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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JOHN DOE,

Plaintiff and Appellant,

v.

STATE OF CALIFORNIA,

Defendant and Respondent.

2d Crim. No. B290587
(Super. Ct. No. 56-2017-00495144-CU-WM-VTA)
(Ventura County)

John Doe, a registered sex offender, appeals a judgment entered following the trial court's order sustaining a demurrer by the State of California and the Attorney General (collectively "State") without leave to amend. We affirm.

This appeal concerns constitutional challenges to Penal Code section 626.81, which limits and punishes a registered sex offender's unauthorized entry into a school building or upon school grounds: "(a) A person who is required to register as a sex offender pursuant to Section 290, who comes into any school building or upon any school ground without lawful business thereon and written permission indicating the date or dates and

times for which permission has been granted from the chief administrative official of that school, is guilty of a misdemeanor."[1]

The Legislature enacted section 626.81 (Sen. Bill No. 1128) in 2006 as urgency legislation. Legislative history of the statute states that it was "the product of months of discussion with, and input from, experts . . . . [It] will make all of California's communities safer from all sexual predators . . . ." (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1128 (2005-2006 Reg. Sess.).) The Assembly Committee on Public Safety also recognized that "keeping sex offenders away from schools . . . where children and youth congregate is more likely to be successful through restrictions on loitering in these locations rather than residency restrictions which may have severe unintended consequences, including the relocation of sexual offenders into rural communities." (Assem. Com. on Public Safety, Analysis of Sen. Bill No. 1128 (2005-2006 Reg. Sess.) p. 35.)

John Doe brings this action against the State seeking to participate in his child's elementary school education and school activities. We reject John Doe's constitutional contentions and conclude that the trial court properly sustained the demurrer to his complaint without leave to amend.

FACTUAL AND PROCEDURAL HISTORY

On February 15, 2017, John Doe filed an original petition for mandamus or prohibition with the California Supreme Court, challenging the constitutionality of section 626.81. The court denied the petition without prejudice to refiling in a lower court.

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[1] All statutory references are to the Penal Code unless stated otherwise.

On April 13, 2017, John Doe filed this verified petition for mandamus or prohibition and a complaint for declaratory and injunctive relief against the State, the Ventura Unified School District, and the District's interim superintendent (collectively "District"). John Doe alleged that he was convicted of a sexual offense that he committed against a child in 1990 and, therefore, was required to register as a sex offender pursuant to section 290. He now is the parent of an elementary school-age child and would like to participate in his child's education, including volunteering at school-related activities, observing classroom instruction, and attending parent-teacher conferences, among other activities. John Doe alleged that in 2014, and again in 2016, he sought permission from the principal of his child's elementary school to participate in classroom activities. On each occasion, the principal denied permission for John Doe to be on school grounds. John Doe alleged that he appealed the principal's decisions to the District superintendent and then the Board of Education. The superintendent summarily denied the requests. The Board of Education did not consider John Doe's requests at either the September or October 2016 board meetings; the board president recommended, however, that John Doe appear personally at the November 2016 board meeting. John Doe declined because he feared disclosing his identity and being subject to harassment and risk of physical harm.[2]

The petition and complaint purport to state causes of action for declaratory and injunctive relief. They also attack section

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[2] John Doe alleged that the California School Boards Association, of which the District is a member, has advised school districts that they may not use section 626.81 to prevent access to school grounds to parents who are registered sex offenders.

626.81 on grounds of violation of: 1) substantive due process infringing John Doe's right to participate in his child's education; 2) violation of procedural due process; 3) vagueness; 4) violation of John Doe's right to free movement and travel; and 5) violation of the ex post facto clause.

The State and the District demurred to the complaint. The trial court overruled the demurrer regarding the District defendants; John Doe later dismissed his claims against them. The court sustained the demurrer without leave to amend regarding the State. The court ruled that the section 626.81 was "narrowly drafted to address the compelling state interest of protecting children while on school grounds." Moreover, the complaint did not state sufficient facts to constitute a cause of action for the as-applied challenges because John Doe did not allege any involvement from the State in the District's decisions. The court concluded: "[John Doe's] claims, if any, are against the school district and its superintendent only."

John Doe's appeal followed. He asserts that pursuant to the federal and state Constitutions, section 626.81 is unconstitutional on its face and as applied.

