Provision of online-solicitation statute, communicating in a sexually explicit manner with a person believed to be a minor with an intent to arouse or gratify sexual desire, found to be unconstitutionally overbroad.

On October 30, 2013, the Texas Court of Criminal Appeals concluded that the online-solicitation statute was not narrowly drawn enough to effectuate a compelling state interest because there were narrower means of achieving the State interests.

¶ 13-5-11. **Ex Parte Christopher LO**, No. PD-1560-12, 2013 WL 5807802 (Tex.Crim.App., 10/30/13).

Facts: Appellant was charged with the third degree felony of communicating in a sexually explicit manner with a person whom he believed to be a minor with an intent to arouse or gratify his sexual desire. He filed a pretrial application for a writ of habeas corpus alleging that this specific subsection of the felony offense of online solicitation of a minor is facially unconstitutional for three distinct reasons: (1) it is overbroad and criminalizes a wide range of speech protected by the First Amendment; (2) it is vague because the term "sexually explicit" communications that "relate to" sexual conduct chills the exercise of free-speech by causing citizens to steer wide of the uncertain boundaries between permitted and prohibited speech; and (3) it violates the Dormant Commerce Clause. The trial judge denied relief, and the court of appeals affirmed. We granted discretionary review to determine, as a matter of first impression, whether Section 33.021(b)—the "sexually explicit communications" provision—is facially unconstitutional.

Because the court of appeals used the wrong standard of review for addressing constitutional challenges to a penal statute that restricts speech based on its content, it reached the wrong conclusion. Applying the constitutionally required presumption that "content-based regulations [of speech] are presumptively invalid" and subject to strict scrutiny, we conclude that Section 33.021(b) of the Texas Penal Code is overbroad because it prohibits a wide array of constitutionally protected speech and is not narrowly drawn to achieve only the legitimate objective of protecting children from sexual abuse.

Held: Reversed and Remanded

Opinion: Whether a statute is facially constitutional is a question of law that we review de novo. When the constitutionality of a statute is attacked, we usually begin with the presumption that the statute is valid and that the legislature has not acted unreasonably or arbitrarily. The burden normally rests upon the person challenging the statute to establish its unconstitutionality. However, when the government seeks to restrict and punish speech based on its content, the usual presumption of constitutionality is reversed. Content-based regulations (those laws that distinguish favored from disfavored speech based on the ideas expressed) are presumptively invalid, and the government bears the burden to rebut that presumption. The Supreme Court applies the "most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."

To satisfy strict scrutiny, a law that regulates speech must be (1) necessary to serve a (2) compelling state interest and (3) narrowly drawn. A law is narrowly drawn if it employs the least restrictive means to achieve its goal and if there is a close nexus between the government's compelling interest and the restriction. If a less restrictive means of meeting the compelling interest could be at least as effective in achieving the legitimate purpose that the statute was enacted to serve, then the law in question does not satisfy strict scrutiny. Furthermore, when the content of speech is the crime, scrutiny is strict because, "as a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

In this case, the court of appeals mistakenly applied the usual standard of review, including the presumption of the statute's validity, instead of the presumption-of-invalidity standard of review for First Amendment, content-based statutes.

First, we examine what the statute prohibits and what is its expressed legislative purpose.

B. Section 33.021 of the Texas Penal Code

1. Section 33.021(c): Solicitation of a Minor.

Section 33.021 of the Texas Penal Code is titled "Online Solicitation of a Minor." It includes subsection (c)—a provision that prohibits and punishes an actor who uses electronic communications to "solicit" a minor, "to meet another person, including the actor, with the intent that the minor will engage in" certain sexual behavior. Such solicitation statutes exist in virtually all states and have been routinely upheld as constitutional because "offers to engage in illegal transactions [such as sexual assault of a minor] are categorically excluded from First Amendment protection." Thus, it is the conduct of requesting a minor to engage in illegal sexual acts that is the gravamen of the offense. The First Court of Appeals previously upheld the constitutionality of the Texas online-solicitation-of-minors statute. That specific provision is not at issue in this case, but it provides an excellent contrast to the provision that is at issue.

