SUPREME COURT OF THE PHILIPPINES
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Republic of the Philippines
Supreme Court
Manila

EN BANC

ALLAN MADRILEJOS, ALLAN HERNANDEZ, GLENDA GIL, and LISA GOKONGWEI-CHENG,
Petitioners,

-versus-

LOURDES GATDULA, AGNES LOPEZ, HILARION BUBAN, and THE OFFICE OF THE CITY PROSECUTOR OF MANILA,
Respondents.

G.R. No. 184389

Present:

BERSAMIN,* *CJ.*,
CARPIO,**
PERALTA,
PERLAS-BERNABE,
LEONEN,
JARDELEZA,
CAGUIOA,
A. REYES, JR.,
GESMUNDO,
J. REYES, JR.,
HERNANDO,
CARANDANG,
LAZARO-JAVIER,
INTING, and
ZALAMEDA, *JJ.*

Promulgated:

September 24, 2019

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DECISION

JARDELEZA, *J.*:

This is a petition for prohibition with prayer for the issuance of a preliminary injunction and/or temporary restraining order,[1] seeking to prevent respondents from carrying out the preliminary investigation of the criminal complaint entitled *Abante, et al. v. Asumbrado, et al.*, docketed as I.S. No. 08G-12234, on the ground that Ordinance No. 7780 is unconstitutional.

On July 7, 2008, 12 pastors and preachers from various churches filed a joint complaint-affidavit[2] against the officers and publishers of seven

* On official business.
** Acting Chief Justice Per Special Order No. 2703.
1 *Rollo*, p. 4.
2 *Id.* at 44.

men's magazines and tabloids. The complainants alleged that sometime during the period of September 2007 to July 2008, the identified magazines and tabloids, which were printed, published, distributed, circulated, and/or sold in the City of Manila, contained material which were "clearly scandalous, obscene, and pornographic within the meaning and in violation of Articles 200 and 201 of the Revised Penal Code and Ordinance No. 7780 of the City of Manila."[3]

Articles 200 and 201 of the Revised Penal Code (RPC) provide:

> Art. 200. *Grave scandal.* – The penalties of *arresto mayor* and public censure shall be imposed upon any person who shall offend against decency or good customs by any highly scandalous conduct not expressly falling within any other article of this Code.
>
> Art. 201. *Immoral doctrines, obscene publications and exhibitions, and indecent shows.* – The penalty of *prision mayor* or a fine ranging from six thousand to twelve thousand pesos, or both such imprisonment and fine, shall be imposed upon:
>
> 1. Those who shall publicly expound or proclaim doctrines openly contrary to public morals;
>
> 2.(a) The authors of obscene literature, published with their knowledge in any form; the editors publishing such literature; and the owners/operators of the establishment selling the same;
>
> (b) Those who, in theaters, fairs, cinematographs or any other place, exhibit indecent or immoral plays, scenes, acts or shows, it being understood that the obscene literature or indecent or immoral plays, scenes or shows, whether live or in film, which are prescribed by virtue hereof, shall include those which: (1) glorify criminals or condone crimes; (2) serve no other purpose but to satisfy the market for violence, lust or pornography; (3) offend any race or religion; (4) tend to abet traffic in and use of prohibited drugs; and (5) are contrary to law, public order, morals, and good customs, established policies, lawful orders, decrees and edicts;
>
> 3. Those who shall sell, give away or exhibit films, prints, engravings, sculptures, or literature which are offensive to morals.

The pertinent portions of Ordinance No. 7780,[4] on the other hand, read as follows:

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[3] *Id.*

[4] *Rollo*, p. 39.

<u>Sec. 2. Definition of Terms:</u> As used in this ordinance, the terms:

A. **<u>Obscene</u>** shall refer to any material or act that is **indecent**, erotic, lewd or offensive, or **contrary to morals**, good customs or religious beliefs, principles or doctrines, or to any material or act that tends to corrupt or deprive the human mind, or is **calculated to excite impure imagination or arouse prurient interest**, or is unfit to be seen or heard, or which violates the proprieties of language or behavior, regardless of the motive of the printer, publisher, seller, distributor, performer or author of such act or material, such as but not limited to:

1. Printing, showing, depicting or describing sexual acts;

2. Printing, showing, depicting or describing children in sexual acts;

3. Printing, showing, depicting or describing completely nude human bodies; and

4. Printing, showing, depicting or describing the human sexual organs or the female breasts.

B. **<u>Pornographic or pornography</u>** shall refer to such objects or subjects of photography, movies, music records, video and VHS tapes, laser discs, billboards, television, magazines, newspapers, tabloids, comics and live shows **calculated to excite or stimulate sexual drive or impure imagination**, regardless of motive of the author thereof, such as, but not limited to the following:

1. Performing live sexual acts in whatever form;

2. Those other than live performances showing, depicting or describing sexual acts;

3. Those showing, depicting or describing children in sex acts;

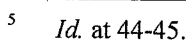
4. Those showing, depicting or describing completely nude human body, or showing, depicting or describing the human sexual organs or the female breasts.

C. Materials shall refer to magazines, newspapers, tabloids, comics, writings, photographs, drawings, paintings, billboards, decals, movies, music records, video and VHS tapes, laser discs, and similar matters.

<u>Sec. 3. Prohibited Acts</u> The printing, publishing, distribution, circulation, sale and exhibition of **obscene** and **pornographic** acts and materials and the production, public

> showing and viewing of video and VHS tapes, laser discs, theatrical or stage and other live performances and private showing for public consumption, whether for free or for a fee, of pornographic pictures as herein defined are hereby prohibited within the City of Manila and accordingly penalized as provided herein.
>
> **<u>Sec. 4. Penalty Clause:</u>** any person violating this ordinance shall be punished as follows:
>
> 1. For printing, publishing, distribution or circulation of obscene or pornographic materials; the production or showing of obscene movies, television shows, stage and other live performances; for producing or renting obscene vidoes and VHS tapes, laser discs, for viewing obscene movies, television shows, videos and VHS tapes, laser discs or stage and other live performances; and for performing obscene act on stage and other live performances – imprisonment of one (1) year or fine of five thousand pesos (₱5,000.00), or both, at the discretion of the court.
>
> 2. For the selling of obscene or pornographic materials – imprisonment of not less than six (6) months nor more than one (1) year or a fine of not less than one (1) thousand (₱1,000.00), nor more than three thousand (₱3,000.00) pesos.
>
> Provided, that in case the offender is a juridical person, the President and the members of the board of directors, shall be held criminally liable; Provided, further, that in case of conviction, all pertinent permits and licenses issued by the City of Government to the offender shall be confiscated in favor of the City Government for destruction; Provided, furthermore, that in case the offender is a minor and unemancipated and unable to pay the fine, his parents or guardian shall be liable to pay such fine; provided, finally, that this ordinance shall not apply to materials printed, distributed, exhibited, sold, filmed, rented, viewed, or produced by reason of or in connection with or in furtherance of science and scientific research and medical or medically related art, profession, and for educational purposes. (Emphasis supplied; underscoring in the original.)

