Filing # 42971414 E-Filed 06/20/2016 02:19:14 PM

IN THE SUPREME COURT OF FLORIDA

R.J. REYNOLDS TOBACCO CO.,

Petitioner,

v.

Case No.: SC16-218
L.T. No.: 4D13-1703

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

Respondent.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF FLORIDA

AMICUS BRIEF OF *ENGLE* PLAINTIFFS' FIRMS IN SUPPORT OF RESPONDENT

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STATEMENT OF IDENTITY AND INTEREST OF AMICI

The amici curiae filing this brief are the law firms of Abrahamson & Uiterwyk; Avera & Smith, LLP; David J. Sales, P.A.; Doffermyre Shields Canfield & Knowles, LLC; The Ferraro Law Firm; Gordon & Doner; Kelley Uustal, PLC; Knopf Bigger; Law Offices of Howard M. Acosta; Law Offices of John S. Kalil, P.A.; Law Offices of William J. Wichmann, P.A.; Levin Papantonio Thomas Mitchell Rafferty & Proctor, P.A.; The Mills Firm, P.A.; Morgan & Morgan; Schlesinger Law Offices, P.A.; Searcy Denney Scarola Barnhart & Shipley, P.A.; Terrell Hogan Yegelwel, P.A.; Trop Law Group, P.A.; Vaka Law Group; The Whittemore Law Group, P.A.; and Wiggins Childs Pantazis Fisher & Goldfarb, LLC (hereinafter, "Amici"). The Amici collectively represent hundreds of *Engle* class members in their individual actions against the tobacco companies.

These clients, who are far too numerous to list individually, have a direct interest in this case because they wish to hold on to the rights secured on their behalf in the *Engle* class litigation. They will be severely and negatively affected if this Court retreats from its holdings in *Engle*. Amici are interested in this case because they relied on the finality afforded by the res judicata effect of *Engle* findings in taking on these cases; R.J. Reynolds's arguments here threaten to undo that finality. As such, they also appeared as amici supporting the petition for rehearing en banc of the now-vacated opinion in *Graham v. R.J. Reynolds Tobacco*

Co., 782 F.3d 1261 (11th Cir. 2015), and have been granted leave to appear as amici in the en banc rehearing proceeding currently pending at the Eleventh Circuit.

SUMMARY OF ARGUMENT

In the answer brief, Mr. Marotta details the claims made by the *Engle* class, how those claims foreclose the preemption argument, and how the tobacco defendants presented and Florida courts considered the same federal preemption argument made here throughout the original *Engle* litigation. Yet these details were never presented to the panel in *Graham* prior to the panel's now-vacated decision. Instead, the plaintiff there largely accepted at face value the tobacco defendants' characterization of the *Engle* class proceedings and argued why the preemption and due process arguments failed as a matter of law. While Mr. Graham's arguments were undoubtedly correct, the panel's decision, even had it not been vacated, lacks any persuasive value based on its misapprehension of the claims raised and preemption arguments made in *Engle*.

This Court should find the preemption argument is but one more attempt by a tobacco defendant to further delay these cases with an argument that was long ago settled in *Engle*. Similarly, RJR's continued refrain that it has been denied due process is an argument that has been rejected many times over and any fears thereto are alleviated by the actual record in these cases.

ARGUMENT

I. THE NOW-VACATED PANEL DECISION IN *GRAHAM* WAS BASED ON A FUNDAMENTAL AND UNCORRECTED MISCONCEPTION ABOUT THE CLAIMS MADE BY THE *ENGLE* CLASS.

In certifying its question of great public importance, the Fourth District set forth its disagreement with the merits of the Eleventh Circuit's preemption decision in *Graham v. R.J. Reynolds Tobacco Co.*, 782 F.3d 1261 (11th Cir. 2015). Not only has the original panel decision in *Graham* since been vacated and is subject to en banc rehearing, 811 F.3d 434 (11th Cir. 2016), it was based on a faulty premise never clarified by the *Engle* plaintiff there.

The panel's opinion rested entirely on the conclusion that the *Engle* strict liability and negligence findings apply to "all cigarettes," an assertion the panel repeated again and again. *E.g.*, *Graham*, 782 F.3d at 1282, 1284. But the reality in *Engle* progeny cases, including Mr. Graham and Mr. Marotta's cases, is that the claims and evidence demonstrate that RJR and its cohorts deliberately manipulated the nicotine in their cigarettes to ensure addiction to keep people smoking to the point of death. (Ans. Br. 3-11.) Reflecting that underlying premise, the *Engle* record is clear that the original class action was never tried as an attack on all cigarettes. (Ans. Br. 6-11.) While the class did allege that cigarettes cause cancer

and it would have lost had it not proven that, the class did not seek to impose liability based on this fact alone.[1]

