Republic of the Philippines
Supreme Court
Baguio City

G.R. No. 204819 – James M. Imbong, *et al.* versus Hon. Paquito N. Ochoa, Jr., *et al.*; G.R. No. 204934 – Alliance for the Family Foundation Philippines, Inc., *et al.* versus Hon. Paquito N. Ochoa, Jr., *et al.*; G.R. No. 204957 – Task Force for Family and Life Visayas, Inc., *et al.* versus Hon. Paquito N. Ochoa, Jr., *et al.*; G.R. No. 204988 – Serve Life Cagayan de Oro City, Inc., *et al.* versus Office of the President, *et al.*; G.R. No. 205003 – Expedito A. Bugarin, Jr. versus Offices of the Hon. President of the Republic of the Philippines, *et al.*; G.R. No. 205043 – Eduardo Olaguer, *et al.* versus DOH Secretary Enrique T. Ona, *et al.*; G.R. No. 205138 – Philippine Alliance of XSeminarians, Inc. (PAX), *et al.* versus Hon. Paquito N. Ochoa, Jr., *et al.*; G.R. No. 205478 – Reynaldo J. Echavez, M.D., *et al.* versus Hon. Paquito N. Ochoa, Jr., *et al.*; G.R. No. 205491 – Spouses Francisco S. Tatad, *et al.* versus Office of the President of the Republic of the Philippines; G.R. No. 205720 – Pro-Life Philippines Foundation, Inc., *et al.* versus Office of the President, *et al.*; G.R. No. 206355 – Millennium Saint Foundation, Inc., *et al.* versus Office of the President, *et al.*; G.R. No. 207111 – John Walter B. Juat, *et al.* versus Hon. Paquito N. Ochoa, Jr., *et al.*; G.R. No. 207172 – Couples for Christ Foundation, Inc., *et al.* versus Hon. Paquito N. Ochoa, Jr., *et al.*; G.R. No. 207563 – Almarim Centi Tillah, *et al.* versus Executive Secretary Paquito N. Ochoa, Jr., *et al.*

Promulgated:

April 8, 2014

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CONCURRING OPINION

LEONARDO-DE CASTRO, *J.*:

The question of validity or nullity of laws is not determined by who makes the most popular of arguments in legislative or academic halls, or the most passionate of pleas in the parliament of the streets. The issue of validity of laws is not a matter of popularity or passion but is a question of conformity with the Constitution. And in our legal system, this Court, as the final interpreter of the Constitution and the articulator of its underlying

principles, has been conferred the power to determine whether a law is in harmony with the Constitution.

Arguably, no law has been as controversial under the regime of the 1987 Constitution as Republic Act No. 10354, otherwise known as "The Responsible Parenthood and Reproductive Health Act of 2012," and more commonly known as the "Reproductive Health (RH) Law." It is not merely a collision of the conservative and liberal sectors of Philippine society, or a colossal clash between the (Catholic) Church and the State as some project it to be, or the paradox of an irresistible force meeting an immovable object. It is perceived to have started a cultural war and spawned these consolidated cases, which highlight a deep disagreement and an intense debate on the implications of the law on various fundamental rights.

I submit this Opinion in the hope of contributing to our people's appreciation of the issues involved so that we may continue to collectively look for ways to promote our democratic institutions and protect individual liberties.

The RH Law: Legislating 'RH Rights'

After more than a decade of deliberation in Congress, the RH Law was enacted by the Fifteenth Congress as Republic Act No. 10354 on December 12, 2012. It was signed by the President into law on December 21, 2012.

In connection with the President's signing of the RH Law, the Office of the President issued a statement that said:

> The passage into law of the Responsible Parenthood Act closes a highly divisive chapter of our history – a chapter borne of the convictions of those who argued for, or against this Act, whether in the legislative branch or in civil society. At the same time, it opens the possibility of cooperation and reconciliation among different sectors in society: engagement and dialogue characterized not by animosity, but by our collective desire to better the welfare of the Filipino people.
>
> This is the mark of a true democracy: one in which debate that spans all levels of society is spurred by deeply-held beliefs and values, enriching

> and elevating public discourse, as we all work together to find ways to improve the lives of our fellow citizens.[1]

The RH Law creates a bundle of rights known as the "RH rights" defined as follows:

> *Reproductive health rights* refers to the rights of individuals and couples, to decide freely and responsibly whether or not to have children; the number, spacing and timing of their children; to make other decisions concerning reproduction, free of discrimination, coercion and violence; to have the information and means to do so; and to attain the highest standard of sexual health and reproductive health: *Provided, however,* That reproductive health rights do not include abortion, and access to abortifacients.[2]

The RH rights are fortified by the concept of "universal access" to so-called "medically-safe, non-abortifacient, effective, legal, affordable, and quality reproductive health care services, methods, devices and supplies which do not prevent the implantation of a fertilized ovum as determined by the Food and Drug Administration (FDA)."[3]

The RH Law and Constitutional Questions

Anti-RH Law advocates did not waste time in questioning the constitutionality of the law. The first petition against the said law, G.R. No. 204819, was filed in this Court on January 2, 2013. Thirteen petitions were subsequently filed.

The common arguments of the various petitioners against the RH Law are as follows:

> (1) the RH Law violates the constitutional safeguard for the sanctity of the family under Section 12, Article II, and Article XV of the 1987 Constitution;

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1 Statement dated December 29, 2012 of Deputy Presidential Spokesperson Abigail Valte on the RH Law, http://www.gov.ph/2012/12/29/statement-the-deputy-presidential-spokesperson-on-the-responsible-parenthood-and-reproductive-health-act-of-2012/, last visited September 30, 2013.

2 Section 4 (s), RH LAW.

3 Section 2, RH Law.

(2) the RH Law defeats the constitutional protection for the life of the unborn from conception under Section 12, Article II of the 1987 Constitution;

(3) the RH Law prejudices the right to health of the people, particularly of women, contrary to Section 15, Article II of the 1987 Constitution;

(4) the RH Law unduly constricts the freedom of religion, particularly the free exercise of one's spiritual faith, guaranteed under Section 5, Article III of the 1987 Constitution; and

(5) the RH Law unduly restrains the right to free speech guaranteed under Section 4, Article III of the 1987 Constitution.

In defense of the RH Law, the Government, through the Office of the Solicitor General, asserts that the RH Law is a landmark piece of social welfare legislation that seeks to promote the health and welfare of mothers, infants, children and the Filipino family as a whole. It gives the people, especially the poor and the marginalized, access to information and essential reproductive health care services and supplies. It is the State's response to the need to address the reproductive health concerns of its citizens. Particularly, the law intends to save the lives of mothers and new born infants.[4]

The Government further describes the RH Law as, at its core, a government subsidy designed to make reproductive health devices and services available to the public. As the power of Congress to subsidize education, public utilities and food is generally considered to be within its constitutional authority, the power of Congress to subsidize reproductive health devices and services should similarly be viewed as not susceptible to constitutional attacks.[5]

The Government insists that the RH Law as a legislative act, which has been approved by the executive, enjoys the presumption of constitutionality. In enacting the RH Law, Congress effectuated the constitutional prohibition against abortion. In particular, in defining "abortifacients", the legislature implemented the constitutional intent to

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4 Consolidated Comment, p. 4.
5 Id. at 5.

protect life from conception. Moreover, in providing that the National Drug Formulary shall include "hormonal contraceptives, [and] intrauterine devices [(IUDs)]", Congress made a legislative finding of fact that contraceptives and IUDs are "safe" and "non-abortifacient." The Government contends that, this finding, supported in the legislative records by evidence-based medical and scientific testimony, is entitled to great weight and deference by this Court.[6]

The parties were then heard in oral arguments to give them an opportunity to exhaustively discuss their respective arguments as well as to inform the public of the constitutional and legal issues involved in these cases.

On Procedural Issues

I concur with the majority opinion on procedural issues relating, among others, to the exercise of the power of judicial review, the existence of an actual case or controversy which is ripe for judicial determination and the propriety of facial challenge in the case of the RH Law.

I wish to add that, in general, a facial challenge is a constitutional challenge asserting that a statute is invalid on its face as written and authoritatively construed, when measured against the applicable constitutional doctrine, rather than against the facts and circumstances of a particular case.[7] The inquiry uses the lens of relevant constitutional text and principle and focuses on what is within the four corners of the statute, that is, on how its provisions are worded. The constitutional violation is visible on the face of the statute. Thus, a facial challenge is to constitutional law what *res ipsa loquitur* is to facts – in a facial challenge, *lex ipsa loquitur*: the law speaks for itself.[8]

The Government, invoking *Estrada v. Sandiganbayan*[9], argues that legitimate facial attacks upon legislation constitute a rare exception to the exercise of this Court's jurisdiction.[10] This is the conventional wisdom and it is principally based on the American *Salerno*[11] rule that a facial challenge

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6 Id.

7 O' Grady, Catherine, *The Role of Speculation in Facial Challenges*, 53 ARIZ. L.REV. 867, 871 (2011).

8 Rosenkranz, Nicholas Quinn, *The Subjects of the Constitution*, 62 STAN. L.REV. 1209, 1238 (2010).

9 421 Phil. 290 (2001).

10 Consolidated Comment, p. 16.

11 *United States v. Salerno*, 481 U.S. 739 (1987).

to a legislative act is the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the law would be valid.[12] It has been previously pointed out, however, that the American *Salerno* rule has not been met with unanimity in the American legal community.[13] It has also been pointed out that Philippine jurisprudence "has traditionally deigned to nullify or facially invalidate statutes or provisions thereof without need of considering whether 'no set of circumstances exists under which the [law or provision] would be valid.'"[14] A good example is the recent case of *Biraogo v. Philippine Truth Commission*.[15]

More significantly, laws that violate important individual rights uniquely and distinctly warrant facial invalidation.[16] This is grounded on the following justification:

> [W]here constitutional values are unusually vulnerable, the Supreme Court can authorize the robust protection afforded by tests that invite rulings of facial invalidity and preclude the case-by-case curing of statutory defects. This approach most commends itself when a constitutional provision both affords protection to speech or conduct that is especially prone to "chill" and reflects a value that legislatures may be unusually disposed to undervalue in the absence of a significant judicially established disincentive.[17]

As worded, the RH Law goes against a number of significant constitutional guarantees and principles. For this reason, I join the majority in declaring unconstitutional certain provisions of the RH Law that are inconsistent and incompatible with the constitutional guarantee of fundamental rights such as the freedom of religion and freedom of speech and the protection of the sanctity of the family, including the corresponding rights of the husband and the wife as spouses and as parents. A close scrutiny of the law is imperative to see to it that it does not imperil the constitutionally guaranteed right to life and health of the unborn from

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12 Id. at 745.

13 *Romualdez v. Commission on Elections*, 576 Phil. 357, 453 (2008), Tinga, J. dissenting. More recent proof of this is Richard Fallon, Jr.'s *Fact and Fiction About Facial Challenges*, 99 CAL. L.REV. 915, 917 (2011) (claiming that facial challenges to statutes are common, not anomalous).

14 Id. at 454.

15 G.R. Nos. 192935 & 193036, December 7, 2010, 637 SCRA 78. While what was involved in this case was Executive Order No. 1, an executive issuance and not a legislative enactment, the point is that the Court actually engaged in a facial invalidation without reference to the standard of "no set of circumstances exists under which the [law or provision] would be valid."

16 Borgmann, Caitlin, *Holding Legislatures Constitutionally Accountable Through Facial Challenges*, 36 HASTING CONST. L.Q. 563, 565 (2009).

17 Id. at 566, quoting Richard Fallon, Jr.'s *As-Applied and Facial Challenges and Third Party Standing*, 113 HARV. L.REV. 1321, 1352 (2000).

conception, and of women. All of these sustain the facial challenge against certain provisions of the RH Law.

On the Substantive Issues
The Right to Life

I fully concur with the comprehensive and exhaustive discussion in the majority opinion penned by the Honorable Justice Jose Catral Mendoza, as to the plain meaning and jurisprudential and medical foundation of the Court's conclusion that the moment of conception is reckoned from fertilization; that the fertilized ovum, known as zygote, is the beginning of a human being; and that the theory of implantation as the beginning of life is devoid of any legal or scientific mooring or basis as it pertains not to the beginning of life but to the viability of the fetus. The fertilized ovum is able to attach or implant itself to the uterine wall because it is a living human being. The majority opinion aptly quoted with favor the following statement of the Philippine Medical Association:

> The scientific evidence supports the conclusion that a zygote is a human organism and that the life of a new human being commences at a scientifically well defined "moment of conception." This conclusion is objective, consistent with the factual evidence, and independent of any specific ethical, moral, political, or religious view of human life or of human embryos.

