Republic of the Philippines
Supreme Court
Manila

EN BANC

THE DIOCESE OF BACOLOD, REPRESENTED BY THE MOST REV. BISHOP VICENTE M. NAVARRA and THE BISHOP HIMSELF IN HIS PERSONAL CAPACITY,
Petitioners,

- versus -

COMMISSION ON ELECTIONS AND THE ELECTION OFFICER OF BACOLOD CITY, ATTY. MAVIL V. MAJARUCON,
Respondents.

G.R. No. 205728

Present:

SERENO, *C.J.*,
CARPIO,
VELASCO, JR.,
LEONARDO-DE CASTRO,
BRION,*
PERALTA,
BERSAMIN,
DEL CASTILLO,
VILLARAMA, JR.,
PEREZ,
MENDOZA,
REYES,
BERNABE,
LEONEN, and
JARDELEZA,** *JJ.*

Promulgated:
January 21, 2015

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* On official leave.
** No part.

DECISION

LEONEN, *J.*:

> "The Philippines is a democratic and republican State. Sovereignty resides in the people and all government authority emanates from them." – Article II, Section 1, Constitution

All governmental authority emanates from our people. No unreasonable restrictions of the fundamental and preferred right to expression of the electorate during political contests no matter how seemingly benign will be tolerated.

This case defines the extent that our people may shape the debates during elections. It is significant and of first impression. We are asked to decide whether the Commission on Elections (COMELEC) has the competence to limit expressions made by the citizens — who are not candidates — during elections.

Before us is a special civil action for certiorari and prohibition with application for preliminary injunction and temporary restraining order[1] under Rule 65 of the Rules of Court seeking to nullify COMELEC's Notice to Remove Campaign Materials[2] dated February 22, 2013 and letter[3] issued on February 27, 2013.

The facts are not disputed.

On February 21, 2013, petitioners posted two (2) tarpaulins within a private compound housing the San Sebastian Cathedral of Bacolod. Each tarpaulin was approximately six feet (6') by ten feet (10') in size. They were posted on the front walls of the cathedral within public view. The first tarpaulin contains the message "IBASURA RH Law" referring to the Reproductive Health Law of 2012 or Republic Act No. 10354. The second tarpaulin is the subject of the present case.[4]

This tarpaulin contains the heading "Conscience Vote" and lists candidates as either "(Anti-RH) Team Buhay" with a check mark, or "(Pro-

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1 *Rollo*, pp. 3–18.
2 Id. at 19.
3 Id. at 23.
4 Id. at 6.

RH) Team Patay" with an "X" mark.[5] The electoral candidates were classified according to their vote on the adoption of Republic Act No. 10354, otherwise known as the RH Law.[6] Those who voted for the passing of the law were classified by petitioners as comprising "Team Patay," while those who voted against it form "Team Buhay":[7]

TEAM BUHAY	**TEAM PATAY**
Estrada, JV	Angara, Juan Edgardo
Honasan, Gregorio	Casiño, Teddy
Magsaysay, Mitos	Cayetano, Alan Peter
Pimentel, Koko	Enrile, Jackie
Trillanes, Antonio	Escudero, Francis
Villar, Cynthia	Hontiveros, Risa
Party List Buhay	Legarda, Loren
Party List Ang Pamilya	Party List Gabriela
	Party List Akbayan
	Party List Bayan Muna
	Party List Anak Pawis

During oral arguments, respondents conceded that the tarpaulin was neither sponsored nor paid for by any candidate. Petitioners also conceded that the tarpaulin contains names of candidates for the 2013 elections, but not of politicians who helped in the passage of the RH Law but were not candidates for that election.

On February 22, 2013, respondent Atty. Mavil V. Majarucon, in her capacity as Election Officer of Bacolod City, issued a Notice to Remove Campaign Materials[8] addressed to petitioner Most Rev. Bishop Vicente M. Navarra. The election officer ordered the tarpaulin's removal within three (3) days from receipt for being oversized. COMELEC Resolution No. 9615 provides for the size requirement of two feet (2') by three feet (3').[9]

On February 25, 2013, petitioners replied[10] requesting, among others, that (1) petitioner Bishop be given a definite ruling by COMELEC Law Department regarding the tarpaulin; and (2) pending this opinion and the availment of legal remedies, the tarpaulin be allowed to remain.[11]

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5 Id. at 155.
6 Id. at 6–7.
7 Id.
8 Id. at 19.
9 *See* COMELEC Resolution No. 9615 (2013), sec. 6(c).
10 *Rollo*, pp. 20–22.
11 Id. at 21.

On February 27, 2013, COMELEC Law Department issued a letter[12] ordering the immediate removal of the tarpaulin; otherwise, it will be constrained to file an election offense against petitioners. The letter of COMELEC Law Department was silent on the remedies available to petitioners. The letter provides as follows:

> Dear Bishop Navarra:
>
> It has reached this Office that our Election Officer for this City, Atty. Mavil Majarucon, had already given you notice on February 22, 2013 as regards the election propaganda material posted on the church vicinity promoting for or against the candidates and party-list groups with the following names and messages, particularly described as follows:
>
> | | | |
> |---|---|---|
> | Material size | : | six feet (6') by ten feet (10') |
> | Description | : | FULL COLOR TARPAULIN |
> | Image of | : | SEE ATTACHED PICTURES |
> | Message | : | CONSCIENCE VOTE (ANTI RH) TEAM BUHAY; (PRO RH) TEAM PATAY |
> | Location | : | POSTED ON THE CHURCH VICINITY OF THE DIOCESE OF BACOLOD CITY |
>
> The three (3) – day notice expired on February 25, 2013.
>
> Considering that the above-mentioned material is found to be in violation of Comelec Resolution No. 9615 promulgated on January 15, 2013 particularly on the size (even with the subsequent division of the said tarpaulin into two), as the lawful size for election propaganda material is only two feet (2') by three feet (3'), please order/cause the immediate removal of said election propaganda material, otherwise, we shall be constrained to file an election offense case against you.
>
> We pray that the Catholic Church will be the first institution to help the Commission on Elections in ensuring the conduct of peaceful, orderly, honest and credible elections.
>
> Thank you and God Bless!
>
> [signed]
> ATTY. ESMERALDA AMORA-LADRA
> *Director IV*[13]

Concerned about the imminent threat of prosecution for their exercise of free speech, petitioners initiated this case through this petition for certiorari and prohibition with application for preliminary injunction and temporary restraining order.[14] They question respondents' notice dated February 22, 2013 and letter issued on February 27, 2013. They pray that: (1) the petition be given due course; (2) a temporary restraining order (TRO) and/or a writ of preliminary injunction be issued restraining respondents

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12 Id. at 23.
13 Id. at 23.
14 Id. at 15–16.

from further proceeding in enforcing their orders for the removal of the Team Patay tarpaulin; and (3) after notice and hearing, a decision be rendered declaring the questioned orders of respondents as unconstitutional and void, and permanently restraining respondents from enforcing them or any other similar order.[15]

After due deliberation, this court, on March 5, 2013, issued a temporary restraining order enjoining respondents from enforcing the assailed notice and letter, and set oral arguments on March 19, 2013.[16]

On March 13, 2013, respondents filed their comment[17] arguing that (1) a petition for certiorari and prohibition under Rule 65 of the Rules of Court filed before this court is not the proper remedy to question the notice and letter of respondents; and (2) the tarpaulin is an election propaganda subject to regulation by COMELEC pursuant to its mandate under Article IX-C, Section 4 of the Constitution. Hence, respondents claim that the issuances ordering its removal for being oversized are valid and constitutional.[18]

During the hearing held on March 19, 2013, the parties were directed to file their respective memoranda within 10 days or by April 1, 2013, taking into consideration the intervening holidays.[19]

The issues, which also served as guide for the oral arguments, are:[20]

I.

WHETHER THE 22 FEBRUARY 2013 NOTICE/ORDER BY ELECTION OFFICER MAJARUCON AND THE 27 FEBRUARY 2013 ORDER BY THE COMELEC LAW DEPARTMENT ARE CONSIDERED JUDGMENTS/FINAL ORDERS/RESOLUTIONS OF THE COMELEC WHICH WOULD WARRANT A REVIEW OF THIS COURT VIA RULE 65 PETITION[;]

A. WHETHER PETITIONERS VIOLATED THE HIERARCHY OF COURTS DOCTRINE AND JURISPRUDENTIAL RULES GOVERNING APPEALS FROM COMELEC DECISIONS;

B. ASSUMING ARGUENDO THAT THE AFOREMENTIONED ORDERS ARE NOT CONSIDERED JUDGMENTS/FINAL ORDERS/RESOLUTIONS OF THE COMELEC, WHETHER THERE ARE EXCEPTIONAL

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15 Id. at 16.
16 Id. at 24.
17 Id. at 32–49.
18 Id. at 35.
19 Id. at 50-C.
20 Id. at 94–96.

CIRCUMSTANCES WHICH WOULD ALLOW THIS COURT TO TAKE COGNIZANCE OF THE CASE[;]

II.

WHETHER IT IS RELEVANT TO DETERMINE WHETHER THE TARPAULINS ARE "POLITICAL ADVERTISEMENT" OR "ELECTION PROPAGANDA" CONSIDERING THAT PETITIONER IS NOT A POLITICAL CANDIDATE[;]

III.

WHETHER THE TARPAULINS ARE A FORM OR EXPRESSION (PROTECTED SPEECH), OR ELECTION PROPAGANDA/POLITICAL ADVERTISEMENT[;]

A. ASSUMING ARGUENDO THAT THE TARPAULINS ARE A FORM OF EXPRESSION, WHETHER THE COMELEC POSSESSES THE AUTHORITY TO REGULATE THE SAME[;]

B. WHETHER THIS FORM OF EXPRESSION MAY BE REGULATED[;]

IV.

WHETHER THE 22 FEBRUARY 2013 NOTICE/ ORDER BY ELECTION OFFICER MAJARUCON AND THE 27 FEBRUARY 2013 ORDER BY THE COMELEC LAW DEPARTMENT VIOLATES THE PRINCIPLE OF SEPARATION OF CHURCH AND STATE[;] [AND]

V.

WHETHER THE ACTION OF THE PETITIONERS IN POSTING ITS TARPAULIN VIOLATES THE CONSTITUTIONAL PRINCIPLE OF SEPARATION OF CHURCH AND STATE.

I

PROCEDURAL ISSUES

I.A
This court's jurisdiction over COMELEC cases

Respondents ask that this petition be dismissed on the ground that the notice and letter are not final orders, decisions, rulings, or judgments of the COMELEC En Banc issued in the exercise of its adjudicatory powers, reviewable via Rule 64 of the Rules of Court.[21]

Rule 64 is not the exclusive remedy for all acts of the COMELEC. Rule 65 is applicable especially to raise objections relating to a grave abuse

[21] Id. at 62–64.

of discretion resulting in the ouster of jurisdiction.[22] As a special civil action, there must also be a showing that there be no plain, speedy, and adequate remedy in the ordinary course of the law.

Respondents contend that the assailed notice and letter are not subject to review by this court, whose power to review is "limited only to final decisions, rulings and orders of the COMELEC *En Banc* rendered in the exercise of its adjudicatory or quasi-judicial power."[23] Instead, respondents claim that the assailed notice and letter are reviewable only by COMELEC itself pursuant to Article IX-C, Section 2(3) of the Constitution[24] on COMELEC's power to decide all questions affecting elections.[25] Respondents invoke the cases of *Ambil, Jr. v. COMELEC*,[26] *Repol v. COMELEC*,[27] *Soriano, Jr. v. COMELEC*,[28] *Blanco v. COMELEC*,[29] and *Cayetano v. COMELEC*,[30] to illustrate how judicial intervention is limited to final decisions, orders, rulings and judgments of the COMELEC En Banc.[31]

These cases are not applicable.

In *Ambil, Jr. v. COMELEC*, the losing party in the gubernatorial race of Eastern Samar filed the election protest.[32] At issue was the validity of the promulgation of a COMELEC Division resolution.[33] No motion for reconsideration was filed to raise this issue before the COMELEC En Banc. This court declared that it did not have jurisdiction and clarified:

> We have interpreted [Section 7, Article IX-A of the Constitution][34] to mean *final orders, rulings and decisions* of the COMELEC rendered in the exercise of its adjudicatory or quasi-judicial powers." This decision must be a *final decision or resolution* of the Comelec *en banc, not of a division,* certainly not an interlocutory order *of a division.* The Supreme Court has no power to review via *certiorari*, an interlocutory order or even

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22 *See Macabago v. Commission on Elections,* 440 Phil. 683, 690–692 (2002) [Per J. Callejo, Sr., En Banc].

23 *Rollo,* p. 63.

24 CONST., art. IX-C, sec. 2(3):
Sec. 2. The Commission on Elections shall exercise the following powers and functions:
. . . .
(3) Decide, except those involving the right to vote, all questions affecting elections, including determination of the number and location of polling places, appointment of election officials and inspectors, and registration of voters.

25 *Rollo*, p. 64.

26 398 Phil. 257 (2000) [Per J. Pardo, En Banc].

27 G.R. No. 161418, April 28, 2004, 428 SCRA 321 [Per J. Carpio, En Banc].

28 548 Phil. 639 (2007) [Per J. Carpio, En Banc].

29 577 Phil. 622 (2008) [Per J. Azcuna, En Banc].

30 G.R. No. 193846, April 12, 2011, 648 SCRA 561 [Per J. Nachura, En Banc].

31 *Rollo,* p. 64.

32 *Ambil, Jr. v. Commission on Elections*, 398 Phil. 257, 271 (2000) [Per J. Pardo, En Banc].

33 Id. at 271–272.

34 Sec. 7. . . . Unless otherwise provided by this Constitution or by law, any decision, order, or ruling of each Commission may be brought to the Supreme Court on *certiorari* by the aggrieved party within thirty days from receipt of a copy thereof.

> a final resolution of a Division of the Commission on Elections.[35] (Emphasis in the original, citations omitted)

However, in the next case cited by respondents, *Repol v. COMELEC*, this court provided exceptions to this general rule. *Repol* was another election protest case, involving the mayoralty elections in Pagsanghan, Samar.[36] This time, the case was brought to this court because the COMELEC First Division issued a *status quo ante* order against the Regional Trial Court executing its decision pending appeal.[37] This court's ponencia discussed the general rule enunciated in *Ambil, Jr.* that it cannot take jurisdiction to review interlocutory orders of a COMELEC Division.[38] However, consistent with *ABS-CBN Broadcasting Corporation v. COMELEC*,[39] it clarified the exception:

> This Court, however, has ruled in the past that this procedural requirement [of filing a motion for reconsideration] may be glossed over to prevent miscarriage of justice, when the issue involves the principle of social justice or the protection of labor, when the decision or resolution sought to be set aside is a nullity, or when the need for relief is extremely urgent and *certiorari* is the only adequate and speedy remedy available.[40]

Based on *ABS-CBN*, this court could review orders and decisions of COMELEC — in electoral contests — despite not being reviewed by the COMELEC En Banc, if:

1) It will prevent the miscarriage of justice;
2) The issue involves a principle of social justice;
3) The issue involves the protection of labor;
4) The decision or resolution sought to be set aside is a nullity; or
5) The need for relief is extremely urgent and certiorari is the only adequate and speedy remedy available.

Ultimately, this court took jurisdiction in *Repol* and decided that the *status quo ante* order issued by the COMELEC Division was unconstitutional.

Respondents also cite *Soriano, Jr. v. COMELEC.* This case was also an election protest case involving candidates for the city council of Muntinlupa City.[41] Petitioners in *Soriano, Jr.* filed before this court a

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35 *Ambil, Jr. v. Commission on Elections*, 398 Phil. 257, 274 (2000) [Per J. Pardo, En Banc].
36 G.R. No. 161418, April 28, 2004, 428 SCRA 321, 322 [Per J. Carpio, En Banc].
37 Id. at 325.
38 Id. at 330.
39 380 Phil. 780 (2000) [Per J. Panganiban, En Banc].
40 *Repol v. Commission on Elections*, G.R. No. 161418, April 28, 2004, 428 SCRA 321, 330 [Per J. Carpio, En Banc], *citing ABS-CBN v. Commission on Elections*, 380 Phil. 780, 789–790 (2000) [Per J. Panganiban, En Banc].
41 *Soriano, Jr. v. Commission on Elections*, 548 Phil. 639, 642 (2007) [Per J. Carpio, En Banc].

petition for certiorari against an interlocutory order of the COMELEC First Division.[42] While the petition was pending in this court, the COMELEC First Division dismissed the main election protest case.[43] *Soriano* applied the general rule that only final orders should be questioned with this court. The ponencia for this court, however, acknowledged the exceptions to the general rule in *ABS-CBN*.[44]

Blanco v. COMELEC, another case cited by respondents, was a disqualification case of one of the mayoralty candidates of Meycauayan, Bulacan.[45] The COMELEC Second Division ruled that petitioner could not qualify for the 2007 elections due to the findings in an administrative case that he engaged in vote buying in the 1995 elections.[46] No motion for reconsideration was filed before the COMELEC En Banc. This court, however, took cognizance of this case applying one of the exceptions in *ABS-CBN:* The assailed resolution was a nullity.[47]

Finally, respondents cited *Cayetano v. COMELEC*, a recent election protest case involving the mayoralty candidates of Taguig City.[48] Petitioner assailed a resolution of the COMELEC denying her motion for reconsideration to dismiss the election protest petition for lack of form and substance.[49] This court clarified the general rule and refused to take cognizance of the review of the COMELEC order. While recognizing the exceptions in *ABS-CBN*, this court ruled that these exceptions did not apply.[50]

***Ambil, Jr., Repol, Soriano, Jr., Blanco,* and *Cayetano* cited by respondents do not operate as precedents to oust this court from taking jurisdiction over this case. All these cases cited involve election protests or disqualification cases filed by the losing candidate against the winning candidate.**

In the present case, petitioners are *not* candidates seeking for public office. Their petition is filed to assert their fundamental right to expression.

