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Judiciary Committee  
January 28, 2009

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[LB155 LB244 LB276 LB277]

The Committee on Judiciary met at 1:30 p.m. on Wednesday, January 28, 2009, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB276, LB277, LB244, and LB155. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Mark Christensen; Colby Coash; Brenda Council; Scott Lautenbaugh; Amanda McGill; and Kent Rogert. Senators absent: None.  
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SENATOR ASHFORD: Good afternoon, everyone, and welcome to the Ernie Chambers Judiciary Hearing Room. My name is Brad Ashford. I'm from Omaha. Senator Coash is here from Lincoln; Senator Christensen from Imperial; and Senator Lautenbaugh from Omaha; Senator McGill from Lincoln; Senator Lathrop from Omaha; Senator Rogert, in the green tie, from somewhere south of here somewhere (laughter)...or north--actually it's north--so, in any event, from Tekamah. But thank you all for being here. We have four bills; very interesting topics today. What we will do is most of you, or some of you, at least--at least Corrie has been here before and knows kind of the ground rules. We have a light system that gives everybody a little warning when we'd like you to sum up with the yellow light, and give you three minutes or so to give us your presentation, not counting questions, so we will do that. You are aware, most of you, hopefully, of the sign-in sheets at the--where are the sign-in sheets? I always get those confused--okay, that we get the sign-in sheets signed and...okay, we'll just put the sign-in sheet at the corner of the table and the page will pick it up. And I see Senator Council is here. Welcome to her. All right, let's start with Senator Nordquist, LB276. Welcome. [LB276]

SENATOR NORDQUIST: (Exhibit 1) Good afternoon, Chairman Ashford and members of the committee. My name is Jeremy Nordquist and I represent District 7 in Omaha. LB276 is the result of years of experience by those fighting graffiti in our communities, as well as the findings of this committee in an interim study resolution, LR333. That study was brought by my predecessor, John Synowiecki. This is a comprehensive bill that represents the best of that study. It seeks to aid our communities by increasing and broadening penalties for graffiti and establishing graffiti as a state crime. Repeat offenders would face stronger penalties, and defendants found to be advancing the interests of gangs would also see enhanced penalties. This bill also gives judges more flexibility, such as the ability to order restitution, order counseling, or to suspend a defendant's driver's license. For graffiti causing less than \$500 damage, a defendant would be guilty of a Class III misdemeanor on their first offense, Class II misdemeanor on their second offense, and Class I misdemeanor on third and subsequent offenses. For graffiti causing more than \$500 damage, a defendant would be guilty of a Class II misdemeanor on their first offense, Class I misdemeanor on their second offense, and Class IV felony on third and subsequent offenses. Also, defendants found to be guilty of advancing the interests of a gang with their graffiti would be guilty of a Class I misdemeanor on first offense and Class IV felony on second and subsequent offenses.

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Despite popular perception, it's not only teenagers that are caught defacing property in Omaha and other communities around our state; as we heard from our city prosecutor last October during the interim study, the average age is 22 or 23. Currently, a typical adult conviction in Omaha would result in a month or so of jail time, but sentences generally are shorter than the maximum six month penalty prescribed in Omaha ordinance. In cases of 16- to 17-year-olds, these cases are typically referred to juvenile court. Mr. Chairman, graffiti is a real problem in south Omaha, all across Omaha, and in other communities throughout our state. Graffiti is more than a minor eyesore. It lowers property value and is often evidence of gang-related activity, and threatens to chase businesses and jobs out of affected neighborhoods. Worse yet, graffiti is on the rise. In 2004, by the gang unit in Omaha, there were nine arrests. That number was up to 103 in 2007. Lieutenant Gonzalez of the gang unit is here, and he hopefully will be testifying and can give you some more background on that. But it is certainly time to recognize graffiti as the serious crime that it is. As many of you heard, those that were on the committee at the interim study, there are two types of graffiti plaguing our neighborhoods: gang graffiti, which seeks to send a message to rival gangs, mark territory, and to intimidate and instill fear in our community; tagging, on the other hand, has less insidious intentions, but perpetrators are usually after fame and recognition but their crime still damages property and threatens community morale. Regardless of the type of graffiti, it tends to be a gateway crime; in other words, kids and adults defacing property tend to graduate to more serious crimes. It's often part of gang initiation, and the gang unit has arrested perpetrators with guns in their possession at the time. Omaha typically spends about \$100,000 a year cleaning up graffiti. Their graffiti van gets as many as 1,500 calls a year. They have...the city has enlisted a state-of-the-art tracking company to track graffiti and to determine whether it's gang-related. Omaha has taken graffiti seriously and needs the state to do the same. We can do that by advancing LB276, by increasing penalties for repeat and gang-related offenses. Antigraffiti measures have led to positive results in communities throughout our country, reducing overall crime rates and violent crime rates. One town in particular, Pico Rivera, California, in 2005, had about 15 homicides. After enactment of an aggressive graffiti program, they had eight homicides in '07 and no homicides through the first three quarters of this year. Tim Kephart, of Graffiti Tracker, the company that the city of Omaha has worked with, has done a lot of work with this city and can maybe speak a little bit to that situation. But this is just one example, and I think it speaks to the serious nature of the crime. We are fortunate to have a few of the same testifiers here that were here for LR333, and I asked them to share their expertise with you. It is my hope that LB276 is at least a partial solution to the increasing graffiti and violent crimes that we see in our communities, and ask for your full consideration. Thank you. [LB276]

SENATOR ASHFORD: Thanks, Jeremy. Any questions? Yes, Senator Lautenbaugh. [LB276]

SENATOR LAUTENBAUGH: Thank you, Senator Ashford. Thank you, Senator

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Nordquist, for bringing this. I understand we're increasing the penalties for graffiti. Is that correct? [LB276]

SENATOR NORDQUIST: That would be correct. Right now, most of the time they're charged under city ordinance. However, I've got an article here from the Journal Star from October. They charged, under the state's criminal mischief statute, which, right now, depending on the amount of damage, does carry a felony for that. So it depends. Most of the time, in Omaha, they are charged under the city ordinance. [LB276]

SENATOR LAUTENBAUGH: Okay. Would this give them some additional tool to prosecute graffiti then? [LB276]

SENATOR NORDQUIST: It is. That's our hope, and I hope the committee can work with us to create a comprehensive approach that gives some flexibility to the bench--a wide variety, enhance penalties. It's not a felony on first offense. If it's not gang-related, if it's just taggers out causing damage, it takes a third offense to get to that level. If it is gang-related, it takes a second offense. So it gives them tools there. It gives them the tools to order restitution, to order the perpetrator into counseling and also potentially take their driver's license for a year. [LB276]

SENATOR LAUTENBAUGH: Are we on solid ground when we get to the intent of the graffiti and try to, I guess for lack of better word, enhance the penalty because we think we know what it means? [LB276]

SENATOR NORDQUIST: Well, I would leave that up to the, hopefully, some folks testifying after me that can speak to that and how they do it now and how they determine if it's gang-related and kind of the science behind that. But I think...and it would be up to the prosecutor to make that case to get to those elevated penalties. [LB276]

SENATOR LAUTENBAUGH: Thank you. [LB276]

SENATOR ASHFORD: Thanks, Jeremy. I just would...first of all, I thought that the hearing we had this year, this fall, was extremely helpful to me. Lieutenant Gonzalez and many of the people here today were there at that hearing. One of the things that I recall from that hearing is that many of these episodes of graffiti occur or they are repeat individuals who are repeating doing these acts, in many cases; at least that's the impression I received from that hearing. Is that your recollection of that? [LB276]

SENATOR NORDQUIST: Yeah, certainly. And just this Journal Star article, and I can get a copy for the committee--it's from October--a kid that was picked up last year for tagging the State Capitol, and a hotel downtown, cost what they estimated at \$20,000 damage to a downtown hotel. He was picked up at the age of 15, in 2001, for graffiti,

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and was picked up at 23 years old just this last year for the same problem. One of the things that you might remember from the hearing--it's just a story that stuck with me, and maybe Lieutenant Gonzalez can speak to this--there was a minor picked up in the middle of the night, 2:00 in the morning; ticketed; taken to his home. A half-hour later, watching the same building, picked up the same kid tagging the same building. That's certainly a problem we have to look at. [LB276]

SENATOR ASHFORD: So maybe we can intercede there. Yes, Senator Council. [LB276]

SENATOR COUNCIL: Yes. Thank you, Senator Nordquist. We all share a concern and a desire to eradicate graffiti, but one of the concerns I have is--and I think Senator Lautenbaugh has touched on it--and maybe Lieutenant Gonzalez would be the better person to answer the question, is the distinction between gang graffiti and taggers. And we characterize taggers, and sometimes these are first offenders, for lack of a better term. And I'm just thinking about the situation that occurred in the Millard area where a loosely associated or affiliated group of people who had no...there was no evidence of any involvement in criminal activity which would result in the, I guess, technical identification as a gang, did engage in some graffiti. And the issue there was whether it was gang graffiti or just tagging. I mean, that's one of the concerns that I have, because, I mean quite frankly, and you have indicated in your testimony that one of the primary purposes for this legislation is to enhance the penalties for graffiti. And my concern is to not...to lump all of these potential offenders into a category that could lead to, you know,... [LB276]

SENATOR NORDQUIST: And that's certainly my hope, too, as well, that we could make that distinction. And part of the system that Omaha uses--and they might be able to shed a little light on this--it looks, nationally, at what's going on: symbols and things. And they kind of use that to determine whether or not this is used to advanced... [LB276]

SENATOR COUNCIL: Okay, because I...and whoever that is, because that's one of my questions when I was looking at your testimony, this state-of-the-art technology with Graffiti Tracker and how does it determine if it's gang-related? [LB276]

SENATOR NORDQUIST: That's right, and I hope we can get some more information. And I want to work with the committee to alleviate any concerns on that and make sure you have a full understanding of it. [LB276]

SENATOR ASHFORD: Thank you, Jeremy. [LB276]

SENATOR NORDQUIST: Thank you. [LB276]

SENATOR ASHFORD: I neglected to welcome Councilman Gernandt here, who is

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here. Are you next, Councilman? [LB276]

GARRY GERNANDT: I could be. [LB276]

SENATOR ASHFORD: Okay. Well, I was going to welcome you anyway, even if you weren't next, but come on up. [LB276]

GARRY GERNANDT: Good afternoon, Mr. Chairman, Senators. Thank you for allowing me to testify today. My name is Garry Gernandt, G-e-r-n-a-n-d-t. I'm the city councilmember from District 4, which is south Omaha. Typically, the boundary is 72nd Street to the river, Martha to the Sarpy County line. This can of spray paint is as harmless as anything right now, just sitting on this table or on the counter of a hardware store. But in the hands of a violator, it becomes criminal mischief and can destroy property. This...I'm not here just for the city of Omaha, I'm not just here for south Omaha. I can tell you that this is happening across our great state of Nebraska, and we need more effective tools. And I'm here in support of LB276 today, as not just the skill saw or not just the pliers. I think this could possibly be the Black and Decker wall, and make some accountability that is definitely needed, I think, with our young people today. And I'll explain if I could share a story with you. On January 8 of this year, I was working my district, and I drove up on some graffiti in progress at 36th and Grover Street. Called 911, and within five minutes the violator was apprehended by law enforcement. He was a 17-year-old white male. As I know today, is that he's not really affiliated with a gang. He is, was known as a tagger. But what I found interesting is, is that his statement to the officers, which I happened to overhear, was I don't have to be accountable to anybody. But I think LB276 brings some of that accountability into play as a good tool, and I would urge you, urge you, to support this bill and get it out onto the floor for some more discussion. I think we're in some quicksand across the state, but I believe LB276 provides some of that solid ground that is needed. Thank you. [LB276]

SENATOR ASHFORD: Thank you, Garry. Any questions of Councilman Gernandt? Yes, Senator Lautenbaugh. [LB276]

SENATOR LAUTENBAUGH: Thank you, Senator Ashford. Thank you, Councilman Gernandt. Really, the same question: Does it bother you that in this bill we're distinguishing between...we're trying to divine the intent of the "graffiti-ist," if you will, and charging him, possibly differently, as a result? [LB276]

GARRY GERNANDT: Does that bother me? [LB276]

SENATOR LAUTENBAUGH: Yes. [LB276]

GARRY GERNANDT: No. [LB276]

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SENATOR LAUTENBAUGH: Can you elaborate any? [LB276]

GARRY GERNANDT: I'm known in Omaha for short answers, okay? [LB276]

SENATOR LAUTENBAUGH: Oh, you're the one. [LB276]

GARRY GERNANDT: Yes. Yes, I'm the one. But at times I do get results. We have to start somewhere, Senator, and I think what came out of our Judiciary hearing held in Omaha awhile back, this is the best approach. And if we don't start with, I believe, the larger piece of the puzzle, which this aims at, I think we'll be creating more of that quicksand as opposed to getting to the solid ground which you referred to, sir. [LB276]

SENATOR ASHFORD: Thank you, Senator Lautenbaugh. Any other questions? I will applaud you, Councilman Gernandt, because--Garry--because I think you have made progress, and in that hearing that was clear; that the efforts, with a small force--Lieutenant Gonzalez only has a couple of people on his team, I believe--I think that there has been significant progress, which is a good reason to then maybe, to deal a little more aggressively on the state's side with it. I mean, it's not as if you've sat back and nothing has happened, because it has. I mean, you've made some good strides in your district and all over the city, so. [LB276]

GARRY GERNANDT: Thank you, sir, and I think we've made some significant progress, even though they may be in the form of baby steps. [LB276]

SENATOR ASHFORD: Right. [LB276]

GARRY GERNANDT: But if we... [LB276]

SENATOR ASHFORD: But you're not sitting back... [LB276]

GARRY GERNANDT: You have to walk before you can run. Is that right? [LB276]

SENATOR ASHFORD: You're not sitting back, I don't believe, so I think that's good. Thank you. [LB276]

GARRY GERNANDT: Thank you very much. [LB276]

SENATOR ASHFORD: Any other testifiers on LB276? Marty. [LB276]

MARTY CONBOY: Good afternoon. [LB276]

SENATOR ASHFORD: Welcome. [LB276]

