IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA, Appellee, vs. DARREN J. DRAHOTA, Appellant.	)))))))	CASE NO. A-08-628 PETITION FOR FURTHER REVIEW AND BRIEF IN SUPPORT OF PETITION FOR FURTHER REVIEW

Appellant, Darren J. Drahota, petitions the Nebraska Supreme Court for further review of the above-captioned case for the following reasons:

ASSIGNMENTS OF ERROR

1. The Nebraska Court of Appeals erred in concluding that the First Amendment did not protect Darren J. Drahota's two political e-mails to a candidate for the state legislature. *State v. Drahota*, 17 Neb. App. 678, 686 (2009).

2. The Nebraska Court of Appeals erred in concluding that Darren J. Drahota's e-mails constituted a breach of the peace. *Id.* at 685.

FACTS

In early 2006, Appellant Darren J. Drahota was a University of Nebraska student who had been in William Avery's political science class. (20:17-23.) Avery was still a University professor, but had announced that he was running for the Nebraska Legislature (2:24-3:8; E1,4:9,10).

Drahota e-mailed Avery on Jan. 27, 2006, which led to an exchange of 18 e-mails over two weeks. (E1,1-11:9,10.) At least one of Drahota's e-mails used epithets and personal insults of Avery, alongside political commentary. (E1,9:9,10.) One of Avery's e-mails used an epithet and an insult of Drahota as well, saying "I am tired of this shit" and saying Drahota "and the 'Chicken Hawks' in the Bush Administration" didn't "have the guts" to join the military. *Id.* At the end of

the exchange, Avery e-mailed Drahota saying, "Please consider this email a request that you not contact me again for the purpose of spilling more vile [*sic*]." (E1,10:9,10.) Drahota responded with an apology. *Id.*

Four months later, Drahota sent two more e-mails to Avery, this time from the address "averylovesalqueda@yahoo.com." (39:7-9; E1,11-12:9,10.) In the first, Drahota wrote concerning the death of an Iraqi terrorist, and asked Avery: "Does that make you sad that the al-queda leader in Iraq will not be around to behead people and undermine our efforts in Iraq? . . . You . . . and the ACLU should have a token funeral to say goodbye to a dear friend of your anti-american sentiments." (E1,12:9,10.) The second had the subject line "traitor," and read, in relevant part,

> I have a friend in Iraq that I told all about you and he referred to you as a Benedict Arnold. I told him that fit you very well. . . . I'd like to puke all over you. People like you should be forced out of this country. Hey, I have a great idea!!!! . . . Let's do nothing to Iran, let them get nukes, and then let them bomb U.S. cities and after that, we will just keep turning the other cheek. Remember that Libs like yourself are the lowest form of life on this planet[.]

(E1,12:9,10.) After a bench trial, Drahota was convicted of breach of the peace. (T31.) The Court of Appeals affirmed the conviction, based solely on the last two e-mails. 17 Neb. App. at 685, 687.

ARGUMENT

I. THE IMPORTANCE OF THIS CONSTITUTIONAL PRECEDENT WARRANTS REVIEW BY THIS COURT

The decision below sets an important precedent, in Nebraska and elsewhere, that sharply limits the constitutional protection for political speech. It appears to be the first published decision allowing criminal punishment for nonthreatening but insulting politically themed speech to an elected official or candidate for office. Prosecutors throughout Nebraska and the country will now be more likely to conclude that such speech could indeed lead to a prosecution. And citizens throughout the country will now be rightly concerned that their critical e-mails to government officials and political

candidates will lead to criminal prosecution if a prosecutor concludes the e-mails contain "epithets" (even clearly political ones such as "traitor") or "personal abuse."

It is thus important for this Court to review the case, notwithstanding Drahota's labeling his assignments of error in his pro se appellate brief as "issues" instead of "assignments of error." 17 Neb. App. at 683. Drahota's briefing was incorrect on this score. Nonetheless, he supported his claims with detailed argument. The state's brief did not claim any waiver on Drahota's part. The opinion below dealt fully with his arguments. And while the Court of Appeals stated it was reviewing the case for plain error, *id.* at 684, it concluded there was no error at all.

The precedential force of the decision below is thus not limited to plain error cases. Because of this, reviewing the constitutional issue "is necessary to a reasonable and sensible disposition of the issues presented," *State v. Conover*, 270 Neb. 446, 449, 703 N.W.2d 898, 902 (2005), both in this case and for the benefit of future speakers who might be deterred by the precedent set below. *See, e.g., Linn v. Linn*, 205 Neb. 218, 221, 286 N.W.2d 765, 767 (1980) (reviewing constitutional question in "'the interests of substantial justice,'" though the issue had not even been raised below (quoting *Wittwer v. Dorland*, 198 Neb. 361, 253 N.W.2d 26 (1977))).

