EN BANC

G.R. No. 263590 (ATTY. ROMULO B. MACALINTAL, Petitioner, v. **COMMISSION ON ELECTIONS and THE OFFICE OF THE PRESIDENT through EXECUTIVE SECRETARY LUCAS P. BERSAMIN,** Respondents)

G.R. No. 263673 (ATTY. ALBERTO N. HIDALGO, ATTY. ALUINO O. ALA, ATTY. AGERICO A. AVILA, ATTY. TED CASSEY B. CASTELLO, ATTY. JOYCE IVY C. MACASA, and ATTY. FRANCES MAY C. REALINO, Petitioners, *v.* **EXECUTIVE SECRETARY LUCAS P. BERSAMIN, THE SENATE OF THE PHILIPPINES, duly represented by its Senate President, JUAN MIGUEL ZUBIRI, THE HOUSE OF REPRESENTATIVES, duly represented by its Speaker of the House, FERDINAND MARTIN ROMUALDEZ, and THE COMMISSION ON ELECTIONS, duly represented by its Chairman, GEORGE ERWIN M. GARCIA,** Respondents)

Promulgated:

June 27, 2023

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CONCURRENCE

LAZARO-JAVIER, *J.*:

The consolidated Petitions assail the constitutionality of Republic Act No. 11935[1] which essentially postpones the Barangay and Sangguniang Kabataan Elections (BSKE) scheduled on December 5, 2022 to a later date, i.e., the last Monday of October 2023; and grants the authority to incumbent barangay and Sangguniang Kabataan officials to remain in office until their successors have been duly elected and qualified, unless sooner removed or suspended for cause.[2] The core issue thus involves an *apparent clash* between the right of suffrage and the Congress' exercise of its plenary legislative power, which includes the power to regulate elections.[3]

In the main, the *ponencia* grants the Petitions declaring Republic Act No. 11935 unconstitutional and ordains, among others:

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1 "An Act Postponing the December 2022 Barangay and Sangguniang Kabataan Elections, Amending for the Purpose Republic Act No. 9164, as amended, Appropriating Funds therefor, and for Other Purposes."

2 *Ponencia*, p. 3.

3 *Id.* at 9.

First, the case has not been rendered moot to preclude the Court's exercise of its judicial review power despite the lapse of the original date of the BSKE on December 5, 2022;

Second, while Republic Act No. 11935 does not encroach on the Commission on Election's (COMELEC) power to administer elections, it is unconstitutional because: (i) it fails to satisfy the substantive due process requisites for validity of laws, thereby encroaching on the right of suffrage; and (ii) the enactment thereof was attended with patent grave abuse of discretion amounting to lack or excess of jurisdiction;

Third, the effects and consequences of Republic Act No. 11935, prior to the Court's declaration of its unconstitutionality, are considered operative facts and cannot be ignored and reversed as a matter of equity and practicality; and

Finally, the continuation in the office of the current barangay and Sangguniang Kabataan officers in a hold-over capacity does not amount to a legislative appointment.

I humbly and respectfully express my concurrence.

Foremost, I agree with the *ponencia* inasmuch as it rules that the case has ***not*** become *moot and academic* despite the lapse of the scheduled date of the Barangay and BSKE, i.e., December 5, 2022. The good *Ponente* has expertly discussed the legal concept of mootness vis-à-vis the Court's fastidious power and responsibility to address the present and pressing issue—and I agree with every point in this regard.

Indeed, the determination of the constitutionality of Republic Act No. 11935 is *exigent* and *compelling* in view of the reality that postponements of the BSKE has become an *alarming trend* as pointed out by the good *Senior Associate Justice Marvic M.V.F. Leonen* during the oral arguments. Verily, to stay mum on the issue is *to renege* on the Court's *constitutional duty* to curtail any *grave abuse of discretion* on the part of *any* branch, department, or instrumentality of the government. This We cannot do.

As a general rule, the Court refrains from ruling upon the validity of the official acts of its co-equal branches, since the same, falling within their constitutionally-allocated sphere, must be accorded great respect. When, however, these acts are patently arbitrary, capricious, and without basis, the Court will not shy from striking down the same as unconstitutional, *as here.*

Notably, the issue at hand may also be viewed as one involving a balancing of interest between the plenary power of the Congress to legislate

on one hand and the right of the people of suffrage on the other. On this score, may I raise the following points for consideration:

In determining the reasonableness or validity of any government regulation, the Court has utilized three tests of judicial scrutiny. These tests were adopted from guiding legal principles, both foreign and local, which the Court has developed further in deciding landmark issues.[4] The most restrictive of all, the **strict scrutiny test**, applies when the classification interferes with the exercise of fundamental rights, including the basic liberties guaranteed under the Constitution or burdens suspect classes. The **intermediate scrutiny test**, on the other hand, applies when a classification does not involve suspect classes or fundamental rights, but requires heightened scrutiny, such as for classifications based on gender and legitimacy.[5] And finally, the **rational basis test** applies to all other subjects *not covered* by the first two tests.[6]

Indeed, the issue posed before the Court requires a study of the levels of judicial scrutiny and a determination of which among these tests is applicable—and consequently, if the questioned legislation passes the appropriate test.

Upon deeper study of each of the varied erudite opinions of the learned Members of the Court, I got inspired to evaluate my personal take on the issue and respectfully join the esteemed Chief Justice Alexander Gesmundo in suggesting that the applicable test here, as a *general rule,* ought to be the **rational basis test** subject only to the existence of specific circumstances which require the application of a more stringent level of scrutiny.

