

RULING

Number 43/PUU-IX/2011

FOR THE SAKE OF JUSTICE UNDER GOD ALMIGHTY
CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] adjudicate constitutional cases at the first and last,
passed a decision in the case of petition Testing Act
Number 36 Year 2009 on Health of the Constitution
Republic of Indonesia Year 1945, filed by:

[1.2] 1. Name: Dr. Widyastuti Soerojo, M.Sc.;
Occupation: Physician;
Street Address Bhakti Kav. 25, Village Cilandak
Timur, Jakarta 12560;

----- Hereinafter referred to as Petitioner I;

2. Name: Dr. Muherman Aaron;
Occupation: Physician;
Address Parks Aries E 12 / 8 RT 007/008, Village
North Meruya, District Kembangan, Jakarta
West;

----- Hereinafter referred to as Petitioner II;

3. Name: Association of Public Health Student Senate
Indonesia (ISMKMI);
Represented by:
Name: Nilna Rahmi Isna;
Occupation: Secretary of Health Student Association Senate
Indonesia Society (ISMKMI);
Address: Independence Pioneer Road, Jati, Padang;

Hereinafter referred to as Petitioner ----- III;

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Based on the Special Power of Attorney dated July 21, 2011, authorizing
Todung Mulya Lubis, SH., Azas Tigor Nainggolah, SH., M.Sc., Tubagus Haryo
Karbyanto, SH., David Tobing, SH., Ari Subagyo, SH., Muhammad Joni, SH., MH.,
Mustakim, SH., MH., Mike Mariana Siregar, SH., Andry Oktriawan, SH., Arief
Ariyanto, SH. Yobelny Coal, SH., Rizki Zulkarnain, SH., Rio Arif Wicaksono,
SH., Alfred Koko, SH., Asep Bambang Fauzi, SH. Heriyanto Yang, SH., Daniel S.
Sinaga, SH., Nina Zainab, SH., And KA. Rahayu, SH., All lawyers
and Assistant Advocates who are members of Solidarity For Public Advocate
Tobacco Control or the Sapta INDONESIA, the address at Jalan
Residents Panca IV No. 44 RT 003/07 Cipinang Muara, East Jakarta, both
together or individually to act for and on behalf of the endorser;

Hereinafter referred to as ----- --- the Petitioners;

[1.3] Reading the petition of the Petitioners;
Having heard the statements of the Petitioners;
Examine the evidence of the Petitioners;

2. CASE SITTING

[2.1] Considering whereas the Petitioner filed a petition that

then listed on the Registrar of the Constitutional Court (hereinafter referred to as Court Registrar) on Monday July 4, 2011 with registration case Number 43/PUU-IX/2011, which has been repaired and accepted in Court Clerk on July 29, 2011, describing things as the following:

A. The authority of the Constitutional Court

1. Whereas Article 24 paragraph (2) Amendment of the 1945 Constitution states, "The judicial power shall be done by a Supreme Court and judicial bodies underneath it, and by a Constitutional Court ";

2. That the next Article 24C paragraph (1) Changes in the 1945 Third stated, "The Constitutional Court authority to hear at a level

The first and last decision is final for testing legislation against the Constitution, rule on the dispute the authority of state institutions
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the authority granted by the Constitution, to decide the dissolution of the party political and decide disputes concerning the results of the General Election ";

3. Whereas, pursuant to the provisions above, the Constitutional Court has right or authority to conduct testing legislation (the Act) against the Constitution which is also based on Article 10 paragraph (1) Law Law Number 24 Year 2003 concerning Constitutional Court stated, "The Constitutional Court authority to hear at a level
The first and last decision is final for: (a) test legislation (the Act) against the Constitution NRI Year 1945 ";

4. Whereas Article 29 paragraph (1) of Law Number 48 Year 2009 on Judicial Power, said that the Constitutional Court authority to hear at the first and last of which the decision be final:

a. Test the laws against the Constitution of the State Republic of Indonesia Year 1945;

b. Breaking the authority dispute of state institutions whose authorities granted by the Constitution of the Republic of Indonesia Year 1945

c. Decide upon the dissolution of political parties

d. Decide upon disputes concerning election results; and

e. Other powers granted by statute.

5. Whereas, pursuant to the provisions of Article 7 of Law Number 10 Year 2004 on the establishment of legislation to set that the hierarchical position higher than the 1945 Act Law, therefore any of the provisions of Act should not be contrary to the 1945 Constitution. Thus, if there is provision in the Act as opposed to the 1945 then these provisions may be filed to be tested through a mechanism Testing Act;

6. The Constitutional Court was established as an institution protecting the constitution (the guardian of constitution). If there is the Act which contains or

formed contrary to the constitution (unconstitutional), then
The Constitutional Court can menganulirnya by canceling

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the existence of the Act as a whole or per
the article;

7. That as the protector of the constitution, the Constitutional Court is also entitled
provide an interpretation of the provisions of those Articles legislation
to correspond with the values of the constitution. Tafseer Court
The Constitution of the constitutionality of articles of the law
interpretation is the sole (the sole interpreter of constitution) that
have the force of law. So on the articles that have
meaning of ambiguous, vague, and / or multi-interpretation may also be requested
interpretation to the Constitutional Court;

8. That in Article 4 paragraph (2) of the Constitutional Court Regulation Number
Guidelines for examining 06/PMK/2005 Testing Case

The Act, material testing is testing an Act to
regarding the substance of the paragraph, chapter, and / or section
Act which are considered contrary to the 1945 Constitution;

9. Whereas under the provisions of law above, the Constitutional Court
authority to examine, hear and decide judicial review over
Explanation of Article 114 of Law Number 36 Year 2009 on
Health of Article 28D paragraph (1) of the 1945 Constitution;

6. The Status Law (Legal Standing) And Interest Constitutional
The Petitioners.

Preamble of the Constitution of 1945 states that the purpose of the State
Republic of Indonesia is to protect the whole Indonesian nation and the entire
homeland of Indonesia and to promote the general welfare,
the intellectual life of the nation, and participate in the establishment of world order
based on freedom, lasting peace and social justice.

