No. 18-649

IN THE

Supreme Court of the United States

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

Petitioners,

v.

CHERYL SEARCY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CAROL LASARD,

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

Should this Court, as it has done on twenty-six prior occasions, once again decline the tobacco companies' invitation to review the same factual determinations in the same Florida proceedings, involving the same claims for relief, based on the same arguments raised in all prior Petitions?

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INTRODUCTION

Here we go again. This is the *twenty-seventh* 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 critical health issues, and whether the companies manipulated nicotine levels. These and other such claims have by now been established by federal health 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]

Despite the dire warnings in the Petition, the federal tobacco cases in Florida are drawing to a close in rather conventional fashion. 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. Of the 4,432 cases removed to federal court, 750 were dismissed. *In re Engle Cases*, 767 F.3d 1082, 1087-88 (11th Cir. 2014). A total of 32 cases were tried, yielding 17 plaintiff verdicts (one of which was vacated on appeal) and 15 defense verdicts, contrary to the claim that the system was rigged against Petitioners. The remaining cases settled. Among the plaintiff verdicts are cases like the two at issue in *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013), *cert. denied*, 573 U.S. 913 (2014), which between them yielded trial verdicts

[1] For ease of reference, the Questions Presented in each of the twenty-six prior Petitions are gathered in Respondent's Appendix at RA. 1a-26a.

totaling $35,000 as a result of jury determinations that the plaintiffs were 80-90 percent at fault.

The breathless claims about issues of national significance implicate only the six remaining cases pending in federal court: five on appeal (including this one) and one pending post-trial motions. No trials of liability remain. The Court rightly rejected the twenty-six 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 to the Court. The ruling below was controlled by *Burkhart v. R.J. Reynolds Tobacco Co.*, 884 F.3d 1068 (11th Cir. 2018), which itself was a straightforward application of the rulings in *Walker* and *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169 (11th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 646 (2018), both denied certiorari by this Court. The Eleventh Circuit has again and again rejected Petitioners' invitation to undertake plenary review of the Florida courts' rulings on matters of state law. Instead, the court of appeals has, as it must under Full Faith and Credit, carefully assessed what the Florida Supreme Court has held to be the proper findings from *Engle*, and granted those findings the same preclusive effect they receive in state court.

Most significantly, the Petition, like all its predecessors, relies critically on claims that are just plain false. When stripped of indulgent rhetoric ("a constitutional farce unparalleled," Pet. 1), there are three claims that are refuted by the record: i) that Petitioners' conduct "may" never have been found culpable by a jury, Pet. 2; ii) that the trial in this matter included no evidence from which the jury could independently find that the tobacco companies engaged in decades of nefarious

conduct, Pet. 3; and iii) that, contrary to what Petitioners argued in the Eleventh Circuit and previously in this Court, the earlier rulings of the Eleventh Circuit on which certiorari was denied were narrowly circumscribed to specific factual findings, Pet. 31.

These are not variations on prior arguments – they are the identical core claim pressed in every one of the prior Petitions. Again and again Petitioners insist, echoed by the same chorus of amici, that preclusion is being imposed without any underlying factual findings. But the Florida courts have repeatedly upheld specific factual findings on the conduct of the tobacco companies and federal courts have properly given these findings the full faith and credit to which they are entitled. This Court should, once again, decline Petitioners' invitation to disturb those courts' rulings, which the Eleventh Circuit has faithfully applied.

STATEMENT OF THE CASE

A. The *Engle* Class Litigation.

The history of the underlying tobacco litigation has been presented to this Court twenty-six times in petitions for certiorari, and is set forth in *Walker*, 734 F.3d at 1281-86, and *Graham*, 857 F.3d at 1174-79. 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 nicotine. *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 40 (Fla. 3d DCA 1996), *review 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 Grp., 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 but one count. *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 cigarette companies' wrongful conduct and the judgment for two of the individual plaintiffs. *Id.* at 1262-65. The 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 court further held that specific causation, comparative fault, reliance, and damages were too individualized for continued class treatment. *Id.*

The 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. The 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). *Id.* at 1276.

Specifically, the common findings on the defendants' conduct established on a class-wide basis that each defendant had acted negligently, sold cigarettes that were defective and unreasonably dangerous, concealed or omitted material information not otherwise known concerning the health effects or addictive nature of cigarettes, and agreed to so conceal. *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. *Douglas*.