2. Section 33.021(b): Sexually Explicit Communications.

Article 33.021 contains a separate, very different, subsection (b), that prohibits and punishes speech based on its content. That subsection prohibits a person from communicating online in a "sexually explicit" manner with a minor if the person has the intent to arouse and gratify anyone's sexual desire. According to the statute, " '[s]exually explicit' means any communication, language, or material, including a photographic or video image, that relates to or describes sexual conduct." The statute bars explicit descriptions of sexual acts, but it also bars any electronic communication or distribution of material that "relates to" sexual conduct. That bar would encompass many modern movies, television shows, and "young adult" books, as well as outright obscenity, material harmful to a minor, and child pornography.

3. The Legislative Purpose of Section 33.021.

The online-solicitation statute was enacted in 2005. As the State notes, the legislative purpose of that provision was to "allow for the filing of charges against individuals who engage in conversations over the Internet with the intent of meeting the child for sexual activity before any physical contact takes place." It is directed against those who "engage in conversations over the Internet with the intent of meeting a minor for sexual activities." But subsection (c), read in

conjunction with subsection (d), covers that "luring" scenario. Subsection (b) punishes, as a third-degree felony, salacious speech over the internet (but not "dirty talk" spoken face-to-face) and the distribution of sexually explicit materials over the internet (but not the distribution of those same materials hand-to-hand) to a minor as long as the actor has the intent to arouse or gratify anyone's sexual desires. It does not require that the actor ever have any intent to meet the minor for any reason. We turn now to the First Amendment.

II.

A. The First Amendment Overbreadth Doctrine

According to the First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a "substantial" amount of protected speech "judged in relation to the statute's plainly legitimate sweep." The State may not justify restrictions on constitutionally protected speech on the basis that such restrictions are necessary to effectively suppress constitutionally unprotected speech, such as obscenity, child pornography, or the solicitation of minors. "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." This rule reflects the judgment that "[t]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted[.]"

Thus, in Ashcroft v. Free Speech Coalition, the Supreme Court rejected the government's argument that a statute criminalizing the distribution of constitutionally protected "virtual" child pornography was necessary to further the state's interest in prosecuting the dissemination of constitutionally unprotected child pornography that used "real" children. The government had argued that "the possibility of producing images by using computer imaging makes it very difficult for [the government] to prosecute those who produce pornography using real children." Thus, according to the government, the protected speech (virtual child pornography) could be banned along with the unprotected speech (real child pornography). The Supreme Court rejected that notion entirely: "The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." Free Speech Coalition tells us that a ban upon constitutionally protected speech may not be upheld on the theory that "law enforcement is hard," and the State may not punish speech simply because that speech increases the chance that "a pervert" might commit an illegal act "at some indefinite future time."

The State may regulate the content of constitutionally protected speech to promote a "compelling interest," such as the physical and psychological well-being of minors, if it chooses "the least restrictive means" to further that interest. But it is not enough that the governmental ends are compelling, the means to achieve those ends must be narrowly drawn to achieve only those ends .

B. Section 33.021(b) Is Unconstitutionally Overbroad.

Although the State has a compelling interest in protecting children from sexual predators, this "explicit sexual communications" provision is not narrowly drawn to achieve that legitimate goal. Indeed, this subsection does not serve any compelling interest that is not already served by a separate, more narrowly drawn, statutory provision. This subsection covers obscene material,

but obscene communications and materials are already proscribed by Sections 43.22 and 43.23. This subsection covers material harmful to a minor, but that material is already proscribed by Section 43.24. This subsection covers child pornography, but that material is already proscribed by Section 43.26. The only material that this subsection covers that is not already covered by another penal statute is otherwise constitutionally protected speech. "Sexual expression which is indecent but not obscene is protected by the First Amendment." Subsection (b) covers a whole cornucopia of "titillating talk" or "dirty talk." But it also includes sexually explicit literature such as "Lolita," "50 Shades of Grey," "Lady Chatterly's Lover," and Shakespeare's "Troilus and Cressida." It includes sexually explicit television shows, movies, and performances such as "The Tudors," "Rome," "Eyes Wide Shut," "Basic Instinct," Janet Jackson's "Wardrobe Malfunction" during the 2004 Super Bowl, and Miley Cyrus's "twerking" during the 2013 MTV Video Music Awards. It includes sexually explicit art such as "The Rape of the Sabine Women," "Venus De Milo," "the Naked Maja," or Japanese Shunga. Communications and materials that, in some manner, "relate to" sexual conduct comprise much of the art, literature, and entertainment of the world from the time of the Greek myths extolling Zeus's sexual prowess, through the ribald plays of the Renaissance, to today's Hollywood movies and cable TV shows.