Health as one element of the general welfare must be realized
through a variety of health measures in a series of health development
thoroughly and are supported by an integrated health system
national (Explanation of Law Number 44 Year 2009 on House
Hospital, State Gazette Year 2009 Number 153, Supplement
State Number 5072) (evidence-P1)

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Health is a human right and one of the elements of welfare
which must be realized in accordance with the ideals of the nation of Indonesia as
stipulated in Pancasila and the Preamble to the Constitution of the State
Republic of Indonesia Year 1945, particularly Article 28D paragraph (1);
Health as a human right must be realized in the form
provision of various health efforts to the entire community through
implementation of development and affordable quality health
by the community. Therefore, all activities and efforts to
improving community health status is the highest
implemented based on the principle of non-discriminatory, participatory, protection,

and sustainability are very important for the formation of resources Indonesia humans, increased resilience and competitiveness of the nation, as well as national development. (See M. Husni Syam, Legal Protection for Health Workers, By mhsyam Leave a Comment, Categories: Articles, 26 December 2009) (evidence-P2);

In relation to human rights, issues on health Indonesia is in the state regulated in Law Number 36 of 2009 of Health which in Article 1 paragraph (1) states that health is good health, both physically, mentally, spiritually and social that allows each person to live socially productive and economical;

Then Article 51 paragraph (1) of Law Number 24 Year 2003 on The Constitutional Court stated, "Petitioner is a party that considers rights and / or impaired by the enactment of constitutional authority legislation, namely: (a) individual citizens, (b) the unity of the legal community all still alive and customary in accordance with the development of society and the principle of a unitary state of Indonesia as regulated in law, (c) body public and private law, or (d) state institutions".

Petitioner I and Petitioner II, namely: Dr.. And Dr. Aaron Muherman. Widyastuti Soerojo, MSc, is a citizen of Indonesia as evidenced from the Card 6

Identity of the Republic of Indonesia (proof P-3 and P-4). Whereas Petitioner III is a Public Health Student Association Senate Indonesia (ISMKMI) is committed to public health demonstrated with the Articles of Association (P-5). As such provisions as set in Article 51 paragraph (1) letter a and letter c of Law Number 24 Year 2003 on the Constitutional Court are met. However, the Applicant realized to prove the fulfillment of legal standing to be explained causality (causal verband) and the potential loss of constitutional real due to the existence or enactment of a piece of legislation, Explanation namely Article 114 of Law No. 36 of 2009, against Article 28D paragraph (1) of the Act of 1945; Referring to the Constitutional Court Decision No. 006/PUU-III/2005 Case Number 11/PUU-V/2007 (evidence-P6), the applicant must be qualified as follows:

- a. The presence of the Petitioners' constitutional rights granted by the 1945 Constitution.
- b. That the constitutional rights of the applicant are deemed by the Petitioner has been aggrieved by an Act that were tested.
- c. That the constitutional impairment of the Petitioners in question is specific or specific and actual or at least potential in nature which according to logical reasoning will surely occur.
- d. A causal relationship between losses and the enactment of Invite a petition to be tested.
- e. The possibility that the petition is granted constitutional impairment argued will not or no longer occur.

Five requirements referred to above is described again by the Court Constitution through Decision Number 27/PUU-VII/2009 in formal testing Second Amendment Supreme Court Act, which states as follows:

From the practice of the Court (2003-2009), individual citizens, especially taxpayers (tax payer; vide Decision Number 003/PUU-I/2003) various associations and NGOs / NGOs that are concerned about a Undang⁷ Invite the public interest, legal entities, local government, state agencies, and others, the Court considered to have legal standing to file the petition, both formal and material, the Act of 1945 (see also Lee Bridges, et al. In "Judicial Review in Perspective, 1995). (Page 59) (evidence-P7).

Petitioner I and Petitioner II is respectively as Citizens State of Indonesia and also as a physician, which in provisions of Article 9 and Article 12 of Law No. 36 of 2009 of Health has an obligation to realize, mempertahankan and improve community health status, (Exhibits P-8). As for the content of Article 9 and Article 12 states:

Article 9

(1) Every person is obliged to come to realize, maintain, and improving community health status is the highest.

(2) The obligation referred to in paragraph (1), its implementation involves health efforts of individuals, public health efforts, and health oriented development.

Article 12

Every person is obliged to maintain and improve health for others who are responsible.

In addition, Petitioner I've testified as an expert in case judicial review of Law Number 32 Year 2002 on Broadcasting as shown in Decision No. 6/PUU-VII/2009 (P-9) and Case Number 19/PUU-VIII/2010 (Exhibits P-10).

Thus the requirement of legal standing as stated in the Decision of the Constitutional Court

Number 27/PUU-VIII/2009 met.

