EN BANC

G.R. No. 246816 ***(ANGKLA: Ang Partido ng mga Marinong Pilipino, Inc. and Serbisyo sa Bayan Party, petitioners v. Commission on Elections [sitting as the National Board of Canvassers], Chairman Sheriff M. Abas, Commissioner Al A. Parreno, Commissioner Luie Tito G. Guia, Commissioner Ma. Rowena Amelia V. Guanzon, Commissioner Socorro B. Inting,* Commissioner Marlon S. Casquejo and Commissioner Antonio T. Kho, Jr., respondents).***

(Aksyon Magsasaka – Partido Tinig ng Masa [AKMA-PTM], petitioner-in-intervention).

Promulgated: December 7, 2021

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DISSENTING OPINION

GESMUNDO, *C.J.:*

On September 15, 2020, a sharply divided court promulgated its decision in this instant case, the dipositive portion reads:

> "**ACCORDINGLY**, the Amended Petition and Petition-in-Intervention are **DENIED** for lack of merit. The Court declares as **NOT UNCONSTITUTIONAL** Section 11(b), RA 7941 pertaining to the allocation of additional seats to party-list parties, organizations, or coalitions in proportion to their respective total number of votes. Consequently, National Board Canvassers Resolution No. 004-19 declaring the winning party-list groups in the May 13, 2019 elections is upheld.
>
> Let copy of this Decision be furnished to the House of Representatives and the Senate of the Philippines as reference for a possible review of RA 7941, specifically Section 11(b), pertaining to the seat allocation for the party-list system.
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> **SO ORDERED.**"[1]

The majority opinion, written by Madame Justice Amy C. Lazaro-Javier, sustained the validity of the assailed provision, negating the existence of violation of the equal protection clause and the principle of one person-one

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* Also referred to as "Commissioner Soccorro B. Inting" in the petition.

[1] G.R. No. 246816, September 15, 2020.

vote concept and justifying the soundness of the formula provided for in *BANAT v. Commission on Elections (BANAT)*. The majority opinion was joined by Justice Jose C. Reyes (ret.), Justice Rosmari D. Carandang and Justice Henri Jean Paul B. Inting. Senior Associate Justice Estela M. Perlas-Bernabe and Justice Marvic Mario Victor F. Leonen submitted their respective separate concurring opinion while Justice Mario V. Lopez submitted his separate concurring and dissenting opinion. Justice Priscilla Baltazar-Padilla (deceased) was then on leave.

Justice Alfredo Benjamin S. Caguioa submitted his separate opinion where he agreed with the dismissal of the petition but with a call to abandon the *BANAT* formula for failing to reflect the spirit and intention of the Constitution and Republic Act *(R.A.)* No. 7941. Instead, he proposed to adopt a straightforward formula to be used in the succeeding elections.

On the other hand, Justice Rodil V. Zalameda, who was joined by Justice Edgardo L. Delos Santos (ret.) and Justice Samuel H. Gaerlan, wrote a separate dissenting opinion where he concluded that the assailed provision indeed violated the equal protection clause because of the double voting that occurs in the *BANAT* formula where votes used to qualify for a guaranteed seat were again used to qualify for the additional seat. To remedy this obnoxious scenario, Justice Zalameda opined that the first round of allocation should allocate at least 1 but not more than 3 seats depending on the total number of votes cast for the party-list group. The variance in excess of 2% or 4% (which would correspond either to 1 or 2 seats) shall be computed and accordingly ranked with the non-two percenters for purposes of distributing additional seats under the *BANAT* formula.

Lastly, in my dissenting opinion, joined by then Chief Justice Diosdado M. Peralta (ret.) and Justice Ramon Paul L. Hernando, I concluded that the current *BANAT* formula violates the equal protection clause and the principle of *"one person, one vote"* which is the bedrock of every democratic and republic system. Consistent with the constitutional intent and spirit of R.A. No. 7941, I adopted petitioners' formula in the allocation of seats, thus:

> 1. The parties, organizations, and coalitions shall be ranked from the highest to the lowest based on the number of votes they garnered during the elections;
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> 2. The parties, organizations, and coalitions receiving at least two percent (2%) of the total votes cast for the party-list system shall be entitled to one guaranteed seat each;

> 3. Subtract the two percent (2%) of the votes from the percentage of the total votes garnered of the party list groups which were already allocated a guaranteed in the first round, then re-rank the groups accordingly;
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> 4. Multiply the percentage of total votes garnered by each party, as adjusted, with the total number of remaining available seats;
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> 5. The whole integer product shall be the party's share in the remaining available seats;
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> 6. Assign one party-list seat to each of the parties next in rank until all available seats are completely distributed;
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> 7. Each party, organization, or coalition shall be entitled to not more than three (3) seats.

