



**DECISION**

**NUMBER 57/PUU-IX/2011**

**FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD**

**THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA**

[1.1] Hearing constitutional cases at the first and final level, has passed a decision in the case of petition for Judicial Review of Law Number 36 Year 2011 regarding Health under the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] 1. Name : **Enryo Oktavian**  
Place/date of birth : Jakarta, October 19, 1978  
Occupation : Private Employee  
Address : Jalan Menteng Number 04,  
Neighborhood Ward/Neighborhood  
Block (RT/RW) 001/005, Menteng, West  
Bogor City, Bogor

Hereinafter referred to as ..... **Petitioner I**

2. Name : **Abhisam Demosa Makahekum**  
Place/date of birth : Bandung, February 23, 1980  
Occupation : Private Employee

Address : Banteng Utama Number 88,  
Neighborhood Ward/Neighborhood  
Block (RT/RW) 006/030, Sinduharjo,  
Ngaglik, Sleman, Yogyakarta

Hereinafter referred to as ..... **Petitioner II**

3. Name : **Irwan Sofyan**  
Place/date of birth : Bogor, December 19, 1988  
Occupation : Student  
Address : Kelapa Dua, Neighborhood  
Ward/Neighborhood Block (RT/RW)  
007/011, Tugu, Cimanggis, Depok

Hereinafter referred to as ..... **Petitioner III**

By virtue of Special Power of Attorney dated August 12, 2011 granting power of attorney to 1) R. Heri Sukrisno, S.H., 2) Hedy Christiyono Nugroho, S.H., 3) Daru Supriyono, S.H., 4) Pradnanda Berbudy, S.H., and 5) Achmad Deva Permana, S.H., all being Advocates associated in the *Tim Pembela Kretek (TPK)*, having its address at Jalan Tebet Barat Dalam IV E, Number 24, Tebet, South Jakarta, both jointly or individually to act for and on behalf of the authorizers;

Hereinafter referred to as ..... **Petitioners**

**[1.3]** Having read the petition of the Petitioners;

Having heard the statements of the Petitioners;

Having heard and read the written statement of the Government;

Having read the written statement of the People's Legislative Assembly;

Having heard and read the written statements of Hilarion Haryoko, Normansyah, Sumiati, Kholidi, dr. Hakim Sorimuda Pohan, and Abdillah Ahsan as the Related Parties;

Having examined the evidence of the Petitioners and the Related Parties;

Having heard the statements of experts of the Petitioners as well as the witnesses of the Related Parties.

Having read the written conclusions of the Petitioners, the Government and the Related Parties.

## **2. CASE POSITION**

**[2.1]** Whereas the Petitioners have filed a petition with letter of petition dated August 15, 2011 which was received at the Registrar's Office of the Constitutional Court (hereinafter referred to as the Registrar's Office of the Court) on Tuesday, August 16, 2011 based on the Deed of Petition File Receipt Number 309/PAN.MK/2011 and which was registered in the Constitutional Case Registration Book on Tuesday, September 6, 2011 under case registration Number 57/PUU-IX/2011, which was revised and received at the Registrar's Office of the Court on September 28, 2011 which describes the following matters:

## I. AUTHORITY OF THE CONSTITUTIONAL COURT

1. The Petitioners request the Constitutional Court to review the Elucidation of Article 115 paragraph (1) (to the extent of the word 'may') of Law Number 36 Year 2009 regarding Health (Law No. 36 Year 2009 regarding Health (Law No. 36/2009). (*vide* Exhibit P-1).
2. As regulated in Article 24C paragraph (1) of the 1945 Constitution *juncto* Article 10 paragraph (1) sub-paragraph a of Law Number 24 Year 2003 regarding the Constitutional Court (the Constitutional Court Law), which asserts that one of the authorities of the Constitutional Court is to conduct judicial review of Laws under the 1945 Constitution.

Article 24C paragraph (1) of the 1945 Constitution states, among other things:

*“The Constitutional Court shall have authority to hear at the first and final levels the decision of which shall be final, to conduct judicial review of Laws under the Constitution,...”*

Article 10 paragraph (1) sub-paragraph a of the Constitutional Court Law states, among other things:

*“The Constitutional Court shall have authority to hear at the first and final levels, the decision of which shall be final:*

- a. *To review laws under the 1945 Constitution of the State of the Republic of Indonesia, ...”*

3. In addition, Article 7 of Law Number 12 Year 2011 regarding the Formulation of Laws and Regulations regulates that the status of the 1945 Constitution is hierarchically higher than Law, and therefore, every provision of Law shall not be inconsistent with the 1945 Constitution. Any provision of Law which is inconsistent with the 1945 Constitution can be petitioned for review through judicial review mechanism;
4. Based on the foregoing, the Constitutional Court shall have authority to examine and decide upon this judicial review petition.

## **II. LEGAL STANDING OF THE PETITIONERS**

1. Whereas pursuant to Article 51 paragraph (1) of the Constitutional Court Law, *“The petitioners shall be the parties considering that their constitutional rights and/or authority are impaired by the coming into effect of a Law, namely:*
  - a. *individual Indonesian citizens;*
  - b. *customary law community units insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of the*

*Republic of Indonesia as regulated in law;*

*c. public or private legal entities; or*

*d. state institution.*

2. Whereas the Elucidation of Article 51 paragraph (1) of Law Number 24 Year 2003 regarding the Constitutional Court states that “referred to as constitutional rights shall be the rights regulated in the 1945 Constitution of the State of the Republic of Indonesia”;

Subsequently, Elucidation of Article 51 paragraph (1) states:

Referred to as “constitutional rights” shall be the rights regulated in the 1945 Constitution of the State of the Republic of Indonesia.

Elucidation of Article 51 paragraph (1) of the Constitutional Court Law does not regulate constitutional authority, but by making an analogy of the definition of constitutional right, it can be concluded that constitutional authority means the authority regulated in the 1945 Constitution.

3. Based on the aforementioned provision, two requirements must be fulfilled to test whether the Petitioners have legal standing in the case of Judicial Review. The first requirement is the qualification to act as Petitioners as described in Article 51 paragraph (1) of the Constitutional Court Law. The second requirement is that the

constitutional rights and/or authority of the Petitioners are impaired by the coming into effect of a law.

Detailed discussion of the legal standing of each of the Petitioners will be described in the following section.

- a) Whereas the Petitioners are individual Indonesian citizens whose constitutional rights may potentially be impaired by the coming into effect of Elucidation of Article 115 paragraph (1) of Law Number 36 Year 2009 as intended in Article 51 paragraph (1) of the Constitutional Court Law and its Elucidation; (**vide Exhibit P-2**);
- b) Whereas Petitioner I and Petitioner II are individual persons and smokers using public places. Petitioner III is an individual person working in a private agency (**vide Exhibit P-3**). Whereas Petitioners I through III are all Indonesian citizens;
- c) Whereas with the existence of the provision in the Elucidation of Article 115 paragraph (1) of Law Number 36 Year 2009 stating that “**Particularly, workplaces, public places and other places may provide special smoking rooms**” then the aforementioned provision in the **Elucidation** of Article 115 paragraph (1) (to the extent of the

word 'may') of Law Number 36 Year 2009 may potentially impair the Petitioners' constitutional rights;

d) Whereas the provision in the Elucidation of Article 115 paragraph (1) (to the extent of the word 'may') of Law Number 36 Year 2009 is a form of "restriction" of the Petitioners' constitutional rights, so that the aforementioned provision may potentially impair the constitutional rights of the Petitioners as Indonesian citizens;

e) With the existence of the provision in the Elucidation of Article 115 paragraph (1) (to the extent of the word 'may') of Law Number 36 Year 2009 regulating the provision of special smoking rooms in workplaces, public places and other places, the constitutional right of the Petitioners to smoke in special smoking rooms in workplaces, public places, and other places may potentially be impeded by the existence of the word 'may' in the formulation of the Elucidation of Article 115 paragraph (1) of Law Number 36 Year 2009;

**4.** Whereas the foregoing description proves that the Petitioners (individual Indonesian citizens) meet the qualification and have legal standing to act as Petitioners in the petition for review of the aforementioned Law Number 36 Year 2009 under the 1945



Constitution;

5. Referring to Decisions of the Court since Decision Number 006/PUU-III/2005 dated May 31, 2005 and Decision Number 11/PUU-V/2007 dated September 20, 2007 and subsequent decisions, the Constitutional Court is of the opinion that the impairment of constitutional rights and/or authority as intended in Article 51 paragraph (1) of the Constitutional Court Law must meet 5 (five) requirements, namely:
  - a. The existence of constitutional rights and/or authority of the Petitioners granted by the 1945 Constitution;
  - b. The Petitioners consider that such constitutional rights and/or authority have been impaired by the coming into effect of the law petitioned for review;
  - c. The impairment of such constitutional rights and/or authority must be specific and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring;
  - d. There is a causal relationship (*causal verband*) between the impairment of constitutional rights and/or authority of the Petitioners and the law petitioned for review;

- e. The possibility that with the granting of the Petitioners' petition, the impairment of such constitutional rights and/or authority argued by the Petitioners will not or will no longer occur;

Therefore, there are five absolute requirements which must be met in assessing the legal standing of the petitioners in a case of Judicial Review. The *first requirement* is the qualification to act as Petitioners as asserted in Article 51 paragraph (1) of the Constitutional Court Law. The *second requirement* is that the coming into effect of a Law impairs the Petitioners' constitutional rights and/or authority. The *third* is that such constitutional impairment must be specific. The *fourth* is that such impairment has been due to the coming into effect of the Law being petitioned. The *fifth* is that such constitutional impairment will longer occur if the petition is granted.

Whereas based on the aforementioned qualification and requirements, the Petitioners' constitutional rights and/or authority may potentially be *impaired* due to the coming into effect of Law Number 36 Year 2009, especially the Elucidation of Article 115 paragraph (1) of Law Number 36 Year 2009 (to the extent of the word 'may'), since potentially, the Petitioners cannot use their rights to smoke in public places, workplaces and other places. Finally, if

the petition for the review of the provision in the Elucidation of Article 115 paragraph (1) of Law Number 36 Year 2009 is granted, the Petitioners' constitutional rights and/or authority will no longer be potentially impaired. Therefore, the legal standing requirements and potential impairment to the Petitioners have been in accordance with and have met the applicable provisions;

Therefore, it is clear that the Petitioners have legal standing and interests to file this petition for substantive review.

### **III. REASONS FOR THE PETITION FOR SUBSTANTIVE REVIEW**

In line with Article 51 paragraph (3) of Law Number 24 Year 2003 regarding the Constitutional Court which reads:

“In the petition as intended in paragraph (2), the Petitioner must describe clearly that:

- a. the formulation of the Law does not meet the provisions under the 1945 Constitution of the State of the Republic of Indonesia; and or
- b. the substance in paragraphs, articles and/or any parts of the Law is considered inconsistent with the 1945 Constitution of the State of the Republic of Indonesia”

#### **A. OBJECT OF PETITION**

The Petitioners file a petition for substantive review with respect to the coming into effect of:

Elucidation of Article 115 paragraph (1) (to the extent of the word 'may') of Law Number 36 Year 2009 regarding Health:

*“Particularly, workplaces, public places and other places may provide special smoking rooms”*

## **B. REASONS FOR PETITION**

Whereas the objections of the Petitioners in relation to the issuance of ***Law Number 36 Year 2009 regarding Health***, among other things, are:

1. Whereas the matters conveyed in the sections on the authority of the Constitutional Court and legal standing of the Petitioners as described above constitute an inseparable part of the Substance of this Petition;
2. Whereas Article 1 paragraph (3) of the 1945 Constitution states that *“The State of Indonesia is a “Rule of Law State”*. This affirmation essentially means that law is “Supreme” as the means to fulfill the human rights of all citizens and the obligation of every state administrator or the government to be subject to the law. No power is above the law, as all is

under the rule of law. With this status, there shall be no arbitrary power or misuse of power; (Sumali, *Reduction of the Executive Power in Regulations in Lieu of Law (Reduksi Kekuasaan Eksekutif di Bidang Peraturan Pengganti Undang-Undang (PERPU))*, Second print, UMM Press, Malang, 2003, page 11). (**vide Exhibit P-4**).

