DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CM-147

GENE R. LENINGER,
Appellant,

v. **(2022-CMD-4713)**

UNITED STATES,
Appellee.

Appeal from the Superior Court of the District of Columbia—Felony Division

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SUPPLEMENTAL BRIEF FOR APPELLANT

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ISSUES PRESENTED

I. Whether Mr. Leninger only engaged in non-protected free speech in his interactions with the complainant.

II. Whether Mr. Leninger's conviction should be vacated pursuant to the *en banc* opinion in *Mashaud v. Boone* holding that the statute under which he was prosecuted was unconstitutional when applied to non-protected speech.

III. Whether Mr. Leninger's conviction should be vacated because the other constitutional infirmities *Mashaud* found in the statute all applied to him.

IV. Whether, even if *Mashaud* does not apply, whether Mr. Leninger's conviction should be vacated due to insufficient *mens rea* evidence, as well as being behavior not meant to be criminalized by the statute.

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STATEMENT OF THE CASE

After initial briefing, the Court, *sua sponte*, ordered Mr. Leninger to submit a "supplemental brief addressing the impact of the *Mashaud* case on the sufficiency of the evidence". See April 23, 2024, Order referring to *Mashaud v. Boone*, 295 A.3d 1139 (D.C. 2023)(*en banc*)(Mashaud's conviction for stalking Boone by sending truthful electronic messages to Boone's family, friends, and

colleagues that Boone had an affair with Mashaud's wife was reversed because his speech was constitutionally protected, despite "no shortage of evidence". *Id.*, at 1151. Mr. Leninger was convicted under the same statute as Mashaud eight months earlier*, and he also challenged the sufficiency of evidence.

This brief argues that his conviction should be vacated for the same reasons given in the *en banc* opinion. While Mr. Leninger's opening brief argued that the evidence was insufficient due to the lack of evidence of his mental intent on each of the occasions adduced by the government, *Mashaud* adds the additional insufficiency reason that if the occasions presented by the government all consisted of non-protected speech, they were not criminal acts under the statute. Further, *Mashaud* found the statute to be unconstitutional in a variety of other ways that made it unlawful to have been applied to Mr. Leninger.

APPLICABLE LAW

Mr. Leninger was convicted pursuant to 22 D.C. Code §3133, the District's stalking statute. It was designed to punish "a course of conduct directed at a specific individual" that a defendant should have known would cause a reasonable person in the complainant's

* October 2023 opinion; February 2023 conviction.

circumstances to . . . suffer emotional distress, *id.*, subsections(a)(3), although the law does not require any showing that the targeted person actually suffered emotional distress. *Mashaud* at 1148.

The law's intent is "to prohibit seriously troubling conduct, not mere unpleasant or mildly worrying encounters that occur on a regular basis in any community", *Coleman v. United States,* 202 A.3d 1127, 1144 (D.C. 2019), "something markedly greater than the level of uneasiness, nervousness, unhappiness or the like which is commonly expressed in day to day living", *id.,* at 1145. It must involve a "severe intrusion" on the victim's personal privacy and autonomy to trigger criminal liability. *Id.,* at 1144.

Emotional distress is defined as "significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling. D.C. Code 22-3132(4)(A).

The law "specifically covers communication to or about another individual". *Mashaud* at 1148-49.

"[T]o engage in a course of conduct "requires 2 or more occasions of distressing conduct (citation omitted) and the defendant must possess the requisite mental state on each of those two (or more) occasions of distressing conduct" (internal quotations omitted). *Mashaud* at 1149(quoting *Coleman* at 1140).

