# EXPANDING THE SCOPE OF FACIAL CHALLENGES AND THE ADOPTION OF THE SUBSTANTIALITY TEST*

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**ABSTRACT**

Facial challenges are generally disfavored as such approach is seen as "manifestly strong medicine" in invalidating laws for being unconstitutional. While the early conception of the doctrine suggests that facial invalidation is permitted to assail only governmental acts that curtail the freedom of speech, recent jurisprudence has opened the doors to expanding this scope to other fundamental rights. However, broadening the application of facial challenges has associated costs which pose serious implications for the administration of justice. This is why the Court is impelled to act with prudence and constraint in carving out the doctrine under the broader framework of judicial review.

This Note posits that the scope of facial challenges may be expanded to permit suits assailing the constitutionality of statutes infringing upon other constitutional rights on the grounds of overbreadth and vagueness based on three reasons: *first*, free speech overlaps and is interrelated with other rights; *second*, chilling effect applies not only to free speech but also to other rights; and *third*, there is a need to reconcile jurisprudence as facial challenges have already been applied in non-speech cases. Moreover, in order to ensure that the costs associated with facial invalidation will not outweigh these underlying reasons, this Note proposes the adoption of the *substantiality test* in the contexts of overbreadth and vagueness doctrines in operationalizing facial suits. This measure ensures that facial challenge is resorted to only when infringement upon fundamental rights is widespread, not simply in isolated instances that could be better dealt with through as-applied suits.

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* *Cite as* Macario B. Duguiang, Jr., *Expanding the Scope of Facial Challenges and the Adoption of the Substantiality Test*, 98 PHIL. L. J. 643, [page cited] (2025).

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## INTRODUCTION

A party can question the validity of a statute only if, as applied, it is unconstitutional.[1] This means that a litigant can assail the constitutionality of a law only as applied to their own specific facts and circumstances. As an exception to this rule, a facial challenge may be made to nullify a governmental act for its possible "chilling effect" upon protected speech.[2] Prevailing Philippine jurisprudence holds that a statute may be facially invalidated only if it curtails freedom of speech.[3] Facial challenges have also been held to be inapplicable to plain penal statutes.[4]

In the 2021 case of *Calleja v. Executive Secretary*,[5] the Court recognized that the scope of facial challenges has been expanded in our jurisdiction. In recent jurisprudence, facial challenges have been applied to penal laws and have been permitted to assail the validity of statutes that curtail not only the freedom of speech but also other fundamental rights.[6] However, the Court

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[1] Spouses Romualdez v. Comm'n on Elections [hereinafter, "*Spouses Romualdez*"], 576 Phil. 357, 406 (2008) (Carpio, *J.*, *dissenting*).

[2] Romualdez v. Sandiganbayan [hereinafter, "*Romualdez*"], 479 Phil. 265, 281 (2004), *citing* Estrada v. Sandiganbayan [hereinafter, "*Estrada*"], 421 Phil. 290, 430 (2001) (Mendoza, *J.*, *concurring*).

[3] Calleja v. Exec. Sec'y [hereinafter, "*Calleja*"], 918-B Phil. 1, 80 (2021).

[4] Madrilejos v. Gatdula, 863 Phil. 754, 796 (2019), *citing Estrada*, 421 Phil. at 354.

[5] *Calleja*, 918-B Phil. 1 (2021).

[6] *Id.* at 79, *citing* Imbong v. Ochoa [hereinafter, "*Imbong*"], 732 Phil. 1, 125–26 (2014).

made no definitive pronouncement as to the extent of rights which may serve as bases for mounting a facial challenge, stating that:

> [T]he Court, at this time, finds it improper to expand the scope of facial challenges to all other constitutional rights, as it is not even material, much more necessary for the just disposition of this already complex case. Moreover, it appears that if such position is adopted at this time, the judiciary will be put in a precarious position where it may be inundated with numerous petitions to invalidate statutes as soon as they come into effect.[7]

The Court anticipates that broadening the scope of facial invalidation may allow anyone to challenge a law for transgressing any constitutional right without an actual case or controversy. Such scenario poses serious implications for the substantive and procedural administration of justice, which would explain the Court's reluctance in allowing such challenge beyond the realm of free speech.

Facial invalidation represents a powerful tool of the Court in safeguarding the guarantees of the Constitution. But while facial invalidation plays a vital role in the legal system, its use must be approached with prudence and deliberation.

This Note posits that the scope of facial challenges may be expanded to allow a suit assailing the validity of a statute that concerns fundamental rights other than freedom of speech. Moreover, this Note proposes the adoption of the "substantiality test" as used in US jurisprudence in order to limit the costs associated with the use of facial challenges. This Note proceeds as follows: *first*, the doctrine of facial challenge and its jurisprudential history will be discussed to contextualize the analysis and arguments of the Note; *second*, the two types of facial challenges will be introduced to delimit the scope of the Note; *third*, the considerations in expanding the scope of facial challenges will be analyzed; *fourth*, arguments for the expansion of the scope will be presented; and *finally*, the substantiality test will be introduced and cases applying this test will be discussed to serve as guidance for its operation.

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[7] *Id.* at 80.

## I. THE FACIAL CHALLENGE DOCTRINE

### A. Definition and Jurisprudential History

A facial challenge is "an examination of the entire law, pinpointing its flaws and defects, not only on the basis of its actual operation to the parties but also on the assumption or prediction that its very existence may cause others not before the court to refrain from constitutionally protected speech or activities."[8] It is a mechanism to challenge the constitutionality of laws or regulations based solely on their text, without awaiting its application to an individual's specific circumstances.[9] If meritorious, it results in the invalidation of an act on the ground that it might infringe constitutionally protected rights of parties who may not be before the Court.[10]

As an exception to the requirements of *actual case and controversy* and *legal standing* in the exercise of judicial review,[11] a facial challenge permits decisions to be made without application to the concrete facts of a litigant.[12] Tied to this notion is the concept of ripeness, which requires that a party be directly and adversely affected to be permitted to challenge an act.[13]

A facial challenge is also an exception to the rule that parties must only present their own cases and factual circumstances before the courts,[14] since they may raise the rights of third parties as well.[15] Former Chief Justice Reynato Puno explained that a law that is vague and overly broad is considered as "an immense evil and destructive of fundamental rights in a democratic regime."[16] It is a threat to every member of the body politic and, thus, must be struck down at any time and by anyone.[17]

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[8] S. Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council, 646 Phil. 452, 489 (2010).

[9] Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359 (1998) *citing* Tobe v. City of Santa Ana, 892 P.2d 1145, 1152 (Cal. 1995).

[10] *Estrada*, 421 Phil. at 432 (Mendoza, *J.*, *concurring*).

[11] Francisco v. House of Representatives [hereinafter, "*Francisco*"], 460 Phil. 830, 892 (2003), *citing* Angara v. Electoral Comm'n [hereinafter, "*Angara*"], 63 Phil. 139 (1936).

