PLENARY

PETITION FOR BREACH OF FUNDAMENTAL PRECEPT 449 FEDERAL DISTRICT

RELATOR: MIN. LUIZ FUX

RESPONDENT(S): LIBERAL SOCIAL PARTY

ATTORNEY(S): RODRIGO SARAIVA MARINHO AND OTHERS

INTDO.(A/S): CITY HALL OF FORTALEZ

ATTORNEY(S): UNREPRESENTED

INTDO.(A/S): MAYOR OF FORTALEZA

ATTORNEY(S): UNREPRESENTED

AM. CURIAE. : ASSOCIATIONBASEDE INFORMATION AND COMMUNICATION TECHNOLOGY - BRASSCOM

ATTORNEY(S): LUIZ ROBERTO PEROBA BARBOSA

ATTORNEY(S): ANDRÉ ZONARO GIACCHETTA

ATTORNEY(S): VICENTE COELHO ARAÚJO

AM. CURIAE. : NATIONAL SERVICE CONFEDERATION - CNS

ATTORNEY(S): RICARDO OLIVEIRA GODOI

ATTORNEY(S): MARCELO MONTALVAO MACHADO

AM. CURIAE. : MUNICIPALITY OF FORTALEZA

PROC.(A/S)(ES): ATTORNEY GENERAL OF THE FEDERAL GOVERNMENT FORTALEZA

AM. CURIAE. : NEW NATIONAL PARTY - NEW

ATTORNEY(S): FLÁVIO HENRIQUE UNES PEREIRA AND OTHERS

AM. CURIAE. UBER DO BRASIL TECNOLOGIA LTDA

ATTORNEY(S): OTTO BANHO LICKS AND OTHERS

AM. CURIAE. : SECRETARIAT OF FOLLOW-UP ECONOMIC OF THE MINISTRY OF FINANCE

PROC.(A/S)(ES): ADVOCATE-GENERAL OF THE UNION

AM. CURIAE. **:** BDEONLINETO ASSOCIATION

OFFLINE - ABO2O

ATTORNEY(S): MARCOSJOAQUIMGONÇALVESAE

OTHER

EMENTA: CONSTITUTIONAL AND ADMINISTRATIVE LAW AND THE REGULATÓRIO. PROIBIÇÃO DO LIVRE EXERCISE OF THE

ACTIVITY OF INDIVIDUAL PASSENGER TRANSPORTATION. UNCONSTITUTIONALITY. CONSTITUTIONAL STATUS OF LIBERTIES. CONSTITUTIONAL PRINCIPLES OF FREE ENTERPRISE AND THE SOCIAL VALUE OF LABOR (ART. 1º, IV), OF PROFESSIONAL FREEDOM (ART. 5, XIII), OF FREE COMPETITION (ART. 170, *CAPUT*), OF CONSUMER'S DEFENSE (ART. 170, V) AND THE SEARCH FOR FULL EMPLOYMENT (ART. 170, VIII). IMPOSSIBILITY OF ESTABLISHING RESTRICTIONS TO MARKET ENTRY. DISPROPORTIONATE MEASURE. NEED FOR JUDICIAL REVIEW. MECHANISMS OF BRAKES AND COUNTERWEIGHTS. ADPF GRANTED.

1. The Argument of Noncompliance with a Fundamental Precept is applicable against municipal law, adopting as a control parameter a fundamental precept contained in the Letter of the Republic, although the control in light of the State Constitution is also applicable in theory before the competent Court of Justice.

2. The power of attorney that lacks specific powers to file the Argument of Noncompliance with a Fundamental Precept can be regularized during the course of the process, thanks to the instrumentality of Procedural Law.

3. The Argument of Noncompliance with a Fundamental Precept does not lack interest in bringing suit because of the revocation of the rule under control, especially in view of the need to establish the regime applicable to legal relations established during the effectiveness of the law, as well as with regard to laws with identical content approved in other municipalities. Precedents: ADI 3306, Rapporteur: Min. GILMAR MENDES, Full Court, judged on 03/17/2011; ADI 2418, Rapporteur: Min. TEORI ZAVASCKI, Full Court, judged on 05/04/2016; ADI 951 ED, Rapporteur: Min. ROBERTO BARROSO, Full Court, judged on 10/27/2016; ADI 4426, Rapporteur: Min. DIAS TOFFOLI, Full Court, judged on 02/09/2011; ADI 5287, Rapporteur: Min. LUIZ FUX, Full Court, judged on 05/18/2016.

4. The Union has private competence to legislate on

"guidelines for the national transport policy", "traffic and transport" and "conditions for the exercise of professions" (art. 22, IX, XI and XVI, of the CRFB), being forbidden both to municipalities to dispose on these subjects and to the federal ordinary law to promote its legislative delegation to smaller federative entities, considering that the art. 22, sole paragraph, of the Constitution allows the complementary Law to authorize only the States to legislate on specific issues of the referred matters. Precedents: ADI 3136, Rapporteur: Min. Ricardo Lewandowski, Full Court, judged on 08/01/2006, DJ 10/11/2006; ADI 2.606, Rapporteur: Min. Maurício Corrêa, Full Court, DJ of 07/02/2003; ADI 3.135, Rapporteur: Min. Gilmar Mendes, Full Court, DJ of 08/09/2006; and ADI 3.679, Reporting Justice Sepúlveda Pertence, Full Court, DJ on 08/03/2007; ARE 639496 RG, Reporting Justice Cezar Peluso, judged on 06/16/2011; ADI 3049, Reporting Justice Cezar Peluso, Full Court, judged on 06/04/2007.

5. The private driver, in his work activity, is protected by the fundamental freedom inscribed in art. 5, XIII, of the Magna Carta, subjecting himself only to the regulation proportionally defined in federal law, so that art. 3, VIII, of Federal Law No. 12,965/2014 (Marco Civil da Internet) and Federal Law No. 12,587/2012, amended by Law No. 13,640 of March 26, 2018, guarantee the operation of paid passenger transportation services by apps.

6. The freedom of initiative guaranteed by Articles 1, IV, and 170 of the Brazilian Constitution embodies a protection clause that stands out in the Brazilian legal system as a foundation of the Republic and is characteristic of a select group of Constitutions around the world.

7. Modern constitutionalism is based on the need to restrict state power over the functioning of *the* market economy, with the *Rule of Law* prevailing over authoritarian initiatives aimed at concentrating privileges, imposing monopolies on means of production or establishing arbitrary wages, prices and quality standards, since they generate a hostile environment for competition, innovation, and quality.

progress and the distribution of wealth. Literature: ACEMOGLU, Daron; ROBINSON, James. *Why nations fail - The origins of power, prosperity, and poverty*. Trad. Cristiana Serra. 1st ed. Rio de Janeiro: Elsevier, 2012.

8. *Public* choice theory predicts that the political process through which regulations are issued is often captured by power groups interested in obtaining, in this way, profits superior to what would be possible in an environment of free competition, because a political resource commonly desired by these groups is the state power to control the entry of new competitors in a given market, in order to concentrate benefits in favor of a few and disperse losses throughout society. Literature: STIGLER, George. "The theory of economic regulation". *in*: *The Bell Journal of Economics and Management Science*, Vol. 2, No. 1 (Spring,1971).

9. The exercise of economic and professional activities by private individuals must be protected from arbitrary coercion by the State, and it is up to the Judiciary, in light of the system of checks and balances established in the Brazilian Constitution, to invalidate normative acts that establish disproportionate restrictions on free initiative and professional freedom. Jurisprudence: RE no. 414426 Rapporteur: Min. ELLEN GRACIE, Full Court, judged on 08/01/2011; RE 511961, Rapporteur: Min. GILMAR MENDES, Full Court, judged on 06/17/2009.

10. The constitutional system of protection of liberties enjoys *prima facie* prevalence, and any restrictions must be informed by a constitutionally legitimate parameter and conform to the proportionality test, requiring a burden of regulatory justification based on empirical elements that demonstrate that the requirements for intervention are met.

11. The rule that prohibits the "use of private cars registered or not in applications, for the remunerated individual transport of people" configures a disproportionate limitation to the freedom of initiative (art. 1, IV, and 170 of the CRFB) and of profession (art. 5, XIII, of the CRFB), which causes oligopolistic restriction of the market for the benefit of a certain group and in

detrimental to the collectivity. Furthermore, the empirical analysis shows that private transportation services through apps have not diminished the market for cabs.

12. The regulatory framework of cabs in Brazil is based on the granting of permission titles to a limited group of individuals, who benefit from an extraordinary income by artificially restricting the market, so that the asset granted does not correspond to any benefit generated to society, but only to the unnatural scenario of scarcity resulting from the governmental limitation, being correct to state that the constitutional principles of equality (art. 5, caput), of free enterprise (articles 1, IV, and 170) and of free competition (art. 173, § 4) forbid the State to prevent the entry of new agents in the market to preserve the income of traditional agents. Jurisprudence: ADI 5062, Rapporteur: Min. LUIZ FUX, Full Court, judged on 27/10/2016.

13. The legal prohibition of the free exercise of the profession of remunerated individual transport affronts the principle of the search for full employment, inscribed in art. 170, VIII, of the Constitution, since it prevents the opening of the market to new entrants, eventually interested in migrating to the activity as a consectary of the economic crisis, to unduly promote the maintenance of the value of cab permits.

14. The regulatory capture, once evidenced, legitimizes the Judiciary to review the suspicious measure, as an institution structured to decide independently from political pressures, in order to prevent democracy from becoming a regime that serves the privileges of organized groups, leaving the Separation of Powers unscathed before the performance of checks and balances to annul arbitrary acts of the Executive and Legislative branches.

15. The literature on the subject asserts that, *verbis*: "there is no accepted theory or body of evidence that attributes social benefits to regulation that limits entry and price competition" (POSNER, Richard A. "The Social Costs of Monopoly and Regulation". *In: The Journal of Political Economy*, Vol. 83, No. 4 (Aug., 1975), pp. 807-828). In a similar vein: SHLEIFER, Andrei. The Enforcement Theory of Regulation. In:

The Failure of Judges and the Rise of Regulators. Cambridge: The MIT Press, 2012. p. 18; GELLHORN, Walter. "The Abuse of Occupational Licensing". In: 44 U. Chi. L. Rev. 6 1976-1977.

16. Technological evolution is capable of overcoming economic problems that traditionally justified regulatory interventions, an example being the significant reduction of transaction costs and asymmetry of information by private individual transport applications, making it unnecessary the standardization of cab services by the public authorities. Literature: MACKAAY, Ejan. *Law and Economics for Civil Law Systems*. Cheltenham: Edward Elgar, 2013.

17. The benefits generated to consumers by the operation of individual passenger transport applications are documented in specialized literature, which points out, through empirical research methods, a significant *consumer surplus*, consistent with the difference between the marginal benefit in the acquisition of a good or service and the amount actually paid for it, from the interaction between the demand curve and the market price, so that prohibiting the operation of these services achieves the opposite effect to the goal of consumer protection imposed by Articles 5, XXXII, and 170, V, of the Constitution.

18. The Constitution imposes on the regulator, even in the task of city planning, the option for the measure that does not exercise unjustifiable restrictions on the fundamental freedoms of initiative and professional exercise (art. 1, IV, and 170; art. 5, XIII, CRFB), being unequivocal that the need to improve the use of public roads does not authorize the creation of an oligopoly harmful to consumers and potential service providers in the sector, especially when there are known alternatives for the achievement of the same purpose and in view of empirical evidence on the benefits generated to the fluidity of traffic by transport applications, making it clear that the prohibitive rule denies "the citizen the right to efficient urban mobility", in contravention of the commandment contained in art. 144, § 10, I, of the Constitution, included by Constitutional Amendment No. 82/2014.

19. Argument of Noncompliance with a Fundamental Precept judged

upheld to declare unconstitutional the Municipal Law of Fortaleza No. 10.553/2016, for offense to articles 1, IV; 5, *caput,* XIII and XXXII; 22, IX, XI and XVI; 144, § 10, I; 170, *caput,* IV, V and VIII; and 173, § 4, all of the Magna Carta.

A C O R D

These proceedings have been seen, reported and discussed, the Justices of the Federal Supreme Court, in Plenary Session, under the presidency of Justice Dias Toffoli, in conformity with the minutes of the trial and the case notes, agree, preliminarily, by majority vote, to ACKNOWLEDGE the plea of breach of fundamental precept, with the dissenting votes of Justices Rosa Weber and Marco Aurélio, who judged it prejudiced. On the merits, unanimously, to DENY the claim to declare unconstitutional, *in full, the* Municipal Law of Fortaleza No. 10.553/2016, according to the Rapporteur's vote. Minister Celso de Mello was absent, with good reason.

Brasilia, May 8, 2019. Justice

LUIZ FUX - RELATOR *Document digitally signed*

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PETITION FOR BREACH OF FUNDAMENTAL PRECEPT 449 FEDERAL DISTRICT

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INTDO.(A/S): CITY HALL OF FORTALEZ

ATTORNEY(S): UNREPRESENTED

INTDO.(A/S): MAYOR OF FORTALEZA

ATTORNEY(S): UNREPRESENTED

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PROC.(A/S)(ES): ADVOCATE-GENERAL OF THE UNION

AM. CURIAE. **:** BDEONLINETO

ASSOCIATION

OFFLINE - ABO2O

ATTORNEY(S): MARCOSJOAQUIMGONÇALVESAE

OTHER

R E L A T O R Y

O SENIOR MINISTER LUIZ FUX (RELATOR): This is an Argument of Noncompliance with a Fundamental Precept *filed* by the National Directory of the Social Liberal Party (PSL), a political party with representation in the National Congress, in which it is requested to be declared "*materially and formally unconstitutional, with reduction of the text, articles 1 and 2 of the Municipal Law of Fortaleza No. 10.553/2016, which provide for the prohibition of the use of private cars registered or not in applications, for the paid individual transport of people in the Municipality of Fortaleza*.

The petitioner wants the Federal Supreme Court to establish, within the scope of this ADPF, an understanding that can be extended "*to any other Laws of any Municipality of the Federation that are contrary to it, without the need to file other endless ADPFs*", which would not be possible in abstract control of constitutionality before the Court of Justice. He alleges subsidiarity as a requirement for the action, based on the argument that the municipal law is incompatible with the Federal Constitution, and that the possibility of filing an ADI before the local court does not preclude the hearing of this action. On the merits, he claims that the contested rules "*violate the principles of the social value of labor and free enterprise (art. 1, IV, CF/88), free competition (art. 170, IV, CF/88), consumer protection (art. 170, V, CF/88), as well as the search for full employment (art. 170, VIII, CF/88)*. He also argues that the municipal law ignores the authorization of private individual passenger transportation established by Federal Law No. 12,587/2012, as well as the freedom of business models promoted on the Internet enshrined in art. 3, VIII, of Federal Law No. 12,965/2014 (Marco Civil da Internet).

The Municipality of Fortaleza/CE provided information, preliminarily alleging that *(i)* the ADPF is unacceptable because it seeks "*a single purpose: to prevent the Executive Branch of the Municipality of Fortaleza from exercising the powers conferred on it by the Constitution.*

its attributions and constitutional powers about the contracts or business [*sic*] *of individual private transportation*"; *(ii)* there would be irregularity of representation by proxy without specific powers to file the ADPF; *(iii)* "*the author party is captive and focused,* in casu, for the *defense of subjective, private interests, not demonstrating properly an objective interest to protect in ADPF*"; and *(iv)* there would be no compliance with the test of subsidiarity, since it is possible to file a concentrated control of the municipal rule before the Court of Justice. On the merits, he requested the dismissal of the initial requests, arguing that the activity "*cannot, nor should not, be left exclusively to the discretion and free initiative of individuals*", and that "*when it is subject to the legal regime of public law, it can only be exercised by individuals when (or as long as) they are granted permission, delegation or authorization*". It defended that "*there are no economic activities within the scope of services of public interest that are totally free and immune to state action and presence*" and that "*free competition, free enterprise, and the freedom to choose a profession will invariably find their limits in the public interest* (...) *through state regulation*". *The* City believes that "*private passenger transportation (Uber) must necessarily be subject to municipal police power, for reasons of public/collective interest and safety of the passengers themselves*". Finally, it justifies the regulation "*as to Uber*" to combat "*the risk that it will compete with the public power itself or reach a monopoly level*" and also the fixing of "*excessively abusive price*".

The City Council of Fortaleza, in turn, justified the law by the "*need for protection as to the system and professionals in the sector, in order to avoid the proliferation of services that could endanger users, as well as create opportunities for the emergence of clandestine professionals through deficiency of surveillance,*" arguing that the rule "*does not have any charge of unconstitutionality*. Affirmed that the activity of paid transportation in private cars "*is exclusive to professional taxi drivers, holders of specific certification for the exercise of the profession, issued by the competent body of the location of the provision of*

service." It justifies the norm on the grounds that it would have arisen "*as an instrument of attempt to assure the citizen the concern for a safe and duly authorized transportation by the legitimate bodies, in order to facilitate the concrete possibility of exercising the inspection activity*."

The Office of the Attorney General of the Union attached to the case records a statement as follows

> *"Transportation. Articles 1 and 2 of Law No. 10.553/2016 of the Municipality of Fortaleza/CE, which prohibit individual public transport of passengers without proper legal permission. Preliminary. Irregularity in the procedural representation of the plaintiff. Legal impossibility of the subsidiary request of interpretation according to the Constitution. Merits. No affront to the precepts of valorization of labor, free enterprise, free competition, defense of the consumer and search for full employment (articles 1, IV: and 170, IV, V and VIII, of the Constitution). The contested provisions are limited to regulating the supervision of the services provided by taxi drivers, since, in compliance with the federal legislation, they prohibit the individual public transportation of passengers without the proper legal authorization. The rules under invective are in line with the federal Law No. 12.587/2012, which provides for the National Policy on Urban Mobility. The acts of the local Executive Branch that, in theory, would have conferred an erroneous interpretation to the hostile norms were not challenged by the plaintiff, and are not subject to control in this claim. Manifestation for the rejection of the claim and, on the merits, for the dismissal of the claims."*

The Attorney General of the Republic handed down an opinion in which she says that the request is preliminarily denied and, alternatively, that the action should be granted, which was summarized in the following terms:

> *"CONSTITUCIONAL. URBAN POLICY, MOBILITY AND TECHNOLOGY. ARGUITUTION OF*

BREACH OF FUNDAMENTAL PRECEPT. MUNICIPAL LAW 10.553/2016 OF FORTALEZA-CE. APPLICATION OF THE RULE TO INDIVIDUAL PASSENGER TRANSPORTATION ORGANIZED BY ONLINE APPLICATION. PRIVATE COMPETENCE OF THE UNION TO LEGISLATE ON TRANSPORTATION (ART. 22, XI). PRIVATE NATURE OF INDIVIDUAL PASSENGER TRANSPORTATION. VIOLATION OF ARTS. 1, IV (SOCIAL VALUE OF WORK AND FREE ENTERPRISE) AND 170, IV, V AND VIII (FREE COMPETITION, CONSUMER'S DEFENSE AND SEARCH FOR FULL EMPLOYMENT) OF THE CONSTITUTION. NON-APPLICATION OF THE RULE OF LAW 12.587/2012 (NATIONAL URBAN MOBILITY POLICY LAW) TO A SERVICE NOT REGULATED BY IT. INSUFFICIENT SIMILARITIES BETWEEN CAB AND SERVICE ORGANIZED BY APPLICATION TO JUSTIFY ANALÓGICA DE REGULAÇÃO SPECIFIC APPLICATION. IMPOSSIBILITY OF ELEVATING INFRA-CONSTITUTIONAL RULE TO THE STATUS OF PARAMETER FOR THE CONTROL OF CONSTITUTIONALITY. MUNICIPAL LAW THAT PROHIBITS TECHNOLOGICAL INNOVATION IN TRANSPORTATION ACTIVITIES AFFRONTS THE PRINCIPLE OF PROPORTIONALITY. VIOLATION OF FUNDAMENTAL PRECEPTS. PROCEDURE.

1. Failure to state reasons for the requests for a declaration of formal unconstitutionality, material unconstitutionality with textual reduction and conforming interpretation of the contested rule.

2. ADPF is inapplicable when the intended result is achieved by challenging the legality of the municipal supervisory conduct targeted by the action. Concentrated exterm control is equally inapplicable when there is a representation of unconstitutionality in face of the state constitution, before the respective Court of Justice. The requirement of subsidiarity is not met. Preliminary rejection of the request.

3. Violation of the constitutional regime of division of competencies. Municipal law that prohibits individual passenger transport organized by online applications usurps competence

legislative power of the Union to legislate on transportation and disregards the principle of proportionality. Formal and material unconstitutionality.

4. Paid individual transport of passengers organized by online applications is a private activity of an economic nature. Regulation of individual transport should consider citizens' welfare and urban balance. Public policies should be defined based on scientific evidence and popular participation. Respect for the principle of separation of powers and the democratic regime.

5. Only federal law can interfere with private individual passenger transport organized by online applications as an activity of public interest. Principle of free enterprise, competition and consumer protection.

6. Impossibility of constitutional rule on cab (art. 12 of Law 12.468/2012) acting as a parameter for constitutionality control. Constitutional hierarchy. Difference between rules and principles.

7. Opinion for the dismissal of the action and for the granting of the request."

On April 10, 2017, by analogy, I determined the application of art. 12 of Law 9.868/99 to the present proceeding.

The following requested to be included as *amici curiae*: PARTIDO NOVO NACIONAL; CONFEDERAÇÃO NACIONAL DE SERVIÇOS; MUNICÍPIO DE FORTALEZA/CE; UBER DO BRASIL TECNOLOGIA LTDA; SECRETARIA DE ACOMPANHAMENTO ECONÔMICO DO MINISTÉRIO DA FAZENDA; ASSOCIAÇÃO BRASILEIRA DAS EMPRESAS DE TECNOLOGIA DA INFORMAÇÃO E COMUNICAÇÃO – BRASSCOM; and BRAZILIAN ONLINE TO OFFLINE ASSOCIATION – ABO2O.

On 11/21/2017, I admitted all *amici curiae*, with the exception of ASSOCIAÇÃO BRASILEIRA DE ONLINE TO OFFLINE. The Plenary

of this Court denied the interlocutory appeal filed by it, in which it challenged the inadmissibility.

In consultation on the World Wide Web, I found that the law challenged in ADPF was expressly repealed by Law 10.751/2018 of the Municipality of Fortaleza.

This is the report.

PLENARY

PETITION FOR BREACH OF FUNDAMENTAL PRECEPT 449 FEDERAL DISTRICT

V O T O

O SENISTRO LUIZ FUX (RELATOR): Mr. President,
The Honorable Representative of the Public Prosecutor's Office is a member of the Honorable Full Court.

I. PRELIMINARIES ADMISSIBILITY OF THE ADPF

Preliminarily, I note the admissibility of the ADPF now on trial.

