

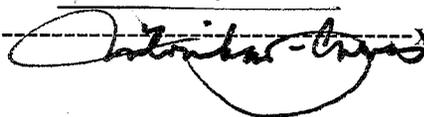
EN BANC

G.R. No. 199479 — NAPOLEON SANOTA, BAMBI MAGNO PURISIMA, ANTONIO TABBAD, BONIFACIO COLES, BENJIE REBUENO, ARNOLD ATADERO, BOY SILVA, REY ARQUIZA, BEN PAYPON, ARTURO GALLEGRO, JACK PATEÑA, JULIO SISON, FROILAN MORALLOS, BOY MIRASOL, ED BAUSA, VICTOR REYES, IBARRA SAMSON, JR., RICKY CARVAJAL, JR., TONY WYCO, CUSTOMS MEDIA ASSOCIATION, INC., and CUSTOMS TRI-MEDIA ASSOCIATION, INC., Petitioners, v. BUREAU OF CUSTOMS, represented by COMMISSIONER ROZZANO RUFINO B. BIAZON, Respondent.

Promulgated:

April 3, 2024.

X-----X



DISSENTING OPINION

LEONEN, J.:

I acknowledge that the repeal of Customs Memorandum Order (CMO) No. 37-2011 renders this case moot. However, in fulfilling its obligation to safeguard fundamental constitutional freedoms, this Court should adjudicate on the matter to guide the Bench and the Bar, and to avoid its repetition in the near future. Therefore, I dissent.

The role of a free press in a deliberative democracy is crucial. It acts as a watchdog over the government. It keeps the public informed so that they may participate in public discussions. It empowers the sovereign with information to hold the government accountable.

Given its crucial role, the media is expected to deliver information and news with accuracy, fairness, accountability, and transparency.¹ These standards are embodied in the Philippine Journalist's Code of Ethics, which is not a legal obligation to adhere to, but is carried out through self-regulation by the community of journalists and media organizations tasked to discipline its own members.²

The Journalist's Code of Ethics tackles the content of the news and reports. It provides a guide on using facts, handling confidential

¹ *Guy v. Tulfo*, 851 Phil. 748, 772 (2019) [Per J. Leonen, Third Division].

² NATIONAL UNION OF JOURNALISTS OF THE PHILIPPINES, ETHICAL GUIDE FOR FILIPINO JOURNALISTS 26 (2021).



information, and gathering and reporting news. As it is a self-regulating measure, the State has no power to interpret and use it to test the legitimacy of a media practitioner. By using it as a condition in the revocation of an interview permit, the Bureau of Customs will necessarily assess the language and substance of the work of media practitioners. This amounts to a content-based regulation, which infringes on the exercise of free expression, speech, and of the press.

I

Customs Memorandum Order No. 37-2011 lays down the guidelines and procedures in the accreditation of media practitioners.³ It requires them to submit certain documents to enter the Bureau of Customs and to interview Customs officials and employees.⁴ The chief of Public Information and Assistance Division of the Bureau of Customs is mainly responsible for approving and revoking the accreditation.⁵

The Memorandum Order requires the following documents for accreditation:

III. 1. Requirements for Accreditation

a. Publication

1. Complete Application Form;
2. For partnerships and corporations, Certified True Copy of Securities & Exchange Commission (SEC) Registration, Articles of Partnership/Incorporation, By-Laws and latest General Information Sheet;
3. For sole proprietorships, Certified True copy of Department of Trade & Industry (DTI) Registration;
4. Certified True Copy of Mayor's Permit;
5. Certified True Copy of Bureau of Internal Revenue (BIR) Certificate of Registration;
6. Publisher's Association of the Philippines, Inc. Certificate of Registration;
7. Proof that the publication has been consistently in circulation for at least six (6) months;
8. Proof that the publication has a weekly circulation of at least 3,000 copies;

b. Reporters/Writers/Photographers

1. Completed Application Form;
2. Letter of Assignment on Official Letterhead of a Media Organization/Publication signed by the Publisher or Editor-in-Chief Indicating the name and duration of assignment of the reporter/journalist/writer/photographer;

³ *Rollo*, p. 24.

⁴ *Id.*

⁵ *Id.*

3. Bureau of Internal Revenue (BIR) Identification Card;
4. Print media representatives are required to submit two articles published within the past month and a copy of the publication;
5. Radio and Television representatives are required to submit two recordings of two reports broadcast within the past month;
6. Photographers are required to submit original photographs published within the past month and copy of the publication.⁶

It also provides the following terms and conditions:

IV. TERMS AND CONDITIONS:

- a. The Editorial Content of the publication must at all times be compliant to the Philippine Journalist's Code of Ethics;
- b. BOC accredited media organizations/publications shall be allowed a maximum of three (3) media professionals to cover the Customs beat;
- c. Bureau of Customs (BOC) issued media IDs must always be worn while inside the BOC premises;
- d. The NO I.D., NO ENTRY policy shall be strictly enforced;
- e. In order to avoid disruption of work, media interviews with BOC officials and employees must be pre-arranged with the PIAD;
- f. Loitering within the BOC premises without the necessary access pass from PIAD shall be strictly prohibited;
- g. The accreditation granted pursuant to this Order shall be non-transferable;
- h. Any information the accredited media practitioner obtains by virtue of his/her accreditation will only be used for bona fide news reporting;
- i. The BOC reserves the right to identify areas where media access shall be restricted so as not to disrupt the operations of the Bureau. Accredited media practitioners shall be allowed access to these restricted areas only with express permission from concerned authorities.⁷

According to the Memorandum Order, the Bureau of Customs can revoke or cancel the accreditation upon a valid complaint and after due notice and hearing conducted by a Grievance Committee.⁸ The Grievance Committee is composed of the Public Information and Assistance Division chief, a representative from the Legal Service, and a representative from the Office of the Commissioner.⁹

Napoleon Sanota and other media practitioners filed a Petition for Prohibition, praying that public respondent Bureau of Customs be enjoined from implementing Customs Memorandum Order No. 37-2011.¹⁰



⁶ *Id.* at 24–25.

