

**FILED**  
**04-08-2022**  
**CLERK OF WISCONSIN**  
**SUPREME COURT**

STATE OF WISCONSIN  
IN THE SUPREME COURT

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Case No. 2020AP1775

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NANCY KINDSCHY,

Petitioner-Respondent,

v.

BRIAN AISH,

Respondent-Appellant-Petitioner.

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**PETITION FOR REVIEW**

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Petition for Review from the Court of Appeals, Division III.  
There heard on appeal from the Circuit Court for Trempealeau County, the  
Honorable Rian W. Radtke, Presiding.

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Respectfully Submitted,

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### **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

Whether Wis. Stat. §813.125, as construed by the Court of Appeals to prohibit speech from a public sidewalk intended to persuade listeners to cease their sinful conduct (participation in abortion) and repent immediately before something bad happens and they no longer have time to repent, violates the First Amendment of the U.S. Constitution and Art. I, §3 of the Wisconsin Constitution?

Circuit Court Answer: No

Appellate Court Answer: No

Whether speech from a public sidewalk intended to persuade listeners, even if directed to a specific listener, to cease sinful conduct (participation in abortion) and repent immediately before something bad happens and there is no longer time to repent serves “no legitimate purpose” within the meaning of Wis. Stat. §813.125?

Circuit Court Answer: No

Appellate Court Answer: No

Whether enjoining, for a period of four years, a longtime pro-life, anti-Planned Parenthood protestor from protesting on a public sidewalk in front of a Planned Parenthood during its business hours because he made comments urging a Planned Parenthood worker to repent before something bad happens and there was no more time to repent, constitutes an unconstitutional restraint on First Amendment protected expression?

Circuit Court Answer: No

Appellate Court Answer: No

### **REASONS FOR GRANTING REVIEW**

- 1. This case presents a real and significant question of federal and state constitutional law.**

This case presents real and significant questions of federal and state constitutional law as they relate to the construction and application of Wis.

Stat. §813.125. Here, the Circuit Court entered a four year injunction against Petitioner, Brian Aish (“Aish”), a long time pro-life protester, that effectively bars him from protesting in front of the Planned Parenthood where he had previously regularly protested. The injunction was based on the claimed impact his speech had, “even coming from a place of love or nonaggression,” on a Planned Parenthood employee. The Circuit Court found that the speech “appear[ed] to be intimidating,” even though made in the context of “trying to convey a message of repentance, a message in an attempt to encourage someone to turn their life over and turn to Jesus,” and “trying to share the gospel,” and also opposing Planned Parenthood because it performs abortions “that result in the loss of life of unborn children and that is what Mr. Aish was wanting to stop or change the behavior of by his protesting here.” (App. 21-22). The Circuit Court and the Court of Appeals found that speech, uttered from a public sidewalk outside Planned Parenthood, seeking to “scare” a perceived sinner to cease her conduct and to repent before it is too late, is speech with no legitimate purpose. As broadly construed by both the Circuit Court and the Court of Appeals to prohibit and punish the speech at issue in this case, Wis. Stat. §813.125 is unconstitutional as violative of the First Amendment to U.S. Constitution, as well as Article I, §3 of the Wisconsin Constitution.

**2. A decision by the Supreme Court will help develop, clarify or harmonize the law, and the question presented is a question of law of the type likely to recur.**

Review by this Court is warranted since the question presented is a question of law relating to the misinterpretation of the “no legitimate purpose” language of Wis. Stat. §813.125. That issue is likely to recur, especially if the Court of Appeals’ published decision is permitted to stand, unless resolved by this Court. The appropriate construction of that language continues to vex the courts, as it did the Circuit Court and the Court of

Appeals in this case. In this case, the Court of Appeals did exactly what this Court in *Bachowski v. Salamone*, 139 Wis. 2d 397, 407 N.W.2d 533 (1987) indicated was impermissible. As this Court stated in *Bachowski*, “[Wis. Stat. §813.125] is not directed at the exposition of ideas but at oppressing repetitive behavior which invades another’s privacy interests in an intolerable manner.” *Id.* at 411. The Court of Appeals, however, interpreted this Court’s decision in *Bachowski* as supporting a finding that Wis. Stat. §813.125 can be used to silence and punish the exposition of an idea, such as the “bad things can happen, repent now” speech at issue in this case. Similarly, the Circuit Court concluded it was intimidating to cause Kindschy “to even think about that she might get killed on her way home or bad things are going to happen to her and her family.” (App. 28). A decision by this Court in this case will correct that misinterpretation and allow this Court to provide further guidance and definition of the boundaries between speech which violates Wis. Stat. §813.125 and speech that is protected by the First Amendment and Art. I, §3 of the Wisconsin Constitution.

