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

PINES BACH LLP

Electronically signed by Diane Welsh
Diane M. Welsh, SBN 1030940
Eduardo E. Castro, SBN 1117805
122 W. Washington Ave., Ste. 900
Madison, WI 53703
Telephone: 608-251-0101
Facsimile: 608-251-2883
dwelsh@pinesbach.com
ecastro@pinesbach.com

Attorneys for Petitioner-Respondent Nancy Kindschy

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(1) 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?

This Court should answer: No. Consistent with federal and state court decisions, Wisconsin's harassment injunction statute proscribes conduct or repeated acts which are made with the intent to harass or intimidate and has no legitimate purpose and may include speech within or outside of the limited categories. Even permissible speech can be subject to time, place, and manner restrictions—or enjoined—to protect the rights of another unwilling listener.

(2) 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?

This Court should answer: No. The scienter requirement in section 813.125, which requires the circuit court to find that a respondent had the subjective intent to harass or intimidate in order to issue a restraining order adequately protects against chilling permissible speech. Neither *Counterman* nor other caselaw establishes a constitutional basis to require that a petitioner seeking a civil harassment injunction also prove that respondent was aware that others could regard the respondent's statements as threatening violence.

(3) 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 Court should answer that strict scrutiny does not apply, but even if it did, this injunction survives strict scrutiny.

INTRODUCTION

Petitioner-Respondent, Nancy Kindschy, appreciates the Court's interest in fully examining the impact on this case of the United States Supreme Court's recent decision in *Counterman v. Colorado,* 600 U.S. 66 (2023), which established that in a criminal conviction for stalking, based solely on repeated speech which were characterized as "true threats," the state must prove the defendant has a subjective understanding of the threatening nature of his speech. As discussed below, the impact of that decision on this harassment injunction, or harassment injunctions in general, is limited. This is true for multiple reasons.

First, *Counterman* involves criminal prosecutions by the state and does not declare a broad rule that would necessarily be applied in all civil harassment proceedings.[1] Second, it is settled law that even when speech is subject to First Amendment protections, that speech may be enjoined to protect the rights of an unwilling listener. Third, section 813.125 includes a *mens rea* requirement which exceeds the recklessness level of culpability required by *Counterman.* And, equally important, the test properly focuses on a respondent's[2] intent to *harass* or *intimidate*, as opposed to the less relevant

[1] *See* "Supplemental Brief of Petitioner-Respondent," filed on August 18, 2023, at 6-10; "Supplemental Reply Brief of Petitioner-Respondent" filed on August 31, 2023, at 4-6.

[2] Under section 813.125, the party seeking a harassment injunction is the "petitioner" and the party who is the subject of the petition is the "respondent."

and more amorphous question of whether the state showed "that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Counterman,* 600 U.S. at 69.

When reviewing a claim that a harassment injunction has infringed on the First Amendment rights of the respondent, Wisconsin Courts have not applied strict scrutiny. The U.S. Supreme Court rejected the need to apply strict scrutiny to such cases, instead focusing on "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Madsen v. Women's Health Center,* 512 U.S. 753, 765 (1994). Nothing in *Counterman* changes this.

ARGUMENT

I. Under section 813.125, there is no requirement that the respondent's speech fits within one of the limited categories of speech which the U.S. Supreme Court has said is unprotected by the First Amendment because even otherwise-protected speech may be subject to limits to reduce threats to public order or protect an individual's right to privacy.

This Court has held that pursuant to section 813.125, the circuit court may regulate speech, even protected speech, when the speech is made to harass or intimidate another individual. Accordingly, the speech does not need to fall within a traditionally unprotected category to be enjoined under section 813.125.

The right of free speech "is not absolute at all times and under all circumstances." *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942). First Amendment freedoms may be restrained when they threaten the individual rights of others and public order.

> [F]reedom of speech and peaceable assembly, are not the be all and end all. They are not an absolute touchstone. The United States Constitution is not unmindful of other equally important interests such as public order. To recognize the rights of freedom of speech and

> peaceable assembly as absolutes would be to recognize the rule of force; the rights of other individuals and of the public would vanish.

State v. Zwicker, 41 Wis. 2d 497, 509, 164 N.W.2d 512 (1969).

Harassment injunctions protect a *petitioner's* right against unwanted harassing or intimidating conduct by the respondent. Courts have recognized that victims of harassment enjoy a constitutional right to privacy and "to be let alone." *Predick v. O'Connor*, 2003 WI App 46, ¶ 31, 260 Wis. 2d 323, 660 N.W.2d 1 (Anderson, J., concurring) (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

The United States Supreme Court has recognized a "right to free passage in going to and from work." *Hill v. Colorado*, 530 U.S. 703, 717 (2000) (citing *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 204 (1921)). Privacy interests also include the ability to "avoid[ ] unwanted communications." *Id.* at 716.