In *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013), *cert. denied,* 571 U.S. 889 (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 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. The court concluded that the cigarette 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*, 571 U.S. 889 (2013).

C. *Walker.*

In *Walker*, the Eleventh Circuit, in an opinion by Judge William Pryor, held that "federal courts sitting in diversity are bound by the decisions of state courts on matters of state law." 734 F.3d 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's limited inquiry was "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 R.J. 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 rejected 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 court 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 R.J. 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 court 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*, 573 U.S. 913 (2014).

D. *Graham.*

In *Graham*, the Eleventh Circuit sat en banc to correct a panel ruling holding that use of the *Engle* findings was preempted by Congress's decision not to ban the sale of cigarettes. At Petitioners' request, the court also permitted briefing on the due process

questions decided in *Walker*. The en banc court, again in an opinion by Judge Pryor, "reaffirm[ed]" *Walker*'s due process holding. 857 F.3d at 1174.

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," *id.* at 1181 (citation omitted), so "long as the state proceedings 'satisfied the minimum procedural requirements' of due process." *Id.* at 1184 (quoting *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481 (1982)).

Further, "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.* Due process "does not require a state to follow the federal common law of res judicata and collateral estoppel." *Id.* 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." *Id.* 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." *Id.* at 1185.

Finally, and of critical importance, 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. *Id.* at 1182 ("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)).

This Court again denied certiorari. *R.J. Reynolds Tobacco Co. v. Graham*, 138 S. Ct. 646 (2018).

E. *Burkhart.*

After certiorari was denied in *Graham*, Petitioners maintained that the holdings of *Walker* and *Graham* did not apply to the *Engle* findings regarding fraudulent concealment and conspiracy. In *Burkhart*, the Eleventh Circuit held that the "rationale[] employed by this court in *Walker* and *Graham*[] applies equally to the Florida Supreme Court's similar grant of preclusive weight to *Engle* progeny plaintiffs' concealment and conspiracy claims." 884 F.3d at 1092-93.

The court explained that "[t]he concealment and conspiracy claims were litigated alongside the negligence and strict-liability claims in *Engle* [and] as with the negligence and strict-liability claims, [Petitioners] had the opportunity to argue the conduct elements of the concealment and conspiracy claims," including "the opportunity to protest the jury instructions given," and "the benefit of appellate review of the jury instructions as to those claims." *Id.* at 1093. And they

had the opportunity to contest "the Florida Supreme Court's factual finding in *Douglas* that the *Engle* jury's verdict though ambiguous, established the individualized conduct elements of the plaintiffs' negligence, strict liability, fraudulent concealment, and conspiracy claims." *Id.* Finally, Petitioners "still enjoyed and continue to enjoy the right to litigate the causation and reliance elements of those intentional tort claims." *Id.*

Petitioners moved for rehearing, but en banc review was denied without any judge calling for a vote. *Burkhart v. R.J. Reynolds Tobacco Co.*, No. 14-14708 (11th Cir. May 2, 2018). Amazingly, there was no petition for certiorari.

F. The Proceedings Below.

1. Trial.

The present case involves an appeal of a jury verdict on behalf of Carol LaSard. The trial evidence showed that Ms. LaSard began smoking cigarettes at age 15 and smoked compulsively for 47 years. Despite repeated efforts to quit smoking as an adult, including nicotine replacement therapy, LaSard proved to be too addicted to stop successfully and smoked until she died of lung cancer at age 63.

In addition to the findings from *Engle*, Respondent introduced evidence that Ms. LaSard started smoking as a young girl, well before any warnings appeared on cigarette packs, and relied on the fraudulent concealment of addiction and danger, and that she smoked filtered cigarettes, which Petitioners falsely marketed as a healthier alternative. Trial Tr., Vol. 1 PM at 72-79, 95-97, 110-129, Vol. 2 AM at 5-7, 13-27, Vol. 2 PM at 133-35. Respondent also introduced extensive evidence of the fraudulent concealment of addiction and danger in the specific low-tar and low-nicotine cigarettes smoked by Ms. LaSard. *Id*; *see also* Trial Tr., Vol. 3 AM at 68-70.

