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COURT OF APPEALS
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STATE OF WASHINGTON
BY
DEPUTY

No. 43926-3-II

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION TWO

In re Marriage of:

BRIAN MASSINGHAM,

Petitioner,

and

KAREN THIEL,

Respondent.

AMENDED PETITION FOR REVIEW BY
THE WASHINGTON SUPREME COURT

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I. INTRODUCTION

"As one federal judge has noted, 'Free speech is the single most important element upon which this nation has thrived.'"[1] To that end, "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause."[2] In fact, this Court has held threats to injure a person's mental health and safety are entitled to constitutional protection.[3] Despite this, Division II refused to modify its Commissioner's ruling that Petitioner Brian Massingham had no constitutional protection when he uttered the words "Kenny Gray" at a public ballpark.

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[1] Nelson v. McClatchy Newspapers, Inc., 131 Wash. 2d 523, 535-36, 936 P.2d 1123, 1129 (1997), *citing*, *Guzick v. Drebus,* 305 F.Supp. 472, 481 (N.D.Ohio 1969), *aff'd,* 431 F.2d 594 (6th Cir.1970), *cert. denied,* 401 U.S. 948, 91 S.Ct. 941, 28 L.Ed.2d 231 (1971).

[2] Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist., 605 F.3d 703, 708 (9th Cir. 2010) *citing* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001)

[3] State v. Williams, 144 Wash. 2d 197, 208, 26 P.3d 890, 896 (2001). ("the statute also prohibits those threats which would not properly be characterized as true threats to physical safety because it also prohibits threats "to do any other act which is intended to substantially harm the person threatened ... with respect to his or her ... *mental health* or safety." RCW 9A.46.020(1)(a)(iv) (emphasis [in original]). The Court of Appeals therefore properly concluded the criminal harassment statute prohibits at least some constitutionally protected speech.'); and

State v. Williams, 98 Wash. App. 765, 770, 991 P.2d 107, 110 (2000). ("RCW 9A.46.020(1)(a)(iv) criminalizes, among other things, threats to do an act intended to substantially harm another's "mental health." These are not threats to inflict bodily harm or to take the life of another. The statute therefore prohibits at least some threats that are not 'true threats' and therefore, on its face, the statute proscribes at least some protected speech.")

This is the perfect case to differentiate pure constitutionally protected speech from constitutionally unprotected conduct. This Court has previously recognized that pure speech is constitutionally protected and cannot form the basis for an anti-harassment order.[4] This Court has also detailed when a person crosses the line from engaging in pure constitutionally protected speech and engaged in conduct that is not constitutionally protected that can be proscribed by our state's unlawful harassment statutes.[5] No case, however, has explained when a person stops short of crossing that line and engages in only constitutionally protected free speech. That is until now.

Here, unlike *Noah*, Brian Masingham only uttered words ("Kenny Gray") and did not engage in other constitutionally unprotected conduct. Here, unlike *Trummel*, he did not force the unwanted message into Respondent's home; rather, he uttered his words in a public forum. As such, this Court should accept review and show our citizens, judges, and lawmakers what is pure constitutionally protected speech exempt from the "course of conduct" definition in our anti-harassment statutes.[6]

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[4] State v. Noah, 103 Wash. App. 29, 38-39, 9 P.3d 858, 865 (2000) ("Noah contends that the lawful exercise of his right of free speech and right to picket are excluded from the definition *39 of "course of conduct," and cannot be the basis for an antiharassment order. He is absolutely correct.")

[5] *See* State v. Noah, 103 Wash. App. 29, 39, 9 P.3d 858, 865 (2000) ("The trial court's findings identify conduct other than speech and picketing as a basis for the order." *i.e.* trespass); and Trummel v. Mitchell, 156 Wash. 2d 653, 668, 131 P.3d 305, 313 (2006)

[6] RCW 10.14.020(1)

II. PETITIONER'S IDENTITY

Petitioner Brian Massingham ("Massingham") is the Petitioner at the Court of Appeals and the trial court. Despite this, Respondent Karen Thiel ("Thiel") was the party who petitioned for an anti-harassment order of protection against Massingham

III. CITATION TO APPELLATE DECISION TO BE REVIEWED

Petitioner Brian Massingham requests the Washington State Supreme Court exercise its discretion and review the Washington State Court of Appeals', Division II's, Order Denying Motion to Modify its Commissioner's ruling granting Division II's own motion on the merits in *In re the Marriage of Brian Massingham, Appellant, and Karen Thiel, Respondent*, No. 43926-3-II, Washington Court of Appeals, Division Two (June 26, 2013 and August 29, 2013, respectively), herein the "Order" and the "Ruling," respectively. Copies of the Ruling and the Order are included in the **Appendix**.

IV. ISSUES PRESENTED FOR REVIEW

A. Significant Question of Law under the U.S. Constitution.

This matter raises significant questions of law under the U.S. and State Constitution because it:

1. Concerns whether a person may be punished for non-commercial, private speech uttered in a public forum that is neither defamatory, a "true threat," an incitement to violence, fighting words, nor obscene.

2. Concerns a remedy for engaging in pure speech that is not narrowly tailored to advance a compelling state interest.

B. Conflicts With Decisions of This State Supreme Court.

1. Division II's Order and Ruling conflict with this Court's holding in State v. Noah, 103 Wash. App. 29, 38-39, 9 P.3d 858, 865 (2000) that lawful exercising free speech rights are excluded from the definition of "course of conduct," under RCW 10.14.020(1) and cannot be the basis for an anti-harassment order.

