MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Eighth Session
March 26, 2015

The Committee on Judiciary was called to order by Chairman Ira Hansen at 8 a.m. on Thursday, March 26, 2015, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/App/NELIS/REL/78th2015. In addition, copies of the audio or video of the meeting may be purchased, for personal use only, through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Ira Hansen, Chairman
Assemblyman Erven T. Nelson, Vice Chairman
Assemblyman Elliot T. Anderson
Assemblyman Nelson Araujo
Assemblywoman Olivia Diaz
Assemblywoman Michele Fiore
Assemblyman David M. Gardner
Assemblyman Brent A. Jones
Assemblyman P.K. O'Neill
Assemblywoman Victoria Seaman
Assemblyman Tyrone Thompson
Assemblyman Jim Wheeler

COMMITTEE MEMBERS ABSENT:

Assemblyman James Ohrenschall (excused)

GUEST LEGISLATORS PRESENT:

Assemblyman Michael C. Sprinkle, Assembly District No. 30
Assemblyman Lynn D. Stewart, Assembly District No. 22

STAFF MEMBERS PRESENT:

Diane Thornton, Committee Policy Analyst
Brad Wilkinson, Committee Counsel
Lenore Carfora-Nye, Committee Secretary
Jamie Tierney, Committee Assistant

OTHERS PRESENT:

Michelle Gorelow, Director of Program Services, March of Dimes Nevada Chapter
Joseph P. Iser, M.D., Dr.P.H., M.Sc., Chief Health Officer, Southern Nevada Health District
Ben Schmauss, Government Relations Director, American Heart Association
Michael Hackett, representing Nevada Tobacco Prevention Coalition
Frankie Vigil, Executive Director, American Lung Association in Nevada
Kacey Larson, Private Citizen, Carson City, Nevada
Spencer Flanders, Private Citizen, Douglas County, Nevada
Hannah Sizelove, Private Citizen, Douglas County, Nevada
Vanessa Spinazola, representing American Civil Liberties Union of Nevada
Keith F. Pickard, Attorney, Pickard Parry Kolbe, Henderson, Nevada
Gary R. Silverman, Private Citizen, Reno, Nevada
Roger Harada, Private Citizen, Reno, Nevada
Katherine Provost, Private Citizen, Clark County, Nevada
Marshal S. Willick, Private Citizen, Las Vegas, Nevada
Robert Langford, Attorney, Las Vegas, Nevada
Kristin Erickson, representing Nevada District Attorneys Association
Terry McCarthy, Chief Deputy District Attorney, Appellate Division, Washoe County District Attorney

Chairman Hansen:
[The roll was called.] We have three bills on the agenda today. We are going to start with Assembly Bill 322.

Assembly Bill 322: Prohibits the smoking of tobacco inside any motor vehicle in which a child under the age of 18 years is present. (BDR 15-128)

Assemblyman Michael C. Sprinkle, Assembly District No. 30:
Thank you for taking my bill out of order. I want to start with a video to set the stage for what we are talking about (Exhibit C). The U.S. Environmental Protection Agency's (EPA) website says secondhand smoke in cars can be especially harmful to children because cars are small, confined spaces where children are closer to the smoker and the smoke. While a child's lungs are still developing, they can be easily damaged by exposure to the high levels of secondhand smoke in the car. Even though many smokers choose to open a window or increase the ventilation, the child passenger is still not fully protected. Secondhand smoke lingers long after the smoking stops. The EPA website also notes that children exposed to high doses of secondhand smoke are at an increased risk of experiencing damaging health effects, such as asthma, bronchitis, pneumonia, colds, sore throats, ear infections, lung function reduction, and sudden infant death syndrome.

There are a couple of amendments. One amendment (Exhibit D) is already up on the Nevada Electronic Legislative Information System (NELIS). There is one that I am still working on. The bill provides for the health and safety of children who cannot protect themselves. When I was thinking about why I thought this was an important piece of legislation, I was also thinking about what it is that we are all charged with as elected officials. In my mind, the most important thing that we can do is protect the health and safety of those who are not capable of protecting themselves. Children are oftentimes in these vehicles in confined spaces where secondhand smoke is extremely detrimental to their health. The children are there with an adult, and the child may not feel comfortable asking the adult not to smoke around him or her. Certainly, an infant or a two-year-old will not even understand what is going on from a physical standpoint. For us, as elected officials, I believe this is one of those times where it is imperative for us to step forward to protect the children's health and safety. You have all heard the documented proof about how detrimental secondhand smoke is to any of us. When we are talking about a developing brain and lungs of a child, it is even more imperative that they are prevented from being around this.

One of the other things this bill is going to do is to provide added incentive for education about the effects of secondhand smoke. The penalties or citations potentially given by law enforcement are not very great. That is not the intent of this. I am not trying to throw people in jail or financially burden them. What I am trying to do is give them the ability to understand. In no way, shape, or form am I trying to say that somebody should not be allowed to smoke

a cigarette or an e-cigarette. I never want to take away their individual rights to do that. I am suggesting that they try not to do it around their children.

There have been some concerns raised to me. One concern is taking away an individual's right to smoke. I do not believe this bill does that. That is certainly not the intent of this bill. One of the other concerns is making this a primary offense rather than a secondary offense. In my mind, a primary offense gives law enforcement the right to stop the vehicle and examine further what is going on if they notice what may be potential harm. That is the reason why we kept this as a primary offense as opposed to a secondary offense. I will reiterate the fact that the citation that goes along with this is very minor and is based off of the secondary-offense laws related to seatbelt use.

Section 1 makes it illegal to smoke in a vehicle with a child under 18 years of age. It also allows law enforcement to issue citations for such an infraction. Additionally, it describes penalties associated with the infraction and provides some protection from negligence. I did mention a couple of amendments. Having spoken extensively with those in the health care profession, I believe it is important that we add electronic cigarettes, which are a growing trend. There is data out there currently that shows the vapor coming out of these electronic cigarettes does contain some of the harmful carcinogens associated with combustible cigarettes. At this point, even though relatively new throughout the U.S., this is a great way for Nevada to be a leader in an emerging trend that is detrimental to our children from a health standpoint.

After talking to people, we are trying to define exactly who we are targeting with this bill. It is a little bit unclear as to what would happen if someone who was driving a vehicle happened to be under the age of 18. I am going to be moving forward with another amendment which will suggest that the person responsible is the driver of the vehicle. In any situation, ultimately, the person responsible for that vehicle is the driver. To better define that, it will be the adult driver of the vehicle who the law enforcement officer will be looking at for responsibility. I am more than happy to answer any questions that you may have.

Michelle Gorelow, Director of Program Services, March of Dimes Nevada Chapter:

As Assemblyman Sprinkle has mentioned, this bill is very important to help protect infants and young children. I have already submitted my testimony (Exhibit E), so I will not go ahead and read it. However, I did want to touch on the aspect of sudden infant death syndrome (SIDS), which is the second-leading cause of infant mortality in Nevada, with prematurity being first. One of the

highest risk factors for SIDS is secondhand smoke. The United States ranks twenty-fifth in infant mortality, and Nevada ranks about twenty-sixth.

Joseph P. Iser, M.D., Dr.P.H., M.Sc., Chief Health Officer, Southern Nevada Health District:

Assemblyman Sprinkle's bill is very well balanced. It does not take away the right to smoke or to use e-cigarettes or vapors. It does help to protect children. The few things that I can add in terms of data is that cigarette smoke contains more than 7,000 chemicals, including hundreds that are toxic and about 70 that can cause cancer. As Assemblyman Sprinkle pointed out, e-cigarettes or vapors also have many of these chemicals, although not quite as many, but certainly chemicals that cause cancer as well. There is no risk-free level of secondhand smoke exposure. Even a short-term exposure to the smoke can be harmful to your health.

A survey released in July 2013 found that 82 percent of U.S. adults favor prohibiting smoking in vehicles when children under the age of 13 are present. The survey found broad-based support for the policy including support from a majority of current smokers-60 percent; former smokers-84 percent; and never smokers-87 percent. There are other states or territories that restrict smoking in vehicles with minors such as Arkansas, Louisiana, California, Maine, Utah, Oregon, Vermont, and Puerto Rico.

Additionally, I have left my written testimony (Exhibit F). If we want to make a dent in chronic diseases in this state and want to save money for Medicaid and health insurers throughout the state and the nation, this is one way to take a step in that direction. Usually, I lament the fact that I do not have enough funds to do much in chronic diseases. The only tools that I have are the ones that you give me through the Legislature. This is a tool that does not give me any authority, but it does give law enforcement some authority to help crack down on people who smoke in cars.

I also like to give personal experiences. I mentioned that I am a former smoker. My mother was a very heavy smoker. She smoked in the house and in the car. She actually died after her second heart attack at the age of 63. I am fortunately now older than she was when she died. I can tell you the reason that I took up smoking is because both of my parents did, particularly my mother. I saw that as the role model for me to follow. Of course in the '50s and '60s, the health risks were not as well known. I believe this is a reasonable mechanism to try to prevent kids from being exposed to smoke and from smoking themselves.

