IN THE SUPREME COURT OF FLORIDA

ORIGINAL

AMANDA JEAN HALL, etc.,

Petitioner,

v.

R.J. REYNOLDS TOBACCO CO.,

Respondent.

Case No. SC11-1611
L.T. No. 1D10-2820

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

REPLY BRIEF

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Avoiding the constitutional problems with section 569.23(3), Florida Statutes (the *Engle* Appellate Bond Law), Reynolds spends much of its answer brief highlighting what it deems to be the positive attributes of the law and its alleged benefit to various state coffers.[1] But regardless, a prohibited special law cannot become constitutional just because the benefits accorded to a private corporation are shared with the state. And this Court's exclusive authority over stays pending appeal is not lost just because an offending state statute might protect a source of judicial funding.

I. THE *ENGLE* APPELLATE BOND LAW IS AN INVALID SPECIAL LAW THAT DRAWS NO CLASSIFICATION

Identifying several state programs funded in part by the proceeds that the four tobacco companies pay into the Florida Settlement Agreement ("FSA"), Reynolds asserts that it and its fellow signatories to the FSA are properly singled out for special treatment by the Legislature when it comes to judgments imposed against them. This claim fails for multiple reasons.

First, the plain language of the constitution states that there shall be no special law pertaining to a grant of privilege to a corporation. Art. III, § 11(a)(12), Fla. Const. It does not provide any exception for special laws in the categories it

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[1] Reynolds and its amici never suggest, however, that any of the tobacco companies actually face any risk of defaulting on their obligations to the state, so even these benefits are speculative to non-existent.

lists if they also benefit the state. And it is the "actual language used in the Constitution" that controls matters of interpretation; when "that language is clear, unambiguous, and addresses the matter in issue, then it must be enforced as written." *Crist v. Fla. Ass'n of Criminal Defense Lawyers, Inc.*, 978 So. 2d 134, 140 (Fla. 2008) (internal quotation marks and citation omitted). If this Court's interpretation of the prohibition against special laws leaves any room for doubt, that window should now be closed in favor of a strict construction. Unless this Court intends to supplant the unambiguous language of the constitution with its own view of preferred public policy, it must reject Reynolds' suggestion that all of the special laws prohibited by article III, section 11(a) can be saved so long as they are "reasonably related" to protecting state revenues. (Ans. Br. 28-29.) And without that dubious principle of law, the *Engle* Appellate Bond Law must fall.

Second, Reynolds' argument is not supported by the case law. Indeed, this Court has never held that a special law according benefits to a specific group of private corporations is permissible simply because the benefits received by the class may perpetuate benefits the state is receiving from the corporations. Reynolds cites to cases of this Court defining general laws to include statutes that draw "permissible classifications." (Ans. Br. 15 (quoting *Schrader v. Fla. Keys Aqueduct Auth.*, 840 So. 2d 1050, 1055 (Fla. 2003)). But it never explains how the

terms of the *Engle* Appellate Bond Law can be read to draw a class, notwithstanding whether the classification drawn by it is permissible.

The *Engle* Appellate Bond Law does not draw any classification. It refers to a specific group of tobacco companies just as plainly as if it had actually named them. Like other statutes drafted in a general manner that actually apply to only a closed set of entities, it "is an unconstitutional special law enacted in the guise of a general law." *Fla. Dep't of Bus. & Prof'l Regulation v. Gulfstream Park Racing Ass'n, Inc.*, 967 So. 2d 802, 809 (Fla. 2007). As such, it draws no classification and is an unconstitutional special law.

Reynolds argues that the size of the group affected by a law is irrelevant to a general law determination. But while size may not matter, future application does. A law truly draws a classification when it demarcates a fungible group. Indeed, in one of the very cases Reynolds continues to rely on, this Court stated that "[t]he fact that matters" in the general law determination "is that the classification is potentially open to other [entities]." *Dep't of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.*, 434 So. 2d 879, 882 (Fla. 1983). Reynolds cannot escape that on this Court's most recent iterations of the general versus specific law analysis, the ultimate question is whether the law is fixed to preclude additional parties from being subject to it, and not whether the Legislature had good reason for the law. *St. Vincent's Med. Ctr., Inc. v. Mem'l Healthcare Grp., Inc.*, 967 So. 2d 794, 801-802

(Fla. 2007); *Gulfstream*, 967 So. 2d at 808 ("[W]e acknowledge that a statute that appears to apply to one situation or area at the time of enactment may still be considered a general law if it could be applied to other situations or areas in the future.").

