G.R. No. 184389 - ***ALLAN MADRILEJOS, ALLAN HERNANDEZ, GLENDA GIL, AND LISA GOKONGWEI-CHENG, Petitioners, v. 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

LAZARO-JAVIER, *J.*:

ANTECEDENTS

Petitioners are Allan Madrilejos, Allan Hernandez, and Glenda Gil, Editor-in-Chief, Managing Editor, and Circulation Manager, respectively, of *For Him Magazine Philippines* (FHM), with Lance Y. Gokongwei and Lisa Gokongwei-Cheng, Chairman and President, respectively, of Summit Publishing, FHM Philippines' publisher. They were among the respondents in a criminal complaint filed by pastors and preachers from various churches with the Office of the City Prosecutor, City of Manila. The complaint was docketed I.S. No. 08G-12234. It alleged, among others, that from 2007 to 2008 respondents printed, published, distributed, circulated and/or sold in the city "scandalous, obscene and pornographic" identified magazines and tabloids in violation of Articles 200 and 201 of The Revised Penal Code (RPC) and **Ordinance No. 7780** of the City of Manila.

Articles 200 and 201 of the RPC provide:

> Article 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.
>
> Article 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.

On the other hand, the pertinent portions of Ordinance No. 7780 read:

x x x x

Sec. 2. Definition of Terms: As used in this ordinance, the terms:

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 **depr[a]ve** 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. 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 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**.

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.

Sec. 4. **Penalty Clause**: 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 videos 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**. (Emphases supplied.)

Meantime, the Office of the City Prosecutor formed a panel of prosecutors to conduct the preliminary investigation. While it was ongoing,

petitioners filed the present petition which, in the words of the *ponencia* of Honorable Associate Justice Francis H. Jardeleza (now retired) is premised "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."

In so many words, petitioners themselves described the present petition as both an **as-applied** and a **facial** challenge to the validity of Ordinance No. 7780.[1] Petitioners prayed for a writ of prohibition restraining the conduct of the preliminary investigation **and** a declaration nullifying the Ordinance and enjoining its implementation.

As aptly summarized in the *ponencia*, petitioners **particularized** their **as-applied** and **facial** challenge to the constitutionality of Ordinance No. 7780 by –

> x x x alleging that [Ordinance No. 7780] 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. **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."[2] x x x Petitioners' arguments are facial attacks against Ordinance No. 7780 on the ground of overbreadth.
>
> x x x x

The Office of the City Prosecutor filed its own Comment on the petition **arguing in the strongest terms possible in favor of the constitutionality of the assailed Ordinance.**

Meanwhile, the Office of the City Prosecutor issued Resolution dated June 25, 2013 dismissing the charges for violation of Article 200 and Ordinance No. 7780 but ordering the filing of an Information for violation of Article 201 (3) of the RPC. The pertinent portion of the Resolution, as quoted in the *ponencia*, reads:

> 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.

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[1] Petition, paragraph 12.

[2] *David v. Arroyo*, 489 SCRA 160, 213-214 (2006).

> 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

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

The *ponencia* further recounted: "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." (Emphasis supplied.)

Back to Criminal Case No. 13-30084, the same was ordered dismissed with prejudice, upon petitioners' motion on account of the People's failure to prosecute.

THE COURT'S RULING

The *ponencia* dismissed the present petition on the following grounds:

(1) The dismissal of the criminal charges against petitioners for violation of the provisions of Ordinance No. 7780 has rendered this case moot and academic.

One. The *ponencia* **characterized** the present petition as one "for prohibition with prayer for the **issuance of a preliminary injunction and/or temporary restraining order**, 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.**" This **characterization** is clarified by the *ponencia*'s understanding of the petition's **sole thrust**, which "...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," and inferentially, of the **unconstitutionality** of Ordinance No. 7780 as a **tool** meant **merely to terminate** the preliminary investigation of the criminal complaint against petitioners. Therefore, as the *ponencia* ruled, with the **dismissal** on preliminary investigation of the complaint for **violation of the Ordinance** (along with Article 200 of the RPC) and during the trial of the criminal case for violation of Article 201 (3) of the RPC, it **should follow** that the **outcome of the present petition** as to the **unconstitutionality** of the Ordinance would have **no practical use or value** to petitioners.

Two. The *ponencia* defined a **"moot and academic case"** as "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.**" A **moot case lacks "actual controversies** involving rights which are legally demandable and enforceable x x x" without which courts have **no jurisdiction** to act.

The *ponencia*, however, did **not** explain (at least in this section) why an actual controversy **had ceased** to exist after the dismissal of the criminal case and why the **declaration** sought by petitioners would have **no** practical use or value to them or those similarly situated.

Instead, the *ponencia* went on to explain why the **exception** to the general rule that this Court **should decline** to act upon **moot** cases – **the case is capable of repetition yet evading review**.

The *ponencia* explained that this exception has **two (2) requisites**: **(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 *ponencia* ruled that neither of these requisites applied to the present petition.

The *ponencia* held that the **preliminary investigation** which the present petition sought to stop did **not** involve a **very short duration**:

> 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. v. ICC***[3] (two-year validity of an Interstate Commerce Commission (ICC) cease and desist order) and ***Roe v. Wade***[4] (266-day human gestation period) **does not exist here.**

It also ruled that there was **no reasonable expectation** that **petitioners** would be **subjected to the same action again** because:

> x x x 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 Office of the City Prosecutor of Manila (OCP) for the same or another violation of Ordinance No. 7780. 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 FMH Philippines alleged to be obscene, after the case below was dismissed as early as July 19, 2016.

The *ponencia* **took an exacting interpretation** of the second requisite. The Court required **reasonable expectation** or a **demonstrated probability** that **the same complaining party** would be **subjected to the same action again.** This second element is **missing** if it were **highly speculative** and **hypothetical**, or **highly doubtful** if he or she can demonstrate a **substantial likelihood**, that **the same complaining party** would be **subjected to the same action again.**

This ruling stressed that this second element may refer to **history** that it was **not far-fetched** that **the same complaining party** would be **subjected to the same action again.** An **affair of annual occurrence** is one where there **exists** a **reasonable expectation** that **the same complaining party** would be **subjected to the same action again.**

(2) Ordinance No. 7780, an anti-obscenity law, cannot be facially attacked on the ground of overbreadth because obscenity is unprotected speech.

One. The *ponencia* held that petitioners' **facial** challenge based on the overbreadth doctrine was **improper** because this ground applied **only** to **free speech cases** – which the present petition was **not.** According to the

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[3] 219 U.S. 498 (1911).
[4] 410 U.S. 113 (1973).

ponencia, as this petition stemmed from an **obscenity *and*** a **criminal prosecution**, such **facial** challenge is **not available**. (Emphasis supplied)

The *ponencia* explained –

First, a **facial** overbreadth challenge is **limited** to cases involving **protected speech**, and **obscenity** is **not** a **protected speech**. The *ponencia* justified this conclusion by holding that "laws that regulate or proscribe classes of speech falling beyond the ambit of constitutional protection cannot, therefore, be subject to facial invalidation **because there is no 'transcendent value to all society' that would justify** such attack." (Emphasis supplied)

And, *second*, a **facial** overbreadth challenge does **not** apply even to vague and overbroad **penal statutes** since the latter have **no possible "chilling effect" upon protected speech**.[5]Thus:

> x x x 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**.
>
> **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." 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**

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[5] *Estrada v. Sandiganbayan*, 369 SCRA 394.

> **taken as applying to other persons** or **other situations** in which **its application might be unconstitutional.**" (Emphases supplied)
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> x x x x

The *ponencia* further affirmed the rule that "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 may be hampered. No prosecution would be possible.**"

Two. The *ponencia* then **characterized** Ordinance No. 7780 as a **criminal** or **penal statute** that **criminalizes** or **penalizes** an **unprotected speech –obscenity**. As thus **characterized**, this Court ruled that the Ordinance **cannot be challenged on its face.**

On **obscenity** being an **unprotected** speech, the *ponencia* expounded:

> It was in 1942 when the US Supreme Court first held in the landmark case of ***Chaplinsky v. New Hampshire***[6] that the lewd and the obscene are not protected speech and therefore falls outside the protection of the First Amendment. x x x 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 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***[7] (implicit in the history of the First Amendment is the rejection of obscenity) to Miller v. California, (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 x x x
>
> 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***,[8] that **the law on freedom of expression frowns on obscenity.**
> x x x

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[6] 315 U.S. 568 (1942).
[7] 354 U.S. 476 (1957).
[8] 137 SCRA 717 (1985).

> x x x 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 the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. (Emphases supplied)
>
> x x x x

Three. The *ponencia* held that **while** petitioners had **no right** to assail a law that regulates unprotected speech, such as Ordinance No. 7780, using a **facial** challenge, they may do so **as-applied**, *viz*:

> 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. 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**. (Emphases supplied)

The *ponencia* outlined the steps in assailing the Ordinance **as-applied**.

An **as-applied** challenge would require petitioners to **go to trial** to allow the trial court to determine whether "the materials complained of as obscene were indeed proscribed under the language of Ordinance No. 7780." This might also entail the **adoption of the *Miller*[9] standards** if petitioners raise them as a defense:

> x x x x
>
> (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.
>
> The next steps in the **as-applied** challenge would be as follows:

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[9] *Miller v. California*, 413 U.S. 15 (1973).

> x x x petitioners could argue based on the *Miller* standards **as applied** 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.
>
> 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.
>
> x x x x

The *ponencia* stressed that **none** of the cases challenging anti-obscenity laws involved a **facial** attack on the ground of overbreadth. It also rejected, on separation of powers rationale, petitioners' plea to superimpose the *Miller* standards on Ordinance No. 7780, thus:

> x x x x
>
> 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.
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.
>
> 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." x x x 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.**
>
> x x x x

> Finally, x x x **as applied to the actual facts of the case** 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.
>
> x x x x

Petitioners moved for reconsideration of the **dismissal** of the petition. The Resolution penned by the learned Honorable Chief Justice Diosdado M. Peralta affirmed the dismissal by reiterating the *ponencia*'s rationale.

Since 2018, FHM has shifted from **paper-based** to **digital publications**.[10] There is **no reason** to believe that this shift has exempted petitioners as publishers and distributers of these magazines in **digital format** from the coverage of Ordinance No. 7780. If at all, this shift may have **far worse adverse implications** upon them due to Section 6 of RA 10175 (2012), *Cybercrime Prevention Act of 2012*, which states:

> SECTION 6. **All crimes defined and penalized by the Revised Penal Code, as amended,** and special laws, if committed by, through and with the use of information and communications technologies **shall be covered by the relevant provisions of this Act: Provided, That the penalty to be imposed shall be one (1) degree higher** than that provided for by the Revised Penal Code, as amended, and special laws, as the case may be.

MY RESPECTFUL DISSENT

I joined the *ponencia* when the case was ***first*** decided. My vote was based on my assessment **then** of the cogency of its *ratio decidendi*.

On petitioners' motion, however, and after a more introspective analysis of the arguments raised in my senior colleagues' respective Opinions and relevant case law both new and old, I **now vote to grant** the petition and **to declare** Ordinance No. 7780 as **unconstitutional**.

A. The Issues

The dispositive issues are:

One. Is the petition a **freedom of expression** (or **free speech**) case?

