789 Phil. 197

EN BANC

[G.R. No. 205728. July 05, 2016]

THE DIOCESE OF BACOLOD, REPRESENTED BY THE MOST REV. BISHOP VICENTE M. NAVARRA AND THE BISHOP HIMSELF IN HIS PERSONAL CAPACITY, PETITIONERS, VS. COMMISSION ON ELECTIONS AND THE ELECTION OFFICER OF BACOLOD CITY, ATTY. MAVIL V. MAJARUCON, RESPONDENTS.

RESOLUTION

LEONEN, J.:

This Motion for Reconsideration[1] filed by respondents prays that this Court reconsider its January 21, 2015 Decision and dismiss the Petition for lack of merit.[2] The dispositive portion of the Decision reads:

> **WHEREFORE**, the instant petition is **GRANTED**. The temporary restraining order previously issued is hereby made permanent. The act of the COMELEC in issuing the assailed notice dated February 22, 2013 letter dated February 27, 2013 is declared unconstitutional.
>
> **SO ORDERED.**[3] (Emphasis in the original)

First, respondents reiterate that the assailed notice and letter are not final orders by the Commission on Elections En Banc in the exercise of its quasi-judicial functions, thus, not subject to this Court's review.[4] Respondents contend that they merely implemented the law when they issued the assailed notice and letter. These are reviewable not by this Court but by the Commission on Elections pursuant to Article IX-C, Section 2(3) of the Constitution on its power to decide "all questions affecting elections."[5] There are also remedies under Rule 34 of the Commission on Elections Rules of Procedure on preliminary investigation for election offenses. Respondents, thus, submit that petitioners violated the rule on exhaustion of administrative remedies.[6]

Second, respondents submit that the tarpaulin is election propaganda that the Commission on Elections may regulate.[7] The tarpaulin falls under the definition of election propaganda under Section 1.4 of Commission on Elections Resolution No. 9615 for three reasons. First, it "contains the names of the candidates and party-list groups who voted for or against the RH Law."[8] Second, "the check mark on 'Team Buhay' and the cross mark on 'Team Patay' clearly suggests that those belonging to 'Team Buhay' should be voted while those under 'Team Patay' should be rejected during the May 13, 2013 elections."[9] Lastly, petitioners posted the tarpaulin on the cathedral's facade to draw attention.[10]

Respondents argue that the "IBASURA RH Law" tarpaulin would have sufficed if opposition to the law was petitioners' only objective. They submit that petitioners "infused their political speech with election propaganda which may be regulated by the COMELEC."[11] They further submit that it is immaterial that the posting was not "in return for consideration" by any candidate or political party since the definition of election propaganda does not specify by whom it is posted.[12] Respondents then discuss the history of the size limitation by mentioning all previous laws providing for a 2′ by 3′ size limit for posters.[13] According to respondents, petitioners raised violation of freedom of expression and did not question the soundness of this size limitation.[14] Petitioners even cut the tarpaulin in half, thus confirming that the tarpaulin is election propaganda.[15]

Third, respondents argue that size limitation applies to all persons and entities without distinction,[16] thus:

> Notwithstanding that petitioners are not political candidates, the subject tarpaulin is subject to the COMELEC's regulation because petitioners' objective in posting the same is clearly to persuade the public to vote for or against the candidates and party-list groups named therein, depending on their stand on the RH Law, which essentially makes the subject tarpaulin a form of election propaganda.[17]

Respondents argue the general applicability of the Fair Elections Act. Election propaganda should not be interchanged with campaign materials as the latter is only one form of the former.[18] Respondents submit that "[w]hen an election propaganda is posted by a candidate or political party, it becomes a campaign material subject to the COMELEC's regulation under Section 9 of the Fair Elections Act."[19] They argue that "the Fair Elections Act regulates a variety of election-related activities that are not only engaged in by candidates

and political parties but also by other individuals and entities" in that Section 4 regulates publications, printing, and broadcast, while Section 5 regulates election surveys.[20] Assuming the Fair Elections Act does not apply to private individuals, Section 82 of the Omnibus Election Code still applies to all.[21] Respondents also quote portions of the 1971 Election Code deliberations, in that the prohibition covers a candidate's follower who writes "Vote for X" on his or her own shirt even if this is not mass-produced since allowing this opens a wide loophole for possible abuse, and the limitation ensures equality of access to all.[22]

Lastly, respondents argue that the size limitation is a valid content-neutral regulation on election propaganda. As such, only a substantial governmental interest is required under the intermediate test.[23] Respondents cite *National Press Club v. Commission on Elections*[24] in that "the supervisory and regulatory functions of the COMELEC under the 1987 Constitution set to some extent a limit on the right to free speech during the election period."[25] The order to remove the tarpaulin for failure to comply with the size limitation had nothing to do with the tarpaulin's message, and "petitioners could still say what they wanted to say by utilizing other forms of media without necessarily infringing the mandates of the law."[26] Respondents cite constitutional provisions as basis for regulating the use of election propaganda such as political equality and election spending minimization.[27]

We deny the Motion for Reconsideration.

