Federal Supreme Court

Full Text of the Decision - ADI 4306 / DF

12/20/2019 **PLENARY SESSION**

DIRECT ACTION OF UNCONSTITUTIONALITY 4306 FEDERAL DISTRICT

REPORTER	: **JUSTICE EDSON FACHIN**
PLAINTIFF(S)	: NATIONAL CONFEDERATION OF COMMERCE OF GOODS, SERVICES AND TOURISM (CNC)
ATTORNEY(S)	: NEUILLEY ORLANDO SPINETTI DE SANTA RITA MATTA AND OTHERS
DEFENDANT(S)	: GOVERNOR OF THE STATE OF RIO DE JANEIRO
DEFENDANT(S)	: LEGISLATIVE ASSEMBLY OF THE STATE OF RIO DE JANEIRO
AMICUS CURIAE	: ACT - TOBACCO CONTROL, HEALTH PROMOTION AND HUMAN RIGHTS ASSOCIATION (ACT - PROMOÇÃO DA SAÚDE)
ATTORNEY(S)	: CLARISSA MENEZES HOMSI AND OTHERS
AMICUS CURIAE	: ARY FRAUZINO FOUNDATION FOR CANCER RESEARCH AND CONTROL
ATTORNEY(S)	: FRANCISCO DE ASSIS GARCIA AND OTHERS
AMICUS CURIAE	: NATIONAL CONFEDERATION OF WORKERS IN TOURISM AND HOSPITALITY - CONTRATUH
ATTORNEY(S)	: AGILBERTO SERÓDIO AND OTHER(S)

SUMMARY: DIRECT ACTION OF UNCONSTITUTIONALITY. CONSTITUTIONAL AND ADMINISTRATIVE. LAW NO. 5517 OF 2009, OF RIO DE JANEIRO. PROHIBITION OF SMOKING PRODUCTS IN COLLECTIVE ENVIRONMENTS. LEGITIMATE EXERCISE OF THE STATES COMPETENCE TO SUPPLEMENT FEDERAL LEGISLATION. VIOLATION TO FREE ENTERPRISE. INEXISTENCE. ACTION DISMISSED.

1. In cases in which the doubt about legislative competence falls upon a norm that covers more than one theme, the interpreter must accept an interpretation that does not limit the competence held by the smaller entities to dispose of a certain matter.

2. Because federalism is an instrument of political decentralization that aims to realize fundamental rights, if the federal or state law clearly indicates, in a necessary, adequate, and reasonable manner, that the effects of its application exclude the power of complementation held by the smaller entities, it is possible to rule out the presumption that, in the regional sphere, a certain subject must be regulated by the larger entity. In conflicts over the scope of the powers of the federal entities, the Judiciary should favor the solutions constructed by the Legislative Branch.

3. Law No. 5517 of 2019, of the State of Rio de Janeiro, by prohibiting the use of cigarettes, cigarillos, cigars, pipes, or any other smoking product, whether or not derived from tobacco, did not exceed the scope of legislative action, usurping the Union's competence to legislate on general rules. Nor did it exacerbate the concurrent competence to legislate on public health, considering that, according to cooperative federalism and the incidence of the principle of subsidiarity, the state action was in accordance with the constitutional legal order.

4. It is clear that Federal Law 9294 of 1996, when establishing the general norms about tobacco products advertising and use restrictions, when providing for the possible use in an exclusive area destined for this purpose, did not rule out the possibility that the states, in their concurrent attribution exercise of protection and defense of health (Article 24, XII, of the Federal Constitution), stipulate restrictions to its use. Absence of formal defect.

5. Free enterprise must be interpreted in conjunction with the principle of consumer protection, and restrictions to products that present possible risks to health are legitimate.

Precedent. The economic agent must answer for the risks that originated from the exploitation of its activity.

6. Direct action dismissed.

COURT DECISION

Having seen, reported, and discussed these records, the Justices of the Federal Supreme Court, under the presidency of Mr. Justice Dias Toffoli **in a virtual plenary session from December 13th to 19th, 2019**, unanimously agree to dismiss the action, in accordance with the Reporter's vote, and pursuant to the trial's records and shorthand notes. .

Brasilia, December 20th, 2019.

