

FILED
11-28-2022
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
SUPREME COURT

Case No. 2020AP1775

NANCY KINDSCHY,

Petitioner-Respondent,

v.

BRIAN AISH,

Respondent-Appellant-Petitioner.

APPEAL FROM FINAL ORDER OF THE TREMPLEAU
COUNTY CIRCUIT COURT, THE HONORABLE RIAN W. RADTKE,
PRESIDING, TREMPLEAU COUNTY CASE NO. 20-CV-40

PETITIONER-RESPONDENT’S AMENDED RESPONSE BRIEF

Diane M. Welsh, SBN 1030940
Leslie A. Freehill, SBN 1095620
PINES BACH LLP
122 W. Washington Ave., Ste. 900
Madison, WI 53703
Telephone: 608-251-0101
Facsimile: 608-251-2883
dwelsh@pinesbach.com
lfreehill@pinesbach.com

Attorneys for Petitioner-Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
STATEMENT OF ISSUES PRESENTED FOR REVIEW	5
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	6
STANDARD OF REVIEW	6
STATEMENT OF THE CASE	8
ARGUMENT	16
I. Neither the First Amendment of the U.S. Constitution nor Art. I, § 3 of the Wisconsin Constitution protect Aish’s threats and intimidating physical conduct.	16
a. Aish’s threats and physical conduct toward Kindschy did not themselves concern public affairs.	16
b. Intimidation is a type of true threat not protected by the First Amendment.....	19
II. Threats and intimidating physical conduct in order to scare someone, even if accompanied by religious or anti-abortion purposes, do not serve a legitimate purpose.....	21
III. The narrowly tailored injunction is not an impermissible prior restraint on free speech.	23
IV. The circuit court’s factual finding that Aish’s words and conduct intimidated and threatened Kindschy, separate from his anti-abortion protest, was not clearly erroneous.....	24
CONCLUSION	28
CERTIFICATION.....	30
CERTIFICATION OF COMPLIANCE	30

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bachowski v. Salamone</i> , 139 Wis. 2d 397, 407 N.W.2d 533 (1987).....	22, 24
<i>Bank of Sun Prairie v. Opstein</i> , 86 Wis. 2d 669, 273 N.W.2d 279 (1979).....	7
<i>Bible Believers v. Wayne County, Michigan</i> , 805 F.3d 228 (6th Cir. 2015)	18
<i>Virginia v. Black</i> , 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).....	8, 19, 23
<i>Board of Regents-UW Sys. v. Decker</i> , 2014 WI 68, 355 Wis. 2d 800, 850 N.W.2d 112	6, 17, 21, 22
<i>Carroll v. President & Comm'rs of Princess Anne</i> , 393 U.S. 175, 89 S. Ct. 347, 21 L. Ed. 2d 325 (1968)	24
<i>United States v. Fuller</i> , 387 F.3d 643 (7th Cir. 2004)	19
<i>United States v. Fulmer</i> , 108 F.3d 1486 (1st Cir. 1997)	21
<i>United States v. Gilbert</i> , 884 F.2d 454 (9th Cir. 1989), <i>overruled on other grounds</i> , <i>United States v. Hanna</i> , 293 F.3d 1080 (9th Cir. 2002)	21
<i>Reusch v. Roob</i> , 2000 WI App 76, 234 Wis.2d 270, 610 N.W.2d 168.....	7
<i>Royster-Clark, Inc. v. Olsen's Mill, Inc.</i> , 2006 WI 46, 290 Wis. 2d 264, 714 N.W.2d 530	6, 7, 28
<i>Snyder v. Phelps</i> , 562 U.S. 443 (2011)	17, 18
<i>Ward v. Rock Against Racism</i> , 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989).....	23

State v. Ward,
2009 WI 60, 318 Wis. 2d 301, 767 N.W.2d 2367

Welytok v. Ziolkowski,
2008 WI App 67, 312 Wis. 2d 435, 752 N.W.2d 3596

Statutes

Wis. Stat. § 805.17(2).....7

Wis. Stat. § 813.125 *passim*

Wis. Stat. § 813.125(1)(am)(2)24

Other Authorities

NATIONAL ABORTION FEDERATION, *2021 violence and disruption statistics* (May 2022). Available at https://5aa1b2xfmfh2e2mk03kk8rsx-wpengine.netdna-ssl.com/wp-content/uploads/2021_NAF_VD_Stats_Final.pdf.....20

TIME, *Armed demonstrators and far-right groups are escalating tensions at abortion protests (July 8, 2022)* Available at <https://time.com/6194085/abortion-protests-guns-violence-extremists/>20

U.S. DEPT. JUSTICE, *Recent cases on violence against reproductive health care providers (June 29, 2022)*. Available at <https://www.justice.gov/crt/recent-cases-violence-against-reproductive-health-care-providers>20

U.S. Constitution First Amendment *passim*

Wisconsin Constitution Art. I, § 316

STATEMENT OF ISSUES PRESENTED FOR REVIEW

- (1) Is the issuance of an injunction under Wis. Stat. § 813.125, based on a pattern of intimidating physical conduct and threats of death or bodily harm directed at one individual, consistent with the First Amendment?

Answered by the Circuit Court: Yes.

Answered by the Court of Appeals: Yes.

This Court should answer: Yes.

- (2) Did the circuit court correctly conclude that a pattern of intimidating physical conduct and threats directed at one individual served “no legitimate purpose” within the meaning of Wis. Stat. § 813.125?

Answered by the Circuit Court: Yes.

Answered by the Court of Appeals: Yes.

This Court should answer: Yes.

- (3) Does an injunction prohibiting, for four years, Mr. Aish from contacting, harassing, or intimidating the individual he specifically intimidated for months, and only that individual, violate his First Amendment right to free speech on matters of public concern?

Answered by the Circuit Court: No.

