G. R. No. 205728 – THE DIOCESE OF BACOLOD, REPRESENTED BY THE MOST REVEREND 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

DISSENTING OPINION

BRION, *J.*:

Prefatory Statement

The present case asks us to determine whether respondent Commission on Elections (*Comelec*) should be prevented from implementing the size restrictions in Republic Act No. 9006 (RA 9006, otherwise known as the *Fair Elections Act*) to the six by ten feet tall tarpaulin posted by petitioner Diocese of Bacolod containing the message "RH LAW IBASURA" during the election period.

The *ponente* opts to give due course to the petition despite obvious jurisprudential, practical and procedural infirmities that will prejudicially impact on established rules to the detriment of the electoral process; that confuses the lines between right of free speech and election propaganda; and that inordinately disregards constitutional electoral values through its misplaced views on the right to free speech – a right that can exist only if this country continues to be a democratic one where leaders are elected under constitutionally established electoral values and orderly processes.

Thus, the *ponente* declares as unconstitutional Section 3.3 of RA 9006, and its implementing rule, Section 6(c) of Comelec Resolution No. 9615, for violating the freedom of speech. In so doing, it classifies the size restrictions in RA 9006 as a content-based regulation and applied the strict scrutiny test to a regulation of a poster's size.

In my view, the petition prematurely availed of the Court's power of judicial review BY OPENLY DISREGARDING ESTABLISHED COMELEC PROCESSES BY BYPASSING THE COMELEC *EN BANC*. This is a legal mortal sin that will sow havoc in future cases before this Court. The petition consequently failed to show any *prima facie* case of grave abuse of discretion on the part of the Comelec, as it had not yet finally decided on its course of action.

Most importantly, the issues the petition presents have now been MOOTED and do not now present any LIVE CONTROVERSY. The Court will recall that we immediately issued a temporary restraining order to halt further Comelec action, so that the petitioner was effectively the prevailing party when the elections - the critical time involved in this case - took place. Subsequently, the interest advocated in the disputed tarpaulin was decided by this Court to the satisfaction of the public at large, among them the Church whose right to life views prevailed. THESE ARE CIRCUMSTANCES THAT SHOULD DISSUADE THIS COURT FROM RULING ON A CASE THAT WEIGHS THE RIGHTS OF FREE SPEECH AND DEMOCRATIC ELECTORAL VALUES.

A point that should not be missed is that the disputed tarpaulin is covered by regulations under RA 9006, as it falls within the definition of election propaganda. The key in determining whether a material constitutes as election propaganda lies in whether it is ***intended to promote the election of a list of candidates it favors and/or oppose the election of candidates in another list***. RA 9006 did not, as the *ponente* infers, require that the material be posted by, or in behalf of the candidates and/or political parties.

Lastly, the assailed law is a valid content-neutral regulation on speech, and is thus not unconstitutional. The assailed regulation does not prohibit the posting of posters; does not limit the number of allowable posters that may be posted; and does not even restrict the place where election propaganda may be posted. ***It only regulates the posters' size***.

To reiterate, our decision in the present case sets the tone in resolving future conflicts between the values before us. While freedom of speech is paramount, it does have its limits. We should thus be careful in deciding the present case, such that in recognizing one man's right to speak, we do not end up sacrificing the ideals in which our republican, democratic nation stands upon.

IN SUM, THE MORE PRUDENT APPROACH FOR THIS COURT IS TO SIMPLY DISMISS THE PETITION FOR MOOTNESS AND PROCEDURAL INFIRMITIES, AND TO PROCEED TO THE WEIGHING OF CONSTITUTIONAL VALUES IN A FUTURE LIVE AND MORE APPROPRIATE CASE WHERE OUR RULING WILL CLARIFY AND ELUCIDATE RATHER THAN CONFUSE.

I. Factual Antecedent

This case reached us through a special civil action for *certiorari* and prohibition with application for preliminary injunction and temporary restraining order under Rule 65 of the Rules of Court. The petition assails the Comelec's **Notice to Remove Campaign Materials** that it issued through Election Officer Mavil V. Majarucon on February 22, 2013, and through Comelec Law Director Esmeralda Amora-Ladra on February 27, 2013.

The assailed notices direct the petitioners to remove the tarpaulin (*subject poster*) they placed within a private compound housing at the San Sebastian Cathedral of Bacolod on February 21, 2013 **for exceeding the size limitations on election propaganda**. The notice dated February 27, 2013 warned the petitioners that the Comelec Law Department would be forced to file an election offense case against them if the subject poster would not be removed.

The petitioners responded by filing the present petition assailing the two notices the Comelec sent to them on the ground that **the poster is not a campaign material**, and is hence **outside the coverage of Comelec Resolution No. 9615**. The petitioners also supported their position by invoking their **rights to freedom of expression** and **freedom of religion**.

II. Procedural Arguments

A. Reviewability of the assailed notices as an administrative act of the Comelec

The *ponente* posits that a judicial review of the size limitations under RA 9006 is necessary, as it has a chilling effect on political speech. According to the *ponente*, the present petition has triggered the Court's expanded jurisdiction since the Comelec's letter and notice threaten the fundamental right to speech.

To be sure, the concept of judicial power under the 1987 Constitution recognizes its *(1)* traditional jurisdiction to settle actual cases or controversies; and *(2)* expanded jurisdiction to determine whether a government agency or instrumentality committed a grave abuse of discretion.[1] The exercise of either power could pave the way to the Court's power of judicial review, the Court's authority to strike down acts of the legislative and/or executive, constitutional bodies or administrative agencies that are contrary to the Constitution.[2]

Judicial review under the traditional jurisdiction of the Court requires the following requirements of justiciability: (1) there must be an ***actual case or controversy*** calling for the exercise of judicial power; (2) the person challenging the act must have the ***standing*** to question the validity of the subject act or issuance; otherwise stated, he must have a personal and substantial interest in the case such that he has sustained, or will sustain, direct injury as a result of its enforcement; (3) the question of

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[1] See J. Brion's discussion on the Power of Judicial Review in his Concurring Opinion in *Imbong v. Executive Secretary*, G.R. No.204819, April 8, 2014, pp. 7–9.

[2] *Garcia v. Executive Secretary*, G.R. No. 157584, April 2, 2009, 583 SCRA 119, 128–129.

constitutionality must ***be raised at the earliest opportunity***; and (4) the issue of constitutionality must be the very ***lis mota*** of the case.[3]

Failure to meet any of these requirements justifies the Court's refusal to exercise its power of judicial review under the Court's traditional power. The Court, however, has, in several instances, opted to relax one or more of these requirements to give due course to a petition presenting issues of transcendental importance to the nation.

In these cases, the doctrine of transcendental importance relaxes the standing requirement, and thereby indirectly relaxes the injury embodied in the actual case or controversy requirement. Note at this point that an actual case or controversy is present when the issues it poses are ripe for adjudication, that is, when the act being challenged has had a direct adverse effect on the individual challenging it. Standing, on the other hand, requires a personal and substantial interest manifested through a direct injury that the petitioner has or will sustain as a result of the questioned act.

