IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0429-16

RUSSELL LAMAR ESTES, Appellant

v.

THE STATE OF TEXAS

ON STATE'S & APPELLANT'S PETITIONS FOR DISCRETIONARY REVIEW FROM THE SECOND COURT OF APPEALS TARRANT COUNTY

KEASLER, J., delivered the opinion of the Court as to Parts I, II, III, and V, in which KELLER, P.J., and YEARY, KEEL, and WALKER, JJ., joined, and filed an opinion as to Part IV, in which KELLER, P.J., and YEARY and KEEL, JJ., joined. NEWELL, J., filed an opinion concurring in part and dissenting in part, in which HERVEY and RICHARDSON, JJ., joined. ALCALA, J., dissented.

O P I N I O N

In enacting the current form of Penal Code Section 22.011(f),[1] the Legislature apparently wished to provide higher penalties for polygamists "who sexually assault their

[1] *See* TEX. PENAL CODE § 22.011(f).

purported spouses."[2] But the resulting statute has the potentially unintended effect of punishing married offenders more harshly than unmarried offenders. Does the State have a rational interest in enforcing this scheme? We believe it does, specifically as applied to cases in which a married adult sexually abuses a child. We reverse.

I. FACTS

The opinion below adequately conveys the details of the offense.[3] The essential facts are as follows.

"[O]ver the course of approximately one year," Russell Estes had an ongoing sexual relationship with K.A., a then-fourteen-year-old girl.[4] "They had sexual intercourse on multiple occasions and engaged in other sexual acts with each other."[5] During that span, Estes was legally married to someone else. So, in addition to charging Estes with sexual assault of a child, ordinarily a second-degree felony, the State also alleged that K.A. was a person "whom the defendant was prohibited from marrying or purporting to marry or with whom the defendant was prohibited from living under the appearance of being married[.]"[6] This additional fact, if proven true, would subject Estes to first-degree-felony punishment

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[2] *See State v. Rosseau*, 396 S.W.3d 550, 558 (Tex. Crim. App. 2013).

[3] *See Estes v. State*, 487 S.W.3d 737, 743–46 (Tex. App.—Fort Worth 2016, pet. granted).

[4] *Id.* at 744.

[5] *Id.*

[6] 1 CR at 7 ("Indictment No. 1388628").

under Penal Code Section 22.011(f):

> An offense under [Section 22.011, describing the offense of "Sexual Assault,"] is a felony of the second degree, except that [it] is a felony of the first degree if the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under Section 25.01 [describing the offense of "Bigamy"].[7]

Estes was also charged with various counts of indecency with a child.[8]

A. Trial Court Proceedings

Estes filed a pre-trial motion to quash the child-sex-assault counts within the indictment, in which he objected to what he called the "[b]igamy element of this allegation[.]"[9] Specifically, Estes argued that Section 22.011(f) "is unconstitutional both facially and as applied to [him] because it treats married people more harshly than . . . unmarried people in violation of the Due Process and Equal Protection clauses of the United States and Texas Constitutions."[10] When this motion was denied, Estes asked for, and was granted, a running objection along these lines.

As relevant here, Estes was ultimately found guilty of all five counts of sexual assault of a child. In a single special issue, the jury also found "that [K.A.] was a person whom [Estes] was prohibited from marrying or purporting to marry or with whom [Estes] was

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[7] TEX. PENAL CODE § 22.011(f).

[8] *See id.* § 21.11.

[9] 1 CR at 78 ("Motion to Quash Counts 1–5 of the Indictment").

[10] *Id.*

prohibited from living under the appearance of being married,"[11] thereby triggering the Section 22.011(f) enhancement. Within the first-degree-felony punishment range, Estes was sentenced to 12 years' confinement on each count of sexual assault of a child.

B. Appeal

Before the Second Court of Appeals, Estes re-urged his contention that Section 22.011(f) is unconstitutional as applied to him. Estes primarily argued that, because this particular "application of Section 22.011(f) . . . impinges on his fundamental right to marry, the constitutionality of the statute should be reviewed under the 'strict scrutiny' standard."[12] "However," Estes maintained, "even if reviewed under the more deferential rational-basis test, the law is still unconstitutional as applied" to him because the Section 22.011(f) enhancement "was intended to apply only in cases where the offense of bigamy or certain categories of bigamy are involved."[13]

In response to Estes's claims, the State advanced two possible rational bases for upholding the constitutionality of Section 22.011(f) in this case. The State argued that this application of Section 22.011(f) can be rationally understood as a method of "preventing the sexual exploitation of children by those who would use the 'cloak of marriage'" to gain

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[11] *Id.* at 243 ("Special Issue No. 1").

