STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP1775

NANCY KINDSCHY,

Petitioner-Respondent,

v.

BRIAN AISH,

Respondent-Appellant-Petitioner.

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

SUPPLEMENTAL NONPARTY BRIEF AMICUS CURIAE BY THE WISCONSIN DEPARTMENT OF JUSTICE

JOSHUA L. KAUL
Attorney General of Wisconsin

THOMAS C. BELLAVIA
Assistant Attorney General
State Bar #1030182

Attorneys for Nonparty Wisconsin Department of Justice

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8690
(608) 294-2907 (Fax)
bellaviatc@doj.state.wi.us

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INTRODUCTION

This brief responds to the Court's February 5, 2024, order addressing three questions to the parties in this appeal for supplemental briefing and inviting the Department of Justice, a non-party, to also respond. This brief addresses the first two questions posed; because the third question deals with the application of the law to the specific facts of the case, the Department respectfully declines to address that question.

As to the first question, an injunction that can be justified only through reference to the content of a respondent's speech is permissible only if the speech is constitutionally unprotected speech that can be restricted.

As to the second question, the scienter requirement established in *Counterman* can apply in both civil and criminal true threat cases, but the appropriate level of required scienter in a given case depends on the extent to which the sanction in that case—whether criminal or civil—threatens to chill constitutionally protected speech. [1]

[1] The Department's first amicus brief suggests that *Counterman* applies whenever criminal or civil liability is imposed based on the threatening content of a person's speech, but did not specifically analyze whether the same level of scienter would be required in all such cases. (*See, e.g.,* Wis. DOJ Nonparty Amicus Curiae Br. 11, 15.)

ARGUMENT

I. Based on precedent of both the U.S. Supreme Court and this Court, where an injunction can be justified only through reference to the content of the respondent's speech, a court must determine whether the speech was constitutionally unprotected speech that can be restricted.

The Court's first question asks:

> Where a circuit court relies, in whole or in part, upon the content of a respondent's speech to determine that a harassment injunction may be issued under Wis. Stat. § 813.125, must the speech relied upon by the circuit court also fall within one of the limited categories in which the U.S. Supreme Court has permitted restrictions upon the content of speech? Why or why not?

(2-25-24 Suppl. Briefing Order.)

The answer is yes but only with an additional assumption built in. Assuming that a content-based injunction could not survive strict scrutiny, a court issuing a such an injunction must determine whether the speech in question is constitutionally unprotected.

The Department previously discussed the applicable legal principles on pages 12–13 of its amicus brief. An injunction that is based on the content of a respondent's speech is permissible only (a) if the injunction passes strict scrutiny; or (b) if the speech content in question falls into one of the established categories of unprotected speech, such as true threats. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968); *Cohen v. California*, 403 U.S. 15, 16 (1971); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916–18 (1982); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Where, as in the present case, there is no claim that the

content-based injunction at issue could survive strict scrutiny, a court can issue such an injunction only if it determines that the content in question is constitutionally unprotected.

Whether an injunction is content-based depends on whether it "is justified without reference to the content of regulated speech." *Hill v. Colorado*, 530 U.S. 703, 720 (2000). Moreover, if that justification depends, *in whole or in part*, on the content of speech, then the above legal standard applies.

This conclusion follows from *Claiborne Hardware Co.* That case involved a civil rights boycott that included both violent activity, which was not protected by the First Amendment, and expressive activity, which was. 458 U.S. at 898–906. Some merchants affected by the protests brought tort claims, arguing that the protesters had maliciously interfered with their businesses. *Id.* At 889–90. The Mississippi Supreme Court rejected the defendants' First Amendment defense based on its conclusion that since some of the activity included unlawful acts of physical force, violence, and intimidation, the entire boycott was unlawful. *Id.* at 894–95.

The U.S. Supreme Court disagreed, holding that "the nonviolent elements of petitioners' activities [were] entitled to the protection of the First Amendment." *Id.* at 915. The Court went on to examine the effect that the presence of constitutionally protected speech had on the state's ability to impose liability for other elements of the boycott that were not constitutionally protected. *Id.* at 915–16. The Court acknowledged that the First Amendment did not protect the defendants against tort liability for violent conduct, but nonetheless held that, when such conduct occurs in conjunction with protected speech, "'precision of regulation' is demanded." *Id.* at 916 (citation omitted). While liability could be imposed as a remedy for unprotected conduct, it could

not be imposed as a remedy for conduct protected by the First Amendment. *Id.* at 918.

