STATE OF WISCONSIN

IN THE SUPREME COURT

Case No: 2020AP1775

NANCY KINDSCHY,

Petitioner-Respondent,

vs.

BRIAN AISH,

Respondent-Appellant-Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT-APPELLANT-PETITIONER

THOMAS MORE SOCIETY

Joan M. Mannix
Illinois State Bar No: 6201561

BUTING, WILLIAMS & STILLING S.C.

Dudley A. Williams
State Bar No. 1005730

Address:
300 South Wacker Drive
Chicago, Illinois 60606
Phone (312) 521-5845

TABLE OF CONTENTS

ARGUMENT

I. The Supreme Court's Decision In *Counterman* Reinforces The Paramount Value Accorded Free Speech By The First Amendment.

A. The *Counterman* Decision.

The United States Supreme Court held in *Counterman v. Colorado* that a listener's subjective reaction to speech *targeted specifically to that listener* is not the standard by which the propriety of such speech is judged, even with respect to speech communicated *in a private forum and having no conceivable connection to any matter of public concern*. See *Counterman v. Colorado*, __ U.S. __, 143 S.Ct. 2106, 2112-13 (2023). At issue in *Counterman* were hundreds of Facebook messages sent over a period of two years by Billy Counterman to C.W., a woman he had never met. Despite C.W.'s repeated attempts to block the messages, they continued. They included messages suggesting Counterman was surveilling C.W. and some that "envisaged harm befalling her".[1]

The speech at issue in *Counterman* is fundamentally distinct from that at issue in this case. It is not possible to

[1] *E.g.*, "'Fuck off permanently[,]'" "'Staying in cyber life is going to kill you[,]'" and "You're not being good for human relations. Die.'" *Id.*

equate Aish's speech, uttered in a traditional public forum and indisputably related to a matter of public concern, to the speech at issue in *Counterman*. The Court may disdain Aish's message and the manner in which he phrased it, but under no conceivable interpretation was his speech completely valueless like that at issue in *Counterman*. Importantly, however, the U.S. Supreme Court in *Counterman* held that even speech completely devoid of value must be afforded some protection in order to guard against a possible chilling effect upon protected speech.

In *Counterman*, the Court held that, even in a true threats case, the First Amendment requires at least proof of a reckless *mens rea* with respect to the threatening nature of a communication. The Court concluded that the need to protect against a chilling impact on non-threatening speech required extending the protection of "a subjective mental-state element … even with respect to [such] historically unprotected speech" that "pos[es] real dangers." See *Id.* at 2113. The Court explained:

> Prohibitions on speech have the potential to chill, or deter, speech outside their boundaries. A speaker may be unsure about the side of a line on which his speech falls. Or he may worry that the legal system will err, and count speech that is permissible as instead not. Or he may simply be concerned about the expense of becoming entangled in the legal system. The result is "self-censorship" of speech that could not be proscribed – a "cautious and restrictive exercise" of First Amendment freedoms. And an important tool to prevent that outcome – to stop people from steering "wide[] of the unlawful

> zone" – is to condition liability on the State's showing of a culpable mental state. Such a requirement comes at a cost: It will shield some otherwise proscribable (here, threatening) speech because the State cannot prove what the defendant thought. But the added element reduces the prospect of chilling fully protected expression."

Id. at 2114-2115 [citations omitted throughout]. In the context of true threats, a "recklessness" *mens rea* requirement means "a speaker is aware 'that others could regard his statements as' threatening violence and 'delivers them anyway.'" *Id*. at 2117. [Citations omitted throughout.]

Unlike the speech at issue in *Counterman,* Aish's speech was uttered in a public forum (the public sidewalk outside a Planned Parenthood) – a locale where speech has long been recognized as entitled to "special" First Amendment protection. See *Snyder v. Phelps*, 562 U.S. 443, 456, quoting *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). Kindschy acknowledged that, at no time during any of the interactions upon which she based her claimed entitlement to an injunction, did Aish leave the sidewalk. (R. 35-30).

Moreover, the speech at issue in this case related to a matter of public concern – abortion. Irrespective of any differences in political ideology, the U.S. Supreme Court has always recognized the overarching importance of protecting such speech, even if rejected by a listener as abhorrent or offensive, and even when uttered in a public forum but directed to a specific person or persons. See *e.g.*, *Snyder*, 562 U.S. at

454.[2] After all, the messages spurned by listeners are those which require First Amendment protection:

> If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Indeed, "the point of all speech protection ... is to shield just those choices of content that in someone's eyes are misguided, or even hurtful."

Id. at 458 [citations omitted throughout].

