STATE OF WISCONSIN : CIRCUIT COURT : WAUKESHA COUNTY

DARYL J. SCHMIDT,

Petitioner

v. Case No. 2010CV01611

JILL M. FERGUSON,

Respondent.

RESPONDENT'S SUCCESSOR COUNSEL'S SUPPLEMENTAL BRIEF IN SUPPORT OF THE §806.07(1)(h) MOTION FOR RELIEF FROM THE TEMPORARY RESTRAINING ORDER AND INJUNCTION

Respondent JILL M. FERGUSON, by her attorneys, GERARD F. KUCHLER and BRADLEY J. BLOCH, renew the Motion filed on July 8, 2011 by prior counsel, Attorney RICHARD D. MARTIN of the Office of State Defender, but current counsel report that the rationale that current counsel find is the controlling law is distinctly different than predecessor counsel's dated "transparent invalidity" analysis cited to *Walker v. Birmingham* and its limited progeny. This motion, in practical terms, says that the Court should narrow or abandon the extraordinarily and unnecessarily broad prohibitions of this extreme Section 813.125 Harassment injunction that impermissibly restricts Respondent's expressive rights guaranteed by the minimum standards of the First and Fourteenth Amendments to the United States Constitution and the even broader protections of Article 1, §3 of the Wisconsin Constitution.

It may be helpful to commence this Supplemental Brief by succinctly reviewing the timeline material to the case:

> April 9, 2010 > Petitioner Daryl J. Schmidt files Petition for Section 813.125 Harassment Temporary Restraining Order executed by the Circuit Court for Waukesha County.
>
> April 10, 2010 > Temporary Restraining Order is served upon Respondent at 7:40 P.M..

April 20, 2010 > United States Supreme Court releases *United States v. Stevens*, 559 U.S. ___, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010).

April 22, 2010 > Waukesha County Court Commissioner Linda Georgeson conducts Section 813.125 Injunction hearing where Respondent asserted her First Amendment expressive rights. Injunction is issued and served upon Respondent prohibiting use of the Internet in any manner "to communicate about Petitioner," ordering an existing website be "removed immediately," prohibiting website creation "or posting on other websites regarding Petitioner" and prohibiting "media or licensing agency contacts re: Petr ... by Respondent."

July 23, 2010 > Waukesha County District Attorney files *State v. Jill M. Ferguson*, Case No. 2010 CM 1473 charging Count 1, Violation of Harassment Restraining Order and Counts 2 Violation of Harassment Injunction in 10 CV 1611 and Count 3 Violation of separate harassment injunction secured by Petitioner's attorney in Case No. 10 CV 2326.

August 18, 2010 > SPD Richard Martin files Motion to Dismiss. Judge James R. Kieffer recuses "due to alleged victims being colleagues."

August 26, 2010 > Case No. 2010 CM 1473 is ordered assigned to Jefferson County Circuit Judge Jennifer L. Weston.

March 1, 2011 > Following briefing by State and Ferguson's SPD, Judge Weston issues Memorandum Decision finding probable cause for Count 1 limited to Ferguson violating the 10 CV 1611 TRO's phrase "not to utilize the internet to harass the petitioner" while dismissing Count 2 for want of allegation of harassing behavior directed toward Respondent Schmidt and dismissing Count 3 for want of personal jurisdiction as to the 10 CV 2326. Judge Weston's Memorandum Decision, as to Count 1, also concluded "defendant may not seek to collaterally attack that count within the criminal case."

March 2, 2011 > United States Supreme Court releases *Snyder v. Phelps*, 562 U.S. ___, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011).

June 27, 2011 > United States Supreme Court releases *Brown v. Entertainment Merchants Association*, 564 U.S. ___, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011).

July 8, 2011 > SPD Martin files in Case No. 10 CV 1611 a Section 806.07(1)(h) Motion for Relief from the TRO and Injunction together with a Brief in Support.

September 20-21, 2011 > Office of State Public Defender appoints Attorney Gerard Kuchler to represent Ferguson as to the pending misdemeanor and as to SPD Martin's pending Motion for Relief.

