Opinion issued July 14, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00344-CR
NO. 01-20-00345-CR
NO. 01-20-00346-CR
NO. 01-20-00347-CR
NO. 01-20-00348-CR
NO. 01-20-00349-CR
NO. 01-20-00350-CR
NO. 01-20-00351-CR
NO. 01-20-00352-CR
NO. 01-20-00353-CR

EX PARTE DONALD THOMAS DEHNERT, Appellant

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Case Nos. 1660931, 1660942, 1660939, 1660936, 1660941, 1660933, 1660934, 1660940, 1660932, 1660930

O P I N I O N

Appellant, Donald Thomas Dehnert, appeals from the orders denying him the relief he requested in his pretrial applications for writ of habeas corpus.[1] In a single issue on appeal, appellant contends that the Texas Penal Code statute prohibiting the possession of child pornography[2] is facially overbroad and violates the Free Speech Clause of the United States and Texas Constitutions.[3] We affirm.

CONSTITUTIONALITY OF TEXAS PENAL CODE SECTION 43.26

A Harris County grand jury indicted appellant on 10 charges of possession of child pornography in violation of section 43.26 of the Texas Penal Code. Appellant then filed his "Second Amended Application for Writ of Habeas Corpus," asserting that section 43.26 is unconstitutional. The trial court denied the habeas corpus relief appellant requested, i.e., dismissal of the indictments. In his sole issue on appeal, appellant contends that the trial court erred in denying his requested relief, arguing that section 42.26 of the Texas Penal Code "is a facially overbroad restriction on speech in violation of the Free Speech Clause of the First

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1 A party may file a pretrial application for writ of habeas corpus to assert a facial challenge to the constitutionality of a statute. *See Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010). Orders in such cases may be appealed. *See* TEX. R. APP. P 31.

2 TEX. PENAL CODE § 43.26.

3 U.S. CONST. amend. I; TEX. CONST. art. I, § 8.

Amendment of the United States Constitution and article I, section 8 of the Texas Constitution."

Standard of Review

We review the constitutionality of a criminal statute de novo as a question of law. *Maloney v. State*, 294 S.W.3d 613, 626 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). When presented with a challenge to the constitutionality of a statute, we presume that the statute is valid, and the legislature has not acted unreasonably or arbitrarily. *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002). The party challenging the statute carries the burden to establish its unconstitutionality. *Id*. We must uphold the statute if we can apply a reasonable construction that will render it constitutional. *Ely v. State*, 582 S.W.2d 416, 419 (Tex. Crim. App. [Panel Op.] 1979); *see also Maloney*, 294 S.W.3d at 626 (stating that if statute can be interpreted in two different ways, one of which sustains its validity, we apply interpretation that sustains its validity).

Applicable Law Regarding Overbreadth

A facial challenge attacks the statute itself rather than the statute's application to the defendant. *Peraza v. State*, 467 S.W.3d 508, 514 (Tex. Crim. App. 2015). Ordinarily, to mount a successful facial challenge, the challenger must establish that no set of circumstances exists under which the statute would be valid or that the statute lacks any plainly legitimate sweep. *See id.*; *see also United*

States v. Stevens, 559 U.S. 460, 472 (2010). However, in the case of statutes that encroach upon activity protected by the First Amendment, the challenger may also bring a "substantial overbreadth" challenge. Under such a facial challenge, a statute may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473; *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002) (holding overbreadth doctrine prohibits government from banning unprotected speech if substantial amount of protected speech prohibited or chilled in process). This type of facial challenge may be made when a statute restricts or punishes speech based upon its content. *See Ex parte Lo*, 424 S.W.3d 10, 15 (Tex. Crim. App. 2014).

A law is "content-based" if it distinguishes between favored and disfavored speech on the basis of the views expressed or if it is necessary to review the content of the speech in order to determine whether the speaker violated the law. *Ex parte Thompson*, 442 S.W.3d 325, 345 (Tex. Crim. App. 2014). A content-based regulation that distinguishes favored from disfavored speech based on the views expressed is presumptively invalid, and the government bears the burden to rebut the presumption. *Lo*, 424 S.W.3d at 15. We apply the "most exacting scrutiny to regulations that suppress, disadvantage, or impose different burdens on speech because of its content." *Id.* To satisfy a strict scrutiny review, a statute that

regulates speech must be necessary to serve a compelling state interest and be narrowly drawn. *Id.* To be considered narrowly drawn, a law must employ the least restrictive means to achieve its goal and there must be a close nexus between the state's compelling interest and the restriction. *Id.* The statute does not survive strict scrutiny review if there is a less restrictive means of meeting the state's compelling interest that would be at least as effective as the statute under review. *Id.* at 15–16. However, a statute may not be held overbroad merely because it is possible to conceive of some impermissible applications. *United States v. Williams*, 553 U.S. 285, 303 (2008).

