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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP1775

NANCY KINDSCHY,

Petitioner-Respondent,

v.

BRIAN AISH,

Respondent-Appellant-Petitioner.

APPEAL FROM FINAL ORDER OF THE TREMPELEAU COUNTY CIRCUIT COURT, THE HONORABLE RIAN W. RADTKE, PRESIDING, TREMPELEAU COUNTY CASE NO. 20-CV-0040

NONPARTY BRIEF AMICUS CURIAE BY THE WISCONSIN DEPARTMENT OF JUSTICE

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INTRODUCTION

This case involves the legality of a circuit court order granting a civil harassment injunction against an antiabortion protester. The circuit court found that the protester intentionally engaged in a course of harassing conduct toward an employee of a family planning clinic. The protester invokes the First Amendment "true threat" doctrine developed by the U.S. Supreme Court, claiming that his statements were not true threats and therefore should be constitutionally protected against the restrictions imposed by the injunction.

On July 28, 2023, this Court ordered supplemental briefing discussing the impact, if any, of the U.S. Supreme Court's June 27, 2023, decision in *Counterman v. Colorado*, 143 S. Ct. 2106 (2023), which clarified the "true threat" doctrine. The order granted leave to the Wisconsin Department of Justice to file a non-party brief *amicus curiae* on that subject. The Department respectfully submits this brief pursuant to that order.

ARGUMENT

While courts, including this Court, have agreed that verbal threats fall outside the protection of the First Amendment, they have varied in the test they apply to define a "true threat." *Counterman* resolves that disagreement, creating a two-prong First Amendment analysis for threatening speech that supersedes previous standards, including this Court's test in *State v. Perkins*, 2000 WI 46, ¶¶ 17–18, 243 Wis.2d 141, 626 N.W.2d 762. While the circuit court below did not have the benefit of the *Counterman* decision, its findings under the relevant statute may comport with the new test.

I. *Counterman* changed the First Amendment analysis of speech based on its threatening content.

While the First Amendment generally prohibits government from imposing content-based restrictions on speech unless the restriction survives strict scrutiny,[1] the U.S. Supreme Court has repeatedly held that content-based restrictions are permissible for certain narrowly defined categories of speech that directly harm society while contributing little or nothing to the exposition of ideas. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992). Courts have recognized that verbal threats are among those categories, but they have disagreed about how to define such a threat. *Counterman* addresses that disagreement.

A. The true threat standard prior to *Counterman* and this Court's decision in *Perkins*.

Both the U.S. Supreme Court and this Court have recognized that genuine threats of violence—customarily labeled "true threats"— do not merit First Amendment protection. *See, e.g., R.A.V.*, 505 U.S. at 388; *United States v. Watts*, 394 U.S. 705, 708 (1969); *Perkins*, 243 Wis.2d 141, ¶¶ 17–18. The exclusion of threats from that protection is justified not only by the interest in protecting individuals against the possibility that the threatened violence will occur, but also by the interests in protecting them against the fears of such violence and against the disruptions that such fear engenders. *R.A.V.*, 505 U.S. at 388.

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[1] *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 790–91 (1994).

It is true, of course, that courts must "confine the perimeters of any unprotected category [of speech] within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose Corp. v. Consumers Union of the U.S.*, 466 U.S. 485, 505 (1984). Prior to *Counterman*, courts disagreed as to the precise boundaries of the category of unprotected true threats. Some jurisdictions employed a subjective test that required proof that the speaker intended the recipient to understand the statement as a threat of violence. Others, including Wisconsin, applied some form of an objective test that asked whether a reasonable listener would interpret a particular statement as such a threat.

In *Perkins*, this Court adopted an objective, reasonable person true threat standard that was applied from the perspectives of both the speaker and the listener. *Perkins*, 243 Wis. 2d 141, ¶ 29. Under that standard, "[a] true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered." *Id.*

B. *Counterman* establishes a two-prong analysis for true threats that supersedes *Perkins*.

The U.S. Supreme Court addressed the lower courts' disagreement in *Counterman*, examining the question whether, in order to convict a person of a crime for making a statement that is an unprotected true threat, it is sufficient to show that a reasonable person would understand the statement to be threatening, or whether the government must

also show that the speaker subjectively knew or intended the threatening nature of the statement. *Counterman* established a new two-prong approach that supersedes the true threat standard established by this Court in *Perkins*.

