

EN BANC

G.R. No. 205357 (GMA NETWORK, INC., *Petitioner*, v. COMMISSION ON ELECTIONS, *Respondent*); G.R. No. 205374 (ABC DEVELOPMENT CORPORATION, *Petitioner*, v. COMMISSION ON ELECTIONS, *Respondent*); G.R. No. 205592 (MANILA BROADCASTING COMPANY, INC. and NEWSOUNDS BROADCASTING NETWORK, INC., *Petitioners*, v. COMMISSION ON ELECTIONS, *Respondent*); G.R. No. 205852 (KAPISANAN NG MGA BRODKASTER NG PILIPINAS and ABS-CBN CORPORATION, *Petitioners*, v. COMMISSION ON ELECTIONS, *Respondent*); SENATOR ALLAN PETER “COMPAÑERO” CAYETANO, *Intervenor*.

Promulgated:

SEPTEMBER 02, 2014

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SEPARATE CONCURRING OPINION

CARPIO, *Acting C.J.*:

I join the *ponencia*'s holding striking down Section 9(a) of COMELEC Resolution No. 9615, as amended, (Resolution) for being violative of the Free Speech Clause of the Constitution. In addition, however, I vote to strike down Section 6.2 of the Fair Elections Act (Republic Act No. 9006 [RA 9006]) for similarly trenching on the freedoms of speech and of expression of candidates and political parties. I find this conclusion inevitable as Section 9(a) of the Resolution is merely the administrative rule implementing Section 6.2 of RA 9006.

*Minimizing Election Spending the Intended Government Interest
in Capping Campaign Air Time*

The COMELEC grounds its issuance of the Resolution not only on RA 9006 but also on two provisions of the Constitution,¹ namely, Section 2(7) and Section 4, both of Article IX-C. Section 2(7) concerns the power of the COMELEC to “[r]ecommend to the Congress effective measures to minimize election spending, x x x.”² On the other hand, Section 4 authorizes the COMELEC, during the election period, to “supervise or regulate the

¹ Decision, pp. 8, 13.

enjoyment and utilization of all franchises x x x for the operation of x x x media of communication or information x x x.”³ Different constitutional values underpin these two provisions. Section 2(7) advances the government interest of keeping election spending to a minimum to maximize competition in electoral exercises while Section 4 ensures “equal opportunity, time and space, including reasonable, equal rates” to candidates and political parties during the campaign period.

In capping the broadcast advertising time of candidates and political parties, neither Congress nor the COMELEC (under Section 6.2 of RA 9006 and Section 9(a) of the Resolution, respectively) supervised or regulated the enjoyment and utilization of franchises of media outfits under Section 4, Article IX-C. Media firms continue to operate under their franchises free of restrictions notwithstanding the imposition of these air time caps. Section 6.2 of RA 9006 and Section 9(a) of the Resolution do not approximate the rule barring media firms from “sell[ing] x x x print space or air time for campaign or other political purposes except to the Commission [on Elections],”⁴ a clear statutory implementation of Section 4.⁵ On the other hand, by regulating the length of broadcast advertising of candidates and political parties, a propaganda activity with correlative financial effect, Section 6.2 of RA 9006 and Section 9(a) of the Resolution enforce Section 2(7), Article IX-C. They are meant to advance the government interest of minimizing election spending.

***Section 6.2 of RA 9006 and Section 9(a) of the Resolution
Restrict Free Speech and Free Expression Excessively
and Minimize Election Spending Arbitrarily***

Section 6.2 of RA 9006 and Section 9(a) of the Resolution are content-neutral “time” regulations which do not reach the content of campaign speech but merely limit its cumulative broadcast “time” or length during the campaign period. Such content-neutral regulations are subjected to the intermediate, not heightened, level of scrutiny under the four-pronged *O’Brien* test, originally crafted by the U.S. Supreme Court and later adopted

² The provision reads in full: “Recommend to the Congress effective measures to minimize election spending, including limitation of places where propaganda materials shall be posted, and to prevent and penalize all forms of election frauds, offenses, malpractices, and nuisance candidacies.”

³ The provision reads in full: “The Commission may, during the election period, supervise or regulate the enjoyment or utilization of all franchises or permits for the operation of transportation and other public utilities, media of communication or information, all grants, special privileges, or concessions granted by the Government or any subdivision, agency, or instrumentality thereof, including any government-owned or controlled corporation or its subsidiary. Such supervision or regulation shall aim to ensure equal opportunity, time, and space, and the right to reply, including reasonable, equal rates therefor, for public information campaigns and forums among candidates in connection with the objective of holding free, orderly, honest, peaceful, and credible elections.”

⁴ Section 11(b), Republic Act No. 6646, repealed by Section 14 of RA 9006.

