IN THE NEBRASKA SUPREME COURT

CASE NO. S-08-628

STATE OF NEBRASKA,
Plaintiff-Appellee,

vs.

DARREN J. DRAHOTA,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF LANCASTER COUNTY
THE HONORABLE JOHN A. COLBORN, DISTRICT COURT JUDGE

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NEBRASKA

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STATEMENT OF INTEREST OF AMICUS CURIAE

American Civil Liberties Union Foundation of Nebraska (ACLU) is the state affiliate of a national non-profit, nonpartisan organization founded in 1920 for the purpose of maintaining and advancing civil liberties in the United States. It has over three hundred thousand members nationwide, and ACLU Nebraska has over 1,300 members in this state. The interest of the ACLU in this case stems from its commitment to the full enforcement of the Bill of Rights' guarantees of free speech. The ACLU has specialized knowledge and interest in the area of the First Amendment Free Speech Clause.

ACLU regularly defends individuals charged with "disturbing the peace" when their conduct is in fact legally protected, and we therefore have a strong interest in this matter on behalf of past, current and future clients.

ARGUMENT

I. THE OFFENSE TAKEN AT THE SPEECH AT ISSUE

Drahota cannot be punished for the text of his speech. Neither can he be punished for its tone, for the manner of its delivery.

Let us assume that some find his speech offensive. This—the fact that speech gives offense—is precisely the reason it needs to be protected. The State does not suppress speech it finds agreeable. Polite, polished, flattering speech need not be so fearful of government suppression. The very speech that needs the First Amendment is that which is disagreeable, crude, and offensive. It is speech just like that of Drahota that needs—*and receives*—the protection of the Free Speech Clause. *E.g.*, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) ("'The fact that society may find speech offensive

is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.'" (quoting *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978)). *Accord, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (plurality opinion) ("Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same."); *Street v. New York*, 394 U. S. 576, 592 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.").

■ Not all of us can express our emotions with the subtlety of W.B. Yeats. Some are like Larry Flynt who expressed his feelings regarding Reverend Jerry Falwell and all that he stands for by producing and publishing an ad parody that has Falwell "stat[ing] that his 'first time' was during a drunken incestuous rendezvous with his mother in an outhouse." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 48 (1988).

■ Not all of us are able to support our positions with the depth of St. Thomas Aquinas. Some are like Mr. Brandenburg, a "hooded figure[]" at a Ku Klux Klan rally, gathered with others "around a large wooden cross, which they burned," who gave a speech that included, "'This is what we are going to do to the niggers,'" "'Send the Jews back to Israel,'" and "'Bury the niggers.'" "Though some of the figures in the films carried weapons, the speaker did not." *Brandenburg v. Ohio*, 395 U.S. 444, 446 and 446 n.1 (1969).

■ Not all of us possess the gift to express our political views with the erudition of President Abraham Lincoln. Some are like Paul Cohen who, during the Vietnam War, was in a corridor of a courthouse "'wearing a jacket bearing the words 'Fuck the Draft' which were plainly visible.'" *Cohen v. California*, 403 U.S. 15, 16 (1971).

■ Not all of us have the ability to effect change with the political skills of President Lyndon Johnson. Some are like Gregory Lee Johnson: "The demonstration ended in front of Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, the protestors chanted, 'America, the red, white, and blue, we spit on you.' . . . [S]everal witnesses testified that they had been seriously offended by the flag burning." *Texas v. Johnson*, 491 U.S. 397, 399 (1989).

■ Most are not able to defend their theories with the logic of Stephen Hawking. Some are like Reverend Fred Phelps, founder of the Westboro Baptist Church, who protests at the funerals of American soldiers killed in Iraq saying that the death of American servicemen and women is God's punishment for America's tolerance of homosexuality and carrying signs saying, among other things, "God Hates the USA," "God hates you," and "Thank God for dead soldiers." *Snyder v. Phelps*, 580 F.3d 206, 212 (4th Cir. 2009) (multiple quotation marks omitted).

