DISTRICT OF COLUMBIA COURT OF APPEALS

No. 16-FM-383

Lauren Mashaud, *Appellant*,

v.

Christopher Boone, *Appellee*.

Appeal from the Superior Court of the District of Columbia
(CPO-739-14)
(Hon. Fern Flanagan Saddler, Trial Judge)

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF THE DISTRICT OF COLUMBIA AS AMICUS CURIAE IN SUPPORT OF REHEARING EN BANC

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October 4, 2021

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Pursuant to leave of court granted on September 22, 2021, the American Civil Liberties Union of the District of Columbia files this brief, as amicus curiae, in support of the pending petition for rehearing en banc.

INTEREST OF AMICUS

The American Civil Liberties Union of the District of Columbia is a nonprofit District of Columbia membership corporation dedicated to defending and expanding the rights of people who live, work, and visit the District of Columbia. Founded in 1961, it has often represented parties, and filed amicus briefs, in cases involving the exercise of First Amendment rights in the District of Columbia, including cases involving civil protective orders, *see, e.g., Sobin v. Sobin*, No. 10-FM-1126 (D.C. 2010) (representing respondent-appellant); *Gray v. Sobin*, 2014 WL 624406 (D.C. Super. Ct. Feb. 14, 2014) (amicus). At the same time, it supports effective enforcement of constitutionally-sound laws against domestic violence and stalking, because those offenses are usually—although not in this case—directed against, and a means of suppressing, women.

As explained below, ACLU-DC believes that this case presents a legal issue of exceptional importance as to which the Superior Court needs and deserves this Court's guidance, that the issue is ripe for decision by this Court, and that a second remand to the Superior Court will serve no purpose other than delay in a case that is already seven years old.

STATEMENT

This case arises out of a brief affair between petitioner Boone (who was a vice-president of his company) and respondent Mashaud's wife (who was an intern there), and respondent's subsequent written communications about that affair to petitioner, to some of petitioner's work colleagues, to some of petitioner's Facebook friends, and in a blog. *Mashaud v. Boone*, 256 A.3d 235 (D.C. 2021). In opposing petitioner's request for a Civil Protective Order alleging that respondent had committed the crime of stalking, respondent relied, in part, on the provision in the D.C. stalking law that "[t]his section does not apply to constitutionally protected activity." D.C. Code § 22-3133(b).

The Superior Court rejected that argument, ruling that the Constitution categorically did not protect speech that was not about a matter of public interest. *Mashaud*, 256 A.3d at 238-39. The Division reversed on that point, *id*. at 239, but rather than deciding whether respondent's writings were constitutionally protected —thereby providing guidance on the meaning of that provision of the stalking law—it remanded the case, for the second time, so that the trial judge could make findings "on whether . . . the course of conduct here served no legitimate purpose other than to harass and intimidate." *Id*. at 240 (internal quotation marks and citation omitted).

Petitioner sought rehearing en banc, and respondent seconded the motion.

ARGUMENT

I. This case presents a legal issue of exceptional importance on which this Court's guidance is needed.

Before issuing a protective order based upon allegations of stalking, the Superior Court must find, by a preponderance of the evidence, that the respondent has violated the criminal law prohibiting stalking, D.C. Code § 22-3133. This year, the Superior Court is on track to receive nearly 900 petitions seeking anti-stalking orders.[1] While many of those cases may involve conduct that is separate from speech, such as "follow[ing]" or "monitor[ing]" a person, *id*. § 22-3132(8)(A), it is likely that many of those cases involve speech (whether oral or written). Indeed, the statute specifies that the offense of stalking can be committed by "communicat[ing] to or about another individual," even (as alleged here) in the absence of any other conduct. *Id*.

[1] Until recently, and in this case, such orders were Civil Protective Orders. The Intrafamily Offenses and Anti-Stalking Orders Amendment Act of 2020, effective April 27, 2021, codified at D.C. Code § 16-1061 to § 16-1065, created a new, separate order called an Anti-Stalking Order. The substantive basis for issuing such an order—violation of the (unchanged) criminal law against stalking—remains the same, and thus the question presented in this appeal remains applicable to cases that will arise under the new law.

In the five months from April 27 to September 29, 2021, 364 anti-stalking petitions were filed in Superior Court (per September 29 email to undersigned counsel from Sandra Embler, Senior Research Associate, Strategic Management Division, D.C. Courts). That extrapolates to an annual rate of approximately 875.

