ORIGINAL

Case No. SC11–1611

IN THE SUPREME COURT
STATE OF FLORIDA

AMANDA JEAN HALL,

Plaintiff/Petitioner,

v.

R.J. REYNOLDS TOBACCO COMPANY,

Defendant/Respondent.

ON DISCRETIONARY REVIEW FROM A DECISION
OF THE FIRST DISTRICT COURT OF APPEAL OF FLORIDA

ANSWER BRIEF OF RESPONDENT R.J. REYNOLDS TOBACCO COMPANY

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STATEMENT OF THE CASE AND FACTS

This case presents two constitutional challenges to a bond cap statute enacted by the Legislature to protect billions of dollars that the State receives from a tobacco settlement agreement. Every judge to have considered these challenges has rejected them. In this case, the First District held that the bond cap statute, although narrow in focus, serves important statewide government interests and is reasonably related to those interests. Accordingly, the court held that the statute is not an impermissible special law. (App. 10–16.)[1] Moreover, the First District concluded that the bond cap statute addresses substantive rights and is entirely consistent with this Court's procedural rules. Accordingly, the court held that the statute does not violate the separation of powers. (App. 16–23.)

I. THE FLORIDA SETTLEMENT AGREEMENT AND THE STATEWIDE PROGRAMS THAT IT FUNDS

In 1995, the State of Florida sued several major United States cigarette manufacturers, including R.J. Reynolds Tobacco Company, for billions of dollars of healthcare costs allegedly paid by the State and attributable to smoking. Fla. Senate Staff Analysis, S.B. 2198, Apr. 23, 2009, at 2 ("2009 Staff Analysis") (App. 26). Reynolds and three other companies settled with the State in 1997. *Id.* The ensuing Florida Settlement Agreement (FSA) obligates those companies to pay the State about $13 billion over 25 years. *Id.* The companies will make

[1] Citations to the Appendix to this Answer Brief are noted as (App. __).

additional yearly payments to the State in perpetuity. *Id.*; *see* Fla. Senate Staff Analysis, S.B. 2826, Apr. 18, 2003, at 2 ("2003 Staff Analysis") (App. 36).

FSA payments fund important public programs throughout the State. The payments are held in trust and disbursed pursuant to legislative guidelines. § 569.21, Fla. Stat. (2011). In accordance with these guidelines, the Legislature has appropriated FSA payments for programs run by the Agency for Health Care Administration, the Department of Children and Family Services, the Agency for Persons with Disabilities, the Department of Elderly Affairs, and the Department of Health. §§ 20.195, 20.1971, 20.415, 20.425, 20.435, Fla. Stat. (2011); *see also* §§ 17.41, 215.5601, Fla. Stat. (2011). In Fiscal Year 2010-2011, the State allocated $369.6 million of FSA revenue for these various programs. *See* Office of Economic & Demographic Research, Fla. Legislature, *Tobacco Settlement Trust Fund Financial Outlook Statement*, at 1, available at http://edr.state.fl.us/Content/revenues/outlook-statements/tobacco-settlement-tf/110225_TSTFoutl.pdf (last visited May 27, 2012) ("*Tobacco Settlement Outlook Statement*") (App. 41).

As one example, following a 2006 constitutional amendment, the Legislature has directed "a portion of the money ... to fund a comprehensive statewide tobacco education and prevention program." Art. 10, § 27, Fla. Const.; *see* § 381.84, Fla. Stat. (2011). Today, that program operates with about a $65-million budget to educate children and provide tobacco-cessation services. *See* http://www.tobacco

freeflorida.com/Contents-32/About-Us/ (last visited May 27, 2012).

II. LEGISLATIVE RESPONSES TO THE THREAT THAT THE *ENGLE* LITIGATION POSES TO FSA-FUNDED STATE PROGRAMS

In an effort to "protect[] the state's settlement revenue from diminution," Committee on Regulated Industries, *Florida Tobacco Settlement & Nonsettling Manufacturers*, Report No. 2005-157, at 2 (Nov. 2004) (App. 46) ("FSA Report"), the Legislature created the Task Force on Tobacco-Settlement Revenue Protection to evaluate risks to FSA payments. *See* Ch. 00-128, § 5, Laws of Fla. Among the risks identified was the possibility of bankruptcy due to large adverse judgments. *See* FSA Report at 2 (App. 46).

The Legislature further recognized that even invalid judgments could disrupt FSA revenue if the signatory company could not post sufficient bonds to stay execution of the judgments pending appeal. For example, the Legislature knew that, in response to an Illinois judgment that required a $12 billion bond to stay execution pending appeal, the attorneys general of some 37 states urged that the bond be reduced so as not to interfere with similar settlement payments to other states. 2009 Staff Analysis at 3 & n.4 (App. 37). Because the Legislature determined that the *Engle* litigation posed the same kind of risk, it adopted three bond cap statutes in response, including the FSA Bond Cap at issue here. Each of these statutes was designed to prevent adverse judgments from disrupting, prior to completion of the appellate process, the various programs financed by the FSA.

A. The 2000 Act

In 2000, the Legislature enacted a statute limiting the size of the bond required to stay execution of punitive-damage judgments on appeal in class actions. § 768.733(1)–(2), Fla. Stat. (2011). The statute was designed to address "the threat to recovery of [FSA] settlement proceeds created by a potentially large punitive damage award in [*Engle*]." H.R. Staff Analysis, CS/HB 1721, at 12 (July 13, 2000) (App. 84). In enacting the statute, the Legislature recognized the serious constitutional concerns with requiring a defendant to bond off large punitive-damages judgments to stay those judgments pending appeal. *Id.* at 13 (App. 85).

B. The 2003 Act

In 2003, the Legislature enacted a bond cap for judgments against the FSA signatories. *See* Ch. 03-133, § 1, Laws of Fla. This statute limited to $100 million the size of appeal bonds "[i]n any civil action involving a signatory, or a successor, parent, or affiliate of a signatory, to a tobacco settlement agreement." § 569.23(2), Fla. Stat. (2011). The statute reflected a concern that the "cost of dozens of individual lawsuits and class action suits" would interfere with FSA payments prior to the completion of the appellate process, and thereby disrupt state programs in the interim. 2003 Staff Analysis at 3 (App. 37).

C. The FSA Bond Cap

Concern about the aggregate impact of individual judgments increased once

this Court decertified the *Engle* class. *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1269 (Fla. 2006). In the wake of that decision, more than 9000 individuals filed over 3000 "*Engle* progeny" suits. 2009 Staff Analysis, at 5 (App. 29). With that onslaught of litigation, the Legislature realized that, even if no single case threatened a bankrupting or unbondable judgment, "the tobacco companies [could] have to post supersedeas bonds in up to 3,000 separate cases that could cumulatively total billions of dollars." *Id.*; H.R. Staff Analysis, H.B. 7153, at 3 (Apr. 22, 2009) (App. 92). It also recognized that "[i]f [an FSA signatory] ... declares bankruptcy, the state may not be able to collect its money." 2009 Staff Analysis at 9 (App. 33).

Accordingly, the Legislature passed the FSA Bond Cap by large margins (100 to 17 in the House and 29 to 10 in the Senate). *See* http://archive.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&ElementID=JumpToBox&SubMenu=1&Year=2009&billnum=2198 (last visited May 27, 2012). The FSA Bond Cap provides for an automatic stay "[i]n civil actions against a signatory, or a successor, parent, or affiliate of a signatory, to a tobacco settlement agreement brought by or on behalf of persons who claim or have been determined to be members of a former class action that was decertified in whole or in part." § 569.23(3)(a)(1), Fla. Stat. (2011).

In particular, the FSA Bond Cap (which is set forth in full as an addendum

to this brief) includes the following provisions:

- *Bond Cap In Florida Courts*: The bond cap sets the required security for a stay by a sliding scale tied to the number of pending judgments. The defendants must secure each plaintiff's judgment, but do not need to provide more than $200 million in total security. Thus, for the first 40 judgments, the maximum security per judgment is $5 million. On the 41st judgment, the maximum security decreases to $2.5 million for all judgments up to the 80th judgment. And the bond per judgment continues to decline in this fashion as the number of judgments reaches additional tiers. *See id.* § 569.23(3)(a)(2), (4).
- *Bond Cap For U.S. Supreme Court Review*: The bond required to stay a case pending in the U.S. Supreme Court is the lesser of the amount of the judgment or three times the amount that would be required for a stay in the Florida courts. *Id.* § 569.23(3)(b)(1)–(2).
- *Protection Against Dissipation Of Assets*: If a defendant is dissipating assets to avoid paying a judgment, the trial court may order the defendant to post a bond up to the full amount of the judgment. *Id.* § 569.23(4).
- *State Courts Revenue Trust Fund*: The Clerk of this Court maintains the security, with fees and interest from any deposits accruing to the

State Courts Revenue Trust Fund. *Id.* § 569.23(3)(a)(1), (3)(d).

