No. 16-FM-383

(Superior Court No. CP0739-14)

IN THE
DISTRICT OF COLUMBIA
COURT OF APPEALS

LAUREN MASHAUD,

APPELLANT

v.

CHRISTOPHER BOONE,

APPELLEE

Appeal from the Superior Court of the District of Columbia
Domestic Violence Unit
(Hon. Fern Flanagan Saddler, Trial Judge)

EN BANC BRIEF FOR APPELLANT

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STATEMENT OF INTERESTED PARTIES

Appellant Lauren Mashaud and Appellee Christopher Boone are the only parties to this appeal. Boone was represented in the Superior Court and is represented in this appeal by attorney Governor E. Jackson, III. Mashaud was represented at trial by attorney Steven A. Krieger. Mashaud is represented in this appeal by attorney Matthew B. Kaplan, who also represented Mashaud in the prior appeal in this matter and in the Superior Court on remand from that appeal. The American Civil Liberties Union Foundation of the District of Columbia, represented by attorney Arthur B. Spitzer, filed an amicus curiae brief asking this court to review this matter *en banc*.

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STATEMENT OF JURISDICTION

This court has jurisdiction to hear this matter because it arises from Appellant Lauren Mashaud's timely notice of appeal from a final judgment or order that disposed of all the parties' claims in this matter.

INTRODUCTION

Appellee Christopher Boone had an affair with Ms. W., Appellant Mashaud's wife. Mashaud found out about the affair. He told others what had happened and expressed to them his view that Boone had acted improperly. Mashaud's statements were truthful and were not threatening.

Boone was unhappy that Mashaud told others about the affair. He sought a Civil Protection Order ("CPO") to silence Mashaud. The trial court issued the CPO, ruling that Mashaud's statements violated the District of Columbia's stalking statute and were, consequently, crimes.

The trial court was wrong. Mashaud's statements did not violate any reasonable interpretation of the statute. Moreover, Mashaud's speech was protected by the First Amendment's guarantee of the freedom of speech.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellant Lauren Mashaud presents the following issues for review:

- Whether Appellant Mashaud violated this jurisdiction's stalking statute, and thus committed a crime when he truthfully told others that Appellee Christopher Boone had had an affair with his wife.
- Whether Appellant Mashaud's truthful statements to others that Appellee Christopher Boone had had an affair with his wife were protected by the First Amendment's guarantee of freedom of speech.

STATEMENT OF THE CASE

This is Lauren Mashaud's appeal of the trial court's determination that he had committed the crime of stalking and that, consequently, a CPO restricting Mashaud's conduct and requiring him to pay money to Boone, should issue. The CPO was issued on July 11, 2014, after an eight-day trial. *See* Supp. R. 96[1] (text of CPO). Mashaud appealed and prevailed on that appeal. *Mashaud v. Boone*, 14-FM-0894, Mem. Op. & J. (Feb. 29, 2016) ("*Mashaud I*"). The panel of this court that decided that appeal declined to reach Mashaud's First Amendment arguments but reversed because the trial court had mistakenly relied on a repealed statute. *Id.* at 1-2 & n.2. On April 12, 2016, on remand, the trial court again ruled that Mashaud had committed the crime of stalking, as defined by the correct statute,

[1] Citations in the form of Supp. Rec. [page number] refer to the Supplemental Record filed in support of this appeal. Citations in the form "JA [page number]" refer to the Joint Appendix (denominated "Appendix").

D.C. Code § 22-3133, and that, consequently, the CPO was properly issued, pursuant to D.C. Code § 16-1005. JA 41. Mashaud again appealed. On August 12, 2021 a split panel of this Court vacated the CPO and remanded to the trial court for further findings. *Mashaud v. Boone*, 256 A.3d 235, 238-42 (D.C. 2021). Judge Beckwith, dissenting, would have reversed without a remand. *Id.* at 246. Both Parties urged the Court to grant en banc review and it did so on December 30, 2021, vacating the panel's decision.

STATEMENT OF FACTS

The Affair

During 2013 Boone and Mashaud's wife, Ms. W. both worked for Avalere Health, a Washington, D.C.-based healthcare consulting company. Boone was a company vice president, tr. 4-23-14 at 14, and "one of the leaders in the firm," tr. 5-7-14 at 31, while Mashaud's wife was an intern.[2] *Id.* at 18. While both were employed at the firm Boone and Ms. W. had a brief sexual affair. Tr. 4-23-14 at 18-19; tr. 5-8-14 at 39.

The Statements Relating to the Affair

On March 5, 2014 Boone, upset at statements that Mashaud had made about the affair, filed a petition for a CPO with the Superior Court Domestic Violence

[2] Citations in the form tr. [date] at [page] refer to transcripts of trial court proceedings that are in the Record.

Unit. Supp. Rec. 90-92. He asked the court to order Mashaud (who lived in Connecticut) "not to abuse threaten or harass" him or his "family and friends," to stay away from his home, his business and his person and to not contact him. *Id.* He complained that Mashaud "is attempting to sabotage my personal and professional credibility." *Id.*

Boone claimed that several statements by Mashaud constituted stalking. The trial court ultimately determined that two specific instances of speech were stalking. Those instances, which are the subject of this Appeal, are an email message from Mashaud to Boone's employer and Facebook messages to some of Boone's Facebook friends.

The Avalere Email

On July 24, 2013 Mashaud sent an email (the "Avalere Email") to three senior Avalere officials, with a cc to Boone's personal and work email addresses. It said the following:

> 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…. Christopher Boone and my wife … are involved in an extramarital affair…. Aside from the potential sexual harassment claims this situation presents, it also involves the inappropriate use of company resources and assets. Christopher Boone and [Mashaud's wife] have used company time and company resources to further their affair.

Supp. Rec. 54-55. Attached to the email was some of the correspondence between Boone and Mashaud's wife. Supp. Rec. 55-58; tr. 4-23-14 at 30. The email asked Avalere to investigate but did not say or suggest that Mashaud would take any action against Avalere or Boone. Supp. Rec. 54-55. Boone responded to the email by emailing Mashaud, suggesting that they meet in person to discuss their differences. Supp. Rec. 54. Mashaud did not respond. Tr. 5-6-14 at 28.

Boone testified on direct examination that, upon receiving the cc of this email, he felt "violated and threatened and it was, in some regards … embarrassing … because you now have introduced a whole new segment of individuals who had no involvement in this personal matter." Tr. 4-23-14 at 31. He explained that he felt "threatened" because sending such an email to others at his place of work "was unreasonable behavior." *Id.* at 32.

On cross-examination, Boone clarified that Mashaud's email to Avalere did not actually make him "fearful:"

> At the point when I sent this e-mail [to Mashaud, responding to the Avalere Email], I was just being direct in telling this gentleman to please do not engage my profession into a personal matter. And, so, was I fearful at the point when I sent this e-mail, no I wasn't.

Tr. 5-6-14 at 29.

The Facebook Messages

In October 2013 Boone learned that Mashaud had sent a Facebook message (the "Facebook Messages") to several persons connected to Boone on Facebook. Mashaud sent these messages separately to each recipient, but the substantive text of each was apparently identical. *See* Supp. Rec. 20-51. Boone was not a direct recipient of these messages, but some recipients forwarded copies to him. Boone described these messages, which did not contain threats, as "very similar" to the email that had been sent to Avalere in July.[3] Tr. 4-23-14 at 37.