Justice **EDSON FACHIN**
Reporter

Federal Supreme Court

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ATTORNEY(S)	: AGILBERTO SERÓDIO AND OTHER(S)

REPORT

JUSTICE EDSON FACHIN (REPORTER): This is a direct action brought by the National Confederation of Commerce of Goods, Services and Tourism (CNC) to this Court for the declaration of the unconstitutionality of Law No. 5517 of August 17th, 2009, of the State of Rio de Janeiro, which prohibits the consumption of cigarettes, cigarillos, cigars, pipes, or any other smoking product, whether or not derived from tobacco. The norm establishes the following provisions:

> "Article 1 - This law establishes health protection standards and liability for consumer damage, under the terms of Article 24, items V, VIII, and XII, of the Federal Constitution, to create smoke-free collective environments.
>
> Article 2 - The use of cigarettes, cigarillos, cigars, or any other smoking product, whether or not derived from tobacco, is hereby prohibited on the territory of the State of Rio de Janeiro, in public or private collective environments.
>
> Paragraph 1 - The provisions of this article's caput apply to collective environments, totally or partially enclosed on any of their sides by walls, partitions, ceilings, or roofs, even if temporary, where there is permanence or circulation of persons.
>
> Paragraph 2 - For the purposes of this law, the expression "collective environments" includes, among others, work and study places, cultural, religious worship, leisure, sport or entertainment facilities, common areas in condominiums, show houses, theaters, cinemas, bars, snack bars, night clubs, restaurants, food courts, hotels, inns, shopping malls, banks and similar, supermarkets, butcheries, bakeries, pharmacies, drugstores, government departments, health institutions, schools, museums, libraries, exhibition spaces, public or private vehicles for collective transport, including vehicles on rails, boats, and aircraft, when in Rio de Janeiro, official vehicles of any kind, and taxis.

Paragraph 3 - In the locations foreseen in paragraphs 1 and 2 of this article, no-smoking signs must be displayed in places where they are clearly visible, indicating the telephone numbers and address of the state agencies responsible for sanitary surveillance and consumer protection, as well as the applicable penalties in case of non-compliance with this law.

Article 3 - The owners or persons responsible for the places and collective transports mentioned in Art. 2, and its paragraphs, must supervise and protect these environments so that the present law's provisions are not violated inside them.

Sole Paragraph. If consumers or users do not notice the smoking products prohibition, the owner or person responsible shall warn them about the ban and the obligation contained therein. In case they persist in the prohibited conduct, they must be immediately removed from the place, with the help of police force if necessary.

Article 4 - In case of non-compliance with the provisions of this law, the owner or person in charge of the establishment or collective transport where the violation occurs will be subject to a fine. The fine must be set at an amount between 1,548.63 (one thousand, five hundred and forty-eight units and sixty-three hundredths) and 15,486.27 (fifteen thousand, four hundred and eighty-six units and twenty-seven hundredths) UFIRs-RJ (Fiscal Reference Unit of Rio de Janeiro), without prejudice to the sanctions provided for in the sanitary legislation.

Paragraph 1 - In setting the amount of the fine, the following must be taken into consideration:

I - degree of relevance;

II - the economic capacity of the violator;

III - the extent of the damage caused to public health.

Paragraph 2 - In case of recurrence, the fine shall be doubled.

Paragraph 3 - Once the fine referred to in this article has been imposed, the violator shall have a period of 30 (thirty) days to file an objection, with due regard to the opportunity to be heard and the right to adversarial proceeding.

Paragraph 4 - The objection shall be addressed to the immediately superior authority, which shall decide within 5 (five) days, except when supplementary documents and evidence are needed to support the process. In case of dismissal, it is possible to file an appeal to the State Secretary of Health and Civil Defense.

Article 5 - Any person may report a fact not complying with the provisions of this law to the agencies of sanitary surveillance or consumer protection, depending on the area of competence.

Paragraph 1 - The report referred to in this article's caput shall contain:

I - a statement of the fact and its circumstances;

II - a statement, subject to the penalties of the law, that the report corresponds to the truth;

III - the author's identification with name, surname, identity card number, address, and signature.

Paragraph 2. At the criterion of the interested party, the report might be presented electronically on the internet site of the agencies referred to in this article's caput.

Article 6. This law does not apply to

I - religious cults in which smoking products are part of the ritual;

II - public ways and outdoor spaces;

III - residences;

IV - rooms or suites in hotels, inns, and the like;

V - tobacco stores;

VI - theatrical productions;

VII - cinema and television filming locations.

