

No. 13-14590-AA

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UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

EARL E. GRAHAM, *as personal representative of the*  
ESTATE OF FAYE DALE GRAHAM,

*Plaintiff-Appellee,*

v.

R.J. REYNOLDS TOBACCO COMPANY, *et al.*,

*Defendants-Appellants.*

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Appeal from the United States District Court  
for the Middle District of Florida, Jacksonville Division

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**APPELLANTS' MOTION REGARDING ISSUES TO BE INCLUDED IN  
*EN BANC* BRIEFING**

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**CORPORATE DISCLOSURE STATEMENT AND  
CERTIFICATE OF INTERESTED PERSONS**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Defendants-Appellants R. J. Reynolds Tobacco Company and Philip Morris USA Inc. provide the following Corporate Disclosure Statement and Certificate of Interested Persons.

1. Altria Group, Inc. (MO)—publicly held company and parent company of Defendant-Appellant Philip Morris USA Inc.
2. Arnold & Porter, LLP—counsel for Defendant-Appellant Philip Morris USA Inc.)
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6. Barnett, Kathryn E.—former attorney for Earl E. Graham, as Personal Representative of the Estate of Faye Dale Graham
7. Beaver, Renee T.—attorney for Defendant-Appellant Philip Morris USA Inc.
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9. Bernstein-Gaeta, Judith—attorney for Defendant-Appellant Philip Morris

- USA Inc.
10. Bidwell, Cecilia M.—attorney for Defendant-Appellant Philip Morris USA Inc.
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  12. Bradford, II, Dana G.—attorney for Defendant-Appellant Philip Morris USA Inc.
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  14. British American Tobacco p.l.c. (“BTI”)—Through its ownership interest in Brown & Williamson Holdings, Inc., the indirect holder of more than 10% of the stock of Reynolds American Inc., parent company of Defendant-Appellant R. J. Reynolds Tobacco Company
  15. Brown, Joshua R.—attorney for Defendant-Appellant Philip Morris USA Inc.
  16. Brown & Williamson Holdings, Inc.—holder of more than 10% of the stock of Reynolds American Inc., parent company of Defendant-Appellant R. J. Reynolds Tobacco Company
  17. Brown, Joshua Reuben—attorney for Defendant-Appellant Philip Morris USA Inc.

18. Burnette, Jason T.—attorney for Defendant-Appellant R.J. Reynolds Tobacco Company
19. Byrd, Kenneth S.—attorney for Earl E. Graham, as Personal Representative of the Estate of Faye Dale Graham
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22. Coll, Patrick P.—attorney for former Defendant Lorillard Tobacco Company
23. Corrigan, Timothy J.—U.S. District Court Judge of Middle District of Florida
24. Council for Tobacco Research, USA Inc.—former Defendant
25. Crampton, William J.—attorney for Defendant-Appellant Philip Morris USA Inc.
26. Crane, Eliza S.— attorney for Defendant-Appellant Philip Morris USA Inc.
27. Daboll, Bonnie C.—attorney for Defendant-Appellant Philip Morris USA Inc.
28. Dalton, Jr., Roy B.—Judge of Middle District of Florida
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51. Heise, Mark J.—attorney for Defendant-Appellant Philip Morris USA Inc.
52. Homolka, Robert D.—attorney for Defendant-Appellant Philip Morris USA Inc.

53. Howard, Marcia Morales—U.S. District Court Judge of Middle District of Florida
54. Hughes, Hubbard & Reed, LLP—Counsel for former Defendant Lorillard Tobacco Company
55. Invesco Ltd. (“IVZ”)—holder of more than 10% of the stock of Reynolds American Inc., parent company of Defendant-Appellant R. J. Reynolds Tobacco Company
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- Inc.
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119. Tedder, Gay—attorney for former Defendant Lorillard Tobacco Company

120. The Tobacco Institute, Inc.—former Defendant
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122. Toomey, Joel B.—Magistrate Judge of Middle District of Florida
123. Treadwell, Marc T.—U.S. District Court Judge sitting by designation in the Middle District of Florida
124. Tye, Michael S.—attorney for Defendant-Appellant Philip Morris USA Inc.
125. Vector Group, Ltd. (“VGR”) formerly known as Brooke Group Ltd., Inc., formerly known as Brooke Group Holding, Inc.—former Defendant
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129. Wilner, Norwood S.—attorney for Earl E. Graham, as Personal Representative of the Estate of Faye Dale Graham
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131. Yarbrough, Jeffrey A.—attorney for Defendant-Appellant R. J. Reynolds

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132. Young, William G.—U.S. District Court Judge, sitting by designation in the  
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133. Zack, Stephen N.—attorney for Defendant-Appellant Philip Morris USA Inc.

