IN THE SUPREME COURT OF FLORIDA
CASE NO: SC03-1856

On Review from a Decision of the Third District Court of Appeal

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HOWARD A. ENGLE, M.D., et al., Petitioners

v.

LIGGETT GROUP, INCORPORATED, et al., Respondents

BRIEF OF *AMICI CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE, PUBLIC CITIZEN, THE CAMPAIGN FOR TOBACCO-FREE KIDS, AND THE AMERICAN CANCER SOCIETY IN SUPPORT OF PETITIONERS

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

This brief is filed on behalf of Trial Lawyers for Public Justice, Public Citizen, the Campaign for Tobacco-Free Kids, and the American Cancer Society, Inc.[1] *Amici* include public interest organizations dedicated to fighting for and protecting victim's rights. *Amici* also include several renowned science-based public health organizations that are dedicated to eradicating the health scourge caused by tobacco products. Part of their strategy is to assure that private lawsuits that seek to recover compensatory and punitive damages caused by tobacco companies can be maintained, to compensate tobacco victims, and to deter tobacco companies from engaging in wrongful conduct. *Amici* are interested in this case because the Court of Appeal's holding that the plaintiffs' punitive damages claims are barred by the *res judicata* effect of the State's prior settlement with the tobacco industry will effectively immunize defendants for their deception and misconduct over the last 50 years. Although the Court of Appeal's *res judicata* ruling was limited to the question of punitive damages, its potential effect is far broader. If upheld, this ruling will effectively end all lawsuits by tobacco victims,

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[1] A more detailed statement of *amici*'s background and qualifications is contained in *amici's* Motion For Leave to File an *Amici Curiae* Brief, which is being filed contemporaneously herewith.

both individual and class actions, because tobacco litigation is so complex, time-consuming and expensive that few attorneys will represent tobacco victims without the potential for punitive damages. For these, as well as the reasons explained below, *amici* contend that the Court of Appeal's application of *res judicata* was in error and should be reversed.

INTRODUCTION

In 1994, the named plaintiffs filed a class action complaint against a number of tobacco companies ("defendants") alleging that their deceptive and dangerous practices caused plaintiffs extensive physical and emotional injuries from tobacco use. Plaintiffs alleged a variety of common-law violations, including strict liability, negligence, fraud and misrepresentation, breach of warranty and intentional infliction of emotional distress. The trial court certified the class, and this ruling was affirmed in most respects by the Court of Appeal. *See R.J. Reynolds Tobacco Co. v. Engle*, 672 So.2d 39 (Fla. 3d DCA 1996). The class is estimated to include as many as 700,000 individuals.

In 1995, the State of Florida filed its own complaint against many of the same defendants in which it sought recoupment for Medicaid monies it spent treating the victims of tobacco-related illnesses, as well as punitive damages. The State sued only on behalf of itself as a state entity seeking recovery of state

expenditures from the state treasury. It did not bring its action on behalf of its citizens, nor did it seek any recovery for the injuries that its citizens suffered as a result of tobacco use. The State's claims for punitive damages were subsequently thrown out by the trial court. A.13a.[2]

In 1997, Florida entered into a settlement with defendants resolving all its outstanding claims. In exchange for releasing its claims, the State received $550 million in compensation for its Medicaid expenses, a separate payment of several billion dollars to be paid out over a period of years designated "for the benefit of the State of Florida," and injunctive relief. Neither of the two monetary payments was expressly labeled as "punitive" or "exemplary" damages. The settlement, by its own terms, applied only to claims, including claims for punitive damages, brought by the State of Florida and its affiliated public entities. The settlement did not purport to cover claims against defendants brought by private parties. Significantly, the Florida settlement did not contain any language extinguishing private claims for punitive damages.

While the State was negotiating its settlement with defendants, this case proceeded through the courts, and went to trial starting in 1998. The trial took

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[2] For ease and convenience *amici* adopt the format for citations to the record used by class counsel.

more than two years to complete, and included testimony from more than 150 witnesses as well as thousands of documents and exhibits. Upon examination of all the evidence, the jury found each defendant guilty as to all non-dismissed counts and awarded $12.7 million in compensatory damages for the three named plaintiffs, plus $145 billion in punitive damages for the entire class.

