CONSTITUTIONAL COURT

REPUBLIC OF GUATEMALA, C.A.

DOCKET 2158-2009

THE CONSTITUTIONAL COURT, CONSISTING OF JUSTICES JUAN FRANCISCO FLORES JUAREZ, WHO PRESIDES THEREOVER, ALEJANDRO MALDONADO AGUIRRE, MARIO PEREZ GUERRA, GLADYS CHACON CORADO, JOSE ROLANDO QUESADA FERNANDEZ, VINICIO RAFAEL GARCIA PIMENTEL and HILARIO RODERICO PINEDA SANCHEZ. Guatemala, February sixteen two thousand ten.

To issue a judgment, consideration was afforded to the general claim of unconstitutionality brought by the Guatemala Chamber of Commerce against Articles 3, 4 and 6 of the Law for the Creation of Tobacco Smoke Free Environments. The petitioner is domiciled in the department of Guatemala and has acted with counsel from attorneys Luis Fernando Merida Calderon, Hector Eduardo Berducido Mendoza and Luis Alberto Barrientos Suasnavar.

BACKGROUND INFORMATION

I. LEGAL GROUNDS OF CHALLENGES

The petitioner of a finding of unconstitutionality states that the challenged norms are in conflict with the constitutional text for the following reasons: **a) violation of Article 43 of the Political Constitution of the Republic**. Challenged Article 3 prohibits smoking or maintaining tobacco products lit in any enclosed public space, which is in violation of the freedom of industry and commerce contained in Article 43 of the Constitution, inasmuch as, although such prohibition is based on enforcing the right to health, there is no provision prohibiting the activities destined for the manufacture, production, distribution or marketing of such tobacco-based products, which activities are admittedly lawful, representing the exercise of the freedom of industry and commerce. Therefore, by maintaining the lawful nature of the activities destined for the manufacture, production, distribution and marketing of such products, the prohibition to consume them as established in the referred Article leads to consider that the Law for the Creation of Tobacco Smoke Free Environments represents a limitation or restriction of the exercise of the freedom of industry and commerce. The sole exception to the virtually-absolute ban against smoking refers to hotel and motel rooms, subject to the conditions determined by the law itself. This circumstance evidences that the limitation is absolute and that such products may solely be consumed in private homes. This leads to the conclusion that the consumption of tobacco products is a clandestine activity. The application of the provisions of Article 3 of the Law for the

Creation of Tobacco Smoke Free Environments shows a clear restriction of the exercise of the freedom of industry and commerce beyond the margin of reasonability and ultimately rendering the aforesaid freedom worthless. Therefore, such prohibition is unconstitutional. **b) violation of Article 2 of the Constitution.** Article 2 of the Political Constitution of the Republic establishes the principle of legal security. Under such perspective, it is clear that the content of subsection a) of Article 3 of the challenged law is contrary to the principle in question as it prohibits smoking or maintaining any type of tobacco products lit "in any enclosed public space", without defining what is to be understood as "enclosed public places". Article 2 of the Law for the Creation of Tobacco Smoke Free Environments defines "public place" and "enclosed place", but does not define an "enclosed public place". This implies that the prohibition established in the aforesaid Article 3 is devoid of the security feature required under the constitutional norm. As the Law does not define what is to be understood by "enclosed public place", the prohibition in question gives rise to a lack of the certainty that a norm must have to be effectively enforced. It is unconstitutional to establish a norm prohibiting smoking without providing the persons that must observe this prohibition the elements to allow them to comply with the provision and avoid punishment. **c) violation of Article 4 of the Political Constitution of the Republic.** The intention of the lawmaker was to establish several scenarios with areas exempt from the general prohibition established in the Law for the Creation of Tobacco Smoke Free Environments. This is confirmed by the text of initiative 3309, heard by the Congress of the Republic in plenary meeting held on August ten, two thousand five, as it references private clubs, open outdoor areas and places for employees specially conditioned for such purpose as possible exempt areas. By not including the referenced places and solely establishing hotels and motels as exempt places, a privilege is granted to the owners of such businesses. That is contrary to the principle of equality recognized under Article 4 of the Political Constitution of the Republic, inasmuch as other types of analogous establishments cannot benefit by setting aside at least twenty percent of their areas as spaces exempt from the smoking ban. **d) violation of Articles 5, 41 and 42 of the Constitution.** Article 6 of the Law for the Creation of Tobacco Smoke Free Environments establishes several scenarios for overriding the ban against smoking or maintaining tobacco products lit, establishing pecuniary penalties for offenders. Should the prohibition contained in Article 3 of the referenced Law, in its application, result in an unreasonable exercise of the freedom of industry and commerce and is therefore unconstitutional, the same qualification would apply to the infraction contained in Article 6.1) in question (a pecuniary penalty equivalent to ten days of minimum wages for agricultural activities).