Assemblywoman Fiore:
Thank you, Assemblyman Sprinkle. I get the idea, concept, and the intention of the bill. However, as you are well aware, sometimes in making new laws, we go down a path with unintended consequences. The way I see this, we may now be looking at an overzealous police officer who sees someone smoking, pulls him over to make sure there is not a child in the car, and we go down that path. All of a sudden, we make it illegal to smoke in the car, and then what is to say, down the road, that we make it illegal to smoke in the house? I just feel that we have to be quite careful with the legislation we bring forth because we cannot legislate stupid.

Assemblywoman Seaman:
Where do we stop? I am not a smoker either, but is there going to be a law that you cannot smoke in the vicinity of 100 feet of a minor? I am a little leery about this too. My question is, how many states have implemented this?

Joseph Iser:
There are seven states and one territory. If I may add, two of those states are in the south where smoking is heavier. Those states would be Arkansas and Louisiana.

Assemblyman Jones:
I have a question about the vapor. You mentioned that there are carcinogens in the vaping smoke. Compared to regular smoking, where is vapor? Do you know of any studies? If vaping is only 5 percent as dangerous as smoking, we are overreaching with that aspect.

Joseph Iser:
Indeed it is true that the studies are not great on vapors. That is partly because vapors are not regulated at all. No one knows what each individual manufacturer puts into their vapors except for certain flavorings, nicotine, and other chemicals that are not carcinogenic. Carbon monoxide would not necessarily be in vapor, although it is in regular cigarettes. I do not think we can judge how safe or unsafe the comparison is. I think they are both unsafe around vulnerable populations. The Food and Drug Administration (FDA) is currently doing studies to regulate these devices. I am a former investigator for the FDA. When I was back in Washington, D.C. a few weeks ago, I met with a friend who works for that part of the FDA. My friend asked why we are not moving on this. The answer was politics. We are unable to move forward in a quick, expeditious manner. They will be coming out with regulations related to this in the future. This is a way for us to lead the nation in trying to protect our children.

Assemblyman Jones:
So your answer is you do not know of any studies that compare the amount of dangers in each.

Joseph Iser:
I know of no particular studies that compare vapors with cigarettes head to head. I am concerned about trying to characterize one as being safer or less safe than the other. A lot of it depends on how much you vape versus how much you smoke. There are so many variables, and I have not seen any studies that do a comparison.

Assemblyman Nelson:
You mentioned there were seven states and Puerto Rico that have passed similar legislation. I am curious what the results were in those states.

Assemblyman Sprinkle:
Are you looking for citation counts, or decrease in health-related episodes with children? What exactly are you looking for?

Assemblyman Nelson:
Both of those. What experiences have they had? Has it been successful? Has it had any positive or negative results?

Assemblyman Sprinkle:
The only specific results that I am aware of are anecdotal. Police officers have said they had a difficult time enforcing it since it is a secondhand law. That is one of the reasons that I think you will hear testimony later from police officers who are in favor of this being a primary law and not a secondary law. It gives them a little more ability to ascertain whether this is occurring and to help prevent the exposure to the secondhand smoke. Other than that, I do not have the statistics right now. I would be more than happy to research them for you and get back to you.

Joseph Iser:
No, I do not have statistics. Some of these laws are very new. Vermont's law was passed in 2014, so there would not be much data. I would be happy to work with Assemblyman Sprinkle and our colleagues to see what we can find out through medical literature and get it back to you.

Assemblyman Wheeler:
I am a smoker, but one of the big exceptions I see to this is basically you are going to make it a crime to smoke. You are going to put it on someone's record because he smoked. That is a big problem for me. The question I have is for

Dr. Iser. You mentioned the health benefits and how overwhelming they are. However, you cannot smoke in a car otherwise you are a criminal, but you can smoke in the house, at least for now. What is the big difference in the health benefits with the car versus the house? I do not smoke in my house because I do not like the smell in the house. Also, I do not smoke in front of the kids because I do not want them picking it up. However, it is my business if I wanted to. I am just wondering what is the big difference in relation to a child in the house who is exposed to this at all times.

Joseph Iser:
I do not want to speak of the criminal aspects of this, but I can discuss the health aspects. There was a study referenced in my prepared testimony (Exhibit F), which I did not discuss earlier. The average levels of respiratory particulate matter gets very deep into the lungs. This is the very small particles that come from the cigarette smoke. It is also the pollution inhaled from primary or secondary smoking. In vehicles, the level found was even higher than what was found at bars in several towns in eastern Massachusetts. In addition, the levels of particulate matter found in the vehicles exceeded those levels described by the EPA as "unhealthy for sensitive groups, such as children and the elderly." One of the benefits of being in the home is the child can get up and walk away. He or she can move to another room and is not often necessarily in the same room as the smoker. There will not be the same level of concentration of carcinogens. In a car, the child is in a trapped environment, particularly in areas that are very hot or very cold, where the windows will be rolled up. That is where the particulate matter and other carcinogens rise to very high levels. A child cannot go anywhere else but sit in the car with the parent.

Assemblyman Wheeler:
For your information, I do not usually take my grandkids to bars. That study does not mean a lot to me. What I would like to see is a study showing the difference of the house versus the car. I smoke in the car, but I do keep the windows open whether it is cold or hot. I do not like the smell in the car. There are some people who smoke and who are considerate of others.

Assemblyman Araujo:
Thank you, Assemblyman Sprinkle, for bringing this forward. I am a bit concerned that we are losing track of what the bill's intent is. I do not think the bill is singlehandedly pointing out one direct person or that responsible parent who does not have any intent of surrounding the child with smoke. The fine here is very minimal. Alluding that this will add this huge criminal penalty on someone for smoking in the car is a little stretched. I commend you for taking a step forward in protecting our children by addressing this issue. I remind the

Committee members that there is a reason why we have a similar law in place when it comes to restaurants and smoking. It is to create a conducive environment for the child to live a healthy life, because they do not have the ability to make that choice at such a young age.

Assemblywoman Diaz:
This is a secondary offense, meaning that someone cannot be pulled over because he is smoking, correct? Or is it a primary offense in your bill?

Assemblyman Sprinkle:
What I said in my earlier testimony was that the fines associated with the bill are similar to the secondary offense of seatbelts in the car. However, this would be a primary offense.

Assemblywoman Diaz:
Thank you for clarifying that. It seems as though the bill is trying to be more of an educational experience. When we are younger, we do not always think through our actions and the affect they have on our children. I see your bill as a learning opportunity, because it is not a moving traffic violation and it cannot be considered negligent. Therefore, I do not see there being a harmful negative effect on the parent. I do see it as a way to make the parent realize that he or she may be making a mistake. Is it your intent to make sure it is more of an educational opportunity?

Assemblyman Sprinkle:
That is exactly what the intent of the bill is. The primary intent is to protect the health of children who are not in the position to protect their own health. Secondary to that, the reason I structured it the way that I did was to give police officers the ability to inform people of the potential harm being caused by the secondary smoke to a developing body and brain. When you look at the statistics, children's brains do not fully develop until they are 23 years old. I can go into all of the side effects and negative effects of secondhand smoke, but I think we already know that. This is just an ability to try to help educate adult smokers and to protect the health of the children.

Assemblyman Thompson:
Regarding section 1, subsection 3, can you further explain the fine? I see it is $25. Where does that money go? Does it go towards community education on the issue, or does it go directly into the law enforcement jurisdiction? Also, please tell us a little more about the hours of community service.

Assemblyman Sprinkle:
This relates to the previous question that it is based on the structure of the secondary offense of not wearing a seatbelt. It was intended to be minimal, mostly used as an educational tool. I would have to refer to the statute for where the money specifically goes. It is based off of a similar statute. Regarding the reference to community service, this will basically give a judge the option.

Chairman Hansen:
Let us say I am smoking and I am pulled over by a cop. I roll down the window, but I am smoking a medical marijuana cigarette. It is perfectly legal, apparently. It is my understanding that marijuana smoke is more carcinogenic. Is that accurate or not?

Assemblyman Sprinkle:
Section 1, subsection 1 specifically says the smoking of tobacco, which would include electronic cigarettes with the nicotine in that form. This bill is specifically related to tobacco products.

Chairman Hansen:
If I am smoking a medical marijuana cigarette in my car with my children in it, there is nothing making that illegal currently under Nevada law. There has been this interesting dichotomy in our building, with consistent criminalizing of tobacco use, yet we have this legalization process of marijuana use. They both involve smoke, and both are very harmful to our lungs. Meanwhile, the people pushing the medical marijuana seem to be equally as aggressive in stopping the tobacco use. Do you intend to have any amendments to include medical marijuana?

Assemblyman Sprinkle:
I think the discussion to allow recreational usage of medical marijuana is percolating through the building and will continue to do so. My intent with this bill was tobacco products, and that is what I intend to stick with.

