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IN THE SUPREME COURT OF WISCONSIN
NO. 2020AP001775

NANCY KINDSCHY,

Petitioner-Respondent,

v.

BRIAN AISH,

Respondent-Appellant-Petitioner.

On Appeal from Final Order of the Trempealeau County Circuit Court Case No. 2020CV000040, the Honorable Rian W. Radtke, Presiding

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NONPARTY *AMICUS CURIAE* BRIEF OF END DOMESTIC ABUSE WISCONSIN IN SUPPORT OF PETITIONER-RESPONDENT

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INTEREST OF *AMICUS*

Amicus Curiae End Domestic Abuse Wisconsin ("Amicus"), a 501(c)(3) nonprofit organization, is a statewide coalition led by social-policy advocates, attorneys, and experts working to support, empower, and lead organizations for social change to end domestic violence and abuse. Founded in 1978, the organization has worked on a wide array of initiatives to address domestic violence and abuse, including public policy and legal-systems advocacy. Amicus has an interest in ensuring that survivors of domestic violence and abuse remain able, without undue burden, to obtain restraining orders and injunctions against their abusers under Wisconsin's civil harassment injunction statute.

INTRODUCTION

For nearly 40 years, Wisconsin's civil harassment injunction statute, Wis. Stat. § 813.125—which requires a finding that the respondent acted "with intent to harass or intimidate"—has served as a critical tool for survivors of domestic abuse, stalking, sexual assault, and other forms of harassment to obtain needed protection against their abusers. Under current law and practice, it is challenging enough for such survivors to get the legal relief they need. Oftentimes survivors are not believed, or their abuse is minimized, particularly when they are people of color or members of marginalized groups.

In *Counterman v. Colorado*, the U.S. Supreme Court reviewed a criminal conviction based on the defendant's written

threats of violence and held that the State must prove that the defendant had some "subjective understanding of the threatening nature of his statements." 600 U.S. 66, 69 (2023). Amicus is concerned that if *Counterman* is applied broadly and rigidly to Wisconsin's civil harassment injunction statute, then domestic abuse survivors—as well as victims of other forms of harassment—could, in cases involving threatening speech, face additional, and unjust, burdens in their efforts to obtain injunctions to protect themselves from their abusers and harassers.

This Court should not apply *Counterman* in a manner that creates *any* additional burden on petitioners seeking injunctions under Wis. Stat. § 813.125, even in cases involving threatening speech. First, *Counterman*'s language and context indicate that *Counterman* should not apply at all to Wis. Stat. § 813.125. Second, even if this Court held that, in theory, *Counterman* applies to the statute, it should also hold that, as a matter of law, *Counterman*'s requirement that the respondent be aware that others could regard his statements as threatening violence is met by the statute's requirement that the respondent acted "with intent to harass or intimidate." Wis. Stat. § 813.125(4)(a)3. To hold otherwise would risk creating additional, and unjust, obstacles to petitioners obtaining injunctions against their abusers and harassers.

ARGUMENT

In *Counterman*, the U.S. Supreme Court held that, as general matter, the State must prove that a criminal defendant had some "subjective understanding of the threatening nature of his statements" to convict him for communicating "true threats" of violence. 600 U.S. at 69. The Court then adopted a "recklessness" standard of subjective understanding (rather than a "purpose" or "knowledge" standard), holding that the State must prove that the defendant was "aware 'that others could regard his statements as' threatening violence." *Id.* at 75, 79 (citation omitted).