Should the activity of manufacture, production, distribution and marketing of tobacco products not constitute an unlawful activity, by unreasonably restricting its consumption and penalizing as described the failure to observe the ban established in Article 3 of the Law for the Creation of Tobacco Smoke Free Environments, the freedom of industry and commerce would be undermined, as a legal activity would be transformed into an illegal one, in a contradictory and unreasonable manner. Based on these same arguments, Article 6.2 of the referred Law is also unconstitutional; in addition to the fact that the norm in question makes a penalty applicable to a person other than to whom the prohibition is addressed, due to the mere fact of their being the owner or manager of the place where another person – consumer – disrespects the prohibition imposed by law. Article 6.1) is also considered to be in infringement of Article 41 of the Political Constitution of the Republic, which expressly prohibits the seizure of goods and the imposing of confiscatory fines. This circumstance would arise in case of a literal application of the norm in question, which provides that in the case of second offenses, the offender shall be subject to twice the penalty established, and for each subsequent offense, the amount of the preceding penalty shall be doubled, without establishing a maximum limit to such penalties. This could in the future render the penalty imposed confiscatory. A similar argument is employed against subsections 2), 3) and 4) of that same Article 6 of the Law for the Creation of Tobacco Smoke Free Environments, with regard to the penalty of closing establishments for the breach of the obligations established in the law in question. The claimants hold that these circumstances breach Article 43 of the Political Constitution of the Republic, inasmuch as by not establishing a maximum number of days of penalty, this could prevent the development of an industrial or commercial activity, nullifying the freedom protected by the Constitution. **e) violation of Article 2 of the Political Constitution of the Republic**. Article 6.4) of the Law for the Creation of Tobacco Smoke Free Environments represents a threat to the legal security of the Guatemalan State, inasmuch as it provides a penalty for establish smoking areas in forms differing from those established by the challenged law, in spite of the fact that, upon examination of the challenged law, there is no reference to any procedure whatsoever for the creation of smoking areas. The aforementioned circumstance speaks to the lack of legal security represented by the challenged norm, inasmuch as the people to whom the prohibition is directed do not have sufficient regulatory elements to foresee or anticipate their behavior so as to not incur in the situation which would lead to their being penalized. **f) Proposal of exhortative finding**. As a case law development, judgments referred to as exhortative have been proffered in certain constitutional courts of around the world. The purpose

of such judgments, among others, is to recommend the lawmaker to issue new norms to replace those then current, so that the matters regulated thereby conform to the provisions of the constitutional text. It is based on what has been established by doctrine that this Court is asked to request the Legislative Body to establish further types of exceptions to the smoking ban, providing a reasonable balance and allowing the harmonious coexistence of the consumption of tobacco products, while respecting the right to health and the freedom of industry and commerce.

II. UNCONSTITUTIONALITY PROCEEDINGS

The provisional suspension of the challenged norms was not decreed. Hearings were set up for within fifteen days with the President of the Republic of Guatemala; the Congress of the Republic of Guatemala; the Ministry of Public Health and Social Welfare; the Ministry of the Environment and Natural Resources; the Public Prosecutor's Office, through the Office of the Prosecutor of Constitutional Matters, Relief and Habeas Corpus; and the Medicine Faculties of the Universities of the country. The date and time for the hearing was promptly set.

III. SUMMARY OF PLEAS

The Public Prosecutor's Office stated that it does not share the opinion of the claimant inasmuch as, although the law seeks to protect non smokers from the damage caused by second-hand smoke, this does not mean that it prohibits the production of tobacco and tobacco products. It also held that the lack of a definition of enclosed public place does not constitute a defect that would imply the unconstitutionality of the Law for the Creation of Tobacco Smoke Free Environments, inasmuch as an overall interpretation of the items existing in the law in question is required to determine the types of spaces where smoking is banned. It also held that there is no violation of the principle of equality inasmuch as the regulations to the challenged law lists in detail other places where smokers may consume tobacco products without restrictions. It further claimed that, contrary to what the claimant has held, the law does not prohibit smoking. What it does is establish the places where smoking is or is not permitted. It also added that the breach of the requirements made by law will logically carry consequences for noncompliance, but this does not render the norm unconstitutional. It requested that the action for unconstitutionality be dismissed. **B) The President of the Republic of Guatemala**, merely came forth in these proceedings for procedural purposes. He asked that a finding be reached in accordance with the Law. **C) The Ministry of the Environment and Natural Resources** began its testimony by stating that the Law for the Creation of Tobacco Smoke Free Environments develops what has been established by the World Health Organization, WHO, which has recognized nicotine use as an