I reject the preliminary claim raised by the Municipality of Fortaleza in the sense that the constitutional action is not appropriate because it aims at "*a single purpose: to prevent the Executive Power of the Municipality of Fortaleza from exercising its attributions and constitutional powers regarding the contracts or businesses* [*sic*] *of individual private transport*"; another related argument would be that the applicant of the ADPF would be defending "*subjective, private interests*". In fact, the Arguition in question has a determined object of control, which is the Municipal Law of Fortaleza No. 10,553/2016. There is no controversy, in the case law of this Court, as to the suitability of ADPF against municipal law, adopting as a parameter of control a fundamental precept contained in the Charter of the Republic. For this very reason, contrary to what is affirmed by the City Hall, the subsidiarity test is satisfied as to the suitability of the present Argument, even if, in theory, the control in light of the State Constitution would also be suitable before the competent Court of Justice. In this regard, I cite the following decisions of the Plenary of the Supreme Court:

> "*The principle of subsidiarity is measured at the time of*

the filing of ADPF, so that no other constitutional action with the ability to prevent damage to the federative pact in question can be inferred. (...) The occurrence of coexistence of state and national constitutional jurisdictions configures the hypothesis of prejudicial suspension of the abstract normative control proceeding filed before the local Court of Justice. Precedents."

(ADPF 190, Rapporteur: Min. EDSON FACHIN, Full Court, judged on 09/29/2016)

"Possibility of filing a petition for breach of a fundamental precept to resolve a controversy over the legitimacy of a federal, state or municipal law or normative act, even if it predates the Constitution (pre-constitutional rule). (...)Principle of subsidiarity (art. 4, §1 of Law 9882/99): inexistence of another effective means of remedying the injury, understood within the context of the overall constitutional order, as the one capable of resolving the relevant constitutional controversy in a broad, general and immediate manner. (...) The existence of ordinary proceedings and extraordinary appeals should not exclude, a priori, the use of the claim of breach of a fundamental precept, in view of the markedly objective nature of this action."

(ADPF 33, Rapporteur: Min. GILMAR MENDES, Full Court, judged on 12/07/2005)

Also admitting the filing of ADPF against municipal law: ADPF 316 MC-Ref, Rapporteur: Min. MARCO AURÉLIO, Full Court, judged on 09/25/2014.

The request for dismissal of the case for alleged irregularity of representation due to power of attorney without specific powers to file the Motion for Reconstitution of Fundamental Precept also does not deserve to be accepted. In a petition registered under number 26541/2017, was attached to the records power of attorney granted by the NATIONAL DIRECTORY OF THE LIBERAL SOCIAL PARTY to

lawyers acting for the case, with the specific powers to do so

the filing of the ADPF. In similar cases, the Court has held that the defect is fully remediable, even if at a later stage of the trial. *Verbi gratia*, see: "*The Court granted a period of 5 (five) days for the presentation of a power of attorney with specific powers to file the ADPF and decided to proceed with the examination of the injunction*" (ADPF 167 MC-REF, Rapporteur: Min. EROS GRAU, Full Court, judged on 01/10/2009); "*The Court* (...) *rejected the preliminary precedence of the issue of regularization of the power of attorney*" (ADPF 4 MC, Rapporteur: Min. ELLEN GRACIE, Full Court, judged on 08/02/2006). This is the orientation that best accords with the instrumentalist spirit of the new Code of Civil Procedure, and the best possible use should be made of procedural steps, preventing sterile formalities from hindering the progress of the case.

As explained in the report, the municipal law challenged in this Argument was expressly repealed by Law No. 10.751/2018 of the Municipality of Fortaleza. This fact, however, does not remove the interest of action in the present action. This is because the utility of the judicial provision persists with the purpose of establishing, with *erga omnes* and binding character, the regime applicable to legal relations established during the validity of the law, as well as with respect to laws of identical content approved in other municipalities. This is the solution that is most in line with the principle of procedural efficiency and the imperative of using the acts already practiced in a socially beneficial manner. In this regard, there are several precedents of the Court admitting the continuation of abstract control actions of constitutionality after the revocation of the rule under control: ADI 3306, Reporting Judge GILMAR MENDES, Full Court, judged on 03/17/2011; ADI 2418, Reporting Judge: Min. TEORI ZAVASCKI, Full Court, judged on 05/04/2016; ADI 951 ED, Rapporteur: Min. ROBERTO BARROSO, Full Court, judged on 10/27/2016; ADI 4426, Rapporteur: Min. DIAS TOFFOLI, Full Court, judged on 02/09/2011; ADI 5287, Rapporteur: Min. LUIZ FUX, Full Court, judged on 05/18/2016.

In light of the above, I consider the Argument under examination to be well-founded.

II. MERIT

Moving on to the analysis of the issues of merit presented to the Court by the present ADPF, there is a theme of enormous social and economic repercussion, concerning the constitutional status of fundamental freedoms. The question is whether it is possible for the State to arbitrarily prohibit or restrict the exercise of economic activities by private individuals, in light of the constitutional principles of free enterprise and the social value of work (art. 1, IV), of professional freedom (art. 5, XIII) and of free competition (art. 170, *caput*). Specifically regarding the individual urban passenger transportation through digital platforms, it is pointed out, also, offense to the principles of consumer protection (art. 170, V) and the search for full employment (art. 170, VIII). Here is the content of the contested Municipal Law:

> LAW NO. 10.553, OF DECEMBER 23, 2016.
>
> Provides for the prohibition of the use of private cars registered or not in applications, for the paid individual transport of people in the Municipality of Fortaleza, and other provisions.
>
> HEREBY MAKE KNOWN THAT THE CITY COUNCIL OF FORTALEZA HAS APPROVED AND I HEREBY SANCTION THE FOLLOWING LAW:
>
> Art. 1 - It is forbidden in the city of Fortaleza the individual public transport of passengers without the proper legal permission. Art. 2º - The infraction to the disposed in this Law will bring to the driver a fine of R$ 1.400,00 (one thousand and four hundred reais), applied until the limit of 4 (four) times the value of the fine, in
> in case of recurrence within a period of 12 (twelve) months.
>
> Article 3 - The expenses with the execution of this Law will be covered by its own budget appropriations, supplemented if necessary.
>
> Article 4 - This Law goes into effect on the date of its

publication,

The provisions to the contrary are revoked.

Regarding the formal aspect, it is necessary to decide on the competence of municipalities to regulate the activity of private individual passenger transport. It should be noted that several municipalities have issued similar laws, such as Aracaju/SE (Law No. 4.738/2015), Salvador/BA (Law No. 9.107/2017), Campinas/SP (Law No. 13.775/10), among others.

It is known that the article 22, items IX and XI, of the Constitution establishes the private competence of the Union to legislate, respectively, on "guidelines for the national transport policy" and on "traffic and transport". The *ratio of* this rule resides in the need to establish national uniformity to the mobility modals, thus preventing that the fragmentation of the regulatory competence by the smaller federated entities makes the implementation of an efficient, integrated and harmonious transportation system unfeasible. In this context, it seems incompatible with the constitutional distribution of competencies the edition of municipal law that restricts the exercise of transport activities of a strictly private nature, under penalty of transforming the federative model into an obstacle to the full development of the country, considering the disorderly profusion of conflicting legislations.

It should be added that article 22, XVI, also attributes to the Union exclusive competence to define "conditions for the exercise of professions", and it is certain that the exercise of the private driver activity is protected as a fundamental freedom by article 5, XIII, of the Constitution, being subject only to the regulation defined in federal law, which must refrain from creating proportional restrictions, as will be better explained below. A Municipal Law that prohibits the private individual transportation of passengers, as a logical consequence, also prohibits the exercise of the private driver profession in a very relevant portion of the market, invading competence that would be of the Union.

In this context, Article 3, VIII, of Federal Law No. 12,965/2014 (Marco Civil da Internet) already guarantees the freedom of business models promoted on the internet, as is the case of private passenger transportation networks by apps. In the same vein, the National Policy for Urban Mobility, established by Law No. 12,587/2012 and recently amended by Law No. 13,640 of March 26, 2018, already regulates individual private remunerated transportation of passengers, defining it as the "remunerated passenger transportation service, not open to the public, for the performance of individualized or shared trips requested exclusively by users previously registered on apps or other network communication platforms." The referred law started to establish requirements for the exercise of this activity, such as the requirements of hiring personal accident insurance for passengers and DPVAT, collection of municipal taxes and social security contributions, presentation of negative certificate of criminal record, registration and licensing of the vehicle *etc*.

Still about Law 13.640/2018, it should be noted that the delegation of the regulation of private individual passenger transportation services to the Municipalities and Federal District, according to the new wording of articles 11-A and 11-B of Law 12.587/2012, also violates the Constitution, by unduly delegating exclusive competence of the Union, under the terms of the aforementioned article 22, items IX, XI and XVI, of the Constitution.

It is convenient to recall precedents from this Court that have ruled formally unconstitutional state and district laws regulating the licensing of motorcycles for passenger transport ("Mototaxis"), precisely for usurping the competence of the Union to legislate on the matter, as can be seen in the following decision:

> *"DIRECT ACTION OF UNCONSTITUTIONALITY. LAW FROM THE STATE OF MINAS GERAIS. LICENSING OF MOTORCYCLES FOR PASSENGER TRANSPORTATION*

("MOTOTAXI"). PRIVATE JURISDICTION OF THE UNION. FORMAL UNCONSTITUTIONALITY RECOGNIZED. I - Private competence of the Union to legislate on traffic and transport (CF, art. 22, XI). II - Exercise of attribution by the State that requires authorization in supplementary law. III - Inexistence of express authorization regarding the remunerated transportation of passengers by motorcycles. IV - Direct action granted to declare the unconstitutionality of mining law 12.618/97."

(ADI 3136, Rapporteur: Min. Ricardo Lewandowski, Full Court, judged on August 1st, 2006, DJ 10/11/2006)

In the same sense: ADI 2.606, Reporting Justice Maurício Corrêa, Full Court, DJ de 07/02/2003; ADI 3.135, Reporting Justice Gilmar Mendes, Full Court, DJ de 08/09/2006; and ADI 3.679, Reporting Justice Sepúlveda Pertence, Full Court, DJ de 03/08/2007.

In ARE no. 639.496, judged in General Repercussion, the Rapporteur, Min. Cezar Peluso, noted that this "Court has also established jurisprudence in the sense that it is the exclusive competence of the Union to legislate on traffic and transport, making it impossible for the Member States and municipalities to legislate on the matter while not authorized by Complementary Law" (ARE 639496 RG, Rapporteur: MINISTER PRESIDENT, judged on June 16, 2011). The Plenary has also already decided it is unconstitutional, for offense to art. 22, XI, of the Constitution, "state law that, under the pretext of authorizing service concession, provides for technical inspection of vehicles to assess safety conditions and control pollutant emissions and noise" (ADI 3049, Rapporteur: Min. CEZAR PELUSO, Full Court, judged on June 04, 2007).

It is concluded, therefore, by the formal unconstitutionality of the Municipal Law of Fortaleza 10.553/2016, for affront to article 22, items IX, XI and XVI, of the Constitution.

Regarding the level of material constitutionality, it is a matter of

This is an opportune occasion for this Court to define the limits of regulatory power in relation to the competitive environment and the exercise of professions, providing legal security not only for the disruptive innovations arising from the brand new "sharing economy", but also for private initiative in the most diverse market sectors.

The definition of governmental boundaries in relation to the economic order is of particular importance considering a special feature of the Brazilian Constitution. According to the "*Comparative Constitutions Project*" database, one of the largest collections of information on constitutional texts from different countries, organized by Professors Tom Ginsburg (*University of Chicago*) and Zachary Elkins (*University of Texas)*, only 21% (twenty-one percent) of the Constitutions currently in force around the world expressly provide for some type of right to a competitive market environment (available at: <http://www.comparativeconstitutionsproject.org>). Not even the North American Constitution of 1789, precursor of the model of liberal constitutionalism, consecrates a commandment equivalent to the freedom of initiative guaranteed by Articles 1, IV, and 170 of the Brazilian Constitution. For this reason, this fundamental clause, inscribed in the Charter of 1988 as a foundation of the Republic and unparalleled in the vast majority of the constitutional texts of other nations, cannot be reduced to a mere rhetorical whim of the constituent, to unjustifiably remove or restrict judicial control of normative acts that infringe basic economic freedoms.

Moreover, the need to restrict state power over the functioning of the market economy is precisely what led to the emergence of modern constitutionalism. In a historical context, the concentration of decision-making power over productive activities in the hands of the monarch and the elite that served him has always represented an effective means of control over the subjects, as long as it led, concomitantly, to the impoverishment of society. In Europe, since

n the Middle Ages, professions were strictly regulated by the so-called guilds, and it was forbidden to practice them without the authorization of their leaders. It is curious to note how traces of this period still exist in the modern world: look at the European surnames that refer to professions, derived from the time when all descendants of a family were obliged to follow the trade of their ancestors. The regulatory rigidity concentrated in an elite of master craftsmen, at the top of the imposed hierarchy, the prerogative of monopolizing the means of production, as well as setting wages, prices and quality standards. In this environment hostile to competition and innovation, it was easier to control the masses and ensure the ruling nobility's hold on power. Despite the notorious obstacle to progress and distribution of wealth, the system was paradoxically justified in the protection of the worker.

In this regard, professors Daron Acemoglu (MIT) and James Robinson (Harvard) point out that the absence of limits on the sovereign's power to govern the economy and the professions leads to a vicious circle of political totalitarianism and accentuation of misery, responsible for the failure of various societies throughout history, from the Roman Empire, through Venice, to the present day. The following excerpt is taken from his work:

> "In 1583, William Lee returned from his studies at Cambridge University to become the local parish priest in Calverton, England. Elisabeth I (1558-1603) had recently determined that her subjects should always wear a knitted biretta. Lee noted that 'knitters were the only means of producing these garments, but the delay in finishing each item was too long. I set myself to pondering. I watched my mother and sisters sitting in the twilight of dusk, twiddling with their needles. If each garment was made by two needles and a thread of thread, why not several needles to guide the thread?'
>
> This flash marked the beginning of the mechanization of production

textile. Lee became obsessed with building a machine that would free people from that endless hand knitting. According to him, 'I began to neglect my duties to church and family. The idea of my machine and its creation completely took my heart and brain.

Finally, in 1589, his sock-knitting machine was ready. Enthusiastic, he headed to London, hoping to get an audience with Elisabeth I to show her how useful the machine could be and to apply for a patent, in order to prevent others from copying the idea. He rented a building to set up the machine and, with the help of his local representative in Parliament, Richard Parkins, was introduced to Henry Carey, Lord Hundson, a member of the Queen's Privy Council. Carey arranged for Queen Elizabeth to come and see the machine, but her reaction was devastating; not only did she refuse to grant Lee's patent, but she admonished him: 'How bold of you, Lord Lee. Consider what such an invention could do to my poor subjects. Surely it would bring them ruin by depriving them of employment, thus turning them into beggars.' Devastated, Lee moved to France to try his luck there, where, having also failed, he returned to England, where he applied for a patent from James I (1603-1625), Elizabeth's successor. James I also refused, on the same grounds as Elisabeth.

(…)

The reaction to Lee's brilliant invention illustrates the central thesis of this book. Fear of creative destruction is the main reason why there was no sustained improvement in living standards between the Neolithic and industrial revolutions. Technological **innovation** contributes to the prosperity of human societies, but it also **entails the** replacement of the old with the new, as well as the **destruction of the economic privileges and political power of a few**. For sustained economic growth, new technologies and new ways of doing things are needed (...). Ultimately, it **was not concern for the fate of the potentially unemployed**

<u>because of Lee's invention that led Elisabeth I and James I to deny him the patent; it was their fear of losing out politically - that is, their fear that those harmed by the machine would create political instability and jeopardize their power.</u>"

(ACEMOGLU, Daron; ROBINSON, James. *Why nations fail - The origins of power, prosperity, and poverty*. Trad. Cristiana Serra. 1st ed. Rio de Janeiro: Elsevier, 2012. p. 143-144 - no original emphasis)

The great leap forward for humanity, which allowed us to enjoy standards of living never before experienced, was only possible with the advent of constitutionalism - in the English case, with the collapse of the absolutist Stuart dynasty and the imposition, by the glorious revolution, of a constitutional monarchy, the institutions that led to the industrial revolution were created. In this sense, the enrichment of the poorest is a direct result of a more productive economy, while the absence of arbitrary interventions by rulers and the guarantee of freedom of economic organization are fundamental conditions for this. It was for the lack of these components, Acemoglu and Robinson conclude, that there was no significant improvement in the living standards of humanity between the Neolithic revolution, still in prehistory, and the industrial revolution, at the end of the 18th century.

The explanation for this correlation between the lack of institutional limits on regulatory power and economic failure is abundant in the economic literature. The Nobel Prize winner in economics George Stigler already taught, *in* his classic "*The theory of economic regulation*", that, *in verbis*: "with its power to prohibit or compel, to withdraw or grant money, the state selectively can and does help or hurt a vast number of industries" (*in*: *The Bell Journal of Economics and Management Science*, Vol. 2, No. 1 (Spring,1971), pp. 3-21. In original: "*With its power to prohibit or compel, the state can and does selectively help or hurt a vast number of industries.* "). Observed the acclaimed

economist that the political process through which regulations are issued is often captured by power groups interested in obtaining, in this way, profits superior to what would be possible in an environment of free competition. According to him, a political resource commonly desired by these groups is state power to control the entry of new competitors in a given market. In this case, the benefits of the restrictive measure are usually concentrated in a small group, while the costs are dispersed throughout society, reducing political resistance. In Stigler's words, with express reference to the regulation of occupations, we read that:

> *"The industry seeking regulation must be prepared to provide the two things a party needs: votes and resources. Resources can be provided by campaign contributions, in-kind contributions (the businessman who heads a fund-raising committee), and more indirect methods such as employing party workers. Votes in favor of regulation are concentrated, while votes against are dispersed (...).*
>
> *Licensing of occupations is a possible use of the political process to improve the economic circumstances of a group. Licensing is an effective barrier to entry because exercising the occupation without a license is a crime."*
>
> (No original: "The industry which seeks regulation must be prepared to pay with the two things a party needs: votes and resources. The re- sources may be provided by campaign contributions, contributed services (the businessman heads a fund-raising committee), and more indirect methods such as the employment of party workers. The votes in support of the measure are rallied, and the votes in opposition are disperse (...).
>
> The licensing of occupations is a possible use of the political process to improve the economic circumstances of a group. The license is an effective barrier to entry because occupational practice without the license is a criminal offense.")

Once it is established that the exercise of economic and professional activities by private individuals should be protected from arbitrary coercion by the State, it is necessary to define who is ultimately responsible for monitoring the observance of the limits of regulatory power. Limits defined and implemented by the limited entity itself challenge the idea of the rule of law, giving rise to the emergence of a hegemonic instance of power. According to Friedrich Hayek's classic formulation, "the *Rule of Law* requires that administrative discretion in coercive action (*i.e.*, interfering in the person and property of the private citizen) must always be subject to scrutiny by an independent Court" (HAYEK, Friedrich August. *The Political Ideal of the Rule of Law*. *In*: National Bank of Egypt fiftieth anniversary commemoration lectures. National Bank of Egypt, 1955. p. 45. In the original: "*the Rule of Law requires that administrative discretion in coercive action (i.e. in interfering with the person and property of the private citizen) must always be subject to review by an independent court"*). In light of the system of checks and balances established in the Brazilian Constitution, it is incumbent upon the Judiciary to invalidate normative acts that establish disproportionate restrictions on free enterprise and professional freedom.

This Federal Supreme Court has already decided along these lines on more than one occasion, ruling out arbitrary limitations on the exercise of professional activities. Thus, in the judgment of RE No. 414426 (Rapporteur: Min. ELLEN GRACIE, Full Court, judged on 08/01/2011), this Plenary expressly defined that, *in verbis*: "*Not all trades or professions may be conditioned to compliance with legal conditions for their exercise. The rule is freedom. Only when there is harmful potential in the activity can registration with a professional inspection council be required.*" In turn, when considering the constitutionality of state control of the journalism profession, the Court expressed itself thus, in a statement by Min. Gilmar Mendes

"ÂMBITO DE PROTEÇÃO DA FREEDOM OF EXERCÍCIO PROFISSIONAL (ART. 5º, INCISO XIII,THE

CONSTITUTION). IDENTIFICATION OF CONSTITUTIONALLY PERMITTED LEGAL RESTRICTIONS AND CONFORMATIONS. QUALIFIED LEGAL RESERVE. PROPORTIONALITY. The 1988 Constitution, in assuring professional freedom (art. 5, XIII), follows a model of qualified legal reserve present in the previous Constitutions, which prescribed to the law the definition of the "conditions of capacity" as conditions for the professional exercise. ***In the context of the qualified legal reserve model present in the formulation of art. 5, XIII, of the 1988 Constitution, there is an immanent constitutional question as to the reasonableness and proportionality of restrictive laws, specifically, laws that regulate professional qualifications as conditions for the free exercise of professions****. Federal Supreme Court Jurisprudence: Representation No. 930, Reporting Justice Rodrigues Alckmin, DJ, September 2, 1977.* ***The legal reserve established by art. 5, XIII, does not confer on the legislator the power to restrict the exercise of professional freedom to the point of reaching its very essential core****."*

(RE 511961, Rapporteur: Min. GILMAR MENDES, Full Court, judged in 06/17/2009)

The precedents cited here highlight an essential characteristic of the constitutional system of freedom protection, that is, its *prima facie* prevalence, reserving governmental restriction only for very exceptional and justified situations. It is a consequence of the dignity of the human person, which, as the German Federal Constitutional Court states, understands the human being as an intellectual and moral being, capable of determining himself and developing in freedom ("*Dem liegt die Vorstellung vom Menschen als einem geistig- sittlichen Wesen zugrunde, das darauf angelegt ist, in Freiheit sich selbst zu bestimmen und sich zu entfalten*") (BVerfGE 45, 187).

