because I was finding her testimony very helpful. [LB1025]

SENATOR ASHFORD: Then proceed. [LB1025]

SENATOR SCHIMEK: Were you finished? [LB1025]

KIM TAYLOR-RILEY: No, ma'am. [LB1025]

SENATOR SCHIMEK: Would you like to finish? [LB1025]

KIM TAYLOR-RILEY: But there's not much left. [LB1025]

SENATOR SCHIMEK: Okay. [LB1025]

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KIM TAYLOR-RILEY: Okay. Basically, the reason that we need to do this is because we are at risk for losing somewhere in the neighborhood of \$4.5 million. There is approximately \$1.5 million that comes from the feds directly. There are matching funds, however, that come from other pots in the federal government, and those are triggered by the initial VAWA funds. So we're at risk for losing approximately \$4.5 million in the event that we can't make ourselves compliant. So the big thing we lose is that, yeah, we lose the money, but the other big thing we lose is that we lose professionals that work on a day-to-day basis providing support to victims and to victims' children. I am the Violence Against Women prosecutor for the Attorney General's Office, and in that capacity I prosecute domestic violence, sexual assault, and stalking matters, but in addition to that I provide training on a regional basis to county attorneys, to law enforcement, advocates, and other folks that work directly with victims of violence. So it's a concern not just because of the actual monies, but it's a concern because of the loss of the professionals that we have intact in place now that work on a daily basis with these folks. At some point, we may be able to get ourselves into compliance at some point in the future, after they tell us that we need to do that; however, we would lose this professional basis of folks that work with these victims in the interim, and that's all I have. [LB1025]

SENATOR SCHIMEK: Thank you very much. [LB1025]

SENATOR ASHFORD: That was helpful. Senator Chambers, yes. [LB1025]

SENATOR CHAMBERS: Ms. Taylor-Riley, now that Senator Schimek has stolen my thunder as though she read my mind, I have to make it seem like I had something else on my mind. (Laughter) You said that you work in the Attorney General's Office? [LB1025]

KIM TAYLOR-RILEY: Yes, sir. [LB1025]

SENATOR CHAMBERS: How is that such a nice lady as yourself works in a place like that? (Laughter) That's all that I have though. Thank you. [LB1025]

SENATOR ASHFORD: Any other questions of Kim? Thanks. [LB1025]

KIM TAYLOR-RILEY: Thank you. [LB1025]

SENATOR ASHFORD: Other proponents? [LB1025]

BOB MOYER: (Exhibit 2) Senator Ashford and members of the committee, my name is Bob Moyer. I'm executive director of the Family Violence Council in Lancaster County. Our organization is a planning entity that works to stop all forms of abuse in our county. I'm passing around just some statistics. There are three brief points I wanted to make.

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First, there is a reason why the federal government added these provisions, because of the...and these are some statistics from a book called Why Do They Kill? by Dr. David Adams. But the statistics underlying, you can see the sources. Two-thirds of intimate partner homicides have involved the use of a gun. Three-fourths of guns used are handguns. Ninety-five percent of murder-suicides involving domestic violence partners, intimate partners, have involved guns. So guns are frequently associated with homicides in this area, and that's why the feds included that. I staff the coordinated response in Lancaster County. This funds the law enforcement officers, victim service providers, prosecutors. And the statistics I offer show that our project started in 1996. I think we have seen a very dramatic change in terms of outcomes in our community as a result of these funds, one of which I would point out is that we've also received more than \$4.5 million in federal grants and other grants in the last five to six years. We have another \$2 million pending. And I do not believe any of those funds would have come or very few would have come to our community without the underlying STOP grant funds. So that's another way of saying that it's not just the actual dollars involved in the STOP grants, but the impact they have on our ability to do the work. It's really core funding. It's very vital to my community that this be sustained. The last thing I would mention, I get often asked--and I'm the statistician in our community on these things--and I get often asked if protection orders work. And I don't know of a great answer to that but I did provide some numbers. In the most current year I figured them, we had 801 orders in 2005. One hundred sixty-eight people violated those orders, which means that 21 percent of the orders were violated, which, put another way, means that 80 percent of them weren't. So you could argue that 80 percent of the time the orders had some value to people. And so it's important that we have an effective protection order process in Nebraska, and it is concerning, the things that have been mentioned earlier. If we don't get this law changed, it may compromise that system. [LB1025]

SENATOR ASHFORD: Any questions of Bob? Thanks. Thank you, sir. Good afternoon. [LB1025]

MARY LARSEN: (Exhibit 3) Good afternoon, Senator Ashford and members of the Judiciary Committee. My name is Mary Larsen, L-a-r-s-e-n, and I'm community affairs director at YWCA-Omaha. I'm just going to speak briefly about the benefits of the VAWA STOP grant funding, just in Omaha. Sometimes advocates have heard that senators really don't care that we lose funding, and I think you do care because this does affect the constituents you have. So what I want to do is take you back about 12 years and give you a situation where a domestic violence victim walks into the YWCA. She has a black eye, a cut on her lip, and a bump on her head. She tells us that after she had been assaulted by her partner, the police were called. They arrived and they said, we did not witness this so we can't do anything about it, and if you want to do something, you need to go file a warrant. They also have separated the two parties, and they tell them that if they get called back to the house again that evening they may come back and just arrest both of them. And one of the officers might even say to the woman, you

