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Judiciary Committee  
February 23, 2011

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[LB232 LB298 LB512 LB518 LB658]

The Committee on Judiciary met at 1:30 p.m. on Wednesday, February 23, 2011, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB658, LB232, LB298, LB512 and LB518. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Colby Coash; Brenda Council; Tyson Larson; and Amanda McGill. Senators absent: Burke Harr and Scott Lautenbaugh.

SENATOR ASHFORD: (Recorder malfunction, some testimony lost.)...ask how many people are here on LB658? How about LB232? Okay. LB298? LB512? Andy is here. LB518? Okay. All right. We're going to get started. I think we have enough people here. Let's get started. We're going to start with LB658/Senator Karpisek. Those of you...I see that many of you have been here before. But I will remind everyone that we have a light system. We ask you to confine your comments, other than the introducers of the bills, to three minutes. The yellow light will tell you that you have a few--30 seconds or so to sum up. And then, of course, that three minutes doesn't count the questioning and so forth and so on. So why don't we get started with Senator Karpisek and LB658.

SENATOR KARPISEK: Thank you, Senator Ashford, members of the Judiciary Committee. For the record, my name is Russ Karpisek, R-u-s-s K-a-r-p-i-s-e-k, and I represent the 32nd Legislative District. LB658 changes the...increases the fee for obtaining a handgun certificate from \$5 to \$10. This fee has not been adjusted since LB355 in 1991, which was the statute that enacted the permit. Unfortunately, the fee no longer covers the cost of issuing the certificate. We have people behind me that will be able to spell that out better for you, how the process works. And if you were anywhere near the floor this morning, I'm sure that you heard that we are cutting county and city aid. This is a way to...I feel, when we are making them do things, when we give them mandates but we don't let them even get the money back that it costs, we are putting them at a very big disadvantage. So even the \$10 would not make up the complete cost of doing this, but it would help a little bit. With that, I'd be glad to answer any questions. [LB658]

SENATOR ASHFORD: Any questions of Senator Karpisek? My gracious. Senator Coash, do you have a question, or is that just a...? [LB658]

SENATOR KARPISEK: I stunned them. (Laughter) [LB658]

SENATOR ASHFORD: That was a wave. Okay, thanks, Russ. Any proponents? Come on up. And those who are going to testify, if you'd sort of come up to the front of the room and--chairs in the front and sign the sheet, that would be great. Good afternoon. [LB658]

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TODD DUNCAN: (Exhibits 1 and 2) Good afternoon. My name is Todd Duncan, T-o-d-d D-u-n-c-a-n, and I'm here representing the Lancaster County Sheriff's Office here in Lincoln as well as the Nebraska Sheriffs' Association. And I am here also just to speak in support of LB658. Essentially, I'll just echo the senator's opening remarks, in that the \$5 fee that we assess to process a handgun purchase certificate application falls far below the actual cost that we incur when we process the application and conduct the required background check. I've sent a couple of handouts by. One will show a breakdown of those costs and where they come from, from a couple of the area counties--the Douglas County Sheriff's Office, Sarpy County, Fillmore County, our county--just showing some of the processes that we do when we're reviewing one of those applications. You'll see from those handouts that the average cost to a sheriff's office or police department when processing an application is about \$15 per application, which is well above the \$5 that we collect as a fee. So even if we are in support of a \$10 fee, that fee still falls well below the actual cost that we incur to process the application. And for a statistical reference, we do about 2,200 applications per year here in Lancaster County. That's pretty much our position, and I'd be happy to answer any questions. [LB658]

SENATOR ASHFORD: You support higher fees? [LB658]

TODD DUNCAN: Ten dollars, yes. I support the proposed fee increase. [LB658]

SENATOR ASHFORD: Any questions? Seeing none...Senator Larson. [LB658]

SENATOR LARSON: Thank you, Mr. Chairman. You gave us the example of, like, Lancaster and some of...what about the more rural counties? Are they seeing the same increases in personnel costs, or are they managing it with \$5? [LB658]

TODD DUNCAN: I'm going to...without documentation from those counties, I'll go out on a limb and say that the process is fairly similar from each jurisdiction. We think we do a responsible job, and we're pretty confident the other agencies do as well. It's just a matter of the hours it takes to run the required checks to make sure they're not prohibited by federal, state, or local laws. And many of the federal records that are in the FBI's database are incomplete. There will be an arrest record shown but no court disposition. And that requires a lot of personal research by calling the arresting jurisdiction or the court of jurisdiction to find out what the actual court disposition was. And so every county encounters that same problem. [LB658]

SENATOR LARSON: All right. I didn't know if they're, you know, oftentimes...had said that the smaller counties had to be a little more efficient in terms of personnel because they don't have quite the tax base. But I appreciate that. [LB658]

SENATOR ASHFORD: Any other questions? Okay. How is that...we increased the

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capias fee, was that what we did last--was it two years ago, do you remember that?  
[LB658]

TODD DUNCAN: I don't, I'm sorry. [LB658]

SENATOR ASHFORD: Okay. All right. Thanks. Thanks for your comments. [LB658]

TODD DUNCAN: You're welcome. Thank you for your time. [LB658]

SENATOR ASHFORD: Any other testifiers on this bill? Andy, do you care to...okay, opponents. Do we have any opponents? Andy. [LB658]

ANDY ALLEN: (Exhibit 3) As usual, Andy Allen, A-I-I-e-n, Nebraska Firearms Owners Association. Just to keep things moving along, I'm going to kind of sum it up real quick. Our members have no understanding of why it needs to go up. They don't see where it costs more than \$5. There needs to be a better job of informing the public: if we're going to be raising fees, the public needs to now why we're raising fees. I think we've all heard a lot lately from people about, well, why is this cost--why is this tax going up? Why is this fee going up? And the fact of the matter is we need to do a better job of letting our constituents and the people out there know why those fees are going up. That's why our organization isn't able to support it, as they don't see where the costs are needed.  
[LB658]

SENATOR ASHFORD: Okay. Thanks, Andy. I don't see any questions. Any other opponents? Neutral testifiers? Senator. It's a record, almost. [LB658]

SENATOR KARPISEK: I don't know if that's a good sign or a bad sign, though, Senator. I think Mr. Allen is correct; people don't see why that has to be. But I don't know...that's why we have public hearings; that's why the news media is here. I don't know that the sheriff's offices have to go out and try to educate people. I don't understand that. I would think anyone would think that \$5 is not much to do anything. If anyone is making \$10 an hour, it's not going to take them long to eat up that \$5. Senator Larson, you asked about the rural counties. I agree. I think they are usually more efficient or can be more efficient. But they usually have fewer people too. And I will try to get some numbers on that. But, I would say, anywhere it's going to take close to half a person to be doing these permits. I think we want them to do the permits. Obviously, they're going to do the permits, no matter what. This does go back to the county budget, to the county general fund. It does not go to the sheriff directly. I have a little issue with that, but we don't want to delve into that at this time. So that's the bill. I think it does need to be raised. I realize it's a 100 percent raise from \$5 to \$10. Again, we don't like to see anything go up, but I think we're just really low on this. It was 1991 when it was implemented. I think we need to take a look at some of these things; this is not the only thing. With that, I'd be glad to answer any questions. [LB658]

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SENATOR ASHFORD: Thanks, Russ. Don't see any questions. Thank you. Pretty straightforward request. Thank you. [LB658]

SENATOR KARPISEK: Thank you, Senator Ashford. [LB658]

SENATOR ASHFORD: Senator Christensen, I believe, is next--next, yeah, four bills. LB232. [LB658]

SENATOR CHRISTENSEN: Thank you, Mr. Chairman and members of the Judiciary Committee. I'm Senator Mark Christensen, C-h-r-i-s-t-e-n-s-e-n. I represent the 44th Legislative District, here to introduce LB232. LB232 amends Section 28-1410, which describes when an individual may legally use force or even deadly force in the protection of a third person from an unlawful force. LB232 would clarify that an unborn child is included in the definition of a third person, which would make it clear that an individual can use force to protect an unborn child under the same circumstances that an individual may use force to protect any other third person as currently provided under the law. In addition, the bill uses the same definition of unborn child as used currently in Nebraska's Assault of an Unborn Child Act. The definition reads, "Unborn child means an individual member of the species Homo sapiens at any stage of development in utero." Currently, Section 28-1410(1) states, "Subject to the provisions of this section and of Section 28-1414, the use of force upon or toward the person of another is justifiable to protect a third person when: the actor would be justified under Section 28-1409 in using such force to protect himself or herself against the injury he or she believes to be threatened to the person whom he or she seeks to protect; under the circumstances as the actor believes them to be, the person whom he or she seeks to protect would be justified in using such protective force; and the actor believes that his or her intervention is necessary for the protection of such other persons." The concern--which was brought to my attention by a case that took place in the state of Michigan, of which some of you may be aware--is that under Nebraska current law a pregnant mother of an unborn child may not have the same right to use force to protect her unborn child like she would if her child she needed to protect was one or two years old. In the Michigan case, a woman's boyfriend attacked her unborn children, quadruplets, by punching her in the stomach several times, causing a miscarriage. During the attack, she defended the children by stabbing the boyfriend, who later died from the wounds. Michigan's use-of-force law in the protection of others was not clear as to one's rights to use the defense argument in the case of protecting an unborn child. And the pregnant woman who...sorry, the pregnant woman was charged and found guilty of manslaughter. The case was eventually overturned by the Michigan Court of Appeals, but I think this is a lesson Nebraska does not want to repeat if we don't have to. The states of Missouri and Oklahoma have addressed this issue in their self-defense laws. I personally do not want to see a pregnant woman in Nebraska go through the same trauma of losing her unborn child, her baby, and then be prosecuted and

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punished by trying to protect the child from its attacker. I hope our courts will get it right. However, looking into our statutes, it doesn't seem that they are clear in regards to this issue. I think it is important for us as state legislators to seek clear and consistent policy in such instances, which was my intention with LB232. LB232 is really no more than an attempt to make sure a pregnant woman is not unnecessarily charged with a crime for using force to protect her unborn child from someone who means to bring harm to her unborn children. I believe there will be testifiers following me that plan to present some statistics regarding attacks towards pregnant women and their children. In addition, I would encourage you to read the Americans United for Life testimony on their legal opinion on this issue and LB232. Again, my desire with this bill is to make sure a mother has the right to protect an unborn child like she would her 2-year-old son or daughter under Nebraska law. In conclusion, I hope that you will look at this bill as a clarification. I think that LB232 is a natural and logical extension to our current policy in Nebraska pertaining to fetal assault and fetal homicide. I'm willing to listen to any suggestions that the committee may have to clarify this issue in Nebraska. Thank you for your consideration of LB232, and I urge its advancement to General File. [LB232]

SENATOR ASHFORD: Any questions of Senator Christensen? Senator Council.  
[LB232]

SENATOR COUNCIL: Thank you, Chairman Ashford. Thank you, Senator Christensen. I guess I'm trying to understand this. It's your belief that the current self-defense provisions of Nebraska law would not allow a pregnant woman to use force if she was being physically assaulted, with the object of the physical assault being carried in her body, that she would not have a right--that she would be subject to prosecution if she was...if her unborn child was being threatened because in and of itself she was being threatened? [LB232]

SENATOR CHRISTENSEN: Well, I agree, in the terms of herself she's probably got better defense than the child. And I just wanted to make sure it was clear that that child can be defended too. I think that was maybe part of the issue in the Michigan case. They relied on trying to use the term of "protecting the children" rather than "self-protection." But I just wanted to make sure it's clear that we don't want the women attacked this way. [LB232]

SENATOR COUNCIL: I guess I'm just curious as to any county attorney in Nebraska...if a woman was being threatened and if she happened to be pregnant at the time, if the woman was being threatened to the point where she herself could use deadly force to protect herself, why would it change by virtue of the fact that she was carrying a child? I mean, self-defense is self-defense in that scenario, because the unborn child is not going to be charged with the homicide, it's going to be the mother. And I don't understand why there is a concern that, in a situation like that, the mother would not have a recognized self-defense under current law? [LB232]

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SENATOR CHRISTENSEN: Well, I guess, you know, I'm just...I looked at that case in Michigan, and that bothered me. And I just wanted to try and clarify that to be sure; that was my intent with this. And I can't say that you're not correct. I just wanted to make sure that the baby would be protected. [LB232]

SENATOR COUNCIL: It's interesting. I'd be very curious to read the Michigan case, because as you described it, if this woman was being punched as you described and being punched and she resorted to deadly force, you know, the unborn children didn't need to even be mentioned in that because she herself was being threatened with the kind of force that would allow her to use self-defense. So I'd like to see...I mean, there's something else going on in that Michigan case that would result in any conviction in that situation. So if you have a copy of that Michigan court case, I'd be happy to look at it, because there's something more going on in that case. [LB232]

SENATOR CHRISTENSEN: I don't have it with me, but I can get it, I'm sure. [LB232]

SENATOR COUNCIL: Okay. [LB232]

SENATOR ASHFORD: Thank you, Senator Council. [LB232]

SENATOR COUNCIL: Thank you. [LB232]

SENATOR ASHFORD: Do we have any other questions? [LB232]

SENATOR LATHROP: Yes. [LB232]

SENATOR ASHFORD: Senator Lathrop. [LB232]

SENATOR LATHROP: Yes, I'd like a copy of that case, too, so that I can see what the problem is. I do share Senator Council's concern, and it's this simple: any time you would need to resort to this statute, you probably have a self-defense case yourself. And I don't know that this provides...affords the mother any more protection, because it's difficult to understand how somebody could attack a fetus without at the same time providing the mother with an opportunity to defend herself. Can you think of any circumstance where a person could attack an unborn child and not at the same time afford the mother an opportunity to defend herself? [LB232]

SENATOR CHRISTENSEN: I could not. I had the same concern; I thought about that and looked at it. [LB232]

SENATOR LATHROP: Here's...I'll be honest with you, Mark, here's the other concern that I have, is that I think it opens the door to something unintended. I don't think you

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came in here intending to make those who provide abortions a target of the use of force. But I think it may unintentionally do that or at least provide somebody with an argument that they were justified in that. And that isn't, of course, the proper response to what those guys are doing. [LB232]

SENATOR CHRISTENSEN: So I guess I don't think that would be, because that's a legal procedure you'd be talking about there. [LB232]

SENATOR LATHROP: What do you mean? [LB232]

SENATOR CHRISTENSEN: If somebody is going to have an abortion--is that what you're talking about? [LB232]

SENATOR LATHROP: Right. [LB232]

SENATOR CHRISTENSEN: If somebody is going to have an abortion, that's a legal procedure in this state. And that's a willing consent. So I don't see that that should be an issue in this case. [LB232]