Paragraph 1 - For the purposes of this law, a tobacco store is understood to be an establishment that, according to its articles of organization, is specifically intended for

on-site consumption of cigarettes, cigarillos, cigars, pipes, or any other smoking product, whether or not derived from tobacco, with over 50% (fifty percent) of its revenue deriving from the sale of these products.

Paragraph 2 - Tobacco stores shall advertise, at their entrances and inside, that smoking products are being used at that location.

Paragraph 3. In the locations described in subsection V of this article, conditions of isolation, ventilation, or air exhaustion shall be adopted to prevent contamination of the environments protected by this law.

Article 7. Penalties arising from the violation of this law's provisions shall be imposed by the state or municipal sanitary surveillance or consumer protection agencies, in their respective jurisdictions.

Sole Paragraph. A comprehensive educational campaign shall precede the beginning of the penalties enforcement. The state government shall conduct the campaign in the media, such as newspapers, magazines, radio, and television, in public and private schools and universities, and by distributing educational pamphlets in the places detailed in Article 2 and its paragraphs to clarify the duties, prohibitions, and penalties imposed by this law, besides of the harmful effects of smoking on health.

Article 8 - The state shall train, monitor, and evaluate the implementation of the Tobacco Control Program in the municipalities.

Article 9 - This law shall come into effect within ninety (90) days after the date of its publication."

The plaintiff points out that the Union has already ruled this matter through Law No. 9294/96, regulated by Decree 2018/99. According to the plaintiff, the federal law provides for smoking places, which, in its opinion, could not have been suppressed by the state law.

The plaintiff also assets a violation to individual freedom, which is claimed to be excessively affected because "the protection of individual health cannot become a justification for the state's complete interference in the individual's private sphere when it comes to the choice of using a legal product or performing activities allowed by the constitutional and legal framework" (eDOC 0, page 13).

The plaintiff also argues that the challenged rule violates free enterprise. It asserts that the total prohibition of consumption configures "undue intrusion of the government where the principle of the free enterprise in a market economy ensures the right to market a legal product that generates employment, income, and pays taxes. The latter translates into a disproportionate interference in the operation of commercial establishments where part of the customers are smokers and wish to exercise their right to consume cigarettes" (eDOC 0, page 15).

The plaintiff alleges that Article 3 of the contested law ends up delegating the police power of the state to the businessman, which could not be admitted. It warns that "police power, being an activity vested with state power, can only be exercised by legal persons governed by public law" (eDOC 0, page 17).

Finally, the plaintiff also understands that the constitutional principles of proportionality and reasonableness are violated.

The plaintiff requested, as a precautionary measure, the suspension of the rules, and, in merit, the declaration of unconstitutionality of Articles 1 to 5, 6 (as a consequence of the logical correlation), and 7 to 8 of Law No. 5517/2009, of the State of Rio de Janeiro.

Justice Ricardo Lewandowski applied the procedure of Article 12 of Law 9868/99.

The Governor of the State of Rio de Janeiro pointed out the plaintiff's lack of standing due to the lack of thematic pertinence between the social purposes of the plaintiff and the object of the action. On the merits, he defended the constitutionality of the state law. He affirmed that "the Federal Law and the Convention simply form the framework that the state legislation, as a legal consequence, cannot fail to detail" (eDOC 2, page 6).

He argued that "the prevalence of the collective interest is given by the preservation of smokers' and nonsmokers' health, which has a higher weight, from the point of view of the constitutional axiology, than the mere expression of a supposed right to smoke, which can and should be subject to curtailment" (eDOC 2, page 12).

The Legislative Assembly agreed with the Governor and added, regarding the merit, that "the Union already expected other federal entities, in harmony with the international treaty, to adopt measures that complement the federal law, within the scope of their legislative domains" (eDOC 3, page 10).

It also claimed that the State of Rio de Janeiro's law "did nothing more than better express the limits already imposed by the Federal Constitution itself to the freedom to use tobacco products" (eDOC 3, page 17). It alleged that there is no delegation of police power but collaboration with the private individual regarding compliance with the rule.