Chairman Hansen:
I will now open up the floor to anyone who would like to testify in favor of Assembly Bill 322.

Ben Schmauss, Government Relations Director, American Heart Association:
I will save your time and just say ditto to the medical testimony provided. I would like to emphasize the Surgeon General's report, which states the scientific evidence about the dangers of secondhand smoke is clear. There is no safe level of exposure, and we echo those sentiments. Smoking and

secondhand smoke is still a huge issue impacting the health of Nevadans, specifically children. We support this bill as part of our commitment to reducing death and disease in Nevada. As a child, I was exposed to high levels of secondhand smoke in a closed-window car in rural Alaska. I have suffered from chronic ear infections since I was a very young child. I believe in protecting children from secondhand smoke, and there is no safe level of exposure.

Michael Hackett, representing Nevada Tobacco Prevention Coalition:
We want to go on record in support of this bill and say that we appreciate Assemblyman Sprinkle for bringing the bill forward. We have had a chance to work with him during the interim. From our point of view as a tobacco prevention coalition, we certainly understand the science regarding tobacco use and the health risks that they portend on people are very clearly settled and specifically with secondhand smoke. As we look at this bill and the demographic that Assemblyman Sprinkle is trying to protect from exposure to secondhand smoke, we firmly believe this is a very good public health policy. We are in support of this legislation.

Chairman Hansen:
I am not a smoker, but I went to Israel and brought back a pack of cigarettes from there because of what is written on it. On the front it says "Smoking Kills" and on the back it says "Smoking may reduce blood flow and causes impotence."

Michael Hackett:
Absolutely, and if you have gone to Mexico recently, you would have found those same warnings as well.

Frankie Vigil, Executive Director, American Lung Association:
We are here to support Assemblyman Sprinkle's bill. I wanted to address some of the questions that have come up previously regarding the difference between smoking in your home versus a car. Studies have shown consistently that the small, enclosed space of a car makes secondhand smoke even more dangerous. Secondhand smoke in motor vehicles can be up to 27 times more concentrated than in a smoker's home. In the time it takes to smoke half of a cigarette, the air quality in a car can reach up to ten times the hazardous level on the EPA's air quality index. We have all seen the air quality announcements in our communities. At ten times the levels of hazardous, it is affecting the lungs of people with no preexisting conditions. At that rate, healthy people are even told to restrict their outside use when at such high levels. We are excited that Nevada has the opportunity to be a leader and protect our children from secondhand smoke.

Kacey Larson, Private Citizen, Carson City, Nevada:
I have been a Nevada resident for nearly 20 years, and I live right here in Carson City. I am a registered nurse, but more importantly, I am the parent of a great 5-year-old girl with asthma. Five years ago, I thought asthma was no big deal. You just have to take your medicines, avoid secondhand smoke, and you will be okay, right? Three years ago, it became a bigger deal for our family. Sydney was two years old when she was diagnosed with asthma. The diagnosis came under terrifying circumstances for our family. We took her to the doctor's office because she had another cold. She was congested and coughing. [Continued reading from prepared statement (Exhibit G).]

Spencer Flanders, Private Citizen, Douglas County, Nevada:
I am 16 years old and a junior at Douglas High School. I am currently serving as advocate for the 2014 Campaign for Tobacco-Free Kids, Western Region. I also hold a seat on the Drug Abuse Resistance Education (D.A.R.E.) Youth Advisory Board. Most importantly, I stand here on behalf of the youth of Nevada. As a D.A.R.E. representative, I have been able to spend time in classes, educating the youth about the harmful effects of tobacco and secondhand smoke. In addition to education, my D.A.R.E. advisor and I have been using strategies on how to avoid secondhand smoke. They are simple things such as walking away or leaving the room. Unfortunately, there is no way to escape secondhand smoke inside of a car. The only true strategy is to ask the person to stop smoking, but the problem is it is hard for kids to ask their parents or a trusted adult not to smoke in the car with them. Because it is hard, one of five of all middle school and high school students have been exposed to secondhand smoke inside a vehicle within the last week. I do not blame the parents, because 90 percent of them started smoking when they were under the age of 18. They have been tricked, manipulated, and were ignorant to the dangers of tobacco use and secondhand smoke for them and their families. I have witnessed the harmful effects that can be addressed if A.B. 322 is passed.

I stand here before you because one of my dearest friends has been exposed to secondhand smoke her entire life because both of her parents smoke. She has asthma, chronic ear infections, and always tries to stay away from her parents when they are smoking. In her words, the smoke does not make her feel good. As hard as she has tried to protect herself from the dangers of secondhand smoke, she is powerless to protect herself when she is in the car because she cannot run away from it.

We, the youth, feel it is time for us to stand up and address the issue of secondhand smoke in Nevada. We believe safety is the first priority of any situation, and when it comes to secondhand smoke and its proven dangers, it

should not be treated any differently. Passing A.B. 322 is the necessary course of action for one simple reason: secondhand smoke is harmful. Statistics from the Campaign for Tobacco-Free Kids show that 50,000 Americans face unfair and unjust deaths due to the residue that secondhand smoke leaves in the air. These statistics prove that at least one-fifth of all 12- through 18-years-olds have inhaled over 7,000 chemicals while riding in a car with a smoker within the last week. The unfairness of this upsets me, and my dear friend's blue eyes break my heart because she faces the consequences of others through no choice of her own. The sad truth is that quitting the use of tobacco is not an easy thing to do. Because it is so hard to quit, the youth pay the price for the exposure. Passing A.B. 322 would not only positively affect students' lives, but it would significantly decrease their chances of cancer in adulthood. Ultimately, passing A.B. 322 will help thousands of children. On behalf of youth, we urge you to pass this very important piece of legislation.

Chairman Hansen:
Mr. Flanders, thank you very much for taking the time to come down here and testify. You provided an excellent presentation this morning.

Hannah Sizelove, Private Citizen, Douglas County, Nevada:
As a compassionate ninth grade student at Pau-Wa-Lu Middle School and a dedicated advisory member of the Nevada Statewide Coalition of Youth, I have the honor of representing the youth of Nevada in a desperate battle to make you aware of the damage we are exposed to every day by secondhand smoke.

Throughout my advocacy experience, it is emphasized that we have the power to stand up against tobacco, and we have the power to walk away. But, I ask you, how do we walk away when we are a six-month-old baby, a kindergartner who cannot get out of the car, or even a teenager whose parents ignore our pleas to put out their cigarette? [Continued reading from prepared statement (Exhibit H).]

Assemblyman Elliot T. Anderson
I just want to say that I am very impressed with your presentations. I fully expect to see you up here sitting in one of these seats one day.

Assemblyman Thompson:
I also want to echo those comments. Thank you so much. I love to see our young people testifying for whatever issue they believe in. You did your homework, and you are very articulate. I do have a question for Mr. Flanders, since you are in high school. The way I read the bill, and because we are talking about adults, some of your peers may smoke. Have you had a chance,

through your campaigning, to see what their thoughts are? They would also be subject to this bill.

Spencer Flanders:
I have not talked about this bill to kids that smoke. I have talked to another peer in my study skills class who has parents who smoke all of the time. He really dislikes it. He heard me reading this when I was practicing in class, and he told me that he totally supported this bill.

Assemblyman Thompson:
I just wanted to point out we are talking about adults. However, in a motor vehicle, the driver could be 17 or 17 1/2 years old. That could be part of this bill as well.

Assemblyman Wheeler:
Now you know why the graduation rate in Douglas County is one of the highest in the state.

Assemblywoman Diaz:
As well as congratulating both of you, I want to congratulate your parents and educators. I do have a question. Have you been able to ask your colleagues if they have ever had a conversation with their parents who smoke in the vehicles? If so, what has been the outcome?

Spencer Flanders:
I have not talked to them, but it is very difficult to ask a trusted adult or parent to not smoke in the car. That is the reason why this piece of legislation needs to be passed.

Hannah Sizelove:
There are countless stories available online that all illustrate the frustration and pain that youth must endure because the parents smoke. Why would they smoke if they know it hurts us? It is hard for us to understand why we do not have the right to choose to take control of our health.

Chairman Hansen:
Seeing no further questions, we will open it up to the opposition.

Vanessa Spinazola, representing American Civil Liberties Union of Nevada:
We are in opposition to A.B. 322. We appreciate Assemblyman Sprinkle working with us before the drafting of the bill and as late as last night. One of the amendments that we proposed is to ensure the adult driver is the only one to receive the citation. It was unclear to me from the previous language.

Our main concern is that this is a primary offense. This will be a reason that people can get pulled over. I drive back and forth from Reno every day, and the number of people I see smoking in cars is a large number. Car windows are tinted, and when the sun slants a certain way, you cannot tell if there is a child in the vehicle. Those people are going to get pulled over. The people I am concerned about most are all of the teenagers in the car. Are they 17 or 18? I said to Assemblyman Sprinkle last night, they all look like they are 13 to me. I would need to ask everyone in the car what their age is. Under current Nevada law, the only thing you have to share with a law enforcement officer is your name. That case has been litigated all the way up to the U.S. Supreme Court with *Hiibel v. Sixth Judicial District Court of Nevada 542 U.S. 177 (2004)*. This is basically adding to our law that now you can ask people's age, because how else are you going to determine if a citation should be issued or not? Basically, this bill will create a pretext for stops—which leads to searches, which leads to interrogations—for people who are not violating a criminal law.