Answered by the Court of Appeals: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Petitioner-Respondent Kindschy respectfully requests oral argument to address any outstanding questions the Court may have. The opinion need not be published because the issues of the case involve no more than the application of well-settled law and the record supports the circuit court's judgment. Wis. Stat. § (Rule) 809.23(1)(b)1 and 2.

STANDARD OF REVIEW

On appeal, the Court “review[s] a circuit court's decision to grant a harassment injunction for an erroneous exercise of discretion.” *Welytok v. Ziolkowski*, 2008 WI App 67, ¶ 23, 312 Wis. 2d 435, 752 N.W.2d 359; *Board of Regents-UW Sys. v. Decker*, 2014 WI 68, ¶ 19, 355 Wis. 2d 800, 814, 850 N.W.2d 112, 119. A court must “look for reasons to sustain a discretionary ruling.” *Decker*, 2014 WI, ¶ 19.

“Though the decision to issue an injunction is within the discretion of the circuit court, in order to grant an injunction under Wis. Stat. § 813.125, the circuit court must find ‘reasonable grounds to believe that the respondent has engaged in harassment with intent to harass or intimidate the petitioner.’” *Decker*, 2014 WI 68, ¶ 20, quoting Wis. Stat. § 813.125(4)(a)3. This finding presents a mixed question of fact and law. *Decker*, 2014 WI 68, ¶ 20. A reviewing court will uphold the factual findings of the circuit court unless they are clearly erroneous. *Id.* However, whether reasonable grounds exist to grant the injunction is a question of law that the court reviews *de novo*. *Id.* Finally, the scope of the injunction is within the sound discretion of the trial court. *Welytok*, 2008 WI App 67, ¶ 23.

Under the “highly deferential” clearly erroneous standard, factual findings are only clearly erroneous when “the finding is against the great

weight and clear preponderance of the evidence.” *Royster-Clark, Inc. v. Olsen's Mill, Inc.*, 2006 WI 46, ¶¶ 11-12, 290 Wis. 2d 264, 271, 714 N.W.2d 530, 534; Wis. Stat. § 805.17(2). “[W]hen the trial judge acts as the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses.” *Bank of Sun Prairie v. Opstein*, 86 Wis. 2d 669, 676, 273 N.W.2d 279, 282 (1979). When more than one reasonable inference may be drawn from the credible evidence, the reviewing court must accept the inference drawn by the fact finder. *Id.* In applying the clearly erroneous standard, “even though the evidence would permit a contrary finding, findings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the same finding.” *Reusch v. Roob*, 2000 WI App 76, ¶ 8, 234 Wis.2d 270, 610 N.W.2d 168 (citation omitted). Thus, a reviewing court must “search the record not for evidence opposing the circuit court’s decision, but for evidence supporting it.” *Royster-Clark*, 2006 WI 46, ¶ 12.

The court independently reviews *de novo* the application of constitutional principles to the circuit court’s findings. *State v. Ward*, 2009 WI 60, ¶ 17, 318 Wis. 2d 301, 317, 767 N.W.2d 236, 244.

STATEMENT OF THE CASE

This is a routine harassment injunction case which Respondent-Appellant-Petitioner Brian Aish (“Aish”) couches in free speech rhetoric because he was motivated by his anti-abortion and religious beliefs to harass and intimidate his victim, causing her sincere fear for herself and her family. Menacing physical conduct and repetitive threats concerning death and bodily harm, targeting a single individual while following her, chasing her car, or violently shaking a sign inches from her face, are not entitled to First Amendment protection merely because the speaker separately expresses religious or anti-abortion viewpoints. The First Amendment is not absolute. Aish’s reading of the Amendment would disregard crucial exceptions the U.S. Supreme Court has carved out to “protect[] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur.” *Virginia v. Black*, 538 U.S. 343, 3360, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003). In the end, his conduct and statements toward Petitioner-Respondent Kindschy (“Kindschy”) constitute harassment and the injunction should be upheld.

Statement of Facts

Kindschy petitioned for a harassment injunction against Aish on March 10, 2020. (R.1.) The Honorable Rian W. Radtke held a hearing on July 13 and September 9, 2020. (R.35, 36.) During the hearing, the circuit court heard testimony from Kindschy; her co-workers, Shonda Racine and Jessica Beranek; Aish; and his wife, Anna Aish. (R.35, R.36.) The witnesses testified concerning the incidents on October 8, 15, and 29, 2019, and February 18 and 25, 2020, at the Blair Health Center in Blair, Wisconsin. (R.35, R.36.) The circuit court also reviewed brief video footage of the incident on February 18, 2020. (R.24.)

Testimony of Nancy Kindschy

Nancy Kindschy testified that she has worked as a nurse practitioner at the Blair Health Center (“Center”), which is operated by Planned Parenthood of Wisconsin, since August 2019. (R.35:4 at 2-14; R.35:5 at 2-3; P-App.007-008.) The Center provides family planning services, but is not an abortion clinic. (R.35:29 at 13-24; P-App.032.) She has known Aish since 2014, when he began protesting at a family planning clinic in Black River Falls. (R.35:5 at 6-17; P-App.008.) At the Center, Kindschy generally saw Aish on Tuesdays. (R.35:6 at 19-23; P-App.009.) Previously, he had never confronted Kindschy directly, but would tell her it was a beautiful day and to have a nice day. (R.35:29 at 1-4; P-App.032.)

On October 8, 2019, Kindschy testified that as she left the Center, Aish stood three to four feet from her car, looked directly at her, and stated “You may be killed by a drunk driver on your way home. It’s not going to be long and bad things are going to start happening to you and your family.” (R.35:7 at 2-14; P-App.10; R.35:8 at 22-24; P-App.011.) He did not speak to the other Center employee with Kindschy, and Aish was aggressive, loud, and stern. (R.35:9 at 14-23; P-App.012; R.35:10 at 9-10.; P-App.013.) Kindschy testified she became fearful of Aish that day, explaining “I’ve known Mr. Aish as a protestor for going on six years and he’s said other comments but he’s never made a statement such as being killed on my way home or bad things happening to my family.” (R.35:10 at 13-17; P-App.013.)

