Filed 2/16/05

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| ROBERT KRELL,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>FLEMING GRAY,<br><br>Defendant and Appellant. | B169593<br><br>(Los Angeles County<br>Super. Ct. No. BS083364) |

APPEAL from a judgment of the Superior Court of Los Angeles County, John Shook, Judge. Reversed with directions.

Law Office of Bruce Adelstein, Bruce Adelstein for Defendant and Appellant.

Los Angeles Unified School District Office of General Counsel, Katrina Campbell for Plaintiff and Respondent.

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Defendant and appellant Fleming Gray (Gray) appeals the trial court's order granting the petition of plaintiff and respondent Robert Krell (Krell) for an injunction under Code of Civil Procedure section 527.6[1] prohibiting Gray from contacting or harassing Krell; ordering Gray to stay at least 100 yards away from Krell and Krell's residence and workplace; and ordering Gray to remove Krell's name from all of Gray's flyers, signs and other written materials. Gray contends the trial court erred by issuing the injunction because the doctrines of res judicata and collateral estoppel barred Krell from obtaining relief in the instant action following denial of an injunction in favor of Krell's employer, the Los Angeles Unified School District (LAUSD); Gray's conduct as a matter of law did not constitute harassment under section 527.6; Gray's conduct involved a labor dispute and was protected under section 527.3; and issuance of the injunction violated Gray's federal and state constitutional rights of free speech.

We hold that the doctrines of res judicata and collateral estoppel do not bar the issuance of an injunction in this case; there was substantial evidence to support issuance of an injunction to prevent harassment under section 527.6; section 527.3 does not apply to the facts of this case; the injunction issued, to the extent it prohibits use of Krell's name in all signs and written materials, was an unconstitutional prior restraint on speech; and to the extent the injunction imposed a 100-yard distance restriction, the injunction was overbroad, given the absence of any justification in the record for such a restriction. We therefore reverse the judgment and remand the matter for the trial court to determine what injunctions should issue consistent with this opinion and specifically, what distance restriction, if any, would accomplish the desired result of preventing harassment without impeding Gray's constitutionally protected rights of expression.

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[1] All further statutory references are to the Code of Civil Procedure, unless stated otherwise.

## BACKGROUND

Gray was employed as a substitute teacher at Pacoima Middle School. Krell is the assistant principal at the school. In June 2002, Krell investigated an incident involving Gray and Mario C., a student in Gray's class, in which Gray purportedly refused to permit Mario to use the restroom during class. When the class period ended, Gray dismissed the other students but forced Mario to remain seated. Mario urinated in his pants. Students Susana G. and Javier S. corroborated Mario's version of the incident. Without discussing the matter with Gray, Krell and the school principal issued a reprimand (called a "notice of inadequate service") to Gray regarding the incident. Gray filed a grievance, and the LAUSD and Gray ultimately settled the matter by removing the reprimand from Gray's personnel record in exchange for Gray's agreement not to return to Pacoima Middle School for substitute work.

In October 2002, Gray sent Krell a letter objecting to the manner in which the investigation had been conducted and requesting "compensation of a suitable amount and a written apology." Krell did not agree to those requests. In January 2003, Gray began picketing and handing out leaflets on the public sidewalk in front of the school. He was quoted as saying, "You watch and see what one person can do to disrupt the system."

The picket sign and leaflets contained the following message: "Notice [¶] Sometimes, a racist can even be someone who says they care about your child's education. At this school, Mr. Krell appears to be more interested in encouraging children to play a lottery, 'Krell's Krush,' than what is important to learn. At the same time when children, such as Mario [C.], Susana [G.], Alex [R.], Cindy [G.], Jose [F.] attack their teacher with racist and sexist words, he is not concerned or interested. He even chooses to believe them when they tell lies about a teacher who they don't like because he demands good work and discipline. [¶] That attitude by the leadership of this school is one of the reasons for the lack of discipline here and why Pacoima students are one of the lowest in LAUSD for academic achievement. What is happening with your child? [¶] F.D. Gray." At about the same time, Krell began receiving daily threats by

telephone and mail such as "Die Krell Racist," "Watch your back, the windows or the street we see your car," and "I know what time you go to work, . . . has anybody tried to kill you before? Do you know what a gun shot sounds like?"