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[10] End of an era: FHM PH reveals final print cover girl, at https://news.abs-cbn.com/entertainment/05/02/18/end-of-an-era-fhm-ph-reveals-final-print-cover-girl (last accessed December 24, 2020).

Two. Has the petition seeking to declare Ordinance No. 7780 as unconstitutional been rendered **moot** –

> 1. When, after preliminary investigation, the criminal complaint for violation of Ordinance No. 7780 (along with Article 200 of the RPC but upon another ground) was dismissed per Resolution dated June 25, 2013 of the OCP of Manila, since "the subject matter covered by the city ordinance of Manila is already absorbed in Article 201 of the Revised Penal Code."
>
> 2. When, during the trial, Criminal Case No. 13-30084 for violation of Article 201 (3) of the RPC was dismissed with prejudice upon petitioners' motion due to the People's failure to prosecute?

Three. May Ordinance No. 7780 be **challenged on its face** on the ground of **overbreadth** though it is a **penal** statute that seeks **to punish alleged obscene and indecent expressions**?

Four. If Ordinance No. 7780 may be challenged **facially**, does Ordinance No. 7780 **on its face** violate freedom of expression for being **overbroad**; and as a **content-based criminalization**, the **strict scrutiny test**?

Five. **As applied** to petitioners, did Ordinance No. 7780 violate their freedom of expression when it sought to prohibit and penalize their acts of printing, publishing, distributing, circulating and/or selling certain identified issue of their FHM Magazine?

B. My Submissions

One. *The present petition is a* ***freedom of expression*** *(or* ***free speech****) case.*

It is my respectful submission that the **pitfalls** in the original *ponencia* **started** with its **characterization** of the petition as **not being** a **freedom of expression** or **free speech** case, and its **approach** to **lump** Ordinance No. 7780 **together with penal laws** that has **nothing to do** with **expression**.

The *ponencia* **held** that this case is **not** about **free speech** because **obscene** expression is **unprotected speech**. This, however, **begs the question**.

The petition was initiated **precisely to test** whether indeed Ordinance No. 7780 **impacts on expression**, and **if it does**, whether it **only penalizes obscene** expression or includes within its ambit **protected** speech. To **at once concede** that the assailed Ordinance is all **about obscenities** is to **assume** the

truthfulness of the **issues** that **in the first place** are precisely the **subject of the petition.**

The **characterization** of the petition as **not** being a free speech case is **erroneous** because the **subject matter of Ordinance No. 7780** – *materials* or *acts* such as *photography, movies, music records, video and VHS tapes, laser discs, billboards, television, magazines, newspapers, tabloids, comics* and *live shows* – is a form of **speech** or **expression**, and the assailed Ordinance **punishes on its face** the *printing, publishing, distributing, circulating* and/or *selling* of these materials or acts **on account of** their respective **contents** or **messages.**

The **materials** or **acts** subject of Ordinance No. 7780 are forms of **speech** or **expression** since they each **intend to convey** a **particularized message**, and each of the messages they intend to convey is **most likely to be understood as such** by those who heard, read, or viewed it.[11]

Here, the **particularized messages** targeted by the Ordinance are *indecency, eroticism, lewdness, offensiveness to morals, good customs, religious beliefs, principles or doctrines, tendency to corrupt or depr[a]ve the human mind, calculation to excite impure imagination or stimulate sexual drive or impure imagination or arouse prurient interest, unfitness to be seen or heard,* or *violation of the proprieties of language or behavior.* As stated, this Ordinance **punishes on its face** the *printing, publishing, distributing, circulating* and/or *selling* of these materials or acts **on account of** these **contents** or **messages.**

It is accepted that:

> x x x x
>
> The **First Amendment literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word.** While we have **rejected "the view** that an apparently **limitless variety of conduct can be labeled 'speech' whenever** the person engaging in the conduct **intends thereby to express an idea,"** we **have acknowledged** that **conduct** may be **"sufficiently imbued with elements of communication to fall within the scope of the First** and Fourteenth **Amendments."** x x x Hence, we have **recognized the expressive nature** of students' wearing of black armbands to protest American military involvement in Vietnam, of a sit-in by blacks in a "whites only" area to protest segregation; of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam; and of picketing about a wide variety of causes.[12] (Emphasis supplied)

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[11] *Texas v. Johnson*, 491 U.S. 397, 109 S. Ct. 2533, 350, 105 L. Ed. 2d 342, 350, 1989 U.S. LEXIS 3115, *1-4, 57 U.S.L.W. 4770 (U.S. June 21, 1989).

[12] *Id.*

x x x x

Here, the petition **challenges** Ordinance No. 7780 **precisely** because it **seeks to control** by **criminalizing** the **expressions** of petitioners and those similarly situated **because** of the **criminalized meanings** the expressions convey.

Note that laws regulating **speech** or **expression** are classified as either **content-based** or **content-neutral**. For this reason, **challenges** to **such laws** are **treated** and **analyzed** as **free speech** cases.

Content-neutral laws involve regulations that impact upon the **time, place,** and **manner** of the expression or the **secondary effects** of the speech and **only minimally** the **message** or **meaning** conveyed or imparted. Ordinance No. 7780 is **not** a **content-neutral** penal law because it has **nothing to do with** the time, place, and manner of the subject-matter expression or its secondary effects.

On the other hand, **content-based** laws target speech based on its **communicative content.**[13] These laws ask ***what* the *subject materials* or *acts communicate* as *meanings*** and ***what punishments* or *regulations* are to be *imposed* these *materials* or *acts on account of* these *meanings***. Stated differently, the **test** to determine whether a government regulation is **content-based** is as follows:

x x x x

> Government regulation of speech is **content based** if *a law applies to particular speech* **because of** the **topic discussed** or the **idea or message expressed**. This common-sense meaning of the phrase "content based" requires a court to consider **whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys.**[14]

x x x x

As held in ***Survivors Network of Those Abused by Priests, Inc. v. Joyce***,[15] "[a] statute 'would **not be content neutral** if it were **concerned with undesirable effects** that arise from 'the **direct impact of speech on its audience**' or '**[l]isteners' reactions to speech.**'" To illustrate:

> In Boos, a District of Columbia provision **banned display of any sign within 500 feet of a foreign embassy which tended to bring the foreign government into "public odium" or "disrepute."** 485 U.S. at 315 (internal quotation marks omitted). The Court decided that **the District's law was content based and unconstitutional**, for **its ban on sign displays sought to regulate "speech due to its potential primary impact"** – that

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[13] *Willson v. City of Bel-Nor*, 2020 U.S. Dist. LEXIS 117818.

[14] *Id.*

[15] 779 F.3d 785 (8th Cir. Mo. March 9, 2015).

> is, the **effect "that speech has on its listeners."** Id. at 321, 329. Because the law sought "to protect the dignity of foreign diplomatic personnel **by shielding them from speech that is critical of their governments**," it was **content based**.[16]

To elucidate further, a rule is "**content-based** on its face" if it **defines several terms based on the message** the material or act conveys, and then **subjects each message or category of message** to different restrictions,[17] or in this case, **to different criminal penalties**.

Ordinance No. 7780's ban on allegedly indecent and obscene materials and acts is **obviously designed to protect against** these materials and acts' "**potential primary impact**." The Ordinance thus seeks to criminalize their *printing*, *publishing*, *distributing*, *circulating* and/or *selling*. Some of the messages which petitioners **seek to communicate** may well be considered indecent and obscene by their target audience. The very topics which petitioners wish to address, including eroticism, sexuality, sex stories, sexual abuse, women and LGBTQ rights, sectarian and religious beliefs and quirks, fashion, anything and everything that a reader **may not find** in broadsheets and *regular* publications, can **elicit strong emotional responses** whether from the religious (such as the **complainants against petitioners**), church members, victims of abuse and their supporters, those erotically inclined, or any other member of the public. Others **may take exception** to the materials or acts demonstrations, others **may accept** and **embrace** the **messages** – the fact remains that the **control** sought by the Ordinance emanates from the materials and acts' respective **communicative** *actual* and *perceived* intent.

Once a law is **determined** to be either **content-based** or **content-neutral**, it **necessarily follows** that the **analysis** in the **challenge to that law** would have to take account of the **standards** inherent in **free speech** cases.

Ordinance No. 7780 is thus a **content-based** criminal prohibition. It operates upon the **materials** or **acts** therein mentioned **precisely because** of the **topic they discuss** or **the idea or message they express**. This Ordinance **draws distinctions** on what is **criminal** and what is not **criminal** based on the **message** a speaker conveys. As stated, the **criminal messages** are *indecency*, *eroticism*, *lewdness*, *offensiveness to morals, good customs, religious beliefs, principles or doctrines, tendency to corrupt or depr[a]ve the human mind, calculation to excite impure imagination or stimulate sexual drive or impure imagination or arouse prurient interest, unfitness to be seen or heard*, or *violation of the proprieties of language or behavior*. The Ordinance **punishes on its face** the *printing*, *publishing*, *distributing*, *circulating* and/or *selling* of materials or acts that convey these **contents** or **messages**.

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[16] *Id.*

[17] Supra note 13.

The petition seeks to declare Ordinance No. 7780 because of its **adverse impact** on petitioners' free expression as a **content-based** criminal law. The **analysis** of the arguments raised in the petition **necessarily calls for** the application of **free speech** standards. To **reject** this petition as a free speech case is to **undermine** progressive **generations of human rights jurisprudence** on the **right to free expression**.

Additionally, the **characterization** of the petition as **not** a free speech case is **especially problematic** since "'[i]n evaluating the **free speech rights of adults**,' the Supreme Court has "made it perfectly clear that '**sexual expression** which is **indecent** but not obscene is **protected by the First Amendment**.'"[18] To illustrate, **nude dancing** of a certain type is **expressive** conduct, so that "**any ordinance regulating nude dancing** must be **analyzed** to ensure it does **not unduly impair** the **exercise of First Amendment rights**."[19]

To repeat, the **holding** that **ordinances** aimed at **regulating adult entertainment businesses** may constitute **content-based** or **content-neutral** regulations[20] **seriously** and **necessarily implies** that such ordinances must be **reviewed** as **free speech** cases.

It is **of course true** that **obscene** expressions are **beyond** the succor of the **right to expression**. But, **before** we may even reach the **conclusion** that Ordinance No. 7780 **penalizes only speech outside** of constitutional **protection**, which in this case would be **obscene**, and is therefore, **constitutionally permissible**, we **must first examine** the Ordinance from the perspectives of **free speech**.

In other words, we **must treat** the petition as a **free speech** case. Thus: Is the Ordinance one that **impacts on expression**? And because the Ordinance does, is it a **content-based** or a **content-neutral prohibition**? Here, I have explained that the Ordinance is a **content-based** prohibition. Further: What **injuries** have been **caused** to **petitioners' expression**? Do these **injuries persist**? Or have they been **mooted**? May these **injuries** be still **remedied** through this petition? How do we **test** the **validity** of the **criminal punishment** of expression as specified in the assailed Ordinance? And, what is the **result** of the **application** of the **appropriate test**?

Free speech cases allow both **on-its-face challenge** and **as-applied challenge**. A **facial challenge** alleges **overbreadth** and as a result **covers instances** or **illustrative incidents** that may not be the petitioner or plaintiff's

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[18] *American Booksellers Foundation for Free Expression v. Dean*, 202 F. Supp. 2d 300 *, 2002 U.S. Dist. LEXIS 8901 **,30 Media L. Rep. 2121.

