No. 16-FM-383

(Superior Court No. CP0739-14)

IN THE
DISTRICT OF COLUMBIA
COURT OF APPEALS

LAUREN MASHAUD,

APPELLANT

v.

CHRISTOPHER BOONE,

APPELLEE

and

DISTRICT OF COLUMBIA,

INTERVENOR

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

EN BANC REPLY BRIEF FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Other Authorities

* indicates an authority principally relied on.

INTRODUCTION

The portion of the District of Columbia's stalking law at issue in this case criminalizes engaging in one or more instances of conduct that is intended to, reasonably is expected to or reasonably should be expected to make another person "[f]eel seriously alarmed, disturbed, or frightened" or to "[s]uffer emotional distress." D.C. Code § 22–3133(a). Appellant Mashaud sent several messages to others criticizing Appellee Boone for having had sex with his wife. The appellate issues are: 1) whether, under a proper interpretation of these statutory words, Mashaud's speech violated the statute and 2) whether the First Amendment permits the government to punish such speech. This case involves only speech, not other conduct.

The First Amendment compels this court to hold that what Mashaud did—sending messages that seriously disturbed and upset Boone but that were not true threats or speech within another of the limited subject matter areas that the government may restrict—is not a crime. This result can be achieved by ruling that the principle of constitutional avoidance mandates that the words of the statute

at issue be interpreted in a constitutionally valid manner or by holding that this portion of the statute is unconstitutional when applied to pure speech.[1]

ARGUMENT

I. MASHAUD'S SPEECH DID NOT VIOLATE THE PROPERLY INTERPRETED STATUTE

Mashaud and Intervenor District of Columbia contend that Mashaud's speech did not violate the stalking statute. The District's view is that this conclusion can be reached by a straightforward application of the statute's text and the case law interpreting it. This may be so, but in Mashaud's view the existing case law interpreting the relevant sections of the stalking statute should be clarified to make it clear that it cannot be applied to constitutionally protected speech, as it was in this case.

The District highlights *Coleman v. United States*, 202 A.3d 1127 (D.C. 2019), which held that the statute must be interpreted so that "the level of fear, alarm, or emotional distress must rise significantly above that which is commonly experienced in day to day living, and must involve a severe intrusion on the victim's personal privacy and autonomy. Ordinary uneasiness, nervousness, and unhappiness are insufficient." *Id.* at 1145 (citations, alteration and quotations

[1] In his Brief Boone implies that a Mashaud-published blog also violated the statute. But the trial court's unappealed ruling was that the blog was not stalking. Tr. 4-12-16 at 19-22; JA 38-41.

omitted). The difficulty is that, in this case, Boone contends that Mashaud's speech was a severe intrusion on his personal privacy, significantly greater than what is commonly experienced in everyday living. Boone feared that the disclosure by Mashaud of information he deemed highly personal might cost him his professional reputation and his job. And the trial court credited Boone's claim that Mashaud's messages caused him to seek mental health counseling—Mashaud was required to pay for it.

The interpretation of the statute set out in *Coleman*—which did not involve a First Amendment challenge—is not fully consistent with the First Amendment. As explained in Mashaud's opening brief—and in a recent Third Circuit decision—"[t]he First Amendment protects at least some speech that persistently annoys someone and makes him fearful or timid…. the free speech clause protects a wide variety of speech that listeners may consider deeply offensive." *United States v. Yung*, 37 F.4th 70, 78 (3d Cir. 2022); *see also id.* at 77 ("The First Amendment protects lots of speech that is substantially emotionally distressing." (citing *Snyder v. Phelps*, 562 U.S. 443, 448 (2011); *Hustler Magazine v. Falwell*, 485 U.S. 46, 47-48, 51 (1988))).

Yung, decided after Mashaud filed his opening *en banc* brief, provides guidance relevant to interpreting this jurisdiction's stalking statute. That case involved a conviction under the federal cyberstalking statute, 18 U.S.C. § 2261A.

See also District Br. at 40 ("The District's law … resembles the federal stalking statute"). *Yung* focused on the meaning of language in the statute criminalizing potentially harassing speech done with the "intent to ... harass [or] intimidate." 37 F.4th at 78 (brackets by the court). The court explained that "harass" and "intimidate" could be interpreted broadly or narrowly. *Id.* at 79. It "acknowledge[d]" that the statutory text strongly suggested that Congress wanted these terms interpreted broadly. *Id.* But doing so would make the provision unconstitutional because broad "definitions of 'harass' and 'intimidate' can describe nonviolent, nonthreatening speech" that cannot be constitutionally prescribed. *Id.* at 78.