In 2011, the Legislature removed the FSA Bond Cap's sunset provision that had provided for expiration of the law. *See* Ch. 11-61, § 16, Laws of Fla. In so doing, it found

> that hundreds of millions of dollars appropriated annually in support of the state's Medicaid program and other critical health programs come directly from revenues resulting from the [FSA] settlement ..., that maintaining those revenues is critical to the health of this state's residents, that [the FSA Bond Cap] protects the continued receipt of those revenues, that the sunset of [the FSA Bond Cap] will undermine financial support for the state's Medicaid and other critical health programs, and that the sunset ... should therefore be repealed.

Id.§ 16(1). Like the original statute, this amendment passed by lopsided margins (80 to 38 in the House and 24 to 15 in the Senate). *See* http://www.flsenate.gov/Committees/BillSummaries/2011/html/2144BC (last visited May 27, 2012).

III. STATUS OF THE *ENGLE* PROGENY LITIGATION

The Legislature's concern about the aggregate impact of potentially infirm *Engle* progeny judgments has proved well-founded. With only about 70 cases tried to verdict, the roughly 43 successful plaintiffs have been awarded over $450 million in judgments. Many of those judgments may be vulnerable on appeal. For example, there is a significant division of authority regarding proper use of the *Engle* findings in progeny cases, *compare, e.g.*, *Brown v. R.J. Reynolds Tobacco*

Co., 611 F.3d 1324, 1334-36 (11th Cir. 2010), *with, e.g.*, *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1069 (Fla. 1st DCA 2010), and this Court's resolution of that issue in *Philip Morris U.S.A. Inc. v. Douglas* (No. SC12–617) may affect every *Engle* progeny case pending on appeal. Moreover, despite the relatively small number of *Engle* progeny appeals to have run their course, the district courts of appeal have already reversed *Engle* progeny judgments on the grounds that they were inconsistent with the governing statute of limitations, *see Philip Morris USA, Inc. v. Barbanell*, No. 4D09-3987, 2012 Fla. App. LEXIS 2657, at *10–*13 (Fla. 4th DCA Feb. 22, 2012); inconsistent with the governing statute of repose, *see Philip Morris USA, Inc. v. Hess*, No. 4D09-2666, 2012 Fla. App. LEXIS 6882, at *13–*18 (Fla. 4th DCA May 2, 2012); or excessive, *see R.J. Reynolds Tobacco Co. v. Webb*, No. 1D10-6557, 2012 Fla. App. LEXIS 5324, at *12–*22 (Fla. 1st DCA Apr. 9, 2012); *R.J. Reynolds Tobacco Co. v. Townsend*, No. 1D10-4585, 2012 Fla. App. LEXIS 2122, at *10–*20 (Fla. 1st DCA Feb. 14, 2012). These decisions confirm the obvious point that, in *Engle* progeny cases, as elsewhere, many judgments simply will not survive the rigors of appellate scrutiny.

IV. THE DECISIONS BELOW UPHOLDING THE FSA BOND CAP

In this case, the trial court entered a $15.75 million judgment for Plaintiff Amanda Hall. Final Judgment (App. 96). Reynolds appealed and, under the FSA Bond Cap, obtained a stay of execution by filing a bond for $5 million. Reynolds

Supersedeas Bond (App. 98). In the underlying merits appeal, the First District affirmed, *R.J. Reynolds Tobacco Co. v. Hall*, 70 So. 3d 642 (Fla. 1st DCA 2011); this Court declined jurisdiction, *R.J. Reynolds Tobacco Co. v. Hall*, 67 So. 3d 1050 (Fla. 2011); and the U.S. Supreme Court denied certiorari, *R.J. Reynolds Tobacco Co. v. Hall*, 132 S. Ct. 1795 (2012). On April 27, 2012, Reynolds paid the judgment, thus rendering moot any dispute about the appropriate appeal bond.

While the merits appeal was pending, Mrs. Hall challenged the FSA Bond Cap as an unconstitutional special law and as a violation of Florida's constitutional requirement of separation of powers. Pl.'s Mot. to Determine Sufficiency of Bond (App. 103). Reynolds opposed (Def.'s Opp'n to Pl.'s Mot. (App. 119)), and the Attorney General intervened to defend the constitutionality of the statute (Mot. To Intervene Of Attorney General (App. 160)). The trial court rejected the challenges (App. 165), and the First District affirmed (App. 2).

First, the First District held that the FSA Bond Cap is a "general law" that need not comply with the constitutional restrictions on "special laws." (App. 10–16.) The court rejected Mrs. Hall's argument that the FSA Bond Cap is a special law because it applies only to the FSA signatories, citing precedent from this Court that "'a law does not have to be universal in application to be a general law.'" (App. 12) (quoting *St. Johns River Water Mgmt. Dist. v. Deseret Ranches of Fla., Inc.*, 421 So. 2d 1067, 1069 (Fla. 1982)). Indeed, this Court has even upheld a

statute "benefit[ing] a single pari-mutuel racing facility," because it protected state tax revenue and its narrow class was reasonably related to that statewide purpose. (App. 12–13) (discussing *Dep't of Legal Affairs v. Sanford-Orlando Kennel Club*, 434 So. 2d 879 (Fla. 1983)).

The First District concluded that this case is analogous to *Sanford-Orlando Kennel Club*. The FSA Bond Cap serves a statewide purpose, the court held, because it protects the various "state programs" funded by "significant revenues from the FSA." (App. 13–14.) The court next held that the Legislature reasonably restricted the FSA Bond Cap to the FSA signatories who provide these revenues. (*Id.*) "It [was] not for [the First District] to say whether the Legislature could have or should have chosen other means to achieve" its public purposes; this reasonable fit between ends and means qualified the FSA Bond Cap as a general law. (App. 14.) Finally, the First District held that "the class of cases subject to the statute is not closed," as the tobacco signatories reasonably "may be the subject of other class actions that end up being decertified." (App. 15.)

Second, the First District held that the FSA Bond Cap does not violate the separation of powers. Under the Florida Constitution, this Court bears responsibility for procedural court rules, whereas the Legislature bears responsibility for substantive law. The First District held that, because the FSA Bond Cap comports with this Court's rules, it is not an invalid procedural rule.

(App. 17–18.) Specifically, Florida Rule of Appellate Procedure 9.310(a) provides: "Except as provided by general law ... , a party seeking to stay a final or non-final order pending review shall file a motion in the lower tribunal, which shall have continuing jurisdiction, in its discretion, to grant, modify, or deny such relief." The First District reasoned that, because the FSA Bond Cap is a general law, it falls within the exception expressly provided by the rule. (App. 18.) The court further reasoned that the statute, in seeking to protect state revenues and appellate rights, addresses "a substantive matter within the purview of the Legislature." (App. 19.)

In so doing, the First District followed *BDO Seidman, LLP v. Banco Espirito Santo International*, 998 So. 2d 1 (Fla. 3d DCA), *review denied*, 996 So. 2d 211 (2008), which held that another bond cap "concern[ed] substantive rights to property and to appeal." *Id.* at 2; (App. 19). The First District rejected Mrs. Hall's argument that *BDO Seidman* conflicts with *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979). While *Wait* held that stays are procedural, the Court was not addressing Rule 9.310(a), whose "except as provided by general law" clause "'preserve[d] any statutory right to a stay.'" (App. 20–21) (quoting *In re Proposed Fla. Appellate Rules*, 351 So. 2d 981, 1010 (Fla. 1977)).

SUMMARY OF THE ARGUMENT

I. The First District correctly held that the FSA Bond Cap is a general

law that need not comply with the constitutional rules for the passage of special laws. Under this Court's precedent, whether a law is general or special does not turn on the number of individuals or entities to whom a statute applies. Rather, a law is general if, giving due deference to the Legislature's choices, the Court finds both that the law serves statewide purposes and that the limits on the law's application reasonably relate to those purposes.

Under this test, the FSA Bond Cap qualifies as a general law. It serves statewide purposes by protecting the State's FSA revenue stream from the disruption that could result if multiple judgments against the FSA signatories became unbondable. It thereby protects millions of Floridians who rely on FSA-funded statewide programs. Further, the statute's restriction of its application to the FSA signatories and their affiliates is reasonably related to these purposes because the FSA signatories pay the very revenue that the Legislature seeks to protect.

Mrs. Hall's contrary arguments are meritless. Most notably, she errs in suggesting that the FSA Bond Cap is necessarily a special law because it adopts a "closed class" that applies only to the FSA signatories. The Court has never held that closed classes automatically make a law a special law, and, indeed, several cases have held statutes to be general even though they apply only to certain entities. Instead, the Court asks *why* a statute creates a closed class. Where the

class can only be explained as designed to benefit private interests over statewide interests, it will be struck down as a special law. But where, as here, the restricted class is reasonably related to statewide purposes, it qualifies as a general law. Regardless, the FSA Bond Cap does not enact a closed class because, as the First District found, it applies to an increasing number of potential lawsuits and defendants.

