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IN THE SUPREME COURT OF FLORIDA

R.J. REYNOLDS TOBACCO COMPANY,

Petitioner,

Case No. SC16-218

v.

L.T. No. 4D13-1703

PHIL J. MAROTTA, as Personal Representative of the Estate of Phil F. Marotta, Deceased,

Respondent.

ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

AMICUS BRIEF OF THE FLORIDA JUSTICE ASSOCIATION IN SUPPORT OF RESPONDENT, PHIL J. MAROTTA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF PHIL F. MAROTTA, DECEASED,

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CELENE H. HUMPHRIES
Florida Bar No. 884881
chumphries@bhappeals.com
MAEGEN P. LUKA
Florida Bar No. 549851
mluka@bhappeals.com
THOMAS J. SEIDER
Florida Bar No. 86238
tseider@bhappeals.com
BRANNOCK & HUMPHRIES
1111 W. Cass Street, Suite 200
Tampa, Florida 33606
Tel: (813) 223-4300
Fax: (813) 262-0604
eservice@bhappeals.com

Attorneys for Amicus, Florida Justice Association

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The Florida Justice Association ("FJA") is a statewide, not-for-profit, voluntary association of more than four thousand attorneys concentrating on litigation in all areas of the law. FJA members are pledged to the preservation of the American legal system, as well as the protection of Florida's citizens. These interests are implicated by the issues before this Court because the net effect of R.J. Reynold Tobacco Company's argument would be to upend the historic balance between Federal/State relations, undermining the autonomy that allows states to serve the valuable role of protecting their citizens.

SUMMARY OF THE ARGUMENT

At heart, R.J. Reynolds Tobacco Company argues that state tort law on cigarette smoking is preempted because Congress has regulated cigarettes for years, but has never banned them. Not only is R.J. Reynolds' argument wrong legally, it implicates "far greater interference with state legal remedies, producing a serious intrusion into state sovereignty while simultaneously wiping out the possibility of remedy for . . . alleged injuries." *Medtronic, Inc. v. Lohr*, 518 U.S, 470, 488 (1996). Under R. J. Reynolds' rationale, every state law cause of action against "inherently dangerous" products would be preempted, no matter what the defendant's specific conduct actually was, as long as *some* federal regulations

apply. Adopting this argument would be a breathtaking expansion of obstacle preemption that would jeopardize states' sovereign authority to protect their citizens from injury by all sorts of products, not just cigarettes.

ARGUMENT

The FJA fully joins in the detailed, substantive analysis presented by the Respondent. We file this amicus brief to address the impact of R.J. Reynolds' broad implied preemption argument on consumer protection law in Florida. R.J. Reynolds' novel preemption theory posits that Congress preempts products liability lawsuits if it takes any action with respect to a product, such as requiring a warning label, but declines to impose a nationwide ban.

This is an incredibly broad reading of the implied preemption doctrine that turns the traditional "presumption against preemption" on its head. *See, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 575 (2009). The United States Supreme Court time and again has held "that the absence of regulation [does not] itself constitute[] regulation." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286 (1995); *cf. Sprietsma v. Mercury Marine*, 537 U.S. 51, 67 (2002) (The situation is different if Congress takes the "further step of deciding that, as a matter of policy, the States and their political subdivisions should not" exercise their regulatory authority.). Otherwise, "deliberate federal inaction could always imply pre-emption, which cannot be."

Puerto Rico Dep't of Consumer Affairs v. Isla Petrol. Corp., 485 U.S. 495, 503 (1988).

This "presumption against preemption is heightened where federal law is said to bar state action in fields of traditional state regulation." *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 334 (2008) (internal quotation marks omitted). Courts presume that Congress did not supplant the "historic police powers of the States" unless such a purpose is "clear and manifest." *Wyeth*, 555 U.S. at 565 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). The requirement is even more demanding where a preemption of state tort remedies would leave injured persons without recourse. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."). The implication that "Congress would have barred most, if not all, relief" for persons so injured is "perverse." *Lohr*, 518 U.S. at 487.