A statute cannot be said to draw a classification when it specifically names particular entities, as it has essentially done in the *Engle* Appellate Bond Law. It identifies the tobacco companies by referring to the case number of a specific case they settled. Because the *Engle* Appellate Bond Law is not open to other entities, it cannot be classified as a general law. Thus, the Court cannot consider whether a classification is permissible; none exists.

Reynolds cites *Cesary v. Second National Bank of North Miami*, 369 So. 2d 917 (Fla. 1979), in support of its argument that the *Engle* Appellate Bond Law draws a permissible classification. The classification drawn by the statute in *Cesary* included "banks, Morris Plan banks, discount consumer financing, small loan companies and domestic building and loan associations." *Id.* at 918 n.2 (quoting section 687.031, Fla. Stat. (1975)). Thus, the law at issue in *Cesary* was a general law because it applied to lenders as a class and not just specifically-identified banks or loan companies. The law identified an open class (and there is no suggestion in this Court's opinion that the challengers contended otherwise). *Id.* at 920 (noting that the law's challenger's contention was that the legislature

"cannot constitutionally classify according to the type of lender."). The Court's analysis of the statute's reasonable relation to its purpose followed its determination that the law drew a classification. *Id.* By contrast, no classification, reasonable or otherwise, exists here.

Reynolds confuses the reasonableness consideration of a classification drawn with the reasonable relationship requirement between a geographically-based special law and a matter of statewide importance. (Ans. Br. 26-27.) As the initial brief sets forth, the relationship between a law's subject and a matter of statewide importance only comes into play when the law specifically identifies an area of the state.[2] (Init. Br. 10-11.) Far from Ms. Hall creating the "geographic limitation ... out of whole cloth" (Ans. Br. 26), it is Reynolds whose formulation lacks any support in the case law. To adopt its position here, this Court would have to ignore its analyses that the laws at issue in the cases cited by the initial brief escaped special law status despite that they "affect only a limited geographic area." *Schrader*, 840 So. 2d at 1056; *see also Dep't of Bus. Regulation v. Classic Mile, Inc.*, 541 So. 2d 1155, 1159 (Fla. 1989) ("In each of these cases this Court upheld

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[2] Special laws addressing particular geographic or political subdivisions do not fit any of the categories of special laws prohibited by article III, section 11(a). These special laws may therefore be enacted so long as the notice requirements of article III, section 10 are met.

as general laws statutes which, on their faces, appeared to affect only limited geographic areas of the state ....").

Like the First District, Reynolds continues to cite *Sanford-Orlando Kennel Club* for its argument that a reasonable relationship saves an otherwise special law. But it offers no reason to depart from this Court's reiteration in 2007 that the fact that mattered in *Sanford-Orlando* was that the "classification [was] potentially open to other tracks." *Gulfstream*, 967 So. 2d at 808 (quoting *Sanford-Orlando Kennel Club*, 434 So. 2d at 882).

The special law test Reynolds proposes— whether the *Engle* Appellate Bond Law draws a classification reasonably related to an issue affecting the state—bears a striking resemblance to a rational basis test, which is not "a rigorous standard of review." *Tiedemann v. Dep't of Mgmt. Servs.*, 862 So. 2d 845, 847 (Fla. 4th DCA 2003). Reynolds responds to Ms. Hall's contention that its reasonable classification test would render the special law prohibitions meaningless by asserting that a special law only "benefitting a particular locale without justification" would be invalid. (Ans. Br. 28.) But that would render the special law prohibition surplusage because such a law would already be unconstitutional under a rational basis analysis. *The Fla. High Sch. Activities Ass'n, Inc. v. Thomas by and through Thomas*, 434 So. 2d 306, 308 (Fla. 1983) (holding that classification drawn by a

statute that failed to bear "some rational relationship to a legitimate state purpose" would be unlawful under equal protection analysis).

