EN BANC

G.R. No. 258805 – ST. ANTHONY COLLEGE OF ROXAS CITY, INC., represented by SISTER GERALDINE J. DENOGA, D.C., DR. PILITA DE JESUS LICERALDE, and DR. ANTON MARI HAO LIM, Petitioner, **v. COMMISSION ON ELECTIONS, represented by the acting chairperson, COMMISSIONER SOCORRO B. INTING, and COMELEC DIRECTOR JAMES ARTHUR B. JIMENEZ, in his official capacity as spokesperson of the Commission on Elections and as Director IV of the Commission on Elections Department for Education and Information,** Respondent.

Promulgated:

October 10, 2023

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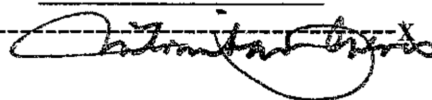

CONCURRING OPINION

LEONEN, *J.*:

Size matters. *Diocese of Bacolod v. Commission on Elections*[1] has shown that for campaign paraphernalia, the form matters as much as the content.

It is true that *Diocese of Bacolod* involved a social advocacy couched in campaign material while this case involves campaign material that purely endorses a chosen candidate. Free speech and expression, however, not only encompass the speech of private persons advocating for certain issues, but also the right of a citizen to freely express to the public whom they want to vote for and why. Sections 21(o), 24, and 26 of COMELEC Resolution No. 10730, series of 2021, are unconstitutional for arbitrarily restricting the size of campaign materials, and therefore, stifling the people's right to freely express their chosen candidates however they choose, within their own private property.

I

Freedom of expression is a core value in our democratic society and is a fundamental right enshrined in Article III, Section 4 of the Constitution:

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[1] 751 Phil. 301 (2015) [Per J. Leonen, *En Banc*].

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.

The freedom is so essential that the protection it grants covers "all media of communication, whether verbal, written, or through assembly. The protection conferred is not limited to a field of interest; it does not regard whether the cause is political or social, or whether it is conventional or unorthodox."[2] *Adiong v. Commission on Elections*[3] states: "All of the protections expressed in the Bill of Rights are important[,] but we have accorded to free speech the status of a preferred freedom."[4]

The right to free speech and expression occupies a preferred position in the hierarchy of our constitutional values. It protects "democratic political process from abusive censorship" and promotes "equal respect for the moral self-determination of all persons[.]"[5] Thus, in *Diocese of Bacolod*:

> 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.[6]

Political discourses occupy an even higher position within the species of protected speech. Free and uncensored discussion on policy and governance results in an informed electorate, which, in turn, ensures an effective government always accountable to its people. Discussions on public affairs or fair criticisms on public policy allow citizens to determine for themselves which causes to support and which issues are essential to good governance. This is consistent with the constitutional principle that "[s]overeignty resides in the people and all government authority emanates from them."[7] In *Diocese of Bacolod*:

> 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." 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." It anchors on the principle that the cornerstone of every democracy is that sovereignty resides in the people. 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

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2 *Chavez v. Gonzales*, 569 Phil. 155, 198 (2008) [Per C.J. Puno, *En Banc*].
3 G.R. No. 103956, March 31, 1992 [Per J. Gutierrez, *En Banc*].
4 *Id.* (Citations omitted)
5 *Diocese of Bacolod v. Commission on Elections*, 751 Phil. 301, 332 (2015) [Per J. Leonen, *En Banc*].
6 *Id.* at 332.
7 CONST., art. II, sec. 1.

> people to make government accountable. Necessarily, this includes the right of the people to criticize acts made pursuant to governmental functions.[8] (Citations omitted)

Similarly, in an opinion in *Nicolas-Lewis v. Commission on Elections*:[9]

> Freedom of expression, as with other cognate constitutional rights, is essential to citizens' participation in a meaningful democracy. Through it, they can participate in public affairs and convey their beliefs and opinion to the public and to the government. Ideas are developed and arguments are refined through public discourse. Freedom of expression grants the people "the dignity of individual thought." When they speak their innermost thoughts, they take their place in society as productive citizens. Through the lens of self-government, free speech guarantees an "ample opportunity for citizens to determine, debate, and resolve public issues."[10] (Citations omitted)

Political speech is "indispensable to the democratic and republican mooring of the [S]tate whereby the sovereignty residing in the people is best and most effectively exercised through free expression."[11] *Diocese of Bacolod* further states:

> 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.[12]

The exercise of free speech and expression, however, is not with unbridled discretion. The State may regulate such exercise pursuant to its inherent police power. But because what is being regulated is a protected fundamental right, regulations will depend on the nature of the speech being regulated. In *Chavez v. Gonzales*:[13]

> 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

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[8] *Diocese of Bacolod v. Commission on Elections*, 751 Phil. 301, 359–360 (2015) [Per J. Leonen, *En Banc*].