No associations of persons and no other firms, partnerships, or corporations  
have an interest in the outcome of this case or appeal.

**APPELLANTS' MOTION REGARDING ISSUES TO BE INCLUDED IN  
*EN BANC* BRIEFING**

Pursuant to Fed. R. App. P. 27 and 11th Cir. R.35-8, Defendants-Appellants R.J. Reynolds Tobacco Company and Philip Morris USA Inc. move the Court to include both implied preemption and due process in the issues to be briefed by the parties and considered by the *en banc* Court.

The Court granted Plaintiff's petition for rehearing *en banc* without calling for a response from Defendants, who therefore have not had an opportunity to state their position regarding the issues that should be decided by the *en banc* Court. Defendants respectfully submit that this Court should order briefing not only on the implied-preemption issue decided by the panel in this case, but also on the question whether it violates federal due process to allow plaintiffs to use the *Engle* jury findings to establish essential elements of their individual tort claims. A panel of this Court answered no with respect to the defect and negligence findings from *Engle*, see *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013), and a different panel has been considering for over a year the same due-process question with respect to the concealment and conspiracy findings, see *Searcy v. R.J. Reynolds Tobacco Co.*, No. 13-15258 (argued Oct. 17, 2014).

The implied-preemption issue in this case is inextricably intertwined with *Walker*'s due-process holding, which was an essential predicate for the panel's preemption analysis. In *Walker*, a panel of this Court held itself bound to follow

*Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013), which it read as having adopted the broadest possible understanding of what issues the *Engle* jury actually decided with regard to strict liability and negligence—*i.e.*, that all cigarettes are defective because they are addictive and cause disease. If that interpretation of the *Engle* findings is correct, it leads to the implied-preemption problem identified by the panel in this case. However, if *Walker*'s interpretation of the *Engle* findings is flawed, then there would be a grave due-process problem with permitting Plaintiff to use the *Engle* findings to establish elements of his claims, and the implied-preemption question might not even arise. Ordering briefing on the threshold due-process question would therefore enhance this Court's ability to consider the implied-preemption question within its broader legal context.

Before the panel, Appellants squarely raised the due-process issue but did not make it the focus of this appeal, because the panel was bound by *Walker*'s holding. That, of course, is not true for the *en banc* Court. And the due-process question is a critically important one that merits the *en banc* Court's attention.

The grounds for this motion are as follows:

1. This appeal raises two closely related questions involving the adjudication of claims for strict liability and negligence brought by plaintiffs in so-called “*Engle*-progeny” cases. Plaintiff here was permitted to use the defect and negligence findings made by the jury in the now-decertified class action in *Engle v.*



*Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), to establish the defect and negligence elements of his individual claims in this subsequent individual action. The questions presented are whether such use of the *Engle* findings is either (1) barred by federal due process or (2), if not, impliedly preempted by federal law. These questions arise out of the unusual procedural history of *Engle*, including how that case was tried and what that jury actually decided. Defendants' consistent position throughout this litigation has been that the only possible way to avoid a due-process problem is to create an insurmountable implied-preemption problem.

2. In *Engle*, a putative class of smokers raised strict-liability, negligence, and other claims against various large cigarette manufacturers, including the Defendants here. On each claim, the class asserted distinct alternative allegations of tortious conduct. For example, the class asserted that all cigarettes are defective, and the sale of all cigarettes is negligent, simply because cigarettes cause diseases and are addictive. In the alternative, the class also asserted various narrower allegations targeting particular brands or types of cigarettes, such as unfiltered cigarettes, filtered cigarettes, light or low-tar cigarettes, and cigarettes with specific additives. As the Florida Supreme Court later summarized the *Engle* trial record, the evidence and allegations "included brand-specific defects, but [they] also included proof that the *Engle* defendants' cigarettes were defective because they are addictive and cause disease." *Douglas*, 110 So. 3d at 423.

