

**MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY**

**Eightieth Session
February 14, 2019**

The Committee on Judiciary was called to order by Chairman Steve Yeager at 8:03 a.m. on Thursday, February 14, 2019, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 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/80th2019.

COMMITTEE MEMBERS PRESENT:

Assemblyman Steve Yeager, Chairman
Assemblywoman Lesley E. Cohen, Vice Chairwoman
Assemblywoman Shea Backus
Assemblyman Skip Daly
Assemblyman Chris Edwards
Assemblyman Ozzie Fumo
Assemblywoman Alexis Hansen
Assemblywoman Lisa Krasner
Assemblywoman Brittney Miller
Assemblywoman Rochelle T. Nguyen
Assemblywoman Sarah Peters
Assemblyman Tom Roberts
Assemblywoman Selena Torres
Assemblyman Howard Watts

COMMITTEE MEMBERS ABSENT:

Assemblywoman Jill Tolles (excused)

GUEST LEGISLATORS PRESENT:

None



STAFF MEMBERS PRESENT:

Diane C. Thornton, Committee Policy Analyst
Bradley A. Wilkinson, Committee Counsel
Traci Dory, Committee Secretary
Melissa Loomis, Committee Assistant

OTHERS PRESENT:

Aaron D. Ford, Attorney General
Lisa Rasmussen, representing Nevada Attorneys for Criminal Justice
Scott L. Coffee, Deputy Public Defender, Clark County Public Defender's Office
Holly Welborn, Policy Director, American Civil Liberties Union of Nevada
John J. Piro, Deputy Public Defender, Clark County Public Defender's Office
John T. Jones, Jr., Chief Deputy District Attorney, Clark County District Attorney's Office; and representing the Nevada District Attorneys Association
Marc Schifalacqua, Senior Assistant City Attorney, City Attorney's Office, City of Henderson
Brandon P. Kemble, Assistant City Attorney, City Attorney's Office, City of Henderson
Andy Moore, Deputy City Attorney, City of North Las Vegas
Craig Madole, representing Nevada Chapter of the Associated General Contractors of America, Inc.
Dagny Stapleton, Executive Director, Nevada Association of Counties
Alex Ortiz, Assistant Director, Clark County Department of Administrative Services
Shani J. Coleman, Deputy Director, Government Affairs Executive, Office of Administrative Services, City of Las Vegas
Omar Saucedo, representing Las Vegas Valley Water District; and Southern Nevada Water Authority
Jamie Rodriguez, Government Affairs Manager, Office of the Washoe County Manager
Gary Milliken, representing the Nevada Contractors Association
Warren B. Hardy, II, representing the Associated Builders and Contractors of Nevada; and Nevada League of Cities
J. Daniel Yu, Assistant District Attorney, Office of the District Attorney, Carson City
Tyre L. Gray, representing the Las Vegas Metropolitan Chamber of Commerce
Douglas V. Ritchie, Chief Civil Deputy District Attorney, Douglas County District Attorney's Office
Lindsey Anderson, Government Affairs Director, Washoe County School District

Chairman Yeager:

[Roll was called. Committee protocol was explained.] We are going to take things out of order this morning. We will do the work session first, then an overview presentation from the Office of the Attorney General, Assembly Bill 109, Assembly Bill 101, and conclude with public comment. At this time, I will open our work session on Senate Bill 143.

Senate Bill 143: Repeals, revises and reenacts provisions relating to background checks for certain sales or transfers of firearms. (BDR 15-755)

Diane C. Thornton, Committee Policy Analyst:

As nonpartisan staff, I am not here to advocate for the issues, but to assist members with the policy issues brought before this Committee.

Senate Bill 143 repeals, revises, and reenacts provisions relating to background checks for certain sales or transfers of firearms ([Exhibit C](#)). It was sponsored by Senator Atkinson and heard in a joint meeting of the Senate Committee on Judiciary and the Assembly Committee on Judiciary on February 12, 2019.

This bill repeals, revises, and reenacts provisions relating to background checks on certain firearm sales and transfers that were approved by voters at the 2016 General Election.

The measure provides that, with certain exceptions, a person who does not hold a license as a firearm dealer, importer, or manufacturer cannot sell or transfer a firearm to another unlicensed person unless a licensed dealer first conducts a background check on the buyer or transferee. The licensed dealer is to contact the same agency he or she would if selling or transferring the firearm from his or her own inventory.

Upon receiving a request for a background check, the Central Repository for Nevada Records of Criminal History or other appropriate agency will conduct the background check in the same way it would for a sale or transfer from the licensed dealer's own inventory. The agency conducting the background check may not charge a fee for conducting a background check. However, a licensed dealer may charge a reasonable fee for conducting a background check and facilitating the sale or transfer.

A person who sells or voluntarily transfers one or more firearms in violation of the provisions of this measure is guilty of a gross misdemeanor for a first offense and a category C felony for a second or subsequent offense. There are no amendments for this measure.

Chairman Yeager:

I am looking for a motion to do pass S.B. 143.

ASSEMBLYMAN FUMO MOVED TO DO PASS SENATE BILL 143.

ASSEMBLYWOMAN COHEN SECONDED THE MOTION.

Members, before we take the vote, I am going to allow discussion on the motion. In the interest of time, I am going to limit members to two minutes for discussion. I think it is pretty likely that members are pretty solidified on where we are with this particular bill after almost eight hours of hearings on Tuesday, but I will give members the chance to make any comments before the vote.

Assemblyman Roberts:

I just have a quick policy question. I noticed on the bill that there was no fiscal note, and the Central Repository for Nevada Records of Criminal History (Central Repository) is going to be conducting the checks and no fee will be charged. That will increase their workload. It seems to me that there may not be sufficient staff and therefore there may need to be additional staff. So, I think the fiscal note may be in error. Could I get clarification on that from the legal standpoint?

Bradley A. Wilkinson, Committee Counsel:

There was a fiscal note prepared by the Central Repository. I do not know if they want to speak to that, but that is what was submitted.

Assemblyman Roberts:

Is that on the Nevada Electronic Legislative Information System (NELIS)?

Bradley A. Wilkinson:

The fiscal note is on NELIS.

Chairman Yeager:

Obviously that will need to be resolved in some fashion, if it has not been already. But, as you know, this Committee is a policy committee so fortunately for us, we do not have to deal with the money side of any of these bills. We get to decide on the policy, and then whatever process is in place to resolve that fiscal note will be undertaken. Good question, thank you for asking.

Assemblywoman Hansen:

Thank you, Chairman, for giving us this opportunity. As a freshman legislator I have been a little shell-shocked with a bill of this magnitude to drop so quickly and to be pushed forward through a process that I feel has been extremely rushed. But, on the Assembly side, I am very proud and appreciative that Chairman Yeager and Speaker Frierson are giving us the process that we have right now to have a work session and a floor session without suspending the rules. With that being said, my goal in coming to the Legislature was to work on effective legislation and find solutions. I have mentioned that I am a mother of 8, a grandmother of 18, a concealed weapons permit holder, and I do not take that lightly. I wanted to own a gun, to be familiar with it, to not be a victim, and to be able to protect myself. No matter where we are on this issue, there are great people in this room whom I have come to respect and these are the hard things. This is when you have to put aside your partisanship and decide what is going to work, what is going to be effective.

As I have reviewed and looked over this bill, there are too many flaws to be on board. I also want to make it clear that no matter what side of the issue we are on guns, nobody has cornered the market on compassion, nobody has cornered the market on being so horrifically disturbed by mass shootings, nor by any kind of violence that takes the lives of innocent people. It has all been said that we are trying to do the will of the people and this vote was about a 0.5 percent margin. I would remind the body that in 2014 the will of the people

spoke on Question 3—78 percent said no—yet this body went against the will of the people. I do not know if that is necessarily why we are here, but people are suspicious. They have a right to be suspicious. I was told by the majority leader during the hearing that this was not an act, not a bill to take away our gun rights or to infringe on our Second Amendment rights. Yet we see layer upon layer of legislation every single session that affects business and industry, guns, and personal liberties every two years, and then we have a process that is rushed as this has been. Then we wonder why people are suspicious. I have to be a no on this, and thank you for the opportunity to be able to state my opinion.

Assemblyman Roberts:

I am about law enforcement and background checks and keeping guns out of criminals' hands. There are some flaws in the bill. I just do not believe it will be enforceable by law enforcement. I do not believe that the tools are there for them to adequately address people who circumvent the law. The ballot question in 2016 failed in my district by 10 percent. Overwhelmingly, I have had a lot of opposition emails and phone calls, and not very many for it. Therefore, I will be voting no on this, and I will be making a statement on the floor.

Assemblyman Edwards:

Could I ask a quick question before I make a statement? It is a clarification question. Does this bill ultimately require that when you bring your gun to a gunsmith, there has to be a background check when you give the gun to them because you will be leaving it in their exclusive control? And do they have to do another background check when you come to pick your gun up? It looks like that to me. I am just wanting to get some clarification.

Bradley A. Wilkinson:

In looking at the bill right now, I need to look a little further to see if there is any exemption as to whether that would constitute a transfer or not.

Assemblyman Edwards:

That is what I am looking at as well. If it is a transfer, since I believe once it goes into the exclusive possession of one, then you actually have to do the background check each time.

Chairman Yeager:

I am not sure we are going to have an answer for you, but I would just ask, Is that going to change your vote whether that is a yes or no?

Assemblyman Edwards:

Probably not.

Chairman Yeager:

I will let you resolve that after the fact. I do not want to put legal counsel on the spot. I think more of an analysis on that would need to be done. The question is out there, but feel free to follow up directly with legal. I am assuming you would like to make a statement before the vote.

Assemblyman Edwards:

Yes. I want to say that this bill is not what the voters approved. It is a much greater overreach influenced by California and New York. I do not believe it is suitable for Nevada. I think we had the opportunity to do that if we had been a bit more patient and a bit more bipartisan to actually make this bill something that would be workable, enforceable, and good for our state and our people. I do not think that you can justify having this as a background check when you are, in fact, requiring that a background check be done in the woods, not at a gun show. What this effectively does is make every square inch of Nevada a gun show 24/7. That is not what the people wanted. I think there is a section in here that talks about the military, and I know that they are trying to make an exemption so that the military does not get harmed. However, the people who wrote this bill do not understand the military and when you are on active duty and when you are in your official role as an active duty member. Because of that, there is great potential to do harm to our military personnel whether they be active duty, reserve, or National Guard. I think we have failed to make sure that the adequate protections were included.

The final thing I will say, there are so many terms and definitions that have not been clarified in legal terminology so that they actually know what is going to be legal and what is going to be illegal, what constitutes a transfer, what does it mean, what are the parameters. Without those kinds of clarifications, we put our people at risk, and I do not think that is what we are supposed to be doing here. So the bill is still as flawed today as it was on Monday when it was introduced. I am disappointed that the Senate did not approve the amendment which would have fixed many of the errors, and I think we have a long way to go before we actually do right by the people in this arena. So, I will be a no, and I would encourage everyone else to be a no, because this is just not what the people wanted.

Assemblywoman Backus:

The first thing I did when I got S.B. 143 was compare it to Question 1. When I ran for this office, I committed to my district, Assembly District 37, which is in northwest Las Vegas close to Assemblyman Roberts. I wanted to see how my voters had voted for Question 1 as I committed to be their representative. They voted in the majority more so than the whole state of Nevada, and I am committed to represent my voters in Assembly District 37 today. I am also an attorney in private practice and I kept listening to everyone's challenges to this bill and, as a practitioner who appears before our courts, I understand that if any words are not defined in the statute, they will get their plain and ordinary meaning consistent with the statute. And with this, I feel comfortable giving my full support behind S.B. 143, which is almost verbatim to Question 1 with some clarifications that were consistent with former Attorney General Laxalt's opinion.

