No. 17-415

IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY AND PHILIP MORRIS USA INC.,

Petitioners,

v.

THERESA GRAHAM, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FAYE DALE GRAHAM,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Do this Court's prior denials of Petitioners' repeated petitions for writs of certiorari from the same factual determinations in the same Florida proceedings, involving the same claims for relief, foreclose a recurring Petition raising the same argument?

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INTRODUCTION

Not often does a petition for certiorari confidently claim to know exactly what the respondent will argue in opposition. This case is the exception. Repeatedly the Petition refers to the arguments to come and proposes to begin the colloquy unilaterally. Why such certainty? As the Petition acknowledges, the simple answer is that we have all seen this movie before. This is the *nineteenth* petition raising the same due process claim that the issue preclusive rulings of the Florida state courts in the *Engle* litigation somehow denied the tobacco defendants an opportunity to challenge, yet again, whether cigarettes cause cancer, whether nicotine is addictive, whether the tobacco companies obfuscated the critical health issues, whether the companies manipulated nicotine levels, and other such claims that have been established by the federal authorities, by rulings of the D.C. federal courts, and to a large extent, even acknowledged on the public websites of the tobacco defendants themselves.[1]

With the passage of time, the overwhelming majority of what are termed *Engle*-progeny cases in the federal courts have been tried and resolved (with each side winning about half of the cases), or have settled. Only about a dozen cases remain, and the breathless claims about issues of national significance implicate only the few cases still pending on appeal. The Court rightly rejected the eighteen prior petitions, and the normal processes of trial and judgment, negotiation and settlement, all took hold. This Petition raises no issue that was not the subject of repeated presentation

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[1] For ease of reference the Questions Presented in each of the eighteen prior petitions are gathered in Respondent's Appendix at RA. 1a-18a.

to the Court. Indeed, the en banc ruling below is identical to the ruling in *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 2727 (2014), itself rejected for en banc review by the Eleventh Circuit and denied certiorari by this Court.

The only reason this case went en banc was a stray ruling by a panel that state tort law is presumptively preempted by federal law, unless and until Congress has acted affirmatively to authorize state law. Under the panel approach, state law is preempted in any domain where Congress could act, even if there is no conflict with any actual congressional enactment. This jaw-dropping extension of this Court's preemption precedents to core areas of traditional state law was so astonishing that Petitioners' attorney managed to utter not a single word in defense of this ruling during the en banc argument. Even now, Petitioners muster a mere two pages to give a perfunctory rendition of the argument below. The Eleventh Circuit was obligated to take this case en banc as a matter of internal doctrinal housekeeping. Cleaning up a panel-level mess is not the job of this Court.

STATEMENT OF THE CASE

A. The *Engle* Class Litigation.

The history of the underlying tobacco litigation has been presented to this Court eighteen times in different petitions for certiorari, and is again set forth in the opinion below. PA. 3-16. The basic facts emerge from a case begun twenty years ago when Dr. Howard Engle and others filed a class action against Petitioners and other cigarette manufacturers to recover damages for diseases caused by their addiction to smoking the defendants' cigarettes containing nico-

tine. *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 40 (Fla. 3d DCA 1996), *rev. denied*, 682 So. 2d 1100 (Fla. 1996). They brought claims for, *inter alia*, strict liability, negligence, fraud, fraudulent concealment, conspiracy, and intentional infliction of emotional distress. *Id.* The trial court certified a class of plaintiffs "who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *Id.*

To organize the proceedings, the trial court developed a three-phase trial plan. *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1256 (Fla. 2006), *cert. denied*, 552 U.S. 941 (2007). Phase I was a lengthy trial on all issues that applied to "the class as a whole." *Id.* After the class prevailed on all counts, including winning a determination of entitlement to punitive damages, the court conducted a two-part Phase II trial. The same jury first resolved the remaining individual issues for the three named class representatives' claims, and then determined the total amount of punitive damages for the class as a whole. *Id.* at 1257. At the conclusion of Phase II, the trial court awarded compensatory damages to the three class representatives and entered a final judgment in favor of the *Engle* class on all counts but one. *Id.*

Before the trial court could proceed to Phase III, the Florida Supreme Court reviewed the entire proceeding, reversing parts (such as the punitive damages award), but affirming the core findings on the wrongful conduct of the cigarette companies. *Engle*, 945 So. 2d at 1262-65. The Florida Supreme Court held that class certification had been appropriate for Phase I but that the class would be decertified going forward because all the common questions had been answered in Phase I. *Id.* at 1267-68. The Florida Supreme Court

held that the remaining issues of specific causation, comparative fault, and damages were too individualized for continued class treatment. *Id.*

The Florida Supreme Court then determined that a subset of the factual findings from the jury in the class trial would be retained. Giving class members one year to file individual suits, the court decreed that these "common core findings" from the Phase I class trial would have *res judicata* effect. *Id.* at 1269, 1276-77. The Phase I findings going to the conduct of defendants were sufficiently specific to be common to the entire class. These findings would apply in the individual suits (termed the "*Engle* progeny cases"), while the findings that "involved highly individualized determinations," i.e., those relating to fraud and emotional distress, would not. *Id.* at 1269; PA. 12. The Florida Supreme Court also affirmed the use of the common findings as the basis for judgment for two of the three individual plaintiffs in the Phase II trials (the third being barred by the statute of limitations). PA. 12.

For purposes of the progeny litigation, the common findings on the defendants' conduct established on a class-wide basis that each defendant had acted negligently and sold cigarettes that were defective and unreasonably dangerous. *Engle*, 945 So. 2d at 1255, 1276-77. Based on the factual determination that these findings applied equally to the class members regardless of particular circumstances (e.g., what brand of cigarettes they smoked, when they began smoking, and so forth), the Florida Supreme Court directed that individual class members could proceed with the common findings having "*res judicata* effect in any subsequent trial between individual class members and the defendants." *Id.* at 1277.

The cigarette companies sought review of *Engle* in this Court, contending that the approved jury findings were too vague to have prospective preclusive effect. This Court twice denied certiorari. *R.J. Reynolds Tobacco Co. v. Engle*, 552 U.S. 941 (2007), *reh'g denied*, 552 U.S. 1056 (2007).

B. The Decision in *Douglas*.

In *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013), the Florida Supreme Court reaffirmed the critical *Engle* findings that the common core issues of the cigarette companies' decades of wrongful acts, as they pertained to the various state-law causes of action, had been tried and determined on a class-wide basis. *Id.* at 429-31, 436. The court likewise reaffirmed that substantial evidence supported the findings on the cigarette companies' common conduct with regard to the class of smokers. *Id.* at 428, 433 (holding that progeny plaintiffs may efficiently rely upon the approved jury findings "[b]ecause these findings go to the defendants' underlying conduct, which is common to all class members and will not change from case to case"). Thus, the Florida Supreme Court confirmed the propriety of using these findings in individual class-member trials, as it had done with regard to the Phase II trials in *Engle* itself. *Id.* at 433, 436.

