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STATE OF WISCONSIN  
SUPREME COURT

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Case No. 2020AP1775

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NANCY KINDSCHY,

Petitioner-Respondent,

v.

BRIAN AISH,

Respondent-Appellant-Petitioner.

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

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SUPPLEMENTAL REPLY BRIEF  
OF PETITIONER-RESPONDENT

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## ARGUMENT

### I. **Even if *Counterman* applies to harassment injunctions, the harassment injunction issued against Aish is valid.**

The record supports the circuit court finding that Brian Aish intentionally engaged in a course of harassing conduct directed at Nancy Kindschy.<sup>1</sup>

Likewise, the record supports the issuance of the harassment injunction even if the recklessness *mens rea* standard articulated in *Counterman v. Colorado*, 143 S.Ct 2106 (2023), applies because the circuit court found that Aish acted with the intent to intimidate and scare Kindschy. In other words, the record confirms he was at least aware that his statements could be understood as threats. *Counterman*, 143 S.Ct at 2119. Aish intended to scare Kindschy with his intimidating comments that Kindschy or her family may be killed or harmed (R.36:85-86). The evidence and findings with supporting argument are fully set forth in Kindschy's prior briefs, and therefore will not be repeated here.<sup>2</sup>

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<sup>1</sup> I have learned that at some point after the Court held oral argument, Ms. Kindschy retired from her nursing position.

<sup>2</sup> Kindschy disagrees with the characterization of the facts and circuit court findings stated in Aish's Supplemental Brief. *E.g.*, (Aish Supp'l Br. at 9-11); (Aish Supp'l Br. at 11-13). The purpose of this Reply Brief is to discuss *Counterman*, and not litigate factual disputes. Kindschy set forth the pertinent facts and circuit court findings in her first brief, which can be verified by the transcripts. (Kindschy Resp't Br. at 8-23; 25-28; R. 35; R. 36).

**II. The U.S. Supreme Court has not held that a person seeking a harassment restraining order or injunction must prove the respondent had a subjective intent to make a threat.**

On the broader question of whether *Counterman* applies to civil harassment injunctions or restraining orders—thus adding a new *mens rea* requirement to Wisconsin Statute § 813.125—this is not answered by the Supreme Court in *Counterman*. The majority opinion is solely focused on “defendants” and the “state’s” burden. *Counterman*, 143 S.Ct at 2111-2119; *see e.g., id.* at 2111 (“True threats of violence are outside the bounds of First Amendment protection and *punishable as crimes*. Today we consider a *criminal conviction* for communications falling within that historically unprotected category.”) (emphasis added). The majority opinion never addresses whether an individual seeking a harassment restraining order or injunction must make the same showing of *mens rea* that a state prosecutor must make in a criminal proceeding, which could result in imprisonment. *See generally id.* at 2111-2119.

Respectfully, it is not clear that the Department of Justice’s position as to the applicability of *Counterman* in actions under § 813.125 is correct. (Department of Justice Amicus Br. at 12-15). The impact of such a decision would be far-reaching—and could impact individuals across the state who

have obtained a harassment restraining order or injunction under § 813.125.<sup>3</sup> And it certainly will impact those who may be seeking an injunction. As discussed in Kindschy's Supplemental Brief, these petitioners have no fewer constitutional rights than respondents.<sup>4</sup> (Kindschy Supp'l Br. at 6-7.)

Kindschy followed the procedure set forth under § 813.125 and established that Aish was intentionally engaged in a harassing course of conduct targeted at her. *See e.g.*, (Kindschy Resp't Br. at 24-28). She is entitled to the protection afforded by an injunction despite Aish's claims that it limits his speech. This Court has recognized that individuals—including one who seeks to speak out on public policy—may be restrained by a harassment injunction because “an individual's First Amendment speech rights are not absolute.” *Board of Regents v. Decker*, 2014 WI 68, ¶ 45, 355 Wis. 2d 800, 850 N.W. 2d 112 (internal quote omitted).

As set forth in the record and prior briefs, this Court should uphold Ms. Kindschy's injunction against Mr. Aish.

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<sup>3</sup> This also impacts those who may be the subject of a petition under § 813.125. Notably, organizations who routinely represent the interests of either petitioners or respondents have not yet weighed in on this question.

<sup>4</sup> More comprehensive briefing on this issue may be beyond the limits of this supplemental reply. And, other interested persons may wish to be heard before any significant change is made to § 813.125. If additional analysis and argument is desired by the Court, Kindschy will certainly expand the argument made in her supplemental brief and here.

Respectfully submitted this 31<sup>st</sup> 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 719 words.

Dated this 31<sup>st</sup> day of August, 2023.

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