On appeal, the Third District Court of Appeal de-certified the class and overturned the jury's punitive damage award on a number of grounds. *See Liggett Group, Inc. v. Engle*, 853 So.2d 434 (Fla. 3d DCA 2003). Of particular relevance to *amici*, the Court held that *res judicata* barred plaintiffs from seeking punitive damages on the theory that the State's previous settlement with defendants resolved all claims for punitive damages, even though the plaintiffs' were not party to, nor adequately represented by, the settlement. *See id.* at 467-68.

SUMMARY OF THE ARGUMENT

The Court of Appeal erred in determining that the State's settlement of its lawsuit against the tobacco industry barred all private claims for punitive damages in tobacco cases under the doctrine of *res judicata*. The Court of Appeal's holding was improper for two reasons. First, the Court's application of *res judicata* was error under Florida's common law because (a) the *Engle* plaintiffs were not parties to the State settlement; (b) the State and the *Engle* plaintiffs were

not in privity with each other; and (c) application of *res judicata* to bar private punitive damage claims would result in a miscarriage of justice. Second, the court's application of *res judicata* under the circumstances of this case runs afoul of the Due Process Clauses of the United States and Florida Constitutions.

ARGUMENT

I. THE STATE'S SETTLEMENT CANNOT BAR THE *ENGLE* PLAINTIFFS' CLAIMS FOR PUNITIVE DAMAGES AS A MATTER OF THE FLORIDA COMMON LAW OF *RES JUDICATA*.

By holding that the State's settlement of its tobacco suit resolved all private claims for punitive damages, the Third District Court of Appeal misapplied the doctrine of *res judicata* and deprived plaintiffs of their right to their day in court. Under the doctrine of *res judicata* (also known as claim preclusion), a judgment in a previous case will bar future claims only if the following elements are met: "identity of the thing sued for; identity of the cause of action; identity of the parties; [and] identity of the quality in the person for or against whom the claim is made." *Albrecht v. State*, 444 So.2d 8, 12 (Fla. 1984). *Res judicata* binds only those persons who were parties to the first litigation, or who were in privity to such parties. *See Massey v. David*, 831 So.2d 226, 232 (Fla. 1st DCA 2002).

Because *res judicata*, especially when applied to someone not a party to the

original action, has the potential to close off access to the courts, the doctrine must be applied cautiously in order to ensure that no one is denied the basic due process right to one's day in court. *See Southwest Airlines Co. v. Tex. Int'l Airlines, Inc.*, 546 F.2d 84, 95 (5th Cir. 1977). Therefore, under Florida law, an individual is in privity with a party to an action only if she has such a strong interest in the action "that she will be bound by the final judgment as if she were a party," *Stogniew v. McQueen*, 656 So.2d 917, 920 (Fla. 1995), or where the individual's interests are so closely aligned with those of the party that the party acts as the individual's virtual representative. *See Lathan Constr. Corp. v. McDaniel Grading, Inc.*, 695 So.2d 354, 355 n.5 (Fla. 5th DCA 1996).

The party claiming the benefit of *res judicata* carries the burden of demonstrating the doctrine's applicability. *deCancino v. E. Airlines, Inc.*, 283 So.2d 97, 99 (Fla. 1973). Any doubts about the doctrine's applicability must be resolved against preclusion. *See Neidhart v. Pioneer Fed'l Sav. & Loan Ass'n*, 498 So.2d 594, 596 (Fla. 2d DCA 1986).

A. The *Engle* Plaintiffs Were Not Parties to the State's Settlement

First, it is beyond dispute that none of the *Engle* plaintiffs was a party to the settlement agreement. The settlement defines "Plaintiffs" as the State of Florida and its associated public agencies. *See* A.8, Settlement Agreement, § I.D., at 4-5.

The Settlement also states that it is binding only on the State of Florida and those institutions affiliated with it. *See id.*, § I.B, at 4. Individual private plaintiffs, such as the *Engle* class members, are not included either in the definition of "Plaintiffs" or in the list of persons bound by the agreement. That the *Engle* class members were not parties to the settlement is further confirmed by the fact that they were given no notice of the settlement nor any right to enforce, or participate in, any of the provisions of the agreement. *See id.*, § VI.H, at 16 ("[n]o portion of this Settlement Agreement shall provide any rights to, or be enforceable by, any person or entity that is not a party hereto or a Released party.").