In reviewing an injunction obtained by a reproductive healthcare clinic, the U.S. Supreme Court recognized that "[t]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 772-73 (1994). Ultimately, there is no right for "any person to interfere with the rights of others." *Predick*, 2003 WI App 46, ¶ 32 (Anderson, J., concurring) (citing *State v. Lee*, 957 P.2d 741, 751-52 (Wash. 1998)).

The purpose of section 813.125 is to curb "oppressing repetitive behavior which invades another's privacy interests in an intolerable manner" and further "protections long afforded to the general public under disorderly conduct and breach of peace statutes." *Bachowski v. Salamone,* 139 Wis. 2d 397*,* 409, 411, 407 N.W.2d 533 (1987). This Court has determined that such regulation of harassment is entirely consistent with the First Amendment, finding that section 813.125 is neither overbroad nor vague. *Id.* at 405-13.

Section 813.125 "is not directed at the exposition of ideas." *Id.* at 411. Nor does the statute "sweep within its ambit actions which are constitutionally protected so as to render it unconstitutionally overbroad." *Id.* at 412.

The text of section 813.125 also allows courts to identify harassing speech or conduct, potentially even within the context of otherwise-protected expression. *Id.* at 409 ("[T]he Legislature has sought to prevent repeated assaults on the privacy interests of individuals without unnecessarily infringing on their freedom to express themselves through speech and conduct.").

This Court has ruled that *protected* speech may be enjoined to protect the rights of others and the public. In *Decker v. Bd. of Regents-UW System*, the respondent, in the name of protesting student fee assessments, repeatedly and aggressively confronted university officials, went to various campuses despite having been suspended, and interrupted university meetings. 2014 WI 68, ¶¶ 4-13, 355 Wis. 2d 800, 850 N.W.2d 112. Although Decker claimed that he was engaged in legitimate protest, this Court rejected that claim because

> [I]ntentionally harassing conduct can never serve a legitimate purpose. Decker cannot shield his harassing conduct from regulation by labeling it 'protest.' If Decker's purpose was even in part to harass the Board of Regents, his conduct may be enjoined under Wis. Stat. § 813.125.

Id. ¶ 38. The Court further reiterated: "Decker's right to protest on UW property can be restricted when he engages in harassment with the intent to harass or intimidate." *Id.* ¶ 45. Simply put, even protected speech may be enjoined if a court finds that it was made with the intent to harass or intimidate another.

This is in line with the U.S. Supreme Court's holding in *Madsen*, 512 U.S. at 759, which upheld aspects of an injunction preventing antiabortion protesters from engaging in unfettered protest at a medical facility "to protect

the health, safety and rights of women in Brevard and Seminole County, Florida and surrounding counties seeking access to [medical and counseling] services."

Consistent with legal precedent, courts may issue a harassment injunction even if the speech falls outside the limited categories which are undeserving of First Amendment protections. Even otherwise protected speech, when made to harass or intimidate another, may be enjoined to preserve individual and public interests and the rights of others.

II. The scienter requirement in section 813.125, which requires the circuit court to find that a respondent had the subjective intent to harass or intimidate in order to issue a harassment injunction, adequately protects against chilling permissible speech. Neither *Counterman* nor other precedent establishes a constitutional basis to require that a petitioner seeking a civil harassment injunction also prove that respondent was aware that others could regard the respondent's statements as threatening violence.

In *Counterman*, the Supreme Court was confronted with the question of whether a "true threats" criminal prosecution required proof of a defendant's subjective mindset or whether an objective-person evaluation of the threat provided sufficient First Amendment protections. 600 U.S. at 72. The Supreme Court determined that the First Amendment required a showing of "subjective mental-state" in a true threats criminal prosecution. *Id.* at 75. The Supreme Court explained the need for a subjective-intent requirement,

> 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…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.

Id. (internal citations omitted).

The Supreme Court then addressed what was the appropriate *mens rea* requirement for a statute criminalizing true threats, using the typical formulations of *mens rea* in the criminal context,

> The law of mens rea offers three basic choices. Purpose is the most culpable level in the standard mental-state hierarchy, and the hardest to prove. A person acts purposefully when he 'consciously desires' a result—so here, when he wants his words to be received as threats. Next down, though not often distinguished from purpose, is knowledge. A person acts knowingly when 'he is aware that [a] result is practically certain to follow'—so here, when he knows to a practical certainty that others will take his words as threats. A greater gap separates those two from recklessness. A person acts recklessly, in the most common formulation, when he 'consciously disregard[s] a substantial [and unjustifiable] risk that the conduct will cause harm to another.' That standard involves insufficient concern with risk, rather than awareness of impending harm.

