Case No. S-06-425

COURT OF IMPEACHMENT
NEBRASKA SUPREME COURT

NEBRASKA LEGISLATURE,

Plaintiff,

v.

C. DAVID HERGERT,

Defendant.

Impeachment Proceedings & Trial

Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss Impeachment Resolution

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Jurisdictional Statement

1. Nebraska's constitutional process to remove a civil officer from office requires two distinct steps—one by each of the two involved co-equal branches of government. First, the Legislature decides whether conduct amounting to an impeachable offense has occurred, and it adopts Articles of Impeachment in a resolution. Second, this Court of Impeachment conducts trial to determine whether clear and convincing evidence proves what the Legislature determined is impeachable conduct.

2. This Court does not sit as the Supreme Court at trial; it sits as the Court of Impeachment. *Neb Const* Art III, § 17. This may not be clear upon first reading of Article III, § 17 but this provision is clearest when the possible impeachment of a Supreme Court judge is considered. In that instance, the Clerk of the Legislature serves the impeachment resolution on the Clerk of the District Court in Lancaster County who "shall choose, at random, seven Judges of the District Court in the State to meet within thirty days at the Capitol, to sit as a Court to try such impeachment, which Court shall organize by electing one of its members to preside." *Id.* ¶ 3. Nebraska Revised Statutes Chapter 24, Articles 1 – 3 provides clues, too. Chapter 24, Article I governs the Court of Impeachment, Article II governs the Supreme Court and Article III governs district courts. "The Clerk of the Supreme Court shall act as the clerk of the Court of Impeachment ..." *Neb Rev Stat* § 24-104. "Whenever the Court of Impeachment in any way interferes with the business of any other court of the state, that of the Court of Impeachment shall take precedence." *Neb Rev Stat* § 24-105.

3. The two removal process steps of (a) impeachment by the Legislature and (b) judgment of conviction or acquittal by the Court of Impeachment are steps as distinct as the duties of a grand jury, provided for in *US Const Amend* V, and a petit jury provided for in *US Const Amend* VI. The two (2) juries are distinct. One does not second-guess the decision of the other. Instead, they make entirely distinct and different decisions. The petit jury's acquittal or conviction has nothing to do with the grand jury's indictment decision. Likewise, the Legislature's decision to impeach has nothing to do with this Court's judgment on the Articles. The Legislature impeaches; this Court finds the facts.

4. Just as the Supreme Court defers to legislative findings when passing on constitutional validity, the Court of Impeachment, while discharging its fact-finding duties in the procedure of removal, defers to legislative decisions about what is impeachable. The decision about what is impeachable is textually committed to the Legislature. The Legislature decides whether the conduct charged, if proven, merits removal from office. The Impeachment Court decides if the facts prove the charge. *Neb Const Art* III, § 17. The Supreme Court reviews the Impeachment Resolution only for constitutionality, and defers to the Legislature's judgment if it is rational.

5. Hergert's dismissal Motion apparently seeks to invoke the Supreme Court's power to declare Legislative enactments unconstitutional and does not invoke the Impeachment Court's duty to judge the facts. If the Legislature transcends its power to impeach, and acts unconstitutionally, the Supreme Court can so declare, but the standard of review is whether the Legislature had a rational basis for the impeachment decision.

This Impeachment Court does not sit as a superlegislature to second guess the decision to impeach just as the Supreme Court does not superlegislate to trump the Unicameral's choices about what to enact into law. This includes impeachment resolutions, which are judged for proof here.

Nature of the Case

6. C. David Hergert was impeached by the Nebraska Legislature on ten (10) Articles. Briefly summarized they are:

Article I	False swearing of constitutional oath. *Neb Const Art* XV, § 1. (1/06/05)
Article II	Mail fraud. 18 *USC* §§ 1341 & 1346. (1/10-11/06)
Article III	False reporting to the Nebraska Accountability and Disclosure Commission ("NADC"). *Neb Rev Stat* § 28-907. (1/11/05 NADC filing)
Article IV	False reporting to law enforcement. *Neb Rev Stat* § 28-907. (10/8/05 Nebraska State Patrol ("NSP") interview)
Article V	Obstructing government operations. *Neb Rev Stat* § 28-901. (1/11/05 NADC filing)
Article VI	Obstructing government operations. *Neb Rev Stat* § 28-901. (10/8/05 NSP interview).
Article VII	Violation of *Campaign Finance Limitation Act. Neb Rev Stat* § 32-1604(5)(b). (Forty Percent Affidavits). (2004 campaign—various dates)
Article VIII	Violation of *Nebraska Accountability and Disclosure Act, Neb Rev Stat* § 49-14,134. (2004 campaign—various dates)
Article IX	Violation of *Nebraska Accountability and Disclosure Act, Neb Rev Stat* § 49-1446.04. (Improper Loan 10/21-22/04)

Article X Violation of *Nebraska Accountability and Disclosure Act, Neb Rev Stat* § 49-14,134. (Improper Loan 10/04)

7. Hergert moved to dismiss the Articles of Impeachment alleging LR 449, the Legislature's Resolution adopting them is invalid because it:

7.1 Fails to identify impeachable offenses involving either (a) official duties of a Regent, or (b) "misdemeanors in office."

7.2 Exceeds "the permissible scope of impeachment."

7.3 Infringes Hergert's due process rights, and are "unconstitutionally vague and overbroad."

7.4 Are beyond this Court of Impeachment's subject matter jurisdiction as to Impeachment because Article II invokes federal, not state, law.

Issues to be Decided

8. Are any, or all, of the Articles of Impeachment subject to dismissal for (a) failure to relate to official duties, or constitute misdemeanors in office; (b) exceeding the permissible scope of impeachment; (c) violation of due process rights of the Defendant; (d) being unconstitutionally vague and overbroad, or (e) exceeding this Court's subject matter jurisdiction because they arise under federal law?

How the Issues Should be Decided

9. This Court should decide the Articles of Impeachment are all valid, require trial, and are within the permissible scope of the law. None of them should be dismissed. Hergert failed to cite persuasive authority, advance logical or persuasive

arguments, or exhibit a colorable ground for dismissal. He essentially asks the Court to declare the Impeachment Resolution unconstitutional because it is an act of constitutional proportions within the Legislature's plenary authority.

Scope of Review

10. This Court's scope of review sweeps LR 449 for a legal flaw so deep that the Legislature's expressed will to impeach can be ignored because it runs directly and diametrically contrary to the Nebraska, or the Federal Constitution. Unless there is a constitutional infirmity in the Legislature's Resolution, dismissal of the Impeachment Articles is not appropriate.

11. Importantly, this is the first impeachment case in Nebraska history since *Neb Const Art* III, § 17 was extensively amended in 1986 by the voters. The 1986 amendment followed this Court's split decision in which an insufficient 4-3 majority of the Court voted not to convict the State's Attorney General on Articles of Impeachment. At that time, impeachment proceedings were conducted as though they were criminal in nature. Proof beyond a reasonable doubt was required. For all meaningful purposes, before 1986,impeachment charges were treated by this Court like a crime.