Surely, more than mere rational-basis review is required of special laws, which are specifically prohibited by the constitution *in addition to* irrational classifications. This Court has refused previous invitations to render the constitution's special law prohibitions essentially toothless. *See Shands Teaching Hosp. & Clinics, Inc. v. Mercury Ins. Co. of Fla.*, No. SC09-2069, 2012 WL 2035832, at *4 (Fla. June 7, 2012) (rejecting Shands' interpretation of statute because it "would effectively read the portion of article III, section 11(a)(9) [at issue] ... out of existence or place an unwarranted and arbitrary restriction on its scope"); *Gulfstream*, 967 So. 2d at 809 (holding that future applications must be realistic to render class open, lest the Court's "assessment would essentially be standardless, a situation we do not believe to be consistent with judicial review and enforcement of [the constitution's special law provisions]").

And the assertion that the *Engle* Appellate Bond Law does not draw a closed class is wholly without merit. The law applies to parties to a settlement described by a particular case name and number. § 569.23(1), Fla. Stat. ("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.).").

Although the statute insinuates that the FSA may be amended, the reality is that to add more FSA signatories, the State would have to reopen its long-closed case against the defendants and add more parties. Such a scenario is beyond the realm of "imaginable or theoretically possible." *State, Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering v. Gulfstream Park Racing Ass'n, Inc.*, 912 So. 2d 616, 622 (Fla. 1st DCA 2005); *see also St. Vincent's*, 967 So. 2d at 802 ("The question of general application is not to be guided by irrational speculation that anything is possible."). Instead, it is flat-out prohibited by the very terms of the FSA as well as core tenets of civil procedure. *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1258 (Fla. 2006) ("In 1997, the State and the FSA Defendants entered into the Florida Settlement Agreement, which resolved 'all present and future civil claims against *all parties to [the] litigation* relating to the subject matter of [the] litigation, which [were] or could have been asserted by *any of the parties [thereto]*.'" (alterations and emphasis in original)); *Dickinson v. Segal*, 219 So. 2d 435, 436 (Fla. 1969) (noting that "the general rule—universally—is that intervention may not be allowed after final judgment").

Plus, the fact that the law permits successors and different formulations of these particular companies is of no import. A successor or affiliate is only eligible

because it inherits the privilege from one of the FSA signatories. It cannot be the case that the *Engle* Appellate Bond Law achieves general law status because it allows the corporations to keep their bond cap privileges no matter how they grow and affiliate.

II. BECAUSE A STAY PENDING APPEAL IS A PURELY PROCEDURAL MATTER, THE *ENGLE* APPELLATE BOND LAW VIOLATES SEPARATION OF POWERS

Contrary to Reynolds' contentions, the separation of powers is anything but a flimsy, flexible rule of constitutional law. This Court has "traditionally applied a strict separation of powers doctrine." *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004) (quoting *State v. Cotton*, 769 So. 2d 345, 353 (Fla. 2000)). Indeed, even where areas of the law "contain both procedural and substantive aspects," it is incumbent on both the legislative and judicial branches to ensure that those aspects "work harmoniously to prevent one branch from encroaching on the constitutional powers of another." *Se. Floating Docks, Inc. v. Auto-Owners Ins. Co.*, 82 So. 3d 73, 78 (Fla. 2012). Where a matter of procedure is involved, the Legislature cannot interfere with the judicial branch's pronouncements.

The setting of the amount of bond necessary to automatically stay a judgment pending appeal is, as part of the process of the enforcement of a judgment, a purely procedural matter. This Court has never withdrawn from its holding in *Wait v. Florida Power & Light Company*, 372 So. 2d 420, 423 (Fla.

1979), that "[t]he granting of a stay, because it is a step in the enforcement of a final judgment, is concerned with 'the means and method to apply and enforce' substantive rights and falls within the definition of procedural law." *See also QBE Ins. Corp. v. Chalfonte Condo. Apt. Ass'n*, No. SC09-441, 2012 WL 1947863, at *13 (Fla. May 31, 2012) (referring to a defendant's "procedural right to stay execution of the judgment pending appeal by posting a supersedeas bond"). Absent an express withdrawal from this broad holding in *Wait*, it cannot be contended that *Wait* does not apply in this case. *See Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002) ("We take this opportunity to expressly state that this Court does not intentionally overrule itself sub silentio.").