⁵ *Osmeña v. COMELEC*, 351 Phil. 692, 708 (1998).

by this Court.⁶ Under *O'Brien*, Section 6.2 of RA 9006 and Section 9(a) of the Resolution will pass constitutional muster “[1] [if they are] within the constitutional power of the Government; [2] if [they] further[] an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on the x x x freedoms [of speech, expression and press] is no greater than is essential to the furtherance of that interest.”⁷

Section 6.2 of RA 9006 provides:

Equal Access to Media Time and Space. – x x x

x x x x

6.2. (a) Each bona fide candidate or registered political party for a nationally elective office shall be entitled to not more than one hundred twenty (120) minutes of television advertisement and one hundred eighty (180) minutes of radio advertisement whether by purchase or donation.

(b) Each bona fide candidate or registered political party for a locally elective office shall be entitled to not more than sixty (60) minutes of television advertisement and ninety (90) minutes of radio advertisement whether by purchase or donation.

x x x x

Section 9(a) of the Resolution, implementing Section 6.2 for last year’s election, provides:

Requirements and/or Limitations on the Use of Election Propaganda through Mass Media. - All parties and bona fide candidates shall have equal access to media time and space for their election propaganda during the campaign period subject to the following requirements and/or limitations:

a. Broadcast Election Propaganda

The duration of air time that a candidate, or party may use for their broadcast advertisements or election propaganda shall be, as follows:

For Candidates/Registered Political parties for a National Elective Position [-] [n]ot more than an aggregate total of one hundred (120) minutes of television advertising, whether appearing on national, regional, or local, free or cable television, and one hundred eighty (180) minutes of radio advertising, whether airing on national, regional, or local radio, whether by purchase or donation.

⁶ Considered as the “canonical” standard of review for content-neutral regulations, the test is eponymously named after *US v. O'Brien*, 391 U.S. 367 (1968). This Court applied *O'Brien* in *Osmeña v. COMELEC*, *id.* and *Social Weather Station v. COMELEC*, 409 Phil. 571 (2001). In contrast, content-based regulations are subjected to heightened scrutiny (for the reasons underlying such strict scrutiny and its application in Philippine jurisprudence, see *Osmeña v. COMELEC*, *id.* at 717-719).

⁷ *Social Weather Station v. Commission on Elections*, *id.* at 587-588, citing *US v. O'Brien*, *id.* at 377.

For Candidates/Registered Political parties for a Local Elective Position [-] [n]ot more than an aggregate total of sixty (60) minutes of television advertising, whether appearing on national, regional, or local, free or cable television, and ninety (90) minutes of radio advertising, whether airing on national, regional, or local radio, whether by purchase or donation.

These provisions pass the first and third prongs of *O'Brien*. Undoubtedly, it was within the power of Congress to enact Section 6.2 of RA 9006 and of COMELEC to adopt Section 9(a) of the Resolution to enforce Section 2(7), Article IX-C of the Constitution. Nor is there any question that the government interest of minimizing election spending under Section 2(7) of Article IX-C is unrelated to the suppression of free expression, concerned as it is in the non-speech government interest of maximizing competition in the political arena. As explained below, however, the capping of campaign air time by Section 6.2 of RA 9006 and Section 9(a) of the Resolution advances the state interest of minimizing election spending arbitrarily and the incidental restriction on the freedoms of speech and expression these provisions impose is greater than is essential to the furtherance of such state interest, thus failing the second and fourth prongs of *O'Brien*.

Under Section 6.2 of RA 9006, the ban in broadcast campaign kicks-in once the limits of the air time caps are reached *regardless* of the amount of money actually spent by candidates or political parties. Section 9(a) of the Resolution tightens the regulatory noose by reckoning the air time caps for the entire campaign period cumulatively.⁸ By divorcing the amount of campaign air time logged by candidates and political parties during the campaign period from the amount of expenses they incur to do so, Section 6.2 of RA 9006 and Section 9(a) of the Resolution operate under the assumption that advertising rates in TV and radio are uniform, regardless of the broadcast coverage and time.

The fact of the matter is, advertising rates for each medium vastly vary depending on the extent and time of broadcast. Even if the statutorily mandated discounts are factored,⁹ a 30-second campaign ad placed in petitioner GMA, Inc.'s national TV station GMA-7 on a weekday evening primetime slot will cost a candidate or political party 96% more than a 30-second campaign ad placed by another candidate or party in any of GMA,

⁸ According to petitioner GMA, Inc., this leaves a candidate or political party only 27.3 seconds of campaign broadcast time per day (Decision, p. 41). Under the regulations issued by the COMELEC implementing Section 6.2 of RA 9006 for the 2007 and 2010 elections, the caps were reckoned based on the length of advertising time logged by each candidate or political party at every TV or radio station.

