IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

CASE NO. 5D14-4362

Debra Lippens,

Appellant,

v.

Cheryl Powers O/B/O A.M.P-L.,

Appellee.

INITIAL BRIEF OF APPELLANT DEBRA LIPPENS

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STATEMENT OF THE CASE

This appeal arises from the misuse and misapplication of Section 784.048(2), Fla. Stat. (2014), a statute intended to protect people from domestic violence and stalking ("Protection Against Stalking Statute"). The Protection Against Stalking Statute provides that "A person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person commits the offense of stalking." *Id.* In order to meet the statutory definition of "harass," a person must "engage in a course of conduct directed at a specific person which causes substantial emotional distress to that person and serves no legitimate purpose." § 784.048 (1)(a), Fla. Stat. (2014). In the face of these stringent statutory requirements, the court granted Appellee the protective order based on scant evidence falling far below the requisite legal standard to sustain an injunction against stalking.

This Court should reverse the decision below enjoining Appellant from contacting 12 year-old A.M.P-L., whom she has co-parented with Appellee since birth, because there is no evidence to support that A.M.P-L is a victim of stalking. Appellee, Cheryl Powers ("Ms. Powers"), does not allege that Appellant, Debra Lippens (Ms. Lippens"), committed or threatened to commit violence against A.M.P-L. Nor is there evidence to support that Ms. Lippens harassed or intimidated A.M.P-L., or that she caused her, or reasonably could have caused her,

substantial emotional distress. The court below appears to have based its order solely on a conclusion that, absent a "paternity order," Ms. Lippens had no "legitimate right to visit with A.M.P-L.," (R. 66-67), the 12 year-old child who shares her last name, calls her "Momma" and who she has raised since birth with her spouse, Ms. Powers. Such a conclusion is contrary to law.

A.M.P-L., who considers the former couple her only parents since her birth more than 12 years ago, was conceived through reproductive technology with anonymous sperm and born after the couple entered a legally recognized civil union in Vermont. Indeed, the women attempted to secure their familial relationship to each other and their daughter in various ways, including entering a Vermont civil union prior to her birth, marrying each other in 2004, and giving their daughter a hyphenated last name to reflect her familial relationship to both women. Even though the couple's relationship deteriorated in 2007, Ms. Lippens continued to enjoy a parent-child relationship and regular visitation with A.M.P-L. until September 1, 2014, when Ms. Powers suddenly informed Ms. Lippens that A.M.P-L. allegedly no longer wished to see her. Ms. Lippens texted her daughter to say that she "didn't understand" but "would respect" such a decision. One month later, Ms. Lippens, anxious to resume visitation, sent a text to see if her daughter "was ready yet." After receiving a message from her spouse that she was not to contact A.M.P-L. until further notice, Ms. Lippens created an online legal

fund to help her raise awareness and money to fight for custody as a parent and spouse living in state which, at the time, discriminated against married same-sex couples. A few days after Ms. Powers learned that Ms. Lippens intended to file a petition for divorce and custody, she filed a petition for an injunction against stalking, the subject of this appeal.

At the hearing on Ms. Powers's petition, the court entered a Final Judgment of Injunction for Protection Against Stalking ("Order of Injunction") without allowing Ms. Lippens, who appeared *pro se*, to present a defense or submit evidence. The decision appears solely based on the court's conclusion that absent an order establishing parentage, Ms. Lippens lacked a "legitimate right to visit with A.M.P-L." In doing so, the court treated Ms. Lippens as a legal and *literal* stranger to her wife, Ms. Powers, and to the child they have co-parented for 12 years and turned a blind eye to the actual parent-child relationship existing between Ms. Lippens and A.M.P-L. Moreover, Ms. Powers' evidence never established the necessary showing of malice, threats or harassment; or that Lippens caused, or reasonably could have caused, A.M.P-L., who did not testify, substantial emotional distress. Rather, the evidence showed the contrary: that Ms. Lippens had a legitimate purpose for communicating with A.M.P-L. out of parental concern for her well-being. Similarly, Ms. Lippens's truthful, non-threatening statement—not malicious, threatening, or directed at a specific person—to raise money for legal

representation was justified by a legitimate purpose and is constitutionally protected expression.

This Court should reverse and vacate the injunction.

