Republic of the Philippines
Supreme Court
Manila

EN BANC

LOIDA NICOLAS-LEWIS,
Petitioner,

- versus -

COMMISSION ON ELECTIONS,
Respondent.

G.R. No. 223705

Present:

BERSAMIN, *C.J.*,
CARPIO,
PERALTA,
PERLAS-BERNABE,
LEONEN,
JARDELEZA,
CAGUIOA,
REYES, A. JR.,
GESMUNDO,
REYES, J. JR.,
HERNANDO,
CARANDANG,
LAZARO-JAVIER,
INTING, and
ZALAMEDA, *JJ.*

Promulgated:

August 14, 2019

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DECISION

REYES, J. JR., *J.*:

On grounds of violation of the freedom of speech, of expression, and of assembly; denial of substantive due process; violation of the equal protection clause; and violation of the territoriality principle in criminal cases, Loida Nicolas-Lewis (petitioner) seeks to declare as unconstitutional Section 36.8 of Republic Act (R.A.) No. 9189, as amended by R.A. No. 10590[1] and Section 74(II)(8) of the Commission on Elections (COMELEC)

[1] Approved on May 27, 2013.

Resolution No. 10035,[2] which prohibit the engagement of any person in partisan political activities abroad during the 30-day overseas voting period.

Relevant Antecedents

On February 13, 2003, R.A. No. 9189, entitled "An Act Providing for a System of Overseas Absentee Voting by Qualified Citizens of the Philippines Abroad, Appropriating Funds Therefor, and for other Purposes," also known as "The Overseas Absentee Voting Act of 2003," was enacted. Its purpose is to ensure equal opportunity to all qualified Filipino citizens abroad to exercise the fundamental right of suffrage pursuant to Section 2, Article V[3] of the 1987 Constitution.

In 2012, certain amendments to R.A. No. 9189 were proposed both by the House of Representatives and the Senate through House Bill No. 6542 and Senate Bill No. 3312, respectively.

Consequently, R.A. No. 9189 was amended by R.A. No. 10590 or "The Overseas Voting Act of 2013."

Of relevance in the instant petition is Section 37 of R.A. No. 10590 which renumbered Section 24 of R.A. No. 9189 and amended the same as follows:

> SEC. 36. Prohibited Acts. - In addition to the prohibited acts provided by law, it shall be unlawful:
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> x x x x
>
> 36.8. For any person to engage in partisan political activity abroad during the thirty (30)-day overseas voting period;
>
> x x x x
>
> The provision of existing laws to the contrary notwithstanding, and with due regard to the Principle of Double Criminality, the prohibited acts described in this section are electoral offenses and shall be punishable in the Philippines.

On January 13, 2016, the COMELEC promulgated Resolution No. 10035 entitled "General Instructions for the Special Board of Election Inspectors and Special Ballot Reception and Custody Group in the Conduct of Manual Voting and Counting of Votes under Republic Act No. 9189, x x x as amended by Republic Act No. 10590 for Purposes of the May 9, 2016 National and Local Elections." Section 74(II)(8), Article XVII thereof provides for the same prohibition above-cited, *viz.*:

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2 Promulgated on January 13, 2016.

3 Sec. 2. The Congress shall provide a system for securing the secrecy and sanctity of the ballot as well as a system for absentee voting by qualified Filipinos abroad. x x x.

> Sec. 74. Election offenses/prohibited acts. -
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> x x x x
>
> II. Under R.A. 9189 "Overseas Absentee Voting Act of 2003", as amended
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> x x x x
>
> 8. For any person to engage in partisan political activity abroad during the thirty (30)-day overseas voting period.
>
> x x x x
>
> The provision of existing laws to the contrary notwithstanding, and with due regard to the Principle of Double Criminality, the prohibited acts described in this section are electoral offenses and shall be punishable in the Philippines.
>
> x x x x

Petitioner possesses dual citizenship (Filipino and American), whose right to vote under R.A. No. 9189, as amended, or the absentee voting system, was upheld by the Court *En Banc* in the 2006 case of *Nicolas-Lewis, v. COMELEC*.[4]

Petitioner alleges, albeit notably *sans* support, that she, "together with thousands of Filipinos all over the world," were prohibited by different Philippine consulates from conducting information campaigns, rallies, and outreach programs in support of their respective candidates, especially for the positions of President and Vice-President for the 2016 Elections, pursuant to the above-cited provisions.[5]

Hence, this petition.

Considering the urgency of the matter as the May 2016 presidential and vice-presidential elections were forthcoming when the petition was filed, the Court, in its April 19, 2016 Resolution[6] partially granted the application for temporary restraining order (TRO), enjoining the COMELEC, its deputies and other related instrumentalities from implementing the questioned provisions, except within Philippine Embassies, Consulates, and other Posts where overseas voters may exercise their right to vote pursuant to the Overseas Voting System, where partisan political activities shall still be prohibited until further orders from the Court.

