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STATE OF WISCONSIN
SUPREME COURT
Appeal No.: 2020AP001775

NANCY KINDSCHY,

Petitioner-Respondent,

v.

BRIAN AISH,

Respondent-Appellant-Petitioner.

RESPONDENT-APPELLANT-PETITIONER'S BRIEF

On Petition For Leave To Appeal from the Court of Appeals,
District III. There heard on Appeal From a Decision Entered
September 9, 2020, in the Trempeleau County Circuit Court,
the Honorable Rian W. Radtke, Presiding, Case No. 2020CV40.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether Wis. Stat. §813.125, as construed by the Circuit Court and 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 U.S. Constitution, Amendment I (“First Amendment”) 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 a “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

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Respondent-Appellant-Petitioner, Brian Aish (“Aish”) requests oral argument in order to address any questions or concerns the Court may have and to further expound upon the issues presented as may be appropriate given the Court’s questions and

concerns. Publication is warranted because the issues presented, including the proper interpretation and application of Wis. Stat. § 813.125, warrant publication.

STANDARD OF REVIEW

A reviewing court independently reviews a circuit court's determination to enter an injunction, which is based on established facts, to determine whether reasonable grounds exist for the injunction. See *Welytok v. Ziolkowki*, 2008 WI App 67, ¶ 23, 312 Wis. 2d 435, 752 N.W.2d 359 (Ct. App. 2008). Whether Petitioner-Respondent, Nancy Kindschy ("Kindschy") met her burden of proof is a question of law, also subject to *de novo* review. See *Id.*, citing *Brandt v. Brandt*, 145 Wis.2d 394, 409, 427 N.W.2d 126 (Ct. App. 1988). Put slightly differently, "whether reasonable grounds exist to grant the injunction is a question of law that [the reviewing court] review[s] *de novo*. *Board of Regents-UW System v. Decker*, 2014 WI 68, ¶20, 355 Wisc.2d 800, 850 N.W.2d 112, citing *Welytok*, 2008 WI App 67, ¶ 23, 312 Wis. 2d 435, 752 N.W.2d 359.

A reviewing court can reverse a circuit court decision to grant a harassment injunction when the record establishes an erroneous exercise of discretion by the circuit court. See *Welytok*, 2008 WI App 67, ¶ 23, 312 Wis. 2d 435, 752 N.W.2d 359. A reviewing court should uphold the circuit court's findings of fact unless they are clearly erroneous. Wis. Stats. § 805.17(2).

STATEMENT OF THE CASE

On March 10, 2020, Kindschy petitioned for the entry of an injunction against Aish. Aish is a pro-life protestor who regularly stands on the sidewalk outside a Planned Parenthood location at which Kindschy and others work, and who, among other things, urges the Planned Parenthood workers to repent and to turn to God before it is too late. Kindschy based her request for an injunction on statements made by Aish in that setting on various dates in October and November, 2019, and February, 2020. (R. 1:4, 5).

On July 13, 2020 and September 9, 2020, the Honorable Rian W. Radtke ("the Circuit Court") held a hearing on Kindschy's allegations. At the conclusion of the

hearing, the Circuit Court made oral findings of fact and set forth the basis of its decision in favor of Kindschy. (R. 36: 80-94; App. 6-20.). The Circuit Court found that Aish made the statements at issue to “scare” Kindschy into leaving her employment with Planned Parenthood and to embrace Aish’s religious beliefs. (R. 36: 84, 85; App. 10-11). The statements Kindschy alleged as a basis for the injunction included statements to the effect that bad things, such as accidents and death, can happen to oneself and one’s family at any time, and so Kindschy should cease her sinful conduct (working at Planned Parenthood) and immediately repent. (R. 36: 83-84; App. 9-10). The Circuit Court concluded that, “even coming from a place of love or nonaggression,” and despite a finding that Aish was not being angry or aggressive, the comments “would intimidate somebody” (R. 36:84; App. 10) and were not made for a legitimate purpose. (R. 36:85-90; App. 11-16).

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 Planned Parenthood clinic at which she works and at which Aish formerly protested. (R. 23:2-3; R. 36:91-94; App. 17-20).