Chairman Yeager:

Are there any further comments from members? [There were none.] Before we take the vote, I just wanted to make a couple of comments of my own. I did have a chance to go back and look at the results of Question 1. In 2016, 62 percent of the voters in my district, Assembly District 9, voted for Question 1. Throughout this process, we obviously heard a lot of testimony on Tuesday. I believe it was about 8 1/2 hours. I can tell members that I do not

think we will hear another bill this session that we are going to hear that length of testimony. In fact, I went back and looked at Senate Bill 221 of the 77th Session, which was the earlier version of this bill, and even that bill did not get that amount of time for hearing when you combined the Senate Health and Human Services and Assembly Judiciary Committees. Throughout this process, I have heard from constituents, and by about a 4-to-1 margin since this bill was introduced, that they want Question 1 enforced as they voted in 2016. I am under no illusion that this bill is going to solve our gun violence problem. It is not. But we do know that over the last three years in the state of Nevada, over 5,000 transactions have been nullified by background checks here in Nevada. If you do the math on that, that is about three a day where someone attempts to obtain a firearm and they are then excluded from obtaining that firearm. We cannot prove a negative. We do not know what would have happened if those individuals were able to get a firearm. I am confident that enacting this legislation is going to save lives, even if we are not able to quantify that. So, consistent with the will of the voters of the state of Nevada and certainly the will of the voters in Assembly District 9, I will be voting this out of Committee and look forward to supporting it on the floor.

THE MOTION PASSED. (ASSEMBLYMEN DALY, EDWARDS,
HANSEN, KRASNER, AND ROBERTS VOTED NO.
ASSEMBLYWOMAN TOLLES WAS ABSENT FOR THE VOTE.)

[A letter in opposition to S.B. 143 was submitted by Daniel Reid, Western Regional Director of the National Rifle Association of America ([Exhibit D](#)).]

We have the honor of having with us today our Attorney General, Aaron Ford. Mr. Attorney General, I want to welcome you to the Assembly Judiciary Committee.

Aaron D. Ford, Attorney General:

I am here today to give you an overview of our office. The Office of the Attorney General consists of 352 dedicated, hardworking individuals who are committed to enforcing Nevada law and upholding justice for the protection and benefit of our citizens ([Exhibit E](#)). My senior management team members are:

- Caroline Bateman, First Assistant Attorney General;
- Christine Jones Brady, Second Assistant Attorney General;
- Heidi Parry Stern, Solicitor General;
- Rachel Anderson, General Counsel;
- Jessica Adair, Chief of Staff; and
- Kyle George, who will be working on special projects on behalf of the office.

As the state's chief law enforcement officer, the Attorney General represents the people of Nevada before state and federal trials and appellate courts in criminal and civil matters; serves as legal counsel to all state officers, state departments, most state boards and commissions; and assists the 17 district attorneys of the state.

Our office is composed of several divisions with specific assignments related to the Attorney General's statutory responsibilities. The Administration Division is responsible for all administrative matters pertaining to the office, including personnel and fiscal matters, information technology, grant administration, constituent services, and media relations.

On the second day on the job, I had an all-hands-on-deck meeting with all offices to discuss my belief that one of the core missions of our office is justice. Several divisions in the Attorney General's Office are dedicated to one of the most sacred responsibilities of the office: seeking justice for victims of crime, protecting vulnerable Nevadans, and simply treating all people with dignity and respect.

Our Criminal Prosecution Division is led by Chief Michael Kovac. Some of the areas in which we have primary jurisdiction are insurance fraud, workers' compensation fraud, securities fraud, mortgage fraud, sex trafficking, cybercrime, public integrity cases, crimes that occur in the Department of Corrections' facilities, and financial fraud, including instances of financial fraud and elder exploitation. In fact, over this past year alone, this division has obtained a felony guilty plea from four defendants in the state's largest-ever elder exploitation case. It has obtained a felony guilty plea in a multimillion-dollar securities fraud case. It has filed charges against another defendant who perpetrated another multimillion-dollar securities scam, and it has obtained felony guilty pleas from ten defendants in the largest multidefendant prosecution in our history. It was the prosecution of 24 defendants involving 68 felony counts of insurance fraud that is still being prosecuted.

We are actively working several cases regarding what I learned early last year was the biggest terroristic threat to our state. Listen closely because you may not recognize what I am about to say. The biggest terroristic threat to our state that I learned through one of former Attorney General Laxalt's law enforcement summits was sovereign citizens. A sovereign citizen does not ascribe to our jurisdiction, our authority. They do not believe that we have the ability to arrest them for a traffic violation, let alone prosecute them for major crimes. We are actively working several cases here in Nevada regarding sovereign citizens who represent the most significant threat of domestic terrorism here in our state.

We have an Appellate Division led by Chief Heather Procter. This division works in the area where people have already been convicted. They handle petitions for habeas corpus in state and federal courts. This division is also responsible for representing the state in death penalty cases. By the end of 2018, the division was handling 113 federal habeas cases and 1,181 state habeas cases.

We have a Medicaid Fraud Control Unit run by Chief Mark Kemberling, which as you might imagine, works in the area of Medicaid fraud. We just issued a press statement about some convictions in the Medicaid Fraud Control Unit.

We also have a unit that meshes with all others in the sense that they have to help with investigations. The Investigations Division is led by Chief Roland Swanson. It consists of approximately 50 sworn peace officers, 8 compliance investigators, and 9 professional

support staff. Our investigators work directly with our prosecutors and local law enforcement partners to investigate a wide array of criminal activity associated with complex financial fraud, elder financial exploitation, public integrity, technology crimes, human trafficking, opioid provider abuse, missing and exploited children, and terrorism.

One of the other items that we are responsible for in the Office of the Attorney General is representing our state, and we have in that arena several different divisions that work in some of the most important aspects of our state including our Gaming Division, which is run by Chief Darlene Caruso. Staff with the Gaming Division advises the Nevada Gaming Commission, the Nevada Gaming Control Board, the Nevada Athletic Commission, and the Nevada Gaming Policy Committee. In addition to daily legal advice, staff also represents the board and commission at monthly meetings. Litigation in this division includes: disciplinary actions brought against gaming licensees for violations of gaming regulations and statutes; disputes regarding the proper payment of taxes and fees; hearings on the surrender of gaming licenses for nonpayment of taxes; and actions to add to the list of excluded persons.

Every attorney general brings his own focus. Catherine Cortez Masto had a big focus on human and sex trafficking and mortgage fraud issues, and Adam Laxalt focused on military legal assistance. One of the things that I indicated would be a main area of focus of mine would be consumer protection. Chief Ernest Figueroa leads the Consumer Protection Division working diligently to protect Nevada consumers from economic harm. He is considered our consumer advocate. He works on litigating against businesses or entities that may be defrauding our citizens, but also in the area of utilities representing ratepayers to ensure that we are getting fair rates from our utility providers.

There are a number of scams that individuals are subjected to, particularly our senior citizens. One of the things that the office is doing tomorrow with the AARP is a telephone town hall on romance scams. Oftentimes, seniors are lonely, especially after they lose their loved ones, and they are preyed upon. We will be working with AARP to talk about how to recognize these scams so as not to send money to someone who promises to come be with you and at your side.

It is a funny story, as well, that just last week I received a phone call from the Internal Revenue Service. They told me that I had past due taxes—I paid my taxes, just so you know—and that the police are going to come get me the following week. I called them back, and they hung up on me because I would not give them my address. I called them back a second time, and the lady who answered gave me my address and started talking about what my issue was with them but also hung up on me after I pressed her for more information. I called back one more time, and this time Leonardo DiCaprio answered the phone and he indicated that his immediate supervisor was Robert Downey Jr. I indicated I was the Attorney General of Nevada, and he said, "Yeah, right," and hung up on me. The reason why I shared that story with you is because if the Attorney General of Nevada is getting these types of calls, so are several others in our state. Our Consumer Protection Division works in this arena to help protect consumers from those types of fraudulent activities. We have

issued an alert as an example on tax fraud so that consumers make themselves aware of those types of scams and how to protect themselves.

Our Boards and Licensing Division is led by Chief Greg Ott. This unit provides counsel to all *Nevada Revised Statutes* (NRS) Title 54 occupational licensing boards on administrative law and procedure, the administrative rulemaking process, the law of licensure, and the Open Meeting Law. Deputies in this division attend meetings of the boards and commissions, as well as serve as prosecutor and board counsel in disciplinary proceedings against licensees. This is a very important division for us, especially in the arena of Open Meeting Law.

Our Government and Natural Resources Division is led by Chief Wayne Howle. They serve client agencies and officials responsible for providing core government infrastructure, such as the Controller; the Division of Human Resource Management; the Department of Administration; the Department of Employment, Training and Rehabilitation; the Nevada National Guard; the Nevada Indian Commission; and the Public Employees Retirement System. This division also works with the Department of Conservation and Natural Resources; the Division of Environmental Protection; the Department of Wildlife; and the Agency for Nuclear Projects, which many have been in the headlines of late.

Chief Linda Anderson runs our Health and Human Services Division. Staff in this division serve as counsel to the Department of Health and Human Services and its many subdivisions. Our office advises them on some of the most critical matters to Nevadans, which include services at its Divisions of Health Care Financing and Policy, Welfare and Supportive Services, Public and Behavioral Health, Aging and Disability Services, and Child and Family Services.

Our Personnel Division is run by Chief Cameron Vandenberg. That division advises the Executive Branch departments, divisions, and agencies on all aspects of employment law, including administrative hearings regarding involuntary transfers and the reasonableness of dismissals, demotions, or suspensions of state employees, as well as judicial review of administrative proceedings. It is a very important part of our office as it represents and gives advice to all agencies in regard to employment matters.

We have a Public Safety Division which is led by Chief Randy Gilmer. That division advises the Nevada Department of Corrections and provides representation in all inmate-related litigation, including property and constitutional claims. Staff in this division also participate in the Inmate Mediation Program, which is a unique program of alternative dispute resolution for inmates.

Chief Dennis Gallagher runs our Transportation Division. This division advises the Transportation Board of Directors and the many divisions of the Department of Transportation (NDOT) in all actions, proceedings, and hearings relating to NDOT. Staff in this division provide counsel on many complex transportation matters, including Project NEON in southern Nevada. They also work a lot in the eminent domain arena.

Our Business and Taxation Division is run by Chief David Pope. This division advises the Department of Taxation and the Department of Business and Industry on the various issues that they address as well as the Real Estate Division, Division of Mortgage Lending, Division of Insurance, Division of Financial Institutions, and the Taxicab Authority.

Heidi Parry Stern is our Solicitor General and leads our Complex Litigation Division. This is a unique office that oversees all appeals, regardless of substantive matter, before the Nevada Court of Appeals, the Nevada Supreme Court, the United States Supreme Court, and other appellate courts across the nation. The Solicitor General also coordinates with other solicitors general throughout the nation to talk about and work on other lawsuits together. It also houses our Complex Litigation Division, a team of highly skilled and experienced attorneys who work with staff in all of our divisions on complex or sensitive matters, or cases that expose the state to great financial liability.

In talking about our ability to serve all Nevadans, one of the divisions in that regard is the Administrative Division. It is a lean yet efficient staff who support the legal divisions as well as our inner workings of a large agency. We have a Grants Division that works in the grants arena to help our communities be able to receive work in the sexual assault kit investigations. We have a Domestic Violence Ombudsman, Nicole O'Banion, who works in the area where our state is one of the worst for domestic violence. Our state consistently ranks at or near the top of the list for women killed by men. Our office is a leading partner in efforts to prevent domestic violence in Nevada.

We also have an Office of Military Legal Assistance. This office was created by former Attorney General Adam Laxalt, and it is an office that I intend to continue. It does great work to help address Nevada's unmet need of legal advice and representations for veterans in civil matters. It is the first of its kind in any attorney general office across the nation. It has received accolades across the nation, and I am proud to continue that particular piece of legacy.