⁷ *Id.* at 25–26.

⁸ *Id.* at 26.

⁹ *Id.*

¹⁰ *Id.* at 5–6.

Petitioners mainly contend that the Memorandum Order is a form of prior restraint on the freedom of speech and of the press as its accreditation requirement functions like business permits, which cannot be applied to media practitioners.¹¹ They add out that press work cannot be government-regulated, and the Bureau of Cusstoms cannot enforce the Journalist's Code of Ethics, a private undertaking among journalists only.¹²

Petitioners further assert that the guidelines are vague and may be interpreted to strike down bad press, such as when the Memorandum Order required that all information gathered only be for bona fide news reporting, without explaining what it means.¹³

They add that the Bureau of Customs usurped legislative authority as it arrogated upon itself the powers of a quasi-judicial body.¹⁴

On the other hand, the Bureau of Customs argues that the Memorandum Order is not a form of prior restraint and censorship, but a content-neutral regulation, which does not control how media practitioners will conduct interviews or the contents of their work.¹⁵ It asserts that the Memorandum Order is merely an internal policy meant to facilitate information gathering and to avoid the disruption of work in its office.¹⁶

Moreover, the Bureau of Customs asserts that the guidelines are intended to filter out fly-by-night media outlets, which degrade the profession due to their lack of training, skill, and purpose.¹⁷ This allegedly guarantees the quality and integrity of the media practitioners' news gathering, reporting, and accountability.¹⁸

Last, the Bureau of Customs submits that its reference to the adherence to the Philippine Journalist's Code of Ethics does not impose an additional burden or restraint to petitioners.¹⁹

Subsequently, the Bureau of Customs released Customs Memorandum Order No. 22-2015, which repealed the 2011 Memorandum Order. It reduced the documentary requirements to the following:

¹¹ *Id.* at 15–16.

¹² *Id.* at 17.

¹³ *Id.*

¹⁴ *Id.* at 18.

¹⁵ *Id.* at 95–97.

¹⁶ *Id.* at 98–99.

¹⁷ *Id.* at 98.

¹⁸ *Id.* at 99.

¹⁹ *Id.* at 100.

- a. Letter from the publisher, editor in chief or section editor with the official letterhead stating that the applicant for accreditation has been officially assigned to primarily cover news in the Bureau;
- b. Clear photocopies of government-issued identification such as passport, driver's license, TIN.²⁰

It further limited the grounds for cancellation or revocation of accreditation to the following:

- 1) Violation of any guidelines set forth in this Order
- 2) Violation of Philippine Journalist[s] Code of Ethics
- 3) Involvement in smuggling activities
- 4) Involvement in altercations or any acts that violate the rules and regulations within BOC premises
- 5) Use of the accreditation as proof of professional qualifications or as authorization or as credential to conduct any other transaction with the Bureau
- 6) Willfully allowing another person to use his/her BOC-issued ID.²¹

Accordingly, this Court's majority dismissed the Petition, saying that Customs Memorandum Order No. 22-2015 was a supervening event that rendered the issue of constitutionality of Customs Memorandum Order No. 37-2011 moot.²² It ruled that "an adjudication of the case or declaration on the issue would not serve any actual substantial relief to the parties[.]"²³

I dissent.

In *Pangilinan v. Cayetano*,²⁴ this Court reiterated that addressing constitutional issues requires a present and existing case apt for determination, the absence of which renders the case moot.²⁵

However, exceptions to the rule on mootness abound in certain cases: (1) if there is a grave violation of the Constitution; (2) if the case involves a situation of exceptional character and was of paramount public interest; (3) if the issues raised require the formulation of controlling principles to guide the Bench, the Bar, and the public; and (4) if the case is capable of repetition yet evading review.²⁶

In *Sy v. Sandiganbayan*,²⁷ the petitioner was charged with violating Section 3(e) of Republic Act No. 3019. A hold departure order was issued to

²⁰ *Id.* at 108.

²¹ *Id.* at 109.

²² *Ponencia*, p. 10.

²³ *Id.* at 14.

²⁴ 898 Phil. 522 (2021) [Per J. Leonen, *En Banc*].

²⁵ *Id.* at 604-605.

