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

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

Petition for Further Review from the Court of Appeals
Inbody, Sievers, and Cassel, Judges
On Appeal Thereto from the County Court for Lancaster County
Gale Pokorny, County Judge
and the District Court for Lancaster County
John A. Colborn, District Judge

APPELLANT'S BRIEF

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Jurisdictional Statement

On June 16, 2009, the Court of Appeals affirmed Darren J. Drahota's conviction for breach of the peace. Drahota timely filed a petition for further review on July 13, 2009. This Court sustained the petition for further review on September 30, 2009. This Court has jurisdiction over this case pursuant to Neb. Rev. Stat. § 24-1107 (2009).

Statement of the Case

1. Nature of the Case

This case is a prosecution of Darren J. Drahota for breach of the peace, based on his having sent two e-mails to William Avery, who was at the time a candidate for the Nebraska Legislature; Avery had also been Drahota's professor at the University of Nebraska.

2. Issues Decided

The Court of Appeals considered whether Drahota's e-mails constituted breach of the peace, and whether they were protected against criminal punishment by the First Amendment.

3. How the Issues Were Decided

The Court of Appeals concluded that the e-mails constituted breach of the peace, and were not constitutionally protected speech. *State v. Drahota*, 17 Neb. App. 678, 685, 686 (2009).

4. Scope of Review

In reviewing a fact finder's determination that certain speech constitutes constitutionally unprotected speech, this Court must "conduct an independent review and determine, as a matter of constitutional law, if the material" is the sort of speech "that may be constitutionally regulated under the First Amendment." *State v. Haltom*, 264 Neb. 976, 981, 653 N.W.2d 232, 237 (2002) (so holding in an obscenity case); *see also, e.g.*, *Street v. New York*, 394 U.S. 576, 592 (1969) (engaging in such

independent review in dealing whether expressive conduct constituted unprotected fighting words); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 504-08 (1984) (mandating such independent review in First Amendment cases generally).

In determining whether there was sufficient evidence to support a criminal conviction, "A trial court's findings in a criminal case have the effect of a jury verdict, and a conviction in a bench trial will be sustained if the properly admitted trial evidence, viewed and construed most favorably to the State, is sufficient to support the conviction." *State v. Abbink*, 260 Neb. 211, 214, 616 N.W.2d 8, 11 (2000).

Assignments of Error

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

Propositions of Law

1. The First Amendment protects political speech, including communications made to only one person, unless the speech falls within one of the narrow First Amendment exceptions that the U.S. Supreme Court has recognized. *City of Houston v. Hill*, 482 U.S. 451, 461-62 (1987); *State v. McKee*, 253 Neb. 100, 105, 568 N.W.2d 559, 563 (1997).

2. Nebraska breach of the peace law does not extend to speech that is constitutionally protected. *State v. Broadstone*, 233 Neb. 595, 599-600, 447 N.W.2d 30, 33-34 (1989); *State v. Groves*, 219 Neb. 382, 385, 363 N.W.2d 507, 510 (1985).

3. The First Amendment exception for "[t]rue threats" of illegal conduct covers "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003).

4. 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).

5. Words, including the word "traitor," are not libelous when they are used "in a loose, figurative sense" rather than as "representation[s] of fact." *Letter Carriers v. Austin*, 418 U.S. 264, 284, 286 (1974); *Wheeler v. Neb. State Bar Ass'n*, 244 Neb. 786, 792, 508 N.W.2d 917, 922 (1993).

6. Anonymous speech is protected by the First Amendment on the same terms as non-anonymous speech is. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 199, 204 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).

7. The "fighting words" exception to First Amendment protection consists of words that are likely to "provoke immediate violence." *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982); *Gooding v. Wilson*, 405 U.S. 518, 528 (1972); *United States v. Poocha*, 259 F.3d 1077, 1080-81 (9th Cir. 2001).