**3. The Court of Appeals’ decision conflicts with controlling decisions of this Court and the U.S. Supreme Court.**

The decisions of the U.S. Supreme Court make it clear that the kind of speech here cannot be punished because of disagreement with the message, or because listeners find the message disturbing, distasteful or frightening. See e.g., *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). The Court of Appeals’ decision also conflicts with the decision of this Court in *Bachowski*, as discussed *supra*.

**STATEMENT OF THE CASE**

On March 10, 2020, Respondent, Nancy Kindschy (“Kindschy”), a Nurse Practitioner at the Planned Parenthood located in Blair, Wisconsin

(“Blair Planned Parenthood”), petitioned for the entry of a temporary restraining order and permanent injunction against Aish, a pro-life protester who had regularly protested at that Blair Planned Parenthood since it opened in April, 2019. (R.1-4, 35-5).

### **Proceedings Before The Circuit Court**

The Circuit Court found that Aish “to be very credible as to what happened on the incidents, as well as his positions on his religious beliefs.” (App. 19). Aish, a retired law enforcement officer, testified that he is a Christian who believes that “salvation is only through Jesus Christ and through repentance....” (R. 36-27, 35). He protests at Planned Parenthood to “stand for children.” (R. 36-27, 28). His priority is to share the gospel, to warn women they will be accountable to God on the day of judgment if they proceed, and to try to persuade them to repent. (R. 36-29, 30).

After the last appointments for the day, Aish stays until the employees check out “because they all stand condemned apart from Jesus Christ and [he] just want[s] them to hear the gospel and [he] want[s] them to turn away from their sin...” He urges them not to wait because bad things can happen and they might not make it to the next week when he sees them again and has another opportunity to try to persuade them to repent. (R. 36-30, 31, 34, 35).

Aish knew Kindschy was a Lutheran because he believed she previously told him that. (R. 36-32, 46). He asked her if she was Lutheran to try to get a dialog going with her - something he had done many times over the years he had known her. (R. 36-32). Aish has had several dialogues through the years with Kindschy; his goal is to try to get the workers to open up, plant a seed and get them to think about what they are doing. (R. 36-37).

Aish denied any desire to harm or intimidate Kindschy. (R. 36-35, 40). When he said that bad things, like drunk drivers happen, and Kindschy could die, he said this because he is aware that 7,000 people a day die in the

United States and, he wants her to turn away from sin and put her faith in Jesus Christ before it is too late. (R. 36-35, 36).

He addresses all the clinic employees. (R. 36-32, 33, 40, 41). He does not talk to the employees with an intent to harass or intimidate them; he talks to them because he loves them and is trying to persuade them to repent, without delay, by sharing “the gospel” - “the truth” with them. All of the signs Aish uses have Bible verses written on them and when he speaks he repeats Bible verses and warnings that God gives “through his word.” (R. 36-33, 34, 41).

**The Video Evidence Submitted In Support Of  
Kindschy’s Harassment Claim Demonstrates That The  
Circuit Court And Court Of Appeals Misconstrued Wis. Stat.  
§813.125 To Encompass Constitutionally Protected Conduct**

At the hearing before the Circuit Court, a video taken by Kindschy on her cell phone of her interaction with Aish was displayed to Circuit Court and introduced into evidence. Kindschy testified Aish’s conduct, as displayed in the video was typical of his behavior on other occasions which Kindschy alleged in support of her claimed need for an injunction. (R. 35-39, 40). That video is part of the record and available for viewing by the Court. See Order of the Court of Appeals dated January 15, 2021.