On October 15, 2019, Kindschy again encountered Aish. Due to her frightening interaction with Aish on October 8, Kindschy had backed her car into her parking spot in order to be able to get away from Aish more quickly. (R.35:32 at 10-14; P-App.035.) She left the Center with another employee, but Aish did not speak to or follow the other employee. (R.35:13 at 6-10; P-App.016.) Kindschy testified Aish was loud and aggressive, and told her she

had blood on her hands. (R.35:12 at 1-4, 19-21; P-App.015.) He made her nervous. (R.35:12 at 1-4; P-App.015.) “I was just scared and wanted to leave.” (R.35:12 at 6; P-App.015.)

On October 29, 2019, Kindschy again encountered Aish as she left with another employee. Once again, Aish followed Kindschy and not the other employee. (R.35:15 at 7-10; P-App.018.) Kindschy did not speak to Aish, and hurried into her car. (R.35:14 at 12-16; P-App.017.) However, as she pulled away, Aish ran out into the road after her and pumped his anti-abortion sign at her within inches of her car window. (R.35:14 at 16-19; P-App.017.)

On February 18, 2020, Kindschy testified Aish followed her directly to her car, called her a liar with blood on her hands, and sneered “Satan will come to judge you,” which frightened Kindschy “so bad.” (R.35:15 at 15-21; P-App.018.) Aish was “loud, very stern, and agitated.” (R.35:16 at 20-21; P-App.019.) Aish further said Kindschy “would be lucky if [she] got home safely and that I could possibly be killed and that bad things are going to start happening to [her] family.” (R.35:15 at 24-25; 35:16 at 1; P-App.018-019.) Kindschy testified “I felt threatened.” (R.35:16 at 23; P-App.019.) Aish did not say anything to the other employee leaving with Kindschy. (R.35:16 at 2-9; P-App.019.) Kindschy played a partial video of this interaction for the court on her cell phone. (R.35:39 at 6-25; R.35:40 at 1-9; P-App.042-043.)

Finally, Kindschy testified Aish confronted her on February 25, 2020. He again appeared loud, stern and agitated, and directed his comments solely to her despite other employees leaving the Center at the same time. (R.35:20 at 16-17; P-App.023.) Aish told Kindschy she was a liar and that she had lied to the authorities about him. (R.35:19 at 6-8; P-App.022.) Kindschy was very concerned because “Mr. Aish’s behavior has continued to just get more aggressive, specifically towards me. He’s not addressing other people as they

leave; he's coming directly towards me and singling me out." (R.35:19 at 12-15; P-App.022.) This final interaction caused her "great concern." (R.35:19 at 9-10; P-App.022.)

Testimony of Shonda Racine

Shonda Racine was the former manager of the Blair Health Center. (R.35:46 at 12-18; P-App.049.) Racine testified that she was present with Kindschy as she left the Center on October 8, 15, and 29, 2019. (R.35:48 at 6-8; P-App.051.) She testified that on those dates, Aish directed his comments solely to Kindschy—and no other employees leaving at the same time—and shook his sign at her, standing four feet away. (R.35:48 at 11-25 to R.35:51 at 1-15; P-App.051-054.) She testified that Aish was aggressive, including "loud...encroaching her space, angry tone, volume." (R.35:51 at 8-12; P-App.054.) She further elaborated that Aish was shaking his sign at Kindschy "violently" and "yelling and screaming." (R.35:56 at 3-10; P.App.059; 35:63 at 11-12; P-App.066.) Finally, she testified that the February 18, 2020 video of Aish was different than her observations of Aish in October 2019, which were more "aggressive" and included violent sign-shaking directly at Kindschy. (R.35:66 at 22-25 to R.35:67 at 1-17; P-App.069-070.)

Testimony of Jess Beranek

Jess Beranek was the manager of the Blair Health Center in February 2020. (R.36:7 at 2-4; P-App.084.) She testified she was present with Kindschy on February 18, 2020, when Aish confronted Kindschy. (R.36:7 at 23-25 to R.36:8 at 1; P-App.084-085.) She testified she left the Center with Kindschy and three other individuals, but Aish approached Kindschy only. (R.36:8 at 13-22; P-App.085; R.36:11 at 8-9; P-App.088.) When Aish confronted Kindschy, Beranek confirmed Kindschy appeared bothered or scared, and "was heading straight for her car as quickly as possible." (R.36:18 at 1-4; P-App.095.) Beranek also testified she had observed Aish as a protester in years

past at other family planning clinics, but “[i]t wasn’t similar to what it is now. It’s gotten much more aggressive in the past about a year since we became Planned Parenthood.” (R.36:14 at 21-25; P-App.091.) Prior to February 18, 2020, Aish “hadn’t been as aggressive and hadn’t been pointedly going after Nancy [Kindschy].” (R.36:19 at 9-13; P-App.096.) Beranek testified that the Center installed security cameras in order to observe Aish. (R.36:20 at 4-10; P-App.097.)

Testimony of Brian Aish

Brian Aish testified that he generally protested at the Center every Tuesday in late 2019 and early 2020. (R.36:7 at 5-7; 36:28 at 14-19; P-App.084:5-7; 105:14-19.) He stated that in general, he intended to warn individuals going to the Center that they’re going to be “held accountable because they’re shedding the innocent blood of a child.” (R.36:29 at 18-20; P-App.106.) He further elaborated that he wanted people to understand that “7,000 people are dying every day in this country, we don't know if we’re going to have another day and God says don’t worry about tomorrow, today has enough worries of its own, so we try to warn them because they may not make it to next week, with DUI accidents, murder or criminal behavior and all of that.” (R.36:30 at 22-25 to 36:31 at 1-33; P-App.107-108 (emphasis added).) He confirmed that on at least one day, he confronted Kindschy specifically. (R.36:32 at 13-17; P-App.109.) He denied having an intent to harass or intimidate Kindschy, but confirmed that Kindschy had always walked away and ignored him. (R.36:33 at 7-10; P-App.110; R.36:43 at 13-15; P-App.120.)

