SUPREME COURT OF THE PHILIPPINES
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En Banc

G.R. No. 263590 – ATTY. ROMULO B. MACALINTAL, *Petitioner*, **v. COMMISSION ON ELECTIONS and the OFFICE OF THE PRESIDENT through EXECUTIVE SECRETARY LUCAS P. BERSAMIN,** *Respondents*.

G.R. No. 263673 – ATTY. ALBERTO N. HIDALGO, ATTY. ALUINO O. ALA, ATTY. AGERICO A. AVILA, ATTY. TED CASSEY B. CASTELLO, ATTY. JOYCE IVY C. MACASA, and ATTY. FRANCES MAY C. REALINO, *Petitioners,* **v. EXECUTIVE SECRETARY LUCAS P. BERSAMIN, THE SENATE OF THE PHILIPPINES, duly represented by its Senate President, JUAN MIGUEL ZUBIRI, THE HOUSE OF REPRESENTATIVES, duly represented by its Speaker of the House, FERDINAND MARTIN ROMUALDEZ, and THE COMMISSION ON ELECTIONS, duly represented by its Chairman, GEORGE ERWIN M. GARCIA,** *Respondents*.

Date Promulgated:

June 27, 2023

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SEPARATE CONCURRING OPINION

ZALAMEDA, *J.*:

> *"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."*
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> -Justice Thurgood Marshall in *McCulloch v. Maryland*[1]

In a democratic republic country like ours, the Judiciary is assigned as the protector of individual liberties to balance the exercise of overwhelming powers by the Executive and the Legislative. In discharging this task, courts

[1] 17 U.S. 316 (1819).

are guided by the Constitution, even though its words do not always expressly provide specific and detailed solutions to the myriad problems that arise from governance. This Court has applied different tests, in recognition of the varying weights and relevance of competing state and individual interests, to examine the validity of government acts against settled constitutional principles. I write this opinion to expound on and highlight the propriety of adopting an intermediate scrutiny analysis for controversies that do not involve outright transgressions of deeply rooted constitutional principles and freedoms.

1. Tests to determine the validity of laws originated from the Supreme Court of the United States

The use of tests to determine validity of laws originates from decisions of the Supreme Court of the United States (SCOTUS).

In his majority opinion for the SCOTUS in the 1938 case of *United States v. Carolene Products (Carolene Products)*,[2] Justice Harlan F. Stone applied the "rational basis test" to economic legislation. The rational basis test presumes the constitutionality of the challenged law, and tasks the party questioning it to definitively show its unconstitutionality. The assailed government act in *Carolene Products* involved a federal law that restricted shipments of milk. The SCOTUS held that the law was "presumptively constitutional" and within the legislature's discretion to enact. It was supported by public health evidence and was neither arbitrary nor irrational.

Footnote Four of the majority opinion in *Carolene Products,* however, introduced the idea that certain legislative acts should be subjected to a higher standard of review than that of the rational basis test. It read:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See Stromberg v. California, 283 U.S. 359, 369, 370, 51 S.Ct. 532, 535, 536, 75 L.Ed. 1117, 73 A.L.R. 1484; Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949, decided March 28, 1938.
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> It is unnecessary to consider now whether legislation that restricts those political processes which can ordinarily be expected to bring about

[2] Id.

> repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see *Nixon v. Herndon*, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759; *Nixon v. Condon*, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984, 88 A.L.R. 458; on restraints upon the dissemination of information, see *Near v. Minnesota*, 283 U.S. 697, 713—714, 718—720, 722, 51 S.Ct. 625, 630, 632, 633, 75 L.Ed. 1357; *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660; *Lovell v. Griffin*, supra; on interferences with political organizations, see *Stromberg v. California*, supra, 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117, 73 A.L.R. 1484; *Fiske v. Kansas*, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108; *Whitney v. California*, 274 U.S. 357, 373—378, 47 S.Ct. 641, 647, 649, 71 L.Ed. 1095; *Herndon v. Lowry*, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066; and see Holmes, J., in *Gitlow v. New York*, 268 U.S. 652, 673, 45 S.Ct. 625, 69 L.Ed. 1138; as to prohibition of peaceable assembly, see *De Jonge v. Oregon*, 299 U.S. 353, 365, 57 S.Ct. 255, 260, 81 L.Ed. 278.
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> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468, or national, *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1446; *Bartels v. Iowa*, 262 U.S. 404, 43 S.Ct. 628, 67 L.Ed. 1047; *Farrington v. Tokushige*, 273 U.S. 284, 47 S.Ct. 406, 71 L.Ed. 646, or racial minorities. *Nixon v. Herndon*, supra; *Nixon v. Condon*, supra; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare *McCulloch v. Maryland*, 4 Wheat. 316, 428, 4 L.Ed. 579; *South Carolina State Highway Department v. Barnwell Bros.*, 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734, decided February 14, 1938, note 2, and cases cited.