As the master rule of the normative system, as the German jurist Robert Alexy states, the "*principle of legal freedom requires a*

situation of legal discipline in which one orders and prohibits the minimum possible" (ALEXY, Robert. *Theory of Fundamental Rights*. Trad. Virgílio Afonso da Silva. São Paulo: Malheiros, 2008. p. 177). And the philosopher continues, about the logical-legal consequences of the general right to freedom (*das Allgemeine Freiheitsrecht*):

> *"The general freedom of action is a freedom to do or not to do what one wants. (...) On the one hand, everyone is prima facie - that is, if no restriction occurs - allowed to do or not to do what he wants (permissive norm). On the other hand, everyone has a prima facie right, in the face of the state, not to hinder his action or abstention, that is, not to have the state intervene in them (rule of rights).*
>
> (...)
>
> *Because the general right to freedom relates not only to actions, but also to situations and positions, two other principles must be added to this principle: one requiring the greatest possible degree of non-affectation of situations, and another requiring the greatest possible degree of non-elimination of legal positions of the holder of the fundamental right. These three principles can be grouped into a higher principle, the principle of negative liberty. In what follows, only the simplest of the sub-principles, the principle of legal freedom, which requires that alternatives of action be affected as little as possible by duties and prohibitions, will be treated."* (*Op. cit*. p. 343 and 352)

Since freedom is a *topoi*, extracted from human dignity and from the very configuration of the legal system, it is imperative to infer, under penalty of rendering it sterile, that eventual restrictions should (i) be informed by a constitutionally legitimate parameter; and (ii) be adequate to the proportionality test: (i) be informed by a constitutionally legitimate parameter; and (ii) conform to the proportionality test. Adopting similar reasoning, the German Federal Constitutional Court has ruled that "*the individual must accept restrictions on his freedom of action, established by the legislator for the protection and promotion of social coexistence within reasonable limits according to the factual situation; but the autonomy of the individual must be maintained*" ("*Der Einzelne muß sich*

The citizen must put up with those limits to his freedom of action that the legislature draws for the maintenance and promotion of social coexistence within the limits of what is generally reasonable in the given circumstances; but the autonomy of the person must be preserved") (BVerfGE 30, 1 [20]). Examinando a orientação pretoriana transcrita, Alexy vaticina: "*Essa fórmula, na qual claramente se vislumbra a máxima da proporcionalidade, não apenas diz que a liberdade é restringível, mas também que ela é restringível somente diante da presença de razões suficientes*" (*Op. cit*. p. 357-358).

Volker Epping (professor at the University of Hannover) and Christian Hillgruber (professor at the University of Bonn), who, analyzing Article 2 of the German Constitution (*das Grundgesetz*), argue that the guarantee of human freedom of action "*is expressed primarily in a strict application of the principle of proportionality, with increased burden of justification by the state for interventions*" ("*menschlicher Handlungsfreiheit sich zuvörderst in einer strikteren Anwendung des Verhältnismäßigkeitsgrundsatzes mit erhöhter Rechtfertigungslast seitens des Staates bei Eingriffen ausdrückt*") (EPPING, Volker; HILLGRUBER, Christian. *Grundgesetz - Kommentar*. 2nd ed. München: C. H. Beck, 2013. p. 29).

This high burden of justification, of course, is not met with the use of merely rhetorical arguments. In other words: the restriction on freedom must be supported by empirical elements that indicate its necessity and suitability for achieving the constitutionally legitimate objective. It is the onus of the proponent of the measure to substantiate it with information - field research, statistics, historical surveys, *etc.* - that justify it and demonstrate its effectiveness.

Since empirical findings depend on analyses, more or less controversial, on data whose scope and reliability may vary, the question arises: what is the required degree of certainty of the

arguments of justification to legitimize a given intervention in freedom? In effect, this is a dynamic requirement, not a static one, since its severity will vary according to the severity of the proposed restriction on freedom. This is what Alexy calls the "epistemic law of weighing": "*The heavier the intervention in a fundamental right, the more certain must be the premises on which it is based*" (ALEXY, Robert. *Theory of Fundamental Rights*. Trad. Virgílio Afonso da Silva. São Paulo: Malheiros, 2008. p. 617).

In light of these premises, it is necessary to determine whether the rule challenged in this ADPF, which prohibits the "*use of private cars registered or not in applications, for the paid individual transport of people*", configures proportional limitation to the freedoms of initiative (art. 1, IV, and 170 of the CRFB) and profession (art. 5, XIII, of the CRFB). Note that the scrutiny performed here does not cover all possible types of regulation of the passenger transportation market, such as minimum security standards, information duties, objective qualification requirements for drivers, *etc*. The strict scope of analysis in the present claim concerns the possibility of oligopolistic restriction of this market, that is, the limitation of the number of service providers to a group authorized by the government, forbidding the exercise of the profession to all other individuals.

In reality, as is common knowledge, the licensing of cabs in Brazil functions as the delegation of a privilege to certain individuals, who have the exclusive right to operate the passenger transportation service. License holders, in turn, can "assign" their license to third parties (the actual drivers), for a fee (called "diárias"). The artificial market restriction thus creates an extraordinary income for license holders, whose value derives precisely from the possibility of transacting this "title". It is an asset, therefore, that does not correspond to any benefit generated to society, but only to the unnatural scenario of scarcity

resulting from the government limitation.

This mechanism has as its only consequence the involuntary transfer of resources from consumers and workers to a specific group, formed by those who are awarded the restricted number of licenses. For this reason, there is enormous resistance from organized groups to the opening of the market to new entrants - that is, new workers, migrating from sectors in crisis towards opportunities to generate value for society. Considering that unemployment in Brazil recently reached the record level of 13.7%, affecting 14.2 million people (see IBGE data reported in: <http://g1.globo.com/economia/noticia/desemprego-fica-em-137-no-1-quarter-of-2017.ghtml>), the opening of a market that represents absorption of labor is to be praised and any measure to the contrary is considered an affront to the principle of seeking full employment, enshrined in art. 170, VIII, of the Constitution. The real "injured parties", then, are those who have to lose with the fall in the value of cab "permits", the same ones who have always opposed the expansion of the number of these licenses, as clarified in an important study by Insper:

> *"**Those who were most affected by this new business model were the license holders, drivers or not, whose value derived precisely from the right to prevent the entry of new drivers and thus ensure supra-competitive rents**. For example, before Uber's entry, the market had a defined number of cab licenses, which did not vary according to the fluctuations in supply and demand, but by the decision of each city hall. These, in turn, could be subject to the interest of those who already had licenses and who did not want to see increased competition.*
>
> (…)
>
> *In theory, these licenses could not be traded in the market (although sometimes they were (...)), but they could be rented and thus confer to their holder rents for the granting of the right of use. (') For example, **in Rio de Janeiro**, the first city*

where Uber started operating, ***the estimated value for a license is approximately R$ 900,000****. This amount is obtained by taking the average value of the daily rates, referring to the license and car rental, the average cost of a vehicle, worth R$ 50,000.00, renewed every five years, deducting tax exemptions on the purchase of vehicles by taxi drivers; an annual cost of maintenance and insurance of about R$ 4 thousand per year, which generates a cash flow, which is discounted to net present value using the real Selic rate of 4.22% p.a. (risk-free rate discounted for inflation over the last twelve months).* ***In the case of São Paulo, this amount, considering the average daily rate in this city, would be approximately R$ 680 thousand****. This means that Uber's entry into the market has the potential to expand the supply of services to the point where there is no longer any value in the right to limit the participation of third parties, potentially reducing to zero the value of licenses.* ***If we multiply the net present value of each license by the number of existing licenses in each of these four municipalities, we have an approximate value of 58 billion reais arising from the power to prevent the entry of competitors****. This is the size of the resistance to Uber's expansion."*

(AZEVEDO, PF; PONGELUPPE, LS.; MORGULIS, MC; ITO, NC (2016). *Uber: The dilemma of growing with a disruptive innovation*. Insper: Case Study Series. Available at: <https://www.insper.edu.br/casos/colecao-ae/uber-o-dilema-de - grow-with-disruptive-innovation/>)

The scenario outlined here represents the existence of an evident regulatory capture of public agencies to prohibit the depletion of the value of cab licenses due to the opening of the market, even if this represents damage to consumers and other workers who intend to enter the sector. The restrictive norm of the individual transportation activity consists of an odious form of transfer of resources from consumers to the license holders, reducing the options of choice of the former to favor the latter.

Even license holders who do not delegate the exercise of the cab activity to third parties are not entitled to any legal or administrative protection against competition. Drivers who traditionally operate in the market may at first experience a decrease in income from the entry of new agents, as a natural effect of the law of supply and demand - although there is, as will be clarified later, empirical evidence that this decrease in income did not actually occur in major Brazilian cities. This is the same as what happens, for example, to the baker who worked alone in the neighborhood, after a new bakery opens in the neighboring block. The former agents, then, must provide a better, cheaper service or, as a last resort, migrate to another activity in which they can produce greater value to society. This system is beneficial to consumers, to the community, and also to the workers, since competition, which is always healthy, makes them more productive. For this very reason, it is a system protected by several constitutional rules protecting basic freedoms and competition (articles 1, IV; 5, *caput* and XIII; 170, *caput* and IV; 173, § 4).

About the social and consumer benefits, I will analyze in more detail below. What must be stressed at this point is that *the State cannot prevent new agents from entering the market in order to preserve the income of traditional agents*, under penalty of insurmountable violation of the constitutional principles of equality (art. 5, *caput*) and free enterprise (articles 1, IV, and 170). This is the *ratio* that informed the edition of the Binding Precedent No. 49 by this Court, according to which, *in verbis*: "It *offends the principle of free competition municipal law that prevents the installation of commercial establishments of the same branch in a given area*. After all, the purpose of antitrust law, of a constitutional nature, is precisely to protect new entrants from the concerted actions of traditional *players,* not the other way around. As provided in art. 173, § 4, of the Constitution, the "*law shall repress the abuse of economic power that aims at the domination of markets, the*

elimination of competition and the arbitrary increase of profits". When the law artificially restricts markets, it is actually favoring market domination, the elimination of competition, and the arbitrary increase of profits. This last factor occurs by fixing fares that are manifestly higher than the market price, which is verified by the fact that new competitors have been able to establish themselves in the individual transportation market with quality services and at lower or similar prices. All this due to the activity of pressure groups before the Legislative and Executive Powers, in the most varied spheres of the Federation.

In light of the aforementioned teachings of George Stigler, the environment par excellence of the so-called *rent-seeking*, embodied in the capture of political power by those with economic power, takes place when the gains from a given measure are concentrated in a class, while the costs are dispersed throughout the collectivity, reducing the incentives for resistance through the traditional channels of participation. In these cases of dysfunctional democratic institutions, it is the duty of the Judiciary to intervene to guarantee the full effectiveness of the freedoms constitutionally guaranteed.

In the judgment of the Direct Actions of Unconstitutionality nº 5.062 and 5.065, of which I was the reporting judge, I formulated profound considerations about the parameters that should guide the analysis of the proportionality of regulatory acts in scenarios of evident capture, and it is necessary to transcribe them to shed light on the case under analysis:

> "The myth of benevolence of rulers has been debunked since the second half of the twentieth century with the studies of *Public Choice Theory*. This is an area of knowledge that uses economic methodology to deal with traditional questions of political science (cf., among others, DOWNS, Anthony. An Economic Theory of Democracy. New York: Harper, 1957; BUCHANAN,

James M., TULLOCK, Gordon. The Calculus of Consent: Logical Foundations of Constitutional Democracy. Ann Arbor: University of Michigan Press, 1962). This theoretical contribution helps to identify the incentive structure to which legislators and bureaucrats are subject, not always guided by the public interest.

Among the problems diagnosed, the so-called regulatory capture stands out for its special relevance, understood as the manipulation of the collective decision process in favor of certain interest groups, generally better organized, and to the detriment of society as a whole (cf. Regulatory capture: a review. Oxford Review of Economic Policy , vol. 22, nº 2, 2006, pp. 203-225). Regulatory capture often leads to a vice that has long been known in national legalpublicist doctrine: the misuse of power, whether legislative or administrative (cf. TÁCITO, Caio. Deviation of legislative power. Revista Trimestral de Direito Público (Public Law Quarterly Magazine). São Paulo, no. 1, 1993, pp. 62-68; MELLO, Celso Antônio Bandeira de. The misuse of power. Revista de Direito Administrativo. Rio de Janeiro, nº 172, 1988, pp. 1-19).

Well then. The second guideline above intends exactly to avoid that the political decision process be forged to favor specific interests to the detriment of the entire collectivity. The transparency required creates an environment favorable to regulatory consistency, to the extent that it forces decision-makers to explain, with greater analytical rigor, the reasons for and the ends pursued by the state intervention. The lack of transparency, in turn, makes the measure suspicious, authorizing a more particularistic posture from the Judiciary in the examination of its legal validity. I believe that the insulation of judges and courts in the structure of the State, ensured by a regime of independence and impartiality, allows this analysis to be made with more neutrality.

(…)

In legal dogmatics, the duty of proportionality constitutes an authentic guideline of moderation and prudence to guide

all the actions of the Public Power. Its function is to allow the axiological harmony of the normative system. Its foundation is the very notion of legal principles as optimization commands in face of factual and legal restrictions, following the teaching of Robert Alexy (Theory of Fundamental Rights. Trad. Virgílio Afonso da Silva. São Paulo: Malheiros, 2011, p. 116). Its operationalization is methodologically divided into three stages or phases: adequacy, necessity and proportionality in the strict sense.

The first stage, the analysis of adequacy, investigates the suitability of the state measure to achieve the desired goal. Here, it is a comparison between means and ends, requiring that the chosen measure is suitable to promote the desired objective. In the second stage, the analysis of the necessity of the state act contrasts alternative means of promoting the desired end. The objective is to investigate the existence (or not) of substitute means for the one originally chosen by the State and then compare them both in relation to the degree of adequacy to the public purpose and the impact on opposing legal goods. Finally, in the last stage of the methodological itinerary, proportionality in the strict sense imposes the comparison of costs and benefits of the restrictive measure. According to Robert Alexy's lesson: the higher the degree of non-compliance or restriction of one principle, the greater should be the importance of compliance with the other (ALEXY, Robert. On balancing and subsumption: a structural comparison. Ratio Juris, vol. 16, nº 14, Oxford, December 2003, p. 436 - free translation from the original)."

Therefore, once the regulatory capture is evidenced, the Judiciary is legitimized to review the suspected measure, as an institution structured to decide independently from political pressures, in order to prevent democracy from becoming a regime serving the privileges of organized groups. It is worth noting that, in the concrete case, the City Council of Fortaleza/CE itself justified the impugned rule based on the "*need for protection as to the system and the professionals of the sector*",

making the purpose of the law crystal clear, which is: to preserve income and market restriction in favor of certain professional agents.

Nor may it be claimed that judicial review, in this case, compromises the separation of powers. The romanticized vision of regulators and judges has been absolutely abandoned by specialists in the matter. The assertion that the expertise of the regulatory bodies, as opposed to the generalist training of magistrates, would guarantee the latter a broad field of action that would be immune to judicial control no longer resists a more careful analysis of the nuances that involve this special application of *checks and balances*. The most recent regulatory theory of *enforcement* leans in this direction, which considers the criterion of efficiency as a guide for the distribution of methods for enforcing socially desirable standards of conduct among private actors, the Judiciary and the government, as clarified by Harvard University economics professor Andrei Shleifer:

> "The basic premise of regulatory *enforcement* theory is that all such strategies for social control of business are imperfect, and that optimal institutional design involves a choice between imperfect alternatives. *Enforcement* theory specifically recognizes a basic *trade-off* between the social costs of each institution: disorder and dictatorship. Disorder refers to the ability of private agents to cause harm to others - stealing, abusive charging, hurting, cheating, imposing external costs, *etc*. Dictatorship refers to the ability of government and its agents to impose these costs on private agents. As we move from purely private orderings, to private litigation, to regulation, to the public domain, the powers of government increase and those of private agents decrease. The social costs of disorder decrease while those of dictatorship increase. (...) When market discipline can successfully control disorder and avoid Hobbesian anarchy, it is the best approach because it produces the

lower social costs relative to dictatorship. Any argument for public intervention must rest crucially on the presumed failure of market discipline to control disorder."

(SHLEIFER, Andrei. Understanding Regulation. *In*: *European Financial Management*, Vol. 11, Nº. 4, 2005. p. 443-444. No original: "The basic premise of the enforcement theory of regulation is that all of these strategies for social control of business are imperfect, and that optimal institutional design involves a choice among these imperfect alternatives. The enforcement theory specifically recognises a basic trade-off between two social costs of each institution: disorder and dictatorship. Disorder refers to the ability of private agents to harm others - to steal, overcharge, injure, cheat, impose external costs, etc. Dictatorship refers to the ability of the government and its officials to impose such costs on private agents. As we move from private orderings to private litigation to regulation to public ownership, the powers of the government rise, and those of private agents fall. The social losses from disorder decline as those from dictatorship increase. (...) When market discipline can successfully control disorder and avoid Hobbesian anarchy, it is the best approach because it has the lowest social costs of dictatorship. Any case for public intervention relies crucially on the presumptive failure of market discipline to control disorder")

For what specifically concerns the case at hand, the theory in question asserts that there is no justification for regulation when it implies a restriction on the entry of new agents through state licensing. In this sense, reference should be made to the following lessons from Shleifer:

"In many cases, this argument for the effectiveness of market discipline is powerful. Consider entry regulation: the restriction on the entry of new entrepreneurs through licensing and permits. To the extent that

entry firms are small, and given that any failure to provide quality products would almost immediately be detected and penalized by consumers, it **is unclear why the quality of entrepreneurs or their firms should be regulated at the entry stage**."

(SHLEIFER, Andrei. Understanding Regulation. *In*: *European Financial Management*, Vol. 11, Nº. 4, 2005. p. 444. No original: "In many instances, this case for the effectiveness of market discipline is powerful. Consider the regulation of entry: the restriction on entry by new entrepreneurs through licensing and permits. Since entering firms are small, and since any failure to deliver quality products would be almost immediately recognised and penalised by customers, it is not clear why the quality of entrepreneurs or of their firms should be regulated at the entry level.")

"There is a particularly important way in which regulation can be substantially inferior to jurisdictional activity. Specifically, **regulators have far more opportunities to create rules that are not only politically motivated, but actually serve primarily to benefit themselves by creating opportunities for corruption. Licensing and permits are the clearest examples of this type of regulation.**"

(SHLEIFER, Andrei. The Enforcement Theory of Regulation. *In*: *The Failure of Judges and the Rise of Regulators*. Cambridge: The MIT Press, 2012. p. 18. No original: "There is one particularly important way in which regulation might be substantially inferior to litigation. Specifically, regulators have far greater opportunity to create rules that are not only politically motivated, but actually serve principally to benefit themselves by creating opportunities for bribe taking. Licenses and permits are the clearest examples of such regulations.")

In the same vein, Richard Posner asserts that "while there are theoretical reasons to believe that concentration in deregulated markets

While *there are theoretical reasons for believing that concentration in unregulated markets is associated with economies of scale and* other efficiencies (*Demsetz 1973), there is no* accepted theory or *body* of evidence that *ascribes social benefits* to *regulation limiting entry and* price competition. POSNER, Richard A. "The Social Costs of Monopoly and Regulation". *In*: *The Journal of Political Economy*, Vol. 83, No. 4 (Aug., 1975), pp. 807-828). Also the late Columbia University professor Walter Gellhorn already warned that the limitation of professional practice in the field of entry is not justified under the prism of quality assurance in the consumer market. According to him, "*What are needed are measures that will provide protection against those demonstrably* deficient in capability or integrity *without in the process creating* artificial limitations upon career choices, work opportunities, and stimuli to *provide* superior service *at lesser cost.*" GELLHORN, Walter. "The Abuse of Occupational Licensing." *In*: 44 *U. Chi. L. Rev.* 6 1976-1977).

Disbelief in the ability of the regulator to produce social benefits by limiting market entry is not restricted to theory. The hypothesis that entry regulation is in the interest of consumers does not stand up to empirical analysis either. In a study based on data from 85 (eighty-five) countries, the researchers concluded that limiting entry, besides not generating benefits to consumers, promotes corruption. These are the conclusions of professors Simeon Djankov (University of Michigan), Rafael La Porta (PhD in economics from Harvard University), and Florencio Lopez-de-Silanes (PhD in economics from Harvard University):

"In a cross-sectional analysis of countries, we found no correlation between stricter regulation of entry and higher product quality, better pollution or health outcomes, or more intense competition. However, **stricter entry regulation is associated with extremely higher levels of corruption** and a larger relative size of the informal economy. This evidence favors *public choice theory over public* interest regulatory theory.

(...)

We conclude that countries with more open access to political power, greater restrictions on the executive, and more political rights exhibit less costly regulation of entry - albeit controlling for *per capita* income - than countries with less representative, less limited, and less free governments. (...) The fact that better governments regulate entry less, alongside the unambiguous interpretation of the evidence on corruption and the informal economy, points to the '**toll plaza theory': entry is regulated because it favors the regulators.**"

(DJANKOV, Simeon; LA PORTA, Rafael; LOPEZ-DE-SILANES, Florencio. The Regulation of Entry. *In*: *The Failure of Judges and the Rise of Regulators*. Cambridge: The MIT Press, 2012. p. 270. No original: "In a cross-section of countries, we do not find that stricter regulation of entry is associated with higher quality products, better pollution records or health outcomes, or keener competition. But stricter regulation of entry *is* associated with sharply higher levels of corruption, and a greater relative size of the unofficial economy. This evidence favors public choice over the public interest theories of regulation.

(…)

We find that the countries with more open access to political power, greater constraints on the executive, and greater political rights have less burdensome regulation of

entry - even controlling for per capita income - than do the countries with less representative, less limited, and less free governments. (...) The fact that better governments regulate entry less, along with the straightforward interpretation of the evidence on corruption and the unofficial economy, point to the tollbooth theory: entry is regulated because doing so benefits the regulators.")

It is clear, therefore, that the objective pursued by the regulator, *in casu,* is unconstitutional, because the constitutional principles of free enterprise (articles 1, IV, and 170), of professional freedom (art. 5, XIII), of equality (art. 5, *caput)* and of broad competition (art. 173, § 4) prevent legislative and administrative actions that preserve the interests of traditional market agents to the detriment of new entrants and consumers. Nevertheless, it should be emphasized, additionally, the existence of empirical evidence in the sense that private transportation services through apps have not diminished the market where cabs operate. A study carried out by the Department of Economic Studies of the Administrative Council for Economic Defense (CADE), with data from São Paulo, Rio de Janeiro, Belo Horizonte and the Federal District, showed that the emergence of the Uber platform for the provision of individual transportation services actually promoted a widening of the market, winning over consumers who previously did not use cabs for transportation. I will transcribe the conclusions of the study:

"The results obtained do not provide any evidence that the number of cab rides hired in the municipalities of the treatment group (with presence of the Uber app in the period After Entry) have shown inferior performance to those of the control group (without presence of the Uber app in the period After Entry). In terms of empirical exercises applied to antitrust policy, this means that **we cannot even assume** (at least in the periods analyzed here) **the hypothesis of**

that the services provided by the app Uber were (until May 2015) **in the same relevant market as the services provided by the cab rides apps 99taxis and Easy Taxi**. Additionally**, it is not possible to rule out the possibility that the entry of the Uber app into the Brazilian individual passenger transport market was sponsored, almost exclusively, by the expansion and diversification of this market, i.e., by meeting a repressed demand, not previously met by the services provided by cabs**.