[12] *Estrada*, 421 Phil. at 432 (Mendoza, *J.*, *concurring*).

[13] Peralta v. Phil. Postal Corp., 844 Phil. 603, 617–18 (2018).

[14] Falcis v. Civ. Registrar Gen., 861 Phil. 388, 446 (2019).

[15] *Spouses Romualdez*, 576 Phil. at 406 (Carpio, *J.*, *dissenting*).

[16] *Calleja*, 918-B Phil. at 59–60, *citing* Position Paper of Former C.J. Reynato S. Puno as *amicus curiae*, at 5.

[17] *Id.*

The doctrine of facial challenge finds its roots in American jurisprudence. In *Thornhill v. Alabama*,[18] the US Supreme Court first proposed that the traditional rules on standing should be made different in the context of the First Amendment which protects freedom of speech, the press, assembly, and the right to petition the government for a redress of grievances.[19] In *Gooding v. Wilson*,[20] it was held that facial challenges may be made against vague or overbroad statutes because of the possible "chilling effect" upon protected speech.[21] *Gooding* laid down the theory behind allowing facial invalidation:

> "[W]hen statutes regulate or proscribe speech and no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution, the transcendent value to all society of constitutionally protected expression is deemed to justify allowing attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with narrow specificity." The possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that the protected speech of others may be deterred and perceived grievances left to fester because of possible inhibitory effects of overly broad statutes.[22]

In Philippine jurisprudence, the Court first recognized its authority to declare the act void on its face in *Gonzales v. COMELEC*,[23] holding that "[t]here is respectable authority for the court having the power to so act."[24] In *Cruz v. Secretary of Environment and Natural Resources*,[25] Justice Vicente V. Mendoza first opined that facial challenges are limited only to freedom of expression cases.[26] This was the holding in *Estrada v. Sandiganbayan*, where the Court first declared that penal statutes cannot be the subject of facial invalidation.[27]

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[18] 310 U.S. 88 (1940).
[19] *Id.* at 96.
[20] [Hereinafter, "*Gooding*"], 405 U.S. 518 (1972).
[21] *Id.* at 520.
[22] *Estrada*, 421 Phil. at 353–54, *citing Gooding*, 405 U.S. at 521.
[23] 137 Phil. 471 (1969).
[24] *Id.* at 500.
[25] 400 Phil. 904 (2000).
[26] *Id.* at 1092 (Mendoza, *J.*, *separate*).
[27] *Estrada*, 421 Phil. at 354.

In his dissent in *Spouses Romualdez*,[28] Justice Antonio Carpio posited that while the overbreadth and vagueness doctrines are indeed inapplicable to penal statutes for purposes of mounting a facial challenge, an exception is admitted for cases which involve free speech.[29] This was adopted by the Court in *Disini v. Secretary of Justice*,[30] which categorically stated that "[w]hen a penal statute encroaches upon the freedom of speech, a facial challenge grounded on the void-for-vagueness doctrine is acceptable."[31]

A few months after *Disini,* the Court, in *Imbong v. Ochoa,* emphasized that our jurisdiction has expanded the scope of facial challenges to cover statutes not only regulating free speech but also those involving "other fundamental rights."[32] This became a point of contention in *Calleja*, where the petitioners construed the phrase "other fundamental rights" as including all other rights in the Constitution. Thus, they argued that the Anti-Terror Act may be facially challenged for violating the right to due process, the right to be presumed innocent, and the right to bail.[33] The Court struck down this argument, clarifying that the phrase "other fundamental rights" pertains to freedom of expression and its cognate rights, and reaffirming that facial challenges are still only allowed if a statute curtails such rights.[34]

### B. Two Types of Facial Challenges

There are two types of facial challenges.[35] The first type is one that invalidates a law in its entirety for violating the Constitution "because it has no valid application."[36] This is best characterized in *United States v. Salerno*[37] which set forth the "no set of circumstances" test. This stringent test places a high burden on challengers, requiring them to show that the law is unconstitutional in all its applications,[38] ensuring that courts do not strike down laws based on hypothetical or speculative situations, but on actual application.[39]

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[28] 576 Phil. 357 (2008).
[29] *Id.* at 386 (Carpio, *J.*, *dissenting*).
[30] [Hereinafter, "*Disini*"], 727 Phil. 28 (2014).
[31] *Id.* at 121.
[32] 732 Phil. at 126.
[33] *Calleja*, 918-B Phil. at 79–80.
[34] *Id.* at 80.
[35] Solomon F. Lumba, *Understanding Facial Challenges*, 89 PHIL. L.J. 596, 596 (2015).
[36] *Id.* at 597.
[37] 481 U.S. 739 (1987).
[38] *Id.* at 745.
[39] *Id.*

The second type of facial challenge seeks to invalidate a law in its entirety for public policy considerations "because it has at least one reasonably conceivable invalid application."[40] This includes challenges grounded on the overbreadth and void-for-vagueness doctrines, which are both incompatible with the first type of facial challenge. This Note's analysis shall be limited to the second type.

The overbreadth and void-for-vagueness doctrines are analytical tools for testing statutes on their faces.[41] The overbreadth doctrine decrees that "a governmental purpose may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[42] Simply put, an overbroad law is one that restricts not only unprotected but also protected speech.[43] A statute may thus be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[44] Aptly, facial challenges based on overbreadth fall under the second type. Where a law, although legitimate in some applications, violates constitutionally protected rights, public policy considerations permit a facial challenge to prevent abridgment of these rights.[45]

As for the void-for-vagueness doctrine, an act is vague when "it lacks comprehensible standards that men of common intelligence must necessarily guess at its meaning and differ as to its application."[46] It is violative of due process for failure to give persons fair notice of what the prohibited conduct is and for giving law enforcers wide discretion in carrying out its provisions.[47] As a result, individuals will respond by steering away from unclearly marked zones in the vague law, thereby deterring people from exercising even constitutionally protected rights.[48] While void-for-vagueness suits grounded on due process are only permitted as applied, free speech vagueness cases may also result in facial invalidation.[49] This was affirmed in *Disini*, where the

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[40] Lumba*, supra* note 35, at 597.

[41] *Romualdez*, 479 Phil. at 282, *citing Estrada*, 421 Phil. at 431 (Mendoza, *J.*, *concurring*).

[42] *Estrada*, 421 Phil. at 430 (Mendoza, *J.*, *concurring*), *citing* Nat'l Ass'n for the Advancement of Colored People v. Alabama [hereinafter, "*Alabama*"], 377 U.S. 208, 307 (1958); Shelton v. Tucker, 364 U.S. 479 (1960).

[43] Nicolas-Lewis v. Comm'n on Elections, 859 Phil. 560, 588 (2019).

[44] United States v. Stevens, 559 U.S. 460, 461 (2010).

[45] Lumba*, supra* note 35, at 598.