Clearly, Footnote Four described certain laws that should be subjected to a higher level of scrutiny: (1) appears on its face to violate a provision of the United States Constitution, such as the Bill of Rights; (2) restricts the political process that could repeal an undesirable law (such as restrictions on the right to vote, restraints upon the dissemination of information, interferences with political organizations, and prohibition on peaceable assembly); or (3) is directed at religious, national, or racial minorities, especially when prejudice against discrete and insular minorities curtails their ability to seek redress through political processes.

Apart from this, it is significant that Footnote Four signaled the end of the *Lochner*[3] era, during which the SCOTUS struck down various economic regulations on account of substantive due process. With the advent of Footnote Four, the SCOTUS exercised restraint, generally deferred to the Legislature, and employed specific tests to examine the validity of laws that regulate various freedoms. Footnote Four thus established two standards of

[3] The Lochner era was coined from the case *Lochner v. New York*, 198 U.S. 45 (1905), where the SCOTUS struck down a New York law that prohibited bakers to work more than 60 hours a week or ten hours a day.

judicial review: strict scrutiny for laws dealing with freedom of the mind or restricting the political process, and rational basis for economic legislation.[4]

The intermediate scrutiny test, on the other hand, was introduced in the 1976 case of *Craig v. Boren* (*Craig*).[5] The SCOTUS was asked to determine whether an Oklahoma statute that prohibited the sale of 3.2% beer to males under the age of 21 but allowed sale of the same to females over the age of 18 violated the Equal Protection Clause. In invalidating the law, the SCOTUS subjected it to a heightened level of scrutiny and held that a gender-based classification must serve and be substantially related to an important government objective.

The emergence of a mid-level test was both logical and inevitable. The SCOTUS acknowledged the necessity of having a middle ground test due to the implications of using either the strict or the rational basis test. The rational basis test weighs in favor of the government as it implements the presumption of constitutionality, and thus places on the objector the burden to show that the law is not imbued with a legitimate interest and/or that there is no rational connection between the law and the means employed to achieve the State's objectives.[6] The opposite is true when the court applies strict scrutiny, oftentimes described as "strict in theory, fatal in fact,"[7] wherein the presumption is reversed, and the government is burdened to establish a compelling governmental interest and that the means chosen to accomplish that interest are narrowly tailored. Some scholars believed that intermediate scrutiny, particularly as it is used in gender and affirmative action, was an inevitable progression from the two-tier scrutiny tests, developed as a response to an "analogical crisis," or a time when there were cases which the SCOTUS cannot pigeon-hole into either the strict scrutiny or rational basis track. Verily, gender discrimination and affirmative action cases resemble those involving race discrimination, but also have characteristics that distinguish them from each other.[8]

Before the formal inception of the intermediate scrutiny test in *Craig*, however, the SCOTUS has applied in various strands of free speech cases a middle-tier test or analysis, where both the strict or rational basis test seemed inappropriate.[9]

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4 *White Light Corp. v. City of Manila*, 596 Phil. 444 (2009).

5 429 U.S. 190 (1976).

6 *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996); *Cornerstone Christian Schools v. University Interscholastic League,* 563 F.3d 127, 243 Ed. Law Rep. 609 (5th Cir. 2009); *Independent Charities of America, Inc. v. State of Minn.*, 82 F.3d 791 (8th Cir. 1996); *Bah v. City of Atlanta*, 103 F.3d 964 (11th Cir. 1997).

7 See Gerald Gunther, *The Supreme Court, 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harvard Law Review, 1, 8 (1972)

8 See Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, in 66 George Washington Law Review 319 (1998).

9 See Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment jurisprudence*, 2007 U. Ill. L. Rev. 783 (2007).

One such group of cases involve laws that regulate free speech but do not involve prior restraint. For instance, in *Schneider v. State*,[10] the SCOTUS declared unconstitutional city ordinances prohibiting the distribution of handbills on city streets and sidewalks. The SCOTUS ratiocinated that the State's legitimate interest in preventing litter was not sufficient to justify prohibiting the defendants from handing out literature to willing recipients. Likewise, in *Saia v. New York,*[11] the SCOTUS struck down an ordinance forbidding the use of sound amplification devices in public places except with the permission of the Chief of Police. After noting that the ordinance did not provide standards for its application, the SCOTUS held that the right to be heard was placed in the uncontrolled discretion of the Chief of Police. It explained that, in passing on the constitutionality of local regulations, "courts must balance the various community interests, [but] in that process they should be mindful to keep the freedoms of the First Amendment in a preferred position."

It can be gleaned from these cases that the SCOTUS did not presume these local laws as suspect nor did it summarily defer to the legislative bodies' authority, but proceeded to weigh competing social and individual interests and examined the justifiability of the means adopted by the government to achieve its supposed objectives.