Procedural History

Following the two-day hearing, the court found Kindschy and her supporting witnesses to be credible. (R.36:80 at 7-21; P-App. 157.) Based on the evidence, the circuit court found Aish repeatedly committed acts that intimidated and harassed Kindschy. (R.36:84 at 16-25; P-App.161.)

The court 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 that those threats were directed specifically to Kindschy. (R.36:82 at 8-25 to R.36:84 at 1-25; P-App.159-161.) The court further found that Aish used intimidation with intent to scare Kindschy into quitting her employment. (R.36:85 at 1-25 to R.36:90 at 1-3; P-App.162-167.) The circuit court's findings were based on testimony concerning Aish's words and conduct on at least three separate instances, which the court concluded "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 at 19-25; P-App.161.)

The circuit court next addressed whether Aish's conduct served any legitimate purpose under Wis. Stat. § 813.125, concluding that "it seems from the Court's review of the evidence presented that the purpose was to scare Ms. Kindschy." (R.36:85 at 1-18; P-App.162.) Further, the court found, "these scare statements were designed to get Ms. Kindschy to leave her employment or to stop doing what she was doing" or, alternatively, "to get Ms. Kindschy to adopt ... Mr. Aish's religious beliefs." (R.36:86 at 11-18; P-App.163.) Explaining that there existed "differing opinions" on whether that purpose was legitimate, the court explained that Aish thought they were "from the sense of saving the lives of unborn children and also [] from the religious perspective of saving Ms. Kindschy's soul." (R.36:86 at 20-25; P-

App.163.) Although the court explained it “could see” Aish’s viewpoint, “on the other hand, I can see Ms. Kindschy’s position that this is not a legitimate purpose to use intimidation and scare tactics to get someone to leave their job, to get someone to change their religion.” (R.36:87 at 3-10; P-App.164.) Weighing the two, the court concluded that although

First Amendment rights [] are very guarded and very protected...to then say that Ms. Kindschy is to endure being intimidated with statements that make her have to even think about that she might be 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...

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’s a legitimate purpose here.

(R.36:88 at 23-25 to R.36:90 at 1-7; P-App.165-167.) The court issued an injunction against Aish barring him, until September 9, 2024, from harassing Kindschy and requiring him to avoid Kindschy’s residence or any premises temporarily occupied by her, including the Center at which she works (R.23; R-App. 002; R.36:91 at 10-25 to R.36:94 at 1-8; P-App.168-171.)

The court of appeals affirmed, engaging in a detailed analysis of the circuit court’s factual findings and rejecting Aish’s claim that his intimidating statements and conduct toward Kindschy were constitutionally protected protest.

In regard to the circuit court’s factual findings, the court of appeals concluded correctly that the circuit court had found Aish “directed his comments toward Kindschy” and “intimidated Kindschy by repeatedly making threats to Kindschy and her family.” (R-App. 027 at ¶ 14.) Responding to Aish’s argument that he had merely pointed out

commonplace dangers to Kindschy, the court of appeals declared it “contrary to the record and the circuit court’s findings,” explaining

Kindschy testified that she was scared of Aish as a result of the comments he made to her, not that she was suddenly fearful that she or her family might be the victim of some wholly unrelated accident. In fact, one of Kindschy’s co-workers testified that Kindschy appeared bothered and scared, and she would head straight for her car “as quickly as possible” to avoid Aish. The record also shows that the Blair Clinic added a security guard and cameras to address Kindschy’s concerns about Aish.

(R-App.028-029 at ¶ 17.) In total, “this evidence established a pattern of repeated actions that frightened Kindschy.” (R-App. 029 at ¶ 19.) The court of appeals also rejected Aish’s assertion he was not “threatening or intimidating” in a single, short clip of video evidence presented at hearing,¹ with the court of appeals directing Aish to the numerous other, non-videotaped incidents which the circuit court had found to be threatening and intimidating due to Kindschy and her colleagues’ credible testimony. (R-App. 029 at ¶ 18.)

Turning to the circuit court’s finding that Aish’s conduct served “no legitimate purpose,” the court of appeals affirmed there is “no legitimate purpose in intimidating someone to get them to leave their job because the person making the intimidating statements does not agree with the victim’s employment or the work that the victim’s employer performs.” (R-App.030 at ¶ 22.) Noting Aish’s simultaneous intent to “influence Kindschy to leave her employment and to proselytize,” the court explained his argument “overlooked the circuit court’s finding that he also intended to frighten Kindschy,” and that “[h]arassing behavior cannot be transformed into nonharassing, legitimate conduct simply by labeling it as political protest.”

¹ In his initial brief, Aish describes extensively a brief video clip of just one encounter between himself and Kindschy. (Aish Br. 8-9.) Aish’s self-serving description of the video should be rejected.