In other words, the analysis of the period examined, which is the phase of entry and sedimentation of Uber in some capital cities, showed that **the application, instead of absorbing a significant portion of the rides done by taxis, actually conquered mostly new customers, who did not use taxi services**. It means, in short, that so far **Uber has not "usurped" a considerable part of taxi clients or significantly compromised the taxi drivers' business, but rather generated a new demand.**"

(Department of Economic Studies - DEE, CADE. "Rivalry after entry: the immediate impact of the Uber app on door-to-door cab rides." Available at <www.cade.gov.br>)

In light of the above, we conclude, first of all, that the measure prohibiting the private exercise of transportation activity through apps cannot be based on the protection of the interests of traditional market agents - whether they are license holders or taxi drivers in general - under penalty of evident unconstitutionality. The regulatory capture makes suspect the criteria for the limitation of entrants in the market of passenger transportation service providers, violating the constitutional principles of equality (art. 5, *caput*), of professional freedom (art. 5, XIII) and free enterprise (art. 1, IV, and 170, *caput*).

Uma vez definida a inconstitucionalidade dessa first

justification for the impugned rule, we will now analyze the possibility of its grounding in an alleged consumer protection. In other words, it is necessary to examine whether the prohibition of apps that offer transportation services serves to correct market failures harmful to consumers.

The correct understanding of the role of technological innovations in the development of the so-called "sharing economy" allows us to conclude that the traditional explanation for the regulation of entry in the cab market does not hold up nowadays, if this limitation was ever reasonable in any historical moment. According to the public interest regulatory theory, whose greatest exponent is the British economist Arthur Pigou, entry regulation would be justified by the need for the government to filter new entrants in order to ensure that consumers purchase quality products and services. In the cab market, the government would provide, with the licenses, a supposed confidence in the quality of vehicles and drivers, in the predictability of the price and in the punishment of the service provider in case of accidents. However, as the regulatory *enforcement* theory asserts, this proposition has been overcome by practical experience.

Technology has allowed the reduction of information asymmetries between consumers and suppliers to a level never before reached by regulators. These advances have led to the emergence of the so-called "sharing economy", disruptive in various market segments, whose characteristics are listed by Professor Arun Sundararajan, of *New York University's Stern School of Business*:

> “1. Broadly Market-based: the sharing economy creates markets that enable the exchange of goods and the emergence of new services, resulting in potentially higher levels of economic activity.
>
> 2. High-impact capital: the sharing economy opens up new opportunities for everything from assets and skills

even time and money, is used at levels close to its maximum capacity.

3. 'Networks' based on crowds rather than centralized institutions or 'hierarchies': the supply of capital and labor derives from decentralized crowds of individuals rather than aggregates of firms or states; future exchanges can be mediated by distributed market environments based on crowds rather than centralized third parties.

4. Blurred lines between the personal and the professional: the supply of labor and services often commercializes and scales *peer-to-peer* activities like giving someone a ride or lending someone money, activities that used to be considered 'personal.'

5. Blurred lines between employment and casual work, between independent and dependent employment, between work and leisure: many traditionally full-time jobs are supplanted by contract jobs that feature varying levels of time commitment, granularity, economic dependence, and entrepreneurship."

(SUNDARARAJAN, Arun. *The Sharing Economy*. Cambridge: The MIT Press, 2016. p. 27. No original: "1. Largely market-based: the sharing economy creates markets that enable the exchange of goods and the emergence of new services, resulting in potentially higher levels of economic activity.

2. High-impact capital: the sharing economy opens new opportunities for everything, from assets and skills to time and money, to be used at levels closer to their full capacity.

3. Crowd-based 'networks' rather than centralized institutions or 'hierarchies': the supply of capital and labor comes from decentralized crowds of individuals rather than corporate or state aggregates; future exchange may be mediated by distributed crowd-based marketplaces rather than by centralized third parties.

4. Blurring lines between the personal and the professional: the supply of labor and services often commercializes and scales peer-to-peer activities like giving

someone a ride or lending someone money, activities which used to be considered 'personal.'

5. Blurring lines between fully employed and casual labor, between independent and dependent employment, between work and leisure: many traditionally full-time jobs are supplanted by contract work that features a continuum of levels of time commitment, granularity, economic dependence, and entrepreneurship.")

Defying the classic explanation for licensing cabs, passenger transportation apps manage not only to provide everything that traditional regulation has always promised consumers, but goes even further: *(i) it* allows the user to track the route to prevent the driver from taking a longer route unnecessarily;
(ii) prevents the adulteration of taximeters; (*iii)* allows the evaluation of users, to the benefit of drivers; (*iv)* shares other users' evaluations with consumers; *(v)* provides insurance to passengers; and *(vi)* allows the sharing of rides between different users, cheapening the service and making the transportation system as a whole more efficient.

Technology, therefore, definitively solved problems classically understood as "market failures" that previously justified regulatory intervention, so that these spontaneous innovations of society, in addition to providing new amenities to the community, removed the inconvenience that transaction costs and information asymmetries could cause in a market without entry barriers. On the dynamic and evolutionary understanding of market failures, I take from the lesson of University of Toronto Professor Ejan Mackaay, *verbis*:

"Transaction costs can evolve over time. Advances in transportation and communication technology can change them. A rule that may have made sense as

correction mode for substantial transaction costs in earlier times may no longer be justified when these costs change. Regulations of sewage, water, electricity, telecommunications, which seemed justified while these industries appeared to be natural monopolies, ceased to be appropriate when technical advances made us realize that these services may well be offered on a competitive basis."

(No original: "Transaction costs may evolve over time. Advances in transportation and communication technologies may change them. A rule that might have made sense as a correction for substantial transaction costs in earlier times may cease to be justified when these costs change. Regulation of sewage disposal, water, electricity, telecommunications that appeared justified so long as these industries looked like natural monopolies cease to be apposite when technical advances make us realise that these services can very well be offered on a competitive basis." MACKAAY, Ejan. *Law and Economics for Civil Law Systems*. Cheltenham: Edward Elgar, 2013. p. 11).

The benefits to consumers, besides being evidenced by the growing use of the services of these new platforms, are also registered by important researchers in the field. A study prepared by economists from the Universities of Chicago and Oxford estimated the *consumer* surplus generated by personal transportation service platforms in the United States market. Consumer surplus is the difference between the marginal benefit of acquiring a good or service and the amount actually paid for it, as observed by the interaction between the demand curve and the market price. It is the economic welfare experienced by consumers when they purchase something for less than the maximum they would be willing to pay. Calculating the elasticity of demand in view of price variation using econometric techniques and *big data*, the study estimates that only the UberX service generated a surplus to the

consumers totaling $6.8 billion in the United States in 2015 alone. It is relevant to mention the following excerpts from the study, *in verbis*:

> "We derive ample estimates of the consumer surplus generated by UberX. We compute the dollar value of consumer surplus from UberX runs that occurred in Uber's four largest Uber markets in the United States in 2015 (Chicago, Los Angeles, New York, and San Francisco) at about $2.88 billion annually. This is equivalent to more than six times Uber's revenue from UberX runs in those cities. In 2015, those cities accounted for approximately 42.6% of UberX revenue in the United States. If we assume that consumer surplus is proportional to that revenue, we can estimate a value of over $6.76 billion in UberX consumer surplus in the United States. The estimated consumer surplus is approximately 1.57 times the actual consumer spending. This means that for every dollar spent on an UberX ride, we estimate that the consumer saves $1.57 as surplus. These consumer surplus estimates are high relative to the likely gains and losses experienced by cab drivers as a consequence of Uber's entry into the market (...)"
>
> (No original: "We obtain large estimates of the consumer surplus generated by UberX. We compute the dollar value of consumer surplus from UberX rides taken in Uber's four biggest U.S. markets in 2015 (Chicago, Los Angeles, New York, and San Francisco) to be roughly $2.88 billion (SE=$122 million) annually. This is more than six times Uber's revenues from UberX in those cities. In 2015, these cities accounted for around 42.6% of UberX US gross bookings. If we assume that consumer surplus is proportional to gross bookings, we can extrapolate to an estimate of $6.76 billion in consumer surplus from UberX in the U.S. The estimated consumer surplus is approximately 1.57

times as large as consumer expenditures on rides taken at base pricing. That is, for each $1 spent on an UberX ride at 1.0x, we estimate the consumer receives $1.57 in extra surplus. These estimates of consumer surplus are large relative to the likely gains or losses experienced by taxi drivers as a consequence of Uber's entrance into the market (...)." LEVITT, Steven *et alii*. "Using Big Data to Estimate Consumer Surplus: The Case of Uber". NBER Working Paper No. 22627, sep. 2016. Disponível em: <http://www.nber.org/papers/w22627>)

It is relevant to highlight the conclusion of the renowned authors of this study: "One day's worth of consumer surplus, by our estimates, is about $18 million. If Uber unexpectedly disappeared for a day, that's how much consumers would lose" ("*One day's worth of consumer surplus, by our estimates, is about*
$18 million. If Uber were to unexpectedly disappear for a day, that is how much consumers would lose in surplus. , p. 21). In these terms, preventing, by governmental act, the operation of the mentioned platform would be equivalent to a billionaire annual damage to American consumers. Considering the wide acceptance among Brazilian consumers of transportation services of this kind, there is no reason to doubt that also in our country the sharing economy has provided a desirable consumer surplus in the individual transportation market. Consequently, banning the operation of these services generates an effect contrary to the objective of consumer protection imposed by articles 5, XXXII, and 170, V, of the Constitution, constituting a patent distortion of the regulatory power of the State to the detriment of citizens.

Under the prism of proportionality analysis, the rule that prohibits the "*use of private cars registered or not in applications, for the paid individual transportation of people*" is neither *necessary* nor *appropriate* to reduce transaction costs or information asymmetries in the consumer market. On the contrary, this ban imposes a high social cost,

in terms of price and quality of consumer services, job opportunities, dynamism of the economy, *etc*., without any collective benefit in return.

Another possible justification for the measure relates to urban and traffic planning concerns. It is argued that regulators would have an interest in restricting the individual transport market to adjust the supply and price of the service in order to reduce the number of cars in circulation, prioritizing public transport, and also to favor the compacting of cities, generating incentives for people to reside as close as possible to their daily destinations and thus reducing urban *sprawl.*

Even if it is necessary to increase the price of urban displacement in individual transportation for various urbanistic purposes, it is a *non sequitur* that this must necessarily occur by restricting market entry. It is worth remembering that the Constitution imposes on the regulator, even in the task of city planning, the option for the measure that does not exercise unjustifiable restrictions on the fundamental freedoms of initiative and professional exercise (art. 1, IV, and 170; art. 5, XIII, CRFB), always respecting the principle of isonomy (art. 5, *caput*, CRFB). The need to improve the use of public roads does not authorize the creation of an oligopoly that is harmful to consumers and potential service providers in the sector, especially when there are alternatives known and practiced around the world to face the problem.

It is particularly perplexing to invoke the goal of improving traffic to ban services that create innovative alternatives to reducing the number of vehicles on the road, such as systems for sharing rides among people unknown to each other, using algorithms (for example, the so-called "Uber pool"). The prohibitive option also disregards the hypothesis that

This reduces the need for parking spaces in areas of high flow, influencing the urban *sprawl,* besides reducing the traffic of drivers looking for these spaces, relieving the traffic.

A study prepared by researchers investigated the correlation between the entrance of the Uber app in the market and traffic congestion in urban areas of the United States, applying the econometric technique called "differences-in-differences", which considers the scenarios before and after the entrance of the analyzed factor in the test and control groups. The authors defined their conclusions in the following terms: "*Our findings provide empirical evidence that ride-sharing services such* as Uber significantly decrease the traffic congestion after *entering an* urban area." LI, Ziru; HONG, Yili; ZHANG, Zhongju. "*Do Ride-Sharing Services Affect Traffic Congestion? An Empirical Study of Uber Entry.*" (2016). Available at: <https://ssrn.com/abstract=2838043>).

The New York City Council itself has opined against a proposal to limit the number of drivers operating through transportation apps, stating, in a study prepared on the subject, expressly that: (*i)* "transportation apps *do* not *appear* to *be driving* the *additional* congestion experienced in the *CBD*"; and *(ii)* by virtue of emission standards imposed on the entire automotive industry, "*changes in the on-demand* vehicle *sector are not likely to affect New York City air quality in a significant*

manner". City of New York, Office of the Mayor. "*For-Hire Vehicle* StudyDisponívelem:
<http://www1.nyc.gov>).

Still in relation to transit management, another empirical study, which also employed the "differences-in-differences" statistical technique, correlates the entry of the Uber app into California markets to a significant and rapid reduction in the number of homicides occurring with motor vehicles under the influence of alcohol (GREENWOOD, Brad N.; WATTAL, Sunil. "*Show Me the Way to Go Home: An Empirical Investigation of Ride Sharing and Alcohol Related Motor Vehicle Homicide*" (2015). Fox School of Business Research Paper No. 15-054. Available at:
<https://ssrn.com/abstract=2557612>). The researchers responsible for the study point out that "*the absence of a sufficient number of* cabs *may* result in citizens *operating motor vehicles under the* influence *of alcohol*". This positive effect of the operation of ridesharing apps covers not only the number of lives saved, but also the costs saved in prosecuting and incarcerating individuals involved in accidents. Moreover, congestion results from both recurring and non-recurring factors, a substantial fraction of the latter being traffic accidents. If sharing economy platforms reduce drunken driving, they also contribute, from this perspective, to better traffic flow.

Even if ridesharing services were to have a negative impact on traffic and the expansion of cities, and even if they did not have other positive social effects related to urban mobility, there would be no room for a measure that prohibits the exercise of constitutionally guaranteed freedoms, given the existence of alternatives that are notorious for addressing the same issues and that do not restrict entry into the professional market.

So-called urban tolls allow for the management of traffic in an isonomic way, as classically proposed by the English economist Arthur Pigou already in the 1920s and later refined by Nobel Prize-winning economist William Spencer Vickrey ("Congestion Theory and Transport Investment. *In*: *The American Economic Review*, Vol. 59, No. 2, Papers and Proceedings of the Eighty-first Annual Meeting of the American Economic Association (May, 1969), pp. 251-260). The objective is to match demand to the social marginal cost of road use by changing the individual cost of each trip. The model allows taking into account the heterogeneity of users, the characteristics of each modal, differences by region, *etc*. Initiatives of this kind have been adopted in Singapore (*Electronic Road Pricing*), Sweden (*Trängselskatt i Stockholm*) and England (*London Congestion Charge*), among other countries. Another alternative is the institution of rodízio for the circulation of automobiles at certain times and regions, as already occurs in the city of São Paulo/SP since the Municipal Law 12.490/1997. The literature on the economic theory of urban mobility also offers numerous examples of public policies that contribute to the improvement of transit, such as changes in urban zoning - the establishment of minimum density controls and the diversification of land uses to favor walking and cycling in daily commuting are pointed out as useful traffic management tools (BERNICK, Michael; CERVERO, Robert. *Transit Villages in the 21st Century*. New York: McGraw-Hill, 1997).

Legislative repression of modern initiatives for spontaneous transportation planning denies "citizens the right to efficient urban mobility," contrary to the commandment contained in art. 144, § 10, I, of the Constitution, included by Constitutional Amendment No. 82/2014. It disregards the potential positive impact of new technologies on traffic, on the demand for parking spaces in large centers and on the number of automobile accidents due to alcohol use, not to mention the

countless and already detailed benefits to consumers. It also ignores alternative measures that are recurrently pointed out by specialists for facing mobility and urbanization problems, which, for being isonomic, do not result in an arbitrary restriction to the constitutional liberties of initiative (art. 1, IV, and 170) and professional freedom (art. 5, XIII). For this very reason, the prohibitive rule now being challenged lacks rational justification.

The same conclusion was portrayed in another study by the Economic Studies Department of the Administrative Council for Economic Defense (CADE), according to which there is no economic justification for prohibiting new players from entering the individual passenger transportation market.

> "(...) it is concluded that **there are no economic elements that justify the prohibition of new providers of individual transport services**. In addition, economic elements suggest that, from a competitive and consumer perspective, the performance of new agents tends to be positive.
>
> (…)
>
> From this viewpoint, it would not make sense to restrict the entry of paid rides mediated by apps, since such services actually provide a very satisfactory self-regulatory mechanism, in addition to serving a market not hitherto covered (or covered unsatisfactorily) by cabs, and also providing additional rivalry to the individual passenger transport market. In short, the innovations could largely address the regulatory problems of the cab markets, as long as the street segments were losing share to the door-to-door segment.
>
> The above argument is again summarized in a decision in a writ of mandamus filed by a driver using the UBER application against the authorizing authority (President of the Department of Highway Transportation of the State of Rio de Janeiro).

Janeiro/RJ), handed down by judge Bruno Vinícius da Rós Bodart in the records of case 0346273-34.2015.8.19.0001 of the 1st Public Treasury Court of Rio de Janeiro:

> '(...) there are significant indications that the state initiative is the result of regulatory capture and is not aimed at promoting the best public interest. Strictly speaking, the legal consistency of the prohibitive choice is fragile. On one hand, there is a well-qualified service that is increasingly used by society. On the other hand, there is the fierce opposition of governments to the activity; opposition fomented, it is important to emphasize, by interest groups that, fortunate for the scarce permissions granted, achieve extraordinary income in the exploitation of the service.

(...) even in recognition of the fact that urban planners, urban economists, and local legislators pursue anti-sprawl policies, the fact remains that banning paid ride services remains economically unjustified, for two basic reasons:

As will be seen below, economic science provides a set of analytical elements for the measurement and simulation of potential effects arising from consumption externalities, as well as a list of public policy proposals to mitigate such effects, so that prohibiting or banning any solution that brings increased welfare to a group of consumers would be unnecessary and counterproductive;

It cannot be ruled out that urban planners and economists can create the necessary incentives for paid ride markets to operate in a sprawl-neutral manner or even in line with an anti-sprawl agenda.

(...) the paid carpooling market is operationalized through smartphone applications, therefore it tends to operate exclusively in the door-to-door individual transportation segment

This means that it does not compete with the spaces dedicated to cab stands (rank hiring) nor does it circulate on public roads in search of passengers (hailing). If the paid ride market replaces a significant fraction of private cars, which until then were used for the purpose of transporting people to their places of work (usually in the centers), the demand for parking lots in city centers would tend to be reduced, thus making room for a greater degree of densification in urban centers, as well as greater compactness of cities."

(Department of Economic Studies - DEE, CADE. "The Individual Passenger Transportation Market: Regulation, Externalities, and Urban Equilibrium." p. 6, 8-9, 14-15. Available at <www.cade.gov.br>)

By way of conclusion, I note that fundamental freedoms establish substantial limits on the power of the State, legitimating judicial control whenever they are subject to arbitrary regulatory interventions. First of all, it is considered arbitrary the measure that has a purpose prohibited by the Constitution, as in the cases where it is intended to unduly favor pressure groups, resulting from evident regulatory capture. Besides, it is arbitrary the measure that limits fundamental liberties, such as those of initiative (art. 1, IV, and 170 of the Constitution) and of professional exercise (art. 5, XIII, of the Constitution), without reasonable evidence that it is *adequate to* produce social benefits whose attainment is also constitutionally ordered. Likewise, the measure must be recognized as arbitrary when the regulator ignores evident alternatives for the production of the same social benefit and that do not produce the same damage to fundamental liberties, failing the *necessity* test, recognized by this Court at least since the judgment of Direct Unconstitutionality Action no. 9 (Reporting Judge: Min. NÉRI DA SILVEIRA, Reporting Judge: Min. ELLEN GRACIE, Full Court, judged on 12/13/2001). Finally, the measure deserves to be qualified as arbitrary when it presents a manifest and unjustified disproportion between, on the one hand

on the one hand, its potential benefits and, on the other, its potential harm to constitutionally protected values.

About this last criterion of judicial control, it is pertinent to mention the very recent case judged by the Supreme Court of the United States, namely, *Michigan v. Environmental Protection Agency (EPA)* [576 U. S. _ (2015)]. In the vote followed by the majority, it was categorically stated that, *verbis*: "It cannot be said to be rational, much less 'appropriate,' to impose billions of dollars in economic costs in exchange for a few dollars in health or environmental benefits (...). Consideration of costs reflects the understanding that the reasonableness of regulation usually requires attention to the advantages and disadvantages of the regulator's decisions." (In original: "*One would not say that it is even rational, never mind 'appropriate', to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits* (...). *Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions*").

Equally important for the definition of these guidelines for the judicial control of regulations in light of constitutionally guaranteed freedoms is the conclusion that the burden of justification of the restrictive measure falls on the public authority. This burden is met when first-order reasons are present, understood as those that demonstrate, with minimally sustainable evidence, the potential legitimate benefits of the measure, the reasonableness of its choice in view of the manifest alternatives, as well as that the relationship of intensity between benefits and restrictions to fundamental freedoms meets the constitutional order. The burden of justification is also met when second order reasons exist, i.e., in hypotheses in which it is not possible to present first order reasons due to demonstrated uncertainties and limitations inherent to the decision-making process in the concrete case.

In the field of second order reasons, uncertainty may arise from the very scientific vagueness about the factors involved in the analysis, when *experts* fail to sufficiently define the effects that a given solution to a public policy problem may generate, or if they do not provide enough elements to allow a clear comparison between the measure and its alternatives. The regulator may also be faced with time limits, so that the urgency to meet a relevant interest prevents a detailed analysis of the consequences of the measure adopted. The limitation may also be of resources, when the investment required to clarify the empirical assumptions regarding the regulatory decision would not be compensated by the benefits of making the choice in the least uncertain scenario possible. Regarding the *Administrative Procedure Act's (*APA, *Section* 706(2)(A)) prohibition against "arbitrary" or "capricious" regulation, Harvard University Professor Adrian Vermeule has the following observations:

> "There is an appropriate role for the Courts, which is to ensure that agencies have adequately invested resources in information gathering, which can resolve uncertainty, possibly by transforming it into risk or even certainty. (') the existence of a problem of uncertainty sometimes implies that the very question of whether the gathering of more information is justified in light of its costs is itself uncertain. In cases like these, Courts must leave room for agencies to make rationally arbitrary decisions about when to stop the information-gathering process. (') By first-order reason, I mean the reason that justifies the choice relative to other choices within the agency's possible set. A second-order reason is a reason for making one choice or another within the set of those that are possible, even if no first-order reason can be given. In situations of uncertainty, agencies will often have perfectly valid second-order reasons even when it is not possible

provide a first-order reason. In other words, there is a domain of agency decisions that are necessarily and inevitably arbitrary in a first-order sense. The controlling Courts must refrain from extending their demands for reasons and for rationality of decision-making beyond the point beyond which the possibility of reason is exhausted."