[12] Appellant's Brief in the Second Court of Appeals at 30.

[13] *Id.*

access to potential victims.[14] The State also proposed that this application of Section 22.011(f) advances Texas's "legitimate interest in protecting" and "nourish[ing] the union of marriage."[15]

The court of appeals rejected both of these rational bases. Regarding the State's "cloak of marriage" argument, the court found "nothing in the record" to support the claim "that a defendant's status of being married creates greater opportunities and access for sexually assaulting children."[16] The court also declared that it could not "fathom that the legislature intend[ed] to resurrect" the notion of criminalizing adultery "through the language contained in section 22.011(f)."[17] Finally, the court of appeals faulted the State for advocating a reading of the statute that, in the court of appeals' judgment, would result in an "extraordinarily broad" number of potential applications.[18] The court of appeals ultimately concluded that, "under the circumstances of this case and as applied to appellant," Section 22.011(f) "violates equal protection because it penalizes him differently than a similarly

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[14] State's Brief in the Second Court of Appeals at 19–20.

[15] *Id.* at 18–19 (citing *Obergefell v. Hodges*, 135 S.Ct. 2584, 2599–601 (2015)).

[16] *Estes*, 487 S.W.3d at 749.

[17] *Id.*

[18] *See id.* ("Through its briefing and its oral argument, the State proposes that under section 22.011(f), a sexual assault becomes a first-degree felony when the defendant is married but the victim is not, when the victim is married but the defendant is not, when the defendant and victim are both married but not to each other, or when the victim is too young to be married. . . . [W]e cannot conclude that the legislature intended for the increased penalty under section 22.011(f) to apply in such an expansive fashion.").

situated defendant without a rational basis for doing so."[19] The court went on to affirm various other aspects of his convictions for sexual assault of a child "as second-degree felonies" and remanded those charges "to the trial court for a new trial on punishment."[20] Both parties petitioned this Court for discretionary review.

C. Discretionary Review

We granted the State's petition for discretionary review to reexamine the court of appeals' conclusion that there is no rational basis for the State's applying the Section 22.011(f) "bigamy" enhancement to the conduct of a monogamous person.[21]

We also granted Estes's petition for discretionary review to determine whether his equal-protection claim should be "reviewed under strict scrutiny."[22] However, because the court of appeals concluded that this particular application of Section 22.011(f) fails even the rational-basis test, it explicitly declined to consider Estes's arguments that strict scrutiny should apply.[23] "In these circumstances, [an appellant's] arguments for heightened scrutiny

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[19] *Id.* at 750.

[20] *Id.* (citing *Thornton v. State*, 425 S.W.3d 289, 298 (Tex. Crim. App. 2014)).

[21] *See* State's Petition for Discretionary Review at 3.

[22] Appellant's Petition for Discretionary Review at 1.

[23] *Estes*, 487 S.W.3d at 747 n.8 (citations omitted) ("Appellant argues that we should apply a higher review of strict scrutiny with respect to his equal protection claim because section 22.011(f) 'impinges on his fundamental right to marry.' We need not resolve that argument because we conclude . . . that as applied to appellant, section 22.011(f) does not have a rational governmental basis.").

are best left open for consideration by the Court of Appeals on remand."[24] Especially when addressing the constitutionality of a particular statutory provision, a reviewing court should not "anticipate a question of constitutional law in advance of the necessity of deciding it"; neither should it "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[25] Both of these canons of judicial restraint would be compromised were we to reverse the court of appeals on an issue that it expressly declined to address.[26] We therefore dismiss, as improvidently granted, Estes's first issue on discretionary review.[27]

Furthermore, based on our resolution of the State's sole ground for review, we need not reach Estes's second issue, in which he claims that it was "error for the Court of Appeals to affirm Appellant's sexual assault convictions as second-degree felonies . . . rather than order the prosecution of Appellant dismissed."[28] We turn now to the State's ground for review.

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[24] *See F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 314 n.6 (1993) (quotation marks and citations omitted).

[25] *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985) (citations omitted).

[26] *Contra* Concurring and Dissenting Opinion at 22 (arguing that the court of appeals "effectively decided the issue of whether strict-scrutiny review is appropriate").

[27] *Smith v. State*, 463 S.W.3d 890, 900 (Tex. Crim. App. 2015) (Yeary, J., concurring and dissenting) ("When a court of appeals has failed to address an issue that was squarely presented to it, rather than reach that issue for the first time in discretionary review, we have typically remanded the cause for the court of appeals to address in the first instance.").

