IN THE NEBRASKA SUPREME COURT

STATE OF NEBRASKA, Appellee, vs. DARREN J. DRAHOTA, Appellant.	))))))))	CASE NO. S-08-628 BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANT.

INTEREST OF THE AMICI

The Foundation for Individual Rights in Education, Inc. ("FIRE"), is a non-profit, tax-exempt educational and civil liberties organization pursuant to section 501(c)(3) of the Internal Revenue Code interested in promoting and protecting academic freedom and First Amendment rights at American institutions of higher education. David Post is the I. Herman Stern Professor of Law at the Beasley School of Law, Temple University. *Amici* believe that, for academic freedom and robust collegiate expression to survive, the law must remain clearly and vigorously on the side of free speech on campus. For all of the reasons stated below, *amici* believe that the lower courts have erred by finding defendant's speech to be not only unprotected by the First Amendment, but actually criminal.

ARGUMENT

I. If Allowed to Stand, the Lower Court's Opinion Will Endanger a Broad Range of Protected Speech

A. The Lower Court's Opinion Criminalizes Speech That Judges and Juries Find Uncivil, Lewd, Profane or Insulting

The Court of Appeals, in holding that the two e-mails sent from an anonymous e-mail address constitute a breach of the peace, reasoned that the

communication contained in the e-mails "hardly represents civil discourse or debate." *State v. Drahota*, 17 Neb. App. 678, 685 (June 16, 2009). It held that speech may be proscribed, consistent with the First Amendment, if it is lewd, profane, or insulting. Under these standards, if a citizen of Nebraska makes any contested political statement in a pointed or shocking fashion in an e-mail or letter, she may be subjecting herself to criminal punishment by unknowingly stepping outside of the state's unreasonable definition of "civil discourse."

This result is inconsistent with long-established First Amendment doctrine and decades of jurisprudence. The United States Supreme Court has already rejected a state's attempt to interpret its disturbing the peace statute as proscribing uncivil or hostile expression, explaining, "[T]he principle contended for by the State seems inherently boundless. How is one to distinguish [the word "fuck"] from any other offensive word?" *Cohen v. California*, 403 U.S. 15, 25 (1971). In *Cohen*, the Supreme Court invalidated a state conviction of a citizen for "disturb[ing] the peace...by...offensive conduct" after he wore a jacket bearing the words "Fuck the Draft" inside a courthouse. In significant part, the Court reasoned that because "governmental officials cannot make principled distinctions" between offensive and civil speech, the state must leave offensive speech unregulated. *Id.* at 25.

Furthermore, *Cohen* held that offensive speech is protected for its ability to communicate "otherwise inexpressible emotions." *Id.* at 26. Citizens have the right to "speak foolishly and without moderation" on political matters. *Id.* (internal citation and quotation omitted). Therefore, the *Cohen* Court observed, "Surely the State has no right

to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." *Id.* at 25.

Numerous other Supreme Court precedents support the holding in *Cohen* and the reasoning contained in that decision. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) (stating that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) (stating that even "gross and repugnant" expression about a public figure does not lose protection because it caused the public figure "emotional harm"); *Papish v. Board of Curators*, 410 U.S. 667, 670 (1973) (stating that speech cannot be punished for failing to meet "conventions of decency," "no matter how offensive [the speech is] to good taste"); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (stating that freedom of expression "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger"). Together, these decisions make clear that uncivil, lewd, profane, and insulting speech is fully protected by the First Amendment and has communicative value. The Court of Appeals' decision disregards these binding precedents and endangers a large swath of protected speech.

B. The Lower Court's Opinion Impermissibly Expands the "Fighting Words" Doctrine

By criminalizing Appellant Darren J. Drahota's two e-mails, the Court of Appeals' decision will impermissibly chill protected expression. The lower court employed the "fighting words" rationale to find Drahota's expression criminally sanctionable. However, the fighting words exception to the First Amendment, to the extent that it is still legally cognizable, reaches only a narrow range of expressions

"which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

As the e-mails in this case were not sent to a third party, the only possible "injury" at issue in this case is the feeling of offense experienced by their recipient. The Supreme Court has repeatedly clarified that *Chaplinksy*'s suggestion that speech can be punished merely because it is emotionally injurious speech was incorrect. To lose protection, offensive speech must be "inherently likely to provoke violent reaction." *Cohen,* 403 U.S. at 20. Drahota's speech does not come close to meeting this narrow exception. As Drahota's expression came in the form of two e-mails, rather than in a face-to-face confrontation, it does not meet the immediate provocation requirement of *Chaplinsky*. The Court of Appeals has erroneously expanded the *Chaplinsky* precedent and thereby placed the expressive rights of residents of Nebraska in doubt. It will be difficult for residents to anticipate whether a particular instance of expression will constitute a breach of the peace. As a result, at least some residents will self-censor in order to avoid potential criminal punishment. This chilling effect is impermissible under the First Amendment.