Thus, when the standing is relaxed because of the transcendental importance doctrine, the character of the injury presented to fulfill the actual case or controversy requirement is likewise tempered. When we, for instance, say that the petitioners have no standing as citizens or as taxpayers but we nevertheless give the petition due course, we indirectly acknowledge that the injury that they had or will sustain is not personally directed towards them, but to the more general and abstract Filipino public.

A readily apparent trend from jurisprudence invoking the transcendental importance doctrine shows its application in cases where the government has committed grave abuse of discretion amounting to lack of, or excess of jurisdiction. This strong correlation between the exercise of the Court's expanded jurisdiction and its use of the transcendental importance doctrine reflects the former's distinct nature and origin. The Court's expanded jurisdiction roots from the constitutional commissioners' perception of the political question doctrine's overuse prior to the 1987 Constitution, a situation that arguably contributed to societal unrest in the years preceding the 1987 Constitution.

The political question doctrine prevents the Court from deciding cases that are of a political nature, and leaves the decision to the elected-officials of government. In other words, the Court, through the political question doctrine, defers to the judgment and discretion of the Executive and Legislature, matters that involve policy because they are the people's elected officials and hence are more directly accountable to them.

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[3] *Senate of the Philippines v. Ermita*, G.R. No. 169777, April 20, 2006, 488 SCRA 1, 35; and *Francisco v. House of Representatives*, 460 Phil. 830, 842 (2003).

The 1987 Constitution, recognizing the importance of the Court's active role in checking abuses in government, relaxed the political question doctrine and made it a duty upon the Court to determine whether there had been abuses in the government's exercise of discretion and consequently nullify such actions that violate the Constitution *albeit* in the narrow and limited instances of grave abuse of discretion. Thus, when a government agency's exercise of discretion is so grave as to amount to an excess or lack of jurisdiction, it becomes the duty to step in and check for violations of the Constitution. In these instances, the political question doctrine cannot prevent the Court from determining whether the government gravely abused its jurisdiction, against the back drop of the Constitution.

Necessarily, the government's act of grave abuse of discretion, more so if it has nationwide impact, involves a matter of transcendental importance to the nation. On the other hand, when the government's act involves a legitimate exercise of discretion, or amounts to an abuse of discretion that is not grave, then the need to temper standing requirements through the transcendental importance doctrine is not apparent.

This correlation between the Court's use of the transcendental doctrine requirement and its eventual exercise of the power of judicial review under its expanded jurisdiction warrants a review, *prima facie*, of whether there had been a grave abuse of discretion on the part of government. Where there is a showing *prima facie* of grave abuse, the Court relaxes its *locus standi* requirement (and indirectly its actual case or controversy requirement) through the transcendental importance doctrine. Where there is no showing of *prima facie* grave abuse, then the requirements of justiciability are applied strictly.

Thus, translated in terms of the Court's expanded jurisdiction, the actual case or controversy requirement is fulfilled by a *prima facie* showing of grave abuse of discretion. This approach reflects the textual requirement of grave abuse of discretion in the second paragraph of Article VIII, Section 1 of the 1987 Constitution. As I have earlier pointed out in my separate opinion in *Araullo v. Aquino*, justiciability under the expanded judicial power expressly and textually depends only on the presence or absence of grave abuse of discretion, as distinguished from a situation where the issue of constitutional validity is raised within a "traditionally" justiciable case which demands that the requirement of actual controversy based on specific legal rights must exist.

That a case presents issues of transcendental importance, on the other hand, justifies direct resort to this Court without first complying with the doctrine of hierarchy of courts.

A review of the petition shows that it has failed to show a *prima facie* case of grave abuse of discretion on the part of the Comelec.

The petition characterizes the notices as administrative acts of the Comelec that are outside the latter's jurisdiction to perform. The Comelec's ***administrative function*** refers to the enforcement and administration of election laws. Under the Section 2(6), Article IX-C of the Constitution, the Comelec is expressly given the power to "prosecute cases of violations of election laws, including acts or omissions constituting election frauds, offenses, and malpractices." The constitutional grant to the Comelec of the power to investigate and to prosecute election offenses as an adjunct to the enforcement and administration of all election laws is intended to enable the Comelec to effectively ensure to the people the free, orderly, and honest conduct of elections.[4]

This administrative function is markedly distinct from the Comelec's two other powers as an independent government agency established under the 1987 Constitution, *i.e.*, its ***quasi-legislative power*** to issue rules and regulations to implement the provisions of the 1987 Constitution,[5] the Omnibus Election Code,[6] and other election laws;[7] and its ***quasi-judicial power*** to resolve controversies arising from the enforcement of election laws, and to be the sole judge of all pre-proclamation controversies and of all contests relating to the elections, returns, and qualifications.[8]

The nature of the assailed action of the Comelec is essential to determine the proper remedy by which a review of its actions can reach this Court. ***As a general rule, an administrative order of the Comelec is not an appropriate subject of a special civil action for certiorari.***[9]

Through jurisprudence, the Court has clarified that the petition for *certiorari* under Rule 64 in relation to Rule 65 of the Rules of Court covers only the Comelec's quasi-judicial functions.[10] By reason of its distinct role in our scheme of government, the Comelec is allowed considerable latitude

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4 *Pimentel, Jr. v. COMELEC*, 352 Phil. 424 (1998).

5 Article IX-C, Section 2 of the 1987 Constitution provides:
Section 2. The Commission on Elections shall exercise the following powers and functions:
(1) Enforce and administer all laws and regulations relative to the conduct of an election, plebiscite, initiative, referendum, and recall. x x x

6 Sec. 52. Powers and functions of the Commission on Elections. - In addition to the powers and functions conferred upon it by the Constitution, the Commission shall have exclusive charge of the enforcement and administration of all laws relative to the conduct of elections for the purpose of ensuring free, orderly and honest elections, and shall:

x x x x

(c) Promulgate rules and regulations implementing the provisions of this Code or other laws which the Commission is required to enforce and administer, and require the payment of legal fees and collect the same in payment of any business done in the Commission, at rates that it may provide and fix in its rules and regulations. x x x. See *Bedol v. Commission on Elections*, G.R. No. 179830, December 3, 2009.

7 See, for instance, Section 26, Rep. Act No. 8436.

8 Section 2. The Commission on Elections shall exercise the following powers and functions: x x x
(2) Exercise exclusive original jurisdiction over all contests relating to the elections, returns, and qualifications of all elective regional, provincial, and city officials, and appellate jurisdiction over all contests involving elective municipal officials decided by trial courts of general jurisdiction, or involving elective *barangay* officials decided by trial courts of limited jurisdiction.

Decisions, final orders, or rulings of the Commission on election contests involving elective municipal and *barangay* offices shall be final, executory, and not appealable.

9 *Macabago v. Commission on Elections*, G.R. No. 152163, November 18, 2002, 392 SCRA 178.

