STATE OF WISCONSIN
SUPREME COURT

Appeal No.: 2020AP001775

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NANCY KINDSCHY,

Petitioner-Respondent,

v.

BRIAN AISH,

Respondent-Appellant-Petitioner.

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**RESPONDENT-APPELLANT-PETITIONER'S REPLY TO PETITIONER-RESPONDENTS' SECOND SUPPLEMENTAL BRIEF, SUPPLEMENTAL NONPARTY BRIEF *AMICUS CURIAE* BY THE WISCONSIN DEPARTMENT OF JUSTICE AND NONPARTY *AMICUS CURIAE* BRIEF OF DOMESTIC ABUSE WISCONSIN IN SUPPORT OF PETITIONER-RESPONDENT**

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Respectfully Submitted,

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## ARGUMENT

### I. A Content-Based Speech Restriction Violates The First Amendment Unless The Speech Falls Within One Of The Categories Of Speech Not Entitled To First Amendment Protection Or The Restriction Withstands Strict Scrutiny.

The Circuit Court justified the injunction in this case on the basis that Kindschy, as a Planned Parenthood employee, would feel "harassed or bothered" by a "protestor against the things that Planned Parenthood does," and was "intimidated" by his message that she needed to repent "or bad things would happen to her". (R. 36:82). The Circuit Court's intimidation finding was based on speech uttered in the context of trying to convey to Kindschy a message central to his religious beliefs. The Circuit Court concluded those statements "appear[ed] to be intimidating", "even in the context that is presented here 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 also ... a stance of being against the things that Planned Parenthood does, which include abortions...." (R. 36:82-83). The Court found that Aish's statements went too far because they made Kindschy "even have to think about" bad things, like car accidents, that could happen to her or her family. (R. 36:86-89).

The Wisconsin DOJ acknowledges the injunction is a content-based speech restriction, and that such restrictions are unconstitutional unless speech falls within one of the categories of speech which are not protected, or the restriction satisfies strict scrutiny. (WI DOJ Br., pp. 5-7).[1] In a footnote, the Wisconsin DOJ embraces a diametrically conflicting position. It states, "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

[1] The Wisconsin DOJ states, "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."

basis of Aish's non speech physical conduct." (WI DOJ Sup. Br., p. 7, fn. 2). But, it fails to explain how this injunction can be both a content-based speech restriction, and a content-neutral restriction. Moreover, any such explanation would ignore the record presented and the Circuit Court's extensive explanation of its decision.

The Wisconsin DOJ suggests this Court could sustain the injunction on the basis of "Aish's non-speech physical conduct" (WI DOJ Sup. Br., p. 7, fn. 2), but it fails to identify what that conduct might be. The only clue is its statement, without any record citation, that the record includes evidence of "related non-speech physical conduct." (WI DOJ Sup. Br., p. 7). But the Circuit Court did not find any "related non-speech physical conduct" and did not base its injunction on any such conduct.

Kindschy argues, based on the Decker decision, that "[P] ursuant 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." (Kindschy (Second) Supp. Br., p. 7). Kindschy maintains:

> [c]onsistent 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.

(Kindschy (Second) Supp. Br., p. 10).

Kindschy's analysis is incorrect and relies upon a patchwork of incorrect assumptions and cases that fail to support her argument. In Bachowski *v. Salamone*, 139 Wis. 2d 397, 407 N.W. 2d 533 (1987), this court held that §813.125 had no chilling effect on speech precisely because "protected expression is not reached by the statute". This court found that §813.125's requirement that the actor intend to commit acts which are harassing and intimidating and the requirement that the conduct at issue have "no legitimate purpose" exempt speech protected by the First Amendment. *Id* at 411. As the Wisconsin DOJ acknowledges in its brief, the

precedent of both the U.S. Supreme Court and this Court recognize that a content-based speech restriction cannot stand unless the speech at issue is of a type that is entitled to no constitutional protection (*i.e.*, true threats") or can withstand strict scrutiny. (See WI DOJ Supp. Br., pp. 5-6). Kindschy wholly fails to establish that a court may, consistent with the First Amendment, ban speech based on its content without a showing that the speech falls within one of the unprotected categories recognized by the U.S. Supreme Court or that such a restriction can withstand strict scrutiny.