Id. at 78-79 (internal citations omitted).

The Supreme Court concluded that a reckless *mens rea* requirement—the least culpable "level in the standard mental-state hierarchy"—best balanced the constitutional interest in free expression and regulating the "profound harms, to both individuals and society, that attend true threats of violence." *Id.* at 79-80. More specifically, recklessness ensures that the utterance of a true threat is "morally culpable conduct, involving a deliberate decision to endanger another'" and means that the speaker is aware "that others could regard his statements threatening violence and delivers them anyway." *Id.* at 79 (citing *U.S. v. Elonis*, 575 U.S. 723, 746 (2015) (Alito, J., concurring in part and dissenting in part) (internal quotations omitted)).

Turning to the implications for section 813.125, the majority in *Counterman* did not say that its ruling also applies when a court issues a civil harassment injunction at the request of an individual petitioner. *Counterman* was entirely focused on the First Amendment implications for true threats

cases in the criminal context. *E.g., Id.* at 78-80, 82; *Id.* at 101-04 (Sotomayor, J., concurring in part).

Regardless—if *Counterman* requires the finding of a subjective-intent requirement by the respondent facing a harassment injunction, then section 813.125 already contains a subjective-intent requirement. To issue a harassment injunction, a court must find that the harassing conduct or repetitive acts are made with the "intent to harass or intimidate." Wis. Stat. § 813.125(4)(3). In interpreting that provision, courts have recognized that the "intent" requirement requires a showing that the respondent had the subjective understanding that their conduct was done with the intent to harass or intimidate. *See Decker,* 2014 WI 68, ¶ 38 ("If Decker's **purpose** was even in part to harass the Board of Regents, his conduct may be enjoined under Wis. Stat. § 813.125.") (emphasis added); *Welytok v. Ziolkowski,* 2008 WI App 67, ¶ 26, 312 Wis. 2d 435, 752 N.W.2d 359 ("Intent is a fact: 'The state of a [person's] mind is as much a fact as the state of his [or her] digestion.") (brackets in original; internal citation omitted).

Consequently, the danger of the "chilling effect" on permissible speech that the *Counterman* court was concerned with, 600 U.S. at 75, is mitigated by the "intent to harass or intimidate provision" in section 813.125. Further, a harassment injunction must not be vague or overbroad in accordance with the First Amendment. *Bachowski,* 139 Wis. 2d at 414.

The First Amendment concerns raised in *Counterman* are more than adequately addressed by section 813.125 itself, including by requiring a finding of an "intent to harass or intimidate."

III. Strict Scrutiny does not apply to review of harassment injunctions, but if it did, the injunction issued here would satisfy strict scrutiny.

When a content-neutral injunction implicates speech, the appropriate test is "whether the challenged provisions of the injunction burden no more

speech than necessary to serve a significant government interest." *Madsen*, 512 U.S. at 765. In *Madsen,* the Supreme Court reviewed an injunction that prevented antiabortion protestors from engaging in protest near a family planning clinic. *Id.* at 757-61. While the injunction enjoined the speech of antiabortion protesters, the Supreme Court rejected that the injunction was necessarily content or viewpoint based and therefore subject to strict scrutiny. *Id.* at 762. Although Justice Scalia argued that injunctions of this nature should be examined under strict scrutiny, and Justice Stevens argued that "injunctive relief should be judged by a more lenient standard than legislation," the majority settled on this intermediate test where speech was enjoined. *Id.* at 765-66.

In *Bachowski,* the court noted that injunctions under section 813.125 "must be specific as to the acts and conduct which are enjoined." 139 Wis. 2d at 414 (concluding that injunction did not meet that standard). In *Welytok,* the court rejected the respondent's claim that the injunction was "overly broad and, thus, impermissibly infringes on and chills his free expression and liberty." 2008 WI App 67, ¶¶ 39-40. The court considered whether the injunctive relief was tailored to the necessities of the particular case. *Id.* ¶ 40 (citing *State v. Seigel,* 163 Wis 2d 871, 890, 472 N.W.2d 584 (Ct. App. 1991)).

