

■ JUSTICE ROBERTSON, with whom JUSTICE MONTEMAYOR joins, dissenting in the judgment.

The Court reaches its decision today by reevaluating the factual findings of the Election Commission, while ignoring the arguments that were actually raised on appeal. I do not believe justice is served by the Court's decision and strongly disagree with both the reasoning and the conclusion of their opinion. Therefore, I must respectfully dissent.

Shortly before polls closed for the Texas Tech University Student Government Association (SGA) Executive Officer elections on February 28, 2013, Forest Stovall, Taylor Weeks, Peyton Craig, and Daniel Yates (Bridge the Gap) obtained evidence to suggest that their opponents, Luke Cotton and Jill Berger (Raiders United), had sent an email possibly constituting a spamming violation under § 6.08 of the Election Code. Subsequently, Bridge the Gap filed a memorandum (complaint) with the Election Commission alleging email spamming, incentivizing the vote, and endorsement violations. The next day, Bridge the Gap filed a second memorandum with the Commission adding to the alleged violations and clarifying several issues from the first memorandum. A hearing of the Election Commission occurred on Sunday, March 3, 2013, and a decision was issued the following day. The Election Commission found Raiders United not guilty of alleged violations of §§ 6.12, 6.21, and 7.18 of the Election Code. The Election Commission did find a violation of § 6.08 of the Election Code and accordingly voted to disqualify the election results and set a new election for the Week of March 18, 2013. An individual candidate of Raiders United was also found guilty of a violation under § 7.31 and was disqualified from both the first election and the second March 18th election. Raiders United promptly filed an appeal with this Court, alleging that the Election Commission exceeded its authority in finding a § 6.08 violation and that disqualification of the election results was an excessive and inequitable punishment.

Raiders United broadly argues that any claim of impropriety raised by Bridge the Gap is necessarily barred by Bridge the Gap's failure to follow procedure. I disagree. While procedural due process is certainly of concern to this Court, I am not convinced that there was a violation of due process in this case. Raiders United first contends that they did not have adequate notice of the § 6.08 claim being brought by Bridge the Gap. When the initial complaint was filed by Bridge the Gap, it alleged a violation of § 6.08 of the Election Code. Because their second complaint, filed before commencement of the Election Commission hearing, failed to address any § 6.08 concerns, Raiders United contends that the § 6.08 complaint was dropped and was not, therefore, properly pleaded before the Election Commission. Raiders United goes on to argue that, because the claim was not properly pleaded in the second complaint, the Election Commission exceeded its authority by finding a violation of § 6.08.

I am unconvinced that Raiders United did not have proper notice for two reasons. First, a § 6.08 complaint was properly pleaded in Bridge the Gap's first petition to the Election Commission. Nothing in the second complaint indicates Bridge the Gap's intention to drop the charges in their first complaint and Bridge the Gap thus argues that this Court should read both documents together as a cumulative complaint to the Election Commission. I agree. Secondly, Raiders United raised no objections to a § 6.08 complaint during the Election Commission's proceedings. Bridge the Gap contends that, in light of Raiders United's failure to object to the

charges being brought during the Election Commission, they have necessarily waived any procedural objections relating to the initial pleading and should be barred from raising those objections on appeal. I believe that Bridge the Gap is correct. The appellate level is not the appropriate time to raise an initial objection and contend that a petition has been improperly filed. If Raiders United believed that they had insufficient notice of the § 6.08 complaint at the time of the Election Commission hearing, then they should have raised such an objection to the Election Commission. Because they did not, I believe they should be precluded from arguing this issue and find that, in light of the facts, it was reasonable for the Election Commission to conclude that Raiders United had sufficient notice of the complaint.

