

AMPARO ON APPEAL

PLAINTIFF AND APPELLANT: *****

REPORTING JUSTICE: LENIA BATRES GUADARRAMA

SECRETARY: CÉSAR VILLANUEVA ESQUIVEL

ASSISTED: AARÓN ENRIQUE HUERTA ORTIZ

SUMMARY

Facts: ***** filed an indirect amparo lawsuit against the Decree amending, adding, and repealing several provisions of the General Law for Tobacco Control; these provisions were published in the Official Gazette of the Federation on February 17, 2022. The indirect amparo lawsuit explicitly requested the **repeal** of Article 27, Section II, which was in effect until before the amendment. The lawsuit argued that the challenged acts violated her fundamental rights provided in Articles 1, 5, 14, 16, and 28 of the Federal Constitution.

The District Court denied the amparo because the challenged decree does not violate the appellant's rights to security, to equality, or the principle of non-discrimination; nor does it restrict the appellant's freedom of commerce and freedom of association.

This is because, according to the District Court, the regulation of designated smoking spaces in the open air in establishments open to the public guarantees the health of persons without violating these establishments' acquired rights or freedom of commerce, since the conditions that existed before the reform were mere expectations of a right.

Dissatisfied with the previous conclusion, the appellant filed an appeal for review, arguing that the challenged article violated the freedom of commerce, the right to equality and non-discrimination, and legal certainty regarding consolidated rights.

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		Federation on February 17, 2022.	
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AMPARO ON APPEAL 672/2023

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ASSISTED: AARÓN ENRIQUE HUERTA ORTIZ

Mexico City. The Second Chamber of the Supreme Court of Justice of the Nation, in session dated March 13, 2024, issues the following

JUDGMENT

By means of which the **amparo on appeal 672/2023**, filed against the judgment issued on September 7, 2022, by the Tenth District Court in Administrative Matters in Mexico City, is decided.

The legal issue to be resolved by this Second Chamber of the Supreme Court of Justice of the Nation consists of verifying the constitutionality of the Decree reforming and repealing various provisions of the General Law for Tobacco Control –published in the Official Gazette of the Federation on February 17, 2022–, specifically, Article 27.

BACKGROUND

1. Amparo lawsuit. *****, legal representative of *****, filed an indirect amparo lawsuit against the Chambers of Deputies and Senators of the Congress of the Union, as well as against the President of the Republic. This indirect amparo referred to the discussion, approval, issuance, and enactment of a Decree amending, adding, and repealing several provisions of the General Law for Tobacco Control. Such decree was published in the Official Gazette of the Federation on February 17, 2022. The indirect amparo was explicitly filed to

discuss the **derogation** of Article 27, Section II, in force until before such amendment.

The plaintiff, in the section of the Amparo corresponding to the grounds for violation, stated that the challenged Decree violated her fundamental rights set forth in Articles 1, 5, 14, 16, and 28 of the Political Constitution of the United Mexican States.

1. Judgment of indirect amparo. The Tenth District Court in Administrative Matters in Mexico City heard the lawsuit, a jurisdictional body that registered it under the indirect amparo proceeding file 729/2022.

2. Following the relevant proceedings, the District Court held the respective constitutional hearing on September 7, 2022; by judgment dated November 14, 2022, the District Court ruled the following determinations:

3. The District Court referred that the grounds for dismissal expressed by the President of the Republic were **without merit** since:

The plaintiff has a legal interest in filing an indirect amparo lawsuit since it is the owner, administrator, or person in charge of a commercial establishment with public access. Therefore, their situation falls under the scope of Article 27 of the General Law for the Control of Tobacco, whose entry into force imposed the obligation to locate the exclusive smoking areas in open air rather than indoor spaces within a period of no more than sixty days after the publication of the challenged Decree; thus, the cause of inadmissibility outlined in Article 61, Section XII of the Amparo Law is not met.

The plaintiff did argue that the promulgation of the challenged decree violated their human right to legal certainty. Therefore, the ground of dismissal, provided in Article 61, Section XXIII, of the Amparo Law, concerning the provisions of Article 108, Section VIII, of this same law, has not been proven.

The President of the Republic's reasoning departs from an incorrect premise since the occurrence of a legislative omission was not alleged. Instead, positive

acts were challenged. Therefore, the cause of dismissal provided for in Article 61, Section XXIII, of the Amparo Law, in relation to the provisions of Article 77 of this same law, is not applicable. This is so because, in the hypothetical of the constitutional protection being granted, the President of the Republic would not be obliged to repair any omission, nor would it give general effects to the judgment.

1. Regarding the consideration of the merits, the District Court decided **not to grant the amparo, or protect to *******, since the concepts of violation raised were **unfounded** based on the following considerations:

2. The decree does not violate the plaintiff's right to legal certainty because the rules in force before the enactment of the challenged provision only amounted to legal expectations. Such rules were issued in response to the specific moments that motivated their issuance.