8. Therefore, while face-to-face insults may qualify as "fighting words," e-mails sent to someone who is far away—and who thus cannot start an immediate fight with the sender—cannot be fighting words. *State v. Fratzke*, 446 N.W.2d 781, 785 (Iowa 1989); *Tollett v. United States*, 485 F.2d 1087, 1095 (8th Cir. 1973); *Citizen Pub'g Co. v. Miller*, 210 Ariz. 513, 115 P.3d 107 (Ariz. 2005); *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 602 (W.D. Pa. 2007); *Neudecker v. Shakopee Police Dep't*, 2008 WL 4151838, *8 (D. Minn. 2008).

9. All of this Court's cases upholding convictions on fighting-words grounds have involved speech capable of inciting an immediate fight, such as speech in a "face-to-face confrontation," or speech from "across the street." *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); *State v. Broadstone*, 233 Neb. 595, 597, 447 N.W.2d 30, 32 (1989).

10. A candidate for the Nebraska Legislature is a public figure. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271 (1971); *Hoch v. Prokop*, 244 Neb. 443, 446, 507 N.W.2d 626, 629 (1993)

11. Speech about public figures 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, 50, 53 (1988).

12. Liability for speech about public figures cannot be based on the "adverse emotional impact" of the speech, even when the speech consists of "repugnant," "vehement," and "caustic" insults of public figures. *Hustler Magazine v. Falwell*, 485 U.S. 46, 50, 51, 55 (1988).

13. "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."'" *State v. McKee*, 253 Neb. 100, 106, 568 N.W.2d 559, 564 (1997) (quoting *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994)).

14. "Although 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).

15. Offensive politically themed messages on a public official's answering machine are protected by the First Amendment. *United States v. Popa*, 187 F.3d 672 (D.C. Cir. 1999).

16. "When 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)).

17. Privacy protections that may sometimes shield ordinary citizens generally do not apply to candidates and government officials, whether the protections are from intentionally annoying or abusive telephone messages, unwanted sexually offensive mailings, disclosure of private facts by other citizens, disclosure of private facts by the government, or compelled disclosure of information to the government. *United States v. Popa*, 187 F.3d 672, 677 (D.C. Cir. 1999); *People v. Klick*, 66 Ill. 2d 269, 274, 362 N.E.2d 329, 332 (1977) (favorably discussed by this Court in *State v. Kipf*, 234 Neb. 227, 242-43, 450 N.W.2d 397, 409 (1990)); *U.S. Postal Serv. v. Hustler Magazine, Inc.*, 630 F. Supp. 867, 871 (D.D.C. 1986); *Willan v. Columbia County*, 280 F.3d 1160, 1162 (7th Cir. 2002); *McCall v. Oroville Mercury Co.*, 142 Cal. App. 3d 805, 807, 191 Cal. Rptr. 280, 281 (1983); *Summe v. Kenton County Clerk's Office*, 626 F .Supp. 2d 680, 691 n.8 (E.D. Ky. 2009); *Creel v. City of Cleveland*, 2008 WL 2169507, *4 (E.D. Tenn. 2008); *Lambert v. Belknap County Convention*, 157 N.H. 375, 384, 949 A.2d 709, 718 (2008); *Common Cause v. Nat'l Archives & Records Serv.*, 628 F.2d 179, 184 (D.C. Cir. 1980); *Seymour v. Elections Enforcement Comm'n*, 255 Conn. 78, 99, 762 A.2d 880, 892 (2000) (quoting *Fritz v. Gorton*, 83 Wash. 2d 275, 294, 517 P.2d 911, 923 (1974)); *State v. Morgan*, 1987 WL 11809, *4 (Ohio Ct. App. 1987).

18. A statute banning further postal mailings to someone who has said "stop mailing me" is constitutional when a citizen has an absolute right to stop further mailings, with no further inquiry on the government's part into the content of the mailing. *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 737 (1970).

19. Civil liability for "outrageous" speech is unconstitutional because "'[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 Magazine v. Falwell*, 485 U.S. 46, 53, 55 (1988).