Issues

Notably, the questioned provision in COMELEC Resolution No. 10035 merely echoed that of Section 36.8 of R.A. No. 9189, as amended by

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4 *Nicolas-Lewis v. COMELEC*, 529 Phil. 642 (2006).
5 *Rollo*, p. 8.
6 Id. 94-95.

R.A. No. 10590. Also, said Resolution was issued for purposes of the May 9, 2016 Elections only, which already came to pass.

Thus, ultimately, this Court is called upon to resolve the issue on whether Section 36.8 of R.A. No. 9189, as amended by R.A. No. 10590, is unconstitutional for violating the right to speech, expression, assembly, and suffrage; for denial of substantive due process and equal protection of laws; and for violating the territoriality principle of our criminal law.

The Court's Ruling

The Court is once again confronted with the task of harmonizing fundamental interests in our constitutional and democratic society. On one hand are the constitutionally-guaranteed rights, specifically, the rights to free speech, expression, assembly, suffrage, due process and equal protection of laws, which this Court is mandated to protect. On the other is the State action or its constitutionally-bounden duty to preserve the sanctity and the integrity of the electoral process, which the Court is mandated to uphold. It is imperative, thus, to cast a legally-sound and pragmatic balance between these paramount interests.

Essentially, petitioner urges the Court to review the questioned provision, premised on the claim that "she and all the Filipino voters all over the world" have experienced its detrimental effect when she, "together with thousands of similarly situated Filipinos all over the world," were allegedly prohibited by different Philippine consulates from conducting information campaigns, rallies, and outreach programs in support of their respective candidates in the 2016 Elections.

The Office of the Solicitor General (OSG), however, argues that these allegations do not only lack veracity, but also failed to demonstrate how petitioner, or overseas Filipino voters for that matter, were left to sustain or are in the immediate danger to sustain direct injury as a result of the enforcement of the assailed provision. Significant details such as the true nature of the activities allegedly conducted by the petitioner and the alleged thousands of overseas Filipino voters all over the world and the circumstances that led to the alleged prohibition made by the Philippine consulates, if at all, were not asserted which could have clearly demonstrated the claimed detrimental effect caused by the operation of the questioned law to her and all the Filipino voters abroad. Hence, the OSG posits that petitioner failed to establish that this case involves a justiciable controversy to warrant the Court's review of a co-equal branch's act.

Contrary to the OSG's position, the instant petition involves an actual case or justiciable controversy, warranting the Court's exercise of the power of judicial review.

Indeed, whether under the traditional or the expanded setting, the power of judicial review is subject to certain limitations, one of which is that

there must be an actual case or controversy calling for the exercise of judicial power.[7] In the recent case of *Samahan ng mga Progresibong Kabataan (SPARK) v. Quezon City*,[8] the Court expounded on this requisite, *viz.*:

> x x x [A]n actual case or controversy is one which ["]involves a conflict of legal rights, an assertion of opposite legal claims, susceptible of judicial resolution as distinguished from a hypothetical or abstract difference or dispute.["] In other words, **"there must be a contrariety of legal rights that can be interpreted and enforced on the basis of existing law and jurisprudence."** According to recent jurisprudence, in the Court's exercise of its expanded jurisdiction under the 1987 Constitution, this requirement is simplified **"by merely requiring a *prima facie* showing of grave abuse of discretion in the assailed governmental act."**
>
> Corollary to the requirement of an actual case or controversy is the requirement of ripeness. A question is ripe for adjudication when the act being challenged has had a direct adverse effect on the individual challenging it. **For a case to be considered ripe for adjudication, it is a prerequisite that something has then been accomplished or performed by either branch before a court may come into the picture, and the petitioner must allege the existence of an immediate or threatened injury to himself as a result of the challenged action.**

Relatedly, in *Ifurung v. Morales*,[9] the Court explained that:

> [G]rave abuse of discretion arises when a lower court or tribunal patently violates the Constitution, the law, or existing jurisprudence. We have already ruled that petitions for *certiorari* and prohibition filed before the Court "are the remedies by which grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the [g]overnment may be determined under the Constitution," and explained that "[w]ith respect to the Court, x x x the remedies of *certiorari* and prohibition are necessarily broader in scope and reach, and the writ of *certiorari* or prohibition may be issued to correct errors of jurisdiction committed not only by a tribunal, corporation, board or officer exercising judicial, quasi-judicial or ministerial functions, but **also to set right, undo, and restrain any act of grave abuse of discretion amounting to lack or excess of jurisdiction by any branch or instrumentality of the [g]overnment, *even if the latter does not exercise judicial, quasi-judicial or ministerial functions*.**"

Thus, "[w]here an action of the legislative branch is seriously alleged to have infringed the Constitution, it becomes not only the right, but in fact the duty of the judiciary to settle the dispute. The question, thus, posed is judicial rather than political. The duty to adjudicate remains to assure that the supremacy of the Constitution is upheld."[10]

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7 *Peralta v. Philippine Postal Corporation*, G.R. No. 223395, December 4, 2018; *Biraogo v. Philippine Truth Commission of 2010*, 651 Phil. 374, 438 (2010).