Furthermore, all these cases cited by respondents pertained to COMELEC's exercise of its adjudicatory or quasi-judicial power. This case

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42 Id. at 643.
43 Id.
44 Id. at 656.
45 *Blanco v. Commission on Elections*, 577 Phil. 622, 627 (2008) [Per J. Azcuna, En Banc].
46 Id.
47 Id. at 630.
48 *Cayetano v. Commission on Elections*, G.R. No. 193846, April 12, 2011, 648 SCRA 561, 563 [Per J. Nachura, En Banc].
49 Id. at 566.
50 Id. at 571.

pertains to acts of COMELEC in the implementation of its regulatory powers. When it issued the notice and letter, the COMELEC was allegedly *enforcing* election laws.

I.B
Rule 65, grave abuse of discretion,
and limitations on political speech

The main subject of this case is an alleged constitutional violation: the infringement on speech and the "chilling effect" caused by respondent COMELEC's notice and letter.

Petitioners allege that respondents committed grave abuse of discretion amounting to lack or excess of jurisdiction in issuing the notice[51] dated February 22, 2013 and letter[52] dated February 27, 2013 ordering the removal of the tarpaulin.[53] It is their position that these infringe on their fundamental right to freedom of expression and violate the principle of separation of church and state and, thus, are unconstitutional.[54]

The jurisdiction of this court over the subject matter is determined from the allegations in the petition. Subject matter jurisdiction is defined as the authority "to hear and determine cases of the general class to which the proceedings in question belong and is conferred by the sovereign authority which organizes the court and defines its powers."[55] Definitely, the subject matter in this case is different from the cases cited by respondents.

Nothing less than the electorate's political speech will be affected by the restrictions imposed by COMELEC. Political speech is motivated by the desire to be heard and understood, to move people to action. It is concerned with the sovereign right to change the contours of power whether through the election of representatives in a republican government or the revision of the basic text of the Constitution. The zeal with which we protect this kind of speech does not depend on our evaluation of the cogency of the message. Neither do we assess whether we should protect speech based on the motives of COMELEC. We evaluate restrictions on freedom of expression from their effects. We protect both speech and medium because the quality of this freedom in practice will define the quality of deliberation in our democratic society.

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51 *Rollo*, p. 19.
52 Id. at 23.
53 Id. at 3–4.
54 Id. at 8–9.
55 *Reyes v. Diaz*, 73 Phil. 484, 486 (1941) [Per J. Moran, En Banc].

COMELEC's notice and letter affect preferred speech. Respondents' acts are capable of repetition. Under the conditions in which it was issued and in view of the novelty of this case, it could result in a "chilling effect" that would affect other citizens who want their voices heard on issues during the elections. Other citizens who wish to express their views regarding the election and other related issues may choose not to, for fear of reprisal or sanction by the COMELEC.

Direct resort to this court is allowed to avoid such proscribed conditions. Rule 65 is also the procedural platform for raising grave abuse of discretion.

Both parties point to constitutional provisions on jurisdiction. For petitioners, it referred to this court's expanded exercise of certiorari as provided by the Constitution as follows:

> Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, *and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government*.[56] (Emphasis supplied)

On the other hand, respondents relied on its constitutional mandate to decide all questions *affecting* elections. Article IX-C, Section 2(3) of the Constitution, provides:

> Sec. 2. The Commission on Elections shall exercise the following powers and functions:
>
> . . . .
>
> (3) Decide, except those involving the right to vote, all questions affecting elections, including determination of the number and location of polling places, appointment of election officials and inspectors, and registration of voters.

Respondents' reliance on this provision is misplaced.

We are not confronted here with the question of whether the COMELEC, in its exercise of jurisdiction, gravely abused it. We are confronted with the question as to whether the COMELEC had any jurisdiction at all with its acts threatening imminent criminal action effectively abridging meaningful political speech.

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[56] CONST., art. VIII, sec. 1, par. (2).

It is clear that the subject matter of the controversy is the effect of COMELEC's notice and letter on free speech. This does not fall under Article IX-C, Section 2(3) of the Constitution. The use of the word "affecting" in this provision cannot be interpreted to mean that COMELEC has the exclusive power to decide **any and all** questions that arise during elections. COMELEC's constitutional competencies during elections should not operate to divest this court of its own jurisdiction.

The more relevant provision for jurisdiction in this case is Article VIII, Section 5(1) of the Constitution. This provision provides for this court's original jurisdiction over petitions for certiorari and prohibition. This should be read alongside the expanded jurisdiction of the court in Article VIII, Section 1 of the Constitution.

Certainly, a breach of the fundamental right of expression by COMELEC is grave abuse of discretion. Thus, the constitutionality of the notice and letter coming from COMELEC is within this court's power to review.

During elections, we have the power and the duty to correct any grave abuse of discretion or any act tainted with unconstitutionality on the part of any government branch or instrumentality. This includes actions by the COMELEC. Furthermore, it is this court's constitutional mandate to protect the people against government's infringement of their fundamental rights. This constitutional mandate outweighs the jurisdiction vested with the COMELEC.

It will, thus, be manifest injustice if the court does not take jurisdiction over this case.

I.C
Hierarchy of courts

This brings us to the issue of whether petitioners violated the doctrine of hierarchy of courts in directly filing their petition before this court.

Respondents contend that petitioners' failure to file the proper suit with a lower court of concurrent jurisdiction is sufficient ground for the dismissal of their petition.[57] They add that observation of the hierarchy of courts is compulsory, citing *Heirs of Bertuldo Hinog v. Melicor*.[58] While respondents claim that while there are exceptions to the general rule on

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57 *Rollo*, p. 66.

58 495 Phil. 422, 432 (2005) [Per J. Austria-Martinez, Second Division].

hierarchy of courts, none of these are present in this case.[59]

On the other hand, petitioners cite *Fortich v. Corona*[60] on this court's discretionary power to take cognizance of a petition filed directly to it if warranted by "compelling reasons, or [by] the nature and importance of the issues raised. . . ."[61] Petitioners submit that there are "exceptional and compelling reasons to justify a direct resort [with] this Court."[62]

In *Bañez, Jr. v. Concepcion*,[63] we explained the necessity of the application of the hierarchy of courts:

> The Court must enjoin the observance of the policy on the hierarchy of courts, and now affirms that the policy is not to be ignored without serious consequences. The strictness of the policy is designed to shield the Court from having to deal with causes that are also well within the competence of the lower courts, and thus leave time to the Court to deal with the more fundamental and more essential tasks that the Constitution has assigned to it. The Court may act on petitions for the extraordinary writs of *certiorari*, prohibition and mandamus only when absolutely necessary or when serious and important reasons exist to justify an exception to the policy.[64]

In *Bañez,* we also elaborated on the reasons why lower courts are allowed to issue writs of certiorari, prohibition, and mandamus, citing *Vergara v. Suelto:*[65]

> The Supreme Court is a court of last resort, and must so remain if it is to satisfactorily perform the functions assigned to it by the fundamental charter and immemorial tradition. It cannot and should not be burdened with the task of dealing with causes in the first instance. Its original jurisdiction to issue the so-called extraordinary writs should be exercised only where absolutely necessary or where serious and important reasons exist therefore. Hence, that jurisdiction should generally be exercised relative to actions or proceedings before the Court of Appeals, or before constitutional or other tribunals, bodies or agencies whose acts for some reason or another are not controllable by the Court of Appeals. Where the issuance of an extraordinary writ is also within the competence of the Court of Appeals or a Regional Trial Court, it is in either of these courts that the specific action for the writ's procurement must be presented. This is and should continue to be the policy in this regard, a policy that courts and lawyers must strictly observe.[66] (Emphasis omitted)

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59 *Rollo*, p. 67.
60 352 Phil. 461 (1998) [Per J. Martinez, Second Division].
61 Id. at 480; *Rollo*, p. 99.
62 *Rollo*, p. 100.
63 G.R. No. 159508, August 29, 2012, 679 SCRA 237 [Per J. Bersamin, First Division].
64 Id. at 250.
65 240 Phil. 719 (1987) [Per J. Narvasa, First Division].
66 Id. at 732–733.

The doctrine that requires respect for the hierarchy of courts was created by this court to ensure that every level of the judiciary performs its designated roles in an effective and efficient manner. Trial courts do not only determine the facts from the evaluation of the evidence presented before them. They are likewise competent to determine issues of law which may include the validity of an ordinance, statute, or even an executive issuance in relation to the Constitution.[67] To effectively perform these functions, they are territorially organized into regions and then into branches. Their writs generally reach within those territorial boundaries. Necessarily, they mostly perform the all-important task of inferring the facts from the evidence as these are physically presented before them. In many instances, the facts occur within their territorial jurisdiction, which properly present the 'actual case' that makes ripe a determination of the constitutionality of such action. The consequences, of course, would be national in scope. There are, however, some cases where resort to courts at their level would not be practical considering their decisions could still be appealed before the higher courts, such as the Court of Appeals.

The Court of Appeals is primarily designed as an appellate court that reviews the determination of facts and law made by the trial courts. It is collegiate in nature. This nature ensures more standpoints in the review of the actions of the trial court. But the Court of Appeals also has original jurisdiction over most special civil actions. Unlike the trial courts, its writs can have a nationwide scope. It is competent to determine facts and, ideally, should act on constitutional issues that may not necessarily be novel unless there are factual questions to determine.

This court, on the other hand, leads the judiciary by breaking new ground or further reiterating — in the light of new circumstances or in the light of some confusions of bench or bar — existing precedents. Rather than a court of first instance or as a repetition of the actions of the Court of Appeals, this court promulgates these doctrinal devices in order that it truly performs that role.

In other words, the Supreme Court's role to interpret the Constitution and act in order to protect constitutional rights when these become exigent should not be emasculated by the doctrine in respect of the hierarchy of courts. That has never been the purpose of such doctrine.

Thus, the doctrine of hierarchy of courts is not an iron-clad rule.[68] This court has "full discretionary power to take cognizance and assume jurisdiction [over] special civil actions for *certiorari* . . . filed directly with it

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[67] *Ynot v. Intermediate Appellate Court*, 232 Phil. 615, 621 (1987) [Per J. Cruz, En Banc]. *See J.M. Tuason & Co., Inc. et al. v. Court of Appeals, et al.*, 113 Phil. 673, 681 (1961) [Per J. J.B.L. Reyes, En Banc]; *Espiritu v. Fugoso*, 81 Phil. 637, 639 (1948) [Per J. Perfecto, En Banc].

[68] *Roque, Jr., et al. v. COMELEC, et al.*, 615 Phil. 149, 201 (2009) [Per J. Velasco, Jr., En Banc].

for exceptionally compelling reasons[69] or if warranted by the nature of the issues clearly and specifically raised in the petition."[70] As correctly pointed out by petitioners,[71] we have provided exceptions to this doctrine:

First, a direct resort to this court is allowed when there are genuine issues of constitutionality that must be addressed at the most immediate time. A direct resort to this court includes availing of the remedies of certiorari and prohibition to assail the constitutionality of actions of both legislative and executive branches of the government.[72]

In this case, the assailed issuances of respondents prejudice not only petitioners' right to freedom of expression in the present case, but also of others in future similar cases. The case before this court involves an active effort on the part of the electorate to reform the political landscape. This has become a rare occasion when private citizens actively engage the public in political discourse. To quote an eminent political theorist:

> [T]he theory of freedom of expression involves more than a technique for arriving at better social judgments through democratic procedures. It comprehends a vision of society, a faith and a whole way of life. The theory grew out of an age that was awakened and invigorated by the idea of new society in which man's mind was free, his fate determined by his own powers of reason, and his prospects of creating a rational and enlightened civilization virtually unlimited. It is put forward as a prescription for attaining a creative, progressive, exciting and intellectually robust community. It contemplates a mode of life that, through encouraging toleration, skepticism, reason and initiative, will allow man to realize his full potentialities. It spurns the alternative of a society that is tyrannical, conformist, irrational and stagnant.[73]

In a democracy, the citizen's right to freely participate in the exchange of ideas in furtherance of political decision-making is recognized. It deserves the highest protection the courts may provide, as public participation in nation-building is a fundamental principle in our Constitution. As such, their right to engage in free expression of ideas must be given immediate protection by this court.

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69 Id., *citing Chavez v. National Housing Authority*, 557 Phil. 29, 72 (2007) [Per J. Velasco, Jr., En Banc].

70 Id. at 201, *citing Cabarles v. Maceda*, 545 Phil. 210, 224 (2007) [Per J. Quisumbing, Second Division].

71 The counsels for petitioners are Atty. Ralph A. Sarmiento, Atty. Raymundo T. Pandan, Jr., and Atty. Mitchelle M. Abella.

72 *See Aquino III v. COMELEC*, G.R. No. 189793, April 7, 2010, 617 SCRA 623, 637–638 [Per J. Perez, En Banc]; *Magallona v. Ermita*, G.R. No. 187167, August 16, 2011, 655 SCRA 476, 487–488 [Per J. Carpio, En Banc].

73 Thomas I. Emerson, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT, Faculty Scholarship Series, Paper 2796 (1963), *cited in Gonzales, et al. v. COMELEC*, 137 Phil. 471, 493–494 (1969) [Per J. Fernando, En Banc].

A second exception is when the issues involved are of transcendental importance.[74] In these cases, the imminence and clarity of the threat to fundamental constitutional rights outweigh the necessity for prudence. The doctrine relating to constitutional issues of transcendental importance prevents courts from the paralysis of procedural niceties when clearly faced with the need for substantial protection.

In the case before this court, there is a clear threat to the paramount right of freedom of speech and freedom of expression which warrants invocation of relief from this court. The principles laid down in this decision will likely influence the discourse of freedom of speech in the future, especially in the context of elections. The right to suffrage not only includes the right to vote for one's chosen candidate, but also the right to vocalize that choice to the public in general, in the hope of influencing their votes. It may be said that in an election year, the right to vote necessarily includes the right to free speech and expression. The protection of these fundamental constitutional rights, therefore, allows for the immediate resort to this court.

Third, cases of first impression[75] warrant a direct resort to this court. In cases of first impression, no jurisprudence yet exists that will guide the lower courts on this matter. In *Government of the United States v. Purganan*,[76] this court took cognizance of the case as a matter of first impression that may guide the lower courts:

> In the interest of justice and to settle once and for all the important issue of bail in extradition proceedings, we deem it best to take cognizance of the present case. Such proceedings constitute a matter of first impression over which there is, as yet, no local jurisprudence to guide lower courts.[77]

This court finds that this is indeed a case of first impression involving as it does the issue of whether the right of suffrage includes the right of freedom of expression. This is a question which this court has yet to provide substantial answers to, through jurisprudence. Thus, direct resort to this court is allowed.

Fourth, the constitutional issues raised are better decided by this court. In *Drilon v. Lim*,[78] this court held that:

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74 *See Initiatives for Dialogue and Empowerment through Alternative Legal Services, Inc. (IDEALS, INC.) v. Power Sector Assets and Liabilities Management Corporation (PSALM)*, G.R. No. 192088, October 9, 2012, 682 SCRA 602, 633 [Per J. Villarama, Jr., En Banc]; *Agan, Jr. v. PIATCO*, 450 Phil. 744, 805 (2003) [Per J. Puno, En Banc].

75 *See Soriano v. Laguardia*, 605 Phil. 43, 99 (2009) [Per J. Velasco, Jr., En Banc]; *See also Mallion v. Alcantara*, 536 Phil. 1049, 1053 (2006) [Per J. Azcuna, Second Division].

76 438 Phil. 417 (2002) [Per J. Panganiban, En Banc].

77 Id. at 439.

78 G.R. No. 112497, August 4, 1994, 235 SCRA 135 [Per J. Cruz, En Banc].

> . . . it will be prudent for such courts, if only out of a becoming modesty, to defer to the higher judgment of this Court in the consideration of its validity, which is better determined after a thorough deliberation by a collegiate body and with the concurrence of the majority of those who participated in its discussion.[79] (Citation omitted)

In this case, it is this court, with its constitutionally enshrined judicial power, that can rule with finality on whether COMELEC committed grave abuse of discretion or performed acts contrary to the Constitution through the assailed issuances.

Fifth, the time element presented in this case cannot be ignored. This case was filed during the 2013 election period. Although the elections have already been concluded, future cases may be filed that necessitate urgency in its resolution. Exigency in certain situations would qualify as an exception for direct resort to this court.

Sixth, the filed petition reviews the act of a constitutional organ. COMELEC is a constitutional body. In *Albano v. Arranz*,[80] cited by petitioners, this court held that "[i]t is easy to realize the chaos that would ensue if the Court of First Instance of each and every province were [to] arrogate itself the power to disregard, suspend, or contradict any order of the Commission on Elections: that constitutional body would be speedily reduced to impotence."[81]

In this case, if petitioners sought to annul the actions of COMELEC through pursuing remedies with the lower courts, any ruling on their part would not have been binding for other citizens whom respondents may place in the same situation. Besides, this court affords great respect to the Constitution and the powers and duties imposed upon COMELEC. Hence, a ruling by this court would be in the best interest of respondents, in order that their actions may be guided accordingly in the future.

Seventh, petitioners rightly claim that they had no other plain, speedy, and adequate remedy in the ordinary course of law that could free them from the injurious effects of respondents' acts in violation of their right to freedom of expression.

In this case, the repercussions of the assailed issuances on this basic right constitute an exceptionally compelling reason to justify the direct resort

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79 Id. at 140.
80 114 Phil. 318 (1962) [Per J. J.B.L. Reyes, En Banc].
81 Id. at 322.

to this court. The lack of other sufficient remedies in the course of law alone is sufficient ground to allow direct resort to this court.