epidemic with worldwide implications due to its dire consequences on public health, and that it has warned that the increase in the consumption and production of cigarettes and other tobacco products worldwide, especially in developing countries, poses a serious risk to health and to family economics, due to the burden it imposes on the poorest families and the national health systems. It further stated that numerous scientific studies have proven that the consumption of tobacco and exposure to second-hand smoke are causes of morbidity and disability, and that their effects on health are caused through brief and small dosages when an individual is exposed to tobacco smoke. This makes it necessary to take preventive and prohibitive measures to separate the people from consumption or exposure to second-hand smoke. It also held that important and conclusive studies in relation to the consumption of tobacco and the exposure to second-hand smoke have shown that the latter contributes to pollution in enclosed environments, causing serious damage to the health of non smokers or second-hand smokers, who are susceptible of serious diseases, such as heart attacks, brain hemorrhaging and chronic obstructive pulmonary disease, among others. It further held that the Law for the Creation of Tobacco Smoke Free Environments does not breach Articles 2, 4, 41 and 43 of the Political Constitution of the Republic. Rather, on the contrary, it develops the constitutional principles guaranteeing life, freedom, justice, security, peace and the comprehensive development of the person as a duty of the State with the inhabitants of the Republic; as well as the freedom and equality in dignity and rights among all mankind. Finally, it held that upon reading the report of filing of this action for general partial unconstitutionality it seems clear that it does not meet the elemental requirements established in Article 135 of the Law of Relief, Habeas Corpus and Constitutionality, specifically as it should have expressed in a clear reasoned manner the strictly and purely legal grounds supporting the challenge. It requested that the general partial unconstitutionality action be dismissed. **D) Faculty of Medical Sciences of San Carlos University, Guatemala** stated that it was conducting the relevant inquiries to issue a decision on the proposed unconstitutionality and would therefore present its pleas on the day of the hearing. **E) The Congress of the Republic** considered that it enacted the Law for the Creation of Tobacco Smoke Free Environments upon interpretation of the criteria of the constitutional framers established in the preliminary recitals of the Political Constitution of the Republic of Guatemala, as follows: "…affirming the primacy of the human being as the subject and purpose of social order, recognizing the family as the primary and fundamental genesis of the spiritual and moral values of society and, the State, as responsible for the promotion of the common good…", developed in Articles 1, 2, 93, 94 and 95 establishing: that

the ultimate purpose of the State is the accomplishment of the common good; that it is the duty of the State to guarantee the life of the inhabitants of the Republic; that the right to health is a fundamental right of the human being, without any discrimination whatsoever; that the State shall guarantee the health and social welfare of all inhabitants and shall develop prevention actions through its institutions… and any relevant complementary others, to provide them the most complete physical, mental and social welfare; and that the health of the people of the Nation is a public good, and that all persons and institutions are required to strive for its preservation and restoration. It further added that the claimant holds that Article 2 of the Political Constitution of the Republic has been breached, but does not clearly establish what the claimed breach is. It further stated that, with respect to the violation of the principle of equality, resulting from the exception established by the Law for the Creation of Tobacco Smoke Free Environments with respect to hotels and motels to set aside rooms for their guests in smoking areas, it should be noted that the lawmaker acted in the use of its authorities, and that such decision is backed by the doctrine established by the Constitutional Court, holding that the principle of equality refers to the universality of the law, but does not prohibit, nor is it contrary to such principle, that the lawmaker have envisaged the need or convenience of classifying and distinguishing between different situations and affording them different treatment, provided the difference is reasonably justified in accordance with the system of values adopted by the Constitution. It added that there are no grounds for the violation of Article 5 of the Constitution, inasmuch as if the owners or managers of the places where the ban is in force break it, or allow it to be broken, they are also responsible for the scenarios set out in the law. It also considered that, in reference to the violation of Article 41 of the Political Constitution of the Republic, the claimant has confused the effects that the seizure of goods may have, or the creation of a confiscatory tax or the imposing of a fine with confiscatory characteristics, with the imposing of a penalty for the performance of a prohibited action. Therefore, it does not see the contradiction claimed with the aforesaid constitutional norm. It requested that the general partial unconstitutionality action be dismissed.

PLEAS MADE ON THE DATE OF THE HEARING

A) The claimant reiterated the pleas set out in its initial brief and subsequently expressed a series of criticisms in respect of those subpoenaed in this action, which were issued due to a lack of analysis of the subject matter or due to the lack of a specific finding in respect of the matter for which they were called. It requested that the general partial unconstitutionality action be upheld.

B) The President of the Republic of Guatemala reiterated the items issued when producing the

hearing granted, and thus merely came forth in these proceedings for procedural purposes. **C) The Congress of the Republic** ratified and reiterated the arguments expressed during the hearing it was granted in this proceeding. It requested that in issuing a judgment the arguments expressed be considered and that, accordingly, the action for the general partial unconstitutionality of Articles 3, 4 and 6 of Decree 74-2008 by the Congress of the Republic be dismissed. **D) Faculty of Medical Sciences of San Carlos University, Guatemala** stated that by Decree 47-2005, amended by Decree 80-2005 by the Congress of the Republic, the State of Guatemala approved the Framework Convention of the World Health Organization for the Control of Tobacco, which is intended to regulate the demand and supply of tobacco products, to continuously and substantially reduce the prevalence of the consumption of tobacco and the exposure to tobacco smoke. It further stated that tobacco use is an epidemic and a worldwide problem with dire consequences for public health. It held that the duty to protect people against the exposure to tobacco smoke is based on basic human rights and freedoms. Due to the dangers posed by the inhalation of second-hand tobacco smoke, the duty of protection is implied in the right to live and the right to enjoy the highest possible level of health, recognized in numerous international legal instruments. It held that there is no problem in the interpretation of what should be understood by "enclosed public place" and, as a result, there cannot be a violation of Article 2 of the Constitution as there is no impact on legal security in the interpretation of the norm. It claimed that no article of the law prohibits the manufacture, production, distribution and marketing of tobacco products, as its purpose is not to regulate such activities, but to establish the norms pertaining to their consumption to protect the right to life and to health of the consumer itself, and of non smokers, passive smokers or second-hand smokers. Along these lines, the Political Constitution of the Republic guarantees those inherent rights of people under Articles 2 and 3 (right to life), 93, 94 and 95 (right to health), the importance and preponderance of which is unquestionable. It stated that the main obligations of the State in economic and social matters include the defense of consumers (without exception, which includes consumers of tobacco products) to guarantee their health and security, as provided by Article 119.i) of the Constitution. It is in pro of such guarantee that the Law for the Creation of Tobacco Smoke Free Environments seeks to establish the norms pertaining to the rights of the consumers of such products and not the rights of the manufacturer, producer, distributor or marketer of tobacco products. It is precisely the social interest referenced in Article 43 of the Constitution that is sought to be preserved and protected. It added that, in the scientific realm, numerous studies have indicated

