NO. _____

In the
Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY,

Petitioner,

v.

JIMMIE LEE BROWN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROGER BROWN, DECEASED

Respondent.

On Petition for Writ of Certiorari to the Florida Fourth District Court of Appeal

PETITION FOR WRITT OF CERTIORARI

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March 28, 2014

QUESTION PRESENTED

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?

PARTIES TO THE PROCEEDING

Defendant-appellant below, who is petitioner before this Court, is R.J. Reynolds Tobacco Company, individually and as successor by merger to Brown & Williamson Tobacco Corporation and The American Tobacco Company. Plaintiff-appellee below, who is respondent before this Court, is Jimmie Lee Brown, as personal representative of the estate of Roger Brown.

CORPORATE DISCLOSURE STATEMENT

Petitioner R.J. Reynolds Tobacco Company is a wholly owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc., which in turn is a wholly owned subsidiary of Reynolds American Inc. ("RAI"), a publicly held company. Brown & Williamson Holdings, Inc., holds more than 10% of the stock of RAI. British American Tobacco p.l.c. indirectly holds more than 10% of the stock of RAI through Brown & Williamson Holdings, Inc.

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INTRODUCTION

This case presents a due process question at the heart of thousands of so-called "*Engle* progeny" cases pending in state and federal court. These cases are the aftermath of a massive and misguided class action in which six Florida residents attempted to litigate the tort claims of thousands of individuals who smoked myriad brands of cigarettes over a period spanning half a century. The class ultimately was decertified after the courts realized that there was no way to litigate these inherently individualized claims to final judgment on a class-wide basis. Rather than discarding the generic findings this flawed proceeding produced, however, the Florida Supreme Court declared them entitled to "res judicata effect" in subsequent cases brought by individual class members. That cryptic statement has bedeviled courts ever since, as they have struggled in vain to devise a way to give preclusive effect to those findings without violating the *Engle* defendants' due process rights.

The simple fact is that no such way exists. The findings cannot be given claim preclusive effect (as the Florida Supreme Court tried to give them) because they are just findings, not a final judgment. And they cannot be given issue preclusive effect (as the Florida Supreme Court candidly admitted) because they are "useless" for that purpose: It is impossible to tell what issues the jury actually decided in reaching its generic findings that, for example, each *Engle* defendant marketed a defective cigarette. It is therefore equally impossible to tell

whether the jury made any findings applicable to all class members' claims. Had the *Engle* trial been anything other than the one-year monstrosity it was, surely courts would have resigned themselves to this reality long ago. Instead, courts have insisted on trying to rescue the findings from futility, notwithstanding the obvious due process problems that result.

The intermediate court in this case openly wrestled with this problem and questioned whether what the Florida Supreme Court seemed to envision was reconcilable with well-settled principles of issue preclusion or due process. And when the Florida Supreme Court finally faced the due process problem that its attempt to rescue the *Engle* findings created, it candidly acknowledged that the findings are "useless" under settled issue preclusion principles, as it is impossible to tell which of the many theories the *Engle* jury accepted or rejected in reaching its generic findings. But the court tried to get around that problem by inventing a wholly novel doctrine of offensive claim preclusion, under which progeny plaintiffs may estop defendants from litigating any issues that *might* have been decided in *Engle*—even if the jury never actually decided those issues, and even though the class' claims indisputably were never litigated to final judgment.

That extreme departure from settled preclusion principles is not remotely consistent with due process. The irreducible minimum of claim preclusion is a final judgment, and the irreducible minimum of issue preclusion is an actual decision on

the issue to be precluded. Because Phase I of *Engle* produced neither, there is no way to give the findings the kind of preclusive effect progeny plaintiffs seek without violating defendants' due process rights. Yet rather than correct this due process violation for progeny cases in federal court, the Eleventh Circuit has now sanctioned it—albeit under a dramatically different and mutually inconsistent theory that disregards what the Florida Supreme Court actually said about the Phase I findings (*viz.*, that they are "useless" for issue preclusion purposes) and actually held (*viz.*, that they nonetheless may be given "claim preclusive" effect). Accordingly, absent this Court's intervention, thousands of progeny cases involving potentially billions of dollars in damages will be subjected to the same truncated procedure in both state and federal courts, even though no court has ever come anywhere close to explaining how that result can be reconciled with due process.

OPINIONS BELOW

The opinion of the Florida Fourth District Court of Appeals is reported at 70 So. 3d 707 and reprinted at App.1-27. The Florida Supreme Court's order dismissing review is reprinted at App.30-31.

JURISDICTION

The Florida Fourth District Court of Appeals entered its final judgment on September 21, 2011. The Florida Supreme Court initially accepted jurisdiction over a timely petition for review on May 1, 2013, App.28, but then discharged jurisdiction and dismissed the review proceeding on February 27,

2014. App. 30-31. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The relevant provision of the Fourteenth Amendment to the U.S. Constitution is reproduced at App.51.

STATEMENT OF THE CASE

This case involves the strict liability and negligence claims of the estate of an individual whose representative alleges that his death resulted from smoking cigarettes manufactured and marketed by petitioner. In a typical case of this nature, the plaintiff would need to prove that the defendant engaged in some tortious conduct relevant to the plaintiff—*i.e.*, that the cigarettes the plaintiff smoked were defective, or that the defendant acted negligently when manufacturing or marketing them. And the defendant, of course, would be permitted to contest that evidence and submit its own evidence that it did not engage in the tortious conduct alleged.