B. The State and the *Engle* Plaintiffs Are Not in Privity With Each Other.

1. Privity is Absent Because the State and the *Engle* Plaintiffs Alleged Distinct Causes of Action With Distinct Injuries.

Nor can it be said that the State acted in privity with, or on behalf of, the *Engle* plaintiffs. First, privity is absent because the State alleged entirely distinct causes of action from those alleged by the *Engle* plaintiffs. The State brought its action under the Medicaid Third Party Liability Act to obtain economic compensation for state Medicaid expenditures used to treat the victims of tobacco-related injuries. *See* A.13c, Complaint, *State of Fla. v. Am. Tobacco Co.*, Civ. No. 95-1466, ¶¶ 2-3 ("This civil action . . . is brought pursuant to statute to obtain

reimbursement of the State for the expenditures it made to provide medical assistance to Medicaid recipients as a result of the actions of the defendants."); *see also State of Fla. v. Am. Tobacco Co.*, 707 So.2d 851, 852 (Fla. 4th DCA 1998) (describing State's suit as one "for damages incurred by the state through payments for tobacco-related illnesses to medicaid patients"). In this case, by contrast, the plaintiffs seek compensation, pursuant to the common law rather than statute, for the personal physical and emotional injuries associated with tobacco use. *See* Complaint, *Engle v. R.J. Reynolds Co.*, Civ. No. 94-08273, ¶ 154(b) (seeking compensatory damages for, *inter alia*, "bodily injury, pain and suffering, disability, [and] disfigurement"). These injuries are legally and analytically distinct, as the former represent exclusively economic injuries to the state treasury, while the latter involve personal injuries to private individuals. *See, e.g.*, *State of Md. v. Philip Morris, Inc.*, 1997 WL 540913 (Md. Cir. Ct. May 21, 1997) at *12-13 (distinguishing, in the context of state tobacco suits, a state subrogation action from a private personal injury action); *State of Wash. v. Am. Tobacco Co.*, 1997 WL 714842 at *2-3 (Wash. Super. June 6, 1997) (noting that while the State may have suffered economic injury from tobacco, unlike individual smokers, it has not suffered any physical injury). Because the claims pursued by the State are altogether distinct from those asserted by the *Engle* plaintiffs, the State and the

Engle class have different interests at stake and cannot be considered to be in privity for *res judicata* purposes.

The difference between the State's claims and the class members' claims starkly confirms this lack of privity because, unlike the members of the *Engle* class, the State could not assert, either on behalf of itself or its citizens, any viable claims for punitive damages. Prior to the State's settlement, the court threw out all of the State's claims for punitive damages, holding that the Medicaid Third Party Liability Act, did not authorize the recovery of punitive damages. A.13a. As a result, even though the State purported to settle all of its punitive damage claims, in actuality, it had no punitive damage claims to settle. The *Engle* plaintiffs, no the other hand, did raise viable punitive damage claims. Because the State had no colorable claims for punitive damages, it could not have pursued claims for punitive damages on behalf of class plaintiffs, and its interests were in no way aligned with the interests of class plaintiffs, who did have a cognizable interest in obtaining punitive damages. Thus, the State was not in privity with the class plaintiffs.

Furthermore, this difference between the state's and the plaintiffs' claims demonstrates the lack of privity because it shows that the State will not adequately pursue the interests of its citizens in recovering for their own personal injuries. In *Thomas v. Shelton*, 740 F.2d 478 (1984), the Seventh Circuit held that there is no

privity between a government and a private citizen, for purposes of *res judicata*, where the government seeks to recover medical expenses spent on a private citizen's treatment and the private citizen in a separate action seeks to recover for her physical injuries. The reason it gave is fully applicable here: "[A]ll the government has at stake in its suit is [plaintiff's] medical expenses. As they are only a fraction of [plaintiff's personal injury] claim, there can be no assurance that the government would fight as hard to prove its claim as [plaintiff] would to prove his." *Id.* at 481-82.