Since the Constitution protects the life of the unborn from conception, abortion of the fertilized ovum cannot be allowed by law. Thus, the RH Law defines an abortifacient as follows:

> SEC. 4. *Definition of Terms*. – For the purpose of this Act, the following terms shall be defined as follows:
>
> (a) *Abortifacient* refers to any drug or device that induces abortion or the destruction of a fetus inside the mother's womb or the prevention of the fertilized ovum to reach and be implanted in the mother's womb upon determination of the FDA.

While an abortifacient is outlawed by the Constitution and the RH Law, the practical problem in its enforcement lies in the determination of whether or not a contraceptive drug or device is an abortifacient. This is where expert medical opinion is imperative. The character of the contraceptive as an abortifacient or non-abortifacient cannot be legislated or

fixed by law and should be confined to the domain of medical science. It is in this light that the provision of Section 9 of the RH Law quoted below should be construed if it is to be saved from constitutional attack:

> SEC. 9. *The Philippine National Drug Formulary System and Family Planning Supplies*. – The National Drug Formulary shall include hormonal contraceptives, intrauterine devices, injectables and other safe, legal, non-abortifacient and effective family planning products and supplies. The Philippine National Drug Formulary System (PNDFS) shall be observed in selecting drugs including family planning supplies that will be included or removed from the Essential Drugs List (EDL) in accordance with existing practice and in consultation with reputable medical associations in the Philippines. For the purpose of this Act, any product or supply included or to be included in the EDL must have a certification from the FDA that said product and supply is made available on the condition that it is not to be used as an abortifacient.
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> These products and supplies shall also be included in the regular purchase of essential medicines and supplies of all national hospitals: *Provided, further*, That the foregoing offices shall not purchase or acquire by any means emergency contraceptive pills, postcoital pills, abortifacients that will be used for such purpose and their other forms or equivalent.

There is no unanimity of opinion whether hormonal contraceptives and intrauterine devices are in fact "non-abortifacient" and "safe." In fact, in the last sentence of Section 9, there is a tacit admission that said hormonal contraceptives or intrauterine devices are abortifacient but they are "not to be used" as such.

Accordingly, since Section 9 admits that only safe, legal and non-abortifacient contraceptives, injectables and devices can be lawfully included in the National Drug Formulary, I join the majority opinion in holding that Section 9 should be read to mean that there is no legal compulsion to include hormonal contraceptives, injectables and devices in the National Drug Formulary unless they are safe, legal and non-abortifacient, which obligatory preconditions must be determined by the appropriate government agency, in this case the Food and Drug Administration (FDA). I concur in principle with Justice Mariano C. del Castillo's opinion that the FDA must formulate stringent and transparent rules of procedure in the screening, evaluation and approval of all contraceptive drugs and devices to ensure that they are safe, non-abortifacient and legal or compliant with the mandate of the Constitution and the law. The government should be accountable or held liable whenever deleterious consequences to the health or life of the unborn or the mother

result from the latter's availment of government supplied contraceptive drugs or devices and the government's inability to provide adequate medical attention or supervision dictated by the individual health condition of a woman beneficiary.

I also agree with Justice Mendoza's *ponencia* and Justice del Castillo's objection to Section 3.01 of the RH Law's Implementing Rules and Regulations (IRR) that the latter cannot redefine the term "abortifacient" by the addition of the word "primarily" as follows:

> Section 3.01. For purposes of these Rules, the terms shall be dfined as follows:
>
> a) Abortifacient refers to any drug or device that **primarily** induces abortion or the destruction of a fetus inside the mother's womb or the prevention of the fertilized ovum to reach and be implanted in the mother's womb upon determination of the Food and Drug Administration (FDA). (Emphasis supplied)

As reworded, it will allow the approval of contraceptives which has a secondary effect of inducing abortion or the destruction of the fetus or the prevention of implantation of the fertilized ovum in the mother's womb. This secondary effect is the fail-safe mechanism, which is contrary to Section 12, Article II of the 1987 Constitution and Section 4 (a) of the RH Law.

The RH Law and the People's Right to Health

The relevant portion of Section 2 of the RH Law declares as a policy the centrality of the advancement and protection of women's human rights in the matter of reproductive health care:

> SEC. 2. *Declaration of Policy*. – x x x
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> Moreover, the State recognizes and guarantees the promotion of gender equality, gender equity, women empowerment and dignity as a health and human rights concern and as a social responsibility. **The advancement and protection of women's human rights shall be central to the efforts of the State to address reproductive health care**. x x x (Emphasis supplied)

The policy of the centrality of women's human rights in the matter of reproductive health care seeks to empower women. The importance of the centrality of women's human rights in the matter of reproductive health care is underscored by its reiteration in Section 3 (m)[18], the guiding principles for the law's implementation, and its privileged status in Section 27[19] as the determining factor in interpreting or construing the law. The policy of centrality of women's human rights in the matter of reproductive health care finds its rationale in the biological function and anatomical make-up of the woman in relation to reproduction. This finds expression in the last part of Section 4 (h) on gender equity which states that "while [RH] involves women and men, it is more critical for women's health." In other words, the law acknowledges that, while both man and woman are entitled to RH rights, the RH rights are more significant for the woman as she is the one who gets pregnant, bears the unborn child in her womb for nine months, and gives birth to the child.

Thus, if the RH Law is to really protect and empower women, the RH Law's universal access policy should be read and implemented in a manner that does not put the health of women at risk or impair their right to health.

Section 15, Article II of the 1987 Constitution provides:

> Section 15. The State shall protect and promote the right to health of the people and instill health consciousness among them.

The right to health is a necessary element of the right to life. More importantly, the right to health is, in itself, a fundamental human right. This is a consequence of the Philippines being a party to the Universal Declaration of Human Rights and the Alma Conference Declaration of 1978,[20] as well as the country's adoption of generally accepted principles of international law.[21] Reproductive health is defined as the "state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes.[22] Thus, the right to health is greater than and subsumes reproductive health.

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18 Section 3 (m) provides: "(m) Gender equality and women empowerment are central elements of reproductive health and population and development; x x x"

19 Section 27 provides: "SEC. 27. *Interpretation Clause*. – This Act shall be liberally construed to ensure the provision, delivery and access to reproductive health care services, and to promote, protect and fulfill women's reproductive health and rights."

20 Bernas, Joaquin, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY (2009), p. 1270.

21 *See* Section 2, Article II, 1987 Constitution.

22 Section 4 (p), RH Law.

The petitioners assert that, rather than promoting the health of women, the State is exposing women to serious illnesses in its enactment of the RH Law and sponsorship of the universal access of so-called modern means of family planning. According to them:

> Studies have established that use of oral contraceptives increases the risk of breast and cervical cancer. Advocates of oral contraceptives have brushed aside these harmful effects. To do so in light of the magnitude of the adverse side-effects of oral contraceptives which have been documented is a woeful ignorance of the facts or a deliberate and cynical act of injustice to women.
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> x x x x x x x x x
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> To provide a graphic example, [the RH Law] would almost have the same effect as the government funding the purchase of cigarettes – another known carcinogenic – as basic goods, distributing them for free (especially to the poor) and prescribing their use. We can say, therefore, that [the RH Law] does not promote reproductive health, but sickness and death.
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> This being so, [the RH Law] not only allows the violation of women's right to health, but encourages, and funds the purchase of such carcinogenic substances which clearly endanger women's health. As such, the law should be declared unconstitutional and void.[23]
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> xxx an International Agency for Research on Cancer (IARC) Study (2011) by 23 scientists from 10 countries concluded that "oral combined estrogen-progestogen contraceptives are carcinogenic to humans.["] The study mentions that "oral combined estrogen-progestogen contraceptives cause cancer of the breast, in-situ and invasive cancer of the uterine cervix, and cancer of the liver." It cannot be gainsaid as it has been established by scientific studies that contraceptives are hazardous to women, yet, the RH Law allots billions of taxpayers' money for the purchase of the contraceptives to be distributed particularly to the poor. On this score alone, the RH Law is already unconstitutional. Treatment for cancer is very expensive even if it is not always curative but mostly just palliative. What is even more tragic is that when these poor women get sick of cancers, there is no free treatment available from the government. More and more women are getting sick of different kinds of cancers because of oral contraceptive pills that they themselves buy for their own use, with the abundant free supply from the [State], it would not be farfetched to expect a deluge of cancer patients.[24]
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> x x x x x

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23 Petition for Prohibition in G. R. No. 204934, pp. 24-26.

24 Petition for Certiorari and Prohibition in G. R. No. 204988, p. 12.

The [RH] law not only violates the right to life of the unborn,
But endangers the life of the mother as well

51. Both the life of the mother and the unborn are protected by the Constitution. However, the law subject of this petition allows women to use certain drugs that are not only abortifacients, but also cause long-term illnesses to women.

52. A monograph released last year (2011) by a working group under the WHO's International Agency for Research on Cancer (IARC) made an "overall evaluation" that "combined oral estrogen-progesterone contraceptives are carcinogenic to humans." The 2011 report classified the pill as a "Group 1" carcinogen, which means the highest level of evidence of cancer risk. "There is sufficient evidence in humans for the carcinogenicity of oral combined estrogen-progesterone contraceptive. Oral combined estrogen-progesterone contraceptives cause cancer of the breast, in-situ and invasive cancer of the uterine cervix, and cancer of the liver," said the 40-page section on oral contraceptive pills of the WHO-IARC monograph.

53. On *breast cancer*, the Mayo Clinic, consistently considered as one of the best hospitals in the world, published in 2006, an article entitled "Oral Contraceptive Use as a Risk Factor for Premenopausal Breast Cancer: A Meta-analysis." The meta-analysis, a study of world scientific literature on this issue, concluded that use of the pill is linked with statistically significant association with pre-menopausal breast cancer. The association was 44% over baseline in women who have been pregnant and took the pill before their first pregnancy.

54. On *cervical cancer*, a systemic review of literature of 2003 published at the Lancet, one of the leading medical journals in the world, stated: "long duration use of hormonal contraceptives is associated with an increased risk of cervical cancer."

55. On *heart attacks*, a 2005 meta-analysis at The Journal of Clinical Endocrinology & Metabolism stated that "a rigorous meta-analysis of the literature suggests that current use of low-dose OCs significantly increases the risk of both cardiac and vascular arterial events."

56. On *stroke*, one of the leading scientific journals of the American Heart Association, published a study, precisely titled as STROKE in 2002, concluded that indeed the pill confers "the risk of first ischemic stroke."

57. Considering the foregoing long-term effects of contraceptives on women, the law allowing the use of such contraceptives clearly violate[s] one of the most important tenets of the Constitution. The

drugs allowed by the law not only harm the unborn, but endanger the life of the mother as well.[25]

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Medical consequences

65. In the case of contraception, the medical harm caused by contraceptives are well-documented. Strong links have been established, for example, between the pill and cancer, stroke and heart attacks, while the availability of condoms has been statistically shown to spread AIDS, rather than suppress it.

66. Thus, among just some of the specific dangers alleged are neural tube defects (from a study by the Department of Epidemiology, School of Public Health, China Medical University; 2011), childhood strokes (Christerson, Stromberg, Acta; 2010), and a disturbing hypothesis regarding hypoplastic left heart syndrome and gastroschisis (by Waller, DK, et al., University of Texas, Houston Health Science Center; 2010).

67. To women themselves, the dangers arising from contraceptive use are apparently endless: breast cancer, cervical cancer, high blood pressure, heart attacks, venous thrombosis (or blood clotting), excessive bleeding, menstruation difficulties, permanent infertility (making even artificial insemination ineffective), migraines and bone damage. Jenn Giroux (longtime commentator on contraception and with decades of experience in health service), writing for the Washington Times ("*Killer Compromise: Plan to give birth control to women will raise body count*"; 13 February 2012) found:

- "Since 1975 there has been a 400% increase in *in situ* breast cancer among pre-menopausal women under 50 years old. This mirrors the increased use of birth control over these same years.

- A Mayo Clinic study confirms that any young girl or woman who is on hormonal birth control for 4 years prior to first full term pregnancy increases their breast cancer risk by 52%.

- Women who use hormonal birth control for more than five years are four times more likely to develop cervical cancer.

- The International Agency for Research on Cancer (IARC), a research arm of the World Health Organization classifies all forms of hormonal contraception as a Group 1 carcinogen. This group of cancer causing agents also includes cigarettes and asbestos.

- In October 2010 the NY Times carried an article about Hormone Replacement Therapy drugs. It quoted the American Medical Association (AMA) as warning women that these post-menopausal

[25] Petition in G. R. No. 205478, pp. 11-12.

> drugs which were originally marketed as keeping a woman 'young and sexy' were discovered instead to be more likely to cause advanced and deadly breast cancer. It stopped short of making one other startling revelation: The only difference between hormone replacement therapy drugs which cause deadly breast cancer and the hormonal birth control drugs (now mandated by the Obama administration) is that the birth control drugs are six times the dosage -- and are the very same drug[s]!"