B. The Speech At Issue In This Case.

The speech at issue in this case is Aish's expression of his religiously-inspired opposition to abortion, and concomitant attempts to persuade Kindschy, as well as other listeners, to reconsider their position on that matter of national debate and to embrace his viewpoint. It was undisputed that Aish had a long history of public protest against abortion. He spent many years outside Planned Parenthood locations advocating for his Christian, pro-life viewpoint to everyone coming and going, including clinic employees and patients, other building tenants, and random passerby. (R. 36, pp. 27-35, 41-42, 44-48). There was no evidence that, in all those

[2] In *Snyder*, the Supreme Court recognized, "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."

years, Aish came into even coincidental physical contact with anyone, including Kindschy, at any time. (See *e.g.*, R. 35, pp. 22-23).

The Circuit Court made a finding that Aish was at the Blair Planned Parenthood where Kindschy worked to share the Gospel and protest and that his communications to Kindschy were made in that context. The Circuit Court found Aish's statements were made for the purpose 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". He was also attempting to articulate his "stance of being against the things that Planned Parenthood does, which include abortions… and that ["procedures that result in the loss of life of unborn children"] was what Mr. Aish was wanting to stop or change the behavior of by his protesting here.…" (R. 36, pp. 17-25). Kindschy herself testified that, since April, 2014, Aish had been a "frequent protester" at the clinics where she worked. (R. 35, pp. 5, 10, 21).

The record contains objective evidence which clearly establishes the nature of Kindschy's interactions with Aish upon which she based her claim for an injunction. Kindschy recorded one of her interactions with Aish on her phone, a video that was admitted into evidence at the trial of the case. (R. 24; R. 35, pp. 39-40; Ex. 2). Kindschy testified that that recorded interaction was "indicative" of Aish's behavior on each of the five dates (October 8, 15, 29, 2019 and February

18, 25, 2020) as to which Kindschy offered testimony in support of her request for an injunction. (R. 1:5; R. 35, pp. 39-40). That video can be viewed here: https://drive.google.com/file/d/1Rpqi2j1fg3T3Xyptw6DByVc6uhfTE96C/

The video is critically important because it provides "an objective record" which resolves any questions regarding the context of Aish's speech, his statements, his actions and his demeanor. See *In re Jerrell C.J.*, 2005 WI 105, ¶53, 283 Wisc.2d 145, 169, 699 Wisc.2d 145, 122 (2005). It was relied upon by the Circuit Court in making its findings of fact and, as noted by the Circuit Court, disproved in significant respects Kindschy's characterizations of her interactions with Aish. (See *e.g.*, R. 36, pp. 80, lines 14-19).

Kindschy's testimony, and the testimony of Shonda Racine, Kindschy's Planned Parenthood manager, established that Aish sought to communicate his message to other staff, patients, and everyone in the area, not just to Kindschy. Kindschy nonetheless testified she felt "singled out". (R. 1:5; 35, pp. 42, 74). Aish testified that, after the last appointments for the day, he stayed until the employees checked out "because they all stand condemned apart from Jesus Christ," he wants them "to hear the gospel" and "to turn away from their sin..." He urges them not to wait because bad things can happen and they might not make it to the next week when he

sees them again and has another opportunity to try to persuade them to repent. (R. 36, pp. 30-31, 34-35).

Kindschy testified that those types of comments when directed to her "frightened her so bad" and she felt "threatened". (R. 35, pp. 15-16). Causing fear and even profound distress to a listener, however, is not the measure by which the propriety of speech in a public forum on a matter of public concern is judged. See *e.g.*, *Snyder*, 562 U.S. at 458. The United States Supreme Court has consistently held that paramount foundational interests protect even speech which is "upsetting", "arouses contempt", is "vehement", "caustic" or "unpleasant" because, "'in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment.'" *Id.*, quoting *Boos v. Barry*, 485 U.S. 312, 322 (1988). The decision in *Counterman* reaffirms those interests.

II. The Circuit Court's Previous Factual Findings Preclude Any Possible Determination That Aish Acted Recklessly.

Assuming Aish's comments to Kindschy even arguably constituted "true threats of violence" (which, as discussed *infra, Counterman*'s reaffirmation of the principles defining what constitutes a "true threat" disproves), Kindschy cannot establish that Aish was at least reckless with respect to the

impact of his speech on Kindschy.

The Circuit Court found that 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 Circuit Court found Aish's speech was "in the context of wanting to send this message" and came "from a place of love or nonaggression." (R. 36, p. 84, lines 1-6). The Circuit Court did not find any aggression in the February 18, 2020 video and cited Kindschy's acknowledgement that the other incidents at issue "were similar in nature as to tone". The Circuit Court found "Mr. Aish is passionate about his beliefs and not that he was being angry or aggressive….", despite Kindshy's testimony that he was loud and aggressive. (R. 36, p. 84, lines 6-16).