(No original: "*There is a proper role for courts in ensuring that agencies have adequately invested resources in information-gathering, which may resolve uncertainty, perhaps by transforming it into risk or even certainty.* (...) *the existence of an uncertain problem implies that, sometimes, the very question whether collecting further information will be cost-justified is itself uncertain. In cases like that, courts must leave room for agencies to make rationally arbitrary decisions about when to cut off the process of information-gathering.* (...) *By a first-order reason, I mean a reason that justifies the choice relative to other choices within the agency's feasible set. A second- order reason is a reason to make some choice or other within the feasible set, even if no first-order reason can be given. In situations of uncertainty, agencies will often have perfectly valid second-order reasons even when no first-order reason is possible. In other words, there is a domain of agency decisions that are necessarily and unavoidably arbitrary, in a first-order sense. Reviewing courts must not press their demands for reasons and reasoned decision-making beyond the point at which the possibility of reason is exhausted*." VERMEULE, Adrian. *Law's Abnegation*. Cambridge: Harvard University Press, 2016. p. 130, 134-135)

As has been amply demonstrated in this vote, the very serious measure of prohibiting the activities of shared economy platforms in the urban transportation sector is not supported by any legitimate reason. The Brazilian Constitution does not admit, under penalty of clear violation of fundamental rights, freedom-restricting measures devoid of rational basis, whether of first or second order, as occurred in this case.

Considering that the purpose of the impugned rule is to protect traditional agents of the passenger transportation market against new competitors, there is an offense to the guarantee of a competitive market environment, expressed by the Constitution in its articles 1, IV; 5, *caput* and XIII; and 170, *caput* and IV; and 173, § 4. According to the jurisprudence of this Court, this is an unusable criterion to justify restrictions on the free exercise of professions, which can only occur on an exceptional basis (RE no. 414426, Reporting Justice ELLEN GRACIE, Full Court, judged on 08/01/2011; RE 511961, Reporting Justice GILMAR MENDES, Full Court, judged on 06/17/2009). As amply demonstrated, in view of evidence of regulatory capture, the Judiciary must intervene to prevent the use of political power as a mechanism for concentration of wealth at the expense of the development of society (see ADIs 5.062 and 5.065, Rapporteur: Min. LUIZ FUX, Full Court, judged on 10/27/2016). The extensive specialized literature referred to throughout the vote points to the absence of social benefits by limiting entry into economic markets, as well as concludes, both in theory and by empirical analysis, that regulations of this kind favor corruption, evidencing the harmful scenario of capture. Without prejudice, even if this stage of scrutiny regarding the legitimacy of the regulatory intervention is overcome, the measure would not be justified under the prism of *adequacy*, given the existence of data showing that the new entrants have not caused significant impact on the income of traditional agents in the economic sector under consideration.

The possible justification of the prohibitive rule under the consumer protection angle does not hold up either. Considering that new technologies, regardless of regulatory intervention, have managed to solve problems related to information asymmetries and transaction costs in the transportation sector without the unwanted market restriction promoted by traditional legislation, it is imperative to conclude that the prohibition of service provision by digital platforms is neither *necessary* nor *appropriate*. The ban imposes enormous costs to users of the system

of transportation, considering the aforementioned "consumer surplus" provided by modern sharing economy services, without resulting in any social benefit, so that articles 5, XXXII, and 170, V, of the Constitution, which impose on legislators and administrators the duty to protect consumer interests, are offended.

Finally, traffic and urbanistic concerns do not confer rationality to the rule that is the object of this Argument. Even pursuing this goal, the measure is disproportionate under the prism of *adequacy*, at the mercy of penalizing services that contribute to the improvement of traffic and reduction of congestion, offering ridesharing, allowing the non-use or non-acquisition of own vehicles by individuals, reducing the incidence of accidents due to driving under the influence of alcohol, *etc*. It is, furthermore, an *unnecessary* measure, considering manifest and less harmful alternatives to fundamental freedoms, listed in a previous moment of this vote.

In the absence of any second order reasons capable of sustaining the prohibitive rule, I conclude that it is unconstitutional, for offense to articles 1, IV; 5, *caput,* XIII and XXXII; 22, items IX, XI and XVI; 144, § 10, I; 170, *caput*, IV, V and VIII; and 173, § 4, all of the Magna Carta.

Furthermore, I note that the unconstitutionality of articles 1 and 2 of the hostile law is prejudicial to the validity of articles 3 and 4 of the same rule, which imposes the use of the declaration technique *by dragging* for these articles.

Ex positis, I grant the Argument of Noncompliance with Fundamental Precept to declare unconstitutional, *in totum*, the Municipal Law of Fortaleza No. 10.553/2016.

It's like voting.

PLENARY

PETITION FOR BREACH OF FUNDAMENTAL PRECEPT 449 FEDERAL DISTRICT

ANTICIPATION OF VOTING

SENIOR LUÍS ROBERTO BARROSO - Thank you, President. Good afternoon everyone!

The constitutional issue at stake in both ADPF 449 and the extraordinary appeal that received general repercussion is whether the use of private cars for remunerated individual transport of passengers and the prohibition of this service violate constitutional commandments. In both cases, municipal laws are at issue: in my case, a municipal law of São Paulo, and in Justice Luiz Fux's case, a municipal law of Fortaleza, which prohibit the activity of remunerated individual passenger transportation.

In the specific case of the São Paulo law, it is understood that this is a public service or a public utility service that can only be provided by authorization of the Public Authority, and, therefore, its provision, as a private activity, would constitute a clandestine cab service, thesis sustained by the City Council.

So, originally, this was the discussion: whether it was a public utility subject to authorization or whether it is an economic activity governed by the principles of the economic order and that could eventually be restricted, but not prohibited.

I say originally, Minister Rosa, because after the filing of both lawsuits, there was the supervening of a federal law, Law No. 13.640, of March 26, 2018, which amended the Urban Mobility Law and resolved this controversy, because the new law began to provide for the existence of two distinct situations and expressly: individual public transportation, to be offered by the traditional cab system and private individual remunerated transportation, which deserved a specific subsection and can be provided by platforms such as Uber, Cabify and 99 Taxi.

The new federal law also took care of establishing the norms that should govern the provision of this private individual transportation, and it establishes some rules that I will announce shortly. In addition, the federal law expressly assigned - solving a dispute - to the municipalities and to the Federal District the competence to supervise and regulate this service. In other words, the federal law established the parameters for private service and attributed to the municipalities and the Federal District the competence to regulate and inspect this service.

Therefore, once the private nature of this service was recognized, the discussion shifted to the principles of the private economic order applicable to this matter. On the one hand, we have, as has already been mentioned from the rostrum - incidentally, I salute all the illustrious lawyers, who have contributed greatly to the discussion, and the eminent scholars, eminent professors, Professor Carlos Ari Sundfeld, Professor Daniel Sarmento, Professor Marçal Justen Filho, among others, who have contributed with relevant doctrinal contributions. Thus, once the private nature is recognized, the discussion moves on to the principles of the economic order. And here, in a way, both the principle of free enterprise and the principle of free competition are balanced or come into play.

My vote, President, is divided into three not very long parts. In the first, not to repeat what Justice Luiz Fux has already done in his dense vote, I explore the social impact of innovations in the life of a country. In the second part, I briefly discuss the content of free enterprise and the solutions to this problem that are compatible with free enterprise. And in the third and final part, I discuss the limits of municipal and district competence in this matter.

I begin, Chairman, with innovation and social impacts to the inevitability of change. In a book that has become a classic, the Israeli historian Yuval Noah Harari identifies the occurrence of three great revolutions that have guided human history: the cognitive revolution, the agricultural revolution, and the scientific revolution. The scientific revolution, which begins at the turn of the 15th to the 16th century, has - I am making a long story short - one of its most

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important in the Industrial Revolution.

I came to the Industrial Revolution because our discussion is impacted by an Industrial Revolution that is underway, the fourth Industrial Revolution, which is the technological revolution, the digital revolution. The previous revolutions were that of steam, at the turn of the 19th to the 20th century, electricity, in the first half of the 20th century, and the engine and automation, which brought us the automobile and the airplane. And now we are living this fourth digital revolution, in which mechanical and analogical technology is replaced by digital technology, which allowed - and here we come to our specific theme - the massification of computer use, the massification of cell phone use and the worldwide connection of people through the world wide web, the *internet*. The way we carry out research, go shopping, call for transportation, book a flight or listen to music, nowadays, is entirely revolutionized. Therefore, we live under the aegis of a new vocabulary, a new grammar and a new semantics, in which we have incorporated a lot of new words into our lives, and without which we would no longer know how to live. Take a look at my short list: Google, WhatsApp, Waze, Spotify, YouTube, Windows, Dropbox, Skype, iTunes, iPhone, FaceTime, Facebook, Twitter, Instagram, Amazon, Google Maps, Google Translator, and Netflix. To name just the ones I know of from my own knowledge. Younger and single people use a so-called Tinder as well, but fortunately I am out of that market, because I am well married, thank God.

Most of the proceedings today at the Supreme Federal Court are electronic proceedings. And we know this well - for those who travel - we work anywhere in the world, with access to the system and able to sign documents, whether we are in Brasília, in London, or in Vassouras.

I make this introduction to contextualize a world that is completely transformed in the last decades. Until recently, the big companies were either oil companies or companies that produced durable goods: automobiles; relevant utilities, such as

refrigerators. Today, the five most valuable companies in the world are: Apple, Amazon, Microsoft, Google, and Facebook.

Technology, knowledge, and intellectual property have replaced the material goods that made the wealth of another era. And so there is no way that the old economy is unaffected, which is why everyone is looking for new business models. Many functions, trades, and equipment that used to be mandatory are now obsolete. The empty stenographer's chairs here in the center of this Plenary indicate this changing reality. What has been happening is what, in economic theory, in a classic by Schumpeter, is called creative destruction.

We have a cycle typical of capitalist development, in which old technologies, old modes of production, are replaced by new forms of production, in a new terminology often called *disruptive innovation*, to designate ideas capable of weakening or replacing industries, companies, or products established in the market. And, in this scenario, it is very easy to see the kind of conflict that is occurring here between the owners of these new disruptive technologies and the traditional players in the market: *players* who were established in their markets, sometimes monopolists, and who are threatened by players who take advantage of regulatory gaps in new activities to obtain competitive advantages, whether regulatory or tax.

This is not the only dispute that is occurring between new technologies and traditional markets: (i) WhatsApp and telephone utilities have a dispute of their own; (ii) Netflix and cable television companies; (iii) Airbnb and hotel chains; and, as portrayed in this extraordinary appeal, (iv) between app-based individual transportation service and cabs.

President, I think we have to accept as an inexorability of social progress the fact that there are new technologies competing in the marketplace with traditional ways of offering certain services.

I think it is innocuous to try to prohibit innovation or preserve the *status quo,* just as, with the destruction of the loom machines, in the early 19th century, by English workers, or, a little later, in France, when they started to sell *prêt-à-porter* clothes, where the tailors also invaded the big stores, it was not possible to stop the industrial revolution. The challenge for the state is how to accommodate innovation with the pre-existing markets, and I think that banning the activity in an attempt to contain the process of change is clearly not the way to go, because I think it would be like trying to catch wind with your hands.

In closing the first part of my vote, I say that there is a set of new technologies that impose themselves and deserve a relevant demand from society. Evidently, the best way for the State to deal with these innovations and, eventually, with the creative destruction of the old order is not to prevent progress, but rather to try to produce the possible conciliatory paths.

I move on, President, to the second chapter of my vote, which concerns free enterprise in the Constitution.

I think that we are also living, in Brazil, an important process of reduction of one of the great national discussions, which is officialdom - this belief that everything that is relevant depends on the State, its blessings and/or its financing. In Brazil, from telephony to Carnival costumes, everything depends on money from BNDES, Caixa Economica, pension funds, state or municipal coffers, or favors from the President, Governor or Mayor, or at least a little permission or authorization, which are often conditioned to political interests. In this way, the social values of work and free enterprise in Brazil, as I perceive it, are often defeated by a State capitalism, with its crony capitalism, with its distribution of favors and blessings.

My deep belief today, analyzing Brazil, is that what we need is more civil society, more free enterprise, more social movement, and less State; a capitalism with private risk,

competition, honest entrepreneurs, clear and stable rules, conducive to a good business environment. In this context that I have just portrayed, it is in the first place the idea of free enterprise, which is, as we know, one of the foundations of the Brazilian State. Right at the opening of the Constitution, there is free enterprise, next to the social value of labor.

Free enterprise has not only an economic dimension, it has a dimension of individual freedom, of the exercise of personality rights. It transcends, therefore, the purely economic domain, to mean people's existential choices, whether professional, personal, or philanthropic.

Furthermore, free enterprise is also a specific principle of the Brazilian economic order, and this means an option for a market economy, which means an economy that gravitates around the law of supply and demand, with occasional State interventions to correct market failures. This is the constitutional option in Brazil. Therefore, in this environment, I think it is incompatible with free enterprise rules that explicitly prohibit an economic activity, such as, in this case, is the individual paid transportation of passengers registered in apps.

I highlight three fundamentals by which I consider unconstitutional this prohibition materialized in the São Paulo law and materialized in the Fortaleza law.

First of all, the Constitution establishes, as a principle, free enterprise. The law cannot arbitrarily remove a particular economic activity from people's freedom to undertake, unless there is a constitutional foundation that authorizes that restriction. And I see that there is no constitutional rule or principle that prescribes the maintenance of a specific model of individual passenger transport. There is not a line in the Constitution on this subject. Therefore, the issue of prohibitive laws or normative acts based on a non-existent exclusivity of the model of operation by cabs does not conform to the constitutional regime of free enterprise. I think that this is the

first plea and by itself would be sufficient.

Second, free enterprise also means free competition, and this idea contains an option for a market economy based on the belief that it is competition among economic agents on the one hand, and freedom of choice for consumers on the other, that will produce the best social results, which are the quality of goods and services at a fair price.

Well, here is the third conclusion in this area. It is contrary to this free competition regime to create market reserves in favor of already established economic players, in this case, cabs, with the simple purpose of avoiding the impact generated by innovation in the sector, the arrival, among others, of Uber, Cabify and 99.

It is true that, as no principle is absolute, free enterprise may also be mitigated in favor of other values, in the specific case, the legitimate claim to remedy market failures to prevent market domination, for example, and for consumer protection. Therefore, the arrival of new players in a pre-established market cannot, in turn, eliminate equally existing competition. Therefore, the state can encourage or discourage behavior where the free market does not adequately realize the constitutional values. However, state regulation cannot affect the essential core of free enterprise, depriving economic agents of the right to undertake, innovate, compete. And, therefore, the disproportionate restriction on individual passenger transport by drivers and customers registered in apps, also, for this reason, goes against the Constitution.

So, here established the contours of free enterprise, President, I come to the third and final part. My vote concerns the limits to the regulation of municipal and district activity and competence. I have established, therefore, that I consider State intervention legitimate, even in a free enterprise regime, to curb market failures and/or to protect the consumer.

And here I note that before the arrival of these applications that make use of new technologies - Uber, Cabify and 99 - the cab service

enjoyed a de facto monopoly in individual passenger transportation. And this circumstance generated persistent market failures due to lack of competition. Monopolies, in general, in any area, produce inefficiency and, very often, corruption. And, therefore, high fixed prices, poor quality of vehicles and, sometimes, bad attitude of the drivers, by exception - I have used a cab all my life, I am very grateful and admiring, it is a thorny job and extremely useful
-, but the truth is that there were market failures and deficiencies in the cab service, and with the arrival of competition from drivers registered in apps, the truth is that the cab service has undergone significant changes for the better. I tried to list some of them: cab call apps, so the traditional cab service also began to benefit from the technology that allowed the entry of new economic actors; special discounts began to be offered, because competitors started to offer better prices; fleets were modernized and drivers incorporated new standards of service. Therefore, the coexistence of different regulatory regimes in the individual passenger transportation market had a positive impact on the quality of services, including those in the pre-existing market. And this was, as already mentioned from the rostrum by the illustrious lawyers who made high quality arguments, the understanding endorsed by the Secretariat for Economic Monitoring of the Ministry of Finance in a technical note that I will refrain from reading, because it has already been specifically mentioned.

The authorization regime to which cabs are subjected imposed barriers to the entry of new operators in the market. This, therefore, meant a limitation on the number of cars in circulation and an obstacle to competition, aggravated by the fact that there was price control and a single price practiced by all economic agents.

The admission of different regulation regimes for the same activity, which characterizes the so-called regulatory asymmetry, does not violate isonomy, but, in fact, is a way to increase competitiveness with the proportional improvement of the user's well-being

of services, which benefits from competition between traditional models and innovative models.

Other positive aspects of the entry of new *players* in this market: 1 - the expansion of the consumer's right to choose, which meets the constitutional mandate of consumer protection; 2 - positive impact on urban mobility. The truth is that the offer of Uber and the like in the urban transportation market has curiously reduced the number of cars on the streets, because fewer people started to drive their own cars. And here is some interesting data: a survey by the Datafolha Institute in 2017 revealed that 59% of people use these services to get to or from a subway station, train, or bus stop. Therefore, these data reveal that the private mode of individual transportation meets a repressed demand for integration modals to public transportation lines. And the third important and very interesting benefit is the positive impact on the environment: research by the *Massachusetts Institute of Technology* - MIT, released on January 16, 2018, shows that shared transportation through apps contributes to reducing the number of vehicles in circulation, improving traffic in cities and reducing the emission of pollutants.

Therefore, Chairman, in summary, the admission of a mode of individual transport, subject to regulation of lower intensity, but complementary to the cab service, is affirmed as a constitutionally adequate strategy for the accommodation of the new economic activity in the sector and it is an option that 1. privileges free initiative and free competition; 2. encourages innovation (something we are in dire need of); 3. has a positive impact on urban mobility and the environment; 4. protects the consumer; 5. is apt to correct the inefficiencies of a sector historically submitted to a de facto monopoly.

Moving on, Chairman, to the solution of the problem as I see it, from these premises, it is possible to draw three conclusions for the solution of the problem:

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First, the unconstitutionality of the prohibition of the activity of individual remunerated transportation by drivers registered in apps. Therefore, in light of this premise, São Paulo Law No. 16,279/2015, which prohibits this economic activity, is unconstitutional for violating the principles of free enterprise and free competition.

Second, that it is equally unconstitutional to issue regulations and exercise supervision that, in practice, makes the activity unviable. Therefore, the competence that the municipalities received from the law to regulate and supervise this activity cannot be a competence exercised in order to, in a surreptitious or implicit manner, interdict, in practice, the provision of this service. For this very reason, it is necessary to establish limits to the regulatory powers in this matter. See, and here it is very important, Federal Law No. 13.640/2018, which amended the urban mobility law, established the parameters for the provision of this private service of transporting people by establishing: 1. The duty to collect taxes for the provision of services;
2. The hiring of personal accident and passenger insurance and the mandatory insurance - DPVAT; 3. the driver's enrollment as an individual taxpayer of the INSS; 4. the requirement of a driving license; 5. the vehicle's compliance with the age and characteristic requirements of the traffic authority and the Public Power; 6. the maintenance of the Vehicle Registration and Licensing Certificate; 7. the presentation of a negative certificate of criminal record.

As can be seen, the commands deal exclusively with the regulation of quality and information. For this reason, President, I consider that this regulatory option for the sector makes it impossible to create barriers to entry and price control for private individual transport by application.

The objective of the federal law is precisely not to reproduce the scenario of violation to competition and free enterprise that until then marked this market. The regulation and supervision entrusted to the municipalities and the Federal District cannot, therefore, go against this regulatory standard established by the federal legislator. It is worth remembering that the competence

legislation to deal with matters associated with traffic and transport is exclusive to the Union, under the terms of art. 22, XI.

The *third and last conclusion*, Chairman, for the solution of the problem is that, in thesis, an action to preserve the competitive market may be legitimate, so that a de facto monopoly is not replaced by another, to the detriment of the user-consumer. Therefore, the risk of predatory action of private passenger transportation in relation to the cab service should be considered. It is true that, in contexts in which the same activity is subject to different degrees of intervention, it is necessary that the Public Power acts to ensure competition, correcting the effects of imperfect competition. In practice, however, the performance of app drivers and cab drivers does not even allow us to affirm the exact coincidence of the market.

It should be noted that drivers registered in apps: (i) cannot pick up passengers by circulation and streets, which is the fare system, this remains an exclusive market of the public modality of individual transport; (ii) likewise, the public power grants cabs, but not operators of private individual transport of passengers, specific points in privileged boarding places, such as airports and bus stations, as well as reserved places of public parking and, moreover, the individual private transport neither has, as the public cab service has, tax exemption for the acquisition of vehicle nor counts on access to selective traffic lanes. This scenario, in my view, rules out, as a general rule, the claim of unfair competition.

The absence of unfair competition in this regard was attested to by the Administrative Council for Economic Defense, CADE itself, which in a study that specifically evaluated Uber's entry into the market between 2014 and 2016, indicated the absence of damage to competition in relation to the cab service called by app.

Therefore, President, what we perceive is that the entry of this new service and these new technologies, in fact, what it did was to improve the existing market and improve the quality of the services provided by

Public cab services that coexist, I think, in relative harmony with the private transport service provided by the new market authors.

For these reasons, President, I am accepting - my vote has already been combined - in the case of the Argument of Noncompliance with a Fundamental Precept reported by Minister Luiz Fux, who made a tight summary of an exquisite vote that I had the privilege to look over, so I am granting the request in the ADPF; and, in the extraordinary appeal, I am dismissing it.

And although, without obviously submitting the thesis for approval, but only in conclusion of my vote, because I always like to conclude this way, my essential conclusions are the following, President: (i) the prohibition or disproportionate restriction of the activity of individual remunerated transportation by driver registered in an app is unconstitutional for violation of the principles of free enterprise and free competition; and (ii) in the exercise of their competence to regulate and supervise private individual passenger transportation, municipalities and the Federal District cannot establish anti-competitive measures, such as entry restrictions or price control, since such competence cannot contradict the parameters set by the federal legislature, which has private attribution in the matter.

And to the cab drivers who provide, as I said, a valuable service, I am convinced that this line of thinking that Justice Luiz Fux and I are professing here will actually increase the market through competition, with improved conditions for the consumer and for the workers themselves in this market.

That's how I vote, Chairman.