Among those charged were petitioners Allan Madrilejos (Madrilejos), Allan Hernandez (Hernandez), and Glenda Gil (Gil), Editor-in-Chief, Managing Editor, and Circulation Manager, respectively, of For Him Magazine Philippines (FHM Philippines), with Lance Y. Gokongwei and Lisa Gokongwei-Cheng, Chairman and President, respectively, of Summit Publishing, FHM Philippines' publisher.[5]



[5] *Id.* at 44-45.

On July 24, 2008, the Office of the City Prosecutor of Manila (OCP Manila) issued a subpoena requiring petitioners to submit, within 10 days from notice, their counter-affidavit, among others, and appear before the proper authorities to testify under oath or answer clarificatory questions.[6] On August 14, 2008, petitioners appeared before respondent Lourdes Gatdula (Gatdula). They were informed of the creation of a panel of prosecutors, composed of respondent Gatdula with co-respondents Agnes Lopez (Lopez) and Hilarion Buban (Buban), to conduct the preliminary investigation in the case. When petitioners requested for additional time within which to study the complaint and prepare their respective counter-affidavits, preliminary investigation was again reset to August 28, 2008.

Instead of filing their respective counter-affidavits, however, petitioners, prior to the August 28, 2008 hearing, filed an urgent motion for bill of particulars. According to petitioners: the joint complaint-affidavit failed to apprise them of the specific acts they allegedly committed as to enable them to adequately and properly prepare their counter-affidavits; since all seven publishers were charged in the same case, it would appear that they were being charged as conspirators; yet, the specific acts supposedly committed by petitioners in all the other publications were not indicated in the joint complaint-affidavit with such particularity as to allow them to know and understand the accusations against them.[7] This was opposed by complainants.[8]

Meanwhile, on September 24, 2008, and pending the resolution of their urgent motion for bill of particulars, petitioners filed the present action "on the ground that Ordinance No. 7780 is invalid on its face for being patently offensive to their constitutional right to free speech and expression, repugnant to due process and privacy rights, and violative of the constitutionally established principle of separation of church and state."[9]

In their comment, respondents urged the Court to dismiss the petition on the grounds that: (1) the petition does not allege that the OCP Manila is conducting the preliminary investigation proceedings without or in excess of its jurisdiction; (2) criminal prosecutions cannot be enjoined; (3) petitioners are not the proper parties to challenge the validity of Ordinance No. 7780; and (4) Ordinance No. 7780 enjoys the presumption of constitutionality.[10]

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[6] *Id.* at 50.

[7] *Id.* at 428.

[8] Petitioners' motion was set for hearing on the next scheduled date for preliminary investigation, and on that date, counsel for complainants asked for time to file their comment or opposition. The hearing for the submission of counter-affidavits was thus reset to September 18, 2008, without prejudice to any ruling the panel may make on the pending incident; *id.* at 7; at the hearing of September 18, 2008, the motion for bill of particulars not having been resolved, the filing of the counter-affidavits was again reset to October 9, 2008; *id.* at 7-8, counsel for complainants then filed an opposition to the urgent motion for bill of particulars with counter motion, stating that except for respondents Gloria Galuno and Edwin Alcala, all the other respondents should be deemed to have waived their right to file their counter-affidavits for their failure to file them despite two opportunities to submit. The opposition also argued that the motion was dilatory and prohibited under the rules on preliminary investigation; *id.* at 428.

[9] *Id.* at 8.

[10] *Id.* at 352-368.

On November 11, 2013, petitioners informed the Court that the OCP Manila had already issued a Resolution dated June 25, 2013, which dismissed the charges for violation of Article 200 of the RPC and Ordinance No. 7780 but nevertheless ordered the filing of criminal informations for violation of Article 201(3) of the RPC. The pertinent portion of the Resolution reads as follows:

> x x x x
>
> If the act or acts of the offender are punished under another article of the Revised Penal Code, Article 200 is not applicable. Considering that the subject matter of the complaint is the obscene publication under Article 201 of the Revised Penal Code, [petitioners] should not be liable for Grave Scandal; hence, the complaint for Grave Scandal should be dismissed.
>
> On the other hand, considering that the subject matter covered by the city ordinance of Manila is likewise the printing, publication, sale, distribution and exhibition of obscene and pornographic acts and materials, it is already absorbed in Article 201 of the Revised Penal Code and the complaint for violation of the city ordinance should likewise be dismissed.
>
> x x x x
>
> Any person who has something to do with the printing, publication, circulation and sale of the obscene publications should be made liable. Hence, except for respondents Eugenio Lopez III, who was charged being the Chairman of the Board of ABS-CBN Publishing, Inc., Ernesto M. Lopez, being the President of the said publishing company, Lance Y. Gokongwei and Lisa Y. Gokongwei-Cheng, being the Chairman of the Board and President, respectively of Summit Publishing, their actual knowledge, consent, and/or participation in the obscene publications not having been clearly established by the evidence, said respondents should not be made liable thereto. However, all the other respondents being persons responsible for the publication, circulation and sale of the subject obscene publications should be made liable thereto.
>
> All the other respondents, either being the Editor-in-Chief, Managing Director, General Manager or Circulation Manager of their respective publishing companies should be made liable for Violation of Section 201 paragraph 2(a) of the Revised Penal Code.
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> x x x x[11]

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[11] *Id.* at 438-439.

The criminal case against petitioners for violation of Article 201(3) was docketed as Criminal Case No. 13-30084 and assigned to Branch 16 of the Regional Trial Court (RTC) of Manila.

Despite the dismissal of the charge for violation of Ordinance No. 7780, petitioners did not move to withdraw the present action, adamant that the Ordinance "violates the constitutional guarantees to free speech and expression, violates the right to due process, and offends privacy rights."[12] On April 26, 2016 and upon petitioners' motion, Criminal Case No. 13-30084 was ordered dismissed with prejudice.[13]

We dismiss the petition on the following grounds:

> (1) The dismissal of the criminal charges against petitioners for violation of the provisions of Ordinance No. 7780[14] has rendered this case moot and academic; and
> (2) Ordinance No. 7780, an anti-obscenity law, cannot be facially attacked on the ground of overbreadth because obscenity is unprotected speech.