II. The First District rightly rejected Mrs. Hall's separation-of-powers challenge. Because the distinction between substance and procedure is often unclear, the Court has enacted deferential standards for judging legislative decisions. Only *purely* procedural statutes violate the separation of powers; the Court has consistently rejected challenges to procedural provisions intertwined with substantive rights. And not every activity must be categorized as substantive or procedural. Just as this Court can create substantive common law in the face of legislative inertia, so too the Legislature may pass procedural statutes that comport with the Court's rules. The Court also gives the Legislature more room if a statute addresses an area in which it has traditionally been involved.

Under these rules, the FSA Bond Cap does not violate the separation of powers. The statute addresses substantive areas, including the right to appeal, the right to property, and the State's budget. The FSA Bond Cap also is in harmony with the Court's rules. By its terms, Rule 9.310 sets out only default provisions for

staying judgments, permitting the Legislature to adopt additional exceptions to its provisions "by general law." Finally, the Legislature has a long history in this area, confirming that it has not encroached on this Court's powers.

Mrs. Hall's contrary arguments depart from unanimous decision in the district courts of appeal. Her argument that the FSA Bond Cap concerns matters of pure procedure ignores the budgetary goals that are furthered by the statute and interprets the substantive rights to property and to an appeal too narrowly. Her argument that the FSA Bond Cap conflicts with Rule 9.310 interprets that Rule in an atextual manner. And her argument based on federal *Erie* principles overlooks that those principles are directed to an entirely different problem not at issue here.

STANDARD OF REVIEW

Mrs. Hall's constitutional challenges present legal questions subject to de novo review. *See Schrader v. Fla. Keys Aqueduct Auth.*, 840 So. 2d 1050, 1055 (Fla. 2003). However, statutes come "clothed with a presumption of constitutionality." *Dep't of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.*, 434 So. 2d 879, 881 (Fla. 1983). Thus, "[i]t is well established that all doubt will be resolved in favor of the constitutionality of a statute, and that an act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt." *State v. Kinner*, 398 So. 2d 1360, 1363 (Fla. 1981) (citation omitted); *Caple v. Tuttle's Design-Build, Inc.*, 753 So. 2d 49, 51 (Fla. 2000).

ARGUMENT

I. THE FSA BOND CAP IS A CONSTITUTIONAL GENERAL LAW

The Florida Constitution distinguishes "general laws" from "special laws," and subjects the latter to distinctive limitations and procedural requirements. The Legislature may not enact "special laws" pertaining to a host of areas, including "grant of privilege to a private corporation," Art. III, § 11(a)(12), Fla. Const, and it must give adequate "notice" before passing a special law on a permissible topic, *id.* § 10. This distinction between general laws and special laws turns on whether a statute has a legitimate statewide purpose and whether its classifications are reasonably related to that purpose. Under that test, the FSA Bond Cap easily passes muster, because it protects statewide programs and reasonably limits its application to entities providing the program funding. Accordingly, the First District correctly concluded that the FSA Bond Cap is a general law.

A. The Difference Between A General And A Special Law Turns On A Statute's Purpose And The Reasonableness Of Its Distinctions

1. This Court has established a flexible, multi-pronged definition to distinguish a "general law" from a "special law." A general law "'operates universally throughout the state, *or* uniformly upon subjects as they may exist throughout the state, *or* uniformly within *permissible classifications* by population of counties or otherwise.'" *Schrader v. Fla. Keys Aqueduct Auth.*, 840 So. 2d 1050, 1055 (Fla. 2003) (emphases added) (quoting *State ex rel. Landis v. Harris*,

163 So. 237, 240 (Fla. 1934)). Under that definition, universal application is sufficient—but not necessary—to establish a law's generality.

As the First District correctly concluded (App. 12), even if limited to particular groups, a statute may qualify as general if it makes "'permissible'" rather than "'illegal'" classifications. *Schrader*, 840 So. 2d at 1055 (citation omitted). Indeed, this Court has "repeatedly held that a law does not have to be universal in application to be a general law if it materially affects the people of the state." *St. Johns River Water Mgmt. Dist. v. Deseret Ranches of Fla., Inc.*, 421 So. 2d 1067, 1069 (Fla. 1982); *see Dep't of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.*, 434 So. 2d 879, 881 (Fla. 1983); *Cesary v. Second Nat'l Bank*, 369 So. 2d 917, 921 (Fla. 1979); *Cantwell v. St. Petersburg Port Auth.*, 21 So. 2d 139, 140 (Fla. 1945). A classification merely needs to be "reasonably related" to the statute's statewide purpose. *Schrader*, 840 So. 2d at 1056. In other words, "[t]he classification scheme must be reasonable and not arbitrary ... and must rest on some reasonable relation to the subject matter in respect of which the classification is proposed." *Sanford-Orlando Kennel Club*, 434 So. 2d at 881; *Cesary*, 369 So. 2d at 921 ("'Reasonable classification as to subject matter is permitted.'" (citation omitted)).

2. Well-established principles distinguish reasonable classifications from arbitrary ones. To begin with, this Court gives great deference to the Legislature. Presuming that legislative distinctions are reasonable, the Court will uphold a

classification "'[i]f any state of facts can reasonably be conceived that will sustain [it].'" *Golden Nugget Grp. v. Metro. Dade Cnty.*, 464 So. 2d 535, 537 (Fla. 1985) (citation omitted). The Court asks only whether the Legislature could "have had any reasonable ground for believing that there were public considerations justifying the particular classification" it adopted. *Lewis v. Mathis*, 345 So. 2d 1066, 1068 (Fla. 1977).

Further, narrow classifications are not necessarily arbitrary. "Uniformity of treatment within [a] class is not dependent upon the *number of persons* in the class." *Sanford-Orlando Kennel Club*, 434 So. 2d at 881 (emphasis added). To the contrary, the existence of narrow classifications—or even a classification containing one member—has never been "sufficient to make a law special, and not general." *Ex parte Wells*, 21 Fla. 280, 313 (Fla. 1885); *id.* at 310 ("'Classification does not depend upon numbers.'" (citation omitted)). This rule makes sense: because particular entities can have an "actual impact [that] far exceeds [their] limited" domains, laws tailored to narrow classes often represent the most efficient means for achieving statewide goals. *See Schrader*, 840 So. 2d at 1056.

The Court's functional approach cuts both ways. Just as the Legislature need not create breadth for its own sake, it also cannot use ostensibly general standards that, without justification, are "designed to operate upon or benefit only particular" entities. *City of Miami v. McGrath*, 824 So. 2d 143, 148 (Fla. 2002);

see, e.g., *Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So. 2d 503, 510 (Fla. 2008); *St. Vincent's Med. Ctr., Inc. v. Mem'l Healthcare Grp., Inc.*, 967 So. 2d 794 (Fla. 2007); *Fla. Dep't of Bus. & Prof'l Regulation v. Gulfstream Park Racing Ass'n*, 967 So. 2d 802 (Fla. 2007); *Dep't of Bus. Regulation v. Classic Mile, Inc.*, 541 So. 2d 1155 (Fla. 1989). If a classification is "nothing more than a descriptive technique ... to identify" favored special interests, it is "not reasonably related" to statewide purposes and, accordingly, the law at issue is special. *Id.* at 1158–59.

3. Applying these standards, this Court repeatedly has held that statutes with narrow classifications can qualify as general laws. In *Sanford-Orlando Kennel Club*, the Court upheld a statute authorizing the conversion of failing harness racing tracks to dog racing, even though the statute applied only to one track. 434 So. 2d at 880. The Court held that the statute served a state purpose "because of the substantial revenue [the State] receives from parimutuel betting." *Id.* at 881. And its application only to "less productive racing facilities" was reasonably related to "this state interest—increased state revenues." *Id.* at 882.

Likewise, in *Schrader*, the Court upheld a statute that authorized any "local government within the Florida Keys" to impose more stringent sewage-connection ordinances, even though governments within the Florida Keys were the sole beneficiaries. 840 So. 2d at 1052, 1056. The statute's "primary purpose ... [was] one of statewide importance," as "the nearshore waters of the Florida Keys" are "a

vital natural resource of the state," and their protection provides statewide benefits to the environment and industries such as tourism and seafood. *Id.* at 1056. The Court further held that the statute's limit to "local governments within the Florida Keys" reasonably related to this purpose. *Id.* at 1054.

Similarly, in *Golden Nugget Group*, the Court upheld a statute permitting counties that meet certain requirements to charge a tax for improving or constructing convention centers. 464 So. 2d at 536. Only three counties could ever meet the requirements. *See id.* Nonetheless, the Court concluded that the statute was designed to serve the statewide purpose of "promot[ing] tourism by facilitating the improvement and construction of convention centers," and that the "classification utilized in the statute" (the limit to three counties) was "reasonable" because those counties "ha[d] substantial tourist-oriented economies, and they ha[d] concentrated on developing facilities that [would] attract convention tourists in order to improve their tourist industries." *Id.* at 537.