PLENARY

PETITION FOR BREACH OF FUNDAMENTAL PRECEPT 449 FEDERAL DISTRICT

RELATOR: MIN. LUIZ FUX

RESPONDENT(S): LIBERAL SOCIAL PARTY

ATTORNEY(S): RODRIGO SARAIVA MARINHO AND OTHERS

INTDO.(A/S): CITY HALL OF FORTALEZ

ATTORNEY(S): UNREPRESENTED

INTDO.(A/S): MAYOR OF FORTALEZA

ATTORNEY(S): UNREPRESENTED

AM. CURIAE. : ASSOCIATIONBASEDE
INFORMATION AND COMMUNICATION TECHNOLOGY
- BRASSCOM

ATTORNEY(S): LUIZ ROBERTO PEROBA BARBOSA

ATTORNEY(S): ANDRÉ ZONARO GIACCHETTA

ATTORNEY(S): VICENTE COELHO ARAÚJO

AM. CURIAE. : NATIONAL SERVICE CONFEDERATION - CNS

ATTORNEY(S): RICARDO OLIVEIRA GODOI

ATTORNEY(S): MARCELO MONTALVAO MACHADO

AM. CURIAE. : MUNICIPALITY OF FORTALEZA

PROC.(A/S)(ES): ATTORNEY GENERAL OF THE FEDERAL GOVERNMENT
FORTALEZA

AM. CURIAE. : NEW NATIONAL PARTY - NEW

ATTORNEY(S): FLÁVIO HENRIQUE UNES PEREIRA AND OTHERS

AM. CURIAE. UBER DO BRASIL TECNOLOGIA LTDA

ATTORNEY(S): OTTO BANHO LICKS AND OTHERS

AM. CURIAE. : SECRETARIAT OF FOLLOW-UP
ECONOMIC OF THE MINISTRY OF FINANCE

PROC.(A/S)(ES): ADVOCATE-GENERAL OF THE UNION

AM. CURIAE. **:** BDEONLINETO

ASSOCIATION

OFFLINE - ABO2O

ATTORNEY(S): MARCOSJOAQUIMGONÇALVESAE

OTHER

VIEW

SENIOR MINISTER RICARDO LEWANDOWSKI - Sir

ADPF 449 / DF

President, in order.

I had, during the break, expressed that I have some technical questions with regard to these two votes that were beautifully enunciated, as well as the oral supports from the rostrum that were very substantial.

But there is one small point that I wanted to clarify. And I'll ask permission, if the colleagues agree, to ask to see it in advance. And my question is this: with regard to ADPF 499, Article 1 of Law 10.553, of 2016, of Fortaleza, which is attacked in this ADPF, mentions individual public transportation. But Minister Barroso brought up - in my opinion, in a very timely way - that Federal Law 12.587/2012 - which establishes guidelines for national urban mobility policy - brings a very sophisticated and correct distinction, in Article 4, VIII, between individual transport - which in this section dedicated to definitions, is conceptualized as a paid passenger transport service open to the public, through rental vehicles, for individualized trips. This is in subsection VIII. In turn, subsection X of this same provision, art. 4, defines private individual passenger transportation as the paid passenger transportation service not open to the public, for individualized or shared trips, requested exclusively by users previously registered in applications or other network communication platforms.

Therefore, my question - and I will bring my vote as soon as possible - is to clarify, at least to me - if this article 1 of the Fortaleza law, when it talks about individual public transportation, also covers the use of private cars hired through apps. But only this technical issue - which seems interesting to me to be developed a little further - I will bring, as soon as possible.

I'm asking for an early view then, Mr. President.

MR. RODRIGO SARAIVA MARINHO (LAWYER) -
May I make a clarification, Your Honor? Just a clarification

quickly on the subject alluded to.

Even though the law talks about individual public passenger transport, at least ten individual transports, private cars were seized in that sequence. It's just to explain that.

SENIOR RICARDO LEWANDOWSKI - That is
precisely the doubt that I have, even because Justice Fux, when he began his vote, already mentioned the amendment, saying that the amendment already speaks of prohibition, etc.. But it is a different kind of transportation. There is a small incongruence between the amendment of the Fortaleza law and this article 1, from a conceptual, terminological point of view.

It is just that little doubt that I will bring up. I think I can verticalize that question a little bit more, but it will be brought as soon as possible.

I thank the lawyer.

PLENARY

EXCERPT FROM THE MINUTES

PETITION FOR BREACH OF FUNDAMENTAL PRECEPT 449
PROCED. : FEDERAL DISTRICT
RELATOR : MIN. LUIZ FUX
RESPONDENT(S) : LIBERAL SOCIAL PARTY
ATTORNEY(S) : RODRIGO SARAIVA MARINHO (15807/CE) AND OTHERS
INTDO.(A/S) : FORTALEZ CITY COUNCIL
ATTORNEY(S): UNREPRESENTED INTDO.(A/S) : MAYOR OF
FORTALEZA ATTORNEY(S): UNREPRESENTED
AM. CURIAE. : BRAZILIAN ASSOCIATION OF INFORMATION TECHNOLOGY AND COMMUNICATION COMPANIES - BRASSCOM
ADV.(A/S) : LUIZ ROBERTO PEROBA BARBOSA (130824/SP)
ADV.(A/S) : ANDRÉ ZONARO GIACCHETTA (147702/SP)
ADV.(A/S) : VICENTE COELHO ARAÚJO (13134/DF)
AM. CURIAE. : CONFEDERACAO NACIONAL DE SERVICOS - CNS
ADV.(A/S) : RICARDO OLIVEIRA GODOI (143250/SP)
ATTORNEY(S) : MARCELO MONTALVAO MACHADO (34391/DF, 4187/SE, 357553/SP)
AM. CURIAE. : MUNICIPALITY OF FORTALEZA
PROC.(A/S)(ES) : ATTORNEY GENERAL OF THE MUNICIPALITY OF
FORTALEZA AM. CURIAE. : NEW NATIONAL PARTY - NEW
LAWYER: FLÁVIO HENRIQUE UNES PEREIRA (0031442/DF) AND OTHERS AM.
CURIAE. UBER DO BRASIL TECNOLOGIA LTDA
ATTORNEY(S) : OTTO BANHO LICKS (RJ079412/) AND OTHERS
AM. CURIAE. SECRETARY OF ECONOMIC MONITORING OF THE MINISTRY OF FINANCE
PROC.(A/S)(ES) : ADVOCATE-GENERAL OF THE UNION
AM. CURIAE. : BRAZILIAN ONLINE TO OFFLINE ASSOCIATION - ABO2O
ADV.(A/S) : MARCOS JOAQUIM GONÇALVES ALVES (20389/DF) AND OTHERS

Decision: After the votes of Justices Luiz Fux (Rapporteur) and Roberto Barroso, who upheld the petition for breach of fundamental precept, Justice Ricardo Lewandowski requested access to the case records. The following spoke: for the plaintiff, Dr. Rodrigo Saraiva Marinho; for the amicus curiae PARTIDO NOVO NACIONAL – NOVO the Dr. Flávio Henrique Unes Pereira; for the amicus curiae CONFEDERAÇÃO NACIONAL DE SERVIÇOS - CNS, Dr. Orlando Maia Neto;
for amicus curiae UBER DO BRASIL TECNOLOGIA LTDA, Dr. Carlos Mário da Silva Velloso Filho; and, for amicus curiae ASSOCIAÇÃO BRASILEIRA DAS EMPRESAS DE TECNOLOGIA DA INFORMAÇÃO E COMUNICAÇÃO – BRASSCOM, Dr. André Zonaro Giacchetta. Justified absences: Justices Celso de Mello and Cármen Lúcia. Presiding Justice Dias Toffoli. Plenary, 6.12.2018.

Presiding Justice Dias Toffoli. Present at the

Justices Marco Aurélio, Gilmar Mendes, Ricardo Lewandowski, Luiz Fux, Rosa Weber, Roberto Barroso, Edson Fachin and Alexandre de Moraes were in session.

Justified absences: Justices Celso de Mello and Cármen Lúcia.

Deputy Attorney General of the Republic, Dr. Luciano Mariz Maia.

Carmen Lilian Oliveira de Souza
Chief Plenary Advisor

PLENARY

PETITION FOR BREACH OF FUNDAMENTAL PRECEPT 449 FEDERAL DISTRICT

V O T E
(VIEW)

O Senhor Ministro **Ricardo Lewandowski**: This is a plea of non-compliance with a fundamental precept, with a request for an injunction, against arts. 1 and 2 of Law No. 10.553/2016, of the Municipality of Fortaleza/CE, which provides for the prohibition of the use of private cars registered or not in apps, for the paid individual transportation of people in the city of Fortaleza.

I transcribe the impugned provisions of the referred rule:

> "Art. 1 - It is forbidden in the city of Fortaleza the **individual public transport** of passengers without the proper legal permission.
>
> Art. 2 - Violation of the provisions of this Law will result in a fine of R$ 1,400.00 (one thousand and four hundred reais) for the driver, applied up to the limit of 4 (four) times the amount of the fine, in case of recurrence within a period of 12 (twelve) months" (emphasis added).

From the outset, I verify that the rule is compatible with the constitutional text and is within the legislative competence of the federative entity.

I note that individual public transportation is a paid passenger transportation service **open to the public**, through rental vehicles, for individualized trips (art. 4, VIII, of Law 12.587/2012). Cabs are included in this concept, which, in their nature, are private cars used to provide public utility services.

The so-called app cars (Uber, Cabify, Pop, 99, among others), on the other hand, are conceptualized as private individual passenger transportation, which, according to the governing law, is a paid passenger transportation service, **not open to** the **public,** for individualized or shared trips **requested exclusively by users previously registered with apps or other network communication platforms** (art. 4, X, of Law 12.587/2012).

Given these concepts - individual public transport and individual private paid transport of passengers - I believe that the municipal rule refers only to cabs, not covering private cars linked exclusively to the aforementioned applications.

Having said this, I grant the ADPF, with the interpretation that the impugned law does not apply to the so-called application cars (Uber, Cabify, Pop, 99, among others), conceptualized by the governing law as individual private paid transportation of passengers.

PLENARY

PETITION FOR BREACH OF FUNDAMENTAL PRECEPT 449 FEDERAL DISTRICT

V O T O

O SENISTRO ALEXANDRE DE MORAES: This is an Argument *of* Noncompliance with a Fundamental Precept, with a request for an injunction, proposed by the Social Liberal Party - PSL, against arts. 1 and 2 of Municipal Law 10.553/2016 of Fortaleza/CE, which "*provides for the prohibition of the use of private cars registered or not on apps, for the paid individual transportation of people in the Municipality of Fortaleza, and makes other provisions".*

The plaintiff points out that the fundamental precepts that have been violated are those that guarantee the social value of labor and free enterprise (art. 1, IV, of the FC), free competition, consumer protection, and the search for full employment (art. 170, IV, V and VIII, of the FC).

Here are the contents of the impugned rules:

> Art. 1 It is forbidden in the city of Fortaleza the individual public transport of passengers without the proper legal permission. Art. 2 The infraction to what is established in this Law will bring to the driver a fine of R$ 1,400.00 (one thousand and four hundred reais), applied up to the limit of 4 (four) times the amount of the fine, in
> in case of recurrence within a period of 12 (twelve) months.

Initially, the proponent claims that, although article 1 of Municipal Law 10.553/2016 requires legal permission specifically for individual *public* passenger transport, exercised exclusively by taxi drivers, the Executive Branch of the city of Fortaleza, giving a broad interpretation to the provision, would be using it as grounds to fine drivers and seize vehicles that provide individual *private* passenger transport services through technological applications such as Uber.

It also argues that such an interpretation violates the precepts

which ensure the social value of labor and free enterprise, free competition, consumer protection and the search for full employment. This is because, by ignoring the distinction between the models of individual passenger transportation provided for by Federal Law 12,587/2012, the contested municipal law and its respective interpretation given by the Municipality of Fortaleza "*grant taxi drivers an undue monopoly over any type of paid individual passenger transportation*", "*preventing the exercise of legitimate activities, expressly provided for in the Civil Code, Law No. 12,587/2012 and the Marco Civil da Internet*" (pp. 24-25, Doc. 1).

Thus, by disregarding the literal wording of the normative statement and giving it a broad interpretation to include private passenger transportation services organized through apps, the Municipality creates a market reserve that affects (i) the professional drivers who work or intend to work in the activity, since they are prevented from working and, consequently, from earning income; (ii) the business companies that develop the applications; and (iii) the consumers who use the technology, who see their options restricted in the search for better prices and better quality services, and their right to choose hindered.

It also alleges that the impugned rule originated from Bill 146/2016, whose original wording "*expressly prohibited the activity of individual remunerated passenger transport provided by companies such as Uber and similar*" (page 8, Doc. 1), which demonstrates the real intention of the law, despite the changes made in the legislative process, to prohibit the service provided by app drivers.

Finally, the plaintiff affirms that, by promoting undue limitation to the new business model of internet transportation, the contested rule violates *the* Union's legislative option enshrined in the Marco Civil da Internet, which ensures "*freedom of business models promoted on the internet*" (art. 3), resulting in violation of the freedom of initiative guaranteed by the Constitution of 1988.

In these terms, he asks for a precautionary suspension of the effectiveness and, by

final, the declaration of material and formal unconstitutionality, with textual reduction, of arts. 1 and 2 of Municipal Law 10.553/2016 of Fortaleza. Subsidiarily, it requires the declaration of unconstitutionality, without reduction of the text, in order to define the "*interpretation applicable to the rule in order to recognize the distinction between 'individual public transport' and 'individual private transport', so that the Municipality of Fortaleza is prevented from categorizing - illegally - drivers of the application Uber and similar as public carriers*" (fl. 34-35, Doc. 1).

On 19/4/2017, the Reporting Justice issued an order adopting the rite of art. 12 of Law 9.868/1999, requesting information from the required authorities and determining the hearing of the Attorney General of the Union and the Attorney General of the Republic.

On 5/17/2017, the City Council of Fortaleza submitted information, in which it defended the constitutional regularity of the processing of the project that originated the impugned norm, asking for the dismissal of the request.

On 5/18/2017, the Mayor of Fortaleza submitted information, sustaining irregularity of procedural representation of the plaintiff and inapplicability of the action also for failure to comply with the subsidiarity requirement. On the merits, the head of the municipal government argues that public and private passenger transportation are activities subject to regulation and the police power of the municipal government, pursuant to art. 30, V, of the Constitution (exhibits 40 and 41).

On 5/24/2017, the Office of the Federal Attorney General presented its position, in which it raised, preliminarily, (i) the plaintiff's defect in representation; and (ii) the legal impossibility of the subsidiary request for interpretation in conformity with the Constitution, since the meaning of the contested rule is unambiguous.

On the merits, AGU maintains that the impugned provisions of Law 10,553/2016 prohibit the individual public transportation of passengers without the proper legal permit, not preventing, by themselves, the provision of individual private transportation services. It states that they are concrete acts

of the Public Power that inhibit the exercise of individual transport activity in the Municipality of Fortaleza, which should have been properly challenged. Thus, he claims that it is not appropriate to analyze, in this way, the validity of the concrete acts of the Municipal Executive Branch. Requests, in these terms, the rejection of the request.

In an opinion issued on 09/15/2017, the Attorney General's Office raises, preliminarily, (i) irregularity in the procedural representation of the author; (ii) lack of grounds for the request for declaration of formal unconstitutionality, given the absence of indication of defect in the legislative process; (iii) lack of grounds for the request for declaration of material unconstitutionality. (iv) the lack of grounds for the request for an interpretation in conformity with the Constitution of the contested rule, considering that the concrete acts of the Public Authorities held to be unconstitutional are supported not only by the provisions herein contested, but also by art. 28 of Municipal Law 7.163/1992; (v) the absence of relevance of the controversy that justifies the exercise of concentrated control, as the question on the merits does not present a homogenous character indispensable to give rise to a decision that can be applied to other municipalities; and (vi) non-observance of the subsidiarity requirement, given the possibility of filing a representation of unconstitutionality in light of the Constitution of the State of Ceará, before the respective Court of Justice. It therefore opines that the action should be dismissed and, once the preliminaries have been overcome, that a public hearing should be held.

In an order of 9/25/2017, the Reporting Justice considered the procedural representation updated by petition 26.541/2017, and returned the case records to the Attorney General's Office for a new manifestation on the merits of the request.

In a new opinion, the Attorney General's Office again opines that the action should be dismissed. On the merits, it indicates (i) the formal unconstitutionality of arts. 1 and 2 of Law 10.553/2016 of the

Municipality of Fortaleza/CE, as they violate the Union's private competence to legislate on traffic and transport, according to art. 22, IX, of the CF; and (ii) and material unconstitutionality, since, being private *the* activity of individual transport of passengers performed by applicative drivers, "*the rule is freedom*", which can only be excepted by law and, even so, always in balance with the constitutional principles of free enterprise, competition, consumer protection and proportionality.

He emphasizes, in summary, the democratic nature of the shared economy and collaborative consumption, such as private passenger transportation services through applications, which, being a technological innovation, require legal regulation. However, it highlights that "*the decision on the regulatory model of this sector should be taken in a democratic and participatory way, based on scientific evidence and in respect to fundamental rights*", which prevents the total ban of this service, under penalty of violation of the principle of proportionality, the right to consumer choice and the guarantees to free enterprise and competition.

He affirms, finally, that "*it is not up to the State's jurisdictional function to choose the best regulatory model for urban development and people's mobility*", but rather to ensure the faithful observance of the aforementioned constitutional principles, in order to guarantee citizens' well-being and urban balance.

The requests for admittance as *amici curiae of* Uber do Brasil Tecnologia Ltda., the National New Party - NOVO, the City of Fortaleza, the Secretariat for Economic Monitoring of the Ministry of Finance, the National Confederation of Services - CNS, and the Brazilian Association of Information Technology and Communication Companies - BRASSCOM were admitted.

This is the report.

As reported, the plaintiff sustains the unconstitutionality of arts. 1 and 2 of Law 10.553/2016 of the City of Fortaleza/CE, which have been interpreted by the municipal executive branch so as to

to base its action on the prohibition of private individual passenger transport organized through apps, despite the fact that the literalness of the contested provisions only prohibits public individual transport, i.e. cab services, without the proper legal permission.

I note at the outset that the law challenged in this claim, although issued under the pretext of dealing with the prohibition of paid transportation of people by private cars, did not actually prohibit the exercise of this activity, but conditioned its practice to obtaining a "*legal permit*" (art. 1).

Undoubtedly, despite this particularity, the purpose of the municipal legislator, following the example of legislation issued by many other Brazilian municipalities, including large capital cities, was to change the way the transportation service of people by private cars is provided, especially when intermediated by electronic platforms (the "apps"). The Municipality of Fortaleza, in its manifestation in the records, sought to characterize the edition of the rule in focus as the exercise of material and legislative competence of art. 30, V, of the CF.

The question before this COURT, therefore, is to define the legal nature of services provided by private individuals, with the intermediation of electronic applications that offer this service to all interested members of the public. This is an entirely new reality, arising from new technologies that have given the common citizen unprecedented access to all kinds of information useful to his interests.

In this case, the legislation under examination intended to regulate the use of networked communication platforms for commuting in urban space - private individuals are willing to transport other private individuals, in their own vehicles, for a fee, only with the intermediation of applications that, in addition to registering drivers and users, manage this service and control the rates.

It is now important to know whether this new availability is a public service and, if so, who would be the public entity holding this service and the respective exploitation regime. Or, on the other hand

On the other hand, whether it would be an economic activity freely available to any private individual, and what would be the regulatory margin available to the government to reconcile this practice with the public interest.

The federal legislator outlined an answer to these questions through the edition of Law 13.640/2018, which amended Law 12.587/2012, the National Policy for Urban Mobility, to define "*individual private remunerated transportation of passengers*" as the "*remunerated passenger transportation service, not open to the public, for the performance of individualized or shared trips requested exclusively by users previously registered on apps or other network communication platforms*" (art. 4, X, of Law 12.587/2012). In addition, the federal legislator assigned to the municipalities the power to regulate certain aspects of the provision of this service, related to the safety of those involved, the possibility of inspection by traffic authorities and the guarantee of social rights of drivers. In this sense, arts. 11-A and 11-B of Law 12.587/2012 (with the wording of Law 13.640/2018):

> Art. 11-A. It is exclusively up to the Municipalities and the Federal District to regulate and supervise the individual private remunerated transportation service for passengers foreseen in item X of art. 4th of this Law within their territories.
>
> Sole Paragraph. In the regulation and fiscalization of the individual private transport service of passengers, the Municipalities and the Federal District will have to observe the following guidelines, having in mind the efficiency, the efficacy, the security and the effectiveness in the rendering of the service:
>
> I - effective collection of municipal taxes due for the provision of the service;
>
> II - requirement to contract Personal Accident Insurance for Passengers (APP) and Mandatory Insurance for Personal Injury caused by Motor Vehicles on Land (DPVAT);
>
> III - requirement for the driver to register as an individual taxpayer with the National Institute of Social Security (INSS), in the

> under the terms of item h of clause V of art. 11 of Law n. 8,213, of July 24, 1991.
>
> Art. 11-B. The individual private transport service of passengers foreseen in item X of art. 4th of this Law, in the Municipalities that choose to regulate it, will only be authorized to the driver who meets the following conditions:
>
> I - have a National Driver's License in category B or higher that contains the information that he/she is engaged in a paid activity;
>
> II - driving a vehicle that meets the maximum age requirements and the characteristics required by the traffic authority and by the municipal and Federal District public power;
>
> III - issue and maintain the Vehicle Registration and Licensing Certificate (CRLV);
>
> IV - submit a negative certificate of criminal record.
>
> Sole Paragraph. The exploitation of remunerated services of individual private transport of passengers without the fulfillment of the requirements foreseen in this Law and in the regulation by the municipal public power and the Federal District will characterize illegal transport of passengers.

The legislator acted correctly in defining the practice of these services as distinct in nature from the *individual public transportation of passengers*, established by the National Plan for Urban Mobility as the "*remunerated passenger transportation service open to the public, through rental vehicles, for individualized trips*" (art. 4, VIII, of PNMU), as well as the "*public utility services of individual passenger transportation*", referred to in art. 12 of the same law, which also includes the service provided by professional taxi drivers (art. 2 of Law 12.468/2011).

Paid transportation by apps follows its own economic and social dynamic, meeting a demand that emerged, in

first, the serious problems of urban mobility in large Brazilian cities, especially the deficiency of public transportation, and the technological possibilities offered by *online* applications. I don't see, therefore, how to qualify this activity as a public service, to subject it to the legal regime of administrative law and attribute its ownership to the State, even if in a non-exclusive regime. In my view, it is a matter of social needs being supplied by private initiative, in the exercise of their freedom to undertake in a market economy. The eventual submission of this reality to a regime of authorization or permission by the Public Administration would void its economic utility.

Certainly, as it is a matter of public utility, it will be the State's responsibility to regulate all the necessary aspects for the correct fulfillment of all the interests involved, up to the point in which this does not make it impossible for private individuals to fully exercise their freedom.

The Union, in the exercise of its competence to legislate on the national transport and traffic policy (art. 22, IX and XI), and to institute guidelines on urban development (art. 21, XX, of the FC), edited the aforementioned Law 12.587/2012, as well as amended it to specifically address transportation paid by apps. Although the federal law itself has reserved to the municipalities the possibility of regulating and supervising this activity, there is a clear formal unconstitutionality in the municipal laws that intended the total prohibition of the offer of paid transportation via apps, or that regulated it in a way incompatible with the federal legislation.