The government was required to prove the *mens rea* element that Mr. Leninger should have known that a reasonable person who is aware of the same facts and circumstances as he was, *Coleman,* 202 A.3d at 1127, would find that his actions in two or more of the occasions, *Mashaud* at 1149, would cause a reasonable person, in her circumstances, Criminal Jury Instructions for the District of Columbia, instruction 4.501, §5C (5th ed. 2018); 2/8/23 Tr-60), to suffer emotional distress. Although called an "objective standard", *Coleman* at 1143, the jury is actually required (1) to assess whether a reasonable person, standing in Mr. Leninger's shoes, had knowledge of the complainant that (2) would have informed him—as a reasonable person—that he should have known that a reasonable person in her shoes, would suffer the serious harm required of the statute.

The *Mashaud* Decision

Mashaud found the stalking statute to be unconstitutional as applied to non-protected speech, as well as being unconstitutionally overly broad, void for vagueness, and content-based: "the constitutional problems with the statute are glaring". *Mashaud,* 295 A.3d at 1144.

1. The stalking statute unconstitutionally punished non-protected free speech.

Mashaud ruled that 22 D.C. Code § 3133(b), the District's stalking law

> covers only speech that fits within the well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problems. This includes threats, obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. Outside of those narrow categories, speech is constitutionally protected activity that the statute does not apply to (internal quotation marks and citations omitted).

Mashaud at 1144. "The only question remaining", the Court asked, "is whether Mashaud's speech fit[s] within a narrow category of speech that lacks First Amendment protection. That is a pretty open and shut case: it does not." (*Id.*, 1170)

2. The stalking law unconstitutionally regulated speech based on content.

"It is a foundational principle of the First Amendment that 'speech cannot be restricted simply because it is upsetting". *Id.*, 1157. A "[l]isteners' reaction to speech is not a content-neutral basis for regulation", *id.*, at 1144 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)). "Content-based regulations are presumptively invalid", *Mashaud* at 1144 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)), because "[s]peech may not be banned on the ground

that it expresses ideas that offend, be upsetting, offensive, disagreeable or even very distressing. *Mashaud* at 1156, 1158. "A statute that prohibits speech indiscriminately based solely on its propensity for causing such distress is a constitutional nonstarter". *Id.*, at 1156.

By criminalizing communications to another that would reasonably inflict emotional distress, the statute impermissibly restricted free speech (*id.*, at 1155). On this basis, it reversed Mashaud's conviction even though there was "no shortage of evidence that [he] intended to cause Boone emotional distress", *id.*, at 1151, and that he should have known he would cause a reasonable person in Boone's shoes to suffer emotional distress, *id.*, at 1153.

3. The stalking statute is unconstitutionally overbroad as applied to non-protected speech.

The court also ruled the statute unconstitutionally overbroad. "By its plain language, the District's stalking statute criminalizes 'any communicat[ions] to or about an individual' that would reasonably cause emotional distress." *Id.*, at 1159. "[T]he most natural reading of its prohibitions would be overbroad" *Id.*, at 1161).

4. The stalking law is unconstitutionally void for vagueness.

The court also found the statute void for vagueness because it did not "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Id.*, at 1162. "[B]y placing [fact-finders], rather than legislators, in the position of deciding when to 'make an act a crime'", it leaves "the public to guess as to what the statute actually prohibits and the courts to define the statute's true scope". *Id.*, 1162-63. It requires "enforcement authorities to examine the content of the message that is conveyed to determine whether' a violation has occurred", *id.*, at 1155.

EVIDENCE PRESENTED

Since the jury was not asked to be unanimous about which two (or more) events constituted the alleged course of conduct, it is not known which occasions or number of events were considered by it.*

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* Appellant's brief listed four events; the government's brief and closing argument listed five; its post-trial opposition motion to the motion for judgement of acquittal listed four, but also cited testimony about communications from May 1st through May 3rd; and its closing argument and post-trial opposition motion stressed an incident on April 4th when the complainant agreed to view Mr. Leninger's gun. Most pleadings agree on the May 6, May 17, June 27, and July 1st communications. The jury was instructed to use the "ordinary meaning" of the word occasion.

