

SLAMA [00:00:04] [RECORDER MALFUNCTION] Cathy, first off, thank you so much for coming out today. How big was the rake in question that you ran over-- well, it-- well, it was thrown in front of your school bus.

CATHY HAUDER [00:00:14] It was a full-size rake.

SLAMA [00:00:16] Full size, like garden rake?

CATHY HAUDER [00:00:18] Like a garden rake.

SLAMA [00:00:20] OK. OK. That's my only question. Thank you.

LATHROP [00:00:23] I see no other questions. Thanks for coming out today. We appreciate you relating that awful experience to us and your support of the bill.

CATHY HAUDER [00:00:32] Thank you.

LATHROP [00:00:34] Anyone else here in support?

JASON NORMAN [00:00:39] Oh.

LATHROP [00:00:39] Good afternoon.

JASON NORMAN [00:00:42] Good afternoon, Senators. Jason Norman; it's J-a-s-o-n N-o-r-m-a-n. Cathy Hauder, the bus driver, is actually my mother and I'm mainly here in support of her. I live in North Platte, so I'm considerable ways away from McCook. But I did call. I called McCook. I called everyone I could. I called the sheriff's department. I talked to the sheriff. He told me it was no concern of mine because I didn't live in Red Willow County. But I did contact the local State Patrol's office in North Platte and I've also called up here to Lincoln. First of all, I think it's absurd I'm sitting here in front of all of you because this is insane that we don't have any laws against this. But I just want to point out, about the rake, it was not a garden rake. We're talking this-- this was an asphalt rake. And if you know what an asphalt rake is, you're talking thick tines. I know we don't like to play a lot of "if" games, but if that was to hit the-- the tire of this bus, you're talking about a blown-out tire in a vehicle that doesn't have seatbelts for 12 children on board, not to mention my mom. I'm more concerned about my mother because she's almost 60 years old and no one, and I mean no one, would take this fight. So I appreciate Senator Hughes taking this up. But again, I think it's absurd that we have to have these kind of laws, but apparently it's necessary because everywhere I went I was told repeatedly that there is no law. So as of right now in the state of Nebraska, you can walk out to the interstate and you can throw something in front of a vehicle going 75 miles per hour and you're perfectly within your rights to do so, and I find that absurd. That's all I have.

LATHROP [00:02:29] OK. Let's see if anybody has any questions before you get away, Jason.

JASON NORMAN [00:02:35] Yes, sir.

LATHROP [00:02:36] Any questions for the testifier? I see none. Thank you for coming today.

JASON NORMAN [00:02:39] Thank you very much.

LATHROP [00:02:40] Yeah. Are there any other proponents of LB143 care to testify? Any opponents of LB143 that care to testify?

SPIKE EICKHOLT [00:03:03] Good afternoon, Chairman Lathrop. Members of the committee, my name is Spike Eickholt; first name S-p-i-k-e, last name E-i-c-k-h-o-l-t, appearing on behalf of the Nebraska Criminal Defense Attorneys Association opposed to the bill. I first want to clarify, if the people who testified in support of the bill are still here, that I'm not speaking against anything that happened to them, particularly the woman who was driving the school bus. Our association took a position of opposing this bill because we believe that everything that's characterized in the green copy of this bill is already criminalized. Now I cannot explain why no one was cited for this incident or why no one was charged, but just listening to the testimonies, I can hear of a series of different crimes that could have been charged. You commit-- a person commits criminal mischief, you've-- if you damage the property of another even if it-- the damage is just incidental or insignificant. If it's less than-- I think we change the dollar amounts-- if it's less than \$500, it's a misdemeanor offense. If this rake actually hit this bus, and I'm sure it did, it caused some sort of damage, a dent, a scratch, something. That's all you need to show to have at least the bare, bottom, minimal charge of criminal mischief. This was upsetting to the woman driving the school bus. That's disturbing the peace. There's children on the school bus. That's child abuse, child neglect. You're putting these children in danger. The concern that we have about recriminalizing existing crimes is that you get overlap, you get inconsistency with the elements. If you look at this bill, which is kind of unusual for our statutes, you have a staggering of different penalties according to the classification. Typically, if you look at other crimes, you have the crime, the elements are listed, and then you simply label whatever class penalty it is and then that's listed in another couple of statutes. Here it's got a whole staggered different sanctions for the penalty. That's also odd. When you have multiple crimes that you sort of relabel and rename and rebrand for the same offense, what that leads to, and it's our position as an association, that leads to overcharging, it leads to the stacking of offenses, and it artificially inflates what arguably a sentence ought to be for the wrongfulness of the actions. I don't know why these people-- why no one was cited for this. There apparently was no mystery as to who did it. I can't explain that. And I understand that senators maybe want to do something about that, but passing this bill is not going to direct the prosecutors to charge cases, it's not going to direct law enforcement to investigate and cite for violations of the law. So it's our position this bill is unnecessary and for those reasons that I stated earlier, we would oppose it.

LATHROP [00:05:49] Thanks, Spike. Any questions for the testifier? I see none. Appreciate you coming down today. Anyone else here to testify in opposition to LB143? Anyone here in a neutral capacity? Seeing none, for the record, we have some letters that have been received-- I'm sure Laurie told me where they would be found, I thought they were in the book-- oh, one letter in opposition from Spike, who just testified, from the ACLU; no other letters in support or in opposition. With that, we'll close the hearing on LB143 and move to Senator Wayne who is introducing LR1CA. Good afternoon, Senator Wayne.

WAYNE [00:07:26] Good afternoon. My name is Justin Wayne, W-a-y-n-e, J-u-s-t-i-n W-a-y-n-e. I represent District 13 which is north Omaha and northeast Douglas County. I'm here today, which is an interesting bill, and I won't go through every single detail of how we got here, but it is pretty basic on how we-- we got here. During the time of our becoming a state, we were actually vetoed not once but twice, and it had to do with another bill that I introduced dealing with felon voting rights. The first two drafts that went before Congress when we tried to become a state included that only white man could vote. And the President did a pocket veto at the time and then came back the second time, did another veto, and a third time it was presented by Congress, Congress approved it with fundamental conditions, is which they called it. And those fundamental conditions is found in our Article II, Article I, and it was basically you could vote if you weren't convicted of a felony. And that's how they got around that. Well, during the time of doing that research two years ago, there was something that stuck out to me and it kept sticking out. And it wasn't until the movie, the "13th" amendment, came out where they start exploring the federal Thirteenth Amendment that has the same loophole that I'm going to talk to you about, that it became very concerning. And it became concerning for a couple of-- of reasons, and that is slavery is abolished and prohibited and indentured servitude unless you are convicted of a felony. Well, you would think Nebraska doesn't have a dark history of that because we were a freed slate-- a free state. However, Nebraska was a part of this. Nebraska, starting in 1975, began what's called convict leasing where if you were a newly freed slave and were convicted of a crime, you were leased to businesses so they can still continue to provide free service. That is exactly what our constitution meant and why we put it in there, which is Nebraska prohibits slavery and indentured servitude unless otherwise convicted of a crime. And again, most people find that unbelievable that it's still in our constitution but it's there. I didn't organize a group of people to testify because this is a bill that I'm not asking for your support. I'm asking for everybody on this committee to cosponsor. When we get to the floor, I'm going to ask everybody on the floor to cosponsor because we have to send a strong message that the notion of slavery and indentured servitude is not a Nebraska value. I hear-- a lot of times I hear about Nebraska value, but never did I think a Nebraska value was slavery or indentured servitude. So up until 1913, Nebraska had a lease system where they were leasing former slaves to individual businesses for less than 50 cents a day. And actually the State Capitol used convict leases to build the building from 18-- 1880-- I'm sorry, 1883 to 1889. Our government endorsed and promoted convict leasing. So I stand here today on this bill saying something really simple. Is slavery and indentured servitude under any circumstance a Nebraska value? I don't believe it is and I think we need to take it to the voters to make sure it's not-- Utah in 2020 will have this measure on the ballot. They have similar language, along with 13 other state-- 14

other states. We need to do the same thing. Last year, 2018, Colorado passed the same legislation at the voter level to remove slavery and prohibit it completely in their constitution. And I'm asking this committee to put this on the floor as fast as we can and send a message that in the time of dividedness, in the time of race mongering and hateful speech that we see every night on the news, that we send a message from this body that we're going to at least acknowledge and truly end one of the darkest points in American history. Slavery was considered the original sin by James Madison. We need to make a clear message to our populace that we do not believe slavery is a Nebraska value under any circumstance. With that, I'll answer any questions.

LATHROP [00:12:27] Thank you, Senator Wayne. Any questions for Senator Wayne?

WAYNE [00:12:33] I just want you to know I'm really nervous because Senator Chambers sits there and looks at me and he will like tear into me, so I've got to be careful.

LATHROP [00:12:39] Senator Chambers, you need to tear into Senator Wayne today?

CHAMBERS [00:12:44] I was contemplating what he was saying.

LATHROP [00:12:51] I don't see any questions, Senator Wayne. Are there folks here who wish to testify as proponents of this bill or resolution? Seeing none, are there any-- oh, I'm sorry.

SPIKE EICKHOLT [00:13:17] Good afternoon, Chairman Lathrop and members of the committee. My name is Spike Eickholt, S-p-i-k-e, last name E-i-c-k-h-o-l-t, appearing on behalf of the ACLU of Nebraska in support of the legislative resolution to suggest a constitutional amendment. We want to thank Senator Wayne for his leadership on this issue. I cannot restate anything better than what Senator Wayne did. I did submit a letter to you that outlines some of the history with respect to convict labor, convict leasing. In present day, admittedly, perhaps this has just got some symbolic value or some historically symbolic value to have this in our constitution, but it is important for the same symbolic reasons to remove that from our Constitution. As Senator Wayne explained, just last fall, in November of 2018, Colorado, which had a similar, almost verbatim constitutional provision in their state constitution, remove theirs from-- struck that from their constitution. The vote was 65 to 35, approximately, and we would encourage this committee to advance this resolution to the floor so it can appear on the ballot before the voters. With that, I'd answer any questions.

LATHROP [00:14:28] Any questions for Spike? I don't see any. I-- I have a question for you. So the-- the provision as it's found in our constitution reads: There shall be neither slave nay-- "slavery nor involuntary servitude in this state, otherwise than for punishment of a crime, whereof the party shall have been duly convicted." So does this limit the Department of Corrections in their options? Do we have anything that amounts to forced work by people that have been convicted of crimes in the state?

SPIKE EICKHOLT [00:15:04] Obviously we have forced incarceration, but I don't think inmates can be forced to work; and they certainly can't be sold, they certainly can't be leased to private companies, they certainly can't be shipped around the state or even outside the state, as they were historically with that similar loophole language. I'd argue no.

LATHROP [00:15:22] OK. Any other questions? Seeing none, thanks for coming down today. Anyone else here to testify in favor of this resolution? Anyone here in opposition? Good Afternoon.

ROBERT KLOTZ [00:15:49] Afternoon. My name is Robert Klotz, R-o-b-e-r-t K-l-o-t-z. I am here to speak in favor of maintaining this. I don't want to be here because of all the problems with race anyway, but listening it seemed like race kept being brought up, so I'll just read this whole thing. Looking at history, it was a black man from Angola in 1654 who demanded his African cultural rights to have a slave. The Virginia courts granted Johnson his right as a black man to have a slave, forcing slavery into the American culture. At this time, remember, it was against the law for a white man to own slaves, so slavery began to flourish as black slave masters increased. In 1861 there was a civil war in which it is documented that at least a handful of black men fought willingly for Con-- the Confederate Army against the North, but the bulk of the 620,000 war deaths were white men who suffered death because of the slavery forced into America by a black man. In 1865, it was white men who passed the Thirteenth Amendment, freeing black men from slavery but kept slavery in place for any individual, black or white, who disrespected society's norms by committing crimes. Now we have legislation action to eliminate slavery for those who disrespect social-- social-- so-- so-- societal norms and enslave those who do respect societal norms. Department of Corrections does require inmates to work, thus slave labor. The men clean prisons, cook the meals, clean clothes and much more. You would have to replace this slave labor force that takes care of the chores and the-- and the other inmates. You cannot find enough qualified people to work in prison now. How will you increase the work force so those who spurn society can have maid service? Why would you subject law-abiding, hardworking individuals to the expense and drudgery of slavery just to provide maid service for those who disrespect societal laws and norms? To do so is to disrespect the very people who sent you to the Capitol as their representatives. I urge you to vote no to this constitutional change by Senator Wayne.

LATHROP [00:18:26] Any questions for this witness or this testifier? I see none. Thank you for coming down today. Anyone else here in opposition to the resolution? Anyone here in a neutral capacity? Senator Wayne to close.

WAYNE [00:18:49] Thank you, Chairman Lathrop. I didn't bring up the prison aspect because I didn't want people to be confused or clouded. There are currently over 23 states that have a prohibition completely on slavery and they are operating prisons. They continue to have people work in the prisons who are prisoners. It's not been an issue. I can't promise you a Supreme Court ruling in Nebraska would say they couldn't do that because they can interpret it how they want. But everybody still operates, the states that have a clear prohibition on it, the same way

that we do in Nebraska. That won't change. Doesn't affect community service hours, it doesn't affect pretrial diversion where they might require some community service because most judges take into account-- well, actually, all of them-- and the law takes into account it's a way to reduce sentence and keep yourself out of jail. Oftentimes, particularly on a DUI, you get community service and they only give you 10-- 9-- or 12 months' probation, 9 months' probation. Without that community service options, those sentences would actually increase. So it's not looked at as-- as that way. But here's what I want this committee to think beyond race, in the sense of our constitution is not just symbolic. We come around here and defend the constitution, whether it's the second Amendment or whether it's the right for equal protection, because it is a document that is living with us and recognizes our moral and legal foundation of this state. I don't believe slavery has any-- any role in that, being in that founding foundational document that we reside on. I believe slavery is not a Nebraska value and I hope this committee joins me in this effort.

LATHROP [00:20:41] Thank you, Senator Wayne. We do have one letter in support from Kelly Keller at the Nebraska-- National Association of Social Workers. And with that, we'll close the hearing on Senator Wayne's constitutional amendment, or his resolution, and go to Senator De Boer and have her introduce LR141 [SIC] Good afternoon, Senator DeBoer.

DeBOER [00:21:31] Good afternoon, Chair Lathrop and members of the committee. My name is Wendy DeBoer, W-e-n-d-y D-e-B-o-e-r, and I represent the 10th Legislative District. I was asked to introduce this bill on behalf of the Nebraska Coalition to End Sexual and Domestic Violence in order to address what they and I see as an inconsistency in our laws that impact domestic violence victims. If the facts show that a victim has been strangled, prosecutors can charge the assault-- the assailant with a felony. And if the slightly different facts show that the victim has been suffocated, the assailant is charged with a misdemeanor. This bill would allow all assaults on a person's airways to be treated the same. In the Nebraska criminal statutes, the general crime of assault is split into three degrees: first and second, which are felonies, and third, which is a misdemeanor. The difference between felony and misdemeanor assault depends on the type of harm which the victim sustains, generally felony for serious bodily injury or any injury with a dangerous instrument and misdemeanor assaults for menacing threats or simply any bodily injury. In addition to these generic assault provisions, Nebraska statutes recognize certain specific types of assault with greater specificity. Assault by strangulation is one of those specifically enumerated assaults, and this bill would include suffocation within that specific assault. In part, this specificity is necessary because of the unique nature of cutting off of a person's ability to breathe. Unlike other types of assault of physical harm whose severe-- whose severity generally corresponds to the injuries sustained, impeding one's airways leaves relatively little injury right up until the point of death. Without specific enumeration, a very nearly fatal assault involving preventing someone from breathing would likely only be chargeable as a misdemeanor. Nebraska's current law, however, recognized the unique nature of airway assaults and 28-33-- 310.01 as currently in place-- provides for felony charges for strangulation. This bill would include also suffocation because of its similar nature and danger. To illustrate the difficulty of the current statute, charging assailants under the current law requires the application of pressure on the throat or neck of the other person. On the other hand, sitting on someone

and crushing them to the point that they can't breathe or holding your hand or a pillow over someone-- over someone's nose and mouth, both acts of suffocation, are not covered by 28-310.01. And again, while these could be charged as assaults with lesser penalties, this bill would allow for these acts to be charged in the same way as assault by strangulation. This language was drafted using federal assault language and by looking-- and that's 18 U.S.C. 113(a)(8) and (b)(4) and (5)-- and also by looking at other states with statutes that treat assault by strangulation and assault by suffocation in the same way. The phrase "knowingly, intentionally, or recklessly" is added in order to match the mens rea our adult-- or assault statutes, 28-310, generally. Also, those assault statutes also require a showing that the act was done knowingly, intentionally, or recklessly. At this point, I've handed out to you an amendment for the consid-- committee's consideration. Strangulation is one of the crimes not currently included in the Statute 28-115, which is the pregnancy enhancement statute. The original bill as I introduced it added the pregnancy revision right into the statute defining strangulation and now suffocation, but instead what the proposed amendment would do is put the enhancement in the proper statute with the rest of the pregnancy enhancement language which is already in place. My amendment would also tighten the crime so that a finding of suffocation would require both the mouth and nose to be covered rather than one or the other. I think in the original statute I had if the nose was covered or if the mouth-- We changed that to an "and," as that's probably better. So thank you for your consideration of this very important legislation, and at this time I'm happy to answer any questions that you might have.

