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Floor Debate
May 26, 2009

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SENATOR STUTHMAN PRESIDING []

SENATOR STUTHMAN: Good morning, ladies and gentlemen. Welcome to the George W. Norris Legislative Chamber for the eighty-fourth day of the One Hundred First Legislature, First Session. Our chaplain for today is Senator Wallman. Please rise. []

SENATOR WALLMAN: (Prayer offered.) []

SENATOR STUTHMAN: Thank you, Senator Wallman. I call to order the eighty-fourth day of the One Hundred First Legislature, First Session. Senators, please record your presence. []

SPEAKER FLOOD PRESIDING []

SPEAKER FLOOD: Mr. Clerk, please record. []

ASSISTANT CLERK: There's a quorum present, Mr. President. []

SPEAKER FLOOD: Thank you, Mr. Clerk. Are there any corrections for the Journal? []

ASSISTANT CLERK: I have no corrections this morning. []

SPEAKER FLOOD: Are there any messages, reports, or announcements? []

ASSISTANT CLERK: Mr. President, there are. A series of letters from the Governor indicating bills that have been signed by him: LB160, LB603, LB603A, LB187, LB195, LB224, LB232, LB263, LB342, LB342A, LB402, LB440, LB463, LB463A, LB476, LB476A, LB494, LB532, LB568. Those bills have been signed and delivered to the Secretary of State. Your Committee on Enrollment and Review reports LB285 as correctly engrossed. And a motion from Senator Friend relative to LB658. That's all I have, Mr. President. (Legislative Journal pages 1701-1703.) [LB160 LB603 LB603A LB187 LB195 LB224 LB232 LB263 LB342 LB342A LB402 LB440 LB463 LB463A

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LB476 LB476A LB494 LB532 LB568 LB285 LB658]

SPEAKER FLOOD: Thank you, Mr. Clerk. We now proceed to the first item on the agenda. Senators, please find your seats. We now move to Final Reading. Members, please find your seats. Before we begin Final Reading, one scheduling note. It is my intention to pass over LB561 today. Again, we will pass over LB561 on Final Reading. Please make a note of it. Mr. Clerk, we proceed this morning, we start with LB16. [LB16]

ASSISTANT CLERK: (Read LB16 on Final Reading.) [LB16]

PRESIDENT SHEEHY PRESIDING []

PRESIDENT SHEEHY: All provisions of law relative to procedure having been complied with, the question is, shall LB16 pass? All those in favor vote yea; opposed, nay. Please record, Mr. Clerk. [LB16]

ASSISTANT CLERK: (Record vote read, Legislative Journal page 1704.) Vote is 40 ayes, 0 nays, 2 present and not voting, 7 excused and not voting, Mr. President. [LB16]

PRESIDENT SHEEHY: LB16 passes. We will now proceed to LB218. [LB16 LB218]

ASSISTANT CLERK: (Read LB218 on Final Reading.) [LB218]

PRESIDENT SHEEHY: All provisions of law relative to procedure having been complied with, the question is, shall LB218 pass? All those in favor vote yea; opposed, nay. Please record, Mr. Clerk. [LB218]

ASSISTANT CLERK: (Record vote read, Legislative Journal pages 1704-1705.) Vote is 37 ayes, 1 nay, 5 present and not voting, 6 excused and not voting, Mr. President. [LB218]

PRESIDENT SHEEHY: LB218 passes. We will now proceed to LB241. Mr. Clerk, the first vote is to dispense with the at-large reading. All those in favor vote yea; opposed, nay. Please record, Mr. Clerk. [LB218 LB241]

ASSISTANT CLERK: 38 ayes, 0 nays to dispense with the at-large reading. [LB241]

PRESIDENT SHEEHY: The at-large reading is dispensed with. Mr. Clerk, please read the title. [LB241]

ASSISTANT CLERK: (Read title of LB241.) [LB241]

PRESIDENT SHEEHY: All provisions of law relative to procedure having been complied

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with, the question is, shall LB241 pass? All those in favor vote yea; opposed, nay. Please record, Mr. Clerk. [LB241]

ASSISTANT CLERK: (Record vote read, Legislative Journal pages 1705-1706.) Vote is 41 ayes, 0 nays, 2 present and not voting, 6 excused and not voting, Mr. President. [LB241]

PRESIDENT SHEEHY: LB241 passes. The cookies that are being passed out to you this morning at your desks are from Senator Pankonin and his wife Lori. Mr. Clerk, we will now proceed to LB288. Mr. Clerk, the first vote is to dispense with the at-large reading. All those in favor vote yea; opposed, nay. Please record, Mr. Clerk. [LB241 LB288]

ASSISTANT CLERK: 37 ayes, 0 nays to dispense with the at-large reading, Mr. President. [LB288]

PRESIDENT SHEEHY: The at-large reading is dispensed with. Mr. Clerk, please read the title. [LB288]

ASSISTANT CLERK: (Read title of LB288.) [LB288]

PRESIDENT SHEEHY: All provisions of law relative to procedure having been complied with, the question is, shall LB288 pass with the emergency clause attached? All those in favor vote yea; opposed, nay. Please record, Mr. Clerk. [LB288]

ASSISTANT CLERK: (Record vote read, Legislative Journal page 1707.) Vote is 44 ayes, 0 nays, 5 excused and not voting. [LB288]

PRESIDENT SHEEHY: LB288 passes with the emergency clause attached. We will now proceed to LB288A. [LB288 LB288A]

ASSISTANT CLERK: (Read LB288A on Final Reading.) [LB288A]

PRESIDENT SHEEHY: All provisions of law relative to procedure having been complied with, the question is, shall LB288A pass with the emergency clause attached? All those in favor vote yea; opposed, nay. Please record, Mr. Clerk. [LB288A]

ASSISTANT CLERK: (Record vote read, Legislative Journal page 1708.) Vote is 44 ayes, 0 nays, 5 excused and not voting, Mr. President. [LB288A]

PRESIDENT SHEEHY: LB288A passes with the emergency clause attached. While the Legislature is in session and capable of transacting business, I propose to sign and do hereby sign LB16, LB218, LB241, LB288, and LB288A, also LR169 and LR170.

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(Visitors introduced.) Mr. Clerk, do you have items for the record? [LB16 LB218 LB241 LB288 LB288A LR169 LR170]

CLERK: I have one, Mr. President. Enrollment and Review reports LB658 to Select File with Enrollment and Review amendments attached. That's all that I have. (Legislative Journal pages 1708-1709.) [LB658]

PRESIDENT SHEEHY: Thank you, Mr. Clerk. We will now move to the first item under Select File, 2009 senator priority bill, LB36. [LB36]

CLERK: Mr. President, LB36. Senator Nordquist, E&R amendments first of all. (ER8134, Legislative Journal page 1652.) [LB36]

PRESIDENT SHEEHY: Senator Nordquist, you're recognized for a motion. [LB36]

SENATOR NORDQUIST: Mr. President, I move the E&R amendments to LB36. [LB36]

PRESIDENT SHEEHY: You have heard the motion on the adoption of E&R amendments. All those in favor say aye. Opposed, nay. They are adopted. [LB36]

CLERK: At this time, Mr. President, I have no amendments pending to the bill. [LB36]

PRESIDENT SHEEHY: Senator Nantkes, you're recognized. [LB36]

SENATOR NANTKES: Thank you, Mr. President. Good morning, colleagues. When we left this issue on General File, I concluded my comments at that round of debate, noting that there was a good deal of information that had been brought out in that area of debate, but yet we still had many pertinent issues to discuss on Select File in regards to some legal and technical concerns regarding LB36, so I'm going to continue that discussion this morning. I want to talk about the delegation of the execution protocols as envisioned under LB36 and as amended to a certain extent through the committee amendment. I'll draw your attention to page 10, lines 14 through 24, where the committee amendment strikes language exempting the protocols from...specifically from the Administrative Procedure Act. But, colleagues, I want to also draw your attention to the fact that nowhere in LB36, nowhere in the committee amendment does in fact...do in fact we require the execution protocols to be subject to the Administrative Procedure Act. Instead, it simply delegates the protocols regarding substances and execution to the department director of Corrections, Correctional Services, to create, modify, maintain, and maintain a written execution protocol. This is troubling because, according to the Fifth Amendment and the Fourteenth Amendment to the constitution requiring certain procedures and protocols in relation to the taking, particularly the taking of life, this provokes questions in regards to whether or not the delegation of powers is significant and done so without clear parameters of transparency or

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accountability. In fact, LB36 gives no specific consideration to the actual method by which we carry out this horrific practice. LB36 is vague in regards to the protocols and, as said, we in the Nebraska Legislature in fact are simply punting our authority, our legislative authority, we're abdicating our legislative authority, our role in this regard to unelected prison bureaucrats who are lacking in expertise, knowledge, and training to accomplish these tasks effectively. This should trigger a judicial or a litigation-related inquiry into, number one, whether or not this is an appropriate delegation of a legislative authority, which I believe it is not, does not provide the appropriate set of parameters to allow an administrative agency to conduct this kind of maintenance and creation of protocols; number two, the proper level of deference should also be subject to inquiry under the administrative law or a criminal law, considering we don't know which is applicable under LB36 or its amendments, and I'd challenge anybody to show me in the bill or in the committee amendment itself where it says the protocols will be subject to the APA, because it simply does not exist. Thus, number two, the challenge should be surrounding the proper level of deference under administrative law or criminal law which should be necessary to sustain these actions related to protocol. Thus, judicial intervention will be necessary to address the political and legal failures of LB36. These failures compound and increase the risk that condemned inmates will die an excruciating death. That is why the administrative issues are critically important, colleagues, because they're relevant under both Mata and Baze. Justices, in the concurring and majority opinions from Baze to Mata, told us that at the very least we should take the time to ensure at a minimum a transparent procedure being carried out by competent personnel. That's what the court, the U.S. Supreme Court and the Nebraska... [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR NANTKES: ...State Supreme Court, is telling us as a Nebraska Legislature we must do in order to meet constitutional muster. So even if you're an avid proponent of capital punishment, you should be concerned with these issues, because they're lacking in LB36. Let's talk about deference under the APA, even though again as I noted it's not required to be used in LB36. Should the court apply any deference in reviewing these protocols? Should they utilize a de novo standard or, number two, should they use a substantial evidence standard which says the court will only uphold agency decisions that are reasonable? Where in our record have we proven that these protocols are reasonable? Number three, should the court instead use administrative protocols themselves to try and overcome...could the court utilize these administrative protocols to try and overcome an abuse of discretion or an arbitrary and capricious challenge? [LB36]

PRESIDENT SHEEHY: Time, Senator. Thank you, Senator Nantkes. Senator Council, followed by Senator Nantkes. Senator Council, you're recognized. [LB36]

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SENATOR COUNCIL: Yes, thank you, Mr. President. I certainly appreciate Senator Nantkes' comments because, as we both stated when this matter was being discussed on General File, there are a number of procedural problems with LB36, regardless of your position on the death penalty. And let me make it perfectly clear, I believe that the death penalty should be repealed in this state. And I find it interesting that the justification that is provided for the advancement of LB36 is that we have on our books a provision for death penalty as a punishment and we don't have a means to carry it out. I mean the interesting fact related to that assertion is that we've had a death penalty provision on our books since 1973 or '75, depending upon your perspective, and if in reality we have never had a way to carry it out because the system is inherently flawed and that failure and that flaw has been repeatedly, repeatedly demonstrated through the cases that have been presented to our highest court, the Nebraska Supreme Court, with the many reversals of death penalty sentences that have been rendered by our Supreme Court. And I think that that is a very important fact to note. This bill is being advanced because it's been modeled on a Kentucky statute that withstood the scrutiny of the United States Supreme Court. This statute has not, and in my opinion will not, withstand the scrutiny of the Nebraska Supreme Court with regard to constitutionality and there are a number of reasons that that will not occur, that this bill...that this statute will not be found to be constitutional; relates to a number of the issues that my colleague has pointed out. But I'm troubled and I'm deeply concerned that this body is being lulled into some sense of complacency or comfort because the U.S. Supreme Court upheld the Kentucky protocols. I again urge every member of this body to read the Baze decision. The Baze decision, the U.S. Supreme Court relied extensively on the record that was created at the state court level, at the state appeals court level, and those courts went into great detail in examining each and every aspect of the Kentucky protocol. Here we don't even know what the protocol is. Senator Nantkes raised a point that if it's our intent that the protocols be developed in accordance with the Administrative Procedures Act, why don't we state that in the statute so that it is clear? Also, if you look at the statute, the statute indicates that the director of Corrections can change the protocol at any time he or she believes that is necessary. I don't know the extent to which any rules that are put in place by the director of the Department of Corrections, how quickly they could be implemented if it's not expressly made clear that no changes in this procedure, this protocol, can be established without first going through the Administrative Procedures Act. [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR COUNCIL: And we need to deal with the false hope, the false representation that this bill represents. Ladies and gentlemen, if the death penalty was an efficient, effective means of punishing individuals in this state who commit heinous crimes, I first submit to you that we wouldn't have 222 individuals currently incarcerated for life, without possibility of parole. We believe that to be an alternative, a reasonable alternative to death and we also believe inherent in that decision is that that provides

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safety to the residents of the state of Nebraska. We also ignore the fact that, in all the time that Nebraska has had a death penalty, 68 percent of those cases were found to have reversible error, which meant... [LB36]

PRESIDENT SHEEHY: Time, Senator. Thank you, Senator Council. Senator Nantkes, followed by Senator White. Senator Nantkes, you're recognized. [LB36]

SENATOR NANTKES: Thank you, Mr. President. Thank you, Senator Council, for your thoughtful comments in regards to this issue as well. Colleagues, I want to talk specifically again where the Mata case, where the Nebraska Supreme Court tells us these issues surrounding protocols are important and the need to be able to utilize an effective framework of the protocols as developed in order to create a factual record, which the Nebraska Supreme Court is requiring under Mata in order to proceed with any sort of future executions under any method and which is not spelled out in any way, shape or form, contemplated or addressed under LB36 or its amendments. Page 31 through 33 of the Mata decision, the Nebraska Supreme Court tells us we must demonstrate...the state must demonstrate the need or, excuse me, I'll just quote right from the case. That's better than my own notes on it, which are difficult to read at this point in time. We need to have a factual record, according to the Nebraska Supreme Court in the Mata decision, and it must be proffered by the state and by the defense, and LB36 does not provide a clear legal or evidentiary framework for such. The standard of review that the Nebraska Supreme Court utilized in Mata was according to an old Eighth Amendment case, Trop v. Dulles, which actually was not a capital punishment case but a different punishment under review in that case, and it looks at the evolving standards of decency and that's how we determine whether or not a method of execution challenge should be decided. And that standard of review lays out a test and it lays out factors in order to make that determination. The standards require that the case be based in light of modern scientific knowledge about the imposition of cruelty or pain utilized in the execution procedure itself and that, colleagues, is why we're going to have to spend some time this morning on very unpleasant topics in regards to botched executions in other states following similar protocols, because we know, we know from practice of other states that there is a substantial risk of inflicting excruciating pain upon the condemned. And you don't have to have particular sympathy for any individual or group that sits on death row, but it matters legally. It matters under Eighth Amendment jurisprudence. If the state has knowledge, if we can see a foreseeable risk in the imposition of excruciating pain in regards to our execution protocols and procedures, then we are in constitutional violation, then the state will be prevented from carrying out any death sentences through lethal injection as envisioned under LB36 or any other method. We have to be able to provide a factual record proving that we have taken steps to move beyond the risk of inflicting excruciating pain as has happened in other states utilizing similar protocols. As such, colleagues, as I noted on the General File debate, that is why the Baze decision has not stopped ongoing litigation into lethal injection procedure and protocols in other states that have it. That is

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not a magic wand and we should take the time to figure out how to appropriately address that. But there's a refusal and, thus, a political failure. [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR NANTKES: Under Mata, the state must prove, through LB36 and corresponding protocols or procedures, that we can meet both parts of a two-part test: one, that substantial risk that prisoner will suffer unnecessary and wanton pain will be eliminated. Colleagues, tell me where in the record, where in the language has this issue been addressed. How can we meet that standard? Number two, that this method of execution complies with the evolving standards of decency that mark a civilized society. Tell me where in the record, where in LB36 have we provided information to help the state meet its burden of proof in regards to overcoming both parts of that two-pronged test, as set forth in Mata. We have not. [LB36]

PRESIDENT SHEEHY: Time, Senator. Thank you, Senator Nantkes. We have Senator White, followed by Senator Council and Senator Nantkes. Senator White, you're recognized. [LB36]

SENATOR WHITE: Thank you, Mr. President. I yield my time to Senator Nantkes. [LB36]

PRESIDENT SHEEHY: Senator Nantkes, you're yielded 4 minutes 55 seconds. [LB36]

SENATOR NANTKES: Thank you, Senator White, and thank you, Mr. President. Again to go through the test, the Nebraska Supreme Court says, state, state of Nebraska, before you're able to carry out any legally sanctioned, appropriately provided for sentence of death, this is right on page 48, you must prove, you must meet the burden that, one, the execution method presents a substantial risk that a prisoner will suffer unnecessarily and wanton pain in an execution. You have to overcome that, to prove that the method will not inflict substantial risk that a prisoner will suffer unnecessary and wanton pain in execution. That's nowhere in the committee record, which I've read; it's nowhere in the record on this bill in General File; it's nowhere in the language of the bill itself. Second, state, you must also prove that the new method that you come forward with doesn't violate evolving standards of decency that mark a mature society--again, nowhere in the record, not in the committee hearing, not in that transcript, not on the General File debate, nowhere in the bill itself. And then finally, you must prove, state--this is key, colleagues, number three--that your method that you come forward with minimizes physical violence and mutilation of the prisoner's body. That is the established, relevant, legal standard that we will then turn to our standard of review towards. That is the test. It is not met in regards to the language or the record surrounding LB36 and that's why we're going to have to talk about very unpleasant things in relation to how other states following similar protocols, using unqualified,

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untrained personnel, have in fact created systems that does not minimize but, rather, increases the physical violence and mutilation of the prisoner's body and increases rather than minimizes the substantial risk that a prisoner will suffer unnecessary and wanton pain in execution. Again, to be clear, this is not out of pure sympathy towards those accused who will suffer this horrific practice, even though, to be clear, they do have legal rights, they do have human rights. And no matter how horrific their crimes are, that is a fact which we must deal with, and LB36 does not. Nonetheless, under the Nebraska Supreme Court's test put forth finding that electrocution was unconstitutional and saying how the state must proceed in order to conduct other executions, we have no record to help meet that three-pronged test. And that's why we're going to have to talk about some unpleasant things in regards to the real and serious and substantial risks that exist and that have befallen other states and befallen the condemned in other states when they utilize bills like LB36 that delegate our legislative prerogative to unelected, unaccountable prison bureaucrats with no training, no medical training, no understanding of how to carry out the process. And so let's talk about some of those. March 13, 1985, as reported by The New York Times, Stephen Peter Morin is subject to lethal injection in Texas. Because of the inmate's history of drug abuse,... [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR NANTKES: ...the execution technicians were forced to probe both of the inmate's arms and one of his legs with needles for over 45 minutes before they could find a suitable vein. What does that do in terms of physical violence and mutilation of the prisoner's body, as the Nebraska Supreme Court tells us to be aware of? Texas, Randy Wools, lethal injection, a drug addict: Wools helped the execution technicians find a usable vein for execution in 1986, as reported by the L.A. Times. June 24, 1987, also in Texas, Elliot Rod Johnson, lethal injection: Because of collapsed veins, it took nearly an hour to complete the execution, reported by The New York Times, June 25, 1987. December 13, 1988, also from Texas, Raymond Landry, lethal injection, pronounced dead over 40 minutes after being strapped to the execution gurney and 24 minutes after... [LB36]

PRESIDENT SHEEHY: Time, Senator. [LB36]

SENATOR NANTKES: Thank you, Mr. President. [LB36]

PRESIDENT SHEEHY: Thank you, Senator Nantkes. (Visitors introduced.) Continuing floor discussion on LB36, members requesting to speak: Senator Council, followed by Senator Nantkes, Senator Howard, and Senator Wallman. Senator Council, you're recognized. [LB36]

SENATOR COUNCIL: Yes, thank you, Mr. President. You know, I know that there are some in this body and some who may be viewing this debate and saying that the efforts

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of senators like myself and Senator Nantkes are in vain because this body has already predetermined that lethal injection is going to be the method of executing individuals in the state of Nebraska. Well, I don't accept that proposition and it is my responsibility, I believe, as a member of this body, to do whatever I can to make sure that this body understands the gravity of the decisions it makes, particularly in regard to the death penalty. And again, it is amazing to me that we ignore the data that comes from this state. I can understand us ignoring data from other states or ignoring studies performed by people from outside this state but not ignoring the data in this state. Our history, our track record with the death penalty is that seven out of every ten who have been sentenced to death in this state, their sentences were reversed because error was found. And one of the most compelling reasons for eliminating the death penalty is the risk of killing an innocent person. We all know the old adage that it's better to release 100 guilty people than to execute 1 innocent person, but we're throwing that out the window. We're throwing the data out of the window that shows that in seven out of every ten cases something was done wrong, despite this body's repeated efforts. If you go back and look at the legislative history surrounding every death penalty debate that this body has ever undertaken, it's a change, it's a change, it's a change, it's a change, trying to improve a system that cannot be improved, ladies and gentlemen. I don't know how many times I have to tell you it's inherently flawed. But we continue to do that. We even had a special session and it relates to the incident that Senator Flood related, and everyone understands that was a heinous act that was committed during that bank robbery. And here we are again. We tried to get lethal injection then and were unsuccessful. We're trying to get lethal injection now. We should be equally unsuccessful. And if you look at the bill, and I've talked about false hopes and this bill is just...we want to let people know that...or think that something is really going to change under this bill that didn't occur under every other piece of legislation that has been enacted with regard to the death penalty. Folks, it will not. I think it's laughable that we go to great lengths to say that every time after a review, the date of execution shall be set no later than 60 days following the issuance of the warrant. Go back into every death sentence that's been issued in this state, and you know and I know and the citizens of the state of Nebraska ought to know that this is mere words; that individuals have the extensive... [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR COUNCIL: ...appeal rights that they have, ladies and gentlemen, because we're not talking about just incarcerating people for the rest of their lives, we're talking about taking their life, and our constitution mandates that these individuals be given every conceivable constitutional guarantee. When we last discussed, I related to you that an individual had just been retried and released, a gentleman who was on death row, supposedly with all of the guarantees that purportedly exist under Nebraska statute. But they were about to convict and sentence and execute an innocent person. We have it right here in our state. And when we talk about deterrent, I'm going to tell

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you again, the only thing that the death penalty is used for in this state is to extract confessions from innocent people and we have example... [LB36]

PRESIDENT SHEEHY: Time, Senator. [LB36]

SENATOR COUNCIL: ...after example. [LB36]

PRESIDENT SHEEHY: Thank you, Senator Council. Senator Nantkes. This is your third time. [LB36]

SENATOR NANTKES: Thank you, Mr. President. Colleagues, we're going to have a continuation of the discussion and reading into the record of the substantial risk that exists under LB36 in regards to inflicting unnecessary suffering and wanton pain in regards to the execution, and also an increased risk of physical violence and mutilation of the prisoner's body because...not because I enjoy getting up in the morning and reading through these things and talking about them in a public matter, but because as this march to death continues it's important that we build an appropriate record. March...May 24, 1989, also in Texas, Stephen McCoy, subject to lethal injection, has a violent physical reaction to the drugs, heaving chest, gasping, choking back, arching off gurney, etcetera. One of the witnesses, male, mind you, fainted, crashing into and knocking over another witness. Houston attorney, Karen Zellars, who represented McCoy and witnessed the execution, thought the fainting would catalyze a chain reaction. The Attorney General admitted the inmate seemed to have a stronger reaction, adding the drugs might have been administered in a heavier dose or more rapidly, "Witness to Execution," Houston Chronicle, May 27, 1989. September 12, 1990, Illinois, Charles Walker, lethal injection: Because of the equipment failure and human error, Mr. Walker suffered excruciating pain during his execution, according to Gary Sutterfield, an engineer from the Missouri State Prison who has been retained by the state of Illinois to assist with the execution, an unelected, independent contractor assisting in the execution, not prohibited by LB36, mind you. The same thing could happen in Nebraska. A kink in the plastic tubing going into Mr. Walker's arm stopped the deadly chemicals from reaching Mr. Walker. In addition, the intravenous needle was inserted pointing at Walker's fingers instead of his heart, thus, prolonging the execution unnecessarily, United Press International, November 8, 1992. January 24, 1992, in Arkansas, Rickey Ray Rector, lethal injection: It took medical staff more than 50 minutes, almost an hour, colleagues, to find a suitable vein in Rector's arms. Be clear, there is nothing humane about this practice you are ready to authorize and it does not meet legal muster and constitutional muster in regards to Mata, where the Nebraska Supreme Court tells us we cannot put forward a method that presents a substantial risk that a prisoner will suffer unnecessarily in wanton pain in execution or that minimizes...or that does not minimize physical violence and mutilation of the prisoner's body. Witnesses were kept behind a drawn curtain, not permitted to view the scene. They reported hearing Rector's eight loud moans throughout the process. During the

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ordeal, Rector, who suffered from serious brain damage, helped the medical personnel find a vein. The administrator of the state's Department of Corrections' medical program said, paraphrased by a newspaper reporter, the moans did come as a team of two medical people that had grown to five worked on both sides of his body to find a vein. How can an execution team grow from two to five? That same thing can happen under the Nebraska law that you're ready to pass here. It has some limits in who's allowed to be in the room, but it does not speak clearly as to what their qualifications and training are. It does not speak clearly to exactly how many can be available. It does not speak clearly to what happens if a failure of the protocol occurs and they have to be rethought and reacted... [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR NANTKES: ...in a moment's notice. A prison guard, a security personnel sitting there might jump in and start conducting the execution. That's allowed under LB36. Doesn't that cause pause? Doesn't that cause reason to think about how we're moving forward here? Rickey Ray Rector's story was reported in the Richmond Times-Dispatch, October 19, 1990. March 10, 1992, in Oklahoma, Robyn Lee Parks, subject to lethal injection: Parks had a violent reaction to the drugs utilized in lethal injection. Two minutes after the drugs were dispensed, his muscles in his jaw, neck, and abdomen began to spasm for 45 seconds. Parks continued to gasp and violently gag until death came 11 minutes after the drugs were first administered. The Tulsa World reporter, Wayne Greene, wrote: The execution looked painful, ugly, and scary. It was overwhelming, stunning, disturbing intrusion. [LB36]

PRESIDENT SHEEHY: Time, Senator. Thank you, Senator Nantkes. Senator Howard, you're recognized. [LB36]

SENATOR HOWARD: Thank you, Mr. President, members of the body. I will give my time to Senator Nantkes so she can finish what she was saying. [LB36]

PRESIDENT SHEEHY: Senator Nantkes, you're yielded 4 minutes 55 seconds. [LB36]

SENATOR NANTKES: Thank you, Mr. President, and thank you, Senator Howard. Mind you, this is reports from a seasoned veteran journalist, colleagues, who was reacting to this execution, this lethal injection execution in Oklahoma: It was an overwhelming, stunning, disturbing, an intrusion into a moment so personal that reporters, taught for years that intrusion is their business, had trouble looking each other in the eye after it as over, Tulsa World news, March 11, 1992. April 23, 1992, in Texas, Billy Wayne White, lethal injection: White was pronounced dead 47 minutes after being strapped to the gurney. The delay was caused by difficulty in finding a vein. White had a long history of heroin abuse, as do many on death row. During the execution, White attempted to assist the authorities in finding a suitable vein, New York Times, April 24, 1992. May 7,

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1992, in Texas, Justin Lee May, subject to lethal injection: May had an unusually violent reaction to the lethal drugs, which, mind you, colleagues, the substance or substances that will be utilized in this protocol in carrying out executions is nowhere identified or mentioned in this legislation. We completely leave that decision to an unelected, unaccountable agency bureaucrat to determine how we carry out our most solemn duty. According to one reporter at Justin Lee May's execution, May gasped, coughed, and reared his head against the leather restraints, coughing once again before his body froze. An AP reporter, Michael Graczyk, wrote: Compared to other executions in Texas, May's reaction was more violent. He went into a coughing spasm, groaned and gasped, lifted his head from the death chamber gurney, and would have arched his back if he had not been belted down. After he stopped breathing, his eyes and mouth remained wide open, in the Denison, Texas, Herald, May 8, 1992. May 10, 1994, in Illinois, John Wayne Gacy, lethal injection: After the execution began, the lethal chemicals unexpectedly solidified, clogging the IV tube that led to Gacy's arm and prohibiting any further passage. Blinds covering the window, through which witnesses observed the execution, were drawn. We don't even know what viewpoint the execution witnesses, whether they be media, clergy, medical or otherwise, will have. We don't know what view they will be afforded to adequately ensure that we are not creating unnecessary and substantial risk of physical violence and mutilation of the prisoner's body, but that's okay. It's yucky. It's disgusting. We don't want to deal with those kinds of details. LB36 provokes this discussion. We must deal with these details. Continuing: The blinds covering the window, through which the witness observed the execution, were drawn and the execution team replaced the clogged tube with a new one. Ten minutes later, the blinds were then reopened. Who knows what happened in that ten minutes the witnesses weren't allowed to see. The execution then resumed. It took 18 minutes to complete. Anesthesiologists blamed the problem on inexperience of prison officials who were conducting the execution, saying the proper procedures taught in IV 101 would have prevented the error, but we don't even take the time or the decency to ensure that those members of the execution team have that basic training in order to minimize the risk, as reported by the Chicago Tribune, May 11, 1994. May 3, 1995, in Missouri, Emmitt Foster, subject to lethal injection:... [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR NANTKES: ...seven minutes after the lethal chemicals began to flow, the execution was halted when the chemicals stopped circulating. Foster was gasping and convulsing; again, blinds drawn so witnesses could not view the scene. Death was later pronounced 30 minutes later, and then the three blinds were opened so witnesses could view the corpse but had absolutely no idea about what happened in terms of the execution itself; again, no protections afforded to witnesses who act on our behalf as a society to ensure we are not inflicting physical violence or mutilation of the prisoner's body. That's pause for concern. That's pause to redraft this legislation, even if you are a supporter of capital punishment, which I'm not, to be clear. Continuing in the Missouri

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case, after the blinds were reopened... [LB36]

PRESIDENT SHEEHY: Time, Senator. Thank you, Senator Nantkes. (Visitors introduced.) Continuing with floor discussion on LB36, members requesting to speak: Senator Wallman, followed by Senator Rogert and Senator White. Senator Wallman, you're recognized. [LB36]

SENATOR WALLMAN: Thank you, Mr. President, members of the body. I hope everybody is listening to a couple of attorneys here because are we thinking about the victims, all these appeals for the death penalty? Folks, it doesn't happen for awhile. The victim's families, they have to go to courthouses, they have to listen to this stuff, so are we thinking about the victims? Number two, being it's Memorial Day weekend, self-reflection, going to cemeteries, talking to people, looked in the first book of the Good Book. A brother killed his brother. He was not killed. He was sent across the mountain to start a family, which one of them was Methuselah, the oldest person on earth. So I'd yield the rest of my time to Senator Council. [LB36]

PRESIDENT SHEEHY: Senator Council, you're yielded 4 minutes. [LB36]

SENATOR COUNCIL: Yes, thank you very much, Senator Wallman and Mr. President. Certainly Senator Nantkes is addressing one of the critical aspects of this piece of legislation. And again, you know, for those who are paying attention and perhaps even more importantly for those not paying attention, this procedure will have to pass the scrutiny of the Nebraska Supreme Court. And the Nebraska Supreme Court has stated in Mata, which Senator Nantkes has eloquently analyzed the three-prong test required to be met in order for any form of execution in this state to be found constitutional, it appears that the concerns that are being raised are being lightly dismissed, but we're talking about a situation that, for all intents and purposes, is a medical procedure. And unlike the state of Kentucky, LB36 does not prohibit doctors from participating in this procedure. Now I asked the question last week, why don't we adopt that portion of the Kentucky statute? Well, for me, if we don't include it, there must be a reason and that is apparently some expectation that medical professionals like surgeons who would be required in the instance related by Senator Nantkes, where you have an individual whose veins have collapsed after years of intravenous drug use, and a cutdown has to be performed in order to insert the lethal substances. Who's going to do that in the state of Nebraska? We haven't...like Kentucky said, it can't be a doctor, and if it's not a doctor...and I dare say, based upon the testimony of members of the medical profession who appeared and testified before the Judiciary Committee, it is unlikely that you would get any medical practitioners, MDs, to participate in this procedure and actually inserting the IV or performing a cutdown in this instance because it violates their ethical code, which is thou shalt do no harm. So the question is a legitimate question and it's one that I believe needs to be answered before we go forward with this. Senator Nantkes again has pointed out the fact that in other states these issues are currently being addressed

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through litigation. Not all... [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR COUNCIL: ...of those cases have reached the U.S. Supreme Court but rest assured they will. And what becomes the prevailing standard of decency has yet to be determined. We don't know if we can meet that standard. We believe the simple fact that lethal injection is the selected form of execution in 30-plus states means that we've met the standard of decency. Just because the Supreme Court in Baze approved Kentucky's protocol, we believe that we've met the Mata standard, the standard set by our Supreme Court, as to whether there's a substantial risk of harm here. I do not believe that we have satisfied any of those standards in this piece of legislation and, because we haven't, that 68 percent error rate is going to go up to 75 percent, 80 percent, 85 percent, and you're going to see the same results... [LB36]

PRESIDENT SHEEHY: Time, Senator. [LB36]

SENATOR COUNCIL: ...that we've seen over the last 30 years. [LB36]

PRESIDENT SHEEHY: Thank you, Senator Council. Senator Rogert, you're recognized. [LB36]

SENATOR ROGERT: Thank you, Mr. President. I yield my time to Senator Nantkes. [LB36]

PRESIDENT SHEEHY: Senator Nantkes, you're yielded 4 minutes 55 seconds. [LB36]

SENATOR NANTKES: Thank you, Mr. President. And thank you to Senator Rogert for the time. Want to continue the recitation of this information regarding botched executions as relevant to the legal inquiry as put forth under Mata and Baze. This information was compiled, researched, and provided to me by groups associated with the Nebraskans Against the Death Penalty and the Nebraska Catholic Conference. January 23, 1996, Richard Townes, Jr., subject to lethal injection: This execution was delayed for 22 minutes while medical personnel struggled to find a vein large enough for the needle. After several unsuccessful attempts to insert the needle into the arms, the needle was finally inserted through the top of Mr. Townes's foot, New York Times, January 25, 1996. July 18, 1996, in Indiana, Tommie J. Smith, subject to lethal injection: Because of the unusually small veins Mr. Smith had, it took over one hour and nine minutes for Mr. Smith to be pronounced dead after the execution team began to stick needles into his body. For 16 minutes, the execution team failed to find adequate veins and a physician was then called. What happens, again, colleagues, in terms of Nebraska's actual procedure and protocols if the team, as established, regardless of training because it's un contemplated and unrequired in the statute or in LB36, fails in

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the midst of an execution, then has to bring in other members? Is that allowed or afforded or contemplated under LB36? No. We don't want to deal with that. For 16 minutes in the Indiana execution, after the team was unable to find the veins, the physician was called and Mr. Smith was given an anesthetic and the physician then twice attempted to insert a tube into Mr. Smith's neck. That failed. An angio-catheter was then inserted into Smith's foot. Only then were witnesses permitted to view the process, not previously, not prior to these failed attempts and mutilations and unwanted (sic), unnecessary risk of pain, as prohibited by our Nebraska Supreme Court, and we'll have no way to ensure that witnesses have full view so that we can build a record that shows our process does, in fact, comply with constitutional standards. Continuing: The lethal drugs were finally injected into Mr. Smith almost 49 minutes after first attempts. It took 20 minutes before death was pronounced, Indianapolis News, July 18, 1996. May 8, 1997, in Oklahoma, Scott Dawn Carpenter: Carpenter was pronounced dead some 11 minutes after lethal injection was administered. As the drugs took effect, Carpenter began to gasp and shake. This was followed by a guttural sound, multiple spasms, and gasping for air until his body stopped moving three minutes later, Tulsa World, May 8, 1997. June 13, 1997, in South Carolina, Michael Eugene Elkins, subject to lethal injection: Because Elkins' body has become swollen from liver and spleen problems, it took over an hour to find a suitable vein for the insertion of the catheter. Elkins tried to assist the executioners, asking, should I lean my head down a bit, as they probed for a vein. After numerous failures, a usable vein was finally located, as reported in the Chattanooga Free Press, June 13, 1997. April 23, 1998, in Texas, Joseph Cannon, subject to lethal injection: It took two attempts to complete the execution. After making his final statement, the execution process began. A vein... [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR NANTKES: ...in Cannon's arm collapsed and the needle popped out. Seeing this, Cannon laid back, closed his eyes and exclaimed to the witnesses, it's come undone. Officials then pulled the curtain to block the view of any of the witnesses, reopening it 15 minutes later when a weeping Cannon made a second final statement and the execution process resumed. By the way, Cannon was executed for a crime he committed when he was 17 years old, as reported by the Austin American-Statesman, April 23, 1998. October 5, 1998, in Nevada, Roderick Abeyta: It took 25 minutes for the execution team to find a suitable vein for utilizing lethal injection, as reported by the Las Vegas Review-Journal, October 5, 1998. June 8, 2000, Florida, Bennie Demps: It took the execution technicians 33 minutes to find suitable veins for the execution. They butchered me back there, said Demps in his final statement; I was in a lot of pain. They cut me in the groin, they cut me in the leg, I was bleeding... [LB36]

PRESIDENT SHEEHY: Time, Senator. [LB36]

SENATOR NANTKES: ...profusely. Thank you, Mr. President. [LB36]

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PRESIDENT SHEEHY: Thank you, Senator Nantkes. Senator White, you're recognized. [LB36]

SENATOR WHITE: I would yield my time to Senator Council, if she would like it. [LB36]

PRESIDENT SHEEHY: Senator Council, you're yielded 4 minutes 55 seconds, and then you're next in the queue. [LB36]

SENATOR COUNCIL: Yes, thank you very much, Mr. President, Senator White. Again, while going through LB36, as it's currently drafted, I think it's important to note that in the original version of the bill, it expressly provided that the establishment, modification, or maintenance of these protocols would be exempt by...would be exempt from the Administrative Procedures Act, which, to me and to anyone else who would read that, is an indication that we wanted to keep those protocols secret and not open to the public. Now the committee amendment struck that section but, as Senator Nantkes has noted, there is nothing in this bill that expressly provides that the director shall be subject to the Administrative Procedures Act in developing, maintaining, or modifying these protocols. And without that level of oversight, I think we subject ourselves to intense judicial scrutiny with regard to the establishment of these protocols. Again, I don't support the bill at all, but if this body is looking to advance some piece of legislation that they think will be effective and, again, our experience ought to demonstrate to us that it will not be effective, it will not be efficient. And I think that effective and efficient is something that we have an obligation. We do it with regard to any other piece of legislation we pass. We look at the economic benefits, we look at the economic risks. We haven't done it with regard to this piece of legislation and, in fact, I think it's incredulous that we can't determine the costs of the death penalty, we can't determine the savings from repealing the death penalty, but we can move forward, purportedly on behalf of the citizens of the state of Nebraska, representing to them that we are advancing legislation that will address their concerns. That is not what is happening in the case of LB36. And when I am on my own time, I want to follow up on some of the points that Senator Nantkes has made with regard to the actual injection process. And I hope that Senator Dierks reenters the Chamber because I, quite frankly, think he is the only one present that has the level of expertise to address some of these issues. When we talk about administering the types of drugs that we're talking about administering, ladies and gentlemen, we have to have someone who is highly skilled in knowing the specific amount of these drugs to be administered and whether the drug that has been selected, the drug or combination of drugs--you know, I think it's, you know, unfortunate that this is referred to across the land as a cocktail--but the combination of these drugs and how they operate. What happens if the dose is too high? What happens if the dose is too low? Are we then in a position where we have violated the very standard... [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

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SENATOR COUNCIL: ...that our Supreme Court has set with regard to carrying out executions? I would submit to you that we will and that under this law, as it's currently constituted, that you're not going to see any real change. And I think it's a farce and I think it borders on dishonesty to submit to the citizens of the state of Nebraska that if this bill is passed, all of their fears and worries and concerns should be alleviated because this law, under it we're going to see to it that the worst of the worst are executed. Our own experience says that is a flat-out falsehood. We don't execute the worst of the worst, and I think it's ironic that when we compare the worst of the worst that... [LB36]

PRESIDENT SHEEHY: Senator Council, you're now on your time, and this is your third time. [LB36]

SENATOR COUNCIL: Thank you very much, Mr. President. That...and I understand how Senator Flood passionately addresses this issue because of the senseless tragedy that occurred in his community. I understand that. But there were other senseless tragedies that occurred in his community and there were senseless tragedies that I think if a survey were taken were just as senseless, just as heinous as the crime that has led to this drive, this drive to enact lethal injection. I think that this state should take a step back, like other surrounding states. We are quick to compare ourselves when it suits our purposes. We're quick to compare ourselves to what other states are doing when it suits our purposes. But when it doesn't suit our purposes, we could care less what Kansas is doing. We could care less what the law has been in Iowa for years. We could care less what Colorado, Montana, New Mexico are doing because that doesn't suit our purposes. But I submit to you that we need to be cognizant of what they're doing because that's the standard. Senator Dierks, would you yield to a question, please? [LB36]

PRESIDENT SHEEHY: Senator Dierks, would you yield to Senator Council? [LB36]

SENATOR DIERKS: Yes. [LB36]

SENATOR COUNCIL: We're talking about injecting drugs intravenously. Now are there certain drugs that will make someone unconscious for short periods of time compared to drugs that will render someone unconscious for longer periods of time? [LB36]

SENATOR DIERKS: Yes, there are. There are long-acting anesthetics and short-acting anesthetics. [LB36]

SENATOR COUNCIL: Under the scenario that has been painted for us in terms of what the intent of this legislation is, which one of those drugs would result in the least risk that the inmate would suffer substantial risk of harm? [LB36]

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SENATOR DIERKS: The least risk? [LB36]

SENATOR COUNCIL: Yes. [LB36]

SENATOR DIERKS: Would probably be the long-acting... [LB36]

SENATOR COUNCIL: Okay. Okay, and... [LB36]

SENATOR DIERKS: ...anesthetic. It's called sodium pentobarbital, I think is the name of it. [LB36]

SENATOR COUNCIL: Sodium pentobarbital? [LB36]

SENATOR DIERKS: Yeah. [LB36]

SENATOR COUNCIL: And that is a drug that will render someone unconscious for a substantial period of time. [LB36]

SENATOR DIERKS: Longer than the shorter acting one, yeah. [LB36]

SENATOR COUNCIL: Okay. [LB36]

SENATOR DIERKS: And it's... [LB36]

SENATOR COUNCIL: So in terms of developing a protocol, Senator Dierks, if you were charged with that responsibility, which one of those drugs would you choose? [LB36]

SENATOR DIERKS: Well, I'd choose the long-acting. [LB36]

SENATOR COUNCIL: Okay. [LB36]

SENATOR DIERKS: And, personally, I don't think you need anything else. I don't think you need the drug that causes the heart to stop or the one that causes the muscles to start...the nerves to stop working. Those are the things that get them in trouble. That's part of the cocktail. [LB36]

SENATOR COUNCIL: And would you explain why that calls...because that's what I was going to go to that, that's the pancuronium... [LB36]

SENATOR DIERKS: In the cocktail? [LB36]

SENATOR COUNCIL: Yeah, the second and third drugs in the cocktail. Pancuronium?

