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Case No. SC16-218

SUPREME COURT OF FLORIDA

R.J. REYNOLDS TOBACCO COMPANY,

Defendant/Petitioner,

v.

PHIL J. MAROTTA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF PHIL F. MAROTTA,

Plaintiff/Respondent.

On Discretionary Review from a Decision of the Fourth District Court of Appeal

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REPLY BRIEF OF PETITIONER R.J. REYNOLDS TOBACCO COMPANY

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Federal law impliedly preempts state tort claims that seek to impose liability based on the inherent health and addiction risks of cigarettes. The reason is simple: Congress's policy is to preserve a market for cigarettes, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 139 (2000), so the imposition of liability for selling ordinary cigarettes conflicts with that policy, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2000). Thus, the Third District in *Engle* itself, the Fourth District in *Liggett v. Davis*, an Eleventh Circuit panel in *Graham*, and at least nine federal district judges have concluded that federal law impliedly preempts strict-liability and negligence claims based on risks inherent in cigarettes. Initial Brief ("IB") 18-23 (collecting cases).

In this case, the Fourth District rejected that conclusion, but on grounds having nothing to do with *Engle* itself. It reasoned that (1) common-law duties enforced through the tort system are different from legal duties enacted into positive law, (2) states may ban alcohol even though the federal government has not, (3) one federal statute governing cigarettes contains an express-preemption clause that does not apply to Mr. Marotta's claims, and (4) another federal statute contains a savings clause that preserves certain state authority with respect to tobacco. As we have shown, none of these rationales withstands scrutiny. IB 23-30.

In response, Mr. Marotta barely defends the Fourth District's reasoning. He devotes only the last quarter of his brief to the implied-preemption question decid-

ed below. Answer Brief ("AB") 37-48. On that point, he affirmatively abandons the inapt analogy to alcohol (*id.* at 42 n.13), and he does not defend the proposition that tort duties escape preemption because they are enforced through damages remedies, for which even the Fourth District noted binding adverse precedent. *R.J. Reynolds Tobacco Co. v. Marotta*, 182 So. 3d 829, 832 n.2 (Fla. 4th DCA 2016) ("but see" citation to *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2477 (2013)) (App. A). Instead, Mr. Marotta stresses two alternative arguments: that his own strict-liability and negligence claims do not rest on the inherent health and addiction risks of all cigarettes and that, in any event, *Engle* itself either decided or foreclosed the implied-preemption question. AB 25-37. Mr. Marotta also led with those arguments in the courts below. The Fourth District did not accept either of them, and for good reason.

A. Federal Law Impliedly Preempts Tort Claims Premised On The Inherent Health And Addiction Risks Of All Cigarettes

In *Brown & Williamson*, the Supreme Court held that the FDA lacked authority to regulate nicotine as a "drug" under the federal Food, Drug, and Cosmetic Act ("FDCA"). The Court reasoned that, if nicotine qualified as a "drug," the FDCA would require the FDA to ban it. 529 U.S. at 134-35. But a "ban of tobacco products," the Court explained, would "plainly contradict congressional policy" reflected in various other federal statutes specifically "addressing the problem of tobacco use and human health." *Id*. at 139, 143. The Court reviewed these statutes

at length, *see id.* at 137-39, 143-58, and repeatedly concluded that "the collective premise of these statutes is that cigarettes and smokeless tobacco will continue to be sold in the United States." *Id.* at 139; *see also id.* at 137 ("Congress, however, has foreclosed the removal of tobacco products from the market."); *id.* at 139 (statutes "reveal [Congress's] intent that tobacco products remain on the market"). This conclusion was central to the Court's reasoning, and cannot remotely be brushed aside as "clipped dicta" (AB 37).

Mr. Marotta complains that Reynolds cited the governing statutes "in a footnote" and did not expound on each one at length. AB 38. However, the Supreme Court already did that work in *Brown & Williamson*, and Reynolds did lay out the key points (IB 16-18). Among other things, Congress required extensive disclosure about the health risks of smoking on cigarette packages and in cigarette advertising, 15 U.S.C. § 1333; it prohibited cigarette advertising on radio and television, *id.* § 1335; and it required disclosure to the government of cigarette ingredients, *id.* § 1335a. At the same time, however, Congress "stopped well short of ordering a ban" on the sale of cigarettes, *Brown & Williamson*, 529 U.S. at 138; it declared a national policy that "commerce" in cigarettes be "protected to the maximum extent consistent with [its] declared policy" of ensuring that "the public may be adequately informed" of the health risks of smoking, 15 U.S.C. § 1331; and, at all relevant times, it declared that the "marketing of tobacco constitutes one of the great basic

industries of the United States . . . and stable conditions therein are necessary to the general welfare," 7 U.S.C. § 1311(a) (2000).