LATHROP [00:26:35] Thanks, Senator DeBoer. Any questions for the introducer? I see none. We will now hear from proponents. Good afternoon.

ROBERT SANFORD [00:26:54] Good afternoon. Chairman Lathrop and members of the Judiciary Committee, my name is Robert Sanford, R-o-b-e-r-t S-a-n-f-o-r-d. I am the legal director for the Nebraska Coalition to End Sexual and Domestic Violence. The Nebraska Coalition is a statewide organization. Our primary membership is comprised of local domestic violence and sexual assault programs across Nebraska. These programs provide shelter and other support services to individuals victimized by these acts. Our goal is twofold. First, we want to make certain that every individual seeking assistance in overcoming domestic violence, sexual assault, dating violence, or stalking is served. This is accomplished by ensuring a strong network of programs that provide support services to victims. More significantly, though, we want to see these abusive acts eradicated from society. This is accomplished through primary prevention as well as through offender accountability. Offender accountability occurs when we provide law enforcement with the support needed to make arrests, prosecutors the tools needed to obtain appropriate convictions, and postconviction support and services needed by those working with an individual choosing to use violence. We would like to thank Senator De Boer for introducing LB141 which fits squarely within the-- the aim of offender accountability. This bill is needed because suffocation, a common form of domestic assault, can only be charged with third-degree domestic assault or third-degree assault, both misdemeanors as a first offense, because we see both strangulation and suffocation used by domestic violence perpetrators, and we think the penalties should be the same both-- for both strangulation and suffocation. LB141

would change Nebraska law and put it in line with federal law and the laws of many other states, including Colorado, Kansas, New Mexico, and several others, ensuring both strangulation and suffocation can be charged as felony. Last week I asked advocates if any had worked with survivors who had suffocate-- had been suffocated. Several indicated that they had recently worked with individuals who had been victimized in this way. I asked an advocate with the victim witness unit what happens in these cases and she indicated that her experience is most are charged as a third-degree domestic assault, a Class I misdemeanor. At least one ended up as a disturbing-the-peace charge, a Class III misdemeanor. Charging this offense as a misdemeanor does not suggest the severity of the crime and does not serve to hold offenders accountable. Again, thank you to Senator DeBoer for bringing this issue forward and to you for considering the importance. We urge you to vote in favor of this legislation. Thank you.

LATHROP [00:29:49] Thank you. Any questions for this witness? I see none. Thanks for your testimony--

ROBERT SANFORD [00:29:55] Thank you.

LATHROP [00:29:55] --today, Mr. Sanford. Anyone else? Come on forward. Welcome.

ANNE BOATRIGHT [00:30:04] Good afternoon, Chairperson Lathrop and members of the Judiciary Committee. My name is Anne Boatright, A-n-n-e B-o-a-t-r-i-g-h-t. I'm a registered nurse and currently serve as the state forensic nursing coordinator with the Nebraska Office of the Attorney General. In my work as the state forensic nursing coordinator, I strive to develop best-practice standards for victims of sexual assault, domestic violence, human trafficking, and strangulation across our state. I have worked as a registered nurse for 12 and a half years and received specialized training and education in the area of forensics in 2009. Since then, I've served countless victims of the aforementioned crime and I come here today in support of LB141. While caring for victims of strangulation and suffocation, I have seen firsthand the impact this crime can have. According to a study completed by the San Diego Attorney's Office and Dr. Dean Hawley of attempted strangulation among 300 domestic violence cases, it was estimated that less than half of all of those victims had any visible signs of injuries, even when examined by a medical provider. In my anecdotal experience, I would also agree with this research and say that many patients presenting poststrangulation and suffocation have no visible signs of injury at all. Many times, those who have died from strangulation and suffocation also have no visible outward signs of injury at all. Strangulation and suffocation are often linked to a significant increase in intimate partner-related homicides and must be viewed as such. I have seen perpetrators use these tactics to inflict fear within their victims and cause serious bodily harm. I also commend the increase of use of penalties for those who are pregnant. Strangulation and suffocation are extremely life-threatening to not only the mother but the unborn fetus. According to the American College of Obstetric-- Obstetrics and Gynecology, it is never recommended for even a woman to hold her breath due to the increase of adverse-- adverse outcomes to the pregnancy and fetus. Some of these can include preterm labor, fetal death, and brain damage to the fetus. This bill allows for protection of these women. Our office

would like to suggest one change to line 23 of LB141. We recommend the addition of this section or any other state or federal law with essentially the same elements as these provisions, the purpose being if someone strangles their victim in the state of Iowa, they are charged under Iowa law and then they come over to Nebraska and strangle their victim again in Nebraska, we're not able to increase that penalty for them as such. I do believe that LB141 is a needed, crucial steps [SIC] for victims of strangulation and suffocation in our state. We have the opportunity to better the landscape for these victims. I look forward to the possibility of the next steps and hope that you will advance LB141, and I welcome any questions. Thank you.

LATHROP [00:33:06] Thank you for your testimony. Any questions? I don't see any. Thanks for coming down today.

JENNIFER TRAN [00:33:23] Good after-- ooh, sorry.

LATHROP [00:33:23] That's all right. Welcome.

JENNIFER TRAN [00:33:26] Good afternoon, Chairperson Lathrop and members of the Judiciary Committee. My name is Jennifer Tran, spelled J-e-n-n-i-f-e-r, last name T-r-a-n. I'm the team leader of the forensic nursing program at Methodist Hospital in Omaha, and I've been working as a forensic nurse for the past nine and a half years. Through my time there, I have cared for victims and survivors of domestic violence, sexual assault, human trafficking, strangulation, and elder abuse. Unfortunately, many of those populations overlap. I'm here today to ask for your support for LB141. One of the unfortunate realities is that people who choose to suffocate another human being are being charged with misdemeanors, unlike those who strangle are charged with felonies. However, both are forms of asphyxiation. Asphyxial injuries are due to failure of oxygen to reach or to be utilized in our cells. This can occur actually in four different ways: strangulation, suffocation, chemical, and drowning. During a strangulation, a person's jugular veins and carotid arteries and/or airway are occluded by exterior pressure. When external pressure is applied to the airway-- I'm sorry-- blood flow is prevented to going to and from the brain. When external pressure is applied to the airway, oxygen is unable to get to the lungs and consequently the heart and brain. The resulting injuries are many, although very hard to see with the naked eye. Suffocation can actually happen in two ways: entrapment or when an object is placed over the victim's nose and mouth, preventing oxygen from entering the airway. Entrapment would happen if someone were locked into the trunk of a car or other airtight space. Occlusion of the airways by an object is oftentimes done by using a hand, pillow, plastic bag, and/or tape, to name a few. We can all hold our breath for 30 to 60 seconds. Much longer than that, an untrained person will lose consciousness. After loss of consciousness, cell death begins to occur. And if the oxygen deprivation continues, irreversible brain injury and even brain death results. Take a moment and think of a time when were unable to catch your breath. Perhaps you were underwater too long or a hard workout had you gasping for air. Now consider if someone used their power and their control to make this happen to you. While being victimized by a knife or gun is traumatic, the personal nature of suffocation and strangulation should not be overlooked. Obviously, these experiences will have

traumatic consequences to the survivor; however, in asphyxiation there will be irreversible brain cell loss. We cannot overlook the fact that a person who is willing to prevent a person from breathing, a necessity for life, is willing and able to kill them. Therefore, the two forms of asphyx-- asphyx-- asphyxiation that we commonly see in assaults should carry the same penalty. I ask you to support LB141 and I'm happy to answer any questions.

LATHROP [00:36:03] Thank you for your testimony. Are there any questions for this testifier? I see none. Thanks for coming down today, Jennifer. Anyone else here in support?

NATE GRASZ [00:36:23] Good afternoon, Chairman Lathrop and members of the committee. My name is Nate Grasz, N-a-t-e G-r-a-s-z. I'm the policy director for Nebraska Family Alliance and I'm here today to express our support for LB141. By including suffocation in the statute for assault by strangulation, penalties are appropriately matched for two very similar, egregious crimes, and we believe it is right to establish a higher penalty for strangling or suffocating a pregnant woman, as this bill provides. This is important in both valuing and protecting the life of the mother, who is especially vulnerable when pregnant, and her unborn child. When a violent action such as strangulation or suffocation is taken against a pregnant woman, two lives are being threatened. LB141 recognizes this and affirms the importance and interest of the state in protecting both women and their children. We would like to thank Senator DeBoer for introducing this bill and the many senators, including those on this committee who have already added their name as cosponsors, and we'd respectfully encourage the committee to advance LB141. Thank you.

LATHROP [00:37:27] Thanks, Nate. Any questions? I see none. Thanks for your testimony today. Next proponent.

LAZARO SPINDOLA [00:37:45] Where is the light? Oh. Good afternoon, Chairman Lathrop and members of the committee. Thank you for receiving me today. For the record, my name is Lazaro Spindola, L-a-z-a-r-o S-p-i-n-d-o-l-a, and I am the executive director of the Latino American Commission. I am here in support of LB141, and I wish to thank Senator DeBoer for introducing this bill. LB141 offers two things that I find compelling. First, it includes the term "suffocation." Suffocation is impeding the flow of air to the lungs, which many times results in death. Now suffocation is a consequence of strangulation. Strangulation is a procedure that can produce damage through four different mechanisms. First of all, there can be cardiac arrhythmia or even cardiac arrest by pressure on the carotid artery nerve ganglion, and this would produce death within one or two minutes. In my day, we were trained to do this when we were dealing with patients that had uncontrollable high heart rate or a very high blood pressure and we had nothing else to deal with this. It was not encouraged because it easily gets out of hand. The second mechanism is by pressure that obstructs the carotid arteries and prevents the blood flow to the brain. Loss of consciousness can happen between two or three minutes afterwards. This is not easy because the carotid arteries, when you are trying to strangle somebody, the neck stiffens and the carotid arteries are protected by the muscles in the neck. But I know that some people-- I was not trained to do this, but I know that some people in the military and martial arts

are trained to do this. Now there could be a pressure that obstructs the blood flow from the jugular veins and prevents the flow-- the blood from returning from the brain and the blood begins to pool in the brain and, therefore, the oxygen-rich blood has more difficulty getting inside the brain. This is relatively easy to do but it takes long-- it takes about ten minutes for somebody to lose consciousness doing this. The fourth mechanism is pressure that obstructs the larynx, thus cutting the airflow to the lungs and this results in asphyxia or suffocation. Death can take up to 15 minutes. The most common mechanism that we see is number four because what usually happens if compressing the larynx with the thumbs-- think about this. In order to strangle somebody, you need to place four fingers behind the neck, bring the neck towards you, and use your thumbs to push against the windpipe or against the larynx, and such pressure can either crush the larynx or produce such severe swelling that it will impede the flow of air to the lungs. The pressure-- that person can take up to 15 minutes to die with this and those 15 minutes will be passed in sheer agony with that individual fighting against the other person. There is nothing accidental about this-- I will choke you to death-- and you have to be willing to choke somebody to death in order to do this. The second thing that I find compelling about LB141 is that it includes the term "pregnant women." Now if we think about the fact that depriving the brain of oxygen can lead to death, either immediate or delayed, or to a level of brain damage that is hard to predict due to an oxygen encephalopathy-- that's lack of oxygen to the brain-- think about what oxygen deprivation can do to the brain of a fetus. There is an increased risk of premature birth, internal organ damage, cerebral palsy, and all kinds of things. Now our Governor has declared Nebraska as a right-to-life state. We have made such a big effort at protecting the unborn and yet we have this loophole where the catastrophic damage can be done to the unborn child with not being acknowledged. It is for these reasons that I ask the committee to advance LB141. Thank you.

LATHROP [00:42:02] Thank you. I appreciate your testimony. Any questions for the witness-- or the testifier? I see none. Thanks for coming down again today. Next proponent. Good afternoon.

MARION MINER [00:42:27] Good afternoon, Chairman Lathrop and members of the Judiciary Committee. My name is Marion Miner, that's spelled M-a-r-i-o-n, last name Miner, M-i-n-e-r-- excuse me-- and I'm here on behalf of the Nebraska Catholic Conference which advocates for the public policy priorities of the Catholic church and advances the gospel of life through engaging, educating, and empowering public officials, the Catholic faithful, and the general public. While LB141, among other things, creates a unique offense for the crime of suffocation, which may be a worthwhile endeavor in its own right and it seems to be so, our particular interest in this legislation is for something else it does that we think is worth highlighting and lending our support, and namely it's provision for enhanced penalties where the victim is a pregnant woman. Assaults on pregnant women are particularly heinous, as I think we all understand intuitively, for several reasons. First, a woman who is pregnant is more vulnerable and less able to defend herself against an attacker than if she were not pregnant, and for that reason she deserves special protection. Second, and of equal importance, a woman who is pregnant is necessarily also carrying another human person inside of her, her preborn child, and that child is in the most vulnerable state a human being can be. For that reason, the child also

deserves special protection. And finally, the law should and does provide for greater protections for the vulnerable in our society and for more severe penalties for those who attack them. That's true in many areas of the law, including, among others, our existing homicide of an unborn child statutes which are Section 28-388 and following, and assault against an unborn child, Statutes 28-395 and following. So we have many good laws in our state which afford special protection to those who are vulnerable. Because a pregnant woman and her pre born child deserve special recognition and special protection under the law, the Catholic Conference supports LB141 and urges this committee to advance the bill to General File for consideration by the full Legislature. So thank you, Senator DeBoer, and thank you to the committee.

LATHROP [00:44:47] Thank you, Mr. Miner. Any questions for this testifier? I see none. Thank you for coming down today.

MARION MINER [00:44:54] Thank you.

LATHROP [00:44:55] Other proponents? Good afternoon.

PATRICK CONDON [00:45:13] Good afternoon, Chairman Lathrop and members of the Judiciary. My name is Patrick Condon, P-a-t-r-i-c-k C-o-n-d-o-n. I am the Lancaster County Attorney. I'm here in support of this bill of Senator DeBoer's, and I appreciate her bringing this forth. As an anecdotal, I guess, testimony is that we have had incidences in our office where individuals were under this bill suffocated-- that is, their breathing was impaired by somebody placing something, either their hands or an object, over their nose and/or mouth and because of that they were-- they were not able to breathe. Now this Legislature did pass 28-310.01 which dealt with strangulation. That's the impeding of the blood or the breath of an individual. And I think this is just a natural advancement of that to include suffocation, and that is an individual who impedes the breathing by putting the hands over the-- the nose or the mouth and impedes the breathing is also guilty of-- of-- of that type of an-- of an incident. Basically it's the same type of a-- of a crime-- that is, the suffocation and strangulation are of similar types. Excuse me. Also in-- in support of this being added to the 28-115, which is the enhancement of-- of these crimes due to the fact that the victim is pregnant, so we would support that. I would tell the Legis-- this committee-- excuse me-- I would tell this committee that I am also a member of the Nebraska County Attorneys Association. However, we have not been able to meet has an association group yet to discuss the bills before this committee. We intend to do that tomorrow. But I do anticipate the-- the Nebraska County Attorneys Association supporting this bill also. So with that, I would ask the committee to advance this to the Legislature and I would entertain any questions.

LATHROP [00:47:24] Any questions? Senator Pansing Brooks.

PANSING BROOKS [00:47:28] Thank you. Thank you for coming, Mr. Condon. I appreciate it. Do you-- I'm sort of glad you're up here because I've-- I've been wanting to know if anybody really knows the history about why strangulation became the focus rather than include-- and--

and is there any evidence that-- that really suffocation was included in strangulation or were they truly separated by misdemeanor and felony because nobody really thought suffocation was that bad a crime or-- I can't figure out why this has ended up this way.

PATRICK CONDON [00:48:01] I-- I--

PANSING BROOKS [00:48:03] Is it because of the lack of appearance of evidence of an injury?

PATRICK CONDON [00:48:06] I-- I don't know if that would be so much so. It may be just one of those ones that, you know, when drafting the bill, it seems so commonsensical that-- that it would include a suffocation. But, you know, the-- the-- the pressure put to the neck or throat really limits us to that and then-- and then the fact that they-- you know, you could put the hand over the mouth or the face and still cause that-- you know, that lack of--

PANSING BROOKS [00:48:29] Same.

PATRICK CONDON [00:48:29] --that lack of breathing to occur. I-- I tried to go back and look a little bit at the-- at the history of this bill. It was I think back in the '90s that the-- that the original bill of strangulation was passed and-- and I wasn't able to see that. But it-- it could be just, you know, like many things, once the bill is passed and we-- we begin prosecuting it, we see some deficiencies in-- in-- in the bill, in the way it was passed, or the law, in which it was passed. And that is, you know, the defense attorneys, doing their job, get in and say they're not restricting by placing their hands around the throat or neck. And that would be-- they would be absolutely correct and, you know, they're-- they're doing their job of enforcing the laws that this legislative body did pass. So my-- my initial thought would perhaps be it was just something that was not thought of at the time that the strangulation came forward.

PANSING BROOKS [00:49:21] And did you by chance do any research into what other-- what other states have adopted suffocation--

PATRICK CONDON [00:49:28] I-- I did not. I believe-- well, let me take-- let me take a step back. I did look at this initially when it came in. We did look at the federal statutes and how that is and also other statutes. I believe Senator DeBoer also had looked at some other statutes. I believe Kansas, Wisconsin, Oregon, Connecticut, Massachusetts all have similar laws; California I believe has a similar law with suffocation included. And so there are other states that have addressed this issue. They have also the strangulation and then they have a separate for suffocation. So we do see that in other states.