The plaintiff can intend the protection of a legal expectation based on the legislation in force before it was amended; however, the plaintiff cannot consider that a prior activity of the public administration had granted the power to the owners, administrators, or managers of commercial establishments to operate permanently under the same terms and conditions.

Assuming a contrary criterion would imply contravening the democratic State's power to adapt the legal rules to social and political changes, as in issuing the necessary policies to preserve the health of the population, mainly to prevent diseases derived from tobacco consumption and exposure to its emissions.

This reasoning was supported by case-law 2a./J. 4/2020 (10a.) with record 2021455, under the heading: "**LEGITIMATE TRUST. ITS APPLICATION IN THE MEXICAN LEGAL ORDER REGARDING ACTIONS OF THE LEGISLATIVE BRANCH**".

1. The decree does not violate the plaintiff's right to equality and non-discrimination. The Court considers that there were no grounds for a particularly intense scrutiny of constitutionality because the challenged rule did

not introduce into the legal system a distinction articulated around any of the categories considered as prohibited grounds for discrimination under Article 1 of the Constitution.

The challenged decree did not impose a limitation on the exercise of ownership of a commercial establishment; instead, it required that the designated smoking areas be in open-air spaces. In this way, referring to all owners or operators of spaces with access to the public, regardless of whether or not they have open-air spaces, is appropriate from the perspective of the purposes of the rule, i.e., respecting the right to health of non-smokers against an unchosen risk that allows reducing morbidity and mortality associated with exposure to smoke.

1. The decree does not impede the right to freedom of trade because it does not affect the center or core of the right to choose a profession or trade, since the challenged rule does not condition the possibility of owning or operating a commercial establishment; it does not prevent its owners or operators from operating or exercising their legally authorized line of business, nor does it qualitatively or quantitatively limit the provision and supply of the services they offer.

On the contrary, such a decree regulates the conditions for the operation of commercial establishments, aiming to ensure due respect for the right to health of persons who may be affected by the activity of smokers and those around them. Therefore, the legal rule is a reasonable and proportional measure.

In addition, the challenged rule does not constitute a guideline applicable to smokers in enclosed spaces, but rather to the owners or operators of spaces with free or restricted public access and to workplaces with or without public access.

1. It is not appropriate to apply the proportionality test in the terms requested since it is up to the legal operator to decide which of the available argumentative methods is applicable without being obliged to justify the reasons that lead him to use (or not) the proposed method. Choosing a particular

argumentative method is inherent to their freedom of jurisdiction as long as the determination is subject to the satisfaction of the constitutional requirements of substantiation and motivation.

2. Appeal for Review. Against this decision, *****, through their legal counsel *****, filed an appeal for review, with the following arguments:

3. The appealed judicial decision incorrectly decided that the measure established in the challenged decree is in accordance with the principle of legal reasonableness and proportionality. This is so because it overlooked that the freedom of commerce implies not only the possibility of operating the respective mercantile establishment but also the freedom to choose whether to allocate areas duly equipped for smokers.

Based on this premise, in the appellant's view, the District Court should have considered a weighing exercise to determine whether the rule is constitutionally valid. This is because the impact on the freedom of commerce implied in the decision of imposing an absolute prohibition of not smoking indoors is more significant than the degree of protection of the right to health of non-smokers.

The appellant insisted that there is no scientific, legal, or logical reason to support the greater benefit the legislative branch alleged of regulating the absolute prohibition of smoking in any indoor space compared to the previous measure that allowed smoking in indoor spaces with specific areas, sufficient ventilation, and necessary adjustments so that tobacco smoke would not affect other people in the establishment. To reinforce this argument, he referred to case law P./J. 3/2022 (11a.) with digital record number 2024425, entitled: **"TOBACCO CONTROL. THE ABSOLUTE PROHIBITION OF ARTICLE 16, SECTION VI, OF THE TOBACCO GENERAL LAW IS UNCONSTITUTIONAL."¹**

¹ Location data: Plenary session. Type of thesis: Case law. Source: Federal Judicial Weekly Gazette. Volume I, Book 12, April 2022. Subject(s): Constitutional. Thesis: P./J. 3/2022 (11a.) Page: 5. Digital record: 2024425. The content is transcribed below: "Justification: The article referred to contains an absolute prohibition on trading, selling, distributing, displaying, promoting, or producing objects that are not tobacco products but that in some way emulate them, because they contain elements of the brand or any type of design or auditory signal that identifies them with tobacco products. This prohibition directly affects various human rights, including freedom of trade. Hence, its constitutionality is subject to a proportionality test, which it does not satisfy. This is because, although the prohibition

1. The challenged judicial decision erroneously concluded that the challenged decree is not contrary to the right to equality and the principle of non-discrimination. According to the plaintiff, the District Court got to this conclusion without carrying out a strict scrutiny in its decision, arguing that the regulation does not distinguish either the activity carried out by each establishment in relation to the public to which it is addressed, nor the material possibility that its premises allow for the adaptation of designated outdoor smoking areas.

