EN BANC

G.R. No. 223705 – LOIDA NICOLAS-LEWIS, *Petitioner*, **v. COMMISSION ON ELECTIONS,** *Respondent.*

Promulgated:
August 14, 2019

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SEPARATE CONCURRING OPINION

LEONEN, *J.*:

I concur in the result. Nonetheless, I maintain that the provisions in question should be stricken down as they are forms of prior restraint and content-based illicit prohibition on the exercise of the primordial right to freedom of expression.

During elections, active deliberations prompted by the exercise of the freedoms of speech, expression, and association of the electorate itself should remain untrammeled. Our assurance of authentic democracy depends on safe spaces for vigorous discussion. The provisions in question do the exact opposite. Curtailing political speech during the elections is presumptively unconstitutional.

The very first section in the Declaration of Principles and State Policies of the Constitution states:

> SECTION 1. The Philippines is a democratic and republican State. Sovereignty resides in the people and all government authority emanates from them.

The electoral exercise is a significant forum for the sovereign. It is during this time that the primordial and fundamental protection for the speech of every voter and every citizen is most sacred. It is this type of political speech that lies at the core of the guarantee of freedom of expression in Article III, Section 4 of the Constitution.

Therefore, any limitation on speech by the electorate must be justified on legitimate grounds that are clear and indubitable and with means that are narrowly tailored and only specifically calibrated to achieve those purposes.

Unfortunately, neither Section 36.8[1] of the Overseas Absentee Voting Act of 2013 nor Section 74(II)(8) of Commission on Elections Resolution No. 10035[2] can be justified as to its clear purpose or its narrowly circumscribed and calibrated means. Both impose a prohibition that unduly stifles the votes of Filipinos abroad when we should amplify their ideas, especially during elections, and even more so that a multitude of them are overseas workers whose sacrifices are just as abundant.

Rather than a scalpel to precisely remove a specific evil, these regulations carelessly wield a wayward machete, striking negligent blows on the fundamental rights of Filipinos living overseas.

In my view, and after a careful examination of the case and a cautious review of our jurisprudence, the 30-day prohibition on partisan political activities abroad violates the fundamental right of freedom of expression.

Foremost, the assailed provisions are content-based regulations because they specifically target a kind of speech identified by its political element. While they seem to merely regulate the time allowed in conducting partisan political activities, their prohibition actually cuts deep into the expression's communicative impact and political consequences. Thus, being content-based regulations, the strict scrutiny test must be applied. They must bear a heavy presumption of unconstitutionality.

It is uncertain what clear, present, and substantial dangers are sought to be curtailed in the different countries where the prohibition is applied. Respondent Commission on Elections failed to discharge its burden of proving that the State has a compelling interest in prohibiting partisan political activities abroad. It has not shown why the prohibition is necessary to maintain public order abroad during the election period. As they failed to overcome the presumption of the law's invalidity, the assailed provisions must be stricken down.

Absent any compelling State interest, the constitutionally preferred status of free speech must be upheld.

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[1] Republic Act No. 9189 (2003), as amended by Republic Act No. 10590 (2013), sec. 36.8 provides:
SECTION 36. *Prohibited Acts.* — In addition to the prohibited acts provided by law, it shall be unlawful:

. . . .

36.8. For any person to engage in partisan political activity abroad during the thirty (30)-day overseas voting period[.]

[2] General Instructions for the Special Board of Election Inspectors and Special Ballot Reception and Custody Group in the Conduct of Manual Voting and Counting of Votes Under Republic Act No. 9189, otherwise known as "The Overseas Absentee Voting Act of 2003" as amended by Republic Act No. 10590 for Purposes of the May 9, 2016 National and Local Elections.

I

The Constitution guarantees protection to the exercise of free speech, recognizing that free speech is fundamental in a democratic and republican State.[3] Freedom of expression is enshrined in Article III, Section 4 of the 1987 Constitution, which states:

> 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.

This essential right springs from the constitutional touchstone that "[s]overeignty resides in the people and all government authority emanates from them."[4] This is why the extent of freedom of expression is broad. It protects almost 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.[5]

To have a proper understanding and evaluation of this fundamental freedom, it is necessary to know how and why freedom of expression occupied a core value in our society, along with the influences that shaped the contours of our free speech clause.

Prior to being enacted in the present Bill of Rights, our free speech clause was worded differently in the 1899 Malolos Constitution:

> ARTICLE 20. Neither shall any Filipino be deprived:
>
> 1. Of the right to freely express his ideas or opinions, orally or in writing, through the use of the press or other similar means.

The framing of the Malolos Constitution, while copied from the Spanish Constitution, should be understood in view of the country's inadequate protection to free speech during the Spanish rule.[6] At that time, there was an increasing demand for reforms for free speech and free press.[7] Apparent from the text is that the protection to free speech clause is tightly interweaved with a guaranteed free press, as the printing press was the main medium through which free speech was exercised then.

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[3] *Reyes v. Bagatsing*, 210 Phil. 457, 465–467 (1983) [Per C.J. Fernando, En Banc].

[4] CONST., art. II, sec. 1.

[5] *Chavez v. Gonzales*, 569 Phil. 155, 198 (2008) [Per C.J. Puno, En Banc].

[6] George A. Malcolm, *The Malolos Constitution,* 36 POLITICAL SCIENCE QUARTERLY 91 (1921), available at <https://archive.org/details/jstor-2142663> (last visited on August 12, 2019).

[7] *U.S. v. Bustos*, 37 Phil. 731, 739 (1918) [Per J. Malcolm, First Division] *citing* Jose Rizal, Filipinas Despues de Cien Anos (The Philippines A Century Hence) (1912).