For their part, Petitioners put on a vigorous defense of the concealment and conspiracy claims, arguing to the jury that Ms. LaSard did not rely to her detriment, and that her injuries were not caused by Petitioners' fraud. Petitioners argued that Ms. LaSard did not pay attention to their statements, omissions, concealments, or marketing, and that there was a "barrage" of public information regarding the dangers of smoking, which Ms. LaSard knew or should have known. Trial Tr., Vol. 5 at 51-53. And Petitioners relied specifically on the facts that Ms. LaSard's husband quit smoking in the early 1960s and encouraged her to do the same, and that relatives of hers died of smoking-related illnesses. *Id.*

The jury determined that addiction to smoking Petitioners' cigarettes was the cause of Ms. LaSard's death and found in her daughter's favor on negligence, strict liability, and intentional tort claims. As often occurs in the complicated fact presentations of tobacco cases, the jury allocated 30% of the fault to R.J. Reynolds, 30% to Philip Morris, and the remainder to Ms. LaSard herself. PA. 6. The jury awarded $6,000,000 in compensatory damages and found the defendants' conduct sufficiently reprehensible to warrant an award of $20,000,000 in punitive damages. *Id.* The district court reduced the compensatory damages award, which it deemed unreasonably excessive, to $1,000,000, and remitted the punitive damages award to $3,340,000, to be divided equally between the two defendants, in order to maintain the jury's ratio of punitive to compensatory damages for each defendant. PA. 7.

2. The Eleventh Circuit's Decision.

The Eleventh Circuit affirmed. Judge Julie Carnes (who dissented in *Graham*) expressed skepticism that

Graham and *Burkhart* were correctly decided, as well as her view that *Graham* had "parse[d] the *Engle* record," but acknowledged that the question before the court had been resolved by circuit precedent. PA. 18-20. Judge Martin, who joined the majority in *Graham*, concurred, noting her view that *Graham* (and thus *Burkhart*) "actually held that the Florida Supreme Court's rulings about what the *Engle* jury decided were due full faith and credit." PA. 41.

REASONS TO DENY THE WRIT

I. The Twenty-Seventh Time is Not the Charm.

This Petition does not raise any issue not previously raised in twenty-six 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 the 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 twenty-six 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 twenty-six 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.

Two bedrock principles foreclose any challenge to the decision below. First, in *Douglas,* the Florida Supreme held in clear, unmistakable terms that what are known as "*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." 110 So. 3d at 433. Second, 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. And again in *Graham*, which simply "reaffirm[ed] our holding in *Walker*." 857 F.3d at 1174. This Court denied certiorari in *Douglas*, *Walker*, and *Graham*.

Nothing changed in *Burkhart*, which simply recognized that the findings as to defendants' conduct were established matters of fact that did not turn on

the specific legal theory being advanced or on the circumstances of individual plaintiffs: "the Florida Supreme Court's factual finding in *Douglas* that the *Engle* jury's verdict, though ambiguous, established the individualized conduct elements of the plaintiffs' negligence, strict-liability, fraudulent concealment, and conspiracy claims." 884 F.3d at 1093.

Petitioners continue to claim that there are no factual predicates for the findings on their conduct. 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 "a prior jury's findings to establish elements of their claims without showing that those elements were actually decided in their favor." 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."[2] 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."[3] And again in *Walker*: challenging the use of "generic" findings of fact "to excuse thousands of plaintiffs … from proving essential elements of their

[2] RA. 1a.

[3] RA. 8a.

claims."[4] And finally in *Graham*: challenging the use of "generalized findings" where "there is no way to tell whether a prior jury found particular facts against a party."[5] This recurring Question has received a consistent answer: "cert. denied."

These repeated denials of certiorari review on the same Question Presented, particularly in *Douglas,* make the collateral attack on final state-court rulings through the present Petition procedurally improper. *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."); *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 finality and efficiency of the judicial process by

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[4] RA. 18a.

[5] RA. 19a.

'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 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). Federal courts lack the power of appellate review of state court judgments. Final state court rulings can only be reviewed on federal law grounds under 28 U.S.C. § 1257, which "vests authority to review a state court's judgment solely in this Court." *Exxon*, 544 U.S. at 292. The entire argument below, 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 the Eleventh Circuit correctly held in *Walker* and in all cases subsequent: "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 *Graham*: "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." 857 F.3d at 1182. And yet again
in *Burkhart*, which granted full faith and credit to
"the Florida Supreme Court's factual finding in
Douglas that the *Engle* jury's verdict, though ambiguous, established the individualized conduct elements
of the plaintiffs' negligence, strict-liability, fraudulent
concealment, and conspiracy claims." 884 F.3d at
1093.

