No. ____

In the
Supreme Court of the United States

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

Petitioners,

v.

THERESA GRAHAM, as personal representative of Faye Dale Graham,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MIGUEL A. ESTRADA
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., NW
Washington, DC 20036
(202) 955-8500

Counsel for Philip Morris USA Inc.

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
MICHAEL D. LIEBERMAN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for R.J. Reynolds Tobacco Company

(*Additional Counsel Listed on Inside Cover*)

September 15, 2017

ANDREW L. FREY
LAUREN R. GOLDMAN
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2500

Counsel for Philip Morris USA Inc.

MICHAEL A. CARVIN
YAAKOV ROTH
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939

Counsel for R.J. Reynolds Tobacco Company

QUESTIONS PRESENTED

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

The questions presented are:

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

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

PARTIES TO THE PROCEEDING

Defendants-appellants below, who are petitioners before this Court, are R.J. Reynolds Tobacco Company, individually and as successor by merger to Brown & Williamson Tobacco Corporation and The American Tobacco Company, and Philip Morris USA Inc.

Plaintiff-appellee below, who is respondent before this Court, is Theresa Graham, as personal representative of Faye Dale Graham.

CORPORATE DISCLOSURE STATEMENT

Petitioner R.J. Reynolds Tobacco Company is a wholly owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc., which is a wholly owned subsidiary of Reynolds American Inc. ("RAI"), which in turn is an indirect, wholly owned subsidiary of British American Tobacco p.l.c., a publicly held corporation.

Petitioner Philip Morris USA Inc. is a wholly owned subsidiary of Altria Group, Inc. Altria Group, Inc. is the only publicly held company that owns 10% or more of Philip Morris USA Inc.'s stock. No publicly held company owns 10% or more of Altria Group, Inc.'s stock.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Many petitions ask this Court to resolve complex constitutional questions about which reasonable minds can differ. This is not such a petition. The constitutional principle at stake here is obvious and has been established for over a century: Before imposing liability, a state must allow the defendant *to defend itself* on every element of the plaintiff's claim—in short, to contest whether it is liable for the plaintiff's injuries. As Judge Tjoflat's extraordinary dissent lays bare over the course of its 227 pages, the Florida courts have abandoned that bedrock due-process rule "to the unique detriment of a single group of unpopular defendants," App.260-61 n.265, subjecting tobacco companies to massive liability even though there is no way to know whether any jury has ever found that they committed tortious acts that harmed the plaintiffs. And through what Judge Tjoflat described as "a transparently nonsensical opinion," App.252, a divided *en banc* Eleventh Circuit has now blessed that manifestly unconstitutional regime by purporting to give full faith and credit to a position twice disavowed by the Florida Supreme Court.

Making matters worse, the *en banc* majority's effort to avoid the obvious due-process problem with depriving defendants of the chance to contest facts that no prior factfinder ascertainably found is too clever by half, as it just creates a federal preemption problem. The majority dismissed that preemption problem only by accepting the proposition that states may ban the sale of cigarettes altogether, notwithstanding the carefully calibrated balance

Congress struck when it decided to require disclosure of cigarettes' risks while allowing their continued sale. The decision below thus not only sanctions massive and seriatim due process violations, but does so by embracing a theory that suffers from an insurmountable preemption problem.

That is not a result that this Court should tolerate. There are still *thousands* of pending cases, each seeking millions of dollars in damages, that will be controlled by the truncated procedures the decision below has blessed. And in each case, courts are employing an "unconstitutional conclusive presumption" to impose liability, App.267 (Tjoflat, J.), in a gross departure from the most fundamental requirements of due process. Indeed, as Judge Tjoflat explained in his mammoth dissent, the only consistent thread in the conflicting and ever-shifting efforts of courts to reconcile the proceedings they have sanctioned with due process "is that *Engle*-progeny courts have rested their thumbs on the scales to the detriment of the unpopular *Engle* defendants." App.48.

With the *en banc* Eleventh Circuit having spoken (albeit in deeply divided fashion), this Court is now the only remaining safeguard to prevent a major industry from suffering an unparalleled unconstitutional deprivation of property. Those stakes plainly merit this Court's attention. The Court should grant review and confirm that tobacco companies, like companies in all other industries, are entitled to the most basic guarantees of due process.

OPINIONS BELOW

The Eleventh Circuit *en banc* opinion is reported at 857 F.3d 1169 and reproduced at App.1-310. The panel opinion is reported at 782 F.3d 1261 and reproduced at App.311-59. The district court's opinion is available at 2013 WL 12166326 and reproduced at App.360-81.

JURISDICTION

The Eleventh Circuit issued its *en banc* opinion on May 18, 2017. Justice Thomas extended the time for filing a petition to September 15, 2017. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause, Supremacy Clause, and Full Faith and Credit Act are reproduced at App.382-83.