Drahota's speech does not come near sinking to the level of that of Larry Flynt, Klansman Brandenburg, or Fred Phelps. Many would find it less objectionable than the flag burning by Gregory Lee Johnson and the public display on the back of Paul Cohen's jacket. The judgments against or convictions of Flynt, Brandenburg, Cohen, Johnson, and Phelps were all overturned as in violation of the Free Speech Clause of the First Amendment.

Yeats, Hawking, Aquinas, Lyndon Johnson, and Lincoln do not need the protection of the First Amendment. Those who are only able to express themselves more crudely have just as much right to speak. They have just as great a right to the protection of the First Amendment, and a much greater need of its protection. Flynt, Brandenburg, Cohen, Gregory Lee Johnson, and Phelps, need its protection. So does Drahota. The disagreeable speakers, the ones whose speech is crude and offensive, are the ones who need the First Amendment at their backs.

In each of the cases sketched above—*Flynt*, *Brandenburg*, *Cohen*, *Johnson*, and *Phelps*—the speech was protected. The criminal conviction or award of damages was overturned. In the order in which they are presented above: *Hustler Magazine*, 485 U.S. at 55 ("'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."); *Brandenburg*, 395 U.S. at 445-46 and 446 n.1 (overturning the conviction despite the fact that "hooded figures, some of whom carried firearms[,] . . . gathered around a large wooden cross, which they burned" and gave speeches about what they "were going to do to the niggers," the "dirty nigger[s]," that they were going to "bury the niggers," and that the "[n]igger will have to fight for every inch he gets from now on," and in which they said similar things about Jews); *Cohen*, 403 U.S. at 25 (stating that "while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric."); *Texas v. Johnson*, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society

finds the idea itself offensive or disagreeable."); *Snyder v. Phelps*, 580 F.3d at 226 ("Notwithstanding the distasteful and repugnant nature of the words being challenged in these proceedings, we are constrained to conclude that the Defendants' signs. . . are constitutionally protected." And it was not just the words that were "distasteful and repugnant," but also the fact that they were directed at and for the most part delivered outside the funeral of a United States Marine Lance Corporal killed in action. "'It is a fair summary of history to say that the safeguards of liberty have often been forged in controversies involving not very nice people'" *Id.* (quoting *Kopf v. Skyrm*, 993 F.2d 374, 380 (4th Cir. 1993) (internal quotation marks omitted in *Snyder*)).

That Drahota's speech cannot be punished because of its tone—the emotion expressed in its delivery—is further born out by this:

> Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. ...

Cohen v. California, 403 U.S. 15, 25-26 (1971). *See also, e.g., NAACP v. Claiborne Hardware*, 458 U.S. 886, 928 (1982) (finding that "[t]he emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech set forth in *Brandenburg*"). The quotation from *Cohen* continues (this part in the context of speech directed at public persons such as those standing as candidates for the State Legislature): "Indeed, as Mr. Justice Frankfurter has said, 'one of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only

informed and responsible criticism but the freedom to speak foolishly and without moderation.' *Baumgartner* v. *United States*, 322 U.S. 665, 673-674 (1944)." *Cohen*, 403 U.S. at 26.

"[E]ven when a speaker or writer is motivated by hatred or ill-will his expression was protected by the First Amendment." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988) (citing *Garrison v. Louisiana*, 379 U. S. 64 (1964)).

> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.

Cohen v. California, 403 U.S. 15, 24-25 (1971).

II. CATEGORIES OF UNPROTECTED SPEECH

The Supreme Court takes a categorical approach to the Free Speech Clause. *E.g. R.A.V v. St. Paul*, 505 U.S. 377, 382-83 (1992). There are a few well-recognized categories of speech that receive little or no protection from the First Amendment. Drahota's speech does not fall into any of these categories.

