G.R. No. 217910 – JESUS NICARDO M. FALCIS III, *Petitioner* v. CIVIL REGISTRAR-GENERAL, *Respondent;* LGBTS CHRISTIAN CHURCH, INC., REVEREND CRESCENCIO "CEEJAY" AGBAYANI JR., MARLON FELIPE, and MARIA ARLYN "SUGAR" IBAÑEZ, *Petitioners-in-intervention;* ATTY. FERNANDO P. PERITO, *Intervenor*; and ATTYS. RONALDO T. REYES, JEREMY I. GATDULA, CRISTINA A. MONTES, AND RUFINO POLICAPRIO III, *Intervenors-oppositors.*

Promulgated:

September 3, 2019

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CONCURRING OPINION

JARDELEZA, *J.:*

> Justice Scalia: "I'm curious... when did it become unconstitutional to exclude homosexual couples from marriage? Seventeen ninety-one? Eighteen sixty-eight, when the Fourteen Amendment was adopted? x x x"
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> Ted: "When – may I answer this in the form of a rhetorical question? When did it become unconstitutional to prohibit interracial marriages? When did it become unconstitutional to assign children to separate schools?" x x x ***Courts decide there are constitutional rights when they have before them a case that presents the issue, and when they know – and society knows – enough about the issue to make informed decisions***.[1]

I vote to DISMISS the petition, not the idea of marriage equality.

Petitioner Jesus Nicardo M. Falcis III (petitioner) is not the proper party to assert a liberty interest in same-sex marriage. He did not suffer any injury as a result of the enforcement of Articles 1 and 2 of Executive Order (EO) No. 209, otherwise known as "The Family Code of the Philippines" (Family Code). The subsequent intervention by Reverend Crescencio "Ceejay" Agbayani, Jr. (Rev. Ceejay), Marlon Felipe (Marlon) of LGTBS Christian Church (LGTBS Church), and Maria Arlyn "Sugar" Ibañez (Sugar),[2] (collectively, the two couples), did not cure this defect in the petition.

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[1] Exchange between United States Supreme Court Justice Antonin Scalia and lawyer Theodore Olson, during the Oral Arguments for *Hollingsworth et. al. v. Perry et. al.*, 570 U.S. 693 (2013), as cited in David Boies and Theodore Olson, Redeeming the Dream, Proposition 8 and the Struggle for Marriage Equality, (2014), p. 254.

[2] Sugar is in a romantic and sexual relationship with Joanne Reena "JR" Gregorio. JR, however, did not join Sugar in filing the petition-in-intervention. See *Rollo*, p. 137.

I also find dismissal to be proper because direct recourse to the Court in this case is unwarranted. Petitioner asserts that he raises legal questions, principally that Articles 1 and 2 of the Family Code violate his fundamental right to enter into a same-sex marriage. This, however, cannot be farther from the truth. The issues he raises implicate underlying questions of fact which, in turn, condition the constitutionality of the legal provisions he questions.[3] In his exuberant rush to bring this case directly to the Court as both lead party and counsel, petitioner chose to skip building a factual foundation of record upon which the Court can make an informed judgment. The underlying questions of fact that underpin his legal argument include whether: (a) couples of the same-sex can satisfy the essential requirements of marriage equally as heterosexual couples; (b) procreation is an essential requirement of marriage; (c) couples of the same-sex can raise children equally as well as heterosexual couples; (d) Filipino tradition accepts same-sex marriage; and (e) the LGBTS Church is a religion whose members, including the two couples, hold a sincere belief in same-sex marriage as a central tenet of their faith.

I

A

The petition presents no actual case or controversy.

There is an actual case or controversy when the case is appropriate or ripe for determination, not conjectural or anticipatory, lest the decision of the court would amount to an advisory opinion.[4] This means that there must be a conflict of legal rights or an assertion of opposite legal claims which can be resolved on the basis of existing law and jurisprudence. An abstract dispute, in stark contrast, only seeks for an opinion that advises what the law would be on hypothetical state of facts.[5] Furthermore, a case is ripe for adjudication when the act being challenged has had a direct adverse effect on the individual challenging it. Something must have been accomplished or performed by either branch of Government before a court may come into the picture, and a petitioner must allege the existence of an immediate or threatened injury to him/her as a result of the challenged action.[6]

On its face, it presents a hypothetical and contingent event, not ripe for adjudication, which is hinged on petitioner's **future plan** of settling down with a person of the same-sex.

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3 *Ermita-Malate Hotel and Motel Operators Association, Inc. et al. v. The Honorable City Mayor of Manila*, G.R. No. L-24693, October 23, 1967, 21 SCRA 449, 451-452, citing *O'Gorman & Young v. Harford Fire Insurance, Co.*, 283 U.S. 251 (1931).

4 *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, G.R. No. 178552, October 5, 2010, 632 SCRA 146, 176.

5 *Guingona v. Court of Appeals*, G.R. No. 125532, July 10, 1998, 292 SCRA 402, 413-414.

6 *Province of North Cotabato v. Government*, G.R. No. 183591, October 14, 2008, 586 SCRA 402, 451.

Petitioner alleged that "the prohibition against the right to marry the same-sex injures [his] plans to settle down and have a companion for life in his beloved country."[7] **Yet as of the filing of the petition, petitioner has no partner.** He lamented that his "ability to find and enter into a long-term monogamous same-sex relationship is impaired because of the absence of a legal incentive for gay individuals to seek such relationship."[8] Significantly, however, even if he has a partner, petitioner admitted in open court that it is not automatic that his partner might want to marry him.[9] Thus, petitioner cannot, did not or even attempted to, file an application for marriage license before the civil registry of his residence.

Consequently, the Civil Registrar General (CRG) or any other official in any of the branches of the government has nothing to act upon. They could not and have not performed an act which injured or would injure petitioner's asserted right. It is clear that petitioner's cause of action does not exist.

B

Petitioner has no legal standing to file the suit.

Standing or *locus standi* is defined as the right of appearance in a court of justice on a given question.[10] To determine whether a party has standing, the *direct injury test* is applied.[11] Under this test, the person who impugns the validity of a statute must have a personal and substantial interest in the case such that he has sustained, or will sustain, direct injury as a result of its enforcement.[12]

Despite this, however, there have been cases wherein the Court has allowed the following non-traditional suitors to bring a case before it despite lack of direct injury:

1. For **taxpayers**, there must be a claim of illegal disbursement of public funds or that the tax measure is unconstitutional;
2. For **voters**, there must be a showing of obvious interest in the validity of the election law in question;
3. For **concerned citizens**, there must be a showing that the issues raised are of transcendental importance which must be settled early;
4. For **legislators**, there must be a claim that the official action complained of infringes upon their prerogatives as legislators;[13]
5. For **associations**, its members must be affected by the action;[14] and

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7 *Rollo*, p. 12.
8 *Id.* at 12.
9 TSN of the Oral Arguments dated June 19, 2018, pp. 67-68.
10 *David v. Macapagal-Arroyo*, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 216.
11 *Id.* at 217.
12 *People v. Vera*, 65 Phil. 56, 89 (1937).
13 *David v. Macapagal-Arroyo*, *supra* note 10 at 220-221.