²⁶ *Timbol v. Commission on Elections*, 754 Phil. 578, 585 (2015) [Per J. Leonen, *En Banc*]. (Citation omitted)

²⁷ 841 Phil. 475 (2018) [Per J. Perlas-Bernabe, Second Division].

prevent him from leaving the country. He filed three motions to allow him to leave the country, but these were all denied. He went to this Court to question the denials, but the issue was rendered moot since the travel period requested had already lapsed.²⁸ Yet, this Court still “deem[ed] it proper to take cognizance of th[e] case . . . to guide the [B]ar and especially the [B]ench in deciding similar cases wherein they are called upon to rule on whether to issue, upon motion, an allow departure order without unduly restricting an accused’s constitutional right to travel.”²⁹

In *David v. Arroyo*,³⁰ several petitions were filed assailing the constitutionality of the declaration of a state of national emergency. Although the declaration had been revoked before the cases were concluded, this Court still ruled on the merits as the issues involved were of serious constitutional violations and of public significance. It also reaffirmed its duty to establish constitutional principles and acknowledged the possibility that the actions could repeat.³¹

In the recent case of *Ranada v. Office of the President*,³² the petitioners, who are journalists of media network Rappler, filed a petition before this Court seeking to prohibit the respondents from banning them from covering any news event in the presence of then President Rodrigo Duterte. They contended that “the ban abridges the freedom of the press, as barring access to members of the press, or otherwise restricting or censoring the ability of the press to cover activities or events of the President, contravenes their constitutional rights.”³³ Regrettably, this Court dismissed the petition on the ground of mootness:

President Duterte is no longer the current President of our Republic. His term ended at noon on June 30, 2022 in accordance with Article VII, Section 4 of the Constitution, when he was succeeded in office by President Ferdinand Marcos, Jr. (President Marcos).

Given that the primary assertion of the petitioners is that the ban was the result of the various offices in the executive department acting to implement the verbal directives of President Duterte, and that the accreditation issue was merely a pretext for President Duterte's personal dislike of the petitioners, it is clear that the expiration of his term as President has mooted this Petition.³⁴

Both *Ranada* and this case involve the fundamental right of speech, expression, and the press. Then and now, I maintain my dissent:

²⁸ *Id.* at 478–480.

²⁹ *Id.* at 483–484.

³⁰ 522 Phil. 705 (2006) [Per J. Sandoval-Gutierrez, *En Banc*].

³¹ *Id.* at 755.

³² G.R. No. 246126, June 27, 2023 [Per J. Singh, *En Banc*].

³³ *Id.* (Citation omitted)

³⁴ *Id.* at 11.

While this case has been rendered moot by the end of the term of former President Rodrigo Duterte and the inclusion of the petitioners in the list of media entities allowed to access presidential events, I urge that we continue to rule to emphasize our doctrines on a free press and to avoid repetition in the future.

The implication of the ban and regulation of the media in covering the events of a government institution raises questions on the exercise of a free press vis-à-vis the State and the condition of our democracy.

The task of a free press in a deliberative democracy is paramount. Journalists are the watchdogs over the government and its officials. The press empowers the citizens by keeping them informed about public affairs, allowing them to hold the government accountable.

Government interference in exercising free press is always treated as suspect, and the government must prove the validity and constitutionality of its regulation.³⁵

II

The Constitution guarantees the freedom of expression, of speech, and of the press. Article III, Section 4 of the Constitution states:

SECTION 4. 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.³⁶

Freedom of expression and its cognate rights are “highly ranked in our scheme of constitutional values.”³⁷ These rights “enjoy precedence and primacy.”³⁸ In *Philippine Blooming Mills Employees Organization v. Philippine Blooming Mills Co., Inc.*:³⁹

Property and property rights can be lost thru prescription; but human rights are imprescriptible. If human rights are extinguished by the passage of time, then the Bill of Rights is a useless attempt to limit the power of government and ceases to be an efficacious shield against the tyranny of officials, of majorities, of the influential and powerful, and of oligarchs — political, economic or otherwise.

In the hierarchy of civil liberties, the rights of free expression and of assembly occupy a preferred position as they are essential to the preservation and vitality of our civil and political institutions; and such priority “gives these liberties the sanctity and the sanction not permitting dubious intrusions.”⁴⁰ (Citations omitted)

³⁵ J. Leonen, Dissenting Opinion in *Ranada v. Office of the President, et al.*, G.R. No. 246126, June 27, 2023 [Per J. Singh, *En Banc*].

³⁶ CONST., art. III, sec. 4.

³⁷ *Reyes v. Bagatsing*, 210 Phil. 457, 475 (1983) [Per C.J. Fernando, *En Banc*].

³⁸ *Id.*

³⁹ 151-A Phil. 656 (1973) [Per J. Makasiar, First Division].

⁴⁰ *Id.* at 676.

The right to free expression and speech is anchored on the constitutional paradigm that “[s]overeignty resides in the people and all government authority emanates from them.”⁴¹ The exercise of free expression is indispensable in a meaningful and deliberative democracy, as it is through a full and free discourse on public affairs that citizens can hold the government accountable.⁴² In *The Diocese of Bacolod v. Commission on Elections*:⁴³

Proponents of the political theory on “deliberative democracy” submit that “substantial, open, [and] ethical dialogue is a critical, and indeed defining, feature of a good polity.” This theory may be considered broad, but it definitely “includes [a] collective decision making with the participation of all who will be affected by the decision.” It anchors on the principle that the cornerstone of every democracy is that sovereignty resides in the people. To ensure order in running the state's affairs, sovereign powers were delegated and individuals would be elected or nominated in key government positions to represent the people. On this note, the theory on deliberative democracy may evolve to the right of the people to make government accountable. Necessarily, this includes the right of the people to criticize acts made pursuant to governmental functions.