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[LB36]

SENATOR DIERKS: Pancuronium is one of them. I think that's... [LB36]

SENATOR COUNCIL: Potassium chloride. [LB36]

SENATOR DIERKS: Potassium chloride is the other one. [LB36]

SENATOR COUNCIL: And in your estimation the use of those two drugs pose a substantial risk of inflicting unnecessary pain on the inmate. Is that correct? [LB36]

SENATOR DIERKS: Well, yeah, especially if they use the short-acting anesthetic. [LB36]

SENATOR COUNCIL: Okay. Now in terms of dosage, am I correct in my understanding that you would need someone who is highly skilled in determining... [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR COUNCIL: ...the amount of each of these substances that is required, particularly the long-acting drug, the first drug in the Kentucky protocol? [LB36]

SENATOR DIERKS: Well, that's right. All those anesthetics are...the dosage is based on the body weight of the patient. [LB36]

SENATOR COUNCIL: Okay. So there has to be someone who is skilled in making those types of determinations. [LB36]

SENATOR DIERKS: That's correct. [LB36]

SENATOR COUNCIL: And even someone skilled in making those types of determinations, isn't it possible that when the IV is inserted that if it's off in anyway that the drug itself would not be entering...could not be entering the system, it could be entering other parts of the body and not achieving the, quote, intended objective? [LB36]

SENATOR DIERKS: Well, you'd hope that that didn't happen but I think it could. Usually when the person is doing the intravenous treatment gets the needle in the vein, the blood comes back out of the needle... [LB36]

PRESIDENT SHEEHY: Time, Senator. [LB36]

SENATOR DIERKS: ...and that tells you you're there. [LB36]

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SENATOR COUNCIL: Thank you, Senator Dierks. [LB36]

PRESIDENT SHEEHY: Thank you, Senator Council. Thank you, Senator Dierks. Members wishing to speak on LB36 are Senator Mello, followed by Senator White, Senator Nordquist, and Senator Wallman. Senator Mello, you're recognized. [LB36]

SENATOR MELLO: Thank you, Mr. President, members of the Legislature. I'd like to yield my time to Senator Nantkes. [LB36]

PRESIDENT SHEEHY: Senator Nantkes, you're yielded 4 minutes 55 seconds. [LB36]

SENATOR NANTKES: Thank you, Mr. President. And thank you, Senator Mello. Colleagues, to continue from the June 8, 2000, botched execution in Florida of Bennie Demps, this is a quote. I'll just start over. It took the execution technicians 33 minutes to find suitable veins for the execution. They butchered me back there, said Demps in his final statement. I was in a lot of pain. They cut me in the groin, they cut me in the leg. I was bleeding profusely. This is not an execution; it is a murder. The executioners had unusual problems finding one vein. But because Florida's protocol required a second alternative intravenous drip, they continued to work to insert another needle finally abandoning their effort after prolonged failures. Colleagues, that prompts another question. Under Baze it tells us clearly, the United States Supreme Court tells us clearly that the lack of a viable alternative in regards to execution procedures and protocols is the fatal flaw in any state scheme towards execution. LB36 offers no viable alternative and that makes it in clear violation of the United States Supreme Court case. The United States Supreme Court case that Senator Flood relies upon tells us we must have a viable alternative in regards to the procedures and protocols for administering the execution. We have none in LB36. We have none for comparative review. We have none to evaluate from a judicial perspective at the Nebraska Supreme Court or United States Supreme Court level. LB36 again, full of flaws, full of false hope, a political failure and a legal nightmare. June 28, 2000, in Missouri, Bert Leroy Hunter: Hunter had an unusual reaction to the lethal drugs, repeatedly coughing and gasping for air before he lapsed into unconsciousness. An attorney who witnessed the execution reported that Hunter had violent convulsions. His head and chest jerked around rapidly upward as far as the gurney restraints would allow and then he fell quickly down upon the gurney. His body convulsed back and forth like this repeatedly. He suffered a violent and agonizing death. This is a letter from attorney Cheryl Rafert to Missouri Governor Mel Carnahan, dated June 30, 2000. Colleagues, these real life examples, these graphic, horrific depictions of how lethal injection as a procedure fails to meet the Nebraska Supreme Court's directive that we offer a method of execution that does not present a substantial risk that a prisoner will suffer unnecessary and wanton pain in the execution or violate our evolving standards of decency or minimize the physical violence and mutilation of the prisoner's body, this is notice, this is proof that without even a basic framework to

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carry out this protocol and horrific practice therein, no way can the state ever meet its burden to prove that LB36 or lethal injection otherwise would probably meet this constitutional standard. I want to talk a little bit, too, again about the alternatives and how Baze tells us an alternative, an alternative procedure and protocol, mind you, colleagues, must be provided. And now that's a part, that's a part of the United States Supreme Court jurisprudence surrounding lethal injection and surrounding the Eighth Amendment. And it's not clear how LB36 will apply to those on death row currently and those who may be prospectively. And this lack of viable alternative... [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR NANTKES: ...in regards to current inhabitants of death row and prospective members of death row, again a fatal flaw in terms of drafting and implementation, prompting years of additional litigation and failing to meet the dictates and standards that the United States Supreme Court and the Nebraska Supreme Court has put forward telling the state of Nebraska how to carry out this horrific procedure. And nowhere in the legislation, in the committee amendment, in the record are these issues addressed or remedied. We also know in regards to this delegation problem and delegation issues surrounding the political failure of LB36 and its complete abdication of authority and decision making to unelected prison bureaucrats without proper training or expertise in how to carry this out, we... [LB36]

PRESIDENT SHEEHY: Time, Senator. [LB36]

SENATOR NANTKES: Thank you, Mr. President. [LB36]

PRESIDENT SHEEHY: Thank you, Senator Nantkes. Senator White, you're recognized. This is your third time. [LB36]

SENATOR WHITE: Thank you, Mr. President. I yield my time to Senator Nantkes. [LB36]

PRESIDENT SHEEHY: Senator Nantkes, you're yielded 4 minutes 55 seconds. [LB36]

SENATOR NANTKES: Thank you, Mr. President. And thank you, Senator White. As we move...continuing in regards to delegation issues under the Administrative Procedure Act, whether or not that actually applies as noted, it's not specifically mandated in the legislation. So in fact the Department of Corrections could promulgate its rules and regulations in regards to this protocol in 100 complete...100 percent complete secrecy, outside of the public view, because LB36 does not require them to be carried out in a public fashion, to be clear. Nonetheless, assuming maybe if the Department of Corrections chooses to utilize a procedure similar to what is outlined under the Administrative Procedures Act, and I don't know how they'd go about availing

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themselves to the jurisdiction and authority of the Administrative Procedures Act without a legislative grant of authority or direction, but nonetheless, the courts have said that agencies cannot adjudicate constitutional facts. Constitutional facts in regards to the pain and suffering are exactly what we're talking about in Mata. And the other courts have found in the realm of administrative procedure that agencies cannot adjudicate these constitutional facts. Facts underlying a constitutional claim are...violate issues regarding nondelegation. And colleagues, be clear, I'm not an expert in terms of administrative law or practice. This is from one semester of administrative law in law school. And if I'm able to come up with these kinds of questions that are prompted by this poorly crafted legislation, putting it, interfacing it against the United States Supreme Court decision in Baze, and the Nebraska Supreme Court decision in Mata, you think this will not prompt additional painful, prolonged litigation for each victim and their family in regards to this issue? Let's look more about general principles under administrative law that are now prompted because of this expansive delegation of legislative prerogative to an unelected state agency. The courts tell us, when looking at these issues, if there's an absence of standards for the guidance of the director of Corrections' actions, it would be impossible in a proper proceeding to ascertain whether or not the will of this body has been obeyed. Would we be justified in overriding the choice of means for effecting its declared purpose? Yes. Other cases, this is quoting from Yakus v. United States, United States Supreme Court, 1944, they talk about in this framework of administrative law how you in your legislative prerogative must set forth an intelligible principle or minimal standards to carry out the protocols and procedures if you're going to delegate this authority. And LB36 does not set forth an intelligible principle or minimal standards in regards to these issues. Let's look at our own Nebraska Supreme Court, in Lincoln Dairy Company v. Finigan, 170 Nebraska 777, from 1960. The Nebraska Supreme Court found an improper delegation of authority... [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR NANTKES: ...in regards to how we regulate milk through the Department of Agriculture. This bill has less standards than as afforded through that statutory delegation scheme and it related to how we regulate milk. This bill relates to how we kill people and fails to have an intelligible principle monitoring and guiding those standards amongst the delegation authority to the state agency who is unelected, untrained and has no expertise. The state Supreme Courts in other states following these challenges regarding nondelegation and whether or not they meet the basic, minimum threshold of intelligible principles tell us that you must identify in the legislation, one, the persons and activities potentially subject to the regulation; two, the harm sought to be prevented; and three, the general means intended to be available to the administrator to prevent... [LB36]

PRESIDENT SHEEHY: Time, Senator. [LB36]

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SENATOR NANTKES: ...the identified harm. Thank you, Mr. President. [LB36]

PRESIDENT SHEEHY: Thank you, Senator Nantkes. Senator Nordquist, you're recognized. [LB36]

SENATOR NORDQUIST: Thank you, Mr. President. I give my time to Senator Nantkes. [LB36]

PRESIDENT SHEEHY: Senator Nantkes, you're yielded 4 minutes 55 seconds. [LB36]

SENATOR NANTKES: Thank you, Mr. President. And thank you, Senator Nordquist. Again, colleagues, this lack of procedural protection within LB36 is one reason why this legislation might violate a nondelegation doctrine in regards to future challenges. We talked earlier on General File about how the legislation was replete with potential due process violations. But I also want to talk about how the lack of careful attention to the delegation issues and the development, maintenance and creation of the protocols and procedures prompts additional legal challenges under the auspices of administrative law, whether they be nondelegation or whether or not they be any other number of things. Colleagues, at the very least, we should take the time to craft transparent procedures to be carried out by competent professionals. Otherwise, these administrative protocols themselves will not be over...able to overcome a challenge, whether it's under a substantial evidence test, whether it's under an arbitrary or capricious challenge, whether it's under an abuse of discretion challenge, whether or not it's even subject to the APA, which we don't know under this legislation. And I...here's another wrinkle just brought out through debate this morning. Since this legislation is not specifically subject to the APA, does the Department of Corrections even have the authority to utilize the APA in crafting this protocol, prompting additional due process violations or concerns? I want to talk as well a little bit about costs. We talked a little bit about these on General File in regards to the prosecution of these cases. What we haven't had a chance to talk about the cost issue was from a perspective of the Department of Corrections. And again, state, or colleagues, we can look at the experience of other states in regards to this issue. When California switched its method of lethal injection and decided to move forward...or switched its method of execution and decided to move forward with lethal injection there were substantial issues and challenges surrounding the architecture of the execution chambers. This is relevant for costs. We know to the cost issue, which again should not be dispositive to this public policy decision as a whole but should at least be a factor. The Department of Corrections notes on its fiscal note, we anticipate no costs associated with this. Really? How will they have the means to carry out this legislation without making any sort of physical changes to Nebraska's death chambers? We know in California when this happened significant sums of public dollars were expended without knowledge or authorization from the California Legislature. Later, when this use of significant public funds was brought forward to the attention of the California Legislature, they halted the

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construction and the retrofitting of the death chamber to have a public view of these issues. At the very least, colleagues, wouldn't you anticipate that there would have to be some sort of changing or retrofitting to the current physical structures utilized in Nebraska's... [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR NANTKES: ...method of utilizing capital punishment, considering we're making a dramatic change from electrocution to lethal injection? And we're not going to expend a single penny, whether in the prosecution, as the Attorney General knows, we won't spend a single penny litigating any of these and we're not going to spend a single penny retrofitting the death penalty chamber itself? That's incredulous, that's ridiculous. It won't cost a single penny to make this change? If we can't have a basic level of voracity in terms of basic things like costs, how can we even have the broader discussion? But that doesn't seem to bother anybody else. So I'll move forward. [LB36]

PRESIDENT SHEEHY: Time, Senator. [LB36]

SENATOR NANTKES: Thank you, Mr. President. [LB36]

PRESIDENT SHEEHY: Thank you, Senator Nantkes. (Visitors and doctor of the day introduced.) Continuing with floor discussion on LB36, members requesting to speak are Senator Wallman, followed by Senator Pirsch, Senator Cook, Senator Howard, and Senator Mello. Senator Wallman, you're recognized. [LB36]

SENATOR WALLMAN: Thank you, Mr. President. I yield the rest of my time to Senator Council. [LB36]

SENATOR COUNCIL: Thank you, Mr. President. Thank you, Senator Wallman. Again, so much of this bill is based upon the Supreme Court decision in the Baze case. And last week I urged all of my colleagues to read the case, pull it up and read exactly what the U.S. Supreme Court found. And in the event that did not occur, let me read a couple of selected passages from that decision so that you'll understand the context in which this legislation is being debated. Justice Breyer stated, although the death penalty has serious risks, for example, that the wrong person may be executed, that unwarranted animus about the victim's race, for example, may play a role, and that those convicted will find themselves on death row for many years, the penalty's lawfulness is not before the court. And with regard to the petitioner's proof and evidence, they simply do not show that that particular execution amounts to cruel and unusual punishment. Again, the lawfulness was not before the court, but the court recognized the very points that those of us who support repeal of the death penalty have been urging. Our Supreme Court justices recognize that the wrong person may be executed; that there is unwarranted animus that may intervene, unwarranted animus based upon the victim's

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race, for example. And, ladies and gentlemen, I can point to case after case in Nebraska where I submit to you that the victim's race, not the perpetrator's race but the victim's race, was the principal reason that a death sentence was issued. And we can look at those cases and they run from Norfolk to Omaha and across this state. But also Judge Stevens made a very valid point that has to be considered here; that is, Judge Stevens concluded that, instead of ending the controversy over the death penalty and the use of lethal injection, this case will generate debate not only about the constitutionality of the three-drug protocol and specifically about the justification for the use of pancuronium bromide, a drug that Senator Dierks and I were discussing, but also about the justification for the death penalty itself. Judge Stevens: States wishing to decrease the risk that future litigation will delay executions or invalidate their protocol would do well to reconsider their continued use of pancuronium bromide. I don't know if we plan to use pancuronium bromide. I don't think the introducer of this bill knows whether we plan to use pancuronium bromide. But if we do, the Supreme Court has already given us a heads up. If you choose to use that drug as a part of your protocol, the constitutionality is suspect at best. Justice Stevens went on to say, moreover,... [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR COUNCIL: ...although experience demonstrates that imposing that penalty--listen, folks--constitutes the pointless and needless extinction of life with only negligible social or public merit in return, this conclusion does not justify a refusal to respect the court's precedence. The judges themselves are telling us this is not the end-all case, this is the beginning of years of protracted litigation over whether lethal injection is cruel and unusual punishment. And if I get an opportunity to speak again, you need to again delve into this case and see exactly what Kentucky did that not only do we not know whether we're doing it, we don't know how we're going to develop what we're going... [LB36]

PRESIDENT SHEEHY: Time, Senator. [LB36]

SENATOR COUNCIL: ...to do. [LB36]

PRESIDENT SHEEHY: Thank you, Senator Council. (Visitors introduced.) Senator Pirsch, you're recognized. [LB36]

SENATOR PIRSCH: Thank you, Mr. President, members of the body. And I do appreciate the debate that's gone on today. And to the extent that Senator Council would like to utilize the time to further discuss what she hinted that she would like to discuss the Kentucky case, I would yield the balance of my time to her. [LB36]

PRESIDENT SHEEHY: Senator Council, you're yielded 4 minutes 40 seconds. [LB36]

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SENATOR COUNCIL: Thank you, Mr. President. Thank you, Senator Pirsch. And I really appreciate it, Senator Pirsch, because again we are, I believe, many of us are basing a decision on this bill on the mere representation that the Supreme Court of the United States has indicated that this is a constitutional means of carrying out the death penalty. And without looking at the specifics of this case and what the Supreme Court actually said, again I will repeat. Judge Stevens concluded that instead of ending this controversy, this case will generate debate, not only about the constitutionality of the three-drug protocol and specifically about the justification for the use of pancuronium bromide, but also about the justification for the death penalty itself. Because he went on to say that the death penalty constitutes the pointless and needless extinction of life with only negligible social or public return. And believe me, folks, if you study the history of the death penalty in the state of Nebraska, there are no truer words spoken. The application of the death penalty in the state of Nebraska has constituted the pointless and needless extinction of, since 1973, three lives with only negligible social or public return. We talked about the lack of the deterrent effect of the death penalty. It does not act as a deterrent and the data in the state of Nebraska shows that. It shows it vividly. When we have had, since the institution of the death penalty, 1,450 homicides committed in this state and 31 people sentenced to death, and half of them having their sentences reversed and serving anywhere from life to life without possibility of parole, I ask anyone to challenge the statement that the death penalty in the state of Nebraska has only negligible social or public return. But if I quickly can read from the decision with regard to the Kentucky protocol and then, as you're listening say, hmm, we don't have that; oh, we don't do that; oh, I don't know if we do that. The Kentucky Department of Corrections set about developing a written protocol to comply with the requirements of their statute. Kentucky's protocol called for the injection of 2 grams of sodium thiopental, 50 milligrams of pancuronium bromide, and 240 milliequivalents of potassium chloride. In 2004, as a result of this litigation, now listen to this, in 2004, as a result of this litigation, the department chose to increase the amount of sodium thiopental from 2 grams to 3 grams. Why, ladies and gentlemen? Because they discovered that 2 grams of that drug did not render someone unconscious long enough for them not to regain consciousness before this procedure was completed. [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR COUNCIL: It went on to say, between injections, members of the execution team flushed the IV lines with 25 milligrams of saline. Currently, Kentucky uses a certified phlebotomist and an emergency medical technician to perform the venipunctures necessary for the catheters. They have up to one hour to establish both primary and secondary peripheral intravenous sites in the arm, hand, leg or foot of the inmate. Do we know whether that is the protocol for Nebraska? I don't. It describes their execution facilities. But most importantly, it describes the educational and experience requirements of the individuals who will be participating in this procedure. We don't

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know. We don't even know whether medical professionals will have any input in the director's... [LB36]

PRESIDENT SHEEHY: Time, Senator. [LB36]

SENATOR COUNCIL: ...development of these protocols. [LB36]

PRESIDENT SHEEHY: Thank you, Senator Council. Senator Cook, you're recognized. [LB36]

SENATOR COOK: Thank you, Mr. President, members of the body. If she would like it, I would yield my time to Senator Council. [LB36]

PRESIDENT SHEEHY: Senator Council, you're yielded 4 minutes 50 seconds. [LB36]

SENATOR COUNCIL: Yes. Thank you, Mr. President. Thank you, Senator Cook. And now, we talked...Senator Nantkes just touched on it briefly, the costs associated with moving from the current unconstitutional form of execution to the proposed soon to be found unconstitutional form of execution. The Department of Corrections, as well as the Attorney General, couldn't identify any costs associated with that. Well, last I checked, we have an execution chamber. Well, under Kentucky's protocol, Kentucky's execution facilities consist of the execution chamber, a control room separated by a one-way window and a witness room where the warden, the deputy warden remain in the execution chamber with the prisoner, and then the execution team administers the drugs remotely from the control room through five feet of IV tubing. If, as determined by the warden and deputy warden, through visual inspection, the prisoner is not unconscious within 60 seconds following the delivery of the sodium thiopental to the primary IV site, a new 3 gram dose of thiopental is administered to the secondary site before injecting the pancuronium and potassium chloride. In addition to assuring that the first dose of thiopental is successfully administered, the warden and the deputy warden also watch for any problems with IV catheters and tubing. Now what training does our director or assistant director of Corrections have in determining whether there are problems with IV catheters and tubing? I dare say that they don't have any training, knowledge or expertise in that area. And also, if you look at other state protocols on how to determine whether the inmate is unconscious, it is not by visual inspection. They have specified procedures, touching the eyelash, calling the name, various specific procedural steps that one has to go through to ensure that the inmate is unconscious. There is nothing in LB36 that even requires that. That, at a minimum, should be a standard stated in statute that regardless of what combination of drugs you use, there must be a set established procedure for determining whether or not the inmate is unconscious and will remain unconscious throughout this procedure. We do not have that, we do not do that, we have no way of determining whether it will be done. And in fact, we are setting ourselves up for challenges that could run for decades to come. And

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we talk about providing closure to these families, as Senator Wallman alluded to. There's no closure under those circumstances. And Senator Nantkes made mention of another important aspect of the Kentucky case. The prisoners in the Kentucky case raised their constitutional challenge because Kentucky used a three-drug protocol and they insisted that a one-drug protocol presented less risk... [LB36]

SENATOR MCGILL PRESIDING []

SENATOR MCGILL: One minute. [LB36]

SENATOR COUNCIL: ...of causing substantial pain to the inmate. And what the Supreme Court said, which is very important, is that a state's refusal to adopt a proffered alternative procedure may violate the Eighth Amendment where the alternative procedure is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain. We don't know whether we can meet that standard. We don't know whatever combination of drugs that is developed under a process that we don't even go to the extent of mandating that it be a public process in terms of the... [LB36]

SENATOR MCGILL: Time. [LB36]

SENATOR COUNCIL: ...development and creation. [LB36]

SENATOR MCGILL: Thank you, Senator Council and Senator Cook. Mr. Clerk, you're recognized for announcements. [LB36]

CLERK: Madam President, bills read on Final Reading this morning were presented to the Governor at 9:56 a.m. (Re LB16, LB218, LB241, LB288, LB288A.) Two resolutions: Senator Cornett, LR243; Senator Mello, LR244. Both will be laid over. Confirmation hearing report from the Government, Military and Veterans Affairs Committee, signed by Senator Avery, as Chair. Senator Sullivan offers explanation of vote (Re LB16, LB218, LB241, LB288, and LB288A). (Legislative Journal pages 1709-1711.) [LB16 LB218 LB241 LB288 LB288A LR243 LR244]

Madam President, priority motion: Senator Nantkes would move to bracket LB36 until May 29, 2009. [LB36]

SENATOR MCGILL: Senator Nantkes, you're recognized to open on your bracket motion. [LB36]

PRESIDENT SHEEHY PRESIDING []

SENATOR NANTKES: Thank you, Mr. President. And as a point of information, can you

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tell me how much time I have in my opening, please? [LB36]

PRESIDENT SHEEHY: Ten minutes, Senator. [LB36]

SENATOR NANTKES: Ten minutes, okay. Thank you, Mr. President. Colleagues, I gave the Speaker a heads up before I put this motion in this morning. And it is a serious motion. This is not a dilatory tactic, this is not a filibuster tactic. This is a last chance safety valve provided to the members of the Nebraska Legislature who have listened carefully and thoughtfully to the serious issues that Senator Council, myself and others have injected into this debate. And it simply says, colleagues, that we should postpone consideration of this bill. LB36 is a flawed piece of legislation that does not meet the minimum legal and constitutional requirements as set forth by our Nebraska Supreme Court in Mata, or the United States Supreme Court in Baze. And it says, colleagues, even if you are a proponent of capital punishment and you want to move forward, colleagues, we should do it in the right way. And LB36 does not offer us that opportunity. Whether it's from a delegation perspective, whether or not it's from a due process perspective, the list goes on and on. And I know that the Speaker and others interested in pursuing this issue have the ability to make the law more compliant with what federal and state case law dictates and they should do so over the interim. And they should give careful consideration and thought to the procedural protocols that will be required to carry out LB36 and which are lacking in LB36. This motion is serious and I plan to proceed to a vote on it. Whether it be costs, whether it be legal concerns, whether it be other technical issues that have been raised on General and Select and in the committee hearings, at the very least, colleagues, this motion says, we're going to take a deep breath, we're going to think about these issues and address them and correct them in a meaningful way before we carry out the state's only, mind you, irrevocable punishment. Before we mete out the ultimate sanction, we're at least going to make sure that we do so in a way that complies with our statutory and constitutional framework. Fifth and Fourteenth Amendments rights and constitutions are at play here. It requires us to put forward a very carefully considered framework for depriving our citizens of their life as protected under the U.S. and Nebraska Constitutions. LB36 fails to do so. This says, let's take a deep breath. Let's follow the advice given by the past-president of the Nebraska Bar Association that says, particularly in the light of term limits, take a moment to carefully consider these multilayered, complex issues before you rush to judgment and before you move forward. LB36 can continue next session. It will carry over if this bracket motion is adopted, but it would have a chance to be amended to address the real and serious issues in relation to the protocols and procedures that are not identified or laid out in LB36. It would allow the state the opportunity to better meet the constitutional mandate of Mata, to meet the three-part test, to be able to provide a factual and evidentiary record that we had considered how to meet the three-part test, which we haven't in this legislation or in this record. We do not have a factual or evidentiary baseline available to help the state meet its burden to show that the method of execution that they're bringing forward will, in fact, not create a

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substantial risk of injury to the inmate, will in fact lower the unnecessary and wanton pain inflicted upon the condemned, does in fact comply with the evolving standards of decency that represent a maturing society, and finally that complies and comports with the dignity of man. Taking human life by unnecessarily cruel means shocks the fundamental instincts of civilized man. It should not be possible under the constitutional procedure of a self-governing people, quoting from State v. Mata, 275 Nebraska 1, 2008. With the risks, the real and serious risks that I read into the record this morning regarding lethal injection, particularly when not conducted through legal or thoughtful or careful means, doesn't...it fails the Mata test. And if we don't take time to ensure that our procedures and protocols minimize the physical violence and mutilation to the prisoner's body and can prove such to the state Supreme Court, we will not be able to move forward with conducting executions. This bracket motion represents a chance for us to breathe, consider those issues, recraft and move forward. To be clear, colleagues, I will always stand in opposition to capital punishment. But my motives here are sincere in regards to the fact that the record has been made that LB36 is so flawed and so lacking in terms of its drafting and its intent that we have to step backwards, we have to take a breath, we have to allow this body the chance to address those serious issues. But for that option, we're proceeding forward in a very...in a way that's not careful, that's not considered, that doesn't listen or follow the dictates of what the United States Supreme Court or the Nebraska Supreme Court has told us we must do in order to move forward with a legal method of execution. The lack of viable alternative absolutely required under Baze, it's not in LB36. We would have no way to know how the procedures and protocols will be carried out by the unelected members of a state agency who have no training and expertise in this issue. We have no viable alternatives. We have no mandates in terms of how the procedures and protocols will be created, maintained or modified. Those are serious, serious due process violations, colleagues. And if you want to in fact move forward, if you want to provide a legal method of carry out executions in the state of Nebraska, we should take the time to address those issues. In the same time, we should try and get a handle on the cost factor, which currently we have no response on. And... [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR NANTKES: ...and we know, we know, that that's a piece, again not dispositive, but a piece of the debate and the equation which is lacking in terms of response and providing a full picture to this body and our citizenry about all the parameters, all the issues surrounding this punishment. I urge you to support the bracket motion. It is not meant for dilatory purposes but rather for substantive purposes to help us comply with Supreme Court decisions from both the United States Supreme Court and the Nebraska Supreme Court to thoughtfully consider issues surrounding procedures and protocols and to create an evidentiary and factual record to do so, to help the state meet its burden and to think about the provision of a viable alternative which must be provided, which is not under LB36, to have a discussion and a real

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investigation of costs, which has not happened and not been provided under LB36. [LB36]

PRESIDENT SHEEHY: Time, Senator. [LB36]

SENATOR NANTKES: Thank you, Mr. President. [LB36]

PRESIDENT SHEEHY: Thank you, Senator Nantkes. You have heard the motion to bracket LB36 until May 29, 2009. Members requesting to speak are Senator Mello, followed by Senator Lathrop, Senator Flood, Senator Christensen, Senator Council, Senator Lautenbaugh. Senator Mello, you're recognized. [LB36]

SENATOR MELLO: Thank you, Mr. President, members of the Legislature. I'd yield my time to Senator Nantkes. [LB36]

PRESIDENT SHEEHY: Senator Nantkes, you're yielded 4 minutes 55 seconds. [LB36]

SENATOR NANTKES: Thank you, Mr. President. Thank you, Senator Mello. I talked about the legal and technical issues that prompted this motion earlier, but I also want to go back to some of the policy considerations. Senator Council mentioned them briefly this morning, the risks of executing an innocent. Just during debate on this issue this year we've seen that happen in other states, people have become exonerated, removed from death row. Here in Nebraska this very session we saw and dealt with issues surrounding those who were wrongfully accused and convicted in relation to the Beatrice Six as a real-life example. As noted by our own Attorney General in the November 13, 2008, editorial concern...from the Lincoln Journal Star concerning how the death penalty distorted the Beatrice Six case by threatening, quote, by threatening the death penalty, four defendants were bullied into confessions when authorities threatened them with the electric chair, according to Attorney General Jon Bruning. Later the paper editorial board continues, the circumstances of the Beatrice case ought to shake the faith of the most hardened defender of the death penalty. The next time lawmakers once again consider whether to retain the death penalty, they should study this case. The evidence is fresh and convincing yet LB36 ignores those realities and it asks us to move forward blindly, recognizing that not only the real-life evidence we have from Beatrice but a very recent case from Douglas County wherein the chief investigator has been accused of planting physical evidence, tampering with evidence, and moving forward in an unscrupulous and illegal way. Because we have humans in the system, whether they be prosecutors, investigators, police, judge, jury, etcetera, not to diminish them by any means but because they're prone to human error, as we all are, we cannot ensure we will not mete out the most serious significant punishment on an innocent man or woman in Nebraska. That's another reason, a policy reason. I've offered you technical and legal reasons to support this issue, to support this motion. That's a policy issue that our media outlets are calling upon us, are telling us to take pause, to be

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careful before we move forward. Don't...we can't bury our heads in the sand and forget about the Beatrice Six and forget about that Douglas County CSI case because they're relevant to this debate. And if we are unresponsive to those failures, to those human errors within the system, we cannot move forward in ensuring that we have a system here that will be free from error. In a November 11, 2007, piece from the Lincoln Journal Star, our own Senator Brad Ashford was quoted in saying, capital punishment in Nebraska is arbitrary and inconsistent, that is an absolute unrefutable fact. Why should we impose such a penalty if it is arbitrary? And Senator Ashford, who I admire and respect a great deal, had to navigate a very difficult course in... [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR NANTKES: ...regards to his personal feelings in favor of abolition of the death penalty and moving forward if that were to fail and reinstating the death penalty through the method as outlined in LB36. And I leave that to him to make those two positions work. And I think he has come to resolution in regards to those issues in his head, in his heart. But they do, colleagues, provoke the broader policy issues that are afoot here in relation to innocence, in relation to human error, in relation to costs, in relation to deterrence which, mind you, after having read the committee transcript on LB36, not one source, not one credible source, other than anecdotal personal opinion, was brought forward to show that the death penalty is in fact a general or... [LB36]

PRESIDENT SHEEHY: Time, Senator. [LB36]

SENATOR NANTKES: ...specific deterrent. Thank you, Mr. President. [LB36]

PRESIDENT SHEEHY: Thank you, Senator Nantkes. Thank you, Senator Mello. Senator Lathrop, you're recognized. [LB36]

SENATOR LATHROP: Thank you, Mr. President and colleagues. Good morning. I stand just because more than anything, believe it or not, the discussion on General File ended before I had an opportunity to share a thought that I've had about the death penalty and that is, where are we going to be with the death penalty 20 years from now or 30 years from now? And I think that's an important question to ask ourselves today because if you look at the Supreme Court cases, as I have, and in particular Mata, which found our electric chair to be cruel and unusual, you can see what the Supreme Court is doing. Besides some specific problems with the electric chair and the fact that it inflicted unnecessary pain in advance of the death, the court also looked around to see in terms of just generally, and this is...if it's not in Mata it's in some of the other cases, but they look around generally to see where we're at in the evolving standards of decency. Typically, what they do is they look around the country and they say how many states have the death penalty, how many states have repealed it. And we will come to a place, and I believe it will happen in the next 10 years probably, certainly

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within the next 20, where our Supreme Court, the Nebraska Supreme Court will look around, as someone brings to the court the issue of whether or not the death penalty itself is cruel and unusual, and they will look around the country and see that we are one of the last people, one of the last states still with a death penalty, and it will go by judicial decision. It will be found to be cruel and unusual only because the evolving standards of decency are taking place. And this year we've seen a couple of states repeal the death penalty and they repeal it for a variety of reasons. Certainly its cost is a significant consideration, its inefficiency as a form of punishment is also an issue. And so as we ask ourselves, probably if you would have asked the Legislature 10 or 20 years ago if they could ever imagine a day when the electric chair would be found to be cruel and unusual punishment, the senators would have said, no, you know, because that's where they were with the evolving standards of decency. And I predict, not because I take any delight in it but because just as a matter of watching the evolving standards of decency in the court's opinions, that we'll get to a place where the death penalty will not be available, either because enough states have repealed it or finally the last of the states that are holding on will have it go by way of judicial decision. And why is that important to us today? If we're going to continue to invest in this institution with its inefficiencies, with its arbitrary application, we ought to ask ourselves if we really want to do that and for what end. These people, these men that committed these horrible acts up in Norfolk, awful people, awful people, don't deserve to walk the face of the earth as far as I'm concerned. But by the time they get through all their appeals it will be 20, 25 years down the road. And we won't be measuring whether or not the evolving standards of decency allow for lethal injection by 2009 standards but rather by the standards that prevail 25 years from now. And while I take no delight in it, no satisfaction whatsoever, I expect that these people will never be given lethal injection just because by the time they... [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR LATHROP: ...finish their appeals the death penalty will no longer be viable in this state. But in the meantime we're going to spend millions of dollars on this institution that provides only a small percentage of families any kind of relief as a form of punishment. So as it comes as no surprise, I oppose the death penalty for these reasons. And if you just look at what we're going to put these families through in the next 25 years, I think you could easily justify your opposition to the death penalty by viewing what is most humane to the families of the victims. Thank you. [LB36]

PRESIDENT SHEEHY: Thank you, Senator Lathrop. Senator Flood, you're recognized. [LB36]

SPEAKER FLOOD: Thank you, Mr. President. Thank you and good morning, members. I haven't spoke yet on Select File advancement of LB36, but I want to rise very strongly to tell you I am against this bracket motion. I will not be voting for it. I do not see where