[19] See *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County*, 274 F.3d 377 *, 2001 U.S. App. LEXIS 26007 **; 2001 FED App. 0415P (6th Cir.) ***; *City of Erie v. Pap's A.M.*, 529 U.S. 277 (U.S. March 29, 2000).

[20] *Id.*

own situation or situations. The offending law may be **invalidated** on the ground of **overbreadth** – this is because the **chilling** effect on one's expression is an **injury-in-fact** in free speech cases[21] that may be **remedied** by the **invalidation. Content-based** regulations of expression are **presumptively unconstitutional** and may be **justified only** under **strict scrutiny** if the government proves that they are **narrowly tailored** to serve **compelling state interests.**

This Court's ruling also **erred** in **lumping** Ordinance No. 7780 **together with penal laws** that have **nothing to do** with **expression**, such as the criminal law against **plunder** referred to in the *ponencia*'s citations.

With **utmost respect**, this approach is **erroneous** since **laws that impact on free expression** are **analyzed differently** from **other penal** laws. Thus, in ***American Civil Liberties Union v. The Florida Bar***:[22]

> x x x As this court stated in ***Fire Fighters***:
>
> > **The injury requirement is most loosely applied--particularly in terms of how directly the injury must result from the challenged governmental action--where First Amendment rights are involved**, because of the fear that free speech will be chilled [*1494] even before the law, regulation, or policy is enforced.
>
> 922 F.2d at 760 (citing Solomon v. City of Gainesville, 763 F.2d 1212 (11th Cir.1985) [**25] (allowing pre-enforcement challenge to local ordinance based on the First Amendment); Eaves, 601 F.2d 809). Schack's **fear of disciplinary action was reasonable** and thus, the **harm he suffered was an objective chill** of his First Amendment rights.
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> x x x x
>
> Further:
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> x x x x
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> This is precisely the approach taken by the Third Circuit in Stretton, 944 F.2d 137. There, a judicial candidate brought a ***pre-enforcement*** **challenge** to a section of Pennsylvania's Code of Judicial Conduct that bars judicial candidates from announcing their views on disputed legal or political issues. The **plaintiff alleged a**

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21 See *Speech First, Inc. v. Fenves*, 2020 U.S. App. LEXIS 34087 *; 979 F.3d 319: "This court has repeatedly held, in the pre-enforcement context, that '[c]hilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement.' Ctr. for Individual Freedom v. Carmouche, 449 F.3d 655, 660 (5th Cir. 2010) (same) ("As the district court noted, '[t]he First Amendment challenge has unique standing issues because of the chilling effect, self-censorship, and in fact the very special nature of political speech itself.'"). It is not hard to sustain standing for a pre-enforcement challenge in the highly sensitive area of public regulations governing bedrock political speech."

22 999 F.2d 1486, 1993 U.S. App. LEXIS 22340 **, 7 Fla. L. Weekly Fed. C 749.

> **chill of his protected speech rights** and the disciplinary authorities disclaimed that the proposed speech would violate the canon. **Nevertheless, the court held that a case or controversy existed.** The court wrote:
>
> > The Boards take the position here as they did in the district court that the topics plaintiff proposes to discuss in the course of his campaign do not violate the Code. The Boards, however, do not have the final word [**32] on interpretation of the Code. Moreover, **plaintiff has also challenged the Canon on overbreadth grounds and *may maintain the action on that basis***. See Board of Trustees of the State Univ. of New York v. Fox, 492 U.S. 469, 484, 109 S. Ct. 3028, 3037, 106 L. Ed. 2d 388 (1989)[23] (Emphasis supplied)

***Two**. The present petition seeking to declare Ordinance No. 7780 as unconstitutional has **not** been rendered **moot** when (a) after preliminary investigation, the criminal complaint for violation of Ordinance No. 7780 was dismissed (along with Article 200 of the RPC but upon another ground) through the Resolution dated June 25, 2013 of the Office of the City Prosecutor since "the subject matter covered by the city ordinance of Manila x x x is already absorbed in Article 201 of the Revised Penal Cod x x x" and (b) during trial, Criminal Case No. 13-30084 for violation of Article 201 (3) of The Revised Penal Code was dismissed with prejudice upon petitioners' motion due to the People's failure to prosecute.*

The *ponencia* correctly defined a **"moot and academic case"** as "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**." A **moot case lacks "actual controversies** involving rights which are legally demandable and enforceable x x x" without which courts have **no jurisdiction** to act.

I respectfully beg to differ.

a. The Doctrine of Mootness is inapplicable.

The **doctrine of mootness** is **intimately connected** with the **interrelated requirements** of **standing, injury** and **case and controversy**. This is because **only if an actual controversy ceases to exist** at any stage of litigation **would the case** become **moot** and should be dismissed.[24] Hence, if **standing, injury** and **case and controversy** have been established to exist and ***continues to exist***, it **necessarily follows** that the case is **not moot**.

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[23] *Id.*

[24] *Nathan M. v. Harrison Sch. Dist.* No. 2, 942 F.3d 1034 *, 2019 U.S. App. LEXIS 34082 **, 2019 WL 5997387.

The **case or controversy requirement** must be met throughout the entirety of the proceedings.[25] Whether an **actual and live controversy** exists over the constitutionality of a law, when a party brings a **pre-enforcement** challenge ***or*** a challenge **after-the-fact**, that is, when the government has **voluntarily ceased** the challenged conduct, the court **must** ask **whether "the conflicting parties present a real, substantial *controversy* which is definite and concrete rather than hypothetical and abstract."**[26]

In order **to prove** that a **real and substantial *controversy* exists**, a plaintiff **must** show **"a realistic danger of sustaining direct *injury* as a result of the statute's operation or enforcement."**[27]

On the other hand, to have ***standing***, a plaintiff must (1) have **suffered an *injury in fact***, (2) that is **fairly traceable to the challenged action** of the defendant, and (3) that will **likely be redressed by a favorable decision.**[28]

Standing and **case and controversy** depend upon, among others, the existence and **continued existence** of an **injury in fact**. Where the case points to these **three (3) items**, it **cannot be said** that **mootness** adversely impacts on the case.

Here, the **dismissal** of the complaint for violation of Ordinance No. 7780 on **preliminary investigation** and the **dismissal** on trial of the criminal case for violation of Article 201 (3) of *The RPC* **did not stop** the injury-in-fact to petitioners, **did not end** the enforceability of the Ordinance, and **did not render ineffectual** the declaration of the Ordinance as void for being unconstitutional. It must be stressed that the instant petition is **not just about halting the criminal proceedings** against petitioners **but also involves making sure that the criminal proceedings do not happen again** and that **petitioners are not ever chilled, unsettled, alarmed, petrified,** and **terrified** in making the speech or expression they have been doing. In sum, **these matters clarify** why the case has **not** been rendered moot and is **not** moot, and why petitioners have **retained their standing** and are **still entitled to seek relief** on judicial review.

i. Injury-in-fact and Case and Controversy

In a **pre-enforcement** challenge, when a plaintiff has stated that he or she **"intends to engage** in a specific course of conduct '**arguably affected with a constitutional interest**,' he or she "**does not have to expose** himself [or herself] **to enforcement** to be able to challenge the law. If the **injury is certainly impending**, that is **enough.**"[29]

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25 *American Civil Liberties Union v. The Florida Bar,* Supra note at 22.
26 *Id.*
27 *Id.*
28 Supra note at 21.
29 Supra note at 22.

Thus, a plaintiff has "**suffered an injury in fact** if he or she **(1)** has an "**intention to engage** in a course of **conduct arguably** affected with a **constitutional interest**, (2) his or her **intended future conduct** is '**arguably . . . proscribed** by [the **policy in question**],' and (3) the **threat of future enforcement** of the [challenged policies] is **substantial.**"[30]

In a challenge **after-the-fact**, that is, when the government has **voluntarily ceased** the challenged conduct, **as in here**, a **live case or controversy** remains if there is **some possibility** that "the defendants **will seek to enforce** the challenged regulation." This is the case **if,** as in the **present case,** the **prosecutors continue to assert** that, despite their acquiescence in the **dismissal** of the complaint for violation of Ordinance No. 7780, the **latter** is **constitutional.**[31] This **assertion** of the **prosecutors** is found in the ***Comment*** they *filed* against the present petition.

Therefore, I have **no reason to think that Ordinance No. 7780 would not be enforced again** in the future against petitioners or others similarly situated.[32] This is **because neither** the prosecutors at the Office of the City Prosecutor in the City of Manila **nor** any panel to be constituted by that office is **bound** by the *Resolution* dated June 25, 2013. **More**, the panel of prosecutors that investigated the criminal complaint against petitioners is **not** the final arbiter of whether a violation of the Ordinance **cannot be pursued** simultaneously with a charge for violating Articles 200 and 201 of *The RPC* as was resolved in the preliminary investigation against petitioners.

An **absolute bar** from **any re-filing** of similar criminal complaints **would moot** this case.[33] Unfortunately, however, that **bar** is **not yet in place.** The "**[v]oluntary cessation** of challenged conduct" **moots** a case "**only if** it is '**absolutely clear** that the allegedly **wrongful behavior could not be reasonably expected to recur.**'" Certainly, the **continuing existence** of the unaltered Ordinance No. 7780 and the Office of the City Protector's **continuous assertion** of its constitutionality and enforceability **do not make it "absolutely clear"** that the Office of the City Prosecutor will **not** change its mind as expressed in its *Resolution* dated June 25, 2013.[34]

ii. Injury-in-fact, Case and Controversy and Causation (fairly traceable to defendant's action)

There is a **real and immediate fear** of **indictment** and **prosecution against petitioners**, together with their **collateral negative effects** of **again violating** and **chilling** their **right to free speech** when the Office of the City Prosecutor **again accepts a criminal complaint** for violation of Ordinance No. 7780 against petitioners or those similarly situated, **entertains the**

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30 Supra note at 22.
31 *Id.*
32 *Id.*
33 *Playboy Enterprises, Inc. v. Public Service Com.*, 698 F. Supp. 401 *; 1988 U.S. Dist. LEXIS 12416 **
34 Supra note at 21.

criminal complaint by **forming a panel of prosecutors** to **interrogate** them and **resolve** the criminal complaint, and **files** and **prosecutes** the Information against them for violating the Ordinance, with the trial court **issuing warrants for their arrest**, **requiring bail** for their continuous appearance, **limiting** their **right to travel or movement**, and **entering criminal records** under their respective names.

The same facts – the **continuing existence** of the unaltered Ordinance No. 7780 and the Office of the City Prosecutor's **continuous assertion** of the **constitutionality** and **enforceability** of Ordinance No. 7780 – **represent** a "**very real, and very fearsome, possibility** of [a **criminal complaint** and] **prosecution**," and "**ample demonstration that [petitioners'] concern with [criminal complaint** and **prosecution] has not been 'chimerical.**"[35] To be sure, **past enforcement** of speech-related laws and the **continuing assertions of their validity** and **enforceability** can legitimately assure **injury-in-fact**.[36]

As held in ***American Civil Liberties Union v. The Florida Bar***,[37] a **live case** or **controversy continues to exist** where "plaintiffs '**wanted to pursue a specific course of action** which they knew was at least **arguably forbidden** by the pertinent law'; ***and*** (2) "**all that remained** between the plaintiff and **impending harm** was the **defendant's discretionary** decision – **which could be changed** – to withhold [enforcement]."