1. The *Counterman* test features both an objective and a subjective component.

Counterman addressed a stalking conviction under a Colorado statute that did not require a showing that the defendant intended his statements to be threatening or that he was aware that they could be interpreted that way. *Counterman*, 143 S. Ct. at 2112–13. Counterman petitioned for certiorari, arguing that this standard violated the First Amendment, and the U.S. Supreme Court accepted the case. *Id.*

On June 27, 2023, the Supreme Court issued its ruling. It held that for liability to be imposed based on the threatening content of a person's speech, the First Amendment requires not only proof that a reasonable person would view the statements as threatening, but also proof that the speaker had some subjective understanding of the threatening nature of his statement.[2] *Id.* at 2111.

In the first prong of the analysis, the Court accepted that whether a statement counts as a threat—and hence its protected or unprotected status—is "based solely on its objective content." *Id.* at 2113. "Whether the speaker is aware of, and intends to convey, the threatening aspect of the message," the Court said, "is not part of what makes a statement a threat." *Id.*at 2114. To the contrary, the existence

[2] Because the speakers in *Counterman* and the present case were both male, this brief, for the sake of consistency, will use masculine pronouns to refer generically to speakers in the abstract.

of a threatening statement that is not protected by the First Amendment "depends not on 'the mental state of the author,' but on 'what the statement conveys' to the person on the other end." *Id.* (quoting *Elonis v. United States*, 575 U.S. 723, 733 (2015).

In the second prong of the analysis, the Court concluded that even if the speech in question is an unprotected true threat, a subjective mental state requirement is necessary to avoid chilling protected speech by reducing a speaker's uncertainty that he might accidentally or erroneously incur liability for speaking. *Id.* at 2114–15. In the Court's view, a purely objective test could lead to self-censorship that would chill too much protected, non-threatening expression and discourage the kind of uninhibited discourse the First Amendment is intended to protect. *Id.* at 2116.[3]

The Court then proceeded to determine that the specific mental state demanded by the First Amendment is recklessness—*i.e.* the government must show that the speaker consciously disregarded a substantial risk that his communications would be viewed as threatening violence.[4] *Id.*

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[3] The subjective mental state requirement is thus a prophylactic mechanism against chilling effects, analogous to similar prophylactic mental state requirements the Court has established in areas involving other categories of unprotected speech, such as obscenity, defamation, and incitements to unlawful conduct. *Counterman,* 143 S. Ct at 2115–16.

[4] Five justices endorsed the recklessness standard. Two justices (Sotomayor and Gorsuch) would apply a more stringent standard of intent, rather than recklessness, in at least some cases, but agreed with the majority that Colorado erred by requiring no proof of the speaker's mental state. *See Counterman,* 143 S. Ct at 2119–32 (Sotomayor, J., concurring). The two dissenting justices (Thomas and Barrett) would allow convictions based on objectively threatening speech without proof of the speaker's mental state. *See id.* at 2132–41 (Barrett, J., concurring).

at 2111–12., In reaching that conclusion, the Court balanced the harms of chilling protected speech against the harms to individuals and to society caused by allowing genuine threats of violence to go unregulated. *See id.* at 2217–19.

The Court rejected requiring the two most stringent mental state standards: (1) purpose or intent and (2) knowledge. The Court reasoned that requiring proof that the speaker intended or knew to a practical certainty that others would take his words as threats would make it too difficult for the government to establish the inferences about state-of-mind that would be necessary to convict morally culpable defendants. *See id.* at 2117–18.

The Court also rejected the least stringent mental state standard—negligence—under which a speaker would be liable if he simply should have been aware of a substantial risk that others would understand his words as threats. Such a standard, the Court reasoned, would make liability depend entirely on whether a reasonable recipient would understand the statement as a threat. *See id.* at 2117 n.5.