I

In light of the dismissal with prejudice of all criminal charges against petitioners, this case has clearly been rendered moot and academic. A moot and academic case is one that ceases to present a justiciable controversy by virtue of supervening events, so that a declaration thereon would be of no practical use or value. Generally, courts decline jurisdiction over such case or dismiss it on ground of mootness.[15] This pronouncement traces its current roots from the express constitutional rule under paragraph 2 of Section 1, Article VIII of the 1987 Constitution that "[j]udicial power includes the duty of the courts of justice to settle *actual controversies* involving rights which are legally demandable and enforceable x x x."[16] Judicial power, in other words, must be based on an *actual justiciable controversy* at whose core is the existence of a case involving rights which are legally demandable and enforceable. Without this feature, courts have no jurisdiction to act.[17]

True, exceptions to the general principle on moot and academic have been developed and recognized through the years. At present, courts will decide cases, otherwise moot and academic, if it feels that: (a) there is a

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[12] *Id.* at 422-423.
[13] *Id.* at 446.
[14] *Id.* at 39-41; charges for violation of Article 201(3) of the Revised Penal Code have also been dismissed with prejudice.
[15] *David v. Macapagal-Arroyo*, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 213-214. Citations omitted.
[16] Concurring and dissenting opinion of Justice Arturo Brion in *The Province of North Cotabato v. The Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP)*, G.R. No. 183591, October 14, 2008, 568 SCRA 402, 702.
[17] *Id.*

grave violation of the Constitution; (b) the situation is of exceptional character and paramount public interest is involved; (c) the constitutional issue raised requires formulation of controlling principles to guide the bench, the bar, and the public; and (d) the case is capable of repetition yet evading review.[18] Further discussion will bear out that none of these exceptions obtains here.

It has been advanced that a ruling, however, on the merits of the petition must still be had under the fourth exception to the doctrine on mootness since the Ordinance remains valid within the City of Manila, and as such, the dismissal of the criminal charges against petitioners does not mean that no other person will be charged or penalized under it. This is not, however, how the exception applies.

The "capable of repetition, yet evading review" exception to the mootness doctrine was first laid down by the United States (US) Supreme Court in the 1911 case of *Southern Pacific Terminal Co. v. Interstate Commerce Commission.*[19] There, a challenge was made against an Order of the Interstate Commerce Commission (ICC) prohibiting the terminal from granting a particular shipper preferential wharfage charges. By the time the US Supreme Court was ready to decide the case, the cease and desist order, which had a validity period of only two years, had already expired. In rejecting the motion to dismiss the case on the ground of mootness, the Court held that:

> In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The question involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar), and these considerations ought not to be, as they might be, defeated, by short-term orders, capable of repetition, yet evading review, and at one time the government, and at another time the carriers, have their rights determined by the Commission without a chance of redress.

Southern Pacific Terminal Co. was first cited in Our jurisdiction in the 1997 case of *Alunan III v. Mirasol.*[20] There, the Court held that the question of "whether the COMELEC can validly vest in the DILG the control and supervision of SK (Sangguniang Kabataan) elections is likely to arise in connection with every SK election and yet the question may not be decided before the date of such elections."[21] *Alunan* cited, among other cases,[22] *Roe*

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[18] *David v. Macapagal-Arroyo, supra* note 15 at 164. Citations omitted.

[19] 219 U.S. 498 (1911).

[20] G.R. No. 108399, July 31, 1997, 276 SCRA 501.

[21] *Id.* at 509.

[22] Also cited were *Moore v. Ogilvie*, 394 U.S. 814 (1969), which involved a challenge to signature requirement on nominating petitions which the US Supreme Court had yet to decide before the election was held, and *Dunn v. Blumstein*, 405 U.S. 330 (1972), where the US Supreme Court decided merits of a

v. Wade,[23] where the petitioner, a pregnant woman, brought suit in 1970 to challenge the anti-abortion statutes of Texas and Georgia on the ground that she had a constitutional right to terminate her pregnancy. Though the case was not decided until three years later, long after the termination of petitioner's 1970 pregnancy, the US Supreme Court refused to dismiss the case as moot:

> [W]hen, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review."[24]

Over the years, however, the US Supreme Court has increasingly limited the application of the "capable of repetition, yet evading review" exception. Beginning in the 1975 case of *Sosna v. Iowa*,[25] a class action challenging the Iowa durational residency requirement for divorce, the US Supreme Court held:

> In *Southern Pacific Terminal Co. v. ICC,* 219 U. S. 498 (1911), where a challenged ICC order had expired, and in *Moore* v. *Ogilvie,* 394 U. S. 814 (1969), where petitioners sought to be certified as candidates in an election that had already been held, the Court expressed its concern that the defendants in those cases could be expected again to act contrary to the rights asserted by the particular named plaintiffs involved, and in each case the controversy was held not to be moot because the questions presented were "capable of repetition, yet evading review." That situation is not presented in appellant's case, for the durational residency requirement enforced by Iowa does not at this time bar her from the Iowa courts. Unless we were to speculate that she may move from Iowa, only to return and later seek a divorce within one year from her return, the concerns that prompted this Court's holdings in *Southern Pacific* and *Moore* do not govern appellant's situation. But **even though appellees in this proceeding might not again enforce the Iowa durational residency requirement against appellant, it is clear that they will enforce it <u>against those persons in the class that appellant sought to represent and that the District</u>**

challenge to durational residency requirement for voting even though Blumstein had in the meantime satisfied that requirement.

[23] 410 U.S. 113 (1973).

[24] *Id.* at 125.

[25] 419 U.S. 393 (1975).

> **<u>Court certified</u>. In this sense the case before us is one in which state officials will undoubtedly continue to enforce the challenged statute and yet, because of the passage of time, no single challenger will remain subject to its restrictions for the period necessary to see such a lawsuit to its conclusion.**[26] (Emphasis and underscoring supplied.)

In the subsequent case of *Weinstein, et al. v. Bradford,*[27] the US Supreme Court rejected a plea to resolve an issue alleged to be "capable of repetition, yet evading review."[28] The Court found that the suit did not involve a class action—as in fact the District Court refused Bradford's earlier motion to have it declared as such—and that there is no demonstrated probability that Bradford will again be subjected to the parole system. Thus, following *Sosna*, "the capable of repetition, yet evading review" exception was limited to the situation where two elements must concur:

> **(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.** The instant case, not a class action, clearly does not satisfy the latter element. While petitioners will continue to administer the North Carolina parole system with respect to those who at any given moment are subject to their jurisdiction, there is no demonstrated probability that respondent will again be among that number.[29] (Emphasis supplied.)

