G.R. No. 223705 – Loida Nicolas-Lewis, *Petitioner* v. Commission on Elections, *Respondent*.

Promulgated: August 14, 2019

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CONCURRING OPINION

PERLAS-BERNABE, *J.*:

At the onset, I concur that Section 36.8 of Republic Act No. (RA) 9189,[1] as amended by RA 10590[2] (Section 36.8), is a content-neutral regulation, for which the intermediate scrutiny test should be made to apply.[3] The said provision reads:

> Section 36. *Prohibited Acts.* – In addition to the prohibited acts provided by law, it shall be unlawful:
>
> x x x x
>
> 36.8. **For any person to engage in partisan political activity abroad during the thirty (30)-day overseas voting period**[.] (Emphasis supplied)

The distinction between content-neutral and content-based regulations is well-settled in our jurisprudence. In *Newsounds Broadcasting Network Inc. v. Dy*:[4]

> [J]urisprudence distinguishes between a **content-neutral** regulation, *i.e.*, merely concerned with **the incidents of the speech, or one that merely controls the time, place or manner, and under well-defined standards**; and a **content-based** restraint or censorship, *i.e.*, **the restriction is based on the subject matter of the utterance or speech.**[5] (Emphases supplied)

In *Ward v. Rock Against Racism*,[6] the Supreme Court of the United States of America stated that the principal inquiry in determining content-

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[1] 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," otherwise known as "THE OVERSEAS ABSENTEE VOTING ACT OF 2003," approved on February 13, 2003.

[2] Entitled "AN ACT AMENDING REPUBLIC ACT 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,'" otherwise known as "THE OVERSEAS VOTING ACT OF 2013," approved on May 27, 2013.

[3] See *ponencia*, pp. 12-13.

[4] 602 Phil. 255 (2009).

[5] Id. at 271.

[6] 491 U.S. 781 (1989).

neutrality is whether the government has adopted such regulation "***because of disagreement with the message it conveys***."[7]

As I see it, Section 36.8 is primarily a regulation on the ***place*** (*i.e.*, overseas/abroad) and ***time*** (*i.e.*, during the thirty [30]-day overseas voting period) in which political speech (particularly, those considered as "partisan political activity") may be uttered under the standards the provision prescribes. The government's purpose therefor is not so much on prohibiting "the message or idea of the expression"[8] *per se*, but rather on regulating "the time, place or manner of the expression."[9] As such, Section 36.8 should only be classified as a content-neutral regulation, and not a content-based one.

Being a content-neutral regulation, case law states that the **intermediate scrutiny test** should be made to apply. In the Separate Concurring Opinion of Senior Associate Justice Antonio T. Carpio in *Chavez v. Gonzales*,[10] he discussed:

> If the prior restraint is not aimed at the message or idea of the expression, it is content-neutral even if it burdens expression. A content-neutral restraint is a restraint which regulates the time, place or manner of the expression in public places without any restraint on the content of the expression. **Courts will subject content-neutral restraints to intermediate scrutiny**.
>
> An example of a content-neutral restraint is a permit specifying the date, time and route of a rally passing through busy public streets. A content-neutral prior restraint on protected expression which does not touch on the content of the expression enjoys the presumption of validity and is thus enforceable subject to appeal to the courts. **Courts will uphold time, place or manner restraints if they are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of expression**.[11] (Emphases and underscoring supplied)

Following the intermediate scrutiny approach, a content-neutral regulation is valid if it meets these parameters: (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) **the incidental restriction on freedoms of speech, expression, and press is no greater than what is essential to the furtherance of that interest.**[12] In relation to the fourth element, a restriction that is so broad that it encompasses more than what is

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[7] See id. See also *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972), wherein the Supreme Court of the United States of America held that government may not grant a forum to acceptable views yet deny it from those who "express less favored or more controversial views."

[8] See Separate Concurring Opinion of Senior Associate Justice Antonio T. Carpio in *Chavez v. Gonzales*, 569 Phil. 155, 238 (2008).

[9] Id.

[10] Id.

[11] Id. at 238.

[12] See *ponencia* in *Chavez v. Gonzales*, id. at 205-206; citing *Osmeña v. COMELEC*, 351 Phil. 692, 717 (1998).

required to satisfy the governmental interest will be invalidated. In other words, the regulation must be "**narrowly tailored**" to fit the regulation's purpose.[13] In my view, Section 36.8 fails to satisfy this fourth parameter of the intermediate scrutiny approach,[14] and hence, unconstitutional for the reasons explained below.

