NO. _____

In the
Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY,

Petitioner,

v.

ALVIN WALKER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ALBERT WALKER, AND GEORGE DUKE, III, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SARAH DUKE

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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?

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. Plaintiffs-appellees below, who are respondents before this Court, are Alvin Walker, as personal representative of the estate of Albert Walker, and George Duke, III, as personal representative of the estate of Sarah Duke.

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. Time and again, they have failed.

The Florida Supreme Court's ultimate answer was to acknowledge that the findings are "useless" for issue preclusion purposes, but to try to sidestep that problem by inventing a novel offensive version of claim preclusion that estops defendants from litigating any issues that *might* have been decided in *Engle*, even though the jury never resolved the class' claims, and no one knows what issues it actually decided. Here, instead of finally making a clear federal appellate determination whether this novel version of offensive claim preclusion comports with due process, the Eleventh Circuit adopted a fundamentally conflicting approach. Although it purported to apply full faith and credit principles, the court neither adopted the Florida Supreme Court's offensive claim preclusion approach nor attempted to reconcile that radical departure from centuries of preclusion law with due process. Instead, the Eleventh Circuit ascribed to the Florida Supreme Court a finding it pointedly declined to make—namely, that the *Engle* jury found *all* cigarettes defective.

That conclusion cannot be reconciled with what the Florida Supreme Court actually held, the Full

Faith and Credit Act, or due process. Indeed, it is nothing more than the wishful thinking of a court determined to avoid a glaring constitutional problem. The Eleventh Circuit's decision thus allows a massive due process violation not only to stand, but to be replicated in thousands of trials, exposing defendants to damages in the billions, without any consideration by the federal courts of whether the unprecedented procedure Florida actually approved is constitutional. Worse still, thousands of cases will proceed in state court on a theory fundamentally incompatible with the theory that allows hundreds more to proceed in federal court. Indeed, the theories are mutually exclusive—state courts provide preclusive effect despite the generic nature of the *Engle* findings, while federal courts provide preclusive effect on the rationale that the findings were not generic at all, but rather definitively determined all cigarettes defective. The only thing these proceedings will have in common is a fundamental failure to comport with due process, which only this Court can correct.

OPINIONS BELOW

The court of appeals' initial opinion is reprinted at App.26-50. Its amended opinion is reported at 734 F.3d 1278 and reprinted at App.1-25. The district court's opinion is reported at 835 F. Supp. 2d 1244 and reprinted at App.55-131.

JURISDICTION

The court of appeals entered its amended judgment on October 31, 2013. A timely petition for rehearing *en banc* was denied on January 6, 2014. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Fifth and Fourteenth Amendments to the U.S. Constitution and the Full Faith and Credit Act, 28 U.S.C. § 1738, are reproduced at App.158.

STATEMENT OF THE CASE

This case involves the strict liability and negligence claims of the estates of two individuals whose representatives allege that their deaths 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 plaintiffs were required to prove none of those things, and the defendant was prohibited from attempting to disprove them. Instead, the court simply instructed the juries that petitioner "placed cigarettes on the market that were defective and unreasonably dangerous" and "was negligent." This anomalous procedure is the result of courts' 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 nationwide 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 Walker* Doc. 252 & *Duke* Doc. 205 (documenting class' varying theories). Indeed, the class considered it "a fallacy that every common issue has to apply to one hundred percent of the class members." *Walker* Doc. 252-9. 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." *Walker* Doc. 252-10 at 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.141, 154.

As the defendants objected, *see Waggoner* Doc. 35-2 at 9-10, 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

Over the next year, some 9,000 individuals claiming to be *Engle* class members 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. And, 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. The first federal courts to confront the issue recognized this problem right away, but their decisions were soon overtaken by a series of contradictory rulings whose only unifying rationale is that the ordinary rules do not apply where *Engle* is concerned.

1. The first federal court to consider the issue concluded that the *Engle* findings cannot be given the preclusive effect progeny plaintiffs seek consistent with due process. *Bernice Brown v. R.J. Reynolds Tobacco Co.* ("*Brown I*"), 576 F. Supp. 2d 1328 (M.D. Fla. 2008). The court first concluded that the Florida Supreme Court could not possibly have intended to imbue the findings with *claim* preclusive effect because claim preclusion applies only to a final *judgment*, which Phase I did not produce. *Id.* at 1339-40. The court thus concluded that the Florida Supreme Court must have meant *issue* preclusion.

