IN THE NEBRASKA SUPREME COURT
CASE NO. S-08-628

STATE OF NEBRASKA,	)
Appellee,	)
	)
vs.	)
	)
DARREN J. DRAHOTA,	)
Appellant.	)

(Court of Appeals: Inbody, Sievers, and Cassel, Judges]
County Court for Lancaster County: Gale Pokorny, County Judge
District Court for Lancaster County: John A. Colborn, District Judge)

AMICUS BRIEF OF CURRENT AND FORMER ELECTED OFFICIALS

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INTEREST OF THE AMICI

Amici curiae are current and former elected officials. As both officials and candidates, they have received rude, insensitive, or offensive e-mails or other forms of communication. These *amici* nonetheless believe that such communication should be protected from criminal penalties by the First Amendment. The following are the *amici*:

Keith Brown has been a member of the Bunker Hill Village, Texas, City Council since 2006, and a fire commissioner for the Villages, Texas, Fire Department since 2006.

Michael Patrick Carroll has been a member of the New Jersey Assembly since 1996.

Brian Cook was a Representative Town Meeting member in Fairfield, Connecticut, from 2005 to 2008.

Dan Greenberg has been a member of the Arkansas General Assembly since January 2007. He was a county legislator (called Justice of the Peace) from 2003 to 2007.

Jeff Jennings was a member of the Malibu, California, City Council, from 1996 to 2008, and was Mayor of Malibu from 1997 to 1998 and from 2002 to 2003.

Jim C. Patrick was a member of the Board of Supervisors, Shenandoah County, Virginia, from 2004 to 2007.

David B. Schmidt was a member of the Board of Town Trustees for Windsor, Colorado from April 1989 through December 1992.

Randy Simmons has been Mayor of Providence, Utah since 2006 and was a member of the City Council from 2000 to 2006.

Jeff Steinport was a member of the Grand Rapids, Michigan, Board of Education, from 2001 to 2004.

Jerod Tufte has been State's Attorney for Kidder County, North Dakota, since 2005.

Douglas Vatter has been a member of the Board of Trustees of the Village of Cornwall on Hudson, New York, since March 2009.

Jack Weiss was a member of the Los Angeles City Council from 2001 to 2009, and was a candidate for Los Angeles City Attorney in 2009.

INTRODUCTION

The legal issues in this appeal have been amply briefed by the parties, and the *amici* here will not repeat these arguments. Instead, *amici* will offer this court some insights into the important ways in which even offensive and rude e-mails or other communications help promote good government decisionmaking and accordingly should be protected from criminal prosecution. There are at least three problematic effects of imposing criminal penalties on the author or sender of an offensive communication: (1) a reduced and skewed flow of information and argument to elected officials, (2) the reluctance of constituents to send important e-mails because of the risk of criminal liability, and (3) the impoverished ability of deliberative bodies to decide issue collectively if such criminal convictions were permitted.

ARGUMENT

I. IMPOSING CRIMINAL LIABILITY FOR OFFENSIVE E-MAILS WOULD REDUCE AND SKEW THE FLOW OF INFORMATION AND ARGUMENT TO ELECTED OFFICIALS.

Amici receive many communications from constituents, and fortunately most of these are supportive or at lease constructive. However, *amici* have also received numerous rude, insensitive, or offensive e-mails or other communications. Much of the time, these communications mix some sort of political or public policy argument or comment with strongly worded insults or invective. But despite the unpleasant language, the policy argument contained in these communications are sometimes helpful. Even when they are not, the mere fact that the e-mail was sent gives elected officials some indication of the number and type of people who support or oppose any particular measure and the intensity of their feelings. This alone is useful information. Criminalizing such communications will decrease the amount of useful information and argument that elected officials have, and thus result is worse governmental decisionmaking.

An example might help illustrate this point. In March 2009, a constituent sent an angry e-mail to an Arkansas state senator, with a copy to every member of the Arkansas legislature and several members of the press, criticizing the state senator for supporting a particular bill involving illegal aliens. The e-mail was full of angry and rude language: "According to you . . . moral courage is something to be turned off and on whenever it suits you . . . how absolutely pathetic." It claimed that "you and those other Senators supporting this Bill are an embarrassment to the Senate, the legislative process & Arkansans." It further explained that the senator who sponsored the bill "and

her Marxists shills" "not only sullies the reputation of the Arkansas Senate but makes a mockery of the legislative and judicial process, not to mention the expense to taxpayers." It compared politicians to hogs. And it then elucidated that the senator supporting the bill is "morally, ethically and constitutionally bankrupt and more importantly, you have betrayed the citizens of Arkansas and particularly by your own admission your own constituents, by voting for this travesty."

An Arkansas state representative (who was merely copied on the initial e-mail) sent a short response asking not to receive further e-mails: "You may be critical of anyone in the legislature but when you do please do not copy me. Thank you for your cooperation."

This attempt failed. The sender of the e-mail then sent a response to the representative (again, with a copy to every member of the Arkansas legislature and to members of the press), refusing to take the representative off his e-mail list. "You fail to recognize that you are part of a legislative body that passes laws that we must adhere to. Your parochial view of the Arkansas legislative landscape is breathtaking. No, you will not be removed from our list."