6. For **those bringing suit on behalf of third parties**, the litigant must have suffered an 'injury-in-fact,' thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests.[15]

In this case, petitioner is not in a long-term monogamous same-sex relationship. He has not attempted to marry nor was prevented by the State from doing so. This makes his lack of direct interest in the enforcement of the assailed provisions of the Family Code patent.

Neither does petitioner qualify as a taxpayer as he has not alleged illegal disbursement of public funds or that a tax measure is involved in this case. He does not assail the validity of an election law, so he also does not have standing as a voter. Finally, he is not a legislator nor an association and therefore cannot claim standing as such.

C

The petition-in-intervention cannot cure the defects of the petition.

An intervention is merely ancillary and supplemental to an existing litigation. It is not an independent action. It presupposes the pendency of a suit in a court of competent jurisdiction; in other words, jurisdiction over the same is governed by jurisdiction over the main action. Perforce, a court which has no jurisdiction over the principal action has no jurisdiction over a complaint-in-intervention.[16]

As stated earlier, the petition before Us lacks the essential requisites for judicial review. This ousts the Court of jurisdiction to take cognizance of the same. More, jurisprudence instructs that a petition-in-intervention cannot create an actual controversy for the main petition. The cause of action must be made out by the allegations of the petition without the aid of any other pleading.[17]

In any event, the petition-in-intervention is, in itself, wanting and cannot lend any validity to the main petition. The LGBTS Church, while claiming to intervene on behalf of its members, failed to satisfy the following requirements to successfully maintain third-party standing: (1) the

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[14] *Executive Secretary v. Court of Appeals*, G.R. No. 131719, May 25, 2004, 429 SCRA 81, 96. See also *Godinez v. Court of Appeals*, G.R. No. 154330, February 15, 2007, 516 SCRA 24 and *Purok Bagong Silang Association, Inc. v. Yuipco*, G.R. No. 135092, May 4, 2006, 489 SCRA 382.

[15] *White Light Corporation v. City of Manila*, G.R. No. 122846, January 20, 2009, 576 SCRA 416, 430-431.

[16] *Bangko Sentral ng Pilipinas v. Campa, Jr.*, G.R. No. 185979, March 16, 2016, 787 SCRA 476, 498, citing *Asian Terminals v. Bautista*, G.R. No. 166901, October 27, 2006, 505 SCRA 748, 763.

[17] *De Borja v. Pinalakas na Ugnayan ng Maliliit na Mangingisda ng Luzon, Mindanao at Visayas*, G.R. Nos. 185320 & 185348, April 19, 2017, 823 SCRA 550, 570.

litigant must have suffered an 'injury-in-fact,' thus giving him/her a "sufficiently concrete interest" in the outcome of the case in dispute; (2) the litigant must have a close relation to the third party; and (3) there must be some hindrance to the third party's ability to protect his/her own interests.[18] The first and third elements are missing. As will be discussed in detail later, the LGBTS Church failed to show how the challenged law injures it and its members. On the other hand, the filing of the petition-in-intervention by the two couples, who are members of the LGBTS Church, proved that they are sufficiently capable to acting to protect their own interest. Any invocation of third party-standing is thus misplaced.

D

Neither can the transcendental importance doctrine save the petition and the petition-in-intervention. This doctrine dispenses only with the requirement of *locus standi*. It does not override the requirements of actual and justiciable controversy, a condition *sine qua non* for the exercise of judicial power.[19]

Very recently in *Gios-Samar, Inc. v. Department of Transportation and Communications*,[20] the Court held that mere invocation of the transcendental importance doctrine cannot, absent a showing that the issue raised is one of law, excuse a violation of the rule on hierarchy of courts. Hence, when a question before the Court involves the determination of factual issues indispensable to the resolution of a legal issue, the Court will refuse to resolve the factual question regardless of the invocation of the transcendental or paramount importance of the case.[21]

II

As stated at the outset, the petition and the petition-in-intervention raise issues which the Court cannot resolve in the absence of a factual foundation of record. Their decision to bring the case directly before the Court is unwarranted and constitutes ground for the outright dismissal of the petition.

While the Court has original and concurrent jurisdiction with the Regional Trial Court (RTC) and the Court of Appeals (CA) over petitions seeking the issuance of writs of *certiorari* and prohibition, litigants do not have unfettered discretion to invoke the Court's original jurisdiction. The doctrine of hierarchy of courts dictates that direct recourse to this Court is allowed only to resolve questions of law.[22]

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[18] *White Light Corporation v. City of Manila*, G.R. No. 122846, January 20, 2009, 576 SCRA 416, 430-431.

[19] *De Borja v. Pinalakas na Ugnayan ng Maliliit na Mangingisda ng Luzon, Mindanao at Visayas*, *supra* note 17 at 578. Citations omitted.

[20] G.R. No. 217158, March 12, 2019.

[21] *Id.*

[22] *Gios-Samar, Inc. v. Department of Transportation and Communications*, *supra* note 20.

I note that petitioner did couch his petition and the petition-in-intervention in a manner as to purport to present a pure legal question, that is, whether Articles 1 and 2 of the Family Code are constitutional. He argued that the assailed provisions are unconstitutional because they violate his (and other homosexuals'): (1) due process right/liberty to marry a person of the same-sex;[23] (2) right to equal protection of the laws;[24] and (3) right to found a family within a marriage in accord with their religious convictions under Section 3(1), Article VX of the Constitution.[25] Before this Court can reach the issue of constitutionality, however, it first needs to determine whether petitioner's asserted liberty interest exists. The query at the outset is, therefore, is: "**Did petitioner lose something that fits into one of the three protected categories of life, liberty, or property?**"[26] **If in the affirmative, the next question to ask is: "Is it a fundamental right protected by the Constitution?"**

I had occasion to express my views on the concept of fundamental rights under constitutional law in my Concurring and Dissenting Opinion in *Versoza v. People of the Philippines, et al.*[27] decided today. They bear some repetition here.

A

The concept of fundamental rights, once described as "liberties that operate as trumps,"[28] was first extensively covered by the Court, through Chief Justice Puno, in *Central Bank Employees Association, Inc. v. Bangko Sentral ng Pilipinas*.[29] There, the Court, citing Gerald Gunther, traced its history and development in the context of American constitutional equal protection analysis.[30]

The recognition of an asserted liberty interest as "fundamental" has significant legal consequences. Traditionally, liberty interests are protected only against *arbitrary* government interference. If the government can show a *rational* basis for believing that its interference advances a legitimate

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23 *Rollo*, p. 16.