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 appeal, the Court of Appeals affirmed the Circuit Court’s September 9, 2020 injunction order. The Court of Appeals held:

The evidence established a pattern of repeated actions over the course of months that demonstrated Aish’s purpose was to scare and intimidate Kindschy, including evidence that Aish threatened Kindschy and her family on more than one occasion. Although Aish claims that he intended only to influence Kindschy to leave her employment, to shut down Planned Parenthood, and to proselytize, his comments and behavior were harassing to Kindschy, making his actions unprotected speech. To protect against such harassment, the court permissibly tailored the injunction order to prevent Aish from being at Blair Clinic when Kindschy is there. An individual’s ability to protest abortion, like any other subject, is not unlimited.

Kindschy v. Aish, 401 W.2d 406, 410 (2022). (App. 24.)

However, as discussed in greater detail *infra*, the Circuit Court did not find that Aish made any threats to Kindschy or her family. Instead, the Circuit Court found Aish violated Wis. Stat. §813.125 by making statements that made Kindschy “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. 36:88-89; App. 14-15). There was no evidence and no finding that Aish threatened to inflict any harm upon Kindschy or her family.

STATEMENT OF FACTS

Procedural History

On March 10, 2020, Kindschy petitioned for the entry of a temporary restraining order and permanent injunction against Aish, a pro-life protester who protests at the Planned Parenthood clinic at which Kindschy works. In support of her Petition for Temporary Restraining Order And/Or Petition and Motion for Injunction Hearing (“Petition”), Kindschy asserted she works as a nurse practitioner at a Planned Parenthood located in Blair, Wisconsin (the “Blair Planned Parenthood”), (R.35:5), where Aish “regularly protests ... and has since approximately April of 2019 when the Blair Center opened.” (R. 1:4). Kindschy purported to describe statements Aish made to her on various occasions (R. 1:4-5) and claimed that Aish makes her fear for her safety.

In support of her Petition, Kindschy admitted into evidence a video recording, taken on her phone, on which she recorded Aish on February 18, 2020. Kindschy testified that what is shown in the video was “indicative” of the manner in which Aish protested and his conduct on the other occasions which Kindschy cited in support of her claimed entitlement to an injunction. (R. 35: 39, 40).

Kindschy also presented her own testimony and the testimony of two of her co-workers at the Blair Planned Parenthood. (R. 24:1-2; R. 35:39-40; R. 36:64; Pet. Ex.

2). Aish presented his own testimony and that of his wife and fellow pro-life protester, Anna Aish.

At the conclusion of the hearing, the Circuit Court granted the Petition and, among other things, ordered Aish to avoid Kindschy's residence and/or any premises temporarily occupied by her. The Circuit Court ruled that the injunction covers the Blair Planned Parenthood, at which Aish formerly protested and ministered, whenever Kindschy is or might be at work or otherwise present there. (R. 23:2-3; R. 36: 91-94; App. 17-20).

The Hearing On Kindschy's Petition

The February 18, 2020 Video

The video Kindschy took on her phone on February 18, 2020 was admitted into evidence, was reviewed by the Circuit Court and is part of the Record. (R. 24; R. 35: 39-40; Ex. 2). As noted above, Kindschy acknowledged that Aish's behavior as shown on the video was "indicative" of his behavior on each of the other occasions which Kindschy also claimed as a basis for the entry of the injunction. (R. 1:5; 35: 39, 40). The video can be viewed via this link:

<https://drive.google.com/file/d/1Rpqi2j1fg3T3Xyptw6DByVc6uhfTE96C/>

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]”.¹ 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 car. 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 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.

Kindschy’s testimony

Kindschy testified that she works at the Blair Planned Parenthood and at a Planned Parenthood located in LaCrosse, Wisconsin. (R. 35:4). The Blair Planned Parenthood is only open on Tuesdays. (R. 35-4, 5, 6).

Kindschy stated that Aish is a “frequent protester” at the clinics where she works. (R. 35:5, 10, 21). Kindschy premised her claimed entitlement to an injunction on five interactions with Aish occurring from October 8, 2019 through February 25, 2020.

¹ Quotes from the video have been transcribed as accurately as possible given some difficulty in discerning every word spoken.