The District Court examined only that there were no grounds to scrutinize its constitutionality, based on the ground that the challenged rule does not fall within any of the suspect categories for discrimination provided in Article 1 of the Constitution. To teach this conclusion, the District Court argued that the challenged rule serves the proper purpose of protecting the right to health of non-smokers. For the appellant, the District Court did not consider that the challenged decree places the appellant at a disadvantage compared to establishments that have open-air spaces, which would eventually lead to the loss of the appellant's clients and the ensuing patrimonial damage.

1. The judicial decision under appeal improperly ruled that the challenged decree does not violate the principle of legitimate trust and does not affect acquired rights. According to the appellant, that decision was based on the premise that the appellant only had legal expectations because the legislature has the legal power to issue laws freely. The plaintiff contended that the judicial decision omitted to conclude that the plaintiff should be granted legal certainty regarding the investments made to comply with the legislation as it existed before its amendment. The plaintiff added that the legislation was arbitrarily and

pursues a constitutionally valid purpose (such as protecting the human right to health) and constitutes a suitable measure to satisfy that purpose to some degree, the truth is that it is not a necessary measure, as there are equally suitable alternatives to achieve its purpose that are less harmful to freedom of trade than an absolute ban (for example, restrictions on the sale of these products to minors or educational and information campaigns on the harmful effects of products that emulate those of tobacco). Even if the measure were necessary, it would be disproportionate in the strict sense, as it constitutes an absolute and overly inclusive ban, since it prohibits non-tobacco products that may have a greater impact on consumption or addiction than products that may have a lesser impact. Furthermore, the ban is established indiscriminately for both minors and adults, ignoring the fact that the latter can access tobacco simply by proving that they are of legal age.

suddenly modified, thereby restricting the plaintiff's freedom of trade without a reasonable justification.

Accepting the District Court's conclusion would amount to admitting that the legislature has arbitrary and unlimited powers not subject to any control, which would go against the purposes of the democratic State, whose activity is conditioned by society's fundamental rights.

Furthermore, the judicial decision violates the principle of progressive realization, in its non-regression facet, by violating acquired rights. Such acquired rights correspond to those inherent in protecting the appellant's freedom of trade based on the repealed regulation. Therefore, a proportionality test between the rights in collision should have been carried out.

1. Admission and procedures. The appeal for review was turned over to the Tenth Collegiate Court in Administrative Matters of the First Circuit, registered under file number 31/2023, and admitted by resolution of January 19, 2023.

2. Decision of the Collegiate Court. In the session of July 13, 2023, the Tenth Collegiate Court in Administrative Matters of the First Circuit issued a decision in which it declared that it lacked jurisdiction to resolve the matter since the question of the constitutionality of Article 27 of the General Law for the Control of Tobacco persisted. Hence, this Collegiate Court determined to refer the case to the Supreme Court of Justice of the Nation, considering that there was no jurisprudence on the subject nor three precedents on the matter.

Proceedings before the Supreme Court of Justice of the Nation. By resolution of August 15, 2023, the Chief Justice of the Supreme Court of Justice of the Nation ordered to assume jurisdiction to hear the appeal for review, to which corresponded the file of Amparo in review 672/2023. Likewise, she referred the issue to Justice Loretta Ortiz Ahlf and ordered that it be filed in this Second Chamber.

4. Assumption of jurisdiction over the case. By agreement of September 25, 2023, the President of the Second Chamber ordered the case to be heard and decided to refer the case to the office of Justice Loretta Ortiz Ahlf to prepare the corresponding draft resolution.

5. Reassignment. By order of January 3, 2023, due to the assignment of Justice Loretta Ortiz Ahlf to the First Chamber of this Supreme Court of Justice of the Nation and considering that the Plenary of the Senate swore in Justice Lenia Batres Guadarrama, the present matter was sent to Justice Lenia Batres Guadarrama for her review.

6. Publication of the draft. In accordance with Articles 73, paragraph two, and 184, paragraph one, of the Amparo Law, the draft judgment was made public, with the same advance notice as the publication of lists of cases.

I. JURISDICTION

1. This Second Chamber of the Supreme Court of Justice of the Nation has jurisdiction to hear and decide this appeal for review based on the provisions of Articles 107, Section VIII, paragraph a), of the Political Constitution of the United Mexican States; 83, first paragraph, of the Amparo Law; and 21, Section III, of the Organic Law of the Judiciary of the Federation, as well as on the First and Third Points of the Plenary General Agreement 1/2023, published in the Official Gazette of the Federation on February 3, 2023, and amended on April 10 of that same year, as it is a matter of an administrative nature, within the jurisdiction of this Second Chamber, whose decision does not warrant the intervention of the Full Court. The foregoing, since it is filed against a ruling handed down by a District Judge in an indirect amparo proceeding in which federal administrative regulations for which there is no case law were challenged.