The 50 second recording shows Kindschy walking along a cement walkway which, straight ahead, ends in a sidewalk. To the left of the cement walkway is an area paved in asphalt. The recording briefly shows a person walking alongside Kindschy to her right. Kindschy walks toward Aish, who is standing on the sidewalk at its intersection with the end of the asphalt. Aish holds a sign that says, “THOSE WHO LOVE ME, OBEY ME! JESUS.”

Kindschy walks towards Aish. Aish speaks but his words are, for the most part, drowned out by the sound of the wheels on the bags rolled behind two other individuals, presumably other clinic employees, who walk between

Aish and Kindschy. Those employees turn in front of Kindschy and walk out of the frame to her left. Aish turns in the direction in which the other clinic employees have walked and says something about, “Don’t profess to be a Christian [inaudible].”<sup>1</sup> The recording then turns towards a car (presumably Kindschy’s), which has the driver’s side backseat door open. Kindschy’s car is parked the closest to where Aish is standing on the sidewalk. In the background Aish can be heard saying something about “lies” and then, “You know who the father of all lies is? [inaudible] Christian [inaudible].”

The recording pans back toward Aish on the sidewalk, briefly showing a security guard standing off to the side of Kindschy’s car. Aish, who has partially turned back toward Kindschy states, “If I remember right, you are Lutheran aren’t you? Kindschy turns away from Aish and back to her. Kindschy then turns back toward Aish who says, “You understand the father of all lies is Satan, not God. You mock but he’ll be mocking on the day of your day of judgment.” The recording cuts away and appears to show Kindschy getting into the front driver’s seat of her car. Aish is heard in the background stating, “I’ll pray that you guys make it home safely for another day that you can turn to Christ and repent.” The recording turns back to the security guard, who remains standing off to the side of Kindschy’s car, at the intersection of the cement walkway and asphalted area. The recording briefly turns back to Aish, who is still standing on the sidewalk and who says, “You still have time”. The recording pans back to the security guard and then ends.

### **The Circuit Court’s Ruling**

Following hearings on July 13, 2020 and September 9, 2020, the Circuit Court found that Aish made the statements at issue to “scare”

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<sup>1</sup> Quotes from the recording have been transcribed as accurately as possible given the difficulty in discerning each of the words spoken by Aish as depicted in the recording.



Kindschy into leaving her employment with Planned Parenthood and to embrace Aish's religious beliefs. (App. 23-24). The alleged statements were to the effect that bad things, like death, can happen to oneself and one's family at any time, and so Kindschy should immediately repent before it was too late to do so. (App. 22-23).

The Circuit Court concluded the comments "would intimidate somebody," "even coming from a place of love or nonaggression," and despite the Circuit Court's additional finding that Aish was not being angry or aggressive. (App. 23).

Despite these findings, the Circuit Court concluded that Aish's statements were intimidating because they "address somebody's loss of life or their family members being hurt or harmed." (App. 23). The Circuit Court concluded it was intimidating to cause Kindschy "to even think about that she might get killed on her way home or bad things are going to happen to her and her family." (App. 28).

The Circuit Court further found that Aish's actions did not serve any legitimate purpose, finding, "I don't find it's a legitimate purpose to use that intimidation to get someone to leave their job because the person making the intimidating statements doesn't agree with the position of that employment or what that employer stands for, and I don't also believe that it's a legitimate purpose to intimidate someone to get them to change or reaffirm their religious beliefs. I don't believe that that's a legitimate purpose here." (App. 28-29).

The Court held these were not legitimate purposes because:

We live in a country where not everybody has the same religious beliefs.... [W]e live in a country where ... freedom of expression and religion is -- is a right that people have and so to say that -- that to force someone -- or not force someone, to scare someone through things that may from the perspective of someone's religious beliefs might be important to tell

somebody, somebody else could look at that as being scared or intimidated to change their religion or change how they're living in their religion or to change their job and to use a religious basis for that. I don't see here in the state of Wisconsin or the United States that that is a legitimate purpose for expressing someone's religious rights... but I think it's difficult because I think on one hand you have Mr. Aish expressing his First Amendment rights to protest and have his opinions and his views on this and the question is has this gone too far to the point where the Court by its order here today is going to say no, you can't express that and in particular to this person or in this manner, I think that's -- it's very serious. These are First Amendment rights that are very guarded and protected in our nation and in our state; but, on the other hand, to then say that Ms. Kindschy is to endure being intimidated with statements that make her have to even think about that she might get killed on her way home or bad things are going to happen to her and her family, I think that that crosses the line into an area of not -- not a legitimate purpose in this particular case.... (App. 27-28).