(R-App.031 at ¶ 23.) Thus, Aish could not shield his conduct in the name of free speech. *Id.*

Finally, the court of appeals addressed Aish's First Amendment concern that an injunction prohibiting his presence at the Center while Kindschy is at the Center effectively prevented him from protesting abortion at the Center at all due to the limited schedule during which Planned Parenthood provided services there. (R-App.032 at ¶ 25.) Citing numerous state and federal First Amendment cases, the court of appeals concluded "it is well established that an individual's ability to protest is not unlimited," which also applies to anti-abortion protests. (R-App.032 at ¶ 26.) Furthermore, the court explained, "[t]o be clear, Aish was not protesting at an abortion clinic. His efforts were not geared toward changing the minds of the general public or legislators." (R-App.032 at ¶ 27.) Aish's specifically harassing conduct, separate from any alleged anti-abortion protest he carried out, was not public in nature. (R-App.032-033 at ¶ 27.) "Rather, Aish was attempting to convince a private citizen to end her employment with a private organization, by making comments that instilled fear and trepidation. Aish's efforts were almost entirely personal—and not public—in nature." (*Id.*)

ARGUMENT

- I. **Neither the First Amendment of the U.S. Constitution nor Art. I, § 3 of the Wisconsin Constitution protect Aish's threats and intimidating physical conduct.**
 - a. **Aish's threats and physical conduct toward Kindschy did not themselves concern public affairs.**

Although Aish is an abortion protester who purports to have strongly held religious beliefs, and although abortion and religion may be matters of public concern, the harassment injunction in this case was not centered on

expressions of viewpoints on either abortion or religion. The circuit court was clear that it was not Aish's words proclaimed in protest of abortion or in espousing his religious views that constituted harassment under Wis. Stat. § 813.125. Instead, it was strictly his 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, that met the definition of harassment under Wis. Stat. § 813.125. (R.36:82-84; P-App. 159-161.)

That Aish engaged in this behavior because he opposes abortion or wishes others to adopt his religious views does not recast the behaviors as statements on a matter of public concern. The veil of abortion or religion does not "shield [] harassing conduct from regulation by labeling it 'protest.'" *Decker*, 2014 WI 68, ¶ 38. In other words, such matters of public concern might have motivated Aish to intimidate Kindschy, but they do not transform the resulting intimidation itself into protected First Amendment protest.

Aish's repeated reliance on *Snyder v. Phelps*, 562 U.S. 443 (2011), for First Amendment protection is misplaced. Unlike the conduct in this case, the speech protected in *Snyder* was not intimidating or threatening at all, let alone directed at a single person—despite being cringe-worthy and unpopular. Protesters displayed "offensive and distasteful" signs outside a military funeral, such as "God Hates Fags" and "Thank God for Dead Soldiers." 562 U.S. at 448. Despite the inflammatory nature of the signs, the U.S. Supreme Court held they were nonetheless the "expression of an idea" protected by the First Amendment, which could not be restricted merely because they were "upsetting or arouse[d] contempt." *Id.* at 458. Contrary to

this case, there was no evidence in *Snyder* of threats or intimidation creating a fear for life or bodily harm. *Id.* at 449.

Similarly, *Bible Believers v. Wayne County, Michigan*, 805 F.3d 228 (6th Cir. 2015), concerned only “loathsome and unpopular speech,” not speech intended to cause fear of death or bodily harm in a single, targeted individual. In *Bible Believers*, the speech was a series of signs conveying anti-Muslim messages to attendees of an Arab festival. *Id.* at 238. As in *Snyder*, there was no record evidence that the protesters engaged in a pattern of conduct singling out individuals with express or implied threats of death or bodily harm, or that the onlookers to the protest feared for their safety; to the contrary, the crowd aggressively heckled the protesters. *Id.* at 238-240.

Here, considering the totality of the circumstances and the credible testimony of Kindschy and other witnesses, the circuit court found Kindschy was not simply offended or upset by Aish’s statements and conduct; she was genuinely scared for herself and her family due to Aish. (R.35:7 at 16-18; P-App.010:16-18 ((Kindschy) “I was very frightened about him coming so close to the car”; R.35:10 at 13-17; P-App.013:13-17 (“(Counsel) Did the statements make you afraid or fearful?” “(Kindschy) Yes. I’ve known Mr. Aish as a protester for going on six years and he’s said other comments but he’s never made a statement such as being killed on my way home or bad things happening to my family.”); R.35:12 at 3-6; P-App.015:3-6 ((Kindschy) “I was just nervous...I thought he’s really angry now. I was just scared and wanted to leave.”); R.35:16 at 22-23; P-App.019:22-23 (“(Counsel) Did you feel as if he had threatened you? (Kindschy) Yes, I felt threatened.”)

The circuit court found Kindschy was intimidated by Aish’s escalating conduct and threats against her and her family, not by his decrees on abortion or his religious views. Aish’s conduct meriting the harassment

injunction is distinct from his protest and, therefore, the harassing behavior is not protected by the First Amendment.

b. Intimidation is a type of true threat not protected by the First Amendment.

As Aish concedes, even First Amendment protections are not absolute and do not protect speech which constitutes a “true threat.” *Virginia v. Black*, 538 U.S. 343, 358, 123 S. Ct. 1536, 1547, 155 L. Ed. 2d 535 (2003); (Aish Br. at 23.) Notably, “[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat.” *Id.* at 360 (emphasis added). As the U.S. Supreme Court has explained, a prohibition on true threats, including intimidation, is essential in order to “protect[] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur.” *Id.* (internal quotations omitted). In short, individuals have a right to be free from fear for their safety, even when the person causing them fear is otherwise engaging in First Amendment protest.

Aish claims the circuit court erred by failing to find “that Aish made any serious expression of an intent to commit any act of violence against Kindschy or her family.” (Aish Br. 23.) However, intent to actually carry out a threat is unnecessary under the First Amendment analysis. *Black*, 538 U.S. at 359–60; *see also United States v. Fuller*, 387 F.3d 643, 647 (7th Cir. 2004) (explaining actual intent is irrelevant because “[d]isruptions, inconveniences, and substantial costs occur regardless of whether a threat was subjectively intended to be carried out”). Instead, what matters is solely that the speaker had the “intent of placing the victim in fear of bodily harm or death.” *Id.* at 360.