10 *Jalosjos v. Comelec*, G.R. No. 205033, June 18, 2013, 698 SCRA 742, 752–753.

in devising means and methods to ensure the accomplishment of the great objective for which it was created – free, orderly and honest elections.[11] The Court recognizes this reality and concedes that it has no general powers of supervision over the Comelec except those specifically granted by the Constitution, *i.e.*, to review its decisions, orders and rulings within the limited terms of a petition for *certiorari*.[12]

Thus, ***the Court reviews Comelec's administrative acts only by way of exception, when it acts capriciously or whimsically, with grave abuse of discretion*** amounting to lack or excess of jurisdiction. Necessarily, this invokes the Court's expanded jurisdiction under the second paragraph of Article VIII, Section 1.

That there is an alleged grave abuse of discretion on the part of Comelec, however, does not automatically mean that the petition should be given due course. It has to meet the requirements of justiciability which, under the terms of the Court's expanded judicial power, has been translated to mean a prima facie showing of ***a governmental entity, office or official granted discretionary authority to act and that this authority has been gravely abused***. There can be no *prima facie* showing of grave abuse of discretion unless something has already been done[13] or has taken place under the law[14] and the petitioner sufficiently alleges the existence of a threatened or immediate injury to itself as a result of the gravely abusive exercise of discretion.[15]

In the case of an administrative agency (more so, if it involves an independent constitutional body), a matter cannot be considered ripe for judicial resolution unless administrative remedies have been exhausted.[16] ***Judicial review is appropriate only if, at the very least, those who have the power to address the petitioner's concerns have been given the opportunity to do so.*** In short, the requirement of ripeness does not become less relevant under the courts' expanded judicial power.

In this light, I find it worthy to note that that ***the petition challenges RA 9006 and Comelec Resolution No. 9615 not because its text, on its face, violates fundamental rights,[17] but because Comelec erroneously***

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11 *Sumulong v. Commission on Elections*, 73 Phil. 288, 294-295 (1941), cited in *Espino v. Zaldivar*, 129 Phil. 451, 474 (1967).

12 *Atty. Macalintal v. Commission on Elections,* G.R. No. 157013, July 10, 2003, 405 SCRA 614.

13 In the case of a challenged law or official action, for instance, the Court will not consider an issue ripe for judicial resolution, unless something had already been done. *Imbong v. Ochoa*, *Syjuico v. Abad*, *Bayan Telecommunications v. Republic*.

14 *Mariano, Jr. v. Commission on Elections*, G.R. No. 118577, March 7, 1995, 242 SCRA 211.

15 *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel*, 589 Phil. 463, 481 (2008).

16 See *Corales v. Republic*, G.R. No. 186613, August 27, 2013.

17 This is in contrast to my discussion of a *prima facie* grave abuse of discretion in *Imbong v. Executive Secretary*. In *Imbong*, the petition alleged (and the Court eventually concluded) that the text of the Reproductive Health Law violates the right to life of the unborn child in the Constitution. Congress, in enacting a law that violates a fundamental right, committed a grave abuse of discretion. Thus, citizens have an interest in stopping the implementation of an unconstitutional law that could cause irreparable injury to the countless unborn.

applied an otherwise constitutional law. Comelec's administrative act of including the petitioners' poster within the coverage of Comelec Resolution No. 9615 allegedly violated their constitutional rights to freedom of speech and religion.

This issue could have been best decided by the Comelec, had the petitioners followed the regular course of procedure in the investigation and prosecution of election offense cases. The ***assailed action of Comelec, after all, contained a warning against possible prosecution for an election offense that would have had to undergo an entire process before it is filed before the proper tribunal***. This process allows suspected election offenders to explain why an election offense should not be filed against them, and for the Comelec to consider the explanation.

Comelec Resolution No. 9386 (**Rules of Procedure in the Investigation and Prosecution of Election Offense Cases in the Commission on Elections**), in particular, provides that once a complaint is initiated, an investigating officer would have to conduct a preliminary investigation to determine whether it warrants prosecution. At this stage, the respondent(s) to the complaint may submit his counter-affidavit and other supporting documents for the complaint's dismissal.[18] The investigating

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The constitutionality of the text of RA 9006, on the other hand, is not in question in the present case. What the petitioners assail is their inclusion within the coverage of election propaganda regulations in RA 9006 and Comelec Resolution No. 9615.

[18] Section 6 of Comelec Resolution No. 9386 provides:

Section 6. Conduct of Preliminary Investigation. Within ten (10) days from receipt of the Complaint, the investigating officer shall issue a subpoena to the respondent/s, attaching thereto a copy of the Complaint, Affidavits and other supporting documents, giving said respondent/s ten (10) days from receipt within which to submit Counter-Affidavits and other supporting documents. The respondent shall have the right to examine all other evidence submitted by the complainant. Otherwise, the Investigating officer shall dismiss the Complaint if he finds no ground to continue with the inquiry. Such Counter-Affidavits and other supporting evidence submitted by the respondent shall be furnished by the latter to the complainant.

If the respondent cannot be subpoenaed, or if subpoenaed, does not submit Counter-Affidavits within the ten (10) day period, the investigating officer shall base his Resolution on the evidence presented by the complainant.

If the investigating officer believes that there are matters to be clarified, he may set a hearing to propound clarificatory questions to the parties or their witnesses, during which the parties shall be afforded an opportunity to be present, but without the right to examine or cross-examine. If the parties so desire, they may submit questions to the investigating officer which the latter may propound to the parties or parties or witnesses concerned.

Thereafter, the investigation shall be deemed concluded, and the investigating officer shall resolve the case within thirty (30) days there from. Upon the evidence thus adduced, the investigating officer shall determine whether or not there is sufficient ground to hold the respondent for trial.

Where the respondent is a minor, the investigating officer shall not conduct the preliminary investigation unless the child respondent shall have first undergone the requisite proceedings before the Local Social Welfare Development Officer pursuant to Republic Act No. 9344, otherwise known as the "Juvenile Justice and Welfare Act of 2006."

No motion, except on the ground of lack of jurisdiction or request for extension of time to submit Counter-Affidavits shall be allowed or granted except on exceptionally meritorious cases. Only one (1) Motion for Extension to file Counter-Affidavit for a period not exceeding ten (10) days shall be allowed. The filing of Reply-Affidavits, Rejoinder-Affidavits, Memoranda and similar pleadings are likewise prohibited.