C. The Lower Court's Opinion Misconstrues Libel

Additionally, the Court of Appeals incorrectly held that Drahota's expression was libelous. It characterized the e-mail address used by Drahota, averylovesalqueda@yahoo.com, as "false and libelous" in that it "accused Avery of being aligned with a terrorist group." *Drahota*, 17 Neb. App. at 685. This finding ignores the basic requirement that a statement, in order to be libelous, must be communicated to a third party other than the allegedly defamed party. *See MSK EyES Limited v. Wells Fargo*

Bank, 546 F.3d 533, 542 (8th Cir. 2008) (stating that "[d]efamation claims require a showing of publication by the defendant to a third party."). In this case, Drahota's statements were communicated solely to Avery, meaning that the requirement of communication to a third party was not met.

Moreover, defamation also requires a statement of fact. *See Michaelis v. CBS, Incorporated*, 119 F.3d 697, 701 (8th Cir. 1997). Here, no individual who came across the e-mail address created by Drahota would reasonably take it to mean that Avery must in fact love al-Qaeda. Rather than presenting a serious assertion of fact, the e-mail address can only logically be read as a form of ridicule, satire, or hyperbole. The e-mail address does not even identify who "Avery" is by providing a full name, rendering it very unlikely that a third party would identify the subject as the intended "Avery." It is therefore incorrect for the court to conclude that Drahota's expression was libelous.

D. The Lower Court's Opinion Fails to Recognize That Anonymous Speech Is Protected by the First Amendment

Finally, the Court of Appeals incorrectly grounded its decision on the anonymous nature of Drahota's two e-mails. The court emphasized in its opinion that Drahota "wrote these two e-mails without identifying himself" and stated, "It is of consequence that in June, he attempted to hide his authorship..." *Drahota*, 17 Neb. App. at 685, 687. However, the Supreme Court has made clear that under the First Amendment, the mere fact that speech is expressed anonymously does not deprive it of its constitutional protection. The Court has declared that anonymous speech "is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority." *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995). *See also Talley v. California*, 362 U.S. 60, 65

(1960) (stating that citizens have a right to distribute anonymous handbills because "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance"). In contravention of these precedents, the Court of Appeals' decision grants anonymous speech a lesser status and diminished constitutional protection. Nebraska residents will react by self-censoring their anonymous expression, resulting in a chilling effect on an entire, important category of speech. Again, this chilling effect is untenable under the First Amendment.

II. If Allowed to Stand, the Lower Court's Decision Will Embolden Censors at Campuses Across the Country and Harm Higher Education

If the lower court's decision stands, would-be censors at college and university campuses across the United States will take careful note. The lower court's criminalization of protected speech—speech that originated in the context of a conversation between a student and a professor—will provide a dangerous signal to students, faculty, and administrators at our nation's colleges and universities that merely unwanted, disagreeable, or offensive speech may be attacked and silenced through the criminal justice system. FIRE's decade of experience defending constitutional liberties on campus makes clear the shocking extent to which institutions will censor student and faculty speech; criminalizing protected expression will furnish campus censors with a powerful new weapon. In light of the unique importance of freedom of expression in higher education, as recognized by decades of Supreme Court jurisprudence, this result would be disastrous for the role of American public universities as "peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972) (internal quotations omitted).

A. The Will to Censor Exists on Campus

In FIRE's ten years of existence, we have received thousands of case submissions alleging censorship on campus. Of those submissions, we have documented hundreds of examples of brazen violations of freedom of speech. Cases chosen by FIRE include only those in which the students or faculty members affected were willing to defend their rights and the documentation was clear enough that FIRE believed the alleged violation had occurred and could be addressed. However, given the abuse of privacy laws that allow universities to hide their disciplinary processes from public view, as well as the dearth of students and faculty who both know their rights and have the courage to stand up for them, it is safe to assume that the thousands of case submissions FIRE has received over the years represent only a small proportion of the actual number of abuses. FIRE's extensive case archives illustrate the unquestionable propensity for attacks on freedom of expression on our nation's campuses. Examples of such attacks are legion. Moreover, FIRE's record of achieving victories in these cases speaks to our ability to accurately gauge and assess campus abuses. Since FIRE's inception in 1999, FIRE has won 160 public victories for students and faculty members at 121 colleges and universities with a total enrollment of more than 2.6 million students. FIRE has been directly responsible for changing 81 unconstitutional or repressive policies affecting nearly 1.7 million students.