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MARTY CONBOY: Mr. Chairman, members of the Judiciary Committee, my name is Marty Conboy, C-o-n-b-o-y. I'm the city prosecutor in Omaha, and here to testify in support of LB276 on behalf of the city of Omaha; also on behalf of the County Attorneys Association of Nebraska. And I can tell you, as a prosecutor, this bill will do several things. First of all, I think it updates the law as it applies to damage to property. Historically, we've had laws against things like theft, but as credit cards and technology advanced, we added statutes that addressed those specific new crimes. We're not talking about people spraying "Class of '75" on the water tower. This is something that has become prevalent and it means a lot more, both to the victims and to the offenders, than it did as just mere criminal mischief. It not only updates the law but I think it gives the Legislature a chance to make a statement, to say that we recognize the specific crime of graffiti and that it is a problem in the state of Nebraska. The numbers of offenses, I think the high-water mark we've had is about 104 in a year for arrests; I think about 70 last year. Many of them were juveniles. Many of them are in that age group where they're 16, 17 years old, and many of them are taggers. They run the whole spectrum from just goofy teenagers to very serious hard-core criminals. Last week--just in the last week--there have been two news reports: one of a woman who went to bed and found graffiti on her front porch in the front of her house. She woke up the next morning; her house was shot up 17 times. Another report that aired yesterday is a video of some kids putting graffiti on a wall, and they stopped and took their pictures to kind of...you know, the triumph of having marked these walls. And that bravado and that confidence I think is something that needs to be addressed: this impunity that they seem to work with. This bill does not require any particular penalty. I think it's good that it gives the court some latitude for some new penalties, including cleaning up the graffiti, to replace that bravado with maybe a little humility and embarrassment, publicly, in the neighborhoods where they live and work with their graffiti. It also gives the court some opportunities to take the driver's license, which with younger people is a far more feared sanction than most others. It doesn't require that they do that; it only gives them the opportunity to do that. It does challenge the court. It certainly challenges prosecutors to prove the gang-related aspect of this. It is often proved simply by the comments made by the taggers themselves, not only the nature of their graffiti but the admissions that they make when they're apprehended. They're usually pretty bold about it, frankly. That's...but again, even if we can't prove the gang-related aspect of it, there is still criminal mischief, and these statutes do permit the enhancement which would now address the most serious chronic offenders, which right now there is no way to address. And finally I guess I would just add, this is a step forward in trying to convince these people who engage in this crime that it is serious and that we do take it more seriously than we have in the past; that there will be more serious penalties, potentially, for those offenders who repeatedly commit this crime. I'd be glad to answer any questions about the application or the nuts and bolts of this statute. [LB276]

SENATOR ASHFORD: Thanks, Marty, for your comments. Senator Lautenbaugh.  
[LB276]

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SENATOR LAUTENBAUGH: You can probably anticipate the question since you've been here in the room. Making it a different or a greater offense, if you will, or a greater penalty if the graffiti is gang-related. I ask you this question because I don't know the answer. Is there precedence for something like this in our law currently? [LB276]

MARTY CONBOY: Absolutely. We do this with drunk driving when people refuse tests. We do it with hate crimes. We even do it with first-degree murder, depending on the level of intent. So there are elements of sentencing that have to be proved independent of the violation itself, so it would be incumbent upon a prosecutor not only to prove somebody committed a crime of criminal mischief, but that they did it with the defacement as a gang intent or to enhance criminal behavior. So it adds an element of proof that the prosecutor would have to add to the current trial, and that's done in a number of other settings in our laws. [LB276]

SENATOR LAUTENBAUGH: You mentioned in drunk driving prosecutions? [LB276]

MARTY CONBOY: Correct. [LB276]

SENATOR LAUTENBAUGH: In what sense? [LB276]

MARTY CONBOY: Well, in Nebraska, if you commit a drunk driving offense, with a certain level of breath test it becomes a more serious penalty. If you refuse a test and are convicted of drunk driving, the fact that you refused the test can be used to enhance your penalty to another level of penalty. But again, the prosecutor not only has to prove that you're guilty of drunk driving, but also then of this additional factor to reach that penalty. [LB276]

SENATOR LAUTENBAUGH: This, I think, is a little different in that the graffiti could arguably be speech. Is there a difference there? Has this found to be...has this ever been upheld, I guess is what I'm asking: something this specific? [LB276]

MARTY CONBOY: No. And the reason for that is because it, you know, there is a statute here specifically calls upon. It can't...I guess if there's permission of the owner of the property, if you want to go in your front yard and spray paint on the side of your house, "Down with Whales," or something, then that would certainly be your free speech. But if I went to your house and did that without your permission, then that becomes a crime. And so it is, I guess, the freedom from speech that has also been recognized in the law, that homeowners and property owners should be free from other people's exercise of speech that's against their will. [LB276]

SENATOR LAUTENBAUGH: Thinking this through--and I'm not trying to be difficult on this issue, certainly--I understand that you don't have to let people paint graffiti on your



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house because I'd say my First Amendment right to paint graffiti on your house. But I thought we're going one step beyond that and judging the message itself, and making some determination that that requires a greater level of penalty. Has that ever been dealt with in your experience in the law? Are there any decisions that say that kind of thing is okay? [LB276]

MARTY CONBOY: Well, I would say, analogously, there are things that make the nature--again hate crimes probably being the first thing to come to mind. If the message that I purveyed is just a simple threat, then it has a particular level of penalty. But if it is a hate-filled threat, then we, in Nebraska--already in many states, in fact--have a scheme of statutes that make that more serious. So, yes, the content, I guess, it can dictate a more serious penalty based on the nature of the offense. [LB276]

SENATOR LAUTENBAUGH: Thank you. [LB276]

SENATOR ASHFORD: Yes. Senator Council. [LB276]

SENATOR COUNCIL: Good afternoon, Marty. Just a question with regard to how the charges will be handled, and this is where my concern arises. Under 28-519(1) it speaks to criminal mischief, and says "Except as provided in section 3," this is what the penalties are for criminal mischief, and it defines criminal mischief as damaging or destroying property of another intentionally. And one of my concerns is, does that provide prosecutorial discretion if the act that is committed is spray painting and damaging my property by spray painting the exterior walls of my garage? You, as prosecutor under this legislation, have the choice of charging me with either criminal mischief or defacement? [LB276]

MARTY CONBOY: Correct. [LB276]

SENATOR COUNCIL: Okay. And if you charge me with defacement, and it's my second offense, the punishment is a Class I misdemeanor. [LB276]

MARTY CONBOY: Correct. [LB276]

SENATOR COUNCIL: But if you choose to charge me under the criminal mischief statute, my second offense I'm subject to a Class IV felony. Help me understand the distinction. [LB276]

MARTY CONBOY: Well, I guess the...as I read this, I didn't see that there was a tremendous distinction in the level of penalties, truthfully. A first offense over \$500 is a Class I misdemeanor; for a second offense, it's a felony. And for the defacement section, if I read this...if the law says over \$500, it's a Class II misdemeanor, which is lower; a Class I misdemeanor for the second; and a Class III for a felony. The only thing

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I can tell you is that, first of all--and I've sat in this seat within the last two years, twice, to say that we need to raise these amounts on this criminal mischief statute. The theft statutes were changed to reflect that a felony occurs at a higher level simply to reflect the economy. And a \$500 level, frankly, for a felony, or to raise, is not a very high ceiling. I mean, that's...just to repaint a building anymore probably costs many times that. So with that caveat, I would say that the potential penalties and why they're different, I guess I'm not real sure why those particular levels were chosen. Probably...and I think you suggested it in your earlier question about the taggers which are also encompassed in this group of people, you know, we don't want to have the same potential for those kids who are really just misguided and imitating something more serious. I think it gives the judge the latitude to sentence them for a lower-level crime, but it also gives them enough latitude, if it is serious, to at least sentence them to a serious penalty. So that would be my guess as to why it starts at a lower level for those crimes over \$500. [LB276]

SENATOR COUNCIL: Okay, but it depends on the charge in terms of what penalty the judge is able to impose, and that's...and what I was reading from was the defacement which causes a pecuniary loss of less than \$500 and presumably, since that is not in (a), that paragraph is intended to apply to taggers as opposed to those individuals who have engaged in this defacement that's gang-related. So under (b) which I will say the taggers section, I guess that's what the concern is, is that if someone commits an offense that constitutes defacement, which can also constitute criminal mischief... [LB276]

MARTY CONBOY: Correct. [LB276]

SENATOR COUNCIL: ...if you charge me under criminal mischief and it's my second offense, I'm facing a felony. If you choose to charge me under defacement--it's my second offense--it's a Class I misdemeanor. [LB276]

MARTY CONBOY: If, in fact, the damage is below 2... [LB276]

SENATOR COUNCIL: Or a 5...and it's the same because the pecuniary loss under criminal mischief of \$500 or more but less than \$1,000, and on defacement it's \$500 or more. So it could be, in fact, under defacement, it could be \$1,500 in damage, and I won't face the same penalty as someone who is charged under criminal mischief. [LB276]

MARTY CONBOY: I will tell you that there was discussion, and I know Senator Nordquist's office did talk to us about how we assessed the amount of damage. And one of the discussions we had is that, with spray painting almost anything, the damages are going to jump up very quickly compared to somebody who just breaks a window or something. Trying to keep the penalties reasonable given a level of the potential

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damage, I think was the main reason for selecting these amounts. And again, it's in a setting where I think these amounts are already kind of screwy in terms of the levels that they set for enhancement to higher penalties. I think the thought was there was a discussion about those minor violators who might commit just a silly crime and yet find themselves charged with something. I think that's why the amounts and the penalties were set lower, in a sense, for the tagging, rather than the criminal mischief penalties. And it is true, the prosecutor can elect which one to use. One of the advantages of this statute, if we go under Section 3 which is the graffiti section, that gives the criminal history a more accurate depiction of what this crime was about. So sometimes even if you get a tagger, you want to make sure, for future enhancement purposes, that you charge under the new graffiti section, and that would reflect in the criminal history so that if they go to Lincoln or Norfolk and have this offense reoccur, they can see that it was not just a criminal mischief but a defacement charge. So I guess I can't answer your question as to whether there's really a great reason to have those cutoffs for those amounts of money in those penalties. That's, I guess, the starting point here, and if...I would certainly suspect that that might become an issue of discussion as this bill advances. [LB276]

SENATOR COUNCIL: Okay, and like I said, I understand and appreciate the attempt to draw the distinction between, for lack of a better term, the gang members and the wannabes, or the people who are trying to distinguish themselves and aren't gang-affiliated in whatever manner. But I'm troubled by the fact that if you have a tagger, and the prosecutor chooses to file a criminal mischief charge against that person...and as we all concede, you do much painting to the exterior of a property, you're looking at more than \$500. And if they fall within more than \$500 and you charge me with criminal mischief, the second time that happens--and we hope that it doesn't--but the second time that happens, I'm faced with a felony, while someone who is consistently charged under the defacement doesn't get to a felony until they've done it the third time. And that is kind of troubling. I mean, I don't know how we strike that balance; if there's some way to merge the defacement into the criminal mischief and do it...I'm just concerned about the fact that it depends on what you're charged with. Even if you're a gang member, I mean even if it's unquestionably gang-related, the graffiti, you don't have to charge them under defacement; you can charge them under the criminal mischief statutes. And they still may avoid extensive penalties. [LB276]

MARTY CONBOY: Well, the only other thing I would say is that without these changes, we would be forced to use the criminal mischief amounts, and merging them together so that they are the same makes some sense too. There was discussion of that and I guess it's difficult to say what's most appropriate. And we did consider the minor nature of some of these offenses or at least the nature of the people who commit them and their actual motives. [LB276]

SENATOR COUNCIL: Well, I don't want to belabor the point, but I appreciate it, Marty,

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but that's just so that, and that concern and need to figure out a way, because I want to make it clear. And as a former member of the city council of Omaha and not having had the pleasure of serving with Councilmember Gernandt, the issue of graffiti, particularly in his district, and growing ever more a problem in my district, it's something that we all agree needs to be addressed. It's just that the best way to do it in a way that we're not creating more problems than we're trying to solve. That's all I have, Mr. Chairman. [LB276]

SENATOR ASHFORD: Senator Lathrop. [LB276]

SENATOR LATHROP: Marty, I'm just wondering if part of the problem that people are having with this is that gang-related. I don't see that that's defined and I'm wondering if you are...if we don't need a definition of what gang-related means so that it distinguishes it from the loosely organized group of people in Millard that may have a name for themselves but commit no criminal activity. And is that tagging or do you have to have a...does it have to be an association of people that have been involved in some criminal activity? [LB276]

MARTY CONBOY: It would make sense to have a tighter definition of gang than just the common definition in the dictionary, which is what we would end up with under the law. There are other bills, in fact, in this Legislature which deal with gang crime this year, and I would suspect that those definitions would probably apply to this, as well, although there's no guarantee that everything would advance. But that would make sense to have, if not here, at least some reference to another statute where that could be defined. [LB276]

SENATOR LATHROP: And then that it's also not just the gang-related, but it's the activity. So they would have to be marking territory for whatever gang they belong to, rather than going out and being a gang member and then doing some tagging. [LB276]

MARTY CONBOY: Right. There would have to be a relationship between the tagging and their membership. [LB276]

SENATOR LATHROP: Okay. Thanks. [LB276]

SENATOR ASHFORD: Thank you, Marty. The next proponent of LB276: Lieutenant Gonzalez. [LB276]

RICH GONZALEZ: Senators, thanks for having me today. I'll try to answer some of the questions for you that you may have, but as far as statistics go, yes, in '04 I believe we had nine arrests. It grew from there. Graffiti started becoming a little bit different in about '04 and we started receiving more complaints. Our number of gang members grew at that time. So we put a few people together, doing the best that we could with not having

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a whole lot of knowledge at the time as far as graffiti investigations are concerned. But we were able to produce approximately 80 arrests in '06; over 100 in '07; and over 100 in '08. So it continues to grow; it's an issue. And with all of the...I'm sorry for not introducing myself, first. Lieutenant Rich Gonzalez with the Omaha Police Department gang unit. We do have several complaints, numerous complaints. And with all of the complaints, gang-related complaints that I receive in the office, graffiti probably outnumbers all of them. It's an issue that is more so, particularly in south Omaha, in the southeast precinct. But as Senator Council said, it has spread to the northeast precinct. It's in the northwest precinct; it's in the southwest precinct; it's in the state of Nebraska. And I think over... [LB276]

SENATOR ASHFORD: That's pretty much all the precincts. [LB276]

RICH GONZALEZ: Pretty much all we can cover. So we have a chance here. I don't know if there are other cities in the state of Nebraska, further west, that actually have the opportunity to prosecute like we do with our city ordinance, but I think this would not only help us and give us another tool when investigating graffiti crimes; it would also give the other cities in the state a chance to investigate and prosecute graffiti crimes, as well. I think we're doing what we have to do. We really could use another tool. As Councilman Gernandt said, that's what it is; it's another tool that we can use. We have done our side when it comes to presentations and educating the kids in the schools. We do it weekly. We brought it to the attention of neighborhood groups. We are continuously asked to speak at OPS events, at community events. And one of the number one speaking requests is going to be on graffiti: What can we do, how do we report it, and what are you doing about it. So I think on our side we're doing as much as we can for public awareness, for educating the kids. And if we were just coming in front of you right now and we had not done that, if we had not educated the kids or at least attempted to, if we had not attempted to educate the public, then I would probably say we need to get out there and educate folks, first. But I believe we have done what we can and we will continue to do it, but now we need some help on the prosecution side of it, and giving us another tool, especially for the repeat offenders. [LB276]