On respondents' argument on the prematurity of filing the case before this Court, we discussed in our Decision that Rule 64 is not the exclusive remedy for all Commission on Elections' acts as Rule 65 applies for grave abuse of discretion resulting to ouster of jurisdiction.[28] The five (5) cases[29] again cited by respondents are not precedents since these involve election protests or are disqualification cases filed by losing candidates against winning candidates.[30]

Petitioners are not candidates. They are asserting their right to freedom of expression.[31] We acknowledged the "chilling effect" of the assailed notice and letter on this constitutional right in our Decision, thus:

> Nothing less than the electorate's political speech will be affected by the restrictions imposed by COMELEC. Political speech is motivated by the desire to be heard and understood, to move people to action. It is concerned with the sovereign right to change the contours of power whether through the election of

> representatives in a republican government or the revision of the basic text of the Constitution. The zeal with which we protect this kind of speech does not depend on our evaluation of the cogency of the message. Neither do we assess whether we should protect speech based on the motives of COMELEC. We evaluate restrictions on freedom of expression from their effects. We protect both speech and medium because the quality of this freedom in practice will define the quality of deliberation in our democratic society.
>
> COMELEC's notice and letter affect preferred speech. Respondents' acts are capable of repetition. Under the conditions in which it was issued and in view of the novelty of this case, it could result in a "chilling effect" that would affect other citizens who want their voices heard on issues during the elections. Other citizens who wish to express their views regarding the election and other related issues may choose not to, for fear of reprisal or sanction by the COMELEC.
>
> Direct resort to this court is allowed to avoid such proscribed conditions. Rule 65 is also the procedural platform for raising grave abuse of discretion.[32]

The urgency posed by the circumstances during respondents' issuance of the assailed notice and letter—the then issue on the RH Law as well as the then upcoming elections—also rendered compliance with the doctrine on exhaustion of administrative remedies as unreasonable.[33]

All these circumstances surrounding this case led to this Court's pro hac vice ruling to allow due course to the Petition.

The other arguments have also been considered and thoroughly addressed in our Decision.

This Court's Decision discussed that the tarpaulin consists of satire of political parties that "primarily advocates a stand on a social issue; only secondarily—even almost incidentally—will cause the election or non-election of a candidate."[34] It is not election propaganda as its messages are different from the usual declarative messages of candidates. The tarpaulin is an expression with political consequences, and "[t]his court's construction of the guarantee of freedom of expression has always been wary of censorship or subsequent punishment that entails evaluation of the speaker's viewpoint or the content of one's speech."[35]

We recognize that there can be a type of speech by private citizens amounting to election paraphernalia that can be validly regulated.[36] However, this is not the situation in this case. The twin tarpaulins consist of a social advocacy, and the regulation, if applied in this case, fails the reasonability test.[37]

Lastly, the regulation is content-based. The Decision discussed that "[t]he form of expression is just as important as the information conveyed that it forms part of the expression[,]"[38] and size does matter.[39]

WHEREFORE, the Motion for Reconsideration is **DENIED** with **FINALITY**.

SO ORDERED.

Sereno, C. J., on official leave.
Leonardo-De Castro, Del Castillo, Perez, Reyes, and *Perlas-Bernabe, JJ.*, concur.
Carpio,[**] *J.*, I reiterate my Separate Concurring Opinion.
Velasco, Jr., J., I join the dissent of J. Brion.
Brion, J., see Dissenting Opinion.
Peralta, J., I join the opinion of J. Carpio.
Bersamin, J., I join the dissent of J. Brion.
Mendoza, J., on official leave.
Jardeleza, J., no part.
Caguioa, J., I join/concur with J. Bernabe's original separate concurring opinion.

NOTICE OF JUDGMENT

Sirs/Mesdames:

Please take notice that on July 5. 2016 a Decision/Resolution, copy attached herewith, was rendered by the Supreme Court in the above-entitled case, the original of which was received by this Office on July 28, 2016 at 8:35 a.m.

Very truly yours,
(SGD)FELIPA G. BORLONGAN-ANAMA
Clerk of Court

[**] Designated Acting Chief Justice effective July 4, 2016, per Special Order No. 2357 dated

June 28, 2016.

[1] *Rollo*, pp. 284-307.

[2] Id. at 306.

[3] Id. at 246.

[4] Id. at 286-287.

[5] Id. at 288.

[6] Id. at 289.

[7] Id. at 290.

[8] Id.

[9] Id. at 291.

[10] Id.

[11] Id.

[12] Id.