12. The 1986 constitutional amendment changed the landscape, markedly. It now requires five of the Court's members convict Hergert based on evidence they find clear and convincing to prove he violated one of the ten Impeachment Articles. The proceeding is to be conducted in the manner of a civil proceeding and not in the manner of the criminal one.

13. The Impeachment Articles are not required to have any particular form. They represent the Legislature's decision to classify the conduct at issue as deserving impeachment and, subject to conviction at trial, removal from office. This Court reviews the legality of the Legislature's decision on the Motion to Dismiss for a rational and constitutional basis only. It gives the Legislature great deference and avoids treading on the Legislature's separate constitutional turf. "The Separation of Powers Clause in the Nebraska Constitution prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives." *State v. Jones*, 248 Neb 117, 532 NW2d 293 (1995).

Statement of the Facts

14. Few facts are required for purposes of this Motion to Dismiss. Essentially all facts for consideration upon dismissal are contained in LR 449, the Legislature's Impeachment Resolution. It was enacted April 12, 2006, and delivered by the Clerk to the Chief Justice April 13, 2006. The Impeachment Resolution is the only prescribed pleading.

15. This Court sits as a court of impeachment. It is empowered to promulgate rules for impeachment proceedings. *Neb Rev Stat* §§ 24-101 *et seq.* But, it has not done so formally. Of course, the Court established case progression deadlines, briefing deadlines, and issued a comprehensive order for a pretrial conference.

16. C. David Hergert campaigned for the office of University Regent in 2004. He lost the primary election overwhelmingly, and won the general election by a larger margin than his Spring loss, in November.

17. Hergert raised virtually no money, had essentially no grass-root support, and used his own funds, including money he loaned the campaign in excess of legal limits, to hire consultants from Virginia, Ohio, Minnesota, and perhaps elsewhere to design and execute his campaign. Hergert concealed what he paid them. He violated Nebraska's *Campaign Finance Limitation Act, Neb Rev Stat* §§ 32-1601 *et seq.*,and its *Accountability and Disclosure Act, Neb Rev Stat* §§ 49-1401 *et seq.* Hergert admitted the violations in the spring of 2005, months after he took office. He gave the Nebraska Accountability and Disclosure Commission ("NADC") written admissions of campaign violations, and paid a fine of more than $33,000—the largest in the state's history by a miscreant candidate.

18. The Nebraska Legislature called upon Hergert to resign in LR 98, *Laws 2005*. The Resolution provided for a special election to fill the seat, giving Hergert a chance to campaign honestly for the post. Hergert declined. A year later, when it next convened at the Capitol, the Legislature impeached Hergert on ten Articles.

19. Six Impeachment Articles charge that Hergert committed offenses on or after taking the official oath of office, which occurred January 6, 2005. (Articles I-VI). Articles VII-X charge Hergert with some of his election fraud.

Constitutional Provisions Involved

20. Hergert's impeachment case involves several parts of the Nebraska Constitution. These include:

Nebraska Constitution Article III, § 17, describes impeachment and trial as follows:

(broken into parts for readability):

> The Legislature shall have the sole power of impeachment, but a majority of the members elected must concur therein. Proceedings may be initiated in either a regular session or a special session of the Legislature.
>
> Upon the adoption of a resolution of impeachment, which resolution shall give reasonable notice of the acts or omissions alleged to constitute impeachable offenses but need not conform to any particular style, a notice of an impeachment of any officer, other than a Judge of the Supreme Court, shall be forthwith served upon the Chief Justice, by the Clerk of the Legislature, who shall thereupon call a session of the Supreme Court to meet at the Capitol in an expeditious fashion after such notice to try the impeachment.
>
> A notice of an impeachment of the Chief Justice or any Judge of the Supreme Court shall be served by the Clerk of the Legislature, upon the clerk of the judicial district within which the Capitol is located, and he or she thereupon shall choose, at random, seven Judges of the District Court in the State to meet within thirty days at the Capitol, to sit as a Court to try such impeachment, which Court shall organize by electing one of its number to preside.
>
> The case against the impeached civil officer shall be brought in the name of the Legislature and shall be managed by two senators, appointed by the Legislature, who may make technical or procedural amendments to the articles of impeachment as they deem necessary. The trial shall be conducted in the manner of a civil proceeding and the impeached civil officer shall not be allowed to invoke a privilege against self-incrimination, except as otherwise applicable in a general civil case.
>
> No person shall be convicted without the concurrence of two-thirds of the members of the Court of impeachment that clear and convincing evidence exists indicating that such person is guilty of one or more impeachable offenses, but judgment in cases of impeachment shall not extend further than removal from office and disqualification to hold and enjoy any office of honor, profit, or trust, in this State, but the party impeached, whether convicted or acquitted, shall nevertheless be liable to prosecution and punishment according to law. No officer shall exercise his or her official duties after he or

> she shall have been impeached and notified thereof, until he or she shall have been acquitted.

Nebraska Constitution Article III, § 17 was originally Art III, § 14 in 1875 when first enacted. It was amended 1972, Laws 1971, LB 126, §1; amended 1986, Laws 1986, LR 318, § 1.

Nebraska Constitution Article IV, § 5, provides:

> All civil officers of this state shall be liable to impeachment for any misdemeanor in office.

Nebraska Constitution Article VII, § 10, provides for the Board of Regents to be elected from Districts established by the Legislature and requires the elections for Regent comply with the Legislature's criterion. The Constitution specifically provides:

> The general government of the University of Nebraska shall, under the direction of the Legislature, be vested in a board of not less than six (6) nor more than eight (8) regents to be designated the Board of Regents of the University of Nebraska, who shall be elected from and by districts as herein provided, and three (3) students of the University of Nebraska who shall serve as non-voting members... The terms of office of elected members shall be for six (6) years each. The terms of office of student members shall be for the period of service as student body president. Their duties and powers shall be prescribed by the law; and they shall receive no compensation, but may be reimbursed by their actual expenses incurred in the discharge of their duties.

Nebraska Constitution Article XV, § 1, prescribes the oath of office:

> Executive and judicial officers and members of the legislature, before they enter upon their official duties shall take and subscribe the following oath, or affirmation.
>
> I do solemnly swear (or affirm) that I will support the constitution of the United States and the constitution of the state of Nebraska, and will faithfully discharge the duties of _____ according to the best of my ability, and at the election at which I was chosen to fill

> said office, I have not improperly influenced, in any way, the vote of any elector...
>
> Nebraska Constitution Article XV, § 1 continues:
>
> ...and any person who shall be convicted of having sworn falsely to, or violating his said oath, shall forfeit his office, and thereafter be disqualified from holding any office of profit or trust in this state unless he shall have been restored to civil rights.