STATEMENT OF THE CASE

This case presents due process and preemption questions at the heart of thousands of so-called "*Engle*-progeny" cases. These cases are the aftermath of a fundamentally flawed class action pressing the tort claims of thousands of individuals who smoked dozens of different brands of cigarettes during a 40-year period. Over the course of a sprawling year-long trial, the class presented scores of theories of defect and negligence, many of which implicated only *particular* cigarette brands, or *particular* designs, or *particular* time periods. Yet, over defendants' repeated objections, the jury was never asked to identify which of those theories it accepted or rejected or did not consider at all. As a result, there is no way to know

what underlies the jury's general findings that each defendant committed one or more negligent acts and manufactured one or more defective products.

On direct appeal, the Florida Supreme Court prospectively decertified the class, recognizing that it involved too many individualized issues. But instead of discarding the jury findings that the class trial had produced, the court directed lower courts to give those findings "res judicata effect" in subsequent cases brought by former class members. In this case, as in every other *Engle*-progeny case, the district court implemented that direction by simply instructing the jury that defendants "placed cigarettes on the market that were defective and unreasonably dangerous" and that defendants were "negligent."

Defendants thus were prohibited from even attempting to contest that the particular cigarettes Ms. Graham smoked by the decedent were defective, or that their conduct toward her was negligent—even though there is no way to know whether the *Engle* jury actually found that defendants committed any tortious conduct that affected the decedent. Indeed, for all anyone knows, the *Engle* jury could have *absolved* defendants of all wrongdoing with respect to the particular brands, designs, and time periods relevant to the decedent's smoking history, and instead based its generic findings exclusively on unrelated conduct.

That anomalous procedure is the product of a long line of competing, conflicting, and ultimately unsuccessful efforts by courts to explain how the *Engle* findings can be used to excuse plaintiffs from proving

the basic elements of their claims without violating defendants' due process rights.

A. The *Engle* Trial

1. *Engle* was one of several putative class actions initiated in the 1990s seeking billions of dollars from tobacco companies based on tort claims on behalf of "nicotine-addicted" individuals who smoked cigarettes. The effort in *Engle* was particularly ambitious: Individuals seeking to represent nicotine-addicted individuals across the country brought suit in Florida state court alleging assorted tort claims and seeking to recover hundreds of billions of dollars. Most courts rejected these so-called "addiction classes," finding the claims far too individualized for class-wide adjudication. *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, the smokers these classes sought to represent "were 'exposed to different … products, for different amounts of time, in different ways, and over different periods.'" *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998). Nevertheless, the Florida courts forged ahead, simply limiting the putatively nationwide effort to Florida and certifying 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).

Over 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 the loosest pre-*Wal-Mart* sense: Whether, over a period spanning four decades, each defendant did anything that *might* make it liable to *any* class member on *any* of the class' claims. If the class prevailed during Phase I, the same jury would decide in Phase II whether defendants' conduct injured the three class representatives. If so, the jury would determine compensatory damages for those three individuals, would decide whether the entire class was entitled to punitive damages and, if so, would make a "lump sum" punitive award for the class. During Phase III, new juries would try individual class members' claims, with successful members sharing in any punitive damages award. App.57-58 (Tjoflat, J.).

2. Unsurprisingly, presenting evidence on dozens of theories of wrongful conduct allegedly committed by multiple companies over a four-decade period proved unwieldy. In the year-long Phase I trial, plaintiffs presented evidence on every theory of wrongdoing that they could muster—including theories that applied only to certain cigarettes and/or time periods—in hopes that something would stick and provide a gateway to punitive damages. For example, the class presented evidence that "*some* cigarettes were manufactured with the breathing air holes in the filter being too close to the lips," that "*some* filters … utilize[d] glass fibers that could produce disease," that *some* cigarettes used "a higher nicotine content tobacco called Y-1," and that ammonia was "*sometimes*" used to increase nicotine levels. *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 423-24 (Fla. 2013) (emphasis added). Some evidence focused in alleged defects in "light" cigarettes, while other

evidence attacked "full-flavor" cigarettes. And the evidence "spann[ed] decades of tobacco-industry history," from 1953 until 1994. App.59 (Tjoflat, J.).

At the end of the trial, the jury was not asked to make findings on the particular theories of defect or negligence that were litigated during the trial. Nor was it asked any comprehensive questions that would have established a common basis for liability for all class members, such as whether *all* cigarettes were defective.[1] Instead, it was asked, on the class' strict-liability claim, only whether each defendant "place[d] cigarettes on the market that were defective and unreasonably dangerous"; and, on negligence, only whether each defendant "failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances." App.295, 306 (Tjoflat, J.). To answer these questions "yes," the jury needed to find only that each defendant manufactured a single defective cigarette or committed a single negligent act over the multi-decade time periods specified.

Defendants objected that these generic questions would produce findings that would be "useless for application to individual plaintiffs," App.67-68, as affirmative answers would establish only that a defendant marketed *a* defective cigarette, without identifying *which* brands or types of cigarette(s) or *what* defect(s). That would leave plaintiffs in Phase

[1] The jury was asked to make more specific findings about whether smoking cigarettes causes specific diseases. App.9. Defendants do not challenge the issue-preclusive effect of those specific findings, because the verdict form makes clear what the jury actually decided.

