Affirmed and Opinion Filed July 17, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00889-CR

EX PARTE JEFFREY BARRETT
EX PARTE BARBARA JEAN BARRETT

On Appeal from the 354th District Court
Hunt County, Texas
Trial Court Cause Nos. 32470CR and 32471CR

OPINION

Before Justices Osborne, Partida-Kipness, and Pedersen, III
Opinion by Justice Partida-Kipness

Jeffrey Leon Barrett and Barbara Jean Barrett are charged with the offense of trafficking of children for forced labor or services. *See* TEX. PENAL CODE § 20A.02(a)(5)–(6). The Barretts appeal the trial court's denial of their pretrial applications for writ of habeas corpus in which they asserted facial constitutional challenges to section 20A.02.[1] Although the Barretts are represented by separate counsel in the trial court and on appeal, the trial court jointly heard and decided their

[1] Although the Barretts refer to the statute generally on appeal, only subsections (a)(5) and (a)(6) are under review because the indictment only charges violations of the "forced labor or services" portions of the statute applicable to minors. Neither the trial court nor this Court has jurisdiction to address the constitutionality of provisions of the statute under which the Barretts have not been charged. *See Ex parte Maddison*, 518 S.W.3d 630, 635 (Tex. App.—Waco 2017, pet. ref'd).

pretrial applications without objection. Moreover, aside from the party names and cosmetic differences, the Barretts' briefs in this Court are substantively identical. Because the legal issues are the same, the Court consolidated the appeals on its own motion following submission of the case to the above-referenced judicial panel. After reviewing the parties' briefs and the appellate record, we affirm the trial court's orders.

BACKGROUND

In this case of first impression, the Barretts are accused of forcing their own children to work against their will and profiting from the children's labor. The indictments charge that two or more times between February 11, 2012 and September 23, 2017, the Barretts "did knowingly traffic" four children under the age of eighteen "and through force, fraud or coercion" caused the complainants "to engage in forced labor or services." The indictments further charge the Barretts did "knowingly receive a benefit from participating in a venture that involved trafficking" the four child complainants "and through force, fraud or coercion" caused the complainants "to engage in forced labor or services." The indictments charge the Barretts with the offense of continuous trafficking of persons as set out in section 20A.03 of the penal code. *See* TEX. PENAL CODE §§ 20A.03(a), 20A.02(a)(5)–(6).

The record is silent regarding what specific acts the State contends the Barretts engaged in to violate the statute. An appellate court, however, has the discretion to

take judicial notice of adjudicative facts that are matters of public record on its own motion and for the first time on appeal. TEX. R. EVID. 201(b), (c), (f); *Office of Pub. Util. Counsel v. Pub. Util. Comm'n of Tex*., 878 S.W.2d 598, 600 (Tex. 1994). An appellate court may take judicial notice of a fact that is not subject to reasonable dispute because it (1) is generally known within the trial court's territorial jurisdiction, or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. TEX. R. EVID. 201(b); *Hudson v. Markum*, 931 S.W.2d 336, 337 n. 1 (Tex. App.—Dallas 1996, no writ) (appellate court took judicial notice of funeral and death announcement in Dallas Morning News); *In re Estate of Hemsley*, 460 S.W.3d 629, 638–39 (Tex. App.—El Paso 2014, pet. denied) (taking judicial notice that it was widely reported on local, state, and national news that Hemsley was buried in El Paso on November 21, 2012 at Fort Bliss National Cemetery).

Here, local news media outlets reported the Barretts' arrests. *E.g.*, Brad Kellar, *Greenville couple charged with trafficking, accused of using adopted kids as 'slave labor'*, HERALD BANNER (Aug, 3, 2018), https://tinyurl.com/y824spmn[2]; Amanda Jesse, *Texas couple accused of using adopted children as slave labor to run puppy*

[2] https://www.heraldbanner.com/news/local_news/greenville-couple-charged-with-trafficking-accused-of-using-adopted-kids/article_c6d7fd4a-9869-11e8-9cbc-b7da68e30c48.html (last visited July 15, 2020).

mill, THE DALLAS MORNING NEWS (Aug. 9, 2018), https://tinyurl.com/y7wa4teg[3]. We take judicial notice that it was reported in local newspapers after the Barretts' arrests that the Barretts were arrested by Texas Department of Public Safety officers on August 2, 2018, charged with continuous human trafficking, and accused of removing their adopted children from public school and beating and forcing the children "to care for more than 100 animals in filthy conditions at a puppy mill being run behind their home." Jesse, *supra*; *see also* Kellar, *supra*. We also take judicial notice that media outlets reported that officials began investigating the children's welfare shortly after Hunt County officials arrested the Barretts on charges of animal cruelty[4] following the seizure of 117 animals from the family's home in September 2017, officials observed four of the children had "marks, bruises and open wounds in different stages of healing," and "[t]he children told authorities that the Barretts hit them with plywood, bamboo sticks, and brushes." Jesse, *supra*. The reports cited as sources officials from the Texas Department of Family and Protective Services and arrest-warrant affidavits. *Id.*; Kellar, *supra*. We attach no legal significance to these facts and make no findings or conclusions regarding the truth of the State's

[3] https://www.dallasnews.com/news/crime/2018/08/10/texas-couple-accused-of-using-adopted-children-as-slave-labor-to-run-puppy-mill/ (last visited July 15, 2020).

