

## **Supreme Court overturns lifetime review theory for pension calculation**

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*The decision prevents an impact of R\$480 billion, according to the 2024 Budget Guidelines Act*

In a surprising turn of events, when assessing the validity of amendments to the Social Security Benefits Act (Law 8213/1991) introduced by Law 9876/1999, the Federal Supreme Court overturned the “lifetime review” theory. The retirees’ loss is a billion-reais victory for the federal government, which estimated a potential cost of R\$480 billion, according to the 2024 Budget Guidelines Act.

The financial impact discussed was not unanimous. For the Brazilian Institute of Social Security Law (IBDP), there were about 383,000 benefits eligible for review, and the amount would be much lower—R\$1.5 billion. That’s because the theory would benefit a restricted group of retirees—only those who were in the transition rule of the 1999 Social Security Reform would be in a disadvantaged position in relation to the planned rule.

When ruling on the matter in December 2022, the Supreme Court gave retirees an option for the more beneficial calculation. Today, a new composition of the Court overturned this possibility in the rulings of two other cases (ADI 2110 and 2111), where the review was a secondary issue. Additionally, an appeal related to the 2022 decision (RE 1276977) was on the agenda but was not addressed.

In Thursday’s (21) ruling, the justices validated the creation of the social security factor and made family allowance payments—government-provided benefits intended to support families with children by helping to cover some of the costs of their upbringing and education—conditional on presenting a vaccination card and verifying the child’s school attendance. By a majority vote (six to five), the requirement for a ten-month waiting period for maternity leave payments to individual contributors was eliminated. Justices Edson Fachin, Flávio Dino, Luiz Fux, Cármen Lúcia, Dias Toffoli, and Luís Roberto Barroso voted in this manner.

The main point of contention was precisely the transition rule established in Article 3 of Law 9876. Until the enactment of this law, retirement benefits were calculated based on the 36 highest salaries received in the 48 months before retirement or the

beneficiary's death. Following the law, the calculation considered the highest 80% of salaries received throughout the worker's life.

The law established a transition rule for those who had started contributing by its publication date but had not yet retired, which was to calculate using the highest 80% of salaries received, excluding salaries prior to July 1994, when the Real Plan—a set of measures implemented in Brazil in 1994 to stabilize the country's economy—was implemented.

The divergence analyzed on Thursday (21) by the Supreme Court was in the transition regime. The justices debated whether the beneficiary would be subject to the transition rule or could benefit from the definitive rule applicable to those who joined later.

The obligation of the transition regime was the prevailing understanding by seven votes to four. Voting in this direction were Justices Cristiano Zanin, Flávio Dino, Dias Toffoli, Gilmar Mendes, Luiz Fux, Luís Roberto Barroso, and Nunes Marques.

The approved thesis clarifies: “The constitutional validation of Article 3 of Law 9876/1999 requires that this legal provision be mandatorily followed by other judicial bodies and the public administration, strictly according to its literal interpretation, which admits no exceptions. Consequently, social security beneficiaries falling under this provision are not permitted to choose the definitive rule, even if it would be more advantageous to them.”

João Badari, a partner at Aith, Badari e Luchin Advogados and representing retirees as an *amicus curiae*, stated, “By reviving two direct actions for the declaration of unconstitutionality that didn't originally address the ‘lifetime review,’ they successfully annulled it. That effectively terminated the retirees' rights.”

Diego Cherulli, director of the Brazilian Institute of Social Security Law, highlighted the Court's decision's dependency on its composition, describing the day's events as a procedural coup. “They employed a 25-year-old case to overturn a new thesis adjudicated in general repercussion. This approach raises significant procedural questions and poses a serious threat to legal certainty,” he explained. Mr. Cherulli further emphasized the gravity of the situation, adding, “The implications for retirees and pensioners are profoundly detrimental.”

According to Mr. Cherulli, some beneficiaries who have already secured their rights in court cases with no further appeal possible (*res judicata*) should see no change. However, those with ongoing proceedings will likely be denied their requests.

“As part of a procedural strategy by those aiming to win the case, they prioritized the lawsuits tried today, thereby securing the right. It was a tactical move to use one case to overturn another,” Mr. Cherulli stated. He expects the appeal pending from the 2022 decision to be deemed moot and dismissed.

The lawsuits judged now reached the Full Bench after Justice Cristiano Zanin highlighted them in the STF’s Virtual Plenary, where he also led the majority vote. Justice Alexandre de Moraes expressed strong reservations about re-evaluating the lifetime review under these circumstances. He clarified, “If we proceed with a review, it means we’re in a position where one Plenary is reviewing the decision of another Plenary due to the Court’s changed composition since the 2022 session.”

Justice Cristiano Zanin mentioned that the appeal concerning the lifetime review has not achieved *res judicata* status, and the motions for clarification, set for Thursday’s (21) agenda, remain unresolved. “The merits have already been adjudicated; any further review would constitute an oversight or contradiction,” Justice Moraes articulated in his vote.

The General Counsel for the Federal Government, Jorge Messias, stated that the decision safeguards the integrity of public accounts and the financial stability of Social Security. “This is a paradigmatic decision for the country,” he remarked.

Moreover, Mr. Messias noted that the decision prevents the emergence of a “scenario of judicial and administrative chaos” that the National Social Security Institute would have inevitably faced had it been required to apply the so-called lifetime review thesis, as highlighted in the arguments made by the Office of the General Counsel for the Federal Government in the cases presented to the Supreme Court.

“The Supreme Court’s decision ensures legal certainty and reaffirms a stance the court itself established over 20 years ago,” Mr. Messias commented.

The federal government’s economic policy team widely acclaimed the decision. “It’s a significant win for the country,” a Finance Ministry source expressed. Although the 2024 Budget Guidelines Act includes the R\$480 billion, the Supreme Court’s ruling, while not generating additional revenue, ensures the federal government is no longer at risk of forfeiting the amount estimated by the economic policy team. Since taking office, Finance Minister Fernando Haddad has repeatedly underscored the importance of Thursday’s (21) decision.

<https://valorinternational.globo.com/law/news/2024/03/22/supreme-court-overturns-lifetime-review-theory-for-pension-calculation.ghtml>

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