This Court should hold that *Counterman* does not change the current law and practice under Wis. Stat. § 813.125 and imposes no additional burdens on petitioners seeking civil injunctions against their abusers and harassers, even in cases involving threatening speech. Amicus's argument addresses the second of the three issues identified by the Court in its February 5, 2024 order.[1]

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[1] *Counterman* addresses First Amendment concerns in the context of speech constituting "true threats" of violence. 600 U.S. at 69. Survivors of domestic violence and abuse and other victims of harassment may seek and obtain injunctions under the Wisconsin statute based on repeated conduct of a respondent that is outside of the verbal threats context, such as (a) physical acts independent of any speech, and (b) speech not involving threats of violence. *See* Wis. Stat. § 813.125. *Counterman* does not apply to petitioners seeking harassment injunctions based on those categories of conduct. *See, e.g.*,

I. *Counterman* should not apply to civil harassment injunctions under Wis. Stat. § 813.125.

Counterman should not apply to civil restraining orders and injunctions under Wis. Stat. § 813.125 for two fundamental reasons. *First*, the U.S. Supreme Court's decision arose in the context of a criminal prosecution brought by a state, not a private civil injunction action brought by a victim of harassment, as here. *Counterman* begins by emphasizing that its holdings apply, first and foremost, in the criminal context:

> 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. The question presented is whether the First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements. We hold that it does, but that a mental state of recklessness is sufficient. The *State must show* that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence.

Hill v. Colorado, 530 U.S. 703, 716-18 (2000) ("None of our decisions has minimized the enduring importance of 'a right to be free' from persistent 'importunity, following and dogging' after an offer to communicate has been declined. While the freedom to communicate is substantial, 'the right of every person to be let alone must be placed in the scales with the right of others to communicate.' It is that right, as well as the right of 'passage without obstruction,' that the Colorado statute legitimately seeks to protect. The restrictions imposed by the Colorado statute only apply to communications that interfere with these rights rather than those that involve willing listeners.") (citation omitted; cleaned up).

600 U.S. at 69 (emphasis added); *see also id.* at 72 n.2 ("The question in this case arises when the defendant … understands the content of the words, but may not grasp that others would find them threatening. Must he do so, under the First Amendment, for *a true-threats prosecution* to succeed?") (emphasis added); *id.* at 79–80 ("We have so far mostly focused on the constitutional interest in free expression, and on the correlative need to take into account *threat prosecutions'* chilling effects.") (emphasis added). Moreover, the "true threats" cases relied on by *Counterman* were all criminal cases. *See id.* at 74, 74 n.3, 78; *Elonis v. United States*, 575 U.S. 723, 733 (2015); *United States v. Alvarez*, 567 U.S. 709, 717–718 (2012); *Virginia v. Black*, 538 U.S. 343, 359 (2003); *Rogers v. United States*, 422 U.S. 35, 95 (1975); *Watts v. United States*, 394 U.S. 705, 708 (1969); *United States v. Jeffries*, 692 F.3d 473, 479–80 (6th Cir. 2012).

As both this Court and the U.S. Supreme Court have recognized, criminal prosecutions instituted by the State—seeking redress for a public harm and carrying the threat of incarceration of the defendant—implicate legal and policy concerns different in kind from those implicated by civil actions instituted by a private plaintiff and seeking an injunction or other legal redress for a private harm. *See, e.g.*, *Bd. of Regents-UW Sys. v. Decker*, 2014 WI 68, ¶ 31, 355 Wis. 2d 800, 850 N.W.2d 112 (comparing civil injunctions under Wis. Stat. § 813.125 with "the higher burden of

proof required by the criminal justice system . . . ."); *Standefer v. United States*, 447 U.S. 10, 25 (1980) ("'[T]he purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant.'") (citation omitted).

Second, unlike the present case, *Counterman* addressed a Colorado criminal statute that imposed no *mens rea* requirement whatsoever on the offender. The Colorado criminal "stalking" statute made it unlawful to repeatedly communicate with another person "in 'a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person … to suffer serious emotional distress.'" *See* 600 U.S. at 70 (quoting Colo. Rev. Stat. § 18–3–602(1)(c) (2022)); *id.* at 71 (noting that the Colorado Court of Appeals "'decline[d] … to say that a speaker's subjective intent to threaten is necessary' under the First Amendment to procure a conviction for threatening communications."). The Wisconsin civil harassment injunction statute, by contrast, explicitly imposes a clear *mens rea* requirement: the circuit court judge must find reasonable grounds to believe that the respondent "has engaged in harassment *with intent to harass or intimidate the petitioner*." Wis. Stat. § 813.125(4)(a)3 (emphasis added); *see also* Wis. Stat.