The court noted that the doctrine of constitutional avoidance requires that courts faced with two plausible statutory interpretations should avoid the interpretation that raises constitutional issues. *Id.* at 79; *see also Skilling v. United States*, 561 U.S. 358, 405 (2010) ("It has long been our practice … before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction."); *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1236 (D.C. 2016) (construing "ambiguous statutory language" in a manner that "avoid[ed] serious constitutional doubts.").

Consequently, to permit the statute to be constitutionally enforced the court adopted narrow definitions of the statute's key words: "To 'intimidate,' we hold, a

defendant must put the victim in fear of death or bodily injury. And to 'harass,' he must distress the victim by threatening, intimidating, or the like." *Yung*, 37 F.4th at 80.

The statutory interpretation issue in *Yung* closely parallels that now before this court: how the terms "[f]eel seriously alarmed, disturbed, or frightened" or to "[s]uffer emotional distress" should be interpreted. Although a broad interpretation of these words is arguably the most facially reasonable understanding of the statutory text, such an interpretation would reach First Amendment-protected communications.[2] But this court, like the *Yung* court, can save this provision by interpreting it to only reach constitutionally unprotected speech, such as speech putting a victim "in fear of death or bodily injury."[3]

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[2] The statute defines "emotional distress" to be "significant mental suffering or distress," but says that this encompasses suffering or distress "that may, but does not necessarily, require medical or other professional treatment or counseling." § 22–3132(4). If read expansively this definition encompasses much First Amendment-protected communication. Protected communications can cause emotional distress and people with emotional distress may reasonably seek counseling. Boone did so in this case. The stalking statute's definition of emotional distress is much less restrictive than the requirement that an intentional infliction of emotional distress tort plaintiff prove "emotional distress of so acute a nature that harmful physical consequences might be not unlikely to result." *Ortberg v. Goldman Sachs Group*, 64 A.3d 158, 164 (D.C. 2013).

[3] This court can only avoid the constitutional issue and adopt narrow, constitutionally valid definitions of these terms if such definitions "will not 'twist the text beyond what it will bear.'" *Yung* at 79 (quoting Amy Coney Barret,

II. MASHAUD'S CONDUCT IS CONSTITUTIONALLY PROTECTED

If the "[f]eel seriously alarmed, disturbed, or frightened" and "[s]uffer emotional distress" language is not narrowly interpreted, so as to not reach constitutionally protected speech (or if the court otherwise reaches the constitutional issue), this language, at least as it applies to speech, is unconstitutional. This is so because the stalking statute is a content-based regulation of speech and such regulations are subject to "strict scrutiny," *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015), unless they involve those "few limited areas … [of] historic and traditional categories" of "well-defined and narrowly limited classes of speech," "including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct," where such regulation is permitted. *United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (citations and quotations omitted).[4]

Substantive Canons and Faithful Agency, 90 B.U. L. Rev. 109, 141 (2010)). A court "cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question." *Salinas v. United States*, 522 U.S. 52, 60 (1997).

[4] Although it is often said that "the 'protection of the First Amendment does not extend'" to these specific categories of speech, this "shorthand" is not "literally true." *R. A. V. v. St. Paul*, 505 U.S. 377, 383 (1992). What such statements "mean is that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.) -- not that they are categories of speech entirely invisible to the

"[S]trict scrutiny …. is a demanding standard. It is rare that a regulation restricting speech because of its content will ever be permissible." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (quotations omitted). Nevertheless, Boone suggests that the challenged language would survive such scrutiny. His apparent view is that this is because the government has a compelling interest "in preventing speech that alarms, disturbs or distresses" where that speech "can lead" to violence. Boone Br. at 9. And the District, while taking no position on the statute's constitutionality, asserts that "[m]ost applications of the stalking law" would survive strict scrutiny.[5] District Br. at 48.

But, "[u]nder strict scrutiny, the government must adopt the least restrictive means of achieving a compelling state interest." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021) (quotations omitted). Assuming that the government has a compelling interest in criminalizing speech that "can lead" to

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Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." *Id.* at 383-84 (emphasis omitted). A city council could not "enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government." *Id.* at 384.