III trials "unable to prove that the defendants' negligent conduct caused [their] harm," because they would be unable to "identify the conduct the Phase I jury deemed negligent." App.64 n.18 (Tjoflat, J.).

For example, while some class members smoked only filtered cigarettes, the jury could have based its generic findings on evidence purporting to show only that *un*filtered cigarettes were defective. Likewise, many class members may not have smoked cigarettes that utilized glass fibers, Y-1, or ammonia, yet the jury was presented with evidence that each of those brand-specific characteristics was the source of the purported defect and/or negligence, and may have rested its verdict solely on such evidence. Accordingly, if the jury was not asked *what* defect it found, or *what* conduct it deemed negligent, there would be no way to know whether a defect or negligence finding applied to the particular cigarettes the class member smoked, and thus no way to apply the findings to the class members, each of whom smoked only certain brands or types of cigarettes. The trial court nonetheless overruled defendants' objections and asked the jury only the generic yes-or-no questions, to which the jury answered "yes" for each defendant. App.67-69 (Tjoflat, J.).

By design, the Phase I jury's findings "did *not* determine whether the defendants were liable to anyone." *Engle III*, 945 So. 2d at 1263. The trial thus proceeded to Phase II, where the same jury found the defendants liable to the three class representatives and returned a class-wide *$145 billion* punitive damages verdict—at the time, the largest in U.S. history. App.69-79 (Tjoflat, J.).

3. Before Phase III began, the intermediate appellate court reversed, holding "that certification of smokers' cases is unworkable and improper." *Engle II*, 853 So. 2d at 443-44. As the court explained, the trial court had allowed the class to "try fifty years of alleged misconduct that they never would have been able to introduce in an individual trial." *Id.* at 467 n.48. Worse still, the jury made no "specific findings as to any act by any defendant at any period of time," making the findings useless for application to individual plaintiffs. *Id.* The resulting "tainted" verdict required "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 prospectively. *Engle III*, 945 So. 2d at 1254. It also agreed that the $145 billion punitive damages award must be vacated, as punitive damages could not be awarded to plaintiffs who had not proven their individual claims. *Id.* But rather than follow the intermediate court's lead and reverse in full, the court fashioned a "pragmatic solution" in the apparent hope of salvaging as much of the class proceedings as possible: It retroactively certified an issues class action under Florida's analog to Federal Rule of Civil Procedure 23(c)(4), "retain[ed]" most of the jury's Phase I findings, and directed courts to give those findings "res judicata effect" in individual cases filed by class members within one year of the court's mandate. *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. *See id.* at 1284 (Wells, J., concurring in part

and dissenting in part) (objecting to this "problematic" directive).

B. The *Engle*-Progeny Litigation

1. Over the next year, approximately 9,000 individuals claiming to be *Engle* class members filed suit in Florida state and federal courts. Invoking the Florida Supreme Court's "pragmatic solution," plaintiffs insisted that they did not need to prove any specific tortious acts relevant to their own injuries—*e.g.*, that the cigarettes they smoked were defective. Instead, plaintiffs sought to establish the tortious-conduct elements of their claims simply by having juries instructed that they were bound by the *Engle* jury's findings to accept that each defendant's cigarettes were "defective" and that each defendant was "negligent." App.16-17.

The first federal court to confront this anomalous procedure recognized the obvious problem with trying to use the *Engle* findings to establish the tortious-conduct elements of plaintiffs' claims when the 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. *See 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's reference to *res judicata* could not possibly have been intended to imbue the findings with *claim*-preclusive effect because claim preclusion is a *defense* that applies only to final judgments, which Phase I did not produce. *Id.* at 1339-40. But the findings were also useless for issue-preclusion purposes because their generality made it impossible to "discern what specific issues were actually decided by the Phase I

jury," which is an indispensable requirement for issue preclusion. *Id.* at 1342, 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.* at 1344.

Plaintiff appealed, and the Eleventh Circuit vacated and remanded. *Brown v. R.J. Reynolds Tobacco Co.* (*Brown II*), 611 F.3d 1324 (11th Cir. 2010). Plaintiff stipulated that the Florida Supreme Court must have meant issue preclusion, not claim preclusion. *Id.* at 1333 n.7. The dispute, therefore, was about what the Phase I jury "actually decided." Defendants argued that, given the generalized findings and disparate evidence, it was impossible to determine whether the jury decided anything more than that each defendant marketed some defective cigarette and engaged in some negligent act. Plaintiff, by contrast, maintained that the findings could be "fleshed out" by looking to "the record as a whole." *Id.* at 1335. Although the court saw "nothing in the record" to support plaintiff's argument given the many varying theories pressed at trial, it allowed plaintiff to try to "flesh out" the findings on remand. *Id.*