The sender then accused the representative who wanted to stop receiving these e-mails of being "one of many parasitic bureaucrats." The sender noted that "the frontal assault on middleclass Arkansans, losing their jobs, being fired, struggling mightily to maintain some semblance of family comforts and standard of living while subsidizing so-called 'public servants', in addition to being forced to pay for the illegals' schools, healthcare, pre & postnatal care, penal costs, & welfare not available to themselves."

> "The audacity that you would try to quell the 1st Amendment. I say to you [representative], as I said to the 13 simpletons, your duty and honor should be placed at the feet of U.S. citizens, not the Fascist Tysons/Government directives. [¶] We are

still a republic founded on the rule of law, sovereignty, and more importantly the Constitution. [¶] You will never get a surrender from us [, representative]."

Most of the *amici* here have received numerous similar communications. We certainly do not enjoy reading these, and there is no dispute that the tone and content of these e-mails is rude and lacks civility. But the issue here is not whether these e-mails were polite; it is whether they are criminal. They should not be.

Such e-mails have value. They convey some useful information and argument. For example, in sifting through the invective in the two e-mails quoted above, the writer does note "the expense to taxpayers" of the bill in question, and the harm to "middleclass Arkansans, losing their jobs, being fired, struggling mightily to maintain some semblance of family comforts and standard of living" while "being forced to pay for the illegals' schools, healthcare, pre & postnatal care, penal costs, & welfare not available to themselves." That is, the writer perceives that there are unacceptable economic costs to the bill. Of course, he did not express this concern in such polite language, but the policy point is still there.

Also, the *intensity* of the invective may also convey a sense of the outrage of the particular citizen, the *number* of such e-mails may convey a sense of how many people support or oppose a particular issue or candidate, and the *language* used might convey a sense of *who* supports or opposes a particular issue or candidate. All of this information is relevant and potentially important to government decisionmaking. Criminalizing such e-mails or other communications would deprive elected official of this information.

If such e-mails could be criminally prosecuted, there would also a problem with the *distribution* of information. Some sides of public policy issues simply attract more vehement

supporters, or even more rude and ill-mannered supporters. If people faced criminal prosecution for sending offensive e-mails, and thus sent fewer of them, it is likely that some sides in a public debate would be more heavily affected than others. The result is that elected official would not only have less information, but they would have skewed information.

These forms of communication also provide an important benefit to the constituents themselves. Our republican form of government is built on the premise that people *should* participate in government. These forms of communication are the means by which angry and dissatisfied constituents have a say in the governmental process. It would be counterproductive to limit this right, and to limit it with criminal penalties would only force dissatisfied constituents to find less socially beneficial ways to influence the process. Criminalizing such communications does nothing to address the underlying anger of the constituents; it simply stops one socially productive way of expressing it.

The benefit of such a criminal ban is also likely to be small. It is fairly easy for an elected official or candidate who does not want to read such e-mails to simply skim them and then delete them at the first sign of rude invective. It is also simple for elected officials or candidates to ignore e-mails from particular constituents. And it is just as easy for an official or candidate to discard similar types of mail received from angry constituents. Saving elected officials or candidates this minimal burden, and the psychological discomfort of reading (or at least skimming) such communications is not much of a benefit.

Thus, such communications, offensive as they are, nonetheless contain some valuable and useful information and help constituents become part of the process of self-government. Criminalizing them would deprive the government of this information with no significant benefit.

We firmly believe our polity would be far worse off if such communications, no matter how offensive, were subject to criminal prosecution.

II. MOST CITIZENS WOULD NOT UNDERSTAND THE LIMITS OF A COMPLEX RULE THAT CRIMINALIZED *SOME* E-MAIL SENT TO PUBLIC OFFICIALS BUT PROTECTED OTHER SUCH E-MAILS. AFFIRMING THE CONVICTION HERE WOULD LIKELY RESULT IN SOME CONSTITUENTS BEING DETERRED FROM COMMUNICATING WITH ELECTED OFFICIALS.

One might argue that this court should affirm the conviction, but explain in detail when offensive e-mails or other communications may or may not be criminally punished. As Drahota explained in detail in his Appellant's Brief, such an approach would still violate the constitution, and the *amici* here agree with that analysis. But the *amici* wish to elaborate on a public policy issue in this brief, not the constitutional issue, although note the two are certainly related. Any rule permitting criminal liability for some offensive e-mails but protecting other such e-mails would be both complex and incomplete, and thus likely to be misunderstood by the public. The result of such a holding would be to cause at least some citizens not to send potentially problematic e-mails to elected officials out of fear of criminal prosecution.

Any such rule upholding the conviction here but protecting other offensive e-mails would be quite complex. For example, this court could potentially hold that Drahota's e-mails were not constitutionally protected because four months earlier Avery had requested Drahota not to send him any further e-mails. This attempt would fail legally since existing law holds to the contrary, as

explained in Drahota's Appellant's Brief. But even if such a holding were constitutionally permitted, any such rule would have to address the following issues:

Length Request Remains In Effect. How long would such a request would remain in effect? Would a request not to send e-mails made one year earlier suffice? Five years earlier? Fifteen years earlier? A "reasonable period" earlier? Any bright-line rule would be both overinclusive and underinclusive, and any fact-specific "reasonable" time period would add result in less predictability.