3. Whereas from the perspective of Indonesian rule of law state, Sjahrhan Basah identifies the Indonesian rule of law state base on *Pancasila*, where, in his opinion, in the Indonesian rule of law state there are human rights and obligations, personal rights which must be considered only, but which must also be enforced in view of public interest, respect for other people's right, observance of the protection/interest of national safety as well as general morals and national resilience based on Law. In such concept, personal rights are recognized, guaranteed and protected but also limited by: *First*, social functions which are inherent in proprietary rights, and *second*, the type of Indonesian society which imposes individual Indonesians with various obligations to the family, society and fellow Indonesians. In such concept, as stated by Paulus Effendi Lotulung, there is the principle of harmony and balance between individual interests and public interests; (Ellydar

Chaidir, *Rule of Law State, Democracy and State Administration Constellation in Indonesia (Negara Hukum, Demokrasi dan Konstalasi Ketatanegaraan Indonesia)*, First Print, Kreasi Total Media, Yogyakarta, 2007, page 71). (**vide Exhibit P-5**)

**4.**

Whereas Prof. Dr. Jimly Asshiddiqie, S.H. stated that there are 11 basic principles of a rule of law democratic state from horizontal and vertical perspectives, namely: **(1)** Existence of guaranteed equality and parity in a collective life. **(2)** Recognition of and respect for differences or pluralism. **(3)** Existence of binding rules which are made as common reference sources. **(4)** Existence of a dispute settlement mechanism based on the mechanism of commonly complied with rules. **(5)** Recognition of and respect for human rights. **(6)** Limitation of power through the separation of power mechanism accompanied with the mechanism for settling state administration disputes among state institutions, both vertically and horizontally. **(7)** Existence of independent and impartial judiciary with authority of the highest decision based on justice and truth. **(8)** Establishment of a judicial institution specifically intended for guaranteeing justice for citizens harmed by government decisions or policies (state

administration officials). **(9)** Existence of “judicial review” mechanism by judicial institutions of the norms of legislative provisions stipulated both by the legislative and the executive. **(10)** Formulation of a constitution and laws and regulations regulating the guaranteed implementation of the aforementioned principles. **(11)** Recognition of the legality principle or the principle of due process of law throughout the state administration system. (Jimly Asshiddiqie, *State Administration Law and Pillars of Democracy; Fragments of Thoughts on Law, Media and Human Rights (Hukum Tata Negara dan Pilar-Pilar Demokrasi ‘Serpihan Pemikiran Hukum, Media and HAM)*, Second Printing, Konstitusi Press, Jakarta, 2005, pages 246-247). (**vide Exhibit P-6**).

5. Whereas, human rights constitute basic rights of all human beings without discrimination. In view of the fact that basic rights are gifts from the One Almighty God, **then** the definition of human rights are gifts from the One Almighty God inherent in human beings, which are natural, **universal** and eternal, in relation to the dignity and worth of human beings;
6. Whereas Indonesia is a rule of law state, and then state administration practices are performed based on **laws** and

regulations, including in respect of fulfillment of human rights;

7. Whereas in respect of the guarantee of human rights of every person, *Article 28D paragraph (1) of the 1945 Constitution provides that:*

*“Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law”*

Article 28D paragraph (1) contains the constitutional norm that the guaranteed human rights of every person, including the Petitioners, to receive the recognition, guarantee and protection for smoking based on the certainty of just laws and equal treatment before the law.

8. Article 28G paragraph (1) of the 1945 Constitution provides that:

*“Every person shall have the right to protect him/herself, his/her family, honor, dignity and property under his/her control, and shall have the right to feel secure and be protected from the threat of fear to do, or not to do something which constitutes human right”.*



Constitutional norms enshrined in the aforementioned provision allows for the fulfillment of the rights of the Petitioners to be free from fear and to be protected from threats to do or not to do something, including in terms of smoking. Therefore, the guaranteed provision of rooms for smokers **must be implemented with the obligation to provide rooms for smokers.**

9. **Article 28I paragraph (3) of the 1945 Constitution provides that:**

*“The culture identities and the rights of traditional communities shall be respected in conformity with the development of time and civilization.”*

Constitutional norms enshrined in the aforementioned provision provide the guarantee of the existence of cigarettes as legal and free products to be used by the Petitioners.

10. In Law Number 39 Year 1999 regarding Human Rights, the aforementioned three constitutional norms are further regulated in Article 3 paragraph (2) which states that:

*“Everyone has the right to be recognized, guaranteed,*

*protected, and treated fairly before the law and is entitled to equal legal certitude and treatment before the law”*

Article 3 paragraph (3) further provides that:

*“Every person has the right without any discrimination, to protection of human rights and basic freedom of humans”.*

Article 4 reads:

*“The right to life, the right not to be tortured, the right to freedom of the individual, to freedom of thought and conscience, the right of religion, the right not to be enslaved, the right to be acknowledged as an individual before the law, and the right not to be prosecuted under retroactive laws are human rights which cannot be diminished under any circumstances and by anyone.”*

Article 5 paragraph (1) reads:

*“Everyone is recognized as an individual who has the right to demand and obtain equal treatment and protection before the law as befits his or her human*

*dignity”*

Article 29 paragraph (2) reads:

*“Everyone has the right to recognition everywhere as a person before the law”*

Article 30 reads:

*“Everyone has the right to a sense security and peace as well as to protection against the threat of fear from any act or omission.”*

11. Whereas, constitutional norms regulate cigarettes as the traditional and cultural identity of the community and as legal products whose existence is protected by laws and regulation. Tobacco and clove are closely related as the main basic materials for cigarette industry, so that tobacco constitutes one of the most important basic materials of cigarette products, as further regulated in Elucidation of Article 19 paragraph (2) of Law Number 18 Year 2004 regarding Plantation which states:

*“Plantation strategic commodities mean plantation commodities having an important role in social, economic and environmental development, namely*

*palm oil, rubber, cocoa, coffee, sugarcane, and tobacco”*

This provision means that tobacco product industry is a prioritized industry as an agro-based industry.

Article 4 paragraph (1) of Law Number 11 Year 1995 regarding Excise states that "Excise shall be charged to Excisable Goods consisting of":

- a. Ethyl alcohol or ethanol, regardless of the materials used in its manufacturing process;
  - b. Beverages containing ethyl alcohol of any level, regardless of the materials used in their manufacturing process, including concentrate containing ethyl alcohol;
  - c. Tobacco products, including cigarettes, cigars, tobacco leaf, tobacco slices, and other tobacco processing products, regardless of whether substitute materials or auxiliary materials are used or not in their manufacturing.
- 12.** Decision of the Constitutional Court Number 6/PUU-VII/2009 regarding substantive review of Article 46 paragraph (3) sub-

paragraph c of the Broadcasting Law, in the Court's Opinion section, states that:

*“In scrutinizing the Article 46 paragraph (3) subparagraph c a quo including other legislations, the Court has never positioned cigarette as a product prohibited from being publicized, and moreover its trading is not prohibited and also tobacco and clove have never been positioned as prohibited agricultural products, so that cigarette is a legal product, as evidenced by the excise charged to cigarette and tobacco”. (vide Decision of the Constitutional Court Number 6/PUU-VII/2009, Point 3.18, page 279).*

Whereas in its opinion, it is clear that the Constitutional Court recognized cigarette as a legal product, and that smoking activity is a living culture among Indonesian society.

13. Furthermore, in the same decision, the Constitutional Court stated that:

*“Cigarette, smoking and cigarette advertisement are three different things and therefore they also have different legal domain although the three things constitute one series which is not independent. This*

*means that cigarette promotion cannot be separated from the existence of cigarette and smoking culture,....and so forth. Insofar as cigarette has not been declared as an illegal product, cigarette promotion activities must still be considered legal so long as such promotion is conducted according to the applicable laws and regulations". (vide Decision of the Constitutional Court Number 6/PUU-VII/2009, Point 3.18, page 282).*

- 14.** Whereas smoking activity is legal as it is protected by law. Although some laws and regulations define the element of permission of smoking activities as it can be concluded in Law Number 36 Year 2009 regarding Health;
- 15.** Whereas Law Number 36 Year 2009 regarding Health has been created as a Law intended for providing health guarantee to the community. In relation to the existence of cigarette and smoking activity, the Health Law also contains limits smoking activities by applying non-smoking areas;
- 16.** Article 115 paragraph (1) of law Number 36 Year 2009 regarding Health states that:  
  
Non-smoking areas are, among other things:

- a. health service facilities;
- b. places of learning and teaching process;
- c. children's playing ground;
- d. places of worship;
- e. public transportation;
- f. workplaces; and
- g. public places and other places as stipulated.

Elucidation of Article 115 paragraph (1) of Law Number 36 Year 2009 states that:

*“Particularly, workplaces, public places and other places **may** provide special smoking rooms”.*

17. Whereas smoking is an activity which is the right of every person or individual, insofar as it is not prohibited by the laws and regulations. Law Number 36 Year 2009, Article 115 paragraph (1) along with its elucidation, **clearly and factually** limits or prohibits smoking in certain areas, namely: a. health service facilities; b. places of learning and teaching process; c. children's playing ground; d. places of worship; and e. public transportation. **Meanwhile**, workplaces, public places and other places stipulated are excluded in respect of non-smoking areas with the provision of special smoking rooms;

18. Whereas, to fulfill smokers' constitutional right to smoke in workplaces, public places and other places as stipulated, the **law gives a guarantee by providing Special Smoking Rooms;**
19. Whereas according to the Standard Dictionary of Indonesian Language, '**may**' is defined as 'capable of', 'able', 'permitted', 'may be'. (Language Center of the National Education Department (*Pusat Bahasa Departemen Pendidikan Nasional*), *Standard Dictionary of Indonesian Language (Kamus Besar Bahasa Indonesia)*, Third Edition, Balai Pustaka, Jakarta, 2002, page 236). (**vide Exhibit P-13**). That which is regulated in the Elucidation of Article 115 paragraph (1) (to the extent of the word 'may') of Law Number 36 Year 2009, clearly indicates an **unclear meaning**. The meaning of the word 'may' in the formulation of Elucidation of Article 115 paragraph (1) of Law Number 36 Year 2009 is more of "**facultative**" nature;
20. Whereas, according to Maria Farida Indrati Soeprapto, it is recognized that some sentences in the form of provisions in laws and regulations contain legal norms which are general and abstract, which are normative sentences, non-descriptive or declaratory. In Indonesian standard grammar,



normative sentences are usually called imperative sentences. However, since not all orders are applicable norms, I order to indicate that such sentences contain norms, they are called normative sentences rather than imperative sentences. Sentences of normative law (*rechtnormzin*) are usually marked with the use of auxiliary verbs of “must” or “may”. From their formulation, people will immediately know that such sentences contain instructions (to do something), prohibitions (not to do something), exemption (allowed not to do something), or permission (allowed to do something); (Maria Farida Indrati Soeprapto, *Legislation Studies ‘Basis and Formation’ (Ilmu Perundang-Undangan ‘Dasar-Dasar dan Pembentukannya’)*, Kanisius, Yogyakarta, 1998, page 186). (**vide Exhibit P-14**)

21. The fact that the word ‘may’ in the formulation of Elucidation of Article 115 paragraph (1) of Law Number 36 Year 2009 contains or leads to an interpretation of ‘exemption (allowed not to do something), or permission (allowed to do something)’. Therefore, the word ‘may’ in the formulation of Elucidation of Article 115 paragraph (1) of Law Number 36 Year 2009 means that in workplaces, public places and other places, **it is justified to provide or not to provide special smoking rooms;**

22. Whereas the word 'may' in the Elucidation of Article 115 paragraph (1) of Law Number 36 Year 2009 means an order that it is "not obligatory/not a must" to provide special smoking rooms in public places, workplaces and other places for smokers to smoke. This, **clearly and factually**, has the potential to eliminate the recognition and guarantee of constitutional rights of the Petitioners to smoke as regulated under the 1945 Constitution;
23. Whereas the Enactment and application of the provision of Elucidation of Article 115 paragraph (1) of Law Number 36 Year 2009 containing the word 'may' which is "***facultative***" in nature **has the potential to lead to the occurrence of deviation** from the 1945 Constitution because there is no guaranteed protection of human rights for the Petitioners as to the certainty of just laws and equal treatment before the law;
24. Whereas the facts explained above in respect to the Elucidation of Article 115 paragraph (1) (to the extent of the word 'may') of Law Number 36 Year 2009 leads to impure and inconsistent implementation of the 1945 Constitution and constitutes a form of violation of the Petitioners' constitutional rights. Therefore, to provide the recognition,

guarantee and legal certainty as well as freedom from fear to do or not to do something for the Petitioners, the word 'may' in the Elucidation of Article 115 paragraph (1) of the Health Law shall **be replaced with** the word "must" which contains a clear and non-interpretable meaning;

25. Whereas the word 'may' in the formulation of Elucidation of Article 115 paragraph (1) of Law Number 36 Year 2009, based on the abovementioned facts, **clearly and factually violates the Petitioners' constitutional rights** whereby Petitioner I and Petitioner II as users of public places cannot use their right to smoke in public places, while Petitioner III as a user of workplaces cannot use his right to smoke in workplaces. Therefore, this impairs the Petitioners' constitutional right;

26. Whereas the laws and regulations regulates and guarantee that cigarette is the identity of the community the existence and use of which are recognized and legalized, so that every person may use it. Based on the foregoing, the Petitioners as smokers or people using cigarettes must obtain the **recognition and guarantee as well as freedom from fear and protection from any threat of fear to do or not to do something;**

27. The constitutional norm regulating the recognition and guarantee of the Petitioners' human rights in the form of the right to smoke in workplaces, public places and other places is not found in the Elucidation of Article 115 paragraph (1) of Law Number 36 Year 2009 due to the **existence of the aforementioned word "may"**, so that the recognition and guarantee of the constitutional right **are not clearly and factually fulfilled**;
28. Whereas with respect to the regulation in the Elucidation of Article 115 paragraph (1) of Law Number 36 Year 2009 on the provision of special smoking rooms in workplaces, public places and other places, the existence of the word "may" leads to constitutional impairment to the Petitioners due to lack of guarantee for the Petitioners to **use their constitutional right**;
29. Whereas the facts explained above with respect to the provision of the Elucidation of Article 115 paragraph (1) (to the extent of the word 'may') of Law Number 36 Year 2009 are **factually inconsistent** hierarchically with higher laws and regulations namely the 1945 Constitution as provided for in Article 12 paragraph (1) of Law Number 12 Year 2011;

- 30.** Whereas in the framework of maintaining the constitution and enforcing democracy, the Constitutional Court must perform its functions and roles as mandated by the 1945 Constitution, where the Constitutional Court is *the guardian of the Constitution* and *the final interpreter of the Constitution*. Therefore, based on the description above, the Constitutional Court is expected to kindly declare the provision of Elucidation of Article 115 paragraph (1) (to the extent of the word 'may') of Law Number 36 Year 2009 inconsistent with *Article 28D paragraph (1), Article 28G paragraph (1), Article 28I paragraph (3)* of the 1945 Constitution. Therefore, the provision of the Elucidation of Article 115 paragraph (1) (to the extent of the word 'may') of Law Number 36 Year 2009 shall be *unconstitutional* and shall be declared without any binding legal effect.