Here, however, the plaintiff was required to prove none of those things, and the defendant was prohibited from attempting to disprove them. Instead, the court simply instructed the jury that a "prior court" had already determined that petitioner "[p]laced cigarettes on the market that were defective, and unreasonably dangerous" and "[f]ailed to exercise the degree of care that a reasonable cigarette manufacturer would exercise under like circumstances." Phase II Jury Instr. No. 3. This anomalous procedure is the result of the Florida

Supreme Court's continuing efforts to rescue from futility findings from a class action that never should have been certified.

A. The *Engle* Trial

1. *Engle* was one of several putative class actions initiated in the 1990s by individuals seeking to represent multitudes of smokers on purportedly "common" claims against tobacco companies. These putative classes sought billions of dollars in damages on an array of tort claims purportedly brought on behalf of all "nicotine-addicted" individuals who had smoked during an extensive time period. *Engle* fit this pattern to a tee: Six individuals seeking to represent all nicotine-addicted individuals nation-wide brought suit in Florida state court alleging claims of strict liability, negligence, breach of express warranty, breach of implied warranty, affirmative fraud, fraudulent concealment, conspiracy to commit fraud, and intentional infliction of emotional distress, and seeking to recover hundreds of billions of dollars.

Most courts—state and federal alike—readily rejected these so-called "addiction classes," finding such claims too individualized to make class-wide adjudication viable or fair. *See Liggett Grp. Inc. v. Engle* ("*Engle II*"), 853 So. 2d 434, 444-45 (Fla. Dist. Ct. App. 2003) (collecting cases). As one court put it, because the numerous smokers these classes sought to represent "were 'exposed to different … products, for different amounts of time, in different ways, and over different periods,'" class-wide litigation presented insurmountable obstacles. *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998)

(quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997)). Nonetheless, the Florida courts forged ahead, certifying *Engle* as the first-ever class of its kind. Pausing only to reduce it to a state-wide class, they approved certification of a class of all Florida "'citizens and residents, and their survivors, who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine.'" *Engle v. Liggett Grp., Inc.* ("*Engle III*"), 945 So. 2d 1246, 1256 (Fla. 2006), *cert. denied*, *R.J. Reynolds Tobacco Co. v. Engle*, 552 U.S. 941 (2007).

Over the defendants' objection, the *Engle* trial court adopted a three-phase plan: During Phase I, a jury would decide purportedly "common issues" that were "common" only in a very pre-*Wal-Mart* sense—the jury essentially was invited to decide whether, over a 50-year period, each defendant engaged in any conduct that *might* make it liable to any (but not necessarily all) class members on any of the class' claims. If the class prevailed, during Phase II, the same jury would decide whether the defendants were *in fact* liable to three class representatives and, if so, determine compensatory damages. The jury also would decide whether *the entire class* was entitled to punitive damages and, if so, make a "lump sum" award. During Phase III, it was envisioned that new juries would try individual class members' claims, with the punitive damages award (if any) to be divided among successful members.

2. Unsurprisingly, deciding whether any tobacco company engaged in any conduct over 50 years that

might give rise to liability under eight different causes of action proved an unwieldy endeavor: Phase I lasted an entire year. Notwithstanding the fact that it was supposed to be devoted to "common" issues, the class presented evidence on any and every theory of liability it could muster—including theories that applied only to certain cigarettes and/or class members—in hopes that something would stick and provide a gateway to punitive damages.

For instance, attempting to prove that each defendant marketed defective cigarettes, the class argued that some *filtered* cigarettes were defective due to the location of their ventilation holes, others because they contained loose filter fibers, still others because they contained glass filter fibers. Conversely, the class argued that *unfiltered* cigarettes were defective because they yielded higher tar and nicotine levels than filtered cigarettes. The class offered many other brand- or category-specific theories—*e.g.*, that "light" or "low-tar" brands, brands with genetically engineered or ammoniated tobacco, and brands with artificially adjusted nicotine levels were defective. And because cigarettes often changed over a half-century, many theories mattered only for cigarettes sold during a limited portion of the class period.

These overlapping and often mutually exclusive theories were not unique to the class' defect claims. *See* Supp. Record ("SR") 344-48, 353-57 (documenting class' varying theories); *Engle v. R.J. Reynolds Tobacco* ("*Engle I*"), 2000 WL 33534572, at *2 (Fla. Cir. Ct. Nov. 6, 2000) (discussing conflicting

theories). Indeed, the class considered it "a fallacy that every common issue has to apply to one hundred percent of the class members." SR-344-48 (*Engle v. Liggett Grp., Inc.* Tr. 24417-18). Accordingly, it presented at least five negligence theories, ranging from general negligence in "manufacturing, designing, marketing, selling and distributing cigarettes," to "not testing tobacco and commercial cigarettes to confirm that smoking causes human disease," to "failing to design and produce a reasonably safe cigarette," to "understating nicotine and tar levels in low-tar cigarettes," to "failing to warn smokers of the dangers of smoking and the addictiveness or dependence-producing effects of cigarettes prior to July 1 of 1969." SR-344-48 (*Engle* Tr. 37564). Likewise, the class pressed marketing theories relating to different campaigns for different brands at different times over 50 years.

Notwithstanding the myriad theories presented during this sprawling trial, at its conclusion, the class refused to ask the jury any questions that would reveal the specific basis for its findings—*i.e.*, which theories it rejected or accepted. Nor would the class ask the jury any comprehensive questions that would have established a *common* basis for liability for all class members—such as whether it found *all* cigarettes defective, or the mere act of selling cigarettes negligent. Doing so would have heightened the risk not only of a verdict in the defendants' favor, but also of federal preemption. *See Engle II*, 853 So. 2d at 460 ("Federal law preempts claims that selling cigarettes is tortious or otherwise

improper."). Instead, the class insisted on asking only a series of highly general questions essentially equivalent to whether each defendant did anything wrong in the past 50 years. Thus, on its defect claim, the class would ask only whether each defendant "place[d] cigarettes on the market that were defective and unreasonably dangerous"; likewise, on its negligence claim, only whether each defendant "failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances." App.34, 47.