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any of the proponents of this bracket motion have any legitimate interest in discussing better ways to conduct a lethal injection. I know that's one of the arguments being made. And to Senator Nantkes and Senator Council's credit, I understand how much they oppose this. And I find it interesting that Chief Justice Roberts, in Baze v. Rees, made a statement that I think puts this debate in good context. He says, quote, reasonable people of good faith disagree on the morality and the efficacy of capital punishment. And for many who oppose it, no method of execution would ever be acceptable. He goes on to say, this court has ruled that capital punishment is not prohibited under our constitution and that the states may enact laws specifying that sanction. Senator Lathrop just talked to you about the idea that at some point, if states don't repeal the death penalty, a court some day will. The standard is cruel and unusual, it's a two-part test, not a one-part test. But more importantly, it took the Supreme Court of the United States 50 years to jump back into the discussion on capital punishment. I have every reason to believe it's going to be as long before they look at it again. The Supreme Court chooses and picks its cases very carefully and they have, with Baze v. Rees, sent the message to the states that lethal injection as used in the state of Kentucky is in fact permissible. There has been a question raised out here as to whether or not there has to be this alternative method. And I want to make sure the record is very clear. I'm looking at Baze v. Rees, page 1535. When you look at that case, I challenge those of you that have raised this to show me where in that language it says we have to have an alternative method. In fact, I think what the court was saying, starting on page 1534, was that, as a result we are "left without any findings on the effectiveness of petitioners' barbiturate-only protocol, despite scattered references in the trial testimony to the sole use of sodium thiopental and pentobarbital as a preferred method of execution." They're talking about one dose versus three doses to cause death as an alternate method. There is no discussion in here about having to have the electric chair and lethal injection. And I don't know for sure if that's where senators in this body were going before, but I want to make sure that's very clear. If you look at page 1535 of the actual opinion in Baze v. Rees, I think you'll see pretty clearly that the Supreme Court did not come out and say there has to be this alternative...alternate method. The other thing I want to point out, Justice Stevens in his concurrence writes, on page 1537, "A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the state's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. A state with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard." We are talking about passing a bill that makes it possible to put in place the very method the state of Kentucky had reviewed by the United States Supreme Court. Baze v. Rees is controlling here and it has everything to do... [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

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SPEAKER FLOOD: ...with the way this bill was created. I want to read another comment here from Justice Roberts, also from Baze v. Rees. He says, and I quote, "A state with a lethal injection protocol substantially similar to the protocol we uphold today would not create a substantial and demonstrated risk of severe pain." You know, I think I've made my point on that specific area. I'd also call the opponents to LB36 attention to page 1530 and 1531 when it talks about the standard that the petitioner in a certain case has to raise and meet in order for it to be reviewable. I think the court is very clear with Kentucky's situation that it is okay. This sets up the process to make it okay. There is specifically, and I want to say this because I heard this, on page 10, lines 12 through 13, the consciousness checks. It...you were told earlier there was no specific language about consciousness checks, it's in there. [LB36]

PRESIDENT SHEEHY: Time, Senator. [LB36]

SPEAKER FLOOD: Thank you, Mr. President. [LB36]

PRESIDENT SHEEHY: Thank you, Senator Flood. Senator Christensen, you're recognized. [LB36]

SENATOR CHRISTENSEN: Thank you, Mr. President. I stand in opposition to the bracket movement and I just want to state the Judiciary Committee studied lots of options to improve LB36. No one brought viable options. We need solutions, not just talk of opposition to the bill. I hope you'll stick with me for a little bit. A number of you are not going to like the direction I go for a little bit but at the end I think you can...I'll give you a very good thought to look at. I'm going to address the statement on ethical code of doctors. Why do some of you support stabbing and sucking out of brains in abortion? It makes no sense, even if it's not a partial birth-abortion but the clamping on the head and pulling out is causing pain. Where is the comparison of ethical code to cause no pain and allow any type of an abortion? Abortion is murder. Without an abortion life of a human comes. Murder of the innocent unborn is okay by some of you, but killing of a criminal isn't. I can never put the rights of a criminal ahead of the rights of the unborn. Let's stop the bloodshed of the unborn and stop the pain inflicted by them doctors. Why is the life of a murderer worth more than the life of the innocent? I will turn a different direction now, hope you'll listen to. Why aren't we looking at training of criminals? Setting up training for self-worth, pride, and ability to work in society makes more sense than this debate on a few on death row. Results of the Work Ethic Camp in McCook should set forth...should be...set forth an example in why we should expand programs of training, not this senseless debate on a few. The Work Ethic Camp in McCook with Mid-Plains College set up a welding program to train inmates for a release program. What would happen if we ended this debate and went to work on training programs on the mass of the inmates that we can make a difference on? Inmates leaving the Work Ethic Camp welding program have work at Valmont upon finishing the program and their training. Again, let's train the felons, let's protect the unborn and make Nebraska a

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better place, one we can be proud of. And if Senator Flood is around and would like my time, I would yield it to him. [LB36]

PRESIDENT SHEEHY: Senator Flood, you're being yielded just over 2 minutes. Senator Flood has stepped from the Chambers. [LB36]

SENATOR CHRISTENSEN: Thank you. [LB36]

PRESIDENT SHEEHY: Thank you, Senator Christensen. Senator Council, you're recognized. [LB36]

SENATOR COUNCIL: Thank you, Mr. President. I had intended to direct my comments in another area, but I'm compelled to respond to Senator Christensen's comments. And he's absolutely correct. The Judiciary Committee looked for ways to improve this bill and they couldn't find any ways. And in terms of these issues around lethal injection, all of the information that's being shared with the members of this entire body were presented in detail by expert testimony during the Judiciary Committee hearing. Despite that expert testimony, the only changes in the bill were to satisfy the news media so that they would know the identities of the people who were participating in the execution protocol. None of the other issues were debated or addressed. You don't even have a requirement in here that the protocols be developed pursuant to the Administrative Procedures Act. The only thing that occurred was you struck the language that said it's exempt from the Administrative Procedures Act. So I will not be held responsible for the failure to fix a bill that I didn't introduce. Number two, I resent the suggestion that because I oppose flawed and faulty legislation that that means I support the taking of the lives of the unborn. I resent that. I have stood before this body before, I've discussed that LB675 and said I, no more than anyone in here, want to see abortions performed, but if we're going to pass legislation addressing it then it better be good legislation. It better not be flawed legislation. I attempted to improve the legislation, the same thing I'm being criticized of not doing with LB36. I attempted to improve LB675 and you didn't want to hear that. So you advanced that flawed legislation. Secondly, I agree with Senator Christensen, we ought to be paying more attention to preparing inmates to return to society. But you know why we don't do it? Because we don't allocate money to do it. But we don't know how much money could be available for that express purpose, Senator Christensen. We don't know because our Attorney General can't tell us how much it costs, the Corrections Department can't tell us how much it costs. But let's borrow from Kansas, since we're so good at borrowing. Kansas says that since they implemented the death penalty, much later than we did, 1994, and in 1994 their method was execution with electrocution and lethal injection. In 2004, despite the fact that they had the death penalty, they enacted a law that allowed for the sentence of life without parole. Duh, why do you need that? Because it's a reasonable alternative. But in testimony Friday, in Topeka, Pat Scalia of the Board of Indigents Defense Services, which is the equivalent of Nebraska's Advocacy Services, stated that since the

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reenactment of the death penalty 107 cases were filed with charges under the capital murder statute, very comparable to Nebraska, very comparable, during that same period of time. To date 26 death penalty trials have been completed, 12 resulting in the death sentence, so less than 50 percent,... [LB36 LB675]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR COUNCIL: ...so more than 50 percent had some reversible error that could have led to the execution of an innocent person, and the cost for the defense alone was \$19.9 million. We could do a lot to educate and train inmates with \$19.9 million. But instead we choose to move forward with a process...and, Senator Flood, I certainly didn't say that the Baze case requires an alternative. I said we don't know whether an alternative will meet the constitutional scrutiny because we don't know what the protocol is. If you're so confident that the Kentucky protocol is constitutional, put it in the statute. Don't leave it to doubt, don't leave it to the director, put it in the statute. It's specific... [LB36]

PRESIDENT SHEEHY: Time, Senator. Thank you, Senator Council. Members requesting to speak on the motion to bracket until May 29, 2009, on LB36, we have Senator Lautenbaugh, followed by Senator Nantkes, Senator Dierks, and Senator Howard. Senator Lautenbaugh, you're recognized. Senator Lautenbaugh waives. Senator Nantkes, you're recognized. [LB36]

SENATOR NANTKES: Thank you, Mr. President. Thank you, colleagues. We heard it talked about a little bit in terms of the General File debate about how a state statute passed by then Senator Pat Bourne years ago in regards to administrative review would remedy any potential errors or violations that occur in regards to the crafting of procedures and protocols for the lethal injection...for lethal injection to be carried out. Again to be clear, LB36 does not mandate that the protocols be designed according to the framework afforded under the Administrative Procedures Act so, in fact, can and could be designed without public view or transparency or comment or notification. And again, without making them compliant or specifically mandated to follow the APA, I don't even know how they could follow the APA without that parameter of delegated authority in clear, intelligible principles provided to the department. But nonetheless, let me tell you why that's not an adequate safeguard in regards to Senator Bourne's bill, why the legislative veto, per se, is what it's commonly called in terms of administrative procedure law and practice, is probably...is not an adequate remedy. Number one, in term...it hasn't been challenged in this state. When a similar procedural protection was put in place on the federal level, it's been declared unconstitutional as a violation of the separation of powers. So it's arguable at the very least that if a similar challenge was brought forward to that provision of Nebraska law that it, too, would be unconstitutional, which I anticipate might come up as a progeny of LB36. And let's talk about why the legislative veto is an inappropriate remedy to address these concerns as Senator Flood

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says it will and why it's probably unconstitutional. Because the courts found that Congress could delegate substantial discretion to an...could not delegate substantial discretion to an agency and still retain the authority to disprove of specific agency decisions, otherwise that violates principles of (a) presentment and (b) bicameralism and poses additional legal problems in terms of legislative mechanisms that have been used to try and promote that safeguard. Quoting from Administrative Procedures and Practices, Thong, Shapiro and Weaver, West Group, 2001, to highlight this discussion. So colleagues, whenever there is a question about, well, if we don't really figure out what we're going to do in terms of rules and regs the Legislature has a chance to maybe review that under the law Bourne passed a few years ago. Well, (a) if in fact that law is constitutional, I guess; (b) if in fact the department follows the Administrative Procedure Act as envisioned under that law which is not required under LB36; and (c) is an inadequate safeguard which is another example of inappropriate delegation of legislative authority to an unelected, unqualified state agency. We'll talk more colleagues about what Baze says in regards to... [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR NANTKES: ...a viable alternative, a viable protocol, a viable procedure to be presented because as the Chief Justice noted and Senator Flood quoted, yes, reasonable people can differ in regards to their interpretation or their feelings in terms of the morality of this punishment. And what he offers you is simply his interpretation of what a plurality decision says in regards to one specific aspect, one specific state's protocols. It's not the end-all and be-all. If it was, litigation on these issues would not be pending in other states, it would have been rendered moot. It hasn't. Thus being said...that being said, there is a comparative review as required under Baze, and that's part of crafting the evidentiary and factual record in regards to the viable alternative protocol. And it is not mine or Senator Council's or any other... [LB36]

PRESIDENT SHEEHY: Time, Senator. [LB36]

SENATOR NANTKES: Thank you, Mr. President. [LB36]

PRESIDENT SHEEHY: Thank you, Senator Nantkes. Senator Dierks, you're recognized. [LB36]

SENATOR DIERKS: Thank you, Mr. President. Members of the Legislature, and you know, of course, that I'm anti-death penalty. My philosophy has always been that our heavenly Father makes the decisions about life and death. He knows before we're born when we're going to die. And we're playing God when we take people's lives. If we have killed one man that was innocent that's just one too many. I certainly support the bracket motion. Thank you. [LB36]

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PRESIDENT SHEEHY: Thank you, Senator Dierks. Senator Howard, you're recognized. [LB36]

SENATOR HOWARD: Thank you, Mr. President, members of the body. I would like to offer my time to Senator Nantkes. [LB36]

PRESIDENT SHEEHY: Senator Nantkes, you're yielded 4 minutes 55 seconds. [LB36]

SENATOR NANTKES: Thank you, Mr. President. And thank you, Senator Howard. Colleagues, to continue on that last train of thought, it is not opponents of capital punishment's burden of proof to bring forward viable alternatives to carry out a system replete, ridiculed and heavy with constitutional flaw in terms of the morality arguments as capital punishment as a whole or the technical issues involved in an execution--protocols and procedures. But I mind...I draw your attention to the committee transcript. Nowhere in the committee transcript were viable alternatives presented. There were moments of caution brought forward, moments of concern, issues surrounding how Nebraska could make LB36 better, how it could change the law as presented to try and address the comparative review issues in Mata and in Baze by learned experts in this regard. The Judiciary Committee didn't take those up, it didn't. It exempted...it struck out the part that exempted the protocols from public view under the APA without replacing them with the mandate that they be considered by the APA. And then it tried...and then the only other committee amendment that brought forward said that some members of the news media could be witnesses to make sure that the news media had an objective view of potential executions, again without delving into any sort of protocol in terms of the placement, participation, activity, and otherwise that will be afforded to those witnesses so that we can ensure we are not inflicting unwanted (sic) infliction of pain upon the condemned nonetheless. I want to also talk about the cost issue. This was looked at by other states very recently as they go through very difficult economic conditions, as they try to weather those conditions, as we do here in Nebraska. And independent analysis from legislative audits in Kansas and Tennessee and Maryland and California, Florida, New York, Texas, Indiana, Colorado have looked at these issues. We haven't even had a chance to look at those issues as we rush to judgment, as we march to death with this flawed law, full of empty promises in terms of closure and deterrence. We can't even take the time to conduct a study on critical aspects surrounding taxpayer...use of taxpayer resources? I guess if proponents are so confident in terms of the adequacy and efficiency of the language itself and the other public policy issues surrounding lethal injection, why the rush? Why the rush? Let's take a minute to tell Senator Council and myself that we're wrong. Prove it through empirical evidence. I will offer up the first apology. Let's take a year. Let's figure out if we're headed in the right direction. There is no need to rush to that judgment. Our colleagues in other states have commissioned these comprehensive reviews and studies. In all these other states that I just read off, they've looked at.... [LB36]

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PRESIDENT SHEEHY: One minute. [LB36]

SENATOR NANTKES: ...these cost issues in a serious and unbiased manner. We haven't even had the time to do that, and again, not dispositive but part of the equation. The procedures and protocols and the delegation issues, which are lacking in terms of LB36, are not addressed in the committee amendment, are not addressed in the record. The lack of viable alternatives is something that I think arguably must be considered if not required under Supreme Court jurisprudence. The Speaker says in his reading of the opinion it's not. Well, I'll tell you what. We both got our law degrees from the same place and we've come to opposite conclusions on that. One of us will ultimately be right or the court will find another direction. Thus, we have to be careful who we rely on in sources and in interpreting cases because attorneys from both perspectives can come with very different viewpoints about what a very fractured Supreme Court decision says in this regard. It failed to garner a majority opinion... [LB36]

PRESIDENT SHEEHY: Time, Senator. [LB36]

SENATOR NANTKES: ...in any regard. Thank you, Mr. President. [LB36]

PRESIDENT SHEEHY: Thank you, Senator Nantkes. Members requesting to speak are Senator Council, followed by Senator Nantkes. Senator Council, you're recognized. [LB36]

SENATOR COUNCIL: Yes, thank you, Mr. President. In case there is any doubt, I rose before and I rise now in support of the bracket motion. And the point that I was making when my time ran out the last time is that if those who support LB36 are that confident that merely mimicking what the state of Kentucky has in terms of protocol, I submit to you that you amend this bill to specifically so provide. If you look at Section 10(2), it says the director shall create, modify and maintain a written execution protocol describing the process and procedures by which an execution will be carried out consistent with this section. Why don't we say consistent with the protocols found to be acceptable by the U.S. Supreme Court? And that's one of the problems with this piece of legislation. And Senator Nantkes addressed one of the points that I wanted to make. I have 11 possible amendments that I could introduce with regard to the errors that are blatantly obvious in LB36. But again, I don't support the death penalty. I believe this state should repeal the death penalty, so it is not in my interest to introduce amendments that will enable the state to carry out a punishment that I believe is no longer appropriate in a civilized society. So, no, I won't introduce my 11 amendments, although I know full well by introducing them I could delay this process for hours upon end. But the objective of the bracket motion is to get this body to carefully examine the issues that have been raised regarding the constitutionality of LB36, about the procedural flaws in LB36. But instead, we're so quick to rush and put this measure on the books so that we can tell our constituents who are death penalty supporters that,

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look what I did for you today. Where are you going to be...Senator Lathrop said 20 years, it won't be 20 years, it will be less than 10 years before the Supreme Court will address the very issue that it stated it was not addressing in Baze, which was the lawfulness of the death penalty. It will revisit that. There will be cases that will be elevated to that level. And for those of you who think that the Supreme Court won't entertain a lethal injection case that is presented to them on the right set of facts in the right form, you're grossly mistaken. In fact, you ignore one of the justice's express statement... [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR COUNCIL: ...that this decision isn't going to end this controversy, it's just beginning, and that instead of being the last state to make things right, like we were the last state to realize that electrocution wasn't an appropriate form of the sole method of executing, we'll be the last state to realize that the death penalty serves no recognizable social or public benefit. It is, in its highest form, state-sanctioned revenge and it's applied to a selective group. It is applied... [LB36]

PRESIDENT SHEEHY: Time, Senator. [LB36]

SENATOR COUNCIL: ...inconsistently and discriminatorally. [LB36]

PRESIDENT SHEEHY: Thank you, Senator Council. Senator Nantkes, you're recognized. [LB36]

SENATOR NANTKES: Thank you, Mr. President. Colleagues, I talk a little bit about how it would be important to just back off for a moment and address these serious issues, these flaws that have been put forth in the interim and why you should support the bracket motion. As James Hewitt, past-president of Nebraska Bar Association, said in the Omaha World Herald, January 29, 2009, Nebraska legislators should proceed slowly and cautiously in determining whether lethal injection should be the method the state employs to execute convicted murderers. Nebraska does not need to rush to judgment. Examine the matter fully. Let new senators have a chance to think about the issue. A study about the costs of executing a prisoner versus confining him or her for life, as well as the effectiveness of lethal injection compared to other methods of execution, would allow both the Legislature and the citizens to feel comfortable with what decision is ultimately going to be reached. Nebraska does not need to rush to judgment, examine the matter fully. The bracket motion allows us to follow that sage advice. But maybe there is another reason, another motive behind the lack of interest in delving deeper into the policy issues. The last time the Nebraska Legislature utilized taxpayer dollars, commissioned an unbiased study to look at issues surrounding the death penalty in Nebraska conducted by one of the foremost experts on capital punishment in the United States, Mr. Baldus, what did it tell us? What did that

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comprehensive review of the death penalty in Nebraska tell us? Paid for with Nebraska taxpayer dollars, it told us that Nebraska's death penalty is meted out in a way that is potentially unconstitutional because it is unfair in terms of victim and defendant's socioeconomic status and race. That's a problem. Nebraska has failed to act on those issues, as presented in that study by the foremost expert on the issue in the country. Says Nebraska's system is flawed and we take no action, except for to move in the other direction, to reinstitute a means to carry out what's very clearly a flawed, flawed system, legally, morally, otherwise. Maybe that's the reason we don't want to take a step back and look more comprehensively and more carefully at costs, at alternatives, at procedures and protocols, because the last time we did we didn't like the results, so we decided not to act on them. That's not what a thoughtful body should do. The thoughtful body, when spending taxpayer dollars to find empirical evidence to help them make policy decisions, should either criticize the methodology, which I've heard no one do, of that study or the source, which I've heard no one do, or we should follow those conclusions. We shouldn't move in the opposite direction. That shows a lack of thinking, a lack of understanding. And that's not what the Nebraska Legislature is about. It's better than that, it has to be better than that. We're the only house that our citizens have to carry out that kind of debate and deliberation. How do you think your constituents would feel if you told them we refuse to act on studies paid for with your tax dollars that showed us our system is broken? Do you think that they're okay with that? I sure would hope not. [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR NANTKES: But maybe that provokes an alternative for why proponents don't want to look at costs, for why proponents don't want to look at alternatives, for why proponents won't adequately address the procedure and protocol issue, because they don't want to know what the results are, because it doesn't hasten the march to death and the political gain that comes therein. And that's wrong. Thank you, Mr. President. [LB36]

PRESIDENT SHEEHY: Thank you, Senator Nantkes. Mr. Clerk, do you have items for the record? [LB36]

CLERK: I do, Mr. President. Senator Lathrop offers LR245; that will be laid over. Explanation of votes from Senators Giese and McCoy (re LB218, LB155, LB392, LB358, LB503, LB626, LB630, LB27A, LB27, LB60, LB84, LB94, LB113, LB122, LB129, LB131, LB133, LB137, LB152, LB163, LB175, LB208, LB209, LB238, LB274, LB278, LB294, LB299, LB302, LB339, LB343, LB347, LB348, LB360, LB372, LB389, LB394, LB412, LB422, LB432, LB434, LB441, LB445, LB446, LB447, LB450, LB488, LB498, LB500, LB501, LB524, LB528, LB531, LB533, LB537, LB540, LB562, LB587, LB598, LB604, LB627, LB631, LB9, LB63A, LB63, LB237A, LB237, LB246A, LB246, LB420, LB464A, LB464, LB555, LB603A, LB603, LB671A and LB671). (Legislative Journal

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pages 1711-1712.) [LR245 LB218 LB155 LB392 LB358 LB503 LB626 LB630 LB27A LB27 LB60 LB84 LB94 LB113 LB122 LB129 LB131 LB133 LB137 LB152 LB163 LB175 LB208 LB209 LB238 LB274 LB278 LB294 LB299 LB302 LB339 LB343 LB347 LB348 LB360 LB372 LB389 LB394 LB412 LB422 LB432 LB434 LB441 LB445 LB446 LB447 LB450 LB488 LB498 LB500 LB501 LB524 LB528 LB531 LB533 LB537 LB540 LB562 LB587 LB598 LB604 LB627 LB631 LB9 LB63A LB63 LB237A LB237 LB246A LB246 LB420 LB464A LB464 LB555 LB603A LB603 LB671A LB671]

And a priority motion: Senator Sullivan would move to recess the body until 1:30 p.m. []

PRESIDENT SHEEHY: You have heard the motion to recess until 1:30 p.m. All those in favor say aye. Opposed, nay. We stand at recess. []

RECESS []

SENATOR CARLSON PRESIDING []

SENATOR CARLSON: Good afternoon, ladies and gentlemen. Welcome to the George W. Norris Legislative Chamber. The afternoon session is about to reconvene. Senators, please record your presence.

PRESIDENT SHEEHY PRESIDING

PRESIDENT SHEEHY: Please record, Mr. Clerk.

ASSISTANT CLERK: There's a quorum present, Mr. President.

PRESIDENT SHEEHY: Do you have items for the record?

ASSISTANT CLERK: Mr. President, I do. New resolutions: LR246 by Senator Hadley and LR247 by Senator Pahls. That's all I have at this time. (Legislative Journal pages 1712-1713.) [LR246 LR247]

PRESIDENT SHEEHY: Thank you, Mr. Clerk. We will now be continuing with floor discussion of the Select File, 2009 senator priority bills, LB36. Senator Nantkes, would you like to give us a recap of your motion to bracket. [LB36]

SENATOR NANTKES: Thank you, Mr. President. Good afternoon, colleagues. Before we left for the noon break, I had opened on and we had started discussion on a motion to bracket LB36 until 5/29/09. To be clear and, again, for the record, this is a legitimate motion, not any part of an attempt to continue on unnecessarily but to provide a last-minute safety valve to the body to allow proponents to go back through during the interim and address and remedy deficiencies in regards to various legal and technical

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and policy questions, arguments, and challenges that have been brought forth. Thank you, Mr. President. [LB36]

PRESIDENT SHEEHY: Thank you, Senator Nantkes. Members requesting to speak on the motion to bracket, Senator Council, you're recognized. [LB36]

SENATOR COUNCIL: Thank you, again, Mr. President. I'd like to pick up where I left off and that's with regard to the problems and the flaws in LB36 and the need for those flaws to be addressed. And I think it's of particular import that it be the proponents of LB36 that take action to address these flaws, particularly with regard to the Administrative Procedures Act issue, since the original version of the bill specifically exempted this protocol development procedure from the Administrative Procedures Act. By specifically removing it by amendment, the inference to be drawn is that this procedure will not be subject to the Administrative Procedures Act and, as a result, it will cause more litigation than I think the proponents of LB36 appreciate and, in that regard, I would urge them to consider this bracket motion as an opportunity not only to address that issue but to also address the other issues raised in the Baze decision with regard to why the Kentucky protocols were able to withstand that judicial scrutiny. And one of the reasons it withstood that judicial scrutiny was the level of educational background and experience required of those who are responsible under the protocol for inserting the IV and monitoring the catheters. They have specific, stated requirements in their protocol and the point that I was making before we recessed was that if, as those who have spoken in support of this bill are confident that the Kentucky protocols, if our statute is modeled after them, that our statute would also withstand judicial scrutiny, it begs the question as to why we don't just extract those portions of the Baze decision and incorporate it into the language of LB36. If you look at LB36, it says that the director of Corrections will develop the training required by these individuals. Well, the question is, is what training does the director of Corrections have to establish the training that's required for someone who, under the Kentucky protocols, has to be a licensed phlebotomist? So if we're going to model legislation after what other states do, we should have the confidence that those procedures withstand judicial scrutiny and take the opportunity to amend this legislation to address those issues. Now again, that could be done on the floor, but these issues are of such a crucial and critical nature that I agree with Senator Nantkes that it requires additional study and it requires additional study in terms of not only what Kentucky has done but what other states have done and are doing. There are other states where the experience and background of the individuals who are inserting IVs and inserting catheters... [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR COUNCIL: ...are, in fact, the issue that is the subject of litigation in those states. I would think we'd want to address that. But in closing, in the 45 seconds or so I have left, I want to read again to you from Senator Carolyn McGinn, who is a Kansas

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state senator, who said the committee also heard much testimony disputing the widely held belief that the death penalty acts as a deterrent to violent crime. The American Society of Criminology surveyed criminologists about their thoughts regarding whether the death penalty was a deterrent to crime and the vast majority responded that it was not a deterrent. Further, the life without parole sentence has given the state an effective alternative to ensure the most heinous criminals are never able to endanger society again. Ladies and gentlemen, we have that alternative. We have that reasonable, effective alternative. It's currently been applied to 222. [LB36]

PRESIDENT SHEEHY: Time, Senator. That was your third time. (Visitors introduced.) Are there additional members requesting to speak on the motion to bracket LB36 until May 29, 2009? Seeing none, Senator Nantkes, you're recognized to close on your motion to bracket until May 29, 2009. [LB36]

SENATOR NANTKES: Thank you, Mr. President. Thank you, colleagues. Again to reiterate, this is a serious motion brought forward in response to a variety of technical, legal, and policy considerations and challenges that have been presented at the committee level on General File debate and on Select level that requires, in order to move forward in a thoughtful and appropriate way, that we should study this further over the interim so that those issues can be adequately addressed. We've talked specifically about inadequacy that exists within LB36 itself, specifically related to the delegation of authority in carrying out such protocols, procedures, and practices to the Department of Corrections. Colleagues, also be clear I forgot to mention this, this morning, this is in no way meant to imply or otherwise that the Department of Corrections and the director of Corrections is incapable of carrying out the many duties which they are vested with. In fact, I think they do a pretty good job in carrying out the many duties that they're vested with and are trained professionals in almost all regards to our penological policy and procedure. However, they're not experts nor trained in putting forward a humane and a legally appropriate method for changing Nebraska's method of execution from electrocution to lethal injection, as envisioned by LB36. Read LB36 and the committee amendments that we adopted on Select File. Nowhere, nowhere in the legislation does it say the state Department of Corrections will carry out, create, maintain or otherwise deal with the protocols and procedures necessary to carry out lethal injection according to the framework of the Administrative Procedures Act. So we're saying, hey, Department of Corrections, sua sponte, on your own, without any sort of legislative direction in this massive and inappropriate delegation of legislative authority do we tell you how to put together this framework; go and figure it out yourself; and if you do avail yourself to the Administrative Procedure Act, we can't even say that that's a valid process because it's absent legislative authority. And even if they do avail themselves to the Administrative Procedure Act, will it be informal rule making, will it be formal rule making, will it be in adjudication, will it be negotiated rule making? All of those different issues have not been contemplated nor addressed and they need to because it goes to rights afforded to the accused under both the Fifth, Eighth, and Fourteenth

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Amendments. These are basic procedural safeguards that must be put in place to help guide and determine the legality of meting out the ultimate sanction. They haven't been addressed in the legislation. They haven't been remedied by the committee amendment. I pose to you, colleagues, they have not been addressed on this floor. We have brought forth, Senator Council, myself and others, have brought forth legitimate points of challenge to try and improve this bill or at least draw attention to its many flaws... [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR NANTKES: ...and we have yet to receive a response in relation to the appropriateness of LB36, as written, in terms of dealing with these issues. It doesn't exist in the law. It hasn't existed in explanation from this floor amongst proponents. The only response we've received thus far is, well, the Speaker reads the Baze case to say that it will be okay. Is that really...and not to diminish his legal opinion but there's legal authorities that hold different opinions. Is that solely what we're going to rest this decision on? Is that enough? Maybe it is for you. It's not enough for me, and I think that we owe it to our constituents to be thoughtful, to be careful, and look at all of the issues before we make a decision. I urge your support of the bracket motion. Thank you, Mr. President. [LB36]

PRESIDENT SHEEHY: Thank you, Senator Nantkes. You have heard the closing. The question before the body is on the motion to bracket LB36 until May 29, 2009. All those in favor vote yea; opposed, nay. Please record, Mr. Clerk. Senator Nantkes. [LB36]

SENATOR NANTKES: Mr. President, I would request a call of the house and a roll call vote in regular order, please. [LB36]

PRESIDENT SHEEHY: There has been a call of the house. The question before the body is, shall the house be placed under call? All those in favor vote yea; opposed, nay. Please record, Mr. Clerk. [LB36]

CLERK: 38 ayes, 0 nays, Mr. President, to place the house under call. [LB36]

PRESIDENT SHEEHY: The house is placed under call. All unexcused senators please report to the Legislative Chamber. All unauthorized personnel please step from the floor. The house is under call. Senators, please record your presence. Senator Fulton, the house is under call. Senator Nantkes, all members are present or accounted for. There has been a request for a roll call in regular order. Mr. Clerk, please proceed. [LB36]

ASSISTANT CLERK: (Roll call vote taken, Legislative Journal page 1714.) Vote is 11 ayes, 35 nays, Mr. President. [LB36]

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PRESIDENT SHEEHY: The motion to bracket is not adopted. We will now return to floor discussion on LB...the call is raised...floor discussion on LB36. Senator McGill, you're recognized. [LB36]

SENATOR MCGILL: I yield my time to Senator Nantkes. [LB36]

PRESIDENT SHEEHY: Senator Nantkes, you're yielded 4 minutes 55 seconds. [LB36]

SENATOR NANTKES: Thank you, Mr. President. Thank you, Senator McGill. Sorry, colleagues, there was a bit of confusion in regards to who had time left to provide to Senator Council or myself in regards to additional points in making this record. I want to talk again briefly about the Mata case and how Justice Connolly, I believe it was, writing for the majority, talked about how it would be natural for our citizenry or this Legislature to want to inflict the same sort of pain upon these men and potentially women on death row as they inflicted on their victims and how that is a valid consideration, but how in fact from a legal perspective that's not a valid consideration and how we have to ensure that we'll be able...the state will be able to meet the three prongs of the test set forward in proving that the new method of execution that they put forward, based on a factual record and based on a full evidentiary record, can in fact ensure that we've done what we can to mitigate unnecessary and wanton pain, that we've complied with the evolving standards of dignity and that, further, we've minimized physical violence and mutilation of the prisoner's body. Well, LB36 still doesn't do that. And we had some discussion about botched executions in regards to lethal injection in other states, which puts the state on notice and demonstrates through this legislative record that the state refuses to address or remedy these issues to mitigate these types of risks and punishments and pain, which further, I think, befalls a tangled future for LB36 and lethal injection procedures in Nebraska. When we look at what's happened in other states and their ability to create a factual record showing how their policies and their laws have mitigated these risks, we draw lessons in terms of when the professionals involved are not properly trained or otherwise that they can in fact create serious mistakes that in fact increase rather than mitigate the possibility for mutilation of the prisoner's body or otherwise. You can see how, when a prisoner has, for example, a history of drug abuse or obesity or other health problems, these risks are exacerbated. Nowhere in LB36 or these protocols...which don't exist and may be delegated to the Department of Corrections and may be promulgated according to the APA but we don't know that according to the bill. Are we going to do an individualized assessment of that individual inmate's risk factors in order to carry out the procedures in a way that mitigate those risks? Are we going to do a generalized protocol? What happens if something...what happens if there's a mistake in the midst of carrying out the protocols? These are all valid concerns because then we're going to end up with lethal injection IVs and the other medical practices and procedures necessary... [LB36]

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PRESIDENT SHEEHY: One minute. [LB36]

SENATOR NANTKES: ...to carry out lethal injection or the quasi-medical procedures and practices necessary to carry out lethal injection. We're not mitigating the risks that come with cutdowns, with additional injections, with the amounts, the levels, etcetera, for a failure to ensure the IV is appropriately administered and what part of the body that's going to happen in, whether it's the arms, the legs, the groin, other arteries. We don't know. We don't know what procedures and practices will happen in that regard. And we know that without these kinds of protections we don't mitigate those risks. Want to talk additionally about something that hasn't received a lot of attention in regards to the protocols and procedures but to talk about the language in the bill that specifically... [LB36]

PRESIDENT SHEEHY: Time, Senator. [LB36]

SENATOR NANTKES: Thank you, Mr. President. [LB36]

PRESIDENT SHEEHY: Thank you, Senator Nantkes. We have Senator Howard, Senator Giese, and Senator Wallman. Senator Howard, you're recognized. [LB36]

SENATOR HOWARD: Thank you, Mr. President and members of the body. I offer my time to Senator Nantkes in order to... [LB36]

PRESIDENT SHEEHY: Senator Nantkes,... [LB36]

SENATOR HOWARD: ...finish. [LB36]

PRESIDENT SHEEHY: ...you're yielded 4 minutes 55 seconds. [LB36]

SENATOR NANTKES: Thank you, Mr. President. And thank you, Senator Howard. I wanted to just continue the discussion about the issues surrounding the identity and the confidentiality of the participants on the execution team, and the committee amendment attempted to address some of these issues. Of course, we don't want to expose our state employees or independent contractors or whoever it is who's carrying out these practices to additional public scrutiny or any sort of harm, but we must strike an appropriate balance in terms of protecting their personal confidentiality and then also ensuring that our legislation that we put forward is sympathetic and addressing constitutional concerns in this regard and also public policy concerns. And while we've...the committee amendment again has attempted to address some of these issues, if the existing provisions are interpreted broadly, that could insulate from disclosure even the most basic information about the execution personnel's training and qualifications. If litigants are not afforded the opportunity to know the execution personnel's training and qualifications, the state and the litigants will not be able to put

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together a full and complete evidentiary, factual record that demonstrates they can meet the Mata test or the Baze test. So these are issues that aren't dealt with in the committee amendment and that deserve further attention. We know, for example, in Missouri, they refuse to disclose whether or not a team member had ever been disciplined or had a medical license revoked on the grounds that it was identifying information, violative of a similar section. But obviously, that information is directly relevant to the safety of the execution procedure, again, outside of public view potentially. Because the constitutionality of each state's procedure is fact-specific, these issues are important, and this is what learned experts in the field tell us, like Professor Berger, when he testified before the Judiciary Committee, providing his thoughts on LB36, which are a part of the record. These issues have been brought forth at each level of debate. They've failed to be addressed by this body or the committee and they will provide years and years of subsequent litigation to those currently on death row, those who may be sentenced to death row now while Nebraska is without a means of execution, and those who will be on death row prospectively. But rather than addressing real ways to get tough on crime, prevention, treatment, opportunity, this body has decided instead that they don't want to deal with that and they're going to push these decisions to unelected members of the bureaucracy. Folks, that doesn't meet legal or constitutional or public policy standards, basic standards. It's a failure of this Legislature in responding appropriately to any of those concerns that have been addressed. And I wish more people would take time to be engaged in these questions... [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR NANTKES: ...and...because they're brought forward in a very thoughtful, considered manner. And I know the body is tired of dealing with this. I wish we didn't have to at all. I didn't bring this legislation. But nonetheless, those who did, it is their burden to overcome. And we have not received any sort of response in those regards. Thank you, Mr. President. [LB36]

PRESIDENT SHEEHY: Thank you, Senator Nantkes. Senator Giese, you're recognized. [LB36]

SENATOR GIESE: Thank you, Mr. President and members of the body. I rise today in support of LB36 and I struggle with my decisions, as I'm sure a lot of my colleagues do. One of the...and how I arrive at the decision, as we all do as how we either support or do not support LB36, is...comes down to our core beliefs. The death penalty is a...and the lethal injection is a very difficult issue. I don't believe it is a deterrent but, in some cases, in my belief, it is the punishment. And for the members of the body, if you're not aware, over the weekend...I will read you just a brief description of a unfortunate incident in my hometown of South Sioux City this weekend: Details surrounding a weekend murder in South Sioux City, Nebraska, are slowly coming out, but many questions still remain. Woodbury County authorities are holding a resident of Mexico on

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a \$5 million bond for the rape and murder of a South Sioux City, Nebraska, child. South Sioux City police say he raped, sodomized, and killed a three-year-old girl inside her home in the early morning hours Saturday while her family slept. He is charged with first-degree murder, sexual assault, and burglary. Police Chief Scot Ford says another child in the home helped identify the individual, who was familiar with the family. These are very difficult decisions that we all make. I respect Senator Nantkes' opinion and would yield her any time that I have remaining. [LB36]

PRESIDENT SHEEHY: Senator Nantkes, you're yielded 3 minutes. [LB36]