Furthermore, Petitioner III is a Faculty Student Association Public Health from several universities who joined as container advocacy and student movement against public health issue.

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Petitioner III in its legal position as a judicial review petition Law Number 36 Year 2009 on Health refers to the Statutes and Household Health Student Association Senate Indonesia Society (ISMKMI) (P-11);

In Chapter IV Objectives and Duties, Article 6 and Article 7 is described on General Purpose and Special Purpose, as follows:

General purpose is to establish ISMKMI unity among Senate

Public Health students throughout Indonesia in the framework of coaching
Students of Public Health in Indonesia as beings who
appreciate and implement the values contained in the science
public health;

In particular purpose

a. Increase the sensitivity and the role of the Student Senate Health
Community in criticizing national development in general and
development of public health in particular.

b. Increasing active role in efforts to achieve and preventive
the independent community to live healthy and productive.

III That the applicant has a real and factual in the time period
long-running activities that aim to implement the values of
contained in the science of public health and increase
development of public health and increasing active role in
promotive and preventive efforts to achieve a self-contained communities for
healthy and productive life. In addition Petitioner III is also involved in efforts
impact of tobacco control across Indonesia through
Regional Coordination and networks that spread almost throughout the
Indonesia, such as the socialization of understanding for the people of
impact of tobacco in order to improve community health status;

That with reference to Article 6 and Article 7 of the Articles of Association and Articles of
Association

Household Public Health Student Association Senate Indonesia
(ISMKMI), it has been qualified as referred to Constitutional Court

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Number 27/PUU-VIII/2009, namely: as associations / student bond
concern in defense of public interest in this issue
health;

Furthermore, Petitioner I, Petitioner II and III Petitioner wanted to clarify
about constitutional loss or potential loss of constitutional due

Explanation of the implementation of the provisions of Article 114 of Law Number 36
Year 2009 on Health.

As a citizen and a love of Health Students Association of
ground water and care about the fate of the nation has a constitutional right to
get right to a fair legal certainty as stipulated in

Article 28D paragraph (1) of the 1945 Constitution

In view of the Petitioners with the word "may" as contained
in the Explanation of Article 114 of Law Number 36 Year 2009 does not
consistent, resulting in the absence of a fair legal certainty for
the whole community, especially the Petitioners.

Based on the above, it is clear the Petitioner has the legal
(Legal standing) as a testing applicant of Law Number 36

Year 2009 on Health dikaitakan with Article 28D paragraph (1) of the Constitution
1945;

7. Reasons Application

That the Petitioner in this petition stating that the Company

Article 114 of Law Number 36 Year 2009 on Health long as the word "may" is contradictory to Article 28D Paragraph (1) Law Act of 1945, referring to Hans Kelsen's theory, known as the theory "Stufenbau des recht or The hierarchy of law or Stufentheorie", explained that the rule of law is step-by-step and multi-layered in a hierarchy (arrangement), in the sense of a norm of lower valid, sourced, and based on the higher norms, which norma higher sourced and based on the higher norms and so on until the norm that can not be traced and are

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hypothesis and the fictitious basic norm "Grundnorm") (Maria Farida Indrati, S, Science Legislation, Types, Functions and meteri Cargo, (London: Kanisiua, 2007);

That in accordance with the basis of testing used in the application This is Article 28D paragraph (1) which reads, "Everyone is entitled to recognition, security, protection, and fair legal certainty and equal treatment before the law ", then we use alasan-alasan as follows:

1. Explanation of Article 114 of Law Number 36 Year 2009 on Throughout the health of the word "may" lead to uncertainty, disharmony and imbalance of Law.

a. That Law No. 36 of 2009 on Health, Article 114 states "Any person who manufactures or enter Indonesia cigarette into the region must include the health warning " later in the Elucidation of Article 114 "What is meant by "Health warning" in this provision is written clearly and easily readable and can be accompanied by pictures or other forms of "..

b. That other provisions in Act No. 36 of 2009, namely Article 199 paragraph (1) of Law Number 36 Year 2009 on Health, who explained that "Any person who intentionally produce or put cigarettes into the territory of Unitary Republic of Indonesia with a warning not to include shaped a picture of health as defined in Article 114 sentenced to imprisonment of 5 (five) years and a fine at most Rp500.000.000, 00 (five hundred million rupiah) ".

c. Whereas therefore the provisions of the Explanation of Article 114 and Article 199 Act No. 36 of 1999 on Health shows the ketidaksinkronisasian one another. Moreover with the ketidaksinkronisasian between the Elucidation of Article 114 with Article 199 does not indicate compliance with the principles in formation process of legislation as described in Article 5 letter d and f of Law Number 10

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Year 2004 on the Establishment of legislation.