Unperturbed, petitioners filed this instant Motion for Reconsideration,[2] seeking the reversal of the majority opinion promulgated last September 15, 2020. They claimed that the majority of the Court erred in sustaining the *BANAT* formula despite the blatant double counting or crediting of votes that occurs in the *BANAT* formula. They urge the Court to use the formula that they proposed and which I adopted in my dissenting opinion.

In response, respondent prays for the denial of the motion for reconsideration and argues that the majority of the Court did not err in sustaining the validity of Section 11(b) of R.A. No. 7941 as the Court merely applied the meaning and intention of Congress.

After much thought, I maintain my dissent.

I still maintain the position that the *BANAT* formula is constitutionally obnoxious as it perpetuates the invalid practice of double counting of votes in violation of the equal protection clause and the one person-one vote principle. To recall, I illustrated how the double counting occurs in my September 15, 2020 Dissenting Opinion, thus:

> From the foregoing, two (2) things are clear. First, the concept of "one person, one vote" is inherent in our system and need not be expressly stated because it is a necessary consequence of the republican and democratic nature of the Philippines state. Second, the concept of "one person, one vote" is protected under the mantle of equal protection since the weight of the vote of a person is the same as others and there is no

[2] *Rollo*, pp. 404-440.

substantial distinction per voter whether on the basis of race, gender, age, lineage, social standing or education.

Considering the concepts discussed above, I am convinced that the *BANAT* formula for distributing additional seats violates this principle.

As correctly pointed out by the petitioners, the 2% votes to justify the allocation of one (1) guaranteed seat were already considered and used during the allocation of the guaranteed seats. To consider them again, this time for purposes of allocating additional seats, would give these votes more weight or more value than others in violation of the equal protection clause as it gives due preference to votes received by party-list organizations who got 2% of the votes from those who did not.

Justice Javier seems to justify the grant of "double counting votes" by alleging that there is substantial distinction between party-list organizations who received 2% or more of the total votes cast and those party-lists who did not meet the threshold. Thus, justifying the difference in treatment, *i.e.*, allowing the votes already counted for the guaranteed seat to once again be considered for the allocation of additional seat.

Again, I cannot subscribe to this argument.

First, a reading of *Veterans,* would show that Veterans never discussed the validity of the 2% threshold on equal protection grounds. Veterans upheld the 2% threshold on the basis of the intent of the Constitutional framers and the intent of Congress to ensure proper representation; and for Congress, 2% of the total votes cast would already ensure a mandate. Even if there is an equal protection component in Veterans, its justification is limited only in the first round. The same treatment cannot be extended to the allocation of the additional seat. This is simply not part of Veterans and would be an unacceptable stretch of the Court's argument.

Second, there seems to be a contradiction in the stance of Justice Javier when, in one breath, she claims that the double counting of votes is acceptable, since there is substantial distinction between groups obtaining the needed 2% threshold and those who do not, and at the same time declares that there is no double counting of votes since the deduction of 2% as *BANAT* instructs "is done in the second step of the second round of the seat allocation not in the first step of the second round." The stance is self-defeating.

Third, the argument that the deduction of the 2% was made is not an accurate claim. While there is indeed a reduction of the percentages garnered by party-list organizations in the distribution of the additional seats following *BANAT,* the reduction does not amount to the 2% of the total votes cast. This is because in the round that allocates the guaranteed seat, its proportionality is based on the total number of votes cast for the party-list election while in the round for the allocation of additional seats, the proportionality is not dependent on the numbers of votes cast alone but also

on the total number of reserved remaining party-list seats in Congress. Thus, the reason for the reduction is not the deduction of the 2% allocated for the guaranteed seats but because of the change in the basis of the proportionality which is now the total number of votes cast AND the total number of seats remaining for party-list organizations after deducting the number of guaranteed seats already allocated. This is why the reduction from the percentage in the guaranteed seats to the percentage in the additional seat can never by 2%. Hence, to claim that there is no double counting of votes because the 2% considered was already deducted is without basis.

Lastly, even if there is an exact 2% reduction given to the party-list organizations who garnered the 2% threshold, the *BANAT* formula would still be flawed considering that the reduction in the allocation of the additional seats apply not only to party-list organizations who obtained the 2% threshold but to all parties since all parties will be subjected to the same formula. Thus, any deduction brought about by the formula to the group who obtained the 2% threshold, the same deduction will be applied to the others. Conversely stated, if there are no double counting of votes because the 2% was deducted only from those party-list organizations who already qualified to get a guaranteed seat, then why the reduction on the percentages of votes of party-list organizations who failed to meet the 2% requirement in the allocation of additional seat? Thus, it cannot be said that there is no inequality of votes here.