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know, you should just leave and not ever come back. So she comes into our office and we accompany her down to the prosecutor's office where she is supposed to file an affidavit. Depending on what prosecutor she meets up with, she may be told that she is going to have to come back another time after they've seen the police report, which means she may have to take another day off or find childcare. Another prosecutor might say to her, let's have a scolding session; bring your partner in here and we'll sit the two of you down and I'll scold your partner for what they've done, and then they'll stop that behavior. Or another prosecutor might say to her, okay, we'll go ahead and file this; we'll have the warrant issued and it will get mailed out to your partner and they'll come in and we will start that process. And so, of course, if that gets mailed out, the process will start, and eventually 6-8 weeks later, after the individual has been arraigned, there will be a court hearing. She'll arrive at the court hearing and she...it's like a cattle call. She is asked by the prosecutor, what would you like to have done? So it makes it very difficult for her to know what is done. She doesn't feel like there's a lot of support. Today, it's much different. There is a coordinated response that's taking place. We have prosecutors who are specialized; police officers who are specialized to actually get the warrant. We have specialized probation officers. The whole community is working together and it's for the safety of the victim, and so I really urge you that you will forward this bill out of committee. Thank you. [LB1025]

SENATOR ASHFORD: Thank you, Mary. Any questions of Mary? Thanks for your work. Next proponent. Marty. [LB1025]

MARTY CONBOY: Good afternoon, Mr. Chairman and senators. My name is Marty Conboy. I'm the city prosecutor in Omaha. I'm here on behalf--it's C-o-n-b-o-y--here on behalf of the Douglas County Domestic Violence Coordinating Council. As several people have commented, there is money at stake here. It's always kind of unsettling when the federal government attempts to extort behavior from states with money, especially funding that is used for such a beneficial purpose, and you've heard a lot about that. In Douglas County, this has been extremely beneficial, and helps support a program which has seen a reduction in domestic violence homicides since the inception of this grant and its implementation, from six to seven a year down to where it's about one or two a year. It has been dramatically successful and continues to help victims in the county. That money would be at risk if this law or something similar is not passed by the end of the year, and you've heard a lot of those sorts of things. That risk is real. And the good news about this particular situation is that this is a fairly beneficial law in terms of public policy. The idea of notifying somebody that they can be federally prosecuted if they're convicted is important. I think as Senator Lathrop pointed out, probably from his criminal experience, people plead guilty sometimes just to get rid of cases or they feel remorseful or whatever reason; walk out of the courtroom and think that they're done with the matter if nobody tells them that they are now tantamount to a felon in terms of federal prosecution for possession of a gun or ammunition; that they might be later prosecuted without realizing that they've put themselves in that position. And I think

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Senator Chambers correctly pointed out in the very first change there on page 3, where it talks about you "may" be prosecuted for a violation. It probably should say to "knowingly" ship or transport or "knowingly" receive, which obviously would be necessary, but it might be unclear to a person who could be victimized by somebody just mailing them some ammunition just to get them in trouble because they would have no knowledge of it. So if we're going to tell them what the rules are, it probably ought to be accurate in terms of the legal ramification. The protection order process right now does not necessarily require any kind of hearing or notice to a person served about the firearm ramifications. This would require a hearing. I think it might be troubling, and it certainly was an issue with the bar association as to whether this might change or increase the burden on the courts in terms of these required hearings. Now, there are thousands of such orders each year. Not all of them--in fact, not the majority--have hearings, so that would be a substantial change. But ultimately there would not be a downside to this law, as often is the discomfort with money that is tied to some state action, and I would urge this group to advance this bill for the benefit of victims and to continue the funding that's been so well-used. [LB1025]

SENATOR ASHFORD: Any questions of Marty? The hearing has many purposes. I mean, one is, it brings the parties together, potentially, assuming that other party shows up, so there is some benefit just to that I suppose. [LB1025]

MARTY CONBOY: A lot of the time the matters can be resolved. And, of course, sometimes the failure to appear by one party or the other can allow the judge to make a decision about the sincerity of the matter. So that happens from time to time, as well. [LB1025]

SENATOR ASHFORD: And maybe someone has already answered this, but of the protection orders that are issued how many hearings actually occur? [LB1025]

MARTY CONBOY: Actually we have tremendous statistic-gathering through the Domestic Violence Coordinating Council, and I'd be glad to provide to you and to the committee some... [LB1025]

SENATOR ASHFORD: Okay. But this would certainly increase that. [LB1025]