[4] https://www.spca.org/news---puppy-mill-arrests-102017 (October 27, 2017) (reporting arrest of the Barretts on charges of cruelty to non-livestock animals in connection with the seizure of 117 animals from an alleged puppy mill in Hunt County, east of Greenville, TX) (last visited July 15, 2020).

allegations. We take judicial notice of these facts solely for the purpose of providing context to the case.

The Barretts each filed an application for pretrial writ of habeas corpus alleging the indictment failed to charge an offense because the four named complainants are the Barretts' children and it is legally impossible to charge parents with trafficking their own children for forced labor or services. The trial court denied the first writ applications, and the Barretts did not appeal those decisions.

The Barretts then each filed a second application for pretrial writ of habeas corpus contending subsections 20A.02(a)(5) and 20A.02(a)(6), the predicate offenses for the continuous trafficking charges, are unconstitutionally overbroad and vague on their face under both the United States and Texas constitutions. Specifically, the Barretts contend the challenged portions of the statute violate their freedoms of speech and association, their due process and equal protection rights, and their fundamental right as parents to make decisions concerning the care, custody, and control of their children as guaranteed by the First, Fifth, and Fourteenth Amendments to the United States Constitution and Article I, sections 8, 10, and 19 of the Texas Constitution.[5]

[5] Although the Barretts argue that the statute is overbroad under both the federal and state constitutions, they do not argue that the Texas Constitution creates a different standard than the United States Constitution, and they blend citations to federal and state cases to argue that the statute is overbroad under the First Amendment. By not providing the trial court or this Court with separate briefing and analysis of the Texas constitutional claim, the Barretts have waived any argument that the Texas Constitution provides any greater protection than the United States Constitution. *See Pena v. State*, 285 S.W.3d 459, 464 (Tex.

After conducting a non-evidentiary hearing, the trial court denied relief on the Barretts' second applications. The trial court found that the Barretts conceded there are circumstances under which the forced labor provisions of the statute would be valid. As such, the trial court concluded the facial challenge failed because the Barretts did not meet their burden to show there are no circumstances in which the statute would be valid. The trial court further concluded the constitutional overbreadth doctrine applicable to free speech cases did not apply because (1) the statute regulates conduct rather than free speech, (2) the State has the power to regulate and prohibit child labor, and (3) the statute is not unconstitutionally overbroad, even applying an overbreadth analysis, because the statute does not have a substantial number of unconstitutional applications when judged in relation to its plainly legitimate sweep. As for the Barretts' vagueness complaint, the trial court concluded the statute is not unconstitutionally vague because it gives a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited and has enough clarity to avoid arbitrary and discriminatory enforcement. The trial court also determined the statute does not chill free expression and should not be subjected to a heightened vagueness analysis. On appeal, the Barretts challenge the

Crim. App. 2009) ("[B]y failing to distinguish the rights and protections afforded under the Texas due course of law provision from those provided under the Fourteenth Amendment before the trial judge in this context, Pena failed to preserve his complaint that the due course of law provides greater protection for appellate review."). We will, therefore, analyze the issues under the federal standard only. *Freeman v. State*, 510 S.W.3d 466, 471–72 (Tex. App.—Dallas 2013), *judgment vacated on other grounds*, 425 S.W.3d 289 (Tex. Crim. App. 2014).

trial court's findings and conclusions regarding the constitutionality of the statute, including the trial court's failure to apply a heightened level of scrutiny to the statute.

STANDARD OF REVIEW

We review a trial court's ruling on a habeas application for an abuse of discretion, viewing any factual determinations in the light most favorable to the trial court's ruling. *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). When a habeas applicant challenges the facial constitutionality of a statute, that determination is a question of law that we review de novo. *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). In conducting our de novo review, we start with the presumption that the statute is valid and that the legislature did not act unreasonably or arbitrarily in creating it. *Id.* at 14–15. The challenger bears the burden to establish the statute is unconstitutional. *Id.* at 15. We make every reasonable presumption in favor of the statute's constitutionality, unless the contrary is clearly shown. *Peraza v. State*, 467 S.W.3d 508, 514 (Tex. Crim. App. 2015). When, however, the statute under review seeks to restrict speech based on its content, we reverse the usual presumptions of constitutionality, presume the content-based statute is invalid, and shift the burden to the State to show the statute is valid. *Lo*, 424 S.W.3d at 15.