On September 9, 2020, the Circuit Court entered an injunction against Aish barring him, until September 9, 2024, from harassing Kindschy and requiring him to avoid Kindschy's residence and/or any premises temporarily occupied by her, including the Blair Planned Parenthood at which Aish formerly protested. (R. 23-2, 3; App. 30-33).

On October 5, 2020, the Circuit Court denied Aish's Motion For Reconsideration in which he argued that the court committed manifest error "by determining that Mr. Aish's right to assemble and his right to freedom of expression under the First Amendment was not a legitimate purpose." (R. 26-1).

On October 22, 2020, Aish filed his Notice of Appeal (R. 28-1, 2).

### **Proceedings Before The Court of Appeals**

On March 8, 2021, the Court of Appeals issued its Opinion affirming the Circuit Court's injunction ruling and rejecting all of the claims of error asserted by Aish. (App. 1-13). Central to the Court of Appeals' decision

was its incorrect belief that the Circuit Court found “found that Aish intimidated Kindschy by repeatedly making threats to Kindschy and her family.” (App. 6-7, ¶14. See also App. 5, ¶10 (“The court further found that Aish’s repeated statements that Kindschy would be “lucky” if she made it home safely and that bad things would start happening to her family were threatening.”) And, App. 8, ¶18 ( “Although Aish argues that the video evidence does not support a determination that he was threatening or intimidating Kindschy, the circuit court found to the contrary....”) And, App. 8, ¶19 (“[Aish] berated [Kindschy] with veiled threats suggesting harm toward both Kindschy and her family....”)

To the contrary, although the Circuit Court found that someone could be intimidated by the comments made by Aish, it made no finding that Aish made any threats against Kindschy and her family. Instead, the Circuit Court concluded that comments by Aish:

appear to be intimidating and even in the context that is presented here of trying to convey a message of repentance, a message in an attempt to encourage someone to turn their life over and turn to Jesus is the context based on the testimony of Mr. Aish of what he was trying to do, trying to share the gospel, and also has a stance of being against the things that Planned Parenthood does, which include abortions... that the protest was the fact that Planned Parenthood itself, even though not at this particular facility, is engaged in procedures that result in the loss of life of unborn children and that is what Mr. Aish was wanting to stop or change the behavior of by his protesting here.” (App. 21-23).

The Circuit Court found these kinds of statements were intimidating, but it never found that they constituted threats against Kindschy and her family or that Aish acted angrily or aggressively:

So the Court finds even in that context that that would be intimidating to tell somebody, even if it's in the context of

wanting to send this message and even coming from a place of love or nonaggression, which I didn't find any aggression in the February 18, 2020 video, and Ms. Kindschy testified that the other incidents were similar in nature as to tone, although there was some testimony that Mr. Aish was loud or aggressive. Based on the testimony here I think it's more likely that Mr. Aish is passionate about his beliefs and not that he was being angry or aggressive; however, that doesn't mean that somebody can't on the receiving end feel that it was aggressive or loud. But, nonetheless, I do find that there was intimidation Mr. Aish made towards Ms. Kindschy, these statements of "bad things happening to you and your family" and "you're lucky if you make it home safe." Those types of things certainly would intimidate somebody because they lead to -- they are statements that address somebody's loss of life or their family members being hurt or harmed and certainly that would intimidate somebody. (App. 23).

Contrary to the Court of Appeals belief that the Circuit Court found that Aish threatened Kindschy and her family, the Circuit Court found that Aish's behavior was not angry or aggressive and came from "a place of love or nonaggression." (R. 36-83, 84). It was undisputed that the purpose of Aish's comments were to influence Kindschy to leave her employment, to shut down Planned Parenthood, and to proselytize.