2. Division II's Order and Ruling conflict with this Court's holding in In re Marriage of Suggs, 152 Wash. 2d 74, 80, 93 P.3d 161, 163-64 (2004) holding the anti-harassment statutes may not be used "to infringe upon any constitutionally protected rights including, ... freedom of speech" *citing* RCW 10.14.190

3. Division II's Order and Ruling conflict with this Court's holding in State v. Williams, 144 Wash. 2d 197, 208, 26 P.3d 890, 896 (2001) that holds speech that may threaten someone's mental health or safety is not a "true threat" and is, therefore, constitutionally protected

C. Conflicts With Decisions of Other Appellate Court Decisions

1. Division II's Order and Ruling conflict with State v. Bradford, 68568-6-I, 2013 WL 4056281 (Wash. Ct. App. Aug. 12, 2013) That states the plain language of the definition of the term "course of conduct" explicitly excludes from its scope constitutionally protected activities such as pure speech and that the text of RCW 10.14.020(1) expressly declares that " '[c]ourse of conduct' ... does not include constitutionally protected free speech. Constitutionally protected activity is not included within the meaning of 'course of conduct.' "

D. Matter Involves an Issue of Substantial Public Interest

1. Division II's Order and Ruling chill free speech. Here, despite RCW 10.14.020(1) and 10.14.190's prohibition on sweeping constitutionally protected activity, especially free speech, into its ambit, Division II applied the anti-harassment statutes, RCW ch. 10.14, to affirm the state court's punishing Massingham for engaging in pure constitutionally protected speech in a public forum. The public interest concern is that applying the anti-harassment statures in RCW ch. 10.14 in such an overbroad manner will not only deter Massingham from engaging in free speech in the future, but will also deter others from engaging in permissible and otherwise protected expression. This public interest policy is the underpinning for allowing third parties to have

standing to challenge statutes that are facially overbroad and impermissibly sweep protected speech within their purview. State v. Immelt, 173 Wash. 2d 1, 8, 267 P.3d 305, 308 (2011).

2. This is also a matter affecting a significant public interest because anti-harassment restraining orders and orders of protection have a recognized stigma on the person against whom such an order is entered. Hough v. Stockbridge, 113 Wash. App. 532, 537, 54 P.3d 192, 194 (2002) rev'd on other grounds, 150 Wash. 2d 234, 76 P.3d 216 (2003). Placing such a stigma on persons exercising their free speech rights affects a significant public interest.

3. Finally, this is a matter affecting a significant public interest because lawmakers, judges, and citizens alike need guidance in what is permissible constitutionally protected free speech and what is constitutionally unprotected conduct. This Court has shown where persons have crossed the line and went beyond pure speech and their constitutionally unprotected conduct justified an anti-harassment order. This Court has yet to provide any example where a person stops short of engaging in constitutionally unprotected conduct and remains in the constitutionally protected free speech "safe harbor." Here, the trial court and Division II concluded Massingham crossed the line into constitutionally unprotected conduct because of "what was said, how it

was said, where it was said, the frequency of it." *See* Commissioner's Ruling, Pg. 8.

V. STATEMENT OF THE CASE

On May 9, 2012, the Lewis County Superior Court entered a Permanent Parenting Plan finding Massingham and Thiel co-custodians of their two minor children and awarding them joint decision making.[7] Shortly after the ink was dry on the Permanent Parenting Plan, Respondent Thiel filed a notice of intended relocation and a petition and declaration for an anti-harassment order for protection against Massingham.[8] In her anti-harassment petition and declaration, Thiel alleged numerous acts Massingham engaged in.[9] Nearly all these allegations were not found against Massingham at the anti-harassment trial by a superior court commissioner, either because the allegations were unproven, or did not constitute harassment because Massingham had a legitimate purpose for his actions, or did not constitute a course of conduct toward Thiel as required for issuance of an anti-harassment order.[10]

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[7] *See* ¶¶ 3.12 and 4.2 of the Permanent Parenting Plan attached to Petitioner's Motion to Modify Commissioner's Ruling.
[8] CP 20-22.
[9] *Id.*
[10] RP Jul. 30, 2012 at 94-99.

Despite this, the trial court commissioner did enter an anti-harassment order against Massingham because the commissioner found Massingham was "[c]ontinuing to tell [Thiel] 'Kenny Gray' to her face."[11]

The trial court commissioner's findings were based upon Thiel's testimony that Massingham had uttered the words "Kenny Gray" to Thiel on two occasions. First, in April, 2012, at a fastpitch softball tournament in a public park, she put up a chair behind the backstop to watch the parties' daughter warm up for pitching when Massingham stood in front of her and turned around and said Kenny Gray's name loud enough for people within 20 feet to hear.[12] Massingham is one of the fastpitch team coaches, and his coaching duties typically include warming up the pitchers.[13] Second, on May 13, 2012, at another softball tournament for the parties' daughter at a public park, Thiel and her mother were walking by the ballfield when Massingham allegedly called out Kenny Gray's name "loud enough for us to hear as we were walking by."[14] Thiel herself did not verify it was Massingham who uttered the words "Kenny Gray"; rather it was Thiel's mom who turned around to verify it was Massingham.[15] Massingham denied he uttered the words and had

[11] RP Jul. 30, 2012 at 99.
[12] RP Jul. 30, 2012 at 25-27.
[13] RP Jul. 30, 2012 at 46, 70.
[14] RP Jul. 20, 2012 at 18, 20-21.
[15] RP Jul. 20, 2012 at 18, 20-21.

corroborating witnesses, but the trial court commissioner stated "two incidences... I find the testimony regarding him telling her 'Kenny Gray, Kenny Gray' and standing in front of her and turning around and saying 'Kenny Gray,' is very credible."[16]

Based on these two instances where Massingham uttered the words "Kenny Gray" in public parks, the trial court commissioner concluded Massingham engaged in unlawful harassment, as defined by RCW 10.14.020, and granted a six month anti-harassment Order for Protection. The Order for Protection restrained Massingham from contacting Thiel for six months, "except in regards to the children by text or email," and from going within 500 feet of Thiel's residence. It also required the parties to exchange their children at a service station or other neutral location.[17]

On August 9, 2012, Massingham filed a Motion for Revision of the commissioner's order on the basis that it violated his constitutional right to free speech.[18] The superior court judge denied Massingham's revision motion at a hearing on September 7, 2012, and concluded "this is not constitutionally protected speech...[because] it was meant to vex and

[16] RP Jul. 30, 2012 at 95.
[17] CP 221.
[18] CP 233-40.

annoy and harass and it achieved that purpose."[19] The trial judge further rejected Massingahm's argument that it was pure constitutionally protected speech based on Massingham's subjective intent behind uttering the words Kenny Gray, the way he said it, and the number of time he said it.