No one provision of the Constitution prevails over others, and Defendant Hergert's suggestion to the contrary (Br 3) is not correct. Every clause in the Constitution has been inserted for a useful purpose and should receive broader and more liberal construction than statutes. *Hall v. Progress Pig, Inc.*, 254 Neb 150, 575 NW2d 369, appeal after remand, 259 Neb 407, 610 NW2d 420 (1998).

21. This Court sits, here, as a court of impeachment. Its jurisdiction and authority is defined by *Neb Rev Stat* §§ 24-101 *et seq.* As a court of impeachment, this Court "shall make such rules and orders as in its discretion shall be best adopted to a full, fair and impartial investigation of the charges made, and to the promotion of substantial justice." *Id.* § 24-103. Its business "shall take precedence" over the business "of any other court of the state." *Id.* The business of a court of impeachment takes precedence over the business of the Supreme Court. *Neb Rev Stat* § 24-105. The Clerk of the Supreme Court is the impeachment court's clerk and "shall keep a full record of each day's proceedings in a book to be specifically provided for that purpose, and each day's proceedings shall be signed by the presiding judge. The Clerk of the Supreme Court shall always be the custodian of the book." *Neb Rev Stat* § 24-106. The Court of Impeachment's opinions are recorded in the Nebraska Reports. *Neb Rev Stat* § 24-107.

Impeachment cases need not be tried during the term of an offense, though the impeached officer must be in office when the Articles of Impeachment are adopted. *Neb Const Art* IV, §5; *Neb Rev Stat* § 24-109.

Argument

I.

Impeachment and Trial are Distinct Constitutional Steps in the Process To Remove a Miscreant Civil Officer.

This Court of Impeachment Gives Deference to the Legislature's Decision to Impeach as it Does When Reviewing Legislative Enactments.

22. This Court's review, on this Motion to Dismiss, searches for a legal flaw in LR 449 which would prevent the Impeachment Articles from moving forward. Absent such a flaw, trial must occur. *Neb Const Art* III, § 17 This Court may decide jurisdictional issues related to the Impeachment Articles, *State v. Hill*, 37 Neb 80 (1893), but the form the Legislature chooses to plead its impeachment decision is not prescribed, and as with civil proceedings, the Legislature need only notify Hergert of the nature of the offenses against him. In this case, the Legislature did so with specificity in each Impeachment Article.

23. This Impeachment Court is not confronted with what is tantamount to a *Neb R Civ P* 12(b) motion to dismiss as Defendant's moving papers suggest. Defendant miscomprehends the situation from a pleadings and dismissal perspective. The issue before this Court does not involve the sufficiency of a pleading to state a claim. The Legislature is empowered to decide, in whatever manner it choses, what form the

impeachment resolution will take. The Legislature's sole responsibility, in adopting an impeachment resolution is to:

> Give reasonable notice of the acts or omissions alleged to constitute impeachment offenses but need not conform to any particular style....

Neb Const Art III, § 17. Impeachment need not be pled "with particularity." This is a civil, not a criminal, proceeding. *Id.*

24. The Legislature's Articles of Impeachment may not be dismissed without trial unless the act of impeachment, itself, suffered a constitutional infirmity. Nebraska's governmental powers are carefully divided into three distinct, co-equal and co-extensive governmental branches. *Neb Const Art* II, § 1. Where one department of government has plenary authority over a particular act, the others must defer to it. "The Separation of Powers Clause in the Nebraska Constitution prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives." *State v. Jones*, 248 Neb 117, 532 NW2d 293 (1995). An action of the Legislature is constitutional so long as it bears some rational relationship to a legitimate purpose. The burden is on one attacking a legislative enactment to negate every conceivable basis that might support it. Deference to the legislative branch is required. *Gourley, ex rel Gourley, v. Nebraska Methodist Health System, Inc.*, 265 Neb 918, 63 NW2d 43 (2003). Where the Legislature makes a decision within its plenary authority and does not exceed that authority, the Court "does not sit as a superlegislature to review the wisdom of legislative acts." *Gourley*, 265 Neb 943, 663 NW2d at 68. It is not this Court's place to second-guess the Legislature's

reasoning behind passing an act or adopting a resolution. Instead, the Court must discharge its constitutional duty. When it sits as a Court of Impeachment, that duty, manifestly, is to judge the facts. This is why, when this Court sits as a Court of Impeachment, it choses one of its members to be a presiding judge, while the others focus intently on fact-finding. *Neb Const Art* III, § 17.

25. Nebraska's constitutional impeachment process has been amended twice. Each instance followed unpleasantness in the state's history. The first governor was impeached in a messy proceeding which led to adoption of a unique process whereby the Legislature decides what is impeachable and passes an impeachment resolution, and then this Court judges guilt or innocence. This constitutional change occurred in 1875 after Governor Butler's impeachment. It was retained at the 1919-20 Constitutional Convention, but dramatically modified in 1986, after the State's first impeachment trial before this Court.

26. In 1986, plenary legislative authority over the decision to impeach, and to decide what is impeachable, was reiterated by the people, but new constraints were imposed on the Court as the ultimate decision-maker. The standard of proof was altered from guilt beyond a reasonable doubt to clear and convincing evidence, and the process was redefined as civil, not criminal.

27. Nebraska's electorate, 111 years after their first episode of tinkering with impeachment, tinkered again. This time they made it even more clear the Legislature is to decide when to impeach and for what. This Court is to decide whether the acts charged by the Legislature occurred. If one or more did, this Court's judgment

is to be "guilty." If the Court substitutes its judgment for what constitutes impeachable conduct, it treads on the Legislature's textually-committed constitutional responsibility. *Cf., Pony Lake School Dist. 30 v. State Committee for Reorg.*, 271 Neb 173, 710 NW2d 609 (2006).

28. The Legislature has plenary authority to impeach. The Court of Impeachment has plenary authority to adjudicate Articles of Impeachment. Thus, "the Legislature shall have the sole power of impeachment...." Then:

> [u]pon the adoption of a resolution of impeachment... a notice of impeachment... shall be forthwith served upon the Chief Justice by the clerk of the legislature who shall thereupon call a session of the Supreme Court to meet at the capitol in an expeditious fashion after such notice to try the impeachment.

Neb Const Art III, § 17.

29. This Court sits as trier of fact to decide whether clear and convincing evidence proves Hergert is guilty of one or more of the ten offenses charged in the Articles of Impeachment. Impeachment is an act of the Legislature. This Court does not second-guess the decision to impeach; instead, as the Court of Impeachment it decides whether guilt is proven by clear and convincing evidence. *Id.* The Legislature's decision to impeach might be subject to constitutional infirmity if it improperly classifies conduct as impeachable or outreaches the Constitution. But a challenge to an impeachment resolution on constitutional grounds requires the Court give the Legislature great deference and review its impeachment decision like any legislative enactment. Constitutional review is for a rational basis and constitutional authority for the legislative action, not for judicial agreement or disagreement with the Legislature. "The rational

basis standard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective." *State v. Garber*, 249 Neb 648, 654, 545 NW2d 75 (1996). This Court said:

> Even provisions that a court might deem 'foolish and misdirected...' are generally valid if subject only to rational basis review... In short, a traditional rational review is ' paradigm of judicial restraint.'