I consider applicable to the case the precedents of this Supreme Federal Court that censure local legislations edited with the purpose of regulating urban transportation services in opposition to, or without the support of, federal legislation. In this sense, I cite the following judgments:

> EMENTA: AÇÃO DIRETA OF UNCONSTITUTIONALITY. LAW FROM THE STATE OF MINAS GERAIS. LICENSING OF MOTORCYCLES FOR

TRANSPORTATION OF PASSENGERS ("MOTOTAXI"). COMPETÊNCIA PRIVATIVA OF THE UNION. FORMAL UNCONSTITUTIONALITY RECOGNIZED.

I - Private competence of the Union to legislate on traffic and transport (CF, art.22, XI).

II - Exercise of attribution by the State that requires authorization in a complementary law.

III - Non-existence of an express authorization regarding the remunerated transportation of passengers by motorcycles.

IV - Direct action granted to declare the unconstitutionality of mining law 12.618/97.

(ADI 3136, Rel. Min. RICARDO LEWANDOWSKI, Full Court, judged on 01/08/2006, DJ of 10/11/2006)

EMENTA: UNCONSTITUTIONALITY. Direct action. Law 2.769/2001, of the Federal District. Legislative Competence. Labor law. The profession of motorcycle courier. Regulation. Inadmissibility. Rules about labor law, conditions for exercising the profession and traffic. Exclusive competence of the Union. Offense to arts. 22, clauses I and XVI, and 23, clause XII, of the Federal Constitution. Action judged valid. Precedents. It is unconstitutional the district or state law that provides about conditions for the exercise or creation of a profession, especially when this refers to traffic safety.

(ADI 3610, Reporting Justice CEZAR PELUSO, Full Court, judged on 08/01/2011, DJe de 09/21/2011)

SUMMARY: Direct action of unconstitutionality. District L. 3.787, of February 02, 2006, which creates, in the scope of the Federal District, the MOTO-SERVICE system - remunerated transportation of passengers with the use of motorcycles: unconstitutionality declared for usurpation of the private competence of the Union to legislate on traffic and transportation (CF, art. 22, XI). Precedents: ADIn 2606, Pl., Maurício Corrêa, DJ 7.2.03; ADIn 3.136, 1.08.06, Lewandowski; ADIn 3.135, 0.08.06,
Gilmar.

(ADI 3679, Reporting Justice SEPÚLVEDA PERTENCE, Court of Appeals, São Paulo, Brazil)
Pleno, judged on 06/18/2007, DJe de 2/8/2007)

With respect to the contested provision - Municipal Law 10.553/2016 of Fortaleza/CE -, I understand that its article 1 deals with *individual public passenger transportation,* which, in line with article 4, X, of Law 12.587/2012, does not reach the paid transportation of people via apps. And neither could it, since it is an economic activity freely available to all interested parties, although subject to regulation and supervision by the municipal government.

In light of the above, I partially grant the request to declare the nullity, without reduction of the text, of the contested provision, removing from its scope of application the services of *private individual passenger transport*, as defined in the federal legislation.

It is the vote.

PLENARY

PETITION FOR BREACH OF FUNDAMENTAL PRECEPT 449 FEDERAL DISTRICT

ANTICIPATION OF VOTING

Mr. **Justice EDSON FACHIN** - Mr. President, although only on the grounds of formal defect, from the reading of the judgment, the application system, in my view, is an activity that, preponderantly, subsumes the concept of transport, which is why the State has the competence to regulate it - therefore, in accordance with the provisions of item XI of Article 22 of the Federal Constitution - the Union.

In the case of Extraordinary Appeal 1.054.110, there is a municipal law that, strictly speaking, instead of promoting, in the spatiality it is allowed, a complementary regulatory power, ends up prohibiting, therefore, abolishing normatively, a system of service provision. The Urban Mobility Law, Law 13.640, dealt with this matter, and I believe that the existence of a federal rule removes this legislative latitude from the municipalities. I will attach the explanation of vote that mirrors this conclusion.

And, analyzing the communion that exists between the State's regulatory activity and free enterprise in the economic order, I am accepting only the formal defect, but this does not imply a change in the result, which is why I am following the eminent Justice Luís Roberto Barroso in not granting the Extraordinary Appeal and, in the ADPF, the eminent Justice Luiz Fux, who upholds the validity of the claim.

I follow both Rapporteurs, but on that basis.

Document digitally signed according to MP No. 2.200-2/2001 of 24/08/2001. The document can be accessed at http://www.stf.jus.br/portal/autenticacao/autenticarDocumento.asp under the code D30A-BB68-E35B-5B29 and password 4B2F-8C01-EA70-3FE8

PLENARY

PETITION FOR BREACH OF FUNDAMENTAL PRECEPT 449 FEDERAL DISTRICT

V O T O - V O G A L

JUSTICE EDSON FACHIN: I recognize, *in* this case, a formal defect, since the competence to legislate on traffic and transport, *in the* terms of art. 22, XI, of the CRFB, is exclusive to the Union, *in verbis*:

> "Art. 22 - The Union has exclusive competence to legislate on (…)
> XI - transit and transportation;"

In this sense is the jurisprudence of this Supreme Court:

> "DIRECT ACTION OF UNCONSTITUTIONALITY. LAW FROM THE STATE OF SANTA CATARINA. LICENSING OF MOTORCYCLES DESTINED TO THE REMUNERATED TRANSPORTATION OF PASSENGERS. COMPETENCE OF THE UNION. FORMAL UNCONSTITUTIONALITY. 1. it is the exclusive competence of the Union to legislate on traffic and transport, being necessary express authorization in a complementary law so that the federated unit can exercise such attribution (CF, article 22, item XI, and sole paragraph). 2. 2 - Unconstitutional is the ordinary norm of a state that authorizes the exploration of services of paid transportation of passengers carried out by motorcycles, a type of vehicle for hire that is not contemplated in the National Traffic Code. 3 - Matter of origin and national interest that must be regulated by the Union after studies related to the requirements of safety, hygiene, comfort and preservation of public health. Direct action of unconstitutionality granted. (ADI 2606, Reporting Justice Maurício Corrêa, Full Court, judged on November 21, 2002).

"Direct action of unconstitutionality. Law n. 6.457/1993, of the State of Bahia. 2. Mandatory installation of seat belts in public transportation vehicles. Matter related to traffic and transportation. Exclusive competence of the Union (CF, art. 22, XI). 3. 3 - Inexistence of a complementary law to authorize the States to legislate on a specific question, in the terms of art. 22, sole paragraph, of the Federal Constitution. (ADI 874/BA, Reporting Justice Gilmar Mendes, Plenary, DJe 28.2.2011).

"DIRECT ACTION OF UNCONSTITUTIONALITY. LAW N. 7.723/99 OF THE STATE OF RIO GRANDE DO NORTE. INSTALLMENT PAYMENT OF TRAFFIC FINES. FORMAL UNCONSTITUTIONALITY. 1 This Court, in repeated pronouncements, has established that the Constitution of Brazil exclusively confers on the Union the power to legislate on traffic, and that the Member States cannot, until the advent of the supplementary law provided for in the sole paragraph of article 22 of CB/88, legislate on the matters listed in the precept. 2. The request for a declaration of unconstitutionality is granted" (ADI 2.432/RN, Reporting Justice Eros Grau, Plenary, DJ August 25, 2006).

"DIRECT ACTION OF UNCONSTITUTIONALITY. LAW OF THE STATE OF SÃO PAULO. ELECTRONIC INSPECTION. FINE. COMPETENCE OF THE UNION. MATERIAL UNCONSTITUTIONALITY . 1. it is the
The Union has the exclusive competence to legislate on traffic and transport, being necessary express authorization in a complementary law so that the federated unit can exercise such attribution (Federal Constitution, article 22, item XI and sole paragraph). 2. The State has no authority to legislate or to restrict the scope of a law that only the Union can enact (FC, article 22, XI). Direct unconstitutionality action granted" (ADI 2.328/SP, Reporting Justice Maurício Corrêa, Plenary, DJ

16.4.2004).

"DIRECT ACTION OF UNCONSTITUTIONALITY. LAW OF THE STATE OF SANTA CATARINA. LICENSING OF MOTORCYCLES DESTINED TO THE REMUNERATED TRANSPORTATION OF PASSENGERS. COMPETENCE OF THE UNION. FORMAL UNCONSTITUTIONALITY. 1. it is the exclusive competence of the Union to legislate on traffic and transport, being necessary express authorization in a complementary law so that the federated unit can exercise such attribution (CF, article 22, item XI, and sole paragraph). 2. 2 - Unconstitutional is the ordinary norm of a state that authorizes the exploration of services of paid transportation of passengers carried out by motorcycles, a type of vehicle for hire that is not contemplated in the National Traffic Code. 3 - Matter of origin and national interest that must be regulated by the Union after studies related to the requirements of safety, hygiene, comfort and preservation of public health. Direct unconstitutionality action granted" (ADI 2.606/SC, Reporting Justice Maurício Corrêa, Plenary, DJ February 7, 2003).

It is true that the municipalities, within the scope of their local competence, can supplement the federal legislation to meet the peculiarities of local services (art. 30, I and II, of the Federal Constitution).

On other occasions (ADI 5.356 and ADPF 109), I have argued that the traditional understanding of Brazilian federalism, which seeks to resolve conflicts of competence only from the standpoint of the prevalence of interests, does not present a satisfactory solution, particularly for cases in which the doubt about the exercise of legislative competence arises from normative acts that may deal with different themes.

In these cases, there is multidisciplinarity, that is, "the law issued by a political entity simultaneously refers to categories foreseen in two or more competence rules, some of which are permitted and some of which are prohibited to that political entity" (as Tiago has well described

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Magalhães Pires, in a work already cited by the Justice Luís Roberto Barroso).

Multidisciplinary rules are, therefore, those that have more than one cause that justifies the exercise of legislative competence by the entities of the federation, that is, more than one entity is authorized to rule on aspects of the same theme.

The solution, in such cases, cannot escape the well-known canon of interpretation according to which one should favor the interpretation that leads to the constitutionality of the contested law, under penalty of presuming unconstitutional conduct of the legislator, after all "one should not assume that the legislator has wanted to provide contrary to the Constitution; on the contrary, the infraconstitutional rules arise with the presumption of constitutionality" (MENDES, Gilmar. *Course of constitutional law.* 10th ed. São Paulo: Saraiva, 2015, p. 97).

This presumption of constitutionality, enlivened by the value attributed by the Federal Constitution to federalism, can be broken down into three interpretation guidelines: (i) it is necessary to minimize direct confrontations between political entities; (ii) it is necessary to balance the value of the rules of material competence, equating them to those of concurrent competence; and (iii) it is necessary to improve the value of the political representation of the states in Congress, especially the procedural weight of legislative inertia.

In this sense, the canon of the presumption of constitutionality unfolds in what the American jurisprudence calls a presumption in favor of the competence of the smaller entities of the federation (*presumption against pre-emption*).

Thus, it is necessary to recognize, within the constitutional division of federative powers, that the Municipality, as long as it has competence for the matter, has primacy over the issues of local interest, under the provisions of art. 30, I, of the CRFB. Likewise, the States and the Union have competence over issues of their respective interests, regional and national, under the terms of paragraphs of art. 24 of the CRFB and also of art. 21 of the Charter.

In cases of conflicts over the federal competence of laws that

have a multidisciplinary nature, it is necessary to examine whether the entity that has exclusive and exclusive competence over a certain matter has ruled out the possibility of other entities to manifest themselves on it when the same theme was subject to more than one approach.

In this way, it is possible to equate the presumption of constitutionality of state and municipal laws with the national harmonization made by the Union in other matters. It would be possible to glimpse, thus, a principle of subsidiarity in Brazilian law consisting in recognizing the preference for national law, provided that the Union has effectively legislated and removed the competence of other entities on the matter. At the same time that it recognizes the presumption in favor of the competence of the States and Municipalities, guaranteeing the political decentralization erected as a fundamental clause by the Federal Constitution, this solution also has the advantage of allowing the Union, through the exercise of its Legislative Power, to harmonize, if it sees fit, the most diverse and plural legal situations. The Judiciary, on its turn, should abstain from opting for the federalization of the issues, if there is no express rule of the Union in this respect.

While it is true that such a solution allows greater citizen participation in the production of binding collective decisions, one should not confuse, of course, the greater proximity of government, which naturally occurs in municipalities, with more democracy. The Constitution is also a counterpoint to the capture of local government by oligarchies. It is precisely here that the material source of competence of the other federative entities resides: as long as it favors the material realization of constitutionally guaranteed rights, the Union, or the States, in their respective competencies, can dispose about matters that affect the local interest. Federalism becomes, therefore, an instrument of political decentralization, not to simply distribute political power, but to realize fundamental rights.

Thus, it would be possible to overcome the merely formal content of the principle and recognize a material aspect: only when the federal or state law clearly indicates, in an adequate, necessary and

If the effects of its application exclude the power of complementation held by smaller entities (*clear statement rule*), it would be possible to rule out the presumption that, at the regional level, a certain subject must be regulated by the larger entity.

In summary, the doctrine of preemption is, therefore, the one that best fits the requirement of the presumption of constitutionality of rules made by the other entities of the federation. As Ernest A. Young warns:

> "This doctrine has employed rules for interpreting laws - the traditional presumption against preemption - rather than strict limits on congressional authority. For this reason, its application gives Congress the final say and minimizes direct confrontation. Moreover, the preemption doctrine has not applied material categories or public policy values that have failed in the past. *Clear statement* rules signal the strengthening of political representation and the increased costs of circumventing procedural rules of federal action. More importantly, the doctrine of preemption allows the judiciary to focus on what it can do best: protect the regulatory autonomy of the states."
>
> (YOUNG, Ernest A. *Federal Preemption and State Autonomy*. In: EPSTEIN, Richard A. e GREVE, Michael S. *Federal Preemption. States' Powers, National Interests*. Washington: The AEI Press, 2007, p. 254).

Let us emphasize: any convenience in harmonizing a certain theme related to the concurrent or common competence of the entities of the federation requires a law in the strict sense, edited by the Union. It is not given to the judge to presume that the exercise of competence by the legislative branch has been done in an unconstitutional manner. Therefore, only when there is a rule that clearly indicates the obstacle to the exercise of the competence of the other entities, is that there is room for the Judiciary to act. In other words, in the absence of a norm edited by the entity with exclusive competence, the Judiciary cannot rule out the presumption

of the constitutionality of the state or municipal rule edited based on the concurrent or common competence.

In casu, the federal regulation Law No. 12,587/2012, which establishes the National Policy for Urban Mobility and which was already in force at the time of the judgment of the direct action, preserved, in this case, the material attribution of the municipal entities to plan, execute and evaluate the respective urban transportation services, under the terms of its article 18, I, whose content I reproduce:

> "Art. 18: The Municipalities have the following attributions
> I - plan, execute and evaluate the urban mobility policy, as well as promote the regulation of urban transportation services;"

Under the terms defined by the federal legislation, there is no room for the exercise of municipal competence aimed at prohibiting a certain mode of urban transport. It is up to the municipal power to regulate, not abolish the system of provision.

Therefore, in light of the constitutional system of division of competence, the competence of municipalities to legislate on themes related to local interest (art. 30, I, CRFB) or to supplement federal and state legislation (art. 30, II, CRFB), cannot overlap with the competence to legislate on matters contained in the exclusive domain of the Union, under the terms of art. 22, IX, of the CRFB, as pointed out by the Attorney General in an opinion attached to the case records.

In other words, the existence of a federal rule that clearly removes the legislative competence of municipalities removes the presumption of constitutionality enjoyed by municipal laws. The São Paulo law challenged in this direct action is, on this point, formally unconstitutional.

Although these fundamentals already indicate that I am following the conclusions reached by the Rapporteur, I emphasize, by way of *obiter dictum*, my understanding regarding the offense to free enterprise. This is because, with regard to the material unconstitutionality, the freedom to

regulation by the entities of the federation and, in the case in question,

To justify such a position, it is necessary to recall the content of the impugned law:

> "Art. 1 It is forbidden in the city of Fortaleza the individual public transport of passengers without the proper legal permission. Art. 2: The infraction to what is established in this Law will bring to the driver a fine of R$ 1.400,00 (one thousand and four hundred reais), applied until the limit of 4 (four) times the value of the fine, in in case of recurrence within a period of 12 (twelve) months.
>
> Art. 3 The expenses with the execution of this Law will be covered by its own budget appropriations, supplemented if necessary.
>
> Art. 4 This Law goes into effect on the date of its publication, revoking provisions to the contrary. "

As can be seen from the reading of the law, the norm seeks to frame the services that today, by the incidence of Law 12.587/2012, amended by Law 13.640/2018, are known as "individual private remunerated transportation of passengers" (art. 4, X, of Law 12.587/2012) in the regulation of the cab service. In summary, the impugned rule aims to equate the service on apps, such as *Uber* and *Cabify*, with the cab service.

Having put the question in these terms, it is necessary to point out that even if the existence of a formal defect is overcome, according to the *above-mentioned* reasoning, the legal power for the Municipalities to equate the services no longer exists.

In fact, with the specific regulation of each of these modalities of passenger transportation by Federal Law 13.640/2018, municipalities can no longer, under the pretext of regulating a matter of local interest, contradict the common and general discipline of federal law.

> Law 12.587/2012
>
> "Art. 4 For the purposes of this Law, it is considered:
>
> I - urban transport: all modes and services of public and private transport used for the displacement of

people and cargo in the cities that are part of the National Policy of Urban Mobility;

II - Urban mobility: condition in which the displacements of people and cargo in the urban space take place;

III - accessibility: facility made available to people that allows everyone autonomy in the desired displacements, respecting the legislation in force;

IV - Motorized transport modes: modalities that use motorized vehicles;

V - Non-motorized transportation modes: modalities that use human effort or animal traction;

VI - public collective transport: public passenger transport service accessible to the entire population by means of individual payment, with routes and prices fixed by the public authority;

VII - private collective transport: passenger transport service not open to the public for trips with operational characteristics unique to each line and demand;

VIII - individual public transport: paid passenger transport service open to the public, by means of hired vehicles, for the accomplishment of individualized trips;

IX - urban freight transport: transport service for goods, animals or merchandise;

X - individual private remunerated transport of passengers: remunerated passenger transport service, not open to the public, to carry out individualized or shared trips requested exclusively by users previously registered on applications or other network communication platforms. (Redaction given by Law 13.640, of 2018);

XI - Urban inter-municipal public transport: collective public transport service between municipalities that have contiguity in their urban perimeters;

XII - interstate collective public transportation of character

urban: collective public transport service between municipalities of different States that maintain contiguity in their urban perimeters; and

XIII - international urban public transport: public transport service between municipalities located in border regions whose cities are defined as twin cities.

(...)

Art. 11-A. It is exclusively up to the Municipalities and the Federal District to regulate and supervise the individual private remunerated transportation service for passengers foreseen in item X of art. 4th of this Law within their territories.

Sole Paragraph. In the regulation and fiscalization of the individual private transport service of passengers, the Municipalities and the Federal District will have to observe the following guidelines, having in mind the efficiency, the efficacy, the security and the effectiveness in the rendering of the service:

I - effective collection of municipal taxes due for the provision of the service;

II - requirement to contract Personal Accident Insurance for Passengers (APP) and Mandatory Insurance for Personal Injury caused by Motor Vehicles on Land (DPVAT);

III - requirement that the driver be registered as an individual taxpayer with the National Institute of Social Security (INSS), under the terms of item *h* of clause V of art. 11 of Law n. 8.213, of July 24, 1991.

Art. 11-B. The individual private transport service of passengers foreseen in item X of art. 4th of this Law, in the Municipalities that choose to regulate it, will only be authorized to the driver who meets the following conditions:

I - have a National Driver's License in category B or higher that contains the information that he/she is engaged in a paid activity;

II - driving a vehicle that meets the maximum age requirements and the characteristics required by the traffic authority and by the municipal and Federal District public power;

III - issue and maintain the Vehicle Registration and Licensing Certificate (CRLV);

IV - submit a negative certificate of criminal record.

Sole Paragraph. The exploitation of remunerated services of individual private transport of passengers without the fulfillment of the requirements foreseen in this Law and in the regulation by the municipal public power and the Federal District will characterize illegal transport of passengers.

Art. 12: The public utility services of individual transport of passengers will have to be organized, disciplined and fiscalized by the municipal public power, based on the minimum requirements of safety, comfort, hygiene, quality of services and previous fixation of the maximum values of the tariffs to be charged.

Art. 12-A. The right to operate cab services may be granted to any interested party who meets the requirements demanded by the local public power.

1. The transfer of the grant to third parties that meet the requirements demanded in municipal legislation is allowed.

In the event of death of the grantor, the right to operate the service will be transferred to his or her lawful heirs, in the terms of Articles 1829 et seq. of Title II of Book V of the Special Part of Law No. 10,406 of January 10, 2002 (Civil Code).

The transfers mentioned in §§ 1 and 2 will take place for the term of the grant and are conditioned to the prior consent of the municipal public power and to compliance with the requirements established for the grant.

Art. 12-B. In the granting of cab service exploration, 10% (ten percent) of the parking spaces will be reserved for handicapped drivers.

To compete for the vacancies reserved in the form of

> **caput of this** article, the disabled driver must observe the following requirements regarding the vehicle used:
>
> I - be owned and driven by him; and
>
> II - be adapted to its needs, according to the legislation in force.
>
> In case the vacancies are not filled in the manner established in the **caption of** this article, the remaining vacancies must be made available to the other competitors."

Nevertheless, were it not for the federal regulation, there would be no unconstitutionality in the municipal rule that equates transportation via app with what is offered by the cab licensing system.

The claim here is that rules that prohibit or disproportionately restrict private individual passenger transport are unconstitutional.

With all due respect to this position, I do not see in the principle of free enterprise the extension that suppresses from the legislator the competence to condition the free exercise of economic activity to the authorization of public agencies. Article 170, sole paragraph, of the CRFB states that "everyone is guaranteed the free exercise of any economic activity, regardless of authorization from public agencies, except in cases provided by law.

It is the constitutional text itself, therefore, that refers the regulation of free enterprise to ordinary law. The law of the Municipality of Fortaleza, on the other hand, simply submitted the individual transportation of passengers to the cab service. It stated, in other words, that the individual transportation of passengers is subject to permission from the Municipality. He said, therefore, that if it is not subject to the permission regime, it is illegal.

This equivalence promoted by the law derives from the federal legislation itself. Law 12,468/2011, which regulates the profession of taxi driver, provides, in its article 2, that "it is a private activity of professional taxi drivers to use a motor vehicle, their own or a third party's, for the

individual remunerated public transport of passengers".

This requirement is not disproportionate. I agree with the diagnosis of the flaws in the regulation of the individual transportation market in Brazil - and of urban transportation in general. The fact that free enterprise is being invoked to crowd out state regulation designed to promote these rights is an indication that there is a problem with state regulation. After all, if consumers opt for the guarantees offered by a private company rather than those offered by the state, the state should re-examine whether it is in fact guaranteeing the right as it set out to do.