PANSING BROOKS [00:50:12] So and then as I was trying to just briefly look this up, they mention strangulation, suffocation, and confinement, as Ms. Tran who is with-- the forensics nurse from Methodist Hospital-- Hospital mentioned. Was there any discussion about possibly adding in confinement or do you think that's covered somewhere else, like put-- I mean she mentioned putting somebody in a trunk and then they're unable to breathe. It seems like there

ought to be a section about causing somebody to be unable to breathe in a way. Of course, then we can add in waterboarding too. I don't know.

PATRICK CONDON [00:50:48] I-- I-- I under-- yeah, I understand that and I--

PANSING BROOKS [00:50:50] You didn't really look at it on that.

PATRICK CONDON [00:50:54] I didn't look at it. I--

PANSING BROOKS [00:50:55] Yeah.

PATRICK CONDON [00:50:55] I apologize. I did not look at that.

PANSING BROOKS [00:50:57] Now, well, it-- it-- I just thought it was a good idea and I just didn't know if you had looked at it.

PATRICK CONDON [00:51:01] I have not.

PANSING BROOKS [00:51:02] OK. Thank you.

LATHROP [00:51:04] Any other questions? Senator Chambers.

CHAMBERS [00:51:07] In states where they have a law of this kind, if there is no evidence of an injury, no detectable injury, how does the prosecution go about proving suffocation--

PATRICK CONDON [00:51:26] It would be--

CHAMBERS [00:51:26] --if you know?

PATRICK CONDON [00:51:28] I-- I would assume, Senator Chambers, in-- in prosecuting that we would ask the victim if the victim was able to-- to breathe during the incident or if the victim passed out during the incident, and that could all be evidence of-- of that-- that suffocation.

CHAMBERS [00:51:46] It really boils down, though, to one person's word against the other. I'm accused of doing it, I say I didn't do it, and you don't have any external evidence to prove that it was done. Should a crime-- that was by way of introduction. And if you don't want to attempt to answer this, you don't have to. But we're being asked to create a new crime. If there is no way to establish a crime except that somebody says that it was an act which was committed, is that in your opinion wise criminal legislation?

PATRICK CONDON [00:52:44] Well, Senator, I think it is. I think we already do it and I think it is correct to do it. There are instances in strangulation, as one of the earlier presenters-- or testifiers testified to, that sometimes you do not see injury on an individual that has been

strangled, there is no physical injury on an individual that is strangled, and it is the testimony of that witness that-- that determines whether or not there was, you know, an act going on there. You can also have-- even though you don't see physical injuries, you may have another witness that says I saw the individual with their hands around their neck or their hands over their nose or mouth. And so even though there may not be any physical injury, there may be other evidence of the act itself, the-- the fact that the individual passed out, things like that, that could lead to the evidence to go to the proving beyond a reasonable doubt, which we have-- have to prove in these-- in any criminal case. So I think it-- it is something that is important. I-- I understand, you know, you have a-- somebody's word against somebody else's. But we do, do that, and I think there is other ways to assist the prosecution. And sometimes there's not and it's-- it comes down to that that trier of fact, the jury or the judge, to make that determination.

CHAMBERS [00:54:12] You did introduce another dimension when you spoke of a possible witness.

PATRICK CONDON [00:54:17] Correct.

CHAMBERS [00:54:18] I was speaking of a situation where there's only the accuser and the accused, no external evidence. If a prosecutor were unwilling to file a charge on that basis, there could develop an attack against a prosecutor for not believing a victim. You don't see any difficulty with a situation where a crime exists solely because somebody said, without any other evidence, if there is no witness, that the crime was committed?

PATRICK CONDON [00:55:08] I don't think the-- I-- I didn't-- I don't believe I said that wouldn't cause any problems. It always causes a problem, Senator, with-- that always causes problems. It causes problems during sexual assaults when somebody-- when a-- when a victim says that she was sexually assaulted and there's no witnesses and there's no injury and that-- that is always-- that is always a problem that we have and it's something that we have to do as prosecutors to look at the facts surrounding all the evidence and see if we believe that we can present that to a jury.

CHAMBERS [00:55:39] I ask these questions of you because I think they should be a part of the record. That's all that I would have.

PATRICK CONDON [00:55:45] Thank you, sir.

LATHROP [00:55:45] I have a few for you.

PATRICK CONDON [00:55:47] Sure.

LATHROP [00:55:48] And this bill adds recklessly to both strangulation and suffocation.

PATRICK CONDON [00:55:55] Correct.

LATHROP [00:55:56] Can you give us an example of how either one of these might be done recklessly--

PATRICK CONDON [00:55:58] Well--

LATHROP [00:56:02] --because the penalty doesn't get worse if it's recklessly done versus deliberately or intentionally.

PATRICK CONDON [00:56:04] Correct, and it's-- and again, you know, as a prosecutor, when you-- when, you know, you're looking at things like this, it's like, how-- how can this be done recklessly? Well, you know, the argument could be, well, I-- I-- I put her-- I put my hand over her mouth not to stop her breathing but to keep her from yelling or to keep her from screaming and, therefore, the act was intentional but the-- the-- the outcome may be a reckless-- you know, recklessly, you know, did that, not with the intent to cause the-- the breathing to stop, but recklessly causing the-- the breathing to stop because they put their hand over their mouth. We have had individuals that said, I didn't mean to strangle her but I was pushing her up against the wall and when I pushed her up against the wall, I pushed against her neck and I caused that injury, you know, the-- the injury to the-- to the-- impeding the breathing. And again, that could be argued to be a reckless act and not an intentional act, that they did it recklessly. It is also-- and again, we-- this-- this bill I believe is consistent with the third-degree assault language, which is knowingly, intentionally, recklessly, and also I believe consistent with the federal statutes and other-- and other laws-- other states that have passed similar laws.

LATHROP [00:57:19] What's the penalty for a third-degree assault though?

PATRICK CONDON [00:57:22] It's a Class I misdemeanor, sir.

LATHROP [00:57:23] And what's the penalty under this bill?

PATRICK CONDON [00:57:25] A IIIA felony.

LATHROP [00:57:27] So, yeah, it sounds like something that could be done recklessly which generally would be a Class I misdemeanor is now turning into a IIIA?

PATRICK CONDON [00:57:42] Correct.

LATHROP [00:57:42] OK. How many of-- if a person is charged under this statute, and I'm not talking about the recklessly suffocating somebody, is there other assault statutes that they can be charged under?

PATRICK CONDON [00:57:58] Well, and I think, you know, it kind of goes to your-- your first question also, Senator, and that is, you know, I can-- I can put my-- my hand and-- and nose--

or my hand over somebody's mouth and nose and squeeze their nose. I could be causing pain to their nose and they can say that hurts and without this bill, probably all I could charge is the third-degree assault. I was causing pain or injury to the individual by squeezing their nose, so that hurt, where if, you know, you get hit and somebody says, ow, that hurts, and you have a third-degree assault, it's-- it's the fact that you're impeding a bodily function that's necessary for life and that is breathing and-- and-- and the case history--

LATHROP [00:58:38] How long do you have to do it under this bill to be charged?

PATRICK CONDON [00:58:40] Pardon me?

LATHROP [00:58:41] How long do you have to do it? Is-- is--

PATRICK CONDON [00:58:42] Well, I think--

LATHROP [00:58:43] Is 30-- three seconds long enough?

PATRICK CONDON [00:58:45] I-- I-- I don't think there's-- you know, we say if it's done at all, it's-- it's-- that's a possibility that that is a suffocation or a strangulation. I think, you know, the-- the-- the language of strangulation doesn't say, you know, it has to be done until they turn blue or until they pass out.

LATHROP [00:59:06] Yeah, because there's a little bit of difference, I think, though, in that-- they're both bad, all right? -- strangulation, if you put your arm around somebody's neck, there's only really one purpose for that. If somebody is in some-- some public place and someone begins to yell and somebody places their hand over that person's mouth, do we have a suffocation under this bill?

PATRICK CONDON [00:59:34] I think--

LATHROP [00:59:35] Hand, put their hand over someone's mouth and nose?

PATRICK CONDON [00:59:37] I-- I think-- I think they-- it could be charged as a suffocation.

LATHROP [00:59:40] It doesn't matter how long they do it?

PATRICK CONDON [00:59:46] I think if the victim would say-- and it kind of again goes to what Senator Chambers was-- was talking about, but if the-- if the individual said, I cannot breathe, you know, what you or I feel may be a danger to ourselves and not being able to breathe may be completely different to somebody else. And I think, you know, that-- that-- but I think to answer that question is, yes, I don't think there is a time limit and I don't know how you would put a time limit on that.

LATHROP [01:00:11] What if I suffocate somebody to the point where they suffer brain injury? Is there another assault statute that you can charge them under?

PATRICK CONDON [01:00:22] Yes. I mean, that would be a first-degree assault causing serious bodily injury.

LATHROP [01:00:26] And what's that class of felony?

PATRICK CONDON [01:00:28] Class II, I believe.

LATHROP [01:00:30] OK. So what we're dealing with here, obviously, that would be-- as a defendant, that would be worse than getting charged under this bill.

PATRICK CONDON [01:00:39] Absolutely.

LATHROP [01:00:39] If I-- if I've suffocated somebody long enough to create an injury-- brain injury, then I'm looking at a Class II, worse penalties than what's under this bill, so the bill really is intended for the person who has been suffocated but does not sustain a personal injury.

PATRICK CONDON [01:01:02] Oh, I think they-- I think they sustain a personal injury. I think it may not be an injury that we-- that's observable.

LATHROP [01:01:07] True. You don't have a brain injury as a result--

PATRICK CONDON [01:01:11] Right.

LATHROP [01:01:11] --of being deprived of the oxygen.

PATRICK CONDON [01:01:13] Correct.

LATHROP [01:01:13] So certainly, depending on the amount of force used, you're sustaining an injury and being frightened, at a minimum.

PATRICK CONDON [01:01:22] Correct.

LATHROP [01:01:22] Are these things that you see part of domestic violence?

PATRICK CONDON [01:01:29] It's often seen in domestic violence.

LATHROP [01:01:31] Are there other bills or other statutes that you can charge somebody with a-- a-- another crime besides the assault if it's done to a domestic partner or someone in--

PATRICK CONDON [01:01:43] Well, there-- there are--

LATHROP [01:01:44] --in a domestic relationship?

PATRICK CONDON [01:01:45] Excuse me, Senator. Yes, there are the domestic violence statutes under-- I believe it's 28-323 which talks about, you know, assaults being done to the domestic partner. Again, though, it-- you have the strangulation which is not included in that-- in that language of-- of the domestic violence so this--

LATHROP [01:02:06] So one of the things I'm curious about, if I can, is what niche are we filling that-- or are we simply overlapping, OK? So I'm going to give you a hypothetical. The police reports come into your office and they show that the victim has been living with the-- the-- the person that perpetrated this crime. They've been living together for-- you know, you probably see a lot of police reports. These two have argued forever and it oftentimes gets physical and now it turns into this domestic partner has attempted to-- he put his hand over the person's mouth and nose. What is that person going to be charged with today and-- and what gap are we filling? Or are we giving you one more thing to charge when you already have one or two things to charge him with today?

PATRICK CONDON [01:03:05] Well, one--

LATHROP [01:03:07] You understand the question?

PATRICK CONDON [01:03:07] I-- I do, Senator.

LATHROP [01:03:09] OK.

PATRICK CONDON [01:03:09] I do understand the question. One, there is not a domestic component to this bill. So if-- if-- even though I may be living-- I-- I-- they-- I-- we have-- had a case several years back now-- actually, I was not the prosecutor and I did the postconviction in the case-- where it was a grandson that smothered the grandmother. And so there was no domestic-- you know, there's no domestic relationship there. He just-- he suffocated her with-- with a pillow and-- and so, I mean, he was charged with murder in that case. But-- but--

LATHROP [01:03:41] Right.

PATRICK CONDON [01:03:41] --in a situation where if the individual lived, they wouldn't fit under the domestic-- you know, the domestic statutes, and they could be charged with a third-degree assault. But if that person was suffocated to the point where they either blacked out or they were afraid that something was going to happen, we wouldn't have anything without this statute, unlike the-- you know, if they would-- if he would have put his hands around the neck or throat and-- and strangled the individual.

LATHROP [01:04:05] But-- but going back to my hypothetical--

PATRICK CONDON [01:04:07] Sure.

LATHROP [01:04:07] --which was a domestic situation, tell us what you charge him with today.

PATRICK CONDON [01:04:11] With the domestic, if it was a strangulation where they put their hands around the neck--

LATHROP [01:04:19] Let's-- let's go with suffocation since this is--

PATRICK CONDON [01:04:21] OK, suffocation--

LATHROP [01:04:21] --essentially a suffocation--

PATRICK CONDON [01:04:22] --we would probably charge-- if it was a domestic offense, we would probably charge the-- in all honesty, we'd charge a third-degree assault because then we don't have the added element of a domestic-- having to prove a domestic relationship. So in that instance, I would probably just go with a third-degree assault because third-degree domestic assault and third-degree assault, you know, are similar and I don't have to worry about that-- that other issue.

LATHROP [01:04:44] Do those two crimes carry the same penalty or are-- do we enhance the domestic--

PATRICK CONDON [01:04:51] I believe--

LATHROP [01:04:53] --assault penalty?

PATRICK CONDON [01:04:54] And I apologize, Senator, because I-- I don't charge-- I don't handle a lot of the-- the criminal matters. But I believe they're the same. I believe they're both Class I misdemeanors.

LATHROP [01:05:08] So what we're filling in here is the non-domestic partner or--

PATRICK CONDON [01:05:12] Correct, the same as in strangulation. I mean, you know, the-- I guess I-- and I--- why I'm getting back to that is the same-- the same questions that you have for this-- for this could have also been asked at time of the strangulation and I guess, you know, we-- the-- this legislative body saw fit to add strangulation because of the nature of that. And I think it goes back to the fact that you're impeding that-- that bodily function that's necessary for-- for life.

LATHROP [01:05:39] Sure. And all I'm doing today is try to get some context for this and how it fits into the scheme that we already have for crime and punishment and what niche this fills or

what need it fills that you can't get somebody properly charged. I want to ask a question also about the-- the--

PATRICK CONDON [01:06:00] No, go ahead.

LATHROP [01:06:01] --if it's a pregnant woman, kind of the same-- same question. If it's-- if this happens to someone who is a pregnant woman and neither the woman nor the child are-- sustain any type of cognitive impairment, no brain injury, are they charged with one crime or two?

PATRICK CONDON [01:06:25] Well, they would be-- I mean it's charge as a-- as an assault of a pregnant woman. So it's charged as one crime. And-- and, Senator, I-- as I'm sitting here thinking, the difference between the domestic violence and the third-degree--third-degree assault domestic violence and-- and third-degree assault is third-degree domestic violence is an enhanceable offense. So if we charge somebody with a third-degree domestic violence charge and then later they-- they commit another third-degree domestic violence, that can be enhanced to a felony that's not available under the assault charge, so the third-degree assault. So I apologize for kind of having that memory lapse there, but that's-- that's the difference in those statutes.

LATHROP [01:07:06] When Mr. Miner was up here, he talked about a statute, and I'm going to confess I'm not familiar with it, an assault on an unborn child.

PATRICK CONDON [01:07:15] Correct.

LATHROP [01:07:15] Does that require an injury to the unborn child?

PATRICK CONDON [01:07:27] I-- I apologize, Senator. I-- I-- perhaps if Mr. Miner is here-- I-- I'm trying to think back if--

LATHROP [01:07:33] Well, we can-- I can have-- I can take a look at the statute, but I guess we're very mindful in this committee about whether we are piling on or whether we're filling a niche and that's what I'm looking for.

PATRICK CONDON [01:07:47] Yeah, I-- I think it is filling the-- the niche of-- of, you know, what we have seen where it doesn't fit a strangulation charge because of the fact that it isn't a restriction of the-- around the neck.

LATHROP [01:08:00] OK. Anybody else have questions? I see none. Thanks for your appearing today, your testimony, and answering questions for me.

PATRICK CONDON [01:08:13] Thank you.

LATHROP [01:08:15] Next proponent. Welcome.