Before the printing press, the societal outlook had been authoritarian, and the medieval church had the central authority to determine what was true and false.[8] Slowly, after the dawn of the Renaissance and Reformation and the birth of the printing press, the modern concept of freedom of thought and expression developed.[9] Particularly, in England, the monopoly of the king and the church on the societal truth eroded with the advent of dissent through the new medium of print.[10]

With the growing threat of the printing press, different forms of control on expression and discourse were used, such as treason, seditious libel, and domination of the press through state monopoly and licensing.[11] By the end of the 17th century, the Bill of Rights was introduced, gradually relaxing control on the press. Nevertheless, state control was still in place through subsidizing and taxation.[12]

From the English common law, the concept of freedom of speech and the press was inherited by the United States through its adoption of the First Amendment.[13] By the dawn of the 20th century, disputes on free speech and the press mostly involved the role of newspapers and periodicals, particularly "those of a different political persuasion than the party in power—in acting as critics of the government."[14]

The roots of our own free speech clause can be traced back to the U.S. First Amendment. In 1900, U.S. President William McKinley introduced a differently worded free speech clause through the Magna Carta of Philippine Liberty. Heavily influenced by the First Amendment, it read: "That no law shall be passed abridging the freedom of speech or of the press or of the rights of the people to peaceably assemble and petition the Government for a redress of grievances."[15] This was echoed in the organic acts of the Philippine Bill of 1902 and the Jones Law of 1916.[16] With the increasing desire for independence, the free exercise of speech and the press became indispensable for our people.

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8 WILLIAM COHEN, THE FIRST AMENDMENT: CONSTITUTIONAL PROTECTION OF EXPRESSION AND CONSCIENCE 1 (2003).

9 Id. at 2.

10 Id.

11 Id.

12 Id. at 3.

13 David S. Bogen, *Freedom of Speech and Origins*, 42 MD. L. REV. 429, 430-431 (1983), available at <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2503&context=mlr> (last visited on August 12, 2019) and JOSEPH J. HEMMER, COMMUNICATION LAW: THE SUPREME COURT AND THE FIRST AMENDMENT 4 (2000).

14 WILLIAM COHEN, THE FIRST AMENDMENT: CONSTITUTIONAL PROTECTION OF EXPRESSION AND CONSCIENCE 8–9 (2003). *See also Masses Publishing Co v. Patten*, 244 F. 535 (S.D.N.Y. 1917).

15 *U.S. v. Bustos*, 37 Phil. 731, 740 (1918) [Per J. Malcolm, First Division].

16 Id.

The free speech clause eventually flowed through our jurisprudence. In the 1922 case of *United States v. Perfecto*,[17] the right of the people to free exercise of speech and of assembly has been acknowledged as fundamental in our democratic and republican state:

> The interest of civilized society and the maintenance of good government demand a full and free discussion of all affairs of public interest. Complete liberty to comment upon the administration of Government, as well as the conduct of public men, is necessary for free speech. The people are not obliged, under modern civilized governments, to speak of the conduct of their officials, their servants, in whispers or with bated breath.
>
> The right to assemble and petition the Government, and to make requests and demands upon public officials, is a necessary consequence of republican and democratic institutions, and the complement of the right of free speech.[18] (Citations omitted)

The right to free speech was accorded constitutional protection in the 1935 Constitution, and eventually, the 1973 Constitution, which retained the same wording of the free speech clause:

> No law shall be passed abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and petition the Government for redress of grievances.

Free speech has since enjoyed a preferred position in the scheme of our constitutional values.[19] In *Philippine Blooming Mills Employees Organization v. Philippine Blooming Mills Company, Inc.*:[20]

> Property and property rights can be lost thru prescription; but human rights are imprescriptible. If human rights are extinguished by the passage of time, then the Bill of Rights is a useless attempt to limit the power of government and ceases to be an efficacious shield against the tyranny of officials, of majorities, of the influential and powerful, and of oligarchs - political, economic or otherwise.
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> In the hierarchy of civil liberties, the rights of free expression and of assembly occupy a preferred position as they are essential to the preservation and vitality of our civil and political institutions; and such priority "gives these liberties the sanctity and the sanction not permitting dubious intrusions."[21]

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17 43 Phil. 58 (1922) [Per J. Johnson, En Banc].

18 Id. at 62.

19 *Reyes v. Bagatsing*, 210 Phil. 457, 475 (1983) [Per C.J. Fernando, En Banc]

20 151-A Phil. 656 (1973) [Per J. Makasiar, First Division].

21 Id. at 676.

Free speech was accorded with even greater protection and wider coverage with the enactment of the 1987 Constitution, which added the more expansive word "expression" in the free speech clause.

Freedom of speech has gained constitutional value among liberal democratic societies.[22] This is because free speech promotes liberal and democratic values. Particularly, it protects "democratic political process from abusive censorship"[23] and promotes "equal respect for the moral self-determination of all persons[.]"[24]

The significance of freedom of expression in our jurisdiction has been oft-repeated in recent jurisprudence. Paraphrasing *In re: Gonzales v. Commission on Elections*,[25] this Court in *Chavez v. Gonzales*[26] elucidated:

> [T]he vital need of a constitutional democracy for freedom of expression is undeniable, whether as a means of assuring individual self-fulfillment; of attaining the truth; of assuring participation by the people in social, including political, decision-making; and of maintaining the balance between stability and change. As early as the 1920s, the trend as reflected in Philippine and American decisions was to recognize the broadest scope and assure the widest latitude for this constitutional guarantee. The trend represents a profound commitment to the principle that debate on public issue should be uninhibited, robust, and wide-open.[27] (Citations omitted)

Further, in *The Diocese of Bacolod v. Commission of Elections*:[28]

> 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.[29]

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.[30] Ideas are developed and arguments are refined through public discourse. Freedom of expression grants the people

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22 *See Primicias v. Fugoso*, 80 Phil. 71 (1948) [Per J. Feria, En Banc]. *See also* EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 30–31 (1989).
23 DAVID A.J. RICHARDS, FREE SPEECH AND THE POLITICS OF IDENTITY 18 (1999).
24 Id. at 21.
25 137 Phil. 471 (1969) [Per J. Fernando, En Banc].
26 569 Phil. 155 (2008) [Per C.J. Puno, En Banc].
27 Id. at 197.
28 751 Phil. 301 (2015) [Per J. Leonen, En Banc].
29 Id. at 332.
30 ERIC BARENDT, FREEDOM OF SPEECH 20 (1987).