STATEMENT OF THE FACTS

Ms. Lippens and Ms. Powers are a legally married same-sex couple. (R. 63). Five years after their romantic relationship began, the Parties entered a Vermont civil union on July 19, 2002. (R.9, 60). The couple's efforts to have a child via Alternative Reproductive Technology (A.R.T.) with donor sperm culminated in Ms. Powers's pregnancy. (R. 60). The couple's daughter, A.M.P-L. was born on November 12, 2002. (R. 6). The couple gave the child a hyphenated last name at birth to reflect her familial relationship to both women,[1] (R. 48), whom A.M.P-L. calls "Mommy" and "Momma." In 2004, the women legally married each other in Massachusetts. (R. 63).

The couple broke up in May, 2007 but were unable to dissolve their marriage and seek an allocation of custody prior to January 6, 2015, when an injunction against the enforcement of unconstitutional laws barring the recognition of marriages between same-sex couples went into effect.[2] The couple nonetheless

[1] Although Ms. Powers misrepresented the child's last name on the petition underlying this appeal, she later admitted that the child shares Ms. Lippens's last name, as reflected on the child's birth certificate. (R. 48).

[2] On August 21, 2014, a federal court issued a preliminary injunction finding that

continued to co-parent A.M.P-L., with Ms. Lippens exercising regular and consistent visitation with A.M.P-L., including overnight visits (R. 52, 64), until September 1, 2014, when Ms. Powers told Ms. Lippens that A.M.P-L. did not want to see her. (R. 53).

Ms. Lippens initially complied with Ms. Powers's directive. She communicated only twice over the following month by text message, but otherwise did not see, or attempt to see, A.M.P-L. On October 6, 2014, Ms. Powers sent Ms. Lippens an email requesting that she not communicate with A.M.P-L. until further notice. (R. 56). On October 17, 2014, Ms. Powers learned that Ms. Lippens intended to file an action seeking an allocation of custody, (R. 57), prompting Powers to file this petition for protection against stalking three days later on October 20, 2014. (R. 11). A hearing was held November 3, 2015. (R. 46). Ms. Lippens appeared *pro se*.

Evidence Concerning First Incident of Alleged Stalking

At the hearing, Ms. Powers alleged that Ms. Lippens had embarked on a "campaign of stalking" A.M.P-L. beginning September 3, 2014. (R. 53). Ms.

"Florida's same-sex marriage provisions violate the Due Process and Equal Protection Clauses." *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1290 (N.D. Fla. 2014). This ruling went into effect on January 6, 2015. *See Brenner v. Armstrong*, 2014 U.S. App. LEXIS 24725, at *15 (11th Cir. Dec. 3, 2014) ("The stay of preliminary injunctions entered by the District Court expires at the end of the day on January 5, 2015"). Ms. Lippens filed a petition for dissolution and custody three days later, on January 9, 2015.

Powers testified that the first purported incident of stalking was that "Debbie sent a text to [A.M.P-L.]. Specifically, it said,

> *I heard your request from mommy not to text, call or visit. I don't understand it, but I will honor your wishes if that is what you want. Okay.*"

There was no evidence introduced that this text message caused A.M.P-L. emotional distress.

Evidence Concerning Second Incident of Alleged Stalking

Ms. Powers next described her finding, but not reading, a letter she suspected had been written by Ms. Lippens:

Q: Okay. And on September 19th, what happened?

A. On September 19th, I found a letter in my guest mailbox that appeared -- it was clearly in Debbie's handwriting, but it was purporting to be from a child, written in a child's handwriting to [A.M.P-L.] Pretending it was from a child named Devon that [A.M.P-L.] knows. That Debbie knows.

Q. At your guest house on your property?

A. Yeah. It was at my guest house which was a mailbox that is not even our home address. It's a guest house of mine. But it is where [A.M.P-L.] plays basketball. And so I suspect that the hope was [A.M.P-L.] would find it before I found it.

Q. Okay. And it purported to be written from another child, not from Debbie?

A. Not from Debbie.

Q. And what did you do with that?

A. It creeped me out and I shredded it immediately.

(R. 54-55).

There was no evidence introduced that A.M.P-L. knew about the existence of this letter or that it caused her emotional distress.

Evidence Concerning Third Incident of Alleged Stalking

Ms. Powers testified that:

Q. Okay. On October 2nd, what occurred?

A. Um, on October 2nd, Debbie sent another text to [A.M.P-L.] saying,

> *We'd like to see you. It's been a month of no contact. Are you ready?*"

(R. 55).

There was no evidence introduced that this text message caused A.M.P-L. emotional distress.