This Court applied strict scrutiny in a challenge to a conviction for identity theft in violation of Wis. Stat. § 943.201(2)(c), where the defendant had accessed another person's emails, then sent those emails pretending to be the other person, with the intend to harm the reputation of another. *State v. Baron*, 2009 WI 58, ¶ 38, 318 Wis. 2d 60, 769 N.W.2d 34. The majority concluded that section 943.201(2)(c), as applied in that case, was content based because whether Baron's conduct was prohibited depended entirely upon whether his speech (the content of the e-mails) was intended to be reputation-harming speech. *Id.* Two separate concurrences questioned this conclusion, although they agreed with the majority that the statute was

constitutional as applied. Justice Walsh Bradley and Justice Prosser each explained why the statute regulated conduct and not speech. *Id.* ¶¶ 59-68 (Walsh Bradley, J., concurring) ("Although the application of strict scrutiny is not warranted in this case because the statute criminalizes conduct rather than speech, I agree with the majority that the statute would withstand a strict scrutiny challenge."); ¶¶ 69-83 (Prosser, J., concurring) (discussing how the statute regulated conduct). To survive strict scrutiny, the regulation must be "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* ¶ 45 (citing *Boos v. Barry*, 485 U.S. 312, 321, (1988)).

Although caselaw establishes that the appropriate level of scrutiny for reviewing a harassment injunction is the intermediate level, the record demonstrates that even if strict scrutiny is applied, the injunction should be affirmed. The injunction was not based on Aish's speech discussing religion or abortion. Rather, the injunction was issued based on his intimidating conduct and his threats directed to Kindschy. For example, his threats were accompanied by Aish coming within feet of Kindschy and her car, following her into the street and pumping a sign within inches of her window, and appearing increasingly agitated and angry when she ignored him. (R.35:16 at 12-23; P-App.019.)

The circuit court issued an injunction directing that Aish cease or avoid harassing Kindschy or contacting her without her consent; avoid her residence and any premises temporarily occupied by her; and avoid contact that harasses or intimidates her. (R.23; R-App.001-003.). Nothing about the injunction limits Aish from expressing certain ideas or opinions; it merely limits him from subjecting Kindschy—an unwilling listener to whom he made threats—to his presence or messages.

Consistent with the cases discussed above, numerous compelling and significant state interests are protected by this injunction. The government

has an interest in protecting its citizens from fear of death or bodily harm. *Virginia v. Black*, 538 U.S. 343, 360 (2003). The government has an interest in protecting the public order and individual's privacy rights. *Zwicker*, 41 Wis. 2d at 509; *Predick*, 2003 WI App 46, ¶ 31(Anderson, J., concurring). The government also has an interest in ensuring Kindschy enjoys the right and interest to avoid unwanted communication at her place of work. *Hill*, 530 U.S. at 717; *Madsen*, 512 U.S. at 772-73. These rights and interests, taken individually or in combination, are sufficient, compelling interests to be protected by a restraining order.

These interests are achieved here by burdening no more speech than is necessary. The injunction protects one single individual—and only that individual—who was targeted by Aish's harassing and intimidating conduct and remarks. Indeed, as the Court of Appeals found, "Aish was not protesting at an abortion clinic. His efforts were not geared toward changing the minds of the general public or legislators… Aish was attempting to convince a private citizen to end her employment with a private organization, by making comments that instilled fear and trepidation." *Kindschy v. Aish*, 2022 WI App 17, ¶ 27, 401 Wis.2d 406, 973 N.W.2d 828.

Aish remains free to speak to anyone other than Kindschy; he is free to discuss abortion or his faith anywhere and everywhere other than where Kindschy temporarily is—including in front of the State Capitol or at other family planning clinics, where he already routinely protests. (R.36:6 at 14-16; P-App.083: R.36:27 at 24-25 to R.36:28 at 1-3; P-App.104-105.). Limiting Aish's ability to target Kindschy, based on his past intimidation of her, is precisely the "pin-pointed" restriction couched in the "narrowest terms" possible to accomplish the government's interests. *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968).

Given the state's compelling interest in protecting against harassment and intimidation and the narrowly tailored injunction issued here, although

the Court need not apply strict scrutiny, the injunction would also pass this level of scrutiny.

For the reasons set forth here and in prior briefs, the circuit court's issuance of the injunction should be upheld by the Court.

Respectfully submitted this 26th day of February, 2024.

PINES BACH LLP

Electronically signed by Diane Welsh
Diane M. Welsh, SBN 1030940
Eduardo E. Castro, SBN 1117805
122 W. Washington Ave., Ste. 900
Madison, WI 53703
Telephone: 608-251-0101
Facsimile: 608-251-2883
dwelsh@pinesbach.com
ecastro@pinesbach.com

Attorneys for Petitioner-Respondent

CERTIFICATION

I hereby certify that this brief conforms to the Court's February 5, 2024 Order for a supplemental brief and the rules contained in § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 3,434 words.

Dated this 26th day of February, 2024.

Electronically signed by Diane Welsh
Diane M. Welsh, SBN 1030940