A Memorandum, Manifestation or Motion to Dismiss is a prohibitive pleading and cannot take the place of a Counter-Affidavit unless the same is made by the respondent himself and verified.

officer may also hold a hearing to propound clarificatory questions to the parties and their witnesses. The parties may even submit questions to the investigating officer, which the latter may propound to the parties or parties or witnesses concerned.[19]

After preliminary investigation, the investigating officer has two options: if he finds no cause to hold the respondent for trial, he shall ***recommend the dismissal of the complaint***; otherwise, he shall prepare a ***recommendation to prosecute***, and the corresponding Information.[20]

Whichever course he takes, the investigating officer is required to forward the records of the case to the Commission *En Banc* (in cases investigated by the Law Department or the Regional Election Director) or to the Regional Election Director (in cases investigated by the Assistant Regional Election Director, Regional Election Attorney, or Provincial Election Supervisor or any of the Commission's lawyers assigned in the field office) for their approval or disapproval. ***In the latter case, the resolution of the Regional Election Director may be subject of a motion for reconsideration and, if need be, a petition for review with the COMELEC En Banc.***[21]

In the case before us, the petitioners ask us to exercise our power of judicial review ***over the action of the COMELEC's Election Officer***, Mavil Majarucon, who ordered the petitioners to remove the subject poster, and over ***the action of Director Esmeralda Amora-Ladra of the Comelec Law Department***, reiterating the previous order with a *warning* of possible criminal prosecution – ***without any other action by the Comelec at its higher levels as the established procedures provide.***

Contrary to the petitioners' allegation that they "have no other plain, speedy, and adequate remedy, the above-described procedure before the Comelec clearly shows otherwise. ***By immediately invoking remedies before this Court, the petitioners deprived the Comelec itself of the opportunity to pass upon the issue before us*** – a procedure critical in a *certiorari* proceeding. In short, the direct invocation of judicial intervention is clearly **premature**.

In the interest of orderly procedure and the respect for an independent constitutional commission such as the Comelec, on matters that are *prima facie* within its jurisdiction, ***the expansion of the power of judicial review***

When an issue of a prejudicial question is raised in the Counter-Affidavit, the investigating officer shall suspend preliminary investigation if its existence is satisfactorily established. All orders suspending the preliminary investigation based on existence of prejudicial question issued by the investigating officer shall have the written approval of the Regional Election Director or the Director of the Law Department, as the case may be.

19 Comelec Resolution No. 9386, Section 6.

20 Id., Section 8.

21 Id., Sections 11 and 12.

could not have meant the power to review any and all acts of a department or office within an administrative framework.

While I agree with the *ponencia* that Section 2(3), Article IX-C does not grant the Comelec the power to determine "any and all" issues arising during elections, the Comelec under this provision can certainly decide whether to initiate a preliminary investigation against the petitioners. It can decide based on the arguments and pieces of evidence presented during the preliminary investigation — whether there is probable cause to file an information for an election offense against the petitioners. This determination is even subject to review and reconsideration, as discussed in the above-described process.

To be sure, this is a matter that the Comelec should have been given first an opportunity to resolve before the petitioners directly sought judicial recourse. While the freedoms invoked by the petitioners certainly occupy preferential status in our hierarchy of freedoms, the Court cannot second-guess what the Comelec's action would have been, particularly when the matters before us are nothing more than the Election Officer Majarucon's **notice** and the Director Amora-Ladra's **order**.

In these lights, I see no occasion to discuss the traditional rules on ***hierarchy of courts*** and ***transcendental importance***, which only concern the propriety of a direct resort to the Supreme Court instead of the lower courts, and not the question of whether judicial intervention is proper in the first place. As I concluded above, the direct invocation of judicial intervention is as yet premature.

B. The petition is already moot and academic

Aside from the petition's premature recourse to the Court, the legal issues it presents has already become moot and academic.

A petition becomes moot and academic when it "*ceases to present a justiciable controversy by virtue of supervening events, so that a declaration thereon would be of no practical use or value.*"[22] A case becomes moot and academic when there is no more actual controversy between the parties, or no useful purpose can be served in passing upon the merits.[23]

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[22] *David v. Macapagal-Arroyo*, G.R. No. 171396, May 3, 2006, 489 SCRA 160, 213-214, citing *Province of Batangas v. Romulo*, G.R. No. 152774, May 27, 2004, 429 SCRA 736, *Banco Filipino Savings and Mortgage Bank v. Tuazon, Jr.*, G.R. No. 132795, March 10, 2004, 425 SCRA 129, *Vda. de Dabao v. Court of Appeals*, G.R. No. 116526, March 23, 2004, 426 SCRA 91; *Paloma v. Court of Appeals*, G.R. No. 145431, November 11, 2003, 415 SCRA 590, *Royal Cargo Corporation v. Civil Aeronautics Board*, G.R. Nos. 103055-56, January 26, 2004, 421 SCRA 21 and *Lacson v. Perez*, G.R. No. 147780, May 10, 2001, 357 SCRA 756.

[23] *Tantoy, Sr. v. Hon. Judge Abrogar*, 497 Phil. 615 (2005).

The passage of the election period has effectively made the issues in the present petition moot and academic. Any decision on our part – whether for the validity or invalidity of the Comelec's actions would no longer affect the rights of either the petitioners to post the subject posters, or the Comelec to prosecute election offenses.

The present petition had been filed to assail an administrative act of the Comelec, which warned the petitioners of a possible prosecution should they continue posting election propaganda that do not comply with the size requirements under RA 9006. The Letter issued by Comelec Director Amora-Ladra, in particular, advised compliance with the size requirements, otherwise it would file an election case against them. Thus, as per the Comelec's Letter, prosecution of the offense would commence only if the petitioners continued posting the poster without complying with the size requirements. Had the petitioners complied with the size requirements for their poster, no election offense would have been filed against them.

The petitioners, upon receipt of the letter, immediately filed a petition for *certiorari* before the Court the next day. Five days later, they were granted a temporary restraining order that forbade the Comelec from enforcing its Notice and Letter. At this point, the Comelec had not yet implemented the warning it gave the petitioners in its Letter. Thus, the temporary restraining order effectively prevented the Comelec's Letter from being enforced. At the time the TRO prevented the enforcement of the Comelec's Letter, the petitioners could have still exercised the choice of complying with the Comelec's Notice and Letter, and hence avoided the initiation of an election offense against them. This choice had never been exercised by the petitioners as the temporary restraining order forbade the Notice and Letter's implementation, and effectively allowed them to continue posting the subject posters without threat of prosecution.

In the mean time, the election period, during which the election offense of illegally posting election propaganda may be committed and prosecuted, came to pass. Thus, our decision in this case, and the consequent lifting of the temporary restraining order against the Comelec, could no longer affect the rights of the petitioners. At this point in time, our ruling regarding the validity of the Comelec's Notice and Letter (whether for its validity or invalidity) would no longer have any impact on the petitioners and respondent.

To be sure, the issue of the constitutionality of the poster's size limitations, as well as the inclusion of speech of private individuals are issues capable of repetition, as elections are held every three years.

But while these issues are capable of repetition, they most certainly cannot escape review. The administrative process outlined in Comelec

Resolution No. 9615 provides a process through which the Comelec may decide these issues with finality. After the Comelec had been allowed to exercise its jurisdiction to the fullest, judicial review of its actions may be availed of through a petition for *certiorari* under the Rules of Court. At that point, the issues would certainly no longer be premature.

III. Substantive Arguments: Section 3.3 of RA 9006 and Section 6(c) of Comelec Resolution No. 9615 are valid content-neutral regulations on election propaganda

Even assuming that the Court can give due course to the present petition, I strongly disagree with the *ponencia*'s finding that the notices, as well as the regulations they enforce, are unconstitutional for violating the petitioners' right to free speech.

According to the *ponencia*, the Comelec's attempt to enforce Comelec Resolution No. 9615 is a content-based regulation that is heavily burdened with unconstitutionality. Even assuming that the letter and notice contain a content-neutral regulation, the *ponencia* asserts that it still fails to pass the intermediate test of constitutionality.