The Court of Appeals rejected Aish's argument that his conduct was for a legitimate First Amendment purpose and protected by the First Amendment (App. 8-12), in short because, "The court correctly determined that the First Amendment does not uphold a right to threaten or scare people in order to sway their religious beliefs or induce them to quit their jobs." (App. 12, ¶29). Again, however, the Court of Appeals' decision rested on the same mistaken conclusion that the Circuit Court had made a factual finding that Aish threatened Kindschy and her family.

## **ARGUMENT**

### **I.**

#### **AS CONSTRUED BY THE CIRCUIT COURT AND THE COURT OF APPEALS, WIS. STAT. § 813.125 IS UNCONSTITUTIONAL. THE CIRCUIT COURT AND THE COURT OF APPEALS CONSTRUED WIS. STAT. § 813.125 TO PROHIBIT FIRST AMENDMENT PROTECTED SPEECH RELATING TO PUBLIC CONCERNS IN A PUBLIC FORUM BECAUSE IT WAS DISTURBING AND UPSETTING TO A LISTENER.**

As relevant to this case, Wis. Stat. § 813.125(1) defines “harassment” to mean, “Engaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose.”<sup>2</sup> The Court of Appeals’ concluded that Aish’s conduct falls within the ambit of Wis. Stat. § 813.125 based on its deference to alleged findings by the Circuit Court that Aish threatened Kindschy and her family. (See App. 5, ¶10, App. 6-7, ¶14, App. 8, ¶¶18-19). The Circuit Court, however, made no finding of any threats. Instead, it found that Aish harassed Kindschy within the meaning of Wis. Stat. § 813.125, because his comments that she should repent before something bad happened to her or her family and it was too late to repent were intimidating. (R. 36-82, 83).

Contrary to the Court of Appeals conclusion, there was no evidence, and no finding by the Circuit Court, that Aish threatened Kindschy or otherwise suggested that Aish might play a role in any bad thing that might

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<sup>2</sup> Wis. Stat. § 813.125 also defines “harassment” to include, “1. Striking, shoving, kicking or otherwise subjecting another person to physical contact; engaging in an act that would constitute abuse under s. 48.02(1), sexual assault under s. 940.225, or stalking under s. 940.32; or attempting or threatening to do the same.” Kindschy never alleged, and there was no certainly evidence that Aish committed any of the foregoing acts.

happen to Kindschy or her family. Aish did not threaten Kindschy or her family.

However, the Circuit Court found Aish's comments constituted intimidation because "they are statements that address somebody's loss of life or their family members being hurt or harmed and certainly that would intimidate somebody." (R. 36-84). The Circuit Court held Kindschy was entitled to protection from "statements that make her have to even think about that she might get killed on her way home or bad things are going to happen to her and her family...." (R. 36-89). The Court of Appeals affirmed, finding that Aish's speech was not protected by the First Amendment. (App. 11-12, ¶¶ 25-27).

The Circuit Court and the Court of Appeals interpreted Wis. Stat. § 813.125 to punish and prohibit anti-abortion speech that urges people to turn to God, eschew sinful complicity in abortion and immediately repent, because you never know when you are going to die, bad things happen all the time, and then it will be too late, because it is disturbing, distasteful, or frightening. Such an interpretation renders Wis. Stat. § 813.125 unconstitutional as violative of the First Amendment, as well Art. I, §3 of the Wisconsin Constitution.

As the Supreme Court explained in *Snyder v. Phelps*, 562 U.S. 443, 452 (2011), speech regarding public affairs, as opposed to speech regarding purely private matters, is entitled to special protection. "Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'" *Id.* at 453. [Citations omitted throughout.] Speech which is public in nature "cannot be restricted simply because it is upsetting or arouses contempt. 'If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit

the expression of an idea simply because society finds the idea itself offensive or disagreeable.’ Indeed, “the point of all speech protection ... is to shield just those choices of content that in someone’s eyes are misguided, or even hurtful.” *Id.* at 458. [Citations omitted throughout.]