But, as the court explained, the findings are useless for issue preclusion purposes because they are hopelessly general and could have rested on any of several different theories, many of which apply to only some class members. For instance, although the "verdict indicates that each Defendant manufactured a defective product at some point in time, … it fails to specify what defect" that was, making it "impossible to determine whether the unreasonably dangerous defect was present in the cigarettes smoked by a particular plaintiff." *Id.* at 1343. Because this

problem inheres in all the relevant findings, it is "impossible to discern what specific issues were actually decided by the Phase I jury, and what facts and allegations were necessary to its decision." *Id.* at 1344. Accordingly, the court found itself "unable to give the Phase I findings preclusive effect with respect to the elements of any of the *Engle* plaintiffs' claims" without violating defendants' due process rights. *Id.*

Plaintiffs appealed, and the Eleventh Circuit vacated and remanded. *Bernice Brown v. R.J. Reynolds Tobacco Co.* ("*Brown II*"), 611 F.3d 1324 (11th Cir. 2010). The court agreed that the Florida Supreme Court must have meant issue, not claim, preclusion. *Id.* at 1333. And it saw no need to consider any federal due process questions because it concluded that, under Florida issue preclusion law, the "findings may not be used to establish facts that were not actually decided by the jury." *Id.* at 1334. But the court refused to foreclose the possibility that a plaintiff might use the entire trial record "to show with a 'reasonable degree of certainty' that the specific factual issue" relevant to her claims "was determined in [her] favor." *Id.* at 1335. Accordingly, the court remanded for further consideration of "precisely what facts are established" by the findings. *Id.* at 1336. The court observed, however, that "plaintiffs have pointed to nothing in the record, and there is certainly nothing in the jury findings themselves," to suggest that the jury actually decided the tortious-conduct elements of every progeny plaintiff's claims. *Id.* at 1335.

2. State courts considering progeny cases were equally perplexed as to how to give "res judicata effect" to a verdict that resolved no claims, but they adopted a dramatically different approach. Although they agreed that the Florida Supreme Court must have meant issue, not claim, preclusion, they rejected the notion that a progeny plaintiff must "trot out the class action trial transcript to prove" what the *Engle* jury actually decided. *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1067 (Fla. Dist. Ct. App. 2010), *cert. denied*, 132 S. Ct. 1794 (2012). Instead, they read the Florida Supreme Court's opinion as imbuing the findings with the comprehensiveness they lack. *See id.* Thus, in their view, whether a progeny plaintiff could demonstrate that the jury actually decided any issue relevant to his claims was beside the point; it was enough that they thought the Florida Supreme Court (implicitly) declared it so. Although the intermediate courts deemed themselves bound by this understanding, some acknowledged the serious due process questions it raised. *See, e.g.*, *R.J. Reynolds Tobacco Co. v. Brown*, 70 So. 3d 707, 719-20 (Fla. Dist. Ct. App. 2011) (May, J., specially concurring), *cert. pending* (filed Mar. 28, 2014).

3. As defendants explained back in federal district court, the version of Florida preclusion law adopted by these state courts is irreconcilable with the premise of the Eleventh Circuit's *Brown II* decision. Because defendants believed this novel version of preclusion could not be applied in federal cases without violating due process, they raised that issue in a Rule 16(c) motion applicable to all progeny

cases pending in the Middle District of Florida. App.55-131 (*Waggoner v. R.J. Reynolds Tobacco Co.,* 835 F. Supp. 2d 1244 (M.D. Fla. 2011)).[1] The court tasked with resolving this motion did not deny that the form of preclusion being applied by the Florida courts was "an 'extreme' departure from traditional issue preclusion," in that it required no showing of what the *Engle* jury actually decided. App.113. Nonetheless, insisting that this "unique situation demands some flexibility," the court deemed this extreme departure consistent with due process because, *inter alia*, the defendants had not been "*totally* foreclosed" from contesting liability in *Engle* itself, and "Florida law continues to offer Defendants" *other* due process "protections" in progeny cases. App.117, 123, 126.

4. These dubious and conflicting approaches to preclusion—in a context involving thousands of cases and potentially billions of dollars—led one 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. Finally confronting the issue, the Florida Supreme Court concluded that they can—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,

[1] The resulting decision was incorporated into all such cases, including these two. App.132.

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.

