



OFFICE OF THE CLERK
Supreme Court of Wisconsin

110 EAST MAIN STREET, SUITE 215

P.O. BOX 1688

MADISON, WI 53701-1688

TELEPHONE (608) 266-1880

FACSIMILE (608) 267-0640

Web Site: www.wicourts.gov

FILED

02-05-2024

CLERK OF WISCONSIN

SUPREME COURT

February 5, 2024

To:

Hon. Rian Radtke
Circuit Court Judge
Electronic Notice

Kari Tidquist
Clerk of Circuit Court
Electronic Notice

Eduardo E. Castro
Electronic Notice

Diane M. Welsh
Electronic Notice

Richard A. Schaumberg
Electronic Notice

*Distribution list continued on Page 4.

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

No. 2020AP1775

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

On July 28, 2023, this court ordered the parties to file supplemental briefs addressing the impact of the decision in Counterman v. Colorado, 600 U.S. 66, 143 S. Ct. 2106 (2023), on the issues in this case and the relief sought by each party. The court's order also permitted the Wisconsin Department of Justice to file a non-party brief *amicus curiae* on these issues. Having reviewed these supplemental briefs, the court concludes that further supplemental briefing would assist the court in deciding this matter. 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, addressing the following issues:

- (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?

Page 2

February 5, 2024

No. 2020AP1775

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

- (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?
- (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 supplemental briefs shall be no longer than 30 pages if a monospaced font is used or 6,750 words if a proportional serif font is used; and,

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 13 pages if a monospaced font is used or 3,000 words if a proportional serif font is used; and,

IT IS FURTHER ORDERED that the Department of Justice may file a supplemental nonparty brief addressing the issues listed above. The Department’s nonparty brief shall be filed within 20 days of the date of this order, shall be limited to addressing the issues set forth 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; and

IT IS FURTHER ORDERED that a supplemental oral argument on the issues identified in this order shall occur as the second case on March 19, 2024 (approximately 11:00 a.m.).

REBECCA GRASSL BRADLEY, J. (*dissenting*). The court could have resolved this case last term, but a majority "inexplicably refuse[d] to do so and unnecessarily delay[ed] the case" with a needlessly long schedule for supplemental briefs addressing the United States Supreme Court's decision in Counterman v. Colorado, 600 U.S. 66 (2023). Kindschy v. Aish, No. 2020AP1775, unpublished order, at 4 (Wis. July 28, 2023) (Rebecca Grassl Bradley, J., dissenting). Not only was the previous round of supplemental briefing unnecessary, the length of the schedule needlessly "preclude[d] [then-justice] Roggensack from sitting on this case." Id. at 3 (Ziegler, C.J., dissenting). By ordering another round of supplemental briefing, the majority virtually eliminates any possibility of meaningful relief for Brian Aish should he prevail. In September 2020, the circuit court effectively enjoined Aish from conducting pro-life protests in front of a Planned Parenthood facility. The injunction expires in September 2024. Because of the majority's unnecessary delay, an opinion likely won't be released until mid 2024, at which point Aish will have had his liberty restrained for nearly the entire duration of the injunction. If this

Page 3

February 5, 2024

No. 2020AP1775

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

court remands the case to the circuit court for further action, the case will be moot—by the court's own inaction.

The majority offers no reason for dawdling in deciding this case. The majority has not hesitated to fast-track cases it deems important.¹ The majority released its decision to redraw the state's legislative maps and reallocate political power on December 22, 2023—less than five months after the petitioners filed their original action. Clarke v. Wis. Elections Comm'n, 2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370. In contrast, the court issues this order for additional supplemental briefing on February 5, 2024—more than five months (158 days) after the parties submitted the first round of supplemental briefing ordered by the majority. Aish's cause will not advance the majority's political agenda, so it takes a back seat to cases like Clarke.

This court should not need additional briefing or an additional oral argument to do its job. We received more than one hundred pages of briefing and heard oral arguments more than one year ago; more recently, we already required the parties to address Counterman's impact on this case. On July 28, 2023, this court ordered the parties to file briefs "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." Kindschy, No. 2020AP1775 (July 28, 2023). The parties complied. Additionally, the Wisconsin Department of Justice filed a brief, as amicus curiae. In total, we received more than 60 pages of briefing on the issues. Those briefs make clear that Counterman's recklessness standard applies in the civil context. Nevertheless, the court orders the parties to answer this question again, repeated in the form of the third issue in the order, once again needlessly delaying the resolution of case.

The first and third questions the court now orders the parties to address could have been posed to the parties in 2022; their substance was always before the court. Moreover, the first and third questions raise issues Kindschy could have raised and argued in her previous briefs but did not. The court generally does not raise issues on a party's behalf, and it should not do so here.

It isn't clear why this court now asks the parties to address the first and third issues in the order, more than a year after we heard oral arguments in this case. The majority appears determined to delay this case's resolution as long as it can. But the court cannot remain paralyzed by the prospect it must—one day—"say what the law is" and decide this case. Marbury v. Madison, 1 Cranch 137, 177 (1803). Aish's liberty is on the line. I dissent.

I am authorized to state that ANNETTE KINGSLAND ZIEGLER, C.J., joins this dissent.

Samuel A. Christensen
Clerk of Supreme Court

¹ See Clarke v. Wis. Elections Comm'n, 2023 WI 70, 995 N.W.2d 779, 802 (Hagedorn, J., dissenting) (noting the majority changed the court's internal writing deadlines for original actions "to ensure [Clarke] would be fast-tracked").

Page 4

February 5, 2024

No. 2020AP1775

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

Distribution list continued:

Dudley A. Williams

Electronic Notice

Joan M. Mannix

Electronic Notice

Thomas C. Bellavia

Assistant Attorney General

P.O. Box 7857

Madison, WI 53707-7857