(Exhibits P-12).

d. That the principles as stated in Article 5 of Law Act No. 10 of 2004, it is "feasible" and "clarity statement" explaining that each establishment legislation must have clear objectives that be reached and any legislation should be meet the technical requirements of the preparation of regulatory legislation, systematics and choice of words or terminology and language law is clear and easy to understand, so can not cause variety of interpretations in the implementation. In addition to the principle establishment of legislation and regulations, principles meteri charge in making legislation is also not met the Article 6 paragraph (1) of Law Number 10 Year 2004, order and legal certainty (proof P-13).

e. Whereas therefore the provisions of Article 114 with explanation Article 199 of the Health Act, did not show consistency resulting in a legislation does not cause justice and legal certainty, which in the Elucidation of Article 114 indicate the presence of ketidakwaajiban as seen in the word "May" to include images in cigarette packs, but in other provisions of Article 199 provides criminal sanctions precisely if there is any person who knowingly manufactures or insert cigarettes into the territory of the Republic Indonesia and do not include health warnings in the form drawings referred to in Article 114 shall be punished imprisonment 5 (five) years and a maximum fine of Rp. 500 million (five hundred million rupiahs).

f. Consistency in the legislation that was not something happen by itself, but must be created, so it can there are not consistent in the formation of regulatory legislation. In terms of law enforcement, consistency in the actions of state agency will determine levels of legal certainty, in fragile sense of consistency in the action will result in the escape
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legal certainty. Legal certainty will be the observation society, because society has sensitive feelings injustice (Kusnu Goesniadhi, S, "Harmonization of Law In Legislation Perspective (Lex Specialist A Problem) ", (Jakarta: PT. TEMPRINA MEDIA GRAFIKA, 2006), p.. 44) (evidence P-14);

g. According to John Rawls' A Theory of Justice "justice is a value which embodies a balance between the parts in unity, between personal goals and objectives together. In the emergence of a fair justice will never be allowed, except to avoid a greater justice;

h. The establishment of the rule of law that is not based on legal principles

constitutively to produce a collection of rules that are material is not a legal norm. Similarly, the next process of implementation of the rule of law can not be searched basic principle a regulative law, would produce a much legal norms of objective justice. In the book *The Morality of LAW (MORALITY LAW)* stated that the principles of law include

ie must not conflict with each other (Laws Should not be contradictory) (Brian Bix, "Jurisprudence: Theory and Context", chapter "Lon Fuller Understanding ". Second Edition, London, Sweet & Maxwell, 1999, ha. 76, See also AAG, Peter and Koesriani Siswosubroto (ed) 1990. "Law and Social Development". Sociology of Law Textbooks Book III, London: Reader Ray of Hope, p.. 61-62) (P-15);

i. That thus the word "may" as contained in Explanation of Article 114 and Article 199 raises the inconsistency which implies the emergence of injustice and a fair legal certainty in society. Additionally, it will affect the process of enforcement law on the implementation of the Act relating to liability company / cigarette manufacturers to include warnings either writing or drawing in cigarette packs. therefore raises ketidakkonsisten which implies the emergence of injustice and certainty just law in society, then the Petitioners are very confident Explanation of Article 114 that all the word "may" contradict
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with Article 28D paragraph (1) of the Act of 1945.

j. That the applicant believes that the petition against the Company Article 114 Health Act will not be tolerated by The Constitutional Court, because obviously in the Elucidation of Article 114 with Section 199 Health Act indicates inconsistencies with one another. Concern and authority Constitutional Court not to allow the existence of norms that are not consistent and inconsistent with the constitutional mandate is seen in consideration of the Constitutional Court in Decision:, but Court in accordance with its constitutional authority, will not let the norm in the Act that are inconsistent and not in accordance with the mandate of the constitutional protection constructed by the Court. (Decision Number 1/PUU-VIII/2010, page 153) (P-15a).

2. Written warning and is accompanied Images will provide education and information that is clear and open to the public.

a. The explanation that the provision of Article 114 now provides permissibility to the cigarette manufacturers to provide warnings in packs of cigarettes to not use the image in the memorial on cigarette packs, even though theoretically the health warnings is a form of education as well as information that reminds public about the dangers of smoking to health. Written warning in cigarette packs that have been widely used by manufacturers

cigarettes, do not give a correct information, clear and honest and open about the condition and guarantee of the goods and / or services, obviously when Law No. 8 Year 1999 on Consumer protection requires the manufacturer to provide true, clear and honest on an object, as mentioned in Article 4 letter c, which reads "the right consumers are right to correct information, clear and honest warranties regarding the condition of the goods and / or services ". (Exhibits P-16)

b. That the judges of the Constitutional Court in putusan Number 6/PUUVII / 2009, dated 10 September 2009, the consideration reads "... As well as the tobacco industry that have the same rights

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in marketing activities, including the right to use the proposition communication is available among other print media, outdoor media, Internet, electronic media such as television and radio as well as activities sponsorship and other promotional activities which the whole is communication to consumers so as to provide information right about its products "(page 286 putusan Number 6/PUU-VII/2009). From these considerations it can be concluded the obligation for the tobacco industry to provide information either to the customer (proof P-17)

c. That the word "may" in the Explanation of Article 114 of Law-Law Number 36 Year 2009 on Health, Manufacturers of cigarettes will tend to only use a written warning that it proved of the many manufacturers of cigarettes in Indonesia only using a written warning, written warning but not provide true, clear and honest with the public, thus the public will not know and aware of the consequences caused or actual hazards caused by smoking.

d. That the obligation to provide correct information on productproducts produced is also seen explicitly in the decision Number 6/PUU-VII/2009 Constitutional Court, dated September 10, 2009, which reads "... into consideration as well as tobacco industry that have the same rights in its marketing including the right to use the proposition of communication available between other print media, outdoor media, internet, electronic media such as television and radio as well as sponsorship and other promotional activities which Overall is an activity of communication to consumers so as to provide correct information about its products "(page 286 decision Number 6/PUUVII / 2009). From these considerations we can conclude the existence of obligation for the tobacco industry to provide good information to the customer (proof P-18).

e. That one of the arguments about cigarette consumption were smokers itself that makes the decision to buy cigarettes on the basis