Petitioner Philip Morris had argued in *Douglas* that *Fayerweather v. Ritch*, 195 U.S. 276 (1904), foreclosed the preclusive use of the common *Engle* jury findings on due process grounds. The Florida Supreme Court rejected Philip Morris's argument. *Douglas*, 110 So. 3d at 435.[2] The court concluded that the cigarette

[2] The lone dissenter in *Douglas* found no due process violation but disagreed with the majority's interpretation and application of Florida's claim preclusion rules.

companies' due process rights had not been abridged for the simple reason that they had received notice and an opportunity to be heard during the *Engle* class-action proceedings. *Id.* at 431-32. Philip Morris had also claimed that the *Engle* findings were insufficiently specific to be given preclusive effect in light of the trial record, but the *Douglas* court held that "by accepting some of the Phase I findings and rejecting others based on lack of specificity, this Court in *Engle* necessarily decided that the approved Phase I findings are specific enough." *Id.* at 428 (citing *Engle*, 945 So. 2d at 1255).

Philip Morris again sought certiorari on its due process claim, which was denied. *Philip Morris USA Inc. v. Douglas*, 134 S. Ct. 332 (2013).

C. The Decision in *Walker*.

In *Walker*, the Eleventh Circuit heard appeals from two judgments entered on jury verdicts in *Engle* progeny cases that were in federal court on diversity jurisdiction. 734 F.3d at 1286. The Eleventh Circuit, in an opinion by Judge Pryor, held that, "federal courts sitting in diversity are bound by the decisions of state courts on matters of state law." *Id.* at 1284. Therefore, under the Full Faith and Credit Act, 28 U.S.C. § 1738, the court's task was "not to decide whether the decision in *Douglas* was correct as a matter of Florida law." *Id.* at 1287 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). The Eleventh Circuit could not sit as a court of appeals over the decision of the Florida Supreme Court. Rather, the court undertook the limited inquiry of "whether giving full faith and credit to the decision in *Engle*, as interpreted in *Douglas*, would arbitrarily deprive R.J. Reynolds of its property without due process of law." *Id.* at 1287. The court thus declined Petitioner Reynolds' invitation to "conduct a

searching review of the *Engle* class action and apply what amounts to *de novo* review of the analysis of Florida law in *Douglas*," because it "lack[ed] the power to do so." *Id.*

The Eleventh Circuit proceeded to reject the basic premise of Petitioners' argument: "R.J. Reynolds argues that the Supreme Court held in *Fayerweather* … that parties have a right, under the Due Process Clause, to the application of the traditional law of issue preclusion, but we disagree." *Id.* at 1289. The Eleventh Circuit explained that, in fact, this Court "had no occasion in *Fayerweather* to decide what sorts of applications of issue preclusion would violate due process." *Id.* The Eleventh Circuit further held that, "[i]f due process requires a finding that an issue was actually decided, then the Supreme Court of Florida made the necessary finding . . . ." *Id.* The *Douglas* court did so "when it explained that the approved findings from Phase I 'go to the defendants[']' underlying conduct which is common to all class members and will not change from case to case.'" *Id.* (quoting *Douglas*, 110 So. 3d at 428).

In rejecting Reynolds' due process argument, the Eleventh Circuit concluded that "R.J. Reynolds had a full and fair opportunity to litigate the issues of common liability in Phase I." *Id.* at 1288. Additionally, "R.J. Reynolds also has had an opportunity to contest its liability in these later cases brought by individual members of the *Engle* class . . . [and] has vigorously contested the remaining elements of the claims, including causation and damages." *Id.* Accordingly, the Eleventh Circuit affirmed the verdicts and refused to disturb *Douglas* "[b]ecause R.J. Reynolds had a full and fair opportunity to be heard in the Florida class action and the application of res judicata under

Florida law does not cause an arbitrary deprivation of property[.]" *Id.* at 1280-81.

Certiorari was again denied. *R.J. Reynolds Tobacco Co. v. Walker*, 134 S. Ct. 2727 (2014).

D. The Proceedings Below.

1. Trial

The present case involves an appeal of a jury verdict on behalf of Faye Graham. Like so many others, Graham started smoking as a teenager. Despite repeated efforts to quit smoking as an adult, including hypnosis and chewing gum, Graham proved to be too addicted to stop successfully and smoked until she died of lung cancer at age 58.

The case was tried to a jury. The district judge instructed the jury with the approved common *Engle* findings. PA. 16-17. The jury determined that addiction to smoking Petitioners' cigarettes was the cause of Ms. Graham's death and found in her favor on negligence, strict liability, and intentional tort claims. As often occurs in the complicated fact presentations of tobacco cases, the jury allocated 20% of the fault to R.J. Reynolds, 10% to Philip Morris, and the remainder to Ms. Graham herself. PA. 17. The district court entered judgment against R.J. Reynolds for $550,000, and against Philip Morris for $275,000. *Id.*

2. The Panel Decision.

On appeal, the panel per Judge Tjoflat, held that use of the *Engle* findings was preempted by federal law because "Congress has regulated cigarettes for many years" but "has never banned them." PA. 344. Although the panel referenced a handful of federal statutes that addressed aspects of cigarette production and labeling, the core of the opinion was a holding that customary

state police powers are preempted based on the *absence* of a federal prohibition of cigarettes. The panel discerned from Congressional inaction a "clear" purpose to "leav[e] to adult consumers the choice whether to smoke cigarettes or to abstain." PA. 353.

The panel relied on an administrative law decision, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), in which the Court held that the FDA lacked authority to regulate cigarettes, in part because such authority would have required the FDA to ban them. From this, the panel concluded that "regulation of cigarettes rests on the assumption that they will still be sold" and that consumers will maintain a right to choose to smoke or not to smoke." PA. 344 (internal quotation marks omitted).

The panel held that this congressional "assumption" preempted Florida's strict liability and negligence law as expressed through the *Engle* findings. PA. 348-53. The panel concluded that the *Engle* findings "imposed a common-law duty on cigarette manufacturers that they necessarily breached every time they placed a cigarette on the market. Such a duty operates, in essence, as a ban on cigarettes." PA. 353. This, the panel held, "conflicts with Congress's clear purpose and objective of regulating—not banning—cigarettes." *Id.*

Respondent petitioned for rehearing en banc on the basis that the panel opinion conflicted with Supreme Court and Eleventh Circuit decisions, including *Walker*, permitting common law claims against cigarette manufacturers, and that the panel opinion inferred preemption from congressional inaction, even though this Court's precedent "explicitly rejects the notion that mere congressional silence on a particular issue may be read as pre-empting state law." *Wyeth v.*

Levine, 555 U.S. 555, 602-03 (2009) (Thomas, J., concurring) (citation omitted). The court granted rehearing.

3. The En Banc Decision.

The en banc Eleventh Circuit, again in an opinion by Judge Pryor, "reaffirm[ed]" *Walker*'s due process holding. PA. 3. The court reiterated, point-for-point, what it had said in *Walker*. The court stated that the Full Faith and Credit Act, 28 U.S.C. § 1738 "requires federal courts to give preclusive effect to a state court judgment to the same extent as would courts of the state in which the judgment was entered," PA. 18 (citation omitted), so "long as the state proceedings 'satisfied the minimum procedural requirements' of due process." PA. 24 (quoting *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481 (1982)).

The court recognized that "R.J. Reynolds and Philip Morris do not . . . contend that they were denied notice or an opportunity to be heard, the central features of due process." *Id.* And the court explained that due process "does not require a state to follow the federal common law of res judicata and collateral estoppel." PA. 25. Instead, "[t]he Due Process Clause requires only that the application of principles of res judicata by a state affords the parties notice and an opportunity to be heard so as to avoid an arbitrary deprivation of property." PA. 26. In this case, "[t]he tobacco companies were given an opportunity to be heard on the common theories in a year-long trial followed by an appeal to the Florida Supreme Court and later individual trials and appeals on the remaining issues of proximate causation, comparative fault, and damages." PA. 26-27.