SENATOR NANTKES: Thank you, Mr. President. Thank you, Senator Giese. Senator Giese, I and no one in this body wants to appear uncaring or callous towards the horrific nature of the crimes that recently occurred in your home community or the horrific nature of the crimes that have been perpetrated by each of the members of those currently on Nebraska's death row, but the viciousness and horrificity of those crimes in the far past or the recent past or the future still do not eviscerate the public policy technical and legal arguments that prompt us to know LB36 and lethal injection is flawed, is bad policy, is poorly drafted, doesn't meet United States or Nebraska Supreme Court conditions and dictates. The horrific nature of those crimes cannot be doubted, cannot be doubted, should not be doubted, and our hearts go out to the families, the victims. But the death penalty continues to fail victims' families. It doesn't provide a swift response for closure or for justice. Lethal injection does nothing, LB36 does nothing to address additional procedural safeguards that should be put in place so that we can ensure we don't execute an innocent person. Even after we have the Beatrice Six case this year and the CSI case from Douglas County, there's no additional safeguards provided in LB36. We have no real discussion or examination of the costs. [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR NANTKES: We have remaining public safety officials agreeing that the death penalty is flawed and unnecessary and not a deterrent. We have problems with fairness, who gets life, who gets death. Class, race, geography, and the discretion of prosecutors, that's what determines that, not this body, not this law. That's what the Baldus study told us, that Nebraska's system was more replete with arbitrariness than any other in the country in 2001, and we took no action in response. But instead, we continue to move in the other direction. We know that LB36 will bring forward a litany of additional litigation, further protracting the agony for those families and the victims. And we... [LB36]

PRESIDENT SHEEHY: Time, Senator. [LB36]

SENATOR NANTKES: Thank you, Mr. President. [LB36]

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PRESIDENT SHEEHY: Thank you, Senator Nantkes. Thank you, Senator Giese. Members requesting to speak on LB36 are Senator Wallman, followed by Senator Cook. Senator Wallman, this is your third time. [LB36]

SENATOR WALLMAN: Thank you, Mr. President, members of the body. This is an emotional issue. And I looked at the testimony: 11 against, 4 (sic) for. And I'd yield the rest of my time to Senator Council, if she'd like. [LB36]

PRESIDENT SHEEHY: Senator Council, you're yielded 4 minutes 40 seconds. [LB36]

SENATOR COUNCIL: Thank you very much, Mr. President. Thank you, Senator Wallman. I want to follow up just quickly with the CSI case that Senator Nantkes has referred to during a number of occasions during this debate, and I think the other part of this story that I have referred to, and I don't know whether everyone in the body has put it together, but the CSI administrator in Douglas County, who is currently under indictment in connection with his handling of evidence connected with a homicide, was handling the evidence that resulted in Matthew Livers being arrested, interrogated for 11 hours, threatened with the death penalty until such time as he confessed and implicated his cousin, and the problem being that neither one of them committed the crime. But the reason Matthew Livers was picked up in the first instance was the result of the CSI investigator miraculously finding a spot of blood under the dashboard of the victim's automobile that wasn't found during the first round of evidence collection, and it was that spot of blood that led to Matthew Livers being arrested, subjected to 11 hours of interrogation to the point that he confessed to a crime he didn't commit because he was threatened with the death penalty. Now there are a lot of people who don't seem to understand why someone would confess to a crime they didn't commit. That question was raised repeatedly when we were discussing LB260 and the Beatrice Six. But until any of you are in that situation, where you're being harassed, intimidated, threatened, and you don't know what the outcome will be if you go ahead and deny your culpability and say you want to have the matter tried in court, you'll end up like Joseph White, who was the only one of the Beatrice Six who did not succumb to the threats, did not succumb to the intimidation, did not succumb to the coercion and the threat of the death penalty and requested a trial, and the jury found him guilty nevertheless. And clearly, don't take this comment as any denigration of juries. Juries are human but juries are one of the stated first-lines of defense in these death penalty cases. But that is a classic case of juries being human, making a mistake. I'd like to read some words that were penned almost eight years ago: Although it is the most awesome enactment of which the Legislature is capable, involving literally life and death, the capital punishment law does not mean what the Legislature says it means but, rather, what each of the 93 county attorneys decides it shall mean, in his or her particular county at a particular point in time. [LB36 LB260]

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PRESIDENT SHEEHY: One minute. [LB36]

SENATOR COUNCIL: Ironically, such Alice-in-Wonderland weirdness surrounds the death penalty that it would not be considered defeated if no person ever were sentenced to die under it. No other law can make such a claim. In fact, any other law could make such a claim, that law would be deemed unnecessary and would be wiped off the books, but not the politically beloved death penalty. When the vast majority of wrongdoers, for whom a law is enacted to punish them, escape even the risk of such punishment, one is dealing not with a law but a perversion of law which is used randomly and whimsically to get rid of a small handful of people whose crime is indistinguishable from the crime of the vast majority who get a free pass. These words should be familiar to you. They were penned by former Senator Ernie Chambers in August of 2001. [LB36]

PRESIDENT SHEEHY: Time, Senator. Thank you, Senator Council. Thank you, Senator Wallman. Senator Cook, you're recognized. [LB36]

SENATOR COOK: Thank you, Mr. President. I would yield my time to Senator Council, if she would like it. [LB36]

PRESIDENT SHEEHY: Senator Council, you're yielded 4 minutes 55 seconds. [LB36]

SENATOR COUNCIL: Thank you very much, Mr. President and Senator Cook, because I wanted to continue reading this because this applies equally today to LB36 as it applied in 2001 when this body was discussing LB711. And the fact is that what we're talking about is going through this process that will inevitably result in protracted litigation and will inevitably produce the same results that have been produced under the law since its existence, and that is this random and whimsical attempt to get rid of a small number of people whose crime is indistinguishable from the crimes of the vast majority who get a free pass. I shared those numbers the other day. We have 11 people currently on death row. We have 222 in general population serving life without possibility of parole, and I would venture to say that a significant percentage of that 222 committed acts as heinous, if not as...more heinous than the act that...the senseless act that occurred this weekend in Sioux City. In fact, Senator Giese, I went back and looked at some of those examples. In June of 1981, here in Lincoln a woman strangled the four-year-old son of her boyfriend and was charged with first-degree murder. When the sentencing judge reviewed the case, he said: The intent to kill the boy is beyond question. The very nature of the strangulation goes beyond a mere impulse. The decision was made to kill and it was over a period of time. This individual wasn't sentenced to death. The judge accepted a plea bargain and allowed her to plead guilty to second-degree murder. A case again in Norfolk, which is most interesting because we talk about the heinous nature. In April 1977, Ricky Roewert killed Henry Hernandez with a knife and beheaded him. Now you have to understand the circumstances. Ricky

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Roewert was drinking at the bar. Henry Hernandez was drinking at the bar. Mr. Roewert convinced Mr. Hernandez to ride with him somewhere. Clearly, Mr. Roewert had been drinking, but Mr. Roewert was not too impaired to stop and pick up a knife so that he could stab Mr. Hernandez and behead him. Mr. Roewert pleaded guilty to first-degree murder. He was sentenced to life. Now there was an aggravating/mitigating balance being struck there, but if you read the case, they say Mr. Roewert did not have a significant criminal history. That was the mitigator--his criminal history wasn't significant. And he was impaired by alcohol. But he had enough presence of mind to stop and get a knife to carry out his act. But he didn't get the death penalty. And again, when you're looking at how the death penalty is applied in this state, again, of the 26, at that time in 19...excuse me, in 2001, only 3 men... [LB36]

PRESIDENT SHEEHY: One minute. [LB36]

SENATOR COUNCIL: ...suffered judicial execution: 2 were men of African descent and 1 was Caucasian. But all of their victims were white. The remarkable, even startling result is that more than 42 percent of the men sentenced to death have been taken off death row. Who can argue that the 7 men on death row, now 11, plus the 3 that have been executed were truly the worst of the worst of the hundreds of perpetrators, some of whom dismembered or horribly mutilated their victims? It cannot rationally be claimed that Nebraskans are safer or more secure as a consequence of 3 persons being executed and 11 remaining on death row. A system producing such random, spotty results cannot be deemed fair, consistent, or nondiscriminatory regardless of the basis of the discrimination. Also, it is inordinately inefficient in achieving its proclaimed purpose. Extraordinary expensive and... [LB36]

PRESIDENT SHEEHY: Time, Senator. [LB36]

SENATOR COUNCIL: ...inexcusably wasteful. [LB36]

PRESIDENT SHEEHY: Thank you, Senator Council. Thank you, Senator Cook. Senator Nordquist, you're recognized. [LB36]

SENATOR NORDQUIST: Thank you, Mr. President. I yield my time to Senator Nantkes. [LB36]

PRESIDENT SHEEHY: Senator Nantkes, you're yielded 4 minutes 55 seconds. [LB36]

SENATOR NANTKES: Thank you, Mr. President. I was hoping that Speaker Flood would yield to a question, please. [LB36]

PRESIDENT SHEEHY: Speaker Flood, would you yield to Senator Nantkes? [LB36]

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SPEAKER FLOOD: Yes. [LB36]

SENATOR NANTKES: Thank you, Mr. Speaker. I just want the record to be clear for those who are reviewing it later. You've been present during the entirety of this debate on General and Select File. Is that correct? [LB36]

SPEAKER FLOOD: It is. [LB36]

SENATOR NANTKES: And would it be your judgment in regards to being the sponsor of this bill that, for the most part, on both General File and Select File, we've had the vast majority of the members present and listening and engaged in the debate? [LB36]

SPEAKER FLOOD: I'm not in a position to speculate as to how many people were here during the actual debate that occurred. I know that during the votes that were taken at that time following a call of the house, usually a number of above 45 senators were present and voting at that time. [LB36]

SENATOR NANTKES: Thank you, Mr. Speaker. Thank you for your time. And, colleagues, to be clear, those aren't trick questions. It's to make sure that the record reflects adequately what I believe has been a very thoughtful and considered debate. And, you know, when I called up, prior to this time speaking, I think there's one senator checked out today. I think that's Senator Haar. He's been afforded an opportunity to participate in an international event and is representing our state in that regard, and that's a unique honor. But I want the record to be clear that these questions and concerns did not fall upon an empty Chamber but fell upon representatives who were sent here to make these difficult decisions and to address these serious concerns, and they've gone unaddressed. And I want the court and those down the road reading this opinion...reading this history, reading this record to know that those concerns were not brought in a vacuum, they were not brought to an empty Chamber. They've been brought to a body, Nebraska's only deliberative body in regards to this issue, regards to any legislative issue, with full participation. With full participation that has been had, we have yet to receive response to mitigating those challenges, risks, inconsistencies, and flaws that have been presented. And I want the court and I want those down the road who read this history to know that it's either because there were no answers or it was a complete political failure and refusal to deal with those issues. And I also want to take a moment, colleagues, to thank you for your time in allowing us the opportunity to build this record and to bring forward those issues and concerns in a respectful and thoughtful manner. I truly do appreciate that and, believe me, for one second this is not my favorite topic to discuss. I don't think it's any of our favorite topics to discuss, but it is important and it is important to have zealous advocates on both sides of the issue present the case, make the case, and help us each find an appropriate resolution that's in accordance with our morals, our faith, our understanding of the law, our hearts and minds, and what our constituents deserve and respect. Thank you, Mr. President.

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[LB36]

PRESIDENT SHEEHY: Thank you, Senator Nantkes. Senator Lautenbaugh, you're recognized. Senator Lautenbaugh waives. Are there further members requesting to speak on LB36? Seeing none, Mr. Clerk, anything further on LB36? [LB36]

CLERK: Nothing further, Mr. President. [LB36]

PRESIDENT SHEEHY: Senator Flood, you're recognized for a motion. [LB36]

SENATOR FLOOD: I move LB36 to E&R for engrossing. [LB36]

PRESIDENT SHEEHY: You have heard the motion. All those in favor say aye. There has been a call for a record vote. The question before the body is on the advancement of LB36. All those in favor vote yea; opposed, nay. Have all voted who wish? Please record, Mr. Clerk. [LB36]

CLERK: (Record vote read, Legislative Journal pages 1714-1715.) 34 ayes, 11 nays, Mr. President, on the advancement of LB36. [LB36]

PRESIDENT SHEEHY: LB36 advances. We will now proceed under Final Reading, motion to return to Select File for specific amendment, LB35. [LB36 LB35]

CLERK: Mr. President, Senator Ashford would move to return LB35 to Select File for specific amendment, AM1498. (Legislative Journal pages 1715-1716.) [LB35]

PRESIDENT SHEEHY: Senator Ashford, you're recognized to open on your motion to return LB35 to Select File. [LB35]

SENATOR ASHFORD: Thanks, Mr. Lieutenant Governor. This motion would bring LB35 back for the purpose of clarifying that the Lancaster County district judge, the issue we discussed last week, would...that additional judgship would take effect on June 30, 2011...I'm sorry, July 1, 2011. [LB35]

PRESIDENT SHEEHY: Thank you, Senator Ashford. You have heard the opening on the motion to return LB35 to Select File. All those in favor vote yea; opposed, nay. Please record, Mr. Clerk. [LB35]

CLERK: 42 ayes, 1 nay, Mr. President, to return the bill. [LB35]

PRESIDENT SHEEHY: The motion to return is adopted. [LB35]

CLERK: Mr. President, AM1498 is offered by Senator Ashford. [LB35]

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PRESIDENT SHEEHY: Senator Ashford, you're recognized to open on AM1498 to LB35. [LB35]

SENATOR ASHFORD: I would just urge the adoption of AM1498. [LB35]

PRESIDENT SHEEHY: Thank you, Senator Ashford. You have heard the opening of AM1498. Member requesting to speak, Senator Pirsch, you're recognized. [LB35]

SENATOR PIRSCH: Thank you, Mr. President, members of the body. I wonder if Senator Ashford might just yield to a quick question. [LB35]

PRESIDENT SHEEHY: Senator Ashford, would you yield to Senator Pirsch? [LB35]

SENATOR ASHFORD: Yes. [LB35]

SENATOR PIRSCH: And the nature of the amendment then to the underlying bill, LB35, what does this do to the bill? [LB35]

SENATOR ASHFORD: Actually, what it does is it just clarifies what we discussed last week and makes it clear that the eighth judge in Lancaster County would...judgeship would take effect on July 1, 2011. That was the intent in last week's amendment but it was not clear from the wording in that. This is all it does. [LB35]

SENATOR PIRSCH: Thank you, Mr. President. [LB35]

PRESIDENT SHEEHY: Thank you, Senator Pirsch. Are there additional members requesting to speak? Senator Council, you're recognized. [LB35]

SENATOR COUNCIL: Yes, thank you, Mr. President. I rise in opposition to AM1498. As was noted, I was the sole vote against returning this to...for the specific amendment, and I think one of the principal reasons is, in fact, something Senator Heidemann said the last time we debated this particular amendment and that is, while we're saying that we're going to establish this judgeship in Lancaster County effective July 1, 2011, all we're doing is postponing the inevitable without any means of assuring that the funding is available to make that happen. We're making a commitment of state funds two years off. We're already looking at the problems that may be created when the federal stimulus dollars are exhausted, and here we are putting off something until July 1 of 2011, without any means of assuring that funds would be appropriated for that judgeship to be created, and what we would have is on the books an additional judgeship but not addressing the burdens that are faced by Lancaster County. I read briefly from a communication from Judge Chevront the last time we spoke on this matter where he made it clear, while there's an impression that he's prepared to serve

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as a part-time judge, he's not prepared to do that nor was he aware of anyone else who would want to do that, so...while it's my recollection, I think we...the body even voted last time to remove the appropriation for the part-time judge in Lancaster County. So I just think that we're postponing the inevitable and I think we're not being fiscally responsible by putting off an expenditure that I don't think anyone in this body questions needs to be made and the unwillingness to make that decision now. I remain baffled as to the reason that the Governor opposes the creation of this judgeship in Lancaster County. I think at a minimum that reason ought to be articulated. Whether I agree with it or not, it should be forthcoming. And to enact this amendment on the threat of a veto of a bill that contains so many issues that need to be addressed at this time by this body escapes me; that if we believe, as it was stated, that the Governor believed that everything else in the bill is worthy of enactment, then why do we take the brunt of removing a particular provision that the Judiciary Committee voted unanimously to advance to the floor and that I've heard no reason articulated for why the judgeship should not be created during this fiscal cycle. So for those reasons, I would hope others would join in voting not to advance AM1498 and then would move to advance LB35 as it was originally voted out of the committee. [LB35]

PRESIDENT SHEEHY: One minute. Thank you, Senator Council. Senator White, you're recognized. [LB35]

SENATOR WHITE: Thank you, Mr. President. I won't take long on this. I voted to return it to file, and if Senator Ashford asks to amend it I will probably support it. But I would like one more opportunity to offer to my rural friends the opportunity to recognize what's really going on here. While we do not fill this judgeship in Lancaster County, we are cannibalizing the judicial services that should be available in your districts. I had told Senator Stuthman in the argument before that, while he may have title to the tractor, as long as it's plowing my field I really own it. And that's what's going on. And if we're serious about supporting small-town life, small-town economies, a system where it is a livable community, one of the essential elements is a functioning judiciary in areas that do not...are not separated by too great of a geographical distance. And that's true even if they don't have the caseload to justify being there. But that is an essential service, you might say the essential service the state should provide to its citizens, and we are falling short on that. We pretend we're not taking something away from you but, in reality, members, we are. So no one should hide from the reality here that judicial resources are being shifted from rural areas to urban areas and that's because we don't want to pay for additional judges as they become necessary. Thank you, Mr. President. [LB35]

PRESIDENT SHEEHY: Thank you, Senator White. Are there additional members requesting to speak on AM1498? Seeing none, Senator Ashford, you're recognized to close. [LB35]

SENATOR ASHFORD: Thank you, Mr. Lieutenant Governor. I'm not going to belabor

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this. We've argued it at length last week. I just want to clarify one point and that is this. I think it's perfectly legitimate when the Governor of the state has conversations with the Judiciary Chair and voices concerns about the price tag of a particular initiative in a particular bill, and it was in the spirit of that concern that I suggested to the body that we move the judge two years out. I can assure the body that what this discussion has done, at least for the Judiciary Committee, is to refocus our attention, Senator White said it, to refocus our attention on allocation of judges, how they be allocated and moved and so forth. The committee will spend time this summer and fall. We're assigning someone on the committee to work on this full-time. Senator Coash is committed to work full-time this summer and fall, along with his other job, to come up with some solutions, some plans for this body. It's a big issue to be discussed. I think this particular amendment gets us through this next two years without a fiscal impact but does not in any way deflect from the issue, and it is an issue that we're all concerned about. Our judges are concerned about it, our lawyers across the state, our citizens who rely upon the court system should and are concerned about it. I know you're concerned about it. I promise you we will work hard on it. Senator Coash has made a similar promise. And I would urge the body to advance AM1498. Thank you. [LB35]

PRESIDENT SHEEHY: Thank you, Senator Ashford. You have heard the closing. The question before the body is on the adoption of AM1498 to LB35. All those in favor vote yea; opposed, nay. Please record, Mr. Clerk. [LB35]

CLERK: 46 ayes, 1 nay, Mr. President, on the adoption of the Select File amendment. [LB35]

PRESIDENT SHEEHY: AM1498 is adopted. Is there anything further, Mr. Clerk? [LB35]

CLERK: Nothing further, Mr. President. [LB35]

PRESIDENT SHEEHY: Senator Nordquist, you're recognized for a motion. [LB35]

SENATOR NORDQUIST: Mr. President, I move LB35 to E&R for engrossing. [LB35]

PRESIDENT SHEEHY: You have heard the motion. All those in favor say aye. Opposed, nay. LB35 advances. We will now move to Select File, 2009 committee priority bill, LB622. [LB35 LB622]

CLERK: Mr. President, if I might, a couple of items before that. Judiciary confirmation report, Judiciary Committee confirmation report, and an explanation of vote (re LB16 and LB241). (Legislative Journal pages 1716-1717.) [LB16 LB241]

Mr. President, LB622. First of all, I have no E&Rs. I have an amendment. I also have two priority motions. Senator Lathrop would move to bracket the bill, Mr. President, until

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March, I'm sorry, May 27, 2009. [LB622]

PRESIDENT SHEEHY: Senator Lathrop, you're recognized to open on your motion to bracket LB622 until May 27, 2009. [LB622]

SENATOR LATHROP: Thank you, Mr. President and colleagues. Good afternoon. I put this bracket motion up on my own bill or on this bill that's a priority from Business and Labor so I would have the first opportunity to speak. I'll withdraw it at the conclusion of my remarks, but I did want to visit with you, remind you what this bill is about, tell you what I promise to do before General File or on General File, assure you that I've kept my word, and then tell you what the bill is about one more time before we hear Senator Lautenbaugh's motion to recommit. LB622 is a very simple bill. Its purpose is to prevent frivolous claims being made on appeal from the Workers' Compensation Court. The bill was made necessary by a Nebraska Supreme Court Opinion called Lagemann v. Methodist Hospital. In that opinion, the Supreme Court indicated that the penalties intended to discourage frivolous claims against employee claims, that penalty being a 50 percent penalty on benefits, did not apply on appeal. What that meant was insurance companies were permitted to make any claims they wished, regardless of the level of merit, with no penalty associated with the appeal. And in the meantime, an employee who is...has benefits coming their way as a result of a decision of the Workers' Compensation Court do not receive benefits. And just so that you know and that you have the proper background, an appeal takes typically two years, so someone who cannot work sits at home with no benefits, even though the court has determined that they're due, and even if the claim on appeal is without merit, they'll sit at home with no benefits. Now you've all at one time or another professed to be fiscal conservatives. These people are going to come to the good old state of Nebraska for benefits while their appeals are sitting around and they're not getting benefits. To discourage that practice, the Worker's Compensation law has a penalty in place and that penalty says that if a matter is not in controversy, the insurance company has to pay that benefit and it may litigate any other benefits for which there is a reasonable controversy. If they litigate a benefit or an aspect of a workers' compensation claim for which there is a reasonable benefit, there's no penalty. Lagemann said...the Supreme Court said in Lagemann that that penalty doesn't apply on appeal, and they invited the Legislature to deal with that issue. The amendment that was adopted on General File does just that, and you'll recall that we had a dialogue on the floor about this very subject matter and we did, in that amendment, require that a penalty be in place for those benefits which are not the subject matter of a reasonable controversy on appeal. And I promised on General File to address the concerns of a business interest or business interests that had concerns about when that penalty began. I'll introduce an amendment shortly that does just that. I've kept my word. I've developed and, in fact, adopted the amendment, the language offered by the business interests that had concerns about the amendment that we adopted on General File. We should be clear that LB622 is about frivolous claims. The question that we will answer before we vote on the next couple of motions

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and amendments is whether or not we will let an insurance company not pay somebody a benefit that's due and for which there is no reasonable controversy or whether they can appeal, assign as an error something to do with that penalty even though the assignment has no merit, and essentially not pay an injured worker for two years while an appeal sits in the Supreme Court or in the Court of Appeals. Procedurally, this is how it's going to go this afternoon. After this...after the introduction of this bracket motion, I'll withdraw it. You will then hear from Senator Lautenbaugh who has a motion to reconsider the bill or recommit it, pardon me, to the Business and Labor Committee. I want to talk about that for a minute. Senator Nordquist's LB622 was heard before the Business and Labor Committee. The subject matter of LB622 was penalties as they relate to not paying hospital bills in a timely fashion. We heard that bill. In the meantime, Lagemann v. Methodist Hospital was decided by the Supreme Court. As I said, they invited us to fix this problem and so we took the substance of Nordquist's bill out and substituted it with the language that is the fix in the wake of the Lagemann v. Methodist Hospital. Both bills...both the bill and the amendment that we adopted on General File deal with the subject matter of penalties in a work comp claim. They are germane. The approach taken by the Business and Labor Committee is perfectly appropriate. In fact, it is typical of approaches taken to deal with issues and particularly those that come along in the interim or while we are in session and presented to us by the Supreme Court. In short, as you listen to the motion to recommit, as you listen to the amendment and as you decide what to do with LB622 today, I ask you to keep in mind that this is about frivolous claims. Your vote is about frivolous claims and whether or not they'll be permitted on appeal. Now I understand that many of you have heard, and I have as well, received e-mails from people in your district that have said you can't be for this, LB622 is a big problem; in fact, LB622 is terrible for employers, it will raise rates, it will be the end of the system, it's wrong. And you've all gotten the e-mails. And I understand why you've gotten the e-mails because that's the information they've gotten from the lobby. Let me tell you, this has nothing to do with rates. It's about whether an insurance company can ignore the fact that they don't have a beef about a disability benefit and still not pay it when they're appealing another aspect of the work comp claim. LB622 passed on General File and I don't think...my recollection is we had like 35 votes without a call of the house. This wasn't even close. The part that is being attacked and the opposition now comes from the very part the business interests had no complaint about on General File. This is a logical...it's consistent with the work comp act, it is an appropriate amendment, it is a lawful amendment, and I urge the adoption of the amendment that I will introduce after Senator Lautenbaugh's motion to recommit. Thank you, Mr. President. With that, I'll withdraw my motion to bracket. [LB622]

PRESIDENT SHEEHY: The motion to bracket LB622 is withdrawn. We'll move to the next amendment, Mr. Clerk. [LB622]

CLERK: Mr. President, a priority motion: Senator Lautenbaugh would move to recommit the bill to the Business and Labor Committee. [LB622]

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PRESIDENT SHEEHY: Senator Lautenbaugh, you're recognized to open on your motion to recommit LB622 to committee. [LB622]

SENATOR LAUTENBAUGH: Thank you, Mr. President and members of the body. As previously indicated, I did file a motion to recommit this and I wanted the opportunity to explain why I filed this. A lot of it was explained. And I'm not standing here saying that something was done inappropriately. I'm not standing here criticizing anyone's motives or approach to this. Things happened entirely within the rules and aboveboard. There's no question about that and I want to be very clear on that from the outset. And this bill did pass from General File to Select File with substantial support. I don't even recall, I may or may not have voted for it, but as I understood it at the time, there was going to be work between General and Select, and there has been, and that was to try to work out some concerns, one of which dealt with when these penalties and when...when you measured, I guess, when penalties, interest, fees and whatnot could be pegged from and whether or not an issue is contested or not. And the dispute, as it comes down to now, I'll represent to you, and I'll be corrected if I'm wrong, is whether or not we're deciding whether the test is whether or not there's a reasonable controversy or whether or not the matter is on appeal. And you've been told that, well, if we just let people appeal these things, if we just make the test, well, was this issue appealed, then there will be all these frivolous appeals. I would remind you that in the case for frivolous appeal, the interest ticks along at 14 percent, not the judgment rate, and that seems like a substantial penalty in and of itself. Also, there's a possibility of an attorney's fee award if you're unsuccessful on appeal. The dispute here is between whether we measure it as to whether or not the issue is on appeal, or whether or not we measure it as if there's a reasonable controversy. And the problem I have with this is that reasonable controversy is in the eye of the beholder. You don't know if a review panel is going to determine there's a reasonable controversy or not. We know when something is on appeal. But even then, it gets more complex. When a plaintiff appeals, say for instance, the nonappealing party sets forth his...if it's the case of an employer, its grounds for appeal in its brief, which is due sometime later. So we don't know for sure when the deadline will be for an appeal in all cases, but at least it's calculable. Reasonable controversy can come and go, once again, in the eye of the beholder. I've had trial judges find that there's a reasonable controversy. I've had the three-judge panel say, no, there wasn't reasonable controversy. That does not give a measure of certitude to the employers. Now why did I bring a motion to recommit? I brought the motion to recommit for the simple reason that, as indicated, this was not the bill that the committee heard. The committee heard a bill that dealt with penalties on medical payments, medical bills, as I understand it, bringing the 50 percent penalty to medical bills that currently exist for indemnity payments in the workers' compensation world. That's not what this bill does anymore. As was indicated, it was completely changed to deal with another topic to address a Supreme Court decision that came down in the interim. Well, we haven't had a hearing on this yet and I believe this area is particularly unique in that these hearings

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are often well-attended and well-contested when you're changing the compact. In this case, the underlying bill, I believe the Trial Attorneys and the AFL-CIO came and testified. The opponents were Property and Casualty Insurers Association of America, National Federation of Independent Businesses, Nebraskans for Workers' Compensation Equity and Fairness, Nebraska Chamber of Commerce, city of Omaha, Werner Enterprises. Well, that tells us nothing because they were having a hearing on a different bill. What is set forth in this bill today was not before that committee on that date. So we have a committee statement but we did not have a hearing on what is before you now. And there are differences here and it is an important policy choice: whether or not we say whether or not there's a reasonable controversy as whether or not we're talking about interest, penalties, attorney's fees, whatever, or whether or not we're saying simply on matters that aren't appealed. And that's a choice that I think we should have a committee hearing on. That's a choice that I think the opposing parties and the stakeholders, if you will, in this type of issue should have a chance to submit testimony on. That's a choice that I think the members of the committee should make an informed choice on after testimony. And like I said, this is not by design. This wasn't someone waiting in the weeds saying, gee, I hope there's a Supreme Court decision that comes down so I can take Senator Nordquist's bill away and make it do something else. That's not what was at work here but it's what happened. And I believe the motion to commit is...recommit, excuse me, is proper on these facts in this case especially, and I would urge your support of the motion. Thank you. [LB622]

PRESIDENT SHEEHY: Thank you, Senator Lautenbaugh. You have heard the motion to recommit LB622. Members requesting to speak, Senator Lathrop, followed by Senator Carlson. Senator Lathrop, you're recognized. [LB622]

SENATOR LATHROP: Thank you, Mr. President. I do want you to know that, before I start my remarks again, that Senator Lautenbaugh told me what he was going to do and I think we're probably...for the most part we agree on what this issue is about. It's whether somebody can just appeal something or whether there actually has to be a dispute. But let me talk for a minute, to start with, about the motion to reconsider or, pardon me, to recommit. Here's the issue and the problem. There is nothing wrong with a committee taking a bill and substituting for it something within their jurisdiction. In fact, if this was the problem and if this was a good reason to recommit, the objection should have been to germaneness, but there's not a problem with that. There is no need to recommit this bill to Business and Labor and, I'm going to tell you something, it's a dangerous practice if you want to go there. You all serve on different committees and now you can consider what happens if we recommit LB622 to Business and Labor, what have we said about our process, because we're going to break decades of tradition if we do this. Decades of tradition are going to go out the window because this is a common practice for a committee to take the substance of one bill and, in a related matter, make it a committee amendment. It is germane, it is an appropriate course, and we do it all the time. And if we recommit this, we're going to have problems with the way

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we function. Every bill that comes out of every committee is going to be examined to see if any amendment has been put on the bill that changes any aspect of the bill as it was originally introduced, and then we're going to start having motions to recommit out here, and we don't want to go down that road. This isn't just about LB622 and your interest in trying to help somebody who's talked to you about it. This is about where we're going as a body with the way committees function here. LB622 does not need to go back to Business and Labor, nor be recommitted. As to the substance of what took place on General File, on General File we had a test or a standard for when the penalty applied. If there is no reasonable controversy and the benefit is not paid, then there would be a penalty. The court has indicated what that means. It's not that allusive. It is a well-known commodity in workers' comp litigation and, in fact, the Supreme Court has interpreted that phrase this way: To avoid the penalty provided for in 48-125, an employer need not prevail in the employee's claim. It simply must have an actual basis in law or fact for disputing the claim and refusing compensation. That's the standard that I want in place, that's the standard the Business and Labor Committee thought was appropriate for matters on appeal; the opposition doesn't. The opposition does not want a standard that simple. All they have to do is have an arguable basis for their defense and they pass this test. Senator Lautenbaugh framed it this way, and I would agree: The difference is whether or not one must simply appeal, in which case they get a pass not to pay, or whether there actually has to be a dispute. There must, there necessarily ought to be a dispute. If they don't dispute something, if you don't pass LB622 all they can do is list on their list of grievances, called assignment of errors, a particular benefit, regardless of whether there's any merit to the claim, regardless of how frivolous it is,... [LB622]

PRESIDENT SHEEHY: One minute. [LB622]

SENATOR LATHROP: ...and they avoid the penalty. We believe there should be something in dispute. We think that's what the Supreme Court asked us to clarify as a body. I fixed the thing that was expressed to me by the business community, which is the timing of this. They actually had no complaints on General File with respect to the test, that is the no reasonable controversy piece of this. It was the timing, and I took their language and incorporated it into my amendment. I strongly oppose the motion to recommit and encourage you to think about this, not just in terms of LB622 but in terms of how this body is going to operate after this vote. Thank you. [LB622]

PRESIDENT SHEEHY: Thank you, Senator Lathrop. Members requesting to speak are Senator Carlson, followed by Senator Friend and Senator Lautenbaugh. Senator Carlson, you're recognized. [LB622]

SENATOR CARLSON: Mr. President and members of the Legislature, I'd like to address a question or two to Senator Lathrop, if he would yield. [LB622]

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PRESIDENT SHEEHY: Senator Lathrop, would you yield to Senator Carlson? [LB622]

SENATOR LATHROP: I will. [LB622]

SENATOR CARLSON: Now, Senator Lathrop, I'm really asking you some questions here to help me. And being a member of the Business and Labor Committee, I need some more understanding on this, and I think if I do, from that standpoint, there are quite a few in the body that do and hopefully this discussion will help us along here. Give us, if you can, a quick, real-life example of how this might come into play. [LB622]

SENATOR LATHROP: I'd be happy to. Here's a perfect example: Fellow gets hurt at work, say he's hit by a forklift, okay, and there are two issues in his trial. Nobody disputes that he got hurt in the scope and course of his employment, nobody disputes that, but he hasn't been able to work since the day he was...had his pelvis crushed by a forklift. Okay? And there is a doctor bill that's in dispute. They don't know if the treatment was necessary or if the guy jumped through all the right hoops. They have a trial. Nobody disputes that the guy was supposed to get the disability benefit because he hasn't been able to work a day since the forklift ran him over. But the insurance company continues to have a dispute over whether or not that medical expense is rightly due the hospital and should be paid by the insurance company. They get a decision against them in the Work Comp Court and then appeal it. The question is whether or not they can stop paying the disability benefit nobody disputes is due simply by appealing or whether that disability benefit needs to be a legitimate controversy between the parties before they stop paying it pending the appeal. [LB622]

SENATOR CARLSON: Okay. Now I even got lost a little bit there. In a case, injury at work, that's work comp. Well, the disability has got to be work comp as well. So if...what's the dispute? He's got a medical bill and then he's got disability benefits. If one would be disputed they both would be, wouldn't they? [LB622]

SENATOR LATHROP: No, that's not true. If they had an argument, the guy shows up on Monday morning, his back hurts and, you know, he tells a coworker that he hurt himself playing basketball but now he's going to claim it was a work comp injury, then the whole thing is in a dispute. Everything is in controversy. But if in front of three people he gets run over and crushed by a forklift, nobody is disputing that it happened at work, nobody is disputing it happened in the scope and course of his employment or that he can't work at all. But they might have a beef over some medical care. [LB622]

SENATOR CARLSON: As to whether it was...whether it was necessary. [LB622]

SENATOR LATHROP: Whether it was necessary, whether the person went through the proper channels and saw the right doctor. There are hoops that these people have to jump through in terms of choosing their own physician and who they see and getting

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referrals. [LB622]

SENATOR CARLSON: Okay. Now without this, let's go back to under current law the employer could face and would face a 14 percent penalty anyway. Is this correct? [LB622]

SENATOR LATHROP: The...it's not a penalty. It's actually just waiting time interest and that happens on all judgments. If you...if you and I have a dispute and I win a money judgment against you and you appeal it, there's interest on that judgment,... [LB622]

SENATOR CARLSON: Okay. [LB622]

SENATOR LATHROP: ...not prejudgment interest but interest on the judgment. [LB622]

SENATOR CARLSON: So 14 percent over a short period of time doesn't amount to much money but 50 percent penalty does. [LB622]

SENATOR LATHROP: Fifty percent penalty is an inducement to indicate...to pay on the...pay the benefits you don't dispute while the appeal is pending, yes. [LB622]

SENATOR CARLSON: Okay. Now I thought that when I heard you on example before that...and here you're using a... [LB622]

PRESIDENT SHEEHY: One minute. [LB622]

SENATOR CARLSON: ...a medical bill versus a disability benefit, and if it's work comp, we only have one disability benefit for a certain period of time. We don't have short-term and long-term disability. We may have permanent though. [LB622]

SENATOR LATHROP: We lawyers that do this kind of work use "disability" to talk about, and Senator Lautenbaugh has used the phrase, indemnity benefits. That's probably a more accurate statement. We call total...indemnity benefits for total disability are called total disability benefits, so permanent disability benefits compensate somebody for their loss of earning capacity and those last no more than 300 weeks. [LB622]

SENATOR CARLSON: Okay. Thank you. I may come back for another question. Thank you. [LB622]

PRESIDENT SHEEHY: Thank you, Senator Carlson. Thank you, Senator Lathrop. Senator Friend, you're recognized. [LB622]

SENATOR FRIEND: Thank you, Mr. President, members of the Legislature. This is an

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interesting motion. Last time I saw it is one I threw up here and Senator Ashford almost ripped my head off. I remember it well. It's actually funny to talk about now. It wasn't too enjoyable at the time. Recommit to committee motions, I would only...I would only disagree with Senator Lathrop to this degree, this has been done, it will be done again. It's a motion that's in our rule books for the purpose of doing a couple of different things--under these circumstances, I think it's doing one of those things--a couple of different things meaning it ostensibly kills a bill. You can do...you can throw a bracket motion up on it. I mean you can throw an IPP motion. We're actually on Select File. You throw an IPP motion up on General File, you don't even have to go get the amount of votes that you'd get on Select File. The bottom line is it might as well be a kill motion for the session. The second reason that you would do it, and I don't know how serious Senator Lautenbaugh is in regard to taking this to a final conclusion, is that he might think that it needs...that this particular piece of subject matter needs a public hearing. The only time I've seen a bill recommitted to committee, it was out of my committee, a committee that I chaired, so I don't take offense to them. It's the nature of the beast. By the way, I deserved it. I deserved it. I kicked two bills out. One of them got drilled, knocked back to committee. The other...the other bill got messed around and beat up on the floor. It was the natural gas wars. It was a nightmare, really not for anybody else, just for me, okay? This is not...these motions are not personal and I think what's really got to be pointed out is that they're not...they shouldn't be personal to the committees either. It's a motion. It's as simple as that. Under these circumstances, it appears to be a kill motion to me. Here's what I'm looking at and here's why...let me switch gears a little bit to LB622. Senator Carlson started this line of questioning. I was going to ask Senator...maybe I can do it on my time in the next time I speak to this, I was going to ask Senator Lathrop. Fifty percent, a fifty percent late penalty, and I'm just bringing myself up to speed with this, that seems exorbitant. That seems pretty high. I want a really good reason why that's the case. Here's the bottom line: 14 percent from the time of the award unless the employer receives a reduction in the amount of benefits awarded. The prospect of paying attorney's fees and a 14 percent interest, do we think that's sufficient, attorney's fees and 14 percent? Show me the last 401(k) that you've received 14 percent on. A rhetorical question would be, why not just raise percentages? You want a deterrent. Why not go up to 20 percent? I would ask if...how much time do I have? [LB622]

PRESIDENT SHEEHY: One minute twenty-five seconds. [LB622]

SENATOR FRIEND: I would ask if Senator Lathrop would please yield to a question. [LB622]

