EN BANC

G.R. No. 184389 – 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.*

Promulgated:

November 16, 2021

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DISSENTING OPINION

CAGUIOA, *J.*:

After a careful re-evaluation of the merits of the instant case, aided by the sharp Dissenting Opinion of Senior Associate Justice Estela M. Perlas-Bernabe, I am now reconsidering my vote in the main Decision.[1]

To recall, the dismissal of the petition in the main Decision was hinged on two grounds: (1) the dismissal of the criminal charges against petitioners for violation of Manila Ordinance No. 7780[2] has rendered the 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. On the first ground, the main Decision held that a justiciable controversy has ceased to exist with the dismissal of the charge against petitioners for violation of Ordinance No. 7780, as well as the dismissal with prejudice of the criminal case filed against them for violation of Article 201(3)[3] of the Revised Penal Code. While acknowledging several exceptions to the moot and academic doctrine laid down in various jurisprudence over the years, the main Decision zeroed in on the inapplicability of one of the exceptions, which was the "capable of repetition, yet evading review." The discussion on the evolution of this principle being sound and exhaustive notwithstanding, upon my re-assessment of the issues in this case, I submit that the Court should not have felt precluded from taking cognizance of the case despite the dismissal of the

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1 *Madrilejos v. Gatdula*, G.R. No. 184389, September 24, 2019.

2 AN ORDINANCE PROHIBITING AND PENALIZING THE PRINTING, PUBLICATION, SALE, DISTRIBUTION AND EXHIBITION OF OBSCENE AND PORNOGRAPHIC ACTS AND MATERIALS AND THE PRODUCTION, RENTAL, PUBLIC SHOWING AND VIEWING OF INDECENT AND IMMORAL MOVIES, TELEVISION SHOWS, MUSIC RECORDS, VIDEO AND VHS TAPES, LASER DISCS, THEATRICAL OR STAGE AND OTHER LIVE PERFORMANCES, EXCEPT THOSE REVIEWED BY THE MOVIE, TELEVISION REVIEW AND CLASSIFICATION BOARD (MTRCB), approved on February 19, 1993.

3 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:

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3. Those who shall sell, give away, or exhibit films, prints, engravings, sculptures, or literature which are offensive to morals.

criminal charges against petitioners. I join Senior Associate Justice Perlas-Bernabe's observation that with petitioners also questioning the validity of the Ordinance, there remains a live controversy which is ripe for adjudication.

The dismissal of the criminal charges against petitioners did not strip their petition before the Court of the requirement of actual case or controversy in judicial review. "[A]n actual case or controversy is one which 'involves a **conflict of legal rights**, an assertion of **opposite legal claims**, susceptible of judicial resolution as distinguished from a hypothetical or abstract difference or dispute.' In other words, 'there must be a **contrariety of legal rights that can be interpreted and enforced on the basis of existing law and jurisprudence**.'"[4] In relation to this requirement, the case must also be ripe for adjudication. A question is ripe for adjudication when the act being challenged has had a direct adverse effect on the individual challenging it. It is a prerequisite that something has then been accomplished or performed by either the executive or legislative branch before a court may come into the picture, and petitioner must allege the existence of an immediate or threatened injury to himself or herself as a result of the challenged action. He or she must show that he or she has sustained or is immediately in danger of sustaining some direct injury as a result of the act complained of.[5]

In *Imbong v. Ochoa, Jr.*[6] (*Imbong*), the Court rejected the arguments of the proponent of the Reproductive Health Law (RH Law) or Republic Act No. (R.A.) 10354[7] that the petitions did not present any actual case or controversy because the RH Law has yet to be implemented, no one has been charged with violating any of its provisions, and that there was no showing that any of petitioners' rights has been adversely affected by its operation. In finding that there was, on the contrary, an actual case or controversy that was ripe for judicial determination, the Court explained:

> In this case, the Court is of the view **that an actual case or controversy exists and that the same is ripe for judicial determination.** Considering that the RH Law and its implementing rules have already taken effect and that budgetary measures to carry out the law have already been passed, it is evident that the subject petitions present a justiciable controversy. As stated earlier, when an action of the legislative branch is seriously alleged to have infringed the Constitution, it not only becomes a right, but also a duty of the Judiciary to settle the dispute.
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> Moreover, the petitioners have shown that the case is so because medical practitioners or medical providers are in danger of being

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4 *Samahan ng mga Progresibong Kabataan (SPARK) v. Quezon City,* G.R. No. 225442, August 8, 2017, 835 SCRA 350, 385. Emphasis supplied; emphasis and underscoring in the original omitted.