[28] Appellant's Petition for Discretionary Review at 1.

II. LAW

A. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[29]

The United States Supreme Court has interpreted the Fourteenth Amendment's Equal Protection Clause as "essentially a direction that all persons similarly situated should be treated alike."[30] Resolving a claim that some state action has resulted in the law's unequal application begins with the reviewing court deciding which of the "devised standards for determining the validity" of the complained-of state action should apply.[31] The default, "general rule" or "standard" is that state action is "presumed to be valid" and will be upheld if it is but "rationally related to a legitimate state interest."[32] This general rule "gives way, however," when a state action either "classifies by race, alienage, or national origin,"[33] or "impinge[s] on personal rights protected by the Constitution."[34] Under these circumstances, the state action is subjected to "strict scrutiny," and will be sustained only if it is "suitably

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[29] U.S. CONST. amend. XIV, § 1.

[30] *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (citations omitted).

[31] *Id.* at 439–40.

[32] *Id.* at 440 (citations omitted).

[33] *Id.* (citing, *inter alia*, *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (invalidating under strict scrutiny an anti-fornication law that by its terms applied only to interracial couples)).

[34] *Id.* (citing, *inter alia*, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (invalidating under strict scrutiny a law permitting the sterilization of habitual criminals)).

tailored to serve a compelling state interest."[35]

B. "[A] rational means to serve a legitimate end."[36]

How a reviewing court applies these constitutional standards depends upon the type of constitutional challenge being made. In a "facial" constitutional challenge, the claimant asserts that the complained-of law is unconstitutional "on its face," meaning that it operates unconstitutionally in all of its potential applications.[37] Conversely, in an as-applied challenge, the claimant "concedes the general constitutionality of the statute, but asserts that the statute is unconstitutional as applied to his particular facts and circumstances."[38] Under either type of challenge, the reviewing court begins with the presumption that the Legislature acted both rationally and validly in enacting the law under review.[39]

We have said that resolving an as-applied challenge "requires a recourse to evidence."[40] By dint of the presumption of constitutionality, the challenger, and no other

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[35] *Id.* (citations omitted).

[36] *Cleburne*, 473 U.S. at 442.

[37] *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 908–09 (Tex. Crim. App. 2011).

[38] *Id.* at 910.

[39] *Faust v. State*, 491 S.W.3d 733, 743–44 (Tex. Crim. App. 2015) ("When reviewing the constitutionality of a statute, we presume that the statute is valid and that the Legislature acted reasonably in enacting it.").

[40] *Fine*, 330 S.W.3d at 910.

party, bears the burden of producing this evidence.[41] He must do so by specifically demonstrating that the law in question is unconstitutional as "applied to him; that it may be unconstitutional as to others is not sufficient (or even relevant)."[42] Likewise, it will not suffice for him merely to introduce evidence that the State's "conceived reason for the challenged distinction" is not what "actually motivated the legislature" in passing the law that it did.[43] Indeed, this consideration is "entirely irrelevant for constitutional purposes."[44] "In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."[45] Instead, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."[46] This is a heavy burden.[47]

Above all, a court should spurn any attempt to turn rational-basis review into a debate

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[41] *Rosseau*, 396 S.W.3d at 557 ("Appellee, as the individual challenging the statute, has the burden to establish its unconstitutionality.").

[42] *Fine*, 330 S.W.3d at 910.

[43] *Beach Commc'ns, Inc.*, 508 U.S. at 315.

[44] *Id.*

[45] *Id.*

[46] *Vance v. Bradley*, 440 U.S. 93, 111 (1979).

[47] *Id.* at 96–97 (in cases where neither a suspect classification nor a fundamental liberty interest is at issue, "courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws").

over the wisdom, eloquence, or efficacy of the law in question.[48] As its name would suggest, rational-basis review should focus solely on the rationality of the law or state action. Should we determine that the State has invoked a legitimate governmental purpose and, in enforcing its law, has charted a course that is "rationally related" to it, "our inquiry is at an end."[49]

III. ANALYSIS

We have interpreted Section 22.011(f) as essentially requiring proof "that the defendant committed sexual assault and that, if he were to marry or claim to marry his victim, or to live with the victim under the appearance of being married, then he would be guilty of bigamy."[50] In *State v. Rosseau*, we rejected a facial challenge to the constitutionality of Section 22.011(f), noting that "it has at least one valid application: the punishment of bigamists who sexually assault their purported spouses."[51] In this narrower, as-applied challenge, Estes contends that, while Section 22.011(f) might enjoy constitutional validity in other settings, it is unconstitutional "as applied" to him because "it treats married persons

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[48] *See, e.g.*, *Nordlinger v. Hahn*, 505 U.S. 1, 17–18 (1992) (internal quotation marks and citations omitted) ("[T]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely [a reviewing court] may think a political branch has acted.").