Raiders United next contends that Bridge the Gap's complaint should have been barred because Bridge the Gap failed to comply with the required negotiation procedures under § 4.18 prior to filing a complaint. I am unconvinced that Raiders United correctly interprets the statute. Bridge the Gap claimed at the hearing, and again on appeal, that they did not attempt to comply with the § 4.18 requirement to negotiate because they were instructed by Election Commissioner, Brad Schniers, that there was no need to do so. Commissioner Schniers produced a statement to this Court in which he acknowledged that he told Bridge the Gap there was no need to negotiate and attempt to reach a settlement because the email that was sent could not be retracted and there was thus no way to undo the harm which had already been caused. I believe there is a legitimate concern about whether or not the Election Commissioner has the authority to allow individual candidates to forgo a mandatory provision of the Election Code and, indeed, Bridge the Gap concedes that it can point this Court to no authority for such a finding. They contend that, in the absence of such express authority, this Court should assume that the Election Commissioner possesses the authority inherently. I strongly disagree with Bridge the Gap's contention and would not find such authority to exist absent direct language in the Election Code which provides it. However, Bridge the Gap raises an alternative compelling argument that failure to follow § 4.18 negotiation procedures does not necessarily preclude a claim from being brought. Counsel for Bridge the Gap correctly pointed out during oral arguments that § 4.18 provides no penalty for a failure to negotiate and, additionally, that the only four reasons the Election Commission may refuse to hear a claim are outlined by § 4.20. It is reasonable to conclude that the Student Senate, in drafting the Election Code, intended for these four causes for dismissal to be an exhaustive list. As "failure to negotiate" is not listed among these causes for dismissal, I believe Bridge the Gap correctly contends that their claim may not be dismissed for failing to negotiate and therefore give no merit to Raiders United's argument.

At the Election Commission hearing, an email was offered into evidence to suggest that Raiders United had violated § 6.08 by spamming the University Fountains apartment complex. Raiders United contends that this email was improperly admitted hearsay and should be precluded under Rules and Operating Procedure of the Student Supreme Court § 6.05. Raiders United correctly identifies hearsay as "an out-of-court statement offered to prove the truth of the matter asserted." 29 AM. JUR. 2d EVIDENCE § 671. However, Raiders United has mischaracterized this email as hearsay. The email itself was documentary evidence admitted to show that Raiders United had sent a campaign email constituting spam, in violation of the Election Code. Bridge the Gap was not attempting to introduce any "statement" by a third party individual concerning what was said outside of court. Instead, they were introducing a physical

document to assert that a § 6.08 violation had occurred. Because of this distinction, I concur with the majority's conclusion that the email was not hearsay and was properly admitted.

Raiders United next argues that the harm done, if any, was negligible. During oral arguments it was pointed out that, even assuming every recipient of the email from Raiders United voted in the election and, assuming further that every recipient would have cast their vote for Bridge the Gap had they not received the email, Luke Cotton would still have received a majority of the votes for president, electing him to the office, and Jill Berger would have lost by only thirteen votes, triggering a run-off election. I would argue that there was substantial harm suffered, but the Court has chosen to depart from any evaluation of the degree of harm and has instead decided to create its own theory of the case, deciding that there was *no* injury at all because the email did not constitute spam. In fact, this Court has declined to answer any of the procedural issues raised on appeal, deciding this case instead on a factual finding that a § 6.08 violation did not occur. On this point, I must take my furthest departure from the majority and strongly disagree with my esteemed colleagues' reasoning.

The Election Commission, the fact finders charged with weighing and evaluating the evidence, properly found a sufficient violation of the Election Code to warrant a disqualification of the results and ordered that a new election take place. In essence, they found that the results of this election were tainted by cheating and that the student body was entitled to a new election. The opinion of this Court today will set aside that ruling. The Court will refuse to allow a new election and will enable candidates to take executive office who are marred by allegations of cheating that they do not even deny. It is fair to say that the majority disapproves of cheating in a student body election and they certainly do not make their decision lightly. However, they have chosen to reevaluate the facts of the case and provide their own rational, unoffered by either party, by which Raiders United may have been innocent of violating § 6.08. By doing this, the Court has found Raiders United to be innocent of any wrongdoing, despite the fact that Raiders United does not offer any defense on the merits and does even contend that they are innocent.