Mr. Marotta notes that *Brown & Williamson* was not itself a preemption case, and the Supreme Court thus had no occasion to spell out the implied-preemption implications of its ruling. AB 37-38. However, the Court *did* conclude that a "ban of tobacco products" would "plainly contradict congressional policy" as reflected in the various tobacco-specific statutes. 529 U.S. at 139. A ban imposed through state tort law would "plainly contradict" this policy no less than one imposed by the FDA, and would thereby "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Along the same lines, Mr. Marotta errs in suggesting that the FDA lost *Brown & Williamson* because it had no "delegation of authority" from Congress, which "sovereign States" do not need. AB 17. To the contrary, the FDCA provided ample statutory authority for the FDA to regulate drugs, and the Supreme Court took no issue with the FDA's assertion that nicotine, like other drugs under its authority, has "significant pharmacological effects." *See* 529 U.S. at 127. Thus, the dispositive objection was not that the FDCA's grant of authority was too narrow, but that the exercise of that authority would require a ban on cigarettes—and thereby conflict with the later, tobacco-specific statutes through which Congress had foreclosed a ban. *See id.* at 133.

Mr. Marotta attempts to characterize the argument for implied preemption as resting solely on inaction—in particular, Congress's failure to ban cigarettes. AB 39. As shown above, it does not. His own authority describes the governing principle: "Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the preemptive inference can be drawn, not from federal inaction alone, but from inaction joined with action." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Co.*, 485 U.S. 495, 503 (1988). That statement describes this case perfectly. *See Brown & Williamson*, 529 U.S. at 155 ("[T]his is not a case of simple inaction by Congress . . . . To the contrary, Congress has enacted several statutes addressing the particular subject of tobacco and health, creating a distinct regulatory scheme for cigarettes and smokeless tobacco."). Accordingly, cases refusing to find implied preemption from mere congressional inaction are inapposite. *See*, *e.g.*, *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286 (1995); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002).

Mr. Marotta does not fully defend the Fourth District's reasoning that implied preemption must fail because the Labeling Act contains an express-preemption clause that does not reach his claims. Nonetheless, he does state more narrowly that express-preemption clauses are the "best evidence of Congress's preemptive intent." AB 39. However, in *Geier*, the Supreme Court held that the inapplicability of an express-preemption clause, even when confirmed by an ex-

plicit savings clause, does not "foreclose *or limit* the operation of ordinary preemption principles." 529 U.S. at 869 (emphasis added). In reaching this conclusion, the Court asked a rhetorical question for which opponents of preemption had no good answer: "Why, in any event, would Congress not have wanted ordinary preemption principles to apply when an actual conflict with a federal objective is at stake?" *Id.* at 871. *Geier*'s holding is now well-established. *See*, *e.g.*, *Arizona v. United States*, 132 S. Ct. 2492, 2504-05 (2012); *Sprietsma*, 537 U.S. at 65.[1]

Mr. Marotta trumpets two savings clauses in tobacco-related statutes. AB 41. As *Geier* makes clear, however, such clauses would have little significance for *implied* preemption even if they appeared in the primary statutes governing cigarettes at the relevant times. Even less significant are the provisions noted by Mr. Marotta, which appear in one statute governing smokeless tobacco and another statute not enacted until 2009 and made expressly inapplicable to pending cases like this one. IB 29-30, 37-38.

Mr. Marotta raises the specter of implied preemption extending to a vast swath of products from fireworks to kangaroos, AB 42-43 n.13; applying "no mat-

[1] *Wyeth v. Levine*, 555 U.S. 555 (2009), is not to the contrary. There, the Supreme Court held that the imposition of tort liability against drug manufacturers does not undermine the purposes and objectives of federal law, for the simple reason that the FDCA establishes only a "floor" of regulation, but not a "ceiling." *See id.* at 573–74. Here, in contrast, the governing federal scheme for tobacco reflects a careful balance between the competing objectives of ensuring adequate disclosure while protecting commerce in cigarettes.