It follows that if the State's injuries are unrelated to the *Engle* class' injuries, then the class' claims for punitive damages are similarly unrelated such that resolution of the State's punitive damages claims cannot bar the *Engle* class' claims for punitive damages. The doctrine of *res judicata* applies to particular causes of action. *See Albrecht*, 444 So.2d at 12 (stating that one of the elements of *res judicata* is "identity of the cause of action"). A claim for punitive damages, however, does not exist as an independent cause of action, but must be based on the violation of some underlying substantive right. *See* 17 Fla. Jur. 2d *Damages*, § 118; *see also Kirk v. Denver Pub'g Co.*, 818 P.2d 262, 265 (Colo. 1991). Punitive damages are merely a form of relief that can be obtained under certain circumstances when a plaintiff prevails on a particular cause of action. Thus, if the

underlying cause of action for which punitive damages potentially are available is not barred by *res judicata*, then the punitive damages arising from that cause of action also are not precluded.[3]

2. Privity is Absent Because the State Cannot Sue on Behalf of its Citizens To Obtain Compensatory and Punitive Damages for the Citizens' Private Injuries.

Privity between the State and the *Engle* plaintiffs also is absent because the State had no authority to pursue the plaintiffs' claims for compensatory and punitive damages on their behalf. It is an elementary principle of *res judicata* that a judgment in a prior action does not have preclusive effect over matters that could not have been litigated in that action. *See* Fla. Jur. 2d *Judgments & Decrees*, § 139; *cf. Lobato-Bleidt v. Lobato*, 688 So.2d 431, 434 (Fla. 5th DCA 1997) ("A

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[3] This point is reinforced by the fact that for cases commenced prior to 1999, under Florida law, there is no prohibition or limitation of successive punitive damage awards against a single defendant for injuries stemming from a common course of conduct. *See W.R. Grace & Co. v. Waters*, 638 So.2d 502, 506 (Fla. 1994) ("In conclusion, we hold that prior punitive damage awards assessed against a defendant do not preclude subsequent awards against the defendant for injuries arising from the same conduct."); *Alamo Rent-A-Car v. Mancusi*, 632 So.2d 1352, 1358 (Fla. 1994) (statutory limitations on punitive damage awards are applied prospectively only); *cf. Dunn v. HOVIC*, 1 F.3d 1371, 1385-86 (3d Cir. 1993) (holding that in general, multiple punitive damage awards can be issued against a defendant for a single course of conduct). Because multiple punitive damage awards can be imposed against a single defendant, the settlement of one party's punitive damage claims cannot bar the punitive damage claims raised by other parties in separate lawsuits.

judgment is not *res judicata* as to rights which were not in existence and could not have been litigated at the time the prior judgment was entered."). Although, under certain circumstances, an action brought by a State can bar a subsequent action by the State's citizens, that is only true when the State sues in its *parens patriae* capacity on behalf of its citizens in order to enforce a general public right. *See, e.g.*, *Satsky v. Paramount Comm., Inc.*, 7 F.3d 1464, 1469 (10th Cir. 1993) (citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600, 607 (1982)); Am. Jur. 2d *Judgments*, § 697. A State action has no preclusive effect on future actions by its citizens, however, where the citizens seek to enforce their own *private* rights. *See Satsky*, 7 F.3d at 1469; *State of New York v. Seneci*, 817 F.2d 1015, 1017 (2d Cir. 1987) ("The state cannot merely litigate as a volunteer the personal claims of its competent citizens." (citing *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976)). Personal injury actions for money damages are precisely the type of private interest that the State has no right to pursue on behalf of its residents. *See Seneci*, 815 F.2d at 1017 (State lacks standing where "the complaint only seeks to recover money damages for injuries suffered by individuals"); *Pfizer v. Lord*, 522 F.2d 612, 616 (8th Cir. 1975) (State cannot sue "to collect the damage

claim of one legally entitled to sue in his own right").[4]

This same analysis holds true for punitive damages as well: States cannot sue for punitive damages in place of private citizens where the individual punitive damage claims stem from the citizens' private injuries. In a case almost identical to the instant action, the Ninth Circuit rejected the argument that a consent decree between a government party and a defendant can bar private claims for punitive damages against that same defendant and stemming from the same course of conduct. *In re Exxon Valdez*, 270 F.3d 1215, 1227-28 (9th Cir. 2001). In that case, Exxon argued that a prior $900 million settlement between it, the State of Alaska, and the Federal Government in a suit involving the Valdez oil spill barred a subsequent punitive damages verdict in a private suit brought by Alaska residents.