I am surprised there is no fiscal note on this because if you are smoking in your car, that is a lot of people that are going to get pulled over. Representing the American Civil Liberties Union, I have to bring up the racial justice component. Assembly Bill No. 500 of the 71st Session did a one-year study of racial profiling in Nevada. At the time, it found that African American folks were two times more likely to be stopped on a primary offense, which was 12 percent of the stops and only 6 percent of the population. They are also twice as likely to be arrested and have their vehicles searched. At the very least, we would hope this would become a secondary offense. We do not think that people should get pulled over for smoking.

The other thing we are concerned about is the place this bill is located is not in the traffic statutes. It is located within crimes against public health. Under traffic laws, officers have a duty to cite instead of arrest. I really would like to see language in this bill that links it to NRS 484A.730, where there is a duty of an officer to issue that citation instead of actually arresting the person. Additionally, we are worried about the passengers in the car. If I am a passenger in a car, I may not have my identification on me, and there may be an issue about how old I am. I do not want that scenario to lead to passengers in the vehicle when the driver is seeking to smoke, and it could lead to the passengers' arrest. Those are our main concerns.

Chairman Hansen:
Ms. Spinazola, is it true that a disproportionate number of people who smoke are low-income people in the U.S.?

Vanessa Spinazola:
Yes, that is true.

Assemblywoman Fiore:
I want to address our students because even though I may not agree with this bill, I agree with your stance in coming up here and your efforts. I admire that.

Chairman Hansen:
Is there anyone here or in Las Vegas who would like to testify in the neutral position? Seeing no one, we will close the hearing on Assembly Bill 322. We will open the hearing on Assembly Bill 263.

Assembly Bill 263: Revises provisions governing the custody and support of children. (BDR 11-199)

Assemblyman Lynn D. Stewart, Assembly District No. 22:
This bill that I am presenting deals with domestic relations and child custody. We are trying to increase the fairness of this very important issue. With me today is Mr. Keith Pickard. He is an attorney who practices in this area. He has spent a number of months researching and putting this bill together. With your permission, I will turn the time over to him.

Keith F. Pickard, Attorney, Pickard Parry Kolbe, Henderson, Nevada:
I appreciate this opportunity and Assemblyman Stewart for bringing this bill to you today. I think everyone here will agree that we need to make sure that when families are falling apart, our first and foremost responsibility is to protect the children. They did not ask for what they are about to get, and they are least able to protect their own interests. It is this very reason that both the Legislature and the Nevada Supreme Court have unequivocally stated that when it comes to determining custody of children, it is the best interest of those children that is of paramount concern. (Continued reading from prepared statement (Exhibit I).

There have been many discussions, including discussions with many other members of the family law community. Good ideas were presented all the way through. I will also note that this has been the result of months of discussions. We first circulated the bill draft back in July. Many comments were provided as late as last night. We would invite friendly amendments. I would like to discuss two of them. The comment I received most often was the one about the cohabitation for one year as discussed in section 5, subsection1(b) and section 6, subsection 1(b). The intent was to try to allow the nonresidential parent to maintain his or her position in the life of the child. It reflects the one-year look-back as allowed in *Rivero v. Rivero, 216 P.3d 213 (2009)*, as we

review the actual custodial arrangement that is in place. There were two comments that I think are valid. It allows us to tie this closely to the time period immediately before the action begins. Therefore, one comment was to insert the word "immediately" so that it would read "for a period of one year or more, immediately before the filing." Another comment was to change the language to drop the one-year provision and simply state that a parent has demonstrated or has attempted to demonstrate, but has been frustrated by the other parent, an intent to establish a meaningful relationship with the child. We would invite that sort of amendment because the intent of this bill is to put the parents on an even playing field and allow the court to start with the presumption that both parents are equally valid and appropriate in the life of the child. Obviously, there may be circumstances that may change that calculus, but that is precisely why we want to put this in the hands of the district court.

The second comment I would like to consider is in regard to section 7. It has been proposed that an amendment be added to include a third presumption addressing domestic violence, and we are in favor of this amendment. As I understand it, the language would suggest that joint physical custody would be presumed to not be in the best interest of the child if there has been an adjudication, after an evidentiary hearing, that a parent has engaged in one or more acts of domestic violence against the child, a parent of the child, or any other person residing with the child. This is a rebuttable presumption. I believe these amendments would be prudent and consistent with the intent of the legislation. Thank you for your time, and I welcome any questions.

Assemblywoman Fiore:
Let us say that we have a young couple with a child. One of the parents really is not involved that much with the child, and the couple is not married. All of a sudden, two years down the road, if this law passes, are you saying that this law would make unmarried couples have equal joint custody automatically?

Keith Pickard:
No. The answer would be found in section 7, subsection 2 of the bill. It would give the district court the ability to award primary physical custody based upon the arrangement that the parents put into place. This goes back to the idea that has been fairly well established in the case law of *Rivero v. Rivero*, which cited a U.S. Supreme Court case known as *Troxel v. Granville 530 U.S. 57 (2000)*. We presume that parents act in the best interest of their children. In the referenced case, we have this one-year look-back provision that allows the court to go back and really examine what has occurred in the past. This would be the opportunity for the mother to step in and tell the judge that the father has never been an active part of the child's life and should not now be able to step in and take control from the only parent the child has ever known. The legislation

really just establishes the starting point for the discussion. Remember this is a fundamental right. The U.S. Supreme Court in *Troxel V. Granville* said that access to a person's child is a fundamental constitutional right. This bill simply makes the statutory scheme comport with that idea. It puts them on similar footing from the start. After that, it is up to the parties to present their testimony to the court showing what actually has been done.

Assemblywoman Fiore:
So I am correct because if you are going to make it a fundamental right, a mom or dad who has not been present prior and does not even know the child can come into a child's life. Until they actually get to court, it is their fundamental right. If the police are called, they cannot even do anything. I have literally seen this happen in the past because we have confused law enforcement. It is a fundamental right for a father or mother to come see the child that they have had no relationship with in the past two years until all of a sudden they have to pay for lawyers and courts. This is how I am reading the bill, and I just want a yes or a no.

Keith Pickard:
The answer is no. The fundamental right was established a couple of decades ago through *Troxel V. Granville*. That is a legal position. The fundamental right merely protects a parent's right to the access. It does not necessarily overrule any of the findings a court would make in establishing what an appropriate custodial arrangement would be. I agree that there are numerous times that we see interesting results, if not absurd results, come from the statutory scheme. I would suggest that is the result of the fragmentation of the scheme where we have actually several points, particularly when we talk about unmarried parents in NRS 125C.200, where they are actually in conflict. Merely because of whether or not they were married, one party has a presumption in one direction, and the other party has a conflicting presumption in the other direction. The police are left unsure because they are not family lawyers or judges, and they do not get in the middle of it. If we make the statutory scheme consistent throughout, starting with a preference and not a presumption, the difference is the presumption is what the court must do absent rebuttal testimony or evidence proving it otherwise. This is simply a stated preference that we start with the presumption that both parents have an equal right, but they have to bring their evidence to the court to determine what is in the best interest of the child. Let us not forget that this is about putting the interest of the child before the interest of the parent. Not that they are not intertwined, but we need to start with that preference.

Assemblyman Jones:
I look at this bill, and there is a lot of new black. That means there is a lot of changing and revising going on to the statute having to do with parental rights and how the court is going to adjudicate it. Not being a family lawyer, it is pretty overwhelming. It seems like only you and two other family law attorneys have opined on this. Do you have a family law section in the State Bar, or should there be some more consensus built around this instead of just dropping this huge law on us neophytes?

Keith Pickard:
It certainly looks like it is a major rewrite. If you examined the language, you will see that the bulk of it is new to NRS Chapter 125C. It is not new to the statutory scheme. For example, in section 7, it consolidates NRS 125.465, NRS 125.490, and NRS 126.031 from their various places into one place. The language is largely identical. The same thing occurs in section 3 combining NRS 125.460, NRS125B.020, and NRS 126.031. They are simply moving from the other places into one place. It does look like we are rewriting it, but we are not. We are adding the relocation issues and then we are homogenizing the rest of the scheme so that it is consistent and fair without respect to gender or marital status. That is why there is a difference.

Assemblyman Jones:
What about the consensus with the section of family law for the American Bar Association?

Keith Pickard:
This bill was presented to the executive committee of the Family Law Section. It was circulated through them several times. There have been literally hours of discussion with members of that committee. This is not from what one or two people have suggested. This is really the result of many hours of conversation and compromise, trying to really hone it to where we do not make substantial changes to the majority of the bill. We made uniform rules and the standards in the existing law and added provisions to close the loophole.