2. State appellate courts considering progeny cases were equally perplexed. In *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. Dist. Ct. App. 2010), the First District rejected defendants' argument that the *Engle* findings "establish nothing relevant to any individual class member's action"—not necessarily because it disagreed, but because accepting that position "would essentially nullify" the Florida Supreme Court's command to give the findings

"res judicata effect." *Id.* at 1066. The court's solution was to interpret the *Engle* findings as encompassing *every* theory that had been presented to the *Engle* jury. As long as the class had presented sufficient evidence to support a finding, that finding would be deemed to have been made—even though the jury was never actually asked to make it and in fact could have made its general findings even if it *rejected* all but one of the class' defect and negligence theories. As Judge Tjoflat later observed, this "strange sufficiency-of-the-evidence standard" was equivalent to giving issue-preclusive effect "to the *evidence* presented." App.155, 161.

The Fourth District was next, and it rightfully worried that the First District's approach "violates [defendants'] due process rights." *R.J. Reynolds Tobacco Co. v. Brown*, 70 So. 3d 707, 716 (Fla. Dist. Ct. App. 2011). But because it, too, felt "compelled" to follow the Florida Supreme Court's command, it embraced the same dubious solution. *Id.* at 715-16. In a special concurrence, Judge May highlighted the "lurking constitutional issue" pervading progeny litigation: "To what extent does the preclusive effect of the *Engle* findings violate the manufacturer's due process rights?" *Id.* at 720.

3. The Florida Supreme Court finally confronted that issue in *Douglas*. The *Douglas* court acknowledged that the *Engle* findings were "useless in individual actions" for issue-preclusion purposes because they did not identify the particular conduct the jury deemed tortious. 110 So. 3d at 433. But rather than follow that conclusion to its logical end—*i.e.*, the findings cannot be used to establish the

tortious-conduct elements of plaintiffs' claims—the court responded with an utter novelty that defied the expectations of every court, state or federal, to wrestle with the issue. The court interpreted its *Engle* decision's use of the term "res judicata" as a reference to claim preclusion, rather than issue preclusion—even though claim preclusion is a *defense*, used to preclude parties from relitigating *claims* that have been adjudicated in or extinguished by prior litigation, not an *offensive* doctrine plaintiffs may invoke to preclude defendants from litigating issues. And the court dealt with the rather obvious problem that there was no final judgment in *Engle* by simply characterizing the Phase I verdict as "a final judgment." *Id.*

The court's motive for all this relabeling was clear. As it observed, "claim preclusion, unlike issue preclusion, has no 'actually decided' requirement." *Id.* at 435. The court's novel approach thus allowed plaintiffs to preclude defendants from contesting any issues the jury *might* have decided in the class' favor, regardless of what issues it *actually* decided. Justice Canady dissented, calling the majority's decision "a radical departure from the well-established Florida law concerning claim preclusion." *Id.* at 439.

4. In the first federal appeal after *Douglas*, defendants argued that *Douglas*' approach did not fix the constitutional problem, but rather made the due-process violation even more apparent. Offensive claim preclusion is an oxymoron, and claim preclusion without a final judgment is a stranger to the Anglo-American legal system. But instead of deciding whether the Florida Supreme Court's definitive view

of the *Engle* findings and Florida preclusion law was consistent with due process, the Eleventh Circuit dodged the question through what Judge Tjoflat would later describe as "a transparently nonsensical opinion," App.252. *See Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013).

The *Walker* court began by recognizing that, subject to constitutional limits, the Full Faith and Credit Act required it to honor the Florida Supreme Court's decision in *Engle* as interpreted in *Douglas*. *Id.* at 1286. But it then proceeded to give full faith and credit to an interpretation of *Engle* that is flatly inconsistent with *Douglas* itself: It insisted that *Douglas* concluded that the *Engle* jury, despite being presented with scores of brand- and type-specific theories, had "actually decided" that *all* cigarettes are defective, and that simply selling them is negligent. *Id.* at 1281-82, 1287-88. In other words, the court read *Douglas* as holding not just that the *Engle* jury *could have* found all cigarettes defective, but that the *Engle* jury did in fact rest its findings on that all-cigarettes reasoning.

Having done so, the court avoided the need to decide whether the novel version of claim preclusion *Douglas* invented complies with due process. In the *Walker* court's view, because it had to accept *Douglas*' purported conclusion that the *Engle* jury decided that all cigarettes are defective, it could give that non-existent finding *issue*-preclusive effect without running afoul of due process' "actually decided" requirement.

C. The Proceedings Below

This petition arises out of an *Engle*-progeny case filed by the personal representative of Faye Graham, who plaintiff alleges died from addiction to cigarettes manufactured by defendants. App.16. The jury was not asked whether defendants acted negligently or whether the cigarettes Ms. Graham smoked were defective. Instead, as is now the norm in progeny cases, the district court instructed the jury that, if it found that Ms. Graham was an *Engle* class member, it would be bound by the *Engle* jury's findings that defendants were "negligent" and "placed cigarettes on the market that were defective." App.312-13. To find class membership, the jury was required to find only that addiction to smoking, not any particular tortious conduct by defendants, caused Ms. Graham's death. App.333. The jury found for plaintiff on her strict-liability and negligence claims, and awarded compensatory damages. App.17.

