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
Domestic Violence Unit – 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 APPELLANT AND REVERSAL

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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 oppressing, women.

This case presents important questions about the boundary between speech that can be criminally punished and speech that is protected by the Constitution.

This brief is filed pursuant to Rule 29(a)(2), both parties having consented to its filing.

ISSUES PRESENTED

1. Whether a person commits the crime of Stalking under D.C. Code § 22-3133 when he communicates embarrassing—but truthful and non-threatening—information about another person.

2. Whether the provision that the stalking statute "does not apply to constitutionally protected activity," D.C. Code § 22-3133(b), is more than simply an acknowledgment that the statute, like all statutes, is subject to constitutional limits.

STATEMENT

The D.C. stalking statute makes it unlawful for a person to "purposefully engage in a course of conduct directed at a specific individual" if the person either intended to cause that individual to, or knew or should have known that his actions would cause that individual reasonably to, "(A) Fear for his or her safety or the safety of another person; (B) Feel seriously alarmed, disturbed, or frightened; or (C) Suffer emotional distress." D.C. Code § 22-3133(a). However, the statute "does not apply to constitutionally protected activity." D.C. Code § 22-3133(b).

The trial court held that Lauren Mashaud violated the stalking statute when he wrote to some of Christopher Boone's work colleagues and Facebook friends, informing them that Boone—who was a vice-president of his company—had an affair with Mashaud's wife, who was an intern there. Mashaud's communications were brief, truthful, and non-threatening. He wrote to each person only once.

On July 24, 2013, Mashaud sent an email to three senior officials at Boone's company, stating:

> This e-mail is to bring a matter to your attention that may be a violation of your Company's Code of Conduct and/or other policies, procedures, business ethics and character or standard of the Company.

> Christopher Boone and my wife, [Ms. W.], are involved in an extramarital affair that took place, primarily, in the workplace. Aside from the potential sexual harassment claims this situation presents, it also involves the inappropriate use of company resources and assets. Christopher Boone and [Ms. W.] have used company time and company resources to further their affair. If you check the call histories on their office phones and email communications, you will find the two of them have spent an inordinate amount of what should be productive work time to further their relationship.
>
> Christopher Boone was previously sent a no contact email from my wife on May 11, 2013 (as attached), but he continues to ignore our request and fails to respect our boundaries to allow my wife and I to heal and to regain the integrity of our marriage.
>
> Bringing these unfortunate events/behaviors to the attention of the HR department and select directors has not been easy, nor has it been done in the absence of substantial thoughtful deliberation, consultation and reflection. I will anticipate a response from you once you have investigated these concerns and taken appropriate corrective action.

Supp. Rec. 3. Boone was copied on this email. Supp. Rec. 2. (Mashaud's brief refers to this as the "Avalere Email" and this brief will follow suit.)

On October 10, 2013, Mashaud sent Facebook Messages to several of Boone's Facebook connections:

> It grieves me to write this, but after much dialogue, discourse and reflection with my wife, we both agree that you should know the kind of person Christopher Boone really is. Christopher had a sexual affair with my wife, [Ms. W.], from May to July of this year. We believe that not only should you know about his morally reprehensible behavior, even after a no contact letter was sent to him expressing our clear wishes to stop any efforts to contact my wife and allow us to regain the integrity of our marriage and heal our family, but his friends and family should also know of his behavior. While my moral compass may seem antiquated by today[']s societal standards, I believe that a man upon knowing of a woman's relationship status or seeing a ring on her finger, has a moral obligation to respect her relationship status and boundaries.