APPLICABLE LAW

A defendant may raise a facial challenge to the constitutionality of a statute that defines the offense charged through a pretrial application for a writ of habeas corpus. *Ex parte Thompson*, 442 S.W.3d 325, 333 (Tex. Crim. App. 2014). A facial

challenge attacks the statute itself rather than the statute's application to the defendant. *Peraza*, 467 S.W.3d at 514. 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." *United States v. Stevens*, 559 U.S. 460, 472 (2010) (citations omitted). This is the standard the trial court applied in its evaluation of the statute. However, in the case of statutes that encroach upon activity protected by the First Amendment, the challenger may also bring a "substantial overbreadth" challenge. *Id.* at 473. Under such a 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." *Id.* (citation omitted); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002) ("The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."). This type of facial challenge may be made when a statute restricts or punishes speech based upon its content. *Lo*, 424 S.W.3d at 19. This is the standard the Barretts contend the trial court should have applied.

The overbreadth doctrine is "strong medicine" that is used "sparingly and only as a last resort." *State v. Johnson*, 475 S.W.3d 860, 865 (Tex. Crim. App. 2015) (quoting *N.Y. State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 14 (1988)). To apply the substantial overbreadth doctrine, the statute must prohibit a substantial amount of protected expression, and the danger that the statute will be unconstitutionally

applied must be realistic and not based on "fanciful hypotheticals." *Id.* (quoting *Stevens*, 559 U.S. at 485). The person challenging the statute must demonstrate from its text and from actual fact "that a substantial number of instances exist in which the Law cannot be applied constitutionally." *Id.* (quoting *N.Y. State Club Ass'n*, 487 U.S. at 14). Because the overbreadth doctrine's purpose is to prevent the chilling of protected speech, the doctrine's applicability attenuates as the sanctioned behavior "moves from 'pure speech' toward conduct." *Id.* (quoting *Virginia v. Hicks*, 539 U.S. 113, 124 (2003)). Overbreadth challenges rarely succeed against laws not specifically directed at speech or at conduct necessarily associated with speech such as picketing or demonstrating. *Id.* A statute is not rendered overbroad merely because it is possible to conceive of some impermissible applications. *United States v. Williams*, 553 U.S. 285, 303 (2008); *Ex parte Fujisaka*, 472 S.W.3d 792, 794–95 (Tex. App.—Dallas 2015, pet. ref'd).

THE STATUTE

The indictments charge violations of the "forced labor or services" subsections of penal code section 20A.02 applicable to minors, which provide:

> (a) A person commits an offense if the person knowingly:
>
> > (5) traffics a child with the intent that the trafficked child engage in forced labor or services; [or]
> >
> > (6) receives a benefit from participating in a venture that involves an activity described by Subdivision (5), including by receiving labor or services the person knows are forced labor or services.

TEX. PENAL CODE §§ 20A.02(a)(5)–(6).

Within Chapter 20A, "[f]orced labor or services" is defined as "labor or services, other than labor or services that constitute sexual conduct, that are performed or provided by another person and obtained through an actor's use of force, fraud, or coercion." TEX. PENAL CODE § 20A.01(2). "Traffic" means "to transport, entice, recruit, harbor, provide, or otherwise obtain another person by any means." TEX. PENAL CODE § 20A.01(4).

We construe the words in the statute according to the rules of grammar and common usage and read them in context. TEX. GOV'T CODE § 311.011(a). "Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." *Id.* at § 311.011(b).

ANALYSIS

The Barretts raise five issues on appeal. In their first three issues, the Barretts bring a facial challenge to the statute based on overbreadth. In their fourth and fifth issues, the Barretts assert a vagueness challenge. We address the overbreadth challenge first.

A. Overbreadth Challenge

As explained above, to succeed in a typical facial attack of a statute, the Barretts must establish "that no set of circumstances exists under which [the statute] would be valid" or "that the statute lacks 'any plainly legitimate sweep.'" *Stevens,*

559 U.S. at 472. The Barretts concede their facial attack fails under this general standard because the Trafficking of Persons statute has applications that are valid and constitutional. The Barretts argue instead that the heightened scrutiny review applied to statutes that implicate the First Amendment, i.e., a substantial overbreadth analysis, should be applied here. They divide this overbreadth challenge into three issues. First, they assert the statute infringes upon a First Amendment right to intimate association, thus triggering the need for a substantial overbreadth analysis. Next, they argue the statute is subject to a substantial overbreadth analysis because it regulates speech. Finally, they contend the statute is facially overbroad when reviewed under the appropriate standard.