As the defendants objected, *see* SR-344-48 (Outline of Pls.' Proposed Phase I Verdict Form Questions & Certain Defs.' Objections & Counterproposals at 9, *Engle v. R.J. Reynolds Tobacco Co.* (Fla. 11th Cir. Ct. June 14, 1999) ("*Engle* Verdict Form Objections")), these questions were bound to produce findings "useless for application to individual plaintiffs" in Phase III, as an affirmative answer would establish only, *e.g.*, that a defendant marketed *a* defective cigarette, without identifying *which* cigarette(s) or *what* defect(s) that might be. Since the class included individuals who smoked any brand sold throughout the extensive period, it would be impossible to tell whether the jury had found for the class on a theory applicable to any particular class member. Nonetheless, the trial court agreed to ask the jury only these generic yes-or-no questions, to which the jury answered "yes" for each defendant.

Because those findings "'did *not* determine whether the defendants were liable to anyone,'" *Engle III*, 945 So. 2d at 1263, the trial proceeded to

Phase II, during which the same jury resolved liability and damages for three class representatives. The jury found the defendants liable to each of those individuals and entered a class-wide *$145 billion* punitive damages award—the then-largest punitive award in U.S. history by an order of magnitude.

3. The defendants appealed, and the intermediate appellate court reversed, agreeing with "virtually all" courts to have addressed the question "that certification of smokers' cases is unworkable and improper." *Engle II*, 853 So. 2d at 443-44. As the court explained, the class devised purportedly "common" issues only by "creat[ing] a composite plaintiff who smoked every single brand of cigarettes, saw every single advertisement, read every single piece of paper that the tobacco industries ever created or distributed, and knew about every single allegedly fraudulent act." *Id.* at 467 n.48. Doing so enabled its members to "try fifty years of alleged misconduct that they never would have been able to introduce in an individual trial." *Id.* Worse still, the jury made no "specific findings as to any act by any defendant at any period of time," but rather essentially determined liability issues of use only to this non-existent "composite plaintiff." *Id.* The result was the "tainted" verdict of a jury that "'ran amuck,'" requiring "that the entire case be reversed." *Id.* at 467.

The class appealed, and the Florida Supreme Court reversed in part and affirmed in part. The court agreed that the class must be decertified going forward and instructed class members who wished to

pursue their claims to bring individual suits within one year. *Engle III*, 945 So. 2d at 1254. It also agreed that the $145 billion punitive damages award must be vacated, and punitive damages litigated in individual trials. *Id.* Yet rather than follow the intermediate court's lead and decertify *in toto* while allowing individual actions to be tried in the normal manner, the court *sua sponte* adopted a "pragmatic solution" designed to salvage as much of the class proceedings as possible: It "retain[ed] the jury's Phase I findings" on all but two claims (fraud and intentional infliction of emotional distress) and directed courts to give those generic findings "res judicata effect" in individual cases. *Id.* at 1269. The court did not elaborate on this cryptic instruction, or on how it envisioned courts giving this "res judicata effect" consistent with due process. *Id.* at 1263.

B. The *Engle* Progeny Litigation and the Proceedings Below

1. Over the next year, some 9,000 individuals claiming to be *Engle* class members, including respondent, filed suit in state and federal courts. Invoking the Florida Supreme Court's "pragmatic solution," the plaintiffs in these "*Engle* progeny" cases insisted that they need not prove that defendants committed any tortious acts relevant to their own claims—*e.g.*, that the cigarettes they smoked were defective—to establish liability and recover damages. Instead, they sought to establish the tortious-conduct elements of their claims by having juries instructed that they were bound by the *Engle* jury's findings to accept, *e.g.*, that each

defendant's cigarettes were "defective" and each defendant was "negligent."

The flaw in this logic should be obvious: The Phase I jury did not make any "*specific* findings as to any act by any defendant at any period of time." *Engle II*, 853 So. 2d at 467 n.48 (emphasis added). Nor did it make *comprehensive* findings that *all* cigarettes, or *all* cigarettes of *each* defendant, were defective. Instead, it found only that each defendant, *e.g.*, marketed some unidentified defective cigarette, and engaged in some unidentified negligent act, at some unidentified point over 50 years. It is therefore impossible to tell whether its findings rested on a theory applicable to all class members, or instead rested on one of the class' many theories applicable only to certain brands of cigarettes and/or at certain times. Of course, due process plainly prohibits a court from simply imposing liability, or from precluding a defendant from litigating an issue that the plaintiff cannot demonstrate that some prior fact-finder actually decided in its favor. Accordingly, the *Engle* findings cannot be given the kind of preclusive effect progeny plaintiffs seek without violating the due process rights of defendants.