B. The FSA Bond Cap Protects Statewide Programs And Makes Classifications That Are Reasonably Related To That Purpose

Under this settled framework, the First District correctly concluded that the FSA bond cap qualifies as a general law. It serves "a primary purpose of ... statewide importance," *Schrader*, 840 So. 2d at 1056, and makes classifications that rest on a "reasonable relation to the subject matter in respect of which the classification[s] [are] proposed," *Sanford-Orlando Kennel Club*, 434 So. 2d at 881.

1. The First District properly recognized the FSA Bond Cap's statewide purposes. (App. 13–14.) The Legislature enacted the cap out of concern that judgments against FSA signatories would be unbondable in the aggregate, threaten the signatories' financial viability, and jeopardize FSA payments. As the Legislature explained when repealing the sunset provision, the statute "protects the continued receipt of those [FSA] revenues," and its expiration would "undermine financial support for the state's Medicaid and other critical health programs." Ch. 11-61, § 16(1), Laws of Fla.

Keeping the FSA Bond Cap in place is, as the Legislature found, of vital statewide interest because the billions of dollars in FSA payments fund a range of crucial programs. In 2010, for example, the Agency for Health Care Administration allocated $60.2 million for Kidcare/Healthy Kids; $7.2 million for Medikids; $15.6 million for Children's Medical Services; and $54.8 million for Medicaid and related services. *Tobacco Settlement Outlook Statement* at 2 (App. 42). The Department of Children and Families received $132.3 million. *Id.* The Department of Health allocated about $10 million to school services. *Id.* In addition, the Legislature sought to provide funding to the judiciary—at a time of historic budget crisis—by allowing the Clerk of this Court to collect fees on monies deposited as security. § 569.23(3)(a)(1), (3)(d), Fla. Stat. (2011). Protecting these programs by safeguarding their revenue stream is a valid state

interest. *See, e.g.*, *Sanford-Orlando Kennel Club*, 434 So. 2d at 882.

2. The FSA Bond Cap's two classifications—one of defendants and one of plaintiffs—are "reasonably related to the law's purpose." *Schrader*, 840 So. 2d at 1056. On the defense side, the statute applies to FSA signatories and successors or affiliates. § 569.23(3)(a)(1), Fla. Stat. (2011). Because the FSA signatories make the FSA payments, this class reasonably relates to the purpose of protecting the FSA revenue. *Sanford-Orlando Kennel Club*, 434 So. 2d at 882.

On the plaintiffs' side, the statute applies to cases brought by members of decertified class actions. § 569.23(3)(a)(1), Fla. Stat. (2011). This class is reasonable because decertified class actions—particularly ones with plaintiffs given legal benefits based on proceedings prior to decertification—pose distinctive risks of multiple adverse judgments that may become unbondable in the aggregate. Thus, it is hardly surprising that *Engle* progeny cases account for the vast bulk of litigation against the FSA signatories, and pose the greatest threat to FSA revenue. And it made perfect sense for the Legislature to focus on the problem exemplified by those cases. *See Cesary*, 369 So. 2d at 921 (noting that the Legislature may "classify regulatory enactments with reference to degrees of evil").

In sum, the bond cap statute is a general law because the Legislature had a "reasonable ground for believing that there were public considerations justifying the ... classification[s]" made in that statute. *Lewis*, 345 So. 2d at 1068. As the

First District correctly concluded, given the existence of such reasonable classifications, "[i]t is not for [courts] to say whether the Legislature could have or should have chosen other means to achieve" its statewide purposes. (App. 14.)

C. Mrs. Hall's Contrary Arguments Are Mistaken

Mrs. Hall does not dispute that the FSA Bond Cap serves statewide purposes by protecting vital FSA revenue. Nor does she object to the FSA Bond Cap's limit to decertified class actions. Nonetheless, she asks the Court to classify the FSA bond cap as an impermissible special law for three reasons: because the statute applies only to the FSA signatories; because this Court's reasonable-classification test applies only to geographic classifications; and because the First District's contrary decision would "nulli[f]y" the limits on special laws and encourage "graft." All three arguments are wrong.

1. The statutory classifications are neither closed nor impermissibly narrow

Mrs. Hall primarily argues that the FSA Bond Cap is a special law because it "only applies to the specific tobacco companies that settled the Medicaid lawsuit brought by the State." Petr's Br. 8. The First District correctly found that argument to be wrong both legally and factually. (App. 12–16.)

Legally, Mrs. Hall errs by suggesting that a statute limited to particular entities automatically qualifies as a special law. Petr's Br. 7. As the First District explained, "[t]he narrow scope of [the FSA Bond Cap] is not necessarily

dispositive." (App. 12.) This Court repeatedly has upheld statutes creating closed classes, i.e., those for which only certain individuals or entities could qualify. *See, e.g.*, *Schrader*, 840 So. 2d at 1052 (statute applied only to "local government within the Florida Keys"); *Golden Nugget Grp.*, 464 So. 2d at 535–37 (statute could only apply to three counties); *Cantwell*, 21 So. 2d at 140 (statute applied only to counties with bodies of water connected to the Gulf of Mexico). In each case, this Court found the closed classification to be reasonably related to a legitimate statewide purpose. *See, e.g.*, *Cantwell*, 21 So. 2d at 140.

In addition, Mrs. Hall misreads the cases that have struck down, as special laws, statutes creating closed classes. She suggests that these cases turned entirely on whether the classes were open or closed. Petr's Br. 8. "Careful reading of these cases, however, reveals that the acts therein were invalidated because this Court found no reasonable relationship between the classification and the subject matter." *Sanford-Orlando Kennel Club*, 434 So. 2d at 882. Thus, the ultimate question remains whether the class is "'based upon proper distinctions and differences that inhere in or are peculiar or appropriate to a class.'" *McGrath*, 434 So. 2d at 148 (citation omitted).

The cases identify whether the statute at issue created an open or closed class for just one reason—to assist in determining whether the classification was "'based upon proper distinctions.'" *Id.* at 148 (citation omitted). Closed classes

are unreasonable if they are "nothing more than a 'descriptive technique' ... to identify" favored interests. *Id.* That is so, not because the classes are closed, but because the classification is not "reasonably related to [statewide] purpose[s]." *Classic Mile*, 541 So. 2d at 1158. Instead, the classification could be explained only as *undermining* statewide interests by placing local or private interests ahead of them. *See, e.g., St. Vincent's*, 967 So. 2d at 800–01 (statute aimed at benefiting particular entity); *Gulfstream Park Racing Ass'n*, 967 So. 2d at 808–09 (same). In short, this Court's cases make clear that a statute's limitation to particular entities does not convert it into a special law if the statute promotes a valid state purpose and creates classifications reasonably related to that purpose. *See Schrader*, 840 So. 2d at 1052–56; *Golden Nugget Grp.*, 464 So. 2d at 535–37.

Factually, Mrs. Hall errs in contending that the FSA Bond Cap creates a closed class. The First District correctly held that the statutory cap applies to an increasing number of *Engle* progeny cases. (App. 15–16.) To be subject to the cap, a plaintiff must have secured a judgment against an FSA signatory or affiliate. § 569.23(3)(a)(1), Fla. Stat. (2011). When the FSA Bond Cap was enacted, only five plaintiffs had done so. Today, that number has increased to over 40. As the First District also explained, the FSA bond cap is not even limited to *Engle* progeny litigation. Rather, "it applies in any civil case against an FSA signatory brought by or on behalf of a member of a decertified class action," and "[i]t is not

unreasonable to expect that the FSA signatories, which include the nation's four largest tobacco companies, may be the subject of other class actions that end up being decertified." (App. 15.)

Moreover, contrary to Mrs. Hall's claim (Petr's Br. 9), the bond cap is not limited to specified tobacco companies. Rather, it is open to new "successor, parent, [and] affiliate" companies of the *current* FSA signatories. § 569.23(3)(a)(1), Fla. Stat. At least one company has come within its scope since its enactment. In December 2009, Reynolds's parent acquired Niconovum AB, a manufacturer of nicotine-replacement-therapy products. Reynolds American, Inc., Annual Report (10-K) at 9 (Feb. 19, 2010) (App. 9). The FSA Bond Cap would also apply to *future* FSA signatories. The Legislature was aware that "several other tobacco companies have since entered into the [Master Settlement Agreement]" between the tobacco companies who signed the FSA and dozens of other states. FSA Report at 2 (App. 46). Accounting for the possibility that additional companies could enter into the FSA, the FSA Bond Cap applies to any amendments to it. § 569.23(1), Fla. Stat. (2011). In a footnote, Mrs. Hall objects that any "extension of the bond rights" to other companies "is merely part of the benefit conferred on the tobacco companies." Petr's Br. 9 n.6. She thus concedes that the class is open and can be *extended.* And whether or not the statute may benefit the increasing number of entities who fall within it, it still qualifies as a

general law because it serves statewide purposes and creates classes reasonably related to those purposes. *Sanford-Orlando Kennel Club*, 434 So. 2d at 882.

In sum, the statutory classes are open and steadily expanding. The First District properly determined that "the class of cases subject to the statute is not closed." (App. 16.)

