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CLERK OF WISCONSIN

SUPREME COURT

July 28, 2023

To:

Hon. Rian Radtke
Circuit Court Judge
Electronic Notice

Kari Tidquist
Clerk of Circuit Court
Electronic Notice

Leslie Anne Freehill
Electronic Notice

Diane M. Welsh
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*Address list continued on Page 5.

You are hereby notified that the Court has entered the following order:

No. 2020AP1775

Kindschy v. Aish, L.C. #2020CV40

On February 3, 2023, this court held this case in abeyance pending the United States Supreme Court decision in Counterman v. Colorado, 600 U.S. ___, 143 S. Ct. 2106 (2023). The decision in that case was issued on June 27, 2023. To assist this court in its consideration of this matter, it orders additional briefing from parties as set forth below. Further, on March 15, 2023, the Wisconsin Department of Justice filed a letter with this court stating that the Department has "substantial interest" in the "true threat" issue and requesting permission to move for leave to file a nonparty brief should this court order further briefing. The court construes this letter to be a motion to file a nonparty brief *amicus curiae* regarding the impact of the decision in Counterman. Therefore,

IT IS ORDERED that respondent-appellant-petitioner, Brian Aish, and petitioner-respondent, Nancy Kindschy, shall file simultaneous supplemental briefs within 20 days of the date of this order, discussing: (1) the impact of the Counterman decision, if any, on the issues raised in this case; and (2) the impact of the Counterman decision, if any, on the relief sought by each party. The briefs shall be no longer than 20 pages if a monospaced font is used or 4,500 words if a proportional serif font is used; and,

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IT IS FURTHER ORDERED that each party may file a reply to the supplemental brief of the opposing party within 10 days after the opposing party's supplemental brief is filed. A reply to a supplemental brief shall be no longer than 10 pages if a monospaced font is used or 2,250 words if a proportional serif font is used; and,

IT IS FURTHER ORDERED that the Department of Justice's March 15, 2023 letter is construed to be a motion for leave to file a nonparty brief *amicus curiae* regarding the impact of the decision in Counterman; and,

IT IS FURTHER ORDERED that the motion of the Department of Justice is granted. The Department's nonparty brief shall be filed within 20 days of the date of this order, shall be limited to addressing the impact of the Counterman decision, as specified above, and shall comply with the length limitations imposed above on the parties' supplemental briefs. Because the Department is not a party to this case, it may not file a reply to the parties' supplemental briefs.

JILL J. KAROFSKY, J. (*concurring*). I agree with the court's order asking the parties to file supplemental briefs informing us of how the recent United States Supreme Court decision in Counterman v. Colorado, 600 U.S. ___, 143 S. Ct. 2106 (2023), may impact our decision here. I write separately to respond to Justice Rebecca Bradley's dissent.

Justice Rebecca Bradley disagrees with the briefing schedule set out in the court's order, asserting that "justice delayed is justice denied" because we are not ordering expedited briefing. While "justice delayed is justice denied" is certainly pithy, the reality is that sometimes justice takes time—as all members of the court, including Justice Rebecca Bradley, knew when we unanimously ordered this case be held in abeyance until the United States Supreme Court decided Counterman. See Kindschy v. Aish, No. 2020AP1775, unpublished order (Wis. Feb. 3, 2023). It should go without saying that the natural consequence of our hold order was that our decision would be delayed, likely for months given that the United States Supreme Court often releases opinions late into June. Another natural consequence is that, now that Counterman is released, we are asking the parties to weigh in on how that case impacts the one in front of us—and we are giving the parties an adequate amount of time to do so. Far from any sort of nefarious stalling tactic, this order is simply the result of the court acting in ordinary course as it assesses the impact of a relevant United States Supreme Court case.

Justice Rebecca Bradley insists that because Justice Patience Roggensack's final term ends on July 31 and Justice-elect Janet Protasiewicz's term starts on August 1, we are compelled to expedite briefing and hastily rush a decision. However, membership changes on this court are not abnormal, and consequently the panel for any one case may change when a new justice is elected or appointed. See, e.g., In re Matthew D., 2016 WI 35, 368 Wis. 2d 170, 880 N.W.2d 107; State v. Matalonis, 2016 WI 7, 366 Wis. 2d 443, 875 N.W.2d 567; State v. Parisi, 2016 WI 10, 367 Wis. 2d 1, 875 N.W.2d 619 (all cases in which Justice Rebecca Bradley participated in the final decision, even though oral arguments for these cases took place prior to her appointment to the court). That the court's makeup would change, possibly very shortly after the Counterman decision was released, was known to all members of the court prior to our hold order. Thus, the fact that a

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new justice may participate in the case is neither extraordinary, nor unexpected. In short, a change of court membership is not cause for expediting the briefing schedule.