ter what the defendant's specific conduct actually was," AB 47; and thus "wiping out the possibility of remedy" for injured plaintiffs, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 488 (1996). All of this is hyperbole. The only product at issue here is cigarettes, and "Congress, for better or worse, has created a distinct regulatory scheme for tobacco products." *Brown & Williamson*, 529 U.S. at 159. Thus, while Congress has not banned the sale of kangaroo products, it also has never declared their sale to be one of the "great basic industries of the United States." 7 U.S.C. § 1311(a) (2000). Nor has it ever codified a federal policy that commerce in kangaroo products must be "protected to the maximum extent consistent" with informing consumers about the threat such products pose to kangaroos. 15 U.S.C. § 1331. Moreover, the only tort claims at issue are those keyed to the inherent health and addiction risks of cigarettes. Nothing we say here would "prevent[] an injured plaintiff from bringing a state-law tort suit against a tobacco company, provided he does not premise his suit on a theory of liability that means all cigarettes are defective as a matter of law." *Graham v. R.J. Reynolds Tobacco Co.*, 782 F.3d 1261, 1284 (11th Cir. 2015), *vacated for reh'g en banc*, 811 F.3d 434 (11th Cir. 2016).

Finally, Mr. Marotta claims support from *Austin v. Tennessee*, 179 U.S. 343 (1900). AB 42. *Austin* held only that the Constitution of its own force does not preempt state laws banning the sale of cigarettes. 179 U.S. at 135. The Supreme

Court did not, and could not, say a word about the preemptive effect of various federal statutes enacted more than half a century after that decision.[2]

B. The "Res Judicata" Effect Of The *Engle* Defect And Negligence Findings Triggers Implied Preemption

Under *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013), the defect and negligence findings from *Engle* establish not only theories of defect that the *Engle* jury actually decided against the *Engle* defendants, but also theories of defect that "might with propriety have been litigated and determined" against them. *Id*. at 432 (internal quotation marks omitted). Some of those theories were limited to specific brands or types of cigarettes, but another was "that the *Engle* defendants' cigarettes were defective because they are addictive and cause disease." *Id*. at 423. That theory targets inherent features of all cigarettes, and thus posits a tort-based duty not to sell cigarettes. And it plainly triggers implied preemption, as progeny juries are not asked to determine whether any narrower theory applies to the individual smoker at issue. *See id.* at 427-30. The Fourth District rejected the

[2] Mr. Marotta significantly overstates the extent of lower-court precedent in his favor. As shown above, at least a dozen appellate and other cases directly support Reynolds' position, including *Engle* itself. Mr. Marotta counters with a single decision by a federal trial court, *Berger v. Philip Morris USA, Inc.*, No. 3:09-cv-14157, 2016 WL 2593841 (M.D. Fla. May 5, 2016). *Berger* largely tracks Mr. Marotta's own arguments, and is thus unpersuasive for the reasons explained above. The other lower-court decisions cited by Mr. Marotta (AB 45-46 n.15) reject implied-preemption challenges to tort claims *not* premised on the inherent health and addiction risks of all cigarettes. Far from undercutting the position urged here by Reynolds, they only underscore its narrowness.

conclusion that federal law impliedly preempts tort claims attacking cigarettes generically, but it did not dispute that this appeal presents such claims.

To resist the latter conclusion, Mr. Marotta contends that the defect and negligence findings from *Engle* rest ascertainably and exclusively on the *Engle* defendants' manipulation of nicotine levels in *their* cigarettes. AB 6-10, 35-37. That contention cannot be reconciled with *Douglas*, where this Court explained that the *Engle* findings would be "useless in individual actions" if they established only facts shown to have been actually decided in favor of the class. 110 So. 3d at 433. Indeed, that is precisely why this Court had to adopt a theory of preclusion and due process under which it simply *does not matter* what the *Engle* jury actually decided. *See id.* at 435 ("claim preclusion, unlike issue preclusion, has no 'actually decided' requirement").

The *Engle* record confirms that it is impossible to determine what the *Engle* jury actually decided. In denying a motion for directed verdict, the *Engle* trial court laid out six different theories on which the defect finding could have rested:

> There was more than sufficient evidence . . . to support the jury verdict that the cigarettes manufactured and placed on the market by the [*Engle*] defendants were defective in many ways including [1] the fact that cigarettes contained many carcinogens, nitrosamines, and other deleterious compounds such as carbon monoxide. That levels of nicotine were manipulated, [2] sometime[s] by utilization of ammonia . . . and [3] sometime[s] by using a higher nicotine content tobacco called Y-1 . . . . The evidence more than sufficiently proved [4] that nicotine is an addictive substance which when combined with other deleterious properties, made the cigarette unreasonably dangerous. The evidence

> also showed [5] some cigarettes were manufactured with the breathing air holes in the filter being too close to the lips . . . . There was also evidence at trial that [6] some filters being test marketed utilize[d] glass fibers . . . .