Kindschy testified that, on October 8, 2019, when Kindschy left work with another co-worker, Aish was standing on the sidewalk, where he usually protested, holding a sign. Aish was approximately 3 to 4 feet away from Kindschy's car. According to Kindschy, on that occasion, Aish told her she still had time to repent. He also stated she might be killed by a drunk driver on her way home and that it would not be too long before bad things started happening to her and her family. Kindschy asserted that Aish made these statements in a "raised" "very direct voice" toward her. (R. 35:27). Kindschy and her co-worker got in their cars and left. When Kindschy left, Aish was "still standing on the sidewalk." (R. 35:7-10).

Kindschy also premised her injunction request on an interaction which she alleged occurred on October 15, 2019. With respect to that date, Kindschy claimed Aish said something to Kindschy, in a "cold, angry, loud" manner, about having blood on her hands. (R. 35:11 -14).

According to Kindschy, on October 29, 2019, when Kindschy and her co-worker left, Aish was "at the end of the sidewalk where he would line himself up." Kindschy left quickly. She stated that after she left, Aish "ran out into the road after [her] pumping his anti-abortion sign into my car window within inches of it" and she sped off. (R. 35:14).

Kindschy also testified regarding the February 18, 2020 interaction with Aish which Kindschy had videotaped. Kindschy testified that, on February 18, 2020, as she was leaving work with a co-worker, Aish "followed [her] directly to [her] vehicle." (R. 35:15). According to Kindschy, Aish said, "'Ma'am, you have time to repent. If I recall you are a Lutheran.'" He told her she had blood on her hands and that she was a liar. He also said, "'Do you know who plays the game of lies, ma'am? It's [S]atan. Satan will come to judge you.'" She said these comments "frightened her so bad." Kindschy claimed Aish also said she would be lucky if she got home safely, that she could possibly be killed, and that bad things were going to start happening to her family. According to Kindschy's testimony, Aish was "very loud," "very stern" and "very

agitated” when he made these comments and Kindschy stated “she felt threatened.” (R. 35:15-16).

The February 18, 2020 video fails to support Kindschy’s testimony that Aish “followed [her] directly to [her] vehicle,” and fails to support her testimony regarding the content and manner of Aish’s speech.

The video from February 18, 2020 shows Aish off to the side, doing nothing to impede Kindschy or to block her vehicle. (R. 35:41). Kindschy claimed, however, that “he’s just been very close, which [had] frightened [her] that he could step into [her] vehicle.” (R. 35:41-42). She admitted, however, that he had never stepped into her vehicle and, as far as she was aware, had never touched her vehicle. (R. 35:42).

With regard to the final interaction upon which Kindschy premised her claimed entitlement to an injunction, she maintained that, on February 25, 2020, Aish “told [her] she had been a liar and still [had] time to repent.” Kindschy claimed she felt threatened when Aish told her she had been a liar. (R. 35:17). Kindschy further testified that on that date, when she was leaving work, Aish said she had lied to the authorities about him and that she would be lucky to make it home safely. Kindschy asserted that this caused her “great concern” because Aish’s “behavior has continued to just get more aggressive, specifically toward [Kindschy].” (R. 35:19-20). Kindschy stated Aish was “very loud”, “very stern” and “very agitated” when he made the comments but did not block Kindschy’s way or make it difficult for her to leave. (R. 35:20-21).

Kindschy acknowledged that, at no time during any of the interactions Kindschy described did Aish leave the sidewalk as she walked from the entry to the Blair Planned Parenthood to her car. (R. 35:30).

Kindschy maintained that she felt threatened by Aish because he “continues to single [her] out, even as he harasses other staff and patients”, which was what she alleged in her Petition. (R. 1:5; 35:42).

Testimony of Brian Aish

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). For approximately 9 years he has protested at Planned Parenthood and other clinics that perform abortions to “stand for children.” (R. 36:27, 28).

Aish and the other protesters tried to make sure someone was always at the clinic “to represent God and to be there for women coming in and being misled in the wrong direction.” (R. 36-28). Aish tries to be present at the Blair Planned Parenthood in the afternoon. Members of Aish’s family sometimes join him there and a couple of other families with kids are also usually there in the afternoon. (R. 36-31-32).

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 denied “focusing” on Kindschy. He knew Kindschy was a Lutheran because he believed she previously told him that. (R. 36: 32, 46). On February 18, 2020, Aish asked Kindschy 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 employees to open up, plant a seed and get them to think about what they are doing. (R. 36: 37).