In sum, everything that Section 33.021(b) prohibits and punishes is speech and is either already prohibited by other statutes (such as obscenity, distributing harmful material to minors, solicitation of a minor, or child pornography) or is constitutionally protected.

1. The State Has a Compelling Interest in Preventing Child Abuse, but Section 33.021(b) Is Not Narrowly Drawn.

> "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." There is no question that the State has a right-indeed a solemn duty-to protect young children from the harm that would be inflicted upon them by sexual predators. In upholding the constitutionality of Section 33.021(c)—the offense of online solicitation—the First Court of Appeals stated that "[t]he prevention of sexual exploitation and abuse of children addressed by the Texas online solicitation of a minor statute constitutes a government objective of surpassing importance." Indeed it does. The statute prohibits internet communications with a minor that solicit an illegal sex act.

Many states have enacted statutes aimed at preventing the dissemination of "harmful" materials to minors and solicitation of minors over the internet. Courts all across the United States have upheld these statutes. They share either of two characteristics: (1) the definition of the banned communication usually tracks the definition of obscenity as defined by the Supreme Court in Miller v. California; or (2) the statutes include a specific intent to commit an illegal sexual act, i.e., the actor intends to "solicit" or "lure" a minor to commit a sexual act. All of the cases cited by the State in its brief deal with such solicitation or dissemination statutes. None of them deal with non-obscene, non-solicitative, non-child pornographic, non-harmful-to-minors sexually explicit communications to minors.

Most states, like Texas, have also enacted a statute prohibiting the dissemination to children of material that is "harmful" to minors. These statutes, following the Supreme Court decision in Ginsberg v. New York, define "harmful" as "material defined to be obscene on the basis of its appeal to [minors] whether or not it would be obscene to adults." Such statutes do not

invade "the area of freedom of expression constitutionally secured to minors," merely because the definition of obscenity is geared "to social realities by permitting the appeal of this type of material to be assessed in term[s] of the sexual interest" of minors. Although we have not directly addressed the issue, the First Court of Appeals upheld the constitutionality of Texas's statute prohibiting the sale of material harmful to minors in State v. Stone.

On the other hand, in Reno v. ACLU, the Supreme Court struck down as overbroad a portion of the federal Communications Decency Act that prohibited the "knowing" dissemination of "indecent" communications as well as "obscene" communications to children over the internet. As the court explained, "In evaluating the free speech rights of adults, we have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment.' "Therefore, the communication of descriptions or other depictions of non-obscene sexual conduct that do not involve live performances or visual reproductions of live performances by children retain First Amendment protections.

Ginsberg and Reno are bookend cases: The Supreme Court upholds statutes prohibiting the dissemination of material that is defined as "obscene" for children, but it will strike down, as overbroad, statutes that prohibit the communication or dissemination of material that is merely "indecent" or "sexually explicit." New Mexico and Virginia enacted statutes that criminalized the dissemination of non-obscene but sexually explicit material to minors over the internet, but federal courts held those statutes unconstitutionally overbroad under Reno because they unconstitutionally burdened otherwise protected speech.

Looking at the present statute, the compelling interest of protecting children from sexual predators is well served by the solicitation-of-a-child prohibition in subsection (c). But subsection (b) does not serve that same compelling purpose. It may protect children from suspected sexual predators before they ever express any intent to commit illegal sexual acts, but it prohibits the dissemination of a vast array of constitutionally protected speech and materials. The State argues that this provision is intended to target "grooming" by predators who develop a relationship with their intended victim by befriending the child online, developing their trust, and then eventually engaging in sexually explicit conversations. We are unable to find anything in the 2005 legislative history to support an intent to criminalize "grooming" by titillating speech. The intent expressed in the bill analyses, the committee hearings, and the floor debate was that the crime of solicitation of a minor on the internet is complete at the time of the internet solicitation, rather than at some later time if and when the actor actually meets the child. Furthermore, the Supreme Court has rejected the notion that allowing the dissemination of "virtual" child pornography would "whet the appetites of pedophiles," and therefore could be banned. We must do the same here.

But even if the Legislature did have an intent to prohibit "grooming" in subsection (b), the culpable mental state prescribed in that provision—"intent to arouse or gratify the sexual desire of any person"—is not narrowly drawn to achieve that end. A more narrowly drawn culpable mental state would be "with intent to induce the child to engage in conduct with the actor or another individual that would constitute a violation of §§ 21.11, 22.011, or 22.021." The State suggests that, without the current provision, perverts will be free to bombard our children with salacious emails and text messages, and parents and law enforcement would be unable to

stop it. But as we have just observed, there are more narrow means of drawing a statute to target the phenomenon of "grooming."