> Call me old fashioned, but morality, fidelity, honor and strength of character are words and a way of life that defines a man of integrity. Due to Christopher's lack of integrity and respect for himself, he failed to respect the boundaries of a married woman.
> . . .
> While I know that receiving this message is unexpected and unanticipated, please know that the pride we have lost revealing my wife's infidelity to you is tempered with empathy and integrity to do the right thing and shed light into the dark reality of their affair.
>
> Thank you for your time.
>
> Lauren Mashaud, MD, MPH

Supp. Rec. 20–21.[1]

On March 5, 2014—more than seven months after the Avalere Email and nearly five months after the Facebook Messages—Boone filed a petition for a civil protective order (CPO), alleging that Mashaud had stalked him, in violation of D.C. Code § 22-3133. Boone characterized the Avalere Email as "harassing" and asserted that it "falsely accused [him] of sexual harassment with the intent of getting [me] fired." Supp. Rec. 90. He characterized the Facebook Messages as "defaming me [with] accusations of continuing a relationship w/wife." *Id*.[2]

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[1] Mashaud also posted several essays about the affair on a blog, but the trial court did not find those blog posts to constitute stalking, *see* JA 38-39, and there is no cross-appeal.

[2] In fact, however, Boone and Mashaud's wife apparently did have a continuing relationship at the time the Facebook Messages were sent. Her letter to Boone discussing their "continuing conversations via a secret gmail account" and instructing him not to contact her again (Supp. Rec. 59-60) was not sent until February 2014. JA 36 (lines 6–11).

After a bench trial, the Superior Court held that these communications constituted stalking and were not constitutionally protected. The court entered a CPO prohibiting Mashaud from (*inter alia*) "communicat[ing] about [Boone] by name or by implication on the internet or social media." Supp. Rec. 95.

On appeal, this Court reversed and remanded because the trial court had relied on a repealed stalking statute. *Mashaud v. Boone*, 133 A.3d 1004 (2016) (Table). On remand, the court again ruled that Mashaud had violated the stalking statute and that "a civil protection order is still issued by the Court." JA 23.

Mashaud again appealed. This Court again vacated, because the trial court's ruling rested on the incorrect premise that the First Amendment protected speech only on matters of "public concern." *Mashaud v. Boone,* 256 A.3d 235, 239 (D.C. 2021). The division majority would have remanded "for the trial court to consider in the first instance whether the evidence proved stalking given that speech about matters of private concern may enjoy constitutional protection," *id*., and to determine whether Mashaud's statements "served no legitimate purpose other than to harass and intimidate." *Id.* at 240. Judge Beckwith dissented on the ground that Mashaud's speech was protected by the First Amendment. *Id.* at 245-46.

Both parties urged *en banc* review, as did the ACLU of the District of Columbia, as amicus curiae, submitting that "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 . . . is needed." ACLU-DC Brief at 7. On December 30, 2021, rehearing *en banc* was granted and the division opinion was vacated.

ARGUMENT

As this Court has recognized, the stalking law was designed to prevent "severe intrusions on [an individual's] personal privacy and autonomy" and conduct that "creates risk to the security and safety of the [individual]." *Coleman v. United States*, 202 A.3d 1127, 1144 (D.C. 2019) (quoting D.C. Code § 22-3131(a) (alterations by the Court)). The law's important purpose is to "enable law enforcement to intercept behaviors that potentially lead to violence, a loss in the quality of life, or even death." D.C. Council, Committee on Public Safety and the Judiciary, Report on Bill 18-151, at 33 (June 26, 2009) ("Committee Report"), available at http://lims.dccouncil.us/Download/22306/B18-0151-CommitteeReport1.pdf.

But the facts of this case involved no such "behaviors." They involved speech alone—speech that was unwelcome and embarrassing, but truthful and non-threatening, and directed primarily at third parties. There was no allegation of following, monitoring, or surveilling, and no allegation of domestic violence or attempted violence. Mashaud's speech did not violate the stalking law. And it was protected by the First Amendment.

The statutory exemption for "constitutionally protected activity" has a critical role to play in rendering D.C.'s stalking statute constitutional. If that exemption is understood merely to state the truism that the law cannot be applied in an unconstitutional manner, then the statute as it stands is impermissibly broad under the First Amendment—as illustrated by its application here. Specifically, if the statute may be applied to a "course of conduct" consisting only of speech, it would be a content-based regulation that is not narrowly tailored to serve a compelling interest.