C. The Proceedings Below

This petition arises out of the first federal progeny appeal following the district court's decision

in *Waggoner* and the Florida Supreme Court's decision in *Douglas*. As is now the norm, respondents were permitted to use the *Engle* findings to establish the tortious-conduct elements of their claims. Thus, rather than require them to prove that the cigarettes smoked by the decedents—one of whom smoked only filtered cigarettes, the other only non-"lights"—were defective, or that petitioner engaged in any negligent conduct relevant to the decedents, the court instructed the juries that petitioner "placed cigarettes on the market that were defective and unreasonably dangerous" and "was negligent." App.71-72. The only liability question submitted to the juries was "whether the conduct of the defendant was a legal cause of" the decedents' deaths. *Walker* Doc. 214 at 1699-1702; *Duke* Doc. 165 at 14323. The juries found for respondents on the strict-liability and negligence claims in *Walker* and the strict-liability claim in *Duke*. Both juries awarded compensatory damages, which were reduced to reflect comparative-fault findings.

On appeal, petitioner argued that precluding it from contesting issues that the *Engle* jury did not necessarily decide violated due process. Petitioner also argued that the approach adopted by *Douglas* does not fix this problem, but rather simply achieves the same unconstitutional result under the guise of a novel doctrine of offensive claim preclusion. Thus, at long last, this case provided a federal appellate court with a square opportunity to decide whether the Florida Supreme Court's definitive view of Florida preclusion law—specifically, its novel version of

offensive claim preclusion—is consistent with due process.

Rather than address that question, the Eleventh Circuit attempted to avoid it. The court began by *sua sponte* declaring itself bound to "give full faith and credit to the decision in *Engle*, as interpreted in *Douglas*, so long as it 'satisf[ies] the minimum procedural requirements' of due process." App.17.[2] The court then proceeded to give "full faith and credit" to an interpretation of *Engle* that is flatly inconsistent with the interpretation adopted by *Douglas*: It insisted that *Douglas* had "look[ed] beyond the jury verdict" and found that the *Engle* Phase I jury "*actually decided* … *only* issues of common liability." App.20 (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

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[2] The panel initially framed its inquiry solely in terms of "giving full faith and credit to the decision in *Douglas*." App.43. After petitioner's first petition for rehearing explained that Florida law requires mutuality of parties, which *Douglas* and the instant cases lack, the panel *sua sponte* vacated its opinion and issued a new one, this time reframing its inquiry in terms of "giving full faith and credit to the decision in *Engle*, as interpreted in *Douglas*." App.18.

'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." App.18. 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." App.23-24.

Having deemed itself bound by an interpretation of the *Engle* findings that the Florida Supreme Court expressly declined to adopt, the Eleventh Circuit managed to avoid the federal due process question entirely. In its view, because it had to accept *Douglas*' purported conclusion that the *Engle* jury actually decided only class-wide issues, the findings could be given preclusive effect without running afoul of the "actually decided" requirement. The court also emphasized that although petitioner was precluded from contesting the tortious-conduct elements of respondents' claims, it was permitted to "vigorously contest[] the remaining elements of the claims, including causation and damages." App.21.

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 ordinary issue preclusion principles because it is impossible to tell what the jury actually decided in reaching them. The court attempted to cure that problem by declaring the Phase I verdict a "final judgment"—something any first-year law student would recognize it is not—entitled to a novel *offensive* version of *claim* preclusion that precludes defendants from contesting *issues* in ongoing litigation.

Unsurprisingly, the Eleventh Circuit could not bring itself to endorse that extreme departure from settled preclusion principles. But rather than confront whether *Douglas*' novel form of offensive claim preclusion can be reconciled with due process, the Eleventh Circuit simply wished away the due process issue by treating *Douglas* as having concluded that the *Engle* findings embody actual determinations that, for example, every cigarette is defective. *Douglas* did no such thing; to the contrary, it openly acknowledged that it is impossible to tell what the jury actually decided. The net effect is that both state and federal courts are denying defendants' due process rights, albeit under fundamentally inconsistent theories. This would be bad enough if these conflicting theories affected only a handful of

cases. But unless this Court intervenes, thousands of cases will proceed under mutually exclusive but equally indefensible theories of why defendants cannot defend themselves on or force plaintiffs prove the most basic elements of their claims.