#### **IV. *PETITUM***

Whereas based on all the arguments described above and the evidence enclosed, the Petitioners hereby request the Panel of Constitutional Court Justices to kindly pass the following decisions:

##### **Primary**

1. Accepting and granting the Petitioners' petition in its entirety

2. Declaring the substance of the Elucidation of Article 115 paragraph (1) (to the extent of the word 'may') of Law Number 36 Year 2009 regarding Health inconsistent with *Article 28D paragraph (1), Article 28G paragraph (1), Article 28I paragraph (3)* of the 1945 Constitution.
3. Declaring that the substance of the Elucidation of Article 115 paragraph (1) (to the extent of the word 'may') of Law Number 36 Year 2009 regarding Health has no binding legal force, with all the legal consequences thereof.
4. Ordering this decision to be properly included in the Official Gazette of the Republic of Indonesia.

### **Subsidiary**

If the Panel of Justices is of a different opinion, we request for the decisions to be passed according to what is equitable and good (*ex aequo et bono*).

**[2.2]** Whereas to evidence their arguments, the Petitioners have presented written instruments of evidence marked as Exhibits P-1 through P-8, as follows:

1. Exhibit P-1 : Photocopy of Law Number 36 Year 2009 regarding Health;

2. Exhibit P-2 : Photocopies of Resident Identity Cards (KTP) of the Petitioners;
3. Exhibit P-3 : Photocopy of Employment Certificate;
4. Exhibit P-4 : Photocopy of Quotation from the Book *Reduction of Executive Power in Regulations in Lieu of Law (Reduksi Kekuasaan Eksekutif di Bidang Peraturan Pengganti Undang-Undang (Perpu))* written by Sumali;
5. Exhibit P-5 : Photocopy of Quotation from the Book *Rule of Law State, Democracy and State Administration Constellation in Indonesia (Negara Hukum, Demokrasi, dan Konstalasi Ketatanegaraan Indonesia)*, written by Ellydar Chaidir;
6. Exhibit P-6 : Photocopy of Quotation from the Book *State Administration Law and Pillars of Democracy; Fragments of Thoughts on Law, Media and Human Rights (Tata Negara dan Pilar-Pilar Demokrasi "Serpihak Pemikiran Hukum, Media, dan HAM")*, written by Jimly Asshiddiqie;
7. Exhibit P-7 : Photocopy of Quotation from Standard Dictionary of Indonesian Language (*Kamus Besar Bahasa*

*Indonesia*);

8. Exhibit P-8 : Photocopy of Quotation from the Book *Legislation Studies "Basis and Formation" (Ilmu Perundang-Undangan "Dasar-Dasar dan Pembentukannya")*, written by Maria Farida Indrati Soeprapto.

In addition, the Petitioners have presented 2 (two) experts whose statements were heard at the hearings on November 15, 2011 and December 20, 2011, who principally stated as follows:

**1. Dr. Aprinus Salam**

- Every human being has the right to obtain all which become his/her human needs, such as the right to obtain clothes, food and shelter;
- One of the rights of human beings is to consume goods, including to consume food and beverages as well as entertainment legally traded, including the right to consume cigarettes;
- The government needs to guarantee the certainty for a person consuming legally traded cigarettes or goods;
- Elucidation of Article 115 paragraph (1) of Law Number 36 Year 2009 regarding Health may cause smokers to lose the places to obtain their human rights, in this respect to consume cigarettes;



- The word “may” in the Elucidation “Particularly, workplaces, public places and other places **may** provide special smoking rooms”, is multi-interpretable and is not binding;
- Whereas the word “may” in the aforementioned sentence may harm smoking consumers, and therefore, the Law *a quo* shall be reviewed.

## 2. Prof. Yusril Ihza Mahendra

- For states adhering to both the European Continental legal system and the Anglo Saxon legal system as well as states which can be categorized as adhering to the Islamic Law, laws and regulations at the level of *act* have no elucidation;
- Norms are contained in the articles rather than in the elucidation;
- In the history of the birth of the 1945 Constitution, ratifications of the 1945 Constitution have been conducted of the articles only. The elucidation of the 1945 has never been ratified by PPKI. In fact, it was not until several months following the separate publication in the Official Gazette of the Republic of Indonesia Year 1946 that the Elucidation of the 1945 Constitution emerged;
- Following the amendments to the constitution since 1999, the 1945 Constitution no longer has any elucidation, so that the 1945 shall

only consist of the introduction or preamble and the articles.

- Whereas the habit of making elucidations in a Law is still controversial;
- In the appendix to Law Number 12 Year 2011, it is asserted that “The elucidation shall not contain norms, shall not explain anything inconsistent with the norms, shall not regulate separate norms, shall not make anything different or deviating from what is formulated in the norms in the articles”;
- Elucidation shall only serve the function of explanation, for instance, elucidation of words, foreign terms, or technical terms, which are not understood by laymen which are considered necessary to be explained so that people reading the norms of the articles may understand them. However, the norms cannot regulate and shall not be allowed to regulate separate norms;
- Elucidation of Article 115 paragraph (1) contains a tentative norm, namely that “Particularly, workplaces, public places and other places may provide special smoking rooms”;
- The provision of the Elucidation of Article 115 paragraph (1) regulates a separate norm which is different from the provision of Article 115. If the Petitioners file a petition for formal review, the Expert is of the opinion that the provision of the Elucidation of

Article 115 paragraph (1) shall be null and void because it is inconsistent with Law Number 12 Year 2011 regarding the Formulation of Laws and Regulations.

**[2.3]** Whereas with respect to the Petitioners' petition, the Government has conveyed its oral statement conveyed at the hearing on November 5, 2011 and which was then completed with the written statement and conclusion received at the Registrar's Office of the Court on January 3, 2012, which is principally as follows:

**I. SUBSTANCE OF THE PETITIONERS' PETITION**

1. Whereas according to the Petitioners, the Provision of Elucidation of Article 115 paragraph (1) (to the extent of the word 'may') of Law Number 36 Year 2009 regarding Health (hereinafter referred to as the Health Law) is inconsistent with the provisions of the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution) for the following reasons:
  - a. Article 28D paragraph (1) of the 1945 Constitution states that *"any person shall have the right to the recognition, guarantee, protection and certainty of just laws as well as equal treatment before the law."* According to the Petitioners, this provision contains a constitutional norm that the guarantee of human rights for every person, including the

Petitioners to obtain the recognition, guarantee and protection to smoke based on the certainty of just laws and equal treatment before the law.

- b. Article 28G paragraph (1) of the 1945 Constitution states that “*every person shall have the right to protect him/herself, his/her family, honor, dignity and property under his/her control, and shall have the right to feel secure and be protected from the threat of fear to do, or not to do something which constitutes human right*”. The constitutional norm enshrined in the aforementioned provision allows for the fulfillment of the rights of the Petitions to be free from fear and to the protection from threats to do or not to do something, including for smoking. Therefore, the guarantee of fulfillment of the rooms for smokers must be implemented as an obligation to provide rooms for smokers.
- c. Whereas according to the Petitioners, the provision *a quo* is inconsistent with Article 28I paragraph (3) of the 1945 Constitution which states that “*the culture identities and the rights of traditional communities shall be respected in conformity with the development of time and civilization.*” This constitutional norm guarantees the existence of cigarettes as legal product which can be freely used by the

Petitioners.

2. Whereas according to the Petitioners, the aforementioned three norms (1a, 1b, 1c) are further regulated in Law Number 39 Year 1999 regarding Human Rights, namely as included in:
  - a. Article 3 paragraph (2) of Law Number 39 year 1999 regarding Human Rights which states that “everyone has the right to be recognized, guaranteed, protected, and treated fairly before the law and is entitled to equal legal certitude and treatment before the law”.
  - b. Article 3 paragraph (3) of Law Number 39 year 1999 regarding Human Rights which states that “everyone has the right without any discrimination, to protection of human rights and obligations”.
  - c. Article 4 of Law Number 39 year 1999 regarding Human Rights which states that “The right to life, the right to not to be tortured, the right to freedom of the individual, to freedom of thought and conscience, the right not to be enslaved, the right to be acknowledged as an individual before the law, and the right not to be prosecuted retroactively under the law are human rights that cannot be diminished under any circumstances whatsoever by anyone”.

- d. Article 5 paragraph (1) of Law Number 39 year 1999 regarding Human Rights which states that “everyone is recognized as an individual who has the right to demand and obtain equal treatment and protection before the law as befits his or her human dignity”.
  - e. Article 29 paragraph (2) of Law Number 39 year 1999 regarding Human Rights which states that “everyone has the right to recognition everywhere as a person before the law”.
  - f. Article 30 of Law Number 39 year 1999 regarding Human Rights which states that “everyone has the right to security and protection against the threat of fear from any act or omission”.
3. Whereas according to the Petitioners, the word “may” in the formulation of Elucidation of Article 115 paragraph (1) of Law Number 36 Year 2009 means that in workplaces, public places and other places, it is justified to provide or not to provide special smoking rooms, meaning that the word “may” constitutes an order that it is “not obligatory/not a must” to provide special smoking rooms in public places, workplaces and other places for smokers to smoke. This indicates an unclear meaning and is facultative in nature.

## II. LEGAL STANDING OF THE PETITIONERS

In accordance with the provision of Article 51 paragraph (1) of Law Number 24 Year 2003 as amended by Law Number 8 Year 2011 regarding the Constitutional Court, the petitioners shall be the parties considering that their constitutional rights and/or authority are impaired by the coming into effect of a Law, namely:

- a. individual Indonesian citizens;
- b. customary law community units insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of the Republic of Indonesia as regulated in law;
- c. public or private legal entities; or
- d. state institutions.

The aforementioned provision is confirmed in its elucidation, namely that “constitutional rights” refer to the rights regulated in the 1945 Constitution, so that for a person or a party to be eligible as Petitioner having legal standing in a petition for Judicial Review of Law under the 1945 Constitution, he/she must first explain and evidence:

- a. His/her qualification in the petition *a quo* as referred to in Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court;

- b. His/her constitutional rights and/or authority in the intended qualification which are deemed to have been impaired by the coming into effect of the law petitioned for review;
- c. The impairment of the constitutional rights and/or authority of the Petitioner due to the coming into effect of the Law petitioned for review.

Furthermore, following its Decision Number 006/PUU-II/2005 and Decision Number 11/PUU-V/2007, as well as subsequent decisions, the Constitutional Court has provided the definition and cumulative limitations concerning the impairment of constitutional rights and/or authority arising due to the coming into effect of a law according to Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court, which must meet 5 (five) requirements namely:

- a. existence of constitutional rights and/or authority of the Petitioners granted by the 1945 Constitution;
- b. the Petitioners believe that such constitutional rights and/or authority have been impaired by the coming into effect of the law petitioned for review;
- c. the impairment of such constitutional rights and/or authority must be specific and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring;
- d. there is a causal relationship (*causal verband*) between the impairment of



constitutional rights and/or authority of the Petitioners and the law petitioned for review;

- e. it is likely that with the granting of the Petitioners' petition, the impairment of such constitutional rights and/or authority argued by the Petitioners will not or will no longer occur.