The potential perverse impact of R.J. Reynolds' argument becomes clear when you consider some of the products currently on the market which are heavily regulated by Congress because of their inherent risks. Under R.J. Reynolds' rationale, every state law cause of action against "inherently dangerous" pharmaceuticals would be preempted, no matter what the specific conduct in the manufacture or application. *Contra Wyeth*, 555 U.S. 555. Similarly, an

"inherently dangerous" pesticide would be immunized from suit, even if it destroyed a farmer's crops. *Contra Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005). No person injured by an "inherently defective" seatbelt could recover. *Contra Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323 (2011). And, product liability actions against airplane manufacturers would be barred. *Contra Sikkelee v. Precision Airmotive Corp.*, --- F.3d ---, 2016 WL 1567236 (3d Cir. Apr. 19, 2016). There could be no strict liability, for example, in the classic case of blasting if Congress had acted to regulate the sale and labeling of the explosives, but never banned them. According to R.J. Reynolds, because the only way to avoid liability for injuries would be to refrain from this ultrahazardous activity, any judgment based on strict liability would be preempted. Plainly, that is not the law.

Not only is R.J. Reynolds' theory wrong, it also defies common sense. The federal government extensively regulates many products without precluding state regulation or bans, and allows states to permit in-state use of products that are banned in interstate commerce.

Examples abound. The federal government regulates the transportation of consumer fireworks in interstate commerce, yet several states permit only sparklers or novelty fireworks, and three states ban fireworks entirely. *See* 27 C.F.R. § 555.1 *et seq.*; *see also, e.g.*, Mass. Gen. Laws ch. 148, § 39. State laws regulating,

or even banning, fireworks are not preempted. *See Pickelman v. Mich. State Police*, 31 F. App'x 298, 302 (6th Cir. 2002) (unpublished).

The list of products regulated by the federal government that states may ban goes on:

- MTBE. *See In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 457 F. Supp. 2d 324, 336 (S.D.N.Y. 2006), *aff'd*, 725 F.3d 65 (2d Cir 2013).
- BPA. *See In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, No. 08-1967, 2009 WL 3762965, at *4 (W.D. Mo. Nov. 9, 2009).
- Kangaroos. *See Viva! Int'l Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, 162 P.3d 569, 582-83 (Cal. 2007) (holding that California's ban on the importation of products made from kangaroo was not preempted despite long history of federal regulation and deregulation of commercial trade in kangaroos and their parts).
- Lead fishing tackle. *Compare* Letter from James J. Jones, Acting Assistant Administrator, EPA, to Adam Keats (Feb. 14, 2012) (denying petition to ban lead fishing tackle, but recognizing authority to do so), *with, e.g.*, N.Y. Envtl. Conservation Law § 11-0308 (banning lead fishing tackle).

Many of these products are subject to federal regulation far more pervasive than the laws governing tobacco at the time of the conduct at issue here. But, even when a "federal statutory regulation . . . is comprehensive and detailed[,] matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994).

The absurdity of the free-floating obstacle preemption claimed by R.J. Reynolds is evident from a brief consideration of cotton production. A New Deal-era statute (the Agricultural Adjustment Act of 1938, 52 Stat. 31) sought to stabilize the prices of various crops, including cotton. In addressing cotton prices, did Congress preempt state regulation of the use of industrial dyes or controls on the flammability of children's cotton clothing? Clearly, any such state regulation would affect the costs of production and consequently have an impact on interstate commerce. But the answer is decidedly no, even in the face of additional, specific federal regulations addressing flammability standards. *See Wilson v. Bradlees of New England, Inc.*, 96 F.3d 552, 559 (1st Cir. 1996) (finding, despite federal regulation, no preemption under the Flammable Fabrics Act, 15 U.S.C. § 1203(a), including for negligence and strict liability on design and warnings); *Howard v. McCrory Corp.*, 601 F.2d 133, 138-39 (4th Cir. 1979) (holding that compliance with federal flammable fabrics statute does not preclude state common law liability for flammable children's pajamas and bathrobes).