[49] *Beach Commc'ns, Inc.*, 508 U.S. at 314 (citations omitted).

[50] *Arteaga v. State*, 521 S.W.3d 329, 335 n.9 (Tex. Crim. App. 2017) (emphasis omitted).

[51] 396 S.W.3d at 558.

and unmarried persons differently and in effect punishes him for being married."[52] To that contention, we now turn.

A. The State has a legitimate interest in deterring, preventing, and punishing the sexual exploitation of children.

The State argues that Section 22.011(f) advances the "legitimate interest" the Texas Legislature has in "protecting the well-being of children" by "preventing their sexual exploitation."[53] Specifically, the State says that, as applied to Estes, the statute protects children against sexual predators "who would use the 'cloak of marriage' to gain access to children whose parents might be less cautious in sending their children to homes with married parents."[54] So the State invokes what the Supreme Court has referred to as the "compelling" interest a government has in "safeguarding the physical and psychological well-being of . . . minor[s]."[55]

May the State plausibly invoke this interest to justify its use of the "bigamy" enhancement in this case? After all, some extra-textual indicators of the legislative intent behind the Section 22.011(f) enhancement suggest that it was aimed specifically toward

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[52] Appellant's Brief in the Second Court of Appeals at 24.

[53] State's Brief on the Merits of State's Petition for Discretionary Review at 16.

[54] *Id.* at 17.

[55] *New York v. Ferber*, 458 U.S. 747, 756–57 (1982) (internal quotation marks and citations omitted).

protecting those who had suffered "from the blight of bigamy and polygamy[.]"[56] And the literal text of Section 22.011(f) is not explicitly directed towards sexual assaults involving children. Under the literal text, anyone who engages in sexually assaultive, would-be-bigamous conduct may trigger the enhancement, whether his acts are inflicted upon a child or not.[57]

Despite these indications to the contrary, the State may still rely upon its general interest in protecting children to justify its use of the enhancement in this case. We have previously acknowledged that the literal language of Section 22.011(f) accomplishes more than merely punishing actual instances of bigamy.[58] And, in the same case, we noted that "Section 22.011(f) was [amended] as part of a senate bill that was broadly aimed at providing more protection to children and the elderly."[59] The State's use of the enhancement to deter and punish conduct such as Estes's at the very least implicates this broader goal. Indeed, the State's construction arguably has the virtue of advancing both the narrow goal of deterring sexually-assaultive polygamous practices and the broader goal of providing "more protection

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[56] *Arteaga*, 521 S.W.3d at 337.

[57] *See* TEX. PENAL CODE § 22.011(f).

[58] *Arteaga*, 521 S.W.3d at 335 & n.9 ("When we discuss 'facts that *would* constitute bigamy,' we do not mean that the State has to prove that the defendant [actually] committed . . . bigamy.") (emphasis in original).

[59] *Id.* at 337.

to children" from sexually exploitative practices generally.[60]

Then again, any debate over the "real" legislative intent behind Section 22.011(f) is, to some extent, beside the point, at least in the context of an as-applied constitutional challenge. The Legislature passed, and the Governor signed into law, a bill whose literal language is plainly broad enough to cover Estes's conduct in this case.[61] In other settings, we have said that the "literal text" of a statute "is the only *definitive* evidence of what the legislators (and perhaps the Governor) had in mind when the statute was enacted into law."[62] The competing counter-indicia of legislative intent identified above are prime examples of why this rule of statutory construction has withstood the test of time, and why it makes good sense in this context, as well.

In any event, we need not concern ourselves with whether the Legislature truly "intended" for the law to be used in the fashion employed by the State in this case,[63] for "it is entirely irrelevant for constitutional purposes whether the conceived reason for the

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[60] *Id.*

[61] *See id.* at 335 n.9 ("[T]o elevate second-degree felony sexual assault to first-degree felony sexual assault under Section 22.011(f), the State must prove that the defendant committed sexual assault and that, if he were to marry or claim to marry his victim, or to live with the victim under the appearance of being married, then he *would* be guilty of bigamy.") (emphasis in original).

[62] *See Boykin*, 818 S.W.2d at 785 (emphasis in original).