Another strand of free speech cases which mirrors the intermediate scrutiny test prior to its formal adoption is cases on regulations of symbolic conduct. In *United States v. O'Brien (O'Brien)*,[12] which upheld a federal law prohibiting the knowing mutilation of draft cards, the SCOTUS explained that:

> [W]e think it clear that a government 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 incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.** (Emphasis supplied)

The same means-end analysis was also applied to examine laws regulating speech of government employees. In *Pickering v. Board of Education*,[13] a public school teacher was terminated from employment on account of a letter he wrote to the editor at the Lockport Herald criticizing the school's allocation of more funds to athletics than academics. Applying the balancing of interests approach, the SCOTUS stated that it is imperative that there be a balance between the interests of the teacher, as a citizen, in

[10] 308 US 147 (1939).
[11] 334 U.S. 558 (1948).
[12] 391 U.S. 367 (1968).
[13] 391 U.S. 563 (1968).

commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Even in recent controversies, the SCOTUS has employed intermediate scrutiny in deciding cases involving laws that impose burdens or restrictions on freedom of speech. In *Packingham v. North Carolina,*[14] for example, the SCOTUS invalidated a State law which made it a felony for a registered sex offender to gain access to a number of websites, including commonplace social media websites like Facebook and Twitter (now, X). The Court weighed the State's interest in protecting children from sex predators with the latter's First Amendment right, and found that the law was not narrowly tailored to serve the aforesaid "significant government interest." The Court noted that social media sites are also used to access and discuss relevant information, find employment, and in "otherwise exploring the vast realms of human thought and knowledge." With the ban in place, users are also deprived of such legitimate uses and benefits of internet sites.

Likewise, in *City of Austin v. Reagan Nat'l Adver. of Austin, LLC*,[15] the SCOTUS held that a city regulation which prohibited the construction and alteration of off-premises signs[16] but not on-premises signs is a content-neutral regulation which is not subject to the strict, but intermediate scrutiny test. The Court found that the city's regulation did not single out any topic or subject matter for differential treatment.

Beyond free speech cases, the intermediate scrutiny test has likewise been used by the SCOTUS in equal protection cases assailing laws that discriminate against mental disabilities,[17] the illegitimate status of children,[18] and occasionally, against aliens.[19] One of its most notable uses, however, was in adjudicating cases involving state action that differentiates on the basis of sex.[20]

For instance, in determining whether the all-male admission policy of Virginia Military Institute (VMI) violated the equal protection clause, the SCOTUS, through Justice Ruth Bader Ginsburg's majority opinion in *United States v. Virginia,*[21] ruled that parties defending a challenged classification must establish that it serves important governmental objectives which are exceedingly persuasive, and that the discriminatory means employed are substantially related to the achievement of those objectives.

[14] 582 U.S. 98, 137 S. Ct. 1730 (2017).
[15] 142 S. Ct. 1464 (2022).
[16] Off-premises signs are signs that advertise things that are not located on the same premises as the sign, as well as signs that direct people to offsite locations. An example of an off-premise sign is a billboard.
[17] See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).
[18] See *Clark v. Jeter,* 486 U. S. 456, 461 (1988).
[19] See *Plyler v. Doe*, 457 U.S. 202 (1982).
[20] *United States v. Virginia*, 518 U.S. 515 (1996); *Sessions v. Morales-Santana,* 582 U.S. 47 (2017).
[21] 518 U.S. 515 (1996).

VMI's proffered justifications were analyzed: *first,* that single gender education contributes to diversity in educational approaches, and *second,* that VMI's unique method of education would have to be modified if it were to admit females. The SCOTUS found that, based on VMI's history and mandate, there is no evidence showing that it was established to implement the state policy of diversity in education. The SCOTUS did not find meritorious VMI's argument that admitting females would be radical or drastic, as to transform or destroy its program. Rather, it noted that this argument was based on "fixed notions concerning the roles and abilities of males and females." Ultimately, the SCOTUS ruled that VMI's goal of producing citizen soldiers is not substantially advanced by excluding females from admission.

In voting rights cases, the SCOTUS has also employed this careful balancing approach to determine permissible state regulations.

In *Anderson v. Celebrezze,*[22] the SCOTUS declared unconstitutional a state law that imposed early filing requirements on an independent presidential candidate who wished to appear on the general election ballot. In finding that the early filing deadline placed an unconstitutional burden on the voting and associational rights of the candidates' supporters, the SCOTUS explained the importance of careful consideration of the vital interests of both the State and the citizens in the courts' adjudication of validity of voting regulations, *viz.*:

> As a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." [**1570] *Storer v. Brown*, 415 U.S. 724, 730 (1974). To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. **Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects – at least to some degree – the individual's right to vote and his right to associate with others for political ends. Nevertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.**
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> Constitutional [***558] challenges to specific provisions of a State's election laws therefore cannot be resolved by any "litmus paper test" that will separate valid from invalid restrictions. Storer, supra, at 730. Instead, **a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.** In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the

[22] 460 U.S. 780 (1983).

> extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. See Williams v. Rhodes, supra, at 30-31; Bullock v. Carter, 405 U.S., at 142-143; *American Party of Texas v. White*, 415 U.S. 767, 780-781 (1974); [****18] *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 183 (1979). The results of this evaluation will not be automatic; as we have recognized, there is "no substitute [*790] for the hard judgments that must be made." *Storer v. Brown, supra*, at 730. (Emphasis supplied)

The SCOTUS similarly used this flexible mid-level approach in determining the constitutionality of a state law prohibiting write-in voting. In *Burdick v. Takushi*,[23] the Court cautioned against the application of strict scrutiny on all regulations that affect citizens' right to free speech, as this would effectively tie the hands of states seeking to assure that elections are conducted equitably and efficiently. Thus, the SCOTUS declared that if the states merely impose reasonable and politically neutral restrictions upon individuals' right of speech, then important state objectives are generally sufficient to sustain the validity of said restriction. In that case, it found the State's interest in avoiding possibility of factionalism and party raiding at the general election sufficient to justify the minor burden resulting from the voting ban.

This moderately deferential style of judicial review was also adopted in determining the validity of state law requiring: (1) in-person voters to present government-issued identification;[24] and (2) enrollment of legitimate voters in a political party in a previous general election.[25] In these cases, the Court noted that strict scrutiny is not applicable because the restrictions imposed by the State are justified by important objectives and were not invidious or arbitrary.

2. The Philippine Judiciary also uses the three-tiered analysis to determine validity of laws

While the Philippine Judiciary has similarly relied on the three-tiered analysis developed by the SCOTUS, it has, in certain instances, diverged on the manner of its application.

For example, this Court has utilized the strict scrutiny test to evaluate laws that classify on the basis of income. In *Central Bank (now Bangko Sentral ng Pilipinas) Employee Association, Inc. v. Bangko Sentral ng Pilipinas*,[26] We struck down the last proviso of Section 15(c), Article II of

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[23] 504 U.S. 428, 112 S. Ct. 2059 (1992).
[24] *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 128 S. Ct. 1610 (2008).
[25] *Rosario v. Rockefeller*, 410 U.S. 752, 93 S. Ct. 1245 (1973).
[26] 487 Phil. 531 (2004).

Republic Act No. (RA) 7653[27] which maintained the bank's rank-and-file employees under the Salary Standardization Law (SSL), even when the rank-and-file employees of other governmental financial institutions had been exempted from the SSL by their respective charters.

The Court also applied the strict scrutiny test on a law which created a classification on the basis of period of employment contract. In *Serrano v. Gallant*,[28] We declared unconstitutional the clause "or for three months for every year of the unexpired term, whichever is less" in the 5th paragraph of Section 10 of RA 8042[29] because of the failure of the State to show any definitive governmental purpose served by the law.

These Philippine cases deviate from the ruling in *San Antonio Independent School District v. Rodriguez*,[30] where the SCOTUS upheld a Texas public education financing system under the rational basis test scrutiny after finding that education is not a fundamental right and discrimination on the basis of wealth is insufficient to trigger strict scrutiny.

Meanwhile, there are a few cases which adopted the balancing of interests approach, or intermediate scrutiny, in determining the constitutionality of state actions.

As early as the 1970 case *In re: Kay Villegas Kami, Inc.*,[31] this Court has already acknowledged the State's interest in the electoral process and the necessity of balancing the same with asserted individual rights, *viz.*:

> The first three grounds were overruled by this Court when it held that the questioned provision is a valid limitation on the due process, freedom of expression, freedom of association, freedom of assembly and equal protection clauses; for the same is designed to prevent the clear and present danger of the twin substantive evils, namely, the prostitution of electoral process and denial of the equal protection of the laws. Moreover, under the balancing-of-interests test, **the cleansing of the electoral process, the guarantee of equal change for all candidates, and the independence of the delegates who must be "beholden to no one but to God, country and conscience," are interests that should be accorded primacy.**[32] (Emphasis supplied)

Citing the SCOTUS opinion in *O'Brien*, this Court, in *Adiong v. COMELEC*,[33] looked into the relative weights of the interests of the

[27] Entitled: "THE NEW CENTRAL BANK ACT." Approved: 14 June 1993.
[28] 601 Phil. 245 (2009).
[29] Entitled: Migrant Workers and Overseas Filipinos Act of 1995. Approved: 7 June 1995.
[30] 411 U.S. 1, 93 S. Ct. 1278 (1973).
[31] 146 Phil. 429 (1970).
[32] Id. at 431.
[33] 207 SCRA 712, 722 (1992).

government and individuals with regard to the implementation of the Commission on Elections (COMELEC)'s ban on the use of campaign decals and stickers except in the COMELEC common poster area or billboard, at the campaign headquarters of the candidate or their political party, or at their residence. We found that the ban restricted property rights of individuals and their right to express their political preferences without a showing of a state interest it intends to address. Further, We ruled that the regulation was not related and did not further the supposed state interest, *viz.*:

> The constitutional objective to give a rich candidate and a poor candidate equal opportunity to inform the electorate as regards their candidacies, mandated by Article II, Section 26 and Article XIII, section 1 in relation to Article IX (c) Section 4 of the Constitution, is not impaired by posting decals and stickers on cars and other private vehicles. Compared to the paramount interest of the State in guaranteeing freedom of expression, any financial considerations behind the regulation are of marginal significance.[34]

Similarly, in *Osmeña v. COMELEC*,[35] this Court also examined the specific freedoms and state interests invoked and affected by Sec. 11(b) of RA 6646,[36] which prohibited mass media from selling or giving free of charge print space or airtime for campaign or other political purposes, except to the COMELEC. After finding that the statute merely regulated the **time, place, and manner** of political speech, We proceeded to acknowledge the substantial governmental interest justifying the restriction, which is to implement political equality, and weighed it against the supposed objection that the law violates the people's freedom of expression. Ultimately, the Court found that any resulting restriction on freedom of expression is only incidental and no more than is necessary to achieve the purpose of promoting equality.