It is true that this Court has been given discretion to review questions of fact as well as questions of law. STUDENT GOVERNMENT ASSOCIATION ELECTION CODE § 4.01. However, I believe that strong deference should be shown to the original fact finder's decision, unless there is clear and convincing evidence that the original finding of fact was inequitable. The Election Commission is established by the elected representatives of the student body and is entrusted with the power to decide questions of fact concerning violations of the Election Code. In a hearing on March 3, 2013, the Election Commission heard evidence related to multiple alleged violations of the Election Code and determined, in its expert opinion, that a violation of § 6.08 had occurred. Today, this Court overturns that decision and tells the Election Commission that it must reverse its decision because no § 6.08 violation occurred. This Court, unlike the Election Commission, does not regularly deal with the Election Code and cannot be said to be experts in all of the provisions of the Code. Furthermore, the factual issue of whether a § 6.08 violation occurred is not even before this Court on appeal and I believe that the Court today reaches too far in finding that there was no violation. Raiders United does not appeal the finding that they violated § 6.08. During oral arguments, Counsel for Raiders United acknowledged that their appeal was based on procedural issues and that they did not contest the merits of their conviction. If a violation was alleged by Bridge the Gap, found by the Election Commission, and

not appealed by Raiders United, I do not believe it is within this Court's authority to second-guess that factual finding and overturn the Election Commission's ruling by determining that a violation did not occur.

Assuming, *arguendo*, that the Court was correct to examine this factual finding, I still believe that their reasoning is inherently flawed. The majority claims that, "[b]ased on [Ms. Berger] being a tenant of University Fountains and having entered into [a lease] agreement...it is reasonably assumed that Ms. Berger has a business relationship with the complex and the officials in charge of enforcing the agreement..." *Cotton v. Stovall*, S2013-01 at 2 (2013). I agree. The majority then goes on, however, to say that Ms. Berger only sent her email to Ms. Kari Wazny, the leasing manager of University Fountains, and that this was properly done because of their existing business relationship. They decline to hold Ms. Berger responsible for the subsequent forwarding of that email by Ms. Wazny and thus conclude that there was no spamming violation. I reach a much different conclusion.

The email sent to Ms. Wazny contained information about the February SGA executive officer elections and encouraged voting in those elections on behalf of Ms. Berger. Ms. Wazny is not a student of Texas Tech University and is not eligible to vote in SGA elections. Why then, should Ms. Berger send Ms. Wazny an email providing information about the elections? It seems obvious to me that Ms. Berger's intent was to have Ms. Wazny forward this email to all 656 tenants at University Fountains, most (or all) of which are Texas Tech students and are eligible to vote in the elections. Indeed, Ms. Berger's email would have been pointless had its only intended recipient been Ms. Wazny. As a candidate for Vice President of Internal Affairs, Ms. Berger surely maintained a very busy schedule, and it would be a large waste of her time to compose an email explaining details about the election to an individual who could not cast a vote. If that individual could access 656 eligible voters, however, then Ms. Berger's email could be very productive. Indeed, the original composition of the email only makes sense if we conclude that Ms. Berger intended its contents to be forwarded.

If I am correct, and Ms. Berger did intend for the email to be forwarded to all residents of the University Fountains apartment complex, then the email surely constitutes spam. Spamming is defined by the SGA Election Code as "the use of electronic messaging systems to send unsolicited bulk messages indiscriminately." STUDENT GOVERNMENT ASSOCIATION ELECTION CODE § 2.14. Email can reasonably be said to constitute an electronic messaging system. Raiders United can offer no evidence to suggest that the 656 tenants of University Fountains asked to receive campaign or voting information from Ms. Berger, making the email unsolicited. The size of its audience certainly constitutes a bulk message. Finally, Ms. Berger cannot be said to have selected the individual recipients of her message carefully, given that she does not personally know all 656 residents of University Fountains – she even conceded this fact during the Election Commission's hearing. It seems that Ms. Berger's email thus satisfies all of the necessary components to be considered spam. At the very least, there was sufficient evidence for the Election Commission to find that a spamming violation had occurred. Given that the Election Commission's finding was reasonable and that they are the official body tasked with interpreting and enforcing the SGA Election Code, I do not believe there is any conceivable reason to overturn their finding of fact and determine that a § 6.08 violation did not occur, as the majority has done.