> So to argue that this is constitutionally protected when it was clear that the intent of the comments, the intent of the speech given what was said, how it was said, where it was said, the frequency of it, it's clear to me that this was harassment.[20]

Massingham timely appealed both the Order for Protection and the Order Denying Motion for Revision.[21] On appeal, Massingham argued (1) that the anti-harassment statutes were not a proper vehicle to regulate constitutionally protected speech because RCW 10.14.020(1) clearly defined "course of conduct" as not including constitutionally protected conduct, including constitutionally protected speech; (2) that the anti-harassment statute, RCW 10.14.020(2), as applied was unconstitutionally vague and overbroad; and (3) that the anti-harassment order was not narrowly tailored to serve a compelling state interest.

The Judges in Division II never even got a chance to read or hear Massingham's constitutional challenge. Under RAP 18.4, Division II's

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[19] RRp Sept 7, 2012 at 12-13.
[20] *Id.*
[21] CP 255-62.

Commissioner set the appeal to be considered on his own motion on the merits.[22] On June 26, 2013, the Division II's Commissioner granted his own motion on the merits and affirmed the trial court's order.[23] Massingham then filed a Motion to Modify Commissioner's Ruling that was considered by Division II's judges. On August 29, 2013, Division II's judges did consider Massingham's Motion to Modify Commissioner's Ruling, but denied it.[24] Massingham now petitions for review by this Court.

VI. ARGUMENT

A. Standards of Review.

This Court reviews issues regarding statutory construction *de novo*.[25] Constitutional challenges are questions of law and are also reviewed *de novo*.[26] The specific restrictions contained in an anti-harassment order are reviewed for an abuse of discretion.[27]

Motions on the merits to affirm a trial court's decision will only be granted "if the appeal or any part thereof is determined to be clearly without merit."[28] In making these determinations, an appellate court

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[22] Ruling at 2.
[23] *Id.*
[24] Order at 1.
[25] *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001).
[26] *Weden v. San Juan County*, 135 Wn.2d 678, 693, 958 P.2d 273 (1998).
[27] *Trummel v. Mitchell*, 156 Wn.2d 653, 668, 131 P.3d 305 (2006).
[28] RAP 18.4(e)(1)

> will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court or administrative agency.[29]

B. The Anti-Harassment Order was Based on Massingham's Constitutionally Protected Speech, not on his Conduct.

Anti-harassment orders of protection cannot be based on constitutionally protected activity.[30] Moreover, they cannot infringe on free speech rights.[31] Despite this, Division II affirmed the trial court's anti-harassment order of protection against Massingham because of something he said. The trial judge and Division II found his speech was constitutionally unprotected because "what was said, how it was said, where it was said, the frequency of it." This ruling ignores our state and federal constitutions and the cases construing them.

There are a few limited areas where speech is not constitutionally protected: obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.[32] Mr. Massingham's saying "Kenny Gray" does not fall into any of these unprotected areas. It is, therefore, constitutionally protected speech. His speech, standing alone, cannot constitute unlawful harassment and cannot give rise to a valid anti-harassment order.

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[29] RAP 18.4(e)(1)
[30] RCW 10.14.020(1)
[31] RCW 10.14.190
[32] *In re Marriage of Suggs*, 152 Wn.2d 74, 80, 93 P.3d 161 (2004).

The trial judge justified the trial court commissioner's conclusions Massingham engaged in unlawful harassment because "it was meant to vex and annoy and harass and it achieved that purpose."[33] Here, the trial court erred. "There is no categorical 'harassment exception' to the First Amendment's free speech clause."[34] Words must do more than offend, cause indignation, or anger the addressee to lose the protection of the First Amendment.[35] "It is firmly settled that under our Constitution the *public* expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[36] As a general matter, the U.S. Supreme Court has indicated that in public debate, American citizens must tolerate insulting, and even outrageous, speech.[37] Even if Thiel was insulted, offended, and outraged by Massingham's public references to Kenny Gray, this would not move Massingham's speech outside the realm of constitutional protection.

To be sure, this Court has specifically held speech that might inflict injury to a person's mental health is constitutionally protected. In *State v. Williams*,[38] it struck down a criminal anti-harassment statute as

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[33] RRp Sept 7, 2012 at 12-13.
[34] *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d. Cir. 2001).
[35] *Hammond v. Adkisson*, 536 F.2d 237, 239 (8th Cir. 1976).
[36] *Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969) (emphasis added).
[37] *Schenck, v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 383, 117 S.Ct. 855 (1997).
[38] 144 Wn.2d 197, 26 P.3d 890 (2001)

facially overbroad because words that might inflict injury to a person's mental health were not "true threats" and were constitutionally protected.[39] Similarly, here, words that might annoy, vex or harass Thiel are constitutionally protected unless they are a threat to commit bodily injury, which they clearly were not.