[63] *Contra Estes*, 487 S.W.3d at 749 ("Again, we cannot conclude that the legislature intended for the increased penalty under section 22.011(f) to apply in such an expansive fashion.").

challenged distinction actually motivated the legislature."[64] Our job is simply to determine whether, assuming the Legislature intended to pass precisely the law we have before us, the State's use of that law in Estes's case is rationally related to the compelling interest the State has in protecting children from sexual abuse. For the following reasons, we conclude that it is.

B. Section 22.011(f), as applied here, is rationally related to the State's interest in protecting children from sexual exploitation.

Rejecting the notion that the State's proposed use of Section 22.011(f) is rationally related to the goal of protecting children from sexual abuse, the court of appeals made two observations. First, the court of appeals opined that the "evidence in this case . . . does not show that appellant used his marital status to gain the trust of [K.A.] or her parents."[65] Second, it could find no evidence in the record to support "the general proposition that a defendant's status of being married creates greater opportunities and access for sexually assaulting children."[66]

We disagree with the court of appeals' approach to this question. In each of these observations, the court of appeals pointed to a silent or underdeveloped record in support of its conclusion that Section 22.011(f) is unconstitutional as applied to Estes. In so doing, it seemingly shifted the burden to the State, either to produce evidence that Estes "used his

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[64] *Beach Commc'ns, Inc.*, 508 U.S. at 315.

[65] *Estes*, 487 S.W.3d at 748.

[66] *Id.* at 749.

marital status to gain the trust of [K.A.]," or to substantiate the assertion that marriage "creates greater opportunities and access for sexually assaulting children."[67] If so, the court of appeals ran afoul of the rule that the constitutional challenger bears the burden of proving that the law is unconstitutional as applied to him. "A State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification."[68] It was Estes's burden to rebut, with credible evidence, the notion that married men have an easier time gaining would-be victims and parents' trust. It fell upon him to show that this assumption "could not reasonably be conceived to be true."[69] Had Estes put on evidence to show that any "speculation" by the Legislature in this regard would have been objectively "[ir]rational," both the trial court and the court of appeals would at least be in a better position to evaluate the strength of Estes's arguments.[70]

Then again, though we discount no possibility, it would seem that this is a showing Estes was unlikely to make even if he had presented any evidence to this effect. As the Supreme Court recently explained, there is an indelible connection in our society between the union of marriage and the ideas of "family,"[71] "home,"[72] "stability,"[73] "security, safe

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[67] *Id.* at 748–49.

[68] *Heller v. Doe*, 509 U.S. 312, 320 (1993).

[69] *Bradley*, 440 U.S. at 111.

[70] *Beach Commc'ns, Inc.*, 508 U.S. at 315.

[71] *Obergefell v. Hodges*, 135 S.Ct. 2584, 2599 (2015) (quoting *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978)) (characterizing marriage as "the relationship that is the foundation

haven"[74]—and, indeed, "children."[75] These connections were not conjured from thin air; they are deeply embedded in the public's time-honored understanding of what "marriage" entails.[76] Just as the Supreme Court did, the Legislature could rationally conclude that to be a married man or woman is to project the kind of "stability" and "safe haven" that many children find comfort in.[77] It could rationally conclude that one who has solemnly sworn to "forsak[e] all others"[78] might be perceived, at least by some parents, as being less likely to make sexual advances upon their children. And it could rationally see fit to declare that one who would enjoy this marital perception of trustworthiness will be punished all the more severely if he uses it to groom, and then sexually abuse, a child.

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of the family in our society").

[72] *Id.* at 2600 (quoting *Zablocki*, 434 U.S. at 384) (discussing "[t]he right to 'marry, establish a home, and bring up children'").

[73] *Id.* ("Marriage also affords the permanency and stability important to children's best interests.").

[74] *Id.* at 2599 (quoting *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 955 (Mass. 2003)) ("[M]arriage . . . 'fulfils yearnings for security, safe haven, and connection that express our common humanity[.]'").

[75] *Id.* at 2600 ("A third basis for protecting the right to marry is that it safeguards children[.]") (citations omitted).

[76] *Id.* at 2601 ("[T]his Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order.").

[77] *Id.* at 2600 (acknowledging the "recognition, stability, and predictability [that] marriage offers," especially in the eyes of children).

[78] *Sapp v. Newsom*, 27 Tex. 537, 538 (Tex. 1864).