Additionally, I believe that the majority makes a grave error in their reasoning. This Court has concluded that Ms. Berger's email was not spam because it was sent through the medium of a third party agent with whom Ms. Berger had an existing business relationship. If Ms. Berger had sent the email to all the residents of University Fountains herself, then it is unlikely the majority would have reached the same conclusion. According to the Court's holding, Ms. Berger is not guilty of violating the § 6.08 prohibition against spamming because Ms. Wazny was the individual who actually sent the email in question. Yet it seems to me that, under this theory, Ms. Berger may still be guilty. The Election Code clearly implies that a candidate may be held liable for any violations of the Election Code committed by their agents. *See generally* STUDENT GOVERNMENT ELECTION CODE §§ 4.31, 4.32, 4.33. An "agent" is defined as "any person contributing time, effort or services for the purpose of supporting a candidacy." *Id.* § 2.19. Ms. Wazny contributed time (if minimal) and a service in forwarding Ms. Berger's email to University Fountains residents. She therefore meets the Election Code's definition of an agent. The majority has failed to acknowledge that Raiders United may still be vicariously liable for their agent's violation of § 6.08 and choose not to address this possibility in their opinion.

The majority has further failed to realize that, under their proposed theory, there is another possible violation in this case. The Election Code provides that "[o]nly individuals who are officially registered as students of Texas Tech University may participate in Student Government Association elections except where expressly allowed in this Code." STUDENT GOVERNMENT ELECTION CODE § 1.12. Ms. Wazny is not a student of Texas Tech University and the Election Code clearly states that she is prohibited from participating in SGA elections. The Election Commission did not find Raiders United to be in violation of § 1.12, nor did they find any violations resulting from Ms. Wazny's actions. Unlike my esteemed colleagues, I will not presume to reevaluate the factual findings of the Election Commission or insist that there were violations in this case that were overlooked. I merely point out these *possible* violations to illustrate the problems in the majority's logic. If the majority is convinced that the factual findings of the Election Commission were incorrect and uses these findings to decide the outcome of this case, then it only seems equitable to me that they should look at *all* of the facts and not just the facts which exonerate Raiders United. By ignoring the issues actually presented to this Court on appeal and choosing to develop their own, independent theory of the case, this Court has only uncovered more factual problems. I cannot speak for why they choose to ignore the problems that their theory creates, but I certainly disagree with their decision not to address these concerns. I cannot concur with a judgment that decides this case by reviewing certain aspects of the Election Commission's finding and completely ignoring others which may have led the Court to a different result. This Court should have focused on issues raised during appeal, instead of declining to address those issues and creating their own findings. If the Court did see major factual problems that were created by the Election Commission's finding, then they should have indiscriminately reviewed all of the facts with a neutral lens. They should not have stopped at concluding that Raiders United was innocent of spamming because Ms. Wazny sent the email and should have pursued their theory to conclusion, addressing the potential violations I have discussed here. Either way, I believe the majority's logic is grossly flawed, incomplete, and ineffective, and I disagree with the judgment that they have reached.

Raiders United finally contends that their punishment was unduly harsh. This Court seems to agree and states in its majority opinion that, “[a]ssuming, arguendo, that a § 6.08 violation was found to have occurred, the punishment proscribed by the Commission is grossly unfair and unjust and the harm was in fact harmless.” *Cotton v. Stovall*, 2013-01 at 3 (2013). I disagree. Cheating is cheating. In my opinion, the amount of harm caused by the email is irrelevant so long as the email was a violation of § 6.08 of the Election Code; all that Bridge the Gap is required to show is that a violation occurred and harm resulted. A true democratic system necessarily requires the existence of fair elections. When Raiders United violated the Election Code by sending an email which constituted spam, they violated their responsibility to behave ethically and responsibly and they betrayed the trust placed in them by the student body and by their fellow candidates. The harm done is not in the amount of votes affected, but in the fact that Bridge the Gap was denied the opportunity to compete in a fair and equitable election as guaranteed by the Election Code. Raiders United does not assert their innocence; they presented no evidence at the Election Commission hearing or on appeal to even suggest that they were innocent of the allegations and have all but conceded that the email they sent was a § 6.08 violation. Instead of contesting the charge on the merits, Raiders United has structured their entire argument around procedural technicalities and has attempted to convince this Court that procedural errors in the complaint process are more egregious violations than willfully and knowingly cheating in a student body campaign. Raiders United claims that they should not be subject to disqualification because they did not have proper notice that disqualification might occur. This is nothing more than a procedural shield that seeks to excuse cheating by one group of individuals because another group of individuals failed to follow the proper procedure. I am mindful, however, that “the interest of [this] Court is justice, not necessarily form or procedural rules.” RULES AND OPERATING PROCEDURES OF THE STUDENT SUPREME COURT § 7.2.3. Ultimately, this court is not an established court of law with jurisdiction granted by a legal document; we are a court established by the SGA with jurisdiction granted by the Student Constitution of Texas Tech University. Our primary responsibility, therefore, is to protect the interests of the student body and ensure the integrity of the SGA. While we are responsible for establishing and adhering to procedure, we are not bound by such strict procedural restraints as other courts. I believe that violating the trust of the student body and the election process by cheating in an election properly warrants disqualification from that election. I further believe that there was reasonable evidence for the Election Commission to reach this same conclusion and would not overturn their decision based on a procedural argument.

