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

PETITIONER-RESPONDENT'S REPLY BRIEF TO SUPPLEMENTAL BRIEFING

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INTRODUCTION

> Constitutionally protected rights, such as freedom 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).

Civil harassment injunctions are a critical tool for those who have experienced harassment, domestic abuse, and stalking to help protect their own rights to life, liberty, and pursuit of happiness and obtain protection against those who seek to harass or harm them. The constitutional rights of individuals petitioning for a harassment injunction are no less meaningful than the asserted constitutional rights of the respondents to those petitions.

For the reasons set forth in the *amicus curiae* brief submitted by End Domestic Abuse Wisconsin, as well as the Petitioner-Respondent Kindschy's prior arguments, this Court should hold that the *mens rea* required by *Counterman v. Colorado,* 600 U.S.66 (2023), does not apply to civil harassment injunction actions issued under section 813.125. If *Counterman* does compel a subjective understanding requirement, this Court should conclude that the constitutional requirement is already satisfied by the intent requirement of section 813.125.

ARGUMENT

I. Section 813.125 can be used to limit speech when the speaker uses speech with the intent to harass or intimidate because speech used in this manner is no longer fully constitutionally protected.

This Court has held that even when the content of speech is protected under the First Amendment, it may be regulated if it is part of a harassing or intimidating course of conduct. *Decker v. Bd. of Regents-UW System*, 2014 WI 68, ¶ 38, 355 Wis. 2d 800, 850 N.W.2d 112. In *Decker,* the Court stated, "Decker cannot shield his harassing conduct from regulation by labeling 'protest.'" *Id.* The Court determined that "Decker's right to protest on UW property can be restricted when he engages in harassment with intent to harass or intimidate." *Id.* ¶ 45.

One way to look at this precedent is that otherwise-protected speech, when used to harass or intimidate, may be regulated through a harassment injunction. Viewed another way, once speech is used with the intent to harass or intimidate, that speech is no longer protected and may be regulated through a harassment injunction. The latter approach would be consistent with caselaw recognizing that speech used in furtherance of a crime is not deserving of the same level of First Amendment protection.

For example, in *State v. Hemmingway*, the court held that Wisconsin's stalking statute, section 940.32, did not trigger First Amendment scrutiny because although "the stalker may use language in his or her commission of the proscribed acts…[t]he use of language is not against the law. What is against the law is the intentional course of conduct to inflict harm, which the language shows." 2012 WI App 113, ¶ 16, 345 Wis. 2d 297, 825 N.W.2d 303. "Such intimidating conduct serves no legitimate purpose and merits no First Amendment protection." *Id.* Similarly, in *State v. Robins*, the court rejected that internet conversations and emails used in a child enticement prosecution were protected speech because, "[s]imply put, the First Amendment does not protect child enticements." 2002 WI 65, ¶ 44, 253 Wis. 2d 298, 646 N.W.2d 287.

Section 813.125 is in line with this jurisprudence. It curbs "**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 544 (1987) (emphasis added). The statute is not "directed at the exposition of ideas." *Id.* at 411. Rather, to obtain a restraining order, a petitioner must establish that the respondent engaged in "course of conduct…or repeatedly commit[ed] acts which harass or intimidate," that such actions had "no legitimate purpose," and the acts were done with "intent to harass or intimidate another person." Wis. Stat. §§ 813.125 (1)(4)(b); (4)(a)(3).

Speech may be the vehicle used to carry out harassing or intimidating acts or course of conduct. Courts may examine the content of the speech to determine whether the respondent's actions were intimidating or harassing, that his actions lacked a legitimate purpose, or that his intent was to harass or intimidate the petitioner. Such considerations of speech do not implicate First Amendment rights. *See Robins*, 2002 WI 65, ¶ 42. "It is not an abridgement of freedom of speech…to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* (citing *Giboney v. Empire Storage*, 336 U.S. 490, 502 (1949)).

If speech is used as the vehicle to carry out harassing or intimidating acts or a course of conduct that fails to serve a legitimate purpose, that speech—which might otherwise have been deserving of protection—becomes subject to restriction just like speech made in furtherance of a crime. Hence, the speech of a respondent to a harassment restraining order may be restrained to protect a petitioner against further harassment or intimidation.

Courts have made clear that protected speech may be curtailed to regulate conduct that threatens the public order and the privacy interests of others. "To recognize the rights of freedom of speech…as absolute[ ] would be to recognize the rule of force; the rights of other individuals and of the public

would vanish." *Zwicker*, 41 Wis. 2d at 509. "[T]he United States Constitution does not create a right for any person to interfere with the rights of other persons." *Predick v. O'Connor*, 2003 WI App 46, ¶ 32, 260 Wis. 2d 323, 660 N.W.2d 1 (Anderson, J., concurring) (citing *State v. Lee*, 957 P.2d 741, 751-52 (1998)); *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942).

This Court can decide whether harassing and intimidating speech is properly cast as (1) constitutionally protected speech subject to restriction to avoid further harassment or intimidation; or (2) unprotected speech. They are two sides of the same coin. Under either view, courts have long recognized the ability of a state to enjoin harassing speech. *E.g., Bachowski*, 139 Wis. 2d at 411-12; *Decker*, 2014 WI 68, ¶ 38. Accordingly, when the content of speech is considered under section 813.125, if the court finds that the speech was made with the intent to harass or intimidate, that is enough. The speech need not fall into another otherwise unprotected category of speech before the harassing or intimidating conduct may be enjoined.