Speech that promotes dialogue on public affairs, or airs out grievances and political discontent, should thus be protected and encouraged.⁴⁴ (Citations omitted)

Thus, this Court gives immediate protection to the exercise of free speech, adopting the principle that “debate on public issues should be uninhibited, robust, and wide open . . . [including even] unpleasantly sharp attacks on government and public officials.”⁴⁵ In *In re Gonzales*:⁴⁶

The vital need in a constitutional democracy for freedom of expression is undeniable whether as a means of assuring individual self-fulfillment, of attaining the truth, of securing participation by the people in social including political decision-making, and of maintaining the balance between stability and change. The trend as reflected in Philippine and American decisions is to recognize the broadest scope and assure the widest latitude to this constitutional guaranty. It represents a profound commitment to the principle that debate of public issue should be uninhibited, robust, and wide-open. It is not going too far, according to another American decision, to view the function of free speech as inviting dispute. “It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”

⁴¹ CONST., art. II, sec. 1.

⁴² *The Diocese of Bacolod v. Commission on Elections*, 751 Phil. 301, 359–360 (2015) [Per J. Leonen, *En Banc*].

⁴³ *The Diocese of Bacolod v. Commission on Elections*, 751 Phil. 301 (2015) [Per J. Leonen, *En Banc*].

⁴⁴ *Id.* at 359–360.

⁴⁵ *Id.* at 360. (Citation omitted)

⁴⁶ 137 Phil. 471 (1969) [Per J. Fernando, *En Banc*].

Freedom of speech and of the press thus means something more than the right to approve existing political beliefs or economic arrangements, to lend support to official measures, to take refuge in the existing climate of opinion on any matter of public consequence. So atrophied, the right becomes meaningless. The right belongs as well, if not more, for those who question, who do not conform, who differ. To paraphrase Justice Holmes, it is freedom for the thought that we hate, no less than for the thought that agrees with us.⁴⁷ (Citations omitted)

Freedom of expression is intertwined with press freedom. These freedoms empower the public with information on governmental acts, enabling citizens to scrutinize these acts and to provide opinion on public affairs. In *Tulfo v. People*:⁴⁸

The need to protect freedom of speech and of the press cannot be understated. These freedoms are the most pervasive and powerful vehicles of informing the government of the opinions, needs, and grievances of the public. It is through these guarantees that the people are kept abreast of government affairs. Without these rights, no vigilant press would flourish. And without a vigilant press, the government's mistakes would go unnoticed, their abuses unexposed, and their wrongdoings uncorrected.

In this regard, journalists and the media enjoy a wide latitude of discretion in investigating, gathering, and reporting news pertinent to public affairs. Public affairs encompass a wide array of matters, including information on public officials' exercise of their official functions.⁴⁹ (Citation omitted)

The press acts as a watchdog. Journalists play a crucial role in a deliberative democracy by keeping the public informed and well equipped to participate in the public discourse. In *Guy v. Tulfo*:⁵⁰

The degree of freedom by which journalists operate to uncover and write the news is an indication of the current state of our country's democracy. By freely obtaining vital information on matters of public concern, citizens become socially aware and well-equipped to participate in different political processes to exercise their rights enshrined in the fundamental law. Journalists are the sentinels who keep watch over the actions of the government. They are the eyes and ears of the citizenry.⁵¹

The work of the press is political speech because it is “both intended and received as a contribution to public deliberation about some issue,” ‘foster[ing] informed and civic-minded deliberation.’⁵² It is “motivated by

⁴⁷ *Id.* at 493.

⁴⁸ *Tulfo v. People*, 893 Phil. 6 (2021) [Per J. Leonen, Third Division].

⁴⁹ *Id.* at 6–7.

⁵⁰ *Guy v. Tulfo*, 851 Phil. 748 (2019) [Per J. Leonen, Third Division].

⁵¹ *Id.* at 752.

⁵² *The Diocese of Bacolod v. Commission on Elections*, 751 Phil. 301, 368 (2015) [Per J. Leonen, *En Banc*]. (Citation omitted)

the desire to be heard and understood, to move people to action.”⁵³ Thus, the Constitution confers greater protection on the exercise of free speech and press compared to other types of speech, such as commercial speech.⁵⁴

III

Given the precedence and primacy of the right to free speech and free press, governmental acts that regulate these rights are treated as suspect.⁵⁵ Any form of censorship is anathema to our constitutional values.⁵⁶

Governmental regulation on free expression may be in the form of prior restraint or subsequent punishment.⁵⁷ Prior restraint is a governmental restriction on expression in advance of its utterance, dissemination, or publication.⁵⁸ In *Chavez v. Gonzales*:⁵⁹

Prior restraint refers to official governmental restrictions on the press or other forms of expression in advance of actual publication or dissemination. Freedom from prior restraint is largely freedom from government censorship of publications, whatever the form of censorship, and regardless of whether it is wielded by the executive, legislative or judicial branch of the government. Thus, it precludes governmental acts that required approval of a proposal to publish; licensing or permits as prerequisites to publication including the payment of license taxes for the privilege to publish; and even injunctions against publication. Even the closure of the business and printing offices of certain newspapers, resulting in the discontinuation of their printing and publication, are deemed as previous restraint or censorship. Any law or official that requires some form of permission to be had before publication can be made, commits an infringement of the constitutional right, and remedy can be had at the courts.⁶⁰ (Citations omitted)

On the other hand, subsequent punishment takes the form of imposing liabilities on the individual or entity that already exercised its freedom. The liability may be criminal, civil, or administrative.⁶¹

Between the two, prior restraint is a more severe restriction on expression because it absolutely prevents the dissemination of ideas. While

⁵³ *Id.* at 325.