Even apart from the preclusive consequences of the
law of the case, there is simply no tenable due process
argument here. Federal *Engle*-progeny litigation is
nearly at an end and the results speak for themselves:
roughly half of the tried cases yielded a defense verdict. In this case, a federal jury found that cigarette
smoking was responsible for the death of Carol LaSard.
Even with the *Engle* Phase I findings, the jury found
that R.J. Reynolds and Philip Morris were each 30%
at fault, placing a significant portion of the responsibility on Ms. LaSard herself. 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 given ample opportunity
to defend their interests.

B. 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 Petitioners' fanciful due process 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 were 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 speculate that other "courts are relying on unorthodox procedural devices." Pet. 32. What other courts are doing is of no moment in assessing the opinion below. Petitioner and amici claim that this case should stand in for an ominous set of developments in aggregate litigation that they imagine just over the horizon. 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 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).

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

II. The Decision Below Is Manifestly Correct.

A. The Eleventh Circuit Assessed What The Florida Supreme Court Held To Be the Findings from *Engle*.

Petitioners would have this Court find error in the Eleventh Circuit giving full faith and credit to the Florida Supreme Court's determination of what facts were proven in *Engle*. The claim that Petitioners' due process rights were violated by preclusion in the absence of fact finding is the main theme of the petition, as in every single post-*Engle* petition to this Court. *See* RA. 1a-26a (examples of the same assertion time and again).

This core claim is simply false. In every opinion of the Eleventh Circuit, that court has carefully focused on the fact that, as held in *Douglas*, the Florida Supreme Court made a "factual finding" concerning the conduct of Petitioners. *Burkhart*, 884 F.3d at 1093. As the Circuit held in *Graham*: "[W]e are satisfied that the Florida Supreme Court determined that the *Engle* jury found the common elements of negligence and strict liability." 857 F.3d at 1182; *see also* PA. 41a (Martin, J., concurring) ("*Graham* makes clear its holding derived from giving full faith and credit to the Florida Supreme Court's decision in *Engle*.").

In *Burkhart*, which bound the panel below, Petitioners contended that such factual findings applied only to some causes of action and not to the application of the same factual issues to claims for fraudulent

concealment and conspiracy. This variation on the endless theme of uncertainty was again rejected because the findings carried over from the *Engle* trial concerned across-the-board conduct by the tobacco companies, which were dependent neither on the particular legal theory being advanced nor on the conduct of any particular plaintiff. Per *Douglas*, "the Phase I verdict against the *Engle* defendants resolved all elements of the claims that has anything to do with the *Engle* defendants' cigarettes or their conduct." 110 So. 3d at 432. Those findings "establish the *Engle* defendants' common liability," including the "fraudulent concealment, and conspiracy to fraudulently conceal claims." *Id.* at 436. Certainly, this is what Florida state courts uniformly understand as the mandate of the state high court. *See, e.g.*, *Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687, 694 (Fla. 2015). Consistent with state court appellate decisions, *Burkhart* found *Douglas* to hold that the "*Engle* jury's verdict … established the individual conduct elements of the plaintiff's negligence, strict-liability, fraudulent concealment, and conspiracy claims." 884 F.3d at 1093. As *Walker* held (and *Graham* expressly reaffirmed): "R.J. Reynolds argues that we should conduct a searching review of the *Engle* class action and apply what amounts to *de novo* review of the analysis of the Florida law in *Douglas*, but we lack the power to do so." 734 F.3d at 1287.

Although Petitioner now argues that all prior Petitions were somehow circumscribed to factual questions not presented here, Pet. 31, this is also wrong. Time and again, the prior Petitions turned on the central claim that "in *Engle*-progeny cases, courts simply instruct the jury that, if the plaintiff proves membership in the *Engle* class, the jury must accept that the defendant committed tortious acts against the

plaintiff, even though—as the Florida Supreme Court has twice admitted—there is no way to know whether the *Engle* jury so found." Pet. for Cert., *R.J. Reynolds Tobacco Co. v. Graham* (No. 17-415), at 20-21. The claim of uncertainty in factual findings in long-concluded Florida proceedings has been rejected as the basis for certiorari by this Court 26 times, and counting.