When Boone learned of the Facebook Messages he testified that

> basically I felt the same way I did the first time it happened [with the Avalere Email]…. [I]n many cases you start to feel like your security is threatened because you wonder how someone has such access to … your personal contacts … you start to feel for their safety as well…

Tr. 4-23-14 at 43. Boone was concerned that someone had improperly accessed his electronic data. *Id.* at 47-48; tr. 5-7-14 at 19. Mashaud subsequently testified, however, that he had sent this message to persons who had "liked" Boone's

[3] In the Facebook Messages, Mashaud identified himself by name and wrote that

> you should know the kind of person Christopher Boone really is. Christopher had a sexual affair with my wife… We believe that not only should you know about his morally reprehensible behavior, … but his friends and family should also know of his behavior.

Supp. Rec. 20. The complete text is at Supp. Rec. 20-21.

Facebook cover photo and that Boone's security settings were such that the identity of such persons was public. Tr. 5-8-14 at 78-81. Mashaud said he sent the Facebook Messages—exhibits introduced at trial indicated that he had sent them to some fifteen persons—using a Facebook feature that allowed any user to pay a small fee (a dollar per recipient) to message anyone who had liked another user's public cover photo. *Id*; Supp. Rec. 20-51. Mashaud supported his testimony with Facebook payment receipts and Boone did not dispute this explanation. Supp. Rec. 22-51.

Other Communications

Boone suggested or asserted that several other instances of speech were also crimes. The trial court ultimately concluded, however, that these statements did not violate the stalking statute.

Boone claimed that statements in a Mashaud-created blog entitled "The Power of Light and Truth," which discussed dealing with affairs, constituted stalking. Tr. 4-23-14 at 53-58. In a February 2014 post Mashaud wrote on this blog that Boone had had an affair with his wife and in this and other posts he discussed the impact of the affair on his life, his research on dealing with a partner's affair, recommended two books on responding to an affair, criticized a movie about an affair and described other blogs in which individuals whose partner had had an affair discussed their situations. *Id.* at 10-18, 62-88. Mashaud wrote

nothing that suggested he would take any action against Boone beyond criticizing his character. *See* Supp. Rec. 17. Boone testified that he was concerned that Mashaud's blog posts "could negatively impact some of our business relationships." Tr. 4-23-14 at 57. He also asserted that the posts made him feel "threatened" and "violated." *Id.* at 70.

Boone took special exception to an April 20, 2014 blog post—made just before the trial—in which Mashaud wrote that he was involved in a pending legal proceeding against the (unnamed) person who had had an affair with his wife, that "I cannot comment at this moment" about the case, and that he expected it to be resolved soon. Tr. 5-6-14 at 8-9. Boone testified that, on reading this, "I felt threatened." *Id.* at 10.

Boone also asserted that a handwritten letter he received from Ms. W. in which Ms. W. told Boone that she wanted no further contact with him constituted stalking. According to Boone, upon reading this letter, he "felt violated." Tr. 4-23-14 at 52.

Prior to the trial Mashaud's attorney had contacted Boone—then unrepresented—to discuss settlement. Tr. 4-2-14 at 16-18. Boone complained to the trial court that this "indirect communication" from Mashaud constituted improper harassment. ("I felt harassed … by his attorney"). *Id.* at 17.

Other Relevant Facts

Aside from the Avalere email, which was copied to him, Boone did not claim to have received any other communications sent to him directly by Mashaud. Tr. 5-6-14 at 13-14. Moreover, although Boone and Mashaud apparently met at a company event before Mashaud learned of the affair, they had had no subsequent "in person communications." *Id.* at 14.

Boone never asserted that anything Mashaud said was untrue.

The Adjudication by the Trial Court and this Court

The Parties' Contentions and the Trial Court's Initial Ruling

At the end of the trial Boone argued the trial court should issue a CPO because Mashaud had used the "internet to wreak havoc and defame the professional character of Mr. Boone and invade his privacy with at best a deliberate indifference to the negative affect [*sic*] on Mr. Boone." Tr. 6-16-14 at 23. He also asserted that Mashaud's statements "ma[de] him feel threatened," but did not identify any specific threat by Mashaud. *Id.* at 30. According to Boone's attorney, Mashaud's communications

> injure[d] [Boone's] standing in the professional community…. [H]is career is made and derived off of his activities online…. [T]hat is why Mr. Boone had to go out and pay $7500 to a brand restoration firm because his brand, his professional brand and his professional character is so interweaved with his activities at Avalere

> … that if his reputation is injured online, he is basically taken out of the marketplace.

Id. at 41-43.

Mashaud responded that his statements were protected by the First Amendment, that Boone had not proven a violation of the stalking law, that Boone's petition "was filed as a tactic to protect the petitioner's image," and that there was no credible evidence that Boone ever feared for his safety. *Id.* at 49-55, 56-57.

The trial court ruled from the bench on July 11, 2014. After noting that "there's not a lot of dispute about" the facts, it applied those facts to the law and found, by a preponderance of the evidence, that Mashaud had committed "an intrafamily offense"—the crime of stalking—and entered a CPO. Tr. 7-11-14 at 16-17, 19-29.

The trial court ruled that the Avalere Email, the Facebook Messages and the blog posts were not protected by the First Amendment and constituted stalking. It found that Ms. W.'s letter to Boone was also not constitutionally protected but that it could not be deemed to be harassment by Mashaud because there was no evidence to indicate that Mashaud was the person who sent it. *Id.* at 31. The trial court had earlier told Boone that it was not improper (when Boone was *pro se*) for Mashaud's attorney to contact him. Tr. 4-2-14 at 16-17.

The trial court rejected Mashaud's First Amendment argument, explaining

> that one of the primary factors Courts should consider in determining whether speech is constitutionally protected or not is whether the speech was made regarding matters of public or private concern…. matters of public concern is usually deemed constitutionally protected while speech regarding matters of purely private concerns is less protected if protected at all.

Tr. 7-11-14 at 21. Moreover, according to the trial court, Mashaud's argument that his statements were factually correct was irrelevant because "there are times where you are telling the truth, but what you are saying can constitute harassment." *Id.* at 34.

The CPO required Mashaud (and Mashaud's wife) not to "assault threaten, harass or stalk" Boone or to "destroy" his property. JA 16-18. Mashaud was also required to stay a specified distance from Boone's person, home, workplace and vehicle, to not contact Boone "either directly or indirectly," to "enroll in and complete a counseling program for … domestic violence" and to pay $1,800 for Boone's psychiatric treatment. Tr. 7-11-14 at 55; JA 16-18.

The First Appeal and the Ruling on Remand

Mashaud appealed. This court reversed because the trial court had applied a version of the stalking statute (former D.C. Code § 22-404(b)) that had been repealed at the time of the conduct at issue and it remanded for adjudication under the current statute, D.C. Code § 22-3133. *Mashaud I* at 1-2. It declined to address Mashaud's First Amendment arguments. *Id.* at 2 n.2.

On remand the trial court did not hear additional argument or receive new evidence, but on April 12, 2016, applying the correct statute, it ruled that the CPO had been properly issued. Tr. 4-12-16 at 4; JA 23.[4]

According to the revised ruling, by sending the Avalere Email, Mashaud had committed the offense of stalking because the email's language would cause a reasonable person to be "alarmed, disturbed, or frightened or suffer emotional distress" and Mashaud knew, should have known and intended that Boone would be alarmed disturbed, frightened or suffer emotional distress. Tr. 4-12-16 at 11-13; JA 31-32. This conclusion was supported by the fact that the email contained "personal or private information" and was sent directly to Boone's employer. Tr. 4-12-16 at 12; JA 31. The trial court also ruled that "the email is not constitutionally protected speech because it involves … matters of purely private rather than public concern." Tr. 4-12-16 at 9; JA 28.

