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 Faye Dale Graham,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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Plaintiff denigrates this petition as "nothing more than a complaint that case-specific facts were found against Petitioners." Opp.32. Quite literally the opposite is true: The problem with *Engle*-progeny litigation is that there is no way to know if critical case-specific facts *have ever* been found against petitioners. The jury in *Engle* was not asked to find them, and the jury in this case was not asked to find them either. Yet the *en banc* Eleventh Circuit majority and the Florida Supreme Court have adopted conflicting (and equally indefensible) ways to impose liability anyway, in patent violation of the Due Process Clause.

Instead of confronting this profound constitutional problem, plaintiff relies principally on denials of certiorari in past cases. To the extent plaintiff is insisting that past denials preclude defendants from seeking certiorari here, denials of review in other cases obviously cannot preclude defendants from contesting the constitutional harms visited upon them in *this* case. To the extent she is appealing to the Court's discretion, she fails to mention that none of those prior denials followed *en banc* review or a dissent exhaustively detailing every due-process deprivation, every conflicting rationale, and every bait-and-switch. In reality, plaintiff's strained efforts to preclude this Court from even considering this petition are just the latest example of something *Engle*-progeny litigation has had far too much of: utterly implausible assertions of res judicata.

On the merits, plaintiff embraces the majority's all-cigarettes-are-defective rationale but never even

tries to reconcile that revisionist rationale with the Florida Supreme Court's decisions in *Douglas* and *Marotta*, both of which expressly held that the *Engle* jury did *not* find all cigarettes defective. Nor does plaintiff's argument comport with reality; she fails to identify any actual finding that all cigarettes are defective, instead claiming only that the evidence *would have* supported such a finding had the jury made one. In the end, then, plaintiff is left arguing that never mind what the jury actually found; it suffices that defendants had notice and a full and fair opportunity to argue against liability in *Engle*. There is a reason why more than 200 years of precedent have rejected that approach: because due process requires an actual *decision* adverse to the defendant on every element of a plaintiff's claim, not just the opportunity to put on a defense.

Plaintiff's defense of the majority's preemption holding is equally unavailing. Instead of explaining how a state-law ban on cigarettes could be squared with *Brown & Williamson*, plaintiff responds only to a caricature of defendants' argument, and misleadingly claims that defendants seek to insulate the tobacco industry from all tort liability.

Finally, plaintiff tries to downplay the significance of the questions presented by noting that most federal *Engle*-progeny cases have been resolved, but she ignores the thousands of state-court cases that remain pending, each seeking millions of dollars in damages. This case was important enough for the Eleventh Circuit to grant *en banc* review, and important enough for Judge Tjoflat—joined by two other judges—to dedicate 227 pages to detailing the

myriad inconsistencies and due-process violations that pervade *Engle*-progeny litigation. The fact that the constitutional violations not only are present here, but will be replicated in thousands of state-court cases seeking an enormous quantum of liability, more than justifies this Court's review.

I. Denials Of Certiorari In Other Cases That Involved Neither *En Banc* Review Nor A 227-Page Dissent Do Not Preclude Review Here.

Having already benefited from a novel and precedent-defying preclusion doctrine to prevail below, plaintiff invents an equally novel and precedent-defying preclusion doctrine to try to shield that victory from this Court's review. Bucking more than a century of settled law, plaintiff contends that, as a matter of res judicata, denials of certiorari in other *Engle*-progeny cases preclude certiorari in this case. Opp.13-15. This Court has long held exactly the opposite: "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923); *see also, e.g.*, *Christie v. Nat'l Collegiate Athletic Ass'n*, 137 S. Ct. 2327 (2017) (granting review after denying certiorari on identical question presented by identical petitioner three years earlier). Indeed, because denial of review may rest on a host of unexpressed considerations, denials of certiorari do not even reflect a conclusion that the issue presented is uncertworthy. The lone authority plaintiff offers in defense of her contrary position is Justice Jackson's solo concurrence in *Brown v. Allen*, 344 U.S. 443 (1953), espousing a habeas-specific position with which a majority of the

Court disagreed, *id.* at 491, and that would not even help plaintiff here. Foreclosing consideration of the only petition involving plaintiff's claims would be entirely consistent with the preclusion doctrine applied below and entirely inconsistent with more than 100 years of this Court's jurisprudence.