In addition to those responsibilities, the Attorney General or his designee is a member of several committees as provided by the *Nevada Constitution* and our statutes. I am a member of the State Board of Examiners; the Board of State Prison Commissioners; the State Board of Pardons Commissioners; the Executive Branch Audit Committee; Advisory Commission on the Administration of Justice; Nevada Council for the Prevention of Domestic Violence; the Substance Abuse Working Group; the Nevada Prosecution Advisory Council; the Technological Crime Advisory Board; and the newly created Task Force on Sexual Harassment and Discrimination Law and Policy.

I will start wrapping it up by once again touching on something I alluded to earlier, and that is that every attorney general brings in with him a particular area of focus. I shared the first of my three Cs, consumer protection. The other two are related to criminal justice and criminal justice reform as well as the protection of our civil and constitutional rights. We have a situation where many have a trust level problem with the government. Some have no trust level with the government, and some could use an augmentation of trust level with the

government. I view it as a responsibility of the Attorney General's Office to find a way to help keep that balance where people we represent and purport to protect have a belief that we are working to do that.

In that regard, I will be keeping the Office of Military Legal Assistance going. The law enforcement summits will continue as well. We will have a continued focus on those three issues of consumer protection, constitutional law, and criminal justice reform. I am happy to answer any questions that you may have.

Chairman Yeager:

Thank you, Attorney General Ford. I do not know if others on the Committee can relate, but I probably get about four phone calls a week telling me I am going to be incarcerated if I do not pay my taxes. Now part of me thinks I will get a little time off from the Legislature if that happens, but it certainly is a problem in our state. Obviously, there are some difficulties in finding those people because I think many of them are calling from out of state or out of the country. I will say, in addition to that, in my former life I certainly represented elderly individuals who had been taken advantage of by some of these scammers. The stories are just heartbreaking, because they are really good people who get caught up in these things. I certainly commend you for trying to get information out. As my parents get older, I become very aware that sometimes these things are very sophisticated, and we need to make sure that we are keeping folks educated. I want to thank you for taking that on, and I think your story was fantastic about calling back. It is always fun to engage to some extent.

I may have some additional comments later, but I wanted to open it up for any questions for Attorney General Ford or his staff from Committee members. [There were none.] Before you leave, I did want to commend you for your hiring of staff. I think the measure of a great leader is whom that leader surrounds himself with. When I look out at who you have here in Carson City and Las Vegas, I think I have had the pleasure of working with each of these individuals in some capacity. Obviously, you and I worked together in the Legislature and the Advisory Commission on the Administration of Justice. Ms. Jones Brady and I have served on the Advisory Commission on the Administration of Justice together, and perhaps I go farthest back with Ms. Bateman when she was a Clark County deputy district attorney and I was on the other side. Hopefully, Ms. Anderson remembers that we served on an interim commission back in 2014 talking about DNA from arrestees that came out of late Senator Debbie Smith's bill. I just cannot say how delighted I am that you have surrounded yourself with really smart and competent people who I think are really going to improve the office and make you look really good, which is all you can ask for.

Again, I want to thank all of you for being here. Committee members, make sure you hold onto that document that gives you the biographies of Attorney General Ford's staff ([Exhibit F](#)), and feel free to reach out as the session moves forward. I know that we will see you and your staff quite a bit here in the Assembly Judiciary Committee, and please do not hesitate to reach out to us if we can be of any assistance.

I will now open the hearing on Assembly Bill 109, which revises provisions governing credits awarded to reduce a sentence of imprisonment. Assemblyman Fumo will be presenting this bill to us, and after he is done presenting, we will take some additional testimony.

Assembly Bill 109: Revises provisions governing credits awarded to reduce a sentence of imprisonment. (BDR 14-764)

Assemblyman Ozzie Fumo, Assembly District No. 21:

I have been practicing law in Nevada since 1996 in both criminal and civil realms in both state and federal courts. I have argued before the United States Court of Appeals for the Ninth Circuit, and I am currently an adjunct professor at the University of Nevada, Las Vegas William S. Boyd School of Law teaching my area of expertise—trial advocacy, opening statements, and closing arguments. The reason I gave you a little bit of background is because when I bring you this bill, it is not because someone brought it to me and said it was a good idea. It is because I have experienced it firsthand in court.

Before I get into the specifics of the bill, the short version is it will give an individual credit for his or her time on house arrest. Earlier last week we saw a presentation by James Dzurenda, Director of the Department of Corrections, and one of the statistics he provided was that he will soon be at critical mass. What the prison does at that point is release people on house arrest and give them day-for-day credit.

Two years ago Chief Justice James Hardesty from the Nevada Supreme Court came before this Committee and asked us to please stop giving out so many B felonies because it was causing the incarceration rate to go up so high. Earlier this week we heard from Chief Natalie Wood of the Division of Parole and Probation of the Department of Public Safety, and she discussed the importance of house arrest. To incarcerate someone, it costs hardworking Nevadans \$150 per day. Earlier this week we heard from Chuck Callaway that we have 4,237 people in the Clark County Detention Center. We spend \$635,550 per day in Clark County alone. That is \$232 million per year as opposed to the 178 people on house arrest. As of 2016, we had 14,000 people incarcerated in our prison system. That costs hardworking Nevadans \$766 million a year. When you add the county and state incarceration costs, you are looking at over \$1 billion a year in warehousing people in the state of Nevada.

When a person is arrested and taken before a magistrate, the magistrate must determine whether or not the person detained is going to appear at his or her court date, whether he is a flight risk, or a danger to the community. They can address it with bail or house arrest. House arrest is the most restrictive way, without putting him in jail, to assure his appearance in court. The detainee pays the costs of this; there is a set-up fee and a daily cost. There is a sliding scale that goes along with it, but the detainee must qualify and strict parameters are put upon him. I have had clients where I have argued and received house arrest, the judge agrees they should get house arrest, and the jail has called back and said they do not qualify.

So it is not a given that they are going to get it every single time. And as Mr. Callaway said, there are only 178 people in Clark County who are on house arrest.

With that background, I want to introduce the people who are here with me to present the bill: Mr. Scott Coffee, who is a member of the Nevada Attorneys for Criminal Justice and a deputy public defender in Clark County; and Ms. Lisa Rasmussen, who is also a member of the Nevada Attorneys for Criminal Justice and an excellent attorney in her own right. They will discuss the parameters of the bill with you.

Lisa Rasmussen, representing Nevada Attorneys for Criminal Justice:

The Nevada Attorneys for Criminal Justice (NACJ) was formed back in the late 1990s and it is essentially a statewide criminal defense bar. We have lawyers from all over the state, and we are a nonprofit organization. We get together to discuss issues pertaining to all things criminal defense. We oftentimes appear before these committees in legislative sessions to educate and explain to you what is really going on in our profession and with our clients.

Many of our clients are indigent. I also get appointed on death penalty cases. So when you see me or members of NACJ coming to testify before you, this is our bone in the fight, and we have a lot of issues that come up before this Committee.

People who are subject to house arrest preconviction [while they are awaiting trial] are traditionally never given credit for that time. We give people credit for time served on house arrest after their conviction, but not before their conviction. I think that this bill is really important because house arrest is a punishment. It is a pretrial punishment; a punishment that the defendants undergo while they are awaiting trial. It is different from monitoring, which is when someone has an electronic bracelet so the court knows where they are, makes sure they do not get into trouble, or that they abide by curfew restrictions. House arrest is punishment because they cannot leave their house. The only reason they can leave their house is sometimes to go to work, go to court, meet with their lawyer, or to go to a doctor appointment. It is punitive. Giving credit for time that people have spent on house arrest applicable to their sentence once they are sentenced would be an important measure in helping us depopulate and easing some of the burden of the Department of Corrections (NDOC).

The Department of Corrections, as Assemblyman Fumo just mentioned, is completely overburdened. Before coming here this morning, I was looking through salaries because I think it is a fiscal issue. When you look in the public records at TransparentNevada, most correctional officers have a base salary between \$50,000 and \$60,000, and then most of them also have overtime pay of approximately \$70,000. We are paying correctional officers \$120,000 a year—most of which is overtime and in some instances double their base pay—because NDOC is overburdened. We use house arrest to relieve some of that burden for inmates who are incarcerated on the state level, but what we have not done is look at applying the time that they have already served on house arrest toward their sentence when they are sentenced. Someone could be on house arrest for a year, get sentenced to a term of 3 to 6 years or a 2 to 5 year term, and this would take some of that time that they would have

to spend in NDOC off the table, which would help to overall reduce our burdens on the Department of Corrections.

I think it is not only appropriate because it is applying the credit that someone spent in a punitive situation, it is also fiscally important for us to consider this bill. I would urge you to support this bill for those reasons.

Scott L. Coffee, Deputy Public Defender, Clark County Public Defender's Office:

I have been with the Clark County Public Defender's Office for 24 years. The last 20 years I have spent training new attorneys and dealing with homicide cases and the more serious cases we deal with. I have been actively involved in this body. I think this is one of the more practical bills that I have seen come before this body in 20 years of testifying before the Legislature. The reason I say it, I think, requires a bit of a history lesson.

The statute that controls granting credit for time served was adopted around 1970. For years we used to be able to agree to give credit for time served for house arrest. Both sides would agree and some of the times it would happen and sometimes it would not. My first ten years of practice, it happened that way actually. And it still happens in cases once someone is sentenced. For example, right now the Clark County Detention Center is so overburdened with people that there was a standing court order that if the overcrowding got too bad, they had to move low-level offenders out of the detention center. We are just out of space for these people. A lot of times those people are going to be placed on some kind of electronic monitoring. If they have been sentenced, that electronic monitoring counts toward their sentence. Same thing if someone goes to prison. If they go to prison and the prison removes the person, the time that they spend on electronic monitoring or residential confinement, counts toward their term. The Nevada Supreme Court has addressed this, by the way.

The change to everything in this history lesson happened in 2005. There was a decision by the Nevada Supreme Court that took a look at the term "custody," and the statute reads that you get credit for time actually spent in confinement. Confinement had not been defined for the first ten years of my practice, which is why we could agree to credit for time served for people and it made sense in a lot of cases. There were times when the judge would have more discretion in that situation. But in 2005, the Nevada Supreme Court said we think the time you spent on house arrest is not draconian enough. Now, I tend to disagree with that. House arrest is a lockdown situation. The judge has control over what you are doing, if you have left the home, if you are out after curfew, or whatever it might be, you are going to be placed back into custody. I will tell you doing this on the front lines, I would have to explain to my clients that they were getting credit for the time they served in jail, but were not getting credit for the time on house arrest. But to be honest, the people who are placed on house arrest are generally low-level, first-time offenders. If it is somebody I represent—I have been doing homicide cases for 20 years—they are not going to be on house arrest by and large. And if they are on house arrest and they did get credit for that time, the sentence that they are going to be facing is so substantial the house arrest is somewhat insignificant. If they spend a year on house arrest and have a 20-year sentence, it is not the same situation as, for example, someone who is serving a lighter sentence. But the lighter sentences are the

people we need to get out of the detention center in a timely manner. We can do it once they are sentenced, but we cannot do it before they are sentenced now because of the way the Nevada Supreme Court has interpreted this in actual confinement. Assemblyman Fumo's bill corrects that. I think it is a good bill, is fiscally responsible for the county, and helps the Department of Corrections. For those reasons, on behalf of the Clark County Public Defender's Office and the NACJ, we hope that you will support it.

Assemblyman Fumo:

One thing I wanted to point out is that section 1 of the bill says the judge may order credit for time served. It is not a guarantee. It is not that every person on house arrest will automatically receive this. The way that I envision it is when it comes time for sentencing, I will be able to argue for credit for time served; the district attorney can argue for or against it; and the judge makes the decision. That is why we elect these judges, and that is why we put them there. I think it leaves them the discretion of what to do.

The reason I brought this bill in the first place was that I had a client who was out on house arrest for over a year as she had to have surgeries. The district attorney and I both agreed that she should receive credit for time served in the plea agreement and the judge accepted the plea agreement. When it came time for sentencing, he indicated he would like to give her credit for time served but could not because there is no fix. That is why we are here.