Assemblywoman Diaz:
I do see the need for some changes. I have heard from constituents and from close friends about the inequity that currently exists in the statute. Do you see that there is not a level playing field currently as our statutes are written in terms of custody battles? I have heard of a lot of cases where the father is not wed to the mother and they had the child out of wedlock. The relationship did not work out, but the father does want to partake and become an active parent. However, because of retaliation, the mom is using the child as a tool to get revenge. I do not think that is right. I think we need to keep the child in

mind first. We should not be making the process more burdensome for the father that does want to be a responsible and active father. Sometimes we say deadbeat dads, but that is not always the case. There are many fathers who want to be there alongside their child, just not with the child's mother. I would like for you to address what you see already in our statute and how that is playing out in custody issues.

Keith Pickard:
Thank you, Assemblywoman Diaz. You have hit on one point that I think has driven a number of those trying to resolve the issue. There are inequities in the existing statutory scheme. There is no question about it. I will address one of those inequities that speaks directly to the situation you referenced. In NRS 126.031, it presumes that the mother shall have primary physical custody when the parents are not married. I will not get into the weeds of the details, but it does provide an advantageous position for the unmarried mother. It creates an uphill climb for the fathers. That is not the only inconsistency; there are others. The intent of this legislation is to address that very thing as we homogenize the rules. Right now, we have double standards in several places. We want to consolidate the rules for custody in one place making those standards the same for all. There are inequities, but as we look at the decision in *Druckman v. Ruscitti 130 Nev., Advance Opinion 50* (Exhibit J), we have created an atmosphere in which a parent who is not married and wants to relocate simply relocates without permission of the other parent or the court. In NRS 125C.200, it is not appropriate for couples that are married to go without permission of the court. One of the other things that this legislation tries to resolve is the fact that you can go from Reno to Truckee, California, which would not be a monumental impediment for maintaining your relationship with your child. If you are married, you need court permission to do that, and if you are not married, you do not. However, say you are a resident of Las Vegas, and you want to relocate to Winnemucca, you do not need permission from anybody. You just get up and move.

One of the other things that we tried to do in section 13 is to limit that by distance. There is some discussion as to whether 100 miles is appropriate. It is not an entirely arbitrary number. Those of us who have been discussing this point all happen to live in Las Vegas. We were looking at the Las Vegas Valley and considering if you live in Henderson and relocate to Centennial Hills, it is a pain. You have to drive maybe forty minutes to get to your child's activity, but it can be done. What about Overton? That is a little bit more than an hour. Are you going to be traveling 120 miles just to go to a baseball game? Maybe and maybe not, because it depends on what your work schedule is and how early in the day the game may occur. If the other parent moves to Winnemucca, any ongoing relationship that parent has with the child is

essentially killed. Maybe we can amend this to ask the parties to put forth evidence to suggest that the relocation would create substantial impairment of the child's relationship. We face problems as we add language. In a contract lawyer's world, we love the term reasonable. The more ambiguity, the more likely you are to argue around it. We have to have some concrete terms to address in legislation that will try to work around it. Family cases are fraught with emotion, and as we get into the situation where someone wants to put the hurt on the other side, the more ambiguity there is, the easier it is to do that. As a practicing lawyer, I have been able to exploit the inconsistencies for the benefit of my client. I am not going to say that I advocate what this is trying to do like with the *Druckman* loophole. I am not. We, as officers of the court, should be doing justice and should be stepping up in trying to do what is in the best interest of the child. Certainly, there are inconsistencies that foster inequities.

Assemblywoman Seaman:
My question is about the relocation and if that is part of the reason for this bill. Right now, the law does not address it adequately. You already answered my question, and I thank you for that. Having gone through the system, I know that sometimes the law is not clear.

Assemblywoman Fiore:
I am going to ask a question based upon my experience. You have two young parents who are not married in Las Vegas. One of the parents was trying to take the child to Utah for three or four days without consent. The attorneys involved would not allow the parent to take the child out of state without permission. The attorneys are doing this now, and it is not even law. There are unintended consequences in the courtroom and the judges do not have discretion if we, as legislators, put this into the statutes. This is scary territory.

Keith Pickard:
Certainly, what you are talking about happens. I am well aware that attorneys would tell their clients and others what they would like the law to be. Right now, the law does not address it head on. Temporary departures from the state are fairly consistently held by the trial courts and are not prohibited. Vacations usually require, and most well-written decrees will specify, that an itinerary and contact information will be provided so that the parents understand what is going on and how to contact the other party. This bill is talking about permanent relocation. Therefore, if you are talking about only two or three days, I am unaware of any judge who has prohibited it, except in certain circumstances.

Chairman Hansen:
Is there anyone else to testify in favor of the bill? [There was no one.] Does anyone want to speak in opposition of Assembly Bill 263?

Gary R. Silverman, Private Citizen, Reno, Nevada:
I have been in practice for 30 years, and all I do is divorce work. Four or five times a year, I am the lawyer in the library where often desperately poor people come in and get 12 minutes with a lawyer. I also have a routine family law practice where I deal with people from all walks of life. I have handled relocation cases for 30 years. It was because of a relocation case on behalf of my best friend that I am a divorce lawyer at all. There are two other things that I would like to point out. Relocation cases are the hardest because there can be no compromise. You are either going to move to New York City or you are not. Kansas City is not a compromise. They are very difficult cases.

Couples who are divorcing fall into two categories: They are either people who dislike their spouse more than they love their children, or people who love their children more than they dislike their former spouse. For people who hate their former spouse more than they love their children, you can legislate all day. There will be turmoil, difficulty, and ugliness. For people who like their former spouse as much as they love their children, they will never see the courtroom because they are going to get along. They will resolve their problems. On the other hand, you will be dealing with people in the middle, who are good people and are confronted with difficult problems. That is what I would like to address in this bill.

I think the bill has many merits. Although the Executive Committee of the Family Law Section of the State Bar of Nevada mulled this bill over at length, I am not sure it got the attention it deserved from all of the members of the Family Law Section. I would submit the bill has not been fully vetted by the entire Family Law Section. As we lawyers are prone to do, it is only when faced with a deadline, or having to show up in court, that we sometimes really start paying attention. However, I think that Mr. Pickard, his committee, and the people whom he worked with did as good a job as they could in good faith. I did not think any of them had an ax to grind. I am not here to question the motives of the people who are presenting this bill.

There are problems with the bill. First of all, we talk about domestic violence in section 8, where paragraph (k) of subsection 4 says, "Whether either parent or any other person seeking physical custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child." This language has been around for a long time. I have always wondered why we do not have language that simply says anybody who has

ever committed domestic violence against anybody should have the presumption run against them. Why do we qualify it this way, especially when the thinking is that domestic violence is viral? It is really not about who you commit it against, but the fact that you have committed it.

The other problem I have with the bill is the 100-mile rule. Mr. Pickard has told me in private conversations that this rule was battled back and forth among the Executive Committee. It is a compromise. They wanted a bright-line rule. In family law, bright-line rules are the exception. In family law, we rely on the judge to make a decision as to what is in the best interest of the child based on all of the facts. A bright-line rule only gets predictability, and not justice. I would submit, and I think Mr. Pickard would agree, that we ought to have a rule that if the relocation substantially impairs the ability of either parent to visit, the judge needs to take that into account. In other words, it should be on a case-by-case basis. I submit that you should kill this bill, but if not, you should strike the 100-mile provision.

After all my years of practicing law, I realize the real problem with this bill is that the bill seems to embody, or even entomb, the notion that there are two kinds of physical custody. There is joint physical custody and primary physical custody. Primary physical custody is somebody that has the child more than 60 percent of the time. They are considered the primary custodian. The other person is the secondary custodian. There are no euphemisms here; if you are primary, they are secondary. Joint physical custody means it is 50/50. The Supreme Court actually says that even 60/40 counts as joint physical custody. The dichotomy between joint and primary comes from cases at least 30 years old whereby the Supreme Court wants to establish different burdens of proof for a modification of a custody decree. Admittedly, in Supreme Court opinions, it is much for the convenience of the courts to suppress many motions for change. I question the legitimacy, but nonetheless, there is a difference in physical custodies. In the area of relocation, it is particularly important. Actually, it is the most important and the most pernicious. This is why a primary physical custodian has a much lower burden to overcome if he or she wants to move. A joint physical custodian has a much higher burden if he or she wants to move. The predicate here in a relocation is, if not the death of custody, it is the life with the possibility. As all family lawyers just learned from a case in Ely a month ago, when a parent relocates, the stationary parent essentially loses all of the best parts of custody. The relationship with the child degrades and deteriorates. We are talking about something really important.

If you accept a statute that talks about primary custody as opposed to joint custody, you would entomb that notion in the statute. Nothing is going to

change after that. Any statute that gives a leg up to the primary physical custodian is a bad idea.