The requirement that these two elements must concur has continuously been reiterated in a number of later US cases.[30]

We would also adopt the two-requirement rule in this jurisdiction, beginning with Justice Brion's Concurring and Dissenting Opinion in the *En Banc* Decision in *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP)*[31] Dissenting, Justice Brion wrote:

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[26] *Id.* at 399-400.

[27] 423 U.S. 147 (1975).

[28] *Id.* at 148; Bradford sued the members of the Parole Board claiming that he was constitutionally entitled to certain procedural rights in connection with the latter's consideration of his eligibility for parole. Petitioners Weinstein, *et al.* brought the case before the Supreme Court after the Court of Appeals ruled in Bradford's favor. At the time, however, Bradford had already been granted parole.

[29] *Id.* at 149.

[30] *Murphy v. Hunt*, 455 U.S. 478 (1982); *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990); *Spencer v. Kemna*, 523 U.S. 1 (1998); *United States v. Seminole Nation*, 316 U.S. 286 (1942); *Hain v. Mullin*, 327 F.3d 1177, 1180 (10th Cir. 2003).

[31] G.R. No. 183591, October 14, 2008, 568 SCRA 402, 720. This case involved several suits filed to, among others, prohibit the scheduled signing of the Memorandum of Agreement on the Ancestral Domain (MOA-AD) between the Government and the Moro Islamic Liberation Front (MILF). The *ponencia* held that although certain developments (such as the non-signing of the MOA-AD and the eventual dissolution of the Government of the Republic of the Philippines [GRP] panel) have mooted the case, there was a "reasonable expectation that petitioners will again be subjected to the same problem in

> Finally, let me clarify that the likelihood that a matter will be repeated does not mean that there will be no meaningful opportunity for judicial review so that an exception to mootness should be recognized. For a case to dodge dismissal for mootness under the "capable of repetition yet evading review" exception, two requisites must be satisfied: (1) the duration of the challenged action must be too short to be fully litigated prior to its cessation or expiration; and (2) there must be reasonable expectation that the same complaining party will be subjected to the same action again.
>
> The time constraint that justified *Roe v. Wade*, to be sure, does not inherently exist under the circumstances of the present petition so that judicial review will be evaded in a future litigation. As this Court has shown in this case, we can respond as fast as the circumstances require. I see nothing that would bar us from making a concrete ruling in the future should the exercise of our judicial power, particularly the exercise of the power of judicial review, be justified.[32] (Citations omitted.)

Two years later, the Court *En Banc* would categorically adopt the two-requirement rule in *Pormento v. Estrada,*[33] to wit:

> While there are exceptions to this rule, none of the exceptions applies in this case. **What may most probably come to mind is the "capable of repetition yet evading review" exception. However, the said exception applies only where the following two circumstances concur: (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again. The second of these requirements is absent in this case.** It is highly speculative and hypothetical that petitioner would be subjected to the same action again. It is highly doubtful if he can demonstrate a substantial likelihood that he will "suffer a harm" alleged in his petition.[34] (Emphasis supplied.)

This ruling in *Pormento* would be affirmed in the later cases of *International Service for the Acquisition of Agri-Biotech Applications, Inc. v. Greenpeace Southeast Asia (Philippines)*[35] and *Philippine Association of Detective and Protective Agency Operators v. COMELEC.*[36]

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the future as respondents' actions are capable of repetition, in another or any form," hence, the exception to mootness applies.

[32] *Id.*

[33] G.R. No. 191988, August 31, 2010, 629 SCRA 530.

[34] *Id.* at 533-534.

[35] G.R. No. 209271, July 26, 2016, 798 SCRA 250, 287-288. The Court said:

At this point, the Court discerns that there are two (2) factors to be considered before a case is deemed one capable of repetition yet evading review: (1) the challenged action was in its duration

What has developed and prevailed over time, therefore, is a consensus that the "capable of repetition, yet evading review" exception to mootness is not meant to be applied literally. In the cases where the exception was correctly applied, time constraint was a significant factor. As the US Supreme Court would later caution in *Murphy v. Hunt*,[37] a mere physical or theoretical possibility was never sufficient to satisfy the test stated in *Weinstein.*[38] If this were true, virtually any matter of short duration would be reviewable.[39] There must be a "reasonable expectation" or a "demonstrated probability" that the same controversy will recur involving the same complaining party.[40]

To employ the exception here would be to disregard the two-requirement rule laid down in *Weinstein.* The often cited cases of *David v. Macapagal-Arroyo*[41] and *Belgica v. Ochoa, Jr.*[42] also do not find application because the circumstances in these cases differ from the circumstances here.

First. David involved suits challenging Proclamation No. 1017 and General Order No. 5 issued by then President Gloria Macapagal-Arroyo declaring a state of national emergency and calling out the Armed Forces of the Philippines (AFP) and the Philippine National Police (PNP) to prevent

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too short to be fully litigated prior to its cessation or expiration; and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action.

Here, respondents cannot claim that the duration of the subject field tests was too short to be fully litigated. It must be emphasized that the Biosafety Permits for the subject field tests were issued on March 16, 2010 and June 28, 2010, and were valid for two (2) years. However, as aptly pointed out by Justice Leonen, respondents filed their petition for Writ of *Kalikasan* only on April 26, 2012□just a few months before the Biosafety Permits expired and when the field testing activities were already over. Obviously, therefore, the cessation of the subject field tests before the case could be resolved was due to respondents' own inaction.

Moreover, the situation respondents complain of is not susceptible to repetition. As discussed above, DAO 08-2002 has already been superseded by JDC 01-2016. Hence, future applications for field testing will be governed by JDC 01-2016 which, as illustrated, adopts a regulatory framework that is substantially different from that of DAO 08-2002.

Therefore, it was improper for the Court to resolve the merits of the case which had become moot in view of the absence of any valid exceptions to the rule on mootness, and to thereupon rule on the objections against the validity and consequently nullify DAO 08-2002 under the premises of the precautionary principle.

36 G.R. No. 223505, October 3, 2017, 841 SCRA 524, 542-543. The Court said:

The present case falls within the fourth exception. For this exception to apply, the following factors must be present: (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action.

