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SUPREME COURT

STATE OF WISCONSIN
SUPREME COURT
Appeal No.: 2020AP001775

NANCY KINDSCHY,

Petitioner-Respondent,

v.

BRIAN AISH,

Respondent-Appellant-Petitioner.

RESPONDENT-APPELLANT-PETITIONER'S REPLY 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.

Respectfully Submitted,

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REPLY TO KINDSCHY'S STATEMENT OF FACTS

Kindschy attempts to disavow the February 18, 2020 video she offered as evidence of Aish's allegedly egregious conduct toward her. The video was admitted into evidence at her request, was reviewed by the Circuit Court and is part of the Record. (R. 24; R. 35: 39-40; Ex. 2). In her brief, however, Kindschy states, "The court of appeals declined to include the video as unnecessary in the appellate record (1/15/21 Order), and therefore Aish's self-serving description of the video should be rejected." (Kindschy Br., p. 15, n. 1). Contrary to that assertion, the Appellate Court did not deem the video as "unnecessary" or otherwise somehow unworthy of consideration. The order Kindschy cites provided only that it was unnecessary to supplement the record with the video because it was already part of the Record. (Court of Appeals, Order entered 1/15/2021).

Kindschy further characterizes the February 18, 2020 video as "a partial video" of her interaction with Aish. (Kindschy Br., p. 10). At trial, however, Kindschy testified she had "a video" from "when [Aish] confronted me." (R.35, p. 35, lines 7-8). Kindschy did not claim the video depicted only a portion of her interaction with Aish.

The video evidence Kindschy offered to bolster her credibility proved exactly the opposite. Kindschy's testimony regarding Aish's actions, the content of his speech and demeanor are disproved by the video. Aish did not "follow[] [Kindschy] directly to [her] vehicle", did not "sneer" at her and was not "very loud",

“very stern” and “very agitated. (R. 35, p. 15, lines 14-16; p. 16, lines 18-21; Kindschy Br., p. 10).

Moreover, Kindschy admitted the February 18, 2020 video was “indicative” or typical of how Aish conducted himself on the other occasions at issue. (R. 35, p. 40, lines 13-17).

The video resolves any questions regarding Aish’s actions, what he said and his demeanor, and demonstrates that Kindschy’s testimony was inaccurate. This Court has recognized that video recordings provide the courts with a more accurate and reliable record than testimonial evidence that is subject to flaws in human memory. *In re Jerrell C.J.*, 2005 WI 105, ¶51, 283 Wisc.2d 145, 169, 699 Wisc.2d 145, 122 (2005). Video recordings create “an objective record” that allows “viewers and listeners see and/or hear precisely what was said and done...”. *Id.* at 2005 WI 105, ¶53, 283 Wisc.2d 145, 179, 699 Wisc.2d 145, 122 (2005). [Citation omitted.].

ARGUMENT

I.

SPEECH ON A MATTER OF PUBLIC CONCERN IN A PUBLIC FORUM MAY NOT BE ENJOINED BASED ON DISAGREEMENT WITH ITS MESSAGE.

A. The Purpose Of Aish’s Speech Was To Communicate His Message Regarding Religion And Abortion.

According to Kindschy, the Circuit Court’s injunction had nothing to do with Aish’s “expressions of viewpoints on either abortion or religion.” (Kindschy Br., p.

16). Instead, she claims the injunction was strictly based on repeated “statements of ‘bad things happening to you and your family’ and ‘you’re lucky if you make it home safe,’ directed singularly at Kindschy, while following her to her car, standing in close proximity to her, chasing after her car, and after accusing her of lying to law enforcement about him....” (Kindschy Br., p. 17, citing R.36:82-84; P-App. 159-161.).

Those assertions, however, are disproved by the Circuit Court’s findings. Those findings establish that Aish’s intent or purpose was to express his messages regarding religion and abortion, not to harass or intimidate Kindschy. The Circuit Court recognized Aish’s statements 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 ..., trying to share the gospel, and [he] also has a stance of being against the things that Planned Parenthood does, which include abortions....” (R. 36, p. 83, lines 5-15). The Court found Aish’s speech was harassing or intimidating even though the words Aish used were “*in the context of wanting to send this message*” and came “*from a place of love or nonaggression.*” (R. 36, p. 83, lines 1-6). [Emphasis added.] The Circuit Court did not find that Aish intended to harass or intimidate Kindschy.