On January 30, 2003, the LAUSD filed a petition for an injunction under section 527.8,[2] seeking, on behalf of Krell, an LAUSD employee, an injunction prohibiting unlawful violence or threats of violence by Gray (the LAUSD action). The LAUSD's petition was supported by the declarations of Krell and other administrators at Pacoima Middle School expressing fear of potential injury as a result of Gray's actions. The petition was also supported by declarations from the parents of Mario C. and Susana G. stating that because of Gray's activities, Mario and Susana were afraid to go to school. After an evidentiary hearing in which the trial court found that Gray's conduct did not constitute unlawful violence or a credible threat of violence, the trial court (Commissioner Scott Gordon) denied the petition.[3]

On May 22, 2003, Krell filed a petition seeking an injunction under section 527.6, which allows a person who has suffered harassment to seek an injunction prohibiting further harassment. The trial court found that Gray's conduct constituted harassment under section 527.6 and granted the petition. The injunction provides that Gray "shall not contact, molest, harass, attack, strike, threaten, telephone, send any messages to, follow, stalk, destroy the personal property of, disturb the peace of, or keep under surveillance or block movements in public places or thoroughfares of [Krell]." The injunction also requires Gray to stay at least 100 yards away from Krell and Krell's residence and place of work, and requires Gray to "remove [Krell's] name from any and all of [Gray's] flyers,

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[2] We grant Gray's request to take judicial notice of the pleadings filed by the parties in the LAUSD's action and the reporter's transcript of proceedings for the March 12, 2003 hearing in that action.

[3] Section 527.8 provides that an employer may obtain injunctive relief to prevent unlawful violence or threat of violence directed at an employee at the workplace.

signs or any other written material." Gray appeals from the order granting the petition for an injunction.

## DISCUSSION

### A. Standard of Review

A trial court's decision to grant a permanent injunction rests within its sound discretion and will not be disturbed without a showing of a clear abuse of discretion. (*Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 912.) In determining whether the trial court abused its discretion when there are disputed factual issues, we review the trial court's findings under the substantial evidence standard, resolving all factual conflicts and questions of credibility in the respondent's favor and drawing all legitimate and reasonable inferences to uphold the judgment, so long as it is supported by evidence that is reasonable, credible and of solid value. (*Ibid; Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762 [determined "whether substantial evidence supports the requisite elements of willful harassment, as defined in Code of Civil Procedure section 527.6, . . ."].) In granting Krell's petition for an injunction, the trial court found that Gray's conduct constituted harassment as defined in section 527.6.[4] We review that finding under the substantial evidence test. We review de novo questions of law, including Gray's arguments that the doctrines of res judicata and collateral estoppel bar Krell from obtaining relief, that Gray's conduct was protected by section 527.3 and by the federal and state constitutions, and that the injunction was constitutionally overbroad. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.)

[4] Even if the finding is not express, we infer that the trial court impliedly made all necessary findings. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)

## B. Res Judicata and Collateral Estoppel

"'Res judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. Collateral estoppel, or issue preclusion, 'precludes relitigation of issues argued and decided in prior proceedings.' [Citation.]" (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896 (*Mycogen*).)[5]

We determine that neither res judicata nor collateral estoppel bars Krell's action under section 527.6 because the cause of action in this case and the cause of action in the LAUSD action are not the same, and there were no issues argued and decided in the LAUSD action that are dispositive in this case. Therefore, we do not have to determine for purposes of res judicata or collateral estoppel whether Krell was in privity with the LAUSD.

### *1. Claim preclusion*

"California law defines a 'cause of action' for purposes of the res judicata doctrine by analyzing the primary right at stake: '[A] "cause of action" is comprised of a "primary right" of the plaintiff, a corresponding "primary duty" of the defendant, and a wrongful act by the defendant constituting a breach of that duty." [Citation.]' . . . '" [I]f two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads

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[5] "While the term 'res judicata' has been used to encompass both claim preclusion and issue preclusion, we here use the term 'res judicata' only to refer to claim preclusion. As we have noted, 'The doctrine of collateral estoppel is one aspect of the concept of res judicata. In modern usage, however, the two terms have distinct meanings.' [Citation.]" (*Mycogen, supra,* 28 Cal.4th at pp. 896-897, fn. 7; see Garner, A Dictionary of Modern Legal Usage (1995 2d ed.)169 ["The best way of remembering these doctrines clearly is to view *collateral estoppel* as a miniature of *res judicata*: the former applies to issues, the latter to entire claims or lawsuits"].)

different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery. [Citations.]"' [Citation.] 'On the other hand, different primary rights may be violated by the same wrongful conduct.' [Citation.]" (*Le Parc Community Assn. v. Workers' Comp. Appeals Bd.* (2003) 110 Cal.App.4th 1161, 1170; see also *Mycogen, supra,* 28 Cal.4th at p. 904.)