Petitions for Anti-Stalking Orders (previously Civil Protective Orders) can be filed *pro se*, and no involvement by the United States Attorney, the D.C. Attorney General, or even a lawyer is required. And the petition form provided by the Superior Court provides no guidance regarding what conduct may constitute the crime of stalking, other than a bare citation to the statute.[2] Even assuming that people who believe themselves to be victims of stalking would know how to access the statute, and would make the effort to do so, they would see only a long string of complicated legalese. Compounding the difficulty, the statute provides no help in understanding the key terms, "seriously alarmed, disturbed, or frightened," § 22-3133(a)(1)(B); (a)(2)(B); (a)(3)(B), and provides no clue whether the term "seriously" modifies only "alarmed," or also modifies "disturbed, or frightened."

Indeed, the D.C. Council was well aware that the law it enacted failed to define this criminal offense with clarity. In the Committee Report recommending passage of the relevant bill, the Committee on Public Safety and the Judiciary asked, "at what point does the man's conduct [in repeatedly asking a woman for a second date] become harassing to that woman? Annoying? Alarming? Disturbing? The answer is not found in a bright line distinction between strict definitions of acceptable and alarming. Neither is it the intent of this legislation to accurately

[2] The "Petition and Affidavit for Anti-Stalking Order" is available at https://www.dccourts.gov/sites/default/files/2021-04/ASO-Petition-and-Affidavit-For-Anti-Stalking-Order.pdf

pinpoint that distinction." Committee on Public Safety and the Judiciary, Report on Bill 18-151 at 33 (June 26, 2009).

Apparently recognizing the strong likelihood that a statute that explicitly criminalizes "communicat[ion]" and that makes no effort "to accurately pinpoint [the] distinction" between innocent and guilty conduct risks the prosecution of constitutionally protected speech, the Council provided that "[t]his section does not apply to constitutionally protected activity." § 22-3133(b). But the Division recognized that "the text of D.C. Code § 22-3133(b) does not provide an unambiguous answer" to the question of what that exemption means, *Mashaud*, 256 A.3d at 238, and without an authoritative construction of that critical provision, lawyers who litigate under the statute and judges who must apply it are left in the dark.[3] Without clear guidance from this Court, § 22-3133(b) will not, therefore, provide much assurance that constitutionally protected activity will not result in anti-stalking orders.

The Council itself recognized that its definition of stalking was "subjective," Committee Report at 33, and with that in mind, it made the criminal offense jury-

[3] Thus, for example, the experienced trial judge who sat in this case ruled that speech that was not on a matter of public interest was categorically not protected by the First Amendment. The trial judge also relied on the fact that respondent was not "required to disclose this information [about his wife's affair with petitioner] to petitioner's HR department" as a material factor in determining that respondent's speech was not constitutionally protected. Transcript of April 12, 2016, Oral Ruling (hereafter "Tr.") 11, App. 30. If there is any authority that would support the court's analysis, amicus is not aware of it.

demandable, explaining that "[a] key change recommended by the Committee has to do [with] ensuring a defendant's right to a jury trial. . . . It seems highly appropriate that a jury of peers would be best equipped to judge whether the behavior is acceptable or outside the norm and indicative of escalating problems. . . . '[S]talking is an offense for which the community, not a single judge, should sit in judgment.'" Committee Report at 33 (quoting testimony by the D.C. Public Defender Service). Of course, while a criminal defendant accused of stalking can demand a jury trial, is entitled to the assistance of counsel, and can be convicted only if a jury unanimously agrees that he or she is guilty beyond a reasonable doubt, the respondent in a case seeking an Anti-Stalking Order has no similar right to counsel and will have the question whether he or she violated the stalking law decided by a preponderance of the evidence and by the "single judge" that the Council felt was not appropriate to adjudicate such a vaguely-defined offense.

Although respondents to anti-stalking petitions do not face incarceration as criminal defendants do, they nonetheless face very serious sanctions. An Anti-Stalking Order can require the respondent to stay away from the petitioner, which may involve vacating their joint residence, of which the respondent may be the co-owner or even the sole owner. D.C. Code § 16-1064(c)(2). It may prohibit the respondent from working at his or her workplace or attending class at his or her college or university, if the parties are colleagues or classmates. *Id*. It may require

the respondent to "relinquish possession or use" of his or her car, even if the respondent is the sole owner. *Id*. § 16-1064(c)(3). It may order the respondent "to perform or refrain from" *any* other actions that the court finds appropriate. *Id*. § 16-1064(c)(7). The order may last for up to two years and can be renewed for an indefinite number of two-year extensions merely upon a showing of good cause, even if the respondent has never violated the order. *Id*. § 16-1064(e).

Given the volume of petitions filed, the acknowledged (even intentional) vagueness of the law, the severity of the available sanctions, and the likelihood that the activity complained of will involve speech (sometimes, as in this case, *only* speech), the meaning of the statutory provision that "[t]his section does not apply to constitutionally protected activity" is a question of exceptional importance on which this Court's guidance to parties, counsel, and trial judges is needed.