20. For a speech restriction to be applied to a defendant's speech on the grounds that the restriction applies only under certain circumstances, there must be language in past definitions of the restriction "that would have put [defendant] on notice that certain kinds of otherwise permissible speech or conduct would nevertheless . . . not be tolerated" under those circumstances. *Cohen v. California*, 403 U.S. 15, 19 (1971).

21. The government's failure to claim waiver on a defendant's part itself waives the government's right to rely on defendant's alleged waiver. *United States v. Reider*, 103 F.3d 99, 103 n.1 (10th Cir. 1996); *United States v. Schmidt*, 47 F.3d 188, 193 (7th Cir. 1995); *United States v. Quiroz*, 22 F.3d 489, 490-91 (2d Cir. 1994) (per curiam).

22. To guarantee review by this Court, "an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error." *State ex rel. Lemon v. Gale*, 272 Neb. 295, 312, 721 N.W.2d 347, 361 (2006).

23. "Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process."

In re Interest of Mainor T. & Estela T., 267 Neb. 232, 243, 674 N.W.2d 442, 454 (2004).

24. "[W]here the constitutional invalidity of a statute is plain and such determination is necessary to a reasonable and sensible disposition of the issues presented," a court is "required by necessity to notice the plain error." *State v. Conover*, 270 Neb. 446, 449, 703 N.W.2d 898, 902 (2005).

25. This Court may review a question in "'the interests of substantial justice,'" though the issue had not even been raised below. *Linn v. Linn*, 205 Neb. 218, 221, 286 N.W.2d 765, 767 (1980) (quoting *Wittwer v. Dorland*, 198 Neb. 361, 366, 253 N.W.2d 26, 29 (1977)).

Statement of 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 a professor at the University, but had announced that he was running for the Nebraska Legislature, and Drahota was aware of Avery's campaign (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.) The e-mails generally consisted of political discussions, but 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" did not "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's University of Nebraska e-mail address (E1,11-12), this time from the address "averylovesalqueda@yahoo.com." (39:7-9; E1,11-12:9,10.) In the first e-mail, Drahota wrote about 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 good-bye 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.) Avery called the police, who tracked down the e-mail account to Drahota. (39:5-6.) Drahota was charged with breach of the peace, and was convicted after a bench trial (T31), based solely on these last two e-mails (14:16-17; 17:4-9).

Drahota appealed to the District Court, which affirmed the conviction (T45-T49), and then to the Court of Appeals. The Court of Appeals likewise affirmed the conviction, reasoning that Drahota's speech was constitutionally unprotected:

> The argument that the communications of June 14 and 16, 2006, are constitutionally protected speech fails. The U.S. Supreme Court's opinion in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942), was quoted at some length by the Nebraska Supreme Court in *State v. Broadstone*, 233 Neb. 595, 600, 447 N.W.2d 30, 34 (1989), as follows:
>
> > "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting'

> words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' *Cantwell v. Connecticut*, 310 U.S. 296, 309-310[, 60 S. Ct. 900, 84 L. Ed. 1213 (1940)]."
>
> It would be difficult to author a more apt description of Drahota's actions in sending the two e-mails to Avery in June 2006, or to better explain why the two June e-mails subject him to criminal prosecution and conviction.

17 Neb. App. at 686. The Court of Appeals decision, like the County Court decision, was based solely on the last two e-mails sent by Drahota to Avery. 17 Neb. App. at 685, 687. This brief will refer to these as "the two e-mails," to distinguish them from the early e-mails, which did not form the basis for Drahota's conviction.

Summary of Argument

Drahota's two e-mails consisted of constitutionally protected speech, sent to a candidate for political office, and they were far different from speech that this Court has treated as a breach of the peace in the past. The e-mails did not fit within any of the exceptions to First Amendment protection. In particular, they were not true threats, libel, or fighting words. Nor did the e-mails' anonymity strip them of protection, because anonymous speech is fully covered by the First Amendment.