The LAUSD action and the present action do not involve the same cause of action. The LAUSD action sought an injunction pursuant to section 527.8, which enables "[a]ny employer, whose employee has suffered unlawful violence or a credible threat of violence from any individual, that can reasonably be construed to be carried out or to have been carried out at the workplace," to "seek a temporary restraining order and an injunction on behalf of the employee prohibiting further unlawful violence or threats of violence by that individual." (§ 527.8, subd. (a).) In this action, Krell sought relief under section 527.6, which authorizes a "person who has suffered harassment" (§ 527.6, subd. (a)) to obtain an injunction against the harassing conduct. The primary right at issue in the LAUSD action was the right of an employer to maintain a workplace free of violence. The primary right at issue here is the right of an individual to enjoin conduct that "seriously alarms, annoys, or harasses" that individual. Thus, res judicata does not bar the present action.

*2. Issue preclusion*

In the LAUSD action, the trial court found Gray's conduct did not constitute unlawful violence or a credible threat of violence and denied injunctive relief. Gray contends that this ruling precludes Krell from obtaining relief in this case because "harassment," as defined in section 527.6, encompasses "unlawful violence" and "a credible threat of violence." He is incorrect.

Although the definition of "harassment" in section 527.6 overlaps, to some extent, with section 527.8, that definition includes conduct that is outside the scope of section 527.8. Section 527.6 defines "harassment" as follows: "'harassment' is unlawful

violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff." (§ 527.6, subd. (b).) Thus, in addition to "unlawful violence" and "a credible threat of violence," section 527.6's definition includes a third type of conduct – conduct "that seriously alarms, annoys or harasses." (§ 527.6, subd. (b).) It is this third type of conduct that is at issue in this case.

The ruling in the LAUSD action that Gray's conduct was neither violent nor a credible threat of violence did not preclude the trial court in this action from determining whether such conduct was harassing in the sense that it "seriously alarms, annoys or harasses." Moreover, the trial court in the LAUSD action expressly stated that it was not deciding whether Gray's conduct constituted harassment under section 527.6: "527.6 is between two individuals and is harassment between individuals. That is not at issue here. The reason I mention it is because there are three kinds of conduct that can be restrained under section 527.6. One is violent [*sic*], threat of violence, or harassment. [¶] Harassment being defined as any kind of conduct that does not have a legitimate purpose that would seriously annoy, harass, and cause substantial emotional distress. [¶] 527.8 which is the section that the legislation gave dealing with protecting a work environment in a school certainly is under 527.8 deals with [*sic*] – and it is interesting the conduct that it deals with specifically indicates any employer whose employee has suffered unlawful violence or credible threat of violence from any individual can seek an injunction. So there are two forums. The first of the two enjoin [*sic*] under 527.6 are there. The third is not." Because the trial court in the LAUSD action expressly excluded from its ruling any determination of whether Gray's conduct was harassment under section 527.6, the ruling in the LAUSD action does not collaterally estop Krell from adjudicating that issue here.

**C. Section 527.3**

Gray contends that his conduct constituted "peaceful picketing" arising out of a labor dispute and was protected by section 527.3.[6] Gray further contends that this issue previously was adjudicated in his favor in the LAUSD action and that Krell is collaterally estopped from arguing otherwise.

Section 527.3 provides in part: [¶] "(a) In order to promote the rights of workers to engage in concerted activities for the purpose of collective bargaining, picketing or other mutual aid or protection, and to prevent the evils which frequently occur when courts interfere with the normal processes of dispute resolution between employers and recognized employee organizations, the equity jurisdiction of the courts in cases involving or growing out of a labor dispute shall be no broader than as set forth in subdivision (b) of this section, and the provisions of subdivision (b) of this section shall be strictly construed in accordance with existing law governing labor disputes with the purpose of avoiding any unnecessary judicial interference in labor disputes. [¶] (b) The acts enumerated in this subdivision, whether performed singly or in concert, shall be legal, and no court nor any judge nor judges thereof, shall have jurisdiction to issue any restraining order or preliminary or permanent injunction which, in specific or general terms, prohibits any person or persons, whether singly or in concert, from doing any of the following: [¶] (1) Giving publicity to, and obtaining or communicating information regarding the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, or by any other method not involving fraud, violence or breach of the peace. [¶] (2) Peaceful picketing or patrolling involving any labor dispute, whether engaged in singly or in numbers. . . ."

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[6] Section 527.3 also is called the Moscone Act (*Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters* (1979) 25 Cal.3d 317, 322).