SENATOR LATHROP: Okay. [LB232]

SENATOR COUNCIL: May I just... [LB232]

SENATOR ASHFORD: Senator Council. [LB232]

SENATOR COUNCIL: And just for a point of clarification, Senator Christensen, to follow up on Senator Lathrop's questioning--and it's not the legality of the procedure. If you look at the section of statute that you're changing, it gives an individual a right to a self-defense argument when they're protecting a third person. Okay? And by your amendment, "third person" includes "unborn child." So if there's an individual out there who believes that a woman, for example, who is walking into a clinic that is known to provide abortion services, under your bill that person would have a self-defense argument if they used force against the people who ran that clinic, because under here you'd be asserting an argument that the person was protecting the unborn child because of that person's fear that that unborn child's life was being threatened. That's the circumstance that Senator Lathrop is referring to. It's not a question about, you know, whether the act itself is legal or illegal, it's...under your amendment, a person who believes that someone who was assisting a woman to obtain an abortion is threatening the life of the unborn child and would use that as a self-defense argument. Now I'm not aware of the Michigan case. But I am certainly aware of the case where that argument was made by an individual who shot and killed a doctor who was known to provide abortion services. And his self-defense argument was: I was protecting the unborn child, and I have a right if I believe that unborn child's life is being threatened. And that's the

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concern that Senator Lathrop was--I believe, I don't want to speak for him--referring to, and it's a concern that I share. [LB232]

SENATOR CHRISTENSEN: I guess it's not my intent to go that direction, but... [LB232]

SENATOR COUNCIL: Thank you. [LB232]

SENATOR ASHFORD: Thanks, Mark. Proponents of LB232. [LB232]

DAVID BYDALEK: (Exhibits 4-8) Good afternoon, Chairman Ashford, members of the committee. My name is David Bydalek. And, for the record, that's spelled B-y-d-a-l-e-k. I'm the executive director of Family First, and I'm here today to signify our support for LB232. In 2002 Nebraska passed a fetal homicide bill, which was LB824 and was one of the first bills I had the pleasure of working on at Family First. LB824 recognized an unborn child as the possible victim of a homicidal act. Specifically, the law protects Nebraska's substantial and important interest in protecting life by criminalizing the killing of an unborn child by a third party. The common-sense application of the fetal homicide law recognizes that while a woman has a privacy interest in terminating her pregnancy, a defendant who assaults a woman causing the death of her unborn child has no such interest. Thus, states are free to define the victims of homicidal acts at whatever stage of existence they see fit. Nebraska also expanded its assault laws to apply to an unborn child a few years after the passage of the fetal homicide law. We see LB232 as the logical extension of Nebraska's fetal homicide and assault laws. Because an unborn child is recognized as a person pursuant to these laws, it is easy to see that the application of the affirmative defense of others to cases where a mother uses force to protect the life of her unborn child should be explicitly distinguished in Nebraska's self-defense statutes. LB232 is not a mere gimmick bill. Unfortunately, studies reveal that the leading cause of death among pregnant women is homicide. A study published by the Journal of the American Medical Association in 2001 found that in Maryland a pregnant or recently pregnant woman was more likely to be a victim of homicide than to die of any other cause. Specifically, homicide accounted for 50 of 247 maternal deaths in Maryland over a six-year period, more than 20 percent. The information that I've handed to the clerk--it relates to the studies that I'm talking about. A 2009 study, a follow-up by a television station in Baltimore, reaffirmed that murder was still the number one cause of death among pregnant women in Maryland. A 2005 U.S. government study also established that homicide is a leading cause of pregnancy-associated injury deaths. From 1991 to '99, 617 of 1,993 injury-related deaths to pregnant women--that's about 31 percent--were due to homicide. And finally, the Pan American Health Organization similarly cited a study from the publication Midwifery Today, which found that pregnant women are 61 percent more likely to be beaten than women who are not pregnant. Violence is cited as a pregnancy complication more often than diabetes, hypertension, or any other serious complication. Given this disturbing data, Family First believes that LB232 constitutes sound public policy, one which should be adopted by



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the Unicameral. And for these reasons we'd ask the committee to advance LB232 to General File for debate by the entire Legislature. [LB232]

SENATOR ASHFORD: Thank you, Dave. Do we have any questions? Senator Council. [LB232]

SENATOR COUNCIL: Yes. Thank you, Mr. Bydalek. My question is, what is it about current Nebraska law that you don't believe adequately protects against all of the horrors you just described... [LB232]

DAVID BYDALEK: Um-hum. [LB232]

SENATOR COUNCIL: ...and which we're well aware of--what is it about current Nebraska law that you don't believe provides the kind of protection to the pregnant woman? [LB232]

DAVID BYDALEK: If you look at the statutory scheme, Senator Council, fetal assault, fetal homicide, manslaughter, all of these things that we did to make the unborn child a person under the law, were done in separate statutes specifically set forth as defining the unborn as a person for victimhood under these crimes. If you look at the self-defense statutes, which--I think it's 28-1409 and 1410--a prosecutor, I believe--and I did work as a prosecutor in the AG's Office for about 9 years...since this isn't specifically set forth or since there isn't a specific provision in there that would say an unborn child is a person for purposes of that statute I think leaves the question open. And I think that what this bill would do would be make it explicit. [LB232]

SENATOR COUNCIL: Okay. Now...and so it's your honest belief that a prosecutor who is presented with a case where a pregnant mother takes a defensive action using force, on the belief that her unborn child is at risk of injury, which... [LB232]

DAVID BYDALEK: Um-hum. [LB232]

SENATOR COUNCIL: ...also implicit in that is her risk of injury... [LB232]

DAVID BYDALEK: Um-hum. [LB232]

SENATOR COUNCIL: ...would not recognize a self-defense argument? [LB232]

DAVID BYDALEK: I think it depends, because if you look at the statutes, first of all, it talks about using the force necessary to protect themselves against serious bodily injury. The Michigan case, for example, dealt with I think it was a boyfriend that specifically punched the stomach. And in that particular case, the use of deadly force, had she defended herself in such a way where she used deadly force against the

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perpetrator of the crime, I don't think the statute would have necessarily protected her, because what was happening to her under those circumstances wouldn't necessarily cause her death. So... [LB232]

SENATOR COUNCIL: Not necessarily true. [LB232]

DAVID BYDALEK: Not necessarily but possible. [LB232]

SENATOR COUNCIL: No, no. Well, a punch in the gut from a man to a woman could cause enough damage to cause death. [LB232]

DAVID BYDALEK: It could. But what this bill would do is clarify that she could even use deadly force if the impetus for the attack was a domestic dispute or the boyfriend wanted to have the girl have an abortion and he wanted to get rid of the unborn child and his intent was to actually kill that unborn child; she would be able to use deadly force under LB232. Whereby, if it was a specific attack on her abdomen at the unborn child, I don't know that it would be clear that she could use deadly force. This would solidify her ability to use deadly force in defense of her unborn child. [LB232]

SENATOR COUNCIL: Other than the Michigan case, which according to Senator Christensen's testimony was reversed, are you aware of any other case in the United States where a pregnant woman who used deadly force was...did not have a recognized self-defense? [LB232]

DAVID BYDALEK: I can't say that I am aware. I would say this, though, with regard to the question of a pregnant women using the defense, this would also allow somebody to come to the aid of the pregnant woman and use justifiable force as well. [LB232]

SENATOR COUNCIL: And that person could use justifiable force because all you have to demonstrate is you had a reasonable belief that that mother was at risk of serious injury... [LB232]

DAVID BYDALEK: Serious bodily injury or... [LB232]

SENATOR COUNCIL: ...bodily--or death. [LB232]

DAVID BYDALEK: Right, right. [LB232]

SENATOR COUNCIL: So, I mean, he or she could have that defense without the amendment that's being sought here. [LB232]

DAVID BYDALEK: It is possible that a prosecutor would believe that. I just think that this makes it...if you look at the statutory scheme, we set forth specific provisions in the

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other areas of the law where we recognize an unborn child as a victim--possible victim of homicide. I think it makes sense to do so under our self-defense statutes as well. [LB232]

SENATOR COUNCIL: Okay. And you'd also, as a prosecutor, have to establish that the person knew or intended to harm the unborn child. [LB232]

DAVID BYDALEK: Yeah. And I, unfortunately, if you look at some of the data that I've presented to the clerk, and you'll have a chance to read it, it is very common to have an attack that--it is based upon the idea of the perpetrator wanting to get rid of the baby. [LB232]

SENATOR COUNCIL: Yeah. Well... [LB232]

DAVID BYDALEK: Yeah. [LB232]

SENATOR COUNCIL: ...what about--let's talk about the... [LB232]

DAVID BYDALEK: Wanting to get rid of the baby. [LB232]

SENATOR COUNCIL: Let's talk about the scenario of there's a domestic violence situation. [LB232]

DAVID BYDALEK: Um-hum. [LB232]

SENATOR COUNCIL: And that's basically what the material... [LB232]

DAVID BYDALEK: Right. [LB232]

SENATOR COUNCIL: ...refers to. [LB232]

DAVID BYDALEK: Um-hum. [LB232]

SENATOR COUNCIL: And in a domestic violence situation it's...the perpetrator is the male and he doesn't know that the female is pregnant... [LB232]

DAVID BYDALEK: Um-hum. [LB232]

SENATOR COUNCIL: ...and she uses deadly force. Would she be denied a self-defense argument there? [LB232]

DAVID BYDALEK: I don't believe so, given the fact...but the perpetrator takes the victim as they find them. He doesn't have to know, for her to be able to use that defense.

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[LB232]

SENATOR COUNCIL: And that's the point I'm making. The perpetrator takes the victim as they find them. And if the victim believes that she's at risk of serious injury, serious bodily injury or death, under current Nebraska law she could use up to deadly force... [LB232]

DAVID BYDALEK: Um-hum. [LB232]

SENATOR COUNCIL: ...correct? [LB232]

DAVID BYDALEK: I believe so. But the thing is, is if you look at these cases of domestic violence against pregnant women, it is so often the case that the unborn child is the object of the crime--they want to get rid of the baby. And it's where the perpetrator knows that the woman is pregnant. I was shocked to see the statistics on this. If we would have known that the number one cause of death--injury-related death to pregnant women is domestic assault, I think people would be shocked to know that. And so it's a real, serious problem. The other thing I wanted to touch upon... [LB232]

SENATOR ASHFORD: David, that's okay. [LB232]

DAVID BYDALEK: Oh, you were going ask about the abortion...the abortionist, how...in fact, it would be, if you look at the statute 1409, 1410, specifically 1409 talks about protecting himself against the use of unlawful force. So the qualifier is a person can only use justifiable force against another person if there is an unlawful use of force being perpetrated on them. An abortion is a lawful use of force; it's protected under the Fourteenth Amendment. And if the woman is consenting to have the abortion, then it is a lawful use of force by the abortionist. [LB232]

SENATOR ASHFORD: What about the third trimester? [LB232]

SENATOR COUNCIL: But this is the third person. [LB232]

SENATOR ASHFORD: What about a...sorry, Senator Council. [LB232]

DAVID BYDALEK: Well, I mean, that's what the statute says. And it incorporates 1409, which is in LB232. [LB232]

SENATOR ASHFORD: What about a late-term abortion? [LB232]

DAVID BYDALEK: Well, late-term abortions are illegal in Nebraska anyway, unless it's to save the life of the mother. I mean, LB1103 pretty much did away with late-term abortions from 20 weeks on. [LB232]

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SENATOR ASHFORD: Right. So if someone tried to defend...thought they were...the same question was raised earlier--and they attack a physician who performs a late-term abortion or is in the business of performing late-term abortions, that's not a legal... [LB232]

DAVID BYDALEK: It's not a legal act here in the state of Nebraska. [LB232]

SENATOR ASHFORD: It's not a legal act. [LB232]

DAVID BYDALEK: It's not a legal act. [LB232]

SENATOR ASHFORD: Correct. [LB232]

DAVID BYDALEK: Right. [LB232]

SENATOR ASHFORD: So it's an illegal act. [LB232]

DAVID BYDALEK: Well, you would have a couple things; you'd be violating...the abortionist would be violating Nebraska state law, number one. [LB232]

SENATOR ASHFORD: Yes, but would that...? [LB232]

DAVID BYDALEK: Yeah... [LB232]

SENATOR ASHFORD: ...but I think it gets to the issue... [LB232]

DAVID BYDALEK: ...hypothetically, yes. [LB232]

SENATOR ASHFORD: Hypothetically, would it justify the attack on the physician that's performing late-term abortions at over 20 weeks, after 20 weeks? [LB232]

DAVID BYDALEK: Um-hum. [LB232]

SENATOR ASHFORD: I mean, you could raise that--could you not raise that argument? [LB232]

DAVID BYDALEK: I think you could. [LB232]

SENATOR ASHFORD: So even though... [LB232]

DAVID BYDALEK: A way to fix that would be... [LB232]

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SENATOR ASHFORD: Even though...well, I think you could raise that argument.  
[LB232]

DAVID BYDALEK: Yeah. [LB232]

SENATOR ASHFORD: But if you...even though there would not be a specific intent, there would be a general intent, because theoretically this person that perpetrated or attacked the doctor... [LB232]

DAVID BYDALEK: Um-hum. [LB232]

SENATOR ASHFORD: ...would be doing so for their general, they think... [LB232]

DAVID BYDALEK: Um-hum. [LB232]

SENATOR ASHFORD: ...performance of third-term abortions or late-term abortions.  
[LB232]

DAVID BYDALEK: Um-hum. [LB232]

SENATOR ASHFORD: So there wouldn't be a specific...there wouldn't be a situation where there's harm being done specifically to a specific person or unborn child. It would be a general sense that this doctor is violating--or they have knowledge that this doctor is performing third-term abortions, over-20-week abortions. [LB232]

DAVID BYDALEK: Yes. [LB232]

SENATOR ASHFORD: So, theoretically, that defense could be used in that case to justify that use of force, it seems. [LB232]

DAVID BYDALEK: Um-hum, and...yeah, you're right, Senator. [LB232]

SENATOR ASHFORD: Okay. Then that seems...okay. That seems a little bit beyond what we were talking about. [LB232]

DAVID BYDALEK: Yeah. [LB232]

SENATOR ASHFORD: So...but is that what we have here with this bill? [LB232]

DAVID BYDALEK: Well, basically, it allows the use of force against any unlawful act.  
[LB232]

SENATOR ASHFORD: Right. So... [LB232]

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DAVID BYDALEK: So... [LB232]

SENATOR ASHFORD: ...performing an abortion and performing...I mean, if... [LB232]

DAVID BYDALEK: If it's a legal abortion, it's... [LB232]