■ *Nonexpressive Conduct*: His speech was pure speech and not unprotected non-expressive conduct. *See, e.g., Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 65-66 (2006).

■ *Obscenity*: His speech was not obscene; at a minimum, obscene speech must appeal to the prurient interest in sex. *E.g., Miller v. California*, 413 U.S. 15, 24 (1973).

■ *Fighting Words*: His speech did not consist of fighting words. They require immediate provocation and, as such, must be spoken face-to-face. *E.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942). *See State v. Boss*, 195 Neb. 467, 471, 238 N.W.2d 639, 643 (1976) (while silent as to outer limits of the doctrine, finding that "the words here used were fighting words" in part because they were spoken in a "face-to-face confrontation").

■ *False Advertising, Advertising an Illegal Activity, Fraud, and Child Pornography*: His speech was not false advertising, *see Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 110 (1990), advertising of an illegal activity, *see 44 Liquormart v. Rhode Island*, 517 U.S. 484, 496 (1996), fraudulent speech, *see Illinois ex rel. Madigan v. Telemarketing Associates, Inc.* 538 U.S. 600 (2003), or child pornography, *see, e.g.*, *United States v. Williams*, ___ U.S. ___, 128 S.Ct. 1830 (2008).

■ *Libel*: Though libelous speech is protected, some—the libel of one private person by another—does receive a minimal level of protection. Drahota cannot be convicted for the crime of libelous speech.

First, for speech to be libelous it must be "published," it must disseminated to someone other than the person allegedly libeled. *Molt v. Lindsay Mfg. Co.*, 248 Neb. 81, 91, 532 N.W.2d 11, 18 (1995) ("'There is no publication when the words are communicated only to the person defamed . . . .' 53 C.J.S. *Libel and Slander* § 50 a. at 97 (1987)."); Black's Law Dictionary (8th ed. 2004) ("publish, vb. . . . **2.** To communicate (defamatory words) to someone other than the person defamed."). Drahota did not "publish" his statements. (There is nothing in the record to indicate that Drahota communicated any of the statements involved herein to anyone other than the person who

was the subject of the statements. To the extent they have subsequently been "published," that was a result of the actions of the complainant in filing criminal charges against Drahota.)

Second, the complainant here was a public figure. He was a candidate for the Unicameral. *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 (1971). *See also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988) (stating that "in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment.").

Third, Drahota's statements were not statements of fact and no one would reasonably take them to be statements of fact. In truth, they are not even statements of opinion, but rather extravagant exaggerations that could not, and would not, be taken seriously—even had they been published. If the statement cannot reasonably be interpreted as stating actual facts about an individual, it is protected. *Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6, 14 (1970); *see also, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988). No one really believes, for example, that the complainant is a "traitor" and should be "forced out of this country," or that "Libs like yourself are the lowest form of life on this planet." (E1, 12:9, 10) Like Larry Flynt's statements about Jerry Falwell's incestuous relationship, *Hustler Magazine, Inc. v. Falwell*, *supra*, nothing said here can be taken seriously.

■ *Clear and Present Danger*: Nothing in the record supports a finding of a clear and present danger of a grave substantive evil that government has a right to prevent. *E.g., Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). Klansman Brandenburg's barely veiled threats, Paul Cohen's wearing his jacket in public, Gregory

Lee Johnson burning his flag in front of a Dallas, Texas, crowd, Fred Phelps picketing the funeral of a fallen Marine—none of these protected activities created a clear and present danger. There is nothing in the record to say that Drahota's protected speech did either.

Here is how, in *NAACP v. Claiborne Hardware*, 458 U.S. 886, 928 n.71 (1982), the Court expressed a point similar to many of those made above:

> In *Watts v. United States*, 394 U.S. 705, the petitioner was convicted of willfully making a threat to take the life of the President. During a public rally at the Washington Monument, petitioner stated in a small discussion group:
>
> "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.*, at 706.
>
> This Court summarily reversed. The Court agreed with the petitioner that the statement, taken in context, was a "kind of very crude offensive method of stating a political opposition to the President." *Id.*, at 708.

