G.R. No. 190582 - ANG LADLAD LGBT PARTY represented herein by its Chair Dante Remoto, ***petitioner*** **v. COMMISSION ON ELECTIONS,** ***respondent.***

Promulgated:

April 8, 2010

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SEPARATE CONCURRING OPINION

PUNO, *C.J.*:

I concur with the groundbreaking *ponencia* of my esteemed colleague, Mr. Justice Mariano C. del Castillo. Nonetheless, I respectfully submit this separate opinion to underscore some points that I deem significant.

FIRST. The assailed Resolutions of the Commission on Elections (COMELEC) run afoul of the non-establishment clause [1] of the Constitution. There was cypher effort on the part of the COMELEC to couch its reasoning in legal – much less constitutional – terms, as it denied Ang Ladlad's petition for registration as a sectoral party principally on the ground that it "tolerates immorality which offends religious (*i.e.*, Christian [2] and Muslim [3]) beliefs." To be sure, the COMELEC's ruling is completely antithetical to the fundamental rule that "[t]he public morality expressed in the law is **necessarily secular**[,] for in our constitutional order, the religion clauses prohibit the state from establishing a religion, **including the morality it sanctions**." [4] As we explained in **Estrada v. Escritor,** [5] the requirement of an articulable and discernible secular purpose is meant to give flesh to the constitutional policy of full religious freedom for all, *viz.*:

> Religion also dictates "how we ought to live" for the nature of religion is not just to know, but often, to act in accordance with man's "views of his relations to His Creator." But the Establishment Clause puts a negative bar against establishment of this morality arising from one religion or the other, and implies the affirmative "establishment" of a civil order for the resolution of public moral disputes. *This agreement on a secular mechanism is the price of ending the "war of all sects against all"; the establishment of a secular public moral order is the social contract produced by religious truce.*

> Thus, when the law speaks of "immorality" in the Civil Service Law or "immoral" in the Code of Professional Responsibility for lawyers, or "public morals" in the Revised Penal Code, or "morals" in the New Civil Code, or "moral character" in the Constitution, the distinction between public and secular morality on the one hand, and religious morality, on the other, should be kept in mind. The morality referred to in the law is public and necessarily secular, not religious as the dissent of Mr. Justice Carpio holds. "Religious teachings as expressed in public debate may influence the civil public order but public moral disputes may be resolved only on grounds articulable in secular terms." *Otherwise, if government relies upon religious beliefs in formulating public policies and morals, the resulting policies and morals would require conformity to what some might regard as religious programs or agenda. The non-believers would therefore be compelled to conform to a standard of conduct buttressed by a religious belief, i.e., to a "compelled religion;" anathema to religious freedom. Likewise, if government based its actions upon religious beliefs, it would tacitly approve or endorse that belief and thereby also tacitly disapprove contrary religious or non-religious views that would not support the policy. As a result, government will not provide full religious freedom for all its citizens, or even make it appear that those whose beliefs are disapproved are second-class citizens.* Expansive religious freedom therefore requires that government be neutral in matters of religion; governmental reliance upon religious justification is inconsistent with this policy of neutrality.[6] (citations omitted and italics supplied)

Consequently, the assailed resolutions of the COMELEC are violative of the constitutional directive that **no religious test shall be required for the exercise of civil or political rights**.[7] Ang Ladlad's right of political participation was unduly infringed when the COMELEC, swayed by the private biases and personal prejudices of its constituent members, arrogated unto itself the role of a religious court or worse, a morality police.

The COMELEC attempts to disengage itself from this "excessive entanglement"[8] with religion by arguing that we "cannot ignore our strict religious upbringing, whether Christian or Muslim"[9] since the "moral precepts espoused by [these] religions have slipped into society and . . . are now publicly accepted moral norms."[10] However, as correctly observed by Mr. Justice del Castillo, the Philippines has not seen fit to disparage homosexual conduct as to actually criminalize it. Indeed, even if the State has legislated to this effect, the law is vulnerable to constitutional attack on privacy grounds.[11] These alleged "generally accepted public morals" have not, in reality, crossed over from the religious to the secular sphere.

Some people may find homosexuality and bisexuality deviant, odious, and

offensive. Nevertheless, private discrimination, however unfounded, cannot be attributed or ascribed to the State. Mr. Justice Kennedy, speaking for the United States (U.S.) Supreme Court in the landmark case of **Lawrence v. Texas,** [12] opined:

> It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. *The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the … law. "Our obligation is to define the liberty of all, not to mandate our own moral code."* [13]

SECOND. The COMELEC capitalized on Ang Ladlad's definition of the term "sexual orientation," [14] as well as its citation of the number of Filipino men who have sex with men, [15] as basis for the declaration that the party espouses and advocates sexual immorality. **This position, however, would deny homosexual and bisexual individuals a fundamental element of personal identity and a legitimate exercise of personal liberty**. For, the "ability to [independently] define one's identity that is central to any concept of liberty" cannot truly be exercised in a vacuum; we all depend on the "emotional enrichment from close ties with others." [16] As Mr. Justice Blackmun so eloquently said in his stinging dissent in **Bowers v. Hardwick** [17] (overturned by the United States Supreme Court seventeen years later in **Lawrence v. Texas** [18]):