"Labor dispute" is defined in the statute as follows: "(i) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (a) between one or more employers or associations of employers and one or more employees or associations of employees; (b) between one or more employers or associations of employers and one or more employers or associations of employers; or (c) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' of 'persons participating or interested' therein (as defined in subparagraph (ii) ). [¶] (ii) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation. [¶] (iii) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment regardless of whether or not the disputants stand in the proximate relation of employer and employee." (§ 527.3, subd. (b)(4).)

The express purpose of the statute, consistent with its legislative history, is "to promote the rights of workers to engage in concerted activities for the purpose of collective bargaining, picketing or other mutual aid or protection, and to prevent the evils which frequently occur when courts interfere with the normal processes of dispute resolution between employers and recognized employee organizations . . . ." (§ 527.3, subd. (a); *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters,*

*supra,* 25 Cal.3d at p. 323.) Section 527.3 does not apply to this case, which involves an individual's alleged harassment of another individual and which does not involve Gray's union or any other recognized employee organization or any terms or conditions of employment. Gray's status as a former employee at the school where Krell is employed does not make this matter a labor dispute. Because the issue of whether section 527.3 applied to Gray's conduct was not argued and decided in Gray's favor in the LAUSD action, Krell is not collaterally estopped from arguing against the application of section 527.3 in this case.

**D. Section 527.6**

Section 527.6 provides in relevant part: "A person who has suffered harassment as defined in subdivision (b) may seek a temporary restraining order and an injunction prohibiting harassment as provided in this section." As noted above, subdivision (b) of the statute defines "harassment" as "unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff." (§ 527.6, subd. (b).)

"Course of conduct" is defined in section 527.6, subdivision (b)(3) as follows: "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an individual, making harassing telephone calls to an individual, or sending harassing correspondence to an individual by any means, including, but not limited to, the use of public or private mails, interoffice mail, fax, or computer e-mail. Constitutionally protected activity is not included within the meaning of 'course of conduct.'" That picketing and leafleting are not specifically mentioned as included within the term "course of conduct" does not mean they are excluded. "[T]he word 'including' in a statute is 'ordinarily a term of

enlargement rather than limitation.'" (*Hassan v. Merry American River Hospital* (2003) 31 Cal.4th 709, 717; see *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 639 ["The statutory definition of a thing as 'including' certain things does not necessarily place thereon a meaning limited to the inclusions"].) There is no reason why any particular form of communication cannot be a "course of conduct" constituting harassment.

To uphold an injunction under section 527.6, we must first conclude there is substantial evidence of harassment. We must then determine that the conduct was not constitutionally protected, and thus capable of being enjoined. Finally, we must determine whether the scope of the injunction is constitutional.

1. *Acts of Harassment*

The trial court found that Gray's conduct constituted harassment, as that term is defined by section 527.6. There is substantial evidence that Gray's conduct qualifies as such harassment so long as it was not constitutionally protected.

Krell testified that every day from January 21, 2003 until June 18, 2003, Gray carried a sign and handed out leaflets in front of the school stating that Krell was a racist and naming some of the school's students. Krell said that as a result of Gray's conduct and false accusations, Krell was being publicly humiliated and parents and students questioned his integrity, credibility and authority. Krell also testified that during this same time period, he received threatening messages with "obscene accusations" daily in writing and by telephone; that he had never previously received such threats; that Gray's conduct created a threatening atmosphere; and that Krell was fearful of his personal safety and the safety of the children attending the school.

Krell added that in early January he had suffered a heart problem due to stress, and that Gray's conduct caused Krell and others emotional distress. Krell's testimony was corroborated by that of the school's principal, David Gonzalez, who stated that Gray's conduct was threatening not only to Krell, but to other staff members who were afraid to

talk to or approach Gray. He noted that Gray was no longer an employee of LAUSD. He said that some students "are fearful to attend school as long as [Gray] remains in front of the school distributing flyers and displaying his sign, both of which contain confidential student information and derogatory information about Mr. Krell and myself." Mr. Gonzalez added that several parents have complained that Gray is harassing the children.

Here the claim is by Krell—not the school district. Nevertheless, adverse effects upon school children and teachers by the activities are components of that which "seriously alarms, annoys, or harasses" Krell under section 527.6. Moreover, some of Gray's activities, especially the disclosure of the names of the school students, not only "serves no legitimate purpose" under section 527.6, but may violate the rights of the students. (See *Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825.)[7]

2. *Not Constitutionally Protected*

The conduct here is not constitutionally protected and therefore is a "course of conduct" under section 527.6 that can constitute harassment. The First Amendment of the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . ." These rights are protected against state interference by the due process clause of the Fourteenth Amendment of the United States Constitution. (*De Jonge v. Oregon* (1937) 299 U.S. 353, 364.) Article I, section 2, subsection (a) of the California Constitution provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

[7] A school may be held responsible for its failure to protect students from the acts of third parties (see *Davis Next Friend La Shonda D. v. Monroe County Bd. of Educ.* (1999) 526 U.S. 629, 642 (*Davis*)).