The Applicable Penal Statutes

The first step in considering an overbreadth challenge "is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Williams*, 553 U.S. at 293.

Section 43.26(a) of the Texas Penal Code provides that a person commits an offense if:

> (1) the person knowingly or intentionally possesses, or knowingly or intentionally accesses with intent to view, visual material that visually depicts a child younger than 18 years of age at the time the image of the child was made who is engaging in sexual conduct, including a child who engages in sexual conduct as a victim of an offense under Section 20A.02(a)(5), (6), (7), or (8) and
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> (2) the person knows that the material depicts the child as described by Subdivision (1).

TEX. PENAL CODE § 43.26(a).

"Sexual conduct" is defined as:

> [S]exual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola.

TEX. PENAL CODE §§ 43.26(b)(2), 43.25(a)(2).

"Simulated" is defined as:

> [T]he explicit depiction of sexual conduct that creates the appearance of actual sexual conduct and during which a person engaging in the conduct exhibits any uncovered portion of the breasts, genitals, or buttocks.

TEX. PENAL CODE § 43.25(a)(6).

It is an affirmative defense to prosecution under Section 43.26(a) that:

> (1) the defendant was the spouse of the child at the time of the offense;
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> (2) the conduct was for bona fide educational, medical, psychological, psychiatric, judicial, law enforcement, or legislative purpose; or
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> (3) the defendant is not more than two years older than the child.

TEX. PENAL CODE §§ 43.26(c), 43.25(f).[4]

[4] Though not applicable here, the statute also provides a defense for law enforcement officers and school administrators under certain circumstances. TEX. PENAL CODE § 43.26(h).

Analysis

Appellant contends that the child pornography statute under which he is charged is overbroad for three reasons:

> 1. Because it punishes as "child pornography" the possession of images of people who may effectively consent to sexual conduct;
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> 2. Because it punishes as "child pornography" the possession of images of "lewd exhibition of . . . the anus, or any portion of the female breast below the top of the areola," which is speech that the United States has never recognized as child pornography; and
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> 3. Because it punishes as "child pornography" the possession of images of "simulated" sexual conduct, which does not implicate the purposes of the child pornography exception to free speech.

Appellant also challenges the statute as being overbroad under the Texas Constitution.

We address each argument, respectively.

1. Punishing the possession of pornography involving 17-year-old minors

First, appellant argues that the statute is overbroad because it punishes the possession of pornography involving 17-year-old minors, while the age at which a minor can consent to sex, thereby preventing prosecution of their partner, is 17. *See* TEX. PENAL CODE § 22.011(c)(1) (defining "child" in sexual-assault statute as a person younger than 17). Appellant argues that "Texas, having made the decision that a seventeen-year-old can effectively consent to sex, cannot invoke as its compelling interest for forbidding pornography of seventeen-year-olds *protecting*

children under 18 from sexual seduction, nor protecting the children exploited by the production process."

Two Texas cases, both of which were refused discretionary review by the Texas Court of Criminal Appeals, have considered and rejected this argument in the context of section 43.25 of the Penal Code. *See Ex parte Fujisaka*, 472 S.W.3d 792, 800 (Tex. App.—Dallas 2015, pet. ref'd) and *Dornbusch v. State*, 156 S.W.3d 850, 867 (Tex. App.—Corpus Christi 2005, pet. ref'd) (addressing facial overbreadth challenges to Texas Penal Code section 43.25).