> *Only the most willful blindness could obscure the fact that sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality*[.]" [19] The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will *come from the freedom an individual has to choose the form and nature of these intensely personal bonds*. [20]
>
> In a variety of circumstances we have recognized that *a necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices*. For example, in holding that the clearly important state interest in public education should give way to a competing claim

> by the Amish to the effect that extended formal schooling threatened their way of life, the Court declared: "There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different."[21] The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is *the fundamental interest all individuals have in controlling the nature of their intimate associations with others*. (italics supplied)

It has been said that freedom extends beyond spatial bounds.[22] Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.[23] These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the due process clause.[24] At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.[25] Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[26] **Lawrence v. Texas**[27] is again instructive:

> To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.
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> This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. *It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.* (italics supplied)

THIRD. The *ponencia* of Mr. Justice del Castillo refused to characterize homosexuals and bisexuals as a class in themselves for purposes of the equal protection clause. Accordingly, it struck down the assailed Resolutions using the most liberal basis of

judicial scrutiny, the rational basis test, according to which government need only show that the challenged classification is rationally related to serving a legitimate state interest.

I humbly submit, however, that a classification based on gender or sexual orientation is a **quasi-suspect classification**, as to trigger a **heightened level of review**.

Preliminarily, in our jurisdiction, the standard and analysis of equal protection challenges in the main have followed the rational basis test, coupled with a deferential attitude to legislative classifications and a reluctance to invalidate a law unless there is a showing of a clear and unequivocal breach of the Constitution. [28] However, **Central Bank Employees Association, Inc. v. Bangko Sentral ng Pilipinas**, [29] carved out an exception to this general rule, such that prejudice to persons accorded special protection by the Constitution requires stricter judicial scrutiny than mere rationality, *viz.*:

> Congress retains its wide discretion in providing for a valid classification, and its policies should be accorded recognition and respect by the courts of justice except when they run afoul of the Constitution. *The deference stops where the classification violates a fundamental right, or prejudices persons accorded special protection by the Constitution. When these violations arise, this Court must discharge its primary role as the vanguard of constitutional guaranties, and require a stricter and more exacting adherence to constitutional limitations*. Rational basis should not suffice. (citations omitted and italics supplied)

Considering thus that labor enjoys such special and protected status under our fundamental law, the Court ruled in favor of the Central Bank Employees Association, Inc. in this wise:

> While R.A. No. 7653 started as a valid measure well within the legislature's power, we hold that the enactment of subsequent laws exempting all rank-and-file employees of other GFIs leeched all validity out of the challenged proviso.
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> x x x x
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> According to petitioner, the last proviso of Section 15(c), Article II of R.A. No. 7653 is also violative of the equal protection clause because after it was enacted, the charters of the GSIS, LBP, DBP and SSS were also amended, but the personnel of the latter GFIs were all exempted from the coverage of the SSL. Thus, within the class of rank-and-file personnel of GFIs, the BSP rank-and-file are also discriminated upon.
>
> Indeed, we take judicial notice that after the new BSP charter was enacted in 1993,

Congress also undertook the amendment of the charters of the GSIS, LBP, DBP and SSS, and three other GFIs, from 1995 to 2004, *viz.*:

x x x x

It is noteworthy, as petitioner points out, that the subsequent charters of the seven other GFIs share this common proviso: a blanket exemption of all their employees from the coverage of the SSL, expressly or impliedly...

x x x x

The abovementioned subsequent enactments, however, constitute significant changes in circumstance that considerably alter the reasonability of the continued operation of the last proviso of Section 15(c), Article II of Republic Act No. 7653, thereby exposing the proviso to more serious scrutiny. This time, the scrutiny relates to the constitutionality of the classification — albeit made indirectly as a consequence of the passage of eight other laws — between the rank-and-file of the BSP and the seven other GFIs. The classification must not only be reasonable, but must also apply equally to all members of the class. The proviso may be fair on its face and impartial in appearance but it cannot be grossly discriminatory in its operation, so as practically to make unjust distinctions between persons who are without differences.

Stated differently, the second level of inquiry deals with the following questions: Given that Congress chose to exempt other GFIs (aside the BSP) from the coverage of the SSL, can the exclusion of the rank-and-file employees of the BSP stand constitutional scrutiny in the light of the fact that Congress did not exclude the rank-and-file employees of the other GFIs? Is Congress' power to classify so unbridled as to sanction unequal and discriminatory treatment, simply because the inequity manifested itself, not instantly through a single overt act, but gradually and progressively, through seven separate acts of Congress? Is the right to equal protection of the law bounded in time and space that: (a) the right can only be invoked against a classification made directly and deliberately, as opposed to a discrimination that arises indirectly, or as a consequence of several other acts; and (b) is the legal analysis confined to determining the validity within the parameters of the statute or ordinance (where the inclusion or exclusion is articulated), thereby proscribing any evaluation vis-à-vis the grouping, or the lack thereof, among several similar enactments made over a period of time?

In this second level of scrutiny, the inequality of treatment cannot be justified on the mere assertion that each exemption (granted to the seven other GFIs) rests "on a policy determination by the legislature." All legislative enactments necessarily rest on a policy determination — even those that have been declared to contravene the Constitution. Verily, if this could serve as a magic wand to sustain the validity of a statute, then no due process and equal protection challenges would ever prosper. There is nothing inherently sacrosanct in a policy determination made by Congress or by the Executive; it cannot run riot and overrun the ramparts of protection of the Constitution.