2. The considerations set forth herein are binding, having been unanimously approved by five votes from Ministers Yasmín Esquivel Mossa, Lenia Batres Guadarrama (rapporteur), Luis María Aguiar Morales, Javier Laynez Potisek, and President Alberto Pérez Dayán.

II. STANDING AND TIMELINESS

1. This Second Chamber deems it unnecessary to rule on standing and timeliness in the presentation of the appeal for review, since the Collegiate Circuit Court addressed these issues in the second and third paragraphs of its decision, respectively.

III. ADMISSIBILITY

1. This Second Chamber does not find *ex officio* the existence of any cause of inadmissibility or ground for dismissal; therefore, the present matter merits the corresponding substantive review.

2. The considerations set forth herein are binding, having been unanimously approved by five votes from Ministers Yasmín Esquivel Mossa, Lenia Batres Guadarrama (rapporteur), Luis María Aguiar Morales, Javier Laynez Potisek, and President Alberto Pérez Dayán.

IV. CONSIDERATION OF THE MERITS

1. Issue under analysis. The review will address the constitutionality of Article 27 of the General Law for Tobacco Control, as outlined in the Decree published in the Official Gazette of the Federation on February 17, 2022, in accordance with the appeal for review filed by the authorized party of the legal entity. To do so, it will break down the claim as follows: (i) freedom of trade; (ii) right to equality and principle of non-discrimination; and (iii) legal certainty.

(i) On freedom of trade

1. The first claim argues that the appealed judgment incorrectly concluded that the challenged decree is in accordance with the principle of legal reasonableness and proportionality, thereby ignoring that the challenged rule

violates their freedom of trade. It is deemed **unfounded**.

2. In this regard, it should be noted that Article 5 of the Constitution provides that no person may be prevented from engaging in the profession, industry, trade, or work that suits him/her if it is lawful. This freedom may be stopped only by judicial determination when the rights of third parties are attacked, or by governmental resolution when the rights of society are offended, provided that it is dictated under the terms established by law.

3. Article 6 of the International Covenant on Economic, Social and Cultural Rights indicates that States recognize the right to work, which includes the right of everyone to the opportunity to gain their living by work freely chosen or accepted, and that appropriate steps shall be taken to ensure this right.

4. Article 6 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador,"² states that everyone has the right to work, which includes the opportunity to obtain the means to lead a decent and dignified life through the performance of a freely chosen or accepted lawful activity.

5. The fundamental right to freedom of work, in connection with the freedom of profession or trade provided for in Article 5 of the Constitution, guarantees that individuals or legal entities engage in productive activities that give them the satisfaction of their needs through the industrialization and commercialization of goods and services.³

6. In the first claim, the appellant states that the District Court started its analysis from the incorrect premise that the freedom of trade only entails the appellant's freedom to exploit their commercial establishment. The appellant considers this

² Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights "Protocol of San Salvador" CNDH Date of publication: September 1, 1998.

³ Location data: First Chamber. Type of thesis: Case law. Source: Weekly Judicial Gazette of the Federation. Volume II, Book 15, July 2022. Subject(s): Administrative, Constitutional. Thesis 99/2022 (11th). Page 2097. Digital record 2025003., under the heading: **"FREEDOM OF TRADE. THE PROHIBITION OF THE GENERAL HEALTH LAW AND THE FEDERAL CRIMINAL CODE, FOR THE GROWING, HARVESTING AND CULTIVATION OF CANNABIS FOR THE PRODUCTION OF ITS DERIVATIVES, IN CONCENTRATIONS OF 1% (ONE PERCENT) OR LESS OF THC (TETRAHYDROCANNABINOL), WITH BROAD INDUSTRIAL USES AND PURPOSES OTHER THAN MEDICAL AND SCIENTIFIC, AFFECTS, PRIMA FACIE, THE CONTENT OF THAT FUNDAMENTAL RIGHT".**

wrong because the freedom of trade also includes the right to take the appropriate actions to commercialize their services in the manner that best suits the needs of their transactions.

7. The Second Chamber deems this claim unfounded since the District Court correctly assessed that the purpose of the challenged regulation is to control the conditions of tobacco consumption in establishments with public access in harmony with protecting the right to health of the people who come to consume their services.

8. Article 27 of the General Law for Tobacco Control,⁴ in force since the publication of the decree in the Official Gazette of the Federation on February 17, 2022, establishes the basis for the existence of designated smoking areas in places with public access, restricting them to spaces located only outdoors.

9. As a preamble, it is worth mentioning that the 56th World Health Assembly adopted the World Health Organization Framework Convention on Tobacco Control, ratified by Mexico on May 28, 2004, whose Article 8 outlines that science has unequivocally demonstrated that exposure to tobacco smoke is a cause of mortality, morbidity, and disability.

10. Such Article 8 sets forth the obligation of States Parties to adopt and implement effective legislative, executive, administrative, and other measures to protect against exposure to tobacco smoke in indoor workplaces, transportation, indoor public places, and other public places, as appropriate.