2. Mrs. Hall creates her geographic limitation to the reasonable-classification test out of whole cloth

Faced with the many cases upholding statutes creating closed classes, Mrs. Hall seeks to distinguish those cases as involving classifications "that applied to particular geographic areas." Petr's Br. 11. Here, the classification concerns *entities* rather than *areas*, her argument goes, so the reasonable-classification test does not apply. The First District rightly rejected that argument. (App. 12–13.)

For starters, Mrs. Hall cites no case intimating that the definition of general law differs in this manner. That is for good reason. Her argument sharply conflicts with this Court's "general law" definition, which has never limited the reasonable-classification test to geographic areas. A "law relating" not simply "to *subdivisions* of the state" but also "to *subjects, persons, or things*" qualifies as "a valid general law if the classification is based upon proper differences which are inherent in or peculiar to the class." *Schrader*, 840 So. 2d at 1055 (emphasis added); *see Landis*, 163 So. at 240 (defining general law as one that "'operates ... uniformly within permissible classifications by population of counties *or*

otherwise'" (emphasis added)). Even *Lawnwood*, a case that Mrs. Hall repeatedly cites, confirms that the cases treat statutes designed to favor "local *or* private interests" as equally invalid. 990 So. 2d at 513 (emphasis added).

Moreover, other cases have applied the reasonable-classification test to non-geographic classes. For example, in *Cesary*, this Court upheld a statute establishing different interest-rate caps for different lenders. 369 So. 2d at 921. In rejecting the plaintiff's special-law challenge, the Court noted that classes "must be based upon some difference bearing a reasonable and just relationship to the subject matter regulated," and found this test satisfied because the "classifications of lenders ... [had] a basis in real differences of conditions" among them. *Id.* Similarly, in *Sanford-Orlando Kennel Club*, this Court applied the reasonable-classification test to a non-geographic class (racing tracks). Mrs. Hall concedes as much (Petr's Br. 12), which confirms that the reasonable-classification test cannot somehow be limited to cases involving geographic or county-based classifications.

Finally, Mrs. Hall's geographic distinction is illogical. She concedes (Petr's Br. 11–12) that the Legislature may serve statewide purposes through a narrow enactment "that facially appear[s] to affect only a limited geographic area," because the enactment can have "an actual impact far exceeding the limited geographic area." *Schrader*, 840 So. 2d at 1056. But such external impacts are not limited to classes based on geography; just as legislation limited to certain

locations may have a broad impact, so too can legislation limited to certain *entities*. This case proves that point. While the FSA Bond Cap may cover FSA signatories and related entities, its "actual impact far exceed[s]" those entities, because it protects the millions of Floridians who benefit from the public programs funded by the FSA. *Id.* Both precedent and logic refute Mrs. Hall's argument.

3. The reasonable-classification test does not render the Florida Constitution a "nullity" or promote "graft"

Mrs. Hall lastly asserts that the First District's decision "would render much of article III, section 11(a) a nullity" and promote "graft" among corporations and public officials. Petr's Br. 14–15. These remaining arguments are meritless.

Mrs. Hall's claim (Petr's. Br. 14) that the reasonable-classification test reads out prohibitions in Article III, § 11(a)—like the ban on special laws pertaining to the assessment of taxes—misconstrues the test. The Legislature could not defend a grant of a special taxing power to only one county against a special-law challenge solely on the ground that the tax increases revenue. Petr's Br. 14. Rather, the question would be whether the *limit* of the grant to a single county reasonably related to that purpose. And where such a discriminatory class could be explained only as benefitting a particular locale without justification, it would be invalid. *McGrath*, 824 So. 2d at 148. For this same reason, the other provisions in Article III, § 11(a) that Mrs. Hall cites (Petr's Br. 15) ensure that the classifications concerning "punishment for crime," "disposal of public property," and "regulation

of occupations" reasonably serve state interests.

Similarly, Mrs. Hall errs in arguing that the Constitution recognizes "no exception" to the ban on special laws "where the special benefit given to [a] private corporation[] also serves a public policy." Petr's Br. 15. This argument flips the test on its head. The correct formulation is that the Constitution recognizes no exception to the reasonable-classification test even if a statute designed to serve state interests also benefits particular entities. In *Cesary*, for example, the statute surely benefited the lenders who could charge higher interest rates, but the Court still upheld the law given its reasonable relation to state purposes. 369 So. 2d at 921. Mrs. Hall's argument also ignores the *reason* for the limits on special laws. Those restrictions do not exist to hamstring the Legislature's ability to serve state interests efficiently; they merely "prevent state action benefiting local or private interests" at the *expense* of statewide interests. *Lawnwood*, 990 So. 2d at 513.

Finally, Mrs. Hall's accusations of "graft" by the Legislature (Petr's Br. 15) are baseless. As explained, the Legislature passed the FSA Bond Cap by overwhelming, bipartisan margins to protect its FSA revenue. It borders on nonsensical to posit that the politically accountable branches would narrowly favor tobacco companies—which the First District characterized as "'present-day popular villain[s]'" (App. 16) (citation omitted)—rather than the billions of dollars

that the State had extracted from those companies through litigation.

II. THE FSA BOND CAP DOES NOT VIOLATE THE SEPARATION OF POWERS BETWEEN THE LEGISLATURE AND THE COURT

The Florida Constitution grants this Court "the exclusive authority to 'adopt rules for the practice and procedure in all courts.'" *Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000) (quoting Art. V, § 2(a), Fla. Const.). By contrast, the Legislature possesses the authority to enact "substantive law." *Id.* As both the First and Third Districts have held, statutes like the FSA Bond Cap meet these separation-of-powers requirements because they affect substantive rights to property and appeal and comport with the Court's procedural rules. (App. 16–23); *BDO Seidman, LLP v. Banco Espirito Santo International*, 998 So. 2d 1, 2–3 (Fla. 3d DCA), *review denied*, 996 So. 2d 211 (2008). Mrs. Hall's contrary arguments would require the Court to depart from this unanimous case law.

A. Statutes That Affect Substantive Rights And Comport With This Court's Rules Do Not Violate The Separation Of Powers

Under the separation-of-powers provisions, this Court has authority over procedural rules ("the machinery of the judicial process" or "the method of conducting litigation," *State v. Raymond*, 906 So. 2d 1045, 1048 (Fla. 2005)), whereas the Legislature has authority over substantive law ("those rules and principles which fix and declare the primary rights of individuals with respect to their persons and property," *id.* at 1049). Because this "distinction between

substantive laws enacted by the Legislature and procedural rules governed by the Court is not always clear," *Se. Floating Docks, Inc. v. Auto-Owners Ins. Co.*, 82 So. 3d 73, 78 (Fla. 2012); *Caple v. Tuttle's Design-Build, Inc.*, 753 So. 2d 49, 53 (Fla. 2000), the Court has adopted a flexible approach to separation of powers, permitting substantial room for play in the joints between substance and procedure.

To begin with, only "*purely* procedural" statutes invade the Court's authority. *Raymond*, 906 So. 2d at 1048 (emphasis added); *Se. Floating*, 82 So. 3d at 78 n.4. Thus, a statute that creates substantive rights may "include procedural elements." *Raymond*, 906 So. 2d at 1049. And even if a statute *affects* substantive rights, it will not be considered purely procedural. *See Benyard v. Wainwright*, 322 So. 2d 473, 475 (Fla. 1975). Simply stated, the Court has "consistently rejected constitutional challenges where the procedural provisions were intertwined with substantive rights." *Caple*, 753 So. 2d at 54; *see Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1092 n.10 (Fla. 1987); *VanBibber v. Hartford Accident & Indem. Ins. Co.*, 439 So. 2d 880, 882–83 (Fla. 1983).

In addition, not "every governmental activity [must] be classified" as purely substantive ("belonging exclusively" to the Legislature) or purely procedural ("belonging exclusively" to the Court). *State v. Johnson*, 345 So. 2d 1069, 1071 (Fla. 1977). To the contrary, the branches have considerable overlapping responsibilities, and each has significant latitude where its actions do not impinge

upon the prerogatives of the other. This Court, for example, "may determine public policy" (a substantive question) "in the absence of a legislative pronouncement." *VanBibber*, 439 So. 2d at 883. Conversely, the Court will uphold a statute if its "procedural aspect[s] d[o] not conflict with any existing court rule." *Raymond*, 906 So. 2d at 1049; *see Looney v. State*, 803 So. 2d 656, 676 (Fla. 2001) ("[I]t cannot be said that [a] statute unconstitutionally violates separation of powers" if it "does not 'interfere with,' 'intrude upon,' or 'conflict this Court's own rule[s].").

Finally, tradition plays a role. If a statute addresses "a field in which the legislature has historically been deeply involved," the Court is more likely to conclude that the statute permissibly affects substantive rights. *VanBibber*, 439 So. 2d at 883. That follows from more general separation-of-powers principles. When determining the domain of each branch of government, the Court has long held that "the powers of the respective branches 'are those ... so recognized by *immemorial governmental usage*.'" *Fla. Ass'n of Prof'l Lobbyists, Inc. v. Div. of Legislative Info. Servs.*, 7 So. 3d 511, 515 (Fla. 2009) (citation omitted) (emphasis added); *see State v. Atl. Coast Line R. Co.*, 47 So. 969, 974 (Fla. 1908).