⁵⁴ *Nicolas-Lewis v. Commission on Elections*, 859 Phil. 560, 586 (2019) [Per J. J.C. Reyes, Jr., *En Banc*].

⁵⁵ J. Kapunan, Concurring and Dissenting Opinion in *Iglesia ni Cristo v. Court of Appeals*, 328 Phil. 893, 945 (1996) [Per J. Puno, *En Banc*].

⁵⁶ *Id.* at 954.

⁵⁷ *Chavez v. Gonzales*, 569 Phil. 155, 202 (2008) [Per C.J. Puno, *En Banc*].

⁵⁸ *Id.* at 203.

⁵⁹ 569 Phil. 155 (2008) [Per C.J. Puno, *En Banc*].

⁶⁰ *Id.* at 203–204.

⁶¹ J. Sandoval-Gutierrez, Concurring Opinion in *Chavez v. Gonzales*, 569 Phil. 155, 224 (2008) [Per C.J. Puno, *En Banc*].

subsequent punishment deters expression, the ideas are still disseminated to the public.⁶²

Given the preferred position of free expression in our Constitution, governmental regulations tantamount to prior restraint of free expression are presumed invalid and unconstitutional. The government bears the burden of proving otherwise.⁶³ In *Calleja v. Executive Secretary*,⁶⁴ we explained:

The Constitution, however, abhors prior restraints on speech. Thus, a law does not enjoy the presumption of constitutionality if it restrains speech. Instead, a presumption of unconstitutionality arises. This presumption proceeds from the constitutional command under Section 4, Article III that no law shall be passed abridging free speech, expression, and their cognate rights. And this mandate, in turn, is actualized by the Court through the many iterations of the dictum that said rights are accorded preference or a high place in the constitutional scheme that any alleged infringement manifest in the language of the statute cannot be allowed to pass unnoticed. In such cases, therefore, it becomes the burden of government to establish the law's constitutionality. Instructive on this rule is the separate opinion of Associate Justice Marvic Mario Victor F. Leonen in *Samahan ng mga Progresibong Kabataan (SPARK) v. Quezon City*:

Fundamental rights which give rise to Strict Scrutiny include the right of procreation, the right to marry, the right to exercise First Amendment freedoms such as free speech, political expression, press, assembly, and so forth, the right to travel, and the right to vote.

Because Strict Scrutiny involves statutes which either classifies on the basis of an inherently suspect characteristic or infringes fundamental constitutional rights, the presumption of constitutionality is reversed; that is, such legislation is assumed to be unconstitutional until the government demonstrates otherwise. The government must show that the statute is supported by a compelling governmental interest and the means chosen to accomplish that interest are narrowly tailored.

The Court has thus declared that any restriction to the freedom of speech or expression should be treated as an exemption — any act that chills or restrains speech is presumed invalid and any act that chills or restrains speech is hobbled by the presumption of invalidity and should be greeted with furrowed brows.⁶⁵ (Citations omitted)

⁶² J. Carpio, Concurring Opinion in *Chavez v. Gonzales*, 569 Phil. 155, 240 (2008) [Per C.J. Puno, *En Banc*].

⁶³ *ABS-CBN Broadcasting Corp. v. Commission on Elections*, 380 Phil. 780 (2000) [Per J. Panganiban, *En Banc*].

⁶⁴ *Calleja v. Executive Secretary*, G.R. Nos. 252578 et al., December 7, 2021 [Per J. Carandang, *En Banc*].

⁶⁵ *Id.*

Nevertheless, the exercise of free speech is not absolute. It must “not be injurious to the equal enjoyment of others having equal rights, nor injurious to the rights of the community or society.”⁶⁶

When a governmental regulation is challenged for being a prior restraint, it is crucial to distinguish whether it is a content-neutral or a content-based regulation.

A regulation is characterized as content-neutral if it is “merely concerned with the incidents of the speech, or one that merely controls the time, place[,] or manner, and under well-defined standards[,]” regardless of the content of the speech.⁶⁷ Content-based regulation is based either on the point of view of the speaker or the subject of the expression,⁶⁸ focusing on the subject matter of the speech.⁶⁹

A content-based regulation carries a heavy presumption of unconstitutionality and must overcome the clear and present danger test.⁷⁰ To pass the test, the government must demonstrate that the regulation seeks to prevent a substantive and imminent evil already manifested on ground and the speech it targets to suppress brings about that evil.⁷¹

In *Primicias v. Fugoso*,⁷² this Court upheld an ordinance that granted a mayor discretion to determine the public places where a procession or meeting may be conducted but did not empower the mayor to deny the permit. *Primicias* explained that the right to free speech and assembly is not curtailed as the ordinance merely secures the “convenient use of the streets and public places by others, and to provide adequate and proper policing to minimize the risk of disorder.”⁷³

*Reyes v. Bagatsing*⁷⁴ involved a permit to conduct a march and rally at Luneta Park up to the United States Embassy. Refusing to issue the permit due to intelligence reports of subversive elements, the Manila mayor suggested another area instead.⁷⁵ This Court granted the mandatory injunction, allowing the rally to proceed. It held that the exercise of the rights to free speech and peaceful assembly cannot be frustrated unless there is a clear and present danger of a substantive evil that the State must prevent,

⁶⁶ *Primicias v. Fugoso*, 80 Phil. 71, 75 (1948) [Per J. Feria, *En Banc*].