Recently, a student at Georgia's Valdosta State University was deemed a "clear and present danger" for publishing a collage on the popular social networking website Facebook.com that mocked his university's president for referring to a proposed parking garage as his "legacy." For this "offense," the university expelled the student and required him to undergo psychological counseling. A federal civil rights lawsuit is now

proceeding. *Barnes v. Zaccari, et al.*, No. 1:2008cv00077 (N.D. Ga. filed January 9, 2008).

In another case, San Francisco State University's College Republicans held an anti-terrorism rally at which they stepped on homemade replicas of Hamas and Hezbollah flags. Offended students filed charges of "attempts to incite violence and create a hostile environment" and "actions of incivility," prompting an SFSU "investigation" that lasted five months. In response, the College Republicans brought a constitutional challenge to SFSU's policies in federal district court. The court, siding with the College Republicans, ordered a preliminary injunction barring SFSU and other schools in the California State University system from enforcing several challenged policies, including a requirement that students "be civil to one another." The ruling also limited the California State University System's ability to enforce a policy prohibiting "intimidation" and "harassment." *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007).

During the past two years, Tarrant County College in Texas has repeatedly prohibited members of Students for Concealed Carry on Campus from participating in a nationwide "empty holster" protest on TCC's campus. The empty holsters are intended to signify opposition to state laws and school policies denying concealed handgun license holders the right to carry concealed handguns on college campuses. TCC forbade the protesters from wearing empty holsters anywhere on campus, even in the school's designated "free speech zone"—an elevated, circular concrete platform about 12 feet across. TCC informed students it would take adverse action if SCCC members wore empty holsters anywhere, strayed beyond the school's "free speech zone" during their

holster-less protest, or even wore T-shirts advocating "violence" or displaying "offensive" material. Recently, after being told that this prohibition would continue, two TCC students filed suit in the United States District Court for the Northern District of Texas, Fort Worth Division, asking the court to ensure that they are allowed to fully participate in the upcoming protests and including a request for a temporary restraining order prohibiting the school from quarantining expression to its "free speech zone." The court has granted the students' motion and issued a temporary restraining order against TCC. *Smith v. Tarrant County College District*, Civil Action No. 4:09-CV-658-Y (N.D. Texas, Fort Worth Division, November 6, 2009).

These are just three of hundreds of examples of college administrators actively attempting to silence protected student speech. FIRE's concern that new legal avenues for censorship on campus—such as the "breach of the peace" rationale proffered by the lower court—will be exploited by administrators is, sadly, more than hypothetical. Indeed, our research demonstrates that most universities maintain policies that prohibit speech protected by the First Amendment. In a 2009 report, FIRE surveyed publicly available policies at the 100 "Best National Universities" and at the 50 "Best Liberal Arts Colleges," as rated in the August 27, 2007, "America's Best Colleges" issue of *U.S. News & World Report*, as well as at an additional 207 major public universities. FIRE found that 77 percent of public universities surveyed maintain policies that both clearly and substantially restrict constitutionally protected speech. Spotlight on Speech Codes: The State of Free Speech on our Nation's Campuses, *available at* http://www.thefire.org/Fire_speech_codes_report_2009.pdf (last visited November 4, 2009). Equipping universities already engaged in censorship of student speech with

another means of silencing dissent, criticism, or merely unwelcome speech, as the lower's court decision will if allowed to stand, will only exacerbate the already shameful disregard for protected speech on campuses across the country.

B. On Campus, Any Ambiguity in Law Will Be Exploited to Silence Speech

FIRE's experience demonstrates that universities will seize upon any ambiguity in the law as a means or justification to silence unwanted speech on campus. For example, one week after the United States Court of Appeals for the Seventh Circuit's decision in *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1169 (2006) (holding that public colleges may regulate the content of student newspapers in a manner akin to high schools), the general counsel for the California State University (CSU) system penned a memorandum to CSU college presidents in favor of campus censorship, based on the *Hosty* decision. She stated that the decision "appears to signal that CSU campuses may have more latitude than previously believed to censor the content of subsidized student newspapers." Memorandum from Christine Helwick, General Counsel, California State University, to CSU Presidents (June 30, 2005), *available at* http://www.splc.org/csu/memo.pdf (last visited July 15, 2009). *Hosty*, in fact, held that the decision to censor the student newspaper may have been unconstitutional, but the law was not "clearly established" in this area. 412 F.3d at 738-39. CSU's inclination to read ambiguities in the law in favor of censorship is common on college campuses, and students at Nebraska's public institutions of higher education would be ill-served by such an attitude among Nebraska officials.