DISCUSSION

In reviewing an order sustaining a general demurrer, we exercise our independent judgment to determine whether the complaint states a cause of action as a matter of law. (*Kahan v. City of Richmond* (2019) 35 Cal.App.5th 721, 730.) We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1010; *Kahan*, at p. 730.) Moreover, we give the complaint a reasonable interpretation,

reading it as a whole and its parts in context. (*Centinela*, at p. 1010.) Plaintiff bears the burden of establishing that the allegations of the complaint establish every element of his cause of action. (*Ibid.*; *Kahan*, at p. 730.) A plaintiff should be permitted "great liberality" in amending his complaint, but not where an amendment would be futile. (*Ivanoff v. Bank of America* (2017) 9 Cal.App.5th 719, 726.) We apply the abuse-of-discretion standard in our review of the court's order sustaining a demurrer without leave to amend. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 400-401.)

I.

John Doe argues that he properly alleged a challenge to the constitutionality of section 626.81 on an as-applied basis. He relies upon *New York Times Co. v. Superior Court* (1990) 51 Cal.3d 453, 466, holding that " 'it is not necessary that [plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters with the exercise of his constitutional rights.' " (*Ibid.* [credible threat of prosecution an exception to "traditional notions of ripeness"].)

The trial court properly sustained the State's demurrer concerning John Doe's as-applied constitutional challenges. The court concluded that "[n]either the State of California nor [the Attorney General] appear to have participated in [John Doe's] claimed exclusion from school grounds or the refusal to provide him with the 'written permission from the chief administrative official.' " The State played no role in the application of section 626.81 to John Doe despite his allegations that the State defendants "maintain[] and oversee[]" the Penal Code and that the Attorney General is the "chief law officer of the State."

" 'An as applied challenge [seeking] relief from a specific application of a facially valid statute . . . *contemplates analysis of the facts of a particular case* . . . to determine the circumstances in which the statute . . . has been applied and to consider whether *in those particular circumstances* the application deprived the individual . . . of a protected right.' " (*In re Taylor* (2015) 60 Cal.4th 1019, 1039.) Neither the State nor the Attorney General has taken any specific action against John Doe that gives rise to his purported causes of action; his allegations pertain to actions taken or not taken by the District defendants. There is no credible threat of prosecution by the State to entitle John Doe to challenge section 626.81 and seek declaratory and injunctive relief. (*New York Times Co. v. Superior Court, supra,* 51 Cal.3d 453, 466 [credible threat of prosecution sufficient to permit plaintiff's constitutional challenge to statute].) As such, John Doe has not properly alleged an as-applied claim against the State.

II.

Ex Post Facto

John Doe argues that section 626.81 violates the federal and state constitutional guarantees against ex post facto laws because it burdens his constitutional rights to participate in and direct his child's education, operates retroactively, and increases punishment for his now 27-year-old conviction for child molestation.

No statute falls within the ex post facto prohibition unless two critical elements exist. First, the statute must be retroactive, and, second, it must implicate one of the four categories set forth in *Calder v. Bull* (1798) 3 U.S. 386, 390. (*People v. Trujeque* (2015) 61 Cal.4th 227, 256.) To be retroactive, the law must

change the legal consequences of the defendant's criminal act committed before the law's effective date. (*Ibid.*) As to the second factor, the *Calder* categories encompass laws that: 1) criminalize conduct that was innocent when done; 2) aggravate or make greater a crime than when committed; 3) change and increase punishment; and 4) alter the rules of evidence to reduce the legal sufficiency necessary to support a finding of guilt. (*Calder*, at p. 391 ["Every ex post facto law must necessarily be retrospective; but every retrospective law is not an ex post facto law"]; *Trujeque*, at p. 256.) The ex post facto clauses of the federal and California constitutions are "analyzed identically." (*People v. McVickers* (1992) 4 Cal.4th 81, 84; *In re E.J.* (2010) 47 Cal.4th 1258, 1279 [article I, sections 9 and 10 of the United States Constitution and article I, section 9 of the California Constitution interpreted similarly].)

The trial court properly denied John Doe's claims because section 626.81 does not apply retroactively nor does it create "a more burdensome *punishment*." (*People v. McVickers, supra,* 4 Cal.4th 81, 84.) True, section 626.81 applies to John Doe only because he is a lifelong-registered sex offender, a status he achieved by virtue of his 1990 child molestation conviction. The school visitation restrictions described by section 626.81, however, apply to trespass and loitering conduct occurring after the 2006 effective date of section 626.81, i.e., visiting or remaining on school grounds without written permission. (*In re E.J., supra,* 47 Cal.4th 1258, 1280 [upholding parole conditions forbidding registered sex offenders from residing within 2,000 feet of any school or park where children gather].)

Moreover, section 626.81 does not impose "a more burdensome *punishment*." (*People v. McVickers, supra,* 4 Cal.4th

81, 84.) Its purpose is " 'to notify members of the public of the existence and location of sex offenders so they can take protective measures.' " (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 877.) The requirement that registered sex offenders obtain written permission prior to entering school grounds alerts school officials to take protective measures to safeguard children. The statute does not impose a categorical ban that permanently bars sex offenders from entering school grounds.