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In the case at bar, it is precisely the fact that as regards the exemption from the SSL, there are no characteristics peculiar only to the seven GFIs or their rank-and-file so as to justify the exemption which BSP rank-and-file employees were denied (not to

mention the anomaly of the SEC getting one). The distinction made by the law is not only superficial, but also arbitrary. It is not based on substantial distinctions that make real differences between the BSP rank-and-file and the seven other GFIs.

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The disparity of treatment between BSP rank-and-file and the rank-and-file of the other seven GFIs definitely bears the unmistakable badge of invidious discrimination — no one can, with candor and fairness, deny the discriminatory character of the subsequent blanket and total exemption of the seven other GFIs from the SSL when such was withheld from the BSP. Alikes are being treated as unalikes without any rational basis.

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Thus, the two-tier analysis made in the case at bar of the challenged provision, and its conclusion of unconstitutionality by subsequent operation, are in cadence and in consonance with the progressive trend of other jurisdictions and in international law. *There should be no hesitation in using the equal protection clause as a major cutting edge to eliminate every conceivable irrational discrimination in our society. Indeed, the social justice imperatives in the Constitution, coupled with the special status and protection afforded to labor, compel this approach.*

Apropos the special protection afforded to labor under our Constitution and international law, we held in *International School Alliance of Educators v. Quisumbing*:

> That public policy abhors inequality and discrimination is beyond contention. Our Constitution and laws reflect the policy against these evils. The Constitution in the Article on Social Justice and Human Rights exhorts Congress to "give highest priority to the enactment of measures that protect and enhance the right of all people to human dignity, reduce social, economic, and political inequalities." The very broad Article 19 of the Civil Code requires every person, "in the exercise of his rights and in the performance of his duties, [to] act with justice, give everyone his due, and observe honesty and good faith."
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> International law, which springs from general principles of law, likewise proscribes discrimination. General principles of law include principles of equity, i.e., the general principles of fairness and justice, based on the test of what is reasonable. The Universal Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Discrimination in Education, the Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation — all embody the general principle against discrimination, the very antithesis of fairness and justice. The Philippines, through its Constitution, has incorporated this principle as part of its national laws.
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> In the workplace, where the relations between capital and labor are often skewed in favor of capital, inequality and discrimination by the employer are all the more reprehensible.

The Constitution specifically provides that labor is entitled to "humane conditions of work." These conditions are not restricted to the physical workplace — the factory, the office or the field — but include as well the manner by which employers treat their employees.

The Constitution also directs the State to promote "equality of employment opportunities for all." Similarly, the Labor Code provides that the State shall "ensure equal work opportunities regardless of sex, race or creed." It would be an affront to both the spirit and letter of these provisions if the State, in spite of its primordial obligation to promote and ensure equal employment opportunities, closes its eyes to unequal and discriminatory terms and conditions of employment.

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Notably, the International Covenant on Economic, Social, and Cultural Rights, in Article 7 thereof, provides:

> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and [favorable] conditions of work, which ensure, in particular:
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> a. Remuneration which provides all workers, as a minimum, with:
>
> i. Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

xxx xxx xxx

The foregoing provisions impregnably institutionalize in this jurisdiction the long honored legal truism of "equal pay for equal work." Persons who work with substantially equal qualifications, skill, effort and responsibility, under similar conditions, should be paid similar salaries.

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Under most circumstances, the Court will exercise judicial restraint in deciding questions of constitutionality, recognizing the broad discretion given to Congress in exercising its legislative power. Judicial scrutiny would be based on the "rational basis" test, and the legislative discretion would be given deferential treatment.

But if the challenge to the statute is premised on the denial of a fundamental right, or the perpetuation of prejudice against persons favored by the Constitution with special protection, judicial scrutiny ought to be more strict. A weak and watered down view would call for the abdication of this Court's solemn duty to strike down any law repugnant to the

> *Constitution and the rights it enshrines.* This is true whether the actor committing the unconstitutional act is a private person or the government itself or one of its instrumentalities. Oppressive acts will be struck down regardless of the character or nature of the actor.
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> *In the case at bar, the challenged proviso operates on the basis of the salary grade or officer-employee status. It is akin to a distinction based on economic class and status, with the higher grades as recipients of a benefit specifically withheld from the lower grades*. Officers of the BSP now receive higher compensation packages that are competitive with the industry, while the poorer, low-salaried employees are limited to the rates prescribed by the SSL. The implications are quite disturbing: BSP rank-and-file employees are paid the strictly regimented rates of the SSL while employees higher in rank — possessing higher and better education and opportunities for career advancement — are given higher compensation packages to entice them to stay. *Considering that majority, if not all, the rank-and-file employees consist of people whose status and rank in life are less and limited, especially in terms of job marketability, it is they — and not the officers — who have the real economic and financial need for the adjustment. This is in accord with the policy of the Constitution "to free the people from poverty, provide adequate social services, extend to them a decent standard of living, and improve the quality of life for all." Any act of Congress that runs counter to this constitutional desideratum deserves strict scrutiny by this Court before it can pass muster.* (citations omitted and italics supplied)