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

Consistent with the claims in all 26 prior Petitions, Petitioners again assert, and falsely here too, that no jury has "found that the defendants committed tortious acts against" *Engle*-progeny plaintiffs. Pet. 20. Tobacco's claim of factual uncertainty in the record, as in all prior petitions,[6] is in turn premised on the fact that there were findings that some but not all cigarettes were manufactured with glass fibers or had breathing air holes or had high ammonia levels or were putatively "light" cigarettes. Pet. 5-6, 27-30. It is of course true that the defendants' conspiracy to conceal the dangers of smoking employed different means of obfuscation, and that this conduct took various forms over decades. But the fact that all reviewing courts have found that tobacco companies over the decades employed many strategies of deception does not yield the conclusion there was no proof of any defect in the cigarettes smoked by Carol LaSard. From the fact of a persistent campaign of public health deception, Petitioners would have this Court believe that there was no evidence that the particular cigarettes that caused Ms. LaSard's cancer were defective.

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

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,[7] 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.

Petitioners claim that the trial results have no applicability to an individual plaintiff, but the findings are precisely to the contrary. As summarized in *Graham*:

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

857 F.3d at 1175.

The jury was asked a series of specific questions about the conduct of each tobacco company. *Id.* at

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[7] *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.").

1177. Petitioners must now grudgingly accept that the first question (whether cigarettes cause cancer and other diseases) and the second question (whether cigarettes that contain nicotine are addictive) were specific enough to yield binding findings of fact. Pet. 8 n.2.[8] Each of the ensuing questions about negligence, strict liability, and concealment similarly addressed the ***conduct*** of the tobacco companies in the sale of ***all*** cigarettes in the relevant period.

It does not follow that because some cigarettes had additional defects (e.g., being mentholated, or sold as "lite," or having air holes to compound the entry of nicotine into the lungs), the common defects found as to all of Petitioners cigarettes cease to apply. Accordingly, the *Engle* trial "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." *Graham*, 857 F.3d at 1177 (emphasis in original). The evidence, "the court ruled" further supported "a finding that the tobacco companies were negligent in producing and selling *all* of their cigarettes. *Id.* at 1178 (emphasis in original). Similarly, the *Engle* trial court found sufficient evidence to support class-wide findings on counts of fraudulent concealment and conspiracy. *Engle v. R.J. Reynolds Tobacco*, 2000 WL 33534572, at *2 (Fla. Cir. Ct. Nov. 6, 2000) ("Abundant evidence was adduced at trial to support … the jury verdict of the Count of Fraud and Misrepresentation."); *id.* at *3 ("The Court finds sufficient and more than adequate evidence to … support the jury verdict that

[8] These concessions are of recent vintage; 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).

the defendants acted in concert to misinform and deceive.").

Petitioners challenge the concealment and conspiracy findings on the basis of a "disjunctively worded verdict-form question" that asked the jury to determine whether Petitioners concealed the health effects of smoking, its addictive nature, or both. Pet. 29. The novelty of judging the adequacy of a verdict form in the *Engle* state court trial on collateral attack in federal court goes unacknowledged. But regardless, this theory is nonsensical. Addiction and disease are inextricably intertwined not only because addiction leads to disease, but because concealing addiction *is* concealing disease, and vice versa. Both addiction *and* disease are central to the structure of *Engle* cases; the very first burden on putative *Engle* plaintiffs is to show that they are class members by proving they have a disease caused by tobacco and that they are addicted to cigarettes. *See, e.g.*, *Douglas*, 110 So. 3d at 426 n.4.

In the original *Engle* litigation, based on these findings, the jury awarded compensatory damages to the named plaintiffs in the original action, a judgment adverse to the tobacco companies that was upheld on all appeals, with this Court denying certiorari. *See Engle*, 945 So. 2d at 1255-56; *Engle*, 552 U.S. 941.