Because Masssingham's words were constitutionally protected; they could not constitute unlawful harassment if the anti-harrasment statutes in RCW ch. 10.14 were read literally. RCW 10.14.020(2) provides that "unlawful harassment" means a knowing and willful course of conduct directed "at a specific person," which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. RCW 10.14.020(1) defines "course of conduct" to mean a pattern of conduct, composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. "Course of conduct" includes, in addition to any other form of communication, contact, or conduct, the sending of electronic communication.[40] Constitutionally protected activity is not included within the meaning of "course of conduct."[41] Moreover, RCW 10.14.190 makes clear that "nothing in this chapter shall be construed to infringe

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[39] 144 Wn.2d at 212, 26 P.3d at 898
[40] RCW 10.14.020(1).
[41] *Id.*

upon any constitutionally protected rights including, but not limited to, freedom of speech..."

This case is distinguishable from *Trummel v. Mitchell* because it involved only speech in a public forum and not widespread predatory conduct. The record in *Trummel* contained substantial evidence relating to Trummel's "predatory conduct," including yelling and screaming at staff and residents, disrupting meetings, spying on residents, and threatening residents with criminal consequences if they failed to meet with him.[42] This Court stated that the "trial court's focus was on Trummel's behavior and not the message in his newsletters" in affirming the anti-harassment order.[43]

Trummel additionally argued that he had a constitutional right to provide tenants with hate-filled newsletters even if they did not want them.[44] However, this Court noted that the U.S. Supreme Court in *Rowan*[45] "categorically" rejected the idea that a person has a right under the Constitution to send unwanted material *into the home of another*, additionally citing the intense privacy values associated with the home in American law, and that the home is the principal exception to the general

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[42] *Id.* at 666.
[43] *Id.* at 666-67.
[44] *Id.* at 667.
[45] *Rowan v. U.S. Post Office Dep't.*, 397 U.S. 728, 737, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970).

rule that the burden is on the viewer to avert his or her eyes from unwanted speech.[46] This Court concluded in *Trummel* that the trial court had "properly focused on the speaker's conduct and not the message, consistent with the constitution, to properly issue an anti-harassment order," finding substantial evidence in the record documenting Trummel's conduct, which included yelling and screaming at staff and residents, threatening residents, spying on residents, and disrupting meetings.[47]

Here, the anti-harassment order was based on Massingham's speech, not his conduct. The commissioner who issued the order stated plainly on the record that she was issuing the order for Massingham's ""[c]ontinuing to tell [Thiel] 'Kenny Gray' to her face."[48]

Unlike in *Trummel*, there were no findings that Massingham had engaged in threatening, spying, or disruptive behavior. In one of the two instances, there is testimony about where Massingham stood and that he turned around to face Thiel. In the other instance, Thiel herself was walking near the ballfield where Massingham already was. First, a single instance of standing and turning is not a course of conduct separate and apart from the speech itself no more than moving one's lips is conduct.

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[46] *Trummel*, 156 Wn.2d at 667.
[47] *Id.* at 668.
[48] RP Jul. 30, 2012 at 99.

Finally, it is undisputed that the two occurrences of Massingham saying "Kenny Gray" took place in a public park. The U.S. Supreme Court long ago recognized that members of the public retain strong free speech rights when they venture into public streets and parks, "which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'"[49] These two occurrences were not intrusions into the privacy of Thiel's home such as might warrant a protection order. Instead, being in a public park, the burden was on Thiel to "avert her eyes" from unwanted speech.

Division II's Commissioner stretched beyond recognition the captive audience exception to free speech. Division II's Commissioner found, without any authority in the record, Thiel was the children's custodian and was duty-bound to remain in the public park with the parties' daughter.[50] In actuality both Massingham and Thiel are co-custodians of their children.[51] Moreover, there was no evidence at the trial that it was even Thiel's residential time with the children when these incidents occurred. Finally, there is no legal authority that such a situation constitutes a captive audience such that normal constitutional

[49] *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469, 129 S. Ct. 1125, 1132, 172 L. Ed. 2d 853 (2009) (citations omitted).
[50] Commissioner's Ruling, Pg. 8
[51] Motion to Modify Commissioner's Ruling, Appendix A, ¶3.12

protections do not apply. This is even more problematic given the procedural posture that this was decided by a motion on the merits where the law must be settled before a motion to affirm may be granted.

The anti-harassment order was improperly based on constitutionally protected speech taking place in a public park. It was therefore issued in error, and this Court should accept review and reverse.

C. The Anti-Harassment Statute, RCW 10.14.020(2), is Unconstitutionally Vague and Overbroad as Applied.

RCW 9A.46.020(1)(a)(iv) stated in relevant part that a person is guilty of unlawful harassment if, without lawful authority, the person knowingly threatens "Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical *or mental* health or safety;[52] (Emphasis added).

The Washington Supreme Court struck down the mental health provision in RCW 9A.46.020(1)(a)(iv) because it was facially unconstitutionally overbroad as it restricted constitutionally protected speech:

> RCW 9A.46.020(1)(a)(iv) is unconstitutionally vague to the extent "mental health" is referenced...Moreover, use of the term is unconstitutionally overbroad insofar as *it restricts constitutionally protected speech*, subjecting it to a strict scrutiny test it fails to meet. We therefore find the term

[52] RCW 9A.46.020(1)(a)(i)-(iv).

> "mental health" in RCW 9A.46.020(1)(a)(iv) renders the statute both unconstitutionally vague and overbroad.[53]

Applying RCW ch. 10.14 in the way it was applied here suffers from the same constitutional infirmity, and it underscores that pure speech like Mr. Massingham's is constitutionally protected speech. RCW 10.14.020 defines unlawful harassment as

> a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner...[54]

In RCW 10.14.020, use of the language "seriously alarms, annoys, harasses, or is detrimental to such person" and "substantial emotional distress" are as unconstitutionally vague and overbroad as the mental health language in RCW 9A.46.020(1)(a)(iv) because the public is left to speculate as to what speech or conduct is prohibited. Terms such as "substantial emotional distress" and "seriously alarms, annoys, harasses or is detrimental" are no more definite than was the term "mental health" in RCW 9A.46.020(1)(a)(iv). RCW 10.14.020 is, therefore, constitutionally vague. It is also constitutionally overbroad if this Court fails to give effect to the clause in RCW 10.14.020(2) that excludes

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[53] *State v. Williams*, 144 Wn.2d 197, 212, 26 P.3d 890, 898 (2001).
[54] RCW 10.14.020(2).

constitutionally protected activity from the "course of conduct" definition.

