G.R. No. 223705 – LOIDA NICOLAS-LEWIS, *Petitioner* v. COMMISSION ON ELECTIONS, *Respondent.*

Promulgated:

August 14, 2019

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SEPARATE AND CONCURRING OPINION

JARDELEZA, *J.*:

I vote to grant the petition on the ground that Section 36.8[1] of Republic Act No. (RA) 9189,[2] as amended by RA 10590,[3] and Section 74(II)(8)[4] of Commission on Elections (Comelec) Resolution No. 10035[5] are impermissible content-based regulations. These provisions both provide that it shall be unlawful for any person to engage in partisan political activity abroad during the 30-day overseas voting period. Partisan political activity or election campaign is, in turn, defined under Section 79(b) of *Batas Pambansa Bilang* (BP) 881[6] as an act designed to promote the election or defeat of a particular candidate or candidates to a public office. These acts shall include:

> 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;
> 4. Publishing or distributing campaign literature or materials designed to support or oppose the election of any candidate; or

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[1] Sec. 36.8. For any person to engage in partisan political activity abroad during the thirty (30)-day overseas voting period[.]

[2] The Overseas Absentee Voting Act of 2003.

[3] The Overseas Absentee Voting Act of 2013.

[4] Sec. 74. Election offenses/prohibited acts. –

x x x x

II. Under R.A. 9189 "Overseas Absentee Voting Act of 2003," as amended

x x x x

8. For any person to engage in partisan political activity abroad during the thirty (30)-day overseas voting period.

[5] 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, otherwise known as "The Overseas Absentee Voting Act of 2003" as amended by Republic Act No. 10590 for Purposes of the May 09, 2016 National and Local Elections.

[6] Omnibus Election Code of the Philippines.

> 5. Directly or indirectly soliciting votes, pledges or support for or against a candidate.

Section 79(b) provides, at the same time, when the foregoing acts shall not be considered as election campaign or partisan political activity and these are:

> [1.] x x x [I]f 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 x x x[; and]
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> [2.] 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 x x x.

Petitioner alleges that on the basis of the above regulations, she, together with thousands of similarly situated Filipinos all over the world, was prohibited by the different Philippine Consulates from conducting information campaigns, rallies, and outreach programs in support of their respective candidates for the May 2016 national elections. Petitioner contends that these regulations violate one's freedom of speech, expression, and assembly, and are content-based prior restraints on speech which curtail the expression of political inclinations, views, and opinions of Filipinos abroad. I agree.

It bears emphasis at the outset that the Court should take cognizance of this case because of the presence of a justiciable controversy involving free speech, a textually identified fundamental right under the Constitution,[7] and not because of the alleged transcendental importance of the issue petitioner invokes. There exists an actual justiciable controversy when there is a contrariety of legal rights that can be interpreted and enforced on the basis of existing law and jurisprudence.[8] Here, there is an evident clash of the parties' legal claims, particularly on whether Section 36.8 of RA 9189, as amended by RA 10590, and Section 74(II)(8) of Comelec Resolution No. 10035 impair the free speech rights of petitioner and of all Filipinos abroad.[9] Section 36.8 of RA 9189, as amended by RA 10590 is an existing law that was fully implemented, as evidenced by the issuance of Section 74(II)(8) of Comelec Resolution No. 10035 during the 2016 national elections. The purported threat or incidence of injury is, therefore, not merely speculative or hypothetical but rather, real and apparent.[10]

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[7] Art. III, Sec. 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.

[8] *Samahan ng mga Progresibong Kabataan (SPARK) v. Quezon City*, G.R. No. 225442, August 8, 2017, 835 SCRA 350, 385.

[9] See *SPARK v. Quezon City, id.*

[10] *SPARK v. Quezon City, supra* at 386.