Evidence Concerning Fourth Incident of Alleged Stalking

Ms. Powers testified that on October 6, 2014, Ms. Lippens came to Ms. Powers's house "pressing to see A.M.P-L." Ms. Powers admitted that neither she nor A.M.P-L. spoke to Ms. Lippens, and that Ms. Lippens left without incident. (R. 56). There was no evidence introduced that A.M.P-L. knew that Ms. Lippens had dropped by or that her doing so caused emotional distress.

Evidence Concerning Final Incident of Alleged Stalking

On October 6, 2014, Ms. Powers sent Ms. Lippens an "official" request to stop communicating with A.M.P-L. (*Id.*). Thereafter, Ms. Powers testified that she learned that Ms. Lippens had created a website seeking funds to pay for her legal fees:

> Q. Okay. On October 17th, um, what did you learn?
>
> A. I learned that Debbie had posted, um, a campaign on a site called Fundly to raise funds to – for a -- I don't know what you call it. I'm sorry. She wanted –
>
> Q. A legal proceeding?
>
> A. A legal proceeding where she wanted custody of [A.M.P-L.].

(R. 57).

Ms. Powers introduced a copy of the Fundly site as evidence of the alleged "stalking." The site described a goal of raising $5,000 because

> *The status of Same-Sex marriage in Florida is changing…The time has come for me to pursue divorce & legal custody of my non-bio daughter. I need your help….*

(R. 17) (ellipsis in original).

Ms. Powers claimed that this fundraising effort, ("Lippens Legal Fund") which Ms. Lippens explained was only shared as "a private Facebook posting," (R. 67), was evidence of stalking because it contained a picture of A.M.P-L. and disclosed that A.M.P-L. has same-sex parents. (R. 58). There was no evidence

introduced that A.M.P-L. knew about this post—which had been "removed within a day upon request" (R. 67)—or that it caused A.M.P-L. emotional distress.

The Court's Basis for Issuing the Injunction

The court permitted Ms. Lippens to ask only one question of Ms. Powers on cross-examination—"what is A.M.P-L.'s legal name?" (R. 62)—before it truncated the hearing and issued the injunction. The court did not allow Ms. Lippens to give an opening statement, testify (other than in response to the court's questions), or call witnesses. Instead, the court asked Ms. Lippens whether she had "ever gone to court [] to have the issue of paternity resolved?" (R. 63), before concluding that:

> So I doubt the State of Florida would recognize the validity of your marriage. But the, the problem is bigger than this case….And it can be resolved in this case, and I will issue the injunction and I'm going to issue it for a year and, and, and require all those things be imposed at –.

(R. 66) (ellipsis in original).

Ms. Lippens attempted to interject a defense, or otherwise object to the issuance of the injunction prior to her presentation of argument or evidence, but the court would not allow it:

> MS. LIPPENS: Sir, can I not --
>
> THE COURT: Let, let, let me finish. Let me finish.
>
> MS. LIPPENS: Yes, sir.

> THE COURT: Okay. That, that, that you not attempt to contact A.M.P-L. and you not attempt to contact Ms. Powers and that you not post anything of the likeness of A.M.P-L, um, on, on, on the Internet or any social media because I agree with what she has indicated….

(*Id.*)

Although the court had already issued the injunction, Ms. Lippens explained to the judge that she had taken A.M.P-L.'s picture down from her website "within a day upon request" and that it "was a private Facebook posting" shared only with her friends (R. 67) and asked if her attorney, who was unable to attend the hearing, could be present. The court denied her request and warned her that it would hold her in contempt of court if she attempted to have contact with A.M.P-L. (R. 68).

In issuing the injunction—which exposes Ms. Lippens to criminal sanctions if she so much as sends her daughter a birthday card this year—the court below criticized Ms. Lippens's web posting of a photograph of her daughter on the ground that disclosure of the child's family structure, and specifically the fact that A.M.P-L has lesbian mothers, would invite disapproval and discrimination:

> Even though it appears that you all took steps together, that there, there are a lot of bad people in, in the world and there are people who would treat [A.M.P-L.] unfairly just because they receive information that she was born to two females and I don't think you, you would like that. And so, to the extent that posting photographs of her, um, as a product of, um, two females, I think is -- it does a disservice to her and you need to stop that until you can get it resolved.

(R. 66).

The court then suggested that Ms. Lippens file a paternity action, improperly linking the stalking action to whether Ms. Lippens could produce a court order determining parentage:

> What you ought to do is you ought to go and hire you an, an attorney and you ought to file an action for paternity. In that case, somebody could conceivably decide that you have a legitimate right to visit with [A.M.P-L.]…

(R. 66-67).