§ 813.125(3)(a)2 (requiring same intent standard for temporary restraining order). Wisconsin courts rigorously enforce this *mens rea* requirement. *See, e.g.*, *Decker*, 355 Wis. 2d 800, ¶ 38 ("We agree with the circuit court … that Decker possessed the requisite intent to harass."); *Bachowski v. Salamone*, 139 Wis. 2d 397, 408, 407 N.W.2d 533 (1987) ("A TRO or injunction can only be obtained if the conduct was *intended* to harass.") (emphasis in original). Indeed, under the analysis set forth in *Counterman* itself, the subjective "intent" requirement of the Wisconsin civil harassment injunction statute—akin to the "purpose" standard discussed in *Counterman*—is a significantly more "culpable" *mens rea* standard than the recklessness requirement *Counterman* adopted. *See* 600 U.S. at 79. Thus, as discussed further below, the intent requirement of Wis. Stat. § 813.125 is more than sufficient to address the First Amendment concerns expressed in *Counterman*.

Finally, this Court need not, and should not, credit the view articulated in the Wisconsin Department of Justice (DOJ) *amicus curiae* brief filed August 17, 2023, that *Counterman* applies to the case at bar to the extent the Court considers the content of the respondent's speech. The Wisconsin DOJ did not address either of the two critical points of distinction discussed above and provided no basis or reasoning for its conclusion that *Counterman* applies to civil injunctions under Wis. Stat. § 813.125. Indeed, the Wisconsin DOJ spent the majority of its August 2023 brief arguing that

Counterman supersedes this Court's analysis of "true threats" in *State v. Perkins*, 2001 WI 46, ¶¶ 29–30, 243 Wis. 2d 141, 626 N.W.2d 762, but ignored that (a) *Perkins* was, like *Counterman*, a criminal case, and (b) *Perkins* said nothing about civil harassment injunctions under the Wisconsin statute. *See* DOJ Aug. 17, 2023 Amicus Br. 6–11; *Perkins*, 243 Wis. 2d 141, ¶¶ 2, 16. Indeed, as the *Perkins* Court noted, its holdings were grounded in a review of "First Amendment case law relating to statutes *criminalizing threats to persons*." *Id.* ¶ 16 (emphasis added). The Wisconsin DOJ may be correct that *Counterman* supersedes the true threat analysis of *Perkins*, but neither *Perkins* nor *Counterman* applies to civil harassment injunctions under Wis. Stat. § 813.125.[2]

II. *Counterman* should impose no additional burden on petitioners seeking harassment injunctions under Wis. Stat. § 813.125.

A. The Wisconsin statute fulfills *Counterman*'s *mens rea* requirements as a matter of law.

Even if this Court decides that *Counterman* in theory applies to petitioners seeking harassment injunctions under Wis. Stat.

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[2] Similarly, this Court need not credit the view of the *Counterman* dissent that "the Court's holding affects the *civil* consequences for true threats just as much as it restricts criminal liability." 600 U.S. at 119. (Barrett, J., dissenting) (emphasis in original). First, the majority opinion nowhere makes such a statement. Second, the dissent's view is premised on the conclusion that the case "is about the scope of the First Amendment, not the interpretation of a criminal statute," *id.* at 118, but, as set forth above, the majority opinion makes very clear that its holdings are grounded in the First Amendment *in the context of a criminal prosecution* for threats. *Id.* at 69, 72 n.2, 74, 74 n.3, 78–80.

§ 813.125 based on threatening speech, it should hold that the *mens rea* requirements adopted in *Counterman* are, as a matter of law, met by the "intent to harass or intimidate" requirement of the statute. Wis. Stats. §§ 813.125(3)(a)2, (4)(a)3, (5)(a)3.