After all of this talk, this is the point I want to make. If somebody comes into my office and says, "We are getting divorced, but my wife is a good gal, and I will get to see the kids all I want. I run a café, and I work 6 days a week and 12 hours a day. I cannot possibly be a joint physical custodian. She is a good gal, and we are going to work it out." She really is, and we are talking about good people. Then I say to my client, "What if your wife goes to her high school reunion and meets the flame from her senior year who now lives in Miami, where he is a successful surgeon? They reignite the flame, and she wants to move to Miami with the children, and she is the primary, physical custodian. There is nothing to stop her, and she is out of here. You do not have a fighting chance." That is the practical effect of being the primary physical custodian and, more importantly, not being the joint physical custodian. If you are the joint physical custodian, she has a much tougher time. I do not mean to be sexist about this, but this is how it is in this world. It is changing, but it is my experience that the father tends to be the stationary parent, and the mother tends to be the migratory parent. Upon realizing this scenario, my client decides he wants to be the joint physical custodian. I proceed to tell my client, "You have got to fight to be a joint physical custodian." The net effect is his life and her life are torqued. To become joint physical custodians, he has to change his life in profound ways, or she has to change her life in profound ways, or the children are spending more time with a father who is busy and sometimes disinterested.

This is not anything the law should encourage. It requires the parties to argue and fight on the front end where there may be substantial good will. Once people start talking and arguing about custody, things deteriorate very rapidly. Any bill you pass that gives any primacy to primary physical custodianship in the relocation setting is a bad idea. You are creating litigation, ill will, and conflict over children. I ask you not to do that. To me, this is the major reason this bill should not be passed.

Assemblyman Araujo:
Are there any parts of the bill that you find to be good additions to the statute?

Gary Silverman:
Not really. I think much of the substance of the bill and the substance of relocation law in Nevada is very problematic. People really need to look at the assumptions about relocation and custody that this bill makes. You should be advised about those assumptions, practicality, and application in the real world

before you pass a statute that the likelihood of change or amendment in the future is remote.

Assemblyman Jones:
Would you recommend that this is overreaching, and there is no solution? You would just throw the whole thing out. Is that correct?

Gary Silverman:
My bottom line is to throw the whole thing out until you have a chance to study it with family law attorneys and third-party laymen. I think the intentions of the bill and of the Committee were pure and good. I just think they are wrong. You can do better and make this right. But not with this bill. That would be fragmenting the effort. Two years from now, something can come out of this Legislature that people will be proud of.

Assemblyman Wheeler:
You said that in the absence of striking the whole bill, we should probably strike the 100-mile provision. I am wondering what you would replace that with, and what you base it on.

Gary Silverman:
The 100-mile provision is just arbitrary. The Committee could not decide what to do. Therefore, they came up with the 100-mile bright-line rule. The law works this way. You either give the judge discretion to look at the facts of every case and make a decision, or you make a hard-and-fast rule that applies no matter what the facts are. I guess it is okay to have a hard-and-fast rule. This is the conflict in law that has been going on since the Magna Carta, and is inherent in the law. I think it is a really good idea to have hard-and-fast rules and uniform commercial codes. Everybody understands, and people can plan and adjust. However, in the family law area, it is a terrible idea because you are talking about the entire breadth of human experience and behavior. Let the judge make the call. One hundred miles may be too short, or it may be too long. The facts will tell. My amendment would say the judge can decide if the move will substantially impair any meaningful visitation. If it will do that, the judge should listen to all of the facts and then decide. Hypothetically, if my wife moved to Fallon with our three children and I am a working stiff that gets off at 5 p.m., I would see an eighth of the baseball games. I would see half of the piano recitals. Even 70 miles is a severe impairment of visitation and parenthood. Do not make a bright-line rule. Give the judge the power to look at all of the facts and make a reasoned decision, meaning he or she has to write out the reasons for why they are making the decision, which would be reviewable by the appellate court.

Assemblywoman Seaman:
If someone wanted to fight to get their children back if the other parent relocates, what would that cost?

Gary Silverman:
I could not afford it. It would be very expensive. Relocation cases are the most expensive and difficult.

Assemblywoman Seaman:
Knowing that, would this let them have that discussion beforehand so that they could work it out?

Gary Silverman:
Absolutely. One of the problems is we live in a world where the parents cannot get along. They have never settled their hash from the divorce. In many ways, they still act immaturely. What do we do? We send the kids to counseling. What sense does that make? That is how we do it.

Assemblywoman Seaman:
That is my point. This bill would make it a little bit better for the children.

Gary Silverman:
I am not sure that is the case, and I am not sure this bill helps the children that much.

Chairman Hansen:
Seeing no further questions, thank you very much for your testimony.

Roger Harada, Private Citizen, Reno, Nevada:
As the Committee may already be aware, I am a practicing attorney for the last 21 years, and primarily in family law for the last 12 years. I am in opposition to this bill. I am not going to get into as much of the specifics as Mr. Silverman did. I can tell you that in reviewing this proposed legislation, I have had active communications with Mr. Pickard, who is acting as a bit of a Don Quixote. He is the only person who is taking up the reins pointing out the inconsistencies in the law which needs to be fixed. However, I think his motives for taking it on were rooted in the *Druckman* decision, which I do not necessarily agree is a bad decision. I just do not see it as needing a fix as much as he would portray.

Although I have been practicing family law for over a dozen years, this is a personal bill for me. I can completely identify with some of the sentiments of wanting to create a fix in relocation law, but this is not as well thought out as it

should be. The bill has not been worked up by a committee. It is mostly the work of Mr. Pickard. I applaud his efforts, but I think he is going too far.

After I graduated college in 1981, I was accepted to law school. I was heading to Arizona State University. About a week before I was ready to leave for law school, my wife told me she was not going with me. At the time, we had two children. We had one between us, and there was one stepchild for her, which was my son for whom I had custody. When my first wife found out that my second wife was not going with me to Arizona, she did not give me the permission, under statute, to relocate with my child. I ended up going to law school, and it was a very difficult decision. As a matter of fact, I ended up driving halfway down and I turned back around. It was that miserable of an experience being without my kids. Three distinguished people who were friends of mine advised me not to give up my future. Those three people were Robert Fahrendorf, who is a major principal in a law firm; Scott Freeman, now a sitting judge; and Brian Sandoval, whom I went to elementary school with. They all told me to go to law school and to move on with my life, and I did. I eventually did go to law school and things worked out. It was the most heart-wrenching decision I ever made to leave my son and wife behind and basically give up custody of my other son temporarily for a year. This law is not a good relocation fix. If it were, I would be all for it. I look forward to the opportunity of working with many attorneys, including Mr. Pickard, in crafting a more comprehensive repair to our family law statutes, globally. This one is way too much, way too fast, and way too not thought out. I oppose it.

Chairman Hansen:
Is there anyone who would like to testify in the neutral position? In the interest of time, I am going to have to ask you to keep your testimony to five minutes. Ms. Provost, keep in mind that the Committee has previously received your written testimony (Exhibit K). I have read it personally, and I think that some of your ideas are excellent. If you have something to add, please proceed.

Katherine Provost, Private Citizen, Clark County, Nevada:
Although I am the immediate outgoing Chair of the Family Law Section of the State Bar of Nevada, I am not here today in that role. The reason why is because the State Bar of Nevada's process about whether or not the section can take a position on a bill requires that the bills be vetted by a date in August. This particular bill, while it was provided to some members of our section for commentary, did not come in in time for it to be vetted or approved through the State Bar process. To answer the Assemblyman's question from earlier today as to why the committee is not taking a position on this bill, the answer is because it was not vetted early enough for there to be an official State Bar of Nevada, Family Law Section position on the bill.

I am also a member of the Nevada Justice Association's (NJA) Legislative Committee. When you heard today that this bill had been bantered back and forth and presented to members of the committee, it is actually the members of the NJA's Legislative Committee that Mr. Pickard has been working with. The members of that committee are the ones who proposed the revisions to sections 5 and 6 of this bill, taking the one-year requirement for cohabitation out of the bill and replacing it with language dealing with meaningful relationships in the children's life. We are also those who proposed the amendment that Mr. Pickard spoke of dealing with the presumption for joint physical custody which should not apply if there has been an adjudication of a domestic violence charge. As a family law practitioner, it is just not realistic to have a joint custody arrangement that is workable if you have domestic violence undertones.

Finally, the last comment that I would like to make is with respect to the 100-mile rule. I think that there is some confusion. What this bill proposes to do is to place a requirement that there be some type of a court proceeding brought before a parent relocates within Nevada. Mr. Pickard said it was not a wholly arbitrary number, but it is a number that really does not have a true foundation. It can be any number between 0 and 100 or between 0 and 1,000, but it would be the first time that there would be a requirement for a parent to seek court approval or the other parent's approval prior to relocating within the state. I believe that is something that is important to occur. Our state is too large for there not to be some type of parameter where if parents cannot agree, the court can make the decision. I thank you and will pass now to Mr. Willick.