The Court has permitted a legislative enactment to address procedural issues along with substance only where "the procedural aspect did not conflict with any existing court rule ...." *State v. Raymond*, 906 So. 2d 1045, 1049 (Fla. 2005). Where there are gaps in the procedural or substantive law, therefore, a coordinate branch may fill in to a limited extent. Here, however, Rule 9.310(b) entirely addresses the requirements for bond amounts necessary to automatically stay executions of judgments on appeal. The Legislature has sought to statutorily carve out an exception to the already enacted rule. As the *Engle* Plaintiff Amici point out, section 569.23(3) has an effect directly contrary to this Court's purpose behind Rule 9.310. (Pl. Am. Br. 5-6 (noting "ultimate irony" to the statute's scheme that

as more tobacco judgments are entered, even though they are consistently affirmed, tobacco defendants will find it "easier and easier ... to appeal without financial consequence" because of the sliding cap).)

Contrary to its contentions, Reynolds has the same right to appeal and to its property regardless of the enactment of section 569.23. *Cf. Raymond*, 906 So. 2d at 1049 ("Because the right to nonmonetary pretrial release is not itself at issue—any person entitled to PTS nonmonetary release before the amendment is still entitled to it after the amendment—this is not a substantive provision."). The only difference now is the determination of how much money Reynolds must post as a bond to stay execution while it appeals a final judgment. Consequently, substantive rights are not the subject matter addressed by these provisions.[3]

Reynolds attempts to draw a comparison between its bond requirements to (1) this Court's consideration of the right to appeal without the payment of costs discussed in *Jackson v. Florida Department of Corrections*, 790 So. 2d 381, 383-84 (Fla. 2000), and (2) this Court's treatment of prior statutes imposing "appellate bonds" that had to be posted for a defendant to exercise the right to appeal in *Austin v. Town of Oviedo*, 92 So. 2d 648, 650 (Fla. 1957), and *Simmons v. Spratt*, 22 Fla. 370 (1886). But both lines of cases expressly dealt with the substantive

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[3] If they were at issue, one must wonder (1) why the Legislature has not asserted more of a role in this area and (2) how this Court would have authority to promulgate Rule 9.310(b)(2) at all.

right to proceed in court without paying costs. Whether a litigant can proceed in court without paying costs has long been characterized as a substantive right governed by the Legislature. *Jackson*, 790 So. 2d at 383-84.[4] That the Legislature can regulate the cost of filing an appeal has no bearing on whether it can regulate stays because whether a defendant posts a bond or otherwise obtains a stay of a judgment has no bearing on its substantive right to appeal. *See City of St. Petersburg v. Wall*, 475 So. 2d 662, 663-64 (Fla. 1985) (explaining why stay requirements do not impact substantive right to appeal and contrasting against prior decisions involving bonds that had to be posted before an appeal could be filed).

The remaining cases on which Reynolds relies are equally unavailing. In those cases, the Court found substantive rights were clearly the issue of the particular statute: the length of prison sentence time, *Benyard v. Wainwright*, 322 So. 2d 473, 475 (Fla. 1975), and the creation of a substantive right to property, *Caple v. Tuttle's Design-Build, Inc.*, 753 So. 2d 49, 54 (Fla. 2000). No such right is addressed directly by the *Engle* Appellate Bond Law. In *Smith v. Department of Insurance*, 507 So. 2d 1080, 1092 n.10 (Fla. 1987), the Court approved the trial court's determination that a statute mixing procedure and substance was permissible. But the trial court noted that the purely procedural aspects of the

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[4] Moreover, the *Jackson* court made clear that when a statute governing filing fees conflicts with a court rule regarding the procedures for determining the applicable fees, the rule controls the statutes. *Id.* at 384.

statute were permissible because they were "entirely optional" for the courts to follow and made clear that this made all the difference. *See id.* ("If this provision were mandatory, plaintiffs' constitutional argument that section 54 unlawfully encroaches upon the prerogatives of the Florida Supreme Court would be well taken."). In *VanBibber v. Hartford Accident & Indemnity Insurance Company*, 439 So. 2d 880, 882-83 (Fla. 1983), the Court specifically reviewed elements of the statute at issue that distinguished it from a purely procedural statute it had previously struck. Those differences included matters touching on substantive rights in the insurance arena, "a field in which the legislature has historically been deeply involved." *Id.*

Expanding its failed special law arguments to the separation of powers arena, Reynolds asserts again that state funds will be affected by the *Engle* Appellate Bond Law. (Ans. Br. 34.) It fails to demonstrate, however, how the state's budgetary concerns implicate any of the tobacco defendant FSA signatories' substantive rights. None being at issue, the right to an automatic stay of a money judgment is a matter of pure procedure, wholly within the province of this Court.

