88R7529 JRR-F

By:  Schaefer H.B. No. 1408

A BILL TO BE ENTITLED

AN ACT

relating to changing the elements of the offense of possession or promotion of lewd visual material depicting a child and to the prosecution and punishment of that offense and the severability of certain related penal laws.

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

SECTION 1.  Section 43.262, Penal Code, is amended by amending Subsection (b) and adding Subsections (e), (f), (g), (h), (i), and (j) to read as follows:

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

[~~(1)~~] depicts the lewd exhibition of the genitals, [~~or~~] pubic area, or buttocks of an unclothed, partially clothed, or clothed child who is younger than 18 years of age at the time the visual material was created[~~;~~

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

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

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

(1)  possessed or accessed the visual material in good faith solely as a result of an allegation of a violation of this section;

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

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

(f)  It is an affirmative defense to prosecution under this section that the actor:

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

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

(g)  Notwithstanding Section 8.03, Penal Code, or any other law, the following are not a defense to prosecution under this section:

(1)  ignorance or mistake of law;

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

(3)  a defendant's reliance on any court decision, including a decision of the United States Supreme Court, that has been overruled on appeal or by a subsequent court, even if that court decision had not been overruled when the defendant engaged in the conduct that violates this section; or

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

(h)  When it becomes necessary for the purposes of this section to determine whether visual material depicts the lewd exhibition of the genitals, pubic area, or buttocks of an unclothed, partially clothed, or clothed child who is younger than 18 years of age at the time the visual material was created, the court or jury may make this determination based on any of the following factors:

(1)  whether the focal point of the visual depiction is the child's unclothed, partially clothed, or clothed genitals, pubic area, or buttocks;

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

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

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

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

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

(7)  any other factors authorized by law.

(i)  When it becomes necessary for the purposes of this section to determine whether a child depicted in the visual material described by Subsection (b) was younger than 18 years of age, the court or jury may make this determination by any of the following methods:

(1)  personal inspection of the child;

(2)  inspection of the visual material;

(3)  oral testimony by a witness to the creation of the visual material as to the age of the child based on the child's appearance at the time the visual material was created;

(4)  expert medical testimony based on the appearance of the child in the visual material; or

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

(j)  Conduct under this section constitutes an offense regardless of whether the actor knows the age of the child depicted in the visual material at the time of the offense.

SECTION 2.  Subchapter B, Chapter 43, Penal Code, is amended by adding Section 43.28 to read as follows:

Sec. 43.28.  SEVERABILITY. (a) Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute the United States Supreme Court held that an explicit statement of legislative intent is controlling, it is the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in this subchapter, and every application of the provisions in this subchapter, are severable from each other.

(b)  If any application of any statutory provision in this subchapter to any person, group of persons, or circumstances is found by a court to be invalid or unconstitutional, the remaining applications of that statutory provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this subchapter shall be severed from any applications that a court finds to be unconstitutional or otherwise invalid, leaving the valid and constitutional applications in force, because it is the legislature's intent and priority that the valid and constitutional applications of each statutory provision be allowed to stand alone. Even if a reviewing court finds a substantial number of a statute's applications under this subchapter to be unconstitutional, judged in relation to the statute's plainly legitimate sweep, the applications that do not presently violate the Texas Constitution or United States Constitution shall be severed from the remaining applications and shall remain in force, and shall be treated as if the legislature had enacted a statute limited to the persons, group of persons, or circumstances for which the statute's application does not violate the Texas Constitution or United States Constitution.

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

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

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

(1)  is nothing more than an edict prohibiting enforcement that may subsequently be vacated by a later court if that court has a different understanding of the requirements of the Texas Constitution or United States Constitution;

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

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

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

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

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

(g)  If the attorney general fails to adopt the rules and issue notice under Subsection (f), a person may petition for a writ of mandamus requiring the attorney general to adopt the rules and issue notice.

SECTION 3.  The change in law made by this Act applies only to an offense committed on or after the effective date of this Act. An offense committed before the effective date of this Act is governed by the law in effect on the date the offense was committed, and the former law is continued in effect for that purpose. For purposes of this section, an offense was committed before the effective date of this Act if any element of the offense occurred before that date.

SECTION 4.  This Act takes effect September 1, 2023.