1. Issue One – Intimate Association

The Barretts first argue that the statute is subject to a substantial overbreadth analysis because it infringes upon a First Amendment right to intimate association. The United States Supreme Court recognizes that the Constitution protects both expressive association and intimate association. *Roberts v. United States Jaycees*, 468 U.S. 609, 617–18 (1984). The freedom of expressive association protects the "right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id.* at 618. The Barretts do not contend that the statute infringes the right to expressive association. The right to intimate association is protected "as a fundamental element of personal liberty." *Id.* It applies to relationships involving

"the creation and sustenance of a family" such as marriage, childbirth, and the raising and education of children because such relationships involve "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Id.* at 619–20.

While the Constitution does offer family members constitutional protection for their intimate associations and offers parents protection for their right to supervise and raise their children, the Barretts cite no authority for the proposition that statutes allegedly encroaching upon a right to intimate association should be evaluated under a First Amendment substantial overbreadth analysis. Although the Supreme Court has applied the substantial overbreadth test for cases involving free speech and expressive conduct, s*ee, e.g.*, *Williams*, 553 U.S. at 292–304 and *New York State Club Association*, 487 U.S. at 14, the Court has not addressed whether substantial overbreadth review applies in cases involving the right to intimate association, and the Fifth Circuit, federal district courts in Texas, and Texas state courts have yet to speak on this issue. Only the Second Circuit and federal district courts in Illinois and New York have applied a First Amendment overbreadth analysis to determine whether a statute substantially interferes with the right to intimate association. *United States v. Thompson*, 896 F.3d 155, 166–67, n.12 (2d Cir. 2018) (concluding the substantial overbreadth challenge fails even assuming without deciding that "overbreadth attacks apply to alleged infringements of the

right to intimate association as they do to First Amendment rights") (citation omitted); *United States v. Biancofiori*, No. 16 CR 306-1, 2018 WL 372172, at *5 (N.D. Ill. Jan. 11, 2018) (conducting substantial overbreadth analysis without deciding whether the relationships alleged were protected by the right to intimate association); *United States v. Estrada-Tepal*, 57 F. Supp. 3d 164, 171–72 (E.D.N.Y. 2014) (conducting substantial overbreadth analysis to determine if statute unconstitutionally infringes on right of intimate association).

Given the uncertainty regarding whether a First Amendment substantial overbreadth test would even apply to an assertion of the right to intimate association, we cannot conclude the trial court erred as a matter of law by determining that the substantial overbreadth doctrine was inapplicable here. *See Thompson*, 896 F.3d at 166–68. We, therefore, overrule the Barretts' first issue.

2. Issue Two – Freedom of Speech

In their second issue, the Barretts argue the statute is subject to substantial overbreadth review because it infringes on their speech as well as their conduct necessarily associated with speech, both of which the Barretts maintain are rights protected by the First Amendment. They ask this Court to reverse and remand the case to the trial court to apply the substantial overbreadth standard. The State responds the trial court did not err in choosing the general standard because the statute regulates unprotected conduct rather than speech protected by the First Amendment.

The Barretts concede they cannot meet the test of showing that no set of circumstances exist under which the statute would be constitutional because the statute has "clearly legitimate" applications, giving as an example, a person brought across the border and forced to work against their will for a number of years to obtain their freedom. We agree. *See, e.g.*, *Ramos v. State*, No. 13-06-00646-CR, 2009 WL 3210924, at *1–4 (Tex. App.—Corpus Christi–Edinburg Oct. 8, 2009, no pet.) (mem. op., not designated for publication) (affirming conviction of trafficking of adult under section 20A.02(a)(1) where victim was trafficked from Mexico); *see also Benavides v. State*, No. 04-18-00273-CR, 2019 WL 5580260, at *5 (Tex. App.—San Antonio Oct. 30, 2019, pet. ref'd) (mem. op., not designated for publication) (affirming conviction for continuous trafficking of persons and holding that section 20A.03 is not unconstitutionally vague as applied because it "clearly prohibits Benavides's conduct of transporting women to a new location and forcing them to have sex"); *United States v. Toviave*, 761 F.3d 623, 626 (7th Cir. 2008) (stating in dicta that federal forced labor statute would apply to forced-labor sweat shop run by minor victim's parent). Therefore, if the statute merely regulates unprotected conduct rather than protected expression as the trial court concluded, the Barretts' challenges must fail.