[5] Mashaud does not assert that there is any constitutional infirmity in the statute's criminalization of conduct, including speech, that reasonably causes a person to "[f]ear for his or her safety or the safety of another person," a provision he was not found to have violated. D.C. Code § 22-3133(a)(1)(A), (b)(1)(A), (c)(1)(A). And he raises no issue regarding the statute's coverage of other non-speech conduct.

violence, the challenged language is far from the least restrictive means of doing so. Among other issues, evidence that the speech would tend to lead to violence is not required. And there was no such evidence in this case.[6]

In defending its position on strict scrutiny, the District, at 50, says that the statute is meaningfully limited because the defendant must act with a specific mental state: it must be shown that he intends, or reasonably "knows" or "should have known" that his conduct will have an impermissible impact on another. § 3133. But individuals generally have a First Amendment right to say things that seriously disturb others. Consequently, the statute's prohibition on, for example, intentionally making statements that are "seriously" "disturb[ing]" to another is unconstitutional if those words are given their normal meaning. This unconstitutionality is not cured by requiring proof that the speaker intended to do something which he was entitled to do (or by requiring proof of the "knows" or "should have known" mental states).

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[6] Boone says that there was a potential for violence because "Boone testified about wanting to meet personally with Mashoud [*sic*] which … has a reasonable prospect of leading to violence based on the combined temperament of passion, scorn, and disdain underlying their meeting." Boone Br. at 9. But the trial court did not find any prospect of violence and Boone's rejected attempt to meet Mashaud suggests that he did not fear him. Furthermore, Boone provides no support for his apparent view that contentious speech becomes unprotected when a recipient reacts by taking steps that might lead to a violent confrontation. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation.").

Boone also argues that strict scrutiny does not apply because the statute's restrictions on speech are "not content-based." Boone Br. at 9. But he is mistaken—if Mashaud's messages had praised Boone as an exemplary mentor he would not have violated the law.

Boone separately contends that the challenged language is constitutional because it only criminalizes speech that is an integral part of a crime—a regulatable speech category—with the crime being violating the stalking statute itself.[7] Boone Br. at 13. The District seemingly agrees. But this argument is untenable. "[I]t is not enough that the speech itself be labeled illegal conduct…. Rather, it must help cause or threaten other illegal conduct." *In re Welfare of A.J.B.*, 929 N.W.2d 840, 853 (Minn. 2019). If Boone's view were the law the First Amendment's protection of speech would be toothless. Congress could, for example, criminalize criticism of the President and that law could not be struck down because criticism of the President would be speech integral to criminal activity—the crime of criticizing the President. A legislature may not define speech as a crime, and then render the speech unprotected by the First Amendment merely because it is integral to speech that the legislature has criminalized. *See*

[7] Because Boone did not make this argument to the trial court it is, in Mashaud's view, forfeited.

United States v. Sryniawski, __ F.4th __, No. 21-3487, 2022 U.S. App. LEXIS 24802, at *9 (8th Cir. Sep. 2, 2022) ("the government argues that Sryniawsk's e-mails were integral to the criminal conduct of cyberstalking itself. That argument is circular and unpersuasive." "To qualify as speech integral to criminal conduct, the speech must be integral to conduct that constitutes another offense that does not involve protected speech," reversing conviction).

Nevertheless, the District says that a legislature "can also sometimes regulate expression without any accompanying illegal conduct," citing only one example, "an agreement to set higher prices in violation of antitrust law." District Br. at 46. But in such cases the predicate offense is the independent crime of entering into an unlawful agreement. A single cited case, *United States v. Osinger*, 753 F.3d 939, 947 (9th Cir. 2014), seems to support the view that speech that violates a stalking statute is not protected by the First Amendment because it violates a stalking statute. But this was an alternate holding and *Osinger* provided no meaningful explanation of its circular reasoning. *See id.* at 948 ("Osinger's speech is not afforded First Amendment protection for the additional reason that it involved sexually explicit publications concerning a private individual."). Concurring, Judge Watford explained that "[w]hat makes this a straightforward case is the fact that Osinger committed the offense by engaging in both speech and unprotected non-speech conduct." *Id.* at 953 (Watford, J., concurring). This

conduct included setting up a fake Facebook account in his victim's name and disseminating pictures of her engaged in sex acts. *Id.* at 952. Judge Watford explained that "[i]f a defendant is doing nothing but exercising a right of free speech, without engaging in any non-speech conduct, the exception for speech integral to criminal conduct shouldn't apply." *Id.* at 954.[8]

