**When a statute restricts speech based on content, the usual presumptions of constitutionality and burdens of proving constitutionality are flipped:**

> 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.[9] The burden normally rests upon the person challenging the statute to establish its unconstitutionality.[10] However, when the government seeks to restrict and punish speech based on its content, the usual presumption of constitutionality is reversed.[11] Content-based regulations (those laws that distinguish favored from disfavored speech based on the ideas expressed)[12] are presumptively invalid, and the government bears the burden to rebut that presumption.[13] The Supreme Court applies the "most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."[14]

*Ex Parte Lo*, 424 S.W.3d 10, 14-15 (Tex. 2013).

9 *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex.Crim.App.2002).

10 *Id*.

11 *Playboy*, 529 U.S. at 817, 120 S.Ct. 1878 ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."); see *Ex parte Nyabwa*, 366 S.W.3d 719, 724 (Tex.App.-Houston [14th Dist.] 2011, pet. ref'd) (citing *Playboy* in stating, "when the government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded legislative enactments is reversed.").

12 *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 643, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). If it is necessary to look at the content of the speech in question to decide if the speaker violated the law, then the regulation is content-based. *Gresham v. Peterson*, 225 F.3d 899, 905 (7th Cir.2000). For example, if a statute makes it a crime for an adult to communicate with a minor via the internet, that is a content-neutral law. But if the statute prohibits an adult from communicating with a minor in a sexually explicit manner, that is a content-based law because one has to look at the content of the communication to decide if the speaker violated the law.

13 *Ashcroft v. ACLU*, 542 U.S. 656, 660, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004) (*Ashcroft II* ) ("Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat the Constitution demands that content-based restrictions on speech be presumed invalid, and that the Government bear the burden of showing their constitutionality.") (citation omitted).

14 *Turner Broadcasting*, 512 U.S. at 642, 114 S.Ct. 2445.

**When a statute restricts a substantial amount of protected speech, it is facially overbroad and therefore entirely invalid – that is a facial challenge:**

> 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."[29] 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.[30] "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."[31] 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[.]"[32]
>
> 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[33] 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

29 *Virginia v. Hicks*, 539 U.S. 113, 118–19, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003).
30 *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002).
31 *Id.*
32 *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).
33 "Virtual" pornography is produced through computer-imaging technology without the use of real children. *Free Speech Coalition*, 535 U.S. at 241–42, 122 S.Ct. 1389.

> prosecute those who produce pornography using real children."[34] 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."[35] Free Speech Coalition tells us that a ban upon constitutionally protected speech may not be upheld on the theory that "law enforcement is hard,"[36] 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."[37]

*Ex Parte Lo*, 424 S.W.3d 10, 18-19 (Tex. 2013).

34 *Id*. at 254, 122 S.Ct. 1389; see also *Stanley v. Georgia*, 394 U.S. 557, 567–68, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1968) (people have a First Amendment right to possess obscene material, even though the existence of this right makes it more difficult for the states to further their legitimate interest in prosecuting the distribution of obscenity).

35 *Free Speech Coalition*, 535 U.S. at 255, 122 S.Ct. 1389; see also *Lewis v. City of New Orleans*, 415 U.S. 130, 133, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974) (holding statute that prohibited cursing at police or using "obscene or opprobrious" language toward them was overbroad and facially unconstitutional).

36 *Free Speech Coalition*, 535 U.S. at 254, 122 S.Ct. 1389.

37 See *Hess v. Indiana*, 414 U.S. 105, 108, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (per curiam) (defendant's statement at an anti-war demonstration that "we'll take the fucking street later (or again)" could not be punished as obscene speech or "fighting words" because it did not incite imminent violence; such speech was constitutionally protected because it merely advocated illegal action at some undefined time in the future).