Moreover, contrary to Petitioners' claim that the judgment below relied "exclusively" on the *Engle* findings, Pet. 3-4, there was ample independent evidence of Petitioners' misconduct. Over five trial days, Respondent put on extensive evidence of the concealment of the dangers of smoking, including evidence specific to the low-tar and low-nicotine cigarettes smoked by Ms. LaSard. For example, one of the authors of key Surgeon General reports on

smoking testified that Petitioners falsely promoted low-tar and light cigarettes as safer, and that those concealments and omissions were effective in misleading smokers like Ms. LaSard. Trial Tr., Vol. 1 PM at 79-79, 95-97, 110-129, Vol. 2 AM at 5-7, 13-27. And Ms. LaSard's family members testified that Ms. LaSard smoked such cigarettes because she thought they were safer and would help her quit. Trial Tr., Vol. 2 PM at 134-35, Vol. 3 AM at 68-70. The district court held that "Plaintiff presented sufficient evidence for a jury to determine that LaSard detrimentally relied upon the misrepresentations and concealment of Defendants regarding the health risks associated with smoking," and that "Defendants' fraudulent concealment and conspiracy were a substantial factor in LaSard's … injury." *Searcy v. R.J. Reynolds Tobacco Co.*, 2013 WL 4928230, at *6 (M.D. Fla. Sept. 11, 2013). No challenge to the sufficiency of the evidence was preserved on appeal.

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 Cnty.*, 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 in *Walker*, "what the Florida Supreme Court calls the relevant doctrine ... is no concern of ours." 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 Cnty.*, 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 *Parklane* or *Blonder-Tongue* (and cites *Kremer* only in passing)—the controlling cases on the due process boundaries of preclusion—or in any way distinguish these from the decision below. 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 an inheritance 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

> requisite to the due process which the Constitution prescribes.

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

This is exactly what the Eleventh Circuit has repeatedly 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.

Graham, 857 F.3d at 1184; *accord Burkhart*, 884 F.3d at 1093. 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.

Graham, 857 F.3d at 1185. Consequently, "applying Florida law in this trial did not violate the tobacco companies' rights to due process of law." *Id*.

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.

As the D.C. District Court found across an entire volume of the federal reporter, addiction and disease are not only intertwined but the obfuscation of each was at the heart of the longstanding conspiracy to conceal the dangers of cigarettes. Today Petitioners are under federal court order to publish corrective statements acknowledging, among other things, that cigarettes are dangerous, nicotine is addictive, and "low tar" and "light" cigarettes are no safer than any other cigarette. *Id.* at Doc. 6223. This extraordinary remedial order was justified by the conspiratorial

fraud to obscure danger *and* addiction. *See United States v. Philip Morris USA Inc.*, 801 F.3d 250, 253-54 (D.C. Cir. 2015).

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.

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 state-law 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.

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. 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?

***Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169 (11th 2017) (en banc), cert. denied, *R.J. Reynolds Tobacco Co. v. Graham*, 138 S. Ct. 646 (2018).**

In the course of a later-decertified class action against the major U.S. tobacco companies, a Florida jury found that, at some point over four decades, each defendant was negligent and sold defective cigarettes. But while the class put on evidence of myriad purported negligent acts and defects, the jury never identified what act it found negligent or what defect it found, making it impossible to tell what conduct and which cigarettes, over what time frame, it had condemned. Nonetheless, the Florida Supreme Court held that the thousands of members of the decertified class who subsequently filed individual actions could rely on the "res judicata" effect of these generalized findings to prove the tortious-conduct elements of their claims, regardless of which cigarettes they had smoked, or when. Defendants are thus barred from contesting the core basis of their own liability. In the decision below, a sharply divided *en banc* Eleventh Circuit held that this regime neither violates the Due Process Clause nor is preempted by federal law.

The questions presented are:

1. When there is no way to tell whether a prior jury found particular facts against a party, does due process permit those facts to be conclusively presumed against that party in subsequent litigation?

2. If the *Engle* jury's findings are deemed to establish that all cigarettes are inherently defective, are claims based on those findings preempted by the many federal statutes that manifested Congress' intent that cigarettes continue to be lawfully sold in the United States?

***R.J. Reynolds Tobacco Co. v. Block*, 225 So. 3d 828 (Fla. Dist. Ct. App. 2017), Pet. Dismissed, *R.J. Reynolds Tobacco Co. v. Block*, 138 S. Ct. 733 (2018).**

This case presents questions also raised in the petition for a writ of certiorari filed September 15, 2017, in *R.J. Reynolds Tobacco Co. v. Graham*, No. 17-415.

1. When there is no way to tell whether a prior jury found particular facts against a party, does due process permit those facts to be conclusively presumed against that party in subsequent litigation?

2. Are strict-liability and negligence claims based on the findings by the class-action jury in *Engle v. Liggett Group, Inc.* preempted by the many federal statutes that manifested Congress's intent that cigarettes continue to be lawfully sold in the United States?