But all of the emphasis Reynolds and its amici place on the public policies allegedly promoted by the *Engle* Appellate Bond Law does beg the question of whether, although it is clearly not required to uphold the law, the Court **should**—whether as a matter of its own policy determinations or pure deference to public

policies the Legislature seeks to advance—amend Rule 9.310(b)(2). The Court, after all, clearly has the authority to alter the bond requirements in that rule.

Should the Court consider this path, it ought to consider two separate aspects of the conflict between the statute and the rule: (1) the amount of the rule and (2) the duration of the stay. The policies underlying both the *Engle* Appellate Bond Law and section 45.051(1), the $50 million supersedeas cap upheld in *BDO Seidman, LLP v. Banco Espirito Santo Int'l, Ltd.*, 998 So. 2d 1 (Fla. 3d DCA 2008), only implicate the first aspect. While Ms. Hall maintains that the current rule is fair and equitable as it is, a sufficiently large cap, such as the $50 million cap in section 45.051(1), will at least provide substantial protection for an appellant. Ms. Hall would submit that an even fairer option would be to require a bond in the full amount of all compensatory damages (plus twice the rate of interest) and place a cap, of say $50 million, only on the punitive damage award. This would be a reasonable compromise between the competing policies at issue.

As to the second aspect of the *Engle* Appellate Bond Law, however, no change should be contemplated. Rule 9.310(b)(2) provides that the automatic stay lasts only until the appellate court issues its mandate. After that, a stay pending review in either this Court or the Supreme Court of the United States is discretionary based on the likelihood of success and the competing risks of prejudice. *See generally State ex rel. Price v. McCord*, 380 So. 2d 1037 (Fla.

1980). This makes far more sense than the provision in the subject statute, which continues the stay during all discretionary review in this Court and the Supreme Court of the United States no matter how unlikely the defendant will succeed on the merits. For example, Reynolds is currently refusing to pay several judgments that have been affirmed by the First District Court of Appeal in per curiam affirmances where the district court refused to stay its mandate. It is even taking the position that it can refuse to pay the judgments for a full six months after the PCA becomes final at the district court level (the initial 90-day deadline for filing a petition for certiorari in the United States Supreme Court plus a 60-day extension that is granted as a matter of course with no opportunity for the plaintiff to oppose it plus the 30-day continuing stay provided after review becomes final).

This Court should not tolerate this kind of flouting of the finality of district court of appeals' rulings that is contemplated by our system of extremely limited review by this Court and the United States Supreme Court. *See, e.g., Chase Fed. Sav. & Loan Ass'n v. Schreiber*, 479 So. 2d 90, 104-05 (Fla. 1985) ("An oft-noted feature of Florida's judicial organization is that our district courts of appeal are intended to be, in most cases, courts of last resort."). Absent some special showing that the district court's judgment has a realistic chance of being overturned, any stay should expire with the appellate mandate.

Respectfully submitted,

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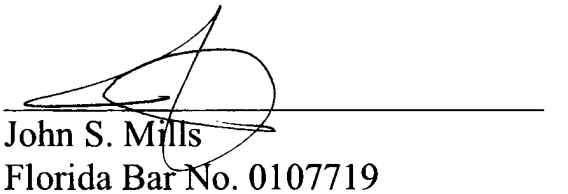

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CERTIFICATE OF SERVICE

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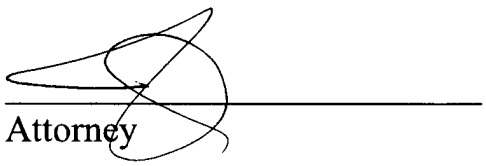

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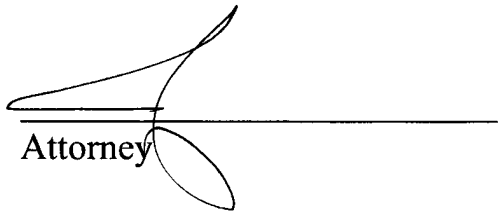
CERTIFICATE OF COMPLIANCE

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



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