5 Id. at 385.

6 G.R. Nos. 204819, 204934, 204957, 204988, 205003, 205043, 205138, 205478, 205491, 205720, 206355, 207111, 207172 & 207563, April 8, 2014, 721 SCRA 146.

7 AN ACT PROVIDING FOR A NATIONAL POLICY ON RESPONSIBLE PARENTHOOD AND REPRODUCTIVE HEALTH, otherwise known as "THE RESPONSIBLE PARENTHOOD AND REPRODUCTIVE HEALTH ACT OF 2012," approved on December 21, 2012.

> criminally prosecuted under the RH Law for vague violations thereof, particularly **public health officers** who are **threatened to be dismissed from the service with forfeiture of retirement and other benefits**. They must, at least, be heard on the matter **NOW**.[8] (Emphasis in the original)

Imbong relied on the case of *The Province of North Cotabato v. The Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP)*,[9] where the Court ruled that the fact of the law or act in question being not yet effective does not negate ripeness. Concrete acts under a law are not necessary to render the controversy ripe. Even a singular violation of the Constitution and/or the law is enough to awaken judicial duty.[10]

Similarly, in *Samahan ng mga Progresibong Kabataan (SPARK) v. Quezon City*[11] (*SPARK*), which involved an original Petition for *Certiorari* and Prohibition before the Court assailing the constitutionality of the curfew ordinances issued by the local governments of Quezon City, Manila, and Navotas, the Court found the existence of an actual justiciable controversy in the case in this wise:

> x x x [T]his Court finds that there exists an actual justiciable controversy in this case given the evident clash of the parties' legal claims, particularly on whether the Curfew Ordinances impair the minors' and parents' constitutional rights, and whether the Manila Ordinance goes against the provisions of RA 9344. Based on their asseverations, petitioners have — as will be gleaned from the substantive discussions below — conveyed a *prima facie* case of grave abuse of discretion, which perforce impels this Court to exercise its expanded jurisdiction. The case is likewise ripe for adjudication, considering that the Curfew Ordinances were being implemented until the Court issued the TRO enjoining their enforcement. The purported threat or incidence of injury is, therefore, not merely speculative or hypothetical but rather, real and apparent.[12]

Applying the foregoing cases here, there remains an actual case or controversy with the continued presence of Ordinance No. 7780. Not having been struck down and declared void, the Ordinance remains good law. As in *SPARK*, there is, in this case, an "evident clash of the parties' legal claims," particularly on whether the Ordinance is violative of the constitutional rights of petitioners and of others who are similarly situated like them. Evidently, this issue is purely legal and therefore does not require the presence of prevailing, concrete, or overt facts before the Court may be taken to task to adjudicate.

On this score, I further concur with Senior Associate Justice Perlas-Bernabe's position that there remains a practical legal value to judicially pass upon the facial challenge posed by petitioners against Ordinance No.

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8 *Imbong v. Ochoa, Jr.*, supra note 6, at 281. Citation omitted.
9 G.R. Nos. 183591, 183752, 183893, 183951 & 183962, October 14, 2008, 568 SCRA 402.
10 *Imbong v. Ochoa, Jr.*, supra note 6, at 280-281.
11 Supra note 4.
12 Id. at 385-386.

7780. Specifically, petitioners filed the case on the ground that it 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."[13] As will be further discussed below, the chilling effect of the overbroad provisions of the Ordinance on the exercise of the fundamental freedom of speech and expression warrants the judicial review of the Court. As a matter of fact, by this very reason, the facial challenge can prosper even without further facts that usually animate an actual case or controversy.