With respect to the foregoing, the Government can convey the following matters:

1. According to the Government, the Petitioners are not harmed by the coming into effect of the provision *a quo*, since as smokers, the Petitioners' right to smoke is still guaranteed on condition that it is done in the pre-determined places so that it will not disturb non-smoking community. Therefore, according to the Government, the provision *a quo* is not inconsistent with Article 28D paragraph (1) of the 1945 Constitution which states that "*every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law*".
2. According to the Government, smoking is not a human right because it is not a non-derogable right given by God naturally since birth, so that the regulation on non-smoking room is a form of regulation by the Lawmakers which is not inconsistent with Article 28G paragraph (1) of the 1945 Constitution stating that "*every person shall have the right to protect him/herself, his/her family, honor, dignity and property under his/her*

*control, and shall have the right to feel secure and be protected from the threat of fear to do, or not to do something which constitutes human right”.*

3. Whereas there has not been any research stating that the culture of smoking is a cultural identity and custom of traditional communities in Indonesia which must be maintained; on the contrary, there have been many scientific researches stating that smoking is dangerous not only those who smoke (active smokers) but also to the people around them who inhale the smoke from the cigarettes, so that the regulation on non-smoking areas in the Law *a quo* is not inconsistent with Article 28I paragraph (3) of the 1945 Constitution which states that “*the culture identities and the rights of traditional communities shall be respected in conformity with the development of time and civilization*”.

Therefore, according to the Government, it is necessary to question:

- a. Whether the Petitioners’ interest has been accurate as the parties whose constitutional rights and/or authority have been impaired by the coming into effect of the provision of the Elucidation of Article 115 paragraph (1) of the Health Law (to the extent of the word “may”);
- b. Whether there is any constitutional impairment to the Petitioners which is specific and actual in nature, or which is at least potential in nature which, according to logical reasoning, can be assured of occurring;
- c. Whether there is any causal relationship (*causal verband*) between the

intended impairment and the coming into effect of the Law petitioned for review.

Whereas based on the description above, according to the Government, the provision of the Elucidation of Article 115 paragraph (1) of the Health Law (to the extent of the word “may”), in fact, allows the management of workplaces, public places and other places to provide special places for smokers so that they will not arbitrarily disturb any non-smokers, while smokers are allowed to smoke in the pre-determined places so that the provision *a quo* is not inconsistent with Article 28D paragraph (1), Article 28G paragraph (1), and Article 28I paragraph (3) of the 1945 Constitution.

For that purpose, according to the Government, the Petitioners’ petition is unclear and obscure (*obscuur libels*), particularly in construing the existence of impairment of constitutional rights and/or authority due to the coming into effect of the provision *a quo* petitioned for review. Therefore, according to the Government, the Petitioners’ do not meet the legal standing qualification as provided for in the provision of Article 51 paragraph (1) of Law Number 24 Year 2003 regarding the Constitutional Court and based on Decision of the Constitutional Court Number 006/PUU-III/ 2005 and Decision Number 11/PUU-V/2007 as well as subsequent decisions.

However, if the Chief Justice/Panel of Constitutional Court Justices is of a different opinion, the Government leaves it all to the Chairperson/Members of the Panel of Constitutional Court Justices to consider and evaluate whether the

Petitioners have legal standing or not.

### **III. GOVERNMENT'S EXPLANATION OF THE PETITION FOR JUDICIAL REVIEW OF LAW NUMBER 36 YEAR 2009 REGARDING HEALTH**

In relation to the petition for review of the provision of Elucidation of Article 115 paragraph (1) (to the extent of the word 'may') of Law Number 36 Year 2009 regarding Health which states:

#### **Article 115 paragraph (1) of the Health Law**

- (1) Non-smoking areas are, among other things:
  - a. health service facilities;
  - b. places of learning and teaching process;
  - c. children's playing ground;
  - d. places of worship;
  - e. public transportation;
  - f. workplaces; and
  - g. public places and other places as stipulated.

#### **Elucidation of Article 115 paragraph (1) of the Health Law**

Particularly, workplaces, public places and other places **may** provide special smoking rooms.

The Petitioners consider that the aforementioned provision is inconsistent with the provision of Article 28D paragraph (1), Article 28G paragraph (1), Article 28I paragraph (3) of the 1945 Constitution, which state:

**Article 28D paragraph (1) of the 1945 Constitution**

Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law.

**Article 28G paragraph (1) of the 1945 Constitution**

Every person shall have the right to protect him/herself, his/her family, honor, dignity and property under his/her control, and shall have the right to feel secure and be protected from the threat of fear to do, or not to do something which constitutes human right.

**Article 28I paragraph (3) of the 1945 Constitution**

The culture identities and the rights of traditional communities shall be respected in conformity with the development of time and civilization.

With respect to the substance of the norm petitioned for review by the Petitioners, *in casu* the provision of Elucidation of Article 115 paragraph (1) (to the extent of the word 'may') of the Law *a quo*, the statements and arguments of the Government refer to the opening statement of the Government in the judicial review petition under registration Number 57/PUU-IX/2011 filed by Mr. Enryo Oktavian, cs.

The following is the remaining statement which is supplementary, complementary and which improves the previous statement of the government, as follows:

**With respect to the substance petitioned for review by the Petitioners, the Government can give an explanation from philosophical and sociological perspectives on the existence of the provision petitioned for review, namely as follows:**

1. Article 1 sub-article 1 of Law Number 39 Year 1999 regarding Human Rights defines Human Rights as a set of rights bestowed by God Almighty in the essence and being of humans as creations of God which must be respected, held in the highest esteem and protected by the state, law, Government, and all people in order to protect human dignity and worth.
2. Jan Materson (of the UN Human Rights Commission) in *Teaching Human Rights, United Nations* as quoted by Baharuddin Lopa asserts that human rights are the rights inherent in every human being, without which it would be impossible for human beings to live as human beings.
3. John Locke defined human rights as the rights directly granted by God the Supreme Creator as natural rights.
4. Human rights violation pursuant to Article 1 sub-article 6 of Law Number 39 Year 1999 regarding Human Rights means any actions by individuals or groups of individuals, including the state apparatus, both intentional and unintentional, that unlawfully

diminish, oppress, limit and/or revoke the human rights of an individual or group of individuals guaranteed by the provisions set forth in this Act, and who do not or may not obtain fair and total legal restitution under the prevailing legal mechanism.

5. Whereas the Government's goal in issuing the provision *a quo* is for implementing the mandate of the Constitution. This constitutes a proof of the Government's concern with the fulfillment of the right to life pursuant to the guarantee in Article 28H paragraph (1) of the 1945 Constitution which reads "every person shall have the right to live a physically and mentally prosperous life, to have residence, and to obtain a proper and healthy living environment as well as to obtain health services."
6. Whereas the obligation to participate in realizing, maintaining and improving the highest level of health of the community constitutes the obligation of every person without exception. This is in line with the provision of Article 9 paragraph (3) of Law Number 39 year 1999 regarding Human Rights which states that "*Everyone has the right to an adequate and healthy environment*". In this respect, a healthy environment also means the air which is free from cigarette smoke;
7. Whereas basically, the application and/or placement of special smoking rooms in workplaces, public places and other places has

not guaranteed human rights to good and healthy environment because the application of special smoking rooms and an air circulation system are not capable of providing effective protection for passive smokers. The protection will be effective only if the environment is 100% free from cigarette smoke.

8. Whereas according to the Petitioners, the provision *a quo* is perceived to be inconsistent with human rights because its application limits people's human right to smoke. However, according to the Government, smoking is not a human right because, pursuant to the definition of Human Rights in paragraph 2 and paragraph 3 above, **smoking is not a right directly bestowed by God** and if a person does not smoke, he/she will not die from smoking. However, the **right to clean and healthy environment is clearly a human right**, because it has been directly bestowed by God and that no one can live without clean and healthy environment. It is clear here that "communal human rights prevail over individual human rights."
9. Whereas based on the description above, according to the Government, the provision of Elucidation of Article 115 paragraph (1) of the Health Law (to the extent of the word "may"), in fact, allows the management of workplaces, public places and other places to provide special places for smokers so that they will not



arbitrarily disturb any non-smokers, while smokers are allowed to smoke in the pre-determined places. The meaning of being allowed intended above means the freedom given by the Health Law to the management of workplaces, public places and other places to provide or not to provide special smoking rooms according to their capacity.

In addition, the word “may” constitutes the policy of the Lawmakers to make a regulation accommodating the interest of the people in a balanced manner by considering the aspect of justice, considering the fact that there are smoking and non-smoking communities. This is in line with the statement of expert presented by the Related Parties (Widyastuti Suroyo) stating that *“The elucidation of Article 115 paragraph (1) for workplaces, public places and other places are substantive bonuses for Indonesia at this time. The word “may” in the Elucidation of Article 115 paragraph (1) needs to be perceived as the fulfillment of the constitutional right of smokers and non-smokers which is just under the special condition which must be fulfilled that it will not harm any party whosoever.”*

10. According to the Government, if the Petitioners’ petition is grated with the deletion of the word “may”, then the Elucidation of Article 115 paragraph (1) of the Health Law will mean an “obligation” for workplaces, public places, and other places to provide special

smoking rooms. Therefore, it is inconsistent with the substance of Article 115 paragraph (1) of the Health Law regulating non-smoking areas.

Based on all the foregoing description, according to the Government, the provision of the provision of the Elucidation of Article 115 paragraph (1) of the Health Law (to the extent of the word “may”) is not inconsistent with the provision of Article 28D paragraph (1), Article 28G paragraph (1), and Article 28I paragraph (3) of the 1945 Constitution of the State of the Republic of Indonesia and does not impair the constitutional right of the Petitioners. In fact, the provision *a quo* is intended to provide protection of health of the community in a balanced manner from the dangers of tobacco products.

#### **IV. Response of the Government to the Statements of Experts/Witnesses presented by the Petitioners and the Related Parties**

At the hearings on November 15, 2011 and December 20, 2011, the Petitioners presented 2 (two) experts while the Related Parties presented 2 (two) Experts and 3 (three) Witnesses. With respect to such expert statements, the Government conveys the following matters:

1. With respect to the statement of the Petitioners' Expert: APRINUS

SALAM who principally conveyed the following:

- Whereas one of the human rights of human beings is to consume goods, including food or to consume legally traded beverages and entertainment. In this respect, one example is that human beings also have the right to consume cigarettes because cigarettes are legally traded. Indeed, there are a number of polemics whether smoking harms health and smoking spreading around smokers can harm the health of non-smokers around the smokers. However, it does not mean that people shall not smoke. That is why, in an equal and balanced context, smokers also have the right to the protection that they may still smoke.
- With reference to Law Number 39 Year 2009 regarding Health, the provision of Article 115 paragraph (1) and its Elucidation clearly lead the smokers' losing the place to obtain their human right, in this case to consume cigarette. The word "may" in the provision of the elucidation is multi-interpretable and is not binding. The word "may" in the provision *a quo* harms consumers.

The Government disagrees to the statement of the aforementioned expert because in fact, the substance of Article 115 paragraph (1) of the Law *a quo* expressly refers to **non-smoking areas**, which

means that such areas are 100% non-smoking areas, **being clearly intended to ambiguously understood as special smoking rooms in non-smoking areas.**

2. In relation to the statement of the Petitioners' Expert: YUSRIL IHZA MAHENDRA, particularly regarding the doubt whether smoking is included in the category of cultural identity and the right of traditional communities as intended in Article 28I paragraph (3) of the 1945 Constitution, so that the expert is of the opinion that it is inappropriate for Article 28I paragraph (3) to be the touchstone.

The aforementioned doubt of the expert, according to the Government, has been in accordance with the statement of the government in the legal standing section so that the Petitioners' petition, particularly in relation to the provision of the Elucidation of Article 115 paragraph (1) of the Law *a quo* is obscure (*obscur libel*).

3. With respect to the statements of experts and witnesses of the Related Parties, the Government agrees with them and leaves it to the Constitutional Court to assess it.

## V. CONCLUSION

Based on the explanation above, the Government requests the Chief Justice/Panel of Constitutional Court Justices hearing the petition for

review of Law Number 36 Year 2009 regarding Health under the 1945 Constitution of the State of the Republic of Indonesia to pass the following decisions:

1. Declaring that the Petitioners do not have legal standing;
2. Rejecting the Petitioners' petition for review in its entirety or at least declaring that the Petitioners' petition for review cannot be accepted (*niet onvankelijk verklaard*);
3. Accepting the Government's Statement in its entirety;
4. Declaring that the provision of Elucidation of Article 115 paragraph (1) of Law Number 36 Year 2009 regarding Health is not inconsistent with the provisions of Article 28D paragraph (1), Article 28G paragraph (1) and Article 28I paragraph (3) of the 1945 Constitution of the State of the Republic of Indonesia.