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).

Aish sought to share the gospel and warn everyone going into or coming out of the building to repent, and to educate them about what Planned Parenthood does (“kill children and make money on it”). This included clinic employees and patients, others employed in the same building, people doing business with the clinic or with other occupants of the building, and people passing on the street. (R. 36:41-42, 44-48).

Aish had no desire to harm or intimidate Kindschy. (R. 36:35, 40). When he said that bad things happen, like drunk driving accidents, he said this because he is aware that 7,000 people a day die in the United States, and he wanted her to turn away from sin and put her faith in Jesus Christ before it is too late. (R. 36:35-36).

Aish testified that the video Kindschy took and admitted into evidence (Pet. Ex. 2) shows the usual volume and tone of his voice. Aish modulates his voice based on how close or how far away he is from the person he is speaking to. (R. 36:36-37).

Aish never sought to block Kindschy’s ingress or egress. (R. 36:37-38). He was present at the clinic one evening when the police came and stated the clinic workers had called and said he was blocking them, but, in fact, the workers had not yet come out to leave. (R. 36-40, 41). The workers frequently called the police and, apparently, reported Aish to the FBI on at least one occasion. (R. 36:39-40).

Testimony of Anna Aish

Anna Aish (“Anna”) is Aish’s wife of 21 years. They have two daughters, a 16 year old and a 9 year old. (R. 36:49). About ten years before, she and Aish started going to a clinic to counsel abortion-minded women, trying to save them and their babies. (R. 36:50-51). When that clinic closed, they started going to the next closest clinic (Blair Planned Parenthood). (R. 36:51, 52).

There are anywhere from a few to ten protesters at the clinic. (R. 36:51, 52). Anna has been present when Aish ministers to the clinic employees. She testified that

Aish is very passionate about trying to help the clinic employees see what they are doing is wrong, She and Aish pray they will change their hearts. Aish does not do this to be mean but to help the clinic employees. (R. 36:53-54). Aish has never threatened Kindschy nor spoken about wanting to hurt her. (R. 36:54).

Anna and Aish also give the mothers Christian literature with pictures of babies in the womb at various stages of development. They encourage them to change their minds and offer to talk with them and direct them to a clinic that performs ultrasounds. (R. 36:51).

The Testimony of Other Planned Parenthood Employees

Shonda Racine (“Racine”), a Planned Parenthood center manager, stated that when she was at the Blair Planned Parenthood there were typically 3-4 protestors. (R. 35:53). Aish was there almost every Tuesday when Racine was there. (R. 35:54). Aish protested throughout the day when he was at the Blair Planned Parenthood, making his position known to everyone in the area; he did not protest only when Kindschy was present. (R. 35:64).

Racine claimed she heard Aish say to Kindschy she had blood on her hands, that bad things are going to start happening to her and her family, that she needed to repent, and that he could not help her. (R. 35:48, 50-51, 63-64).

Racine asserted that on October 8, 2019, she saw through her rearview mirror that Aish stood in the roadway with his sign. Racine said Aish was in Kindschy’s way but then moved. (R. 35:49). However, Kindschy herself testified that when she left the clinic on that date Aish was standing on the sidewalk (R. 35:7-10) and moved out of Kindschy’s way as she pulled out and left. (R. 35:31).

Jessica Beranek (“Beranek”), a Planned Parenthood Wisconsin center manager had known Aish since April 2014; she knew him as a protestor at the Whitehall clinic (which later moved and eventually became the Blair Planned Parenthood), the Blair Planned Parenthood, and the Black River Falls Clinic. (R. 36:6, 13).

Berenak was at the Blair Planned Parenthood on February 18, 2020. (R. 36:6-7). On that date, Beranek, Kindschy and another employee, Marshall Carter, left together. (R. 36:8-12). She confirmed that Aish remained on public property on that date. (R. 36:9).

The Circuit Court's Ruling in Favor of Kindschy

The Circuit Court found Aish “to be very credible as to what happened on the incidents, as well as his positions on his religious beliefs.” (R. 36:80; App. 6).

