No. 16-FM-383

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)
Superior Court No. CPO-739-14

EN BANC BRIEF OF *AMICI CURIAE* PROFESSOR EUGENE VOLOKH AND PROTECT THE FIRST FOUNDATION SUPPORTING APPELLANT AND REVERSAL

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IDENTITY, INTEREST, AND AUTHORITY OF *AMICI CURIAE*

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Protect the First Foundation (PT1) is a nonprofit nonpartisan organization that advocates for protecting First Amendment rights in all applicable arenas. PT1 is concerned about all facets of the First Amendment and advocates on behalf of people from across the ideological spectrum, people of all religions and no religion, and people who may not even agree with the organization's views.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under D.C. Code § 22-3133(a) (coupled with the definitions in § 22-3132), it is generally a crime to (among other things)

- "directly or indirectly . . . in person or by any means, on 2 or more occasions"
- "communicate . . . about another individual"
- while "inten[ding]," "know[ing]," or under circumstances where the speaker "should have known"
- that such communications would cause "significant mental suffering or distress."

Yet even outrageous speech—such as protests denouncing the military near a funeral for a fallen servicemember or publications satirically saying that a minister had sex with his mother—cannot result in civil liability even if they actually cause significant emotional destress. *See*, *e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 458-60 (2011); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50-52 (1988).

The statute's overbreadth could theoretically be remedied by § 22-3133(b)'s savings clause for "constitutionally protected activity," but that term is undefined and ambiguous. As the panel correctly recognized, it could be read as either

1. protecting all speech that falls outside "'existing, well-established First Amendment exceptions,'" such as for true threats, or

2. being "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.'"

Panel Op. at 8 (describing without endorsing the two options). Interpretation 1 would eliminate the statute's overbreadth, as speakers could look to these well-established exceptions and determine with some confidence whether their planned speech will fall within an exception. But because of the complexity of First Amendment doctrine, interpretation 2 would be far too vague to cure the statute's overbreadth.

This Court should thus adopt interpretation 1 of § 22-3133(b). Under that interpretation, Mashaud's speech about Boone's extramarital affair would be exempted from the statute's coverage, because his speech did not fall within any well-established First Amendment exception. And well-established First Amendment doctrines demonstrate that Mashaud's speech does not lose First Amendment protection even if it touches on matters of private concern, because the public/private concern distinction is not a general test for First Amendment protection. That distinction is instead relevant only to narrow categories of speech like defamation, *see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), and restrictions on government employee speech, *see Connick v. Myers*, 461 U.S. 138 (1983)—exceptions that do not apply to Mashaud's speech here.

Mashaud's speech likewise would not lose First Amendment protection based on an inference about his purpose in speaking. And his speech would also not fit

within the speech integral to criminal conduct exception, which Boone invoked at the thirteenth hour—*see* Panel Op. at 26-27 n.7 (Beckwith, J., dissenting)—because that exception applies only to speech that is integral to *another* crime, not to speech that just violates the very statute under which the defendant is being prosecuted.

Finally, this Court should choose the established-First-Amendment-exceptions interpretation of § 22-3133(b) because the stalking statute would otherwise authorize the government to issue unconstitutional prior restraints. This Court should therefore reverse the civil protective order against Mashaud, *see* Panel Op. at 27 (Beckwith, J., dissenting), and remand to the trial court with instructions that the case be dismissed.

ARGUMENT

I. Unless the exemption for "constitutionally protected activity" covers all speech except that within established First Amendment exceptions, the stalking statute is unconstitutionally overbroad and vague

By its terms the stalking statute "does not apply to constitutionally protected activity." D.C. Code § 22-3133(b). The only constitutionally acceptable construction of this exemption is that "constitutionally protected activity" covers all speech except "the categories of speech the Supreme Court has recognized as unprotected by the First Amendment." Panel Op. at 19 (Beckwith, J., dissenting) (citation and footnote omitted). The alternative construction—that the exemption covers only speech the statute "isn't allowed to cover" because application of the statute to that speech

would fail strict scrutiny or some other similar test, *id.* at 18 (Beckwith, J., dissenting)—would be unconstitutionally vague. And, because of that vagueness, the savings clause would be powerless to save the statute from being invalidated as overbroad.