PRESIDENT SHEEHY: Senator Lathrop, would you yield to Senator Friend? [LB622]

SENATOR LATHROP: Yes. [LB622]

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SENATOR FRIEND: Senator, thank you, Senator Lathrop. Did that come up in discussions? I mean I know that this is probably...this subject matter has probably been broached. Why a 50 percent hit? Why not just crank...why not just crank that 14 percent up to 20 or 25? [LB622]

SENATOR LATHROP: Because the 14 percent applies to... [LB622]

PRESIDENT SHEEHY: One minute. [LB622]

SENATOR LATHROP: ...any...it's a postjudgment interest rate, okay? It's not intended to penalize people for advancing a frivolous argument;... [LB622]

SENATOR FRIEND: Oh... [LB622]

SENATOR LATHROP: ...the 50 percent penalty is. [LB622]

SENATOR FRIEND: Okay, good. But couldn't we kill...for lack of a better term, couldn't we kill two birds with one stone? [LB622]

SENATOR LATHROP: We're not trying to discourage legitimate appeals. If you crank the interest rate up to 50 percent, you would be discouraging legitimate appeals. That's not the purpose of this section, 48-125. It's to discourage insurance companies from not paying that portion that they don't even dispute. [LB622]

SENATOR FRIEND: Okay. [LB622]

SENATOR LATHROP: If they don't dispute it, they ought to pay it. [LB622]

SENATOR FRIEND: Okay. [LB622]

SENATOR LATHROP: And a 50 percent penalty is intended to provide the inducement for that. [LB622]

SENATOR FRIEND: Okay. Fair enough. That being said, and let's say a person like me stands here and takes that all at face value that that is going to be an inducement to... [LB622]

PRESIDENT SHEEHY: Time, Senator. [LB622]

SENATOR FRIEND: Thank you, Mr. President. [LB622]

PRESIDENT SHEEHY: Thank you, Senator Friend. Thank you, Senator Lathrop. Members requesting to speak are Senator Lautenbaugh, followed by Senator Carlson,

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Senator Lathrop, and Senator Friend. Senator Lautenbaugh, you're recognized. [LB622]

SENATOR LAUTENBAUGH: Thank you, Mr. President and members of the body. I do want to point out a few things, that, once again, the 14 percent interest is not the normal judgment rate of interest. That's a special higher rate of interest in the workers' compensation world. That is not what you get when you just have a normal judgment. So there's a certain penalty element in that anyway beyond what you'd get on a normal civil suit judgment. And I would submit again that if there are frivolous issues taken up on appeal, the judge does have a hammer available. Even assuming the party would benefit by letting 14 percent interest click along while they litigated and paid to litigate a frivolous appeal, the judge can award attorney's fees too. Not only can they; they do. So I don't think making the test whether the matter is on appeal versus whether or not there's reasonable controversy, I don't think that will lead to frivolous appeals. I think it will have the value of being certain and reliable. And I do believe that after General File, at least I remember this discussion and I know there have been proposed amendments back and forth, that this was raised as a possible...not a possible issue, as an issue, whether we're pegging it to when things are on an appeal or whether or not there's a reasonable controversy. And I hesitate to tell war stories but I will, as I have worked previously in this area. Reasonable controversy, we were given a definition of it. It means different things to different judges and different people. I mean I had a case where the trial judge found there to be reasonable controversy. The injured party sought treatment at the alleged time of injury but did not tell anyone what happened; did not tell his doctor, and this is what I did; didn't tell his employer, and this is what I did, this is how I hurt myself. A year later he tells his doctor, yeah, I think I did it at work. And the doctor says, well, that history makes sense, you could have hurt yourself this way at work so, fine, this is work-related injury. At trial we prevailed upon that, that there was reasonable controversy because there was a failure to report, failure to tell his doctor how he hurt himself, and ample preexisting medical as well, preexisting injuries. Three-judge panel said, no, all the doctors say that his history is reasonable for causation so there's no reasonable controversy; no doctor says this isn't how he hurt himself. And I argued, hold on, of course all the doctors are saying if your history is true then, yes, this injury could result; we're questioning the history. Trial judge said, yeah, that's obvious, reasonable controversy. Three-judge panel said, no, you don't have any doctor questioning his history, which I guess can only mean the doctors were supposed to follow him around in advance of the treatment so they would know whether or not his history was true, whether or not they should question it. So the three-judge panel said, no, no reasonable controversy here. That is the point I'm trying to make. Having practiced in this area, reasonable controversy is often in the eye of the beholder and the beholders differ widely and wildly in this area. That's the point of having the whether or not the issue is contested on appeal standard as the proper standard here. That is why I filed an amendment to the pending amendment that includes cross appeals instead of just appeals and says that it is tied to whether or not the issue is on appeal rather than whether or not there is reasonable controversy. So I would urge you to support that

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amendment to the amendment... [LB622]

PRESIDENT SHEEHY: One minute. [LB622]

SENATOR LAUTENBAUGH: ...and at this time I would withdraw my motion to recommit to committee. [LB622]

PRESIDENT SHEEHY: The motion to recommit LB622 is withdrawn. Mr. Clerk, you have an amendment on your desk. [LB622]

CLERK: I do, Mr. President. Senator Lathrop would move to amend the bill with AM1198. (Legislative Journal page 1697.) [LB622]

PRESIDENT SHEEHY: Senator Lathrop, you're recognized to open on AM1198 to LB622. [LB622]

SENATOR LATHROP: Thank you, Mr. President and colleagues. And, Senator Lautenbaugh, I appreciate that withdraw of the motion to recommit. On General File, I explained LB622 and represented to you that, in my conversations with the business interests that approached me relative to LB622, the only concern they had was relative to the timing and not the test, the timing being when do we start counting the 30 days in the event of an appeal. The language that I have incorporated into AM1198 came from the business interests. We asked them, what do you want to see; we incorporated it into AM1198. AM1198 includes the standard that no one had a problem with on General File, plus the language the business interests brought to me relative to the timing. I would encourage your adoption of AM1198. I'm also going to use this occasion to talk about reasonable controversy in a practical matter. I, too, have practiced in this area and I am familiar with the standard. Recognize that the Supreme Court believes that to have an actual reasonable controversy you need only have an actual basis in law and fact for disputing the claim and refusing compensation. That standard is a known commodity. Can judges in a particular situation disagree over whether there's a reasonable controversy? Yes. It's not...there are too many fact situations in litigation to tell you or to predict with certainty in any given case. That's not a reason to throw the standard out. It is a necessary standard as it incentivizes insurance companies to pay those things that they don't dispute. My experience with the reasonable controversy comes on the other side of the coin. I frequently find myself representing someone who has been run over by a forklift, for example, and my experience is that to create a reasonable controversy, an insurance company need only hire one of the handful of doctors in Omaha who are willing to provide testimony, predictable testimony, to create a reasonable controversy. This is a very difficult standard to overcome, frankly. It is. Courts are reluctant. I've had plenty of cases where there was, in my judgment, no reasonable controversy, and the courts are...typically err on the side of not finding the absence of a reasonable controversy. So in my judgment, this is the equivalent of a

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frivolous standard and that kind of a standard is hard to dispute and hard to argue against. I would encourage you, again, to adopt AM1198. Thank you. [LB622]

PRESIDENT SHEEHY: Thank you, Senator Lathrop. You have heard the opening of AM1198 to LB622. Mr. Clerk, you have an amendment on your desk. [LB622]

CLERK: Mr. President, Senator Lautenbaugh would move to amend Senator Lathrop's amendment with AM1500. (Legislative Journal page 1717.) [LB622]

PRESIDENT SHEEHY: Senator Lautenbaugh, you're recognized to open on AM1500 to AM1198. [LB622]

SENATOR LAUTENBAUGH: Thank you, Mr. President and members of the body. You've heard much of the opening on this already and we're making quite a bit of news here today. Apparently Senator Lathrop and I are often on opposite sides in litigation. Stay tuned for the weather after that. That said, I have explained the basis for this and it is again that, while the reasonable standard or reasonable controversy standard currently exists, it's normally applied pre-award. This is an attempt to move it into the post-award arena, which we don't think is warranted. At this point, as I previously indicated, whether or not an issue is on appeal is actually a definable standard. You have dates involved. You know when appeals are due. You know whether or not an issue has been appealed. And, yes, reasonable minds do differ. And without going down the road we always go down, I would point out that there are doctors, there are voc counselors, there are people on both sides, whether you're a plaintiff or defendant, who will give you the opinion you want to give...want to have, but that's not enough. And what this does, by looking at reasonable controversy, you're kind of penalizing the people who don't choose to use the doctors who will say what you want. Because again, in the scenario that I previously gave you, there was found to be reasonable controversy and there was found not to be, and that was not based upon the opinion of the doctors because all the doctors said, yes, if this history is correct then it's a work-related injury. The underlying question was whether or not the history was correct. And, yes, this is a standard that's been identified and accepted for years, in law for years, litigated for years, but that case went all the way up on appeal and we got no relief. The first trial, reasonable controversy, appeal before the three-judge panel, which is what you do in a comp case. You have a trial judge, then you have a panel of three comp judges you appeal to, then you go to the Court of Appeals, then you go to the Supreme Court perhaps. Interpretation changed. That's why I'm using it to underline the point, reasonable controversy is not a clear, certain standard. What would be clear, as what is offered in my amendment, is are the issues on appeal or are they not on appeal? And I did speak to this in a limited way on General File because I asked the question, what about plain error? So there was discussion on this on General File. Courts can notice plain error even if it's not appealed. So what we're asking here, and in my heart of hearts if you said is this bill good, would it pain you if the bill went away, no, it wouldn't

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pain me one bit, but the amendment I'm bringing does represent a compromise that I think business community, insurance community can probably live with. It's not an original thought of mine, although I understand it. But what I'm saying is, in this arena, the 14 percent interest is its own reward, I guess is the best way to put it. And, yes, there is plain error and if you pay an award and no one appeals a given issue and it's found out later that, well, gee, you know, you were wrong, the statute of limitation had run and...well, that's a poor example because you have to plead that. But in any event, some appellate court finds, well, gee, yeah, the plaintiff isn't entitled to anything because of some technical defect, you're in the position of having to recoup that money somehow from a plaintiff and his attorney if you paid it out prematurely. By addressing the Lagemann decision, we're trying to get more payments sent out earlier. On General File, I did say, well, hold on, is that a good thing? And you have a competing interest here. But I would submit to you that the interest in holding up payment simply isn't there when interest is clicking along at 14 percent or where the possibility that you thought you had reasonable controversy and then you don't goes away, and then you could be subject to penalties at some point in the proceeding. That is why I brought this amendment which simply states peg it to whether or not the issues are on appeal. We all know which issues have been appealed by the time an appeal is perfected or a cross appeal is perfected, which is the other point of my amendment. The underlying amendment, if you will, does not make it clear that cross appeals are included, I don't think. My amendment adds cross appeals as well and I think it's a much more certain standard. I think it's the kind of thing we should be shooting for in the law, and I would urge your support for the amendment. Thank you. [LB622]

PRESIDENT SHEEHY: Thank you, Senator Lautenbaugh. You have heard the opening of AM1500 to AM1198. Members requesting to speak are Senator Carlson, followed by Senator Utter, and Senator Lathrop. Senator Carlson, you're recognized. [LB622]

SENATOR CARLSON: Thank you, Mr. President and members of the Legislature. I'm going to make a comment here and then want to resume my conversation with Senator Lathrop, if he would yield. Senator Lathrop, the...your initial example was a medical bill of some sort. Person is hurt at work, there's no question about it. People saw it. There's no argument there. That's...that should be uncontested. And then we've got the possibility of loss of wages, the indemnity, disability, however we want to refer to that beyond that. Now I don't understand the problem there because if it's an injury and it's medical, the employee is not going to lose money out of his pocket. But if the employee isn't getting the lost wages, that's where the real problem is for the employee. Am I tracking okay there? [LB622]

PRESIDENT SHEEHY: Senator Lathrop, would you yield? [LB622]

SENATOR LATHROP: I'll yield to a question and, in response to your question, that's where the problem is for the employee. [LB622]

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SENATOR CARLSON: Okay. Now then again help me along here because...let's go back to a specific example where we're talking about wages, we're talking about something that, in cash, the employee should end up with, and part of it is contested and part of it isn't. [LB622]

SENATOR LATHROP: Okay. [LB622]

SENATOR CARLSON: What's an example? [LB622]

SENATOR LATHROP: Well, I think we had a good example going with the forklift driver that's crushed whose injury is not in dispute, the scope and course of his employment is not in dispute and he's in a wheelchair now and unable to work. That's not in dispute, but there's a question about his medical bills or an issue related to his care and treatment. Under...well, that's the hypothetical that we've been using and I think that's a good vehicle to explain the difference between my amendment and the proposed amendment by Senator Lautenbaugh. [LB622]

SENATOR CARLSON: All right. Now I'm bothered by the terminology "reasonable controversy," but you can...you can (laugh) handle that on your time. But as we talk about these various things, contested and uncontested, if there's an uncontested award that's due to an employee, I have no patience with the employer. I don't think you do either. [LB622]

SENATOR LATHROP: If...that is if there's no gripe about the fact that it's due, you want the employer to pay it. [LB622]

SENATOR CARLSON: Right. [LB622]

SENATOR LATHROP: So do I. [LB622]

SENATOR CARLSON: Okay. [LB622]

SENATOR LATHROP: And that's what my bill does. [LB622]

SENATOR CARLSON: Okay, we're not arguing about that. [LB622]

SENATOR LATHROP: Okay. [LB622]

SENATOR CARLSON: We may not be arguing about anything but on... [LB622]

SENATOR LATHROP: I may have you on my side, is what I'm thinking. [LB622]

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SENATOR CARLSON: All right. Now on the other hand, if it's a frivolous request by an employee that's not quite cut and dried the way we're talking about an example here, I have no patience for that employee. [LB622]

SENATOR LATHROP: Nor do I. [LB622]

SENATOR CARLSON: Okay. So with that in mind, as we go along here, help us understand what the...why we need reasonable controversy, and then I'll...you go ahead and comment on Senator Lautenbaugh, and I'll yield the balance of my time to you. Thank you. [LB622]

SENATOR LATHROP: Thank you. Thank you. There is a clear difference between the amendment offered by Senator Lautenbaugh, which changes the language, and no reasonable controversy. It's the difference between filing a piece of paper over at the courthouse and then stopping all of your payments, even the ones that nobody disputes, or requiring that once you file that notice of appeal that you continue to pay those things that you don't dispute. If we were to adopt Senator Lautenbaugh's amendment, all an insurance company would need to do, a work comp insurance company would need to do is to file an appeal and they could stop paying without any penalty. The whole point of LB622 and what my amendment does and what Senator Lautenbaugh's amendment would undo is the requirement that they... [LB622]

SENATOR PIRSCH PRESIDING []

SENATOR PIRSCH: One minute. [LB622]

SENATOR LATHROP: ...pay those portions of the award that they don't dispute, that there's no reasonable controversy. And remember, the standard is they just have to be able to articulate something in the law or in the facts to create the dispute. If they can't do that, don't we want them paying it? And if they don't pay it and somebody is sitting around in a wheelchair for two years waiting for that benefit to come, waiting for a decision from the Supreme Court or the Court of Appeals, where are they going for their money? They're going to be drawing money from the state of Nebraska. They're going to be getting food stamps. They're going to be getting benefits in the form of...some form of welfare because they got to provide for their families. If it's not in dispute, they should be paying it, and simply filing an appeal should not be an excuse, regardless of the merit, shouldn't be an excuse for stopping payment, and this is that simple and that's why I say again this is about frivolous claims on appeal. Thank you. [LB622]

SENATOR PIRSCH: Time, Senator. Thanks. Senator Utter, you are next recognized, followed by Senators Lathrop, Carlson, and Lautenbaugh. [LB622]

SENATOR UTTER: Thank you, Mr. President and colleagues. I just have actually a

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question or two. We've talked quite a bit about the penalties that we're going to impose upon insurance companies and upon employers for not paying the claims that they're supposed to pay in a responsible time, and we're using what I consider some pretty healthy penalties, a 50 percent penalty and a pretty healthy interest rate in the form of a 14 percent interest rate. And I understand that that's the workmen's comp standard interest rate. I don't understand why it is. But I'm wondering in the bill, Senator Lathrop, if you would yield to a question, that in the bill is there...what's the penalty on the worker that files a frivolous lawsuit and is there...and God save me from saying this with a body full of attorneys, but what's the penalty for an attorney that just automatically files about any lawsuit that comes along, whether it has merit or not? Can you help me with that? [LB622]

SENATOR PIRSCH: Senator Lathrop, would you yield to a question? [LB622]

SENATOR LATHROP: Yes, I will and I'd be glad to talk about that. Representing employees and people that are making claims, you should understand that most of those lawyers work on a contingent fee. That contingent fee is sometimes referred to as the gates...the keys to the courthouse for an injured worker, because most of them can't afford to pay an hourly rate like big insurance companies can. The filter in this process, the first filter in the process is the lawyer. All right? If somebody comes to me or a lawyer that does this kind of work and says, I want to make this frivolous claim, my answer is, no thanks, not just because, although it's an important consideration, I'd never make a frivolous claim ethically or intentionally, but as a practical matter no lawyer can provide for his or her family if what they work on is frivolous claims, because ultimately there is a punishment for the claimant who makes a frivolous claim, and that's already in our law, Senator. We punish frivolous claims. But the lawyer is not going to make a living if they are getting a contingent fee from zero dollars. So the first filter, and it is an effective filter, is the attorneys handling these kinds of claims do not handle frivolous claims. Does one get through the infield? Can we find an example? Yes, we can. And we can find examples of frivolous appeals or frivolous defenses too. But as a general matter, the system works well because the lawyers screen the cases and don't advance the frivolous claims. [LB622]

SENATOR UTTER: Thank you. Thank you. [LB622]

SENATOR PIRSCH: Thank you, Senators. Senator Lathrop, you are next recognized, followed by Senators Carlson and Lautenbaugh. [LB622]

SENATOR LATHROP: Thank you, Mr. President. I appreciate that. And maybe just to continue, ultimately what we do with LB622 reflects how we feel about frivolous claims. Frivolous claims can take a lot of forms. They can be filed by plaintiffs and they can be advanced by defendants. In the work comp statute right now, existing law, existing law says once an insurance company that does work comp recognizes that a claim has

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been filed and there is no reasonable controversy that the benefits are due, they have to pay, and if they don't they're subject to a 50 percent penalty. That's already in the law. We're not changing, we're not making some dramatic change to the law, which is the insurance company's duty to pay when there's no reasonable controversy. That's already in the law. All we're doing is extending that to the appeals process and requiring that if there is no reasonable controversy...remember, if they can advance something that has a basis in law or fact for disputing the claim, there's a reasonable controversy. That isn't that hard to do. These things are actually very rare in Work Comp Court litigation, but if they can advance something in law or in fact, an argument for not paying, then they're not going to be penalized, so imagine what we're talking about. If you can't advance a reasonable argument in the law or in the facts in support of your denial of benefits, it's frivolous. And the difference in the standard between the amendment offered by Senator Lautenbaugh is you file a piece of paper, you can stop writing checks and starve somebody out, even though you don't dispute the matter. That's what's at issue here. And you may have been invited and you may have been told by the e-mails that this is a significant controversy that's going to affect premiums. It's not. Insurance companies have a responsibility the same as claimants do. Their responsibility is not to advance silly defenses, frivolous defenses, or to not pay when you don't even dispute that the benefit is due. Remember, colleagues, that in work comp litigation it's not a once and for all, like a car accident. They can litigate different aspects of a work comp case and you can go to court when a controversy arises, and you can actually even...you can try a work comp case several different times, depending on how many disputes come up. So it's intended to be taken piecemeal. And the law already is that if you don't have a dispute or a reasonable controversy, you're subject to a 50 percent penalty if you don't pay in 30 days. All we're doing is extending that to appeals to require that insurance companies pay, while the matter is on appeal, those portions that are not in dispute. Thank you. [LB622]

SENATOR PIRSCH: Speaker Flood, the Chair recognizes you for a Speaker's announcement. [LB622]

SPEAKER FLOOD: Thank you, Mr. President. Good afternoon, members. We will be having a meal in the Capitol tonight. I want to outline for you what I foresee the rest of the week looking, for your benefit, looking like. Tomorrow it's my intention to start our work at 9:00 a.m. You'll note on tomorrow's agenda there will be a motion to pull LB675 back for a technical amendment. We will work most likely until noon tomorrow, recess, and then reconvene at 1:30 and continue our work into the afternoon. As we look at Thursday, again a 9:00 a.m. start time. We'll take up some Final Reading. It is possible that we may be done by noon. Obviously, that is very tentative at this point. And as we look to Friday, it is my intention to start our work on Friday at 1:30 p.m. That will give members an opportunity to work in their offices and conclude last minute business, as we intend to adjourn sine die on Friday. We will take up some Final Reading, motions to override if necessary, if not before, and we will have an address from Governor

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Heineman on that day. That is what the week looks like. Thank you very much for your hard work. Thank you, Mr. President. [LB622]

SENATOR PIRSCH: Thank you, Speaker Flood. Senator Lautenbaugh, yours is the last light on. Would you like to treat this as your closing or proceed? [LB622]

SENATOR LAUTENBAUGH: I'll treat it as a closing. [LB622]

SENATOR PIRSCH: Very good. [LB622]

SENATOR LAUTENBAUGH: Mr. President and members of the body, we just have a very basic dispute here over when we should be measuring from and what the standard should be: whether or not an issue is on appeal, properly filed, knowable, demonstrable, in writing; or whether or not there's a reasonable controversy. And you're being asked to accept that to establish a reasonable controversy all you have to do is articulate something in the law and the facts...or the facts that creates a reasonable controversy. That is not how it works. And I'm hammering on the same argument, the same example, because I lived it. I know it. We had a trial court that found reasonable controversy because the plaintiff did not report the cause of his injury till a year later, despite seeking treatment at the time. Never mentioned it was work related. We had a three-judge panel who said, no, no, no, all the doctors accepted his story so there is no reasonable controversy. So it is not the case that just because you articulate something in the law or in the facts you have a reasonable controversy. It changes. It's unknowable. It depends on who's making the call. That cannot be said if you're just looking at whether or not an issue is on appeal, because you have to list the specific items you're appealing and so you know. That is more, I believe, in line with current law, which under the Supreme Court says, look, as long as this is on appeal, the 14 percent interest is clicking along but no penalties, because they recognize the plain error standard, which I'm kind of fine with. But if we're going to change this, if we're going to try to address this court opinion, I think we should go for clarity, I think we should go for certainty or we'll be back here, or we'll be penalizing employers unduly. My amendment is very clear. It says those issues which are appealed, those issues which are on appeal, that's the test, not whether or not there's reasonable controversy regarding a given issue. I think that's clear. I think it's warranted. I think it's knowable. Additionally, the amendment makes it clear that cross appeals count as well, as that's important. Sometimes one party can appeal, the plaintiff, unhappy with some particular issue. The defendant then is left to do what is known as a cross appeal if they have other issues they're unhappy with. The amendment underlying, as written, does not address cross appeals, I would argue. My amendment clears that defect as well. This is an important amendment that I've brought here. I believe it's proper. I believe it's clear. I believe it will lead to certainty of outcomes and I would urge your approval of the amendment. [LB622]

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SENATOR PIRSCH: Thank you, Senator Lautenbaugh. You have heard the closing on AM1500 to AM1198. The question is, shall the amendment to the amendment be adopted? All those in favor vote aye; all those opposed vote nay. Senator Lautenbaugh, for what purpose do you rise? [LB622]

SENATOR LAUTENBAUGH: I would request a call of the house. [LB622]

SENATOR PIRSCH: There has been a request to place the house under call. The question is, shall the house go under call? All those in favor vote aye; all those opposed vote nay. Record, Mr. Clerk. [LB622]

CLERK: 40 ayes, 0 nays to place the house under call, Mr. President. [LB622]

SENATOR PIRSCH: The house is under call. Senators, please record your presence. Those senators outside the Chamber please return to the Chamber and record your presence. All unauthorized personnel please leave the floor. Again, the house is under call. Senators Heidemann, Wightman, Dubas, the house is under call. Senator Lautenbaugh, how would you like to proceed? [LB622]

SENATOR LAUTENBAUGH: A board vote, regular order, please. Excuse me. Roll call vote, (laugh) regular order, please. [LB622]

SENATOR PIRSCH: There's been a call...Mr. Clerk, please call the roll. [LB622]

CLERK: (Roll call vote taken, Legislative Journal pages 1717-1718.) 27 ayes, 19 nays, Mr. President, on the amendment to the amendment. [LB622]

SENATOR PIRSCH: The amendment is adopted. Please raise the call. We are back to consideration of the Lathrop amendment, AM1198. Senator Lathrop, your light is on. [LB622]

SENATOR LATHROP: Thank you, Mr. President and colleagues. You've just gutted AM1198, opting for a pass on frivolous claims by insurance companies. That's essentially what AM1198 does. I know that you've been contacted by constituents. People have written you e-mails. I've seen the reason they wrote you e-mails. This was predicted to be bad for business. The predictions are made by those who want to leave available to themselves the option of frivolous appeals. They want to continue to be able to starve out somebody who's due benefits and whose benefits are not the subject matter of a dispute. That's now the substance of AM1198. Before you vote twice to endorse the practice of frivolous claims by insurance companies in their appeals, I now find myself in a position asking for you to defeat AM1198 and going back to Senator Nordquist's LB622, which is what we advanced from General File. Thank you. [LB622]

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SENATOR PIRSCH: Thank you. Senator Lautenbaugh, you are next recognized.
[LB622]

SENATOR LAUTENBAUGH: Thank you, Mr. President, members of the body. It was not my intent to defeat this amendment, especially as amended, obviously. And I realized this was a possibility if this amendment was successful, so I did have drafted an amendment to the underlying bill, if this amendment is pulled, that accomplishes the same thing. So that is being brought up to file and I guess we will deal with that in the same way with the same debate on the underlying bill as previously amended. So one way or another, we are going to be having this vote on whether or not...how we are going to measure, I should say, when penalties run, when interest run, when there's a controversy, that kind of thing. I don't believe it is correct to say that the various stakeholders in this were unwilling to work on a compromise or that there hasn't been work on some sort of a compromise. I know at one point there was a compromise or at least an amendment offered previously, very similar to the one that I'm introducing now, and the response was, well, let's try it our way first, from other people in the lobby, meaning if we can get done what we want, then we don't need your input. Once again, those are conversations, as I understand them, that took place outside the glass, not among anyone in here. And I believe the parties to this are willing to work together still and can work together and should, but once again we're touching on some of the topics that dealt with the motion to recommit, at least were discussed in the motion to recommit, and I think there has to be, based upon that last vote, a serious attempt to work out the differences between the stakeholders in this area. And I'm not willing to say that this is an attempt by plaintiffs to do one thing or another thing, or this is an attempt by the trial attorneys to do one thing or another thing. And I don't believe that my amendment was to allow insurance companies to pursue frivolous appeals, far from it. But we're either going to have a hearing on these matters and a discussion on the matter or we're going to hash it out on the floor. Those are our two choices. And we're hashing this out on the floor. Thank you, Mr. President. [LB622]

PRESIDENT SHEEHY PRESIDING []

PRESIDENT SHEEHY: Thank you, Senator Lautenbaugh. Senator Council, you're recognized. [LB622]

SENATOR COUNCIL: Thank you, Mr. President. I rise in opposition now to AM1198 as amended. I sat and not engaged in debate thus far to hear what the various positions were going to be. As Vice Chair of the Business and Labor Committee, I can tell you that when LB622 was advanced all of the stakeholders had an opportunity to weigh in on these issues. In fact, I sat in a meeting with the individuals who at least have been tentatively identified as the stakeholders. And when the bill was advanced in its original form, I can tell you that I had an understanding that those stakeholders had no problem with LB622. And, consequently, LB622 advanced from General File to Select File, and I

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don't recall either, but I don't recall there being any votes in opposition to the advancement of LB622 from General File to Select File. So, you know, here we are at a point where the committee has made the efforts to address issues that were identified at the hearing level, that were identified posthearing and prior to this bill being placed on General File. And it would be, I think, quite unfortunate that the very individuals who were provided more than ample opportunity to raise any issues that they had with LB622, who were given an opportunity to have input, their input was taken into consideration, seriously taken into consideration before this bill came to General File. And so now we're talking about the issue of recommitment. Well, if anything, LB622 in its original form should be advanced to Select File. That was the bill that was worked out. That was the bill that this body has already voted to advance. That bill had a hearing and every opportunity to hear those issues, and for that reason I submit to you that with the amendment that has been adopted to AM1198 that we undermine all of the work that went into trying to address these stakeholders' issues that were raised during the hearing. And if the body has issues surrounding the work of the committee and what efforts of the committee should be respected and which should be ignored, in this instance I submit to you that LB622 in its original form, since the efforts to amend it further to address the issues raised are now apparently, for some reason, unsatisfactory to those who agreed to what LB622 contained, that we do not advance AM1198 and just act on LB622 as it was originally presented on General File and advanced from General File to Select. [LB622]

PRESIDENT SHEEHY: Thank you, Senator Council. Senator Lathrop, followed by Senator Nelson. Senator Lathrop, you're recognized. [LB622]

SENATOR LATHROP: Thank you, Mr. President and colleagues. Obviously, that's a discouraging vote for me, and we put a lot of time into this and a lot of consideration. And the amendment, Senator Lautenbaugh's amendment, essentially guts mine. And so I want to take a minute to talk about our relationship with the guys outside. I hope some of you will listen because this is essentially what's happened. When this matter was on General File, there was one person that had a concern. That concern related to the timing and my amendment accommodated that. Then they came to me and said, we want to change the test or we want to change the standard. I said, well, what do you got in mind? Well, we want it to be no penalty if we file an appeal, which is what you just did. There is no middle ground. Either we say you have to pay if you don't have a complaint or you cannot pay by filing an appeal. We're encouraging appeals here. We're encouraging appeals. I did what I promised I would do in response to the only person that expressed a concern on General File, but in the meantime they've cranked up the e-mail machine. Okay. Everybody in here is like, oh my God, I got e-mails; Lathrop, I'm getting e-mails on LB622; I got little businesses in my community, they're worried. Have you looked at what they're getting? I mean have you looked at what people are telling them LB622 is about, or are you just counting the e-mails in your in-box? Because here is my experience with what's going on in LB622. I read one that came from one of the

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business interests and it...by the way, on LB630, I saw their representation about what LB630 did. It said it would cause a significant increase in premiums. You were here. You saw the sheet, it was negligible. But the representations that go out from the interest groups that want to generate the e-mails that are scaring you from doing the right thing, they create their own reality. It's a call to action. The one that I saw even had like the cop light, the cherry, going around and around to get your attention to make sure you read it. This is an emergency. And so the e-mails come. And when the e-mails come it's just easier to vote with these people than to explain to the people that are writing them that they've been...that the bill has been mischaracterized. So how are we going to govern as a body? Do we just need a bunch of e-mails in our in-box to scare us off an issue? What's the right thing to do? The right thing to do is to discourage people from frivolous appeals. Now here's something for you. This was never meant to be a gotcha vote, but here's what you're being asked to do by the people that have misrepresented what this bill is about. You're being asked to vote against frivolous appeals. You really want to do that? Wouldn't it be easier to respond to these e-mails and tell people, wait a minute, the bill has been mischaracterized, this is what it does, it stops insurance companies from filing frivolous appeals? Isn't that the proper approach to making policy? It sure takes a lot more... [LB622 LB630]

PRESIDENT SHEEHY: One minute. [LB622]

SENATOR LATHROP: ...fire power, a little more energy than counting the e-mails in your in-box. The difference is very clear. No reasonable controversy means you have to have something to argue about, you have to have something at stake. Filing an appeal which is now the standard means all you have to do is file a piece of paper. Doesn't matter if your claim has merit or not. That's what we've done with adopting the last amendment. I submit to you that when it comes to making policy and we start getting barraged with e-mail, we ought to look at what the people said who generated the e-mail, because I have. It was an emergency, a call to action. [LB622]

PRESIDENT SHEEHY: Time, Senator. [LB622]

SENATOR LATHROP: We have to do this. Thank you. [LB622]

PRESIDENT SHEEHY: Thank you. Thank you, Senator Lathrop. Senator Nelson, you're recognized. [LB622]

SENATOR NELSON: Thank you, Mr. President, members of the body. I rise to say that I only received one e-mail on this issue and I felt that it was entirely reasonable. I'm going to read: Currently, an employer must pay an attorney fee to the employee's attorney should it appeal a case and lose, regardless of whether there was a reasonable controversy. In other words, under existing law, if an employer appeals a case and does not win any of its arguments on appeal, it pays an attorney fee for the

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employee. On top of that, the employer must also pay interest to the employee at 14 percent on the entire unpaid award. Consequently, there are already measures in place to ensure that employers appeal only causes that they believe they can win or have some reasonable prospect of winning. I simply want to say that I think this is a perfect example of where this should have been recommitted to committee. We voted that down. LB622 is not the way it originally came to the committee. That was about medical payments and a penalty for those. I think it is apparent, from the questions that are raised by members of the committee today, that if we were going to get into the matter of frivolous appeals there should have been a hearing on that. There should have been an opportunity for the various interests to express their concerns about that instead of proceeding with an entirely different bill and then an amendment thereto. This is why we're having the uncertainty and the controversy today, things that we really shouldn't have to be dealing with here on the floor. It should have been settled satisfactorily by the committee. Well, here we are. I'm in a position of whether I don't know whether to vote for this, Senator Lathrop's amendment, or sustain it. Maybe we'll hear more about what we should do. If Senator Lathrop needs some time, I will yield some time to him at this time. Thank you, Mr. President. [LB622]

PRESIDENT SHEEHY: Thank you, Senator Nelson. Senator Lathrop, you're yielded 2 minutes 50 seconds. [LB622]

SENATOR LATHROP: Thank you very much. And thank you, Senator Nelson. I appreciate that. As constituted right now, and I just filed an amendment that we may get to momentarily that would change AM1198, but as constituted, I'd have to be against it. Now in a little bit I'll be in favor of an amendment that will clean it up. But, Senator Nelson, I appreciate you yielding me time but, with all due respect, the process of changing a bill in committee is common. The confusion isn't because we didn't take this up specifically in Business and Labor. The confusion comes from the misrepresentations and the mischaracterizations of what LB622 will do. And it isn't that difficult of a concept. We can have, very simply, either the insurance companies who have tried the work comp case and have a portion of that award that they do not dispute, whether they should have to pay that or not. It's that simple. If it's not in controversy, I believe that they should have to pay that portion that's not in controversy and they can appeal the rest. Senator Lautenbaugh's amendment to AM1198 simply says, regardless of the merits of the claim, it doesn't even have to have any merit. They may not even care about the issue, but all they have to do is list it in their assignment of error and they don't have to pay anymore. It's that simple. Either you think that's okay or you don't. And I don't, frankly, think we need a committee hearing to sort that out because the for and against isn't going to change. It's the same people... [LB622]

PRESIDENT SHEEHY: One minute. [LB622]

SENATOR LATHROP: ...that show up in Business and Labor. They showed up on

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Senator Nordquist's bill. What's at issue? Very simple, either insurance companies should pay if there's no controversy, or they should get away with not paying. But understand, and you're on Appropriations and you're watching Medicaid grow and you're watching public assistance grow, these people are going to someone to survive the two years while their case is on appeal, and you're going to be providing for them and we are going to be providing for them through the appropriations process. And it is simply a business practice where you lay your responsibility off to the state of Nebraska and ignore it and starve somebody out and then call them about halfway through appeal and try to settle it with them after they've lost their house and their car and their dignity. Thank you. [LB622]

PRESIDENT SHEEHY: Thank you, Senator Lathrop. Mr. Clerk, you have an amendment on your desk. [LB622]

CLERK: Mr. President, Senator Lathrop would move to amend his amendment with FA50. (Legislative Journal page 1718.) [LB622]

PRESIDENT SHEEHY: Senator Lathrop, you're recognized to open on FA50 to AM1198. [LB622]

SENATOR LATHROP: Thank you, Mr. President and colleagues. My amendment is very simple. As you can understand, there are two things that we accomplished with Senator Lautenbaugh's amendment to AM1198. The first thing is we broadened the time frame for determining when the penalty starts. That is an accommodation to the business interests or the insurance companies. This amendment would leave that accommodation in place but change the standard back to no reasonable controversy. I have spoken about this at length. I feel as though I'm repeating myself. Again, FA50 would simply return the standard that was changed by Senator Lautenbaugh's amendment back to where there is no reasonable controversy. I read for you earlier what that means. The Supreme Court in the state of Nebraska has interpreted no reasonable controversy this way: To avoid the penalty under 48-125, the employer need not prevail in the employee's claim. It's not about who wins or loses. The employer simply must have an actual basis in law and fact for disputing a claim, that's it. And isn't that the appropriate standard? Isn't that the fair standard? Isn't that the right thing to do, to have the standard that is already in place extend not just to the period of time before trial but have it extend to the period of time after trial? I would encourage your adoption of FA50. Thank you. [LB622]

PRESIDENT SHEEHY: Thank you, Senator Lathrop. You've heard the opening of FA50 to AM1198. Members requesting to speak are Senator Loudon, followed by Senator Lautenbaugh. Senator Loudon, you're recognized. [LB622]

SENATOR LOUDON: Thank you, Mr. President and members. As I've looked these bills

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over, I've not been that well-acquainted with workmen's comp. I've had to pay, pay the workmen's comp insurance and that sort of thing, but I've never been on the end where there would be anyone that was receiving it or working with them, other than a constituent or two. I was wondering if Senator Lathrop would yield for a question. [LB622]

PRESIDENT SHEEHY: Senator Lathrop, would you yield to Senator Louden? [LB622]

SENATOR LATHROP: Yes, I will. [LB622]

SENATOR LOUDEN: Senator, did...do you sometimes represent people on these workmen's comp courts? [LB622]

SENATOR LATHROP: From time to time. [LB622]

SENATOR LOUDEN: On their deal. Okay. Then what do they...is this something that they have to have an attorney to represent them to...for their appeal, or do they have to have an attorney just to file the papers to get their workmen's compensation, or is every one of these, I guess, instances have to be paperwork filed by an attorney? [LB622]

SENATOR LATHROP: No, a lawyer is not mandatory. In fact, the Work Comp Court maintains forms for somebody to do it themselves. If it is a complex matter, if you lost the tip of your finger, it would be pretty simple. You might be able to do that without a lawyer. But if you have a significant injury that leaves you totally disabled, ultimately, most of those people will get a lawyer. [LB622]

SENATOR LOUDEN: Now what...how much compensation then does that lawyer get to do something like that? I mean is that just...do they charge on a hourly rate or do they charge whatever the market will bear or how is that figured? [LB622]