The letter and notice sent by the Comelec's legal department both sought to enforce the **size restrictions on election propaganda** applicable to the subject poster. The Comelec advised the petitioners to comply with these size restrictions or take down the poster, or else it would be compelled to file an election offense against him. Thereby, the Comelec recognized that it would not have any cause of action or complaint if only the petitioners would comply with the size restriction.

The size restrictions are found in Comelec Resolution No. 9615, which implements Section 3 of the Fair Elections Act. Section 3.3 of the Fair Elections Act and Section 6(c) of Comelec Resolution No. 9615 mandate that posters containing election propaganda must not exceed an area of two by three feet.

Three queries must be resolved in determining the legality of Comelec's letter and notice:

First, whether the subject poster falls within the election propaganda that may be regulated by the Comelec;

Second, whether the size restrictions in Comelec Resolution No. 9615 and RA 9006 impose content-neutral or content-based restrictions on speech; and

Third, whether this regulation pass the appropriate test of constitutionality.

A. The subject poster falls within the regulated election propaganda in RA 9006 and Comelec Resolution No. 9615

The subject poster carries the following characteristics:

(1) It was posted **during the campaign period**, by private individuals and within a private compound housing at the San Sebastian Cathedral of Bacolod.

(2) It was **posted with another tarpaulin** with the message "RH LAW IBASURA."

(3) Both tarpaulins were approximately **six by ten feet in size**, and were posted in front of the Cathedral **within public view**.

(4) The subject poster contains the heading "**conscience vote**" and two lists of senators and members of the House of Representatives. The ***first list*** contains names of legislators who voted against the passage of the Reproductive Health Law, denominated as Team Buhay. The ***second list*** contains names of legislators who voted for the RH Law's passage, denominated as "Team Patay." The "Team Buhay" list contained a check mark, while the Team Patay list an X mark. All the legislators named in both lists were candidates during the 2013 national elections.

(5) It does not appear to have been sponsored or paid for by any candidate.

The 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.

Comelec Resolution No. 9615 contains rules and regulations implementing RA 9006 during the 2013 national elections. Section 3 of RA 9006 and Section 6 of Comelec Resolution No. 9615 seek to regulate election propaganda, defined in the latter as:

> 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 offic***e. 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]

Based on these definitions, ***the subject poster falls within the definition of election propaganda***. It ***named candidates*** *for the 2013 elections, and was clearly* ***intended to promote the election of a list of candidates it favors and oppose the election of candidates in another list***. It was ***displayed in public view,*** *and as such is* ***capable of drawing the attention of the voting public*** passing by the cathedral to its message.

That the subject poster was posted by private individuals does not take it away from the ambit of the definition. The ***definition found in Comelec Resolution No. 9615 does not limit election propaganda to acts by or in behalf of candidates***.

Neither does RA 9006 contain such restrictions: ***a look at what constitutes lawful election propaganda in RA 9006 also does not specify by whom or for whom the materials are posted***, *viz.*:

> Sec. 3. Lawful Election Propaganda. - Election propaganda whether on television, cable television, radio, newspapers or any other medium is ***hereby 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, observance of truth in advertising and to the supervision and regulation by the Commission on Elections (COMELEC). x x x [Emphasis supplied]

Further, lawful election propaganda under the Omnibus Election Code, which RA 9006 cites as part of its definition of what constitutes lawful propaganda, does not limit the materials enumerated therein to those posted by or in behalf of candidates.[24] Neither does the definition of what

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[24] Sec. 82. Lawful election propaganda. - Lawful election propaganda shall include:
(a) Pamphlets, leaflets, cards, decals, stickers or other written or printed materials of a size not more than eight and one-half inches in width and fourteen inches in length;
(b) Handwritten or printed letters urging voters to vote for or against any particular candidate;
(c) Cloth, paper or cardboard posters, whether framed or posted, with an area exceeding two feet by three 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 feet by eight feet in size, shall be allowed: Provided, That said streamers may not be displayed except one week before the date of the meeting or rally and that it shall be removed within seventy-two hours after said meeting or rally; or
(d) All other forms of election propaganda not prohibited by this Code as the Commission may authorize after due notice to all interested parties and hearing where all the interested parties were given an equal opportunity to be heard: Provided, That the Commission's authorization shall be published in two newspapers of general circulation throughout the nation for at least twice within one week after the authorization has been granted.

constitutes an election offense limit the unlawful posting of election propaganda to those posted by, or in behalf of candidates and their parties.[25]

Thus, I find it clear that the law does not distinguish between materials posted by or in behalf of candidates or by private individuals who have no political affiliation. When the law does not distinguish, neither should we.

Had Congress intended to limit its definition of election propaganda to materials posted for or in behalf of candidates, it could have so specified. Notably, Section 9[26] on the Posting of Campaign Materials indicates who the Comelec may authorize to erect common poster areas for campaign materials in public places. It does not, as the *ponencia* makes it appear, limit the definition of election propaganda to those posted by candidates and parties.

The title of Section 9 uses the word "campaign materials" and not election propaganda; thus, it refers to a particular type of election propaganda. Election propaganda becomes a campaign material once it is used by candidates and political parties. Nevertheless, the latter is different from the more generic term 'election propaganda' in the other parts of RA 9006.

As worded, Section 9 regulates the manner by which candidates may post campaign materials, allowing them, subject to the Comelec's authorization, to erect common poster areas in public places, and to post campaign materials in private property subject to its owner's consent. **It does not, by any stretch of statutory construction, limit election propaganda to posts by parties and candidates.** Notably, the word "campaign material" appears only once in RA 9006, signifying its limited application to Section 9, and that it should not be interchanged with the term "election propaganda" appearing in other parts of the law.

In these lights, I disagree with the *ponencia*'s insistence that the Comelec had no legal basis to regulate the subject posters, as these are expressions made by private individuals.

To support this conclusion, the *ponencia* pointed out that ***first***, it may be **inferred** from Section 9 of RA 9006 and Section 17 of Comelec Resolution No. 9615 (**both referring to campaign materials**) that election propaganda are meant to apply only to political parties and candidates because the provisions on campaign materials only mention political parties and candidates;[27] ***second***, the focus of the definition of the term election propaganda hinges on whether it is "designed to promote the election or defeat of a particular candidate or candidates to a public office;"[28] and ***third***,

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25 Id.
26 See Article XII of the Omnibus Election Code.
27 Draft *ponencia*, pp. 27-28.
28 Id. at 30.

the subject poster falls within the scope of personal opinion that is not considered as political advertising under Section 1, paragraph 4[29] of Comelec Resolution No. 9615.[30]

To my mind, the first two arguments lead us to navigate the forbidden waters of judicial legislation. **We cannot make distinctions when the law provides none** – *ubi lex non distinguit, nec nos distinguere debemos.*

As I have earlier pointed out, the definition of election propaganda is not limited to those posted by, or in behalf of candidates. Further, campaign materials are different from election propaganda – the former refers to election propaganda used by candidates and political parties, and hence it is understandable that it would only mention candidates and political parties.