Eighth, the petition includes questions that are "dictated by public welfare and the advancement of public policy, or demanded by the broader interest of justice, or the orders complained of were found to be patent nullities, or the appeal was considered as clearly an inappropriate remedy."[82] In the past, questions similar to these which this court ruled on immediately despite the doctrine of hierarchy of courts included citizens' right to bear arms,[83] government contracts involving modernization of voters' registration lists,[84] and the status and existence of a public office.[85]

This case also poses a question of similar, if not greater import. Hence, a direct action to this court is permitted.

It is not, however, necessary that all of these exceptions must occur at the same time to justify a direct resort to this court. While generally, the hierarchy of courts is respected, the present case falls under the recognized exceptions and, as such, may be resolved by this court directly.

I.D
The concept of a political question

Respondents argue further that the size limitation and its reasonableness is a political question, hence not within the ambit of this court's power of review. They cite Justice Vitug's separate opinion in *Osmeña v. COMELEC*[86] to support their position:

> It might be worth mentioning that Section 26, Article II, of the Constitution also states that the "State shall guarantee equal access to opportunities for public service, and prohibit political dynasties as may be defined by law." I see neither Article IX (C)(4) nor Section 26, Article II, of the Constitution to be all that adversarial or irreconcilably inconsistent with the right of free expression. In any event, the latter, being one of general application, must yield to the specific demands of the Constitution. The freedom of expression concededly holds, it is true, a vantage point in hierarchy of constitutionally-enshrined rights but, like all fundamental rights, it is not without limitations.
>
> The case is not about a fight between the "rich" and the "poor" or

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82 *Chong v. Dela Cruz*, 610 Phil. 725, 728 (2009) [Per J. Nachura, Third Division], *citing Gelindon v. De la Rama*, G.R. No. 105072, December 9, 1993, 228 SCRA 322, 326–327 [Per J. Vitug, Third Division].

83 *Chavez v. Romulo*, G.R. No. 157036, June 9, 2004, 431 SCRA 534 [Per J. Sandoval-Gutierrez, En Banc].

84 *COMELEC v. Quijano-Padilla*, 438 Phil. 72 (2002) [Per J. Sandoval-Gutierrez, En Banc].

85 *Buklod ng Kawaning EIIB v. Zamora*, 413 Phil. 281 (2001) [Per J. Sandoval-Gutierrez, En Banc].

86 351 Phil. 692 (1998) [Per J. Mendoza, En Banc].

> between the "powerful" and the "weak" in our society but it is to me a genuine attempt on the part of Congress and the Commission on Elections to ensure that all candidates are given an equal chance to media coverage and thereby be equally perceived as giving real life to the candidates' right of free expression rather than being viewed as an undue restriction of that freedom. The wisdom in the enactment of the law, i.e., that which the legislature deems to be best in giving life to the Constitutional mandate, is not for the Court to question; it is a matter that lies beyond the normal prerogatives of the Court to pass upon.[87]

This separate opinion is cogent for the purpose it was said. But it is not in point in this case.

The present petition does not involve a dispute between the rich and poor, or the powerful and weak, on their equal opportunities for media coverage of candidates and their right to freedom of expression. This case concerns the right of petitioners, who are non-candidates, to post the tarpaulin in their private property, as an exercise of their right of free expression. Despite the invocation of the political question doctrine by respondents, this court is not proscribed from deciding on the merits of this case.

In *Tañada v. Cuenco*,[88] this court previously elaborated on the concept of what constitutes a political question:

> What is generally meant, when it is said that a question is political, and not judicial, is that it is a matter which is to be exercised by the people in their primary political capacity, or that it has been specifically delegated to some other department or particular officer of the government, with discretionary power to act.[89] (Emphasis omitted)

It is not for this court to rehearse and re-enact political debates on what the text of the law should be. In political forums, particularly the legislature, the creation of the text of the law is based on a general discussion of factual circumstances, broadly construed in order to allow for general application by the executive branch. Thus, the creation of the law is not limited by particular and specific facts that affect the rights of certain individuals, *per se*.

Courts, on the other hand, rule on adversarial positions based on existing facts established on a specific case-to-case basis, where parties affected by the legal provision seek the courts' understanding of the law.

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87 Id. at 727–728, separate opinion of J. Vitug.
88 103 Phil. 1051 (1957) [Per J. Concepcion, En Banc].
89 Id. at 1067.

The complementary nature of the political and judicial branches of government is essential in order to ensure that the rights of the general public are upheld at all times. In order to preserve this balance, branches of government must afford due respect and deference for the duties and functions constitutionally delegated to the other. Courts cannot rush to invalidate a law or rule. Prudence dictates that we are careful not to veto political acts unless we can craft doctrine narrowly tailored to the circumstances of the case.

The case before this court does not call for the exercise of prudence or modesty. There is no political question. It can be acted upon by this court through the expanded jurisdiction granted to this court through Article VIII, Section 1 of the Constitution.

A political question arises in constitutional issues relating to the powers or competence of different agencies and departments of the executive or those of the legislature. The political question doctrine is used as a defense when the petition asks this court to nullify certain acts that are exclusively within the domain of their respective competencies, as provided by the Constitution or the law. In such situation, presumptively, this court should act with deference. It will decline to void an act unless the exercise of that power was so capricious and arbitrary so as to amount to grave abuse of discretion.

The concept of a political question, however, never precludes judicial review when the act of a constitutional organ infringes upon a fundamental individual or collective right. Even assuming arguendo that the COMELEC did have the discretion to choose the manner of regulation of the tarpaulin in question, it cannot do so by abridging the fundamental right to expression.

Marcos v. Manglapus[90] limited the use of the political question doctrine:

> When political questions are involved, the Constitution limits the determination to whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the official whose action is being questioned. If grave abuse is not established, the Court will not substitute its judgment for that of the official concerned and decide a matter which by its nature or by law is for the latter alone to decide.[91]

How this court has chosen to address the political question doctrine has undergone an evolution since the time that it had been first invoked in *Marcos v. Manglapus*. Increasingly, this court has taken the historical and

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90 258 Phil. 479 (1989) [Per J. Cortes, En Banc].

91 Id. at 506–507.

social context of the case and the relevance of pronouncements of carefully and narrowly tailored constitutional doctrines. This trend was followed in cases such as *Daza v. Singson*[92] and *Coseteng v. Mitra Jr.*[93]

Daza and *Coseteng* involved a question as to the application of Article VI, Section 18 of the 1987 Constitution involving the removal of petitioners from the Commission on Appointments. In times past, this would have involved a quintessentially political question as it related to the dominance of political parties in Congress. However, in these cases, this court exercised its power of judicial review noting that the requirement of interpreting the constitutional provision involved the legality and not the wisdom of a manner by which a constitutional duty or power was exercised. This approach was again reiterated in *Defensor Santiago v. Guingona, Jr.*[94]

In *Integrated Bar of the Philippines v. Zamora*,[95] this court declared again that the possible existence of a political question did not bar an examination of whether the exercise of discretion was done with grave abuse of discretion. In that case, this court ruled on the question of whether there was grave abuse of discretion in the President's use of his power to call out the armed forces to prevent and suppress lawless violence.

In *Estrada v. Desierto*,[96] this court ruled that the legal question as to whether a former President resigned was not a political question even if the consequences would be to ascertain the political legitimacy of a successor President.

Many constitutional cases arise from political crises. The actors in such crises may use the resolution of constitutional issues as leverage. But the expanded jurisdiction of this court now mandates a duty for it to exercise its power of judicial review expanding on principles that may avert catastrophe or resolve social conflict.

This court's understanding of the political question has not been static or unbending. In *Llamas v. Executive Secretary Oscar Orbos*,[97] this court held:

> While it is true that courts cannot inquire into the manner in which the President's discretionary powers are exercised or into the wisdom for its exercise, it is also a settled rule that when the issue involved concerns the validity of such discretionary powers or whether said powers are

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92 259 Phil. 980 (1989) [Per J. Cruz, En Banc].
93 G.R. No. 86649, July 12, 1990, 187 SCRA 377 [Per J. Griño-Aquino, En Banc].
94 359 Phil. 276 (1998) [Per J. Panganiban, En Banc].
95 392 Phil. 618 (2000) [Per J. Kapunan, En Banc].
96 406 Phil. 1 (2001) [Per J. Puno, En Banc].
97 279 Phil. 920 (1991) [Per J. Paras, En Banc].

> within the limits prescribed by the Constitution, We will not decline to exercise our power of judicial review. And such review does not constitute a modification or correction of the act of the President, nor does it constitute interference with the functions of the President.[98]

The concept of judicial power in relation to the concept of the political question was discussed most extensively in *Francisco v. HRET*.[99] In this case, the House of Representatives argued that the question of the validity of the second impeachment complaint that was filed against former Chief Justice Hilario Davide was a political question beyond the ambit of this court. Former Chief Justice Reynato Puno elaborated on this concept in his concurring and dissenting opinion:

> To be sure, the force to impugn the jurisdiction of this Court becomes more feeble in light of the new Constitution which expanded the definition of judicial power as including "the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government." As well observed by retired Justice Isagani Cruz, this expanded definition of judicial power considerably constricted the scope of political question. He opined that the language luminously suggests that this duty (and power) is available even against the executive and legislative departments including the President and the Congress, in the exercise of their *discretionary* powers.[100] (Emphasis in the original, citations omitted)

Francisco also provides the cases which show the evolution of the political question, as applied in the following cases:

> In *Marcos v. Manglapus*, this Court, speaking through Madame Justice Irene Cortes, held:
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> > The present Constitution limits resort to the political question doctrine and broadens the scope of judicial inquiry into areas which the Court, under previous constitutions, would have normally left to the political departments to decide. x x x
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> In *Bengzon v. Senate Blue Ribbon Committee*, through Justice Teodoro Padilla, this Court declared:
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> > The "allocation of constitutional boundaries" is a task that this Court must perform under the Constitution. Moreover, as held in a recent case, "*(t)he political question doctrine neither interposes an obstacle to judicial determination of the rival claims. The jurisdiction to*

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98 Id. at 934.
99 460 Phil. 830 (2003) [Per J. Carpio Morales, En Banc].
100 Id. at 1103, concurring and dissenting opinion of J. Puno.

> **delimit constitutional boundaries has been given to this Court. It cannot abdicate that obligation** mandated by the 1987 Constitution, although said provision by no means does away with the applicability of the principle in appropriate cases." (Emphasis and italics supplied)

And in *Daza v. Singson*, speaking through Justice Isagani Cruz, this Court ruled:

> In the case now before us, the jurisdictional objection becomes even less tenable and decisive. *The reason is that, even if we were to assume that the issue presented before us was political in nature, we would still not be precluded from resolving it under the* **expanded** *jurisdiction conferred upon us that now covers, in proper cases, even the political question.* x x x (Emphasis and italics supplied.)
>
> . . . .
>
> In our jurisdiction, the determination of whether an issue involves a truly political and non-justiciable question lies in the answer to the question of whether there are constitutionally imposed limits on powers or functions conferred upon political bodies. If there are, then our courts are duty-bound to examine whether the branch or instrumentality of the government properly acted within such limits.[101] (Citations omitted)

As stated in *Francisco*, a political question will not be considered justiciable if there are no constitutionally imposed limits on powers or functions conferred upon political bodies. Hence, the existence of constitutionally imposed limits justifies subjecting the official actions of the body to the scrutiny and review of this court.

In this case, the Bill of Rights gives the utmost deference to the right to free speech. Any instance that this right may be abridged demands judicial scrutiny. It does not fall squarely into any doubt that a political question brings.

I.E
Exhaustion of administrative remedies

Respondents allege that petitioners violated the principle of exhaustion of administrative remedies. Respondents insist that petitioners should have first brought the matter to the COMELEC En Banc or any of its divisions.[102]

Respondents point out that petitioners failed to comply with the

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[101] Id. at 910–912.
[102] *Rollo*, p. 37.

requirement in Rule 65 that "there is no appeal, or any plain, speedy, and adequate remedy in the ordinary course of law."[103] They add that the proper venue to assail the validity of the assailed issuances was in the course of an administrative hearing to be conducted by COMELEC.[104] In the event that an election offense is filed against petitioners for posting the tarpaulin, they claim that petitioners should resort to the remedies prescribed in Rule 34 of the COMELEC Rules of Procedure.[105]

The argument on exhaustion of administrative remedies is not proper in this case.

Despite the alleged non-exhaustion of administrative remedies, it is clear that the controversy is already ripe for adjudication. Ripeness is the "prerequisite that something had by then been accomplished or performed by either branch [or in this case, organ of government] before a court may come into the picture."[106]

Petitioners' exercise of their right to speech, given the message and their medium, had understandable relevance especially during the elections. COMELEC's letter threatening the filing of the election offense against petitioners is already an actionable infringement of this right. The impending threat of criminal litigation is enough to curtail petitioners' speech.

In the context of this case, exhaustion of their administrative remedies as COMELEC suggested in their pleadings prolongs the violation of their freedom of speech.

Political speech enjoys preferred protection within our constitutional order. In *Chavez v. Gonzales*,[107] Justice Carpio in a separate opinion emphasized: "[i]f ever there is a hierarchy of protected expressions, political expression would occupy the highest rank, and among different kinds of political expression, the subject of fair and honest elections would be at the top."[108] Sovereignty resides in the people.[109] Political speech is a direct exercise of the sovereignty. The principle of exhaustion of administrative remedies yields in order to protect this fundamental right.

Even assuming that the principle of exhaustion of administrative remedies is applicable, the current controversy is within the exceptions to

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103 RULES OF COURT, Rule 65, sec. 1.
104 *Rollo*, p. 65.
105 Id.
106 *Tan v. Macapagal*, 150 Phil. 778, 784 (1972) [Per J. Fernando, En Banc].
107 569 Phil. 155 (2008) [Per C.J. Puno, En Banc].
108 Id. at 245, separate concurring opinion of J. Carpio.
109 CONST., Preamble.

the principle. In *Chua v. Ang*,[110] this court held:

> On the other hand, prior exhaustion of administrative remedies may be dispensed with and judicial action may be validly resorted to immediately: (a) when there is a violation of due process; (b) *when the issue involved is purely a legal question*; (c) when the administrative action is patently illegal amounting to lack or excess of jurisdiction; (d) when there is estoppel on the part of the administrative agency concerned; (e) when there is irreparable injury; (f) when the respondent is a department secretary whose acts as an alter ego of the President bear the implied and assumed approval of the latter; (g) *when to require exhaustion of administrative remedies would be unreasonable*; (h) when it would amount to a nullification of a claim; (i) when the subject matter is a private land in land case proceedings; (j) when the rule does not provide a plain, speedy and adequate remedy; or (k) *when there are circumstances indicating the urgency of judicial intervention*."[111] (Emphasis supplied, citation omitted)

The circumstances emphasized are squarely applicable with the present case. First, petitioners allege that the assailed issuances violated their right to freedom of expression and the principle of separation of church and state. This is a purely legal question. Second, the circumstances of the present case indicate the urgency of judicial intervention considering the issue then on the RH Law as well as the upcoming elections. Thus, to require the exhaustion of administrative remedies in this case would be unreasonable.

Time and again, we have held that this court "has the power to relax or suspend the rules or to except a case from their operation when compelling reasons so warrant, or when the purpose of justice requires it, [and when] [w]hat constitutes [as] good and sufficient cause that will merit suspension of the rules is discretionary upon the court".[112] Certainly, this case of first impression where COMELEC has threatened to prosecute private parties who seek to participate in the elections by calling attention to issues they want debated by the public in the manner they feel would be effective is one of those cases.

II

SUBSTANTIVE ISSUES

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110 614 Phil. 416 (2009) [Per J. Brion, Second Division].

111 Id. at 425–426.

112 *Tiangco v. Land Bank of the Philippines*, G.R. No. 153998, October 6, 2010, 632 SCRA 256, 271 [Per J. Peralta, Second Division], *quoting Heirs of Villagracia v. Equitable Banking Corporation*, 573 Phil. 212, 221 (2008) [Per J. Nachura, Third Division]: "The rules of procedure ought not to be applied in a very rigid and technical sense, for they have been adopted to help secure, not override, substantial justice. Judicial action must be guided by the principle that a party-litigant should be given the fullest opportunity to establish the merits of his complaint or defense rather than for him to lose life, liberty, honor or property on technicalities. When a rigid application of the rules tends to frustrate rather than promote substantial justice, this Court is empowered to suspend their operation."

II.A
COMELEC had no legal basis to regulate expressions made by private citizens

Respondents cite the Constitution, laws, and jurisprudence to support their position that they had the power to regulate the tarpaulin.[113] However, all of these provisions pertain to candidates and political parties. Petitioners are not candidates. Neither do they belong to any political party. COMELEC does not have the authority to regulate the enjoyment of the preferred right to freedom of expression exercised by a non-candidate in this case.

II.A.1

First, respondents cite Article IX-C, Section 4 of the Constitution, which provides:

> Section 4. 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.[114] (Emphasis supplied)

Sanidad v. COMELEC[115] involved the rules promulgated by COMELEC during the plebiscite for the creation of the Cordillera Autonomous Region.[116] Columnist Pablito V. Sanidad questioned the provision prohibiting journalists from covering plebiscite issues on the day before and on plebiscite day.[117] Sanidad argued that the prohibition was a

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113 *Rollo*, pp. 70–71, 74, and 82–83.

114 *See* Rep. Act No. 9006 (2001), sec. 2.
Sec. 2. Declaration of Principles. - The State shall, during the election period, supervise or regulate the enjoyment or utilization of all franchises or permits for the operation of media of communication or information to guarantee or ensure equal opportunity for public service, including access to media time and space, and the equitable right to reply, for public information campaigns and fora among candidates and assure free, orderly, honest[,] peaceful and credible elections.
The State shall ensure that bona fide candidates for any public office shall be free from any form of harassment and discrimination.