The Eleventh Circuit's transparent attempt to duck this grave constitutional issue is so patently erroneous and has such far-reaching consequences that, at a minimum, this Court should summarily reverse and order the court to explain whether the offensive claim preclusion theory *Douglas* invented is reconcilable with due process. But the better course would be for this Court to address that constitutional question itself, whether in this case, the petition filed today in *R.J. Reynolds Tobacco Co. v. Brown*, or both. The Florida Supreme Court has the final word on what it meant by "res judicata effect." But the federal courts, and ultimately this Court, have the final word on whether that "res judicata effect"—namely, offensive "claim" preclusion applied to individual issues—is consistent with due process.

That question is of exceptional importance given the reality that federal courts will give the *Engle* findings "res judicata effect" in countless other cases. This Court has considered extreme departures from traditional preclusion principles even when they arise in only one case and are unlikely to recur. Intervention is far more critical here, where the issue affects thousands of cases, and state and federal courts will proceed on fundamentally inconsistent theories of what the *Engle* jury found and what that means for preclusion purposes. In sum, this Court

should address the critical due process question the Eleventh Circuit evaded, but at a minimum should correct that court's egregiously erroneous effort to give full faith and credit to a reading of *Douglas* that is flatly contrary to what *Douglas* actually said.

I. The Decision Below Sanctions Seriatim Due Process Violations Of The First Order Through An Indefensible Application Of Full Faith And Credit Principles.

A. The *Engle* Findings Cannot Be Given the Preclusive Effect Progeny Plaintiffs Seek Consistent with Due Process.

"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 v. Jefferson Cnty., Ala.*, 517 U.S. 793, 797 (1996). 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).[3] It is 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

[3] *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).

universally as a matter of both common and constitutional law. *See id.* at 297-98.[4]

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.'" *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

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[4] *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).

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 v. R.J. Reynolds Tobacco*, 2000 WL 33534572, at *2 (Fla. Cir. Ct. Nov. 6, 2000).

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. Courts have concocted no fewer than four different approaches to attempting to square this circle. 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.

For instance, the Eleventh Circuit started on the right track in *Brown II* by recognizing that claim preclusion is a non-starter and that Florida issue preclusion law would not excuse plaintiffs from proving the tortious-conduct elements of their claims without showing that the *Engle* jury actually decided those specific issues in their favor. *See Brown II*, 611 F.3d at 1335. But the court would not admit what the district court correctly had concluded—that it is "impossible to discern what specific issues were actually decided by the Phase I jury," *Brown I*, 576 F. Supp. 2d at 1344—and instead remanded for further consideration of "precisely what facts are established" by the findings. 611 F.3d at 1336.

Recognizing the futility of this task, the Florida intermediate courts insisted that the Florida Supreme Court's *Engle* decision required them to permit plaintiffs to invoke issue preclusion *without* "trot[ting] out the class action trial transcript to prove" what the jury actually decided. *Martin*, 53 So. 3d at 1067. And the *Waggoner* court, insisting that this "unique situation demands some flexibility," endorsed this extreme application of issue preclusion for yet another reason—because defendants are not being deprived of *all* due process. App.126.

None of these theories comes anywhere close to refuting the conclusion that was staring courts in the face: There simply is no way to give the findings the issue preclusive effect progeny plaintiffs seek without abandoning universally accepted legal principles. When it finally confronted the issue, the Florida Supreme Court agreed, acknowledging that the findings would be "useless" under a traditional issue preclusion analysis. *Douglas*, 110 So. 3d at 433. But the court tried to sidestep that problem by adopting 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 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, it is functionally indistinguishable from simply eliminating issue preclusion's actually decided requirement—something this Court already has concluded is unconstitutional. *See Fayerweather*, 195 U.S. at 307.

C. The Eleventh Circuit Sanctioned This Extreme Departure from Universally Accepted Norms Only By Ignoring It.

This case provided the Eleventh Circuit with an opportunity to right this massive wrong. The court had before it an array of different decisions, none of which suggested that there is any way to divine what issues the *Engle* jury actually decided in Phase I, and each of which posited a different "solution" to that problem. And as the final word of the Florida Supreme Court on Florida preclusion law, *Douglas* ensured that the Eleventh Circuit could decide definitively whether the version of "res judicata effect" being applied in progeny cases comports with due process. Instead, the Eleventh Circuit ducked. Rather than consider the constitutionality of what

Douglas actually approved, the court essentially wished away the due process problem by incorrectly deeming itself bound to view the *Engle* findings as having resolved far more than they did.