Finally, the court examined and rejected Petitioners' claim that the *Engle* findings were without evidentiary foundation in the record. The court concluded that *Douglas*'s holding was well-supported. PA. 21 ("After reviewing the *Engle* trial record, we are satisfied that the Florida Supreme Court determined that the *Engle* jury found that common elements of negligence and strict liability against Philip Morris and R.J. Reynolds."); *see also Walker*, 734 F.3d at 1289 ("If due process requires a finding that an issue was actually decided, then the Supreme Court of Florida made the necessary finding when it explained that the approved findings from Phase I 'go to the defendants underlying conduct which is common to all class members and will not change from case to case' and that 'the approved Phase I findings are specific enough' to establish certain elements of the plaintiffs' claims." (quoting *Douglas*, 110 So. 3d at 428)).

The en banc court then rejected the panel's preemption holding: "We conclude that the federal tobacco laws do not preempt state tort claims based on the dangerousness of all the cigarettes manufactured by the tobacco companies." PA. 30. The court reviewed the text of each statute addressing tobacco and found that "[t]he only significant requirement imposed on cigarette manufacturers by the six federal laws in question is the warning label requirement for cigarette packages and advertising." PA. 32-33. The court found "[n]othing" that "reflects a federal objective to permit the sale or manufacture of cigarettes." PA. 34; *see also* PA. 35 ("Federal law is silent both by its terms and by its operation."). The court rejected Petitioners' argument as "contrary to settled law that inaction by Congress cannot serve as the justification for finding federal preemption of state law." PA. 37. Finally, the court dismissed Petitioners' reliance on *FDA v. Brown*

& Williamson, explaining that "[a]lthough federal agencies have only the authority granted to them by Congress, states are sovereign" and "*Brown and Williamson* does not address state sovereignty, and it does not consider the preemptive reach of federal legislation on tobacco." PA. 39.

REASONS TO DENY THE WRIT

I. THE NINETEENTH TIME IS NOT A CHARM.

This Petition does not even pretend to raise any issue not previously raised in eighteen prior petitions. Time after time, the tobacco Petitioners argue that a year-long trial resulting in specific findings of unlawful conduct is somehow an affront to due process. In words of an early rock 'n' roll song, this issue has been decided "over and over and over again." But unlike in some tales of forlorn love, there are consequences to invoking the certiorari jurisdiction of this Court. While the denial of certiorari may not have jurisprudential stare decisis effects, it does have preclusive results for the litigation *sub judice*: "for the case in which certiorari is denied, its minimum meaning is that this Court allows the judgment below to stand with whatever consequences it may have upon the litigants involved under the doctrine of res judicata as applied either by state or federal courts." *Brown v. Allen*, 344 U.S. 443, 543 (1953) (Jackson, J., concurring).

Neither the preceding eighteen petitions nor this Petition present any claim that has not been fully and finally determined by the Florida courts, with full appellate review ending in the denial of certiorari. This petition, like the eighteen that preceded it, seeks

only to reopen the factual issues resolved in *Engle*, 945 So. 2d 1246.

A. The Law of the Case Precludes Relitigation of the Same Collateral Attack on State Court Judgments.

Petitioners' breathless claims of a due process violation were rejected by the Florida Supreme Court in *Douglas*, 110 So. 3d at 433. *Douglas* held in clear, unmistakable terms that what are known as "the *Engle* progeny cases" benefit from the final class-action judgment on the conduct elements of various causes of action: "The *Engle* judgment was a final judgment on the merits because it resolved substantive elements of the class's claims against the *Engle* defendants." *Id.* After *Douglas*, full faith and credit principles required federal courts sitting in diversity to follow the instructions given by the Florida Supreme Court for similar state-court cases. That is what the Eleventh Circuit did in *Walker*, which ruled that the scope of the preclusive effect was a question of fact that the state supreme court had conclusively resolved: "R.J. Reynolds next argues that it is impossible to tell whether the jury determined that it acted wrongfully in connection with some or all of its brands of cigarettes because the plaintiffs presented both general and brand-specific theories of liability, but the decision of the Supreme Court of Florida forecloses that argument." 734 F.3d at 1289. This Court denied certiorari in both *Douglas* and *Walker*.

In the present case, the en banc Eleventh Circuit, simply "reaffirm[ed] our holding in *Walker*." PA. 3. For the Petitioners, the question of the preclusive effect of the factual determinations in *Engle* is unaffected by the serial presentation to this Court. But those denials, particularly in *Douglas,* make the collateral

attack on final state-court rulings through the present Petition procedurally improper.

A denial of certiorari has consequences: "for the case in which certiorari is denied, its minimum meaning is that this Court allows the judgment below to stand with whatever consequences it may have upon the litigants involved under the doctrine of res judicata as applied either by state or federal courts." *Brown*, 344 U.S. at 543 (Jackson, J., concurring); *see also Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 727-28 (2010) ("If certiorari were denied . . . the matter would be res judicata.").

Even a quick glance at the Questions Presented in the various Petitions shows that this is precisely the sort of relitigation condemned by Justice Jackson. The present Petition challenges the use of "generalized findings" where "there is no way to tell whether a prior jury found particular facts against a party." That is the spitting image of the Question Presented to this Court in *Engle*: "Whether the Due Process Clause prohibits a state court from giving preclusive effect to a jury verdict when it is impossible to discern which of numerous alternative grounds formed the basis for the jury's findings of wrongful conduct."[3] And as presented again in *Douglas*: "whether the Due Process Clause is violated by the Florida Supreme Court's new rule of preclusion, which permits *Engle* class members to establish petitioners' liability without being required to prove essential elements of their claims or establishing that those elements were actually decided in their favor in a prior proceeding."[4] And again in *Walker*: challenging the use of "generic" findings of

[3] RA. 1a.

[4] RA. 8a.

fact "to excuse thousands of plaintiffs … from proving essential elements of their claims."[5] This recurring Question has received a consistent answer: "cert. denied."

This Court has twice rejected Petitioners' attempt to overrule *Walker*, first in *Douglas*,[6] and then in *Walker* itself. Since then, there have been no newly discovered facts and no intervening changes in Florida law—nothing that mandates a different result. *See Miroyan v. United States*, 439 U.S. 1338, 1338-39 (1978) (Rehnquist, Circuit Justice) (repeat petitions for certiorari should be denied, "unless applicants can demonstrate a conflict among the Courts of Appeals of which this Court was unaware at the time of the previous denials of certiorari, or which has developed since then"). A change in caption does not justify a change in outcome.

Because Petitioners have already challenged the Eleventh Circuit's full faith and credit determination, further review is barred not only by res judicata but also by the law of the case. *See Arizona v. California*, 460 U.S. 605, 618 (1983) (holding that a "decision should continue to govern the same issues in subsequent stages in the same case"); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (finding that "[t]his rule of practice promotes the

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[5] RA. 18a.

[6] *See* Reply Br. for Pet'r R.J. Reynolds, *Philip Morris USA Inc. v. Douglas*, No. 13-191, 2013 WL 4875108, at *6 (Sept. 13, 2013), ("In light of the Eleventh Circuit's *Walker* decision, the due process issue is now fully ripe for this Court's review.") (heading altered); *id.* at *9, 12 (arguing that it was "imperative for this Court to intervene" as "[t]he Eleventh Circuit's misguided analysis makes crystal clear that only this Court can prevent massive due process violations."), *cert. denied*, 134 S. Ct. 332 (2013).

finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'") (citation omitted).