11. In this regard, the Committee on Economic, Social and Cultural Rights, in General Comment 24,⁵ points out that certain business activities have had a negative impact on the economic, social, and cultural rights of individuals, particularly regarding the right to health. For this reason, the committee asserted that companies must respect domestic legislation designed to respect, protect, and ensure the effectiveness of this right, as in the case of the limitation

⁴ Article 27. There may be areas designated exclusively for smoking in places with free or restricted access to the public, workplaces with or without attention to the public, public or private. Such areas shall be located only in open-air spaces in accordance with the provisions established by the Ministry.

⁵ Committee on Economic, Social and Cultural Rights, *General Comment No. 24 (2017) on States' obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, adopted at its 61st session (29 May-23 June 2017), paragraphs 1, 5, 10 and 19.

of services related to tobacco products in accordance with the Framework Convention on Tobacco Control.

12. The amendment to the challenged rule stemmed from the opinion of the Health and Legislative Studies Commissions of the Senate, which stated that second-hand tobacco smoke is the mixture of the smoke exhaled by the smoker and the smoke emanating from the lit cigarette. According to this body, second-hand tobacco smoke generates a deadly mix of more than seven thousand chemical substances, of which two hundred and fifty cause proven damage to health, and at least sixty-nine of those substances are carcinogenic.

13. The Health and Legislative Studies Commissions of the Senate's opinion emphasized that if Mexico carried out the proposed reforms to the General Law for Tobacco Control, setting out spaces 100% free of tobacco smoke and emissions, it would prevent diseases derived from the consumption of this product and exposure to the smoke it emits, as well as avoid the death of more than fifty-one thousand people and the exposure of more than forty million people to second-hand tobacco smoke annually.

14. After clarifying the above, the Second Chamber considers that the purpose of the challenged regulation is to protect the right to health of persons as an adequate and proportional measure so that tobacco consumption can be carried out in establishments with access to the public under a scheme in which smokers do not affect the personal sphere of those who do not smoke.

15. This legislative measure is in accordance with the constitutional text because, contrary to what the appellant claims, the challenged Article does not determine the particular actions that the commercial establishment must carry out to comply with the objectives inherent to its commercial line of business, corporate purpose, or economic interests. Instead, the Article determines the scheme to which spaces designated exclusively for smokers must conform to protect the health of non-smokers.

16. The Supreme Court of Justice of the Nation has held that protecting people's health is a crucial objective that clearly justifies regulations of trade and industry, including, in particular, preventing smoking inside enclosed spaces of public

establishments.⁶

17. The Supreme Court has also asserted that the measures designed to limit tobacco consumption within particular areas in establishments open to the public do not affect the core of the right to choose a profession or trade since they do not amount to a restriction that conditions the possibility of owning or operating a commercial establishment. Instead, they simply regulate the conditions for exercising those freedoms, as so many other measures do in a vast universe of regulatory norms in which these commercial establishments are immersed.⁷

18. The delimitation of the conditions of the designated smoking areas that may exist in establishments open to the public does not limit the exercise of the freedom of trade of individuals or legal entities since it does not affect the substantive nature of the economic activities in which they decide to engage. Nor does this delimitation violate the right to operate their commercial businesses, since the purpose of the challenged regulation is to regulate protection areas to ensure the integrity of people to reduce the latent risks that may exist to their health and life.

19. This protection extends to all persons who enter enclosed spaces in commercial establishments, regardless of whether they are smokers or not, such as those who perform the work necessary to ensure the proper operation of these businesses.

20. This is true even if the commercial purpose of the appellant is the operation of casinos and gambling centers for the exclusive entertainment of adults, excluding minors, since the problem of tobacco consumption and exposure to second-hand smoke equally affects the health of this adult sector, by causing

⁶ Location data: Plenary session. Type of thesis: Case law. Source: Weekly Judicial Journal of the Federation and its Gazette. Volume XXXIV, August 2011. Subject(s): Constitutional, Administrative. Thesis P.J. 25/2011. Page 9. Digital record: 161230, entitled: "**PROTECTION OF THE HEALTH OF NON-SMOKERS IN THE FEDERAL DISTRICT. THE CONCERNED LAW DOES NOT VIOLATE THE GUARANTEE OF FREEDOM OF TRADE**".

⁷ Location data: Plenary session. Type of thesis: Case law. Source: Weekly Judicial Journal of the Federation and its Gazette. Volume XXXIV, August 2011. Subject(s): Constitutional, Administrative. Thesis P.J. 27/2011. Page 19. Digital record 161223, with the title: "**PROTECTION OF THE HEALTH OF NON-SMOKERS IN THE FEDERAL DISTRICT. THE CONCERNED LAW DOES NOT VIOLATE THE GUARANTEE OF FREEDOM OF TRADE**".

diseases such as diabetes, neoplasms, chronic respiratory disorders and cardiovascular diseases, among others, which cause the death of more than fifty-one thousand people per year.