State v. Senters, 270 Neb 19, 26, 669 NW2d 810, 816 (2005) (rev'd on other grounds).

30. In this case, each of the ten Impeachment Articles specifically provide, in the closing paragraph, that:

> Hergert's actions were related, but inimical, to his duties in office, subversive of fundamental and essential principles of government, and were highly prejudicial to the public interest.

The Legislature must now prove this is true by clear and convincing evidence. It may do so by establishing these action are inimical to those duties, subversive of fundamental and essential principles of government, or highly prejudicial to the public interest. Here, the facts will establish this is so on each of the Articles. This requires trial and cannot be disposed of with motion practice.

31. The Court's responsibility to pay deference to the Legislative Findings and Articles in LR449 is well-established in jurisprudence concerning respect for co-extensive branches of government, and observation of the doctrine of separation of powers. The Court is prohibited by *Neb Const Art* II, § 1, the separate departments of government clause, from encroaching on the Legislature's role by dismissing its Resolution. Trial must occur. *See, In re Interest of Constance G,* 254 Neb 96, 575 NW2d 133 (1998). For example, the Legislature may not prescribe a *de novo* standard

of review to apply where a court is called upon to review an exercise of authority which is, by its nature, legislative. To give the court *de novo* review of a decision, which is committed to the Legislature by the Constitution, would constitute a violation of the constitutional requirement of separation of powers. *Neb Const Art* II, § 1; *Slack Nursing Home, Inc. v. Department of Social Services*, 247 Neb 452, 465, 528 NW2d 285 (1995). *Accord, Keller v. Potomic Electric Co.*, 261 US 428, 43 S Ct 445 (1923).

32. Here, Hergert claims the Legislature acted unconstitutionally by making its Legislative Findings and adopting Articles of Impeachment. Hergert asks this Court to decide, without trial, whether the allegations in any of the Articles, judged facially, exceed the Legislature's authority to impeach. They do not. This Court, when passing on the *validity,* not the *proof to sustain*, the Impeachment Articles, should approach its task in the same careful manner it approaches constitutional review of statutes, which are also legislative enactments. *See, Neb Const* Art III, § 18; *McDonald v. Rentfrow*, 176 Neb. 796, 127 NW2d 480 (1964). *Accord, State v. Hunt,* 220 Neb. 707, 371 NW2d 708 (1985); *State ex rel. Douglas v. Marsh*, 207 Neb 598, 300 NW2d 181 (1980).

33. The Legislature classified Hergert's conduct as impeachable; this Court should examine the Articles before trial only for constitutional infirmity and should not second-guess. If a rational basis for the Articles can be shown and they are not constitutionally flawed, trial must occur. At trial, it is this Impeachment Court's plenary role to adjudicate guilt or innocence on each Article.

34. Rules of interpretation of legislative enactments apply to the Impeachment Resolution; it is an enactment of the Legislature and uniquely within the Legislature's province. The Supreme Court's well-defined governing rules are:

> We have set forth well-recognized principles of statutory interpretation providing the framework within which the constitutionality of a statute is considered. 'It is well established that all reasonable intendments must be indulged to support the constitutionality of legislative acts....' A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. A penal statute must be construed so as to meet constitutional requirements if such can reasonably be done. 'When a statute is susceptible of two constructions, under one of which the statute is valid while under the other of which the statute would be unconstitutional or of doubtful validity, that construction which results in validity is to be adopted.' The unconstitutionality of a statute must be clearly established before a court may declare it void. 'The courts will not declare an act of the Legislature unconstitutional except as a last resort on the facts before the court.'
>
> Given this strong presumption of constitutionality, we cannot say that § 28-703 is plainly invalid. The fact that reasonable arguments can be made does not make a statute's unconstitutionality plainly evident, and a statute is not vague merely because a reviewing court believes the Legislature could have drafted it with greater precision. Rather, the void-for-vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its applications. This is not a case in which the Legislature has failed to supply a material element; rather, it is a case in which the Legislature has failed to specifically define a term.

> In our consideration of § 28-703, we note that there is weighty precedent which suggests that § 28-703 is not unconstitutionally vague for failing to specifically define 'minor.'

State v. Johnson, 269 Neb 507, 515, 695 NW2d 165, 172 (2005) (internal citations omitted).

35. The Legislature took extraordinary steps, different from those taken in 1984 under the former provisions of *Neb Const* Art III, § 17, to impeach Hergert. Here, the legislative body made specific, detailed, and pointed Findings. These Findings are within the Legislature's constitutional province. In this connection, LR 449 specifically found:

> 3. Clear and convincing evidence exists to establish that C. David Hergert committed each and all of the impeachable offices identified in the Articles.... Each of these... is an impeachable offense because each is an offense "in its nature or consequences subversive of some fundamental or essential principle of government, or highly prejudicial to the public interest...

36. The Legislature found the integrity of this State's democratic government provides a "compelling state interest in preserving the integrity of the electoral process... by insuring that these elections are free from corruption..." *Id.* at ¶4.

37. Importantly, the Legislature also found:

> 7. Candidates who are not incumbents seeking election as a civil officer, owe the public the same duty to avoid corruption, illegality, and fraud as does an incumbent civil officer seeking a re-

election to a public office in Nebraska. C. David Hergert was not an incumbent seeking re-election in 2004.

8. C. David Hergert may not be lawfully elected to office, or serve, after committing violations of Nebraska's election laws so flagrant as to subvert fundamental and essential principles of government or be highly prejudicial to the public interest to permit an official misdemeanant to hold office would improperly provide a model of behavior and conduct that would, if emulated by university students or others, foster and encourage fraud, cheating, lying, plagiarism, false pretense, or other acts and omissions subversive of the daily educational process and the integrity of the university, and the laws of the State.

38. The Legislature repeated, in its ninth and subsequent Findings, that Hergert's conduct related to, but is inimical to, his duties in office. It found Hergert committed election fraud, entered office under false pretense, held office while continuing to commit more violations of law, and his conduct constitutes "obstruction of the general governance of the University and of the State." *Id.* at ¶ 10.

39. The Legislature found Hergert's duties as a Regent required him "to obey the law, including election and accountability laws, while in office." The Legislature made this Finding in ¶ 11 of LR 449. It did so after finding Hergert's entry into office was procured by false pretense. These Findings are important. This Court must decide whether the evidence is sufficient to prove the Impeachment Articles. Along the way, the Court may find the evidence is sufficient, or may find it is not, to meet the

clear and convincing evidence standard. For its part, and at its level of constitutional inquiry, the Legislature was clearly convinced. Now, it must prove its case to the Court.