The trial court made a similar determination with respect to the Facebook Messages, holding that they constituted stalking because they would cause a reasonable person to be "alarmed, disturbed, or frightened or suffer emotional distress" and that Mashaud knew, should have known and intended that Boone would be alarmed disturbed, frightened or suffer emotional distress. Tr. 4-12-16 at

[4] The relevant portion of the April 12 transcript is set out in the Joint Appendix.

14-17; JA 33-36. This was so because the message discussed private information that "petitioner did not personally choose to disclose to his own family and friends." Tr. 4-12-16 at 15; JA 34. The trial court ruled that the Facebook Messages "are not constitutionally protected speech because … they involve matters of purely private rather than public concern." Tr. 4-12-16 at 13; JA 32.

Because the sending of the Avalere Email and the Facebook Messages constituted criminal stalking, the CPO had been properly issued. Tr. 4-12-16 at 20-22; JA 39-41.

Although the appellate decision had not addressed Mashaud's First Amendment arguments, the trial court on remand *sua sponte* reevaluated its earlier ruling that Mashaud's blog posts had not been First Amendment protected. It now ruled that they were because "the overall thrust and dominant theme of the blog speaks to broader public issues" and that its prior determination to the contrary had been a mistake. Tr. 4-12-16 at 19-22; JA 38-41. But this finding did not cause it to modify the CPO.

The Second Appeal and the Panel Decision

Mashaud appealed again, on First Amendment grounds. In a published opinion issued more than four years after oral argument, *Mashaud*, 256 A.3d 235, 239, a panel of this court rejected the trial court's view that the First Amendment only protected speech on matters of "public concern." *Id.* at 239. It nevertheless

ordered a remand so that the trial judge could determine whether Mashaud's statements "served no legitimate purpose other than to harass and intimidate." *Id.* at 240.

Judge Beckwith dissented. She agreed that the First Amendment protected speech on "private matters," but would not have remanded for further factual findings. *Id.* at 245-46. She would have reversed on the grounds that Mashaud's speech was protected by the First Amendment. *Id.*

Boone sought *en banc* review of the panel decision. Mashaud filed a response agreeing that this matter should be brought before the full court. On December 30, 2021 review *en banc* was granted and the panel decision vacated.

SUMMARY OF ARGUMENT

Boone was concerned that Mashaud's statements to others about his affair with Mashaud's wife would hurt his personal and professional reputation. But a finding of stalking requires much more than this. Boone needed to show that, in making statements that displeased him, Mashaud intended, knew, or should have known that more than one of these statements would seriously alarm, disturb, or frighten him or cause him significant emotional distress. Because there was no evidence that this was so—nothing Mashaud said can be construed as a threat—there was insufficient evidence to support the trial court's determination that he

committed the crime of stalking. And, because stalking was not established, the CPO should not have been issued.

Moreover, regardless of whether Mashaud's conduct met the statutory definition of stalking, the ruling that he committed a crime is inconsistent with the First Amendment. The Supreme Court has held that the government may make no law punishing a person for the content of his or her speech, except for speech that falls within a narrow set of long-established categories of speech—true threats being the category most potentially relevant in stalking cases—that can be restricted. Consequently, the government may not criminalize what happened here: truthful speech by one person which annoyed or embarrassed but did not threaten another. Consistent with this Supreme Court jurisprudence, courts in other jurisdictions, adjudicating arguments like those now made by Mashaud, have repeatedly found stalking laws similar to the one here to be constitutionally infirm when applied to facts analogous to those in this case. Additionally, the trial court's ruling that Mashaud's speech was not protected by the First Amendment because it was on a matter of private rather than public interest is entirely inconsistent with Supreme Court precedent.

Mashaud does not challenge the stalking statute to the extent that it prohibits true threats and harassing conduct other than speech. But its application in these circumstances—a senior executive seeking a judicial order to deter speech about

his sexual relationship with an intern—is inconsistent with the principles of the First Amendment and actually undermines efforts to combat sexual abuse, a principal objective of the statute.

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE TO FIND THAT MASHAUD COMMITTED A CRIME

Reversal is required, even without direct reference to the First Amendment, because the facts adduced at trial, applied to the correctly interpreted statutory provisions, do not establish that Mashaud committed stalking.

In an appeal from a non-jury trial this court reviews "the facts and the law." *Steuart Inv. Co. v. Meyer Group*, 61 A.3d 1227, 1233 n.6 (D.C. 2013). It reviews "the trial court's legal conclusions de novo." *Id.* It defers to the trial court's factual findings unless they are "clearly erroneous." *Id.* A decision is clearly erroneous if it is not "supported by substantial reasoning drawn from a firm factual foundation in the record." *In re E.D.R.*, 772 A.2d 1156, 1158 (D.C. 2001). This court "will not sustain findings in which the trial court has rejected or failed to draw the inferences … inescapable from the record as a whole." *Id.* (quotations omitted).

Under District of Columbia law in effect at the time of the trial,[5] "[a] petitioner," in this case Boone, "may file a petition for civil protection in the Domestic Violence Unit [of the Superior Court] against a respondent," here Mashaud, "who has allegedly committed or threatened to commit one or more criminal offenses against the petitioner." D.C. Code § 16-1003(a). The trial court found that a CPO should issue because Mashaud had stalked Boone.[6]

D.C.'s stalking statute provides that

> (a) It is unlawful for a person to purposefully engage in a course of conduct directed at a specific individual:
> (1) With the intent to cause that individual 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;
> (2) That the person knows 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; or

[5] The Intrafamily Offenses and Anti-Stalking Orders Amendment Act of 2020, D.C. Law 23-275, effective April 27, 2021, created a new order called an Anti-Stalking Order. *See* D.C. Code § 16–1061 *et seq.* The basis for issuing such an order—violation of the (unchanged) criminal law against stalking—remains the same, and thus the issues raised in this appeal remain applicable to cases that will arise under the new law.

[6] Neither Boone nor the trial court was of the view that a CPO could issue because Mashaud had "threatened to commit" a crime, instead asserting that he had actually engaged in stalking.

(3) That the person should have known would cause a reasonable person in the individual's circumstances 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.

(b) This section does not apply to constitutionally protected activity.

§ 22-3133. For purposes of this section, "'[e]motional distress' means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." § 22-3132(4). A "course of conduct" requires conduct that occurs "on 2 or more occasions." § 3132(8).

The trial court's post-remand decision separately analyzed the Avalere Email and the Facebook Messages and determined that the sending of each independently constituted stalking. Specifically, it found that in sending these emails Mashaud had intended to, reasonably knew and should have known that his conduct would cause Boone to "[f]eel seriously alarmed, disturbed, or frightened or to suffer emotional distress." *See, e.g.,* tr. 4-12-16 at 12; JA 31. But neither the evidence at trial nor reasonable inferences arising from that evidence support this conclusion. The trial court's determination that stalking had occurred was grounded on the view that public disclosure that an unmarried man engaged in a brief sexual relationship with a married woman would cause "a reasonable person in petitioner's circumstances to feel seriously alarmed disturbed, or frightened or to

suffer emotional distress," but this proposition is facially implausible and the court provided no meaningful explanation of why this would be so under the facts of this case. Tr. 4-12-16 at 12; JA 31.