To avoid constitutional infirmity, the Court should construe the exemption for constitutionally protected activity as excluding from the statute's coverage applications to speech (when speech alone is the basis for liability) unless that speech falls into existing, well-established First Amendment exceptions such as true threats or fighting words.

I. Absent the Exemption for Constitutionally Protected Activity, the Stalking Statute Would be Unconstitutional as Applied to a "Course of Conduct" Consisting Only of Speech.

A. The Stalking Statute Prohibits Speech Based on its Content.

The stalking statute makes it unlawful to "engage in a course of conduct," D.C. Code § 22-3133(a), including to "[f]ollow, monitor, place under surveillance, [or] threaten . . . another individual" or to "[i]nterfere with, damage, take, or

unlawfully enter an individual's real or personal property or threaten or attempt to do so." D.C. Code § 22-3132(8)(A)-(B) (defining "engage in a course of conduct").

Prohibiting such conduct, at least as a general matter, raises no constitutional concerns. And the fact that such conduct may sometimes involve speech—*e.g.,* a series of 4 a.m. telephone calls—does not change that conclusion. The stalking statute goes further, however, making it unlawful to "communicate to or about another individual," *id*. at (C), even in the absence of any other unlawful conduct—in other words, it labels speech alone as "stalking," as the trial court did in this case.

But the government "cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963) (rejecting attempt to prohibit civil rights advocacy by labeling it "improper solicitation of legal business"). Thus, for example, in *Cohen v. California*, 403 U.S. 15 (1971), the Court reviewed a conviction for "disturb[ing] the peace . . . by offensive conduct" that consisted of wearing a jacket saying, "Fuck the Draft." *Id*. at 16 & n.1. Because "[t]he only 'conduct' which the State sought to punish [was] the fact of communication," it was "a conviction resting solely upon 'speech,' not upon any separately identifiable conduct," *id*. at 18 (internal citation omitted).

It follows that, in this case and others in which the "course of conduct" consists only of "the fact of communication," the stalking statute punishes speech. And in order to determine whether a given communication violates the statute, a

court must examine the content of the speech to see whether it would have the specified effect (*e.g.,* to make the listener suffer emotional distress). Had Mashaud sent emails and Facebook Messages to the same recipients saying that his wife's internship had been a wonderful learning experience and that Boone had been an exemplary mentor, the statute would not have been violated. The statute is therefore a content-based prohibition on speech.

B. As Applied to Conduct Consisting of Speech, the Stalking Statute is Subject to Strict Scrutiny, Which it Cannot Survive.

A law that prohibits speech on the basis of content must be narrowly tailored to serve a compelling state interest. *See, e.g., Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."); *Ashcroft v. American Civil Liberties Union,* 542 U.S. 656, 660 (2004) (the Constitution "demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality"). That remains true "regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Reed*, 576 U.S. at 156 (internal quotation marks omitted).

Moreover, the stalking statute specifically authorizes the court to issue prospective injunctive relief, and as applied to speech, such relief is a prior restraint. Thus, like the order this Court vacated in *Facebook, Inc. v. Pepe*, 241 A.3d 248 (D.C. 2020), the CPO here "is both content-based, because it prohibits the discussion of a particular topic [Mr. Boone] and a prior restraint on speech, as it 'forbid[s] certain communications . . . in advance of the time that such communications are to occur' or before the speaker has the opportunity to make them." *Id*. at 261 (citations omitted).

Such prior restraints "come with a 'heavy presumption' against their constitutional validity." *Id.*; *see also Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 559 (1976) ("prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights").

A statute that routinely results in content-based prior restraints on speech that is neither false nor threatening cannot pass strict scrutiny because it is not narrowly tailored to serve a compelling state interest.