[46] People v. Nazario, G.R. No. 44143, 165 SCRA 186, 190, Aug. 31, 1988.

[47] Zabal v. Duterte, 859 Phil. 743, 878 (2019) (Leonen, *J.*, *dissenting*).

[48] *Spouses Romualdez*, 576 Phil. at 407 (Carpio, *J.*, *dissenting*).

[49] *Southern Hemisphere*, 646 Phil. at 483.

Court ruled that "when a penal statute encroaches upon the freedom of speech, a facial challenge grounded on the void-for-vagueness doctrine is acceptable."[50]

Both doctrines serve to prevent the chilling of constitutional rights[51] and have been applied in our jurisdiction congruously with the "no set of circumstances" standard in *Salerno*.[52] However, these doctrines are incompatible with this standard. Accordingly, this Note's analysis shall be limited only to this second type of facial challenge.

## II. CONSIDERATIONS IN EXPANDING THE SCOPE OF FACIAL CHALLENGES

The premise underlying facial challenges lies in the assertion that governmental acts engender a chilling effect, dissuading citizens from exercising even constitutionally protected rights, thus, making it impracticable for such acts to be analyzed as applied. When an overbroad law chills the exercise of a right, only facial invalidation can remedy the chilling effect.[53] It is in these circumstances that facial challenges allow for a better enforcement of constitutional rights as opposed to as-applied review which may be inadequate in protecting constitutional guarantees.[54]

To reiterate, prevailing jurisprudence limits facial challenges to laws that curtail freedom of speech and its cognate rights. However, in *Imbong*, the Court recognized the expansion of the scope of facial challenges to other fundamental rights. Although the Court did not categorically declare the extent of such rights, it laid down the underlying principle in the expansion of facial challenges:

> For unlike its counterpart in the U.S., this Court, under its expanded jurisdiction, is mandated by the Fundamental Law not only to settle actual controversies involving rights which are legally demandable and enforceable, but also to determine whether or not there has been a grave abuse of discretion amounting to lack or

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[50] *Disini,* 727 Phil. at 121.

[51] *Romualdez*, 479 Phil. at 282, *citing Estrada*, 421 Phil. at 430 (Mendoza, *J.*, *concurring*).

[52] *See Disini*, 727 Phil. at 100. "[T]he overbreadth challenge places on petitioners the heavy burden of proving that under no set of circumstances will Section 4(a)(3) be valid."

[53] David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1345 (2005), *citing* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236 (1994).

[54] *Id.* at 1352.

> excess of jurisdiction on the part of any branch or instrumentality of the Government. Verily, the framers of Our Constitution envisioned a proactive Judiciary, ever vigilant with its duty to maintain the supremacy of the Constitution.[55]

Judicial review, as conferred by Article VIII, Section 1 of the 1987 Constitution, empowers courts to invalidate constitutionally infirm acts.[56] It is part of the system of checks and balances which "forms the bedrock of our republican form of government and insures that its vast powers are utilized only for the benefit of the people for which it serves."[57] This lays down the basis of the Court's authority to permit facial invalidation. However, this exercise of power rests on the sound discretion of the Court.

Facial challenges are so designed to address certain deficiencies of as-applied challenges in protecting the rights of individuals. However, mounting a facial challenge would result in forgoing valid applications of a law because of some invalid ones. Laws passed for legitimate governmental purposes may be struck down based on hypothetical instances, entailing a tradeoff between allowing the proliferation of unprotected conduct and safeguarding protected conduct from unintended infringement.[58]

This also raises an especially pressing concern in the context of penal statutes, which, by their nature, are intended to have an *in terrorem*[59] effect to deter socially harmful conduct.[60] If facial challenges are permitted against penal statutes, the same may well lose their effectiveness in preventing such conduct, and the prosecution of crimes may be hampered. This is the underlying reason behind the view that facial challenges, on the grounds of the overbreadth and vagueness doctrines, apply only to free speech cases.[61]

Moreover, recall that facial challenges are carved out as an exception to the requirements of ripeness and standing in the exercise of judicial power. These requirements ensure that the parties before the court have a personal stake in the result, thereby assuring "concrete adverseness which sharpens the presentation of issues upon which the court depends for illumination of

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[55] *Imbong*, 732 Phil. at 126. (Emphasis omitted.)

[56] *Francisco*, 460 Phil. at 881.

[57] *Id.* at 882, *citing Angara*, 63 Phil. 139 (1936).

[58] *See Gooding*, 405 U.S. at 522.

[59] Defined as "in terror or warning; by way of threat." HENRY CAMPBELL BLACK, BLACK'S LAW DICTIONARY 609 (2nd ed. 1910).

[60] *Estrada,* 421 Phil. at 354 (Mendoza, *J.*, *concurring*).

[61] *Id.*

difficult constitutional questions."[62] The Court should refrain from speculating on hypothetical scenarios when none of the parties involved can adequately present their arguments due to a lack of established facts.[63] Otherwise, any resolution would merely result in abstract legal inquiries yielding unproductive conclusions disconnected from reality.[64]

These requirements are also rooted in the principle of separation of powers.[65] The Judiciary will not interfere with or invalidate any act, law, or regulation rendered by its co-equal branches, unless there exists an actual or reasonably imminent infringement upon a right.[66] Thus, jurisprudence provides that the judiciary's power of review is limited in application. In fulfilling their duty to interpret the law, the courts may only resolve ambiguities in the context of an actual situation.[67]

Furthermore, the limited capacity of courts must also be considered. Dispensing with the requirements of standing and actual controversy could be tantamount to indiscriminately opening doors to frivolous lawsuits and litigants. This would overburden the dockets of the courts, impairing the judiciary's ability to dispense justice.[68]

These are the important considerations in carving out the framework for facial challenges. They represent the associated costs of expanding the scope of facial invalidation to fundamental rights other than free speech. Having this laid out, this Note posits that the scope of facial challenges may be expanded to permit suits assailing the validity of statutes concerning other constitutional rights on the grounds of overbreadth and vagueness based on the following reasons: *first*, free speech overlaps and is interrelated with other rights; *second*, chilling effect applies not only to free speech but also to other rights; and *third*, there is a need to reconcile jurisprudence as facial challenges have already been applied in non-speech cases.

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[62] *Falcis*, 861 Phil. at 532.
[63] *Id.* at 551.
[64] *Angara*, 63 Phil. at 153.
[65] *Falcis*, 861 Phil. at 532.
[66] Kilusang Mayo Uno v. Aquino, 850 Phil. 1168, 1188 (2019).
[67] Lozano v. Nograles, 607 Phil. 334, 340 (2009).
[68] *Falcis*, 861 Phil. at 532.

### A. Free Speech Overlaps and is Interrelated with Other Constitutional Rights

Rights do not exist in isolation but intersect, associate, and interact with one another.[69] Their meanings are derived not only from individual texts but also from the relationships between and among rights.[70] These relations are dynamic in that the courts must be mindful of the changes in the interpretation of one in interpreting another.[71] In the case of free speech, it has been held to be "the indispensable condition of nearly every other form of freedom."[72] The ability to express oneself freely lays the foundation for the existence and preservation of other freedoms.