The court signed a form order, the Final Judgment for Protection Against Stalking, providing, in relevant part, as follows:

> Respondent shall have no contact with Petitioner. Respondent shall not directly or indirectly contact Petitioner in person, by mail, e-mail, fax, telephone, through another person, or in any other manner. Further, Respondent shall not contact or have any third party contact anyone connected with Petitioner's employment or school to inquire about Petitioner or to send any messages to Petitioner. Unless otherwise provided herein, **Respondent shall not go to, in, or within 500 feet of:** Petitioner's current residence, …, or any residence to which Petitioner may move; Petitioner's current or any subsequent place of employment, …, or place where Petitioner attends school, ….

(R.24) (emphasis in original).

The order expires November 13, 2015. The court did not make findings of fact or otherwise reveal the basis for its ruling. Ms. Lippens filed a Motion for Rehearing on November 18, 2014, preserving the issues raised in this appeal. (R.29). The court summarily denied the motion. (R. 32). This appeal timely followed.

SUMMARY OF THE ARGUMENT

The meager evidence offered by Ms. Powers was legally insufficient to support an injunction against stalking. Although the trial court treated Ms. Lippens as if she were a legal and literal stranger to A.M.P-L., in fact, the two share a close familial relationship with each other. There is no evidence of maliciousness or that Ms. Lippens's actions caused, or reasonably could have caused, A.M.P-L. substantial emotional distress. Lippens's two brief text messages to A.M.P-L. were non-threatening, supportive, and reasonable in light of their parent-child relationship. Ms. Lippens's use of a photograph of her daughter in connection with a web post—limited to her friends—seeking help to pay for legal fees also is legally insufficient to support a stalking injunction.

As a child of two spouses born during a civil union, who was conceived through the use of reproductive technology, A.M.P-L. is the child of both women under Florida statutes regardless of biological connection. Moreover, even putting legal parentage aside, Ms. Lippens is at the very least a step-parent, and has functioned as A.M.P-L.'s parent since birth. Given their familial relationship, Ms. Lippens had a legitimate purpose in communicating with her daughter—who shares her last name, calls her "Momma" and has always known her as a parent. A judicial determination of parentage is *not* required in order for an adult who shares

a familial relationship with a child to have a legitimate purpose in communicating with that child.

Likewise, Ms. Lippens's web post cannot support the injunction because she had a legitimate purpose in seeking assistance in paying for her legal fees via social media and, in any event, such communications are protected speech beyond the reach of the statute and fail to meet the stringent statutory requirements for stalking.

At its heart, this case is an example of the misuse and misapplication of the Statute for Protection Against Stalking, an important tool to protect people from fear and abuse, but which was employed here to alienate a child from one of her parents and to gain advantage over a spouse in a family law matter.[3]

STANDARD OF REVIEW

An appellate court reviews an injunction for stalking to determine whether it is supported by "competent, substantial evidence." *McMath v. Biernacki*, 776 So. 2d 1039, 1041 (Fla. 1st DCA 2001). "When evaluating whether competent,

[3] *See* Florida Senate Interim Report 2011-127 (January 2011) ("Although in general the orders play an important role in helping to protect individuals from harm, legal scholarship notes that misuse of orders of protection against violence does occur through the filing of false petitions. For example, … a person who is not truly a victim of violence, or who does not have reasonable cause to believe that he or she is in imminent danger of becoming a victim of violence, may file a petition in order to harass the respondent or to gain an advantage over the respondent in a related family law matter, such as a divorce or child custody proceeding.") (available at http://www.flsenate.gov/UserContent/Session/2011/Publications/InterimReports/pdf/2011-127ju.pdf)

substantial evidence supports a trial court's ruling, "'[l]egal sufficiency . . . as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.'" *Brilhart v. Brilhart ex rel. S.L.B.*, 116 So. 3d 617, 619 (Fla. 2d DCA 2013) (alterations in original) (quoting *Tibbs v. State*, 397 So. 2d 1120, 1123 (Fla. 1981)).