The Attorney General's Office argued in favor of the action, with the following opinion (eDOC 6):

> "Law No. 5517 of 2009, of the State of Rio de Janeiro, which prohibits in public or private collective environments the use of cigarettes, cigarillos, cigars, or any other smoking product, whether or not derived from tobacco. Existence of a general law on the matter edited by the Union. Invasion of the Union's competence by the Member State. Contradiction to the terms of Article 24, subsections V and XII, paragraphs 1 to 3, of the Federal Constitution. The legal diploma is formally unconstitutional. This office is in favor of upholding the action."

The Solicitor General's Office defended the dismissal of the action (eDOC 7):

> "Direct action of unconstitutionality. Law No. 5517/2001 of the State of Rio de Janeiro 'prohibits the use of cigarettes, cigarillos, cigars, pipes, or any other smoking product, whether or not derived from tobacco, as specified, and creates smoke-free collective environments.' The CNC has standing. It is impossible to discard, in advance, the interest of the economic categories represented by the plaintiff since a large part of the commercial establishments are reached by the norm. There is no formal defect. The Framework Convention for Tobacco Control (FCTC), ratified on November 3rd, 2005 and promulgated by Decree 5658/2006, revoked Law 9294/96 for being posterior and of superior hierarchy, besides ruling differently against tobacco smoke exposure by not consenting that smoking areas in collective environments are an effective measure. In this context, there is full harmony between the current federal law and the challenged state law, therefore complying with Article 24, XII, of the Constitution. In matters of human rights, it is inconceivable to privilege a national law to the detriment of effective guidelines seeking to combat exposure to tobacco smoke, that are foreseen in ratified international treaties and conflict with the federal rule. Conversion of the national sovereign State into a cooperative constitutional State. Federal Law 9294/96, by allowing the so-called smoking room in collective environments, does not realize the fundamental value of health. Thus, it violates Article 196 of the Constitution and the principle of prohibition of insufficient protection of constitutionally protected legal assets, representing a facet of the principle of proportionality. The possibility of state laws to stipulate more restrictive conditions in public health matters, except when it offends another constitutional rule aimed at preserving a different legal value. Precedents. No violation of the principle of individual freedom since the State of Rio de Janeiro's law does not prohibit smoking but only conditions it to respect other citizens' health. There is no violation of the principles of free enterprise, free trade, and free competition. Any economic activity encounters restrictions and limitations when faced with consumers and workers' right to health and environment. The collaboration of a private individual in complying with a rule that

> interests the society as a whole does not translate into police power. This office supports the dismissal of the action."

ACT - Tobacco Control, Health Promotion and Human Rights Association (ACT Promoção da Saúde), Ary Frauzino Foundation for Cancer Research and Control, and the National Confederation of Workers in Tourism and Hospitality - CONTRATUH were admitted as amici curiae.

In summary, this is the Report.

12/20/2019 **PLENARY SESSION**

DIRECT ACTION OF UNCONSTITUTIONALITY 4306 FEDERAL DISTRICT

VOTE

JUSTICE EDSON FACHIN (REPORTER): Preliminarily, I acknowledge the cognizability of the present direct action.

This Court, following Article 103, IX, of the Federal Constitution, has already recognized the standing of the plaintiff, the National Confederation of Commerce of Goods, Services and Tourism (CNC) (e.g.: ADI 4314, Justice Reporter Marco Aurélio, Full Court, Electronic Judicial Gazette (DJe) 10/29/2018).

Regarding the thematic pertinence, its presence is unequivocal. For the sake of brevity, it is relevant to establish that the plaintiff has approached this concentrated constitutional jurisdiction other times to analyze the constitutionality of provisions of similar content to those challenged here, in Direct Actions of Unconstitutionality that have even had their collegiate judgment (e.g.: ADI 1980, Justice Reporter Cezar Peluso, Full Court, DJe 08/07/2009; ADI 855, Justice Reporter Octavio Galloti, Full Court, DJe 03/06/2008, and ADI 3731 Precautionary Measure, Justice Reporter Cezar Peluso, Full Court, DJe 08/29/2007).

On the merits, the direct action is dismissed.

The issue in the case records is limited to the distribution of competence among the various federal entities to legislate on the matters specified by the Constitution. The distribution of competence is an essential characteristic of a federated state to protect the autonomy of each of its members and, consequently, the harmonious coexistence between the spheres, avoiding secession. From this perspective, this arrangement can be made horizontally or vertically, taking into account the domain of the interests involved.