The Court thus settled on the intermediate mental state of recklessness, under which a person is liable if he consciously disregards a substantial and unjustifiable risk that his conduct will cause harm to another. *Id.* at 2117.[5] In the threat context, the Court found, recklessness means that a speaker is aware that others could regard his statements as threatening violence and delivers them anyway. *Id.*

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[5] *Cf.* Wis. Stat. § 939.24 ("'[C]riminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk."); Model Penal Code § 2.02(2)(c) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.").

The Court concluded that Counterman's stalking conviction violated the First Amendment under this test because he was prosecuted under an objective standard that required Colorado to show only that a reasonable person would understand his statements as threats and required no showing of any awareness on Counterman's part that the statements could be understood that way. The Court thus vacated the conviction and remanded for further proceedings. *Id.* at 2119.

Under *Counterman*, before imposing civil or criminal liability on a person based on the threatening content of the person's speech, a court must first determine whether, under all the relevant circumstances of the communication in question, a reasonable recipient of the speech would understand it to have an objectively threatening meaning. If an objective threat is found, the court then must determine whether the speaker was subjectively aware that others could regard his statement as threatening and chose to deliver the statement in spite of that awareness.

2. *Counterman* supersedes this Court's *Perkins* standard, in two respects.

Counterman supersedes this Court's *Perkins* standard, in two respects.

First, in making an initial determination as to whether a particular statement is an unprotected threat, *Counterman* requires a court to determine whether, under all the relevant circumstances, a reasonable recipient of the statement would understand it to have an objectively threatening meaning. *See Counterman*, 143 S. Ct. at 2113–14. This determination depends only on what the statement conveys to a reasonable recipient and does not involve the speaker's mental state. *See id. Perkins*, in contrast, required examining how "a speaker would reasonably foresee that a listener would

reasonably interpret" the speaker's statement. *Perkins*, 243 Wis. 2d 141, ¶ 29. That part of the *Perkins* standard has no role in the first, objective prong of a *Counterman* analysis.

Second, if the statement at issue is found to be objectively threatening, *Counterman* requires a court to determine whether the speaker was subjectively aware that others could regard his statement as threatening and delivered it anyway. *Counterman*, 143 S. Ct. at 2117. This requirement of finding a subjective mental state of recklessness on the part of the speaker was absent from the *Perkins* standard.

In sum, the *Perkins* true threat standard is inconsistent with *Counterman* and thus is no longer good law. Going forward, Wisconsin courts should handle true threat cases under the two-prong *Counterman* analysis.

C. *Counterman* does not apply to restrictions that are not based on the content of speech, but it does apply to restrictions based on both the threatening content of statements and other threatening physical acts.

It does not follow that *Counterman* governs every case involving a civil harassment injunction like the one in the present case. True threat analysis only applies to restrictions based on the threatening content of speech. A civil harassment injunction, however, may regulate a course of conduct not on the basis of the threatening content of any statements, but rather on the basis of physical conduct that is itself independently threatening. It also may regulate a course of conduct based on a *combination* of threatening physical conduct and verbal statements with threatening content. *Cf. United States v. O'Brien*, 391 U.S. 367, 376 (1968) (distinguishing between speech and nonspeech elements within a course of conduct); *Cohen v. California*, 403 U.S. 15,

16 (1971) (distinguishing burdens placed directly upon speech and burdens on separately identifiable conduct).

To the extent an injunction is justified without reference to the content of speech, it is subject to a version of the U.S. Supreme Court's "time, place, or manner" analysis and satisfies the First Amendment if it serves a legitimate and significant government interest unrelated to content and is narrowly tailored to burden no more speech than is necessary to serve that interest. *Madsen*, 512 U.S. at 765; *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Importantly, the speaker's mental state is *not* a component of the "time, place, or manner" analysis. Therefore, where that analysis applies, there is no need to examine the speaker's subjective understanding of the meaning of his own statements.