D. The Anti-Harassment Order was not narrowly Tailored to Serve a Compelling State Interest.

The trial court erred in fashioning a remedy bearing no relation to Mr. Massingham's speech. "Although a trial court has broad authority in [the unlawful harassment] area, the authority is not limitless."[55] The relief granted "must be warranted by the facts."[56] A court may not properly grant relief to a person beyond the nexus of the relationship between the parties "*and the harm.*"[57] Here, the purported offending conduct was stating Kenny Gray's name in a public forum (specifically, a park). The remedy, however, was to punish Mr. Massingham for uttering these words by prohibiting him from picking his children up and dropping them off at Ms. Thiel's home. It also prohibited him from going back to her home to allow their children to retrieve sports gear, homework, or other belongings that they might have forgotten when they were moving between households. There is no nexus between Massingham's speech and the conduct proscribed by the trial court's order.

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[55] *Trummel v. Mitchell*, 156 Wn. 2d 653, 668, 131 P.3d 305, 313 (2006).
[56] *Trummel*, 156 Wn.2d at 668.
[57] *Trummel*, at 669.

1. The Trial Court Cannot Use The Unlawful Harassment Statute To Impose Time, Manner Or Location Restrictions on Pure Speech.

Courts cannot use the unlawful harassment statutes to impose time, manner or place restrictions on pure speech. Washington's unlawful harassment statutes create a cause of action for "unlawful harassment."[58] To prove unlawful harassment, a party must show a knowing and willful "course of conduct."[59] "Constitutionally protected activity" is excluded from the statutory definition for course of conduct.[60] ("Constitutionally protected activity is not included within the meaning of 'course of conduct.'"). In other words, a court must find more than constitutionally protected activity such as pure speech or picketing in order to validly issue an anti-harassment order.[61]

There is little doubt courts can impose time, manner and location restrictions on purely constitutionally protected activity under the proper circumstances using avenues other than the unlawful harassment statutes. For instance, in *Bering v. SHARE*,[62] the Washington Supreme Court affirmed a time, manner and location injunction sought by a physician

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[58] RCW 10.14.040.
[59] RCW 10.14.020(2).
[60] RCW 10.14.020(1).
[61] RCW 10.14.090; and *State v. Noah*, 103 Wn. App. 29, 38-39, 9 P.3d 858, 865 (2000) ("Noah contends that the lawful exercise of his right of free speech and right to picket are excluded from the definition of "course of conduct," and cannot be the basis for an antiharassment order. He is absolutely correct.")
[62] 106 Wn.2d 212, 721 P.2d 918 (1986).

against anti-abortion protestors who were doing nothing more than exercising free speech and picketing in front of the medical building where petitioner worked.[63] In other words, the activists were engaging solely in constitutionally protected activity. The physician in *Bering*, however, did not use the anti-harassment statutes to achieve the court imposed restrictions; rather, the physician sought an injunction. That may be the proper method to regulate Mr. Massingham's speech. The unlawful harassment statutes are improper to achieve this end.

Mr. Massingham engaged in nothing more than constitutionally protected activity, and the unlawful harassment statutes were not the proper vehicle to place any time, manner or location restrictions on Mr. Massingham's speech. If Ms. Thiel had sought an injunction, the granting of which does not require a course of harassing conduct that does not include constitutionally protected activity, then the trial court may have issued an injunction placing restrictions on the time, place and manner of Mr. Massingham's conduct, but it would have had to comply with the strict scrutiny analysis mandated when a court infringes upon a fundamental constitutional right.[64]

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[63] *Bering*, 106 Wn.2d at 216.

[64] *Bering* at 222 ("Such restrictions are valid if they 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'")

Courts may also impose narrowly tailored, content-neutral time, manner, and location restrictions on free speech in cases where a person engages in activity beyond what is constitutionally protected. For instance, in *Noah*, a psychotherapist successfully obtained an anti-harassment order against Noah who not only picketed in front of the psychotherapist's office, but also contacted the psychotherapist's landlord, placed an unsolicited phone call into the psychotherapist's residence, and attempted to find out where the psychotherapist's ill father was hospitalized.[65] The appellate court agreed with Noah that his pure speech and picketing activities were constitutionally protected and could not form the basis for an anti-harassment order.[66] His other activity, like Trummel's, was not constitutionally protected and allowed the trial court to conclude there was unlawful harassment. Once the trial court could properly make this finding, it could then issue a valid anti-harassment order that incidentally placed narrowly tailored content-neutral restrictions on Noah's constitutionally protected activity.[67]

Even if this Court were to view this case as a time, manner and location restriction case, the remedy the trial court fashioned is still unconstitutional. The restrictions are valid only if they "are content-

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[65] *Noah*, 103 Wn. App. at 39.
[66] *Id.* at 38-39.
[67] *Id* at 41-44.

neutral, are narrowly tailored to serve a compelling government interest, and leave open ample alternative channels of communication."[68] Here, even if we were to assume that this state has a compelling interest in keeping Mr. Massingham from uttering the words "Ken Gray" or "Kenny Gray" while Ms. Thiel is within earshot, the trial court's remedy still has no nexus to the speech and was, therefore, not narrowly tailored to achieve the state's objective. The remedy does nothing to prevent Mr. Massingham from uttering the words "Ken Gray" at a ballpark, a public forum, or within earshot of Ms. Thiel. All it does is prohibit Mr. Massingham from coming within 500 feet of Ms. Thiel's residence. There was no allegation or evidence that Mr. Massingham ever mentioned Ken Gray while he was at Ms. Thiel's residence.