68. Lori Chaplin reported (Want to Find a Good Husband and Have a Family? Don't Use the Pill, National Catholic Register, 10 November 2012; citing a 2009 U.K. study "Does the Contraceptive Pill Alter Mate Choice in Humans?") that, aside from making women less attractive (due to the contraceptive's prevention of ovulation, thus, interfering with a woman's "appearance, odor and voice pitch – to which men are sensitive"), contraceptives also unquestionably cause harm to women's bodies.

69. Chaplin describes such serious dangers to include "increased likelihood of breast cancer, heart attack, strokes, blood clots, high blood pressure, liver tumors and gallstones. The pill also heightens infertility. 'When a hormone is chronically changed, it actually changes the entire system of hormones. It changes the master hormones and how they excrete. The result of this is when a woman does want to become pregnant and stops the pill, the body continues to act as if the pill is still being taken. That is one of the reasons why women who have been on contraceptives for a long period of time can't get pregnant!"

70. The aforementioned UK study further noted contraceptives' "detrimental effects on future generations, stressing that more studies need to be conducted. They predict that offspring of pill users will be homozygous (possessing two identical forms of a particular gene), which can be related to impaired immune function, an increase of genetic diseases, as well as decreased perceived health and attractiveness."

71. Reuters (7 November 2011) also reported on studies indicating that the risk for venous blood clots was 43 percent to 65 percent higher with drospirenone-containing pills, compared with older, so-called second- and third-generation pills."

72. Contraceptives are obviously so dangerous to health that the US Federal Drug Agency, within the last year alone, had to either oversee the recall of or order increased warnings on two separate oral contraceptive brands due to the possible serious adverse health problems that they could cause. It is a fact that numerous lawsuits have been filed against manufacturers of contraceptives over the health problems they caused. They are of such grave medical concern that numerous doctors in the United States (see the group One More Soul, for example) have decided not to prescribe contraceptives to their patients.

> 73. As mentioned in the immediately foregoing paragraphs, the perils accompanying contraceptives are such that liability lawsuits are a growing industry in the West. Legal aid group Lawyers and Settlements reported that as of "March 2012, approximately 12,000 lawsuits" have been brought against the manufacturer of widely used contraceptives "Yasmin, Yaz, Beyaz and Safyral, alleging an increased risk of blood clots (deep vein thrombosis (DVT), pulmonary embolism (PE) and gallbladder problems." NuvaRing Resource Center, a "patient advocacy group", also reported that "the FDA has received 1,000 reports of blood clot injury or death in patients using NuvaRing. On October 27, 2011 they released a report titled, 'Combined Hormonal contraceptives (CHCs) and the Risk of Cardiovascular Disease Endpoints', which showed vaginal ring contraceptives could increase the risk of blood clots by as much as 56%".[26]

The Government refutes the allegations of petitioners by invoking its own set of authorities and expert opinions:

> **The RH Law does not violate the right to health provision under Section 15, Article II, nor the right to protection against hazardous products in Section 9, Article XVI of the Constitution.**
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> Preliminarily, the above constitutional provisions allegedly violated by respondents are mere statements of principles and policies. Hence, they cannot give rise to a cause of action in the courts; they do not embody judicially enforceable constitutional rights.
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> Even assuming that the said constitutional provisions may be considered self-executory, they were not violated.
>
> In the aforementioned Medical Experts' Declaration on the Action of Contraceptives dated August 8, 2011 prepared by UHC Study Group, Annex 5 hereof, the medical experts made the following conclusions:
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> x x x x x x x x x
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> 8. Like all medical products and interventions, contraceptives must first be approved for safety and effectiveness by drug regulatory agencies. Like all approved drugs, contraceptives have "side effects" and adverse reactions, which warrant their use based on risk-benefit balance and the principles of Rational Drug Use. Risk-benefit balance also applies when doing not[h]ing or not providing medicines, which can result in greater morbidities and death.

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[26] Petition for Certiorari and Prohibition in G. R. No. 205720, pp. 28-31.

In case of contraceptives, which are 50[-][year] old medicines, the Medical Eligibility Criteria (MEC) developed by the WHO is the comprehensive clinicians' reference guiding the advisability of contraceptives for particular medical conditions.

9. **The benefits of the rational use of contraceptives far outweigh the risk**. The risk of dying from pregnancy and childbirth complications is high (1 to 2 per 1000 live births, repeated with every pregnancy). Compared to women nonsmokers aged below 35 who use contraceptive pills, the risk of dying from pregnancy and delivery complications is about 2,700 times higher.

10. The risk of cardiovascular complications from the appropriate use of hormonal contraceptives is low. While the risk for venous thromboembolism (blood clotting in the veins among oral contraceptive users is increased, the risk of dying is low, 900 times lower than the risk of dying from pregnancy and childbirth complications. Heart attack and stroke are also rare in women of reproductive age and occur in women using hormonal contraceptives only in the presence of risk factors - like smoking, hypertension and diabetes. The MEC will guide providers in handling patients with cardiovascular conditions.

11. The risk of breast cancer from the use of combined hormonal pills (exogenous estrogen or estrogen from external sources) is lower than the risk from prolonged exposure to endogenous estrogens (hormones naturally present in the body). Current users of oral contraceptives have a risk of 1.2 compared to 1. 9 among women who had early menarche (first menstruation) and late menopause, and 3.0 among women who had their first child after age 35. The risk of breast cancer from oral contraceptive use also completely disappears after 10 years of discontinuing use.

Combined hormonal pills are known to have protective effects against ovarian, endometrial and colorectal cancer.

12. The safety and efficacy of contraceptives which passed the scientific scrutiny of the most stringent drug regulatory agencies, including the US FDA, warranted their inclusion in the WHO's "core list" of Essential Medicines since 1977. The core list enumerates "minimum medicine needs for a basic health care system listing the most efficacious, safe and cost-effective medicines for priority conditions."

13. Contraceptives are included in the Universal Health

> package of the Department of Health. The use of contraceptives in Family Planning programs are known to reduce maternal mortality by 35% through the elimination of unintended pregnancy and unsafe induced abortions.

Moreover, the WHO regularly publishes a monograph entitled *Medical Eligibility Criteria for Contraceptive Use* (MEC) to further ensure the general safety and efficacy of modern artificial contraceptives. This monograph "aims to provide guidance to national family planning/reproductive health programs in the preparation of guidelines for service delivery of contraceptives."

The MEC has since been translated by the DOH into the Family Planning Manual which is a ready clinical reference to guide health care providers in advising their patients on the best possible family planning drug, device, method or service that would maximize benefits and minimize risks given their individual circumstances.

To repeat, the RH Law simply guarantees access to contraceptives which are medically-safe, non-abortifacient, legal and effective in accordance with scientific and evidence-based medical research standards such as those registered and approved by the FDA. The FDA shall first determine and certify the safety, efficacy, and classification of products and supplies for modern family planning methods prior to their procurement, distribution, sale and use.

The RH Law also provides that "[t]he FDA shall issue strict guidelines with respect to the use of contraceptives, taking into consideration the side effects or other harmful effects of their use." Likewise, it provides that "[t]he State shall promote programs that: xxx (5) conduct scientific studies to determine the safety and efficacy of alternative medicines and methods for reproductive health care development." Furthermore, the selection of "drugs including family planning supplies that will be included or removed from the Essential Drugs List (EDL)" shall be "in accordance with existing practice and in consultation with reputable medical associations in the Philippines." It is thus very clear that before contraceptives are made available to the public, the same shall have first been the subject of strict scrutiny by the FDA.

The RH Law promotes, protects and enhances the people's right to health, particularly of mothers and infants.

Section 11, Article XIII of the 1987 Constitution provides:

> **Section 11**. The State shall adopt an integrated and comprehensive approach to health development which shall endeavor to make essential goods, health and other social services available to all the people at affordable cost. There shall be priority for the needs of the underprivileged, sick,

> elderly, disabled, women, and children. The State shall endeavor to provide free medical care to paupers.
>
> The expression of "an integrated and comprehensive approach to health development" sums up two principles premised on the understanding that the high level of health of the people and of the country can be attained only through a combination of social, economic, political and cultural conditions. Integration connotes a unified health delivery system, a combination of private and public sectors, and a blend of western medicine and traditional health care modalities. Comprehensiveness includes health promotion, disease prevention, education, and planning. And all of these are a recognition of the people's right to health.
>
> Moreover, the right to health is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.
>
> Consequently, the promotion of reproductive health development includes, among others, access to a full range of modern methods of family planning which includes medically-safe and effective contraceptives even to the poor.
>
> In **Del Rosario vs. Bengzon**, wherein the Philippine Medical Association (PMA) questioned the Generics Act, this Honorable Court held that the PMA misread the law's purpose which is to fulfill the constitutional command to make health care affordable.
>
> The RH Law therefore does not violate the constitutional right to health; rather it promotes, protects and enhances the same by reducing maternal and infant mortality rates through access to safe, legal, affordable, effective and essential reproductive health care services and supplies. Studies show that maternal deaths in the Philippines continue to rise simply because these mothers were not given the proper health care and access to key reproductive health information.[27]

Thus, the disagreement on the safety of the use of hormonal pills and IUDs by women is actually a result of reliance by the parties on conflicting scientific findings on the matter. How should this Court address the constitutional concerns raised in these cases in the light of the divergence of position of the parties considering their significant implications on the

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[27] Consolidated Comment, pp. 50-55.

constitutionally guaranteed right to health of the people, particularly of women?

The contending parties have presented a plethora of findings of experts in the medical field to support their respective positions. In this connection, two legal principles find relevance: the principle of prudence and the precautionary principle.

Fr. Joaquin Bernas, S.J., a member of the Constitutional Commission explained the principle of prudence:

> The unborn's entitlement to protection begins "from conception," that is, from the moment of conception. The intention is to protect life from its beginning, and the assumption is that human life begins at conception and that conception takes place at fertilization. There is, however, no attempt to pin-point the exact moment when conception takes place. But while the provision does not assert with certainty when human life precisely begins, it reflects the view that, **in dealing with the protection of life, it is necessary to take the safer approach**.[28] (Emphasis supplied)

The comment of Bishop Teodoro Bacani, another member of the Constitutional Commission, during the discussion of the provision affording protection to the life of the unborn from conception is also relevant:

> BISHOP BACANI. Madam President, may I again intervene. First of all, my personal belief is that this provision does not even depend on whether or not we recognize a strict right to life, that is why I proposed the family rights provision which, I believe, is a stronger one. And, secondly, Commissioner Aquino said that we cannot deal with speculation. Let me put it this way. On the other hand, **when there is a doubt regarding questions of life and respect for human life, one must try to be on the safe side**. For example, if one doubts whether a person is really still alive or is already dead, he is not going to bury that person. He is going to make sure first that the person is really dead because if he buries that person and says: "Well, I cannot rely on speculation. I cannot be completely certain," then he is hurting life or risks hurting life. Suppose there is an object moving in the thickets; I see it and as a hunter I say, "Well, I am not sure whether it is a human being or an animal; but nevertheless I am hunting now, I will shoot." I do not think that that is a very prudent thing to do.[29] (Emphasis supplied)

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[28] Bernas, *supra* note 20 at 84.

[29] IV RECORDS 707.

The gist of the principle of prudence, therefore, is that, in questions relating to life, one should err on the side of life. Should there be the slightest iota of doubt, life should be affirmed.[30]

On the other hand, in cases involving the environment, there is a precautionary principle which states that "when human activities may lead to threats of serious and irreversible damage to the environment that is scientifically plausible but uncertain, actions shall be taken to avoid or diminish that threat."[31] The Rules of Procedure for Environmental Cases provides:

> RULE 20
> PRECAUTIONARY PRINCIPLE
>
> Section 1. *Applicability.* – When there is a lack of full scientific certainty in establishing a causal link between human activity and environmental effect, the court shall apply the precautionary principle in resolving the case before it.
>
> The constitutional right of the people to a balanced and healthful ecology shall be given the benefit of the doubt.
>
> Section 2. *Standards for application.* – In applying the precautionary principle, the following factors, among others, may be considered: (1) threats to human life or health; (2) inequity to present or future generations; or (3) prejudice to the environment without legal consideration of the environmental rights of those affected.

The precautionary principle seeks to protect the rights of the present generation as well as to enforce intergenerational responsibility, that is, the present generation should promote sustainable development and act as stewards or caretakers of the environment for the benefit of generations yet unborn. In its essence, the precautionary principle calls for the exercise of caution in the face of risk and uncertainty. It acknowledges the peculiar circumstances surrounding environmental cases in that "scientific evidence is usually insufficient, inconclusive or uncertain and preliminary scientific evaluation indicates that there are reasonable grounds for concern" that there are potentially dangerous effects on the environment, human, animal, or planet health. For this reason, the precautionary principle requires those who have the means, knowledge, power, and resources to take action to

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30 Id. at 802.