The e-mails also did not lose their constitutional protection on the grounds that they do not constitute "civil discourse or debate," but instead contain "insulting . . . words," which "by their very utterance inflict injury," *State v. Drahota,* 17 Neb. App. 678, 685-86 (2009). Both recent U.S. Supreme Court cases and cases from other courts make clear that even uncivil and insulting speech is

constitutionally protected (unless it contains fighting words that are likely to cause an imminent fight), especially when said to a public figure like then-candidate Avery.

Nor were the e-mails stripped of constitutional protection by Avery's request that Drahota stop sending him "more vile [*sic*]." Government officials and candidates for government office are not entitled to use the force of law to block messages from constituents or prospective constituents (at least unless the messages fit into the true threats exception to First Amendment protection). Moreover, even if a narrowly crafted statute that expressly gives e-mail recipients a right to block further messages from the sender could constitutionally be applied to e-mail sent to officials and candidates, no such statute was present here. Instead, this case involves a general disturbing-the-peace law, which had never before been interpreted to embody such a ban on continued unwanted e-mail. In addition, the law here was applied by the Court of Appeals and by the trial court in a way that involved discretionary evaluation of the civility of Drahota's argument—the very thing that the U.S. Supreme Court has condemned.

Finally, Drahota's labeling his assignments of error in his Court of Appeals brief as "Issues," rather than "Assignments of Error," should not preclude independent review of his conviction. Though Drahota's briefing was incorrect, he supported his claims with detailed argument, and the state's failure to discuss the briefing error itself waived the right to rely on any such error. And the opinion below rejected Drahota's arguments on the merits.

Moreover, the brief before this Court does specifically assign and argue the errors, so there is no need for this Court to resort to review for plain error. Regardless, even if the conviction is reviewed only for plain error, the error in this case is plain, and should be noticed to avoid an unconstitutional result.

Argument

I. The First Amendment, and a Proper Understanding of Nebraska Breach of the Peace Law, Prohibit Punishing Drahota's Two E-Mails As a "Breach of the Peace."

The First Amendment protects political speech, including communications made to only one person, *see, e.g., City of Houston v. Hill*, 482 U.S. 451, 461-62 (1987) , unless the speech falls within one of the narrow First Amendment exceptions that the U.S. Supreme Court has recognized. *See, e.g.*, *State v. McKee*, 253 Neb. 100, 105, 568 N.W.2d 559, 563 (1997). Because of this, Nebraska breach of the peace law does not extend to speech that is constitutionally protected. *See, e.g., State v. Broadstone*, 233 Neb. 595, 599-600, 447 N.W.2d 30, 33-34 (1989) (considering whether the defendant's speech was constitutionally protected, in the course of responding to a claim that the evidence did not suffice to show breach of the peace); *State v. Groves*, 219 Neb. 382, 385, 363 N.W.2d 507, 510 (1985) (construing a disorderly conduct ordinance as not covering "constitutionally protected conduct," precisely to avoid First Amendment problems). The e-mails in this case do not fit within any exception to constitutional protection, nor are they like the speech that this Court has treated as a breach of the peace in the past.

A. The Two E-Mails Do Not Contain "True Threats."

The e-mails do not contain "[t]rue threats" of illegal conduct, which are "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," *Virginia v. Black*, 538 U.S. 343, 359 (2003). The opinion below did not suggest that the e-mails were threatening. The County Court's decision did not suggest that the e-mails were threatening. (45:7-46:5.) Even Senator Avery, when asked whether the e-mail from Drahota was "at any time threatening," pointed only to a different e-

mail (22:25-23:10; E1:9), which was not one of the two messages that formed the basis for this conviction (14:16-17; 17:4-9).

B. The Two E-Mails Are Not Libelous.

The e-mails in this case are likewise not 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 e-mails' 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. No reasonable reader would understand Drahota's e-mail as claiming that Avery had committed the crime of treason, or as otherwise asserting that the author was privy to some facts that demonstrated some specific acts of treachery on Avery's part. The reasonable reader would understand that Drahota was simply expressing an opinion that Avery's political positions were unduly favorable to the nation's enemies. *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).