Equally important, the Court in *Gios-Samar, Inc. v. Department of Transportation and Communications*[11] already clarified the proposition that the purported transcendental importance of an issue does not operate as a talismanic license to justify direct recourse to the Court. Thus:

> To be clear, the transcendental importance doctrine does not clothe us with the power to tackle factual questions and play the role of a trial court. The only circumstance when we may take cognizance of a case *in the first instance*, despite the presence of factual issues, is in the exercise of our constitutionally-expressed task to review the sufficiency of the factual basis of the President's proclamation of martial law under Section 18, Article VII of the 1987 Constitution. The case before us does not fall under this exception.
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> x x x x
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> **Accordingly, for the guidance of the bench and the bar, we reiterate that when a question before the Court involves determination of a factual issue indispensable to the resolution of the legal issue, the Court will refuse to resolve the question regardless of the allegation or invocation of compelling reasons, such as the transcendental or paramount importance of the case. Such question must first be brought before the proper trial courts or the CA, both of which are specially equipped to try and resolve factual questions.**[12] (Citations omitted; emphasis in the original.)

The justiciable controversy present here involves a pure question of law. We are not being called to rule on questions of fact. This direct recourse to Us via this petition is, therefore, being allowed on this basis as well, and not on petitioner's misplaced invocation of the transcendental importance doctrine.

Going now to the substance of the petition, I reiterate that my vote here is grounded on the nature of Section 36.8 of RA 9189, as amended by RA 10590, and Section 74(II)(8) of Comelec Resolution No. 10035 which, as impermissible content-based restrictions, do not survive strict scrutiny analysis.

Prior restraint refers to official governmental restrictions on the press or other forms of expression in advance of actual publication or dissemination.[13] Section 36.8 of RA 9189, as amended by RA 10590, and Section 74(II)(8) of Comelec Resolution No. 10035 fit this definition because these regulations restrain speech and expression before they are made. While governmental imposition of varying forms of prior restraints of speech and expression may present a constitutional issue, it does not follow, by design,

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[11] G.R. No. 217158, March 12, 2019.

[12] *Id.*

[13] *Chavez v. Gonzales*, G.R. No. 168338, February 15, 2008, 545 SCRA 441, 491. Citation omitted.

that the regulations herein questioned *ipso facto* violate the Constitution.[14] The State may, indeed, curtail speech when necessary to advance a significant and legitimate interest.[15] Any prior restraint, however, which does so comes to this Court bearing a heavy presumption against its constitutional validity, which the Government has the burden to justify.[16]

Consequently, Our inquiry here does not end with the determination as to whether the challenged act constitutes some form of restraint on freedom of speech. A distinction has to be made whether the restraint is content-neutral or content-based.[17] A content-neutral restraint is merely concerned with the incidents of the speech, or one that merely controls the time, place or manner, and under well-defined standards.[18] A content-based restraint, on the other hand, is based on the subject matter of the utterance or speech.[19]

In my view, Section 36.8 of RA 9189, as amended by RA 10590, and Section 74(II)(8) of Comelec Resolution No. 10035 fall under the content-based classification. Following *Ward v. Rock Against Racism*,[20] the restrictions here describe speech, expression, and assembly in terms of time and manner and were not adopted because of the Government's disagreement with the message the subject speech or expression relays. There is no evidence, or suggestion, that the Government made any distinction based on the speaker's views or perspectives. Viewpoint, however, is just one aspect of free speech or expression. The Constitution's hostility to content-based regulation extends not only to a restriction on a particular **viewpoint**, but also to a prohibition of public discussion of an **entire topic**.[21] Hence, while Section 36.8 of RA 9189, as amended by RA 10590, and Section 74(II)(8) of Comelec Resolution No. 10035 do not discriminate between viewpoints, they do discriminate against a whole class of speech, which is political speech. Whether individuals may exercise their free speech rights during the 30-day voting period overseas depends entirely on whether their speech is related to a political campaign.[22] The regulations do not reach other categories of speech, such as commercial solicitation, distribution, and display.[23] Section 36.8 of RA 9189, as amended by RA 10590, and Section 74(II)(8) of Comelec Resolution No. 10035 thus "**[slip]** from the neutrality of time, place, and circumstance into a concern about content."[24]

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[14] *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 803-804 (1984), citing *C.J.* Burger's dissent in *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 561 (1981).

[15] *Id.* at 804, citing *Schenck v. United States*, 249 U.S. 47, 52 (1919).

[16] See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

[17] *Chavez v. Gonzales*, *supra* note 13 at 493.

[18] *Newsounds Broadcasting Network, inc. v. Dy*, G.R. Nos. 170270 & 179411, April 2, 2009, 583 SCRA 333, 352.

[19] *Id.*

[20] 491 U.S. 781 (1989).