"the dignity of individual thought."[31] When they speak their innermost thoughts, they take their place in society as productive citizens.[32] Through the lens of self-government, free speech guarantees an "ample opportunity for citizens to determine, debate, and resolve public issues."[33]

Speech that enlivens political discourse is the lifeblood of democracy. A free and robust discussion in the political arena allows for an informed electorate to confront its government on a more or less equal footing.[34] Without free speech, the government robs the people of their sovereignty, leaving them in an echo chamber of autocracy. Freedom of speech protects the "democratic political process from the abusive censorship of political debate by the transient majority which has democratically achieved political power."[35]

In *The 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 people to make government accountable. Necessarily, this includes the right of the people to criticize acts made pursuant to governmental functions.[36] (Citations omitted)

Speech with political consequences occupies a higher position in the hierarchy of protected speeches and is conferred with a greater degree of protection. The difference in the treatment lies in the varying interests in each type of speech. Nevertheless, the exercise of freedom of speech may be regulated by the State pursuant to its sovereign police power. In prescribing regulations, distinctions are made depending on the nature of the speech involved. In *Chavez*:

> Some types of speech may be subjected to some regulation by the State under its pervasive police power, in order that it may not be injurious to the equal right of others or those of the community or society. The

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[31] JOSEPH J. HEMMER, JR., COMMUNICATION LAW: THE SUPREME COURT AND THE FIRST AMENDMENT 3 (2000).

[32] Id.

[33] Id.

[34] ERIC BARENDT, FREEDOM OF SPEECH 146 (1987).

[35] DAVID A.J. RICHARDS, FREE SPEECH AND THE POLITICS OF IDENTITY 18 (1999).

[36] *The Diocese of Bacolod v. Commission of Elections*, 751 Phil. 301, 360 (2015) [Per J. Leonen, En Banc].

> 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.[37] (Citations omitted)

This Court recognized in *The Diocese of Bacolod* that political speech occupies a preferred rank within our constitutional order, it being a direct exercise of the sovereignty of the people.[38] In a separate opinion in *Chavez*, Associate Justice Antonio Carpio underscored that "if ever there is a hierarchy of protected expressions, political expression would occupy the highest rank[.]"[39]

In contrast, other types of speeches, such as commercial speech, are treated in this jurisdiction as "low value speeches."[40]

In *Disini, Jr., v. Secretary of Justice*,[41] this Court has recognized that "[c]ommercial speech . . . is not accorded the same level of protection as that given to other constitutionally guaranteed forms of expression[.]"[42] This is because, as I opined in that case, the protection accorded to commercial speech is anchored on its informative character and it merely caters to the market.[43]

Since the value of protection accorded to commercial speech is only to the extent of its channel to inform, advertising is not on par with other forms of expression.

In contrast, political speech is "indispensable to the democratic and republican mooring of the state whereby the sovereignty residing in the people is best and most effectively exercised through free expression."[44]

The rationale behind this distinction lies in the nature and impact of political speech:

> 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

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

[38] *The Diocese of Bacolod v. Commission of Elections*, 751 Phil. 301, 343 (2015) [Per J. Leonen, En Banc].

[39] Id. *citing* J. Carpio, *Separate Concurring Opinion in Chavez v. Gonzales*, 569 Phil. 155, 245 (2008) [Per J. Puno, En Banc].

[40] *Iglesia ni Cristo v. Court of Appeals*, 328 Phil. 893, 933 (1996) [Per J. Puno, En Banc].

[41] 727 Phil. 28 (2014) [Per J. Abad, En Banc].

[42] Id. at 110.

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

[44] Id. at 420.

> 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.[45]

Media law professor Eric Barendt explained it succinctly in his book, *Freedom of Speech*:

> To confine freedom of expression to political speech (or at any rate to protect it most rigorously in this context) does reduce the scale of the difficulty. Political speech is immune from restriction, because it is a dialogue between members of the electorate and between governors and governed, and is, therefore, conducive, rather than inimical, to the operation of a constitutional democracy. The same is not so obviously true of other categories of 'speech', for which the protection of the free speech may be claimed—pornography or commercial advertising.[46]

Philosopher and free speech advocate Alexander Meiklejohn similarly forwarded this thesis in arguing "that the principle of freedom of speech was rooted in principles of self-government, and that there should be absolute protection for the discussion of public issues, but considerably less protection for speech that did not discuss issues of public interest."[47]

As a direct exercise of the people's sovereignty, political expression is accorded the highest protection. This is even more heightened during the election period, when political activities and speech are propelled by the electorate's ideals and choice of representatives. Given the crucial importance of political expression in our democracy, it should be favored and guarded against any illicit and unwarranted government censorship.

II

To be a true channel of democracy, free speech must be exercised without prior restraint or censorship and subsequent punishment. In Associate Justice Santiago Kapunan's separate opinion in *Iglesia ni Cristo v. Court of Appeals*:[48]

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

[46] ERIC BARENDT, FREEDOM OF SPEECH 147 (1987).

[47] WILLIAM COHEN, THE FIRST AMENDMENT: CONSTITUTIONAL PROTECTION OF EXPRESSION AND CONSCIENCE 41 (2003).

[48] 328 Phil. 893 (1996) [Per J. Puno, En Banc].

> The rights of free expression and free exercise of religion occupy a unique and special place in our constellation of civil rights. The primacy our society accords these freedoms determines the mode it chooses to regulate their expression. But the idea that an ordinary statute or decree could, by its effects, nullify both the freedom of religion and the freedom of expression puts an ominous gloss on these liberties. Censorship law as a means of regulation and as a form of prior restraint is anathema to a society which places high significance to these values.[49]

Prior restraint is an official governmental restriction on any form of expression in advance of its actual utterance, dissemination, or publication. Thus, freedom from prior restraint is freedom from government censorship, regardless of its form and the branch of government that wielded it. When a governmental act is in prior restraint of expression, it bears a heavy presumption against its validity.[50] In *Chavez*:

> Prior restraint refers to official governmental restrictions on the press or other forms of expression in advance of actual publication or dissemination. 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.[51] (Citations omitted)

On the other hand, subsequent punishment is the imposition of liability on the individual exercising his or her freedom. The penalty may be penal, civil, or administrative.[52]

Prior restraint is deemed a more severe restriction on expression than subsequent punishment because while the latter dissuades expression, ideas are still disseminated to the public. On the other hand, prior restraint prevents even the dissemination of ideas.[53]

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[49] Id. at 953–954.

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

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

[52] J. Sandoval-Gutierrez, Concurring Opinion in *Chavez v. Gonzales*, 569 Phil. 155, 224 (2008) [Per J. Puno, En Banc].