[9] 859 Phil. 560 (2019) [Per J. J. Reyes, Jr., *En Banc*].

[10] J. Leonen, Separate Concurring Opinion in *Nicolas-Lewis v. Commission on Elections*, 859 Phil. 560, 614 (2019) [Per J. J. Reyes, Jr., *En Banc*].

[11] *See* J. Leonen, Dissenting Opinion in *Disini, Jr. v. Secretary of Justice*, 727 Phil. 28, 420 (2014) [Per J. Abad, *En Banc*].

[12] *Diocese of Bacolod v. Commission on Elections*, 751 Phil. 301, 325 (2015) [Per J. Leonen, *En Banc*].

[13] 569 Phil. 155 (2008) [Per C.J. Puno, *En Banc*].

> 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.[14] (Citations omitted)

Nonetheless, political speech, as an exercise of a citizen's sovereignty, is accorded the highest protection, especially during election periods when political speeches and activities can directly influence the electorate's choice of their leaders and representatives. Censorship of political speeches and activities, thus, must be strictly examined and fully substantiated.

II

Prior restraint "refers to official governmental restrictions on the press or other forms of expression in advance of actual publication or dissemination."[15] A governmental act that imposes prior restraint on expression "bears a heavy presumption against its validity."[16] In *Chavez*:

> Freedom from prior restraint is largely freedom from government censorship of publications, whatever the form of censorship, and regardless of whether it is wielded by the executive, legislative or judicial branch of the government. Thus, it precludes governmental acts that required approval of a proposal to publish; licensing or permits as prerequisites to publication including the payment of license taxes for the privilege to publish; and even injunctions against publication. Even the closure of the business and printing offices of certain newspapers, resulting in the discontinuation of their printing and publication, are deemed as previous restraint or censorship. Any law or official that requires some form of permission to be had before publication can be made, commits an infringement of the constitutional right, and remedy can be had at the courts.[17] (Citations omitted)

In determining whether a government regulation involves prior restraint on free speech and expression, it must also be examined whether the questioned regulation is content-based or content-neutral.

A regulation is content-based if it is concerned with the content of the speech itself.[18]

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14 *Id.* at 199.

15 *Chavez v. Gonzales*, 569 Phil. 155, 203 (2008) [Per C.J. Puno, *En Banc*].

16 *1-United Transport Koalisyon v. Commission on Elections*, 758 Phil. 67, 84 (2015) [Per J. Reyes, *En Banc*].

17 *Chavez v. Gonzales*, 569 Phil. 155, 203–204 (2008) [Per C.J. Puno, *En Banc*].

18 *See Newsounds Broadcasting Network, Inc. v. Dy*, 602 Phil. 255, 271 (2009) [Per J. Tinga, Second Division].

Given "its inherent and invasive impact"[19] on free speech and expression, a content-based regulation must pass the "strict scrutiny" test to be valid. The governmental interest sought to be protected must be justified by a showing of a "substantive and imminent evil that has taken the life of a reality already on ground"[20] and the words and expression being used "will bring about the substantive evils that Congress has a right to prevent."[21] There must be a *compelling* State interest, and the regulation must be narrowly tailored and the least restrictive means to achieve that interest.[22]

Newsounds Broadcasting Network, Inc. v. Dy[23] further explains:

> The immediate implication of the application of the "strict scrutiny" test is that the burden falls upon respondents as agents of government to prove that their actions do not infringe upon petitioners' constitutional rights. As content regulation cannot be done in the absence of any compelling reason, the burden lies with the government to establish such compelling reason to infringe the right to free expression.[24] (Citation omitted)

Invalid prior restraint on the content of the speech results in a chilling effect, preventing the free exchange of ideas in a republican democracy. In his dissent in *Soriano v. Laguardia*,[25] Chief Justice Reynato Puno explains:

> The test is very rigid because it is the communicative impact of the speech that is being regulated. The regulation goes into the heart of the rationale for the right to free speech; that is, that there should be no prohibition of speech merely because public officials disapprove of the speaker's views. Instead, there should be a free trade in the marketplace of ideas, and only when the harm caused by the speech cannot be cured by more speech can the government bar the expression of ideas.[26] (Citation omitted)

Content-neutral regulations, on the other hand, regulate not the content of the speech itself, but are "merely concerned with the incidents of the speech, or one that merely controls the time, place[,] or manner, and under well-defined standards[.]"[27] They are subject to "lesser but still heightened scrutiny."[28]

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[19] *Chavez v. Gonzales*, 569 Phil. 155, 206 (2008) [Per C.J. Puno, *En Banc*].
[20] *Id.* (Citation omitted)
[21] *Cabansag v. Fernandez*, 102 Phil. 152, 163 (1957) [Per J. Bautista Angelo, First Division].
[22] *See Divinagracia v. Consolidated Broadcasting System, Inc.*, 602 Phil. 625 (2009) [Per J. Tinga, Second Division].
[23] 602 Phil. 255 (2009) [Per J. Tinga, Second Division].
[24] *Id.* at 274.
[25] 605 Phil. 43 (2009) [Per J. Velasco, Jr., *En Banc*].
[26] Id. at 163.
[27] *Newsounds Broadcasting Network, Inc. v. Dy*, 602 Phil. 255, 271 (2009) [Per J. Tinga, Second Division].
[28] *Id.*

For content-neutral regulations, the "intermediate approach" is applied. Under this, the validity of a regulation only requires that there be *substantial* State interest to be protected,[29] instead of the *compelling* interest required in content-based regulations. Content-neutral regulations are "unrelated to the suppression of speech; . . . any restriction on freedom of expression is only incidental and no more than is necessary to achieve the purpose of promoting equality."[30]

The intermediate approach requires the following analysis:

> The intermediate approach has been formulated in this manner:
>
> A governmental regulation is sufficiently justified if it is within the constitutional power of the Government, if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incident restriction on alleged [freedom of speech & expression] is no greater than is essential to the furtherance of that interest.[31] (Citation omitted)

The right to freely express one's chosen candidate is part of the right of suffrage:

> "[S]peech 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." At the heart of democracy is every advocate's right to make known what the people need to know, 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.[32] (Citations omitted)

It is in the State's interest to protect the integrity of the electoral process by providing safe spaces for people to vote and campaign for their chosen candidates. During the election period, restricting the freedom to speak and express for advocacies or candidates weakens the right of suffrage. Thus, for any prior restraint on political speech to be upheld, the governmental interest should outweigh the people's fundamental rights.

Here, the *ponencia* struck down as unconstitutional "Oplan Baklas," explaining that in *Diocese of Bacolod*, this Court held "that the restricted speech was in the nature of social advocacy rather than election paraphernalia,"[33] and that in the present case, "the parties do not dispute that the materials subject of the instant controversy are election paraphernalia

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[29] *Osmeña v. Commission on Elections*, 351 Phil. 692, 718 (1998) [Per J. Mendoza, *En Banc*].
[30] *Id.*
[31] *Chavez v. Gonzales*, 569 Phil. 155, 206 (2008) [Per C.J. Puno, *En Banc*].
[32] *Diocese of Bacolod v. Commission on Elections*, 751 Phil. 301, 372 (2015) [Per J. Leonen, *En Banc*].
[33] *Ponencia*, p. 12.

plainly and primarily intended to endorse the candidacy of Robredo and cause her election to the presidency."[34] The *ponencia* cited *Diocese of Bacolod* to say that these are "declarative speech that, taken as a whole, has for its principal object the endorsement of a candidate only."[35]

The *ponencia* explains that while the speech being restricted here is primarily intended to endorse a certain candidate, "there may be valid regulation of private speech that amounts to election paraphernalia."[36] Indeed, *Diocese of Bacolod* states:

> 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.[37]

Diocese of Bacolod, however, is not the first case that discusses the regulation of election paraphernalia or the restriction of speech of persons who are not candidates or who do not speak as members of a political party.

In *National Press Club v. Commission on Elections*,[38] certain members of the media assailed Section 11(b) of the Electoral Reforms Law of 1987, which prohibited newspapers, radio broadcasting or television stations, or any person making use of the mass media from selling or freely giving print space or air time to campaigns or other political purposes other than to the Commission on Elections. Political candidates could only campaign in mass media through the "Comelec time" or "Comelec space" procured by the Commission itself. According to the media members, this amounted to censorship and an abridgment of the free speech of political candidates.