VII. Conclusion

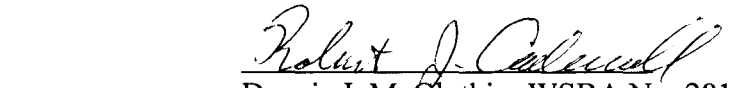
What is pure constitutionally protected speech? This Court has an excellent opportunity to answer this question. Here, Massingham uttered the words "Kenny Gray" in a public park on two occasions. The trial court commissioner concluded this was unlawful harassment. The trial judge similarly did not revise the commissioner's ruling because what

[68] *Bering v. SHARE*, 106 Wash. 2d 212, 222, 721 P.2d 918, 925 (1986) (citations omitted); and *Noah*, at 41 (recognizing that "[u]nder the Washington Constitution, the standard is stricter: a 'compelling' not 'significant' government interest is required to uphold a statute regulating time, place or manner.")

was said, how it was said and the frequency with which it was said. At this point, it still sounds like constitutionally protected free speech. Division II made the matter worse by stretching the captive audience exception beyond its constitutional limits and without any legal authority to affirm the trial court's erroneous rulings on the appellate court's own sua sponte motion on the merits. Because this Petition involves constitutional issues and conflicts with decisions rendered by this Court, and other appellate courts as well as significantly affects public interests in free speech and preventing a chilling effect on other citizens' free speech right, review should be accepted and this case reversed and remanded to the trial court for entry of an order dismissing Thiel's anti-harassment petition.

DATED this 4th day of October, 2013.

OLYMPIC LAW GROUP, PLLP



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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the below written date, I caused delivery of a true copy of Amended Petition for Review to the following:

Office of the Clerk State of Washington Court of Appeals, Div. II 950 Broadway Suite 300 Tacoma, WA 98402-4427	[ ] Facsimile [ ] Hand Delivery [X] U.S. Mail [ ] Email
Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	[ ] Facsimile [ ] Hand Delivery [X] U.S. Mail [ ] Email
S. Tye Menser Megan Bartley Morgan Hill, P.C. 2102 C. Carriage Drive SW Olympia, WA 98502	[ ] Facsimile [ ] Hand Delivery [X] U.S. Mail [X] Email

Signed this 4th day of October, 2013 Seattle, Washington.

My H. Nguyen
Legal Assistant

APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN RE THE MARRIAGE OF: BRIAN MASSINGHAM, Appellant, and KAREN THIEL, Respondent.	No. 43926-3-II RULING GRANTING COURT'S MOTION ON THE MERITS

Brian Massingham appeals the trial court's antiharassment order dated July 30, 2012.[1] He argues that: (1) the antiharassment order was based improperly on constitutionally protected free speech; (2) the antiharassment statute, RCW 10.14.020(2), is unconstitutionally vague and overbroad as applied;

[1] The order expired on January 30, 2013, by its own terms. CP 221. Thiel did not seek its renewal. This appeal is not moot, however, because Massingham seeks "to cleanse [his] record of the continuing stigma of the antiharassment order." *Hough v. Stockbridge*, 113 Wn. App. 532, 537, 54 P.3d 192 (2002), *rev'd on other grounds*, 150 Wn.2d 234 (2003).

and (3) the antiharassment order was not narrowly tailored to serve a compelling state interest. This court set his appeal to be considered as a motion on the merits under RAP 18.14. Concluding that Massignham's appeal is clearly without merit, this court grants the motion on the merits to affirm the trial court's order.

FACTS AND PROCEDURAL HISTORY

On June 21, 2012, Karen Thiel filed a petition and declaration for an order for protection against her ex-husband, Massingham. The petition was based on various alleged acts by Massingham, including: (1) kicking in a window at Thiel's home; (2) entering Thiel's home without her permission; (3) attempting to back his truck into Thiel; (4) repeatedly driving past Thiel's home; (5) intercepting and monitoring Thiel's personal phone calls, text messages, and voicemails; (6) contacting Thiel's employer, insurance company, and landlord; (7) speaking with third parties about an alleged affair between Thiel and their daughter's pitching coach, Kenny Gray; (8) standing in front of Thiel during a fastpitch softball tournament in April 2012, turning around, and continuing to say Kenny Gray's name to her face; (9) screaming at Thiel's father and yelling out inappropriate sexual comments about Thiel during a fastpitch softball tournament on May 13, 2012.

On July 30, 2012, a superior court commissioner heard testimony concerning the above incidents. Regarding the April 2012 incident at the fastpitch softball tournament, Thiel testified that she was putting her chair up behind the backstop to watch her daughter warm up for pitching when

Massingham came over and stood in front of her. She testified that Massingham kept turning around and saying things about Kenny Gray so that she could not watch her daughter. Thiel indicated that the other mothers on the team, as well as the 13-year-old catcher, were present during this, and that Massingham was saying Kenny Gray's name loud enough for people within 20 feet to hear. Thiel also stated that there was room for Massingham to stand somewhere other than right in front of her. Regarding the May 13, 2012 incident, Thiel testified that she was walking by the dugout with her mother when Massingham yelled out "Kenny Gray" from about 50 feet away. Report of Proceedings (RP) Jul. 30, 2012 at 20-21, 35. Thiel indicated that all the teen girls and their parents were present.

In discussing her reasons for wanting the antiharassment order, Thiel testified that she did not feel safe without the order because Massingham was unable to communicate cordially in a safe manner and it was not healthy for her children to see this behavior. In addition, Thiel indicated that, under the parenting plan, any communication between Thiel and Massingham was supposed to occur via text or phone calls.