A. The stalking statute would be unconstitutionally overbroad in the absence of the savings clause

The Supreme Court has explained that "a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (cleaned up). The overbreadth analysis requires courts to (1) construe the statute to determine its reach, and then (2) determine whether the statute, as construed, "criminalizes a substantial amount of protected expressive activity." *United States v. Williams*, 553 U.S. 285, 293, 297 (2008).

The stalking statute "create[s] a criminal prohibition of alarming breadth." *Stevens*, 559 U.S. at 474. The statute covers "a wide range of acts, *communications*, and conduct" "even in the absence of express threats of physical harm." § 22-3131(b) (emphasis added). The statute's "current language" captures "all speech that a person should know would cause an individual to feel alarmed, disturbed, or distressed."[1] But, as the Criminal Code Reform Commission noted, while "a person

[1] Criminal Code Reform Comm'n, Recommendations for the Council and Mayor, Commentary on Subtitle II. Offenses Against Persons 471 (2021), https://

who exposes another person's extramarital affair" will likely cause disturbance or distress, this behavior would still "likely [be] protected as free speech." *Id.* at 471 n.84 (citing *Stevens*, 559 U.S. at 479).

Thus, for instance, the targets of vitriolic protests near a soldier's funeral, *cf. Snyder*, 562 U.S. at 448-49, likely experience significant mental distress. So do hold-outs from civil rights boycotts whose names are then publicized as supposed traitors to the cause. *Cf. NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 903-04 (1982). So do people who see Nazi parades through heavily Jewish neighborhoods, *Nat'l Socialist Party v. Skokie*, 432 U.S. 43, 43 (1977), or passersby who observe burning crosses at racist rallies, *Virginia v. Black*, 538 U.S. 343, 348-49 (2003). Yet the speech that distresses those people is still constitutionally protected, as those cases hold.

The stalking statute is also overbroad because it "include[s] both communications to a person and communications *about* a person without distinction." CCRC Commentary at 471 (citing D.C. Code § 22-3132(8)(C)) (emphasis added). Sharply critical speech is among the "many distressing communications 'about' an

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ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/Commentary-on-Subtitle%20II.pdf [hereinafter CCRC Commentary]. The CCRC is an independent agency established and funded by the D.C. Council "to reexamine the District's antiquated criminal code and make recommendations for 'reform.'" *Fleming v. United States*, 224 A.3d 213, 240 (D.C. 2020) (Easterly & Beckwith, JJ., concurring) (citing D.C. Code §§ 3-151, -152 (2016 Repl.)).

individual" that—though capable of producing substantial emotional distress—generally remain constitutionally protected. *Id.* at 471-72 (footnoted omitted).

In *Organization for a Better Austin v. Keefe*, for instance, the Supreme Court held that Keefe, a local real estate agent subjected to a critical campaign—which today might be called "naming and shaming"—could not enjoin the distribution of leaflets criticizing his business: his "interest in being free from public criticism . . . [did not] warrant[the] use of the injunctive power of a court." 402 U.S. 415, 419 (1971). Similarly, speech critical of Boone's extramarital affair is protected even if Boone suffered substantial emotional distress because of it.

B. The savings clause must be interpreted to protect all speech except that which fits within the existing First Amendment exceptions

Section 22-3133(b) does not define "constitutionally protected activities," and the panel majority likewise declined to "delineate[]" the contours of the exemption. Panel Op. at 8. The safe harbor is susceptible to at least two interpretations. One interpretation—which a D.C. court has already adopted, *see Gray v. Sobin*, No. 2013 CPO 3690, 2014 WL 624406, at *1 (D.C. Super. Ct. Feb.14, 2014)—provides that the exemption covers all speech except for that falling into "existing, well-established First Amendment exceptions." Another interpretation is that the safe harbor exempts only speech that a court eventually finds to be constitutionally protected, potentially after applying the entire edifice of First Amendment law, including tests

such as "strict scrutiny" (or, for some kinds of speech or some kinds of restrictions, "intermediate scrutiny").