24 *Id.* at 20

25 *Id.* 11-12; Section 3 provides: 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; x x x

26 See *People v. Larrañaga*, G.R. No. 138874, February 3, 2004, 421 SCRA 530, 555-556 (2004).
x x x **In evaluating a due process claim, the court must determine whether life, liberty, or property interest exists**, and if so, what procedures are constitutionally required to protect that right. **Otherwise stated, the due process clause calls for two separate inquiries in evaluating an alleged violation: did the plaintiff lose something that fits into one of the three protected categories of life, liberty, or property?;** and, if so, did the plaintiff receive the minimum measure of procedural protection warranted under the circumstances? (Emphasis supplied.)

27 G.R. No. 184535, August 28, 2019.

28 Easterbrook, "*Implicit and Explicit Rights of Association*," Vol. 10 Harvard Journal of Law and Public Policy (1987), pp. 91-92.

29 G.R. No. 148208, December 15, 2004, 446 SCRA 299.

30 *Id.* at 371-374.

legislative objective, a claim to a liberty interest may fail.[31] Where, however, a liberty interest has been accorded an "elevated" status – that is, by characterizing it as a right (or a fundamental right), then the government is subject to a *higher* burden of proof to justify intrusions into these interests, namely, the requirements of strict scrutiny in equal protection cases[32] and that of compelling state interest in due process cases.[33] As the United States Supreme Court (US Supreme Court) has warned, affixing the label "fundamental" to such liberty interests would place them outside the arena of public debate and legislative action.[34] Resultantly, and as is also true in this jurisdiction, fundamental rights have been deemed to include only those basic liberties explicitly or implicitly guaranteed by the Bill of Rights of the Constitution.[35]

B

There seems to me little disagreement as to the "fundamental" nature of an asserted liberty interest when the same can be read from the text of the Bill of Rights of the Constitution itself. Thus, when a state act is alleged to have implicated an **explicit** "fundamental right," *i.e.*, a right textually found in the Bill of Rights, the Court has been wont to subject the government to a *higher* burden to justify its challenged action: This the Court did in *Ebralinag v. The Division Superintendent of Schools of Cebu*,[36] (on religious beliefs); *Legaspi v. Civil Service Commission*,[37] (on the right of the people to information on matters of public concern); *Disini, Jr. v. Secretary of Justice*,[38] (on the right to freedom of expression, right to privacy, and right against unreasonable searches and seizures); *Samahan ng mga Progresibong Kabataan (SPARK) v. Quezon City*,[39] (on the right to travel); *Chavez v. Gonzales*,[40] (on the freedom of the press); *Newsounds Broadcasting*

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[31] Crump, "*How do the Courts Really Discover Unenumerated Fundamental Rights - Cataloguing the Methods of Judicial Alchemy*," 19 Harv. J. L. & Pub. Pol'y 795 (1996), pp.799-800.

[32] See *Central Bank Employees Association, Inc. v. Bangko Central ng Pilipinas*, *supra* note 29.

[33] See *Obergefell v. Hodges*, 576 U.S. ___ (2015).

[34] *Id.*

[35] *Republic v. Manalo*, G.R. No. 221029, April 24, 2018, citing *J.* Brion, Separate Opinion in *Biraogo v. Philippine Truth Commission of 2010*, G.R. No. 192935, December 7, 2010, 637 SCRA 78, 359-360.

[36] G.R. No. 95770, March 1, 1993, 219 SCRA 256. The Court annulled and set aside orders expelling petitioners from school, thereby upholding their right under the Constitution to refuse to salute the Philippine flag as guaranteed under Section 5, Article III.

[37] G.R. No. L-72119, May 29, 1987, 150 SCRA 530. The CSC was ordered, via mandamus, to open its register of eligibles for the position of sanitarian, and to confirm or deny, the civil service eligibility of certain identified individuals for said position in the Health Department of Cebu City, in furtherance of the fundamental right provided under Section 7, Article III of the Constitution.

[38] G.R. No. 203335, February 18, 2014, 716 SCRA 237. The Court struck down as unconstitutional Sections 4(c)(3), 12, and 19 of the Cybercrime Law for being violative of Sections 4, 3, and 2, respectively, of Article III of the Constitution.

[39] *J.* Leonen Separate Opinion in *Samahan ng mga Progresibong Kabataan (SPARK) v. Quezon City*, G.R. No. 225442, August 8, 2017, 835 SCRA 350. This case involved a challenge against curfew ordinances for minors for being violative of Section 6, Article III of the Constitution. There, the Court chose to apply the strict scrutiny test and found that while the government was able to show a compelling state interest, it failed to show that the regulation set forth was the least restrictive means to protect such interest or the means chosen is narrowly tailored to accomplish the interest.

[40] G.R. No. 168338, February 15, 2008, 545 SCRA 441. The Court nullified the official government statements warning the media against airing the alleged wiretapped conversation between the President and other personalities. According to the Court, any attempt to restrict the exercise guaranteed under

Network, Inc. v. Dy,[41] (on the right to free speech and freedom of the press); and *Kabataan Party-List v. Commission on Elections*,[42] (on the right to vote).

C

How should the Court proceed if the right asserted to be fundamental is not explicitly found in the Bill of Rights or other provisions of the Constitution, or where the fundamental right is asserted to flow from generally-stated rights such as due process and equal protection? Justice Harlan of the US Supreme Court has famously noted that "the full scope of the liberty guaranteed by the Due Process Clause cannot be found in, or limited by, the precise terms of the specific guarantees elsewhere provided in the Constitution."[43]

In this jurisdiction, this Court has had occasion to rule on assertions of **unenumerated** fundamental rights:

In the 1924 case of *People v. Pomar*,[44] and reminiscent of the *Lochner*-era rulings, this Court declared unconstitutional provisions of law which required employers to pay a woman employee, who may become pregnant, her wages for 30 days before and 30 days after confinement. Citing a long line of US Supreme Court *Lochner*-era decisions, this Court found that the right to liberty includes **the right to enter into (and terminate) contracts.**[45]

Section 4, Article III must be met with "an examination so critical that only a danger that is clear and present would be allowed to curtail it."

[41] G.R. Nos. 170270 & 179411, April 2, 2009, 583 SCRA 333, 334. The Court held that respondents' actions, which ranged from withholding permits to operate to the physical closure of those stations under color of legal authority, failed to pass the test of strict scrutiny which it deemed appropriate to assess content-based restrictions on speech. According to the Court, "[a]s 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." Due to the government's failure to show a compelling state interest, the Court granted petitioner's prayer for a writ of mandamus and ordered respondents to immediately issue the requisite permits.