31 Section 4(f), RULES OF PROCEDURE IN ENVIRONMENTAL CASES.

prevent or mitigate the harm to the environment or to act when conclusively ascertained understanding by science is not yet available.[32]

The right to health, which is an indispensable element of the right to life, deserves the same or even higher degree of protection. Thus, if it is scientifically plausible but uncertain that any foreign substance or material ingested or implanted in the woman's body may lead to threats of serious and irreversible damage to her or her unborn child's right to life or health, care should be taken to avoid or diminish that threat. The principle of prudence requires that such a rule be adopted in matters concerning the right to life and health. In the face of the conflicting claims and findings presented by the parties, and considering that the right to health is inextricably intertwined with the right to life, it is proper to refer to the principle of prudence, which is the principle relied on by the framers of the 1987 Constitution on matters affecting the right to life. Thus, any uncertainty on the adverse effects of making contraceptives universally accessible on the life and health of the people, especially of women, should be resolved in a way that will promote life and health.

In the same vein, the application by logical and actual necessity of the precautionary principle also gains relevance in the discussion of the implications of the RH Law on the people's right to health. The unresolved medical issue on the potentially life-threatening effects of hormonal contraceptives and IUDs demands a cautious approach in the face of risk and uncertainty so as to prevent or mitigate the harm or threat of harm to the people, particularly to women.

The principle of prudence and the precautionary principle in matters concerning the right to life and health may be better promoted by continuing the regulation of the sale, dispensation and distribution of contraceptive drugs and devices under Republic Act No. 4729[33]:

> Section 1. It shall be unlawful for any person, partnership, or corporation, to sell, dispense or otherwise distribute whether for or without consideration, any contraceptive drug or device, unless such sale, dispensation or distribution is by a duly licensed drug store or pharmaceutical company **and with the prescription of a qualified medical practitioner**. (Emphasis supplied)

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32 Annotation to the Rules of Procedure for Environmental Cases.

33 Otherwise known as "An Act to Regulate the Sale, Dispensation and/or Distribution of Contraceptive Drugs and Devices."

Republic Act No. 4729 provides for a controlled access policy and requires that the sale, dispensation or distribution of any contraceptive drug or device should be made only by a duly licensed drug store or pharmaceutical company **pursuant to a doctor's prescription**. On the other hand, with its thrust of providing universal access to contraceptives, the RH Law gives the impression that it requires, under pain of criminal prosecution, even persons other than doctors of medicine (such as **nurses**, **midwives**, **public health workers**, and **barangay health workers**) to distribute contraceptives.[34]

Considering the relevant medical issues and health concerns in connection with contraceptives and devices, the regulated framework under Republic Act No. 4729 where contraceptive drugs and devices are sold, dispensed or distributed only by duly licensed drug stores or pharmaceutical companies pursuant to a doctor's prescription is no doubt more in harmony with the principle of prudence and the precautionary principle than the apparently unrestricted or universal access approach under the RH Law. This is so as the bodies of women may react differently to said drugs or devices depending on many factors that only a licensed doctor is capable of determining. Thus, the universal access policy should be read as qualified by the regulated framework under Republic Act No. 4729 rather than as impliedly repealing the said law.

The RH Law and the Freedom of Religion and Freedom of Speech

Freedom of religion and freedom of speech are among our people's most cherished liberties. Petitioners assert that these freedoms are seriously infringed by the RH Law.

Freedom of Religion

Religious freedom is guaranteed under Section 5, Article III of the 1987 Constitution:

> Section 5. No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or

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[34] *See* Section 23 (a), RH Law in conjunction with Section 4 (n), RH Law.

> preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.

According to petitioners, the RH Law compels them to act against their religious beliefs and threatens them with criminal sanction if they insist on exercising the teachings of their faith. They point to Sections 7 and 23 (a)(3) of the RH Law as the provisions impinging on their religious freedom.

Petitioners assail Section 7's directive to extend family planning services to paying patients of private health facilities with the exception of non-maternity specialty hospitals and hospitals owned and operated by a religious group. The exception is, however, subject to the alternative mandate of referring the person seeking reproductive health care and services to another health facility which is conveniently accessible. Thus, while private health facilities run by conscientious objectors have no duty to render the reproductive health care and services required under the RH Law, such facilities are mandated to refer the patient to another health facility which will perform the said services. This same obligation to refer to another health care provider is found in Section 23 (a)(3), which imposes criminal sanctions on any private or public health care provider which refuses to extend quality health care services and information to a person seeking reproductive health service and information.

Petitioners claim that the RH Law does not truly respect the religious freedom of a conscientious objector when it imposes upon the latter the duty to refer a person seeking reproductive health services to another health care provider. The imposition of such duty to refer makes the referring objector complicit to the methods and acts of the referred health care provider. Thus, petitioners assert that while the law does not directly violate the religious freedom of the conscientious objector, there is still an indirect violation of religious freedom.

For its part, the Government claims that, contrary to petitioners' contention, the RH Law does not violate petitioners' religious freedom. Rather, the RH Law recognizes and accommodates a person's right to exercise his or her religion. According to the Government, the mandate of Section 5, Article III of the 1987 Constitution is to protect and promote religious liberty; the freedom from any government compulsion to adhere to a specific religion or to none at all. Congress, in enacting the RH Law, recognized and acknowledged a person's right to his faith by expressly providing in Section 2 of the RH Law that the State recognizes and guarantees the "right to choose and make decisions for themselves in

accordance with their religious convictions", particularly, the "right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood". Moreover, Section 3, which lays down the guiding principles for the implementation of the RH Law, expressly provides in its paragraph (h) that the "State shall respect individuals' preferences and choice of family planning methods that are in accordance with their religious convictions and cultural beliefs, taking into consideration the State's obligations under various human rights instruments." Clearly, therefore, the RH Law was crafted within the context that each person has a religious belief deserving of recognition and respect. The general direction of the RH Law therefore is to accommodate. This principle of religious tolerance and acceptance is concretized in its Sections 7 and 23.[35] According to the Government:

> Based on Section 7, a private health facility owned and operated by a religious group has the option to provide the full range of modern family planning methods. However, if due to its religious convictions it shall opt not to do so, it is duty bound to immediately refer the person seeking such care to a conveniently accessible health facility which is capable of doing so.
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> Section 23 (a)(3) similarly affords a health care provider the right to refuse to treat a person due to his religious convictions, on the condition that he must also refer the person to another health care provider who is capable and willing to extend the service.
>
> The RH Law excludes from its coverage private health facilities owned and operated by religious groups and health care providers, who have objections based on their religious convictions. The exemption provides that these private health facilities and health care providers cannot be compelled or coerced to provide reproductive health services when such would be in conflict with their religious beliefs.
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> Having the choice is the essence of religious liberty. Since these private health facilities and health care providers are not compelled to disobey their religious beliefs, their freedom of religion is not offended.[36]

The Government further explains that the requirement to immediately refer a person to another health facility and health care provider does not offend religious freedom. Section 5, Article III of the 1987 Constitution is a protection against dogmatic compulsion and not a shield against civic obligations. Sections 7 and 23 (a)(3) of the RH Law generally allow private health facilities and health care providers to refuse, based on religious

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35 Consolidated Comment, pp. 56-58.

36 Id. at 58.

grounds, to extend services and information to persons requesting for such. This "opt-out clause" is the Government's accommodation to the religious beliefs of these private health facilities and health care providers. There is therefore no burden on their religious freedom and the "opt-out clause" does not offend the objector's religious freedom.[37]

For the Government, religious liberty is the freedom from coercion by the State to adhere either to a specific religion or to none at all. The act of referring a person to another health facility or health care provider is not a compulsion for the religious private health facility and health care provider either to violate their religious beliefs or to accept another's beliefs. Moreover, the accommodation afforded by the State to religion is not a shield against civic obligations, but must be balanced with another's right to health and information. That is the very purpose of the proviso that a religious private health facility or a health care provider who has a conscientious objection must nonetheless refer the patient to another non-objecting facility and health care provider.[38]

The position of petitioners is correct.

Estrada v. Escritor[39] established the test to be used in deciding cases involving freedom of religion:

> xxx in resolving claims involving religious freedom (1) **benevolent neutrality** or **accommodation**, whether mandatory or permissive, is the spirit, intent and framework underlying the religion clauses in our Constitution; and (2) in deciding [a] plea of exemption based on the Free Exercise Clause …, it is the **compelling state interest** test, the strictest test, which must be applied.

In addressing the constitutionally guaranteed religious freedom of the people, the State should adopt an attitude of benevolent neutrality or accommodation. And on the matter of carving an exemption to the free exercise aspect of religious freedom, a compelling state interest must be shown and the least restrictive approach should be taken.

The Government essentially agrees with petitioners that the duty to refer is a condition imposed on conscientious objectors or those, who on the

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37 Id. at 58-59.
38 Id. at 59-62.
39 A.M. No. P-02-1651 (Formerly OCA I.P.I No. 00-1021-P), June 22, 2006.

basis of their religious beliefs, are exempted from the legal obligations to provide a full range of modern family planning methods under Section 7. They are required to immediately refer a person seeking reproductive health care and services to another health care service provider within the same facility or one which is conveniently accessible under Section 23 (a)(3) of the RH Law. The contending parties, however, disagree on the implications of such duty to refer as a condition on a conscientious objector's right to free exercise of religion. Petitioners posit that such a condition is unconstitutional for being an undue burden on their right to freely exercise their religious beliefs, while the Government maintains that it is a constitutionally valid limitation on the religious freedom of religious objectors.

I join the majority in upholding the petitioners' position.

The duty to refer as a condition on conscientious objection is a restriction of a conscientious objector's freedom to exercise his or her religious beliefs. While a conscientious objector is allowed, on grounds of religious freedom, to be exempted from the legal obligations imposed under Sections 7 and 23 (a)(3) of the RH Law, he or she is nonetheless imposed a substitute duty, that of referral of a person seeking reproductive health care and services to another health care service provider who may be willing and able to provide a full range of modern family planning methods or reproductive health care services.

Estrada v. Escritor, in recognition of freedom of religion as a preferred right, observed the standard of strict scrutiny and required a showing by the Government of a compelling state interest to justify the curtailment of the right to freely exercise one's religious beliefs. In these present cases, the Government failed to pass strict scrutiny as it was not able to give any clear compelling state interest. Worse, as pointed out by the *ponencia* of Justice Mendoza, during the oral arguments, the Government did not even see the need to show a compelling state interest on the flimsy and off-tangent argument that the legal obligations imposed by the law is "an ordinary health legislation" and not a "pure free exercise matter." Yet, by recognizing conscientious objectors as constituting a class or group that is exempt from certain legal obligations under Sections 7 and 23 (a)(3), the RH Law itself acknowledges that the religious beliefs of conscientious objectors and their constitutionally guaranteed right to the free exercise of such beliefs are entitled to respect and protection. This recognition afforded by the RH Law to conscientious objectors is irreconcilable with the Government's position that the imposition of the substitute duty to refer is outside the protection afforded to free exercise. It also contradicts the Government's

stance that the compelling interest test should not be applied because the accommodation given by the RH Law to conscientious objectors is justified by the standard of the balancing of the freedom of religion of conscientious objectors with the interests of patients to health and information.

The guarantee of free exercise of religion proscribes the imposition of substantial burden upon the said right absent any compelling state interest to justify the same. A governmental restriction substantially burdens religious freedom when it bans behavior that the objectors see as religiously compelled, or mandates behavior that the objectors see as religiously prohibited.[40] Requiring people to do something that "is forbidden by [their] faith" qualifies as a substantial burden on religious practice.[41] "While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial" and that is so even where the relevant "conduct proscribed by a religious faith" is indirect complicity in other conduct, and the complicity line that the religious claimant draws appears inconsistent or unsound to the reviewing court because "[i]t is not for [secular courts] to say that the line [the claimant] drew was an unreasonable one."[42] Thus, the law recognizes that requiring a person to do something that he or she sincerely sees as sinful is a "substantial burden" on his/her religion, and people's definition of "sinful" often includes sins of complicity and not just sins of direct action.[43]

Viewed under the lens of the above substantial burden standard, the substitute duty to refer imposed on conscientious objectors under Sections 7 and 23 (a)(3) is a substantial burden on a conscientious objector's right to the free exercise of religious beliefs as it mandates behavior that the objectors see as religiously prohibited even if done indirectly through complicity and not directly or personally. It places conscientious objectors in an unconscionable dilemma – either to violate the law or to violate their faith. Therefore, the substitute duty to refer under the said provisions of the RH Law violates the right to free exercise of religion of conscientious

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40 Volokh Eugene, What is the Religious Freedom Restoration Act?, citing *Sherbert v. Verner* (374 U.S. 398 [1963]) and *Wisconsin v. Yoder* (406 U.S. 205 [1972]), posted on December 2, 2013, www.volokh.com/2013/12/02/1a-religious-freedom-restoration-act/, last visited April 7, 2014.