But "a general savings provision 'cannot substantively operate to save an otherwise invalid statute . . . [if it is] a mere restatement of well-settled constitutional restrictions on the construction of statutory enactments,'" or if the safe harbor has constitutional defects of its own. *Long v. State*, 931 S.W.2d 285, 295 (Tex. Crim. App. 1996) (quoting *CISPES v. FBI*, 770 F.2d 468, 474 (5th Cir. 1985)). Requiring defendants to prove that their speech was protected, under a nonspecific savings clause, "would relegate the First Amendment issue to a case-by-case adjudication, creating another vagueness problem." *Id.* at 297 (citation and quotation marks omitted).

Thus, as the Minnesota Supreme Court has explained, "a statement in a criminal statute that a person cannot be prosecuted if the conduct is protected by the First Amendment does not remove the risk of chilling protected activities because the general public may not understand what speech is protected, particularly on the margins." *Matter of Welfare of A.J.B.*, 929 N.W.2d 840, 851 (Minn. 2019). Accordingly, because a saving statute may not mitigate all "constitutional risk to be avoided by the overbreadth doctrine," a "Legislature cannot save a statute that is otherwise unconstitutionally overbroad by including language stating that the statute does not reach speech or expression protected by the First Amendment." *Id.* Indeed, because

"First Amendment doctrines are often intricate and/or amorphous," "attempt[ing] to charge people with notice of First Amendment caselaw would undoubtedly serve to chill free expression." *CISPES*, 770 F.2d at 474. An exemption that states, "[t]his [s]ection does not apply to an exercise of the right to free speech or assembly that is otherwise lawful" "does not prevent unwarranted prosecutions under a case-by-case application of the 'communicates to or about' language." *People v. Relerford*, 104 N.E.3d 341, 355 (Ill. 2017). The Illinois Supreme Court has explained that such an exemption provides no "guidance" about which "distressing communications . . . are subject to prosecution and [which] . . . are not." *Id.* at 355. Faced with such an exemption, then, citizens are left to "tease out that difference" on their own, running the risk that they will be prosecuted according to a "case-by-case discretionary decision by law enforcement officers and prosecutors." *Id.*

Even a savings clause, accordingly, is not sufficient to "remediate the extreme overbreadth" of a statute because it "does not solve the problem of the chilling effect on innocent speakers who fear prosecution based on negligently made distressing communications to or about a person." *Id.* More broadly, statutes which "incorporate by reference a large body of changing and uncertain [constitutional] law . . . not always reducible to specific rules . . . [and] expressible only in general terms," lack "the basic specificity necessary for criminal statutes under our system of government." *Screws v. United States*, 325 U.S. 91, 96 (1945).

For these reasons, and because "ambiguous statutory language [should] be construed to avoid serious constitutional doubts,'" *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1236 (D.C. 2016), § 22-3133(b) should be read as excluding from the statute's coverage all speech except that which falls into well-established First Amendment exceptions.

II. Mashaud's speech cannot lose its constitutional protection on the grounds that it was on a matter of private concern

Regardless of how § 22-3133 is interpreted, Mashaud's speech cannot be made criminally punishable, in whole or in part, on the theory (employed by the trial court) that it is merely on a matter of private concern. *See* Panel Op. at 9 (noting that the trial court "misapprehend[ed] the extent of protection provided by the First Amendment for communications about matters of purely private concern").