II. THE FIRST AMENDMENT, AND A PROPER UNDERSTANDING OF BREACH OF THE PEACE LAW, BAR PUNISHING DRAHOTA'S E-MAILS AS "BREACH OF THE PEACE"

The decision below is not only important but mistaken, both as to what constitutes "breach of the peace" and as to what the First Amendment protects. It is therefore likely to be confusing to lower courts, as well as likely to improperly deter constitutionally protected speech.

The e-mails in this case do not fit within any exception to First Amendment protection, nor are they like the speech that this Court has treated as a breach of the peace in the past. The e-mails

do not contain "true threats" of illegal conduct; the opinion below did not suggest that the e-mails were threatening. Nor are they libelous, despite the assertion by the opinion below that the e-mail address from which they were sent ("averylovesalqueda@yahoo.com") was "libelous," 17 Neb. App. at 685, and despite the use of the word "traitor." First, there can be no libel "'when the words are communicated only to the person defamed.'" *Molt v. Lindsay Mfg. Co.*, 248 Neb. 81, 91, 532 N.W.2d 11, 18 (1995) (quoting 53 C.J.S. *Libel and Slander* § 50a. at 97 (1987)). Second, in context Drahota's "allegation" was a hyperbolic statement of opinion, not a statement of fact. *See Letter Carriers v. Austin*, 418 U.S. 264, 284, 286 (1974) (noting that "traitor" can be used not as a "representation[] of fact" but "in a loose, figurative sense"); *Wheeler v. Neb. State Bar Ass'n*, 244 Neb. 786, 792, 508 N.W.2d 917, 922 (1993) (endorsing the *Letter Carriers* analysis).

A. THE E-MAILS IN THIS CASE ARE NOT "FIGHTING WORDS"

The rationale of the decision below is unclear, but the decision could be read as holding that the e-mails constituted "fighting words." Such a holding would set an unsound precedent that should be corrected. The fighting-words exception consists of words that are so insulting that they are "inherently likely to provoke violent reaction." *Virginia v. Black*, 538 U.S. 343, 359 (2003); *Cohen v. California*, 403 U.S. 15, 20 (1971); *see also, e.g., Buffkins v. City of Omaha*, 922 F.2d 465, 472 (8th Cir. 1990); *Knight Riders v. City of Cincinnati*, 72 F.3d 43, 46 (6th Cir. 1993). While face-to-face insults may therefore qualify as "fighting words," e-mails sent to someone who is far away—and who thus cannot start an immediate fight with the sender—do not qualify. *See State v. Fratzke*, 446 N.W.2d 781, 785 (Iowa 1989) (concluding that defendant's letter did not "tend to inflict injury or an immediate breach of the peace," partly because "words contained in a letter" were "a mode of expression far removed from a heated, face-to-face exchange"); *Tollett v. United States*, 485 F.2d

1087, 1095 (8th Cir. 1973) (rejecting a fighting-words-like justification for a criminal libel law that covered mailed postcards, on the grounds that a "printed defamatory statement sent through the mails and not made face-to-face lends itself only to the remotest concern of persons resorting to violence 'in defense of their honor'"); *see also Layshock v. Hermitage School Dist.*, 496 F. Supp. 2d 587, 602 (W.D. Pa. 2007) ("A 'MySpace' internet page is not outside of the protections of the First Amendment under the fighting words doctrine because there is simply no in-person confrontation in cyberspace such that physical violence is likely to be instigated."); *Neudecker v. Shakopee Police Dep't*, 2008 WL 4151838, *8 (D. Minn. 2008) (concluding that even a "grossly offensive" letter didn't constitute "fighting words" and therefore couldn't constitute "disorderly conduct," because "it was not likely to provoke a violent reaction or incite an immediate breach of the peace").

Moreover, all of this Court's cases that uphold convictions on fighting-words grounds have been fully consistent with this First Amendment principle: They have all involved speech capable of inciting an immediate fight, such as speech in a "face-to-face confrontation," *State v. Boss*, 195 Neb. 467, 471, 238 N.W.2d 639, 643 (1976); *see also State v. Groves*, 219 Neb. 382, 384, 363 N.W.2d 507, 509 (1985); *State v. Dreifurst*, 204 Neb. 378, 379, 282 N.W.2d 51, 52 (1979), or speech from "across the street," *State v. Broadstone*, 233 Neb. 595, 597, 447 N.W.2d 30, 32 (1989).