8 G.R. No. 225442, August 8, 2017, 835 SCRA 350, 385.

9 G.R. No. 232131, April 24, 2018.

10 Id.

Guided by the foregoing principles, the Court finds that there exists an actual justiciable controversy in this case given the "evident clash of the parties' legal claims"[11] as to whether the questioned provision infringe upon the constitutionally-guaranteed freedom of expression of the petitioner, as well as all the Filipinos overseas. Petitioner's allegations and arguments presented a *prima facie* case of grave abuse of discretion which necessarily obliges the Court to take cognizance of the case and resolve the paramount constitutional issue raised. The case is likewise ripe for adjudication considering that the questioned provision continues to be in effect until the Court issued the TRO above-cited, enjoining its implementation. While it may be true that petitioner failed to particularly allege the details of her claimed direct injury, the petition has clearly and sufficiently alleged the existence of an immediate or threatened injury sustained and being sustained by her, as well as all the overseas Filipinos, on their exercise of free speech by the continuing implementation of the challenged provision. A judicial review of the case presented is, thus, undeniably warranted.

Besides, in *Gonzales v. COMELEC*,[12] the Court ruled that when the basic liberties of free speech, freedom of assembly and freedom of association are invoked to nullify a statute designed to maintain the purity and integrity of the electoral process by Congress calling a halt to the undesirable practice of prolonged political campaign or partisan political activities, the question confronting the Court is one of transcendental significance, warranting this Court's exercise of its power of judicial review.[13]

Verily, in discharging its solemn duty as the final arbiter of constitutional issues, the Court shall not shirk from its obligation to determine novel issues, or issues of first impression, with far-reaching implications.[14]

That being so, this Court shall now endeavor to settle the constitutional issue raised in the petition promptly and definitely.

Petitioner assails the constitutionality of Section 36.8 of R.A. No. 9189, as amended by R.A. No. 10590, which prohibits "any person to engage in partisan political activity abroad during the 30-day overseas voting period." A violation of this provision entails penal and administrative sanctions.

Section 79(b) of the Omnibus Election Code defines partisan political activity as follows:

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11 *Samahan ng mga Progresibong Kabataan (SPARK) v. Quezon City,* supra note 8, at 385-386.
12 *Gonzales v. COMELEC*, 137 Phil. 471 (1969).
13 *Estipona, Jr. v. Judge Lobrigo*, G.R. No. 226679, August 15, 2017, 837 SCRA 160, 171.
14 Id.

> Section 79. Definitions. – x x x
>
> x x x x
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> (b) The term "election campaign" or "partisan political activity" refers to an act designed to promote the election or defeat of a particular candidate or candidates to a public office which shall include:
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> (1) Forming organizations, associations, clubs, committees or other groups of persons for the purpose of soliciting votes and/or undertaking any campaign for or against a candidate;
>
> (2) Holding political caucuses, conferences, meetings, rallies, parades, or other similar assemblies, for the purpose of soliciting votes and/or undertaking any campaign or propaganda for or against a candidate;
>
> (3) Making speeches, announcements or commentaries, or holding interviews for or against the election of any candidate for public office;
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> (4) Publishing or distributing campaign literature or materials designed to support or oppose the election of any candidate; or
>
> (5) Directly or indirectly soliciting votes, pledges or support for or against a candidate.
>
> The foregoing enumerated acts if performed for the purpose of enhancing the chances of aspirants for nomination for candidacy to a public office by a political party, aggroupment, or coalition of parties shall not be considered as election campaign or partisan election activity.
>
> Public expressions or opinions or discussions of probable issues in a forthcoming election or on attributes of or criticisms against probable candidates proposed to be nominated in a forthcoming political party convention shall not be construed as part of any election campaign or partisan political activity contemplated under this Article.

Basically, on its face, the questioned provision prohibits the act of campaigning for or against any candidate during the voting period abroad.

In the main, petitioner argues that the prohibition is a violation of Article III, Section 4 of the 1987 Constitution. Petitioner explains that the prohibited partisan political activities as defined under the law are acts of exercising free speech, expression, and assembly. Corollary, these activities are necessary for the voters to be informed of the character, platforms, and agenda of the candidates to the end of having an educated decision on who to vote for. As such, it is petitioner's position that the prohibition on partisan political activities is a clear curtailment of the most cherished and highly-

esteemed right to free speech, expression, and assembly, as well as the right to suffrage.

Specifically, petitioner argues that the questioned prohibition constitutes a content-based prior restraint on the overseas Filipino voters' right to express their political inclinations, views and opinions on the candidates, hence, must be given the presumption of unconstitutionality and subjected to the strictest scrutiny, *i.e.*, overcoming the clear and present danger rule.

We resolve.