Clearly, this double counting of votes creates a classification that does not justify the requirements of a valid classification; particularly, the classification not being germane to the purposes of the law. There is no justification why there is a need to re-credit votes already credited. Further, there can be no conceivable explanation why the vote of one person should have more value compared to others. A contrary rule would be obnoxious to the democratic and republican nature of the country and the promise of equal protection under the Bill of Rights.

As such, since there is double counting of votes and the same violates the equal protection clause, particularly the "one person, one vote" mantra of democratic and republican states, the formula as to the allocation of additional seats must be fine-tuned to address this conundrum.

In recommending the denial of the motion for reconsideration, the *ponente* insists that the principle of "one person, one vote" is not applicable in party-list elections as it only applies to district elections following *Aquino III v. Commission on Elections (Aquino)*. For the *ponente,* to extend the application of the one person-one vote principle to party-list and to apportionment laws would effectively overturn *Aquino* and subject apportionment laws like R.A. No. 9716 to possible constitutional challenges.[3]

[3] Synopsis, pp. 6-7.

Also, for the *ponente,* the one person-one vote principle calls for absolute proportionality which the law does not require.

Lastly, the proposal in my dissenting opinion has no basis in the Constitution or in R.A. No. 7941.

Regrettably, I cannot share my colleague's learned disquisition. Contrary to the position of the *ponente,* the one person-one vote principle is applicable in party-list elections particularly when there is inequality in the crediting of votes coming from similarly situated voters in a constituency. More, as it stands, the one person-one vote principle, as applied in our party-list elections does not result into absolute proportionality as the said elections have inherent mechanisms that prevent the attainment of said absolute proportionality. This is why, in *Veterans,* Justice Panganiban characterized the party-list elections in this country as "unique," even dubbing it *as Party-list Elections: Philippine Style.*[4] Lastly, contrary to the position of the *ponente,* the resulting proposal is but a result of judicial action of declaration of unconstitutionality and does not amount to judicial legislation.

Allow me to explain.

The *ponente* insists that the concept of one person-one vote is akin to absolute proportionality and has no application to apportionment or reapportionment laws or to our party-list elections.

I respectfully beg to differ.

As discussed in my September 15, 2020 Dissenting Opinion, the one person-one vote concept is rooted in the democratic and republican nature of the Philippine state, thus:

> Article II, Sec. I provides that the Philippines is a democratic and, republican State. Sovereignty resides in the people and all government authority emanates from them. For the Constitutional framers, the concept of republicanism was added to purposely declare that the country adopts a representative democratic system where leaders are chosen by the people to govern and lead them.
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> As a tool to determine the representatives of the people, elections are held during such event, the people exercise their sovereign power to choose their leaders. In this regard, the equal protection clause ensures that a person is entitled to one vote and such vote carries the same weight as

[4] *Veterans v. Commission on Elections*, 396 Phil. 419, 445, 453 (2000).

> others. There are no privileged individuals whose vote is weightier than others simply because of gender, race or station in life.
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> Retired Senior Associate Justice Antonio T. Carpio succinctly discussed this equality of weight of votes or the "one person[,] one vote" concept in his Dissenting Opinion in *Sen. Aquino IIII v. COMELEC*, thus-
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> > Evidently, the idea of the people, as individuals, electing their representatives under the principle of "one person, one vote," is the cardinal feature of any polity, like ours, claiming to be a "democratic and republican State." A democracy in its pure state is one where the majority of the people, under the principle of "one person, one vote," directly run the government. A republic is one which has no monarch, royalty or nobility, ruled by a representative government elected by the majority or the people under the principle of "one person, one vote," where all citizens are equally subject to the laws. A republic is also known as a representative democracy. The democratic and republican ideals are intertwined, and converge on the common principle of equality – equality in voting power, and equality under the law.
> >
> > The constitutional standard of proportional representation is rooted in equality in voting power – that each vote is worth the same as any other vote, not more or less. Regardless of race, ethnicity, religion, sex, occupation, poverty, wealth or literacy, voters have an equal vote. x x x

While the *ponente* is correct to state that the one person-one vote concept is a hallmark of proportional representation, it does not mean that the same principle cannot apply to issues of apportionment or *malapportionment,* gerrymandering and other issues of voting equality.