⁶⁷ *Newsounds Broadcasting Network, Inc. v. Dy*, 602 Phil. 255, 271 (2009) [Per J. Tinga, Second Division].

⁶⁸ *The Diocese of Bacolod v. Commission on Elections*, 751 Phil. 301, 373 (2015) [Per J. Leonen, *En Banc*].

⁶⁹ *Newsounds Broadcasting Network, Inc. v. Dy*, 602 Phil. 255, 271 (2009) [Per J. Tinga, Second Division].

⁷⁰ *Chavez v. Gonzales*, 569 Phil. 155, 207–208 (2008) [Per C.J. Puno, *En Banc*].

⁷¹ *Id.* at 206.

⁷² 80 Phil. 71 (1948) [Per J. Feria, *En Banc*].

⁷³ *Id.* at 77.

⁷⁴ 210 Phil. 457 (1983) [Per C.J. Fernando, *En Banc*].

⁷⁵ *Id.* at 465.

which in that case the government failed to show.⁷⁶ *Reyes* reiterated the rationale in *Primicias* that the requirements of a special license do not violate the rights of assembly, of free speech, and of the press as long the considerations for issuing it are limited to time, place, and manner and the authority has no arbitrary discretion to refuse its issuance.⁷⁷

The guide in *Reyes* was subsequently codified in Batas Pambansa Blg. 880, or the Public Assembly Act of 1985, which this Court upheld as a valid content-neutral regulation in *Bayan v. Ermita*.⁷⁸

Bayan explained that the restriction in Batas Pambansa Blg. 880 is content-neutral as it merely regulates the time, place, and manner of the conduct of assemblies. This Court, applying the clear and present danger test, held that the law is not a prior restraint because the content of the speech is not relevant to the regulation.⁷⁹

In the more recent case of *Diocese of Bacolod v. Commission on Elections*,⁸⁰ tarpaulins containing a classification of electoral candidates based on their stand on the Reproductive Health Law was put up on the front walls of a cathedral. The Commission on Elections ordered their removal for exceeding the prescribed size of election paraphernalia, and justified this as a content-neutral regulation because only the size was regulated.⁸¹

We held that the regulation was content-based because the content of the materials cannot be divorced from the size of its medium. The larger the size of the tarpaulin, the more efficient it is in communicating its message, as it is more readable and attracts more attention. Moreover, the size underscores the importance of the message, and the larger space allows for more messages.⁸² In any case, even if the order were a content-neutral regulation, we pointed out that the Commission on Elections cannot regulate the speech of the petitioners, who were not electoral candidates.⁸³

Meanwhile, in *Newsounds Broadcasting Network, Inc. v. Dy*,⁸⁴ this Court explained the application of the strict scrutiny test to content-based regulations:

The immediate implication of the application of the “strict scrutiny” test is that the burden falls upon respondents as agents of

⁷⁶ *Id.* at 466.

⁷⁷ *Id.* at 470.

⁷⁸ 522 Phil. 201 (2006) [Per J. Azcuna, *En Banc*].

⁷⁹ *Id.* at 233–234.

⁸⁰ *The Diocese of Bacolod v. Commission on Elections*, 751 Phil. 301-450 (2015) [Per J. Leonen, *En Banc*].

⁸¹ *Id.* at 373.

⁸² *Id.* at 374, 377, 382.

⁸³ *Id.* at 394–395.

⁸⁴ 602 Phil. 255 (2009) [Per J. Tinga, Second Division].

government to prove that their actions do not infringe upon petitioners' constitutional rights. As content regulation cannot be done in the absence of any compelling reason, the burden lies with the government to establish such compelling reason to infringe the right to free expression.⁸⁵ (Citations omitted)

In content-neutral regulations, the intermediate approach is employed. The government must clearly show that the restriction furthers a substantial government interest, that the interest is unrelated to the suppression of the speech, and that the restriction is not greater than what is essential to facilitate the interest.⁸⁶

While there is greater suspicion toward content-based regulation, content-neutral regulations are subject to "lesser but still heightened scrutiny."⁸⁷ It may be struck down if the incidental restriction on the exercise of free speech is greater than what is required to attain the governmental interest.⁸⁸ The regulation must be "reasonable and narrowly drawn to fit the regulatory purpose, with the least restrictive means undertaken[.]"⁸⁹

Further, while governmental restrictions that touch on the exercise of free expression may be allowed, the government must prove that it is precise. It cannot "sweep unnecessarily broadly and thereby invade the area of protected freedoms."⁹⁰ In *In re Gonzales*:

[E]ven 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. For precision of regulation is the touchstone in an area so closely related to our most precious freedoms.

Under the circumstances then, a majority of the Court feels compelled to view the statutory provisions in question as unconstitutional on their face inasmuch as they appear to range too widely and indiscriminately across the fundamental liberties associated with freedom of the mind.⁹¹

Even if the government's interest and purpose is legitimate and substantial, it cannot be imposed through means that "stifle fundamental personal liberties, when the end can be more narrowly achieved."⁹²

⁸⁵ *Id.* at 274.