Freedom of expression has gained recognition as a fundamental principle of every democratic government, and given a preferred right that stands on a higher level than substantive economic freedom or other liberties.[15] In no equivocal terms did the fundamental law of the land prohibit the abridgement of the freedom of expression. Section 4, Article II of the 1987 Constitution expressly states:

> No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.

A fundamental part of this cherished freedom is the right to participate in electoral processes, which includes not only the right to vote, but also the right to express one's preference for a candidate or the right to influence others to vote or otherwise not vote for a particular candidate. This Court has always recognized that these expressions are basic and fundamental rights in a democratic polity[16] as they are means to assure individual self-fulfillment, to attain the truth, to secure participation by the people in social and political decision-making, and to maintain the balance between stability and change.[17]

Rightfully so, since time immemorial, "[i]t has been our constant holding that this preferred freedom [of expression] calls all the more for the utmost respect when what may be curtailed is the dissemination of information to make more meaningful the equally vital right of suffrage."[18] In the recent case of *1-United Transport Koalisyon (1-UTAK) v. COMELEC*,[19] the Court *En Banc* pronounced that any governmental restriction on the right to convince others to vote for or against a candidate – a protected expression – carries with it a heavy presumption of invalidity.

To be sure, this rather potent deviation from our conventional adherence to the presumption of constitutionality enjoyed by legislative acts

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15 *Chavez v. Gonzales*, 569 Phil. 155, 195 (2008).

16 *The Diocese of Bacolod v. COMELEC*, 751 Phil. 301, 444 (2015), citing *National Press Club v. COMELEC*, 283 Phil. 795, 810 (1992).

17 *ABS-CBN Broadcasting Corporation v. COMELEC*, 380 Phil. 780, 792 (2000).

18 *Mutuc v. COMELEC*, 146 Phil. 798, 805-806 (1970).

19 758 Phil. 67 (2015).

is not without basis. Nothing is more settled than that any law or regulation must not run counter to the Constitution as it is the basic law to which all laws must conform. Thus, while admittedly, these rights, no matter how sacrosanct, are not absolute and may be regulated like any other right, in every case where a limitation is placed on their exercise, the judiciary is called to examine the effects of the challenged governmental action[20] considering that our Constitution emphatically mandates that no law shall be passed abridging free speech and expression. Simply put, a law or statute regulating or restricting free speech and expression is an outright departure from the express mandate of the Constitution against the enactment of laws abridging free speech and expression, warranting, thus, the presumption against its validity.

In this regard, therefore, a law or regulation, even if it purports to advance a legitimate governmental interest, may not be permitted to run roughshod over the cherished rights of the people enshrined in the Constitution.[21] It is only when the challenged restriction survives the appropriate test will the presumption against its validity be overthrown.

The question now is what measure of judicial scrutiny should be used to gauge the challenged provision.

Over the years, guided by notable historical circumstances in our nation and related American constitutional law doctrines on the First Amendment, certain tests of judicial scrutiny were developed to determine the validity or invalidity of free speech restrictions in our jurisdiction.

Foremost, a facial review of a law or statute encroaching upon the freedom of speech on the ground of overbreadth or vagueness is acceptable in our jurisdiction. Under the overbreadth doctrine, a proper governmental purpose, constitutionally subject to state regulation, may not be achieved by means that unnecessarily sweep its subject broadly, thereby invading the area of protected freedoms.[22] Put differently, an overbroad law or statute needlessly restricts even constitutionally-protected rights. On the other hand, a law or statute suffers from vagueness when it lacks comprehensible standards that men of common intelligence must necessarily guess at its meaning and differ as to its application.[23]

It is noteworthy, however, that facial invalidation of laws is generally disfavored as it results to entirely striking down the challenged law or statute on the ground that they may be applied to parties not before the Court whose activities are constitutionally protected. It disregards the case and controversy requirement of the Constitution in judicial review, and permits decisions to be made without concrete factual settings and in sterile abstract

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20 *BAYAN v. Ermita*, 522 Phil. 201, 224 (2006), citing *Reyes v. Bagatsing*, 210 Phil. 457, 467 (1983).
21 Id.
22 *Disini v. The Secretary of Justice*, 727 Phil. 28, 121 (2014).
23 *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council*, 646 Phil. 452, 488 (2010).

contexts,[24] deviating, thus, from the traditional rules governing constitutional adjudication. Hence, an on-its-face invalidation of the law has consistently been considered as a "manifestly strong medicine" to be used "sparingly and only as a last resort."[25]

The allowance of a review of a law or statute on its face in free speech cases is justified, however, by the aim to avert the "chilling effect" on protected speech, the exercise of which should not at all times be abridged.[26] The Court elucidated:

> The theory is that "[w]hen statutes regulate or proscribe speech and no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution, **the transcendent value to all society of constitutionally protected expression is deemed to justify allowing attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with narrow specificity.**"[27] (Emphasis supplied, citation omitted)

Restraints on freedom of expression are also evaluated by either or a combination of the following theoretical tests, to wit: (a) the dangerous tendency doctrine,[28] which were used in early Philippine case laws; (b) the clear and present danger rule,[29] which was generally adhered to in more recent cases; and (c) the balancing of interests test,[30] which was also recognized in our jurisprudence.