The government argues in its opening brief (p. 23), that the assessment in determining whether Mr. Leninger possessed the requisite criminal mental intent, should not be confined to the facts of each incident, but must encompass the broader context and all that had transpired between them. This misstates the law, which requires only evidence of the mental intent on two or more occasions. But even if its assertion were true, the overall circumstances never indicated to a reasonable person in Mr. Leninger's shoes that significant mental distress would occur; quite the opposite.

These circumstances and broader context show a series of communications and personal interactions in a consensual and friendly relationship between two neighbors that the complainant allowed, encouraged and participated in; a relationship between the two who let their dogs play together late at night after she returned from her work at a nightclub or as a promoter (2/27/23 Tr-68, 78). She provided Mr. Leninger with a way to communicate with her through instant messages (*id.*, 69), phone (*id.*, 68), and even agreed upon a method of communicating with a flashlight signal to let her know he was outside with his dog in case she wanted to bring her dog out (*id.*, 56). She carried on detailed and private conversations with him about ongoing protests, the "patriarchy", medications, music, their dreams, and

exchanged pleasantries like saying good night, be safe, and call me when you get back (*id.*, 78, gov't exhs 4-22 and 23). She didn't mind—and agreed to—his showing her a legal and safe (disarmed) pistol (*id.*, 61-63). The social relationship included her admitted to using marijuana and alcohol before their late-night meetings (*id.*, 164-65). Even when she rebuffed his romantic interest, she reconciled with him by continuing to meet outside at night with their dogs. She testified that their relationship was "cordial" and "neighborly" (*id.*, 78).

DISCUSSION

Mr. Leninger was convicted under the same statute as Mashaud and also only engaged in free, unprotected speech which *Mashaud* ruled were not violations of the statute, and therefore cannot be part of a course of conduct the statute was meant to criminalize. Thus, the evidence was insufficient for him to be convicted of the required two or more acts. His interactions with the complainant were lawful communications, not criminal conduct.

All the other reasons given for reversing Mashaud's conviction also apply to Mr. Leninger. Because it was left to the jury to decide what the law was, the statute as applied to him was void for vagueness. It was overly broad as applied because it did not inform

him as to what conduct is prohibited. He was judged on content-based speech, and was convicted because he should have known that his actions would result in serious emotional distress even though "[st]he 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).

The occurrences

The complainant testified that her friendly relationship with Mr. Leninger started in the spring when they began meeting each other at night to let their dogs play together (2/7/23 Tr-48, 52-56). They texted each other (*id.*, 69, gov't exhs 4-1 through 4-60). She permitted him to shine a flashlight that he took out at night when he walked his dog, through a window of her apartment to let her know he and his dog were in the yard in order to see if she wanted to bring her dog out to play. "[T]hat's the way had we (*sic.*) of communicated", she said (*id.*, 56). On **April 4th**, she said that after asking her, she felt comfortable allowing him to show her a pistol he had (*id.*, 63-64). She testified, however, that it made her feel unnerved, but was not threatening (*id.*, 66-67). They continued their relationship; she let him text her to come out with her dog, and she testified they were friendly with each other (*id.*, 67, 69).

This was not unprotected speech. The only conduct was their social interactions, including the non-threatening showing of a legal gun that she agreed to see. Otherwis, there was only free speech protected under the Constitution. There was nothing that would indicate to Mr. Leninger, or a reasonable person with his knowledge of the complainant and of their relationship, that she might suffer serious emotional distress from the interactions even though she said in trial that she felt uncomfortable—a far cry from the serious emotional distress required by the statute.

On **May 1st**, in a series of test messages between the two, he called her "darling" and "I want u ok" (*id.*, 84). She answered, "[y]ou want my friendship? That's great bc (*sic.*) it's all I'm offering". (*Id.*, 85, gov't exhs 4-26, 4-27). She testified this made her feel uncomfortable (*id.*, 85, gov't exh 4-27).

This incident only involved free truthful speech, not conduct. She said that she was still offering friendship. There is nothing that would have indicated to a reasonable person, with his knowledge of her circumstances, that she might suffer serious emotional distress.