SENATOR LATHROP: They do not charge on an hourly rate, typically, but not necessarily exclusively. Generally, they work on a contingent fee which has to do with some percentage of the disability benefits that are at issue. For example, if somebody comes in to me and says, I want you to represent me, Lathrop, on a work comp claim, the insurance company is paying me; I say, okay, I'll help you out, but if they're paying you a benefit I don't charge a fee on anything that gets...that's being paid without a dispute. [LB622]

SENATOR LOUDEN: Okay. Here's the reason I went down that line of questioning. I had a constituent that had a very serious accident and I think this person was awarded like \$150,000-some or something like that. It was a serious accident. And then the people told me...and, of course, that was for their medical, medical bills. And then the people told me that the lawyer took \$80,000. Is that...I mean is that (inaudible)? [LB622]

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SENATOR LATHROP: Oh boy, you know what happens, Senator Louden? My experience is I have a lot of people that come in and they say, you know, the guy down the street wasn't even hurt and he got \$400,000 for nothing in two weeks after the accident. My experience is there's a lot of myths and a lot of misinformation. That would be very unusual and, in fact, I would say unheard of for a lawyer to get half of somebody or greater than half of somebody's work comp benefits. [LB622]

SENATOR LOUDEN: Okay. [LB622]

SENATOR LATHROP: It's generally a much, much smaller percent. [LB622]

SENATOR LOUDEN: Do these people then have any recourse to recover any of that money? [LB622]

SENATOR LATHROP: From the lawyer? [LB622]

SENATOR LOUDEN: Yeah. [LB622]

SENATOR LATHROP: Sure. Yeah, there are ways. There are ways in which they can have their...the reasonableness of the attorney fee reviewed by a court. [LB622]

SENATOR LOUDEN: Okay. Thank you, Senator Lathrop. This is the concerns I've had on some of this when we're talking about how we're going to pay the medical payments, and that part I...that's mostly what the original bill did, was set it up so that medical payments had to be paid within 30 days. And I understand Senator Lathrop wants this written into statute so they, even if they do file an appeal, they still have to pay those payments. Is that correct, Senator Lathrop? [LB622]

SENATOR LATHROP: Well, that's really what we're talking about,... [LB622]

PRESIDENT SHEEHY: One minute. [LB622]

SENATOR LATHROP: ...what do they have to pay while the appeal is going on. [LB622]

SENATOR LOUDEN: Right. [LB622]

SENATOR LATHROP: If we leave it the way Senator Lautenbaugh has amended it, all they have to do is file a piece of paper and stop paying. [LB622]

SENATOR LOUDEN: Okay. [LB622]

SENATOR LATHROP: I think there ought to be a standard in there that there's no

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reasonable controversy. [LB622]

SENATOR LOUDEN: Now my next question is, is how come there was three different amendments that all addressed the same thing on LB622? How come that wasn't addressed in the original bill? [LB622]

SENATOR LATHROP: I'm not sure. I'm not sure I understand the question but let me try... [LB622]

SENATOR LOUDEN: Well, we've...we were...there's been three different amendments and all of them would strike Section 1 and add a new Section 1. I think that's three amendments I got here in my folder and all addressing that same Section 1. And each one has different language in there and I'm wondering, you had the hearing on LB622 but these amendments that came along, there wasn't any hearing. What's the difference in some of those amendments than what's in the original bill? [LB622]

SENATOR LATHROP: Well, the original bill dealt with insurance companies that don't... [LB622]

PRESIDENT SHEEHY: Time, Senator. [LB622]

SENATOR LATHROP: ...that don't pay the doctor. [LB622]

SENATOR LOUDEN: Thank you, Mr. President. [LB622]

PRESIDENT SHEEHY: Thank you, Senator Louden. Thank you, Senator Lathrop. Senator Lautenbaugh, you're recognized. [LB622]

SENATOR LAUTENBAUGH: Thank you, Mr. President, members of the body. I rise in opposition to FA50, which essentially undoes the amendment that I just had adopted to AM1198. I believe that it won't be found to be a mere reconsideration probably because there are some additional matters in my prior amendment that are not included in FA50. However, I would point out that FA50 goes to the heart of the thing that you just voted for. And I do want to be clear on this. We're talking about whether or not matters have been appealed, issues have been appealed, or whether or not there's a reasonable controversy. And the words we use and the words we choose mean something in this case. Prior to the last vote, we had an argument that all the carrier has to do or all the employer has to do is articulate something in law or facts: voila--reasonable controversy. Now again we're pointed out, in a quote from the decision, on this amendment that there has to be something found in law or in fact that gives rise to a reasonable controversy. I would say to you there is a world of difference between merely having to articulate something, as we were previously told was the test, and there being an actual finding of reasonable controversy. And again, I cannot stress

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enough it changes. It changes. And by adopting this amendment, FA50, what we would be doing is subjecting all aspects of appeal. This would go even beyond the Lagemann decision that this was ostensibly to address. And I would submit to you, I've filed yet another amendment, if FA50 fails and Senator Lathrop is successful in getting you to vote against his own amended amendment, which is AM1198, that we're back to the underlying bill as previously amended. And I filed an amendment to that and it deals with the reasonable controversy issue. Here's the thing you need to know. That amendment was e-mailed around, I believe circulated prior to the General File debate, so it has always been clear, at least to me, that reasonable controversy was a problem in this bill. As amended in General File, because this amendment was circulated back then, the one that's coming, if Senator Lathrop is either successful with FA50 or he is successful in getting you to vote against AM1198, I filed an amendment to the underlying bill that addresses this same thing and it's the amendment that was circulated weeks ago. So it is not correct to say that there were just some technical issues but not reasonable controversy that was previously voiced. I was aware of it as an issue. I brought this amendment. This bill has been a long time coming between General and Select, and we knew it had to be worked on. And what FA50 is designed to do is to undo the vote we just had, not in all aspects but in the significant aspect, if you will, in the major aspect, again, putting in a standard of reasonable controversy. And I realize some of you may be sitting there thinking what on earth are you guys talking about; what are you talking about; what does this mean; how is this important? Rest assured, it does matter. You're being told that if you strike this amendment down, FA50, you voted for frivolous appeals. [LB622]

PRESIDENT SHEEHY: One minute. [LB622]

SENATOR LAUTENBAUGH: You have not. There's still a penalty interest rate, if you will, 14 percent clicking away, and the prospect of attorney's fees being awarded. You have not voted for frivolous appeals. Don't be confused by this. And I would point out that if we're talking about the e-mails circulated and the people beyond the glass, both sides are amply represented beyond the glass. Both sides are amply represented often in this particular committee because this is what they fight over. Both sides have people beyond the glass. Don't be shamed into doing something...undoing something that you previously did, because it was the right thing to do. Please vote against FA50 and for AM1198. Thank you, Mr. President. [LB622]

PRESIDENT SHEEHY: Thank you, Senator Lautenbaugh. We have Senator Nordquist, followed by Senator Gloor. Senator Nordquist, you're recognized. [LB622]

SENATOR NORDQUIST: Thank you, Mr. President and members. I agree, Senator Lautenbaugh, that probably many of us around here are asking ourselves what are you guys talking about, that we don't have a full grasp of it. And I want to ask Senator Lathrop a couple questions to see if I can get my hands around it a little bit more as we

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go forward. [LB622]

PRESIDENT SHEEHY: Senator Lathrop, would you yield to Senator Nordquist? [LB622]

SENATOR LATHROP: Sure. [LB622]

SENATOR NORDQUIST: Thank you. Thank you, Senator Lathrop. So if I'm...say I'm a construction worker, reroofing a house, hopefully covered by work comp, fall off of a ladder, you know, and seriously injured, crack my pelvis, break a leg or anything, and the insurance company goes forward with an appeal, when do I get my disability benefit payment if that's what the initial trial determined? [LB622]

SENATOR LATHROP: If the trial court says, yeah,... [LB622]

SENATOR NORDQUIST: Yeah. [LB622]

SENATOR LATHROP: ...you should get paid, you can't work, you got hurt at work, as constituted right now under AM1198, under the version advanced by my friend Senator Lautenbaugh, you wouldn't get paid until the two years' worth of appeals have ended. [LB622]

SENATOR NORDQUIST: Okay. So... [LB622]

SENATOR LATHROP: It could be worse than that. If you go to the Court of Appeals and then the Supreme Court agrees to hear it beyond that, it can be well past two years. [LB622]

SENATOR NORDQUIST: And the 14 percent I'm hearing thrown around, that 14 percent, I wouldn't see a dime of that until after the two years are up? [LB622]

SENATOR LATHROP: No, you wouldn't receive anything,... [LB622]

SENATOR NORDQUIST: Okay. [LB622]

SENATOR LATHROP: ...as constituted. [LB622]

SENATOR NORDQUIST: So... [LB622]

SENATOR LATHROP: In other words, you file the notice of appeal, if you're the insurance company, and just stop paying the guy, and that defeats the whole purpose of work comp, which is to pay those portions that aren't in dispute and have the court decide those portions that are. [LB622]

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SENATOR NORDQUIST: So I fall off a ladder, I'm injured. I got a mortgage to pay, I got children to feed, and the insurance company wants to go forward with an appeal. Even whether it is or isn't based on any evidence, I'm in a tough situation for two years. Is that right? [LB622]

SENATOR LATHROP: That...you are getting nothing. They don't have to pay a thing. [LB622]

SENATOR NORDQUIST: Under FA50, if there's not reasonable controversy...and could you read the reasonable controversy interpretation from the court again, Supreme Court? [LB622]

SENATOR LATHROP: Reasonable controversy exists if there's an actual basis in law or fact for disputing the claim and refusing compensation. [LB622]

SENATOR NORDQUIST: Okay. So if there is a basis in law or fact, then that will go forward with the appeal and I understand that there's questions about it, I wouldn't get paid. But if there is no basis in law or fact, under FA50 I could receive those disability benefits. Is that... [LB622]

SENATOR LATHROP: You would receive them or the employer could be penalized for not paying them. [LB622]

SENATOR NORDQUIST: All right. Okay. Thank you, Senator Lathrop. You know, I'm not a trial attorney. I have no interest in the insurance business. We hear about frivolous appeals and frivolous lawsuits. Well, this comes down to workers. People who are putting their labor on the line and get injured have a lot...they have a lot of challenges at home meeting their needs, and if they're injured, as Senator Carlson said, they should be paid in a prompt manner. And that's why I'm supporting FA50 to AM1198 to LB622, not for trial attorneys or insurance companies but about those men and women that are injured and need this to get by in their families. So with that, I'll yield the rest of my time to Senator Lathrop. Thank you. [LB622]

PRESIDENT SHEEHY: Senator Lathrop, you're yielded 1 minute 20 seconds. [LB622]

SENATOR LATHROP: Well, thank you, Mr. President and Senator Nordquist, for providing me with the time. I think you make a good point and sometimes we get lost in it when we start looking at this like one interest group versus another, but in the middle of this dispute is...are the workers. And you know, I recognize that... [LB622]

PRESIDENT SHEEHY: One minute. [LB622]

SENATOR LATHROP: ...work comp has a...workers' compensation, the system, the

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institution sometimes gets a bad rap. There's a lot of myths associated with it, perpetuated by detectives who catch some guy playing basketball who's claiming to be totally disabled, and so we view with skepticism some work comp claims. I can tell you, this isn't about frivolous claims by the worker. Those get sorted out at the trial level. This is about whether or not an insurance company can stop paying somebody just because they filed a notice of appeal or whether they ought to have a standard of no reasonable controversy. Again, I encourage you to support AM...or, pardon me, FA50. Thank you. [LB622]

PRESIDENT SHEEHY: Thank you, Senator Lathrop. Thank you, Senator Nordquist. Additional members requesting to speak on FA50 to AM1198, we have Senator Gloor, followed by Senator Lautenbaugh, Senator Carlson, and Senator Nelson. Senator Gloor, you're recognized. [LB622]

SENATOR GLOOR: Thank you, Mr. President, members of the body. I was both an employer, participating in workers' comp as an employer, as well as a healthcare provider that saw workers' comp claims comes to our organization for assessments and evaluations, therapy and treatment, etcetera, and so I've had an interesting perspective on this. I think workers' compensation is a great thing. It is a wonderful and appropriate thing for society to do. I believe most of the employers I know, did we not have workers' comp, would in fact pay and help subsidize workers who were injured on the job. I truly believe that. And I believe a lot of the employees who work for employers would also be a participant in that, but not all employers obviously feel that way, which is the reason we as a society have workers' comp. By the same token, I believe the vast majority of workers who are injured on the job have legitimate injuries that need to be taken care of. But just as not all employers are pure, neither are all employees pure. And I have had personal experience of employees who shop for healthcare providers who will tell them what they want to hear for injuries that I've not felt were in fact work related. It happens. Just as employers can cross over to the dark side, so can employees cross over to the dark side. And because of that, I am worried about the term "no reasonable controversy." And a scenario that Senator Nordquist brought forward of an employer who's climbing a ladder, falls off, breaks their pelvis, but in those x-rays we find out that there is an old fracture of an ankle. But maybe it's not an old fracture of an ankle. Maybe it's a new fracture of an ankle related to falling off this ladder. But they're a motorcycle rider and they have dumped their bike several times in the past three or four years, we know that, wearing their helmet, thank goodness, so their injuries would have been much worse. That employer is at risk, I believe, under the definition of reasonable controversy because that employee will shop until they find some healthcare provider who I believe will substantiate that this is a new break in your ankle, not an old break in your ankle, and that concerns me. I wonder if Senator Lathrop would yield for a question. [LB622]

PRESIDENT SHEEHY: Senator Lathrop, would you yield to Senator Gloor? [LB622]

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SENATOR LATHROP: I'd be happy to. [LB622]

SENATOR GLOOR: Senator Lathrop, dissuade me from my concern and hesitancy and skepticism about reasonable controversy under that scenario. [LB622]

SENATOR LATHROP: Thank you for the opportunity to, because I'm glad. I have an appreciation now for where you're coming from or your point of view. A reasonable controversy, can an employee shop for a doctor? The answer is yes. If somebody has a sprain or a strain, he can go find a doctor that will say pretty much what you want him to do. They're likely not to give him decent care, but you can go find those people. They exist on both sides. So just as an employee might be able to go find a doctor to say, yeah, this guy got hurt and it happened in the workplace, so too the employer or the workers' comp insurance company can go to one of a handful of doctors, and, believe me, I'm not going to mention their names but they are well-known in the Omaha community and they're across the state, where an employer will routinely say, I want you to go see Dr. W., okay? Dr. W. may do nothing but do insurance company defense exams and, predictably, will say, even when it's...even when it shouldn't be in dispute, that the guy didn't hurt himself at work or that he's not experiencing pain or he has no disability. Those things happen in a litigation process. It is the court, it is the court that has to sort those out. The court knows who the doctors are that the claimants shop for and the Workers' Comp Court knows who the defense doctors are that will routinely say these things. [LB622]

PRESIDENT SHEEHY: One minute. [LB622]

SENATOR LATHROP: And we just have to trust...we just have to trust, Senator Gloor, that ultimately the courts will make the right decision when there's a controversy before them. And remember, guys like Senator Lautenbaugh and I are in there advocating for our clients and our position and we have a specialized court. These guys don't hear divorces one day and work comp the next. It's specialized judges of the Work Comp Court hearing these disputes and deciding these disputes, and generally they get to the bottom of it and do it correctly. Now a reasonable controversy doesn't exist just because some guy went and shopped and found a doctor, because the insurance company is going to have their doctors too. That happens... [LB622]

PRESIDENT SHEEHY: Time, Senator. [LB622]

SENATOR LATHROP: ...90 percent of the time. Thank you. [LB622]

PRESIDENT SHEEHY: Thank you, Senator Gloor. Thank you, Senator Lathrop. Senator Carlson, you're recognized. [LB622]

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SENATOR CARLSON: Mr. President and members of the Legislature, I'd like to extend my conversation with Senator Lathrop, if he would yield. [LB622]

PRESIDENT SHEEHY: Senator Lathrop, would you yield to Senator Carlson? [LB622]

SENATOR LATHROP: Yes, I will. [LB622]

SENATOR CARLSON: Senator Lathrop, I think maybe several of us here in the body are...we're looking at you as though normally you represent the employee, and Senator Lautenbaugh normally represents the employer. And whether it's correct or not, we look at these as two extremes. I don't know that they are. Most of us are probably in a position, we'd like a solution somewhere in the middle and we're not really perceiving that. But let me ask you this. Who normally would file an appeal in the things that we've been talking about? [LB622]

SENATOR LATHROP: Well, this bill would deal directly with what happens when an employer files an appeal, Senator Carlson. Although if an employee doesn't like what happened in the trial court there, they have every right to file an appeal as well. [LB622]

SENATOR CARLSON: Okay, an employee can but not as often perhaps as an employer. What about the insurance company? [LB622]

SENATOR LATHROP: Well, the employer and the insurance company are synonymous. It's the insurance company, other than the self-insured, it's the insurance company that pays for this. [LB622]

SENATOR CARLSON: Okay. An employer, an insurance company files an appeal. Who do they file it to or...who do they file to? [LB622]

SENATOR LATHROP: The process goes like this. You file a petition in the Work Comp Court. [LB622]

SENATOR CARLSON: Okay. [LB622]

SENATOR LATHROP: One judge of the Work Comp Court hears that trial. You may then file an appeal in the Work Comp Court and have three judges of the Work Comp Court review the record. If you don't like what happens there, you can then appeal to the Court of Appeals. And if you don't like what happens there, you can ask the Supreme Court to review the Court of Appeals. But, unless there's something novel, typically the Court of Appeals would be the end to a typical controversy between an employer and an employee. [LB622]

SENATOR CARLSON: When an appeal is filed, that's going to be in writing, isn't it?

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[LB622]

SENATOR LATHROP: It certainly will. [LB622]

SENATOR CARLSON: And so those of us in the body here, if I've got an issue with Senator Nordquist, I'd rather go look him in the eye and say, I got an issue here, let's see if we can't deal with it. But that's not the way this works and I think that's somewhat of a frustration. But when...then a judge hears, reads the appeal, what should be the case if I, as an employer, through the insurance company or together, we file an appeal? We got to have a reason for it and that's what the judge acts upon then, right? [LB622]

SENATOR LATHROP: You do. And I would agree with Senator Lautenbaugh. I don't think that we're just going to generate appeals for the heck of it. I think that there will be...and what this bill is intended to address are those situations where you might have three things that were tried before the court or two things or five. You really want to appeal one of them because that's really where you think the court was wrong. You don't really have a complaint with the fact that you've been ordered to pay some money, but you do have a problem with the medical care or the amount of the bill, something like that, and that really gets to the substance of what we're here to talk about. Do you have to pay the part that you don't dispute, or can you stop paying everything once you file that piece of paper with the court? [LB622]

SENATOR CARLSON: In your experience, do you find a difference among insurance companies: Some of them would tend to follow, well, we owe this, we're going to pay it; there are others that might say, well, we probably owe this but we're not paying anything until the whole thing is settled? Is there a difference amongst companies? [LB622]

SENATOR LATHROP: You know, I could tell you that in certain types of claims. I do a limited amount of work comp. Mine is a limited practice in the area of work comp. Typically it involves a significant claim and not a large volume of smaller claims. Other lawyers in the community could probably answer that but I couldn't tell you that one is worse than the other, although that's probably the case. [LB622]

PRESIDENT SHEEHY: One minute. [LB622]

SENATOR CARLSON: Okay. Thank you, Senator Lathrop. Perhaps there are several members of the body that kind of feel themselves in this position. We're kind of in the middle. We can see some important points on both sides but we don't have...we don't appear to have anything in the middle to choose from and that's what makes it kind of frustrating. But thank you for your input. Thank you, Mr. President. [LB622]

PRESIDENT SHEEHY: Thank you, Senator Carlson. Thank you, Senator Lathrop.

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Senator Nelson, you're recognized. [LB622]

SENATOR NELSON: Thank you, Mr. President, members of the body. I'd like to ask Senator Lathrop a question or two. [LB622]

PRESIDENT SHEEHY: Senator Lathrop, would you yield to Senator Nelson? [LB622]

SENATOR LATHROP: I'd be happy to. [LB622]

SENATOR NELSON: Senator Lathrop, you talk with such expertise about work comp that I'm surprised that you don't practice in that area extensively. I don't practice at all and so I just have a general knowledge of work comp. I do recall a number of years ago that I did have a client that was really put to the test by an insurance company because they thought it was a fraudulent claim and they didn't pay him anything for a long time. Eventually they did. I'm just kind of intrigued. Every once in awhile you say, well, the insurance company stops payment when they file the appeal. This indicates to me that the plaintiff must be getting something from the very beginning once he files a claim with his employer. Is that true? [LB622]

SENATOR LATHROP: Oh, sometimes they do and sometimes they don't. More often than not this guy gets hurt, and if it's not, you know, crushed by a forklift in front of three coworkers, the insurance company is going to take a little time to investigate it, okay? [LB622]

SENATOR NELSON: Right. [LB622]

SENATOR LATHROP: So they want to make sure it happened at work. They want to make sure that the doctor has given a diagnosis; that they have a good grip on whether the person needs to be off work at all. And so there's going to be a lag time between the injury and the time the first payments come in. In the meantime, this guy is getting behind on his car payments and his house payments, but...so do they pay at the front side before there's a hearing and a trial? Yeah, sometimes they'll pay, Senator Nelson. And they'll say, I don't really dispute these benefits, the disability checks that we should give you so that you can support your family, but I do have a problem with paying your doctor. And the law right now says you have to do that unless there's a reasonable controversy. We're not changing anything significant other than saying the same standard that applies before trial is going to apply after trial. I hope that answers your question. [LB622]

SENATOR NELSON: Well, that does, but I think, by and large, probably at least 95 percent of the time, unless the claim is really suspect, that they're going to begin payments and they're going to be temporary total disability at times or disability payments until, if there is a controversy, there's a trial. And then it's when they file an

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appeal that they have the option of discontinuing payments. Isn't that true? [LB622]

SENATOR LATHROP: We're giving them an incentive to with this...with Lautenbaugh's amendment. [LB622]

SENATOR NELSON: Another question, it seems to me in light of the number of work comp judges, for instance that we have in Douglas County, that if there is an appeal that it would take two years to finish that up. It seems to me they're more efficient than that, at least in Douglas County. [LB622]

SENATOR LATHROP: Well...and I think you misunderstood. It doesn't take two years to get in front of the three-judge panel of the Work Comp Court. But the appeal that comes from the Work Comp Court, the three-judge panel, up to the Court of Appeals or to the Supreme Court can be at least a two-year process. [LB622]

SENATOR NELSON: All right. If they elect to pay while...pay these benefits while they are on appeal, and it turns out that the employer is right, are they able to recover that money that they've paid out? [LB622]

SENATOR LATHROP: They wouldn't pay it out if there's a reasonable controversy so there's no recovering the money back. If they paid a disability benefit and the court later said, you know, you paid on a 15 percent rating and it's actually 10, then they'd have a credit. [LB622]

SENATOR NELSON: All right, credit; but pretty unlikely they're ever going to get the money back. [LB622]

SENATOR LATHROP: Well, they will as a credit. [LB622]

SENATOR NELSON: All right. [LB622]

SENATOR LATHROP: I mean, if they have to pay \$10,000 worth of additional benefits... [LB622]

SENATOR NELSON: Okay. [LB622]

SENATOR LATHROP: ...and they have a \$1,000 credit, then they'll pay \$9,000 out. [LB622]

SENATOR NELSON: All right. [LB622]

PRESIDENT SHEEHY: One minute. [LB622]

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SENATOR NELSON: Okay. I think that makes it a little clearer perhaps for the members of the body here. It's not that a worker doesn't receive any benefits at all from the very beginning. There will be payment and then it's...we're just talking about the appeal. One final question, Senator. What is the initial LB622 all about? That wasn't about frivolous claims, was it, when it came initially to the committee? [LB622]

SENATOR LATHROP: It's always...LB622 has always been about timely payments of benefits. In its original form, the timely payment of amounts due medical providers was the issue. It was amended after Lagemann decision was decided by the Supreme Court to address the payment of disability benefits pending an appeal. [LB622]

SENATOR NELSON: All right. And there is perhaps a controversy...we keep talking about controversy as to just what the Lagemann opinion said... [LB622]

PRESIDENT SHEEHY: Time, Senator. [LB622]

SENATOR NELSON: ...and how far it goes, would that be correct? Thank you, Mr. President. Thank you, Senator Lathrop. [LB622]

PRESIDENT SHEEHY: Thank you, Senator Nelson. Members requesting to speak on FA50 to AM1198, we have Senator Lathrop, followed by Senator Lautenbaugh and Senator Gloor. Senator Lathrop, you're recognized. [LB622]

SENATOR LATHROP: Thank you, Mr. President. I thought I would take this opportunity to talk a little bit about some of the issues raised by those who are engaged in this debate and who have been kind enough to ask me some questions and then been cut off. And I might start with Senator Nelson since he asked the last thing and made a comment. Senator Nelson, once you file a work comp claim, if a guy gets hurt at work...and maybe I can clarify something. A lot of people get hurt at work and they call up the insurance company and they say, I was hurt at work. The insurance company does a little bit of an investigation, whatever it requires, talk to the employer, talk to some coworkers, look at some medical records, and then they start paying. An awful lot of people get paid under work comp without ever even hiring a lawyer and that's the way it should be. It is only when there's a controversy that lawyers get involved or typically only then do lawyers get involved. Sometimes that's resolved with a phone call. I might call up somebody like Senator Lautenbaugh, if he's representing an insurance company, explain the circumstance. He may tell me he needs to see a doctor's report or something like that. I give it to him and the payment goes on. We're not talking about every claim; we're not even talking about a lot of claims. We're talking about a relatively small number of work comp claims. The fact that we're talking about a small number of claims doesn't make it any less important, because if you're the person that's been hurt and you need these benefits, the disability benefits are a substitute for your paycheck, and you legitimately have them and the insurance company doesn't even dispute it, the

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question is whether they should pay. FA50 says you pay. And if we leave Senator Lautenbaugh's amendment alone, they don't have to even if they don't dispute it. All they have to do is dispute some aspect of the claim, file an appeal, and pay nothing. That should violate your sense of what's fair and no reasonable controversy is not a difficult standard. It is a frivolous standard. It's a standard of frivolousness. And so you've heard me say that we're talking about frivolous claims on appeal. That's what we're talking about. Do we let an insurance company file an appeal, however frivolous it may be with respect to a benefit, and not pay? Well, there's something about work comp when this system was devised, and it's a little bit of a social contract between employer and employee that involves some fundamental fairness. And the fundamental fairness doctrine of work comp really requires that an employer pay the parts they don't dispute. And you've heard me say this before. I'll repeat it because it is, I think, fundamental to understanding this bill, and that is, right now, the law is, if you don't have a dispute, you have to pay that benefit in 30 days. That's the law right now. We just have a loophole that we're trying to close with LB622, and the loophole is, if you don't dispute it and you file an appeal, you can stop payment and starve somebody out. We must, Senator Gloor, trust that the Work Comp Court, a specialized court with very...and we have a very competent bench. I've tried cases in front of, I think, every judge on the Work Comp Court. It is a competent court. They deal with these medical issues every day. They deal with the doctors that people shop for,... [LB622]

PRESIDENT SHEEHY: One minute. [LB622]

SENATOR LATHROP: ...and they deal with the doctors that insurance companies shop for. And are they going to get it right every time? No. No courtroom is without its own share of error. That's going to happen in our system. The question is, how can we make this the best system, the best work comp system, and that is to require that if something isn't in dispute, that it be paid. That's a simple proposition. It's fundamental fairness and it's found in FA50. Thank you. [LB622]

PRESIDENT SHEEHY: Thank you, Senator Lathrop. Senator Lautenbaugh, you're recognized. [LB622]

SENATOR LAUTENBAUGH: Thank you, Mr. President and members of the body. And we are, to a certain extent, plowing a lot of the same ground and I apologize, but this needs to be clearly articulated and this needs to get through. We heard a very impassioned argument: Well, this comes down to workers, not the interests involved. Well, workers work for companies, whether we're talking small landscaping operations or ConAgra. And every advancement, every increase, every potential increase in the scope of coverage this year we're told, well, that doesn't come with a cost, that doesn't come with a cost; that won't make Nebraska a hostile business environment; that won't raise your premiums. Somehow, magically, none of that will happen ever. We've seen it in other states with other litigation where, in different areas of the law, where certain

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companies just stop writing in certain states. Now am I saying this is the type of thing that is absolutely going to make a bunch of carriers pull up and run? No, not this one thing, but be mindful, there is a cumulative effect of this kind of thing. And I want to be very clear on what we're doing here. We've been told that it was necessary to take Senator Nordquist's bill and turn it into something entirely different. To say, yes, it previously dealt with late payments and frivolous appeals--no, it dealt with the late payment of medical bills. The current iteration of LB622 has nothing to do with the introduced version, let's be clear on that. But it was necessitated by the Lagemann decision. That Lagemann decision came down and the court invited us to act. Well, what did the court say? "If the Legislature had intended to overturn our decision in Leitz, it would have specified that waiting-time penalties are available pending an appeal for any uncontested portion of the award." Not reasonable controversy--uncontested. And don't let anyone tell you that uncontested means reasonable controversy, because someone saw fit to alter the committee statement. The original committee statement said those portions of the award that were uncontested. That's the language of Lagemann. The revised, corrected committee statement says "portions of the award for which there is no reasonable controversy." That is not the language of Lagemann. That's the language of what Senator Lathrop's amendment, FA50, is trying to do. The Supreme Court did not invite us to take the reasonable controversy standard which applies pre-award and make it apply post-award. That's not what they said. They talked about the uncontested portion of the award. And in my mind, uncontested means unargued on appeal--unappealed portions of the award. FA50 overreaches. Once again, if it's on appeal, you can tell. You have to say what you're appealing. Reasonable controversy is not as clear as you're being led to believe. Reasonable controversy is not what the court invited us to get into post-award. That's what FA50 does. It addresses what the court said, but in my mind it overreaches. That's the difference here. We aren't simply doing what the court suggested or invited in Lagemann; we're going farther. And it is not okay to say uncontested means the same thing as reasonable controversy, otherwise no one would have seen fit to alter the committee statement to change the word "uncontested" to "reasonable controversy"--change the word to the phrase. They don't mean the same thing. Once again, that's what the fight is about. Is the standard whether or not you've appealed... [LB622]

PRESIDENT SHEEHY: One minute. [LB622]

SENATOR LAUTENBAUGH: ...or whether or not there's a reasonable controversy? I've already talked about how interest ticks away, no matter what, at 14 percent; not the judgment rate, not the prevailing rate--14 percent in law. I should also point out that if you don't get a reduction on appeal, you're assessed attorney's fees; not whether or not your appeal was reasonable, just whether or not you succeed on your appeal. So we're being asked to believe that carriers and employers are going to routinely appeal frivolous things so they can have the thrill of paying attorney's fees to the plaintiff's attorney when they lose. That's not going to happen. That's not realistic. That's not what

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we're talking about. So don't be stampeded into something with a plea to think of the workers. You don't check your common sense at the door when you come in here. No one is going to sign up for 14 percent interest and attorney's fees just so they can prosecute an appeal. That's not going to happen. You're being stampeded and scared by something that isn't reasonable. [LB622]

PRESIDENT SHEEHY: Time, Senator. Thank you, Senator Lautenbaugh. Senator Wightman, you're recognized. [LB622]

SENATOR WIGHTMAN: Thank you, Mr. President, members of the body. I've been away from the floor during some of the debate. It seems to me at this point that there are plenty of penalties upon the employer in the event they do not pay and in the event they take an appeal, in that we have 14 percent interest. I've been listening to Senator Lautenbaugh. There are attorney's fees imposed in the event the appeal was not successful. So it just seems to me that a lot of what Senator Lathrop has argued, there are checks on this. I don't see where an employer would file an appeal and subject themselves to paying attorney's fees that they normally wouldn't have to pay, subject themselves to paying 14 percent interest and do it on the basis of a frivolous appeal. I would ask some questions of Senator Lautenbaugh, if he would yield. [LB622]

PRESIDENT SHEEHY: Senator Lautenbaugh, would you yield to Senator Wightman? [LB622]

SENATOR LAUTENBAUGH: Yes, I will. [LB622]

SENATOR WIGHTMAN: Now, Senator Lautenbaugh, can you tell us under what circumstances--you've probably said this--that the 14 percent interest, is that after the initial hearing and if an appeal is taken, or does it always draw interest at 14 percent? [LB622]

SENATOR LAUTENBAUGH: Well, actually it's kind of funny you asked that, Senator, because I just had an argument in the Court of Appeals where the Court of Appeals questioned when the start of interest...whether or not the statute that provides that is clear enough. But I believe the prevailing interpretation is back to when compensation is due, which would arguably be around the start of the injury. [LB622]

SENATOR WIGHTMAN: So it may date back to the entire time. But at any rate, if the employee or the employer takes an appeal, then it continues to run at 14 percent. Is that correct? [LB622]

SENATOR LAUTENBAUGH: Yes, yes. [LB622]

SENATOR WIGHTMAN: And there may still be a question as to when that would start

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exactly, but probably it starts at the time of the injury? [LB622]

SENATOR LAUTENBAUGH: Give or take, yes. [LB622]

SENATOR WIGHTMAN: Now with regard to the attorney's fees, are those only assessed against the employer if an appeal is taken after the initial hearing? [LB622]

SENATOR LAUTENBAUGH: Only if...well, they're assessed against the appealing, normally the employer or the insurance company, if the appeal is unsuccessful, not unreasonable. [LB622]

SENATOR WIGHTMAN: That's if the appeal was unsuccessful though he can...the employer can still go in and go to a hearing before the one-judge court and he isn't paying...the employer isn't paying the attorney's fees at that point. Is that correct? [LB622]

SENATOR LAUTENBAUGH: I'm not 100 percent clear I'm following you. Normally, the appellate court, if there's not a reduction, would make the fee award for alleged frivolous appeal. [LB622]

SENATOR WIGHTMAN: Okay. You wouldn't have attorney's fees if it was appealed, say, from the one-judge court to the three-judge panel. [LB622]

SENATOR LAUTENBAUGH: You surely could, yes. [LB622]

SENATOR WIGHTMAN: You could. [LB622]

SENATOR LAUTENBAUGH: Yes. [LB622]

SENATOR WIGHTMAN: The three-judge panel could assess attorney's fees? [LB622]

SENATOR LAUTENBAUGH: Can and does, yes. [LB622]

SENATOR WIGHTMAN: And does. And would those attorney's fees continue to grow if you went on and took an appeal to the Court of Appeals? [LB622]

SENATOR LAUTENBAUGH: Presumably, and I would say obviously, yes. I mean it's a different level of appeal. There's more work to be done. There would be more fees alleged. Yes. [LB622]

SENATOR WIGHTMAN: So the three-judge panel could assess attorney's fees at that level and then if an appeal was taken to the Court of Appeals there would be additional attorney's fees. [LB622]

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SENATOR LAUTENBAUGH: Yes. [LB622]

SENATOR WIGHTMAN: Thank you. Thank you, Senator Lautenbaugh. It just seems to me that there are a lot of reasons why an employer would not file a frivolous appeal when at every step they're increasing their costs by the continuation of a 14 percent interest factor. Obviously, these employers and their insurers don't make money by continuing 14 percent interest, nor do they make money by... [LB622]

PRESIDENT SHEEHY: One minute. [LB622]

SENATOR WIGHTMAN: Thank you, Mr. President...nor do they make money by subjecting themselves to additional attorney's fees at every level. So it just seems to me somewhat inconceivable that they're going take frivolous appeals without any merit at all with these checks being in place. Thank you, Mr. President. [LB622]

PRESIDENT SHEEHY: Thank you, Senator Wightman. Senator Lautenbaugh, you're recognized and this is your third time on FA50. Senator Lautenbaugh waives. Seeing no additional requests to speak, Senator Lathrop, you're recognized to close on FA50 to AM1198. [LB622]

SENATOR LATHROP: Thank you, Mr. President. And I want to commend my colleague, Senator Lautenbaugh. You have heard two lawyers make a case to you, two lawyers that have a different point of view, and now you've got to make a decision. And I would hope that that decision would be based upon what you've learned inside here and not what somebody has told you outside there. Senator Wightman just spoke and I'd like to respond to something that he said, because you may listen to it and say, yep, Wightman is right, that makes perfect sense to me, I'm going with Lautenbaugh. Well, there's a problem. There is, in that attorney fee and in that interest rate, an incentive not to file an appeal for which there is no merit across the board. You don't have anything to talk about. Those are pretty good incentives to stop you from filing an appeal. LB622 addresses a different situation. LB622 addresses a situation where you have a number of things you could appeal, one of which is meritorious or conceivably meritorious or arguably meritorious. If you have something for which there is a reasonable controversy and you appeal it, LB622 says what do you have to do with the rest of the appeal? If you have a legitimate issue on appeal, does that mean you can stop paying on everything that you don't even dispute? The answer, I think, should be no, and that's what FA50 does. But to suggest that interest rates or attorney fees will stop an insurance company, who is appealing an order for a fair reason, from not paying those portions they don't dispute misses the point. LB622 really deals with a pretty narrow circumstance. You have to really have two things going on. One is you have to have a legitimate thing to appeal, and the other thing is you have to have something that there's not a controversy over. Okay? It's not every appeal. It's those where there's some things

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are in dispute and some things are not. And all LB622 does and all FA50 will do to improve that is to say, the standard that applies in work comp--and it's already in place--if you dispute...if you don't have a reasonable controversy regarding something, without a trial, without a lawsuit, you have a duty to pay it under our law. All we're saying is, that very same standard that's already in the books should apply to that portion of an award that you don't dispute. Should somebody get out of it by filing an appeal, stop paying? That's not the fundamental fairness found in the work comp statute. To avoid that ridiculous result, to avoid allowing insurance companies to not pay even undisputed portions of an award, you have to adopt FA50. I would encourage you to do that. Thank you. [LB622]

PRESIDENT SHEEHY: Thank you, Senator Lautenbaugh (sic). You have heard the closing to FA50 to AM1198. The question before the body is on the adoption of FA50 to AM1198. All those in favor vote...Senator Lathrop. [LB622]

SENATOR LATHROP: Mr. President, I believe I'm going to need a call of the house and I'd request the same. [LB622]

PRESIDENT SHEEHY: There has been a request for the call of the house. The question before the body is, shall the house be placed under call? All those in favor vote yea; opposed, nay. Please record, Mr. Clerk. [LB622]

CLERK: 33 ayes, 0 nays, Mr. President, to place the house under call. [LB622]

PRESIDENT SHEEHY: The house is placed under call. All unexcused senators please report to the Legislative Chamber. All unauthorized personnel please step from the floor. The house is under call. Senators, please record your presence. Senator Dierks, Senator Dubas, Senator Fischer, Senator Loudon, Senator Langemeier, Senator Carlson, the house is under call. Senator Lathrop, all members are present or accounted for. How would you like to proceed? [LB622]

SENATOR LATHROP: Roll call vote in regular order, please. [LB622]