The court did so through a *sua sponte* and indefensible application of full faith and credit principles. According to the Eleventh Circuit, *Douglas* concluded, after a searching review of the *Engle* record, that the *Engle* jury "*actually decided* … *only* issues of common liability." App.20 (emphasis added). The court insisted that, under full faith and credit principles, it "lack[ed] the power" to look behind this purported conclusion, even if it might "disagree … about what the jury in Phase I decided." App.18. Having simply denied the problem at the heart of these cases—that it is impossible to tell what the *Engle* jury actually decided—the court managed to avoid the due process question altogether.

That depiction of *Douglas* is nothing short of surreal. It is the exact *opposite* of what the Florida Supreme Court said, which is that it could not apply issue preclusion because its "actually decided" requirement "would effectively make the Phase I findings … *useless* in individual actions." *Douglas*, 110 So. 3d at 433 (emphasis added). That is why the court deemed it "[o]f specific importance to this case … that claim preclusion, unlike issue preclusion, has no 'actually decided' requirement." *Id.* at 435. Were it even remotely plausible to characterize *Engle* as having actually decided only class-wide issues, surely the Florida Supreme Court would have taken that easy out. Instead, the court expressly acknowledged

the need to solve the "actually decided" problem, and concocted its novel offensive claim preclusion doctrine precisely because it believed that doing so allowed it to give the findings preclusive effect even though it is impossible to tell what issues the *Engle* jury actually decided.

The Eleventh Circuit did not—and could not—defer to that extreme departure from universally accepted preclusion norms. *See Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482-83 (1982). Instead, it deemed itself bound to give "full faith and credit" to an interpretation of the *Engle* findings the Florida Supreme Court refused to adopt, thus neatly devising a way to "defer" to that utterly indefensible interpretation without adopting it as its own. That transparent attempt to deny *Engle* defendants their one chance at federal court review of a grave constitutional problem—one that *every* court has recognized cannot be eliminated through the simple expedient of attributing to the *Engle* jury class-wide findings it never made—is itself a due process violation of the first order. Federal courts are supposed to protect constitutional rights, not ignore their violation by concocting and then "deferring" to an indefensible reading of the very state court decision that enabled it. The Eleventh Circuit's invocation of full faith and credit principles to accomplish the latter is so patently erroneous that, at a minimum, this Court should summarily reverse and direct the court to decide the due process question it was so determined to avoid.

But the better course is for this Court to grant plenary review to consider the due process question itself. There can be no serious dispute that *Douglas* deemed *Engle*'s cryptic reference to "res judicata effect" to mean offensive claim preclusion. And there is no dispute that the Florida Supreme Court has the final word on Florida preclusion law. But this Court has the final word on whether that law comports with the Constitution. The situation in the lower courts is untenable. State courts will deny *Engle* defendants due process under a novel and unconstitutional offensive claim preclusion theory. Federal courts just as surely will deny them due process under a wholly incompatible yet equally unconstitutional issue preclusion theory, endorsed by the Eleventh Circuit only by grossly misapplying full faith and credit principles to fabricate and then defer to an equally gross misreading of *Douglas*. Only this Court can restore order and vindicate due process.

D. 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. *Waggoner* Doc. 35-2 at 9 (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").

And yet, when defendants' day in the only federal appellate court with jurisdiction over progeny cases finally arrived, the Eleventh Circuit turned a blind eye, deeming itself bound to defer to, rather than correct, the massive injustice being perpetrated. Worse still, the court did so by purporting to defer to a determination the Florida Supreme Court never made. The court's reluctance to acknowledge that a state supreme court within its jurisdiction has violated the Constitution is understandable, but it should not be excusable. At a bare minimum, this Court should summarily reverse and instruct the Eleventh Circuit to explain how in the world the version of preclusion *actually* adopted by *Douglas* can be squared with due process. But because any attempt to do so would be futile, the better course would be to grant plenary review 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 more than 1,100 *Engle* progeny cases pending in federal court and another 3,200 in state court. 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 awards here may be modest, but they are 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).[5] And those trials

[5] Liggett Group, Inc., by far the smallest of the four major American manufacturers, recently settled most of its progeny

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). 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 federal courts are not 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

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litigation for *$110 million*. *See* Jessica Dye, *Liggett Group to pay $110 million in tobacco settlement*, Reuters (Oct. 23, 2013), http://reut.rs/1dL3oU8.

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. This Court should 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 *Brown*, then dispose of it consistently with its ruling in that case.

Respectfully submitted,

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