Corollarily, American case law provides that a state action questioned on equal protection grounds is subject to one of three levels of judicial scrutiny. The level of review, on a sliding scale basis, varies with the type of classification utilized and the nature of the right affected.[30]

If a legislative classification disadvantages a "suspect class" or impinges upon the exercise of a "fundamental right," then the courts will employ strict scrutiny and the statute must fall unless the government can demonstrate that the classification has been precisely tailored to serve a compelling governmental interest.[31] Over the years, the United States Supreme Court has determined that suspect classes for equal protection purposes include classifications based on race, religion, alienage, national origin, and ancestry.[32] The underlying rationale of this theory is that where legislation affects discrete and insular minorities, the presumption of constitutionality fades because traditional political processes may have broken down.[33] In such a case, the State bears a heavy burden of justification, and the government action will be closely scrutinized in light of its asserted purpose.[34]

On the other hand, if the classification, while not facially invidious, nonetheless gives rise to recurring constitutional difficulties, or if a classification disadvantages a "quasi-suspect class," it will be treated under intermediate or heightened review.[35] To survive intermediate scrutiny, the law must not only further an important governmental interest and be substantially related to that interest, but the justification for the classification must be genuine and must not depend on broad generalizations.[36] Noteworthy, and of special interest to us in this case, **quasi-suspect classes include classifications based on gender** or illegitimacy.[37]

If neither strict nor intermediate scrutiny is appropriate, then the statute will be tested for mere rationality.[38] This is a relatively relaxed standard reflecting the Court's awareness that the drawing of lines which creates distinctions is peculiarly a legislative task and an unavoidable one.[39] The presumption is in favor of the classification, of the reasonableness and fairness of state action, and of legitimate grounds of distinction, if any such grounds exist, on which the State acted.[40]

Instead of adopting a rigid formula to determine whether certain legislative classifications warrant more demanding constitutional analysis, the United States Supreme Court has looked to four factors,[41] thus:

(1) The history of invidious discrimination against the class burdened by the legislation;[42]

(2) Whether the characteristics that distinguish the class indicate a typical class member's ability to contribute to society;[43]

(3) Whether the distinguishing characteristic is "immutable" or beyond the class members' control;[44] and

(4) The political power of the subject class.[45]

These factors, it must be emphasized, are ***not*** **constitutive essential elements** of a suspect or quasi-suspect class, as to individually demand a certain weight.[46] The U.S. Supreme Court has applied the four factors in a flexible manner; it has neither required,[47]

those groups likely to be the target of classifications offensive to the equal protection clause and therefore warranting heightened or strict scrutiny; experience, not abstract logic, must be the primary guide.[48]

In any event, the first two factors – history of intentional discrimination and relationship of classifying characteristic to a person's ability to contribute – have always been present when heightened scrutiny has been applied.[49] They have been critical to the analysis and could be considered as prerequisites to concluding a group is a suspect or quasi-suspect class.[50] However, the last two factors – immutability of the characteristic and political powerlessness of the group – are considered simply to supplement the analysis as a means to discern whether a need for heightened scrutiny exists.[51]

Guided by this framework, and considering further that classifications based on sex or gender – albeit on a male/female, man/woman basis – have been previously held to trigger heightened scrutiny, I respectfully submit that classification on the basis of sexual orientation (*i.e.,* homosexuality and/or bisexuality) is a quasi-suspect classification that prompts intermediate review.

The first consideration is whether homosexuals have suffered a history of purposeful unequal treatment because of their sexual orientation.[52] One cannot, in good faith, dispute that gay and lesbian persons historically have been, and continue to be, the target of purposeful and pernicious discrimination due solely to their sexual orientation.[53]

Paragraphs 6 and 7 of Ang Ladlad's Petition for Registration for party-list accreditation in fact state:

> 6. There have been documented cases of discrimination and violence perpetuated against the LGBT Community, among which are:
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> (a) Effeminate or gay youths being beaten up by their parents and/or guardians to make them conform to standard gender norms of behavior;
> (b) Fathers and/or guardians who allow their daughters who are butch lesbians to be raped[, so as] to "cure" them into becoming straight women;
> (c) Effeminate gays and butch lesbians are kicked out of school, NGOs, and choirs because of their identity;
> (d) Effeminate youths and masculine young women are refused admission from *(sic)* certain schools, are suspended or are automatically put on probation;
> (e) Denial of jobs, promotions, trainings and other work benefits once one's sexual

> orientation and gender identity is *(sic)* revealed;
> (f) Consensual partnerships or relationships by gays and lesbians who are already of age, are broken up by their parents or guardians using the [A]nti-kidnapping [L]aw;
> (g) Pray-overs, exorcisms, and other religious cures are performed on gays and lesbians to "reform" them;
> (h) Young gays and lesbians are forcibly subjected to psychiatric counseling and therapy to cure them[,] despite the de-listing *(sic)* of homosexuality and lesbianism as a mental disorder by the American Psychiatric Association;
> (i) Transgenders, or individuals who were born mail but who self-identity as women and dress as such, are denied entry or services in certain restaurants and establishments; and
> (j) Several murders from the years 2003-3006 were committed against gay men, but were not acknowledged by police as hate crimes or violent acts of bigotry.
>
> 7. In the recent May 2009 US asylum case of Philip Belarmino, he testified that as a young gay person in the Philippines, he was subjected to a variety of sexual abuse and violence, including repeated rapes[,] which he could not report to [the] police [or speak of] to his own parents.