In determining whether a statute intrudes upon First Amendment rights, we are mindful of what the First Amendment does and does not cover. "The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits

the enactment of laws 'abridging the freedom of speech.'" *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015); U.S. CONST., amend. I. In addition to the spoken and written word, the First Amendment also protects expressive conduct that is "sufficiently imbued with elements of communication." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). To constitute expressive conduct, the actor must intend to convey a particularized message and there must be a likelihood, given the surrounding circumstances, that the message will be understood by viewers. *Id.* Examples of constitutionally-protected expressive conduct include displaying the American flag altered to include a peace symbol, nude dancing, and marching while displaying a swastika. *O'Toole v. O'Connor*, No. 2:15-CV-1446, 2016 WL 4394135, at *19 (S.D. Ohio Aug. 18, 2016) (citations omitted); *State v. Howard*, 172 S.W.3d 190, 192 (Tex. App.—Dallas 2005, no pet.). Conduct that would require an explanation for the viewer to understand the particularized message is not expressive conduct protected by the First Amendment. *Johnson*, 491 U.S. at 404.

Moreover, "[o]therwise proscribable criminal conduct does not become protected by the First Amendment simply because the conduct happens to involve the written or spoken word." *Ex parte Bradshaw*, 501 S.W.3d 665, 674 (Tex. App.—Dallas 2016, pet. ref'd) (quoting *State v. Stubbs*, 502 S.W.3d 218, 226 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd)). For example, several categories of speech and expressive conduct are not protected by the First Amendment, including advocacy intended, and likely, to incite imminent lawless action, obscenity,

defamation, speech integral to criminal conduct, "fighting words," child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent. *United States v. Alvarez*, 567 U.S. 709, 717 (2012). Similarly, although speech may be incidental to criminal conduct, "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). "Speech integral to criminal conduct has long been recognized as a category of speech that may be prevented and punished without raising a First Amendment problem." *Stubbs,* 502 S.W.3d at 226 (citing *Stevens*, 559 U.S. at 468).

Here, the Barretts are alleged to have trafficked their four children by causing those children to engage in forced labor or services through force, fraud, or coercion and to have knowingly received a benefit from that trafficking. The Barretts' conduct, not their speech, is the subject of the governmental regulation. We conclude the statute does not address speech or "conduct necessarily associated with speech," nor does a defendant have to engage in speech to commit the crime of trafficking. Any use of speech by the trafficker would be incidental to the criminal conduct. Namely, any speech used to "initiate, evidence, or carr[y] out" the trafficking is incidental to that criminal conduct and does not violate the Barretts' First Amendment right to freedom of speech. *See Williams*, 553 U.S. at 298-99 (speech

that is "intended to induce or commence illegal activities," is not afforded the protection of the First Amendment and it is error for courts to apply heightened levels of scrutiny and protection). We, therefore, conclude the trial court did not err by determining that the overbreadth doctrine is inapplicable here because the statute criminalizes conduct that is not protected under the First Amendment.

This does not, however, end our inquiry. This consolidated appeal presents the first facial constitutional challenges to the child forced labor provisions of the trafficking of persons statute. We agree with the trial court that the relevant subsections of section 20A.02 govern primarily conduct and behavior unprotected by the First Amendment. Nevertheless, in an abundance of caution and giving fair consideration to the statute's sweep and the importance of the intimate associations the Barretts contend are threatened, we also conclude, as did the trial court, that performing a "substantial overbreadth" review would be prudent here. This approach of conducting an overbreadth review despite its inapplicability has been employed by the Second and Seventh Circuits analyzing the federal forced labor statute. For example, in *United States v. Calimlim*, the Seventh Circuit entertained post-conviction vagueness and overbreadth challenges to the federal forced labor statute.[6]

[6] The federal forced labor statute prohibits (1) knowingly providing or obtaining labor or services from a person by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person; by means of serious harm or threats of serious harm to that person or another person; by means of the abuse or threatened abuse of law or legal process; or by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; and (2) knowingly benefitting financially

538 F.3d 706, 710 (7th Cir. 2008). The court prefaced its overbreadth review by noting that it was "tempting to reject this for the simple reason that [the federal forced labor statute] penalizes conduct, whereas overbreadth is a doctrine designed to protect free speech." *Id.* at 712. The court continued that the federal statute did not criminalize any speech but rather banned behavior that might involve speech, and this difference "blunts any overbreadth attack." *See id.* Nevertheless, the Seventh Circuit proceeded to consider whether the challenged statute was substantially overbroad. *See id*.