ARGUMENT AND AUTHORITY

I. The Evidence is Insufficient to Support an Injunction for Protection Against Stalking.

A person commits the act of stalking by "willfully, maliciously, and repeatedly follow[ing] harass[ing], or cyberstalk[ing] another person . . . .". *See* § 784.048(2), Fla. Stat. (2014). "'Harass' means to engage in a course of conduct directed at a specific person which causes substantial emotional distress to that person and serves no legitimate purpose." *Id*. § 784.048(1)(a). "Each incident of stalking must be proven by competent, substantial evidence to support an injunction against stalking." *Touhey v. Seda*, 133 So. 3d 1203, 1204 (Fla. 2d DCA 2014) (citing *Goudy v. Duquette*, 112 So. 3d 716, 717 (Fla. 2d DCA 2013)). As this Court recently set out in *Laserinko v. Gerhardt*, 154 So. 3d 520, 521 (Fla. 5th DCA 2015), "[i]n determining whether each incident of harassment causing 'substantial emotional distress' has been established to support a finding of stalking, "courts use a reasonable person standard, not a subjective standard." (quoting *Slack v. Kling*, 959 So. 2d 425, 426 (Fla. 2d DCA 2007) (citing *Ravitch v.*

Whelan, 851 So. 2d 271, 273 (Fla. 5th DCA 2003)). The evidence below is woefully insufficient to support an injunction for protection against stalking.

A. Allegations Concerning a Letter Purportedly Written by Ms. Lippens Cannot Plausibly Support an Incident of Stalking Where There is No Evidence as to the Letter's Substance.

Where there is no evidence as to the substance of a letter referenced by Ms. Powers, it cannot form the basis of an incident of stalking. *See*, *e.g., Brilhart v. Brilhart ex rel. S.L.B.*, 116 So. 3d 617, 619 (Fla. 2d DCA 2013) (finding injunction was not supported by competent, substantial evidence where it was based on hearsay about a letter allegedly written by daughter alleging abuse by mother, but where the daughter did not testify and the letter was not admitted into evidence); *Poindexter v. Springer*, 898 So. 2d 204, 207 (Fla. 2d DCA 2005) (finding that it could not rely on allegations concerning an allegedly threatening letter where "[t]he letter was not presented as evidence and is not in our record. Without a record or an adequately developed transcript describing what was contained in the letter, and without a finding by the trial court, there is no way for this court to determine" whether letter was threatening "in the literal sense or whether that is simply her interpretation").

Ms. Powers testified about a letter purportedly written by Ms. Lippens to A.M.P-L. However, she did not testify that this alleged letter was threatening. Nor did Ms. Powers offer testimony or evidence as to how this alleged letter was

threatening or otherwise constitutes harassment. Indeed, she appears to admit that she never even read the letter where she testified that "she shredded it immediately" and did not testify as to its substance in any way. (R. 56).

The testimony of Ms. Powers is not "competent and substantial" evidence to show that this letter meets the definition of stalking, let alone that Ms. Lippens even wrote the letter. Indeed, Ms. Powers contradicted herself by testifying both that it was "clearly in Debbie's handwriting" while also acknowledging that it was "written in a child's handwriting." (R.54-55). Ms. Lippens was not provided the opportunity to testify about the letter, or the fact that she had not written it. In any event, without testimony as to its substance, the letter cannot plausibly support an incident of "stalking." *Poindexter*, 898 So. 2d at 207; *Brilhart* 116 So. 3d at 619.

B. The Evidence is Insufficient to Establish that Ms. Lippens's Two Text Messages and Visit to Ms. Powers's Home Meet the Statutory Requirement For Injunctive Relief for Protection Against Stalking

Neither of Ms. Lippens's text messages was malicious and nothing about them reasonably could have caused substantial emotional distress, nor did Ms. Powers offer any evidence that such distress occurred. Ms. Lippens sent only two brief texts. The first gently acknowledged that she had heard from Ms. Powers that her daughter did not wish to see her, and expressed respect for her daughter's

decision.[4] The second, a month later, asked simply and respectfully whether her daughter was ready to resume visitation. There is nothing malicious about these messages, which is an essential element to establish stalking. *See Touhey*, 133 So. 3d at 1204 (finding that respondent's actions did not constitute stalking where contact was not malicious); *Ravitch,* 851 So. 2d at 273 (reversing injunction because the evidence did not "suggest that any of the emails or phone messages were threatening, hostile or abusive."). To the contrary, the messages on their face were the loving, supportive, and understanding communications of a parent.

There also was no evidence whatsoever that these messages "cause[d] substantial emotional distress." *Touhey*, 133 So. 3d at 1204. Indeed, there was no testimony that these messages ever upset A.M.P-L. or that anyone even told Ms. Lippens after the first text that it was unwelcome. Nor would it be reasonable to find that a teenager in A.M.P-L.'s position would have been substantially emotionally distressed by receiving these messages from her "Momma," who had reared her from birth and who had, until recently, enjoyed regular visitation. *See id.* (finding "a reasonable person would not suffer 'substantial emotional distress' as a result of Mr. Touhey visiting once and calling twice to inquire about Mr.