On the contrary, the one person-one vote concept is particularly applicable to the validity of apportionment when issues of equal protection are raised. Apportionment is defined *as the determination of the number of representatives which a State, county or other subdivision may send to a legislative body.* It is *the allocation of seats in a legislative body in proportion to the population; the drawing of voting district lines so as to equalize population and voting power among the districts.* **Reapportionment,** on the other hand, *is the realignment or change in legislative districts brought about by changes in population and mandated by the constitutional requirement of equality of representation.*[5] At its most basic, therefore, apportionment or

[5] *Bagabuyo v. Commission on Elections*, 593 Phil. 678, 690-691 (2008).

reapportionment is simply the determination of how many representatives are to be sent to Congress.

In *Reynolds v. Sim*[6] *(Reynolds)*, the United States Supreme Court *(USSC)* noted the unequal populations of different counties that resulted in the disparity in voting powers of counties in Alabama due to years of no reapportionment laws being passed. The USSC then observed:

> A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government laws, and not men. This is at the heart of Lincoln's vision of 'government of the people, by the people, [and] for the people.' The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races."

The USSC then concluded:

> We hold that, as a basic constitutional standard the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State. Since under neither the existing apportionment provisions nor either of the proposed plans was either of the houses of the Alabama Legislature apportioned on a population basis, the District Court correctly held that all three of these schemes were constitutionally invalid. Furthermore, the existing apportionment, and also, to a lesser extent, the apportionment under the Crawford-Webb Act, presented little more than crazy quilts, completely lacking in rationality, and could be found invalid on that basis alone.

Also, in *Wesberry v. Sanders,*[7] the USSC reversed the district court's dismissal of the complaint against the 1931 Georgia apportionment law that created constituencies that have glaring unequal populations. In applying the one person-one vote principle, the Court noted:

> We hold that, construed in its historical context, the command of Art. I, 2, that Representatives be chosen "by the People of the several States" means that as [376 U.S. 1, 8] nearly as is practicable one man's vote in a congressional election is to be worth as much as another's. This rule is followed automatically, of course, when Representatives are chosen as a group on a statewide basis, as was a widespread practice in the first 50 years of our Nation's history. It would be extraordinary to suggest that in such

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[6] 377 U.S. 533 (1964).
[7] 376 U.S. 1 (1964).

> statewide elections the votes of inhabitants of some parts of a State, for example, Georgia's thinly populated Ninth District, could be weighted at two or three times the value of the votes of people living in more populous parts of the State, for example, the Fifth District around Atlanta, Cf. Gray v. Sanders, 372 U.S. 368. We do not believe that the Framers of the Constitution intended to permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants. To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected "by the People," a principle tenaciously fought for and established at the Constitutional Convention. The history of the Constitution, particularly that part of it relating to the adoption of Art. I, 2, reveals that those who framed the Constitution [376 U.S. 1, 9] meant that, no matter what the mechanics of an election, whether statewide or by districts, it was population which was to be the basis of the House of Representatives.

Lastly, *the county unit system*, the system used during the primary election for the Democratic party in the state of Georgia was challenged in *Gray v. Sanders*[8] *(Gray)*. There, petitioner claims that under the system, the value of the vote of a person counts for less and less as the population of the county increases. The Court eventually held that the principle of one person-one vote applies even to the primary elections which was practically an election. Also, it upheld the principle in this case holding that:

> The Fifteenth Amendment prohibits a State from denying or abridging a Negro's right to vote. The Nineteenth Amendment does the same for women. If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote; none could successfully contend that discrimination was allowable. See *Terry v. Adams*, 345 U.S. 461. How then can one person be given twice or ten times the voting power of another person in a state-wide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote – whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of [372 U.S, 368, 380] "we the people" under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.

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[8] 372 U.S. 368 (1963).

> The Court had consistently recognized that all qualified voters have a constitutionally protected right "to cast their ballots and have them counted at Congressional elections." United States v. Classic, 313 U.S. 299, 315; see Ex parte Yarbrough, 110 U.S. 651;Wiley v. Sinkler, 179 U.S. 58; Swafford v. Templeton, 185 U.S. 487. ***Every voter's vote is entitled to be counted once. It must be correctly counted and reported, As stated in United States v. Mosely, 238 U.S. 383, 386, "the right to have one's vote counted" has the same dignity as "the right to put a ballot in a box." It can be protected from the diluting effect of illegal ballots.*** Ex parte Siebold, 100 U.S. 371; United States v. Saylor, 322 U.S. 385. And these rights must be recognized in any preliminary election that in fact determines the true weight a vote will have. See United States v. Classic, supra; Smith v. Allwright, supra. The concept of political equality in the voting booth contained in the Fifteenth Amendment extends to all phases of state elections, see Terry v. Adams, supra; and as previously noted, there is no indication in the Constitution that homesite or occupation affords a permissible basis for distinguishing between qualified voters within the State. (underscoring supplied)