Similarly, out of a misunderstanding of what conduct constitutes actionable peer-on-peer hostile environment sexual harassment, the vast majority of universities continue

to maintain poorly worded harassment policies that restrict student speech in spite of the fact that federal courts have consistently overturned such policies as unconstitutional. *See, e.g., DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008) (declaring former sexual harassment policy facially unconstitutional); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining harassment policy); *Booher v. Bd. of Regents*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998) (declaring sexual harassment policy facially unconstitutional); *Dambrot v. Cent. Mich. Univ.*, 839 F. Supp. 477 (E.D. Mich. 1993) (declaring discriminatory harassment policy facially unconstitutional); *The UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring racial and discriminatory harassment policy facially unconstitutional); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of discriminatory harassment policy due to unconstitutionality); *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (declaring speech policies unconstitutionally overbroad). Many universities choose to ignore the fact that "there is no 'harassment exception' to the First Amendment," even for speech that is "detestable." *DeJohn*, 537 F.3d at 316. Attempts to punish students for speech that some consider offensive or inflammatory, as in the instant case, are, sadly, all too common.

Because of the fact that prosecution for speech is at issue, the instant case has already attracted attention beyond Nebraska's borders. *See, e.g., Fine upheld for man who harassed Neb. Professor*, The Associated Press, June 16, 2009; *Neb. Court Of Appeal Upholds Conviction*, Yankton Daily Press & Dakotan, June 18, 2009, at 3; Ann Bartow, *E-mail, Anonymity and the First Amendment: State of Nebraska v. Darren J. Drahota*, Feminist Law Professors, *available at*

http://feministlawprofessors.com/?p=11850 (last visited November 9, 2009). As such, university administrators will be watching this court's decision closely. The outcome in this case has the potential to greatly impact the speech rights of university students across the nation.

C. The First Amendment is Particularly Important in Higher Education

The Supreme Court has declared that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Healy*, 408 U.S. at 180 (internal quotations omitted). That the First Amendment's protections fully extend to public colleges is settled law. *See, e.g.*, *Keyishian v. Board of Regents*, 385 U.S. 589, 605–06 (1967) ("[W]e have recognized that the university is a traditional sphere of free expression ... fundamental to the functioning of our society"); *Healy*, 408 U.S. at 180 (citation omitted) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses."). Further, the Supreme Court has made clear that preserving a robust atmosphere for open dialogue on our nation's campuses has importance beyond even the rights of individual citizens—it is nothing less than a matter of survival for our democracy. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (discussing the "essentiality of freedom" on campus due to universities' "vital role in a democracy").

The two emails at issue in this case resulted from a dialogue between a student and his professor about issues of national security, patriotism, and America's role in the international community. As such, their communications represent the type of free exchange of ideas that the First Amendment is meant to protect in the university setting.

Criminalizing the exchange would abandon important First Amendment principles and severely impair an essential function of the university.

D. Criminalizing Merely Offensive Speech Will Destroy the Marketplace of Ideas at Universities in Nebraska and Across the Nation

Criminalizing merely offensive, unwanted, unpleasant, or uncivil speech, as the lower court's opinion does, would imperil the ideal of the American public university as the "marketplace of ideas." If the lower court's opinion is allowed to stand, university administrators will be empowered to silence speech by resorting to criminal sanctions against students, despite the fact that the vast majority of unpleasant speech is entirely protected by the First Amendment. Most universities maintain their own law enforcement forces, meaning that the arrest and prosecution of students engaged in uncivil but protected speech on campus is a distinct—and unsettling—possibility.

The Supreme Court has warned that "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation... Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy*, 354 U.S. at 250. The Court of Appeals' decision, if not corrected, will act as this "strait jacket," resulting in a creeping uncertainty about the status of protected speech on campus that might well deter student speech. Students will surely self-censor rather than risk criminal prosecution for "breaching the peace." Once this chilling effect takes hold, the marketplace of ideas that our universities are meant to enable will cease to exist.

CONCLUSION

For the foregoing reasons, we urge this Court to reverse the lower's court's decision.

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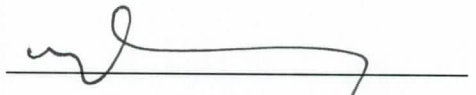
Respectfully Submitted,



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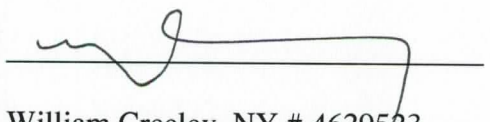
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on November 13, 2009, two true and correct copies of the foregoing Brief *Amicus Curiae* in Support of Appellant were served upon the Appellant's attorneys, Eugene Volokh, Mayer Brown LLP, UCLA School of Law, 405 Hilgard Avenue, Los Angeles, CA 90095 and Gene Summerlin, Ogborn, Summerlin & Ogborn, 610 J Street, Suite 200, Lincoln, NE 68508, (402) 434-8040; 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, by first-class mail, postage prepaid.



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