SENATOR ASHFORD: Well... [LB232]

DAVID BYDALEK: ...you can't use deadly force; if it's an illegal abortion, you... [LB232]

SENATOR ASHFORD: Or if you attack a... [LB232]

DAVID BYDALEK: Right. [LB232]

SENATOR ASHFORD: ...you get...well... [LB232]

DAVID BYDALEK: Right. [LB232]

SENATOR ASHFORD: ...I think it creates...yes, Senator Council. [LB232]

SENATOR COUNCIL: Well, I think it creates a problem, because 1409 is incorporated in (a) of 28-1410. But (c) says that this person could use deadly force if the actor believes his or her intervention is necessary for the protection of such other person--doesn't speak to lawful or unlawful. It's necessary for the protection of such other person. And that's the concern I have. Because in the case I referenced, that was the basis for that individual's... [LB232]

DAVID BYDALEK: Um-hum. [LB232]

SENATOR COUNCIL: ...self-defense argument, that he believed it was necessary for the protection of the unborn child. It wasn't, you know, that the procedure was lawful or unlawful. [LB232]

DAVID BYDALEK: Um-hum. [LB232]

SENATOR COUNCIL: And under the statute with this amendment, that same defense would be available in that type of situation. [LB232]

DAVID BYDALEK: I think that that is a fair way of construing it. Although I think if you look at 1409, 1409 also incorporates 1410. And 1409 talks about using justifiable force only against unlawful acts. So if you relate back, I can see how you say it only relates to (a), but I think if you look at 1409, 1409 talks about 1410 as well. And 1409 specifically

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limits the use of force to unlawful acts. [LB232]

SENATOR COUNCIL: Under that particular scenario. But 28-1410(1): "The use of force upon or toward the person of another is justifiable to protect a third person." And that's pretty specific. [LB232]

DAVID BYDALEK: Um-hum. [LB232]

SENATOR COUNCIL: "Use of force upon or toward the person of another is justifiable to protect a third person when (a) the actor would be justified under 28-1409..." [LB232]

DAVID BYDALEK: Right. [LB232]

SENATOR COUNCIL: "... (b) under the circumstances as the actor believes them to be, the person whom he or she seeks to protect would be justified in using such protective force." That's clearly not applicable here, because an unborn child wouldn't be in a position to... [LB232]

DAVID BYDALEK: Right. [LB232]

SENATOR COUNCIL: ...and the actor believes that his or her intervention is necessary for the protection of such other person. So there are three scenarios... [LB232]

DAVID BYDALEK: Um-hum. [LB232]

SENATOR COUNCIL: ...only one of which does the lawfulness of the act involve...have anything to do with whether or not self-defense is available. [LB232]

DAVID BYDALEK: Right. Are you reading 1409, though? [LB232]

SENATOR COUNCIL: 28-1410. And that... [LB232]

DAVID BYDALEK: Okay, and I said that 1409 incorporates 1410. And 1409 relates specifically to unlawful acts. Although, Senator, I think you raise a good point, in that that could be easily fixable by amending the bill somewhat--LB232 somewhat to clarify that point; if that's... [LB232]

SENATOR ASHFORD: But then you're back in a situation, as Senator Council raised earlier, where the person who...the mother would clearly have the ability to defend herself and, by so being, defend the unborn child as well. If it's a direct attack on the mother... [LB232]

DAVID BYDALEK: Right. [LB232]



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SENATOR ASHFORD: ...or even if the intent was to attack--if you could show that the intent was to attack the unborn child...but you're still...you have to literally attack the mother. I don't know how you get to the unborn child without attacking the mother. [LB232]

DAVID BYDALEK: Yeah. I think, though, there would be a degree where... [LB232]

SENATOR ASHFORD: I just... [LB232]

DAVID BYDALEK: Yeah. [LB232]

SENATOR ASHFORD: ...my point, I guess, is nobody wants anything like that to happen. [LB232]

DAVID BYDALEK: Right. [LB232]

SENATOR ASHFORD: The laws are...I mean, when we talk about a direct attack, I'm not sure. I think we--the issue of whether or not we could--where we would justify using deadly force against a physician who arguably performs a third-trimester abortion... [LB232]

DAVID BYDALEK: Um-hum. [LB232]

SENATOR ASHFORD: ...is the kind of policy we want to adopt. But certainly when it's a direct attack--because we have criminal penalties in the case... [LB232]

DAVID BYDALEK: Um-hum. [LB232]

SENATOR ASHFORD: ...of...that we've adopted, by this Legislature, for a physician that performs an illegal abortion. [LB232]

DAVID BYDALEK: Right. [LB232]

SENATOR ASHFORD: There are criminal penalties for that. And certainly the act of self-defense or the ability to use self-defense, or deadly force in certain circumstances, is also... [LB232]

DAVID BYDALEK: Um-hum. [LB232]

SENATOR ASHFORD: ...in the law as well. I'm just having problems fitting this in. But anyway, thanks. [LB232]

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DAVID BYDALEK: I understand. [LB232]

SENATOR ASHFORD: Thanks for your comments, David. [LB232]

DAVID BYDALEK: Thank you. [LB232]

SENATOR ASHFORD: (Exhibit 9) Next proponent. [LB232]

SUZANNE GAGE: (Exhibit 10) Good afternoon. Thank you, Mr. Chairman and committee, for hearing us this afternoon. My name is Suzanne Gage, S-u-z-a-n-n-e G-a-g-e. I am the state director for Americans United for Life. And what I've provided you with is the legal testimony from Denise Burke, who is vice president of legal affairs for Americans United for Life. It is her drafted model legislation that LB232 is reflected from in protecting unborn children. I'm just going to very briefly skim over some of the testimony and touch on a couple of elements, since we've had quite a bit of a discussion already. LB232, in our opinion, is constitutional. It also comports with existing legal precedents. I won't go over the Michigan case. I will...there is an address at the bottom that should link you to that. If you have issues further, we certainly can provide that for you--and any additional support material. Recognizing the unborn child as a potential victim of criminal violence is the dominant view in American law. The federal Unborn Victims of Violence Act, more commonly known as Laci and Conner's law--a case that's probably very familiar to all of you--as well as laws of 36 states, including Nebraska, recognize unborn children as a separate and unique victim of criminal violence, treating the unborn child as a form of homicide. In addition, 22 states, also again including Nebraska, define nonfatal assaults on unborn children as criminal offenses. I'm going to jump towards the end here to talk specifically--three areas of how LB232 function. Number one, it ensures that the affirmative right of a pregnant woman to carry her child to term is protected. Number two, it ensures the affirmative defenses to criminal liability under Nebraska law explicitly provide for a pregnant woman's right to use force to protect her unborn child. And three, it supplements but does not supersede other criminal provisions of Nebraska law. While each of these functions is important, I'd like to highlight the first, the protection that LB232 provides to pregnant women. We've already touched on this a little bit. I'd like to expand. Studies have repeatedly shown that violence and abuse are often higher during pregnancy than during any other period in a woman's life. According to the Centers for Disease Control, every year in the United States more than 300,000 pregnant women experience some kind of violence involving an intimate partner. And according to the March of Dimes, one in six pregnant women have been abused by a partner. A pregnant woman is more likely to be a victim of homicide than to die of any other cause. And homicide and violent acts are the leading cause of death for women of reproductive ages. Husbands or boyfriends are often the perpetrators of pregnancy-associated violence. And this violence is often directed towards the unborn child or intended to end or jeopardize the pregnancy. Clearly, pregnant women often face ominous threats of violence to themselves and their

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children. They have a right to protect themselves and their children from these threats. Thus it should be explicit in Nebraska law that pregnant women have the right to use force to protect their unborn children. No woman should face prosecution or conviction for using such force. LB232 ensures in Nebraska that pregnant women will be able to protect their unborn children. [LB232]

SENATOR ASHFORD: Any questions of Suzanne? Yes. [LB232]

SENATOR COUNCIL: Yes, thank you. And was I correct in understanding that your testimony was that LB232 was drafted by Ms. Burke? [LB232]

SUZANNE GAGE: Correct. [LB232]

SENATOR COUNCIL: Okay. And... [LB232]

SUZANNE GAGE: Well, not...it reflects that... [LB232]

SENATOR COUNCIL: Okay. [LB232]

SUZANNE GAGE: Yes. [LB232]

SENATOR COUNCIL: And in Ms. Burke's letter, she speaks and promotes and relies on the fact that in April 2009 Oklahoma became the first state to enact Americans United for Life's Pregnant Women's Protection Act explicitly expanding the affirmative defense of defense of others to include instances where a woman uses force to protect her unborn child. Yet, that's not what LB232 does. It goes...it's broader than that. And if that's what the intent is, then the language from Oklahoma's law should be what's reflected in LB232, because I don't think anybody disagrees with the right of a pregnant woman to use force to protect her unborn child. But LB232 goes much farther than that and gives any third person, any person, a right to use deadly force when they believe that the unborn child's life is at risk. And I think that is too broad. And if that's what the intent is, then that can be specifically stated as an exception or as a permissible use of deadly force, rather than the way this is written, which would give people an opportunity to have a defense if they thought that a woman was walking in to have an abortion and they went in and shot the receptionist or the medical provider. LB232 as written would give that person a self-defense argument. And I'm certainly not willing to expand self-defense to that. [LB232]

SUZANNE GAGE: I don't think that was the intention of the senator, and I'll let him speak to that. We certainly wouldn't see that as a by-product of the law. [LB232]

SENATOR COUNCIL: Okay. So if we could, if Senator Christensen would also provide us a copy of the Oklahoma law...thank you. [LB232]

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SUZANNE GAGE: All right, thank you. [LB232]

SENATOR ASHFORD: Thanks, Suzanne. Next proponent. [LB232]

GREG SCHLEPPENBACH: Good afternoon, Senator, members of the committee. My name is Greg Schleppenbach; it's spelled S-c-h-l-e-p-p-e-n-b-a-c-h. I'm here on behalf of the Nebraska Catholic Conference in support of LB232. The conference is an association of the three Catholic dioceses in Nebraska, organized to represent the mutual views and concerns on matters of public policy. I won't belabor the point here. I just simply want to be on record in support of the general policy provisions in LB232, which we think, as has been stated, is a natural extension of existing state law, both the fetal homicide and assault laws as well as the general provision in Nebraska law that says Nebraska is on record to provide protection for the life of the unborn whenever possible. I got to tell you, honestly, when I first saw this bill, my reaction was one of incredulity that even such a bill would be necessary. When I saw that there was such a case in Michigan, no matter that it was overturned, it raises the issue--it can happen, it happened, even though it was overturned in some place. So if clarity can eliminate that from happening in the future, then so be it. I think, in terms of certainly the issue raised about it applying in the abortion context, I believe--I'm not a lawyer--but I believe, in reading this, that the issue in 28-1409, which limits it to unlawful...as this is written, it says that three things must be in place: (a), (b) and (c). And in (a) it refers to 1409, which is specific to unlawful acts. So it has to comport with all three of those, if I understand this correctly, for it to apply. That means it has to be an unlawful act. If that was not clear, we would certainly want that to be clear. Nobody wants this to apply in that context. We've categorically condemned the killing of abortion providers as a response to abortion. Now, on the issue of legal abortions--or illegal abortions, rather, Senator Ashford, which you brought up, I think is an interesting point. There are illegal abortions in this state, presumably. But they're illegal for a reason, because the state and this body believes that the unborn are worthy of protection, they are persons recognized in some fashion in the law. So why shouldn't they be treated the same as any other person who would be that third person being attacked by somebody else? So would force be legitimate in protecting that unborn child that was the victim of an illegal abortion? I would say, sure. If anybody else is, then the unborn should be. Lethal... [LB232]

SENATOR ASHFORD: How would that work, Greg, in what circumstance? You mean attacking a clinic or...how would you...how what that happen? [LB232]

GREG SCHLEPPENBACH: Well, I don't know. And, obviously, prosecutorial judgment would have to come into place. If somebody goes in and kills a physician who is doing an illegal abortion, that would be pretty hard to justify. Could they do something to use force to stop them, short of that? Again, if the scenario was not an unborn child but

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another person, a born person recognized by the law, there would be no question there. But the fact that it's an unborn child, you're making a distinction, where the law, because it recognizes that unborn child in those illegal abortion cases, shouldn't be viewed differently than a born child. [LB232]

SENATOR ASHFORD: So we would be deputizing, then, anybody to go out and make that determination. [LB232]

GREG SCHLEPPENBACH: No more than is the current law, no more than current law. The third person who witnesses somebody being...is not deputized, but they're reacting to. So if somebody knew of or saw somebody doing an illegal abortion, they would certainly have the right, just as anybody who saw somebody attacking a born person would have that same right in our existing law. [LB232]

SENATOR ASHFORD: Okay. Any questions of Greg? Thanks, Greg. [LB232]

GREG SCHLEPPENBACH: You bet. [LB232]

SENATOR ASHFORD: Any other proponents? Opponents? [LB232]

MELISSA GRANT: (Exhibit 11) Chairman Ashford and committee, hello. My name is Melissa Grant, that's M-e-l-i-s-s-a G-r-a-n-t. I work for Planned Parenthood of the Heartland. And I think you...and I appreciate the opportunity to speak with you about LB232 and explain why we have some of the same concerns that have been voiced already today about this particular proposal, which we believe could put our patients, our medical personnel, our staff, our volunteers all at risk of potential violence and harm. I believe I understand the intent of this bill. It's to protect a woman's pregnancy. However well-intended, I also believe that this bill would likely have very grave unintended negative consequences. LB232 could permit and potentially even encourage violence against others. It would give license to a person to physically restrain a woman who is going to an appointment to receive abortion care, even if that abortion would be necessary to save her life or to preserve her health. It would seemingly authorize a person to use deadly force against a physician or other health service personnel who provide abortion care. In short, this bill authorizes and protects vigilantes, and that's something which is unprecedented in our society. Over the years, incidents of abortion-related violence have included destruction of property through vandalism, arson, bombings and have endangered people's lives: crimes against individuals include kidnapping, stalking, assault, attempted murder, and murder, as was discussed here recently--most recently in 2009 the assassination of Dr. George Tiller in neighboring Kansas. I don't believe anyone defends what happened to Dr. Tiller. But the reality, there is a fringe element out there of antiabortion movement who would like to see such a law not only as an invitation but possible permission to commit acts of violence. LB232 differs only slightly from legislation recently struck down in South

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Dakota. Someone intent on preventing a woman from receiving abortion care could resort to murder to do so. We must understand that pregnancies have many outcomes, and because of this, people have strong feelings about abortion, we realize that. But a woman who seeks abortion care should be able to do so safely. We must include the ability to travel to and from an abortion healthcare center without fear of violence. I ask that we take the time to think this through carefully and to indefinitely postpone LB232, as happened with similar legislation in South Dakota. Thank you. [LB232]