[53] *See Chavez v. Gonzales*, 569 Phil. 155 (2008) [Per J. Puno, En Banc] and *Iglesia ni Cristo v. Court of Appeals*, 328 Phil. 893 (1996) [Per J. Puno, En Banc].

Even if there is no prior restraint, the exercise of expression may still be subject to subsequent punishment, either civilly or criminally. If the expression is not subject to the lesser restriction of subsequent punishment, it follows that it cannot also be subject to the greater restriction of prior restraint. On the other hand, if the expression warrants prior restraint, it is unavoidably subject to subsequent punishment.[54]

Because our Constitution favors freedom of expression, any form of prior restraint is an exemption and bears a heavy presumption of invalidity.[55]

Nevertheless, free speech is not absolute, and not all prior restraint regulations are held invalid. Free speech must "not be injurious to the equal enjoyment of others having equal rights, nor injurious to the rights of the community or society."[56]

Doctrinally, this Court has settled the applicable tests in determining the validity of free speech regulations. To justify an intrusion on expression, we employ two (2) tests, namely: (1) the clear and present danger test; and (2) the dangerous tendency test.

In *Cabansag v. Fernandez*,[57] this Court laid down what these tests entail:

> The [clear and present danger test], as interpreted in a number of cases, means that the evil consequence of the comment or utterance must be "extremely serious and the degree of imminence extremely high" before the utterance can be punished. The danger to be guarded against is the "substantive evil" sought to be prevented. And this evil is primarily the "disorderly and unfair administration of justice." This test establishes a definite rule in constitutional law. It provides the criterion as to what words may be published. Under this rule, the advocacy of ideas cannot constitutionally be abridged unless there is a clear and present danger that such advocacy will harm the administration of justice.
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> . . . .
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> The question in every case, according to Justice Holmes, is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that congress has a right to prevent. It is a question of proximity and degree.
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> The "dangerous tendency" rule, on the other hand, has been adopted in cases where extreme difficulty is confronted in determining

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[54] J. Sandoval-Gutierrez, Concurring Opinion in *Chavez v. Gonzales*, 569 Phil. 155, 240–241 (2008) [Per J. Puno, En Banc].

[55] *Iglesia ni Cristo v. Court of Appeals*, 328 Phil. 893, 928 (1996) [Per J. Puno, En Banc].

[56] *Primicias v. Fugoso*, 80 Phil. 71, 75 (1948) [Per J. Feria, En Banc].

[57] 102 Phil. 152 (1957) [Per J. Bautista Angelo, First Division].

> where the freedom of expression ends and the right of courts to protect their independence begins. There must be a remedy to borderline cases and the basic principle of this rule lies in that the freedom of speech and of the press, as well as the right to petition for redress of grievance, while guaranteed by the constitution, are not absolute. They are subject to restrictions and limitations, one of them being the protection of the courts against contempt.
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> This rule may be epitomized as follows: If the words uttered create a dangerous tendency which the state has a right to prevent, then such words are punishable. It is not necessary that some definite or immediate acts of force, violence, or unlawfulness be advocated. It is sufficient that such acts be advocated in general terms. Nor is it necessary that the language used be reasonably calculated to incite persons to acts of force, violence, or unlawfulness. It is sufficient if the natural tendency and probable effect of the utterance be to bring about the substantive evil which the legislative body seeks to prevent.[58] (Citations omitted)

As its designation connotes, the clear and present danger test demands that the danger not only be clear, but also present. In contrast, the dangerous tendency test does not require that the danger be present. In *In Re: Gonzales*:[59]

> The term clear seems to point to a causal connection with the danger of the substantive evil arising from the utterance questioned. Present refers to the time element. It used to be identified with imminent and immediate danger. The danger must not only be probable but very likely inevitable.[60]

The clear and present danger test has undergone changes from its inception in *Schenck v. U.S.*,[61] where it was applied to speeches espousing anti-government action.[62]

In the 1951 case of *Dennis v. U.S.*,[63] the imminence requirement of the test was diminished. That case, which involved communist conspiracy, adopted Judge Learned Hand's framework, where it must be asked "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[64]

Nevertheless, in the 1969 case of *Brandenburg v. Ohio*,[65] the U.S. High Court not only restored the imminence requirement, but added "an

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[58] Id. at 161–163.
[59] 137 Phil. 471 (1969) [Per J. Fernando, En Banc].
[60] Id. at 496.
[61] 249 U.S. 47 (1919).
[62] *Iglesia ni Cristo v. Court of Appeals*, 328 Phil. 893, 932 (1996) [Per J. Puno, En Banc].
[63] 341 U.S. 494 (1951).
[64] *Iglesia ni Cristo v. Court of Appeals*, 328 Phil. 893, 932 (1996) [Per J. Puno, En Banc].
[65] 95 U.S. 444 (1969).

intent requirement which according to a noted commentator ensured that only speech directed at inciting lawlessness could be punished."[66]

As the prevailing standard, *Brandenburg* limits the clear and present danger test's application "to expression where there is 'imminent lawless action.'"[67]

The *Brandenburg* standard was applied in *Reyes v. Bagatsing*.[68] In *Reyes*, this Court required the existence of grave and imminent danger to justify the procurement of permit for use of public streets. It held:

> By way of a summary. The applicants for a permit to hold an assembly should inform the licensing authority of the date, the public place where and the time when it will take place. If it were a private place, only the consent of the owner or the one entitled to its legal possession is required. Such application should be filed well ahead in time to enable the public official concerned to appraise whether there may be valid objections to the grant of the permit or to its grant but at another public place. It is an indispensable condition to such refusal or modification that the clear and present danger test be the standard for the decision reached. If he is of the view that there is such an imminent and grave danger of a substantive evil, the applicants must be heard on the matter. Thereafter, his decision, whether favorable or adverse, must be transmitted to them at the earliest opportunity. Thus if so minded, they can have recourse to the proper judicial authority. Free speech and peaceable assembly, along with the other intellectual freedoms, are highly ranked in our scheme of constitutional values. It cannot be too strongly stressed that on the judiciary, — even more so than on the other departments — rests the grave and delicate responsibility of assuring respect for and deference to such preferred rights. No verbal formula, no sanctifying phrase can, of course, dispense with what has been so felicitiously (*sic*) termed by Justice Holmes "as the sovereign prerogative of judgment." Nonetheless, the presumption must be to incline the weight of the scales of justice on the side of such rights, enjoying as they do precedence and primacy.[69]

This standard was applied in the recent case of *Chavez*:

> [T]he clear and present danger rule . . . rests on the premise that speech may be restrained because there is substantial danger that the speech will likely lead to an evil the government has a right to prevent. This rule requires that the evil consequences sought to be prevented must be substantive, "extremely serious and the degree of imminence extremely high."[70] (Citations omitted)

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[66] *Iglesia ni Cristo v. Court of Appeals*, 328 Phil. 893, 933 (1996) [Per J. Puno, En Banc].