[13] Id. at 291-294. Respondents cite the following: Rep. Act No. 6388 (1971), Election Code of 1971, sec. 48; Pres. Decree No. 1296 (1978), 1978 Election Code, sec. 37; ELECTION CODE, sec. 82; Rep. Act No. 6646 (1987), Electoral Reforms Law of 1987, sec. 11; and Rep. Act No. 9006 (2000), Fair Elections Act, sec. 3, reiterated in COMELEC Res. No. 9615, sec. 6(c).

[14] Id. at 294.

[15] Id. at 295.

[16] Id.

[17] Id.

[18] Id. at 297.

[19] Id.

[20] Id. at 297-298.

[21] Id. at 299.

[22] Id. at 299-300.

[23] Id. at 303.

[24] 283 Phil. 795 (1992) [Per J. Feliciano, En Banc].

[25] *Rollo*, p. 303.

[26] Id. at 304.

[27] Id. Respondents cite Const, art. IX-C, secs. 2(1), 2(7), 4, and 10; art. II, sec. 26; and art. XIII, sec. 1.

[28] Id. at 182-183.

[29] Id. at 286-287. Respondents cite *Ambil v. Commission on Elections*, 398 Phil. 257 (2000) [Per J. Pardo, En Banc]; *Repol v. Commission on Elections*, G.R. No. 161418, April 28, 2004, 428 SCRA 321 [Per J. Carpio, En Banc]; *Soriano, Jr. v. Commission on Elections*, 548 Phil. 639 (2007) [Per J. Carpio, En Banc]; *Blanco v. Commission on Elections*, 577 Phil. 622 (2008) [Per Azcuna, En Banc]; and *Cayetano v. Commission on Elections*, 663 Phil. 694 (2011) [Per J. Nachura, En Banc].

[30] Id. at 185.

[31] Id.

[32] Id. at 186-187.

[33] Id. at 201.

[34] Id. at 230.

[35] Id. at 231.

[36] Id. at 239.

[37] Id.

[38] Id. at 211.

[39] Id.

DISSENTING OPINION

BRION, J.:

I dissent from the *ponencia*'s denial of the Motion for Reconsideration filed by respondents Commission on Elections (*Comelec*) and Election Officer Atty. Mavil V. Majarucon asking that the Court reconsider its January 21, 2015 Decision in *Diocese of Bacolod v. Comelec*. The Decision granted petitioner Diocese of Bacolod and Bishop Vicente Navarra's (*petitioners*) Petition, declared the Comelec's Notice dated February 22, 2013, and Letter dated February 27, 2013, as unconstitutional, and made the temporary restraining order earlier issued against it permanent.

The *ponencia* denied the motion for reconsideration for raising arguments already addressed and emphasized the following points:

First, Rule 64 of the Rules of Court is not the exclusive remedy for all Comelec acts, as Rule 65 applies when grave abuse of discretion takes place, resulting in lack or excess of jurisdiction.

The petitioners, in asserting their right to freedom of expression, allege the "chilling effect" of the assailed notice and letter on this freedom, thus justifying their resort to the Court through a Rule 65 petition.

Additionally, the urgency posed by the circumstances during the Comelec's issuance of the assailed notice and letter – the then issue on the RH Law as well as the then coming elections – also rendered the petitioners' compliance with the doctrine of exhaustion of administrative remedies unreasonable.

Second, the disputed tarpaulin is not an election propaganda material. It involves a satire of political parties and primarily advocates a stand on a social issue; the election or non-election of a candidate is merely secondary and incidental to its message.

Third, the Comelec's regulation of poster size is content-based, as the form of expression is just as important as the information conveyed that forms part of the expression.

I disagree with the denial of the respondents' motion for reconsideration because of its jurisprudential effect: the currently prevailing ruling substantially diminishes the Comelec's constitutional and exclusive jurisdiction to enforce and administer all laws and regulations relative to the conduct of an election under Article IX-C, Section 2 (1) of the 1987 Constitution, including the regulation of election propaganda.

It also reduces the Comelec's capacity under Article IX-C, Section 2 (7) "to recommend to the Congress effective measures to minimize election spending, including limitation of places where propaganda materials shall be posted."

To my mind, these constitutional provisions expressly and clearly allow Congress to craft measures that regulate the time, manner, and place of posting election propaganda, and that enable the Comelec to fully implement these measures.

The size restrictions for election posters in Section 3.3 of Republic Act No. 9006 (RA 9006, otherwise known as the Fair Elections Act) is a lawful exercise of Congress's power to regulate election propaganda. The Comelec's issuance of its implementing rule, Section 6 (c) of Comelec Resolution No. 9615, and its implementation in the present case through the Notice to Remove Campaign Materials issued by Election Officer Mavil V. Majarucon in a Letter dated February 22, 2013, and Comelec Law Director Esmeralda Amora-Ladra in an Order dated February 27, 2013, had not been outside of the Comelec's jurisdiction to enforce and implement election laws.