The case of *Calleja* recognized that the "other fundamental rights" listed in *Imbong*, i.e., the freedom of religion, freedom of the press, the right of peaceable assembly, and the right to petition the government for a redress of grievances, are component rights of the freedom of expression as "they are modes [through] which one's thoughts are externalized."[73] However, this list is not exhaustive. Other rights such as the right to vote,[74] the guarantee of academic freedom,[75] and the freedom of association,[76] have also been held to be complementary to the freedom of expression.

While not explicitly enumerated in many legal frameworks as a component of free speech, the right to privacy is also closely related to freedom of expression. Privacy protections safeguard the ability of individuals to engage in private, intimate, or personal speech and communication without unwarranted intrusion or surveillance.[77] This interplay can be seen in *Clapper v. Amnesty International USA*,[78] where the plaintiffs challenged the constitutionality of a provision of the Foreign Intelligence Surveillance Act, arguing that the law chilled professional speech and invaded the right to privacy. While the Court ultimately sustained the

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[69] Timothy Zick, *Rights Dynamism*, 19 U. PA. J. CONST. L. 791, 797 (2017).
[70] *Id.* at 806.
[71] *Id.* at 807.
[72] Palko v. Connecticut, 302 U.S. 319, 327 (1937).
[73] *Calleja*, 918-B Phil. at 79, *citing Imbong*, 732 Phil. at 125.
[74] Armand Derfner & J. Gerald Hebert, *Voting is Speech*, 34 YALE L. & POL'Y REV. 471, 487 (2016).
[75] Pimentel v. Legal Educ. Bd., 913 Phil. 828, 926 (2019).
[76] *See Alabama*, 357 U.S. 449 (1958).
[77] RAYMOND WACKS, PRIVACY: A VERY SHORT INTRODUCTION 71 (2015 ed.)
[78] 568 U.S. 398 (2013).

law, the plaintiffs' arguments underscored the interrelation between privacy and freedom of expression.[79]

The principles underlying freedom of speech also often intersect with the right to information. In the landmark case of *New York Times Co. v. United States*,[80] the US Supreme Court struck down government regulations enjoining certain newspapers from publishing classified documents. While not explicitly framing the case as a direct relationship between freedom of speech and the right to information, the case underscores the importance of access to information in facilitating free expression. It also recognizes that the ability to seek, receive, and impart information is integral to the exercise of freedom of speech.[81]

Freedom of expression also intersects with the right to equal protection. In *Obergefell v. Hodges*[82] where the US Supreme Court ruled for marriage equality for same-sex couples, it was held that the Constitution protects "a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."[83] By affirming the rights of same-sex couples to marry and receive equal treatment under the law, the Court's ruling implicitly affirmed the importance of protecting diverse forms of expression.

The foregoing discussion shows how the intricate interdependencies of rights make their demarcation from one another almost impracticable. Freedom of speech may be exercised in the form of other rights, some rights may be the vessel for expression, and other rights may be integral conditions to free speech. Where no boundary can be clearly marked, isolating the application of facial challenges to free speech cases may be futile. Attempting to draw clear boundaries between rights is akin to separating threads in a tightly woven tapestry. Each thread influences and depends on the others, creating a complex and interconnected system.

Confining facial challenges solely to free speech cases ignores the broader implications of interconnected rights and overlooks the wider context in which they operate. Consider a hypothetical law passed mandating previously convicted individuals, regardless of the nature of the crime or the severity of the penalty imposed, to install surveillance cameras in their

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[79] *Id.*, slip op. at 7.
[80] 403 U.S. 713 (1971).
[81] *Id.* at 719.
[82] 576 U.S. 644 (2015).
[83] *Id.* at 644.

respective households, purportedly to combat crime. On the surface, this law appears to infringe primarily on the right to privacy. However, this law also has significant implications to freedom of speech. In a society where citizens are constantly under surveillance, individuals may self-censor their speech out of fear of repercussions to their dissenting opinions or reprehensible discussions. Such a scenario is not one that can be concretely proven in an as-applied invalidation. By limiting facial challenges to freedom of speech cases, the Court impairs its effectiveness in protecting not only other constitutional rights but even free speech itself.

This underscores the need for a more comprehensive approach to facial challenges to account for these interconnections. By adopting a broader approach to facial invalidation, the court can recognize the intertwined nature of rights and consider the implications for freedom of speech as well. This approach not only enhances the protection of individual liberties but also promotes coherence and consistency within the legal system. Thus, the expansion of the scope of facial invalidation is not merely a matter of practicality but also of necessity.

### B. Chilling Effect Applies Not Only to Free Speech But Also to Other Rights

There is no substantial difference between freedom of speech and other rights in terms of the effect of vague and broad statutes. Freedom of expression has been given the status of a preferred right, making it stand "on a higher level than substantive economic freedom or other liberties."[84] This preferred position is owed to the idea that freedom of speech is essential to the functioning of a democratic society, and therefore any restrictions to speech must be subject to strict scrutiny and justified by compelling governmental interests.[85] Nonetheless, this preference does not merit the application of the protection of facial challenges to free speech alone.

Generally, the chilling effect occurs when an individual seeks to engage in a protected activity but is deterred from so doing by a governmental act as an indirect consequence of the restriction's

[84] Chavez v. Gonzales, 569 Phil. 155, 195 (2008).
[85] *See* Talley v. California, 362 U.S. 60, 63–64 (1960).

application.[86] While it is most commonly associated with freedom of speech, the chilling effect may also apply to other fundamental rights.

In *National Association for the Advancement of Colored People v. Alabama*, the US Supreme Court recognized that compelled disclosure of membership could have a chilling effect on the willingness of individuals to associate and assemble, emphasizing that individuals must be able to form and maintain associations without undue interference or intimidation in order to effectively engage in collective expression and advocacy on matters of public concern.[87] In *Griswold v. Connecticut*,[88] it also recognized that the law criminalizing contraceptives could create a chilling effect on individuals seeking to obtain information about contraception and infringe upon the fundamental right to marital privacy.[89] In *Aptheker v. Secretary of State*,[90] the US Court invalidated a statute prohibiting any member of a communist organization from applying for or using a passport to prevent chilling effect on the right to travel, thus preempting case-by-case adjudication.[91]

Government surveillance practices can also deter individuals from exercising their right to petition the government.[92] As to the right to vote, restrictive voting laws can deter eligible voters, like marginalized communities, from participating in elections due to concerns about their eligibility or safety. Likewise, regulations prohibiting subversive materials in schools can lead to the chilling of academic freedom of educational institutions to determine what and how to teach.