On appeal, defendants argued that *Walker*'s all-cigarettes-are-defective reading of *Engle* (which was binding on the panel) created an insurmountable preemption problem, as Congress had foreclosed tort claims premised on the notion that cigarettes are inherently defective. The panel unanimously agreed, explaining that if the *Engle* jury really did find "that *all* cigarettes are inherently defective," App.358, then using those findings to impose liability would be equivalent to imposing liability on defendants simply for selling cigarettes, which would conflict with "Congress's clear purpose and objective of regulating—not banning—cigarettes." App.353.

At plaintiff's urging, the Eleventh Circuit granted *en banc* review, and the court directed the parties to address both preemption and whether "giving effect to the jury's findings in *Engle* would 'violate the tobacco companies' rights under the Due Process Clause.'" App.17.

While the *en banc* proceedings were pending, the Florida Supreme Court confronted the same question of whether treating the *Engle* findings as establishing that all cigarettes are defective creates a preemption problem. *R.J. Reynolds Tobacco Co. v. Marotta*, 214 So. 3d 590 (Fla. 2017). The court answered that question by rejecting its premise—*i.e.*, by definitively rejecting *Walker*'s all-cigarettes-are-defective reading of the *Engle* findings. It explained that although the jury heard evidence about "the inherent dangers of all cigarettes," it also heard evidence about other theories, including "that the defendants intentionally manipulated nicotine levels in their products." *Id.* at 601-02. Because the jury could have rested its findings on one of these narrower theories, the court concluded that using the *Engle* findings to impose liability did not pose a preemption problem. *Id.*[2] *Marotta* thus reiterated that the *Engle* findings must be given claim-preclusive effect without regard to what the jury "actually decided." *Id.* at 593.

Yet without even mentioning *Marotta*'s express rejection of *Walker*'s all-cigarettes approach, the *en banc* court doubled down on its contrary reading of the findings, insisting once again that it had to defer to

[2] The court alternatively held that federal law does not preempt tort claims based on the theory that all cigarettes are inherently defective. *Id.* at 600-01.

the Florida Supreme Court's supposed conclusion that the *Engle* jury actually decided "that *all* cigarettes the defendants placed on the market were defective and unreasonably dangerous." App.20. Moreover, the *en banc* court continued to maintain that *issue* preclusion was the proper framework, App.23, even though *Marotta* reiterated that *Douglas* demands *claim* preclusion, and even though *Douglas* was clear that the *Engle* findings could not satisfy the requirements of Florida issue-preclusion law, 110 So. 3d at 433. Turning to preemption, the majority held that the federal statutes regulating the tobacco industry do not reflect a "clear and manifest purpose to displace tort liability based on the dangerousness of all cigarettes manufactured by the tobacco companies." App.41.

In a 227-page dissent, Judge Tjoflat exhaustively recounted the history of the *Engle* litigation, "detailing layer upon layer of judicial error committed by numerous state and federal courts, culminating finally with the Majority's errors today." App.95. As he explained, the *Engle* findings establish only "*that* the *Engle* defendants engaged in proscribed conduct," not "*what* the defendants actually did," rendering those findings "useless" in helping any plaintiff prove that the defendants did something wrong *to him*. App.44. By using those findings to excuse plaintiffs from proving essential elements of their claims, courts are depriving defendants of property through "an unreasonable and arbitrary presumption of liability." App.48-49. And while the Florida Supreme Court has adopted a claim-preclusion rationale that the *en banc* majority "correctly, albeit implicitly, recognize is unconstitutional," the *en banc* majority, "instead of simply refusing to apply the Florida courts'

unconstitutional rationale," applied its own equally problematic rationale, which "is similarly sullied with constitutional errors." App.291. The sad story of *Engle* litigation, Judge Tjoflat concluded, is one of courts repeatedly bending the rule of law "to punish unpopular defendants and benefit sympathetic plaintiffs." App.216.

Judge Tjoflat also dissented on preemption, concluding that "Congress would have intended to preempt Graham's strict-liability and negligence claims, rooted as they are in a broadly applicable state law … that deems all cigarettes defective, unreasonably dangerous, and negligently produced." App.285. He emphasized "the uncertainty surrounding this particular issue and preemption generally" and "urge[d] the Supreme Court to clarify the hazy state of preemption law." App.285-86.

Judges Wilson and Julie Carnes also dissented from the majority's due process holding. Judge Wilson agreed with Judge Tjoflat that "the use of the *Engle* jury's highly generalized findings in other forums" does not satisfy "the minimum procedural requirements of the … Due Process Clause." App.310. Judge Carnes likewise concluded that the *Engle* "jury findings are too non-specific to warrant them being given preclusive effect in subsequent trials," and that "defendants' due process rights were therefore violated." App.42. Judge Carnes concurred in the majority's preemption holding, App.42; Judge Wilson saw no need to reach that question, App.310.