Wisconsin's civil harassment injunction statute defines harassment as "[e]ngaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose." Wis. Stat. § 813.125(1)(am)4.b. To grant an injunction, the circuit court judge must find reasonable grounds to believe that the respondent "has engaged in harassment *with intent to harass or intimidate* the petitioner." *Id.* § 813.125(4)(a)3 (emphasis added).

Importantly, the statute's "intent" requirement—which is equivalent to the "purpose" standard, *see Counterman*, 600 U.S. at 73, 78–79—is a significantly more culpable *mens rea* than the recklessness standard adopted by the U.S. Supreme Court. *See id.* at 78 ("Purpose is the most culpable level in the standard mental-state hierarchy . . . ."). Accordingly, when the evidence in support of a petitioner's injunction request includes speech of the respondent that the petitioner views as threatening violence, the circuit court's finding of reasonable grounds to believe that the respondent acted "with intent to harass or intimidate the petitioner" necessarily encompasses the finding required by *Counterman*, which is that the respondent was "aware 'that others

could regard his statements as' threatening violence . . . ." *Id.* at 79 (quoting *Elonis*, 575 U.S. at 746).[3] Put simply, if a respondent *intended* to harass a petitioner and used threats of violence to do so, the respondent was necessarily *aware* that his statements could be viewed by petitioner as threatening violence. Thus, *Counterman* does not impose any *mens rea* requirement not already imposed by Wis. Stat. § 813.125.

Using the present case as an example, both the circuit court and the Court of Appeals considered evidence that Aish "threatened Kindschy and her family on more than one occasion" and "berated her with veiled threats suggesting harm toward both Kindschy and her family," and that "Aish's repeated statements that Kindschy would be 'lucky' if she made it home safely and that bad things would start happening to her family were threatening." *Kindschy v. Aish*, 2022 WI App 17, ¶¶ 4, 10, 19, 401 Wis. 2d 406, 973 N.W.2d 828. Based on this and other evidence, the Court of Appeals agreed with the circuit court that the hearing testimony provided reasonable grounds to believe that Aish "engaged in a course of conduct that harassed or intimidated Kindschy and served no legitimate purpose, and that he engaged in that conduct with the intent to harass or intimidate Kindschy." *Id.* ¶ 24. Based

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[3] As the U.S. Supreme Court has held, "[t]he existence of a threat depends … on 'what the statement conveys' to the person on the other end." *Id.* at 74 (citing *Elonis*, 575 U.S. 723, 733).

on the evidence of Aish's threatening statements that both courts reviewed, the courts' conclusions that Aish had acted "with the intent to harass or intimidate Kindschy" necessarily encompassed a conclusion that Aish was "aware" that Kindschy "could regard his statements as threatening violence." *See Counterman*, 600 U.S. at 79 (cleaned up).

B. Requiring a petitioner to prove an additional *mens rea* element beyond intent to harass would risk putting an undue burden on those seeking civil harassment injunctions.

Were this Court to hold that a petitioner seeking a harassment injunction based on threatening speech must (a) prove a respondent's "intent to harass or intimidate" and (b) separately prove that the respondent was "aware that others could regard his statements as threatening violence," this Court would risk creating additional and unjust obstacles to the ability of domestic abuse survivors and other harassment victims to obtain needed injunctions against their abusers and harassers.

To start, practitioners in this field understand that the precarious circumstances of domestic abuse survivors and other harassment victims already create challenges for such individuals to obtain a civil harassment injunction. Victims have to attend court hearings and face their abusers. The hearings are often traumatic for victims because the very nature of the legal process compels abusers to try to discredit victims and minimize the abuse

the victim has experienced. And victims are too often disbelieved, especially undocumented immigrants and individuals who are Black, indigenous, or people of color.[4]

In addition, it is not always easy for a harassment victim to adduce evidence showing that the abuser "engaged in harassment with intent to harass or intimidate the petitioner." Wis. Stat. § 813.125(4)(a)3; *see Counterman*, 600 U.S. at 78–79 ("Purpose is the most culpable level in the standard mental-state hierarchy, and the hardest to prove."). The task is especially difficult when harassers and abusers use sinister yet ambiguous language—such as "be careful when you walk home alone"—or veiled and coercive language—such as "I love you; I would never do anything to hurt