[21] *Burson v. Freeman*, 504 U.S. 191, 197 (1992). Emphasis supplied.

[22] *Id.*

[23] *Id.*

[24] *Police Department of Chicago v. Mosley*, 408 U.S. 92, 99 (1972). Emphasis supplied.

Again, following *Ward*, Section 36.8 of RA 9189, as amended by RA 10590, and Section 74(II)(8) of Comelec Resolution No. 10035 may not have been adopted by the Government because of disagreement with the message the speech conveys. Nevertheless, following *Reed v. Town of Gilbert, Arizona*,[25] these regulations cannot be justified without reference to their content as regulated speech. Regulations that appear content-neutral will be treated as content-based because they are, in essence, related to the suppression of expression.

Moreover, the United States (US) Supreme Court in *Reed* cautioned that *Ward* involved a facially content-neutral restriction on the use, in a city-owned music venue, of sound amplification systems not provided by the city. It was in that context that the US Supreme Court then looked to governmental motive, including whether the Government had regulated speech because of its disagreement with its message, and whether the regulation was justified without reference to the content of the speech. The US Supreme Court stressed that *Ward*'s framework applies only if a statute is content-neutral.

Thus, *Reed* declared that the crucial first step in the content-neutrality analysis is to determine whether the law is content-neutral on its face. The mere assertion of a content-neutral purpose is not enough to save a law which, on its face, discriminates based on content.[26] A law that is content-based on its face will be treated as such regardless of the Government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech.[27] Citing the dissent of Associate Justice Antonin Scalia in *Hill v. Colorado*,[28] *Reed* acknowledged that innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future Government officials may one day wield such statutes to suppress disfavored speech:

> x x x That is why the First Amendment expressly targets the operation of the laws—*i.e.*, the "abridg[ement] of speech"—rather than merely the motives of those who enacted them. U.S. Const., Amdt. 1. '"The vice of content-based legislation . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.'" x x x[29]

Furthermore, the cast of the restriction, whether content-neutral or content-based, determines the test by which the challenged act is assayed with.[30] Content-based laws, which are generally treated as more suspect than content-neutral laws because of judicial concern with discrimination in the regulation of expression,[31] are subject to strict scrutiny. Content-neutral

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[25] 135 S. Ct. 2218 (2015).
[26] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642-643 (1994).
[27] *Reed v. Town of Gilbert, Arizona, supra* at 2227.
[28] 530 U.S. 703 (2000).
[29] *Reed v. Town of Gilbert, Arizona, supra* at 2229.
[30] *Chavez v. Gonzales, supra* note 13 at 493.
[31] *Newsounds Broadcasting Network, Inc. v. Dy, supra* note 18.

regulations of speech or of expressive conduct are subject to a lesser, but still heightened scrutiny[32] which is commonly referred to as an intermediate approach.[33]

Being content-based regulations, Section 36.8 of RA 9189, as amended by RA 10590, and Section 74(II)(8) of Comelec Resolution No. 10035 are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.[34] In my view, the Government in this case has failed to discharge its burden in this respect.

What constitutes compelling state interest is measured by the scale of rights and powers arrayed in the Constitution and calibrated by history. It is akin to the paramount interest of the State for which some individual liberties must give way, such as the public interest in safeguarding health or maintaining medical standards, or in maintaining access to information on matters of public concern.[35]

In this case, respondent advances the wisdom behind Section 36.8 of RA 9189, as amended by RA 10590, and Section 74(II)(8) of Comelec Resolution No. 10035, which is to maintain the integrity of the election process and curb the violence and atrocities that have, in recent years, marred the electoral exercise.[36] These are the same objectives behind Sections 50-A and 50-B of the Revised Election Code, which limit the period of election campaign or the conduct of partisan political activity to 150 days immediately preceding the national elections or 90 days immediately preceding the local elections. The Court in *Gonzales v. Comelec*[37] had found the restrictions reasonable and warranted in light of a "serious substantive evil affecting the electoral process, not merely in danger of happening, but actually in existence, and likely to continue unless curbed or remedied."[38]

It is beyond question that the State has an important and substantial interest in seeing to it that the conduct of elections be honest, orderly, and peaceful, and that the right to suffrage of its citizens be protected at all times. This interest, I agree, is compelling in Philippine setting, where history would readily show how the partisan political activities of candidates and their supporters have not only fostered "huge expenditure of funds on the part of candidates," but have also resulted to the "corruption of the electorate," and worse, have "precipitated violence and even deaths."[39] But what is true in one location is not necessarily true elsewhere. The prevailing substantive evils

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[32] *Id.*

[33] *Chavez v. Gonzales*, *supra* note 13 at 493-494.