**[2.4]** Whereas with respect to the Petitioners' petition, the People's Legislative Assembly of the Republic of Indonesia has submitted its written statement which was received at the Registrar's Office of the Court on December 2, 2011, as follows:

**A. PROVISIONS OF THE HEALTH LAW PETITIONED FOR REVIEW UNDER THE 1945 CONSTITUTION OF THE STATE OF THE REPUBLIC OF INDONESIA**

In their petition, the Petitioners petition for review of the Elucidation of Article 115 paragraph (1) (to the extent of the word 'may') of the Health Law

- **Whereas Article 115 paragraph (1) of the Health Law reads:**

*“Non-smoking areas are, among other things:*

- a. health service facilities;*
- b. places of learning and teaching process;*
- c. children’s playing ground;*
- d. places of worship;*
- e. public transportation;*
- f. workplaces; and*
- g. public places and other places as stipulated.”*

- **Whereas Elucidation of Article 115 paragraph (1) of the Health Law reads:**

*“Particularly, workplaces, public places and other places **may** provide special smoking rooms”.*

**B. CONSTITUTIONAL RIGHTS AND/OR AUTHORITY THE PETITIONERS CONSIDER TO HAVE BEEN IMPAIRED BY THE COMING INTO EFFECT OF THE HEALTH LAW**

In the petition *a quo*, the Petitioners state that their constitutional right has been impaired and violated or at least it is potential that,

according to logical reasoning such impairment can be assured of occurring due to the coming into effect of the Elucidation of Article 115 paragraph (1) of the Health Law which is principally as follows:

1. Whereas, according to the Petitioners, smoking is legal as it is protected by Law, although several legislations limit the element of permission of smoking, as concluded in the Health Law. (*vide* Petition *a quo* on page 11).
2. Whereas the Petitioners consider that smoking is an activity which is the right of each person or individual, insofar as it is not prohibited by laws and regulations. The Health Law clearly and factually limits or prohibits smoking in certain areas, namely: namely; a. health service facilities; b. places of learning and teaching process; c. children's playing ground; d. places of worship; and e. public transportation. Meanwhile, workplaces, public places and other places as stipulated are excluded in respect of non-smoking areas with the provision of special smoking rooms. (*vide* Petition *a quo* on page 11).
3. Whereas, according to the Petitioners, to fulfill smokers' constitutional right to smoke in workplaces, public places and other places as stipulated, the law gives a guarantee by providing Special Smoking Rooms (*vide* Petition *a quo* on page 11).

4. Whereas according to the Standard Dictionary of Indonesian Language, '**may**' is defined as 'capable of', 'able', 'permitted', 'may be'. Therefore, anything regulated in the Elucidation of Article 115 paragraph (1) (to the extent of the word 'may') of Law Number 36 Year 2009, clearly indicates an unclear meaning. The meaning of the word 'may' in the formulation of Elucidation of Article *a quo* is more of "**facultative**" nature. (*vide* Petition *a quo* on page 12).
5. Whereas the Petitioners consider that the word '**may**' in the formulation of Elucidation of Article 115 paragraph (1) of the Health Law clearly and factually violates the Petitioners' constitutional rights whereby the Petitioners as users of public places cannot use their right to smoke in public places and in workplaces. (*vide* Petition *a quo* on page 12).

The Petitioners consider that the provision of Elucidation of Article 115 paragraph (1) of Law Number 36 Year 2009 inconsistent with Article 28D paragraph (1), Article 28G paragraph (1), Article 28I paragraph (3) of the 1945 Constitution which read:

- **Article 28D paragraph (1) of the 1945 Constitution, which reads**  
*"Any person shall have the right to the recognition, guarantee, protection and certainty of just laws as well as equal treatment before the law".*



- **Article 28G paragraph (1) of the 1945 Constitution, which reads**  
*“Every person shall have the right to protect him/herself, his/her family, honor, dignity and property under his/her control, and shall have the right to feel secure and be protected from the threat of fear to do, or not to do something which constitutes human right”.*
  
- **Article 28I paragraph (3) of the 1945 Constitution, which reads**  
*“The culture identities and the rights of traditional communities shall be respected in conformity with the development of time and civilization”.*

### **C. STATEMENT OF THE PEOPLES’ LEGISLATIVE ASSEMBLY (DPR)**

With respect to the Petitioners arguments as described in the Petition *a quo*, DPR, in its opinion, first describes legal standing which can be explained as follows:

#### **1. Legal Standing of the Petitioners**

The qualification which must be fulfilled by the Petitioners as Parties has been regulated in the provision of Article 51 paragraph (1) of Law Number 24 Year 2003 regarding the Constitutional Court (hereinafter abbreviated to the Constitutional Court Law) stating that *“The petitioners shall be the parties considering that their constitutional rights and/or authority are impaired by the coming into effect of a Law, namely:*

- a. *individual Indonesian citizens;*
- b. *customary law community units insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of the Republic of Indonesia as regulated in law;*
- c. *public or private legal entities; or*
- d. *state institutions.”*

The constitutional rights intended in the aforementioned provision of Article 51 paragraph (1) is confirmed in its elucidation, namely that “*referred to as “constitutional rights” shall be the rights regulated in the 1945 Constitution of the State of the Republic of Indonesia*”. The Elucidation of this Article 51 paragraph (1) asserts that only the rights explicitly regulated in the 1945 Constitution are categorized as “constitutional rights”.

Therefore, according to the Constitutional Court, for a person or a party to be eligible as Petitioner having legal standing in a petition for Judicial Review of Law under the 1945 Constitution, the person or party must explain and evidence:

- a. His/her qualification in the petition *a quo* as referred to in Article 51 paragraph (1) of Law Number 24 Year 2003

concerning the Constitutional Court.

- b. His/her constitutional authority as intended in the **“Elucidation of Article 115 paragraph (1)”** which is considered to have been impaired by the coming into effect of the Law.

As to the parameters of constitutional impairment, the Constitutional Court has provided the definition and limitation of constitutional impairment due to the coming into effect of a Law, which must meet 5 (five requirements (*vide* Decisions in Case Number 006/PUU-III/2005 and Case Number 11/PUU-V/2007), namely as follows:

- a. existence of constitutional rights and/or authority of the Petitioners granted by the 1945 Constitution;
- b. the Petitioners believe that such constitutional rights and/or authority have been impaired by the coming into effect of the law petitioned for review;
- c. the impairment of such constitutional rights and/or authority must be specific and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring;

- d. there is a causal relationship (*causal verband*) between the impairment of constitutional rights and/or authority of the Petitioners and the law petitioned for review;
- e. it is likely that with the granting of the Petitioners' petition, the impairment of such constitutional rights and/or authority argued by the Petitioners will not or will no longer occur.

In the event that the aforementioned five requirements are not fulfilled by the Petitioners in the case of review of the Law *a quo*, the Petitioners shall not have the legal standing qualification as the Petitioners.

With respect to the aforementioned legal standing, DPR fully leaves the issue to the Panel of Justices to assess whether the Petitioners have legal standing as required by the provision of Article 51 paragraph (1) of the Constitutional Court Law and based on Decisions of the Constitutional Court in Case Number 006/PUU-III/2005 and Case Number 011/PUU-V/2007.

## **2. Review of Elucidation of Article 115 paragraph (1) of the Health Law**

With respect to the petition for review of the Elucidation of Article 115 paragraph (1) of the Health Law, DPR has given its statement as follows:

1. Whereas health is a human right and one of the elements of welfare which must be materialized. To materialize it, the 1945 Constitution provides the guarantee that every person shall have the right to live a physically and mentally prosperous life, to have residence, and to obtain a proper and healthy living environment as well as to obtain health services.
2. One of the efforts to improve the highest level of health initially begins with the efforts to cure diseases and then it gradually develops towards the health efforts for all the people by involving the public at large, which include comprehensive, integrated and continuous promotion, prevention and rehabilitation efforts the regulations of which are enshrined in the Health Law.
3. In the framework of preventive efforts to improve the health level of the community by the efforts of creating good and healthy environment as mandated by Article 28H paragraph (1) of the 1945 Constitution, the Health Law regulates the limitation of smoking activities by determining certain non-smoking areas as provided for in Article 115 paragraph (1) of the Health Law, including: Health service facilities, places of learning and teaching process, children's playing ground, places of worship, public transportation, workplaces and public places and other places as stipulated. The limitation of non-smoking areas is determined based on the consideration that

in addition to harming oneself, smoking also harms other people around by disturbing other people's health.

4. Whereas, with respect to the substance of the Petitioners' petition on the argument stating that the word "may" in the elucidation of Article 115 paragraph (1) of the Health Law has eliminated or at least will potentially eliminate the Petitioners' constitutional right, DPR is of the opinion that the elucidation of Article 115 paragraph (1) of the Health Law cannot be understood partially but it has to be understood comprehensively with due observance of the corpus, namely Article 115 paragraph (1) which, in principle, provides that certain areas shall be free from/without cigarettes. This means that in certain areas, people are prohibited from smoking as it will harm other people. Every person shall have the right to health environment as guaranteed by the constitution and therefore, in exercising his/her freedom, a person must observe the limitations determined by the Law for the purpose of respecting other people's rights and freedom. Therefore, the prohibition of smoking in workplaces, public places and other places as stipulated has been in line with the values of the constitution.
5. Elucidation of an article in a Law is a complementary norm. From the aspect of legislation techniques, Elucidation is made if it is considered necessary. Elucidation shall not reduce or exceed the

norm in the corpus. In the event that the Elucidation reduces or exceeds the corpus, the corpus shall prevail. Article 115 paragraph (1) constitutes a norm which is compelling rather than alternative or facultative. Therefore, it is mandatory to determine special smoking rooms in workplaces, public places and other places.

We have thus presented the statement of the People's Legislative Assembly (DPR) as material for consideration for the Panel of Constitutional Court Justices to hear the case *a quo* and to pass the following decisions:

1. Accepting the statement of the People's Legislative Assembly of the Republic of Indonesia (DPR RI) in its entirety;
2. Declaring that Article 115 paragraph (1) of the elucidation of the Law *a quo* **is not inconsistent** with Article 28D paragraph (1), Article 28G paragraph (1) and Article 28I paragraph (3) of the 1945 Constitution.
3. Declaring that the Elucidation of Article 115 paragraph (1) of the Law *a quo* still has binding legal effect;

**[2.5]** Whereas with respect to the Petitioners' petition, the Related Parties have presented an oral statement conveyed at the hearing on November 15, 2011 which was supplemented with the written statement received at the Registrar's Office of the Court on November 28, 2011, as well as the principal statement of

the Related Parties, dr. Hakim Sorimuda Pohan, which is principally as follows:

**A. Reasons and Legal Basis for the Involvement of the Related Parties**

1. Whereas based on the website of the Constitutional Court, we see that the Constitutional Court is in the process of conducting a plenary hearing I for case Number 57/PUU-IX/2011 reviewing the Elucidation of Article 115 paragraph (1) of Law Number 36 Year 2009 regarding Health to the extent of the word “may” filed by the abovementioned principal Petitioners;
2. Whereas the principal Petitioners request for the Constitution Court to delegitimize the word “may” in the Elucidation of Article 115 paragraph (1) by testing the aforementioned provision against Article 28D paragraph (1) of the 1945 Constitution regulating the protection of freedom from threat of fear, as well as Article 28I paragraph (3) regulating the respect for the cultural identity and rights of traditional community, which is something without any basis and correlation at all;
3. Whereas the Elucidation of Article 115 paragraph (1) reads: “***Particularly, workplaces, public places and other places may provide special smoking rooms***”, so that in our opinion, if the aforementioned principal Petitioners’ petition for substantive review is granted, then the Elucidation of Article 115 paragraph (1) will read, “***Particularly, workplaces, public places and other places provide special smoking rooms***”;
4. Whereas starting from the concern that the interpretation of the content



and provision of the Elucidation of Article 115 paragraph (1) above as well as the importance of protection for the community from the dangers and effects of tobacco and its derivative products, the Public Advocate Solidarity for the Control of Tobacco or *Solidaritas Advokat Publik untuk Pengendalian Tembakau (SAPTA INDONESIA)* acting for and on behalf of Mr. Hilarion Haryoko, Mr. Normansyah, Ms. Sumiati, Ms. Kholidi, Mr. dr. Hakim Sorimuda Pohan and Mr. Abdillah Ahsan, then tries to take part in the hearing *a quo* by becoming the Related Parties;

5. Whereas Article 14 paragraph (1) of the Regulation of the Constitutional Court Number 06/PMK/2005 regarding the Guidelines on the Proceedings of Judicial Review Cases in the Constitutional Court gives a clear room for every individual claiming to be related either directly or indirectly to participate in the hearing process in order to protect and defend their constitutional rights;

## **B. LEGAL FACTS REGARDING TOBACCO AND NON-SMOKING AREAS**

1. Whereas judicially, the fact that tobacco and all its derivative products contain an addictive substance is indisputable (*notoir faten*) considering Article 113 paragraph (2) of Law Number 36 Year 2009 regarding Health states that “*Addictive substance as intended in paragraph (1) includes tobacco, products containing solid, liquid and gaseous tobacco, which are addictive and whose use can harm oneself and/or the people around him/her*” **[Exhibit PT-1]**;

2. Whereas the fact of addictive nature of tobacco is further confirmed by Decision of the Constitutional Court in Case Number 19/PUU-VIII/2010 confirming the legal fact that tobacco is an addictive substance as contained in the consideration of the Court on page 137 at point 3.15.10 stating that “the formulation of Article 113 of Law Number 36 Year 2009 regarding Health is intended to declare that tobacco is categorized as an addictive substance, and therefore, its production, distribution and use shall be regulated as subsequently provided for in Articles 114, 115 and Article 116 of Law Number 36 Year 2009 regarding Health” **[Exhibit PT-2]**;

3. Whereas another evidence which can be made as the parameter to measure the “level of danger” of tobacco and its derivative products is by seeing the fact that tobacco and its derivative products are different products, so that they must be further treated differently. With respect to products considered to have certain characteristics, the state charges excise on such products (in this respect tobacco and its derivative products).