Indeed, the definition of election propaganda focuses on the impact of the message, *i.e.*, that it is intended to promote or dissuade the election of candidates, and not for whom or by whom it is posted. This nuance in the definition recognizes that the act of posting election propaganda can be performed by anyone, regardless of whether he is a candidate or private individual. It does not serve to limit the definition of election propaganda to materials posted by candidates.

At this point, I find it worthy to emphasize that our first and primary task is to **apply and interpret the law as written, and not as how we believe it should be**.

With respect to the third argument, personal opinions are of course not included within the definition of election propaganda. But when these opinions on public issues comingle with persuading or dissuading the public to elect candidates, then these opinions become election propaganda.

Notably, the exclusion of personal opinions in the definition of political advertisements refers to matters that are printed in social media for pecuniary consideration. The entire provision was meant to cover the phenomenon of paid blogs and advertisements in the Internet, without including in its scope personal opinions of netizens. I do not think it can be extended to election propaganda, as exceptions usually qualify the phrase

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[29] 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)

[30] Draft *ponencia*, p. 43.

nearest to it – in this case, it was meant to qualify matters appearing in the Internet.

Further, if we were to follow the *ponencia*'s logic, and proclaim a personal opinion by a private individual meant to influence the public as regards their vote an exemption to the election propaganda definition, then it would render the entire definition useless. Since Comelec Resolution No. 9615 does not limit personal opinions to private individuals, then it applies with equal force to candidates, who necessarily have a personal opinion that they should get elected, and would not pay themselves to utter these opinions. I dare say that such an absurd situation, where an exception nullifies the general provision, had not been the intent of Comelec Resolution No. 9615.

Additionally, the definition of election propaganda under RA 9006 has no mention of personal opinions, and in case of inconsistency (which to me does not exist in the present case) between a law and a regulation implementing it, the law should prevail.

Worthy of note, lastly, is that the commingling of the subject poster's content with a public issue in another poster does not exempt the former from regulation as an election propaganda. The definition of election propaganda necessarily includes issues that candidates support, because these issues can persuade or dissuade voters to vote for them. To be sure, it is a very short-sighted view to claim that propaganda only relates to candidates, not to the issues they espouse or oppose.

The present case reached this Court because the petitioners, who apparently are bent on carrying their Reproductive Health (*RH*) message to the people, and as a means, rode on to the then raging electoral fight by identifying candidates supporting and opposing the RH. While 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.

From this perspective, I find it beyond question that the poster containing the message "RH LAW IBASURA" was an election propaganda, and should thus comply with the size limitations. To stress, the subject poster and its Team Buhay and Team Patay message advocated support or opposition to specific candidates based on their respective RH stand and thus cannot but fall within the coverage of what constitutes as election propaganda.

Lastly, that the subject poster was posted on private property does not divest the Comelec of authority to regulate it. The law specifically recognizes the posting of election propaganda on private property provided its owner consents to it. In the present case, the property owner is the

Diocese of Bacolod itself, and the posting of the subject poster was made upon its own directive.

B. The notice and letter enforce a content-neutral regulation

Philippine jurisprudence distinguishes between the regulation of speech that is content-based, from regulation that is content-neutral. Content-based regulations regulate speech because of the substance of the message it conveys. [31] In contrast, content-neutral regulations are merely concerned with the incidents of speech: the time, place or manner of the speech's utterance under well-defined standards.[32]

Distinguishing the nature of the regulation is crucial in cases involving freedom of speech, as it determines the test the Court shall apply in determining its validity.

Content-based regulations are viewed with a heavy presumption of unconstitutionality. Thus, the government has the burden of showing that the regulation is narrowly tailored to meet a compelling state interest, otherwise, the Court will strike it down as ***unconstitutional***.[33]

In contrast, **content-neutral regulations** are ***not presumed unconstitutional***. They pass constitutional muster once they meet the following requirements: ***first***, that the regulation is within the constitutional power of the Government; ***second***, that it furthers an important or substantial governmental interest; ***third***, that the governmental interest is unrelated to the suppression of free expression; and ***fourth***, that the incidental restriction on speech is no greater than is essential to further that interest.[34]

The assailed regulations in the present case involve a content-neutral regulation that controls the incidents of speech. Both the notice and letter sent by the Comelec to the Diocese of Bacolod sought to enforce Section 3.3 of RA 9006 and Section 6(c) of Comelec Resolution No. 9615 which limits the size of posters that contain election propaganda to not more than two by three feet. It does not prohibit anyone from posting materials that contain election propaganda, so long as it meets the size limitations.

Limitations on the size of a poster involve a content-neutral regulation involving the manner by which speech may be uttered. It regulates how the speech shall be uttered, and does not, in any manner affect or target the actual content of the message.

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31 *Newsounds Broadcasting Network, Inc.v. Dy*, G.R. Nos. 170270 & 179411, April 2, 2009, 583 SCRA 333.

32 *Chavez v. Gonzales*, G.R. No. 168338, February 15, 2008, 545 SCRA 441, 493.

33 Id.

34 *SWS v. Comelec*, G.R. No. 147571, May 5, 2001.

That the size of a poster or billboard involves a time, manner and place regulation is not without judicial precedent, *albeit* in the US jurisdiction where our Bill of Rights and most of our constitutional tests involving the exercise of fundamental rights first took root. Several cases[35] decided by the US Supreme Court treated size restrictions in posters as a content-neutral regulation, and consequently upheld their validity upon a showing of their relationship to a substantial government interest.

Admittedly, ***the size of the poster impacts on the effectiveness of the communication and the gravity of its message. Although size may be considered a part of the message, this is an aspect that merely highlights the content of the message. It is an incident of speech that government can regulate, provided it meets the requirements for content-neutral regulations.***

That the incidents of speech are restricted through government regulation do not automatically taint them because they do not restrict the message the poster itself carries. Again, for emphasis, Comelec Resolution No. 9615 and RA 9006 regulate how the message shall be transmitted, and not the contents of the message itself.

The message in the subject poster is transmitted through the text and symbols that it contains. We can, by analogy, compare the size of the poster to the volume of the sound of a message.[36] A blank poster, for instance and as a rule, does not convey any message regardless of its size (unless, of course, vacuity itself is the message being conveyed). In the same manner, a sound or utterance, without words or tunes spoken or played, cannot be considered a message regardless of its volume. We communicate with each other by symbols – written, verbal or illustrated – and these communications are what the freedom of speech protects, not the manner by which these symbols are conveyed.

Neither is the *ponencia*'s contention — that larger spaces allow for more messages persuade to treat the size limitation as a content-based regulation – persuasive. RA 9006 and Comelec Resolution No. 9615 do not limit the number of posters that may be posted; only their size is regulated. Thus, the number of messages that a private person may convey is not limited by restrictions on poster size.