115 260 Phil. 565 (1990) [Per J. Medialdea, En Banc].

116 Id. at 567.

117 Id.

violation of the "constitutional guarantees of the freedom of expression and of the press. . . ."[118] We held that the "evil sought to be prevented by this provision is the possibility that a franchise holder may favor or give any undue advantage to a candidate in terms of advertising space or radio or television time."[119] This court found that "[m]edia practitioners exercising their freedom of expression during plebiscite periods are neither the franchise holders nor the candidates[,]"[120] thus, their right to expression during this period may not be regulated by COMELEC.[121]

Similar to the media, petitioners in the case at bar are neither franchise holders nor candidates.

II.A.2

Respondents likewise cite Article IX-C, Section 2(7) of the Constitution as follows:[122]

> Sec. 2. The Commission on Elections shall exercise the following powers and functions:
>
> . . . .
>
> (7) 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 candidates.* (Emphasis supplied)

Based on the enumeration made on acts that may be penalized, it will be inferred that this provision only affects candidates.

Petitioners assail the "Notice to Remove Campaign Materials" issued by COMELEC. This was followed by the assailed letter regarding the "election propaganda material posted on the church vicinity promoting for or against the candidates and party-list groups. . . ."[123] Section 9 of the Fair Election Act[124] on the posting of campaign materials only mentions "parties" and "candidates":

> Sec. 9. Posting of Campaign Materials. - The COMELEC may authorize *political parties and party-list group*s to erect common

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118 Id.
119 Id. at 570.
120 Id.
121 Id.
122 *Rollo*, p. 84.
123 Id. at 23.
124 Rep. Act No. 9006 (2001).

> poster areas for their candidates in not more than ten (10) public places such as plazas, markets, barangay centers and the like, wherein *candidates can post, display or exhibit election propaganda*: Provided, That the size of the poster areas shall not exceed twelve (12) by sixteen (16) feet or its equivalent.
>
> Independent *candidates* with no political parties may likewise be authorized to erect common poster areas in not more than ten (10) public places, the size of which shall not exceed four (4) by six (6) feet or its equivalent.
>
> *Candidates may post any lawful propaganda* material in private places with the consent of the owner thereof, and in public places or property which shall be allocated equitably and impartially among the candidates. (Emphasis supplied)

Similarly, Section 17 of COMELEC Resolution No. 9615, the rules and regulations implementing the Fair Election Act, provides as follows:

> SECTION 17. Posting of Campaign Materials. - *Parties and candidates* may post any lawful campaign material in:
>
> a. Authorized common poster areas in public places subject to the requirements and/or limitations set forth in the next following section; and
>
> b. Private places provided it has the consent of the owner thereof.
>
> The posting of campaign materials in public places outside of the designated common poster areas and those enumerated under Section 7 (g) of these Rules and the like is prohibited. Persons posting the same shall be liable together with the candidates and other persons who caused the posting. It will be presumed that the candidates and parties caused the posting of campaign materials outside the common poster areas if they do not remove the same within three (3) days from notice which shall be issued by the Election Officer of the city or municipality where the unlawful election propaganda are posted or displayed.
>
> Members of the PNP and other law enforcement agencies called upon by the Election Officer or other officials of the COMELEC shall apprehend the violators caught in the act, and file the appropriate charges against them. (Emphasis supplied)

Respondents considered the tarpaulin as a campaign material in their issuances. The above provisions regulating the posting of campaign materials only apply to candidates and political parties, and petitioners are neither of the two.

Section 3 of Republic Act No. 9006 on "Lawful Election Propaganda" also states that these are "allowed for all registered political parties, national,

regional, sectoral parties or organizations participating under the party-list elections and for all bona fide candidates seeking national and local elective positions subject to the limitation on authorized expenses of candidates and political parties. . . ." Section 6 of COMELEC Resolution No. 9615 provides for a similar wording.

These provisions show that election propaganda refers to matter done by or on behalf of and in coordination with candidates and political parties. Some level of coordination with the candidates and political parties for whom the election propaganda are released would ensure that these candidates and political parties maintain within the authorized expenses limitation.

The tarpaulin was not paid for by any candidate or political party.[125] There was no allegation that petitioners coordinated with any of the persons named in the tarpaulin regarding its posting. On the other hand, petitioners posted the tarpaulin as part of their advocacy against the RH Law.

Respondents also cite *National Press Club v. COMELEC*[126] in arguing that its regulatory power under the Constitution, to some extent, set a limit on the right to free speech during election period.[127]

National Press Club involved the prohibition on the sale and donation of space and time for political advertisements, limiting political advertisements to COMELEC-designated space and time. This case was brought by representatives of mass media and two candidates for office in the 1992 elections. They argued that the prohibition on the sale and donation of space and time for political advertisements is tantamount to censorship, which necessarily infringes on the freedom of speech of the candidates.[128]

This court upheld the constitutionality of the COMELEC prohibition in *National Press Club.* ***However, this case does not apply as most of the petitioners were electoral candidates, unlike petitioners in the instant case.*** Moreover, the subject matter of *National Press Club*, Section 11(b) of Republic Act No. 6646,[129] only refers to a particular kind of media such as newspapers, radio broadcasting, or television.[130] Justice Feliciano

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125 *Rollo*, p. 106.
126 G.R. No. 102653, March 5, 1992, 207 SCRA 1 [Per J. Feliciano, En Banc].
127 *Rollo*, p. 82.
128 *National Press Club v. COMELEC*, G.R. No. 102653, March 5, 1992, 207 SCRA 1, 6 [Per J. Feliciano, En Banc].
129 The Electoral Reforms Law of 1987.
130 Rep. Act No. 6646 (1988), sec. 11(b).
Sec. 11 Prohibited Forms of Election Propaganda. - In addition to the forms of election propaganda prohibited under Section 85 of Batas Pambansa Blg. 881, it shall be unlawful:
. . . .

emphasized that the provision did not infringe upon the right of reporters or broadcasters to air their commentaries and opinions regarding the candidates, their qualifications, and program for government. Compared to *Sanidad* wherein the columnists lost their ability to give their commentary on the issues involving the plebiscite, *National Press Club* does not involve the same infringement.

In the case at bar, petitioners lost their ability to give a commentary on the candidates for the 2013 national elections because of the COMELEC notice and letter. It was not merely a regulation on the campaigns of candidates vying for public office. Thus, *National Press Club* does not apply to this case.

Finally, Section 79 of Batas Pambansa Blg. 881, otherwise known as the Omnibus Election Code, defines an "election campaign" as follows:

> . . . .
>
> (b) The term "**election campaign**" or "**partisan political activity**" refers to *an act designed to promote the election or defeat of a particular candidate or candidates to a public office* which 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
>
> (5) Directly or indirectly soliciting votes, pledges or support for or against a candidate.
>
> The foregoing enumerated acts if 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

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b) for any newspaper, radio broadcasting or television station, other mass media, or any person making use of the mass media to sell or to give free of charge print space or air time for campaign or other political purposes except to the Commission as provided under Sections 90 and 92 of Batas Pambansa Blg. 881. Any mass media columnist, commentator, announcer or personality who is a candidate for any elective public office shall take a leave of absence from his work as such during the campaign period.

> parties shall not be considered as election campaign or partisan election activity.
>
> *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 *shall not be construed as part of any election campaign or partisan political activity contemplated under this Article*. (Emphasis supplied)

True, there is no mention whether election campaign is limited only to the candidates and political parties themselves. The focus of the definition is that the act must be "designed to promote the election or defeat of a particular candidate or candidates to a public office."

In this case, the tarpaulin contains speech on a matter of public concern, that is, a statement of either appreciation or criticism on votes made in the passing of the RH law. Thus, petitioners invoke their right to freedom of expression.

II.B
The violation of the constitutional right to freedom of speech and expression

Petitioners contend that the assailed notice and letter for the removal of the tarpaulin violate their fundamental right to freedom of expression.

On the other hand, respondents contend that the tarpaulin is an election propaganda subject to their regulation pursuant to their mandate under Article IX-C, Section 4 of the Constitution. Thus, the assailed notice and letter ordering its removal for being oversized are valid and constitutional.[131]

II.B.1

Fundamental to the consideration of this issue is Article III, Section 4 of the Constitution:

> 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.[132]

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131 *Rollo*, pp. 40 and 47.

132 This right is also found under Article 19 of The Universal Declaration of Human Rights in that "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." The Universal Declaration of Human Rights was adopted by the UN

No law. . .

While it is true that the present petition assails not a law but an opinion by the COMELEC Law Department, this court has applied Article III, Section 4 of the Constitution even to governmental acts.

In *Primicias v. Fugoso,*[133] respondent Mayor applied by analogy Section 1119 of the Revised Ordinances of 1927 of Manila for the public meeting and assembly organized by petitioner Primicias.[134] Section 1119 requires a Mayor's permit for the use of streets and public places for purposes such as athletic games, sports, or celebration of national holidays.[135] What was questioned was not a law but the Mayor's refusal to issue a permit for the holding of petitioner's public meeting.[136] Nevertheless, this court recognized the constitutional right to freedom of speech, to peaceful assembly and to petition for redress of grievances, albeit not absolute,[137] and the petition for mandamus to compel respondent Mayor to issue the permit was granted.[138]

In *ABS-CBN v. COMELEC,* what was assailed was not a law but COMELEC En Banc Resolution No. 98-1419 where the COMELEC resolved to approve the issuance of a restraining order to stop ABS-CBN from conducting exit surveys.[139] The right to freedom of expression was similarly upheld in this case and, consequently, the assailed resolution was nullified and set aside.[140]

. . . shall be passed abridging. . .

All regulations will have an impact directly or indirectly on expression. The prohibition against the abridgment of speech should not mean an absolute prohibition against regulation. The primary and incidental burden on speech must be weighed against a compelling state interest clearly allowed in the Constitution. The test depends on the relevant theory of speech implicit in the kind of society framed by our Constitution.

. . . of expression. . .

General Assembly on December 10, 1948. Available at <http://www.un.org/en/documents/udhr/index.shtml> (visited March 25, 2013).

133 80 Phil. 75 (1948) [Per J. Feria, En Banc].

134 Id. at 76–77.

135 Id.

136 Id. at 75.

137 Id.

138 Id. at 88.

139 *ABS-CBN v. Commission on Elections,* 380 Phil. 780, 787 (2000) [Per J. Panganiban, En Banc].

140 Id. at 800.

Our Constitution has also explicitly included the freedom of expression, separate and in addition to the freedom of speech and of the press provided in the US Constitution. The word "expression" was added in the 1987 Constitution by Commissioner Brocka for having a wider scope:

> MR. BROCKA: This is a very minor amendment, Mr. Presiding Officer. On Section 9, page 2, line 29, it says: "No law shall be passed abridging the freedom of speech." I would like to recommend to the Committee the change of the word "speech" to EXPRESSION; or if not, add the words AND EXPRESSION after the word "speech," because it is more expansive, it has a wider scope, and it would refer to means of expression other than speech.
>
> THE PRESIDING OFFICER (Mr. Bengzon): What does the Committee say?
>
> FR. BERNAS: "Expression" is more broad than speech. We accept it.
>
> MR. BROCKA: Thank you.
>
> THE PRESIDING OFFICER (Mr. Bengzon): Is it accepted?
>
> FR. BERNAS: Yes.
>
> THE PRESIDING OFFICER (Mr. Bengzon): Is there any objection? (*Silence*) The Chair hears none; the amendment is approved.
>
> FR. BERNAS: So, that provision will now read: "No law shall be passed abridging the freedom of speech, expression or of the press . . . ."[141]

Speech may be said to be inextricably linked to freedom itself as "[t]he right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."[142]

II.B.2

Communication is an essential outcome of protected speech.[143]

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141 Record of the 1986 Constitutional Commission, R.C.C. No. 33, Vol. 1, July 18, 1986.

142 *Freedom of Speech and Expression*, 116 HARV. L. REV. 272, 277 (2002), *quoting* Justice Kennedy in *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1403 (2002).

143 There are, of course, theories of the fundamental right to expression that finds the individual's right to express as also part of the core value protected by this provision. *See for instance* Daniel Mark Cohen, *Unhappy Anniversary: Thirty Years since Miller v. California: The Legacy of the Supreme Court's Misjudgment on Obcenity Part*, 15 ST. THOMAS L. REV. 545, 638 (2003). This provides that "[a]lthough speech is a form of communication, communication does not necessarily constitute speech." The article states: "A man may communicate (1) the conceptions of his mind through words,

Communication exists when "(1) a speaker, seeking to signal others, uses conventional actions because he or she reasonably believes that such actions will be taken by the audience in the manner intended; and (2) the audience so takes the actions."[144] "[I]n communicative action[,] the hearer may respond to the claims by . . . either accepting the speech act's claims or opposing them with criticism or requests for justification."[145]

Speech is not limited to vocal communication. "[C]onduct is treated as a form of speech sometimes referred to as 'symbolic speech[,]'"[146] such that "'when 'speech' and 'nonspeech' elements are combined in the same course of conduct,' the 'communicative element' of the conduct may be 'sufficient to bring into play the [right to freedom of expression].'"[147]

The right to freedom of expression, thus, applies to the entire continuum of speech from utterances made to conduct enacted, and even to inaction itself as a symbolic manner of communication.

In *Ebralinag v. The Division Superintendent of Schools of Cebu*,[148] students who were members of the religious sect Jehovah's Witnesses were to be expelled from school for refusing to salute the flag, sing the national anthem, and recite the patriotic pledge.[149] In his concurring opinion, Justice Cruz discussed how the salute is a symbolic manner of communication and a valid form of expression.[150] He adds that freedom of speech includes even the right to be silent:

> Freedom of speech includes the right to be silent. Aptly has it been said that the Bill of Rights that guarantees to the individual the liberty to utter what is in his mind also guarantees to him the liberty not to utter what is not in his mind. The salute is a symbolic manner of communication that conveys its message as clearly as the written or spoken word. As a valid form of expression, it cannot be compelled any more than it can be prohibited in the face of valid religious objections like those raised in this petition. To impose it on the petitioners is to deny them the right not to speak when their religion bids them to be silent. This coercion of conscience has no place in the free society.
>
> The democratic system provides for the accommodation of diverse ideas, including the unconventional and even the bizarre or eccentric. The

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(2) his emotions through facial expressions and body posture, and (3) the perception of his senses through artistic renditions or photographs. Words, facial expressions, and pictures are all communicative. But only words, as the vehicle upon which ideas are vitally dependent for their successful conveyance, are comprehended in the word 'speech'."

144 Heidi M. Hurd, *Sovereignty in Silence*, 99 YALE L. J. 945, 954 (1990).

145 Hugh Baxter, *System and Lifeworld in Habermas's Theory of Law*, 23 CARDOZO L. REV. 473, 499 (2002).

146 Joshua Waldman, *Symbolic Speech and Social Meaning*, 97 COLUM. L. REV. 1844, 1847 (1997).

147 Id., *citing US v. O'Brien*, 391 U.S. 367, 376 (1968).

148 G.R. No. 95770, March 1, 1993, 219 SCRA 256 [Per J. Griño-Aquino, En Banc].

149 Id. at 260.

150 Id. at 275, concurring opinion of J. Cruz.

> will of the majority prevails, but it cannot regiment thought by prescribing the recitation by rote of its opinions or proscribing the assertion of unorthodox or unpopular views as in this case. The conscientious objections of the petitioners, no less than the impatience of those who disagree with them, are protected by the Constitution. The State cannot make the individual speak when the soul within rebels. [151]

Even before freedom "of expression" was included in Article III, Section 4 of the present Constitution, this court has applied its precedent version to expressions other than verbal utterances.

In the 1985 case of *Gonzalez v. Chairman Katigbak*,[152] petitioners objected to the classification of the motion picture "Kapit sa Patalim" as "For Adults Only." They contend that the classification "is without legal and factual basis and is exercised as impermissible restraint of artistic expression."[153] This court recognized that "[m]otion pictures are important both as a medium for the communication of ideas and the expression of the artistic impulse."[154] It adds that "every writer, actor, or producer, no matter what medium of expression he may use, should be freed from the censor."[155] This court found that "[the Board's] perception of what constitutes obscenity appears to be unduly restrictive."[156] However, the petition was dismissed solely on the ground that there were not enough votes for a ruling of grave abuse of discretion in the classification made by the Board.[157]

II.B.3

Size does matter

The form of expression is just as important as the information conveyed that it forms part of the expression. The present case is in point.

It is easy to discern why size matters.

First, it enhances efficiency in communication. A larger tarpaulin allows larger fonts which make it easier to view its messages from greater distances. Furthermore, a larger tarpaulin makes it easier for passengers inside moving vehicles to read its content. Compared with the pedestrians, the passengers inside moving vehicles have lesser time to view the content of a tarpaulin. The larger the fonts and images, the greater the probability

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151 Id. at 275–276.
152 222 Phil. 225 (1985) [Per C.J. Fernando, En Banc].
153 Id. at 228.
154 Id. at 229.
155 Id. at 231, *citing Superior Films v. Regents of University of State of New York*, 346 US 587, 589 (1954), J. Douglas concurring.
156 *Gonzalez v. Chairman Katigbak*, 222 Phil. 225, 234 (1985) [Per C.J. Fernando, En Banc].
157 Id. at 235.

that it will catch their attention and, thus, the greater the possibility that they will understand its message.

Second, the size of the tarpaulin may underscore the importance of the message to the reader. From an ordinary person's perspective, those who post their messages in larger fonts care more about their message than those who carry their messages in smaller media. The perceived importance given by the speakers, in this case petitioners, to their cause is also part of the message. The effectivity of communication sometimes relies on the emphasis put by the speakers and on the credibility of the speakers themselves. Certainly, larger segments of the public may tend to be more convinced of the point made by authoritative figures when they make the effort to emphasize their messages.