Some Supreme Court cases do use the public/private concern distinction in certain contexts, such as government employee speech or defamation litigation. But the Court has also made clear that there is no general exception for private concern speech. The government cannot "generally prohibit or punish, in its capacity as sovereign, speech on the ground that it does not touch upon matters of public concern." *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 600 (2008) (citing *Connick*, 461 U.S. at 147). "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 by all persons in its jurisdiction." *Connick*, 461 U.S. at 147.

Consider, for instance, the facts of *Ayala v. Washington*, where plaintiff commercial airline pilot sued the defendant for libel, based on defendant's letters to the plaintiff's employer "alleging that [he] had engaged in several acts of misconduct, including the use of marijuana while off duty." 679 A.2d 1057, 1059 (D.C. 1996). This Court held that these letters were of private concern—which therefore lessened the plaintiff's burden of proving libel—because they "merely communicated information regarding the alleged misconduct of a single private individual, albeit misconduct that could have a significant effect on public safety." *Id.* at 1068 (emphasis added).

Yet that the private/public concern line can be used in determining when *false* statements can lead to *civil* liability cannot mean that it would authorize *criminal* punishment of *true* statements. Surely a hypothetical future Ms. Washington could not be prosecuted for twice accurately reporting to Mr. Ayala's employer that he was using marijuana off-duty. The trial court's suggestion that private concern speech might be punishable—which is to say covered by § 22-3133(a) and not saved by § 22-3133(b)—could lead to precisely that sort of criminal punishment of true allegations. After all, a court could easily find that the hypothetical Ms. Washington "should have known [such allegations] would cause a reasonable person in [Mr.

Ayala's circumstances]" to "[s]uffer emotional distress," since most people would be distressed even by accurate speech that jeopardized their livelihoods. And if—as the panel majority correctly concludes—even the trial court erred in drawing this line in deciding what speech is constitutionally protected under § 22-3133(b), ordinary D.C. residents cannot be expected to more accurately predict how § 22-3133(b) would be applied.

Indeed, the public/private concern line has proved to be quite unpredictable and malleable even in civil cases—in a way that suggests that it would be unconstitutional in criminal cases. As noted above, *Ayala* concluded that a statement to an airline that its pilot uses marijuana is on a matter of private concern. By contrast, *Veilleux v. NBC* held that a report naming a trucker who tested positive for drugs was a matter of public concern, because "drug use, particularly where related to public safety, may be a legitimate matter of public concern." 206 F.3d 92, 104, 132, 134 (1st Cir. 2000).

In the specific context of sexual misconduct allegations, *W.J.A. v. D.A.* held that the defendant's claim that his uncle (the plaintiff) sexually assaulted him when the defendant was a minor was a matter of private concern. 210 N.J. 229, 233-34, 245 (2012). *Anonsen v. Donahue*, on the other hand, held that the plaintiff's grandmother spoke on a matter of public concern when she stated that the plaintiff was born as the result of incestuous rape. 857 S.W.2d 700, 701 (Tex. App. 1993).

And the same vagueness of the public/private concern line is evident even as to political speech. For instance, in *Mississippi Commission on Judicial Performance v. Osborne*, the Mississippi Supreme Court ruled in favor of suspending a black trial court judge who, when running for reelection, told a predominantly black political organization, "White folks don't praise you unless you're a damn fool. Unless they think they can use you. If you have your own mind and know what you're doing, they don't want you around." 11 So. 3d 107, 109 (Miss. 2009). Osborne's statement, the court held, "is not worthy of being deemed a matter of legitimate political concern in his reelection campaign, but merely an expression of his personal animosity." *Id.* at 113. But five years earlier, in *Mississippi Commission on Judicial Performance v. Wilkerson*, the same court held that sharply antigay statements by a sitting judge (made in a letter to the editor and then in a radio interview) were on a matter of public concern. 876 So. 2d 1006, 1008, 1011-13 (Miss. 2004).