Similarly, in *United States v. Thompson*, the Second Circuit entertained a challenge to the federal forced labor statute asserting that the statute intruded unlawfully on family members' intimate associational rights. *Thompson*, 896 F.3d at 162. After noting that the district court had rejected applying "substantial overbreadth" to the statute because Thompson's assertions of intrusion into protected rights were absurd and unrealistic, the circuit court concluded that because of "the broad language in the statute and the complexity of the social problem that it addresses . . . Thompson's arguments merit more extensive analysis before they can be fairly adjudicated." *Id.*

Moreover, in this case, the Barretts challenge the trial court's conclusion that the statute is not unconstitutionally overbroad even when the court applies the

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or receiving anything of value from participating in a venture to obtain such forced labor. *See* 18 U.S.C. § 1589(a)–(b) (2008).

substantial overbreadth standard. This presents a compelling reason to consider whether the statute is substantially overbroad despite our conclusion that the overbreadth doctrine is inapplicable. Thus, we proceed to consider whether the statute satisfies the "substantial overbreadth" test.

3. Issue Three – Overbreadth Challenge

In their third issue, the Barretts contend the trial court abused its discretion by concluding the challenged provisions are not overbroad. The Barretts maintain the trial court incorrectly determined that the statute does not have a substantial number of unconstitutional applications when judged in relation to its plainly legitimate sweep. The State responds that even when the overbreadth standards governing regulations of free speech are applied, the statute is not overbroad because the statute does not have a substantial number of unconstitutional applications judged in relation to its plainly legitimate sweep. We agree with the State and conclude the trial court did not abuse its discretion in concluding the statute is not overbroad.

The first step in an overbreadth analysis is to determine whether the statute reaches a substantial amount of activity protected by the First Amendment. *Ex parte Fujisaka*, 472 S.W.3d at 795 (citing *City of Houston, Tex. v. Hill*, 482 U.S. 451, 458–59 (1987)). If the law does not reach a substantial amount of constitutionally protected activity, then the overbreadth challenge fails. *Id.* (citing *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)). We begin our analysis by examining what the statute covers. *See Stevens*, 559 U.S. at 474.

The "forced labor or services" subsections of penal code section 20A.02 applicable to minors covers the knowing trafficking of a child with the intent that the child engage in forced labor or services or knowingly receiving a benefit from participating in a venture that involved such trafficking. TEX. PENAL CODE § 20A.02(a)(5)–(6). Within Chapter 20A, "[f]orced labor or services" is defined as "labor or services, other than labor or services that constitute sexual conduct, that are performed or provided by another person and obtained through an actor's use of force, fraud, or coercion." TEX. PENAL CODE § 20A.01(2). "Traffic" means "to transport, entice, recruit, harbor, provide, or otherwise obtain another person by any means." TEX. PENAL CODE § 20A.01(4). The State has a compelling interest in the protection of children. *See Schlittler v. State*, 488 S.W.3d 306, 313 (Tex. Crim. App. 2016); *see also State v. Williams*, 257 P.3d 849, 856 (Kan. Ct. App. 2011) (acknowledging State's compelling interest in protecting children in upholding Kansas aggravated trafficking statute). The State also has a compelling interest in stamping out human trafficking and forced labor. *See generally Velez v. Sanchez*, 693 F.3d 308, 319–24 (2d Cir. 2012) (describing international efforts to condemn and eradicate slavery, forced labor, and involuntary servitude); *see also People v. Halim*, 14 Cal. App. 5th 632, 646–47 (Cal. Ct. App. 2017) (State has legitimate interest in enforcing criminal prohibition against human trafficking); *Arganbright v. State*, 328 P.3d 1212, 1217 (Okla. Crim. App. 2014) (noting State's compelling

interest of protecting minors from human trafficking). This statute serves those interests and, thus, has a plainly legitimate sweep that the Barretts do not challenge.

Despite its legitimate applications, the Barretts contend the relevant portion of section 20A.02 is unconstitutionally overbroad because it criminalizes a substantial amount of conduct constitutionally protected by the First Amendment and conduct recognized as a fundamental liberty interest by the Supreme Court and protected by the Due Process Clause, namely the right of parents to raise and supervise their children. They contend the broad definitions of "forced labor and services" and "traffic" turn "millions of Texas parents into felons as a plain reading of the statute provides these parents are presently violating the statute every single day, simply by exercising their essential parental functions which are protected by the First Amendment."

Regarding the definition of "forced labor," the Barretts explain that the First Amendment, Texas law, and social norms grant parents the right and duty to assign children to perform household chores, maintenance on family homes, and work in family businesses. They maintain that the Texas Labor Code and Texas Administrative Code grant parents leeway to force labor or services upon their children, and the Texas Family Code gives parents the right to any income from a child's employment. And they posit that it is not legally possible for parents to traffic their own children to themselves for forced labor and point to their own situation as an illustration of the "dramatically overbroad sweep" of the statute. To support their

arguments, the Barretts rely on two cases from the Sixth Circuit that acknowledge a parent's right to make his child perform household chores. *See United States v. Callahan*, 801 F.3d 606, 619–20 (6th Cir. 2015); *Toviave*, 761 F.3d at 625. The Barretts' reliance on these general authorities is misplaced.