But while Mr. Marotta has thoroughly identified the faulty premise underlying RJR's analysis for this Court, Mr. Graham did not do so for the Eleventh Circuit. As here, the tobacco defendants in *Graham*, including RJR, argued that the *Engle* defect and negligence claims were based on the "inherent" risks of "all cigarettes." (*Graham v. R.J. Reynolds Tobacco Co.*, No. 13-14590 (11th Cir. Def. Br. filed Jan. 23, 2014), at 2.) They claimed that "the class asserted broad allegations that all cigarettes are defective, or that the sale of all cigarettes is negligent." (*Id.* at 4.) Critically, the plaintiff in *Graham* at no point corrected the tobacco defendants' misleading statements about the claims in his case or *Engle*.

[1] Had it done so, the jury's answer to the first question (cigarettes cause disease) would have been the basis for liability. But it was not. This fact no more established liability here than the fact that car wrecks cause injuries would establish a manufacturer's liability in an auto products liability case. The basis for liability asserted in the strict liability and negligence claims was that **these specific manufacturers** designed **their cigarettes** by manipulating the nicotine to ensure addiction, failed to warn their customers of this manipulation before 1969, and declined to use safer available alternative designs that would not addict. By the very definition of the class, these smokers did not get cancer merely because they smoked some cigarettes; their injuries are caused by smoking multiple packs of cigarettes a day for decades as a result of addiction, not free choice. *See Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 431-32 (Fla. 2013) ("[P]roving class membership often hinges on the contested issue of whether the plaintiff smoked cigarettes because of addiction or for some other reason (like the reasons of stress relief, enjoyment of cigarettes, and weight control argued below).").

(*Graham v. R.J. Reynolds Tobacco Co.*, No. 13-14590 (11th Cir. Pltf. Br. filed Mar. 31, 2014).)

Instead, the tobacco defendants' characterization of the *Engle* case was not addressed until after the panel decision. Then, in an amicus brief for *Engle* plaintiffs' firms (largely made up of the same law firms as Amici here), undersigned counsel identified the same *Engle* record citations that show that the claims in these cases were based on the defects caused by the defendants' manipulation of their cigarettes to ensure addiction. (*Graham v. R.J. Reynolds Tobacco Co.*, No. 13-14590 (11th Cir. Amicus Br. of *Engle* State Pls.' Firms in Supp. of Pl.'s Pet. For Reh'g En Banc filed May 4, 2015).) Therein, Amici "acknowledge[d] that their criticisms of the panel's opinion are directed to points that the parties briefed either sparsely (the *Engle* litigation history related to preemption) or not at all (the res judicata argument)." (*Id.* at 8.)

Perhaps misled by the failure to correct the defendants' mischaracterization of these claims, the panel erroneously concluded that the *Engle* findings regarding negligence and strict liability were "premised on the theory that **all** cigarettes are inherently defective and that **every** cigarette sale is an inherently negligent act." *Graham*, 782 F.3d at 1285. Having not been presented with the facts regarding *Engle* and the claims actually made therein, the *Graham* panel decision, even had it not been vacated, would properly be rejected as "unpersuasive." *See Maestas v.*

State, 76 So. 3d 991, 994 (Fla. 4th DCA 2011) (finding federal district court decision unpersuasive "as the decision is based on [a] faulty premise").

II. THE *GRAHAM* PLAINTIFF DID NOT ARGUE THAT THE IMPLIED PREEMPTION DEFENSE IS FORECLOSED BY RES JUDICATA.

Not only did the *Graham* panel misapprehend the basis for *Engle* progeny plaintiffs' strict liability and negligence claims, it also failed to account for the res judicata effect of the *Engle* findings. Again, given that Mr. Graham failed to argue as much in his brief prior to the panel's decision (*Graham v. R.J. Reynolds Tobacco Co.*, No. 13-14590 (11th Cir. Pltf. Br. filed Mar. 31, 2014)), this failure by the panel is not surprising. *See La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 847 (11th Cir. 2004) (refusing to consider argument appellee failed to make in answer brief). Also again, it was a similar group of amici that first briefed the issue at the Eleventh Circuit. (*Graham v. R.J. Reynolds Tobacco Co.*, No. 13-14590, 11th Cir. Amicus Br. of *Engle* State Pls.' Firms in Supp. of Pl.'s Pet. For Reh'g En Banc filed May 4, 2015, at 2 ("The amici first provide what was missing from the parties' briefs—a correct recitation of the history of the class proceedings relating to the *Engle* defendants' preemption defense.").)