On **May 2nd** and **May 3rd**, she continued to communicate with him even after he said he had dreams about her and the two dogs (gov't exh 4-28). She talked about coming home from a protest, and

she came down to meet him in the yard that evening (gov't exh 4-30). She continued to meet with him and testified she wanted to stay on good terms with him (*id.*, 86-87).

Only speech was involved, not conduct. When she went into the yard with her dog that night, she in no way indicated anything that would make a reasonable person, with the knowledge that Mr. Leninger had of her, think that serious emotional distress might occur.

They continued to message each other. On **May 4th**, he linked their names together in a text message, and flashed his light inviting her to come down with her dog, and she did so (*id.*, 91-92, gov't exh 4-45). She told him she was not interested in a romantic relationship (*id.*, 104-05). None-the-less, she came down to meet him with her dog (*id.*, 101-102, 104, gov't exh 4-54). She testified that she freaked out and felt uncomfortable, explaining that she continued to respond to him, hoping any problem would go away (*id.*, 92,94). After going down to see him, she said he wasn't listening to her, but she wanted to remain friends (*id.*, 104-05).

This incident also only involved speech, and, after she rebuffed any romantic interest, she appeared to reconcile with him by continuing to meet with him. This reconciliation would not indicate to a reasonable person that Mr. Leninger's communications would lead to

a finding that he should have known that they would have caused serious emotional distress.

In a series of communications on **May 6th**, he continued to express his feelings towards her: "[l]et's not rush into things, and talk about this when we have a better understanding of what is really important in each other's lives". "I'll listen", she said, but she replies a minute later, "listen to me saying no", then, "please don't contact me anymore" (*id.*, 109-112, gov't exhs 4-56, 4-58, 4-59). Less than fifteen minutes later, he acceded to her request, saying, "in case you mean this literally I will give you your space sorry yours to (*sic.*) kind of a person to misunderstand" (gov't exh 4-59).

Only speech was involved in this series of communications between the two. There was nothing in the speech that was unprotected, such as a threat. They ended the conversation with Mr. Leninger apologizing, and agreeing to her request with an expression of ongoing friendship and respect for her wishes. His cordial ending to their relationship would not indicate to a rational person in his position, with his knowledge, that she might suffer serious emotional distress

There was no other communication again until **May 17th** , 11 days later, when he communicated with his flashlight again, and she yelled at him and told him not to contact her again (*id.*, 114).

Flashing the light was not criminal conduct, as it might have been if it was done incessantly. It was speech, a way of communicating in which he was asking her whether she wanted to come down and let their dogs play together. This was a communication procedure to which she had previously consented. Given her reconciliations with him in the past where she had rebuffed him but still continued to have their dogs play together, it is reasonable to infer that he was only checking to see if she wanted to bring her dog out. It did not indicate that he was any longer interested in a romantic relationship. While she testified that she yelled at him after he flashed the light, there was nothing that would lead a reasonable person to believe that he should have known that his flashlight inquiry would cause a reasonable person in her shoes to suffer serious emotional distress.

Over a month later, on **June 27th**, he texted her, asking how she was doing, and that he missed seeing her with her dog (*id.*, 116-17, gov't exh 4-60). The next day she called the police because of her delusional thought that he had broken into her apartment; instead,

later, she realized she had given a friend permission to enter (*id.*, 117-119).

Her allegation was false, and Mr. Leninger did not even know about her misplaced concern. There is nothing that would indicate to a reasonable person with Mr. Leninger's knowledge of her that his innocuous communication with her would cause a reasonable person in her shoes to feel the serious emotional distress envisioned by the statute.

Finally, on **July 1st**, she received a text message with a "pin drop" showing his location (*id.*, 119-26, gov't exh 4-60). She testified that she felt scared and did not know if he had a gun on him of if he wanted to hurt her (*id.*, 120-21).