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[4] In any event, it is clear that the State itself never intended for its settlement to affect the rights of private citizens to seek redress for their own injuries. First, the *Engle* litigation is never mentioned anywhere in the settlement. Given that *Engle* was ongoing at the time of settlement, involved the same defendants as in the State's case, and encompassed all victims of smoking-related injuries in Florida, both the defendants and the State undoubtedly were aware of the case at the time they settled – yet they chose to say nothing about the settlement's effect on private claims.

Second, the original tentative settlement agreement entered into by Florida expressly extinguished all private claims for punitive damages. *See* Tentative Global Settlement, June 20, 1997, *available at* <http://stic.neu.edu/settlement/6-20-settle.pdf> at 39. That settlement, however, was scrapped, and the ultimate agreement that Florida did enter into contained no such prohibition concerning punitive damages.

See id. The Court held that *res judicata* did not bar the punitive damage award because (1) none of the payments made in the government settlement were described as punitive; (2) the government did not have *parens patriae* authority to vindicate the plaintiffs' private injuries to their land and their commercial fishing interests; and (3) the private plaintiffs sought recovery for injuries to their private land and commercial fishing interests, meaning that the punishment they sought through punitive damages was distinct from the generalized harm to the environment and natural resources that formed the basis of the government's settlement. *See id.* at 1227-28.

Here, like in *Exxon*, plaintiffs' claims are for money damages for their own personal injuries arising from a specific breach of duty owed specifically to those class members. Their claims for punitive damages stem from their private injuries that are unrelated to the injuries vindicated by the State through its settlement. Moreover, none of the payments in the State's settlement were identified as punitive. Thus, the State did not have *parens patriae* authority to accept punitive damages on behalf of plaintiffs' for their private injuries, and could not have stood in privity with them.

In this case, the Court of Appeal's failure to distinguish between public and private rights explains its erroneous application of *res judicata*. The Court of

Appeal held that the State's settlement with the tobacco defendants, by resolving its own potential punitive damage claims, also resolved with finality the punitive damage claims of the class members. However, in the primary case relied upon by the Court of Appeal in support of its *res judicata* ruling, *Young v. Miami Beach Improvement Co.*, this Court merely held that the State's action seeking declaration of an easement to access oceanfront property barred future private actions on the same issue because the State was asserting a "right of the general public." 46 So.2d 26, 30 (Fla. 1950); *id*. (relying on doctrine that a municipal action can bind its citizens as to "matter[s] of general interest to all its citizens").

By contrast, in a more recent case involving private rights, this Court was unwilling to find privity between a State agency and a private citizen. In *Stogniew v. McQueen*, this Court held that the State Department of Professional Regulation (DPR) was not in privity with a private citizen even though both were seeking to sanction a therapist for his negligent conduct. *See* 656 So.2d at 920 (plaintiff "was not in privity nor was she virtually represented by DPR"). Because the case at bar involves private claims to vindicate private rights, the Court of Appeal should not have applied the doctrine of *res judicata*.

C. Application of *Res Judicata* Also is Unwarranted Here Because It Would Defeat the Ends of Justice.

Even if the State and plaintiffs were in privity (which they are not), this Court should nonetheless decline to apply *res judicata* because doing so would result in substantial injustice by effectively immunizing the tobacco industry from future litigation by Florida residents, and, if followed elsewhere, could have nationwide ramifications. This Court has held that *res judicata* is an equitable doctrine of judge-made law that should not be applied so as to create substantial injustice. *See Universal Constr. Co. v. City of Fort Lauderdale*, 68 So.2d 366, 369 (Fla. 1953). Here, the application of *res judicata* to bar private litigants from seeking punitive damages not only would eliminate all private claims for punitive damages, but it likely would have the effect of strongly discouraging private tobacco claims for compensatory damages as well. Tobacco lawsuits are among the most complex, expensive, and time-consuming tort cases, and without the right to seek punitive damages, there will be almost no incentive for private attorneys to represent victims of tobacco-related illnesses. *See, e.g., Jackson v. Johns-Mansville Sales Corp.*, 781 F.2d 394, 403 (5th Cir. 1986) ("punitive damages serve to motivate 'private attorneys general' to bring suit"); *Michael Rustad & Thomas Koenig, The Historical Continuity of Punitive Damage Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1322-23 & nn.276-277 (1993) ("[p]unitive damages permit the litigation of claims that otherwise might be too expensive for an