[4] There is no evidence in the record to indicate whether Ms. Powers' statement to Ms. Lippens about their daughter's wishes was, in fact, true. Given the benign nature of Ms. Lippens' communication attempts, the court more reasonably could have concluded that the evidence presented a classic case of parental alienation attempts by Ms. Powers against Ms. Lippens. Sadly, the court did not recognize this.

Seda's whereabouts."); *see also Goudy*, 112 So. 3d at 717 (father's telephone call to son's teacher that "he wasn't willing to accept [her decisions] anymore" held not to "meet the statutory requirements for even a single act of harassment" because "a reasonable person would not have suffered substantial emotional distress as a result of the conversation, however one-sided or hostile it might have been."); *Slack v. Kling*, 959 So. 2d 425, 426 (Fla. 2nd DCA 2007) (finding that "nothing in the record demonstrates any basis for finding that a reasonable person would suffer 'substantial emotional distress' from these two phone messages" demanding that appellee stay away from appellant's wife).

Additionally, the text messages constitute insufficient evidence to support a stalking injunction for the independent reason that an incident of stalking cannot rest upon communication that serves a legitimate purpose. *See Goudy*, 112 So. 3d at 717 (Fla. 2d DCA 2013) (evidence insufficient to support finding of harassment where respondent had a legitimate purpose for contacting petitioner to address respondent's daughter's participation in a dance competition); *Alter v. Paquette*, 98 So. 3d 218, 220 (Fla. 2d DCA 2012) (evidence insufficient to support stalking where respondent had a legitimate purpose for contacting petitioner to seek repayment of a loan). Here, Ms. Lippens had a legitimate purpose in communicating with A.M.P-L.—first, to acknowledge having received a purported

message from her daughter about canceling upcoming visits, and then a month later to see if her daughter was interested in resuming regular visitation.

Ms. Lippens need not prove that she is A.M.P-L.'s mother or step-mother to have a legitimate reason to send these two text messages, because her history of familial interactions with A.M.P-L[5] is sufficient in itself to demonstrate that her conduct was reasonable. Nevertheless, because Ms. Lippens is a member of A.M.P-L.'s family with an interest in her welfare and a history of exercising visitation, she clearly had a legitimate purpose in sending these messages. Further, the fact that Ms. Lippens is actually the legal parent to A.M.P-L. under the laws of Vermont (the state in which Ms. Lippens and Ms. Powers entered their civil

[5] Courts have recognized that a parent's liberty interests in autonomy and familial association are not limited to genetic parents. *See*, *e.g.*, *Prince v. Massachusetts*, 321 U.S. 158 (1944) (aunt and legal guardian enjoy parental autonomy rights), and transcend the traditional family structure of married, biological, or adoptive parents); *Michael H. v. Gerald D.*, 491 U.S. 110, 124 n.3 (1989) (plurality) ("The family unit accorded traditional respect in our society . . . includes the household of unmarried parents and their children."); *Moore v. City of E. Cleveland*, 431 U.S. 494, 504-05 (1977) (recognizing that constitutional protections for familial relationships are not limited to biological or adoptive parents); *Wooley v. City of Baton Rouge*, 211 F.3d 913, 921-22 n.38 (5th Cir. 2000) (noting that the familial expectations giving rise to constitutional protection may arise between an unrelated adult and child through the "'intimacy of daily association' and the resulting emotional attachments," and those relationships may enjoy due process guarantees even if not sanctioned by state law) (citing *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977)).

union),[6] Massachusetts (where the couple married), and Florida (where they reside)[7] renders the injunction even more absurd. A.M.P-L. shares Ms. Lippens's last name, calls her "Momma," was raised by her since birth, and has always considered her to be a parent. Whereas A.M.P-L. and Ms. Lippens share a profound and vital familial relationship, Ms. Lippens reasonable efforts to maintain that relationship and to ensure that A.M.P-L. did not feel abandoned by her served legitimate purposes.

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[6] Under Vermont law, parties to a civil union enjoy the same rights as those of a married couple with respect to a child of whom either became the natural parent during the term of the civil union and a child born by artificial insemination in either a marriage or a civil union is deemed the child of the spouse regardless of a biological connection. VT. STAT. ANN. tit. 15, § 1204 (2014); *see also* VT. STAT. ANN. tit. 15, § 308(4) (2014) (applying the presumption of parentage if "the child is born while the alleged parents are legally married to each other"); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 970 (Vt. 2006) (finding that the former civil union partner of the biological mother of a child born during the women's civil union was a parent because "[i]f Janet had been Lisa's husband, these factors would make Janet the parent of the child born from the artificial insemination. Because of the equality of treatment of partners in civil unions, the same result applies to Lisa.") (citations omitted).