American Civil Liberties Union v. The Florida Bar further notes that the United States Supreme Court has held that a **case or controversy remains** after a defendant **voluntarily ceases** an alleged improper behaviour **but is free to resume it at any time**, a situation that often arises when the parties enter into a **voluntary dismissal** of the action to which the **defendant is not bound – as in this**.

This situation could result in **hardship** and **absurdity**. If the defendant **resumes the harmful** activity, and plaintiff **goes back to court**, the defendant **can again cease to engage in the harmful conduct** and **argue** that the case is **moot**. To address this hardship and absurdity, ***American Civil Liberties Union v. The Florida Bar*** cited ***United States v. W.T. Grant Co.***, 345 U.S. 629, 73 S. Ct. 894, 97 L. Ed. 1303 (1953) and held that in this situation, the **only** way the case would be rendered **moot** is if "the **defendant can demonstrate** that there is **no reasonable expectation** that **the wrong will be repeated**."

Here, the ***wrong*** that would **reasonably be repeated** is the **continuous assertion** by the Office of the City Prosecutor that **Ordinance No. 7780** is **constitutional** and **enforceable** as well as the **continued enforcement** of the assailed Ordinance. Because it is **not bound** by the dismissal of the criminal complaint against petitioners in other criminal complaints, a **reasonable**

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[35] Supra note 33.
[36] Supra note 21.
[37] Supra note 22.

expectation exists that **this wrong will be repeated**. This **straightforward assertion** of **constitutionality** and **enforceability** would be **enough to chill speech** and would **cause** and **perpetuate** the aforementioned **correlative negative consequences**. These constitute petitioners' **injury-in-fact** that would then **establish** the **live case or controversy** in the present **free speech case**.

In ***Willson v. City of Bel-Nor***,[38] the plaintiff was charged with a violation of a sign-regulation ordinance, and as a result, sought an injunction against the charge and a declaratory relief against the sign-regulation ordinance. But before this action could be resolved, the City ***nolle prosequi*** the Information. The court **held** that the ***nolle prosequi*** of the Information **did not moot** the case for injunction and declaratory relief. It explained:

> x x x "A **case becomes moot** if it **can be said with assurance that there is no reasonable expectation** that the **violation will recur** or if interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." Kennedy Bldg. Assocs. v. Viacom, Inc., 375 F.3d 731, 745 (8th Cir. 2004). "The **heavy burden of persua[ding] the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness**." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (internal quotation marks omitted)." Here, there is **no change to the Ordinance** and the Court finds **Plaintiff is still in violation of it**.
>
> x x x x

As in ***Willson***, **respondents** did **not** discharge **their burden** of proving that the **challenged conduct cannot reasonably be expected to start up again**. Actually, respondents **could not have discharged** this **burden** because they have **consistently asserted** the **constitutionality** and **enforceability** of Ordinance No. 7780.

In ***City of Erie v. Pap's A.M.***,[39] the United States Supreme Court **rejected** the claim that the case for injunction and declaratory relief as regards an anti-nudity ordinance has been **mooted** by the **closure of the subject establishment** offering public nudity. This is because: (1) the establishment was then "still incorporated under Pennsylvania law, and **it could again decide to operate** a nude dancing establishment in Erie;" and (2) the City that enacted the ordinance would be **suffering an ongoing injury** because it **lost** the court case in the Pennsylvania Supreme Court and as a result would be **barred from enforcing the public nudity provisions of its ordinance**. The **respective interests** of the nudity establishment, the City, and the administration of justice itself **demanded** a **resolution** of the case of injunction and declaratory relief to its **finality**:

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[38] Supra note at 13.

[39] See 529 U.S. 277 (U.S. March 29, 2000).

> x x x If the **challenged ordinance is found constitutional**, then **Erie can enforce it**, and the availability of such relief is sufficient to prevent the case from being moot. And **Pap's still has a concrete stake in the outcome** of this case because, to the extent Pap's **has an interest in resuming operations**, it has an interest in preserving the judgment of the Pennsylvania Supreme Court. **Our interest** in **preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review** further counsels against a finding of mootness here.[40] (Emphasis supplied)
>
> x x x x

The same interests are **impacted** here. The City of Manila **can enforce without challenge** Ordinance No. 7780. Petitioners **can operate** its publications business **without fear of prosecution and public relations backlash**. This Court would have an interest in **precluding** litigants from **insulating** a **favorable decision**, as in the case of the Office of the City Prosecutor's Resolution dated June 25, 2013, from our **review**.

Hence, the **controversy** here is **not moot**.

Notably, in **both types of challenge**, *pre-enforcement* and *after-the-fact*, the **injury** requirement is **most loosely applied** – particularly in terms of how directly the injury must result from the challenged governmental action – where the **right to free expression is involved**, because of the **fear that free speech will be chilled** even **before** the law, regulation, or policy is **enforced**[41] or when the **enforcement** is **voluntarily stopped**.

Here, petitioners' **fear of prosecution was** and **remains reasonable** because of the **continued assertion** by the Office of the City Prosecutor of the **constitutionality** and **enforceability** of Ordinance No. 7780. The **harm they have suffered** and **will continue to suffer was** and **remain** to be an **objective chill** of their **right to free expression** and the aforesaid **negative collateral consequences** of the filing of a criminal complaint and its prosecution. This **harm substantiates** the claim that a **case or controversy** existed and **continues to exist**.[42]

The **nature** of the petition as a **facial challenge** is also **significant**. It is a **factor** in determining **whether it is clearly likely that "the future threat of enforcement of the [challenged policy] is substantial."**[43] Thus:

> At this point, **"[t]he distinction between facial and as-applied challenges bears legal significance."** See Schlissel, 939 F.3d at 766. Whereas "**[t]here must be some evidence** that [a] rule would be applied to the plaintiff in order for that plaintiff to bring

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40 *Id.*
41 Supra note at 22.
42 *Id.*
43 Supra note at 21.

> an **as-applied challenge**," that is **not the case for facial challenges**. Instead, "**when dealing with pre-enforcement challenges to recently enacted** (or, at least, non-moribund) **statutes** that **facially restrict expressive activity** by the class **to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence.**" [44] (Emphasis supplied)

This **presumption of a credible threat of prosecution** applies to this case at bar. There is **no evidence** to the contrary.

iii. Causation and Redressability

Lastly, **mootness** is **defeated** as well by the **existence of causation** and **redressability**.[45] Here, the **enforcement** though **aborted** and the **continued threat of enforcement** of the challenged Ordinance have **caused** petitioners' **chill** of their expression and **negative collateral consequences** from their **adverse involvement** in the **criminal** justice system. These **injuries** could be **redressed** by a **categorical and non-discretionary** ruling **enjoining** the **enforcement** of Ordinance No. 7780.[46]

b. At any rate, the exceptions to the Doctrine of Mootness apply.

i. Capable-of-repetition-yet-evading-review Exception

In any event, assuming **without conceding** that the present case appears **technically mooted**, it **still has** in reality a **live controversy** because **the legal questions it presents for decision** will recur and again evade review.[47] The petition falls within the category of cases that are "**capable of repetition, yet evading review**" **exception** to mootness.

As the *ponencia* correctly said, this **exception** applies when "(1) the **challenged action was in its duration too short to be fully litigated** prior to its cessation or expiration, and (2) there [i]s a **reasonable expectation** that **the same complaining party** would be **subjected to the same action again**."[48] As the party asserting the exception, **petitioners bear the burden** of establishing that it applies.[49]

Petitioners satisfied the **first prong** of the **capable-of-repetition-yet-evading-review** exception.

Ordinarily, there is **no preliminary investigation** of criminal complaints for **violations of ordinances** since the **penalties** for these

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[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Nathan M. v. Harrison Sch. Dist. No. 2*, 942 F.3d 1034 *; 2019 U.S. App. LEXIS 34082 **; 2019 WL 5997387.
[48] *Id.*
[49] *Id.*

violations **do not exceed** imprisonment for **four (4)** years.[50] Under the Rules of Court, the **process** should be **finished** in **no more than ten days from the date of filing** of the criminal complaint.[51] This **timing discrepancy** virtually **guarantees** that the **direct filing will expire before** the constitutional challenge reaches the courts, let alone, the Supreme Court.

Notably, too, the power of **judicial review**, or the power to **declare unconstitutional** a statute, treaty, international or executive agreement, presidential decree, order, instruction, ordinance, or regulation **lies in the courts** and **not** with an administrative officer or agency such as the Office of the City Prosecutor in Manila City or its panels.[52] Hence, it would **not be the proper office** to resolve; and therefore would be **useless to raise**, the issue of constitutionality of Ordinance No. 7780 before the Office of the City Prosecutor.

The **second prong** of the requisites – *"a reasonable expectation that the same complaining party would be subjected to the same action again"* – presents a **more difficult question.** It has been affirmed that the "**reasonable expectation" of repetition** must be **more than** "a **mere physical or theoretical possibility**."

But **what exactly** must be **capable of repetition**? ***Nathan M. v. Harrison Sch. Dist. No. 2***,[53] illustrated the **different ways** this question has been answered:

> x x xThis difficulty stems, in part, **from a lack of precision in our cases describing exactly what must be likely to recur**. In Fischbach, we asked whether the complaining party would be "**subjected to the action again**." Fischbach, 38 F.3d at 1161 (quoting Gannett Co. v. DePasquale, 443 U.S. 368, 377, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979)). Then in Wyoming v. U.S. Dep't of Agric., 414 F.3d 1207, 1212 (10th Cir. 2005), we asked the same question, but about potentially **recurrent** "**conduct.**" We reframed the question again in McKeen v. U.S. Forest Serv., 615 F.3d 1244, 1255-56 (10th Cir. 2010), which spoke in terms of an "**issue**" or

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50 Rules of Criminal Procedure (2000), Rule 110, Section 1 and Rule 112, Section 8.

51 SECTION 8. Cases not requiring a preliminary investigation nor covered by the Rule on Summary Procedure. — (a) If filed with the prosecutor. — If the complaint is filed directly with the prosecutor involving an offense punishable by an imprisonment of less than four (4) years, two (2) months and one (1) day, the procedure outlined in Section 3(a) of this Rule shall be observed. The prosecutor shall act on the complaint based on the affidavits and other supporting documents submitted by the complainant within ten (10) days from its filing.

52 See *Serrano v. Gallant Maritime Services, Inc.*, 601 Phil. 245 (2009): "Nonetheless, the issue is deemed seasonably raised because it is not the NLRC but the CA which has the competence to resolve the constitutional issue. The NLRC is a labor tribunal that merely performs a quasi-judicial function — its function in the present case is limited to determining questions of fact to which the legislative policy of R.A. No. 8042 is to be applied and to resolving such questions in accordance with the standards laid down by the law itself; thus, its foremost function is to administer and enforce R.A. No. 8042, and not to inquire into the validity of its provisions." Also, *Perreño v. Commission on Audit*, 551 Phil. 368 (2007); *Presidential Anti-Dollar Salting Task Force v. Court of Appeals*, G.R. No. 83578, March 16, 1989.