B. Bond Caps Concern Substantive Rights And Comport With This Court's Procedural Rules

In *BDO Seidman*, the Third District held that a bond cap statute limiting the bond amount required to obtain a stay for an appeal "concerns substantive rights to

property and to appeal and not an impermissible intrusion on the procedural practices of the courts." 998 So. 2d at 2. In this case, the First District agreed. (App. 16–23).[2] These decisions are correct.

First, the FSA Bond Cap concerns and impacts "substantive rights." *BDO Seidman*, 998 So. 2d at 2. To begin with, "a right to appeal ... relates to a substantive, rather than a procedural[,] right." *State v. Kelley*, 588 So. 2d 595, 597 (Fla. 1st DCA 1991) (citing *State v. Furen*, 118 So. 2d 6 (Fla. 1960)); *see, e.g.*, *St. Mary's Hosp., Inc. v. Phillipe*, 769 So. 2d 961, 963–64 (Fla. 2000); *In re K.M.*, 978 So. 2d 211, 213 (Fla. 2d DCA 2008). The Legislature determined that without the FSA Bond Cap, the FSA signatories would be at risk of losing their appeal rights if they became unable to post the bonds required by default rules as adverse judgments mounted. By addressing this problem, the FSA Bond Cap "directly affects the [ability of a litigant to obtain an appeal] and, therefore, rights are involved, not procedure." *Benyard*, 322 So. 2d at 475.

Additionally, as the First District concluded, the FSA Bond Cap "'concerns

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[2] A number of states have enacted bond cap statutes, but no such statute has ever been declared unconstitutional. *See BDO Seidman*, 998 So. 2d at 3 n.2. Like Florida, these states recognize that bond cap statutes are necessary "to ensure that a defendant can appeal a massive judgment without being put out of business." Mark A. Behrens & Andrew W. Crouse, *The Evolving Civil Justice Reform Movement: Procedural Reforms Have Gained Steam, But Critics Still Focus On Arguments Of The Past*, 31 U. Dayton L. Rev. 173, 184–85 (2006).

substantive rights to property.'" (App. 19) (quoting *BDO Seidman*, 998 So. 2d at 2). Mrs. Hall concedes as much, in complaining that the FSA Bond Cap has allowed FSA signatories "to save over $6 million in [bond] premiums." Petr's Br. 6 n.4. If "a right ... to proceed without payment of costs is a substantive one and is properly provided for by the Legislature," *Jackson v. Fla. Dep't of Corr.*, 790 So. 2d 381, 383–84 (Fla. 2000), so too is a right to reduced bond costs. Likewise, the FSA Bond Cap creates rights concerning when a litigant must turn over its property after an adverse judgment, thereby again affecting property rights. *See Smith*, 507 So. 2d at 1092 n.10 (finding substantive a statute that allowed defendants to pay future economic damages in installments).

Finally, the FSA Bond Cap profoundly affects state appropriations. There is no dispute that matters pertaining to the State budget are within the Legislature's substantive authority. *See, e.g.*, Art. III, §§ 12, 19, Fla. Const.; *see also Sanford-Orlando Kennel Club*, 434 So. 2d at 882. As detailed above, the FSA Bond Cap was passed to protect the "hundreds of millions of dollars appropriated annually in support of the state's Medicaid program and other critical health programs." Ch. 11-61, § 16(1), Laws of Fla. And its fee provision generates funding for the courts at a time of historic fiscal crisis. *See* § 569.23(3)(d), Fla. Stat. (2011).

Second, the FSA Bond Cap comports with the Court's rule governing stays. By its terms, Rule 9.310 sets out default provisions for posting appeal bonds,

"[e]xcept as provided by general law." Fla. R. App. P. 9.310(a). In promulgating Rule 9.310, this Court announced that this clause was meant to "preserve[] *any* statutory right to a stay," confirming that the rule's default provisions are subject to exceptions created by the Legislature. *In re Proposed Fla. Appellate Rules*, 351 So. 2d 981, 1010 (Fla. 1977) (emphasis added).

As the First District recognized (App. 19-20), the Court's decision in *St. Mary's Hospital* confirms this interpretation of Rule 9.310. There, the Court rejected a separation-of-powers challenge to a statute that altered the standard to obtain a stay of an arbitration award. *See* 769 So. 2d at 964–65. Whereas Rule 9.310 grants the trial court discretion to enter a stay and provides for an automatic stay on the posting of a sufficient bond, the challenged statute permitted only district courts to enter a stay and required a showing of necessity "to prevent manifest injustice." *Id.* at 965. The Court rejected the argument that the statute unconstitutionally infringed its authority to regulate procedure. In so doing, it observed that rule 9.310(a) "gives the trial court discretion to enter a stay subject to exceptions ... by general law." *Id.* at 966.

Third, "[t]he regulation and supervision of [appeal bonds] is a field in which the legislature has historically been deeply involved." *VanBibber*, 439 So. 2d at 883. "The general rule which appears to have been accepted throughout the United States is to the effect that a statute requiring an appeal bond is ordinarily held to be

a valid exercise of legislative power." *Austin v. Town of Oviedo*, 92 So. 2d 648, 650 (Fla. 1957). In *Simmons v. Spratt*, 22 Fla. 370 (1886), for example, this Court long ago concluded that "it [is] within the power of the Legislature either to omit the requirement of any bond, or to specify what the condition should be." *Id.* at 372. The Court explained that because "the right of appeal has ... been granted on such conditions as the Legislature saw fit to prescribe, ... it is a legislative function to change the condition, if it shall see fit to do so." *Id.* at 373.[3] That the legislative power over bonds has been "'recognized by immemorial governmental usage'" confirms that the FSA Bond Cap does not violate the separation of powers. *Fla. Ass'n of Prof'l Lobbyists*, 7 So. 3d at 515 (citation omitted).

C. Mrs. Hall's Contrary Arguments Lack Merit

Mrs. Hall does not dispute that two district courts have rejected her position. Instead, she contends that their decisions are "fatally flawed." Petr's Br. 20–21. Specifically, she argues that: (1) bond cap statutes concern purely procedural issues; (2) *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979), generally held stays to be procedural; (3) the FSA Bond Cap conflicts with Rule 9.310; and (4) federal *Erie* principles support her. Each argument is meritless.

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[3] The Constitution at the time had a similar separation-of-powers clause. *See* Art. III, Fla. Const. (1868) ("The powers of the government ... shall be divided into three departments ...; and no person properly belonging to one of the departments shall exercise any functions appertaining to either of the others, except in those cases expressly provided for by this Constitution.").

1. The FSA Bond Cap does not concern purely procedural issues

Mrs. Hall initially argues that the FSA Bond Cap concerns "a matter of pure procedure reserved exclusively for the Court"; she submits that the decisions below and in *BDO Seidman* wrongly concluded that a bond cap concerns rights to appeal and property. Petr's Br. 19. She interprets these rights in an unduly narrow manner and entirely ignores the budgetary issues affected by the FSA Bond Cap.

Mrs. Hall claims that "a stay does not impact the right to appeal because ... an appellant cannot be required to post a bond in order to appeal." Petr's Br. 18. But the Legislature reasonably concluded that individual *Engle* progeny judgments could bankrupt the FSA signatories in the aggregate, and thus immediate executions of those judgments could negatively *affect* their right to appeal. 2000 H.R. Staff Analysis at 13 (App. 85); *see Benyard*, 322 So. 2d at 475.

Mrs. Hall next claims that "a stay does not impact the ultimate right to any property," as it "only determines *when* a right to property that has been established by a final judgment of a trial court becomes effective." Petr's Br. 18. But the right to a reduced bond decreases the costs of obtaining the bond, and thus is as substantive as the right "to proceed without payment of costs." *Jackson*, 790 So. 2d at 384. Moreover, in *Smith*, this Court upheld a statute that allowed a defendant to pay "future medical expenses and future lost wages ... as they are actually incurred" rather than immediately on final judgment. 507 So. 2d at 1092

n.10. Contrary to Mrs. Hall's claim, legislation addressing the *timing* of payments impact substantive rights to property.

2. Mrs. Hall over-reads this Court's *Wait* decision

In citing *Wait* for the sweeping proposition that "the circumstances under which a judgment may be stayed pending appeal is a purely procedural matter" (Petr's Br. 19), Mrs. Hall over-reads that decision. *Wait* addressed the conflict between § 119.11(2), Florida Statutes (1975), which stated that a notice of appeal did not automatically stay an order requiring a public agency to open its records, and this Court's former Fla. App. Rule 5.12(1), which stated that a public agency's notice of appeal automatically stayed an order, *see* 372 So. 2d at 422. In that specific circumstance, this Court held that the rule trumped the statute.