The Circuit Court concluded Aish harassed Kindschy because it determined Kindschy, as a listener, “felt harassed” or “bothered” by the *content* of Aish’s message. (R. 36, p. 82, lines 9-14). The Circuit Court also found that a listener could find Aish’s speech intimidating *based on the phrasing of his message* against

abortion and urging repentance. The Circuit Court stated that message “would intimidate somebody” because it included, “statements of ‘bad things happening to you and your family’ and ‘you’re lucky if you make it home safe.’” (R. 36, p. 84, lines 16-25). There was no finding these words were intended by Aish to threaten Kindschy and Kindschy’s repeated claims that they were threats are contrary to the Circuit Court’s findings of fact. As discussed in greater detail *infra*, a listener’s claimed negative reaction to speech on a matter of public concern in a public forum, is not a basis for suppressing that speech.

The Circuit Court did not “[find] that Kindschy was intimidated by Aish’s escalating conduct and threats against her family....” (Kindschy Br., p. 18; no Record citation). Nor did the Circuit Court “find,” “[Kindschy] was genuinely scared for herself and her family due to Aish.” (Kindschy Br., p. 18; citing *Kindschy’s* testimony). The Circuit Court determined Aish’s message should be suppressed in order to shield Kindschy 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, p. 89, 1-5).

Kindschy does not dispute that Aish’s speech related to matters of public concern but argues that speech was not protected because it had the effect of intimidating her. (Kindschy Br., p. 16). The First Amendment, however, does not allow prohibition of speech on matters of public concern in a public forum because of the upsetting effect on a listener. See *Snyder v. Phelps*, 562 U.S. 443, 454 (2011) (father of slain soldier could not, consistent with the First Amendment, state claims

including intentional infliction of emotional distress, based on picketing in a public forum located near his son's funeral that communicated messages such as "Thank God for Dead Soldiers").

Kindschy maintains Aish's speech was not protected by the First Amendment because it was directed at her. (Kindschy Br., pp. 16-17). Kindschy cites no authority for the proposition that speech on a matter of public interest in a public forum loses its First Amendment protection because it is occasionally directed to a particular listener. To the contrary, except in limited circumstances not applicable to this case (see *e.g.*, *Frisby v. Schultz*, 487 U.S. 474, 486-487 (1988)), unwilling listeners may be subjected to messages regarding matters of public concern in a public forum that they do not want to hear. See *e.g.*, *Snyder*, 562 U.S. at 454 ("And even if a few of the signs - such as "You're Going to Hell" and "God Hates You" - were viewed as containing messages related to [the slain soldier and his family] specifically, that would not change the fact that the overall thrust and dominant theme of [the picketers'] demonstration spoke to broader public issues.").

Contrary to Kindschy's assertions (see Kindschy Br., p. 17), in this case, as in *Snyder*, there was no evidence to suggest that Aish's speech was "a personal attack" on Kindschy that he "attempted to "immunize" by claiming that he was protesting against abortion and Planned Parenthood. See *Snyder*, 562 U.S. at 455. In this case, as in *Snyder*, there was no basis for concern that Aish's speech on public matters "was in any way contrived to insulate speech on a private matter from

liability.” *Id.* Aish actively sought to communicate his message regarding religion and abortion for many years before the incidents alleged. (R. 36, p. 27, line 24 - p. 28, line 11). Further, the Circuit Court found Aish’s speech represented his “honestly believed” views on public issues. (See *e.g.*, R. 36, p. 83, line 7 – p. 84, line 13; R. 36, p. 85, lines 5-25).

Nonetheless, citing *Board of Regents-UW System v. Decker*, 2014 WI 68, 355 Wis.2d 800, 850 N.W.2d 112, Kindschy claims Aish is attempting to shield harassing conduct by labeling it “protest”. (Kindschy Br., p.17). Essential to the Court’s decision In *Decker* was a finding that Decker engaged in harassment with the intent to harass or intimidate. *Decker*, 2014 WI 68, ¶¶20, 35, 38, 45. The Court held, “Decker’s right to protest on UW property can be restricted when he engages in harassment with the intent to harass or intimidate.” *Id.* at ¶45. In this case, contrary to *Decker*, the Circuit Court found that Aish acted “from a place of love and non-aggression” in communicating his religious and anti-abortion messages, without any intent to harass or intimidate.

The Circuit Court’s findings of harassment and intimidation were based exclusively upon speech which had, as its sole intended purpose, delivery of Aish’s message relating to matters of public concern in a public forum. See *Snyder*, 562 U.S. at 452-453. Such speech is protected even if “upsetting or arousing contempt”, “offensive or disagreeable”, or “in someone’s eyes ... misguided, or even hurtful.” *Id.* at 458.