II. The issue is ripe for decision and there is no good reason to remand

The Division majority declined to provide such guidance, instead remanding with the explanation that "[w]e will benefit from the perspective of this experienced CPO judge on whether . . . the course of conduct here 'served no legitimate purpose other than to harass and intimidate.' That fact-bound assessment will help inform our view of whether Mr. Mashaud was engaged in 'constitutionally protected activity.'" *Mashaud*, 256 A.3d at 240 (some internal quotation marks and citation omitted).

With respect, that assessment will not assist this Court in making that determination, because without guidance from this Court, the trial judge has no way to know what constitutes a "legitimate purpose." The trial court has already made clear that, in its judgment, respondent's email to the HR department at petitioner's workplace served no legitimate purpose because "the email discussed petitioner's extramarital affair with respondent's wife which would only have been a concern of the parties involved," Tr. 9, App. 28, and because respondent was not "required to disclose this information to petitioner's HR department." Tr. 11, App. 30. Likewise, "the Facebook messages discussed petitioner's extramarital affair with respondent's wife, which would only have been a concern of the parties involved," and "if not for this incident respondent and petitioner's Facebook contacts would have no reason to communicate." Tr. 14, App. 33. Those emails were the only two actions on which the Superior Court's protective order was based. Tr. 20-22, App. 39–41. Without further instruction from this Court, there is no reason to think the trial court will change its view.

Additionally, the proposition that the First Amendment requires a speaker to have a "legitimate purpose" is puzzling. First Amendment protection, of course, is not limited to speech that has a "legitimate purpose." Indeed, the Supreme Court has repeatedly held that the First Amendment protects speech reflecting far baser purposes than respondent's here. *See, e.g., United States v. Alvarez*, 567 U.S. 709,

714 (2012) (falsely claiming to have been awarded the Congressional Medal of Honor, apparently in "a pathetic attempt to gain respect"); *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (burning American flag while others chanted, "America, the red, white, and blue, we spit on you."); *Rankin v. McPherson*, 483 U.S. 378, 380 (1987) (deputy constable saying, after hearing of attempted assassination of President Reagan, "If they go for him again, I hope they get him."); *Brandenburg v. Ohio*, 395 U.S. 444, 446-47 (1969) (Ku Klux Klan leader conducting rally with burning cross); *Watts v. United States*, 394 U.S. 705, 706 (1969) (speaker at anti-war rally saying, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."). A remand to determine Dr. Mashaud's purpose thus will not relieve this Court of the need to construe the statute.

Petitioner was a vice-president of his company and respondent's wife was an intern there. Respondent wanted some of petitioner's colleagues and friends to be aware of his conduct. Whether the trial court's assessment that those emails served no legitimate purpose was correct or incorrect—and whether that even matters—is for this Court to determine, and the question will be no different on the third appeal of this case than it is now, on the second.[4]

[4] Much of the "#MeToo" movement involves "naming and shaming" powerful men who have sexual relations with subordinate women. Does that movement serve a "legitimate purpose," or could people who disclose such behavior in the District of Columbia be convicted of stalking and could the "victims" of such tactics obtain injunctive and monetary relief against such a "course of conduct"?

The Division posited that the statutory exemption for "constitutionally protected activity" might have one of two meanings: "One view is that the government may not criminalize any speech except for that which falls into existing, well-established First Amendment exceptions such as libel, threats, or obscenity. The exception might, on the other hand, be read as a safety valve which states a truism — that the stalking statute doesn't mean to cover that speech or action that it isn't allowed to cover." *Mashaud*, 256 A.3d at 238 (internal quotation marks and citation omitted). A "fact-bound assessment" about respondent's purpose will not help to answer that question of statutory construction, and a remand for such a finding will only delay this Court's attention to the meaning of the statute, perhaps for years, as literally thousands of additional anti-stalking petitions are filed and adjudicated.[5]

CONCLUSION

For the reasons stated above, in addition to the reasons given by both parties, the petition for rehearing en banc should be granted.

[5] While the proper construction of the statutory provision is a matter for briefing on the merits, it is not premature to observe that the latter construction—"that the stalking statute doesn't mean to cover that speech or action that it isn't allowed to cover"—would leave the trial court just as much at sea as it is now. The question is, *what* speech or action is the stalking statute not allowed to cover?

October 4, 2021

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, the American Civil Liberties Union of the District of Columbia certifies that it is a District of Columbia nonprofit membership corporation, that it has no parent corporation, and that there is no publicly-held corporation that owns 10% or more of its stock.

s/Arthur B. Spitzer
Arthur B. Spitzer

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October, 2021, counsel for all parties were served with the foregoing brief via the Court's electronic filing system. Additionally, courtesy copies were sent to counsel by email:

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s/Arthur B. Spitzer
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