Notably, Kindschy does not dispute that the injunction at issue is a content-based speech restriction. But she asserts that §813.125 does not include a requirement that speech fit within one of the categories recognized by the U.S. Supreme Court as speech not entitled to First Amendment protection because "even otherwise-protected speech may be subject to limits to reduce threats to public order or protect an individual's right to privacy." (Kindschy (Second) Sup. Br., pp. 7-10). Presumably, however, Kindschy is not suggesting that §813.125 trumps the First Amendment, which only allows content-based regulation of unprotected speech (*e.g.*, true threats), or upon a showing that a content-based restriction can withstand strict scrutiny.

Kindschy further asserts that protected speech (*i.e.*, speech that falls outside the limited categories of speech that the U.S. Supreme Court has recognized as unprotected) may be subject to restrictions in order to safeguard others against, for example, invasions of privacy, and harassing or intimidating conduct. (See Kindschy (Second) Supp. Br., pp. 7-10). But, as previously discussed, Kindschy has not and cannot demonstrate that the speech restriction at issue in this case meets the exacting strict scrutiny standard governing the constitutionality of content-based speech restrictions.

## II. This Case Does Not Involve A True Threat. If It Did, *Counterman*'s Recklessness Scienter Requirement Would Apply.

This Court's second question implicitly asks the parties to assume that Aish's speech constitutes "true threats."[2] But the Circuit Court did not find that Aish made any kind of threat, and the record is devoid of evidence that he meant to communicate "*a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals*." See *Virginia v. Black*, 538 U.S. 343, 359 (2003) [Emphasis added.] *Counterman* addresses the subjective standard governing whether "a speaker means" to communicate a serious expression of intent to commit an act of unlawful violence. See *Counterman*, 600 U.S. at 69.

Kindschy and End Domestic Abuse Wisconsin ("EDAW") maintain the *Counterman* decision is inapplicable in civil injunction proceedings. Although *Counterman* addressed true threat *mens rea* in the context of a criminal prosecution (Kindschy Br., p. 11; EDAW Br., p. 8),[3] the Court did not limit its ruling to that context. Instead, the Court's decision reflects the reality that *Counterman* involved a criminal prosecution. (See e.g., EDAW Br., pp. 8-9). Neither Kindschy nor EDAW cite authority establishing that the First Amendment provides a sliding scale of protection for speech dependent on the criminal or civil nature of a proceeding.

Kindschy and EDAW also argue *Counterman* is inapplicable because Wis. Stat. §813.125 imposes an "intent" *mens rea* requirement that is more culpable than the "recklessness" standard adopted in *Counterman*. (EDAW Br., pp. 13-14; Kindschy Br., p. 12). But that argument is confused and incorrect. A reckless intent as to whether speech will be perceived as a "true threat", is not somehow equivalent (or less stringent than) "an intent to harass or intimidate for no legitimate purpose." As discussed above, "true threat" has a specific definition for constitutional purposes. The Circuit Court did not find that Aish's speech included any threat to Kindschy, let alone a true threat, and never even used the word "threat" to characterize Aish's speech. Instead, the Court found Kindschy should be

[3] EDAW relies on the facts as recounted in the Court of Appeals decision (see e.g., EDAW Br., p. 14), but those "facts" are in many respects unsupported by the Circuit Court's findings.

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).

Moreover, the Circuit Court's conclusion that Aish's speech on religion and abortion in a public forum had no "legitimate purpose" ignores the paramount values underlying the First Amendment. Restrictions on speech "completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

The WI DOJ asserts, *Counterman* adopted a sliding scale *mens rea* requirement dependent on a case specific analysis of the potential chilling effect on protected speech in any particular case. (WI DOJ Supp. Br., pp. 10-12). But that is not an accurate reading of the Court's decision. Indeed, the U.S. Supreme Court has rejected a "free floating test for First Amendment coverage ... [based on] an ad hoc balancing of relative social costs and benefits." *U.S. v. Alvarez*, 567 U.S. 709, 717 (2012).