The right to free speech, however, is not absolute. (*Near v. Minnesota* (1931) 283 U.S. 697, 708.) The United States Supreme Court has made clear that there are circumstances in which spoken words or other forms of communication are not constitutionally protected: "[S]ince words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets) . . . speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech." (*R.A.V. v. St. Paul* (1992) 505 U.S. 377, 389; see also *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 628 (*Roberts*) ["[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent – wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection"]; *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 486 ["in its scope, the First Amendment's right to freedom of speech is not unlimited"].) Our Supreme Court has pointed out that the free speech clause of article I of the California Constitution and its right to freedom of speech "are not only as broad and as great as the First Amendment's, they are even 'broader' and 'greater.'" (*Gerawan Farming, Inc. v. Lyons, supra,* 24 Cal.4th at p. 491.) The court noted, however, "that this general rule does not preclude the possibility of exception." (*Ibid.*) The freedom of speech clause in the California Constitution is, like the First Amendment to the United States Constitution, not absolute or unlimited. (See, e.g., *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 142-145 (*Aguilar*); *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 364; see also *Gerawan Farming, Inc. v. Lyons, supra,* 24 Cal.4th at p. 493 and at p. 493, fn. 4.)

Our Supreme Court also has noted, "[m]any crimes can consist solely of spoken words, such as soliciting a bribe (Pen. Code, § 653f), perjury (Pen. Code, § 118), or making a terrorist threat (Pen. Code, § 422). . . . '[T]he state may penalize threats, even

those consisting of pure speech, provided the relevant statute singles out for punishment threats falling outside the scope of First Amendment protection.' [Citations.] . . . . Civil wrongs also may consist solely of spoken words, such as slander and intentional infliction of emotional distress. A statute that is otherwise valid, and is not aimed at protected expression, does not conflict with the First Amendment simply because the statute can be violated by the use of spoken words or other expressive activity." (*Aguilar, supra,* 21 Cal.4th at p. 134.) If the expressive activity "cause[s] unique evils that government has a compelling interest to prevent" or "produce[s] special harms distinct from their communicative impact," the activity is not entitled to constitutional protection. (*Roberts, supra,* 468 U.S. at p. 628.)

We conclude that Gray's activities are not constitutionally protected. The state has expressed, by statute and in the California Constitution (§ 527.6; Cal. Const., art. I, § 1), a compelling interest in protecting individuals from harassing conduct. Section 527.6 is a statute enacted "to protect the individual's right to pursue safety, happiness and privacy as guaranteed by the California Constitution" (*Schraer v. Berkeley Property Owners' Association* (1989) 207 Cal.App.3d 719, 729-730) by proscribing harassing conduct. There was substantial evidence that Gray's expressive activities in the instant case constituted harassment under section 527.6, and that the activities did not stand alone, but constituted a "course of conduct" that "actually cause[d] substantial emotional distress to the plaintiff." (§ 527.6.)[8]

Moreover, because Gray's activities were conducted in the immediate vicinity of a school attended by children, they produced "special harms distinct from their communicative impact." (*Roberts, supra,* 468 U.S. at p. 628.) The United States Supreme Court has recognized that there must be an accommodation between First

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[8] Justice Werdegar, in a concurring opinion in *Aguilar*, said that the question "remains open" as to whether "harassing speech, standing alone, may constitute a violation of title VII [of the Civil Rights Act of 1962 (42 U.S.C. § 2000 et seq.)] consistent with the First Amendment." (*Aguilar, supra,* 21 Cal.4th at p. 154 (conc. opn. of Werdegar, J.).)

Amendment rights and the "'special characteristics of the school environment.'" (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 117 (*Grayned*) [quoting *Tinker v. Des Moines School District* (1969) 393 U.S. 503, 506].) No one has "an absolute constitutional right to use all parts of a school building *or its immediate environs* for his unlimited expressive purposes." (*Grayned, supra,* 408 U.S. at pp. 117-118, italics added.)