Accordingly, this history of discrimination suggests that any legislative burden placed on lesbian and gay people as a class is "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective."[54]

A second relevant consideration is whether the character-in-issue is related to the person's ability to contribute to society.[55] Heightened scrutiny is applied when the classification bears no relationship to this ability; the existence of this factor indicates the classification is likely based on irrelevant stereotypes and prejudice.[56] Insofar as sexual orientation is concerned, it is gainful to repair to **Kerrigan v. Commissioner of Public Health,**[57] *viz.*:

> The defendants also concede that sexual orientation bears no relation to a person's ability to participate in or contribute to society, a fact that many courts have acknowledged, as well. x x x If homosexuals were afflicted with some sort of impediment to their ability to perform and to contribute to society, the entire phenomenon of 'staying in the [c]loset' and of 'coming out' would not exist; their impediment would betray their status. x x x In this critical respect, gay persons stand in stark contrast to other groups that have been denied suspect or quasi-suspect class recognition, despite a history of discrimination, because the distinguishing characteristics of those groups adversely affect their ability or capacity to perform certain functions or to discharge certain responsibilities in society.[58]

> Unlike the characteristics unique to those groups, however, "homosexuality bears no relation at all to [an] individual's ability to contribute fully to society."[59] *Indeed, because an individual's homosexual orientation "implies no impairment in judgment, stability, reliability or general social or vocational capabilities";*[60] *the observation of the United States Supreme Court that race, alienage and national origin -all suspect classes entitled to the highest level of constitutional protection- "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy"*[61] *is no less applicable to gay persons.* (italics supplied)

Clearly, homosexual orientation is no more relevant to a person's ability to perform and contribute to society than is heterosexual orientation.[62]

A third factor that courts have considered in determining whether the members of a class are entitled to heightened protection for equal protection purposes is whether the attribute or characteristic that distinguishes them is immutable or otherwise beyond their control.[63] Of course, the characteristic that distinguishes gay persons from others and qualifies them for recognition as a distinct and discrete group is the characteristic that historically has resulted in their social and legal ostracism, namely, their attraction to persons of the same sex.[64]

Immutability is a factor in determining the appropriate level of scrutiny because the inability of a person to change a characteristic that is used to justify different treatment makes the discrimination violative of the rather "'basic concept of our system that legal burdens should bear some relationship to individual responsibility.'"[65] However, the constitutional relevance of the immutability factor is not reserved to those instances in which the trait defining the burdened class is absolutely impossible to change.[66] That is, the immutability prong of the suspectness inquiry surely is satisfied when the identifying trait is "so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change [it]."[67]

Prescinding from these premises, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment, because a person's sexual orientation is so integral an aspect of one's identity.

[68]
Consequently, because sexual orientation "may be altered [if at all] only at the expense of significant damage to the individual's sense of self," classifications based thereon "are no less entitled to consideration as a suspect or quasi-suspect class than any [69]
other group that has been deemed to exhibit an immutable characteristic." Stated differently, sexual orientation is not the type of human trait that allows courts to relax their [70]
standard of review because the barrier is temporary or susceptible to self-help.

The final factor that bears consideration is whether the group is "a minority or [71]
politically powerless." However, the political powerlessness factor of the level of [72]
scrutiny inquiry does not require a showing of absolute political powerlessness. Rather, the touchstone of the analysis should be "whether the group lacks sufficient political strength to bring a prompt end to the prejudice and discrimination through [73]
traditional political means."

Applying this standard, it would not be difficult to conclude that gay persons are [74]
entitled to heightened constitutional protection despite some recent political progress. The discrimination that they have suffered has been so pervasive and severe – even though their sexual orientation has no bearing at all on their ability to contribute to or perform in society – that it is highly unlikely that legislative enactments alone will suffice to [75]
eliminate that discrimination. Furthermore, insofar as the LGBT community plays a role in the political process, it is apparent that their numbers reflect their status as a small [76]
and insular minority.

It is therefore respectfully submitted that any state action singling lesbians, gays, bisexuals and trans-genders out for disparate treatment is subject to heightened judicial [77]
scrutiny to ensure that it is not the product of historical prejudice and stereotyping.

In this case, the assailed Resolutions of the COMELEC unmistakably fail the intermediate level of review. Regrettably, they betray no more than bigotry and intolerance; they raise the inevitable inference that the disadvantage imposed is born of [78]
animosity toward the class of persons affected (that is, lesbian, gay, bisexual and trans-gendered individuals). In our constitutional system, status-based classification [79]

FOURTH. It has been suggested that the LGBT community cannot participate in the party-list system because it is not a "marginalized and underrepresented sector" enumerated either in the Constitution [80] or Republic Act No. (RA) 7941. [81] However, this position is belied by our ruling in **Ang Bagong Bayani-OFW Labor Party v. COMELEC,** [82] where we clearly held that the enumeration of marginalized and underrepresented sectors in RA 7941 is **not exclusive**.