Even if the same issue had not been resolved previously in the same *Engle* matter, the Petition would still be improper as a collateral attack on state-court rules of decision. At bottom, Petitioners seek to find legal error in the Eleventh Circuit granting full faith and credit to final and dispositive rulings of the Florida Supreme Court as to which this Court has already denied review. But full faith and credit further prevents Petitioners from waging a collateral attack in federal court. *See Exxon Mobil Corp. v. Saudi Basic Indus.*, 544 U.S. 280, 282 (2005) (holding that "[w]hen there is parallel state and federal litigation," once the "state-court adjudication is complete" the state court's decision governs disposition of the federal action). In short, because the Full Faith and Credit Act required the Eleventh Circuit to "accept the rules chosen by the State from which the judgment is taken," the court was duty-bound to accord "preclusive effect to state-court judgments" where "the courts of the State from which the judgments emerged would do so." *Kremer*, 456 U.S. at 482 (citation omitted).[7]

Petitioners seek to use *Graham*'s ruling on full faith and credit to obtain review of *Engle* (and by extension, *Douglas*) on due process grounds. But fundamental

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[7] Petitioners also assert that the Florida Supreme Court's decision in *R.J. Reynolds Tobacco Co. v. Marotta*, 214 So. 3d 590 (Fla. 2017) somehow undermines the full faith and credit rulings of *Walker* and *Graham*. But the only issue in *Marotta* was Petitioners' preemption argument, which the court rejected. *See id.* at 591-92 (framing the certified question as "whether federal law implicitly preempts state tort law claims of strict liability and negligence by *Engle* progeny plaintiffs").

principles of respect for state law mean that this circular logic cannot be entertained. As the Eleventh Circuit correctly held in *Walker*: "the Supreme Court of Florida made the necessary finding when it explained that the approved findings from Phase I 'go to the defendants[']' underlying conduct which is common to all class members and will not change from case to case,'" and that, as a result "'the approved Phase I findings are specific enough' to establish certain elements of the plaintiffs' claims. *Douglas*, 110 So. 3d at 428." *Walker*, 734 F.3d at 1289. And again in the *Graham* decision below: "The Florida Supreme Court made clear in *Douglas* that the *Engle* jury decided common elements of the negligence and strict liability of the tobacco companies for all class members" and "rejected the same argument that R.J. Reynolds and Philip Morris make here about what the *Engle* jury decided." PA. 20.

Douglas and *Graham* are the state and federal bookends of the same inquiry. *Compare Douglas*, 110 So. 3d at 430-31 ("[T]he United States Supreme Court has identified the requirements of due process as *notice and opportunity to be heard* and has recognized that applying res judicata to deny a party those rights offends due process.") (emphasis added), *with* PA. 24 (Petitioners "do not contend they were denied *notice or an opportunity to be heard*, the central features of due process.") (emphasis added), *and Walker*, 734 F.3d at 1280 ("Because R.J. Reynolds had a *full and fair opportunity to be heard* in the Florida class action . . . the application of res judicata under Florida law does not cause an arbitrary deprivation of property.") (emphasis added). *Graham* and *Douglas* employed the same legal reasoning, on the same facts, to reach the same conclusion. There is no basis for a different result in *Graham* than in *Douglas*. Nothing has changed—

neither governing law nor material facts—since this Court denied certiorari in *Douglas*, as indeed it had previously in *Engle*.

In effect, Petitioners seek to evade the consequences of a denial of certiorari under 28 U.S.C. § 1257 by collaterally attacking a final state-court judgment, and then demanding certiorari review from the entirely proper federal-court deference to the final state-court judgment on matters of state law. That outcome is barred by the jurisdictional limit of Section 1257, which "vests authority to review a state court's judgment solely in this Court." *Exxon*, 544 U.S. at 292. While federal courts retain the authority to adjudicate an "independent claim," *id.* at 292-93, they are without jurisdiction to exercise appellate review of the adequacy of a final state-court ruling. The entire argument in *Graham*, just like the same argument in *Walker*, was an attempt to obtain federal relief from a state judgment that was not to Petitioners' liking. As this Court held in *Exxon*, that form of review is jurisdictionally limited to certiorari review in this Court from the final judgment itself, not through collateral challenge in the federal courts. That Petitioners now attempt to circumvent *Exxon* by seeking certiorari to the Eleventh Circuit does not alter the correctness of the decision below to afford finality to the factual determinations of the Florida state courts.

Even apart from the preclusive consequences of the law of the case, there is simply no tenable due process argument here. A federal jury found that cigarette smoking was responsible for the death of Faye Graham. Even with the *Engle* Phase I findings, the jury found that R.J. Reynolds and Philip Morris were only 20 percent and 10 percent at fault, respectively, placing the overwhelming bulk of the responsibility on

Ms. Graham herself. The jury found for Petitioners on Ms. Graham's intentional tort claims, even though *Engle* Phase I findings applied to those as well. Not only have all the issues in this Petition been presented to and rejected by this Court, but the underlying trial results speak to the fact that Petitioners were well capable of defending their interests.

B. The Factual Predicates for Liability Were Proven at Trial in *Engle*.

In every single post-*Engle* petition to this Court, Petitioners falsely assert that "there is no way to know whether any jury has ever found that [Petitioners] committed tortious acts that harmed plaintiffs." Pet. 1; *see also* RA. 1a-18a (examples of the same assertion time and again). Despite being raised numerous times in federal and state court proceedings, no court has ever accepted the factual premise of Petitioners' assertion. Indeed, the very premise of the preemption ruling by the original panel below was that, by finding negligence and strict liability in the manufacture ***of all cigarettes*** during the relevant time period, the *Engle* court had effectively banned cigarettes.

Tobacco's claim of factual uncertainty in the record, which also served as the foundation of all prior petitions,[8] is in turn premised on the fact that there were findings that some but not all cigarettes were manufactured with glass fibers or breathing air holes or high ammonia levels or were putatively "light" cigarettes, and that this conduct took various forms over decades. Pet. 6-7. On this theory, there was no proof of any defect in the cigarettes smoked by Faye Graham as a general matter, and presumably, no

[8] *See. e.g.,* RA. 8a.

evidence that the particular cigarette that caused her cancer was defective. The heart of the due process claim is that "these generic questions" prove nothing when applied to a specific plaintiff. Pet. 7.

These claims, repeated as a mantra across all the many certiorari petitions, ask the Court to disregard the actual facts of record. Beyond this Court's normal reluctance to disturb findings of fact by two courts below,[9] the critical factual findings have been twice affirmed on appeal by the Florida Supreme Court, applied by numerous other Florida appellate courts and federal courts, and denied certiorari review repeatedly.

Contrary to the assertion that defendants did not have a "chance to contest facts that no prior factfinder ascertainably found," the findings are precisely to the contrary. As summarized by the Court below,

> The smokers presented a substantial body of evidence that all of the cigarettes manufactured by the named defendants contained carcinogens that cause disease, including cancer and heart disease, and that nicotine addicts smokers. *Douglas*, 110 So. 3d at 423. They presented evidence that the tobacco companies "failed to address the health effects and addictive nature of cigarettes, manipulated nicotine levels to make cigarettes more

[9] *See, e.g.*, *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.").