One of the objects of Gray's activities—Krell—is a school administrator charged with the safety, care and supervision of school children. The state has expressed a compelling interest, both by statute and in the California Constitution, in safeguarding school children and staff in the public schools. (Cal. Const., art. I, § 28 [all students and staff have the inalienable constitutional right to attend safe, secure, and peaceful public schools]; see Pen. Code, § 627 ["[It] is the intent of the Legislature in enacting this chapter to promote the safety and security of the public schools by restricting and conditioning the access of unauthorized persons to school campuses and to thereby implement the provisions of Section 28 of Article I of the California Constitution . . ."]; Educ. Code, § 32261 ["all pupils enrolled in the state public schools have the inalienable right to attend classes on campuses which are safe, secure, and peaceful"].)

In *Aguilar, supra,* 21 Cal.4th at pp. 144-145, the court noted that neither the United States Constitution nor the California Constitution protected harassment in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). Here we deal with harassment of a school employee in connection with his school activities. The United States Supreme Court has noted that "'[t]he ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace.'" (*Davis, supra,* 526 U.S. 629, 646.) Because there was substantial evidence that Gray's activities invaded the rights of Krell and the school children and conflicted with compelling state interests, the expressive activities at issue were not constitutionally protected and fell within the "course of conduct" that could be enjoined under section 527.6.

3. *Constitutionality of the Terms of the Injunction*

Gray contends the injunction granted is an unconstitutional prior restraint on speech because it seeks to prevent only speculative harm and is overly broad. Gray challenges two aspects of the injunction issued here – a distance restriction that prevents him from coming within 100 yards of the school where he was employed (and where Krell presently works), and a restriction that precludes Gray from naming Krell in any sign, flier, or other written materials.[9]

A prior restraint is an administrative or judicial order that restricts speech in advance of it being made. (*Alexander v. United States* (1993) 509 U.S. 544, 550.) Although not unconstitutional per se, a prior restraint bears "'a heavy presumption against its constitutional validity.' [Citations.]" (*Southeastern Promotions, Ltd. v. Conrad* (1975) 420 U.S. 546, 558.) Not all injunctions that may incidentally affect expression are prior restraints. (*Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753, 764, fn. 2 (*Madsen*); *Aguilar, supra,* 21 Cal.4th at p. 143.)

The injunction here falls within the definition of a "prior restraint" as a "'judicial order[ ] *forbidding* certain communications when issued in advance of the time that such communications are to occur.' [Citation.]" (*Alexander v. United States, supra,* 509 U.S. at p. 550, italics in original.) To the extent the injunction precludes Gray from continuing communications, it is a prior restraint. The question remains whether it is a *prohibited* prior restraint. A prior restraint on speech may be constitutional if "'it takes place under procedural safeguards designed to obviate the dangers of a censorship system.'" (*Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at p. 559.) For example, the United States Supreme Court repeatedly has held that an injunction prohibiting the repetition or continuation of specific expressive activity is not an unconstitutional prior

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[9] In the LAUSD action, Gray had suggested he was amenable to not including the names of students. But there is no indication that he ceased using the childrens' names.

restraint if the court issuing the injunction has found that specific expressive activity to be unlawful and if the injunction "is clear and sweeps no more broadly than necessary." (See, e.g., *Pittsburgh Press Co. v. Human Rel. Comm'n.* (1973) 413 U.S. 376, 390; see also *Aguilar*, *supra*, 21 Cal.4th at p. 140-141 [discussing prior restraints under federal Constitution].)

In *Aguilar, supra,* 21 Cal.4th at page 138, a plurality of the California Supreme Court stated that an injunction prohibiting the use of racial epithets in the workplace was not an unconstitutional prior restraint under either the federal or state Constitution, "because the order was issued only after the jury determined that defendants had engaged in employment discrimination, and the order simply precluded defendants from continuing their unlawful activity." In a concurring opinion, Justice Werdegar suggested that more than a judicial finding of unlawfulness was necessary to enjoin speech, and that other factors in that case weighed in favor of injunctive relief, including "a compelling state interest in eradicating racial discrimination"; the fact that the restrained speech occurred in the workplace, rather than a "traditional public forum," such as a street or public sidewalk; the presence of an "unwilling and captive audience"; and the availability of alternative speech venues for the speaker. (*Id.* at p. 166.)

The plurality and concurring opinions in *Aguilar* support the injunction here. In the instant case, the trial court found that the speech violated section 527.6, a statute enacted to protect a compelling state interest—an individual's state constitutionally protected right to safety, happiness and privacy. (*Schraer v. Berkeley Property Owners' Assn., supra,* 207 Cal.App.3d at pp. 729-730.). There is also a compelling state interest in ensuring the functioning of schools; the school children and their parents who had to come to the school were, in effect, an "unwilling and captive audience"; and there were alternative speech venues for the speaker—e.g. the Board of Education and other public fora, although such fora may not have been as effective in conveying the desired message.