40. The Motion to Dismiss asks the Court to consider the legal sufficiency of the Legislature's decision. Hergert's request is a challenge to the constitutional validity of LR 449. The elements of proof must now be tested by trial. As Connecticut's Supreme Court held two (2) years ago:

> [J]udicial review of controversies arising out of impeachment proceedings is limited to instances in which the 'legislature's action is clearly outside the confines of its constitutional jurisdiction to impeach any executive or judicial officer... or egregious and otherwise irreparable violations of state or federal constitutional guarantees are being or have been committed by such proceedings.'

Office of Governor v. Select Committee of Inquiry, 858 A2d 709, 718 (Conn 2004). This Court observes the Nebraska Legislature "...is clothed with authority to define crimes and misdemeanors, and to determine their punishment; where it exercises such discretion within constitutional limits, its action is not subject to review by the Court..." *State v. Smith*, 114 Neb 653, 653, 209 NW2d 328, 328 (1926) (Syllabus).

41. Due deference must be paid to the Legislature at this motion practice stage of these proceedings. The Legislature is entitled to no deference at trial. As this Court observed:

> The separation of powers doctrine imposes restrictions upon the legislative branch to limit the judicial functions of the courts. The legislature cannot... divest rights which have vested by virtue of a

> judgment.... It cannot enact legislation to retroactively open or vacate a judgment.... The limits of the jurisdiction conferred upon the Supreme Court by the Constitution may not be increased or extended by legislative enactment.... It cannot change procedures established by the Constitution.... It cannot interfere with the judicial function of adjudicating the fact of an acquittal.... It may not reverse a judgment.... It may not direct the disposition of a case in which jurisdiction has attached.

State v. Palmer, 224 Neb 282, 324-25, 399 NW2d 706, 733-34 (1986)

42. Similarly, the Supreme Court cannot decide what constitutes an impeachable offense except to see if the Legislature stayed within constitutional bounds when it passed its Resolution. This Court can decide whether the act of adopting an impeachment resolution is, itself, so far afield as to transcend the Legislature's constitutional authority. *Office of Governor, supra.* No such transgression of the Legislature's authority is present, here. At trial, this Court judges the proof, not the legal desirability of the charges.

II.

The Impeachment Articles Allege Misdemeanors Within *Neb Const* Art IV, § 5. Hergert's Offenses Occurred On or After His Oath was Taken, or as Election Fraud to Achieve Incumbency. They Are "Misdemeanors in Office."

43. Hergert's dismissal Motion's gravamen is that the "misdemeanors in office" alleged in the Impeachment Articles did not occur while he was "in" office. All his other points are insignificant. This one is equally unimportant when analyzed.

44. Hergert's attempt to make the impeachment case turn on a single two-letter word, "in," fails. His approach to the legal problems he confronts amounts to a "quibble and quiddity" like those Dickens reviled. Dickens, *Bleak House* (1853).

45. When Article IV, § 5 of Nebraska's Constitution was first enacted in 1875, campaigning, as it is known in America now, was uninvented. This is true because:

45.1 Marconi had not invented the radio. This occurred in 1896.

45.2 The television had not appeared. This came to be no earlier than 1926, experimentally.

45.3 The computer was nearly a hundred years away.

45.4 Election campaign finance laws requiring periodic reporting did not exist. They really came to be in modern times with the *Federal Election Campaign Act of 1971.*

45.5 No state had an accountability or disclosure commission or its equivalent. Neither did the federal government. *Id.*

45.6 Only a few of the nation's adult citizens could vote. Generally, only Caucasian males were given the privilege. Suffrage, and the prohibitions against poll taxes, would follow by decades. *See, U S Const* Amend XIX (1920) (women's suffrage); *U S Const* Amend XXIV (1964) (poll taxes abolished).

45.7 Public campaign finance did not exist.

46. Election frauds probably occurred, but they involved different kinds of offenses than Hergert's. Ballot-box stuffing by poll workers, spoiled or duplicated ballots, or bribes, were the election fraud of choice before Hergert's fraud's. J. Fund, *Stealing Elections: How Voter Fraud Threatens Our Democracy* (Encounter 2004).

Now, things are not so simple. Now, cheating in the campaign process through false disclosures, misleading fundraising, bogus media buys, or other sorts of false signaling through abusive election reporting, are the modern equivalents of ballot-box stuffing and voter bribery. *Id.*

47. Hergert's argument fails to analyze *Neb Const Art* IV, § 5 in any historical perspective. It fails to note the Constitution must live to have meaning. The supreme will of the people, expressed in the Constitution, must have the vibrancy of expansion as means change to commit offenses against the people, and must be stamped out by the Constitution's mandate. Professional licensure furnishes a good example. Nebraska's Supreme Court will not admit a lawyer to the bar without inquiry into prior conduct. It depends on a living constitution to authorize the inquiry. Thus, "a state is constitutionally entitled to make ... an inquiry [into the moral character and past conduct] of an applicant for admission to a profession dedicated to the peaceful and reasoned settlement of disputes between men, and between a man and his government. The very Constitution that the appellants invoke stands as a living embodiment of that ideal." *In re Converse*, 258 Neb 159, 173, 602 NW2d 500, 509 (1999). The people of Nebraska expect no less for their constitutional civil officers. They properly voiced this expectation in both the 1986 amendments to *Neb Const* Art III, § 17, and in the Impeachment Resolution in this case.

III.

The Impeachment Articles Meet *Neb Const Art* IV, § 5 Standards.

48. Impeachment and conviction are the only ways to remove a constitutional officer. *Neb Const Art* IV § 5. The Supreme Court has specifically held "conduct which took place before the respondent became a judge can nevertheless be considered conduct prejudicial to the administration of justice which brings the judicial office into disrepute." *In re Krepela*, 262 Neb 85, 93, 628 NW2d 262, 270 (2001). A judge may be removed from office for conviction of a crime involving moral turpitude, even if the crime has nothing to do with a case under consideration, or the administrative part of a judicial office. *Neb Const Art* IV, § 30(1)(d).

A. Impeachment Articles I-X relate to Hergert's duties as a Regent because Hergert's Acts Strip Away an Important Public Check on Civil Officers.

49. Hergert is charged with violating his oath of office, fraudulently using the mail, or a common carrier, to accomplish election fraud, and perpetuating the fraud even after the oath of office was sworn, falsely reporting to the Nebraska Accountability and Disclosure Commission ("NADC"), and obstructing a criminal investigation (Articles 1-VI). He is also charged with filing false and deceptive campaign reports, being untimely with his filings, and manipulating the accountability and disclosure process in a way that caused his election opponent to be without funds for the campaign. (Articles VII-X). Each and all of these relate to Hergert's office, and the consequences of each and all occur within, and continue to plague, his conduct in office.