This is a case in point. Here, the decedent smoked only particular brands of cigarettes, meaning that if the *Engle* jury's Phase I findings rested on a defect theory unique to brands he never smoked, they would have no application to this case. Nonetheless, rather than require respondent to prove that the particular brands at issue were defective, or that the *Engle* jury made any specific findings to that effect—

or permit petitioner to attempt to demonstrate otherwise—the court simply instructed the jury that a "prior court" had already determined that petitioner "[p]laced cigarettes on the market that were defective and unreasonably dangerous" and "[f]ailed to exercise the degree of care that a reasonable cigarette manufacturer would exercise under like circumstances." Phase II Jury Instr. No. 3. The jury found for respondent on both his defect and negligence claims and awarded $1.2 million in compensatory damages, which the court reduced to $600,000 to reflect the jury's comparative-fault finding.[1]

On appeal, petitioner argued that this use of the Phase I findings to preclude it from contesting the tortious-conduct elements of respondent's claims violated its federal due process rights. The intermediate appellate court did not disagree; to the contrary, it, too, expressed "concern[]" that this procedure is an "'extreme application[] of the doctrine of res judicata'" that "violates [*Engle* defendants'] due process rights." App.18 (quoting *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 797 (1996)). Nonetheless, the court deemed itself "compelled to follow the mandate of the" Florida Supreme Court. *Id.* As it understood that mandate, "the Florida

[1] The jury considered only the negligence and strict liability claims. The trial court entered a directed verdict in favor of petitioner on the fraudulent concealment and conspiracy claims because the plaintiff failed to adduce evidence of detrimental reliance. Tr. 14:1563-66 (May 21, 2009).

Supreme Court's reference to the *res judicata* effect of the *Engle* findings necessarily meant issue preclusion, not claim preclusion," because the Phase I jury decided only issues. App.15. But it also meant that "the *Engle* Phase I findings established the conduct elements of the asserted claims" for all progeny plaintiffs, even though it is impossible to tell what the jury actually decided in reaching its Phase I findings. App.14. Accordingly, the court deemed itself bound to affirm the judgment below.

In a special concurrence, one judge elaborated on the court's due process concerns, and also on the ways in which *Engle*'s "res judicata effect" instruction was "causing confusion in the trial courts." App.23. As the court explained, the first two courts to consider whether the *Engle* findings can be given significant preclusive effect consistent with the Constitution reached dramatically different results: A federal district court concluded that they cannot be given *any* effect, and a state intermediate court concluded that they can be used to preclude defendants from contesting *every* issue that the *Engle* jury *might* have decided. *Compare Bernice Brown v. R.J. Reynolds Tobacco Co.* ("*Brown I*"), 576 F. Supp. 2d 1328, 1343-44 (M.D. Fla. 2008), *vacated and remanded*, *Bernice Brown v. R.J. Reynolds Tobacco Co.* ("*Brown II*"), 611 F.3d 1324 (11th Cir. 2010), *with R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1067 (Fla. Dist. Ct. App. 2010), *cert. denied*, 132 S. Ct. 1794 (2012). In the concurrence's view, the uncertainty created by *Engle* was forcing courts in progeny cases to play "a form of legal poker" in which

"a lurking constitutional issue hovers over the poker game: To what extent does the preclusive effect of the *Engle* findings violate the manufacturer's due process rights?" App.27. Accordingly, the concurrence called on the Florida Supreme Court to answer "these and other questions" that its *Engle* decision had created. *Id.*

2. Ultimately, this dubious approach to preclusion—in a context involving thousands of cases and potentially billions of dollars in damages—led another state court to certify to the Florida Supreme Court the question whether the Phase I findings can be given "res judicata effect" consistent with due process. Accordingly, this and other cases were put on hold pending the court's resolution of that question. Finally confronting the issue, the Florida Supreme Court concluded that the *Engle* findings can be used to preclude defendants from litigating the tortious-conduct elements of their claims—but did so by adopting a theory on which *no* other court had relied. *See Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla.), *cert. denied*, 134 S. Ct. 332 (2013).

Although the court repeatedly referenced the purportedly "common" nature of the Phase I findings, it expressly acknowledged that the findings are not "common" in the sense that matters—namely, neither they nor the record underlying them establish that the jury's findings rested on a theory applicable to every class member's claims. Accordingly, the court conceded that the findings would be "useless in individual actions" if plaintiffs were required to prove what issues the jury actually

decided, as it acknowledged issue preclusion demands. *Id.* at 433.

But rather than follow that conclusion to its logical end—that giving the findings the preclusive effect progeny plaintiffs seek would violate due process—the court declared the Phase I verdict "a final judgment" entitled to *claim* preclusive effect. *Id.* Thus, according to the court, even though the Phase I jury "'did *not* determine whether the defendants were liable to anyone,'" *Engle III*, 945 So. 2d at 1263, and made no "specific findings as to any act by any defendant at any period of time," *Engle II*, 853 So. 2d at 467 n.48, its findings preclude defendants from contesting any issues the jury *might* have decided in the class' favor, regardless of what issues it *actually* decided. In the court's view, this novel invocation of *claim* preclusion to bar litigation of *issues* avoided the due process problem because "claim preclusion, unlike issue preclusion, has no 'actually decided' requirement." *Douglas*, 110 So. 3d at 435.

3. Shortly after *Douglas*, the Eleventh Circuit was squarely presented with the question whether the offensive claim preclusion doctrine invented by the Florida Supreme Court can be reconciled with due process. Rather than answer that question, the Eleventh Circuit attempted to avoid it by effectively rewriting *Douglas*. *See Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013), *cert. pending* (filed Mar. 28, 2014). According to the Eleventh Circuit, the *Douglas* court held that the *Engle* findings could be given preclusive effect

because, after "look[ing] beyond the jury verdict," it found that the *Engle* Phase I jury "*actually decided* … *only* issues of common liability"—*i.e.*, that *all* cigarettes are defective. *Id.* at 1287-89 (emphasis added).