C. The Two E-Mails' Anonymity Does Not Strip Them of Constitutional Protection.

The opinion below mentions that the e-mails did not reveal the author's name, 17 Neb. App. at 684-85, but this cannot deprive them of constitutional protection. Anonymous speech is protected

by the First Amendment on the same terms as nonanonymous speech is. *See Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 199, 204 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).

D. The Two E-Mails Are Not "Fighting Words."

The two e-mails are also not covered by the "fighting words" exception to First Amendment protection. That exception is limited to words that are so insulting that they are likely to "provoke immediate violence." *See, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982); *Gooding v. Wilson*, 405 U.S. 518, 528 (1972); *United States v. Poocha*, 259 F.3d 1077, 1080-81 (9th Cir. 2001).

While face-to-face insults may 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 Citizen Pub'g Co. v. Miller*, 210 Ariz. 513, 519, 115 P.3d 107, 113 (Ariz. 2005) (concluding that a letter to the editor of a newspaper cannot constitute fighting words, in part because "[t]he fighting words doctrine has generally been limited to 'face-to-face' interactions"); *Layshock v. Hermitage Sch. 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 did not constitute "fighting words" and therefore could not 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 upholding 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).

E. The Two E-Mails May Not Be Punished on the Grounds That They "By [Their] Very Utterance Inflict Injury."

The court below appears to have concluded, quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), 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. Under this reading of *Chaplinsky*, 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" language in *Chaplinsky* might mean, it cannot refer to the "injury" of feeling insulted.

A candidate for the Nebraska Legislature is certainly a public figure. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271 (1971); *Hoch v. Prokop*, 244 Neb. 443, 446, 507 N.W.2d 626, 629 (1993). And speech about public figures 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, 50, 53 (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. As this Court has pointed out, "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."'" *State v. McKee*, 253 Neb. 100, 106, 568 N.W.2d 559, 564 (1997) (quoting *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994)).

If anything, an attack distributed to millions of readers, 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, 625 (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 openly racist. The statute in *Popa* clearly covered such messages; it was not just a general breach-of-the-peace law, which 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.

F. The Two E-Mails May Not Be Punished as "Breaches of the Peace" Despite Avery's Request, Four Months Earlier, That Drahota Stop E-Mailing Him.

The opinion below notes that 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. This also appears to have been part of the County Court's rationale. (45:20-21.) But such a rationale cannot justify this prosecution.

1. The Law May Not Criminalize Speech in Order to Protect Candidates and Elected Officials from Unwanted Messages.

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) (en banc)

(Bork, J., concurring)). Because of this, the privacy protections that may sometimes shield people from unwanted messages, *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 732, 737 (1970), generally do not shield candidates and government officials.

Thus, even intentionally annoying or abusive telephone messages left for government officials are constitutionally protected. *Popa*, 187 F.3d at 677. As set forth in *People v. Klick*, 66 Ill. 2d 269, 274, 362 N.E.2d 329, 332 (1977), an opinion that this Court favorably discussed in *State v. Kipf*, 234 Neb. 227, 242-43, 450 N.W.2d 397, 409 (1990), "Although . . . the state has a legitimate interest in protecting the privacy of its citizens from unwanted telephone intrusions," "citizen complaints to public officials," even made with "intent to annoy," constitute "constitutionally protected" speech (all quotes from *Kipf*). Likewise, as *U.S. Postal Serv. v. Hustler Magazine, Inc.*, 630 F. Supp. 867, 871 (D.D.C. 1986), held, "As elected representatives of the people, [Members of Congress] cannot simply shield themselves from undesirable mail in the same manner as an ordinary addressee," a principle that applies equally to undesirable e-mail sent to candidates for the state legislature.

