




One Fabulous Skyline

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## TIBA's Case of the Week

Case Name: [Ex parte John Christopher Lo](#)

- OFFENSE: Pre-Trial Habeas Corpus / Breach of Computer Security
- COUNTY: Harris
- COURT OF APPEALS: Houston [1st] 2011
- C/A CITATION: 393 S.W.3d 290
- C/A RESULT: Trial Court Affirmed
- CCA. CASE No. PD-1560-12      DATE OF OPINION: October 30, 2013
- DISPOSITION: Court of Appeals Reversed
- OPINION: [Cochran, J.](#)      VOTE: 9-0
- TRIAL COURT: 248th D/C; Hon. Joan Campbell
- LAWYERS: [Mark Bennett](#) (Defense); [Jessica Akins](#) (State)

(Background Facts) Penal Code Section 33.021(b) prohibits communicating with a minor in “a sexually explicit manner” with “an individual who represents himself or herself to be younger than 17 years of age” or “an individual whom the actor believes to be younger than 17 years of age.” Appellant was charged under the statute with the online solicitation of a minor.

 **62 Challenges to Prosecutions / Overbreadth:** Appellant filed a pretrial application for writ of habeas corpus and motion to quash the indictment, asserting that the Penal Code's prohibition of such communications is “unconstitutional on its face under the First Amendment as it is a content based restriction that severely criminalizes a substantial amount of harmless speech between adults that is protected under the First Amendment” and it is “not narrowly tailored to promote a compelling state interest as it prohibits a substantial amount of protected speech that is unnecessary to the protection of children.” Appellant also argued that the language used in the Penal Code's prohibition is “unconstitutionally vague under the First Amendment because it works to encompass a vast array of communications and will chill the exercise of free speech.” Finally, Appellant argued that the Penal Code's prohibition violates the Dormant Commerce Clause “because it unduly burdens interstate commerce by attempting to place regulations on the entirety of the Internet.” The trial court denied Appellant the relief that he requested in his application and refused to dismiss the criminal charge against him. The Court of Appeals affirmed, finding that ❶ the legitimate goal of Section 33.021, including subsection (b), far exceeds any potential unlawful applications of the statute; and ❷ section 33.021(b) is sufficiently clear to provide adequate notice of what conduct constitutes a criminal offense (see , [Vol. 19, No. 47](#); 11/28/2011).

**Holding:** 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.

**Ed Note:** The Court also noted that 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.” Rejecting that theory the Court wrote, “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” Additionally, because of its resolution of the overbreadth issue, the Court did not address whether the provision is also unconstitutionally vague or violates the Dormant Commerce Clause.