Plaintiff's argument that certiorari is barred by law-of-the-case doctrine misses the mark for the same reason, as past denials of certiorari are not law of *this* case. Indeed, the very language plaintiff quotes makes clear that law-of-the-case doctrine applies only to previous determinations "in the same case." Opp.15. And plaintiff's contention that this petition is an improper "collateral attack" on the Florida Supreme Court's judgment in *Douglas* reflects the same faulty reasoning. Opp.16-19. The judgment in *Douglas* is final, binding, and res judicata with respect to *Mr. Douglas' claims*, but this petition concerns whether the judgment with respect to *Ms. Graham's claims* violated the Constitution. Plaintiff's reliance on *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005), is therefore misplaced, as that *Rooker-Feldman* case involved an effort to seek federal court review of a judgment in a finally adjudicated state-court case. *Id.* at 291. Here, defendants do not seek "review and rejection" of the judgment in *Douglas*. They seek review only of whether giving preclusive effect to the *Engle* findings in *this* case would violate the Constitution. That a decision in defendants' favor would have the effect of overruling the legal principle articulated in *Douglas* hardly precludes defendants from asking this Court to answer that question.

In short, plaintiff's implausible procedural arguments succeed only in confirming that *Engle* plaintiffs will stop at nothing to prevent defendants from having a full and fair opportunity to litigate *this case*, and to prevent courts from looking beneath the surface of progeny litigation.

II. The Decision Below Sanctions Massive Ongoing Due Process Violations.

Like the *en banc* majority, plaintiff wisely makes no effort to defend the indefensible claim-preclusion rationale embraced by the Florida Supreme Court. Instead, when plaintiff finally gets around to attempting to defend the decision below, she does so by attributing an all-cigarettes-are-defective finding to the *Engle* jury that cannot be squared with the verdict form or with *Douglas* and *Marotta*. According to plaintiff, all of the brand- and type-specific evidence about "air holes, filters, and adulteration with glass fibers" that was presented during the *Engle* trial was beside the point because the jury was asked to find (and did find) that all cigarettes are inherently defective and that the mere act of selling ordinary cigarettes is negligence. Opp.19-22.

That characterization of the *Engle* findings is pure fantasy. Plaintiff never even tries to explain how one can tell whether the jury made such all-cigarettes findings based on the questions it was asked. Instead, plaintiff focuses myopically on the jury's first two findings—that cigarettes can cause certain diseases and that nicotine is addictive—and insists that *those* findings are sufficiently specific to apply to all cigarettes. Opp.21, 26-27. Indeed they are, as (contrary to plaintiff's contentions, Opp.21 n.10)

defendants have explicitly acknowledged for years. *See, e.g.*, Initial Br. 13, *Philip Morris USA Inc. v. Douglas*, No. SC12-617 (Fla. May 30, 2012) ("[t]he first two *Engle* findings—that smoking can cause 20 specific diseases and that nicotine is addictive—are sufficiently specific to [apply to all cigarettes]").

The problem for plaintiff is that those two findings alone do not themselves amount to a finding of defect or negligence. The mere fact that a product can cause disease or is addictive was not treated in *Engle* as making it *ipso facto* tortious. *See, e.g.*, Restatement (Third) of Torts: Prod. Liab. §2 cmt.a (1998) ("Products are not generically defective merely because they are dangerous."). If it had been, there would have been no need to ask the *Engle* jury to make *distinct* findings on strict liability and negligence. And in contrast to the questions that produced the first two findings, the questions to the *Engle* jury about negligence and strict liability pointedly did not ask about *all* cigarettes. They asked only whether each defendant "place[d] cigarettes on the market that were defective and unreasonably dangerous," Pet.App.295, and "failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise," Pet.App.306. Those questions would be answered affirmatively if defendants negligently placed *any* defective cigarettes on the market, regardless of whether *all* cigarettes shared those flaws. There is thus no way to know whether the jury—which plaintiff concedes was presented with all manner of type- and brand-specific evidence—actually found that the cigarettes plaintiff smoked were defective or negligently marketed.