III. THAT HIS SPEECH WAS DIRECTED AT ONE OTHER INDIVIDUAL DOES NOT DIMINISH ITS FIRST AMENDMENT PROTECTION

The fact that Drahota's speech was directed at a single individual does not diminish its First Amendment protection. *Lewis v. City of New Orleans*, 415 U.S. 130 (1974) (applying the Free Speech Clause to a conviction based on speech directed at an individual police officer).

Surely persons having the e-mail address, postal-mail address, or campaign office phone number of their candidate for the Senate, can write or call that candidate with the same First Amendment protection they would have if they had stood outside the candidate's office and communicated with a bullhorn. *See Saia v. New York*, 334 U.S. 558 (1948) (applying the Free Speech Clause and striking down an ordinance regulating the use of "a loud-speaker or amplifier"; in combination with other cases, such as *Ward v.*

Rock Against Racism, 491 U.S. 781 (1989) and *Kovacs v. Cooper*, 336 U.S. 77 (1949), establishing the proposition that content-based regulation of amplified speech is presumptively unconstitutional). Surely the e-mailer has the same First Amendment protection as those who send postal mail to individuals, *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 544 (1980), hand a pamphlet to another person, *Watchtower Bible and Tract Society v. Village of Stratton*, 536 U.S. 150, 161-62 (2002), or knock on the door to communicate one-to-one with (or even solicit money from) whomever answers, *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980).

IV. DRAHOTA'S CONVICTION IS PRESUMPTIVELY UNCONSTITUTIONAL

Drahota is being punished for the content of his speech: the actual words chosen, and their tone. "When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed. 'Content-bases regulations are presumptively invalid,' *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992), and the Government bears the burden to rebut that presumption." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000). *Accord, e.g., Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927).

In the case at bar the State cannot overcome this presumption. The State cannot meet its burden of showing that it can punish him for either his actual words or his tone. Neither can the State meet its burden of showing that his speech falls within one of the few categories of essentially unprotected speech.

Furthermore, this is an appeal of rights under the Free Speech Clause. Appellate review is de novo. "Because this is a First Amendment case where the ultimate

conclusions of law are virtually inseparable from findings of fact, [appellate courts] are obligated to independently review the factual record to ensure that the [lower] court's judgment does not unlawfully intrude on free expression." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648-49 (2000) (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 567-68 (1995). *Accord, e.g., Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927) ("this Court will review the finding of facts by a State court where . . . a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.")

In making its decision, this Court cannot relax this presumption, "cannot be influenced . . . by the perception that the regulation in question is not a major one because the speech is not very important." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 826 (2000). "If there is any fixed star in our constitutional constellation, it is that no official high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

CONCLUSION

It is clear that Drahota's speech does not fit into any of the categories of unprotected speech. It is clear that Drahota cannot be convicted of a crime because his speech is "offensive," *FCC v. Pacificia, supra*, because his "ideas . . . [are] offensive," *Street v. New York, supra*, because society finds what he has done "offensive or disagreeable," *Texas v. Johnson, supra*, because we are "move[d] . . . to despise what is

said," *Young v. American Mini Theatres*, *supra*, or because of "the distasteful and repugnant nature of the words," *Snyder v. Phelps*, *supra*.

It is clear that Drahota's speech does not fall into any of the categories of unprotected or minimally-protected speech. It is also clear that it does not matter that he only communicated with one other person.

In the end, it is clear that the burden here is on the State and that the State cannot satisfy that burden.

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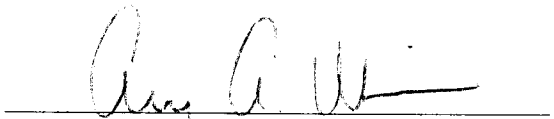

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