MARY CONBOY: We can show how many were filed, how many granted, and a fairly good breakdown of how these things work currently. [LB1025]

SENATOR ASHFORD: So there is a...aside from the federal funds, there is another...there are many other positive...there are other positives to this. [LB1025]

MARY CONBOY: Yes. This is not...I don't see a downside in terms of the implementation of justice. [LB1025]

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SENATOR ASHFORD: Great. Thanks, Marty. Any other questions of Marty? Thank you, sir. Proponents? How many proponents do we have? I guess I asked that once. Do we have more? Okay. One more. Great. [LB1025]

PAM PERRY: Good afternoon. Pam Perry, P-e-r-r-y, with the Nebraska Domestic Violence Sexual Assault Coalition, and I just would like to give you a few more pieces of information related to the proposed legislation. And first of all, I need to tell you that when this grant certification requirement was first communicated to us, my initial reaction and a lot of us who are in the business of advocacy was, well, too bad, we can't do it, because we were very pleased with the way our current protection order process works, and we were concerned that fewer domestic violence victims would file a protection order, knowing that they might be more likely to face their abuser in court. But after working this through...I mean, we figured out it's just going to challenge us more, you know, as advocates to provide for that protection and to work through a coordinated response the very process we've been talking about to provide for that safety, and also looking at the significant risk to victim safety by losing over a million dollars. And when I looked specifically at what that million dollars goes to, I thought you might be interested to know that according to the information from our Nebraska Crime Commission, this money actually funds 35.25 FTE. Part of them are full-time staff and some are part-time staff, so 51 employees. And as was mentioned, that's advocates, law enforcement, probation, batterers' intervention programs, and other court personnel and prosecution. So we determined we needed to do whatever we could to try to come up with a strategy that would be acceptable at the federal level. It would be a compromise certainly. I know the court system is concerned about their scheduling. But we feel that we've come up with the best solution we can while not compromising victims' safety. One of our other concerns is that our programs are facing some significant cuts in federal dollars this coming year, not just our programs but some of these very partners we're talking about in law enforcement and victim witness units, probably over the half-million dollars. So to have this loss of funds on top of that would just be extremely problematic and really would jeopardize victims' safety. And I just wanted to mention that, Senator Chambers, I think you alluded to the concern about are we really going to be able to implement something to take away firearms when needed. And when we talked about crafting this legislation, we wanted to make minimal changes, as few as possible, to be in compliance, to not lose the federal dollars. But we know that in the future that's an issue we're going to have to come back to, because this really intends to keep victims safe by being able to confiscate those firearms, which right now we really don't have sufficient provisions for. So any questions you would have I would sure be glad to answer them, but appreciate your support for this and would like to see it voted out of committee ASAP. [LB1025]

SENATOR ASHFORD: Okay. Thank you. Any other questions? Any questions? Seeing none, thanks. [LB1025]

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PAM PERRY: Okay. Thank you. [LB1025]

MARCEE METZGER: Good afternoon. I am Marcee Metzger, M-e-t-z-g-e-r, and I'm the executive director of Voices of Hope here in Lincoln, which is the victims advocacy program that we have been talking about throughout this process. I just wanted to clarify one thing. In our community, 30 years ago, answering the first crisis line call, women were charged. Women were...the whole system was not coordinated in any way. Prosecutors weren't talking with law enforcement. Law enforcement wasn't talking to the victims. The defense attorneys were becoming involved in stopping the process from going forward. There were no shelters. There were no domestic violence programs. There was a rape line in our community because it was started on campus by individual rape victims. And so it was critical that as our community response came forward, that we saw women's--and I saw women, having done this work this long--lives saved by this coordinated response. I wanted to also answer Senator Chambers' question in terms of watching how this statute came down or this language came down for this bill. The "may" was put in there because in that federal statute there is a provision for individuals who are law enforcement and carry weapons, to be able to continue to carry those on the job. And so some of how they were trying to respond to the fact that they may be responsible or not, was in response to that particular provision in that law. Now, I'm not sure how to clarify that more here, but I do know that that was the discussion in relationship to putting "may" or "shall" into that provision. [LB1025]

SENATOR ASHFORD: Thank you, Marcee. [LB1025]

MARCEE METZGER: Thank you. [LB1025]

SENATOR ASHFORD: Other proponents? Opponents? Neutral? Senator Judge. That was what I said last time, wasn't it? I just want to be consistent, Your Honor. [LB1025]

STEVE BURNS: Good afternoon. My name is Steve Burns, B-u-r-n-s, and I'm here on behalf of the Nebraska District Judges' Association. As has been mentioned earlier, we are concerned with the impacts of a couple of aspects of this bill on judicial resources. I want to take a moment to address those. From that standpoint, there are apparently two things that are being done in this bill. One is it appears that they are eliminating one of the three options that we have when a protection order is applied for. We can either issue the protection order ex parte, which means the order goes into effect without hearing unless the defendant requests a hearing later; we can issue what's called an order to show cause, which means we're not issuing the protection order but we're scheduling an evidentiary hearing at which the parties appear; or we can dismiss the complaint. The bill appears to eliminate our second option, and that's a concern that we had. We've had a lively debate amongst the judges the last couple of days as to whether or not that does it, and it does appear that that's what's happening. So that's a