41 Volokh Eugene, A Brief Note on the "Substantial Burden" Requirement, citing *United States v. Lee* (455 U.S. 252 [1982]) and *Hernandez v. Commissioner* (490 U.S. 680 [1989]), posted on December 5, 2013, www.volokh.com/wp-content/uploads/2013/12/hobbylobby.docx, last visited April 7, 2014.

42 Id. quoting *Thomas v. Review Board of the Indiana Employment Security Division* (450 U.S. 707 [1981]).

43 Volokh Eugene, *Hobby Lobby*, the Employer Mandate, and Religious Exemptions, posted on December 2, 2013, www.volokh.com/2013/12/02/hobby-lobby-employer-mandate-religious-exemptions/, last visited April 7, 2014.

objectors. In the matter of free exercise of religion, what cannot be compelled to be done directly may also not be compelled to be done indirectly.

Religious or moral diversity in the health care profession is a public good. Preserving religious and moral diversity within the health care profession helps to guard against the tragic ethical mistakes that occur when dissent is silenced.[44] This is true as regards the free exercise of religion. This is also true as regards the freedom of speech of medical practitioners.

Freedom of Speech

The right to speak – freedom of speech – is a fundamental right.[45] That liberty is specifically protected under Section 4, Article III of the 1987 Constitution:

> Section 4. **No law shall be passed abridging the freedom of speech, of expression**, or the press, or the right of the people peaceably to assemble and petition the government for redress of grievances. (Emphasis supplied)

Petitioners argue that the RH Law unduly restricts the freedom of expression and compels private health care service providers which conscientiously object to the RH Law to be a mouthpiece of the Government's RH Law program. They are required under subparagraphs (1) and (3), paragraph (a) of Section 23 to participate in the information dissemination component of the Government's RH Law program, under pain of criminal sanction. The assailed provision reads:

> SEC. 23. *Prohibited Acts*. – The following acts are prohibited:
>
> (a) Any health care service provider, whether public or private, who shall:

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44 Galston, William and Melissa Rogers, *Health Care Providers' Consciences and Patients' Needs: The Quest for Balance*, http://www.brookings.edu/~/media/research/files/papers/2012/2/23%20health%20care%20galston%20rogers/0223_health_care_galston_rogers.pdf, last accessed on November 11, 2013.

45 *See Social Weather Stations, Inc. v. Commission on Elections*, 409 Phil. 571, 590 (2001), speaking of the "fundamental right of expression"; and, *MVRS Publications, Inc. v. Islamic Da'wah Council of the Philippines, Inc.*, 444 Phil. 230, 253 (2003), speaking of the "fundamental right to free speech".

> (1) **Knowingly withhold information or restrict the dissemination thereof, and/or intentionally provide incorrect information regarding programs and services on reproductive health** including the right to informed choice and access to a full range of legal, medically-safe, non-abortifacient and effective family planning methods;
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> x x x x x x x x x
>
> (3) **Refuse to extend quality health care services and information on account of the person's marital status, gender, age, religious convictions, personal circumstances, or nature of work**: *Provided*, That the conscientious objection of a health care service provider based on his/her ethical or religious beliefs shall be respected; however, the conscientious objector shall immediately refer the person seeking such care and services to another health care service provider within the same facility or one which is conveniently accessible: *Provided, further*, That the person is not in an emergency condition or serious case as defined in Republic Act No. 8344, which penalizes the refusal of hospitals and medical clinics to administer appropriate initial medical treatment and support in emergency and serious cases; x x x (Emphases supplied)

The Government responds to the contention of the petitioners in this way:

> **Section 23 (A)(1) of the RH Law does not violate the freedom of expression under Section 4, Article III of the 1987 Philippine Constitution.**
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> *The prohibition in Section 23 (A)(1) of the RH Law is against prohibited conduct, not speech.*
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> It bears repeating at the outset that Congress has the inimitable power to define unlawful acts that need to be regulated or prohibited. The power to define crimes and prescribe their corresponding penalties is legislative in nature and inherent in the sovereign power of the State to maintain social order as an aspect of police power. The legislature may even forbid and penalize acts formerly considered innocent and lawful provided that no constitutional rights have been abridged.
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> Withholding or restricting information or providing incorrect information primarily contemplate actions and not speech. To argue otherwise on the basis that speech accompanies the prohibited conduct is to improperly de-compartmentalize the act. The rule is that conduct may be regulated even though it is intertwined with expression. The ruling of

this Honorable Court in **Southern Hemisphere Engagement vs. Anti-Terrorism Council** is instructive:

> Petitioners' notion on the transmission of message is entirely inaccurate, as it unduly focuses on just one particle of an element of the crime. Almost every commission of a crime entails some mincing of words on the part of the offender like in declaring to launch overt criminal acts against a victim, in haggling on the amount of ransom or conditions, or in negotiating deceitful transaction. xxx xxx xxx
>
> Utterances not elemental but inevitably incidental to the doing of the criminal conduct alter neither the intent of the law to punish socially harmful nor the essence of the whole act as conduct and not speech.

The fact, therefore, that the conduct proscribed under Section 23 (A)(1) may be carried out accompanied with some speech does not make it protected speech under Section 4, Article III of the Constitution. It rarely has been suggested that the constitutional freedom of speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. As elucidated in the leading case of **Giboney v. Empire Storage & Ice Co.**:

> xxx But placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control. *Virginia Electric Co. v. Board*, 319 U.S. 533, 319 U.S. 539; *Thomas v. Collins*, 323 U.S. 516, 323 U.S. 536, 323 U.S. 537, 323 U.S. 538, 323 U.S. 539-540. Nor can we say that the publication here should not have been restrained because of the possibility of separating the picketing conduct into illegal and legal parts. *Thomas v. Collins*, supra, at 323 U.S. 547. For the placards were to effectuate the purposes of an unlawful combination, and their sole, unlawful immediate objective was to induce Empire to violate the Missouri law by acquiescing in unlawful demands to agree not to sell ice to non-union peddlers. **It is true that the agreements and course of conduct here were, as in most instances, brought about through speaking or writing. But it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed**. See e.g., *Fox v. Washington*, 236 U.S. 273, 236 U.S. 277; *Chaplinsky v. New Hampshire*, 315 U.S. 568. Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in

> restraint of trade, as well as many other agreements and conspiracies deemed injurious to society.
>
> Similarly in the instant case, any speech or communication used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control. To reiterate, the important public interest advanced by the RH Law is to provide accessible, effective and quality reproductive health care services to ensure maternal and child health, the health of the unborn, safe delivery and birth of healthy children, and sound replacement rate, in line with the State's duty to promote the health, responsible parenthood, social justice and full human development. This objective of the State will be rendered inutile without giving the people full, unbiased and accurate information about reproductive health care services. This is what Section 23 (A)(1) of the RH Law wishes to secure.
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> Also, it must be underscored that the RH Law promotes the ideas of informed choice and voluntarism. Informed choice and voluntarism means effective access to information that allows individuals to freely make their own decision, upon the exercise of free choice and not obtained by any special inducements or forms of coercion or misinterpretation, based on accurate and complete information on a broad range of reproductive health services. Thus, in achieving this end, a health care service provider must act with good faith in the exercise of his or her duties. By good faith means refraining from coercing or misleading patients with incomplete, inaccurate and incorrect information. It cannot be gainsaid that the State has the right and duty to prohibit and penalize a health care service provider who acts otherwise.
>
> Fittingly, legislative determination of the breadth of public interest should command respect for Congress is the constitutional body vested with the power to enact laws. Its representative composition induces judgment culled from the diverse regions of the country. Normally, this should assure that a piece of police legislation is a reflection of what public interest contemporaneously encompasses.[46]

Section 23 (a)(1) of the RH Law declares the following acts, if committed by any health care service provider, as criminal:

> (a) knowingly withholding information or restricting the dissemination of such information; and,
> (b) intentionally providing incorrect information regarding programs and services on reproductive health, including the right to informed choice and access to a full range of legal, medically-safe, non-abortifacient and effective family planning methods.

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[46] Consolidated Comment, pp. 79-82.

Section 23 (a)(1) of the RH Law regulates both the "professional speech" and "speech as a professional" of a doctor or a health care service provider. "Professional speech" refers to the communication between doctor and patient that occurs in the course of ongoing medical consultation or treatment. It pertains to speech uttered (in the case of Section 23 (a)(1), speech either not uttered or should not have been uttered) in the course and conduct of professional practice of the doctor or health care provider.[47] "Speech of/as a professional", on the other hand, is the speech made by a doctor or health care service provider to the public in general, such as an Opinion-Editorial (Op-Ed)[48] piece submitted to a newspaper or a speech given in a conference or statements given during an interview.[49]

The prohibition against the acts covered under Section 23 (a)(1) is aimed at promoting the universal access policy of the RH Law. In particular, it mandates doctors and other health care service providers, when speaking to a specific client or to the public at large, to provide and disseminate full information on modern family planning methods, especially the use of IUDs and contraceptives, in line with the Government's universal access policy. In accordance with Section 23 (a)(1), doctors and other health care service providers must give patients and the public alike information and advice on the merits of reproductive health, the benefits of family planning, and the advantages of the use of contraceptives as "legal, medically-safe, non-abortifacient and effective family planning methods". Thus, the Government has determined the content of the information to be given and disseminated by doctors and health care service providers.

In its proper context, the prohibited act of either withholding or restricting the dissemination of information on reproductive health covers the decision of a doctor or a health care service provider in his/her personal and professional capacity not to indorse or unfavorably talk about the use of contraceptives. On the other hand, the prohibited act of "intentionally providing incorrect information" on reproductive health programs and services logically covers the medical opinion of a doctor that is critical of the use of contraceptives and contradicts the FDA, such as giving advice that the use of IUDs and contraceptives may be unhealthy to women. Thus, Section 23 (a)(1) of the RH Law includes both the act of not giving the Government-mandated information and the act of giving information contrary to or different from that mandated by the Government, whether the basis of the doctor or health care service provider is his or her religious belief or

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47 *See* Post, Robert, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, U. ILL. L.REV. 939, 947 (2007).

48 Id.

49 Id.

professional opinion. In this connection, it is worth noting that there is no provision to accommodate the conscientious objector under Section 23 (a)(1). Nor does Section 23 (a)(1) have room for a doctor or health care service provider who acts against the said provision on the ground of that doctor's well-considered professional opinion.

Under Section 23 (a)(1), the dissemination of information is strictly regimented. Every doctor or health care provider should walk in unison and march in cadence to the RH Law's tune. Under pain of criminal prosecution, no doctor or health care service provider may refuse to march, or follow the beat of a different drummer, or hum his own tune. In practical application, regardless of their religious convictions, it is felonious for doctors and other health care service providers to talk of natural family planning only or to limit their advice, whether in personal or professional capacity, to natural methods of family planning only. Regardless of their religious convictions and professional opinion, too, it is criminal for them to make statements about the risks IUDs and contraceptives pose to both the unborn and the mother where the FDA has already made a determination that such IUDs and contraceptives are "legal, medically-safe, non-abortifacient and effective family planning methods."

Thus, Section 23 (a)(1) effectively compels the doctor or health care provider to make a speech that promotes the Government's RH Law program, particularly the use of contraceptive drugs and devices, regardless of the doctor's religious conviction or well-considered professional opinion. It dictates upon the doctor what should be said and what should not be said in matters of reproductive health. In other words, Section 23 (a)(1) requires the doctor or health care service provider to make a compelled speech, a speech that may be against the doctor's spiritual belief or professional opinion. Moreover, the threat of criminal sanction enhances the chilling effect of the law and serves to deter a health care service provider from expressing his professional views or exercising his religious reservations.

The ratiocination of the Government utilizing the speech-conduct dichotomy does not hold water. In particular, the Government characterizes the acts punished under Section 23 (a)(1) (namely, withholding or restricting information or providing incorrect information) as conduct, not speech, and therefore not covered by the constitutional guarantee on freedom of speech.[50]

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[50] Consolidated Comment, pp. 79-82.

However, the "conduct" penalized under Section 23 (a)(1) is essentially the act of not speaking or speaking against the Government's RH Law message, particularly about artificial methods of family planning. What the law punishes, therefore, is the assertion by the doctor or health care service provider of his or her freedom of the mind as a professional.