I cannot also agree with the considerable departure that the majority made from established jurisprudence in reviewing the administrative actions of a constitutional commission and the government's regulation of speech; I do so not for the purposes of instigating a criminal prosecution against the petitioners, as events have made the issue moot and academic,[1] but to correct its impact on jurisprudence and constitutional litigation.

I discuss below the reasons for my disagreement.

I. The petitions challenging the constitutionality of the Comelec's Letter and Notice are premature and should not have been given due course.

A. The majority in Diocese of Bacolod v. Comelec *took cognizance of the Comelec's administrative act without the final imprimatur of the Comelec en banc, and thus deprived it of its jurisdiction to determine the constitutionality of the acts of its election officers.*

The Court, in exceptional cases, may review the Comelec's administrative acts through the Court's expanded jurisdiction under the second paragraph of Article VIII, Section 1 of the 1987 Constitution. This constitutional authority is different from the *certiorari* petition mentioned in Article IX-B, which pertains to the Comelec's quasi-judicial acts and is instituted through Rule 64 of the Rules of Court.

Because the review of the Comelec's administrative act falls under the Court's expanded jurisdiction (under the second paragraph of Article VIII, Section 1), the petition must necessarily reflect a *prima facie* showing of grave abuse of discretion on the part of the Comelec.

In other words, the petition must have preliminarily shown that the Comelec's administrative act was performed in such a capricious, and whimsical exercise of judgment so patent and gross as to amount to an evasion of a positive duty or to a virtual refusal to perform a duty enjoined by law.

Note, at this point, that there can be no *prima facie* showing of grave abuse of discretion unless something has already been done[2] or has taken place under the law;[3] and the petitioner sufficiently alleges the existence of a threatened or immediate injury to itself as a result of the gravely abusive exercise of discretion.[4]

In the case of an administrative agency (more so, if it involves an independent constitutional body), a matter cannot be considered ripe for judicial resolution unless administrative remedies have been exhausted.[5] ***Judicial review is appropriate only if, at the very least, those who have the power to address the petitioner's concerns have been given the opportunity to do so.*** In short, the requirement of ripeness does not become less relevant under the courts' expanded judicial power.

In this light, I emphasize that ***the petition challenges RA 9006 and Comelec Resolution No. 9165 not because its text, on its face, violates fundamental rights,***[6] ***but because Comelec erroneously applied an otherwise constitutional law***. The Comelec's administrative act of including the petitioners' poster within the coverage of Comelec Resolution No. 9615 allegedly violated their constitutional rights to freedom of speech and religion.

This issue could have been best decided by the Comelec had the petitioners followed the regular course of procedure in the investigation and prosecution of election offense cases. The ***assailed action of the Comelec, after all, contained a warning against possible***

prosecution for an election offense that would have had to undergo an entire process before it is filed before the proper tribunal. This process allows suspected election offenders to explain why an election offense should not be filed against them, and for the Comelec to consider the explanation.

In the interest of orderly procedure and the respect for an independent constitutional commission such as the Comelec, on matters that are *prima facie* within its jurisdiction, ***the expansion of the power of judicial review could not have meant the power to review any and all acts of a department or office within an administrative framework***.

The Comelec under this Article IX-C, Section 2 (3) can certainly decide whether to initiate a preliminary investigation against the petitioners. It can decide based on the arguments and pieces of evidence presented during the preliminary investigation – whether there is probable cause to file an information for an election offense against the petitioners. This determination is even subject to review and reconsideration, as Comelec Resolution No. 9386 (**Rules of Procedure in the Investigation and Prosecution of Election Offense Cases in the Commission on Elections**)[7] clearly provide.

To be sure, this is a matter that the Comelec should have been given the first opportunity to resolve before the petitioners directly sought judicial recourse. While the freedoms invoked by the petitioners certainly occupy preferential status in our hierarchy of freedoms, the Court cannot second-guess what the Comelec's action would have been, particularly when the matters before us are nothing more than the **Election Officer *Majarucon's* notice** and the **Director Amora-Ladra's order**.

B. The inconsistency in the majority's analysis and its dispositive portion reflect and indicate the prematurity of the petitioners' immediate recourse to the Court.

According to the majority, the present petition was given due course because the Comelec's acts had a chilling effect on speech, which justifies the petitioners' immediate resort to the Court under a Rule 65 *certiorari* petition. It then proceeded to argue that the speech involved does not fall under the classification of election propaganda; to classify the laws empowering the Comelec to regulate the size of election posters' size as a content-based regulation; and to hold that, in any case, size restriction of posters does not pass constitutional muster whether under the compelling state interest test for content-based regulations or intermediate scrutiny test for content-neutral regulations.

