

IN THE NEBRASKA SUPREME COURT

STATE OF NEBRASKA,	)	CASE NO. A-08-628
Appellee,	)	
	)	
vs.	)	BRIEF <i>AMICI CURIAE</i>
	)	IN SUPPORT OF PETITION FOR
DARREN J. DRAHOTA,	)	FURTHER REVIEW
Appellant.	)	

**INTEREST OF AMICI**

*Amici curiae* are a group of law professors who teach and write about Internet law and/or Constitutional law at law schools throughout the United States. *Amici* have no interest in the outcome of this litigation except insofar as they share a concern that the Court of Appeals ruling below gave insufficient consideration to the important First Amendment issues raised by this action.

Names and institutional affiliations for all law professor *amici curiae* are provided in the Appendix.

**ARGUMENT**

On January 30, 2007, Darren J. Drahota was convicted of breaching the peace (Neb. Rev. Stat. § 28-1322 (Reissue 2008)) based upon a series of e-mails, filled with personal insults and invective, that he sent to William Avery, a professor of political science at the University of Nebraska-Lincoln; in the words of the Court of Appeals, Drahota’s e-mails “accused Avery of being aligned with a terrorist group responsible for unspeakable violence in this country . . . . called Avery a traitor, said that he wanted to ‘puke all over’ him, and stated that Avery is the ‘lowest form of life on this planet’.” *State v. Drahota*, 17 Neb. App. 678, 685 (2009). At the time of Drahota’s e-mail transmissions, Avery was a candidate for election to the Nebraska legislature. Drahota appealed his conviction (unsuccessfully) to the District Court and the Court of Appeals, and he now seeks review by the

Nebraska Supreme Court.

The undersigned are law professors at law schools across the United States, all of whom have special interest in the areas of Internet law and/or constitutional law. We have no stake, financial or otherwise, in the outcome of this action. We take no position here on the merits of Mr. Drahota's appeal. We write simply to urge this Court, in the exercise of its discretion under Neb. Rule 2-102(G), to accept this case for review. We believe it is imperative that before the State of Nebraska attaches criminal liability to communications like those sent by Mr. Drahota to Mr. Avery, the full Nebraska Supreme Court should have the opportunity to consider both the very significant First Amendment issues at stake and the potentially serious consequences of this ruling for Internet communication generally.

The importance of the decision below, in Nebraska and elsewhere, is difficult to exaggerate. It is, to our knowledge, the first modern published decision declaring that insulting (but non-threatening) politically-themed communication constitutes a criminal "breach of the peace." Given the ubiquity of statutory or common law actions for breach of the peace throughout the United States, this ruling sets an important precedent; as a case of first impression, it deserves consideration by the full Supreme Court.

The decision appears to construe the First Amendment to permit the criminal punishment of any communication that contains "epithets" (*e.g.*, "traitor") or "personal abuse," a holding that, if allowed to stand, would eviscerate American free speech law by permitting political speech to be punished whenever a trier of fact is persuaded that it was not sufficiently "civil." *Cf. Gooding v. Wilson*, 405 U.S. 518, 523-24 (1972) (Georgia statute making it a misdemeanor to use "opprobrious words or abusing language tending to cause a breach of the peace" violates First Amendment where

it had been construed to apply to “harsh insulting language” or language merely “conveying disgrace”). Citizens throughout the country, and indeed throughout the world, whose strongly worded comments, political or otherwise, may be transported into Nebraska, will now be rightly concerned that those comments will make them liable to criminal prosecution.

We are additionally concerned that the Court of Appeals did not fully consider the consequences that this ruling could have for a broad range of communication over the Internet. The ease and availability of electronic mail (and sister technologies like “instant messaging” and the like) has enabled the Internet to become, in the words of one federal judge, a “never-ending worldwide conversation.” *ACLU v. Reno*, 929 F.Supp. 824, 883 (E.D. Pa. 1996) (Dalzell, J.), *aff’d* 521 U.S. 844 (1997). The ruling in this case will, necessarily, have an impact on that conversation, even where it is occurring far beyond Nebraska’s borders. One of the special characteristics of the Internet, distinguishing it from other communications media, is the ease with which individuals can communicate across geographic boundaries. Because it is often difficult, and at times may be impossible, to control or to determine the geographic location of the recipient of an Internet message, e-mail or webpage file, *see American Library Ass’n v. Pataki*, 969 F.Supp 160, 165-67 (S.D.N.Y. 1997) (because Internet addressing system uses “logical rather than geographic address[es],” users cannot determine geographic location of message recipients ), content originating at any point on the Internet can, unbeknownst to the author, make its way into Nebraska in a manner that subjects the sender to criminal liability for violation of Nebraska law. *See, e.g., Jaynes v. Virginia*, 666 S.E.2d 303, 306-08 (VA 2008) (email originating in North Carolina and routed through computers located in Virginia sufficient basis for criminal liability under Virginia statute prohibiting transmission of false identity information); *Simmons v. Florida*, 944 So.2d 317 (FL 2006) (email originating in Virginia and re-