[42] G.R. No. 221318, December 16, 2015, 777 SCRA 574. A challenge was made against a COMELEC resolution setting a shorter deadline for voter registration, one outside of the period provided by Section 8 of Republic Act No. 8189, otherwise known as the "Voter's Registration Act of 1996." The Court found that existing laws grant the COMELEC the power to fix other periods and dates for pre-election activities only if the same cannot be reasonably held within the period provided by law. Since the COMELEC was unable to justify why the mandate of continuing voter registration cannot be reasonably held within the period provided, the Court nullified the deadline set by the COMELEC for being unduly restrictive of the people's right to vote.

[43] *Poe v. Ullman*, 367 U.S. 497, 543 (1961), *J.* Harlan Dissenting Opinion; see also my Concurring Opinion in *Versoza* on how the US Supreme Court has given "fundamental" status to otherwise unenumerated rights.

[44] G.R. No. L-22008, 46 Phil. 440 (1924).

[45] x x x [S]aid section creates a term or condition in every contract made by every person, firm, or corporation with any woman who may, during the course of her employment, become pregnant, and a failure to include in said contract the terms fixed by the law, makes the employer criminally liable subject to a fine and imprisonment. Clearly, therefore, the law has deprived, every person, firm, or corporation owning or managing a factory, shop or place of labor of any description within the Philippine Islands, of his right to enter into contracts of employment upon such terms as he and the employee may agree upon. The law creates a term in every such contract, without the consent of the parties. Such persons are, therefore, deprived of their liberty to contract. The [C]onstitution of the Philippine Islands guarantees to every citizen his liberty and one of his liberties is the liberty to contract. (Emphasis supplied.) *Id.* at 454.

Philippine adherence to this ruling would, however, be short-lived.[46] As Justice Fernando would later explain in *Edu v. Ericta*,[47] the decision in *Pomar* was largely brought about by the fact that "our Supreme Court had no other choice as the Philippines was then under the United States," where only a year before *Pomar*, a statute providing for minimum wages was declared in *Adkins* to be constitutionally infirm. The Court (and the Constitutional Convention) would adopt a more deferential attitude towards government regulation of economic relations and covering such subjects as "collective bargaining, security of tenure, minimum wages, compulsory arbitration, the regulation of tenancy as well as the issuance of securities, and control of public services."[48]

In the meantime, and taking its cue from the US Supreme Court, this Court would also go on to recognize unenumerated, yet fundamental, non-economic rights. For example, although the Bill of Rights speaks only of a right of privacy over communication and correspondence, the Court, in the 1968 case of *Morfe v. Mutuc*,[49] adopted the reasoning in *Griswold* and recognized a constitutional right to *personal* privacy. In *Oposa v. Factoran, Jr.*,[50] this Court accorded fundamental right status to an asserted liberty interest in "a balanced and healthful ecology" under Section 16, Article II of the 1987 Constitution. In *Imbong v. Ochoa, Jr.*,[51] which involved a number of challenges against the constitutionality of Republic Act No. 10354,[52] this Court recognized the constitutional right of parents to exercise parental control over their minor-child and a liberty interest in the access to safe and non-abortifacient contraceptives hinged on a **right to health** under Section 15, Article II[53] and other sections of the Constitution. In *Capin-Cadiz v. Brent Hospital and Colleges, Inc.*,[54] the Court held that the constitutional

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[46] See *Calalang v. Williams*, 70 Phil. 726 (1940); *Antamok Goldfields Mining Company v. Court of Industrial Relations*, 70 Phil. 341 (1940). See also *J.* Fernando's Opinion in *Alfanta v. Noe*, G.R. No. L-32362, September 19, 1973, 53 SCRA 76.

[47] G.R. No. L-32096, October 24, 1970, 35 SCRA 481.

[48] *Id.* at 493. Citations omitted. Justice Fernando further writes:

> x x x [T]o erase any doubts, the Constitutional Convention saw to it that the concept of *laissez-faire* was rejected. **It entrusted to our government the responsibility of coping with social and economic problems with the commensurate power of control over economic affairs.** Thereby it could live up to its commitment to promote the general welfare through state action. **No constitutional objection to regulatory measures adversely affecting property rights, especially so when public safety is the aim, is likely to be heeded, unless of course on the clearest and most satisfactory proof of invasion of rights guaranteed by the Constitution.** x x x
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> x x x x
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> It is in the light of such rejection of the *laissez-faire* principle that during the Commonwealth era, no constitutional infirmity was found to have attached to legislation covering such subjects as collective bargaining, security of tenure, minimum wages, compulsory arbitration, the regulation of tenancy as well as the issuance of securities, and control of public services. So it is likewise under the Republic this Court having given the seal of approval to more favorable tenancy laws, nationalization of the retail trade, limitation of the hours of labor, imposition of price control, requirement of separation pay for one month, and social security scheme. (Emphasis supplied; citations omitted.) *Id.* at 491-493.

[49] G.R. No. L-20387, January 31, 1968, 22 SCRA 424.

[50] G.R. No. 101083, July 30, 1993, 224 SCRA 792.

[51] G.R. No. 204819, April 8, 2014, 721 SCRA 146.

[52] Also known as the Responsible Parenthood and Reproductive Health Act of 2012.

[53] CONSTITUTION, Art. II, Sec. 15:

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

[54] G.R. No. 187417, February 24, 2016, 785 SCRA 18.

right to personal liberty and privacy should be read to include a woman's **right to choose whether to marry** and **to decide whether she will bear and rear her child outside of marriage.**[55]

Most recently, this Court in *Republic v. Manalo*,[56] applying equal protection analysis, upheld, pursuant to a **fundamental right to marry**, a liberty interest on the part of a Filipino spouse to be recapacitated to marry, in cases where a valid foreign divorce has been obtained.

III

Unlike the case of rights that can be located on the text of the Bill of Rights, the rules with respect to locating unenumerated "fundamental" rights, however, are not clear. According to Justice Harlan, speaking in the context of identifying the full scope of liberty protected under the Due Process Clause, the endeavor essentially entails an attempt at finding a balance between "respect for the liberty of the individual x x x and the demands of organized society."[57]

The question that presents itself then is **how** one determines whether an implied liberty interest being asserted is "fundamental," as to call for the application of strict scrutiny. For its part, the US Supreme Court has attempted, over time, to craft principled formulations on how to identify such "unenumerated" or "implied" rights:

> x x x [T]he Court has used a wide variety of methods, ranging from the restrained approach of locating protected interests in the constitutional text to the generous test of evaluating interests by the importance they have for contemporary individuals. Because the Justices do not uniformly agree upon these methods, it is also understandable that opinions for the Court rarely express consensus about the way the methods are chosen, or whether they fit into the hierarchy, or whether some methods are preferable in some situations and others in other situations. x x x
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> These methods lie along a continuum, all the way from hair-trigger formulas that can support a cornucopia of fundamental rights to stingy theories that protect virtually nothing that is not undeniably enumerated. x x x [n]o one method is comprehensive or exclusive, and indeed, the Justices themselves often have used two or three different theories in combination while analyzing a single interest. x x x[58] (Citations omitted.)