Respondent Jill Ferguson's successor counsel contend that there are far more direct arguments in support of the Motion for Relief than those that SPD Martin adapted from his unsuccessful efforts before Judge Weston "to allow a collateral attack on the TRO," Brief in Support, dated July 8, 2011, at 7 to 9, needing a finding of "transparent invalidity" per the 1967 *Walker v. Birmingham* decision and its dated progeny. While the Motion for Relief appears to be

an effort to encourage prosecutorial dismissal of the surviving misdemeanor count as well as to protect Ferguson's on-going expressive rights, successor counsel can report, parenthetically here, that they will seek total invalidation of Section 813.125 on First Amendment overbreadth grounds before Judge Weston should collateral attack on the TRO remain barred.

On the Motion for Relief, successor counsel need to initially clarify two points made in SPD Martin's Brief in Support. First, the Brief in Support cites, at page 4, *Jacobs v. Major* as to the "state action" requirement for both First Amendment and Article 1, § 3 of the Wisconsin Constitution protections. Actually, *Jacobs* and its companion case, *State v. Horn*, 139 Wis.2d. 473, 407 N.W.2d 854 (1987), include erroneous language denying that "state action is present since the plaintiffs sought justice through the courts, nor would it be state action to call upon the police to enforce the law," *Jacobs*, 139 Wis.2d at 528, and which the same four-justice majority called "the rather novel argument" in *Horn*, 139 Wis.2d at 484-485. The United States Supreme Court expressly and unanimously found "state action" in a case reviewing a damage award and injunction nearly five years before either *Jacobs* or *Horn* were decided:

> Although this is a civil lawsuit between private parties, the application of state rules of law by the Mississippi state courts in a manner alleged to restrict First Amendment freedoms constitutes "state action" under the Fourteenth Amendment. New York Times v. Sullivan, supra, [376 U.S. 254] at 256, 84 S.Ct. 710, 11 L.Ed 2d 686. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916, note 51, 102 S.Ct. 3409, 73 L.Ed.2d 1215, 1238, note 51 (1982).

Second, successor counsel emphasize that Petitioner Schmidt's April 22, 2010 Injunction hearing testimony, itself, established that none of Respondent Ferguson's contacts were "true threat" within the category of proscribable expression. Mr. Schmidt testified that none of Ms. Ferguson's behavior "ever threatened you (Schmidt) physically or caused you (Schmidt) to fear for your life," Tr. 4-22-10 at 33-34, that his firearm prohibition-related allegation was a mistake,

Id. at 36, which was withdrawn, *Id.* at 37. Constitutionally proscribable "true threat" requires the subjective specific intent to threaten unlawful violence with the threat reaching bodily harm:

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. ... Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. *Virginia v. Black*, 538 U.S. 343, 359-360, 123 S.Ct. 1536, 1548, 155 L.Ed.2d 535, 552 (2003)

There simply was no "true threat" predicate laid by Petitioner at the April 22, 2010 Injunction hearing. Instead, the evidence only showed only what *Claiborne Hardware* long ago held to be protected expression: "threat of social ostracism," vilification, traduction, 458 U.S. at 921. That the message was intentional and/or embarrasses and/or is coercive does not deny the message protection. *Id.* at 909-910. That Mr. Schmidt related the messages to his business as a physical therapist is no different than the real estate broker who secured a state injunction to suppress leaflets "critical of his business practices" that "were coercive and intimidating, rather than informational" only to see the Highest Court nullify the injunction on First Amendment grounds in *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971). *Keefe* was summarized and re-affirmed in *Claiborne Hardware*, 458 U.S. at 910-912.