The Florida Supreme Court made all of this perfectly clear in *Douglas*. *Douglas* would have been a straightforward issue-preclusion case if it were clear (or even plausible) that the *Engle* jury really found that *all* cigarettes are inherently defective and that the mere act of marketing them constitutes negligence. Instead, *Douglas* found the *Engle* findings "useless" for issue-preclusion purposes, Pet.App.67-68, because they established only that each defendant marketed some defective cigarette and committed some negligent act, without identifying which cigarettes were defective or which acts were negligent. That is precisely why *Douglas* invented its novel and constitutionally unsustainable form of claim preclusion, *see* Pet.24-26—a doctrine that, as noted, plaintiff never once attempts to defend.

If any doubt remained about how the Florida Supreme Court has interpreted the *Engle* findings, its decision in *R.J. Reynolds Tobacco Co. v. Marotta*, 214 So. 3d 590 (Fla. 2017), dispelled it. *Marotta* post-dated the Eleventh Circuit's decision in *Walker*—the first to embrace the all-cigarettes-are-defective reading of the *Engle* findings—and addressed whether that revisionist rationale created a preemption problem. *Marotta*'s answer was to emphatically reject *Walker*'s premise that the *Engle* jury found all cigarettes defective. *See id.* at 601.

Plaintiff's response to *Marotta* is to pretend it never happened, mentioning it only in a footnote about collateral attacks. Opp.16 n.7. Instead of grappling with the obvious incompatibility of the decision below with *Marotta*, plaintiff resorts to the same sleight of hand as the *en banc* court, treating the fact that the

Engle jury *could have* believed that all cigarettes were defective as equivalent to the jury *actually* making such findings. *See* Opp.22. But just because the jury *could have found* certain facts does not mean that it *did*. And if evidence is "offered at the prior trial upon several distinct issues," and a decision on any one of them would justify the verdict, then as a matter of due process, "the prior decision is not an adjudication upon any particular issue or issues, and the plea of *res judicata* must fail." *Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904).

Remarkably, plaintiff refuses to take that bedrock rule as a given, dismissing *Fayerweather* as "a long-forgotten scrap of dicta" that has been superseded by a rule that due process requires nothing more than "notice and opportunity to be heard." Opp.24. In other words, according to plaintiff, so long as the defendant was given an opportunity to defend itself against an allegation (such as an allegation that all cigarettes are defective because dangerous and addictive), it does not matter what (if anything) the *Engle* jury actually decided or was asked to decide.

That plaintiff is forced to embrace such an extraordinary position is understandable, as there is no other way to defend the imposition of liability in the absence of an actual decision on every element of the plaintiff's claim, which is precisely what the decision below sanctions. To state the obvious, a defendant cannot be held liable unless a factfinder has *decided* that the plaintiff established liability. That is why due process entitles defendants to "one full and fair opportunity for *judicial resolution*" of the claim against them. *Blonder-Tongue Labs., Inc. v. Univ. of*

Ill. Found., 402 U.S. 313, 328 (1971) (emphasis added). And a "full and fair" opportunity requires not just an opportunity to present a defense, but an actual "adjudication" on the "particular issue" in dispute. *Fayerweather*, 195 U.S. at 307; *see* COC.Br.8-15. Here, neither the *Engle* jury nor the jury in this case was ever asked to find that all cigarettes are inherently defective or that their mere sale is negligent, and yet, defendants are being required to pay damages nonetheless. By imposing liability notwithstanding the absence of a prior adjudication on core issues, the decision below sanctions seriatim due-process violations.

III. The *En Banc* Court's Preemption Ruling Is Independently Certworthy.

The decision below creates an insurmountable preemption problem. Plaintiff never disputes that the Eleventh Circuit's all-cigarettes-are-defective reasoning amounts to a state-law ban on selling cigarettes. After all, "[a] state-law duty that is breached every time a cigarette is sold constitutes a duty not to sell cigarettes." WLF.Br.15. That duty, however, would squarely conflict with Congress' determination that "cigarettes and smokeless tobacco will continue to be sold in the United States." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 139 (2000).