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[34] *Id.*

[35] *Id., citing Diocese of Bacolod v. Commission on Elections*, 751 Phil. 301, 395 (2015) [Per J. Leonen, *En Banc*].

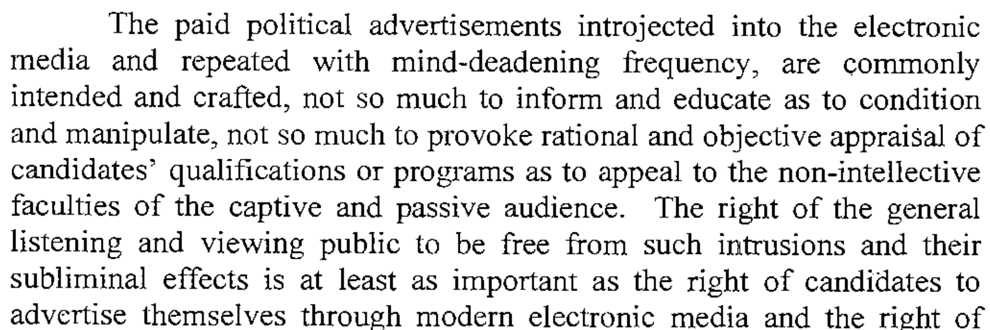
[36] *Ponencia*, pp. 11–12.

[37] *Diocese of Bacolod v. Commission on Elections*, 751 Phil. 301, 372 (2015) [Per J. Leonen, *En Banc*].

[38] 283 Phil. 795 (1992) [Per J. Feliciano, *En Banc*].

The justices of this Court issued a myriad of separate opinions, but the majority opinion eventually upheld the constitutionality of Section 11(b) and declared:

> The flaw in the prohibition under challenge is that while the rich candidate is barred from buying mass media coverage, it nevertheless allows him to spend his funds on other campaign activities also inaccessible to his straitened rival. True enough Section 11 (b) does not, by itself or in conjunction with Sections 90 and 92 of the Omnibus Election Code, place political candidates on complete and perfect equality inter se without regard to their financial affluence or lack thereof. But a regulatory measure that is less than perfectly comprehensive or which does not completely obliterate the evil sought to be remedied, is not for that reason alone constitutionally infirm. The Constitution does not, as it cannot, exact perfection in governmental regulation. All it requires, in accepted doctrine, is that the regulatory measure under challenge bear a reasonable nexus with the constitutionally sanctioned objective. That the supervision or regulation of communication and information media is not, in itself, a forbidden modality is made clear by the Constitution itself in Article IX (C) (4).
>
> It is believed that, when so viewed, the limiting impact of Section 11 (b) upon the right to free speech of the candidates themselves may be seen to be not unduly repressive or unreasonable. For, once again, there is nothing in Section 11 (b) to prevent media reporting of and commentary on pronouncements, activities, written statements of the candidates themselves. All other fora remain accessible to candidates, even for political advertisements. The requisites of fairness and equal opportunity are, after all, designed to benefit the candidates themselves.
>
> Finally, the nature and characteristics of modern mass media, especially electronic media, cannot be totally disregarded. Realistically, the only limitation upon the free speech of candidates imposed is on the right of candidates to bombard the helpless electorate with paid advertisements commonly repeated in the mass media *ad nauseam*. Frequently, such repetitive political commercials when fed into the electronic media themselves constitute invasions of the privacy of the general electorate. It might be supposed that it is easy enough for a person at home simply to flick off his radio or television set. But it is rarely that simple. For the candidates with deep pockets may purchase radio or television time in many, if not all, the major stations or channels. Or they may directly or indirectly own or control the stations or channels themselves. The contemporary reality in the Philippines is that, in a very real sense, listeners and viewers constitute a "captive audience."