Kindschy also argues Aish's speech is not protected because it consisted of "express or implied threats of death or bodily harm." (Kindschy Br., pp. 17-18). The Circuit Court, however, did not find that Aish implicitly or explicitly threatened Kindschy. Instead, the Circuit Court found that Kindschy was entitled to protection against the content of a message that might cause her to contemplate that bad things could happen to her or her family.

B. Aish Made No Threats, Let Alone "True Threats" And Did Not Engage In "Intimidation" In The Constitutionally Proscribable Sense.

Kindschy cites *Virginia v. Black*, 538 U.S. 343, 360 (2003) for the proposition that, "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat." (Kindschy Br., p. 19). But, she makes no attempt to show that Aish's conduct meets the definition of "intimidation in the constitutionally proscribable sense of the word". It does not.

In *Virginia v. Black*, the Court explained "intimidation", in the constitutionally proscribable sense, 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.* "True threats" are "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.* at 359. [Citation omitted.]. While it is true it is not a requirement that the speaker actually intend to carry out the act of unlawful violence (Kindschy Br., p. 19), the speaker

must express an intent to commit an act of unlawful violence in the first instance. *Id.* at 359-360.

In this case, there was no “intimidation” because there was no “true threat”; there was no expression by Aish of an intent to commit an act of unlawful violence and there was no finding by the Circuit Court that there was such a threat. The Circuit Court, however, erroneously found it could prohibit speech in a public forum on a matter of public concern, not because the speaker expressed an intent to harm Kindschy or her family, but because his speech made Kindschy “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, p. 89, 1-5).

Undaunted, Kindschy maintains that the fact “Aish did not specify who might be responsible for the death or bodily harm he intended Kindschy to fear does not save his statements from being a threat.” (Kindschy Br., p. 21). In fact, as the above quoted definitions establish, it does; a threat must communicate a causal connection between the speaker and the threatened death or bodily injury. In any event, the Circuit Court never found that Aish made *any* threat to Kindschy or her family. The clear meaning of Aish’s words was that God, not Aish, could punish Kindschy for her sins.

In the absence of evidence of a “true threat” or constitutionally proscribable “intimidation”, Kindschy seeks to bolster her case by citing various materials relating to violence by anti-abortion activists. (Kindschy. Br., p. 20). That material should not be considered because it is not part of the Record. See *e.g.*, *In Re*

Cooper's Will, 28 Wis.2d 391, 402-203, 137 N.W.2d 93 (1965); *Chionsky v. Germantown School Dist. Bd. of Ed.*, 2019 WI App 12, ¶34, 386 Wis.2d 285, 926 N.W.2d 196. Moreover, Kindschy never testified, and the Circuit Court never found that acts committed by others impacted her perceptions of Aish.

II. Engaging In Speech Regarding Matters Of Public Concern In A Public Forum Was Aish's Only Purpose; Such Speech Serves A Legitimate Purpose.

Kindschy relies upon *Board of Regents-UW System v. Decker* for the proposition that “conduct done with both the purpose of protesting and the purpose of harassing” lacks a legitimate purpose because “intentionally harassing conduct can *never* serve a legitimate purpose.” *Decker*, 2014 WI 68, ¶38. As previously discussed, however, all of the Circuit Court’s findings of “harassment” and “intimidation” were based on concern for Kindschy’s subjective reaction to the content of Aish’s message, not on a finding that Aish intended to harass or intimidate Kindschy. In this case, the Record establishes the *sole* purpose of Aish’s speech was to express his message to embrace God and to reject sin in the form of abortion – he had no intent to harass or intimidate Kindschy for the sake of harassing or intimidating her.

Essentially, the Circuit Court found that speech on matters of public concern in a public forum, phrased in a manner which might scare or intimidate a listener, could never serve a legitimate purpose. The Circuit Court concluded, it is not a legitimate purpose to “scare” or “intimidate” someone by saying:

things that may from the perspective of someone's religious beliefs might be important to tell somebody, [but] 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. (R. 36, p. 88, lines 2-10).

A listener's reaction to a speaker's message, however, is not a permissible basis for muzzling speech on a matter of public concern in a public forum. See *Santa Monica Nativity Scenes Committee v. City of Santa Monica*, 784 F.3d 1286, 1292 (9th Cir. 2015) ("The [hecklers' veto] doctrine prohibits the government from pointing to the 'reaction of listeners' to speech as a 'secondary effect' justifying that speech's regulation; in other words, the government may not regulate speech on the grounds that it will cause its hearers anger or discomfort." [Citation omitted.]