But the WI DOJ acknowledges, as it must, that "*Counterman* did not specifically approve the use of any scienter requirement other than recklessness in true threat cases—whether criminal or civil...." (WI DOJ Sup. Br., p. 9). Further, it acknowledges that, in *Counterman*, the Court's decision indicates that the recklessness standard it adopted is applicable in both criminal and civil contexts. (WI DOJ Sup. Br., pp. 9-10).

**III. The Injunction At Issue Cannot Withstand Strict Scrutiny.**

Kindschy asserts that all harassment injunctions are subject to intermediate, not strict scrutiny, but none of the cases she cites stand for that proposition and it is not an accurate statement of the law. She cites various (See Kindschy (Second) Supp. Br., pp. 12-15)).

Kindschy also maintains the injunction in this case withstands strict scrutiny because it was "not based on Aish's speech discussing religion or abortion" but was

"based on his intimidating conduct and his threats directed to Kindschy". (Kindschy (Second) Supp. Br., p. 14). In other words, Kindschy appears to concede that if the injunction was based on Aish's speech it cannot withstand strict scrutiny, and that the injunction may only be upheld if based exclusively on conduct or unprotected speech (such as "true threats").

As previously discussed, the Circuit Court explicitly relied upon the content of Aish's speech in entering the injunction. Further, contrary to Kindschy's assertion that the Circuit Court based the injunction on conduct, rather than speech, there were no findings by the Circuit Court that Aish directed any threats to Kindschy or engaged in "threats ... 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." (Kindschy (Second) Supp. Br., p. 14). In support of her assertions, Kindschy continues to erroneously equate her testimony with the Circuit Court's findings.

The cases Kindschy cites fail to demonstrate the injunction in this case is constitutional. For example, in *Hill v. Colorado*, 530 U.S. 703 (2000), the Court examined the constitutionality of a statute making it unlawful for any person within 100 feet of a health care facility's entrance, and to "'knowingly approach' within eight feet of another person, without ... consent, 'for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling....'" *Hill*, 530 U.S. at 707-708.[4] The Court found that statute, unlike the injunction in this case, was a content-neutral time, place, manner restriction. *Hill*, 530 U.S. at 721-725. Further, the Court determined the statute was narrowly tailored and left open "ample alternative channels for communication". *Hill*, 530 U.S. at 726. As discussed *infra*, the speech restriction in this case is not content-neutral, not narrowly tailored, and cannot withstand strict scrutiny.

[4] Kindschy cites *Hill* for the proposition that there is a right "'to free passage in going to and from work'" (Kindschy (Second) Supp. Br., p. 8), but there was no finding that Aish ever interfered with Kindschy's passage to and from work.

Kindschy also cites *Madsen v. Women's Health Center,* 512 U.S. 753, 765 (1994), for the proposition "courts may issue a harassment injunction even if the speech falls outside the limited categories which are undeserving of First Amendment protections." (Kindschy (Second) Supp. Br., pp. 9-10). In *Madsen*, however, the Court addressed circumstances in which a previous injunction enjoining individuals "from blocking or interfering with public access to the clinic, and from physically abusing persons entering or leaving the clinic" proved unsuccessful in remedying the misconduct at issue. See *Madsen*, 512 U.S. at 758-759.

Unlike the speech in this case, in *Madsen*, the Court found the injunction was not directed to the content of the petitioners' speech. Instead, it recognized, "Here, the state court imposed restrictions on petitioners incidental to their antiabortion message because they repeatedly violated the court's original order." *Madsen*, 512 U.S. at 763. By contrast, in this case, the stated basis for the injunction was the content of Aish's speech. See *e.g.*, R. 36:82-83, 86-89).

Kindschy reiterates her reliance on the decision in *Decker v. Bd. of Regents-UW System*, 2014 WI 68, 355 Wis. 2d 800, 850 N.W.2d 112. (Kindschy (Second) Supp. Br., p. 9). But in this case Aish's speech was not uttered for the purpose of harassing or intimidating Kindschy, but for purposes of furthering his goal of stopping or ending Planned Parenthood and persuading Kindschy to embrace God. (R. 36-86, 88, 89, 90).