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[55] See *J.* Jardeleza Concurring Opinion, *id.* at 49-50.

[56] G.R. No. 221029, April 24, 2018.

[57] *J.* Harlan Dissenting Opinion in *Poe v. Ullman*, *supra* note 43 at 542.

[58] Crump, "*How Do the Courts Really Discover Unenumerated Fundamental Rights — Cataloguing the Methods of Judicial Alchemy*," 19 Harv. J. L. & Pub. Pol'y 795 (1996), p. 839. In his article, Crump surveyed more than 10 methodologies used by the court for recognizing unenumerated fundamental rights. These include the "history and tradition" test under *Washington v. Glucksberg*, 521 U.S. 702

This Court has not laid down clear guidelines on this matter. Thus, reference to American scholarly commentary is again instructive.

In his article *An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, Robert Farrell wrote that the US Supreme Court uses "a multiplicity of methods of identifying implied fundamental rights."[59] After a survey of US Supreme Court cases, Farrell has classified the different methods used by the Court in categorizing certain rights as fundamental. These are either because the asserted rights: (1) are important;[60] (2) are implicit in the concept of ordered liberty[61] or implicitly guaranteed by the Constitution;[62] (3) are deeply rooted in the Nation's history and tradition;[63] (4) need protection from government action that

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(1997), the "essential requisite for ordered liberty" test under *Palko v. Connecticut*, 302 U.S. 319 (1937), to the "importance to the individual test" under *Goldberg v. Kelly*, 397 U.S. 254 (1970).

[59] Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 St. Louis U. Pub. L. Rev. 203 (2007), p. 209.

[60] *Id.* at 217-221. The US Supreme Court used the "importance" test in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), in striking down a state statute providing for the sterilization of habitual criminals, which by law was limited to perpetrators of felonies involving moral turpitude. The US Supreme Court did not uphold the fundamental right to procreate on the basis of any language in the Bill of Rights; rather, it simply asserted, based on an incontrovertible fact of human existence, that marriage and procreation are fundamental to the very existence and survival of the race. This appears to be the test/approach considered and used by the Court in *Oposa v. Factoran, Jr.*, G.R. No. 101083, July 30, 1993, 224 SCRA 792.

[61] Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, *supra* note 59 221-224. In *Palko v. Connecticut*, 302 U.S. 319 (1937), the US Supreme Court confined fundamental liberties to those that are "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed." *Palko* concerned a state statute which allowed for the re-trial of an accused if made upon the instance of the State. There, the accused, who was initially convicted for the crime of murder in the second degree and sentenced to life in prison, was, upon re-trial, convicted for the crime of murder in the first degree and sentenced to death. An action to challenge said state statute was brought before the US Supreme Court which thereafter upheld it, saying "[t]he right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" See also Crump, "*How Do the Courts Really Discover Unenumerated Fundamental Rights - Cataloguing the Methods of Judicial Alchemy*," 19 Harv. J. L. & Pub. Pol'y 795 (1996), p. 871.

[62] Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, *supra* note 59 at 224-225. The US Supreme Court also used the "implicit" test in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 135 (1973), where it rejected an asserted "implied right to education." In seeming rejection of the importance test, the US Supreme Court declared:

> x x x [T]he importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. x x x
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> x x x x
>
> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education, as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.
>
> **Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not, alone, cause this Court to depart from the usual standard for reviewing a State's social and economic legislation.** (Emphasis supplied.) *Id.* at 30-35.

[63] Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, *supra* note 59 at 225-235. Under this approach, the test of whether or not a right is fundamental is to be determined by whether or not it is rooted in our Nation's history and traditions that is, whether the asserted liberty has been the subject of traditional or historical protection (See also Crump, "*How Do the Courts Really Discover Unenumerated Fundamental Rights — Cataloguing the Methods of Judicial Alchemy*," *supra* note 58 at 860). In *Bowers v. Hardwick*, the US Supreme Court upheld a Georgia

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shocks the conscience;[64] (5) are necessarily implied from the structure of government[65] or from the structure of the Constitution;[66] (6) provide necessary access to government processes;[67] and (7) are identified in previous Supreme Court precedents.[68]

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sodomy statute. It claimed that the right asserted, which it described as "the claimed constitutional right of homosexuals to engage in acts of sodomy" was not considered fundamental within the nation's history and traditions, as is evidenced by a slew of anti-sodomy acts from the time of the enactment of the Bill of Rights to about the time the case was decided. See also the 1934 case of *Snyder v. Massachusetts*, 291 U.S. 97 (1934), where an accused sought to challenge his conviction for the crime of murder on the ground that he was denied permission to attend a view, which was ordered by the court on motion of the prosecution, at the opening of the trial. The jurors, under a sworn bailiff, visited the scene of the crime, accompanied by the judge, the counsel for both parties, and the court stenographer. The Court affirmed the conviction as there was no showing that there was a history or tradition in the State of Massachusetts affording the accused such right. It held that "[t]he constitution and statutes and judicial decisions of the Commonwealth of Massachusetts are the authentic forms through which the sense of justice of the People of that Commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness." For more recent applications, see *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989) and *Washington v. Glucksberg*, 521 U.S. 702 (1997). See, however, *J.* Kennedy's Opinion in *Obergefell v. Hodges*, 576 U.S. __ (2015), where the Court held that "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries. x x x That method respects our history and learns from it without allowing the past alone to rule the present."

[64] Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, *supra* note 59 at 235-237. In the case of *Rochin v. California*, 342 U.S. 165 (1952), the US Supreme Court held that the act of the police in arranging to have a suspect's stomach pumped to produce evidence of illegal drugs constituted a kind of conduct that "shocks the conscience" and therefore violated the Due Process Clause of the Constitution. This test was again seen appropriate to evaluate "abusive executive action," which in said case was a police car chase which resulted in the death of one of those being chased. The Court eventually found in favor of government as what was determinant of whether the challenged action "shocks the conscience" was not negligence or deliberate indifference but whether there was "an intent to harm suspects physically or worsen their legal plight." Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 St. Louis U. Pub. L. Rev. 203 (2007), p. 236.

[65] Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, *supra* note 59 at 237-239. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the US Court considered the constitutional "right to travel interstate" which was alleged to have been infringed by a Connecticut statute which provided that residents cannot receive welfare benefits until they had lived in the state for at least one year. According to the Court, while unwritten in the Constitution, the right to travel is "fundamental to the concept of our Federal Union," which was, by and large, made up of several sovereign states coming together.

The New Union would not have been possible, and would have made no sense, unless citizens of that Union were free to travel from one end of it to another. Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 St. Louis U. Pub. L. Rev. 203 (2007), pp. 237-239.