B. THE E-MAILS IN THIS CASE CANNOT BE PUNISHED ON THE GROUNDS THAT THEY "BY [THEIR] VERY UTTERANCE INFLICT INJURY"

Alternatively, the court below might have concluded that speech is unprotected when it is not "civil discourse or debate," 17 Neb. App. at 685, and contains "insulting . . . words," which "by their very utterance inflict injury," *id.* at 686 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)). Under this theory, merely being insulted would be an "injury" that may lead to prosecution

of the speaker, even if the speech does *not* "tend to incite an immediate breach of the peace," *id.*

Yet no previous Nebraska precedent has found a "breach of the peace" where speech was merely insulting, rather than threatening or likely to provoke a fight. And such an application of the law would conflict with U.S. Supreme Court precedent: Whatever the "by their very utterance inflict injury" prong of *Chaplinsky* might mean, it cannot refer to the "injury" of feeling insulted.

Speech about public figures (such as political candidates, *see Hoch v. Prokop*, 244 Neb. 443, 446, 507 N.W.2d 626, 629 (1993)), retains First Amendment protection even if it is not merely uncivil but "outrageous[]," "patently offensive[,] and . . . intended to inflict emotional injury." *Hustler Magazine v. Falwell*, 485 U.S. 46, 47 (1988). Liability cannot be based on the "adverse emotional impact" of the speech. *Id.* at 55. As *Hustler* holds, even "repugnant" "vehement" and "caustic" insults of public figures, *id.* at 50-51—in that case, a scurrilous, deeply insulting, and nonsubstantive attack—are constitutionally protected. *See also State v. McKee*, 253 Neb. 100, 106, 568 N.W.2d 559, 564 (1997) ("The steadfast rule is that '"in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."'" (quoting *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994))).

If anything, an attack distributed to millions, as in *Hustler*, inflicts more emotional distress and is a greater insult than two private e-mails. Likewise, the satirical discussion in *Hustler* of a noted clergyman's supposedly having drunken sex with his mother in an outhouse, 485 U.S. at 48, is likely more insulting than the politically based insults at issue here. Nonetheless, *Hustler* made clear that *Chaplinsky* does not strip such uncivil speech of constitutional protection. 485 U.S. at 56.

This is why the Seventh Circuit has expressly held that

> [a]lthough the 'inflict-injury' alternative in *Chaplinsky*'s definition of fighting words has

> never been expressly overruled, the Supreme Court has never held that the government may, consistent with the First Amendment, regulate or punish speech that causes emotional injury but does *not* have a tendency to provoke an immediate breach of the peace.

Purtell v. Mason, 527 F.3d 615, 624 (7th Cir. 2008) (concluding that Halloween lawn decorations mocking neighbors were not "fighting words" because they did not "inherently tend[] to incite an immediate breach of the peace," though they caused "embarrassment, anger resentment, and for some, fear"). Likewise, *United States v. Popa*, 187 F.3d 672 (D.C. Cir. 1999), overturned the telephone-harassment conviction of a person who left not two but seven messages on a public official's answering machine, messages that were not just grossly insulting but racist. The statute there clearly covered such messages; it was not just a breach-of-the-peace law, which can and should be interpreted as not covering e-mails such as those here, but a telephone-harassment statute banning all anonymous calls made "with intent to annoy, abuse, threaten, or harass." *Id.* at 673. Still, the D.C. Circuit expressly held that the First Amendment prevented the statute from applying to "public or political discourse," *id.* at 677, including in that case discourse that contains epithets and insults.

C. DRAHOTA'S SPEECH MAY NOT BE PUNISHED AS "BREACH OF THE PEACE" DESPITE AVERY'S REQUEST, FOUR MONTHS EARLIER, THAT DRAHOTA STOP E-MAILING HIM

A final possibility is that the opinion below upheld Drahota's conviction because Drahota "knew after February 10 that Avery was finished with the 'discussion' and wanted no more e-mail from him." 17 Neb. App. at 687. But the opinion does not state that this was a necessary condition for the court's decision. A reader trying to find out what may legally be e-mailed to political candidates in Nebraska—or, conceivably, posted about them on a Web site—could thus reasonably conclude that harsh and insulting criticism is now criminal whether or not the target has sent a message asking that the criticism stop. This is especially so since previous Nebraska breach-of-the-peace pre-

cedents have never distinguished messages sent after a request to stop from other messages, and since nothing in the "by their utterance inflict injury" rationale suggests such a distinction.