[67] *See* footnote 33 of J. Carpio, Separate Concurring Opinion in *Chavez v. Gonzales*, 569 Phil. 155, 242 (2008) [Per C.J. Puno, En Banc].

[68] *Reyes v. Bagatsing*, 210 Phil. 457 (1983) [Per J. J.B.L. Reyes, En Banc].

[69] Id. at 475.

[70] *Chavez v. Gonzales*, 569 Phil. 155, 200 (2008) [Per C.J. Puno, En Banc].

In *ABS-CBN Broadcasting Corporation v. Commission on Elections*,[71] this Court explained that to justify a restriction on expression, a substantial government interest must be clearly shown:

> A government regulation is sufficiently justified if it is within the constitutional power of the government, if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.
>
> Hence, even though the government's purposes are legitimate and substantial, they cannot be pursued by means that broadly stifle fundamental personal liberties, when the end can be more narrowly achieved.[72] (Citations omitted)

In cases involving expression that strengthens suffrage, all the more should freedom of expression be protected and upheld.[73] It is the government's interest that the sanctity and integrity of the electoral process are preserved and the right to vote is protected by providing safe and accessible areas for voting and campaigning. However, to uphold a restriction, the governmental interest must outweigh the people's freedom of expression.[74]

In this case, the regulations are forms of prior restraint on political speech because they disallow certain partisan political activities and expression before they are conducted and uttered. Specifically, Section 36.8 of the Overseas Absentee Voting Act of 2013 and Section 74(II)(8) of Commission on Elections Resolution No. 10035 declare unlawful the engagement of Filipinos abroad in partisan political activities during the 30-day overseas voting period.

This results in a chilling effect that would discourage Filipinos abroad to express their opinion and political ideals during elections. Thus, being forms of prior restraint on the people's political expression, the assailed provisions bear a heavy presumption of invalidity.

III

When faced with contentions involving prior restraint on free speech, it is important to create a distinction between content-based and content-

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[71] 380 Phil. 780 (2000) [Per J. Panganiban, En Banc].

[72] Id. at 795.

[73] Id. at 795–796 *citing Mutuc v. Commission on Elections*, 146 Phil. 798 (1970) [Per J. Fernando, First Division].

[74] Id. at 796.

neutral regulations. Whether a regulation is content-based or content-neutral spells out the difference in the test applied in assaying a governmental regulation.

A regulation is content-neutral if it is "merely concerned with the incidents of the speech, or one that merely controls the time, place[,] or manner, and under well-defined standards[,]"[75] regardless of the content of the speech. On the other hand, content-based restraint or censorship is based on the subject matter of the expression.[76]

In a content-based regulation, the governmental action is tested with the strictest scrutiny "in light of its inherent and invasive impact."[77] It bears a heavy presumption of unconstitutionality. To pass constitutional muster, the regulation has to overcome the clear and present danger rule.[78]

Thus, the government must show the type of harm sought to be prevented by the content-based regulation. It must be based on a "substantive and imminent evil that has taken the life of a reality already on ground."[79] There must be an inquiry on whether the words used will "bring about the substantive evils that Congress has a right to prevent."[80] To justify the regulation, strict scrutiny requires a compelling State interest, and that it is narrowly tailored and the least restrictive means to achieve that interest.[81]

In his dissent in *Soriano v. Laguardia*,[82] Chief Justice Reynato Puno explained the rationale behind the application of the strict scrutiny test:

> *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.[83] (Emphasis supplied, citation omitted)

In *Newsounds Broadcasting Network, Inc. v. Dy*:[84]

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75 *Newsounds Broadcasting Network, Inc. v. Dy*, 602 Phil. 255, 271 (2009) [Per J. Tinga, Second Division].
76 Id.
77 *Chavez v. Gonzales*, 569 Phil. 155, 206 (2008) [Per J. Puno, En Banc].
78 Id. *See also Ayer Productions Pty. Ltd. v. Capulong*, 243 Phil. 1007 (1988) [Per J. Feliciano, En Banc].
79 *Chavez v. Gonzales*, 569 Phil. 155, 206 (2008) [Per J. Puno, En Banc].
80 *Cabansag v. Fernandez*, 102 Phil. 152, 163 (1957) [Per J. Bautista Angelo, First Division].
81 *See Divinagracia v. Consolidated Broadcasting System, Inc.*, 602 Phil. 625 (2009) [Per J. Tinga, Second Division].
82 605 Phil. 43 (2009) [Per J. Velasco, Jr., En Banc].
83 Id. at 163.
84 602 Phil. 255 (2009) [Per J. Tinga, Second Division].

> 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.[85]

While content-based regulations are "treated as more suspect than content-neutral"[86] regulations due to discrimination in regulating the expression, content-neutral regulations are subject to "lesser but still heightened scrutiny."[87]

In content-neutral regulations, the intermediate approach is applied where only a substantial governmental interest is required to be established.[88] This is lower than the stringent standard of compelling State interest required in content-based regulations, since content-neutral regulations are not designed to suppress free speech but only its incidents.[89]

Through the intermediate approach, the validity of a content-neutral regulation is analyzed along the following parameters: (1) whether it is within the government's constitutional power; (2) whether it furthers an important or substantial governmental interest; (3) whether the governmental interest is unrelated to the suppression of free expression; and (4) whether the incidental restriction on freedoms of speech, expression, and the press is no greater than is essential to the furtherance of that interest.[90]

Nevertheless, content-neutral regulations may still be invalidated if the incidental restriction on expressive freedom is greater than is essential to achieve the governmental interest.[91] The regulation must be "reasonable and narrowly drawn to fit the regulatory purpose, with the least restrictive means undertaken";[92] otherwise, it must be struck down.