In the landmark case of *Chavez v. Gonzales,*[31] the Court laid down a more detailed approach in dealing with free speech regulations. Its approach was premised on the rational consideration that "the determination x x x of whether there is an impermissible restraint on the freedom of speech has always been based on the circumstances of each case, including the nature of the restraint." The Court discussed:

> Given that deeply ensconced in our fundamental law is the hostility against all prior restraints on speech, and any act that restrains speech is presumed invalid, and "any act that restrains speech is hobbled by the presumption of invalidity and should be greeted with furrowed brows," it is important to stress that not all prior restraints on speech are invalid. Certain previous restraints may be permitted by the Constitution, but determined only upon a careful evaluation of the challenged act as against the appropriate test by which it should be measured against.

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24 *Estrada v. Sandiganbayan*, 421 Phil. 290, 355 (2001).

25 *David v. Macapagal-Arroyo,* 522 Phil. 705, 726 (2006).

26 *Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council,* supra note 23, at 489.

27 Id. at 485-486.

28 This test permits limitations on speech once a rational connection has been established between the speech restrained and the danger contemplated; *Chavez v. Gonzales*, supra note 15, at 200.

29 This rule rests on the premise that speech may be restrained because there is substantial danger that the speech will likely lead to an evil the government has a right to prevent; *Chavez v. Gonzales*, id.

30 This is used as a standard when courts need to balance conflicting social values and individual interests, and requires a conscious and detailed consideration of the interplay of interests observable in a given situation; *Chavez v. Gonzales*, id.

31 Supra note 15.

Hence, it is not enough to determine whether the challenged act constitutes some form of restraint on the freedom of speech. A distinction has to be made whether the restraint is (1) a content-neutral regulation, *i.e.*, merely concerned with the incidents of speech, or one that merely controls the time, place, or manner, and under well[-] defined standards; **or (2) a content-based restraint or censorship**, *i.e.*, the restriction is based on the subject matter of the utterance or speech. The cast of the restriction determines the test by which the challenged act is assayed with.

When the speech restraints take the form of a content-neutral regulation, only a substantial governmental interest is required for its validity. Because regulations of this type are not designed to suppress any particular message, they are not subject to the strictest form of judicial scrutiny but an intermediate approach—somewhere between the mere rationality that is required of any other law and the compelling interest standard applied to content-based restrictions. The test is called intermediate because the Court will not merely rubberstamp the validity of a law but also require that the restrictions be narrowly-tailored to promote an important or significant governmental interest that is unrelated to the suppression of expression. **The intermediate approach has been formulated in this manner:**

> **A governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incident restriction on alleged [freedom of speech & expression] is no greater than is essential to the furtherance of that interest.**

On the other hand, a governmental action that restricts freedom of speech or of the press based on content is given the strictest scrutiny in light of its inherent and invasive impact. Only when the challenged act has overcome the clear and present danger rule will it pass constitutional muster, with the government having the burden of overcoming the presumed unconstitutionality.

Unless the government can overthrow this presumption, the content-based restraint will be struck down.

With respect to content-based restrictions, the government must also show the type of harm the speech sought to be restrained would bring about — especially the gravity and the imminence of the threatened harm — otherwise the prior restraint will be invalid. Prior restraint on speech based on its content cannot be justified by hypothetical fears, "but only by showing a substantive and imminent evil that has taken the life of a reality already on ground." As formulated, "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

The regulation which restricts the speech content must also serve an important or substantial government interest, which is unrelated to the suppression of free expression.

> Also, the incidental restriction on speech must be no greater than what is essential to the furtherance of that interest. A restriction that is so broad that it encompasses more than what is required to satisfy the governmental interest will be invalidated. The regulation, therefore, must be reasonable and narrowly drawn to fit the regulatory purpose, with the least restrictive means undertaken.
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> Thus, when the prior restraint partakes of a content-neutral regulation, it is subjected to an intermediate review. A content-based regulation, however, bears a heavy presumption of invalidity and is measured against the clear and present danger rule. The latter will pass constitutional muster only if justified by a compelling reason, and the restrictions imposed are neither overbroad nor vague. (Emphasis supplied, citations omitted)[32]

The paramount consideration in the analysis of the challenged provision, therefore, is the nature of the restraint on protected speech, whether it is content-based or otherwise, content-neutral. As explained in *Chavez*, a content-based regulation is evaluated using the clear and present danger rule, while courts will subject content-neutral restraints to intermediate scrutiny.

Section 36.8 of R.A. No. 9189, as amended by R.A. No. 10590, is an impermissible content-neutral regulation for being overbroad, violating, thus, the free speech clause under Section 4, Article III of the 1987 Constitution.