More broadly, political officials' and candidates' privacy rights are considerably less than the privacy rights of ordinary citizens. This is so even where it comes to the tort of disclosure of private facts. *See, e.g., Willan v. Columbia County*, 280 F.3d 1160, 1162 (7th Cir. 2002); *McCall v. Oroville Mercury Co.*, 142 Cal. App. 3d 805, 807, 191 Cal. Rptr. 280, 281 (1983) ("A government official or candidate for public office has usually been considered a 'public figure' who has waived much of his right to privacy."). It is so for the constitutional right to be free from government disclosure of certain private facts. *See, e.g., Summe v. Kenton County Clerk's Office*, 626 F .Supp. 2d 680, 691 n.8 (E.D. Ky. 2009) ("State law affords a candidate for public office only a drastically limited privacy

right against the release of private information."); *Creel v. City of Cleveland*, 2008 WL 2169507, *4 (E.D. Tenn. 2008) ("Running for elected office diminishes an individual's privacy rights."). It is so for privacy-based limits on the disclosure of government documents that mention particular people. *See, e.g.*, *Lambert v. Belknap County Convention*, 157 N.H. 375, 384, 949 A.2d 709, 718 (2008) ("a candidate voluntarily seeking to fill an elected public office has a diminished privacy expectation in personal information relevant to that office"); *Common Cause v. Nat'l Archives & Records Serv.*, 628 F.2d 179, 184 (D.C. Cir. 1980) (taking the same view). It is so for privacy-based objections to laws that compel people to disclose certain things. *See, e.g.*, *Seymour v. Elections Enforcement Comm'n*, 255 Conn. 78, 100, 762 A.2d 880, 892 (2000) ("There are inherent limitations of a unique and significant nature regarding any claim to the right of privacy on the part of candidates and incumbent public officials.'" (quoting *Fritz v. Gorton*, 83 Wash. 2d 275, 294, 517 P.2d 911, 923 (1974))); *State v. Morgan*, 1987 WL 11809, *4 (Ohio Ct. App. 1987) ("Candidates for elective office cannot reasonably expect the same degree of privacy enjoyed by non-candidates.").

So even where the alleged invasion of privacy involves the disclosure of embarrassing personal information—which can ruin careers, marriages, and friendships—candidates' and elected officials' privacy protections are extremely limited. The same principle should apply when the ostensible invasion of privacy involves neither embarrassment nor even physical distraction (as would be the case with repeated unwanted telephone calls), but a candidate's or official's simple receipt of an unwanted rude e-mail. And citizens' rights to speak their mind, even using rude and unwanted communications, to those who hold or seek high office should overcome whatever much-reduced privacy rights those officials or candidates might have.

2. Even When a Law May Criminalize Written Messages Sent to Private-Citizens After the Recipient Has Said "Stop Communicating With Me," the Law May Not Call for Discretionary Government Decisionmaking About What Speech Is "Civil" or "Tolerant."

Moreover, while a statute crafted specifically to ban further contact with someone who has said "stop e-mailing me" might be constitutional—at least if it excluded government officials—the Court of Appeals' interpretation of breach-of-the-peace law is not constitutional. 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, specifically 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 opinion below lacked the attributes that *Rowan* found "essential": The opinion 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 loyalty 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 the County Court found Drahota guilty, it 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. Rightly or wrongly, 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. If the Court of Appeals had agreed that Avery was disloyal, or merited (even hyperbolically) the label "traitor," the court likely would not have declared Drahota's e-mails uncivil and therefore punishable. Yet speech protections, and speech restrictions, must be applied without regard to whether a court agrees with the view that the speaker expresses.

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 Magazine v. Falwell*, 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 unconstitutional for much the same reason.

3. Drahota Was Not on Notice That Nebraska Breach-of-the-Peace Law Empowered E-Mail Recipients to Prohibit Future E-Mails.

Finally, even if repeated e-mail after the recipient says "stop e-mailing me" could be outlawed, nothing in Nebraska law foreshadowed that such a principle was already embodied in the law of breach of the peace. In this 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 the sender to 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.

II. That Drahota's Court of Appeals Brief Labeled His Assignments of Error as "Issues," Rather Than "Assignments of Error," Should Not Preclude Independent Review of His Conviction.

Drahota labeled his assignments of error in his pro se brief to the Court of Appeals as "issues" instead of "assignments of error." 17 Neb. App. at 683. Drahota's briefing was incorrect on this score.

