STATE OF WISCONSIN
SUPREME COURT

Appeal No.: 2020AP001775

NANCY KINDSCHY,

Petitioner-Respondent,

v.

BRIAN AISH,

Respondent-Appellant-Petitioner.

RESPONDENT-APPELLANT-PETITIONER'S
SECOND SUPPLEMENTAL BRIEF

Respectfully Submitted,

THOMAS MORE SOCIETY
Joan M. Mannix
Illinois State Bar No. 6201561
Admitted Pro Hac Vice

BUTING, WILLIAMS & STILLING S.C.
Dudley A. Williams
State Bar No.: 1005730

Address:
135 South LaSalle St.
Chicago, Ill 60603
Phone: (312) 521-5845

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ARGUMENT

I. Where A Court Relies On The Content Of Speech To Determine That It Constitutes Harassment That May Be Enjoined Pursuant To Wis. Stat. §813.125, That Speech Must Fall Within One Of The Limited Categories Which The U.S. Supreme Court Has Permitted Restrictions Upon The Content Of Speech.

The first question as to which the Court has directed the parties to additionally brief is as follows:

> 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?

The answer to the question posed by the Court is "yes". If the speech does not fall within those limited categories, a content-based speech restriction is presumptively invalid.

As the record demonstrates (and as a premise of the question posed by this Court), the Circuit Court construed Wis.Stat. §813.125 to encompass speech, and expressly relied upon the content of Aish's speech in determining whether Aish had committed "harassment" within the meaning of that statute. See *e.g.*, R. 36: 82-84; App. 8-10.[1] The Circuit Court's construction of Wis. Stat. §813.125 renders it

[1] As defined by Wis.Stat. §813.125(1)(4)(b), "'Harassment" means any of the following: *** b. Engaging in a **course of conduct** or **repeatedly committing acts** which harass or intimidate another person and which serve no legitimate purpose." [Emphasis added.] In *Bachowski v. Salamone*, 139 Wis. 2d 397, 408 N.W.2d 533 (1981), this Court previously rejected notice and vagueness due process challenges to the constitutionality of the statute. In doing so, it concluded that the statute prohibits "acts", "conduct" and "course of conduct" – and found that the terms "harass" and "intimidate" were further "narrowed by the statute's requirement that the acts which harass or intimidate must be accomplished by **repeated acts** or a **course of conduct**." *Id.* at 407-408 [Emphasis added.] In *Bachowski*, the Court vacated the injunction finding that the proof at trial was insufficient as a matter of law because it consisted solely of "yelling across the street", without any proof or findings "concerning the acts and conduct specified in Bachowski's petition—false charges and property damage." *Id.* at 413-413. The Court stated, "Given the disparity between what was alleged in the petition and what was offered and proven at trial, we conclude

unconstitutional as applied to Aish. The Circuit Court's injunction entered pursuant to Wis. Stat. §813.125 is a content-based restriction on speech in a public forum. However, Aish's speech does not fall within any of the categories of speech, including true threats, which the U.S. Supreme Court has found are excepted from First Amendment protection because they are of little value. Moreover, the content-based speech restriction entered by the Circuit Court cannot withstand strict scrutiny.

Content-based proscriptions on speech are presumptively invalid unless the regulated speech falls within one of the limited categories of speech that the U.S. Supreme Court has found are so lacking in value they are not entitled to First Amendment protection. As the U.S. Supreme Court has explained:

> "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." As a result, the Constitution "demands that content-based restrictions on speech be presumed invalid ... and that the Government bear the burden of showing their constitutionality." In light of the substantial and expansive threats to free expression posed by content-based restrictions, this Court has rejected as "startling and dangerous" a "free-floating test for First Amendment coverage ... [based on] an ad hoc balancing of relative social costs and benefits." Instead, content-based restrictions on speech have been permitted, as a general matter, only when confined to the few " 'historic and traditional categories [of expression] long familiar to the bar.'"

U.S. v. Alvarez, 567 U.S. 709, 716-717 (2012). [Emphasis added, internal citations and notations omitted throughout.]

In *Police Dept. of the City of Chicago v. Mosely*, 408 U.S. 92, 95-96 (1972), the Supreme Court found that a restriction on non-labor picketing on public sidewalks in front of schools was violative of both the First Amendment and the Equal Protection Clause. In doing so, the Court explained:

> But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure

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that the proof in this case was insufficient as a matter of law." In other words, this Court's *Bachowski* decision appears to have rested on the fact that the statute requires "acts", "course of conduct" or "conduct". In the absence of any proof of illegal *conduct*, as opposed to offensive speech, the Court found the requirements of the statute were not met.

> self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."

[Citations omitted throughout.]