We express no opinion whether we agree with any legislative assumption that married people are more trustworthy around children than their unmarried counterparts. Regrettably, men like Estes make such a belief difficult to hold. But, paradoxically enough, Estes's case also serves as a reminder that the public perception in this regard is all too real.[79] We are simply unwilling, at least on this record, to discard as "irrational" the idea that marriage bestows upon its participants a certain aura of trustworthiness, specifically in regard to children.[80] Nor do we think the Constitution precludes our Legislature from reserving, for deterrent purposes, a higher degree of punishment for those who would defile that trust by using it to sexually assault a child.

IV. COUNTER-ARGUMENTS

Judge Newell's concurring and dissenting opinion posits at least three different arguments as to why he disagrees with our approach. According to Judge Newell, (1) the rationale we adopt today is, essentially, that "marriage is really good and crimes against children are really bad[.]"[81] He also (2) construes our discussion of legislative intent as a

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[79] *See* 4 RR at 119 (wherein K.A.'s mother testifies that she let her daughter spend nights at Estes's house because she "knew that [Estes's wife] would be present"); *id.* at 125 (wherein K.A's mother testifies to her "feeling that [Estes] had the same moral values and beliefs that [she] did"); *id.* at 147 (wherein K.A. testifies that she initially developed a bond of trust with Estes "because he had a family of his own").

[80] *See Cleburne*, 473 U.S. at 439 ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.").

[81] Concurring and Dissenting Opinion at 10.

finding that "the legislative intent behind the statute was really about punishing sexual assault committed under a 'cloak of marriage.'"[82] Instead, he believes that, (3) to conclude that Section 22.011(f) survives rational-basis review, one need only observe that the distinction drawn within the statutory language itself "between married and unmarried offenders . . . is at least rationally related to" the state's interest in prohibiting bigamy and polygamy.[83] We address each argument in turn.

A. Judge Newell mischaracterizes our rationale.

Judge Newell oversimplifies our argument when he describes it as proceeding along the lines of, "marriage is really good and crimes against children are really bad[.]"[84] Although we would almost certainly agree with each of these sentiments from a policy perspective,[85] we need not rely upon either of them in reaching our ultimate result. Instead, our analysis focuses exclusively and appropriately on the reasonableness of a particular legislative assumption: that married people have an easier time gaining the trust of children and parents than unmarried persons. The Legislature could rationally conclude that those who are inclined to make sexual advances upon children, and whose marital status would

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[82] *Id.* at 17.

[83] *Id.* at 10.

[84] *Id.*

[85] *See, e.g.*, *Obergefell*, 135 S.Ct. at 2608 ("No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family."); *Ferber*, 458 U.S. at 756 ("A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.").

make the commission of a crime in satisfaction of those urges incrementally easier to consummate, may need an additional deterrent to further dissuade them from committing such a crime. And, in the absence of evidence to the contrary, it could reasonably conclude that increasing the range of punishment in these circumstances is appropriately suited to that task.

B. We need not—and do not—decide what the "true" legislative intent behind Section 22.011(f) was.

Judge Newell evidently thinks that, when we say that the State may invoke its general interest in preventing the sexual exploitation of children in defending Section 22.011(f) against Estes's constitutional attack, we necessarily hold that the Legislature had this precise interest in mind when it enacted the Section 22.011(f) enhancement.[86] But we are not making any claims about what the Legislature "really" intended to accomplish in amending Section 22.011(f).[87] This is because, consistent with Supreme Court precedent,[88] we consider any debate about the Legislature's "true" intent to be irrelevant to the constitutional question presented in this case.

Next, Judge Newell contends that we misapply *F.C.C. v. Beach Communications, Inc.*

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[86] *See* Concurring and Dissenting Opinion at 17 ("Here, we have some indication of the legislative intent behind the passage of this amendment, yet the Court nevertheless posits a different rationale for the statute.").

[87] *See supra* Part III.A.

[88] *See Beach Commc'ns, Inc.*, 508 U.S. at 318 (quoting *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980)) ("Whether the posited reason for the challenged distinction actually motivated Congress is 'constitutionally irrelevant[.]'").

because, according to Judge Newell, *Beach* involved a record that was utterly silent with respect to legislative intent—whereas in this case, he accuses us of "substituting [our] own policy preferences for th[ose] of the Legislature."[89] But Judge Newell's argument proceeds from a premise that is demonstrably false. It would be inaccurate to say that the regulatory provision at issue in *Beach* was wholly unsupported by extra-textual indicia of legislative intent. To the contrary, the intermediate appellate litigation leading up to the Supreme Court's opinion in *Beach* discussed the relevant legislative history in some detail.[90] The relevance of *Beach*, then, is not that a "reviewing court [is] authorized to engage in rational speculation" only when "it ha[s] no other information regarding the legislative intent."[91] Instead, it is that a reviewing court may engage in "rational speculation" to uphold the constitutionality of a statute even when the government's proffered rational basis finds no support within the legislative history.[92] This is why, in *Beach*, the Supreme Court found that

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[89] Concurring and Dissenting Opinion at 17–18.