[66] Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, *supra* note 59 at 240-241. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), which dealt with the right of married couples to use contraceptives, the US Supreme Court, speaking through *J.* Douglas, "spoke of the 'penumbras formed by emanations' from the guarantees of specific kinds of privacy in the Bill of Rights and used these x x x as a basis for finding a more generalized, more encompassing right of privacy." Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 St. Louis U. Pub. L. Rev. 203 (2007), p. 240.)

[67] Farrell writes that the US Court has found implied constitutional rights to vote (See *Reynolds v. Sims*, 377 U.S. 533 [1964]) and to some level of access to court processes (See *Griffin v. Illinois*, 351 U.S. 12 [1956] and *Boddie v. Connecticut*, 401 U.S. 371 [1971]) on the ground that "legislation and adjudication in the courts are essential elements of a democracy and that a limitation on access to these two institutions is a threat to the institution of government itself." Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 St. Louis U. Pub. L. Rev. 203 (2007), pp. 241-245.

[68] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court used *stare decisis*, in particular its decision in the case of *Roe v. Wade*, 410 U.S. 113 (1093), to explain the nature of the fundamental right to privacy as it related to abortion. *Roe*, in turn, also enumerated several cases from which it understood to have recognized a broad and generalized right to privacy (which includes a woman's decision whether or not to terminate her pregnancy) that is part of the Fourteenth Amendment "liberty." (Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 St. Louis U. Pub. L. Rev. 203 (2007), p 245-246.) This approach

There is no one mode of constitutional interpretation that has been recognized as appropriate under all circumstances. In fact, one would find critiques for every approach in scholarly commentaries on the subject.[69] Nevertheless, and despite the particular shortcomings of each individual approach, it is my view that the Court should endeavor to be deliberate and open about its choice of approach in fundamental rights cases. This, to my mind, would help greatly not only in furthering the public's understanding of the Court's decisions in complex constitutional cases; it would reinforce the credibility of Our decisions, by exacting upon the Court and its members the duty to clearly and consistently articulate the bases of its decisions in difficult constitutional cases.

A

The method by which the US Supreme Court determined the existence of the fundamental right to same-sex marriage in *Obergefell v. Hodges*[70] (*Obergefell*) is instructive.

There, the US Supreme Court considered not only the ancient history of marriage but also its development through time. To quote Justice Kennedy: "The history of marriage is one of both continuity and change."[71] The US Supreme Court also noted the legal and societal progression of the rights of homosexuals from being condemned as immoral to being accorded protection under the law, as depicted in the case of *Lawrence v. Texas*.[72] It must be stressed, however, that the US Supreme Court did not receive and evaluate evidence on these matters for the first time on appeal. The plaintiffs in *Obergefell* did not file a suit directly to the US Supreme Court. Rather, they instituted original actions before their respective Federal District Courts which conducted trials and hearings. Thus, the facts upon which the US Supreme Court based its decision were already a matter of record.

In *DeBoer v. Synder* (*DeBoer*),[73] one of the cases that comprised *Obergefell*, plaintiffs April DeBoer and Jayne Rowse challenged the validity of the Michigan Marriage Amendment (MMA) which prohibited same-sex marriage on the ground of violation of the due process and equal protection clauses of the Fourteenth Amendment. They claimed that they and their children were injured by their ineligibility to petition for joint adoption

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appears to have been used by this Court in *People v. Pomar*, 46 Phil. 440 (1924) and *J.* Jardeleza in his Concurring Opinion in *Capin-Cadiz v. Brent Hospital and Colleges, Inc.*, G.R. No. 187417, February 24, 2016, 785 SCRA 18.

[69] For in depth discussions of the different methods and approaches, see Crump, "*How do the Courts Really Discover Unenumerated Fundamental Rights — Cataloguing the Methods of Judicial Alchemy*," 19 Harv. J. L. & Pub. Pol'y 795 (1996); and Farrell, "*An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*," 26 St. Louis U. Pub. L. Rev. 203 (2007).

[70] 135 S. Ct. 2584 (2015).

[71] *Id.* at 2595.

[72] 539 U.S. 558 (2003). In *Lawrence*, the US Supreme Court reversed its earlier ruling in *Bowers v. Hardwick*, 478 U.S. 186 (1986) and recognized a liberty of consensual sexual conduct.

[73] 772 F.3d 388 (2014). The District Court declared MMA and its implementing rules unconstitutional for violating the equal protection clause.

because the State of Michigan permits only a single person or, if married, couples of opposite-sex, to adopt.[74] Thus, they argue that each of their three children can have only one of them as his/her legal parent. In case tragedy were to befall either DeBoer or Rowse, the other would have no legal rights over their children.[75]

The District Court assumed that the appropriate level of scrutiny is rational basis test; hence, it framed the issue as whether the MMA proscribed a conduct in a manner that is rationally-related to any conceivable legitimate governmental purpose.[76] **It then declared that whether the rationales for the Michigan laws furthered a legitimate state interest is a "triable issue of fact" and held a nine-day trial on the issue.**[77] The State of Michigan offered the following reasons for excluding same-sex couples from marriage: (1) to provide children with "biologically-connected" role-models of both genders that are necessary to foster healthy psychological development; (2) to avoid the unintended consequences that might result from redefining marriage; (3) to uphold tradition and morality; and (4) to promote the transition of "naturally procreative relationships into stable unions."[78]

Both parties presented expert witnesses (which included psychologists, sociologists, law professors, and historians) to prove their respective arguments. The psychologist testified with respect to the relation/non-relation of the quality of a person's child-rearing skills to his/her sexual orientation. The sociologist testified about the stability of same-sex couples and the progress of the children they raised as compared to children raised by heterosexual married couples. The law professor spoke about the effect of the MMA to children raised by same-sex couples if the sole legal parent dies or is incapacitated. The historian narrated the history and bases of civil marriages not only in Michigan but in every state in the country.[79]

Meanwhile, similar to *Deboer* and also instructive here, is *Perry v. Schwarzenegger*,[80] which involved two same-sex couples who challenged the validity of "Proposition 8," a voter-enacted amendment to the California Constitution restricting marriage to one between a man and a woman. Perry, *et al.* alleged that they were denied marriage licenses by their respective county authorities on the basis of Proposition 8, which, in turn, deprived them of their rights to due process and equal protection of the laws.[81] Specifically, they asserted that the freedom to marry the person of one's

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74 *Deboer v. Snyder*, 973 F. Supp. 2d 757, 760-761 (2014).
75 *Obergefell v. Hodges,* 135 S. Ct. 2584 (2015).
76 *Deboer v. Snyder*, *supra* note 74.
77 *Deboer v. Snyder*, 772 F.3d 388, 397 (2014).
78 *Deboer v. Snyder*, *supra* note 74 at 760.
79 *Deboer v. Snyder*, 973 F. Supp. 2d 757, 760, 761-768 (2014).
80 704 F. Supp. 2d 921 (2010). Note that *Perry* is not one of the cases that comprise *Obergefell*.
81 *Id.* at 927. The elected state officials of California, on the other hand, refused to defend the constitutionality of Proposition 8, so this task was taken up by its proponents.