I likewise see no logical or factual obstacle to classifying the members of the LGBT community as marginalized and underrepresented, considering their long history (and indeed, ongoing narrative) of persecution, discrimination, and pathos. **In my humble view, marginalization for purposes of party-list representation encompasses social marginalization as well.** To hold otherwise is tantamount to trivializing socially marginalized groups as "mere passive recipients of the State's benevolence" and denying them the right to "participate directly [in the mainstream of representative democracy] in the enactment of laws designed to benefit them." [83] The party-list system could not have been conceptualized to perpetuate this injustice.

Accordingly, I vote to grant the petition.

REYNATO S. PUNO
Chief Justice

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[1] Section 5, Article III of the 1987 Constitution states: "No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights."

[2] The November 11, 2009 Resolution of the COMELEC cited the following passage from the Bible to support its holding: "For this cause God gave them up into vile affections: for even their women did change the natural use into that which is against nature: And likewise also the men, leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly, and receiving in themselves that recompense of their error which was meet." (Romans 1:26-27)

[3] The November 11, 2009 Resolution of the COMELEC cited the following passages from the Koran to support its holding:

- "For ye practice your lusts on men in preference to women: ye are indeed a people transgressing beyond bounds." (7:81)
- "And we rained down on them a shower (of brimstone): Then see what was the end of those who indulged in sin and crime!" (7.84)
- "He said: "O my Lord! Help Thou me against people who do mischief!" (29:30)

[4] Estrada v. Escritor, 455 Phil. 411 (2003).

[5] Id.

[6] Id.

[7] Section 5, Article III of the 1987 Constitution.

[8] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[9] COMELEC's Comment, p. 13.

[10] Id.

[11] *See Lawrence v. Texas,* 539 U.S. 558, 123 S.Ct. 2472.

[12] Id.

[13] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

[14] Ang Ladlad defined "sexual orientation" as a person's capacity for profound emotional, affectional and sexual attraction to, and *intimate and sexual relations with*, individuals of a *different gender, of the same gender, or more than one gender*." (italics supplied)

[15] Paragraph 24 of Ang Ladlad's Petition for Registration stated, in relevant part: "In 2007, Men Having Sex with Men or MSMs in the Philippines were estimated at 670,000."

[16] *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S.Ct. 3244, as cited in the Dissenting Opinion of Mr. Justice Blackmun in *Bowers v. Hardwick*, *infra.*

[17] 478 U.S. 186, 106 S.Ct. 2841.

[18] *Supra* note 11.

[19] *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63, 93 S.Ct. 2628, 2638, 37 L.Ed.2d 446 (1973); *See* also *Carey v. Population Services International*, 431 U.S. 678, 685, 97 S.Ct. 2010, 2016, 52 L.Ed.2d 675 (1977).

[20] *See* Karst, The Freedom of Intimate Association, 89 Yale L.J. 624, 637 (1980); cf. *Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S.Ct. 1029, 1038, 31 L.Ed.2d 349 (1972); *Roe v. Wade*, 410 U.S., at 153, 93 S.Ct., at 726.

[21] *Wisconsin v. Yoder*, 406 U.S. 205, 223-224, 92 S.Ct. 1526, 1537, 32 L.Ed.2d 15 (1972).

[22] *Lawrence v. Texas, supra* note 11.

[23] Id.

[24] *Planned Parenthood of Southeastern Pa. v. Casey*, *supra* note 13.

[25] Id.

[26] Id.

[27] *Supra* note 11.

[28] *Central Bank Employees Association, Inc. v. Bangko Sentral ng Pilipinas,* 487 Phil. 531, 583 (2004).

[29]
Id.
[30]
Pace Membership Warehouse, Div. of K-Mart Corp. v. Axelson, 938 P.2d 504.
[31]
16B Am. Jur. 2d Constitutional Law § 857, citing *Clark v. Jeter*, 486 U.S. 456, 108 S. Ct. 1910, 100 L. Ed. 2d 465 (1988); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794, 9 Ed. Law Rep. 23 (1983); *Christie v. Coors Transp. Co.*, 933 P.2d 1330 (Colo. 1997); *Baker v. City of Ottumwa*, 560 N.W.2d 578 (Iowa 1997); *Zempel v. Uninsured Employers' Fund*, 282 Mont. 424, 938 P.2d 658 (1997); *Hovland v. City of Grand Forks*, 1997 ND 95, 563 N.W.2d 384 (N.D. 1997).
[32]
Murray v. State of Louisiana, 2010 WL 334537. *See Burlington N. R.R. Co. v. Ford*, 112 S.Ct. 2184, 2186 (1992) (holding classification based on religion is a suspect classification); *Graham v. Richardson*, 91 S.Ct. 1848, 1852 (1971) (holding classification based on alienage is a suspect classification); *Loving v. Virginia*, 87 S.Ct. 1817, 1823 (1967) (holding classification based on race is a suspect classification); *Oyama v. California*, 68 S.Ct. 269, 274-74 (1948) (holding classification based on national origin is a suspect classification); *Hirabayashi v. U.S.*, 63 S.Ct. 1375 (1943) (holding classification based on ancestry is a suspect classification).
[33]
Johnson v. Robison, 415 U.S. 361, 94 S. Ct. 1160, 39 L. Ed. 2d 389 (1974).
[34]
Dunn v. Blumstein, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972); *Hunter v. Erickson*, 393 U.S. 385, 89 S. Ct. 557, 21 L. Ed. 2d 616 (1969); *McLaughlin v. State of Fla.*, 379 U.S. 184, 85 S. Ct. 283, 13 L. Ed. 2d 222 (1964).
[35]
Supra note 31.
[36]
United States v. Virginia, 518 U.S. 515, 533, 116 S.Ct. 2264, 2275, 135 L.Ed.2d 735, 751 (1996).
[37]
Murray v. State of Louisiana, supra note 32. *See Mississippi University for Women v. Hogan*, 102 S.Ct. 3331, 3336 (1982) (holding classifications based on gender calls for heightened standard of review); *Trimble v. Gordon*, 97 S.Ct. 1459, 1463 (1977) (holding illegitimacy is a quasi-suspect classification).
[38]
Supra note 31.
[39]
Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 97 S. Ct. 1898, 52 L. Ed. 2d 513 (1977); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976); *Costner v. U.S.*, 720 F.2d 539 (8th Cir. 1983).
[40]
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).
[41]
Varnum v. Brien, 763 N.W.2d 862 (2009) citing the following passage from *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786, 799 (1982):