⁹ Under Section 11 of RA 9006 ("*Rates for Political Propaganda*. – During the election period, media outlets shall charge registered political parties and bona fide candidates a discounted rate of thirty percent (30%) for television, twenty percent (20%) for radio and ten per cent (10%) for print over the average rates charged during the first three quarters of the calendar year preceding the elections.")

Inc.'s provincial TV stations.¹⁰ If the ad is placed on a weekend non-primetime slot (afternoon), the price variation dips slightly to 93%.¹¹ The rates charged by petitioner ABS-CBN Corporation reflect substantially the same price variance. A 30-second campaign ad placed in its national TV station ABS-CBN on a primetime slot will cost a candidate or political party 97% more than a 30-second campaign ad placed by another candidate or party in any of ABS-CBN Corporation's mid-level local stations.¹² For non-primetime placement, the price difference is 92%.¹³

Substantially the same level of rate variance obtains in radio advertising. A 30-second campaign ad placed in petitioner GMA, Inc.'s DZBB AM radio station for national broadcast is, on average, 93% more expensive than a 30-second campaign ad placed by another candidate or political party aired at GMA, Inc.'s AM radio stations in Puerto Princesa City (DYSP), Iloilo City (DYSI), and Davao City (DXGM).¹⁴ For petitioner ABS-CBN Corporation, a 30-second campaign ad placed in its DZMM AM radio station for national broadcast on a primetime slot (club rate) is 91% more expensive than a 30-second campaign ad placed by another candidate or political party aired at ABS-CBN Corporation's AM radio stations in Cebu City and Davao City.¹⁵

The non-uniform rates in broadcast advertising mean that candidate A for a national position who opts to place campaign ads only in strategic provincial TV and radio stations of the top two networks will have spent at least 90% less than candidate B for the same position who places campaign ads in national TV and radio stations of such networks for the same amount of time as candidate A. Nevertheless, as Section 6.2 of RA 9006 and Section 9(a) of the Resolution do not take broadcast rate variances into account, candidate A will have no choice but to stop airing campaign ads once he reaches the limits of the air time caps even though, compared to candidate B, his expenses for the ad placements are drastically lower. The government interest of minimizing election spending is furthered only in the case of

¹⁰ Based on petitioner GMA, Inc.'s rate card for 2013 (undiscounted), a 30-second national primetime ad costs ₱695,500 while its regional counterpart costs ₱27,500 (with the 30% statutory discount, the rates are ₱487,000 and ₱19,250, respectively).

¹¹ With the national ad costing ₱425,500 and the regional rate constant.

¹² Based on petitioner ABS-CBN Corp.'s rate card for 2013 (undiscounted), a 30-second national primetime ad costs ₱824,374 while its mid-level provincial rate (selected areas) for the same ad is ₱24,800 (with the 30% statutory discount, the rates are ₱577,061.80 and ₱19,360, respectively). The upper-level provincial rate is ₱38,500 (Cebu) while the lower-level rate is ₱7,470 (selected areas).

¹³ With the national ad costing ₱312,264 (with 30% statutory discount, ₱218,584.80) and the mid-level provincial rate constant.

¹⁴ Based on petitioner GMA, Inc.'s rate card for 2013 (undiscounted), DZBB's rate is ₱70,000 while those for DYSP (Puerto Princesa), DYSI (Iloilo) and DXGM (Davao) are ₱2,100, ₱5,000 and ₱6,900, respectively. With the statutory discount of 20%, the rates for DZBB, DYSP, DYSI and DXGM are ₱56,000, ₱1,680, ₱4,000 and ₱5,520, respectively. If the rate (undiscounted) for Cebu's DYSS (₱22,500) is taken into account, the average price variation is 87%.

¹⁵ Based on petitioner ABS-CBN Corp.'s rate card for 2013 (undiscounted), DZMM's rate is ₱67,666 (club rate, primetime) while rates for Cebu City and Davao City are the same at ₱6,570. The rate (undiscounted) for its Palawan AM station is lower at ₱3,290, increasing the price difference with the national primetime, club rate to 95%.

candidate B but not with candidate A. On the other hand, the candidate A's right to make known his candidacy and program of government to the voters – the heart of the freedoms of (political) speech and (political) expression guaranteed by the Constitution – is unduly restricted even though, compared to candidate B, his campaign expenses for airing ads are enormously lower. The system of value-neutral air time capping cuts deep into the core of fundamental rights while advancing a state interest arbitrarily.