choice is a fundamental right protected by the due process clause. Proposition 8 should thus be subjected to a heightened scrutiny under the equal protection clause because gays and lesbians constitute a suspect class, singled out for unequal treatment and discriminated based on sexual orientation.[82]

Since the factual premises underlying Perry, *et al.*'s claim were disputed, the US District Court for the Northern District of California (California District Court) set the matter for trial. The action was tried for more than two weeks (or from January 11 to 27, 2010).[83] The California District Court determined the following issues: (1) whether any evidence supports California's refusal to recognize marriage between two people of the (same) sex; (2) whether any evidence shows California has an interest in differentiating between same-sex and opposite-sex unions; and (3) whether the evidence shows Proposition 8 enacted a private moral view without advancing a legitimate government interest. **The parties were given full opportunity to present evidence in support of their positions and engaged in significant discovery procedures, including third-party discovery, to build an evidentiary record.**[84]

Perry, *et al.* presented nine expert witnesses, which include historians, economists, psychologists, political scientists, and a social epidemiologist, who, *inter alia*, testified that there is no meaningful difference between same-sex couples and opposite-sex couples.[85] Proposition 8 proponents, for their part, presented only two expert witnesses. In the end, the California District Court found that Proposition 8 proponents "failed to build a credible factual record to support their claim that [the law] served a legitimate government interest."[86] It thereafter proceeded to declare Proposition 8

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82 *Id.* at 929.

83 *Id.* The California District Court asked the parties to submit evidence to address 19 **factual** questions: (1) the history of discrimination gays and lesbians have faced; (2) whether the characteristics defining gays and lesbians as a class might in any way affect their ability to contribute to society; (3) whether sexual orientation can be changed, and if so, whether gays and lesbians should be encouraged to change it; (4) the relative power of gays and lesbians, including successes of both pro-gay and antigay legislation; (5) the long-standing definition of marriage in California; (6) whether the exclusion of same-sex couples from marriage leads to increased stability in opposite-sex marriage; (7) whether permitting same-sex couples to marry destabilizes opposite-sex marriage; (8) whether a married mother and father provide the optimal child-rearing environment; (9) whether excluding same-sex couples from marriage promotes this environment; (10) whether and how California has acted to promote these interests in other family law contexts; (11) whether or not Proposition 8 discriminates based on sexual orientation or gender or both; (12) whether the availability of opposite-sex marriage is a meaningful option for gays and lesbians; (13) whether the ban on same-sex marriage meaningfully restricts options available to heterosexuals; (14) whether requiring one man and one woman in marriage promotes stereotypical gender roles; (15) whether Proposition 8 was passed with a discriminatory intent; (16) the voters' motivation or motivations for supporting Proposition 8, including advertisements and ballot literature considered by California voters; (17) the difference in actual practice of registered domestic partnerships, civil unions, and marriage; (18) whether married couples are treated differently from domestic partners in governmental and non-governmental contexts; and (19) whether the right [to marriage] asserted by Perry, *et al.*, is "deeply rooted in this Nation's history and tradition" and thus subject to strict scrutiny under the due process clause. Cited in David Boies and Theodore Olson, Redeeming the Dream, Proposition 8 and the Struggle for Marriage Equality, (2014), pp. 77-78.

84 *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 932.

85 *Id.* at 934.

86 *Id.* at 932.

unconstitutional because the evidence shows, among others, that it does nothing more than to enshrine in the Constitution the notion that opposite-sex couples are superior to same-sex couples.[87]

B

In this case, petitioner and petitioners-in-intervention, as professed homosexuals, gays and lesbians, assert a fundamental right to enter into same-sex marriage.[88] They argue that the legal requirement that marriage be a union between a male and a female violates their rights to due process[89] and the equal protection of the laws.[90] On the former, they claim that there is no rational nexus between limiting marriage to opposite-sex couples and the state interest of protecting marriage as the foundation of the family.[91] They assert that: homosexuals can fulfill the essential marital obligations, heterosexuals are no better parents than homosexuals, and homosexuals can raise children well in the same manner that heterosexuals can.[92] With respect to their equal protection claim, petitioner asserts that classification on the basis of sexual orientation is suspect,[93] because, among others, sexual orientation is an immutable trait. Since the classification is suspect, strict scrutiny review must be resorted to. Petitioner further argues that even applying the rationality test, no substantial distinction can be made between same-sex and opposite-sex couples, because gay couples can do everything that opposite-sex couples are required to do by the Family Code, even if they cannot by themselves procreate.[94]

To my mind, however, these conflated claims to violations of due process and equal rights are uniformly anchored on assertions that present triable questions of fact, the resolution of which needs the reception of evidence. These questions, among others, include: (a) whether homosexuals, gays and lesbians can fulfill the essential marital obligations; (b) whether or how procreation is an essential marital obligation; (c) whether homosexuals, gays and lesbians can raise children in a manner as well as heterosexuals can; (d) whether Filipino tradition can accommodate/accept same-sex marriage; and (e) whether homosexuals are, and should be, treated as a separate class.

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87 *Id.* at 1003. The defendant public officials of California elected not to appeal from the ruling of the California District Court. The proponents of Proposition 8, however, filed an appeal with the Ninth Circuit Court of Appeals. The Circuit Court found the proponents have standing under federal law to defend Proposition 8's constitutionality, but nevertheless affirmed the California District Court on the merits. On further appeal, the US Supreme Court found that the proponents have no standing to appeal the California District Court's ruling. It consequently vacated the decision of the Ninth Circuit Court of Appeals and remanded the case to said court with the directive to dismiss the appeal for lack of jurisdiction. *Hollingsworth et al. v. Perry et al.*, 570 U.S. 693 (2013).

88 *Rollo*, p. 21.

89 *Id.* at 16-20.

90 *Id.* at 20-28.

91 *Id.* at 16.

92 *Id.* at 19.

93 *Id.* at 27.

94 *Id.* at 28.

With particular reference to equal protection, petitioner maintains that classifying individuals by sexual orientation and gender, so as to distinguish between same-sex and opposite-sex couples, is a suspect classification, thus triggering strict scrutiny.[95] He is reminded, however, that in *Ang Ladlad LGBT Party v. Commission on Elections*,[96] We withheld ruling, in the **absence of sufficient evidence**, on whether homosexuals should be treated as a separate class, *viz.*:

> x x x We disagree with the OSG's position that homosexuals are a class in themselves for the purposes of the equal protection clause. **We are not prepared to single out homosexuals as a separate class meriting special or differentiated treatment. We have not received sufficient evidence to this effect**, and it is simply unnecessary to make such a ruling today. x x x[97] (Emphasis supplied; citations omitted.)