The election period in 2016 was from January 10 until June 8, 2016, or a total of only 150 days. The petition was filed only on April 8, 2016. There was thus not enough time for the resolution of the controversy. Moreover, the COMELEC has consistently issued rules and regulations on the Gun Ban for previous elections in accordance with RA 7166: Resolution No. 8714 for the 2010 elections, Resolution No. 9561-A for the 2013 elections, and the assailed Resolution No. 10015 for the 2016 elections. Thus, the COMELEC is expected to promulgate similar rules in the next elections. Prudence accordingly dictates that the Court exercise its power of judicial review to finally settle this controversy.

37 455 U.S. 478 (1982).

38 *Id.*

39 *Murphy v. Hunt*, *supra* note 37.

40 *Id.*

41 *Supra* note 15.

42 G.R. No. 208566, November 19, 2013, 710 SCRA 1.

and suppress acts of terrorism and lawless violence in the country. Despite the lifting of said state of emergency one week later, the Court refused to dismiss the case and justified its assumption of jurisdiction over the matter as follows:

> The "moot and academic" principle is not a magical formula that can automatically dissuade the courts in resolving a case. Courts will decide cases, otherwise moot and academic, if: first, there is a grave violation of the Constitution; second, the exceptional character of the situation and the paramount public interest is involved; third, when constitutional issue raised requires formulation of controlling principles to guide the bench, the bar, and the public; and fourth, the case is capable of repetition yet evading review.
>
> **All the foregoing exceptions are present here and justify this Court's assumption of jurisdiction over the instant petitions.** Petitioners alleged that the issuance of PP 1017 and G.O. No. 5 violates the Constitution. There is no question that the issues being raised affect the public's interest, involving as they do the people's basic rights to freedom of expression, of assembly and of the press. Moreover, the Court has the duty to formulate guiding and controlling constitutional precepts, doctrines or rules. It has the symbolic function of educating the bench and the bar, and in the present petitions, the military and the police, on the extent of the protection given by constitutional guarantees. And lastly, respondents' contested actions are capable of repetition. Certainly, the petitions are subject to judicial review.[43]

As observed by Justice Brion, *David* properly applied the principle owing to the history of "emergencies" which had attended the administration of President Macapagal-Arroyo since she assumed office. Given such history, it was not far-fetched for the then President to again make a similar declaration in the future, or to possibly "act contrary to the rights asserted by the particular named plaintiffs involved."[44]

In *Belgica*, on the other hand, the Court rejected the view that the constitutionality issues related to the assailed Priority Development Assistance Fund (PDAF) in the 2013 General Appropriations Act had been rendered moot and academic by the reforms undertaken by the Executive Department and former President Benigno Simeon S. Aquino III's declaration that he had already "abolished the PDAF."[45] The Court held that the application of the "capable of repetition, yet evading review" exception was called for because the preparation and passage of the national budget is, by constitutional imprimatur, an affair of annual occurence:

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43 *David v. Macapagal-Arroyo, supra* note 15 at 214-215.
44 See *Sosna v. Iowa*, 419 U.S. 393 (1975).
45 *International Service for the Acquisition of Agri-Biotech Applications, Inc. v. Greenpeace Southeast Asia (Philippines), supra* note 35 at 286.

> The relevance of the issues before the Court does not cease with the passage of a PDAF free budget for 2014. The evolution of the "Pork Barrel System," by its multifarious iterations throughout the course of history, lends a semblance of truth to petitioners' claim that "the same dog will just resurface wearing a different collar." In *Sanlakas v. Executive Secretary,* the government had already backtracked on a previous course of action yet the Court used the "capable of repetition but evading review" exception in order "to prevent similar questions from re-emerging." The situation similarly holds true to these cases. Indeed, the myriad of issues underlying the manner in which certain public funds are spent, if not resolved at this most opportune time, are capable of repetition and hence, must not evade judicial review.[46]

In this case, it must be noted that petitioners' purpose in filing the present action was to stop the conduct of the preliminary investigation into their alleged violation of an unconstitutional statute—a process that concludes with an Order whether or not to indict petitioners. Relatedly, and as it happened in this case, such an Order, if and when issued, is not of such inherently short duration that it will lapse before petitioners are able to see it challenged before a higher prosecutorial authority (*i.e.*, the Department of Justice) or the courts. In fact, and unless reversed by the Secretary of Justice or by the courts, an order to indict does not lapse. Thus, the time constraint that justified the application of the exception in *Southern Pacific Terminal Co.* (two-year validity of an ICC cease and desist order) and *Roe* (266-day human gestation period) does not exist here.[47]

Furthermore, when the criminal charges against petitioners were dismissed with prejudice, they can no longer be refiled without offending the constitutional proscription against double jeopardy. Petitioners have also failed to demonstrate a reasonable likelihood that they will once again be hailed before the OCP Manila for the same or another violation of Ordinance No. 7780.[48] It should be noted that the OCP Manila did not even question the dismissal of the case. There is likewise no showing that the pastors and preachers who initiated the complaint here filed, or have threatened to file, *new* charges against petitioners, over *new* material published in FHM Philippines alleged to be obscene, after the case below was dismissed as early as July 19, 2016.[49]

II

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[46] *Belgica v. Ochoa, Jr.*, *supra* note 42 at 96.

[47] See Concurring and Dissenting Opinion of Justice Brion in *Province of North Cotabato v. The Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP),* G.R. No. 183591, October 14, 2008, 568 SCRA 402, 720.

[48] See *Spencer v. Kemna*, 523 U.S. 1 (1998).

[49] In his *Manila Times* column published on November 27, 2018 entitled "*Porn tabloids are proliferating,*" Roberto Tiglao lamented about the easy availability and widespread circulation of pornographic publications very thinly disguised as tabloids in Metro Manila. Despite this, Mr. Tiglao observed that he has not found any case of anybody being convicted of pornography.

Even granting, for the sake of argument, that petitioners' case has not been mooted by the dismissal of the charge for violation of Ordinance No. 7780 against them, they have still failed to establish a cause of action to warrant a ruling in their favor.

A

Petitioners challenge the constitutionality of Ordinance No. 7780, alleging that it defines the terms "obscene" and "pornography" in such a way that a very broad range of speech and expression are placed beyond the protection of the Constitution, thus violating the constitutional guarantee to free speech and expression.[50] Specifically, petitioners take issue with the "expansive" language of Ordinance No. 7780 which, petitioners claim, paved the way for complainants, a group of pastors and preachers, to impose their view of what is "unfit to be seen or heard" and "violate[s] the proprieties of language and behavior."[51]

Petitioners' arguments are facial attacks against Ordinance No. 7780 on the ground of overbreadth. As will be shown, however, the overbreadth doctrine finds special and limited application only to free speech cases. **The present petition does not involve a free speech case; it stemmed, rather, from an obscenity prosecution.** As both this Court and the US Supreme Court have consistently held, obscenity is not protected speech. No court has recognized a fundamental right to create, sell, or distribute obscene material. Thus, a facial overbreadth challenge is improper as against an anti-obscenity statute.