I elucidate.

Whether the restraint is content-neutral or content-based is *relevant only* with respect to the umbrella of related rights under *freedom of expression*, i.e., of speech, of the press, to peaceably assemble, and to freedom of religion. It *does not extend* to cases where what is at stake is the *exercise of the right to vote*, ***except*** where only the right to engage in *partisan political activities*, e.g., campaigning, is affected. For such exercise falls under the protected category of *political speech*.

Thus, in *The Diocese of Bacolod v. COMELEC*,[7] the Court determined whether the COMELEC's size regulations, which ordered the removal of petitioner's tarpaulin containing the names of their chosen candidates to the

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4 See *Samahan ng mga Progresibong Kabataan v. Quezon City,* 815 Phil. 1067, 1113 (2017) [Per *J.* Perlas-Bernabe, *En Banc*].

5 *Id.* at 1113-1114.

6 *Id.*

7 789 Phil. 197 (2016) [Per *J.* Leonen, *En Banc*].

elections, is content-based or content-neutral. In *Nicolas-Lewis v. COMELEC*,[8] the Court declared Republic Act No. 9189 as an impermissible *content-neutral* regulation for violating the free speech clause as it prohibited any person from engaging in partisan political activities abroad during the 30-day overseas voting period.

The right to cast votes, though intrinsically linked to the right to freedom of expression, being an assertion of one's political preference, is itself a *separate, distinct,* and *cardinal* right. The will of the sovereign people, expressed through suffrage, is a human right not only guaranteed by the Constitution, but also by the International Covenant on Civil and Political Rights to which the Philippines is a party.[9]

This *special variance* of the preferred right to free speech is exalted from the latter as the cornerstone of a republican state. Perceptibly, the very structure of the Constitution itself recognizes that *they are two* ***different*** *rights:* the freedom of expression is enshrined under Article III, while the right of suffrage is the entirety of Article V. Verily, whether the regulation is content-neutral, i.e., affecting only the time, place, and manner of exercising the right, is *irrelevant* when we speak of the very act of casting votes in the ballot.

I remain firm in my humble view, which I expressed before, that the act of casting a vote is *not separable* from the time, place, and manner of doing so. An individual simply cannot exercise his or her right to vote without any election. I, however, must reconsider that postponement of elections does not necessarily render the right to vote ineffective precisely because the people are *not completely* deprived of their opportunity to elect their representatives. As borne by history itself, elections were subsequently conducted as scheduled for every postponement legislated by Congress.

As it stands, therefore, the postponement of elections does not *directly* restrict the people's sacred right of suffrage but merely *shifts* the original date of such exercise to a much later date to exercise the essentially same acts, nay rights, that they would have at the earlier date. Otherwise stated, the people would still cast their votes and exercise their right but at a slightly later time. I thus concede that the strict scrutiny test, which I previously endorsed, may not be the proper applicable test in this case.

The strict scrutiny test and the intermediate test being inapplicable, jurisprudence ordains that We apply the rational basis test. I elaborate.

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8 859 Phil. 560, 597 (2019) [Per *J.* Reyes, Jr., *En Banc*].

9 *Agcaoili v. Felipe*, 233 Phil. 348 (1987) [Per *J.* Cortes, *En Banc*].

The *ponencia* itself already acknowledged the Congress' inherent, broad, and general power to postpone elections on grounds apart from those expressly delegated to the COMELEC under Section 5 of the Omnibus Election Code.

Relevantly, the primordial doctrine of separation of powers dictates that each of the three great branches of the government has exclusive cognizance of and is supreme in matters falling within its own constitutionally-allocated sphere.[10] Thus, in enacting a law, it is the sole prerogative of Congress—not the Judiciary—to determine what subjects or activities it intends to govern limited only by the provisions set forth in the Constitution.

As the *ponencia* itself explained, it is thus outside the constitutional purview of this Court to encroach on the wisdom of Our co-equal branch in the government whenever it deems prudent and within the best interests of the honest, peaceful, and orderly conduct of elections to postpone the same sans any showing that it did so with grave abuse of discretion.[11]

Verily, the act of postponing elections *per se,* is an act that falls within the constitutionally-granted powers of Congress. It therefore enjoys a strong presumption of constitutionality. Aptly, the test to be applied in light of this strong presumption should therefore be the *most deferential standard*: the rational basis test.[12] As phrased by the former Chief Justice Artemio V. Panganiban in his dissenting opinion in *Central Bank Employees' Association, Inc. v. Bangko Sentral ng Pilipinas,*[13] regulations scrutinized under the rational basis test enjoy a strong presumption of constitutionality and, not being clearly arbitrary, could not therefore be invalidated.

So must it be.

AMY C. LAZARO-JAVIER
Associate Justice

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MARIFE M. LOMIBAO-CUEVAS
Clerk of Court
Supreme Court

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10 See *Defensor-Santiago v. Guingona,* 359 Phil. 276 (1998) [Per *J.* Panganiban, *En Banc*].
11 Ponencia, p. 80.
12 See *White Light Corporation v. City of Manila,* 596 Phil. 444 (2009) [Per *J.* Tinga, *En Banc*].
13 487 Phil. 531 (2004) [Per *J.* Puno, *En Banc*].