Article 4 paragraph (1) sub-paragraph C of Law Number 11 Year 1995 regarding Excise states that “*Excise shall be charged to Excisable Goods consisting of tobacco products, including cigarettes, cigars, tobacco leaf, tobacco slices, and other tobacco processing products, regardless of whether substitute materials or auxiliary materials are used or not in their*

*manufacturing.*” **[Exhibit PT-3];**

4. Whereas different forms of application to tobacco and tobacco products can also be seen in the regulation prohibiting active smokers from smoking in certain areas as contained in Article 115 paragraph (1) which reads, “*Non-smoking areas are, among other things:*
  - a. *health service facilities;*
  - b. *places of learning and teaching process;*
  - c. *children’s playing ground;*
  - d. *places of worship;*
  - e. *public transportation;*
  - f. *workplaces; and*
  - g. *public places and other places as stipulated.*” **[Exhibit PT-4];**
  
5. Whereas the regulation on non-smoking areas is also enshrined in **Article 22 of Government Regulation Number 19 Year 2003 regarding the Safeguarding of Cigarettes to Health** *juncto* **Article 13 of Regional Regulation of DKI Jakarta Province Number 2 Year 2005** regarding the Control of Air Pollution, which specifically gives an explanation of public areas categorized as non-smoking areas such as public places, health facilities, workplaces and specific places of learning and teaching,

children's play ground, places of worship and public transportation  
**[Exhibit PT-5];**

6. Whereas different treatment to tobacco and its derivative products constitutes a part of the efforts to fulfill citizens' right to good and healthy environment, as guaranteed by Article 9 paragraph (3) of Law Number 36 Year 1999 regarding Human Rights stating that "***Everyone has the right to an adequate and healthy environment***" **[Exhibit PT-6]**. Healthy environment also means cigarette smoke-free air;
  
7. Whereas the efforts of protection of the right to life which have been made by the government of the Republic of Indonesia by issuing the abovementioned regulations are in line with the mandate which must be implemented by Indonesia as a country implementing the goal of the state namely to protect the entire Indonesian nation and the entire Indonesian native land, and in order to advance general welfare, to develop the intellectual life of the nation, and to partake in implementing world peace. And as a part of the world community, Indonesia is a party actively pioneering the establishment of the Framework Convention on Tobacco Control (FCTC), an international treaty initiated by WHO, whose Article 8 paragraph (2) expressly states that "***Each Party shall adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative***

*and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places.” [Exhibit PT-7];*

8. Whereas the obligation required by the convention and or treaty as well as Law above basically constitutes a part of the **fulfillment of the right to life**, as contained in **Article 28H paragraph (1) of the 1945 Constitution** which reads, “***Every person shall have the right to live a physically and mentally prosperous life, to have residence, and to obtain a proper and healthy living environment as well as to obtain health services***” [Exhibit P-8];
9. Whereas the prohibition from smoking in public places and/or prohibition from activities of production, sale, advertisement, promotion and/or use of cigarettes are clearly regulated in **Article 115 paragraph (1) subparagraph g of Law Number 36 Year 2009 regarding Health juncto Article 22 of Government Regulation Number 19 Year 2003 regarding the Safeguarding of Cigarettes for Health juncto Article 13 paragraph (1) of Regional Regulation of DKI Jakarta Province Number 2 Year 2005 regarding the Control of Air Pollution** which state that: “***Non-Smoking Areas are, among other things, public places and other places as stipulated***”
10. Whereas furthermore, as an effort to protect Jakarta residents from the dangers of cigarette smoke, the Governor of DKI Jakarta, in this respect

- Mr. DR. Ing. FAUZI BOWO then applied the Non-Smoking Areas in a regional regulation namely Governor's Regulation Number 88 Year 2010 regarding the Amendment to Governor's Regulation Number 75 Year 2005 regarding Non-Smoking Areas;
11. Whereas the efforts made by Mr. Dr. Ing. Fauzi Bowo in initiating the regulation on Non-Smoking Areas in the Province of DKI Jakarta have born a distinctive achievement, for which WHO then presented an award for the commitment of Mr. Governor Dr. Ing. Fauzi Bowo in the context of control of tobacco in DKI Jakarta Province, as published in the Pos Kota daily newspaper on May 30, 2011 **[Exhibit PT-9]**;
  12. Whereas to provide an understanding on the procedures for the application of Non-Smoking Areas in DKI Jakarta Province, the Regional Environmental Management Board (BPLHD) of DKI Jakarta Province subsequently issued the Practical Guideline on the Implementation of Non-Smoking Areas for public places and workplaces **[Exhibit PT-10]**;
  13. Whereas in relation to the application of Non-Smoking Areas, the Demographic Institute of Indonesia University issued a comprehensive research on Non-Smoking Areas **[Exhibit PT-11]**;
  14. Whereas the efforts to provide protection of citizens from the dangers of cigarette smoke are, in fact, parallel with and/or in line with the will of the Indonesian people. This is evidenced by the results of survey in 8 (eight)

big cities in Indonesia conducted by the Indonesian Consumer's Institute Foundation (YLKI) in 2011 regarding the support of the community for specific policies on mitigating the use of tobacco in Indonesia, which include:

- a. prohibition of advertisement of cigarettes and tobacco products (71%);
  - b. obligation of including more specific and noticeable warning message on tobacco products (95%);
  - c. **prohibiting smoking in all closed public places and workplaces (88%);**
  - d. prohibition from selling cigarettes to children under 18 years of age (94%);
  - e. increasing taxes for tobacco products and dedicating a portion of tax revenues to programs for preventing the use of tobacco among children and providing assistance for smokers who want to quit smoking (87%);
  - f. requiring advertisements to inform the community of the dangers of tobacco to health (95%) **[Exhibit PT-11];**
15. Whereas in addition to the research results above, the support of the community for the application of non-smoking areas can also be seen in

- the research results of “Smoke Free Park of Ragunan Zoo” conducted by Mr. Tubagus Haryo Karbyanto, where approximately 87% of the visitors out of 998 respondents of the zoo agree for the zoo to be made as a smoke-free area. **[Exhibit PT-12];**
16. Whereas in practice, a similar wish to be protected from the exposure to cigarette smoke of smokers in public places has also gained the attention of several regional governments, where several regions in Indonesia then adopted similar measures by issuing regional regulations in the form of Regional Regulations or Mayor’s Regulation and/or other forms of regulations as implemented by South Sumatra Province and Bogor City in West Java;
17. Whereas subsequently, several state institutions and/or Ministries have also initiated similar measures, namely to support the application of non-smoking areas in public places. This fact can be seen in **Article 1 sub-article 11 of the Joint Regulation of the Minister of Health and the Minister of Home Affairs Number 188/Menkes/PB/I/2011 regarding the Guidelines on the Implementation of Non-Smoking Areas**, then *public places shall be all closed places which can be accessed by the public and/or places which can be used together for the activities of the community managed by the government, private parties and the community*” **[Exhibit PT-13];**
18. Whereas based on the points above, it is very clear that **applying non-**



**smoking areas in public places** constitutes the duty and responsibility of the state as a form of efforts of the state's protection of citizens, and is a fact which is indisputable that workplaces, public places as well as other places which are the centers of activities of the general community must be subject to the abovementioned regulations;

19. Whereas in principle, all the aforementioned regulations **are not intended to stop and/or prohibit smokers from smoking at all but rather, only to move the places for smoking**, because the provision of **Article 5 paragraph (2) of the Joint Regulation of the Minister of Health and the Minister of Home Affairs Number 188/Menkes/PB//2011 regarding the Guidelines on the Implementation of Non-Smoking Areas** explains in detail the places and/or locations which can be used by smokers to smoke, namely that, "*Special places for smoking as intended in paragraph (1) must meet the following requirements:*
- a. *Being an open space or a space directly related to the external air so that air can be properly circulated;*
  - b. *Being separate from the main building/place/room and other rooms used for activities;*
  - c. *Being far from entry and exit doors;*
  - d. *Being far from places where people pass [Exhibit PT-14];*

20. Whereas **in addition to providing a clear definition of non-smoking areas for a national scale, the state also grants authority to regional governments to regulate and apply** the abovementioned provision within the scope of regional regulation being adjusted to the needs and wishes of the local community in accordance with the provision of **Article 115 paragraph (2) of Law Number 36 Year 2009 regarding Health, juncto Article 25 of Government Regulation Number 19 Year 2003 regarding the Safeguarding of Cigarettes for Health;**
21. Whereas in accordance with Article 1 sub-article 5 of the General Provisions of Law Number 32 Year 2004 regarding Regional Government which states “***Regional Autonomy shall be the right, authority and obligation of an autonomous region to regulate and manage its own governmental affairs and the interests of the local community in accordance with the laws and regulations***” [Exhibit PT-15];
22. Whereas the state grants authority to regions to regulate matters deemed necessary for the advancement of their regions as guaranteed by **Article 18 paragraph (2) of the 1945 Constitution**, which states that “*The division of Indonesia’s territory into large and small regional territories along with the structure of their respective government, shall be determined by law, with regard for and in observance of deliberation in the governmental system of the state, and the traditional rights in the regional territories which have a special character*” [Exhibit PT-16];

23. Whereas in addition, Article 10 paragraph (3) of Law Number 32 Year 2004 regarding Regional Government also implicitly provides a very clear definitions of the matters and/or authority of the central government, namely, “*government affairs which become the affairs of the government as intended in paragraph (1) shall include;*

*e. Foreign politics;*

*f. Defense;*

*g. Security*

*h. Justice;*

*i. National Monetary and Fiscal Affairs*

*j. Religion” [Exhibit PT-17];*

24. Whereas based on the points above, it is very appropriate that the issue of **“creating healthy and clean environment” is part of the duty and responsibility of the Regional Government;**

25. Whereas it is an indisputable fact (*notoire fater*) and constitutes a principle of *curia novit ius* (the court knows the law) that smoking is dangerous and can even cause death. **The dangers of smoking will be felt not only by the smoker, but also by the people around the smoker. Even passive smokers are vulnerable to diseases due to**

- smoking by sucking additional smoke which is 3 times more dangerous than the smoke sucked by the smoker.** In other words, smoking (especially in public places) will impede a person's right to life which is a supreme right which **shall not** be ignored under any situation, even including emergency situations;
26. Whereas the fact is that the dangers of cigarette smoke for people around the smoker are not only to the second hand smokers but also affect third hand smokers, as contained in a quotation from the Newyork Times daily newspaper dated January 2, 2009 which states that, *"that's the term being used to describe the invisible yet toxic brew of gases and particles clinging to smokers' hair and clothing, not to mention cushion and carpeting, that lingers long after second hands smoke has cleared form a room. The residue includes heavy metals, carcinogens and even radioactive materials that young children can get on their hands and ingest, especially if they're crawling or playing on the floor"* **[Exhibit PT-18]**;
27. Whereas the arguments of the principal Petitions in the case *a quo*, requesting that workplaces, public places and other places be granted specialty by providing special smoking rooms there are inconsistent not only with the numerous regulations above but they should also be considered inhuman **due to the application of special smoking rooms and the air circulation system which is incapable of providing effective protection for passive smokers. Protection will only be**

**effective if the environment is 100% cigarette smoke-free;**

28. Whereas basically, the application of special smoking rooms in closed rooms and/or the application of a ventilation system will not solve the problem because special smoking rooms will not provide protection of other people from exposure to cigarette smoke, as included in the Package of Cigarette-Free Area Development; Guidelines for Advocators, published by Tobacco Control Support Center of the Association of Community Health Experts (TCSC-IAKMI) **[Exhibit PT-19]**;
29. Whereas **Article 28D paragraph (1) of the 1945 Constitution which reads “Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law”**, in fact, pro a very clear understanding that every Indonesian citizen must obtain equal treatment and/or that there is no discrimination in the fulfillment of their right, including the fulfillment and protection from the dangers of smokers’ cigarette smoke;
30. Whereas to avoid different treatment (in this matter the treatment between smokers and non-smokers), and for greater public interest namely to protect the community members from the dangers of cigarette smoke, as well as the form of compliance of citizens with the regulations made by the state, it is considered appropriate for all closed rooms and/or closed places becoming the centers of activities of many people without

exception must be determined as cigarette smoke-free places;

31. Whereas similarly, **Article 28G paragraph (1) which reads “Every person shall have the right to protect him/herself, his/her family, honor, dignity and property under his/her control, and shall have the right to feel secure and be protected from the threat of fear to do, or not to do something which constitutes human right”** in fact explains that the community has the right to be free from fear of the dangers of cigarette smoke from smokers smoking in public rooms;
32. Whereas up to the present, **the state has not regulated and/or declared in a valid legal document that smoking is a part of human rights.** Basically, every person has the right to do something insofar as it is not inconsistent with and/or interferes with other peoples’ right;
33. Whereas Article 28I paragraph (3) of the 1945 Constitution which reads *“The culture identities and the rights of traditional communities shall be respected in conformity with the development of time and civilization”*, is basically not directly related to the discussion of the case *a quo*, because if the principal Petitioners are of the opinion that smoking constitutes a part of the right of traditional community, the next question is that whether smoking constitutes a part of the life of Indonesian traditional community, and which traditional community is to be represented by the principal Petitioners;