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concern to us because that's a very useful tool. The second thing it does is to require a hearing in 100 percent of the cases that are filed. That includes those cases which come in, which on the face of the complaint clearly do not qualify for a protection order; for instance, a domestic abuse protection order request where there is clearly no statutory relationship between the parties. In those cases we will dismiss the complaint without further hearing, but under this bill that's going to require a hearing. Now, in the short time I've had available to prepare for this, I visited with the judges in Douglas County, as well as looking at our Lancaster County statistics. In Douglas County, in 2007, there were 3,261 applications made for a protection order, and in Lancaster County there were 1,280 applications made. That totals 4,541 applications for protection orders made. Douglas County keeps statistics on this. Lancaster County does not. But apparently in Douglas County about 30 percent of those cases actually end up in a hearing. And... [LB1025]

SENATOR ASHFORD: How much...? I'm sorry, Judge. [LB1025]

STEVE BURNS: About 30 percent. And I've got my one minute and I know I am not going to complete...just do what I can. [LB1025]

SENATOR ASHFORD: Well, just feel free to be judgelike (laughter) and finish. [LB1025]

STEVE BURNS: I'm lecturing my lawyers all the time about being brief. (Laugh) But if I might, what we're looking at here, Lancaster County feels that's a little bit high in terms of the number of hearings that we actually conduct. But even if you accept the 30 percent figure, that means there are approximately 1,360 evidentiary hearings in these two counties each year on protection orders. Now, if this bill goes into effect, that would increase the number by 3,181 under its current language. If you say that, on average, we can get rid of the case in one way or another by an evidentiary hearing in about an average of 15 minutes; that's going to mean some people don't show up and it's a short hearing; that means, as I had on Wednesday, an hour-long hearing where there is an evidentiary dispute in one of these. But if you take 15 minutes, that increases the amount of time for the judges, the district judges in these two counties alone, by 50 hours per year. We know that judicial resources are tight, and what we are asking for is, that as you consider this bill and as you consider other bills that impact the judiciary, that you take into consideration the impact on those resources and make some evaluative decisions as to how those resources can be effectively used. We're taking a neutral position on the bill but we want to make sure that you are aware of the impact on the judiciary from this bill. Sorry to have gone over. [LB1025]

SENATOR ASHFORD: No. [LB1025]

STEVE BURNS: Any questions? [LB1025]

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SENATOR ASHFORD: Any questions of Judge Burns? I just have one question. If we...in LB1014, which is the court's bill that's on the floor now--it's a committee priority bill--there is a provision that would expand the jurisdiction of the county court into domestic matters. That might make a difference here. [LB1025]

STEVE BURNS: The county courts already have jurisdiction in this area. [LB1025]

SENATOR ASHFORD: But do they hear the protection order cases? [LB1025]

STEVE BURNS: Yes. [LB1025]

SENATOR ASHFORD: They do in Lancaster County? [LB1025]

STEVE BURNS: Yes. Historically, I think that's been--and there are probably people here who have statistics that are better than I--but I think somewhere in the neighborhood of 30 percent. I think that percentage is going up in terms of the percentage of cases that are going to county court as opposed to district court. [LB1025]

SENATOR ASHFORD: Okay, so that... [LB1025]

STEVE BURNS: But the amount of hearings are going to be the same by a judge someplace. [LB1025]

SENATOR ASHFORD: So the 50 hours, that includes county court participation? [LB1025]

STEVE BURNS: That's... [LB1025]

SENATOR ASHFORD: Increase? [LB1025]

STEVE BURNS: Yes. That's all of the protection orders that are filed. [LB1025]

SENATOR ASHFORD: Okay. Yes, Senator Pirsch. [LB1025]

SENATOR PIRSCH: And thanks, I appreciate your concern there with respect to...you are saying there are instances that would clearly not be applicable to a court, but because of the formality as required, it might unnecessarily tie up the court's time? Could you state again, you would...when you were starting out--and I apologize, I had to walk out for a second--you said with respect to the second option, it would... [LB1025]

STEVE BURNS: Be ordered to show cause. [LB1025]

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SENATOR PIRSCH: Yeah. Which...you had, I think, mentioned three options, and you said, with respect to the second, it would limit it. What was that in reference to again? [LB1025]

STEVE BURNS: That's in reference to the option where we look at the complaint, and there is enough there that we have concern but for one reason or another there isn't...perhaps there isn't anything there that suggests an emergency where we would do it ex parte, so we'll schedule a hearing at a later time. [LB1025]

SENATOR PIRSCH: Very good. Okay. I just (inaudible). [LB1025]