Scott Coffee:

I overlooked one point. The other thing, by giving the judge discretion in this situation, you are providing an incentive for people on house arrest to stay good. Because if they are messing up on house arrest, the judge is going to be much less likely to grant them the credit for the time they spent on house arrest. I think that is a good incentive for everyone, particularly for people who we do not have locked in a cage someplace.

Assemblywoman Cohen:

My only dealings in criminal justice have been minimal as an attorney. I did have one juvenile delinquency case. My client was on house arrest for about four months before we could prove that he was innocent. I remember how affected he was by house arrest. He was 15, and it was not good for him mentally. My question is, with adults, are there any studies or data that you can give us about that so we understand that this is not just feeling like you got away with something and you are hanging out at home for a while?

Scott Coffee:

Chairman Yeager was joking earlier about spending time in Carson City away from everyone else. But imagine being locked in your home. It sounds like a great idea and probably is for a day or two, but not when people are there for 14 or 15 months. When they are monitored, if the bracelet goes off, they are pulled back into custody. They have to check in monthly; it is absolutely punitive. I have clients through the years on other cases whom I have helped who have been in exactly the situation that Assemblywoman Cohen spoke about, and it is absolutely punitive and absolutely has an effect on these people. I personally had a juvenile in a situation who was accused of killing his stepfather and he was placed on house arrest. It

was an unintentional killing, and it definitely affected him. The way the sentence was structured the judge was not able to give him any credit for that time whatsoever, not even partial credit for the time. We fashioned a negotiation where he did 14 or 15 months in custody, and it was appropriate given the circumstances. I know that is hard to believe when someone is dead, but in the circumstances it was appropriate. But there was no opportunity to give him house arrest time in that instance. The other thing I would point out is, if you had credit for time served for house arrest in that instance, the judge is free to give additional time if he thinks incarceration is needed. I think we give our judges more discretion which makes sense when we are releasing people. Right now the jail just releases people when the overcrowding hits. They do not go through an additional judicial proceeding. This actually adds a filter to some extent.

Assemblyman Fumo:

It is punitive. I have had clients who when placed on house arrest cannot go to the mailbox or take out the trash. I had a client in Boulder City whose bedroom was subterranean and every time he went to bed, the police were at his door because it triggered the alarm. So he had to sleep upstairs on the couch. You have heard the term "cabin fever." It literally is like that. It lasts for about two days, and then clients are usually calling saying, Can you get me off of house arrest? This is driving me crazy. Absolutely, we can file a motion, get in front of the judge, and he will put you right back in custody. It is their choice. But you have to be good. You have to be excellent to survive this. I have also had clients tell me what a great thing it was; one client in particular said he became a better father. Instead of going out after work drinking and playing pool, he was home and able to do homework with the kids. He was there with his wife and saw what she had to do with the housework, and he became a better father and husband. It does work both ways. But it absolutely is a punitive thing, and it is an adjustment for someone to get used to. It is not a day at the beach at all.

Assemblywoman Hansen:

As the daughter of a district attorney, I really do have an appreciation for public defenders. Thank you for what you do. When someone is on house arrest before trial, determination of guilt has not even occurred. But for some reason, it is thought best that you be under house arrest for, I would assume, safety reasons. Could you give me some reasons why a person is on house arrest before trial?

Lisa Rasmussen:

Many times people are placed on house arrest because the court thinks that they could represent a danger to the community or the court is concerned about their not returning to court. There may be something in their history, but it may be that kind of offense where the court thinks they do not need to really be in jail but I want a little bit more than that. Sometimes people are placed on house arrest because they are ill, they have had a surgery, or they are elderly, but it is a serious offense. Frankly, we see it a lot in driving under the influence (DUI) cases where there has been a death. The court is not comfortable just allowing someone out in the community, but jail may not be appropriate because oftentimes those people have no prior record. You see it in a variety of cases as Mr. Coffee was saying, but you are less likely to see it in a very serious case. I think it does not come up a lot in

misconduct type cases. It seems to come up in those midrange cases that are sort of a 2 to 10 year sentence range where the court wants a little bit more than a release on their own recognizance (OR) or even a bail release. The judge may want a little bit more that makes it more comfortable releasing the person, so house arrest is the option. Those are the typical kinds of cases. They seem to be more midrange, not misdemeanors, and not really serious cases.

Assemblywoman Nguyen:

Is it possible for someone to explain the process for even when the court orders an individual to be placed on house arrest, whether or not they qualify, and what kinds of things might disqualify them from even being placed on house arrest?

Lisa Rasmussen:

I do not think people understand how difficult it is to get through the process of house arrest. Oftentimes people are arrested, taken into custody, have an appearance before the court at some point, and the court will order house arrest. With my clients, it takes, for some unknown reason, close to two weeks for house arrest to actually get set up. People are often disqualified because they do not have a landline at their home, or because they do not have a suitable place to live. The house arrest people from the jail, at least in Clark County, go check out the home where they will be staying; make sure that it is suitable; make sure there are no weapons in the home; make sure there is no alcohol in the home; and make sure there are no other felons in the home. There are all these hurdles that people have to go through to get approval from the jail to actually be a candidate for house arrest. As Assemblyman Fumo was saying, sometimes the judge orders it, the district attorney agrees to it, we ask for it, and then the jail says, No, they are not eligible. It is a more narrowed population of people who are eligible for house arrest, and it is not easy. The process is actually kind of a pain in the butt and takes a couple of weeks to even get implemented.

Assemblywoman Nguyen:

And while someone is on house arrest, there are staff at the jail that monitor them and do home visits and make sure they are complying with house arrest. Is that correct?

Lisa Rasmussen:

Absolutely, that is correct. They basically have a chain around their ankle in electronic form, and they can only go so far from their unit which is tied into their phone. That is why people often cannot even take out the trash at their own house. It is constantly monitored. People in the jail know if they have strayed from this epicenter of where the phone and electronic unit are located in the home.

Assemblywoman Miller:

Thank you for bringing this bill forth. For those who are on house arrest, and I know that it is very restricted as you just explained, but it is my understanding that some individuals would be allowed to continue work, which I would assume means that maybe they are allowed to continue some type of educational training, even if online. Does that also extend to continuing other services, maybe mental health services or counseling, all of those? If that

is the case, can you explain the benefit of still participating in those activities for the individual as opposed to someone being incarcerated in jail?

Scott Coffee:

Absolutely. It is at the judge's discretion where they are going to be allowed to go, where they are going to be allowed to work, or when they are allowed to go to appointments. A number of people have medical issues and are allowed to go to medical appointments and counseling. It is somewhat beyond the scope of the bill, but I will tell you that being locked in the Clark County Detention Center, the services are meager and the ability to get any kind of help for counseling, drug addiction, et cetera, is just not really there. It is not designed to provide for those. So you will see provisions for people to go to Narcotics Anonymous or Alcoholics Anonymous meetings, things that can help them along. And those are all conditions of house arrest. The nice thing about Assemblyman Fumo's bill is, if the judge has discretion to do that, you incentivize those people to participate in these programs. It is a big thing; you want people to help themselves, give them the opportunity to help themselves, but some people need a little bit of an extra push. A lot of times that is really what house arrest is. We were talking about reasons people might be turned down, and another reason is the cost involved as far as punishment. If you are able to pay, you are going to have to pay for the monitoring. That is also part of the punishment that is involved. I wanted to make sure we mentioned that at some point. Those provisions are set by the court, and the court can monitor those things. You were an hour late; you were allowed to get groceries once this week and you were 15 minutes late; therefore, come in and give us a urinalysis or a breath analysis. Those things are all common in house arrest situations so that they can track people, and so that people can move forward with their lives. A lot of these are hardworking people who have had a run-in with the law for some reason.

Assemblywoman Miller:

Would you then say, even if it is anecdotal, that being able to continue in those services and programs would help lessen the likelihood of their recidivating again, even if that person is found guilty?

Scott Coffee:

It is more than anecdotal. You can look at studies from The Bronx Defenders, and their move toward holistic defense, which is one of the more progressive movements in the criminal justice system. The sooner someone gets out of custody has a direct relationship to whether or not they are going to appear in court for future dates, whether or not they are going to lose family, whether or not they are going to lose jobs, and whether or not they are going to reoffend. With all of those things, detention is not the answer to every problem. The sooner people can get on with their lives and pay their debt, the more likely they are to succeed. And that is not anecdotal. I think there is substantial research to back that up.

Assemblyman Roberts:

In my background of 25 years in law enforcement, with my last 10 years on the executive staff for the Las Vegas Metropolitan Police Department, I am very familiar with the house arrest program. I am a big fan of it. We had more bracelets than we had people on it based

on prisoner classifications and all of the things you mentioned regarding difficulty. We had a lot of people escape, so would those folks still be eligible for that good time credit even though they escaped from house arrest?

Assemblyman Fumo:

No, that is why I left it up to the judge. What I anticipate is that at the time of sentencing, I would argue for it and the state would either agree or disagree based on the conditions met by the individual, and the judge can decide at that point whether the person would or would not get the credits.

Assemblyman Roberts:

I know we had testimony earlier about the nominal fee charged for house arrest. The government does provide for the fee for some individuals, but not everybody is eligible based on their economic situation. Do you think there is an issue of fairness? So, for people who are affluent, who may not use the public defender, would there be an unfairness to somebody who has the money, the ability to put themselves on house arrest for an extended period of time, and get credit so that they never spend a day in jail for a felony DUI or some nonviolent offense that the public would probably not care to give them the pass?

Scott Coffee:

I represent indigent defendants and have for 20 years. The sad truth is, some people do not even have homes, and they are not going to be eligible for house arrest. As much as I would like to be able to solve that problem, it is not realistic. It is beyond what we can do with this bill. I do not know if that is a reason to take house arrest away, and I do not think that it is a form of discrimination against those people because it is happening already when they are sentenced to prison. For example, if you are sentenced to prison on a DUI, you can be sent to residential confinement almost immediately. If you are sent to Casa Grande Transitional Housing, which is not prison per se, you are going to get credit for time served for that. If the detention center puts you out because of a situation of overcrowding and you do not have a home, you are not going to be eligible for house arrest. It is one of those necessary evils of the system. I wish that we had a place to house people for house arrest who could not afford it or could not afford homes. But that is not realistic. I do not think it is an issue. The Clark County Public Defender's Office represents 13,000-plus indigent clients a year and is wholly supportive of Assemblyman Fumo's bill. We think it is good, even recognizing that some of our clients may not be able to benefit because of their situation.

Lisa Rasmussen:

Assemblyman Roberts, I think there is a sliding scale for people who have less of an ability to pay. We are always concerned, collectively, about something that impacts one particular socioeconomic group more than another. Also, most times when we are requesting house arrest, it might be because my client is the father of five and he is the only person in the family who works. If he can have house arrest and maintain his job, we will not have all those other dominoes falling down the line. It is available to people with limited means. I also wanted to follow up on something else that you had asked about. You do not get to go just anywhere you want when you are on house arrest. I want to make the members of the

Committee understand that. Even if you are on house arrest, you have to ask your person at the jail if you can have permission to go to your lawyer's office. You have to plan in advance and provide that information to the staff at the jail.

Assemblyman Roberts:

Just for clarification on escapes: He cuts the ankle bracelet off and he just runs. That is my term for escape, not necessarily violating the conditions of house arrest.

Assemblywoman Krasner:

With regard to credits for time served on residential confinement, are there any other states that are doing this? And if so, how many?

Scott Coffee:

I do not have it at hand right at the moment. I will be happy to look into it and get that information to the entire Committee.