53 Supra note at 47.

> an "**alleged injury**" that could be repeated, and in Parker v. Winter, 645 F. App'x 632, 635 (10th Cir. 2016) (unpublished) (quoting Honig, 484 U.S. at 319 n.6), asking whether a claimant had demonstrated that a recurrence of the "**dispute**" was more [*1042] probable than not and whether the "**controversy**" was capable of repetition. (Emphases supplied)

As **summarized** in ***Nathan M. v. Harrison Sch. Dist. No. 2***,[54] "the '**wrong**' that is, or is not, 'capable of repetition' must be **defined in terms of the precise controversy it spawns**." The alleged '**wrong**' must be put in terms of **the legal questions it presents for decision**."

Pulling these various threads together, **to satisfy the second prong of the capable-of-repetition exception to mootness**, petitioners **bear the burden** of establishing that it is **reasonably likely**[55] that the Office of the City Prosecutor, **to repeat**, will **again violate** and **chill** their **right to free speech** by **accepting a criminal complaint** for violation of Ordinance No. 7780 against petitioners or those similarly situated, **entertaining** the **criminal complaint** by **forming a panel of prosecutors** to **interrogate** them and **resolve** the criminal complaint, and **filing** and **prosecuting** the Information against them for violating the Ordinance, with the trial court **issuing warrants for their arrest, requiring bail** for their continuous appearance, **limiting** their **right to travel or movement**, and **entering criminal records** under their respective names.

Petitioners have clearly **discharged** their burden of proving the **wrongs** that will **likely happen** if the present case would **continue** to be declared **moot**, as was done by this Court in its present ruling. The **second prong** of the **capable-of-repetition-yet-evading-review** exception has also been **satisfied**.

But to justify its ruling that the present case has been rendered **moot**, the *ponencia* held that the **dismissal with prejudice** ***of the criminal case*** against petitioners before the trial court would ensure that **they would not be prosecuted again** for violation of Ordinance No. 7780.

With utmost respect, this ruling is based on an **erroneous appreciation of the facts**, and as result, **inaccurate conclusion of law**.

The **dismissal with prejudice** by the trial court referred **solely** to the charge for **violation of Article 201 (3)** of the RPC, and **not** to the charge for **violation of Ordinance No. 7780**. The **dismissal with prejudice** precludes **only** the re-filing of **the same acts** complained of as constituting the offense **under Article 201 (3)** of the RPC. The **dismissal with prejudice** has **nothing**

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[54] *Id.*
[55] *Id.*

to do with the **violation of the City Ordinance** or with the **other issues** of the *condemned publications* whether prior or subsequent to the latter.

To recall, the **complaint for violation of Ordinance No. 7780** was processed at the **level of the Office of the City Prosecutor** in the City of Manila. It was **dismissed** by said office in its *Resolution* dated June 25, 2013 **not because** the complaint was **unmeritorious; rather**, the **dismissal** was based on its theory that the elements of this offense were **absorbed** by the **complainants' other claims** for violations of the RPC. There is also **no res judicata** or **double jeopardy** in proceedings before the Office of the City Prosecutor.[56]

Hence, **both requisites** for the application of the **capable-of-repetition-yet-evading-review exception** to **mootness** are present. There is **no way** the present petition has been mooted.

ii. Negative collateral consequences

Another **exception to mootness** justifies the foregoing conclusion – **negative collateral consequences.**[57] To recall, the **doctrine of mootness** is **justified** by the **requirement** of an "**actual controversy** arising between **adverse** litigants who have a **legally cognizable interest in the outcome** of the case."[58] This **requirement** is in turn **warranted** by the **lack of constitutional authority** to render mere **advisory opinions.**[59]

A case **becomes moot** when a court "**can no longer grant effective relief.**"[60] And even if a case **was not moot when it was first filed, intervening events** since its filing **can render it moot.**[61]

As explained, the present petition **was not moot** when it was **filed.** It **has not been rendered moot** by changes in circumstances. Assuming **without conceding** that it has become moot, the **negative collateral consequences** apply to support this Court's action **on the merits.**

The **exception** for **negative collateral consequences** means what it says: negative collateral consequences are likely to result from the action being reviewed. This exception is based on the premise that –

> x x x the Court should still consider a case – even if it no longer involves a live controversy – **if the action challenged by the appellant will continue to pose negative consequences for the appellant if it is not addressed.** It is

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56 See *Pavlow v. Mendenilla*, 809 Phil. 24 (2017).
57 *Paige v. State*, 2017 VT 54 *; 205 Vt. 287 **, 171 A.3d 1011 ***, 2017 Vt. LEXIS 73 ****.
58 *Id.*
59 See *Doria v. Univ. of Vt.*, 156 Vt. 114, 117, 589 A.2d 317, 318 (1991).
60 Supra note at 57
61 *In re Moriarty*, 156 Vt. 160, 163, 588 A.2d 1063, 1064 (1991).

> a **natural extension of the concept** that "[t]he central question of all mootness problems is '**whether decision** of a once living dispute **continues to be justified by a sufficient prospect** that the **decision will have an impact on the parties**.'" For example, we have held that the exception applied in a mental health case in which an involuntary hospitalization order – which had expired – nevertheless could have resulted in "**legal disabilities**" and "**social stigmatization**" for the patient past its effective date. "[D]espite [the] appellant's continued hospitalization under an order for continued treatment, the **negative collateral consequences** of being **initially adjudicated mentally ill** and then **involuntarily hospitalized** may **continue to plague** [the] appellant **with both legal disabilities** and **social stigmatization.**"[62] x x x (Emphasis supplied)

For the **negative collateral consequences exception** to apply, "the contemplated **prospective 'impact on the parties'** that justifies the exception must be **specific to the claimant.**[63] It may **not** be a **generalized grievance shared widely among the public.**

Petitioners' case **meets** the **negative collateral consequences exception** because of these **negative collateral consequences**: (i) their **right to free speech** continues to be **chilled** by the **real and reasonable fear** of complaint and prosecution, which arises from respondents' **continuous assertion** of the **constitutionality** and **enforceability** of Ordinance No. 7780; (ii) the **legal disabilities** and **other collateral consequences** resulting from the filing of the criminal complaint, its prosecution and the actions of the trial court; and (iii) the **social stigmatization** of being referred to as **purveyors of smut** and **kindred terms.**

These **negative collateral consequences** are **specific to petitioners.** They have actually **suffered these consequences.** They may be shared with others **similarly situated,** but **these others** are certainly **not** the shared-widely-among- the-public-as-a-whole **disqualified** by the exception. The **similarly situated** is a **very small** and **compact community** of publishers engaged in the same erotic and benign expressions as petitioners.

In sum, the present petition is **not moot.** But even assuming it has become moot, two (2) **exceptions** to mootness apply, as heretofore discussed.

Three. *Ordinance No. 7780 may be challenged on its face on the ground of overbreadth even though it is a penal statute that seeks to punish alleged obscene and indecent expressions.*

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62 Supra note at 57.

63 *Id.*

I also respectfully submit that the *ponencia* was **mistaken** when it disallowed petitioners' **facial challenge** of Ordinance No. 7780 to insist only on an **as-applied challenge**.

It has **long** been **settled** that a law **impacting** on speech or expression is **reviewable** not only on the basis of a **plaintiff's own injuries** but also upon its **overbreadth**.[64] ***Willson v. City of Bel-Nor***[65] explained:

> "**[A] law may be invalidated as overbroad** if '*a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.*'" United States v. Stevens, 559 U.S. 460, 473, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010) (quoting Wash. State Grange v. Wash. State Repub. Party, 522 U.S. 442, 449 n.6 (2008)); Langford v. City of St. Louis, 2020 WL 1227347, at *6 (E.D. Mo. Mar. 5, 2020). "**The First Amendment doctrine of overbreadth is an exception to [the] normal rule regarding the standards for facial challenges.**" Virginia v. Hicks, 539 U.S. 113, 118, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003). "**[T]he overbreadth doctrine permits the facial invalidation of laws** that **inhibit the exercise of First Amendment rights** if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" City of Chicago v. Morales, 527 U.S. 41, 52, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)). "**The aim of facial overbreadth analysis is to eliminate the deterrent or 'chilling' effect an overbroad law may have on those contemplating conduct protected by the First Amendment.**" Turchick v. United States, 561 F.2d 719, 721 (8th Cir. 1977).

To stress, the **overbreadth** doctrine exists "to **prevent the chilling of future** protected expression."[66] Therefore, any law imposing **restrictions so broad that it chills speech outside the purview of its legitimate** regulatory purpose will be **struck down**.[67] For the same reason, petitioners would "have standing to challenge the Ordinance's overbreadth **even though they do not dispute that the Ordinance applies to each of them.**" The **overbreadth** doctrine **constitutes an exception to traditional rules of standing** and **allows claimants to assert the rights of parties not before the court.**"[68]

To conclude, the assailed Ordinance, as it criminalizes certain forms of speech, may be **challenged on its face** on the ground of **overbreadth** as a **free speech or expression issue**. More, since the Ordinance is a **content-based criminalization**, it is **presumptively unconstitutional** and **may only be validated** if it passes the **strict scrutiny test**.

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64 Supra note at 22.
65 Supra note at 13.
66 *Staley v. Jones*, 239 F.3d 769, 779 (6th Cir. 2001).
67 Supra note at 18.
68 *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994).

Four. *As Ordinance No. 7780 may be challenged* ***facially, on its face, it violates freedom*** *of expression for being* ***overbroad,*** *and as a* ***content-based criminalization, the strict scrutiny test.***

a. Overbreadth

First, I discuss the objection on the **overbreadth** of Ordinance No. 7780.

A three-part test is used to determine whether a statute is unconstitutionally overbroad.[69] Thus:

> "The **first step** in **overbreadth analysis** is to **construe the challenged statute**; it is impossible to determine whether a statute reaches too far without first **knowing what the statute covers**." Snider v. City of Cape Girardeau, 752 F.3d 1149, 1158 (8th Cir. 2014) (quoting United States v. Williams, 553 U.S. 285, 293, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008)). "**After construing** the statute, the **second step** is to **examine whether the statute criminalizes a 'substantial amount' of expressive conduct**." Id., citing Williams, 553 U.S. at 292). **Third**, courts must "**ask whether** [*20] **the statute is readily susceptible to a limiting construction which would render it constitutional**." (Id., citing Virginia v. American Booksellers Ass'n, 484 U.S. 383, 397, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988)). (Emphasis supplied)

The Ordinance's **expansive** definition of what is **obscene** – the **particularized messages** targeted by the Ordinance are *indecency*, *eroticism*, *lewdness*, *offensiveness to morals, good customs*, *religious beliefs*, *principles or doctrines*, *tendency to corrupt or depr[a]ve the human mind*, *calculation to excite impure imagination or stimulate sexual drive or impure imagination or arouse prurient interest*, *unfitness to be seen or heard*, or *violation of the proprieties of language or behavior* – and its **criminalization** of the *printing*, *publishing*, *distributing*, *circulating* and/or *selling* of these materials or acts **on account of** these **contents** or **messages**, applies to a **substantial amount of expressive conduct**. The Ordinance is **not vague**. It is **clear as to its meanings and implications**. But it is **overbroad**.

I can **illustrate** numerous examples of expressive conduct that the Ordinance prohibits **beyond what it should only be criminalizing**:

- Rigoberto Tiglao's op-ed entitled "Did Jesus Exist?"[70] This appears to be *offensive to religious beliefs*. Mr. Tiglao in fact prefaces his op-ed with this opening paragraph: "AT this time, when our culture,

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[69] Supra note at 13.

