

By: Schaefer

H.B. No. 2198

A BILL TO BE ENTITLED

AN ACT

1  
2 relating to the prosecution and punishment for certain offenses  
3 regarding the possession or promotion of lewd material depicting a  
4 child; creating criminal offenses; increasing criminal penalties.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

6 SECTION 1. Section 43.25, Penal Code, is amended by  
7 amending Subsection (g) to read as follows:

8 (g) When it becomes necessary for the purposes of this  
9 section, ~~[or]~~ Section 43.26, Section 43.261, or Section 43.262 to  
10 determine whether a child who participated in sexual conduct was  
11 younger than 18 years of age, the court or jury may make this  
12 determination by any of the following methods:

13 (1) personal inspection of the child;

14 (2) inspection of the photograph or motion picture  
15 that shows the child engaging in the sexual performance;

16 (3) oral testimony by a witness to the sexual  
17 performance as to the age of the child based on the child's  
18 appearance at the time;

19 (4) expert medical testimony based on the appearance  
20 of the child engaging in the sexual performance; or

21 (5) any other method authorized by law or by the rules  
22 of evidence at common law.

23 SECTION 2. Section 43.26, Penal Code, is amended by  
24 amending Subsection (h) to read as follows:

1 (h) It is a defense to prosecution under Subsection (a) or  
2 (e) that the actor is a law enforcement officer or a school  
3 administrator who:

4 (1) possessed or accessed the visual material in good  
5 faith solely as a result of an allegation of a violation of Section  
6 43.261 or Section 43.262;

7 (2) allowed other law enforcement or school  
8 administrative personnel to possess or access the material only as  
9 appropriate based on the allegation described by Subdivision (1);  
10 and

11 (3) took reasonable steps to destroy the material  
12 within an appropriate period following the allegation described by  
13 Subdivision (1).

14 SECTION 3. Section 43.262, Penal Code, is amended by  
15 amending Subsections (a) and (b), and adding Subsections (e)  
16 through (i) to read as follows:

17 (a) In this section:

18 (1) "Promote", "sexual performance", "performance",  
19 and "sexual conduct" have the meanings assigned by Section 43.25.

20 (2) "Visual material" has the meaning assigned by  
21 Section 43.26.

22 (b) A person commits an offense if the person knowingly  
23 possesses, accesses with intent to view, or promotes visual  
24 material that~~+~~

25 ~~(1)~~ depicts the lewd exhibition of the genitals, or  
26 public area, or buttocks of an unclothed, partially clothed, or  
27 clothed child who is younger than 18 years of age at the time the

1 visual material was created. ~~[, and~~

2 ~~(2) appeals to the prurient interest in sex; and~~

3 ~~(3) has no serious literary, artistic, political, or~~  
4 ~~scientific value.]~~

5 (e) It is a defense to prosecution under this section that  
6 the actor is a law enforcement officer or a school administrator  
7 who:

8 (1) possessed or accessed the visual material in good  
9 faith solely as a result of an allegation of a violation of Section  
10 [43.262](#);

11 (2) allowed other law enforcement or school  
12 administrative personnel to possess or access the material only as  
13 appropriate based on the allegation described by Subdivision (1);  
14 and

15 (3) took reasonable steps to destroy the material  
16 within an appropriate period following the allegation described by  
17 Subdivision (1).

18 (f) It is an affirmative defense to a prosecution under this  
19 section that:

20 (1) the defendant was the spouse of the child at the  
21 time of the offense; or

22 (2) the defendant is not more than two years older than  
23 the child.

24 (g) When it becomes necessary for the purposes of this  
25 section to determine whether visual material depicts the lewd  
26 exhibition of the genitals, pubic area, or buttocks of an  
27 unclothed, partially clothed, or clothed child who is younger than

1 18 years of age at the time the visual material was created, the  
2 court or jury may make this determination by any of the following  
3 methods; whether:

4 (1) the focal point of the visual depiction is the  
5 child's unclothed, partially clothed, or clothed genitalia or  
6 buttocks;

7 (2) the place or pose of the child depicted in the  
8 visual material is sexually suggestive;

9 (3) the child is depicted in an unnatural pose or  
10 inappropriate attire;

11 (4) the child is fully or partially clothed or nude;

12 (5) the visual material suggests sexual coyness or a  
13 willingness to engage in sexual activity;

14 (6) the visual material is intended or designed to  
15 elicit a sexual response in the viewer; or

16 (7) by any other method authorized by law or by the  
17 rules of evidence at common law.

18 (h) When it becomes necessary for the purposes of this  
19 section to determine whether a child who participated in sexual  
20 conduct, sexual performance, or lewd exhibition of the unclothed,  
21 partially clothed, or clothed genitals or buttocks was younger than  
22 18 years of age, the court or jury may make this determination by  
23 any of the following methods:

24 (1) personal inspection of the child;

25 (2) inspection of the visual material that shows the  
26 child engaging in sexual performance, sexual conduct or lewd  
27 exhibition of the unclothed, partially clothed, or clothed genitals

1 or pubic area or buttocks of the child;

2 (3) oral testimony by a witness to the sexual  
3 performance, sexual conduct, or lewd exhibition of the unclothed,  
4 partially clothed, or clothed genitals or pubic area or buttocks of  
5 the child as to the age of the child based on the child's appearance  
6 at the time the visual material was created;

7 (4) expert medical testimony based on the appearance  
8 of the child engaging in the sexual performance, sexual conduct or  
9 lewd exhibition of the unclothed, partially clothed, or clothed  
10 genitals or pubic area or buttocks of the child; or

11 (5) any other method authorized by law or by the rules  
12 of evidence at common law.

