STATE OF WISCONSIN

IN THE SUPREME COURT

Case No: 2020AP1775

NANCY KINDSCHY

Petitioner-Respondent,

vs.

BRIAN AISH,

Respondent-Appellant-Petitioner.

SUPPLEMENTAL REPLY BRIEF OF RESPONDENT-APPELLANT-PETITIONER, TO SUPPLEMENTAL BRIEF OF PETITIONER-RESPONDENT AND TO NONPARTY BRIEF AMICUS CURIAE BY THE WISCONSIN DEPARTMENT OF JUSTICE

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ARGUMENT

I. The *Counterman* Decision Applies To Both Civil Restraining Orders And Criminal Prosecutions (Reply To Kindschy Supp. Br., pp. 6-7).

First, Respondent-Appellant-Petitioner, Nancy Kindschy ("Kindschy") tentatively posits, without citation to the *decision* in *Counterman v. Colorado*, ___ U.S. ___, 143 S.Ct. 2106 (2023) (rather than the concurrence or dissent), that the Supreme Court's decision "may be inapplicable" here because the context in which *Counterman* arose was a criminal prosecution. (Kindschy Supp. Br., pp. 6-7). However, nothing in the Court's decision supports the conclusion that it determined the appropriate *mens rea* required by the First Amendment for "true threat" speech is conditioned upon whether the regulation of that speech occurs in a criminal or civil context. Kindschy's only references to the *Counterman* decision (as opposed to the concurrence or dissent) do not support her argument. (See Kindschy Supp. Br. at p. 6, citing *Counterman v. Colorado*, 143 S.Ct. at 2117, 2118). In determining that a "reckless" *mens rea* requirement "offers the right path forward" incriminal prosecutions for true threats of violence, the majority in *Counterman* explicitly recognized that that standard was already in place in the context of civil defamation actions:

> Using a recklessness standard also fits with the analysis in our defamation decisions. As noted earlier, the Court there adopted a recklessness rule, applicable in both civil and criminal contexts, as a way of accommodating competing interests. See supra, at 2115 - 2116. In the more than half-century in which that standard has governed, few have suggested that it needs to be higher—in other words, that still more First Amendment "breathing space" is required. Gertz, 418 U.S. at 342, 94 S.Ct. 2997.

Id. at 2118. Ultimately, the *Counterman* decision makes clear that the values promoted and protected by the First Amendment controlled its inquiry, and not whether the challenge to the speech at issue arose in a criminal or civil context. The court stated:

> This Court again must consider the prospect of chilling non-threatening expression, given the ordinary citizen's predictable tendency to steer "wide[ ] of the unlawful zone." Speiser, 357 U.S. at 526, 78 S.Ct. 1332. The speaker's fear of mistaking whether a statement is a threat; his fear of the legal system getting that judgment wrong; his fear, in any event, of incurring legal costs—all those may lead him to swallow words that are in fact not true threats.

Id. at 2116.

The Wisconsin Department of Justice ("Amicus") disagrees with Kindschy's suggestion that *Counterman* may not apply in a civil injunction case. Amicus recognized that

Counterman's recklessness standard must be met "before imposing civil or criminal liability on a person based on the threatening content of the person's speech". (Wisconsin DOJ Amicus Br., p.11).

II. The *Counterman* Decision Does Not Support Upholding The Injunction Against Aish's Speech On A Public Sidewalk Outside The Planned Parenthood At Which Kindschy Works.

(Reply To Kindschy Supp. Br., pp. 6-7).

After half-heartedly attempting to argue that *Counterman* does not apply at all, Kindschy reverses course and argues that it nonetheless supports upholding the injunction (restraining order) she obtained against Aish. Kindschy argues that subjective intent is an element of the statute under which the injunction was entered because the language of the statute requires a showing of "harassment with intent to harass or intimidate…." (Kindschy Br., p. citing Wis. Stat. §813. 125 (4) (a)3 (emphasis added by Kindschy)). But that argument ignores the precedent of this Court which controlled the circuit court's inquiry at the time of the trial.