[34] *Citizens United v. Federal Election Commission*, 558 U.S. 310, 882 (2010).

[35] *Serrano v. Gallant Maritime Services, Inc.*, G.R. No. 167614, March 24, 2009, 582 SCRA 254, 296. Citations omitted.

[36] *Rollo*, p. 376.

[37] G.R. No. L-27833, April 18, 1969, 27 SCRA 835.

[38] *Id.* at 864.

[39] See *Gonzales v. Comelec*, *supra*.

recognized in *Gonzales* may be endemic to the Philippines alone. Respondent has failed to demonstrate that these same evils persist in the foreign locations where overseas voting is allowed.

At the same time, the prohibition under Section 36.8 of RA 9189, as amended by RA 10590, and Section 74(II)(8) of Comelec Resolution No. 10035 is not narrowly tailored to achieve the Government's objective of preserving the integrity and order of the electoral process. The regulations completely prohibit partisan political activities with neither any limitation as to place or location nor as to the speaker or actor.

Respondent, in an effort to save the regulation, proffers a resort to statutory construction. Respondent proposes that the regulations must be harmonized with Section 261(k) of BP 881, which reads:

> Sec. 261. *Prohibited Acts.* – The following shall be guilty of an election offense:
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> x x x x
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> (k) *Unlawful electioneering.* – It is unlawful to solicit votes or undertake any propaganda on the day of registration before the board of election inspectors and on the day of election, for or against any candidate or any political party within the polling place and with a radius of thirty meters thereof.

Accordingly, respondent insists that the prohibition under Section 36.8 of RA 9189, as amended by RA 10590, and Section 74(II)(8) of Comelec Resolution No. 10035 shall be taken to mean that it is confined to the polling places and to a radius of 30 meters.

Respondent also proposes that We look into the intent of Congress to limit the prohibition on campaigning abroad during the 30-day voting period to candidates. Respondent cites the sponsorship speech of Senator Aquilino Pimentel III for Senate Bill No. 3312, where he said that one of the changes agreed upon was to introduce a proviso making it an election offense for candidates to campaign in the country they are visiting within the 30-day voting period for overseas voting.[40]

Respondent's arguments are flawed.

Indeed, the touchstone of statutory interpretation is the probable intent of the legislature. When interpreting a statute, We must ascertain legislative intent so as to effectuate the purpose of a particular law. But the first step in determining that intent is to scrutinize the actual words of the statute, giving them a plain and common-sense meaning. When the words are clear and unambiguous, there is no need for statutory construction or resort to other indicia of legislative intent, such as legislative history.[41]

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[40] *Rollo*, p. 373.

[41] *Quarterman v. Kefauver*, 55 Cal.App.4th 1366, 1371 (1997).

The language of Section 36.8 of RA 9189, as amended by RA 10590, and Section 74(II)(8) of Comelec Resolution No. 10035 is clear and unambiguous. If Congress truly intended the interpretations suggested by respondent, it could have easily identified the exact place where the prohibition applies and to whom the prohibition is addressed. As the regulations plainly read, however, they prohibit **any person** (and not just the candidates) from engaging in partisan political activities **without** any qualification as to the location where these activities are conducted.

Courts must presume that a legislature says in a statute what it means and means in a statute what it says there.[42] When the words of a statute are unambiguous, then judicial inquiry is complete.[43] I cannot subscribe to the proposition of respondent that the legislative history of RA 9189, as amended by RA 10590, points to a different result. Judicial inquiry into the reach of Section 36.8 begins and ends with what Section 36.8 does say and with what it does not.[44]