REASONS FOR GRANTING THE PETITION

As the Eleventh Circuit recognized when it agreed to hear this case *en banc*, and Judge Tjoflat stressed

when he penned his remarkable 227-page dissent, this petition presents issues of exceptional practical importance. The questions presented are central to thousands of pending cases that each seek millions of dollars in damages against a major domestic industry. And the decision below is manifestly wrong: The preclusion scheme the Florida Supreme Court concocted, and the *en banc* Eleventh Circuit has now approved (albeit on a rationale irreconcilable with the Florida Supreme Court's), is facially contrary—indeed, offensive—to due process. Tobacco companies may not be popular, but they are entitled to the same basic constitutional protections as any other defendant. With both the state supreme court and *en banc* Eleventh Circuit unwilling to vindicate the rule of law, this Court's intervention is needed now more than ever.

To be sure, *Engle* is an exclusively Florida phenomenon, so there is necessarily no conflict among the circuits on the due process question. But there is a stark conflict in rationale between the Florida Supreme Court and the *en banc* Eleventh Circuit, with the two courts construing the *Engle* findings in irreconcilable (but equally indefensible) ways. There is also a fierce conflict *within* the only federal Court of Appeals in which the issues will ever arise, with dissents from not only Judge Tjoflat, but also Judges Wilson and Julie Carnes. This Court has not hesitated to grant certiorari in other cases when (as here) constitutional principles are at stake and no conflict is likely to arise. *See, e.g.*, *Oil States Energy Servs. LLC v. Greene's Energy Grp., LLC* (No. 16-712); *SAS Institute Inc. v. Lee* (No. 16-969); *District of Columbia v. Wesby* (No. 15-1485).

As plaintiff undoubtedly will point out, this Court has denied review in other *Engle* cases, including *Walker*. But that was before the Eleventh Circuit took the issues *en banc*, confirming their importance and eliminating any opportunity for self-correction. It was before Judge Tjoflat wrote his exhaustive dissent exposing what he described as the "disingenuous" reasoning of the majority below and the Florida Supreme Court. App.114. It was before the Florida Supreme Court decided *Marotta*, making undeniable the conflict with the Eleventh Circuit's revisionist "all-cigarettes-are-defective" rationale. And it was before the state or federal courts considered the implication of that latter rationale on the compatibility of the *Engle* findings with federal statutory law, presenting an important preemption issue in its own right that has divided courts. As those developments underscore, this Court now stands as the sole remaining forum to step in and prevent these unparalleled deprivations of property without the most basic protections of due process.

I. The Decision Below Sanctions Massive And Seriatim Due Process Violations.

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

The constitutional violation repeatedly inflicted in *Engle*-progeny cases is straightforward: Due process requires that, before a defendant is subjected to liability, each element of the plaintiff's claim must be found against the defendant. Yet in *Engle*-progeny cases, courts simply instruct the jury that, if the plaintiff proves membership in the *Engle* class, the

jury must accept that the defendant committed tortious acts against the plaintiff, even though—as the Florida Supreme Court has twice admitted—there is no way to know whether the *Engle* jury so found. No matter the label—either issue preclusion or claim preclusion—this is patently unconstitutional.

1. It "hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision … does not meet [the due process] standard." *Bell v. Burson*, 402 U.S. 535, 542 (1971). If a court simply *assumes* that an element of a plaintiff's claim is satisfied—and does not give the defendant a fair chance to contest it—the defendant is deprived of property without due process. As this Court put it long ago, "a presumption … that operates to deny a fair opportunity to repel it, violates the due process clause." *W. & Atl. R.R. v. Henderson*, 279 U.S. 639, 642 (1929).

To be sure, if a defendant had a fair opportunity in a prior action to contest a fact—*and it was actually resolved against him*—then there is no constitutional problem with treating that finding as preclusive on the issue in later litigation. But it is "clearly settled" that issue preclusion applies only when a prior fact-finder *actually decided* the relevant issue. 18 Wright & Miller, *Federal Practice and Procedure* §4420 (3d ed.). Conversely, if evidence is "offered at the prior trial upon several distinct issues," and a decision on any one of them would justify the verdict, then "the prior decision is not an adjudication upon any particular issue or issues, and the plea of *res judicata* must fail." *Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904); *see also, e.g.*, *Cromwell v. Cty. of Sacramento*,

94 U.S. 351, 353 (1876) ("the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined"); Restatement (Second) of Judgments § 27, cmt. e (1982).