13 (i) Conduct under this section constitutes an offense  
14 regardless of whether the actor knows the age of the victim at the  
15 time of the offense.

16 SECTION 4. Subchapter B, Chapter 43, Penal Code, is amended  
17 by adding Section 43.28 to read as follows:

18 Section 43.28. NO MISTAKE OF LAW DEFENSE. Notwithstanding  
19 any other law, including Section 8.03, Penal Code, the following  
20 shall not be a defense to prosecution under this subchapter:

21 (1) ignorance or mistake of law;

22 (2) a defendant's belief that any of the requirements  
23 of this subchapter are unconstitutional or were unconstitutional;

24 (3) a defendant's reliance on any court decision,  
25 including a decision of the United States Supreme Court, that has  
26 been overruled on appeal or by a subsequent court, even if that  
27 court decision had not been overruled when the defendant engaged in

1 the conduct that violates this subchapter; or

2 (4) a defendant's reliance on any ruling or opinion  
3 issued by a federal district court or the United States Court of  
4 Appeals for the Fifth Circuit, which do not bind the state  
5 judiciary.

6 SECTION 5. Subchapter B, Chapter 43, Penal Code, is amended  
7 by adding Section 43.29 to read as follows:

8 Section 43.29. SEVERABILITY. (a) Mindful of *Leavitt v.*  
9 *Jane L.*, 518 U.S. 137 (1996), in which in the context of determining  
10 the severability of a state statute the United States Supreme Court  
11 held that an explicit statement of legislative intent is  
12 controlling, it is the intent of the legislature that every  
13 provision, section, subsection, sentence, clause, phrase, or word  
14 in this subchapter, and every application of the provisions in this  
15 subchapter, are severable from each other.

16 (b) If any application of any statutory provision in this  
17 subchapter to any person, group of persons, or circumstances is  
18 found by a court to be invalid or unconstitutional, the remaining  
19 applications of that statutory provision to all other persons and  
20 circumstances shall be severed and may not be affected. All  
21 constitutionally valid applications of this subchapter shall be  
22 severed from any applications that a court finds to be invalid or  
23 unconstitutional, leaving the valid and constitutional  
24 applications in force, because it is the legislature's intent and  
25 priority that the valid and constitutional applications of each  
26 statutory provision be allowed to stand alone. Even if a reviewing  
27 court finds a substantial number of a statute's applications under

1 this subchapter to be unconstitutional, judged in relation to the  
2 statute's plainly legitimate sweep, the applications that do not  
3 presently violate the Constitution shall be severed from the  
4 remaining applications and shall remain in force, and shall be  
5 treated as if the legislature had enacted a statute limited to the  
6 persons, group of persons, or circumstances for which the statute's  
7 application does not violate the Constitution.

8 (c) The legislature further declares that it would have  
9 enacted this subchapter, and each provision, section, subsection,  
10 sentence, clause, phrase, or word, and all constitutional  
11 applications of this subchapter, irrespective of the fact that any  
12 provision, section, subsection, sentence, clause, phrase, or word,  
13 or applications of this subchapter, were to be declared  
14 unconstitutional.

15 (d) If any statutory provision of this subchapter is found  
16 by any court to be unconstitutionally vague, then the applications  
17 of that statutory provision that do not present constitutional  
18 vagueness problems shall be severed and remain in force.

19 (e) No court may decline to enforce the severability  
20 requirements of Subsections (a), (b), (c), and (d) on the ground  
21 that severance would rewrite the statute or involve the court in  
22 legislative or lawmaking activity. A court that declines to  
23 enforce or enjoins a state official from enforcing a statutory  
24 provision does not rewrite a statute, as the statute continues to  
25 contain the same words as before the court's decision. A judicial  
26 injunction or declaration of unconstitutionality:

27 (1) is nothing more than an edict prohibiting

1 enforcement that may subsequently be vacated by a later court if  
2 that court has a different understanding of the requirements of the  
3 Texas Constitution or United States Constitution;

4 (2) is not a formal amendment of the language in a  
5 statute; and

6 (3) no more rewrites a statute than a decision by the  
7 executive not to enforce a duly enacted statute in a limited and  
8 defined set of circumstances.

9 (f) If any federal or state court declares unconstitutional  
10 or enjoins the enforcement of a provision in this subchapter and  
11 fails to enforce the severability requirements of Subsections (a),  
12 (b), (c), (d), and (e), for any reason whatsoever, the Attorney  
13 General shall:

14 (1) adopt rules that enforce the requirements  
15 described by this subchapter to the maximum possible extent while  
16 avoiding the constitutional problems or other problems identified  
17 by the federal or state court; and

18 (2) issue notice of those rules, not later than the  
19 30th day after the date of the court ruling.

20 (g) If the Attorney General fails to adopt the rules and  
21 issue notice under Subsection (f), a person may petition for a writ  
22 of mandamus requiring the executive commissioner to adopt the rules  
23 and issue notice.

24 SECTION 6. This Act takes effect immediately if it receives  
25 a vote of two-thirds of all the members elected to each house, as  
26 provided by Section 39, Article III, Texas Constitution. If this  
27 Act does not receive the vote necessary for immediate effect, this



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1 Act takes effect September 1, 2021.