In *Romualdez v. Sandiganbayan*,[14] the Court explained why facial invalidation is generally disfavored and employed sparingly and as a last resort in facial challenges involving penal statutes. The concern was that an "on-its-face" invalidation of 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.[15]

Subsequently in *Imbong*, the Court, veering away from the restrictive application of facial challenges to strictly penal statutes, held that it has expanded the scope of facial challenges to cover statutes not only regulating free speech, **but also those involving religious freedom, and other fundamental rights in a modified approach from that of the Supreme Court of the United States (SCOTUS)**. The Court elucidated that unlike its counterpart in the U.S., its expanded jurisdiction under the Constitution mandates it to not only settle actual controversies involving rights which are legally demandable and enforceable, but also to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government. The Court then concluded that the framers of our Constitution envisioned a proactive Judiciary, ever vigilant with its duty to maintain the supremacy of the Constitution.[16] Verily, the Court expounded on the requirement of justiciable controversy and notably held that **to dismiss the petitions before it on the "simple expedient that there exist[s] no actual case or controversy, would diminish this Court as a reactive branch of government, acting only when the Fundamental Law has been transgressed, to the detriment of the Filipino people."**[17]

Insofar as overbreadth is concerned, in particular, the explanation of the Court on the necessity to apply a facial type of invalidation in *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*[18] (*Southern*

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13 See *Madrilejos v. Gatdula*, supra note 1, at 5.
14 G.R. No. 152259, July 29, 2004, 435 SCRA 371.
15 Id. at 383.
16 *Imbong v. Ochoa, Jr.*, supra note 6, at 282.
17 Id. at 283. Emphasis and underscoring supplied.
18 G.R. Nos. 178552, 178554, 178581, 178890, 179157 & 179461, October 5, 2010, 632 SCRA 146.

Hemisphere) which was later reiterated in *SPARK,* bears emphasis. The discussion, albeit done in the context of third-party standing, is consonant and closely related with the principle of actual case or controversy. *Southern Hemisphere* instructed that, **by its nature, the overbreadth doctrine has to necessarily apply a facial type of invalidation in order to plot areas of protected speech, inevitably almost always under situations not before the court, that are impermissibly swept by the substantially overbroad regulation. Otherwise stated, a statute cannot be properly analyzed for being substantially overbroad if the court confines itself only to facts as applied to the litigants.**[19] The Court expounded on this "exception to some of the usual rules of constitutional litigation" and to the factor that motivates the departure, to wit:

> "The most distinctive feature of the overbreadth technique is that it marks an exception to some of the usual rules of constitutional litigation. Ordinarily, a particular litigant claims that a statute is unconstitutional as applied to him or her; 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. Moreover, challengers to a law are not permitted to raise the rights of third parties and can only assert their own interests. **In overbreadth analysis, those rules give way; challenges are permitted to raise the rights of third parties; and the court invalidates the entire statute "on its face," not merely "as applied for" so that the overbroad law becomes unenforceable until a properly authorized court construes it more narrowly. The factor that motivates courts to depart from the normal adjudicatory rules is the concern with the "chilling;" deterrent effect of the overbroad statute on third parties not courageous enough to bring suit. The Court assumes that an overbroad law's "very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *An overbreadth ruling is designed to remove that deterrent effect on the speech of those third parties.*"** x x x[20] (Emphasis, italics and underscoring supplied; underscoring in the original omitted)

Hence, under pain of repetition, the continued effectivity of Ordinance No. 7780, which has overbroad provisions that infringe on freedom of speech and expression, should impel the Court to take cognizance of the facial challenge by petitioners despite the dismissal of the criminal charges against them. True, it has been pointed out that "procedures for testing the constitutionality of a statue 'on its face' x x x are fundamentally at odds with the function of courts in our constitutional plan."[21] When an accused is guilty of conduct that can constitutionally be prohibited and that the State has endeavored to prohibit, the State should be able to inflict its punishment. Such punishment violates no personal right of the accused.[22] **I submit, however, that this precept should never remain unbending when**

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19 Id. at 187.

20 Id. at 188. Citation omitted.

21 Separate Opinion of Associate Justice Vicente V. Mendoza in *Estrada v. Sandiganbayan,* G.R. No. 148560, January 29, 2002, citing *Younger v. Harris*, 401 U.S. 37, 52 (1971), accessed at <https://www.chanrobles.com/scresolutions/resolutions/2002/january/148560.php>.