By contrast, Mr. Marotta has detailed the fact that implied preemption was litigated extensively in the original *Engle* trial, from the filing of the tobacco defendants' answer to their petition for writ of certiorari. (Ans. Br. 11-16.) As Mr.

Marotta explains, RJR's preemption argument is therefore barred by res judicata. (Ans. Br. 25-32.) This Court has reaffirmed that *Engle* finally adjudicated the "defendants' common liability" on the conduct elements of the strict liability and negligence claims, including every class-wide defense that either was raised or could properly have been raised. *Douglas*, 110 So. 3d at 432-33 (quoting *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1259 (Fla. 2006)); *see also Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687, 698 (Fla. 2015) (holding that the res judicata effect of the *Engle* findings bar the statute of repose defense because it goes to the defendants' conduct, not the plaintiff's reliance).

Neglecting this information, the Eleventh Circuit panel's decision worked as a de novo appeal of this Court's decision. Amici urged the Eleventh Circuit (in an amicus brief after rehearing en banc was granted) to exercise judicial restraint and avoid resolution of the merits of the preemption issue where res judicata provides a state ground to avoid a constitutional question:

> If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable.

Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944). This same "well-settled rule" of judicial restraint has long guided this Court. *See Metro. Dade Cty. Trans. Auth. v. State Dep't of Hwy. Safety & Motor Vehicles*, 283 So. 2d 99, 100 (Fla. 1973) ("[W]e recognized the well-settled rule that precludes us from

deciding constitutional questions whenever the case can be disposed of on a non-constitutional ground.") (citing *Armstrong v. City of Tampa*, 106 So.2d 407 (Fla. 1958); *Ogle v. Pepin*, 273 So. 2d 391 (1973)). Application of res judicata rather than reconsideration of the federal preemption question is the best means of ensuring that such judicial restraint is exercised here. *See also Richards v. Jefferson Cty.*, 517 U.S. 793, 797 (1996) (noting that "[s]tate courts are generally free to develop their own rules for protecting against the relitigation of common issues").

III. RJR'S DUE PROCESS CONCERNS REMAIN UNFOUNDED.

RJR raises the same due process argument the tobacco defendants have made in nearly every case they have lost, usually with the same passing argument that the only way to avoid their due process argument is to create a preemption problem. Every Florida appellate court, this Court, and the Eleventh Circuit has rejected that argument, and the Supreme Court of the United States has denied certiorari on this issue at least seventeen times since *Engle*.[2]

[2] *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 2727 (2014); *Philip Morris USA Inc. v. Douglas*, 110 So. 3d 419 (Fla.), *cert. denied*, 134 S. Ct. 332 (2013); *R.J. Reynolds Tobacco Co. v. Kirkland*, 136 So. 3d 604 (Fla. 2d DCA 2013), *cert. denied*, 134 S. Ct. 2726 (2014); *R.J. Reynolds Tobacco Co. v. Mack*, 134 So. 3d 956 (Fla. 1st DCA), *cert. denied*, 134 S. Ct. 2726 (Fla. 2014); *R.J. Reynolds Tobacco Co. v. Smith*, 131 So. 3d 18 (Fla. 1st DCA), *rev. denied*, 139 So. 3d 299 (Fla.), *cert. denied*, 134 S. Ct. 2727 (2014); *R.J. Reynolds Tobacco Co. v. Sury*, 118 So. 3d 849 (Fla. 1st DCA 2013), *rev. denied*, 134 So. 3d 449 (Fla.), *cert. denied*, 134 S. Ct. 2727 (2014); *R.J.*

While their constitutional claims have been consistently rejected, RJR and its cohorts continue to receive due process at every step. Other than the fact that they do not all burden the same trial court and proceed under different case numbers, it is hard to distinguish an *Engle* progeny trial from the Phase 3 proceedings envisioned in the class trial plan. Although most class members drop the two breach of warranty claims, experience is otherwise consistent with this Court's observation that class members merely "pick up litigation of the approved six causes of action right where the class left off—i.e., with the *Engle* defendants' common liability for those claims established." *Douglas*, 110 So. 3d at 432.