Marshal S. Willick, Private Citizen, Las Vegas, Nevada:
I have been a practicing family law attorney in Nevada for over 30 years. I am the former chair of Nevada Bar Family Law Section, former president of the Nevada Chapter of the American Academy of Matrimonial Lawyers (AAML), and the primary author of the *Nevada Family Law Practice Manual*. I am an academic expert and referral source on family law in Nevada. I am here to urge the Committee to do something difficult. That is to look at the big picture. You have already seen and will continue to see two categories of family law bills. They are those that have been submitted for examination and debate by the Family Law Section and by the academy chapter, and those that have not. Those that have been submitted for review and debate have been reviewed and discussed by hundreds of lawyers representing those on both sides of each one of these questions. When it goes through that debating process, you can rest assured that those people who have any sort of an ax to grind will face those on the other sides of those questions in real-life cases. If you get a bill that comes out of that process as a recommendation by the section, approved by the Board of Governors, you can be assured that the overall opinion of the

people backing the bill is that it is a necessary improvement to the process or a correction of known problems. For those that have not been submitted and debated, I think the Committee should be skeptical of the motives or the potentials of the people who are submitting the legislation. They are sometimes, and too often, people trying to line their own pockets or are trying to get a special advantage for themselves or people like them and their divorces. You have already seen some of each of those this session.

Assemblywoman Fiore and Mr. Pickard both used the term unintended consequences. It is the most important concept that has been discussed here today, regardless of the motivations of the people proposing unvetted, undiscussed, undebated bills. Whenever the Committee sees bills, I ask you to be absolutely sure that you understand all of the unintended consequences of the proposal that you are discussing. If not, you should defer action on it until those people who can see some of those ramifications have debated and reported back to you what those expected results are going to be. If you go tinkering with alimony law, you are going to do a great deal of damage to a great number of people that you are not even thinking about when looking at the subject matter immediately before you. You cannot see the ramifications unless you have the time to go over all of the possibilities. If you were going to touch this bill at all, you should fix the typo.

[Mr. Willick also provided written testimony (Exhibit L).]

Chairman Hansen:
Mr. Willick, I am sorry but we are out of time for this hearing. I assure you that I will seriously consider all of your recommendations. I appreciate the time you have taken today to come and testify. Assemblyman Stewart, will you come back up for a brief moment before we close up the hearing?

Assemblyman Stewart:
I assure you that we are not Don Quixote tilting at windmills. We are here to try to fix a problem. Maybe this does not completely fix it, but nothing has been done previously. I would challenge the opponents of this bill to get together with Mr. Pickard and, if discussions since July are not enough, keep having discussions in order to get this problem fixed so that fathers and mothers can watch the full ball game and not an eighth of it as Mr. Silverman noted.

Chairman Hansen:
At this time, we will close the hearing on Assembly Bill 263. We will now open the hearing on Assembly Bill 262. Mr. Ohrenschall is ill today, and he has asked Mr. Robert Langford to present the bill.

Assembly Bill 262: Revises provisions concerning the withdrawal of certain pleas. (BDR 3-124)

Robert Langford, Attorney, Las Vegas, Nevada:
I have been practicing law in Nevada for 25 years. For the first seven and a half years, I was with the Clark County District Attorney's Office, first assigned to the Appellate Division, and later as a trial deputy. For the subsequent years, I have been primarily involved in criminal defense. This bill seeks to make what was law up until last summer when the Nevada Supreme Court decided that the legislative intent 20 years ago was to get rid of this final bite of the apple for someone to correct a manifest injustice. It is important to recognize that this was a statutory remedy that was on the books for many years and recognized by the Nevada Supreme Court as a viable remedy for somebody seeking to correct a manifest injustice. What is a manifest injustice? It is typically described as a result that shocks the conscience. It is something that is obviously so unfair and unjust that something needs to be done about it.

In my private practice, I filed probably six cases. Out of the six, I was only successful in two. The first was a person who had sustained a domestic violence conviction when he was considerably younger. In the course of growing older, he became a prominent citizen of Clark County, and he started collecting guns. When the federal regulations were changed to prohibit the possession of firearms for someone who had a domestic violence conviction, he had purchased a new firearm and went down to register it. He was told, not only can you not register this firearm, you cannot possess this firearm, nor can you possess any of the firearms that you have. He was going to lose a valued constitutional right to possess firearms. His conviction had been many years prior, and he was never in custody for that particular crime. Therefore, the remedy of a petition for writ of habeas corpus was unavailable to him. In order to do a writ of habeas corpus, which literally means the body is being held unlawfully, you would have to be in custody. If you are not in custody, you cannot use that remedy. The only avenue we had was to show that he had not been advised by an attorney. There were circumstances that supported that in the record. It would further have to be proved that this was a manifest injustice because he was losing a constitutional right.

When I filed that motion, the state had an opportunity and the right to assert the defense of laches, which says the passage of time is so great that we have lost our ability to prosecute the case again. If you motion to withdraw a guilty plea and it is granted by the court, it does not mean that you are no longer susceptible to being prosecuted. In fact, it means we start over with the prosecution. If the State of Nevada comes in and says, we no longer can find our witnesses, we no longer have our physical evidence, we are prejudiced by

the granting of this motion in that we cannot start that prosecution over again, the judge can deny granting the motion to withdraw the guilty plea.

Someone asked me the other day if this is just another bite at the apple. Yes, it is another bite at the apple. It is an apple that is at the bottom of a barrel filled with water four feet deep. That is how difficult it is to be successful in one of these cases. In this particular case, the victim in the case was my client's wife. The state could have proceeded. We crafted a plea that satisfied everyone. In the end, my client was able to keep his Second Amendment right to bear firearms.

The other successful case involved a U.S. Air Force sergeant. It was a similar situation. He had been involved in a drunken argument with his wife. The police were called. He admitted he pushed her to get her out of the way. He was arrested, went to court, but his attorney was willfully unprepared the day of the trial. He had not subpoenaed anybody to be a witness to show the wife was the primary aggressor in that particular case. I was able to show that he was not adequately represented and that there were grounds for ineffective assistance of counsel. Why is this a manifest injustice that this particular person sustained this conviction? He was a soldier and was about to be deployed to Afghanistan. Under the law, if you have been convicted of a domestic violence charge, you cannot be a soldier. He was told, not only are you not going to be deployed, but we will give you a desk job until your enlistment is up, and then you are done with the Air Force. He had been decorated prior to this. They wanted him in the Air Force. We wanted him in the Air Force.

You may hear we are going to open the floodgates with this particular bill. This bill has been Nevada law and has been available as a remedy for decades. I can almost count on one hand the number of times I utilized it as a criminal defense attorney. Therefore, this is an exaggerated argument that might be made. This is important. For a manifest injustice, you have to show constitutional reasons why you should be allowed to withdraw your guilty plea. In the end, if the State can show a judge they are unfairly prejudiced by the guilty plea being withdrawn, you lose. You just lose, and then it is truly over.

Assemblyman Nelson:
You and I have had a nice discussion about this bill. I just want to make sure that I understand that to prevail on a motion to withdraw a plea, you would have to prove that there was ineffective assistance of counsel or a manifest injustice, et cetera. Is that true?

Robert Langford:
Yes. In fact, you have to show both. You must show a constitutional right was violated and the result of that right being violated was a manifest injustice which is actually different than a habeas corpus petition. For a habeas corpus petition, you only have to show that your constitutional right was violated.

Assemblyman Jones:
You said there was legislative intent 20 years ago. Can you give a little more reason why the court decided that they did not want to allow this right anymore?

Robert Langford:
I cannot. I can hazard a guess that the Supreme Court feels like their resources are stretched to the limit. The rare cases that come before the court are difficult because laches is a somewhat subjective concept, and so is manifest injustice. It is so rare that it happens. I cannot speculate really on why they did it. That is the only guess that I have. They literally went back and overturned their own decision. They had specifically recognized in 2000 that it was a remedy that survived the unification of post-conviction remedies. That remedy survived, and they specifically held that it is still available as long as you show a manifest injustice. Fourteen years later, they changed their mind about what the legislative intent was, and it is troubling.

Assemblyman Gardner:
Section 2 says "... pending on or after June 12, 2014." I would like to know why that date. Also, filing this motion is after a lot of work has already been done in this case. If we have already gone through the conviction and sentencing, why would we allow it then? The law already says you can do it up until you get the conviction.

Robert Langford:
Many times, a lot of work has not been done on the case, and it is primarily why you wind up with a manifest injustice. This particular remedy is designed to address those people who have entered a guilty plea. Therefore, it is not someone who has gone to trial. It is someone who entered a guilty plea. It is also someone who is no longer in custody. Taking this particular remedy away, if you are not in custody, you have no other remedies. You cannot file a writ of habeas corpus. That is no longer available to you once you are out of custody. You are not challenging the unlawful detention of your person. These occur when no work has been done. It is typically someone comes into court, pleads guilty without the advice of counsel, or the advice of counsel has been so inadequate that we end up with a manifest injustice.