22 Id.

fundamental rights are violated by a law. In such cases, it cannot be gainsaid that the legislature has repudiated its duty to uphold the Constitution.[23] It becomes the Court's duty then not to reward or accommodate the legislature's failure, but to protect individual rights from it.[24] Complete, pre-enforcement invalidation of the law in such circumstances satisfies constitutional norms and vindicates the courts' critical role in protecting individual rights from majority oppression.[25]

The main Decision dismissed the petition also on the ground that petitioners cannot mount a facial challenge against Ordinance No. 7780 because it is a penal statute proscribing obscenity, which is unprotected speech. Again, on reconsideration, I now demur from this restrictive interpretation.

Indeed, what has been often repeated in cases involving the constitutionality of a penal law is the observations of former Associate Justice Vicente V. Mendoza adopted in the *ponencia* of *Estrada v. Sandiganbayan*[26] (*Estrada*). Ruling on whether the allegations that the Plunder Law is vague and overbroad justify a facial review of the law's validity, Justice Mendoza answered in the negative. He concluded that the overbreadth and vagueness doctrines have special application only to free speech cases and are inapt for testing the validity of penal statutes.[27] The challenge is allowed because of the possible "chilling effect" upon protected speech. This possibility outweighs the possible harm to society in permitting some unprotected speech to go unpunished, a rationale that, according to Justice Mendoza, 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.[28]

However, in his opinion in the resolution of the motion for reconsideration in *Estrada*, Justice Mendoza clarified the observations he made in the main *ponencia*, to wit:

> Before discussing these cases, let it be clearly stated that, when we said that "the doctrines of strict scrutiny, overbreadth and vagueness are analytical tools for testing 'on their faces' statutes in free speech cases or, as they are called in American law, First Amendment cases [and therefore] cannot be made to do service when what is involved is a criminal statute," we did not mean to suggest that the doctrines do not apply to criminal statutes at all. They do, although they do not justify a facial challenge, but

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23 Borgmann, C., HOLDING LEGISLATURES CONSTITUTIONALLY ACCOUNTABLE THROUGH FACIAL CHALLENGES, CUNY Academic Works, City University of New York (2009), accessed at <https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1138&context=cl_pubs>.

24 Id.

25 Id.

26 G.R. No. 148560, November 19, 2001, 369 SCRA 394.

27 Id. at 465.

28 Id. at 464-465.

> only an as-applied challenge, to those statutes. Parties can only challenge such provisions of the statutes as applied to them. **Neither did we mean to suggest that the doctrines justify facial challenges only in free speech or First Amendment cases. To be sure, they also justify facial challenges in cases under the Due Process and Equal Protection Clauses of the Constitution with respect to so-called "fundamental rights."** ***In short, a facial challenge, as distinguished from as-applied challenge, may be made on the ground that, because of vagueness or overbreadth, a statute has a chilling effect on freedom of speech or religion or other fundamental rights.*** **But the doctrines cannot be invoked to justify a facial challenge to statute where no interest of speech or religion or fundamental freedom is involved, as when what is being enforced is an ordinary criminal statute like the Anti-Plunder law.**[29] (Emphasis, italics and underscoring supplied)

Later, the Dissenting Opinion of former Associate Justice Dante O. Tinga in *Spouses Romualdez v. Commission on Elections*[30] pointed out that "[i]n light of Justice Mendoza's subsequent clarification, **it is a disputable matter whether *Estrada* established a doctrine that 'void-for-vagueness or overbreadth challenges do not apply to penal statutes.'**"[31]

The foregoing interpretation on the application of facial challenges to penal statutes made by Justice Mendoza and Justice Tinga is, I submit, the correct position. The nature of the assailed law should not be controlling — rather, what should be key is whether fundamental rights or freedoms can be demonstrated to have been implicated by the law. To once again take a cue from the clarificatory opinion of Justice Mendoza in *Estrada:*

> x x x For the question in the case at bar, it cannot be overemphasized, is not whither (sic) the vagueness and overbreadth doctrines apply to facial challenges to criminal statutes. The question rather is whether the mere assertion that a penal statute is vague or overbroad — without a showing that interests of speech (or, it may be added, freedom of religion) or other fundamental rights are infringed — triggers a facial review of the said statutes, using strict scrutiny as the standard of judicial review. We hold it does not.
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> As the Anti-Plunder Law implicates neither free speech nor freedom of religion or other fundamental rights of petitioner, a facial review of the law cannot be required nor the burden of proving its validity placed on the State. Mere assertions that it is vague or overbroad only justify an "as-applied" review of its challenged-provisions. x x x[32]