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enough knowledge about the product he bought. This argument based on economic theory of consumer sovereignty said that the consumers themselves who are entitled to determine how to spend their money with a basic knowledge enough about the costs and benefits of purchasing these products and consumers themselves will bear the burden of costs due to purchase. Both assumptions do not apply to consumer products tembakau because potential smokers are not fully aware that the products bought will snare him for life because it is addictive, at risk for illness and premature death, as well as providing load economic and health directly or indirectly in others. Therefore there is need for a warning in the form of images on packs of cigarettes.

f. That the health warnings in the form of images increases awareness about the relationship of smoking to health impacts and specific knowledge about the effects of smoking on health higher in countries that include the specific impact on health warning. In Canada where the health warning shaped the image has been required, 84% of smokers see a label health warnings as a source of health information while in the United States where health warnings are still shaped writing, only 47% of smokers who consider as a source health information (Exhibit P-18).

g. That in Article 22 of the Universal Declaration of Human Rights states, "every person as a member of the public are entitled to social security and is entitled to realization of economic, social and cultural rights indispensable for his dignity and the free personality, through national effort and cooperation and in accordance with international regulations as well as the resources each country ". Then the Committee on Economic, Social and Cultural Rights provide legal interpretation of 4 (four) elements of the right to health through the availability of General Comment 14 (availability), accessibility (of access), acceptability (acceptable according to the ethics and culture) and quality (quality). Therefore, in order

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meet one of the elements mentioned is accessibility or lack of access, then it should alert the packs of cigarettes in addition to a written warning should include the pictorial warnings, so that the public will have access a clear, bright and open up information about the dangers of smoking (Exhibits P-18a);

h. That apart, there are some positive legal provisions Indonesia that provide space on the need for warning Shaped Picture and the foundation for the implementation of the warning dangers of smoking are:

1) Act No. 39 of 2007 on Excise who mentioned that the characteristics of the goods affected by taxes, among others its use can have negative impacts for the community or the environment [Article 2 paragraph (1c)]. (Exhibits P-19).

2) Law No. 8 Year 1999 on the Protection Consumers, Article 4c and Article 3a who explained that consumers are entitled to the right information, clearly and honestly about the condition and guarantee of the goods and / or services, and aims to raise awareness of consumer protection, ability, and independence to protect themselves. (Exhibits P-20).

3) Act No. 14 of 2008 on Transparency Public Information (proof P-21).

i. That the effectiveness of health warning messages in the form of writing packs of cigarettes on the market Indonesia has been evaluated through studies conducted KDP UI in 2007, and the results showed that more than 90% of respondents had read health warnings on cigarette packs form of writing, each 97 smokers and 83% non-smokers, but 43% do not believe because it was not proven, 26% were not motivated to stop smoking and 20% said terlelu writing small and unreadable. From the study found that 75% of respondents wanted a health warning form of drawings and writings, and even a third of smokers want a specific message and frightening (Research Center UI Health, Indonesia and SEATCA Heart Foundation, Warning 17

Cigarette Smoking and Safety Hazards in the Warning Effort Health, Jakarta 2007 (P-22). In ASEAN, there are four states that have imposed health warnings on packs of cigarettes for domestic production of cigarettes and cigarette imports were Singapore, Thailand, Brunei Darussalam, and Malaysia, do not miss cigarettes imported into these countries participate adherence to regulations applicable in countries that implement it;

j. That the national tobacco industry has experienced in producing shaped picture health warnings for cigarette exports (evidence P-23), comply with regulations in the destination country, the legal basis new in Indonesia, the national tobacco industry should do it The same if you do not want to say to apply double standards and discrimination against people in his country, in addition to the application shaped picture health warnings on cigarette packs will raised position of Indonesia in the eyes of the world which has always a caretaker, Indonesia is expected to become the country to-5 ASEAN after Singapore, Thailand, Brunei, and Malaysia implementing health warnings on cigarette packs shaped image or country to-3 after Thailand and India in the SEARO region of WHO (exhibits P-14);

k. That thus the word "may" contained in the Explanation

Article 114 of Law 36/2009 which does not require the Company / Manufacturer cigarettes has castrated the constitutional rights of the people in this user / pengguna cigarettes to get the information that can develop themselves and their social, as mandated in Law No. 8 of 1999 on Consumer Protection and Article 28D Paragraph (1) of the Act of 1945.

Whereas therefore, there is reason for the violation of rights the 1945 constitutional, and the loss of constitutional penormaan Act No. 36 of 2009, Explanation of Article 114 along about the word "may" is contradictory to Article 28D paragraph (1) of the 1945 Constitution;

That as such enforcement or penormaan Act No. 36 of 2009, Explanation of Article 114 along the said 18

"May" has been shown to cause harm and the existence of constitutional violation of constitutional rights guaranteed by Article 28D paragraph (1) of the 1945 Constitution;

That the reasons mentioned above, the provisions of Law Act No. 36 of 2009, Explanation of Article 114 along the the word "may" is contradictory to Article 28D paragraph (1) of the 1945 Constitution;

That the reasons mentioned above the Petitioners request Panel of Judges of the Constitutional Court in the petition a quo examine, hear and decide application for judicial review a quo express provisions of Law No. 36 of 2009, the Company Article 114 along about the word "may" is contradictory to Article 28D paragraph (1) of the 1945 Constitution.

