G.R. No. 205728 – THE DIOCESE OF BACOLOD, REPRESENTED BY THE MOST REV. BISHOP VICENTE M. NAVARRA and THE BISHOP HIMSELF IN HIS PERSONAL CAPACITY, *Petitioners v.* COMMISSION ON ELECTIONS and THE ELECTION OFFICER OF BACOLOD CITY, ATTY. MAVIL V. MAJARUCON, *Respondents.*

Promulgated:

January 21, 2015

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SEPARATE CONCURRING OPINION

PERLAS-BERNABE, *J.*:

I concur with the *ponencia* that the COMELEC's Notice to Remove Campaign Materials dated February 22, 2013 and Letter dated February 27, 2013 (the COMELEC issuances) ordering the immediate removal of the tarpaulin subject of this case are null and void for being unreasonable restrictions on free speech. I, however, disagree in the approach the *ponencia* takes in decreeing the same. This stems from my view that the **said COMELEC issuances constitute content-neutral and not content-based regulations** as the *ponencia* so holds, reasoning that "the content of the tarpaulin is not easily divorced from the size of its medium."[1] In this regard, I agree with the opinion of Senior Associate Justice Antonio T. Carpio that **these issuances, which effectively limit the size of the tarpaulin, are examples of content-neutral regulations as they restrict only the manner by which speech is relayed but not the content of what is conveyed.**[2] I find this to be true since no peculiar reason was proffered by the petitioners behind the sizing of their poster – say, to put emphasis on a particular portion of the text or to deliberately serve as some sort of symbolic allusion. The tarpaulin's size links, as it appears, only to the efficiency of the communication, following the logic that a larger size makes them more visible. This, to my mind, merely concerns the manner by which the speech is communicated, and not its content. In the same vein, it is my observation that sensible use of time and place (both of which are generally recognized as incidents of speech, akin to how I perceive the poster's size) may also affect the efficiency of communication: perceptibly, a message conveyed at a time and place where people are most likely to view the same may have the effect of making the communication more "efficient." The distinction between a content-neutral regulation and a content-based regulation, as enunciated in the case of *Newsounds Broadcasting Network, Inc. v. Hon. Dy*,[3] is as follows:

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1 See *Ponencia*, p. 47.

2 See Separate Concurring Opinion of Senior Associate Justice Antonio T. Carpio, p. 3.

3 602 Phil. 255 (2009).

> [J]urisprudence distinguishes between a **content-neutral** regulation, *i.e.*, merely concerned with **the incidents of the speech, or one that merely controls the time, place or manner, and under well-defined standards**; and a **content-based** restraint or censorship, *i.e.*, **the restriction is based on the subject matter of the utterance or speech**.[4]
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> x x x x (Enphases supplied)

Since the sizing regulations, *i.e.*, the COMELEC issuances, are concerned only with an incident of speech, that is, the manner by which the speech was communicated, I thus respectfully submit that they should have been characterized by the *ponencia* as content-neutral, and not content-based regulations. As I see it, the medium here is not the message.

On the premise that the COMELEC issuances constitute content-neutral regulations, the method of constitutional scrutiny which should be applied would then be the intermediate scrutiny test, and not the strict scrutiny test which the *ponencia* necessarily utilized due to its content-based classification.

As comprehensively explained in the seminal case of *Chavez v. Gonzales*,[5] "[w]hen the speech restraints take the form of a **content-neutral regulation**, **only a substantial governmental interest** is required for its validity. Because regulations of this type are not designed to suppress any particular message, they are not subject to the strictest form of judicial scrutiny but an **intermediate approach** — somewhere between the mere rationality that is required of any other law and the compelling interest standard applied to content-based restrictions. The **test** is called **intermediate** because the Court will not merely rubberstamp the validity of a law but also require that the restrictions be narrowly-tailored to promote an important or significant governmental interest that is unrelated to the suppression of expression. The intermediate approach has [thus] been formulated in this manner: A governmental regulation is sufficiently justified if it is within the constitutional power of the Government, if **[(*a*)]** **it furthers an important or substantial governmental interest**; **[(*b*)]** the governmental interest is unrelated to the suppression of free expression; and **[(*c*)]** the incident restriction on alleged [freedom of speech and expression] is no greater than is essential to the furtherance of that interest."[6]

"On the other hand, a governmental action that restricts freedom of speech or of the press **based on content** is given the **strictest scrutiny** in light of its inherent and invasive impact. Only when the challenged act has overcome the **clear and present danger rule** will it pass constitutional

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4 Id. at 271.
5 569 Phil. 155 (2008).
6 Id. at 205-206 (emphases and underscoring supplied).

muster, with the government having the burden of overcoming the presumed unconstitutionality."[7]

Given the peculiar circumstances of this case, it is my view that the COMELEC issuances do not advance an important or substantial governmental interest so as to warrant the restriction of free speech. The subject tarpaulin cannot be classified as the usual election propaganda directly endorsing a particular candidate's campaign. Albeit with the incidental effect of manifesting candidate approval/disapproval, the subject tarpaulin, at its core, really asserts a private entity's, *i.e.*, the Diocese's, personal advocacy on a social issue, *i.e.*, reproductive health, in relation to the passage of Republic Act No. 10354,[8] otherwise known as the "Responsible Parenthood and Reproductive Health Act of 2012." What is more is that the tarpaulin, although open to the public's view, was posted in purely private property by the Diocese's own volition and without the prodding or instruction of any candidate. In *Blo Umpar Adiong v. COMELEC* (*Adiong*),[9] the Court nullified the prohibition on the posting of decals and stickers in "mobile" places like cars and other moving vehicles as the restriction **did not endanger any substantial government interest**, observing, among others, that "**the freedom of expression curtailed by the questioned prohibition is not so much that of the candidate or the political party**."[10] The Court rationalized that:

> The regulation strikes at the freedom of an individual to express his preference and, by displaying it on his car, to convince others to agree with him. A sticker may be furnished by a candidate but once the car owner agrees to have it placed on his private vehicle, **the expression becomes a statement by the owner, primarily his own and not of anybody else**. If, in the *National Press Club* [*v. Comelec*] case [G.R. No. 102653, March 5, 1992, 207 SCRA 1] , the Court was careful to rule out restrictions on reporting by newspapers or radio and television stations and commentators or columnists as long as these are not correctly paid-for advertisements or purchased opinions[,] with less reason can we sanction the prohibition against **a sincere manifestation of support and a proclamation of belief by an individual person who pastes a sticker or decal on his private property**.[11] (Emphases supplied)

Considering the totality of the factors herein detailed, and equally bearing in mind the discussions made in *Adiong*, I submit that the COMELEC issuances subject of this case do not satisfy the substantial governmental interest requisite and, hence, fail the intermediate scrutiny test. Surely, while the COMELEC's regulatory powers ought to be recognized, personal advocacies pertaining to relevant social issues by a private entity

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7 Id. at 206 (emphases in the original).

8 Entitled "AN ACT PROVIDING FOR A NATIONAL POLICY ON RESPONSIBLE PARENTHOOD AND REPRODUCTIVE HEALTH"(December 21, 2012).

9 G.R. No. 103956, March 31, 1992, 207 SCRA 712.

10 Id. at 719.

11 Id.

within its own private property ought to fall beyond that broad authority, lest we stifle the value of a core liberty.

ACCORDINGLY, subject to the above-stated reasons, I concur with the *ponencia* and vote to **GRANT** the petition.

ESTELA M. PERLAS-BERNABE
Associate Justice