that there are no safe levels of exposure to second-hand smoke and that methods based on technical solutions such as ventilation, air renewal and the use of areas set up for smokers, do not protect from exposure to tobacco smoke. Therefore, to seek to enhance the places for tobacco consumption would constitute a misguided interest in increasing economic profits through the marketing and distribution of tobacco products, at the expense of the lives and health of the people in general. It considered that the claimant failed to meet the obligation to confront the constitutional norms claimed to have been breached, being that they are the grounds for the actions brought, which are casuistic and misleading, and that such circumstance distorts the purpose of these actions, which is to maintain effective the abstract control of the constitutionality of the norms. It stressed that the purpose of the fine or pecuniary penalty established by the norm in question is not to award ownership in the face of an administrative fault, but rather is a deterrent for offenders, due to the impact on life, health and their own economics, and most especially that of passive smokers. It enclosed documents it identified as Exhibit IV (Guidelines for the Protection from Exposure to Tobacco Smoke, prepared by the World Health Organization); Exhibit V (Document prepared by Dr. Jesus Armando Chavarria, Coordinator of the Physical Activity and Sports Medicine Program, Stage I, of the Faculty of Medical Sciences of the San Carlos University in Guatemala, synthesizing the technical information based on national and international scientific evidence of the benefits of policies favoring tobacco-smoke free environments); Exhibit VI (Publication by the Pan-American Health Organization, in relation to the World No Tobacco Day). It requested that the unconstitutionality action brought be dismissed. **E) The Ministry of the Environment and Natural Resources**, reiterated and confirmed each of the pleas set out in the brief calling the meeting, with emphasis on the following: a) that pertaining to the background information, as it illustrates the steps leading to the enactment of the Law for the Creation of Tobacco Smoke Free Environments; b) the challenged regulations were issued in accordance with the principle of constitutional supremacy; c) the action promoted is devoid of technical – legal analysis to establish the existence of a direct comparison of the challenged norm with the constitutional norm; and d) the challenged norm responds to the constitutional norms referring to the protection of life to health and the healthy environment of the people of the Republic of Guatemala. It requested that the general action for unconstitutionality brought by the Guatemala Chamber of Commerce be dismissed. **F) The Medical Sciences and Health Faculty of the Mariano Galvez University**, stated that the consumption of tobacco is the main cause of preventable disease and death worldwide. It stated that from a legal viewpoint, the

unconstitutionality claimed by the claimant is nonexistent. It further stated that a principle used by the State to limit by law behavior that is contrary to the health of the people is that the interests of the many prevail over the interest of the one. It stated that the duties of the State involve protecting life, the integrity and the common welfare of all the inhabitants of the Republic, a circumstance which implies the protection of the health of the population at a national level. It stated that the lawmaker acted within its powers when considering it necessary to issue measures to control and avoid the environmental contamination produced by the consumption of cigarettes. It requested that the general partial unconstitutionality action filed by the Guatemala Chamber of Commerce be dismissed. **G) The Ministry of Public Health and Social Welfare** stated that there was background information, mainly in terms of health and hygiene policy for the people that determined the need to enact the Law for the Creation of Tobacco Smoke Free Environments. It also indicated that there is scientific proof of the health damage caused by the smoke of tobacco and its derivatives and that such circumstance compels the State to take preventive measures. He stated that the claimant is citing an alleged regulatory incongruence without duly expressing where the defects it claims are located. It stressed that in compliance with the express provisions of Articles 3, 93, 94, 95 and 97 of the Political Constitution of the Republic, the challenged legislative act is fully legal, and establishes guidelines for the protection of the lives and health of non smokers. It requested that the general unconstitutionality action brought by the Guatemala Chamber of Commerce be dismissed. **H) The Public Prosecutor's Office** reiterated the pleas set out in the hearing that it was granted for fifteen days, stressing that it does not share the opinion of the claimant, inasmuch as although the law seeks to protect non smokers from the damage caused by second-hand smoke, this does not imply a prohibition of the production of tobacco and tobacco products. It also held that the lack of a definition of enclosed public place does not constitute a defect that would imply the unconstitutionality of the Law for the Creation of Tobacco Smoke Free Environments, inasmuch as it is necessary to arrive at an overall interpretation of the items existing in the law in question to determine the types of spaces where smoking is banned. It further claimed that, contrary to what the claimant has held, the law does not prohibit smoking. It also added that the breach of the requirements made by law logically carries consequences for noncompliance, but this does not render the norm unconstitutional. It requested that the action for unconstitutionality be dismissed. I) The Association *Una Voz contra el Cancer* (One Voice Against Cancer) requested its appearance *amicus curiae* after the processing of the action had finished, which is why only the brief it filed is on the record. J) The National League against Cancer,

requested its appearance *amicus curiae* after the processing of the action had finished and its request was thus denied.