Additionally, Justice Rebecca Bradley insists that we expedite our decision because "some legal commentators" anticipate that Justice-elect Protasiewicz may receive a recusal motion because of comments she made about abortion while campaigning. This argument is not only speculative but entirely irrelevant to the briefing schedule.

Because there is no reason for us to abandon our ordinary course and order expedited briefing, I agree with the court's order.

I am authorized to state that Justice REBECCA FRANK DALLET joins this concurrence.

ANNETTE KINGSLAND ZIEGLER, C.J. (*dissenting*). I dissent because I would decide this case without further briefing. I note, too, that approval of the briefing schedule set forth in this order serves to preclude Justice Roggensack from sitting on this case, as her term ends July 31, 2023. Though I do not believe further briefing is necessary, at a minimum, the court should have ordered an expedited briefing schedule given this extraordinary situation.

I am authorized to state that Justice PATIENCE DRAKE ROGGENSACK joins this dissent.

REBECCA GRASSL BRADLEY, J. (*dissenting*). By setting an unreasonably long briefing schedule, the majority significantly limits any relief that could be provided to Brian Aish. In September 2020, the circuit court enjoined Aish, severely restricting his ability to hold pro-life protests outside a Planned Parenthood facility.¹ The injunction will expire in September 2024. In all likelihood, a decision from this court will not release until early 2024 at the earliest given the majority's order. By that time, Aish will have been subject to restraints on his liberty for over three years—more than 75% of the length of the injunction. As a practical matter, the losing party will not be able to seek relief in the United States Supreme Court even though this case raises serious First Amendment questions because the case will be moot. Although sometimes justice takes time, at this point in the case there is no good reason to delay it. Justice delayed is justice denied.

¹ The Honorable Rian W. Radtke, Trempealeau County Circuit Court, presided.

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Additionally, as Chief Justice Annette Kingsland Ziegler notes, the majority sets this schedule with no regard for this court's imminent change in membership.² Whether the incoming justice will sit on this case is unclear. Unlike Justice Patience Drake Roggensack, the incoming justice did not participate in oral argument and has not been involved in any of this court's deliberations. Some legal commentators anticipate the incoming justice may receive recusal motions on cases involving abortion in light of comments the incoming justice made on the campaign trail. See generally Josh Blackman, Justice Janet Protasiewicz, Say Hello to Caperton v. Massey, Volokh Conspiracy (Apr. 5, 2023), <https://reason.com/volokh/2023/04/05/justice-janet-protasiewicz-say-hello-to-caperton-v-massey/>.

If the incoming justice does not participate, this court could split, resulting in a 3-3 ruling. That outcome could leave in place a decision by the court of appeals that may run afoul of the United States Supreme Court decision in Counterman v. Colorado, 600 U.S. ___, 143 S. Ct. 2106 (2023).

Parties often frame their arguments differently depending on the make up of the court. In this case, however, the parties do not know what the composition of the court will be. Resolving this case before the end of the current term would avoid these issues entirely.

Finally, whether additional briefing will assist this court in resolving the case is questionable. This court has already received more than 100 pages of briefing and held oral argument. All that remains is to consider the impact of the United States Supreme Court decision in Counterman. To the extent further briefing has utility, the parties do not need 20 days to file supplemental briefs, let alone 10 days to file supplemental reply briefs. At most, briefing of this nature should take no more than a week.

The court could have resolved this case before the expiration of the current term. Instead, the majority inexplicably refuses to do so and unnecessarily delays the case until after Justice Roggensack retires from the court. Why? I dissent.

Samuel A. Christensen
Clerk of Supreme Court

² Justice Jill J. Karofsky unconvincingly compares my participation in cases when I joined the court in 2015—after the term had already begun, following the death of Justice Patrick Crooks—to the possible participation of the incoming justice in this pending matter. Unlike 2015, this year Justice Roggensack is retiring at the end of the current term, which does not leave any cases susceptible to a 3-3 split this term. Delaying the disposition of this case until next term does, as the incoming justice has opened herself up to credible recusal motions on abortion-related cases. This situation easily could have been avoided had the majority been willing to do its work promptly.

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