II. *Counterman* does not require a change to the outcome of this case or to how section 813.125 is generally applied.

Aish argues that the reckless scienter requirement in *Counterman* applies to civil harassment orders and to this case. Aish Supplemental Br. at 6-7. Aish claims that *Counterman* was meant to apply in "any context" and, "[t]here is nothing in the *Counterman* decision which suggests it was driven by the fact the case involved a criminal prosecution." Aish Supplemental Br. at 6-7. That is not so.

The majority decision is replete with concerns regarding criminalizing speech. *See e.g., Counterman*, 600 U.S. at 69,78, 79-80. And the "true threats" cases discussed in *Counterman* were criminal cases. *Id.* at 74, 78 (citing *Elonis v. United States*, 575 U.S. 723, 733 (2015); *United States v. Alvarez*, 567 U.S.

709, 717–18 (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)).

Likewise, Kindschy agrees with the analysis submitted by *amicus curiae* End Domestic Abuse Wisconsin ("End Abuse") that because section 813.125 is a *civil* statute to prevent against harassing or intimidating speech, *Counterman* is does not alter the requirements of section 813.125. End Abuse Br. at 8-12.

If the holding of *Counterman* compels courts to consider the speaker's intent in a harassment injunction proceeding, Kindschy and End Abuse agree that the obligation that the court find that the speaker had the "intent to harass or intimidate" adequately protects against any "chilling" effect on speech and satisfies any scienter requirement that may be called for by *Counterman*. End Abuse Br. at 12-15.

As End Abuse compellingly points out, imposing *additional* First Amendment analysis or additional *mens rea* requirements beyond what is required under section 813.125 would infringe upon the rights of victims of harassment and domestic abuse and make it more difficult for such victims to obtain prompt relief. End Abuse Br. at 15-18; *see also Decker*, 2014 WI 68, ¶ 31 ("An injunction has several features that make it an especially desirable remedy for harassment victims.").

The same is true for Kindschy, who sought and obtained a harassment injunction against Aish. Although Kindschy did not work in an abortion clinic or perform abortions, she was employed by a family planning clinic. This is why Aish targeted her. (R. 36:40-42). Healthcare providers who provide abortions and patients who seek abortions are increasingly becoming the targets of violence by anti-abortion activists. "Since 1977, there have been 11 murders, 42 bombings, 200 arsons, 531 assaults, 492 clinic invasions, 375

burglaries, and thousands of other incidents of criminal activities directed at patients, providers, and volunteers." *2022 Violence and Disruption Statistics*, NATIONAL ABORTION FEDERATION (2023).[1] This Court should not make it more difficult for healthcare providers who work at family planning clinics to obtain a harassment injunction when they are being subjected to harassment and intimidation and targeted with threats.

Ultimately, *Counterman* does not require this Court to graft any additional requirements on to section 813.125.

III. Although strict scrutiny is not the appropriate standard, if applied here, the injunction should be upheld.

As set forth in Kindschy's Supplemental Brief at 12-16, 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 v. Women's Health Center*, 512 U.S. 753, 765 (1994).

Aish makes the conclusory and unsupported assertion that the injunction entered against him is a "content-based restriction on speech in a public forum" and therefore, is subject to strict scrutiny. Aish Supplemental Br. at 4. Actually, the restraining order is neither a content-based restriction on speech nor based upon speech in a public forum.

First, the restraining order entered against Aish is content-neutral—nothing about the injunction prevents Aish from expressing certain ideas or opinions. (R.23; R-App 001-003). The only restriction on his speech is that he makes no comments of any nature to Kindschy. Aish can profess his views about religion and abortion to the rest of the county, state, country, or world—just not to Kindschy.

[1] *Available at:* https://prochoice.org/wp-content/uploads/2022-VD-Report-FINAL.pdf.

To the extent that the court used Aish's words in support of the injunction, the speech relied upon was threatening comments to Kindschy about the safety of Kindschy and her family and made with the intent to harass or intimidate Kindschy. They were not remarks about religion or Aish's position on abortion.

Second, Aish argues that because his harassment and intimidation occurred in a "traditional public forum," the injunction is subject to strict scrutiny. Aish Supplemental Br. at 4-5. The Court of Appeals expressly rejected that Aish was engaged in any sort of "public" expression or speech, or that the injunction inhibits such expression. *Kindschy v. Aish*, 2022 WI App 17, ¶ 27, 401 Wis. 2d 406, 973 N.W.2d 828. "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." *Id.*

In considering harassment restraining orders made in public spaces, the correct scrutiny is intermediate. The court considers "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. "[A] time, place, and manner restriction is constitutional if it is reasonable and content-neutral." *Decker,* 2014 WI 68, ¶ 44.

Regardless of whether this court applies strict scrutiny or intermediate scrutiny, as discussed in Kindschy's prior brief, the injunction is narrowly tailored, and compelling rights and interests are served by the harassment injunction issued here. Kindschy Supplemental Br. at 7-8; 4-16. These include the right to privacy and to "be let alone," "right to free passage in going to and from work" and avoiding unwanted communications, and to be free from the fear of death or bodily harm. Kindschy Supplemental Br. at 7-8; 14-15. The injunction burdens "no more speech than is necessary," it simply

prevents Aish from targeting Kindschy with further harassment and intimidation. The injunction issued by the circuit court passes such constitutional muster.

CONCLUSION

For the reasons set forth in this and prior briefs and oral argument, this Court should affirm the circuit court's issuance of a harassment injunction issued against Aish.

Respectfully submitted this 11th day of March, 2024.

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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 2,196 words.

Dated this 11th day of March, 2024.

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