This Court’s decision sets a dangerous precedent and I am concerned about the impact it will have on future SGA elections. Broadly speaking, the Court decides today that Raiders United did not commit a spamming violation because they used a third party agent with whom they had an existing business relationship to send a mass email to 656 persons with whom they cannot be said to have a business relationship. This sends the message to future candidates that you may indiscriminately spam large populations of people, so long as you have an existing relationship with the agent you use to send the message. It is unnecessary to have a relationship with the actual, ultimate recipients of your message. To illustrate the problem that this creates, I propose the following hypothetical: Suppose I am an SGA candidate that has a great relationship with the Dean of the School of Law. I can be said to have a business relationship with the Dean because I pay tuition to the School of Law and the Dean is responsible for overseeing my education. I choose to send an email to the Dean discussing the ongoing election and asking for

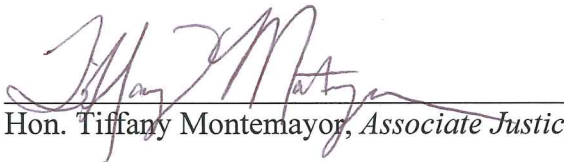
support from student voters. I then have the Dean forward this email to every student enrolled in the School of Law. When my opponents challenge this action, claiming that I do not have a valid business relationship with all of the recipients of the email and that the message thus constitutes spam, I simply bring the Election Commission's attention to this Court's decision in *Cotton v. Stovall*. Under this precedent, I cannot be said to have violated the Election Code because my actions were factually similar to those of Raiders United and the Dean was acting in a similar capacity to Ms. Kari Wazny. Beyond the inequity and injustice done by this Court's decision to the current SGA election, I believe that the precedent established today poses a much more serious threat to future elections. While I do not believe this was the majority's intent, I believe that their decision effectively undermines the Election Code and allows for carefully disguised spamming, consistent with this opinion, to occur in every subsequent SGA election.

The fact remains that Raiders United has not asked this Court to determine whether or not there was a violation of § 6.08 and have all but admitted that they violated the election code by sending the email. They appeal the decision of the Election Commission only based on alleged procedural errors and do not contest the factual finding of a § 6.08 violation in their brief. This Court has chosen to ignore those procedural arguments and declines to even address the claims in their majority opinion. Instead, they have chosen to take an easier road and avoid the convoluted arguments raised by both parties by determining (based on expansive and unsound logic) that there was no § 6.08 violation and no need to address any of the other allegations in this appeal. I believe this is a grave error on the Court's part and the wrong path to take. This Court should have given more deference to the Election Commission's finding that a violation of § 6.08 occurred. The Court should have considered that Raiders United does not appeal that guilty conviction based on the merits, but only on procedural arguments. Finally, the Court should have addressed the arguments raised by the parties on appeal, instead of choosing to take an alternative path by taking it upon itself to review the factual findings of the Election Commission.

For all of the above reasons, I must respectfully dissent from the Court's opinion. I would AFFIRM the decision of Election Commission and require that a new election take place as scheduled.



Hon. Drew Robertson, Associate Justice



Hon. Tiffany Montemayor, Associate Justice