III. Mashaud's speech cannot lose its constitutional protection based on a court's finding about its supposed lack of legitimate purpose

The panel majority nevertheless suggested that Mashaud's speech might or might not be constitutionally protected depending on his purpose in speaking. Panel Op. at 11-12. But "under well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection." *Wis. Right to Life, Inc. v. FEC*, 551 U.S. 449, 468 (2007) (cleaned up). This is because,

> [A]n intent-based test would chill core political speech by opening the door to a trial on every [item of speech], on the theory that the speaker actually [had unlawful intent] . . . . An intent-based standard "blankets with uncertainty whatever may be said," and "offers no security for free discussion." . . . "First Amendment freedoms need breathing space to survive." An intent test provides none.

Id. (lead op.) (internal citation and paragraph break omitted). Justice Scalia's three-justice concurrence agreed on this point:

> [Purpose-based tests] ultimately depend . . . upon a judicial judgment . . . that rests upon consideration of innumerable surrounding circumstances which the speaker may not even be aware of, and that lends itself to distortion by reason of the decisionmaker's subjective evaluation of the importance or unimportance of the challenged speech. . . . Under these circumstances, "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas."

Id. at 493-94 (Scalia, J., concurring) (internal citation omitted).

For this reason, *Bolles v. People* correctly struck down a harassment statute that had a "legitimate purpose" exception, 541 P.2d 80, 83 (Colo. 1975): A "delegation of power to judges or juries" to determine the propriety of a defendant's motive without "ascertainable standards" opens the door to arbitrary enforcement, because what constitutes a legitimate purpose is often a matter of dispute. *Id.* And due to the natural human tendency to think the worst of those with whom we disagree, prosecutors', judges', and jurors' inferences about people's motives will often be subconsciously influenced by the viewpoint of the speech.

We can see the vagueness of the "legitimate purpose" test in the disparate and conflicting conclusions that courts reach on the subject. In New York, for example, "no purpose of legitimate communication" only covers speech that consists of "threats and/or intimidating or coercive utterances." *People v. Stuart*, 797 N.E.2d 28, 41 (N.Y. 2003). But across the Hudson River, mailing a torn-up copy of a support order to one's ex-wife is seen as "serv[ing] no legitimate purpose." *State v. Hoffman*, 695 A.2d 236, 243 (N.J. 1997). *See generally* Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking*," 107 Nw. L. Rev. 731, 779 n.228 (2013) (collecting cases).

Focusing on a speaker's purpose or purportedly "vindictive motive" also infringes listeners' rights to hear the speaker's message. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976) (recognizing that the First Amendment protects listeners' right to receive information). Even when people do "speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964).

Interpreting § 22-3133(b) as simply saying that the law "doesn't mean to cover that speech or action that it isn't allowed to cover," Panel Op. at 8, would thus also make § 22-3133 unconstitutionally vague. It would (1) fail to give "person[s] of ordinary intelligence a reasonable opportunity to know what is prohibited,"

Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); (2) fail to "provide explicit standards for [the government officials] who apply" the statute, thereby rendering prosecutions under the statute susceptible to "resolution on an ad hoc and subjective basis, with . . . attendant dangers of arbitrary and discriminatory application," *id.* at 108-09; and (3) "operate[] to inhibit the exercise of" speech, because the law's "[u]ncertain meaning[would] inevitably lead citizens to steer far wider of the unlawful zone than [they would] if the boundaries of the forbidden areas were clearly marked," *id.* at 109 (cleaned up). The well-established First Amendment exceptions, while not perfectly predictable or fleshed out in every conceivable application, provide a far firmer basis for fair notice than an inquiry into whether the speaker had supposedly improper purposes.