individual plaintiff to prosecute"); *cf. Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 418 (D.N.J. 1993) (permitting plaintiff's counsel to withdraw from tobacco lawsuit because it had become "an unreasonable financial burden"). If the Court of Appeal's decision is allowed to stand, hundreds of thousands of victims of tobacco-related illnesses will be left with little recourse for their injuries because they will have great difficulty retaining a qualified attorney to represent them. Barring punitive damages also could have serious public health consequences, because the current level of punitive damages awarded against defendants may not be sufficient to prevent and deter future smoking-related injuries.[5] Dooming the future of private tobacco litigation in Florida would defeat the ends of justice as well, and for this reason, this Court should hold that *res judicata* does not bar the class plaintiffs from seeking punitive damages. *See Universal Const. Co.*, 68 So.2d at 369 ("the State, as well as the courts, is more interested in the fair and proper administration of justice than in rigidly applying a fiction of the law designed to terminate litigation").

II. THE COURT OF APPEAL'S DECISION THAT THE *ENGLE* PLAINTIFFS ARE BOUND BY THE STATE'S SETTLEMENT ALSO VIOLATES THE DUE PROCESS CLAUSES OF THE

[5] This point is addressed in greater detail in the Brief of *Amici Curiae* submitted by the American Public Health Association, at 15-17.

FEDERAL AND FLORIDA CONSTITUTIONS.

The Court of Appeal's decision barring the *Engle* plaintiffs' punitive damage claims, if allowed to stand, will deprive plaintiffs of their day in court in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and of Art. I, § 9 of the Florida Constitution. Although states are free to adopt their own rules regarding the preclusive effects of prior judgments, those rules cannot override the Due Process guarantees of the Fourteenth Amendment. *See Richards v. Jefferson County*, 517 U.S. 793, 797 & n.4 (1996). Under both Florida and Federal law, due process requires, at a minimum, that an individual not be denied her day in court on a claim for money damages unless she receives notice, an opportunity to be heard and an opportunity to opt-out, or her interests are adequately represented by another party. *Keys Citizens for Responsible Gov't v. Fla. Keys Aqueduct Auth.*, 795 So.2d 940, 948 (Fla. 2001) (Florida law); *Phillips Petroleum v. Shutts*, 472 U.S. 797, 811-12 (1985) (absent party must have notice, opportunity to be heard, and opportunity to opt out); *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940) (requirement of adequate representation).

In the present case, due process will be violated if the Court of Appeal's ruling is upheld because the *Engle* plaintiffs were never put on notice of the potentially preclusive effect of the State's action, were never given an opportunity

to participate in the action, and were never given an opportunity to object to or opt-out of the action. It almost goes without saying that binding the *Engle* plaintiffs under these circumstances would offend due process. *See Shutts*, 472 U.S. at 811-12.

Additionally, the State failed to represent adequately the interests of the *Engle* plaintiffs in its action. In *Richards v. Jefferson County*, the U.S. Supreme Court held that it violates due process for a prior state court judgment to bar subsequent private actions on the same issue where the parties in the prior action "did not sue on behalf of a class; their pleadings did not purport to assert any claim against or on behalf of any nonparties; and the judgment they received did not purport to bind any . . . nonparties." 517 U.S. at 801. Here, the State did not bring its action as a class action, and neither the State's complaint nor its settlement purported to bind any private parties. Thus, "there is no reason to suppose that the [State] took care to protect the interests of [the *Engle* plaintiffs]." *Id.* at 802. Nor did the State provide any notice whatsoever, even in the settlement agreement itself, let alone notify the members of the *Engle* class directly, that the judgment would be binding on them, as required by *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), or let alone provide a right to opt-out of a settlement that gave them nothing individually, as required by *Shutts*. Moreover, as explained above,

the State's interest and the *Engle* plaintiffs' interests were not aligned because the State raised entirely separate claims, with respect to both compensatory and punitive damages, from those raised by the *Engle* plaintiffs, and those claims could not have been adequately represented, as *Hansberry* requires. Thus, the Court of Appeal's decision that the State settlement bars private claims for punitive damages violates due process as a matter of both federal and Florida law.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the Court of Appeal's holding that the State of Florida's settlement of its tobacco litigation bars plaintiffs in this case from obtaining an award of punitive damages against defendant.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this ___ day of June, 2004 to: ALL COUNSEL ON ATTACHED SERVICE LIST.

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