***Philip Morris USA Inc. v. Naugle*, 225 So. 3d 928 (Fla. Dist. Ct. App. 2017), Pet. Dismissed, *Philip Morris USA Inc. v. Naugle*, 138 S. Ct. 735 (2018).**

This case presents questions also raised in the petition for a writ of certiorari filed today in *R.J. Reynolds Tobacco Co. v. Graham*, No. 17-__:

1. When there is no way to tell whether a prior jury found particular facts against a party, does due process permit those facts to be conclusively presumed against that party in subsequent litigation?

2. Are strict-liability and negligence claims based on the findings by the class-action jury in *Engle v. Liggett Group, Inc.* preempted by the many federal statutes that manifested Congress's intent that cigarettes continue to be lawfully sold in the United States?

***R.J. Reynolds Tobacco Co. v. Turner*, 230 So. 3d. 865 (Fla. Dist. Ct. App. 2017), Pet. Dismissed, *R.J. Reynolds Tobacco Co. v. Turner*, 138 S. Ct. 736 (2018).**

This case presents the first question raised in the petition for a writ of certiorari filed in *R.J. Reynolds Tobacco Co. v. Graham*, No. 17-415: When there is no way to tell whether a prior jury found particular facts against a party, does due process permit those facts to be conclusively presumed against that party in subsequent litigation?

***R.J. Reynolds Tobacco Co. v. Grossman*, 211 So. 3d 221 (Fla. Dist. Ct. App. 2017), Pet. Dismissed, *R.J. Reynolds Tobacco Co. v. Grossman*, 138 S. Ct. 748 (2018).**

This case presents a question also raised in the petition for a writ of certiorari filed September 15, 2017, in *R.J. Reynolds Tobacco Co. v. Graham*, No. 17-415:

When there is no way to tell whether a prior jury found particular facts against a party, does due process permit those facts to be conclusively presumed against that party in subsequent litigation?

***R.J. Reynolds Tobacco Co. v. Lewis*, 226 So. 3d 852 (Fla. Dist. Ct. App. 2017), Pet. Dismissed, *R.J. Reynolds Tobacco Co. v. Lewis*, 138 S. Ct. 923 (2018).**

This case presents questions also raised in the petition for a writ of certiorari filed September 15, 2017, in *R.J. Reynolds Tobacco Co. v. Graham*, No. 17-415.

1. When there is no way to tell whether a prior jury found particular facts against a party, does due process permit those facts to be conclusively presumed against that party in subsequent litigation?

2. Are strict-liability and negligence claims based on the findings by the class-action jury in *Engle v. Liggett Group, Inc.* preempted by the many federal statutes that manifested Congress's intent that cigarettes continue to be lawfully sold in the United States?

***R.J. Reynolds Tobacco Co. v. Monroe*, 212 So. 3d 545 (Fla. Dist. Ct. App. 2017), Pet. Dismissed, *R.J. Reynolds Tobacco Co. v. Monroe*, 138 S. Ct. 923 (2018).**

This case presents questions also raised in the petition for a writ of certiorari filed September 15, 2017, in *R.J. Reynolds Tobacco Co. v. Graham*, No. 17-415.

1. When there is no way to tell whether a prior jury found particular facts against a party, does due process permit those facts to be conclusively presumed against that party in subsequent litigation?

2. Are strict-liability and negligence claims based on the findings by the class-action jury in *Engle v. Liggett Group, Inc.* preempted by the many federal statutes that manifested Congress's intent that cigarettes continue to be lawfully sold in the United States?

***Philip Morris USA Inc. v. Lourie*, 198 So. 3d 975 (Fla. Dist. Ct. App. 2016), Pet. Dismissed, *Philip Morris USA Inc. v. Lourie*, 138 S. Ct. 923 (2018).**

This case presents questions also raised in the petition for a writ of certiorari filed today in *R.J. Reynolds Tobacco Co. v. Graham*, No. 17-__:

1. When there is no way to tell whether a prior jury found particular facts against a party, does due process permit those facts to be conclusively presumed against that party in subsequent litigation?

2. Are strict-liability and negligence claims based on the findings by the class-action jury in *Engle v. Liggett Group, Inc.* preempted by the many federal statutes that manifested Congress's intent that cigarettes continue to be lawfully sold in the United States?