See id. at 423-24 (quoting *Engle* trial court). Thus, the defect finding could have rested on either of two generic theories attacking all cigarettes (for containing carcinogens or nicotine), on either of two nicotine-manipulation theories (regarding ammonia or Y-1), on either of two filter theories (regarding air holes or glass fibers), or on any combination of these. As this Court recognized in *Douglas*, there is no basis for concluding that the defect finding, which stated only that each defendant "place[d] cigarettes on the market that were defective and unreasonably dangerous," *Engle* Phase I Verdict Form at 2 (App. B), rested on one of these possible theories rather than another.

Moreover, the manipulation allegations encompassed only a small subset of the *Engle* defendants' cigarettes. For example, only about 20 percent of Reynolds' products were ammoniated. *Engle* Tr. 234:25740-50, 25766-68 (App. C). Likewise, Y-1 tobacco was used commercially only by one company and only between 1992 and 1994. *Engle* Tr. 299:32851-59 (App. D). If the *Engle* defect finding ascertainably encompassed *only* these manipulation allegations, then its use in progeny litigation—to establish that *non*-ammoniated cigarettes with *no* Y-1 tobacco were defective—would flagrantly violate due process. *See*, *e.g.*, *Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904); *Graham*, 782 F.3d at 1273, 1280. And it would

also violate the core holding of *Douglas*: that the *Engle* findings may be used in *all* progeny cases even though they are "useless" under any theory of preclusion that turns on what the *Engle* jury actually decided. *See* 110 So. 3d at 433.

Mr. Marotta also notes that the progeny litigation involves only certain defendants, plaintiffs, and time frames. AB 35-36. If the breadth of the progeny litigation were relevant, this argument would not fare well: the *Engle* defendants accounted for over 97% of the United States tobacco market, *see* Fla. S. Comm. on Reg. Indus., Report No. 2005-157, Florida Tobacco Settlement and Nonsettling Manufacturers (Nov. 2004), at 1; the *Engle* class was estimated to encompass some 700,000 individuals, *see Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1258 (Fla. 2006); and the relevant times extended back at least to 1953 and forward at least to 1994. However, what matters for preemption purposes is not the size of the case, but the breadth of the theory of liability: No case involves all possible defendants, plaintiffs, and times. And a single plaintiff can assert broad, preempted claims against a single defendant, *see Liggett Grp., Inc. v. Davis*, 973 So. 2d 467, 472-74 (Fla. 4th DCA 2007), just as a sweeping class can assert narrow, non-preempted claims against an entire industry.

Mr. Marotta spends pages discussing the evidence from his individual case. AB 3-6. Under *Douglas*, however, his progeny jury was not permitted to determine whether *that* evidence established any defect, but instead was instructed that

a defect had already been established and could not be questioned. T.19:2564-65. Thus, what matters are the defect theories that were or could have been decided in *Engle*, for they are the ones that undergird Mr. Marotta's claim.[3]

C. *Engle* Did Not Decide Or Preclude Implied Preemption

As he did below, Mr. Marotta leads with an extended argument that this Court decided or precluded implied preemption in *Engle* itself. AB 11-16, 25-32. The Fourth District did not accept that argument, and for good reason.

In *Engle*, this Court devoted two sentences of its opinion to preemption. The first sentence identified the "preemption defense" before it: "that the warnings on the cigarettes were as provided by law." 945 So. 2d at 1273. The second sentence rejected that defense: "Although compliance with the federal warnings preempted any claim based on failure to warn, it did not eliminate the other causes of action" before the jury. *Id*. Critically, "compliance with the federal warnings" plays no role in the implied-preemption defense at issue here; rather, it is the predicate for an express-preemption defense that the relevant claims involve "the advertising or

[3] In any event, Mr. Marotta's own distinct defect theory is itself impliedly preempted. He contends that cigarettes are defective because manufacturers failed to remove all, or virtually all, of the nicotine that "naturally occurs" in tobacco—in other words, because they *failed* to manipulate nicotine levels by reducing them. AB 5-6. As he admits (AB 5, 36 n.10), when cigarettes with almost no nicotine were test-marketed, they tasted terrible, T.10:1247 (like "dead fish"), and were a commercial failure, *id.* at 1248. Of course, Congress would not have wanted to protect commerce in cigarettes to the "maximum extent consistent" with adequate disclosure, 15 U.S.C. § 1331, but only for cigarettes that nobody wanted to buy.