This Court's decision in *State v. Perkins*, 2001 WI 46, ¶29, 243 Wis.2d 158, 626 N.W.2d 770 (2001) required the circuit court to apply an objective speaker and listener standard. In *Perkins*, this Court concluded:

> [T]he test for a true threat that appropriately balances free speech and the need to proscribe unprotected speech

> is an objective standard from the perspectives of both the speaker and listener. A true threat is determined using an objective reasonable person standard.

But the U.S. Supreme Court's decision in *Counterman* held that a subjective reckless speaker standard is required by the First Amendment. *Counterman*, 143 S.Ct. at 2119. *Id.* As Amicus acknowledges, this Court's decision in *Perkins* was "superseded" by *Counterman*. (See *e.g.*, Wisconsin DOJ Amicus Br., pp. 5, 6-12).

Kindschy also argues that the Circuit Court's finding that Aish intended "to scare" Kindschy means that the court necessarily also concluded that Aish uttered true threats with the intention of threatening Kindschy and was aware of "the threatening nature of his actions." (Kindschy Supp. Br., p. 8). But that argument takes a single finding of the circuit court (that Aish intended "to scare" Kindschy) completely out of context and ignores the circuit court's other findings.

As the Court explained in *Counterman*, "The 'true' in that term ["true threat"] distinguishes what is at issue from jests, 'hyperbole,' *or other statements that when taken in context do not convey a real possibility that violence will follow*." *Id.* [Emphasis added.] Or, as the Wisconsin Department of Justice puts it, a true threat must be a "genuine threat of violence". (Wisconsin DOJ Amicus Br., p. 5). In this case, the circuit court made no finding that Aish recklessly (or intentionally) threatened Kindschy with

violence. Instead, the circuit court found that Aish's words, uttered from a public sidewalk outside a Planned Parenthood as part of his protest against Planned Parenthood and abortion, should be silenced because Kindschy should be protected from his message.

That message did not threaten any violence but, according to the circuit court's findings, sought to "scare" Kindschy into leaving her Planned Parenthood employment, "to stop doing what she was doing" and to get her to embrace Aish's religious beliefs. (R. 36: 86). The circuit court did not find those statements were true threats of violence but, nonetheless, found that it could punish and censor those words because they "appear[ed] to be intimidating," even in the context presented of Aish "trying to convey a message of repentance, a message in an attempt to encourage someone to turn their life over and turn to Jesus" and "*coming from a place of love or nonaggression*." (R. 36: 84 [emphasis added]). These findings, however, do not establish a "true threat" consistent with the requirements articulated in *Counterman*. Rather, the court's finding that Aish's statements were made in the context of wanting to send a message coming from a place of "love or nonaggression" (see R. 36: 84), precludes a finding that Aish could have reasonably foreseen that his speech would be interpreted as a serious expression of an intent or plan to personally inflict harm on Kindschy.

The circuit court determined that the "scary" aspect of Aish's message was making Kindschy contemplate the possibility that God might punish her by making bad things happen to her family, such a being killed by a drunk driver, and that she needed to turn to Christ and repent before such bad things started happening. (R. 36: 82-84). The circuit court found that Kindschy should be protected from that message because she should not have to hear words that made her think about the possibility that bad things might happen to her family. The circuit court did *not* find that Aish at any time communicated a message that suggested *he* would cause any bad things to happen to Kindschy. "Scaring" someone with an upsetting idea is not the same as threatening someone with violence.

Kindschy also relies upon her own testimony (Kindschy Supp. Br., 9), which was discredited by the video evidence. (R. 36, p. 80, lines 10-17). She argues, "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." (Kindschy Supp. Br., p. 8, citing her own testimony at R. 35: 16 at 12-23). Amicus also cites that testimony.

The circuit court did not accept Kindschy's testimony alleging that Aish engaged in threatening physical conduct

and that he was agitated and angry, all of which was disputed by Aish. There is no reason for this court to embrace that testimony in light of the circuit court's findings rejecting it.