SENATOR ASHFORD: Thank you, Melissa. Any...? Yes, Coash. [LB232]

SENATOR COASH: Thank you, Chairman Ashford. Thank you, Melissa. If I recall, and I wasn't here when the fetal homicide bill was passed, but there were similar arguments made when we passed fetal homicide, that this might put healthcare providers of abortion in danger. Has...and that was definitely talked about and reported about. But since then, are you aware of any violence against healthcare providers because of passing the fetal homicide defense bill that we did? [LB232]

MELISSA GRANT: What I would say is there are constant threats against healthcare providers going on regularly, maybe not at the same level and maybe not in response to specific legislation, but it's something that my staff and I have dealt with regularly, daily. And anything that would potentially incite that, to me, is a very fearful possibility. [LB232]

SENATOR COASH: But, at least in your experience, we haven't had it. I can appreciate the threats of violence. But have we had any violence in our state that you're...I mean, any violence carried out? [LB232]

MELISSA GRANT: We've had violence against our health centers, yes. [LB232]

SENATOR COASH: Is that the vandalism and things that you're referring to? [LB232]

MELISSA GRANT: Absolutely. [LB232]

SENATOR COASH: Okay, thank... [LB232]

MELISSA GRANT: Absolutely. [LB232]

SENATOR COASH: Thanks, Melissa. [LB232]

SENATOR ASHFORD: Senator Council. [LB232]

SENATOR COUNCIL: Thank you. Thank you, Ms. Grant, for appearing. And I think you were present in the room when I asked the representative of Americans United for Life

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about limiting the language of LB232 to what apparently is the blueprint, because it professes that Oklahoma became the first state to enact this. But it says explicitly to include instances where a woman uses force to protect her unborn child. Would your organization's opposition be the same if it was explicitly limited to a woman protecting...a pregnant woman protecting her unborn child, that that would be the allowable self-defense? Would Planned Parenthood have objection to that... [LB232]

MELISSA GRANT: No. [LB232]

SENATOR COUNCIL: ...if it was explicit in terms of a pregnant woman's right to use force, up to deadly force, to protect her unborn child? [LB232]

MELISSA GRANT: Likely not. [LB232]

SENATOR COUNCIL: Okay. Thank you. [LB232]

MELISSA GRANT: A different scenario, yes. [LB232]

SENATOR COUNCIL: And just FYI, unfortunately the young woman in the Michigan case was a fourth or fifth habitual offender, and methinks that had a little bit to do with her prosecution. [LB232]

SENATOR ASHFORD: Thank you, Senator Council. Thanks. Any other...? Alan. [LB232]

ALAN PETERSON: Hello, Senator Ashford, members of the Judiciary Committee. I'm Alan Peterson, A-l-a-n P-e-t-e-r-s-o-n. I'm a representative of ACLU Nebraska. We oppose this bill. First of all, let's correct a misstatement that's been made about how the term "lawful force" is incorporated into this bill because it refers to 28-1409. The language in 28-1409 does not say it has to be the situation of lawful force, only that this person who wants to use the defense of others defense has to have a belief that what's going on is not lawful. And then they can step in, take action against it, up to deadly force. I really respect the pro-life people because of what I think is the sincerity and depth of their commitment, that they do believe, many times, that something has been done illegally in the course of preparing for an abortion. This bill, as it's written now, would allow an interference with not only the mother but with the providers. If they wanted it to be limited to the pregnant woman having this defense, why didn't they write it this way? Only one other state that I know of has tried to do this bill, South Dakota. Just in the last week it got out of committee there--by the way, on a strictly party-line vote. But it was immediately set aside, didn't even go through first-round debate, because people, including the governor, realized that very same language could justify attacks on abortion providers, and they didn't mean for that to happen, didn't want it to happen. Nebraska Supreme Court, in a case called State v. Cozzens, in 1992, held that

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because abortion can be legal--U.S. Supreme Court in Roe v. Wade and in the Casey case said it was--that you cannot use the justification defenses, including self-defense, defense of others; that's something called the choice of the lesser evil. In those situations involving a case where your moral belief goes against a constitutionally protected right, it said no, you can't do that. And in Cozzens it was in some of the protests up in Omaha involving this same issue. State v. Cozzens, C-o-z-z-e-n-s. Let's not pull out the ace of spades, the right to kill, as an answer to these tough problems. The choice of violence, which we're talking about here, ought to be the very last. And a broad bill like this ought to be killed; that's the appropriate place to use the word "kill." They could have written it narrower; they did not. [LB232]

SENATOR ASHFORD: Okay, thanks, Alan. Any questions? Senator Council. [LB232]

SENATOR COUNCIL: Thank you. Thank you, Mr. Peterson. And two points. And that is that the bill could have been narrowly drafted to provide the professed protection of the mother defending their unborn child and a concern that hasn't been expressed...and I think it's because none of us want to think it's possible, but all things are possible. I mean, under the bill as written, if a male--his girlfriend who's pregnant with his child, he doesn't want her to have an abortion, she wants to, he just wants to stop her from doing it and wings her. He'd have a self-defense argument under LB232, wouldn't he? [LB232]

ALAN PETERSON: She'd have a self-defense argument under existing law, I would think. [LB232]

SENATOR COUNCIL: No, no, no. I'm saying, under LB232 he...if he believed... [LB232]

ALAN PETERSON: Yeah. [LB232]

SENATOR COUNCIL: ...that despite his protestations... [LB232]

ALAN PETERSON: Oh, if he believed...yeah. [LB232]

SENATOR COUNCIL: ...that his girlfriend was going to go and have an abortion... [LB232]

ALAN PETERSON: That's how it's written. [LB232]

SENATOR COUNCIL: ...he could shoot her... [LB232]

ALAN PETERSON: Yeah. [LB232]

SENATOR COUNCIL: ...you know, I said "wing her" because... [LB232]



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ALAN PETERSON: Theoretically, yes. [LB232]

SENATOR COUNCIL: ...and have a self-defense. [LB232]

ALAN PETERSON: Yes. No lawyer taking his case would be able to avoid that. And I ought to say there have been about five or six cases, not just the killing of Dr. Tiller, but five or six cases of assaults or killings of abortion providers, and each lawyer raised this defense: Oh, it's the defense of others. They didn't succeed. Pass LB232, they might well succeed in Nebraska. It'd be a disgrace. [LB232]

SENATOR COUNCIL: Thank you. [LB232]

SENATOR ASHFORD: Thank you, Alan. [LB232]

ALAN PETERSON: Thank you. [LB232]

SENATOR ASHFORD: Do we have any other opponents? [LB232]

DAVID BAKER: Senator Ashford and members of the committee, my name is David Baker, D-a-v-i-d B-a-k-e-r. I'm here on behalf of the Omaha Police Department in opposition to LB232. My remarks will be very brief. I know there's been a lot of discussion about this. The remarks and the opinions of the department express the same concerns raised by Senator Council and Senator Lathrop at the beginning. And I will not go over those there again, other than to say we support wholeheartedly Senator Council's position in this and share the same fears as Senator Lathrop and Senator Council, in that this could be used to incite violence against abortion providers. I understand the stated intent. And the Omaha Police Department wants to assure, we take no position whatever on the abortion issue. However, we believe that in order to avoid the potential for violence here, if this bill was much more concisely construed to address the specific problems addressed here today, then we would have no problem with the bill. [LB232]

SENATOR ASHFORD: Thanks, David. Any questions of the chief? Thanks, David. [LB232]

DAVID BAKER: Thank you. [LB232]

SENATOR ASHFORD: Any other opponents? Neutral? Senator Christensen. [LB232]

SENATOR CHRISTENSEN: Thank you, Mr. Chairman and committee. Appreciate your time today. You know, I'm glad to work with the committee or bring something to you to narrow this down, because my intent is still very legit. I want to protect the woman and her child. That's where it lays, that's where it stays. And, you know, it disappoints me a

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little bit that a couple people said they knew my intent, or I would have had it narrowed. I think that's too bad they didn't come talk to me, because that's never been my intent. But I think we can all agree on one thing: we don't want to have pregnant women abused, hurt in any way. And if we can narrow this down to protect them, I'd be glad to do that. [LB232]

SENATOR ASHFORD: Thanks, Mark. Any questions of...yes. [LB232]

SENATOR LATHROP: Just a comment. I hope you don't think that my question suggested that I thought or tried to imply that your intent was to open the season on people that provide abortions. [LB232]

SENATOR CHRISTENSEN: No, I...my... [LB232]

SENATOR LATHROP: I think I understood what your intent was, Mark. And I have a concern... [LB232]

SENATOR CHRISTENSEN: Um-hum. [LB232]

SENATOR LATHROP: ...and I think Senator Council has a thought that might narrow it to the point where that defense wouldn't be misused. [LB232]

SENATOR CHRISTENSEN: Correct. [LB232]

SENATOR LATHROP: Right. [LB232]

SENATOR CHRISTENSEN: I agree with you. [LB232]

SENATOR LATHROP: Okay. [LB232]

SENATOR CHRISTENSEN: No, I was referring... [LB232]

SENATOR LATHROP: Good. [LB232]

SENATOR CHRISTENSEN: ...to a testifier... [LB232]

SENATOR LATHROP: Okay. [LB232]

SENATOR CHRISTENSEN: ...Mr. Peterson... [LB232]

SENATOR LATHROP: Okay. [LB232]

SENATOR CHRISTENSEN: ...that said he knew my intent, or it would have been

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narrower. [LB232]

SENATOR LATHROP: Okay. [LB232]

SENATOR ASHFORD: (Exhibit 19) Thanks, Mark. You're next: LB298. [LB298]

SENATOR CHRISTENSEN: Are you ready? [LB298]

SENATOR ASHFORD: Yes, sir. [LB298]

SENATOR CHRISTENSEN: Thank you, Mr. Chairman and members of the Judiciary Committee. I'm Senator Mark Christensen, C-h-r-i-s-t-e-n-s-e-n. I represent the 44th Legislative District. LB298 would amend some of Nebraska's use of force statutes, self-defense statutes, to strengthen and simplify when a resident of Nebraska can use force to defend themselves, others, and their property. Specifically, LB298 amends 28-1409 and 28-1410 to remove the difficult obligation of an actor to discern when they are required to retreat in certain situations and not use force against unlawful force. Instead, it asserts the right for an actor to stand their ground and meet unlawful force with force as long as the actor is not engaged in an illegal activity and the actor has a right to be in the location. The bill also amends 28-1411, which addresses the use of force in regards to the protection of property, and specifically the subsection describing when the use of deadly force is justified. It would add a new subdivision in subsection 6 of Section 28-1411 allowing the use of deadly force when a person has unlawfully entered an occupied dwelling or occupied motor vehicle and is not attempting to exit the dwelling or vehicle. Finally, LB298 would provide civil immunity to an actor for such conduct of self-defense that is justified under 28-1406 to 28-1416 unless such conduct recklessly or negligently injured an innocent person. The bill was my attempt to address several of the committee's concerns that were expressed during the hearing of LB889 from last session and its companion, LR430, in the interim study from last fall. I incorporated much of what the Nebraska Firearms Owners Association had expressed their members were interested in seeing in the bill. Since LB298 was introduced, my office also had discussion with the NRA regarding their suggestions for improving Nebraska's use of force laws in the context of the same previous hearings on this subject. I believe Mr. Jordan Austin will be here today representing them to discuss their suggestions. My staff also met with Mr. Bob Creager, an attorney in town who--I was told he would be testifying today about his concerns. As I understand, his concern stems from the experience litigating use of force cases. The problem he sees is with Nebraska jury instructions and the courts ignoring or not applying Section 28-1414 dealing with the recklessness and negligent use of force. He will explain this in greater detail. I am appreciative to all the work that the interested parties have done to help this process. I believe they make some good suggestions for change. As always, I'm willing to work with the committee to find those suggestions we can agree on to improve Nebraska laws pertaining to use of force. If the committee prefers the language of

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LB298 on page 10, dealing with civil immunity, I have an amendment, AM291, for your consideration. It would strike on page 10, on lines 7 and 8, the phrase "or creates a risk of injury to." That phrase was recommended during drafting but after further consideration seems too vague and potentially working against my intentions. Thank you for your consideration, and your time, of LB298. [LB298]

SENATOR ASHFORD: Thanks, Mark. Any questions? Seeing none, thanks. Proponents? [LB298]

ROBERT CREAGER: (Exhibit 12) Chairman Ashford, members of the committee, my name is Bob Creager, C-r-e-a-g-e-r. I'm an attorney here in Lincoln with the law firm of Anderson, Creager, and Wittstruck, and I appear here today as a practicing attorney who has experience in litigating self-defense issues and on behalf of the Nebraska Criminal Defense Attorneys Association--I'm the immediate past president and am on their legislative committee. Against all the heady discussion around the fringes of what self-defense is or isn't in this state, I want to bring to your attention a serious problem or a flaw in the self-defense law as interpreted by our court. In the past ten years, anybody who has been willing to listen to me, I have been arguing that the Nebraska Supreme Court has already unfairly limited Nebraskans' rights to self-defense in a series of case decisions. I have a paper I've written on it, which I've provided to the clerk and to members of the committee. But it has to do with what many members of this committee have talked about in other contexts, and that is whether Nebraska law requires a reasonable belief in the use of force before a self-defense can even apply. Now, this is a very serious matter, because our Legislature some time ago began a combat, is the best way to put it, with the Nebraska Supreme Court over this legislative body's right to give its citizens the right to use force in certain circumstances. And whether that belief simply had to be an honest belief or a reasonable belief is something that has been debated in the law for as long as there's been a law. Nebraska had adopted an honest belief mechanism. That means if I honestly believe that I could use force, I was entitled to use that force. But the Nebraska Supreme Court kept telling the Legislature: You can't do that; we impose a provision that the decision be based upon a reasonable belief. Now, that debate was ended, I thought, when the Nebraska Legislature adopted 28-1414, which was a provision in the Model Penal Code which says--here's the rule: Your belief has to be reasonable, but if it's not, you don't lose your right to self-defense altogether. It then becomes modified or an imperfect self-defense, and you can still claim self-defense as against crimes of intent, but you could not raise self-defense against crimes of negligence or recklessness. It's a very arcane legal issue, but it's a very significant legal issue, and I have included in the record the Nebraska jury instruction in the cases in which the Nebraska Supreme Court has simply ignored that provision. So under current law, you lose the right to self-defense in its entirety unless the jury finds that your decision to use force was reasonable. And that is not the law. That's not the law passed by this Legislature. And the Supreme Court in a number of cases, two of them which involve cases I presented and one recently in this year, finally