Based on these arguments, the majority opinion held that the Comelec's interpretation of its powers through the assailed letter and notice is unconstitutional. Thus, the dispositive portion of the main decision reads:

> WHEREFORE, the instant petition is GRANTED. The temporary restraining order previously issued is hereby made permanent. The act of the COMELEC in **issuing the assailed notice dated February 22, 2013** and **letter dated February 27, 2013, is declared unconstitutional**. [emphasis supplied]

Under these terms, the majority decision's analysis is inconsistent with the remedy it granted in its dispositive portion. This inconsistency reflects the prematurity of the issues presented in the petition, as well as the manner the ruling has prevented the Comelec *en banc* from exercising its discretion to affirm or correct the actions of its election officers.

Note that despite the majority decision's pronouncements regarding the unconstitutionality of the size restriction of posters (which form the basis for the unconstitutionality of the Comelec's administrative act), the majority decision's dispositive declaration of unconstitutionality is directed at the Comelec's administrative acts, without mention of the constitutionality of the laws these administrative acts apply. In marked contrast, Justice Antonio T. Carpio's Separate Concurring Opinion grants the petition and declares the laws limiting the size of election posters as unconstitutional, thus:

> Accordingly, I vote to GRANT the petition and DECLARE UNCONSTITUTIONAL (1) Section 3.3 of Republic Act No. 9006; (2) Section 6(c) of COMELEC Resolution No. 9615, dated 15 January 2013; and (3) the notices, dated 22 February 2013 and 27 February 2013, of the Commission on Elections for being violative of Section 4, Article III of the Constitution.

The disparity between the discussion in the body of the majority decision and the content of its dispositive portion leads me to ask: is the size restriction constitutional, but unconstitutional as applied to the petitioners? May the Comelec still regulate the size of election posters of candidates, and under what parameters?

In decisions declaring a law's unconstitutionality ***as applied*** to the petitioner, the assailed law remains valid, but its application to the individual challenging it (and subsequently to

others similarly situated) is unconstitutional.

If indeed the majority decision had treated the petition in this case as an ***as-applied challenge*** to the constitutionality of Section 3 of RA 9006 and Section 6(c) of Comelec Resolution No. 9615, then the issues it presented to the Court were premature.

As-applied challenges to the constitutionality of the law prosper only when there has been an enforcement of the law to the individual claiming exemption from its application. In other words, the challenged law must have been enforced and has already been applied to the petitioner, *i.e.*, at the very least, the Comelec *en banc* must have rendered its decision to prosecute the petitioners and institute an election offense against them.

Notably, this was not what happened, as the administrative acts of the Comelec's election officer and law department had been restrained before the issue of the unconstitutionality of the letter and order issued against the petitioners could be validly assessed by the Comelec. Thus, the petition assailed the administrative acts of the Comelec's Law Department and election officer before it could be affirmed by the Comelec, and before any quasi-judicial proceeding for the prosecution of an election offense could be instituted and resolved.

In contrast, ***facial challenges*** may be introduced against a law soon after its passage, typically because these laws pose a chilling effect on the exercise of fundamental rights, such as speech. The petitioners instituting a petition asking for a facial challenge of the law has the burden to prove that the law does not have any constitutional application, that is, that the law is unconstitutional *in all its applications*. Upon meeting this burden, the decision would have declared the challenged law as unconstitutional.

The present petitions, however, challenge the Comelec's administrative acts – not the laws it seeks to implement – and thereby raise issues that are applicable only to them.

The majority decision apparently mixed the concepts of applied and facial challenges, such that it granted a remedy for as-applied challenges, under the reasoning and analysis meant for facial challenges.

Thus, while the petition seeks to declare the Comelec's administrative acts to be unconstitutional as applied to the petitioners, the majority decision proceeded to analyze the case as the Court typically would in facial challenges: it gave due course to the petition because of the possibility of a chilling effect on speech, and then proceeded to discuss the unconstitutionality of the laws that the challenged administrative acts apply.

The majority's uneven approach shows the prematurity of the issues that the petition presents. ***If indeed, the law is unconstitutional as applied, then this would have been the defense to a possible criminal proceeding against the petitioner. It cannot and should not be used to pre-empt a criminal proceeding.***

Indeed, our expanded jurisdiction under Section 1, Article VIII of the 1987 Constitution allows us to determine grave abuse of discretion in the actions of governmental agencies, and has considerably reduced the requirements of standing in constitutional litigation. The recognition of this expanded jurisdiction has led me to theorize, in several previous opinions, that a *prima facie* showing of grave abuse of discretion is sufficient to trigger the Court's expanded jurisdiction. The simplicity of this requirement does not diminish the gravity of the petitioners' burden to preliminarily prove that the Comelec acted in an arbitrary and capricious manner outside of what the law and the Constitution allows it to do.

