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WLF Asks Supreme Court to Review Florida Tort Law that Conflicts With Federal Law

(*R.J. Reynolds Tobacco Co. v. Graham*)

“Federal regulation of tobacco has always rested on the spoken assumption that cigarettes—despite their harmful or addictive properties—will continue to be sold and that consumers will continue to enjoy a right to choose whether or not to smoke.”—Cory Andrews, WLF Senior Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation yesterday asked the U.S. Supreme Court to review—and ultimately reverse—an *en banc* decision of the U.S. Court of Appeals for the Eleventh Circuit that, in misplaced deference to rulings by the Supreme Court of Florida, upheld a tort duty on tobacco manufacturers *not* to sell cigarettes. In its *amicus* brief urging review of the decision below, WLF charges that the Eleventh Circuit ratified a theory of liability that is preempted by federal law.

The case arises out of an abortive effort more than a decade ago to try all tort claims by Florida smokers in a single class action. That case lasted several years until the Florida Supreme Court (in its *Engle* decision) decertified the class in 2006 on the ground that issues of fact could not be litigated on a class-wide basis. But the *Engle* court also held that smokers bringing future individual tort suits could take advantage of a finding made by the class-action jury—namely that cigarette manufacturers acted negligently in manufacturing and marketing a “defective” product.

As WLF’s brief demonstrates, that “finding”—that all cigarettes are inherently defective—stands as an obstacle to the longstanding objectives of federal law. In detailing Congress’s elaborate regime of tobacco legislation and regulation since 1965, WLF argues that such laws are premised on the assumption that cigarettes will remain on the market. In contrast, the *en banc* Eleventh Circuit’s decision ratifies a sweeping theory of tort liability that operates as a functional ban on cigarettes. That holding, WLF contends, cannot be reconciled with the Supreme Court’s decision in *FDA v. Brown & Williamson*, which held that Congress has “foreclosed the removal of tobacco products from the market.” As WLF explains in its brief:

In its attempt to avoid *Engle*’s myriad due process deficiencies, the *en banc* Eleventh Circuit held that *Engle*’s preclusive findings are bottomed on the lowest common denominator established at trial: “that the defendants produced, and the plaintiffs smoked, cigarettes containing nicotine that are addictive and cause disease.” But that conclusion—even if it were actually true—unavoidably rushes headlong into the Supremacy Clause, because federal law impliedly preempts the states from imposing liability based on nothing more than the inherent health and addiction risks of all cigarettes.

Celebrating its 40th year, WLF is America’s premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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