Addressing the issue that section 43.25 of the Penal Code ("the sexual-performance-by-a-child statute") was overbroad because it applied to all children under the age of 18, while section 22.011 ("the sexual-assault statute") applied to children under the age of 17, the *Fujisaka* court noted:

> Although there is some overlap between the offenses set forth in Title Five of the penal code, addressing offenses against persons, and the offenses set forth in Title Nine of the penal code, addressing offenses against public order and decency, we see no necessary inconsistency between the provisions of these titles and no reason why the age of consent to sexual relations in the Title Five offenses need be the same as the threshold age for prosecutions of conduct violative of public order and decency in Title Nine. Compare §§ 21.11(a), 22.011(a)(2), (c)(1), and 22.021(a)(1)(B), (b)(1) (criminalizing sexual conduct with persons younger than seventeen years of age), with §§ 43.02(c)(3), 43.03(b)(2), 43.04(b), 43.251(a)(1), and 43.26(a)(1) (criminalizing or enhancing punishment for offenses involving persons younger than eighteen years of age). Appellant has not provided any authority mandating an age limit on regulations aimed at protecting children and society from adults exploiting children for sexual purposes. We do not find the argument persuasive that the age restriction cannot be

> set by the legislature at seventeen years for some purposes and eighteen years for others. *See, e.g.*, 18 U.S.C.A. § 2256(1) (West 2015) (defining "minor" as "any person under the age of eighteen years" for purposes of federal law prohibiting the sexual exploitation and other abuse of children). Appellant's suggestion that we interpret the statute to encompass only sexual conduct or sexual performances that are otherwise proscribed by Title Five offenses does not fully grasp the significance of the government's compelling interest in protecting children from sexual exploitation. *See New York v. Ferber*, 458 U.S. 747, 757, 102 S. Ct. 3348, 73 L.Ed.2d 1113 (1982) (recognizing "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance").

Fujisaka, 472 S.W.3d at 800–01.

The *Dornbusch* court, also considering a challenge to section 43.25, noted as follows:

> Furthermore, section 21.11 [the indecency-with-a-child statute] is in the part of the penal code that criminalizes offenses against persons, whereas section 43.25 is in the part of the code that criminalizes offenses against the public decency and order. *See* §§ 21.11, 43.25(b). A helpful analogy can be drawn between inducement of sexual conduct by a child and prostitution. Both are offenses against the public decency and order. Prostitution is not a crime against the prostitute; it is an offense against the "public decency and order" because it violates the moral values of society. *See* TEX. PEN. CODE ANN. § 43.02 (Vernon 2003). Consequently, a prostitute's consent to sex in exchange for money does not make the conduct legal. It still amounts to prostitution. Similarly, although an adult's consensual sexual contact with a seventeen-year-old cannot be prosecuted as indecency with a child, the teenager's consent to sex does not de-criminalize the adult's conduct under section 43.25(b) because the adult's conduct is a crime against the public, not against the teenager. *See* §§ 21.11, 43.25(b).

Dornbusch, 156 S.W.3d at 871.

Though *Fujisaka* and *Dornbusch* decide whether section 43.25 of the Penal Code is overbroad, and this case involves section 43.26 of the Penal Code, we find their reasoning persuasive. That the State does not permit sex with a child under the age of 17 for purposes of the sexual-assault statute or the indecency-with-a-child statute does not compel the conclusion that the age must be the same for the child-pornography statute. Similarly, that a 17-year-old child can consent to sex does not compel the conclusion that the same child can consent to participate in pornography. As noted by the *Dornbusch* court, the child-indecency statute is in the section of the Penal Code prohibiting offenses against persons, while the sexual-performance-by-a-child statute is in the section of Penal Code prohibiting offenses against public order and decency. Similarly, the *Fujisaka* court noted the same difference between the sexual-assault statute and the sexual-performance-by-a-child statute. The same difference exists between the sexual-assault statute and the child-pornography statute in this case. Given the different purposes of the statutes, the Legislature could have believed that public order and decency would be best served by prohibiting pornography involving *all* minors, even those who might be able to consent to sex. Indeed, given widespread distribution of child pornography on the internet, and that "The Internet is Forever,"[5] the long-term consequences of child pornography might also compel the Legislature to conclude

[5] *See* Paisley, Brad, "The Internet is Forever," Love and War, Arista Records (2017).

that *all* children should be protected from participating in pornography, even those who might otherwise be permitted to consent to sex. *See New York v. Ferber*, 458 U.S. 747, 759 (1982) ("[T]he materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation").