The pin drop was communication. It was speech. Given her past reconciliations and their history of consensual social interactions, the pin drop can easily be inferred to be just a communication saying that he was still available in case she wanted to still interact. Any inference that it was a threat or speech supporting a criminal act is speculation.

ARGUMENT

1. Mr. Leninger's conviction must be vacated because he only engaged in protected speech.

Since *Mashaud* held the stalking statute to be unconstitutional as applied to a course of conduct consisting only of speech, Mr. Leninger's conviction must be vacated. The *Mashaud* Court said the statute excludes applications to speech when speech alone is the basis for liability, unless that speech falls into existing, well-established First Amendment exceptions such as true threats or fighting words.

Mr. Leninger's communications included no threats, were not defamatory, did not incite criminal activity, and were neither obscene nor fraudulent. There is no suggestion that his messages reflected an intent to induce or commence any crime "Because the course of conduct identified by the trial court [in *Mashaud*] consisted solely of 'communications to or about another individual' and those communications did not fall within one of the categories of speech that lack First Amendment protections, the court erred by finding that Mashaud committed the crime of stalking." *Mashaud* at 1171. This precedent must apply to Mr. Leninger.

Nor was his speech related to criminal conduct. 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. See *United States v. Stevens*, 559 U.S. 460, 468-69 (2010). His alleged criminal conduct was "the fact of communication," and thus involved no "separately identifiable conduct" to which it could be integral. *Cohen v. California*, 403 U.S. 15, 18 (1971). Because Mr. Leninger's conviction "quite clearly rests upon the asserted offensiveness of the words [he] used to convey his message," *id.*, he could not constitutionally be found to have committed the crime of stalking. There was no conduct involved here, only communication and speech. As noted above, flashing the light into the apartment was communication, not conduct.

Nor can the occurrences be considered to be integral to criminal conduct merely because they were statutorily proscribed by the District's stalking statute. Such reasoning is "fatally circular" because the speech is only integral to criminal conduct because this statute criminalizes the conduct. Speech cannot be transformed into criminal conduct based on the circularity of the language of the statute. *Mashaud* at 1170-71.

2. Mr. Leninger's conviction must be vacated since the other constitutional infirmities of the statute also applied to him.

A. Mr. Leninger was subject to a content-based regulation.

Mashaud declared the stalking statute to be unconstitutional because it regulated unprotected speech. Mr. Leninger's "course of conduct" consisted only of speech that was criminalized by the same content-based regulation. Statements to a person cannot be banned simply because they make another person feel bad, even on purpose: "The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." *R.A.V.*, 505 U. S. 377, 414.

Mr. Leninger engaged only in speech that was judged based its content and the effect on the listener, not conduct. His speech was judged based on whether or not the communication might cause a reasonable person to predictably feel disturbed or suffer emotional distress. The government admits (gov't opening brief, p. 6) that Mr. Leninger was convicted based on the content of his speech: "[i]nitially" the test messages were "cordial and neighborly", but later, they "made her feel uncomfortable". However, "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County, GA v. Nationalist Movement,* 505 U.S. 123, 134

(1992). Just as *Mashaud* concluded, Mr. Leninger's conviction under the statute must be vacated since he was subject to a content-based regulation which allowed for judging him based on its content.

B. Mr. Leninger was convicted under a statute that was declared void for vagueness.

The stalking law did not define the offense with sufficient notice as to what type of behavior it criminalized. Instead, it was up to the jury to make the second-guessing determination as to what Mr. Leninger should have known. Because the statute was vague and unconstitutional, Mr. Leninger could not be lawfully prosecuted under the statute. See *Kolender v. Larson,* 461 U.S. 352, 361 (1983); *District of Columbia v. Garcia,* 395 A.2d 214, 826 (D.C. 2007).