The *Walker v. Birmingham* "transparent invalidity" notion is not strongly applicable, here, for two reasons. First, the exact same standards for conduct upheld by the narrow 5-4 *Walker* majority were held to hold First Amendment protection less than two years later by a unanimous court, *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969). Second, more recent discussion of *Walker*'s collateral bar rule suggests it is to be applied only in contempt proceedings – not, as here, where criminal penalty is the sanction. Justice Scalia observed while dissenting in *Madsen v. Women's Health Center*, 512 U.S. 753, 793-794, 114 S.Ct. 2516, 2539, 129 L.Ed.2d 593 (1994):

> Normally, when injunctions are enforced through contempt proceedings, only the defense of factual innocence is available. The collateral bar rule of *Walker v. Birmingham*, (cite deleted), eliminates the defense that the injunction itself was unconstitutional. Accord, *Dade Classroom Teachers' Assn. v. Rubin*, 238 So.2d 284, 288 (Fla. 1970). Thus, persons subject to a speech-restricting injunction who have not the money or not the time to lodge an immediate appeal face a Hobson's choice: They must remain silent, since if they speak their First Amendment rights are no defense in subsequent contempt proceedings. This is good reason to require the strictest standards for issuance of such orders.

Indeed, the *Madsen* majority, in reflection on Justice Scalia's analysis, adopted a more rigorous standard than that normally applied to a content-neutral time, place, manner analysis:

> We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest. See, *e.g. Claiborne Hardware, supra*, 458 U.S. at 916, 102 S.Ct at 3427 (when sanctionable "conduct occurs in the context of constitutionally protected activity ... 'precision of regulation' is demanded.") SOURCE: *Madsen*, 512 U.S. at 765-766.

Respondent Ferguson's current counsel believe that the more efficient route to the same conclusion of law is to honor the 2010 and 2011 United State Supreme Court precedent; *Stevens*, *Snyder* and *Brown*; which Wisconsin must adapt to in any event when addressing the limited subject matter jurisdiction of its courts on the Section 813.12, 813.122, 813.123 and 813.125 TRO/Injunction procedures.

Wisconsin case law is frequently found to assert essentially universal subject matter jurisdiction of its courts with such jurisdiction created by the Wisconsin Constitution. *See*, for example, *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 1, 273 Wis.2d 76, 82, 681 N.W.2d 190, reporting "never without subject matter jurisdiction" from a Wisconsin Constitution provision. But the federal Supremacy Clause, Article VI, Clause 2, "trumps" the Wisconsin Constitution so that the Wisconsin Supreme Court has recognized that "All state courts, of course, are bound by decisions of the United States Supreme Court on matters of federal law." *State v. Jennings*, 2002 WI 44, ¶ 18, 252 Wis.2d 228, 237-238, 647 N.W.2d 142.

Chief Justice Roberts wrote the lead opinion of *Stevens* in April of last year. The Court rejected "ad hoc interest balancing" initially emphasizing the First Amendment's impact on "subject matter:"

> The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech." "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." ... "From 1791 to the present," however, the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," and has never "include[d] a freedom to disregard these traditional limitations." 130 S.Ct. at 1584. (Emphasis added.)

The Court specifically rejected the kind of interest balancing employed since Wisconsin adopted the various Chapter 813 abuse-harassment procedures:

> The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs." Brief for the United States 8, see also *id.* at 12.
>
> As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. 130 S.Ct. at 1585.

The *Stevens* Court explained that the Government's error derived from language of past cases, periodically quoted for decades in Wisconsin published case law, that is "just that – descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor." 130 S.Ct. at 1585-86.

For instance, the very same quotation from *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942), that was the example quoted by the *Stevens* Court is quotation used by the Wisconsin Supreme Court in *State v. Zwicker*, 41 Wis.2d 497, 510, 164 N.W.2d 512 (1969) as "a

test" and then repeated in, for instance, *State v. A.S.*, 2001 WI 48, ¶ 15, 243 Wis.2d 173, 189, 626 N.W.2d 712. The *Stevens* Court concluded: "Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment." 130 S.Ct at 1586.

Ever since *Bachowski v. Salamone*, 139 Wis.2d 397, 411, 407 N.W.2d 533 (1987), denied succinctly a First Amendment overbreadth challenge to the original Section 813.125 Harassment TRO/Injunction statute, our State has been ad hoc interest-balancing. *Bachowski* said "The intent requirement and the phrase 'no legitimate purpose' make clear that protected expression is not reached by the statute," – analysis slam-dunked by a Court Commissioner who actually said on record "any 1st Amendment right is *tempered* by the laws, common sense," Tr. April 22, 2010 at 58, and much stunningly more as to said purported "tempering" – and explained the interest balanced against free expression: "It is not directed at the exposition of ideas but at oppressing repetitive behavior which invades another's privacy interests in an intolerable manner." The ad hoc interest-balancing paragraph is located at 139 Wis.2d at 411.