Massingham testified that he believed Thiel had an affair with Gray, which he told to multiple third parties. He denied, however, screaming out or mentioning the name "Kenny Gray" at the softball games. RP Jul. 30, 2012 at 46.

After hearing all the testimony, the commissioner found that the majority of the incidents alleged in Thiel's petition were either unproven (allegations 1, 2, and 3) or did not constitute harassment because Massingham had a legitimate

purpose for his actions (allegations 4 and 6) or his behavior did not constitute a course of conduct (allegation 9).[2] The commissioner stated that Massingham's conduct in yelling at Thiel's father was "annoying and probably harassing," but that it did not constituent a "course of conduct" because it only occurred once. RP Jul. 30, 2012 at 97. The commissioner found, however, that Massingham's conduct in "[c]ontinuing to tell her 'Kenny Gray' to her face" was unlawful harassment. RP Jul. 30, 2012 at 99. Specifically, the commissioner stated:

> [T]he main reason why I'm granting this[] [is] . . . I find the testimony regarding him telling her "Kenny Gray, Kenny Gray," and standing in front of her and turning around and saying "Kenny Gray," is very credible.
>
> . . . .
>
> . . . I find that he just continues to want to poke, poke, poke, poke, poke, to the point where it's now – it's not reasonable. . . . I do find that he's doing that to annoy her. He can't quite seem to get over that emotional part of the dissolution.

RP July 30, 2012 at 95-97. In finding that Massingham had committed unlawful harassment as defined in RCW 10.14.080, the commissioner entered an order restraining Massingham from contacting Thiel for six months "except in regards to the children by text or email," restraining him from going within 500 feet of Thiel's residence, and requiring the parents to exchange the children at a service station or other neutral location. Clerk's Papers (CP) at 221. The order did not restrain Massingham from saying the name "Kenny Gray."

On August 9, 2012, Massingham filed a motion for revision of the commissioner's order on the basis that it violated his constitutional right to free

[2] The commissioner did not address allegations 5 and 7.

speech. On September 7, 2012, the superior court judge denied his motion, ruling as follows:

> I find that this is not constitutionally protected speech. Simply because it is in a public place does not mean a person can say whatever they want. The words themselves, just stating a name doesn't sound like much. It's not a big deal. But given the context here, clearly it was meant to vex and annoy and harass and it achieved that purpose. That's clearly what was going on here.
>
> The course of conduct, this was not constitutionally protected speech. There is ample evidence in the record to support the Commissioner's decision here. . . .
>
> So to argue that this is constitutionally protected when it was clear that the intent of the comments, the intent of the speech, given what was said, how it was said, where it was said, the frequency of it, it's clear to me that this was harassment, that the order for protection against harassment was appropriate.

RP Sept. 7, 2012 at 12-13. The judge also found that the remedy was appropriate, as it imposed a limited and narrow restriction on contact.

Massingham appeals.

ANALYSIS

A motion on the merits to affirm will be granted if "the appeal or any part thereof is determined to be clearly without merit." RAP 18.14(e)(1). An appeal is "clearly without merit" if the issues on review:

> (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court.

RAP 18.14(e)(1).

Massingham challenges the issuance and scope of the commissioner's antiharassment order, as well as the superior court's denial of his motion for revision. All commissioner rulings are subject to revision by the superior court. *State v. Ramer*, 151 Wn.2d 106, 113, 86 P.3d 132 (2004); RCW 2.24.050. On

revision, the superior court reviews both the commissioner's findings of fact and conclusions of law de novo based upon the evidence and issues presented to the commissioner. *Ramer*, 151 Wn.2d at 113. Once the superior court makes a decision on revision, the appeal is from the superior court's decision, not the commissioner's. *Ramer*, 151 Wn.2d at 113.

Basis for Antiharassment Order

First, Massingham argues that the antiharassment order is improperly based on constitutionally protected free speech. He asserts that he had a constitutional right to say the name "Kenny Gray" in the public parks where the softball games were being played and, therefore, it could not form the basis for an antiharassment order.

When reviewing the issuance of an antiharassment order, this court reviews any contested findings for substantial evidence, questions of law de novo, and the issuance and scope of the order for abuse of discretion. *Trummel v. Mitchell*, 156 Wn.2d 653, 668-69, 131 P.3d 305 (2006). Since the evidence is undisputed in this case, the superior court's determination of unlawful harassment is reviewed de novo.

RCW 10.14.040 allows an individual to petition the trial court for an order for protection in cases of unlawful harassment. Under RCW 10.14.080, the trial court shall issue a civil antiharassment protection order if it finds by a preponderance of the evidence that unlawful harassment exists. "Unlawful harassment" is defined by statute as follows:

> [A] knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental

> to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner, or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child.

RCW 10.14.020(2).

Under RCW 10.14.020(1), "course of conduct" means "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose." Constitutionally protected free speech is not included within the meaning of "course of conduct." RCW 10.14.020(1).

"The government has a strong and legitimate interest in preventing the harassment of individuals." *State v. Alexander*, 76 Wn. App. 830, 837, 888 P.2d 175, *review denied*, 127 Wn.2d 1001 (1995) (quoting *State v. Dyson*, 74 Wn. App. 237, 244, 872 P.2d 1115 (1994)). Washington's civil antiharassment statute specifically was enacted due to the increasing number of incidents of serious, personal harassment through repeated invasions of a person's privacy by acts and words showing a pattern of harassment designed to coerce, intimidate, or humiliate the victim. RCW 10.14.010. Although harassment may take the form of speech, it is not necessarily a communication warranting free speech protection. *Alexander*, 76 Wn. App. at 837; *Dyson*, 74 Wn. App. at 244.