Aish did indeed intend to cause Kindschy fear of bodily harm or death—he simply testified he was motivated to do so by his religious beliefs. (R.36:30 at 25 to 36:31 at 3; P-App.107 (Aish explaining his intent to warn others of possible death due to murder, criminal behavior, drunk driving, and “all of that.”) He himself refers repeatedly to his words as “warnings.” (*Id.*; R.36:29 at 15-16, 22-23; 36:31 at 1; 36:33 at 14; 36:35 at 2; P-App.016:15-16, 22-23; 018:1; 110:14; 112:2.) However, the circuit court found that his religious motivation to cause Kindschy to fear *God* did not nullify the fear and intimidation Kindschy felt *of Aish*, to which she credibly testified. (R.36:86 at 19 to 36:90 at 7; P-App.163:19-167:7.) Certainly her fear was not unreasonable in light of rising violence against abortion providers and patients by anti-abortion activists. Since the National Abortion Federation began tracking incidents of violence by anti-abortion activists in 1977, there have been 11 murders, 42 bombings, 196 arsons, and 491 assaults, but experts have seen a sharp rise in recent years. In 2021 alone, assaults and stalking incidents rose by 128% and 600%, respectively. NATIONAL ABORTION FEDERATION, *2021 violence and disruption statistics* (May 2022).² The U.S. Department of Justice, too, has prosecuted numerous cases against violent anti-abortion activists. U.S. DEPT. JUSTICE, *Recent cases on violence against reproductive health care providers* (June 29, 2022).³ Analysts expect this dramatic rise to continue, as anti-abortion protests increasingly include armed anti-government militias and members of extremist groups. TIME, *Armed demonstrators and far-right groups are escalating tensions at abortion protests* (July 8, 2022).⁴

² Available at https://5aa1b2xfmfh2e2mk03kk8rsx-wpengine.netdna-ssl.com/wp-content/uploads/2021_NAF_VD_Stats_Final.pdf.

³ Available at <https://www.justice.gov/crt/recent-cases-violence-against-reproductive-health-care-providers>.

⁴ Available at <https://time.com/6194085/abortion-protests-guns-violence-extremists/>.

Furthermore, Aish not only repeatedly spouted his threats over the course of months, he also accompanied them with escalating physical presence and conduct. For example, although Kindschy had known Aish as a protester for years, she testified that his formerly peaceful conduct had changed by October 2020, when Aish began coming within feet of her and her car, chasing her car into the street and pumping a sign within inches of her window, and appearing increasingly agitated and angry when she ignored him. (R.35:16 at 12-23; P-App.019.)

Finally, the fact that 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. *United States v. Fulmer*, 108 F.3d 1486, 1492 (1st Cir. 1997) (“The use of ambiguous language does not preclude a statement from being a threat.”); *United States v. Gilbert*, 884 F.2d 454, 457 (9th Cir. 1989), *overruled on other grounds*, *United States v. Hanna*, 293 F.3d 1080, 1088 (9th Cir. 2002) (“The fact that a threat is subtle does not make it less of a threat.”)

II. Threats and intimidating physical conduct in order to scare someone, even if accompanied by religious or anti-abortion purposes, do not serve a legitimate purpose.

Aish argues that the circuit court erred by failing to find that his speech had “no purpose other than to harass or intimidate,” (Aish Br. at 26), but that misconstrues the circuit court’s findings and was rejected explicitly by this Court in *Board of Regents-UW System v. Decker*, 2014 WI 68, 355 Wis. 2d 800, 850 N.W.2d 112.

The test for “legitimate purpose” under Wis. Stat. § 813.125 is not whether the *sole purpose* of the speech was illegitimate, but whether *any purpose* of the speech is illegitimate. As this Court explained in *Decker*,

Decker argues conduct can never constitute harassment if it is done for any legitimate purpose, such as protesting. Taken to its logical conclusion, this argument suggests that if an individual has both a legitimate and an illegitimate purpose, the legitimate purpose automatically protects the individual's conduct from being enjoined. Put another way, according to Decker's logic, conduct done with both the purpose of protesting and the purpose of harassing cannot constitute harassment. This is a senseless argument that flatly contradicts our holding in *Bachowski* that intentionally harassing conduct can never serve a legitimate purpose. Decker cannot shield his harassing conduct from regulation by labeling it "protest." If Decker's purpose was even in part to harass the Board of Regents, his conduct may be enjoined under Wis. Stat. § 813.125.

Decker, 2014 WI, ¶ 38 (emphasis added); citing *Bachowski v. Salamone*, 139 Wis. 2d 397, 408, 407 N.W.2d 533, 537 (1987) (“[C]onduct or repetitive acts that are intended to harass or intimidate do not serve a legitimate purpose.”).

Aish's quibbles with the factual differences between *Decker* and the case at hand cannot evade that result. (See Aish Br. at 26.) Here, the circuit court first explicitly found that Aish did intend to intimidate Kindschy. (R.36:85 at 14-18; P-App.162.) (“The Court finds that there was a purpose of Mr. Aish's comments, and it seems from the Court's review of the evidence presented that the purpose was to scare Ms. Kindschy.”) The circuit court then carefully articulated that although Aish may have had both legitimate and illegitimate purposes, his illegitimate purpose must carry the day under Wis. Stat. § 813.125 per *Decker*:

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. . . 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.

These specific intimidating comments of you and your family might be harmed or I hope you make it home safely tonight and not get killed, and I know I'm not saying it -- quoting it exactly there, but statements of that, nature that were made, I believe the purpose was to scare Ms. Kindschy, and the question is why was Mr. Aish trying to scare Ms. Kindschy, and based on the context of everything that the Court has heard it's clear that the purpose was to get Ms. Kindschy to leave her

employment, . . . Alternatively, based on the testimony I believe the purpose -- maybe a dual purpose here was to get Ms. Kindschy to adopt her -- adopt Mr. Aish's religious beliefs, and so I find that was the purpose.