21. In conclusion, the regulation of smoke-free enclosed spaces is adopted as a progressive measure that seeks to guarantee the maximum degree of people's right to health by accumulating gradual actions that the State has at its disposal to attain their full effectiveness.

22. It should not go unnoticed that the appellant has referred to the content of the case law P.J. 3/2022 (11a.) with digital registry 2024425, under the heading: **"TOBACCO CONTROL. THE ABSOLUTE PROHIBITION OF ARTICLE 16, SECTION VI, OF THE RESPECTIVE GENERAL LAW IS UNCONSTITUTIONAL."**⁸

23. However, this criterion is not relevant to the case of the appellant in accordance with their corporate purpose since the cited case-law thesis did not follow from the analysis of regulations of spaces designated exclusively for smokers, but is linked to the study of the commercial activities related to the objectives of the companies dedicated to the tobacco industry and the prohibition outlined in article 16, section VI, of the General Law for Tobacco Control to trade, sell, distribute, exhibit, promote or produce any object that is not a tobacco product, containing any of the elements of the brand or any design or auditory sign that identifies them with tobacco products.

⁸ Location data: Plenary session. Type of thesis: Case law. Source: Weekly Judicial Gazette of the Federation. Volume I, Book 12, April 2022. Subject(s): Constitutional. Thesis: P.J. 3/2022 (11a.) Page: 5. Digital record: 2024425. The content of that decision is transcribed below: "Justification: The referred article establishes an absolute prohibition to trade, sell, distribute, exhibit, promote or produce objects that are not a tobacco product, but that in some way emulate it, by containing elements of the brand or any type of design or auditory sign that identifies them with tobacco products. Such prohibition has a frontal impact on several human rights, including the freedom of trade. Therefore, its constitutional validity is subject to a proportionality test, which it does not surpass. This is so because although it pursues a constitutionally valid purpose (such as protecting the human right to health) and constitutes a suitable measure to satisfy to some degree that purpose, it is not a necessary measure, since there are equally suitable alternatives to achieve its purpose, while being less harmful to the freedom of trade than those that an absolute prohibition entails (for example, restrictions on the sale of these products to minors or educational and information campaigns on the harmful effects of products that emulate those of tobacco). Even if the measure were necessary, it would be disproportionate in the strict sense, since it constitutes an absolute and over-inclusive prohibition, since non-tobacco products that may directly have a greater impact on consumption or addiction are prohibited, as well as products that may have a lesser impact. In addition, the prohibition is established indistinctly for minors and adults, ignoring that the latter can access tobacco by simply proving they are of legal age".

24. Therefore, if the appellant's corporate purpose is limited to the crossing of bets in events, races, sports competitions, and games held within and outside the national territory, not including activities related to the production, distribution, and commercialization of tobacco products, it is clear that the assumptions contemplated in the referred criterion do not address the appellant's legal sphere and do not apply to the specific case.

(ii) On the rights to and non-discrimination

1. The second claim states that the appealed judgment concluded wrongfully that the challenged decree is not contrary to the right to equality or the principle of non-discrimination. This claim, too, is deemed **unfounded**. The reason for this conclusion is that the article does not distinguish the specific commercial activity of each establishment in relation to the public it is intended for, nor the prospects for them to have the spaces established in accordance with the regulated conditions.

2. Article 1 of the Constitution states, in the relevant part, that in the United Mexican States, all persons shall enjoy the human rights outlined in the Constitution and in the international treaties to which the Mexican State is a party, as well as the guarantees for their protection, the exercise of which may not be restricted or exceeded, except in the cases and under the conditions established by the Constitution itself.

3. Article 1 also provides for the prohibition of any discrimination based on ethnic or national origin, gender, age, disabilities, social status, health conditions, religion, opinions, sexual preferences, marital status, or any other reason that violates human dignity and has the purpose of nullifying or impairing the rights and freedoms of persons.

4. In this regard, this Supreme Court of Justice of the Nation has specified that to determine whether or not a given normative differentiation is contrary to the principle of equality, a strict scrutiny of the legislative classifications must be carried out. Therefore, whenever the classifying action of the legislator affects

constitutionally guaranteed fundamental rights, it will be necessary to apply the requirements derived from the principle of equality and non-discrimination with particular intensity.⁹

5. However, as the District Court rightly ruled, in this case, there are no grounds for strict scrutiny of the challenged article since it did not introduce any classification that reproduces the classifications provided for in Article 1 of the Constitution as potential acts of discrimination, but instead provided for the administrative conditions that establishments open to the public must have in case they have designated smoking areas, which must necessarily be outdoors.

6. Indeed, the legal provision setting the rules for the distribution of designated smoking areas in establishments accessible to the public entails regulatory measures that do not articulate or delimit spaces based on ethnic or national origins, genders, ages, disabilities, social conditions, health conditions, religions, opinions, sexual preferences, civil status, or any other that may be contrary to human dignity or that may be intended to nullify or impair the rights and freedoms of persons. Henceforth, there are no grounds requiring a particularly intensive examination of the challenged article's content.