Citing numerous Supreme Court authorities, in *Bible Believers v. Wayne County, Michigan*, 805 F.3d 228, 243 (6th Cir. 2015), the Court stated:

The First Amendment offers sweeping protection that allows all manner of speech to enter the marketplace of ideas. This protection applies to loathsome and unpopular speech with the same force as it does to speech that is celebrated and widely accepted. The protection would be unnecessary if it only served to safeguard the majority views. In fact, it is the minority view, including expressive behavior that is deemed distasteful and highly offensive to the vast majority of people, that most often needs protection under the First Amendment.

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Accordingly, “[t]he right to free speech ... includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker’s message may be offensive to his audience.” [Citations omitted throughout.]

Irrespective of whether Kindschy found Aish’s statements “upsetting” or “offensive”, Wis. Stat. § 813.125 is unconstitutional if, as the Circuit Court (erroneously) found, it prohibits the utterance of words on a matter of public concern on a public forum.

The Court of Appeals found that *Snyder* is inapplicable because Aish’s speech was “almost entirely personal - and not public in nature” because:

“[Aish’s] efforts were not geared toward changing the minds of the general public or legislators. Rather, Aish was attempting to get Kindschy specifically to change her mind and

to resign her position as a nurse practitioner at the Blair Clinic.”  
(App. 12, ¶27).

The Court of Appeals cites no authority for the proposition that speech is public speech only when directed to “the general public or legislators.” Despite the Court of Appeals’ characterization, the speech at issue did not relate to some personal or private interest Aish had in Kindschy’s employment situation. To the contrary, as the Circuit Court accepted that Aish’s comments were made in the context “of trying to convey a message of repentance, a message in an attempt to encourage someone to turn their life over and turn to Jesus is the context based on the testimony of Mr. Aish of what he was trying to do, trying to share the gospel, and also has a stance of being against the things that Planned Parenthood does, which include abortions.” (App. 21-23).

Moreover, *Snyder* makes clear, “Speech deals with matters of public concern “when it can ‘fairly considered as relating to any matter of political, social, or other concern to the community, such speech is public speech.” The Circuit Court recognized, “Mr. Aish also testified himself that he directs comments towards people and tries to engage in dialogue to -- in order to pass the message that he's trying to convey.” (App. 21). It was undisputed that Aish’s presence on the sidewalk outside the Blair Planned Parenthood was in furtherance of his pro-life beliefs and that his objection to Planned Parenthood and to Kindschy’s work there was his opposition to abortion - a matter of undeniable social and political concern to the community.

Abortion, and whether Planned Parenthood can continue to find people to employ and remain in business, are matters of public concern. “Such speech cannot be restricted simply because it is upsetting or arouses contempt. ‘If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply



because society finds the idea itself offensive or disagreeable. Indeed, “the point of all speech protection ... is to shield just those choices of content that in someone’s eyes are misguided, or even hurtful.” *Snyder*, 562 U.S. at 458. [Citations omitted throughout.]

Further, if, as the Court of Appeals held, Wis. Stat. § 813.125 permits a four year ban on speech in a public forum regarding a matter of public concern, it is unconstitutional as a prior restraint. The Supreme Court of the United States has consistently held that “[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) [Citations omitted.] Because of this, the “Government ‘thus carries a heavy burden of showing justification for the imposition of such a restraint.’” *Id.* [Citation omitted.]. An order which restricts First Amendment rights “must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order.” *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 183 (1968).

As previously discussed, Aish’s opposition to Planned Parenthood because of its participation in abortion is First Amendment expression on a matter of public interest. Abortion remains a hotly contested political and social issue. Aish’s opposition to Planned Parenthood and efforts to spread a pro-life, Christian message is the kind of message accorded the highest level of First Amendment protection. The injunction entered by the Circuit Court, and affirmed by the Court of Appeals, impermissibly effectively completely bans Aish from exercising his First Amendment right to protest at the Blair Planned Parenthood and fails to meet the “heavy burden of showing justification for the imposition of such a restraint.” See *New York Times Co.*, 403 U.S. at 714.