The Eleventh Circuit made no attempt to reconcile that bewildering contention with *Douglas*' acknowledgement that the Phase I findings do *not* establish what the jury actually decided and would be "useless in individual actions" if progeny plaintiffs were required to prove otherwise. *Douglas*, 110 So. 3d at 433. Nor did the Eleventh Circuit square its reading of *Douglas* with the Florida Supreme Court's insistence on invoking claim preclusion because "claim preclusion, unlike issue, preclusion has no 'actually decided' requirement," *id.* at 435—a distinction that would have been wholly irrelevant had the court concluded that the *Engle* jury actually decided issues applicable to all class members. Instead, the Eleventh Circuit concluded that it "lack[ed] the power" to look behind the interpretation of *Engle* that it (erroneously) attributed to *Douglas*, even if it might "disagree … about what the jury in Phase I decided." *Walker*, 734 F.3d at 1287. The court conceded that *Douglas*' insistence on applying *claim* preclusion "may be unorthodox and inconsistent with the federal common law," but declared that a mere "[l]abeling" matter that is "no concern of ours." *Id.* at 1289.

REASONS FOR GRANTING THE PETITION

There can be no serious dispute that massive and seriatim due process violations are infecting

thousands of *Engle* progeny cases pending in state and federal court. In case after case, plaintiffs are being relieved of their burden of proving the tortious-conduct elements of their claims against tobacco companies, even though no court has been willing or able to find that the *Engle* jury actually decided any of those issues in each progeny plaintiff's favor. Indeed, the Florida Supreme Court said exactly the opposite: It expressly acknowledged that the *Engle* findings are "useless" under any recognizable version of issue preclusion. Since even the Florida Supreme Court was unwilling to accept the indefensible argument that a plaintiff may invoke issue preclusion without proving that a prior fact-finder actually decided the relevant issue, that should have been the end of the court's ill-conceived effort to rescue the *Engle* findings from futility.

Instead, the Florida Supreme Court purported to avoid one due process violation only by committing another. The court attempted to sidestep the issue preclusion problem by unilaterally declaring that the *Engle* jury resolved claims, not issues, and that the Phase I findings therefore constituted a "final judgment" entitled to claim preclusive effect. Of course, the *Engle* jury did no such thing, and the Phase I verdict is no such thing. Indeed, that is the *one* thing upon which every other court to consider the issue has agreed. And for very good reason—as the Florida Supreme Court itself explicitly recognized in *Engle*, the jury "'did *not* determine whether the defendants were liable to anyone'" in Phase I. *Engle III*, 945 So. 2d at 1263 (quoting *Engle II*, 853 So. 2d

at 450). If it had, then there never would have been a Phase II—let alone a trial plan that called for thousands of individualized Phase III trials on liability. Moreover, if the *Engle* jury really had litigated the class' claims to final judgment, then the progeny plaintiffs themselves would be precluded from re-litigating those claims in subsequent individualized actions. The Florida Supreme Court avoided that obvious flaw in its logic only by inventing out of whole cloth the oxymoronic concept of *offensive* claim preclusion, under which no *claims* are precluded, but *plaintiffs* may preclude *defendants* from contesting the *elements* of their claims.

That none of this is remotely consistent with due process should have been obvious to the Eleventh Circuit when it was confronted with a constitutional challenge to this extreme departure from settled preclusion principles. Yet rather than acknowledge as much, the court simply refused to engage on the due process question, and endorsed the Florida court's misguided pragmatism only by deeming itself bound to give full faith and credit to an interpretation of the *Engle* findings that the Florida Supreme Court pointedly refused to adopt. As a result, there is nowhere left for *Engle* defendants to turn. Only this Court can put an end to the blatant due process violations that are infecting thousands of pending *Engle* progeny cases, putting defendants at risk of billions of dollars in damages.

Because the due process question at the heart of this and every other progeny case was squarely presented to the Eleventh Circuit in *Walker*, this

Court should grant the petition in *Walker* to correct the Eleventh Circuit's gross misreading of *Douglas* and to address the due process question on the merits. In that event, the Court should hold this petition pending *Walker*'s resolution. As an alternative, the Court could grant this petition either instead of or in addition to the petition in *Walker* to consider the constitutionality of the novel version of preclusion adopted in *Douglas*. As the intermediate court below recognized, the misguided *Engle* class action continues to distort countless proceedings in ways that violate due process but that the Florida courts are either unable or unwilling to correct. The result is that billions of dollars are at risk in what amounts to little more than "legal poker." The stakes are too high and the constitutional violations too stark to ignore. Whether in *Walker*, this case, or both, the court should grant certiorari and put an end to the flagrant constitutional violations that otherwise are bound to infect thousands of *Engle* progeny case for years to come.

I. The Decision Below Sanctions Seriatim Due Process Violations Of The First Order

A. The Novel Version of Preclusion Being Applied in Thousands of *Engle* Progeny Cases Is Patently Unconstitutional.

"As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994). Accordingly, although state courts "are generally free to develop their own rules for protecting against the relitigation

of common issues," the Court has not hesitated to hold unconstitutional "extreme applications of the doctrine of res judicata" that are "inconsistent with a federal right that is 'fundamental in character.'" *Richards*, 517 U.S. at 797. Indeed, a presumption of unconstitutionality arises whenever a state court "abrogat[es] … a well-established common-law protection against arbitrary deprivations of property." *Oberg*, 512 U.S. at 430. And "[w]hen the absent procedures would have provided protection against arbitrary and inaccurate adjudication," unconstitutionality necessarily follows. *Id.*

Whether viewed through the lens of claim preclusion or issue preclusion, the preclusive effect being given to the *Engle* findings in progeny cases is exactly the kind of "extreme" departure from universally accepted procedural protections that due process guards against. Indeed, it is wholly alien to Anglo-American jurisprudence.