Third, larger spaces allow for more messages. Larger spaces, therefore, may translate to more opportunities to amplify, explain, and argue points which the speakers might want to communicate. Rather than simply placing the names and images of political candidates and an expression of support, larger spaces can allow for brief but memorable presentations of the candidates' platforms for governance. Larger spaces allow for more precise inceptions of ideas, catalyze reactions to advocacies, and contribute more to a more educated and reasoned electorate. A more educated electorate will increase the possibilities of both good governance and accountability in our government.

These points become more salient when it is the electorate, not the candidates or the political parties, that speaks. Too often, the terms of public discussion during elections are framed and kept hostage by brief and catchy but meaningless sound bites extolling the character of the candidate. Worse, elections sideline political arguments and privilege the endorsement by celebrities. Rather than provide obstacles to their speech, government should in fact encourage it. Between the candidates and the electorate, the latter have the better incentive to demand discussion of the more important issues. Between the candidates and the electorate, the former have better incentives to avoid difficult political standpoints and instead focus on appearances and empty promises.

Large tarpaulins, therefore, are not analogous to time and place.[158] They are fundamentally part of expression protected under Article III, Section 4 of the Constitution.

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[158] *See Navarro v. Villegas*, GR No. L-31687, February 26, 1970, 31 SCRA 730, 732 and *Reyes v. Bagatsing*, 210 Phil. 457, 476 (1983) [Per C.J. Fernando, En Banc]. Both cases involve regulation of time and place, but this does not affect free speech. In *Navarro*, this court considered that "civil rights and liberties can exist and be preserved only in an ordered society." Moreover, *Reyes* held that "[t]he high estate accorded the rights to free speech and peaceable assembly demands nothing less."

II.B.4

There are several theories and schools of thought that strengthen the need to protect the basic right to freedom of expression.

First, this relates to the right of the people to participate in public affairs, including the right to criticize government actions.

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."[159] 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."[160] It anchors on the principle that the cornerstone of every democracy is that sovereignty resides in the people.[161] 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.

Borrowing the words of Justice Brandeis, "it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies."[162]

In this jurisdiction, this court held that "[t]he interest of society and the maintenance of good government demand a full discussion of public affairs."[163] This court has, thus, adopted the principle that "debate on public issues should be uninhibited, robust, and wide open . . . [including even] unpleasantly sharp attacks on government and public officials."[164]

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159 *See* James A. Gardner, *Shut Up and Vote: A Critique of Deliberative Democracy and the Life of Talk*, 63 TENN. L. REV. 421, 422 (1996).

160 *See* John J. Worley, *Deliberative Constitutionalism*, BYU L. REV. 431, 441 (2009), *citing* Jon Elster, *Deliberative Democracy* 8 (1998).

161 CONST., art. II, sec. 1.

162 *See* J. Sanchez, concurring and dissenting opinion in *Gonzales, et al. v. COMELEC*, 137 Phil. 471, 523 (1969) [Per J. Fernando, En Banc], *citing* concurring opinion in *Whitney v. California*, 274 U.S. 357, 375 (1927).

163 *United States v. Bustos*, 37 Phil. 731, 740 (1918) [Per J. Malcolm, En Banc].

164 *Adiong v. COMELEC*, G.R. No. 103956, March 31, 1992, 207 SCRA 712, 716 [Per J. Gutierrez, Jr., En Banc]. *See also Gonzales, et al. v. COMELEC*, 137 Phil. 471, 493 (1969) [Per J. Fernando, En Banc].

Second, free speech should be encouraged under the concept of a market place of ideas. This theory was articulated by Justice Holmes in that "the ultimate good desired is better reached by [the] free trade in ideas:"[165]

> When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[166]

The way it works, the exposure to the ideas of others allows one to "consider, test, and develop their own conclusions."[167] A free, open, and dynamic market place of ideas is constantly shaping new ones. This promotes both stability and change where recurring points may crystallize and weak ones may develop. Of course, free speech is more than the right to approve existing political beliefs and economic arrangements as it includes, "[t]o paraphrase Justice Holmes, [the] freedom for the thought that we hate, no less than for the thought that agrees with us."[168] In fact, free speech may "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."[169] It is in this context that we should guard against any curtailment of the people's right to participate in the free trade of ideas.

Third, free speech involves self-expression that enhances human dignity. This right is "a means of assuring individual self-fulfillment,"[170] among others. In *Philippine Blooming Mills Employees Organization v. Philippine Blooming Mills Co., Inc,*[171] this court discussed as follows:

> The rights of free expression, free assembly and petition, are not only civil rights but also political rights *essential to man's enjoyment of his life, to his happiness and to his full and complete fulfillment.* Thru these freedoms the citizens can participate not merely in the periodic establishment of the government through their suffrage but also in the administration of public affairs as well

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165 *See The Impermeable Life: Unsolicited Communications in the Marketplace of Ideas*, 118 HARV. L. REV. 1314 (2005), *citing Abrams v. United States,* 250 U.S. 616, 630 (1919). In *Abrams,* Justice Holmes dissented from the Supreme Court's opinion affirming the conviction of five men for circulating pro-Soviet leaflets.

166 Id.

167 Id.

168 *Gonzales, et al. v. COMELEC,* 137 Phil. 471, 493 (1969) [Per J. Fernando, En Banc], *citing* Justice Holmes in *US v. Schwimmer,* 279 US 644, 655 (1929).

169 *Gonzales, et al. v. COMELEC,* 137 Phil. 471, 493 (1969) [Per J. Fernando, En Banc], *citing Terminiello v. City of Chicago*, 337 US 1, 4 (1949).

170 *Gonzales, et al. v. COMELEC,* 137 Phil. 471, 493 (1969) [Per J. Fernando, En Banc].

171 *Philippine Blooming Mills Employees Organization v. Philippine Blooming Mills Co., Inc,* 151-A Phil. 656 (1973) [Per J. Makasiar, En Banc].

> as in the discipline of abusive public officers. The citizen is accorded these rights so that he can appeal to the appropriate governmental officers or agencies for redress and protection as well as for the imposition of the lawful sanctions on erring public officers and employees.[172] (Emphasis supplied)

Fourth, expression is a marker for group identity. For one, "[v]oluntary associations perform [an] important democratic role [in providing] forums for the development of civil skills, for deliberation, and for the formation of identity and community spirit[,] [and] are largely immune from [any] governmental interference."[173] They also "provide a buffer between individuals and the state - a free space for the development of individual personality, distinct group identity, and dissident ideas - and a potential source of opposition to the state."[174] Free speech must be protected as the vehicle to find those who have similar and shared values and ideals, to join together and forward common goals.

Fifth, the Bill of Rights, free speech included, is supposed to "protect individuals and minorities against majoritarian abuses perpetrated through [the] framework [of democratic governance]."[175] Federalist framers led by James Madison were concerned about two potentially vulnerable groups: "the citizenry at large - majorities - who might be tyrannized or plundered by despotic federal officials"[176] and the minorities who may be oppressed by "dominant factions of the electorate [that] capture [the] government for their own selfish ends[.]"[177] According to Madison, "[i]t is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part."[178] We should strive to ensure that free speech is protected especially in light of any potential oppression against those who find themselves in the fringes on public issues.

Lastly, free speech must be protected under the safety valve theory.[179] This provides that "nonviolent manifestations of dissent reduce the likelihood of violence[.]"[180] "[A] dam about to burst . . . resulting in the 'banking up of a menacing flood of sullen anger behind the walls of restriction'"[181] has been used to describe the effect of repressing nonviolent

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172 Id. at 675.

173 *See Lessons in Transcendence: Forced Associations and the Military*, 117 HARV. L. REV. 1981 (2004). This note explains why integration has been so successful regarding military as a forced community, and acknowledging the benefits that forced communities produce such as empathy and the like. It discusses voluntary associations by way of background.

174 Id. at 1983, *citing* Cynthia Estlund, *Working Together: How Workplace Bonds Strengthen a Diverse Democracy* 106 (2003).

175 *See* Daryl J. Levinson, *Rights and Votes*, 121 YALE L. J. 1293 (2012).

176 Id. at 1293–1294.

177 Id. at 1294.

178 Id.

179 *See Reyes v. Bagatsing*, 210 Phil. 457, 468 (1983) [Per C.J. Fernando, En Banc].

180 *See Safety Valve Closed: The Removal of Nonviolent Outlets for Dissent and the Onset of Anti-Abortion Violence*, 113 HARV. L. REV. 1210, 1222 (2000).

181 Id., *citing* Bradley C. Bobertz, *The Brandeis Gambit: The Making of America's "First Freedom,"*

outlets.[182] In order to avoid this situation and prevent people from resorting to violence, there is a need for peaceful methods in making passionate dissent. This includes "free expression and political participation"[183] in that they can "vote for candidates who share their views, petition their legislatures to [make or] change laws, . . . distribute literature alerting other citizens of their concerns[,]"[184] and conduct peaceful rallies and other similar acts.[185] Free speech must, thus, be protected as a peaceful means of achieving one's goal, considering the possibility that repression of nonviolent dissent may spill over to violent means just to drive a point.

II.B.5

Every citizen's expression with political consequences enjoys a high degree of protection.

Respondents argue that the tarpaulin is election propaganda, being petitioners' way of endorsing candidates who voted against the RH Law and rejecting those who voted for it.[186] As such, it is subject to regulation by COMELEC under its constitutional mandate.[187] Election propaganda is defined under Section 1(4) of COMELEC Resolution No. 9615 as follows:

> SECTION 1. Definitions . . .
>
> . . . .
>
> 4. The term "political advertisement" or "election propaganda" refers to any matter broadcasted, published, printed, displayed or exhibited, in any medium, which contain the name, image, logo, brand, insignia, color motif, initials, and other symbol or graphic representation that is capable of being associated with a candidate or party, and is intended to draw the attention of the public or a segment thereof to promote or oppose, directly or indirectly, the election of the said candidate or candidates to a public office. In broadcast media, political advertisements may take the form of spots, appearances on TV shows and radio programs, live or taped announcements, teasers, and other forms of advertising messages or announcements used by commercial advertisers.
>
> Political advertising includes matters, not falling within the scope of personal opinion, that appear on any Internet website, including, but not limited to, social networks, blogging sites,

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1909–1931, 40 WM. & MARY L. REV. 557, 611 (1999), *quoting* Glenn Frank, Is Free Speech Dangerous? 355, 359 (July 1920).

182 Id.

183 Id. at 1223.

184 Id. at 1210.

185 Id.

186 *Rollo*, pp. 72–73.

187 Id. at 73.

> and micro-blogging sites, in return for consideration, or otherwise capable of pecuniary estimation.

On the other hand, petitioners invoke their "constitutional right to communicate their opinions, views and beliefs about issues and candidates."[188] They argue that the tarpaulin was their statement of approval and appreciation of the named public officials' act of voting against the RH Law, and their criticism toward those who voted in its favor.[189] It was "part of their advocacy campaign against the RH Law,"[190] which was not paid for by any candidate or political party.[191] Thus, "the questioned orders which . . . effectively restrain[ed] and curtail[ed] [their] freedom of expression should be declared unconstitutional and void."[192]

This court has held free speech and other intellectual freedoms as "highly ranked in our scheme of constitutional values."[193] These rights enjoy precedence and primacy.[194] In *Philippine Blooming Mills,* this court discussed the preferred position occupied by freedom of expression:

> 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."[195] (Citations omitted)

This primordial right calls for utmost respect, more so "when what may be curtailed is the dissemination of information to make more meaningful the equally vital right of suffrage."[196] A similar idea appeared in our jurisprudence as early as 1969, which was Justice Barredo's concurring and dissenting opinion in *Gonzales v. COMELEC:*[197]

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188 Id. at 107.
189 Id.
190 Id. at 106.
191 Id.
192 Id. at 111.
193 *Reyes v. Bagatsing*, 210 Phil. 457, 475 (1983) [Per C.J. Fernando, En Banc]. *See also Adiong v. COMELEC*, G.R. No. 103956, March 31, 1992, 207 SCRA 712, 715, and 717 [Per J. Gutierrez, Jr., En Banc].
194 *Reyes v. Bagatsing*, 210 Phil. 457, 475 (1983) [Per C.J. Fernando, En Banc].
195 *Philippine Blooming Mills Employees Organization v. Philippine Blooming Mills Co., Inc*, 151-A Phil. 656, 676 (1973) [Per J. Makasiar, En Banc].
196 *Adiong v. COMELEC*, G.R. No. 103956, March 31, 1992, 207 SCRA 712, 716 [Per J. Gutierrez, Jr., En Banc].
197 137 Phil. 471 (1969) [Per J. Fernando, En Banc].

> I like to reiterate over and over, for it seems this is the fundamental point others miss, that genuine democracy thrives only where the power and right of the people to elect the men to whom they would entrust the privilege to run the affairs of the state exist. In the language of the declaration of principles of our Constitution, "The Philippines is a republican state. Sovereignty resides in the people and all government authority emanates from them" (Section 1, Article II). Translating this declaration into actuality, the Philippines is a republic because and solely because the people in it can be governed only by officials whom they themselves have placed in office by their votes. And in it is on this cornerstone that I hold it to be self-evident that *when the freedoms of speech, press and peaceful assembly and redress of grievances are being exercised in relation to suffrage or as a means to enjoy the inalienable right of the qualified citizen to vote, they are absolute and timeless.* If our democracy and republicanism are to be worthwhile, the conduct of public affairs by our officials must be allowed to suffer incessant and unabating scrutiny, favorable or unfavorable, everyday and at all times. Every holder of power in our government must be ready to undergo exposure any moment of the day or night, from January to December every year, as it is only in this way that he can rightfully gain the confidence of the people. I have no patience for those who would regard public dissection of the establishment as an attribute to be indulged by the people only at certain periods of time. *I consider the freedoms of speech, press and peaceful assembly and redress of grievances, when exercised in the name of suffrage, as the very means by which the right itself to vote can only be properly enjoyed.* It stands to reason therefore, that suffrage itself would be next to useless if these liberties cannot be untrammelled [sic] whether as to degree or time.[198] (Emphasis supplied)

Not all speech are treated the same. In *Chavez v. Gonzales*, this court discussed that some types of speech may be subject to regulation:

> Some types of speech may be subjected to some regulation by the State under its pervasive police power, in order that it may not be injurious to the equal right of others or those of the community or society. The difference in treatment is expected because the relevant interests of one type of speech, *e.g.*, political speech, may vary from those of another, *e.g.*, obscene speech. Distinctions have therefore been made in the treatment, analysis, and evaluation of the permissible scope of restrictions on various categories of speech. We have ruled, for example, that in our jurisdiction slander or libel, lewd and obscene speech, as well as "fighting words" are not entitled to constitutional protection and may be penalized.[199] (Citations omitted)

We distinguish between political and commercial speech. Political speech refers to speech "both intended and received as a contribution to public deliberation about some issue,"[200] "foster[ing] informed and civic-minded deliberation."[201] On the other hand, commercial speech has been

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198 Id. at 563.

199 *Chavez v. Gonzales*, 569 Phil. 155, 199 (2008) [Per C.J. Puno, En Banc].

200 *See* footnote 64 of *Freedom of Speech and Expression*, 116 HARV. L. REV. 272 (2002), *citing* Cass R. Sunstein, *Free Speech Now*, THE BILL OF RIGHTS IN THE MODERN STATE 255, 304 (1992).

201 *See Freedom of Speech and Expression*, 116 HARV. L. REV. 272, 278 (2002).

defined as speech that does "no more than propose a commercial transaction."[202]

The expression resulting from the content of the tarpaulin is, however, definitely political speech.

In Justice Brion's dissenting opinion, he discussed that "[t]he content of the tarpaulin, as well as the timing of its posting, makes it subject of the regulations in RA 9006 and Comelec Resolution No. 9615."[203] He adds that "[w]hile indeed the RH issue, by itself, is not an electoral matter, the slant that the petitioners gave the issue converted the non-election issue into a live election one hence, Team Buhay and Team Patay and the plea to support one and oppose the other."[204]

While the tarpaulin may influence the success or failure of the named candidates and political parties, this does not necessarily mean it is election propaganda. The tarpaulin was not paid for or posted "in return for consideration" by any candidate, political party, or party-list group.

The second paragraph of Section 1(4) of COMELEC Resolution No. 9615, or the rules and regulations implementing Republic Act No. 9006 as an aid to interpret the law insofar as the facts of this case requires, states:

> 4. The term "political advertisement" or "election propaganda" refers to any matter broadcasted, published, printed, displayed or exhibited, in any medium, which contain the name, image, logo, brand, insignia, color motif, initials, and other symbol or graphic representation that is capable of being associated with a candidate or party, and is intended to draw the attention of the public or a segment thereof to promote or oppose, directly or indirectly, the election of the said candidate or candidates to a public office. In broadcast media, political advertisements may take the form of spots, appearances on TV shows and radio programs, live or taped announcements, teasers, and other forms of advertising messages or announcements used by commercial advertisers.
>
> ***Political advertising includes matters, not falling within the scope of personal opinion, that appear on any Internet website, including, but not limited to, social networks, blogging sites, and micro-blogging sites, in return for consideration, or otherwise capable of pecuniary estimation.*** (Emphasis supplied)

It is clear that this paragraph suggests that personal opinions are not

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202 *See* Eric Barendt, *Tobacco Advertising: The Last Puff?*, PUB. L. 27 (2002).
203 J. Brion, dissenting opinion, p. 13.
204 J. Brion, dissenting opinion, p. 17.

included, while sponsored messages are covered.

Thus, the last paragraph of Section 1(1) of COMELEC Resolution No. 9615 states:

> SECTION 1. Definitions - As used in this Resolution:
>
> 1. The term "election campaign" or "partisan political activity" refers to an act designed to promote the election or defeat of a particular candidate or candidates to a public office, and shall include any of the following:
>
> . . . .
>
> Personal opinions, views, and preferences for candidates, contained in blogs shall not be considered acts of election campaigning or partisan political activity unless expressed by government officials in the Executive Department, the Legislative Department, the Judiciary, the Constitutional Commissions, and members of the Civil Service.

