STATE OF WISCONSIN

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-40

SUPPLEMENTAL BRIEF OF PETITIONER-RESPONDENT

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SUPPLEMENTAL ISSUES

1. What impact does *Counterman v. Colorado,* 600 U.S. ___, 143 S. Ct. 2106 (2023) have on the issues raised in this case?
   Short answer: Because this matter deals with a harassment restraining order and not a criminal conviction, the *Counterman* decision does not necessarily have any impact on the issues raised in this case. Regardless, because the circuit court determined that Mr. Aish intended to scare Ms. Kindschy with his conduct and remarks, if this Court determines that there is an obligation to establish the speaker had some objective understanding of the threatening nature of his remarks in order to obtain a harassment restraining order, that requirement was met here.

2. What impact does *Counterman v. Colorado* have on the relief sought by each party?

   Short Answer: The decision supports the circuit court's issuance of the harassment injunction against Mr. Aish and undermines his argument that a court would need to find that he actually intended to carry out the threats he made in order to issue an injunction.

Summary of Counterman v. Colorado

Billy Counterman was convicted under a Colorado criminal statute making it unlawful to repeatedly make any form of communications with another person in a manner that would cause a reasonable person to suffer serious emotional distress and that does cause that person to suffer serious emotional distress. *Counterman v. Colorado,* 600 U.S. ___, 143 S. Ct. 2106, 2112 (2023) (citing Colo. Rev. Stat. § 18-3-602(1)(c) (2022)). The conviction was based on Counterman sending hundreds of Facebook messages to a

local singer/musician—some simple, some suggesting he was surveilling her, and others envisaging harm befalling her. *Id.* Under Colorado law, the State had to prove that a reasonable person would have viewed the Facebook messages as threatening; the State did not have to prove that Counterman had any subjective intent to threaten the victim. *Id.* at 2112-13. Counterman challenged the conviction on First Amendment grounds.

The United States Supreme Court considered the question of whether the First Amendment requires proof that a criminal defendant had some subjective understanding of the threatening nature of his statements. *Id.* at 2113. The Court held that the First Amendment does require proof that the defendant had some understanding of the threatening nature of his comments and that a mental state of recklessness is sufficient. *Id.* "The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The State need not prove any more demanding form of subjective intent to threaten another." *Id.* at 2111-12; *see also Id.* at 2113 (holding that the First Amendment does "not require that the State prove the defendant had any more specific intent to threaten the victim.")

The Court determined that the First Amendment demands a subjective mental-state requirement for true threats to avoid a chilling effect. *Id.* at 2114-15. Because prohibitions on speech have the potential to chill or deter speech outside of their boundaries, a speaker "may be unsure about the side of a line on which his speech falls;" "may worry that the legal system will err and count speech that is permissible as not;" or he may "be concerned about the expense of becoming entangled with the legal system. *Id.* The result may be self-censorship of otherwise protected speech. *Id.* at 2115.

The State need not show the criminal defendant acted "purposely" or consciously desired a result. *Id.* at 2117-18. The State need not show the

defendant "knowingly" acted. *Id.* Rather, all that is required is that the State establishes that the defendant acted "recklessly." *Id.* The recklessness standard "involves insufficient concern with risk, rather than awareness of impending harm." *Id.* at 2117 (citing *Borden v. United States,* 593 U.S. ___, 141 S.Ct. 1817, 1824 (2021) (Kagan, J., plurality opinion)).

The Counterman Decision Sets a Standard for Criminal Prosecutions and May be Inapplicable Here.

Because *Counterman v. Colorado* came to the Supreme Court as a challenge to a criminal conviction, the majority opinion discussion is focused solely criminal prosecution and what a state needs to prove *to criminally convict* a person for making "true threats." *E.g., Id.* at 2117, 2119; *Id.* at 2130-31 (Sotomayor, J., concurring in part); *Id.* at 2140 (Barrett, J., dissenting) ("[T]he Court's decision seems driven in no small part by the heavy hammer of criminal punishment."). Repeatedly, the Court's decision focuses on criminal defendants and the burden of the state.

The Court's decision does address whether the same First Amendment concerns arise in the civil context or when a person is the subject of a harassment restraining order. In criticizing the breadth of the Court's holding, the Dissent states that the Court's decision is not be limited to criminal matters and affects civil matters, as well—including where threat victims seek restraining orders from their harassers. *Id.* at 2141 (Barret, J., dissenting). In support of this statement, the dissent relies on a remark made at oral argument, as opposed to anything articulated in the Court's opinion. *Id.* at 2140. Hence, it is wholly unclear that the same intent standard would necessarily apply in the context of a harassment restraining order.