Associate Justice Vicente V. Mendoza explained in his Separate Opinion in *Estrada v. Sandiganbayan*[52] why a facial overbreadth challenge is limited to cases involving protected speech:

> A facial challenge is allowed to be made to a vague statute and to one which is overbroad because of possible "chilling effect" upon protected speech. The theory is that "[w]hen statutes regulate or proscribe speech and no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution, the transcendent value to all society of constitutionally protected expression is deemed to justify allowing attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with narrow specificity." The possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that the protected speech of others may be deterred and perceived grievances left to fester because of possible inhibitory effects of overly broad statutes.

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[50] *Rollo*, pp. 15-17.
[51] *Id.* at 18.
[52] G.R. No. 148560, November 19, 2001, 369 SCRA 394.

> **This rationale does not apply to penal statutes. Criminal statutes have general *in terrorem* effect resulting from their very existence, and, if facial challenge is allowed for this reason alone, the State may well be prevented from enacting laws against socially harmful conduct. In the area of criminal law, the law cannot take chances as in the area of free speech.**
>
> **The overbreadth and vagueness doctrines then have special application only to free speech cases. They are inapt for testing the validity of penal statutes.** As the US Supreme Court put it, in an opinion by Chief Justice Rehnquist, "we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." In *Broadrick v. Oklahoma*, the Court ruled that "claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate only spoken words" and, again, that "overbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct." For this reason, it has been held that "a facial challenge to a legislative Act is ... the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." x x x
>
> In sum, the doctrines of strict scrutiny, overbreadth, and vagueness are analytical tools developed for testing "on their faces" statutes in free speech cases or, as they are called in American law, First Amendment cases. They cannot be made to do service when what is involved is a criminal statute. With respect to such statute, the established rule is that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." [53] x x x (Emphasis supplied.)

Justice Mendoza's Opinion has since become the controlling rule in cases where the validity of criminal statutes is challenged on the ground of vagueness or overbreadth. Quoting it at length, this Court in *Romualdez v. Sandiganbayan*[54] held that:

> [A]n "on-its-face" invalidation of criminal statutes would result in a mass acquittal of parties whose cases may not have even reached the courts. Such invalidation would constitute a departure from the usual requirement of "actual case and controversy" and permit decisions to be made in a sterile abstract context having no factual concreteness.

[53] *Id.* at 441-442.
[54] G.R. No. 152259, July 29, 2004, 435 SCRA 371.

x x x x

> For this reason, generally disfavored is an on-its-face invalidation of statutes, described as a "manifestly strong medicine" to be employed "sparingly and only as a last resort." In determining the constitutionality of a statute, therefore, its provisions that have allegedly been violated must be examined in the light of the conduct with which the defendant has been charged.[55]

In *Romualdez v. Comelec*,[56] the Court again relied on the Opinion of Justice Mendoza in *Estrada*, reaffirming that it remains good law:

> The rule established in our jurisdiction is, only statutes on free speech, religious freedom, and other fundamental rights may be facially challenged. Under no case may ordinary penal statutes be subjected to a facial challenge. The rationale is obvious. If a facial challenge to a penal statute is permitted, the prosecution of crimes maybe hampered. No prosecution would be possible. A strong criticism against employing a facial challenge in the case of penal statutes, if the same is allowed, would effectively go against the grain of the doctrinal requirement of an existing and concrete controversy before judicial power may be appropriately exercised. A facial challenge against a penal statute is, at best, amorphous and speculative. It would, essentially, force the court to consider third parties who are not before it.[57]

B

Ordinance No. 7780 is a local legislation which criminalizes obscenity. Obscenity is unprotected speech. This rule is doctrinal both here and in the US.

It was in 1942 when the US Supreme Court first held in the landmark case of *Chaplinsky v. New Hampshire*[58] that the lewd and the obscene are not protected speech and therefore falls outside the protection of the First Amendment, thus:

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the **lewd and obscene**, the profane, the libelous, and the insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite

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55 *Id.* at 383-384.
56 G.R. No. 167011, December 11, 2008, 573 SCRA 639.
57 *Id.* at 645-646.
58 315 U.S. 568 (1942).

> an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Beginning from *Roth v. United States*[59] (implicit in the history of the First Amendment is the rejection of obscenity) to *Miller v. California*,[60] (this much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment), the US Supreme Court has invariably held that obscene materials do not come under the protection of the First Amendment. This doctrine continues to be valid to this day, as exemplified in the later case of *New York v. Ferber*,[61] where the US Supreme Court noted that "[i]n *Chaplinsky*[,] x x x the Court laid the foundation for the excision of obscenity from the realm of constitutionally protected expression." In *Ferber*, the Court not only upheld the constitutionality of the child pornography statute of New York, it also allowed the States greater leeway in the regulation of pornographic depictions of children by essentially holding that the test for child pornography is lower than the obscenity standard enunciated in *Miller*.[62]

As earlier stated, this Court has long accepted *Chaplinsky's* analysis that obscenity is unprotected speech. In 1985, We held, in the case of *Gonzalez v. Katigbak*,[63] that the law on freedom of expression frowns on obscenity and rightly so.[64] The Court quoted with approval *Roth v. United States*,[65] which, in turn, cited *Chaplinsky*:

> All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. **But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.** This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of

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[59] 354 U.S. 476 (1957).

[60] 413 U.S. 15 (1973).

[61] 458 U.S. 747 (1982).

[62] According to the Court, with respect to child pornography, "[t]he Miller formulation is adjusted in the following respects: a trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole." See also *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), where the Court held that while pornography can generally be banned only if it is obscene under *Miller v. California*, 413 U.S. 15, "pornography depicting actual children can be proscribed whether or not the images are obscene because of the State's interest in protecting the children exploited by the production process."

[63] G.R. No. L-69500, July 22, 1985, 137 SCRA 717.

[64] *Id.* at 725.

[65] *Supra* note 59.