CHRISTON MacTAGGART [01:08:32] Good afternoon, Chairperson Lathrop and members of the Judiciary Committee. My name is Christon MacTaggart, spelled C-h-r-i-s-t-o-n, last name M-a-c-T-a-g-g-a-r-t. I am the domestic and sexual violence program manager for the Women's Fund of Omaha. The Women's Fund of Omaha is a nonprofit organization focused on improving the lives of women and girls through research, advocacy, and policy. As part of our work, we provide coordination and support for domestic and sexual violence response teams in Douglas County, and those teams create and implement standards around the medical, criminal justice, and victim services approach to these issues. I'm here today to testify in support of LB141. I don't want to spend your time repeating a lot of the things that you've heard. I want to make a couple quick notes and then I'd also like to provide you some additional information on a couple of the questions that you just previously asked. So I would just say that most-- again, speaking mostly from a domestic violence standpoint because that's really my area of expertise, we know that about 89 percent of-- in about 89 percent of strangulations, the victors-- the victim is an intimate partner of the offender, and that victims who are strangled are seven times more likely to be eventually killed by their partner. Our criminal justice partners indicate that every month they have cases where the victim was suffocated. Their stories are varied. They include the offender holding a pillow over them, their hand or another object over their face or nose, sitting on their chest so they could not breathe, or putting a knee in the victim's back while they hold their face into the couch or-- or something else, all with the intent to prevent them from breathing, all situations which currently fall outside of statute as-- as it relates to the strangulation statute. If these incidents are able to be charged at all, most are charged as misdemeanor assaults. Despite that, the impact to the victim is no less dangerous for suffocation and includes oftentimes similar injuries. To your note, Senator Pansing Brooks, about where this came from, I-- last year there was some national technical assistance provided to Nebraska in the way of training by an expert from the national strangulation institute and he-- and in looking at our law, he indicated this was a gap. I believe it was an oversight when the law was originally passed in the early 2000s that we've seen in this-- in the criminal justice system as-- as oversight since then. Colorado, Kansas, New Mexico, Wisconsin, Oregon, Alabama, Maryland, California, Massachusetts, and Connecticut are the other states that currently have laws that ensure both strangulation and suffocation are part of the-- a felony statute. The other thing I would say is just to note that, to-- to your question, Senator Chambers, about injuries and understanding the concerns about that, I would say that although many injuries aren't visible, it doesn't mean that they don't exist. One of the benefits that we have in Douglas County that I recognize not a lot of other counties have is that we have forensic nursing programs out of our two-- two of our major hospital systems that also treat strangulations and-- and domestic violence-related injuries. And so there is the ability to document in a way that not all hospitals have access to. And so documentation, for example, we know that a victim may lose-- may become incontinent, have-- or experience bladder incontinence after about 15 seconds of strangulation or suffocation, bowel incontinence after about 30 seconds; death can occur as early as two minutes; there are typically signs of brain injury that they're trained to look for. And so that all can be reflected in documentation by those professionals. And again, we're looking at

many of the same effects or the exact same effects in suffocation as in strangulation. So I just wanted to make a note on those because historically we've been supportive of this issue. To your note, Chairperson Lathrop, about the reckless issue, I would say that we certainly support that but wouldn't want that particular term to hold up moving this bill forward because we think it's-- it-- it fills a gap in the current law as it exists and, you know, would support moving forward without it if that was the only option. So lastly, I would just say that aside from all of the-- the physical pieces, those are just the physical impact. I mean they're just that, the-- it doesn't account for the emotional terror of someone who's had their ability to breathe cut off and believes that they may die. It's imperative that victims who were suffocated have the same response by the system when they reach out for help as those that are strangled. And so we respectfully request the Judiciary Committee to approve LB141, and I would just thank you for your time and consideration and say that I'd be happy to answer any questions you may have.

LATHROP [01:13:47] Very good. Thank you. Any questions? Senator Pansing Brooks.

PANSING BROOKS [01:13:51] Thank you. Thank you for coming, Ms. MacTaggart. I was just wondering-- you've-- you've done a bunch of research, so I'm wondering if you've-- if you've also researched what is happening in other states with prosecution of this crime-- have you seen-- have there been prosecutions, how is it going-- so that-- I-- I mean I'm just interested in-- in-- again, we have sort of the discussion here of a 'tis-'tain't of-- of it's one person's word against another. What is happening? And again, it's something new to our laws, so I'm just interested in how those cases are going.

CHRISTON MacTAGGART [01:14:30] Um-hum. I think that always refers back to what the totality of the evidence is. Again, speaking from Douglas County's perspective, we have forensic nurses that are able to do those, and so I think for us some of those barriers are more easily overcome. And I would say in situations in other states where they're dealing with any strangulation or suffocation case, when they have-- when victims receive medical care and have documentation around what the impact was of strangulation, when they know how to ask questions the right way and again can document that, that those cases, you know, can typically, probably, go better and-- and have more successful outcomes as far as prosecution.

PANSING BROOKS [01:15:12] And do you have a feel for whether or not there are efforts to train-- I mean obviously we-- we've heard about Omaha and Methodist Hospital and I'm wondering if there are other efforts to train across the state from--

CHRISTON MacTAGGART [01:15:29] Yes.

PANSING BROOKS [01:15:30] --for people to understand and be able to recognize and describe the situation regarding suffocation of a-- of a person that comes into the hospital, or wherever, the clinic.

CHRISTON MacTAGGART [01:15:45] Um-hum. So the forensic nursing coordinator-- that's Anne Boatright that spoke a little while ago, with the Attorney General's Office-- does training all over the state. She actually is-- is from Omaha, and so I've worked with her for a number of years and I know that she's doing a great job doing training as far as, you know, what national best practices say, what does the research say, and what-- what is the impact to victims and-- and how to provide treatment, so I know that there's--

PANSING BROOKS [01:16:14] Thank you very much.

CHRISTON MacTAGGART [01:16:15] Yeah.

LATHROP [01:16:17] Great. Senator Brandt.

BRANDT [01:16:18] Ms. MacTaggart, thank you for what you do. You have here 150 strangulations are reported annually. What percent of those are suffocations, or suffocations are outside of that?

CHRISTON MacTAGGART [01:16:27] So currently none of those because suffocation isn't included in the statute. So that 150 number is domestic violence specific. We also see strangulation and suffocation with our child crimes. I just-- we don't track those numbers in the same way.

BRANDT [01:16:43] In-- in your experience, though, and I'm not going to hold you to this, what percent would you think would fall under the suffocation category?

CHRISTON MacTAGGART [01:16:51] What we-- what I hear from our law enforcement and our prosecutors is that there are cases every month that range from one case to maybe two or three cases a month. Those are currently charged as misdemeanor assaults, though, not suff-- not strangulations.

BRANDT [01:17:06] Thank you.

CHRISTON MacTAGGART [01:17:10] Um-hum. You're welcome.

LATHROP [01:17:10] I see no other questions. Thanks for coming down today. Anyone else here to testify as a proponent? Anyone here to testify in opposition?

SPIKE EICKHOLT [01:17:21] Good afternoon, Chairman Lathrop, members of the committee. My name is Spike Eickholt, S-p-i-k-e, last name is spelled E-i-c-k-h-o-l-t, appearing on behalf of the Nebraska Criminal Offense Attorneys Association opposed to the bill. One point of-- that I want to make, and it was sort of acknowledged by Mr. Condon, is that I think this issue is being somewhat unfairly presented to the committee by some of the proponents, and that is that if we don't have this crime that means that every act of suffocation can only be charged as a

misdemeanor. That's not completely accurate. There are other crimes that can be charged that are on the books now and Senator-- Chairman Latham identified one of those, first-degree assault. If-- depending on the actual physical act of suffocation, depending on the harm caused, the circumstance regarding it, you can even charge somebody with an attempted murder. So I think that's a little bit unfair for the committee to be presented with the issue of it's only a misdemeanor unless you make it so. That's not completely accurate. Aside from that point, I have had distributed to you, or have handed out, a letter that has four proposed amendments that will address most of our concern. I did meet with Senator DeBoer last week and she's adopted or agreed to two of the amendments, so I didn't know that until after I prepared the letter this morning, but if you'd just disregard paragraphs number two and four. As Senator DeBoer indicated in her opening, she's agreed to sort of make those changes to the bill. But the paragraphs one and three in the handout address some of the issues that I think we've already discussed a little bit ago. Most of our felony crimes-- and for the felonies that we have on our books that are similar to this, the kidnapping charge, false imprisonment, and those other offenses, first-degree assault, have a mens rea of intentionally or knowingly, and that's because when you punish somebody for a felony you want to punish those people who do acts that are wrong and they do so deliberately and they knowingly do that. You want to hit them harder with a harder penalty. You have recklessly as a lesser mens rea and you have that for generally the misdemeanor crimes, the misdemeanor assaults. And arguably this is a way-- that's a step away from that. One thing that Mr. Condon may appreciate, if I make this point, if you have the mens rea as proposed, you're probably going to make it so that third-degree assault is a lesser included offense of the crime of strangulation or suffocation. I don't know if that's what the prosecutors want. That's an argument we can make in the courts. In other words, if you disregard that distinction for mens rea, you may be inviting some unintended consequences. One thing that Senator Pansing Brooks asked about, why was strangulation done this way, why didn't they do this? And that's one of the things I ask the committee keep in mind. When all the proponents are gone and if this bill gets passed as is, no one is going to remember why they did certain things. You're just going to have the letter of the law itself. There's another issue and that's in paragraph number three. We would propose deleting sub (1)(c) on line 11 because if you look at that, and it's more-- even more problematic with the mens rea of recklessly, a person commits this felony crime if they knowingly-- intentionally, knowingly, or recklessly impede the normal breathing of another person. There is no element that that has to be a physical contact. There's no element it has to be a domestic relationship. You simply do something recklessly that interferes with someone's breathing. You know, I walk on the west side and the people who are working HVAC, some of those people are out there smoking. They're impeding the normal breathing of somebody, arguably. If somebody has COPD or asthma, that's going impact. Again, they don't have to know they do it. They simply recklessly do it. I don't think that's the intent at all. I'm not trying to be flippant or disrespectful to the motivation for the bill, but this is an unintended consequence. And what you don't want to do is pass something on the books that's just so overbroad, so vague that someone's going to make a successful challenge to it and the entire thing is invalidated. So the two proposals that we have, we would ask the committee to-- to revert back to the intentionally and knowingly because this is a felony offense. Incidentally, if you look at 28-397-- that's the crime on-- assault on an unborn child-- it has the mens rea of

intentionally or knowingly. It's consistent with false imprisonment which is knowingly restraining somebody. It's consistent with kidnapping and all variety of more serious felony assaults. And then the other proposal we have is just to delete that catch-all, any way you can, impede the normal breathing of another person, or at least narrow it in some way that's consistent with requiring an act. And I acknowledge that this type of crime, the strangulation, that is an offense that is typical in the domestic cases. But as written, this line 11 is just all kinds of things. So we would suggest the committee consider those two additional amendments.

LATHROP [01:22:18] Thanks, Spike. Any questions for this testifier? Senator Chambers.

CHAMBERS [01:22:25] I don't like to create new crimes. There are so many crimes on the books now that there are existing crimes that will cover practically every new issue that is brought. Different groups will feel that certain things are happening to them and they want a particular carving out in the criminal law of a niche that applies to them. Now there are some women who are stronger than men. So if I am arguing with a woman and she's stronger than me and she gets me in a bear hug, suffocation by her because she impeded my breathing, but who even thinks about that when they bring a bill like this? If on the other hand I get the woman in a bear hug, then I've committed a crime. I am not justifying the infliction of harm by one person on another, but I am very regardful of the proliferation of crimes. As a black person, I've seen how it works against us. I have had throughout the years to try to point out that there are certain crimes that they call-- they won't call it by name-- black people's crimes. Crack is the number one. And when Chris Abboud many years ago wanted to enhance penalties for crack but not cocaine, which white people use, I fought against that and lost. All over the country, this was a means of enhancing punishments for black people while ignoring the proliferation and the use of cocaine. They called it, when white people did it, a recreational drug. Now, because the prisons have become overcrowded, those harsh penalties that were put in place-- black people's penalties-- are now having to be mitigated. But if you spent decades in prison, you don't feel that somebody has done you a service by saying we're not going to excessively punish you any further. I looked at that provision you had mentioned deleting, and I was just going to bring it up during the discussion of this bill in committee, but since it is now before us, I will say this. Many of these types of bills are copies from other states, and they get passed in other states because there are not people in the Legislature such as myself who will fight them. So if state A does it, then state B does it, now state C can say, well, A and B did it, and regardless of whether it made sense in the other two instances, the legislators are reluctant to stand against it for being labeled soft on crime. They can label me anything they choose, but I will not agree to the proliferation of crimes when there are already too many specific crimes that apply to a person, maybe because of the work they do. For example-- and the Chairman knows, I fought him on this-- a specific act is different if it's committed against an employee of the Department of Corrections, against a healthcare professional. I think, instead of looking at the individuals who are harmed, when you-- this is my view and I'm saying it here so I don't have to keep saying it on each criminal-- attempt to create a new crime. The act is what should be punished, against whomever the act is committed. But don't say that it's the identical act but if it's done against a cop then we enhance the punishment, if it's done against a healthcare

provider we enhance the punishment. But if a cop does something against a civilian, the cop's crime is not enhanced because a cop committed it; or if a healthcare provider commits a crime, it's not enhanced because the healthcare provider committed it. So either you're going to elevate these people so that if a harm is done to them it's enhanced-- but since they have this enhanced status, if they do harm, the punishment should be enhanced, but it's never a two-way street. And I do not look favorably on legislation which is so loosely drawn that accidental actions can be punished as crimes. If I accidentally harm somebody, that person sues me in a civil action, but the state does not step in and punish me for having committed a crime. I can commit an act carelessly and be civilly liable. I can commit it unintentionally, but carelessly, and be civilly liable. But when the state is going to bring all of its power to bear, then we ought to draw very narrowly and precisely the conduct that is to be punished. So with these recommendations that have been made, maybe I will see my way clear to do something other than what I had thought I would do after I saw the actual language of the bill. And I'm saying it to you because you don't feel like I'm picking on you. And a lot of people come before this committee and they don't want to be questioned. The fact that they say something, they want it accepted. I don't want to be antagonistic, but sometimes, for the record, I have to make my position clear so that it doesn't appear, if somebody wants to look at the record, that if I had these concerns, why were they not raised during the committee hearing, why was not the person on the other side given the opportunity to respond by me making my points? I'm saying it here so that if anybody comes on another bill in the future, my comments along this line will not be taken as being personal against them. Again I'm going to emphasize something. I don't think anybody ought to intentionally harm another person. And if that act is intentional and harmed, there can be a criminal sanction, but this bill is way too broad, in my opinion. All I'd have to do is say-- well, I'm not going to repeat it. That's all that I would have.

LATHROP [01:30:44] Any other questions for this witness? I see none.

SPIKE EICKHOLT [01:30:47] Thank you. I just wanted to--

LATHROP [01:30:48] Thanks, Spike.

SPIKE EICKHOLT [01:30:48] I didn't want to say before-- I wanted to say thank you for Senator DeBoer for meeting with me and adopting some of the changes.

LATHROP [01:30:53] Sure. And the record will reflect that you also offered a letter in opposition. Anyone else here in opposition to the bill? Anyone here in a neutral capacity? Senator DeBoer to close.

DeBOER [01:31:07] I'll only take a minute. I want to say thank you to all of the folks who testified here today and to all of the committee members for what I think was a very productive conversation and some excellent questions. I want to make sure the committee knows that I am absolutely willing to work on this legislation to address some of the concerns which were brought up today and to continue to pass this very important legislation in a form that will

address those concerns and nevertheless uphold the strong policy concerns of preventing suffocation and strangulation. Thank you.

LATHROP [01:32:02] Thank you, Senator DeBoer. That will close our hearing on LB141. We will go to LB7. And as Senator Blood is making her way to the desk, can I see by a show of hands how many people intend to testify on this bill? Looks like one testifier. OK. We got to alert Senator Hansen that this will be a short hearing, apparently. Welcome, Senator Blood.