We also find support for our conclusion in *United States v. Bach*, 400 F.3d 622, 628 (8th Cir.), *cert. denied*, 546 U.S. 901 (2005). In *Bach*, the defendant, who was charged under the federal child pornography statute, argued that his pornographic pictures of a 16-year-old male were not unconstitutional child pornography "because [the child depicted] was sixteen and the age of consent under Minnesota and federal law is sixteen." *Id.* The Eighth Circuit Court of Appeals noted that that Congress had changed the definition of a minor in the federal child pornography statute from 16 years old to 18 years old, and the court concluded that "the congressional choice to regulate child pornography by defining minor as an individual under eighteen is rationally related to the government's legitimate interest in enforcing child pornography laws[.]" *Id.* at 629. In so holding, the court rejected the defendant's argument that depictions of consensual sexual relations could not be prohibited by the child pornography statute because they were entitled to privacy protections under the Fifth Amendment, noting that the case relied upon by the defendant, *Lawrence v. Texas*, 539 U.S. 558 (2003),

involved the privacy rights of two consenting adults, not an adult and a minor "who might be injured or coerced." *Bach*, 400 F.3d at 628–29 (quoting *Lawrence*, 539 U.S. at 578).

In light of these authorities, we reject appellant's argument that the statute is overbroad because it does not require the depiction of a crime, i.e., that the child be below the age of consent. As noted by the *Fujisaka* court, appellant's argument that only crimes against persons, such as those proscribed in section 22.11, can serve as the basis for the child pornography statue "does not fully grasp the significance of the government's compelling interest in protecting children from sexual exploitation." 472 S.W.3d at 801 (citing *Ferber,* 458 U.S. at 757 (recognizing "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance")).

2. Punishing the possession of pornography involving "exhibition of . . . the anus, or any portion of the female breast below the top of the areola"

Appellant also contends that the statute is overbroad because its definition of "sexual conduct" forbids the "lewd exhibition of . . . the anus, or any portion of the female breast below the top of the areola." *See* TEX. PENAL CODE § 43.25(a)(2). Appellant, citing *Miller v. California* and *New York v. Ferber*, seems to argue that, while there can be lewd exhibition of the genitals, there can be no lewd exhibition of the anus or female breast below the top of the areola. *See* 413 U.S. 15, 25 (1973) (interpreting statute prohibiting lewd exhibition of genitals); 458 U.S. at 751

(same). Because the statutes interpreted in *Miller* and *Ferber* both prohibited lewd exhibition of the genitals, and did not include other body parts, appellant argues that the Texas statute is unconstitutionally overbroad because "the Supreme Court has never included in its definition of 'child pornography' anything resembling" the Texas statute's prohibition of the lewd exhibition of body parts other than genitalia.

We do not believe that the Supreme Court's prohibition against child pornography can be read so narrowly. In *Osborne v. Ohio*, 495 U.S. 103, 106 (1990), the Supreme Court considered whether an Ohio statute was facially unconstitutional since it proscribed possession of material depicting "nude" children.[6] Although the *Osborne* Court determined that "depictions of nudity, without more, constitute protected expression," *id.* at 112, it refused to hold the Ohio statute facially unconstitutional. The Supreme Court noted that the Ohio courts had narrowly interpreted the "nude" provision. *Id.* at 114. The Court also noted that the statute's exemptions and "proper purposes" provisions made it less likely that the statute, as written, was substantially overbroad. *Id.* at 112. The Supreme Court did not hold, as suggested by appellant, that only genitals can be

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[6] The Ohio statute interpreted in *Osborne* prohibited a person from "[p]ossess[ing] or view[ing] any material or performance that shows a minor who is not the person's child or ward in a state of nudity," and then provided several proper purposes for which such material might be possessed. *See Osborne*, 495 U.S. at 106-07 (citing Ohio Rev. Code § 2907.323(A)(3) (Supp. 1989)).

lewdly exhibited. Indeed, when rejecting an argument that the Ohio statute was overbroad because it prohibited possession of lewd exhibitions of nudity, not genitals, the Court stated:

> The dissent distinguishes the Ohio statute, as construed, from the statute upheld in *Ferber* on the ground that the Ohio statute proscribes "'lewd exhibitions of nudity' rather than 'lewd exhibitions of the genitals.'" See post, at 1707 (emphasis in original). The dissent notes that Ohio defines nudity to include depictions of pubic areas, buttocks, the female breast, and covered male genitals "in a discernibly turgid state." Post, at 1707. We do not agree that this distinction between body areas and specific body parts is constitutionally significant: The crucial question is whether the depiction is lewd, not whether the depiction happens to focus on the genitals or the buttocks.