WHEREAS

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Article 268 of the Political Constitution of the Republic of Guatemala establishes that the Constitutional Court is a permanent court of privative jurisdiction, the essential function of which is to defend the constitutional order, acting as an associate court, independent from the other State Organizations and exercising specific functions assigned by the Constitution and the Law governing the matter. Article 267 of the Constitution in turn establishes that this Court is charged, as the Supreme Court in constitutional matters, with hearing actions against laws, regulations or general provisions containing defects rendering them unconstitutional in whole or in part, to establish whether any contradictions exist between the norms claimed to be unconstitutional and the fundamental provisions contained in the Constitution indicated by the claimant, requiring the deletion from the legal framework of ordinary provisions that infringe upon, undermine or distort the constitutional precepts. On the other hand, if no conflict is found to exist between ordinary norms and those of constitutional hierarchy, the request for unconstitutionality must be dismissed and they must remain unaltered.

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The Guatemala Chamber of Commerce holds that the challenged norm is in violation of the constitutional text for the following reasons: **a)** Challenged Article 3, which prohibits smoking or maintaining tobacco products lit in any enclosed public space, constitutes a violation of the freedom of industry and commerce contained in Article 43 of the Constitution, inasmuch as, although such prohibition is based on enforcing the right to health, there is no provision prohibiting the activities destined for the manufacture, production, distribution or marketing of such tobacco-based products, which activities are admittedly lawful, representing the exercise of the freedom of industry and commerce. Therefore, by maintaining the lawful nature of the activities destined for the manufacture, production, distribution and marketing of such products, the prohibition to consume them as established in the referred Article leads to consider that the Law for the Creation of Tobacco Smoke Free Environments represents a limitation or restriction of the exercise of the freedom of industry and commerce. The sole exception to the virtually-absolute ban against smoking refers to hotel and motel rooms, subject to the conditions determined by the law itself. This circumstance evidences that the limitation is absolute and that

such products may solely be consumed in private homes. This leads to the conclusion that the consumption of tobacco products is a clandestine activity. The application of the provisions of Article 3 of the Law for the Creation of Tobacco Smoke Free Environments shows a clear restriction of the exercise of the freedom of industry and commerce, beyond the margin of reasonability, and ultimately rendering the aforesaid freedom worthless. Therefore, such prohibition is unconstitutional. **b)** Article 2 of the Political Constitution of the Republic establishes the principle of legal security. Under such perspective, it is clear that the content of Article 3.a) of the challenged law is contrary to the principle in question as it prohibits smoking or maintaining any type of tobacco products lit "in any enclosed public space", without defining what is to be understood as "enclosed public places". This implies that the prohibition established in the aforesaid Article 3 is devoid of the security feature required under the constitutional norm. As the Law does not define what is to be understood by "enclosed public place", the prohibition in question gives rise to a lack of the certainty that a norm must have to be effectively enforced. It is unconstitutional to establish a norm prohibiting smoking without providing the persons that must observe this prohibition the elements to allow them to comply with the provision and avoid punishment. **c)** The intention of the lawmaker was to establish several scenarios with areas exempt from the general prohibition established in the Law for the Creation of Tobacco Smoke Free Environments. This is confirmed by the text of initiative 3309, heard by the Congress of the Republic in plenary meeting held on August ten, two thousand five, as it references private clubs, open outdoor areas and places for employees specially conditioned for such purpose as possible exempt areas. By not including the referenced places and solely establishing hotels and motels as exempt places, a privilege is granted to the owners of such businesses. That is contrary to the principle of equality recognized under Article 4 of the Political Constitution of the Republic, inasmuch as other types of analogous establishments cannot benefit by setting aside at least twenty percent of their areas as spaces exempt from the smoking ban. **d)** Article 6 of the Law for the Creation of Tobacco Smoke Free Environments establishes several scenarios for overriding the ban against smoking or maintaining tobacco products lit, establishing pecuniary penalties for offenders. Should the prohibition contained in Article 3 of the referenced Law, in its application, result in an unreasonable exercise of the freedom of industry and commerce and is therefore unconstitutional, the same qualification would apply to the infraction contained in Article 6.1) in question (a pecuniary penalty equivalent to ten days of minimum wages for agricultural activities). Should the activity of manufacture, production, distribution and marketing of tobacco products