1. As applied to truthful, non-threatening speech, the stalking statute does not serve a compelling interest.

The District of Columbia can punish *conduct* that predictably causes serious alarm or distress, such as shadowing a person, lurking outside a person's door, or repeatedly calling a person at 4 a.m. This is true even if such conduct is accompanied by speech, because it is the conduct that is punished, regardless of the content (or

existence) of any associated speech. For example, repeated 4 a.m. telephone calls saying, "I love you" are treated the same as repeated 4 a.m. telephone calls saying, "I hate you," and the same as repeated 4 a.m. calls containing only silence. But the District cannot have a compelling interest in prohibiting truthful, non-threatening statements to or about a person simply because they cause that person to feel ashamed or embarrassed, or to suffer reputational damage or have hurt feelings.

a. The District has no compelling interest in prohibiting truthful speech, even if it offends or causes hurt feelings.

"As a general matter, 'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'" *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (quoting *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97, 102 (1979)). To be sure, the state can prohibit and punish true threats or words of intimidation, to protect people "'from the fear of violence' and 'from the disruption that fear engenders,'" in addition to protecting people "'from the possibility that the threatened violence will occur.'" *Virginia v. Black*, 538 U.S. 343, 359-360 (2003), (quoting *R.A.V. v. City of St. Paul,* 505 U. S. 377, 388 (1992)). And the stalking statute plainly prohibits such unprotected speech. But the government cannot make it a crime simply for one person to make another person feel bad, even on purpose: "The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." *R.A.V.*, 505 U. S. at 414.

As Professor Volokh has pointed out:

> When speakers criticize a person for what they see as serious ethical failings—whether that person is a supposedly corrupt or oppressive politician, hypocritical religious leader, biased journalist, bigoted police officer, dishonest or rude professional or business owner, or unfaithful ex-lover—they often believe that the target of the speech *should* feel bad because of the target's misconduct. They may want the target to be socially ostracized, economically punished, and emotionally racked with guilt, regret, and a perception of social condemnation.
>
> . . . .
>
> . . . The purpose of making the subject feel bad is thus not an uncommon purpose, nor one held only by a few evil people.

Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 Nw. U. L. Rev. 731, 773 (2013). To prohibit such speech would be to outlaw a broad swath of speech by newspaper opinion writers and politicians, not to mention much of the content of social media, such as nasty comments about neighbors and negative reviews of housepainters, plumbers, and other service providers.

The facts of this case exemplify how the government can have no compelling interest in prohibiting truthful and non-threatening communications to third parties. The communications here alerted Boone's employer to "the potential sexual harassment claims this situation presents," and urged it to "investigate[] these concerns and take[] appropriate corrective action." Supp. Rec. 3. And they let Boone's Facebook friends "know the kind of person Christopher Boone really is," Supp. Rec. 20, in case they might want to reconsider their own relationships with him. Miss Manners might disapprove of such communications, but it is not within the government's

constitutional authority to make them criminal offenses. Indeed, much of the #MeToo movement involves "naming and shaming" powerful men who have coerced women into unwelcome sexual relations. Surely the government does not have a compelling interest in prohibiting that speech, yet under the trial court's view of the stalking statute, people who disclose such behavior in the District of Columbia could be convicted of stalking and the "victims" of such tactics could obtain injunctive and monetary relief against such a "course of conduct."[3]

b. The District has no compelling interest in creating a new defamation tort to which truth is not a defense.

In the District of Columbia, "truth is an absolute defense" to a defamation claim. *Moss v. Stockard*, 580 A.2d 1011, 1022 (D.C. 1990). That is highly relevant here because Boone's real complaint is not that he was put in fear of bodily harm or that his safety was threatened. To the contrary, he suggested in an email that he and Mashaud meet in person to discuss their differences. Supp. Rec. 54 ("I am more than happy to talk, meet, or whatever any time you're ready."). And the trial court did not base its ruling on the "[f]ear for … safety" element of the statute, *see* JA 30-36; 40-

[3] The District of Columbia recognizes the tort of intentional infliction of emotional distress. But "[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Kotsch v. District of Columbia*, 924 A.2d 1040, 1045–46 (D.C. 2007) (quoting RESTATEMENT (SECOND) OF TORTS § 46, cmt. d.). It is hard to think of a case in which truthful and non-threatening speech would meet those criteria.