IV. Mashaud's speech did not fit within an exception for speech "integral to criminal conduct"

Boone further asserts that Mashaud's speech was "integral to criminal conduct, the criminal conduct in this case being that of 'stalking' as statutorily proscribed." Br. for Appellee at 15, No. 16-FM-383 (filed Oct. 27, 2016). But the argument that when "the government criminalize[s] any type of speech, then anyone engaging in that speech [can] be punished because the speech would automatically be integral to committing the offense," *United States v. Matusiewicz*, 84 F. Supp. 3d 363, 369 (D. Del. 2015), is "circular," Panel Op. at 24 (Beckwith, J., dissenting). It should therefore not be enough that speech itself be labeled illegal conduct; the

speech must instead help cause or threaten *other* illegal conduct. Here, because "there is no suggestion that Mashaud's messages reflected an intent to induce or commence" any crime other than the stalking statute itself, the speech does "not lack constitutional protection on the ground that it was integral to criminal conduct." Panel Op. at 26 (Beckwith, J., dissenting).

In *Matter of Welfare of A.J.B.*, for instance, the Minnesota Supreme Court "rejected as circular the State's argument that" its application of a stalking-by-mail statute to the defendant was constitutionally valid because the prohibited speech was "an integral part of a violation of the statute." 929 N.W.2d at 852. Likewise, in *State v. Shackelford*, the North Carolina Court of Appeals held that the defendant's social media posts about the complainant did not fall "within the 'speech integral to criminal conduct' exception," and thus could not be punished under a stalking statute, because the only crime the defendant was charged with was "his speech itself." 264 N.C. App. 542, 556 (2019); *see also Relerford*, 104 N.E.3d at 352 (explaining that speech is only integral to criminal conduct when it "is a mechanism or instrumentality in the commission of a separate unlawful act," and only when there is a "proximate link" between the speech and the criminal conduct); *State v. Burkert*, 174 A.3d 987, 1000 (N.J. 2017) (explaining that speech "cannot be transformed into criminal conduct" based on "[t]he circularity of the language of [a statute]"); *State v. Doyal*, 589 S.W.3d 136, 143 (Tex. Crim. App. 2019) (observing that the speech integral to

criminal conduct exception only "involve[s] speech that furthers some other activity that is a crime"); *People v. Marquan M.*, 24 N.Y.3d 1, 6-7 (2014) (observing the same when striking down a "cyberbullying" statute).

The progenitor of the speech integral to criminal conduct exception, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949), likewise does not help Boone. There, Empire Storage & Ice refused to join an unlawful cartel, and a "union thereupon informed Empire that it would use other means at its disposal to force Empire to come around to . . . [its] view." *Id.* at 492. When "Empire still refused to agree," "[i]ts place of business was promptly picketed by union members." *Id.* at 492. The government could prohibit the union's picketing only because the picketing essentially solicited a separate criminal act by Empire: violation of state antitrust laws. *Id*. at 498. *See* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 991-93 (2016).

Beyond *Giboney*, were Boone's understanding of the exception correct, the Supreme Court in *Cohen v. California* would have affirmed the defendant's disturbing the peace conviction for entering court wearing a jacket embroidered with "Fuck the Draft," 403 U.S. 15, 16 (1971), as that jacket would have been "integral to the criminal conduct" of disturbing the peace. But in fact, *Cohen* held that the state could not criminalize such speech, because the speech did not fall within an established First Amendment exception. *Id.* at 19-20.

The cases cited by the panel majority—which interpreted the federal stalking statute—likewise do not support the theory that Mashaud's speech is unprotected as supposedly "integral to criminal conduct." In *United States v. Gonzalez*, for instance, the defendant's speech fell within the defamation exception. 905 F.3d 165, 193 (3d Cir. 2018) ("Gonzalez, acting along with the other members of her family as a member of the conspiracy, defamed [the victim] by falsely labeling her as a mentally unfit abuser who sexually molested her own children"). Gonzalez's criminal conspiracy also involved other unlawful conduct. *Id*. at 174-77 (describing the facets of Gonzalez's conspiracy, which involved kidnapping, submission of false reports to child protective services, violation of a court order, surveillance of the victim, and premeditated killing of the victim—along with her friend and two police officers—"in the lobby of . . . [a] County Courthouse"). The speech integral to conduct exception was unnecessary to that court's holding.