Meanwhile, in *ABS-CBN v. COMELEC*,[37] We effectively applied the intermediate scrutiny test by using the following requirements: (1) [regulation must be] within the constitutional power of the government, if it furthers an important or substantial government interest; (2) if the governmental interest is unrelated to the suppression of free expression; and (3) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. In that case, the Court invalidated the COMELEC resolution which prohibited the conduct of exit polls as it unduly stifled the collection of exit poll data and their use for any purpose.

In the case of *Chavez v. Gonzales*,[38] this Court took the opportunity to

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34 Id. at 722.

35 351 Phil. 692 (1998).

36 Entitled: "The Electoral Reforms Law of 1987. Approved: 5 January 1998

37 380 Phil. 780 (2000) quoting *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984). See also *Adiong v. COMELEC*, supra.

38 569 Phil. 155 (2008).

expound on the rules governing restrictions to the right to free speech. We clarified that not all prior restraints on speech are anathema to the Constitution. Under the general umbrella of prior restraint on free speech, there is a sub-classification of state action, *viz*: content-based and content-neutral regulations. **Content-based restraint** or censorship is those regulations that are based on the subject-matter of the utterance or speech, while **content-neutral regulations** are merely concerned with the incidents of the speech, or ones that merely control their time, place, or manner, and under well-defined standards. The categorization is material for purpose of determining the standards applicable to test the regulations' validity. Strict scrutiny is employed to test the validity of governmental action that restricts freedom of speech based on content, with the State bearing the burden to overcome the presumption of unconstitutionality. As for content-neutral regulations, intermediate scrutiny applies, which means that the Court will not merely rubber-stamp the validity of the law but will also inquire if the regulation is narrowly tailored to promote the important state interest that is unrelated to the suppression of speech.

The intermediate test was also employed, albeit with a different result, in *1-United Transport Koalisyon v. COMELEC (1-United)*.[39] The Court declared unconstitutional Section 7(g) items (5) and (6) of COMELEC Resolution No. 9615 which prohibited the posting or displaying of any election campaign or propaganda material in public utility vehicles and public transport terminals. In *1-United*, We explained that content-neutral regulations are those which are merely concerned with the incidents of the speech, or those which merely control the time, place, or manner of its exercise. We also clarified that such regulations are constitutionally permissible, even if they may restrict the right to free speech, provided that the following requisites concur: *first,* the government regulation is within the constitutional power of the Government; *second*, it furthers an important or substantial governmental interest; *third,* the governmental interest is unrelated to the suppression of free expression; and *fourth,* the incidental restriction on freedom of expression is no greater than is essential to the furtherance of that interest. Applying these requisites, We held that the intrusion into the fundamental right of expression was unnecessary to further the supposed state interest in ensuring equality of time, space, and opportunity for electoral candidates.

Citing *Chavez v. Gonzales*,[40] this Court, in *Nicolas-Lewis v. COMELEC (Nicolas-Lewis)*,[41] applied the intermediate scrutiny test in declaring a content-neutral election regulation unconstitutional. In that case, Section 36.8 of RA 9189,[42] as amended by RA 10590,[43] and Section 74(II)(8) of COMELEC Resolution No. 10035 sought to prohibit the engagement by any person in partisan political activities abroad during the 30-day

[39] 758 Phil. 67 (2015).
[40] 569 Phil. 155, 195 (2008).
[41] *Nicolas-Lewis v. COMELEC,* 859 Phil. 560 (2019).
[42] Entitled: The Overseas Absentee Voting Act of 2003. Approved: 13 February 2003.
[43] Entitled: An Act Providing for a System of Overseas Absentee Voting by Qualified Citizens of the Philippines Abroad, Appropriating Funds Therefor, and for Other Purposes. Approved: 27 May 2013.

overseas voting period. The Court concluded that the regulation was content-neutral since it merely regulated the time and place to exercise the right to express. Further, there was no showing that it was intended to discriminate based on the speaker's perspective, or to regulate the right to campaign. This Court then proceeded to apply the "intermediate test," enumerating the following requirements:

> Being a content-neutral regulation, we, therefore, measure the same against the intermediate test, *viz.*: (1) the regulation is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) such governmental interest is unrelated to the suppression of the free expression; and (4) the incidental restriction on the alleged freedom of expression is no greater than what is essential to the furtherance of the governmental interest.[44]

We held that the regulation in *Nicolas-Lewis* is invalid as it did not pass the fourth requisite. The use of the word "abroad" in the assailed law and regulation would lead any intelligible reader to the conclusion that the prohibition was intended to also be extraterritorial in application. Hence, such sweeping and absolute prohibition against all forms of expression considered as partisan political activities without any qualification is more than what is essential to the furtherance of the contemplated governmental interest.