> addictive, and concealed information about the dangers of smoking." *Id*.

PA. 5.

The jury was asked a series of specific questions about the conduct of each tobacco company. PA. 9. Tobacco now accepts that the first question, whether cigarettes cause cancer, was specific enough to yield binding findings of fact. Pet. 7 n.1.[10] Yet, somehow, no such conclusion could be drawn from the second question, which asked whether "cigarettes that contain nicotine [are] addictive or dependence producing." PA. 9. Each of the ensuing questions about negligence and strict liability similarly addressed the ***conduct*** of the tobacco companies in the sale of ***all*** cigarettes in the relevant period. There is no difference in the level of specificity between whether cigarettes cause certain cancers and whether nicotine is addictive. That the jury made additional findings about air holes, filters, and adulteration with glass fibers does not in any way diminish the application of the preclusive findings as to ***all*** cigarettes.

As the opinion below chronicled in detail, the jury made specific findings that cigarettes cause certain cancers, that "cigarettes that contain nicotine [are] addictive," that each of the tobacco companies placed

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[10] This itself is a new concession. Petitioners previously challenged any findings from the *Engle I* trial. *See Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1334-35 (11th Cir. 2010). Although Petitioners maintain that it is impossible to discern the meaning of the *Engle* finding that nicotine is addictive, their own websites are to the contrary. *See* R.J. Reynolds, www.rjrt.com/transforming-tobacco/guiding-principles-and-beliefs/ ("Nicotine in tobacco products is addictive"); Altria, www.altria.com/our-companies/philipmorrisusa/smoking-and-health-issues/Pages/default.aspx ("Cigarettes are addictive").

"cigarettes on the market that were defective and unreasonably dangerous," and that each of the tobacco defendants failed to exercise reasonable care. PA. 9. Accordingly the court ruled that "the evidence supported a finding that *all* of the tobacco companies' cigarettes were defective even if some of the cigarettes had brand-specific dangers." PA. 10 (emphasis in original). The evidence further supported "a finding that the tobacco companies were negligent in producing and selling *all* of their cigarettes. PA. 11 (emphasis in original). Based on these findings, the jury awarded compensatory damages to the named plaintiffs in the original action, a judgment adverse to tobacco that was upheld on all appeals for two of them, with this Court denying certiorari. *See Engle*, 945 So. 2d at 1255-56; *Engle*, 552 U.S. 941.

C. States May Craft Their Own Preclusion Rules Within Broad Constitutional Limits.

Petitioners wish to draw this Court into an esoteric debate on the nomenclature of preclusion doctrines, as if the terminology used by the Florida Supreme Court were a matter of constitutional concern. This Court has long held otherwise: "State courts are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes." *Richards v. Jefferson County*, 517 U.S. 793, 797 (1996); *see also, e.g.*, *Postal Tel. Cable Co. v. Newport*, 247 U.S. 464, 475 (1918) ("Res judicata, like other kinds of estoppel, ordinarily is a matter of state law."); *Hansberry v. Lee*, 311 U.S. 32, 42 (1940) ("[T]he Fourteenth Amendment does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments"); *Taylor v. Sturgell*, 553 U.S. 880, 891 n.4

(2008) (federal courts reviewing state law must "incorporate[] the rules of preclusion applied by the State in which the rendering court sits"). As aptly summed up below, "what the Florida Supreme Court calls the relevant doctrine . . . is no concern of ours." PA. 24 (quoting *Walker*, 734 F.3d at 1289).

Federal courts are required to honor state preclusion rules insofar as they comport with the "minimum procedural requirements" of the Due Process Clause. *Kremer*, 456 U.S. at 481-82 (federal courts may not "employ their own rules of res judicata in determining the effect of state judgments," because principles of full faith and credit "go[] beyond the common law and command[] a federal court to accept the rules chosen by the State from which the judgment is taken."). The States are afforded wide latitude in this context: due process requires only that they avoid "extreme applications" that are "inconsistent with a federal right that is 'fundamental in character.'" *Jefferson County*, 517 U.S. at 797 (citing *Postal Tel.*, 247 U.S. at 475); *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 328 (1979) (stating that the "most significant safeguard" of due process is "whether the party against whom [preclusion] is asserted had a full and fair opportunity to litigate") (citation omitted).

Where a party has been furnished notice and a fair and full opportunity to be heard, the "minimum procedural requirements" of due process have been satisfied, *Kremer*, 456 U.S. at 481-82, and even unorthodox preclusion rules pass constitutional muster, *see Parklane Hosiery*, 439 U.S. at 328 (approving non-traditional application of preclusion rules against a party that was provided an opportunity to be heard); *Blonder-Tongue Labs., Inc. v. University of Ill. Found.*, 402 U.S. 313, 329-30 (1971) (allowing non-traditional

application of preclusion rules when the party was afforded an "opportunity for full and fair trial.").

The Petition does not even cite *Kremer* or *Parklane* or *Blonder-Tongue*, the controlling cases on the due process boundaries of preclusion, or in any way distinguish these from the decision below.[11] Instead, Petitioners' errant argument turns on a long-forgotten scrap of dicta from an inapposite decision, *Fayerweather*, 195 U.S. 276. In *Fayerweather*, this Court concluded that a will contest fully litigated in state court barred a later attempt to reopen the contest in federal court. *Id.* at 306. The Court had *no occasion* to decide what sorts of state preclusion rules might violate due process. This Court has never cited *Fayerweather* for the proposition attributed to it by Petitioners. *Fayerweather* plays no role in modern preclusion law or due process law, and rightly goes unmentioned in *Taylor*, 553 U.S. 880, this Court's most recent comprehensive account of preclusion law. And, in reality, the Court has confined the due process inquiry in the application of state preclusion law to the issues of notice and the opportunity to be heard:

> [W]hen the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such *notice* and *opportunity to be heard* as are

[11] The Chamber of Commerce amicus brief, despite an erudite exposition of Roman law, also ignores the Supreme Court decisions on point. Chamber Br. 8-15.

> requisite to the due process which the Constitution prescribes.

Hansberry, 311 U.S. at 40 (emphasis added).

This is exactly what the court below found had been afforded to Petitioners:

> The Florida courts provided them notice that the jury findings would establish the 'conduct elements of the class's claims,' *Douglas*, 110 So.3d at 429. And the year-long trial provided them 'a full and fair opportunity to litigate the issues of common liability in Phase I.' *Walker*, 734 F.3d at 1288. Both tobacco companies seized that opportunity, presenting 'testimony that cigarettes were not addictive and were not proven to cause disease and that they had designed the safest cigarette possible.' *Douglas*, 110 So. 3d at 423. And they continue to contest liability in individual actions by class members, in which new juries determine issues of individual causation, apportionment of fault, and damages. *Id.* at 430; *Engle III*, 945 So. 2d at 1254.

PA. 25. Further,

> [N]o tobacco company can be held liable to any smoker without proof at trial that the smoker belongs to the *Engle* class, that she smoked cigarettes manufactured by the company during the relevant class period, *and* that smoking was the proximate cause of her injury. Every tobacco company must also be afforded the opportunity to contest the smokers' pleadings and evidence and to plead and prove the smokers' comparative fault. Indeed, in this appeal, after the district court

> instructed it, the jury reduced Graham's damages award for his deceased spouse's comparative fault. And in other *Engle* progeny litigation, tobacco companies have won defense verdicts.