The sharing of competence comprises the compatibility of interests to reinforce cooperative federalism in a de facto cooperative and diffuse dimension. The latter means rejecting centralization in one or another entity. The consonant functioning of legislative and executive competence optimizes the foundations (Article 1 of the Federal Constitution) and objectives (Article 3 of the Federal Constitution) of the Republic.

By building an interconnected network of competence, the state is obliged to exercise them for the common good and realization of fundamental rights.

It happens that, as remembered by Justice Gilmar Mendes, sometimes the same law may present complex problems. It may involve a theme divided into a subject of concurrent competence and a matter of legislative competence restricted to only one of the spheres of the Federation (MENDES, Gilmar. *Constitutional Law Course*. 10th ed. São Paulo: Saraiva, 2015, page 841).

On other occasions (ADI 5356 and ADPF 109), I have argued that the traditional understanding of Brazilian federalism, which seeks to resolve competence conflicts only from the interests' prevalence standpoint, does not provide a satisfactory solution for cases where doubt about the exercise of legislative competence arises from normative acts that may deal with different topics.

In these cases, there is multidisciplinarity, as described by Tiago Magalhães Pires in work already cited by Justice Luís Roberto Barroso:

> "There are also situations of competition between the powers of various federative entities, even if they are exclusive. These are cases in which the law issued by a political entity refers simultaneously to categories provided for in two or more jurisdiction rules, some permitted and others prohibited to that political entity. Therefore, the interpreter would be forced to choose the most prominent category or the entity to be allocated, or simply recognize the reality and admit the validity of the law."

Even in such hypotheses, the solution cannot distance itself from the canon of prudence that is incumbent upon the bodies that control constitutionality: preference should be given to the interpretation that is consistent with the presumption of constitutionality that legislative acts enjoy. This is what Justice Gilmar Mendes, in a well-known doctrinaire work, considered the principle of interpretation in conformity with the constitution:

> "It should not be assumed that the legislator wanted to provide contrary to the Constitution; on the contrary, infra-constitutional rules arise with the presumption of constitutionality."
>
> (MENDES, Gilmar. *Constitutional Law Course*. 10th ed. São Paulo: Saraiva, 2015, page 97).

This deference to the legislative power assumes a particular form when the constitutionality control is made in light of the norm produced by the other entities of the federation. It requires the interpreter not to limit the power smaller entities have to rule on a given matter.

In this sense, the canon of the interpretation in conformity with the constitution, to which Justice Gilmar Mendes refers, should be integrated by what, in North-American jurisprudence, has been considered a presumption in favor of smaller entities competence (*presumption against pre-emption*).

Thus, it is necessary to recognize within the constitutional distribution of federal competence that the municipality, for example, as long as it has competence for the matter, holds primacy over issues of local interest, under the terms of the provisions of Article 30, I, of the Federal Constitution. In the same way, the states and the Union have competence over the matters of their respective interests, in terms of Article 24 of the Federal Constitution. There is a direction for the government actions from the local to the national level, in what José de Oliveira Baracho saw as the principle of subsidiarity in Brazilian federalism:

> "The principle of subsidiarity maintains multiple implications of philosophical, political, legal, and economic order, both in the internal as well as in the community and international legal order. The local government must assume great projection within the federative concerns since its effectiveness, structure, political, administrative, and economic frameworks are globally projected in the Federation entities. In the exercise of its attributions, the federative entities' government shall promote actions that should, at least, mitigate social inequality and create conditions for development and quality of life. A quality public administration committed to social needs and open to the solidary participation of society can improve the federative entities and the municipalities. From this level on, the realization of human rights necessarily takes place. At this level, decentralization should be a stimulus to liberties,

> creativity, initiatives, and the vitality of various legalities, propelling new growth and social improvements. Central bureaucracies with authoritarian tendencies are often opposed to decentralizing measures, going against society and local governments' attributions. The best climate for relations between citizens and authorities should begin in the municipalities, aiming to get to know each other, facilitating the diagnosis of social problems and the motivated and responsible participation of social groups in solving problems, generating trust and credibility."
>
> (BARACHO, José Alfredo de Oliveira. *Journal of the Faculty of Law of the Federal University of Minas Gerais (UFMG), No. 35*, 1995. pages 28-29)

Of course, greater proximity of the government, which naturally occurs in municipalities, should not be confused with more democracy. The Constitution is also a counterpoint to the capture of local government by oligarchies. It is precisely here that the material source of other federative entities' competence resides: as long as it favors the material realization of constitutionally guaranteed rights. And as long as they are foreseen within the scope of their respective competence, the Union or even the states can dispose of matters that tangentially affect the local interest. Therefore, federalism becomes an instrument of decentralization, not simply distributing political power but realizing fundamental rights.