BLOOD [01:32:35] Thank you, Chairman Lathrop, and good afternoon to the entire Judiciary-- Judiciary Committee. I love your new digs. It's very nice. Thank you for allowing me the opportunity to speak with you today about my counterfeit airbag legislation. My name is Senator Carol Blood, that's spelled C-a-r-o-l B, as in "boy," -l-o-o-d, as in "dog," and I represent District 3 which includes western Bellevue and southeastern Papillion, Nebraska. Today I'm here to share some information, much of it concerning for our Nebraska consumers, on LB7, also known as the Counterfeit Airbag Prevention Act. Hidden dangers may be lurking in cars across Nebraska as a result of counterfeit airbags. Shrapnel, shards of metal, plastic, and explosives can hit you in the face with the force of a bomb. In fact, in L.A., the LAPD Bomb Squad was called to the scene of a bust to destroy confiscated airbags because they were too dangerous to be transported. You will see a copy of that news report in your packet. Believe it or not, this counterfeit industry is at a minimum a \$600 billion a year industry and is considered to be more profitable than narcotics for organized crime. It is important to also know that a segment of the profit from these sales helps to financially support serious crime organizations in the United States and around the world. The result-- the rest of the profits are going to greedy individuals or organizations who have zero concern about the damage these counterfeit bags cause or the deaths that are a result of these dangerous items. The vast majority of these airbags originate in China and are sold on-line, both wholesale and retail. Consumers may purchase these counterfeits-- counterfeit parts unknowingly, but the overwhelming majority of these are bought by unscrupulous repair shops who are knowingly and intentionally installing them into customer's vehicle without their knowledge. When I refer to an airbag that is counterfeit, I'm referring to a motor vehicle inflatable occupant restraint system device that is part of the vehicle's supplemental restraint system. A counterfeit supplemental restraint would be a replacement that displays a mark that is identical or similar to the genuine mark of a vehicle manufacturer or manufacturer of parts supplier that is not authorized by the manufacturer, this part being obviously designed to fool consumers. A counterfeit restraint sys-- a counterfeit restraint system will include one or more airbags and all of the components required to make sure the airbag deploys as was designed by a vehicle's manufacturer within the window of time it takes to protect you from serious injury or death. The problem with these bags are that they are usually nonfunctional and they may have been previously deployed or damaged or may have an electric fault that is detected by a diagnostic system when installed or it includes part of an object that is designed to specifically trick a consumer into believing that a functional airbag has been installed. Frontal airbags are stored in the steering wheel and dashboard of cars, SUVs, and trucks. When there's a moderate to severe impact on the front bumper, a signal is sent from the airbag's electronic control unit to the inflator in the airbag. An igniter in the inflator

starts a chemical reaction that produces a harmless gas which inflates the airbag in less than one-twentieth of a second. Increase in that response time can mean the difference between life and death. While not mandatory, many new cars are equipped with airbags that offer protection in nonfrontal crashes. These airbag protection systems include the following: side airbags, side curtain airbags, and inflatable seatbelts. A person would violate the Counterfeit Airbag Prevention Act if they knowingly and intentionally manufactured, imported, installed, reinstalled, distributed, sold, or offered for sale any device intended to replace a supplemental restraint system component in any motor vehicle if the device being used as the replacement is a counterfeit, nonfunctional, or does not meet federal safety requirements. It would also be a violation to knowingly do any of those things if the device causes the motor vehicle's diagnostic system to fail to warn when the motor vehicle is equipped with a counterfeit supplemental restraint system component, nonfunctional airbag, or no airbag is installed at all, also when you knowingly and intentionally misrepresent to another person that what you are installing is a counterfeit or nonfunctional. For example, there was a case where the installer literally used a black garbage bag as a decoy to an airbag. Obviously that's never going to deploy. Lastly, if you cause a person to violate this act or assist another person in violating this law, you can also be held accountable since you are participating and being deceitful to consumers. As you may have already discovered, Nebraska's current statute that pertains to this issue is very vague. It does not address issues associated with the sale, distribution, or marketing of these airbags. It was adopted in 2003 and is in Statute 28-635. Section 6 reads that no person shall knowingly install or reinstall in a motor vehicle as part of the motor vehicle's inflatable restraint system any object or material-- material other than an airbag designed for the make, model, and year of the motor vehicle. A person violating this section is guilty of a Class I misdemeanor. LB7 provides varying levels of charges that include repeat offenders and violations that result in bodily injury, serious injury, or death. You may have read about the court case in Missouri. A southwestern Missouri man pled guilty to a scheme to sell counterfeit automotive airbags and components on-line across the country. The man admitted he sold counterfeit automotive airbags and airbag components on his on-line eBay stores CarPro 417 and CarPro Electronics. He had received shipments from various Chinese manufacturers of airbags, airbag covers, and other items that contained the trademarks of at least five major companies. Each of these imported airbags contained trademarks and markings that made it appear the legitimate holder of the trademark had manufactured the airbags. The suspect fraudulently marketed these items as airbags that had been manufactured by the legitimate trademark holder when he knew that the parts were counterfeit and they were not manufactured by the legitimate trademark holder. The fact that the airbags and the airbag component parts were counterfeit and not manufactured by the legal holders of the displayed trademark or logo on the item was never truthfully disclosed to any of the consumers. After his hearing, he was required to turn in his existing inventory which consisted of 150 counterfeit Toyota airbags, 77 counterfeit Honda airbags, 70 counterfeit Chevy and GM-- GMC airbags, 54 counterfeit Ford airbags, 207 counterfeit Nissan bags, 8 counterfeit Infiniti airbags, 10 counterfeit Acura airbags, 13 counterfeit Hyundai airbags, 7 counterfeit BMW airbags, four counterfeit Subaru airbags, four counterfeit Lexus airbags, and 1 Mazda airbag. That's a lot of airbags. Another individual who owned an auto shop in North Carolina bought an estimated 7,000 fake airbags from China and sold them on eBay, making a yearly profit of

approximately \$1.4 million also knowingly using these defective airbags in cars that he repaired in his own auto shop. These are only two examples of the concerns that the Internet and its ease of access brings when it comes to public safety and the sale of these airbags, not to mention the greed involved at the expense of public safety. You may be asking yourself why Nebraska should have legislation on counterfeit air-- airbags when federal agencies usually monitor this type of crime, and that's a great question, and you should know that the feds have authority to seize and prosecute only counterfeit airbags with a company logo or trademark. There is no authority to seize or prosecute for the ones in the vehicle that don't have the trademark or logo. The only one in the vehicle with the trademark or logo is the driver's airbag that's in the steering wheel and there are up-- are up to ten airbags in a vehicle nowadays. None of these others may be captured and they be-- there may be no prosecution for them. In fact, we're seeing proof that the importers are aware of this loophole and they're now sending the airbags without the logo and shipping them separately so they can be attached once they arrive to the United States. The bill covers counterfeit, the ones that have the logo and those that don't have logos and are nonfunction-- functional replacement airbags. State authorities are given this authority in the body of this bill because there have been a long list of incidents in other states of cases that the feds have had to let go and not prosecute because of lack of manpower. This would allow states to address both counterfeit and nonfunctional airbags and allow ICE to concentrate on other key issues, which they have a lot of right now. I'm really concerned about this issue and I think it's always unfortunate when a state must create legislation based on an incident such as someone being seriously hurt or losing a loved one. I want Nebraska to be proactive before something happens and we end up with really-- with legislation or a bill that says "Bobby's Bill" because we didn't take a good look at the growing problem of counterfeit car parts being readily available on the Internet and someone in Nebraska ends up losing their life because of a counterfeit airbag. We know that these counterfeit airbags have been sold to pretty much every state in our country, based on conversations with the federal government that they have so many under investigation right now they're not able to give us accurate numbers but they have told us that they can verify that-- that they have been sold in every state. We know the problem is prevalent and growing. Especially with unknowing DIY consumers looking for deals and adding to their-- the concern, why would we not want to put it on the books that we want to protect our consumers and hold the bad guys who are knowingly doing this responsible? I hope you will really take a hard look at this bill as it does have the potential to protect the lives of our constituents and the ones we love. I remind you that with the ongoing severe weather we continue to have across the United States, there is a constant influx of used cars damaged by storms and floods. With that influx means that there will be people who believe that they can take a short cut for maintenance, save a few pennies by buying counterfeit parts on-line, ultimately bumping up the profits made on these vehicles while endangering the buyer's life, who will be oblivious to the upgrades made illegally. I want to be clear that you understand that this is not like a knockoff purse or a pair of shoes where consumers often know they are purchasing said knockoff. A certified airbag is usually around \$1,000. A counterfeit airbag sells for around \$100. We aren't preventing consumers from saving money. We are preventing bad guys from selling and installing these widowmakers. If you were to walk into an auto parts store and try to purchase aftermarket bags, you would be unable to do so because

it's not profitable. If one day a manufacturer were to choose to make aftermarket airbags, they would still have to meet federal safety standards. At least 17 states have adopted similar legislation as more and more are educated on the impending safety issues. These states are Alabama, California, Connecticut, Florida, Georgia, Iowa, Louisiana, Maryland, New Jersey, New Mexico, New York, Ohio, Rhode Island, South Carolina, Tennessee, Texas, and Washington, as well as Washington, D.C. What is very interesting is that the combined affirmative votes for those states were in the thousands and I can count on both hands how many legislators opposed the bill. I'm sure many of you remember that in 2015 this bill was adopted as model legislation by the CSG in 2015. I hope that you help me make Nebraska number 18. I'm hoping to have the full support of this committee on voting in favor of this bill and kicking it out of committee in your next Exec Session. I'd be appreciative if someone would make a motion to send it out of committee as the bill was never able to get out of queue last year due to the short session. I will add that after conversations between stakeholders, including Honda and GM, that I have an amendment I would like the committee to add to the bill. On page 2, line 23, we've added "or when ownership is intended to be transferred" to the end of that sentence. Some stakeholders felt more confident that the bill did not-- that the bill did what it was supposed to do-- sorry, it's so dark in here I'm having trouble seeing my script here. Some stakeholders felt more confident the bill did what it was supposed to do with that added in. Also, on page 2, lines 24 and 25, we have taken out "but not limited to a supplemental restraint system component." This change came because one stakeholder felt the definition currently in the bill was too open-ended and that the amendment would make it more specific. That amendment would be in front of you now and we expect these changes will take care of any substantive opposition to the bill. So lastly I want to address the elephant in the room, no offense to anybody. We have a heavy lift in Nebraska attempting to reduce our prison population and I want to point out that the punishment starts off as a Class IV felony which does not come with mandatory jail time but does come with a fine. Bodily injury carries a Class III felony. If it causes serious bodily injury, it's a Class IIA. If someone dies, it's a Class II. So technically the only time you are mandating prison is if someone is dead, and somebody that kills another knowingly with a counterfeit airbag should certainly do prison time regardless of where we are at with the prison population. I'm really proud of this bill because we're trying to get in front of a problem as it grows, thanks to the Internet. We know the Internet is not going away and that ICE has enough on its hands with immigration. So let's step up to the plate at the state level and make this happen. This is great bipartisan legislation that we can all get behind to make Nebraska a safer place to live and to drive in. I appreciate your time today and am-- be willing to answer any questions.

LATHROP [01:47:15] Terrific. Thanks, Senator Blood. Senator Brandt.

BRANDT [01:47:19] Thank you, Senator Blood, for bringing this to our attention. I was unaware it was extensive as what it is. What sticks in my mind is I'm a Craigslist kind of a guy--

BLOOD [01:47:29] Sure.

BRANDT [01:47:29] --so when I go on-line and I buy my \$500 or \$1,500 car, that maybe, you know, some do-it-yourself guy repaired, or a junkyard or something like that, and this car is maybe fourth, fifth owner, and maybe this happened three or four times back and I'm unaware, maybe the seller is unaware that it has a counterfeit airbag in it, and this thing deploys and bad things happen, who bears the blame there or how do we handle a situation like that? I mean obviously it looks like we're going after the suppliers, which I think is great. But a lot of these, I get the impression, are already installed in vehicles unknowing to the drivers.

BLOOD [01:48:07] And-- and you would be accurate when you say that. So as I mentioned in my opening, we're talking about people who are knowingly selling or installing these. So if you are an unknowing consumer, if you are unknowing car dealer-- and shame on you if you don't know the difference between a counterfeit and a real airbag and you're dealing and selling cars-- and I think it's quite specific in that, I don't think there's any gray area-- so whoever is responsible for knowingly putting that into that vehicle is the person who is ultimately responsible as far as any criminal acts.

BRANDT [01:48:37] OK. Thank you.

BLOOD [01:48:39] You're welcome.

LATHROP [01:48:40] Senator Chambers.

CHAMBERS [01:48:43] Considering the breadth of this problem and the amounts of money involved, I'm just going to read two paragraphs before I ask my question.

BLOOD [01:48:52] Yes, sir.

CHAMBERS [01:48:53] This detective, this Los Angeles detective talked about that they have an Anti-Piracy Unit in California dealing with it. LAX, which would be the airport, and the ports of Los Angeles and Long Beach are the first line of defense in stopping the flow of knockoffs. Overall, counterfeits fuel a \$600 billion a year industry. Experts say it is even more profitable than narcotics. These people that profit from the sales of counterfeit goods, it goes to the dark side. I'm talking about street gangs, organized crimes, terrorist groups. The profits go to fund other criminal activities. Is there a federal agency or program dedicated to this problem--

BLOOD [01:49:46] I--

CHAMBERS [01:49:46] --that you know of?

BLOOD [01:49:48] I would say assigned but not dedicated, and that would be ICE, and as we know right now, ICE has their hands full with immigra--

CHAMBERS [01:49:53] Could you say it a little louder?

BLOOD [01:49:54] Yes, sir, sorry, I'm losing my voice.

CHAMBERS [01:49:55] Oh.

BLOOD [01:49:56] It's the end of the day. So the answer is yes and no. The answer is, yes, there is an organization that is assigned to it, and that would be ICE, but right now they have their hands full with immigration. And also, because of how the federal law reads, they can only deal with the ones that have the logo or indicia on the airbag. And now the people that are counterfeiting it are getting very smart. They're sending the airbag and the indicia separate. And so now that becomes a state issue because they can't deal with it under federal law.

CHAMBERS [01:50:28] Is Homeland Security involved in this, do you know?

BLOOD [01:50:28] I do not know but the person who is testifying after me may very well know that answer.

CHAMBERS [01:50:32] OK. That's all I would have. Thank you.

BLOOD [01:50:35] Thank you, sir.

LATHROP [01:50:36] Any other questions? I see none. Thanks. Do you want to stay around to close?

BLOOD [01:50:41] Yes, sir.

LATHROP [01:50:42] OK. Terrific. Proponents, you may come forward. Good afternoon.

EMBER BRILLHART [01:50:56] Hi. Good afternoon, Senator and members of the committee. My name is Ember Brillhart, E-m-b-e-r, last name B-r-i-l-l-h-a-r-t. I direct Honda's state government relations program throughout the 50 states for all products and all issues relevant. I am glad to be here today with you to support Senator Blood's bill and appreciate her leadership on this issue. As you've heard, this is a serious issue. This poses serious danger-- dangers to motorists, to drivers, to passengers. We at Honda, since we learned about this over five years ago, we've decided this is so important that we have to take a holistic approach to this, so we have been working with the Homeland Security, Customs and Border Patrol, to identify and to pick out the bags and counterfeit parts that are not ours. We've been working with the FBA [SIC]-- FBI to make sure that we can identify those listings on-line on Amazon, Alibaba.com, on Craigslist, all those places where they were being sold and marketed as genuine OEM parts when they're really not. Our people have been on raids. We have-- we have special contacts with the feds where we help bring them-- we bought-- make the buys. We do testing and then we give it to them for them to prosecute and bring over. We've done customer education. We've done dealer educations. And our final point is being here now talking to state legislators and

explaining to them the need for this. And we've been successful, as Senator Blood said, and even two weeks ago we were able to get the 18th state, so I would like for you guys to be the 19th state. Massachusetts signed it right at the end of the year last year. Obviously, we're no stranger in the auto industry to counterfeit parts. But what shocked us five years ago is the reality that Homeland Security and Customs and Border Patrol brought to us one day when they called our parts guys and said, hey, we've got this boatload of stuff coming in from China and they look all like your parts. And our guy said, hey, no, we think that those are ours, when we looked at them, but let us have them and let us go test them. They were shocked to find out that they were not our parts. They are so good with doing the serial numbers and everything else that it really shocked us and it really made us realize the breadth of the situation. Obviously, as-- as Senator Blood said, this is-- this bill is to get at the people who knowingly and intentionally try to do this and put these into-- into the vehicles of these customers who really don't know anything about it, and when they do know about it, it's too late and there is bodily injury or death at that time to them and there is nothing that they could do about it. Now the customers are unsuspecting, but the reality is that these body shops do know and there are red flags. In my testimony, we've given a signs and red flags sheet for you to look to see what they know. One of them is that honestly you cannot-- under state franchise laws you can't buy an airbag from anybody but a dealer. So if you go to a body shop, they go to the dealer, whether it's a Honda or anybody, and they have to tell the-- the dealership the vehicle identification number of the vehicle and they match that to the-- to the vehicle and then they sell it to them there. And the body shop then can put it in. This isn't a case of us versus aftermarket. If you can make an aftermarket part and you can meet the federal standards, more power to you. We're-- that's great. And we're not-- we're not opposing that by any means. But that's just the reality of franchise laws right now and what they ultimately do is they do an insurance fraud, which is why we have the Coalition Against Insurance Fraud behind us and part of the support for this. And the customer doesn't know until it's too late. So as we become aware of this issue, we've had thousands of-- of them tested not only by the industry but also by NHTSA. Every single one of them, 100 percent of them failed, failed to protect, failed to meet the standards. That means 100 percent of them would have failed if they were in your vehicle. There is no offer for protection, there is no indication for protection or safety. They are not-- they are-- no intention to do anything other than to make a quick buck. As Senator Blood said, we are here today because the feds cannot seize nine of the ten airbags in component parts in a regular vehicle. If it doesn't have the insignia, they have to let it go and ultimately it goes back into the stream of commerce. This is where LB7 comes in. This gives prosecutors a new way, a new tool in their toolbox to protect motorists in Nebraska. So because of this danger, we have done something which is not common in the auto industry. We actually have every single auto-- auto manufacturer behind and in support of this bill, in with the dealers, with the recyclers, with the safety organizations, and with the insurers in support of this bill, and we've worked together to get it passed in 18 states. It has been supported by national organizations and we would appreciate your support and urge you to support this bill and pass it on.

LATHROP [01:56:12] Very good.

EMBER BRILLHART [01:56:13] Glad to answer any questions.

LATHROP [01:56:13] All right, we'll see if there are any. Any questions? Senator--

EMBER BRILLHART [01:56:17] Hi.

CHAMBERS [01:56:16] How--

LATHROP [01:56:17] Senator Chambers.

CHAMBERS [01:56:19] Oh, excuse me. How long, high, and wide would a wall have to be to stop this?

EMBER BRILLHART [01:56:25] Well, it's got to go in the air. As we've seen, most of it is, as they said, Long Beach and other places. You either have the ports or it comes in on the boats, or you have it where it's in by the FedEx and the air-- air couriers.

CHAMBERS [01:56:38] And that does-- that \$600 billion figure seem excessive to you?

EMBER BRILLHART [01:56:45] No, not in counterfeit parts in general. That-- that number is not only for counterfeit airbags. But if you think of all the parts in an automobile, that doesn't seem excessive. And-- and again, counterfeiting is nothing that we haven't heard before. But in these real safety parts that are life and death, it's just shocking that they've--

CHAMBERS [01:57:05] And they--

EMBER BRILLHART [01:57:05] --that they've gone this-- this way because they-- you can make a whole lot more money if you did bumpers or whatever. But why would you have to go into airbags? It's because they cost a lot of money.