The questioned provision is clearly a restraint on one's exercise of right to campaign or disseminate campaign-related information. Prior restraint refers to official governmental restrictions on the press or other forms of expression in advance of actual publication or dissemination.[33] Undoubtedly, the prohibition under the questioned legislative act restrains speech or expression, in the form of engagement in partisan political activities, before they are spoken or made.

The restraint, however, partakes of a content-neutral regulation as it merely involves a regulation of the incidents of the expression, specifically the time and place to exercise the same. It does not, in any manner, affect or target the actual content of the message. It is not concerned with the words used, the perspective expressed, the message relayed, or the speaker's views. More specifically, the prohibition does not seek to regulate the exercise of the right to campaign on the basis of the particular message it conveys. It does not, in any manner, target the actual content of the message. It is easily understandable that the restriction was not adopted because of the government's disagreement with the message the subject speech or

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[32] Id. at 204-208.

[33] *1-United Transport Koalisyon (1-UTAK) v. COMELEC*, supra note 19, at 84.

expression relays.[34] There was no intention on the part of the government to make any distinction based on the speaker's perspectives in the implementation of the regulation.[35] Simply put, regardless of the content of the campaign message or the idea it seeks to convey, whether it is for or, otherwise against a certain candidate, the prohibition was intended to be applied *during the voting period abroad.*

The fact that the questioned regulation applies only to political speech or election-related speech does not, by itself, make it a content-based regulation. It is too obvious to state that every law or regulation would apply to a particular type of speech such as commercial speech or political speech. It does not follow, however, that these regulations affect or target the content of the speech or expression to easily and sweepingly identify it as a content-based regulation. Instead, the particular law or regulation must be judiciously examined on what it actually intends to regulate to properly determine whether it amounts to a content-neutral or content-based regulation as contemplated under our jurisprudential laws. To rule otherwise would result to the absurd interpretation that every law or regulation relating to a particular speech is a content-based regulation. Such perspective would then unjustifiably disregard the well-established jurisprudential distinction between content-neutral and content-based regulations.

To be sure, not all regulations against political speech are content-based. Several regulations on this type of speech had been declared content-neutral by this Court in previous cases. In *National Press Club v. COMELEC*,[36] the Court ruled that while the questioned provision therein – preventing the sale or donation of print space or airtime for political advertisement during the campaign period – of course, limits the right of speech and access to mass media, it does not authorize intervention with the content of the political advertisements, which every candidate is free to present within their respective COMELEC time and space. In the case of *1-UTAK* [37] above-cited, the questioned prohibition on posting election campaign materials in public utility vehicles was classified as a content-neutral regulation by the Court, albeit declared an invalid one for not passing the intermediate test.

Being a content-neutral regulation, we, therefore, measure the same against the intermediate test, *viz.*: (1) the regulation is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) such governmental interest is unrelated to the suppression of the free expression; and (4) the incidental restriction on

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34 *See Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972), wherein the U.S. Supreme Court held that the government may not grant a forum to acceptable views yet deny it from those who "express less favored or more controversial views." <https://supreme.justia.com/cases/federal/us/408/92/> (visited August 9, 2019).

35 *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989 <https://supreme.justia.com/cases/federal/us/491/781/ > (visited August 9, 2019).

36 Supra note 16.

37 *1-United Transport Koalisyon (1-UTAK) v. COMELEC*, supra note 19.

the alleged freedom of expression is no greater than what is essential to the furtherance of the governmental interest.[38]

Our point of inquiry focuses on the fourth criterion in the said test, *i.e.*, that **the regulation should be no greater than what is essential to the furtherance of the governmental interest**.

The failure to meet the fourth criterion is fatal to the regulation's validity as even if it is within the Constitutional power of the government agency or instrumentality concerned and it furthers an important or substantial governmental interest which is unrelated to the suppression of speech, the regulation shall still be invalidated if the restriction on freedom of expression is greater than what is necessary to achieve the invoked governmental purpose.[39]

In the judicial review of laws or statutes, especially those that impose a restriction on the exercise of protected expression, it is important that we look not only at the legislative intent or motive in imposing the restriction, but more so at the effects of such restriction when implemented. The restriction must not be broad and should only be narrowly-tailored to achieve the purpose. It must be demonstrable. It must allow alternative avenues for the actor to make speech.[40]

As stated, the prohibition is aimed at ensuring the conduct of honest and orderly elections to uphold the credibility of the ballots. Indeed, these are necessary and commendable goals of any democratic society. However, no matter how noble these aims may be, they cannot be attained by sacrificing the fundamental right of expression when such aim can be more narrowly pursued by not encroaching on protected speech merely because of the apprehension that such speech creates the danger of the evils sought to be prevented.[41]