With so dramatic a limit on "freewheeling authority" so often previously exercised in lower courts, there was, understandably, some question by government whether the *Stevens* Court could possibly have meant what Chief Justice Roberts' Opinion so clearly said. Such doubt was answered in June when the *Brown* Opinion totally invalidated a California statute on First Amendment overbreadth grounds with the Opinion of the Court this time authored by Justice Scalia:

> Last Term, in *Stevens*, we held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated. *Brown*, Slip Opinion at 3.

Citing *Stevens* as controlling, *Id.* at 4, the *Brown* Court exemplified from its 1948 decision in *Winters v. New York*, 333 U.S. 507, 514, invoking interests of "the corruption of public morals or other analogous injury to the public" concluding: "That is of course the same expansive view of governmental power to abridge the freedom of speech based on interest-balancing we rejected in *Stevens*." *Brown*, Slip Opinion at 5.

On the instant claim of "harassment," the *Snyder v. Phelps* Opinion by Chief Justice Roberts is also highly material. Indeed, the lone dissent by Justice Alito characterized, without difference expressed by any Justice, the repetitive behaviors of Phelps and his Westboro Church as "harassment," Slip Opinion of dissent at 12, and "parts of a single course of conduct," *Id.* at 8, note 15. This was the case that addressed the Westboro Church protesting at nearly 600 military funerals plus the funerals for fallen police officers, firefighters, victims of natural disasters or accidents as well as victims of shocking crimes. *Id.* at 5. Nevertheless, the *Snyder* majority vacated a State of Maryland judgment for a well-established intentional infliction of emotional distress claim on grounds that the First Amendment protects expression far more damaging than anything testified to here by Petitioner Schmidt. The *Snyder* majority plainly rejected Justice Alito's long list of other ways the Westboro Church could have conveyed its messages concluding, quite ironically here, with the very means the Schmidt injunction prohibits:

> Respondents and other members of their church have strong opinions on certain moral, religious, and political issues, and the First Amendment ensures that they have almost limitless opportunities to express their views. They may write and distribute books, ... **they may appear on television and speak on the radio; they may post messages on the Internet and send out e-mails.** And they may express their views in terms that are "uninhibited," "vehement" and "caustic." *Id.* at 1-2. (Emphasis added.)

If the expressive conduct of the Westboro Church is absolutely privileged by the First Amendment, Ferguson's counsel have no idea how the Law of the Land can permit the Injunction issued in Case No. 10 CV 1611 or any other injunction similarly issued using the

Chapter 813 abuse-harassment TRO/Injunction standards. Of course, Wisconsin published cases have already held that expressive conduct holds the same First Amendment privilege as speech itself, *State v. Baron*, 2009 WI 58, ¶ 14, note 6, 318 Wis.2d 60, 68, 769 N.W.2d 34 and that all related to "domestic disputes" are matters of public not purely private concern. *State v. Schwebke*, 2002 WI 55, ¶ 31, 253 Wis.2d 1, 23, 627 N.W.2d 213. The latter principle of law denies Wisconsin "the one out" that counsel see in the *Snyder* majority opinion. While the Chief Justice acknowledged for the Court that "the boundaries of the public concern test are not well defined," Slip Opinion of the Court at 6, *Schwebke* denies "domestic disputes" are "matters of **purely** private significance," *Id.* (Emphasis added), which looks to us like "the one out" that is arguable.

We note that predecessor counsel earlier cited Highest Court authority for "noxious, offensive, or irresponsible speech (being) constitutionally protected," Brief in Support at 4. *Snyder* and *Brown* add two more descriptors or attributes that are also protected. *Snyder* added "outrageous" content to "misguided, or even hurtful" as no basis to deny constitutional privilege. *Snyder*, Slip Opinion at 12. *Brown* added "... disgust is not a valid basis for restricting expression," *Brown*, Slip Opinion at 11.