not constitute an unlawful activity, by unreasonably restricting its consumption and penalizing as described the failure to observe the ban established in Article 3 of the Law for the Creation of Tobacco Smoke Free Environments the freedom of industry and commerce would be undermined, as a legal activity would be transformed into an illegal one, in a contradictory and unreasonable manner. Based on these same arguments, Article 6.2 of the referred Law is also unconstitutional; in addition to the fact that the norm in question makes a penalty applicable to a person other than to whom the prohibition is addressed, due to the mere fact of their being the owner or manager of the place where another person – consumer – disrespects the prohibition imposed by law. Article 6.1) is also considered to be in infringement of Article 41 of the Political Constitution of the Republic, which expressly prohibits the seizure of goods and the imposing of confiscatory fines. This circumstance would arise in case of a literal application of the norm in question, which provides that in the case of second offenses, the offender shall be subject to twice the penalty established, and for each subsequent offense, the amount of the preceding penalty shall be doubled, without establishing a maximum limit to such penalties. This could in the future render the penalty imposed confiscatory. A similar argument is employed against subsections 2), 3) and 4) of that same Article 6 of the Law for the Creation of Tobacco Smoke Free Environments, with regard to the penalty of closing establishments for the breach of the obligations established in the law in question. The claimants hold that these circumstances breach Article 43 of the Political Constitution of the Republic, inasmuch as by not establishing a maximum number of days of penalty, this could prevent the development of an industrial or commercial activity, nullifying the freedom protected by the Constitution. **e)** Article 6.4) of the Law for the Creation of Tobacco Smoke Free Environments represents a threat to the legal security of the Guatemalan State, inasmuch as it provides a penalty for establish smoking areas in forms differing from those established by the challenged law, in spite of the fact that, upon examination of the challenged law, there is no reference to any procedure whatsoever for the creation of smoking areas. The aforementioned circumstance speaks to the lack of legal security represented by the challenged norm, inasmuch as the people to whom the prohibition is directed do not have sufficient regulatory elements to foresee or anticipate their behavior so as to not incur in the situation which would lead to their being penalized. f) As a case law development, judgments referred to as exhortative have been proffered in certain constitutional courts of around the world. The purpose of such judgments, among others, is to recommend the lawmaker to issue new norms to replace those then current, so that the matters regulated thereby conform to the provisions of the

constitutional text. It is based on what has been established by doctrine that this Court is asked to request the Legislative Body to establish further types of exceptions to the smoking ban, providing a reasonable balance and allowing the harmonious coexistence of the consumption of tobacco products, while respecting the right to health and the freedom of industry and commerce.

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The essential request made by the claimant is for the harmonious coexistence of tobacco products, the respect for the right to health and the freedom of industry and commerce, as mentioned when requesting that this Court issue an exhortative judgment. Its request is based mainly on the claim that the challenged articles of the Law for the Creation of Tobacco Smoke Free Environments pose a threat to the freedom of industry and commerce, the principle of legal security, the prohibition of the confiscation of goods and the imposing of confiscatory fines and the right to equality. By reason of the foregoing, this Court shall analyze all challenges presented collectively and the arguments expressed by the claimant to arrive at conclusions and a final decision that conform to the Law.

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The right to health relates to the fundamental right of all persons to life and to live with dignity. It means that the people are entitled to enjoy the highest possible level of health, but it is not limited solely to that. The World Health Organization defines the right to health as “a state of complete physical, mental and social welfare” which “consists not only of access to medical attention, but also access to all goods and services that are essential to a healthy life, or that are conducive thereto”. A safe household, a clean environment, proper nutrition and correct information on the prevention of diseases are the bases of a healthy life. The right to health also implies that the people have control over their body and health. The right to health compels the States to generate conditions in which all may live as healthily as possible. Such conditions include the guaranteed availability of health services, healthy and safe working conditions, adequate housing and nutritional foods. In conclusion, the right to health is not limited to the right to be healthy. The right to health is established in numerous international and regional human rights treaties and in the constitutions of countries of around the world. As examples of treaties of the United Nations on human rights we shall mention the following: the International Covenant on Economic, Social and Cultural Rights of 1966; the Convention on the elimination of all forms of discrimination against women of 1979; the Convention on the Rights of the Child of 1989. As examples of regional human rights treaties, the following may be mentioned: The European Social

Charter of 1961; the African Charter on Human and People's Rights of 1981; the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador) of 1988. Article 12 of the International Covenant on Economic, Social and Cultural Rights of 1966 establishes that, among the measures that must be adopted by the States to ensure the full effectiveness of the right to health, it shall be necessary to include those necessary for the reduction of mortinatality and child mortality, and the sound development of the children; the improvement of workplace and environmental hygiene; the prevention and treatment of epidemic, endemic, professional and other such diseases and the fight against them; and the creation of conditions ensuring access to healthcare by all.

The Guatemalan State has recognized in the Political Constitution of the Republic that health is a fundamental right of the human being, without any sort of discrimination whatsoever; it also considers the health of the people of the Nation to be a public good and has assumed as its obligation the oversight of the health and social welfare of all inhabitants through the development of actions of prevention, promotion, recovery, rehabilitation, coordination and any relevant complementary actions to grant them the most complete physical, mental and social welfare (Articles 93, 94 and 95 of the Political Constitution of the Republic). To comply with the mandate by the constitutional framers, State authorities have laid down a series of public policies which include, for instance, the signature and ratification of the Framework Convention of the World Health Organization on Tobacco Control.