PA. 27. Consequently, "applying Florida law in this trial did not violate the tobacco companies' rights to due process of law." PA. 28.

D. The Facts Underlying the *Engle* Findings Have Been Independently Established in Other Final Proceedings.

Nor is there anything exceptional about the approved *Engle* findings themselves. Take, for instance, the first finding that cigarette smoking causes several diseases, including lung cancer. *Engle*, 945 So. 2d at 1277. This finding of fact was also made in another case against Petitioners—the United States government's civil RICO action, in which the Court similarly denied certiorari review. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 147 (D.D.C. 2006), *aff'd in pertinent part*, 566 F.3d 1095 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 3501-02 (2010) ("Cigarette smoking causes lung cancer.").

The second *Engle* finding is also non-controversial: nicotine is addictive. 945 So. 2d at 1277. This fact, too, was found in the government's civil RICO action:

> Since the 1950s, Defendants have researched and recognized, decades before the scientific community did, that nicotine is an addictive drug, that cigarette manufacturers are in the drug business, and that cigarettes are drug delivery devices. The physiological impact of nicotine explains in large part why people use

> tobacco products and find it so difficult to stop using them.

449 F. Supp. 2d at 208-09.

Petitioners claim it is unconstitutional to lend preclusive effect to two other *Engle* findings on the cigarette companies' long-running conspiracy to fraudulently conceal the health hazards of smoking. 945 So. 2d at 1277. But, again, the government's RICO action yielded parallel conclusions that Petitioners and their co-conspirators:

> intentionally maintained and coordinated their position on addiction and nicotine as an important part of their overall efforts to influence public opinion and persuade people that smoking was not dangerous; in this way, the cigarette company Defendants could keep more smokers smoking, recruit more new smokers, and maintain or increase their earnings. Additionally, Defendants have sought to discredit evidence of addiction in order to preserve their "smoking is a free choice" argument in smoking and health litigation.

449 F. Supp. 2d at 209.

There is nothing extraordinary or offensive about the Florida courts according preclusive effect to a set of facts that have been demonstrated here as elsewhere, and that this Court has uniformly declined to review.

II. PETITIONERS DO NOT SERIOUSLY ARGUE PREEMPTION.

No judge of the Eleventh Circuit voted to rehear *Walker* en banc. The only reason for en banc review in *Graham* was to reverse Judge Tjoflat's extraordinary

panel holding that that state common law exists only at the sufferance of Congress. Having forced the en banc hearing they were denied in *Walker*, Petitioners did not lift a finger to defend their panel victory.

At oral argument before the en banc court, with Judge Tjoflat presiding, Petitioner never mentioned preemption. Counsel for Respondent challenged Petitioners' counsel over whether the argument was being abandoned, and on rebuttal, Petitioners chose once again to say not a word in defense of Judge Tjoflat's panel opinion.

In similar fashion, in the Petition here, preemption has been reduced to an afterthought in two pages of perfunctory presentation. Even if the issue is not deemed waived for having been abandoned at oral argument below, the Court should not grant certiorari on such a half-hearted assertion of the issue.

The en banc Eleventh Circuit needed to repair the doctrinal damage of an indefensible decision. The panel had applied a dormant preemption theory grounded on the fact that "Congress has regulated cigarettes for many years. But it has never banned them." PA. 344. Yet it is hornbook law that "mere congressional silence on a particular issue" cannot "be read as pre-empting state law." *Wyeth*, 555 U.S. at 602-03 (Thomas, J., concurring) (citation omitted); *see also* PA. 37 ("[T]his argument is contrary to settled law that inaction by Congress cannot serve as justification for finding federal preemption of state law."). A decision not to regulate at the federal level "is fully consistent with an intent to preserve state regulatory authority" and does "not convey an 'authoritative' message of a federal policy" that can have any preemptive effect. *Spriestma v. Mercury Marine*, 537 U.S. 51, 65-67 (2002).

Consequently, a "party asserting conflict preemptions faces a high bar." PA. 29. Preemption begins and ends with the text of the relevant statute. Unlike the silence of the Petition on what the statutes actually say, the Eleventh Circuit meticulously analyzed "the six tobacco-specific laws that are relevant to this appeal." PA. 30-34. Three of the statutes have no bearing on the matter, and three address the label of a cigarette. PA. 33. The court below properly concluded that "[n]othing in these six statutes reflects a federal objective to permit the sale or manufacture of cigarettes." PA. 34.

This is hardly novel. This Court has previously rejected claims of preemption in tobacco cases based on the limited preemption clauses covering disclosures and advertising only, as well as savings clauses specifically preserving traditional common law remedies. *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504 (1992) (upholding state common law claims against a tobacco company); *Altria Grp., Inc. v. Good*, 555 U.S. 70 (2008) (upholding even state law claims relating to advertising so long as they were based on generally-applicable duties, not advertising restrictions specifically based on smoking or health). Per the court below, "[t]he only significant requirement imposed on cigarette manufacturers by the six federal laws in question is the warning label requirement for cigarette packages and advertising." PA. 32-33.[12]

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[12] The WLF Brief (at 12) cites *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), but that case reaffirms the limited reach of federal preemption here: "The FCLAA also does not foreclose all state regulation of conduct as it relates to the sale or use of cigarettes. The FCLAA's pre-emption provision governs state regulations of 'advertising or promotion.'" *Id.* at 552.

This Court has long affirmed state authority to restrict or even ban tobacco in the absence of express congressional action to the contrary. Over a century ago, the Court upheld a Tennessee prohibition on the sale of cigarettes "as not infringing the power of Congress under the Commerce Clause," and went on to describe "the cigarette ban as the type of legislation that states may enact 'for the reservation of the public health or safety' under their police powers. *Austin v. Tennessee*, 179 U.S. 343, 349 (1900)." PA. 39.

Rather than trying to root the preemption argument in what the tobacco statutes actually say, Petitioners point, as did the overturned panel decision, to this Court's decision in *Brown & Williamson*, 529 U.S. 120. There, the Court held that the FDA lacked authority to regulate cigarettes, in part because such authority would have required the FDA to ban them. But "[a]lthough federal agencies have only the authority granted to them by Congress, states are sovereign." PA. 39.

If anything, *Brown & Williamson* weighs *against* a finding of preemption because it made clear that federal law does not occupy the field of tobacco regulation. It is implausible (and would be unprecedented) that Congress intended to create a regulation-free zone applicable only to tobacco companies. Instead, *Brown & Williamson* suggests that the obvious answer is the correct one: states may regulate in this space absent a specific Congressional statement to the contrary. *See Wyeth*, 555 U.S. at 584 (Thomas, J., concurring) ("[T]he States possess sovereignty concurrent with that of the Federal Government, subject only to the limitations imposed by the Supremacy Clause."); *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994) (even when a "federal statutory regulation . . .

is comprehensive and detailed[,] matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law").

As the court below properly held, the constitutional bedrock of a federal system based on dual sovereignty is that "[s]tate governments retain their historic police powers to protect public health. *See* U.S. Const. Amend. X." PA. 39. The en banc decision cleaned up the panel-level mess by applying the established jurisprudence of this Court, leaving no residual basis for review.

III. THERE IS NO CONFLICT OF LAW OR SUBSTANTIAL QUESTION OF LAW TO RESOLVE.

A circuit split would be impossible in a limited pool of pending cases arising from a single Florida proceeding. Nor is there conflict within the reviewing courts: for all the appeals through the state and federal system, no court has accepted the fanciful due process and preemption claims. The *Engle* progeny cases are a finite number of tobacco personal injury cases mostly in the Florida state courts; they involve only Florida law and raise no broader issues even in Florida. Following *Walker*, the vast majority of *Engle* cases in federal court have resolved, leaving only a handful of verdicts on appeal.