Parenthetically, past and active members of this Court have also voiced their respective opinions on the suitability of using this mid-tier analysis of laws in cases involving an organization composed of people who identify themselves as lesbians, gays, bisexuals, or transgender,[45] men who are victims of domestic violence,[46] COMELEC regulations on the size of political ads (content-neutral),[47] prohibition to engage in partisan political activity abroad during the campaign period,[48] and terrorism.[49] Common to these opinions is the recognition of equally valid and pressing interests of both the government and individuals, or certain marginalized groups. The Chief Justice's separate opinion in *Calleja v. Executive Secretary*[50] articulates it aptly:

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[44] *Nicolas-Lewis v. COMELEC,* supra at 594.

[45] See Separate Concurring Opinion of J. Puno in *Ang Ladlad LGBT Party v. COMELEC*, 632 Phil. 32 (2010).

[46] See Separate Concurring Opinion of J. Leonardo-De Castro in *Garcia v. Drilon*, 712 Phil. 44 (2013).

[47] See Separate Opinions of J. Perlas-Bernabe and Brion in *The Diocese of Bacolod v. COMELEC,* 751 Phil. 301 (2015).

[48] See Separate Opinions of J. Perlas-Bernabe in *Nicolas-Lewis v. COMELEC*, G.R. No. 223705,14 August 2019.

[49] See Separate opinion of C.J. Gesmundo in *Calleja v. Executive Secretary,* G.R. Nos. 252578, 252579, 252580, 252585, 252613, 252623, 252624, 252646, 252702, 252726, 252733, 252736, 252741, 252747, 252755, 252759, 252765, 252767, 252768, 16663, 252802, 252809, 252903, 252904, 252905, 252916, 252921, 252984, 253018, 253100, 253118, 253124, 253242, 253252, 253254, 254191 & 253420, 07 December 2021.

[50] Id.

> Terrorism is an evolving target. Accordingly, efforts to criminalize it have shifted towards the prevention of terrorism before acts of violence are committed. Prevention is carried out through the suppression of acts that, hitherto innocuous and innocent, enable the commission of violent acts of terrorism. The use of the internet for radicalization, recruitment and movement of warm bodies and logistical resources leading to the Marawi siege serve as concrete context for the necessity to adopt the preventative criminalization of terrorism in the Philippines. The ATA is the government response to this need.
>
> There are at present 19 universal/multilateral international legal instruments as well as several resolutions issued by the United Nations Security Council (UNSC) that make up an international legal regime on terrorism. Inter-state, bilateral and regional instruments on designation and proscription of terrorist persons and entities have been concluded. This regime creates certain binding state obligations regarding the criminalization of terrorism. The consequences for non-compliance with these binding obligations range from chokepoints in financial services, trade, and investment to designation as a state sponsor of terrorism.
>
> The foregoing history of the criminalization of terrorism and crystallization of an international legal regime governing counter-terrorism justify recourse to an intermediate level of judicial scrutiny.
>
> Moreover, even assuming that freedom of expression is incidentally implicated by any provision of the ATA, whether by Sec. 4 or Sec. 10 or Sec. 25, these measures are merely regulatory of the manner rather than content of the expression. In fact, Sec. 4 insulates "advocacy, protest, dissent, stoppage of work, industrial or mass action, and other similar exercises of civil and political rights" from criminalization, without qualifying that such expression must contain a particular perspective or ideology. Rather, Sec. 4 criminalizes the manner of exercising freedom of expression that amounts to acts intended to cause death or serious bodily injury. The established rule is that content-neutral regulations that implicate protected speech are more appropriate for an intermediate level rather than strict level of judicial scrutiny."

A similar observation obtains in this case. There can be any number of events or grounds that can trigger a postponement of a scheduled election. This is apparent from the reasons given by members of the Legislature during the course of RA 11935[51]'s legislative history. Incidentally, in addition to public health reasons like a pandemic, elections in other countries have also been delayed due to natural disasters,[52] budgetary and logistical constraints,[53] the death of a candidate,[54] or structural changes in the

[51] Entitled: An Act Postponing the December 2022 Barangay and Sangguniang Kabataan Elections, Amending for the Purpose Republic Act No. 9164. Approved 10 October 2022.

[52] In Papua New Guinea, elections were postponed due to the eruption of Mt. Ulawun, https://www.rnz.co.nz/international/pacific-news/393466/local-elections-postponed-in-volcano-affected-areas-of-png, last accessed on 01 August 2023; Haiti also postponed its 2020 elections due to an earthquake. <https://www.reuters.com/article/us-quake-haiti-preval-idUSTRE60Q6RA20100127>, last accessed on 01 August 2023.

[53] In 2019, Nigeria postponed elections due to logistical problems. <https://www.africanews.com/2019/02/16/nigeria-electoral-body-postpone-presidential-election/>, last accessed on 01 August 2023.