I can see Ms. Kindschy's position that this is not a legitimate purpose to use intimidation and scare tactics to get someone to leave their job, to get someone to change their religion or even -- and I'm not making judgment here whether they're a Lutheran or a Christian or not to further -- so I guess I would say to change their religious beliefs or reaffirm them or to have them be more in depth to use intimidation or scare tactics to achieve that for that purpose, that's not a legitimate purpose.

(R.36:88 at 15-23; P-App.165; R.36:89 at 1-7; P-App.166; R.36:85 at 18-25 to R.36:86 at 1-18; P-App.162-163; R.36:87 at 6-18; P-App.164.)

III. The narrowly tailored injunction is not an impermissible prior restraint on free speech.

The circuit court ordered Aish to cease or avoid harassing Kindschy or contacting her without her consent; to avoid her residence and any premises temporarily occupied by her; and to avoid contact that harasses or intimidates her. (R.23; R-App.001-003.) The injunction is clear, narrow, and focused solely on protecting Kindschy, the person whom Aish harassed and intimidated—not the public or a particular type of speech. Thus, Aish's assertion that 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” is patently false. (Aish Br. 24.)

The injunction is not an impermissible prior restraint on Aish. Restrictions on expression must be “narrowly tailored to serve the government's legitimate, content-neutral interests.” *Ward v. Rock Against Racism*, 491 U.S. 781, 798, 109 S. Ct. 2746, 2757, 105 L. Ed. 2d 661 (1989). As discussed above, the government has a legitimate interest in protecting its citizens from fear of death or bodily harm. *Virginia v. Black*, 538 U.S. 343, 360, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003). It is difficult to imagine a

more narrowly tailored restriction than one protecting the single individual—and only that individual—who was victimized with intimidation which caused her fear of death or bodily harm.

Despite the injunction, Aish remains free to protest anywhere and everywhere other than where Kindschy temporarily is—including at other Planned Parenthood clinics, where he already does routinely protest—and to speak to anyone other than Kindschy. (R.36:6 at 14-16; P-App.083: R.36:27 at 24-25 to R.36:28 at 1-3; P-App.104-105.) Limiting Aish’s ability to target Kindschy, due to his proven track record of inability to refrain from intimidating her, is precisely the “pin-pointed” restriction couched in the “narrowest terms” possible to accomplish the government’s interests. *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 183, 89 S. Ct. 347, 353, 21 L. Ed. 2d 325 (1968). The injunction is not an unconstitutional prior restraint on Aish’s First Amendment speech.

IV. The circuit court’s factual finding that Aish’s words and conduct intimidated and threatened Kindschy, separate from his anti-abortion protest, was not clearly erroneous.

An implicit recurring thread in Aish’s argument is that the circuit court did not find or support a finding of intimidation under Wis. Stat. § 813.125, allegedly because Aish did not threaten Kindschy. (*See, e.g.*, Aish Br. at 23.) This attempt to undermine the circuit court’s factual findings and credibility determinations is flatly contradicted by the record.

Wis. Stat. § 813.125(1)(am)(2) defines “harassment” as “engaging in a course of conduct or repeatedly committing acts which harass or intimidate another person, and which serve no legitimate purpose.” This Court has held to “‘intimidate’ means ‘to make timid or fearful.’” *Bachowski v. Salamone*, 139 Wis. 2d 397, 407 N.W.2d 533 (1987)).

The circuit court found that based on the facts, Aish did intimidate Kindschy by making her fearful of him. (R.36:81 at 3-5; P-App.158; R.36-84 at 16-18; P-App.161.) It found that Aish had directed his comments and conduct to Kindschy specifically. (R.36:81 at 7-11, 22-25; P-App.158; R.36:84 at 16-18; P-App.161) The court further found that Aish intimidated Kindschy for the purpose of scaring her, ultimately in the hopes of scaring her into leaving her employment, stopping what she was doing, or to adopt Aish's religious beliefs. (R.36:85 at 14-25 to R.36:86 at 1-18; P-App.162-163.) The court found this was not a legitimate purpose under Wis. Stat. § 813.125. (R.36:88 at 25 to R.36:90 at 1-7; P-App. 165-167.)

The testimony wholly supports the circuit court's findings. Aish's conduct toward Kindschy between October 2019 and February 2020 was repetitious, harassing, and intimidating. Aish exhibited a pattern of repeated actions toward Kindschy that caused her to worry and be fearful for herself and her family (R.35:7 at 16-18; P-App.010:16-18; R.35:10 at 13-17; P-App.013:13-17; R.35:12 at 3-6; P-App.015:3-6; R.35:16 at 22-23; P-App.019:22-23. Aish repeatedly got physically close to Kindschy and verbally accosted her, causing her to be worried about her personal safety. *Id.*

First on October 8, 2019, Aish followed closely behind Kindschy all the way to her car. (R.35:7 at 2-11; P-App.010). While standing approximately three to four feet from her vehicle, Aish said to Kindschy, in a raised and direct voice, that Kindschy would possibly 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. (R.35:7 at 12-14; P-App.010). The combination of Aish's words and his physical proximity to her car frightened Kindschy. (R.35:7 at 16-17; P-App.010).

At the time of the October 8, 2019 incident, Kindschy had known Aish as a protestor for six years; however, she previously had not heard him make statements indicating that she would be killed or that harm would

come toward her family. (R.35:10 at 14-17; P-App.013). Kindschy testified that in the previous years, when Aish approached her, he spoke nicely to her and discussed his beliefs, his mission, and would tell her to have a nice day. (R.35:11 at 1; P-App.014; R.35:22 at 18-19; P-App.025; R.35:29 at 1-3; P-App.032). He was never angry or agitated before. (R.35:29 at 3-4; P-App.032.) As a result, on February 18, Kindschy was very frightened not only by Aish's proximity and words, but by the change in his demeanor. (R.35:16 at 12-23; P-App.019.) When she next returned to the Center, she backed her car into the parking space, something she did not usually do, in order to be able to get away from Aish more quickly. (R.35:32 at 10-14; P-App.035.)