50. Even encyclopedias of the law agree with the Legislature's position:

> A state corrupt-practices act may also require each candidate for election to file, within a designated period, a statement of the expenses incurred by the candidate during his or her campaign, and in some states the candidate is required to file a statement as to his or her financial interest in newspapers and as to the value of publicity received. Such provisions are designed to compel publicity with respect to matters contained in the statements and to prevent, by such publicity, the improper use of moneys devoted by candidates to the furtherance of their ambitions. The reporting requirements have been held applicable to the use, by an assemblyman's reelection committee, of the services of a state-paid employee of a legislative caucus, where the services provided by the employee involved solicitation of contributions, planning of campaign strategy, coordination of volunteers, and preparation of the campaign budget. Generally, statutes requiring the filing of expense statements are regarded as mandatory as to the necessity for filing, but only directory as to the time for filing thereof.

Am Jur *Elections* §354.

51. A primary purpose of election disclosure laws is to provide a way to monitor the successful candidate's performance in office to see if pre-election disclosures, which must be accurate and truthful, reveal, during elected service, any favoritism or preference for a campaign supporter or vendor. If the filings are false or deceptive during the campaign, then the successful candidate's service in office cannot be monitored as the duties of office are discharged. This thwarts a primary purpose of election disclosure laws. *Maloney v. Kirk*, 212 So2d 609 (FL 1968).

52. In *Maloney*, a concurring justice noted, while writing about Florida's campaign contributions and expenditures disclosure law and the duty to file truthful reports under it:

> This duty to report and disclose campaign contributions is a continuing one and does not terminate upon assumption of the elected candidates to office, but continues at least insofar as sanctions or penalties under the act are concerned until the statute of limitations appertaining to the violation of this duty has run. So long therefore, as a successful candidate, although having assumed the office he espoused, fails to comply with the provisions of [the law] in its reporting and disclosure aspects, he is in violation of it.

Kirk, 212 So2d at 621.

The Florida opinion continues:

> One of the objects of the Corrupt Practices Act is to set up and preserve an official record of campaign contributions in order that a public officer's performance in office may be scrutinized and evaluated by concerned member of the public in the light of what favoritism may causally result from the contributions...
>
> In order to provide fair elections between or among candidates, it is not intended that campaign debt shall be incurred by a candidate unless there are funds in his campaign treasury to pay them... but even if post-election contributions are received to pay off deficits, the candidate should fully report them and disclose their source....

Id.

53. A University Regent, under *Neb Const Art* XV, § 1, swears to support the Constitution of the United States and the Constitution of the State of Nebraska, and faithfully discharge the duties of office. The University Regent must also, along with the other Regents, exercise the power prescribed by *Neb Rev Stat* § 85-106. This odd statute empowers the Board of Regents to:

53.1 "enact laws for the government of the university;"

53.2 elect a President and others;

53.3 prescribe the duties of the persons selected and fix their compensation;

53.4 provide in its discretion, retirement benefits;

53.5 equalize benefits for retirees, etc.;

53.6 provide for classes at various locations across the state....

54. In any one of these instances, a dishonest Regent who committed election fraud to achieve office and who holds office by virtue of false reports, cannot be effectively monitored for the truthfulness or veracity by checking actions in office against what has been filed. False reporting strips the public of the ability to assess the incumbent and permits the incumbent to roll the pork barrel without the check of truthful Accountability & Disclosure filings.

B. Impeachment Articles I-X relate to Hergert's duties as a Regent because Hergert's Acts Bring Disrepute Upon the University and the State.

55. Executives in business, and in public offices often serve under contracts with "morals" clauses in them. Employment agreements with nonprofit entities oftentimes include morals clauses. *See, Parizek v. Roncalli Catholic High School*

of Omaha, 11 NebApp 482, 655 NW2d 404 (2002); *Mau v. Omaha Nat'l Bank*, 207 Neb 308, 299 NW2d 147 (1980). Acts away from work, on vacation, at home, or even before employment, are grounds to terminate. Thus:

> But where an employee's off-duty behavior is blatantly inconsistent with the mission of the employer and is known or likely to become known, most any employer, public or private, however broadminded, would want to fire the employee and would be reasonable in wanting to do so; and we find no evidence that Congress intended to deny this right to federal agencies.

Wild v. United States Dept. of Housing and Urban Development, 692 F2d 1129, 1133 (7th Cir 1982). The people have no less right, through their Legislature, to get rid of one whose post-inaugural confessions show they violated the oath of office.

56. New York's courts passed on this kind of issue 60 years ago noting of policemen:

> If our form of government is to endure, the confidence of the people must not be destroyed by leaving in office men who admit that they have betrayed their public trust. It would be a reflection upon the integrity of the police force of the City of Buffalo to permit men who admit criminal misconduct to remain as members of that force. The constitution should be construed so as to permit unscrupulous public officers to be removed from office even though their criminal acts had taken place prior to January 1, 1939.
>
> The evil and harmful result of allowing such officers to remain in the public service must be held to be a conclusive reason for an interpretation of the constitution that will prevent such result. A contrary interpretation would not be in accord with the rules of

construction. The efficiency of this salutary provision of the constitution should not be impaired by limiting the scope of its terms.

Canteline v. McClellan, 258 AD 314, 317 (NYAD 4 Dept 1940) (internal citation omitted). The New York court's observations have telling suitability here.

57. Off-duty public servants who commit wrongful acts often subject their employers to harm, and even liability, for their conduct. *See*, *Daigle v City of Portsmouth,* 534 A2d 689, 699 (NH 1987) (holding the city liable for an off-duty police officer's assault because the employment-related activities of employees who have an "obligation, or at least the option, to perform official duties whenever the need may arise" are considered within the scope of their employment). *See also*, *Primeaux v. United States*, 102 F3d 1458 (8th Cir 1996) (off duty officer in uniform raped stranded motorist; held liable).

58. To argue Hergert's conduct has not tainted the University and the State is naïve. Its impact is clearly felt during his service in office; it drags down the otherwise pressing needs and concerns of the University, the district courts, the Attorney General's office, the Legislature, and now this Court of Impeachment.

C. Hergert Intended the Natural Consequences of His Acts. His Fraud Begat Incumbency, so his Wrong Was Completed in Office.

59. One who commits election fraud, like one who commits other fraud, is held to intend the natural consequences of the fraudulent act. The wrongdoing is complete when the injury impacts its victims.

60. Hergert committed fraud to achieve a wrongful objective: win election unlawfully. His election fraud's wrongful objective is indistinguishable, except

for the uniqueness of his goal, from other kinds of intentional misrepresentation and concealment. Hergert is a fraudfeasor. A fraudfeasor seeks, through falsehoods and concealment to achieve an end that might be accomplished through honesty, but would allow others with whom the fraudfeasor deals to judge and make decisions based on complete facts, and awareness of reality, instead of distortion, if done honestly. *State ex rel NSBA v Douglas,* 227 Neb 1, 416 NW2d 515 (1987) ("An affirmative statement is not always required, however, and fraud may consist of the omission or concealment of a material fact if accompanied by the intent to deceive under circumstances which create the opportunity and duty to speak.").