7. The purpose of the rule is fulfilled by requiring that establishments open to the public, regardless of their line of business, purpose, or activity, guarantee spaces for coexistence between smokers and non-smokers regarding the right to health of both. Such a purpose is a sufficient and necessary reason to delimit the configuration of these spaces in the open air concerning the possible and dangerous indirect inhalation of tobacco smoke.

8. In this sense, this Supreme Court of Justice of the Nation has pointed out that the rules aimed at the protection of non-smokers in establishments open to the public must be analyzed under non-strict scrutiny as long as they do not affect any of the categories of Article 1 of the Constitution and deal with

⁹ Location data: First Chamber. Type of thesis: Case law. Source: Weekly Judicial Journal of the Federation and its Gazette. Volume XXVII, April 2008. Subject(s): Constitutional. Thesis: 1a/J. 37/2008. Page: 175. Digital record: 169877, under the heading: "**EQUALITY. CASES IN WHICH THE CONSTITUTIONAL JUDGE MUST APPLY A STRICT SCRUTINY OF LEGISLATIVE CLASSIFICATIONS (INTERPRETATION OF ARTICLE 1 OF THE POLITICAL CONSTITUTION OF THE UNITED MEXICAN STATES).**"

operational conditions of the activities that the establishments may perform.¹⁰

9. The Supreme Court has even asserted that such regulations constitute justified operating conditions that apply to all premises that people want to use for the performance of professional, industrial, or commercial activities, to make sure that, in their operation, non-smokers will not inhale tobacco smoke in the respective premises.¹¹

10. Moreover, the appellant argued that the challenged decree did not distinguish the adult public that goes to their establishment for recreational purposes and that the decree did not consider that it places the adult public in a disadvantageous position compared to those establishments that do have outdoor spaces, which would eventually lead to the loss of their customers and losses in their property. The Court considers these arguments unrelated to the substantive content of the challenged article, whose constitutionality analysis depends only on the general circumstances it contemplates, not on the specific situation of any of its addressees.¹²

(iii) On the rights of legal certainty

1. The third claim states that the appealed judicial decision improperly determined that the challenged article does not violate the principle of legitimate trust or acquired rights. In the appellant's view, it does violate the exercise of their freedom of trade by modifying the conditions that existed before the

¹⁰ Location data: Plenary session. Type of thesis: Case law. Source: Weekly Judicial Journal of the Federation and its Gazette. Volume XXXIV, August 2011. Subject(s): Constitutional, Administrative. Thesis: P./J. 29/2011. Page: 20. Digital record: 161222, under the heading: "**PROTECTION OF THE HEALTH OF NON-SMOKERS. THE RULES THAT RESTRICT THE POSSIBILITY OF SMOKING IN COMMERCIAL ESTABLISHMENTS OPEN TO THE PUBLIC MUST BE ANALYZED UNDER NON-STRICK SCRUTINY.**"

¹¹ Location data: Plenary session. Type of thesis: Case law. Source: Weekly Judicial Journal of the Federation and its Gazette. Volume XXXIV, August 2011. Subject(s): Constitutional, Administrative. Thesis: P./J. 30/2011. Page: 11. Digital record: 161228, under the heading: "**PROTECTION OF THE HEALTH OF NON-SMOKERS IN THE FEDERAL DISTRICT. THE CONCERNED LAW DOES NOT VIOLATE THE PRINCIPLE OF EQUALITY AND NON-DISCRIMINATION.**"

¹² Location data: Second Chamber. Type of thesis: Case law. Source: Weekly Judicial Journal of the Federation and its Gazette. Volume XXVI, October 2007. Subject(s): Constitutional. Thesis: 2a./J. 182/2007. Page: 246. Digital record: 171136, under the heading: "**LAWS. THEIR UNCONSTITUTIONALITY HINGES ON GENERAL CIRCUMSTANCES, NOT ON THE PARTICULAR SITUATION OF THE SUBJECT TO WHICH THEY APPLY.**"

enactment of the challenged decree. The Court finds the claim **unfounded**.

2. Indeed, as the District Court correctly pointed out, the amendment to Article 27 of the General Law for Tobacco Control derived from the powers of the Congress of the Union to adjust the legislation to the social changes that occur successively.

3. This Second Chamber considers that the granting of a permit for a company to operate in accordance with its line of business, purpose, or activity does not imply that it has certain acquired rights that cannot be later changed. On the contrary, granting the permit to a mercantile establishment open to the public obliges the State to update the normative regulations inherent to the conditions of operation of the establishments, especially regarding the guarantee of the health of persons in the delicate task of regulating exposure to tobacco products.