In this case, the challenged provision's sweeping and absolute prohibition against all forms of expression considered as partisan political activities without any qualification is more than what is essential to the furtherance of the contemplated governmental interest. On its face, the challenged law provides for an absolute and substantial suppression of speech as it leaves no ample alternative means for one to freely exercise his or her fundamental right to participate in partisan political activities. Consider:

The use of the unqualified term **"abroad"** would bring any intelligible reader to the conclusion that the prohibition was intended to also be extraterritorial in application. *Generalia verba sunt generaliter*

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38 *Chavez v. Gonzales*, supra note 15.
39 *Social Weather Stations, Inc. v. COMELEC*, 409 Phil. 571, 588 (2001).
40 *The Diocese of Bacolod v. COMELEC*, supra note 16, at 381.
41 *Social Weather Stations, Inc. v. COMELEC*, supra at 590.

inteligencia.[42] General words are understood in a general sense. The basic canon of statutory interpretation is that the word used in the law must be given its ordinary meaning, unless a contrary intent is manifest from the law itself.[43] Thus, since the Congress did not qualify the word "abroad" to any particular location, it should then be understood to include any and all location abroad. Regardless, therefore, of whether the exercise of the protected expression is undertaken within or without our jurisdiction, it is made punishable under the challenged provision couched in pervasive terms.

To reiterate, the perceived danger sought to be prevented by the restraint is the purported risk of compromising the integrity and order of our elections. Sensibly, such risk may occur only within premises where voting is conducted, *i.e.*, in embassies, consulates, and other foreign service establishments. There is, therefore, no rhyme or reason to impose a limitation on the protected right to participate in partisan political activities exercised beyond said places.

While it may be argued that the Congress could not be presumed to have enacted a ridiculous rule that transgresses the elementary principle of territoriality in penalizing offenses, however, the general language of the law itself contradicts such argument.

For the same reason, we cannot accept the OSG's argument that the prohibition was intended to apply to candidates only, whose exercise of the right to campaign may be regulated as to time, place, and manner, citing the case of *The Diocese of Bacolod v. COMELEC.*[44] Again, the overbroad language of the questioned provision, *i.e.*, "**any person**" is prohibited to engage in any partisan political activity within the voting period abroad, betrays such argument. The general term "any person" should be understood to mean "any person" in its general sense as it was not clearly intended to be restricted to mean "candidates only."

It may not be amiss to point out, at this juncture, that a facial invalidation of the questioned statute is warranted to counter the "chilling effect" on protected speech that comes from its overbreadth as any person may simply restrain himself from speaking or engaging in any partisan political activity anywhere in order to avoid being charged of an electoral offense. Indeed, an overbroad law that "chills one into silence" should be invalidated on its face.

Neither was there any provision in the Implementing Rules and Regulations (IRR) of the challenged law which clearly qualifies the application of the questioned prohibition within our jurisdiction and to candidates only. COMELEC Resolution No. 9843[45] or the IRR of R.A. No.

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42 *Gutierrez v. The House of Representatives Committee on Justice,* 658 Phil. 322, 382 (2011).

43 *Philippine Consumers Foundation, Inc. v. National Telecommunications Commission,* 216 Phil. 185, 195 (1984).

44 Supra note 16.

45 Promulgated on January 15, 2014.

9189, as amended, which should have provided for well-defined and narrowly-tailored standards to guide our executive officials on how to implement the law, as well as to guide the public on how to comply with it, failed to do so.

Article 63, Rule 15 of the said IRR similarly provides for an all-encompassing provision, which reads:

> RULE 15
> CAMPAIGNING ABROAD
>
> ART. 63. ***Regulation on campaigning abroad.*** – The use of campaign materials, as well as the limits on campaign spending shall be governed by the laws and regulations applicable in the Philippines and subject to the limitations imposed by laws of the host country, if applicable.
>
> Personal campaigning of candidates shall be subject to the laws of the host country.
>
> **All forms of campaigning within the thirty (30)[-]day voting period shall be prohibited.** (Emphasis supplied)

What is more, while Section 64 thereof provides for specific rules on campaigning, it absolutely prohibits engagement in partisan political activities within our jurisdiction (embassies, consulates, and other foreign service establishments), not only during the voting period, but *even during the campaign period*, or simply *during the entire election period*, *viz.*:

> ART. 64. ***Specific rules on campaigning.*** – **The following rules shall apply during the campaign period, including the day of the election**:
>
> 1) The "port courtesies" that embassies, consulates and other foreign service establishments may extend to candidates shall not go beyond welcoming them at the airport and providing them with briefing materials about the host country, and shall at all times be subject to the availability of the personnel and funding for these activities.
>
> 2) The embassies, consulates and other foreign service establishments shall continue to assist candidates engaged in official Philippine government activities at the host country and in making the representations with the host government.
>
> 3) Members of the Foreign Service Corps may attend public social/civic/religious affairs where candidates may also be present, provided that these officers and employees do not take part in the solicitation of votes and do not express public support for candidates.
>
> 4) While nothing in the Overseas Voting Act of 2003 as amended shall be deemed to prohibit free discussion regarding politics or candidates for public office, members of the Foreign Service Corps cannot publicly endorse any candidate or political party nor take part in activities involving such public endorsement.