And even if this was the rationale of the court below, this rationale cannot justify this prosecution. First, "[w]hen a candidate enters the political arena, he or she 'must expect that the debate will sometimes be rough and personal,'" *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 687 (1989) (quoting *Ollman v. Evans*, 750 F.2d 970, 1002 (D.C. Cir. 1984) (Bork, J., concurring)). Even intentionally annoying or abusive telephone messages left for government officials are constitutionally protected. *Popa*, 187 F.3d at 677. Likewise, "[a]s elected representatives of the people, [Members of Congress] cannot simply shield themselves from undesirable mail in the same manner as an ordinary addressee," *U.S. Postal Serv. v. Hustler Magazine, Inc.*, 630 F. Supp. 867, 871 (D.D.C. 1986), and this principle would apply equally to candidates for the state legislature.

Second, while a specifically defined statute banning further contact with someone who has said "stop e-mailing me" might be constitutional, at least if it excluded government officials, *see id.* at 871, the approach taken by the opinion below is not. In *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728 (1970), the U.S. Supreme Court upheld such a specific statute that covered ordinary mail, but only because "[b]oth the absoluteness of the citizen's right [to stop further mailings] under [the statute] and its finality are essential." *Id.* at 737. "Congress provided this sweeping power not only to protect privacy but to avoid possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a governmental official." *Id.*

The decision below lacked the attributes that *Rowan* found "essential": It engaged in "discretionary evaluation of the material," concluding that Drahota's e-mail was punishable because (among other things) it "hardly represent[ed] civil discourse or debate," "impugn[ed] Avery's loyal-

ty to the United States," and supposedly "accused Avery of the crime of treason." 17 Neb. App. at 685. Nothing in the opinion below announces any clear rule giving recipients the "final[]," "absolute[]" right to prevent further messages, with no need for "discretionary evaluation" by a government official of the messages' content or quality. Rather, the opinion at most ambiguously suggests that senders may be barred from sending some kinds of messages, perhaps even if the recipient never ordered that they stop, and only if a judge later concludes the messages contain unfair accusations or are not "civil."

And the approach adopted by the opinion below poses a serious danger of viewpoint discrimination. Just before it found Drahota guilty, the trial court said, "Let's be a little bit more tolerant, Mr. Drahota, of people who you don't agree with" (46:2-3). If Drahota had expressed intolerance of people who hold intolerable viewpoints—rather than of a mainstream figure such as Professor Avery—a "toleran[ce]" test (apparently used by the trial court) or "civil[ity]" test (apparently used by the Court of Appeals) might have come out in Drahota's favor. Judgments about an argument's civility are often influenced by how sound it seems; even harsh insults may be treated as being within the bounds of civility when aimed at people whom the observer sees as meriting harsh condemnation.

This is partly why the U.S. Supreme Court has rejected imposing even civil liability on "outrageous" speech—"'[o]utrageousness' 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," *Hustler*, 485 U.S. at 55. Imposing criminal liability for speech on the grounds that it is not "civil discourse or debate" or is not sufficiently "tolerant" is similarly unconstitutional.

In that respect, this case is much like *Cohen v. California*, 403 U.S. 15 (1971). In *Cohen*, a

defendant was convicted for disorderly conduct because he wore a jacket bearing a vulgar word. The defendant wore the jacket into a courthouse, and the opinion noted that such speech might be prohibitable by a rule targeted solely to courthouses. *Id*. at 19; *see also ISKCON v. Lee*, 505 U.S. 672, 679 (1992) (holding that speech in nonpublic fora may be restricted through reasonable viewpoint-neutral rules). But *Cohen* nonetheless held that

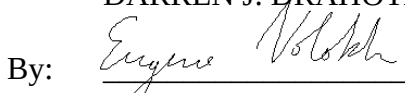
> [a]ny attempt to support this conviction on the ground that the [disorderly conduct] statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places.

403 U.S. at 19. Likewise, any attempt to support Drahota's conviction on the ground that breach-of-the-peace law seeks to protect people from repeated messages sent after they have asked that the messages stop must fail in the absence of any precedent that would have put Drahota on notice that certain kinds of otherwise constitutionally protected messages—neither threats nor fighting words nor other unprotected speech—would be punishable under such circumstances.

CONCLUSION

For the foregoing reasons, this court should grant further review, and reverse the Court of Appeals' decision upholding Drahota's conviction.

DARREN J. DRAHOTA, Appellant

By: 

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on July __, 2009, two true and correct copies of the foregoing Petition for Further Review and Brief in Support of Petition for Further Review were served upon the Appellee's attorney, George R. Love, Office of the Attorney General, 2115 State Capitol, Lincoln, NE 68509, by first-class mail, postage prepaid.

_____
Gene Summerlin