In all these cases, while they show vestiges of proportional representation, they also demonstrate that the principle of one person-one vote is equally applicable in questioning apportionment or reapportionment laws and the effects of malapportionment, even in primary elections, as long as there is unequal treatment of votes. Hence, with due respect, the limitation of the *ponente* as to the application of the doctrine is unfounded and there is no reason to single out party-list elections as an exemption from the application of the principle. Echoing *Gray,* ***party-list elections are practically an election.***

Of course, the power of the courts to strike down invalid apportionment laws has been long recognized when it thwarts the equal protection clause. In *Baker v. Carr,*[9] again, the USSC ruled that:

> Under the Equal Protection Clause, a claim of debasement of the right to vote through malapportionment presents a justiciable controversy, and the Equal Protection Clause provides manageable standards for lower courts to determine the constitutionality of a state legislative appointment scheme.

Here, the issue of distribution of party-list seats is an issue of apportionment because it is a determination of how many representatives qualify for a seat in Congress. The only difference here is that unlike in *Reynolds,* supra, the constituency is national in character rather than by district or counties. If citizens from a different county are counted and treated differently from citizens from another country, this would result in a violation of the one person-one vote principle; much more with the present *BANAT*

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[9] 369 U.S. 186 (1964).

formula, which credits the votes gained by two percenters twice – once for the guaranteed seat and the other for the additional seat – to the detriment of the non-two percenters and giving greater voting power to voters of the two percenters compared to voters of the non-two percenters wholly without basis.

Simply put, in a national constituency, where every voter should have equal voting power, the *BANAT* formula credits votes twice when others credited only once. This is a blatant violation of the equal protection clause and the one person-one vote dictum.

Similarly, the claim that the one person-one vote principle in the Philippine party-list elections would result into absolute proportionality is clearly erroneous. A strict application of the one person-one vote principle is not achievable here because of the mechanisms in place under R.A. No. 7941, *i.e.,* the two percent threshold and the three-seat cap. As such, these mechanisms prevent the application of absolute proportionality as they prevent party-list organizations who got more votes to be entitled to more seats following the Constitutional dictum of opening up the system to more interests and groups. Thus, claims of applying the doctrine of one person-one vote leading to absolute proportional representation is unfounded.

Lastly, I would like to stress that the inclusion of additional steps in the proposed formula are incidents of judicial power and does not amount to judicial legislation.

In *Philippine Judges Association v. Prado,*[10] Sec. 35 of R.A. No. 7354 as implemented by the Philippine Postal Corporation through its Circular No. 92-28, effectively removed from the Judiciary its franking privileges but maintained the same privilege in favor of the other two great departments of Government. The Court therein declared the same as unconstitutional for violating the equal protection clause. Interestingly, as an effect of this judicial action, the Court restored the franking privileges that R.A. No. 7354 withdrew. This is clear in the *fallo*, thus:

> ACCORDINGLY, the petition is partially *GRANTED* and Section 35 of R.A. No. 7354 is declared *UNCONSTITUTIONAL*. Circular No. 92-28 is *SET ASIDE* insofar as it withdraws the franking privilege from the Supreme Court, the Court of Appeals, the Regional Trial Courts, the Municipal Trial Courts, the Municipal Circuit Trial Courts, and the National Land Registration Authority and its Register of Deeds to all of which offices

[10] 298 Phil. 502, 514-516 (1993).

the said privilege shall be RESTORED. The temporary restraining order dated June 2, 1992, is made permanent.

SO ORDERED.[11]

As can be gleaned above, declaration of unconstitutionality of a legislative or executive act would result in the removal of the obnoxious portions of the law. This is the purpose of the additional steps in the proposal. Obviously, the additional step, not in the letter of the law but included as an incident of a court decision, is the removal of the phrase "*in proportion to their total number of votes*" in Section 11(b), R.A. No. 7941. Thus, the formula proposed in my dissenting opinion preserves the intent of Congress and the Constitution while disregarding the inappropriate provisions that run contrary to the latter.

WHEREFORE, I vote to **GRANT** the Motion for Reconsideration and **DECLARE** Section 11(b) of Republic Act No. 7941 as **UNCONSTITUTIONAL.**

ALEXANDER G. GESMUNDO
Chief Justice

[11] Id. at 517.