Scope of the Request. The holding would also have to determine the permissible scope of the request. Could an elected official – using a threat of criminal prosecution – request that a constituent not send him any communications at all, or only any communications pertaining to specific topics, or only communications that use certain offensive language?

Identity of the Requestor. Elected officials often have staff members read and respond to e-mails or other communications. If a staff member requested that a constituent not send further e-mails, would that be sufficient to allow the imposition of criminal penalties or would the request have to come from the official?

Nature of the Request. Would the request have to mention the possibility of criminal penalties, or would a simply request not to send any further e-mails suffice?

Sender's Subjective Beliefs. What if the sender reasonably (but erroneously) believes that such e-mails are constitutionally protected? (Note that in the Arkansas e-mail discussed above, a representative who had merely been sent a copy of the original e-mail had specifically requested not to receive any further e-mails but did not mention the possibility of criminal prosecution. The sender responded by noting – correctly, in our opinion – that such e-mails were protected by the First Amendment.)

All of these issues pertain solely to the request not to send information itself. The same type of analysis would apply to numerous other complex issues, like the type of language used in the offending e-mail. It is theoretically possible that this court could reach a holding that would address all of these issues. However, such a holding would suffer from two serious defects.

Such a holding would necessarily be complex. As such, it would be highly unlikely that ordinary citizens would understand the exact scope of the rule. Most citizens (like the dissatisfied Arkansas constituent discussed above) start with a vague understanding that sending e-mails to elected officials or candidates is protected by the First Amendment. They then might learn about the court's decision from popular sources, such as reports of the case on the internet, television news, the newspapers, or other people who heard about the decision, but not read the full opinion itself. Any such reports are likely not to explain the holding in its full complexity.

Any such holding would also be incomplete. There will be some situations not clearly covered by the rule, no matter how carefully this court tried to craft such a rule.

As a result of these two problems, citizens will be left with only the vague understanding that someone was found criminally liable for sending an offensive e-mail to a candidate for office. People will not have a clear understanding of when such e-mails would and would not be subject to criminal penalties. And this uncertainty is liable to discourage people from sending such e-mails, even if they contain potentially important information. Ordinary citizens do not consult with First Amendment lawyers before sending a communication to an elected official or candidate, and they should not have to do so.

III. IMPOSING CRIMINAL LIABILITY FOR OFFENSIVE E-MAILS WOULD IMPAIR AN ELECTED DELIBERATIVE BODY'S ABILITY TO ANALYZE AND DEBATE PUBLIC POLICY ISSUES, EVEN IF A PARTICULAR OFFICIAL DID NOT WANT TO RECEIVE THE INFORMATION.

An elected body does not exist for the benefit of individual elected officials; it exists for the benefit of the constituency as a whole and it exists as a collective decisionmaking body. Accordingly, it is not only important to *individual officials* to have their constituents feel completely free to send them e-mails or other communications, even those that are offensive or contain invective, but is important *to the elected body as a whole*, even if a particular official might not want to receive such e-mails or communications.

This court recognizes this concern in the related context of juries. In *State v. Robinson*, 272 Neb. 582, 636, 724 N.W.2d 35, 79 (2006), this court held that a trial court acted properly in removing a juror who had been sleeping during part of the trial. Of course, the individual juror might not have thought that he missed anything important and might have been willing to continue hearing the case, even with incomplete information. But the relevant issue is not what the individual juror would have preferred. A jury does not exist to satisfy the preferences of individual jurors; it exists to render justice to the litigants. Accordingly, the beneficiaries of the jury's decisionmaking – the litigants themselves – are entitled to a jury that hears all information and argument presented, even if a particular juror might not be interested in listening.

Similarly, when a juror is replaced by an alternate juror after deliberations have begun, the jury must begin deliberating again. See, e.g, Fed.R.Crim.Proc. 24(c)(3) ["If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations

anew."]. The reason is straightforward. Since a jury is a collective deliberative body, it is important that all its members deliberate together. The members of the original jury and the new juror might be willing to pick up where the original jury had left off. But the litigants have the right to have all members of the jury participate in all deliberations.

Of course, there are numerous differences between a jury and an elected body. But the general point discussed above is applicable both to juries and elected bodies. They exist for the benefit of their constituencies, not their members, and they function best when all members have full access to information and argument. Accordingly, it is important to both the public *and the elected body as a whole* that members of the elected body receive all communications from that the public wants to send, whether or not a particular member of the body wishes to receive that information. Of course, particular members may decide what they want to do with the communication once they receive it. But an elected body, like a jury, does not exist for the benefit of its particular members, and these elected officials need to be open to receiving information for the benefit of their constituents and the elected body as a whole, whether or not they personally wish to do so.

CONCLUSION

For all reasons set forth above and in the briefing on the merits, the judgment should be reversed.

LAW OFFICE OF BRUCE ADELSTEIN

November 10, 2009

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