This list demonstrates that the chilling effect has the similar consequence of deterring or discouraging individuals from exercising other constitutionally protected rights due to fear of adverse repercussions. In the case of freedom of speech, facial challenges are warranted because as-applied invalidation may be impracticable in the face of a possible abridgment. The same rationale applies to other rights because individuals cannot exercise such rights due to fear of consequences as a result of vagueness or overbreadth. While free speech enjoys preferential treatment, other

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[86] Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1481 (2013), *citing* Daniel J. Solove, *The First Amendment as Criminal Procedure,* 82 N.Y.U. L. REV. 112, 142 (1997).

[87] *Alabama*, 357 U.S. at 460.

[88] 381 U.S. 479 (1965).

[89] *Id.* at 481–86.

[90] [Hereinafter, "*Aptheker*"], 378 U.S. 500 (1964).

[91] *Id.* at 505.

[92] *See* Laird v. Tatum 408 U.S. 1, 24 (1972) (Douglas, *J.*, *dissenting*).

fundamental rights are also guaranteed by the Constitution and should be afforded the same protection that facial challenges provide.

When a right is considered a preferred right, it means that it is entitled to heightened protection against governmental intrusion or infringement due to its essential role in a democratic society.[93] The case of *United States v. Carolene Products Co.*[94] first introduced the idea that there may be categories of rights which may be considered preferred and entitled to more rigorous judicial scrutiny.[95] The case is perhaps best known for Justice Harlan Fiske Stone's "Footnote 4," which suggests that there are three types of legislations where the Court may apply different levels of scrutiny: (1) laws that fall within prohibitions of the Constitution, (2) laws that restrict political processes that allow the repeal of undesirable legislation, and (3) laws that discriminate upon "discrete and insular" minorities.[96] The first category pertains to all rights explicitly protected by the text of the Constitution.[97] Footnote 4 has been previously invoked in our jurisdiction to hold that the Judiciary should uphold a legislative act unless the same discriminates against a discrete and insular minority or infringes upon fundamental rights.[98]

From this, it can be inferred that the concept of preference among constitutional rights does not apply to the degree of protection over said rights. In legal contexts, rights may sometimes come into conflict with another, necessitating a balancing of competing interests. But if the circumstance calls for the weighing of a constitutional right against governmental intrusion, the guarantees of the Constitution must be accorded utmost protection, and the governmental act must be accorded the utmost degree of scrutiny.

If a constitutional right is threatened by the chilling effect of a vague or overbroad law, such law must be subjected to rigorous examination. While free speech remains a vital pillar of democracy, other constitutional rights are

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[93] Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

[94] [Hereinafter, "*Carolene Products*"], 304 U.S. 144 (1938).

[95] *Id.* at 152 n.4.

[96] Joseph Landau, *Process Scrutiny: Motivational Inquiry and Constitutional Rights*, 119 COLUM. L. REV. 2147, 2157 n.43, *citing Carolene Products*, 304 U.S. at 152 n.4.

[97] *See Carolene Products*, 304 U.S. at 152 n.4. "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."

[98] *See, e.g.*, White Light Corp. v. City of Manila, 596 Phil. 444, 462 (2009), *citing Carolene Products*, 304 U.S. at 152.

equally deserving of paramount protection owing to the supremacy of the Constitution. Hence, it is imperative that facial challenges be allowed to extend beyond statutes infringing upon free speech. The Court must be able to look into the merits of arguments and weigh conflicting interests without the strict restrictions of procedural technicalities. The Court has to ensure that all fundamental rights are protected to the fullest extent possible within the framework of the law, recognizing that each right serves a critical function in a democratic society.

### C. Facial Challenges Have Been Applied in Non-Speech Cases

While the prevailing doctrine is that facial challenges are permissible only against statutes that curtail the freedom of speech and its cognate rights, jurisprudence is replete with cases permitting facial invalidation of statutes infringing other rights. Despite this, there seems to be, on the part of the Court, a lack of recognition of such use and attempt to create a uniform standard or clear guidelines as to when facial challenges may be permitted.

In *Ople v. Torres*,[99] a facial challenge was allowed against an administrative order establishing a national identification system on the ground that it was violative of the right to privacy. The Court ruled that there is overbreadth as there exists a wide range of technologies for obtaining biometrics which can be intrusive to the privacy of individuals.[100] In the US case *City of Chicago v. Morales*,[101] the Court facially invalidated for vagueness an ordinance prohibiting "criminal street gang members" from loitering in public places for violating the due process clause.[102] In *Louisiana v. United States*,[103] the US Court facially invalidated a state law that required a comprehension assessment as a prerequisite for voter registration for violating the right to vote on the ground of vagueness.[104] In *Aptheker v. Secretary of State*, the US Court facially invalidated a statute prohibiting any member of a communist organization from applying for or using a passport for violating the right to travel.[105] In *Lawrence v. Texas*,[106] the Court facially

[99] 354 Phil. 948 (1998).
[100] *Id.* at 975.
[101] 527 U.S. 41 (1999).
[102] *Id.* at 50.
[103] 380 U.S. 145 (1965).
[104] *Id.* at 150.
[105] *Aptheker*, 378 U.S. at 509.
[106] 539 U.S. 558 (2003).

invalidated a Texas sodomy law that criminalized only homosexual sodomy as violative of substantive due process and equal protection.[107]

The void-for-vagueness doctrine is a special case because courts have used it as basis for facial challenges not only due to its chilling effect but also because of the excessive discretion given to state agents which may lead to discrimination in the application of laws.[108] A facial challenge is appropriate against such vague statute because the risk of discriminatory enforcement cannot be effectively prevented on a case-by-case basis.[109] In the case of *Kolender v. Lawson*, the US Court invalidated on its face a criminal statute finding that it gives excessive discretion to police officers to determine whether persons they stopped have provided a "credible and reliable" identification.[110] Notably, the ruling also provided that laws must be clear and specific enough to inform individuals of what conduct is prohibited and to prevent arbitrary or discriminatory enforcement by law enforcement authorities.[111]

In situations like *Kolender*, proving discrimination would be almost impossible as an officer could practically raise his or her high standard for a "credible and reliable" identification as a defense, and with the limitations in the means of discovery, a person so arrested for failure to provide a credible identification has virtually no evidence to prove such discrimination.[112] This underscores the importance of facial challenges in the protection of the rights to due process and to equal protection of the law which may not be accorded consideration with the limited free speech scope.

Justice Dante Tinga, in his dissent in *Romualdez*, recognized the abundance of US jurisprudence facially invalidating penal statutes suffering from vagueness and argued its applicability to our jurisdiction because it is consistent with our own conception of due process.[113] Citing *Ermita-Malate Hotel and Motel Operators Association v. City Mayor*, he described our notion of due process to be "hostile to any official action marred by lack of

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[107] *Id.* at 563.

[108] Gans, *supra* note 53, at 1364.