As the Florida Supreme Court has found, the procedural history of this case is "unlikely to be repeated." *Engle,* 945 So. 2d at 1270 n.12. Petitioners (at 34) acknowledge that *Engle* is "*sui generis*," but speculate that other "courts … are inventing bespoke procedural devices." What other courts are doing is of no moment in assessing the opinion below. The Eleventh Circuit is addressing the tail end of the few

remaining appeals. The fact-bound resolution of a complex Florida case has no determinate future implications and that alone is reason the Petition should be denied. *See Rice v. Sioux City Mem'l Park Cemetery,* 349 U.S. 70, 79 (1955) (recognizing the importance of limiting grants of certiorari to cases "of importance to the public, as distinguished from that of the parties") (citation omitted). Just as the appropriate forum for challenges to *Engle* and *Douglas* was petitions for certiorari from those decisions, the validity of new and unimagined "procedural devices" can be measured in review of decisions actually adopting those devices.

The dissent from the en banc decision below only reinforces that the issues in the Petition are, in reality, disputes about long-forgotten decisions of the Florida intermediate appellate courts, all regarding issues fully and finally resolved by the highest court of the State, and denied review in this Court.

In the end, the Petition is nothing more than a complaint that case-specific facts were found against Petitioners, a wholly inadequate basis for a grant of certiorari. The court below found, as it did in *Walker*, that the facts defeat any constitutional claim: "After reviewing the *Engle* trial record, we are satisfied that the Florida Supreme Court determined that the *Engle* jury found that common elements of negligence and strict liability against Philip Morris and R.J. Reynolds." PA. 21; *see also Walker*, 734 F.3d at 1289 ("'the approved Phase I findings are specific enough' to establish certain elements of the plaintiffs' claims." (quoting *Douglas*, 110 So. 3d at 438)).

Accordingly, the Petition fails to identify any issue meriting this Court's review.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

QUESTIONS PRESENTED IN DENIALS OF PETITIONS FOR CERTIORARI

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Engle v. Liggett Grp., Inc., 945 So. 2d 1246 (Fla. 2006), cert. denied, *R.J. Reynolds Tobacco Co. v. Engle*, 552 U.S. 941 (2007).

1. Whether the Due Process Clause prohibits a state court from giving preclusive effect to a jury verdict when it is impossible to discern which of numerous alternative grounds formed the basis for the jury's findings of wrongful conduct.

2. Whether, merely by invoking characterizations such as "fraud" or "negligence," a plaintiff may evade federal preemption under this Court's ruling in *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504 (1992), which holds that the Federal Cigarette Labeling and Advertising Act preempts statelaw liability based, *inter alia*, on allegations that cigarette manufacturers failed to warn about the dangers of smoking or marketed cigarettes in ways that "neutralized" the federally mandated warnings.

Liggett Grp. LLC v. Campbell, 60 So. 3d 1078 (Fla. Dist. Ct. App. 2011), cert. denied, *Philip Morris USA Inc. v. Campbell*, 566 U.S. 905 (2012).

Whether the Due Process Clause prohibits the use of issue preclusion to establish elements of a plaintiff's claims where it cannot be shown that the issues being given preclusive effect were actually decided in a prior proceeding.

Liggett Grp. LLC v. Campbell, 60 So. 3d 1078 (Fla. Dist. Ct. App. 2011), cert. denied, *R.J. Reynolds Tobacco Co. v. Campbell*, 566 U.S. 905 (2012).

In its traditional formulation, the doctrine of issue preclusion prohibits a party from litigating an issue that was *actually decided* against it in prior litigation. In this case, applying R. J. Reynolds Tobacco Co. v. Martin, 53 So. 3d 1060 (Fla. Dist. Ct. App. 2010), the court precluded litigation of issues that the prior jury *may not* have decided.

The question presented is the same one presented in the petition for certiorari in *Martin:* whether this unprecedented expansion of preclusion law violates the Due Process Clause of the Fourteenth Amendment.

R.J. Reynolds Tobacco Co. v. Martin, 53 So. 3d 1060 (Fla. Dist. Ct. App. 2010), cert. denied, *R.J. Reynolds Tobacco Co. v. Martin*, 566 U.S. 905 (2012).

In its traditional formulation, the doctrine of issue preclusion prohibits a party from litigating an issue that was actually decided against it in prior litigation. In this case, the court below precluded litigation of issues that were not necessarily decided in prior litigation, based on its conclusion that a prior jury reasonably could have decided the issues. As a result, respondent obtained a $28.3-million judgment without either proving essential elements of her claims or demonstrating that a prior jury had actually decided those elements in her favor.

The question presented is whether this dramatic and unprecedented departure from traditional preclusion law—to impose liability based on earlier litigation without any assurance that the earlier litigation actually decided the precluded issue—violates the Due Process Clause of the Fourteenth Amendment

R.J. Reynolds Tobacco Co. v. Hall, 70 So. 3d 642 (Fla. Dist. Ct. App. 2011), cert. denied, *R.J. Reynolds Tobacco Co. v. Hall*, 566 U.S. 905 (2012).

In its traditional formulation, the doctrine of issue preclusion prohibits a party from litigating an issue that was actually decided against it in prior litigation. In this case, applying *R. J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. Dist. Ct. App. 2010), the court precluded litigation of issues that the prior jury may not have decided.

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R.J. Reynolds Tobacco Co. v. Gray, 63 So. 3d 902 (Fla. Dist. Ct. App. 2011), cert. denied, *R.J. Reynolds Tobacco Co. v. Gray*, 566 U.S. 905 (2012).

In its traditional formulation, the doctrine of issue preclusion prohibits a party from litigating an issue that was actually decided against it in prior litigation. In this case, applying *R. J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. Dist. Ct. App. 2010), the court precluded litigation of issues that the prior jury may not have decided.

The question presented is the same one presented in the petition for certiorari in *Martin*: whether this unprecedented expansion of preclusion law violates the Due Process Clause of the Fourteenth Amendment.

R.J. Reynolds Tobacco Co. v. Clay, 84 So. 3d 1069 (Fla. Dist. Ct. App. 2012), cert. denied, *R.J. Reynolds Tobacco Co. v. Clay*, 568 U.S. 1027 (2012).

The doctrine of issue preclusion prohibits a party from relitigating an issue that was actually decided against it in prior litigation. In this case, the courts below precluded litigation of critical disputed issues absent any determination that those issues had been previously decided.

The question presented is whether this dramatic departure from traditional and heretofore universal preclusion law violates the Due Process Clause of the Fourteenth Amendment.

Philip Morris USA Inc. v. Douglas, 110 So. 3d 419 (Fla. 2013), cert. denied, *Philip Morris USA Inc. v. Douglas*, 134 S. Ct. 332 (2013).

In *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), the Florida Supreme Court partially upheld a massive class action brought on behalf of Florida smokers, ruling that certain "issues"—including defect and negligence—were suitable for class adjudication under Florida's analog to Fed. R. Civ. P. 23(c)(4). The *Engle* jury was presented with multiple theories of defect and negligence, many of which applied only to a subset of class members, and the verdict form required the jury to find against the defendants if any one of the class's theories was proven.