> The paid political advertisements introjected into the electronic media and repeated with mind-deadening frequency, are commonly intended and crafted, not so much to inform and educate as to condition and manipulate, not so much to provoke rational and objective appraisal of candidates' qualifications or programs as to appeal to the non-intellective faculties of the captive and passive audience. The right of the general listening and viewing public to be free from such intrusions and their subliminal effects is at least as important as the right of candidates to advertise themselves through modern electronic media and the right of

> media enterprises to maximize their revenues from the marketing of "packaged" candidates.[39] (Citations omitted)

In *Adiong v. Commission on Elections*,[40] this Court admitted "how difficult it is to draw a dividing line between permissible regulation of election campaign activities and indefensible repression committed in the name of free and honest elections."[41] This Court added that "[t]he gray area is rather wide and [this Court has] to go on a case[-]to[-]case basis."[42] It emphasized, however, that despite the differing opinions in *National Press Club*, it was unanimous in declaring that "regulation of election activity has its limits":[43]

> We examine the limits of regulation and not the limits of free speech. The carefully worded opinion of the Court, through Mr. Justice Feliciano, shows that regulation of election campaign activity may not pass the test of validity if it is too general in its terms or not limited in time and scope in its application, if it restricts one's expression of belief in a candidate or one's opinion of his or her qualifications, if it cuts off the flow of media reporting, and if the regulatory measure bears no clear and reasonable nexus with the constitutionally sanctioned objective.[44]

Section 11(b) was once again challenged in *Osmeña v. Commission on Elections*.[45] The affected political candidates argued that the prohibition actually disadvantaged poorer candidates, since their more affluent rivals could always resort to other means not prohibited by the law, such as airplanes, boats, rallies, parades, and handbills.

In upholding the constitutionality of Section 11(b), this Court held that the law did not prohibit all political advertisements, but "only prohibit[ed] the sale or donation of print space and air time to candidates [and] require[d] the [Commission on Elections] instead to procure space and time in the mass media for allocation, free of charge, to the candidates."[46] This Court found that Section 11(b) was a content-neutral regulation, such that it allocates print space and air time to give all candidates equal time and space, ensuring "free, orderly, honest, peaceful, and credible elections."[47]

Further analyzing and distilling these two cases, this Court in *Diocese of Bacolod* concluded that speech made by candidates and political parties in the context of political campaigns may still be validly regulated as to time, place, and manner:

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[39] *Id.* at 815–817.
[40] G.R. No. 103956, March 31, 1992 [Per J. Gutierrez, *En Banc*].
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] 351 Phil. 692 (1998) [Per J. Mendoza, *En Banc*].
[46] *Id.* at 708–709.
[47] *Id.* at 709.

> 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.
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> 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.
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> 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.*[48]

This is not to say that all speech in the context of electoral campaigns are content-neutral regulations.

In *Adiong*, the Commission on Elections announced that lawful election paraphernalia must only be 8.5 inches wide and 14 inches long and must be placed only in designated areas. A senatorial candidate questioned this restriction insofar as it prohibits the posting of campaign decals on mobile areas such as private vehicles.

While the regulation appeared to be content-neutral, regulating in a sense the placement and manner of campaign paraphernalia, this Court found that the regulation actually restricted the content of the speech and encroached on the property rights of private citizens:

> Significantly, the freedom of expression curtailed by the questioned prohibition is not so much that of the candidate or the political party. *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*

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[48] *Diocese of Bacolod v. Commission on Elections*, 751 Phil. 301, 394 (2015) [Per J. Leonen, *En Banc*].

> *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. . . .
>
> The resolution prohibits the posting of decals and stickers not more than eight and one-half (8-1/2) inches in width and fourteen (14) inches in length in any place, including mobile places whether public or private except in areas designated by the COMELEC. Verily, *the restriction as to where the decals and stickers should be posted is so broad that it encompasses even the citizen's private property, which in this case is a privately-owned vehicle.* In consequence of this prohibition, another cardinal rule prescribed by the Constitution would be violated. Section 1, Article III of the Bill of Rights provides that no person shall be deprived of his property without due process of law:
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> > 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.
>
> As earlier stated, we have to consider the fact that in the posting of decals and stickers on cars and other moving vehicles, the candidate needs the consent of the owner of the vehicle. In such a case, *the prohibition would not only deprive the owner who consents to such posting of the decals and stickers the use of his property but more important, in the process, it would deprive the citizen of his right to free speech and information*:
>
> > Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The danger of distribution can so easily be controlled by traditional legal methods leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the constitution, the naked restriction of the dissemination of ideas.[49] (Emphasis supplied, citations omitted)

The expression of one's preferred political candidate is part and parcel of one's right of suffrage. In this case, petitioners placed the disputed campaign paraphernalia on their private property. Thus, the assailed regulation encroached not only on their right to free speech and expression but also on their property rights.