41. Rather, Boone's complaint is that he was exposed to the very kind of damage that the tort of defamation addresses: his reputation was harmed in the eyes of his friends and business associates; he feared that he might lose his job; he wanted to prevent further speech that would harm him in the same way. His petition for a CPO alleged that the email to his colleagues was sent "with the intent of getting me fired." Supp. Rec. 90. It alleged that Mashaud sent the Facebook Messages "defaming me [with] accusations of continuing a relationship w/wife." *Id*. And it alleged that Mashaud "is attempting to sabotage my personal and professional credibility." *Id*. at 92. In his closing argument at trial, Boone's attorney used the word "defamatory" nine times. Tr. June 16, 2014, at 41-46, and he pointed out that Boone paid $7,500 to a "brand restoration firm" to rehabilitate his reputation. *Id*. at 43.

"When interpreting a statute, the judicial task is to discern, and give effect to, the legislature's intent." *A.R. v. F.C.*, 33 A.3d 403, 405 (D.C. 2011). There is no reason to believe that in enacting the stalking statute the D.C. Council intended to create a new cause of action for defamation in which truth would not be a defense, and there is no good reason for this Court to allow the stalking statute to be used as an end-run around the defense of truth for a claim of defamation. Yet that is essentially what Boone tried to do, and it is essentially how the trial court applied the stalking law here. The District of Columbia has no compelling interest in allowing such an end-run.

In particular, the District has no compelling interest in prohibiting people from speaking truthfully to third parties about troubling behavior by others—for example, warning a friend that the person she's begun dating is married, warning an employer that an employee who has access to cash has previously embezzled money, or informing a person's business associates or friends that the person participated in the January 6, 2021, riot inside the Capitol Building. Yet on the trial court's view of the stalking statute, such communications (if made twice to the same person, or once to two people) could constitute stalking because they may predictably make the "victim"—the married man, the embezzler, or the Capitol rioter—feel disturbed or suffer emotional distress. Certainly the fear of being fired from a job could cause a person to suffer serious emotional distress. But tort law recognizes that "[l]awfully disclosing truthful information does not subject a defendant to liability to a plaintiff whose contract is disrupted as a result. This privilege applies even if the information causes a contract to be breached and was disseminated by the defendant with that hope. The interest in the free flow of truthful information is generally regarded as sufficiently great to outweigh the other interests protected by § 17." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 20 cmt. b (2020).

2. As applied to speech, the stalking statute is not narrowly tailored.

"Broad prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our

most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Yet the D.C. Council intentionally eschewed precision in drafting the stalking statute.

The Committee on Public Safety and the Judiciary wondered, "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?" Committee Report at 33. The Committee responded, "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 pinpoint that distinction*." *Id.* (emphasis added).

Recognizing that its definition of stalking was "subjective," *id*., the Council sought to cure that problem by making the criminal offense jury-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.'" *Id*. (quoting testimony by the D.C. Public Defender Service). But while the right to jury trial is of great importance in both criminal and civil litigation, a jury's task is to apply the law as the law is explained to it by the judge. A jury cannot be instructed to figure out what the law is—especially not in a First Amendment case. In any event, the respondent in a civil case seeking a CPO has no right to a jury trial. Thus, the Council

essentially admitted that the stalking statute "lacks the precision that the First Amendment requires when a statute regulates the content of speech." *Reno v. ACLU,* 521 U.S. 844, 846 (1997).

C. Speech Cannot be Prohibited on the Ground That it Does Not Serve a "Legitimate Purpose."

The division majority would have remanded the case so that this Court could "benefit from the perspective of [the trial judge] on whether . . . the course of conduct here 'served no legitimate purpose other than to harass and intimidate.'" *Mashaud*, 256 A.3d at 240. But that inquiry would be irrelevant, because the First Amendment does not require a speaker to have a "legitimate purpose" for speaking. Indeed, the Supreme Court has repeatedly held that the First Amendment protects speech reflecting far baser purposes than Mashaud's purpose 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, 445-47 (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.").

