

**No. 13-14590**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE ELEVENTH CIRCUIT**

---

EARL E. GRAHAM, AS PERSONAL REPRESENTATIVE  
OF THE ESTATE OF FAYE DALE GRAHAM,  
*Plaintiff-Appellee,*

v.

R.J. REYNOLDS TOBACCO COMPANY, *et al.*,  
*Defendant-Appellant.*

---

Appeal from the United States District Court  
for the Middle District of Florida,  
D.C. No. 3:09-cv-13602

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**MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE***  
**TOBACCO CONTROL LEGAL CONSORTIUM *et al.***  
**IN SUPPORT OF PETITION FOR REHEARING *EN BANC***

---

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## **CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT**

In compliance with Local Rule 26.1-1 and Local Rule 29(c), the undersigned certifies that no counsel to a party authored this brief in whole or in part nor contributed any funds directly or indirectly for this brief's preparation and that no person other than the *amicus curiae* contributed any funding for the preparation of this brief. No party to this filing has a parent corporation, and no publicly held corporation owns 10% or more of the stock of any party to this filing.

Additionally, the following individuals or entities may have an interest in the outcome of this matter:

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85. Reynolds American Inc. (Publicly held parent corporation of Defendant R.J. Reynolds Tobacco Company)



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No other person, firm, partnership, or corporation has an interest in this outcome.

## INTRODUCTION

Pursuant to FED R. APP PROC 29(b) and 11<sup>TH</sup> CIR. R. 35-6, the Tobacco Control Legal Consortium, *et al.* request leave to file the accompanying *amicus curiae* brief in support of the Petitioner Earl E. Graham, as Personal Representative of the Estate of Faye Dale Graham, in support of his Petition for review *en banc*.

### IDENTITY AND INTEREST OF *AMICI CURIAE* AND REASONS WHY BRIEF OF *AMICI CURIAE* IS DESIRABLE

*Amici curiae*, American Cancer Society Cancer Action Network, American Legacy Foundation, American Lung Association, American Lung Association, Americans for Nonsmokers' Rights, Campaign for Tobacco-Free Kids, NAATPN, Inc., National Association of County and City Health Officials, and Tobacco Control Legal Consortium are non-profit public health organizations. *Amici* are unified by their commitment to support policies that educate the public about, and protect the public from, the devastating health consequences of tobacco use. *Amici* have a strong interest in this Petition for Rehearing *en banc* because the Panel's decision would frustrate *amici's* public health goals by stripping state authority to regulate tobacco sales.

The Panel's holding that the application of strict liability to the Respondent is subject to federal preemption because strict liability would amount to a tobacco sales ban contrary to the manifest purpose of Congress would not only wrongly deny the

Petitioner benefits to which he is entitled, but also have a devastating impact state and local tobacco control policy.

Regulating and restricting sales of tobacco products is an essential component of effective public health efforts to limit the harms caused by tobacco products. The vast majority of such efforts have originated in the States and their political subdivisions. The right to even ban the sales of tobacco products, which is what the Panel found to be preempted, goes back more than a century and has been clearly affirmed by Congress, as we seek to explain in our brief, in its most comprehensive expression of regulatory intent, the *Family Smoking Prevention and Tobacco Control Act of 2009*. Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009).

A full or partial erosion in state and local authority to regulate the sales of a dangerous consumer product that causes the premature deaths of half a million Americans per year would be a devastating blow to public health and undermine the mission of the *amici*. U.S. Department of Health and Human Services. *The Health Consequences of Smoking—50 Years of Progress. A Report of the Surgeon General*. Atlanta: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2014.

**AUTHORITY TO FILE *AMICUS CURIAE* BRIEF OF TOBACCO  
CONTROL LEGAL CONSORTIUM *ET AL.***

As several previous *amici* before this Court have noted, Justice Samuel Alito, when a judge sitting on the U.S. Court of Appeals for the Third Circuit, opined that, “I think that our court would be well advised to grant motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet Rule 29’s criteria as broadly interpreted. I believe that this is consistent with the predominant practice in the courts of appeals.” *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 133 (3rd Cir. 2002) (citing Michael E. Tigar and Jane B. Tigar, *Federal Appeals -- Jurisdiction and Practice* 181 (3d ed. 1999) and Robert L. Stern, *Appellate Practice in the United States* 306, 307-08 (2d ed. 1989)).