SENATOR LATHROP: Very good. Thanks, Judge. [LB1025]

STEVE BURNS: All right. Thank you very much. [LB1025]

SENATOR LATHROP: Anyone else in a neutral capacity? Senator McGill waives. That will close our hearing on LB1025. [LB1025]

SENATOR PEDERSEN: We will now open the hearing on LB832. Senator Lathrop will introduce. [LB832]

SENATOR LATHROP: Good afternoon, members of the Judiciary Committee. My name is Steve Lathrop, L-a-t-h-r-o-p, and I represent the 12th District. I am here today to introduce LB832. Increases in international trade has meant more litigation in the interstate context. This means more judgments to be enforced from country to country. There is a strong need for uniformity between states with respect to the law governing foreign-country money judgments. If foreign-country judgments are not enforced appropriately and uniformly, it may make enforcement of judgments of American courts more difficult in foreign-country courts. To meet the increased need for enforcement of foreign-country money judgments, the Uniform Law commissioners promulgated a uniform act in 1962 and a revision of the 1962 uniform act with the 2005 Uniform Foreign-Country Money Judgments Recognition Act. Nebraska has not adopted the 1962 version. LB832 is a revision and an updated 2005 version. That is LB832. I expect that Larry Ruth is sitting behind me who will testify about both the bill, the Uniform Commission, the state bar's position, and the need for some time to work out some differences between the Uniform Commission and the Nebraska State Bar Association. Are there any questions? [LB832]

SENATOR PEDERSEN: Thank you, Senator Lathrop. Are there any questions from the committee? Seeing none, the first proponent please take... [LB832]

LARRY RUTH: Senator Pedersen, members of the committee, my name is Larry Ruth, L-a-r-r-y R-u-t-h, and I'm one of Nebraska's Commissioners on Uniform State Laws. I

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have two hats today. I'm also going to be supplying the position of the State Bar Association. The Uniform Law Commission has a charge to bring to the Legislature acts which may be considered for enactment. Those are the uniform acts from that national conference. I talked with Senator Lathrop about this bill. He agreed to introduce it. I thought that it might be open to appropriate action by the Legislature. After introduction, others interested in the bill had questions and concerns. It's a short session and not enough time to adequately address those questions. We suggest that you hold off consideration of this bill until we have more time for review and possible further understanding by both sides, so I appear in a neutral position on behalf of the commission. However, on behalf of the bar association, the bar does take a position against the bill because it does need more time to work out what it considers to be some of the issues involved with the act. I'd be happy to go into that, but what I'm asking for is that the bill be held and no action be taken on it at this time. [LB832]

SENATOR ASHFORD: Thanks, Larry. Yes, Senator Schimek. [LB832]

SENATOR SCHIMEK: Thank you, Mr. Chairman. And Larry, I think I heard you say that you would be willing to work on the bill over the interim. [LB832]

LARRY RUTH: Absolutely. Right. [LB832]

SENATOR SCHIMEK: Yes. And I have to say it again, that you did great work for us on another bill earlier, and so I appreciate that offer. [LB832]

LARRY RUTH: We try to bring bills to you that enjoy support from a number of different groups, and that has resulted in about 55 or 60 bills enacted in this state which are uniform across the country; the Uniform Commercial Code perhaps being the signature one. [LB832]

SENATOR ASHFORD: Thank you, sir. Oh, Senator Pirsch. [LB832]

SENATOR PIRSCH: And just briefly, I understand that there's some talking to be going on now, but just as far as background, right now is it kind of more of a piecemeal approach towards recognizing judgments of other, say, you know, other nations? Is it...? [LB832]

LARRY RUTH: As I understand it, yes, it is. [LB832]

SENATOR PIRSCH: A case-by-case analysis the court conducts where they do kind of an initial screening whether or not the court in the foreign jurisdiction in question has certain safeguards, so to speak, or is close enough to our system such that we should grant that judgments of credence? [LB832]

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LARRY RUTH: I think that is what the bill would do is to go in that direction. Part of the difference of opinion with some folks is that we should be looking at whether or not the other country is reciprocal and enforces our judgments, and that's been a kind of an active discussion--in other words, don't do it for a country unless they do it for ours--and that's what has to be discussed. [LB832]

SENATOR PIRSCH: I see. Well, I won't get into it so far, but right now there is no requirement of reciprocity, is there? And so... [LB832]

LARRY RUTH: No, not that I know of. [LB832]

SENATOR PIRSCH: It's only that case-by-case analysis, so to speak of... [LB832]

LARRY RUTH: I don't know for sure how it's done except that it is not done uniformly. There are 32 states that do it under a uniform act. Nebraska is not one of those, and that's why we thought that it would be a good idea to bring Nebraska in this direction of doing an analysis of the other states' jurisprudential system and whether or not there is due process and whether they are courts of integrity. [LB832]

SENATOR ASHFORD: Thanks, Larry. [LB832]