The freedom of speech is a protection of the individual's freedom of thought and it includes both the right to speak freely and the right to refrain from speaking at all. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."[51] In other words, the freedom of speech guarantees that no person can be compelled by the Government to carry and convey the Government's ideology.

Compelled speech is not free speech. One who is free to speak cannot be made to say something against his will or violative of his beliefs. The Government may not require a person to subscribe to and promote the Government's ideology. Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes freedom of expression.[52]

Indeed, "[a] society that tells its doctors under pain of criminal penalty what they may not tell their patients is not a free society." [53] The RH Law, however, precisely does that to our society. It dictates upon the doctor what to tell his/her patients in matters of family planning, and threatens the doctor with criminal prosecution in case of non-compliance. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or to manipulate the public debate through coercion rather than persuasion.[54]

The value of free speech concerning the matter of the RH Law for health care providers in the marketplace of ideas is significant:

> [T]he driving force and strongest argument for retaining room for moral refusers in the profession is the fact that many of the issues facing physicians raises metaphysical questions entirely immune to empirical testing or any other comprehensive doctrine for distinguishing right from wrong. … [W]e benefit from maintaining diverse viewpoints, excluding

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51 *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).
52 *Turner Broadcasting System v. Federal Communication Commission*, 512 U.S. 622, 640 (1994).
53 *Poe v. Ullman*, 367 U.S. 497 (1961), Douglas, J., dissenting.
54 *Turner Broadcasting System v. Federal Communication Commission*, *supra* note 52 at 641.

> only arguments that are entirely illogical, for the ensuing debate will help siphon out the most accurate version of moral truth as errors are revealed and persuasive arguments are strengthened through their collision with error.[55]

Chavez v. Gonzales[56] further expounds on the constitutional value of free speech:

> Freedom of speech and of the press means something more than the right to approve existing political beliefs or economic arrangements, to lend support to official measures, and to take refuge in the existing climate of opinion on any matter of public consequence. When atrophied, the right becomes meaningless. **The right belongs as well -- if not more -- to those who question, who do not conform, who differ**. The ideas that may be expressed under this freedom are confined not only to those that are conventional or acceptable to the majority. **To be truly meaningful, freedom of speech and of the press should allow and even encourage the articulation of the unorthodox view, though it be hostile to or derided by others; or though such view "induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."** To paraphrase Justice Holmes, it is freedom for the thought that we hate, no less than for the thought that agrees with us.[57]

To allow the Government to target particular views or subjects permits the Government to greatly distort the marketplace of ideas.[58] Worse, to impose the Government's ideology and restrict the available speech in the market only to Government-manufactured and mandated speech is a monopoly of ideas that is anathema to and destructive of a marketplace. It defeats the public good, particularly that of a free and diverse civil society whose institutions help shape individuals and provide alternatives to publicly defined conceptions of the human and civic good.[59] Thus, information on RH matters that is strictly regimented and severely regulated by the Government stunts rather than promotes fully informed decisions.

The rule is that a **content-based regulation** "bears a heavy presumption of invalidity and is measured against the **clear and present danger rule**." It will pass constitutional muster only if justified by a

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55 Holly Fernandez Lynch, CONFLICTS OF CONSCIENCE IN HEALTH CARE: AN INSTITUTIONAL COMPROMISE, pp. 84-85, cited in Galston and Rogers, *supra* note 44.

56 569 Phil. 155 (2008).

57 Id. at 197-198.

58 Chemerinsky, Erwin, CONSTITUTIONAL LAWS: PRINCIPLES AND POLICIES, p. 934 (2006).

59 Galston and Rogers, *supra* note 44.

compelling reason, and the restrictions imposed are neither overbroad nor vague.[60]

Section 23 (a)(1), a content-based regulation, is heavily burdened by a presumption of unconstitutionality. Placed under the test of strict scrutiny,[61] the Government miserably failed to advance a compelling reason that would overcome the presumption of the RH Law's invalidity. The Government simply invokes the universal access policy but such policy may be advanced without unnecessarily curtailing the right of the doctors or health care service providers to speak their minds freely, and not what the Government commands. In particular, doctors or health care service providers could have been allowed to express their considered professional opinion with the requirement to disclose the fact that their opinion differs from the Government's stand or policy in order to ensure a free and well-informed decision on the matter. Moreover, the overly broad and vague language of Section 23 (a)(1) primarily contributes to the negative chilling impact of that provision on even the health care service provider's "speech as a professional."

The Government also failed to show that speech may be compelled or restrained because there is substantial danger that the speech will likely lead to an evil the government has a right to prevent. There is no demonstration of evil consequences sought to be prevented which are substantive, extremely serious and highly imminent.[62] In other words, no clear and present danger to be prevented has been established.

All told, Section 23 (a)(1) of the RH Law, a tool to promote the universal access policy established in Section 7 of that law, constitutes an undue and unconstitutional restriction of the freedom of speech.

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60 *Chavez v. Gonzales*, *supra* note 56 at 207-208.

61 *See Newsounds Broadcasting Network, Inc. v. Dy*, G.R. Nos. 170270 & 179411, April 2, 2009, 583 SCRA 333, 355. In particular, the Court said in this case:

> The Court is of the position that the actions of the respondents warrant heightened or strict scrutiny from the Court, the test which we have deemed appropriate in assessing content-based restrictions on free speech, as well as for laws dealing with freedom of the mind or restricting the political process, of laws dealing with the regulation of speech, gender, or race as well as other fundamental rights as expansion from its earlier applications to equal protection. The immediate implication of the application of the "strict scrutiny" test is that the burden falls upon respondents as agents of government to prove that their actions do not infringe upon petitioners' constitutional rights. As content regulation cannot be done in the absence of any compelling reason, the burden lies with the government to establish such compelling reason to infringe the right to free expression.

62 *Chavez v. Gonzales*, *supra* note 56 at 200.

Section 23 (a)(1) of the RH Law is constitutionally infirm on another ground. It defeats and contradicts the RH Law's own declared policy in the first paragraph of its Section 2 that the State recognizes and guarantees the right of all persons "to education and information, and the right to choose and make decisions for themselves in accordance with their religious convictions, ethics, cultural beliefs, and the demands of responsible parenthood," as well as the guiding principle in its Section 3 that the "right to make free and informed decisions, which is central to the exercise of any right, shall not be subjected to any form of coercion and must be fully guaranteed by the State, like the right itself." More importantly, it deprives the people of their constitutional right to information on matters of public concern, which is guaranteed under Section 7, Article III of the 1987 Constitution. The doctors are being coerced to toe the line in RH matters by compelling them, under pain of criminal sanction, to promote the Government's RH Law program and prohibiting them from contradicting the said government-sponsored RH Law program, even if it may go against his well-studied professional opinion. It therefore denies the target beneficiary of the program, the recipients of contraceptive drugs and devices, of valuable information that is the premise of the right to make a truly free and fully informed decision on a matter affecting the right to life of the unborn and a woman's right to health. Informed decision-making involves informed consent and there can be no real informed consent until and unless one is provided full information about the benefits, risks and alternatives, taking into account the person's physical well-being, personal circumstances, beliefs, and priorities.

The RH Law and the Sanctity of the Family

The RH Law has a substantial and significant impact on the declared State policy on family in Section 12, Article II of the 1987 Constitution:

> Section 12. The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. It shall equally protect the life of the mother and the life of the unborn from conception. The natural and primary right and duty of parents in the rearing of the youth for civic efficiency and the development of moral character shall receive the support of the Government.

The above constitutional provision has three interrelated and complementary parts.

First, it is a recognition of the family as a basic autonomous social institution. It is an assertion that the family is anterior to the State and not a creation of the State. It is a guarantee that the family may not be subjected to instrumentalization by the State.[63]

Second, it is a guarantee of equal protection to the lives of both the mother and the unborn. The unborn's entitlement to protection commences "from conception," that is, from the moment of conception. The intention is to protect life from its beginning, and the assumption is that human life begins at conception and that conception takes place at fertilization. While it does not assert with certainty when human life precisely begins, it reflects the view that, in dealing with the protection of life, it is necessary to take the safer approach.[64]

The provision on the protection of the unborn is an affirmation that, save in emergency or serious cases where the life of the mother is at stake, the life of the unborn may not be sacrificed merely to save the mother from emotional suffering or to spare the child from a life of poverty. Moreover, the provision is intended to prevent the adoption by the State of the doctrine in *Roe v. Wade*,[65] the American abortion case.[66]

Third, it is an acknowledgment of the natural right and duty of parents, as heads of the family, in preparing their children for a socially useful and upright life. The 1987 Constitution modifies the right and duty of parents "in the rearing of the youth for civic efficiency and the development of moral character" under the 1935 and 1973 Constitutions and characterizes such right and duty not only as "natural" but also as "primary." Such modification means that the right and duty of parents is superior to and precedes that of the State.[67]

In the exercise of their natural right and duty, parents are entitled to the support of laws designed to aid them in the discharge of their responsibility. Moreover, in recognition of the supporting role of the State in the upbringing of the children, the law recognizes in the State a power of

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63 Bernas, *supra* note 20 at 83, pointing to I RECORDS 689-698, 721-723, IV RECORDS 596-602, 668-700, 705-761.

64 Id. at 84.

65 410 U.S. 113 (1973).

66 Bernas, *supra* note 20 at 83.

67 Id. at 85, citing IV RECORDS 809.

control over the conduct of children which reaches beyond the scope of its authority over adults.[68]

To further emphasize the importance of the family as an institution in our society, for the first time in our constitutional history, the Constitution devoted an entire Article on the family, Article XV:

> Article XV
> The Family
>
> *Section* 1. The State recognizes the Filipino family as the foundation of the nation. Accordingly, it shall strengthen its solidarity and actively promote its total development.
>
> *Section* 2. Marriage, as an inviolable social institution, is the foundation of the family and shall be protected by the State.
>
> *Section* 3. The State shall defend:
>
> 1. The right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood;
>
> 2. The right of children to assistance, including proper care and nutrition, and special protection from all forms of neglect, abuse, cruelty, exploitation and other conditions prejudicial to their development;
>
> 3. The right of the family to a family living wage and income; and
>
> 4. The right of families or family associations to participate in the planning and implementation of policies and programs that affect them.
>
> *Section* 4. The family has the duty to care for its elderly members but the State may also do so through just programs of social security.

The significance of Article XV is explained by Justice Cecilia Muñoz Palma, President of the Constitutional Commission which drafted the 1987 Constitution, to wit:

> For the first time, the Constitution devotes a separate Article on the Family thereby giving due recognition to the fact that the family is a basic

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[68] Id. at 86, citing *Prince v. Massachusetts*, 321 U.S. 158 (1944) and *Ginsberg v. New York*, 390 U.S. 629 (1968).

> autonomous social institution and, therefore, the State shall uphold the sanctity of family life, protect the stability of marriage and the right to found a family in accordance with one's religious beliefs and convictions, and responsible parenthood. At this time in the history not only of our country but of all mankind when the institution of the family is subjected to assaults against its inherent dignity as an instrument to God's creation, constitutional provisions which give protection and guarantees to rights and duties of parents are safeguards against the erosion of moral and spiritual values.[69]

Together, Section 12, Article II, and the entire Article XV are the provisions relating to the family or "Family Provisions" of the Constitution. They form one of the common threads that runs through the instant petitions. Also, these Family Provisions purport to be the heart of the RH Law as they are among the declared policies of the law. Upon careful dissection in the pleadings of the parties, the oral arguments, and the deliberations of the members of the Court, that heart has been exposed as artificial and incapable of sustaining the RH Law's Family Provisions.

The RH Law as worded contradicts the constitutional text of the Family Provisions as well as the established constitutional principles on the family. The pertinent policy declarations are contained in Section 2 of the RH Law quoted hereunder:

> SEC. 2. *Declaration of Policy*. – x x x
>
> Moreover, the State recognizes and guarantees the promotion of gender equality, gender equity, women empowerment and dignity as a health and human rights concern and as a social responsibility. The advancement and protection of women's human rights shall be central to the efforts of the State to address reproductive health care.
>
> x x x x x x x x x
>
> **The State likewise guarantees universal access to medically-safe, non-abortifacient, effective, legal, affordable, and quality reproductive health care services, methods, devices, supplies which do not prevent the implantation of a fertilized ovum as determined by the Food and Drug Administration (FDA) and relevant information and education thereon according to the priority needs of women, children and other underprivileged sectors**, giving preferential access to those identified through the National Household Targeting System for Poverty Reduction (NHTS-PR) and other government measures of identifying

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69 Closing remarks delivered on the final session of the Constitutional Commission, October 15, 1986, Batasang Pambansa, Quezon City.

> marginalization, who shall be voluntary beneficiaries of reproductive health care, services and supplies for free.