In *Alvarez*, the U.S. Supreme Court considered a constitutional challenge by the defendant to his conviction under the Stolen Valor Act for lying at a water district board meeting about having received the Congressional Medal of Honor. The Court concluded the Stolen Valor Act was a presumptively unconstitutional content-based speech restriction. The Court's decision rested on its determination that the restriction on speech at issue in that case, like the content-based restriction on speech at issue in this case, did not address one of the limited categories of speech as to which the Court has historically permitted content-based restrictions. See *Id.* at 717-718.[2]

The Court in *Alvarez* ruled that false speech is not a type of speech that is presumptively unprotected by the First Amendment. *Id.* at 722. The Court concluded that only those limited categories of speech, such as "true threats" (the only such category even potentially implicated in this case), are presumptively exempted from First Amendment protection. The Court stated, "[a]bsent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements." *Id.* at 718. Although the Court noted that other categories of presumptively unprotected speech might exist that had yet to be specifically identified, "[b]efore exempting a category of speech from the normal prohibition on content-based restrictions ... the Court

[2] The complete list of the types of speech which may be restricted based on content are, in addition to "true threats", "advocacy intended, and likely to incite imminent lawless action", obscenity, defamation, "speech integral to criminal conduct", "fighting words", child pornography, fraud, and "speech presenting some grave and imminent threat the government has the power to prevent". See *Alvarez*, 567 U.S. at 717-718.

must be presented with "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription[.]". *Id.* [Citation omitted.]

In this case, Aish's speech did not constitute "true threats" and so was not excepted from First Amendment protection. Although the First Amendment allows the banning of "true threats" (see *Virginia v. Black*, 538 U.S. 343, 359 (2003)), in this case there were no threats at all, let alone any "true threats." "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* [Citations omitted.][3] The Circuit Court did not find that Aish's speech included any threat to Kindschy. The Circuit Court did not make any finding, and there was no evidence at all to support a finding, that Aish made any serious expression of an intent to commit any act of violence against Kindschy or her family. Instead, the Court found that Aish's speech was proscribed because Kindschy should be protected against "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. 36:88-89).

If a content-based restriction on speech in a traditional public forum, like that at issue in this case, is not limited to one of the enumerated types of presumptively unprotected speech, the restriction is subject to strict scrutiny analysis. As the Court explained in *Perry Education Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 45 (1983):

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." In these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

[3] As discussed *infra*, in *Counterman v. Colorado*, 600 U.S. 66, 69 (2023), the Court clarified that the mens rea necessary to a finding of a true threat is recklessness.

[Citations omitted throughout.][4]

Accordingly, the content-based restriction on speech in this case is presumptively unconstitutional, and may only be sustained upon a showing that the restriction withstands strict scrutiny. Strict scrutiny analysis requires the government to adopt "'the least restrictive means of achieving a compelling state interest'". *Americans for Prosperity Foundation v. Bonita*, 594 U.S. ___, 141 S.Ct. 2373, 2383 (2021).

In this case, there has been no showing by Kindschy or argument by the Wisconsin Department of Justice that the injunction entered was necessary to protect any compelling governmental interest. Nor has there been any showing that any such interest could not be protected by other means, or that the injunction entered against Aish was the least restrictive means of protecting any such interest.

As discussed in Aish's previous briefs (see *e.g.*, Respondent-Appellant-Petitioner's Br., pp. 19-25; Respondent-Appellant-Petitioner's Reply Br., pp. 2-7, 9-10), in this case the Circuit Court enjoined Aish's speech, in a public forum on matters of public concern (the sidewalk outside of Planned Parenthood). Such speech is entitled to the greatest protection under the First Amendment. Further, the reasons for the injunction in this case are reasons the U.S. Supreme Court has previously determined cannot justify such censorship. See *e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 454 (2011); *Santa Monica Nativity Scenes Committee v. City of Santa Monica*, 784 F.3d 1286, 1292 (9th Cir. 2015). The impermissible justifications for the Circuit Court's injunction included that Kindschy was "annoyed or bothered" by Aish's protest. (R. 36-83). They also included that Kindschy was "intimidated" by Aish's statements despite the Court finding Aish was "trying to convey a

[4] In *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 817 (1985), the Supreme Court recognized that sidewalks, like parks and streets, are "'quintessential public forums'". "'which by long tradition or by government fiat have been devoted to assembly and debate....'"

message of repentance, a message in an attempt to encourage someone to turn their life over and turn to Jesus" and was "coming from a place of love or nonaggression". (R. 36-84).

Finally, the injunction in this case is clearly not the least restrictive means of protecting any claimed interest. Instead, it is a *de facto* blanket ban restricting Aish's speech on an issue of public concern in a public forum. As the Circuit Court recognized, the injunction effectively prohibits Aish's speech at the clinic even when Kindschy was not present. (R. 23:2-3; R. 36: 91-94).