Wait is inapposite here. To begin with, this Court expressly *rejected* the broad holding for which Mrs. Hall now cites it; the Court stated emphatically that its "decision is limited to the relationship between section 119.11(2) and the 'Florida Appellate Rules, 1962 Revision.'" *Id.* at 423 n.2. In addition, *Wait* did not even involve a statute placing a *bond cap* on a monetary judgment; it involved a statute prohibiting an automatic *stay* of a judgment requiring a public body to open its records. Whether or not a stay is procedural, a monetary cap on the amount of a bond is substantive. *See supra* Part II.B. Unlike in *Wait*, therefore, to the extent that the FSA Bond Cap establishes any procedural rules, they are

"intertwined with [the] substantive rights" impacted by the statute. *Caple*, 753 So. 2d at 54. Finally, and critically, the rule and the statute in *Wait* unquestionably conflicted. Here, by contrast, there is no conflict because Rule 9.310 expressly preserves statutory stay rights.

3. Mrs. Hall misinterprets Rule 9.310

Mrs. Hall next contends that the First District misinterpreted Rule 9.310. That court construed the rule's "except as provided by general law" clause to permit general laws to "provide different requirements for obtaining a stay" than does the rule. (App. 18). Mrs. Hall, by contrast, argues that the general-law clause falls within Rule 9.310(a), and so does not permit the Legislature to depart from the bond requirement set forth in Rule 9.310(b)(1). Petr's Br. 21.

The First District correctly rejected Mrs. Hall's strained reading of Rule 9.310. By its terms, Rule 9.310(a) provides that, "[e]xcept as provided by general law and in subdivision (b) of this rule," a party "shall file a motion in the lower tribunal," which may condition the stay on "the posting of a good and sufficient bond. In turn, Rule 9.310(b)(1) provides that, for money judgments, a party "may obtain an automatic stay ... pending review" by posting a bond equal to the judgment amount plus twice the rate of interest. Nothing in Rule 9.310(b)(1) remotely suggests that it provides the *only* exception to Rule 9.310(a) for cases involving money judgments. Moreover, Rule 9.310(a) itself, which sets forth a

rule subject to exceptions "as provided by general law and in subdivision (b)," makes entirely clear that statutory exceptions "as provided by general law" operate *in addition to* the exceptions set forth "in subdivision (b)."

St. Mary's Hospital confirms this obvious point. Mrs. Hall argues that the statute challenged in that case modified Rule 9.310(a) only "to the extent that it [gave] the authority to enter a stay pending appeal to the district court of appeal instead of the trial court." Petr's Br. 23. But the statute also limited the authority to grant a stay to cases where necessary "to prevent manifest injustice," and this Court upheld that provision as "an exception to the automatic stay provision of rule 9.310(b)." 769 So. 2d at 965, 967. The Court's own language rebuts Mrs. Hall's argument that Rule 9.310(b)(1) was not at issue because *St. Mary's* involved "arbitration awards." Petr's Br. 22. *St. Mary's* instead confirms that general laws, no less than Rule 9.310(b), may provide stays on the execution of money judgments pending appeal.

Mrs. Hall also mischaracterizes *St. Mary's* in claiming that the Court did not address "the constitutional distinction between procedure and substance." Petr's Br. 22. As the Third District explained in *BDO Seidman*, *St. Mary's* "cited the Fourth District's observation that the right to both judicial review and payment of a monetary award are substantive rights," and so it is at least "supportive of [the] conclusion that the legislature acted within its authority in enacting" the FSA Bond

Cap. *BDO Seidman*, 998 So. 2d at 3–4 (citing *St. Mary's*, 769 So. 2d at 963–64).

Finally, Mrs. Hall is wrong to contend that her otherwise unsupportable construction of Rule 9.310 is necessary to avoid an unconstitutional delegation of authority from this Court to the Legislature. Petr's Br. 21–22. To begin with, her argument implies that this Court enacted a rule that is unconstitutional if construed to mean what it plainly says. That contention is obviously farfetched. Moreover, it rests on the faulty premise that the FSA Bond Cap concerns "a purely procedural" matter. *Raymond*, 906 So. 2d at 1048. But, as shown above, Florida courts long have recognized that the Legislature has authority to enact bond cap statutes that affect substantive rights. Rule 9.310's general-law exception simply preserves the longstanding recognition of shared judicial and legislative authority in this area.

4. Federal *Erie* principles are irrelevant

Mrs. Hall ends with an attempted analogy to federal decisions distinguishing substance from procedure under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Petr's Br. 23–24. That analogy fails for two reasons.

a. To begin with, the *Erie* line of cases is irrelevant to the distinction between substance and procedure under the Florida Constitution. A "measure which is substantive for one purpose, may be procedural for another." *In re Commitment of Cartwright*, 870 So. 2d 152, 161 (Fla. 2d DCA 2004); *see In re Fla. Rules of Crim. P.*, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring)

(noting that "a statute or rule will be characterized as substantive or procedural according to the nature of the problem"). For example, in *Vaught v. State*, 410 So. 2d 147 (Fla. 1982), this Court rejected the argument that because the Court had found the capital sentencing law procedural for ex post facto purposes, it necessarily was procedural for separation-of-powers purposes. *Id.* at 149 (noting that the ex post facto cases "were not meant to be used as shibboleths for deciding whether the new law violates [the separation of powers]").

The substance/procedure distinction for *Erie* purposes is likewise designed for a different "problem" than the substance/procedure distinction for present purposes. The *Erie* distinction is meant to "insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same ... as it would be if tried in a State court." *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945). That has absolutely nothing to do with the question here. The separation of powers is designed to ensure the "welfare of the people in the preservation and exercise of the rights of sovereignty and of individuals." *Johnson*, 345 So. 2d at 1071 (citation omitted); *see also, e.g.*, Restatement (Second) of Conflicts of Laws § 133 reporter's note (1971) ("federal courts have classified the burden of persuasion ... as a matter of substantive law" for *Erie* purposes, whereas state courts "have characterized their rule as procedural for

choice-of-law purposes"). In short, the *Erie* cases are entirely irrelevant.

b. In any event, the FSA Bond Cap is substantive for *Erie* purposes. As Justice Stevens indicated in his controlling decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 130 S. Ct. 1431 (2010), state law must apply in federal court if it is "part of a State's framework of substantive rights and remedies," *id.* at 1449, or "so intertwined with a state right or remedy that it functions to define the scope of the state-created right," *id.* at 1452. In this case, the Florida Legislature determined that under normal security requirements (full amount of judgment plus interest) the FSA signatories could be at a risk of losing any meaningful right to appeal and that this scenario could threaten the billions of dollars in FSA payments funding various vital public programs. Ch. 11-61, § 16(1), Laws of Fla. The FSA Bond Cap is thus plainly "intertwined with" state substantive law in that it is designed to protect important state interests and revenues and not simply to make a "classically procedural calibration," *Shady Grove*, 130 S. Ct. at 1452, 1459 (Stevens, J., concurring).

CONCLUSION

For all of these reasons, the Court should affirm the First District's decision.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 30, 2012, I served a copy of the foregoing Answer Brief of Respondent by email[4] on the counsel for Petitioner listed below and by U.S. mail, overnight delivery, on the counsel listed for the Attorney General and for Amici below:

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[4] The parties have agreed to accept service by email at the email addresses listed in the certificate of service in lieu of mail and have further agreed that electronic service will be deemed service by mail for purposes of Fla. R. App. 9.420(e).

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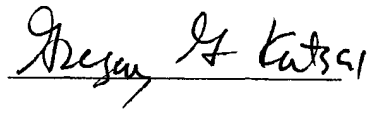
CERTIFICATE OF COMPLIANCE

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

DATED: May 30, 2012



ADDENDUM

569.23 Security requirements for tobacco settlement agreement signatories, successors, parents, and affiliates.—

(1) As used in this section, the term "tobacco settlement agreement" means any settlement agreement, as amended, entered into by the state and one or more cigarette manufacturers in settlement of *State of Florida v. American Tobacco Co.*, No. 95-1466AH (Fla. 15th Cir. Ct.). As used in this section, the term "security" means supersedeas bonds, other surety permitted by Florida law, or cash.

(2) In any civil action involving a signatory, or a successor, parent, or affiliate of a signatory, to a tobacco settlement agreement, the security to be furnished during the pendency of all appeals or discretionary appellate reviews, including reviews by the United States Supreme Court, of any judgment in such litigation shall be set pursuant to applicable laws or court rules, except that the total cumulative value of all security required to stay the execution of the judgment may not exceed $100 million for all appellants collectively, regardless of the total value of the judgment.

(3) (a) 1. In civil actions against a signatory, or a successor, parent, or affiliate of a signatory, to a tobacco settlement agreement brought by or on behalf of persons who claim or have been determined to be members of a former class action that was decertified in whole or in part, the trial courts shall automatically stay the execution of any judgment in any such actions during the pendency of all appeals or discretionary appellate reviews of such judgment in Florida courts, upon provision of security as required in this paragraph. All security shall be provided through the posting with or payment into the registry of the clerk of the Supreme Court.