Osborne, 495 U.S. at 114 n.11. Under the reasoning of *Osborne*, "the focus is on whether the depiction is lewd, not whether the depiction happens to focus on the genitals or the buttocks," or indeed, as in the present case, the anus or female breast below the top of the areola. Thus, section 43.26(a) is not unconstitutionally overbroad because it includes more body parts than genitalia.

Dicta from the Texas Court of Criminal Appeals supports our conclusion. *See Savery v. State*, 819 S.W.2d 837, 838 n.1 (Tex. Crim. App. 1991). In *Savery*, the Texas Court of Criminal Appeals held that the defendant's conviction for violating section 43.26 was unaffected by *Osborne*. Savery did not make a facial constitutional challenge to the Texas statute like the challenge at issue in *Osborne*, but the Court nonetheless observed that section 43.26 did more than proscribe the

possession of displays of child nudity—it "prohibit[ed] the display of children 'engaging in sexual conduct." *Id.*

Thus, we conclude that section 43.26 is not unconstitutionally overbroad because it prohibits the *lewd* exhibition of the anus or female breast below the top of the areola. We also note that, like the statute in *Osborne*, article 43.26 contains exemptions and "proper purposes" provisions that limit the applicability of the statute, so as not to "penal[ize] persons for viewing or possessing innocuous photographs" of a child's anus or female breast below the areola. *Osborne*, 495 U.S. at 114.

3. Punishing the possession of "simulated" sexual contact

Appellant next argues that section 43.26 is overbroad because it forbids the possession of images involving children involved in "simulated" sexual contact. Specifically, appellant argues that "[l]ike images of 17-year-olds, there is no non-speech crime involved in the making of images of simulated sexual conduct" and that "images involving simulated sexual conduct, which have no link to any valid crime, do not fall into the narrow category of *child pornography*[.]"

Appellant again seems to argue, without any citation to authority, that there can be no child pornography unless it depicts an underlying crime. For the same reasons we discussed above, the Legislature could have chosen to define the child-

pornography statute, a crime against public order and decency, differently from a crime against persons.

And, to the extent that appellant is challenging the "simulated" nature of the sexual conduct prohibited in 43.26(a), we note that the Fourteenth Court of Appeals has considered and rejected this argument. *See Porath v State*, 148 S.W.3d 402, 414–15 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). In *Porath*, the defendant argued that section 43.26 was overbroad and violated the First Amendment because "it draws no distinction between possession of actual child pornography and child pornography created by digital or computer imaging," i.e., simulated sexual conduct. In rejecting this argument, the court stated as follows:

> [A]ppellant relies on *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389, 152 L.Ed.2d 403 (2002). In *Free Speech Coalition*, the United States Supreme Court considered a challenge to the Child Pornography Prevention Act of 1996 ("CPPA"). *Id.* at 239, 122 S. Ct. 1389. The CPPA extended the federal prohibition of child pornography to sexually explicit images that "appear to" depict minors engaging in sexual conduct, but are produced without using any real children. *Id.* Because the statute prohibited both protected and unprotected speech, the Court held that the statute was unconstitutional to the extent it regulated virtual images or images that merely appeared to depict children engaged in sexual conduct. *Id.* at 256, 122 S.Ct. 1389. In so holding, however, the Court also observed, "[t]he freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children." *Id.* at 246, 122 S. Ct. 1389.
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> In Texas, it is an offense to knowingly or intentionally possess "visual material that visually depicts a child younger than 18 years of age at

> the time the image of the child was made who is engaging in sexual conduct" if the person "knows that the material depicts the child" engaging in sexual conduct. TEX. PEN. CODE ANN. § 43.26(a) (Vernon 2003). Unlike the federal statute [interpreted in *Ashcroft*], the plain language of the Texas statute indicates that it prohibits only possession of material that depicts an actual child, not material that merely "appears" to depict a child. *Id.*
>
> Because section 43.26(a) only prohibits pornography depicting actual children, the statute is not vague or overbroad. *Webb v. State*, 109 S.W.3d 580, 583 (Tex. App.—Fort Worth 2003, no pet.). Further, because pornography produced with actual children is not a category of speech protected by the First Amendment, the statute's prohibition of these materials does not violate the First Amendment. *Id.*; *see also Free Speech Coalition*, 535 U.S. at 246, 122 S. Ct. 1389.