Kindschy's testimony regarding Aish's actions, the content of his speech and demeanor are all disproved by the video played at the trial. Kindschy herself testified that Aish's behavior as shown by the video was "indicative" or typical of how Aish conducted himself on the other occasions at issue. (R. 35, p. 40, lines 13-17). As shown by the video, Aish did not "come close" to Kindschy, and was not "increasingly agitated and angry." Again, Aish urges the members of the Court to review the short video given its great importance to an understanding of the conduct at issue and because it simply disproves Kindschy's characterizations of that conduct:

https://drive.google.com/file/d/1Rpqi2j1fg3T3Xyptw6DByVc6uhfTE96C/

The circuit court recognized that the video undermined the testimony of Kindschy that Aish was loud and aggressive, which both Kindschy and Amicus argue here should be the basis for upholding the injunction. The court found:

> I didn't find any aggression in the February 18, 2020 video, and Ms. Kindschy testified that the other incidents were similar in nature as to tone, although there was some testimony that Mr. Aish was loud or aggressive. Based on the

> testimony here I think it's more likely that Mr. Aish is passionate about his beliefs and not that he was being angry or aggressive; however, that doesn't mean that somebody can't on the receiving end feel that it was aggressive or loud.

(R. 36, p. 83).

In the same mistaken vein, Amicus contends that this case is not governed by *Counterman* because of this same conduct alleged by Kindshy but rejected by the circuit court:

> 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.

Wisconsin DOJ Amicus Br., p. 14. Amicus' argument, like Kindschy's, ignores the circuit court's actual findings and the objective video evidence. The circuit court did not make any findings that Kindschy engaged in harassing conduct warranting the imposition of an injunction and did not base its injunction on any findings of a course of harassing conduct independent of the content of Kindschy's speech. The circuit court did not find that Aish followed Kindschy, harassed her by virtue of his proximity to her, or that his demeanor, tone, or loudness was threatening or harassing. Amicus' argument that a different standard applies to acts

that are harassing independent of any speech content is simply irrelevant. As Amicus acknowledges, *Counterman* applies if the content of the respondent's speech was a necessary part of the proof needed to justify the injunction. (Wisconsin DOJ Amicus Br., p. 13).

Undaunted by the circuit court's actual findings and the record evidence, Amicus contends that the circuit court's finding that Aish's statements "certainly would intimidate somebody" 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." (Wisconsin DOJ Amicus Br., p. 15). This assertion contradicts the court's findings regarding Aish's demeanor and purpose and is an incorrect statement of the law; Amicus fails to cite any authority that stands for the proposition that a "reasonable person standard" is satisfied by a showing that "somebody" could be intimidated by another's statements. *See: Pope v. Illinois*, 481 U.S. 497, 501 (1987).

Amicus also contends that "[t]he circuit court found that the respondent acted with the intent to harass or intimidate Kindschy into leaving her employment with the clinic". (Wisconsin DOJ Amicus Br., p. 15). Again, Amicus completely ignores the circuit court's finding that Aish acted from "a place of love and non-aggression" and that the

circuit court's injunction was entirely based on speech in a public forum on a matter of public interest.

Finally, noticeably missing from Amicus' analysis is any discussion of the propriety of upholding an injunction based on facts *not* accepted by the circuit court and arguments advanced by a non-party that were never made before the circuit court, the appellate court or this Court until they were made in a supplemental "amicus" brief. *See: F.T.C. v. Phoebe Putney Health Sys., Inc*., 568 U.S. 216, 226, 133 S. Ct. 1003, 1011, 185 L. Ed. 2d 43 (2013).

CONCLUSION

For all of the foregoing reasons, as well as those set forth in his previously filed briefs, Aish asks this Court to reverse the Court of Appeals' March 8, 2022 decision and vacate the "Injunction-Harassment Order of Protection." Issued on September 8, 2020.

Dated this 28th day of August, 2023.

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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 reply brief. The length of this reply brief is 2,184 words.

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