This Court has recognized that the right of suffrage necessarily includes the right to express one's chosen candidate to the public.[93] Especially during the election period, the right to free speech and expression is fundamental and consequential:

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85 Id. at 274.

86 Id. at 271 *citing* GUNTHER, ET AL., CONSTITUTIONAL LAW 964 (14th ed., 2001).

87 Id.

88 *Osmeña v. Commission on Elections*, 351 Phil. 692, 718 (1998) [Per J. Mendoza, En Banc].

89 Id. at 718–719.

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

91 *Social Weather Stations, Inc. v. Commission on Elections*, 409 Phil. 571, 588 (2001) [Per J. Leonen, En Banc].

92 *Chavez v. Gonzales*, 569 Phil. 155, 207 (2008) [Per J. Puno, En Banc].

93 *The Diocese of Bacolod v. Commission on Elections*, 751 Phil. 301, 332 (2015) [Per J. Leonen, En Banc].

> "[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.[94] (Citations omitted)

During the election period, citizens seek information on candidates and campaigns and, upon reaching a choice, campaign and persuade other people to likewise vote for their candidate. At this time, people are most engaged in political discourse. Expressing a political ideology and campaigning for a candidate cannot be divorced from one's right of suffrage. Even electoral candidates rely on their supporters to campaign for them. Thus, any speech or act that directly involves the right of suffrage is a political activity by the people themselves.

In *Social Weather Stations, Inc. v. Commission on Elections*,[95] this Court discussed the regulation of speech in the context of campaigns done by non-candidates or non-members of political parties:

> Regulation of speech in the context of electoral campaigns made by persons who are not candidates or who do not speak as members of a political party which are, taken as a whole, principally advocacies of a social issue that the public must consider during elections is unconstitutional. Such regulation is inconsistent with the guarantee of according the fullest possible range of opinions coming from the electorate including those that can catalyze candid, uninhibited, and robust debate in the criteria for the choice of a candidate.
>
> This does not mean that there cannot be a specie of speech by a private citizen which will not amount to an election paraphernalia to be validly regulated by law.[96]

In *Social Weather Stations, Inc.*, this Court considered the parameters within which a regulation may be held 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*

[94] Id. at 372.
[95] 757 Phil. 483 (2015) [Per J. Leonen, En Banc].
[96] Id. at 516.

> *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.*[97] (Emphasis in the original)

Here, petitioner Loida Nicolas-Lewis assails the constitutionality and validity of Section 36.8 of the Overseas Absentee Voting Act and Section 74(II)(8) of Commission on Elections Resolution No. 10035. These are uniform provisions that prohibit partisan political activities abroad during the 30-day overseas voting period.[98]

Section 36(8) of the Overseas Absentee Voting Act states:

> SECTION 36. Prohibited Acts. — In addition to the prohibited acts provided by law, it shall be unlawful:
>
> . . . .
>
> 36.8. For any person to engage in partisan political activity abroad during the thirty (30)-day overseas voting period[.]

Section 74(II)(8) of the Commission on Elections Resolution No. 10035 states:

> Sec. 74. Election offenses/ prohibited acts. -
>
> II. Under R.A. 9189 "Overseas Absentee Voting Act of 2003", as amended
>
> . . . .
>
> (8) For any person to engage in partisan political activity abroad during the thirty (30)-day overseas voting period.

The definition of "partisan political activity" is found in Section 79(b) of Batas Pambansa Blg. 881, or the Omnibus Election Code. It states:

> (b) The term "election campaign" or "partisan political activity" refers to an act designed to promote the election or defeat of a particular candidate or candidates to a public office which shall include:
>
> > (1) Forming organizations, associations, clubs, committees or other groups of persons for the purpose of soliciting votes and/or undertaking any campaign for or against a candidate;

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[97] Id. at 516–517.

[98] *Rollo*, p. 4.

> (2) Holding political caucuses, conferences, meetings, rallies, parades, or other similar assemblies, for the purpose of soliciting votes and/or undertaking any campaign or propaganda for or against a candidate;
>
> (3) Making speeches, announcements or commentaries, or holding interviews for or against the election of any candidate for public office;
>
> (4) Publishing or distributing campaign literature or materials designed to support or oppose the election of any candidate; or
>
> (5) Directly or indirectly soliciting votes, pledges or support for or against a candidate.
>
> The foregoing enumerated acts if performed for the purpose of enhancing the chances of aspirants for nomination for candidacy to a public office by a political party, aggroupment, or coalition of parties shall not be considered as election campaign or partisan election activity.
>
> Public expressions or opinions or discussions of probable issues in a forthcoming election or on attributes of or criticisms against probable candidates proposed to be nominated in a forthcoming political party convention shall not be construed as part of any election campaign or partisan political activity contemplated under this Article.

From this, it can easily be determined that the assailed provisions are content-based regulations precisely because they specifically target a kind of speech identified by its political element. Contrary to respondent's submission,[99] the assailed provisions are not content-neutral. While they seem to merely limit the time allowed in conducting partisan political activities, they should be evaluated without losing sight of the nature of the expression they seek to regulate.

In her separate opinion, Associate Justice Estela Perlas-Bernabe characterized the regulations as forms of content-neutral restriction, arguing that they merely regulate the place and time in which political speech may be uttered. I disagree.

The prohibition on the conduct of partisan political activities does not merely control the incidents or manner of the political expression, but actually regulates the content of the expression. As admitted by respondent, the limits are placed on the conduct of partisan political activities to subdue the "violence and atrocities"[100] that mar the electoral process. This means that the regulation is anchored on the content, nature, and effect of the prohibited activities.

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[99] Id. at 124.
[100] Id. at 125.

Although guised as merely limiting the manner of the expression, the assailed provisions cut deep into the expression's communicative impact and political consequences. The regulations are not merely incidental.

Considering a regulation as content-neutral is only appropriate when the governmental interest and purpose are clear and unambiguous. In this case, the government's purpose in placing a 30-day restriction on political activities abroad is unclear.

To sustain the validity of Section 36.8 of the Overseas Absentee Voting Act and Section 74(II)(8) of Commission on Elections Resolution No. 10035, they must be evaluated with strict scrutiny. To pass constitutional muster, there must be a showing of a compelling State interest in the 30-day prohibition of partisan political activities abroad.