This "actually decided" requirement is not just a procedural nicety; it is mandated by due process. In *Fayerweather*, a federal court dismissed a suit on the ground that the plaintiffs' claims were precluded by a prior state-court judgment. The plaintiffs sought review in this Court, arguing that the state court had not "actually decided" the relevant issue. By statute, this Court's jurisdiction turned on whether the case presented a constitutional question. 195 U.S. at 297-98. The Court held that it had jurisdiction, explaining that it would violate due process to give "unwarranted effect to a judgment" by accepting as a "conclusive determination" a verdict "made without any finding of the fundamental fact." *Id.* at 297, 299. Since then, the Court has repeatedly rejected "extreme applications of the doctrine of res judicata" that do not comport with due process. *Richards v. Jefferson Cty.*, 517 U.S. 793, 797 (1996); *see Hansberry v. Lee*, 311 U.S. 32, 37 (1940); *Postal Tel. Cable Co. v. Newport*, 247 U.S. 464, 475 (1918).

Under the universally accepted and constitutionally mandated understanding of issue preclusion, the *Engle* findings are "useless" for progeny plaintiffs, *Douglas*, 110 So. 3d at 433, because they do not establish that the jury "actually decided" the tortious elements of any plaintiff's claim. To be sure, they establish that the defendants did *something*

wrong, but in Florida (as everywhere else), "negligence in the air, so to speak, will not do"; tort liability exists only when the defendant did something wrong *to the plaintiff*. *Gehr v. Next Day Cargo, Inc.*, 807 So. 2d 189, 191 (Fla. Dist. Ct. App. 2002) (quoting *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928)). Yet although evidence was "offered at the [*Engle*] trial upon several distinct issues," *Fayerweather*, 195 U.S. at 307, the *Engle* findings do not say "exactly what the Defendants did wrong and when." *Brown I*, 576 F. Supp. 2d at 1342. As a result, there is no way to know what the jury "actually decided," and using "the *Engle* jury's highly generalized findings in other forums" violates the "procedural requirements of the … Due Process Clause." App.310 (Wilson, J.).

This Court need not take defendants' word for that. The *Engle* trial court's post-trial order details the "many ways" in which the jury could have found defendants' cigarettes defective, including because "levels of nicotine were manipulated, sometime[s] by utilization of ammonia," "sometime[s] by using a higher nicotine content tobacco called Y-1," and sometimes "by other means" altogether. *Engle v. R.J. Reynolds Tobacco* (*Engle I*), No. 94-08273-CA-22, 2000 WL 33534572, at *2 (Fla. Cir. Ct. Nov. 6, 2000). The jury also could have found a defect for reasons having nothing to do with nicotine manipulation—for example, because "some cigarettes were manufactured with the breathing air holes in the filter being too close to the lips." *Id.*

To state the obvious, the only cigarettes that could be found defective for containing ammonia, or Y-1, or air holes "too close to the lips," are cigarettes that

actually possessed those qualities. And the only plaintiffs who could benefit from such a finding are plaintiffs who actually smoked such cigarettes. Yet there is no way to know which of these (or the class' many other) theories the jury accepted—and which it rejected or never even considered—in reaching its findings. Accordingly, the only smoker who could constitutionally use those findings is the class' imaginary "composite plaintiff who smoked every single brand of cigarettes." *Engle II*, 853 So. 2d at 467 n.48.

2. The Florida Supreme Court acknowledged exactly that when it declared the findings "useless" for issue-preclusion purposes. *Douglas*, 110 So. 3d at 433. But the novel version of claim preclusion the court embraced to get around that problem is as incoherent as it is unconstitutional. As its name suggests, claim preclusion is a defense that *precludes* certain *claims* from being brought or relitigated altogether. *See Rivet v. Regions Bank of La.*, 522 U.S. 470, 476 (1998). It does not allow a plaintiff to use prior findings offensively to *litigate* claims with certain *issues* deemed precluded. There is a doctrine for that, but it is issue preclusion, and it requires the issue to have been actually decided in the prior litigation. A doctrine of "claim preclusion" that permits a plaintiff to foreclose litigation of issues that were not actually decided by a prior fact-finder is a complete novelty.

Moreover, it is bedrock law that claim preclusion applies only after a "final judgment" on the merits. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008); *Schuler v. Israel*, 120 U.S. 506, 509 (1887). That "has long been a cardinal rule," in Florida and everywhere else.

App.102 (Tjoflat, J.). Here, there was no final judgment in *Engle* in favor of Ms. Graham or any other progeny plaintiff. Indeed, the Florida Supreme Court retroactively certified *Engle* as an *issues* class, and in doing so reiterated that Phase I "did *not* determine whether the defendants were liable to anyone." *Engle III*, 945 So. 2d at 1263, 1268. The Florida Supreme Court attempted to sidestep this problem in *Douglas* by simply declaring the *Engle* findings a final judgment, 110 So.3d at 433—but labeling findings on issues a final judgment does not make them so.