The other cases Kindschy cites fail to establish that a content-based blanket prohibition on First Amendment-protected speech in a public forum is constitutional. Kindschy, however, found a case in which this Court upheld a conviction for identity theft based upon a statute found to withstand strict scrutiny. (Kindschy (Second) Supp. Br., pp. 13-14, citing *State v. Baron*, 2009 WI 58, 318 Wis. 2d 60, 769 N.W. 2d 34)).[5] But Kindschy makes no effort to explain how that

[5] One of Aish's prior briefs indicated he was unaware of a case in which a content-based restriction on speech occurring in a public forum on a matter of public interest withstood strict scrutiny. (Aish

decision supports a finding in this case that the injunction on Aish's speech survives strict scrutiny.

In *State v. Baron*, this Court considered whether an identity theft statute that punished the unauthorized use of personal identifying information to harm the individual's reputation was unconstitutional as applied to the defendant. *Baron*, 2009 WI 58, ¶1. The defendant accessed his boss' email without authorization and discovered emails indicating his boss was having an extramarital affair. The defendant sent those emails to various people, making it appear as though they were forwarded by his boss. *State v. Baron*, 2009 WI 58, ¶¶3-4.

This Court found that as applied the statute was a content-based speech restriction (*Id.* at ¶38), which survived strict scrutiny. The defendant conceded the state had a compelling interest in preventing identity theft, but argued the statute was not narrowly tailored. This Court found there is no "constitutional right to intentionally use another individual's identity without consent in order to harm that individual's reputation" and that strict scrutiny did not eliminate "a government's right to, at times, disallow certain fraudulent methods of disseminating speech." *Id.* at ¶54.

Kindschy's claim that the injunction in this case likewise withstands strict scrutiny is meritless. Kindschy bases her argument on facts not proven and not supported by the Circuit Court's findings (*i.e.*, that Aish made threats to Kindschy and engaged in intimidating *conduc*t. (Kindschy (Second) Supp. Br., pp. 14-15)). Further, despite Kindschy's claims that there are compelling governmental interests in protecting "public order" and "individual's privacy rights", Kindschy fails to show those rights are implicated in this case. Kindschy also claims the government has a compelling interest in "ensuring Kindschy enjoys the right to avoid unwanted communication at her place of work" (Kindschy (Second) Supp. Br., p. 15,) but for the reasons previously discussed, *Hill* and *Madsen* do not support a content-based

Second Supp. Br., p. 8). *State v. Baron* is as close as Kindschy has come to finding one, but it is distinguishable.

injunction in this case.

Kindschy contends the government has a compelling interest in protecting citizens "from fear of death or bodily harm" (Kindschy (Second) Supp. Br., p. 15, citing *Virginia v. Black*, 538 U.S. 343, 360 (2003)), but there were no threats of death or bodily harm in this case. None of the Circuit Court's findings establish any true threats.

Kindschy cannot demonstrate the injunction in this case burdens no more speech than necessary. Even she implicitly admits that it constitutes a *de facto* ban on Aish's speech at any location where Kindschy might be, even temporarily. (Kindschy (Second) Supp. Br., p. 15). The Circuit Court expressly indicated Aish should stay away from anywhere Kindschy might be, even when Kindschy was not actually present. (R. 23:2-3; R. 36: 91-94). The injunction is not narrowly tailored; examples of injunctions which would have burdened less speech include, among others, an order enjoining Aish from speaking to Kindschy or enjoining Aish from being present after the Planned Parenthood closed for the day - the only time Aish had contact with Kindschy. Instead, the Circuit Court imposed a restriction effectively prohibiting Aish from speaking to anyone where Kindschy might be, including anyone else coming or going from the building or passing by, with whom Aish wanted to share the Gospel and his pro-life message. (R. 36:41-42, 44-48).

## CONCLUSION

This Court should reverse the Court of Appeals' decision.

Dated this 7th day of March, 2024.

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## 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 2,972 words.

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