Chairman Yeager:

I have a suggestion that I would like to get your take on. I was looking at the bill itself and I noticed in section 1, there is a "may" in there about whether the judge could grant credit. This may be a flaw in the statute as it exists right now, because after the "may," we have two categories. The first is "the amount of time which the defendant has actually spent in confinement before conviction." It was a little curious to me that there is a "may" for that portion. Are any of you aware of a situation where a judge would not give credit for time in confinement absent the qualifier? Might it make sense to say that a judge "shall" give credit for time actually spent in confinement, and then "may" give credit for time spent on residential confinement? Maybe just a cleanup of the statute, unless I am missing something there.

Scott Coffee:

I think that is a good suggestion. The court has interpreted it as "must" because of the concerns that Assemblyman Roberts brought up about the inability to post bond for some people. In a case 30 years ago, they said it says "may," but actually you must give time. If it was, for example, a capital case and there was no bond, you do not have to give pretrial credit, although judges almost always do. That is a good suggestion. I think it tracks what the law is in Nevada.

Assemblyman Fumo:

I concur. I agree.

Chairman Yeager:

Great. I always like to take a chance that if we are going to meddle with one of these statutes to try to at least conform them to what the law is currently. So we can continue to talk about that, but it might just be a quick reorganization of paragraphs (a) and (b) of section 1. Are there any additional questions from Committee members? [There were none.] I will open it up for testimony in support of A.B. 109.

Holly Welborn, Policy Director, American Civil Liberties Union of Nevada:

We want to register our support for this legislation. House arrest places a high level of restriction on an individual's liberty and freedom of mobility very similar to traditional incarceration. They are monitored 24/7, and in some cases they begin on full lockdown and spend the duration of their house arrest on full lockdown. In some instances, they are able to earn opportunities to work and perhaps take their children to school, go to doctor's appointments, et cetera. But it is a high imposition on their mobility. For these reasons, we believe that they should be entitled to credit for time served during house arrest, and we encourage you to support this bill.

John J. Piro, Deputy Public Defender, Clark County Public Defender's Office:

Mr. Coffee laid out our position. Since the committees are at the same time, I am going to cover Washoe County's position for Ms. Bertschy. The Washoe County Public Defender's Office is also in support of this legislation. I think Assemblyman Roberts' points were well taken. I do not see a judge granting that type of credit if somebody escaped. I do not see that happening.

Chairman Yeager:

Are there any questions? [There were none.] Is there any additional testimony in support of A.B. 109? [There was none.] Is there any testimony in opposition?

John T. Jones, Jr., Chief Deputy District Attorney, Clark County District Attorney's Office; and representing the Nevada District Attorneys Association:

Before I get to my testimony, I want to let you know that I have had numerous conversations with Assemblyman Fumo, and I do appreciate the intent behind his bill.

However, the district attorneys of this state are in opposition. The basic premise of our opposition is that a day on house arrest is not the equivalent of a day in a detention center. I think our public policy should reflect that. They should not be treated as if they are the same. For example, giving a defendant credit for being in his or her own residence is not good public policy, especially when you compare that to a defendant who has spent time in a detention center. If you have two defendants with similar backgrounds who committed similar offenses—one of whom remains in the detention center for one reason or another, including an inability to make bail, and the other who makes bail with a condition of house arrest—one person is going to be earning credit in jail and the other is going to be earning credit in their residence. Assuming they are sentenced on the exact same day to similar sentences, one of them is going to spend a lot more time confined than the other individual.

I want to address a few things. As it currently stands, house arrest can play a factor in sentencing. Oftentimes, if not in most cases, defense attorneys talk about a defendant's participation in house arrest as a mitigating factor in terms of sentencing. In other words, a judge may give a lighter sentence on the back end because a defendant has participated in house arrest and done so without any violations. Additionally, I want to point out that it is not as if you are shut in your residence and cannot ever leave under any circumstances. In fact, the house arrest program in Clark County is designed that you work with your officer,

you can set time frames for work and the officer will give you a reasonable amount of time to go to your place of employment, to go to counseling, or to deal with child care issues. Again, it is not the same as being in the Clark County Detention Center.

There was also referenced other house arrest credit schemes in postconviction. It is true that there are situations, either in jail or in prison, where a sheriff or a director can give house arrest credit to an individual who is otherwise incarcerated in a facility. But, I will point out, in *Nevada Revised Statutes* (NRS) Chapter 209 that deals with prisons, the director can give residential confinement, but there are some exceptions including offenders who commit crimes against a person; who commit a violent act against other people; who commit a sex offense; who commit A or B felonies and are not eligible for house arrest programs. *Nevada Revised Statutes* Chapter 211, which deals with county jails, does allow for house arrest in certain circumstances to relieve overcrowding or other instances at the discretion of the sheriff. But in both of those instances, they cannot be a risk to public safety. They cannot have a violent background with respect to house arrest for relieving of overcrowding. With respect to house arrest for other issues, the sheriff has to demonstrate or has to signify that they are not a risk to the public. That is different than our preconviction scheme.

Our second major opposition point is the fact that this adds to an already confusing prison credit scheme. For those of you who followed the Advisory Commission on the Administration of Justice, Justice Hardesty, who is also a member of the Nevada Sentencing Commission, has on numerous occasions indicated how confusing our credit scheme is. Victims do not understand it. Quite frankly, prosecutors do not understand it. So just using credits to reduce somebody's time in prison, in our opinion, adds to a confusing scheme for victims.

Our third concern is that this could encourage delays of our preconviction prosecutions. In other words, if you are earning credit in your own residence, there is going to be no incentive to resolve your case up until the point where you have almost expired whatever your minimum sentence would be should you get a term of incarceration in prison.

Finally, our fourth major point is the term "residential confinement" is a little broad. I want to point out, in Clark County we basically have five levels of supervision if you include a straight OR release. For the record, an OR release means you are released and there is no condition on your release. You are free to do whatever you want with the only exception being you have to show up to your next date in court. Right above that is something we call intensive supervision. If you recall, when we gave our district attorney presentation, we spoke about what intensive supervision is. It is basically a check-in process. It can be a telephone call, going to a kiosk, or something along those lines. Slightly above that is what we call low-level electronic monitoring. In Clark County this does not require a residence so anybody can be on low-level electronic monitoring as long as the judge orders it. Above low-level electronic monitoring is what we call mid-level electronic monitoring. With mid-level electronic monitoring, it is not house arrest, but a residence is required. Pursuant to mid-level electronic monitoring, you could be ordered to be confined in your residence. If you are on mid-level electronic monitoring, confined to your residence, it is not technically

our house arrest program, but you could be earning credit under this statutory scheme. And finally, above mid-level electronic monitoring is full-blown house arrest, which was described earlier.

It is for those reasons, Mr. Chairman and members of the Committee, that the Nevada District Attorneys Association is opposed to this bill. I have spoken with Assemblyman Fumo, and we will work together to hopefully find an amicable resolution on this bill.

Assemblywoman Cohen:

I appreciate the concerns, but none of that seems to get me past the "may" and the discretion of the judge. Could you please address that?

John Jones, Jr.:

I actually agree with Chairman Yeager's proposed amendment. Right now I know of no instance in which somebody who has actually been confined into a county jail has been denied credit on their sentence at the time of sentencing. But in this instance, we have some judges who may apply house arrest credit, others who may not. You are going to lead again to people with potentially the same backgrounds, potentially the same crimes, getting vastly different sentences due to the "may." At this point, I think it is just going to lead to more instances in which people are receiving different sentences. I will bring up Assemblyman Roberts' point earlier. There is no prohibition if you cut your bracelet off and run from house arrest. There is no prohibition of a judge giving somebody credit up until the point that they cut off his or her bracelet. That is bad public policy, because you could make the argument as a defense attorney that the defendant was compliant up until that point so they should at least get that credit.

Assemblywoman Cohen:

But the way our system works is that there is discretion for the judges, and unless we have strict sentencing guidelines, there is always going to be discretion for the judges. There are always going to be situations where, unfortunately, one judge does something one day that another judge would not have done a different day on the same case. Again, unless you are advocating for strict sentencing guidelines, I do not know how we are going to get around that.

John Jones, Jr.:

It is a great point, Assemblywoman Cohen, but I would argue that we try to mitigate that through matrixes and pretrial risk assessments where we try to plug in people and give just a general guideline as to where they should fall on the sentencing scheme. Now you are right, a judge can depart from the recommendation from the Division of Parole and Probation, they can honor it, they can increase it, but generally we try in our system to give similar people similar sentences.

Assemblywoman Cohen:

I just do not see how this strays from that.

Assemblyman Watts:

I am glad to hear about the district attorneys' concern around issues of equity, and I hope that you will be engaged in some of the bail reform efforts that we are taking on in order to reduce some of the issues that you are talking about. I also appreciate your discussing the different levels of supervision, and I appreciate that because it shows that, in fact, house arrest, which is what the bill is addressing, is the most serious loss of liberty next to confinement. Are you advocating for some form of partial credit for house arrest, which I think would add to the complication you said district attorneys are already seeing, or would you advocate for no credit whatsoever despite this being a high degree of loss of liberty?

John Jones, Jr.:

District attorneys have been involved in the Nevada pretrial risk assessment system. We have participated in every effort that I am aware of to help make bail and release equitable in this state. We have been partners in that effort in this state. Have we raised concerns? Yes, but we have been involved in that system. With respect to this bill, though, I cannot reiterate enough that even though house arrest is the most restrictive level of release, it is still not the same as a day of confinement. And I think a public policy saying they are is not good public policy. Victims certainly are not going to like it when you tell somebody, It matters that you were robbed, but this person is going to get a year's worth of credit for being confined to their residence. In terms of that, we are opposed for a one-to-one credit. Now, I have spoken with Assemblyman Fumo about working toward other schemes if this body determines that giving some sort of credit for house arrest is the direction it wants to go. I have expressed concerns about doing that right now considering there are still a lot of other pieces of the puzzle out there with respect to criminal justice issues this cycle. We have a lot of bills that have yet to drop that deal with criminal justice. Until the Nevada District Attorneys Association sees how all those pieces of the puzzle fit together, it is going to be hard for us to agree right now to a specific two-to-one for house arrest or four-to-one, but we are willing to have those discussions as the session progresses.

Assemblywoman Backus:

You were saying that if someone serves house arrest that that goes to the mitigating factor of their sentencing. My question is whether that is because the law is absent as opposed to what A.B. 109 is proposing. You are not making arguments that serving time before someone is incarcerated goes to a mitigating factor, are you?

John Jones, Jr.:

That has also been argued by defense as a mitigating factor as well in terms of people being confined. Judge, this person has already spent nine months in the Clark County jail, and because of that, that is enough of a period of incarceration, please give this defendant probation going forward. So that can also be used as a mitigating factor. But often, house arrest is used as, Look how good they did on house arrest. They are going to do equally as well on probation; therefore, you should give them probation.

Assemblywoman Miller:

My question is more toward the belief that our criminal justice system is built on the idea that we are innocent until proven guilty. Our jails are full of people who have not yet been proven guilty. We also have individuals—while it may not be the majority, there are a fair number—who are indeed acquitted and deemed not guilty. So what would you say to that individual after house arrest who is then deemed not guilty? Would you still say that their time on house arrest was not tough enough, because if I am proven not guilty, I would say that indeed my house arrest was already too aggressive?

John Jones, Jr.:

I want to address the first part of your question. I am not saying that house arrest is not a great program. I agree with the presenters of the bill who say that it is a good alternative to detention. It absolutely is. I admire the program, and quite frankly, district attorneys often agree for people to be released on the program. I do not want you to think that my opposition here today is a thought that the district attorneys do not think it is a good program. It is. With respect to the latter part of your question, I pursue charges all the time where I believe that I can prove it beyond a reasonable doubt. There are instances where a jury may not agree with my assessment. It is unfortunate, but that is part of our system. I cannot really say much more than that. I can tell you that district attorneys do not pursue cases they do not believe they can prove.

Assemblywoman Miller:

So, did I hear you say that you believe that house arrest is a great program?

John Jones, Jr.:

Yes. I have said that from the very beginning. It is a good program; it is just not the same as a day in detention.