None of those findings are possibly consistent with a reckless *mens rea*. Aish could not possibly speak "from a place of love or nonaggression" and also make a deliberate decision to endanger another. In the context of this case, having said the same words to Kindschy virtually every week over the course of a number of years, there would be no basis in the record for the Circuit Court to have found that Aish consciously disregarded a substantial [and unjustifiable] risk that his words would cause serious harm to Kindschy. The

Circuit Court's findings preclude any possible conclusion that Aish was aware that others could regard his statements as threatening violence and elected to deliver them anyway or that he "consciously accepted a substantial risk of inflicting serious harm" upon Kindschy. See *Counterman*, 143 S.Ct. at 2117-2118.

III. This Is Not A True Threats Case.

In *Counterman,* the U.S. Supreme Court reaffirmed that a "true threat" encompasses "'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence'", but does not include "'jests,' 'hyperbole,' or other statements that when taken in context do not convey a real possibility that violence will follow". See *Counterman*, 143 S.Ct. at 2114 [citations omitted throughout]. The Court further explained:

> Whether the speaker is aware of, and intends to convey, the threatening aspect of the message is not part of what makes a statement a threat…. The existence of a threat depends not on 'the mental state of the author,' but on 'what the statement conveys' to the person on the other end."

Id. [citations omitted throughout].

In this case, on its face and taken in context, Aish's speech did not convey any intent by Aish to commit an unlawful act of violence against Kindschy or otherwise "convey a real possibility that violence will follow." Although the Circuit Court concluded Aish wanted "to scare" Kindschy

in order to get her to leave her employment and adopt Aish's religious beliefs (R36, p. 85, line 23-p. 86, line 18), that is vastly different from intending "to scare" a listener by threatening violence. The fact that a message is phrased in a manner intended to provoke a strong, even fearful, emotional reaction, but which does not convey any intention to commit an unlawful act of violence upon the listener, does not deprive it of First Amendment protection. See *e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 448 (2011) (protest by church members near funeral of soldier killed in Iraq in the line of duty which included signs saying, among other things, "'Thank God for IEDs'" and "'Thank God for Dead Soldiers'", protected under the First Amendment.) If it did, every street preacher in the country who warns people to repent or burn in the fires of Hell for an eternity, and every environmentalist warning of advent of the end of the world, would be muzzled. As the Court observed in *Snyder*:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and - as it did here - inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course - to protect even hurtful speech on public issues to ensure that we do not stifle public debate.

Snyder, 562 U.S. at 460-461.

The Circuit Court determined that Aish's speech was wrongful because Kindschy should be protected 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). But that conclusion ignores that Aish's words encouraging Kindschy to repent now before it was too late and *God* punished her, did not in any way convey an intent by Aish to commit an unlawful act of violence against Kindschy. There was no "true threat" in this case, 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.

IV. The Relief Sought By Aish.

Accepting *arguendo* that the standards articulated in *Counterman* apply to Aish's speech in a public forum on a matter of public concern, as discussed *supra*, as a matter of law the Circuit Court's previous factual findings foreclose Kindschy from meeting her burden of proving that Aish's speech was uttered recklessly, *i.e.,* that Aish was aware that others could regard his statements as threatening violence and elected to deliver them anyway or that he "consciously accepted a substantial risk of inflicting serious harm" upon Kindschy. See *Counterman*, 143 S.Ct. at 2117-2118.

Accordingly, respectfully, the relief previously requested by Aish should be immediately granted; the Court should reverse the Court of Appeals' March 8, 2022 decision and vacate the Circuit Court's May 9, 2022 "Injunction-Harassment Order of Protection." This Court should not countenance any further delay and should reject any request

for relief from Kindschy that would continue to deprive Aish of his constitutional rights. As the Circuit Court recognized, its injunction effectively bans Aish from *any prayer or protest* 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).

Although Kindschy was never entitled to any relief, the Circuit Court's erroneous injunction has already suppressed *all* of Aish's speech from the public sidewalk outside the Blair Planned Parenthood for almost three years, since September 9, 2020, when the Circuit Court entered its Injunction - Harassment (Order of Protection). That unwarranted infringement of Aish's sacred First Amendment rights must cease immediately.

CONCLUSION

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

Dated this 17th day of August, 2023.

Respectfully Submitted,

THOMAS MORE SOCIETY

Electronically Signed by Joan M. Mannix
Illinois State Bar No. 6201561
Admitted Pro Hac Vice

BUTING, WILLIAMS & STILLING, S.C.
Dudley A. Williams
State Bar No. 1005730
Attorneys for Respondent-Appellant-Petitioner

CERTIFICATION BY ATTORNEY

I hereby certify that this petition conforms to the rules contained in Sec. 809.19(8)(b), and (bm) and (8g) for a brief. The length of this supplemental brief is 2,975 words.

Electronically Signed by Dudley A. Williams
State Bar No. 1005730

Address:
7929 N. Port Washington Rd.
Suite B2
Glendale, WI 53217
(262) 821-0999
(262) 821-5599