[109] *Id.* at 1365, *citing* Kolender v. Lawson [hereinafter, "*Kolender*"] 461 U.S. 352, 358 (1983); City of Chicago v. Morales, 527 U.S. 41, 56 (1999).

[110] *Kolender,* 461 U.S. at 353–54.

[111] *Id.* at 357.

[112] Gans, *supra* note 53, at 1369.

[113] *Romualdez*, 479 Phil. at 302 (Tinga, *J.*, *dissenting*).

reasonableness."[114] It is responsive to the supremacy of reason and obedient to the dictates of justice. Thus, in order to satisfy the requirement of due process, a governmental act must not be unreasonable and be used as a tool for oppression.[115] Accordingly, to echo Justice Tinga, "[g]iven the wealth of jurisprudence invalidating penal statutes for suffering from [the void-for-vagueness defect,] it is mystifying why the notion that the doctrine applies only to 'free-speech' cases has gained a foothold with this Court."[116]

Despite these practical applications in non-free speech contexts, the lack of clear rules and formal recognition for facial challenges has led to abstraction within our jurisprudence. It is essential to resolve these inconsistencies in order to ensure that all fundamental rights are protected under a consistent and clear standard of review. Establishing clear guidelines for the application of facial challenges in non-speech cases can provide litigants and courts with a roadmap for navigating issues involving violation of rights, thereby fostering judicial efficiency and consistency in outcomes.

## III. ADOPTING THE "SUBSTANTIALITY TEST" FOR OVERBREADTH AND VOID-FOR-VAGUENESS DOCTRINES

Despite the foregoing reasons, a sweeping application of facial challenges cannot be permitted. Allowing facial challenges in any allegation of infringement of a constitutional right would create legal chaos. As earlier discussed, broadening the scope of facial invalidation poses serious consequences for both the substantive and procedural tenets of the law.

In order to strike a balance between these costs on one hand and the protection of fundamental rights on the other, the *substantiality test*[117] may be adopted in our jurisdiction.[118] This test, as used in US jurisprudence, allows for facial challenges to be permitted if a law reaches a "substantial amount of constitutionally protected conduct."[119] In other words, a law may be

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[114] *Id.* at 303 (Tinga, *J.*, *dissenting*), *citing* Ermita-Malate Hotel and Motel Operators Ass'n v. City Mayor, 127 Phil. 306, 318–19 (1967).

[115] *Id.*

[116] *Id.* at 302.

[117] Gans, *supra* note 53, at 1352.

[118] *See* Hoffman Estates v. The Flipside, Hoffman Estates [hereinafter "*Hoffman Estates*"], 455 U.S. 489, 494 (1982); Houston, Tex. v. Hill, 482 U.S. 451, 458 (1987).

[119] *Hoffman Estates*, 455 U.S. at 494.

subject to facial challenge only if its infringement on fundamental rights is significant, even if not all of its applications would be unconstitutional.[120]

To recall, facial invalidation finds its roots in the 1940 case of *Thornhill* where the US Supreme Court recognized that statutes could be struck down if they broadly infringed on protected speech. In the years that followed, the Court increasingly delved into a more concrete inquiry into the extent to which a law burdens constitutionally protected conduct. In *Winters v. New York*,[121] the Court struck down an obscenity law for being imprecise and incapable of being narrowly interpreted.[122] In *NAACP v. Button*,[123] the Court emphasized the need for precision in laws affecting First Amendment freedoms, cautioning against broad regulations that could chill legitimate advocacy.[124] These cases reflected an emerging judicial concern over laws that deter or punish a significant amount of protected activity. However, these earlier decisions centered on qualitative issues: vagueness, deterrence, and chilling effects. It was in *Broadrick v. Oklahoma*[125] where the substantiality requirement was first clearly articulated. The Court held:

> [T]he overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view that § 818 is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.[126]

This statement marks the first express formulation of a measurable standard for facial challenges. It introduced the idea that an as-applied analysis should instead be resorted to when the statute's overreach into constitutionally protected conduct is not substantial.

As it stands in our jurisdiction, the determination of whether a facial challenge may be permitted is still mainly a qualitative assessment based on the criteria of the overbreadth and vagueness doctrines. In so assessing, the Court relies on descriptive and interpretative examination of the language used in a statute to draw a conclusion. For example, in *Calleja*, the Court

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[120] Virginia v. Hicks [hereinafter, "*Hicks*"], 539 U.S. 113, 118–19 (2003).
[121] 333 U.S. 507 (1948).
[122] *Id.* at 518–19.
[123] 371 U.S. 415 (1963).
[124] *Id.* at 438.
[125] [Hereinafter,"*Broadrick*"], 413 U.S. 601 (1973).
[126] *Id.* at 615–16.

invalidated the "Not Intended" Clause of the Anti-Terror Act[127] after observing the lack of sufficient parameters for judicial construction, rendering it vague. Moreover, the Court interpreted the phrase to mean that an "expression and its mere intent, without more, is enough to arrest or detain someone for terrorism" and concluded that it is overbroad and "a clear case of the chilling of speech."[128] In *Estrada*, the Court upheld Section 3(b) of the Anti-Graft and Corrupt Practices Act, using the dictionary definition of "unwarranted" to give effect to the provision.[129] In fine, the Court looks at the text of the law itself to determine its clarity and precision.

In contrast, the substantiality test raises the question of degree.[130] It requires the Court to conduct a "rough balancing of the number of valid applications compared to the number of potentially invalid applications."[131] Accordingly, the burden is imposed upon the challenger "to provide the Court with some idea of the number of potentially invalid applications the statute permits."[132] The substantiality test thus provides both a quantitative approach on top of a qualitative evaluation by taking into account the costs and benefits of mounting a facial challenge.

As applied to the overbreadth doctrine, a law is substantially overbroad when it has the potential to repeatedly chill the exercise of rights by many individuals.[133] The substantial overbreadth test considers whether the law reaches a significant amount of constitutionally protected conduct beyond what is necessary to achieve its intended purpose.[134] If a law punishes a substantial amount of protected rights, then facial invalidation is permitted.

In *Broadrick*, a statute prohibiting state employees from engaging in partisan political activities was challenged for allegedly infringing on First Amendment rights by potentially restricting protected speech.[135] In applying

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[127] Rep. Act No. 11479 (2020), § 4. The Anti-Terrorism Act of 2020. "[T]errorism as defined in this section shall not include advocacy, protest, dissent, stoppage of work, industrial or mass action, and other similar exercises of civil and political rights, which are not intended to cause death or serious physical harm to a person, to endanger a person's life, or to create a serious risk to public safety."

[128] *Calleja*, 918-B Phil. at 124.

[129] *Estrada*, 421 Phil. at 357.

[130] Magill v. Lynch, 560 F.2d 22 (1st Cir. 1977).

[131] Quinto v. Comm'n on Elections [hereinafter, "*Quinto*"], 627 Phil. 193, 204 (2010).

[132] *Id.* at 252.