Thus, it would be possible to overcome the merely formal content of the principle and recognize a material aspect: only when the federal or state law clearly indicates, in a necessary, adequate, and reasonable manner, that the effects of its application exclude the power of complementation possessed by the smaller entities *(clear statement rule*), it would be possible to rule out the presumption that, in the regional sphere, a particular matter must be regulated by the larger entity.

Legislative clarity does not refer only to concurrent competence. When doubting the terms under which the competence is exercised, whether common or concurrent, it is also up to the law to define the federative entity's scope of action. However, it should be emphasized that whatever the hypothesis may be, the assumption of competence by the larger entity should be based on the principle of subsidiarity, that is, on the demonstration that it is more advantageous for the Union or the state to regulate a certain matter. It is, therefore, to favor the definition given by the legislator, recognizing that any gap should be seen as a possibility of other federal entities to act, not fitting the judiciary, in the absence of a legislative definition, to remove the normative competence of a particular entity of the federation, under penalty of violating its constitutional autonomy.

Moreover, it is observed that the normative act herein challenged, by prohibiting the use of cigarettes, cigarillos, cigars, pipes, or any other smoking product, whether or not derived from tobacco, did not exceed the scope of legislative action, usurping the competence of the Union to legislate on general rules. Nor did it exacerbate the concurrent competence to legislate on public health, considering that, according to the cooperative federalism and the principle of subsidiarity, the state action was following the constitutional legal order.

It is clear that Federal Law 9294/1996 introduced a general permissive rule for the tobacco products' use when establishing the general rules about the restrictions to tobacco products' use and advertising and providing for the possible use in an exclusive area destined for this purpose.However, it does not clearly rule out (*clear statement rule*) the possibility of states to condition its use in exercising their concurrent attribution of health protection and defense (Article 24, XII, of the Federal Constitution). Thus, the state's viability of subsidiary legislative

action is verified within the limits of tolerance, that is, of general permission for consumption under the terms of the law.

The compatibility between state legislative action and this Court's jurisprudence on the elaboration of public policies consistent with the precautionary principle suggests a clear possibility for the states, which are close to the dilemmas of their regional realities, to exercise the concurrent legislative competence attributed to them by the Constitution, either from the health or the consumption perspective.In this scenario, the federal legislator chose not to expressly and explicitly prohibit the use of such products. Under the restrictions defined by it, the other entities are urged to implement the provisions they see as fit in exercising their legislative powers.

At this point, so that there are no doubts about the principle of subsidiarity's incidence and the legislative action of other entities' appropriateness, it is repeated: Federal Law 9294/1996 removes the possibility of states and municipalities to legislate allowing the use of tobacco products in different circumstances than those indicated by the norm. On the other hand, it enables and regulates the consumption of tobacco products in exclusive areas destined for this purpose. It allows the federal entities to act in this point with a more restrictive character, even because, depending on the distinctive aspects of each entity, the legislative provision must reflect the local peculiarities.

Furthermore, as to the material defect regarding the Constitution defended by the plaintiff, I believe that the prohibition promoted by the contested law could only give rise, in theory, to a violation of free enterprise in the terms sustained by the plaintiff if the principle imposed a duty of non-interference by the state.

It is only regarding the alleged violation of free trade that a possible violation of the principle of free enterprise could be admitted, which, in turn, translates into equal treatment that should be given to goods and services. It implies, provided that the principles of Article 170 are observed, the creation at a national level of a free market.

However, it is necessary to outline that free enterprise, the foundation of the constitutional economic order, must also observe the principle of consumer protection, which, also by constitutional provision, is observed by the Union, states, and municipalities. Thus, I believe that it is legitimate to establish restrictions on consuming products that may eventually represent a health risk.