Boone further argues, at 9-10, that the stalking statute is a permissible time place and manner regulation of speech of the type upheld in *Hill v. Colorado*, 530 U.S. 703 (2000). But it is not. *Hill* upheld a statute that restricted "speech-related *conduct*"—approaching persons within 100 feet of the entrance to health care facilities. *Id.* at 707 (emphasis added). The law made "it more difficult to give unwanted advice, particularly in the form of a handbill or leaflet, to persons entering or leaving medical facilities." *Id.* at 708. But unlike the provision here, which reaches pure speech untethered to other conduct, the law in that case did not "place any restriction on the content of any message that anyone may wish to communicate to anyone else." *Id.*

Boone makes only a cursory effort to support the trial court's mistaken view that speech on matters that are not of public importance has limited or no First

[8] The District also cites *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984). But *Roberts*, which rejected a constitutional challenge to a prohibition of discrimination in places of public accommodation, has no relevance to this case.

Amendment protection. He cites no decision that supports this proposition and, as the panel that initially decided this appeal recognized, the trial court's thinking is inconsistent with firmly established First Amendment case law. *Mashaud v. Boone*, 256 A.3d 235, 239 (D.C. 2021) (citing *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 600 (2008); *Connick v. Myers*, 461 U.S. 138, 147 (1983)); *see also Engquist*, 553 U.S. at 600 ("the government [can] not generally prohibit or punish … speech on the ground that it does not touch upon matters of public concern").

The District, at 40, attempts to distinguish *People v. Relerford*, 104 N.E.3d 341 (Ill. 2017), relied on by Mashaud and Amicus Volokh, by suggesting that the stalking language *Relerford* deemed unconstitutional reached a broader array of speech than the statute in this case. But the opposite seems true. The challenged Illinois statute criminalized speech that the speaker "knows or should know" "would cause a reasonable person to" suffer emotional distress, using a different (but not, despite the District's contrary contention, obviously narrower) definition than that in D.C. Code § 22–3132(4). 104 N.E.3d 341 at 348-49 (quoting Illinois statute). But the District's statute, unlike the Illinois law, permits prosecutions of

conduct expected to cause another to be seriously "alarmed" or "disturbed," even when emotional distress is absent.[9] § 22–3133.[10]

Normally this court would not consider a constitutional argument, such as that now advanced by Mashaud, without resolving any relevant questions of statutory interpretation. It is a long-established doctrine that constitutional issues should be avoided if possible. *Camreta v. Greene*, 563 U.S. 692, 705 (2011). *But see id.* at 706-08 (acknowledging with approval that courts need not follow this practice in qualified immunity cases). But the doctrine has little force here. The principal reason courts try to avoid finding legislation unconstitutional is "[p]roper

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[9] *Relerford* observed that, under the provision it struck down, a person who

> repeatedly complains about pollution caused by a local business owner and advocates for a boycott of the business…. could be prosecuted … if he or she persists in complaining after being told to stop by the owner of the business and the person knows or should know that the complaints will cause the business owner to suffer emotional distress due to the economic impact of a possible boycott.

104 N.E.3d at 354. The same is true under this jurisdiction's statute (except that causing the owner to be "alarmed, disturbed, or frightened" would suffice), despite the District's unexplained insistence to the contrary.

[10] The District also says that another of Mashaud's cases, *A.J.B.,* 929 N.W.2d at 851, is not on point because the definition of stalking in the challenged Minnesota statute "includ[ed] 'oppress, persecute, or intimidate,' which are not used in the District's statute." District Br. at 40 (quoting 929 N.W.2d at 854). But it is not clear that this wording difference means, as the District suggests, that the Minnesota law reached more speech than § 3133.

respect for a coordinate branch of the government." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012). In a typical case, declaring a law unconstitutional would frustrate the legislature's intent. But the situation is different here—the Council has affirmatively instructed the courts to ensure that the statute is applied such that it "does not apply to constitutionally protected activity." § 22–3133(b). Indeed, if the Court rules that the Constitution prohibits enforcement of portions of the statute as written it could arguably reason that, because of § 3133(b), it is not making a determination of unconstitutionality but merely interpreting the statute as the legislature directed that it be interpreted.

III. THE "CONSTITUTIONALLY PROTECTED ACTIVITY" SUBSECTION IS LIKELY COEXTENSIVE WITH THE CONSTITUTION

Mashaud and the Amici agree that this case is largely governed by the rule that the government may only regulate speech based on its content when it falls within those few traditional areas where such regulation is permitted. And they agree that, because Mashaud's speech is not within one of those exceptions, he must prevail. However, Mashaud and the Amici apply modestly different analytical frameworks. The Amici interpret the stalking statute's command that it "does not apply to constitutionally protected activity," § 22–3133(b), to mean that any speech not within a traditionally unprotected category is, by the statute's own terms, not criminalized, making further constitutional analysis unnecessary.