[133] New York v. Ferber, 458 U.S. 747, 772 (1982).

[134] State U. of New York v. Fox, 492 U.S. 469, 489 (1989).

[135] *Broadrick*, 413 U.S. at 602.

the test, the US Court held that while the statute did restrict some constitutionally protected speech, the number of potentially unconstitutional applications was not sufficiently substantial.[136] The legitimate applications of the statute—preventing state employees from engaging in partisan political activities that could affect their impartiality and the integrity of the public service—outweighed the potential overbreadth.[137]

While a few Philippine cases have already touched upon the concept by using the phrase "substantially overbroad,"[138] only *Quinto v. COMELEC* has actually operationalized the test in its ruling. In *Quinto*, a COMELEC resolution imposing the automatic resignation of appointive officials who would file their certificates of candidacy for the 2010 elections was challenged on the grounds of overbreadth, among others, insofar as it prohibits the candidacy of all appointive officials regardless of whether it is partisan or nonpartisan in character.[139] Citing *Broadrick*, the Court held that the overbreadth must not only be real, but substantial as well. The Court held that measuring substantiality is a matter of degree and entails a balancing of the number of potentially valid and invalid applications of the law, with the challenger bearing the burden to demonstrate to the Court an idea of these numbers or weights.[140] Applying this in the case, the Court ruled that the challenged resolution was not unconstitutionally overbroad. The more probable circumstance of incumbent appointive officials remaining in office outweighs the less likely possibility of having protected candidacies deterred by a potentially overly broad statute.[141] The Court noted that the only application of the law that would result in the latter would pertain to the elections for barangay offices since these are the only elections which involve nonpartisan public offices.[142]

In the context of vagueness cases, while the substantiality test has not been explicitly used, the concept of substantiality often factors into the analysis of such challenges.[143] Courts have considered that vagueness reaches a substantial amount of constitutionally protected conduct if it encompasses a wide range that could not be easily defined or understood by individuals

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[136] *Id.* at 615–16.

[137] *Id.* at 617–18.

[138] *See, e.g., Southern Hemisphere*, 646 Phil. at 490.

[139] *Quinto,* 627 Phil. at 257.

[140] *Id.* at 252.

[141] *Id.* at 263.

[142] *Id.* at 260.

[143] Gans, *supra* note 53, at 1359, *citing* Hill v. Colorado, 530 U.S. 703, 733 (2000); Cal. Teachers Ass'n v. State Bd. of Educ., 263 F.3d 888, 897 (9th Cir. 2001).

subject to the law.[144] In *Hill v. Colorado*,[145] the US Supreme Court declined to facially invalidate a statute that was "surely valid in the vast majority of its intended applications."[146] The case involved a challenge to a statute that restricted certain types of speech-related activities near healthcare facilities, particularly abortion clinics. The Court held that even though there could be rare instances where the law might restrict some protected speech, those instances were not enough to render the entire statute unconstitutional. The Court applied this principle to avoid what it saw as an unnecessary invalidation of a law that generally served an important and constitutionally permissible purpose: protecting the privacy and safety of individuals in sensitive settings like healthcare facilities, including abortion clinics.

Similarly, *City of Chicago v. Morales* suggests that facial invalidation of criminal laws may be permitted "when vagueness permeates the text of the statute."[147] In this case, the US Supreme Court addressed the constitutionality of a Chicago city ordinance which made it unlawful for individuals in a public place to "loiter" which was defined as "to remain in one place with no apparent purpose." If a police officer believed a group of persons was involved in gang activity, the officer could instruct the group to disperse, and failure to comply could lead to arrest. The Court invoked the void-for-vagueness doctrine and emphasized that the ordinance's definition of "loitering" was too subjective and unclear. Thus, the vagueness permeated the text when the lack of clarity in the ordinance affected not just a small part of it but its entire structure—from the definition of prohibited conduct to the discretion given to law enforcement officers.[148] Similar to the concept of substantiality, this standard used in *Morales* requires that a statute's vagueness must be "pervasive" and "not merely limited to individual outlying cases," as to infect a substantial number of its applications.[149]

This "vagueness permeates the text" standard was further operationalized in *Flamingo Paradise Gaming, LLC v. Chanos*.[150] In this case, Nevada's Clean Indoor Air Act, which prohibits smoking in "indoor places of employment," was challenged facially for vagueness. In invalidating the criminal enforcement of the statute, the State Supreme Court established that when the challenged statute involves criminal penalties or constitutionally

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[144] *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 163 (1972).
[145] 530 U.S. 703 (2000).
[146] *Id.* at 733.
[147] *Id.* at 55.
[148] *Id.*
[149] Gans, *supra* note 53, at 1360.
[150] Flamingo Paradise Gaming, LLC v. Chanos, 125 Nev. 502 (2009).

protected rights, the standard of whether "vagueness permeates the text" shall apply. In applying this standard, the two-factor test for vagueness challenges shall be considered: (1) whether the statute provides notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited, and (2) whether it has specific standards to prevent arbitrary and discriminatory enforcement.[151] Vagueness permeates the text if the statute cannot meet these requirements in most of its applications. This would mean that while some applications of the law would not be void, the statute would still be invalid as it is void in most circumstances.[152] Applying this framework, the Court ruled that the statute failed the test in most of its application. While it is clear that smoking in a restricted area is prohibited, it is unclear if the business owner is obligated to prevent someone from smoking inside the premises of the business, and if so, what that responsibility requires of the business owner. Thus, the statute was unconstitutionally vague as to its criminal enforcement.

In both overbreadth and vagueness cases, the substantiality standard provides a useful framework in determining when a facial challenge, as opposed to an as-applied challenge, is appropriate. It ensures that a facial challenge is resorted to when the statute's infringement upon fundamental rights is widespread, not simply confined to isolated instances that could be better dealt with on a case-by-case basis. Thus, a facial challenge is warranted only when its benefits outweighs its costs. Where a statute has a substantial amount of invalid applications, the protection from potential intrusion of the fundamental right involved overrides the consequences of invalidating a statute on its face. Otherwise, these consequences are better avoided by rejecting a facial challenge and examining the statute as applied.

While the substantiality test has already been operationalized in our jurisdiction in *Quinto*, the case has not created an institutional impetus for it to be used in the broader context of constitutionally protected rights. This is largely due to the limited framing of the Court and its failure to harmonize the test in the current framework of facial invalidation, despite its remarkable demonstration of its use. Recall that in this case, facial invalidation was invoked based on the argument that the challenged law was overbroad because it swept too widely, applying to all appointive officials regardless of the office they sought, and thereby chilling legitimate candidacies. While *Quinto* applied the substantiality test as a component of overbreadth in analyzing a conduct, it failed to expressly challenge the prevailing

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[151] *Id.*, slip op. at 24.
[152] *Id.*, slip op. at 14.

jurisprudence that facial challenges applies only to the context of speech and its cognate rights. This renders the use of the test difficult to reconcile with established doctrines. Consequently, *Quinto*'s use of the substantiality test may be viewed as fact-specific, rather than a binding doctrinal expansion of the framework of facial invalidation. This can be seen from the lack of subsequent decisions referencing *Quinto*'s application, suggesting that the Court has not fully adopted the view that the substantiality test can serve as a general standard for facial challenges.