Massingham's argument that the antiharassment order was improperly based on constitutionally protected free speech is clearly without merit. Massingham suggests the order was not based on him merely saying the name "Kenny Gray" in a public park, and that speech in public parks is especially protected. But the location of the softball games in public parks was

happenstance, unrelated to the role of parks as locations for speech. And Thiel was not free to leave and avoid Massingham's speech because she had a duty, as the custodial parent, to remain at the softball games. Further, the order was not based merely on him saying the name Kenny Gray. As the superior court noted, it was "how it was said, where it was said, the frequency of it." RP Sept. 7, 2012 at 13. Because the "course of conduct" concerned Massingham's behavior and not the content of his speech, the finding of unlawful harassment was not improperly based on constitutionally protected free speech. *See Trummel*, 156 Wn.2d at 668; *State v. Noah*, 103 Wn. App. 29, 42, 9 P.3d 858 (2000), *review denied by Calof v. Casebeer*, 143 Wn.2d 1014, 22 P.3d 802 (2001).

As-Applied Challenge

Second, Massingham argues that RCW 10.14.020(2) is unconstitutionally vague and overbroad as applied. He asserts that the statute's use of the language "substantial emotional distress" and "seriously alarms, annoys, harasses or is detrimental" would not give a reasonable person notice that the conduct found here is subject to an antiharassment order. He relies on *State v. Williams*, 144 Wn.2d 197, 212, 26 P.3d 890 (2001), which held that the statute defining "harassment", RCW 9A.46.020(1)(a)(iv), was unconstitutionally vague and overbroad to the extent that it criminalized conduct intended to harm another person's "mental health." His argument is clearly without merit, as the term "substantial emotional distress" is not as vague as "mental health" and that the

term "seriously alarms, annoys, harasses or is detrimental" is sufficient to put a person on notice of when his course of conduct becomes unlawful harassment.

Scope of Antiharassment Order

Finally, Massingham challenges the specific provisions of the antiharassment order. He argues that the order was not narrowly tailored to serve a compelling state interest because it did not limit Massingham from saying the name Kenny Gray and it was not a valid time, place, and manner restriction. But because the order has expired, those provisions have no current effect and this court cannot grant him any relief from the order. His appeal is moot in this respect.

Attorney Fees

Thiel seeks attorney fees and costs under RCW 26.09.140 and RAP 18.9(a). RAP 18.1(b) requires "[a]rgument and citation to authority" as necessary to inform the court of grounds for an award." *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998). RCW 26.09.140 does not provide a statutory basis for attorney fees because chapter 26.09 RCW governs dissolution proceedings, not civil harassment orders. RAP 18.9(a) permits this court to award attorney fees "when there are no debatable issues upon which reasonable minds could differ and when the appeal is so totally devoid of merit that there [is] no reasonable possibility of reversal." *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691, 732 P.2d 510 (1987). In determining whether an appeal is frivolous, the record should be reviewed in its entirety and any "doubts should be resolved in favor of the appellant." *Mahoney*, 107 Wn.2d at 692.

While Massingham's appeal is clearly without merit, it was not frivolous as it presented debatable issues upon which reasonable minds could differ.[3]

CONCLUSION

Massingham's appeal is clearly without merit under RAP 18.14(e)(1)(a). Accordingly, it is hereby

ORDERED that the motion on the merits to affirm is granted and the antiharassment order is affirmed. It is further hereby

ORDERED that Thiel's request for attorney fees and costs is denied.

DATED this 26th day of July, 2013.

Eric B Schmidt

Eric B. Schmidt
Court Commissioner

cc: Dennis J. McGlothin
Robert J. Cadranell
S. Tye Menser
Megan Bartley Rue
Hon. James Lawler
Hon. Tracy Loiacono Mitchell

[3] Because Thiel's request for attorney fees is denied, Massingham's objections to her financial declaration are overruled as moot.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN RE THE MARRIAGE OF:

BRIAN MASSINGHAM

Appellant,

and

KAREN THIEL,

Respondent.

No. 43926-3-II

ORDER GRANTING MOTION FOR EXTENSION OF TIME TO FILE A MOTION TO MODIFY AND ORDER DENYING MOTION TO MODIFY

APPELLANT filed a motion for extension of time to file a motion to modify and a motion to modify a Commissioner's ruling dated June 26, 2013, in the above-entitled matter. Following consideration, the court grants the motion for extension of time to file the motion to modify and denies the motion to modify. Accordingly, it is

SO ORDERED.

DATED this 29th day of August, 2013.

PANEL: Jj. Worswick, Quinn-Brintnall, Maxa

FOR THE COURT:

CHIEF JUDGE

cc:

Robert Joseph Cadranell, II
Dennis John McGlothin
Megan Kelly Bartley Rue
Samuel Tye Menser

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RCW 10.14.020
Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. "Course of conduct" includes, in addition to any other form of communication, contact, or conduct, the sending of an electronic communication, but does not include constitutionally protected free speech. Constitutionally protected activity is not included within the meaning of "course of conduct."

(2) "Unlawful harassment" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner, or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child.

[2011 c 307 § 2; 2001 c 260 § 2; 1999 c 27 § 4; 1995 c 127 § 1; 1987 c 280 § 2.]

Notes:

Reviser's note: The definitions in this section have been alphabetized pursuant to RCW 1.08.015(2)(k).

Findings -- Intent -- 2001 c 260: "The legislature finds that unlawful harassment directed at a child by a person under the age of eighteen is not acceptable and can have serious consequences. The legislature further finds that some interactions between minors, such as "schoolyard scuffles," though not to be condoned, may not rise to the level of unlawful harassment. It is the intent of the legislature that a protection order sought by the parent or guardian of a child as provided for in this chapter be available only when the alleged behavior of the person under the age of eighteen to be restrained rises to the level set forth in chapter 10.14 RCW." [2001 c 260 § 1.]

Intent -- 1999 c 27: See note following RCW 9A.46.020.