> Several formulations might explain our treatment of certain classifications as "suspect." Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal. Finally, certain groups, indeed largely the same groups, have historically been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." The experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups. Our response to that experience is reflected in the Equal Protection Clause of the Fourteenth Amendment. Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of "class or caste" treatment that the Fourteenth Amendment was designed to abolish.

[42]
See United States v. Virginia, 518 U.S. at 531-32, 116 S.Ct. at 2274-75, 135 L.Ed.2d at 750 (observing 'long and unfortunate history of sex discrimination" (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684, 93 S.Ct. 1764, 1769, 36 L.Ed.2d 583, 590 (1973) (Brennan, J., plurality opinion))); *Lyng v. Castillo*, 477 U.S. 635, 638, 106 S.Ct. 2727, 2729, 91 L.Ed.2d 527, 533 (1986) (noting subject class had "not been subjected to discrimination"); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 at 443, 105 S.Ct. at 3256, 87 L.Ed.2d at 332 (mentally retarded not victims of "continuing antipathy or

prejudice"); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 2567, 49 L.Ed.2d 520, 525 (1976) (considering "history of purposeful unequal treatment" (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28, 93 S.Ct. 1278, 1294, 36 L.Ed.2d 16, 40 (1973))).

[43]

See Cleburne Living Ctr., 473 U.S. at 440, 105 S.Ct. at 3254, 87 L.Ed.2d at 320 (certain classifications merely "reflect prejudice and antipathy"); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725, 102 S.Ct. 3331, 3336, 73 L.Ed.2d 1090, 1098 (1982) ("Care must be taken in ascertain-ing whether the statutory objective itself reflects archaic and stereotypic notions."); *Murgia*, 427 U.S. at 313, 96 S.Ct. at 2566, 49 L.Ed.2d at 525 (considering whether aged have "been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities"); *Frontiero*, 411 U.S. at 686, 93 S.Ct. at 1770, 36 L.Ed.2d at 591 (Brennan, J., plurality opinion) ("[T]he sex characteristic frequently bears no relation to ability to perform or contribute to society.").

[44]

Lyng, 477 U.S. at 638, 106 S.Ct. at 2729, 91 L.Ed.2d at 533 (close relatives "do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"); *Cleburne Living Ctr.*, 473 U.S. at 442, 105 S.Ct. at 3255-56, 87 L.Ed.2d at 322 (mentally retarded people are different from other classes of people, "immutably so, in relevant respects"); *Plyler*, 457 U.S. at 220, 102 S.Ct. at 2396, 72 L.Ed.2d at 801 (children of illegal aliens, unlike their parents, have "legal characteristic[s] over which children can have little control"); *Mathews v. Lucas*, 427 U.S. 495, 505, 96 S.Ct. 2755, 2762, 49 L.Ed.2d 651, 660 (1976) (status of illegitimacy "is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual"); *Frontiero*, 411 U.S. at 686, 93 S.Ct. at 1770, 36 L.Ed.2d at 591 (Brennan, J., plurality opinion) ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth....").

[45]

Lyng, 477 U.S. at 638, 106 S.Ct. at 2729, 91 L.Ed.2d at 533 (close relatives of primary household are "not a minority or politically powerless"); *Cleburne Living Ctr.*, 473 U.S. at 445, 105 S.Ct. at 3257, 87 L.Ed.2d at 324 (refusing to find "that the mentally retarded are politically powerless"); *San Antonio Indep. Sch. Dist.*, 411 U.S. at 28, 93 S.Ct. at 1294, 36 L.Ed.2d at 40 (considering whether minority and poor school children were "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process").

[46]

Varnum v. Brien, supra note 41; *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135, 957 A.2d 407 (2008).