Whereas based on the data and facts above, we request the Chief Justice of the Constitutional Court to reject the whole petition of the principal Petitioners and/or to decide other matters considered necessary for the purpose of fulfilling the constitutional rights of the Indonesian community;

**[2.6]** Whereas to support their arguments, the Related Parties have presented written instruments of evidence marked as Exhibits PT-1 through PT-20, as follows:

1. Exhibit PT-1 : Photocopy of Article 113 paragraph (2) of Law Number 36 Year 2009 regarding Health;
2. Exhibit PT-2 : Photocopy of Decision in Case Number 19/PUU-VIII/2010 regarding the judicial review of the article on tobacco as an addictive substance decided upon by the Constitutional Court of the Republic of Indonesia;
3. Exhibit PT-3 : Photocopy of Article 4 paragraph (1) of Law Number 11 Year 1995 regarding Excise;
4. Exhibit PT-4 : Photocopy of Article 115 paragraph (1) of Law Number 36 Year 2009 regarding Health;
5. Exhibit PT-5 : Photocopy of Article 22 of Government Regulation Number 19 Year 2003 regarding the Safeguarding of Cigarettes for Health;

6. Exhibit PT-6 : Photocopy of Article 9 paragraph (3) of Law Number 39 Year 1999 regarding Human Rights;
7. Exhibit PT-7 : Photocopy of Article 8 paragraph (2) of WHO Framework Convention on Tobacco Control;
8. Exhibit PT-8 : Photocopy of Article 18 paragraph (2) of the 1945 Constitution;
9. Exhibit PT-9 : Photocopy of newspaper clipping on the presentation of award to Mr. Dr. Ing. Fauzi Bowo from WHO for the commitment on tobacco control;
10. Exhibit PT-10 : Photocopy of the book “Practical Guidelines on the Implementation of Non-Smoking Areas (*Panduan Praktis Pelaksanaan Kawasan Dilarang Merokok*)”;
11. Exhibit PT-11 : Photocopy of the results of research by the Demographic Institute of Indonesia University on the important aspects of the application of the regulations on non-smoking areas;
12. Exhibit PT-12 : Photocopy of the results of research in 8 cities in Indonesia conducted by YLKI on the support of the community for the application of Non-Smoking Areas;



13. Exhibit PT-13 : Photocopy of the results of research on Smoke-Free Ragunan conducted by Tubagus Haryo Karbyanto;
14. Exhibit PT-14 : Photocopy of Article 1 sub-article 11 of the Joint Regulation of the Minister of Health and the Minister of Home Affairs Number 188/Menkes/PB/I/2011 – Number 7 Year 2011 regarding the Guidelines on the Implementation of Non-Smoking Areas;
15. Exhibit PT-15 : Photocopy of Article 5 paragraph (2) of the Joint Regulation of the Minister of Health and the Minister of Home Affairs Number 188/Menkes/PB/I/2011 – Number 7 Year 2011 regarding the Guidelines on the Implementation of Non-Smoking Areas;
16. Exhibit PT-16 : Photocopy of Article 1 sub-article 5 of Law Number 32 Year 2004 regarding Regional Government;
17. Exhibit PT-17 : Photocopy of Article 18 paragraph (2) of the 1945 Constitution;
18. Exhibit PT-18 : Photocopy of Article 10 paragraph (3) of Law Number 32 Year 2004 regarding Regional Government;
19. Exhibit PT-19 : Photocopy of the Newyork Times daily newspaper, edition of January 2, 2009;

20. Exhibit PT-20 : Photocopy of the book of Package of Cigarette-Free Area Development; Guidelines for Advocators (*Paket Pengembangan Kawasan Tanpa Rokok Pedoman untuk Advokator*) published by TCSC IAKMI.

In addition, the Related Parties have presented 2 (two) experts and 3 (three) witnesses whose statements have been heard at the hearings of the Court on December 1, 2011 and on December 20, 2011, principally explaining as follows:

#### **Witnesses of the Related Parties**

##### **1. Fuad Baradja**

- The witness is the Chairperson of the Counseling and Education Division in an organization active in smoking issues;
- Whereas cigarette smoke contains many diseases and poisons containing at least four hundred types of chemical compounds constituting toxic chemicals;
- Cigarette smoke is the product of the burning of cigarettes containing poisons. Cigarette smoke is very dangerous to the smoker and other people who inhale it;
- Smoke-free area is useful for protecting those who do not smoke

from cigarette smoke. Non-smoking areas are necessary because non-smoking people have the right to inhale clean and healthy air;

- Special smoking rooms are intended to keep away other peoples' cigarette smoke from non-smokers;
- Whereas smoking areas in a building does not provide effective protection because the people in the smoking room tend to open and shut the door, thus causing cigarette smoke to still pollute the surrounding air;
- A smoking room should be outside the building because rooms inside a building are generally air-conditioned and have a closed air circulation.

## **2. Tulus Abadi**

- The witness is a Member of the Daily Administrators of the Indonesian Consumer Institute Foundation (YLKI);
- Whereas it is necessary to have a non-smoking area serving the function of protecting passive smokers who have been so far the victims of active smokers who often smoke in public places;
- The results of research indicate that all 87.8% of the respondents support the application of non-smoking areas;

- Whereas the application of non-smoking areas is prioritized at the centers of health service, public transportation, places for learning and teaching, shopping centers, as well as buildings of government or private offices;
- Whereas the support from both non-smokers and smokers for the enforcement of non-smoking areas is very strong;
- Whereas the enforcement of non-smoking areas becomes urgent to be regulated, both at the national level and at the regional level;
- Whereas there is still minimum number of regulations regulating smoking areas because in principle, smoking is still allowed in all places except for certain places.

### **Experts of the Related Parties**

#### **1. Nani Widayani**

- The expert is the Head of Community Health Empowerment Division of the Service Office of Health of Bogor City;
- Whereas the definition of non-smoking areas is similar to the definition of places where smoking, producing, selling, advertising, and promoting cigarettes are prohibited;
- Whereas providing clean and healthy air, creating clean and

healthy environment as well as improving community's health are efforts to prevent beginner smokers;

- Whereas activities of application and enforcement of Regional Regulations on Non-Smoking Areas (KTR) in Bogor City were started in 2010 after the ratification of such Regional Regulation with various activities of application and implementation;
- The expert has always conducted campaigns on the dangers of cigarette ad Regional Regulation on KTR as well as conducting sympathetic operations in Bogor City;
- The expert conducts monitoring of the application of non-smoking areas in eight areas in Bogor City once in every three months and imposes sanctions for light criminal acts (*Tindak Pidana Ringan/Tipiring*) for violations of the Regional Regulation of KTR once in every one to two month;
- The application of non-smoking areas is implemented in malls, schools, campuses, workplaces and places of worship in Bogor;
- The expert carries out enforcement of Regional Regulation Number 12 Year 2009 through *Tindak Pidana Ringan* (Light Criminal Act), namely by being heard and imposed with fine on the spot. The enforcement of the Regional regulation has been implemented in, among other things, public transportation places and in malls;

- Whereas the application of non-smoking areas in Bogor has had an impact on changes to healthy behavior;
- Regulation of Mayor of Bogor has regulated the places for smoking outside buildings, in open spaces, without roof as well as with certain size.

## **2. Widyastuti Suroyo**

- Whereas there is no safe limit of cigarette smoke for passive smokers because cigarette can cause health problems to the users;
- Whereas diseases caused by cigarette smoke are causally related diseases and some are strongly suspected to be caused by other people's cigarette smoke;
- Whereas cigarette smoke in a room cannot be limited, meaning that smoking and non-smoking areas are ineffective;
- A study at one of the airports in Century, America, indicated that there were no strict limitation in the policies prohibiting smoking in Century bordering public places and places at the airport not to smoke;
- Whereas the air ventilation and filtration cannot eliminate tiny particles and gases of cigarette smoke;

- Provision of smoking rooms in a building cannot control the leaks of poison of cigarette smoke to other rooms;
- People are not prohibited from smoking in non-smoking areas insofar as it does not impair the right of non-smokers to healthy environment guaranteed by Law;
- Legal rules in Indonesia give an optimum tolerance to the extent of the word “may” in the Elucidation of Article 115 paragraph (1) which needs to be understood as a special place outside a building declared to be a non-smoking area;
- The word “may” will give freedom to regional governments with more advanced view and with commitment to reach an equal position with other states in the world;
- Whereas the smokers’ right to smoke is not similar to the right to pollute the air with poison threatening other people’s right to life;
- Elucidation of Article 15 paragraph (1) for workplaces, public places and other places is a substantive bonus for Indonesia at this time;
- The word “may” in the Elucidation of Article 15 paragraph (1) needs to be understood as the fulfillment of smokers and non-smokers’ right which is just, based on special requirements which must be fulfilled in order to prevent impairment to any other party.

### 3. Witness Sukaesih

- The witness strongly disagrees with the existence of special smoking rooms;
- The witness saw a special smoking room which did not function effectively when she went shopping in a mall in Jakarta;
- The witness saw people smoke in a special smoking room and without being aware of it, cigarette smoke could go out through an open door and through the air filter;
- The witness as a citizen strongly desires comfort when she is out of the home with the family;
- The witness as a passive smoker has the right to inhale clean air and to have a healthy environment;
- The witness as a resident of DKI Jakarta supports Non-Smoking Areas and absence of special smoking rooms.

**[2.7]** Whereas the Petitioners and the Related Parties have submitted their written conclusions received at the Registrar's Office of the Court on December 30, 2011 and which principally state to be consistent with their opinions;

**[2.8]** Whereas to make the description in this decision short, all that happened at the hearing shall be sufficiently referred to in the minutes of hearing.



Constituting an integral and inseparable part of this decision;

### **3. LEGAL CONSIDERATIONS**

**[3.1]** Whereas the substance of the Petitioners' petition is the judicial review of the word "may" in the Elucidation of Article 115 paragraph (1) of Law Number 36 Year 2009 regarding Health (State Gazette of the Republic of Indonesia Year 2009 Number 144, Supplement to the State Gazette of the Republic of Indonesia Number 5063, hereinafter referred to as Law No. 36/2009), under the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution);

**[3.2]** Whereas prior to considering the substance of the petition, the Constitutional Court (hereinafter referred to as the Court) shall first consider the Court's authority to hear the petition *a quo* and the Petitioners' legal standing;

#### **Authority of the Court**

**[3.3]** Whereas based on the provision of Article 24 C paragraph (1) of the 1945 Constitution and Article paragraph (1) sub-paragraph a of Law Number 24 Year 2003 regarding the Constitutional Court as amended by Law Number 8 year 2011 regarding the Amendment to Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2011 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 5226, hereinafter referred to as the Constitutional Court Law) *juncto* Article 29 paragraph (1) of Law Number 48 Year 2009 regarding Judicial Power

(State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076), the Constitutional Court has authority to hear at the first and final levels, whose decision shall be final, to review Laws under the 1945 Constitution;

**[3.4]** Whereas the Petitioners' Petition is intended to review the Elucidation of Article 115 paragraph (1) of Law No. 36/2009, particularly the word "may" under the 1945 Constitution, which becomes one of the authorities of the Court, and therefore, the Court has authority to hear the petition *a quo*;

#### **Legal Standing of the Petitioners**

**[3.5]** Whereas based on Article 51 paragraph (1) of the Constitutional Court Law along with its Elucidation, the parties that may file a petition for judicial review of a Law under the 1945 Constitution shall be those who consider that their constitutional rights and/or authorities have been impaired by the coming into effect of a Law namely:

- a. individual Indonesian citizens (including groups of people having a common interest);
- b. customary law community units insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of the Republic of Indonesia as regulated in law;
- c. public or private legal entities; or

- d. state institutions;

Therefore, the Petitioners in a judicial review under the 1945 Constitution must first explain and prove:

- a. Their standing as Petitioners as intended in Article 51 paragraph (1) of the Constitutional Court Law;
- b. Existence of impairment of constitutional rights and/or authority granted by the 1945 Constitution due to the coming into effect of the Law petitioned for review.

**[3.6]** Whereas following its Decision Number 006/PUU-III/2005 dated May 31, 2005, and Decision Number 11/PUU-V/2007 dated September 20, 2007 as well as subsequent decisions, the Constitutional Court has been of the opinion that the impairment of constitutional rights and/or authority as intended in Article 51 paragraph (1) of the Constitutional Court Law must meet 5 (five) requirements, namely:

- a. existence of constitutional rights and/or authority of the Petitioners granted by the 1945 Constitution;
- b. the Petitioners believe that such constitutional rights and/or authority have been impaired by the coming into effect of the law petitioned for review;
- c. the impairment of such constitutional rights and/or authority must be

specific and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring;

- d. there is a causal relationship (*causal verband*) between the impairment of constitutional rights and/or authority of the Petitioners and the law petitioned for review;
- e. it is likely that with the granting of the Petitioners' petition, the impairment of such constitutional rights and/or authority argued by the Petitioners will not or will no longer occur.