That the reasons mentioned above the Petitioners request so good as the judges of the Constitutional Court in the petition a quo to examine, hear and decide judicial review petition a quo express provisions of Law No. 36 of 2009, the Company Article 114 along about the word "may" not have the power binding law;

8. Petition

Based on the reasons mentioned above, the Applicant appealed to the Panel of Judges of the Constitutional Court to examine, hear, and decide upon the a quo by injunction, which reads as the following:

1. Accept and grant the petition of the Petitioner in its entirety;
2. Declare the material content in the Elucidation of Article 114 of Law No. 36 of 2009, all about the word "may" stated contrary to the 1945 Constitution, Article 28D paragraph (1);
3. Declare the material content in the Elucidation of Article 114 of Law No. 36 of 2009, all about the word "may" not have binding legal force, so the explanation of Article 114 of Law Number 36 Year 2009 on Health should read, "The meant by 'health warning' in this provision is written

a clear and easily legible and accompanied by pictures or other forms ";

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4. Order the proper promulgation of this decision in the Official Indonesia according to statutory provisions in force;

5. When the Panel of Judges on the Constitutional Court of the Republic of Indonesia have another decision, please fairest decision - ex aequo et bono.

[2.2] Considering whereas to prove their arguments, the Petitioners have submit evidence of the letter / article marked as exhibits P-1 to evidence of P-24 as follows:

1. Exhibit P-1: Copy of Act No. 36 of 2009

on Health, which includes Explanation

Law Number 44 Year 2009 on

Hospital;

2. Exhibit P-2: Copy of article entitled Legal Protection

For Health Workers, by M. Husni Syam;

3. Exhibit P-3: Photocopy of Identity Card Dr. Widyastuti

Soerojo, MS.c;

4. Exhibit P-4: Copy of Identity Card Dr. Muherman

Aaron;

5. Exhibit P-5: Copy of the Articles of Association and Bylaws

Appliances Health Student Association Senate

Indonesia Society (ISMKMI);

6. Exhibit P-6: Copy of the Constitutional Court Decision No.

006/PUU-III/2005;

7. Exhibit P-7: Copy of the Constitutional Court Decision No.

27/PUU-VII/2009;

8. Exhibit P-8: Copy of Article 9 and Article 12 of the Act

Number 36 Year 2009 on Health;

9. Exhibit P-9: Copy of the Decision of the Constitutional Mahakah Number 6/PUUVII /

2009;

10. Exhibit P-10: (The physical evidence is not submitted);

11. Exhibit P-11: Copy of Article 6 and Article 7 of the Articles of Association

Bylaws of the Association of Student Senate

Public Health Indonesia (ISMKI);

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12. Exhibit P-12: Copy of Article 5, letter d and f of the Act

Number 10 Year 2004 on the Establishment

Legislation, Regulations;

13. Exhibit P-13: Copy of Article 6 of Law Number 10 Year

2004 on the Establishment of Regulations-Regulations

Invitation;

14. Exhibit P-14: Copy of a fragment of the book by Dr.. Kusnu

Goesniadhi, S, SH., M. Hum., Entitled

Harmonization of Regulations Law in Perspective

Invitation (Lex Specialis A Problem);

15. Exhibit P-15: Copy of a fragment of Books by Dr.. Kusnu Goesniadhi, S, SH., M. Hum., Entitled Harmonization of Law In Perapektif Regulations Invitation (Lex Specialis A Problem);
15. Exhibit P-15a: Copy of Decision Number 1/PUU-VIII/2010, pages 153;
16. Exhibit P-16: Photocopy FACHT SHEET: Health Warning on Cigarette packs, Only Changes Shape of Writing Becoming Pictures;
17. Exhibit P-17: Copy of the Constitutional Court Decision No. 6/PUUVII / 2009, dated 10 September 2009;
18. Exhibit P-18: Photocopy FACHT SHEET: Health Warning on Cigarette packs, Only Changes Shape of Writing Becoming Pictures;
- Exhibit P-18a: Copy of Article 22 of the Universal Declaration of Human Rights Man;
19. Exhibit P-19: Copy of Act No. 11 of 1995 on Excise;
20. Exhibit P-20: Article 3a and Article 4c of Law No. 8 Of 1999 on Consumer Protection;
21. Exhibit P-21: Copy of Act No. 14 of 2008 on Public Disclosure;
22. Exhibit P-22: Copy of article snippets, Health Warning Cigarette Wrap-shaped figure;
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23. Exhibit P-23: Photocopy of fragment article about Warning Health Wrap Shaped Images on Cigarette;
24. Exhibit P-24: (The physical evidence is not submitted)
- [2.5] Considering whereas to make a description in this decision, everything that happens at the hearing sufficiently designated in the Minutes The trial, which is an inseparable unity with this decision;
- 3. LEGAL CONSIDERATIONS**
- [3.1] Considering whereas the purpose and objective of the petition a quo is to test the Elucidation of Article 114 of Law Number 36 Year 2009 on Health (State Gazette of the Republic of Indonesia Year 2009 Number 144, Republic of Indonesia Number 5063, hereinafter referred to as Law 36/2009), of Article 28D paragraph (1) of the Constitution of the State Republic of Indonesia Year 1945 (hereinafter referred to as 1945 Constitution);
- [3.2] Considering whereas prior to considering the purpose thereof, Constitutional Court (hereinafter referred to as the Court) shall first be consider:
- a. authority of the Court to examine, hear and decide petition a quo;
- b. legal status (legal standing) of the applicant to file petition a quo;