It is bedrock law that *claim* preclusion is a *defense* that applies only when there has been "a full and complete judgment on the whole cause of action." *Schuler v. Israel*, 120 U.S. 506, 509 (1887). In other words, only "a *final judgment* forecloses 'successive litigation of the very same claim.'" *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (emphasis added).[2] It is

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[2] *See also, e.g.,* Restatement (Second) of Judgments §§ 17-19 (1982); *Rivet v. Regions Bank of La.*, 522 U.S. 470, 476 (1998); *Comm'r v. Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell v. Cnty. of Sac.*, 94 U.S. 351, 353 (1876); *Wade v. Clower*, 94 Fla. 817, 829 (1927).

equally bedrock law that *issue* preclusion applies only when a prior fact-finder *actually decided* the relevant issue in one party's favor. *See Fayerweather v. Ritch*, 195 U.S. 276, 300 (1904). Thus, when "evidence … was offered at the prior trial upon several distinct issues, the decision of any one of which would justify the verdict or judgment, then the conclusion must be that the prior decision is not an adjudication upon any particular issue or issues." *Id.* at 307. This "actually decided" requirement, which is as old as our legal system itself, is accepted universally as a matter of both common and constitutional law. *See id.* at 297-98.[3]

Clearly, no traditional application of either doctrine would relieve *Engle* progeny plaintiffs of the burden of proving the tortious-conduct elements of their claims. There can be no serious dispute that Phase I of *Engle* did not produce a final judgment entitled to claim preclusive effect. Indeed, both the Florida intermediate and supreme courts in *Engle* readily conceded that Phase I "'did *not* determine whether the defendants were liable to anyone.'"

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[3] *See also, e.g.*, 18 Wright & Miller, *Federal Practice and Procedure* § 4420 nn.1, 13 (2d ed. 2002); Restatement (Second) of Judgments § 27, cmt. e (1982); *Duchess of Kingston's Case*, [1776] (H.L.)*, in* 2 John William Smith*, A Selection of Leading Cases on Various Branches of the Law* 425 (1840); 2 Edwardo Coke, *The First Part of the Institutes of the Laws of England; or a Commentary Upon Littleton* ¶ 352b (1817); *Packet Co. v. Sickels*, 72 U.S. 580, 592, 598 (1866); *Cromwell*, 94 U.S. at 353; *Russell v. Place*, 94 U.S. 606, 608 (1876); *De Sollar v. Hanscome*, 158 U.S. 216, 221 (1895); *Lentz v. Wallace*, 17 Pa. 412, 415 (1851); *People v. Frank*, 28 Cal. 507, 515-16 (1865).

Engle III, 945 So. 2d at 1263 (quoting *Engle II*, 853 So. 2d at 450). The very fact that there was a Phase II readily refutes any contrary contention—had Phase I produced an actual judgment on all class members' claims, there would have been no need for a Phase II to determine whether the defendants were liable to three class representatives. Indeed, if there were a final judgment, then claim preclusion would preclude the *plaintiffs* from "re-litigating" their claims in individual actions.

It is equally clear that the findings do not establish that the *Engle* jury *actually decided* that the defendants engaged in any tortious conduct common to all class members. The verdict itself establishes nothing more than that each defendant, *e.g.*, marketed some unidentified defective cigarette, and engaged in some unidentified negligent conduct, at some unidentified point over 50 years. It is "equivalent to saying that the Defendants did something wrong without saying exactly what the Defendants did wrong and when." *Brown I*, 576 F. Supp. 2d at 1342. The trial record does not cure this ambiguity; in fact, it flatly forecloses any argument that the class pursued only theories common to all members. Indeed, the *Engle* trial court itself catalogued numerous brand-specific theories on which the class relied. *See Engle I*, 2000 WL 33534572, at *2.

That ought to have made it obvious that once the effort to use Phase I as a gateway to a massive punitive damages award failed, its generic findings could not be given any significant preclusive effect in

individual cases. They cannot be used to preclude parties from litigating *claims* because Phase I did not litigate any *claims* to final judgment. And they cannot be used to preclude defendants from litigating the tortious-conduct *elements* of progeny plaintiffs' claims because it is impossible to tell whether the jury actually decided any *issues* that would establish those elements for each class member. None of this is terribly surprising since *Engle* was a failed class action that lacked any truly common issues.

B. The Consistently Inconsistent Attempts of Courts to Justify Preclusion Have Fallen Far Short.

If the *Engle* trial had been anything other than the year-long monstrosity it was, surely courts would have reached the unremarkable conclusion that its findings are useless under settled preclusion principles. Instead, ever since the appeal to the Florida Supreme Court in *Engle*, courts have struggled in vain to devise a way to rescue the findings from futility without violating due process. Time and again, they have failed, producing decisions consistent only in their inability to identify any convincing basis for allowing the findings to conclusively establish issues that it is impossible to tell whether the jury actually decided.

Remarkably, when it finally confronted the question, the Florida Supreme Court did not even deny that there is no way to give the Phase I findings the kind of issue preclusive effect progeny plaintiffs seek. To the contrary, the court readily conceded that the findings would be "useless" under any

version of issue preclusion that requires plaintiffs to prove what the *Engle* jury actually decided—*i.e.*, any version of issue preclusion consistent with due process. *Douglas*, 110 So. 3d at 433.

But the court tried to sidestep that problem by adopting yet another purported "solution"—one that *every* court to consider the issue had rejected out of hand. Seeking to capitalize on the proposition that "claim preclusion, unlike issue preclusion, has no 'actually decided' requirement," the court declared the findings "a final judgment" entitled to a novel form of *claim* preclusive effect, under which defendants are precluded from contesting *elements* of claims, but plaintiffs are not precluded from litigating the claims themselves. *Id.* at 434-35. In other words, the court purported to avoid an extreme application of issue preclusion only through an equally extreme application of claim preclusion—a heretofore-unheard-of form of *offensive* claim preclusion that excuses plaintiffs from proving and precludes defendants from contesting any issue the *Engle* jury *could* have decided, without regard to what the jury *actually* decided.