The Court concluded Kindschy appeared credible, but also found, “there was sometimes where it seemed as though she might have maybe blended some of the days” and “[t]here were times when her recollection wasn't exactly clear on certain details.” For example, the Court noted there was testimony from Kindschy that on February 18th, 2020, Aish said “bad things would happen to her” but, based on the Circuit Court’s review of Exhibit 2, “that wasn't said.” The Court also found the other witnesses to be credible. (R. 36:80; App. 6).

Nonetheless, the Circuit Court found Aish engaged in intimidation of Kindschy. The Court acknowledged that Aish was a frequent protester at the Blair Planned Parenthood where Kindschy works, and that “a number of contacts in late 2019 and early 2020 between Mr. Aish and Ms. Kindschy that ... were directed towards Ms. Kindschy” had occurred. The Circuit Court concluded, “[t]he February 18th, 2020 video clearly points out that Mr. Aish is talking to Ms. Kindschy,” that he asked her, “I believe you are a professing Christian,” and he then made the statement, “You are Lutheran if I remember right.” The Court further stated, “It appears from the video it was directed towards Ms. Kindschy, so I don't find that Mr. Aish was just making generic comments out loud to anybody who would hear, that they were specifically directed to Ms. Kindschy”. (R. 36:81; App. 7).² The Circuit Court, however,

² The video also shows that Aish directed comments toward Kindschy’s co-workers as they passed by him. Aish then specifically addressed Kindschy. But Aish’s further comment, “I’ll pray that you guys make it home safely for another day that you can turn to Christ and repent,” was explicitly directed not only to Kindschy but also her co-workers.

recognized that “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.” (R. 36:82; App. 8).

With regard to whether Aish’s comments were “harassing” or “intimidating,” the Court stated, “Clearly, Ms. Kindschy was annoyed and bothered by it working for Planned Parenthood and a protester against the things that Planned Parenthood does. I'm not surprised that an employee there is -- felt harassed or felt bothered by that. I think the Court's, I guess, bigger concern here is the intimidation.” (R. 36-83; App. 7).

The Circuit Court determined that Aish intimidated Kindschy based on comments he made on October 8, 2019, February 18, 2020, and February 25, 2020. The Circuit Court found that, on October 8, 2019, “Mr. Aish stated that [Kindschy] has time to repent and that ‘it won't be long before bad things will happen to you and your family’ and ‘you could get killed by a drunk driver tonight.’” As to February 18, 2020, the Circuit Court concluded Aish stated to Kindschy, “I pray you guys make it home safely for another day or two until you turn to Christ and repent. You still have time.” With respect to February 25, 2020, the Circuit Court stated Aish indicated that Kindschy would be lucky if she made it home safely. (R. 36: 82-83; App. 8-9).

The Circuit Court found those statements “appear to be intimidating,” even in the context that is presented here where Aish is “trying to convey a message of repentance, a message in an attempt to encourage someone to turn their life over and turn to Jesus.” The Circuit Court found Aish was “trying to share the gospel, and also has a stance of being against the things that Planned Parenthood does, which include abortions...”. The Circuit Court further concluded, “I believe based on the testimony 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 Circuit Court concluded:

[E]ven 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.

(R. 36: 84; App. 10).

After finding Aish engaged in a course of conduct and a repeated committing of acts which intimidated or harassed Kindschy (R. 36: 85; App. 11), the Circuit Court addressed whether "the intimidation serves any legitimate purpose." (R. 36: 85; App. 11). The Circuit Court found the purpose was "to scare" Kindschy to persuade her to leave her employment "or to stop doing what she was doing" and to get Kindschy "to ... adopt Mr. Aish's religious beliefs." (R. 36; 86; App. 12). The Circuit 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....

(R. 36:88-89; App 14-15). The Circuit Court further stated:

I think in the context of everything ... I think it's hard to really adopt Mr. Aish, his argument, that this was done to be concerning for Ms. Kindschy and -- and her spirituality. It seemed more based on the context here that this was done to intimidate of getting her to change her job, so that Mr. Aish's underlying goal of her stopping or ending Planned Parenthood could be achieved, and so for those reasons I'm going to find that Mr. Aish engaged in a course of conduct of repeatedly committed acts that harassed and certainly intimidated Ms. Kindschy and that those intimidation actions did not serve any legitimate purpose, as 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.

(R. 36:89-90; App. 15-16).