> the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956.[66]

In *Pita v. Court of Appeals*,[67] the Court declared that "[u]ndoubtedly, 'immoral' lore or literature comes within the ambit of expression, although not its protection."[68] In *Soriano v. Laguardia*,[69] the Court reiterated that:

> Indeed, as noted in *Chaplinsky v. State of New Hampshire*, "there are certain well-defined and narrowly limited classes of speech that are harmful, the prevention and punishment of which has never been thought to raise any Constitutional problems." In net effect, some forms of speech are not protected by the Constitution, meaning that restrictions on unprotected speech may be decreed without running afoul of the freedom of speech clause. A speech would fall under the unprotected type if the utterances involved are "no essential part of any exposition of ideas, and are of such slight social value as a step of truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Being of little or no value, there is, in dealing with or regulating them, no imperative call for the application of the clear and present danger rule or the balancing-of-interest test, they being essentially modes of weighing competing values, or, with like effect, determining which of the clashing interests should be advanced.
>
> Petitioner asserts that his utterance in question is a protected form of speech.
>
> The Court rules otherwise. It has been established in this jurisdiction that **unprotected speech or low-value expression refers to** libelous statements, **obscenity or pornography,** false or misleading advertisement, insulting or "fighting words," i.e., those which by their very utterance inflict injury or tend to incite an immediate breach of peace and expression endangering national security.[70] (Emphasis supplied.)

As this Court has recognized, laws that regulate or proscribe classes of speech falling beyond the ambit of constitutional protection cannot,

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[66] In the same vein, the US Supreme Court in *Beauharnais v. Illinois* [343 U.S. 250, 254-257 (1952)] noted that "libel of an individual was a common-law crime, and thus criminal in the colonies. Indeed, at common law, truth or good motives was no defense. In the first decades after the adoption of the Constitution, this was changed by judicial decision, statute or constitution in most States, but nowhere was there any suggestion that the crime of libel be abolished. Today, every American jurisdiction—the forty-eight States, the District of Columbia, Alaska, Hawaii and Puerto Rico—punish libels directed at individuals. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."

[67] G.R. No. 80806, October 5, 1989, 178 SCRA 362.

[68] *Id.* at 373.

[69] G.R. No. 164785, April 29, 2009, 587 SCRA 79.

[70] *Id.* at 99-100.

therefore, be subject to facial invalidation because there is no "transcendent value to all society" that would justify such attack.[71]

This is not to suggest, however, that these laws are absolutely invulnerable to constitutional attack.

A litigant who stands charged under a law that regulates unprotected speech can still mount a challenge that a statute is unconstitutional *as it is applied to him or her*. In such a case, courts are left to examine the provisions of the law allegedly violated in light of the conduct with which the litigant has been charged.[72] If the litigant prevails, the courts carve away the unconstitutional aspects of the law by invalidating its improper applications on a case to case basis.[73]

C

Under the circumstances, the proper recourse for petitioners would have been to go to trial to allow the RTC, as the trier of fact, to judicially determine whether the materials complained of as obscene were indeed proscribed under the language of Ordinance No. 7780. As part of their defense, petitioners can probably argue for the adoption of the *Miller* standards, which requires the trier of fact to ascertain:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[74]

Thereafter, petitioners can argue that, applying said standards to the specific material over which they were being prosecuted, they should be acquitted.

On the other hand, the trial court, assuming it adopts *Miller*, will then have to receive evidence and render opinion on such issues as to: (a) who is the "average" Filipino; (b) what is the "community" against which "contemporary standards" are to be measured; (c) whether the subject material appeals to the "prurient" interest; (d) whether the material depicts "patently offensive" sexual conduct; and (e) whether the material "taken as a whole" has serious value.

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[71] *Samahan ng mga Progresibong Kabataan v. Quezon City*, G.R. No. 225442, August 8, 2017, 835 SCRA 350.

[72] See *Romualdez v. Comelec, supra* note 56.

[73] *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, G.R. No. 178552, October 5, 2010, 632 SCRA 146, 188.

[74] *Miller v. California, supra* note 60 at 24.

The decision of the RTC, whether or not in favor of petitioners, may then be brought up on appeal to the Court of Appeals (CA), whose decision may later on be brought to this Court for review. Such is the process observed by the US Supreme Court in all of the obscenity cases cited by the *ponencia* which led to the adoption of the *Miller* standards in the US. The cases, including *Miller*, all involved appellate review conducted with the benefit of a full record. To stress, none of those cases involved a facial attack of the challenged government regulation on the ground of overbreadth.

Hence, to grant the petition would be to declare Ordinance No. 7780 (and by implication Article 201[3] of the RPC)[75] unconstitutional in a complete vacuum. To recall, petitioners were charged for selling or printing alleged obscene materials appearing in 14 pages from four different issues of their magazines. While allegedly marked as annexes of the joint complaint-affidavit, it does not even appear, however, that said pages were attached by petitioners as annexes to their petition. There would thus be no basis even for this Court to rule on the constitutionality of the Ordinance *as applied to petitioners*.

Indeed, the process We suggest here may take longer to resolve than a direct recourse to this Court on an overbreadth challenge. Nevertheless, such is the process required of Us by the Constitution. We must be mindful that the power of judicial review is not boundless; it is limited by the actual case and controversy requirement and the hierarchy of courts.

Equally important, under the separation of powers ordained by the Constitution, this Court is vested only with judicial power, legislative power being entrusted exclusively with the Congress. Were We to declare Ordinance No. 7780 unconstitutional in this case, and impose the *Miller* standards on Congress and the City of Manila, We may be faulted (and not without reason) for engaging in judicial legislation.

We stress at this point that the Court in *Miller* did not impose that the standards it laid down be *legislated.* On the contrary, the Court there was very careful not to overstep its judicial boundaries:

> **We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion,** *supra:*
>
> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

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[75] The constitutionality of which was, notably, not questioned by petitioners.

> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.[76] (Emphasis supplied.)

In fact, *Miller* explicitly held that the obscene conduct depicted or described in materials which is sought to be regulated "must be specifically defined by the applicable state law, as written or *authoritatively* construed." The Court in *Miller*, through Chief Justice Burger, added that it was not holding, "as Mr. Justice Brennan intimates, that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereafter, may well be adequate." Indeed, it does not appear that US Federal laws on obscenity have been amended subsequent to the promulgation of *Miller* to suit or reflect said Decision's exact language.[77] Accordingly, whether a material is obscene or not is still for the Court to decide as it applies or construes a specific statute in a particular case.

Finally, the path followed by the Court in adopting the "actual malice" rule in libel law is instructive. In 1964, the US Supreme Court laid down its precedential ruling in the case of *New York Times v. Sullivan*.[78] There, the US Court held that a public official may not successfully sue for libel unless the official can prove actual malice, which was defined as with knowledge that the statement was false or with reckless disregard as to whether or not it was true.