3. On the conduct elements of these claims, the *Engle* jury found only that the defendants had “placed cigarettes on the market that were defective and unreasonably dangerous” and “were negligent.” *Engle*, 945 So. 2d at 1256 n.4. The *Engle* jury was not asked to specify, and did not specify, which of the alternative allegations it had accepted, rejected, or simply not reached. In particular, the *Engle* jury did not specify whether its defect and negligence findings rested on the theory that all cigarettes are defective because of their inherent health and addiction risks or on some narrower alternative theory.

4. On appeal, the Florida Supreme Court in *Engle* prospectively decertified the class because individualized issues would predominate going forward. *See id.* at 1268. However, the Court permitted former class members to file individual actions in which the defect and negligence findings (among others) would have “res judicata effect.” *See id.* at 1269. Following that decision, thousands of plaintiffs filed such individual actions. This case is one of them.

5. A central issue in *Engle*-progeny cases has been whether the *Engle* jury findings are too ambiguous to establish essential elements of each individual’s progeny claims. For example, defendants have argued that the defect and negligence findings could rest on the theory that *unfiltered* cigarettes are defective for failure to have a filter, in which case the findings would not apply to claims by smokers of *filtered* cigarettes, or the findings could rest on the theory that *filtered*

cigarettes are defective because filters make cigarettes more dangerous, in which case the findings would not apply to claims by smokers of *unfiltered* cigarettes. In response, plaintiffs have urged a “broader view” that the findings “must mean that all cigarettes the defendants sold were defective and unreasonably dangerous because there is nothing to suggest that any type of brand of cigarettes is any safer or less dangerous than any other type or brand.” *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1335 (11th Cir. 2010) (summarizing plaintiffs’ argument).

6. In *Brown*, this Court agreed with Defendants that, if the *Engle* jury findings were ambiguous, they could not be used to establish individual elements of progeny claims. The Court reasoned that such use of the findings would be inconsistent with Florida preclusion law, which it understood as extending only to issues shown to have been “actually adjudicated” by the prior jury. *See id.* at 1334. Accordingly, the Court declined to reach the question whether such use of the findings would also violate due process, as the district court had held. *See id.* Moreover, despite the plaintiffs’ contention that the Florida Supreme Court in *Engle* had definitively construed the *Engle* jury findings, this Court remanded for the district court to “decide in the first instance precisely what facts are established when preclusive effect is given to the approved findings,” based on the district court’s own review of the *Engle* trial record. *Id.* at 1336.

7. In *Douglas*, the Florida Supreme Court rejected Defendants' state-law and due-process arguments that ambiguity in the *Engle* jury findings prevented their use to establish individual elements of progeny claims. In discussing the *Engle* trial record, that court acknowledged that the "proof submitted on strict liability included brand-specific defects, but it also included proof that the *Engle* defendants' cigarettes were defective because they are addictive and cause disease." 110 So. 3d at 423. The court further stated that the instructions in *Engle* told the jury to decide "common" issues. *See id.* In its ensuing analysis of due process, the court adopted a legal theory under which it did not matter what the *Engle* jury actually decided: The court reasoned that the "res judicata" mandated by *Engle* was "claim preclusion," which, "unlike issue preclusion, has no 'actually decided' requirement." *Id.* at 435. The court further observed that applying an actually-decided requirement (as mandated by traditional standards of issue preclusion) "would effectively make the Phase I findings regarding the *Engle* defendants' conduct useless in individual actions." *Id.* at 433. The consequence of that reasoning is that Defendants are liable for any theory of defect or negligence that the *Engle* jury could have decided against them, regardless of whether or not it actually did.

8. In *Walker*, this Court addressed how to apply the defect and negligence findings in light of *Douglas*. This Court construed *Douglas* as having "looked through the jury verdict entered in [*Engle*] to determine what issues the

jury decided.” 734 F.3d at 1287. Specifically, this Court read *Douglas* to have held that the *Engle* jury actually decided that “all” cigarettes are defective, and that the sale of “all” cigarettes is negligent, because cigarettes are addictive and cause various diseases. *Id.*; *see also id.* at 1281. This Court further held that it was bound, under the Full Faith and Credit Act, to accept that understanding of what the *Engle* jury had decided. *Id.* at 1286–87. Then, based on that understanding, the *Walker* panel rejected Defendants’ contention that use of the defect and negligence findings to establish individual elements of progeny claims violates due process. *See id.* at 1289 (“If due process requires a finding that an issue was actually decided, then the Supreme Court of Florida made the necessary finding ....”).