Thus, the prior restraint imposed in Section 36.8 of RA 9189, as amended by RA 10590, and Section 74(II)(8) of Comelec Resolution No. 10035 is not narrowly drawn to protect the avowed interest of the government.[45] This second requirement of the strict scrutiny test stems from the fundamental premise that citizens should not be hampered from pursuing legitimate activities in the exercise of their constitutional rights. While rights may be restricted, the restrictions must be minimal or only to the extent necessary to achieve the purpose or to address the State's compelling interest. When it is possible for governmental regulations to be more narrowly drawn to avoid conflicts with constitutional rights, then they must be so narrowly drawn.[46]

All told, the application of a strict or exacting scrutiny to a content-based prior restraint becomes all the more imperative when political speech is involved. The fundamental right to freedom of speech and expression has its fullest and most urgent application to speech and expression uttered during a campaign for political office.[47] For one, discussions of public issues and debate on the qualifications of candidates are integral to the operation of the system of Government established by our Constitution.[48] Also, under our system of laws, everyone has the right to promote his or her agenda and attempt to persuade society of the validity of his or her position through

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[42] *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992).

[43] *Id.* at 254.

[44] *Id.*

[45] See *Burson v. Freeman, supra* note 21 at 119-200, where the US Supreme Court said that to survive strict scrutiny, the State must do more than assert a compelling State interest, but must also demonstrate that its law is **necessary** to serve the asserted interest. It bears emphasis that the US Supreme Court did not categorically say that the State must adopt the least restrictive means. The measure of the restriction, however, —whether it should be the least or whether it being less/necessary would suffice—is a discussion best left in another appropriate case.

[46] *SPARK v. Quezon City, supra* note 8 at 419-420. Citation and emphasis omitted.

[47] *Buckley v. Valeo*, 424 U.S. 1, 15, 256 (1976).

[48] *Id.* at 14.

normal democratic means. It is in the public square that deeply held convictions and differing opinions should be distilled and deliberated upon.[49]

Thus, the Constitution affords the broadest protection to political speech and expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.[50] In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.[51]

I hasten to add at this point that nothing We say here, however, should be construed to mean that the institution of a campaign-free zone in polling places abroad during the voting period is altogether foreclosed.

In fact, the Court has already observed in *Osmeña v. Comelec*[52] that Our previous decisions in *Gonzales* and *Valmonte v. Comelec*[53] have demonstrated that the State can prohibit campaigning **outside** a certain period as well as campaigning **within** a certain place. The Court went on to say that in *Valmonte*, the validity of a Comelec resolution prohibiting members of citizen groups or associations from entering any polling place except to vote was upheld. The Court then concluded that "[i]ndeed, §261(k) of the Omnibus Election Code makes it unlawful for anyone to solicit votes in the polling place and within a radius of 30 meters thereof."[54]

Statutorily mandated campaign-free zones have also been validated in the US. In *Burson*, the US Supreme Court upheld the validity of a provision of the Tennessee Code which prohibits the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place. The US Supreme Court found the provision to be a content-based restriction, but nonetheless found it valid through the lens of strict scrutiny. The US Supreme Court acknowledged that it was one of the rare cases in which it has held that a law survives strict scrutiny. It arrived at its decision on account of "[a] long history, a substantial consensus, and simple common sense"[55] showing that some restricted zone around polling places is necessary to protect the fundamental right of citizens to cast a ballot in an election free from the taint of intimidation and fraud.

Given *Burson* and Our own pronouncements in *Osmeña*, the establishment of a campaign-free zone in polling places overseas remains an open and viable possibility.

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[49] *Ang Ladlad LGBT Party v. Commission on Elections*, G.R. No. 190582, April 8, 2010, 618 SCRA 32, 65.

[50] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995).

[51] *Id.* at 346-347.

[52] G.R. No. 132231, March 31, 1998, 288 SCRA 447.

[53] Resolution, G.R. No. 73551, February 11, 1988.

[54] *Osmeña v. Comelec*, *supra* at 470.

[55] *Burson v. Freeman*, *supra* note 21 at 211.

WHEREFORE, I vote to **GRANT** the petition and **DECLARE** Section 36.8 of RA 9189, as amended by RA 10590, and Section 74(II)(8) of Comelec Resolution No. 10035 as **UNCONSTITUTIONAL** for violating Section 4, Article III of the 1987 Constitution.

FRANCIS H. JARDELEZA
Associate Justice

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EDGAR O. ARICHETA
Clerk of Court En Banc
Supreme Court