Assemblywoman Torres:

Earlier when you were speaking, you had mentioned how perhaps instead there should be a risk assessment to determine whether or not they should be deemed eligible to get house arrest. I am just not understanding how that risk assessment is less biased than the discretion of a judge who is committed to being unbiased.

John Jones, Jr.:

We in Clark County and a few other jurisdictions in the state use the Nevada Pretrial Risk Assessment tool. A number of factors are input, including the defendant's prior record, their age at first conviction, do they have a stable residence, et cetera. It is an evidence-based tool that judges use in determining bail in Clark County specifically. You get a low-, medium-, or high-risk score. What the judges do is they use that low-, medium-, or high-risk score, and then they fashion a bail, an OR release, some combination of bail or a release condition being a straight OR release if they make bail, or one of the levels of release conditions that I mentioned earlier. What it tries to do is make people as similarly situated as possible get a similar outcome. That is the goal of it.

Assemblywoman Torres:

I understand all of that about the risk assessment tool, but looking at that risk assessment tool, I think it is very obvious that it affects specifically men of color from low-income areas at a significantly higher rate than their white counterparts. I am just not sure that I have faith in that assessment being any less biased.

Assemblyman Roberts:

Do you think that lack of fairness could impact appeals for sentencing based on not everybody being eligible and not treated the same?

John Jones, Jr.:

Potentially.

Marc Schifalacqua, Senior Assistant City Attorney, City Attorney's Office, City of Henderson:

My office is responsible for prosecuting all misdemeanor offenses in the City of Henderson, and I am the head of the Criminal Division. I do want to sincerely thank Assemblyman Fumo for speaking with city staff yesterday to discuss the bill as well as his willingness to work with me to address my concerns. I certainly appreciate it very much.

I would, as written, oppose the bill. I would point to Justice Hardesty's thoughtful Nevada Supreme Court opinion in *State v. Second Judicial District Court*, 121 Nev. 413 (2005). In that case, he discusses several policy and practical reasons why time spent on house arrest should not be credited to a defendant's sentence the same way time in a jail facility should.

First, I think allowing house arrest to count the same way that time in custody would count toward an ultimate sentence does defeat the intent of several statutes. Primarily, the main and top crimes that I am responsible for handling in the City of Henderson are DUIs and domestic violence. We heard Attorney General Ford this morning speak about how tough those issues are and what the challenges are that we face. In those statutes, it states that the court must sentence a defendant to a term of imprisonment of at least two days but not more than six months. House arrest is not an option. It talks about two days of imprisonment. The Legislature intended that those who commit those crimes, when you are convicted, to spend some time in jail as part of their sentence. So this could, and will, render some of those statutes meaningless, and I do not know if that is the intent of this bill. But it would allow folks who are convicted of domestic violence and DUI not to spend any time in jail other than maybe a small time on the original arrest.

I agree with Mr. Jones that house arrest does not restrict someone's liberty the way that being in jail certainly does. There is a potential as well for creating a chilling effect on granting house arrest. This may have the opposite result that we may be looking for here. Many judges, I would think, would be a little hesitant on mandatory prison terms or mandatory cases where someone has to do jail time or prison time to give house arrest knowing that it would be applied to the ultimate sentence.

My concern is on the misdemeanor level because that is what I handle. If misdemeanors are not intended to be included in this bill, I would ask that they be excluded. The reason why I see that this will create injustice is simple. The maximum term of imprisonment for a misdemeanor is six months. If someone is placed on house arrest and his or her trial is set in 60 to 90 days, one continuance is granted and the trial is then set six months from the date of the arraignment, it is over. There is nothing further that the court can really hold that defendant accountable to at trial or sentencing. Everything is gone. Because misdemeanors are somewhat unique in the fact that the time of incarceration is not as long if somebody is placed on house arrest and does get it, it really would eat up the whole sentence and defeat the purpose. I do see my job as to help give victims a voice and this would be tough with someone on the misdemeanor level. I would propose that misdemeanor offenses be excluded from this bill if that was not the intent, and I look forward to working with the bill sponsor on that.

I did just want to briefly address some of the comments that have been made about whether or not this is discretionary. It absolutely is not discretionary. I know what the statute says; it says "may." We may as well read "must" there. The reason why I say that is because the Nevada Supreme Court has determined that it is a must. *Kuykendall v. State*, 112 Nev. 1285 (1996), said that even though this is discretionary on its face, it looked at legislative intent and said that all credits must be given. The judge has zero discretion. So, as the bill is written currently, even if a judge did not want to give credit for the house arrest, he must. That is the way the statute has been interpreted by the Nevada Supreme Court. I think Chairman Yeager's point was spot-on that if that is not the intent going forward, that should be remedied. But to be clear, the person cutting off the bracelet, he gets all of the credit right now. That is the law, and that is how the Nevada Supreme Court has interpreted this statute. Again, I would ask that misdemeanors be excluded if that was not the intent, and I believe that there could be a hard time getting justice for victims of crime if house arrest were granted on this level.

Chairman Yeager:

I do agree that perhaps the way the proposed bill is worded, I think one could argue that it would be a must for residential confinement, but I also think if we broke those two apart, that issue maybe falls away. That is something to think about going forward. Are there any questions from Committee members? [There were none.] Is there any additional testimony in opposition? [There was none.] Is there any neutral testimony? [There was none.] I will give our sponsor a chance to come back up for concluding remarks.

Scott Coffee:

I heard my esteemed colleague say that this would create too much confusion. With all due respect, it is fairly simple arithmetic for a judge to figure out how much time he wants to give at the time of sentencing and write in the judgment of conviction the amount of time he gives. The Legislature has straightened up our sentencing scheme to some extent. We give aggregate sentences at this point, and when you get a judgment of conviction, it will say "X" number of days credit for time served. That is not going to be confusing to anyone, with all due respect.

As for people spending a lot more or a lot less time or there being a chilling effect, I do not believe that is true either. If an offense is serious, the judge has the opportunity to place someone in prison for as long as they see fit. But what it does, it gives an opportunity for the judge to adjust things for house arrest. Suppose there is a two-year minimum sentence and someone spent six months on house arrest. The judge thinks it is fair that the two-year minimum should be reduced a bit; the bill gives the opportunity to do that. It just gives our judges more discretion. I find it somewhat suspect that we think that the sheriff or the Department of Corrections has the ability to figure out who deserves to be placed on house arrest and get credit, but our judges do not. They are elected to do exactly that. From that perspective, I think it makes sense to put those decisions in the hands of the judges.

As far as pretrial delay, because this is discretionary, we heard the opposition talk quite a bit about what could be argued. I would suspect if a prosecutor thought I was delaying the process to get my client time, they would argue as much and argue against the time. I would suspect that many judges would say, You are not going to get the time, because you have been playing games. That is the nice thing about making this discretionary. I think it is why Chairman Yeager's suggested amendment is very important. You could even add the language in the discretion of the trial judge may or may not on the front end of the "may" portion to make it absolutely clear. The decision that said that this was not in the judge's discretion was based on statutory interpretation. You have the opportunity to correct that with a clearer statute this time, so I do not think that is going to be a problem.

As for the mandatory two days on DUI and on domestic violence, that could be excluded from the statute, although in all candor, I have never seen someone placed on house arrest in two days. They do not get into court quickly enough to have that happen. I think it is a problem that just does not exist, to be quite honest, but if that were an issue, I suspect that Assemblyman Fumo would not have a problem with making sure that that was a problem that did not exist.

Lisa Rasmussen:

I just have a couple of points. Mr. Jones brought up that he was concerned that there would be some confusion as to whether mid-level monitoring, which might impose some kind of curfew, would also be construed as house arrest. We do not construe it that way. It is not our position that mid-level monitoring is the same as house arrest. I will go on the record as saying so. Mid-level monitoring is different. It is a global positioning satellite device that basically tells law enforcement where the defendant is located, but it does not confine them to their house. We see them as separate. This bill does not seek to apply credit for monitoring; it seeks to apply credit for house arrest, which is house confinement, which is punitive. That is not to say that mid-level monitoring is not a hassle and that it does not have some burdens that it imposes. The bill is not intended to address mid-level monitoring, and I want to make that clear.

Additionally, there has been a lot of talk about the person who cuts off his or her bracelet getting credit for time served. Let us just be really clear about this: Cutting off your bracelet is its own crime. A person would be charged with a new crime for that, and then the judge

would be saying, Wow, you were pending trial on a case and you committed a new crime. That person is not going to be in a good situation. I do not see how this is going to benefit the person who tampers with or removes his or her bracelet, because clearly a judge could say, No, I am not giving you credit. You committed a new crime while you were on house arrest.

Frankly, as a practicing lawyer, I would not be asking for house arrest on a misdemeanor. I would be asking for an OR release. We are not seeing house arrest on most misdemeanor cases. That is exactly the kind of thing that the whole bail reform—which is not the subject of today's hearing—is trying to address, these low-level misdemeanor crimes and people who cannot afford bail. The bill does not specifically carve out misdemeanors, but as a practical matter, misdemeanors are not the kinds of cases where house arrest is applicable.

Assemblyman Fumo:

I will just add one thing. It takes about two weeks for our clients to get on house arrest. Once you have argued for it, they go through a process, they have to qualify, and the average client I have, it is about two weeks before they get that house arrest bracelet and are released to their home. Mr. Schifalacqua's statement that they are just going to ask for it, get out, and that two days is not going to be credited is wrong. He said that it is over at that point because they spent six months on house arrest and there is nothing else we can do. There are fines, counseling, and community service that are applied with every DUI and domestic violence case, which is much of what happens in the City of Henderson in misdemeanor court. If a person violates any of that, the judge has the right to give him or her contempt time as well, so it is not over. With that, I would urge your support and look forward to a work session on this bill.

Chairman Yeager:

Please keep us updated on discussions. I will close the hearing on A.B. 109. I will now open the hearing on Assembly Bill 101, which authorizes a private plaintiff to bring an action for a declaratory judgment regarding a violation of state law or a local ordinance by certain governmental entities. Our own Assemblyman Daly will be presenting this bill. I know there is a lot of interest in the bill so once we get to additional testimony, we will take stock of that and proceed accordingly.

Assembly Bill 101: Authorizes a private plaintiff to bring an action for a declaratory judgment regarding a violation of state law or a local ordinance by certain governmental entities. (BDR 3-26)

Assemblyman Skip Daly, Assembly District No. 31:

I would like to give a little background before I get into the bill and, of course, I am happy to answer any questions at the end. I sponsored Assembly Bill 283 of the 77th Session that modified the construction manager at risk (CMAR) statutes. In that bill, the number of CMAR projects that a public body in a county with a population under 100,000 could do was no more than two CMAR projects per year. I wanted to try to limit that in the smaller counties as the consistency was not there. We wanted them to be selective on the projects

that CMAR was used. It is meant to be for complex projects or unique projects, not for every single project.

The specific language in *Nevada Revised Statutes* (NRS) 338.169, subsection 2 states: "A public body in a county whose population is less than 100,000 may enter into contracts with a construction manager at risk pursuant to NRS 338.1685 to 338.16995, inclusive, for the construction of not more than two public works in a calendar year that are discrete projects." In this context, "discrete" is an adjective that means individually separate and distinct or consisting of distinct or unconnected elements.

When this came to me and why I brought this forward, I was looking for a solution to a problem that was discovered. As you know, Nevada has a proud citizen legislature. We all have different backgrounds, interests, experiences, and areas of expertise which we apply to the issues of which we are confronted. Also, as a citizen legislature, part of our job is to follow up on the measures that we pass to make sure they are working as we have hoped.