*Amici* recognize that there is certainly no obligation for this Court to hear our reasoning concerning the Panel’s preemption ruling, but we respectfully ask to be heard. Under 11TH CIR. R. 35-6, *amici curiae* must file their proposed brief, accompanied by a motion for filing when necessary, no later than 10 days after the petition for rehearing *en banc* being supported is filed. By filing this Motion today, we are within the filing time limits.

**THE BRIEF OF *AMICI CURIAE* WILL ASSIST THE COURT'S DETERMINATION OF WHETHER THE PANEL'S DECISION MERITS REVIEW EN BANC**

**I. Contrary to The Panel's Holding, Congress Clearly Intended States to Retain the Power to Prohibit Tobacco Sales**

The Panel did not consider the savings and preservation clauses of the Tobacco Control Act that reserve and preserve regulatory power to the States to control and even ban tobacco sales. The effort to determine an implied preemption of such powers where there is express preservation of authority is unnecessary and wrongly denies state authority to regulate a product that has enormous public health implications.

In addition, the Panel's analysis of *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, conflates the limits on federal agency power to regulate with state authority. This analysis contributes to the erroneous preemption holding at issue.

**II. The Panel's Findings Related to Strict Liability and Preemption Wrongly Limits State and Local Regulatory Powers to Restrict Cigarette Sales**

The Panel's preemption holding mistakenly limits state authority to regulate tobacco products and, if applied to other products that are subject to limited Congressional regulation, would similarly strip state of their ability to regulate and ban sales of alcohol, chemicals, pesticides, plastic bags and other products that are historically and actively subject to state regulation.

## CONCLUSION

The accompanying *amici curiae* brief would aid this Court as explained above. Accordingly, movant Tobacco Control Legal Consortium *et al.* respectfully request leave to file the accompanying *amicus curiae* brief.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2015, I electronically filed the foregoing Motion and served true copies via Federal Express on all counsel of record.

/s/ Robert C. Gilbert  
Robert C. Gilbert

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No other person, firm, partnership, or corporation has an interest in this outcome.

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.” The Health Consequences of Smoking – 50 Years of Progress: A Report of the Surgeon General. – Atlanta, GA. : U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2014.....11

## INTEREST OF THE AMICI CURIAE

*Amici curiae*, American Cancer Society Cancer Action Network, American Legacy Foundation, American Lung Association, American Lung Association, Americans for Nonsmokers' Rights, Campaign for Tobacco-Free Kids, NAATPN, Inc., National Association of County and City Health Officials, and Tobacco Control Legal Consortium are non-profit public health organizations. *Amici* are unified by their commitment to support policies that educate the public about, and protect the public from, the devastating health consequences of tobacco use. *Amici* have a strong interest in this Petition for Rehearing *en banc* because the Panel's decision would frustrate *amici's* public health goals by restricting state authority to regulate tobacco.

A further description of each *amicus* and their interests in this litigation is included as an addendum to this brief.

## SUMMARY OF ARGUMENT

The *Graham* Panel did not consider the clear anti-preemption language included in the Family Smoking Prevention and Tobacco Control Act of 2009 that preserves state authority to regulate and even ban tobacco sales. The result of the implied preemption of state tobacco sales bans would be to strip states and localities of longstanding regulatory control over sales and use of tobacco products, and could apply to an array of other products subject to similarly limited federal regulation. For these reasons, the Petition for review by this court *en banc* should be granted.

**I. CONTRARY TO THE PANEL’S PREEMPTION HOLDING, CONGRESS CLEARLY INTENDED STATES TO RETAIN THE POWER TO PROHIBIT TOBACCO SALES**

**A. The Preservation and Savings Clauses in the Tobacco Control Act Were Not Considered by the Panel.**

In any preemption analysis of Congressional intent with respect to state and local regulation of tobacco products, it is essential that the Court’s decision take into account the preservation and savings clauses in the Family Smoking Prevention and Tobacco Control Act (“TCA”). The TCA represents the latest Congressional action with respect to tobacco product regulation. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009).

The clear and specific enumeration in the TCA of authorities that are preempted by federal law and those that are not preempted is the provision most authoritative and indicative as to Congress’s intent to preempt or not preempt state action. Yet, the *Graham* Panel neglected to account for either of these two most relevant clauses in its discussion of the TCA. *Graham v. R.J. Reynolds Tobacco Co.*, 2015 U.S. App. 2015 WL 1546522 (11th Cir. Fla. Apr. 8, 2015)

Section 916(a)(1) of the TCA (codified at 21 U.S.C. § 387p(a)(1)) specifically preserves for states, and other government entities, the power to create laws “*prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products*” (emphasis added). This section also makes clear that states may adopt measures that are “more stringent than” federal

requirements. The second savings clause contained in section 916(a)(2)(B) reinforces this by preserving the right to establish “requirements relating to *sale*, distribution, possession. . . [of] tobacco products” (emphasis added). 21 U.S.C. § 387p(a)(2)(B).