Where a course of conduct combines content-based and non-content-based components, the U.S. Supreme Court has previously held that, even if a defendant could rightly be found liable based on the non-verbal component of his conduct, the First Amendment still precludes a judgment where it cannot be determined from the record whether the finding of liability was based in part on the content of the defendant's speech. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916–18 (1982). Therefore, where an injunction regulates a course of content that includes a combination of threatening statements and threatening physical acts, *Counterman* will apply unless it is clear that the injunction is justified based only on the physical acts and not on the content of any statements.

II. The injunction in the present case may be valid as a content-neutral restriction. Alternatively, it may pass muster under *Counterman* based on the circuit court's findings about the objectively threatening content of the respondent's statements and about his intent to harass Kindschy.

The present case concerns a harassment injunction under Wis. Stat. § 813.125. *Kindschy v. Aish*, 2022 WI App 17, ¶ 1, 401 Wis. 2d 406, 973 N.W.2d 828. Under that statute, a circuit court may grant an injunction ordering a person to cease or avoid the harassment of another if it finds "reasonable grounds to believe that the respondent has engaged in harassment with intent to harass or intimidate the petitioner." Wis. Stat. § 813.125(4)(a)3. "Harassment" is defined, in pertinent part, to mean, "[e]ngaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose." Wis. Stat. § 813.125(1)(am)4.b.

In the present case, evidence was presented of a course of conduct that included the respondent's following Kindschy, proximity to her, demeanor, tone, loudness, etc.—acts that are harassing independent of any speech content. If the injunction was justified based on those acts, then it is subject to a "time, place, or manner" analysis under *Madsen*, which does not consider the respondent's subjective mental state.[6]

[6] The U.S. Supreme Court has recognized that restrictions on such harassing behavior as persistent importuning, following, dogging, unwelcome approaching, near physical touching, and attempting to vociferously argue face-to-face can be evaluated as content neutral restrictions. *See Hill v. Colorado*, 530 U.S. 703, 718, 724 (2000).

If the content of the respondent's speech was a necessary part of the proof needed to justify an injunction, the two-part *Counterman* analysis is required.

The objective prong of *Counterman* could be satisfied by the circuit court's finding that the respondent's statements "certainly would intimidate somebody." (R. 36:84.) That is, the court did not consider only how those statements were understood by Kindschy, but also how they would be understood by anybody in a similar situation. The conclusion that the statements "certainly would intimidate somebody" thus was tantamount to a finding that, under the circumstances of this case, a reasonable person in Kindschy's position would have understood those statements to be threats of violence to Kindschy or her family. Such a finding would suffice under the first prong of *Counterman*.

The subjective prong of *Counterman* could also be satisfied because Wis. Stat. § 813.125(4)(a)3. necessarily requires a finding that the respondent acted "with intent to harass or intimidate"—a showing of mental state that is a higher standard than recklessness. The circuit court found that the respondent acted with the intent to intimidate Kindschy into leaving her employment with the clinic. *Kindschy*, 401 Wis. 2d 406, ¶ 10. To the extent that finding extends to the respondent's awareness of the threatening content of his statements, it would satisfy the second prong of *Counterman*.

CONCLUSION

In *Counterman*, the U.S. Supreme Court established a new analysis for determining when a statement is a "true threat" that is unprotected by the First Amendment. Before civil or criminal liability can be imposed based on the threatening content of a person's speech, *Counterman* requires a determination (1) that the statements in question

were objectively threatening under the circumstances; and (2) that the person was aware that others could regard the statements as threatening but delivered them anyway. The *Counterman* standard supersedes and should replace the standard previously adopted by this Court in *Perkins*.

In the present case, the Court can uphold the injunction at issue if it concludes that it is justified as a content-neutral time, place, or manner restriction. If the Court concludes that the injunction is not content-neutral, then it must determine whether the existing record supports each of the two findings required under *Counterman*.

Dated this 17th day of August 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,096 words.

Dated this 17th day of August 2023.

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 17th day of August 2023.

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