> **5) No partisan political activity shall be allowed within the premises of the embassy, consulate and other foreign service establishment.**
>
> 6) Government-sponsored or permitted information dissemination activities shall be strictly non-partisan and cannot be conducted where a candidate is present.
>
> 7) A Member of the Foreign Service Corps cannot be asked to directly organize any meeting in behalf of a party or candidate, or assist in organizing or act as liaison in organizing any such meeting. The prohibition shall apply to all meetings – social, civic, religious meetings – where a candidate is present. (Emphases supplied)

By banning partisan political activities or campaigning even *during the campaign period* within embassies, consulates, and other foreign service establishments, regardless of whether it applies only to candidates or whether the prohibition extends to private persons, it goes beyond the objective of maintaining order during the voting period and ensuring a credible election. To be sure, there can be no legally acceptable justification, whether measured against the strictest scrutiny or the most lenient review, to absolutely or unqualifiedly disallow one to campaign within our jurisdiction during the campaign period.

Most certainly, thus, the challenged provision, whether on its face or read with its IRR, constitutes a restriction on free speech that is greater than what is essential to the furtherance of the governmental interest it aims to achieve. Section 36.8 of R.A. No. 9189 should be struck down for being overbroad as it does not provide for well-defined standards, resulting to the ambiguity of its application, which produces a chilling effect on the exercise of free speech and expression, and ultimately, resulting to the unnecessary invasion of the area of protected freedoms.[46]

For the foregoing reasons, this Court declares Section 36.8 of R.A. No. 9189, as amended by R.A. No. 10590, unconstitutional for violating Section 4, Article III of the 1987 Constitution.

To be clear, this Court does not discount the fact that our leaders, chosen to maneuver this nation's political ventures, are put in position through an electoral process and as such, the government is constitutionally-mandated to ensure sound, free, honest, peaceful, and credible elections, the same being indispensable in our democratic society. In our goal to achieve such peaceful and credible democratic process, however, we cannot likewise disparage the most exalted freedom of expression, which is undeniably recognized as the bedrock of every democratic society, it being an "indispensable condition of nearly every other form of freedom."[47] After all, the conduct of elections is premised upon every democratic citizen's right to participate in the conduct of public affairs and social and political decision-

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[46] *Disini v. The Secretary of Justice*, supra note 22.

[47] *ABS-CBN Broadcasting Corporation v. COMELEC*, *supra* note 17.

making through the exercise of the freedom of expression. A restraint on such a vital constitutional right through an overbroad statute cannot, thus, be countenanced and given judicial *imprimatur*. As pronounced by the Court in the landmark case of *Adiong v. COMELEC*:[48]

> When faced with border line situations where freedom to speak by a candidate or party and freedom to know on the part of the electorate are invoked against actions intended for maintaining clean and free elections, the police, local officials and COMELEC, should lean in favor of freedom. For in the ultimate analysis, the freedom of the citizen and the State's power to regulate are not antagonistic. There can be no free and honest elections if in the efforts to maintain them, the freedom to speak and the right to know are unduly curtailed.

WHEREFORE, premises considered, the petition is **GRANTED**. The Court declares Section 36.8 of Republic Act No. 9189, as amended by Republic Act No. 10590 as **UNCONSTITUTIONAL**. The temporary restraining order issued by this Court on April 19, 2016 is hereby made **PERMANENT** and its application is accordingly extended within Philippine Embassies, Consulates, and other posts where overseas voters may exercise their right to vote pursuant to the Overseas Voting System.

SO ORDERED.

JOSE C. REYES, JR.
Associate Justice

WE CONCUR:

LUCAS P. BERSAMIN
Chief Justice

ANTONIO T. CARPIO
Associate Justice

DIOSDADO M. PERALTA
Associate Justice

Pls. see Concurring Opinion
ESTELA M. PERLAS-BERNABE
Associate Justice

See separate concurring opinion in the result
MARVIC M.V. F. LEONEN
Associate Justice

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[48] G.R. No. 103956, March 31, 1992, 207 SCRA 712, 717.

I join the separate concurring opinion of J. Jardeleza

FRANCIS H. JARDELEZA
Associate Justice

ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

ANDRES B. REYES, JR.
Associate Justice

ALEXANDER G. GESMUNDO
Associate Justice

RAMON PAUL L. HERNANDO
Associate Justice

ROSMARI D. CARANDANG
Associate Justice

AMY C. LAZARO-JAVIER
Associate Justice

HENRI JEAN PAUL B. INTING
Associate Justice

RODIL V. ZALAMEDA
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court.

LUCAS P. BERSAMIN
Chief Justice

CERTIFIED TRUE COPY

EDGAR O. ARICHETA
Clerk of Court En Banc
Supreme Court