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[4] *See* Negar Katirai, *Retraumatized in Court*, 62 Ariz. L. Rev. 81, 85 (2020) ("In the context of [intimate partner violence], . . . t[he] risk of retraumatization can have a chilling effect on the participation of survivors in court proceedings, including . . . civil proceedings to establish and maintain orders of protection . . . . Given the broader inequalities faced by women in poverty and women of color, the chilling effect of retraumatization can have a particularly harmful effect to already disadvantaged, vulnerable, or marginalized populations.") (citations and footnotes omitted); Tasha McAbee, *Trauma by Trial*, Public Health Post (March 2, 2021), https://www.publichealthpost.org/research/trauma-by-trial/ ("Traumatizing experiences in court include forcing survivors to face their abusers, relive detailed personal accounts of their abuse, and endure brutal character assassination on the witness stand."); Patricia Fersch, *Gender Bias: The "Trauma" Women Experience Testifying in Family Court*, Forbes (May 1, 2023), https://www.forbes.com/sites/patriciafersch/2023/05/01/gender-bias-the-trauma-women-experience-testifying-in-family-court/?sh=5bf1a5a39816 ("Victims [of domestic violence] are often ashamed or embarrassed, or afraid of being disbelieved.").

you." Absent necessary context, these words may not appear threatening or harassing, and abusers may falsely testify at a hearing that they never intended to harass or intimidate.

Adding a second scienter requirement to a petitioner's legal burden—one focused on the abuser's awareness of the threatening nature of his statement—would give the abuser a second opportunity to argue that he lacked the requisite mental state. That is, even if the judge found that a respondent intended to harass or intimidate the petitioner, the respondent could still argue that he was "unaware" that someone could view his statements as threatening and could falsely testify to that effect.

This Court has rightfully recognized that Wis. Stat. § 813.125 provides crucial protection to victims, finding that "[a]n injunction has several features that make it an especially desirable remedy for harassment victims." *Decker*, 355 Wis. 2d 800, ¶ 31. Those features include the fact that "an injunction can be quickly obtained when circumstances demand an immediate remedy" and that "injunctive relief does not depend on the criminal justice system, which can take months or even years to render a final judgment." *Id.* This Court has also recognized that, as Amicus has emphasized herein, "[h]arassment injunctions protect a variety of individuals, including those faced with serious and imminent threats to their safety, such as domestic violence victims." *Id.* ¶ 32.

This Court's recognition of the critical purposes served by Wisconsin's civil harassment injunction statute coincides with the U.S. Supreme Court's recognition of "the enduring importance of 'a right to be free' from persistent 'importunity, following and dogging'" and "'the right of every person to be let alone.'" *Hill v. Colorado*, 530 U.S. 703, 716-18 (2000). It also coincides with the Wisconsin Constitution's recognition of the "inherent rights" of every person to "life, liberty and the pursuit of happiness." *See* Wis. Const. art. I, § 1.

In considering whether and to what extent *Counterman* applies to Wis. Stat. § 813.125, this Court should respect the rights of domestic violence survivors and other harassment victims that have previously been recognized by this Court, by the U.S. Supreme Court, and by the Wisconsin Constitution. The Wisconsin civil harassment injunction statute already contains a meaningful scienter requirement that can be difficult for victims to meet. This Court should decline to create any further scienter requirement, thereby maintaining the ability of domestic violence survivors and other harassment victims to obtain legal redress in the Wisconsin courts.

CONCLUSION

This Court should hold that *Counterman* does not apply at all to civil harassment injunction actions under Wis. Stat. § 813.125. In the alternative, this Court should (a) hold that, as a matter of law, *Counterman*'s subjective understanding requirement is met by the more culpable intent requirement of the Wisconsin statute and (b) decline to adopt a second scienter requirement on account of *Counterman*.

Dated: February 26, 2024

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FORM AND LENGTH 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 3417 words.

Dated: February 26, 2024

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(4), 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: February 26, 2024

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