As will be shown below, in relation to other provisions of the RH Law, the guarantee of "universal access" to so-called "medically-safe, non-abortifacient, effective, legal, affordable, and quality reproductive health care services, methods, devices, supplies" ensured by the RH Law provisions contradicts or, at the very least, seriously impairs the constitutional protections extended to the family.

Spousal Consent

The RH Law mounts an attack on the sanctity of the family on two fronts, one of which is through its penal provision, particularly Section 23 (a). Acts of health care service providers, whether public or private, that will impede or prevent the universal access policy are meted penal sanction. Also, the spousal consent requirement under Section 23 (a)(2)(i) negatively impacts on the family, in general, and on the relationship of the spouses, in particular. Thus, the RH Law's war on the family has great collateral damage, particularly on the married spouses and on minors.

An essential and necessary element of the constitutional protection for the family is the duty and undertaking of the State to "strengthen its solidarity" by, among others, defending the "right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood."[70]

In line with the duty of the State to defend the right of spouses to found a family, as well as with the constitutional recognition of the fundamental equality before the law of women and men,[71] the Family Code has adopted the theory of unity of direction, under which the spouses enjoy legal equality, and discarded the doctrine of marital authority of the husband under the Civil Code.[72]

Among the manifestations of the theory of unity of direction in the Family Code are the joint authority of husband and wife to fix the family

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70 *See* Sections 1 and 3(1), Article XV, 1987 CONSTITUTION.

71 *See* Section 14, Article II, 1987 CONSTITUTION.

72 Tolentino, Arturo, I COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES, 344.

domicile,[73] the joint responsibility of the spouses to support the family,[74] the mutual right and duty of the spouses in the management of the household,[75] the joint administration and enjoyment by the spouses of the community property or conjugal partnership,[76] and the joint parental authority of the father and the mother over the persons of their common children.[77]

With respect to the founding of a family, Section 19 (c) of Republic Act No. 9710, otherwise known as the "Magna Carta of Women," provides that women shall have equal rights in all matters relating to marriage and family relations, including the "**joint decision** on the number and spacing of their children." Another specific provision of the Family Code recognizing the theory of unity of direction in relation to the right of the spouses to found a family is the requirement under Article 164 of that law that both spouses must authorize a decision to have a child through artificial insemination.[78] Also, Republic Act No. 8552, otherwise known as the "Domestic Adoption Act of 1988," mandates that, as a rule, husband and wife shall adopt jointly.[79] These provisions recognize that the right to found a family pertains to both of the spouses and should be exercised by them jointly. They are an acknowledgment that the right to sexual intimacy mutually pertains to the spouses and, therefore, the concomitant right to procreate mutually pertains to the spouses and are jointly decided by them. A marriage cannot be viewed as harmonious if the marriage partners are fundamentally divided on the important and vital issue of having children. The RH Law is cognizant of this when it refers to "responsible parenthood" as "a **shared responsibility between parents** to determine and achieve the desired number of children, spacing and timing of their children according to

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73 Article 69, FAMILY CODE. In contrast, under Article 110 of the Civil Code, the authority to fix the family domicile was given to the husband alone.

74 Article 70, FAMILY CODE. In contrast, under Article 111 of the Civil Code, it was the responsibility of the husband to support the wife and the rest of the family.

75 Article 71, FAMILY CODE. In contrast, under Article 115 of the Civil Code, the wife manages the affairs of the household.

76 Articles 96 and 124, FAMILY CODE. While both spouses are the joint administrators of the community property under Article 206 of the Civil Code, the husband was the administrator of conjugal partnership under Article 165 of the Civil Code.

77 Article 211, FAMILY CODE; Article 172, CIVIL CODE; Article 17, CHILD AND YOUTH WELFARE CODE.

78 In particular, Article 164 of the Family Code provides:

> Art. 164. Children conceived or born during the marriage of the parents are legitimate.
>
> Children conceived as a result of artificial insemination of the wife with the sperm of the husband or that of a donor or both are likewise legitimate children of the husband and his wife, provided, that both of them authorized or ratified such insemination in a written instrument executed and signed by them before the birth of the child. The instrument shall be recorded in the civil registry together with the birth certificate of the child.

79 *See* the relevant portion of Section 7, Republic Act No. 8552. The exceptions to the general rule that husband and wife shall jointly adopt are as follows: (i) if one spouse seeks to adopt the legitimate son/daughter of the other; or (ii) if one spouse seeks to adopt his/her own illegitimate son/daughter, with the other spouse's consent; and (iii) if the spouses are legally separated from each other.

their own family life aspirations, taking into account psychological preparedness, health status, sociocultural and economic concerns consistent with their religious convictions."[80]

Another relevant constitutional principle is the fundamental equality before the law of men and women under Section 14, Article II of the 1987 Constitution:

> Section 14. The State recognizes the role of women in nation-building, and shall ensure the fundamental equality before the law of women and men.

As discussed above, the Family Code provisions reflecting the theory of unity of direction of the spouses operate on the principle that the husband and the wife enjoy equality before the law, that is, a parity of rights and obligations.[81]

In connection with the women's right to health, the pertinent part of Section 17 of the Magna Carta of Women provides:

> Section 17. *Women's Right to Health*. – (a) Comprehensive Health Services. – The State shall, at all times, provide for a comprehensive, culture-sensitive, and gender-responsive health services and programs covering all stages of a woman's life cycle and which addresses the major causes of women's mortality and morbidity: *Provided*, That **in the provision for comprehensive health services, due respect shall be accorded to women's religious convictions, the rights of the spouses to found a family in accordance with their religious convictions, and the demands of responsible parenthood, and the right of women to protection from hazardous drugs, devices, interventions, and substances**. x x x (Emphasis supplied)

Section 17 of the Magna Carta of Women is clear in its recognition that the right to health of a woman is qualified by various factors, including the "right of the spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood." It therefore takes into due consideration the concern that, when the right to health of a married woman will have implications on her rights and obligations as a wife and/or a mother, her right to health is important to her not merely as an individual woman but as a spouse and as a parent.

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80 Section 3 (v), RH Law.

81 Tolentino, *supra* note 72 at 344.

Yet, Section 23 (a)(2)(i) of the RH Law provides:

> SEC. 23. *Prohibited Acts*. – The following acts are prohibited:
>
> (a) Any health care service provider, whether public or private, who shall:
>
> x x x x x x x x x
>
> (2) Refuse to perform legal and medically-safe reproductive health procedures on any person of legal age on the ground of lack of consent or authorization of the following persons in the following instances:
>
> (i) Spousal consent in case of married persons: *Provided*, That in case of disagreement, the decision of the one undergoing the procedure shall prevail; x x x

As worded, Section 23 (a)(2)(i) allows one of the spouses to undergo reproductive health procedures without need of the consent of the other spouse. The provision does away with spousal consent. Under pain of criminal sanction, it prohibits any health care service provider from refusing to perform reproductive health procedures on any married person on the ground of lack of spousal consent or authorization. In other words, lack of spousal consent or authorization may not be invoked by a health care service provider as a ground to refuse to perform reproductive health procedures on a married person. The proviso even strengthens the dispensable nature of the consent of the other spouse because the decision of the one undergoing the procedure trumps the other spouse's opposition.

Clearly, on its face, Section 23 (a)(2)(i) contradicts the unity of direction of the spouses, conflicts with the solidarity of the family, and collides with the fundamental equality before the law of men and women. In particular, it goes against the constitutional right of the spouses to found a family and to jointly decide on the number and spacing of their children. Rather than fostering unity between the spouses, it tends to foment discord and sow division between them.

Parental Authority

The second front, through which the attack on the sanctity of the family is mounted, is Section 7 of the RH Law. The belligerent act consists

of the provision's effect of giving substance to the 'RH rights' and its categorical mandate that "[n]o person shall be denied information and access to family planning services, whether natural or artificial," except a minor who has not secured a written parental or guardian's consent, but the said consent is dispensed with if the minor is already a parent, or has had a miscarriage. The provision states:

> SEC. 7. *Access to Family Planning*. – **All accredited public health facilities shall provide a full range of modern family planning methods**, which shall also include medical consultations, supplies and necessary and reasonable procedures for poor and marginalized couples having infertility issues who desire to have children: *Provided*, That family planning services shall likewise be extended by private health facilities to paying patients with the option to grant free care and services to indigents, except in the case of non-maternity specialty hospitals and hospitals owned and operated by a religious group, but they have the option to provide such full range of modern family planning methods: *Provided, further*, That these hospitals shall immediately refer the person seeking such care and services to another health facility which is conveniently accessible: *Provided, finally*, That the person is not in an emergency condition or serious case as defined in Republic Act No. 8344.
>
> **No person shall be denied information and access to family planning services, whether natural or artificial**: *Provided*, That minors will not be allowed access to modern methods of family planning without written consent from their parents or guardian/s **except when the minor is already a parent or has had a miscarriage**. (Emphases supplied)

The RH Law mandates that "[n]o person shall be denied information and access to family planning services, whether natural or artificial."[82] Minors are supposed to be excluded from the said mandate but this exclusion is diluted by the same provision. While it requires minors to secure written parental or guardian's consent before they can have access to family planning services, any minor who is already a parent or has had a miscarriage may have access to modern family planning methods without need of written parental consent. The said exception to the requirement of written parental consent is objectionable on constitutional ground.

The full significance of this exemption from parental consent can be understood better in the light of the following provisions of the Family Code, as amended by Republic Act No. 6809:

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82 *See* last paragraph of Section 7, RH LAW.

> Art. 234. **Emancipation takes place by the attainment of majority**. Unless otherwise provided, **majority commences at the age of eighteen years**.
>
> x x x x x x x x x
>
> Art. 236. **Emancipation shall terminate parental authority over the person and property of the child who shall then be qualified and responsible for all acts of civil life**, save the exceptions established by existing laws in special cases.
>
> **Contracting marriage shall require parental consent until the age of twenty-one**.
>
> Nothing in this Code shall be construed to derogate from the duty or responsibility of parents and guardians for children and wards below twenty-one years of age mentioned in the second and third paragraphs of Article 2180 of the Civil Code. (Emphases supplied)

For purposes of marriage, the person who is already emancipated but is below 21 years old still requires parental consent.[83] Thus, a person who is no longer under parental authority of his or her parents for being already of legal age but below 21 years of age still cannot exercise the right to sexual intimacy in marriage unless he or she has parental consent. For such person, parental consent is indispensable even if he or she is already a parent or has had miscarriage. Yet, under the RH Law, a minor, who is still under parental authority of his or her parents as he or she is not yet emancipated, can exercise the 'right' to sexual intimacy simply because he or she is already a parent or she has had a miscarriage. Therefore, through the RH Law, the Government gives such minors freedom from parental authority and the opportunity, if not a license, to further engage in the sexual act by virtue of their entitlement under the RH Law to have access to modern methods of family planning. The RH Law therefore recognizes that such minors, regardless of their young age, are entitled to "responsible, safe, consensual and satisfying sex life" and that "they have the capability to reproduce and the freedom to decide if, when, and how often to do so,"[84] without need of parental consent.

The overly liberal stance of the RH Law as regards the access of minors, who are already parents or have had a miscarriage, to modern family planning methods without need of parental consent is contrary to the provision of Section 12, Article II of the 1987 Constitution. It is also

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83 Article 14, FAMILY CODE.

84 Section 3 (p), RH Law.

seriously doubtful if the elimination of the requirement for parental consent will redound to the best interest of the class of minors mentioned in the RH Law. This Court has already ruled in *Malto v. People*[85]:

> A child cannot give consent to a contract under our civil laws. This is on the rationale that she can easily be the victim of fraud as she is not capable of fully understanding or knowing the nature or import of her actions. The State, as *parens patriae*, is under the obligation to minimize the risk of harm to those who, because of their minority, are as yet unable to take care of themselves fully. Those of tender years deserve its protection.
>
> The harm which results from a child's bad decision in a sexual encounter may be infinitely more damaging to her than a bad business deal. Thus, the law should protect her from the harmful consequences of her attempts at adult sexual behavior. For this reason, **a child should not be deemed to have validly consented to adult sexual activity and to surrender herself in the act of ultimate physical intimacy under a law which seeks to afford her special protection against abuse, exploitation and discrimination**. x x x In other words, **a child is presumed by law to be incapable of giving rational consent to any lascivious act or sexual intercourse**.
>
> **This must be so if we are to be true to the constitutionally enshrined State policy to promote the physical, moral, spiritual, intellectual and social well-being of the youth**. (Emphases supplied)

Another anomalous and absurd consequence of the RH Law's exemption of minors who are already parents or have had miscarriage is undue inequality of treatment. It violates the right of minors to equal protection because the classification it creates is not based on any substantial distinction.[86] The fact that the said minors are themselves already parents or have had a miscarriage does not make them less of a minor. Nor does it emancipate them. In fact, such minors, by virtue of their situation as minors who are at the same time parents or who have undergone the traumatic experience of miscarriage, are more vulnerable to conditions that will adversely affect their development. They have a stronger need for the advice and support of their family, particularly of their parents. Yet, Section 7 of the RH Law treats them as if they are no longer minors and already

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85 560 Phil. 119, 139-141 (2007).