Authority of the Court

[3.3] Considering whereas pursuant to Article 24C Paragraph (1) of the 1945 Constitution and Article 10 paragraph (1) letter a of Law Number 24 Year 2003 concerning the Constitution as amended by Act No. 8 of 2011 on Amendment of Law Number 24 Year 2003 on Constitutional Court (State Gazette of the Republic of Indonesia Year 2011 Number 70, Supplement to State Gazette of the Republic of Indonesia Number 5226), hereinafter referred to the Constitutional Court Act in conjunction with Article 29 paragraph (1) letter a of Law Number 48 Year 22

2009 on Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Additional State Gazette of the Republic of Indonesia Number 5076), the Court has the authority to hear at the first and last decision is final, among others, to test the Act against the Constitution 1945;

[3.4] Considering whereas the Petitioners' petition is to test Elucidation of the constitutionality of Article 114 of Law 36/2009 of Article 28D paragraph (1)

1945 Constitution, which became one of the authority of the Court, so that by therefore the Court has authority to examine, hear and decide petition a quo;

The Status Law (Legal Standing) of the Petitioners

[3.5] Considering whereas pursuant to Article 51 paragraph (1) of the Constitutional Court and its

The explanation, which may file a petition for Act against the 1945 Constitution are those who consider the rights and / or authority constitutional provided by the 1945 impaired by the enactment of a The Act, namely:

- a. individual Indonesian citizens (including groups of people who have an equal interest);
- b. customary law community unit along still alive and in accordance with development of society and the principle of the Unitary Republic of Indonesia stipulated in the Act;
- c. public or private legal entities; or
- d. state institutions;

Thus, the Petitioner in the testing of the Act against the Constitution 1945 to explain and prove first:

- a. position as the applicant as referred to in Article 51 paragraph (1) Constitutional Court Law;
- b. constitutional rights and / or authorities granted by the Constitution 1945 resulting from the enactment of the law being applied testing;

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[3.6] Considering also that since the Supreme Constitutional Court Decision

Number 006/PUU-III/2005 dated May 31, 2005 and Decision of the Court Number 11/PUU-V/2007 Constitution dated 20 September 2007, and putusanputusan further opinion that the constitutional rights and / or authority constitutional rights as intended in Article 51 paragraph (1) of the Constitutional Court must satisfy

five conditions, namely:

- a. the rights and / or constitutional authority granted by 1945 Constitution;
- b. rights and / or constitutional authority by the applicant is considered impaired by the enactment of Law petitioned for review;
- c. constitutional damages must be specific (special) and the actual or at least potential are based on logical reasoning can be ensured will occur;
- d. existence of causality (causal verband) between the loss and the enactment of Law petitioned for review;
- e. the possibility that the petition is granted such constitutional impairment argued will not or no longer occur;

[3.7] Considering whereas the Petitioner I and Petitioner II is a citizen Indonesia who is a doctor that they had a duty to create, maintain, and improve health community as mandated by the Act (Article 9 and Article 12 Law 36/2009, vide evidence of P-8);

[3.8] Considering whereas the Petitioner III is an organization of the Association Faculty of Health from several universities who joined as container advocacy and student movement against the health issues society whose objective was to implement the values that contained in the science of public health and enhance the development public health and participation in promotive and preventive to achieve an independent community to live healthy and productive;

[3.9] Considering whereas the Petitioners are concerned with the world essentially argues that health has a constitutional right to set in the 1945 Constitution namely, Article 28D paragraph (1) "Everyone is entitled to recognition,

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security, protection, and legal certainty of fair and equal treatment before the law ", which according to the Petitioners' constitutional rights are has been impaired due to enactment of the word "may" listed in Elucidation of Article 114 of Law 36/2009 which states, "What is meant by "Health warning" in this provision is clear and easy writing legible and can be accompanied by pictures or other forms ";

[3.10] Considering whereas according to the Petitioners the word "may" is listed in the explanation of the a quo article, to the detriment of the Applicant with reasons are the following main points:

- The word "may" listed in the Elucidation of Article 114 of Law 36/2009 cause uncertainty, disharmony and imbalance laws, because it does not sync with Article 199 paragraph (1) of Law 36/2009 which states,

"Any person who knowingly manufactures or put cigarettes into within the territory of the Republic of Indonesia with no to include health warnings as the form of images referred to in Article 114 shall be punished imprisonment of 5 (five) years and maximum fine of Rp. 500 million, - (five hundred million rupiah) ". In Elucidation of Article 114 of Law 36/2009 indicates ketidakwaiban to include images in cigarette packs, but in terms Article 199 of Law 36/2009 provides criminal sanctions even if there are people who intentionally produce or put cigarettes into the territory Republic of Indonesia with a warning not to include the form of images;

· Since the inconsistency Explanation of Article 114 to Article 199 of Law 36/2009, it will have implications for the onset of injustice and just legal uncertainty in the community, especially to the Applicants who care about public health to the world of Indonesia, and will affect the law enforcement process of the implementation of Law The Law;

[3.11] Considering whereas based on the Petitioners' argument mentioned above, according to the Court, the Petitioners in the petition a quo to meet qualifications as Indonesian citizens and legal entities that can

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constitutional rights by force Elucidation of Article 114 of Law 36/2009, therefore, the Petitioners have legal status (legal standing) to file the petition a quo;

[3.12] Considering whereas since the Court has the authority to examine, hear and decide upon the a quo and the Petitioners have legal status (legal standing), then the Court will considering the purpose thereof;