Of course, that effort to afford powerful "claim" preclusive effect to the *Engle* findings is no more constitutional than the issue preclusion rationales that preceded it. Indeed, if anything, its incompatibility with due process is even more obvious. The Florida Supreme Court itself has acknowledged that the *Engle* jury did not litigate the class' claims to final judgment. *See Engle III*, 945 So. 2d at 1263. If it had, there would have been no

progeny cases. The court may not avoid that reality by simply relabeling a verdict that resolved only *issues* "a final judgment on the merits." Even if it could, claim preclusion is a *defense* used to preclude re-litigation of a claim that has been litigated to final judgment, not an *offensive* tool that plaintiffs may use to preclude *defendants* from litigating *elements* of claims that have never been resolved. Again, if the *Engle* findings really were "a final judgment on the merits," they would preclude the progeny plaintiffs themselves from re-litigating those claims. That is precisely why courts repeatedly assumed that the Florida Supreme Court could not possibly have meant claim preclusion when it declared the *Engle* findings entitled to "res judicata effect." In short, *Douglas* not only declares entitled to "claim preclusive" effect findings that are manifestly not a final judgment, but also entitles those findings to something that is manifestly not claim preclusion.

Although the Eleventh Circuit was squarely presented with an opportunity to right this massive wrong in *Walker*, it instead chose to duck the issue entirely. Rather than determine the constitutionality of the novel version of offensive claim preclusion the Florida Supreme Court actually sanctioned, the Eleventh Circuit converted *Douglas* into something it found more palatable: It insisted that the *Douglas* court concluded, after a searching review of the *Engle* trial record, that the *Engle* jury "*actually decided … only* issues of common liability." *Walker*, 734 F.3d at 1287-88 (emphasis added). That depiction of *Douglas* is nothing short of surreal. The *Douglas* court

expressly acknowledged that the findings would be "useless" under an issue preclusion analysis, and insisted upon applying claim preclusion precisely because "claim preclusion, unlike issue preclusion, has no 'actually decided' requirement." *Douglas*, 110 So. 3d at 435. Thus, the Eleventh Circuit did not so much sanction the Florida Supreme Court's decision as rewrite it. And yet, by deeming itself bound by full faith and credit principles to defer to an interpretation of the *Engle* findings that the Florida Supreme Court pointedly refused to adopt, the Eleventh Circuit managed to avoid entirely the need to explain how any of this is remotely consistent with due process.

In sum, both the Florida Supreme Court and the Eleventh Circuit—the only federal court of appeals with jurisdiction over *Engle* progeny cases—have now definitively approved (albeit under mutually inconsistent theories) the extreme departure from settled preclusion principles that infected this case. Accordingly, absent this Court's intervention, every single one of the thousands of state and federal progeny trials that have yet to occur will be infected with the same flagrant due process violation.

C. These Extraordinary Efforts to Salvage the *Engle* Findings Are as Unwarranted as They Are Unconstitutional.

The extraordinary lengths to which courts have gone to devise "pragmatic" solutions to the *Engle* mess are all the more remarkable because this is a mess of the *Engle* class' own making. The Phase I findings are not "useless" in progeny cases because of

some technical mistake that courts should overlook, lest a conventional class-action proceeding be denied the effect it was carefully constructed to have. They are "useless" because the entire *Engle* endeavor was hopelessly flawed from the outset. Indeed, *Engle* was never anything more than a massive abuse of the class-action device.

As nearly every court save the Florida courts recognized at the start, there is no practical way to litigate on a class-wide basis the inherently individualized claims an "addiction class" involves—*i.e.*, claims of thousands of smokers "'exposed to different … products, for different amounts of time, in different ways, and over different periods.'" *Barnes*, 161 F.3d at 143 (quoting *Amchem*, 521 U.S. at 624). There is no "composite plaintiff who smoked every single brand of cigarettes, saw every single advertisement, read every single piece of paper that the tobacco industries ever created or distributed, and knew about every single allegedly fraudulent act," *Engle II*, 853 So. 2d at 467 n.48—let alone an entire class of such individuals. It is little surprise, then, that a jury presented with questions of use only to this "composite plaintiff" failed to produce findings of use to real-life individuals. That is the inevitable result of certifying for class-wide resolution questions that will not "'generate common *answers* apt to drive the resolution of the litigation.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2008).

What is now happening in progeny cases is really just a symptom of this much deeper problem. Courts are painfully aware that *Engle* did not produce the

kind of truly common findings that would "drive the resolution of" individual class members' claims. *Id.* Indeed, that is exactly what the Florida Supreme Court meant when it admitted that, under any recognizable version of issue preclusion, the findings would be "useless in individual actions." *Douglas*, 110 So. 3d at 433. Yet courts are determined to salvage those findings, no matter the cost. For the Florida Supreme Court, that meant inventing a novel version of preclusion that gives plaintiffs all the benefits of both issue and claim preclusion but gives defendants none of the protections of either. For the Eleventh Circuit, it meant pretending that the Florida Supreme Court read into the verdict common findings the jury never made. The means may be different, but the end is the same: flagrant due process violations in thousands of cases.