R.J. Reynolds ignores all of this and claims that the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334, was *intended* to guarantee that cigarettes would remain on the market in all fifty states, regardless of what those states think about the unimpeded sale of cigarettes. Adopting this argument would be a breathtaking expansion of obstacle preemption that would jeopardize states' sovereign authority to protect their citizens from injury by all sorts of products, not just cigarettes. *See Berger v. Philip Morris USA, Inc.*, --- F. Supp. 3d ---, 2016 WL 2593841, at *10 (Fla. M.D. May 5, 2016); Micah Berman, *Eleventh Circuit finds Tobacco Suits* Preempted*: Trouble for Future Public Health Regulations?*, Notice & Comment, Yale J. on Reg. (Apr. 19, 2015) (http://www.yalejreg.com/blog/eleventh-circuit-finds-tobacco-suits-preempted-trouble-for-future-public-health-regulations-by-micah). This Court should reject R.J. Reynolds' invitation to do so and, instead, stay the course dictated by long-standing United States Supreme Court jurisprudence, as argued in detail by Respondent.

CONCLUSION

R.J. Reynolds argues that state tort law on cigarette smoking is preempted because Congress has regulated cigarettes for years, but has never banned them. Adopting this argument would be a breathtaking expansion of obstacle preemption

that would jeopardize states' sovereign authority to protect their citizens from injury by all sorts of products, not just cigarettes. This Court should reject R.J. Reynolds' invitation to upend the autonomy that allows states to perform the valuable role of protecting their citizens.

CELENE H. HUMPHRIES
Florida Bar No. 884881
chumphries@bhappeals.com
MAEGEN P. LUKA
Florida Bar No. 549851
mluka@bhappeals.com
THOMAS J. SEIDER
Florida Bar No. 86238
tseider@bhappeals.com
BRANNOCK & HUMPHRIES
1111 W. Cass Street, Suite 200
Tampa, Florida 33606
Tel: (813) 223-4300
Fax: (813) 262-0604
eservice@bhappeals.com

Attorneys for Amicus, Florida Justice Association

CERTIFICATE OF SERVICE

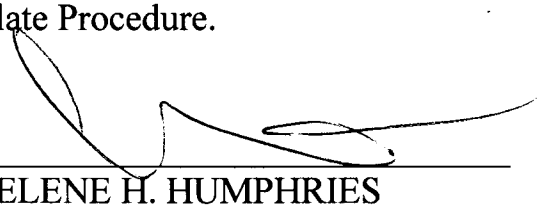
I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by email to Richard Rosenthal (rbr@rosenthalappeals.com), Law Offices of Richard B. Rosenthal, P.A., 1581 Brickell Ave., Suite 1408, Miami, Florida 33129; Philip Freidin (pf@fblawyers.net), Freidin Brown, P.A., 2 South Biscayne Blvd., Suite 3100, Miami, Florida 33131; Alex Alvarez

(alex.alvarez@integrityforjustice.com), The Alvarez Law Firm, 355 Palermo Ave., Miami, Florida 33134; Randy Rosenblum (rrosenblum@ddrlawyers.com), Dolan Dobrinsky Rosenblum, LLP, 2665 South Bayshore Blvd., Suite 609, Miami, Florida 33133; Robert E. Schack (reslegal@hotmail.com), 8950 Southwest 74 Court, Suite 1711, Miami, Florida 33156; Eric L. Lundt (eric.lundt@sedgwicklaw.com) and Robert Weill (robert.weill@sedgwicklaw.com; david.saltares@sedgwicklaw.com), Sedgwick LLP, 2400 E. Commercial Blvd., Suite 1100, Ft. Lauderdale, Florida 33308; Gregory G. Katsas (ggkatsas@jonesday.com), Jones Day, 51 Louisiana Ave., N.W., Washington, DC 20001; Charles R.A. Morse (cramorse@jonesday.com; preichert@jonesday.com), Jones Day, 222 East 41st Street, New York, New York 10017; and John S. Mills (jmills@mills-appeals.com) and Courtney Brewer (cbrewer@mills-appeals.com; service@mills-appeals.com), The Mills Firm, P.A., 325 Calhoun Street, Tallahassee, Florida 32301, this 30th day of June 2016.

CELENE H. HUMPHRIES
Florida Bar No. 884881

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.



CELENE H. HUMPHRIES
Florida Bar No. 884881