In that capacity and in the course of my regular day job, I discovered that the Douglas County School District had put out a request for proposals for a CMAR project that actually consisted of six separate projects in six different locations for different scopes of work. The school district claimed that they were all one maintenance project. Of course, I disagreed, and 90 percent of the people I talked to disagreed. After explaining to the school district that what they were doing was not allowed under the law, the school district proceeded anyway. We—my local union—filed an action seeking a declaratory judgment under NRS Chapter 30. I was looking for the court to give us an answer; one of us was right and one of us wrong. Unfortunately, the court did not provide us with an answer because the action was dismissed. It ruled that because the union, me, a Douglas County citizen who had also signed the complaint, and apparently no other person, has standing in this circumstance to get a ruling.

So let me lay this out in just a slightly different way. When the Legislature passes legislation, we agonize over every word, we have long discussions, we negotiate with interested parties, what will the effect be, how will it work? After we go through all of the hearings and testimony, we finally agree on the intent and what the words mean, and then pass the law. In the context of the case I have described to you, the legal counsel for a public body looks at the same words and says, Well, in my opinion, the words mean something else. They can go forward with a single maintenance project at six different locations for different scopes of work, and the untenable problem that we are left with is that no one on the planet has standing to challenge the decision made by the attorney, in this case, for the school district. It was a private attorney for the school district. It was not the district attorney, although the district attorney's office said the county could do the same thing at a later date.

I am here to fix that problem, which is just one example of an unenforceable provision in law that is basically rendered meaningless if there is no way to get enforcement, get a judgment or a decision, and if my fellow legislators think that might be okay, I might be in the wrong business. We try to make sure that the laws that are passed have a mechanism for

enforcement, and even if one law cannot get that enforcement, judgment or relief, in my opinion, it is a perversion of justice that cannot stand.

The bill is fairly short with only one section and eight subsections. I would be happy to walk through the bill or answer any questions. I understand that most of the agencies and people who are going to testify in opposition here came to talk to me. I explained what was going on, what we are trying to get fixed, and I am going to ask every one of them to see if they have a solution other than this bill. I want to hear it, and I will be open to that whether we carry it forward with a solution through this bill or through another. We have to find a way to fix this, in my opinion.

Section 1, subsection 1 gives a private plaintiff standing to bring an action for a declaratory judgment only to determine if a state law or local ordinance has been violated. Subsection 2 gives the Attorney General the right to intervene or bring a related action to the first action. Subsection 3 prohibits the right to bring an action against the Legislature, the Judiciary, or an elected officer of the Executive Branch, and provides when the state or political subdivision would be a party to a civil action. Subsection 4 requires the Attorney General to be served a copy of the action, and all evidence to support the action must be given to the other party. Subsection 5 specifies where an action may be brought. Subsection 6 states that if the state or political subdivision is found to have violated the law, the underlying action becomes null and void. Subsection 7 states that this right to private action is in addition to any other remedy available. Subsection 8 gives a definition of a political subdivision, a private plaintiff, and the state.

Assemblywoman Miller:

I just wanted to clarify this bill was being brought forth because of certain small local governments, and is it based on the one case scenario with the school district?

Assemblyman Daly:

It is one example. There is another example in the same county, but directly with the county and not the school district. That case is on appeal at the Nevada Supreme Court right now. I can give other examples, and again, back to areas of my expertise, I am sure there are others out there. Recently there was a CMAR project with the City of Reno. They went through the whole process and made their selection in the first step, and they were getting ready to award that project. I reviewed that as part of the regular course of my day job and discovered that there was a flaw in their bid request. They did not ask for the certification that is needed and required under the statute to put in an affidavit with your proposal that says you will self-perform at least 25 percent of the work because the project was a horizontal construction project and they thought it was a building project.

We pointed that out to the City of Reno, and they actually, in my view, did the right thing and said we are going to reject all of those proposals, nobody complied, found them to be nonresponsive, and they are just going to bid that project later. They could have just as easily in that circumstance had their attorney take the position that it was just a minor bid irregularity and we missed it, so we are going to allow you to correct it afterward even

though the statute says it must be submitted at the time of the proposal. In the same scenario, I would not have standing, you would not have standing, the other contractors would not have standing, and they could have just gone forward without following that provision because my attorney says I do not have to. In that context, they have to knowingly and willfully be in violation for it to cross over to any sort of criminal situation. And there is a statute that would make any violation of the law criminal, but you have to meet the intent of knowingly and willingly. That is just another example where another governing body did the right thing in my view. There are several examples that some of you could think of in your arenas, whether it is an education ruling, an agency making a determination, or whatever other state agency that might be out there that may think they do not have to follow that particular section because my attorney said it was okay and was a minor issue. The law is pretty clear, and no one would have standing to challenge that or few people would in some circumstances. As I said, even one circumstance is too many for me.

Assemblywoman Cohen:

My question is about section 1, subsection 2, "If a private plaintiff brings an action pursuant to this section, no person other than the Attorney General or a deputy attorney general designated by the Attorney General may intervene or bring a related action pursuant to this section based on the facts underlying the first action." When I first read this, this had me concerned because what about, for instance, a case where you have similarly situated heirs or a case where people have traditional standing. Is this going to prevent those people from carrying forth a case?

Assemblyman Daly:

My thought process there, and the Legislative Counsel Bureau came up with the language, was that we wanted to have the district attorney in the county or the Attorney General; the one ultimately you could go to with some of this stuff if they felt the need or if they saw the issue, they could go there. We wanted somebody else to be able to say, "I agree and we want to be involved in this case." But I do not think it harms anybody who has traditional standing. This gives other people standing when nobody else does.

Assemblywoman Cohen:

What about the people who do not have traditional standing, but are other people similarly situated to the person who would bring the case if the bill passes? Is it just the one guy who gets to do it to get his relief, but the similarly situated guy next to him does not get the relief?

Assemblyman Daly:

I do not think it limits anybody. So 20 people could bring the case if they wanted to or if they knew about it or had an interest or the wherewithal to do it. Because you are bringing the case, you have to get an attorney. You have to do all of this stuff. I do not think it limits anybody else, but then in my experience the court is not going to have 20 different hearings. They are going to have one and would consolidate all of the issues. That would be my assumption of what would happen.

Assemblywoman Cohen:

I do not quite read it that way, but I will add that I also find it contradictory to subsection 7.

Assemblyman Roberts:

A good point is that it opens it up to anybody. You just mentioned that 20 people could file action against a CMAR, and with that broad ability for folks to file things, do you think it would just virtually end CMAR? People would just completely litigate it until it is gone?

Assemblyman Daly:

The example I gave just happens to be about CMAR. It is not limited to CMAR. It is not aimed at CMAR, and it is not trying to make CMAR any less or more attractive. There are issues with CMAR that are other issues, but not in this bill.

Assemblyman Roberts:

But anybody, regardless of standing, would have the ability to file an action against a CMAR. So if I am in California or Oregon and I just do not like whatever that contract is, I can file an action on it under this bill, correct?

Assemblyman Daly:

Theoretically, I suppose you could. You also have to meet the nonfrivolous standing. You have to get an attorney to do that. They have to put their name and license on it, so I do not think it is as wide open as you might think. There has to be a case there. I do not think you will find a reputable attorney who would be willing to have his or her license reprimanded if it is frivolous.

Assemblywoman Hansen:

I want to try to understand, what does CMAR actually mean and is there an advantage in efficiency and in cost in using CMAR for projects?

Assemblyman Daly:

There are three different delivery methods for the state. You can do design-bid-build, which I can explain to you later. You can do design-build, or you can do CMAR. Each one of them has some advantages and disadvantages. There have been studies that show that the most expensive is CMAR. The least expensive is design-build, and then the design-bid-build is somewhere in the middle. But each project is unique and some of them work better for others. I am happy to talk to anyone and explain fully the bidding procedures, but I do not believe it is relevant to the bill.

Chairman Yeager:

If you are not in this industry, CMAR is a little bit confusing at times. I would recommend to members if you have further questions about exactly what CMAR is and how it works, reach out to Assemblyman Daly or probably there are some hearings we can pull up from the last couple of sessions that would explain it as well. Are there any other questions from Committee members? [There were none.] Is there any testimony in support of A.B. 101? [There was none.]

Before I take opposition, I have a sign-in sheet here with a number of folks who have signed in as opposition. Could I get a show of hands from those who would like to come forward to testify in opposition? It does not look like as many as I thought, but we have about 45 minutes to get through opposition, so I would just remind testifiers that if someone before you has covered your points, it is entirely appropriate for you to get your name on the record and say I agree with what has been said. I am not trying to cut anyone's testimony off, but I want to make sure everybody has a chance to come forward and say what they would like to say. Please be mindful that you have about a dozen or so folks behind you who would like to testify as well.

Brandon P. Kemble, Assistant City Attorney, City Attorney's Office, City of Henderson:

I want to start with thanking Chairman Yeager and Assemblyman Daly for giving us the opportunity to meet with you before this hearing and share with you some of our thoughts. We appreciate that opportunity to raise those concerns with you.

The City of Henderson has submitted some written comments ([Exhibit G](#)), but we felt it was important to testify here today regarding A.B. 101, because the bill fundamentally alters some important principles that underlie our system of government, and changing those principles would have a significant burden on the way state and local governments do business and affect their ability to do the job. There are a few reasons that the City of Henderson opposes A.B. 101.

The first is that it is a fundamental alteration of the principle of standing. I know there are a lot of lawyers on the Committee, but standing is the general concept recognized for hundreds of years in federal and state law that basically says courts are limited to hearing cases by parties who have suffered actual harm. Assembly Bill 101 adopts a concept that any private plaintiff can seek declaratory relief, which means essentially that under A.B. 101 any person can challenge any government action regardless of whether they have suffered any actual harm. That is a fundamental alteration of the principle of standing. The Nevada Supreme Court has long recognized that unless this Legislature specifically states so in a statute, there is not a private cause of action. With regard to declaratory relief, A.B. 101 flips that principle.

Second, I wanted to reiterate Assemblywoman Cohen's point. I have the same reading of subsection 2 that if a private plaintiff initiates an action, it states that no other person other than the Attorney General can bring an action related to the action that is based on the same or similar facts. That means that parties who have suffered actual harm, perhaps an actual bidder in the context of the bidding statutes, could be cut off by a private plaintiff from a labor union, another state, or just some other party who actually did not suffer harm as a result of the infraction to the bidding statute.

I also want to be clear that it does not look like A.B. 101 is limited to any particular statutory section. It is not limited to CMAR, and it is not limited to NRS Chapter 338. This means that under NRS Chapter 30, anybody can bring an action challenging the action of a

government under any statute or a local ordinance. The bill also impacts the long-recognized doctrine of the exhaustion of administrative remedies. Again, both federal and state law have sort of adopted a principle that says if there is an available administrative remedy open to a party, they have to fully exhaust that administrative remedy before coming into court. If you look at subsection 3, paragraph (b), it appears to recognize that parties need to participate in administrative proceedings, but the second sentence in subsection 3, paragraph (b) almost contradicts that provision, because it says that the local jurisdiction or the local government is not deemed to be a party to an administrative proceeding merely because it is presiding over it. That is the nature of most administrative proceedings. So again, subsection 3, paragraph (b) says you cannot maintain a declaratory action so long as the private plaintiff or party are subject to an administrative action, but then it eliminates almost all of the administrative action that normally takes place, so folks could just run right into court.

The important part is what does this do, what do these fundamental alterations of these long-standing legal principles do to state and local governments? Much, much more litigation. It provides the grounds for not only the folks interested in the state of Nevada, it would allow parties from California—I do not think there is even a limitation on folks being in the United States—if they want to challenge the action of a local government or a state government, to bring a declaratory action seeking to invalidate a law. The folks in Las Vegas could challenge actions taken by governments in Reno. There just does not seem to be a limitation for the term "private plaintiff" as it is defined in the bill other than it be a natural person who is not representing a public entity.

While this is difficult to quantify how much litigation this would lead to, I can give you some statistics. In fiscal year 2017 through 2018, the City of Henderson City Council considered 1,450 agenda items. So each one of those agenda items is potentially subject to a challenge for declaratory relief invalidating those official actions. So far, the City of Henderson has considered 893 officially agendized actions. These numbers pale in comparison to the unofficial actions taken by the employees of the City of Henderson which also would be subject to challenge. It goes without saying that a party that is actually affected by those actions should be able to challenge those through declaratory relief, but again, A.B. 101 opens up all of those official actions and all of the unofficial actions to challenge through declaratory relief.