[70] https://www.manilatimes.net/2020/04/15/opinion/columnists/topanalysis/did-jesus-exist/711922/ (last accessed December 30, 2020).

dominated for nearly four centuries by the Hispanic model of late-medieval Catholicism, imposes on us several days of contemplating the Christian Messiah, I dare post again a piece I wrote two years ago, discussing whether Christ did exist in the first place. Someday, sometime in your lives, you will have to choose: the Red or the Blue pill."

- Mr. Tiglao's op-ed "The Real Origins of Christmas."[71] This appears to be *offensive* not just to religious beliefs but also *to good customs, principles or doctrines*, one having a *tendency to corrupt or depr[a]ve the human mind*, characterized by *unfitness to be seen or heard*, or *violation of the proprieties of language or behavior*.
- Nadine Lustre's sexy photos published in ABS-CBN's *Lifestyle* webpage.[72] The photos appear to be *erotic*.
- Same-sex stories as narrated and depicted in the internet.[73] They appear to be a **smorgasbord** of everything the Ordinance **criminalizes** – *indecency, eroticism, lewdness, offensiveness to morals, good customs, religious beliefs, principles or doctrines, tendency to corrupt or depr[a]ve the human mind, calculation to excite impure imagination or stimulate sexual drive or impure imagination or arouse prurient interest, unfitness to be seen or heard*, or *violation of the proprieties of language or behavior*.
- As illustrated in ***Survivors Network of Those Abused by Priests, Inc. v. Joyce***:[74]

> As amici point out, **critical portrayals of Muhammad outside a mosque** or **of the Pope outside a Catholic Church** might well be considered **profane or indecent by their audiences**. Others may find **language using the name of holy figures as swear words not only disrespectful, but profane** as well. Similar expressions in the near vicinity of a house of worship have the potential to disturb or disquiet those present for worship. The meaning of "profane," or irreverence to the sacred, is **not a well defined legislative term familiar to people of different faiths. Any silent demonstration outside a house of worship would likely be able to create a disturbance** only by the content of its message. **Even expression that may be perceived as offensive, rude, or disruptive remains protected by the First Amendment.**
>
> **Some of the messages which appellants seek to communicate may well be considered rude and offensive by their target audience.** The very topics which the record indicates appellants wish to address, including **sexual abuse and the concealment of such crimes, can elicit strong emotional responses whether from clergy accused of wrongdoing**, victims

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71 https://www.manilatimes.net/2020/12/25/opinion/columnists/topanalysis/the-real-origins-of-christmas/817156/ (last accessed December 30, 2020).

72 Ang init! Nadine Lustre sizzles in these hot photos, at https://lifestyle.abs-cbn.com/starstudio/stories/2020/02/read/ang-init-nadine-lustre-sizzles-in-these-hot-photos (last accessed on December 30, 2020).

73 https://www.wattpad.com/stories/same-sex (last accessed on December 30, 2020).

74 779 F.3d 785 (8th Cir. Mo. March 9, 2015).

> of abuse and their supporters, or church members. Others may take exception to the demonstrations by Call to Action advocating for the **ordination of women and church acceptance of gay, lesbian, and transgender people.** (Emphasis supplied)

- Any movie or video featuring a single shot of a person's nude or partially-covered buttocks or a woman's partially covered breast is an **obscene material or act** under the Ordinance, irrespective of whether the content constitutes "adult entertainment" or causes the type of secondary effects, such as crime (sexual and nonsexual) and public health risks, that any government may seek to regulate.[75]
- A painting of a nude person or several nude persons.
- Compelling narration in a court decision of sexual acts.

Any **enlightened** court would find these examples to illustrate that Ordinance No. 7780 creates a "prohibition of alarming breadth."[76] Making things even more problematical is the fact the the *ponencia* **did not identify** the ***compelling state interests*** that the Ordinance would want to pursue and accomplish. Thus, the Ordinance is **overbroad** and **facially invalid** because the **impermissible applications** of the law are **substantial** when judged **in relation to its plainly legitimate sweep** if at all.

Further, the Ordinance is **not readily susceptible to a limiting construction** because it would have to be rewritten in order to conform to constitutional requirements.[77] Indeed:

> The courts do not rewrite laws in these circumstances, as this would invade the "legislative domain." (citing Stevens, 559 U.S. at 481); Snider, 752 F.3d at 1158 ("No limiting construction would be consistent with any plausible understanding of the legislature's intent"). "Limiting constructions of state and local legislation are more appropriately done by a state court or an enforcement agency." Willson, 924 F.3d at 1004 (quoting Ways v. City of Lincoln, 274 F.3d 514, 519 (8th Cir. 2001)).[78]

The **free expression rights of adults** are **not the same as** or **identical to** the **free speech rights *vis-à-vis* minors**. "In evaluating the free speech rights of adults," the United States Supreme Court has "made it perfectly clear that '**sexual expression which is indecent but not obscene is protected** by the First Amendment."[79] Also, "[s]peech **within the rights of adults to hear** may **not be silenced completely** in an attempt **to shield children from it.**"[80]

Here, there is **nothing** in Ordinance No. 7780 which limits its scope to any **established criminal practice,** much less to, for example, the

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[75] Supra note at 19.
[76] Supra note at 13.
[77] *Id.;* Supra note at 18.
[78] *Id.*
[79] *Id.*
[80] *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002).

transmission of harmful material to a minor with the intent of facilitating the sexual exploitation of the minor. The Ordinance is **actually very broad** in scope when it comes to **online speech**, notably, the assailed FHM magazines that have been transformed into **digital** editions. The Ordinance is **especially offensive** to **free expression** in the **digital platform** because it **forces every speaker on the internet** in every state or community anywhere in the Philippines or even the world **to abide by the alleged prevailing community standards of the City of Manila**, even if the **online speech** would **not be found harmful in any other** location. Truly:

> To paraphrase the Supreme Court, it is **neither realistic nor constitutionally sound** to read the First Amendment as **forcing the people** of New York City or San Francisco **to restrict their speech to abide by what is deemed acceptable speech** in Vermont. See Miller v. California, 413 U.S. 15, 32, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973). "**People in different Statcs vary in their tastes and attitudes and this diversity** is not to be strangled by the absolutism of imposed uniformity. x x x"[81](Emphases supplied)

Ordinance No. 7780 **also lacks "*practical* safe harbors or exceptions"**[82] for most publishers. With the exception of "*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*," the Ordinance **applies to all entities and individuals** that communicate the **prohibited messages** on **whatever platform**. Thus, the Ordinance "effectively drives protected and valuable speech for adults out of the 'marketplace of ideas.'"[83]

b. Content-Based and Strict scrutiny

The constitutionality of a restriction on speech depends in large part on whether it is **content-based** and thus subject to the **most exacting** or **strict scrutiny**, or a **content-neutral time, place, manner** or **secondary effects** regulation subject to intermediate scrutiny.[84]

To recall, **content-based** laws are those that target speech based on its communicative content. As already explained above, **Ordinance No. 7780** is a **content-based criminalization** of **overly broad** forms of speech. It defines **obscenity** based on the message the subject material or act conveys and then subjects each category to varying criminal penalties. It is also **content-based** because **enforcement authorities must determine**[85] whether a material or act evokes *indecency, eroticism, lewdness, offensiveness to morals, good*

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81 Supra note at 22.
82 *Id.*
83 *Id.*
84 See supra note 13; *Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678 (8th Cir. 2012); *Survivors Network of Those Abused by Priests, Inc. v. Joyce*, supra note 74.
85 Supra note at 13

customs, religious beliefs, principles or doctrines, tendency to corrupt or depr[a]ve the human mind, calculation to excite impure imagination or stimulate sexual drive or impure imagination or arouse prurient interest, unfitness to be seen or heard, or *violation of the proprieties of language or behavior.*

Because the Ordinance is a **content-based** prohibition, it **must satisfy strict scrutiny** regardless of the City of Manila's "benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the [prohibited] speech."[86] They are **presumptively unconstitutional**. They may be **justified only if** the **government proves** that they are **narrowly tailored** to serve **compelling state interests**. If the restriction is **not narrowly tailored** to achieve a **compelling interest**, it is an **unconstitutional restraint** on free speech.[87]

There is **nothing on record** about the government interests sought to be advanced by Ordinance No. 7780. If it was meant **to curb prurient interests** or **patently offensive sexual conduct**, the **broad sweep** of **the** messages it criminalizes – *indecency, eroticism, lewdness, offensiveness to morals, good customs, religious beliefs, principles or doctrines, tendency to corrupt or depr[a]ve the human mind, calculation to excite impure imagination or stimulate sexual drive or impure imagination or arouse prurient interest, unfitness to be seen or heard*, or *violation of the proprieties of language or behavior* – are **not narrowly tailored** to meet its objectives.

These **messages** may capture even **contrarian ideas** simply because they offend others and may be interpreted by them as *indecent, erotic, lewd, offensive to morals, good customs, religious beliefs, principles or doctrines*, etc. The Ordinance therefore runs a **substantial risk** of **suppressing ideas** in the process, as it **impermissibly** requires enforcement authorities to **look into the content of the speaker's message** in order to enforce it. This is **not permissible**. The right to free expression **guarantees** that the government **ought not to prohibit** and **inhibit** the expression of an idea merely because **society finds the idea itself offensive** or **disagreeable**.[88]

It must also be stressed that:

> The **tailoring requirement** does not simply **guard against** an impermissible **desire to censor**. The government may **attempt to suppress speech** not only because **it disagrees with** the message being expressed, but also for **mere convenience**. [B]y demanding a close fit between ends and means, the tailoring requirement **prevents the government from too readily sacrificing speech for efficiency**.[89]

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[86] *Id.*

[87] *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992).

[88] Supra note at 74.

[89] *McCullen v. Coakley*, 573 U.S. 464, 486, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).

Here, the **approach** of Ordinance No. 7780 **to lump together everything contrarian** under the criminal term **obscene** manifests its **overwhelming** intention **not only** to **censor ideas disagreed** with, **but also** to use the **most convenient mode** of doing so, that is, by **banning** and **criminalizing everything** not to a complainant's or the Ordinance enforcer's liking.

The Ordinance also **fails strict scrutiny analysis** because respondents have failed to demonstrate **why a less restrictive provision would not be as effective** in addressing the goal of curbing prurient interest and patently offensive sexual conduct.[90] There are **several other criminal statutes** that are **potentially less restrictive alternatives** to Ordinance No. 7780. Although **very insistent** on the **continuing validity** and **enforceability** of this Ordinance, the Office of the City Prosecutor was in fact able to identify provisions in the RPC that appear to be *narrowly tailored* to suppressing prurient and patently offensive sexual conduct.

"When First Amendment compliance is the point to be proved, the risk of non-persuasion -- operative in all trials – must rest with the Government, not with the citizen."[91] The Ordinance remains **presumptively invalid**, and this presumption **has not been rebutted** here because the Ordinance has drawn content-based distinctions that are not necessary to achieve the asserted interest against prurient and patently offensive sexual conduct.