Hence, to deny a facial attack on Ordinance No. 7780 on the basis alone that it is a penal statute would foreclose a prompt examination by the Court on whether it truly impinges on constitutionally protected speech and expression. Moreover, to await an as-applied challenge would render, in the meantime, petitioners and those who are similarly situated like them, to exist

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29 Separate Opinion of Associate Justice Vicente V. Mendoza in *Estrada v. Sandiganbayan*, supra note 21.
30 G.R. No. 167011, April 30, 2008, 553 SCRA 370.
31 Id. at 468. Emphasis and underscoring supplied.
32 Separate Opinion of Associate Justice Vicente V. Mendoza in *Estrada v. Sandiganbayan*, supra note 21.

in uncertainty about the limits of Ordinance No. 7780. Excessive uncertainty, however, about the limits of a criminal law can chill even innocent expression.[33]

Reno v. American Civil Liberties Union[34] (*Reno*) is instructive. At issue in said case was the constitutionality of two statutory provisions under the Communications Decency Act of 1996 (CDA) enacted to protect minors from "indecent" and "patently offensive" communications on the Internet. Notwithstanding the legitimacy and importance of the congressional goal of protecting children from harmful materials, *Reno* held that the CDA abridges "the freedom of speech" protected by the First Amendment because it effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. Ruling in favor of the facial invalidation of the CDA, the concern in *Reno* included, in fact, the punitive nature of the law:

> The vagueness of the CDA is a matter of special concern for two reasons. First, the CDA is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech. See, *e. g., Gentile* v. *State Bar of Nev.*, 501 U. S. 1030, 1048-1051 (1991). **Second, the CDA is a criminal statute. In addition to the opprobrium and stigma of a criminal conviction, the CDA threatens violators with penalties including up to two years in prison for each act of violation. The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.** See, *e.g., Dombrowski* v. *Pfister,* 380 U. S. 479, 494 (1965). As a practical matter, this increased deterrent effect, coupled with the "risk of discriminatory enforcement" of vague regulations, poses greater First Amendment concerns than those implicated by the civil regulation reviewed in *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC,* 518 U. S. 727 (1996).[35] (Emphasis supplied)

Furthermore, to ban altogether and unqualifiedly a facial attack against a penal statute that professedly aims to regulate obscenity is quite dangerous. Obscenity is, indeed, outside the mantle of protection of protected speech and expression. **But it is also true that its definition has consistently been regarded as a term that eludes precise definition, so much so that the SCOTUS' logic of what makes frank depictions and descriptions of sex dangerous has fluctuated wildly from case to case.**[36]

Over time, the consensus that has developed is to confine the definition of obscenity to the unduly dangerous and morally corrupting

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33 Tribe, L. and Matz, J., UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION, Henry Holt and Company, LLC (2014), p. 121, citing Schauer, F., FEAR, RISK AND THE FIRST AMENDMENT: UNRAVELING THE CHILLING EFFECT, College of William & Mary Law School William & Mary Law School Scholarship Repository (1978), p. 121.

34 521 U.S. 844 (1997).

35 Id. at 871-872.

36 Tribe, L. and Matz, J., supra note 33.

expression.[37] To clearly set out this delimitation, the SCOTUS, in the leading case of *Miller v. California*[38] (*Miller*), established basic guidelines which remain relevant to this day. These are: (a) whether to the average person, applying contemporary standards would find the work, taken as a whole, appealing 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.[39] Significantly, in our jurisdiction, this Court has recognized that the latest word on the definition of obscenity is that of *Miller*,[40] and has applied its "contextual lessons" in deciding what constitutes obscenity.[41]

Simply put, the *Miller* guidelines were set out to define and circumscribe what obscene is from what is not. In this case, the provisions of Ordinance No. 7780 have overstepped the *Miller* guidelines and the chilling effect presented by this overbreadth is unmistakable. The relevant portion of Ordinance No. 7780 reads in part:

> Sec. 2. Definition of Terms: As used in this ordinance, the terms:
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> A. Obscene 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:
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> 1. Printing, showing, depicting or describing sexual acts;
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> 2. Printing, showing, depicting or describing children in sexual acts;
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> 3. Printing, showing, depicting or describing completely nude human bodies; and
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> 4. Printing, showing, depicting or describing the human sexual organs or the female breasts.
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> B. Pornographic or pornography 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 the motive of the author thereof, such as, but not limited to the following:
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> 1. Performing live sexual acts in whatever form;

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37 Id.
38 413 U.S. 15 (1973).
39 Id. at 24.
40 *Fernando v. Court of Appeals*, G.R. No. 159751, December 6, 2006, 510 SCRA 351, 360.
41 See *Soriano v. Laguardia*, G.R. Nos. 164785 & 165636, April 29, 2009, 587 SCRA 79, 100-101.

> 2. Those other than live performances showing, depicting or describing sexual acts;
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> 3. Those showing, depicting or describing children in sex acts;
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> 4. Those showing, depicting or describing completely nude human body, or showing, depicting or describing the human sexual organs or the female breasts.
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> 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.
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> Sec. 3. Prohibited Acts[:] 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.
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> Sec. 4. Penalty Clause: Any person violating this ordinance shall be punished as follows:
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> x x x x
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> 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.

As summarized by Senior Associate Justice Perlas-Bernabe, the Ordinance criminally punishes the mere "showing, depicting, or describing" of "*sexual acts*," "*completely nude human bodies*," and "*human sexual organs or the female breasts*" for being obscene or pornographic. These materials or acts are not so narrowly tailored as to what the *Miller* guidelines define as unprotected speech and expression. Specifically, the definitions of obscenity and pornography under the Ordinance lack the elements of *appealing to prurient interest when taken as a whole* and of *being a patently offensive depiction or description of sexual conduct.* Senior Associate Justice Perlas-Bernabe aptly observes that while the definition of obscenity includes the phrase *calculated to excite impure imagination or arouse prurient interest (*or *calculated to excite or stimulate sexual drive or impure imagination* in pornography), it is only one of the factors to be considered in determining what is obscene under the Ordinance. Equally important, the dominant theme of the work is completely disregarded. This absence is

crucial because material appealing to the prurient interest or having a tendency to excite lustful thoughts is confined to that which appeals to shameful or morbid interests in sex and excludes as obscene material that provokes only normal, healthy sexual desires.[42]

In the same vein, the materials and acts sought to be punished do not fall within *being patently offensive depictions or descriptions of sexual conduct.* In *Jenkins v. Georgia*[43] (*Jenkins*), the SCOTUS recounted on the pains it took in *Miller* to "'give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced,' that is, the requirement of patent offensiveness."[44] These examples, *Jenkins* further held, included "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," and "representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[45] *Jenkins* explained that while this did not purport to be an exhaustive catalog of what juries might find patently offensive, it was certainly intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination.[46] In reversing the conviction of the appellant for showing an allegedly obscene film in a movie theater,[47] *Jenkins*' disquisition on why the standard of *being patently offensive depictions or descriptions of sexual conduct* is important in determining obscenity is illuminating:

> Our own viewing of the film satisfies us that "Carnal Knowledge" could not be found under the *Miller* standards to depict sexual conduct in a patently offensive way. Nothing in the movie falls within either of the two examples given in *Miller* of material which may constitutionally be found to meet the "patently offensive" element of those standards, nor is there anything sufficiently similar to such material to justify similar treatment. While the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including "ultimate sexual acts" is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes. **There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standards.**
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> Appellant's showing of the film "Carnal Knowledge" is simply not the "public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain" which we said was punishable in *Miller*. *Id.*, at 35. We hold that the film could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way, and that it is

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42 *Brockett v. Spokane Arcades Inc.*, 472 U.S. 491 (1985).

43 418 U.S. 153 (1974).

44 Id. at 160.

45 Id.

46 Id. at 160-161.

47 The statute was enacted in the State of Georgia and defined "[m]aterial is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters." Id. at 154-155.