Accordingly, the Supreme Court held that the trial court's decision must "adequately define[ ] the compass within which [civil liability] could be awarded under state law" and "must be supported by findings that adequately disclose the evidentiary basis" for imposing liability based only on unprotected conduct and not protected conduct. *Id.* at 917–18, 933–34. In *Claiborne Hardware*, the findings made in the state court proceedings did not meet that standard: they were "ambiguous" and "inadequate to assure the 'precision of regulation' demanded by" the First Amendment. *Id.* at 921.

The record in the present case includes evidence of: (a) speech by Aish with allegedly threatening content; (b) the time, place, and manner of his speech, apart from its content; and (c) related non-speech physical conduct. If consideration of the content of Aish's speech is necessary to justify the injunction, then a *Counterman* analysis is required to determine whether that content can be enjoined as an unprotected true threat. (*See* Wis. DOJ Nonparty Amicus Curiae Br. 14–15.)[2]

This position is also supported by this Court's prior application of Wis. Stat. § 813.125 in *Bachowski v. Salamone*, 139 Wis. 2d 397, 407 N.W.2d 533 (1987). The Court there used statutory interpretation to avoid potential First Amendment difficulties by construing Wis. Stat. § 813.125 as not reaching

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[2] Of course, the Court may also consider whether the evidence is sufficient to support the injunction on a non-content basis—*i.e.* either as a content-neutral restriction on the time, place, or manner of speech, or on the basis of Aish's non-speech physical conduct. *Cf. Board of Regents UW System v. Decker*, 2014 WI 68, ¶¶ 43–44, 355 Wis. 2d 800, 850 N.W.2d 112 (holding that an injunction under Wis. Stat. § 813.125 could impose reasonable, *content-neutral* time, place, and manner restrictions on a harassing course of conduct).

constitutionally protected expression. *Id.* at 409–12. It follows that where consideration of the content of a respondent's speech is necessary to justify an injunction, the statute requires the Court to determine whether that speech was constitutionally protected.

* * *

In sum, based on both the constitutional analysis of the U.S. Supreme Court and this Court's construction of Wis. Stat. § 813.125, where an injunction can be justified only through reference to the content of the respondent's speech, a Court must determine whether the speech in question was constitutionally unprotected speech that can be restricted. In a true threat case like this one, that requires a *Counterman* analysis to determine whether the speech can be enjoined.

II. The appropriate level of required scienter in true threat cases is determined not by whether a particular remedy is criminal or civil in nature, but by the extent to which it threatens to chill constitutionally protected speech. In each case, a court must balance the interest in not chilling protected speech and the interest in guarding against the harms caused by unprotected threats.

The Court's second question asks:

> If speech relied upon for an injunction must fall within one of the limited categories of speech where government restrictions are permitted, does the scienter requirement adopted in Counterman v. Colorado, 600 U.S. 66, 143 S. Ct. 2106 (2023) in the context of a criminal prosecution, apply to all civil injunction cases under Wis. Stat. § 813.125 where the speech relied upon by the circuit court is alleged to fall within the category of "true threats?" Why or why not?

(2-25-24 Suppl. Briefing Order.)

While *Counterman* did not specifically approve the use of any scienter requirement other than recklessness in true threat cases—whether criminal or civil—the Court's reasoning both in that case and in earlier decisions suggests that the appropriate level of required scienter in true threat cases is determined by the extent to which a particular sanction—whether criminal or civil in nature—threatens to chill constitutionally protected speech. In each case, a court must balance (1) the interest in avoiding such a chilling effect and (2) the interest in guarding against the harms caused by threats of violence.

It is well established that, if speech falls within the protection of the First Amendment, then government generally may not subject it to either criminal penalty or civil liability. In *New York Times v. Sullivan*, a libel case, the U.S. Supreme Court held that "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." 376 U.S. 254, 277 (1964).

Accordingly, before either criminal or civil liability may be imposed based on the content of speech, a First Amendment analysis is ordinarily required. This includes cases involving civil injunctive relief. *See, e.g., Claiborne Hardware*, 458 U.S. at 886 (injunction against boycott); *Madsen,* 512 U.S. at 753 (injunction against anti-abortion protest); *Schenck v. Pro-Choice Network of Western New York,* 519 U.S. 357 (1997) (same); *Hill v. Colorado*, 530 U.S. 703 (2000) (same). This Court, likewise, has applied First Amendment principles in the context of civil harassment injunctions under Wis. Stat. § 813.125. *See Bachowski*, 139 Wis. 2d at 409–12; *Decker*, 355 Wis. 2d 800, ¶¶ 43–44.

Counterman is consistent with this principle. It is true that, because that case involved a criminal prosecution, some of the statements in the majority opinion are worded in terms of criminal liability, rather than civil liability. *See, e.g.*,

Counterman, 600 U.S. 66, 69 (2023) ("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.") Such statements, however, do not imply that the First Amendment analysis is limited to the criminal context or would not apply in a civil case. To the contrary, at several points, the discussion in *Counterman* indicated that the recklessness scienter requirement can apply to true threat cases in both the criminal and civil contexts. *See id.* at 76–77, 80.