II. The Scienter Requirement Adopted In *Counterman v. Colorado* Applies In This Case.

The second question which the Court has directed the parties to additionally brief is as follows:

> If speech relied upon for an injunction must fall within one of the limited categories of speech where governmental 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.[5]

The answer is "yes". In *Counterman*, the U.S. Supreme Court found that even in a "true threat" case, where speech is *presumptively* unprotected by the First Amendment, it was necessary to extend the protection of "a subjective mental-state element … even with respect to [such] historically unprotected speech" to protect against a chilling impact on non-threatening speech. *Counterman*, 600 U.S. at 75. There is nothing in the Court's *Counterman* decision which suggests it was driven by the fact the case involved a criminal prosecution. Instead, the Court's decision

[5] As discussed herein, the criminal prosecution context in which the Supreme Court addressed the scienter required in *Counterman* was irrelevant to the Court's analysis. But even if it were relevant, the Court's question disregards the fact that a violation of an injunction entered pursuant to Wis. Stat. §813.125 is punishable by imprisonment. See Wis. Stat. §813.125(**7**) (**"Penalty.** Whoever violates a temporary restraining order or injunction issued under this section shall be fined not more than $10,000 or imprisoned not more than 9 months or both.")

explicitly addresses the requirements of the First Amendment applicable in *any* context. The Court stated:

> Yet the First Amendment may still demand a subjective mental-state requirement shielding some true threats from liability. The reason relates to what is often called a chilling effect. 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. As this Court has noted, the requirement lessens "the hazard of self-censorship" by "compensat[ing]" for the law's uncertainties. Or said a bit differently: "[B]y reducing an honest speaker's fear that he may accidentally [or erroneously] incur liability," a *mens rea* requirement "provide[s] 'breathing room' for more valuable speech."

Counterman, 600 U.S. at 75. [Citations omitted throughout.]

The Court's additional comments further highlight the irrelevance of the criminal context in which the scienter issue was raised in *Counterman*. The Court expressly recognized it had extended "[t]hat kind of 'strategic protection'" to other categories of historically unprotected speech, including defamatory speech which is subject to civil, rather than criminal redress. *Counterman*, 600 U.S. at 75-76 (noting that the Court had previously held that "a public figure cannot recover for the injury such a [defamatory] statement causes unless the speaker acted with 'knowledge that it was false or with reckless disregard of whether it was false or not.'" [Citation omitted.])

Moreover, the considerations that drove the Court's decision in *Counterman* are present irrespective of whether raised in the context of a criminal prosecution or a civil injunction case. In either context, application of the "subjective mental-state element" of recklessness is necessary to protect against a chilling impact on non-threatening speech. *Counterman*, 600 U.S. at 75.

III. The Injunction Entered By The Circuit Court Cannot Withstand Strict Scrutiny.

The third question which the Court has directed the parties to additionally brief is as follows:

> If strict scrutiny applies to the issuance of a harassment injunction under Wis. Stat. § 813.125 in this case, does the injunction issued under Wis. Stat. § 813.125 satisfy strict scrutiny, including in light of the reasoning of *Counterman v. Colorado*?

The answer is "no". Aish is unaware of any case in which a content-based restriction on speech occurring in a public forum on a matter of public interest has withstood strict scrutiny. Moreover, neither Kindschy's nor the Wisconsin Department of Justice's previously filed briefs make any attempt to demonstrate the injunction in this case could withstand strict scrutiny.

Any such attempt would be futile. This case does not involve a compelling state interest that trumps the importance of "assur[ing] unfettered interchange of ideas for the bringing about of political and social changes desired by the people'" in a traditional public forum, or the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open". See *New York Times v. Sullivan*, 376 U.S. 254, 269-270 (1964). Nor, as discussed herein, is the injunction entered by the Circuit Court "the least restrictive means" of achieving any claimed compelling state interest.

Further, the video taken by Kindschy on her phone demonstrates that Aish did not act with the requisite reckless scienter. The video shows that, staying always on the public sidewalk, he spoke calmly and quietly – he did not display any aggression or anger - towards Kindschy and her co-workers. His words did not convey any threat - let alone any "true threat". Moreover, Kindschy admitted the February 18, 2020 video was "indicative" or typical of how Aish conducted himself on all of the other occasions at issue. (R. 35, p. 40, lines 13-17).

The Circuit Court's findings also foreclose any determination that Aish made any "true threats" or acted with recklessness as to whether his words might be perceived as "true threats". The Circuit Court made no finding of any "true threat" and instead, recognized 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). All of Aish's statements were made in an effort to convey to Kindschy the urgency of repenting while she still had time. The Circuit Court made no finding these words were threatening, but instead found Kindschy should be shielded from "statements that make her have to even think about such unpleasant things. (R. 36, p. 89, 1-5). None of these findings support a determination that Aish uttered any true threat or acted with a reckless scienter.

CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in Aish's previously filed briefs before this Court, 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 26th day of February, 2024.

BY: 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 3,279 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