ceived in Florida sufficient basis for criminal liability under Florida statute prohibiting “transmission of indecent material” to a minor); *Heckel v. Washington*, 23 P. 3d 404 (WA 2001) (email originating in Oregon and received in Washington sufficient basis for criminal liability under Washington statute prohibiting “spam”).

Thus, the manner in which Nebraska (or any of the 50 States) construes its breach of the peace statute to apply to e-mail or other Internet communications is necessarily of concern to anyone using the Internet, wherever he/she may be located. The potential “chilling effect” from this ruling, and from this construction of Nebraska law, will thus necessarily be felt across the entire Internet and must, at the very least, be given due consideration as part of Mr. Drahota’s First Amendment defense. Because it does not appear that the Court of Appeals gave any consideration to these effects, we believe that its First Amendment analysis was incomplete, and we urge this Court to grant Mr. Drahota’s petition for review in order to more thoroughly address those important issues.

### **CONCLUSION**

For the foregoing reasons, we urge this Court to grant the petition to review Mr. Drahota’s conviction.

*Amici Curiae* Law Professors

By: \_\_\_\_\_

David G. Post, Esq.  
Beasley School of Law, Temple Univ.  
1719 North Broad Street, Philadelphia, PA 19122  
215-204-4539

## **APPENDIX – LIST OF LAW PROFESSOR SIGNATORIES**

Please Note: Institutional affiliations are provided for identification purposes only, and do not imply any institutional endorsement of the position taken in this brief.

Derek E. Bambauer  
Assistant Professor of Law  
Brooklyn Law School

Stuart M. Benjamin  
Douglas Blount Maggs Professor of Law  
Duke Law School

Eric Berger  
Assistant Professor of Law  
University of Nebraska College of Law

Michael W. Carroll  
Scholar-in-Residence and Director, Program on Information Justice and Intellectual Property  
American University, Washington College of Law

James Forman, Jr.  
Professor of Law  
Georgetown University Law Center

Eric Goldman  
Associate Professor and Director, High Tech Law Institute  
Santa Clara University School of Law

Dan Hunter  
Professor of Law & Director, Institute for Information Law & Policy  
New York Law School  
Adjunct Associate Professor of Legal Studies  
The Wharton School, University of Pennsylvania

Andrew Koppelman  
John Paul Stevens Professor of Law and Professor of Political Science  
Northwestern University

Brian K. Landsberg  
Distinguished Professor and Scholar  
Pacific McGeorge School of Law

Sanford Levinson  
Professor of Law, University of Texas Law School and

Visiting Professor, Harvard Law School

Frank Pasquale  
Loftus Professor of Law  
Seton Hall University

David G. Post  
I. Herman Stern Professor of Law  
Beasley School of Law, Temple University

Scot Powe  
Anne Green Regents Chair  
The University of Texas

Martin H. Redish  
Louis and Harriet Ancel Professor of Law and Public Policy  
Northwestern University School of Law

**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that on July 15, 2009, two true and correct copies of the foregoing Motion for Leave to File Brief *Amici Curiae* in Support of Petition for Further Review, and of the Brief *Amicus Curiae*, were served by fax transmission (return acknowledgment received) upon the Appellant's attorney, Gene Summerlin, Ogborn, Summerlin & Ogborn, 610 J Street, Suite 200, Lincoln, NE 68508, (303) 830- 8516, and Appellee's attorney, George R. Love, Office of the Attorney General, 2115 State Capitol, Lincoln, NE 68509, (402) 471-3297.

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David G. Post, Esq.