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[49] *Adiong v. Commission on Elections*, G.R. No. 103956, March 31, 1992 [Per J. Gutierrez, *En Banc*].

In *Adiong*, an argument was raised over the fairness of such a placement, considering that *National Press Club* and *Osmeña* both upheld the restrictions as providing equal media and air time to all candidates, regardless of the amounts in their political coffers. *Adiong*, however, explained that a candidate's wealth should be irrelevant to the right of a private person to freely express their political preferences:

> Whether the candidate is rich and, therefore, can afford to dole out more decals and stickers or poor and without the means to spread out the same number of decals and stickers is not as important as the right of the owner to freely express his choice and exercise his right of free speech. The owner can even prepare his own decals or stickers for posting on his personal property. To strike down this right and enjoin it is impermissible encroachment of his liberties.[50]

In *1-United Transport Koalisyon v. Commission on Elections*,[51] this Court was once again confronted with a Commission on Elections regulation that restricted the posting of campaign paraphernalia on privately owned public utility vehicles and transport terminals at the cost of their franchises. In striking down the regulation, this Court held that it violated the franchise owners' freedom of speech and expression:

> The prohibition constitutes a clear prior restraint on the right to free expression of the owners of PUVs and transport terminals. As a result of the prohibition, owners of PUVs and transport terminals are forcefully and effectively inhibited from expressing their preferences under the pain of indictment for an election offense and the revocation of their franchise or permit to operate.
>
> It is now deeply embedded in our jurisprudence that freedom of speech and of the press enjoys a preferred status in our hierarchy of rights. The rationale is that the preservation of other rights depends on how well we protect our freedom of speech and of the press. It has been our constant holding that this preferred freedom calls all the more for utmost respect when what may be curtailed is the dissemination of information to make more meaningful the equally vital right of suffrage.[52] (Citations omitted)

This Court explained that there was no substantial distinction between the placement of a political decal on a private vehicle and its placement on a public utility vehicle. Both involved the owner's fundamental freedom to freely express their chosen candidate:

> The expression of ideas or opinion of an owner of a PUV, through the posting of election campaign materials on the vehicle, does not affect considerations pertinent to the operation of the PUV. Surely, posting a decal expressing support for a certain candidate in an election will not in

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[50] *Id.*

[51] 758 Phil. 67 (2015) [Per J. Reyes, *En Banc*].

[52] *Id.* at 85.

any manner affect the operation of the PUV as such. Regulating the expression of ideas or opinion in a PUV, through the posting of an election campaign material thereon, is not a regulation of the franchise or permit to operate, but a regulation on the very ownership of the vehicle.

. . . .

In the same manner, the COMELEC does not have the constitutional power to regulate public transport terminals owned by private persons. The ownership of transport terminals, even if made available for use by the public commuters, likewise remains private. Although owners of public transport terminals may be required by local governments to obtain permits in order to operate, the permit only pertains to circumstances affecting the operation of the transport terminal as such. The regulation of such permit to operate should similarly be limited to circumstances affecting the operation of the transport terminal. A regulation of public transport terminals based on extraneous circumstances, such as prohibiting the posting of election campaign materials thereon, amounts to regulating the ownership of the transport terminal and not merely the permit to operate the same.[53]

These prior cases, including *Diocese of Bacolod*, clearly explain that during an election period, the free speech and expression of private persons do not only cover their expression of social issues and advocacies, but also their right to freely express and support their chosen candidate.

This case appears to have a sharp similarity to the facts in *Diocese of Bacolod* because the Commission on Elections has imposed yet again the size of campaign paraphernalia even when placed on private property.

III

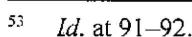
COMELEC Resolution No. 10730, Section 6 provides:

SECTION 6. Lawful Election Propaganda. — Election propaganda, whether on television or cable television, radio, newspaper, the internet or any other medium, is hereby allowed for all bona fide candidates seeking national and local elective positions, subject to the limitation on authorized expenses of candidates and parties, observation of truth in advertising, and to the supervision and regulation by the COMELEC.

Lawful election propaganda shall include:

. . . .

c. 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



53 *Id.* at 91–92.

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[.]