While Boone's trial testimony, and common understanding of human nature, suggest that Mashaud's emails caused Boone annoyance and discomfort, this is not a crime. A finding of criminal stalking required a factual determination not only that Boone was reasonably "disturbed" or "alarmed" by the emails, but that the alarm or disturbance rose to the level of being "serious." § 22-3133(b). "Serious" should be interpreted in a manner consistent with the intent of the revised stalking statute, which the D.C. counsel meant to apply to "behaviors that potentially lead to violence, a loss in the quality of life, or even death." *Mashaud I* at 3-4 (citing legislative history); *see also Whitfield v. United States*, 99 A.3d 650, 656 (D.C. 2014) (court may look beyond plain language of a statute "to effectuate the legislative purpose as determined by a reading of [its] legislative history"). In light of this legislative history, and the admonition that the legislation is not meant to interfere with "constitutionally protected activity," § 22-3133(b), the trial court was wrong to believe that the prohibition on stalking was so expansive as to protect a person who has sex with another person's spouse from the relatively modest discomfort or embarrassment to be expected from the disclosure of that morally suspect conduct.

Significantly, the trial court did not find that anything Mashaud said to Boone violated the statute's prohibition on statements that were meant to cause or reasonably could have caused him to "[f]ear for his or her safety or the safety of another person." D.C. Code § 22-3133(a)(1)(A), (b)(1)(A), (c)(1)(A). Indeed, Boone's suggestion to Mashaud that the two meet in person—a suggestion Mashaud ignored—indicates that Boone was not afraid of Mashaud. *See* Supp. Rec. 54. Consequently, there is no reasonable basis for the trial court's view that either the Avalere Email or the Facebook Messages could have been intended to or reasonably have been expected to "frighten[]" Boone.[7] Similarly, although Mashaud might have made Boone uncomfortable, no reasonable person in Boone's position would suffer "emotional distress" from the type of disclosures contained in the emails to a degree that could be characterized as "significant," a prerequisite for an adverse finding under the statute's emotional distress prong.

The trial court's determination that the Facebook Messages were meant to alarm, disturb or frighten Boone is particularly unsupportable as these communications were not sent to Boone, but to Boone's Facebook friends. Such

[7] The trial court did not clearly find that Mashaud's speech would have frightened (or have caused significant emotional distress to) a reasonable person. Its ruling was in the disjunctive: a reasonable person would have been "alarmed, disturbed, ***or*** frightened ***or*** suffer emotional distress" as a result of Mashaud's words. Tr. 4-12-16 at 11-13; JA 31-32; Tr. 4-12-16 at 14-17; JA 33-36 (emphasis added).

indirect, factually accurate, non-threatening statements to third parties cannot be deemed harassing. The only direct communication from Mashaud to Boone was the Avalere Email, which was CCed to Boone. This too does not meet the criteria for an act that violates the stalking statute, but, even if it did, this cannot, in isolation, be a violation of the statute because a single communication does not make for a "course of conduct," a statutory prerequisite for stalking to occur.

Because the Record does not support the trial court's finding that Mashaud committed a crime, its ruling must be vacated.

II. THE FIRST AMENDMENT PROTECTED MASHAUD'S SPEECH

A. Claims that Speech Is Constitutionally Protected Are Reviewed *De Novo*

The First Amendment provides that "Congress shall make no law … abridging the freedom of speech, or of the press." U.S. Const. Amend. 1. This guarantee of free expression reflects a "transcendent value to all [our] society." *Lewis v. New Orleans*, 415 U.S. 130, 134 (1974). Whether particular speech is constitutionally protected is an issue "of law, not fact," *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983), meaning that this court determines *de novo* whether the statements in the Avalere Email and the Facebook Messages are constitutionally protected. *See Ifill v. District of Columbia*, 665 A.2d 185, 190 n.7 (D.C. 1995) ("The inquiry into the protected status of speech is one of law"); *Davis v. United*

States, 564 A.2d 31, 35 (D.C. 1989) (*en banc*) (questions of law reviewed *de novo*).

B. The First Amendment Generally Prohibits Content-Based Regulation of Speech

"Above 'all else, the First Amendment means that government' generally 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2346 (2020) (plurality opinion) (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). Consequently, as the Supreme Court explained in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), "[c]ontent-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." *Id.* at 2226 (citations omitted).

A government regulation of speech is content based if it "applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* at 2227 (citations omitted).

In *Reed* a town code regulating signs distinguished between "Temporary Directional Signs," which gave directions to certain classes of events, and other signs, imposing restrictions on the directional signs not imposed on other signs. *Id.*

at 2224-25. Although there was no suggestion that the code intentionally targeted any particular group or point of view, the Court held that "[t]he Town's Sign Code is content based on its face" because the rules "that apply to any given sign … depend entirely on the communicative content of the sign." *Id.* at 2227. It rejected the Town's argument that "'content based' [speech]," as used in the Court's earlier decisions, "is a term of art that 'should be applied flexibly' with the goal of protecting 'viewpoints and ideas from government censorship or favoritism.'" *Id.* at 2229-30.

Instead, the Court held that, if a restriction on speech is content-based, it is necessarily "subject to strict scrutiny." *Id.* at 2227. This is so "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 2228 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U. S. 410, 429 (1993)). Consequently, if a regulation of speech contains provisions that are content-based, "those provisions can stand only if 'the Government … [can] prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Id.* at 2231 (quoting *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011)) (quoting *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010))); *see also Facebook, Inc. v. Pepe*, 241 A.3d 248, 261 (D.C. 2020) ("Content-based prior restraints are normally subject to

review under strict scrutiny," citing *Reed*). The Supreme Court's precedents suggest that a statute subject to such strict scrutiny faces "almost certain legal condemnation." *Id.* at 2234 (Breyer, J., concurring in judgment); *see also Heller v. District of Columbia*, 801 F.3d 264, 282 (D.C. Cir. 2015) ("'strict scrutiny' implies" "near-automatic condemnation" of a statute reviewed under it). And, indeed, applying strict scrutiny, *Reed* held that the town's sign code was unconstitutional. 135 S. Ct. at 2231-32.

C. When Applied to Communications that Are Not Threats the Stalking Statute Is an Unconstitutional Content-Based Regulation of Speech

Like the sign code in Reed, the statutory language that was the basis of the CPO against Mashaud, when applied to speech, is a content-based restriction on speech. To determine whether a statement violates the stalking statute a court must—as the trial court here did—review the content of the speech at issue to determine whether the speaker knew, intended or should have known that his speech would alarm, disturb, frighten or distress another person. If Mashaud's words were not of the type that might cause Boone such discomfort no offense would have been committed. Consequently, the provisions of the statute, as applied in this case, are constitutional only if they survive strict scrutiny.

Boone cannot meet this heavy burden. Even if the evidence were sufficient to support a finding that Mashaud knew or should have known that his statements

would "seriously" "alarm[]" or "disturb[]" Boone, or cause him "significant" "emotional distress," or even if Mashaud intended such a result, the government simply does not have a compelling interest in preventing speech that alarms, disturbs or distresses, at least when, as was the case here, that speech is not a threat and poses no reasonable prospect of leading to violence. Indeed, both the Supreme Court and the lower courts have repeatedly emphasized that the First Amendment protects one person's right to offend another: "The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." *R.A.V. v. St. Paul*, 505 U. S. 377, 414 (1992); *see also Lewis*, 415 U.S. at 134 ("vulgar or offensive" speech protected by First Amendment); *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (even speech meant to "inflict great pain" may be constitutionally protected); *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2048 (2021) ("simple undifferentiated fear or apprehension is not enough to overcome the right to freedom of expression" (cleaned up)); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation."); *Coates v. Cincinnati*, 402 U.S. 611, 611, 616 (1971) (statute criminalizing speech "annoying to persons passing by" facially unconstitutional); *People v. Marquan M.*, 19 N.E.3d 480, 487 (N.Y. 2014) ("the First Amendment protects annoying and embarrassing speech"); *Gray v. Sobin*, No. 2013 CPO 3690, 2014 D.C. Super. LEXIS 1, at *24 (D.C. Super. Ct.