⁸⁶ See *ABS-CBN Broadcasting Corp. v. Commission on Elections*, 380 Phil. 780 (2000) [Per J. Panganiban, *En Banc*].

⁸⁷ *Newsounds Broadcasting Network, Inc. v. Dy*, 602 Phil. 255, 271 (2009) [Per J. Tinga, Second Division].

⁸⁸ *Chavez v. Gonzales*, 569 Phil. 155, 207 (2008) [Per C.J. Puno, *En Banc*].

⁸⁹ *Id.*

⁹⁰ *In re Gonzales*, 137 Phil. 471, 507 (1969) [Per J. Fernando, *En Banc*].

⁹¹ *Id.*

⁹² *ABS-CBN Broadcasting Corp. v. Commission on Elections*, 380 Phil. 780, 795 (2000) [Per J. Panganiban, *En Banc*].

Guided by these discussions, I submit that any form of government regulation that burdens and touches upon the work of the free press in its production and publication of news—whether in the guise of accreditation, registration, admission, or exclusion—constitutes prior restraint. Accordingly, such a policy is presumed unconstitutional, and the government must prove its constitutionality.

In weighing the constitutionality of the regulation, the courts' approach is two-tiered: first, they should examine it closely and characterize whether it is content-based or content-neutral; and second, they must apply the corresponding tests—clear and present danger test and strict scrutiny tests for content-based regulation, and intermediate approach test for content-neutral regulation.

While the resolution of these abstract concepts boil down on a case-by-case basis, courts should, in both instances, base their findings on *concrete variables*⁹³ such as the purpose sought to be achieved, extent of censorship, arbitrariness of the regulation, and other similar factors.

As to purpose, to overcome the burden of its unconstitutionality, the regulation must state clear, precise, reasonable, and narrowly defined objectives for restraining the press. Vague or general justifications will not suffice.

When evaluating the extent of censorship, the courts must assess the limitations placed on *what* and *how* information is published, broadcasted, or disseminated. As the content restrictions are presumed unconstitutional, the level and degree of censorship should be carefully considered, particularly when it pertains to matters of public interest and concern.

As to arbitrariness, regulations in the guise of intimidation or even monitoring of the press, especially when specific targets are singled out, are by itself arbitrary, capricious, and whimsical. To withstand scrutiny, such regulations must be strictly examined as opposed to regulations that apply equally to all members of the press.

IV

Customs Memorandum Order No. 37-2011 is a content-based regulation that infringes on the right of petitioners to free speech and free press. It fails the clear and present danger and strict scrutiny tests. In any case, even if it is treated as a content-neutral regulation, it still fails the intermediate scrutiny test.

⁹³ *Sy v. Sandiganbayan*, 841 Phil. 475, 487 (2018) [Per J. Perlas-Bernabe, Second Division].

The Memorandum Order goes beyond mere regulation of the time, place, and manner of the press work inside the vicinity. A careful reading of the requirements reveals its real function.

The Memorandum Order prescribes a minimum qualification on media practitioners who may be granted permission to interview its officials and employees. It also requires multiple and redundant documents, unduly burdening media practitioners. It likewise sets a minimum capacity of weekly circulation and proof of its consistent circulation.

Moreover, the documentary requirements go into the content and publication of media practitioners. For reporters, writers, and photographers, it requires submission of two articles, recordings, or photographs, and a copy of the publication for their application.

While the 2015 Memorandum Order simplified these documentary requirements, it still suffers from the same infirmities. In both Memoranda, the Bureau of Customs grants itself wide discretion to cancel a media practitioner's permit based on whether there is compliance with the Philippine Journalist's Code of Ethics.

The Philippine Journalist's Code of Ethics was adopted by the National Union of Journalists of the Philippines, Philippine Press Institute, and National Press Club in 1988.⁹⁴ It espouses the practice that journalism should be accurate and fair, and mandates accountability and transparency in the profession.⁹⁵ It states:

1. I shall scrupulously report and interpret the news, taking care not to suppress essential facts nor to distort the truth by omission or improper emphasis. I recognize the duty to air the other side and the duty to correct substantive errors promptly.
2. I shall not violate confidential information on material given me in the exercise of my calling.
3. I shall resort only to fair and honest methods in my effort to obtain news, photographs and/or documents, and shall properly identify myself as a representative of the press when obtaining any personal interview intended for publication.
4. I shall refrain from writing reports which will adversely affect a private reputation unless the public interests justifies it. At the same time, I shall write vigorously for public access to information, as provided for in the constitution.
5. I shall not let personal motives or interests influence me in the performance of my duties; nor shall I accept or offer any present, gift or other consideration of a nature which may cast doubt on my professional integrity.
6. I shall not commit any act of plagiarism.

⁹⁴ NATIONAL UNION OF JOURNALISTS OF THE PHILIPPINES, ETHICAL GUIDE FOR FILIPINO JOURNALISTS 26 (2021).

⁹⁵ *Guy v. Tulfo*, 851 Phil. 748, 772 (2019) [Per J. Leonen, Third Division].