4. The fact that an establishment has an authorization to carry out certain activities does not exempt it from complying with the conditions imposed by operational regulatory provisions that are updated in view of changes in a society's structures, values, norms, and relations, since even freedom of trade is subject to being lawful and respecting the rights of third parties.

5. In this regard, the Supreme Court of Justice of the Nation has pointed out that rules such as the one under review must be interpreted in attention to the purposes of protecting the health of people concerning the mechanisms, actions, and public policies aimed at preventing and reducing the consequences derived from the exposure to tobacco smoke in any of its forms.¹³

6. Therefore, the appellant's argument that the challenged article violates the principle of progressive realization, in its non-regression facet, is not correct, since the legal provision's content did not affect the rights acquired by the

¹³ Location data: Plenary session. Type of thesis: Case law. Source: Weekly Judicial Journal of the Federation and its Gazette. Volume XXXIV, August 2011. Subject(s): Constitutional, Administrative. Thesis: 2a./J. 22/2011. Page: 13. Digital record: 161227, with the title: "**PROTECTION OF THE HEALTH OF NON-SMOKERS IN THE FEDERAL DISTRICT. THE CONCERNED LAW AND ITS REGULATIONS DO NOT VIOLATE THE PRINCIPLES OF LEGALITY AND LEGAL CERTAINTY.**"

appellant; instead, the challenged decree incorporates rules that all establishments open to the public must abide by to protect the right to health of persons.

7. The legitimate trust alleged by the appellant does not amount to the inability of the legislative bodies to issue progressive regulations among the myriad of necessary and indispensable actions whose implementation was deemed essential to reduce mortality, morbidity, and disability caused by exposure to tobacco smoke.

8. Consequently, the District Court's decision not to apply the proportionality test in the terms requested by the appellant was appropriate since it is up to the legal operator to decide which of the available argumentative methods is suitable, not being obliged to justify the reasons that led him not to use the one proposed. That aspect is inherent to the judge's freedom of jurisdiction as long as the determination is subject to the satisfaction of the constitutional requirements of substantiation and reasoning.¹⁴

9. These considerations are binding because they were approved by a majority of 4 votes from Ministers Yasmín Esquivel Mossa, Lenia Batres Guadarrama (rapporteur), Javier Laynez Potisek, and President Alberto Pérez Dayán. Minister Luis María Aguilar Morales voted against the absolute ban, citing a lack of justification. Minister Javier Laynez Potisek voted against the methodology and considerations, stating that he would cast a concurring vote.

V. DECISION

1. Consequently, since the appellant's arguments are unfounded, it is appropriate to deny the protection requested regarding the constitutionality of Article 27 of the General Law for Tobacco Control.

¹⁴ Location data: First Chamber. Type of thesis: Case law. Source: Weekly Judicial Journal of the Federation and its Gazette. Volume 1, Book V, February 2012. Subject(s): Constitutional. Thesis: 1a./J. 2/2012 (9a.). Page: 533. Digital record 160267, under the heading: "**RESTRICTIONS TO FUNDAMENTAL RIGHTS. ELEMENTS THAT THE CONSTITUTIONAL JUDGE MUST TAKE INTO ACCOUNT TO CONSIDER THEM VALID**".

In view of the foregoing and the considerations set forth above, the Second Chamber of the Supreme Court of Justice of the Nation rules:

FIRST. On the review, the challenged judgment is **upheld**.

SECOND. The Justice of the Union **does not protect or defend** the complainant against Article 27 of the General Law for Tobacco Control, consistent with the Decree published in the Official Gazette of the Federation on February 17, 2022.

Notify: with the notification of the present judicial decision, return the records to the original Collegiate Court and, in due course, file the file as a concluded matter.

The Second Chamber of the Supreme Court of Justice of the Nation so ruled by a majority of four votes from Justices Yasmín Esquivel Mossa, Lenia Batres Guadarrama (rapporteur), Javier Laynez Potisek, and President Alberto Pérez Dayán. Justice Luis María Aguilar Morales voted against the ruling because there was no justification for the absolute prohibition. Minister Javier Laynez Potisek voted against the methodology and considerations, stating that he would cast a concurring vote.

The President of the Second Chamber and the Reporting Justice sign, with the Secretary of Agreements, authorizing and certifying.

PRESIDENT

JUSTICE ALBERTO PÉREZ DAYÁN

REPORTING JUSTICE

JUSTICE LENIA BATRES GUADARRAMA

**SECRETARY OF AGREEMENTS
CLAUDIA MENDOZA POLANCO**

This document corresponds to appeal 672/2023, ruled on in session on March 13, 2024. **LET IT BE KNOWN.**

In accordance with the provisions of Articles 113 and 116 of the General Law on Transparency and Access to Information, and Articles 110 and 113 of the Federal Law on Transparency and Access to Information; as well as General Agreement 11/2017, of the Plenary Session of the Supreme Court of Justice of the Nation, published on September 18, 2017, in the Official Gazette of the Federation, in this public version, information considered legally reserved or confidential in those regulatory cases is deleted.