This reasoning, endorsed by distinguished Amici and by Judge Beckwith in her panel decision dissent, 256 A.3d at 243-44, would protect the constitutional interests at issue without declaring any portion of the statute unconstitutional. It merits careful consideration. Mashaud adopts it as an alternative to his closely related constitutional argument. Nevertheless, in Mashaud's view (shared by the District) the best understanding of § 3133(b) is that it states a truism—the statute must conform with the Constitution. This makes § 3133(b) redundant, but legislatures sometimes chose to be redundant. *See United States v. Bronstein*, 849 F.3d 1101, 1110 (D.C. Cir. 2017) ("[s]ometimes drafters *do* ... include words that add nothing of substance … to engage in the … lamentably common belt-and-suspenders approach" (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176-77 (2012))); *In re Estate of Nash*, 220 S.W.3d 914, 918 (Tex. 2007) ("there are times when redundancies are precisely what the Legislature intended").

The most reasonable reading of "constitutionally protected activity" is that it refers to activity that the Constitution does not allow the government to interfere with. If the Council had meant that the statute only applies to speech within the categories the First Amendment allows to be regulated, it could have said so. Moreover, nothing in the statute's legislative history suggests that such an interpretation was intended and, as the District notes, jurisdictions with similar

statutory language have not adopted this interpretation. District Br. at 37-38 (citing *State v. Nguyen*, 450 P.3d 630, 640 (Wash. App. 2019); *Johnson v. State*, 648 N.E.2d 666, 670 (Ind. Ct. App. 1995)); *see also A.J.B.*, 929 N.W.2d at 851 (similar provision "is a mere restatement of well-settled constitutional restrictions" (quoting *CISPES v. FBI*, 770 F.2d 468, 474 (5th Cir. 1985))).[11]

Another concern: application of Amici's framework may be no easier than conducting a full constitutional analysis. For example, it may often be unclear, at least initially, whether challenged speech is within a traditional exception. Boone thought Mashaud's statements to be defamatory, a traditional exclusion. It was not under current law because Mashaud spoke the truth. But if this had been contested the statute's applicability would have been uncertain pending a factual determination. And what if a defendant's speech is arguably about a "public figure" or on a "matter of public concern," where libel claims are constitutionally limited? *See Ayala v. Washington*, 679 A.2d 1057, 1063-64 (D.C. 1996).

[11] Amici's understanding would be difficult to apply to the only other D.C. law with an identically worded statutory exclusion, a statute criminalizing "revenge porn." D.C. Code § 22-3055(a)(2).

IV. THE FACT THAT THIS IS NOT A FACIAL CHALLENGE MATTERS LITTLE

The District suggests that, because Mashaud has described his constitutional challenge as as-applied rather than facial, any constitutional ruling must be extremely narrow. District Br. at 41-44. This is wrong.

The plaintiff in *Citizens United v. FEC*, 558 U.S. 310, 322-29 (2010), an as-applied First Amendment challenge to a campaign finance statute, sought a favorable ruling on narrow grounds, having dismissed its initial facial challenge. Nevertheless, the Court's expansive decision invalidated a key aspect of campaign finance law. *Id.* at -362-66. It explained that "Citizens United's narrower arguments are not sustainable under a fair reading of the statute." *Id.* at 333. Consequently, "it is *necessary* then for the Court to consider the facial validity of [the statutory provision]. Any other course of decision would prolong the substantial, nationwide chilling effect caused by [the provision's] prohibitions on corporate expenditures" which could only be resolved by "substantial litigation over an extended time." *Id.* at 333, 326 (emphasis added); *see also id.* at 336 ("a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated."); Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 Cal. L. Rev. 915, 922 (2011) ("Although facial and as-applied challenges are invariably contrasted with one another…. the contrast is not nearly so stark as is often supposed.").

If the court decides in Mashaud's favor on constitutional grounds, it should do so in a manner that prevents any unconstitutional statutory provision from chilling constitutionally protected speech.

Date: October 3, 2022

Respectfully submitted,

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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, Arthur Spitzer, counsel for Amicus The American Civil Liberties Union of The District Of Columbia, Gene C. Schaerr, counsel for Amici Professor Eugene Volokh and Protect the First Foundation and Ashwin P. Phatak, counsel for Intervenor District of Columbia.

/s/Matthew B. Kaplan
Matthew B. Kaplan
Date: October 3, 2022