CHAMBERS [01:57:16] Obviously, these are rhetorical questions.

EMBER BRILLHART [01:57:19] OK.

CHAMBERS [01:57:19] The damage, the harm, and the injuries to numerous people are not theoretical--

EMBER BRILLHART [01:57:28] No.

CHAMBERS [01:57:30] --correct?

EMBER BRILLHART [01:57:30] Correct.

CHAMBERS [01:57:31] They are real.

EMBER BRILLHART [01:57:32] They are real.

CHAMBERS [01:57:35] It might make more sense to spend--

EMBER BRILLHART [01:57:35] And we're seeing it in accident reconstruction.

CHAMBERS [01:57:38] --\$7.5 billion fighting this than to try to build a wall that won't even stop what they're trying to stop. And I'm like you. We can't build one high enough to stop an airplane.

EMBER BRILLHART [01:57:49] Not that high. [LAUGH]

CHAMBERS [01:57:49] But here's-- here's the last question that I will ask. If this bill should become law, are there prosecutors, as far as you all know, in Nebraska who would take it seriously and act under this law to attack this problem?

EMBER BRILLHART [01:58:07] I can't speak for Nebraska. I can tell you that in many places the federal agencies will bring it to the local people and say, here's our case, we cannot do this but it's all here for you, and there's been times when they've said, hey, we don't have a law. In Los Angeles, I-- I wrote the California law with the Los Angeles County Attorney.

CHAMBERS [01:58:32] OK.

EMBER BRILLHART [01:58:32] And we just had a case, and you probably have the video of it, where they used it and they seized thousands of airbags in a guy's driveway and as they were going through the guy's house, the FedEx guy comes up with another package of counterfeit airbags-- incredible.

CHAMBERS [01:58:48] And that's all I would have.

EMBER BRILLHART [01:58:48] There are people out there, but they've got to know what to-- they've got to find it, they've got to know it, and that's what we're here to do. We have been working every way we can to identify it and stop it. We've even gotten the Amazons and Alibabas and Craigslist to agree. We've negotiated with them. If it's-- if it's not legitimate, and we have a process with them where they help us, work with us to determine whether it's a legitimate posting by Honda or Nissan or whoever, that they'll ask them and they'll take it down. They won't even put it on their site.

CHAMBERS [01:59:17] Did you say Honda?

EMBER BRILLHART [01:59:19] If it's not a-- if it's not an original, I don't care which manufacturer it is, but they offer it as a GM or Ford and it's really not. So they're agreeing to take them down to stop this.

CHAMBERS [01:59:31] That's all I have. Thank you.

LATHROP [01:59:31] Any other questions for the testifier?

EMBER BRILLHART [01:59:39] Thank you.

LATHROP [01:59:39] I see none. Thank you for your testimony today. We appreciate it. Anyone else here as a proponent of this legislation? Anyone here in opposition to LB7? Anyone here in a neutral capacity? We have letters of support from Ember Brillhart, who just testified, from Honda North America; Robert Lausten, La Vista Chief of Police; Laurie Klosterboer, Nebraska Safety Council; Joe Cammisso, Automotive Anti-Counterfeiting Council; Matthew Smith, Coalition Against Insurance Fraud; Steve LeClair from the Professional Firefighters Association of Omaha; Rose White with the AAA Auto Club. Did you intend to testify, Spike?

SPIKE EICKHOLT [02:00:37] [INAUDIBLE]

LATHROP [02:00:37] You-- yeah, and I was going to say, and a letter of opposition from Spike Eickholt from the ACLU of Nebraska. Senator Blood, would you like to close?

BLOOD [02:00:49] I would. I never really addressed-- this moves. I never really addressed Senator Chambers' comment about port of entry. You know, right now we have a lot of individuals that are working the ports of entry that are not being paid. And so I think that that even increases our-- our concerns. I know that they're lining up at food banks and-- and doing what they can to provide food to their family right now because the Coast Guard is being-- is now working without pay. So that-- to me, that-- that makes this an even-- even graver concern.

CHAMBERS [02:01:21] You're-- you're talking quieter and quieter. Could you speak a little louder?

BLOOD [02:01:23] That's because I'm losing my voice. It's always-- it always does that by the end of the day. I-- I-- I have grave concern because right now the Coast Guard is not being paid and that's who mans our port of entry, and when we expect them to protect our country and protect our ports of entry, I think we can do better. And so I think that that makes this an even graver concern. And again, I know that our only opposition is ACLU, and I respect the fact and I support the fact that they are trying to help us reduce our prison population. But again, I want to restate that the only person that would be incarcerated would be the person who actually killed somebody knowingly by providing this airbag, and I would stand firm when I say that somebody who knowingly sells an airbag that they know could possibly take someone's life and that person does die, they should be held accountable. And so I ask that you please Exec on this bill. I

wouldn't really like to have Nebraska be number 19. It was a short session last year. It didn't get out of the queue. I'm here to plead and look really sad and say please move my bill forward. This is a good bill and this is a bill we can all join together as a good bipartisan bill. Let's get it done, please.

LATHROP [02:02:45] OK. Thank you, Senator Blood.

BLOOD [02:02:48] Thank you for your time.

LATHROP [02:02:49] Appreciate it. Good to have you here.

BLOOD [02:02:50] Thank you. It was good to be here.

LATHROP [02:02:53] OK. That will close our hearing on LB7 and bring us to Senator Hansen and LB71. Senator Hansen, welcome to Judiciary Committee.

M. HANSEN [02:03:21] Welcome. Thank you. Ready? All right. Good afternoon, Chairman Lathrop and members of the Judiciary Committee. My name is Matt Hansen, M-a-t-t H-a-n-s-e-n, and I represent Legislative District 26 in northeast Lincoln. I'm here today to introduce LB71 which would repeal Section 25--21,194, related to civil claims following a shoplifting arrest. This statute passed in the 1980s--this is a statute that was passed in the 1980s and after 30 years of being on the books here in Nebraska, we can see that it is not needed and it is in fact being used to mislead people on a large scale.

LATHROP [02:04:02] Can you-- can you talk up just a little bit?

M. HANSEN [02:04:03] Sure. Closer?

LATHROP [02:04:06] If you pull it a little closer, I think-- we're all trying to get used to this as a-- as a hearing room and part of the problem is it's kind of hard to hear.

M. HANSEN [02:04:13] Sure. All right.

LATHROP [02:04:16] Better, thanks.

M. HANSEN [02:04:17] Perfect. All right. This statute was enacted in 1987 with one of the stated intents being to decriminalize shoplifting and replace criminal penalties with an opportunity for retailers to recover civilly instead. Unfortunately, it has not had that effect. It has in fact resulted in a systemic problem whereby large collection firms from out-of-state retailers demand alleged shoplifters large sums of money as a civil penalty in addition to the criminal penalty ordered by the court. These demands are misleading and in many instances seem to intentionally misrepresent Nebraska law. The demand letters often lead the accused to believe that they-- that if they pay it, they won't be prosecuted, but that is not the case. These letters are

even sent to those who are simply suspected of shoplifting or even wrongfully accused where there are no grounds for an actual successful criminal case. In other states, these firms are permitted to demand a penalty in addition to actual damages. However, Nebraska's current statute only allows for actual damages-- in other words, the value of the stolen item-- yet these firms send Nebraskans the same letter they send to accused shoplifters in other states with the penalty. The letter stakeholders have seen have demanded up to a \$500 penalty even when the item was recovered and no actual damage was sustained. While the statute ostensibly creates a cause of action, however, our research has indicated that-- no instance where the cause of action has actually been filed in court here in Nebraska, let alone successfully won on its merits. It is just these cryptic and misleading demand letters that come in from almost exclusively out of state. I had the pages pass out a copy of one of these so you should be able to see exactly what I'm referencing here. It is important to note that retailers already have three other avenues for recouping their actual losses: criminally, through restitution; a common-law civil claim; or a statutory civil claim through 25-1801. That section was actually amended last year via LB710 to make it even more clear that actual damages sustained by a retailer can be sought under that statute, making this a perfect time to revisit this-- this statute that would be repealed under this bill. We could repeal this section outright, as I am proposing here in LB71, and there would still be three other potential ways for a retailer to recover damages. Testifying today we will have others with firsthand experience working with clients who have received these letters and insight into the confusion they cause. I especially want to thank the UNL Law civil clinic for drawing attention to this issue and for their assistance this past interim with that. And with that, I will end my opening and encourage you to advance LB71.

LATHROP [02:06:50] Thank you, Senator Hansen. Any questions for Senator Hansen? Senator Chambers.

CHAMBERS [02:06:58] Just a comment. I'd had one of these kind of problems brought to me, and these companies hound, they harass, they threaten, they intimidate. And I think Senator Ashford may be the one who put this atrocity into the law, so I want to hear and see what those look like who try to engage in this kind of extortion. I'm glad you brought the bill. And if you don't mind, I'd like to sign on it with you.

M. HANSEN [02:07:24] I'd be happy to have you. Thank you, Senator.

CHAMBERS [02:07:25] Thank you.

LATHROP [02:07:29] I think that's it for questions.

M. HANSEN [02:07:31] Thank you.

LATHROP [02:07:32] Thanks, Senator Hansen. Proponents of LB71? Welcome.

RYAN SULLIVAN [02:07:45] Thank you. Good afternoon, Senator Lathrop, members of the committee. My name is Ryan Sullivan, R-y-a-n S-u-l-l-i-v-a-n. I'm an assistant professor of law at the University of Nebraska College of Law where I teach in the civil clinical law program. I'm speaking today as a citizen, not on behalf of the university. I want to first thank Senator Hansen for agreeing to bring this very important bill to repeal this law. I'm one of those that he mentions that's dealt with this firsthand. We've dealt with it many times in the civil clinic working with low-income clients who have received these letters, and I have since conducted extensive research into this law. I've provided you a number of documents. Included among them is a Law Review article I coauthored where we describe the many problems with this law, why it serves no legitimate purpose and why it should be repealed. For your convenience, I tabbed and highlighted the relevant portions. I also included an interesting piece from The New York Times providing other examples of how this law is abused on a national scale. When the law was adopted in '87, its intent, as the senator said, was to decriminalize shoplifting. Instead of going through the police and courts to handle these petty theft matters, retailers could handle it civilly, recover their damages civilly. Well, that's not what happened. In fact, criminal prosecutions spiked following the adoption of this bill, and our theory for that is we found that these companies that send these letters have a lot more leverage if the-- if a criminal case is also pending because people get confused and they think that they are one in the same and they think it will benefit them by paying this demand, this civil penalty. A major problem is this out-of-state collection firms and large corporate retailers who demand these civil penalties from those just suspected of shoplifting. We've seen situations where somebody was taken into a backroom, forced to fill out some paperwork. They were suspected of shoplifting. Turns out it was just a misunderstanding. Nonetheless, a week later they get a letter in the mail saying, you owe us \$350, if you don't pay it's going to be \$450 next week because you were involved in this instance of shoplifting. That's what it says-- you were involved in an instance of shoplifting-- and then of course it cites this statute for authority, which it doesn't actually provide. We've seen them as high as \$500 and we had a \$500 instance where they had already paid a \$200 criminal fine and then already paid restitution for the item that was actually returned to the shelf. So the retailer was triple-dipping on this. Shoplifting defense shouldn't be a profit center. These demands, whether they're made in a demand letter or in some back room of a retail establishment by security personnel, are very intimidating, misleading, and harmful. Included in the packet of materials is a handout describing three scenarios exemplifying how this law harms Nebraskans, particularly those of limited means. The statute should be repealed because it's wholly failed to carry out its intent and presently serves no legitimate purpose. Notably, it's never once been used as a cause of action to recover actual damage. We conducted a comprehensive search of every civil filing in the state of Nebraska since its adoption and we couldn't find a single action brought under this statute, so it is not going to be missed. Importantly, repealing this law would not prevent retailers from recovering their actual damages. As the senator points out, they already have three other avenues for relief. They don't need a fourth, particularly where the fourth is solely being used by out-of-state collection firms and large corporations to scam low-income Nebraskans out of money that they really don't owe and they likely don't have. Thank you and I'll entertain your questions.

LATHROP [02:11:59] Any questions? Senator Brandt.

BRANDT [02:12:02] So what percent of these demands by these out-of-state attorneys go to the attorney and how much goes to the actual business?

RYAN SULLIVAN [02:12:12] Our research shows it depends on the contract they have with the attorney. We've seen where they sell lists, so they will-- a large retailer, for example, might just collect these lists where they accuse people of shoplifting. They get their name, address, phone number, their parents' name, address, phone number if they're a minor, then they sell these lists to these collection firms. And these law firms, they're-- all of them are on the-- on the East Coast. I don't know what the arrangement is, but it's a huge profit center. There's one firm in the United States-- this was about eight years ago-- claimed they send a million letters a year. One firm sends a million of these letters a year. Kind of sounds like those scam letters you get in your e-mail from the prince from Nigeria, right? You just-- you send out a million of them, even if they're not legitimate, even if they aren't lawful, you get enough to bite, it's a-- it's a lot of money.

BRANDT [02:13:13] Thank you.

RYAN SULLIVAN [02:13:16] Um-hum.

LATHROP [02:13:16] Any other questions? Did you say that no one ever sues? Like if-- if one of these letters is sent to somebody and they throw it away, they don't follow-- whoever the lawyer is doesn't follow through and file suit?

RYAN SULLIVAN [02:13:31] Never

LATHROP [02:13:31] They just send them out and demand money and then--

RYAN SULLIVAN [02:13:33] Never. They're just-- it's just a-- it's a complete farce. You talk to any defense attorney, their advice is throw it out. Every time we have somebody come to us, we say don't pay it. We send a nasty letter to them. Problem is there's-- there's no real cause of action that we've found. We looked at RICO claims. Those have been brought and failed because they say that, you know, it's missing a few of the elements. It's not a Fair Debt Collection Practice Act because the federal courts say, well, it's not really a debt, right? It's a-- it's this--

LATHROP [02:14:05] Damages.

RYAN SULLIVAN [02:14:06] Yeah, it's this damages amount. We've-- we've tried bringing it under consumer protection laws and they say, well, since they're accused of shoplifting, they're not really a consumer so they don't get any protection, so they're-- the only way that we fix this is to get the law off the books.

LATHROP [02:14:20] So if a kid goes into a store and steals a-- a comb worth a dollar, he gets charged with shoplifting, gives-- they get the comb back, whoever the retailer is, and then he gets a letter that he owes \$200-500 to somebody.

RYAN SULLIVAN [02:14:39] Right. Right. And a lot of times these people will not-- you know, they're not going to have-- most people they are getting these letters are low income. They're not fortunate enough to be able to go to an attorney or have an attorney in their family or maybe they call the clinic to know this, so, you know, the-- the dozens of people we've been able to help out, there are-- you know, if you do the math, that one company is sending 6,000 letters a year to Nebraska.

LATHROP [02:15:04] And to your point, it's not stopping the shoplifting prosecutions.

RYAN SULLIVAN [02:15:10] No. I mean it's-- you look at the data and it's-- if you-- if you got the free time, you can skim through the Law Review article in there. I mean we show the data actually showed it-- it was a dramatic increase for about a decade and a half after these went into effect and you can see that on national. And this-- these really just became profit centers for these scam companies.

LATHROP [02:15:30] OK. I don't see-- oh, Senator Slama has a question for you.

SLAMA [02:15:36] Just one quick question. These civil penalties are unconstitutional in Nebraska but they are allowed in other states? Yeah, most-- Nebraska is pretty unique to have-- to ban civil penalties. You know, Nebraska's Supreme Court made a kind of a unique ruling several years ago on that-- on that notion, so-- but I'll tell you even our statute, the statute I think is constitutional because it says you can seek actual damages plus attorney's fees and costs. But what happens is these-- these companies are too lazy to change up their template that they send, so they just send the same thing to Nebraska that they would send to any other state. So that-- that's what happens. And it-- it's-- yes, exactly, it is unconstitutional presently in Nebraska to have a civil penalty.

SLAMA [02:16:26] Great. Thank you.

LATHROP [02:16:28] At least one that doesn't go to the school district.

RYAN SULLIVAN [02:16:30] Right, and I-- and as far as we could check-- and we-- it's kind of a fund-- we looked into that and they haven't received any into that fund.

LATHROP [02:16:37] There's your cause of action.

RYAN SULLIVAN [02:16:40] Right.

LATHROP [02:16:41] OK. I think that's it for the questions. Thank you for your testimony.

RYAN SULLIVAN [02:16:44] Thank you.

LATHROP [02:16:45] Anybody else here as a proponent wishes to testify? Good afternoon.