PRESIDENT SHEEHY: Members, what you're currently voting on is on the adoption of FA50 to AM1198. Mr. Clerk, roll call in regular order. [LB622]

CLERK: (Roll call vote taken, Legislative Journal page 1718.) 16 ayes, 27 nays, Mr. President, on the amendment to the amendment. [LB622]

PRESIDENT SHEEHY: FA50 is not adopted. The call is raised. Mr. Clerk, you have items for the record. [LB622]

CLERK: I do, Mr. President, before we proceed if I might. Your Committee on

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Enrollment and Review reports they've examined and engrossed LB35 and LB36 and find those correctly engrossed. I have confirmation reports from the General Affairs Committee and the Business and Labor Committee; an Exec Board announcement regarding the Planning Committee and the selection of Senator Harms as Chair and Senator Gloor as Vice Chair of the Planning Committee. Amendments to be printed: Senator Fulton to LB675, Senator Hadley to LB420; an explanation of vote from Senator Cook (re LB16, LB218, LB241, LB288, and LB288A). (Legislative Journal pages 1719-1721.) [LB35 LB36 LB675 LB420 LB16 LB218 LB241 LB288 LB288A]

Mr. President, with respect to LB622, Senator Lautenbaugh, I now have FA52, Senator. [LB622]

PRESIDENT SHEEHY: Senator Lautenbaugh, you're recognized to open on FA52 to AM1198. [LB622]

SENATOR LAUTENBAUGH: Thank you, Mr. President. I'll withdraw that at this time. [LB622]

PRESIDENT SHEEHY: FA52 is withdrawn. [LB622]

CLERK: Senator Lautenbaugh, FA53. [LB622]

PRESIDENT SHEEHY: Senator Lautenbaugh, you're recognized to open on FA53. [LB622]

SENATOR LAUTENBAUGH: I'll withdraw that as well. [LB622]

PRESIDENT SHEEHY: FA53 is withdrawn. [LB622]

CLERK: I have nothing further pending to the principal amendment AM1198, Mr. President. [LB622]

PRESIDENT SHEEHY: Is there further discussion on AM1198? Members requesting to speak: Senator Lautenbaugh. [LB622]

SENATOR LAUTENBAUGH: Thank you, Mr. President, members of the body. I would urge your approval of AM1198. [LB622]

PRESIDENT SHEEHY: Thank you, Senator Lautenbaugh. Seeing no additional requests to speak, Senator Lathrop, you're recognized to close on AM1198. [LB622]

SENATOR LATHROP: Well, AM1198 now contains permission to file an appeal and stop paying even undisputed portions of a claim. I have no choice because I believe as

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firmly as I have any conviction that that's lousy policy, but we seem determined to do that. Nevertheless, I find myself in a position asking you to vote red on AM1198. Thank you. [LB622]

PRESIDENT SHEEHY: Thank you, Senator Lathrop. You have heard the closing. The question before the body is on the adoption of AM1198 to LB622. All those in favor vote yea; opposed, nay. Senator Lathrop...or correction, Senator Lautenbaugh. [LB622]

SENATOR LAUTENBAUGH: Thank you, Mr. President. I would request a call of the house and a roll call vote. [LB622]

PRESIDENT SHEEHY: There has been a request for the call of the house. The question before the body is, shall the house be placed under call? All those in favor vote yea; opposed, nay. Please record, Mr. Clerk. [LB622]

CLERK: 42 ayes, 0 nays, Mr. President, to place the house under call. [LB622]

PRESIDENT SHEEHY: The house is placed under call. All unexcused senators please report to the Legislative Chamber. All unauthorized personnel please step from the floor. The house is under call. Senators, please record your presence. Senator, all members are present or accounted for. Members, the question before the body is on the adoption of AM1198 to LB622. There has been a request for a roll call in regular order. Please continue, Mr. Clerk. [LB622]

CLERK: (Roll call vote taken, Legislative Journal pages 1721-1722.) 27 ayes, 18 nays, Mr. President, on the amendment. [LB622]

PRESIDENT SHEEHY: AM1198 is adopted. The call is raised. Mr. Clerk, do you have an amendment on your desk? [LB622]

CLERK: I do, Mr. President. The next amendment I have to the bill, Senator Lautenbaugh, AM1463. [LB622]

PRESIDENT SHEEHY: Senator Lautenbaugh, you're recognized to open on AM1463 to LB622. [LB622]

SENATOR LAUTENBAUGH: I'll withdraw that. [LB622]

PRESIDENT SHEEHY: AM1463 is withdrawn. [LB622]

CLERK: Senator Lautenbaugh, I now have what I had earlier mistaken as an amendment to AM1198. Senator, this is FA52. [LB622]

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PRESIDENT SHEEHY: Senator Lautenbaugh, you're recognized to open on FA52. [LB622]

SENATOR LAUTENBAUGH: I'll withdraw it. [LB622]

PRESIDENT SHEEHY: FA52 is withdrawn. [LB622]

CLERK: Senator Lautenbaugh, I now have FA53. [LB622]

PRESIDENT SHEEHY: Senator Lautenbaugh, you're recognized to open on FA53. [LB622]

SENATOR LAUTENBAUGH: I'll withdraw that as well. [LB622]

PRESIDENT SHEEHY: FA53 is withdrawn. [LB622]

CLERK: Mr. President, the next motion I have is by Senator Lathrop. Senator Lathrop would move to indefinitely postpone the bill. Senator Nordquist, as principal introducer, you have the option to lay it over. [LB622]

PRESIDENT SHEEHY: Senator Nordquist. [LB622]

SENATOR NORDQUIST: I will lay it over. [LB622]

PRESIDENT SHEEHY: LB622 is laid over. Mr. Clerk, we will move to Final Reading. Members should return to their seats in preparation for Final Reading. Mr. Clerk, we will proceed to LB679. [LB622 LB679]

CLERK: Mr. President, the first motion I have with respect to LB679 is Senator Council would move to return the bill for a specific amendment, AM1245. (Legislative Journal page 1247.) [LB679]

PRESIDENT SHEEHY: Senator Council, you're recognized on your motion to return to Select File. [LB679]

SENATOR COUNCIL: Yes, thank you very much, Mr. President. I offered this motion to address an issue that has arisen with regard to the Foster Care Review Board. During the course of debate, a variety of bills that we have addressed this session, I've heard two terms consistently used: transparency and accountability, transparency and accountability. The Performance Audit Committee advanced LB679 in an effort to address an issue with regard to transparency relative to the Foster Care Review Board. And that issue of transparency had to deal with the interests of respective members of the State Foster Care Review Board, that interest specifically being their relationship

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with the Department of Health and Human Services. And the Performance Audit Committee acted on the basis of the performance auditors' findings after an audit was conducted of the Foster Care Review Board, and the auditors found that there was no conflict of interest in the strictest sense of the term, although they also made reference to the fact that there was...it was not entirely clear. Acting upon the recommendation and advice of the auditors, the Performance Audit Committee advanced LB679, which basically requires that members of the...or people considered for appointment to the Foster Care Review Board have to disclose whether or not they receive or their organization receives any funding in any form from the Department of Health and Human Services. Well, one of the concerns that has been expressed not only by current members of the Foster Care Review Board but former members of the Foster Care Review Board, and others who are just genuinely concerned about the children in the state of Nebraska who find themselves in our foster care system, that there not only are no conflict of interests but no appearances of impropriety on the part of the members of the Foster Care Review Board. And what gives rise to appearances of impropriety is the fact that there are members of the Foster Care Review Board whose agencies depend upon funding, in part, some in whole, from the Department of Health and Human Services. Well, what the contradiction is and what the concern is, is that there is a question of who is being served. And if you look at the legislative intent of establishing the Foster Care Review Board, it was to provide for an independent agency with independent oversight of how children in the foster care system were being handled. And one of the principal duties of the Foster Care Review Board is to report their findings with regard to how children are being handled in the foster care system of the state of Nebraska. I don't need to remind the members of this body, particularly those who were here last year, with regard to the issues surrounding the safe haven legislation. And as a result of the problems that surfaced after the safe haven bill was initially enacted, was that there was a special session called to address that issue. Well, associated with that were requests from members of this body for specific information regarding foster care in the state and how children in the foster care system were being handled, what their issues were. Now there has been some dispute, for lack of a better descriptor, of what kind of information should have been provided in response to that request. There is a controversy as to who should have provided that information. But my concern is that we eliminate any doubt, question, or concern that the Foster Care Review Board...that their objective is and will continue to be to serve the best interests of the children in the state of Nebraska who find themselves in foster care and to not be placed in a position where there's any concern on their part that action they take as a member of the Foster Care Review Board could somehow affect their relationship with the Department of Health and Human Services. So as a result of those concerns, I introduced...I offered AM1245. After preparing and introducing AM1245, I've had occasion to have a number of conversations with a number of members of this body, but in particular Senator Harms, who serves as the Chairman of the Performance Audit Committee, and Senator Gay and Senator Hansen, Senator Coash, and many others about this issue. And Senator Harms raised a very legitimate concern about whether or

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not the amendment that I offer as AM1245 goes much further than what was the issue that was presented for public hearing before the Performance Audit Committee, and I respect and appreciate Senator Harms's position on that. And I think that Senator Harms and others understand my concern, a legitimate concern, that an independent agency established, created by this body needs to understand their duty and their responsibility to provide information to this body when requested, and that there should be no equivocation on the part of any agency of the government of this state to respond when requested, and particularly in the case of the foster care, particularly at the time where the safe haven bill was not only receiving broad attention from citizens of the state of Nebraska but national attention, and Nebraska was being scrutinized with regard to how we were addressing the issues affecting children and families in this state. So as a means of trying to move forward with a way to remove any doubt as to, again for lack of a better term, the loyalty found on the Foster Care Review Board in terms of the relationship between the Foster Care Review Board and the Department of Health and Human Services, Foster Care Review Board and this body, the Legislature, one of the things that Senator Harms and I have discussed was addressing the breadth of my amendment at a later time, and specifically addressing this issue of providing information to this body. And in that regard, I'd like to read into the record a letter that has been signed by Senator Harms, Senator White, Senator Lathrop, and myself. The letter is directed to Georgie Scurfield, who is the chair of the Foster Care Review Board, and Carol Stitt, who is the executive director of the Foster Care Review Board, and it reads as follows: As you undoubtedly know, the duties of the State Foster Care Review Board... [LB679]

PRESIDENT SHEEHY: One minute. [LB679]

SENATOR COUNCIL: ...are prescribed in Chapter 43, Article 13 of Nebraska Revised Statutes. The State Foster Care Review Board was established as an independent body to provide independent and meaningful oversight of the Department of Health and Human Services regarding the placement and well-being of children in foster care. Essentially, your statutory mission is to track, review, and report on the status of foster children to assure that the best interests of these children are being met, including their individual physical, psychological, and sociological needs. State senators have a long history of requesting information from state agencies, boards, and commissions, as well as the State Foster Care Review Board and staff, in order to consider whether policy changes in state law are necessary. Safe haven legislation is a recent example. Senators need timely and accurate information in order to make the appropriate policy choices. Members of the Legislature expect that uncensored information will be provided upon request, in a timely fashion, taking into account information which must be protected for privacy reasons. [LB679]

PRESIDENT SHEEHY: Time, Senator. [LB679]

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SENATOR COUNCIL: Thank you for your consideration and future cooperation.
[LB679]

PRESIDENT SHEEHY: Thank you, Senator Council. You have heard the opening on the motion to return for a specific amendment. Members requesting to speak are Senator Lautenbaugh, followed by Senator Harms, Senator Gay, Senator Howard, Senator Pirsch, Senator Stuthman, and others. Senator Lautenbaugh, you're recognized. Senator Lautenbaugh waives. Senator Harms, you're recognized. [LB679]

SENATOR HARMS: Thank you, Mr. President and colleagues. Senator Council and I have had more than one discussion about her amendment. I've had a full discussion with this in regard to the committee, the Legislative Performance and Audit Committee. We are agreeable to bringing this out for discussion purposes only. I know that there are some strong feelings within this body in regard to the State Foster Care Review Board. And I think it's important for us to surface this information so that you'll have...we'll have this as a matter of record and so that we will have this in a form that I'm quite sure next year there will be legislation introduced to maybe address some of these concerns with this board. But I think it's important today to have that discussion so that we can find out just exactly how this body feels. I don't think there's any question in my mind that there are some issues with that board that I think probably need to be addressed. Now the findings of the Audit Committee and their staff, it was well done. They found that there were no conflict of interest. And as Senator mentioned earlier, that in the strictest sense the definition of conflict of interest is defined by the accountability and disclosure law, and that's the only one that we have. And I'm sure the attorneys in here can probably correct that if I'm wrong, but I think that's the only law that we follow in regard to conflict of interest. What Senator Council's legislation will do will rewrite that entire issue of conflict of interest. It changes the board. It's completely beyond what we have introduced as legislation. It goes way beyond where we want to go at this point with the committee. But I do believe it's important to have the discussion, to have it as a matter of record, and then to have that amendment pulled, but I think it's important for us to do that and we honor that request and we'll just see where this takes us. Thank you, Mr. President. [LB679]

PRESIDENT SHEEHY: Thank you, Senator Harms. Senator Gay, you're recognized.
[LB679]

SENATOR GAY: Thank you, Mr. President. I, too, am opposed to bringing this back to Select File and it's my understanding Senator Council would speak on this. I just rise quickly to remind the body of the appointments that we passed unanimously out of committee, for the state board, and you approved unanimously. And also this vote, we did that...this bill was passed out of committee unanimously to the Performance Audit Committee to take up. I think they addressed it. We had addressed this. We don't want to go backward. But the understanding I'm getting is we're going to have a discussion

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here and we will not pursue this to actually return to Select File. If that were to happen, I have an amendment. I do believe there's...continue to look into this, but...where we're expanding this a little bit, the law reads who will be on this board, and this board is professionals and there...in some situations they can't avoid not dealing with the state because they are state employees in statute. You have to be a member of a CASA program or a child advocacy center could be or any child clinical psychologist who is dealing with any patient on Medicaid, for instance, if you receive any grants. So it's so broad, let's don't rush into this and make a hasty decision. But I believe, today, if it's our intent to discuss this, and I know there's strong feelings both sides of this issue. But anyway, if this does come to a vote to return to Select File, I would strongly encourage you to vote no. With the remainder of my time, I'd yield to Senator Council if she would like it. [LB679]

PRESIDENT SHEEHY: Senator Council, you're yielded 3 minutes 15 seconds. [LB679]

SENATOR COUNCIL: Yes, thank you very much, Mr. President, and thank you, Senator Gay. When I offered this amendment, it was my original intent to take it to vote. But after discussions with Senator Harms and other members of the committee and understanding what the concern was, the understanding that I have had, on the basis of those conversations where we're going to be allowed the opportunity to discuss this issue and be poised to address it during the interim with every intention of introducing some legislation next legislative session, so that I'll make it clear that after there's been discussion on it, it would be my intent to withdraw this amendment and the motion to return to Select File; but this discussion has to occur. Senator Gay raised some legitimate points but I think the legislation can be drafted to address those issues. For example, I think it's a little different when we have pediatricians or psychologists who receive Medicaid for treating a variety of youngsters in the state of Nebraska, not just those in foster care, that that distinction be made. And if you look at the amendment, there's a recognition that guardian ad litem are going to receive some of their income from the courts. So there was a recognition. Certainly, these matters have to be tweaked, but let me draw a comparison. Last week, we advanced LB498. I believe it was Senator Fulton's bill that dealt with the--help me--Wyuka Cemetery? Am I pronouncing that correctly? Thank you. The Wyuka Cemetery, and we advanced that bill. And I want to direct your attention to Section 2 of that bill on page 5. It says:... [LB679 LB498]

PRESIDENT SHEEHY: One minute. [LB679]

SENATOR COUNCIL: ...Any trustee of the Wyuka Cemetery who would be required to take any action or make any decision in the discharge of his or her official duties that may cause financial benefit or detriment to him or her, a member of his or her immediate family, or a business with which he or she is associated, which is distinguishable from the effects of such action on the public...shall take the following

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actions as soon as he or she is aware of such potential conflict or should reasonably be aware of such potential conflict. And it sets forth specific action that those individuals have to take. We don't have that as it relates to members of the State Foster Care Review Board, but we know that there are occasions where the State Foster Care Review Board is expected to make some policy decisions that, quite frankly, may not meet with the approval of the Department of Health and Human Services. And we should not want to place those members of the... [LB679]

PRESIDENT SHEEHY: Time, Senator. [LB679]

SENATOR COUNCIL: Thank you. [LB679]

PRESIDENT SHEEHY: Thank you, Senator Council. Mr. Clerk, do you have items for the record? [LB679]

CLERK: I do, Mr. President. A communication from the Governor to the Clerk. (Read re LB27, LB27A, LB60, LB84, LB94, LB113, LB122, LB129, LB131, LB133, LB137, LB152, LB155, LB163, LB175, LB208, LB209, LB238, LB274, LB278, LB294, LB299, LB302, LB339, LB343, LB347, LB348, LB358, LB360, LB372, LB389, LB392, LB394, LB412, LB422, LB432, LB434, LB441, LB445, LB446, LB447, LB450, LB488, LB498, LB500, LB501, LB503, LB524, LB528, LB531, LB533, LB537, LB540, LB562, LB587, LB598, LB604, LB627, LB630, and LB631.) A second communication. (Read re LB626.) And finally, Mr. President, Senator Cook would like to offer LR248. That will be laid over. That's all that I have, Mr. President. Thank you. (Legislative Journal pages 1724-1726.) [LB27 LB27A LB60 LB84 LB94 LB113 LB122 LB129 LB131 LB133 LB137 LB152 LB155 LB163 LB175 LB208 LB209 LB238 LB274 LB278 LB294 LB299 LB302 LB339 LB343 LB347 LB348 LB358 LB360 LB372 LB389 LB392 LB394 LB412 LB422 LB432 LB434 LB441 LB445 LB446 LB447 LB450 LB488 LB498 LB500 LB501 LB503 LB524 LB528 LB531 LB533 LB537 LB540 LB562 LB587 LB598 LB604 LB627 LB630 LB631 LB626 LR248]

PRESIDENT SHEEHY: Thank you, Mr. Clerk. Continuing with floor discussion on the motion to return for a Select File amendment, members requesting to speak are Senator Howard, followed by Senator Stuthman, Senator Hadley, Senator Hansen, Senator Council, Senator White, and others. Senator Howard, you're recognized. [LB679]

SENATOR HOWARD: Thank you, Mr. President and members of the body. I rise in adamant opposition to this amendment and to returning this bill to Select File for the addition of this amendment. It's only through the resolve of my Chairman of the Health Committee and the reassurance that this amendment was only presented for discussion, and the level-headed thinking of Senator Harms who has reflected on this, that I'm not going to allow myself to become emotionally out of control on this issue. But

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as a longtime employee of the Department of Health and Human Services, I have seen the Foster Care Review Board in action for decades. Keep in mind that the only individual that has ever been the director of the Foster Care Review Board remains the director at this time. This person, we all know who it is--Carol Stitt--began when the Foster Care Review Board began in the early '80s. I believe it was maybe '81. Through all those years this individual has been at the helm and in control of this system. At one point, the department had its own internal review system which was much cheaper and really got the job done in quicker order. But there was a question about conflict of interest raised by Carol Stitt, and the department made the decision that the entire process would be placed with the Foster Care Review Board. No agency should operate without a system of checks and balances in place. And the first year that I was down in this Legislature in 2005, Senator Nancy Thompson brought forth a bill to place a board over Foster Care Review Board. Gene Klein, Georgie Scurfield, and Mary Jo Pankoke were good enough to give their time and expertise to volunteering to work on this board and to being a check in place and to check as a check and a balance for this system. Over these years I've seen a constant resistance to this being in place by Foster Care Review Board. Who wouldn't want an autonomous system where you put out the information and there's really no means, internally, for a question of what's happening? When I was a case manager, I can recall going back to Foster Care Review Board and saying either you correct this misinformation you've put out or I'm going to send a letter to the judge and the concerned parties myself with the correct information in it, and that was always done. But Foster Care Review Board should not operate autonomously. It's not an agency unto itself. It operates under the auspices of this body. I'd question whether we actually need this review system, quite frankly. We have the court in place. It's the court's job. The federal auditors come in and look at the material in the record from the court. If the wording is not correct in the court order--for example, least restrictive placement for the child--we don't pass the audit. Foster Care Review Board is an additionally funded system that this body has sanctioned and, frankly, we pay for. As I said before, I'm adamantly opposed to this amendment. It takes us nowhere but backwards and I feel that we have an obligation to hold the Foster Care Review Board as accountable as we do every other agency in this system. And I would close by saying, if we do not want anyone who has a connection with Health and Human Services or even possibly the profession of social work to be involved in this board, we should take this a step further and look at all boards that are in place and that possibly the professionals that are related to these fields should not be allowed to participate on these boards. I would carry that over to possibly the bar association should not allow attorneys to participate in their system. So thank you for your time and consideration, and I oppose this amendment. [LB679]

PRESIDENT SHEEHY: Thank you, Senator Howard. Senator Stuthman, you're recognized. [LB679]

SENATOR STUTHMAN: Thank you, Lieutenant Governor and members of the body. I

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have mixed feelings on the fact of whether these individuals should be serving on the Foster...be receiving money working for agencies and also serving on the Foster Care Review Board. But I think there is some value in the fact that they do know the information and situations that occur. But I want to bring up another issue that was drawn to my attention. I think it was yesterday there was a program on TV as far as California, as far as the foster care system there, especially to the fact that, you know, I feel that the system is really broken. And I wanted to give you some facts from the California: 70 percent of the inmates in prisons went through the foster care system--70 percent. Only 3 percent of foster care children go to and attend college. Whether they graduate or not, I do not know. But I think those are figures that really bother me because I feel that if a child is removed from the home because of a bad situation and goes into a foster home with foster parents, you know, I think these children deserve better. Why are those numbers, so staggering to me, that 70 percent end up in incarceration? Now I couldn't get any information from Nebraska but I'm going to try to get that information compiled. But the last information that I could get was the fact that in February 1984, which is 25 years ago, 59 percent of the males and 40 percent of the females had spent three or more years--and these were in prison in 1984--59 percent of the males, 40 percent of the females had spent three or more years in court-ordered, out-of-home placement. That's terrible. Don't these children deserve something better? That is why I think that we have to take a serious look at the whole system. These children, in my opinion, deserve better. Why should that percentage of those that were in foster care system, which in my opinion is a system that should look out for the betterment and the improvement of the children when they're placed in a foster home. I really think we should take a serious look at that. And I respect the fact that Senator Council, you know, brought up the issue and I think we should take a serious look at that as to who is serving on the Foster Care Review Board. And the fact is, what is happening to the children that are placed in foster care? That really concerns me. I worked for seven years with a lot of the foster care kids, foster care youth. They were in foster care system for 12 years, were placed 16-20 different times during those 12, 14, and 16 years. That's not good. Every time you move a child to another environment, it changes their outlook on life. I think we have to take a look at what is really happening to those vulnerable youths and how can we improve those situations so that we can make assets... [LB679]

PRESIDENT SHEEHY: One minute. [LB679]

SENATOR STUTHMAN: ...out of these children and not liabilities. But when you look at the records of 70 percent of the inmates in California are a liability to the state, that's not good. That's not good at all. So I hope that we can come up with something that we can look at, you know, what the system is doing, performance of the system, performance of the outcome of these children, which we deserve to give them better. Thank you, Mr. President. [LB679]

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PRESIDENT SHEEHY: Thank you, Senator Stuthman. Senator Hadley, you're recognized. [LB679]

SENATOR HADLEY: Mr. President, members of the body, I got interested in this because it talked about the Legislative Performance Audit Committee and I guess I've been involved with auditing and such as that over my career, and I thought, going back to the underlying bill where it said, requires member of State Foster Care Review Board, prior to their appointment, to disclose any and all funding he or she or his or her employer receives from the Department of Health and Human Services. Basically, from an accounting standpoint as an auditor, we talk about the difference between independence in fact, and independence in appearance. And I think what we want, as much as possible, is to have boards that are basically independent in both cases. What we're dealing with here with this underlying bill, LB679, is independence in appearance. It's the appearance of what people have. They're taking money from potentially the Health and Human Services. But even more than independence in appearance is independence in fact, and independence in fact is a mental attitude that the person has, and that's something that every person on the board has to ask themselves. Am I truly, in fact, in my own mind, independent? And if they can't answer that question, yes, then they shouldn't either be on the board or making decisions. So I support the underlying bill, LB679, because it does get to independence in appearance. But we need to stress to board members that if they're not independent in fact, if they really, truly cannot render judgments independently, they should not be on those boards. So I would support LB679 and I probably will not support AM1245 at this point in time. I would yield the rest of my time to Senator Hansen. [LB679]

PRESIDENT SHEEHY: Senator Hansen, you're yielded 2 minutes 50 seconds. [LB679]

SENATOR HANSEN: Thank you, Mr. President and members of the Legislature, and thank you, Senator Hadley. I, too, rise in favor of bringing this off of Final Reading and I appreciate Senator Council bringing this amendment to us tonight. It seems like the Foster Care Review Board has been in conflict for several years now, at least as long as I've been here. But still they have a function and I think they have an extremely important function in taking care of the wards of the state. I don't think we can ever get that out of our mind, how important these children are to receive permanency, one home, one family, for one lifetime. I don't think anything can be more important than turning that around. I served on HHS Committee for two years, went through a series of those confirmation hearings, and I would like to ask Senator Gay a couple questions if I could, please. [LB679]

PRESIDENT SHEEHY: Senator Gay, would you yield to Senator Hansen? [LB679]

SENATOR GAY: Yes, I would. [LB679]

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SENATOR HANSEN: Thank you. Senator Gay, when I served with you on HHS we went through several of these confirmation hearings, and you went through more of them this year. And two years ago, if you remember, that I raised a question of a conflict of interest with one of the confirmation people that I learned about the background of that person, so this is nothing new, at least for me. Tell us a little bit about the confirmation process that went on this year. [LB679]

SENATOR GAY: Well, Senator Hansen... [LB679]

SENATOR HANSEN: When it dealt with the Foster Care Review Board--I'm sorry--just that. [LB679]

SENATOR GAY: Yeah. I think...I will very quickly. [LB679]

PRESIDENT SHEEHY: One minute. [LB679]

SENATOR GAY: Thank you. We had...I think there were three confirmations and this, of course, we knew the issue from past things, and we asked, and they actually fully disclosed, here's what I do, here's...they brought it forward to us. So that was addressed right away. I think they knew, you know, bring it out there. And one was a CASA volunteer who works for the county; another one, I don't remember quite the exact two. Then we had conversations about backgrounds, why they want to serve, what they've been doing. These were all renewals, by the way, too, so they were reconfirmations, I guess. So it was addressed, it was fully addressed and disclosed. Then we had this bill come before us and we used that, but it was brought up, discussed, and we moved on. There were a lot of other questions. That was one of the questions. And you're right, Senator, you had been concerned on this and we are too, so those were asked. [LB679]

SENATOR HANSEN: How much notice did the Legislature as a body get before those names were brought to us? And I think this is a key point of the confirmation process... [LB679]

PRESIDENT SHEEHY: Senator Hansen, you're now continuing on your time. [LB679]

SENATOR HANSEN: Thank you, Mr. President. I think this is a key point of all the confirmation hearings is that, after the confirmation is done in committee, how much time did we have to know that those confirmations were going to be done other than on one line on the agenda, HHS Committee confirmations? [LB679]

SENATOR GAY: Senator Hansen, I'll get...on ours, I don't know specifically. I think when it's reported out, I don't know the exact process, but whether it's coming from Transportation, Health, or whatever, I don't know how that gets done so I don't want to answer that. But I think there were several days it was out and it was probably in the...

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[LB679]

SENATOR HANSEN: Okay, so it was probably our fault. I'm sorry...thank you, Senator Gay. It's probably our fault that we don't know about the confirmation hearings that are going on in all the other committees. We should become more aware. We leave it to the committee and I know they do a good job, but still we need to be more cognizant of the fact that these confirmation hearings are going on. Senator Howard said that if we're going to talk about the Foster Care Review Board and make some changes there, that it should go to all boards. I agree it should go to all boards. There should not be that perception even that Senator Hadley talked about, the perception of a conflict of interest. If I want to start a new business and I want to be a provider in the children healthcare or the children's services in general, I have to go to HHS and get a permit. I have to go through a process with them that I can do and I can join the business arena, the industry of taking care of our children and our wards of our state. Therefore, HHS has oversight. They have oversight of the providers. The Foster Care Review Board, in my mind, takes care of the reviews. They review cases, hopefully all the cases; they never get to all the cases, but they review the cases of the wards of the state and see how they're doing, if everybody is doing their job, if HHS is doing their job, if the guardian ad litem are doing their jobs, and to try to find a place for those children. They want permanency as their number one goal, too, so there's shared goals in these different agencies. But I look at the Foster Care Review Board as a volunteer board. This is volunteers from across the state that come together to help local boards review these cases. Therefore, how can a provider be on the Foster Care Review Board that has oversight from HHS? It just seems like a conflict of interest there. And the only story I could tell you about anything that's similar in my life is a round pen, the story of the round pen. The round pen is where we train horses. And after the horse is saddled and sacked out and calmed down a little bit, you start riding around in a big circle. And it's a round pen and we ride round and round and round, and that circle gets smaller and smaller, and over the course of two or three months that circle gets really tight. And at the end, we're doing a very small circle, a very small spin right in the middle of that round pen. We can't see what that horse is doing because we're in that round pen and we're going so fast we can't see the big picture. Someone from the outside of the round pen can look over the fence and say, that's a good horse and that's a good rider. But if you're too close to the action, sometimes you don't see the trees. Thank you, Mr. President. [LB679]

PRESIDENT SHEEHY: Thank you, Senator Hansen. Senator Council, you're recognized. [LB679]

SENATOR COUNCIL: Thank you, Mr. President. I certainly appreciate Senator Hansen's comments as well as Senator Hadley's comments, because that is the purpose that AM1245 was introduced, to discuss those very issues of the conflict in fact, or an appearance of a conflict, and what degree of confidence do we want the citizens

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of the state of Nebraska to have in the Foster Care Review Board. You know, when I first started discussing this amendment with Senator Hansen and some others, I had a conversation with Senator Campbell with regard to it and I hope that they accepted my assurance that this had nothing to do with personalities. In fact, I wouldn't know several members of the Foster Care Review Board if they walked in right now. I would be less than candid if I tell you I haven't met Carol Stitt over the years; I have met her. But in terms of the other members of the board, believe me, I applaud any citizen who is willing to come forward and volunteer to serve on a state board or a commission. But that is not the issue, at least in my opinion. The issue is we have an agency, a board that was created for the purpose of providing oversight of the operations of the Department of Health and Human Services. That's what their function is. They review the cases that come through the Department of Health and Human Services. It's difficult, I would think, for individuals whose livelihood, in some respects, depends upon direct funding or grants from Department of Health and Human Services to be willing to advance suggestions for policy, which is what Foster Care Review Board is supposed to do to assist us as legislators, is to develop the appropriate policy. If that policy that needs to be developed is contrary to what the Department of Health and Human Services wants to be developed, I think we place these good citizens in a difficult situation, and that is the reason why I think we need to look carefully at the composition of the Foster Care Review Board. I have reviewed the e-mails and the correspondence and the phone calls about the professionalism. I understand. I went back and read the transcripts from when former Senator Thompson introduced the legislation that changed the composition. I understand and appreciate all of that. But I'm also concerned that when this body has the ultimate responsibility for policy and enactment of policy to address these foster care issues, that we need to have confidence that when information is requested it's not being filtered, it's not being shifted, and that we are getting the information that we need to make the very policy that the Foster Care Review Board was created to help us establish. Yes, we're talking professionalism. [LB679]

PRESIDENT SHEEHY: One minute. [LB679]

SENATOR COUNCIL: That's what they're there for, to help us develop the policy. And there was real concern about whether or not that was accomplished while this body, before my arrival, dealt with the safe haven issue. And it needs to be addressed because we're talking about the children and the thing Senator Stuthman talked about, the vulnerable children in this state. And I just want to make it clear, the reason I introduced this has nothing to do with the individuals who are serving. Again, I applaud them. This is not intended to denigrate or demean any of those individuals in any respect. But I think this body has an obligation to make sure that the intent of the legislation created, in creating the State Foster Care Review Board, is being accomplished. Thank you, Mr. President. [LB679]

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PRESIDENT SHEEHY: Thank you, Senator Council. Members requesting to speak on the Council motion to return LB679 to Select File for a specific amendment are Senator White, followed by Senator Pirsch, Senator Carlson, Senator Campbell, Senator Gloor, Senator Harms, and others. Senator White, you're recognized. [LB679]

SENATOR WHITE: Thank you, Mr. President. Members of the body, I was very concerned when I received a copy of a letter Senator Hansen was...it was addressed to Senator Hansen, indicating that key information was suppressed during the safe haven debate and that it was suppressed by pressure from Foster Care Review Board, and it was suppressed because members of the Foster Care Review Board have contracts or their employers have contracts with HHS, sometimes in excess of \$1 million a year. That alone gave me very grave concern. Following up on it as I said I would, I had occasion to speak with a county attorney who related, among the incidents he was personally aware of, the following. At the time we were pressing to get the number of children in foster care down, the department, through a young social worker--she had not had much experience--was called on to testify in a custody hearing in juvenile court. The social worker testified that it was the department's opinion the child should be returned to the father. The judge was surprised, given the facts, and questioned her and said, now what is your testimony? She said it's the department's opinion that this child should be returned to the father. And the judge, being a well-trained trial attorney apparently, asked, well, wait a minute, what's your opinion, and remember you're under oath sworn to tell the truth under penalty of perjury. The social worker said, in my opinion this child has no business going back to the father whatsoever. The judge thanked her, sent her back, put the child...stayed in foster care. And that social worker, I'm assured by the county attorney, was then reassigned to become a file clerk. I don't care where you stand ultimately on technical issues, but that's corruption. That is intimidation of a witness. And if they said the wrong things when they're trying to get her to testify, it might have been suborning perjury. And we have people in charge of reviewing that system who are beholden for their livelihoods on the people they're supposed to be guarding. That is not acceptable. Thank you. [LB679]

PRESIDENT SHEEHY: Thank you, Senator White. Senator Carlson, you're recognized. [LB679]

SENATOR CARLSON: Mr. President and members of the Legislature, it's interesting to listen to the various people talk on this issue. I'm certainly not an authority by any stretch, and as I make some remarks I'm not laying blame on any state officer or any state senator or any...or the HHS legislative committee. But I think that I've heard more comments and seen more things about the Foster Care Review Board and the problems in Beatrice than anything else in my three years in the Legislature. I received a letter and I'm not going to indicate who it's from because I tried to contact this individual and haven't been able to do that at this point. I'm pretty comfortable with this individual's background, knowledge, and expertise, but it's pretty alarming what came in

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this letter. This is an individual that's acquainted with back to the beginnings of the Foster Care Review Board: I became increasingly concerned about the ability of the board to report on its findings. There was an attempt to change the review board and appoint top administrators of HHS to serve on the state board. The Legislature wisely included language in the legislation that prohibited anyone from serving who had a conflict of interest. From that time until 2006, the Foster Care Review Board was able to review cases and keep the Legislature apprised on what was happening to foster children in the state. In 2006, the legislation was amended to allow people, who receive money from HHS or who had other conflicts, to serve on the state board. Since then it's been difficult for the director of the Foster Care Review Board to report findings if they were critical of HHS. In fact, during the safe haven hearings she was prohibited from speaking to senators, testifying, or answering questions about those cases. I thought that you had the right to know what was happening but she was told by state board members who had ties to HHS that she would be fired if she talked to any senators. In the next few months HHS will be privatizing foster care. Many private nonprofit and profit-making organizations will be providing foster care for these children. This individual believes, without an amendment, staff from those agencies could be appointed to the Foster Care Review Board and be able to totally blind the Legislature on what's happening to foster children. People with dual loyalties should not be on the board whether they had a conflict when they were appointed or whether their agency received a contract after they were serving on the board. I think these are serious issues and need to be addressed, and I don't know if this is a problem unique to the Foster Care Review Board or there's other areas where it applies to as well, but certainly this is an area that I hear about and am concerned about. I tried to think of a parallel example. A teacher in a local school system should not be on the school board. The principal of the local high school should not be on the school board. There's a reason for that, and I think there's a reason why some people should serve on the Foster Care Review Board and others should not. [LB679]

PRESIDENT SHEEHY: One minute. [LB679]

SENATOR CARLSON: Thank you, Mr. President. [LB679]

PRESIDENT SHEEHY: Thank you, Senator Carlson. Senator Campbell, you're recognized. [LB679]

SENATOR CAMPBELL: Thank you, Mr. President. This evening I am the voice of Senator Kate Sullivan and I am reading her statement for her into the record. So these are her words: Colleagues, I am so sorry that I have to make my arguments in this manner but I have severe laryngitis and I can't speak. However, I'm extremely opposed to Senator Council's amendment for the following reasons. My problems with AM1245 to LB679 are the following: Number one, LB679 is on Final Reading. The Council amendment replaces LB679 and is completely different from the context of the green

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copy of the bill. There hasn't been a public hearing on the contents of the amendment. It would be contrary to our legislative process to adopt a substantive amendment to a bill on Final Reading, and if we adopt the Council amendment members of the public will not have the opportunity to testify at a public hearing on this change. Her specific objections would be the following: The amendment is extremely restrictive. It reduces the pool of eligible qualified volunteers who are eligible to serve on the Foster Care Review Board. It would include spouses, siblings, parents, children, and relatives by marriage. We have a process and we should follow it. There are issues between the agency director and the board members that should not be resolved in this manner. And I would have to say I think that Senator Sullivan was a member at one time of the State Foster Care Review Board--local board. No. I'm sorry. Thank you, Mr. President.
[LB679]

PRESIDENT SHEEHY: Thank you, Senator Campbell. Thank you, Senator Sullivan. Senator Gloor, you're recognized. [LB679]

SENATOR GLOOR: Thank you, Mr. President, members of the body. It is my understanding that Senator Council will in fact withdraw AM1245. And I, as a counter to concerns about what it may portend, I do appreciate the opportunity for us to talk about this a little bit because I have gotten letters and e-mails, people expressing concerns about this very issue. I think it's important to point out that conflict of interest is not a bad thing. It is not an unusual thing. There is an inevitability of very busy people who get involved in their communities and busy people touch our lives and they touch the lives of people like foster children in a number of different ways. What is important is to recognize that there is that conflict of interest. What's wrong is to hide a conflict of interest. This to a large extent is about transparency. In this organization alone, how reasonable is it to think that we have members of rural communities, who are in agribusiness themselves, who have conflicts of interest? They are elected in that capacity. How easily could we have talked about LB622 without trial attorneys to help provide some background information for that? It was appropriate for them to be here to participate in that debate. It is about roles, to a large extent. And that's an important issue and I speak to this so that it's on the record, so that we recognize as we go back and revisit this issue, perhaps again next year, that we separate conflicts of interest from the roles we expect people to play, and we recognize transparency in this whole process. To speak to Senator Carlson's comment about school boards having teachers on them, on the other hand, you have hospital boards with physicians, and we see that as an important part of making sure appropriate medical care is provided by having the input of physicians who practice in those hospitals. But it is clear that they have a conflict of interest at times. They speak to that conflict of interest. They may recuse themselves from votes on issues where that conflict of interest is so strong that there is a suspicion that they can't make good and reasonable decisions. And it may, in fact, be so strong that they have to recuse themselves from even discussion about that particular issue. The challenge that we're faced with here is understanding that this is

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not a new issue. The conflicts of interest have come up all the time. There are processes that can be put in place to handle those conflicts of interest. Stating it is one thing. Voting on it is another, and even speaking to it is another issue. These are not insurmountable problems, and buying ourselves some time to speak to these areas, to speak to these concerns and putting together a process that defuses them a little bit is a good thing to do. I'm not in support of AM1245, but I'm in support of a good healthy discussion about AM1245, hopefully setting us up for further discussion on this issue and perhaps even a vote on some important issues next year, if it turns out that way. Thank you, Mr. President. [LB679]

PRESIDENT SHEEHY: Thank you, Senator Gloor. Continuing with floor discussion on the Council motion to return to Select File for an amendment, we have Senator Harms, followed by Senator Coash, Senator Dierks, Senator Price, Senator Howard, Senator Campbell, and Senator Council. Senator Harms, you're recognized. [LB679]

SENATOR HARMS: Thank you, Mr. President, colleagues. I want to talk a little bit about the board because this seems to be the central point that we're discussing. And I'd have to tell you that I've had a variety of experiences, administratively, with a board many years ago that was dysfunctional. I was very young and inexperienced and all of a sudden got into an environment that I wondered what I was doing there. It was a dysfunctional board. And I would have to tell you from looking from observations with the foster care, the State Foster Care Review Board, from what I've read and from the people I've spoken to, and to the people who are close to this board, I'd have to say maybe it's a dysfunctional board. Secondly, I'd have to tell you that I think that it's very clear that there are board members who don't like each other, which automatically then creates the issues and the problems that you start to have with a dysfunctional board. You've got a power struggle that's going on with the net board, at least from the observation point of view. And they seem to want to spend a lot of time trying to figure out how they're going to get rid of their CEO or their executive director, rather than spending more time on making sure that the children and the families are getting the services. And what this creates, from my experience, is the lack of trust. And when you have lack of trust with your executive director or lack of trust within your board, you automatically get into management. You automatically get outside of their own rules and regulations that says they are a policy, they develop the policy, they are involved in governance, but they are not involved in the daily function. And I'm afraid, as you look at this, that's what I see from an observation. And my question to you as we start to think about what should we be doing with this board, how do we legislate issues like this without absolutely just completely redoing the board and removing people from this board? If you're not going to do that, then you have to put in this strategic long-range plan for this board that simply teaches them how to be board members, teaches them how to work within the environment, teaches them how to stay out of the management side and just do the governance side, set the policies and the parameters so that your executive director and your staff can work comfortably. I don't see that happening here.