Feb. 14, 2014) (Edelman, J.) ("the First Amendment protects even offensive and inflammatory speech," rejecting request for CPO under stalking statute). The government simply lacks the power to ban truthful speech because it causes discomfort or hurt feelings.

Furthermore, the stalking statute is subject to heightened scrutiny because it creates a criminal offense. In the First Amendment context, "criminal statutes must be scrutinized with particular care,'" *Houston v. Hill*, 482 U.S. 451, 459 (1987) (citation omitted), "because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Lewis*, 415 U.S. at 134.

D. Truthful Speech on Private Matters Is Not One of the Limited Categories Unprotected by the First Amendment

The trial court reasoned that Mashaud's emails were not constitutionally protected because they were not communications on subjects of public concern. It apparently believed that speech on matters that are not of legitimate public interest is subject to content-based regulation. But, as the panel decision recognized, this is wrong—the First Amendment protects speech on both matters of public concern and on subjects of only private interest.

The Supreme Court has explained that the First Amendment "permit[s] restrictions upon the content of speech" only "in a few limited areas … [of]

historic and traditional categories" that include certain "well-defined and narrowly limited classes of speech." *United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (citations and quotations omitted). Although the Court has not provided a definitive list of such "classes of speech," it has suggested that they are limited to the following: "obscenity; defamation; speech integral to criminal conduct; so-called 'fighting words;' child pornography; fraud; true threats; and speech presenting some grave and imminent threat the government has the power to prevent, although a restriction under the last category is most difficult to sustain." *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (citations omitted) (plurality opinion); *see also Stevens*, 559 U.S. 468-69 (identifying specific content-regulable categories). This set of narrow and limited categories of speech that can be regulated based on their content does not include matters that are not of general concern to the public. Moreover, new categories of speech subject to regulation cannot be created merely because a government thinks it would be good public policy to do so.[8] *Stevens*, 559 U.S. at 468-69.

[8] The speech integral to criminal conduct category does not apply merely because a statute says that certain speech is criminal. "This argument … is circular—the speech covered by the statute is integral to criminal conduct because the statute itself makes the conduct illegal. That is not the test for speech integral to criminal conduct." *In re Welfare of A.J.B.*, 929 N.W.2d 840, 859 (Minn. 2019). "[I]t is not enough that the speech itself *be labeled* illegal conduct. . . . Rather, it must help cause or threaten *other* illegal conduct." *Id.* at 853; *see also Mashaud*, 256 A.3d at 245-46 (Beckwith, J., dissenting) (agreeing, collecting cases).

This was illustrated in *Stevens*. In that case the Court held unconstitutional a statute that prohibited the creation, selling or distribution of certain videos depicting animal cruelty. *Id.* at 464-65, 81. The statute's intent was to prevent the distribution of "'crush videos,' which feature the torture and killing of helpless animals and are said to appeal to persons with a specific sexual fetish." *Id.* at 460. In defending the statute the government argued that the Court should balance the limited value of such videos against their "societal costs" and decide the case by deeming "depictions of animal cruelty" to be an addition to the historical categories that are "unprotected by the First Amendment." *Id.* at 469-70. But the Court rejected this view as a "startling and dangerous" effort to subvert the Founders' judgment on the importance of speech. *Id.* at 470-72. It explained that "[o]ur Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it" and that there is no "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *Id.*; *see also Alvarez*, 567 U.S. at 718 (First Amendment "seeks to guarantee" "an open and vigorous expression of views in public *and private* conversation," protecting even "false statements" (emphasis added)).

Stevens is inconsistent with the trial court's view that Mashaud's speech was not protected because it was not "regarding matters of public concern." Crush videos would presumably never meet such a "public concern" test. But the law is

clear: "*Most* of what we say to one another lacks religious, political, scientific, educational, journalistic, historical, or artistic value (let alone serious value), but it is still sheltered from government regulation. Even wholly neutral futilities come under the protection of free speech." *Stevens*, 559 U.S. at 479-80 (cleaned up). Indeed, the Court has explained that a government "could not generally prohibit or punish … speech on the ground that it does not touch upon matters of public concern.[9] *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 600 (2008); *see also Connick v. Myers*, 461 U.S. 138, 147 (1983) ("We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression.").

Decisions from the federal Courts of Appeals confirm that speech on subjects of only private interest are protected. In *Eichenlaub v. Township of Indiana*, 385 F.3d 274 (3d Cir. 2004), for example, "[t]he District Court entered summary judgment against the [plaintiffs] … on the ground that… the speech in question related to private matters, rather than matters of public concern, and,

[9] *Reed v. Town of Gilbert* also undercuts the trial court's view that private speech enjoys little or no First Amendment protection. It is difficult to see how the information on "Temporary Directional Signs" which guided persons to private events could be construed as speech about matters of true public interest. 135 S. Ct. at 2224. Nevertheless, *Reed* held that such speech was constitutionally protected. *Id.* at 2232.

therefore, was unprotected by the First Amendment." *Id.* at 282. The Third Circuit reversed, explaining that "except for certain narrow categories deemed unworthy of full First Amendment protection … all speech is protected by the First Amendment. ***That protection includes private expression not related to matters of public concern."*** *Id.* at 282-83 (emphasis added) (citing *R.A.V.*, 505 U.S. at 382-90; *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995); *Connick*, 461 U.S. at 147; *United Mine Workers of Am. Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 223 (1967)); *see also id.* at 284. ("[W]hile speech on topics of public concern may stand on the 'highest rung' on the ladder of the First Amendment, private speech … is still protected on the First Amendment ladder."). Similarly, *Klen v. City of Loveland*, 661 F.3d 498 (10th Cir. 2011), rejected the argument of defendant government officials that they were "entitled to qualified immunity, because 'it was not clearly established in 2004-2005 that speech … addressing a private matter is protected by the First Amendment" because, the court held, this aspect of constitutional law had indeed been "clearly established" by that time. *Id.* at 511. The Seventh Circuit reached the same conclusion in *Bridges v. Gilbert*, 557 F.3d 541 (7th Cir. 2009), reversing the dismissal of a prisoner's First Amendment case on grounds that the speech at issue was not on "a matter of public issue or concern" because "speech can be protected even when it does not involve a matter of public concern." *Id.* at 546.

It is also constitutionally significant that the statements that the trial court found constituted stalking were factually accurate. "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, 529 (2001) (quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979)). It is true that the Supreme Court has been careful not "to answer categorically whether truthful publication may ever be punished consistent with the First Amendment." *Id.* at 529 (citing *Fla. Star v. B. J. F.*, 491 U.S. 524, 532-533 (1989)). But if dissemination of truthful information can ever be punished it is only under extraordinary circumstances. Perhaps, for example, the "publication of the sailing dates of transports or the number and location of troops" during time of war. *Florida Star*, 491 U.S. at 532 (quoting *Near v. Minnesota*, 283 U.S. 697, 716 (1931)).