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), is particularly instructive. Mr. Keefe was believed to be a real estate "block buster." Residents who opposed his activities distributed leaflets calling him a "panic peddler" and urging people to call him on his home telephone to tell him to stop. *Id*. at 417. Leaflets were passed out to parishioners at his church and were left at the doors of his neighbors. *Id*. The goal was to let "his neighbors know what he was doing." *Id*. The state court enjoined the residents from distributing such leaflets, viewing them as "coercive and intimidating." *Id*. at 418.

The Supreme Court reversed, noting that "[t]he claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper." *Id*. at 419. "[S]o long as the means are peaceful, the communication need not meet standards of acceptability." *Id*.

The same is true here.

D. The Speech Here Was Not Integral to Criminal Conduct.

Boone argued to the division that Mashaud's speech was unprotected because it was "integral to criminal conduct," and the division majority would have directed

the trial court to consider that argument on remand. *Mashaud*, 256 A.3d at 240.

While speech integral to criminal conduct is one of the "historic and traditional categories" of unprotected speech, *United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (canvassing the categories), Mashaud's speech does not fit that description because his alleged "criminal conduct," like the alleged criminal conduct in *Cohen v. California, supra,* was "the fact of communication," and thus involved no "separately identifiable conduct" to which it could be integral. *Cohen*, 403 U.S. at 18. And as in *Cohen*, because the finding that Mashaud violated the stalking statute "quite clearly rests upon the asserted offensiveness of the words [he] used to convey his message," *id*., he could not constitutionally be found to have committed the offense. *Id.*

Under Boone's theory about speech integral to criminal conduct, almost any speech could be outlawed simply by criminalizing its effect on a listener: teaching critical race theory could be outlawed by making it a crime to distress white people; flying a Confederate flag could be outlawed by making it a crime to distress Black people; picketing the Russian Embassy with a sign saying "Putin = Hitler" could be outlawed by making it a crime to bring a foreign government into "public odium" or "public disrepute." *But see Boos v. Barry*, 485 U.S. 312 (1988) (striking down as an unconstitutional content-based restriction on speech D.C. Code § 22-1115, which

prohibited displaying, within 500 feet of a foreign embassy, "signs tending to bring a foreign government into public odium or public disrepute." *Id*. at 316.

II. The Exemption for Constitutionally Protected Activity Must Be Construed To Exempt a Course of Conduct Consisting Only of Speech That Does Not Fall Within the Established Exceptions to First Amendment Protection.

Apparently aware that it was constitutionally risky to define stalking imprecisely, yet broadly enough to cover cases involving only speech, the Council sought to shield the statute by adding the exemption for "constitutionally protected activity." D.C. Code § 22-3133(b). To avoid the constitutional problems identified above, the Court should interpret this statutory exemption to bar application of the stalking statute to a course of conduct (like Mashaud's) consisting solely of speech that does not fall within the traditional categories of unprotected speech.

The division majority 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). But the latter construction provides no "safety valve" at all, because it provides no safety that the Constitution of the United States does not

already provide, and it supplies no answer to the key question: *what* speech or action is the stalking statute not allowed to cover?

To begin, interpreting the exemption to have independent meaning is the most natural reading of the provision. In *Animal Legal Defense Fund v. Hormel Foods Corp.,* 258 A.3d 174 (D.C. 2021), the parties disputed whether a certain statutory provision modified the standing requirements of Article III of the Constitution. Holding that it did, this Court explained that the provision "would be pointless if it incorporated Article III's restrictions" because "it would serve no independent function," and would therefore "violate the 'basic principle' of statutory interpretation" regarding "not rendering any provision superfluous." *Id*. at 183 (citations omitted). The exemption here would likewise serve no independent function, and be pointless and superfluous, if it simply incorporated by reference the United States Constitution.