It is difficult to imagine a clearer contemporary statement of the manifest purpose of Congress in regard to state regulatory authority over tobacco sales than that found in the preservation and savings clauses of the TCA.

While the Panel accurately described the TCA’s limits on the U.S. Food and Drug Administration’s (“FDA’s”) power to ban sales of tobacco products, it appears to conflate Congress’s intentions for the FDA with its intentions for the several states. *See Graham* at 14 (“Congress has never intended to prohibit consumers from purchasing cigarettes . . .”).

With the TCA, a very clear line is drawn: the FDA can regulate tobacco products in many ways but it cannot prohibit the sale of a few specific classes of products (including cigarettes). The power of the states to completely prohibit the sale of cigarettes -- as states have always had the power to do and, historically, have done (*Austin v. Tennessee*, 179 U.S. 343 (1900)) -- is not affected by the authority given to the FDA. The language is explicit and cannot be ignored by the Eleventh Circuit, especially when the Panel’s conclusion stands in direct opposition to this framework.

## **B. The Panel Misconstrues *Brown & Williamson's* Interpretation of Congressional Intent**

The Panel's misunderstanding of the distinction between Congressional intent to limit agency authority versus the powers left to the states is highlighted by its reliance on *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). The Panel's discussion of *Brown & Williamson* recognizes that the Supreme Court found that Congress could not have intended for the FDA to ban cigarettes because it never instructed the agency to do so.

In *Brown & Williamson*, the Court concluded that, because the regulatory standard the FDA would apply to cigarettes would be the same as the one used for drugs and devices (that they be "safe and effective"), and because no cigarette could meet this standard, the FDA's action was not a mere assertion of regulatory jurisdiction but amounted to a complete prohibition on the products. *See id.* at 136 ("[I]f tobacco products were within the FDA's jurisdiction, the [Food Drug and Cosmetic] Act would require the FDA to remove them from the market entirely."). It was in the total prohibition of tobacco products *by the FDA* absent Congressional authorization where the Court found a discrepancy between Congress's intent and the agency's action. *Brown and Williamson* rightly held that federal agencies are limited by Congressional silence. The Administrative Procedure Act prohibits an agency from stepping outside of its Congressionally mandated authority. Administrative Procedure Act § 1, 5 U.S.C. § 551 (2006).

Congress does not have the same control over the authority of states, however, as it does over the executive branch of the federal government. States do not derive their power from Congress and they are not necessarily limited in the same ways as federal agencies, either by Congressional action or inaction. The Panel decision ignores this distinction entirely.

Most importantly, preemption of tobacco sales bans by the states cannot be implied by Congressional silence where there is an express preservation of that precise state power. The TCA is a prime example of the difference in authority between federal agencies and the states. Under the TCA, Congress prohibits the FDA from banning all cigarettes, but specifically allows states to entirely ban their sale. Congress's intent for the FDA has no bearing on its intent for the states' power over sales restrictions and thus, *Brown and Williamson*, which does not examine state legal authority whatsoever and is not a preemption case, is only useful in examining Congressional intent for the FDA vis-à-vis tobacco regulation (at a time when the Congress had not specifically delegated to the agency the power to regulate tobacco products). It does not stand for the proposition that Congress intends to require cigarettes to be sold in Florida or other states in perpetuity, only that it did not intend for the FDA to take action without a specific mandate.



## **II. THE PANEL’S FINDINGS RELATED TO STRICT LIABILITY AND PREEMPTION WRONGLY LIMITS STATE AND LOCAL REGULATORY POWERS TO RESTRICT CIGARETTE SALES.**

The Panel conducted a thorough exploration of the many twists and turns in the saga of *Engle* and *Engle* progeny litigation, and concluded that “Florida courts have come to interpret the *Engle* Phase I jury findings to demand . . . the functional equivalent of a flat ban” on cigarette sales in Florida. *Graham* 2015 WL 1546522 at 20. Such a ban, the Panel determined, is contrary to “the clear and manifest purpose of Congress,” which “has been to keep cigarettes legally available for adult consumers.” *Id.*

This finding, if taken to its logical conclusion, would have far reaching implications. For example, a municipality would be preempted from determining that cigarettes cannot be sold within its borders, or a state would be preempted from prohibiting the sale of a particularly dangerous kind of cigarettes. This result conflicts squarely with the clearly stated contemporary intent of Congress to preserve such state and local authority, as expressed in the preservation and savings clauses discussed herein. 21 U.S.C.A. § 387p.