As I have discussed earlier, the petitioners have failed in their burden of showing this triggering requirement before the Court; as the petition had been prematurely filed, whether via the traditional constitutional litigation route or by way of the Court's expanded jurisdiction.

II. The disputed tarpaulin falls under election propaganda as it clearly espouses the election of some candidates and the non-election of other candidates because of their stance in the passage of the RH Law.

The subject poster carries the following characteristics:

(1) It was posted **during the campaign period**, by private individuals and within a private compound housing the San Sebastian Cathedral of Bacolod.
(2) It was **posted with another tarpaulin** with the message "RH LAW IBASURA."
(3) Both tarpaulins were approximately **six by ten feet in size**, and were posted in front of the Cathedral **within public view**.
(4) The subject poster contains the heading "**conscience vote**" and two ***lists of senators and members of the House of Representatives***. The ***first list*** contains names of legislators who voted against the passage of the Reproductive Health Law, denominated as Team Buhay. The ***second list*** contains names of legislators who voted for the RH Law's passage, denominated as "Team Patay." The "Team Buhay" list displayed a check mark, while the Team Patay list showed an X mark. All the legislators named in both lists were ***candidates*** during the 2013 national elections.
(5) It does not appear to have been sponsored or paid for by any candidate.

The content of the tarpaulin, as well as the timing of its posting, makes it subject to the regulations in RA 9006 and Comelec Resolution No. 9615.

Comelec Resolution No. 9615 contains rules and regulations implementing RA 9006 during the 2013 national elections. Section 3 of RA 9006 and Section 6 of Comelec Resolution No. 9615 seek to regulate election propaganda, defined in the latter as:

> The term "political advertisement" or "election propaganda" refers to ***any matter broadcasted, published, printed, displayed or exhibited, in any medium***, which ***contain the name***, image, logo, brand, insignia, color motif, initials, and other symbol or graphic representation that is ***capable of being associated with a candidate or party, and is intended to draw the attention of the public or a segment thereof to promote or oppose, directly or indirectly, the election of the said candidate or candidates to a public office***. In broadcast media, political advertisements may take the form of spots, appearances on TV shows and radio programs, live or taped announcements, teasers, and other forms of advertising messages or announcements used by commercial advertisers.
>
> Political advertising includes matters, not falling within the scope of personal opinion, that appear on any Internet website, including, but not limited to, social networks, blogging sites, and micro-blogging sites, in return for consideration, or otherwise capable of pecuniary estimation. [emphasis supplied]

Based on these definitions, ***the subject poster falls within the definition of election propaganda***. It ***named candidates*** *for the 2013 elections, and was clearly* ***intended to promote the election of a list of candidates it favors*** ***and to oppose the election of candidates in another list***. It was ***displayed in public view***, *and as such is* ***capable of drawing the attention of the voting public*** passing by the cathedral to its message.

Notably, the tarpaulin places the words "***conscience vote***" and associates the names of political candidates who voted against the passage of the RH Law with the positive description "Team Buhay", and associates the names of political candidates who voted for the passage of the RH Law with the negative description "Team Patay." It even distinguishes between the marks used to identify the candidates – the members of Team Buhay are marked with the positive sign check mark and the members of Team Patay are associated with the negative "X" mark.

The tarpaulin, obviously, invites voters to vote for members of the Team Buhay and to not

vote for the members of the Team Patay because of their participation in the RH Law. The word "conscience vote," along with the positive description and negative description for political candidates during the election period at the time the tarpaulin was posted for public view clearly indicates this. Under these terms, the tarpaulin does not simply advocate support for the RH Law; it asks the public to vote or not to vote for candidates based on their position on the RH Law.

In this light, I strongly object to the *ponencia*'s characterization of the tarpaulin as "primarily advocates a stand on a social issue; [*sic*] only secondarily – even almost incidentally – will cause the election or non-election of a candidate," and declaration that the tarpaulin is "not election propaganda as the messages are different from the usual declarative messages of candidates."

This is a dangerous justification that could, with some creative tinkering by interested parties, blur the distinctions determining what consists an election propaganda to the point of eradicating it. To illustrate, anyone could put a social issue as the justification for voting or not voting for a candidate, and claim that the paraphernalia merely incidentally intends to convince voters of their voting preferences.

Furthermore, requiring a declarative message from the candidate to vote or not vote for a candidate significantly narrows down the coverage of what constitutes as election propaganda, and excludes propaganda that convey the same message, but do not necessarily use a declarative statement.

In these lights, the *ponente*'s interpretation of election propaganda could render the entire regulation of election propaganda as defined under Section 3 of RA 9006 inutile, as it creates loopholes that would take any propaganda (and possibly not just election posters) outside the definition of election propaganda. Most certainly, I cannot concur with this position.