However, there are no clear, present, and substantial electoral dangers that will be prevented by the prohibition they impose. It is unclear if the substantial dangers and evils sought to be curtailed even exist in every foreign jurisdiction where the prohibition is applied.

It cannot be assumed that the same "horrendous and unforgivable atrocities"[101] during the election period in the Philippines are present and recurring in each and every country where Filipinos are situated. Every country has a unique election experience; it is uncertain if our overseas voters have been through any electoral conflict or violence to justify the State's restraint on free speech abroad. The prohibition applied to partisan political activities within the Philippines cannot be applied as a blanket prohibition that covers overseas voting. The government cannot instate a regulation that unduly interferes with protected expression.

In overseas voting, Philippine embassies, consulates, and foreign service establishments are designated as polling precincts.[102] Filipinos abroad would need to allot hours of travel to get to them without the benefit of an election holiday. A longer duration of a 30-day voting period abroad is, therefore, understandable. The longer voting period is enacted to encourage Filipinos overseas to participate in the elections.

Considering the Philippines' experience during the election period, the two-day prohibition on partisan political activities here bears a crucial role in subduing the dire consequences and abuses that attend it. The tail end of the election campaign period is the peak of candidates' and political parties' efforts to secure a win, and prolonged political campaigns frequently

[101] Id.

[102] Commission on Elections Resolution No. 9843 (2014), art. 89, in relation to Republic Act No. 10590 (2013), sec. 2(l).

result in "violence and even death . . . because of the heat engendered by such political activities."[103]

Overseas, the sweeping prohibition on the partisan political activities during the 30-day voting period has no added value in "safeguarding the conduct of an honest, peaceful, and orderly elections" abroad.[104] There is no discernable reason behind the blanket prohibition. Through the lens of strict scrutiny, the assailed law and resolution fail because there are no dangers and evils present abroad that are "substantive, 'extremely serious[,] and the degree of imminence extremely high.'"[105]

Being forms of prior restraint and content-based regulation, the assailed provisions bear the heavy presumption of unconstitutionality. The government, then, has to prove that the regulations are valid. Here, respondent failed in discharging its burden of proof.

In maintaining their constitutionality, respondent insists that the assailed provisions are content-neutral.[106] As such, respondent contends that they are permissible for satisfying the intermediate test laid down by jurisprudence, *i.e.*, provided by law, reasonable, narrowly tailored to meet their objective, and the least restrictive means to achieve that objective.[107]

Respondent heavily capitalizes on this Court's ruling in *In Re: Gonzales*[108] to justify the assailed law. Quoting *In Re: Gonzales*, respondent postulates that while freedom of expression is at the core of a partisan political activity, Congress has the power to regulate and limit this freedom "for the sake of general welfare and, ironically enough, safeguarding the right of suffrage."[109] It quotes a relevant portion of the Decision:

> This is not to deny that Congress was indeed called upon to seek remedial measures for the far-from-satisfactory condition arising from the too-early nomination of candidates and the necessarily prolonged political campaigns. The direful consequences and the harmful effects on the public interest with the vital affairs of the country sacrificed many a time to purely partisan pursuits were known to all. Moreover, it is no exaggeration to state that violence and even death did frequently occur because of the heat engendered by such political activities. Then, too, the opportunity for dishonesty and corruption, with the right to suffrage being bartered, was further magnified.

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[103] *In re: Gonzales v. Commission on Elections,* 137 Phil. 471, 506 (1969) [Per J. Fernando, En Banc].
[104] *Rollo,* p. 125.
[105] *Chavez v. Gonzales*, 569 Phil. 155, 200 (2008) [Per J. Puno, En Banc].
[106] *Rollo*, p. 124.
[107] Id.
[108] 137 Phil. 471 (1969) [Per J. Fernando, En Banc].
[109] *Rollo*, p. 116.

> Under the police power then, with its concern for the general welfare and with the commendable aim of safeguarding the right of suffrage, the legislative body must have felt impelled to impose the foregoing restrictions. It is understandable for Congress to believe that without the limitations thus set forth in the challenged legislation, the laudable purpose of Republic Act No. 4880 would be frustrated and nullified.[110]

Thus, respondent argues that the measure is reasonable because there is a need to counteract the prevailing abuses and violence that mar the election process. It adds:

> [T]he realities of Philippine politics in 1969 and four decades after remain the same – the unbridled passions of supporters and candidates alike have, in the recent years, even resulted, in some of the most horrendous and unforgivable atrocities. . . .
>
> . . . With that, the regulation, through the prohibition of partisan political activity during the day or days that votes are cast, is not only reasonable, but warranted as well.[111]

Moreover, respondent asserts that the provisions are narrowly tailored to meet their objective of enhancing the opportunity of all candidates to be heard. Respondent construes the provisions in conjunction with Section 261 of the Omnibus Election Code, which provides:

> SECTION 261. Prohibited Acts. — The following shall be guilty of an election offense:
>
> . . . .
>
> (k) Unlawful electioneering. — It is unlawful to solicit votes or undertake any propaganda on the day of registration before the board of election inspectors and on the day of election, for or against any candidate or any political party within the polling place and *with a radius of thirty meters thereof.*
>
> . . . .
>
> (cc) On candidacy and campaign:
>
> . . . .
>
> (6) Any person who solicits votes or undertakes any propaganda, on the day of election, for or against any candidate or any political party within the polling place or *within a radius of thirty meters thereof.*

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[110] Id. at 124–125.

[111] Id. at 125.

Accordingly, respondent notes that partisan political activities are only prohibited on the days of casting of votes and within a 30-meter radius of the polling place. The prohibition, respondent further contends, is only addressed to election candidates.[112]

Lastly, respondent adds that the prohibition is the least restrictive means in safeguarding the conduct of the elections because it is narrowly limited to "solicitation of votes done at the designated polling precincts and only during the time when casting of votes has begun."[113]

These arguments fail to address the constitutional test required to uphold the assailed provisions' validity.

To recapitulate, Section 36.8 of the Overseas Absentee Voting Act and Section 74(II)(8) of Commission on Elections Resolution No. 10035 are content-based regulations because they strike at the core of the communicative effect of political expression and speech. Thus, the presumption of invalidity is put against them. Respondent's reliance on their presumption of constitutionality cannot hold water.