Assemblyman Gardner:
The actual text in the bill says this is after a sentence is imposed. It is my understanding that the sentence is imposed at the very end. You can plea at the very beginning; that is very common. Sentence is at the end of the case and not at the beginning. I am wondering how there can be no work done when the sentence is at the end.

Robert Langford:
It is the last thing that you do. Let us say the person is sentenced to a suspended sentence and does not have any jail time. If we realize that at some point in time down the road, after sentencing, that there is a manifest injustice, without this bill in place, there is no remedy for the person to seek to overturn that manifest injustice.

Assemblyman Gardner:
Why is the starting date June 12, 2014?

Robert Langford:
I believe that is to assist those cases that happened after the *Harris* decision. We have had the ability to do this for thirty years. Since the June 2014 decision in the case of *Harris v. State 130 Nev. Adv. Op.47*, until today, it was not available. Let us say, five years from now, you end up with a person who is in the same position as my other two clients were, but they happened to have been convicted in August 2014; there is nothing they can do.

Chairman Hansen:
Is there anyone else who would like to testify in favor of this bill? [There was no one.] Is there anyone who would like to testify against Assembly Bill 262?

Kristin Erickson, representing Nevada District Attorneys Association:
Although this is a relatively short bill, it does have some troublesome consequences. Chief Deputy District Attorney Terry McCarthy is here with me today. He supervises our appellate division. He has been both a criminal defense attorney and in the Washoe County District Attorney's Office Appellate Division for quite a number of years. With that, I would like to turn it over to Mr. McCarthy.

Terry McCarthy, Chief Deputy District Attorney, Appellate Division, Washoe County District Attorney:
There are a number of problems with this bill. Basically, it is not needed, and it would work great mischief if it were passed. I would first point out that 95 percent of all convictions are by pleas. We seem to be providing an extra benefit for those that plea which is not available for those who stand trial.

That does not make a lot of sense to me. We have a comprehensive scheme in *Nevada Revised Statutes* (NRS) Chapter 34. It was designed to be a comprehensive scheme for a collateral attack on a criminal conviction. We had this additional method for 14 years; such motions rarely make sense. More importantly, the comprehensive scheme we have now in Chapter 34 of NRS already has an exception built in for manifest injustice. All the procedural bars that have been enacted by this Legislature, like the timeliness or only one petition, can be overcome upon a demonstration of a manifest injustice. We already have what this proposes to do. What this does not say is that any of those limits would apply. For instance, there is a suggestion that this should apply only to those who have been convicted of misdemeanors and are no longer in custody. Therefore, the habeas corpus petition is not available. That is not in this bill. It does not say that anywhere.

From my experience, if this bill is enacted, I can expect to get five or six of these from prisoners every day. It will have nothing to do with their plea, but I will get them anyway. If you are going to consider it, consider it for what it is being proposed for. Put in limitations saying it is only available to those who cannot seek a petition for writ of habeas corpus because they are not in prison. I would suggest that there are other remedies available that would be more appropriate. I have seen it before with the people who have lost their ability to carry a gun. They would go to the Nevada Board of Pardons Commissioners, who have the authority to restore that right. We do not need to have judicial acts to fix everything. There are plenty of people convicted long ago of domestic violence and other charges, and they wish they were not convicted. Frankly, the prisons are full of people who wish they were not convicted. That does not change the history of it.

I would suggest if the Legislature were to consider it at all, put some time limits on it. Have it available only to those that are not in custody, and only to those who have no other remedy available. I would have some pleading rules. Currently, when you file a habeas corpus petition, under NRS Chapter 34, you have to be specific. People have to specify what the problem is and how they want it fixed. There is absolutely nothing in this bill that imposes that limitation on people who want to file a motion. They are not going to come from reasonable lawyers. In fact, most of them are not. They will come from prisoners. I appreciate being fully employed, but the taxpayers do not. Taxpayers do not need this. What the people of this state need is an interest in the finality of judgments. There ought to be some finality to a criminal case. This would destroy it. There are no limits in here on the number of times one may file this motion. There are no limits on what may be grounds for granting it. By the way, the laches mentioned earlier do not appear in this bill either. I suppose the Supreme Court might incorporate that, but because it is being

newly enacted, I would say it starts at ground zero and the decision allowing laches as a defense no longer exists. If you are going to consider that, please put that part back in too.

In summary, I am opposed to the bill because it is unnecessary and does not do what it purports to do. It is contrary to society's interest in the finality of judgments.

Chairman Hansen:
You mentioned that this was available for 14 years. Do you have any idea how many cases were actually brought forward under that existing law?

Terry McCarthy:
Yes, it was constantly. About half of my job involved post-conviction litigation. Actually, half of it is appeals and half is post-conviction litigation, which is a combination of habeas corpus petitions, motions to correct an illegal sentence, motions to withdraw the plea, and petitions for writ of coram nobis. Prisoners avail themselves of these remedies. The most common response was, we already ruled on this when you filed your habeas corpus petition. We get motions to withdraw pleas with some regularity.

Chairman Hansen:
I see no further questions for you. Ms. Erickson, do you have anything to add at this time?

Kristin Erickson:
No, thank you.

Chairman Hansen:
Is there anybody else who would like to testify in opposition to A.B. 262? [There was no one.] Is there anyone in the neutral position? Seeing no one, Mr. Langford, come back up to tie up any loose ends.

Robert Langford:
I understand the issue of prisoners doing this. It does not apply to somebody who is in custody and has the ability to do a post conviction. Should we say we want someone in prison even if it is a manifest injustice? What they are saying is it is okay to have a manifest injustice because we want finality. We want finality of justice, and not finality of injustice.

Secondly, while I understand the time limits, I think it would actually work to the detriment of the state. If you say you can only file this motion for a period of five years, that might create a presumption that for five years, the state

cannot assert the defense of laches. Of the six cases I had, four of them I lost on the grounds of laches. I do not think the judge ruled incorrectly. There was a manifest injustice, and I was able to show that. There was a constitutional right that had been violated, and I was able to show that. The state came in and I believe they made a good faith effort to find witnesses, but they could not find them. They said, we will not be able to proceed on this prosecution. It is unfair to the citizens of the State of Nevada. I believe the judge ruled correctly and would not allow the guilty plea to be withdrawn. There are many safeguards.

Lastly, this is not starting over from square one. There is case law well established. It is one of the reasons that this proposed statute was done this particular way. That is basically to tell the Supreme Court that the legislative intent for a long time now has been to have this particular remedy still available. This means that all of the Supreme Court case law dealing with laches and manifest injustice remains in place.

Chairman Hansen:
We will now close the hearing on A.B. 262, and open it up to public comment. Is there anyone who would like to address any issue at this time? Seeing no one, we do have some Committee business to address.

The deadline for getting bills out of this Committee is April 10, 2015. Therefore, we are trying to have as many bills heard as possible. We are going to plan to have a night meeting next Tuesday, April 7, 2015. I am just giving you some advance notice. In addition, we have a work session coming up on March 31, 2015. If you have any bills that you would like to have heard at the work session, you should make sure all of your amendments are in to Diane Thornton. If your amendments do not show up, your bill will not go anywhere. Additionally, Assemblywoman Seaman has some comments.

Assemblywoman Seaman:
The Judiciary Subcommittee is meeting for the second time this evening at 6 p.m. here in Room 3138. We are hearing five bills tonight. Next Thursday, April 2, 2015, there will be an additional Subcommittee meeting.

Chairman Hansen:
We are going to be hearing bills from 8 a.m. to 11 a.m. each day. Today was a little break, but in order to try to hear as much as reasonably possible, plan on a three-hour hearing each day. With no further Committee business, this meeting is adjourned [at 10:35 a.m.].

RESPECTFULLY SUBMITTED:

Lenore Carfora-Nye
Committee Secretary

APPROVED BY:

Assemblyman Ira Hansen, Chairman

DATE:

EXHIBITS

Committee Name: Committee on Judiciary

Date: March 26, 2015 **Time of Meeting: 8 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 322	C	Assemblyman Sprinkle	Toddler inhales video
A.B. 322	D	Assemblyman Sprinkle	Proposed amendment
A.B. 322	E	Michelle Gorelow, March of Dimes	Written Testimony
A.B. 322	F	Dr. Joseph Iser, Southern Nevada Health District	Written Testimony
A.B. 322	G	Kacey Larson, Private Citizen, Carson City, Nevada	Written Testimony
A.B. 322	H	Hannah Sizelove, Private Citizen, Douglas County, Nevada	Written Testimony
A.B. 263	I	Keith Pickard, Attorney, Henderson, Nevada	Written Testimony
A.B. 263	J	Keith Pickard, Attorney, Henderson, Nevada	Druckman v. Ruscitti case
A.B. 263	K	Katherine Provost, Private Citizen, Clark County, Nevada	Written Testimony
A.B. 263	L	Marshal Willick, Private Citizen, Las Vegas, Nevada	Written Testimony