SENATOR ASHFORD: Thanks, Rich. Any questions of...? Yes, Senator Council. [LB276]

SENATOR COUNCIL: Good afternoon, my friend Lieutenant Gonzalez. First, I want to applaud you and the work of your unit and what you emphasize, trying to reach the young people early, counseling them, providing educational programs and alternative opportunities for them to steer them away from this kind of activity. And I certainly understand the need for you to have greater tools. What I'm trying to do is make it so that we can provide for some escalation for individuals who, for whatever reason, choose to engage in what is commonly referred as tagging, and art...you know, doing it as a part of a gang, and then addressing those who we know...or through...and that's a

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question I have, this Graffiti Tracker, and I know that you're intimately aware of the respective gangs in both the southeast and the northeast precinct and what their tags are, for lack of a better descriptor. But...and maybe this is a better question for Mr. Conboy, but as I see the statute as it reads, if we add this new defacement provision which is what Section 3 is, and limit Section 3 in its application to taggers, and then move what is subsection (2)(a) of Section 3 over into the criminal mischief, it would appear to make more sense to me in terms of the punishment. And you're making it clear that for individuals who are engaged in defacing property and it's gang-related, that they're going to be charged with criminal mischief and they're going to face a Class I misdemeanor on their first offense regardless of the value of the damage caused, and they're going to face a Class IV felony for a second or subsequent offense. I'm just concerned about placing that in the defacement section of this, because it, in my opinion, exposes some of these--and I don't think innocent is the proper term--but some of these youngsters who don't do it with the intent of glamorizing or glorifying or engaging in gang activities. Would you have a problem with that from a law enforcement perspective? [LB276]

RICH GONZALEZ: I'm kind of split on it, Senator. I understand exactly what you're saying. The first thing is, some of these kids that commit tagging, to put them in the same category, they probably don't have the criminal mind as a gang member does, and to throw these kids into the youth center who probably wouldn't be able to fend for themselves with other kids that have already become or went in that direction. At the same time, the number of complaints that I get, more so, or because of the issues of graffiti and how ugly it makes the neighborhood, we probably receive more complaints about what are we going to do about the graffiti, what can we do to arrest these kids, than is it gang-related graffiti. If it came to that point where you did separate it, to me we would just continue what we're doing. I mean, it's going to be in your hands. But at the same time, yes, we can read the graffiti and we can differentiate what is gang-related graffiti and what is tagging, and some kids that may just be out there trying to do what they call art. But, no, I don't think the kids that are doing the tagging are ready or necessarily have the same criminal mind as the kids that are out there doing the gang graffiti. [LB276]

SENATOR COUNCIL: And just based upon Mr. Conboy's responses to my questions on criminal mischief, there would be nothing to prevent the prosecutor, if he or she elected not to prosecute someone under the defacement portion and prosecute them under the criminal mischief, just based upon the amount of damage caused, whether they were gang-related or not gang-related. So if you're trying to deter some of the nongang taggers, then the discretion is available to the prosecutor to charge that person under the criminal mischief statute, which already, when I read with the amendments here, would provide for greater penalties than that they would face under the defacement statute. [LB276]

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RICH GONZALEZ: I think we just recently arrested a young kid, I believe he was 17 years old. He probably did more damage as a tagger. I believe so far we've cleared 27 cases of him tagging up probably 20...or it is 27 different locations. Will he learn? I don't know. But I just want to stand here and say, does he have the--and we spoke with him--does he have that same mind-set as a gang member? Is he doing it because he's crossing out another rival gang member's name? Is he doing it as an initiation? Probably not. But is he causing ugliness in the neighborhood? Absolutely. Is he causing extensive damage that we have to hear about it at these meetings from business owners and neighborhood groups? Absolutely, he is. So I'm kind of stuck in between as far as the right way to go. [LB276]

SENATOR COUNCIL: Okay, and using that example and with the legislation as drafted, how many--you've determined that he's responsible for 27 acts of graffiti--is he charged with one...? That's one offense for purposes of the statute, and Mr....I don't know...where's Mr. Conboy? I mean, if you arrest him and determine that he's committed 27 acts, do you charge him with 27 counts or do you charge him with one count? [LB276]

MARTY CONBOY: Twenty-seven. [LB276]

SENATOR COUNCIL: So if he's charged with... [LB276]

SENATOR ASHFORD: That's Mr. Conboy that answered that question and not Lieutenant Gonzalez. [LB276]

SENATOR COUNCIL: And tell me if I'm out of order. [LB276]

SENATOR ASHFORD: No, you can ask anybody in the audience. I just have to...or any question you like, but just don't surprise them, you know. [LB276]

SENATOR COUNCIL: Okay. And if...under the criminal mischief statute, on those 27 counts, once that individual is charged...or convicted of the first of the 27 counts, each count after that is a subsequent offense, isn't it? [LB276]

MARTY CONBOY: No. They would all be first offenses. [LB276]

SENATOR COUNCIL: Okay, so now...and that gets to the point that I'm trying to make because that's going to be one offense. If you charge this, the example you gave, under the defacement, that person is going to be punished as a Class II misdemeanor. If you charge that person under criminal mischief, because clearly 27 counts is going to result in pecuniary loss of more than \$500 but less than \$1,000, they're looking at a Class I misdemeanor. And the next time he or she does it, if you charge them under the criminal mischief statute, they're looking at a felony, where if you charge them under

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defacement, they're looking at a Class I misdemeanor. So that's...I guess that's the point I'm trying to make, is that to, in my opinion, to address the issue in the most effective way would be to amend this to move and classify under subsection (1) of 28-519, a person commits criminal mischief if he or she damages, etcetera, or defaces as defined in subsection (3), and then under the specific offenses, you add defacement which is gang-related as an act of criminal mischief that warrants the kinds of punishment that you have there. I'm through, Mr. Chairman. I'm trying to help you. [LB276]

SENATOR ASHFORD: No, that's very thoughtful, and you're helping all of us, I think, Senator Council. Any other questions? Yes, Senator Coash. [LB276]

SENATOR COASH: Thank you, Senator Ashford. Thank you, Lieutenant. I just had a quick question since you deal with this all the time. I'm just trying to get my mind around the scope of the problem of gang-related graffiti versus taggers. If you go out and investigate ten instances of graffiti, how much of that is going to be gang-related and how much of it is tagging, just roughly? [LB276]

RICH GONZALEZ: Um, you know what? I don't have that exact number. I can get it for you. But I can tell you sometimes you have...gang members will go out there, or graffiti kids that just do tagging, will go out there, and you're going to see both of them on the same wall. These two recent arrests we had, the kid that was tagging 27 locations around south Omaha, but on the same wall was a lot of different graffiti at the same time. So as far as the numbers, I don't have that. I can get that for you. [LB276]

SENATOR COASH: That's okay. I'm just trying to wrap my head around. I mean, in your community is the bigger problem the tagging or is the bigger problem the... [LB276]

RICH GONZALEZ: I can tell you, in Councilman Gernandt's area, an area where I was born and raised: gang graffiti. [LB276]

SENATOR COASH: Gang-related. [LB276]

RICH GONZALEZ: Yes. More so than the tagging, yes. [LB276]

SENATOR COASH: Thank you. [LB276]

SENATOR ASHFORD: Any other questions of Rich? Just very briefly, the 100 prosecutions, is that...is that 100 successful prosecutions or is that arrests? [LB276]

RICH GONZALEZ: Those were 100 arrests or number of arrests. [LB276]

SENATOR ASHFORD: Arrests in the last year...or is that per year sort of? It's gone up



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significantly in the last two or three years, and...Rich, how many, just generally, how many gang members are there in Omaha? [LB276]

RICH GONZALEZ: Um, I believe the recent number that we gave is roughly around 2,900, and that's accessible over the Web site. [LB276]

SENATOR ASHFORD: Right. And of those 100 arrests, half of those are gang-related, I guess, or...we discussed this at the hearing. I can't remember what you told me. [LB276]

RICH GONZALEZ: I can't remember the exact number that we may have given you. [LB276]

SENATOR ASHFORD: Okay. That would be helpful to have just so we have that in our records. [LB276]

RICH GONZALEZ: I would guess...I'm guessing here, that just knowing the arrests, the number of gang-related graffiti arrests or gang members that we arrest, outnumber...it has to be up in the 85 percent. [LB276]

SENATOR ASHFORD: Okay, And is that generally...is that...are those arrests...how much of that is recidivist? How many of those are repeat... [LB276]

RICH GONZALEZ: That I couldn't tell you the exact numbers. [LB276]

SENATOR ASHFORD: Okay. Those are tough...those are tough questions. And there are three of you? Do you have two people in your group? [LB276]

RICH GONZALEZ: Pretty much one on day shift that's part-time and one on the evening shift part-time. I mean, it's become a full-time position for them, but amongst their other duties those are the two that follow up on graffiti. [LB276]

SENATOR ASHFORD: And you're part of the gang unit, generally--the graffiti group? [LB276]

RICH GONZALEZ: Yes. Yes, sir. They are part of the...one is part of the gang intel or intelligence unit, and the other one is part of the gang suppression unit. [LB276]

SENATOR ASHFORD: Okay, good. Good. And thanks for all your good work, Rich. Thank you. Okay, that...next testifier on LB276. how many do we have here on LB276? Two more. Okay. [LB276]

JON CARLSON: Good afternoon, Mr. Chair, committee members. My name is Jon

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Carlson, and I'm an aide to Mayor Beutler here in Lincoln, and I appear today to express the city of Lincoln's strong support for LB276, the bill that would raise the penalties for graffiti and some other important provisions. I manage a project in Lincoln called Stronger Safer Neighborhoods, and it's Mayor Beutler's initiative to partner up city departments and private businesses, nonprofit agencies, neighborhood associations, and other community groups. We work in fragile neighborhoods and we try and revitalize problem areas. Clearly, graffiti is of interest to us. It's an indicator crime in terms of the larger issue of blight and fragility in these neighborhoods. We try and focus resources into these neighborhoods. We try and revitalize the neighborhood groups and try to make them step up, use the business groups and use the LPD resources. We try and really make a difference in these areas. Graffiti is a serious crime. It's, as I said before, it's an indicator crime, and in some ways it's a gateway crime to the larger issue. We think that increasing the penalties is a good idea, and we think that anything that brings additional tools and additional pressure on the problem is going to help LPD in the job that they do. In addition to just the overall property cost issue and the issue of impacting neighborhoods, the issue of the property owners themselves feeling that they've been impacted by this, it really is a time and a resource issue. It ties up a lot of police time. It ties up a lot of city resources and a lot of private resources. As I said before, it contributes to blight. One of the things that I'm...in my work, that I find particularly exciting about this particular bill, is the opportunity for diversion, to get the perpetrators of these crimes. To penalize them is one thing; to try to teach them a lesson, to try and educate them is one thing; but I think the opportunity to get a judge to sentence them to community service and actually cleaning up the mess that they've made or cleaning up a similar mess that they've made is a strong move. We've been able to do this on rare occasions when we've had an active parent who, when their child was caught, actually marched them over and, with our help, forced them to clean up the mess. But I think this is a larger possibility. We work with community organizers from NeighborWorks and from other nonprofits on cleaning up graffiti. And we talked about it for several years now, about the opportunity to get the perpetrators of graffiti crime to actually get involved in cleaning up the crime, to send a larger message. So we think that that's an exciting opportunity here with this bill. I just wanted to be here to, again to urge the city of Lincoln's support and to answer any questions and to urge your careful consideration in support of this bill. [LB276]

SENATOR ASHFORD: Any questions? Thank you. Any other testifiers? One more, I believe. Good afternoon. [LB276]

KYLE MICHAELIS: Mr. Chair, members of the committee, thank you for the opportunity to speak this afternoon. My name is Kyle Michaelis and I'm here to speak in opposition to LB276 as it is currently drafted. Young Nebraskans are a population without registered lobbyists and too often have no voice in our political process. That's unfortunate because this bill could have such disproportionate and ultimately disastrous effects in the lives of young people who evidently have no one else to speak up on their

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behalf. I recognize the impact of graffiti on our communities and respect the efforts of our elected leaders to do something about it. Thank you for answering the calls and the concerns of your constituents; however, I must ask the state senators who have introduced this legislation, as well as this committee and the body as a whole, to please reconsider the ridiculous overreach that would raise a nonviolent crime committed with a spray can to the level of a felony offense. This legislation, as currently written, goes a long way in expanding the circumstances under which the broadly defined offense of criminal mischief would be considered a Class IV felony. A third offense of criminal mischief would even be designated a Class IV felony when it results in pecuniary loss of less than \$200; even no financial loss whatsoever. LB276 also creates the new offense of defacement. This is a change with which I would agree because of the special challenges of dealing with the graffiti problem. In fact, I would even commend the bill's drafters for the alternative sentences for which it specifically provides. But the bill then proceeds to open the same door for repeat graffiti violations, reaching the level of a felony offense--an idea that is simply intolerable in its excesses. It is here that any citizen of conscience and certainly any elected representative must ask themselves, what are we doing here? I understand the political advantages to getting tough on crime, but that can't mean forsaking our common sense, our common decency, and some basic notions of fundamental fairness. The victims of these crimes deserve justice, as does society. But our society is ill-served when we toss around the label of felon with such reckless abandon. These are real laws with real consequences for real people. A Class IV felony carries with it a maximum sentence of five years in prison, but just as damning is that conviction on the offender's criminal record, which will follow him or her for a lifetime. Felons lose their right to vote, in some states for life. They are excluded from some lines of work and certain professional licenses. They face high hurdles in education, employment, and many other avenues of productive membership in society. The origins of the word felon suggest evil intent. To be a felon is to live with a black mark for life. Such punishment is rightly reserved for the gravest of crimes. By even suggesting graffiti or low-level mischief might demand such severity will make mockery of our legal traditions and blind ourselves to their lasting real-world consequences. Of course, something must be done about these crimes, but the lack of political will to fund prevention and rehabilitation programs is a weak justification for taking the easy way out: just raising penalties and thinking that will do anything to fix the underlying problems in our communities. Let's face it: Most of those who would ever be affected by this legislation are young Nebraskans who lack positive influences and have taken a wrong turn somewhere in their young lives. They need intervention. They need correction. They need our help. They don't need us giving up hope, branding them for scorn and hardship that will follow them for the rest of their days. The fiscal note for this legislation reads that the fiscal impact is indeterminate at this time. But this doesn't justify our foolishly imagining that we can get off so cheap. I would go so far as suggesting that every penny that will eventually be spent keeping these offenders behind bars longer, would be better spent on rehabilitation and prevention, even simple community programs for graffiti cleanup. This is especially the case when you consider