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I'd have to tell you when I came here this...in January, I drafted legislation similar to this, not having any idea of whether it would pass, didn't really care, but to get the issue surfaced, to get the issue so we could start having this kind of discussion that we have today or having it in a committee so we can start to surface this in hopes that people would start to listen and understand that maybe there is a serious problem here. But when I became Chair of the Legislative Performance and Audit Committee and I looked at the legislation that they were introducing, I realized then I had a conflict. So I sat down and talked with Martha Carter as well as my own staff and I did not introduce that. You can go into my office today and you'll find that piece of legislation there. Because I had a concern that there was an issue here that we needed to address, but knowing how to address it, is difficult. When you have a board who won't listen, if you have a board who will pay no attention to you, when they're split among themselves, you have a power struggle, it's difficult. And when there's distrust, it even makes it worse. So what happens then, you have a dysfunctional board. And I would tell you as we look at this issue, we need to think through very carefully about what we want on that board. [LB679]

PRESIDENT SHEEHY: One minute. [LB679]

SENATOR HARMS: Thank you, Mr. President. What the...the goal for us as senators is to make sure that our children and families are taken care of. That's what this is about, making sure that we concentrate on these children who need our help, to make sure that they're taken care of appropriately and they're not falling through the cracks and they are reviewing these people. I think it's absolutely embarrassing, the fact that they refused to give Senator Ashford information. I don't think we should ever allow that to happen. That opens it up for every state agency to tell us, when we want something, forget it, we're not going to give it to you. I think that's when we should have taken this issue on, but we didn't do that. And I'm not being critical. I'm just telling you that was a chance for us to address the issue of why are you...are we allowing this to happen? We should not have and now that's going to be an issue in the future. So whatever we do here, whatever you decide that you want to do, it's important for us to keep... [LB679]

PRESIDENT SHEEHY: Time, Senator. [LB679]

SENATOR HARMS: Thank you, Mr. President. [LB679]

PRESIDENT SHEEHY: Thank you, Senator Harms. Senator Coash, you're recognized. [LB679]

SENATOR COASH: Thank you, Mr. President and members of the body. I wanted to take this opportunity and talk a little bit about foster care in general. If any of you have ever worked in the foster care, in the work, I know Senator Howard has, I have, let me tell you what foster parents do. They sign a contract with a provider and with the state of

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Nebraska and they say to our communities, when you have a child who is being hurt, being neglected, being abused, bring him to me and I'll give him a safe home. They don't say I'm going to do this between 9:00 in the morning and 5:00 in the afternoon. They don't say I'm going to do this Monday through Friday. They say, I'll do this any time. Let me tell you a little bit about how kids come into the foster care system. Sometimes it's the police, they investigate a complaint. Sometimes it's Child Protective Service, they investigate something. They find that a child...and more frequently it's multiple children. This is not a one child at a time issue. These are...many times there are multiple children. The CPS worker or the police officer, they snatch that kid up, they find out where they can take that kid and they take him to these foster parents. And the foster parents are there. Sometimes the child or children come with nothing else than the clothes on their back. Babies will show up without diapers. Children with severe medical needs will show up without the medication that they need. And frequently, that's it. And our state owes a big gratitude to anybody who will step up and say, this is my calling, this is what I'm going to do. We can't forget about that. Now with regards to AM1245, we're talking about a restoration of independence for the Foster Care Review Board. That's important. These are serious issues. These are the kids of our state. Senator Carlson was exploring where else does this happen. Well, I think BSDC has taught us a lesson. The Department of Justice became our independent voice on that. Wyuka Cemetery, right here in Lincoln, is teaching us a lesson. Senator Harms, you're absolutely right. The power struggle that's going on within the Foster Care Review Board is killing it and it's affecting the children. Conflict can muddy the waters. I was going to ask Senator Gay a question but I see he's not there, so I'll close. Thank you, Mr. President. [LB679]

PRESIDENT SHEEHY: Thank you, Senator Coash. Senator Dierks, you're recognized. [LB679]

SENATOR DIERKS: Thank you, Mr. President and members of the Legislature. I had a question for somebody, too, but they're all gone eating, I guess. But I have a rather personal interest in the foster care program. My son is a foster father and he has had probably somewhere between 10 and 12 foster sons. And it'd be great if we lived in a perfect world but we don't, and these youngsters that come to him through foster care have had some really mind-shattering difficulties when they were very young, most of them, some sort of abuse. The ones that I know that came to live with him, he's brought them out to our ranch. He's helped...he's watched...they've come and watched us do a calf branding. I've seen that, oh, three or four years in a row. These kids just enjoy every minute of it. They enjoy being out there and they're good citizens and they're solid workers. He can't even tell us really what the problems were, that's all pretty confidential, so we can only surmise. Senator Harms, is not here yet, huh? Like I said, if it was a perfect world we wouldn't have these problems, but it's not. And for us to...maybe we could wish, but as long as we have drug problems among young parents and alcohol problems, and when these kids are born there's fetal alcohol syndrome

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people, we've got problems. I don't think this was that much of a problem when I was a youngster. I don't remember anybody in my community that had the fetal alcohol syndrome. In fact, I didn't know very many people in the community that were divorced. It was just..things were not that way in the late '30s, early '40s, and...but I can't take us back there. But I have a question for somebody and I'd like to know about the...is anybody here from the Health Committee? Senator Hansen. Senator Howard. Could I speak with Senator Howard, please? [LB679]

PRESIDENT SHEEHY: Senator Howard, would you yield to Senator Dierks? [LB679]

SENATOR HOWARD: Yes, of course I would. [LB679]

SENATOR DIERKS: Senator Howard, when we're talking about the difficulties with this board and you're talking about conflict of interest, is the conflict of interest on the members that have spouses or brothers and sisters or somebody else that worked for the Department of Health and Human Services? [LB679]

SENATOR HOWARD: Are you asking me if the board members would have a...if the board members themselves would be, say, married to somebody who is an employee? [LB679]

SENATOR DIERKS: Yes. Are they employees...do the people that are members of this Foster Care Review Board, do they have...and we're talking about conflict and how the board doesn't get along within itself. [LB679]

SENATOR HOWARD: Well, Senator Dierks, I don't know that I've ever heard that as a particular area of concern. As a matter of fact, Foster Care Review Board in many...it used to be many cases would have the spouse of a state senator on a local review board and which, you know, if you want to get purely technical about what would be a conflict of interest, I would see that as a conflict of interest. [LB679]

SENATOR DIERKS: Well, I'm... [LB679]

PRESIDENT SHEEHY: One minute. [LB679]

SENATOR DIERKS: Maybe we're talking about two different boards. I'm not talking about the local. I'm talking about the state board, the...isn't there a difference? Oh, here's Senator Harms. [LB679]

SENATOR HOWARD: Well, there would be but I don't know that that's come up particularly. [LB679]

SENATOR DIERKS: Okay. [LB679]

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SENATOR HOWARD: I don't know if that's helpful, but... [LB679]

SENATOR DIERKS: Okay. Well, thank you, Senator Howard. Senator Harms, please. [LB679]

PRESIDENT SHEEHY: Senator Harms, would you yield to Senator Dierks? [LB679]

SENATOR HARMS: Yes, I would. [LB679]

SENATOR DIERKS: You were talking about a conflict of interest on the board and about how the board members themselves had difficulty cooperating with each other. The difficulty, did that come because some of those people have a relationship with the Department of Health and Human Services and there's a conflict there? If they don't, maybe their spouses or brothers, or... [LB679]

SENATOR HARMS: Well, it could be. I think, though, that it really depends upon them, the board member and their employer. I think when you get into family members like a spouse... [LB679]

PRESIDENT SHEEHY: Time, Senator. [LB679]

SENATOR HARMS: Okay. Thank you. [LB679]

PRESIDENT SHEEHY: Thank you, Senator Dierks. Senator Price, you're recognized. [LB679]

SENATOR PRICE: Thank you, Mr. President and members of the body. I had a couple of questions for Senator Council, if she would yield. [LB679]

PRESIDENT SHEEHY: Senator Council, would you yield to Senator Price? [LB679]

SENATOR COUNCIL: Yes, Mr. President. [LB679]

SENATOR PRICE: Thank you very much, Senator Council. Just want to get some understanding here on a couple of the points. I noticed that the language is absolute in...if there's any conflict of interest as defined in statute, they cannot serve. There's no leeway. It's an absolute, you cannot be a part of their board, correct? [LB679]

SENATOR COUNCIL: That's how the amendment currently reads, yes, Senator Price. And if I could expand upon that, that's one of the reasons as I stated from the outset of this discussion, it's my intent to withdraw AM1245. Senator Harms and other interested senators have expressed a willingness to sit down and try to work out what is the

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appropriate way to address the problem that has surfaced with regard to Foster Care Review Board. [LB679]

SENATOR PRICE: Great. I appreciate that, Senator Council. And then that takes a big question out. I did listen to what you had to say but in all the ensuing conversation it seemed that detail had been lost. Would Senator Harms be able to yield to a question, please? [LB679]

PRESIDENT SHEEHY: Senator Harms, would you yield to Senator Price? [LB679]

SENATOR HARMS: Yes, I would. [LB679]

SENATOR PRICE: Senator Harms, thank you very much. Geia sou. The question I have for you and going where Senator Dierks was, in defining the conflict, conflict amongst board members is probably a naturally occurring phenomenon. I mean we have it in our boards, in our committee hearings. But was I correct in hearing and understanding that the conflict we're talking about isn't necessarily so much from the board members as it is the board member and their employer? [LB679]

SENATOR HARMS: Well, we have to define the conflict of interest and, again, what I said in my opening comments, that the only law that we follow is the accountability and disclosure, and it's rather vague in regard to that particular issue. So that's the definition that we have to use in regard to that. And what our staff found when they went in and reviewed the State Foster Care Review Board, what they found was that there was no evidence that there was at all a conflict of interest. [LB679]

SENATOR PRICE: All right. [LB679]

SENATOR HARMS: So by the strictest definition there was none. But there was a concern, Senator Price, in regard to how people might view these board members if they were receiving thirty, forty million dollars, whether or not that would be a conflict of interest in that perception. And that's why we've introduced the present legislation, was to begin to get that identified so this body could then begin to see... you know...the Governor would have to then disclose to this group, this, senators here, just how much these people were receiving. Then we have an opportunity to say, you know what, maybe we should stop at this point, anything beyond this is way beyond where we should be. That's what this is about. [LB679]

SENATOR PRICE: Okay. Thank you very much, Senator Harms. [LB679]

SENATOR HARMS: Yes. [LB679]

SENATOR PRICE: And let me ask you two more quick questions in the time remaining.

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One, if we redefine these conflicts as Senator Council has laid out in this amendment and the proposed amendment, how many members of the current body do you suspect will be impacted by these new limits? [LB679]

SENATOR HARMS: I don't know, Senator Price. [LB679]

SENATOR PRICE: Okay, great. Finally, if you could expound on it, this is a late moment change. Obviously, we have precedent already in this body for doing this. But if we're going to propose multiple amendments on Final Reading after we take, if we take it out... [LB679]

PRESIDENT SHEEHY: One minute. [LB679]

SENATOR PRICE: Thank you, Mr. President. If we're going to do that, do you really foresee in the time frame we have, to get this accomplished, or are we...is this much to do about nothing? [LB679]

SENATOR HARMS: No, I don't think we have any intent of having this amendment approved. It's way beyond what the bill is. I don't even think it's germane to a certain degree. It's gone so far beyond what the intent of our legislation is. So my point here is that I, you know, I don't know how to answer that question because I think it will come next year in legislation. I think that Senator Council has an interest in introducing legislation to start to redefine the conflict of interest of that board. I think that's when we'll begin to have that issue or someone will be introducing that legislation in the future to address the very issue you're talking about. [LB679]

SENATOR PRICE: Thank you very much, Senator Harms. Thank you, Mr. President. [LB679]

PRESIDENT SHEEHY: Thank you, Senator Price. Senator Howard, you're recognized. [LB679]

SENATOR HOWARD: Thank you, Mr. President and members of the body. There are a couple of things I'd like to reflect on. First, I'd like to thank Senator Sullivan for her very astute remarks through her...the clarity of her voice with Senator Campbell. That was a (laugh) I think that worked very well for both individuals. I also want to thank Senator Carlson and Senator White for their accurate observations on the internal workings of the department. I've heard more and more how the department is ordering case managers to go to the court and give testimony that they may not themselves agree with, and I'll just tell you a couple of the contributing facts to that. Factors to that are that the workers are, in a lot of cases, very young with a minimal level of experience. There's a high turnover and there's low pay involved with this job. I'd also...I also think it's very important if we take a few minutes to reflect on the confirmation process in my Health

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and Human Services Committee. And I was in the committee when the confirmation took place for Gene Klein and Georgie Scurfield, two of the individuals who are being held under scrutiny with this amendment. The committee, in my opinion, has been very diligent regarding the questioning regarding any conflict of interest, especially with these two professional people. In addition, the committee sought information above and beyond what we had easily accessible to us from the Executive Board to ensure that there was no conflict. And quite honestly, I anticipated the possibility of this problem arising and talked to Senator Gay, but we voted this bill out of the committee believing that there wouldn't be this sort of attempt on the floor to, if I may say, hijack this bill. I'm going to offer the remainder of my time to Senator Gay so that he can discuss a bit more the process in committee on the confirmation of these individuals. [LB679]

PRESIDENT SHEEHY: Thank you, Senator Howard. Senator Gay, you're being yielded 2 minutes 50 seconds. [LB679]

SENATOR GAY: Thank you, Mr. President. Thank you, Senator Howard. Senator Howard, as we discussed, Senator Hansen asked and I think you and Senator Campbell and others, we did ask specifically about this, because we knew it would be an issue. Out of courtesy, of course, the Performance Audit Committee, Senator Stuthman who is on that committee as well, we moved this out and, by the way, voted it unanimously, I think, to where we are today. And I know this amendment will be pulled here soon it sounds like, and we've a great discussion. But you know, one thing, I did file an amendment afterwards, not knowing where we're going to go with this, about the local boards, which have so much impact as well. If we're going to do this on the state board, we should at least look in the local boards too. And Senator Harms brought...so we had a discussion earlier about, you know, what is going on. I said if the energy could be sent to doing the job here, we'd all be in a better situation. But it is an important issue. It will be looked at and come up with something. There's, you know, the process to go draft the bill and change it. The current law reads whose on this board and I think, until we change that, we need to take a hard look at that then, too, if we want to change what the direction was. None of us were here, I don't think, when that board was created, when that law...well, we weren't here. So it is what it is. Now we're dealing with it. I think Performance Audit Committee asked, let us deal with this. We then, out of...unanimously said, yep, go deal with it. And we've had great discussion and this is a good discussion today. So with that, Senator Howard, as you know, we did bring this up. We haven't been operating in a vacuum by any means. It's an important issue and I think it's something to be looked into and that's what will happen I'm sure with Senator Council's interested and many, many others as we heard today. So looking forward to see if we can make a...I think it's a very good board right now, quite honestly,... [LB679]

PRESIDENT SHEEHY: One minute. [LB679]

SENATOR GAY: ...people who have dedicated their lives, but maybe we need to spell

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out a little bit more. I don't know. We'll come to some good conclusion. While I do have just one minute left I would say again, this is an excellent board, people who have dedicated their whole lives to helping children and have done remarkable things throughout the state. So I just wanted to get that in while I had the mike because we can't forget about that. They're serving at no compensation, putting forth a lot of time and effort, and we do appreciate that. I think what we're asking is, you know, are you completely no conflicts, and we'll get to that point. Thank you, Mr. President. [LB679]

PRESIDENT SHEEHY: Thank you, Senator Gay. Thank you, Senator Howard. Senator Campbell, you're recognized. [LB679]

SENATOR CAMPBELL: Thank you, Mr. President. I'd like to make three quick observations and now I am speaking for myself and not for Senator Sullivan. Observation one is that I think if we're interested in looking at the merit of board composition on this board, we should also be willing to look at composition on other boards serving the Health and Human Services. Whatever we try on this board, it seems to me we should look at others. Second, I think a key issue will be as you look at boards and conflicts of interest, is how do you use the expertise across the state in child welfare and foster care. And that's partially why some of the people serving on the Foster Care Review Board serve by virtue of an agency that they're representing. The third observation is that perhaps the time has come not just to look at the board composition, but the whole underlying purpose and philosophy of the Foster Care Review Board. We are going into a new era in terms of two initiatives that the state is trying in child welfare and in-home placement and out-of-home placement. And the time may have come to say, does the Foster Care Review Board still serve that purpose as we look into the future? I don't think that we should just be constrained by what the composition of the board is. Thank you, Mr. President. [LB679]

PRESIDENT SHEEHY: Thank you, Senator Campbell. Members requesting to speak on the Council motion to return LB679 to Select File for specific amendment is Senator Council, followed by Senator Harms, Senator Gay, Senator Dierks, and Senator Pirsch. Senator Council, you're recognized. [LB679]

SENATOR COUNCIL: Thank you, Mr. President. I want to make it perfectly clear that I did not introduce AM1245 with any intent to hijack LB679. I have been open, forthright, and honest in my discussions with every senator who has been involved with this issue. And I'm going to ask Senator Harms if he would yield to a couple of questions, Mr. President. [LB679]

PRESIDENT SHEEHY: Senator Harms, would you yield to Senator Council? [LB679]

SENATOR HARMS: Yes, I would. [LB679]

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SENATOR COUNCIL: Senator Harms, after you were apprised of my intent to introduce AM1245, did we have a discussion about next steps in this process rather than pursuing AM1245? [LB679]

SENATOR HARMS: Yeah, we did talk a little bit about where we wanted to be with this and what we thought was the appropriate issue, the thing to do in regard to this process. Yes, we did. [LB679]

SENATOR COUNCIL: And in regard to Senator Sullivan's comments, didn't we discuss that specific issue and you related to me your belief, as the Chair of the committee, and your committee's concern that AM1245 went beyond what the committee heard, and, in your opinion, you believed it needed a public hearing? [LB679]

SENATOR HARMS: Yes, I did feel that it needed to have a public hearing, that it should be referred back, that it was important because it was such a change in what our intent was. And we did have that discussion. [LB679]

SENATOR COUNCIL: Okay. And didn't I agree that that was a legitimate issue and that...but we still addressed the issue of having an opportunity to have this issue discussed before this body, this session, so that we could know the direction to pursue in terms of legislation for next session? [LB679]

SENATOR HARMS: Yes, you have. And I'd have to tell my colleagues, you've been aboveboard with this. Once we started the discussion we both agreed that it's important to build the foundation, it's important for us to make sure that people understand what the issues are so that if we're going to develop legislation, you have a good feeling and a foundation to build that legislation about what other senators are saying. And you've been aboveboard with this. I have no problem with this. And I don't think you've hijacked it at all. I think you had an issue that you wanted to address, and that's exactly what we're doing and it's working just fine. [LB679]

SENATOR COUNCIL: Thank you very much, Senator Harms, because I want the record to be clear, it was not my intent to undermine the work of the Performance Audit Committee by introducing AM1245, and, in fact, during discussions with Senator Harms and Senator Gay, we had discussed and I had offered and advised them, well, I can pull the amendment now before anything gets to this point. But the consensus was this issue needs to be discussed. And with that understanding, I said, I will leave the bill as...the amendment as introduced, we'll have the discussion, and then I'll withdraw it. And I've said that from the beginning. And this is a very important issue. And I'm going back, because I did go back and I looked at the transcript of the floor debate in 2005, and there were concerns expressed then about representatives of certain providers being placed on the Foster Care Review Board. And curiously enough, one of the only phone calls, phone calls I received urging me not to pursue my amendment was from

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such a provider, who depends in large measure on the Department of Health and Human Services for the operation of their business. [LB679]

PRESIDENT SHEEHY: One minute. [LB679]

SENATOR COUNCIL: And I will tell you, because I've heard about Ms. Scurfield, who I don't know, and I've made it clear I have no reason to make any disparaging statements about any of the board members. Senator Price asked how many of them received money from the Department of Health and Human Services. I couldn't tell you. But that's where LB679 gets to because LB679 requires them to tell us. And once they tell us, I think we can make the proper policy decision in terms of the membership of the Foster Care Review Board. Thank you, Mr. President. [LB679]

PRESIDENT SHEEHY: Thank you, Senator Council. Senator Council, that was your third time. Senator Harms, you're recognized. This is your third time. [LB679]

SENATOR HARMS: Thank you, Mr. President. I just wanted to make sure that the body understands that Senator Council was aboveboard. As soon as I learned that she was going to have an amendment, we had a discussion, and later a discussion with Senator Lathrop and Senator Council and myself, and we reached an agreement on what we felt should be done, and I appreciate it. She has not hijacked the bill nor do I think she has undermined this committee. I do want to make sure that, for clarification purposes for the underlying bill, LB679, people understand what we're doing here. And what the intent is here, for any new appointment or reappointments to the State Foster Care Review Board, we were asking the Governor's Office to add a question on the application form, asking whether or not the applicant, his or her employer, receives any income from the Department of Health and Human Services. If so, it would be the applicant's responsibility to let the Governor know the amount of the income that their employer is receiving or he or she might be receiving, and then it's forwarded to the Legislature. So what that gives us then, the opportunity as senators to see just exactly what the income is, and as we watch what takes place we may decide that there's a certain point that we want to stop that. But I think this is what it's about. It's about the consideration of the perception of a conflict. Thank you, Mr. President. [LB679]

PRESIDENT SHEEHY: Thank you, Senator Harms. Senator Gay, you're recognized. [LB679]

SENATOR GAY: Thank you, Mr. President. I said what I needed to say when Senator Howard yielded me the time. But I would just say, too, what Senator Council was saying, she was very aboveboard with myself as well, and I had numerous discussions with her about what's going on. We're making it...we're getting some good input here and...but I just wanted to say she's been very forward with her intentions. I don't know if people heard what was happening earlier when she first spoke, so. But with that, I

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would yield the balance of my time to Senator Council, if she would like it. [LB679]

PRESIDENT SHEEHY: Senator Council, you're yielded 4 minutes 20 seconds. [LB679]

SENATOR COUNCIL: Mr. President, are there any others waiting to be heard? [LB679]

PRESIDENT SHEEHY: There are currently three senators in the queue. [LB679]

SENATOR COUNCIL: Well, I'll just briefly...again, this legislation addresses an agency and that's what it is, is an agency created by and funded through the Legislature. It's not like the bar association which is not a state agency, it's not like a private or not-for-profit hospital board which is not a state agency. This is a agency whose very existence is the result of action of this body, who has a duty expressed in the legislative intent to provide oversight to the Department of Health and Human Services' handling of children in foster care and to report those findings to the Legislature so that the Legislature can develop appropriate policy. And the LB679 takes the first step in the direction of ensuring that there's transparency, there's seamless operation, and accountability. And, yes, there was a dispute, a controversy over whether or not a senator's request for information was fully honored. That's disturbing, that's distressing, particularly because it related to an issue that brought to this state, quite frankly, great disgrace in terms of the drop-off under the safe haven law. And I think it's interesting. I haven't even gone through it, but I have obtained the information that would have been provided to state senators regarding the children who were dropped off under the safe haven, and it's disturbing, it's distressing, and it should be used in terms of developing the proper policy to make sure that we're serving children and families in this state the way we ought to. That is critical information. And it should not be filtered. It should not be hidden. And agencies need to be aware of the fact that that's an expectation. And, in fact, one of the reasons for the letter that's been sent to the Foster Care Review Board and reading that letter into the record, was to let all the other state agencies know that when this body asks for information, they expect to receive it. That's the purpose of the letter. It's not just to the Foster Care Review Board. It's to make it clear to every state agency that they have a duty and a responsibility to provide requisite information to this body so that we can develop appropriate policy. [LB679]

PRESIDENT SHEEHY: One minute. [LB679]

SENATOR COUNCIL: I don't want to cut off any of the other senators who have indicated that they want to speak, but as soon as all have spoken, I will do that which I represented I would do and that is to withdraw the motion to return to Select File. [LB679]

PRESIDENT SHEEHY: Thank you, Senator Council. Members requesting to speak on the Council motion to return LB679 to Select File, we have Senator Dierks, followed by

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Senator White and Senator Sullivan. Senator Dierks, you're recognized. Senator Dierks. Senator White, you're recognized. [LB679]

SENATOR WHITE: Thank you, Mr. President. I would ask if Senator Harms would be kind enough to yield to some questions. [LB679]

PRESIDENT SHEEHY: Senator Harms, would you yield to Senator White? [LB679]

SENATOR HARMS: Yes, I would. [LB679]

SENATOR WHITE: Senator Harms, how long did the Performance Audit Committee spend looking into the concerns over the operation of HHS, particularly the foster care aspect of that agency? [LB679]

SENATOR HARMS: Probably about a year. [LB679]

SENATOR WHITE: And how many witnesses did you have, just approximately? [LB679]

SENATOR HARMS: I don't know, Senator. [LB679]

SENATOR WHITE: Okay. One of the concerns I have, Senator Harms, did your committee uncover evidence that HHS was ordering social workers to tell the court to return children to foster care when they themselves held the view that it was not safe to do that? [LB679]

SENATOR HARMS: No, not that I'm aware of. [LB679]

SENATOR WHITE: You were present in the meeting with a county attorney recently in which that story was related to us. [LB679]

SENATOR HARMS: That's correct. [LB679]

SENATOR WHITE: And you also heard from Senator Howard that that is increasingly being reported to her as well. [LB679]

SENATOR HARMS: That's correct. [LB679]

SENATOR WHITE: Can we, given that information, Senator Harms, really afford to wait a year? And how many children will be hurt, abused, molested, killed? [LB679]

SENATOR HARMS: Well, that's always a tough question and that's a question the body has to decide. But I think when we look at the process that we have, Senator White, I

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think it goes way beyond what our intent is here, and I think it opens it up to a lot of other issues for us in the future. I think we can speed this along and I think that, quite frankly, we're sending a pretty good message now to the state board that there are some issues here and that we need to address these. [LB679]

SENATOR WHITE: Senator Harms, all due respect, what I'm hearing is officials, high level officials of the state, are intimidating witnesses to provide testimony that they know isn't true that puts children's lives at risk. Are you really morally comfortable with that we got to worry about a larger process? To me, we have children at risk, we have what could fairly be argued as perjury being offered to our judges. We have judges in Douglas County holding officials at HHS in contempt over children and their treatment of children in state custody, and we're going to withdraw this and kind of pretend we did something. Is that acceptable to you? [LB679]

SENATOR HARMS: No, it's not, Senator. But you've got to understand, I don't know whether any of this is true or not. And if it is, then the Attorney General should be discussing this issue with people and it ought to be in the courts. But I can't, I cannot... [LB679]

SENATOR WHITE: I know. Senator, you were present when a very highly respected Douglas County Attorney told us these events, were you not? [LB679]

SENATOR HARMS: Yes, I was. But I don't know whether it's truthful or not, whether he's...you know, I don't know that... [LB679]

SENATOR WHITE: But isn't that the job of the Performance Audit Committee to delve into that? Here's the problem. We went through safe haven, folks. We're a year later and what drove safe haven was the fact that many of those children that ended up being dropped off at the hospitals, their families had already gone to HHS to ask for help. So I'm...in all humility, these are lives. [LB679]

SENATOR HARMS: Senator, I just want to make sure that everybody understands and you understand, I think that that Performance Audit Committee, with the scope that the committee actually approved for them to follow, they did an excellent job. They did exactly what they should have. [LB679]

SENATOR WHITE: Oh, I'm not denying that they did an excellent job, Senator. I'm telling you, though, we have...right now you and I have reliable information, from a source I would consider beyond reasonable doubt as being authentic, knowledgeable, and of the utmost integrity, that children's lives are being putting at risk because of political considerations. And yet we're going to sit down tonight because we're tired at the end of the session and we're going to go home. [LB679]

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SENATOR HARMS: I just don't know that's truthful or not, Senator, and I'm sorry, I don't. And I think that if it is, then you have a responsibility, I have a responsibility to ask the Attorney General to look into that. [LB679]

SENATOR WHITE: Well, I think we should. [LB679]

SENATOR HARMS: Sure. [LB679]

SENATOR WHITE: I mean, I think that's the point. But I think at the same time, the agency's board that's supposed to be covering this, we have repeated... [LB679]

PRESIDENT SHEEHY: One minute. [LB679]

SENATOR WHITE: ...we have repeated stories, are getting contracts in excess of \$1 million a year to their employers. And yet we're going to go home and do nothing. And at some point, where's the urgency? Thank you, Mr. President. And thank you for your courtesy, Senator Harms. I yield the rest of my time to Senator Harms. [LB679]

PRESIDENT SHEEHY: Senator Harms, you're yielded 40 seconds. [LB679]

SENATOR HARMS: Oh, thank you very much, Senator White. I appreciate that. I appreciate your comments and, like I said, if...I think this is a decision the body has to make. And to be honest with you, I don't know if any of those things are truthful or not and I think somebody needs to do an investigation. You ought to get after it. And you're an attorney, you know the ropes and the road to travel, you should pursue it. I'll be glad to help you. Thank you, Mr. President. [LB679]

PRESIDENT SHEEHY: Thank you, Senator Harms. Senator Sullivan, you're recognized. [LB679]

SENATOR SULLIVAN: Thank you. I will have to use my own voice because I feel compelled to talk about how we are perhaps going forward with this conflict of interest. If we think perhaps that may solve all the problems, I think we need to think twice. Who does have a conflict of interest? Look at this body. Does Senator Utter have a conflict of interest if he sits on the Banking Committee? Does Senator Schilz have a conflict of interest if he sits on the Ag Committee? We need to be very careful as we venture into this arena if that is, in fact, the subject that we're talking about. And also a part of me believes that we are almost using the children as pawns in this discussion. Because what is the problem here? Was it really a conflict of interest that some perceived as a lack of response on the part of the board when they were asked for information? Or was the board saying, no, we need to review the cases of children in foster care because that's what we really need to be doing as the board. There are so many...almost to the point of accusations being floated around. But again, remind us that I don't think conflict

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of interest is what's going to solve the problem here. Some have said it's a dysfunctional board. Some have said that it's an infighting between the director and the board. I would suggest to you that perhaps it is a lack of leadership on the part of several people, and not necessarily a conflict of interest, that will help solve this problem and really meet the needs of children in foster care. Thank you. [LB679]

PRESIDENT SHEEHY: Thank you, Senator Sullivan. Senator Pirsch, you're recognized. [LB679]

SENATOR PIRSCH: Thank you, Mr. President, members of the body. I wonder if Senator Sullivan would yield for a long conversation here. (Laughter) I'm just kidding you but, no, I do appreciate...I wonder if Senator Harms, though, would yield to a quick question with regards to... [LB679]

PRESIDENT SHEEHY: Senator Harms, would you yield to Senator Pirsch? [LB679]

SENATOR HARMS: Yes, I'd be happy to. [LB679]

SENATOR PIRSCH: Thanks. And, Senator Sullivan, I appreciate your commitment to the issue that gets you up to the mike even given your...you know, the obstacles there with regards to your voice, so I appreciate that. Senator Harms, you've...you're the Chair of the Performance Review Committee. Is that right? [LB679]

SENATOR HARMS: That's correct. [LB679]

SENATOR PIRSCH: Okay. Did you take a comprehensive...obviously, we've been keying on, and I appreciate the conversation and Senator Council bringing this forward, but we've been keying on one issue with respect to conflicts of interest and the board and how they cooperate. Were there...did you take a more broader look at, in your performance review, of the...of this board? [LB679]

SENATOR HARMS: Well, Senator, first you have to understand this was done before I came, before I became Chair of the committee. It was done a year in advance of this. We just simply got the results of the findings. And from what I was able to report, I think they did a pretty broad review of the conflict of interest and they found nothing. And you know, the document is there, you can read it. You can find it for yourself and see what your thoughts are, but I thought it was pretty clear and distinct. [LB679]

SENATOR PIRSCH: Sure. Now this...the Foster Care Review Board is not unique to Nebraska but rather was encouraged...Congress encouraged states to adopt these Foster Care Review Boards in the mid-'80s. Is that right to your recollection? [LB679]

SENATOR HARMS: I think that is correct. [LB679]

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SENATOR PIRSCH: And that's kind of as a check on...I guess, and I'm speculating, tell me if I'm right, just to perceive shortcomings in the foster care systems back in the '80s and so setting up some sort of an entity that could provide some quality assurance. Is that correct? [LB679]

SENATOR HARMS: That's correct. And making sure that children and families are not falling through the cracks. [LB679]

SENATOR PIRSCH: Okay. And I'm probably more familiar with the local boards. I know there are 63 local boards in Nebraska. And in Omaha, in Douglas County, I'm familiar with the local boards there. But I guess when it was added as an entity, the Foster Care Review Board in Nebraska, they found an already existing juvenile court system in which, you know, had it's own...had existed for quite a long while. Is the way in which the Foster Care Review Board in Nebraska interacts with the juvenile courts in Nebraska unique, or is that, or is that pretty uniform across other states, if you know? [LB679]

SENATOR HARMS: I can't really answer that question because I don't know for sure whether it's unique or not or how other states do it. [LB679]

SENATOR PIRSCH: Okay. Just an interesting...and this is again off the regular topic that was brought up today. But I would be interested in seeing if there's, you know, just the interplay, if that was the way things are set up here in Nebraska is common. So perhaps someone will send me information with respect to other states. And I do appreciate the comments here today. And thank you very much, Mr. President. [LB679]

PRESIDENT SHEEHY: Thank you, Senator Pirsch. Seeing no additional requests to speak, Senator Council, you're recognized to close on your motion to return LB679 to Select File for specific amendment. [LB679]

SENATOR COUNCIL: As I represented...Mr. President, thank you. As I represented during my opening on the motion to return to Select File, it was never my intent to take either that motion or AM1245 to a vote. And I will honor the understanding I reached with Senators Harms and Gay and Hansen and others, and I withdraw the motion to return to Select File and I withdraw AM1245. [LB679]

PRESIDENT SHEEHY: The motion to return and AM1245 are withdrawn. Next item, Mr. Clerk. [LB679]

CLERK: Senator Gay would move to return for AM1427. [LB679]

PRESIDENT SHEEHY: Senator Gay, you're recognized on your motion to return LB679

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for AM1427. [LB679]

SENATOR GAY: Thank you, Mr. President. I'd like to withdraw that amendment. [LB679]

PRESIDENT SHEEHY: The motion to return and AM1427 are withdrawn. Any additional items, Mr. Clerk? [LB679]

CLERK: I have nothing further, Mr. President. [LB679]

PRESIDENT SHEEHY: Senators, if you would return to your seats in preparation for Final Reading. Mr. Clerk, we'll proceed to LB679. [LB679]

CLERK: (Read LB679 on Final Reading.) [LB679]

PRESIDENT SHEEHY: All provisions of law relative to procedure having been complied with, the question is, shall LB679 pass? All those in favor vote yea; opposed, nay. Please record, Mr. Clerk. [LB679]

CLERK: (Record vote read, Legislative Journal pages 1726-1727.) 43 ayes, 0 nays, 6 excused and not voting, Mr. President. [LB679]

PRESIDENT SHEEHY: LB679 passes. While the Legislature is in session and capable of transacting business, I propose to sign and do hereby sign LB679. Mr. Clerk, you have items for the record. [LB679]

CLERK: Mr. President, Senator Sullivan offers LR249 and LR250; both will be laid over. Senator Friend has amendments to LB658 to be printed. I have a motion from Senator Hadley to be printed (re LB420). (Legislative Journal pages 1727-1731.) [LR249 LR250 LB658 LB420]

And a priority motion, Mr. President: Senator Wightman would move to adjourn the body until Wednesday morning, May 27, at 9:00 a.m. []

PRESIDENT SHEEHY: You have heard the motion to adjourn until Wednesday, May 27, 2009, at 9:00 a.m. All those in favor say aye. Opposed, nay. The Chair rules the ayes have it. We are adjourned. []