Nonetheless, Drahota supported his claims with detailed argument. The state's brief did not claim any waiver on Drahota's part, and thus itself waived the right to rely on any such waiver by Drahota. *See, e.g.*, *United States v. Reider*, 103 F.3d 99, 103 n.1 (10th Cir. 1996) (concluding that the government's failure to rely on defendant's waiver of an argument below "waived [the] waiver," and allowed the court to consider that argument on the merits); *United States v. Schmidt*, 47 F.3d 188, 193 (7th Cir. 1995) (likewise); *United States v. Quiroz*, 22 F.3d 489, 490-91 (2d Cir. 1994) (per curiam) (likewise). The opinion below dealt fully with Drahota's arguments. And while the Court of Appeals stated it was reviewing the case for plain error, 17 Neb. App. at 684, it concluded there was no error at all.

Moreover, to guarantee review by an appellate court, "an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error." *State ex rel. Lemon v. Gale*, 272 Neb. 295, 312, 721 N.W.2d 347, 361 (2006) (treating this Court as "an appellate court" for purposes of this statement). In the briefs before *this* Court, the errors are both specifically assigned and specifically argued, even if they were not properly assigned before the Court of Appeals.

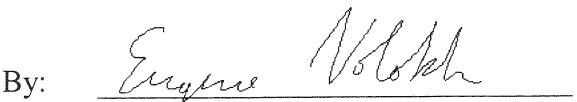
This Court should therefore review the legal basis for the conviction de novo, rather than for plain error. But even if the conviction is reviewed for plain error, the error in this case is plain. "Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process." *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 243, 674 N.W.2d 442, 454 (2004).

As this court noted in *State v. Conover*, 270 Neb. 446, 449, 703 N.W.2d 898, 902 (2005), "where the constitutional invalidity of a statute is plain and such determination is necessary to a reasonable and sensible disposition of the issues presented," it is "required by necessity to notice the plain error." As was shown above, while the underlying breach-of-the-peace law is facially valid, its application to the speech in this case is plainly invalid. Thus, as in *Conover*, this Court should invoke the above-quoted "principle in reaching the constitutional issue presented here." *Id.* *See also, 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, 366, 253 N.W.2d 26, 29 (1977))).

Conclusion

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

DARREN J. DRAHOTA, Appellant

By: 

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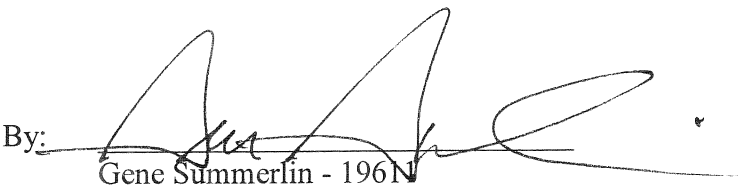
By: 

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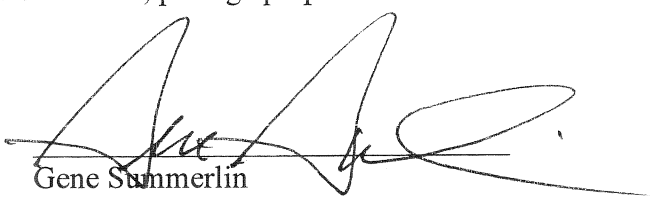
Certificate of Service

The undersigned attorney hereby certifies that on October 20, 2009, two true and correct copies of the foregoing Appellant's Brief were served upon the Appellee's attorney, George R. Love, Office of the Attorney General, 2115 State Capitol, Lincoln, NE 68509, and amicus, Amy Miller, ACLU Foundation of Nebraska, 941 O Street, #1020, Lincoln, NE 68508, David Post, Amici Curiae Law Professors, Beasley School of Law, Temple University, 1719 North Broad Street, Philadelphia, PA 19122, and William Creeley, Foundation for Individual Rights in Education, 601 Walnut Street, Suite 510, Philadelphia, PA 19106, by first-class mail, postage prepaid.



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