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the social costs of this bill, which are not only indeterminate but incalculable in the lives of those who would be prosecuted under it. Thank you for your time. These remarks have been confined to LB276 and its cavalier attitude towards our justice system, but I'd ask that the committee please keep in mind the obvious implications for other legislation that would be just as punitive in effect. Thanks. [LB276]

SENATOR ASHFORD: Any questions of Kyle? Thank you, Kyle. Oh, Senator...I'm sorry. [LB276]

SENATOR CHRISTENSEN: Thank you, Chairman Ashford. Kyle, you mentioned some rehabilitation things, but if we don't go the felony route, what do you really feel is going to slow it down? If they don't have that strong penalty hanging over them, is just repainting to the original going to really do it, than telling them or trying to educate them? [LB276]

KYLE MICHAELIS: Thank you, Senator. I guess I would reject the notion that there is anything magical about labelling someone a felon except for the real-world effects. I don't think it does...the prevention is not proven whatsoever, the simple get-tough-on-crime. I can't guarantee, obviously, that rehabilitation programs would be successful, but at the same time, on the other route, I...where should the burden really be when we are...? You know, this is a lifelong damning from the society. [LB276]

SENATOR CHRISTENSEN: You know, I'd gladly see everybody that's caught doing graffiti have to spend hours repainting everything back to the original. I think that would make a good point. But I don't know if it's a cure, either, so that's why I was thinking. [LB276]

SENATOR ASHFORD: Thank you, Senator Christensen. Thanks, Kyle. Senator Nordquist. Jeremy do you know what the cost to the city of Omaha is for this? [LB276]

SENATOR NORDQUIST: For abatement, they spend about \$100,000 a year, but they just ordered...got a second graffiti van that's coming on-line here to tackle the problem. They've had one graffiti van for a number of years, but now they've added the second van and that will be run through the Public Works department. I apologize to the committee members. Tim Kephart of Graffiti Tracker had a plane to California and wasn't able to change it, but he's going to be submitting some written testimony. And if any members have any questions about how they do that tracking and determination, would certainly be happy to put you in touch with him. On Senator Council's point, kind of looking through it again...and she is right, there kind of is a quirk in the bill here: the \$500 limit. If we change, on the graffiti, the defacement portion, to \$1,500 from the \$500, that would kind of adjust the penalties to make it more logical. I appreciate the committee's thoughtful consideration today, and I know you'll be looking at some other bills that deal with gang activity and other things like that in the coming days and weeks

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here. So there's the potential to move that gang activity section out to another part of statute or another bill, but I do think we need to create statute to recognize graffiti for the serious crime that it is, so. Thank you. [LB276]

SENATOR ASHFORD: Thank you, Senator Nordquist. That concludes the hearing on LB276. See also Exhibit 12. Senator Mello, LB277. How many testifiers do we have on LB277 here? Welcome, Heath. [LB276 LB277]

SENATOR MELLO: Good afternoon, Chairman Ashford and members of the Judiciary Committee. My name is Heath Mello and I represent the 5th Legislative District. My district consists of both south Omaha and north Bellevue, where graffiti has become an increasing problem. This is why I introduced LB277, a bill that would prohibit minors from purchasing the tools used to create graffiti: specifically, spray paint and industrial-strength markers. Graffiti has a negative impact on the entire community, leading to the perception that targeted neighborhoods are both unsafe and depressing morale. It has an economic impact, depreciating the value of both targeted property and the adjacent surrounding properties. Where neighborhoods are viewed as unsafe due to large amounts of graffiti, it is detrimental to businesses in that neighborhood, as customers begin to avoid the area. This is not just a problem in south Omaha, but a city- and statewide problem. Graffiti is used as a stepping stone to harder crimes, and is often linked to gang activity. Other cities across the state are both experiencing similar problems. In Omaha, alone, I'm told that the city receives in excess of 1,500 calls a year, and spend upward to \$100,000 on graffiti removal. This bill seeks not only to help curb the problem in Omaha, but to prevent graffiti and its negative effects from occurring in all communities across the state. The major perpetrators of graffiti and vandalism crimes are kids between the ages of 13 and 17. Making it more difficult for kids to obtain the tools used to create graffiti will help cut down on this unsightly vandalism that is hurting our communities. Preventing graffiti vandalism will help keep both our neighborhoods and communities strong. At least three other states have statutes that prohibit the sale of spray paint to minors: California, Rhode Island, and Texas. Texas and Rhode Island laws also prohibit minors from possessing spray paint unless they have a specific purpose for the use of the product. Numerous other cities and towns across the country have passed similar ordinances and legislation. These cities range in size from large cities like New York City and Washington, D.C., and smaller cities like Lackawanna, New York, and New Haven, Connecticut. While the city of Omaha has passed an ordinance that would prohibit minors from purchasing spray paint, there is still a statewide need for similar legislation as graffiti continues to be an escalating problem across the state. The negative effects caused by graffiti are detrimental to both large and small communities alike, from Omaha and Lincoln metropolitan areas, to smaller communities like South Sioux City and Scottsbluff. Testifying after me are representatives from the city of Omaha and representatives from the city of Bellevue, and from NeighborWorks Lincoln, that can testify to the statewide need for this legislation. I'll take any questions. [LB277]

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SENATOR ASHFORD: Thank you, Senator. Any questions? Yes, Senator Christensen. [LB277]

SENATOR CHRISTENSEN: Thank you, Chairman Ashford. Thank you, Senator. Do you have information in these other states? Has it helped curb by limiting kids being able to buy? Has it been able to help curb the amount of graffiti that's performed after that? [LB277]

SENATOR MELLO: We weren't able to find any specific reports that laid out the statewide reduced in graffiti crime, but most of the states, the three states I mentioned--Rhode Island, Texas, California--also had doubled up with local city ordinances where they saw the impact of the state law helped lower their local...or helped enforce their local ordinances a lot better, which ultimately lowered some of their graffiti crimes. [LB277]

SENATOR CHRISTENSEN: Thank you. [LB277]

SENATOR ASHFORD: Thanks, Senator Mello. Are you going to stay around? It looks like you are. Next testifier. Councilman Gernandt. [LB277]

GARRY GERNANDT: Thank you, Senator and committee members. Garry Gernandt, councilmember, District 4 in southeast Omaha. I'd like to applaud Senator Mello and Senator Nordquist for their efforts to help not just the city of Omaha, but as I mentioned before under LB276, the problem that we're experiencing across the state of Nebraska. LB277, I believe strongly, is closing a loophole that currently exists where the purchase or even giving of spray paint and industrial markers needs to be closed. I would urge you to get this to the floor as well. And for the record, Senators, I am not and never have been opposed to educating the public and educating youngsters in regards to making the best choices that they possibly can, and I will continue to do that. I was a law enforcement officer for 31 years, and I tried to train the folks that worked under me with the philosophy, I'd rather have an educated driver on the streets as opposed to a ticketed one. But we have a serious problem here and it takes serious solutions, and I believe they've been put forward to you in LB276 and LB277. I would encourage you to send both of those to the floor for discussion. And in closing, I would just say that in 2009 the city of Omaha has budgeted \$250,000 for the fight against graffiti. Thank you. [LB277]

SENATOR ASHFORD: Garry, could I just amplify that it's \$250,000 in the budget for getting rid of the graffiti, is that...? [LB277]

GARRY GERNANDT: That's the abatement part. [LB277]

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SENATOR ASHFORD: That's the abatement, which is a significant increase over... [LB277]

GARRY GERNANDT: What we've had... [LB277]

SENATOR ASHFORD: ...what you've had in the budget before. [LB277]

GARRY GERNANDT: ...once we started it as a budgetary line. Yes, sir. [LB277]

SENATOR ASHFORD: And the increased budget number is to get to the problem quicker, is that...so you have more...you have the new truck, the new van. [LB277]

GARRY GERNANDT: We're having a new truck that will be staffed. Of course, that includes benefits, as well. [LB277]

SENATOR ASHFORD: So that mounts up fairly quickly. [LB277]

GARRY GERNANDT: And the equipment that goes inside the truck. [LB277]

SENATOR ASHFORD: It mounts up fairly quickly. [LB277]

GARRY GERNANDT: It adds up real quick, sir. [LB277]

SENATOR ASHFORD: That's a big line item. Thank you, Garry. Gary too. [LB277]

GARY TROUTMAN: Good afternoon, Mr. Chairman and members of the committee. My name is Gary Troutman. I am the city administrator in Bellevue, and I am here today in support on behalf of the city of Bellevue for LB277. And I would like to just comment on the graffiti problem in Bellevue. We, as you know, border up to the south part of Omaha, and we do have a problem with the Bellevue/Omaha movement of activity across our county line and our city limits. I can tell you that our council is in very strong support of this. We look at it as a tool, if you will, in our toolbox of abilities to address this problem. The city of Bellevue does have a graffiti ordinance. Senator Lathrop asked me that a little earlier and I advised him I didn't think so. But I did check, and in 1996 the Bellevue City Council did pass an ordinance, but primarily it was in how to deal with the removal of graffiti, and it was primarily addressed to the property owners. And property owners had ten days to remove the graffiti from their property. The city would adhere to that same ordinance in removing graffiti from public buildings. Today we take a different approach in Bellevue. We work very closely with the property owners in removing the graffiti. Our paint truck, we have...we do not have a graffiti van. We have had meetings with Omaha and work very closely with them. They have sent their graffiti van down to Bellevue and worked on projects where our little spray paint operation really wasn't getting the job done. And we are in the process of working through our Bellevue Police

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Foundation, which was formed two years ago, and with our funding, to purchase a graffiti van. And we, as Omaha, will staff that with an employee. It will be an employee that will perform other functions, but we will have this employee on 24-hour call and so that they are available to address it. We have found that by moving quickly on the graffiti, that that, according to our police chief, is a very positive move. And so the bill that Senator Mello has presented to you, we feel is just another avenue that we can pursue. We do find...and I would like to kind of step out of the public safety issue into the management role of the city, and that is we spent, last year, approximately \$8,000, which doesn't sound like a lot of money, but we did, in replanting--I saw the red light... [LB277]

SENATOR ASHFORD: You can finish your sentence, Gary, but don't get into another paragraph, okay? [LB277]

GARY TROUTMAN: Okay. We did...we had a number of public buildings that were defaced pretty bad, and we did spend a lot of time and effort. And I think every city has that problem too. I think sometimes we overlook the fact that it's not only a criminal situation but it is also a cost situation to our taxpayers. And I thank you very much for your time. [LB277]

SENATOR ASHFORD: Thanks, Gary. Any questions of Gary? Would this be an opportunity to share some costs with the city of Omaha to...? [LB277]

GARY TROUTMAN: We have discussed that with them, using both their van and our van in a coordinated effort also. [LB277]

SENATOR ASHFORD: Especially because you're on some of the border areas, Senator Mello's district where hopefully we can help you a little bit and you won't have to spend \$250,000. But that seems like it might be an opportunity to do some... [LB277]

GARY TROUTMAN: It is, and we have had conversations with Mayor Fahey about that too. [LB277]

SENATOR ASHFORD: Good. Thanks, Gary, very much. [LB277]

GARY TROUTMAN: Thank you. [LB277]

SENATOR ASHFORD: The next testifier, LB277. [LB277]

PAT ANDERSON-SIFUENTEZ: Good afternoon. My name is Pat Anderson-Sifuentez, and I'm a community organizer for NeighborWorks in Lincoln, and I also coordinate with Jon Carlson in the mayor's office in the Stronger Safer Neighborhoods, which is the neighborhoods just to the south of the Capitol. If you ever take a walk, you can,



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especially if you go to the west, you can usually find plenty of graffiti. We don't often have quite the problem that Omaha has, but we also don't have the resources that Omaha has. We're not rich like Omaha. So usually when we rectify the graffiti, it's with volunteer help. But it takes, as Jon alluded to before, it takes so much time when you have the police go out and investigate and see whether gang graffiti is tied in with other gang graffiti around town. And I can't tell you the amount of time I have spent contacting owners of properties. I can get volunteers to go out and paint the graffiti, but contacting the owners and getting the permission is just extremely time-consuming, and I don't really get paid for something like that. But I know how detrimental graffiti is to neighborhoods. If you've ever heard the broken window theory: You get the broken window; you get the graffiti; you get the graffiti that stays on the building for six months; then you get the drugs out on the street, and the prostitutes. I don't have to paint the picture any further, but graffiti is very detrimental to neighborhoods. I not only work in the neighborhood, I also live in this neighborhood, so it's near and dear to my heart. And I think...I'm a proponent of both LB276 and LB277, and they both complement each other, I believe. They both put responsibility, I think, on the adults in the community. It takes a village to raise a child; I'm not so sure that I think the responsibility should be on the village. I really think responsibility should be on parents, but it's obviously not happening. So I think we have to do whatever we can do and use whatever tools we have access to, to help with this problem. And I...whenever someone previously talked about other communities that have enforced this, and in Texas, I know, it...they do find other materials eventually, but immediately it really eradicates the problem. [LB277]

SENATOR ASHFORD: Thank you. I do think that the quick...getting rid of the graffiti quickly within 24 hours is a key piece to this. [LB277]

PAT ANDERSON-SIFUENTEZ: It's totally key. [LB277]

SENATOR ASHFORD: I mean, at least what I heard in the hearing, this summer...or this fall. Otherwise it draws the gang activity. So I think if you have to do it with neighborhood workforce, that makes it awfully tough, but. [LB277]

PAT ANDERSON-SIFUENTEZ: And when they do it on brick, especially on historic buildings, it's extremely hard to eradicate that. If you do it quickly, within 24 hours, you can do it by sanding or power blasting it, but if it goes any longer than that, I've seen it where it's been on old brick for six months and it gets absorbed. [LB277]

SENATOR ASHFORD: Yeah, it's a problem. Thank you very much. Any other proponents? [LB277]

CRYSTAL RHOADES: Thank you. My name is Crystal Rhoades. I'm the assistant executive director of the Neighborhood Center in Omaha, where we service many of the neighborhoods that are dealing with graffiti. It's pretty clear that graffiti leads to a