2. The total amount of security that must be provided for all appellants collectively with regard to a single judgment is equal to the lesser of the amount of the judgment to be stayed or the amount of security per judgment required based on the following tiers of judgments on appeal in the courts of this state at the time the security is provided:

TIER— NUMBER OF JUDGMENTS	AMOUNT OF SECURITY PER JUDGMENT	MAXIMUM TOTAL ALL SECURITY
1-40	$5,000,000	$200,000,000
41-80	$2,500,000	$200,000,000

81-100	$2,000,000	$200,000,000
101-150	$1,333,333	$199,999,950
151-200	$1,000,000	$200,000,000
201-300	$666,667	$200,000,100
301-500	$400,000	$200,000,000
501-1,000	$200,000	$200,000,000
1,001-2,000	$100,000	$200,000,000
2,001-3,000	$66,667	$200,001,000

3. In cases having multiple defendants, an individual appellant shall provide security in proportion to the percent or amount of liability specifically allocated against that appellant in the judgment, or, if liability is not specifically allocated in the judgment, for a share of the unallocated portion of the judgment determined by dividing the unallocated portion of the judgment equally among all defendants against whom the judgment is entered. Once an appellant has provided its required security with respect to a judgment, that appellant is entitled to a stay of that judgment regardless of whether other defendants in that case have provided the security required of them.

4. When the number of judgments on appeal changes so that the total is within a higher or lower tier, the amount of security required in each case shall change by operation of law, upon notice provided by any party to all other parties and upon deposit within 30 days after notice of any additional security required hereunder, from the amount of security previously posted to an amount consistent with the statutory appeal bond rights prescribed in this paragraph. When the amount of security on deposit is changed pursuant to this subparagraph, the security shall be modified as follows:

a. If the security on deposit is in the form of a supersedeas bond or other surety, the appellant shall replace or supplement that supersedeas bond or other surety with security in the new amount as required by this paragraph.

b. If the security on deposit is in the form of cash, the clerk of the Supreme Court shall, as appropriate:

(I) Upon the request of the appellant and notice to all appellees affected, refund to the appellant the difference between the amount of security on deposit and the reduced amount of security required or hold the difference as a credit against future security to be posted by that appellant; or

(II) Record any additional cash provided by the appellant.

(b) 1. In any action subject to this subsection, if there is no appeal or discretionary appellate review pending in a Florida court and an appellant exercises its right to seek discretionary appellate review outside of Florida courts, including a review by the United States Supreme Court, the trial court shall automatically stay the execution of the judgment in any such action during the pendency of the appeal, upon provision of security as required in this paragraph. All security shall be provided through the posting with or payment into the registry of the clerk of the Supreme Court of this state.

2. The amount of security shall be equal to the lesser of the amount of the judgment to be stayed or three times the security required to stay the execution of a judgment during all appellate review in Florida courts at the time appellate review is sought under this paragraph.

(c) A claim may not be made against the security provided by an appellant unless an appellant fails to pay a judgment in a case covered by this subsection within 30 days after the judgment becomes final. For purposes of this subsection, a judgment is "final" following the completion of all appeals or discretionary appellate reviews, including reviews by the United States Supreme Court. If an appellant fails to pay a judgment within such time period, the security for that judgment provided by that appellant shall be available to satisfy the judgment in favor of the appellee. Upon satisfaction of the judgment in any case, the clerk of the Supreme Court may refund any security on deposit with respect to that case to the appellant upon an order from the trial court confirming satisfaction of the judgment.

(d) The clerk of the Supreme Court shall collect fees for receipt of deposits under this subsection as authorized by ss. 28.231 and 28.24(10)(a). In addition, for as long as any cash remains on deposit with the clerk pursuant to this subsection, the clerk of the Supreme Court is entitled to regularly receive as an additional fee the net investment income earned thereon. The clerk shall use the services of the Chief Financial Officer, as needed, for the custody and management of all bonds, other surety, or cash posted or deposited with the clerk. All fees collected pursuant to this subsection shall be deposited in the State Courts Revenue Trust Fund for use as specified by law.

(e) 1. It is the intent of the Legislature that the clerk of the Supreme Court maintain a record of the number of appeals in Florida courts and all security posted

with or paid into the registry of the Supreme Court under this subsection. It is further the intent of the Legislature that the clerk regularly update the records to reflect any revisions in the amount of previously posted or paid security.

2. A signatory, or a successor, parent, or affiliate of a signatory, to a tobacco settlement agreement shall maintain on a continuing basis an accounting of security provided under this subsection, including, but not limited to, the specific amount of security provided with respect to each specific judgment and the date on which it was provided, the amount and date of any adjustments upward or downward to security provided and the basis for the adjustment, and the date of any final disposition related to security. By July 15 of each year, the entity shall provide to the clerk of the Supreme Court an updated copy of the accounting reflecting activity through the immediately preceding June 30, in a manner prescribed by the Supreme Court. A verified copy of such accounting shall also be filed in each circuit court case in which each such judgment was entered.

3. By August 1, 2009, a signatory, or a successor, parent, or affiliate of a signatory, to a tobacco settlement agreement shall provide to the clerk of the Supreme Court a list of all civil actions, as of the date the list is provided and identified by case name and court case number, against the signatory, or a successor, parent, or affiliate of a signatory, brought by or on behalf of persons who claim or have been determined to be members of a former class action that was decertified in whole or in part. A signatory, or a successor, parent, or affiliate of a signatory, shall provide to the clerk the same information on any additional actions filed within 60 days after the additional action is joined.

(4) Notwithstanding subsections (2) and (3), if, after notice and hearing, a plaintiff proves by a preponderance of the evidence that a defendant who posted or paid security under this section is purposefully dissipating assets outside the ordinary course of business to avoid payment of the judgment, the court may enter necessary orders as to that defendant to protect the plaintiff, including an order that the security be posted or paid in an amount up to the full amount of the judgment against that defendant.

(5) This section does not apply to any past, present, or future action brought by the State of Florida against one or more signatories to the settlement agreement.

History.—s. 1, ch. 2003-133;s. 1, ch. 2009-188.

[1]**Note.**—Section 2, ch. 2009-188, provides that "[t]his act shall take effect [June 16, 2009], and applies to all judgments entered on or after that date."

Florida Rule of Appellate Procedure 9.310

(a) Application. Except as provided by general law and in subdivision (b) of this rule, a party seeking to stay a final or non-final order pending review shall file a motion in the lower tribunal, which shall have continuing jurisdiction, in its discretion, to grant, modify, or deny such relief. A stay pending review may be conditioned on the posting of a good and sufficient bond, other conditions, or both.

(b) Exceptions.

(1) Money Judgments. If the order is a judgment solely for the payment of money, a party may obtain an automatic stay of execution pending review, without the necessity of a motion or order, by posting a good and sufficient bond equal to the principal amount of the judgment plus twice the statutory rate of interest on judgments on the total amount on which the party has an obligation to pay interest. Multiple parties having common liability may file a single bond satisfying the above criteria.

(2) Public Bodies; Public Officers. The timely filing of a notice shall automatically operate as a stay pending review, except in criminal cases, in administrative actions under the Administrative Procedure Act, or as otherwise provided by chapter 120, Florida Statutes, when the state, any public officer in an official capacity, board, commission, or other public body seeks review; provided that an automatic stay shall exist for 48 hours after the filing of the notice of appeal for public records and public meeting cases. On motion, the lower tribunal or the court may extend a stay, impose any lawful conditions, or vacate the stay.

(c) Bond.

(1) Defined. A good and sufficient bond is a bond with a principal and a surety company authorized to do business in the State of Florida, or cash deposited in the circuit court clerk's office. The lower tribunal shall have continuing jurisdiction to determine the actual sufficiency of any such bond.

(2) Conditions. The conditions of a bond shall include a condition to pay or comply with the order in full, including costs; interest; fees; and damages for delay, use, detention, and depreciation of property, if the review is dismissed or order affirmed; and may include such other conditions as may be required by the lower tribunal.

(d) Judgment Against a Surety. A surety on a bond conditioning a stay submits to the jurisdiction of the lower tribunal and the court. The liability of the surety on such bond may be enforced by the lower tribunal or the court, after motion and notice, without the necessity of an independent action.

(e) Duration. A stay entered by a lower tribunal shall remain in effect during the pendency of all review proceedings in Florida courts until a mandate issues, or unless otherwise modified or vacated.

(f) Review. Review of orders entered by lower tribunals under this rule shall be by the court on motion

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May 30, 2012

VIA U.S. MAIL OVERNIGHT

Florida Supreme Court
Attention: Clerk's Office
500 South Duval Street
Tallahassee, Florida 32399-1927

Re: Case No. SC11-1611, Hall v. R.J. Reynolds Tobacco Co.

Dear Clerk of Court:

Please find enclosed for filing an original and eight copies of the Answer Brief, the separately bound Appendix to the Answer Brief, the Oral-Argument Request, and the Suggestion of Mootness, all of which were served on May 30, 2012.

Sincerely,

Gregory G. Katsas

Gregory G. Katsas

Enclosures