In this case—one of more than 4,500 suits filed by alleged *Engle* class members—the Florida Supreme Court did not believe it is possible to determine which of the class's alternative theories of defect and negligence the *Engle* jury actually found. Indeed, the court conceded that the *Engle* findings would be "useless" if class members were required to establish what was actually decided in *Engle*. To make the findings useful to members of the "issues class" certified in *Engle*, the court devised a new doctrine of offensive claim preclusion under which the class verdict is conclusively deemed to establish any issue that might have been decided in *Engle*. The court upheld this unprecedented application of preclusion against a due process challenge.

The question presented is whether the Due Process Clause is violated by the Florida Supreme Court's new rule of preclusion, which permits *Engle* class members to establish petitioners' liability without being required to prove essential elements of their claims or establishing that those elements were actually decided in their favor in a prior proceeding.

Philip Morris USA, Inc. v. Barbanell, 100 So. 3d 152 (Fla. Dist. Ct. App. 2012), cert. denied, *Philip Morris USA, Inc. v. Barbanell*, 134 S. Ct. 2726 (2014).

This case presents the same due-process question as the petitions for certiorari filed today in *R.J. Reynolds Tobacco Co. v. Jimmie Lee Brown*, No. 13-__, and *R.J. Reynolds Tobacco Co v. Walker*, No. 13-__:

Whether the Florida courts' extreme application of preclusion principles to thousands of pending cases can be reconciled with the Constitution's guarantee of due process of law.

R.J. Reynolds Tobacco Co. v. Brown, 70 So. 3d 707 (Fla. Dist. Ct. App. 2011), cert. denied, *R.J. Reynolds Tobacco Co. v. Brown*, 134 S. Ct. 2726 (2014).

Can the generic findings from the decertified *Engle* class action—findings the Florida Supreme Court deemed "useless" for issue preclusion purposes—be used to excuse thousands of plaintiffs in follow-on cases from proving essential elements of their claims without violating defendants' due process rights?

R.J. Reynolds Tobacco Co. v. Kirkland, 136 So. 3d 604 (Fla. Dist. Ct. App. 2013), cert. denied, *R.J. Reynolds Tobacco Co. v. Kirkland*, 134 S. Ct. 2726 (2014).

This case presents the same question as the petitions for certiorari filed by petitioner R.J. Reynolds Tobacco Company in *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1297 (11th Cir. 2013), and *R.J. Reynolds Tobacco Co. v. Jimmie Lee Brown*, 70 So. 3d 707 (Fla. Dist. Ct. App. 2011). The question presented is:

Whether the Due Process Clause permits use of generic findings from the decertified *Engle* class action to preclude defendants in thousands of cases from contesting essential elements of the plaintiffs' claims.

R.J. Reynolds Tobacco Co. v. Mack, 134 So. 3d 956 (Fla. Dist. Ct. App. 2014), cert. denied, *R.J. Reynolds Tobacco Co. v. Mack*, 134 S. Ct. 2726 (2014).

This case presents the same question as the petitions for certiorari filed by petitioner R.J. Reynolds Tobacco Company in *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013), and *R.J. Reynolds Tobacco Co. v. Jimmie Lee Brown*, 70 So. 3d 707 (Fla. Dist. Ct. App. 2011). The question presented is:

Whether the Due Process Clause permits use of generic findings from the decertified *Engle* class action to preclude defendants in thousands of cases from contesting essential elements of the plaintiffs' claims.

Lorillard Tobacco Co. v. Mrozek, 106 So. 3d 479 (Fla. Dist. Ct. App. 2012), cert. denied, *Lorillard Tobacco Co. v. Mrozek*, 134 S. Ct. 2726 (2014).

This case presents the same question as the petitions for writs of certiorari filed today by R.J. Reynolds Tobacco Company in *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013), and *R.J. Reynolds Tobacco Co. v. Jimmie Lee Brown*, 70 So. 3d 707 (Fla. Dist. Ct. App. 2011):

Whether the Due Process Clause permits the use of generic findings made in the decertified *Engle* class action to preclude defendants in thousands of cases from contesting essential elements of the plaintiffs' claims.

R.J. Reynolds Tobacco Co. v. Koballa, 99 So. 3d 630 (Fla. Dist. Ct. App. 2012), cert. denied, *R.J. Reynolds Tobacco Co. v. Koballa,* 134 S. Ct. 2727 (2014).

This case presents the same question as the petitions for certiorari filed by petitioner R.J. Reynolds Tobacco Company in *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013), and *R.J. Reynolds Tobacco Co. v. Jimmie Lee Brown*, 70 So. 3d 707 (Fla. Dist. Ct. App. 2011). The question presented is:

Whether the Due Process Clause permits use of generic findings from the decertified *Engle* class action to preclude defendants in thousands of cases from contesting essential elements of the plaintiffs' claims.

R.J. Reynolds Tobacco Co. v. Smith, 131 So. 3d 18 (Fla. Dist. Ct. App. 2013), cert. denied, *R.J. Reynolds Tobacco Co. v. Smith*, 134 S. Ct. 2727 (2014).

This case presents the same question as the petitions for certiorari filed by petitioner R.J. Reynolds Tobacco Company in *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013), and *R.J. Reynolds Tobacco Co. v. Jimmie Lee Brown*, 70 So. 3d 707 (Fla. Dist. Ct. App. 2011). The question presented is:

Whether the Due Process Clause permits use of generic findings from the decertified *Engle* class action to preclude defendants in thousands of cases from contesting essential elements of the plaintiffs' claims.

R.J. Reynolds Tobacco Co. v. Sury, 118 So. 3d 849 (Fla. Dist. Ct. App. 2013), cert. denied, *R.J. Reynolds Tobacco Co. v. Sury*, 134 S. Ct. 2727 (2014).

This case presents the same question as the petitions for certiorari filed by petitioner R.J. Reynolds Tobacco Company in *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013), and *R.J. Reynolds Tobacco Co. v. Jimmie Lee Brown*, 70 So. 3d 707 (Fla. Dist. Ct. App. 2011). The question presented is:

Whether the Due Process Clause permits use of generic findings from the decertified *Engle* class action to preclude defendants in thousands of cases from contesting essential elements of the plaintiffs' claims.

R.J. Reynolds Tobacco Co. v. Townsend, 118 So. 3d 844 (Fla. Dist. Ct. App. 2013), cert. denied, *R.J. Reynolds Tobacco Co. v. Townsend*, 134 S. Ct. 2727 (2014).

This case presents the same question as the petitions for certiorari filed by petitioner R.J. Reynolds Tobacco Company in *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013), and *R.J. Reynolds Tobacco Co. v. Jimmie Lee Brown*, 70 So. 3d 707 (Fla. Dist. Ct. App. 2011). The question presented is:

Whether the Due Process Clause permits use of generic findings from the decertified *Engle* class action to preclude defendants in thousands of cases from contesting essential elements of the plaintiffs' claims.

Walker v. R.J. Reynolds Tobacco Co., 734 F.3d 1278 (11th Cir. 2013), cert. denied, *R.J. Reynolds Tobacco Co. v. Walker*, 134 S. Ct. 2727 (2014).

Do either full faith and credit principles or due process permit generic findings from the decertified *Engle* class action—findings the Florida Supreme Court deemed "useless" for issue preclusion purposes—to be used to excuse thousands of plaintiffs in follow-on cases from proving essential elements of their claims?