Five. As applied to petitioners, *Ordinance No. 7780 has* ***violated their freedom of expression*** *when it sought to prohibit and penalize their acts of printing, publishing, distributing, circulating and/or selling* ***certain identified issues or editions of FHM Magazine****.*

An **as-applied challenge** consists of a challenge to the law's application **only as-applied** to the party before the court.[92] To prevail, a plaintiff must show that the law is unconstitutional **because of the way it was applied to the particular facts of his or her case**.[93]

For the same reasons discussed with respect to **facial overbreadth** and **failed strict scrutiny**, Ordinance No. 7780 has the **effect of unconstitutionally circumscribing** petitioners' free speech **as-applied** to the assailed FHM magazines. For sure, **not all** of their expressive content would be **unprotected speech**. But unfortunately, the **standards** set forth in the Ordinance are **so broad** that they prohibit and criminalize even those portions in petitioners' magazines that are **protected speech**. The Ordinance is **incapable** of **distinguishing** between **protected** and **unprotected** speech. As

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90 *Blitch v. City of Slidell*, 260 F. Supp. 3d 656, 668-669, 2017 U.S. Dist. LEXIS 93751, *15-18, 2017 WL 2634342 (E.D. La. June 19, 2017).

91 Supra note at 33.

92 *Republican Party of Minn., Third Cong. Dist. v. Klobuchar*, 381 F.3d 785, 790 (8th Cir. 2004).

93 *Phelps-Roper v. Ricketts*, 867 F.3d 884, 895 (8th Cir. 2017).

a result of this sweeping coverage, the **entirety** of the **content** of petitioners' magazines is **deemed criminal** by the Ordinance **simply because** they are **offensive to the religious beliefs** of the pastors and preachers who filed the criminal complaint and what they deem to be the **appropriate language and behavior**.

In any event, I **do not find** the assailed issues or editions of FHM Magazine to be **obscene** or in any other manner **unprotected** by the right to free expression. **As-applied** to these magazines, Ordinance No. 7780 **unconstitutionally** curtails petitioners' free speech.

The prevailing test of obscenity in our jurisdiction[94] is founded upon ***Miller v. California***.[95] Under ***Miller***, the basic guidelines to determine whether a work is obscene and, therefore, subject to state regulation, are as follows:

> (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.

All three prongs of the ***Miller*** test must be satisfied for a work to be found obscene.[96]

The key terms in the ***Miller*** test have been explained in this manner:

> **1. Community Standards**
>
> Analysis of obscenity under the Miller test looks to **local, as opposed to national, community standards**. The **"community standards" test** seeks to ensure that jurors assess the potentially obscene material **from the point of view of an average person, not the most sensitive member** of the community. The court or the jury can define the relevant community. The community can include a state as large as California or a small, rural community in Georgia. Thus, First Amendment protection might be afforded in New York to materials deemed obscene, and therefore prohibited, in Maine.
>
> Despite the apparent repudiation of a national standards test in Miller, the Supreme Court has **allowed courts to apply both national and local standards of decency**. In Hamling v. United States, the Court stated that the purpose of the community standards test was "**to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group**." Referencing national standards as well as community standards

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94 Soriano v Laguardia, 605 Phil. 43, 148 (2009).

95 See 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973).

96 See *United States v. Various Articles of Merch.*, 230 F.3d 649, 652, 2000 U.S. App. LEXIS 26627, *4-5 (3d Cir. N.J. October 23, 2000).

fulfilled this goal. Further, when instructing jurors on the community standards test, courts are not required to define which community jurors should consider. Both parties **may choose to use expert witnesses to help explain what the community standard should be**; however, that determination is ultimately left up to the juror.

The interaction between obscene speech and the Internet also creates interesting problems in determining community standards. For example, **when obscenity is posted to the Internet it cannot be prevented from entering any community**. Accordingly, the Sixth Circuit **has applied the standard of the local community in which the materials are received** rather than a national community standard. In effect, this means if distributors of sexual material wish to receive First Amendment protection, **they must comply with the community standards where the materials are disseminated**. However, more recently, the Ninth Circuit has interpreted the plurality in Ashcroft v. American Civil Liberties Union to give us a clearer way in how to define community standards. In United States v. Kilbride, the court followed the position of the Justices who concurred in the judgment on the narrowest grounds. The court concluded that Justice O'Connor's and Justice Breyer's concurrences in the judgment were the correct standards to follow, and that a national community standard must be used to determine obscene material on the Internet. Justice O'Connor reasoned that "**given Internet speakers' inability to control the geographic location of their audience, expecting them to bear the burden of controlling the recipients of their speech**, as we did in Hamling and Sable, **may be entirely too much to ask**, and **would potentially suppress an inordinate amount of expression**" and that a national community standard would avoid this First Amendment problem. Justice Breyer reasoned that **a local community standard** would "**provide the most puritan of communities with a heckler's Internet veto affecting the rest of the Nation**."

2. Prurient Interest

Before Miller, the Supreme Court defined "**prurient**" as "**material having a tendency to excite lustful thoughts**" including "**itching; longing; uneasy with desire or longing . . . lascivious desire or thought.**" **Prurient interest**, as used in the Miller test, is understood as "**that which appeals to a shameful or morbid interest in sex.**" Triers of fact **need not be aroused** by material to judge it prurient. Instead, they **merely need to determine whether the material in question would appeal to a member of the target group in a prurient manner** and **is intended to arouse members of the target group**. Triers of fact have recognized that **not all nudity appeals to a prurient interest; alternative lifestyles**, such as that of a nudist, sometimes encompass materials that **do not necessarily appeal to a prurient interest**.

3. Patently Offensive

Miller did not require states to define "patently offensive" in a uniform way. In fact, many obscenity statutes "**[go] substantially beyond customary limits of candor in description or representation.**" The Miller Court explained that "patently offensive," for example, could **include** "**representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated . . . [or] masturbation, excretory functions, [and] a lewd exhibition of the genitals.**" Some states have

> included sexual acts not mentioned in Miller, such as **bestiality**, **sadomasochism**, and **sexual bondage**. These additions have been found to be permissible examples of "patently offensive" behavior that states may restrict or ban as obscene.
>
> **4. Societal Value**
>
> **Sexually explicit materials** that **have "serious literary, artistic, political**, or **scientific value**" when **viewed as a whole** receive full First Amendment protection under Miller, according some protection for sexual materials with societal value. **Context is important** in this determination. For example, "**medical books** for the education of physicians and related personnel" with explicit illustrations and descriptions are protected. Also, **videogames with fleeting nudity** can be protected. In Entertainment Software Ass'n v. Blagojevich, the court held that the video game God of War was essentially an interactive version of Homer's Odyssey, and its fleeting nudity in one scene should be protected because **the game as a whole has literary value for the youths who play** it. In contrast, merely putting a quotation from a famous author in the flyleaf of a book does not render it a work of serious literature such that it will merit full First Amendment protection.[97]

The assailed FHM magazines do **not** exhibit **any** of these three prongs.

For one, the assailed FHM magazines **contains both texts and pictures** that **cover a variety of general interest topics** – women, pop culture, fashion and grooming, sports, music, movies, gadgets, sex and relationship, and humor. The **magazines have edgy photos** of women in various stages of undress but not totally nude, but nudity per se, much less sexy pictorials, is **not obscenity**. To the average person using contemporary community standards, especially when each page of an issue of the magazine is read with its other pages and the other issues or editions of the magazines in toto, the magazines **cannot be adjudged** as pandering solely to **prurient** interests.

Neither do the magazines depict **sexual conduct in a patently offensive** manner. ***United States v. Various Articles of Merch.*** [98] has explained this **second prong** as follows:

> The Supreme Court emphasized in Miller that "no one will be subject to prosecution for the sale or exposure of obscene materials **unless these materials depict or describe patently offensive 'hard core' sexual conduct**." The Court, recognizing the difficulty and the dangers of attempting to regulate any form of expression, **gave a few examples of what a state statute could define for regulation** under part (b) of the Miller standard:

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97 *"Sixteenth Annual Gender and Sexuality Law: Annual Review Article: Constitutionality of Sexually Oriented Speech: Obscenity, Indecency and Child Pornography,"* 16 Geo. J. Gender & L. 81, 84-91.

98 Supra note at 96.

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.
>
> x x x x

In ***Fernando v. Court of Appeals***,[99] this Court adopted the foregoing formulation of *patently offensive* to define this phrase and prevent unbridled discretion in its invocation.

The **photographs** in the assailed magazines **do not depict private parts at all**. Though there are photographs of women and at times men **in various stages of undress**, their **private parts**, however, are **not exposed**. Neither of these private parts is being exhibited nor being shown off. While their bodies, **including provocative imaginings** or **inciting to sensual imagination** of their private parts, are the **focal point** of the photos, the fact remains that **none** of these photos **actually shows off** the model's private parts. **At a minimum**, the **exposure** of one's private parts would be **necessary** to aggravate the images as being *patently offensive sexual conduct*.

Nor can I conclude that the magazines depict or describe patently offensive **hard core** sexual conduct. Nudity, much less near nudity is **not enough** to make the magazines legally obscene under the ***Miller*** standards. We **need more than nudity** to up the ante. Unfortunately, there are **no explicit sexual positions** on display. Only the **titillating pictures and postures** and **sultry looks** are all there is to even suggest that the materials are obscene. The magazines thus **fall far outside** the zone of **hardcore sexual conduct** that may constitutionally be found to be **patently offensive**.

The **final prong** of the ***Miller*** test, as stated, is **whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value**.

The assailed FHM magazines possess **political value**. "The term '**political**' which we employ here is **broad enough to encompass** that which **might tend to bring about 'political and social changes.'**" [100] The magazines espouse **alternative lifestyles** and **alternative communities**, which celebrate **sexuality** and **sensuality** as acceptable behavior, values and mindset. It is true that the political value of these magazines is not as immediately evident as the political value of, say, the *Economist* or the *Political Science Review*. "However, publications dedicated to presenting a visual depiction of an alternative lifestyle, a depiction with a decidedly

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99 See 539 Phil. 407 (2006).
100 Supra note at 96.

Utopian flavor, have political value similar to the political value of articles criticizing government regulation of that and other lifestyles."[101]

I would suggest that the subject FHM magazines do **not** even reach the status of an **indecent speech**, which at any rate is a category of **protected speech**:

> **Indecent speech is protected** by the First Amendment **but is disfavored and may be regulated. Indecent speech**, while not defined by the Supreme Court, has been explained by the Federal Communications Commission (FCC) **as that which "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards x x x sexual or excretory activities or organs."** The FCC uses a **contextual balancing test of three factors** when looking at broadcast material to determine **whether or not it is indecent: "(1) whether the description or depiction is explicit or graphic, (2) whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs**, and **(3) whether the material appears to pander or is used to titillate or shock."** Thus, unlike obscene speech, **indecent speech need not appeal to the prurient interest** or **lack serious literary, artistic, political, or scientific value in order to be regulated.**
>
> The First Amendment **protects sexual speech not rising to the level of obscenity, but provides less protection than it does for more valuable forms of speech**. The Supreme Court has explained that:
>
> [E]ven though we recognize that the First Amendment will **not tolerate the total suppression of erotic materials x x x society's interest in protecting this type of expression is of a wholly different**, and **lesser, magnitude** than the interest in untrammeled political debate x x x Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But **few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities"** exhibited in the theaters of our choice.
>
> Generally, when the government regulates speech on the basis of its indecent content, courts must apply strict scrutiny.[102](Emphases supplied)

Sexual speech is a specie of indecent speech.[103] It is disfavored but still **protected**. On the other hand, free speech does **not protect obscenity**. The government may ban or regulate it. But it must do so narrowly. Laws that prohibit **obscenity** may be found **unconstitutional** if they **potentially**

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101 *Id.*
102 Supra note at 97
103 *Id.*

prohibit an excessive amount of non-obscene speech. [104] **Private possession** of obscene materials is **generally protected**, while distribution and transmission of such materials is not.[105]

The subject FHM magazines are **benign** expressions of sexuality and sensuality. They are **playful flirtations** with **beauty** and **sexiness**. But they are **not obscene** by *Miller*'s standards. **Neither** are they even **indecent expression** as defined by the United States' Federal Communications Commission. Thus, **as applied** to these magazines, the Ordinance has **violated petitioners' free speech** when it was used to prohibit and penalize, as well as shame and bring opprobrium to, their acts of printing, publishing, distributing, circulating and/or selling these **protected** magazines.