Such an outcome would be similar to a finding that a municipality cannot ban or otherwise restrict the sale of alcohol because the manifest purpose of the 21st Amendment is to keep alcohol legally available, even though section 2 of the Amendment clearly grants the states regulatory authority over matters involving

alcohol sales and use. *See* U.S. Const. amend. XXI; *see also Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939)(finding “Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession . . .”).

It is not unusual for Congress to engage in limited product regulation without impinging on states more thorough control to regulate product sales. The *Graham* Panel’s sweeping interpretation of implied preemption, however, could easily reach beyond tobacco to challenge state and local regulation of a wide array of products that Congress has regulated, but has not banned, such as pesticides, chemicals, weapons, plastic bags, “payday loans,” and other commodities over which a state or political subdivision has historically retained and actively asserted regulatory authority despite some regulation by Congress.

As the Panel noted at the outset in its preemption analysis, “[i]mplied preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives,” . . . because “such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law.” *Graham* (quoting *Chamber of Commerce v. Whiting*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1968, 1985 (2011)). The Panel has, unfortunately, undercut the very principle it cited by failing to recognize that Congress has not preempted state authority to ban tobacco sales but, rather, has expressly affirmed this state authority. 21 U.S.C. § 387p.

Two other Circuits have recently rejected tobacco industry preemption arguments and affirmed a state’s right to regulate, and even ban, tobacco sales. In *Nat’l Ass’n of Tobacco Outlets v. City of Providence*, 731 F.3d 71 (1st Cir. 2013), tobacco industry plaintiffs challenged a city’s ordinance banning the sale of flavored tobacco products. The First Circuit held that a sales ban regulation was specifically allowed by 21 U.S.C. § 387p(a)(2)(B) (the savings clause), and was not preempted. In *U.S. Smokeless Tobacco Manufacturing Co. v. City of New York*, 708 F.3d 428 (2d Cir. 2013), the Second Circuit held that a virtually identical New York City provision banning the sale of flavored tobacco products was not preempted by the TCA. The Court made note of “Congress’s explicit decision to preserve for the states a robust role in regulating, and even banning, sales of tobacco products . . .” *Id.* at 436.

The 2014 Report of the Surgeon General also recognizes that the TCA reserves the right to regulate and ban the sales of tobacco products to the states. U.S. DEPT. OF HEALTH AND HUMAN SERVICES, *THE HEALTH CONSEQUENCES OF SMOKING – 50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL*. Chapter 15 of the Report states that, “the prohibition of FDA banning categories of products in the Tobacco Control Act does not apply to states or localities. It has been noted that every state (and municipality) in the United States has the power to ban the sale of cigarettes, a power upheld by the U.S. Supreme Court in *Austin vs. The State of*

*Tennessee . . .*” The Health Consequences of Smoking – 50 Years of Progress: A Report of the Surgeon General. – Atlanta, GA. : U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2014 at 854.

While it is not entirely clear that the Panel’s conclusion that the *res judicata* impact of the *Engle* Phase I findings on strict liability, as applied by the Florida Supreme Court, amount to a sales ban on tobacco products, it is very clear that such a result would not be subject to the implied preemption that the Panel has applied here and, as such, the matter should be heard again by this Court *en banc*.

### **CONCLUSION**

The Panel’s preemption analysis failed to accurately interpret Congressional intent by omitting consideration of the TCA’s preservation and savings clauses, leading to an unsupportable conclusion that any state regulation banning sales of tobacco products is subject to implied (obstacle) preemption. We respectfully request that this Court grant the Petition for Review *en banc* to provide clarity regarding the regulatory powers of the states to impose restrictions or bans on the sale of tobacco products.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 2,105 words.

**CERTIFICATE OF SERVICE**

I hereby certify that on May 8, 2015, I electronically filed the foregoing Amicus Brief and served true copies via Federal Express on all counsel of record.

/s/ Robert C. Gilbert  
Robert C. Gilbert

## **ADDENDUM**

### **American Cancer Society Cancer Action Network**

American Cancer Society Cancer Action Network is the nation's leading cancer advocacy organization that is working every day to make cancer issues a national priority. Many of the most important decisions about cancer are made outside of the doctor's office. Instead, they are made by government officials at the federal, state, and local levels, including in courts across the nation that rule on legal cases about tobacco control. ACS CAN works with over one million volunteer advocates on effective tobacco control across the nation.