LARRY RUTH: Thank you. [LB832]

SENATOR ASHFORD: Any other testimony? Senator Lathrop. Senator Lathrop waives. Senator Pedersen, LB942. [LB832]

SENATOR PEDERSEN: Thank you, Senator Ashford and colleagues on the Judiciary Committee. For the record, I am Senator Dwite Pedersen, representing the 39th Legislative District, and I'm here today to introduce to you LB942. This bill is really very simple. Current law provides in Section 83-1,121, that the Parole Board may at any time revoke the parole of an offender and recommit him or her to the Department of Correctional Services with or without cause. This bill removes that very broad language and inserts language that states that the Parole Board may revoke parole if, after a hearing, the board finds substantial evidence that the parolee has violated one or more conditions of his or her parole. As I understand the process, the current Parole Board does hold parole revocation hearings, but this bill simply makes it clear in statute that before a parolee loses his or her freedom the board must hold a hearing and show at least substantial evidence that the parolee has actually violated the conditions that were set out when they were allowed to be released on parole. I hope you will agree that there should be at least some evidence that the conditions were not met before we take a person's hard-earned freedom away, and therefore I hope that you will support LB942. Any questions, I'd be glad to answer them for you. [LB942]

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SENATOR ASHFORD: Any questions of Senator Pedersen? Seeing none, thank you. Proponents of LB942. If you would just come on up and sign in at the desk, and you can be next. Yes, sir. [LB942]

ROBERT CREAGER: Senator Ashford, members of the committee, my name is Bob Creager, C-r-e-a-g-e-r. I appear today on behalf of the Nebraska Criminal Defense Attorneys Association. Senator Pedersen is quite correct: What the Parole Board actually does is comply with simple notions of due process. I think it's fair to say that the courts have ruled, over time, that one doesn't have a right to parole or a right to a process for the grant of parole, but once one has received parole, fundamental due process requires certain things to exist before that parole can be revoked. Obviously, this bill does what law requires; that is to simply have good cause. I don't think we like to act arbitrary and capriciously by design and a process for a fair hearing with some substantial evidence to support the revocation, so we think this is a sensible bill. It closes a hole in what might otherwise be in the law, and we support it. And I'll be happy to answer any questions you may have about it. [LB942]

SENATOR ASHFORD: Any questions? Senator Pirsch. [LB942]

SENATOR PIRSCH: Is this a question where right now arguably your belief is the constitution would say due process does attach, and so that should be the way, and so we're just codifying that which is really the state of the law anyhow? Or is this...or is there a...or is this the approach that says...really, and I get the sense that this isn't the approach but tell me if this is correct, that due process doesn't legally apply to these type of situations; that it is based upon a grace kind of analysis, and to the extent that they change things, then that would just be by legislative fiat. And so I guess I'm wondering, is the constitution guiding us to this result so that we're changing the language to be in accord with the constitution, or is this just a matter that the Legislature has full discretion on deciding? [LB942]

ROBERT CREAGER: I don't think it's a matter of discretion. There may be a legal debate in the community about what level of due process attaches; you know, what kinds of hearings, right to counsel, right to confront accusers. There may be questions about the degree to which you have a hearing and an impartial decider and relevant facts. But I think due process clearly attaches, in my judgment, to the revocation process. It does not attach to the grant process. Whether to grant parole is an act of grace and you can't appeal it and you can't take it to court or complain about you didn't have a lawyer. But once you've been given the property right of parole, the statutes and the procedures to revoke it must have some semblance of due process. And I guess I don't know...maybe Senator Pedersen has the history as to why they would have drafted a statute that says at any time for no reason without a hearing we can just do this. There may be some antiquated argument, some days gone by, that that seemed fair, but I think whether it's because of the constitution or fundamental fairness, either

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way you get to the same result; that is, what's wrong with having a reason and having a hearing. [LB942]

SENATOR PIRSCH: Sure, and I appreciate that answer. The other question that I had is deals with the term...and this is on the introducer's statement of intent. I'm not sure if that's actually included in the bill. I haven't looked at the green copy. But it says "if the board finds substantial evidence that the parolee has violated one or more conditions." Is that term "substantial" used? I mean, is this is a new term, so to speak, or does it...is that term used in other statutes or...? [LB942]

ROBERT CREAGER: That term is a term of art within the law, so it has a legal definition. Substantial evidence means significant evidence. We talk about the preponderance of the evidence as being a weighing mechanism, but we don't talk about what kind of evidence meets the burden. So I don't think we're talking here about hearings that comport with the hearsay rules and so you can get some sort of evidence that somebody said that somebody said that somebody said that this guy violated his parole. And you can say, well, there was some evidence that he violated the parole but we wouldn't consider that to be substantial enough to support that the violation occurred. [LB942]

SENATOR PIRSCH: Right. Would you say substantial is somewhat a lesser standard though than preponderance of the evidence? [LB942]