TOWARDS A MORE INCLUSIVE OBSCENITY AND OTHER SEXUAL SPEECH TEST

A final point. I agree with the learned Associate Justice Marvic F. Leonen that the **constitutional protection** given to **sexual speech** has ridden the crest of the **commodification of women**, the **sexual gratification of the heterosexual male specie**, and the **dehumanization and demonization of the *other*** *(female, lesbian, gay, bisexual and queer)* **bodies**. I find it both **funny** and **disconcerting** that in defining the **obscene** and **indecent**, the *puerileness* of the expression to the male penis or its exposure of the *female* nipple has been the standard of constitutional protection. Justice Leonen could be correct that this jurisprudential development is **largely a reflection** of the communities we live in – the rise and power of the **macho** society within and outside of the family and into institutions of power and authority, the courts included.

Helen Longino[106] describes the sexual speech that has *also* greatly benefitted from the constitutional protection to free speech:

> **Pornography** lies when it says that **our sexual life is or ought to be subordinate to the service of men**, that our pleasure consists **in pleasing men and not ourselves**, that we are depraved, that we are fit subjects for rape, bondage, torture, and murder ... [this] fosters more lies about our humanity, our dignity, and our personhood. (Emphases supplied)

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104 *Id.*

105 *Id.*

106 Richard Jochelson, ***After Labaye: The Harm Test of Obscenity, The New Judicial Vacuum and the Relevance of Familiar Voices***, 46 Alberta Law Review 749 (2009), 2009 CanLIIDocs 233, quoting from "Pornography, Oppression, and Freedom: A Closer Look" in Laura Lederer, ed., ***Take Back the Night: Women on Pornography*** (New York: William Morrow, 1980).

Catherine MacKinnon explains, **sexual expression causes harm** not because it leads to a particular violent act against women; rather, the **harm of sexual expression** lies in its **negative impact on a consumer's understanding of gender and sexuality** – it generates **a social environment in which women are devalued** and in which **sex is eroticized violence** by which **men seek gratification.**[107]

Andrea Dworkin[108] would thus advocate:

> The **oppression of women** occurs through **sexual subordination**. It is the **use of sex as the medium of oppression** that **makes the subordination of women** so distinct from racism or prejudice against a group based on religion or national origin. Social inequality is created in many different ways x x x the **radical responsibility** is to **isolate the material means of creating the inequality** so that material remedies can be found for it. (Emphases supplied)

The ***Miller*** test references **community standards** and **societal values**. The question is the **locus** of these standards and values. Upon whose standards and values do we anchor what is obscene and what is not obscene, what is protected and what is unprotected? It is said that the standards and values should be that of the **average person** – what was **intolerable to the average member** of the national community would determine **obscenity**.

But the **average person** is also **situated** somewhere, sometime, and somehow. We **do not live** in homogenous communities. There will always be those who would be the **majority**, the **minority**, the **marginalized**, and the **underrepresented** and **unrepresented**. Substantive equality will have to account as well for their standards and values.

I believe that **majoritarian community standards** tolerate if not accept the materials and acts published in the challenged FHM magazines. The **popularity** and **acceptability** of this magazine as a whole are **off-the-roof**. They are considered **fashionable** and **rarely** referred to as **smut**. The magazines provide political, entertainment, and aesthetic values to the communities in which they are read. Therefore, the magazines **should easily pass** the ***Miller*** test.

But, I **do not accept** that *what is **tolerated** and **accepted*** by the majority is necessarily **liberating** and **progressive**. We **recognize** as a **rule of law** the **equality of the dignities and personhood** of all peoples **regardless** of race, age, sexual orientation, ethnicity and other indicators of one's autonomy and actualization in society. The community standards test **must account** for these differences and **allow for** the distinctiveness of individuals and communities in our midst.

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107 *Id.*
108 *Id.*

In place of the **standards-of-the-community-of-the-average-person test**, I respectfully endorse the **harm-based approach** in assessing the community standards of tolerance.[109] The approach requires the courts to determine using **evidence** about the **harmful effects** of the expression and **inference** from the expression itself "what the **community** would tolerate **others** being exposed to on the basis of the **degree of harm** [to the others] that may flow from such exposure."[110]

Harm in this context has **three types**: "(1) harm to those whose autonomy and liberty may be restricted by being confronted with inappropriate conduct; (2) harm to society by predisposing others to anti-social conduct; and (3) harm to individuals participating in the conduct."[111]

Harm may either be in the **form** of **anti-social conduct** or **anti-social attitudes**.[112] In terms of **conduct**, "criminal law may **limit conduct and expression** in order **to prevent people** who may see it from becoming **predisposed to acting in an anti-social manner**."[113] As regards **attitudinal harm**, the **expression** must be one (i) to which the **public** has been exposed and (ii) which "**perpetuates negative and demeaning images** of humanity and is **likely to undermine respect** for members of the targeted groups and hence **to predispose others to act** in an anti-social manner towards them."[114]

The **degree of harm** that would necessitate regulation, prohibition or even criminalization, was **assessed** by ascertaining **whether the material or conduct was "incompatible with the proper functioning of society."**[115] The **threshold** for establishing such a standard must be **high**, since membership in a diverse society **mandates tolerance** of conduct or material of which one disapproves.[116] **High** means it must be "**objectively shown beyond a reasonable doubt** to interfere with the proper functioning of society."

The **proof of harm** demands more than speculation and vague generalizations.[117] There must be a **real risk** that the expression will cause any one of the types of harm – the sexual act or speech at issue will **lead to attitudinal changes** and hence **to anti-social behaviour**.[118] The **causal link** between images of sexuality **and** anti-social behaviour cannot be assumed; rather, a **link** must be established **first between** the sexual act or speech **and** the formation of negative attitudes, **and second** between those attitudes **and** real risk of antisocial behaviour.[119] **Expert evidence** may help to establish

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109 *Regina v. Lab Regina v. Labaye*, 2005 SCC 80, [2005] 3 S.C.R. 728 (Supreme Court of Canada).
110 *Id.*
111 Supra note at 106.
112 Supra note at 109.
113 *Id.*
114 *Id.*
115 *Id.*
116 *Id.*
117 *Id.*
118 *Id.*
119 Supra note at 106.

actual harm, while the **probability** *(and not merely the possibility)* of the **risk of harm** may be shown from the act or expression itself.

In ***Regina v. Labaye***,[120] the accused was charged with operating a "common bawdy-house," a violation under Section 210(1) of the *Criminal Code* of Canada, for owning the club, in which persons who paid membership fees and their guests could assemble and engage in group and oral sex and masturbate. These activities were consensual and, while members paid the club membership fees, the members did not pay each other in exchange for sex. In determining whether the accused was guilty of owning a bawdy-house, the Canadian Supreme Court had to decide **whether the activities** taking place within should be classified as **indecent**, since **bawdy-houses** are, by definition, **houses in which** prostitution or **indecency** occurs or is planned to occur. The accused was found guilty.

The Canadian Supreme Court acquitted the accused. Using the harm-based approach in arriving at the community standards of tolerance, the Court found **no evidence** that the degree of alleged harm rose to the **level of incompatibility with the proper functioning** of society. It held that consensual **conduct behind code-locked doors** can **hardly** be supposed to **jeopardize** society. **Nothing** was involved that encouraged **sexist** and **misogynist** attitudes. The sex was consensual and **not prostitution**. The threat of sexually transmitted diseases are more of a health issue than a harm that comes exclusively from deviant sex.

The **harm-based approach** could help in pursuing **inclusive** community standards. It allows courts to consider **all of the stakeholders**, not only the community of the average person, in a meaningful manner.

Admittedly, though, ***Labaye*** was decided the way it did on the ground that **no harm to others** that the community would have been **unwilling** to tolerate and accept happened. The **cognitive lens** was still the perspective of the **others**, and not the **autonomy** of the participants in the bawdy-house. Indeed, the "swingers might have been more concerned that the practice at issue was central to the way in which they lived their lives – to their actualization in society."[121]

Further:

> Rather than recognizing the integral nature of the practice to the aggrieved community and then utilizing that affirmative principle to buttress the right to practice the lifestyle, the Court instead arrives at its conclusion by considering the negative implications of swinging as a lifestyle. The underlying messages are that swinging appeals to base interests, that the average member of society is not likely to suffer, and that swingers are not harmed since

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120 Supra note 109.
121 Supra note 106.

> they are already attitudinally changed; therefore the practice in the case at bar was permissible.
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> The focus does not consider all of the stakeholders in a meaningful manner, most notably the beliefs of the aggrieved swingers. The members outside of mainstream society were analyzed as "others" and were left to behave as they wished so long as "our" interests were not harmed.[122]

Just the same, the **harm-based approach** can be enriched "with a **multitude of variables** that would fully situate the harm analysis in a contextually sensitive manner."[123] In determining **whether the sexual act or speech is harmful** as it **unduly exploits sex** and would be **accepted** or **tolerated** by society, the **harms test** may take into account factors such as the sex, race, age, disability, and sexual orientation of the participants; the purposes of the materials; the intended audience, the existence of real or apparent violence; the existence of consent; the nature of the publication, including the relationship of the impugned materials to the entirety of the publication; the framework and manner of production, distribution and consumption; and the benefits to viewers and readers from the production and dissemination of the materials.[124]

Arguably, an **enriched harm-based** context would satisfy the **concerns for equality** and **against stereotyping and discrimination**. This would be the case in the context of sexually explicit materials that challenge the dominant heterosexual male perspective and are enriched by factors that are tailored to account for members of the **other** communities.

I am aware that developments in jurisprudence as remedies to societal inequities **take time** to percolate, and the thoughts I have discussed **would likely remain just** that, idle **thoughts**. In any event, the law is only one among many forums for change. As Brenda Cossman cautions, "while the law is busy trying to discipline these unruly sexual subjects, these sexual subjects are actually being normalized through other competing discourses."[125]

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122 *Id.*

123 *Id.*

124 *Id.*

125 Brenda Cossman, ***"Disciplining the Unruly: Sexual Outlaws, Little Sisters and the Legacy of Butler"*** (2003) 36 U.B.C. L. Rev. 77.

CONCLUSION

I conclude that petitioners have established that they are entitled to a declaration that Ordinance No. 7780 is unconstitutional on its face and as applied to them.

ACCORDINGLY, I vote to GRANT the Petition. City of Manila Ordinance No. 7780 should be declared **UNCONSTITUTIONAL**.

AMY C. LAZARO-JAVIER
Associate Justice