

dissenting opinion in which she was joined by **Judge Lee Finley**. She stated that her “current thinking leads me to want to overrule **Lo**, but a majority of the Court declines to file and set this case to reconsider that decision. I dissent from that declination, because I would file and set the case to reconsider **Lo**.” Presiding [Judge David Schenck](#) dissented and was joined by **Judge Kevin Yeary**. He believes that **Lo** was wrong to hold that “Penal Code § 33.021(b) was so substantially overbroad as to compel its invalidation under the First Amendment.” He also believes that **Lo**’s holding has been fatally undermined by the U.S. Supreme Court’s recent overbreadth decision in ***United States v. Hansen***, 599 U.S. 762 (2023), and other like holdings re-affirming the states’ rights to regulate speech. [Judge Kevin Yeary](#) filed a separate dissenting opinion, restating his long-held belief that the “Court was clearly wrong when -- nearly 12 years ago, in **Lo** -- it declared that the former Texas online solicitation of a minor statute was facially unconstitutional in violation of the United States Supreme Court’s Overbreadth Doctrine.” He was joined by **Presiding Judge David Schenck**, and argued that, before granting relief in this case, “the Court should at the very least consider again whether, especially in light of recent Supreme Court precedents, its decision in **Lo** may have been incorrect.” Judge Yeary also noted that Applicant has “also failed to demonstrate that the statute he was convicted of violating operated unconstitutionally as applied to him.” **Judge Mary Lou Keel** joined Part IV of the opinion, in which, citing ***United States v. Stevens***, 559 U.S. 460 (2010), Judge Yeary pointed out that, unlike an ordinary facial challenge, “requiring that a law be shown to be unconstitutional in all its applications,” the Overbreadth Doctrine provides that “a law may be invalidated as overbroad if [only] ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’” He also argued, citing ***Fournier***, that the “benefits of a conclusion that a criminal statute is overbroad should not automatically be applied retroactively to every applicant convicted under that statute who only later seeks relief in post conviction proceedings. Instead, Texas state post-conviction *habeas* applicants should be required to show that the law they were convicted for violating operated unconstitutionally as applied to them, in their own cases, before relief should be granted.”

Sidebars

([Michael Stauffacher](#)): The "**Lo** has got to go" train has been a long time coming at the CCA. The Court that handed down the unanimous opinion in **Lo** no longer exists, and it is hardly a state secret that Judge Yeary is not a fan of that opinion. My prediction is once Judges Richardson and Newell exit the CCA, the holding in **Lo** will suffer the same fate as the Hindenburg (only with its burnt hulk crashing to Earth in Austin and not New Jersey).

([David A. Schulman](#)) Presiding Judge Schenck and Judge Yeary are correct about the SCOTUS case law (***Hansen***) and its effect on ***Ex parte Lo***. IMHO, there is no way to read ***Hansen*** and believe that **Lo** has continued viability. We should be honest, however, and

recognize that Judge Yeary's long-standing dispute was well founded. The law found unconstitutional in Lo was not very well thought out and was quite poorly drafted. At least in retrospect, the Court of Appeals' opinion in Lo v. State, 393 S.W.3d 290 (Tex.App. - Houston [1st] 2011)(see 68, Vol. 19, No. 47; 11/28/2011), was probably more in keeping with traditional overbreadth cases. In any event, the outcome in this case is a harbinger of the future of Ex parte Lo. Lawyers undertaking post-conviction *habeas corpus* cases relying on Lo should be aware, and should advise their clients, that the language in Fournier indicating that "Applicants are entitled to have their judgments set aside under Lo" will likely soon be inaccurate.

(John G. Jasuta) I am reminded by the continual dissents in the Ex parte Lo situation of the opening to Mr. Baseball (© 1992 Universal Pictures) in which Tom Selleck, played here ably by Judge Yeary, takes strike four! Five! Strike Six, only to wake from a nightmare. In this version, however, the outcome appears to be different, as more voices join him in his rejection of Ex parte Lo, spelling its now predictable end.

(Troy McKinney) In my view, Hansen is materially different than Lo, both factually and legally. The only real change between when Lo was unanimously decided and the Hansen decision is the change in the composition of the Court of Criminal Appeals. Unlike the inherently unprotected fraud in Hansen, the statute in Lo would have prohibited substantial protected speech. Unlike the statute at issue in Lo, the statute in Hansen was narrowly drawn. At least for now, Lo survives, as it should. Further changes in the composition of the court may later result in Lo's demise, but it will only be because of the change in the composition of the court, not because Lo was allegedly wrongfully decided. Williams was properly granted relief.