ROBERT CREAGER: Like I said, I may have to defer to Senator Pedersen on the history behind it. The parole hearings that I've conducted or that I've participated in, they make findings of fact, and that finding of fact can be something as simple as it occurred or that is we believe it more likely than not that it occurred, and that's a preponderance of the evidence. I don't think this is different than that. I just think that what this intends to say is that the evidence that establishes that burden has to be more than something insignificant. I can give you an example, like I did, that there is only one piece of evidence against the defendant, and that is a hearsay statement, twice removed, by an anonymous source. On the preponderance of the evidence theory, there would be some evidence that he did and no evidence that he didn't, and you could say that therefore the complainant has met its burden of proof. But one might say that may be true in the technical sense but that piece of evidence itself is of so little weight or lacking in substance that we wouldn't use that type of evidence to revoke somebody's hard-earned parole. So if there is more to that debate, I don't know it, but that's my experience on it. [LB942]

SENATOR PIRSCH: Yeah. I'm just trying to figure it in the scale of things, differing stand...you know, beyond a doubt, and I mean beyond a reasonable doubt, and then there's clear and convincing and a number of different ranges. I'm just trying to get a sense of what that may be. But I think you've talked about that, and so I do appreciate it.

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[LB942]

ROBERT CREAGER: I don't think that deals with the burden; just the nature of the evidence though. [LB942]

SENATOR PIRSCH: Sure. [LB942]

SENATOR ASHFORD: Thanks, Robert. [LB942]

ROBERT CREAGER: Thank you. [LB942]

SENATOR ASHFORD: Hello. [LR942]

GREGORY TYRRELL: This is the first time I've done this, so bear with me a little bit. [LB942]

SENATOR ASHFORD: Well, we're pretty easy. [LB942]

GREGORY TYRRELL: Good. My name is Gregory Tyrrell. I am currently on parole, and so I have, obviously, a vested interest in this law. In fact, I approached Senator Pedersen about passing this law, and I have some concerns. My concern is, is I guess the archaic nature of the way the law is now, with or without cause. Without cause obviously means that parole can be revoked for no reason. I guess that the Parole Board would probably, if they were here, would say that there is no concern because they obviously are not going to just pull someone's parole for no reason. However, Nebraska has a very interesting history in the parole procedures. Senator Chambers may recall that there...actually there's a famous case by the name of Nebraska Inmates v. Greenholtz, and it was under that case that a lot of the due process procedures were created. And although some were created, there are a number of issues that have not yet been addressed. One of those issues is the standard of evidence used in parole revocation hearings. I appreciate Senator Pirsch's questions and I can maybe address some of those. I do know that there is what is termed the scintilla evidence standard which means basically a very minute standard or some; the next standard would be substantial evidence; the next standard above that would be preponderance of the evidence; and then the standard that's used in criminal hearings is the evidence beyond a reasonable doubt, of course, so. At least this bill would raise the standard to substantial evidence, and it is interesting to note, I think, that this is the same standard that's used in prison disciplinary hearings. In 1993, a law was passed under LB455, which raised the standard of evidence, which changed the procedures in prison disciplinary hearings. I guess part of my argument for changing this law is if the standard of evidence for prison disciplinary hearings is substantial evidence, then at least it should be the same for parole revocation hearings. Parole is not a right, however, as previously discussed. There are some due process rights that attach to the

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privilege, and so I guess...and one reason the courts have, in the U.S. Supreme Court Inmates v. Greenholtz, the standard...the reason some... [LB942]

SENATOR ASHFORD: Go ahead and conclude Greg. That's fine. [LB942]

GREGORY TYRRELL: Okay. The reason some due process standards were created is it was because the Supreme Court realized that once an inmate is released on parole, obviously there is some vested interests that not only the inmate has, but society; for example, a family, employers, and others that the inmate who is trying to interact with society, you know, get his life straightened out, has kind of intertwined his life with theirs. So I guess it's not just the inmates but those that he interacts with. So that's all I have to say. [LB942]

SENATOR ASHFORD: Thanks, Greg, very much. Any questions of Greg? Thanks. [LB942]

SENATOR PIRSCH: Just very helpful. Thank you. [LB942]

SENATOR ASHFORD: (Also Exhibit 4) Okay. We're still on...opponents? Neutral? Senator Pedersen. [LB942]

SENATOR PEDERSEN: I'll waive on that one. [LB943]

SENATOR ASHFORD: Okay. And you have the last bill, LB943. [LB943]

SENATOR PEDERSEN: Thank you, Senator Ashford and colleagues on the committee. For the record, I'm Senator Dwite Pedersen, representing the 39th Legislative District. LB943 is a bill that was brought to me by a friend of mine, probation officers, and it would provide for the release of digital photographs taken for driver's licenses, to probation and parole officers. Current law limits access to the Department of Motor Vehicles photographs to federal, state, and local law enforcement agencies, and to other states' driver's license agencies. Because protecting an individual license holder's privacy is so important, the law provides that any officer requesting the information shall verify the purpose for requesting the information, and provides that, if the information is misused, the employee shall be subject to a Class IV felony and removal from office. Probation officers say that they need the photographs in order to identify probationers and parolees; to identify victims, particularly in protection order cases; and to identify persons with whom probationers are not allowed to associate. There is an officer here today who works in the field, a friend of mine by the name of Chris Morfeld. He has been with the Probation Office some years and he will articulate the need for this bill. If you have any questions of me, I would try and answer them for you. [LB943]