86 The equal protection clause does not require the universal application of the laws to all persons or things without distinction. What it simply requires is equality among equals as determined according to a valid classification. Indeed, the equal protection clause permits classification. Such classification, however, to be valid must pass the test of ***reasonableness.*** The test has four requisites: (1) The classification rests on substantial distinctions; (2) It is germane to the purpose of the law; (3) It is not limited to existing conditions only; and (4) It applies equally to all members of the same class (*Biraogo v. Philippine Truth Commission*, *supra* note 15 at 168).

emancipated from parental authority. By depriving the parents of these minors of their authority with respect to something that may be life-defining for the said minors, the latter are likewise deprived of the instruction, guidance and counsel of their parents on a very important matter. Such minors are effectively denied of their constitutional right as children to assistance and special protection from conditions that may be prejudicial to their development.[87]

The other side of the coin, which is the access of certain minors to modern family planning methods without need of parental consent, is the collateral damage on what the Constitution recognizes as the "primary and natural right and duty of parents in the rearing of the youth for civic efficiency and the development of moral character." [88] Parents have a fundamental liberty interest in the care, custody and management of their child.[89]

In this connection, Article 209 of the Family Code provides:

> Art. 209. Pursuant to the natural right and duty of parents over the person and property of their unemancipated children, parental authority and responsibility shall include the caring for and rearing them for civic consciousness and efficiency and the development of their moral, mental and physical character and well-being.

Parental authority is that mass of rights and obligations which the law confers on parents for the purpose of the children's physical preservation and development, as well as the cultivation of their intellect and the education of their hearts and minds.[90] In particular, it consists of the following rights and duties:

> Art. 220. The parents and those exercising parental authority shall have with the respect to their unemancipated children on wards the following rights and duties:
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> (1) **To keep them in their company, to support, educate and instruct them by right precept and good example**, and to provide for their upbringing in keeping with their means;

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87 Section 3 (2), Article XV, 1987 CONSTITUTION.
88 Section 12, Article II, 1987 CONSTITUTION.
89 *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).
90 *Santos v. Court of Appeals*, 312 Phil. 482, 487 (1995).

> (2) **To give them love and affection, advice and counsel**, companionship and understanding;
>
> (3) **To provide them with moral and spiritual guidance, inculcate in them honesty, integrity, self-discipline, self-reliance, industry and thrift, stimulate their interest in civic affairs, and inspire in them compliance with the duties of citizenship**;
>
> (4) **To enhance, protect, preserve and maintain their physical and mental health at all times**;
>
> (5) **To furnish them with good and wholesome educational materials, supervise their activities, recreation and association with others, protect them from bad company, and prevent them from acquiring habits detrimental to their health, studies and morals**;
>
> (6) **To represent them in all matters affecting their interests**;
>
> (7) To demand from them respect and obedience;
>
> (8) To impose discipline on them as may be required under the circumstances; and
>
> (9) To perform such other duties as are imposed by law upon parents and guardians.[91] (Emphases supplied)

Parental consent is the tangible manifestation of the exercise of parental authority with respect to the access by minors to modern methods of family planning. Parents are naturally and primarily interested in the welfare of their children and the parental consent requirement is an appropriate method of giving the parents an opportunity to foster that welfare by helping their minor child to make and adopt a correct decision, especially when that child is distressed for being already a parent or having had a miscarriage.

Our existing laws governing the suspension or termination of parental authority reflects the constitutional rule on the natural and primary right of parents in the rearing of their children.[92] They show that termination of parental authority is such a drastic step that it can be allowed on the basis of justifiable legal grounds provided by law, such as, emancipation of the child, death of either the parent or the child, adoption of the child, appointment of a general guardian for the child, judicial declaration of abandonment of the child, final judgment of a competent court divesting the parent of parental authority, judicial declaration of absence or incapacity of the parent,

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91 Article 220, FAMILY CODE.

92 See Articles 228-231, FAMILY CODE.

conviction of the parent of a crime with civil interdiction as an accessory penalty, excessive harshness or cruelty of the parent towards the child, giving the child corrupting orders, compelling the child to beg, subjecting the child to acts of lasciviousness, *etc*.[93] Doing away with parental consent in connection with a minor's access to so-called modern methods of family planning, like IUDs and contraceptive drugs and devices, means taking away parental authority in the said area. However, the conditions which trigger the partial loss of parental authority under the RH Law (that is, that minors either already have children or have had miscarriage) are unreasonable and insufficient to justify the restriction of parental authority imposed by the said law.

The education of the children, the vigilance over their conduct, and the formation of their character, are very essential parts of the mission and vocation of the parents.[94] In giving minors who are already parents or have had miscarriage access to modern methods of family planning or "safe, effective, non-abortifacient and legal methods, whether natural or artificial, that are registered with the FDA, to plan pregnancy" without need of parental consent, the Government is disregarding the natural and primary right and duty of parents to exercise parental authority over the said minors. The matter of access of such minors to modern methods of family planning is something that is of great consequence to the said minor children and their respective families. Yet, the Government usurps the natural and primary right of the parents of such minors who are obligated to educate and instruct their children by right precept and good example; to give them advice and counsel; to provide them with moral and spiritual guidance; to furnish them with good and wholesome educational materials, supervise their activities, recreation and association with others, protect them from bad company, and prevent them from acquiring habits that may be detrimental to their health, studies and morals; and, to represent them in all matters affecting their interests.

While not all deprivations of rights or liberty are constitutionally proscribed but only deprivations without due process of law,[95] the fundamental right to parental authority over their minor children has been taken away from the parents without due process of law. It is neither fair

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93 Id.

94 Tolentino, *supra* note 72 at 622.

95 Section 1, Article III, 1987 CONSTITUTION: "No person shall be deprived of life, liberty, or property without due process of law…."

"… the "liberty," against deprivation of which without due process the Fourteenth Amendment protects, embraces more than the rights found in the Bill of Rights. But that liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law" (*Roe v. Wade*, 410 U.S. 113, (1973), Rehnquist J., dissenting).

nor just to ascribe the condition of a minor of either already having a child or having had a miscarriage as a fault or shortcoming of the parents as to outrightly or by operation of law deprive the latter of their natural and primary right. There is therefore no compelling interest, or even rational basis, to deprive parents of their constitutionally recognized natural and primary right to rear their children under the circumstances provided in the proviso of the second paragraph of Section 7 of the RH Law.

In this connection, the second sentence of Section 23 (a)(2)(ii) expands the infringement on parental authority caused by Section 7, as the said section requires parental consent only in elective surgical procedures. For the same grounds mentioned above, this provision also suffers from constitutional infirmity.

The RH Law: Devaluing Society's Values

It is the very purpose of a Constitution – and particularly of the Bill of Rights – to declare certain values transcendent, beyond the reach of temporary political majorities.[96] The question of constitutionality is not a matter of popularity or public perception but of consistency with the constitutional text and principles. It is not determined at the polls or by surveys but by adherence to the Constitution. Thus, while policies crafted by the legislative and executive departments may cater to the public clamor, constitutional construction by courts caters solely to constitutional text and intent.

To reiterate, the Constitution is the fundamental expression of our democratic principles and deeply-held values as a people. Thus, we adopt the following principles which are in harmony with the constitutionally mandated power of the Judiciary:

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[96] Brennan, William, speech given at the Text and Teaching Symposium, Georgetown University October 12, 1985, Washington, D.C., http://www.pbs.org/wnet/ supremecourt/ democracy/sources document7.html, (last accessed November 15, 2013).

> [T]he Court's job is to preserve our society's values, as those values are embodied in a Constitution, which provides a floor below which the citizenry cannot choose to descend.[97]
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> x x x x x
>
> A Madisonian system [of rule by the majority and respect for the rights of the minority] avoids either minority or majority tyranny by giving substantial power to the majority while preserving basic rights for the minority. In such a system, the judges are simply imposing their own values and engaging in judicial tyranny, unless they can derive their conclusions from the Constitution's values and not simply their own.[98]

Bearing the above fundamental premises in mind, the constitutionality of the RH Law ought to be judged based on its implications on the relevant and treasured values of the Filipino society as shown by the Filipino people's history and tradition as enshrined in the Constitution. These cherished values are as follows: the sanctity of the family; the natural joint right of the spouses to found a family; the natural and primary right and duty of parents in the rearing of their children; and the right to health of the people, particularly of women; and the fundamental equality before the law of women and men. These transcendental values include the protection of the freedom of religion and freedom of speech.

As discussed above, on its face and as worded, certain provisions of the RH Law do not promote the said values but instead undermine them. The RH Law dilutes the traditional prerogatives of spouses, defeats the unity of direction of the spouses and erodes the natural and primary right of parents in the rearing of their children through its respective provisions on spousal and parental consent.

On its face and as worded, certain provisions of the RH Law run counter to the freedom of religion and freedom of speech of physicians and health care service providers whose spiritual belief or considered professional opinion differs from the law's policy and program on reproductive health.

As certain provisions of the RH Law, on its face and as worded, contradicts the constitutional values which we have sworn to protect and

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97 Watson, Bradley, OURSELVES AND OUR POSTERITY, Lexington Books (2009), p. xiv citing Justice Antonin Scalia of the U.S. Supreme Court.

98 Harrison, John, *In Memoriam: Robert Bork*, 36 HARV. J.L.&PUB.POL'Y 1245, 1246 (2013).

promote, those provisions of the RH Law must be invalidated if this Court is to be faithful to its duty to preserve our nation's deeply-held values.

In view of the foregoing reasons, I agree with Justice Jose C. Mendoza that the following provisions of Republic Act No. 10354, otherwise known as "The Responsible Parenthood and Reproductive Health Act of 2012," should be declared **UNCONSTITUTIONAL** and, therefore, **null and void**:

(1) Section 7 insofar as it (a) requires private health facilities and non-maternity specialty hospitals and hospitals owned and operated by a religious group to refer patients, not in an emergency or life-threatening condition as defined under Republic Act No. 8344, to another facility which is conveniently accessible, and (b) allows minor-parents and minors who have had a miscarriage access to modern methods of family planning without the written consent of their parents or guardian/s;

(2) Section 23 (a)(1) insofar as it penalizes any health care service provider, whether public or private, who shall knowingly withhold information or restrict the dissemination thereof, and/or intentionally provide incorrect information regarding programs and services on reproductive health;

(3) Section 23 (a)(2) insofar as it penalizes any health care service provider who refuses to perform reproductive health procedures on account of his or her religious beliefs;

(4) Section 23 (a)(2)(i) insofar as it allows a married individual, not in an emergency or life-threatening condition, as defined in Republic Act No. 8344, to undergo reproductive health procedures without the consent of the spouse;

(5) Section 23 (a)(2)(ii), second sentence insofar as it penalizes a health care service provider, whether private or public, for requiring written parental consent from minors before undergoing reproductive health procedures, except only in elective surgical procedures;

(6) Section 23 (a)(3) insofar as it punishes any health care service provider who fails and/or refuses to refer a patient not in an

emergency or life-threatening case, as defined under Republic Act No. 8344, to another health care service provider within the same facility or one which is conveniently accessible regardless of his or her religious beliefs;

(7) Section 23 (b) insofar as it punishes any public officer who refuses to support reproductive health programs or shall do any act that hinders the full implementation of a reproductive health program, regardless of his or her religious beliefs;

(8) Section 17 regarding the rendition of *pro bono* reproductive health service insofar as they affect the conscientious objector in securing Philhealth accreditation; and

(9) Section 3.01 (a) and (j) of the IRR insofar as it uses the qualifier "primarily" for contradicting Section 4 (a) of the RH Law and violating Section 12, Article II of the 1987 Constitution.

Section 9 of the RH Law insofar as its first sentence directs that hormonal contraceptives and intrauterine devices shall be included in the National Drug Formulary should neither be interpreted as mandatory nor as an infallible legislative pronouncement that they are "safe, legal and non-abortifacient," as compliance with these prerequisites cannot be legislated by law but is dependent on expert scientific evaluation. Likewise, the law cannot foreclose or predict the outcome of future scientific study on this matter.

A final note: A heavy responsibility and burden are assumed by the government in supplying contraceptive drugs and devices, for it may be held accountable for any injury, illness or loss of life resulting from or incidental to their use.

Teresita Leonardo de Castro

TERESITA J. LEONARDO-DE CASTRO
Associate Justice