Additionally, I cannot agree with the *ponencia*'s assertion that the assailed regulation is content-based because it only applies to speech

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[35] *Members of the City Council of the City of Los Angeles et al v. Taxpayers for Vincent et al.*, 466 U.S. 789; 104 S. Ct. 2118; 80 L. Ed. 2d 772; 1984; *Baldwin v. Redwood City*, 540 F.2d 1360; 1976 U.S. App. LEXIS 7659; *Baldwin v. Redwood City*, 540 F.2d 1360, 1368-1369 (CA9 1976), cert. denied sub nom. *Leipzig v. Baldwin*, 431 U.S. 913 (1977); *Temple Baptist Church, Inc. v. City of Albuquerque*, 98 N. M. 138, 146, 646 P. 2d 565, 573 (1982); *Krych v. Village of Burr Ridge*, 111 Ill. App. 3d 461, 464-466, 444 N. E. 2d 229, 232-233 (1982); *Regan v. Time*, 468 U.S. 641; 104 S. Ct. 3262; 82 L. Ed. 2d 487; 1984 U.S. LEXIS 147; 52 U.S.L.W. 5084.

[36] See *Regan v. Time,* 468 U.S. 641; 104 S. Ct. 3262; 82 L. Ed. 2d 487; 1984 U.S. LEXIS 147; 52 U.S.L.W. 5084, citing *Kovacs v. Cooper,* 336 U.S. 77 (1949).

connected to the elections, and does not regulate other types of speech, such as commercial speech.[37]

I am sure there are cases in the United States that recognize that a difference in treatment of speech based on the content of the message involves a content-based regulation. These cases, however, involve a single law providing either a preferential or prejudicial treatment on certain types of messages over other messages.[38] In contrast, the assailed regulation covers only election propaganda (without regard to the actual message), and applies only during the election period.

Further, this kind of assertion, if followed, would amount to the declaration that the entire RA 9006 is a content-based regulation of speech, because it only regulates speech related to the elections. On the flipside, this kind of assertion would render time, manner and place regulations on commercial speech as content-based regulations because they regulate only speech pertaining to commerce and not others. I find these resulting situations to be absurd as, in effect, they eradicate the jurisprudential distinction between content-based and content-neutral regulations.

The more reasonable approach, to my mind, is to examine the regulation based on what it has intended to regulate, *i.e.*, the resulting impact of the regulation. In the present case, the assailed regulation results into restricting the size of posters containing election propaganda, which, as I have explained above, is a content-neutral regulation.

C. Comelec Resolution No. 9615 passes the intermediate scrutiny test for content-neutral regulation

Applying the test for the intermediate test to Section 3.3 of RA 9006 and Section 6(c) of Comelec Resolution No. 9615, I find that the size limitation on posters does not offend the Constitution.

1. The size limitation for posters containing election propaganda in Section 6(c) of Comelec Resolution No. 9615 and Section 3.3 of RA 9006 is within the constitutional power of the Government

Philippine jurisprudence has long settled that the time, place, and manner of speech may be subject to Government regulation. Since the size

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37 Draft *ponencia*, p. 46

38 See, for instance, *City of Ladue v. Gilleo*, 512 U.S. 43.

of a poster involves a time, place and manner regulation, then it may be the proper subject of a government regulation.

That Congress may impose regulations on the time place, and manner of speech during the election period is even implicitly recognized in Section 2, paragraph 7, Article IX-C of the 1987 Constitution. Under this provision, the Comelec is empowered to recommend to Congress effective measures to minimize election spending, including limitation of places where propaganda materials shall be posted. That Congress can pass regulations regarding places where propaganda materials may be posted necessarily indicates that it can also pass other content-neutral regulations, such as the time and manner of the speech's utterance.

In considering the matter before us, it should not be lost to us that we are examining actions implementing election laws. Both interests – freedom of speech and honest, fair and orderly elections – have been specifically recognized, in our Constitution[39] and in the jurisprudence applying them,[40] as important constitutional values. If speech enjoys **preference for the individual** in the hierarchy of rights, election regulations likewise have their **preferred status in the hierarchy of governmental interests** and have no less basis than the freedom of speech.[41]

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[39] Consider the following constitutional provisions on free speech and the holding of free, orderly elections that provide equal opportunity for all its candidates:

Article II, Section 26 of the 1987 Constitution provides:

Section 26. The State shall guarantee equal access to opportunities for public service and prohibit political dynasties as may be defined by law.

Article III, Section 4 of the 1987 Constitution provides:

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.

Article IX-C, Section 4 of the 1987 Constitution 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.

[40] See, for instance, *National Press Club v. Comelec*, G.R. No. 102653, March 5, 1992; *Osmena v. Comelec*, G.R. No. 132231, March 31, 1998; *SWS v. Comelec*, G.R. No. 147571, May 5, 2001.

[41] In *National Press Club v. Comelec*, G.R. No. 102653, March 5, 1992 , the Court thus said:

It seems a modest proposition that the provision of the Bill of Rights which enshrines freedom of speech, freedom of expression and freedom of the press (Article III [4], Constitution) has to be taken in conjunction with Article IX(C)(4) which may be seen to be a special provision applicable during a specific limited period — *i.e*., "during the election period." It is difficult to overemphasize the special importance of the rights of freedom of speech and freedom of the press in a democratic polity, in particular when they relate to the purity and integrity of the electoral process itself, the process by which the people identify those who shall have governance over them. Thus, it is frequently said that these rights are accorded a preferred status in our constitutional hierarchy. Withal, the rights of free speech and free press are not unlimited rights for they are not the only important and relevant values even in the most democratic of polities. In our own society, equality of opportunity to proffer oneself for public office, without regard to the level of financial resources that one may have at one's disposal, is clearly an important value. One of the basic state policies

2. The size limitation for posters containing election propaganda furthers an important and substantial governmental interest

To justify its imposition of size restrictions on posters containing election propaganda, the Comelec invokes its constitutional mandate to ensure equal opportunity for public information campaigns among candidates, to ensure orderly elections and to recommend effective measures to minimize election spending.

These, to me, are substantial government interests sufficient to justify the content-neutral regulation on the size of the subject poster. Their inclusion in the Constitution signifies that they are important. We have, in several cases, upheld the validity of regulations on speech because of these state interests.[42]

Further, the limitation on the size of posters serves these interests: a cap on the size of a poster ensures, to some extent, uniformity in the medium through which information on candidates may be conveyed to the public. It effectively bars candidates, supporters or detractors from using posters too large that they result in skewed attention from the public. The limitation also prevents the candidates and their supporting parties from engaging in a battle of sizes (of posters) and, in this sense, serve to minimize election spending and contribute to the maintenance of peace and order during the election period.

The *ponencia* dismissed the government interests the Comelec cites for not being compelling enough to justify a restriction on protected speech. According to the *ponencia*, a compelling state interest is necessary to justify the governmental action because it affects constitutionally-declared principles, *i.e.*, freedom of speech.[43]

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given constitutional rank by Article II, Section 26 of the Constitution is the egalitarian demand that "the State shall guarantee equal access to opportunities for public service and prohibit political dynasties as may be defined by law."