SENATOR ASHFORD: Any questions of Senator Pedersen? Thanks, Senator

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Pedersen. Proponents. [LB943]

CHRISTOPHER MORFELD: Good afternoon. My name is Chris Morfeld, M-o-r-f-e-l-d. I have been a Nebraska state probation officer for almost seven years now, and I'm attached to the domestic violence unit in District 4. I'm not used to public speaking, and I'll try and make this short because I know everybody wants to kind of move on. Senator Pedersen pretty much let you know why we need this, why I believe we need this and I asked for this bill to be written. It's...we do have something called NCJIS. I don't know if everyone is familiar with that, but it's kind of a cooperative effort amongst law enforcement agencies, including probation. And we are supplied with some photos. I would say probably 70 percent of the time we're able to get booking photos. Unfortunately, the other 30 percent or estimated at 30 percent, I don't know why we can't get those. We are able to get information about victims and probationers, however the photograph is the only thing that we are not able to access on that NCJIS computer program. Being attached to the domestic violence unit, when we go into homes and, first of all, we don't know who we're looking for. If Senator Chambers had his way, we would be looking for the guy with no hand on one of his wrists as he spoke of earlier. But honestly, seriously, it is difficult to tell sometimes who's who. For our safety, I think it's important that we know who is in the house. If it's somebody that is a former codefendant and we know they are bad news, we need to leave. Our safety...you know, we have to look after our safety also. But mainly, since I'm running out of time here, it's the victims is the reason that I am here. Many times, a victim will be either coached or coerced as to, if my probation officer comes over, you're my sister. I don't have any legal right to demand ID from a victim, nor do I really want to, and put her kind of in a victim's position again. If I know who she is, I know there is a valid protection order, we can detain him or arrest him for violation of probation at that time without her being kind of caught in the middle of, do I lie, do I not lie. Maybe she wants him gone. [LB943]

SENATOR ASHFORD: So it's a case where the perpetrator is there, but you can't necessarily...they're not identified as the perpetrator. Is that the issue? [LB943]

CHRISTOPHER MORFELD: Yes. Sometimes it is the perpetrator when we are trying to, for instance, arrest an absconder. But when a victim is present and she has a protection order, we have an obligation to detain him for police so they can arrest him for a violation of a protection order, and we can also...then we arrest them for violation of the probation under our statute. I think it's extremely important that we have these photos for our safety, for not to put a victim in a position to have to answer, who are you, and lie or not lie. And I think it really comes...one thing I want to mention on that, it's something I've kind of had to come to the realization that sometimes victims will lie just because of their...it's kind of the mentality of a victim to sometimes still protect him. And I'll stop. [LB943]

SENATOR ASHFORD: Okay. Any questions of Chris? Yes, Senator Chambers. [LB943]

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SENATOR CHAMBERS: From where would the picture be obtained? From the motor vehicles department? [LB943]

CHRISTOPHER MORFELD: Either through motor vehicles department or through NCJIS. Right now, those photos are available through NCJIS, but we are blocked from those photos. [LB943]

SENATOR CHAMBERS: And what would become of the photo? How long would the parole or probation officer retain the photo? [LB943]

CHRISTOPHER MORFELD: Our files are, I believe, scanned, and then shredded, ultimately. [LB943]

SENATOR CHAMBERS: After how much time, though? [LB943]

CHRISTOPHER MORFELD: You know, I can't answer that, Senator. [LB943]

SENATOR CHAMBERS: Okay. That's all that I have. [LB943]

CHRISTOPHER MORFELD: I don't think it's very long. [LB943]

SENATOR CHAMBERS: Thank you. [LB943]

SENATOR ASHFORD: Thank you, Chris. [LB943]

CHRISTOPHER MORFELD: Thank you. And it was my pleasure to speak here today. Thank you very much. [LB943]

SENATOR ASHFORD: Well, we thank you for coming down. Any other proponents? Opponents? Senator Pedersen. [LB943]

SENATOR PEDERSEN: I would just add, in closing, that if we give probation this privilege, they would be held under the same current law that if misused, you know, that they would have...be subject to lose their job and a Class IV felony. Thank you. [LB943]

SENATOR ASHFORD: Thank you. [LB943]

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Disposition of Bills:

LB832 - Held in committee.
LB942 - Held in committee.
LB943 - Advanced to General File.
LB1015 - Held in committee.
LB1025 - Advanced to General File.

Chairperson

Committee Clerk