DANIEL GUTMAN [02:16:58] Good afternoon, Mr. Chairman, members of the committee. My name is Daniel Gutman, D-a-n-i-e-l G-u-t-m-a-n. I am a lawyer practicing in Omaha and a former student of Professor Sullivan's in the civil clinic. I'm actually here testifying in neither of those capacities, just as somebody who is concerned about I think over two decades of misuse of this statute. I first learned of the statute actually in the civil clinic. We had an individual come in who was concerned about letters that the individual was receiving. The individual, who is former law enforcement, former military, was accused of shop-- shoplifting a very small item from a very large retailer. That person took advantage of and completed a veteran's diversion program, paid money into restitution, and despite that-- excuse me-- despite that, was sent two or three letters from a large, out-of-state, what I would refer to as a debt collection firm, basically threatening the individual if they didn't pay \$200-300. So that's when I first became aware of it. We were able to suc-- successfully represent that person, help that person navigate through the system. But since then, I've talked to public defenders and prosecutors who say that this is really par for the course, these are template letters that are sent to every single person that is accused, regardless of whether or not they are convicted of shoplifting. They are very intimidating in nature. They oftentimes threaten litigation if payment of hundreds of dollars are not made. I think that this dovetails into two bigger points regarding Senator Hansen's bill, the first one being I'm a little bit concerned that this bill will kind of create a false narrative or false dichotomy that, you know, you're either pro-person that's accused of shoplifting or pro-retailer. We know of course that that is not true. I think shoplifting is a real issue. It really impacts retailers. It really results in losses. But thankfully, Nebraska law, as Professor Sullivan already said, already accounts for that and provides three separate mechanisms for retailers to recover that, most primarily through criminal restitution, but also through civil actions that everybody else has to use and through a small claims type of procedure I think the second big point to consider is I know that this committee has thought about, has researched, has passed legislation regarding criminal fines, fees, debtors' prisons, those kind of matters, and I think that those issues, as this committee knows, results in a situation where people are entering the criminal justice system and are trapped in that system, trapped in a cycle of poverty which was resulting in increased recidivism. I think Senator Hansen's bill has to be considered in the context of reform, in-- in that reform context because these individuals are entering the criminal justice system, are saddled with huge fines and fees, pay the restitution, often complete everything that they need to do, and then get home to two or three letters from large out-of-state debt collection firms that threaten them with litigation if they do not write an additional check for \$200 or \$300 or \$400. the cycle never ends and I think that that needs to be-- The repeal of the statute needs to be thought about in that context. With that, I would encourage you to support this bill and advance it to-- to the larger body.

LATHROP [02:20:33] Any questions for this testifier? Oh, none-- I don't see any.

DANIEL GUTMAN [02:20:37] OK. Thank you.

LATHROP [02:20:38] Thanks, Mr. Gutman, for coming down today. Good afternoon.

JOE NEUHAUS [02:20:47] Good afternoon, Chairman Lathrop and members of the Judiciary Committee. My name is Joe Neuhaus, J-o-e N-e-u-h-a-u-s, and I would like to add my support for LB71. I am an attorney in Lincoln and a large part of my practice is devoted to criminal-- criminal defense litigation, particularly as appointed counsel for indigent defendants. I've-- I'm also a member of the Nebraska Criminal Defense Attorneys Association, although I'm not here specifically to represent them. But I've-- I've represented a number of defendants who have been charged with-- with shoplifting. Many of them have received demand letters such as the ones discussed here today. Because shoplifting penalties under Section 25-21,194 are civil in nature and providing legal advice would exceed the scope of my representation, I do not generally discuss the letters in any detail with my clients. Nevertheless, I do want to emphasize to the committee those-- the-- the kind of people most affected by shoplifting civil penalties. Many of my indigent criminal defense clients lack the resources to provide for themselves and their families. I don't think that comes as any surprise. This does not operate as an excuse for anyone to shoplift but Nebraska law rightly penalizes shoplifting in the criminal law. Additionally, because of the recent amendment to Section 21-- 25-- excuse me-- 25-1801, there is an avenue for civil remedies in lawsuits of \$4,000 or less, and of course there is the common law remedy as well. What's most disturbing to me is that the statutory code, the mere reference to its section number in a demand letter is-- is being used to coerce people into paying \$200, whatever the sum may be. These are folks I work with on a daily basis. If they pay \$200, they can't afford their rent, food, the list goes on. I have to assume that some incorrectly believe that paying such a sum will take away their criminal liability, and of course it doesn't. They-- they have no resources to hire an attorney. They're generally not sophisticated enough to see these letters as they truly are: a disingenuous and misleading threat. I won't belabor the-- the issues related to the civil side of it, although I would be happy to answer questions as it relates to how it affects defendants criminally. But I would respectfully encourage the committee to advance LB71. Thank you for your consideration and I'd be happy to answer any questions I can.

LATHROP [02:23:43] Great. Thanks, Mr. Neuhaus. Any questions for Mr. Neuhaus? I don't see any. Thanks for coming down here today. Anyone else?

SPIKE EICKHOLT [02:23:59] Chairman Lathrop and members--

LATHROP [02:24:00] Good afternoon once again.

SPIKE EICKHOLT [02:24:01] Good afternoon once again. Chairman Lathrop, members of the committee, my name is Spike Eickholt, S-p-i-k-e E-i-c-k-h-o-l-t, appearing on behalf of the Criminal Defense Attorneys Association. We do support the bill. I'm not going to restate anything that's been said and I don't want to-- but I want to make a couple of points. I practice criminal

law. I've done it for a number of years. Some of you on the committee might be thinking, well, if we repeal this, maybe the retailers, the stores aren't going to get their money back. I will tell you that typically what happens in Lancaster County, and even in Douglas County and other places where I've been, the prosecutors regularly collect restitution on behalf of not just the bigger stores but particularly the local independent businesses. They're locally elected. They --they have to sort of be responsive to the businesses. And businesses do suffer losses from shoplifting. And I've done this in hundreds of cases where my client is charged with one or two counts of shoplifting, if they pay a certain money back, they'll reduce the charges down, they'll dismiss the charge, they'll agree not to file other offenses. They regularly do that. And in all of the hundreds of cases that I've done that with respect to shoplifting, I've never talked about this statute. This doesn't come into play. The prosecutors don't have anything to do with this. I don't have anything to do with this. The only intersection we ever have with this issue is when our clients get a letter, and I don't know the rhyme or reason because not everyone gets them. Clients get a letter and they say, what should I do? And like Professor Sullivan says, I will-- I've tried to call them before, I've written letters in response. You-- you get nothing back. I've got copies of the letter but I-- I know you have a copy of it as well. It's generally from-- it looks like from one attorney in New York where these letters come from. For a while, I remember seeing some letters from some entity in Florida. But I just want to explain to the committee that the collection of restitution is done through the criminal case alone, either through plea negotiations or the court can also order someone to pay restitution as part of a sentence. And that was revamped in LB605 and it has just nothing to do with the civil action. The only purpose I think this statute does is really just to be referenced in a demand letter essentially, because no lawsuits are filed from it, prosecutors don't care about it as far as I can tell, and it's just something that's done to demand arbitrary money amounts. Thank you.

LATHROP [02:26:13] Thanks. Any questions? Senator Pansing Brooks.

PANSING BROOKS [02:26:17] Thank you for coming today, Mr. Eickholt. I'm looking at the Law Review article that was passed out to us and I think it's interesting because there's a part that talks about the difference with theft. And whereas somebody who-- who steals something, the retailer-- I mean-- or the person who's had something stolen from them doesn't have the same opportunities that retailers do with-- with shoplifting. And it says, for instance, an elderly woman who has her purse stolen will at best recover the value of the purse and the items therein, whereas the retailer could recover its actual loss plus costs and reasonable attorney's fees, and in most states also recover indirect costs and added penalties. So, I mean, that's really a significant summary of-- of how this is being applied in Nebraska, and I think it's really wonderful that you've all brought this to us. Thank you.

SPIKE EICKHOLT [02:27:18] Thank you.

LATHROP [02:27:18] I see no other questions. Thanks for coming in. Any other supporters or proponents? Is there anyone here in a-- opposition that cares to testify? Good afternoon.

JIM OTTO [02:27:47] Senator Lathrop, members of the committee, my name is Jim Otto. That's J-i-m O-t-t-o. I'm president of the Nebraska Retail Federation and I'm here to testify in opposition to the bill. First of all, I feel like I'm-- I might have bought-- I-- brought a knife to a gunfight because I'm not sure I can answer all of the concerns that were-- were raised. I do want to point out just a few things. I don't think there's any argument that there has been some abuse and we're not here to support the abuse. We would like to figure out how to solve that. I do want to point out, though, that people don't shoplift for what they need; they shoplift for what they want. By and large, the things that are stolen-- weight-loss drugs, cell phones, Rogaine, Red Bull energy drinks-- so we aren't talking about people shopping for a loaf of bread-- or stealing for a loaf of bread in most cases. The other thing that I'm sure it's possible and has happened that someone gets caught on their very first time, but studies show that most people don't get caught until their 48th time of shoplifting. So I just want to point out that we're not talking about totally innocent people here. But at the same time, these letters that are being abused, we're not here to defend them. I'm just saying that totally throwing out something that's been in effect for three decades and not looking at it to see if it could be improved and accomplish what was originally intended seems way overboard to me. And we would be glad to work with Senator Hansen, the people involved at the university, and see if there are-- if there's some way we can tweak it instead of actually just throwing the entire statute out because I think we would all agree that we-- when someone is actually caught shoplifting it would be much better if they had some kind of a-- of a civil action against them instead of a criminal action. The criminal action affects them all of their lives and as-- I don't argue with the fact that maybe the civil actions haven't been done like they were intended to be, but I would think there is a way for us to encourage that and really make the bill do what it originally was intended to do instead of what we see here today. With that, I'll wait for Senator Chambers to ask me a question.

LATHROP [02:30:27] Let's start with Senator Brandt, then we'll get to Senator Chambers.

BRANDT [02:30:33] Jim, does your organization sell these lists to these attorneys?

JIM OTTO [02:30:38] No.

BRANDT [02:30:38] How did they obtain this information? Do you have any-- any idea?

JIM OTTO [02:30:41] Well, does-- when you say, does our organization, I'm not saying we have no member that does not do that.

BRANDT [02:30:45] That's what I meant. I'm sorry. I stand--

JIM OTTO [02:30:46] Yeah, there-- there may be and in fact maybe that needs to be addressed. I don't know that but I-- our association doesn't do that.

BRANDT [02:30:52] All right. Thank you.

JIM OTTO [02:30:56] Um-hum.

LATHROP [02:30:57] Senator Chambers.

CHAMBERS [02:30:55] Mr. Otto, I'm into my 82nd year and I hope I don't end my life in the way you're approaching the end of yours. I used to have a lot of respect for you. I saw a picture called "The Good, the Bad, and the Ugly," and the ugly guy had to go kill a man in his home, in front of his family, and the guy offered to pay him not to be killed. And the ugly guy said, that would ruin my reputation, I accepted the contract, I must carry it out, and he killed him. You don't have to do everything somebody pays you to do. There is a principle in law, even when it applies to murder, called proportionality. The punishment cannot be excessive when you consider the offense. These are legalized racketeers, they are liars, they are thugs, they are bullies, and the case that was brought to me was from a woman who had not been convicted of shoplifting and the merchant did not want to charge her in court and testify against her. But one of your colleagues, the one that you work with, that you support, was hounding and harassing her. And as the testimony went forth, it reminded me of what I had done because I don't let things go. I think I sent this sucker some columns and articles about the kind of person that I am and that I was going to do everything I could to see that he was punished, even if I had to do it. And I'd always emphasize this is not a personal threat, but there are ways you can be hurt that are more devastating than if I'd hit you in the mouth, and the letters stopped. You, by saying that this atrocity can be improved, would say that if you put lipstick on a pig, you improve the image of the pig; if you put perfume on feces, you take away the abhorrence that people feel for species-- feces. Sometimes I think in rhyme. What you're doing is so detestable that were you carrion you would be indigestible. Oscar Wilde said that fox hunting was a British-- were British gentlemen galloping after foxes, the unmentionable pursuing the uneatable. I am deliberately, because I don't use profanity, trying to use language to show my contempt for this law. And Ashford had something to do with it because he was working with these retailers, whom I call legalized thieves, but I never thought I'd see the day when you would come here defending something like this. But you have done it and you know that in the past I had expressed my respect for you. And being true to myself, that's more important to me than anything else. I cannot let you, a man who I believed had integrity, fall to such a depth without me saying what I'm saying. I had gotten the impression that you are a man with religious beliefs. If I speak harshly enough to you, maybe you can get absolution, or whatever it's called in your faith, and rescue your immortal soul from eternal damnation. I deal with poor people and their problems all the time. And the ones who take advantage of these people are the ones who will never miss a meal, whose children will have a chance to go to school, who will sit up in church and sing hymns and mouth words from prayer books and be considered an upstanding member of the community, and then they can go out and do indescribable damage and harm to the most helpless, vulnerable people. Then they send women here to speak for them, hiding behind women's skirts, but women who submit to that and do it voluntarily are not innocent. They would not want it done to themselves. They would not want it done to their mothers, their grandmothers, their daughters, but they will do it to other women. And for them I have contempt and I'm expressing it all to you. I will do everything in my power to see that this legalized

extortion is wiped off the books. And it reminds me of a call that I'm going to have to make to former-Senator Ashford. I had forgotten about what he had done with reference to this. He's not fit to hold a position of trust and if he ever runs for anything again, I will do everything in my power to expose him for what he is: a man of no conscience, desperate, without any sense of values, he, like you, an evil mind lurking in the night, seeking whom you may devour. I used to think, because I was a child, that the worst symbol of wickedness was Satan. Now I know who that person really is, and his name is the same forward, backward, upside-down. And I know these people here are nervous. They don't like this said. It needs to be said. I'm a member of this Legislature and our rule book and the constitution says, and I wish it didn't because I'd want to go to-- I'd want them to sue me-- I am immune from any action, civil or criminal, for anything said in debate. And when you can do the kind of wickedness you do, I don't have to be nice, like our Chairman or my fellow committee members. See, I'm a black man. I have a lot of experience in the streets. I experience things and I saw people who experience things and you're not going to be treated like anything other than what I'm treating you when you come here and I'm here and I have the opportunity to say it to you. You're paid for it. Earn your money. That's all I have, Mr. Chairman.

LATHROP [02:39:07] OK.

JIM OTTO [02:39:08] I would-- can I reply?

LATHROP [02:39:11] Senator-- Senator Slama has a question for you.

JIM OTTO [02:39:12] OK.

SLAMA [02:39:14] Just one question for you: Can you name a single time in which this statute has been used for its intended purpose in the state of Nebraska in the three decades that it's been in use, one time?

JIM OTTO [02:39:26] I didn't-- I-- I'm not prepared to do it. I'd certainly be glad to do the research to see if that's occurred, but I cannot answer that right now.

SLAMA [02:39:32] So you can't say one time that this has been--

JIM OTTO [02:39:36] I--

SLAMA [02:39:36] --used the way it was intended to be used?

JIM OTTO [02:39:36] --should have-- no, I-- I cannot right now.

SLAMA [02:39:38] OK. Thank you.

LATHROP [02:39:40] Senator Morfeld.

MORFELD [02:39:43] So one of the things that was noted today was that there's three other option-- opportunities for relief or three other statutes to allow for relief from-- from the theft for the retailers. I mean why-- are any three of those not suitable? Do they not satisfy the ability to--

JIM OTTO [02:40:02] Well, the original intent-- once again, as I understand it, the big concern are these letters. And so what I've heard is that-- and these letters don't-- I mean I'm not trying to defend those letters, but that's the big concern. But the original intent was that there would be more small claims and less cluttering of the munic-- the municipal and the district and the criminal court. Now if we can't do that, maybe-- but it seems that there would be a way that we could accomplish what was originally intended. So I don't know the-- once again, I can't specifically answer your question.

MORFELD [02:40:41] I mean I don't know. I-- I've been trying to think of a way to accomplish what we're trying to accomplish any other way than what Senator Hansen has already proposed and I don't see any ways that we would be able to do that. We can't tell an out-of-state attorney that they can't send, you know, a thousand different letters to people demanding payment and allow in-state attorneys to do that, and in-state attorneys would be able to do the same thing. I mean other than having the Attorney General go after and try to somehow go after these folks that are sending these letters that aren't legally or factually correct, I'm trying to figure out a way.

JIM OTTO [02:41:23] Well, we would be glad to try to figure that way out too. I can't-- I don't have the solution for you.

MORFELD [02:41:27] Yeah. I mean my concern is, is that there's a clear pattern of using this to make legally suspect, unconstitutional demands from people. God only knows where that-- those resources for the people who actually did pay and did do their-- and didn't do their research, where that funding is going. And you've got three other avenues in order to be able to obtain relief, so I-- I guess I'm just confused as to why this is--

JIM OTTO [02:41:54] So now if-- to me, one of the questions that has to be answered, and I don't have the answer, is that-- would using those three other avenues stop the letters?

MORFELD [02:42:07] Well, the statute certainly doesn't help stop the letters themselves. I mean I suppose anybody can send a-- a letter to somebody demanding something, but in this case they actually have a statutory basis and it seems like you're defending the statutory basis.

JIM OTTO [02:42:23] Well, once again, I don't want to defend the letters. I do want to defend the original intent of the bill.

MORFELD [02:42:30] OK. Thank you.

LATHROP [02:42:32] Jim, so maybe this is the question that hasn't been asked and ought to be, which is, has it stopped the retailers from calling the cops and having people ticketed for shoplifting?

JIM OTTO [02:42:43] It doesn't, but in all practical purposes the police are so overburdened with other things that it is less than half--

LATHROP [02:42:49] Yeah, but when they--

JIM OTTO [02:42:50] --less than half of the time is-- are the police called, as far as I know.

LATHROP [02:42:53] Pardon me?

JIM OTTO [02:42:54] I say what I am told by members is less than half of the time are police called because they just--

LATHROP [02:43:03] It may have to do with the circumstances--

JIM OTTO [02:43:04] Yeah.