promotion of any cigarettes the packages of which are labeled in conformity with the provisions of" federal law. 15 U.S.C. § 1334. Moreover, the Supreme Court has held that § 1334 expressly preempts claims for failure to warn, but does not expressly preempt other tort claims. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 524-30 (1992). Thus, this Court's ruling in *Engle* perfectly tracks both the trigger for express preemption ("compliance with the federal warnings") and the consequences of express preemption (elimination of claims for "failure to warn"). None of this amounts to an elliptical implied-preemption ruling.[4]

Mr. Marotta invokes this Court's conclusion that *Engle* class counsel did not make "impermissible references to jury nullification" in arguing to the jury that "legal don't make it right" and that "a legal product does not mean that the cigarette companies are not responsible when their product causes harm." 945 So. 2d at 1273-74. However, the Court viewed these arguments as a permissible "response" to the rejected express-preemption defense that "compliance with the federal warnings" forecloses all possible tort liability. *See id.* at 1273. None of that

[4] The Court's ruling on express preemption has no bearing on implied preemption because, as explained above, the failure of an express-preemption defense does not "foreclose or limit the operation of ordinary preemption principles." *Geier*, 529 U.S. at 869. Thus, in *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008), the failure of an express-preemption defense under the Labeling Act did not obviate the need for a freestanding implied-preemption analysis. *See id.* at 86-90.

suggests that federal law would permit the imposition of tort liability merely because cigarettes are dangerous.

Mr. Marotta suggests that this Court must have addressed implied preemption because the class, after losing on that issue in the Third DCA, raised it before this Court. AB 28. But the class never challenged the Third DCA's implied-preemption ruling as such. Moreover, on the issue of jury nullification, the class sought to justify the disputed comments only as a fair response on *express* preemption. Specifically, it argued that Congress did not "intend for tobacco companies to be immune from liability for selling 'a legal product,'" and in support it cited *Cipollone*—a leading express-preemption case. *Engle* Class's Merits Brief at 45-46 n.19 (App. E). Although this Court did not likewise cite *Cipollone*, it adopted the class's argument in exactly those terms. *See Engle*, 945 So. 2d at 1273-74. It did not somehow reverse on a ground that the class never presented to it.

Mr. Marotta also contends that this Court must have rejected implied preemption because otherwise it could not have reinstated individual judgments for class representatives Mary Farnan and Angie Della Vecchia. AB 15, 28. But those individuals—unlike Mr. Marotta—prevailed on claims for concealment and conspiracy, which are not impliedly preempted. *Engle* Phase II-A Verdict Form at 6-10 (App. F). Accordingly, there was an independent ground for their judgments.

As for "res judicata," it establishes only the conduct *elements* of individual progeny *claims*. *See Douglas*, 110 So. 3d at 429 ("we reject the defendants' argument that the Phase I findings are too general to establish any elements of an *Engle* plaintiff's claims"). Thus, "individual plaintiffs do not have to reprove those elements of their claims," and "*Engle* defendants are precluded from arguing in individual actions that they did not engage in conduct sufficient to subject them to liability." *Id.* at 432–33. Mr. Marotta errs in contending that the latter clause extends to defenses. Here, Reynolds does not dispute that it engaged in conduct that would support the imposition of tort liability under Florida law. Rather, it is asserting a defense under federal law—and one that progeny appeals from *Graham* to *Marotta* have addressed on the merits. Moreover, if "res judicata" did extend to defenses, it would resolve implied preemption *in Reynolds's favor*. Mr. Marotta acknowledges that the Third DCA resolved implied preemption for the defendants (AB 14), yet he provides no support for his remarkable contention that an issue resolved against the class—and never appealed—must now be deemed established in its favor.[5]

[5] *Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687 (Fla. 2015), does not help Mr. Marotta. In *Hess*, this Court rejected a statute-of-repose defense for *Engle*-progeny cases, but only because "the *Engle* jury found that the *Engle* defendants' fraudulent concealment conduct occurred within the repose period." *Id.* at 698. *Hess* thus provides no support for precluding the litigation of defenses not actually decided in *Engle* itself, much less for deeming issues actually decided in favor of the defendants to have been actually decided in favor of the class. Finally, Mr. Marotta says that this Court should not "revisit" *Douglas*. AB 32. However, *Douglas* contains not a word about preemption, express or implied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), counsel for Petitioner hereby certifies that the foregoing brief complies with the applicable font requirements because it is written in 14-point Times New Roman font.

DATED: July 28, 2016

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