Unfortunately, on October 15, 2019, Kindschy discovered that Aish's new aggressive demeanor was not a singular event. As she was leaving the Center, she observed Aish again become loud and aggressive. (R.35:12 at 1-2; P-App.015.) She saw Aish receive a ticket from a police officer. (R.35:12 at 4-5; P-App.015.) She was scared of Aish's angry manner. (R.35:12 at 5-6; P-App.015.) Aish approached her vehicle and said to her in an angry, cold, and loud tone "you have blood on your hands." (R.35:14 at 3-5; P-App.017.)

Two weeks later on October 29, 2019, Aish's behavior escalated even further. In response to her ignoring him, Aish "ran out into the road after [her] pumping his anti-abortion sign into [her] car window within inches of it." (R.35:14 at 10-18; P-App.017.) Then, on February 18, 2020, as Kindschy left work, Aish again followed her directly to her vehicle. (R.35:15 at 11-16; P-App.018.) Aish angrily accused Kindschy of being a liar. (R.35:15 at 19; P-App.018.) Aish stated that Kindschy 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. (R.35:15 at 24-25 to R.35:16 at 1; P-App.018-019; R.35:64 at 5-6; P-App-067). Kindschy testified that she felt threatened by and scared of Aish. (R.35:12 at 6; P-App.015; R.35:16 at 22-23; P-

App.019; R.35:17 at 13-15; P-App.020; R.35:19 at 6-15; P-App.022; R.35:42 at 18-23; P-App.045.)

The evidence established a pattern of repeated actions that scared Kindschy. (R.35:12 at 6; P-App.015; R.35:16 at 22-23; P-App.019; R.35:17 at 13-15; P-App.020; R.35:19 at 9-10; P-App.022; R.35:42 at 18-23; P-App.045.) Aish approached Kindschy repeatedly over the course of months and during each unsolicited interaction, he berated Kindschy with threats suggesting harm toward both her and her family, falsely accusing Kindschy of actions she did not commit, and berating her. (R.35:48 at 13-16; P-App.051; R.35:51 at 5-15; P-App.054; R.36:8 at 13-19; P-App.085.) Aish's actions were troubling not only because of the content of his words and his physical proximity, but because of his escalating, aggressive behavior which differed dramatically from his behavior in past years. (R.35:19 at 12-15; P-App.022; R.36:19 at 9-13; P-App.096)

Kindschy was not alone in her distress about Aish's conduct toward her. Her colleagues, Shonda Racine and Jessica Beranek, each testified that they personally observed Aish specifically targeting Kindschy. (R.35:48 at 11-23; P-App.051; R.35:51 at 2-15; P-App.054; R.36:11 at 8-24; P-App.088; R.36:15 at 8-12; P-App.092; R.35:17 at 21-25 to R.36:17 at 21-25 to R.36:18 at 1-4; P-App.094-095.) The circuit court found that Kindschy's testimony was credible, as was that of her colleagues. (R.36:80 at 7-21; P-App.157.) Aish's behavior was intimidating. Kindschy was frightened because of Aish's statements and actions. (R.35:7 at 16-17; P-App.010; R.35:10 at 13-14; P-App.013; R.35:12 at 3-6; P-App.015; R.35:17 at 15; P-App.020; R.35:19 at 9-10; P-App.022.) The Center added a security guard and security cameras, to address Kindschy's concerns about Aish while he was onsite, (R.35:34 at 9-12; P-App. 037; R.35:40 at 18-23; P-App.043; R36:9 at 5-6; P-App.086; R.36:20 at 4-9; P-App.097.) She felt threatened by him. (R.35:17 at 15; P-App.020; R.35:19 at 10; P-App.022.) For example, Kindschy testified: "He

said that I had been a liar and I lied to the authorities about him, and then he said that I would be lucky if I'm able to make it home safely.” (R.35:19 at 6-8; P-App.022.) The court reasonably saw that this statement, directly following Aish’s accusation of wrongdoing against him, was an implicit threat of harm to Kindschy.

As this Court “search[es] the record not for evidence opposing the circuit court's decision, but for evidence supporting it,” *Royster-Clark*, 2006 WI at ¶ 12, the evidence cited above amply supports the circuit court’s findings. Separate from Aish’s protests against abortion and in support of his religious views, he engaged in a course of conduct that intimidated and threatened Kindschy, causing her fear of death or bodily harm. The circuit court’s findings are not clearly erroneous, and the injunction must be upheld.

CONCLUSION

For all of the foregoing reasons, Petitioner-Respondent Kindschy requests the Court affirm the court of appeals’ March 8, 2022 decision and uphold the circuit court’s September 9, 2020 Injunction-Harassment Order of Protection. The circuit court considered the evidence presented at hearing, applied the proper legal standard, and correctly concluded that Brian Aish intimidated Nancy Kindschy and that that intimidation was not protected by the First Amendment, ordering a narrowly tailored injunction that does not violate Aish’s free speech. Therefore, Kindschy respectfully requests that this Court uphold the order for injunction entered on September 9, 2020.

Respectfully submitted this 28th day of November, 2022.

PINES BACH LLP

Electronically signed by Leslie A. Freehill

Diane M. Welsh, SBN 1030940

Leslie A. Freehill, SBN 1095620

122 W. Washington Ave., Ste. 900

Madison, WI 53703

Telephone: 608-251-0101

Facsimile: 608-251-2883

dwelsh@pinesbach.com

lfreehill@pinesbach.com

Attorneys for Petitioner-Respondent

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 6,601 words.

Dated this 28th day of November, 2022.

Electronically signed by Leslie A. Freehill
Leslie A. Freehill, SBN 1095620

CERTIFICATION OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 28th day of November, 2022.

Electronically signed by Leslie A. Freehill
Leslie A. Freehill, SBN 1095620