III. The regulation of poster size under the Omnibus Election Code is a valid content-neutral regulation of speech.

A. The regulation of poster size as a content-neutral regulation.

The assailed regulations in the present case involve a content-neutral regulation that controls the incidents of speech. Both the notice and letter sent by the Comelec to the Diocese of Bacolod sought to enforce Section 3.3 of RA 9006 and Section 6 (c) of

Comelec Resolution No. 9615 which limits the size of posters that contain election propaganda to not more than two by three feet. ***It does not prohibit anyone from posting materials that contain election propaganda, so long as it meets the size limitations.***

Limitations on the size of a poster involve a content-neutral regulation involving the manner by which speech may be uttered. It regulates how the speech shall be uttered, and does not, in any manner affect or target the actual content of the message.

That the incidents of speech are restricted through government regulation do not automatically taint them because they do not restrict the message the poster itself carries. Again, for emphasis, Comelec Resolution No. 9615 and RA 9006 regulate how the message shall be transmitted, and not the contents of the message itself.

Admittedly, ***the size of the poster impacts on the effectiveness of the communication and the gravity of its message. Although size may be considered a part of the message, this is an aspect that merely highlights the content of the message. It is an incident of speech that government can regulate, provided it meets the requirements for content-neutral regulations***.

The message in the subject poster is transmitted through the text and symbols that it contains. We can, by analogy, compare the size of the poster to the volume of the sound of a message.[8] A blank poster, for instance and as a rule, does not convey any message regardless of its size (unless, of course, vacuity itself is the message being conveyed). In the same manner, a sound or utterance, without words or tunes spoken or played, cannot be considered a message regardless of its volume. We communicate with each other by symbols – written, verbal, or illustrated – and these communications are what the freedom of speech protects, not the manner by which these symbols are conveyed.

B. The regulation passes the intermediate scrutiny test applicable for content-neutral regulations.

The size retrictions in Section 6(c) of Comelec Resolution No. 9615 and Section 3.3 of RA 9006 pass the intermediate scrutiny[9] applicable to content-neutral regulations, thus:

First, the size limitations for posters containing election propaganda under these regulations are within the constitutional power of Congress to enact and of the Comelec to enforce.

Section 2 (7), Article IX-C of the 1987 Constitution specifically allows the time, manner, and place regulation of election propaganda, which includes the size limitation of election posters under RA 9006. As a law concerning conduct during elections, RA 9006 falls well within the election laws that the Comelec has the duty to administer and enforce under Article IX-C, Section 2 (1) of the 1987 Constitution.

Second, the size limitation for posters containing election propaganda furthers the important and substantial governmental interest of ensuring equal opportunity for public information campaigns among candidates, ensuring orderly elections and minimizing election spending.

A cap on the size of a poster ensures, to some extent, uniformity in the medium through which information on candidates may be conveyed to the public. It effectively bars candidates, supporters, or detractors from using posters too large that they result in skewed attention from the public. The limitation also prevents the candidates and their supporting parties from engaging in a battle of poster sizes and, in this sense, serves to minimize election spending and contributes to the maintenance of peace and order during the election period.

Third, the government's interest in limiting the size of posters containing election propaganda does not add to or restrict the freedom of expression. Its interests in equalizing opportunity for public information campaigns among candidates, minimizing election spending, and ensuring orderly elections do not relate to the suppression of free expression.

Fourth, the restriction on the poster's size affects the manner by which the speech may be uttered, but this restriction is no greater than necessary to further the government's claimed interests.

Size limits to posters are necessary to ensure equality of public information campaigns among candidates, as allowing posters with different, sizes gives candidates and their supporters the incentive to post larger posters. This places candidates with more money and/or with deep-pocket supporters at an undue advantage against candidates with more humble financial capabilities.

Notably, the law does not limit the number of posters that a candidate, his supporter, or a private individual may post. If the size of posters becomes unlimited as well, then candidates and parties with bigger campaign funds could effectively crowd out public information on candidates with less money to spend to secure posters – the former's bigger

posters and sheer number could effectively take the attention away from the latter's message. In the same manner, a lack of size limitation would also crowd out private, unaffiliated individuals from participating in the discussion through posters, or at the very least, would compel them to erect bigger posters and thus spend more.

Prohibiting size restrictions on posters is also related to election spending, as it would allow candidates and their supporters to post as many and as large posters as their pockets would allow.

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[1] The passage of the election period has effectively made the issues in the present petition moot and academic. Any decision on our part – whether for the validity or invalidity of the Comelec's actions would no longer affect the rights of either the petitioners to post the subject posters, or the Comelec to prosecute election offenses. *See* J. Brion's Dissenting Opinion in *Diocese of Bacolod v. Comelec*, p. 11.

[2] In the case of a challenged law or official action, for instance, the Court will not consider an issue ripe for judicial resolution, unless something had already been done. *Imbong v. Ochoa, Syjuico v. Abad, Bayan Telecommunications v. Republic*.