Petitioner's reference to Chief Justice Puno's Separate Concurring Opinion in *Ang Ladlad*[98] does not help his cause. In fact, it only underscores the need for the reception of evidence, before homosexuals, gays and lesbians can be considered a suspect classification with respect to marriage rights. Particularly, evidence need to be received on: (a) whether there is a history of invidious discrimination against the class; (b) whether the distinguishing characteristic of the class indicate a typical class member's ability to contribute to society; (c) whether the distinguishing characteristic is immutable; and (d) the political power of the subject class.[99]

Petitioner alleges that even if only the rational basis test is applied, the assailed provisions will fail since there is no substantial distinction between opposite-sex couples and same-sex couples respecting marriage. Both can perform the essential marital obligations under the Family Code. These are: (a) the obligation to live together, observe mutual love, respect, and fidelity, and render mutual help and support; (b) fix the family domicile; and (c) support the family and pay the expenses for such support and other conjugal obligations.[100] To reiterate, this argument still requires the presentation of documentary and testimonial evidence. It cannot be assumed especially since there are conflicting claims on these assertions.[101]

With respect to petitioner's claim that same-sex couples can raise children as well as opposite-sex couples,[102] We note that the intervenors-oppositors expressed a strong contrary view and argue that children raised by heterosexual couples fare better than those who are not.[103] The reception

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95 *Id.* at 21.
96 G.R. No. 190582, April 8, 2010, 618 SCRA 32.
97 *Id.* at 65.
98 *Rollo*, p. 21.
99 *Id.* at 22.
100 *Id.* at 28.
101 See *rollo*, pp. 49-50.
102 *Rollo*, p. 9.
103 *Id.* at 285. Paragraph 24 of Opposition-In-Intervention.

of scientific and expert opinion is probably necessary to assist the Court in resolving this issue.

C

Petitioner and petitioner-intervenors' argument that the Family Code, by excluding same-sex couples from marriage, have placed an undue burden on their religious freedom by failing to legally recognize their relationship[104] similarly calls for the reception of evidence.

Petitioner contends that Articles 1 and 2 of the Family Code are unconstitutional because they prohibit same-sex couples from founding a family through the vehicle of marriage in accordance with their religious convictions, a right protected under Section 3(1) Article XV of the Constitution.[105] Petitioners-intervenors, meanwhile, claim that they are of the religious conviction that Christianity does not treat homosexuality as a sin, and that Christianity does not prohibit same-sex marriage; hence, gay and lesbian Christians can also enter into marriage.[106] They further submit that there exists no substantial distinction between their religious convictions and the religious convictions of Filipino Catholics and Filipino Muslims, and yet the latter's religious beliefs enjoy legal recognition from the State.[107]

For its part, the CRG argues that sex-based conceptions of marriage do not violate religious freedom. It claims that the limitation of marriage to opposite-sex couples is a valid state regulation grounded on a purely legitimate secular purpose. The compelling state interests in procreation, foundation of the family, and preservation of the tradition and history of marriage, are enshrined in the Constitution. The CRG maintains that limiting civil marriages to opposite-sex couples is not unconstitutional simply because a particular religion or religious group claims that it goes against their religious beliefs. According to the CRG, allowing such situation will render the State subservient to the beliefs of said religion or religious group.[108]

Relevant to the Court's consideration of the religious argument is the free exercise clause of the 1987 Constitution.[109] This clause guarantees the liberty of religious conscience and prohibits any degree of compulsion or

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[104] *Id.* at 558. Paragraph 44, Petitioner's opening statement, oral arguments.

[105] *Id.* at 11-12. Section 3 provides: 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; x x x

[106] *Id.* at 144.

[107] *Id.* at 150-151.

[108] *Id.* at 329. Paragraphs 106 and 109, OSG's Supplemental Comment with Leave of Court, p. 36.

[109] Section 5, Article III of the 1987 Constitution declares that "[n]o 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 preference, shall forever be allowed." It likewise declares that "no religious test shall be required for the exercise of civil or political rights." This provision in the Bill of Rights encapsulates the Religion Clauses of our Constitution — the Non-Establishment Clause and the Free Exercise Clause.

burden, whether direct or indirect, in the practice of one's religion.[110] In *Estrada v. Escritor*,[111] the Court established benevolent neutrality-accommodation as the regime under which a claim of violation of religious freedom should be considered. The following factual questions should be resolved through the presentation of evidence: (1) whether the claimant's right to religious freedom has been burdened by the government regulation; (2) whether the claimant is sincere in his/her belief, which in turn constitutes a central tenet of their proclaimed religion; and (3) whether the State has compelling interest to override the claimant's religious belief and practice.

Applying the foregoing analysis to this case, petitioner must first show how the assailed provisions of the Family Code created a burden on their right to the free exercise of religion; while on the part of the LGBTS Church, it must prove, foremost, that it is a religion and that same-sex marriage is a central tenet of its faith. Second, petitioner and the petitioners-intervenors must demonstrate that they hold a sincere belief in this tenet. Third, the CRG must establish that the state has a compelling interest to limit marriage to opposite-sex couples. As was shown earlier, these are factual matters requiring the presentation of evidence.

Final Words

It is my view that the case before Us presents a cautionary tale of how **not** to prove a fundamental right in the context of public interest litigation. I believe though, that with the dismissal of their petitions, concerned counsel have been punished enough. Nevertheless, the pursuit (and, maybe, ultimate acceptance) of the idea of marriage equality need not end here. Rather, zealous fealty to the Constitution's strictures on case and controversy and the hierarchy of courts should give the idea of marriage equality a sporting chance to be, in time, vigorously and properly presented to the Court.

For the reasons above-stated, I vote to **DISMISS** the petition.

FRANCIS H. JARDELEZA
Associate Justice

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[110] *Estrada v. Escritor*, A.M. No. P-02-1651 (formerly OCA I.P.I. No. 00-1021-P), August 4, 2003, 408 SCRA 1, 134.

[111] A.M. No. P-02-1651 (formerly OCA I.P.I. No. 00-1021-P), June 22, 2006, 492 SCRA 1, 66. In *Escritor*, the Court is confronted with the issue of whether Escritor's claim of religious freedom could warrant carving out an exemption from the Civil Service Law. Escritor, a court interpreter, was charged with immorality because she cohabited with a man other than her husband during the subsistence of her marriage. In her defense, Escritor countered that Jehovah's Witnesses, a religious sect to which she is a member, legitimizes a union which is otherwise adulterous or bigamous provided that the parties sign a Declaration of Faithfulness. She and her partner executed and signed a Declaration of Faithfulness in 1991, thus they are regarded by their Church as husband and wife. In resolving the case, the Court inquired into three things: (1) whether Escritor's right to religious freedom has been burdened; (2) whether Escritor is sincere in her religious belief; and (3) whether the state has compelling interest to override Escritor's religious belief and practice.