In any event, this case does not refer to speech in cyberspace, and its effects and parameters should be deemed narrowly tailored only in relation to the facts and issues in this case. It also appears that such wording in COMELEC Resolution No. 9615 does not similarly appear in Republic Act No. 9006, the law it implements.

We should interpret in this manner because of the value of political speech.

As early as 1918, in *United States v. Bustos*,[205] this court recognized the need for full discussion of public affairs. We acknowledged that free speech includes the right to criticize the conduct of public men:

> The interest of society and the maintenance of good government demand a full discussion of public affairs. Complete liberty to comment on the conduct of public men is a scalpel in the case of free speech. The sharp incision of its probe relieves the abscesses of officialdom. Men in public life may suffer under a hostile and an unjust accusation; the wound can be assuaged with the balm of a clear conscience. A public officer must not be too thin-skinned with reference to comment upon his official acts. Only thus can the intelligence and dignity of the individual be exalted.[206]

Subsequent jurisprudence developed the right to petition the government for redress of grievances, allowing for criticism, save for some

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[205] 37 Phil. 731 (1918) [Per J. Malcolm, En Banc].
[206] Id. at 740–741.

exceptions.[207] In the 1951 case of *Espuelas v. People*,[208] this court noted every citizen's privilege to criticize his or her government, provided it is "specific and therefore constructive, reasoned or tempered, and not a contemptuous condemnation of the entire government set-up."[209]

The 1927 case of *People v. Titular*[210] involved an alleged violation of the Election Law provision "penaliz[ing] the anonymous criticism of a candidate by means of posters or circulars."[211] This court explained that it is the poster's anonymous character that is being penalized.[212] The ponente adds that he would "dislike very much to see this decision made the vehicle for the suppression of public opinion."[213]

In 1983, *Reyes v. Bagatsing*[214] discussed the importance of allowing individuals to vent their views. According to this court, "[i]ts value may lie in the fact that there may be something worth hearing from the dissenter [and] [t]hat is to ensure a true ferment of ideas."[215]

Allowing citizens to air grievances and speak constructive criticisms against their government contributes to every society's goal for development. It puts forward matters that may be changed for the better and ideas that may be deliberated on to attain that purpose. Necessarily, it also makes the government accountable for acts that violate constitutionally protected rights.

In 1998, *Osmeña v. COMELEC* found Section 11(b) of Republic Act No. 6646, which prohibits mass media from selling print space and air time for campaign except to the COMELEC, to be a democracy-enhancing measure.[216] This court mentioned how "discussion of public issues and debate on the qualifications of candidates in an election are essential to the proper functioning of the government established by our Constitution."[217]

As pointed out by petitioners, "speech serves one of its greatest public purposes in the context of elections when the free exercise thereof informs the people what the issues are, and who are supporting what issues."[218] At the heart of democracy is every advocate's right to make known what the

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207 *People v. Perez*, 45 Phil. 599, 604–605 (1923) [Per J. Malcolm, En Banc].
208 90 Phil. 524 (1951) [Per J. Bengzon, En Banc].
209 Id. at 529.
210 49 Phil. 930 (1927) [Per J. Malcolm, En Banc].
211 Id. at 931.
212 Id. at 937.
213 Id. at 938.
214 210 Phil. 457 (1983) [Per C.J. Fernando, En Banc].
215 Id. at 468.
216 *Osmeña v. COMELEC*, 351 Phil. 692, 720 (1998) [Per J. Mendoza, En Banc].
217 Id. at 719.
218 *Rollo*, p. 108.

people need to know,[219] while the meaningful exercise of one's right of suffrage includes the right of every voter to know what they need to know in order to make their choice.

Thus, in *Adiong v. COMELEC*,[220] this court discussed the importance of debate on public issues, and the freedom of expression especially in relation to information that ensures the meaningful exercise of the right of suffrage:

> We have adopted the principle that debate on public issues should be uninhibited, robust, and wide open and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials. Too many restrictions will deny to people the robust, uninhibited, and wide open debate, the generating of interest essential if our elections will truly be free, clean and honest.
>
> We have also ruled that *the preferred freedom of expression calls all the more for the utmost respect when what may be curtailed is the dissemination of information to make more meaningful the equally vital right of suffrage*.[221] (Emphasis supplied, citations omitted)

Speech with political consequences is at the core of the freedom of expression and must be protected by this court.

Justice Brion pointed out that freedom of expression "is not the god of rights to which all other rights and even government protection of state interest must bow."[222]

The right to freedom of expression is indeed not absolute. Even some forms of protected speech are still subject to some restrictions. The degree of restriction may depend on whether the regulation is content-based or content-neutral.[223] Content-based regulations can either be based on the viewpoint of the speaker or the subject of the expression.

II.B.6

Content-based regulation

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219 *See* Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People's Elusive "Right to Know,"* 72 MD. L. REV. 1, 9 (2012). "[P]eople's 'right to know' serves two separate democratic values: governmental accountability and citizen participation."

220 G.R. No. 103956, March 31, 1992, 207 SCRA 712 [Per J. Gutierrez, Jr., En Banc].

221 Id. at 716. *See also Mutuc v. COMELEC*, 146 Phil. 798, 805–806 (1970) [Per J. Fernando, En Banc].

222 J. Brion, dissenting opinion, p. 24.

223 *See Chavez v. Gonzales*, 569 Phil. 155, 204–205 (2008) [Per C.J. Puno, En Banc]. *See also* Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 51 (2000).

COMELEC contends that the order for removal of the tarpaulin is a content-neutral regulation. The order was made simply because petitioners failed to comply with the maximum size limitation for lawful election propaganda.[224]

On the other hand, petitioners argue that the present size regulation is content-based as it applies only to political speech and not to other forms of speech such as commercial speech.[225] "[A]ssuming *arguendo* that the size restriction sought to be applied . . . is a mere time, place, and manner regulation, it's still unconstitutional for lack of a clear and reasonable nexus with a constitutionally sanctioned objective."[226]

The regulation may reasonably be considered as either content-neutral or content-based.[227] Regardless, the disposition of this case will be the same. Generally, compared with other forms of speech, the proposed speech is content-based.

As pointed out by petitioners, the interpretation of COMELEC contained in the questioned order applies only to posters and tarpaulins that may affect the elections because they deliver opinions that shape both their choices. It does not cover, for instance, commercial speech.

Worse, COMELEC does not point to a definite view of what kind of expression of non-candidates will be adjudged as "election paraphernalia." There are no existing bright lines to categorize speech as election-related and those that are not. This is especially true when citizens will want to use their resources to be able to raise public issues that should be tackled by the candidates as what has happened in this case. COMELEC's discretion to limit speech in this case is fundamentally unbridled.

Size limitations during elections hit at a core part of expression. The content of the tarpaulin is not easily divorced from the size of its medium.

Content-based regulation bears a heavy presumption of invalidity, and this court has used the clear and present danger rule as measure.[228] Thus, in *Chavez v. Gonzales*:

> A content-based regulation, however, bears a heavy presumption of invalidity and is measured against the clear and present danger rule. The latter will pass constitutional muster only if justified by a compelling

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224 *Rollo*, p. 83.
225 Id. at 118.
226 Id. at 123.
227 *See for instance* Wilson R. Huhn, *Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L. J. 801 (2004).
228 *Chavez v. Gonzales*, 569 Phil. 155, 207–208 (2008) [Per C.J. Puno, En Banc].

> reason, and the restrictions imposed are neither overbroad nor vague.[229] (Citations omitted)

Under this rule, "the evil consequences sought to be prevented must be substantive, 'extremely serious and the degree of imminence extremely high.'"[230] "Only when the challenged act has overcome the clear and present danger rule will it pass constitutional muster, with the government having the burden of overcoming the presumed unconstitutionality."[231]

Even with the clear and present danger test, respondents failed to justify the regulation. There is no compelling and substantial state interest endangered by the posting of the tarpaulin as to justify curtailment of the right of freedom of expression. There is no reason for the state to minimize the right of non-candidate petitioners to post the tarpaulin in their private property. The size of the tarpaulin does not affect anyone else's constitutional rights.

Content-based restraint or censorship refers to restrictions "based on the subject matter of the utterance or speech."[232] In contrast, content-neutral regulation includes controls merely on the incidents of the speech such as time, place, or manner of the speech.[233]

This court has attempted to define "content-neutral" restraints starting with the 1948 case of *Primicias v. Fugoso*.[234] The ordinance in this case was construed to grant the Mayor discretion only to determine the public places that may be used for the procession or meeting, but not the power to refuse the issuance of a permit for such procession or meeting.[235] This court explained that free speech and peaceful assembly are "not absolute for it may be so regulated that it shall not be injurious to the equal enjoyment of others having equal rights, nor injurious to the rights of the community or society."[236]

The earlier case of *Calalang v. Williams*[237] involved the National Traffic Commission resolution that prohibited the passing of animal-drawn vehicles along certain roads at specific hours.[238] This court similarly discussed police power in that the assailed rules carry out the legislative policy that "aims to promote safe transit upon and avoid obstructions on

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229 Id.
230 Id. at 200.
231 Id. at 206.
232 Id. at 205.
233 Id. at 204. *See Primicias v. Fugoso*, 80 Phil. 71 (1948) [Per J. Feria, En Banc]; *Reyes v. Bagatsing*, 210 Phil. 457 (1983) [Per C.J. Fernando, En Banc].
234 80 Phil. 71 (1948) [Per J. Feria, En Banc].
235 Id. at 77.
236 Id. at 75.
237 70 Phil. 726 (1940) [Per J. Laurel, En Banc].
238 Id. at 728–729.

national roads, in the interest and convenience of the public." [239]

As early as 1907, *United States v. Apurado*[240] recognized that "more or less disorder will mark the public assembly of the people to protest against grievances whether real or imaginary, because on such occasions feeling is always wrought to a high pitch of excitement. . . ."[241] It is with this backdrop that the state is justified in imposing restrictions on incidental matters as time, place, and manner of the speech.

In the landmark case of *Reyes v. Bagatsing*, this court summarized the steps that permit applicants must follow which include informing the licensing authority ahead of time as regards the date, public place, and time of the assembly.[242] This would afford the public official time to inform applicants if there would be valid objections, provided that the clear and present danger test is the standard used for his decision and the applicants are given the opportunity to be heard.[243] This ruling was practically codified in Batas Pambansa No. 880, otherwise known as the Public Assembly Act of 1985.

Subsequent jurisprudence have upheld Batas Pambansa No. 880 as a valid content-neutral regulation. In the 2006 case of *Bayan v. Ermita*,[244] this court discussed how Batas Pambansa No. 880 does not prohibit assemblies but simply regulates their time, place, and manner.[245] In 2010, this court found in *Integrated Bar of the Philippines v. Atienza*[246] that respondent Mayor Atienza committed grave abuse of discretion when he modified the rally permit by changing the venue from Mendiola Bridge to Plaza Miranda without first affording petitioners the opportunity to be heard.[247]

We reiterate that the regulation involved at bar is content-based. The tarpaulin content is not easily divorced from the size of its medium.

II.B.7

Justice Carpio and Justice Perlas-Bernabe suggest that the provisions imposing a size limit for tarpaulins are content-neutral regulations as these "restrict the *manner* by which speech is relayed but not the *content* of what

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239 Id. at 733.
240 7 Phil. 422 (1907) [Per J. Carson, En Banc].
241 Id. at 426.
242 *Reyes v. Bagatsing*, 210 Phil. 457, 475 (1983) [Per C.J. Fernando, En Banc].
243 Id.
244 522 Phil. 201 (2006) [Per J. Azcuna, En Banc].
245 Id. at 219 and 231. *See also Osmeña v. COMELEC*, 351 Phil. 692, 719 (1998) [Per J. Mendoza, En Banc].
246 *Integrated Bar of the Philippines v. Atienza*, G.R. No. 175241, February 24, 2010, 613 SCRA 518 [Per J. Carpio Morales, First Division].
247 Id. at 526–527.

is conveyed."[248]

If we apply the test for content-neutral regulation, the questioned acts of COMELEC will not pass the three requirements for evaluating such restraints on freedom of speech.[249] "When the speech restraints take the form of a content-neutral regulation, only a substantial governmental interest is required for its validity,"[250] and it is subject only to the intermediate approach.[251]

This intermediate approach is based on the test that we have prescribed in several cases.[252] A content-neutral government regulation is sufficiently justified:

> [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incident restriction on alleged [freedom of speech & expression] is no greater than is essential to the furtherance of that interest.[253]

On the first requisite, it is not within the constitutional powers of the COMELEC to regulate the tarpaulin. As discussed earlier, this is protected speech by petitioners who are non-candidates.

On the second requirement, not only must the governmental interest be important or substantial, it must also be compelling as to justify the restrictions made.

Compelling governmental interest would include constitutionally declared principles. We have held, for example, that "the welfare of children and the State's mandate to protect and care for them, as *parens patriae*,[254] constitute a substantial and compelling government interest in regulating . . . utterances in TV broadcast."[255]

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248 J. Carpio, separate concurring opinion, p. 2, emphasis in the original; J. Perlas-Bernabe, separate concurring opinion, p. 1.

249 *Chavez v. Gonzales,* 569 Phil. 155, 200 (2008) [Per C.J. Puno, En Banc]. The ponencia was concurred in by J. Ynares-Santiago and J. Reyes. Separate concurring opinions were written by J. Sandoval-Gutierrez, J. Carpio, and J. Azcuna. Three justices (J. Quisumbing, J. Austria-Martinez, and J. Carpio Morales) joined J. Carpio's opinion. Dissenting and concurring opinions were written by J. Tinga and J. Velasco, Jr. Separate dissenting opinions were written by J. Chico-Nazario and J. Nachura. J. Corona joined J. Nachura's opinion. J. Leonardo-De Castro joined J. Nazario's and J. Nachura's opinions.

250 Id. at 205. *See Osmeña v. COMELEC,* 351 Phil. 692, 717 (1998) [Per J. Mendoza, En Banc].

251 Id.

252 *See Social Weather Stations, Inc. v. COMELEC*, 409 Phil. 571 (2001) [Per J. Mendoza, Second Division]; *Adiong v. COMELEC,* G.R. No. 103956, March 31, 1992, 207 SCRA 712 [Per J. Gutierrez, Jr., En Banc]; *Osmeña v. COMELEC,* 351 Phil. 692 (1998) [Per J. Mendoza, En Banc].

253 *Chavez v. Gonzales*, 569 Phil. 155, 206 (2008) [Per C.J. Puno, En Banc].

254 CONST., art. II, secs. 12 and 13.

255 *Soriano v. Laguardia, et al.*, 605 Phil. 43, 106 (2009) [Per J. Velasco, Jr., En Banc].

Respondent invokes its constitutional mandate to ensure equal opportunity for public information campaigns among candidates in connection with the holding of a free, orderly, honest, peaceful, and credible election.[256]

Justice Brion in his dissenting opinion discussed that "[s]ize limits to posters are necessary to ensure equality of public information campaigns among candidates, as allowing posters with different sizes gives candidates and their supporters the incentive to post larger posters[,] [and] [t]his places candidates with more money and/or with deep-pocket supporters at an undue advantage against candidates with more humble financial capabilities."[257]

First, *Adiong v. COMELEC* has held that this interest is "not as important as the right of [a private citizen] to freely express his choice and exercise his right of free speech."[258] In any case, faced with both rights to freedom of speech and equality, a prudent course would be to "try to resolve the tension in a way that protects the right of participation."[259]

Second, the pertinent election laws related to private property only require that the private property owner's consent be obtained when posting election propaganda in the property.[260] This is consistent with the fundamental right against deprivation of property without due process of law.[261] The present facts do not involve such posting of election propaganda absent consent from the property owner. Thus, this regulation does not apply in this case.

Respondents likewise cite the Constitution[262] on their authority to recommend effective measures to minimize election spending. Specifically, Article IX-C, Section 2(7) provides:

> Sec. 2. The Commission on Elections shall exercise the following powers and functions:

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256 CONST., art. IX-C, sec. 4.
Section 4. 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.

257 J. Brion, dissenting opinion, p. 25.

258 G.R. No. 103956, March 31, 1992, 207 SCRA 712, 722 [Per J. Gutierrez, Jr., En Banc].

259 *See* John A. Powell, *Worlds Apart: Reconciling Freedom of Speech and Equality*, 85 KY. L. J. 94 (1996–1997).

260 Rep. Act No. 9006, sec. 9; COMELEC Resolution No. 9615, sec. 17(b).

261 CONST., art. III, sec. 1.

262 CONST., art. IX-C, sec. 2(7).

> . . . .
>
> (7) 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 candidates*. (Emphasis supplied)

This does not qualify as a compelling and substantial government interest to justify regulation of the preferred right to freedom of expression.

The assailed issuances for the removal of the tarpaulin are based on the two feet (2') by three feet (3') size limitation under Section 6(c) of COMELEC Resolution No. 9615. This resolution implements the Fair Election Act that provides for the same size limitation.[263]

This court held in *Adiong v. COMELEC* that "[c]ompared to the paramount interest of the State in guaranteeing freedom of expression, any financial considerations behind the regulation are of marginal significance."[264] In fact, speech with political consequences, as in this case, should be encouraged and not curtailed. As petitioners pointed out, the size limitation will not serve the objective of minimizing election spending considering there is no limit on the number of tarpaulins that may be posted.[265]

The third requisite is likewise lacking. We look not only at the legislative intent or motive in imposing the restriction, but more so at the effects of such restriction, if implemented. The restriction must not be narrowly tailored to achieve the purpose. It must be demonstrable. It must allow alternative avenues for the actor to make speech.