> therefore not outside the protection of the First and Fourteenth Amendments because it is obscene. No other basis appearing in the record upon which the judgment of conviction can be sustained, we reverse the judgment of the Supreme Court of Georgia.[48] (Emphasis supplied)

Finally, it may be argued that the constitutionality of Ordinance No. 7780 may be saved by its *proviso* which exempts from the definition of obscenity 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*. This *proviso*, however, is utterly incomplete in what *Miller* requires, that is, *whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.* Consequently, as again correctly observed by Senior Associate Justice Perlas-Bernabe, those with serious literary, artistic, and political value are still considered obscene under the Ordinance. I hasten to add that the problem with overbreadth cannot be saved by simply reading or interpreting the *proviso* to nonetheless include these textually excluded values, considering that the definitions of obscenity and pornography under the Ordinance contain the express clause *regardless of the motive of the printer, publisher, seller, distributor, performer or author of the act or material.*

Notably, the third standard in *Miller* is an evolution of the "value" element in U.S. obscenity cases. The exclusion of obscenity from the protection of the First Amendment began on a mere assumption that it was *utterly without redeeming social importance* in *Roth v. United States*.[49] Later, the element was expressly incorporated as a component into the obscenity test for the first time in *Memoirs v. Massachusetts*[50] (*Memoirs*). It bears to stress that *Memoirs* held that the work remains constitutionally protected even if it appeals to prurient interests or is patently offensive, so long as it has social value. The social value of the work can neither be weighed against nor canceled by its prurient appeal or patent offensiveness. Subsequently, in *Miller,* the "value" element was drastically recast. The test of *utterly without redeeming social value* articulated in *Memoirs* was rejected as a constitutional standard and in its stead, the test now is "*whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.*"[51] As with the first guideline, the dominant theme of the work is similarly taken into consideration, with the end in view of limiting obscenity to materials that depict or describe patently offensive "hard core" sexual conduct and, at the same time, remaining sensitive to any

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48 Id. at 161.

49 354 U.S. 476 (1957). See Montgomery, D., OBSCENITY: 30 YEARS OF CONFUSION AND STILL COUNTING—*POPE V. ILLINOIS*, Creighton Law Review (1987), accessed at <http://dspace.creighton.edu:8080/xmlui/bitstream/handle/10504/39714/20_21CreightonLRev379%281987-1988%29.pdf?sequence=1&isAllowed=y;>. See also Staal, L., FIRST AMENDMENT—THE OBJECTIVE STANDARD FOR SOCIAL VALUE IN OBSCENITY CASES, Journal of Criminal Law and Criminology Volume 78 (1988), accessed at <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6569&context=jclc>.

50 383 U.S. 413 (1966).

51 *Miller v. California*, supra note 38, at 24, 39.

infringement of genuinely serious literary, artistic, political, or scientific expression.[52]

All told, the continued presence of Ordinance No. 7780, which is, on its face, overbroad, justifies the Court's judicial review. The mere fact that a statutory regulation of speech was enacted for the important purpose of curbing obscenity does not foreclose inquiry into its validity.[53] That inquiry embodies an "overarching commitment" to make sure that Congress has designed its statute to accomplish its purpose "without imposing an unnecessarily great restriction on speech."[54] Certainly, while obscenity is outside the realm of protected speech and may therefore be a proper subject of regulation by the local government of Manila, the regulation may not be done by means which sweep unnecessarily broadly and invade the area of the cherished and protected freedom of speech and expression.[55]

To reiterate, what is obscene has been carefully defined under the prevailing guidelines set forth in *Miller,* which this Court has likewise recognized and adhered to. What is outside or excluded from this definition merits the protection of the Constitution, even if such material is of a sexually provocative nature. To be sure, sex and obscenity are not synonymous,[56] and it is likewise well-settled that all ideas having even the slightest redeeming social importance generally have the full protection of the Constitution.[57] Hence, regulations that aim to restrict or stifle materials and acts falling outside of the limiting definition established in *Miller* must be guarded against, lest the guaranteed freedom of speech and expression is deprived of the breathing space it needs to survive.[58]

In view of the foregoing, I vote to **GRANT** the motion for reconsideration of petitioners and to declare Ordinance No. 7780 **VOID** and **UNCONSTITUTIONAL**.

ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

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52 Id. at 23, 27.

53 *Reno v. American Civil Liberties Union*, supra note 34, at 875, citing *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989).

54 Id. at 876, citing *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996).

55 See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

56 *Roth v. United States*, supra note 49, at 487.

57 See id. at 484.

58 See *NAACP v. Button*, 371 U.S. 415 (1963).