**[3.7]** Whereas the Petitioners argue that they are individual Indonesian citizens and consider that the word "may" in the Elucidation of Article 115 paragraph (1) of Law No. 36/2009 impairs their constitutional rights as provided for in Article 28D paragraph (1), Article 28G paragraph (1) and Article 28I paragraph (3) of the 1945 Constitution, stating that:

**Article 28D:**

- (1) *Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law*'.

**Article 28G:**

- (1) *Every person shall have the right to protect him/herself, his/her family, honor, dignity and property under his/her control, and shall have the right to feel secure and be protected from the threat of fear to do, or not to do*

*something which constitutes human right.*

### **Article 28I**

(3) *The culture identities and the rights of traditional communities shall be respected in conformity with the development of time and civilization.*

For the reasons which are principally as follows:

1. The word 'may' in the formulation of Elucidation of Article 115 paragraph (1) of Law No. 36/ contains or leads to an interpretation of 'exemption (allowed not to do something), or permission (allowed to do something)'. The word 'may' in the formulation of Elucidation of Article 115 paragraph (1) of Law Number 36 Year 2009 means that in workplaces, public places and other places, it is justified to provide or not to provide special smoking rooms;
2. Whereas the word 'may' in the Elucidation of Article 115 paragraph (1) of Law No. 36/2009 means an order that it is "not obligatory/not a must" to provide special smoking rooms in public places, workplaces and other places for smokers to smoke. This, clearly and factually, has the potential to eliminate the recognition and guarantee of constitutional rights of the Petitioners to smoke as regulated under the 1945 Constitution;
3. Whereas the enactment and application of the provision of Elucidation of Article 115 paragraph (1) of Law Number 36 Year 2009 containing the word 'may' which is "**facultative**" in nature has the potential to lead to the

occurrence of deviation from the 1945 Constitution because there is no guaranteed protection of human rights for the Petitioners as to the certainty of just laws and equal treatment before the law;

4. Whereas the Elucidation of Article 115 paragraph (1) of Law No. 36/2009 to the extent of the word 'may' leads to impure and inconsistent implementation of the 1945 Constitution and constitutes a form of violation of the Petitioners' constitutional rights. Therefore, to provide the recognition, guarantee and legal certainty as well as freedom from fear to do or not to do something for the Petitioners, the word 'may' in the Elucidation of Article 115 paragraph (1) of Law No. 36/2009, shall be replaced with the word "must" which contains a clear and non-interpretable meaning;
5. Whereas the word 'may' in the Elucidation of Article 115 paragraph (1) of Law No. 36/2009 clearly and factually violates the Petitioners' constitutional rights whereby Petitioner I and Petitioner II as users of public places cannot use their right to smoke in public places, while Petitioner III as a user of workplaces cannot use his right to smoke in workplaces. Therefore, this impairs the Petitioners' constitutional right;
6. Whereas the constitutional norm regulating the recognition and guarantee of the Petitioners' human rights in the form of the right to smoke in workplaces, public places and other places is not found in the Elucidation of Article 115 paragraph (1) of Law No. 36/2009 due to the existence of

the aforementioned word “may”, so that the recognition and guarantee of the constitutional right are not clearly and factually fulfilled;

7. Whereas with respect to the regulation in the Elucidation of Article 115 paragraph (1) of Law Number 36 Year 2009 on the provision of special smoking rooms in workplaces, public places and other places, the existence of the word “may” leads to constitutional impairment to the Petitioners due to lack of guarantee for the Petitioners to use their constitutional right;

**[3.8]** Whereas based on Article 51 paragraph (1) of the Constitutional Court Law and the decisions of the Court on legal standing as well as in relation to the impairment suffered by the Petitions, according to the Court:

- The Petitioners have constitutional rights granted by the 1945 Constitution, particularly Article 28D paragraph (1), Article 28G paragraph (1), Article 28I paragraph (3), and the Petitioners consider that such constitutional rights are impaired by the coming into effect of the Law petitioned for review;
- The constitutional impairment of the Petitioners is specific and actual in nature or at least potential in nature which, according to logical reasoning, can be assured of occurring;
- There is a causal relationship (*causal verband*) between the intended impairment and the coming into effect of the Law petitioned for review,

and also it is likely that with the granting of the petition, the constitution impairment as argued will not or will no longer occur;

Based on the aforementioned considerations, the Court is of the opinion that the Petitioners have legal standing to file the petition *a quo*;

**[3.9]** Whereas since the Court has authority to hear the petition *a quo*, and the Petitioners have legal standing, the Court shall further consider the substance of the petition;

### **Substance of the Petition**

### **Opinion of the Court**

**[3.10]** Whereas having carefully examined the Petitioners' petition, the Government's statement, having read the written statement of the People's Legislative Assembly, the statements of the Related Parties, statements of experts of the Petitioners, statements of witnesses and experts of the Related Parties as well as the written evidence submitted by the Petitioners and the Related Parties, as set out in the Case Position section, the Court gives its considerations, as follows:

**[3.10.1]** Whereas the substance of the Petitioners' petition is the constitutionality review of the word "may" in the Elucidation of Article 115 paragraph (1) of Law No. 36/2009 which, according to the Petitioners, is inconsistent with Article 28D paragraph (1), Article 28G paragraph (1) and Article



28I paragraph (3) of the 1945 Constitution, each stating:

**Article 28D paragraph (1):**

*“Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law”.*

**Article 28G paragraph (1):**

*“Every person shall have the right to protect him/herself, his/her family, honor, dignity and property under his/her control, and shall have the right to feel secure and be protected from the threat of fear to do, or not to do something which constitutes human right”.*

**Article 28I paragraph (3):**

*“The culture identities and the rights of traditional communities shall be respected in conformity with the development of time and civilization”*

**[3.10.2]** Whereas cigarette is a legal product or at least, a product which is not prohibited by the currently prevailing laws and regulations. However, the basic material of cigarette is tobacco which contains an addictive substance which, from the health perspective, is considered harmful to health of both the smokers and of the people around the smokers because the cigarette smoke can “pollute” the air or the places of cigarette consumption [*vide* statement of Expert of the Related Parties, Widyastuti Suroyo]. Based on the aforementioned matter, the state, using legal instruments, requires producers and importers of cigarettes to

warn the community about the dangers of smoking [*vide* Article 114 of Law No. 36/2009] and even prohibits smoking in certain places as regulated in Article 115 of Law No. 36/2009;

**[3.10.3]** Whereas stipulating the prohibition from smoking in certain places is the authority of the state for the purpose of protecting citizens from the threatening dangers of cigarette smoke and as an effort to improve the health level of the community, as it is the right of the citizens, the community and the environment. Smoking is a legal activity, or at least an activity which is not prohibited, so that smoking is allowed by law. Therefore, there is an antinomy of interests between smokers and the community in their environment. Under such circumstances, the state shall be obliged to provide regulations so that certain segments of society are not harmed by another segment of society in protecting the rights of each. Such regulations must be implemented proportionally for accommodating the interests of smokers and other non-smoking communities. The law is the mechanism for fairly accommodating the interests of the community. Therefore, occurrences of conflicts of interests which may become the sources of conflicts in the community in relation to the threatening dangers to health may be avoided;

**[3.10.4]** Whereas, the regulation is intended for protecting the community and the environment from pollution caused by cigarettes. Article 115 paragraph (1) of Law No. 36/2009 and its Elucidation narrows the public space where smoking is allowed by regulating “special smoking rooms”, among other things, in

workplaces, public places and other places. According to the Petitioners, such regulation creates legal uncertainty and injustice as intended in Article 28D paragraph (1) of the 1945 Constitution because the provision of the aforementioned article in its Elucidation contains the word “may” which means that the government is allowed to provide and is also allowed not to provide “special smoking rooms” in workplaces, public places and other places;

With respect to the aforementioned arguments, the Court is of the following opinion:

- Whereas Article 115 of Law No. 36/2009 and its Elucidation constitutes a provision on the safeguarding of addictive substances as a series of activities in the efforts to maintain health by the Government and/or the community in a harmonious, integrated and sustainable manner, among other things, for maintaining and improving the health level of the community [*vide* Article 1 sub-article 11 of Law No. 36/2009]. In the safeguarding of addictive substances, the use of materials containing addictive substances is directed in such a way that it does not harm the health of individuals, families, the community and their environment. For that purpose, the regional governments must stipulate non smoking areas in their regions [*vide* Article 113 paragraph (1)] including, among other things, in workplaces, public places and other places [*vide* Article 115 of Law No. 36/2009]. Such regulation, according to the Court, is appropriate because it constitutes a form of protection for the community and their

environment;

- Whereas the Petitioners' argument that such regulation leads to legal uncertainty and injustice as intended in Article 28D paragraph (1) of the 1945 Constitution because the Elucidation of the aforementioned Article contains the word "may" which means that the Government may provide or may not provide "special smoking rooms" in workplaces, public places and other places, the Court is of the opinion that such argument of the Petitioners is justifiable. In addition, the Court is also of the opinion that the word "may" in the Article *a quo* has an implication of the absence of proportionality in the regulation of "special smoking rooms" accommodating the interests of smokers to smoke and public interest to evade from the threatening dangers to health and for improving the level of health. That is because smoking is a legal activity or an activity which is allowed, so that the word "may" means that the government may or may not provide "special smoking rooms". That will be able to eliminate the opportunity for smokers to smoke when in the implementation, actually, the government does not provide "special smoking rooms" in workplaces, public places and other places;

**[3.11]** Whereas based on the considerations above, the Petitioners' argument that the word "may" in the Elucidation of Article 115 paragraph (1) of Law No. 36/2009 is proven to have legal ground;

#### **4. CONCLUSION**

Based on the evaluation of facts and the law as described above, the Court concludes that:

**[4.1]** The Court has authority to hear the petition *a quo*;

**[4.2]** The Petitioners have legal standing to file the petition *a quo*;

**[4.3]** The substance of the Petitioners' petition is evidenced and has legal ground;

Based on the 1945 Constitution of the State of the Republic of Indonesia, Law Number 24 Year 2003 regarding the Constitutional Court as amended by Law Number 8 Year 2011 regarding the Amendment to Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Number 5226), Law Number 48 Year 2009 regarding Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to the State Gazette Number 5076).

## **5. DECISIONS**

### **Passing the decision,**

#### **Declaring:**

- To grant the Petitioners' petition in its entirety;
- The word "may" in the Elucidation of Article 115 paragraph (1) of Law No. 36/2009 regarding Health (State Gazette of the Republic of Indonesia

Year 2009 Number 144, Supplement to the State Gazette of the Republic of Indonesia Number 5063) is inconsistent with the 1945 Constitution of the State of the Republic of Indonesia;

- That the word “may” in the Elucidation of Article 115 paragraph (1) of Law No. 36/2009 regarding Health (State Gazette of the Republic of Indonesia Year 2009 Number 144, Supplement to the State Gazette of the Republic of Indonesia Number 5063) shall have no binding legal effect;
- To order the inclusion of this decision in the Official Gazette of the Republic of Indonesia properly.

Hence this decision was made in the Consultative Meeting of Justices attended by nine Constitutional Court Justices, namely Moh. Mahfud MD., as Chairperson and concurrent Member, Achmad Sodiki, Ahmad Fadlil Sumadi, Anwar Usman, Maria Farida Indrati, Hamdan Zoelva, Harjono, M. Akil Mochtar, and Muhammad Alim, respectively as Members, on **Monday April the ninth year two thousand and twelve** and was pronounced in the Plenary Session of the Constitutional Court open for the public on **Tuesday, April the seventeenth year two thousand and twelve**, by nine Constitutional Court Justices, namely Moh. Mahfud MD., as Chairperson and concurrent Member, Achmad Sodiki, Ahmad Fadlil Sumadi, Anwar Usman, Maria Farida Indrati, Hamdan Zoelva, Harjono, M. Akil Mochtar, and Muhammad Alim, respectively as Members, assisted by Achmad Edi Subiyanto as Substitute Registrar, in the presence of the Petitioners/their attorneys, the Government or its representative, and the

People's Legislative Assembly or its representative and the Related Parties.

**CHIEF JUSTICE,**

**Sgd.**

**Moh. Mahfud MD.**

**JUSTICES,**

**Sgd.**

**Achmad Sodiki**

**Sgd.**

**Ahmad Fadlil Sumadi**

**Sgd.**

**Anwar Usman**

**Sgd.**

**Maria Farida Indrati**

**Sgd.**

**Hamdan Zoelva**

**Sgd.**

**Harjono**

**Sgd.**

**M. Akil Mochtar**

**Sgd.**

**Muhammad Alim**

**SUBSTITUTE REGISTRAR**

**Sgd.**

**Achmad Edi Subiyanto**