Building on this discussion, it is instructive to examine how the substantiality test could have guided judicial reasoning in subsequent Supreme Court decisions to determine whether to invalidate statutes on its face for infringing constitutional rights beyond free speech. Consider the case of *Disini* where the Supreme Court struck down Section 12 of the Cybercrime Prevention Act, which authorizes law enforcement authorities to collect or record traffic data in real-time, for being violative of the right to privacy.[153] While the Court declared the provision unconstitutional for being akin to an unlawful search warrant, the Court declined to apply the overbreadth and void-for-vagueness doctrines because the provision "neither regulates nor punishes any type of speech."[154]

An expanded analysis applying the overbreadth and void-for-vagueness doctrine would have allowed the Court to examine the provision based on its infringement on the right to privacy. Applying the substantiality test, the same should have been invalidated for reaching a significant amount of constitutionally protected conduct, since the statute failed to define the phrase "due cause." As the Court pointed out, this has no precedent in law or jurisprudence, leaving its determination to the discretion of the law enforcer.[155] While Section 12 allows the authorities to monitor traffic data to enhance its ability to combat cybercrimes, the possible infringements on the right to privacy outnumber the provision's valid application. Due cause may be interpreted to pertain to any act of the person party to the communication surveilled or to any purpose that the enforcer may deem justifiable. The Court correctly pointed out that "with enough traffic data, analysts may be able to determine a person's close associations, religious views, political

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[153] *Disini*, 727 Phil. at 145, *citing* Rep. Act No. 10175 (2012), § 12. Cybercrime Prevention Act of 2012.

[154] *Id.* at 137.

[155] *Id.* at 294 (Carpio, *J.*, *concurring and dissenting*).

affiliations, even sexual preferences"[156] and that the authorities may engage in fishing expeditions as "the power is virtually limitless."[157]

Now consider the case of *Calleja*, where the Court held that Section 4 of the Anti-Terrorism Act cannot be assailed through a facial challenge as it refers to punishable acts, and not speech.[158] With a broadened scope of facial analysis, a statute may be challenged for its infringement on the right to due process and equal protection of law. Applying the substantiality standard would have still upheld Section 4, which was not substantially overbroad as it provides specific standards limiting its application. As observed by the Court, Section 4 has three components: with the first enumerating the acts of terrorism and the second enumerating the purpose or intent.[159] These acts, such as causing death, inflicting serious bodily harm, or using dangerous substances to provoke fear or destabilize the nation, fall within the government's legitimate interest in protecting public safety and national security, making the provision's applications in most cases valid. The potential invalid applications of the provision that are pointed out by the petitioners are mitigated by the clause which removes from the ambit of the law the legitimate exercise of civil and political rights. Even if a small number of hypothetical or actual enforcement scenarios raise concerns of overbreadth, that is, misapplication to non-terroristic acts, these instances do not rise to a level that would render the statute substantially overbroad. If some cases of overreach in the enforcement of the law were to exist, these specific cases can be addressed through as-applied challenges without facially invalidating the entire statute. Accordingly, under this quantified standard, Section 4 should remain valid.

These reexaminations illustrate how facial challenges may serve a broader function as a doctrinal tool not limited to speech. While freedom of speech easily enjoys utmost consideration in the balancing of competing interests, the same may not be said for other rights. In fact, other fundamental rights, such as the right to privacy and procedural due process, may be subject to more regulations to accommodate various governmental interests, such as public safety, national security, or public health. In such cases, the courts are more likely to tilt the scales in favor of the statute as opposed to hypothetical infringement of such rights. A look into *Disini* and *Calleja* highlights the need for a coherent doctrinal framework that enables

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[156] *Id.* at 135.
[157] *Id.* at 136.
[158] *Calleja*, 918-B Phil. at 94.
[159] *Id.* at 95.

the Court to assess facial challenges involving rights beyond speech using uniform standards of adjudication. More precisely, a facial review need not be constrained by the nature of the right asserted, but may instead be guided by the extent of the statute's infringement, as measured through a structured and objective test.

Thus, the substantiality test will be crucial if the scope of facial challenges were to be expanded to all fundamental rights. While the levels of protection for different fundamental rights may vary, the substantiality test anchors the analysis in a quantitative and qualitative evaluation of a law's applications. By requiring a challenger to show that the statute's unconstitutional applications are substantial in relation to its legitimate applications, the test allows courts to invalidate laws only when they pose a real and significant threat to constitutional guarantees. It provides a consistent analytical framework across different rights, regardless of their varying levels of judicial preference.

Ultimately, the substantiality test creates a standard approach that effectively protects constitutional rights while also maintaining judicial restraint. By weighing the degree of valid and invalid applications, laws may not be struck down based on a few hypothetical instances but only based on threats to the fundamental rights that are pervasive and significant, thus avoiding unnecessary disruption to laws that serve legitimate purposes.

## IV. CONCLUSION

The recourse of facial invalidation is a "strong medicine" that has serious consequences in the administration of justice.[160] Nevertheless, facial challenges are indispensable in the pursuit of safeguarding constitutional rights. Through facial challenges, litigants may obtain judicial declaration without having to perform an act within the unclear bounds of the law or to wait for someone to fall into its trap. Moreover, facial challenges allow the invalidation of laws to combat not only chilling effects but also excessive discretion and discriminatory application by state agents—grounds which cannot be concretely proven in an as-applied adjudication.

The underlying reason for the expansion of the scope of facial challenges is the protection of fundamental rights and the supremacy of the Constitution. By adopting a broader perspective on the application of facial

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[160] *Hicks*, 539 U.S. at 120.

challenges, the Court not only enhances the protection of individual liberties but also promotes a greater coherence and consistency within the intricate frameworks of the judiciary. An expanded scope of facial challenges enables the Court to conduct a more comprehensive assessment of laws and governmental actions, ensuring their alignment with constitutional principles and upholding the fundamental rights enshrined therein. Moreover, by embracing the use of facial challenges outside the context of free speech, the Court can create a more structured approach to dealing with issues of constitutionality.

Given the paramount dictate of protecting the rights guaranteed by the Constitution, expanding the scope of facial challenges is imperative. In order to ensure that using this tool is worth its price, the substantiality test may be adopted in operationalizing facial challenges in the protection of any constitutional right. This proposed measure guarantees that the benefits of challenging a law on its face outweigh its associated costs to the substantive and procedural administration of justice. This allows the Court to effectively safeguard fundamental rights and, at the same time, uphold the integrity of the legal system—two cardinal duties entrusted by the Constitution to the courts.

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