Porath, 148 S.W.3d at 414–15.

Further, if appellant is arguing that there can be no child pornography unless there is an actual child *plus* actual sexual intercourse[7] by the child depicted in the image, we disagree.

The United States Fifth Circuit Court of Appeals has recently considered a similar claim. In *United States v. Mecham*, the defendant imposed the face of his granddaughter on the body of an adult engaged in sexual acts to make it appear that the child was engaged in sexual conduct. 950 F.3d 257, 263 (5th Cir. 2020). When

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[7] The statute prohibits "actual or simulated sexual intercourse," and "simulated" intercourse requires "[t]he explicit depiction of sexual conduct that creates the appearance of actual sexual conduct and during which a person engaging in the conduct exhibits any uncovered portion of the breasts, genitals, or buttocks." TEX. PENAL CODE §§ 43.26(b)(2), 43.25(a)(2), 43.25(a)(6).

prosecuted under the federal child pornography statute,[8] the defendant claimed that "the video is entitled to First Amendment protection because, even though it uses an image of a real child, it does not depict the sexual abuse of that child" and that "underlying criminal conduct is necessary . . . for an image to be excluded from the First Amendment." *Id.* The Fifth Circuit rejected this argument, holding that there was no requirement that child pornography depict an underlying sexual abuse claim, and that because the challenged "child pornography depicts an identifiable child, it falls outside the First Amendment." *Id.* at 267; *see also United States v. Lyckman*, 235 F.3d 234, 240 (5th Cir. 2000) (recognizing that "child pornography may involve merely 'pictures of a [naked] child' . . . without physical sexual contact").

Indeed, we note that two of the child-pornography-related statutes upheld by the United States Supreme Court both proscribe the depiction of children in simulated sexual intercourse although they do not specifically address the issue raised here. *See Ferber*, 458 U.S. at 765; *Williams*, 553 U.S. at 296 (noting that definition of simulated sexual intercourse proscribed by statute "is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera trick or otherwise) it may not actually have occurred").

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[8] *See* 18 U.S.C. 2256.

In light of these authorities, we reject appellant's claim that the statute is overbroad because no actual child abuse crime is depicted.

4. Texas Constitutional Challenge

Finally, appellant also claims that the statute is unconstitutional under Article I, section 8 of the Texas Constitution ("Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press"). Specifically, appellant, citing *Davenport v. Garcia*, 834 S.W.2d 4, 8 (Tex. 1992), contends that "Article I, section 8 of the Texas Constitution provides broader rights of free speech than does the First Amendment."

In addressing a similar argument, the Texas Supreme Court has stated:

> In *Operation Rescue–National v. Planned Parenthood of Houston & Southeast Texas, Inc.*, this Court held:
>
> > It is possible that Article I, Section 8 may be more protective of speech in some instances than the First Amendment, . . . but if it is, it must be because of the text, history, and purpose of the provision, not just simply because. Starting from the premise that the state constitutional provision must be more protective than its federal counterpart illegitimizes any effort to determine state constitutional standards. To define the protections of Article I, Section 8 simply as one notch above First Amendment protections is to deny state constitutional guarantees any principled moorings whatever. We reject this approach.
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> And in *Ex Parte Tucci*, Chief Justice Phillips explored in his concurring opinion the history and adoption of Article I, section 8. He

> concluded that *when there is **no prior restraint**, "nothing in the language or purpose of [section 8] authorizes us to abandon the notion of accommodating competing interests . . . or even to afford greater weight in the balancing of interests to free expression than we would under the First Amendment. . . .*"

Tex. Dept. of Transp. v. Barber, 111 S.W.3d 86, 106 (Tex. 2003) (internal citations omitted) (emphasis added).

As noted in *Barber*, the Texas Supreme Court has not interpreted Article I, section 8 more broadly than the First Amendment in any case that does not involve an issue of a prior restraint on free speech. This case does not involve an issue of a prior restraint on free speech, and appellant has shown no reason, based on "the text, history, or purpose of Article 1, section 8," for us to expand the protections afforded in in this case beyond those provided by the First Amendment.

CONCLUSION

Having considered and rejected all reasons advanced by appellant for holding section 43.26 unconstitutionally overbroad, we overrule appellant's sole issue on appeal.

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Lloyd and Countiss.

Publish. TEX. R. APP. P. 47.2(b).