Similarly, in *United States v. Petrovic*, the "communications for which" the defendant was convicted under the interstate stalking statute were "integral" to his crime of "interstate extortionate threat[s]," as those communications "constituted the means of carrying out" the threats. 701 F.3d 849, 855 (8th Cir. 2012) ("Because Petrovic's harassing and distressing communications were integral to his criminal conduct of extortion . . . the communications were not protected by the First Amendment."); *see also United States v. Hobgood*, 868 F.3d 744, 748 (8th Cir. 2017) ("This

court held in *Petrovic* that extortionate communications that threatened another's reputation, and communications carrying out the threat, were not protected by the First Amendment.").

Other cases cited by the majority involved defendants who made communications that either fell into well-established First Amendment exceptions or could otherwise be permissibly restricted under unambiguous statutes. In *United States v. Osinger*, the defendant sent "threatening text messages," 753 F.3d 939, 947 (9th Cir. 2014), which might well have fallen into the true threat exception. He also publicly disseminated "sexually explicit" photos and videos of his victim. *Id*. at 942. *See also United States v. Ackell*, 907 F.3d 67, 71 (1st Cir. 2018) (rejecting the defendant's First Amendment challenge where his speech consisted of warning his victim "that if she stopped sending him [nude] photos, he would disseminate [nude] photos of her that he had saved among her friends, classmates, and family"). Many states have criminalized "revenge porn," and given the compelling privacy interests those laws serve, they might well pass strict scrutiny if narrowly tailored. *See State v. Katz*, 179 N.E.3d 431, 455-60 (Ind. 2022) (holding that a state revenge porn statute survived strict scrutiny).

In any event, the Minnesota Supreme Court's opinion in *Matter of Welfare of A.J.B.* well explains why the federal stalking statute cases do not justify broad statutes such as D.C.'s (or Minnesota's). For instance, the Minnesota court noted that

the federal stalking statute's "malicious intent requirement figures prominently in federal courts' decisions finding that the . . . [statute] is not overbroad." 929 N.W.2d at 856 (citing cases). The Minnesota and the D.C. stalking statutes, by contrast, punish speech even when the speaker is merely negligent about the possible effect of his speech. *See* D.C. Code § 22-3133(a)(3) (providing that speakers are liable if they "should have known" that their communications "would cause a reasonable person" to "suffer emotional distress"). The "[l]egislature's adoption of a negligence standard allows the statute to reach all types of acts . . . that have a tendency to disturb others," a far broader range of speech than communications motivated by a speaker's malicious intent. *Matter of Welfare of A.J.B.,* 929 N.W.2d at 855.

The federal stalking statute also requires proof of "substantial harm to the victim," which serves to "limit[] the statute['s]" scope and save it from overbreadth, as a complainant can actually adduce proof of such harm in a relatively narrow range of cases. *Id*. The Minnesota statute, like D.C.'s, does not require proof of "substantial harm to the victim." *Id.* at 850.

These federal cases therefore do not conclude that otherwise-constitutionally-protected speech, unlinked to any other unlawful act, can be "integral to criminal conduct." And in any event, the circular conception of the speech integral to criminal conduct exception is likely incompatible with this Court's own precedents. In *Richardson v. Easterling*, this Court held that, because "[a] defamatory statement is not

. . . a criminal act," it is incapable of "implicat[ing] the Intrafamily Offenses Act." 878 A.2d 1212, 1217 (D.C. 2005). It would be incongruous, then, if Mashaud's truthful statements could be designated as criminal acts simply by being deemed integral to criminal conduct.

V. The stalking statute's breadth and vagueness allows courts to issue unconstitutional civil protective orders

All of these problems are exacerbated by D.C.'s broad enforcement provisions. Under D.C. Code § 16-1005(c)(1), if a court finds "good cause to believe the respondent has committed or threatened to commit a criminal offense against the petitioner," it can "[d]irect[] the respondent to refrain from committing or threatening to commit criminal offenses against the petitioner and other individuals specified in the order." The court can also "[d]irect[] the respondent to perform or refrain from other actions as may be appropriate to the effective resolution of the matter." *Id.* § 16-1005(c)(11).