[3] *Mariano, Jr. v. Commission on Elections*, G.R. No. 118577, March 7, 1995, 242 SCRA 211.

[4] *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel*, 589 Phil. 463, 481 (2008).

[5] *See Corales v. Republic*, G.R. No. 186613, August 27, 2013.

[6] This is in contrast to my discussion of a *prima facie* grave abuse of discretion in *Imbong v. Executive Secretary*. In *Imbong*, the petition alleged (and the Court eventually concluded) that the text of the Reproductive Health Law violates the right to life of the unborn child in the Constitution. Congress, in enacting a law that violates a fundamental right, committed a grave abuse of discretion. Thus, citizens have an interest in stopping the implementation of an unconstitutional law that could cause irreparable injury to the countless unborn.

The constitutionality of the text of RA 9006, on the other hand, is not in question in the present case. What the petitioners assail is their inclusion within the coverage of election propaganda regulations in RA 9006 and Comelec Resolution No. 9615.

[7] Section 6 of Comelec Resolution No. 9386 provides:

Section 6. Conduct of Preliminary Investigation. Within ten (10) days from receipt of the Complaint, the investigating officer shall issue a subpoena to the respondent/s, attaching thereto a copy of the Complaint, Affidavits and other supporting documents, giving said respondent/s ten (10) days from receipt within which to submit Counter-Affidavits and other supporting documents. The respondent shall have the right to examine all other evidence submitted by the complainant. Otherwise, the Investigating officer shall dismiss the Complaint if he finds no ground to continue with the inquiry. Such Counter-Affidavits and other supporting evidence submitted by the respondent shall be furnished by the latter to the complainant.

If the respondent cannot be subpoenaed, or if subpoenaed, does not submit Counter-Affidavits within the ten (10) day period, the investigating officer shall base his Resolution on the evidence presented by the complainant.

If the investigating officer believes that there are matters to be clarified, he may set a hearing to propound clarificatory questions to the parties or their witnesses, during which the parties shall be afforded an opportunity to be present, but without the right to examine or cross-examine. If the parties so desire, they may submit questions to the investigating officer which the latter may propound to the parties or witnesses concerned.

Thereafter, the investigation shall be deemed concluded, and the investigating officer shall resolve the case within thirty (30) days therefrom. Upon the evidence thus adduced, the investigating officer shall determine whether or not there is sufficient ground to hold the respondent for trial.

Where the respondent is a minor, the investigating officer shall not conduct the preliminary investigation unless the child respondent shall have first undergone the requisite proceedings before the Local Social Welfare Development Officer pursuant to Republic Act No. 9344, otherwise known as the "Juvenile Justice and Welfare Act of 2006."

No motion, except on the ground of lack of jurisdiction or request for extension of time to submit Counter-Affidavits shall be allowed or granted except on exceptionally meritorious cases. Only one (1) Motion for Extension to file Counter-Affidavit for a period not exceeding ten (10) days shall be allowed. The filing of Reply-Affidavits, Rejoinder-Affidavits, Memoranda and similar pleadings are likewise prohibited.

A Memorandum, Manifestation or Motion to Dismiss is a prohibitive pleading and cannot take the place of a Counter-Affidavit unless the same is made by the respondent himself and

verified.

When an issue of a prejudicial question is raised in the Counter-Affidavit, the investigating officer shall suspend preliminary investigation if its existence is satisfactorily established. All orders suspending the preliminary investigation based on existence of prejudicial question issued by the investigating officer shall have the written approval of the Regional Election Director or the Director of the Law Department, as the case may be.

[8] *See: Regan v. Time*, 468 U.S. 641; 104 S. Ct. 3262; 82 L. lid. 2d 487; 1984 U.S. LEXIS 147; 52 U.S.L.W. 5084, citing *Kovacs v. Cooper*, 336 U.S. 77 (1949).

[9] Philippine jurisprudence distinguishes between the regulation of speech that is content-based, from regulation that is content-neutral. Content-based regulations regulate speech because of the substance of the message it conveys. In contrast, content-neutral regulations are merely concerned with the incidents of speech: the time, place or manner of the speech's utterance under well-defined standards.

Distinguishing the nature of the regulation is crucial in cases involving freedom of speech, as it determines the test the Court shall apply in determining its validity.

Content-based regulations are viewed with a heavy presumption of unconstitutionality. Thus, the government has the burden of showing that the regulation is narrowly tailored to meet a compelling state interest, otherwise, the Court will strike it down as unconstitutional.

In contrast, content-neutral regulations are not presumed unconstitutional. They pass constitutional muster once they meet the following requirements: first. that the regulation is within the constitutional power of the Government second, that it furthers an important or substantial governmental interest; third, that the governmental interest is unrelated to the suppression of free expression, and fourth, that the incidental restriction on speech is no greater than is essential to further that interest.

Date created: March 22, 2018