More important, however, if that construction were adopted, the Council (or any legislature) could simply enact a statute providing: "Nothing in the laws of this jurisdiction prohibits constitutionally protected activity"—and presto, any law, no matter how vague, how overbroad, or how contrary to Supreme Court precedent, would automatically be constitutional—subject only to case-by-case litigation on particular facts. On that theory, for example, if the Texas legislature enacted a statute providing: "(a) All abortions are Class A felonies. (b) This section does not apply to

constitutionally protected activity," the statute would survive a constitutional challenge, leaving women and physicians to wonder what they could do. Likewise, if a city council enacted an ordinance providing: "(a) Possession of any photograph of a naked person is punishable by 10 years imprisonment. (b) This section does not apply to constitutionally protected activity," the ordinance would be valid on its face.

The chilling effect of such laws on constitutionally protected activity would be obvious, which is why the Supreme Court recognized, long ago, that "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *United States v. Reese,* 92 U.S. 214, 221 (1875). *See also CISPES (Committee in Solidarity with People of El Salvador) v. FBI*, 770 F.2d 468, 474 (5th Cir. 1985) ("Of course, such a provision cannot substantively operate to save an otherwise invalid statute, since it is a mere restatement of well-settled constitutional restrictions on the construction of statutory enactments.").

In *Dream Defenders v. DeSantis*, No. 4:21CV191, 2021 WL 4099437 (N.D. Fla. Sept. 9, 2021), *appeal pending*, No. 21-13489 (11th Cir., argued Mar. 17, 2022), the court considered vagueness and overbreadth challenges to a new Florida statutory definition of "riot" enacted after the George Floyd protests. The statute included the caveat that "[t]his section does not prohibit constitutionally protected activity

such as a peaceful protest," but the court concluded that the caveat "cannot, on its own, render the statute unambiguous." *Id*. at *23. *Accord Matter of Welfare of A. J. B.,* 929 N.W.2d 840, 851 (Minn. 2019); *Long v. State*, 931 S.W.2d 285, 295 (Tex. Crim. App. 1996). As Professor Tribe has explained, a hypothetical statute that reads, "It shall be a crime to say anything in public unless the speech is protected by the first and fourteenth amendments," "simply exchanges overbreadth for vagueness," because "the premise underlying *any* instance of facial invalidation for overbreadth must be that *the Constitution does not, in and of itself, provide a bright enough line to guide primary conduct*, and that a law whose reach into protected spheres is limited *only* by the background assurance that unconstitutional applications will eventually be set aside is a law that will deter too much that is in fact protected." Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 12-29, at 1031 (2d ed. 1988).

These considerations are precisely why the Supreme Court developed the overbreadth doctrine. In the seminal case establishing the doctrine, the Court explained: "a penal statute . . . which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. . . . results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." *Thornhill v.*

Alabama, 310 U.S. 88, 97-98 (1940). Thus, "[w]here regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression." *Id*. at 98.

To save the stalking statute, as it applies to a "course of conduct" consisting of speech alone, the Court must therefore construe the exemption for "constitutionally protected activity" to mean that the stalking statute does not criminalize speech (when speech alone is the basis for liability) unless that speech falls into existing, well-established categories of unprotected utterances such as true threats or fighting words.[4]

Construing the exemption for "constitutionally protected activity" to mean more than just "go read the Constitution" will leave the stalking statute's core purpose undisturbed, while providing the trial court bench and bar, and the individuals subject to the statute, with a law they can understand and obey.

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[4] Of course, even protected speech can be subject to "reasonable regulations, *unrelated to the content of the message*, concerning the time, place, and manner of the exercise of those liberties." *Bloch v. District of Columbia*, 863 A.2d 845, 849 (D.C. 2004) (emphasis added; citations omitted). But the constitutionality of such regulations is irrelevant here because, as shown above, the stalking statute's application to speech is explicitly content-based, and it therefore "cannot be justified as a legitimate time, place, or manner restriction on protected speech." *City of Cincinnati v. Discovery Network, Inc*., 507 U.S. 410, 430 (1993).

CONCLUSION

For the reasons stated above, the judgment of the Superior Court should be reversed and Mr. Boone's petition should be dismissed with prejudice.

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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 8th day of April, 2022, 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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