The same excessive rights restrictions and arbitrary advancement of public policy unfold for candidates at the local level. Metro Manila, unlike the other provinces, is not covered by “local” TV or radio stations. To broadcast a campaign ad on TV or radio, a candidate for any local position in Metro Manila will have to pay the rates for a national broadcast. The dilemma faced by Metro Manila candidates to either (a) inhibit from broadcasting their campaign ads to save money or (b) spend large amounts of campaign funds to air ads unduly restricts their expressive rights and at the same time negates the government interest of minimizing campaign spending.

The value-neutral capping system under Section 6.2 of RA 9006 and Section 9(a) of the Resolution also operates under the false assumption that candidates at the national and local levels are subject to the same general campaign spending limits, thus the uniform air time caps imposed for each category of candidates. Under Batas Pambansa Blg. 881 (BP 881), as amended by Section 13 of Republic Act No. 7166, however, candidates' spending limits are computed based on the size of the voting population, with the rates proportional to the size of a candidate's constituency.¹⁶ Because all local candidates under Section 6.2 of RA 9006 and Section 9(a) of the Resolution are allotted the same air time, a candidate for mayor in Catbalogan City (which had 54,459 registered voters in 2010) has the same 60 minutes of TV ad time and 90 minutes of radio ad time as a candidate for mayor in Davao City (which had 909,442 registered voters in 2010) even though their spending limits are, under the 2010 census, ₱163,377 and ₱2,728,326, respectively (at ₱3 per registered voter). As ad rates in Davao-based radio and TV stations are relatively low, it could happen that the Davao City mayoral candidate will have consumed her allotted campaign air time while keeping clear of the maximum spending limit, yet, under Section 6.2 of RA 9006 and Section 9(a) of the Resolution she has to stop airing campaign ads.

¹⁶ Under Section 100 of Batas Pambansa Blg. 881 (BP 881), as amended by Section 13 of Republic Act No. 7166 which provides: “*Authorized Expenses of Candidates and Political Parties.* - The agreement amount that a candidate or registered political party may spend for election campaign shall be as follows: (a) For candidates. - Ten pesos (₱10.00) for President and Vice-President; and for other candidates Three Pesos (₱3.00) for every voter currently registered in the constituency where he filed his certificate of candidacy: Provided, That a candidate without any political party and without support from any political party may be allowed to spend Five Pesos (₱5.00) for every such voter; and (b) For political parties. - Five pesos (₱5.00) for every voter currently registered in the constituency or constituencies where it has official candidates.”

***Section 6.2 of RA 9006 and Section 9(a) of the Resolution
Not Reasonably Related to the State Interest of Minimizing
Election Spending***

Even if we subject Section 6.2 of RA 9006 and Section 9(a) of the Resolution to the lowest level of scrutiny under the rational basis test, they still fail to withstand analysis. Rules survive this minimal level of scrutiny if the means drawn by Congress or administrative bodies are reasonably related to a legitimate state interest. The government interest Section 6.2 of RA 9006 and Section 9(a) of the Resolution are meant to advance is the minimization of campaign spending. The means Congress and the COMELEC adopted to do so was to place uniform campaign air caps for national and local candidates, without taking into account the amount of money spent by candidates and political parties to air campaign ads. By ignoring the amount of broadcasting expenses incurred by candidates and political parties, Section 6.2 of RA 9006 and Section 9(a) of the Resolution lack any rational relation to the state policy of minimizing election spending under Section 2(7), Article IX-C of the Constitution. Their enforcement will only result in substantial variation in election spending among national and local candidates for airing campaign ads.

Legislative measures aimed at limiting campaign air time to advance the state policy of minimizing campaign spending under Section 2(7), Article IX-C of the Constitution must necessarily be pegged to spending caps for campaign broadcasting. Such caps, in turn, will depend on the size of the voting population for each category of candidates (national or local), consistent with the existing method for capping general campaign spending under BP 881, as amended. The monetary limit must be set at say ₱2.00 per registered voter for local candidates and ₱4.00 per registered voter for national candidates. Once the total monetary limits are reached, the ban on broadcast advertising takes effect, regardless of the amount of air time logged. This scheme grants to candidates and political parties greater space for the exercise of communicative freedoms while, at the same time, allows the state to uniformly flag profligate campaigns.

Accordingly, I vote to **GRANT** the petitions in part and **DECLARE** Section 9(a) of COMELEC Resolution No. 9615 dated 15 January 2013, as amended by Resolution No. 9631 dated 1 February 2013, and Section 6.2 of Republic Act No. 9006 **UNCONSTITUTIONAL** for being violative of Section 4, ~~and Section 8 of~~ Article III of the 1987 Constitution.

Antonio T. Carpio
18 Sept 2014

Antonio T. Carpio
ANTONIO T. CARPIO
Acting Chief Justice