The Court of Appeals' Decision

The Court of Appeals affirmed the Circuit Court's ruling in favor of Kindschy. The Court of Appeals based its decision in significant part on deference to purported factual findings by the Circuit Court that Aish had repeatedly threatened harm to Kindschy and her family. The Court of Appeals stated, "Aish intimidated Kindschy by repeatedly making threats to Kindschy and her family." *Kindschy v. Aish*, 2022 WI App 17, ¶14. According to the Court of Appeals, "The [Circuit 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." *Kindschy*, at ¶10. See also, *Kindschy* at ¶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, *Kindschy* at ¶19 ("[Aish] berated [Kindschy] with veiled threats suggesting harm toward both Kindschy and her family....")

ARGUMENT

I. As Construed By The Circuit Court And The Court Of Appeals To Prohibit Speech In A Public Forum Intended To Persuade Listeners To Cease Their Sinful Conduct And Repent, Wis. Stat. §813.125 Violates The First Amendment Of The U.S. Constitution And Art. I, §3 Of The Wisconsin Constitution.

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 a listener found such speech “frightening” or “threatening.” Such an interpretation, however, renders Wis. Stat. §813.125 unconstitutional as violative of the First Amendment and Art. I, §3 of the Wisconsin Constitution.

A. The Speech At Issue In This Case Is Consummate First Amendment Protected Speech.

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 First Amendment 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.

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 “frightening” or “threatening”, 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 in 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, however, cited no authority for the proposition that speech is First Amendment protected public speech only when directed to “the general public or legislators.” *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.” *Snyder*, 562 U.S. at 453.

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.’” [Citations omitted throughout.] *Id.* at 458.

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, 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.” (R. 36:82-84; App. 8-10) 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, and the work of the other clinic employees, was based on his opposition to abortion - a matter of undeniable social and political concern to the community.

Aish’s speech in a public forum was protected even if he was espousing his message when no one else was present, when one other person was present, or when scores of people were present. But, the Appellate Court’s assertion that Aish’s “efforts” were not directed to the general public ignores the Circuit Court’s findings of fact and the uncontroverted record evidence. 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). Aish’s uncontroverted testimony established he was at the Blair Planned Parenthood to seek to spread his message to everyone going into or coming out of the building. He sought to communicate his message to clinic employees and patients, others employed in the same building, people doing business with the clinic or with other building tenants, and people passing on the street. (R. 36:41-42, 44-48). Aish did not go to the Blair Planned Parenthood in order to “single out” or direct his message to Kindschy alone.

Aish stayed after the last appointments for the day to spread his message to all the clinic employees. (R. 36: 30-35, 40-41). Kindschy acknowledged that Aish sought to communicate his message to other staff and patients (characterized by Kindschy as Aish harassing the other staff and patients), but she felt threatened and “singled out”. (R. 1:5; 35-42). Racine, a manager at the Blair Planned Parenthood confirmed that Aish protested at the Blair Planned Parenthood throughout the day making his position known to everyone in the area; he did not protest only when Kindschy was present. (R. 35: 74). The February 18, 2020 video confirms Aish’s, Kindschy’s and Racine’s testimony; it shows Aish directing comments to employees other than Kindschy as they walked by Aish.

B. Wis. Stat. §813.125 Is Unconstitutional If It Bans Speech Relating To Matters Of Public Concern In A Public Forum, Because A Listener Finds That Speech To Be “Frightening” Or “Threatening”, Even Though The Speech Does Not Amount To A “True Threat.”

In this case, the Court of Appeals upheld a four year injunction against Aish which effectively bars him from protesting and proselytizing in front of the Planned Parenthood. The injunction was based on the claimed impact Aish’s speech had, “even coming from a place of love or nonaggression” (R. 36:84; App. 10), on a Planned Parenthood employee who stated that speech frightened her and made her feel threatened. (R. 35:15-16). The Circuit Court found that 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.” (R. 36:83-84; App. 9-10).

The Court of Appeals’ based its decision in significant part on the erroneous belief that the Circuit Court “found that Aish intimidated Kindschy by repeatedly making threats to Kindschy and her family.” (*Kindschy v. Aish*, 2022 WI App 17, ¶¶14.