[90] *See Beach Communications, Inc. v. F.C.C.*, 959 F.2d 975, 982 (D.C. Cir. 1992) ("First, there is legislative history that supports the FCC. . . . Petitioners adduce other excerpts from the legislative history; however, these excerpts are at best ambiguous."); *see also id.* (referring to "[g]eneral descriptions of Congress' purpose" in distinguishing between "cable" and "SMATV").

[91] Concurring and Dissenting Opinion at 17.

[92] *See also Fritz*, 449 U.S. at 179 ("[W]e disagree with the District Court's conclusion that Congress was unaware of what it accomplished or that it was misled by the groups that appeared before it. If this test were applied literally to every member of any legislature that ever voted on a law, there would be very few laws which would survive it. The language of the statute is clear, and we have historically assumed that Congress intended what it enacted.").

the regulation in question was supported by at least two conceivable rational bases.[93]

Judge Newell also suggests that our discussion of legislative history is somehow inconsistent with the Court's opinion in *Arteaga v. State*.[94] But we do not "hold in this case that the legislative intent behind the statute was really about punishing sexual assault committed under a 'cloak of marriage[.]'"[95] We expressly decide that, even if this proposition is debatable, it is of no consequence to the proper resolution of this case. This holding in no way conflicts with *Arteaga*'s observation that the Legislature's primary aim in amending Section 22.011(f) was diminishing the "blight of bigamy and polygamy."[96]

C. Judge Newell's approach would nullify as-applied constitutional challenges.

Judge Newell alternatively proposes to resolve Estes's constitutional challenge by focusing exclusively upon the classification drawn by the statutory language itself.[97] His approach essentially has two steps: First, identify a legitimate interest advanced by the statute, making sure that it is an interest that is actually contemplated by the relevant

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[93] *Beach Comm'cns, Inc.*, 508 U.S. at 317 ("Applying these principles, we conclude that the common-ownership distinction is constitutional. There are at least two possible bases for the distinction; either one suffices.").

[94] Concurring and Dissenting Opinion at 17; *see also Arteaga v. State*, 521 S.W.3d 329 (Tex. Crim. App. 2017).

[95] Concurring and Dissenting Opinion at 17.

[96] *Arteaga*, 521 S.W.3d at 337.

[97] Concurring and Dissenting Opinion at 6 ("[A] proper application of the [rational-basis] standard . . . focuses upon whether the Legislature had a rational basis for drawing a classification in the statute.").

legislative history;[98] and then, decide whether the statutory language the Legislature adopted in furtherance of that interest is "rationally related to" it.[99] Applying this approach, Judge Newell cites *Rosseau* for the proposition that "there is at least a legitimate state interest in prohibiting bigamous or polygamous relationships and sexual assault pursuant to such relationships,"[100] and then argues that this interest "alone provides a rational basis for drawing the distinction between married and unmarried offenders within the sexual assault statute."[101] His analysis does not take into account the particular circumstances of the defendant against whom the statute was applied.[102] Instead, he focuses exclusively on the classification drawn within the statute.[103]

At the outset, it is worth noting that Judge Newell's approach seeks to answer

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[98] *Id.* at 8 (identifying "prohibiting bigamous or polygamous relationships and sexual assault pursuant to such relationships" as the "legitimate state interest" furthered by Section 22.011(f)); *id.* at 14–18 (arguing that, by sustaining Section 22.011(f) as a rational means of deterring child abuse, the Court "substitut[es] its own policy preferences for th[ose] of the Legislature").

[99] *E.g.*, *id.* at 10 ("Though the statute is written more broadly than necessary to accomplish its intended goal, the distinction between married and unmarried offenders underlying Section 22.011(f) is at least rationally related to that goal.").

[100] *Id.* at 8 (citing *State v. Rosseau*, 396 S.W.3d 550, 558 (Tex. Crim. App. 2013)).

[101] *Id.* at 9 (citing *State v. Green*, 99 P.3d 820, 830 (Utah 2004)).

[102] *See id.* at 6 n.17(faulting the court of appeals for "focus[ing] exclusively on the effect the statute has on Appellant").