7. I shall not in any manner ridicule, cast aspersions on or degrade any person by reason of sex, creed, religious belief, political conviction, cultural and ethnic origin.
8. I shall presume persons accused of crime of being innocent until proven otherwise. I shall exercise caution in publishing names of minors, and women involved in criminal cases so that they may not unjustly lose their standing in society.
9. I shall not take unfair advantage of a fellow journalist.
10. I shall accept only such tasks as are compatible with the integrity and dignity of my profession, invoking the "conscience clause" when duties imposed on me conflict with the voice of my conscience.
11. I shall comport myself in public or while performing my duties as journalist in such manner as to maintain the dignity of my profession. When in doubt, decency should be my watchword.⁹⁶

The Journalist's Code of Ethics goes deeply into the contents of news reports. It provides a guide into the interpretation of the news, the use and handling of confidential information, and how news is written and delivered to the public. By using it as a measure and condition in the revocation of the permit, the Bureau of Customs will necessarily assess the language and substance of petitioners' work. Depending on its own evaluation, it has the discretion to issue or cancel a media practitioner's accreditation. This is a content-based regulation.

Further, the Memorandum Order is a form of prior restraint because it prescribes requirements, terms, and conditions on the approval and revocation of the permit, which petitioners need before they can interview and, subsequently, publish and broadcast their work.

Accordingly, the Memorandum Order is presumed unconstitutional, and it is the government's burden to prove its constitutionality. On that score, it failed to overcome this burden.

The Memorandum Order fails the clear and present danger test. Here, the Bureau of Customs argues that its issuance is for the orderly conduct of media interviews, and ensures that only legitimate personnel from accredited media outlets can access its premises. Yet, there is no showing of any substantial and extremely serious evil sought to be prevented, and such an excuse is not a reason grave and compelling enough to institute guidelines that infringe on free speech and press. Consequently, the regulation also fails the strict scrutiny test. The guidelines purport to be for administrative purposes, but they have an invasive impact on constitutional rights.

In any case, even if the Memorandum Order were treated as a content-neutral regulation, it would still be struck down for failing the intermediate approach test. The restriction is greater than what is essential to achieve its interest. The guidelines are not reasonable and narrowly drawn.

⁹⁶ JOURNALIST'S CODE OF ETHICS (1988).

First, the Bureau of Customs cannot regulate the work of petitioners. Adherence to the Journalist's Code of Ethics is not a legal, statutory obligation. Unlike other professional codes such as the Code of Professional Responsibilities for lawyers, there is no institutional mechanism to enforce the Journalist's Code of Ethics.

Instead, compliance with it is carried out through self-regulation.⁹⁷ Journalists and media organizations discipline their own members. For instance, complaints about unfair media practices may be reported directly to voluntary regulatory bodies such as the Philippine Press Council or the Kapisanan ng mga Brodkaster ng Pilipinas. There are limited instances when ethical violations overlap and result in violations of civil and criminal laws. In these cases, legal actions may be filed against erring journalists but only if the action has legal consequences, such as libel.⁹⁸

Philippine journalism today is not regulated by a statutory body that polices media conduct. Statutory regulation of media raises controversy, as it risks government interference with the power to effectively silence the media.⁹⁹ Since the Bureau of Customs has no power to be a media regulatory body, it cannot enforce the Journalist's Code of Ethics as a condition to its permit. While compliance is already a responsibility of media practitioners, the State cannot weaponize it as a permit requirement.

Besides, the Bureau of Customs is not qualified to assess whether a media practitioner complies with the Journalist's Code of Ethics. The loose language of the guidelines gives the government a wide discretion on determining whether there is a violation.

Second, the imposition of multiple documentary requisites and the Bureau of Customs' insistence to be regulators of the Journalist's Code of Ethics do not serve the objective of having an orderly conduct of interviews. Even if the 2015 Memorandum Order simplified the documentary requirements, the same terms and conditions on the permit remain. It does not improve or guarantee the quality and integrity of the media practitioners' news gathering, reporting, and accountability. In all, the regulation engenders more harm by unduly burdening media practitioners and keeping watch over their conduct.

Information gathering is necessary to journalistic work. When the State hampers this task, it harms the role of the press in a democracy. Any

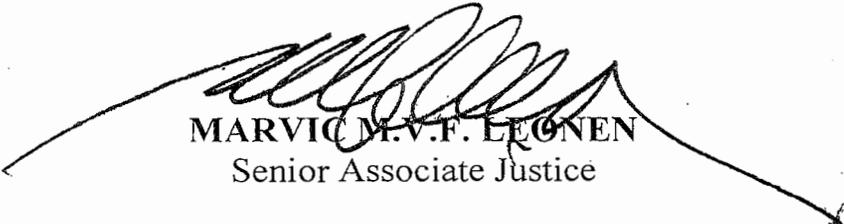
⁹⁷ NATIONAL UNION OF JOURNALISTS OF THE PHILIPPINES, ETHICAL GUIDE FOR FILIPINO JOURNALISTS 26 (2021).

⁹⁸ See *Tulfo v. People*, 893 Phil. 6 (2021) [Per J. Leonen, Third Division].

⁹⁹ CHRIS FROST, JOURNALISM ETHICS AND REGULATION 215 (3rd ed., 2011).

regulation that goes into the content of the press, as in this case, only stifles the exercise of free expression, speech, and of the press.

ACCORDINGLY, I vote to **GRANT** the Petition.



MARVIC M.V.F. LEONEN
Senior Associate Justice