### **American Legacy Foundation**

American Legacy Foundation envisions an America where tobacco is a thing of the past and where all youth and young adults reject tobacco use. Legacy's proven-effective and nationally recognized public education programs include truth®, the national youth smoking prevention campaign that has been cited as contributing to significant declines in youth smoking; EX®, an innovative smoking cessation program; and research initiatives exploring the causes, consequences and approaches to reducing tobacco use. Legacy also develops programs to address the health effects of tobacco use – with a focus on priority populations disproportionately affected by the toll of tobacco – through alliances, youth activism, training and technical

assistance. Located in Washington, D.C., the foundation was created as a result of the November 1998 Master Settlement Agreement (MSA) between attorneys general from 46 states, five U.S. territories and the tobacco industry.

### **American Lung Association**

The American Lung Association is the nation's oldest voluntary health organization. Because smoking is a major cause of lung cancer and chronic obstructive pulmonary disease (COPD), the American Lung Association has long been active in research, education and public policy advocacy regarding the adverse health effects caused by tobacco use, as well as efforts to regulate the marketing, manufacture and sale of tobacco products.

### **Americans for Nonsmokers' Rights**

A national advocacy organization with more than 8,000 members, which promotes the protection of everyone's right to breathe smoke-free air, educates the public and policy-makers regarding the dangers of secondhand smoke, works to prevent youth tobacco addiction, and tracks and reports on the adversarial effects of the tobacco industry.



## **Campaign for Tobacco-Free Kids**

The Campaign for Tobacco-Free Kids is a leading force in the fight to reduce tobacco use and its deadly toll in the United States and around the world. The Campaign envisions a future free of the death and disease caused by tobacco, and it works to save lives by advocating for public policies that prevent kids from smoking, help smokers quit and protect everyone from secondhand smoke.

## **NAATPN, Inc.**

NAATPN, Inc. works to address the health impact of tobacco products on African Americans through education and advocacy. It is the parent organization of the National African American Tobacco Prevention Network, a Centers for Disease Control and Prevention-funded network that focuses on assessing the impact of tobacco within disparate populations, identifying gaps in data, interventions, and research involving African Americans and tobacco use.

## **National Association of County and City Health Officials (NACCHO)**

The National Association of County and City Health Officials (NACCHO) is the voice of the 2,800 local health departments across the country. Local health departments develop policies and create environments that make it easier for people

to be healthy and safe, including informing the public of the hazards of tobacco use, reducing youth access to tobacco, and limiting exposure to secondhand smoke.

### **Public Health Advocacy Institute**

The Public Health Advocacy Institute (“PHAI”) at Northeastern University School of Law provides scholarship, legal technical assistance, and legal advocacy around a range of public health issues with a strong emphasis on tobacco control and use of tobacco litigation as a public health strategy.

### **Tobacco Control Legal Consortium**

The Tobacco Control Legal Consortium is a national network of nonprofit legal centers providing technical assistance to public officials, health professionals and advocates concerning legal issues related to tobacco and public health.

The Consortium serves as *amicus curiae* in cases where its experience and expertise may assist courts in resolving tobacco-related legal issues of national significance. Many of the Consortium’s briefs – in the United States Supreme Court, United States Courts of Appeals, and state and federal courts around the nation – have addressed issues related to federal preemption and state and local government authority to regulate the sale of tobacco products.

The Consortium exists to protect the public from the devastating health consequences of tobacco use. It has a strong interest in ensuring that state and local governments retain the authority to address tobacco use and exposure in their communities.

Tobacco Control Legal Consortium list of Affiliated Legal Centers:

The Tobacco Control Legal Consortium's activities are coordinated through the Public Health Law Center, at William Mitchell College of Law in St. Paul, Minnesota. In addition to Public Health Advocacy Institute, at Northeastern University School of Law, Boston, Massachusetts, the Consortium's affiliated legal centers include: ChangeLab Solutions, Oakland, California; Legal Resource Center for Tobacco Regulation, Litigation & Advocacy, at University of Maryland School of Law, Baltimore, Maryland; Smoke-Free Environments Law Project, at Center for Social Gerontology, Ann Arbor, Michigan; Tobacco Control Policy and Legal Resource Center at New Jersey GASP, Summit, New Jersey; and Center for Public Health and Tobacco Policy, at Northeastern University School of Law, Boston, Massachusetts.