The Philippines eventually adopted the *New York Times* rule, but only after an actual case involving a criminal prosecution for libel is presented to

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[76] *Miller v. California*, *supra* note 60 at 25.

[77] *i.e.* **18 USC. §1460** and **18 USC. §1466** still read, respectively:

Possession with intent to sell, and sale, of obscene matter on Federal property

(a) Whoever, either—

(1) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States; or

(2) in the Indian country as defined in section 1151 of this title, knowingly sells or possesses with intent to sell an obscene visual depiction shall be punished by a fine in accordance with the provisions of this title or imprisoned for not more than 2 years, or both.

(b) For the purposes of this section, the term "visual depiction" includes undeveloped film and videotape but does not include mere words.

Engaging in the business of selling or transferring obscene matter

(a) Whoever is engaged in the business of producing with intent to distribute or sell, or selling or transferring obscene matter, who knowingly receives or possesses with intent to distribute any obscene book, magazine, picture, paper, film, videotape, or phonograph or other audio recording, which has been shipped or transported in interstate or foreign commerce, shall be punished by imprisonment for not more than 5 years or by a fine under this title, or both.

(b) As used in this section, the term "engaged in the business" means that the person who produces sells or transfers or offers to sell or transfer obscene matter devotes time, attention, or labor to such activities, as a regular course of trade or business, with the objective of earning a profit, although it is not necessary that the person make a profit or that the production, selling or transferring or offering to sell or transfer such material be the person's sole or principal business or source of income. The offering for sale of or to transfer, at one time, two or more copies of any obscene publication, or two or more of any obscene article, or a combined total of five or more such publications and articles, shall create a rebuttable presumption that the person so offering them is "engaged in the business" as defined in this subsection. *18 U.S. Code Title 18 - Crimes and Criminal Procedure* <https://www.govinfo.gov/content/pkg/USCODE-2011-title18/html/USCODE-2011-title18-partI-chap71-sec1466.htm> (visited September 6, 2019).

[78] 376 U.S. 254 (1964).

the Court *under the regular appeals process*. Such an opportunity presented itself in 1999 when the Court, thru Associate Justice Vicente V. Mendoza,[79] categorically adopted the *New York Times* rule *as applied* to the actual facts of the case and as part of the Decision's *ratio decidendi*. This is the proper precedent to follow if the Court were to consider adopting the *Miller* standard in our jurisdiction. Thus, and until the proper case presents itself, prudence dictates that the Court should exercise judicial restraint.

WHEREFORE, the petition is **DISMISSED**.

SO ORDERED.

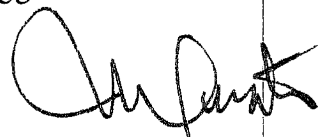
FRANCIS H. JARDELEZA
Associate Justice

WE CONCUR:

(On official business)
LUCAS P. BERSAMIN
Chief Justice

I join the dissent of J. Marvic Leonen

ANTONIO T. CARPIO
Acting Chief Justice
Associate Justice



DIOSDADO M. PERALTA
Associate Justice

Please see Dissenting Opinion

ESTELA M. PERLAS-BERNABE
Associate Justice

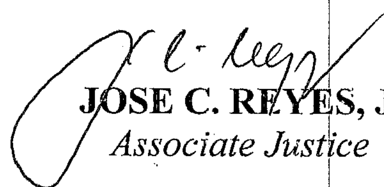
I dissent. See separate opinion

MARVIC M.V. F. LEONEN
Associate Justice

ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

ANDRES B. REYES, JR.
Associate Justice

(On official business)
ALEXANDER G. GESMUNDO
Associate Justice



JOSE C. REYES, JR.
Associate Justice

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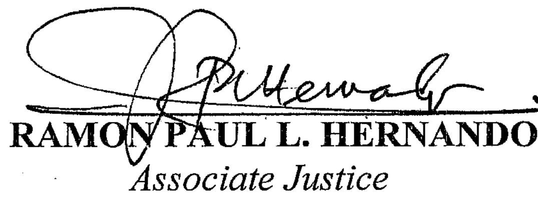
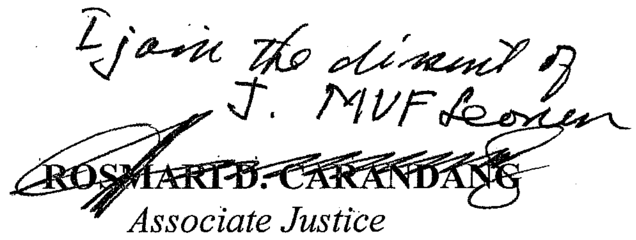
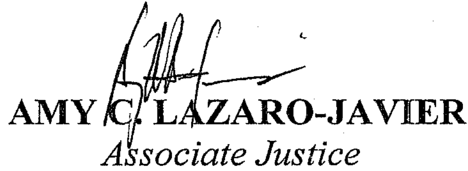
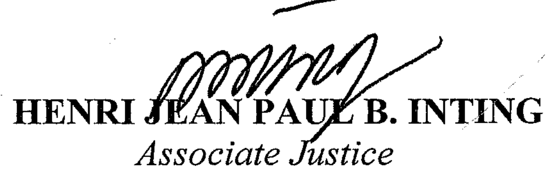
[79] *Vasquez v. Court of Appeals*, G.R. No. 118971, September 15, 1999, 314 SCRA 460.

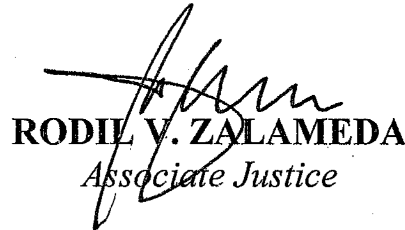
RAMON PAUL L. HERNANDO
Associate Justice

ROSMARI D. CARANDANG
Associate Justice

AMY C. LAZARO-JAVIER
Associate Justice

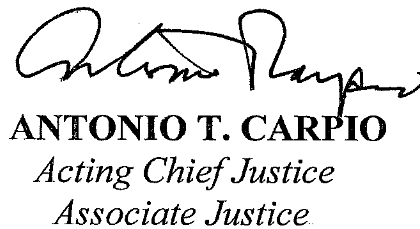
HENRI JEAN PAUL B. INTING
Associate Justice



RODIL V. ZALAMEDA
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court.



ANTONIO T. CARPIO
Acting Chief Justice
Associate Justice

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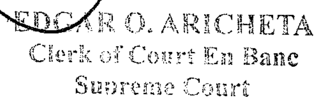

EDGAR O. ARICHETA
Clerk of Court En Banc
Supreme Court