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number of problems in neighborhoods. It's a blemish on the neighborhood overall. It's problematic for businesses, because people are afraid to frequent them. It's difficult for homeowners because it's very costly to remove and often very difficult. The city spends a considerable amount of money, and I can also assure you that small organized neighborhoods and nonprofit groups are also spending a great deal of their money. My organization has spent over \$30,000 just in providing abatement and paint removal for victims of graffiti. I will also tell you that even with the graffiti vans and a fairly well-publicized mayor's hotline that is designed to help track and record graffiti in Omaha, that a large portion of it is still going unreported. We've done several graffiti wipe-outs and removals, and our experience has been that for every one or two cases that are reported, there are three or four directly adjacent to it that have not. It's the nature of the crime. It's also very, very difficult to combat because it happens so quickly, and often it's repetitive. We've heard testimony from law enforcement that sometimes there are as many as...there's dozens of incidents by one perpetrator. So it is something that seriously is causing a great deal of problems. I'm supporting this bill, because what it does is creates a barrier to making the tools used as accessible to minors. Ordinarily, that's not the sort of thing I would support, but given the amount of graffiti and the number of hours I have spent trying to take it down, it seems as though it's a reasonable measure. There are arguments that, well, then they can go to another community and procure these same tools. But when you're talking about teenagers of limited socioeconomic resources, creating this barrier will help to significantly reduce it, and that's why I would urge you to support this particular piece of legislation. Thank you. [LB277]

SENATOR ASHFORD: Thanks, Crystal. Any questions of Crystal? Senator...no. Thank you. [LB277]

CRYSTAL RHOADES: Thank you. [LB277]

SENATOR ASHFORD: Thanks, Crystal. Any other proponents? Opponents? [LB277]

JIM OTTO: Senator Ashford and members of the committee, my name is Jim Otto, O-t-t-o--don't spell it backwards--and I'm a registered lobbyist for the Nebraska Retail Federation and I am here to testify in opposition to LB277. It's not that the retailers aren't sympathetic to the problem; very sympathetic to the problem. Many retailers are victims of the crime and so we do sympathize, but I wanted to just take just a minute or two of your time to explain all the things that retailers already do for the people of Nebraska and the state of Nebraska, and don't get reimbursed for it, and retailers seem to be the natural place to go when there's another frustration. I guess I just want to point out, first of all, that retailers collect a significant portion of the sales tax for the state of Nebraska, and they get practically nothing for that. They get a maximum of \$75 a month. Prior to 2002, they got one-half of one percent of the tax collected. Now, you get a maximum of \$75 a month. Little quick point: On a \$100 sale, \$7 tax, if that sale is on a

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credit card, the \$7 tax goes on the credit card. The retailer collects \$6.86; still remits \$7. That points out that retailers actually remit more sales tax than they collect on a net basis, and we estimate that to be somewhere around \$10 million statewide that retailers are paying in, in excess of the tax they collect, net. So that is...we all talk about unfunded mandates, and we hate unfunded mandates when they come down from Washington, D.C., to the state, or from the state to the city or county. But this is an unfunded mandate on retailers that not only is unfunded but you're charging them to do, and so that is the sales tax portion. And we come to other things that are obviously age-sensitive when it comes to alcohol and tobacco. Those things retailers have to comply with, and understandably so. Pseudoephedrine: That came into the retailer point of view; you can't do that. Any time that there's a problem, it seems like we go to the retailer. I guess...and this would mean that we retrain all kinds of people, we change cash registers, we...not only that, if you mess up, this is not a civil offense; this is a criminal offense. A retailer that messes up is guilty of a Class I misdemeanor. Not a civil offense, but all of sudden has a criminal record. So I'm just asking you to really consider, before you move this on to the floor of the Legislature, what is the best thing to do. I don't think it's very hard to get across that bridge to Iowa to buy it, if you're young; and then if not, somebody that is 16 and has a car is going to run over there and buy four cases of spray paint, come back and sell it on the black market to somebody that wants it. I really don't think it's a solution. We need to search for a solution. Would request that you not move it on to the floor, and with that I will close, and mention that Bob Hallstrom with the National Federation of Independent Business, wanted to express his opposition but had to leave earlier. Thank you. [LB277]

SENATOR ASHFORD: So noted. Senator Council. [LB277]

SENATOR COUNCIL: A quick question, Mr. Otto, and I'm going to ask Senator Mello, too, if he doesn't waive closing. From a retailer's standpoint, what do you understand to be an industrial-strength marking pen? [LB277]

JIM OTTO: I'm glad you asked that question, Senator Council, because I don't know for sure. It does have to be defined, I think. [LB277]

SENATOR COUNCIL: Okay, thank you. [LB277]

SENATOR ASHFORD: Retailers do, do a lot of good things, Jim, so. [LB277]

JIM OTTO: It's my job to tell you. (Laughter) [LB277]

SENATOR ASHFORD: And it's our job to listen. So good for you. Thanks. Kathy [LB277]

KATHY SIEFKEN: Senator Ashford and members of the committee, my name is Kathy

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Siefken, S-i-e-f-k-e-n, here today representing the Nebraska Grocery Industry Association in opposition to this bill. And I'll try and be short and sweet. I agree with everything that Mr. Otto said, but in addition to that, putting things behind the counter is not always the answer. We have a lot of items in our stores that are used for purposes that are not intended. And if we were to put all of those items behind the counter, we wouldn't have anything on our shelves. Putting eggs behind the counter, toilet paper, all of the things that make a mess, doesn't make any sense. So on those grounds we would oppose this bill and hope that you would immediately kill it. Thank you. [LB277]

SENATOR ASHFORD: Can we go into...can we wait until the hearing is over, or do we...? (Laughter) [LB277]

KATHY SIEFKEN: I would prefer now. (Laughter) [LB277]

SENATOR ASHFORD: Thanks, Kathy. Any other questions...any questions of Kathy? Thank you. [LB277]

KATHY SIEFKEN: Thank you. [LB277]

SENATOR ASHFORD: Any other opponents? Neutral? Senator Mello, do you wish to...? [LB277]

SENATOR MELLO: Once again, I'd like to thank the members of the Judiciary Committee for hearing this bill. And Senator Council, to answer your question, something that, when composing the bill, we used in discussions with other members who have dealt with the graffiti problem with more of the tagging component, you see a lot of industrial-strength markers listed on the marker: "industrial strength" marker. And that was what we used when we defined that, since that seems to be a common tool that taggers use for tagging purposes. I'd also like to leave the committee with a thought in all due respect to our friends with the Retail Federation and the grocers. This bill is a crime prevention bill, and it's simply the way it's laid out in the bill is asking to see identification when someone purchases spray paint or industrial-strength markers. It's not a tax. There's no unfunded mandate. It's simply asking to see identification. And depending upon how the business goes about asking for identification is up to that business, as well as up to the bill if it would be passed by the Legislature. So I would like to leave you with that, that in no way is there a fine. There's no fiscal note. There's no penalty extra that anyone has to pay, with the exception if you do break the law; there is a possibility of a fine, as well as the penalties that come with a misdemeanor charge. So with that, I'd like to thank you. [LB277]

SENATOR ASHFORD: Thank you, Senator Mello. Any questions? Thanks. Thanks very much, Heath. Thank you all for coming down. The next bill, Senator Coash is up with LB244. [LB277 LB244]

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SENATOR COASH: (Exhibit 2) Well, thank you, Chairman Ashford and members of the Judiciary Committee. My name is Colby Coash and I represent the 27th District here in Lincoln. The intent of LB244 is to add tramadol and carisoprodol to the list of Schedule IV controlled substances in Nebraska. Tramadol is a narcotic analgesic used for treating moderate to severe pain, and can be addictive. Tramadol is a opioid analgesic similar to morphine, and is abused for its opioid effects by street-drug addicts, chronic pain patients, and health professionals. Tramadol can cause psychological dependency similar to the effects of codeine. Tramadol is a scheduled drug in Arkansas, Kentucky, Georgia. It is classified as a dangerous drug in Ohio, and it is included in a controlled substance monitoring program in North Dakota. Carisoprodol is a drug used as a muscle relaxant. Appropriate treatment with carisoprodol is two weeks, since after a two-week use, tolerance develops, which can lead to psychological dependence and drug abuse. Carisoprodol is a Schedule IV controlled substance in Oklahoma, Arizona, Kentucky, Florida, Alabama, and is on the controlled substance monitoring program in North Dakota. Both of these drugs are available by prescription only. Including them on the list of controlled substances mandates better recordkeeping requirements, limits refills, and increases the awareness of the danger of these drugs. Because of the addictive nature of both of these drugs and the high potential for abuse, the Nebraska Board of Pharmacy and the Nebraska Pharmacists Association supports scheduling of these two drugs. In addition, we've talked to the State Patrol and the prosecutors, and they have indicated they have seen an increase in abuse of these drugs. And eight people, per the Attorney General's Office in Nebraska, with medical licenses of some sort, have had action taken on their licenses in the last four years due to abuse of these drugs. That concludes my...if you have any questions I'd be glad to answer them. [LB244]

SENATOR ASHFORD: Thank you, Senator. Yes, Senator Rogert. [LB244]

SENATOR ROGERT: Senator Coash, referring to your last comment on eight folks have had action taken on their licenses. That was last year? [LB244]

SENATOR COASH: Eight folks since 2004 that have had action taken on their license, either a disciplinary action or loss of license. [LB244]

SENATOR ROGERT: Have you seen data that points one way or the other to abusers as far as "prescribants" versus folks in the industry that have access to it? Which group tends to be more abusive for either--and more specifically, to tramadol because that's what I'm more familiar with--but either of them. [LB244]

SENATOR COASH: I have not. Joni Cover is going to testify after me. She may be able to answer that question for you. [LB244]

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SENATOR ROBERT: Okay. Thank you. [LB244]

SENATOR ASHFORD: Seeing no other questions, thank you, Senator. Proponents. [LB244]

JONI COVER: (Exhibits 3 and 4) Hello, Senator Ashford, members of the committee. My name is Joni Cover, C-o-v-e-r, and I'm the executive vice president of the Nebraska Pharmacists Association. I appear before you today in support of LB244, and I would like to thank Senator Coash for introducing this legislation. LB244 was introduced on behalf of the Nebraska Board of Pharmacy. If you recall, last year, Dr. Kevin Borchert sat before you and testified on the scheduling of tramadol. Kevin was planning to be here today to again testify before you and champion this effort, but he had to be called out of town because of a sudden death of a family member. So I'm filling in for him, and I will tell you right now that I will not do justice to what he was able to do last year. I want you to know that I have included, in the handouts, a copy of his testimony and some additional materials that he wanted to have presented to you. I would like to highlight a couple of things on his testimony. I'm not going to read it. Senator Coash pointed out the number of healthcare professionals that had been sanctioned in the last few years, including pharmacists, physicians, dentists, and nurses. And I know that the Nebraska Department of Health and Human Services routinely screens health professionals on probation for tramadol use. One of the things that I would like to point out in my testimony, since Kevin did such an outstanding job last year, I included the hearing transcript from last year. Kevin was able to answer a lot of questions about the reasons why tramadol and now carisoprodol is going to be scheduled, and I wanted you to see that thorough examination, especially by Senator Chambers. We are seeing an abuse of carisoprodol, and so we would like...we added that to the bill this year. We are asking that tramadol and carisoprodol be listed as Schedule IV drugs, because they have a high potential of abuse and they are abused by individuals from all walks of life, including healthcare professionals. We are aware that the DEA has asked the FDA to schedule these drugs, to consider scheduling these drugs. And I believe that somewhere in the fine workings of our federal government, the process is moving slow. I will also tell you that Canada is considering scheduling tramadol, but I would caution you that hearing about other countries trying to schedule drugs is sort of like comparing apples and oranges with the American drug system. I just wanted to point one thing for your information. Currently, these two drugs are available only pursuant to a prescription. The change would be, right now, you can get a yearlong prescription and you can get as many refills as you'd like. If the drug is scheduled, you still have to have a prescription. The number of refills will be limited to five, and the prescription will have to be renewed every six months. It is an increased burden on pharmacists because we will have to add those two drugs to our inventory list that we do every year. But the pharmacists of Nebraska feel that it's worth the trouble because of the abuse potential. I see my little red light is on, so if you have any questions I'd would be happy to answer them. And thank you very much for your time, and again I apologize Kevin is not here

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because he would do a much better job at this than I have. [LB244]

SENATOR ASHFORD: You did a great job. Any questions of Joni? [LB244]

SENATOR ROBERT: I do, Senator Ashford. [LB244]

SENATOR ASHFORD: Yes, Senator Robert. [LB244]

SENATOR ROBERT: Joni, my concern not lies with the increased burden on the pharmacists. If you guys want to do it, I think that's fine. I do have concerns of the intended users or the "prescribers" that would get these drugs, if I'm understanding it right, once it goes on a schedule it eliminates the use of sampling. Is that correct? [LB244]

JONI COVER: No, that is not true. [LB244]

SENATOR ROBERT: That's not true? [LB244]

JONI COVER: You can still get samples of controlled substances. [LB244]

SENATOR ROBERT: You can still have samples. [LB244]

JONI COVER: Yes. [LB244]

SENATOR ROBERT: How can you have samples without a prescription? [LB244]

JONI COVER: Because physicians have a DEA license and they are able to get samples of controlled drugs. [LB244]

SENATOR ROBERT: And they are...okay, that was my misunderstanding. [LB244]

JONI COVER: I believe that's true. I will reconfirm that but I believe that that is the case, and I will get back to the committee on that. [LB244]

SENATOR ROBERT: I would like to confirm that, because I am concerned about once samples are not available for certain drugs, that it's a direct increase in costs for those. Part of the purpose of the sampling is to promote it, but it's also to help those who can't afford the drugs. [LB244]

JONI COVER: Right. I'll tell you one of the issues that we see with these drugs is--and we notice it a lot in the Medicaid population--is doctor and pharmacy shopping. And we have a program through Nebraska Medicaid called lock-in, so we're able to look at those patients who are frequent fliers. They'll go to different prescribers, different

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pharmacies. When we see carisoprodol and tramadol being prescribed a lot, it's usually a red flag for other abuse issues. And then we can take those patients and lock them in so they can only go to one prescriber or one pharmacy. So that's a big help on the Medicaid side. What you see the tramadol especially used as, you go get a prescription for a Schedule II narcotic; I can't get a refill on that right away or I can't get in to my doctor but I can get access to tramadol, so tramadol will help me until I can get my next prescription filled for the CII, so. But I will double-check on the sampling issue, and I will actually get that information if Senator Coash closes on the bill, hopefully we'll have that information. [LB244]

SENATOR ROBERT: Appreciate it. [LB244]

JONI COVER: No problem. Any other questions? [LB244]

SENATOR ASHFORD: No. Thanks, Joni. [LB244]

JONI COVER: Thank you. [LB244]

SENATOR ASHFORD: Other proponents? And how many proponents do we have? Kathy and... [LB244]