[47]

Varnum v. Brien, id., citing, among others, *Palmore v. Sidoti*, 466 U.S. 429, 433-34, 104 S.Ct. 1879, 1882-83, 80 L.Ed.2d 421, 426 (1984) (foregoing analysis of political power); *Nyquist v. Mauclet*, 432 U.S. 1, 9 n. 11, 97 S.Ct. 2120, 2125 n. 11, 53 L.Ed.2d 63, 71 n. 11 (1977) (jettisoning immutability requirement and scrutinizing classification of resident aliens closely despite aliens' voluntary status as residents); *Mathews*, 427 U.S. at 505-06, 96 S.Ct. at 2762-63, 49 L.Ed.2d at 660-61 (according heightened scrutiny to classifications based on illegitimacy despite mutability and political power of illegitimates); *Murgia*, 427 U.S. at 313-14, 96 S.Ct. at 2567, 49 L.Ed.2d at 525 (omitting any reference to immutability); *San Antonio Indep. Sch. Dist.*, 411 U.S. at 25, 93 S.Ct. at 1292, 36 L.Ed.2d at 38 (omitting any reference to immutability); *Frontiero*, 411 U.S. at 685-88, 93 S.Ct. at 1770-71, 36 L.Ed.2d at 591-92 (Brennan, J., plurality opinion) (scrutinizing classification based on gender closely despite political power of women); *Graham v. Richardson*, 403 U.S. 365, 371-72, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534, 541-42 (1971) (foregoing analysis of immutability); *see* also *Lyng*, 477 U.S. at 638, 106 S.Ct. at 2729, 91 L.Ed.2d at 533 (referring to whether members of the class "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group").

[48]

Concurring and Dissenting Opinion of Mr. Justice Thurgood Marshall in *Cleburne v. Cleburne Living Center, Inc.*, *infra*.

[49]

Varnum v. Brien, supra note 41.

[50]

Id.

[51]

Id.

[52]

Id.; *Kerrigan v. Commissioner of Public Health*, *supra* note 46.

[53]

Kerrigan v. Commissioner of Public Health, id.

[54]

Varnum v. Brien, supra note 41.

[55]

Id.

[56]

Id.

[57]
Supra note 46.
[58]
See, *e.g.*, *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. at 442, 105 S.Ct. 3249 (for purposes of federal constitution, mental retardation is not quasi-suspect classification because, *inter alia*, "it is undeniable ... that those who are mentally retarded have a reduced ability to cope with and function in the everyday world"); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. at 315, 96 S.Ct. 2562 (age is not suspect classification because, *inter alia*, "physical ability generally declines with age"); *see also Gregory v. Ashcroft*, 501 U.S. 452, 472, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) ("[i]t is an unfortunate fact of life that physical [capacity] and mental capacity sometimes diminish with age").
[59]
L. Tribe, American Constitutional Law (2d Ed. 1988) § 16-33, p. 1616.
[60]
Jantz v. Muci, 759 F.Supp. 1543, 1548 (D.Kan.1991) (quoting 1985 Resolution of the American Psychological Association), 976 F.2d 623 (10th Cir.1992), cert. denied, 508 U.S. 952, 113 S.Ct. 2445, 124 L.Ed.2d 662 (1993).
[61]
Cleburne v. Cleburne Living Center, Inc., 473 U.S. at 440, 105 S.Ct. 3249.
[62]
Kerrigan v. Commissioner of Public Health, *supra* note 46.
[63]
Id.
[64]
Id.
[65]
Varnum v. Brien, supra note 41.
[66]
Id.
[67]
Id. citing *Kerrigan v. Commissioner of Public Health*, *supra* note 46.
[68]
Id. citing *In re Marriage Cases*, 183 P.3d at 442.
[69]
Id. citing *Kerrigan v. Commissioner of Public Health*, *supra* note 46.
[70]
Id.
[71]
Kerrigan v. Commissioner of Public Health, *supra* note 46.
[72]
Varnum v. Brien, supra note 41, citing *Kerrigan v. Commissioner of Public Health*, *supra* note 46.
[73]
Id.
[74]
Kerrigan v. Commissioner of Public Health, *supra* note 46.
[75]
Id.
[76]
Id.
[77]
Id.
[78]
Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620.
[79]
Id.
[80]
Section 5(2), Article VI of the 1987 Constitution states, in relevant part:

> SECTION 5. x x x x
>
> (2) The party-list representatives shall constitute twenty per centum of the total number of representatives including those under the party list. For three consecutive terms after the ratification of this Constitution, one-half of the seats allocated to party-list representatives shall be filled, as provided by law, by selection or election from the *labor, peasant, urban poor, indigenous cultural communities, women, youth, and such other sectors as may be provided by law, except the religious sector*. (italics supplied)

[81]
On the other hand, Section 5 of RA 7941 provides:

> SECTION 5. Registration. — Any organized group of persons may register as a party, organization or coalition for purposes of the party-list system by filing with the COMELEC not later than ninety (90) days before the election a petition verified by its president or secretary stating its desire to participate in the party-list system as a national, regional or sectoral party or organization or a coalition of such parties or organizations, attaching thereto its constitution, by-laws, platform or program of government, list of officers, coalition agreement and other relevant information as the COMELEC may require: *Provided, That the sectors shall include labor, peasant, fisherfolk, urban poor, indigenous cultural communities, elderly, handicapped, women, youth, veterans, overseas workers, and professionals.* (italics supplied)

[82]
G.R. No. 147589, June 26, 2001, 359 SCRA 698.

[83]
Id.