There are sound legal and logical reasons to have a different intent standard for a criminal prosecution than for obtaining a harassment

restraining order. A harassment restraining order does not implicate the same liberty interests as a criminal conviction. Being required to stay away from certain persons or spaces does not impact one's freedom like incarceration does.

In addition, the restraining order serves as a tool to inform the speaker where the line is between prohibited speech and protected speech. Any concern about chilling otherwise lawful speech because the speaker does not know where the line is between permitted speech and prohibited speech is addressed through the issuance of a restraining order. The court tells the subject of the order where the line is and what he must not do to avoid crossing that line to avoid criminal prosecution.

Finally, applying an objective standard in restraining order matters recognizes the rights of the subject of a restraining order *vis a vis* the rights of his target. The target of the unwanted attention (or victim) has no less of a right to life, liberty, and the pursuit of happiness than does the subject. *See* Wis. Const. art. I, § 1. The victim has no less a right to free speech and freedom of association than does the subject. *See* Wis. Const. art. I, § 3; U.S. Const., amend. I. The victim has no fewer rights to freedom of worship and liberty of conscience than does the subject. Wis. Const. art. I, § 18. If a court finds that statements or actions are objectively threatening, the subject of a restraining order petition should not be able to evade the order by claiming he lacked the subjective intent to threaten another.

Although it is unclear that the *Counterman* standard applies in this case, that standard has been met here.

The Counterman Decision Supports Upholding the Restraining Order.

Wisconsin's harassment restraining order and injunction statute requires that a court may issue an injunction if, after a hearing, the court

"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 (emphasis added). In granting Ms. Kindschy's request for a harassment injunction, the "Circuit Court found that Aish repeatedly committed acts that intimidated and harassed Kindschy." *Kindschy v. Aish,* 2022 WI App 17, ¶ 8; *see also* (R.37: 81-91, R-App. 007-017). The Court specifically found that Aish ***acted with intent*** to harass or intimidate Ms. Kindschy. (R. 37:85-86; 37:91, lns. 1-3, R-App. 011-012; R.-App. 017). Specifically, Aish intended to scare Ms. Kindschy into quitting her employment with the Blair Clinic or to get Ms. Kindschy to adopt Aish's religious beliefs. (R.37:85, lns. 1-18; R-App. 011; R.36: 86, lns. 11-18; R-App.012). In other words, the Court found that Aish was aware of the threatening nature of his actions. The First Amendment protection articulated in *Counterman* has been met here. The issuance of the harassment restraining order in this case is consistent with the U.S. Supreme Court's holding in *Counterman.*

The *Counterman* decision further demonstrates that Aish is wrong when he claims the circuit court should not have issued the restraining order because the court did not find that Aish actually "threatened to inflict harm upon Kindschy or her family." (Pet'r Br. at 24). It is not necessary to establish that a defendant intended to carry out the threat because true threats include intimidation alone. *Counterman*, 143 S.Ct. at 2124 (Sotomayor, J., concurring in part) (citing *Virginia v. Black,* 583 U.S. 343, 359 (2003)) "And 'intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent of* placing the victim in fear of bodily harm or death.'" *Counterman*, 143 S.Ct. at 2124 (Sotomayor, J., concurring in part) (citing *Black*, 583 U.S. at 360).

The record supports the circuit court finding that Aish intended to harass or intimidate Ms. Kindschy. (Resp't Br. 9-12, 20-21, 25-28); (R. 35:7 at 2-14, P-App. 10; R. 35:8 at 22-24, R-App. 011; R. 35:12 at 6, P-App 015; R. 35:15 at 24-25, 35:16 at 1, P-App. 018-019; R. 36: 81 at 3-5, P-App. 158; R. 36:85 at 14-25 to R. 36:86 at 1-18, P-App. 162-163; R.36:88 at 25 to R. 36:90 at 1-7; P-App. 165-167). In addition to the words he spoke, Aish engaged in contact that was threatening—coming close to her, chasing her car into the street, pumping a sign within inches of her car window, and appearing increasingly agitated and angry when she did not engage with him. (R.35:16 at 12-23; P-App. 019).

If the Supreme Court's opinion in *Counterman v. Colorado* applies here and it is necessary to find that Aish acted intentionally, the record demonstrates that he did so and therefore supports the issuance of a restraining order. The circuit court's order should be affirmed.

Respectfully submitted this 17th day of August, 2023.

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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 1,683 words.

Dated this 17th day of August, 2023.

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