See also *Kindschy* at ¶¶10, 18, ¶19). As noted above, the Circuit Court concluded that comments by Aish appeared to be intimidating, “even in the context that is presented here of trying to convey a message of repentance... and ... a stance of being against the things that Planned Parenthood does, which include abortions...” (R. 36: 83; App. 9). The Circuit Court found Aish was prohibited from expressing his message “in particular to this person or in this manner,” because the Circuit Court concluded Kindschy should not be required to hear “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. 36:88-89; App. 14-15). But, the Circuit Court, made no finding, and there was no evidence, that Aish threatened to inflict harm upon Kindschy or her family.

Although the First Amendment allows the banning of “true threats” (see *Virginia v. Black*, 538 U.S. 343, 359 (2003)), in this case there were no threats at all, let alone any “true threats.” “‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Id.* [Citations omitted.] “Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” *Id.* at 360.

The Circuit Court did not find that Aish’s speech included any threat to Kindschy. The Circuit Court did not make any finding, and there was no evidence at all to support a finding, that Aish made any serious expression of an intent to commit any act of violence against Kindschy or her family. Instead, the Court found that Aish’s speech was proscribed because Kindschy should be protected against “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. 36:88-89).

C. If Wis. Stat. § 813.125 Permits A Four Year Blanket Ban On Speech By Aish In A Public Forum Relating To A Matter Of Public Concern, It Is Unconstitutional As A Prior Restraint.

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 also 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 bans Aish from exercising his First Amendment right to protest at the Blair Planned Parenthood – it effectively bans him from protesting in a public forum outside the Blair Planned Parenthood at any time (since he has no way of knowing when Kindschy may be in the building) (R. 23:2-3; R. 36:91-94; App. 17-20). The injunction bars him from speaking not just to Kindschy, but to *anyone* from the public sidewalk outside the clinic – whether members of the public passing by, building occupants and visitors, or other clinic workers. Accordingly, the injunction 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 MISCONSTRUED THE “NO LEGITIMATE PURPOSE” LANGUAGE OF WIS. STAT. §813.125 TO EXCLUDE FIRST AMENDMENT PROTECTED SPEECH RELATING TO PUBLIC CONCERNS IN A PUBLIC FORUM.

The Circuit Court and the Court of Appeals found that Aish’s speech had no legitimate purpose even though, as discussed previously, it was speech regarding matters of public concern in a public forum. (R. 36:89; *Kindschy*, 2022 WI App 17, ¶20-24). In *Bachowski v. Salamone*, 139 Wis.2d 397, 408, 407 N.W.2d 533, 537-538 (1987), this Court explained that Wis. Stat. § 813.125 prohibits “chronic, deliberate behavior, *with no legitimate purpose* designed to harass another person is proscribed by the statute.” [Emphasis added.] This Court explained 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 previously discussed, as speech relating to matters of public concern, Aish’s speech was subject to assiduous First Amendment protection. In accordance with *Bachowski*, the Circuit Court and the Court of Appeals were required to find that Aish’s speech was not prohibited by Wisc. Stat. §813.125.

The Court of Appeals found the Circuit 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.” *Kindschy*, 2022 WI App 17, ¶29. Again, however, the Court of Appeals’ decision rested on the mistaken conclusion that the Circuit Court had made a factual finding that Aish threatened Kindschy and her family.

The Court of Appeals also relied on this Court's decision in *Board of Regents-UW System v. Decker*, 2014 WI 68, to conclude that Aish's speech had "no legitimate purpose." *Kindschy*, 2022 WI App 17, ¶23. In *Decker*, this Court upheld the injunction at issue based on "ample evidence" that the respondent "engaged in harassment with the intent to harass." This Court rejected the respondent's claim that he had a legitimate First Amendment purpose - protesting student fees. However, the evidence in that case established:

[F]irst, [respondent] swore at and threatened the [University] Chancellor in a meeting and stabbed the Chancellor's documents with a pen during a heated argument. Second, [respondent] told the suspension committee that he had no intention of complying with his suspension, and [respondent] was aware his suspension prohibited him from entering [University] property. Third, [respondent] trespassed on [University] property on numerous occasions after his suspension and disrupted several university meetings. Fourth, [respondent] attempted to purchase a handgun immediately after police endeavored to serve him with a restraining order.