Substantive Due Process

John Doe argues that he sufficiently alleged that section 626.81 denies him substantive due process of law because the statute infringes his constitutional rights to travel and to participate in his child's education. (Educ. Code, §§ 49091.10 [parent has right to observe instruction of his or her school child in accordance with school procedures to ensure student safety]; 51101 [parent has the right and should have the opportunity to participate in education of his or her child].) He asserts that section 626.81 is not reasonably related to the concededly important state interest of keeping school children safe from sex offenders, and that the statute is not narrowly drafted to withstand strict scrutiny review.

Pursuant to any standard of review, we reject John Doe's facial attack on section 626.81. Regulatory laws regarding sex offenders serve "a legitimate state interest in controlling crime and preventing recidivism by sex offenders." (*People v. Mills* (1978) 81 Cal.App.3d 171, 181.) Section 626.81 is narrowly tailored to promote the compelling government interest of protecting school children from registered sex offenders. (*Johnson v. California* (2005) 543 U.S. 499, 505 [pursuant to "strict scrutiny" standard of analyzing substantive due process

claims, government bears burden of establishing law is narrowly tailored to further a compelling state interest].) Section 626.81, subdivision (a) permits a registered sex offender to visit school grounds and participate in his or her child's education by notifying the school principal and requesting permission to enter school grounds for "lawful business thereon." The statute is not a blanket exclusion of the right of a registered sex offender to enter school grounds and participate in his or her child's education.

Procedural Due Process

John Doe contends that section 626.81 violates his constitutional rights to procedural due process of law by depriving him of his right to participate in his child's education and his right to travel, without a hearing or the opportunity to be heard.

We reject this contention because procedural safeguards do exist, and here John Doe's as-applied challenge against the State fails because the State has not deprived or obstructed him from accessing these procedural safeguards.

Similar to section 626.81 but pertaining to "outsider[s]," section 627.2 provides that "[n]o outsider shall enter or remain on school grounds during school hours without having registered with the principal or designee." Section 627.4, subdivisions (a) and (b) state that a school principal may refuse to register an outsider, or revoke the outsider's previous registration if the principal has "a reasonable basis" to conclude that "the outsider's presence or acts would disrupt the school, its students, its teachers, or its other employees." Section 627.5 then provides this procedural safeguard: "*Any person* who is denied registration or whose registration is revoked may request a hearing before the principal or superintendent on the propriety of

the denial or revocation. . . . A hearing before the principal [or superintendent] shall be held within seven days after the principal [or superintendent] receives the request." (Italics added.) The statute also requires the principal or superintendent to provide written notice of the date, time, and place of the hearing to the person denied registration. These safeguards, applicable to registrants and non-registrants alike, provide constitutionally adequate safeguards. Although the term "outsider" does not include a parent, section 627.5 provides a hearing to "[a]ny person who is denied registration." (§ 627.1, subd. (a)(2) ["An 'outsider' is any person other than: . . . [a] parent or guardian of a student of the school"].)

Constitutional Vagueness

John Doe asserts that sections 626.81 and 626, subdivision (a)(4) (defining "school") do not provide sufficient notice of the conduct proscribed to prevent arbitrary and discriminatory enforcement.

The due process concept of fair warning bars the government from enforcing a provision that forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. (*People v. Hall* (2017) 2 Cal.5th 494, 500 [statement of general rule].) A provision is not void for vagueness, however, if it may be made reasonably certain by reference to other definable sources. (*Id.* at pp. 500-501.) The void-for-vagueness doctrine requires no more than a reasonable degree of certainty. (*Id.* at pp. 567-568.) " 'What is constitutionally required is that terms be defined with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary

and discriminatory enforcement." ' " (*Coe v. City of San Diego* (2016) 3 Cal.App.5th 772, 783 [statement of general rule].) Perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity. (*Ibid.*)

Sections 626.81 and 626, subdivision (a)(4) provide fair warning of the conduct proscribed. Section 626.81 punishes unlawful loitering and trespass on school grounds. The statute permits entry by a registered sex offender with a legitimate purpose for entry and with written permission by the school's chief administrative officer. Section 626, subdivision (a)(4), defining "school" as including "any public right-of-way situated immediately adjacent to school property or any other place if a teacher and one or more pupils are required to be [there]," also provides fair warning of the presence of children and prevents minimal risk of arbitrary and discriminatory enforcement.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

Rocky J. Baio, Judge

Superior Court County of Ventura

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