Regarding the aforesaid international instrument, health specialists have stated that May 21, 2003, was a historical day for world public health. At the 56th World Health Assembly, all 192 Member States of the World Health Organization (WHO) unanimously adopted the first world public health treaty, which is the WHO Framework Convention on Tobacco Control. Negotiated under the auspices of the WHO, it is the first legal instrument designed to reduce tobacco-related deaths and diseases around the world. Among many other measures, the treaty requires that the states impose restrictions on advertising, sponsorship and promotion of tobacco; adopt a new packaging and labeling of the tobacco products; and strengthen the laws to vigorously fight tobacco contraband. One of the most significant matters under the Convention in question refers to exposure to tobacco smoke, approached in its Article 8. In such Article, the treaty recognizes that there is scientific proof that exposure to tobacco smoke causes death, disease and disability. Therefore, it requires that all governments implement effective measures to protect nonsmokers from tobacco smoke in enclosed public places, including work places and public transportation.

The purpose of the Convention in question is to "protect current and future generations from the devastating social, environmental, economic and health consequences of tobacco use and exposure to tobacco smoke, providing a frame for the Parties at the national, regional and international levels to implement the measures necessary to control tobacco…". In attention to the mandate established by the international norm, the State of Guatemala enacted Decree 74-2008, by the Congress of the Republic, as a means of investing with continuity the public policies recognizing the right to health as a fundamental human right and, at the same time, considering the health of the people of the Nation to be a public good.

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With respect to the first grounds of the challenge, this Court considers that the alleged violation of Article 43 of the Constitution does not exist, inasmuch as the establishing of limits on smoking in certain places does not imply, as alleged by the claimant in its brief, that the State has promoted a limitation of the freedom of industry and commerce of the entities manufacturing, producing, distributing and marketing tobacco products, as the purpose of the challenged norm is not to regulate such activities, but to regulate their consumption to protect the right to health of the consumers themselves, and that of non smokers.

In reference to the second grounds of contradiction claimed between the challenged norm and the Political Constitution of the Republic, stating that the fact that the law in question does not define "enclosed public places" goes against personal security, this Court finds that a regulatory statement without a claim of exhaustiveness is not grounds for unconstitutionality, inasmuch as its intellection is satisfied by the very meaning of its words, or inferred from its text, context, purpose and other procedures of hermeneutics, with the exception of cases stated confusingly, contradictorily or unintelligibly, which does not occur in the case in point, as the item is deemed to be related to the purpose of protecting non smokers exposed forcefully to second-hand smoke in places that, due to their enclosed structures, retain the smoke for a certain time forcing its inhalation. This situation may also be corrected with the regulatory authorities invested in the President of the Republic, which has been the case in this situation, as the respective Regulations have already been issued through the referred authority.

Regarding the right to equality, the case law of this Court has consistently considered that "the principle of equality therefore means a right to no exceptions being established that exclude some from what is granted to others in equal circumstances" (judgment of August six, nineteen ninety one, docket 34-91); along these lines, this Court has considered – upon interpretation of

the scope of Article 4 of the Constitution – that "The Principle of Equality, established in Article 4 of the Political Constitution of the Republic, provides that equal situations must be treated equally from a regulatory standpoint" (judgment of June sixteen, nineteen ninety two, docket 141-92); and that "equality under the law means that no exceptions or privileges may be established excluding some from what is granted to others in equal circumstances, whether the effects are positive or negative; i.e., that they imply a benefit or damage for the person to whom the scenario provided by law applies (…) What is implied by equality is that the laws must afford equal treatment to equals in equal circumstances" (judgment of June twenty one, nineteen ninety six, docket 682-96). Therefore, upon examining the norm in question, it is observed that the distinction made by the lawmaker, expressly indicating the places subject to the exception to the general prohibition established in the norm, was not an arbitrary or unreasonable distinction. Quite the contrary, the conditions for the exception to apply were clearly established. Therefore, the challenged article is not in violation of the principle of equality. Specifically, it is necessary to consider that allowing hotels and motels to set up smoking areas does not imply the establishment of an exception of unequal content with respect to the prohibition, inasmuch as such facilities are similar in terms of privacy to homes, and inside them it is necessary to respect the intimate surroundings of the individual, leaving the parents in charge of the health of the minors under their care. With respect to this matter, it should also be noted that the claimant asks that the analysis to be conducted by this Court be applied in respect of a bill – No. 3309 – which request cannot be granted inasmuch as the study undertaken by this Court is solely possible by reason of the existence of a general law or norm, i.e., when a norm has been approved, passed, enacted and published following the steps set out in the Political Constitution of the Republic for issuing both the law and its regulations.