The Committee on Public Safety and the Judiciary that produced the statute admitted that its definition of stalking was "subjective" and that there is no "bright line" distinction between strict definitions of acceptable and alarming behavior". D.C. Council, Committee on Public Safety and the Judiciary, Report on Bill 18-151, at 33 (June 26, 2009). The law was therefore amended to permit a jury trial because a jury of peers is best equipped to judge whether the behavior is acceptable or outside the norm and indicative of escalating problems. "[S]talking is an offense for which the community, not a single judge,

should sit in judgment,'" *Id.* (quoting testimony by the D.C. Public Defender Service), but a jury's task is to apply the law as the law is explained to it by the judge. A jury cannot be instructed to figure out what the law is. Mr. Leninger's conviction under the statute should therefore be vacated.

C. Mr. Leninger was convicted under an overly broad statute.

Masaud also ruled the statute unconstitutionally overbroad. "By its plain language, the District's stalking statute criminalizes 'any communicat[ions] to or about an individual' that would reasonably cause emotional distress." *Mashaud* at 1159, and "the most natural reading of its prohibitions would be overbroad" (*id.*, at 1161). Since he was prosecuted under the same statute, his conviction must be vacated.

3. Even if Mr. Leninger's actions were found to be more than speech, the conviction should still be vacated.

A. There was insufficient evidence that Mr. Leninger possessed the necessary mental state to be convicted.

Even if Mr. Leninger were found to have engaged in conduct and not free speech, the conviction should still be vacated for the reasons stated in his opening brief. As also discussed, *infra.*, in the section discussing each event, there was nothing in each interchange in their consensual relationship that would have given a reasonable person in

Mr. Leninger's shoes, with his knowledge of the complainant (or a reasonable person in her shoes), any indication that serious emotional distress would occur from his behavior. Instead, even when she rebuffed him, she would reconcile and continue to meet with him, and their social relationship continued until he acceded to her request not to maintain it. After he did so, he only contacted her to let her know he missed seeing her with her dog and to try to remind her that he was still around if she wanted to maintain an acquaintanceship.

The jury cannot have found the *mens* rea element on at least two occasions, even if it may have also determined there was sufficient evidence of the occurrences. For this reason, the conviction should be vacated. Even where this Court has found sufficient evidence to convict, it has remanded the case to determine whether the mental intent element was present and sufficient. *Coleman,* 202 A.3d at 1146-47 (stalking conviction remanded); *Carrell v. United States*, 165 A.3d 314, 328 (D.C. 2017)(threats conviction remanded).

B. Mr. Leninger's actions were not contemplated by the statute.

Mr. Leninger's conviction must be vacated because the statute did not intend to criminalize his behavior. The stalking law was designed to prevent "severe intrusions on [an individual's] personal privacy and autonomy" and conduct that "creates risk to the security

and safety of the [individual]." *Coleman* at 1144 (quoting D.C. Code § 22-3131(a)), and to "enable law enforcement to intercept behaviors that potentially lead to violence, a loss in the quality of life, or even death." D.C. Council, Committee on Public Safety and the Judiciary, Report on Bill 18-151, at 33 (June 26, 2009).

The facts of this case involved no such "behaviors." They involved speech alone that was may have been unwelcome, but were non-threatening. There was no allegation of following, monitoring, or surveilling, and no allegation of domestic violence, attempted violence, or any criminal activity.

CONCLUSION

This case fits squarely within the *en banc* Court's holding in *Mashaud*. Mr. Leninger only engaged in free, unprotected speech that did not amount to conduct under the statute. All of the constitutional infirmities with the law that were discussed in *Mashaud* apply to him. As a content-based regulation, the jury improperly found that he possessed the needed *mens rea*. Because the statute was vague and overly broad, neither he nor a reasonable person in his shoes, could have known that his speech might result in the serious emotional distress envisioned by the statute. As a result, Mr. Leninger's

conviction should be vacated due to insufficient evidence of criminal conduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing appellant's brief was served upon the Office of the U.S. Attorney for the District of Columbia by electronic filing this 20th day of May, 2024.

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