The purpose of the thirty (30)-day prohibition, based on respondent the Commission on Elections' (COMELEC) Comment,[15] is "to ensure the holding of an honest and orderly election that upholds the secrecy and sanctity of the ballot" or "to maintain public order during election day."[16] Although the law's objective is clearly constitutive of "an important or substantial governmental interest," **Section 36.8's sweeping restriction of all forms of speech considered as partisan political activity <u>abroad, without any qualification whatsoever concerning the location where such disorder may emanate</u>**, *is more than essential to the furtherance of the above-stated interest.* To my mind, the perceived danger of election-related disorder would only be extant when partisan political activity is allowed in places that fall within the jurisdictional reach of our election laws, <u>*e.g.*, within the premises of the embassy, consulate, and other foreign service establishment</u>, and not beyond it. Stated otherwise, the possibility of election-related discord discernibly arises only in places where our election laws remain operative; conversely, where foreign election laws apply, the possibility of election-related discord becomes a domestic concern of that country, and not ours. Hence, by **generally banning partisan political activity regardless of the location where the political speech is specifically uttered abroad**, Section 36.8 **goes over and beyond the objective** of ensuring "the holding of an honest and orderly [Philippine (not foreign)] election that upholds the secrecy and sanctity of the ballot" and "to maintain public order during election day."

While the COMELEC argues that the thirty (30)-day prohibition only applies in the designated polling precincts[17] located in the above-stated places abroad, the general language of the law itself betrays such argumentation. On its face, Section 36.8 broadly prohibits "partisan political activity **<u>abroad</u>** during the thirty (30)-day overseas voting period."[18] It is a rule in statutory construction that "a word of general significance in a statute [– *such as the word <u>abroad</u>* –] is to be taken in its ordinary and comprehensive sense, unless it is shown that the word is intended to be given a different or restricted meaning,"[19] which exception was not shown to obtain in the present case.

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13 See *Chavez v. Gonzales*, id. at 210 and 238; emphasis supplied. See also *Ward v. Rock Against Racism*, supra note 6.

14 In *Gonzales v. COMELEC*, the Court held that "even though the governmental purposes be legitimate and substantial, they cannot be pursued by means that **broadly stifle fundamental personal liberties when the end can be more narrowly achieved**," as in this case. Indeed, "**precision of regulation is the touchstone in an area so closely related to our most precious freedoms**." (137 Phil. 471, 507 [1969]; emphases supplied)

15 Dated April 23, 2016.

16 See Comment, p. 29.

17 See id. at 21.

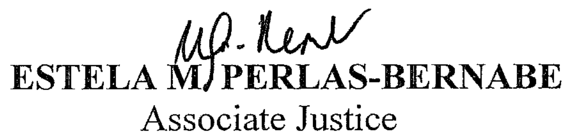
18 Emphasis and underscoring supplied.

19 *Naval v. COMELEC*, 738 Phil. 506, 535 (2014).

Hence, Section 36.8, as worded, foists a prohibition on partisan political activity (including political speech) that generally applies in all places abroad.

In any case, even assuming that Section 36.8 was intended to restrictively apply only within the premises of the embassy, consulate, and other foreign service establishment as the COMELEC argues,[20] it is my view that this intent is not amply reflected in the provision or even amply clarified in its implementing rules.[21] Hence, there is an ambiguity in the law's scope that ultimately has the effect of "chilling" the free speech of our citizens residing overseas. In one case, it was observed that "where vague statutes regulate behavior that is even close to constitutionally protected, courts fear [that] a chilling effect will impinge on constitutional rights."[22] Verily, this observation gains peculiar significance when it comes to regulations that affect political speech. This is because, in *The Diocese of Bacolod v. COMELEC*,[23] the Court has ruled that "[p]olitical speech enjoys preferred protection within our constitutional order. x x x. '[I]f ever there is a hierarchy of protected expressions, political expression would occupy the highest rank, and among different kinds of political expression, the subject of fair and honest elections would be at the top.'[24] Sovereignty resides in the people [and] [p]olitical speech is a direct exercise of the sovereignty."[25]

In fine, Section 36.8 of RA 9189, as amended by RA 10590, is a content-neutral regulation that, however, constitutes a restriction of free speech that is greater than what is essential to the furtherance of the public interest it was intended to meet. Thus, based on the above-discussed considerations, I vote to **GRANT** the petition and **DECLARE** the subject provision as unconstitutional.



ESTELA M. PERLAS-BERNABE
Associate Justice

[20] See Comment, p. 21.

[21] See COMELEC Resolution No. 9843, entitled "IMPLEMENTING RULES AND REGULATIONS OF REPUBLIC ACT NO. 10590, OTHERWISE KNOWN AS 'AN ACT AMENDING REPUBLIC ACT 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,''" otherwise known as "THE RULES AND REGULATIONS IMPLEMENTING THE OVERSEAS VOTING ACT OF 2003, AS AMENDED," approved on January 15, 2014.

[22] See Dissenting Opinion of Retired Associate Justice Dante O. Tinga in *Spouses Romualdez v. COMELEC*, 576 Phil. 357, 433 (2008).

[23] 751 Phil. 301 (2015).

[24] Id. at 343, citing Senior Associate Justice Antonio T. Carpio's Separate Concurring Opinion in *Chavez v. Gonzales*, supra note 8, at 245.

[25] *The Diocese of Bacolod v. COMELEC*; id. at 343.

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EDGAR O. ARICHETA
Clerk of Court En Banc
Supreme Court