In this sense, I point out the following precedent:

> "The constitutional legitimacy of chrysotile asbestos tolerance, as stamped in the challenged precept, pondered in light of free initiative, human dignity, work's social value, the right to health, and the right to an ecologically balanced environment. Economic development, social progress, and collective welfare. *When necessary, the Constitution authorizes limitations on fundamental rights to comply with other equally protected fundamental rights. The fundamental right to free enterprise (Articles 1, IV, and 170, caput, of the Federal Constitution) must be made compatible with protecting the health and preserving the environment.* [Emphasis added] Precedent: Precautionary Action 1657, Full Court, Justice Reporter Cezar Peluso, DJe 08/30/2007. The state's duty to act positively by regulating, in the industry, the use of raw materials that have proven harmful to human health. *The constitutional provision to health protection forces and supports the - federal, state, district, and municipal - legislator by previously excluding, from the range of possible political choices, certain*

> *normative arrangements that are incompatible with it; creating, at the same time, a legitimation sphere for political-normative interventions that translate constitutional inferences that are democratically legitimized."* [Emphasis added]
>
> (ADI 4,066, Justice Reporter Rosa Weber, Full Court, DJe 03/07/2018)

Finally, I believe that safety is a responsibility of the commercial establishments that supply the products subject to Law 9294/1996, as provided in Article 2, sole paragraph of the Consumer Protection Code.

It should be added that consumer protection is the guiding principle of the economic order (Article 170, V, of the Federal Constitution). It means that the one who wishes to explore the economic activity and, therefore, figure as an economic agent in the consumer market must respond to the risks originating from this exploitation, especially in consumer protection.

In other words, Law 5517/2009 of the State of Rio de Janeiro is in line with the constitutional norms by placing public safety not only as a state duty but also as a right and responsibility of all.

The designation for inspection and protection of the sanitary surveillance and consumer protection of the owners and persons responsible for the commercial establishments is not forbidden. On the contrary, private individuals' collaborative participation is recommended to promote and realize them as an indispensable element for the preservation of public order and safety.

In any case, the normative provisions of Law 5517/2009, of the State of Rio de Janeiro are according to the current legal system and the Republic's Constitution.

Therefore, ruling out the formal and material defects pointed out by the initial, the contested diploma is constitutional, which is why this direct action must be dismissed.

This is how I vote.

Federal Supreme Court

Full Text of the Decision - ADI 4306 / DF

PLENARY SESSION

MINUTES SUMMARY

DIRECT ACTION OF UNCONSTITUTIONALITY 4306
PROCEDURE : FEDERAL DISTRICT
REPORTER : JUSTICE EDSON FACHIN
PLAINTIFF(S) : NATIONAL CONFEDERATION OF COMMERCE OF GOODS, SERVICES AND TOURISM (CNC)
ATTORNEY(S) : NEUILLEY ORLANDO SPINETTI DE SANTA RITA MATTA (137228/RJ, 27957B/RS) AND OTHERS
DEFENDANT(S) : GOVERNOR OF THE STATE OF RIO DE JANEIRO
DEFENDANT(S) : LEGISLATIVE ASSEMBLY OF THE STATE OF RIO DE JANEIRO
AMICUS CURIAE : ACT - TOBACCO CONTROL, HEALTH PROMOTION AND HUMAN RIGHTS ASSOCIATION (ACT - PROMOÇÃO DA SAÚDE)
ATTORNEY(S) : CLARISSA MENEZES HOMSI (131179/SP) AND OTHERS
AMICUS CURIAE : ARY FRAUZINO FOUNDATION FOR CANCER RESEARCH AND CONTROL
ATTORNEY(S) : FRANCISCO DE ASSIS GARCIA (116383/SP) AND OTHERS
AMICUS CURIAE : NATIONAL CONFEDERATION OF WORKERS IN TOURISM AND HOSPITALITY - CONTRATUH
ATTORNEY(S) : AGILBERTO SERÓDIO (10675/DF) AND OTHER(S)

Decision: The Court unanimously dismissed the action, according to the Reporter's vote. Virtual Plenary Session from 12/13/2019 to 12/19/2019.

Composition: Justices Dias Toffoli (President), Celso de Mello, Marco Aurélio, Gilmar Mendes, Ricardo Lewandowski, Cármen Lúcia, Luiz Fux, Rosa Weber, Roberto Barroso, Edson Fachin, and Alexandre de Moraes.

Carmen Lilian Oliveira de Souza
Plenary Chief Advisor