61. The elements of proof for intentional concealment or misrepresentation—fraud—are well-known to this Court. They include a proximate cause component. Without proximate cause effectuating injury, no cognizable fraud tort occurs. In the Nebraska Court of Appeal's 2005 words, the elements of fraudulent concealment include "(5) that the alleging party, reasonably relying on the fact or facts as he or she believed them to be as the result of the concealment, acted or withheld action; and (6) that the alleging party was damaged by the opposing party's action or inaction in response to the concealment." *Precision Enterprises, Inc. v. Duffack Enterprises, Inc.*, 14 NebApp 512, 520, 710 NW2d 348, 355 (2006) (citing *Streeks, Inc. v. Diamond Hill Farms, Inc.*, 258 Neb. 581, 605 NW2d 110 (2000)).

62. Hergert had a positive duty imposed by law to disclose when his campaign expenditures reached forty percent (40%) of his finance estimate. *Neb Rev Stat* § 32-1446. His opponent was entitled to public campaign funds when this occurred.

These funds are intended to assure elections for constitutional offices occur on level playing fields with fairly equipped candidates so electors have informed choices.

63. Hergert gamed the system. He concealed his true plan for expenditures, concealed his actual expenditures and his commitments, lied about loan proceeds from his own bank to withhold funds from his opponent until after the election. By doing so, he improperly influenced the votes of electors across his District. Simply, Hergert committed fraud. The proximate result of his fraud resulted in incumbency in office. Hergert completed his wrongdoing when he took his oath. He committed a separate offense at oath taking time when he falsely sworn he had not improperly influenced the vote of any elector. Upon achieving incumbency, Hergert violated *Neb Const Art* XV § 1 – falsely swearing the prescribed oath (Impeachment Article I). His intentional fraud was then completed when the intended consequence of his fraud thrust his wrongful incumbency on the voters. (Impeachment Articles VII – X).

64. Hergert's contention – election fraud occurs before one takes the oath, and therefore cannot constitute a misdemeanor in office – is as pragmatically unrealistic, and utterly unacceptable, as proving that all existence turns on Hergert's perception. The election fraud that one commits today follows him or her into office, and forms a basis for rooting the wrongdoer out of office. The logic of this explanation is ancient: "Truthful lips will be established forever, but a lying tongue is only for a moment." *Proverbs* 12:19. Moreover, of course, "[h]e who does not punish evil, commands it begin." *Leonardo da Vinci.*

65. As one of the nations' founding fathers said, "to do evil that good may come of it is for bunglers, in politics as well as morals." William Penn, 1644-1718.

66. The law does not forget that the evil one does got them to an end, thereby permitting the end to justify the means. As Justice Brandeis cautioned:

> To declare that in the administration of the criminal law the end justifies the means – to declare that the government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. Against that pernicious doctrine, this court should resolutely set its face.

Olmstead v. United States, 277 US 438, 485 (1928) (Brandeis and Holmes dissenting). Thus, "the Constitution cannot be interpreted according to the principle that the end justifies the means." *United States v. Clark*, 435 F3d 1100, 1117 (9th Cir 2006) (Ferguson, dissenting). The concept that "the end justifies the means" is "an idea that is plainly incompatible with our constitutional concept of ordered liberty." *COM of Northern Mariana Islands v. Bowie*, 236 F3d 1083, 1091 (9th Cir 2001). *See also*, *Rochin v. California*, 342 US 165, 169 (1952) (Frankfurter, J., for the Court).

D. Wrongdoers Must Account for Their Wrongs When the Circle of Their Misdeed Has Caused Its Injury. The Injury Allows the Law to Define the Wrong Done.

67. The law is punctuated with instance-after-instance of proof a wrongdoer must account for his wrong when its full injury is known. In fact, in many of the laws most important applications, there is no legal label for a claim, a crime, or right, until the full, complete natural consequences of one's act is known. For example, what starts as a deadly assault on day one becomes murder on day forty if the victim dies then.

And, what starts as a petty thievery becomes a felony when the amount exceeds the line between the two. Neglect in a food processing plant becomes a felony when standards are violated and injury is produced. Fraud does not hurt when the false statement is uttered or the concealment occurs; it takes reliance, and resulting damages, for there to be a wrong.

68. The law is a process of defining what is acceptable, and what is not, in the causes and effects of activities among people. It does not dwell only in cause, or only in affect. These dancing twins must tango for the law to have a role.

69. Hergert's pre-election false campaign filings violated the law when they occurred, and were punishable then. But they affected his service in office, and became misdemeanors in office when their consequence was felt, and when Hergert, pulling along all his previous falsehood in to his post-oath filings made after the fact, repeated and continued his perjury to the NADC.

70. In criminal proceedings, the consequence nearly always defines the crime. Nebraska law is filled with examples. This Court has held, citing *Neb Rev Stat* § 28-303, that a victim's fatal heart attack, proximately caused by a defendant's felonious conduct toward the victim, establishes the causal connection between felonious conduct and homicide necessary to be a felony murder. It is not necessary that the victim die at once; the grim reaper can come slowly. *Dixon v. State*, 222 Neb 787, 387 NW2d 682 (1986). Long ago, this Court held an indictment is invalid unless a causal connection between false pretenses and obtaining funds under a note is positively and explicitly stated. *Anthony v. State*, 109 Neb 608, 192 NW 206 (1923). In criminal cases where a

defendant's conduct is alleged to have caused death, the Supreme Court defines proximate cause as:

> '[A] moving or effective cause or fault which, in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the death and without which the death would not have occurred.'

State v. Muro, 269 Neb 703, 709-10, 695 NW2d 425, 430 (2005) (internal citations omitted).

71. Here it is no different. The term "misdemeanor in office" is appropriately pled and will be proven at trial, where the Legislature alleges, and establishes with its evidence, that Hergert violated *Campaign Limitation Act* provisions and Accountability and Disclosure requirements, improperly influenced electors and the election, wrongfully achieved incumbency, took and holds office. The causative link will be between the former fraud and the latter incumbency. This is the same link required between a false pretense and obtaining money under a promissory note. The thief gets the money, and is given the chance to sign the note, by fraud. The incumbent who cheats in the election gets his office the same way.

IV.

The Impeachment Articles, Each and All, Relate to the Performance of Official Duties, and Occur in or Affect Service in, the Office of Regent.