9. The panel in this case addressed the implied-preemption implications of *Walker*. After exhaustively recounting the history of *Engle*-progeny litigation, the panel concluded that, under *Walker*, the *Engle* findings are deemed to rest on the single theory that “all” cigarettes smoked by any progeny plaintiff are defective because they “are addictive and cause disease.” *Graham v. R.J. Reynolds Tobacco Co.*, 782 F.3d 1261, 1267–73 (11th Cir. 2015). The panel repeatedly stressed that only this construction of the findings could avoid the due-process problem. *See, e.g., id.* at 1273 (“Any findings more specific could not have been ‘actually decided’ by the [*Engle*] jury, and their claim-preclusive application would raise the specter of violating due process.”); *id.* at 1280 (“To avoid a due process violation,

the [*Engle*] findings must turn on the only common conduct presented at trial—that the defendants produced, and the plaintiffs smoked, cigarettes containing nicotine that are addictive and cause disease.”). But, that construction of the findings is precisely what gave rise to implied preemption: While federal law does not generally preempt strict-liability and negligence claims against cigarette manufacturers, it does impliedly preempt claims “premised on the theory that *all* cigarettes are inherently defective and that *every* cigarette sale is an inherently negligent act.” *Id.* at 1284–85. The panel based the latter conclusion on settled principles of implied conflict preemption, under which states cannot impose tort liability for conduct that Congress specifically has allowed, *see, e.g., Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881 (2000), and on a web of federal statutes specifically addressed to smoking and health, through which Congress had “foreclosed the removal of tobacco products from the market,” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 138–39 (2000). *See Graham*, 782 F.3d at 1274–79.

10. In seeking rehearing *en banc*, Plaintiff alleged two distinct conflicts between the panel decision and *Walker*. First, Plaintiff alleged that *Walker* must have rejected Defendants’ implied-preemption argument because, although the decision never mentioned that issue, Reynolds had briefly raised implied preemption as one reason (among many) for construing the *Engle* findings not to rest on the theory that all cigarettes are defective because of their inherent health and addic-

tion risks. *See* Petition for Rehearing En Banc at 5–6, *Graham*, No. 13-14590-EE (Apr. 28, 2015). Second, Plaintiff alleged that the panel’s critical premise in framing its preemption analysis—that this all-cigarettes interpretation of the *Engle* findings was compelled by due process—conflicted with *Walker*’s holding that use of the findings was consistent with due process. *See id.* at 14–15. This Court granted *en banc* review without calling for a response from Defendants.

11. Defendants agree that the proper use of the *Engle* findings in progeny litigation warrants the attention of the full Court. That question arises in, and is central to the conduct of, thousands of progeny actions that remain pending in the wake of *Engle*. However, to fully and fairly consider that question, the Court should allow briefing on both the due-process and implied-preemption issues. As the summary above makes clear, the due-process and implied-preemption issues are joined at the hip. Both arise out of, and are fundamentally shaped by, the jury findings in *Engle*. A clear understanding of what those findings establish is critical to determining whether Defendants may constitutionally be precluded from litigating particular elements of individual progeny plaintiffs’ claims. Likewise, a clear understanding of the findings is critical to determining whether they rest on an impermissible theory that the mere sale of cigarettes is tortious.

12. Moreover, the due-process and implied-preemption challenges are mutually reinforcing. An interpretation of the *Engle* defect and negligence find-

ings as resting on the theory that all cigarettes are defective because of their inherent health and addiction risks may mitigate due-process concerns, but it makes the implied-preemption problem more daunting. *See Graham*, 782 F.3d at 1274–83. Conversely, an interpretation of the findings as possibly resting on narrower theories specific to particular brands or types of cigarettes may mitigate implied-preemption concerns, but it makes the due-process problem more daunting. *See id.* at 1273, 1280. Defendants respectfully submit that one of these challenges must be right: Either the *Engle* defect and negligence findings ascertainably rest on the theory that all cigarettes are defective because of their inherent health and addiction risks, in which case their use in progeny litigation is impliedly preempted; or the *Engle* findings may rest on narrower alternative theories of defect and negligence, in which case their use in progeny litigation violates due process. But, for present purposes, it suffices to note only that one challenge cannot fully be considered without also considering the other.