In this case, the size regulation is not unrelated to the suppression of speech. Limiting the maximum size of the tarpaulin would render ineffective petitioners' message and violate their right to exercise freedom of expression.

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263 Rep. Act No. 9006 (2001), sec. 3.3, provides:
Sec. 3. Lawful Election Propaganda. - . . . .
For the purpose of this Act, lawful election propaganda shall include:
. . . .
3.3. Cloth, paper or cardboard posters whether framed, or posted, with an area not exceeding two (2) feet by three (3) feet, except that, at the site and on the occasion of a public meeting or rally, or in announcing the holding of said meeting or rally, streamers not exceeding three (3) feet by eight (8) feet in size, shall be allowed: Provided, That said streamers may be displayed five (5) days before the date of the meeting or rally and shall be removed within twenty-four (24) hours after said meeting or rally[.]

264 *Adiong v. COMELEC*, G.R. No. 103956, March 31, 1992, 207 SCRA 712, 722 [Per J. Gutierrez, Jr., En Banc].

265 *Rollo*, p. 133.

The COMELEC's act of requiring the removal of the tarpaulin has the effect of dissuading expressions with political consequences. These should be encouraged, more so when exercised to make more meaningful the equally important right to suffrage.

The restriction in the present case does not pass even the lower test of intermediate scrutiny for content-neutral regulations.

The action of the COMELEC in this case is a strong deterrent to further speech by the electorate. Given the stature of petitioners and their message, there are indicators that this will cause a "chilling effect" on robust discussion during elections.

The form of expression is just as important as the message itself. In the words of Marshall McLuhan, "the medium is the message."[266] McLuhan's colleague and mentor Harold Innis has earlier asserted that "the materials on which words were written down have often counted for more than the words themselves."[267]

III
Freedom of expression and equality

III.A
The possibility of abuse

Of course, candidates and political parties do solicit the help of private individuals for the endorsement of their electoral campaigns.

On the one extreme, this can take illicit forms such as when endorsement materials in the form of tarpaulins, posters, or media advertisements are made ostensibly by "friends" but in reality are really paid for by the candidate or political party. This skirts the constitutional value that provides for equal opportunities for all candidates.

However, as agreed by the parties during the oral arguments in this case, this is not the situation that confronts us. In such cases, it will simply be a matter for investigation and proof of fraud on the part of the COMELEC.

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[266] Christina J. Angelopoulos, *Freedom of Expression and Copyright: The Double Balancing Act*, I.P.Q. 3, 334–335 (2008).

[267] M. Ethan Katsh, *Cybertime, Cyberspace and Cyberlaw*, J. ONLINE L. art. 1, par. 7 (1995).

The guarantee of freedom of expression to individuals without any relationship to any political candidate should not be held hostage by the possibility of abuse by those seeking to be elected. It is true that there can be underhanded, covert, or illicit dealings so as to hide the candidate's real levels of expenditures. However, labelling all expressions of private parties that tend to have an effect on the debate in the elections as election paraphernalia would be too broad a remedy that can stifle genuine speech like in this case. Instead, to address this evil, better and more effective enforcement will be the least restrictive means to the fundamental freedom.

On the other extreme, moved by the credentials and the message of a candidate, others will spend their own resources in order to lend support for the campaigns. This may be without agreement between the speaker and the candidate or his or her political party. *In lieu of donating funds to the campaign, they will instead use their resources directly in a way that the candidate or political party would have done so. This may effectively skirt the constitutional and statutory limits of campaign spending.*

Again, this is not the situation in this case.

The message of petitioners in this case will certainly not be what candidates and political parties will carry in their election posters or media ads. *The message of petitioner, taken as a whole, is an advocacy of a social issue that it deeply believes. Through rhetorical devices, it communicates the desire of Diocese that the positions of those who run for a political position on this social issue be determinative of how the public will vote.* ***It primarily advocates a stand on a social issue; only secondarily — even almost incidentally — will cause the election or non-election of a candidate.***

The twin tarpaulins consist of *satire* of political parties. Satire is a "literary form that employs such devices as sarcasm, irony and ridicule to deride prevailing vices or follies,"[268] and this may target any individual or group in society, private and government alike. It seeks to effectively communicate a greater purpose, often used for "political and social criticism"[269] "because it tears down facades, deflates stuffed shirts, and unmasks hypocrisy. . . . Nothing is more thoroughly democratic than to have the high-and-mighty lampooned and spoofed."[270] Northrop Frye, well-known in this literary field, claimed that satire had two defining features: "one is wit or humor founded on fantasy or a sense of the grotesque and

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[268] *See* Leslie Kim Treiger, *Protecting Satire Against Libel Claims: A New Reading of the First Amendment's Opinion Privilege*, 98 YALE L.J. 1215 (1989).

[269] Id.

[270] Id., *citing Falwell v. Flynt*, 805 F.2d 484, 487 (4th Cir. 1986) (J. Wilkinson, dissenting from denial of rehearing en banc).

absurd, the other is an object of attack."[271] Thus, satire frequently uses exaggeration, analogy, and other rhetorical devices.

The tarpaulins exaggerate. Surely, "Team Patay" does not refer to a list of dead individuals nor could the Archbishop of the Diocese of Bacolod have intended it to mean that the entire plan of the candidates in his list was to cause death intentionally. The tarpaulin caricatures political parties and parodies the intention of those in the list. Furthermore, the list of "Team Patay" is juxtaposed with the list of "Team Buhay" that further emphasizes the theme of its author: Reproductive health is an important marker for the church of petitioners to endorse.

The messages in the tarpaulins are different from the usual messages of candidates. Election paraphernalia from candidates and political parties are more declarative and descriptive and contain no sophisticated literary allusion to any social objective. Thus, they usually simply exhort the public to vote for a person with a brief description of the attributes of the candidate. For example "Vote for [x], Sipag at Tiyaga," "Vote for [y], Mr. Palengke," or "Vote for [z], Iba kami sa Makati."

This court's construction of the guarantee of freedom of expression has always been wary of censorship or subsequent punishment that entails evaluation of the speaker's viewpoint or the content of one's speech. This is especially true when the expression involved has political consequences. In this case, it hopes to affect the type of deliberation that happens during elections. A becoming humility on the part of any human institution no matter how endowed with the secular ability to decide legal controversies with finality entails that we are not the keepers of all wisdom.

Humanity's lack of omniscience, even acting collectively, provides space for the weakest dissent. Tolerance has always been a libertarian virtue whose version is embedded in our Bill of Rights. There are occasional heretics of yesterday that have become our visionaries. Heterodoxies have always given us pause. The unforgiving but insistent nuance that the majority surely and comfortably disregards provides us with the checks upon reality that may soon evolve into creative solutions to grave social problems. This is the utilitarian version. It could also be that it is just part of human necessity to evolve through being able to express or communicate.

However, the Constitution we interpret is not a theoretical document. It contains other provisions which, taken together with the guarantee of free expression, enhances each other's value. Among these are the provisions that acknowledge the idea of equality. In shaping doctrine construing these

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[271] *See* Joseph Brooker, *Law, Satire, Incapacity: Satire Bust: The Wagers of Money*, 17 LAW & LITERATURE 321, 327 (2005), *citing* Northrop Frye, *Anatomy of Criticism: Four Essays* 224 (1957).

constitutional values, this court needs to exercise extraordinary prudence and produce narrowly tailored guidance fit to the facts as given so as not to unwittingly cause the undesired effect of diluting freedoms as exercised in reality and, thus, render them meaningless.

III.B.
Speech and equality:
Some considerations

We first establish that there are two paradigms of free speech that separate at the point of giving priority to equality vis-à-vis liberty.[272]

In an equality-based approach, "politically disadvantaged speech prevails over regulation[,] but regulation promoting political equality prevails over speech."[273] This view allows the government leeway to redistribute or equalize 'speaking power,' such as protecting, even implicitly subsidizing, unpopular or dissenting voices often systematically subdued within society's ideological ladder.[274] This view acknowledges that there are dominant political actors who, through authority, power, resources, identity, or status, have capabilities that may drown out the messages of others. This is especially true in a developing or emerging economy that is part of the majoritarian world like ours.

The question of libertarian tolerance

This balance between equality and the ability to express so as to find one's authentic self or to participate in the self determination of one's communities is not new only to law. It has always been a philosophical problematique.

In his seminal work, *Repressive Tolerance*, philosopher and social theorist Herbert Marcuse recognized how institutionalized inequality exists as a background limitation, rendering freedoms exercised within such limitation as merely "protect[ing] the already established machinery of discrimination."[275] In his view, any improvement "in the normal course of events" within an unequal society, without subversion, only strengthens existing interests of those in power and control.[276]

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272 *See* Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 144–146 (2010).
273 Id. at 145.
274 Id. at 148–149.
275 *See* Herbert Marcuse, *Repressive Tolerance*, in A CRITIQUE OF PURE TOLERANCE 85 (1965).
276 Id. at 93–94.

In other words, abstract guarantees of fundamental rights like freedom of expression may become meaningless if not taken in a real context. This tendency to tackle rights in the abstract compromises liberties. In his words:

> Liberty is self-determination, autonomy—this is almost a tautology, but a tautology which results from a whole series of synthetic judgments. It stipulates the ability to determine one's own life: to be able to determine what to do and what not to do, what to suffer and what not. But the subject of this autonomy is never the contingent, private individual as that which he actually is or happens to be; it is rather the individual as a human being who is capable of being free with the others. And the problem of making possible such a harmony between every individual liberty and the other is not that of finding a compromise between competitors, or between freedom and law, between general and individual interest, common and private welfare in an *established* society, but of *creating* the society in which man is no longer enslaved by institutions which vitiate self-determination from the beginning. In other words, freedom is still to be created even for the freest of the existing societies.[277] (Emphasis in the original)

Marcuse suggests that the democratic argument — with all opinions presented to and deliberated by the people — "implies a necessary condition, namely, that the people must be capable of deliberating and choosing on the basis of knowledge, that they must have access to authentic information, and that, on this basis, their evaluation must be the result of autonomous thought."[278] He submits that "[d]ifferent opinions and 'philosophies' can no longer compete peacefully for adherence and persuasion on rational grounds: the 'marketplace of ideas' is organized and delimited by those who determine the national and the individual interest."[279]

A slant toward left manifests from his belief that "there is a 'natural right' of resistance for oppressed and overpowered minorities to use extralegal means if the legal ones have proved to be inadequate."[280] Marcuse, thus, stands for an equality that breaks away and transcends from established hierarchies, power structures, and indoctrinations. The tolerance of libertarian society he refers to as "repressive tolerance."

Legal scholars

The 20th century also bears witness to strong support from legal scholars for "stringent protections of expressive liberty,"[281] especially by political egalitarians. Considerations such as "expressive, deliberative, and

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277 Id. at 86–87.
278 Id. at 95.
279 Id. at 110.
280 Id. at 116.
281 *See* Joshua Cohen, *Freedom of Expression*, in TOLERATION: AN ELUSIVE VIRTUE 176 (1996).

informational interests,"[282] costs or the price of expression, and background facts, when taken together, produce bases for a system of stringent protections for expressive liberties.[283]

Many legal scholars discuss the interest and value of expressive liberties. Justice Brandeis proposed that "public discussion is a political duty."[284] Cass Sustein placed political speech on the upper tier of his two-tier model for freedom of expression, thus, warranting stringent protection.[285] He defined political speech as "both intended and received as a contribution to public deliberation about some issue."[286]

But this is usually related also to fair access to opportunities for such liberties.[287] Fair access to opportunity is suggested to mean substantive equality and not mere formal equality since "favorable conditions for realizing the expressive interest will include some assurance of the resources required for expression and some guarantee that efforts to express views on matters of common concern will not be drowned out by the speech of better-endowed citizens."[288]

Justice Brandeis' solution is to "remedy the harms of speech with more speech."[289] This view moves away from playing down the danger as merely exaggerated, toward "tak[ing] the costs seriously and embrac[ing] expression as the preferred strategy for addressing them."[290]

However, in some cases, the idea of more speech may not be enough. Professor Laurence Tribe observed the need for context and "the specification of substantive values before [equality] has full meaning."[291] Professor Catherine A. MacKinnon adds that "equality continues to be viewed in a formal rather than a substantive sense."[292] Thus, more speech can only mean more speech from the few who are dominant rather than those who are not.

Our jurisprudence

This court has tackled these issues.

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282 Id. at 184.
283 Id. at 184–192.
284 Id. at 186, *citing Whitney v. California*, 274 US 357, 375 (1927) (J. Brandeis concurring).
285 *See* Joshua Cohen, *Freedom of Expression*, in TOLERATION: AN ELUSIVE VIRTUE 187 (1996).
286 Id., *citing Democracy*, p. 134.
287 *See* Joshua Cohen, *Freedom of Expression*, in TOLERATION: AN ELUSIVE VIRTUE 179 (1996).
288 Id. at 202.
289 Id. at 200.
290 Id. at 201.
291 *See* John A. Powell, *Worlds Apart: Reconciling Freedom of Speech and Equality*, 85 KY. L. J. 9, 50–51 (1996–1997).
292 Id. at 51.

Osmeña v. COMELEC affirmed *National Press Club v. COMELEC* on the validity of Section 11(b) of the Electoral Reforms Law of 1987.[293] This section "prohibits mass media from selling or giving free of charge print space or air time for campaign or other political purposes, except to the Commission on Elections."[294] This court explained that this provision only regulates the time and manner of advertising in order to ensure media equality among candidates.[295] This court grounded this measure on constitutional provisions mandating political equality:[296]

> Article IX-C, Section 4
>
> > Section 4. 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.* (Emphasis supplied)
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> Article XIII, Section 1
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> > Section 1. The *Congress shall give highest priority* to the enactment of measures that protect and enhance the right of all the people to human dignity, *reduce* social, economic, and *political inequalities*, and remove cultural inequities by equitably diffusing wealth and political power for the common good.
> >
> > To this end, the State shall regulate the acquisition, ownership, use, and disposition of property and its increments. (Emphasis supplied)
>
> Article II, Section 26
>
> > Section 26. The State shall guarantee *equal access to opportunities for public service*, and prohibit political dynasties as may be defined by law. (Emphasis supplied)

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293 *Osmeña v. COMELEC*, 351 Phil. 692, 705 (1998) [Per J. Mendoza, En Banc].
294 Id. at 702.
295 Id. at 706.
296 Id. at 713–714.

Thus, in these cases, we have acknowledged the Constitution's guarantee for more substantive expressive freedoms that take equality of opportunities into consideration during elections.

The other view

However, there is also the other view. This is that considerations of equality of opportunity or equality in the ability of citizens as speakers should not have a bearing in free speech doctrine.

Under this view, "members of the public are trusted to make their own individual evaluations of speech, and government is forbidden to intervene for paternalistic or redistributive reasons . . . [thus,] ideas are best left to a freely competitive ideological market."[297] This is consistent with the libertarian suspicion on the use of viewpoint as well as content to evaluate the constitutional validity or invalidity of speech.

The textual basis of this view is that the constitutional provision uses negative rather than affirmative language. It uses 'speech' as its subject and not 'speakers'.[298] Consequently, the Constitution protects free speech per se, indifferent to the types, status, or associations of its speakers.[299] Pursuant to this, "government must leave speakers and listeners in the private order to their own devices in sorting out the relative influence of speech."[300]

Justice Romero's dissenting opinion in *Osmeña v. COMELEC* formulates this view that freedom of speech includes "not only the right to express one's views, but also other cognate rights relevant to the free communication [of] ideas, not excluding the right to be informed on matters of public concern."[301] She adds:

> And since so many imponderables may affect the outcome of elections — qualifications of voters and candidates, education, means of transportation, health, public discussion, private animosities, the weather, the threshold of a voter's resistance to pressure — *the utmost ventilation of opinion of men and issues*, through assembly, association and organizations, *both by the candidate and the voter, becomes a sine qua non for elections to truly reflect the will of the electorate.*[302] (Emphasis supplied)

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297 *See* Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 145 (2010).
298 Id. at 155–156.
299 Id. at 156.
300 Id. at 157.
301 J. Romero, dissenting opinion in *Osmeña v. COMELEC*, 351 Phil. 692, 736 (1998) [Per J. Mendoza, En Banc].
302 Id. at 742.

Justice Romero's dissenting opinion cited an American case, if only to emphasize free speech primacy such that "courts, as a rule are wary to impose greater restrictions as to any attempt to curtail speeches with political content,"[303] thus:

> the concept that the government may restrict the speech of some elements in our society in order to enhance the relative voice of the others is wholly foreign to the First Amendment which was designed to "secure the widest possible dissemination of information from diverse and antagonistic sources" and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[304]

This echoes Justice Oliver Wendell Holmes' submission "that the market place of ideas is still the best alternative to censorship."[305]

Parenthetically and just to provide the whole detail of the argument, the majority of the US Supreme Court in the campaign expenditures case of *Buckley v. Valeo* "condemned restrictions (even if content-neutral) on expressive liberty imposed in the name of 'enhanc[ing] the relative voice of others' and thereby 'equaliz[ing] access to the political arena."[306] The majority did not use the equality-based paradigm.

One flaw of campaign expenditure limits is that "any limit placed on the amount which a person can speak, which takes out of his exclusive judgment the decision of when enough is enough, deprives him of his free speech."[307]

Another flaw is how "[a]ny quantitative limitation on political campaigning inherently constricts the sum of public information and runs counter to our 'profound national commitment that debate on public issues should be uninhibited, robust, and wide-open.'"[308]

In fact, "[c]onstraining those who have funds or have been able to raise funds does not ease the plight of those without funds in the first place . . . [and] even if one's main concern is slowing the increase in political costs, it may be more effective to rely on market forces to achieve that result than

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303 Id. at 755.

304 Id. at 750, *quoting Buckley v. Valeo*, 424 US 1 (1976), *citing New York Times v. Sullivan*, 84 S Ct. 710, *quoting Associated Press v. United States*, 326 US 1 (1945) and *Roth v. United States*, 484.