The technical effect of Article IX(C)(4) of the Constitution may be seen to be that no presumption of invalidity arises in respect of exercises of supervisory or regulatory authority on the part of the Comelec for the purpose of securing equal opportunity among candidates for political office, although such supervision or regulation may result in some limitation of the rights of free speech and free press. For supervision or regulation of the operations of media enterprises is scarcely conceivable without such accompanying limitation. Thus, the applicable rule is the general, time-honored one — that a statute is presumed to be constitutional and that the party asserting its unconstitutionality must discharge the burden of clearly and convincingly proving that assertion.

[42] See, for instance, *National Press Club v. Comelec*, G.R. No. 102653, March 5, 1992; *Osmena v. Comelec*, G.R. No. 132231, March 31, 1998.

[43] Draft *ponencia*, p. 49.

First of all, the *ponencia* has mixed and lumped together the test for the constitutionality of a content-based regulation with that of a content-neutral regulation.

A compelling state interest is a requirement for the constitutionality of a content-based regulation. The *ponencia* imposes this requirement as an addition to the intermediate test for content-neutral regulations, while at the same time applying this modified intermediate test to a regulation that it has described as content-based. The test to determine the constitutionality of a content-based regulation is different, and in fact requires a higher standard, from the test to determine a content-neutral regulation's validity. The requirements for the compelling state interest test should not be confused with the requirements for the intermediate test, and vice versa.

If we were to require a compelling state interest in content-neutral regulations, we, in effect, would be transforming the intermediate test to a strict scrutiny test, and applying it to both content-based and content-neutral regulations, as both regulations involve a constitutional principle (*i.e.* the content of speech and the manner of speech). In other words, we would be eradicating a crucial jurisprudential distinction on testing the validity of a speech regulation, something that I find no cogent reason to disturb.

Neither can I agree with the *ponencia's* use of *Adiong v. Comelec*[44] as authority for holding that ensuring equality between candidates is less important than guaranteeing the freedom of expression.[45] This pronouncement is within the context of characterizing the prohibition of stickers and decals to private places as a form of unjustified censorship. In contrast, the regulation in question does not prohibit anyone from posting any election propaganda, but only to regulate its size. Notably, the weighing of constitutional values applies on a case-to-case basis; we have, in the past, decided cases where the regulation of speech is allowed to ensure equal access to public service.

I note, too that ensuring equality between candidates is not the only goal achieved in regulating the size of election posters – it is also meant to enforce the constitutional goals of minimizing election spending, and ensuring orderly elections.

Lastly, I cannot agree with the *ponencia's* contention that the Comelec's interest and regulatory authority in the posting of election propaganda is limited to postings in public places. The regulatory framework of RA 9006 is not limited to election propaganda in public places, and in fact recognizes that they may be posted in private property, subject to their owners' consent.

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

45 Draft *ponencia*, p. 50.

Further, the pronouncement in *Adiong*, where the Court held that the regulation prohibiting the posting of decals and stickers in private property violates the property owners' right to property, does not apply in the presently assailed regulation, because the latter does not prohibit the posting of posters but merely regulates its size.

The *ponencia*'s legal conclusion also contravenes settled doctrine regarding the government's capacity to regulate the incidents of speech, *i.e.*, its time, place and manner of utterance. Notably, paragraph 7, Section 2, Article IX-C of the 1987 Constitution — one of the provisions the Comelec invokes to justify its regulation — specifically recognizes that the Congress may regulate the places of posting election propaganda. This provision, like RA 9006, does not limit the generic term 'place,' and thus applies to both public and private property.

Justice Estela M. Perlas-Bernabe, on the other hand, argues that there is no substantial state interest in restricting the posters' size, because like the posting of decals and stickers in *Adiong*,[46] it does not endanger any substantial government interest and at the same time restricts the speech of individuals on a social issue.[47]

It must be stressed, however, that unlike in *Adiong*, which prohibited the posting of decals and stickers in private places, the assailed regulation in the present case does not prohibit the posting of election propaganda, but merely requires that it comply with size requirements. These size requirements promote government interests enumerated in the Constitution, and its non-regulation would hinder them.

3. The governmental interest in limiting the size of posters containing election propaganda is unrelated to the suppression of free expression

The government's interest in limiting the size of posters containing election propaganda does add to or restrict the freedom of expression. Its interests in equalizing opportunity for public information campaigns among candidates, minimizing election spending, and ensuring orderly elections do not relate to the suppression of free expression.

Freedom of expression, in the first place, is not the god of rights to which all other rights and even government protection of state interest must bow. Speech rights are not the only important and relevant values even in the most democratic societies. Our Constitution, for instance, values giving

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46 *Supra* note 44.

47 Justice Estela M. Perlas-Bernabe's Concurring Opinion, p. 2.

equal opportunity to proffer oneself for public office, without regard to a person's status, or the level of financial resources that one may have at one's disposal.[48]

On deeper consideration, elections act as one of the means by which the freedom of expression and other guaranteed individual rights are protected, as they ensure that our democratic and republican ideals of government are fulfilled. To put it more bluntly, unless there are clean, honest and orderly elections that give equal opportunities and free choice to all, the freedoms guaranteed to individuals may become a joke, a piece of writing held in reverence only when it suits the needs or fancy of officials elected in tainted elections.

4. The incidental restriction on speech is no greater than is essential to further that interest

Indeed, the restriction on the poster's size affects the manner by which the speech may be uttered, but this restriction is no greater than necessary to further the government's claimed interests.

Size 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. This places candidates with more money and/or with deep-pocket supporters at an undue advantage against candidates with more humble financial capabilities.

Notably, the law does not limit the number of posters that a candidate, his supporter, or a private individual may post. If the size of posters becomes unlimited as well, then candidates and parties with bigger campaign funds could effectively crowd out public information on candidates with less money to spend to secure posters – the former's bigger posters and sheer number could effectively take the attention away from the latter's message. In the same manner, a lack of size limitations would also crowd out private, unaffiliated individuals from participating in the discussion through posters, or at the very least, compel them to erect bigger posters and thus spend more.

Prohibiting size restrictions on posters is also related to election spending, as it would allow candidates and their supporters to post as many and as large posters as their pockets could afford.

In these lights, I cannot agree with Justice Antonio T. Carpio's argument that the size restriction on posters restricts speech greater than what is necessary to achieve the state's interests. The restriction covers only

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[48] See *National Press Club v. COMELEC*, G.R. No. 102653, March 5, 1992, 207 SCRA 1.

the size of the posters, and not the message it contains. If posting a longer message or its readability is the issue, then it must be pointed out that nothing in RA 9006 or Comelec Resolution No. 9615 prevents the posting of more than one poster containing the longer message in one site. Applying this to Justice Carpio's example, condominium owners in the 30th floor, should they be adamant in posting their message in the said floor, can post more than one poster to make their message readable.

Too, they can still post their message in other areas where their message may be read. It may be argued, at this point, that this would amount to an indirect regulation of the place where posters may be posted. It must be remembered, however, that the place of posting involves a content-neutral regulation that the Comelec is authorized to implement, and that in any case, there is no explicit limitation as to where the posters may be posted. They may still be posted anywhere, subject only to the size requirements for election propaganda.

ARTURO D. BRION
Associate Justice