13. The understanding of the *Engle* findings (and of *Douglas*) that *Walker* adopted is at least fairly debatable. To be sure, the Florida Supreme Court did stress that the *Engle* jury had decided only “common” issues. *See Douglas*, 110 So. 3d at 423. However, as a matter of Florida class-action law, “common” issues include those that “affect all or a substantial number of the class members,” *Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 107 (Fla. 2011)—as would here,



for example, a defect or negligence finding specific to filtered (or unfiltered) cigarettes. Moreover, while the first half of *Douglas* stressed the “common” nature of the *Engle* findings, the second half of the opinion specifically acknowledged that the findings would be “useless” in progeny cases if applied to establish only those issues that could be shown to have been actually decided in *Engle*. See 110 So. 3d at 433. And the court adopted a claim-preclusion rationale precisely because, under traditional claim preclusion, what the first jury actually decided does not matter. See *id.* at 435. Again, for present purposes, the question is not which understanding of the *Engle* findings or of *Douglas* is ultimately more persuasive, but only whether the full Court, in addressing the proper use of the *Engle* findings, should leave itself free to consider all possible alternatives.

14. *Brown* reinforces this conclusion. There, this Court expressed considerable skepticism that progeny plaintiffs could establish which theories of defect and negligence the *Engle* jury had actually decided in their favor. See 611 F.3d at 1336–37 & n.1 (Anderson, J., concurring) (“Nor have plaintiff’s arguments on appeal been persuasive in this regard. The generality of the [*Engle*] findings present plaintiffs with a considerable task.”); *id.* at 1336 n.11 (majority opinion incorporating concurrence). Moreover, in remanding for the district court to make that inquiry based on its own review of the *Engle* record, this Court rejected the contention that the Florida Supreme Court, whose *Engle* decision was acknowledged to

warrant full faith and credit (*see id.* at 1331), had already made that determination. *See id.* at 1336. Finally, to the extent *Douglas* goes beyond *Engle*, it is entitled to no preclusive effect here, because Florida law would afford it none in a case involving different plaintiffs. *See id.* at 1332–33 (setting forth mutuality requirement for preclusion under Florida law). For all of these reasons, an *en banc* decision narrowly limited to implied preemption might resolve one of the two alleged conflicts between the panel decision and *Walker*, but would leave standing the significant tension between *Walker* and *Brown*.

15. The due-process issue is particularly important in light of other appeals pending in this Court. Defendants have argued that use of the *Engle* concealment and conspiracy findings to establish the conduct elements of progeny claims violates due process because those findings could rest on many alternative theories of concealment that are “common” even in the sense that *Walker* understood that term. That issue was extensively briefed in *Searcy v. R.J. Reynolds Tobacco Co.*, No. 13-15258, which was argued more than fifteen months ago, on October 17, 2014, and then again briefed and extensively argued in *Burkhart v. R.J. Reynolds Tobacco Co.*, No. 14-14708, which was argued post-*Graham* on September 29, 2015. Those cases underscore the importance of the due-process issue and its connection to foundational questions about what the *Engle* jury actually decided. Moreover, to the extent this Court may have been holding one or both decisions

pending its disposition of the *en banc* petition in this case, that only underscores the fundamental relationship between the due-process and implied-preemption issues in *Engle*-progeny litigation.

16. The merits briefs filed in this case before the panel do not adequately address the due-process issue for purposes of *en banc*. Those briefs necessarily took *Walker* as a binding circuit precedent, raised due process only for preservation, and instead focused almost exclusively on the implied-preemption implications of *Walker*. Now that the Court has gone *en banc*, it should freshly consider the related issues addressed respectively in both cases.

WHEREFORE, the Court should enter a briefing order directing the parties to address both the question whether federal law impliedly preempts use of the *Engle* defect and negligence findings to establish individual elements of progeny claims and the question whether such use of the *Engle* findings violates due process.

Dated: February 1, 2016

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 1, 2016, I electronically filed the foregoing APPELLANTS' MOTION REGARDING ISSUES TO BE INCLUDED IN *EN BANC* BRIEFING using the Court's Appellate PACER system, which will automatically send notification to all counsel of record.

/s/ Charles R.A. Morse

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