No elements were brought, however, to allow an assessment of the quality of the legislation in relation to the rights it is intended to guarantee. The set of allegations of the direct action presents arguments that are restricted to the legislative competence in face of the principle of free enterprise. This parameter, however, even if supported by proportionality, cannot rule out the regulation promoted by the municipality.

The City Council, when providing the information, affirmed that the objective of the law that is the object of the present direct action is to guarantee the safety and reliability of the individual transportation service.

He also argued that the law aims to protect consumers and ensure compliance with traffic rules. In this regard, the federal legislation itself (Law 12,865/2013) provided, in the former wording of its art. 12, that "public services of individual passenger transport, provided under permission, should be organized, disciplined and inspected by the municipal government, based on the minimum requirements of safety, comfort, hygiene, quality of services and prior establishment of maximum values of the rates to be charged.

The invocation of the principle of proportionality must, therefore, be weighed against the legal goods that are protected by the contested legislation. No opposition of rights should be presumed here. Free enterprise is supporting the citizens' access to the best possible quality of health, hygiene, and service,

precisely the object of cab service regulation.

Free enterprise is not incompatible with state regulatory activity. The State is not prohibited from improving the legislation, even if, in practice, this means equating the service intermediated by the platforms with the service provided by taxi drivers. The interpretation of the principle of free enterprise does not go against **the** protection of legal goods.

It is not, therefore, a question of defining whether there should be more or less regulation, but of ensuring that it is the best possible. The protection of consumer rights and the guarantee of public and personal safety are calling for decisive action by the state, which must balance the shares of responsibility among companies, public authorities, consumers, and workers.

From this perspective, the legislator's freedom of conformation to promote the realization of these rights is very broad. He can either authorize the operation of these applications, or prohibit them. This power does not derive exclusively from a previous rule defining the scope of its competence, but from a thorough investigation on the best means to achieve the constitutional purpose of protecting fundamental rights. This is the only way free enterprise can be functionalized, that is, it can be at the service of what it effectively promotes: the increase of well-being.

It is evident that the scope of the competence rule imposes some restrictions on the actions of the bodies that hold them. In other words, the promotion of fundamental rights is not a formula for the universal attribution of competence. Not only must the State justify its choice, but it must also indicate the grounds on which it is legitimated.

The amplitude that should be given to the legislative competence derives, in the hypothesis of the case records, from the regulated activity itself. Although the legislator has, in the changes it has promoted in the National Policy of Urban Mobility, established a difference between cab services and those provided via app, nothing would prevent a new equation. This is because the competence to legislate on transportation, a fundamental social right, art. 6 of the CRFB, grants it this prerogative.

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The jurisdiction could only be removed if it were proven that the service provided by these apps is not, strictly speaking, a transportation service. Evidently, however, this is not the case. In the judgment of the case *Asociación Professional Elite Taxi v. Uber Systems Spain, SL,* the European Court of Justice recognized that:

> "In that regard, it must be noted that an intermediary service consisting in establishing a link between a non-professional driver using his own vehicle and a person wishing to undertake an urban journey is, in principle, a service distinct from a transport service consisting in a physical act of moving persons or goods from one place to another by means of a vehicle. It must be added that each of those services, taken in isolation, is likely to be linked to different directives or provisions of the FEU Treaty relating to the freedom to provide services, as the referring court states.
>
> Thus, an intermediation service enabling the transmission, via a smart phone application, of information relating to the booking of a transport service between the passenger and the non-professional driver using his own vehicle, who will carry out the transport, in principle meets the criteria to be classified as an 'information society service' within the meaning of Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers. That intermediation service is, as the definition in that provision of Directive 98/34 provides, 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'.
>
> In contrast, a non-collective urban transport service, such as a cab service, must be qualified as
> "service in the field of transport" within the meaning of Article 2(2)(d) of Directive 2006/123, read in the light of its recital 21 (see, to that effect, judgment of October 1

2015, Trijber et Harmsen, C- 340/14 and C- 341/14, EU:C:2015:641, n. 49).

However, it should be noted that a service such as the one at issue in the main proceedings is not limited to an intermediary service consisting of establishing a connection, via a smart phone application, between a non-professional driver using his own vehicle and a person wishing to make an urban journey.

In a situation such as that referred to by the referring court, in which passenger transport is provided by non-professional drivers using their own vehicle, the provider of that intermediary service simultaneously creates an offer of urban transport services, which it makes accessible in particular by means of IT tools such as the application at issue in the main proceedings, and the general operation of which it organises for the benefit of persons wishing to use that offer for urban travel.

In that regard, it is apparent from the information available to the Court that Uber's intermediary service is based on the selection of non-professional drivers who use their own vehicle, to whom that company provides an application without which, first, those drivers would not be induced to provide transport services and, secondly, persons wishing to undertake an urban journey would not have access to the services of those drivers. In addition, Uber has a decisive influence on the conditions of the provision of these drivers. As regards the latter point, it is apparent, inter alia, that Uber, through the application bearing the same name, sets at least the maximum price for the journey, charges that price to the customer before handing over a portion to the non-professional driver of the vehicle and exercises a degree of control over the quality of the vehicles and their drivers and over their behaviour, which may, where appropriate, lead to their exclusion.

Therefore, it must be considered that this service of

> intermediation is an integral part of an overall service of which the main element is a transport service and therefore meets the qualification, not of an "information society service" within the meaning of Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers, but of a "service in the field of transport" within the meaning of Article 2(2)(d) of Directive 2006/123."

As can be seen in the Court's decision, the app system is, strictly speaking, an activity that preponderantly falls under the concept of transportation, which is why the State has the authority to regulate it.

Just as there is no constitutional rule or principle that prescribes the exclusivity of the cab model in the individual passenger transport market, there is no economic activity that exempts the State's regulatory activity.

In light of the legislation enacted at the time, one must therefore recognize that there is no material defect in the impugned law that violates the constitutional text, and therefore the unconstitutionality of the impugned law must be recognized, however, due to formal defect.

In view of the above, I follow the Rapporteur as to the result, by the granting of the claim, for different reasons, in the terms of the rationale above.

It's like voting.

PLENARY

PETITION FOR BREACH OF FUNDAMENTAL PRECEPT 449 FEDERAL DISTRICT

ANTICIPATION OF VOTING

SENIOR STATE COMMISSIONER ROSA WEBER - Mr. President, I fully agree with the eminent Minister Luís Roberto Barroso that the appeal should not be granted. The thesis is for a subsequent moment. I have a long written vote, but it is absolutely in line with His Excellency's arguments.

With regard to ADPF 449, I confess to Your Excellency that Justice Luiz Fux's own report points out that the law impugned in the ADPF was expressly revoked by Law No. 10.751/2018 of the Municipality of Fortaleza. I would be more comfortable with the loss of object, but I also have no greater difficulty.

O SENISTRO LUIZ FUX - I think I made some reservations about producing effects until then.

I am, however, more restrictive on this point and I would stay at the loss of object, but I am not going to open a divergence along these lines either, because the underlying theme is exactly the same as that of the extraordinary appeal, and, consequently, the Plenary has already examined it.

SENIOR MARCO AURÉLIO - The prohibition of
application would have already fallen? Because the law is no longer in force, the one that is pointed out as revealing a breach of a fundamental precept. So, it would really be a loss of object.

I even had this doubt.

SENIOR RICARDO LEWANDOWSKI - If you
Your Honor, allow me, Minister. What I am saying, and this was the doubt that arose from Justice Fux's vote, is that article 1 of the impugned law says: "Art. 1 Individual public passenger transport is prohibited in the city of Fortaleza (...)". Those are cabs.

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SENIOR MARCO AURÉLIO - But this law was
revoked.

SENIOR RICARDO LEWANDOWSKI - If she was
revoked, I am not sure that she has not incorporated this expression.

THE COURT **ROSA WEBER -** It's in the report.

SENIOR RICARDO LEWANDOWSKI - But what
I mean that, if she is saying that individual public transportation, which are cabs, depend on legal permission, this law, in my opinion, has no problem. Now, if you want to understand, and that is why I am giving an interpretation according to the law, is to say that this expression does not cover the cars that work through applications, because they have another denomination. They are conceptualized, by law, as private individual passenger transport.

A SENHORA MINISTRA CÁRMEN LUCIAlei
were to prevail, as Your Honor points out, any so-called special passenger transport would be forbidden.

SENIOR RICARDO LEWANDOWSKI - Yes, because
Uber is not individual public transportation, it is private transportation.

That is why I am saying, if it were generic as it is.

SENIOR MARCO AURÉLIO - It seems that the law has already been superseded by the Municipality.

SENIOR MINISTER CÁRMEN LÚCIA - Now, if the law was revoked, I think what Justice Rosa is pointing out is in Justice Fux's report.

SENIOR RICARDO LEWANDOWSKI - Yes, I
I'm not opposed to it, I just have a certain doubt if the new law doesn't also incorporate this concept. It is important that we make, very clearly, the distinction between the legal concepts of these two types of transportation: the public, which is cab, and the private, which is Uber, although open to the public. It is a subtle distinction, but it is a legal distinction.

SENIOR LUIZ FUX - I avoided reading it, of course, because I already voted a long time ago, but I remember having

faced this issue and here I have highlighted the following:

> "As explained in the report, the municipal law challenged in this Argument was expressly repealed by Law No. 10.751/2018 of the Municipality of Fortaleza. This fact, however, does not remove the interest of action in the present case. This is because the utility of the jurisdictional provision persists with the purpose of establishing, with *erga omnes* and binding character, the regime applicable to legal relations established during the validity of the law, as well as with respect to laws of identical content approved in other Municipalities."

THE MINISTER DIAS TOFFOLI (PRESIDENT):

Not least because, if there were sanctions in place, probably...

O SENISTRO MARCO AURÉLIO - But the burdensome act of the Government was expressly pointed out, and this act no longer exists.

SENIOR LUIZ FUX - Continuing:

> "This is the solution most in line with the principle of procedural efficiency and the imperative of using the acts already practiced in a socially beneficial manner. TEORI ZAVASCKI, Full Court, judged on 05/04/2016; ADI 951 ED, Rapporteur: Min. ROBERTO BARROSO, Full Court, judged on 10/27/2016; ADI 4426, Rapporteur: Min. DIAS TOFFOLI, Full Court, judged on 02/09/2011; ADI 5287, Rapporteur: Min. LUIZ FUX, Full Court, judged on 05/18/2016."

SENIOR MARCO AURÉLIO - But here it is a
petition for breach of a fundamental precept.

SENIOR LUIZ FUX - It was also ADPF, the same thing.

THE MINISTER DIAS TOFFOLI (PRESIDENT):

The Rapporteur reaffirms his vote that the ADPF should be heard. I ask Minister **Rosa** if she is considering the ADPF as prejudiced or if she is following the Rapporteur.

I conclude **that** the object of the case has been lost, but I disagree with the continuity of the trial on the other issues. I agree with the Rapporteur on the other issues, because I have just said that I *fully* endorse all the arguments put forward by Minister Luís Roberto in the extraordinary appeal, which has exactly the same object.

PLENARY

PETITION FOR BREACH OF FUNDAMENTAL PRECEPT 449 FEDERAL DISTRICT

NO KNOWLEDGE VOTE

SENIOR MINISTER RICARDO LEWANDOWSKI - Sir President, if this law, as I understand it, has preexisting effects, then I think this ADPF should be considered.

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PLENARY

PETITION FOR BREACH OF FUNDAMENTAL PRECEPT 449 FEDERAL DISTRICT

VOTE CONFIRMATION

SENIOR LUÍS ROBERTO BARROSO - I ratify my position. I think that there is no prejudice, because it is necessary to establish the regime applicable to the legal relations that were in force before. And it has been demonstrated that there were different administrative acts that resulted, in practice, in the prohibition of private individual transport.

Thus, I believe that there is at least a relevant residual interest.

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PLENARY

PETITION FOR BREACH OF FUNDAMENTAL PRECEPT 449 FEDERAL DISTRICT

NO KNOWLEDGE VOTE

SENIOR ALEXANDRE DE MORAES - I maintain the vote and I follow the Rapporteur.

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PLENARY

PETITION FOR BREACH OF FUNDAMENTAL PRECEPT 449 FEDERAL DISTRICT

KNOWLEDGE VOTE

Mr. **Justice EDSON FACHIN** - Mr. President, I also maintain the position, both because there are possible past effects, and because many other municipalities have similar legislation. And I believe it is important to give the meaning and scope of this fundamental precept, because the claim was also made in light of the legislation in force at the time.

I maintain the position.

Document digitally signed according to MP No. 2.200-2/2001 of 24/08/2001. The document can be accessed at http://www.stf.jus.br/portal/autenticacao/autenticarDocumento.asp under the code C75C-1A80-8FF5-668B and password 2BBE-F1EB-AE4E-612F

PLENARY

PETITION FOR BREACH OF FUNDAMENTAL PRECEPT 449 FEDERAL DISTRICT

VOTE

SENIOR MINISTER CÁRMEN LÚCIA - President, in
first, as to the extraordinary appeal, in fact, as to the matter, not only the extraordinary appeal, I think that the greatest concern there is, from the point of view of the socio-legal effectiveness of this decision, is relative to the nature of this service, as was put by Minister Barroso and also by Minister Fux, but in a very specific way in Justice Barroso's vote on the extraordinary appeal, because - Justice Fachin now addresses - a question of the utmost importance for us is whether a passenger, that is, a user of this service considered a special public service, which is the cab, has an administrative regulation of responsibilities, duties, set by law and "competes" with other services that are special public services.competes" with other services that are strictly equal, I, the passenger, submit myself or receive a service also from a person who provides, in a private capacity, but is not subject to the same regulation. This has been and has generated the great debates, all over the world, about this transportation, said here to be private transportation, but which is done in the public space, with a passenger who is a citizen, who needs a regulation to know what the responsibility is, and who, many times, then has this distinction of treatment, on the part of the driver, of the one who provides the service, and on the part of the user. I think that this is what gives the necessary tone for one to know the legal nature of this service and, based on the legal nature, the legal regime to which it is subject.

We have other cases like this and very common, for example, the education formally provided in a private entity is different from the regulations that apply to the provision of education in the public space. But even if a child, for example, is studying in a private school, he is subject to the rules that are identical for both types of establishment.

So let it be clear that, as I understand it, some basic rules really need to be observed, regarding responsibility, regarding guaranteeing the safety of the users of the service, regarding the fact that this service is also a service provided for the public, in the public space, even if by private individuals and subject to another regime.

Therefore, this distinction, this discrímen is made between one activity and another and one legal regime and another, needs to be emphasized so that also the service provider, in this case, the taxi driver, is not disadvantaged because, many times, he finds himself aggravated by a series of demands that are made on him, but which are not made on the private individual.

And the user needs to know that when he uses one service or another, he is therefore making a choice that is not of the same regime. One of us, I who am a constant user of this service know that when I use a service of this nature, in one case or another, I am wanting and needing a service from someone to transport me in a public area, on streets, and it is not clear, President, to the Brazilian user that these services have different obligations, that there are different burdens, that there are different legal regimes. And, therefore, for the provider of the service the circumstances are also different.

SENIOR MARCO AURÉLIO - The lack of regulation does not make the service illegal.

MINISTER CÁRMEN LÚCIA - No, it does not make
illicit, that is exactly what I am getting at. There is no illicitness, on the contrary. The Brazilian Constitution, in relation to the example I gave, of education, the provision of services in private schools, is licit and desirable, but it is not at all exempt from any regulation, like this service here as well.

And he who has a child in a private school knows that the State's obligations towards this child are different from those in a public school, but both services are provided, they are considered public services; the other, a public service provided by a private individual. Professor Celso Antônio makes the difference well, using

examples of essential public services: education and health. Just to say that I am following the Justices-Rapporteurs in both cases.

In the case of the extraordinary appeal, exactly, because it seems to me that there is no illegality and that, therefore, it is not demonstrated in this case any possibility of having the removal of the service, but emphasizing that I fully understand when there is dissatisfaction on the part of the one providing the service, with so many demands, which are not made on the other also providing the service by a system, as Justice Ricardo Lewandowski said now, in an annotated and underlined way, because this is a private service and not a special public service, such as the cab service.

It would be a public utility, not a public service per se.

SENIOR MINISTER CÁRMEN LÚCIA - This other one would not be. Minister Lewandowski even makes a specific reference to private service, to a private service.

Although it is in public space, open to the public, but subject to some regulation, because there you have the safety of the passenger, the use of public roads, submission to a series of requirements. You gave an example, Minister, of other types of transport that are provided - for example, school transport - and that are subject to a series of requirements for inspection, which must be made to guarantee the user of this service and so that there is not such a great distinction between the one that provides the public transport service and a private service that is not subject to any type of requirement, because otherwise very different situations are created. In any case, to make it clear, President, that my vote to follow Justice Barroso takes into consideration the legitimate concerns of those who find themselves in a disadvantageous situation, such as those who provide a service, but who choose to provide a public service. Even the number of cabs is determined by the legislature municipal, everything is subject to a specific legal regime.

Therefore, without neglecting to consider these demands and these

concerns, there is no wrongdoing here to cause the appeal to be judged differently, as the Reporting Justice concluded.

As for the plea of non-compliance with a fundamental precept, I ask permission from Justice Rosa Weber not to follow, because the effects of the norms have not been exhausted, even if they have been replaced. For this reason, also in this case, I follow the vote of the Reporting Justice Luiz Fux.

That's how I vote, Chairman.

PLENARY

PETITION FOR BREACH OF FUNDAMENTAL PRECEPT 449 FEDERAL DISTRICT

I will return to what I have always maintained in the Plenary.

In objective proceedings, we do not elucidate conflicts of interest of a subjective nature. The assumption is the existence of a normative act in full force. I was informed that the act under attack, a normative act, no longer exists. Therefore, in my opinion, the concrete situation generates the loss of object of the plea of breach of a fundamental precept.

I follow Justice Rosa Weber in this part.

In the second part, I agree with the Rapporteurs.

I think that the system of apps was welcome. And, although we don't have, in the national scenario, the recommended regulation, it is a safer system today than the regulated one, which is the cab system. I, at least, instead of taking a cab when I go to Rio or São Paulo, I choose Uber and have the application on my cell phone. I call Uber. I even get checked as a transported by the driver of the vehicle and I also check his performance. It is a public utility service of a private nature in itself.

I follow the Rapporteurs in their votes.

Document digitally signed as per MP n° 2.200-2/2001 of 24/08/2001. The document can be accessed at http://www.stf.jus.br/portal/autenticacao/autenticarDocumento.asp under the code 943A-3282-3520-E91F and password 1A18-0D8B-759D-90BF

PLENARY

EXCERPT FROM THE MINUTES

PETITION FOR BREACH OF FUNDAMENTAL PRECEPT 449
PROCED. : FEDERAL DISTRICT
RELATOR : MIN. LUIZ FUX
RESPONDENT(S) : LIBERAL SOCIAL PARTY
ATTORNEY(S) : RODRIGO SARAIVA MARINHO (15807/CE) AND OTHERS
INTDO.(A/S) : FORTALEZ CITY COUNCIL
ATTORNEY(S): UNREPRESENTED INTDO.(A/S) : MAYOR OF
FORTALEZA ATTORNEY(S): UNREPRESENTED
AM. CURIAE. : BRAZILIAN ASSOCIATION OF INFORMATION TECHNOLOGY AND COMMUNICATION COMPANIES - BRASSCOM
ADV.(A/S) : LUIZ ROBERTO PEROBA BARBOSA (130824/SP)
ADV.(A/S) : ANDRÉ ZONARO GIACCHETTA (147702/SP)
ADV.(A/S) : VICENTE COELHO ARAÚJO (13134/DF)
AM. CURIAE. : CONFEDERACAO NACIONAL DE SERVICOS - CNS
ADV.(A/S) : RICARDO OLIVEIRA GODOI (143250/SP)
ATTORNEY(S) : MARCELO MONTALVAO MACHADO (34391/DF, 4187/SE, 357553/SP)
AM. CURIAE. : MUNICIPALITY OF FORTALEZA
PROC.(A/S)(ES) : ATTORNEY GENERAL OF THE MUNICIPALITY OF
FORTALEZA AM. CURIAE. : NEW NATIONAL PARTY - NEW
LAWYER: FLÁVIO HENRIQUE UNES PEREIRA (0031442/DF) AND OTHERS AM.
CURIAE. UBER DO BRASIL TECNOLOGIA LTDA
ATTORNEY(S) : OTTO BANHO LICKS (RJ079412/) AND OTHERS
AM. CURIAE. SECRETARY OF ECONOMIC MONITORING OF THE MINISTRY OF FINANCE
PROC.(A/S)(ES) : ADVOCATE-GENERAL OF THE UNION
AM. CURIAE. : BRAZILIAN ONLINE TO OFFLINE ASSOCIATION - ABO2O
ADV.(A/S) : MARCOS JOAQUIM GONÇALVES ALVES (20389/DF) AND OTHERS

Decision: After the votes of Justices Luiz Fux (Rapporteur) and Roberto Barroso, who upheld the petition for breach of fundamental precept, Justice Ricardo Lewandowski requested access to the case records. The following spoke: for the plaintiff, Dr. Rodrigo Saraiva Marinho; for the amicus curiae PARTIDO NOVO NACIONAL - NOVO the Dr. Flávio Henrique Unes Pereira; for the amicus curiae CONFEDERAÇÃO NACIONAL DE SERVIÇOS - CNS, Dr. Orlando Maia Neto;
for amicus curiae UBER DO BRASIL TECNOLOGIA LTDA, Dr. Carlos Mário da Silva Velloso Filho; and, for amicus curiae ASSOCIAÇÃO BRASILEIRA DAS EMPRESAS DE TECNOLOGIA DA INFORMAÇÃO E COMUNICAÇÃO - BRASSCOM, Dr. André Zonaro Giacchetta. Justified absences: Justices Celso de Mello and Cármen Lúcia. Presiding Justice Dias Toffoli. Plenary, 6.12.2018.

Decision: Preliminarily, the Court, by majority vote, took cognizance of the plea of breach of fundamental precept, the

Justices Rosa Weber and Marco Aurélio, who judged it prejudiced. On the merits, it unanimously granted the claim to declare unconstitutional, *in full, the* Municipal Law of Fortaleza No. 10.553/2016, as per the Rapporteur's vote. Minister Celso de Mello was absent, with justification. Presiding Justice Dias Toffoli. Plenary, 05.08.2019.

Presiding Justice Dias Toffoli. Justices Marco Aurélio, Gilmar Mendes, Ricardo Lewandowski, Cármen Lúcia, Luiz Fux, Rosa Weber, Roberto Barroso, Edson Fachin and Alexandre de Moraes attended the session.

Minister Celso de Mello was absent, with good reason. Attorney General of the Republic, Dr. Raquel Elias Ferreira Dodge.

Carmen Lilian Oliveira de Souza
Chief Plenary Advisor