Although there is a broadly shared common understanding based on social norms and backed by law and constitutional protections that parents have a right to assign their children household chores and expect them to provide reasonable work and service to family farms and businesses,[7] this does not mean that the trafficking statute is unconstitutionally overbroad. These parental rights are not absolute and may be limited by the compelling governmental interest in the protection of children. *See Schlittler*, 488 S.W.3d at 313.

As stated in *Toviave*, in explaining the scope of the federal forced labor statute, which also has a broad definition of "forced labor" and does not expressly exempt family duties:

> [W]e have found no other cases where the government convicted a victim's relatives of forced labor. This absence is likely explained by the difficulty of drawing a line between what amounts to forced labor and what are widely accepted childrearing practices in the context of a familial relationship where the labor at issue consists entirely of household chores.

[7] *See, e.g.*, TEX. LAB. CODE § 51.003 (providing labor laws do not apply to non-hazardous employment of child employed in parent-owned business); 40 TEX. ADMIN. CODE § 700.459(b)(2)(B) (excluding from scope of "labor trafficking" children's work in chores, family businesses and family farms provided such work constitutes normal contribution to family and community life in light of prevailing community standards); *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (parents have fundamental liberty interest in care, custody, and control of their children).

Toviave, 761 F.3d at 630. Although the facts of *Toviave* fell "on the chores side of the line," that court noted that the federal forced labor statute does not immunize parents and suggested that a forced labor sweatshop run by a child victim's parents would violate the statute. *Id.* at 626.

Given these presumptions, laws, and constitutional safeguards, we conclude the Barretts' argument that the statute's definition of "forced labor or services" is overbroad because it might sweep in parents assigning chores to their children or requiring reasonable work in a family business is the type of "fanciful hypothetical" that does not constitute substantial overbreadth. *See Johnson*, 475 S.W.3d at 865. The statute does not prohibit the Barretts from having children, associating with their children, or even assigning the children household chores or having them work in a family business; it only prohibits the Barretts from facilitating or benefiting from a venture in which force, fraud, or coercion is used to cause the children to engage in forced labor or services. Simply put, the constitutionally-protected rights the Barretts maintain are infringed by the statute are not even subject to the statute under its plain terms. We conclude the statute does not have a substantial number of unconstitutional applications judged in relation to its plainly legitimate sweep and, therefore, the statute is not overbroad.

Turning to the Barretts' complaint about the definition of "traffic," they contend the definition of "coercion" in the statute and the inclusion of "enticing,"

"recruiting," and the phrase "by any means" sweeps a substantial amount of speech and protected conduct within the statute's sphere of regulation. We disagree.

Most criminal activity involves some form of communication. However, "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney*, 336 U.S. at 502. If one is "coercing," "enticing" or "recruiting" a child "by any means" knowing and intending that the child engage in forced labor or services, it is difficult to imagine a substantial number of situations where such speech would not be integral to criminal conduct. *See Alvarez*, 567 U.S. at 717; *Giboney*, 336 U.S. at 502; *see also Kuhl*, 497 S.W.3d at 130 (rejecting overbreadth challenge to section 20A.02(a)(7)(c) because defendant failed to demonstrate statute impacts substantial amount of constitutionally protected conduct).

The Barretts further contend that "traffic" is so broadly defined that it could be interpreted to mean such innocuous activities as giving a child a ride to another parent's home. We disagree. Giving a child a ride is not in itself sufficient to constitute trafficking under the statute. Rather, the offender must transport the child knowing and intending that the child is being transported to engage in forced labor or services. By imposing the scienter requirement that the trafficking conduct be done knowingly and with intent, the statute excludes the possibility that innocent

acts of transportation could be construed as "trafficking" a child. *See Calimlim*, 538 F.3d at 712.

Moreover, to the extent that the statute is applied overzealously and unrealistically so as to charge an innocent parent with trafficking as the Barretts suggest, such application may always be challenged post-conviction on direct appeal through an "as applied" challenge. *Thompson*, 896 F.3d at 168 ("Although declaring the entire statute unconstitutionally overbroad would be improper in this case and on this record, we note again that if an arguably unlawful prosecution, in one of the unlikely scenarios Thompson identifies, were ever pursued, it could of course be the subject of an as-applied challenge"); *see Broadrick v. Oklahoma*, 413 U.S. 601, 615–16 (1973) ("[W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.").