Court's opinion

Principal Petition

[3.13] Considering whereas prior to considering the purpose thereof, Court should cite Article 54 of the Constitutional Court Law which states, "the Court constitution can request information and / or minutes of meetings concerning with the application being examined to the Consultative Assembly People, the Parliament, Regional Representative Council, and / or the President ". Since the article

It uses the word "may" then the Court should not hear explanation of the House of Representatives, and / or the President in conducting tests on a

The Act. In other words, the Court may request or not request information and / or minutes of meetings relating to the petition being checked to the People's Consultative Assembly, House of Representatives People's Regional Representative Council, and / or President, depending on the urgency

and relevance. Because of legal issues in the petition a quo obviously, the Court looked no urgency and relevance to

request information and / or minutes of meetings of the People's Consultative Assembly, House of Representatives, Regional Representative Council, and / or the President, so that the Court immediately decide upon the a quo;

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[3.14] Considering whereas after carefully examining the Court Petitioners' petition, and the evidence of the letter / article submitted by the Petitioner argues the Court as follows:

[3.14.1] Whereas the Petitioners invoke the constitutional test for Elucidation of Article 114 of Law 36/2009 of Article 28D paragraph (1) of the 1945 Constitution;

[3.14.2] Whereas Article 114 of Law 36/2009 has petitioned and been Court decided in Decision No. 34/PUU-VIII/2010, November 1, 2011;

[3.14.3] Whereas the material content of the paragraph, chapter, and / or the inside laws that have been tested, unless another or different reasons, not can be petitioned again (vide Article 60 of the Constitutional Court Law, Article 42 of Regulation

Number 06/PMK/2005 Constitutional Court concerning a guideline for examining Test Case Act);

[3.14.4] Whereas according to the Court, in essence the petition and alasan-alasan Petitioners in No. 34/PUU-VIII/2010 same petition

request and the reasons for the Petitioners in the petition a quo

into consideration, among others, stated, "That the word" may "in

Elucidation of Article 114 of Law 36/2009 which is connected with the notion of 'compulsory

to include health warnings "in Article 114 of Law 36/2009 contains

two different senses at once which is cumulative and alternative. In fact,

explanation of a passage is required precisely to explain the formula

firm in order to interpret the word "must include a warning

health "in the provisions of Article 114 a quo becomes more clear and unequivocal,

that posed no other interpretation. Hence the formulation of Explanation

Article 114 a quo which states, "The meaning of" warning

health "in this provision is clearly written and easily readable and

can be accompanied by pictures or other forms "created an interpretation that is not

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clear and firm, especially when associated with the provision of criminal sanctions

listed in Article 199 paragraph (1) of Law 36/2009 which refers to Article 114 of Law

36/2009 and its explanation. Thus, the word "shall include

health warning "in the provisions of Article 114 of Act a quo

shall be interpreted to include health warnings in the form

writing a clear and easily legible and accompanied by a picture or shape

other. It thus can be done by removing the word "may" in

Elucidation of Article 114 of Law 36/2009 ";

[3.14.5] Whereas considerations of the Court in Decision No.

34/PUU-VIII/2010, November 1, 2011, throughout the article that

has been tested with the same stone mutatis mutandis test into consideration as well

in the decision a quo;

[3.15] Considering whereas based on this consideration Petitioners' petition to test the constitutionality of article a quo should otherwise ne bis in idem;

4. CONCLUSION

Based on the assessment of facts and laws as described in above, the Court concluded:

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

[4.2] The applicant has a legal domicile (legal standing) to filed the petition a quo;

[4.3] Petition of the Petitioners ne bis in idem;

Under the Constitution of the Republic of Indonesia Year 1945 and Law Number 24 Year 2003 concerning Constitutional Court 28

as amended by Law No. 8 Year 2011 concerning Amendment to Law Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2011 Number 70, Republic of Indonesia Number 5226) as well as Law Number 48 Year 2009 regarding Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement State Gazette Number 5076);

5. DECISION

Hearing,

To declare the petition of the Petitioners can not be accepted.

Hence the decision was in the Consultative Meeting by nine Constitutional Court Justices namely Moh. Mahfud MD., As Chairman cum Member, Achmad Sodiki, Muhammad Alim, Harjono, Maria Farida Indrati, Anwar Usman, Ahmad Fadlil Sumadi, Hamdan Zoelva, and M. Akil Mochtar, each as a Member, on Tuesday, eighteen months

October year two thousand eleven, and was pronounced in the Plenary Session open to the public on Tuesday, one month of November of two thousand eleven by eight Constitutional Justices, namely Moh. Mahfud MD., As Chairman concurrent Member, Achmad Sodiki, Harjono, Maria Farida Indrati, Ahmad Fadlil Sumadi, Anwar Usman, Hamdan Zoelva, and M. Akil Mochtar, respectively as Members, assisted by Saiful Anwar as the Registrar Substitute, and attended by the Petitioners / their Attorneys, the Government or its representative,

and House of Representatives or its representative.

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CHAIRMAN,

Signed.

Moh. Mahfud MD.

JUSTICES,

Signed.

Achmad Sodiki

Signed.

Harjono

Signed.

Maria Farida Indrati

Signed.

Usman Anwar

Signed.

Hamdan Zoelva

Signed.

Ahmad Fadlil Sumadi

Signed.

M. Akil Mochtar

Registrar,

Signed.

Saiful Anwar