Applying this statutory language, the court below initially ordered Mashaud "not [to] communicate about [Boone] by name or by implication on the internet or social media." (J.A. 17.) This order was "both content-based, because it prohibits the discussion of a particular topic," "and a prior restraint on speech, as it forbids certain communications . . . in advance of the time that such communications are to occur or before the speaker has the opportunity to make them." *Facebook Inc. v. Pepe*, 241 A.3d 248, 261 (D.C. 2020) (cleaned up). "[P]rior restraints on speech and

publication are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Such restraints therefore "come with a 'heavy presumption' against their constitutional validity." *Facebook*, 241 A.3d at 261 (footnote omitted).

Though that order has since been vacated, future courts are likely to be tempted into issuing similar orders; after all, since § 22-3133 defines a "criminal offense[]," § 16-1005 seems to contemplate prohibitions on such criminal conduct. Unless § 22-3133(b) is interpreted as limited to speech that falls within traditionally recognized exceptions, such as for true threats or fighting words, courts are likely to seek to issue future injunctions forbidding speech that may cause emotional distress, much as the trial court in this case initially did. Yet preventing "additional mental anguish" is not a compelling interest that could justify enjoining speech, as "speech does not lose its protected character simply because it may be upsetting and cause distress or embarrassment." *Bey v. Rasawehr*, 161 N.E.3d 529, 544 (Ohio 2020) (citing *Snyder*, 562 U.S. at 458).

Boone suggests that restricting Mashaud's speech in this case is justified by the "substantial government interest" in protecting "personal privacy and autonomy." Br. for Appellee at 12. Infringement of "privacy rights is, however, an insufficient basis for issuing a prior restraint." *Matter of Providence Journal Co.*, 820 F.2d 1342, 1350 (1st Cir. 1986). For this reason, *Organization for a Better Austin v.*

Keefe vacated a prior restraint barring the petitioner from disseminating its criticisms of the respondent's business, even though the speech was thought to work "an invasion of privacy"—that invasion being the "apparent basis for the injunction." 402 U.S. at 419-20. While the respondent's right to privacy may have justified an injunction "to stop the flow of information into his own household," it could not justify stifling "the flow of" damaging "information" about him or his business "to the public." *Id.* at 420. Likewise, Boone's privacy interest might have supported a protective order barring Mashaud from contacting Boone himself. But that interest could not justify preventing Mashaud from disseminating information to the public about Boone, even if that information could lead to Boone being "social[ly] ostraci[zed]." *Claiborne Hardware Co.*, 458 U.S. at 925 n.67, 933.

The civil protective order was thus an unconstitutional content-based prior restraint. And, more generally, the protective order shows how the facial breadth of the stalking statute (absent a reading of § 22-3133(b) that would sharply and clearly limit that breadth), combined with the broad authority granted by § 16-1005, encourages judges to impose unconstitutionally broad restraints on speech.

CONCLUSION

In short, D.C. Code § 22-3133(a) is unconstitutionally overbroad. The only way it can be saved is by interpreting § 22-3133(b) as being anchored to the well-established First Amendment exceptions. And once this construction is adopted,

Mashaud's speech would not fall within the statute, as his speech does not fall within any well-established First Amendment exception. This Court should therefore reverse the civil protective order against Mashaud, Panel Op. at 27 (Beckwith, J., dissenting), and remand to the trial court with instructions that the case be dismissed.[2]

Respectfully Submitted,

s/ Erik S. Jaffe

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CERTIFICATE OF SERVICE

I certify that on this 12th day of April, 2022, the foregoing *En Banc* Brief of *Amici Curiae* was filed with the Court's electronic filing system, through which it was transmitted by electronic mail to counsel for the parties, as follows:

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