Because we conclude the challenged portions of section 20A.02 do not contain a substantial number of impermissible applications that would inhibit the exercise of First Amendment rights to free speech and intimate association when judged in relation to the statute's plainly legitimate sweep, we conclude the trial court did not abuse its discretion in concluding the statute was not overbroad.

4. Conclusion on Overbreadth Challenge

When reviewed for a facial challenge, it is clear that the statute at issue here regulates conduct, is only marginally associated with speech, and virtually all of the

speech it does regulate fits into the category of speech integral to a crime that does not enjoy the protection of the First Amendment. As such, the trial court did not abuse its discretion by declining to apply substantial overbreadth review here. Moreover, the facial challenge fails under the general standard or the heightened standard applied in an overbreadth challenge. Accordingly, we overrule appellants' first three issues.

B. Vagueness Challenge

In their fourth and fifth issues, the Barretts argue the statute is unconstitutionally vague because the definitions of "traffic" and "forced labor" do not apprise a reasonable person of what the law forbids, does not allow parents sufficient guidance to know what chores and work they may require their children to do, and does not give law enforcement determinate, explicit guidelines to prevent arbitrary enforcement.

A criminal law is unconstitutionally vague if it is not sufficiently clear (1) to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and (2) to establish determinate guidelines for law enforcement. *State v. Doyal*, 589 S.W.3d 136, 146 (Tex. Crim. App. 2019). Laws implicating First Amendment freedoms require greater specificity because they must be "sufficiently definite to avoid chilling protected expression" caused by citizens' efforts to steer wide of unlawful zones not marked by clear boundaries. *Id.* But "perfect clarity and precise guidance have never been required even of regulations that restrict

expressive activity." *Id.* Although not always determinative, "a scienter requirement in the statute may sometimes alleviate vagueness concerns." *Id.* "A statute satisfies vagueness requirements if its language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" *Wagner v. State*, 539 S.W.3d 298, 314 (Tex. Crim. App. 2018) (quoting *Jordan v. De George*, 341 U.S. 223, 231–32 (1951)). In the context of a vagueness challenge to a statute that does not regulate protected speech, a court should declare the statute unconstitutional only if it is impermissibly vague in all of its applications. *Id.*

Statutes are not unconstitutionally vague merely because the words or terms employed in the statute are not defined. *State v. Holcombe*, 187 S.W.3d 496, 499 (Tex. Crim. App. 2006). When the words used in a statute are not otherwise defined in the statute, we give the words their plain meaning unless the language is ambiguous or would lead to absurd results. *Parker v. State*, 985 S.W.2d 460, 464 (Tex. Crim. App. 1999).

For the reasons discussed above in resolving the Barretts' overbreadth challenge, we conclude a person of ordinary intelligence could readily understand the concepts of "trafficking" and "forced labor or services" and understand that they may assign their children to perform household chores or to work reasonable hours in the family business without being charged with trafficking the children for forced labor or services. We are similarly unpersuaded that the statute fails to give guidance to law enforcement authorities. Because the statute is not aimed at regulating

expression, but rather conduct, its terms do not chill a substantial amount of protected expression or interfere with the intimate associations bonding parents and their children. Indeed, as discussed above, the types of conduct and intimate association the Barretts contend are chilled by the statute would not even fall under the plain language of the statute. This being the only possible offending application the Barretts raise, we conclude the statute is not unconstitutionally vague and it does not chill protected First Amendment expression. *See Hill v. Colorado*, 530 U.S. 703, 733 (2000) ("[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'") (citation omitted). We overrule the Barretts' fourth and fifth issues.

CONCLUSION

We conclude sections 20A.02(a)(5) and 20A.02(a)(6) of the Texas Penal Code are neither facially unconstitutionally overbroad nor facially unconstitutionally vague. If appellants are convicted at trial, they may raise a challenge to the constitutionality of the statute as applied to their particular circumstances. Accordingly, we affirm the trial court's orders denying Jeffrey Leon Barrett's second application for pretrial writ of habeas corpus and denying Barbara Jean Barrett's

second application for pretrial writ of habeas corpus.

/Robbie Partida-Kipness/
ROBBIE PARTIDA-KIPNESS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

EX PARTE JEFFREY BARRETT
EX PARTE BARBARA JEAN BARRETT
No. 05-19-00889-CR

On Appeal from the 354th District Court, Hunt County, Texas
Trial Court Cause Nos. 32470CR and 32471CR.
Opinion delivered by Justice Partida-Kipness. Justices Osborne and Pedersen, III participating.

Based on the Court's opinion of this date, the trial court's orders denying Jeffrey Leon Barrett's second application for pretrial writ of habeas corpus and denying Barbara Jean Barrett's second application for pretrial writ of habeas corpus are **AFFIRMED**.

Judgment entered this 17th day of July, 2020.