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said, in essence, in the opinion which I provided to the committee: We've been wrong; if we're wrong, we've been wrong so long it's up to the Legislature to fix it. And so I am here, and in my submissions I have proposed the language which I think just restructures how the statutes are written so you don't lose your right to self-defense simply because you were negligent in your selection of the decision to use force. [LB298]

SENATOR ASHFORD: Okay. I think I see what you're saying, Bob, on this. Any questions of Bob? Thank you. Next proponent. [LB298]

JORDAN AUSTIN: (Exhibit 13) Good afternoon, Mr. Chairman, members of the committee. My name is Jordan Austin, A-u-s-t-i-n. I'm speaking today on behalf of the National Rifle Association. As far as the underlying bill, we are supportive of it. In concept, there's a few subtle changes that we would like to see made. The amendments that I'm proposing I am--the clerk is handing out to you as I'm speaking. Essentially, when contact was made with Bob Creager and we discussed this issue--we had learned about it--and we originally sought a method to make a fix that would solve the Supreme Court problem we've been having. And then, essentially, in further discussions with him we realized his approach was perhaps a little bit more sound than what we were proposing. What we had originally proposed was going to put clear language into 1414. But we realized that was the problem and the essence of the disagreement by the Supreme Court, that they weren't applying that section. So the approach he's taking in regards to putting language and more clear language, basically applying 1414 into 1409 through about 1413, would be a more sound approach. While it is a little bit longer and more involved than a separate section being specific, we feel it's necessary for the interpretation of the court. With that being said, I will speak directly to my amendment that I'm proposing. What we'd like to do is specifically address a few issues, and this is the shortened version of what we have; it's based on conversations we had here in the past, when this bill was up last year in the fall. Some concerns brought forth by Senator Council and Senator Lathrop have been addressed, and those provisions were either removed or solved by what we believe--or we believe were solved with this amendment. One has to do with the presumptions. We did a shortened version of that, which basically allows for a presumption to exist within your home if you use or exercise self-defense, if someone is in your home illegally. And then we're also establishing a clear remedy for civil liability, so that if, you know, you are justified in your conduct, then you are immune from any civil action by any individuals. The last section that was in 1411 has to do with language that--in order to have a successful presumption, you need to amend this section, which deals with devices known to cause death or serious bodily harm. That would prevent the use of a firearm in defense of oneself. So that language needs to be amended and, you know, adopted, so we can have a clear self-defense. And it will allow you to legally use a firearm in protection of yourself. At that point, I would be happy to elaborate on any points of the amendment or any aspects of the self-defense statute in general. [LB298]

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SENATOR ASHFORD: Jordan, under this...under your amendment, when is it justified to fire a firearm? [LB298]

JORDAN AUSTIN: If you look under the...I mean, the... [LB298]

SENATOR ASHFORD: Can you just tell me? I mean, do you...can you just--in narrative? [LB298]

JORDAN AUSTIN: I mean, in statute you are allowed to use a firearm, but it seems to contradict itself with the language of 1411, where it says: "Such device is not designed to cause or known to create a substantial risk of causing death or serious bodily harm." So that language seems to contradict the ability to use a firearm or any sort of weapon, really, for self-defense. [LB298]

SENATOR ASHFORD: But I guess what I'm getting at is, if we were to pass this law, this bill into law, when could you use a firearm to protect yourself? [LB298]

JORDAN AUSTIN: The use of a firearm....well, I mean, you could use a firearm if you are attacked. It's... [LB298]

SENATOR ASHFORD: If you're not attacked with a firearm, you can use a firearm. [LB298]

JORDAN AUSTIN: If you are attacked and you feel, you know, threatened, in the cases of death or serious bodily harm, then you can use a firearm for self-defense. [LB298]

SENATOR ASHFORD: Okay. So if you're attacked...and I'm just trying to... [LB298]

JORDAN AUSTIN: Um-hum. [LB298]

SENATOR ASHFORD: ...just get the broad sense here. If you're attacked in any way and you have--and, again, this is getting to Bob's point--but reasonably believe that you are in jeopardy of great bodily harm...is that what it is? Is that the standard? What's the standard? [LB298]

JORDAN AUSTIN: Right now the standard is just belief--that's listed in statute. Now, it has the...as applied by 1414, it creates the reasonability. [LB298]

SENATOR ASHFORD: So if you have a reasonable belief that you could be...you could suffer great bodily harm, you may fire a weapon at that person, if you have access to one. [LB298]

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JORDAN AUSTIN: Correct. [LB298]

SENATOR ASHFORD: Okay. Does that change current law? [LB298]

JORDAN AUSTIN: It's making current law more clear. And what we're doing is we're setting a presumption within the home, so that if someone breaks into your home, there is...we're not getting at the aspect of reasonability. You know, if someone breaks in your home, they're there illegally, you know, they're there to do you harm. We want to preserve the... [LB298]

SENATOR ASHFORD: And do they have to enter the home, or could they be in the process of breaking into your home? [LB298]

JORDAN AUSTIN: Yeah, we clarified the language per the conversations and discussions we had. So the specifics of it are: is unlawfully and forcibly entering or has unlawfully and forcibly entered and is present within the actor's dwelling. [LB298]

SENATOR ASHFORD: And as long as you have a... [LB298]

JORDAN AUSTIN: So we solved the running away aspect that Senator Council had addressed, where we don't want to allow someone, if they're fleeing your home--you're not authorized to just open fire on someone like that. That's not what we were attempting to do with last year's bill, so we adopted this or adopted better language, too. [LB298]

SENATOR ASHFORD: What about the other example we talked about? Was entering the wrong house. [LB298]

JORDAN AUSTIN: Well, what we have to address that situation is we...that aspect, if someone enters your house and they're not there to do you harm... [LB298]

SENATOR ASHFORD: Or they're in the process of trying to get into the house that they believe is the house they have some right to be in, or they believe it's--whatever. I mean, if... [LB298]

JORDAN AUSTIN: So the drunken college kid stumbling through the back door of the wrong house, for example. That would fall under the regular statute and use of force. So it would be subject to reasonability. You know, did you reasonably believe that that person was there to do you harm or...you know, we only want the absolute presumption to apply if the person was there illegally, broke into your house, forcefully and unlawfully, and was there to do you harm. So if... [LB298]

SENATOR ASHFORD: So if...okay, so if you are...if you observe or hear someone

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attempting to get into your house--they're not in the house, but...and the doors are locked, let's say, theoretically--they are locked, and they're attempting to get in or...do you have, under your interpretation of these amendments, is it--do you have the...I suppose every case is different. But under certain scenarios, you would have the right, I guess, or the justification to fire on that person. [LB298]

JORDAN AUSTIN: Well, that would play out a certain way. So, let's say, for example, the person at your back door who's trying the lock and everything happens to be your cousin who's trying to get in... [LB298]

SENATOR ASHFORD: Right. [LB298]

JORDAN AUSTIN: ...and thought he had the right spare key. If you shoot through the door and you injure your cousin, then you would not fall under the presumption. You would fall under the basic self-defense statutes, you know, that we would be seeking to improve through Bob Creager's amendments, which would provide for the...you know, if you had a reasonable belief that this person was there to do you harm, then you would be justified in your actions. But, you know, if there was some sort of negligence on your part, you know, you wouldn't be guaranteed the absolute belief. Now, if that person had a crowbar in their hand, and you know, I mean, you know, like a bag with money on it, you know... [LB298]

SENATOR ASHFORD: I'm not worried...I'm not so much in...I'm in the scenario which happens, because it's reported quite a bit. You hear about either mistakenly trying to enter a home that someone thinks they have the right to be in or to gain access to or, as you say, the intoxicated person that goes to the wrong house or the case in Washington, D.C., where the gentleman, the professor from I guess it was Washington, I can't remember--was the professor's (inaudible)...it was his house or whatever it was. I mean--and they're playing with the front-door handle. They haven't gained access. They don't have any sort of...they're not exhibiting any other action to get into the premises... [LB298]

JORDAN AUSTIN: Yeah. [LB298]

SENATOR ASHFORD: ...and they're shot. [LB298]

JORDAN AUSTIN: Yeah. There's no absolute protection for the homeowner if that person was outside the home. Now, if that person is breaking in, you know, kicking in the door, and they're there to do harm...now, if that person--if they did shoot their...put it very simply, they're taking a risk shooting through the door at someone who's breaking into their home. You know, while it's tough to say, because the situations are very unique, and they're a case-by-case basis--you know, are you supposed to wait until someone actually kicks in your front door, they could immediately open fire? Do you



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want to wait? Well, because there are additional concerns that says, you know, you could be injuring an innocent person who is mistaking the wrong house, you only want that absolute presumption and the absolute protection to be if their actions were illegal. So the case would be analyzed. If, you know, if you did shoot a potential burglar through your door, your actions would be justified because that person was unlawfully attempting to enter your home. Now, if you shot your, you know, your neighbor because they were at the wrong house because they were intoxicated, then you would not fall under the presumption as it exists in my amendment. You would fall under general self-defense statutes, which would be analyzed as to whether or not your actions were reasonable. [LB298]

SENATOR ASHFORD: So the change in your amendments, or Bob's amendments, are related to the presumption. Is that correct? [LB298]

JORDAN AUSTIN: His is specifically dealing with the problems you all are having with the Supreme Court... [LB298]

SENATOR ASHFORD: Well...all right. [LB298]

JORDAN AUSTIN: ...basically dealing with that. Yeah, mine are a little bit more specific as far as establishing a presumption, protecting from civil action from the victim or family members, and removing the confusing language as far as using a deadly weapon for protection. [LB298]

SENATOR ASHFORD: So the amendments deal with the civil side as well, because the bill talks about "recklessly or negligently injures unless..."? [LB298]

JORDAN AUSTIN: Yes. I noticed the language... [LB298]

SENATOR ASHFORD: Okay, that can't possibly be the language. Is that the language you want in there? [LB298]

JORDAN AUSTIN: No. Our language is different. That's the language of the underlying bill. Ours is slightly different. We...you know, use different verbiage, which basically states...let me... [LB298]

SENATOR ASHFORD: On the civil liability side. [LB298]

JORDAN AUSTIN: Correct. You know, basically, "conduct justifiable under the sections abolishes any remedy for conduct which would be otherwise available in a civil action," so basically prevents civil action. Theirs addresses third-party issues. [LB298]

SENATOR ASHFORD: Okay. On the criminal side, what is different about your

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amendments and existing law involving someone who's trying to gain entry to a home? Is there a...or premises or a car, let's say. What is it that's different in your amendments from existing Nebraska law in self-defense? [LB298]

JORDAN AUSTIN: The new section we're creating that deals specifically with the presumption. [LB298]

SENATOR ASHFORD: Okay. [LB298]

JORDAN AUSTIN: So we're setting, you know, it's creating a new section instead of amending existing sections, which is stating crystal clear what your rights are within your home if someone is unlawfully and forcefully trying to gain entrance to your home to do you...you know, it's therefore presumed that they're there to do you harm and your actions are justified. [LB298]

SENATOR ASHFORD: Okay. And so events that occur outside of those protected areas are not in the presumption. I mean, I can read it, too, but... [LB298]

JORDAN AUSTIN: Correct, yes, yes. So they're not...the presumption is specifically your home, if their actions are unlawful and illegal. But all the rest of...outside the home all falls under the 1409, I believe... [LB298]

SENATOR ASHFORD: The existing... [LB298]

JORDAN AUSTIN: Correct. [LB298]

SENATOR ASHFORD: Okay. That's helpful. Thanks. I don't see any other questions, Jordan. Thank you. [LB298]

JORDAN AUSTIN: Okay. Thank you, Mr. Chairman. [LB298]

SENATOR ASHFORD: Next proponent? [LB298]

ANDY ALLEN: (Exhibit 14) Andy Allen, A-I-I-e-n, Omaha, Nebraska, president of the Nebraska Firearms Owners Association, and I'm here to speak in support of the advancement of LB298. Currently, Nebraska's self-defense laws give the advantage to the criminal, and we ask why are laws written to protect the criminals? Under current Nebraska law, a criminal breaking into your home or car has the upper hand over the innocent victim. Under current law, if a criminal is breaking into your home or car, then you, the intended victim, may not use deadly force until the intruder has first produced a weapon or threatened to kill you. Why is law written to assist the criminal? Under current Nebraska law, the victim of violent attack has a duty to retreat. While this is a good idea if you can escape with complete safety, why should the burden of proof fall to

the victim of a crime? A law-abiding citizen who is attacked in a place where they have a right to be should be able to stand their ground. Why do we currently protect the criminal? If a person is justified in using force under Nebraska statute, they should be immune from civil actions by a criminal or the criminal's family. The law, as currently written, allows the criminal to once again victimize their prey. This bill addresses this committee's objections that they had with the previous attempts at protecting the victims of crime: if the victim recklessly or negligently injures an innocent person, then they would not be immune from civil action; also, deadly force cannot be used against someone who is leaving, retreating, or running away. And we ask, why should we have to wait until a crime victim is wrongly charged and prosecuted to have this fixed? [LB298]

SENATOR ASHFORD: Thank you, Andy. Any questions of Andy? Seeing none, thank you, sir. Next proponent. [LB298]

ROD MOELLER: Good afternoon. My name is Rod Moeller, M-o-e-l-l-e-r. Mr. Chairman, committee members, I'm here today on behalf of the Nebraska Council of Sportsmen's Clubs, an organization representing over 100,000 Nebraskans. We support the Victims' Protection Act. A victim of violent crime should be allowed to stand their ground wherever they have a legal right to be. Self-defense is already a difficult, emotional, and legal situation to be found in. A duty to retreat makes a difficult situation even more so. As an example, many stories are reported in the news where people have been attacked in parking lots or in their vehicle. How does a person identify, under duress, where is a safe escape or if that potential escape route contains an additional risk? We believe that our current law provides less protection of victims than it does to the violent criminals. That is why we have made this a priority bill. Of course, finding an escape route, where possible, is the prudent choice. Having the burden of proof, how does one prove that they exhausted all options? After monitoring the discussions on this topic over the past year, we believe that this is a much better bill that protects the victims of violent crime without establishing the loopholes that were raised as concerns last session. [LB298]

SENATOR ASHFORD: Thank you. Any comments or questions? Seeing none, thanks. Next proponent. Opponent? Neutral testifier? [LB298]