Moreover, the First Amendment protects communications of highly sensitive information about others. In *Florida Star*, 491 U.S. at 526, a newspaper was found liable for publishing the name of a rape victim in contravention of a Florida law that prohibited doing so. An appellate court affirmed on the grounds that "a rape victim's name is of a private nature." *Id.* at 529 (quotation omitted). The Supreme Court reversed, holding that punishment for dissemination of truthful information "may lawfully be imposed, if at all, only when narrowly tailored to a state interest

of the highest order," a test which had not been met in the case, despite the state's understandable desire to protect the identities of rape victims.[10] *Id.* at 541.

E. Application of First Amendment Principles Does Not Legalize Stalking

Interpreting the stalking law in a manner consistent with the First Amendment would not impair the legislature's intent of deterring "dangerous" conduct connected to potential "domestic violence" and "sexual assault." D.C. Code § 22-3131(a) (explaining legislative intent).

There is, for example, likely no constitutional infirmity to the stalking statute's prohibition on conduct that is intended to or can be reasonably expected to cause a person to "[f]ear for his or her safety or the safety of another person," § 22-3133(a) (1)(A), (a)(2)(A), (a)(3)(A), because "[i]t is settled that the Constitution does not protect true threats." *Elonis v. United States*, 135 S. Ct. 2001 at 2016 (2015) (Alito, J. concurring in part and dissenting in part) (citing *Virginia v. Black*, 538 U.S. 343, 359-360 (2003)). In this case, however, none of Mashaud's

[10] *Florida Star* deals with publication in a newspaper while the case at bar involves the dissemination of information to a handful of persons. But, in determining the scope of constitutionally protected freedom of expression, courts do not distinguish between the speech and press clauses of the First Amendment. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 352 (2010). ("We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers."); *see also Moss v. Stockard*, 580 A.2d 1011, 1022 n.23 (D.C. 1990) ("media/non-media distinction [is] inconsistent with First Amendment principle that value of speech does not turn on nature of its source").

statements could reasonably have caused Boone to fear for his safety and the trial court did not base its ruling on the "[f]ear for … safety" prong of the statute.

There is also surely no constitutional issue when the stalking statute is applied to conduct that is not primarily speech. If, for example, Mashaud had regularly followed Boone, brandished a weapon in his direction, repeatedly rung his doorbell and walked away or called his phone and hung up none of this would have been speech and none of it First Amendment protected. A court might appropriately conclude that such actions were intended to make Boone "[f]eel seriously alarmed, disturbed, or frightened" or to "[s]uffer [significant] emotional distress" and that, consequently, Mashaud had committed stalking. But Mashaud's conduct here was pure speech—he transmitted words which conveyed his views to others. There may be cases in which conduct involving communications amounts to more than constitutionally protected speech. For example, if Mashaud had intentionally transmitted identical copies of the Avalere Email to the same recipients a thousand times instead of once, or if he had repeatedly phoned Boone in the early morning hours to express his views, a court might reasonably find that conduct other than protected speech was involved. But this did not occur here.[11]

[11] Because the stalking statute as a whole is properly enforceable in many circumstances that do not involve speech, and because a determination of facial unconstitutionality is unnecessary for him to prevail, Mashaud's constitutional

F. Cases in Other Jurisdictions Have Deemed Stalking Statutes Unconstitutional When Applied to Speech

Courts in other jurisdictions have, on First Amendment grounds, invalidated criminal convictions or protective orders arising from statutory provisions similar to those at issue in this case. Such decisions, all in cases not involving true threats, have generally been based on the Supreme Court's jurisprudence limiting the government's ability to regulate speech based on its content. In many of these cases the statements at issue were far more offensive than those attributed to Mashaud.

1. *Relerford* (Illinois)

People v. Relerford, 104 N.E.3d 341 (Ill. 2017), citing *Reed*, reversed a conviction for stalking a radio host because the provisions of two similarly worded stalking statutes were facially unconstitutional. The defendant repeatedly made unwanted, offensive communications to or about the host, including "vulgar and

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challenge focuses on the statute "as applied" to him. This Court has suggested that where alleged unconstitutionality is "not substantial in relation to the statute's plainly legitimate sweep" litigants should "follow the traditional rules of practice by bringing as-applied challenges that seek to invalidate applications of the statute to their particular expressive conduct." *Bolz v. District of Columbia*, 149 A.3d 1130 (D.C. 2016) (cleaned up). But Mashaud's claim can also reasonably be adjudicated as a facial challenge to any interpretation of the statute which permits criminalization of speech that is not a threat. *See A.J.B.*, 929 N.W.2d at 862-63 (granting First Amendment facial challenge to application of a stalking statute to speech but applying a "narrowing construction" which left much of the statute enforceable); *see also Citizens United*, 558 U.S. at 331 ("the distinction between facial and as-applied challenges is not so well defined").

intrusive" Facebook posts. *Id.* at 357. Among other things, the posts "order[ed]" that the host's "vagina [be] in my mouth by next Friday" and stated that "I want to fuck [the host]." *Id.* at 345. The host did not receive the Facebook communications directly but they were forwarded to her by others.

The statutes provided that

> A person commits stalking when he or she knowingly engages in a course of conduct directed at a specific person, and he or she knows or should know that this course of conduct would cause a reasonable person to:
> (1) fear for his or her safety or the safety of a third person; or
> (2) suffer other emotional distress.

Id. at 348-49 (quoting 720 Ill. Comp. Stat. Ann. 5/12-7.3(a) (West 2012)).[12] It defined "course of conduct" to include "acts in which a defendant directly, indirectly, or through third parties … communicates to or about, a person." *Id.* at 349 (quoting statute). Emotional distress was defined to mean "significant mental suffering, anxiety or alarm." *Id.* at 349 (quoting statute).

The court held that, while the statute could restrict non-speech conduct, its prohibition on certain communications "to or about" others "must be considered a content-based restriction" because it could not be enforced "without reference to the content of the prohibited communications." *Id.* at 350, 358 (citing *Reed*, 135

[12] The other statute at issue, 720 Ill. Comp. Stat. Ann. 5/12-7.5(a), (c) (West 2012), specifically focused on cyberstalking but its relevant language was materially the same. 104 N.E.3d at 349 n.1.

S. Ct. at 2227). Furthermore, because it could not survive the strict scrutiny applied to such content-based restrictions, the "communicates to or about" language was facially unconstitutional. *Id.* at 350-51, 358.

2. In re Welfare of A.J.B. (Minnesota)

In re Welfare of A.J.B., 929 N.W.2d 840 (Minn. 2019), vacated a defendant's conviction for stalking (by mail) and harassment (by mail) ("mail" included electronic communication) because of unconstitutionally overboard statutory language. The defendant caused an autistic high school student grave emotional distress by sending "an unrelenting torrent of cruel tweets" about the student, several urging him to commit suicide. *Id.* at 845. The stalking statute criminalized communications that a defendant "knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated, and causes this reaction on the part of the victim." *Id.* at 849 (quoting Minn. Stat. § 609.749, subd. 1 (2018)). The harassment statute criminalized repeatedly making communications with an intent to "'disturb'" or "cause distress'" to another. *Id.* at 859 (citing Minn. Stat. § 609.795, subd. 1(3) (2018) (italics omitted)). The court ruled that these provisions were facially unconstitutional because they "prohibit a substantial amount of constitutionally protected speech judged in relation to the statute's

plainly legitimate sweep" and "chill protected expression."[13] *Id.* at 852-53, 856, 862.[14]

3. *Burkert* (New Jersey)

In *State v. Burkert*, 135 A.3d 150, 151, 157 (N.J. Super. Ct. App. Div. 2016), Burkert, a corrections officer, had distributed flyers containing "unprofessional,

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[13] Like the D.C. statute in this case, the text of the Minnesota statute provided that it did not apply to conduct "protected" by the Constitution. *Id.* at 850. But this did not immunize it from a facial constitutional challenge:

> Application of [this clause] on a case-by-case basis would require people of ordinary intelligence—and law enforcement officials—to be First Amendment scholars. Arguably, people are always "on notice" that constitutionally protected conduct is exempt from prosecution, and law enforcement officials could always look to the First Amendment to determine when a law should not be enforced…. But, the mere existence of the First Amendment has never been held automatically to cure vagueness problems implicating First Amendment freedoms. Because First Amendment doctrines are often intricate and/or amorphous, people should not be charged with notice of First Amendment jurisprudence…. Moreover, an attempt to charge people with notice of First Amendment case law would *undoubtedly serve to chill free expression*.