Finally, SPD Martin's filings address "remedy" in general language where current counsel offer specifics. In light of *Bachowski*'s invoking privacy interests as the motivation for the statute, Branch 9 should narrow the enjoined conduct to that narrow privacy interest for which the United States Supreme Court has tradition in limiting "even good ideas." *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) protects the privacy interests of the unwilling recipient of messages in the recipient's home. Reference to *Frisby* is found in Wisconsin law:

> Even if the sanctions of the statute indirectly prohibit speech, the state can ban speech directed primarily at those who are unwilling to receive it. *See Frisby v. Schultz*, 108 S.Ct. 2495, 2504 (1988). "Individuals are not required to welcome unwanted speech into their own homes and ... the government may protect this freedom." *Id.* Authority: *Schramek v. Bohren*, 145 Wis.2d 695, 710, 429 N.W.2d 501 (Ct. App. 1988).

The *Schramek* Court's direction that readers "see" *Frisby* leads the obedient to realization that the *Schramek* Court's first sentence is not supported by the *Frisby* Opinion – or any other Highest Court precedent – and that the *Frisby* Court carved out an exceedingly narrow exception to free speech guarantees. The *Snyder* decision this last March is another example where a party has sought to have the Court broaden the exception and another example of the Court's refusal to broaden:

> As a general matter, we have applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech. For example, we have upheld a statute allowing a homeowner to restrict the delivery of offensive mail to his home, see *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970), and an ordinance prohibiting picketing "before or about" any individual's residence, *Frisby* [*v. Schultz*,] 487 U.S. [474]at 484-485. ...
>
> We decline to expand the captive audience doctrine to the circumstances presented here. *Snyder*, 562 U.S. ___, Slip Opinion at 13-14.

Relying on *Frisby*, the Court has jurisdiction to enjoin Respondent's unwelcomed messages into Petitioner's residence. Petitioner's court action has made clear that "even good ideas" thrust into his home should stop. Modes of communication addressed in Mr. Schmidt's injunction hearing testimony like e-mails and packages delivered to the residential property are well within the captive audience/unwilling recipient doctrine.

However, nothing in *Frisby* allows lower courts to protect residential privacy interests outside the residence. The Frisby right-to-life pickets had Supreme Court imprimatur to march throughout the Town of Brookfield neighborhood with signs identifying the resident as a doctor who performs abortions. Nothing permits lower courts to prohibit use of the Internet or to prohibit contact with the media or with government regulators or with regulators of

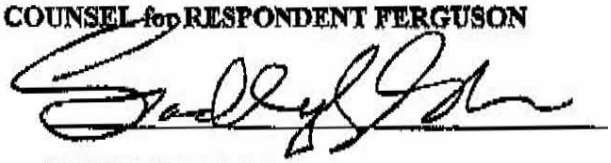
professionals. If Mr. Schmidt or his loved ones choose to review public messages in the confines of a home, they are no longer *unwilling* recipients. They have, instead, materially "opened the door." *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 415, 99 S.Ct. 693, 696, 58 L.Ed.2d 619 (1979): "Having opened his office door to petitioner, the principal was hardly in a position to argue he was the '*unwilling* recipient' of her views."

Moreover, Petitioner Schmidt has no right to initiate or cooperate with Internet-based or other public debate on the quality of his professional service and then complain that that some share the negative team's views on that debatable topic. If the negative debate team resorts to falsehood, the law offers defamation lawsuits but Petitioner Schmidt's filings and testimony in 10 CV 1611 did not claim that anything Respondent wrote was false. Schmidt sought instead to suppress truth.

The Motion for Relief addresses whether the Circuit Court had subject matter jurisdiction to attack our Nation's most cherished freedom over the course of ten pages of transcript, Tr. April 22, 2010 at 56 to 65, and deter timely appeal by characterizing review as "stupid." *Id.* at 59 to 60. All of that was capped off by Petitioner's attorney, as literally the last gasp, requesting and getting suppression of the freedom of the press as well. *Id.* at 64. Relief is due as Respondent's protected rights deserve protection.

Dated in Waukesha, Wisconsin this 21st day of November, 2011.

COUNSEL for RESPONDENT FERGUSON



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