KATHY SIEFKEN: Senator Ashford and members of the committee, my name is Kathy Siefken, S-i-e-f-k-e-n, representing the Nebraska Grocery Industry Association, in support of this bill. I polled my independents and my multiple outlet stores that go across state lines, and everyone said that these are products that need to be controlled. The multiple store outlets that are in multiple states said that they would really like to see this addressed on a federal level so that everything is the same across state lines, and by passing this bill it sends that message to Washington, and hopefully they will step up and do what they need to do too. So with that, if you have any questions I'd be happy to try to answer. [LB244]

SENATOR ASHFORD: Do you think that works... [LB244]

KATHY SIEFKEN: Sometimes. [LB244]

SENATOR ASHFORD: ...the message to Washington thing? [LB244]

KATHY SIEFKEN: I think... [LB244]

SENATOR ASHFORD: To be honest, not that I've been doing this a long time, but I've never seen...and that's not a criticism of your point. You can...you know, hope reigns eternal, I guess. But thanks. Any questions of Kathy? No. Thank you. [LB244]



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KATHY SIEFKEN: Thank you. [LB244]

SENATOR ASHFORD: Any other proponents? Opponents? Neutral? Oh, proponents. Opponent. [LB244]

GARY VORSANGER: (Exhibit 5) Mr. Chairman and members of the Judiciary Committee, I appreciate the opportunity to be able to meet with you today and your consideration of LB244, that would place tramadol under Schedule IV status under the Nebraska Uniform Controlled Substances Act. I'd like to introduce myself. My name is Gary Vorsanger. I'm a physician; I'm an anesthesiologist by training. I work at Ortho-McNeil Janssen Scientific Affairs, which is a Johnson & Johnson company. I'm responsible for all tramadol-containing products at the company, as a clinical lead for tramadol, and I'm also responsible for risk management activities around us, as well. This is clearly a very important issue for us, which is why I'm here today. As a pain specialist, I can tell you that unfortunately pain has been and continues to be undertreated. We recognize pain as really two types: acute pain and chronic pain. Acute pain would be something like with a toothache or after surgery. Chronic pain is a condition which in some ways is more serious; it's more debilitating and has a strong impact on the body. Tramadol, which is a central-acting synthetic analgesic, is an excellent medication to treat both types of pain. It's become a standard pain medication for the treatment of moderate to moderately severe chronic pain, for which it has been approved, and it's a stronger alternative to drugs like Tylenol and nonsteroidal anti-inflammatory drugs, like Motrin, etcetera--when pain becomes more severe. It's also an excellent alternative to lower-dose morphine, so that patients don't necessarily have to move on to stronger medication. By way of background and history, tramadol was approved in the United States in March 1995. At that time, the company had an agreement with the FDA and DEA that the product would be marketed in unscheduled status. An independent steering committee was set up to monitor abuse and diversion of the product. It was comprised of a series of individuals with expertise in abuse liability. One of those people is Dr. Edgar Adams, who will be testifying after me. What we've basically been able to find is that tramadol had lower rates of abuse and diversion from the time it was approved, to 2005; and in 2005, a separate group called RADARS picked up monitoring abuse and diversion of tramadol. And the low rates which were found by the independent steering committee continue throughout the United States. Parenthetically, RADARS now tracks data throughout the United States, and Nebraska has very low rates of abuse and diversion using this accepted RADARS technology, which is information that the FDA and DEA see, as well. So with that history as a background and the various other information I've provided, there's an unintended consequence that happens with scheduling which you may not be aware of. In Arkansas and now recently in Kentucky, tramadol was scheduled. We monitored how drug patterns may change in Arkansas as a consequence of scheduling, and what we found is that physicians appeared to initially be prescribing more of a drug called propoxyphene or Darvocet. That drug is fairly dangerous. I have never prescribed it and

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there are issues around that drug, both in the United States and the UK. So there are other consequences to this, as well, and I'll... [LB244]

SENATOR ASHFORD: Go ahead and finish your comments. [LB244]

GARY VORSANGER: I beg your pardon? [LB244]

SENATOR ASHFORD: Go ahead and finish your comments. [LB244]

GARY VORSANGER: I'll continue. Okay, thank you. There are other potentially unintended consequences, as well: the continued undertreatment of pain that I've been talking to you about; the increased use of medicines that may not be as effective. Some of those are nonsteroidal anti-inflammatory drugs. You know of people who may have taken them and had ulcers, etcetera. There is newer scientific data to show it may have a negative impact on the heart. So again, long-term use of NSAIDs may be problematic, and we have another drug that avoids some of those. And lastly, it may, by scheduling tramadol, there may be an increased use of more potent pain medications which we know have a higher abuse potential. In summary, I just want to say very quickly that our company is very concerned about it. We've been using standard methodology and data that go to the FDA. We haven't seen high levels of abuse in Nebraska but certainly would be more than willing to work with the folks down here to understand the situation better. Last comment, you asked about sampling. Well I know what happened in Arkansas, is once a product becomes scheduled, sampling, at least in that state, is no longer permissible. I don't know the rules in Nebraska. So it may have an impact on that so I wanted to address that. [LB244]

SENATOR ASHFORD: Thank you, Doctor. Senator Council. [LB244]

SENATOR COUNCIL: I just, for the uniformed, Dr. Vorsanger, what is RADARS? [LB244]

GARY VORSANGER: Right. RADARS is a detection system that was designed to monitor for abuse and diversion for a variety of prescription pain medications. There are four components to RADARS. One component--they all work on a survey system--one component monitors information from individuals who may deal directly with people who have abuse and diversion of drugs. The NIDA, which stands for the National Institute on Drug Abuse, NIDA investigators are surveyed quarterly to see if they've heard information about prescription pain medications. That's one. A second one is called the law enforcement network. That reaches out to law enforcement experts to see if they've learned anything specifically about a particular drug. There's one system detection that looks at people coming in for methadone maintenance, for people who are detoxing; and there's a fourth one which is a poison control from the U.S. Poison Control network. So that information comes in; it's evaluated by a series of scientists that sit on a

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scientific advisory board. And that's something that we and other pharmaceutical companies use to monitor abuse and diversion of our medications. That information gets transmitted to the FDA, and the FDA uses these systems, as well. RADARS is completely independent of the pharmaceutical company. We participate by subscription in the same way you can buy a subscription...we can buy information on prescription (inaudible), as well. [LB244]

SENATOR COUNCIL: Okay. I think you may have indirectly answered my other question. What data collection system does the FDA rely upon in determining whether to recommend a drug for scheduling? [LB244]

GARY VORSANGER: Right. FDA looks at a series of...they look at a DAWN database and they look at a number of other databases, as well. They are invited to RADARS' meetings where they can hear the same information that we have, as well. Dr. Adams, who will follow me, headed up NIDA and will provide more information in terms of what the federal government uses. But the RADARS' data is widely recognized by the Food and Drug Administration as information that they use, as well. [LB244]

SENATOR COUNCIL: Thank you. [LB244]

SENATOR ASHFORD: Doctor, this may be a little off the topic, but in reading about the President's plan for upgrading technology in healthcare, that now there are only 17 percent of the physicians, was the number that I read in the press yesterday, currently have technology or use technology to prescribe or to deal with cases. In your opinion, what will the impact of technology, the President's plan, have on some of these issues? How does that help us, as a country, deal with healthcare issues dealing with prescription drugs? [LB244]

GARY VORSANGER: Right. And Mr. Chairman, that's an excellent question. More and more of my colleagues are going over to electronic information, history and physicals, to be able to share information with each other. That's going to be very important. The prescription monitoring program that I believe may have been discussed in Nebraska, there are approximately 38 states within the U.S. that have prescription monitoring programs now, and those are designed so that if somebody comes in and wants to get...has a scrip, if they fool a physician to get a scrip and they're not really legitimate pain patients and they go to another physician and they collect those, they can get them and sell them. A prescription monitoring program will then allow the pharmacists to be in touch with each other and call a doctor up and say, look, I don't know whether you realize it or not but you wrote a scrip and last week the doctor down the street wrote it and two blocks over somebody else did. And they can get a better control for whom, on those individuals who really seek to abuse and divert it. So that's one way where the methodology really helps. Now, interestingly enough, in the state of... [LB244]

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SENATOR ASHFORD: And with only 17 percent of physicians on the...that have...I'm sure some have more technology, but 17... [LB244]

GARY VORSANGER: Right. [LB244]

SENATOR ASHFORD: That really leads to...you don't get very much data with 17 percent. [LB244]

GARY VORSANGER: You don't. And I think, with time, with the President's plan, we'll have more people doing that. But the pharmacies are able...they're already linked to each other so this is something that might work well. I will tell you, in the state of Ohio where they've elected not to schedule tramadol, they have a prescription monitoring program which we think is one of the best that we've seen, and there they keep tramadol unscheduled and monitor it for these doctor shoppers, to be able to do that. But if we can follow up with what you said, Mr. Chairman: Hook up the doctors' offices to get this information, I think that will go a long way to make sure that legitimate pain patients get the drug they need without interfering with other people going to get those medicines. [LB244]

SENATOR ASHFORD: Does your company distribute generic drugs? [LB244]

GARY VORSANGER: We...there are several tramadol-containing products on the market today. There's Ultram, which we initially marketed as a branded product. It's largely genericized today and we're not involved with that. There's Ultracet, which was the next generation. That's a combination of tramadol and acetaminophen. We have a small share of the generic market there; very, very little. The only... [LB244]

SENATOR ASHFORD: Is there software--I didn't want to cut you off because this is a little off the topic--but is there software where a physician can access information on the lowest-cost alternative for a particular prescription, or is it...? If someone comes in and says this is the situation, boom, boom, boom; you should...does that exist, do you know? [LB244]

GARY VORSANGER: I'm sorry; say it again. [LB244]

SENATOR ASHFORD: Is there a software that a physician...where a physician or a healthcare provider can access the lowest-cost alternative for a prescription? [LB244]

GARY VORSANGER: You know, I'm not aware of that. We can look into that for you to get that answer. [LB244]

SENATOR ASHFORD: No, that's okay. I was just wondering if you're aware of it. [LB244]

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GARY VORSANGER: Usually if a patient goes to the pharmacists, they will go through a different series of alternatives and go through that based on their insurance plans, etcetera. [LB244]

SENATOR ASHFORD: I thought the President was also talking about encouraging the development of software to find the lowest-cost alternatives that still fit the criteria. And that's all, and I've gone off the topic, so. [LB244]

GARY VORSANGER: No, no. If I had it I'd be happy to answer it. [LB244]

SENATOR ASHFORD: But you obviously have a lot more expertise than 20 of me, so thanks for your comments. [LB244]

GARY VORSANGER: Thank you. It was my pleasure. Thanks very much. [LB244]

SENATOR ASHFORD: Any other opponents? [LB244]

EDGAR ADAMS: (Exhibit 6) Mr. Chairman, members of the committee, my name is Edgar Adams. I'm the head of epidemiology at Covance, which is a drug development company. I'm also a pharmacist by training. I spent 23 years as a commissioned officer in the Public Health Service. I was the chief epidemiologist at the National Institute on Drug Abuse, and I was responsible for the nation's drug abuse surveillance system. That included DAWN, the National Survey, and a number of other studies and surveys. I've been monitoring abuse of tramadol since 1992, and have recently completed a worldwide review of the data on the abuse of tramadol. I'm also a member of the American Pain Society and the College on Problems of Drug Dependence. I am acutely aware of the undertreatment of pain and very much concerned about that. However, despite more than 150 million people worldwide being exposed or taking, benefitting from tramadol, there is little evidence of abuse on a worldwide basis and in the United States. In a recent review by the World Health Organization in 2006, the WHO concluded that the level of abuse was so low that there was not even a need to consider scheduling this drug under our international treaties. In the United States, I was on the original independent steering committee, and I'm currently on the RADARS' scientific advisory board. The committee found, after years of active case finding, that there was approximately one case of abuse per 100,000 patients. I think we can all agree that's a pretty low rate of abuse. Data from Nebraska show similarly low rates of abuse. In the study of review of data from Poison Control Centers that spanned a period of four years, there was a total of six phone calls about the abuse of tramadol. Data from Key Informant, they're experts in drug abuse, and data from Poison Control Centers since that time support that finding. I was also the principal investigator on an 11,000-patient study looking at the abuse liability of tramadol, and concluded that the abuse of tramadol on a national basis was similar to the abuse of nonsteroidals, which, as you

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know, many are available over the counter, such as ibuprofen. Arkansas and Kentucky have scheduled tramadol, however the scientifically accepted data did not support that. The levels in Kentucky were as low as anywhere else in the nation, and that was also true in Arkansas. So given the low levels, I think there's an opportunity here, and the opportunity is that there's time to look for a solution to be able to monitor tramadol without scheduling it, because scheduling it could, in fact, lead to the continued undertreatment of pain, and that would be essentially harm for the citizens of Nebraska. The PMPs, or prescription monitoring programs that you heard of that are used in Ohio and 37 other states, I think are a very good alternative to look at this to see if there are patients getting drugs from multiple doctors, etcetera. And I am more than happy to take any questions that you may have. [LB244]

SENATOR ASHFORD: Any questions? Senator Rogert. Thank you, Doctor. [LB244]

SENATOR ROBERT: Mr. Adams, I asked the question earlier and I'll ask it to you in maybe a two-part. [LB244]

EDGAR ADAMS: Okay. [LB244]

SENATOR ROBERT: Is there evidence from your findings that this possibly is being abused more by those who prescribe it or industry folks that have access to it than the intended "prescribers," and is that what would cause a higher request of study rate because those are the people that see it directly and they see their employees or their fellow coworkers being involved in abuse instances? [LB244]

EDGAR ADAMS: Let me answer that in two ways. If you're referring to healthcare professionals, we just heard that over the past several years in Nebraska there were eight cases. There was a study done, and I don't know if it's in your package, but if it's not I'm sure that Johnson & Johnson would be happy to provide it for you. It's a study by Knisely which was specifically a study in healthcare professionals. There they found two things. One was that the abuse rates were low, and the second was that once the healthcare professionals were informed that they found something in their urine that they hadn't talked about, by and large, they stopped using the drug. And what that means is this drug is really not very reinforcing for them, which is a key determinant of abuse liability and addiction. So the level was low and the abuse did not continue once they were informed that there was something found in their urine that was not stated previously. [LB244]

SENATOR ROBERT: Okay. Thank you. [LB244]

SENATOR ASHFORD: Just 1 to 10, Doctor, what is the state of public health in the United States today? How would you rate it in your experience? [LB244]

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EDGAR ADAMS: Um, I think that the state of public health needs work. [LB244]

SENATOR ASHFORD: Is it a 5 or a...because you've been at it awhile. [LB244]