III. The Injunction Is An Unconstitutional Prior Restraint.

Kindschy claims that the injunction entered against Aish is not a prior restraint because it "is precisely [a] 'pin-pointed' restriction couched in the narrowest terms' possible to accomplish the government's interests." (Kindschy Br., p. 24). But, the Circuit Court itself recognized the injunction effectively bans Aish from being at the Blair Planned Parenthood whenever it is open - whether Kindschy is present or not. (R. 35, p. 6, lines 9-10; R. 36, p. 93, line 3 – p. 94, line 8).

IV. ALL OF THE CHALLENGED SPEECH WAS PART OF AISH'S PROTEST.

Kindschy continues to improperly equate her testimony with the Circuit Court's findings of fact. (See Kindschy Br., pp. 25-27). For example, she maintains the Circuit Court “ found “an implicit threat of harm to Kindschy” based on Aish’s alleged statements to her on February 25, 2020. (Kindschy Br., p. 28, no Record citation). The Circuit Court made no such finding.

Kindschy ignores the Court’s actual findings, including its finding that Aish was “very credible as to what happened on the incidents, as well as his positions on his religious beliefs.” (R. 36, p. 80, lines 22-25). By contrast, although the Circuit Court found Kindschy to be credible, it also found that she suffered from a flawed memory:

I do find there was sometimes where it seemed as though [Kindschy] might have maybe blended some of the days in describing. There were times when her recollection wasn't exactly clear on certain details, and there was testimony from her that on February 18th, 2020 Mr. Aish said bad things would happen to her. I've reviewed Exhibit 2 [the February 18, 2022 Video] and that wasn't said. ...
(R. 36, p. 80, lines 10-17).

Kindschy cannot avoid the February 18, 2020 video she took on her phone. The video establishes that Kindschy’s testimony, as well as that of Shonda Racine (“Racine”) and Jess Beranek (“Beranek”), was inaccurate.

The Circuit Court did not find that Aish intended to intimidate or harass Kindschy. There was no evidence, and no finding, of a threat by Aish to harm Kindschy or her family. None of Aish’s speech was “separate from his anti-abortion protest” and no finding by the Circuit Court that there was. (Kindschy Br., p. 24).

This case does not involve public speech contrived to insulate speech on a private matter. See *Snyder v. Phelps*, 562 U.S. 443, 45 (2011). Instead, the Circuit Court impermissibly enjoined Aish's speech in a public forum on a matter of public concern because of Kindschy's reaction to it.

CONCLUSION

For the foregoing reasons, and those set forth in Respondent-Appellant-Petitioner's Brief, Aish asks this Court to reverse the Court of Appeals' March 8, 2022 decision and vacate the Circuit Court's May 9, 2022 "Injunction-Harassment Order of Protection."

Dated this 16th day of September, 2022.

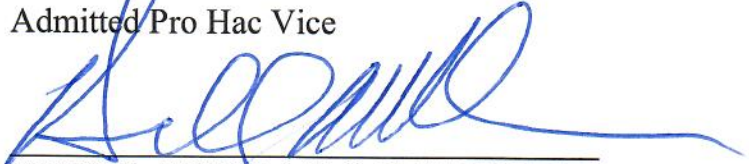
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CERTIFICATION BY ATTORNEY

I hereby certify that this document conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm), and (c) for a reply brief. The length of this document is 2,997 words.

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

Clerk, Wisconsin Supreme Court
110 East Main Street, #215
P.O. Box 1688
Madison, WI 53703-1688

I further certify that I am filing this reply brief on today's date by causing Mr. James Klintworth of AlphaGraphics to place 3 copies in each envelope addressed to:

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

Attorney Richard A. Schaumberg
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and timely delivering those envelopes to the U.S. Post Office to be placed in today's First Class Mail. (Rule) Sec. 809.80(3)(b)(4), Wis. Stats.

Dated this 16th day of September, 2022.

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CERTIFICATION OF COMPLIANCE

I hereby certify that I have submitted an electronic copy of the Respondent-Appellant-Petitioner's Reply Brief, excluding the Appendix, if any, which complies with the requirements Wis. Stats. Sec. 809.19(12).

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 reply brief is identical in form and content to the text of the paper copy of the brief.

Dated this 16th day of September, 2022.

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