305 J. Carpio, dissenting opinion in *Soriano v. Laguardia*, G.R. No. 164785, March 15, 2010, 615 SCRA 254, 281 [Per J. Velasco, Jr., En Banc], *citing* the dissenting opinion of J. Holmes in *Abrams v. United States*, 250 U.S. 616, 40 S. Ct. 17, 63 L. Ed. 1173 (1919).

306 *See* Joshua Cohen, *Freedom of Expression*, in TOLERATION: AN ELUSIVE VIRTUE 202 (1996), *citing Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976).

307 *See* Joel L. Fleishman, *Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Election Campaign Act of 1971*, 51 N.C.L. REV. 389, 453 (1973).

308 Id. at 454.

on active legal intervention."[309] According to Herbert Alexander, "[t]o oppose limitations is not necessarily to argue that the sky's the limit [because in] any campaign there are saturation levels and a point where spending no longer pays off in votes per dollar."[310]

III.C.
When private speech amounts
to election paraphernalia

The scope of the guarantee of free expression takes into consideration the constitutional respect for human potentiality and the effect of speech. It valorizes the ability of human beings to express and their necessity to relate. On the other hand, a complete guarantee must also take into consideration the effects it will have in a deliberative democracy. Skewed distribution of resources as well as the cultural hegemony of the majority may have the effect of drowning out the speech and the messages of those in the minority. In a sense, social inequality does have its effect on the exercise and effect of the guarantee of free speech. Those who have more will have better access to media that reaches a wider audience than those who have less. Those who espouse the more popular ideas will have better reception than the subversive and the dissenters of society. To be really heard and understood, the marginalized view normally undergoes its own degree of struggle.

The traditional view has been to tolerate the viewpoint of the speaker and the content of his or her expression. This view, thus, restricts laws or regulation that allows public officials to make judgments of the value of such viewpoint or message content. This should still be the principal approach.

However, the requirements of the Constitution regarding equality in opportunity must provide limits to some expression during electoral campaigns.

Thus clearly, regulation of speech in the context of electoral campaigns made by candidates or the members of their political parties or their political parties may be regulated as to time, place, and manner. This is the effect of our rulings in *Osmeña v. COMELEC* and *National Press Club v. COMELEC*.

Regulation of speech in the context of electoral campaigns made by persons who are not candidates or who do not speak as members of a political party which are, taken as a whole, principally advocacies of a social issue that the public must consider during elections is unconstitutional. Such

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309 Id. at 479.
310 Id.

regulation is inconsistent with the guarantee of according the fullest possible range of opinions coming from the electorate including those that can catalyze candid, uninhibited, and robust debate in the criteria for the choice of a candidate.

This does not mean that there cannot be a specie of speech by a private citizen which will not amount to an election paraphernalia to be validly regulated by law.

Regulation of election paraphernalia will still be constitutionally valid if it reaches into speech of persons who are not candidates or who do not speak as members of a political party if they are not candidates, only if what is regulated is declarative speech that, taken as a whole, has for its principal object the endorsement of a candidate only. The regulation (a) should be provided by law, (b) reasonable, (c) narrowly tailored to meet the objective of enhancing the opportunity of all candidates to be heard and considering the primacy of the guarantee of free expression, and (d) demonstrably the least restrictive means to achieve that object. The regulation must only be with respect to the time, place, and manner of the rendition of the message. In no situation may the speech be prohibited or censored on the basis of its content. For this purpose, it will not matter whether the speech is made with or on private property.

This is not the situation, however, in this case for two reasons. First, as discussed, the principal message in the twin tarpaulins of petitioners consists of a social advocacy.

Second, as pointed out in the concurring opinion of Justice Antonio Carpio, the present law — Section 3.3 of Republic Act No. 9006 and Section 6(c) of COMELEC Resolution No. 9615 — if applied to this case, will not pass the test of reasonability. A fixed size for election posters or tarpaulins without any relation to the distance from the intended average audience will be arbitrary. At certain distances, posters measuring 2 by 3 feet could no longer be read by the general public and, hence, would render speech meaningless. It will amount to the abridgement of speech with political consequences.

IV
Right to property

Other than the right to freedom of expression[311] and the meaningful exercise of the right to suffrage,[312] the present case also involves one's right

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311 CONST., art. III, sec. 4.
312 CONST., art. V, sec. 1.

to property.[313]

Respondents argue that it is the right of the state to prevent the circumvention of regulations relating to election propaganda by applying such regulations to private individuals.[314]

Certainly, any provision or regulation can be circumvented. But we are not confronted with this possibility. Respondents agree that the tarpaulin in question belongs to petitioners. Respondents have also agreed, during the oral arguments, that petitioners were neither commissioned nor paid by any candidate or political party to post the material on their walls.

Even though the tarpaulin is readily seen by the public, the tarpaulin remains the private property of petitioners. Their right to use their property is likewise protected by the Constitution.

In *Philippine Communications Satellite Corporation v. Alcuaz:*[315]

> Any regulation, therefore, which operates as an effective confiscation of private property or constitutes an arbitrary or unreasonable infringement of property rights is void, because it is repugnant to the constitutional guaranties of due process and equal protection of the laws.[316] (Citation omitted)

This court in *Adiong* held that a restriction that regulates where decals and stickers should be posted is "so broad that it encompasses even the citizen's private property."[317] Consequently, it violates Article III, Section 1 of the Constitution which provides that no person shall be deprived of his property without due process of law. This court explained:

> Property is more than the mere thing which a person owns, it includes the right to acquire, use, and dispose of it; and the Constitution, in the 14th Amendment, protects these essential attributes.
>
> Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. Holden v. Hardy, 169 U.S. 366, 391, 41 L. ed. 780, 790, 18 Sup. Ct. Rep. 383. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land. 1 Cooley's Bl. Com. 127. (Buchanan v. Warley 245 US 60 [1917])[318]

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313 CONST., art. III, sec. 1.
314 *Rollo,* p. 81.
315 259 Phil. 707 (1989) [Per J. Regalado, En Banc].
316 Id. at 721–722.
317 *Adiong v. COMELEC*, G.R. No. 103956, March 31, 1992, 207 SCRA 712, 720 [Per J. Gutierrez, Jr., En Banc].
318 Id. at 721.

This court ruled that the regulation in *Adiong* violates private property rights:

> The right to property may be subject to a greater degree of regulation but when this right is joined by a "liberty" interest, the burden of justification on the part of the Government must be exceptionally convincing and irrefutable. The burden is not met in this case.
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> Section 11 of Rep. Act 6646 is so encompassing and invasive that it prohibits the posting or display of election propaganda in any place, whether public or private, except in the common poster areas sanctioned by COMELEC. This means that a private person cannot post his own crudely prepared personal poster on his own front door or on a post in his yard. While the COMELEC will certainly never require the absurd, there are no limits to what overzealous and partisan police officers, armed with a copy of the statute or regulation, may do.[319]

Respondents ordered petitioners, who are private citizens, to remove the tarpaulin from their own property. The absurdity of the situation is in itself an indication of the unconstitutionality of COMELEC's interpretation of its powers.

Freedom of expression can be intimately related with the right to property. There may be no expression when there is no place where the expression may be made. COMELEC's infringement upon petitioners' property rights as in the present case also reaches out to infringement on their fundamental right to speech.

Respondents have not demonstrated that the present state interest they seek to promote justifies the intrusion into petitioners' property rights. Election laws and regulations must be reasonable. It must also acknowledge a private individual's right to exercise property rights. Otherwise, the due process clause will be violated.

COMELEC Resolution No. 9615 and the Fair Election Act intend to prevent the posting of election propaganda in private property without the consent of the owners of such private property. COMELEC has incorrectly implemented these regulations. Consistent with our ruling in *Adiong*, we find that the act of respondents in seeking to restrain petitioners from posting the tarpaulin in their own private property is an impermissible encroachments on the right to property.

V
Tarpaulin and its message are not religious speech

[319] Id. at 721–722.

We proceed to the last issues pertaining to whether the COMELEC in issuing the questioned notice and letter violated the right of petitioners to the free exercise of their religion.

At the outset, the Constitution mandates the separation of church and state.[320] This takes many forms. Article III, Section 5 of the Constitution, for instance provides:

> Section 5. No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.

There are two aspects of this provision.[321] The first is the non-establishment clause.[322] Second is the free exercise and enjoyment of religious profession and worship.[323]

The second aspect is at issue in this case.

Clearly, not all acts done by those who are priests, bishops, ustadz, imams, or any other religious make such act immune from any secular regulation.[324] The religious also have a secular existence. They exist within a society that is regulated by law.

The Bishop of Bacolod caused the posting of the tarpaulin. But not all acts of a bishop amounts to religious expression. This notwithstanding petitioners' claim that "the views and position of the petitioners, the Bishop and the Diocese of Bacolod, on the RH Bill is inextricably connected to its Catholic dogma, faith, and moral teachings. . . ."[325]

The difficulty that often presents itself in these cases stems from the reality that every act can be motivated by moral, ethical, and religious considerations. In terms of their effect on the corporeal world, these acts range from belief, to expressions of these faiths, to religious ceremonies, and then to acts of a secular character that may, from the point of view of others

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320 CONST., art. II, sec. 6 provides that "[t]he separation of Church and State shall be inviolable."

321 *See Re: Request of Muslim Employees in the Different Courts in Iligan City (Re: Office Hours)*, 514 Phil. 31, 38 (2005) [Per J. Callejo, Sr., En Banc].

322 *See Ebralinag v. The Division Superintendent of Schools of Cebu*, G.R. No. 95770, March 1, 1993, 219 SCRA 256 [Per J. Griño-Aquino, En Banc].

323 *See Islamic Da'wah Council of the Philippines, Inc. v. Office of the Executive Secretary*, 453 Phil. 440 (2003) [Per J. Corona, En Banc]. *See also German, et al. v. Barangan, et al.*, 220 Phil. 189 (1985) [Per J. Escolin, En Banc].

324 *See Pamil v. Teleron*, 176 Phil. 51 (1978) [Per J. Fernando, En Banc].

325 *Rollo*, p. 13.

who do not share the same faith or may not subscribe to any religion, may not have any religious bearing.

Definitely, the characterizations of the religious of their acts are not conclusive on this court. Certainly, our powers of adjudication cannot be blinded by bare claims that acts are religious in nature.

Petitioners erroneously relied on the case of *Ebralinag v. The Division Superintendent of Schools of Cebu*[326] in claiming that the court "emphatically" held that the adherents of a particular religion shall be the ones to determine whether a particular matter shall be considered ecclesiastical in nature.[327] This court in *Ebralinag* exempted Jehovah's Witnesses from participating in the flag ceremony "out of respect for their religious beliefs, [no matter how] "bizarre" those beliefs may seem to others."[328] This court found a balance between the assertion of a religious practice and the compelling necessities of a secular command. It was an early attempt at accommodation of religious beliefs.

In *Estrada v. Escritor*,[329] this court adopted a policy of benevolent neutrality:

> With religion looked upon with benevolence and not hostility, benevolent neutrality allows accommodation of religion under certain circumstances. Accommodations are government policies that take religion specifically into account not to promote the government's favored form of religion, but to allow individuals and groups to exercise their religion without hindrance. Their purpose or effect therefore is to remove a burden on, or facilitate the exercise of, a person's or institution's religion. As Justice Brennan explained, the "government [may] take religion into account . . . to exempt, when possible, from generally applicable governmental regulation individuals whose religious beliefs and practices would otherwise thereby be infringed, or to create without state involvement an atmosphere in which voluntary religious exercise may flourish."[330]

This court also discussed the *Lemon test* in that case, such that a regulation is constitutional when: (1) it has a secular legislative purpose; (2) it neither advances nor inhibits religion; and (3) it does not foster an excessive entanglement with religion.[331]

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326 G.R. No. 95770, March 1, 1993, 219 SCRA 256 [Per J. Griño-Aquino, En Banc].

327 *Rollo*, p. 140.

328 Id. at 273.

329 455 Phil. 411 (2003) [Per J. Puno, En Banc] [C.J. Davide, Jr., JJ. Austria-Martinez, Corona, Azcuna, Tinga, and Vitug concurring; J. Bellosillo concurring in the result; JJ. Panganiban, Ynares-Santiago, Carpio, Carpio Morales, Callejo, Sr., dissenting; JJ. Quisumbing and Sandoval-Gutierrez on official leave].

330 Id. at 522–523, *citing* Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 (3) GEO. WASH. L. REV. 685, 688 (1992).

331 *Estrada v. Escritor*, 455 Phil. 411, 506 (2003) [Per J. Puno, En Banc], *citing Lemon v. Kurtzman*, 403 U.S. 602, 612–613 (1971).

As aptly argued by COMELEC, however, the tarpaulin, on its face, "does not convey any religious doctrine of the Catholic church."[332] That the position of the Catholic church appears to coincide with the message of the tarpaulin regarding the RH Law does not, by itself, bring the expression within the ambit of religious speech. On the contrary, the tarpaulin clearly refers to candidates classified under "Team Patay" and "Team Buhay" according to their respective votes on the RH Law.

The same may be said of petitioners' reliance on papal encyclicals to support their claim that the expression on the tarpaulin is an ecclesiastical matter. With all due respect to the Catholic faithful, the church doctrines relied upon by petitioners are not binding upon this court. The position of the Catholic religion in the Philippines as regards the RH Law does not suffice to qualify the posting by one of its members of a tarpaulin as religious speech solely on such basis. The enumeration of candidates on the face of the tarpaulin precludes any doubt as to its nature as speech with political consequences and not religious speech.

Furthermore, the definition of an "ecclesiastical affair" in *Austria v. National Labor Relations Commission*[333] cited by petitioners finds no application in the present case. The posting of the tarpaulin does not fall within the category of matters that are beyond the jurisdiction of civil courts as enumerated in the *Austria* case such as "proceedings for excommunication, ordinations of religious ministers, administration of sacraments and other activities with attached religious significance."[334]

A FINAL NOTE

We maintain sympathies for the COMELEC in attempting to do what it thought was its duty in this case. However, it was misdirected.

COMELEC's general role includes a mandate to ensure equal opportunities and reduce spending *among candidates and their registered political parties*. It is not to regulate or limit the speech of the electorate as it strives to participate in the electoral exercise.

The tarpaulin in question may be viewed as producing a caricature of those who are running for public office. Their message may be construed generalizations of very complex individuals and party-list organizations.

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332 *Rollo*, p. 86.
333 371 Phil. 340 (1999) [Per J. Kapunan, First Division].
334 Id. at 353.

They are classified into black and white: as belonging to "Team Patay" or "Team Buhay."

But this caricature, though not agreeable to some, is still protected speech.

That petitioners chose to categorize them as purveyors of death or of life on the basis of a single issue — and a complex piece of legislation at that — can easily be interpreted as an attempt to stereotype the candidates and party-list organizations. Not all may agree to the way their thoughts were expressed, as in fact there are other Catholic dioceses that chose not to follow the example of petitioners.

Some may have thought that there should be more room to consider being more broad-minded and non-judgmental. Some may have expected that the authors would give more space to practice forgiveness and humility.

But, the Bill of Rights enumerated in our Constitution is an enumeration of our fundamental liberties. It is not a detailed code that prescribes good conduct. It provides space for all to be guided by their conscience, not only in the act that they do to others but also in judgment of the acts of others.

Freedom for the thought we can disagree with can be wielded not only by those in the minority. This can often be expressed by dominant institutions, even religious ones. That they made their point dramatically and in a large way does not necessarily mean that their statements are true, or that they have basis, or that they have been expressed in good taste.

Embedded in the tarpaulin, however, are opinions expressed by petitioners. It is a specie of expression protected by our fundamental law. It is an expression designed to invite attention, cause debate, and hopefully, persuade. It may be motivated by the interpretation of petitioners of their ecclesiastical duty, but their parishioner's actions will have very real secular consequences.

Certainly, provocative messages do matter for the elections.

What is involved in this case is the most sacred of speech forms: expression by the electorate that tends to rouse the public to debate contemporary issues. This is not speech by candidates or political parties to entice votes. It is a portion of the electorate telling candidates the conditions for their election. It is the substantive content of the right to suffrage.

This is a form of speech hopeful of a quality of democracy that we should all deserve. It is protected as a fundamental and primordial right by our Constitution. The expression in the medium chosen by petitioners deserves our protection.

WHEREFORE, the instant petition is **GRANTED**. The temporary restraining order previously issued is hereby made permanent. The act of the COMELEC in issuing the assailed notice dated February 22, 2013 and letter dated February 27, 2013 is declared unconstitutional.

SO ORDERED.

MARVIC M.V.F LEONEN
Associate Justice

WE CONCUR:

MARIA LOURDES P. A. SERENO
Chief Justice

ANTONIO T. CARPIO
Associate Justice

I join the dissent of J. Brion

PRESBITERO J. VELASCO, JR.
Associate Justice

J. Brion left his vote; see his Dissenting Opinion.

TERESITA J. LEONARDO-DE CASTRO
Associate Justice

ARTURO D. BRION
Associate Justice

I join J. Carpio's opinion

DIOSDADO M. PERALTA
Associate Justice

I join the dissent of J. Brion

LUCAS P. BERSAMIN
Associate Justice

MARIANO C. DEL CASTILLO
Associate Justice

MARTIN S. VILLARAMA, JR.
Associate Justice

JOSE PORTUGAL PEREZ
Associate Justice

JOSE CATRAL MENDOZA
Associate Justice

BIENVENIDO L. REYES
Associate Justice

See Separate Concurring Opinion

ESTELA M. PERLAS-BERNABE
Associate Justice

No Part
FRANCIS H. JARDELEZA
Associate Justice

CERTIFICATION

I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the court.

MARIA LOURDES P. A. SERENO
Chief Justice