We recognize that we may, in the words of Justice Werdegar in *Aguilar*, be "sailing into unchartered First Amendment waters." (*Aguilar, supra,* 21 Cal.4th at 148 (conc. opn. of Werdegar, J.).) We also note the dissents from the opinion in *Aguilar*, although, to some extent, they are based on the position that the record was not sufficient in that case for an injunction. (See *id.* at p. 170 (dis. opn. of Mosk, J.) and p. 180 (dis. opn. of Kennard, J.).) The issue of whether the reasoning set forth in *Aguilar* may be applied to uphold an injunction restraining speech as constitutionally valid if the speech has been adjudicated to violate a specific state statutory scheme, including defamatory speech, are issues that may be resolved by cases currently pending before both the United States Supreme Court and the California Supreme Court. (*Tory v. Cochran* (Oct. 29, 2003, B159437 [nonpub. opn.], cert. granted September 28, 2004, No. 03-1488, __ U.S. __ [125 S.Ct. 26]; *Balboa Island Village v. Lemen*, review granted December 15, 2004, S127904.) Nevertheless, consistent with the decision in *Aguilar*, we believe the trial court may enjoin an act that constitutes statutory harassment subject to injunctive relief, even though the injunction may be a prior restraint on speech.

If, as the court in *Aguilar, supra,* 21 Cal.4th 121 concludes, speech that creates a racially hostile or abusive work environment may be enjoined, it seems to us that certain harassing speech that interferes with the administration of schools and the children in those schools likewise may be curtailed. As noted above, the United States Supreme Court has stated that the schools may require even more protection than in the workplace. (*Davis, supra,* 526 U.S. at p. 646.) Although we deal here with a case brought by a school administrator against one lone picketer, the evidence shows that the picketing and handbills directed at Krell and the children upset the children and interfered with the educational process. Although there is no evidence that Gray sent the threatening and abusive messages, those messages began during the picketing activities. One could reasonably infer that Gray's activities had some relationship to or caused those messages. The evidence shows that the harassment of Krell, by affecting his ability to carry out his educational duties, has caused him, and is causing him, severe emotional distress. Thus,

injunctive relief pursuant to section 526.6, so long as properly framed, would not constitute an invalid prior restraint of speech.

This case is distinguishable from *Mosley, supra,* 408 U.S. 92 and *Grayned, supra,* 408 U.S. 104. In those cases, the Supreme Court held that ordinances prohibiting picketing within a prescribed area of a school, except for peaceful picketing involving a labor dispute, were invalid as violations of the equal protection clause in the 14th Amendment to the United States Constitution. Here, we are dealing with a finding of harassment under a statute that allows injunctive relief to prevent harassment. The statute here, unlike in *Mosley, supra,* 408 U.S. 92 and *Grayned, supra,* 408 U.S. 104, does not involve a blanket prohibition on all picketing near a school. Gray has raised no equal protection clause issue.

Although we have concluded that the acts in question are inconsistent with compelling state interests and can be subject to injunctive relief, that does not mean that the injunction itself is constitutional. The injunction must also be "sufficiently narrowly tailored to achieve the expressed governmental interests." (*Planned Parenthood Shasta-Diablo, Inc. v. Williams* (1995) 10 Cal.4th 1009, 1015; see also *Sable Communications of California, Inc. v. Federal Communications Commission* (1989) 492 U.S. 115, 126 ["The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest"].).) Thus, the injunction may place reasonable "time, place and manner" restrictions on expressive activity if it is necessary to further governmental interests. (See, e.g., *Mosley*, *supra*, 408 U.S. at p. 98 [noting the United States Supreme Court has "continually recognized that reasonable 'time, place and manner' regulations of picketing may be necessary to further significant governmental interests"].) Those "time, place and manner" restrictions are subject to intermediate scrutiny review and must be "content neutral." (*Los Angeles Alliance for Survival v. City of Los Angeles, supra,* 22 Cal.4th 352, 364-365 ["in order to qualify for intermediate scrutiny (i.e. time, place, and manner) review, a regulation must be 'content neutral'"].) To the extent the injunction

imposes a content-based restriction, however, it is reviewed under the strictest standard of scrutiny (*Madsen, supra*, 512 U.S. at p. 762; *Aguilar, supra,* 21 Cal.4th at p. 151, fn. 4 (conc. opn. of Werdegar, J.)), and "must be narrowly drawn to effectuate a compelling state interest" (*Perry Ed. Assn. v. Perry Local Educators' Assn.* (1983) 460 U.S. 37, 46).