EDGAR ADAMS: Well, if you're talking about the uninsured population, I think that's a travesty. If you're talking about the state of the treatment of pain in the United States and worldwide, I think the treatment of pain in the United States and worldwide, especially worldwide, is appalling. There are millions and millions of people...very few people die of pain but many, many millions live in pain and die in pain, and I think that's an appalling situation. [LB244]

SENATOR ASHFORD: And how about in the area of mental health? What's your opinion of the state of mental health in public health? [LB244]

EDGAR ADAMS: Honestly, I haven't reviewed the data on mental health in many, many years. When I was in the Alcohol, Drug Abuse, and Mental Health Administration, I did, but I haven't looked at it in years and I would be reluctant. [LB244]

SENATOR ASHFORD: Okay. Doctor, those are questions you probably weren't prepared, necessarily, to answer, but it's nice to have someone with your vast experience chat with us about these issues. [LB244]

EDGAR ADAMS: Well, thank you very much. [LB244]

SENATOR ASHFORD: Thanks. [LB244]

EDGAR ADAMS: Thank you. [LB244]

SENATOR ASHFORD: Senator Lathrop. [LB244]

SENATOR LATHROP: I have to admit that I walked into this one in the middle of it because I was in a different committee, but I do have a question about the tramadol. Is--and somebody probably covered this before I got here and for that I apologize--but the level of addiction to this, you're saying that it's not the kind of drug typically that one would get addicted to? Or the addiction rate isn't very high? [LB244]

EDGAR ADAMS: There's a lot of confusion about the term "addiction." Many people think that if a drug causes withdrawal it's addicting. The fact, many drugs cause withdrawal. If you take insulin on a daily basis, and stop it, you will have withdrawal symptoms. Would people argue that you're addicted to insulin? No. The measure of addiction agreed to by the American Pain Society and most experts in the field is that when you use the drug you lose control over your ability to control its use. So it's usually measured by loss of control over the use of the drug. You'll do anything to get that drug:

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things that will jeopardize your family, jeopardize your job. It may involve criminal activities and so, so it's a loss of control. Basically, increasing this... [LB244]

SENATOR LATHROP: Using that definition then, what's the...if you prescribe this to 1,000 patients, what do your studies show is the addiction rate using your... [LB244]

EDGAR ADAMS: My study would show that it is similar to what you would find on accepted measures that...the same measures that you would see with NSAIDs. So the rate would be less... [LB244]

SENATOR LATHROP: The NSAIDs being aspirin, Tylenol? [LB244]

EDGAR ADAMS: Well, aspirin is an NSAID. But drugs like ibuprofen, Motrin, Advil, things like that. [LB244]

SENATOR LATHROP: I can't imagine that aspirin has a single person running to hold up the liquor store. [LB244]

EDGAR ADAMS: I'm not aware of any cases, but... [LB244]

SENATOR LATHROP: Well, let me use a different measure then, and ask you what's the...you said that you believe addiction is bigger--and I don't have a quarrel with your definition--you said that addiction is bigger than simply having physical withdrawal symptoms. How many people are going to have physical withdrawal symptoms out of a thousand that are coming off tramadol? [LB244]

EDGAR ADAMS: If they were on tramadol for several months and they were tapered appropriately, they would be fine. If you are on any drug for a long period of time, you should be tapered, which is to reduce the dose over time. Now, I didn't mean to be... [LB244]

SENATOR LATHROP: And they will have no symptoms in that case. [LB244]

EDGAR ADAMS: Honestly, I couldn't give you an exact answer because there will be some people who have withdrawal. The rates of withdrawal would be low, and with any opioid product they're an expected result. They are not an indication of abuse or addiction. [LB244]

SENATOR LATHROP: They're an expected result. In other words, you would expect them to have those symptoms... [LB244]

EDGAR ADAMS: If you take opioids for a long period of time and you stop them abruptly, you will, in all likelihood, experience some withdrawal symptoms. [LB244]



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SENATOR LATHROP: Me; but how about 1,000 people? And I'm going to use a layman's term: Some people are going to climb the...crawl...you know, they're going to be... [LB244]

EDGAR ADAMS: Yeah, right, and obviously I'm reluctant to answer that question, because if you are treated appropriately then withdrawal should not be an issue. [LB244]

SENATOR LATHROP: What if you go to the doctor, as a lot of these people do--and Senator Ashford was asking you about pain--part of the problem with people in pain in this country is they go to surgeons and the surgeons get tired of them because they can't cut on them anymore, and they get rid of them and they say I'm not going to treat you anymore; quit coming back. Isn't that true? [LB244]

EDGAR ADAMS: I can't address that but... [LB244]

SENATOR ASHFORD: "Why not" could be an answer...I mean... [LB244]

SENATOR LATHROP: Well, I think that's certainly been my experience as somebody that represents people that are dealing with chronic pain. But we have people who have access problems after awhile because the docs just finally go: She's driving me crazy; I don't want her in my office anymore. And now they don't get their tramadol. [LB244]

EDGAR ADAMS: If they had that level of pain, they would probably be using something else. But what you say, there's been a lot about patients who have true chronic pain, who go to a primary care physician, who may be reluctant to treat it appropriately and may not know how to treat it appropriately, who will end up getting referred to a pain specialist. [LB244]

SENATOR LATHROP: Okay. And there's certainly more of those than there used to be. [LB244]

EDGAR ADAMS: There needs to be more. [LB244]

SENATOR LATHROP: I wouldn't argue with that or disagree. What about the side effects of the medication? You mentioned the problems with Darvocet, and I happen to have seen people's kidneys get wasted with Darvocet, right? With long-term use? What's the long-term consequences of the tramadol, if any? [LB244]

EDGAR ADAMS: I am honestly not aware of any long-term consequences of tramadol use. [LB244]

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SENATOR LATHROP: It doesn't affect any of the organs of the body? [LB244]

EDGAR ADAMS: I can't address that question. Maybe Dr. Vorsanger could. [LB244]

SENATOR LATHROP: Okay. Okay. Thank you. [LB244]

EDGAR ADAMS: I do want to say, I didn't want to be flippant about the aspirin comment, but we use measures such as the patients continually increasing their dose without their physician's authorization or knowledge, their inability to stop use. And when they said they couldn't stop use, we asked them why. And if they said...if they basically said because it controls my pain and the pain would come back, we didn't count those people. So we had a whole series of measures about inappropriate use that we used. And based on those measures, we found that there was very little abuse of tramadol. [LB244]

SENATOR LATHROP: Okay. [LB244]

EDGAR ADAMS: Okay. Thank you very much. [LB244]

SENATOR ASHFORD: Thank you, Doctor. Any other opponents? I think we're still in the opponent. Neutral? Senator Coash, you've incited a great discussion. [LB244]

SENATOR COASH: Thank you. Thank you, Chairman and members of the committee. Just a couple things in closing as we work through this. One, we don't have a prescription drug monitoring program here in Nebraska, so that's not going to...at this time, that's not an option for us in our state. And we were able to get an answer to a question Senator Rogert asked, which was referring to sampling. We confirmed with Health and Human Services, and this would not prevent distribution via sampling, but it does require that those samples be under lock and key, so. That's all I have. [LB244]

SENATOR ASHFORD: Thank you, Senator. Any further questions of Senator Coash? Thanks, Senator Coash. And that concludes the hearing on LB244. See also Exhibit 11. LB155, Senator Rogert. [LB244]

SENATOR ROBERT: (Exhibit 7) Good afternoon, fellow members of the Judiciary Committee, Chairman Ashford. I'm distributing a newspaper article from the World-Herald from August, and if you have further interest I have two more articles that I can make available to the committee if anybody so wishes. I appear before you today to introduce LB155. My name is Kent Rogert. I'm the representative of Legislative District 16, and I worked on this legislation with the assistance of the Office of the Attorney General. The goal of this bill is to protect the public from three criminal threats: white-collar crime, widespread theft schemes, and identity theft. The first is aggregation. My interest in this legislation was originally started with the idea of being able to

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aggregate charges. As you may or may not recall, the Attorney General's Office lodged an investigation into gas blends at the Department of Agriculture's Division of Weights and Measures, and informed them that stations were selling ethanol-blend gasoline at an unleaded price. The investigation found a gas station owner in my district who was selling ethanol-blend gasoline to customers at the higher unleaded price. People pumped and purchased what they thought was unleaded gas, but what they really got was the lower-priced ethanol blend. The investigation also found that the general manager of a Sapp Bros. distribution center actively promoted this idea of selling the ethanol-blended gas at unleaded prices to other store owners. Both men deceived customers for over a year, taking a little bit of money from a lot of unsuspecting people. Right now, state law won't allow the losses of multiple victims together, so these folks couldn't be charged with felonies. Their practice of taking a little money from a lot of my constituents is inexcusable and we need penalties to fit that crime. With this legislation, that hammer exists. Next, is identity theft. We need to modernize our laws and create a specific identify theft statute. Nearly 800 Nebraska victims were identified as victims of identity theft in 2007 according to the FTC. The Attorney General's Office has had over 200 identity theft complaints over the last two years. Currently, identity theft crimes are prosecuted under the criminal impersonation law. Creating an identity theft statute will make it easier for the public and law enforcement to distinguish between the two. Criminal impersonation is pretending to be a person or organization with the intent to deceive. Identity theft is when a person uses another person's personally identifying information without their consent. As policymakers, we need to protect our customers, our constituents, and this should always be at the forefront of our minds. The final component is what we call RICO . The state of Nebraska, like all other states, continues to encounter organized crime, both large and small; two people, working together and coming up with methods to take money from a lot of people without their knowing is organized crime such as this gas syndicate of sorts; that's organized crime. The largest of these enterprises are patrolled by the federal authorities, but the rest function with near immunity due to the lack of prosecutorial tools to address them. That's why we need the Nebraska Public Protection Act, which is part of this bill. The majority of other states have adopted some form of RICO, which is Racketeering Influenced and Corrupt Organizations, to address these criminal activities. The passage of such legislation would place us on equal footing with other states and prevent Nebraska from being one of the last safe harbors for organizations who choose to commit these acts. This proposed bill sets forth prohibited activities which mirror the federal provisions, and this act makes it illegal to use funds obtained from racketeering activities in the operations of any legal or illegal enterprise. Essentially, it addresses the money laundering of illegally obtained proceeds. The RICO act further addresses loan-sharking, strong-arm protection, and other traditional organized crime activities. The punishment aspect of this act makes it a Class III felony, one to 20 years and/or a \$25,000 fine for a violation unless the underlying racketeering activity is a Class I, IA, or IB felony. The penalty is then increased to a Class IB felony, which is 20 years to life. The act further creates the additional court option to increase the fine to an amount equal to three times of either

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the value gained by the violating enterprise or gross loss caused to the victims. Finally, the act provides the state with the ability to pursue forfeiture of illegally gotten gains or items used in the course of the offense. I appreciate the opportunity to present LB155 and I ask you to join me in supporting these necessary tools to law enforcement and prosecutors of our state. Assistant Attorney General John Freudenberg will follow me with more in-depth on the legislation, and I'll answer any questions, or try to anyway. [LB155]

SENATOR LATHROP: Very good. Thank you, Senator Rogert. Senator Council has a question for you. [LB155]

SENATOR COUNCIL: Yes. Thank you, Senator Rogert. I have a couple of questions. The identity theft portion of the bill I don't have many questions with. I don't have many, any questions with regard to the aggregation issue. I do have questions with regard to the comparable RICO sections. In your opening statement and in the statement of intent, it speaks to trying to address the issue of organized crime. And organized crime, in the minds of most lay people, means more than one person--someone acting in concert. But the way the statute is written it appears that what is principally accomplished by what do you call, the public protection...the Public Protection Act? [LB155]

SENATOR ROBERT: Yes. [LB155]

SENATOR COUNCIL: Is to allow for enhancement for multiple offenses, because the pattern of racketeering activity is defined as committing one or more of a racketeering activity, but then when you read the definition of racketeering activity, if I individually commit any one of these offenses more than twice, it's a pattern of racketeering activity although there's no involvement of anyone other than myself. Is that the intent of the legislation, is just to provide enhancements for multiple offenses of the criminal statutes, or is it truly to address a problem of organized crime? [LB155]

SENATOR ROBERT: Well, I would say yes and no to probably both of those questions. We definitely want to enhance. I may want to look...have you direct the portion of that, being individual or multiple folks, to the folks behind me. But I definitely want to enhance the way we punish these folks. Because what they're doing is it's...when you do it on multiple people, that makes it racketeering. And right now, we're just slapping them on the wrist with some sort of fine and a misdemeanor charge; and this allows us to get all that money back, and then some, if they've made gains from it, and redistribute it back to the folks that it was and then seize any property that they have, as well, and it's more of a deterrent. These types of individuals know where they can go, what states they can go to. They know what they can do where the laws read. Changing the law will, in my opinion, will literally stop the activity when you make it this severe. They...we won't catch a lot of people doing it this way because they will stop doing it. [LB155]

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SENATOR COUNCIL: And I appreciate the issue that you're seeking to address. My concern is that...my reading of the proposed legislation goes far beyond that and casts a much wider net than perhaps may have been intended, and particularly with regard to--and I'll ask this of the representative from the Attorney General's Office. For example, in the gas bait-and-switch--and you can correct me if my recollection is in error, and it may be very well be because I don't practice in that area all the time--but we have a Nebraska trade practices deception act that provides penalties for this type of behavior. And I can appreciate, in a situation like this, wanting to be able to seize any proceeds gained from it; I understand those aspects of the forfeiture provisions of the statute. But I'm very much concerned that racketeering activity has been defined to include just the commission of any one...almost every felony and higher-level misdemeanor offense that's currently set forth in the statute. And if, unfortunately, someone commits such an act and then commits another act within ten years of the last time they committed the act, which is kind of confusing--we have discussed that language with the attorneys--then they're automatically...I mean, they're deemed to be involved in racketeering. So I mean, it's just...to me it appears to be more of an enhancement on penalties for just...and I don't mean to diminish the issue about crime and criminal behavior, but it appears to be principally aimed at increasing penalties for multiple offenses as opposed to targeting organized crime. And I would think if you want to target organized crime, which again by its term implies more than one, then subparagraph (5), racketeering activity, should be more confined to conspiracy to commit, aiding and abetting in the commission, aiding in the consummation of, so that implies that it's just not individual behavior that rises to the level of racketeering. [LB155]

SENATOR ROBERT: And I respect that concern; I do. That may be something we should massage a little bit and discuss, and I think there will be discussion that comes from that. I do think it's meant to be further reaching than what I...well, I know it is. It's meant to be further reaching than what we have and what I aimed to correct with the gas situation. We had a bill that we discussed here a couple weeks ago from Senator Pirsch that talked about bad checks. And there are check forging rings that are all over the place that do this type of (inaudible), and I think this covers that. This would allow for aggregation and consider that a possible racketeering scheme, and in my mind a lot of those definitely are. [LB155]