Moreover, section 42.07 of the Penal Code, the harassment law, already prohibits and punishes an electronic communication that "makes a comment, request, suggestion, or proposal that is obscene." Or, if the repeated emails or text messages are not obscene, but they are "reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend" the child, the sender may be prosecuted under Section 42.07(a)(7).64

In sum, we conclude that the statutory provision before us is not narrowly drawn to effectuate a compelling state interest because there are narrower means of achieving the State interests advanced here, at least some of which are already covered by other statutes prohibiting solicitation, obscenity, harassment, or the distribution of harmful material to minors.

2. The State's Arguments.

The State argues that the Texas "sexually explicit communications" provision is narrowly drawn because the statute reaches only "sexually explicit materials" and the statute requires that the actor communicate those materials with an intent to arouse or gratify someone's sexual desires. Neither of those arguments saves the statute from being unconstitutionally overbroad.

First, the State argues that appellant "has failed to demonstrate how intentional conversations, sexually explicit in nature, with minors constitute protected speech." That is, of course, exactly backwards. Statutes that regulate the content of speech—as this statute most assuredly does—are presumed to be invalid, and it is the State, not appellant, that must establish its validity. The State has not cited a single case from any jurisdiction that has held that sexually explicit speech that is not obscene or "harmful" to minors is outside the protection of the First Amendment as long as the actor has an intent to arouse or gratify sexual desire. And, as noted above, we are unable to find any such case or other state statute. The Supreme Court decisions in Reno, Ashcroft II, and Free Speech Coalition (none of which did the State discuss or distinguish) appear to contradict the State's position.

Second, the State claims that the "explicit sexual communications" law is not overbroad because it "is specifically tailored to battle the widespread use of the Internet and technology as a tool for adults who prey on children, with the specific intent to arouse or gratify a sexual desire." It argues that this law is narrowly tailored by this scienter requirement. But the First Amendment protects thoughts just as it protects speech. As the Supreme Court warned,

> The government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.
> A man's thoughts are his own; he may sit in his armchair and think salacious thoughts, murderous thoughts, discriminatory thoughts, whatever thoughts he chooses, free from the "thought police." It is only when the man gets out of his armchair and acts upon his thoughts that the law may intervene. To protect the right of citizens to think freely and to

protect speech for its own sake, the Supreme Court's cases "draw vital distinctions between ... ideas and conduct." Section 33.021(b) prohibits constitutionally protected speech when that speech is coupled with constitutionally protected thought.

The State has a compelling need to protect children from sexual predators, but this statute is not narrowly drawn to achieve only that legitimate goal of prosecuting "sexual predators who attempt to solicit a minor, or a police officer posing as a minor, for unlawful activity when the individual does not show up for the meeting." This particular provision does not speak to an actor soliciting a child, meeting a child, intending to meet a child, or any other predatory conduct. Indeed, it would apply to a Texas defendant who has "titillating talk" with a child in Outer Mongolia or a Mongolian who has salacious communications with a child in Dallas. Instead, this law prohibits all internet communications relating to or describing explicit sexual material by an adult to a minor if that adult speaks with the intent to arouse or gratify sexual desire. But, consistent with the First Amendment, it is conduct designed to induce a minor to commit an illegal sex act with titillating talk that may be proscribed, not the titillating talk itself.

The State suggests that the statute prohibits only one-on-one communications—i.e., the sexual predator who is "grooming" a child with "titillating talk." But the statute is not limited to one-on-one communications; instead it would apply to one who communicates via the internet with one, ten, or a hundred minors, perhaps sending them salacious selections from "Lolita" with the intent to tickle their fancy. Furthermore, it would be anomalous to think that a person who makes "titillating talk" to one minor over the internet may be subject to felony prosecution, but that same person who makes "titillating talk" to two or more minors in a chat room or through a mass email is not subject to criminal prosecution. As the Tenth Circuit noted in ACLU v. Johnson, such an interpretation "would lead to the absurd result that no violation of the statute would occur if someone sent a message to two minors, or a chat room full of minors, or a minor and an adult."

Conclusion: For the above reasons, we hold that the court of appeals erred in applying an incorrect standard of review and in upholding the constitutionality of Section 33.021(b). We reverse the decision of that court and remand the case to the trial court to dismiss the indictment.