Board of Regents-UW, 2014 WI 68, ¶40. This Court determined that the respondent's right to protest on the University of Wisconsin's property could be properly restricted "when he engages in harassment with the intent to harass or intimidate." *Board of Regents-UW*, 2014 WI 68, ¶45.

The circumstances presented in this case, however, are readily distinguishable from those presented in *Decker*. In this case, the Record amply demonstrates, and Circuit Court findings establish, that Aish's speech was not speech with no purpose other than to "harass or intimidate" *Kindschy*. The Circuit Court explicitly recognized that Aish was exercising his First Amendment rights to protest and to 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 and to embrace his religious perspective. 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. (R. 36: 86, 88-90), Accordingly, Aish's speech was not intended to "harass"

or “intimidate” Kindschy solely for purposes of “harassing” or “intimidating” her.³ The Circuit Court simply disagreed that those were legitimate purposes (R. 36-89, 90), but neither the First Amendment nor *Decker* allow prohibiting speech on the basis of disagreement with the content of the message.

The Circuit Court and the Court of Appeals found that Aish’s intended purposes - “saving the lives of unborn children” and “saving Ms. Kindschy's soul by sharing the gospel” (R. 36-86, 87) were not legitimate because his speech was intended to “scare”, “intimidate” or “harass” Kindschy and went “too far”. (R. 36-86, 87; *Kindschy*, 2022 WI App. 17, ¶¶23-24). However, as previously discussed, speech that does not amount to a “true threat” 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). In adopting such an interpretation of Wis. Stat. § 813.125, the Circuit Court and the Court of Appeals misconstrued and misapplied this Court’s decisions in *Bachowski* and *Decker*, and, as discussed *supra*, adopted a construction of Wis. Stat. § 813.125 that cannot be reconciled with the protections afforded to free speech under the U.S. Constitution and the Wisconsin Constitution.

³ In concluding its findings, the Circuit Court stated, “the Court has already made the reasonable grounds finding to believe that Mr. Aish engaged in harassment with the intent to harass or intimidate the petitioner as defined in Wisconsin Statutes as stated on the record herein.” (R. 36-90, 91). But that statement conflicts with the Circuit Court’s actual prior findings and discussion of the evidence, in which the Circuit Court acknowledged that Aish’s speech was intended to further his anti-abortion, anti-Planned Parenthood message and his attempts to persuade Kindschy to repent and embrace God. (See *e.g.*, R36-85, 86, 87, 88, 89)

CONCLUSION

For all of the foregoing reasons, Aish asks this Court to reverse the Court of Appeals' March 8, 2022 decision and vacate the Circuit Court's September 9, 2020 "Injunction-Harassment Order of Protection."

Dated this 29th day of July, 2022.

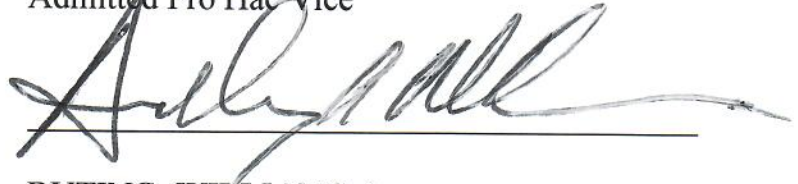
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CERTIFICATION BY ATTORNEY

I hereby certify that this Document conforms to the rules contained in § 809.19(8)(b), (bm) and (c) for a brief. The length of this document is 8,192 words.

I also hereby certify that filed with this brief is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the trial court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any and final decision of the administrative agency.

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I further certify that I am filing 22 copies of this brief and appendix on today's date by causing Mr. James Klintworth of AlphaGraphics to deliver copies to:

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Madison, WI 53703-1688

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Attorney Leslie Anne Freehill; and
Attorney Beauregard William Patterson; and
Attorney Diane M. Welsh
122 W. Washington Avenue, Suite 900
Madison, WI 53703

Attorney Richard A. Schaumberg
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Dated this 29th day of July, 2022.

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A handwritten signature in black ink, appearing to read "Dudley A. Williams", is written over a horizontal line.

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CERTIFICATION

I hereby certify that I have submitted an electronic copy of the Respondent-Appellant-Petitioner's Brief and Appendix, which comply with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

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

I hereby certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief. I also hereby certify that the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

Dated this 29th day of July, 2022.

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