Section 21 of the same Resolution provides:

SECTION 21. Common Poster Areas. — Parties and independent candidates may, upon authority of the COMELEC, through the City or Municipal Election Officer concerned, construct common poster areas, at their expense, wherein they can post, display, or exhibit their election propaganda to announce or further their candidacy subject to the following requirements and/or limitations:

. . . .

o. No lawful election propaganda materials shall be allowed outside the common poster areas except on private property with the consent of the owner or in such other places mentioned in these Rules and must comply with the allowable size (2ft x 3ft) requirements for posters. Any violation hereof shall be punishable as an election offense[.]

Sections 25 and 26 likewise provide:

SECTION 24. Headquarters Signboard. — Before the start of the campaign period, only one (1) signboard, not exceeding three (3) feet by eight (8) feet in size, identifying the place as the headquarters of the party or candidates is allowed to be displayed. Parties may put up the signboard announcing their headquarters not earlier than five (5) days before the start of the campaign period. Individual candidates may put up the signboard announcing their headquarters not earlier than the start of the campaign period. Only lawful election propaganda material may be displayed or posted therein and only during the campaign period.

. . . .

SECTION 26. Removal, Confiscation, or Destruction of Prohibited Propaganda Materials. — Any prohibited form of election propaganda shall be stopped, confiscated, removed, destroyed, or torn down by COMELEC representatives, at the expense of the candidate or political party for whose apparent benefit the prohibited election propaganda materials have been produced, displayed, and disseminated.

Any person, party, association, government agency may likewise report to the COMELEC any prohibited form of election propaganda for confiscation, removal, destruction and/or prevention of the distribution of any propaganda material on the ground that the same is illegal, as listed under Section 7 of this Resolution.

The COMELEC may, motu proprio, immediately order the removal, destruction and/or confiscation of any prohibited propaganda material, or those materials which contain statements or representations that are illegal.

The *ponencia* correctly concludes that these provisions are an arbitrary imposition, reaching into the right of the speaker to speak to their intended audience and effectively stifling their right to free expression.

Indeed, the *form* of the expression matters as much as its content. In *Diocese of Bacolod*:

> 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 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. They are fundamentally part of expression protected under Article III, Section 4 of the Constitution.[54] (Citation omitted)

Restricting the size of the medium also restricts its reach on its intended audience. A smaller tarpaulin only reaches a small audience. A two-by-three feet tarpaulin placed on a large building may render it unreadable and ineffective. Lessening its size lessens its communicative impact.

As discussed in *Diocese of Bacolod*, speech made by candidates or members of their political parties may be regulated as to time, place, and manner. Consequently, this Court provided for a four-fold test to determine whether the regulation of election paraphernalia may be considered valid:

> 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.[55] (Emphasis supplied)

The assailed provisions of COMELEC Resolution No. 10730 do not pass this four-fold test.

According to the Commission on Elections, the restriction "furthers the important and substantial governmental interest of ensuring equal opportunity for public information campaigns among candidates, orderly elections, and minimizing election spending[.]"[56] The *ponencia's* facts, however, show that the election materials used by petitioners were from their own funds and initiatives and were completely volunteer-driven.[57]

The imposition of a size restriction on campaign material made by private persons, spent from their own money, and placed on their own private property is neither reasonable nor "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."[58] The size

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54 *Diocese of Bacolod v. Commission on Elections*, 751 Phil. 301, 358–359 (2015) [Per J. Leonen, *En Banc*].

55 *Id.* at 395.

56 *Ponencia*, p. 9. (Citation omitted)

57 *Id.* at 7.

58 *Diocese of Bacolod v. Commission on Elections*, 751 Phil. 301, 395 (2015) [Per J. Leonen, *En Banc*].

limitation itself is arbitrary, since the Commission on Elections has not validly explained why it should be limited to two by three feet.

Prior cases have seen this Court repeatedly uphold the primacy of the right to free speech and expression, especially when the exercise of this right affects the right of suffrage. The Commission on Elections' repeated imposition of size restrictions on campaign material produced and exhibited by private citizens on their private property is not the least restrictive means by which campaign opportunities between electoral candidates can be equalized.

ACCORDINGLY, I vote to **GRANT** the Petition and make **PERMANENT** the Temporary Restraining Order. I further vote to declare Section 21(o), Section 24, and Section 26 of COMELEC Resolution No. 10730, series of 2021, as **UNCONSTITUTIONAL**.

MARVIC M.V.F. LEONEN
Senior Associate Justice