Finally, I just want to make a point here about the burden this would place on our courts. Nevada district courts are already overburdened. As part of our comments we submitted, there is a chart showing the number of cases that the average district court handled in 2018. That was nearly 1,700 cases [page 5, ([Exhibit G](#))]. I do not know how many more cases this would result in, but it is more than they have now and the courts do not need this pathway to additional litigation.

Assemblyman Daly asked if there were some potential solutions, and it seems like there may be some issues with NRS Chapter 338. The courts have guided the Legislature on how to handle this, and if this Legislature wants to provide a cause of action under NRS Chapter 338 for general taxpayers or for residents of jurisdictions or even for the representative labor

unions that want to challenge local governments' decisions concerning NRS Chapter 338, the Legislature certainly could do that with specific language limited to NRS Chapter 338. The Legislature could also broaden the Nevada Labor Commissioner's authority to regulate. The Nevada Labor Commissioner is already responsible for regulating several provisions under NRS Chapter 338, and again if this Legislature wanted to, I think the most appropriate course here would be to specifically identify those provisions where you want some oversight and litigation. But A.B. 101 has no such limitation.

Chairman Yeager:

Are there any questions from members? [There were none.]

Andy Moore, Deputy City Attorney, City of North Las Vegas:

Mr. Kemble from the City of Henderson hit all of the points I was going to make. I will take you up on your offer not to reiterate what he said because the outline I had hit on the issues of standing, getting rid of the exhaustion of administrative remedies, and the potential burden this places on already strained city attorney offices and already strained Nevada courts. I will limit my testimony to just reiterate Mr. Kemble's points.

Craig Madole, representing Nevada Chapter of the Associated General Contractors of America, Inc.:

While I am sensitive to what Assemblyman Daly had to say about the public owners needing to have that faith and follow the laws, I think that this bill would actually allow me to finish my book on unintended consequences of the Legislature. Obviously, we are opposed to it, but we would be willing to meet with Assemblyman Daly and see if there is some kind of remedy that could address his specific concern.

Dagny Stapleton, Executive Director, Nevada Association of Counties:

Our association is made up of all 17 of Nevada's counties, and we are also in opposition to this bill. We do think it is an overly broad solution to the issue that Assemblyman Daly outlined. The impact it would have on counties would be substantial. In addition, I echo the comments that the representatives from the City of Henderson and the City of Las Vegas made.

Alex Ortiz, Assistant Director, Clark County Department of Administrative Services:

Ditto to everything that has been said prior. I did reach out to the sponsor as well so the sponsor is aware of our position on this bill.

Shani J. Coleman, Deputy Director, Government Affairs Executive, Office of Administrative Services, City of Las Vegas:

We agree with all of the opposition statements made previously, and we are opposed to A.B. 101.

Omar Saucedo, representing Las Vegas Valley Water District; and Southern Nevada Water Authority:

I want to thank Assemblyman Daly for meeting with us, addressing our concerns, and discussing the bill and its intent. I certainly appreciate the spirit of the bill, but for the sake of brevity, I also ditto the comments from the people before me.

Jamie Rodriguez, Government Affairs Manager, Office of the Washoe County Manager:

Again, ditto to what everybody has said before me. I did have an opportunity to speak with the sponsor, and I thank Assemblyman Daly for speaking with me. We agree that this is simply a very broad burden placed on local governments for a specific issue.

Gary Milliken, representing the Nevada Contractors Association:

I certainly am not as eloquent as the attorney from Henderson was, but my only other comment is for those who have been here in previous sessions. Assemblyman Daly and I have discussed CMAR matters since it first became enacted. If you were here last session, you will remember how long that discussion about CMAR went on.

Warren B. Hardy, II, representing the Associated Builders and Contractors of Nevada; and Nevada League of Cities:

I probably am the only guy here who has worked longer than Mr. Milliken with Assemblyman Daly on CMAR and, in fact, introduced the first CMAR bill as a member of the Senate. I have very much the same concerns that Assemblyman Daly has on the CMAR issue, and we have tried to work it out. This bill, however, we have concerns with. I have spoken with Assemblyman Daly and he knows my clients are in opposition to this. I told him I would try to work on an amendment. I suggested we delete the whole thing and replace it with a smiley face emoji. He rejected that idea, but I will not add anything except what has already been said. We have concerns and look forward to the opportunity to work with Assemblyman Daly.

J. Daniel Yu, Assistant District Attorney, Office of the District Attorney, Carson City:

We wanted to voice our very strong opposition to this bill. I also wanted to thank Assemblyman Daly on the record for being generous with his time. We did have an opportunity in advance of today's hearing to speak with him and vet our concerns. We have heard everything this morning, and those points all line up with the points we wanted to make today.

I did want to add one additional matter, though, for this Committee's consideration. That is the importance of legislative intent that Assemblyman Daly himself also touched upon. One of the things that is perhaps an unintended, and a very bad consequence if this bill were to pass, is how it disrupts decades of legislative intent with respect to the exhaustion of remedy provisions already in existing state law. What I mean by that is this legislative body over the decades has built up a huge volume of statutory provisions that speak to the exhaustion of remedies at the administrative and regulatory levels before going into the courts and clogging

the courts and undermining judicial economy. So that is something that this bill would also do as an unintended consequence, and I wanted this body to be mindful of that as well.

Tyre L. Gray, representing the Las Vegas Metropolitan Chamber of Commerce:

I would like to echo the comments of Mr. Brandon Kemble. Just to clarify the point, Article 3, Section 2 of the *U.S. Constitution* says that there must be a case in controversy, and that has just been interpreted as meaning that there must be standing. Now standing just requires that it be the right plaintiff, and by that what we mean is that the plaintiff actually be somebody who has skin in the game. They have a stake in the outcome of the litigation. This particular bill would blow that concept almost completely up by allowing anybody, as we have already articulated, whether that person be here in Nevada, be located in the United States, or pretty much anywhere in the world, if they were unhappy, they could just continue to sue and sue and sue over any type of government action.

Additionally, as a chamber we are concerned about the administrative costs of this particular bill. Again, if you have \$250 and a couple of minutes to waste, you can file the lawsuit. And again, even though it may be frivolous, I believe the municipalities will agree that they would have to exhaust some level of resources to at least either file an answer or a motion to dismiss. So there are some concerns there. I would like to give a nod to Mr. Kemble again for his great analysis of this bill.

Douglas V. Ritchie, Chief Civil Deputy District Attorney, Douglas County District Attorney's Office:

I want to stress one point that Assemblywoman Cohen brought up. Currently under NRS 30.130, it discusses other parties that must be brought into a declaratory relief action if they have an interest in the matter. This proposed bill would undermine that. In fact, just the practical implication is that, if for instance the Douglas County Board of County Commissioners approved a special use permit to build a veterans' home, someone in Ely or in New York or in Belarus could file a declaratory relief action and challenge the issuance of that special use permit. But the people impacted by that, the veterans within Douglas County, would be prohibited under section 1, subsection 2 from participating. It says they may not intervene; only the Attorney General or his designee may do that. That is bad public policy. It has already been discussed; it goes contrary to our founding documents, in Article 3, Section 2 of our *U.S. Constitution*.

I would also say that the other implication from this is it does not help working men and women. It is a gift for attorneys, because what will happen is it will literally be a race to the courthouse to see who can file first. Once they file, they control that process. One of the unintended consequences is, just for an example, if somebody like the Koch brothers decide a project labor agreement was inappropriate, they could file an action and that would stymie that project. Working men and women would be prohibited from working; that project would be stalled or grant funding could be lost while the litigation is proceeding. There are a lot of public policy implications. Again, I understand the concerns. I also had a chance to meet with Assemblyman Daly, but using a nuclear weapon to fix a CMAR project—in Douglas County's case, it is replacing air-conditioning units—is probably not the best thing.

Assemblywoman Backus:

In order to stall an ongoing project, would someone not have to seek a temporary restraining order, not necessarily just the filing of a complaint for declaratory action?

Douglas Ritchie:

That is an excellent point. The practical issue, as you know, is that if millions of dollars on a project are tied up and the action could be declared void, it really gives elected officials pause about going forward with a major public infrastructure project if everything underlying that could be declared void by a court of law.

Lindsey Anderson, Government Affairs Director, Washoe County School District:

We have heard a lot from other local governments, and I wanted to bring it from the angle of a school district. Obviously, all of the resources we use in legal action come from our Distributive School Account, which is money meant to be spent on children. I did meet with Assemblyman Daly, and I consider him a partner as we are building schools in Washoe County and using the CMAR process on some and not others. We expressed our concerns, so we share the same concerns as other local governments, just as a school district.

Chairman Yeager:

Is there any other testimony in opposition either in Las Vegas or Carson City? [There was none.] Is there any testimony in the neutral position? [There was none.] Assemblyman Daly, if you would like to come back up for concluding remarks, please.

Assemblyman Daly:

Yes, I did meet with virtually everybody who came up in opposition. I went through the issues on various things. It is very broad, and I thought about that before I put the bill in. I wanted to make a point. I wanted to get many people interested, and I succeeded at that. There is an issue that needs to be addressed, and I am glad to hear that there are a variety of ways that people are starting to think about how we can address this. Everybody who is interested, make sure you sign the sign-in sheet as we will be following up with everybody who signed in and has an interest in having some meetings. One suggestion was to put it under the Labor Commissioner or just focus it to NRS Chapter 338. I do not think we can get there from this bill in the single subject, but we will discuss those. If we come up with an issue under this, that is fine. I understand about standing, broadening and opening it up, and even if we made some of the technical changes that people brought up, it would still be abolished. Recognizing, though, that we wanted to make a point, I am thankful for the people who are going to help me fix it.

Chairman Yeager:

Thank you, Assemblyman Daly, and thank you for being willing to meet with the various stakeholders who came forward today. I think that really helped us move the meeting along. I want to thank Mr. Kemble. I think he did a really good job of summarizing the opposition. I do not know that I have ever heard that many "dittos" and "me toos" in a long time. That was well done. And I want to thank you, Assemblyman Daly, for bringing a lot of new faces to the Judiciary Committee. I am not sure that we are going to see many of you again on

bills, so it is nice to have some different faces and hear from some different folks here in the Committee.

I will close the hearing on A.B. 101 and open it up to public comment either in Carson City or Las Vegas. [There was none.] Are there any comments from Committee members? [There were none.] We will start tomorrow at 8 a.m. with a presentation from the Gaming Control Board and hear one bill. Monday's hearing will begin at 9 a.m.

The meeting is adjourned [at 10:40 a.m.].

RESPECTFULLY SUBMITTED:

Traci Dory
Committee Secretary

APPROVED BY:

Assemblyman Steve Yeager, Chairman

DATE: _____

EXHIBITS

[Exhibit A](#) is the Agenda.

[Exhibit B](#) is the Attendance Roster.

[Exhibit C](#) is the Work Session Document for [Senate Bill 143](#), dated February 14, 2019, presented by Diane C. Thornton, Committee Policy Analyst, Research Division, Legislative Counsel Bureau.

[Exhibit D](#) is a letter dated February 13, 2019, in opposition to [Senate Bill 143](#), submitted by Daniel Reid, Western Regional Director of the National Rifle Association of America.

[Exhibit E](#) is a document entitled "Attorney General's Office Overview Presentation," submitted by Attorney General Aaron D. Ford.

[Exhibit F](#) is a document entitled "Attorney General's Office Overview Presentation, Management Staff Bios," submitted by Attorney General Aaron D. Ford.

[Exhibit G](#) is written remarks in opposition to [Assembly Bill 101](#), submitted by Brandon P. Kemble, Assistant City Attorney, City Attorney's Office, City of Henderson.