Reynolds Tobacco Co. v. Townsend, 118 So. 3d 844 (Fla. 1st DCA 2013), *rev. denied*, 135 So. 3d 289 (Fla.), *cert. denied*, 134 S. Ct. 2727 (2014); *Lorillard Tobacco Co. v. Mrozek*, 106 So. 3d 479 (Fla. 2012), *rev. denied*, 135 So. 3d 288 (Fla.), *cert. denied*, 134 S. Ct. 2726 (2014); *Philip Morris USA, Inc. v. Barbanell*, 100 So. 3d 152 (Fla. 4th DCA 2012), *rev. denied*, 135 So. 3d 289 (Fla.), *cert. denied*, 134 S. Ct. 2726 (2014); *R.J. Reynolds Tobacco Co. v. Koballa*, 99 So. 3d 630 (Fla. 5th DCA 2012), *rev. denied*, 135 So. 3d 289 (Fla.), *cert. denied*, 134 S. Ct. 2727 (2014); *R.J. Reynolds Tobacco Co. v. Brown*, 70 So. 3d 707 (Fla. 4th DCA 2011), *rev. denied*, 133 So. 3d 931 (Fla.), *cert. denied*, 134 S. Ct. 2726 (2014); *R.J. Reynolds Tobacco Co. v. Clay*, 84 So. 3d 1069 (Fla. 1st DCA), *cert. denied*, 133 S. Ct. 650 (2012); *R.J. Reynolds Tobacco Co. v. Hall*, 70 So. 3d 642 (Fla. 1st DCA 2010), *rev. denied*, 67 So. 3d 1050 (Fla. 2011), *cert. denied*, 132 S. Ct. 1795 (2012); *R.J. Reynolds Tobacco Co. v. Gray*, 63 So. 3d 902 (Fla. 1st DCA), *rev. denied*, 67 So. 3d 1050 (Fla. 2011), *cert. denied*, 132 S. Ct. 1810 (2012); *Liggett Grp. LLC v. Campbell*, 60 So. 3d 1078 (Fla. 1st DCA), *rev. denied*, 67 So. 3d 1050 (Fla. 2011), *cert. denied*, 132 S. Ct. 1794 (2012), *and* 132 S. Ct. 1795 (2012); *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. 1st DCA 2010), *rev. denied*, 67 So. 3d 1050 (Fla. 2011), *cert. denied*, 132 S. Ct. 1794 (2012).

Plaintiffs must prove that by the class cut-off date of November 21, 1996, the smoker (1) was a Florida citizen or resident, *Damiankis v. Philip Morris USA, Inc.*, 155 So. 3d 453, 462-68 (Fla. 2d DCA 2015), who (2) had begun suffering from a tobacco-related disease, *R.J. Reynolds Tobacco Co. v. Ciccone*, No. SC13-2415, 2016 WL 1163361 (Fla. Mar. 24, 2016), and (3) smoked because of addiction as opposed to some other reason, *Douglas*, 110 So. 3d at 431-32. If there is a dispute that their disease manifested before May 5, 1990 (four years prior to the filing of the class complaint), they must overcome a statute of limitations defense. *Frazier v. Philip Morris USA, Inc.*, 89 So. 3d 937, 944-47 (Fla. 3d DCA 2012). Then they must prove their damages, which are reduced by the fault the jury allocates to the smoker at least as to the negligence and strict liability claims. They must further prove the smoker relied on the defendants' concealment to have a shot at avoiding the comparative fault reduction. *R.J. Reynolds Tobacco Co. v. Sury*, 118 So. 3d 849, 851-53 (Fla. 1st DCA 2013); *but see R.J. Reynolds Tobacco Co. v. Schoeff*, 178 So. 3d 487, 495-96 (Fla. 4th DCA 2015), *rev. granted*, No. SC15-2233, 2016 WL 3127698 (Fla. May 26, 2016). Finally, to recover punitive damages, plaintiffs must prove that the defendants' conduct warranted punishment by clear and convincing evidence. *Soffer v. R.J. Reynolds Tobacco Co.*, 187 So. 3d 1219, 1233 (Fla. 2016).

Given this gauntlet each class member must run, tobacco defendants continue to win a significant number of cases. By Amici's count, there have now been 235 *Engle* progeny trials in state or federal court. Plaintiffs obtained 129 verdicts awarding compensatory damages (55%). Defendants have won 73 defense verdicts (31%). The remaining 34 trials (14%) resulted in a mistrial or hung jury, which these defendants tout as "wins."[3] Even when the tobacco companies lose, damages may be very low. *See, e.g., Walker*, 734 F.3d at 1286 (noting judgments in two cases at issue were for $7,676.25 and $27,500). This is hardly the record of defendants who are being deprived of due process.

CONCLUSION

For the foregoing reasons, the Court should answer the certified question in the negative and affirm the decision of the Fourth District.

Respectfully submitted,

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[3] *See, e.g.*, "Remarks by Michael E. Szymanczyk, Altria's Chairman and Chief Executive Officer," 2012 Consumer Analyst Grp. of New York Conference (Feb. 12, 2012), *available at* https://www.sec.gov/Archives/edgar/data/764180/000119312512071640/d304543dex991.htm (last visited June 20, 2016) ("And our record has improved. Since the beginning of 2011, we won or mistried almost two-thirds of the *Engle* cases that went to trial.").

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I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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