LATHROP [02:43:05] --like it's a very, very young child or something like that? OK. That's all the questions I have, Jim.

PANSING BROOKS [02:43:12] Senator--

CHAMBERS [02:43:12] Just with--

LATHROP [02:43:12] Oh, wait a minute. Senator Chambers.

CHAMBERS [02:43:14] --the traditional-type questioning now of the witness, Mr. Otto, do you have a copy of this bill?

JIM OTTO [02:43:20] Not in front of me.

CHAMBERS [02:43:23] I'm going to read language, and despite the way I've castigated you, I will not misread the law. You said the purpose of this was to avoid-- I'm paraphrasing so you can correct me-- litigation and clogging the courts with these kinds of matters.

JIM OTTO [02:43:41] I actually went back and read the 1987 testimony and you're correct that Senator Ashford was one of the proponents. And I am pretty much paraphrasing what he said when I say that.

CHAMBERS [02:43:52] OK. I want to read to you language from this bill, and some language is being stricken. For the record, it would be page 2, starting in line 21, and its (6), "No party shall file more than two claims within any calendar week nor more than ten claims and any calendar year in the Small Claims Court. This subsection shall not apply to actions brought pursuant to section 25-21,194," which is the one being repealed. So they even fouled up and contaminated the Small Claims Court by making it complicit in their extortion activities. Were you aware that they had gotten a provision that allowed them to use the Small Claims Court like this, in this manner, in a way that no other person would be able to do it? Were you aware of that?

JIM OTTO [02:44:58] I-- I read that and once again I would just say that the intent was that people would actually use Small Claims Court more and not go to criminal prosecution, but I guess that is not what has happened, but I'd think that we could try to remedy that, short of repealing the entire thing.

CHAMBERS [02:45:16] I just wanted to bring that to your attention because it could clog Small Claims Court, and that was not the purpose of Small Claims Court. It was not to be a collection agency for large corporations. It was not to be an arm of extortion. And that's what Senator Hansen-- and he has allowed me graciously-- he, being gracious, has allowed me to sign on to his bill to correct this that we've been talking about. And that is all that I have.

LATHROP [02:45:48] I think that's it. Thanks for coming down, Jim. Kathy, another opponent.

KATHY SIEFKEN [02:45:56] Yes.

LATHROP [02:45:57] Welcome to the Judiciary Committee. Good afternoon.

KATHY SIEFKEN [02:46:03] Good afternoon, Chairman Lathrop and members of the Judiciary Committee. My name is Kathy Siefken, K-a-t-h-y S-i-e-f-k-e-n. I am the executive director and registered lobbyist for the Nebraska Grocery Industry Association, here in opposition to LB71. The reason this law or this statute is used by retailers is because it is a very simple, clean, cheap, efficient way to recover damages when people come in and shoplift in our stores. If you look at the statute, the section that this bill would remove, 25-21,194, it very narrowly defines what can be collected. There are three things that can be collected: the actual property that is either damaged or is not replaced-- so if a-- an item is shoplifted and it is not damaged and it can be put back on the shelf, then the statute says that they cannot collect for damages of the item. It also says that the cost of maintaining the action is allowed to be recovered; in addition to that, reasonable attorney fees. So what this-- what this statute does is it allows us to very cleanly recoup the losses that our stores-- that our stores realize because someone comes in and steals something. It's really narrowly defined, so how anyone could write a letter, a demand letter that-- that demands \$500, how is that even possible? How is that legal? How can that even happen when the statute itself limits those damages to those three things? So the things that I've heard today, I'm not an attorney so I can't tell you what happens in the courtrooms and I can't tell you about the letters that have been sent out. And-- and if people are

sending out letters that demand \$500 because someone stole a candy bar, that is absolutely ridiculous. But that's not the intent of this language. So someone, somewhere is taking advantage and they are breaking the law in return. We don't support that; we never have. This-- this is a way for retailers to have the people that-- that walked into their store, stole items, it's a way for them to recover the damages from them so that the costs are not passed on to the normal consumer that obeys the law, comes in, shops our stores, and pays for those things that they need. In addition to that, I think we're talking about two different things. We're talking about people that come in and shoplift as a lark, some of them, and we're talking about people that make a career out of shoplifting. And there is a huge loss. And when-- when people come in with a shopping list to steal things that they can turn around and sell, those issues should go down through the criminal court system. The people that are coming in and stealing and they're caught for the first time, if they get a demand letter, we view this as it being a deterrent to them repeating those actions. That is the intent and it always was the intent, as far as I can see, of the original bill, the current law that we have right now. So if you have any questions, I'd be happy to answer.

LATHROP [02:50:26] Senator Chambers.

CHAMBERS [02:50:28] You don't know how all of your members conduct their businesses, do you?

KATHY SIEFKEN [02:50:33] I can tell you I spent yesterday on the phone talking to a large number of them.

CHAMBERS [02:50:39] No, here's my question. I will rephrase it. Do you know how all of your members conduct their businesses?

KATHY SIEFKEN [02:50:49] I am not in their stores every day, but I do trust that they are honest businesspeople or they wouldn't survive in a competitive world.

CHAMBERS [02:50:57] Here's the question of asking you. I'm asking you, do you know how all of your members conduct their businesses?

KATHY SIEFKEN [02:51:08] I don't know how my members conduct their businesses any more than I know how the people in the Legislature conduct theirs.

CHAMBERS [02:51:15] Well, you answered the question. You don't have to go further. I don't want to-- I-- I'm not going to deal with you like I did Mr. Otto.

KATHY SIEFKEN [02:51:20] Thank you.

CHAMBERS [02:51:21] But we haven't had the kind of relationship he and I had. Now have you heard of the principle of unintended consequences?

KATHY SIEFKEN [02:51:31] Yes.

CHAMBERS [02:51:31] Surely this is not the first time you heard about this kind of activity that is being conducted pursuant to the existence of this statute, or is it the first time you ever heard of it?

KATHY SIEFKEN [02:51:49] I have never heard of lists being sold and provided to other companies so that they could take advantage of-- of individuals any more-- we can't control crooks and thieves. I mean that's-- that's not on retailers that someone else sells a list to someone and they're nasty enough to send letters.

CHAMBERS [02:52:16] OK, well, you-- you answered the question. You said you never knew about that until today. Are you aware that in communities where people of my complexion and where I live charge more for produce, it's not as fresh, than a branch of that store in a white community would charge? Are you aware that there are price differentials? Either you are or you're not.

KATHY SIEFKEN [02:52:38] I can tell you that there are price differentials in different stores based on how far they are away from warehouses, what the local competition is. There are many factors that establish the prices.

CHAMBERS [02:52:51] If it's [INAUDIBLE]

KATHY SIEFKEN [02:52:51] So if you go out to Ord, Nebraska, the price is going to be a little bit higher than it is in Lincoln because of the competition.

CHAMBERS [02:52:57] Well, there is no competition because they'll be the only store and you buy from them or you don't have any place you can purchase and you pay what they charge. So you're not aware that there are merchants that gouge people in poor neighborhoods. You're not aware of that, are you? That's what you're telling me?

KATHY SIEFKEN [02:53:15] I don't believe that the retailers in low-income neighborhoods charge a different rate based on the neighborhood.

CHAMBERS [02:53:25] OK, well, you're just unaware of the realities, so you need to travel around and learn something and maybe you, instead of getting shook up, can learn from me. But here is the question that I'm putting to you. If this language is-- why is this language in the law that allows these merchants to bring any number of actions they want to in Small Claims Court when no other entity can do that? Why is that there for them?

KATHY SIEFKEN [02:53:59] I know that if you limit-- I'm not sure that I'm going to-- if I can-- I know that if you limit the number of cases to ten per year of shoplifting-- shoplifting cases, we get that many a day in some locations. So the-- the-- the--

CHAMBERS [02:54:21] No, that's not what I'm asking you.

KATHY SIEFKEN [02:54:21] It would be worthless.

CHAMBERS [02:54:23] Why do you think this carving out of the jurisdiction, if you want to call it that, of Small Claims Court was provided for merchants? There are other people who would like to use Small Claims Court more than the number of times allowed. Why do you think merchants are allowed an indefinite number of cases that they can bring?

KATHY SIEFKEN [02:54:50] I think they were exempted from this law simply because there are so many shoplifting cases on a regular basis in retail stores.

CHAMBERS [02:55:03] So then maybe the thing to do, because of the purpose of Small Claims Court is not to allow any shoplifting cases to be brought to the Small Claims Court at all. Now you don't have to respond to that. The questions that I wanted to ask of you, I did ask, but I do need to ask you this one. Do you meet with a group before you come and testify on a bill on behalf of the merchants? Do you all have an organization or something that takes positions on these bills and you articulate that position?

KATHY SIEFKEN [02:55:37] Yes, we do.

CHAMBERS [02:55:38] And did such a meeting occur on this bill?

KATHY SIEFKEN [02:55:42] A meeting did not occur on this bill. I spent yesterday on the phone talking to various retailers.

CHAMBERS [02:55:49] How many, if you remember, did you talk to? And I'm not going to ask you who they were.

KATHY SIEFKEN [02:55:54] I can tell you that the retailers that I talked to represented probably 40 to 50 stores.

CHAMBERS [02:55:59] And they all-- were they aware of this bill?

KATHY SIEFKEN [02:56:05] All but one, yes.

CHAMBERS [02:56:05] You have held your position for how long?

KATHY SIEFKEN [02:56:13] Twenty-six years.

CHAMBERS [02:56:14] How long?

KATHY SIEFKEN [02:56:16] Twenty-six years.

CHAMBERS [02:56:17] You must have started when you were three years old, huh?

KATHY SIEFKEN [02:56:19] Oh, thank you.

CHAMBERS [02:56:20] Well, when you have been connected with retail merchants that long, you know what percentage of shoplifting is carried out by employees, don't you.

KATHY SIEFKEN [02:56:31] There is internal theft, true.

CHAMBERS [02:56:35] What-- what-- what would you say the percentage is?

KATHY SIEFKEN [02:56:37] Oh, I don't know.

CHAMBERS [02:56:38] It's high, though, isn't it?

KATHY SIEFKEN [02:56:40] I have no idea. I-- I really-- I'd have to-- I'd have to do the research.

CHAMBERS [02:56:46] You mean the merchants--

KATHY SIEFKEN [02:56:46] But I'm sure you might know.

CHAMBERS [02:56:47] The merchants don't keep track of how much stealing goes on from them by their employees--

KATHY SIEFKEN [02:56:53] Yes, they do.

CHAMBERS [02:56:53] --and have those figures?

KATHY SIEFKEN [02:56:54] Yes, they do, but I did not ask them that question.

CHAMBERS [02:56:57] I'm going to tell you and you cannot contradict it because you don't know.

KATHY SIEFKEN [02:57:01] That's true.

CHAMBERS [02:57:03] The percentage is very high. And there are times that they've had programs on television talking about how much is lost from retail establishments through theft

by their employees and that they have security people naturally who watch customers but who watch their employees, there's that much theft.

KATHY SIEFKEN [02:57:29] That's true.

CHAMBERS [02:57:30] OK. So when I hear the kind of things that you say, I know you have a job and you're doing it. The kind of things Mr. Otto said, he had a job and he's doing it. I have a job that I intend to do, and I have been opposed to this piece of legislation, this-- this activity from the beginning. And I'm going to see if I was in the Legislature at the time it passed.

KATHY SIEFKEN [02:57:57] Yes, you were.

CHAMBERS [02:57:58] I was?

KATHY SIEFKEN [02:57:59] Yes, you were.

CHAMBERS [02:57:59] OK. Do you remember what my position was on it?

KATHY SIEFKEN [02:58:03] Identical to the position you have today, I believe.

CHAMBERS [02:58:07] You mean I didn't change at all? No, I'm-- I-- all I wanted from you really was information and you gave it, and so I don't have any more questions. Thank you.

KATHY SIEFKEN [02:58:15] Thank you.

LATHROP [02:58:18] Any other questions? Senator Morfeld.

MORFELD [02:58:22] Thank you for coming in today. So I guess we know that this hasn't been working for 30 years. I guess I'm still trying to-- I'm still struggling with your defense of the statute, particularly when, again, we have several other remedies for it. I mean, is it simply just defending it because it's another tool for the retailers but it apparently hasn't been used properly for that period of time?

KATHY SIEFKEN [02:58:48] I think the retailers are using it as it was intended to be used, but I think there are some people that are abusing it.

MORFELD [02:58:58] So do you have any instances where it has been used in conformity with the statute and constitutionally?

KATHY SIEFKEN [02:59:04] That has-- that it-- I'm sorry.

MORFELD [02:59:05] That it has been used in conformity with the statute and the constitution. Do you have any instances, any retailers that you can point to?

KATHY SIEFKEN [02:59:14] That it's been used as it was intended?

MORFELD [02:59:18] And in conformity with constitution, yes.

KATHY SIEFKEN [02:59:21] OK, so some of the instances that were brought up in my phone con-- conversations yesterday, I know that they-- they have set parameters in that they don't charge anyone that's under the age of 14 or over the age of 69. I know that if someone comes in that is, say, 14 or 15 years of age, in-- I have been told that in many instances they will call the police, or sometimes not, but the charges are-- are either dropped or they are never charged.

MORFELD [03:00:00] In the use of this statute so they'd be--

KATHY SIEFKEN [03:00:02] In the use of this statute, and--

MORFELD [03:00:03] Can you put me in touch with some of those retailers so that I can talk to them?

KATHY SIEFKEN [03:00:07] Yes, I can.

MORFELD [03:00:08] OK, because I-- I would just like to see some examples because in the research that I've seen from Professor Sullivan, they haven't had one case where this has been used in conformity with the statute and the constitution, and they get a lot of different cases that come in there. I used to be in the civil clinic.

KATHY SIEFKEN [03:00:24] That's because they would never see them if it's used the way it's supposed to be used. There would never be charges. It would never go to court. A demand letter is sent.

MORFELD [03:00:33] It's not charges though. It's a letter. It's a civil letter.

KATHY SIEFKEN [03:00:35] The civil letter isn't even sent if there is restitution. There are-- there are some cases, according to my members, that there is shoplifting, the person is caught, there is proof that the shoplifting took place because they've got cameras, and the-- the restitution takes place immediately. In other words, the item is put back on the shelf so there's no damage. I think the statute worked because it says for damages or loss of product and those instances do occur. Is that what you're asking me?

MORFELD [03:01:33] No, it's not, but that's OK. It's almost 5:00. Maybe Senator Slama has--

SLAMA [03:01:37] Oh, yeah. I'll ask a-- yeah.

LATHROP [03:01:39] Senator Slama.

SLAMA [03:01:41] So my follow-up question to Senator Morfeld is. your argument is-- is that the issues have been-- the statue has performed as intended because the issues have been resolved, there have been no charges filed, yet this statute creates a cause of civic action-- civil, sorry, civil-- first-year law student. So correct me if I'm wrong, but if that civil action were to take place as it is listed under the statute, it would be listed and come up in some form of record that these fine folks from the civil clinic could tell us, right?

KATHY SIEFKEN [03:02:22] I don't know the answer to that.

SLAMA [03:02:23] OK, thank you.

LATHROP [03:02:29] I don't see any other questions. Thanks for coming down today. We appreciate your input. Is anyone else here to testify in opposition to the bill? Anyone here in a neutral capacity? I think we have some letters. Let me enter those. Looks like the letter in support is from Spike Eickholt from the ACLU. And Senator Hansen to close.

M. HANSEN [03:02:57] Thank you, Chairman Lathrop and members of the committee. I appreciate the good questionings and I think throughout this hearing we've had a really good opportunity to kind of take your perspectives into the focus of-- to the statute and how the statute actually works in practice. A couple of things kind of related to the letters. I think that that's kind of-- we had some debates before I introduced this legislation-- were we going to change the statute? Did we want to repeal the statute? What did we want to do? And fundamentally the issue for me, why I chose to come with straight repeal, is it's never actually been a case filed that-- that I've seen, that I've heard of, that we've researched, that we've looked for; it's never actually made it to court. It's always just been some sort of demand outside of court. We've provided you evidence with-- with letters that have been sent to citizens of Nebraska that aren't based in the law, that aren't based in the statute, that are, as far as we could tell, an arbitrary number that either the-- the law firm collecting or the retailer asks for. And additionally I-- I meant to highlight this earlier, and actually Ms. Siefken referenced in her testimony, occasionally this issue comes up outside the letters, as well, occasionally comes up immediately with store management and loss prevention in-- in the store and they will take the item back and occasionally ask for a-- the civil penalty or civil demand there in the store, which creates kind of a confusing situation where you have somebody who has the power, and often does, call and report you to the police for theft and I-- I will say in many, many instances the notion that police and our county attorneys don't-- don't take shoplifting cases, they are called in many, many instances and-- and is a common-- and a common thing. But you'll be in a back room. There will be somebody who will say, hey, you know, under the statute we want you to pay us, and you think you're kind of resolving, you're paying for the item, you're all-- you're all good. In many situations you'll pay for the item, you'll leave the item in the store as well, and then the next thing you know is you're getting a criminal summons following it up based on-- based on the situation there. So that's a-- that's another layer from that. I thank the committee

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for their time and their attention to this issue and be happy to work more with it with you. Thank you.

LATHROP [03:05:10] Great. I think that will close our hearing on LB71. That's it for today. Thank you.