Regarding the fourth contradiction cited, allegedly between Article 6 of the Law for the Creation of Tobacco Smoke Free Environments and Article 43 of the Constitution, that set out in the first paragraph of this recital is reiterated. In terms of the application of penalties to the owners of the places where a ban against smoking exists, the alleged unconstitutionality is inferred from a particular interpretation of the law by the claimant, inasmuch as in terms of the form in which the norm is drafted, it may be observed that it is not directed exclusively to an individual or legal entity owning or managing the establishment or locale, but is directed to banning the act punishable thereunder at certain places. This leads to the deduction that the prohibition refers to all those - individuals and legal entities - that are at the place where the

prohibition exists, regardless of the status as a consumer, client, owner or manager of the establishment. As mentioned earlier, as this is a claim with respect of the means of interpreting a legal norm, the claimed unconstitutionality is disavowed. Regarding the possible amounts of the fines applicable to those in violation of the challenged articles, it is necessary to stress that the norm seeks, above all, to avoid the occurrence of the acts prohibited, but if they do occur, the purpose is to avoid the recurrence of prohibited behavior. The purpose of the norm is not, as the claimant has stated, to take money from the consumers of tobacco products. Quite the opposite, the intention is to persuade smokers not to consume tobacco products in certain places, as this is detrimental to their own health and that of those who are not smokers. Furthermore, the norm solely establishes fines for violations of the ban, and the relevant decision shall be subject to the analysis of the administrative authority of competent jurisdiction, which must be conducted within the parameters of due process, and in which the offender shall have access to all administrative and judicial resources to review the applied penalty. Under these circumstances and characteristics, the imposing of fines is not unconstitutional. Nor is it unconstitutional due the fiscal nature of the penalty, as there is no violation of the tax system, but the repression of behaviors that injure the rights of third parties, in which case it is the contumacy of the offender that would worsen their penalty. The same reasoning applies with regard to the penalty of closing their establishment for the breach of the obligations established by Law.

Regarding the fifth grounds of contradiction claimed between the challenged norm and the Political Constitution of the Republic, this Court considers that the claim refers to a mistake by the lawmaker, reflected in an error in legislative technique, as the circumstance of not establishing a procedure to create smoking areas other than as provided by the challenged law, when the law does not contain a predetermined procedure, is an omission, once again, by the lawmaker, which by no means could be considered grounds for unconstitutionality.

Therefore and in the absence of the constitutional violations claimed, this general partial action for unconstitutionality brought should be dismissed.

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Pursuant to Article 148 of the Law of Relief, Habeas Corpus and Constitutionality, when the claim of unconstitutionality is disproved, a fine is to be assessed against the assisting counsel, notwithstanding the ordering of the claimant to pay court costs. In this case, there is no specific order for the claimant to pay court costs, as no legitimate person is recognized to be charged, but

a fine is assessed against the attorneys assisting in the unconstitutionality action, as it is required by law.

GOVERNING LAW

Articles 267 and 272.a) of the Political Constitution of the Republic ; and 115, 133, 143, 148, 163.a), 185 and 86 of the Law of Relief, Habeas Corpus and Constitutionality; and 31 of Agreement 4-89 by the Constitutional Court.

THEREFORE

The Constitutional Court, based on the considerations and laws cited, does hereby resolve: i) To dismiss the action for the general partial unconstitutionality of Articles 3, 4 and 6 of the Law for the Creation of Tobacco Smoke Free Environments brought by the Chamber of Commerce of Guatemala. II) Not to order the claimant to pay court costs. III) To assess upon each member of the assisting counsel, Luis Fernando Merida Calderon, Hector Eduardo Berducido Mendoza and Luis Alberto Barrientos Suasnavar, a fine in the amount of one thousand quetzals, each, to be paid at the Treasury of this Court, within five days of the date of this finding being held final; otherwise, collection shall be made by the relevant legal means.
IV) Be it notified.

[Signed illegible]
JUAN FRANCISCO FLORES JUAREZ
PRESIDENT

[Signed illegible]
ALEJANDRO MALDONADO AGUIRRE
JUSTICE

[Signed illegible]
MARIO PEREZ GUERRA
JUSTICE

[Signed illegible]
GLADYS CHACON CORADO
JUSTICE

[Signed illegible]
JOSE ROLANDO QUESADA FERNANDEZ
JUSTICE

[Signed illegible]

VINICIO RAFAEL GARCIA PIMENTEL

JUSTICE

[Signed illegible]

HILARIO RODERICO PINEDA SANCHEZ

JUSTICE

[Signed illegible]

AYLIN ORDOÑEZ REYNA

GENERAL SECRETARY

CONSTITUTIONAL COURT

REPUBLIC OF GUATEMALA, C.A.

DOCKET 2158-2009 OFFICER: 6

In the city of Guatemala, February sixteen, two thousand ten, at 4:00 o'clock pm, at VEINTIDOS AVENIDA CERO – VEINTISEIS ZONA QUINCE VISTA HERMOSA DOS

I hereby give notice of the resolution(s) dated: SIXTEEN FEBRUARY TWO THOUSAND TEN.

TO THE: FACULTY OF MEDICINE OF THE SAN CARLOS UNIVERSITY IN GUATEMALA.

By notification certificate containing the copies required by law and which I hereby submit to:

Jose Marti

Who stated acknowledgment: YES and signed [Signed illegible], IN WITNESS WHEREOF [Signed illegible]

Consisting of 16 [17] folios. Attachments: No

[Handwritten note translates as follows: Reads 16, to be omitted; should read 17, folios]

[Signed and stamped by the Secretary of the Constitutional Court of the Republic Guatemala].-