DAVID BAKER: Again, David Baker, D-a-v-i-d B-a-k-e-r, appearing on behalf of the Omaha Police Department and neutral on LB298. We recognize that there are a lot of issues that have been corrected in this bill and some that are supported by the police department. However, we have an area of concern, most particularly in section 6 on page 7. At the bottom of the page, we refer to an area that we believe is overly vague and may be available for use as a defense, inadvertently, I'm sure, but will give us problems in prosecution. Reading from: "The use of deadly force is not justifiable under this section unless the actor believes that the person against whom the force is used

has unlawfully entered an occupied dwelling or occupied motor vehicle and is not attempting to exit the dwelling or motor vehicle at the time the deadly force is used." In following the law, we don't see the issue; but the issue becomes, and we see this daily in a city the size of Omaha and, obviously, less frequently in smaller jurisdictions...where you'll have people for whom maybe there's a protection order--for example, issued between former cohabitants, spouses, boyfriend-and-girlfriend-type situation--where the one party is precluded from entering the residence or getting within so many feet of the other and later made up and come back together again. And for whatever reason at this point, there's been a domestic disturbance or something and we're called back out, and we have to intervene in that case. And most typically, we'll arrest the person who's in the building where they're prohibited from being, even though they're invited over there. And then the question becomes in court whether or not that invitation to come over was a defense in the fact that they did. The problem that we are seeing in this is this allows...this is a certain investigative impediment, if you will, if there is violence, if there is deadly force. Because this person...in this case, deadly force was used against a victim who was over there, even though unlawfully, because of a protection order or other reasons, within the residence, and deadly force was used, as allowed by this bill--that there would be no way for us to be able to determine whether or not it was justifiable or not. The only thing that was requisite in order to justify that deadly force is the mere presence of the person in the house and the fact that they were not exiting the house at the time. And I know this is--or I would presume that this is an unintended consequence of the bill. We do feel that it needs to be tightened up a little bit, amended in that favor. If we could get that done, I think we'd feel a little more comfortable with the bill. [LB298]

SENATOR ASHFORD: Thanks, David. Any questions of Dave? Yes, Senator. [LB298]

SENATOR LATHROP: Yeah, can you tell me where you're...what section...I was trying to follow you, and I thought you said page 2, section 6. [LB298]

DAVID BAKER: No, I'm sorry. It was page 7, section 6. [LB298]

SENATOR LATHROP: Okay, well, hang on just a second, Mr. Baker, and let me get that. Page... [LB298]

DAVID BAKER: At the bottom. [LB298]

SENATOR LATHROP: ...7... [LB298]

SENATOR COUNCIL: And it goes over to the next page. [LB298]

SENATOR LATHROP: Okay. And what was...tell me what part of it is problematic for you. [LB298]

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DAVID BAKER: Well, what's problematic for us is: "The person against whom the force is used"--this would be deadly force, as referred to on page 7--"unlawfully entered an occupied dwelling or occupied motor vehicle." Simply the act of unlawfully entering is a little vague in that regard for the use of deadly force. [LB298]

SENATOR LATHROP: And your concern is, is that if I have a restraining order and they go over to my ex-wife's house... [LB298]

DAVID BAKER: It would be deadly force situation under the wording that we're reading here. [LB298]

SENATOR LATHROP: Okay. And how would you fix it? Did you come with a fix, or are you just going to leave that to our good, sound judgment? [LB298]

DAVID BAKER: (Laugh) I will leave it to Senator Christensen's judgment on that, in that we need to have something more than simply the presence of somebody unlawfully within a structure--within your home, within your car--to justify deadly force. There needs to be something more than simply presence. That's a fairly low standard and one that could be problematic in the future. [LB298]

SENATOR LATHROP: Okay. [LB298]

SENATOR ASHFORD: Thanks, David. [LB298]

DAVID BAKER: Thank you. [LB298]

SENATOR ASHFORD: John. [LB298]

JOHN LINDSAY: Senator Ashford, members of the committee, my name is John Lindsay, L-i-n-d-s-a-y, appearing as a lobbyist on behalf of Nebraska Association of Trial Attorneys, testifying neutral because the language in the...mainly to correct--make the record clear with respect to section 4, subsection 2, that includes the language with respect to immunity from liability. That language--I think one testifier talked about it being maybe more immunity than what the provision reads. The provision, as I read it, is more in affirmance of the common law as opposed to in derogation of the common law at all, because it suggests that if you act negligently or if you act recklessly, that there still would be liability. And I just want to make that clear, because I think that was... [LB298]

SENATOR ASHFORD: Unintended, it had to be unintended. [LB298]

JOHN LINDSAY: ...yeah, an unintended statement. And I might suggest that you

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consider adding intentional, because under this it could be read to provide immunity from liability for intentional conduct. And remember, we are, of course, mixing two standards: the criminal standard on beyond a reasonable doubt with the preponderance standard on the civil side. So whether the state cannot achieve the reasonable doubt standard should not have an impact on the preponderance standard on the civil side. [LB298]

SENATOR ASHFORD: Senator Council. [LB298]

SENATOR COUNCIL: Thank you, Chairman Ashford. Mr. Lindsay, I guess I wasn't following on this page 10 of the bill. The liability. [LB298]

JOHN LINDSAY: Um-hum. [LB298]

SENATOR COUNCIL: And your concern about recklessly or negligently. [LB298]

JOHN LINDSAY: Right. I think the language that is here, I believe, is in affirmance of the common law... [LB298]

SENATOR COUNCIL: Right. [LB298]

JOHN LINDSAY: ...that says if you are negligent, you are liable. [LB298]

SENATOR COUNCIL: Right. [LB298]

JOHN LINDSAY: The concern was, and I think inadvertently, one of the proponents maybe ascribed more immunity than is actually stated here and is primarily appearing...that's why I'm neutral as opposed to being opposed, is just to make sure that that record is clarified. [LB298]

SENATOR COUNCIL: Okay. Okay. [LB298]

SENATOR ASHFORD: Thanks, John. Any other neutral testifiers? Mark? [LB298]

SENATOR CHRISTENSEN: Thank you very much for your time and attention here. And I'd be more than willing to work with Bob Creager and Justin (sic) Austin and anyone on the committee that would like to work with bringing a new amendment, so that we could advance this bill. [LB298]

SENATOR ASHFORD: Okay, thank you. Senator Council. [LB298]

SENATOR COUNCIL: And Senator Ashford and colleagues, I apologize. I had to step out and take a phone call, so I didn't hear all of the proponent testimony. But, Senator

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Christensen, on page 2, 28-1409(1)...and I think I stepped out just as Austin was beginning his proponent testimony and indicating that there were efforts made to address some of the concerns that I raised when this bill was introduced last year. And one of the concerns that I raised last year had to deal with the...my concerns about removing the duty to retreat. [LB298]

SENATOR CHRISTENSEN: Um-hum. []

SENATOR COUNCIL: And I'm looking at the amendment in Section 28-1409(1), and I'm just asking if that was the...the intent of that is to address my concerns about duty to retreat. []

SENATOR CHRISTENSEN: Yeah. I believe that's the way that is. It's... [LB298]

SENATOR COUNCIL: Okay. Well, I see a head nodding no back there, and you're saying yes. [LB298]

SENATOR CHRISTENSEN: Well... [LB298]

SENATOR COUNCIL: So I'm trying to find out, because this language is a little different than last year, because last year the language read, a person not engaged in illegal activity in a place where he or she has a right to be has no duty to retreat. That's how the language read last year. This year it reads, a person not engaged in illegal activity who is attacked in a place where he or she has a right. And...I mean, my question is, is there...the definition intended for "attacked" mean, you know, actually being assaulted or, I mean, what...what do you intend by "who is attacked"? [LB298]

SENATOR CHRISTENSEN: Well, when you're attacked, that's...I guess the way I read it is when you're attacked and you're doing a legal activity and attacked, you have the right to use force. [LB298]

SENATOR COUNCIL: Okay, but what constitutes "attacked," in your opinion? [LB298]

SENATOR CHRISTENSEN: Well, it's got to be..."attacked" here is going to be some use of force. [LB298]

SENATOR COUNCIL: Okay. And I'll find out after the hearing why there was a negative response when I asked if this was intended to address the concern I had last year, because I remain with my concern that removing the duty to retreat could present some very difficult and violent situations. So I'll talk to you after the... [LB298]

SENATOR CHRISTENSEN: Okay. [LB298]

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SENATOR COUNCIL: ...because I had to step out of the room, and I'm not going to delay the committee meeting by going back over something I could have raised at the time. Thanks. [LB298]

SENATOR ASHFORD: Thanks, Senator Council. Thanks, Mark. Do you want to go to LB512? [LB298]

SENATOR CHRISTENSEN: Thank you, Mr. Chairman, members of the Judiciary Committee. I'm Senator Mark Christensen, C-h-r-i-s-t-e-n-s-e-n, represent District 44, here to introduce LB512. LB512 was brought to me by the Nebraska State Patrol and is part of an effort to bring Nebraska up to speed with the National Instant Criminal Background Check System standards. Specifically, this bill seeks to change provisions related to the mental health determinations regarding the possession and purchase of handguns. As you will hear from Captain Julie Maaske with the Nebraska State Patrol, I believe many of these changes were put in place after the tragic shooting that took place at Virginia Tech University. I believe LB512 is an important piece of the information puzzle necessary for ensuring the essential and accurate mental health records are available for the prevention of firearms falling into the wrong hands. It also provides for a process for people who have no longer...who are no longer a threat to the community to get back their Second Amendment rights. Right now I believe I will turn it over to Captain Maaske and her expertise on the subject. Thank you for consideration of LB512, and I'd urge its advancement and take any questions you have. [LB512]

SENATOR ASHFORD: Thanks, Mark. Any questions of Mark? Or we could... [LB512]

SENATOR COUNCIL: I'll wait until after Maaske... [LB512]

SENATOR ASHFORD: Captain Maaske is coming up--or Colonel Tuma is coming up. Colonel. [LB512]

BRYAN TUMA: (Exhibit 15) Good afternoon, Senators. Chairman Ashford and members of the Judiciary Committee, my name is Colonel Bryan Tuma, B-r-y-a-n T-u-m-a, and I serve as the superintendent of the Nebraska State Patrol. I appear before you today in support of LB512. I would like to express our appreciation to Senator Christensen for sponsoring this bill on our behalf and our appreciation to the Department of Health and Human Services and the National Rifle Association for their positive contributions. The bill before you today addresses mental health commitment records and their relationship to the lawful purchase, possession, shipment, transportation, and receipt of a firearm. In an effort to put the bill into perspective as to how it relates to federal and state requirements, I would like to share information regarding the National Instant Criminal Background Check System, what we refer to as NICS. The Brady Handgun Violence Prevention Act of 1993 requires federal firearms licensees to contact the NICS system to determine whether a prospective firearm transfer to an individual would



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violate any of the ten federal prohibitors. One of those prohibitors is if, in a proceeding, a person has been formally determined to be a mental defective, which includes those involuntarily committed to a mental institution or deemed incompetent to handle their own affairs. LB512 addresses those persons who have been subject to a mental health commitment and their subsequent records in the state of Nebraska. This bill will assist Nebraska in addressing the submission of mental health board commitments and involuntary committals to the federal NICS system. Under current Nebraska law, when a mental health board commitment occurs, the record of such is sent to Health and Human Services and shared with the State Patrol, pursuant to Nebraska statute 69-2409.01. However, because the statute only allows the record to be retained for five years, we are prohibited from sharing the record with NICS. LB512 will remove this impediment. We have consulted with the Department of Health and Human Services, and they are agreeable to this change. The bill also addresses a process which is part of the NICS Improvement Amendments Act of 2007, also known as the NIAA. The NIAA encourages states to electronically submit information to the NICS system when an individual falls within a disqualifying category and requires states to have a program for relief of disabilities. We have been asked why states are required to create such a program, under the NIAA. A person's disqualification can effectively be a lifetime prohibition. The existence of a relief process provides balance, in that it affords an opportunity for persons to restore their Second Amendment rights if solely disqualified due to a mental health reason. LB512 will provide for this process by utilizing the mental health boards for those persons who have been barred for mental health reasons to seek relief from the firearm-related disability if they no longer suffer from the condition that originally barred them and provide a statutory definition of the same. Pages 5 and 6 of Senator Christensen's AM225 outlines the standards for relief to comport with due process to include what evidence shall be considered by the board and a right of appeal to the district court for a de novo review. Using history as a determiner of future activity, we estimate this process to involve few people. During a 14-month period, 2 persons out of the 1,012 purchase permit requests and no concealed-carry weapons requests were denied due to the disabilities component. All of these changes will allow Nebraska to participate in the national NICS system in a more effective and efficient manner while affording persons with a lifetime mental health prohibition due process for relief. In summary, the bill addresses mental health records and how they are used in relationship to a person's disqualification or eligibility to purchase, possess, ship, transport or receive a firearm. It will remove the five-year time restrictions and allow information to be shared with both HHS and the State Patrol, thereby removing the barrier of submitting the information to the national NICS system. [LB512]

SENATOR ASHFORD: Colonel, why don't we go ahead and go to questions. [LB512]

BRYAN TUMA: Okay. Okay. [LB512]

SENATOR ASHFORD: I tend to not like cutting you off, but I will anyway. [LB512]

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BRYAN TUMA: That's fine. [LB512]

SENATOR ASHFORD: (Laugh) [LB512]

BRYAN TUMA: I'll take any questions. [LB512]

SENATOR ASHFORD: Okay. Do we have any questions? One thing, tell me a little bit, when we passed the permit-to-purchase law years ago, we...the mental health--I can't recall whether that information was utilized in the denial of a permit to purchase or not. [LB512]

BRYAN TUMA: Yes. [LB512]

SENATOR ASHFORD: How was that information accessed, because...it was through court records, wasn't it? [LB512]

BRYAN TUMA: What happens is, if there is a mental health board or a court proceeding where a person is determined to be...have a mental commitment, then that record is forwarded to the Department of Health and Human Services, who shares that record with us. [LB512]

SENATOR ASHFORD: How does that sharing happen? [LB512]

BRYAN TUMA: The court record is transmitted to HHS, and then they share that with us. And then we enter it into our database. So Nebraska has a database of mental health commitments, but it's only... [LB512]

SENATOR ASHFORD: But they weren't shared, though, with the... [LB512]

BRYAN TUMA: We couldn't share them because there is a five-year limitation to retain that record. And because there was a five-year limitation, we couldn't share it with the federal folks and they couldn't enter it into their system. [LB512]

SENATOR ASHFORD: Could we access their system? [LB512]

BRYAN TUMA: Yes. [LB512]

SENATOR ASHFORD: We could access their system. [LB512]

BRYAN TUMA: Yeah, but we don't...if the federal folks run a systems check in NICS... [LB512]

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SENATOR ASHFORD: They don't get Nebraska. [LB512]