## II.

### **THE CIRCUIT COURT AND THE COURT OF APPEALS CONSTRUED THE “NO LEGITIMATE PURPOSE” LANGUAGE OF WIS. STAT. § 813.125 TO EXCLUDE FIRST AMENDMENT PROTECTED SPEECH RELATING TO PUBLIC CONCERNS IN A PUBLIC FORUM.**

Aish contended that his conduct was protected by the First Amendment (R.36-24, 25, 77, 78), and the Circuit Court explicitly recognized that Aish was exercising his First Amendment rights to protest and proclaim his opinions and his views. (R. 36-88). The Circuit Court found that Aish’s comments were intended to influence Kindschy to leave her employment in furtherance of his goal of shutting down Planned Parenthood (R. 36-86, 89), and to embrace his religious perspective. (R. 36-86). The comments at issue were made in the context of attempting to convey Aish’s message regarding the urgent need to repent and to cease perceived sinful involvement in abortion.

Nonetheless, the Circuit Court and the Court of Appeals held that Aish’s speech served no legitimate purpose. (App. 3, ¶4; App. 8-10, ¶¶20-24; App. 24-29). The Circuit Court found that Aish’s intended purposes - “saving the lives of unborn children and also from -- from the religious perspective of saving Ms. Kindschy’s soul by sharing the gospel,” were not legitimate because Aish went “too far” because his speech was intended to “scare” Kindschy. (App. 25-27). The Court of Appeals affirmed the Circuit Court’s determination. (App. 10, ¶23).

The decisions by the Circuit Court and the Court of Appeals are contrary to both the First Amendment and this Court’s decision in *Bachowski v. Salamone*, 139 Wis.2d 397, 408, 407 N.W.2d 533, 537-538 (1987). In *Bachowski*, this Court explained that Wis. Stat. § 813.125 prohibits

harassment and intimidation intended to harass. This Court stated, “It is clear from sec. 813.125, Stats., that chronic, deliberate behavior, *with no legitimate purpose* designed to harass another person is proscribed by the statute.” [Emphasis added.] This Court further concluded the statute is not overbroad and does not chill free speech because:

The intent requirement and the phrase “no legitimate purpose” make clear that protected expression is not reached by the statute. *See* Model Penal Code sec. 250.4 comment 6 at 371-72. It is not directed at the exposition of ideas but at oppressing repetitive behavior which invades another’s privacy interests in an intolerable manner. *Bachowski*, 139 Wis.2d at 411, 407 N.W.2d at 539.

As discussed above, the speech which the Circuit Court and the Court of Appeals found in this case to violate Wis. Stat. § 813.125 was First Amendment protected speech relating to a matter of public concern in a public forum. Contrary to the Circuit Court’s and the Court of Appeals’ finding of “no legitimate purpose”, such speech does not lose its First Amendment protection because the message is phrased in such a way as to upset or frighten listeners. See *e.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011); *Bible Believers v. Wayne County, Michigan*, 805 F.3d 228, 243 (6th Cir. 2015).

### **CONCLUSION**

For all of the foregoing reasons, Petitioner asks this Court to accept this matter for review and to reverse the Court of Appeals’ March 8, 2022 published decision and to reverse and vacate the Circuit Court’s September 9, 2020 “Injunction-Harassment Order of Protection.”

Dated this 7th day of April, 2021.

BY:

Electronically signed by Joan M. Mannix

THOMAS MORE SOCIETY

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**CERTIFICATION BY ATTORNEY**

I hereby certify that this petition conforms to the rules contained in §809.19(8)(b), and (bm) for a brief and §809.62(4) for a petition for review. The length of this petition for review is 5,838 words.

I further certify that filed with this brief (Petition For Review), as a separate document, an appendix that complies with §809.62(2)(f) and that contains, at a minimum: (1) a table of contents; (2) the decision and opinion of the court of appeals; (3) the judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court necessary for an understanding of the petition; (4) any other portions of the record necessary to an understanding of the petition; and (5) a copy of any unpublished opinion cited under §809.23(a) or (b).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the

record have been so reproduced to preserve confidentiality and with appropriate references to the record.

I further certify that a copy of this certificate has been served with this appendix filed with the court and served on all parties either by electronic filing or by paper copy.

I further certify that the content of the electronic copy of the petition and appendix are identical to the content of the paper copy of the petition and appendix.

Dated April 7, 2022

BY:

Electronically signed by Joan M. Mannix

THOMAS MORE SOCIETY

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