Id. at 851.

[14] Shortly after *A.J.B.* was decided, Minnesota's intermediate appellate court, citing to that case, ruled that a telephone stalking statute that applied to phone calls and text messages that "a defendant knew or had reason to know… would cause the victim to feel fear, loss of power, worry, or ill-treated" was facially unconstitutional. *State v. Peterson*, 936 N.W.2d 912, 918, 923 (Minn. Ct. App. 2019).

puerile, and inappropriate for the workplace" statements about a fellow corrections officer. The targeted individual testified that, as a result of these statements, "he became distraught, embarrassed, and feared for his safety because he believed his authority with inmates was undermined. He left work and never returned." *Id.* at 152. Burkert was convicted under New Jerseys' harassment statute, which prohibited engaging in any "course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person" if done "with purpose to harass another." *Id.* at 155 (quoting N.J. Stat. Ann. § 2C:33-4(c)).

The appellate court reversed on the grounds that the "defendant's conduct was non-actionable protected speech." *Id.* at 155. The conviction was improper because "United States Supreme Court precedent repeatedly holds expressions remain protected even where the content hurts feelings, causes offense, or evokes resentment." *Id.* at 156 (citing *Snyder*, 562 U.S. at 452; *Connick*, 461 U.S. at 145; *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988); *Cohen v. California*, 403 U.S. 15, 20 (1971); *Terminiello v. Chicago*, 337 U.S. 1 (1949)). The court observed that "[a] conveyed opinion, even if stated in crude language, is not harassment." *Id.* at 601.

4. *Bishop* and *Shackelford* (North Carolina)

In *State v. Bishop*, 787 S.E.2d 814 (N.C. 2016), the court vacated on First Amendment grounds the cyberbullying conviction of a person who had sent insulting and sexually oriented messages to a high school student. The relevant statute made it unlawful "to '[p]ost or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor' '[w]ith the intent to intimidate or torment a minor.'" *Id.* at 816 (quoting N.C. Gen. Stat. § 14-458.1(a)(1)(d)) (alteration in original).

Applying *Reed*, the court held that this was an impermissible content-based restriction on speech. *Id.* at 819. This was so because "[t]he statute criminalizes some messages but not others, and makes it impossible to determine whether the accused has committed a crime without examining the content of his communication." *Id.* at 819. It acknowledged that "protecting children from online bullying is a compelling governmental interest." *Id.* Nevertheless, the statute criminalized a wide array of speech and failed strict scrutiny because the state had not met its heavy burden of showing that it was "the least restrictive means of advancing" that interest. *Id.* at 819-20.

Applying similar reasoning, in *State v. Shackelford*, 825 S.E.2d 689 (N.C. Ct. App. 2019), an intermediate appellate court, relying on *Reed*, *Bishop* and *Relerford*, vacated a stalking conviction. The defendant had made numerous

disturbing posts about a woman who he insisted would be his "future wife." *Id.* at 692-94. He was convicted under a statute that criminalized engaging in conduct that "'would cause a reasonable person to . . . [s]uffer substantial emotional distress[.]'" *Id.* at 699 (quoting N.C. Gen. Stat. § 14-277.3A(c)(2) (alteration in original)). The court held that, as applied to that case, the statute was a content-based restriction on the defendant's speech which did not survive strict scrutiny. *Id.* at 701.

5. *Bey* (Ohio)

In *Bey v. Rasawehr*, 161 N.E.3d 529 (Ohio 2020), the court vacated as an impermissible prior restraint on speech a protective order issued pursuant to a stalking statute that criminalized "knowingly" "engaging in a pattern of conduct" that "cause[s] mental distress to [another] person or a family or household member of the other person." *Id.* at 534 (quoting Ohio Rev. Code Ann. § 2903.211(A)). The trial court had determined that defendant Rasawehr had made statements on the internet asserting that two relatives had been culpable in the death of a third person and that he had done so knowing or intending that these statements would cause the relatives "fear and mental distress." *Id.* at 535. Moreover, these statements had caused the relatives to "fear[]" that Rasawehr might cause them "physical harm." *Id.* at 535. Rasawehr was enjoined from making future internet postings about his relatives. *Id.* at 533.

Citing *Reed*, the court deemed the protective order a content-based based regulation of speech because "[i]t is inescapable that a regulation of speech 'about' a specific person (or likely any other specific subject of discussion) is a regulation of the content of that speech." *Id.* at 538-39. It vacated the protective order because it could not survive strict scrutiny. *Id.* at 546. It noted that the expedited procedure that had been utilized for obtaining the protective order was meant to address "imminent threats" and was "not designed to be a shortcut or substitute for conventional civil remedies."[15] *Id.* at 545-46

III. THE TRIAL COURT'S INTERPRETATION WOULD CHILL CONSTITUTIONALLY PROTECTED SPEECH AND UNDERMINE THE STATUTE'S INTENT

A principal purpose of the stalking statute was to combat "domestic violence and … and sexual assault." D.C. Code § 22-3131. But, if the law is applied as the trial court and the panel which initially decided this appeal thought it should be, the statutory framework could be perversely misused to undermine this objective by restricting public discussion of instances of sexual and domestic abuse. The

[15] Numerous other cases are consistent with the reasoning of those discussed above. *See, e.g., State v. Smith*, 452 P.3d 382 (Kan. Ct. App. 2019) (protective order was unconstitutional content-based speech restriction, reversing conviction, citing *Reed*); *United States v. Cook*, 472 F. Supp. 3d 326, 337-340 (N.D. Miss. 2020) (dismissing indictment under federal stalking statute based on Facebook posts—prosecution would be content-based restriction and "government's interest in criminalizing speech that inflicts emotional distress is not a compelling one").

dissemination of information about such incidents is critical to society's ability to understand and combat such abuse.

In October 2017 the New York Times ran an article suggesting that, for decades, renowned Hollywood producer Harvey Weinstein had repeatedly sexually harassed others in the industry who were far less powerful than himself. Jodi Kantor and Megan Twohey, N.Y. Times, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades* (Oct. 5, 2017), www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html. Eight women described to the newspaper incidents of apparent sexual harassment. *Id.* The article helped fuel the Me Too movement, "a movement to help victims of sexual harassment and assault" which has had a profound impact on our society by "bolstering the credibility of victims of sexual assault and harassment." *Elliott v. Donegan*, 469 F. Supp. 3d 40, 51 (E.D.N.Y. 2020).