[54] In Ireland, the death of independent candidate Marese Skehan resulted in the postponement of elections.

government.[55] The variety of these circumstances emphasize the necessity of allowing the other branches of government to swiftly respond using their political will and expertise. In my opinion, there is simply no necessity to make absolute categorizations of such reasons as legitimate or devious, absent full consideration of the facts in every case, and more importantly, their implications to settled constitutional principles and freedoms.

3. The Intermediate Scrutiny Test should apply in the present set of cases

Though RA 11935 undoubtedly affects the people's right of suffrage, the law merely regulates the time and manner, and does not frustrate its exercise.

A. RA 11935 affects voting, which is a form of speech

While there is a tendency to associate jurisprudential rules on freedom of speech and expression merely to the spoken word,[56] a cursory examination of jurisprudence would reveal this Court's recognition of voting as a form of expression, *viz.*:

> In the case before this court, there is a clear threat to the paramount right of freedom of speech and freedom of expression which warrants invocation of relief from this court. The principles laid down in this decision will likely influence the discourse of freedom of speech in the future, especially in the context of elections. The right to suffrage not only includes the right to vote for one's chosen candidate, but also the right to vocalize that choice to the public in general, in the hope of influencing their votes. It may be said that in an election year, **the right to vote necessarily includes the right to free speech and expression**. The protection of these fundamental constitutional rights, therefore, allows for the immediate resort to this court.[57] (Emphasis supplied)

Voting, like the spoken word, is a method of communication and is

<https://www.bbc.com/news/world-europe-51369150>, last accessed on 01 August 2023.

[55] In 2021, Nepal postponed the parliamentary election following the reinstatement of the House of Representatives by the Supreme Court < https://www.thehindu.com/news/international/nepals-election-commission-postpones-novembers-parliamentary-poll-after-supreme-court-reinstates-dissolved-house/article35296540.ece>, last accessed on 01 August 2023.

[56] See Armand Derfner & J. Gerald Hebert, Voting Is Speech, 34 Yale L. & Pol'y Rev. 471 (2016).

[57] *The Diocese of Bacolod v. Commission on Elections*, 751 Phil. 301 (2015).

capable of conveying a message. Choosing and naming a political candidate for an elective position is an expression of one's preference of leaders and the political beliefs they represent. Voting to re-elect a leader may also reflect the people's satisfaction with the incumbent's governance. We have indeed, acknowledged that the right to freedom of expression applies to the entire continuum of speech, that is, from utterances made to conduct enacted, and even to inaction itself as a symbolic manner of communication.[58] Voting in elections, as a mode of political participation and an expression of political views, is certainly covered by the protection of freedom of speech. By parity of reasoning, jurisprudential rules in adjudicating free speech cases apply to controversies involving regulations on the right to vote.

B. RA 11935's postponement of the Barangay and Sangguniang Kabataan elections (BSKE) does not impose a direct burden on the right of suffrage

In G.R. No. 263590, petitioner Romulo Macalintal (Macalintal) assails Sections 1 and 3 of RA 11935, *viz*:

> Section 1. Section 1 of Republic Act No. 9164, as amended, is hereby further amended to read as follows:
>
> > SECTION 1. *Date of Election.* — There shall be synchronized barangay and *sangguniang kabataan* elections, which shall be held on the last Monday of October 2023 and every three (3) years thereafter.
> >
> > x x x x
> >
> > Section 3. *Hold-Over.* — Until their successors shall have been duly elected and qualified, all incumbent *barangay* and *sangguniang kabataan* officials shall remain in office, unless sooner removed or suspended for cause: Provided, That barangay and *sangguniang kabataan* officials who are ex officio members of the *sangguniang bayan, sangguniang panlungsod,* or *sangguniang panlalawigan*, as the case may be, shall continue to serve as such members in the *sanggunian* concerned, until the next *barangay* and *sangguniang kabataan* elections unless removed in accordance with their existing rules or for cause.

He argues that the law deprives the electorate of its right of suffrage by extending the term of incumbent *barangay* officials whose term of office

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[58] Id.

is set to end on 31 December 2022. He claims that RA 11935 disenfranchises voters as they are denied of their fundamental right to elect their leaders. This argument is similar to objections against laws suppressing free speech, which trigger tiered judicial review.

Contrary to Macalintal's argument, I submit that RA 11935 merely delayed, and did not defeat, the exercise of the right of suffrage. Indeed, the law is similar to content-neutral regulations in free speech cases which merely affect the time, manner, and place of exercise of the right. Moreover, there is nothing in the law which shows that it was crafted to prevent the exercise of the right to vote on account of political ideologies or affiliations.

C. Intermediate scrutiny balances the interests of the government and the voting public

Beyond the aforesaid legal discourse, my belief is that intermediate scrutiny fully implements the Court's purpose as a democratic institution in harmonizing its duty to respect a co-equal branch of the government, and as guardian of constitutional rights.[59]

The late SCOTUS Justice Ruth Bader Ginsburg, in a lecture, also pointed out how delicate balancing gives space for allowing future democratic deliberation and social education.[60] By not preliminarily tilting the scales of justice in favor of one party, litigants are given fairly equal opportunity to advocate for their interests or rights and adjust their future actions accordingly.