72. In 1984, when *State v. Douglas*, 217 Neb 199, 349 NW2d 870 (1984) was tried, an impeachment was "in the nature of a criminal proceeding." To convict on Articles of Impeachment, in *Douglas* and before then, "the State must have

proved beyond reasonable doubt one or more of the specifications of Articles of Impeachment." *Douglas*, 217 Neb at 201, 349 NW2d at 874. Then and now, *Neb Const Art* IV, § 5 was the same. But Article III, § 17 has changed. The *Douglas* Court quoted *State v. Hastings*, 37 Neb 96, 55 NW 774 (1893), which pronounced impeachments are to be in the nature of criminal proceedings by noting:

> The provision for the trial of impeachments before the Supreme Court was to ensure a strictly judicial investigation according to judicial methods.... We have endeavored to adopt the rule best sanctioned by authority and which is just, alike to the State and its servants.... An impeachable high crime or misdemeanor is one. in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may constitute a the violation of the Constitution, of law, of an official oath, or of a duty by an act committed or omitted, or without violating a positive law, by the abuse of discretionary powers from improper motives or for an improper purpose.

Douglas, 217 Neb at 202, 349 NW2d at 874-5.

73. After *Douglas*, the people of Nebraska changed the Constitution dramatically. They eliminated the *Hastings* rule that impeachments are to be "in the nature of criminal proceedings," and commanded impeachments be civil in nature. Similarly, the people affirmed that articles of impeachment need not be in any particular form. *Douglas*, and prior Nebraska impeachment cases offer no guidance of any particular moment. The state's organic law, expressed in the supreme will of the people – their Constitution – has changed.

74. Each Impeachment Article here recites specific, pointed, identified acts, dates, documents, or events constituting the alleged misdemeanor in office. There are no exceptions. Defendant's allegations to the contrary are utterly without substance.

The defense argues (Br 15) the Legislature "is basing the Articles of Impeachment on violations of criminal law and is asking this Court to convict him... without proof beyond a reasonable doubt. In other words, the Legislature is attempting to bypass Regent Hergert's constitutional rights..." (Br 15). This is fundamentally incorrect, and all the authorities cited by Defendant under his contention the Impeachment Articles are not sufficiently specific, or are too vague, fail. The Legislature used specific criminal statutes to charge Hergert so he would have pointed knowledge of the alleged acts. The Legislature will establish the elements of proof on each of the Impeachment Articles, involving each of the statutes at issue, by clear and convincing evidence. This standard of proof is set forth in the Constitution, and repeated in LR 449. See, Legislative Findings ¶ 3. Unlike twenty-two years ago, the Legislature's proof, now, will meet the clear and convincing evidence standard and will be adduced in a civil, not a criminal, proceeding's setting. All Hergert's dismissal arguments overlook this fundamental point.

V.

Article II, Charging Hergert Violated Federal Mail Fraud Criminal Statutes, Constitutes an Impeachable Offense Upon Which Conviction is Proper.

75. Hergert contends the Nebraska Legislature cannot impeach, and this Court cannot convict and remove from office, a civil officer who violates federal law. Apparently, Hergert takes this position even if the violation is among the most extreme prohibited by federal law. Federal law provides for a number of specific offenses that are not violations of Nebraska state law. For example: 18 *USC* § 1751 ("whoever kills... the

president... the president-elect, the vice-president..."); 18 *USC* § 32 (destruction of aircraft or aircraft facilities); 18 *USC* § 226 (financing terrorism), *etc.*

76. If Defendant's position is correct, crimes like these could be committed by a civil officer of Nebraska and impeachment would not be available as a remedy to oust him or her from office because the underlying crime would be federal in natuer. The people of Nebraska would be stuck with the federal criminal in office.

77. Hergert overlooks the fact the oath of office requires allegiance to both federal and state law. *Neb Const* Art XV, § 1. Moreover, there is no constitutional precedent for the argument that "misdemeanor in office" refers to misdemeanors under Nebraska law only, or in the criminal law sense only.

78. Violations of federal law can result in incarceration, bring great disrepute on the state, and constitute high crimes. Certainly, they are misdemeanors in office in this sense – and their "federal" status carries no immunity against impeachment.

79. No known law suggests a state constitutional officer is without a duty to obey federal law. Indeed, Nebraska's admission to the Union was conditioned on its adoption of a constitution subordinate to the laws of the United States. The *Enabling Act of Congress*, 13 Stat 47 (1864), authorizing the inhabitants of part of the Nebraska territory to organize the State of Nebraska requires the state "constitution when formed shall be republican, and not repugnant to the constitution of the United States and the principles of the Declaration of Independence...". (Vol 2, *Neb Rev Stat*, p 6). The federal constitution's Supremacy Clause, *US Const* Art VI, cl 2, relegates all state law to federal law where the two are in discord. *Collett v. Collett*, 270 Neb 722, 707 NW2d 769 (2005).

80. The federal mail fraud statutes, including 18 *USC* §§ 1341 and 1346, are major tools in the fight against crime. Without the banking system, wire communications, and the mail or common carriers, fraudfeasors are largely thwarted. The mail fraud statutes are basic tools, therefore, to combat dishonesty and are part of the federal triplets against crime—bank, wire, and mail fraud. Blumel, *Wire & Mail Fraud,* 42 Am Crim L Rev (Georgetown 2005).

81. C. David Hergert used all three. His illegal loan involved the bank. He posted items to the NADC that were fraudulent, and from time to time, his campaign, or he, telephoned his treasurer in North Platte to be sure things moved along from his office to the NADC so the filings were made when he wanted them to be made—generally late.

82. The Legislature chose one of the triplets—mail fraud—for a separate impeachment article. It could have chosen all three.

83. A state official who violates federal law can be indicted, convicted, and incarceration under the federal system, and removed from office for doing so by impeachment under the state system. Nothing in Nebraska's Constitution suggests otherwise. Everything about Nebraska's statehood suggests this is so.

Note Concerning Other Motions

84. Hergert filed a Motion to Strike and Limit Evidence. All relevant legal arguments regarding those meritless Motions are covered in this Brief. No separate submission by the Legislature will be made on those Motions.

Conclusion

85. Democracy burns out, not brightly, if its elections are marred by fraud and corruption that rewards miscreants with incumbency. This, not pleadings niceties, is the point.

86. Hergert's position before this Court lacks legal merit. His election fraud taints his service, tarnishes the State, and fuels the fires of freedom's distracters. At a higher level, Hergert's conduct would be despotism. At his current level, it is impeachable, and deserving of conviction.

87. Trial should begin. Now.

May 1, 2006.

Respectfully submitted.

Nebraska Legislature, Plaintiff,

By: _____

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David A. Domina, being first duly sworn on oath, states as follows:

1. I am the lawyer for the Nebraska Legislature in this case.

2. On May 1, 2006, I caused to be hand delivered the original and sixteen (16) copies of the Brief in Opposition to Motion to Dismiss to the Clerk of the Nebraska Supreme Court.

3. On May 1, 2006, I hand delivered two copies of the Brief to:

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May 1, 2006.

David A. Domina, #11043

Subscribed & sworn to before me this 1st day of May 2006, by David A Domina.

GENERAL NOTARY - State of Nebraska
CLAUDIA STRINGFIELD
My Comm. Exp. April 19, 2008

Notary Public

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