Respondent's argument that there is substantial governmental interest in the regulations must likewise fail. On the contrary, this case calls for the application of the strictest scrutiny test. Respondent must show that the evils sought to be subdued by the assailed provisions are "substantive, 'extremely serious[,] and the degree of imminence extremely high.'"[114]

Here, respondent takes refuge in this Court's ruling in *In Re: Gonzales*. Arguing that the regulations are needed to curb the practices that taint the electoral process, respondent is firm that the assailed provisions must be upheld as valid because they are similar to the regulation involved in *In Re: Gonzales*. Respondent is mistaken.

In a sharply divided vote in *In Re: Gonzales*, this Court upheld the constitutionality of Section 50-B of Republic Act No. 4880, or the Revised Election Code. The provision, which is a verbatim copy of Section 76(b) of the Omnibus Election Code, defines the term "partisan political activity":

> Sec. 50-B. Limitation upon the period of Election Campaign or Partisan Political Activity. — It is unlawful for any person whether or not a voter or candidate, or for any group or association of persons, whether or not a political party or political committee, to engage in an election campaign or partisan political activity except during the period of one

[112] *Rollo*, p. 122.
[113] Id. at 125.
[114] *Chavez v. Gonzales*, 569 Phil. 155, 200 (2008) [Per J. Puno, En Banc].

> hundred twenty days immediately preceding an election involving a public office voted for at large and ninety days immediately preceding an election for any other elective public office.
>
> The term 'Candidate' refers to any person aspiring for or seeking an elective public office, regardless of whether or not said person has already filed his certificate of candidacy or has been nominated by any political party as its candidate.
>
> The term 'Election Campaign' or 'Partisan Political Activity' refers to acts designed to have a candidate elected or not or promote the candidacy of a person or persons to a public office which shall include:
>
> (a) Forming Organizations, Associations, Clubs, Committees or other groups of persons for the purpose of soliciting votes and/or undertaking any campaign or propaganda for or against a party or candidate;
>
> (b) Holding political conventions, caucuses, conferences, meetings, rallies, parades, or other similar assemblies, for the purpose of soliciting votes and/or undertaking any campaign or propaganda for or against a any candidate or party;
>
> (c) Making speeches, announcements or commentaries or holding interviews for or against the election of any party or candidate for public office;
>
> (d) Publishing or distributing campaign literature or materials;
>
> (e) Directly or indirectly soliciting votes and/or undertaking any campaign or propaganda for or against any candidate or party;
>
> (f) Giving, soliciting, or receiving contributions for election campaign purposes, either directly or indirectly. Provided, That simple expressions or opinion and thoughts concerning the election shall not be considered as part of an election campaign: Provided, further, That nothing herein stated shall be understood to prevent any person from expressing his views on current political problems or issues, or from mentioning the names of the candidates for public office whom he supports.

In *In Re: Gonzales*, this Court determined that Section 50-B of Republic Act No. 4880 is a content-based regulation because it is a limitation that cuts deep into the substance of the speech and expression. Proceeding to apply the clear and present danger test, the majority reasoned that the limits on freedom of speech is justified by the serious substantive evil that affects the electoral process. It held that the evils that the law sought to prevent are "not merely in danger of happening, but actually in existence, and likely to continue unless curbed or remedied."[115] It ruled:

[115] *In re: Gonzales v. Commission on Elections*, 137 Phil. 471, 500 (1969) [Per J. Fernando, En Banc].

> For under circumstances that manifest abuses of the gravest character, remedies much more drastic than what ordinarily would suffice would indeed be called for. The justification alleged by the proponents of the measures weighs heavily with the members of the Court, though in varying degrees, in the appraisal of the aforesaid restrictions to which such precious freedoms are subjected. They are not unaware of the clear and present danger that calls for measures that may bear heavily on the exercise of the cherished rights of expression, of assembly, and of association.
>
> This is not to say that once such a situation is found to exist, there is no limit to the allowable limitations on such constitutional rights. The clear and present danger doctrine rightly viewed requires that not only should there be an occasion for the imposition of such restrictions but also that they be limited in scope.[116]

This case, however, bears a different factual milieu. It would be a judicial error to carelessly apply the ruling in *In Re: Gonzales* here.

Respondent overlooked that the prohibition on partisan political activities in *In Re: Gonzales* specifically pertains to elections conducted in the Philippines. Likewise, this Court's justification in *In Re: Gonzales* operates within the premise and context of an election period within the Philippines. Respondent cannot simply rely on that justification in arguing for the validity of the assailed provisions in this case. The application of the prohibition is different for overseas elections.

Respondent cannot use the perceived electoral violence in the Philippines as a justification for a prohibition applied abroad. Thus, I cannot agree with respondent's insistence that "the prohibition on partisan political activities during the 30-day overseas voting period . . . is no different from the election-day prohibition on partisan political activities"[117] within the Philippines.

It is clear that respondent failed to discharge its burden of proof. It has not shown why prohibiting partisan political activities abroad is necessary to maintain public order during the election period. It is uncertain what clear and present dangers the prohibition aims to dispel within the different countries abroad. Hence, the presumption of the regulations' invalidity stands.

Absent any clear and present danger, the people's exercise of free speech cannot be restrained by the government. Without any discernable reason to broadly impose the prohibition on political activities abroad, this Court is impelled to favor and uphold the exercise of free expression.

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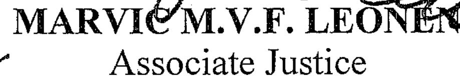
[116] Id. at 503.

[117] *Rollo*, p. 117.

The Overseas Absentee Voting Act's noble intent to encourage Filipinos abroad to exercise their right of suffrage[118] will fail to materialize if we leave our people voiceless and powerless. A meaningful democratic participation through the exercise of the right of suffrage demands that citizens have the right to know what they ought to know, and to express what they know to make informed choices and influence others to do the same.

ACCORDINGLY, I vote that the Petition be **GRANTED**. Section 36.8 of the Overseas Absentee Voting Act of 2013 and Section 74(II)(8) of Commission on Elections Resolution No. 10035 are declared **UNCONSTITUTIONAL**.



MARVIC M.V.F. LEONEN
Associate Justice

[118] Id. at 121.

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EDGAR O. ARICHETA
Clerk of Court En Banc
Supreme Court