That result is intolerable in any circumstance. But it is incredible that courts have struggled so hard to achieve it here, where the same defendants whose due process rights are being violated with impunity warned from the beginning that this result would follow. During the *Engle* trial, they objected to both certification and the inevitably useless verdict the class proposed. *See* SR-344-48 (*Engle* Verdict Form Objections) (arguing that verdict would produce findings "useless for application to individual plaintiffs"). Yet the class forged ahead, confident that generic questions were more likely to produce favorable findings, and indifferent to the consequences for individual trials that they hoped to

avoid by securing an astronomical punitive damages award and forcing a settlement.

When that strategy failed, the only remotely tenable solution was to declare the entire enterprise a massive mistake and instruct former class members to litigate their claims in the ordinary manner. Instead, the Florida Supreme Court adopted a "pragmatic solution" that the defendants once again immediately warned was bound to infect every progeny case with constitutional error. *See* Petition for Writ of Cert., *R.J. Reynolds Tobacco Co. v. Engle*, No. 06-1545, 2007 WL 1494692, at *16 (U.S. May 21, 2007) ("[t]he highly generalized and decidedly ambiguous nature of these findings prevents any other jury from applying them consistent with due process"). But the class insisted that review was "premature" because defendants could complain if and when these due process violations occurred. Br. in Opp., *Engle*, 2007 WL 2363238, at *11 (Aug. 15, 2007) ("[t]he due process claims … are plainly premature").

Now, not only have the defendants' predictions proven correct, but the same due process violation that infected both this case and the *Walker* case (and many cases before them) is destined to recur in each and every *Engle* progeny trial to come. That is not a result that this Court should tolerate—particularly when the stakes are this high. State courts have a lot of latitude when it comes to preclusion principles, but this Court has the final word on whether those principles comport with the Constitution. And when a state court invents a novel preclusion doctrine that

elevates "pragmatism" over due process, it falls to this Court to step in. So, too, when a federal court refuses to even acknowledge—let alone answer—a grave due process question that is staring it in the face. Accordingly, whether in this case or in *Walker*, the Court should grant certiorari and put an end to the *Engle* travesty once and for all.

II. This Extreme Application Of Preclusion Principles Will Infect Thousands Of Cases Involving Potentially Billions Of Dollars With Constitutional Error.

There are nearly 3,200 *Engle* progeny cases pending in the Florida state courts and another 1,100 more pending in the federal courts. Both the Florida Supreme Court and the Eleventh Circuit have now sanctioned the unconstitutional procedures being utilized in these trials. Thus, absent this Court's intervention, every progeny plaintiff will be relieved of the customary burden of proving that the defendant actually engaged in the tortious conduct alleged.

The unconstitutional deprivations of defendants' property bound to result from this truncated procedure will be astronomical. The award here may be relatively modest, but it is hardly representative—collectively, just a tiny fraction of progeny cases already have produced more than $450 million in liability, including both massive punitive awards and "mega-noneconomic" compensatory awards. *R.J. Reynolds Tobacco Co. v. Smith*, 131 So. 3d 18, 19-20 (Fla. Dist. Ct. App. 2013) (Wetherell, J., specially concurring) (affirming $10 million compensatory and

$20 million punitive damages award); *see, e.g.*, *Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67, 82-83 (Fla. Dist. Ct. App. 2013) (affirming $10 million compensatory and $25 million punitive damages award); *Martin*, 53 So. 3d at 1071 (affirming $25 million punitive damages award).[4] And those trials are just the tip of the iceberg. Indeed, these are the same claims on which the *Engle* jury entered its unprecedented *$145 billion* punitive damages award. The stakes in other cases in which this Court has stepped in to prevent extreme departures from settled procedural norms pale in comparison. *See, e.g.*, *Oberg*, 512 U.S. at 418; *Richards*, 517 U.S. at 795.

And the notion that this extreme departure will be confined to tobacco cases, and not applied to the next unpopular defendant, is wishful thinking. The kind of abuse of the class-action device the *Engle* class sought to achieve is nothing new. *See, e.g.*, *Amchem*, 521 U.S. at 597 (affirming decertification of class that sought to litigate inherently individualized asbestos-related claims of "hundreds of thousands, perhaps millions, of individuals"); *Dukes*, 131 S. Ct. at 2547 (reversing certification of class that sought to litigate inherently individualized employment-discrimination claims of 1.5 million employees).

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[4] Liggett Group, Inc., by far the smallest of the four major American manufacturers, recently settled most of its progeny litigation for *$110 million*. *See* Jessica Dye, *Liggett Group to pay $110 million in tobacco settlement*, Reuters (Oct. 23, 2013), http://reut.rs/1dL3oU8.

Federal courts may lack the means to police state-court certification of cases demonstrably incapable of class-wide resolution, but this Court certainly has the means to ensure that neither federal nor state courts are vehicles for using such actions to perfect massive deprivations of property without due process.

The need to do so here is acute. The Florida courts have combined misuse of the class-action device with misuse of preclusion principles to deprive unpopular defendants of due process. Adding insult to injury, the Eleventh Circuit has refused to do anything about the constitutional violations the Florida courts have sanctioned. Because the due process question presented in this and every other progeny case was squarely presented to the Eleventh Circuit in *Walker*, this Court should grant the petition in *Walker* and hold this petition pending *Walker*'s resolution on the merits. In the alternative, the Court should grant this petition to consider the constitutionality of the novel version of preclusion on which the court below relied in rejecting petitioner's due process argument and affirming the judgment against petitioner. In all events, whether in *Walker*, this case, or both, the court should grant certiorari and put an end to this patently unconstitutional practice before it infects thousands of cases and produces billions of dollars in unlawful damages awards.

CONCLUSION

This Court should grant this petition or hold it pending disposition of *Walker*, then dispose of it consistently with its ruling in that case.

Respectfully submitted,

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