For example, *Counterman* analogized cases involving threats to cases involving obscenity or incitement and noted that, in all these categories, "the First Amendment precludes punishment, *whether civil or criminal*," unless the applicable scienter requirement is satisfied. *Id.* at 76–77 (emphasis added). Similarly, *Counterman* analogized its scienter requirement to the scienter requirement in defamation cases, and noted that the latter requirement is "applicable in both civil and criminal contexts." *Id.* at 80. These criminal-civil analogies make it clear that the recklessness scienter requirement is not categorically limited to the context of criminal punishments of threatening speech.

It does not follow, however, that the same *level* of scienter is necessary to protect against a chilling effect in different cases involving sanctions that have substantially different degrees of severity or that present greater or lesser potential burdens on free speech rights. After all, a heavier or more restrictive sanction on unprotected speech could be more likely to chill protected speech than would a lighter or less restrictive sanction. The prophylactic reasoning of *Counterman* does not logically preclude the possibility that a lesser level of scienter, such as negligence, could provide a constitutionally sufficient degree of protection against a chilling effect where a civil sanction is less severe or less

speech-restrictive than was the criminal sentence at issue in *Counterman*. The Court recognized, rather, that the balance between protecting against chilling protected speech and making it more difficult to regulate unprotected and dangerous speech "may play out differently in different contexts." *Id.* at 78.

The constitutionally significant factor thus is not whether a particular sanction on unprotected speech is criminal or civil in nature, but the extent to which it also threatens to chill protected speech. The Supreme Court has thus noted that the burdens imposed on speech by a civil remedy may be just as great as those imposed by criminal punishment. *New York Times*, 376 U.S. at 277. The Court has likewise observed that criminal prosecutions include built-in procedural safeguards that may provide greater protection against an erroneous imposition of liability than is typically provided in a civil proceeding. *Id.* at 277–78. The risk of chilling protected speech thus may be as great from a civil remedy as from a criminal sentence, or it may be less, depending on the circumstances of the case.

Moreover, these principles apply to injunctions as well as to other civil remedies. Again, the important factor is the extent to which a particular injunction restricting unprotected speech also threatens to chill protected speech. The U.S. Supreme Court has recognized that civil injunctions "carry greater risks of censorship and discriminatory application than do general ordinances," and those risks "require a somewhat more stringent[ ] application of general First Amendment principles" in the injunction context. *Madsen*, 512 U.S. at 764–65. At the same time, the Court also acknowledged that "[i]njunctions . . . have some advantages over generally applicable statutes in that they can be tailored by a trial judge to afford more precise relief than a statute where a violation of the law has already occurred." *Id.* at 765.

The issue is thus one of degree. Where a civil injunction or other civil remedy threatens less chilling of protected speech than was threatened by the criminal penalty in *Counterman*, it is possible that First Amendment rights could be sufficiently protected by a lower level of required scienter, such as negligence, rather than recklessness. In each case, a reviewing court should balance (1) the need to guard against chilling the kind of uninhibited discourse the First Amendment is intended to protect, *see Counterman*, 600 U.S. at 77–78; and (2) the value of regulations that defend against the injuries caused by constitutionally unprotected speech, including "the profound harms, to both individuals and society, that attend true threats of violence." *Id.* at 80.

In sum, the appropriate level of required scienter in true threat cases is determined by the extent to which a particular sanction—whether criminal or civil in nature—threatens to chill constitutionally protected speech.

CONCLUSION

Where an injunction can be justified only through reference to the content of the respondent's speech, a Court must determine whether the speech in question is constitutionally unprotected speech that can be restricted. In a true threat case, that requires a *Counterman* analysis to determine whether the speech can be enjoined.

Counterman's scienter requirement can apply in both civil and criminal true threat cases, but the appropriate level of required scienter in a given case is determined not by whether a particular remedy is criminal or civil, but by the extent to which it threatens to chill constitutionally protected speech.

Dated this 26th day of February 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Thomas C. Bellavia
THOMAS C. BELLAVIA
Assistant Attorney General
State Bar #1030182

Attorneys for Nonparty Wisconsin Department of Justice

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8690
(608) 294-2907 (Fax)
bellaviatc@doj.state.wi.us

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 2,555 words.

Dated this 26th day of February 2024.

Electronically signed by:

Thomas C. Bellavia
THOMAS C. BELLAVIA
Assistant Attorney General

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 26th day of February 2024.

Electronically signed by:

Thomas C. Bellavia
THOMAS C. BELLAVIA
Assistant Attorney General