BRYAN TUMA: ...they don't get Nebraska mental health commitments. They would have to check with us individually on a case-by-case... [LB512]

SENATOR ASHFORD: But they wouldn't necessarily...how would they know to do that other than...? [LB512]

BRYAN TUMA: Well, that's the problem. [LB512]

SENATOR ASHFORD: Okay. So if someone moved from Nebraska to some other state and were...and what types of...these are...is it any firearm? [LB512]

BRYAN TUMA: Yeah. You are required to fill out a form for ATF whenever you purchase any firearm. [LB512]

SENATOR ASHFORD: Okay. [LB512]

BRYAN TUMA: So it's long guns, shotguns, and handguns. [LB512]

SENATOR ASHFORD: Okay. So when that form is filled out, it goes to... [LB512]

BRYAN TUMA: Well, at the point of sale, the FFL, or the federal firearms licensee, can call NICS by telephone. [LB512]

SENATOR ASHFORD: Right. [LB512]

BRYAN TUMA: And they can give them the information. And, typically, in about 30 seconds they will get a... [LB512]

SENATOR ASHFORD: Response. [LB512]

BRYAN TUMA: ...a response. [LB512]

SENATOR ASHFORD: But they don't have our records. [LB512]

BRYAN TUMA: No. [LB512]

SENATOR ASHFORD: So for all these years, I mean, this isn't...trust me, it's not (inaudible), but I was trying to get this into context. For all those years (inaudible) permit to purchase, and then we've had concealed-carry permits and then just purchases going on for all these many years. There has been...once--when that federal check is done, Nebraska mental health records are not accessed currently and have not been

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accessed under that system. [LB512]

BRYAN TUMA: Yeah. If we do a check in Nebraska, we will have the mental health information. [LB512]

SENATOR ASHFORD: Right, but the... [LB512]

BRYAN TUMA: Others outside our state... [LB512]

SENATOR ASHFORD: No, but the dealer... [LB512]

BRYAN TUMA: Right. [LB512]

SENATOR ASHFORD: ...the dealer... [LB512]

BRYAN TUMA: Right. [LB512]

SENATOR ASHFORD: ...so going to Guns Unlimited, you're under a commitment order...well, if you're under a commitment order in some other state, it might come up, correct? [LB512]

BRYAN TUMA: Correct. [LB512]

SENATOR ASHFORD: But it would not...the commitment order in Nebraska would not come up under current law. [LB512]

BRYAN TUMA: Well, we enter the data in our database. So if somebody checks with us... [LB512]

SENATOR ASHFORD: No, I got that part. But if you go to Guns Unlimited to purchase a firearm... [LB512]

BRYAN TUMA: Yes. [LB512]

SENATOR ASHFORD: ...and you are under a commitment order in Nebraska and Guns Unlimited does what it's supposed to do, forms filled out, then it gets an instantaneous or 30-second response. That Nebraska mental health record is not in there. [LB512]

BRYAN TUMA: Okay. Is that correct, Captain Maaske? Yeah? Yeah. [LB512]

SENATOR ASHFORD: So that's not good. [LB512]

BRYAN TUMA: No. [LB512]

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SENATOR ASHFORD: And it's not good because you didn't--of anything you did, it's not good because...and I recall, at the time the permit-to-purchase law was passed, since it was my bill, that there was quite a bit of discussion about that access to records issue. And that sort of carried over, I think, didn't it? [LB512]

BRYAN TUMA: Right. [LB512]

SENATOR ASHFORD: For some reason we just didn't change this. [LB512]

BRYAN TUMA: Right. [LB512]

SENATOR ASHFORD: So with the '07 act, now...and step back one second. Prior to '07 there were numbers of states that did share with NICS. [LB512]

BRYAN TUMA: Right. [LB512]

SENATOR ASHFORD: And we didn't because of the five-year deal. [LB512]

BRYAN TUMA: Right. [LB512]

SENATOR ASHFORD: It just didn't come up, or did you ever...it just didn't come up? [LB512]

BRYAN TUMA: I don't recall... [LB512]

SENATOR ASHFORD: Okay. [LB512]

BRYAN TUMA: ...what we did on that. [LB512]

SENATOR ASHFORD: Okay. [LB512]

BRYAN TUMA: All right. [LB512]

SENATOR ASHFORD: And that's...it just didn't come up. Yes, Senator Council. [LB512]

SENATOR COUNCIL: Yes, thank you, Chairman Ashford. And thank you, Colonel Tuma. I was reading the section of the Brady Bill. And it talks about, in a court proceeding, formally determined to be a mental defective, involuntarily committed to a mental institution, or deemed incompetent to handle own affairs are the disqualifiers. Now, what I see LB512 going to is basically an involuntary committal situation and not someone who may be determined to be mentally defective under some other civil action. And so there's no way currently--or no way to access that data. [LB512]

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BRYAN TUMA: No. And I think what we're proposing is that the second issue you spoke to would have to be addressed at some later point in time. We're talking about commitments only at this point. [LB512]

SENATOR COUNCIL: You say you're talking about involuntary commitment--involuntary commitments only. Okay. So that someone deemed incompetent in a conservatorship proceeding--you wouldn't have any way to access that. [LB512]

BRYAN TUMA: Right, and I think my conversation with Captain Maaske...and I think we agree, that something would have to be addressed--done later to address that particular issue. [LB512]

SENATOR COUNCIL: And I'm just thinking if there's any other context other than an involuntary committal hearing where someone could be found to have a mental defect that wouldn't be... [LB512]

SENATOR ASHFORD: Yeah, I'm trying to think, it's not just...is it an incompetency finding, or is it also a district court... [LB512]

SENATOR COUNCIL: It's basically what we could...as I understand it, Colonel Tuma, and you correct me if I'm wrong--currently what Colonel Tuma is saying is that the only thing that we can really get to are involuntary commitment records, court orders. [LB512]

BRYAN TUMA: Yeah, I would suggest our thrust at this point is to address that issue. And perhaps the other issues will have to be addressed at some other point. [LB512]

SENATOR COUNCIL: We'll have to figure out a way to... [LB512]

SENATOR ASHFORD: Okay, because I know...have other states gone beyond the incompetent? [LB512]

BRYAN TUMA: Boy, I don't know. Maybe Captain Maaske has some... [LB512]

SENATOR ASHFORD: Well, that's all right. I mean, I think one of the issues...this isn't...I mean, just trying to understand--I mean, there are other, to Senator Council's point, there are other processes where there's a finding of... [LB512]

BRYAN TUMA: Right. [LB512]

SENATOR ASHFORD: ...mental incompetency other than the mental health board.

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[LB512]

BRYAN TUMA: Involuntary commitment. [LB512]

SENATOR ASHFORD: And I think I asked Mark or Ron at some point about the...and I think that's the same answer they gave me, was it's basically mental health commitments. But... [LB512]

SENATOR COUNCIL: And we really don't have a way, you know: I'm feeling--having bouts of depression or anxiety and I go to a mental health provider and they place me in inpatient treatment and say, you know, I have bipolar disorder with schizophrenic tendencies or whatever. There's no way for you to find that information out. [LB512]

BRYAN TUMA: No, no. [LB512]

SENATOR ASHFORD: There has to be a commitment? [LB512]

BRYAN TUMA: Yeah, we're... [LB512]

SENATOR COUNCIL: Involuntary. [LB512]

BRYAN TUMA: Yeah, involuntary. Yeah, we're looking... [LB512]

SENATOR ASHFORD: Involuntary. So you can't voluntarily... [LB512]

BRYAN TUMA: Right. [LB512]

SENATOR ASHFORD: I mean, there are so many cases of, to Senator Council's point, so many cases of voluntary commitment that turn into... [LB512]

BRYAN TUMA: Well, they do it outpatient. [LB512]

SENATOR ASHFORD: Huh? [LB512]

BRYAN TUMA: I mean, there's cases where it's outpatient treatment. [LB512]

SENATOR ASHFORD: Yeah. [LB512]

SENATOR COUNCIL: Or cases where your family convinces you... [LB512]

SENATOR ASHFORD: Right. [LB512]

BRYAN TUMA: Yeah. [LB512]

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SENATOR COUNCIL: ...without need for... [LB512]

BRYAN TUMA: Without the, yeah, the court or the health board intervening. [LB512]

SENATOR COUNCIL: Right...to go, and they convince you that you need treatment. And you go in and you're diagnosed with a mental health disorder. And in those situations your freedom to come and go is less restricted than somebody who's involuntarily committed. [LB512]

BRYAN TUMA: Right. [LB512]

SENATOR COUNCIL: And those are the people who have greater access to... [LB512]

SENATOR ASHFORD: Firearms. [LB512]

SENATOR COUNCIL: ...firearms. [LB512]

SENATOR ASHFORD: And once you're involuntarily committed and you're released from...I know there's a process in here, but does the release from the commitment allow you then to obtain the firearm, or does there have to be a... [LB512]

BRYAN TUMA: You have to go through a mental health board hearing. They would review it. [LB512]

SENATOR ASHFORD: You go back through the hearing again and there's a release in the hearing. So there is another process in here. [LB512]

BRYAN TUMA: Right. Yeah, there would be a record of that, and then that would be given to us. [LB512]

SENATOR ASHFORD: Okay. So the mental health commitment record goes to you. You then enter that into the NICS system. [LB512]

BRYAN TUMA: And we share it with the federal folks. [LB512]

SENATOR ASHFORD: You share it with the federal authorities, so that when someone purchases a firearm in Nebraska, fills out the form, boom, comes back from NICS...and prior to that the only way that...that would not have happened through that avenue. Could have been known some other way but... [LB512]

BRYAN TUMA: Yeah. [LB512]



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SENATOR ASHFORD: Okay. All right. Well, I mean, I appreciate Mark bringing this bill, because it clearly is something that needs to be addressed. I don't...there's just so many cases of when something could go awry with someone and then they get guns. Okay, thank you very much. Thanks, Colonel. [LB512]

BRYAN TUMA: Thank you. [LB512]

SENATOR ASHFORD: Captain Maaske, are you testifying or... [LB512]

JULIE MAASKE: No, sir. [LB512]

SENATOR ASHFORD: You're not? Everybody keeps saying you're going to testify and tell us the answer. (Laughter) What do you mean, you're not testifying? I don't...do I have subpoena power if you're in the room? [LB512]

JULIE MAASKE: You are the Chair, sir. [LB512]

SENATOR ASHFORD: Okay. I don't know. Is there anything that you could clear up, maybe we've...that you'd have more specific background with or... [LB512]

JULIE MAASKE: I guess the one thing we've talked about is purchase permits. [LB512]

SENATOR ASHFORD: Could you come up and just talk about those. I just want to close the loop in my own thinking. And this is not insubordination, it's... [LB512]

JULIE MAASKE: Okay, thank you for giving me a pass. On the purchase permit or a CCW permit, when the background information is checked for those, those are--because those are run in the state of Nebraska, they do check the mental health records. [LB512]

SENATOR ASHFORD: In the court records. [LB512]

JULIE MAASKE: Yes, because those mental health records are shared with us. And so when they run the background check for a purchase permit or a CCW permit, those go--those check against our records. [LB512]

SENATOR ASHFORD: Okay, but at point of sale that's what was missing? [LB512]

JULIE MAASKE: Yes; yes, sir. [LB512]

SENATOR ASHFORD: Okay. So that's a big gap that's being closed here, it seems. [LB512]

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JULIE MAASKE: Yes, sir. [LB512]

SENATOR ASHFORD: Okay, thanks, Captain. [LB512]

JULIE MAASKE: Thank you. [LB512]

SENATOR ASHFORD: Anybody else I can call up here? No. (Laughter) Yeah. [LB512]

JORDAN AUSTIN: Mr. Chairman, my name is Jordan Austin, again, A-u-s-t-i-n, speaking on behalf of the National Rifle Association. I just want to briefly comment. We have been working with the Nebraska State Patrol on this. This is in relation to the NICS Improvement Act passed several years ago. The substitute amendment being proposed by Senator Christensen in regard to LB512 is something we're supportive of. We've worked with them to, you know, bring them as, you know, directly in line with the federal requirements, to make sure these records are communicated and these individuals are included and prevented from purchasing these firearms. So I'd be happy to answer any questions. I don't have a copy of the bill in front of me, so... [LB512]

SENATOR ASHFORD: Well, I just...state and nationwide, Nebraska, how many other states, other than Nebraska, are in this kind of doughnut hole, which is not the right word, but where you purchase a gun and because they're not in the NICS system they can't get that 30-second response? [LB512]

JORDAN AUSTIN: Of the four states that I handled--this is the fourth one that I've worked on this legislation in. We established this in West Virginia, in Wisconsin last year, in Kansas two years ago, and we're working on it here. So at least in the four states that I handled directly, I can speak to that from experience that we have worked to make sure we've established these provisions in state statute. So we are working nationwide to make sure states get in compliance, working firsthand with enforcement agencies like the State Patrol here or the Department of Justice in other states and specifically with BATF, because they are sort of specific on some of the terminology they like to use, which is why we have the substitute amendment we have. [LB512]

SENATOR ASHFORD: Okay, thank you. [LB512]

JORDAN AUSTIN: You're welcome; thank you, Senator. [LB512]

SENATOR ASHFORD: Next proponent. Then Andy after that, if you want. [LB512]

ANDY ALLEN: I'm neutral. [LB512]

SENATOR ASHFORD: You're neutral? Okay. [LB512]

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AMY PRENDA: Chairman Ashford and members of the Judiciary Committee, my name is Amy Prenda; it's A-m-y P-r-e-n-d-a. And I'm the registered lobbyist for the Nebraska Sheriffs' Association, here to testify in support of LB512. Terry Wagner was going to be here today to testify, but he had a conflict, so I will try to answer any questions that I can. But I'm going to tell you I'm probably not going to be able to. (Laugh) [LB512]

SENATOR ASHFORD: Okay. Any questions of Amy? That's fine. Thanks, Amy. Any opponents...I'm sorry, any more proponents? Any opponents? Neutral? Andy, neutral. [LB512]

ANDY ALLEN: (Exhibit 16) Andy Allen, A-I-I-e-n, Omaha, Nebraska. Just real quickly, our organization is not against trying to keep people that are judged mentally incompetent from having firearms. We have a problem...currently at the federal level once these get reported, there have been problems with getting people removed. Back 15 years ago, this (inaudible) system for removing people from it that were perhaps listed in error--that, unfortunately, at the federal level never got funded, so it never happened. There's been thousands of people that are listed in that NICS database, that they're, because of mental reasons, not able to have firearms--in error. A lot of those are veterans that returned from Desert Storm, that they went to see the base counselor for--hey, I'm having trouble integrating back into the home and family, just need to talk some things out--and their names got added to that database. Today they can't own a firearm. You know, in 2007, the NICS Improvement Act--there are supposed to be systems to improve that. At this point those have not shown themselves to be effective and operating. So we really have a problem supporting this until at the federal level they're able to fix the issue that we're trying to here, with, you know, if somebody is on there by mistake, they should be able to be taken off. [LB512]