[7] Massachusetts law also provides that the same-sex spouse or domestic partner of a woman who gives birth is a legal parent to the child. *Hunter v. Rose*, 975 N.E.2d 857 (Mass. 2012) (birth mother's domestic partner, was a parent in Massachusetts to a child born through assisted reproductive technology). Florida similarly recognizes that children born during a marriage are irrebuttably presumed to be the child of both parents. *See* § 742.11(1), Fla. Stat. (2014) ("any child born within wedlock who has been conceived by the means of artificial or in vitro insemination is irrebuttably presumed to be the child of the husband and wife, provided that both husband and wife have consented in writing to the artificial or in vitro insemination.").

Additionally, Ms. Lippens' visit to Ms. Powers's home to ask to see A.M.P-L. is legally insufficient to constitute an incident of stalking where there was no evidence that A.M.P-L. even knew that Ms. Lippens had stopped by, let alone that this had caused emotional distress. *See Goudy*, 112 So. 3d 716, 717 (Fla. 2d DCA 2013). Even if the act of stopping by and asking to visit could be cited as an "incident," for all of the foregoing reasons related to the familial relationship between Ms. Lippens and A.M.P-L., Ms. Lippens had a legitimate purpose in doing so.

II. The Evidence is Insufficient to Establish that the Lippens Legal Fund Post Meets the Statutory Requirement to Order Injunctive Relief For Cyberstalking.

In order to sustain the finding that Ms. Lippens's web posting on social media to seek financial help with legal fees constituted cyberstalking sufficient to grant an injunction of protection, there must be competent, sufficient evidence that it was part of "a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose." § 784.048(1)(d), Fla. Stat. (2014). "'Course of conduct' means a pattern of conduct composed of a series of acts over a period of time, however short, which evidences a continuity of purpose. The term does not include constitutionally

protected activity such as picketing or other organized protests." *Id*. § 784.048(1)(b).

The evidence regarding Ms. Lippens's fundraising effort is one sentence taken from the front page on the Lippens Legal Fund ("The status of Same-Sex marriage in Florida is changing…The time has come for me to pursue divorce & legal custody of my non-bio daughter. I need your help…") (R.17) (ellipses in original) and Ms. Power's testimony, elicited by her attorney, as follows:

> Q. With regard to this internet proceeding, what is she actually stating about your daughter and her private life?
>
> A. She's stating, um, how she was conceived. Um --
>
> Q. Did she indicate that she was going to send --that you guys were in a same-sex relationship?
>
> A. She does.
>
> Q. Does she indicate she's looking to have custody of her?
>
> A. Yes, she is.
>
> Q. Okay. Are you concerned about the backlash that might be --
>
> A. Yes, I was.
>
> Q. -- brought upon [A.M.P-L.] personally?
>
> * * *
>
> I am concerned because of the nature of the information. I'm concerned for [A.M.P-L.] -- I don't want my child to be bullied. The nature of the information is very sensitive. It is about, um, homosexuality in a state that is very, very sensitive about that subject. And I think it opens her up for bullying and potential hate crimes.

(R. 58-59).

First, Ms. Lippens's single posting on the internet is not legally sufficient to support an injunction against stalking; the statements contained in the posting were not directed at a specific person; they are truthful, non-threatening, protected speech; and Ms. Lippens had a legitimate purpose—to raise funds for her efforts to seek a divorce and custody of her daughter. "[A] single incident composed of multiple actions is not a course of conduct." *Goudy*, 112 So. 3d at 717 (citing *Smith v. Melcher*, 975 So. 2d 500, 502-03 (Fla. 2d DCA 2007); *Poindexter v. Springer*, 898 So. 2d 204, 207 (Fla. 2d DCA 2005)); *see also Levy v. Jacobs*, 69 So. 3d 403, 405 (Fla. 4th DCA 2011) (interpreting stalking statute's predecessor statute to find that "[m]ultiple acts stemming from a single incident do not constitute 'repeat violence' under section 784.046 where those acts were not separated by time or distance"). Further, Ms. Lippens's single post cannot rise to the level of stalking, even if the post were reposted by different users, over which she had no control. *See generally, Poindexter* 898 So. 2d at 207 (Fla. 2d DCA 2005) (three letters constituted only one act when mailed in one envelope).