Instead of addressing that preemption problem head-on, plaintiff responds only to a caricature of the argument, asserting that Judge Tjoflat's panel opinion held that "state tort law is presumptively preempted by federal law, unless and until Congress has acted affirmatively to authorize state law." Opp.2. That is

emphatically not what the panel held. Tobacco regulation is not some field as to which Congress has been silent. "Congress has enacted several statutes addressing the particular subject of tobacco and health, creating a distinct regulatory scheme for cigarettes and smokeless tobacco," and in doing so, "has foreclosed the removal of tobacco products from the market." *Brown & Williamson*, 529 U.S. at 137, 155. Accordingly, the panel opinion correctly concluded that a state-law ban on cigarettes "conflicts with Congress's clear purpose and objective of regulating—not banning—cigarettes, thereby leaving to adult consumers the choice whether to smoke cigarettes or to abstain." Pet.App.353.

Plaintiff argues that *Brown & Williamson* has no bearing here because "federal agencies have only the authority granted to them by Congress," while "states are sovereign." Opp.30. That is surely a distinction between agencies and states, but it does not make any difference in the preemption context. The question in conflict preemption cases is not whether the state had sovereign power to act, but whether it exercised its power in a way that conflicts with Congress' objectives. Thus, the question here is the same as in *Brown & Williamson*: whether a ban on cigarettes would conflict with Congress' objectives, as reflected in the many tobacco-specific laws Congress has passed. And as numerous courts have concluded, *see* Pet.31 n.5, the answer in both contexts is yes.

Recognizing as much would not "create a regulation-free zone applicable only to tobacco companies." Opp.30. As Judge Tjoflat explained, nothing about finding plaintiff's claims preempted

would "prevent[] an injured plaintiff from bringing a state-law tort suit against a tobacco company, provided he does not premise his suit on a theory of liability that means all cigarettes are defective as a matter of law." Pet.App.357-58. Accordingly, the Court should grant review to resolve the division of authority that the decision below deepens and "clarify the hazy state of preemption law." Pet.App.285-86 (Tjoflat, J.).

IV. This Case Presents Significant And Broadly Important Questions.

Plaintiff's attempts to downplay the significance of this case are unpersuasive. While many of the federal *Engle*-progeny cases have been resolved, more than 3,500 cases remain pending in state court, with each plaintiff seeking to use an unconstitutional procedure to deprive defendants of millions of dollars. Plaintiff asserts that the Eleventh Circuit went *en banc* only to reverse the panel's preemption holding, Opp.27-28, but the reality is that the court expressly instructed the parties to address *both* preemption *and* due process, and directed *all* of its questioning at argument to the latter issue. Plaintiff boasts about "eighteen" previous certiorari denials, but most of those were "hold" petitions, and all of them came before the Eleventh Circuit took this case *en banc*, before Judge Tjoflat penned his remarkable 227-page dissent, before Judges Julie Carnes and Wilson agreed with Judge Tjoflat about the due process violation, before *Marotta* rejected *Walker*'s all-cigarettes-are-defective rationale, and before courts considered how that rationale gives rise to an insurmountable preemption problem.

The importance of review also extends beyond *Engle*-progeny cases. As this Court has enforced due-process limits on federal class actions, plaintiffs have increasingly turned to state courts, which have offered "particularly fertile ground" for procedures that "deviate from traditional modes of adjudication." PLAC.Br.19. Review here would allow the Court to address the due-process limits on these state-court procedural innovations, including limits on ascribing preclusive effect to findings made by a jury in an "issues" class action. PLAC.Br.17-18.

Plaintiff argues that the unconstitutional procedures in this case do not warrant review because other courts are employing other bespoke procedures that can be reviewed at some other time. Opp.31-32. But if and when those cases reach this Court, plaintiffs undoubtedly will repeat the same refrain, using the novelty of each unconstitutional deprivation as a shield against review. The buck has to stop somewhere, and a case that implicates thousands of pending cases, each seeking millions of dollars, and has attracted the attention of the *en banc* Eleventh Circuit and the Florida Supreme Court, each embracing diametrically opposed justifications for facilitating massive and plainly unconstitutional property deprivations, is the right case for this Court's intervention and the right place for the due-process deprivations to stop.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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