SENATOR ASHFORD: Okay. Senator Council. [LB512]

SENATOR COUNCIL: Thank you, Chairman Ashford. And, Andy, I agree. But I guess I'm trying to figure out how they got there. I'm looking at the Brady Bill, and it speaks to having something established in a court proceeding. So... [LB512]

ANDY ALLEN: Yes, it does. They were added to that list by executive order. [LB512]

SENATOR ASHFORD: Hmm. What about the veterans groups, don't they...aren't they... [LB512]

ANDY ALLEN: They have been fighting this issue at the federal level for a lot of years. It's been a problem. And we, you know, and that's our concern. And, you know, we support--hey, we need to do something to keep people that won't be a problem from having firearms. But at the same time, we don't, you know, it is one of those, you're innocent until proven guilty. We don't want to let that guy that's innocent to be caught in

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the system and not be able to get out. [LB512]

SENATOR COUNCIL: Okay. And so the executive order apparently had some provision that if a veteran... [LB512]

ANDY ALLEN: The executive order went to the Department of Defense and the Veterans Administration, that for everybody that they had any mental health record on, which I say included down to guys that--hey, you know, I just got back from Iraq and, you know, there's some conflict at home; can you help me deal with that? And sure, we understand how...and that's one of the things that mental health professionals help with, you know. Those names then got added to that database, they got caught in a net that was too fine. [LB512]

SENATOR COUNCIL: Okay. So then my question, and maybe you can answer it later, is, if one of those individuals happens to be a veteran residing in Omaha, and they pursue this due process restoration, are you suggesting that this wouldn't provide them an avenue to have that... [LB512]

ANDY ALLEN: I am not an attorney. I did drive by a Holiday Inn Express on the way here, but I don't think that gives me enough to actually speak on that. [LB512]

SENATOR COUNCIL: Okay, so you don't play one on TV... [LB512]

ANDY ALLEN: All I can really do is point out the issue and allow you folks (laugh) to... [LB512]

SENATOR ASHFORD: Well, maybe Jordan can help us with that. Senator Lathrop. [LB512]

SENATOR LATHROP: Can you get me a copy of the executive order that you just referred to, so I can see what executive order was entered that... [LB512]

ANDY ALLEN: I can try, if I can find it on-line. It's, of course, several years old, but it should be... [LB512]

SENATOR LATHROP: Well, then, have you actually read the executive order, or are you getting that secondhand through some group? [LB512]

ANDY ALLEN: I have read part of the order, I have not read the whole thing. I've read a quoting out of it. As long as the other information... [LB512]

SENATOR LATHROP: Okay. I would like to take a look at that, if you wouldn't mind. And if you can't find it, if you'd just give me the site...because here's the thing, if we're

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supposed to--or we're going to try to fix a problem that involves an executive order, we'd like to look at it to see what it says, because some of us are lawyers and we'll do what we can to fix it. [LB512]

ANDY ALLEN: Okay. [LB512]

SENATOR ASHFORD: Thanks, Andy. [LB512]

ANDY ALLEN: Thank you. [LB512]

SENATOR ASHFORD: Any other proponents--or neutral, I'm sorry. I guess not. Mark, do you wish to close and then open on your next bill? LB518 is next. [LB512]

SENATOR CHRISTENSEN: Again thank you for the hearing and your time. I'll give you the states that have no reporting records right now: Idaho, Wyoming, Nebraska, New Mexico, Alaska, North Dakota, Minnesota, Pennsylvania, Massachusetts. And then there's a number more that only have partial reporting--from Oregon, Nevada, Utah, Montana, South Dakota, Iowa, Illinois, Oklahoma, Louisiana, Kentucky, South Carolina, Maine, Vermont, New Hampshire. So there's quite a few that... [LB512]

SENATOR ASHFORD: Well, I think this is a good thing you brought us, Mark. I mean, this is something that needs to be done. [LB512]

SENATOR CHRISTENSEN: Other than that, I'm sorry you got the amendment late. I forgot it in my office, so Dan got it for me. And again, I hope that we can get this amendment attached to the bill and sent to General File. [LB512]

SENATOR ASHFORD: Okay. LB518. [LB512]

SENATOR CHRISTENSEN: (Exhibit 17) Thank you, Mr. Chairman and members of the Judiciary Committee. I'm Senator Mark Christensen, C-h-r-i-s-t-e-n-s-e-n. I represent the 44th Legislative District. LB518 amends Section 69-2441 and 69-2443 in order to change the penalties for carrying a concealed handgun by a permit holder entering a prohibited or posted place or premises so such penalties resemble the penalty for second-degree criminal trespass currently in Nebraska law. Like second-degree criminal trespass, LB518 would require that the permit holder knew he or she was entering a prohibited or posted place. The bill would also provide clarification that a permit holder who is asked to remove their concealed handgun from a place or premises where the prohibition of concealed-carry was not conspicuously posted does not violate 69-2441 unless they refuse to obey such a request from the owner or controller of the property. Finally, Section 69-2443 is amended to make the penalties for violating subsection (2) of Section 69-2441 similar to second-degree trespass. Currently the penalty for violating Section 69-2441 is a Class III misdemeanor and any

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subsequent violations are a Class I misdemeanor. The violation under 69-2441 in LB518 remains the same, a Class III misdemeanor, with two exceptions. First, like a second-degree criminal trespass, the penalty would not increase to a Class I misdemeanor with subsequent violations. And second, LB518 divides subsection (2) of 69-2441 into subdivision (a) and (b), clarifying the two different trespass scenarios in the current language. Violations of subdivision (b), like second-degree criminal trespass, would be a Class II misdemeanor for refusing a direct order of a property owner or controller of the property to remove the weapon from the premises. I believe the changes in LB518 clarify what constitute a violation by a permit holder entering a posted place or a permit holder refusing to remove his or her handgun at the request of a property owner. I believe these violations are similar to the second-degree criminal trespass and should be treated alike. Thank you for your consideration of LB518. I'd urge its advancement to General File. [LB518]

SENATOR ASHFORD: Any questions of Senator Christensen? Seeing none, thanks, Mark. Do we have any proponents for this bill? Bud. [LB518]

SENATOR COUNCIL: Before Senator... [LB518]

SENATOR ASHFORD: Yeah. Senator Christensen, and then Bud is here. Okay. Oh, I'm sorry, did you have a question? [LB518]

SENATOR COUNCIL: Yeah, I had a question. And thank you, Senator Christensen. And I know we've had some discussions already around signage, and I guess that's what the concern I have here is, on page 3, beginning at line 25. And that subsection (a) speaks to when a person violates this section. And it provides that, you know, a person does not violate the section unless the owner of the property has posted conspicuous notice that carrying a concealed handgun is prohibited. But what's added is "and the permit holder entered the place or premises knowing that carrying a concealed handgun into or onto this place or premises is prohibited." And what my concern is, I take that to mean, despite the posting, the person carrying the weapon could contend that they didn't know and would not be subject to violation. Is that the intent, as I understand it? Am I correct in my understanding? [LB518]

SENATOR CHRISTENSEN: I believe I understand you correctly. This is partly addressed to the signage thing being uniform, because, you know, you could miss it if a door is open, if it's not conspicuous. I guess that was part of my intent with this bill, was lining it up. [LB518]

SENATOR COUNCIL: But one of the things about the current language is--requires that has posted, conspicuous notice. So, I mean, if there's not a conspicuous notice posted, then the person couldn't be found to violate the prohibition. And what you're adding here is--then also has to prove that, notwithstanding that the notice was posted

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conspicuously, that the permit holder knew that it was...that he or she was prohibited. I don't know why it's necessary to add that knowledge requirement, because the purpose of requiring a posting of a conspicuous notice is for the purpose of establishing knowledge, implying knowledge. [LB518]

SENATOR CHRISTENSEN: Correct. And I think that goes back to the uniformity--conspicuous signing again. Because if it's only on one door or it's--as I...we handed out them lists on the signage bill, that it was listed at the bottom, you know, there's some interpretation of "conspicuous." The way I read it, it's got to be obvious; but, again, what is obvious to me might be different with you. And so that's why it's knowingly breaking it. [LB518]

SENATOR COUNCIL: But, see, that's what I have a problem with, okay, (laugh) because you could easily, I mean, someone could easily make the argument that, while it's posted--and just the statement you made: Well, that could be obvious to you, but it wouldn't be obvious to me. I mean, a 2-by-4...somebody could make the argument that it's obvious to you and--obvious to me and not obvious to you. And the problem about coming in a different door, conspicuous notice is conspicuous notice. And if someone came into a door that didn't have that notice posted, there is no conspicuous notice posted. I mean, if that's an entrance and it does not have a notice on it, you haven't satisfied the requirements of the statute as it currently exists to impose criminal liability. [LB518]

SENATOR CHRISTENSEN: I agree with you. That again goes back to my uniformity that I had asked in LB88. [LB518]

SENATOR COUNCIL: Okay, okay. [LB518]

SENATOR ASHFORD: Thanks, Mark. Bud, did you want to... [LB518]

BUD CALLAHAN: Bud Callahan, C-a-l-l-a-h-a-n, and thank you, Senator Ashford and fellow senators on the committee. Along the same lines with Senator Council, the part of this that I like particularly is the lessening, as I see it, of the first-time penalty. Some of the things I have noticed are those doors and entrances that are exposed to the south and to the west, by now those...you have to look really hard. They're becoming sun-faded, and so it's hard to pick up that they're there. And this will at least...back up a little bit. I would like to see, you know, a first-time forgiveness thing, so to speak, for those instances. And another one I ran into right here in Lincoln is the public walkway that goes over what is that, 14th Street, 13th Street I think it is. And, anyway, it goes into the Southeast Community College building. And this is a public walkway. And you're walking along on this public walkway and all of a sudden there's this sign right there. I thought, oh, my gosh, in inclement weather what is a CCW supposed to do? Are they supposed to turn around and go all the way back? This is, after all, a public walkway.

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But there appears this sign on the glass door that you are entering Southeast Community College to some degree. And for someone who inadvertently walked in there with a crowd or something, it would be nice to at least have the opportunity for a lightened first-time offense, so to speak. I'm not aware of any offenses that have occurred under the CCW laws. But I think this would be good and help solidify, if you would, please, some of the inconsistencies that do exist with where these emblems are placed and forgiveness for the first one. And then I was in a building also that I found it in a back room, which from what Senator Council said, that would certainly be a viable argument that you do get a free pass on this one. So thank you. [LB518]

SENATOR ASHFORD: Thanks, Bud. I don't see any questions. Thank you. Other proponents? [LB518]

ROD MOELLER: (Exhibit 18) Good afternoon, Senators. My name, again, is Rod Moeller, M-o-e-l-l-e-r. I live in Omaha, Nebraska. I'm speaking in favor of this. I provided a handout. This is some information I believe you've seen in prior testimony. A person in Omaha by the name of Wesley Dickinson had done some research after having moved to Nebraska and seeing how our signage laws vary from other states'. And this one, this particular handout, is really to focus on what some of the other states have in the way of signage requirements as well as penalties. My focus here today is, really, to discuss what those differences are with adjacent states. In the states of Kansas and Minnesota, a violation of going in, you know, that we're talking about here, where you go into a premises that's posted, most likely not knowing that it was posted, you know, inadvertently going into a premises that was posted--in the states of Kansas and Minnesota, this is just a misdemeanor. It's considered a criminal trespass in the states of Colorado, South Dakota, Wyoming, and Iowa. In the state of Missouri, it's a fine only; there's no charge whatsoever; there's nothing that ever goes on your record; it's just a fine. And it's really only a violation if you remain on the premises after being notified: Hey, this is against our store policies or company policies, please leave. Only after refusing to leave does it become a violation in the states of Colorado, Wyoming, Iowa, Missouri, and Minnesota. There is absolutely no adjacent state that makes this a firearms violation. My concern is how severe of a penalty having a firearms violation is. I shared previously a story about how I had entered a location that was posted, without having noticed, because the location...the entrance I went in was not posted. I went back later and verified. Had something occurred where I had been caught, per se, I would lose my ability to purchase a handgun, I would lose my ability to carry concealed for ten years, for an inadvertent thing. And a scenario that I would like to describe is, say I was...say, well, it's concealed carry. How would somebody know that you violated? One possible scenario would be I became a witness to a crime, I'm doing my civic duty by sticking around and providing a statement to the police. Upon official contact of being with the police I'm required to give notice that I'm a permit holder. Well, I just admitted guilt, and I just lost my permit for ten years. That's a rather severe penalty. So I support this bill because this would allow us to bring it into something comparable to what



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adjacent states have. [LB518]

SENATOR ASHFORD: Okay, thanks, Rod. Any questions of Rod? Seeing none, thanks. Any other proponents? Okay. Andy. [LB518]

ANDY ALLEN: (Exhibit 19b) In the interest of time, I'm Andy Allen, Omaha, Nebraska, A-I-I-e-n. [LB518]

SENATOR ASHFORD: If you have something new and innovative, Andy, otherwise... [LB518]

ANDY ALLEN: I'm just going to take and point out that Rod talked a little bit about surrounding states. And we've got one of our surrounding states where it's not a firearms offense, so you don't lose your concealed-carry permit. And the fine for having done so is as low as \$25. So, you know, ours is the strictest punishment in the region. And with how, as we talked about a couple of weeks ago, how hard it is to see the signs, we need to make it where--hey, somebody could accidentally walk into someplace because they put a plant in front of the sign. Or are we going to say item 14 on a rules board that's posted at 3 of our 100 entrances at this mall is conspicuous posting? We don't have good, solid answers to those questions. So, unless we can come up with a way to shore that up, we need to offer some relief for the person that can accidentally... [LB518]

SENATOR ASHFORD: Any questions of Andy? Seeing none, thanks, Andy. Any other proponents? Any opponents? Neutral? Mark, you're it, this is the end. [LB518]

SENATOR CHRISTENSEN: Again, thank you, not to belabor. I handed this sheet out. Senator Council, you can see where I was mirroring this language from. And that's all I'd have. I'd love to see it advanced. [LB518]

SENATOR ASHFORD: Okay. Thank you. Thanks for staying...joining us all afternoon. [LB518]

SENATOR CHRISTENSEN: Appreciate being here. [LB518]

SENATOR ASHFORD: Thanks, Mark. Okay. Do we have a motion to go into Exec...? [LB518]