As we have noted above, injunctive relief is appropriate here to the extent it prevents certain harassing acts. The injunction issued in the present case, however, contains a content restriction that cannot survive strict scrutiny and a distance restriction that is not supported by substantial evidence.

a. *Prohibition Against Naming*

The blanket prohibition against naming Krell in any of Gray's signs and written materials is not justified under the First Amendment to the United States Constitution or under the California Constitution. The prohibition encompasses much more than the use of Krell's name in a harassing context and precludes more than the mere continuation of past activity. Rather, it seeks to restrain all future uses of Krell's name by Gray. Such a blanket prohibition is overbroad, particularly since the injunctive relief could have been more narrowly tailored. To preclude the use of the name no matter how or in what manner it is used is an invalid prior restraint. (See *Perry Ed. Assn. v. Perry Local Educators' Assn., supra,* 460 U.S. at p. 46; *Aguilar, supra,* 21 Cal.4th at p. 155.)

b. *Distance Restriction*

Expressive activity on public sidewalks outside of schools "may be prohibited only if it 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others.'" (*Grayned, supra,* 408 U.S. at p 118, quoting *Tinker v. Des Moines School District, supra,* 393 U.S. at p. 513.) Recognizing the importance of public schools as both important community institutions as well as the focus of significant grievances, the United States Supreme Court has stated: "Without interfering with normal school activities, daytime picketing and handbilling on public grounds near a school can

effectively publicize those grievances to pedestrians, school visitors, and deliverymen, as well as to teachers, administrators, and students. Some picketing to that end will be quiet and peaceful, and will in no way disturb the normal functioning of the school. For example, it would be highly unusual if the classic expressive gesture of the solitary picket disrupts anything related to the school, at least on a public sidewalk open to pedestrians. On the other hand, a school could hardly tolerate boisterous demonstrators who drown out classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse." (*Grayned, supra,* 408 U.S. at pp. 118-119, fn. omitted.) Here, Gray was a was a "solitary picket," and there was no evidence that Gray's conduct materially disrupted classwork or involved significant physical disruption in or around the classroom.

Although there was evidence that Gray's conduct involved an invasion of Krell's right to be free from harassment and caused distress to students and parents, there is nothing in the record to indicate that the 100-yard distance restriction "burden[ed] no more speech than necessary" in order to preserve that right. (See *Madsen, supra,* 512 U.S. at p. 765; *Planned Parenthood Shasta-Diablo, Inc. v. Williams, supra,* 10 Cal.4th 1009.)[10] In *Madsen,* the United States Supreme Court struck down as constitutionally invalid a similar distance restriction prohibiting anti-abortion demonstrators from picketing within a 300-foot zone of the clinic staff's residences. The court in *Madsen* stated that although "'"the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society,"' . . . [¶] . . . [t]he record before us does not contain sufficient justification for this broad a ban on picketing; it appears that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result." (*Madsen, supra,* at p. 775.) Here, as in *Madsen,* the record is not sufficient to show what distance

[10] Moreover, there is no showing that any restriction is necessary in any location other than in proximity to the school.

restriction, or whether a restriction limited to the school environs, will afford Krell the necessary protection.

Gray contends that a determination that the 100-yard distance restriction and blanket prohibition on naming were constitutionally overbroad mandates outright reversal of these restrictions and that a remand is inappropriate. Because the trial court properly determined that an injunction was necessary to prevent harassment, the matter should be remanded for the trial court to conduct further proceedings to determine, in accordance with this opinion, the scope of injunctive relief necessary to prevent the harassment. (Cf. *Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 776 [appellate court has power to order retrial on limited issue]; *DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal.4th 864, 890 [remand of preliminary injunction to court of appeal].) Any such injunction should, on the basis of the evidence, be tailored so as to burden no more speech than is necessary to prevent the harassment. Any distance provision should depend upon the trial court's analysis of the evidence concerning the physical layout of the school and its environs, the content and extent of Gray's activities, and the effect of those activities.

## DISPOSITION

The judgment is reversed with directions to the trial court to conduct further proceedings, and based upon the evidence and consistent with this opinion, issue an injunction to prevent harassment of Krell so long as the injunction does not contain a blanket prohibition on the use of Krell's name, and provides for a distance restriction that causes no more burden on speech than is necessary to prevent the harassment. The parties are to bear their respective costs on appeal.

CERTIFIED FOR PUBLICATION

MOSK, J.

We concur.

TURNER, P.J.

KRIEGLER, J.*

* Judge of the Superior Court of Los Angeles County, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.