Ms. Lippens's web post is insufficient to support a stalking injunction for the additional reason that there is no evidence that it was malicious. *Touhey*, 133 So. 3d at 1204; *Ravitch,* 851 So. 2d at 273. By contrast, her actions appear to be driven by financial need and a desire to receive support *from friends*. Indeed, the post was not directed at A.M.P-L. at all—nor any specific person for that matter—

so it certainly cannot support the issuance of a protective order. *See Chevaldina v. R.K./FL Mgmt*., 133 So. 3d 1086, 1091-92 (Fla. 3d DCA 2014) (dismissing injunction against stalking because "the appellees failed to introduce evidence that specific blog posts were being used 'to communicate, or to cause to be communicated, words, images, or language . . . directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose.'"). Finally, as was the case with the text messages, there is no evidence that the post caused A.M.P-L. (assuming she even knew about it, which is not reflected in the record) *any*, let alone substantial, emotional distress.

Second, to the extent the court relied upon a finding that a reasonable person would be substantially emotionally distressed based on a fear that some people might react badly to learning that A.M.P-L. was born via reproductive technology to a married same-sex couple, such a basis cannot be relied upon without violating Appellant and A.M.P-L's constitutional rights. Courts may not give effect to private bias and discrimination. *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

In *Palmore*, the Supreme Court overturned an appellate decision of this state depriving a mother in an interracial relationship of custody based on concerns about the child experiencing unfair treatment from third parties. 466 U.S. at 433. The Court had "little difficulty concluding" that "the reality of private biases and the possible injury they might inflict" were impermissible considerations for child

custody allocations. *Id*. Likewise, in *Jacoby v. Jacoby*, 763 So. 2d 410, 413 (Fla. 2d DCA 2000) a Florida intermediate appellate court reversed the grant of custody to father because it was based on the mother's sexual orientation, citing *Palmore* and explaining that "[t]he circuit courts reliance on perceived biases was an improper basis for a residential custody determination." *See also City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 448 (1985) (finding an equal protection violation where government's actions discriminated against the mentally disabled, explaining that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like.").

The lower court's injunctive order appears to be based solely on concerns that "there are people who would treat [A.M.P-L.] unfairly just because they receive information that she was born to two females." (R. 66). Here, just as in *Palmore*, "[t]he Constitution cannot control [] prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." 466 U.S. at 433. To restrict Ms. Lippens's ability to reveal on the web that she reared a child, now 12, with her spouse, and that they brought their child into their family through reproductive technology, based only on a fear that "there are people who would treat [A.M.P-L.] unfairly"

deprives her of equal protection without any constitutionally sufficient justification.

Ms. Lippens's web post is legally insufficient to warrant a stalking injunction for the additional reason that it was constitutionally protected expression. "[C]onstitutionally protected activity" is specifically exempted from the definition of stalking. *See* § 784.048(1)(b), Fla. Stat. (2014). Ms. Lippens's post served an educational purpose as well as a request for help to retain a lawyer,[8] as she both described and illustrated the predicament faced by same-sex spouses who could not seek court assistance in obtaining a divorce until recently. Her post communicated only truthful, non-threatening information and, therefore, is protected First Amendment activity that cannot form the basis for a protective order unless that order is narrowly tailored to promote a compelling governmental interest. *See Burroughs v. Corey*, 2015 U.S. Dist. LEXIS 19269, at *15-16 (M.D. Fla. Feb. 18, 2015) (distinguishing between regulation of speech based on its content requiring application of strict scrutiny and unprotected conduct, such as "advocacy intended and likely to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, true threats, and speech presenting a grave and imminent

[8] The proceeding below, in which the court precluded Ms. Lippens from presenting any meaningful defense to Ms. Powers' evidence, demonstrates the disadvantage unrepresented parties face when they lack the financial ability to obtain professional legal assistance.

threat…. [T]he restriction of these kinds of speech has never been thought to present a First Amendment problem.") (citations omitted).

Here, as set out above, Ms. Lippens had a legitimate purpose in creating the Lippens Legal Fund and the information it contained was truthful and does not fall into any of the categories of unprotected speech. As such, it cannot support the order for protection against stalking.

CONCLUSION

For the foregoing reasons, this Court should reverse the lower court decision and remand with directions to dissolve the injunction.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail on:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2) by using Times New Roman 14-point font.

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