[103] *Id.* at 5 ("In this case, the problem with the court of appeals[']s analysis lay in the focus upon whether there was a rational basis to elevate Appellant's punishment . . . rather than upon whether there was a rational basis for the Legislature to draw a distinction between married and unmarried defendants in the statute.").

something that is "solely and entirely a legal question"[104]—whether the literal text of the statute is reasonably related to its apparent aim. The particular facts of the case, and circumstances of the defendant, are tellingly irrelevant to this question. Thus, by "consider[ing] only the text of the measure itself, and not its application to the particular circumstances of [the] individual[,]"[105] Judge Newell is functionally conducting a facial constitutional analysis—one that this Court already undertook in *Rosseau*.[106] But *Rosseau* itself acknowledged that "[a]rguments pertaining to an as-applied challenge . . . must be reserved for another day."[107] And if Judge Newell is correct that an as-applied challenge may be resolved simply by identifying a previously-acknowledged State interest, regardless of whether it is implicated in the present case,[108] and then measuring the literal statutory language against that interest, upholding a statute's constitutionality on facial grounds would necessitate that it be upheld as to every conceivable as-applied ground, as well.

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[104] *Karenev v. State*, 281 S.W.3d 428, 435 (Tex. Crim. App. 2009) (Cochran, J., concurring).

[105] *Id.* (citing 16 C.J.S. Constitutional Law § 113, at 149 (2005)).

[106] *See Rosseau*, 396 S.W.3d at 558 ("Therefore, the statute is not facially unconstitutional because it has at least one valid application: the punishment of bigamists who sexually assault their purported spouses.").

[107] *Id.* at 558 n.9; *see also id.* at 558 n.9 ("In a facial challenge to a statute's constitutionality, we examine the statute as it is written, rather than how it is applied in a particular case.").

[108] *Cf. Texas v. Johnson*, 491 U.S. 397, 410 (1989) ("We thus conclude that the State's interest in maintaining order is not implicated on these facts.").

It is well-settled that "a statute may be valid as applied to one set of facts and invalid as applied to a different set of facts[.]"[109] So a reviewing court may not resolve an as-applied constitutional challenge solely by comparing the language of the statute to an un-implicated governmental interest and then asking whether the former is "rationally related to" the latter.[110] To hold otherwise would be to misapprehend the thrust of Estes's argument. Estes does not contend that the literal language of Section 22.011(f) is insufficiently "related to" the goal of curbing polygamous practices;[111] he asserts that this particular "application" of the statute does not further that goal.[112] Our rejoinder is simply that, even if this is so, "any" legitimate state basis will suffice to uphold the constitutionality of the challenged application—even if the State's proffered basis is not specifically mentioned within the relevant legislative history—so long as the challenged application is "rationally related to" that basis.

As-applied review must take into account the "particular facts and circumstances" of

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[109] *Fine*, 330 S.W.3d at 910.

[110] *Contra* Concurring and Dissenting Opinion at 5–10.

[111] Appellant's Brief on the Merits of State's Petition for Discretionary Review at 16 ("Appellant does not contend that . . . the State was required to prove Appellant committed an offense under Section 25.01 to prove he committed an offense of sexual assault bigamy as charged in this case.").

[112] *Id.* at 11 ("[T]he application of Section 22.011(f) to Appellant in this case is not rationally related to the express governmental interest the legislation that amended Section 22.011(f) was enacted to promote.").

the litigant,[113] for without such evidence, a reviewing court cannot appropriately discern the classification that is being challenged, and the circumstances under which the State asserts an interest in enforcing that classification. The particular facts and circumstances that inform—and limit—our ruling today are that Estes is a married man convicted of sexually assaulting a child. We express no opinion whether other kinds of challenges, if raised, would be more or less likely to succeed than the one presented here; we simply disapprove of any as-applied analytic approach in which it would be unnecessary to consider the individual facts and circumstances of the case under review.

V. CONCLUSION

We reverse the judgment of the court of appeals and remand the case for that court to analyze Estes's remaining constitutional claims.[114]

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[113] *Fine*, 330 S.W.3d at 910.

[114] *E.g.*, *Estes*, 487 S.W.3d at 747 n.8 (citations omitted) ("Appellant argues that we should apply a higher review of strict scrutiny with respect to his equal protection claim because section 22.011(f) 'impinges on his fundamental right to marry.' We need not resolve that argument because we conclude . . . that as applied to appellant, section 22.011(f) does not have a rational governmental basis."); *id.* at 750 (citations omitted) ("Having concluded that section 22.011(f) violates equal protection as applied in this case, we decline to address appellant's argument that the application of the section in these circumstances also violates his due process rights.").