Moreover, in making a narrow ruling on the specific facts and arguments of the State and the citizens, both are allowed to explore the shape and extent of their rights, and advocate for their respective interests in the future. By applying the intermediate scrutiny test, the government would be allowed to rethink its methods and justifications to conform to the Constitution. In a similar vein, individual rightsholders are not only given judicial imprimatur but are also empowered to aim for its full realization.

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[59] See Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, in 66 George Washington Law Review 334, 339 (1998).

[60] See Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U Law Review, p. 1204 (1992).

For sure, I join my colleagues in finding that RA 11935 is unconstitutional because its postponement of the BSKE unduly burdened the exercise of the right of suffrage in order to make an impermissible transfer of appropriation. Nonetheless, such conclusion should not put Congress in a strait-jacket should the need to postpone local elections arise again in the future. Verily, Congress has submitted other significant reasons for RA 11935, *viz*: continuity of government service at the barangay level; thwarting further divisiveness among the Filipino people; providing a respite for the electorate considering the recently concluded May 2022 National and Local Elections; allowing the newly elected national and local officials to benefit from the experience of the officials at the barangay level in implementing COVID-19 programs and policies; preventing the further spread of the COVID-19 virus; and aligning the BSKE schedule with the schedule originally provided under the Local Government Code.[61] Respect for Congress authority should compel this Court to allow Congress to act on contingencies in the nation's interest without violating individual rights.

4. Strict scrutiny is inapplicable to the cases at bar

An article[62] written by Justice Lewis Powell of the SCOTUS succinctly explained the nature of strict scrutiny, which was largely derived from Footnote Four of *Carolene Products, viz.*:

> The fundamental character of our government is democratic. Our constitution assumes that majorities should rule and that the government should be able to govern. Therefore, for the most part, Congress and the state legislatures should be allowed to do as they choose. But there are certain groups that cannot participate effectively in the political process. And the political process therefore cannot be trusted to protect these groups in the way it protects most of us. Consistent with these premises, the theory continues, the Supreme Court has two special missions in our scheme of government:
>
> First, to clear away impediments to participation, and ensure that all groups can engage equally in the political process; and
>
> Second, to review with heightened scrutiny legislation inimical to discrete and insular minorities who are unable to protect themselves in the legislative process.

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[61] See *ponencia*, p. 59.

[62] Lewis F. Powell, Jr., *"Carolene Products"* Revisited, 82 Columbia Law Review. 1087, 1088-1089 (1982).

From the history of the test, it is clear that strict scrutiny is an exception to the general judicial policy of deferring to the wisdom of the legislature. As Justice Powell expressed, strict scrutiny was meant to be exercised only in specific situations when there is dysfunction in democratic institutions. Certainly, such is not the case here. While there is no debate on the significance of the right to vote, there is no showing that the law was intended or had the effect of rendering the same nugatory, or that specific underprivileged or minority groups were unduly targeted by the same.

Relatedly, strict scrutiny carries with it a presumption against constitutionality and the imposition upon the State of the burden to prove a compelling governmental interest, and that the regulation is narrowly tailored and the least restrictive means to achieve that interest. Moreso, it would seem that the SCOTUS has further sharpened the test's "fatal" character in the recent case of *Students for Fair Admission, Inc. v. President and Fellows of Harvard College*, [63] where it held that private college institutions must not only establish that their race admission criteria are based on compelling interests, but also that those interests are coherent and measurable.

These principles on the strict scrutiny test, to my mind, run counter to Congress' authority to regulate the *barangay* elections. As the *ponencia* succinctly discussed, the power to postpone *barangay* elections is deemed inherently included not only in the legislature's power to fix the term of office of barangay officials but also proceeds from the legislature's broad and plenary power to legislate. Hence, this Court must also accord the legislature the leeway to regulate the BSKE as long as Congress does not transgress cherished fundamental freedoms and constitutional boundaries.

5. Conclusion

The people's ability to direct the affairs of its nation is a hallmark of democracy. Voting confers power on the electorate and is considered a right from which other freedoms derive their existence and vigor. The aspiration to extend full and absolute protection to the right to vote is therefore justified not only by law, but by necessity. The Legislative, on the other hand, is constitutionally vested with a broad authority to legislate, including matters involving the term of office of barangay officials. Absent a definitive

[63] 600 U.S. 23-26 (2023).

showing of attempts to revoke fundamental freedoms, this Court must resist the predisposition for generalizations and endeavor to harmonize equally compelling interests by carefully analyzing specific circumstances and concomitant consequences. Meaningful adjudication does not always require rigid inquiry, nor should it produce bright line rules for a myriad of complicated scenarios. Courts also fulfill their duty by allowing space for political deliberation and dialogue in society.

ACCORDINGLY, I vote to **GRANT** the Petition.

RODIL V. ZALAMEDA
Associate Justice

CERTIFIED TRUE COPY
MARIFE M. LOMIBAO-CUEVAS
Clerk of Court
Supreme Court