SENATOR COUNCIL: Okay. That's all I have, Senator Lathrop. [LB155]

SENATOR LATHROP: Oh. Thank you. Are there any other questions for Senator Rogert? Seeing none, I assume you'll stick around to close on this one. (Inaudible) We will not do that today. Okay, have a seat. Welcome. [LB155]

JOHN FREUDENBERG: (Exhibit 8) Committee members, my name is John Freudenberg, F-r-e-u-d-e-n-b-e-r-g. I'm the criminal bureau chief for the Nebraska

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Attorney General's Office, and I appear in support of LB155, which is part of the Attorney General's legislative package this year, and we appreciate Senator Rogert for sponsoring it. The purpose of this bill is to address several situations of white-collar crime in the state of Nebraska. It is normally straightforward when a person with a gun and a mask takes your money. It's an entirely different situation when he does it with a handshake and a smile. Our statutes, as they currently are, are insufficient to address these types of crime. LB155 has three distinct parts. First is the Racketeer Influenced and Corrupt Organizations statute, or RICO. The second part allows the aggregation of multiple victims' losses when determining the level of the theft offense. And the final item modifies our current criminal impersonation statute and creates the offenses of identity theft and identity fraud. Currently, 34 states and the federal government have some form of RICO statute. And RICO is a highly complex law enforcement tool that can be used to address several different criminal enterprises, many of which you've heard in the everyday news: home mortgage scams; security scams like we're seeing with Mr. Madoff; and locally, in Grand Island, with the First Americans securities matter. It can be used to respond to the business side of street gangs and drug distribution networks, as well as traditional organized crime. It can apply to about any criminal activity that ends in the word "ring": human trafficking ring, burglary ring, dog fighting ring, fencing ring, car theft ring, and so on. The second change is as simple as RICO is complex. Section 8 of LB155 simply changes the phrase "of one person" to the phrase "one or more persons" in the statute that we use to determine the level of a theft offense. This means that losses incurred by multiple victims in one scheme can be added together to determine the level of the classification. As the law now exists, if several people are victimized in a small amount, they must be prosecuted in a series of misdemeanors. Only five states, including Nebraska, specifically do not allow victims' loss to be aggregated; 30 do allow it; and 15 are ambiguous by either not stating it in their statutes nor have the issue been resolved in their courts. Besides the gas scam that Senator Rogert referred to, this would also be applicable to Internet scams, shoplifting sprees, and other multiple victim crimes. A simple example is in Virginia where a person went into a nurses station, stole several belongings of purses from multiple nurses. He was allowed to be prosecuted for a felony because they were allowed to add the amounts together. Here in Nebraska you would not be, even though all the items were taken from one person in one act. The final part of LB155 is the modification of an expansion of our criminal impersonation statute. It is expanded into three separate offenses which I have previously stated. I know my time is running short. I have provided a summary of the bill that I am more than willing to go over with you, and Ms. Levy from our office is also more than willing to meet and discuss any portion of this bill that you find it necessary. [LB155]

SENATOR LATHROP: Thank you very much for your testimony. Are there questions?  
Senator Council. [LB155]

SENATOR COUNCIL: Mr. Freudenberg, I'm going to direct the same questions to you

that I directed to Senator Rogert. And again, I'm going to preface my statements with I understand the objective to address white-collar crime, gang enterprise crime, the aggregation for purposes of penalty, as well as the identity theft. But I have a problem because by the very definitions at the beginning of this statute, "For purposes of the Public Protection Act:", you have a definition of "Enterprise means any individual...", and then the "Pattern of racketeering activity means at least two acts of racketeering activity...", and then it tells how. But then when you get to the definition of racketeering activity, it includes "the commission..."--and I'll just leave it there--or the commission or "attempt to commit..."--which goes back to individual--and then it lists virtually every criminal offense that currently exists in the statute. So my question is, you know, is the real intent to address criminal enterprises or is this just a backdoor means of enhancing criminal penalties for the crimes that are currently covered in statute? Because the pattern of racketeering activity and racketeering activity being defined as the commission or attempt to commit one of the enumerated offenses by an individual, how does that address organized crime? [LB155]

JOHN FREUDENBERG: Senator, in Section 6 of this bill this sets forth the elements of the crime, as I'm sure you're aware. And the...this is a follow-the-money crime. So to prosecute someone in a matter like this, you not only have to have the racketeering activity, you have to be able to show how the money was obtained through the racketeering activity, and how it was distributed. So to successfully prosecute something like this, you have to be able to follow the money and prove how it transferred through. Now, that is not...it is not easy and I think it doesn't sound easy, but this is a complex tool that's used to allow, to get enterprises. If we were only looking for enhancement of criminal offenders, this would be a very, very difficult way to go about it. These crimes are difficult to prove and difficult to investigate; however, when done properly, are very effective for going after enterprises of any number of people. And they allow you to reach many people that you are not able to reach than, normally, in a criminal enterprise. So the intent of this bill, I assure you, has nothing to do with enhancement, because this is far from a simple way of doing it. If there is something in there that needs to be corrected, obviously our office would be willing to work with you on it and discuss the matter, but that is not the intent of this bill at all, and it would be actually harder to do that than just to charge them with additional offenses. [LB155]

SENATOR COUNCIL: Well, as I read it, if I, Individual, commit two robberies, and I commit those two robberies within the time frame set forth in Section 5(2), that constitutes a pattern of racketeering activity. And if I used the proceeds from those robberies to acquire any property or invest in anything, I fall within Section 6. And if I fall within Section 6, then I fall within Section 7. It says, "A person who violates section 6 of this act shall be guilty of a Class III felony; however, such person shall be guilty of a Class IB felony if the violation is based upon racketeering activity which is punishable as a Class I, IA, or IB felony.", which robbery is. [LB155]

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JOHN FREUDENBERG: Well, if I am mistaken, I apologize, but I believe robbery is a Class II felony. [LB155]

SENATOR COUNCIL: We've got armed robbery and robbery. [LB155]

JOHN FREUDENBERG: If I'm mistaken, I apologize, but it is was my understanding it was... [LB155]

SENATOR COUNCIL: Okay, but that's the issue that concerns me. [LB155]

JOHN FREUDENBERG: Well, to alleviate that fear, to show that armed robbery is a Class II felony, if we were to charge them with a RICO violation instead of an armed robbery, if my assumption is correct, we would be going backwards. They would be having a lesser punishment than they were receiving for the robbery. [LB155]

SENATOR COUNCIL: No. No, you could treat it as a Class IB felony. [LB155]

JOHN FREUDENBERG: Only if it was a Class I, IA, or IB felony... [LB155]

SENATOR COUNCIL: Involved. [LB155]

JOHN FREUDENBERG: ...in its own right. [LB155]

SENATOR COUNCIL: Right. [LB155]

JOHN FREUDENBERG: So we couldn't enhance it to higher than that. That would be the same thing. It would be harder to prove the RICO violation than it would be just to prove the straight robbery. And the reason that is, is because there's the additional element set forth in Section 6. And these additional elements in Section 6 say that you have to be able to show there was money or pecuniary items taken, and it was used to purchase an interest in real estate or redeployed in some kind of enterprise. So you have additional elements to get a lesser punishment or at least not a greater punishment in that situation, plus you have to go back and prove the prior offense. So it's not an enhancement for the simple fact that you can't get higher with it, with the examples that we've talked about. [LB155]

SENATOR COUNCIL: And you go from a Class III to a IB. [LB155]

JOHN FREUDENBERG: You...well, the only crimes that I'm aware of in Nebraska that are in the racketeering section that are at the level are either drug crimes or they are murder. And the intent for a I, IA, and IB, if they've committed one of those, first degree murder...or second degree murder or a child abuse, which isn't included in here, then if you're involved with that and you are part of the group that decided to commit the



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murder for hire or whatever realm it's in, you could be pulled in under that, and that's the thought of it. It's not an enhancement. It would be simply easier to prove the murder than it would be to prove the murder plus the RICO provisions. So you're not going to get life plus life, so there's no reason to go to RICO in that situation for the primary. [LB155]

SENATOR COUNCIL: Okay. No further questions. [LB155]

SENATOR ASHFORD: Thank you, Senator Council. Thank you. [LB155]

JOHN FREUDENBERG: Thank you. [LB155]

SENATOR ASHFORD: Other proponents. Lee. [LB155]

LEE POLIKOV: Mr. Chairman, members of the committee, I'm Lee Polikov. I'm the Sarpy County Attorney and I'm appearing today on behalf of the County Attorneys Association as the current president, Nebraska County Attorneys Association. Thank you for allowing me to testify today. The County Attorneys Association believe they have, as one of their roles, the opportunity to assist this body with legislation that could affect our work. We have a select list, believe it or not, and the RICO bill, which also includes aggregation of victim loss and identity theft sections, is one of those bills. This legislation we think will provide important tools to address certain crimes that continue to grow in sophistication. We believe, too, that this legislation will encourage local law enforcement to become more sophisticated in their ability to investigate criminal enterprises, especially involving significant financial transactions. So I would ask you to please consider this legislation and pass it out of committee for consideration by the Unicameral. And Senator Council, as I sat and listened to some of the discussion, I wonder if part of the intent of including individuals might be so that it's clear that if there is a multiparty criminal enterprise but you're only prosecuting one individual, that one individual fits under this statute. Additionally, you might be involved with...and I think they're identified as business enterprises, it might be using computer nonpeople to deal your enterprise in, as an individual. And that was just a thought I had as I listened to your conversation, but I think it's well-taken. [LB155]

SENATOR COUNCIL: And may I respond, Mr. Chairman? [LB155]

SENATOR ASHFORD: Yes, of course. [LB155]

SENATOR COUNCIL: Because that's the issue I'm getting to, Mr. Polikov. I mean, I appreciate and understand if we're talking about an individual who's involved in a criminal enterprise, and an enterprise implies that there's more things or more persons involved. I'm not tracking that as I read the proposed legislation, and perhaps we have an opportunity to sit down and maybe clarify that. Like I said at the beginning, I

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appreciate what the objective is here in terms of addressing these criminal enterprises, and trying to reach the ill-gotten gains and to be able to aggregate. And I appreciate that and I don't think anybody in this room would disagree with providing protection against individuals who have been the victim of the identity theft. But I just want to be careful that we're not creating a greater problem in terms of due process and application in trying to address the organized crime issue. And I think organized crime, and we're talking criminal enterprises, and organized crime sensationalizes and people start thinking about law and order and whatever, but okay. [LB155]

LEE POLIKOV: Well-taken, and the resources of the County Attorneys Association are available to you, as well as, I know, the Attorney General's Office. [LB155]

SENATOR COUNCIL: Thank you. [LB155]

SENATOR ASHFORD: Thank you, Lee. [LB155]

LEE POLIKOV: Thank you. [LB155]

SENATOR ASHFORD: Other proponents. [LB155]

JAIMEE NAPP: Mr. Chairman, members of the committee, thank you for this opportunity to speak on behalf of this, in support of this bill. For the record, my name is Jaimee Napp; it's spelled J-a-i-m-e-e N-a-p-p, and I'm the executive director of the Identity Theft Action Council of Nebraska. We're an Omaha-based nonprofit that works solely on identity theft issues affecting victims in the state. First off, I'd like to thank the Attorney General's Office and Senator Rogert for bringing this important bill forward. I will speak today specifically on Sections 9-13 of the act. It brings Nebraska's identity theft criminal statute to present, closing gaps that our organization, law enforcement, and prosecutors are currently seeing. Identity theft is a constantly changing crime, and these additions will greatly increase their ability to hold offenders accountable. Briefly, I'd like to highlight a few of these additions. Under Section 10, identity theft victims often have a difficult time accessing a police report, and the reason, many times, is jurisdictional because the crime can be perpetrated virtually anywhere. This would allow a victim of identity theft, criminal impersonation, or identity fraud to file a police report at the law enforcement agency where the victim lives. This is critical because victims need to prove their innocence to the creditors, and the police report is regularly required of that to begin clearing their name. Under Section 11, regarding criminal impersonation, the addition of the ability to charge for providing false information to court or a law enforcement officer, and providing false information or documents to an employer for purposes of employment closes many gaps that victims fall through currently. Criminals use personal information for many reasons other than financial gain, including to commit crimes, evading arrest, or undocumented workers use this information to be employed in this country. In addition to Section 12, the crime of identity theft creating that in

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Section 13, identity fraud also greatly enhances the ability to charge and prosecute. Many criminals choose this crime because it's a very high-yield, low-risk crime, and if they're caught, the penalty is usually very minor. If an offender has a second or subsequent conviction under these new provisions, the offender's penalty would be incrementally increased, assisting to kind of slow the revolving door that we have seen. I urge the committee to swiftly pass this bill through, and I'd be happy to answer any questions. [LB155]

SENATOR ASHFORD: Any questions? Good. Thanks. [LB155]

JAIMEE NAPP: Okay. Thank you. [LB155]

SENATOR ASHFORD: Other proponents? Opponents? [LB155]

DON NIEMANN: (Exhibit 9) Afternoon, Senator Ashford and members of the committee. My name is Don Niemann. I'm a private investigator. I'm also here representing the Nebraska Association of Licensed Private Investigators. In general, we, as a private investigator organization, support the bill. We have one little issue or an issue with the Section 11 on page 25. It appears to us that it is extremely broad in nature and may eliminate any undercover operations or any opportunities that we may be providing services for attorneys and our clients in addressing the issues of where we would not be able to use any aliases, any undercover names. It could be so broad as to the fact that we could even affect undercover surveillance operations, doing work comp and those types of things. We would like to have some kind of an exemption on that. I understand the body, when you may not want a blanket exemption for private investigators, so I would call your attention to the second page on that. It was suggested that we come up with some kind of legalese that might exempt certain activities. I would request that the committee look at that and see if there's some way that we could get some relief on that, because the way we read that bill, it's pretty much we have to use our given name or agency and everything else in any activities that we do. And we would be happy to work with you on that, and I realize it's late in the day so if you have any questions. If not, we'd be willing to work with you. [LB155]

SENATOR ASHFORD: Questions of Don? So noted. [LB155]

DON NIEMANN: Thank you. [LB155]

SENATOR ASHFORD: (See also Exhibit 10) Thanks, Don. Any other opponents? Neutral? Where is everybody? Senator Rogert. They're watching us on the Internet or something, but they can't talk to us on the Internet yet, can they? All right, that ends the hearing and we will go into Exec Session for a little bit. [LB155]

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Disposition of Bills:

LB155 - Placed on General File with amendments.

LB244 - Held in committee.

LB276 - Held in committee.

LB277 - Indefinitely postponed.

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Chairperson

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Committee Clerk