But, had the women who spoke to the Times been subject to District of Columbia law, they might not have come forward—both the trial court's reasoning and language in the subsequent panel decision suggest that speaking out as they did might be a crime in this jurisdiction. One passage from the panel majority's opinion, which implies that the trial court reached the correct result despite using a flawed legal framework, illustrates the point. According to the panel,

> it is not clear to us whether the [mistake about the reach of the First Amendment] ultimately affected the [trial]

> court's conclusion about stalking. The court repeatedly focused on Mr. Mashaud's course of conduct intended to cause serious alarm to Mr. Boone by taking steps to contact his co-workers, friends, and family, in a manner designed to come to Mr. Boone's attention, about "very personal matters" involving Mr. Boone. The court repeatedly used the phrase "personal matters such as," suggesting that it was not the particular content of the [*sic*] Mr. Mashaud's messages, but instead the very personal nature (***potential sexual harassment***, an extramarital affair) of what Mr. Mashaud chose to expose to people who were in Mr. Boone's circle but with whom Mr. Mashaud did not have relationships, that drew the trial court's focus. It appears to us that the trial court might have reached the same conclusion even if it had understood that communications about particular matters of private concern enjoy a measure of constitutional protection.

Mashaud, 256 A.3d at 239 (emphasis added).

In other words, in the panel's apparent view, Mashaud's communications may be criminal because he caused "serious alarm" to Boone by telling people he did not know very private information about Boone, including Boone's possible involvement in sexual harassment. But Mashaud's conduct closely parallels that of the women who spoke to the Times. Like Weinstein, with respect to his accusers, Boone, a vice president, was in a position of power and influence over Ms. W., an intern. Like Boone, Weinstein's accusers communicated information "of a very personal nature" about him, including his involvement in "potential sexual harassment," to persons with whom they "did not have relationships," information that they surely knew would cause "serious alarm" to Weinstein.

Of course, Mashaud is not the potential victim of harassment but the potential victim's spouse. But there is no legal basis for conditioning the permissibility of the dissemination of such information on whether the speaker was the victim of potentially inappropriate sexual conduct or a person closely connected to the victim (or a journalist). Moreover, even though Mashaud's wife was not a party before the trial court, the CPO that it issued bound both her and Mashaud, ordering her not to "harass, or stalk" Boone.[16] JA 16.

These considerations further support Mashaud's view that the trial court interpreted the stalking statute in a manner both inconsistent with the intent of its drafters and with the protections of the First Amendment. *See Alvarez*, 567 U.S. at 722 (reviewing "[t]he probable, and adverse, effect of [a statute] on freedom of expression" to support conclusion that statute was unconstitutional).

CONCLUSION

For the foregoing reasons, this court should reverse the trial court's judgment and order that the claims against Mashaud be dismissed with prejudice.

[16] The decision in Mashaud's initial appeal held that he lacked standing to challenge the CPO's restrictions on his wife's conduct. *Mashaud I*, at 2 n.2.

Date: April 1, 2022

Respectfully submitted,

/s/Matthew B. Kaplan

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CERTIFICATE OF SERVICE

I certify that the foregoing (including any appendix or other accompanying documents) was served by this court's electronic filing system, on the date indicated below, on all counsel who have registered for electronic filing, including Governor Jackson, counsel for Appellee, and Arthur Spitzer, counsel for Amicus.

/s/Matthew B. Kaplan
Matthew B. Kaplan
Date: April 1, 2022

ADDENDUM – Relevant Statutory Provisions

Provisions of the District of Columbia Code Relating to Stalking

District of Columbia Official Code
Title 21
Chapter 31A – Stalking

§ 22-3131. Legislative intent.

(a) The Council finds that stalking is a serious problem in this city and nationwide. Stalking involves severe intrusions on the victim's personal privacy and autonomy. It is a crime that can have a long-lasting impact on the victim's quality of life, and creates risks to the security and safety of the victim and others, even in the absence of express threats of physical harm. Stalking conduct often becomes increasingly violent over time. The Council recognizes the dangerous nature of stalking as well as the strong connections between stalking and domestic violence and between stalking and sexual assault. Therefore, the Council enacts this law to encourage effective intervention by the criminal justice system before stalking escalates into behavior that has even more serious or lethal consequences.

(b) The Council enacts this stalking statute to permit the criminal justice system to hold stalkers accountable for a wide range of acts, communications, and conduct. The Council recognizes that stalking includes a pattern of following or monitoring the victim, or committing violent or intimidating acts against the victim, regardless of the means.

§ 22-3132. Definitions.

For the purposes of this chapter, the term:

(1) "Any device" means electronic, mechanical, digital or any other equipment, including: a camera, spycam, computer, spyware, microphone, audio or video recorder, global positioning system, electronic monitoring system, listening device, night-vision goggles, binoculars, telescope, or spyglass.

(2) "Any means" includes the use of a telephone, mail, delivery service, e-mail, website, or other method of communication or any device.

(3) "Communicating" means using oral or written language, photographs, pictures, signs, symbols, gestures, or other acts or objects that are intended to convey a message.

(4) "Emotional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling;

(5) "Financial injury" means the monetary costs, debts, or obligations incurred as a result of the stalking by the specific individual, member of the specific individual's household, a person whose safety is threatened by the stalking, or a person who is financially responsible for the specific individual and includes:

(A) The costs of replacing or repairing any property that was taken or damaged;

(B) The costs of clearing the specific individual's name or his or her credit, criminal, or any other official record;

(C) Medical bills;

(D) Relocation expenses;

(E) Lost employment or wages; and

(F) Attorney's fees.

(6) "Personal identifying information" shall have the same meaning as provided in § 22-3227.01(3).

(7) "Specific individual" or "individual" means the victim or alleged victim of stalking.

(8) "To engage in a course of conduct" means directly or indirectly, or through one or more third persons, in person or by any means, on 2 or more occasions, to:

(A) Follow, monitor, place under surveillance, threaten, or communicate to or about another individual;

(B) Interfere with, damage, take, or unlawfully enter an individual's real or personal property or threaten or attempt to do so; or

(C) Use another individual's personal identifying information.

§ 22-3133. Stalking.

(a) It is unlawful for a person to purposefully engage in a course of conduct directed at a specific individual:

(1) With the intent to cause that individual 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;

(2) That the person knows 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; or

(3) That the person should have known would cause a reasonable person in the individual's circumstances 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.

(b) This section does not apply to constitutionally protected activity.

(c) Where a single act is of a continuing nature, each 24-hour period constitutes a separate occasion.

(d) The conduct on each of the occasions need not be the same as it is on the others.

§ 22-3134. Penalties.

(a) Except as provided in subsections (b) and (c) of this section, a person who violates § 22-3133 shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 12 months, or both.

(b) A person who violates § 22-3133 shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 5 years, or both, if the person:

(1) At the time, was subject to a court, parole, or supervised release order prohibiting contact with the specific individual;

(2) Has one prior conviction in any jurisdiction of stalking any person within the previous 10 years;

(3) At the time, was at least 4 years older than the specific individual and the specific individual was less than 18 years of age; or

(4) Caused more than $ 2,500 in financial injury.

(c) A person who violates § 22-3133 shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 10 years, or both, if the person has 2 or more prior convictions in any jurisdiction for stalking any person, at least one of which was for a jury demandable offense.

(d) A person shall not be sentenced consecutively for stalking and identify theft based on the same act or course of conduct.

§ 22-3135. Jurisdiction.

(a) An offense shall be deemed to be committed in the District of Columbia if the conduct on at least one occasion was initiated in the District of Columbia or had an effect on the specific individual in the District of Columbia.

(b) A communication shall be deemed to be committed in the District of Columbia if it is made or received in the District of Columbia or, if the specific individual lives in the District of Columbia, it can be electronically accessed in the District of Columbia.