Nor does it solve the constitutional problem. In fact, the Florida Supreme Court's justification for all this relabeling actually underscores the constitutional problem. The *Douglas* court candidly recognized that if the *Engle* findings had to satisfy the actually-decided requirement of Florida issue-preclusion law (and due process), then the findings would be useless in follow-on individual cases. The court seized on the claim-preclusion label precisely because claim preclusion does not have an actually-decided requirement. But claim preclusion has other requirements, such as a final judgment, that are not satisfied here. And there is a very good reason why claim preclusion has no actually-decided requirement: Where claim preclusion applies, further litigation of the entire claim is barred, making it immaterial what issues were decided in reaching the judgment being given claim-preclusive effect. By embracing a doctrine that: 1) precludes the litigation of issues, not claims; 2) applies whether or not the issues were actually decided; 3) can be used offensively, not merely as a defense; and 4) does not require a traditional final judgment, the court embraced a preclusion doctrine

with no precedent, or even grounding, in Anglo-American jurisprudence.[3]

At bottom, the Florida Supreme Court's version of claim preclusion is just issue preclusion stripped of its "actually decided" requirement: It precludes defendants from contesting the tortious-conduct elements of progeny claims even though no jury ascertainably found those elements in prior litigation. Calling that forbidden result claim preclusion does not solve the problem: While "[s]tate courts are free to attach such descriptive labels to litigations before them as they may choose," those labels are not determinative for due process purposes. *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); App.109-10 (Tjoflat, J.). If a state court cannot eliminate the "actually decided" requirement when it applies issue preclusion, *see Fayerweather*, 195 U.S. at 307, surely it cannot effect the same result just by calling it something else.

B. The Decision Below Both Ignores and Compounds the Due Process Problem That Pervades *Engle*-Progeny Cases.

The Eleventh Circuit had the opportunity to right this egregious constitutional wrong in *Walker*. Instead, it punted, and "effectively rewrote *Douglas*" in a way that allowed it to purport to avoid the due

---

[3] Making matters worse, this bizarre form of claim preclusion does not work both ways. When defendants sought to bar a progeny plaintiff from pursuing punitive damage claims that the *Engle* plaintiffs forfeited, the Florida Supreme Court declared that the *Engle* plaintiffs' waiver "would not have the same res judicata effect as is generally the case when litigation is declared res judicata." *Soffer v. R.J. Reynolds Tobacco Co.*, 187 So. 3d 1219, 1227 (Fla. 2016).

process problem altogether. App.248 (Tjoflat, J.). It pretended that the Florida Supreme Court had concluded that the *Engle* jury actually found all cigarettes defective, and then pretended that when *Douglas* said claim preclusion, it really meant that it was giving issue-preclusive effect to this (non-existent) all-cigarettes finding. App.228-53 (Tjoflat, J.).

That reasoning was remarkable enough at the time, but it is indefensible after the Florida Supreme Court's decision in *Marotta*, which *explicitly rejected Walker*'s conclusion that the *Engle* jury actually found cigarettes inherently defective. *Marotta* expressly detailed "'many ways'" in which the jury could have found defendants' cigarettes defective, including several that are demonstrably applicable only to certain brands of cigarettes. 214 So. 3d at 603 (quoting *Engle I*, 2000 WL 33534572, at *2). And, for good measure, *Marotta* reiterated that *Douglas* applied, and indeed required, claim preclusion, not issue preclusion. *Id.* at 593. As *Douglas* conceded, there is no way to know what the jury actually decided, and its findings are therefore useless for issue-preclusion purposes. Thus, by the time the *en banc* Eleventh Circuit issued its decision, the Florida Supreme Court had rejected the premise that the *Engle* jury had found all cigarettes defective, not once, but twice. And the *Marotta* court, unlike the *Douglas* court, had the benefit of *Walker* and its effort to avoid the due-process problem by attributing an all-cigarettes-are-defective meaning to the findings. Yet the *Marotta* court still held firm to the view that the jury did not actually decide that all cigarettes were

defective, and that this did not matter because the court was applying claim preclusion.

Thus, at that juncture, one would think that the *en banc* Eleventh Circuit would have to confront whether Florida's now-twice-embraced novel claim-preclusion doctrine is constitutional. Think again. When "faced with the prospect of an embarrassing *mea culpa*," App.214 (Tjoflat, J.), the *en banc* court refused. Instead, the majority not only blithely reaffirmed *Walker*'s "false narrative of *Engle III*," App.48 (Tjoflat, J.), but essentially ignored *Marotta* altogether, citing the case only for its *alternative* holding that federal law would not preempt tort claims based on the mere sale of ordinary cigarettes, App.3, 34-35. As a result, the *Engle* findings now mean one thing in federal courts (which have twice seen and ignored the Florida Supreme Court's contrary approach), but mean something else in state courts (which have seen and squarely rejected the Eleventh Circuit's effort to contort the findings to avoid the due process problem). The only common thread is that the findings mean whatever is necessary to help progeny plaintiffs win.

As Judge Tjoflat pointedly put it, "the one theme that remains constant throughout" these cases "is that *Engle*-progeny courts have rested their thumbs on the scales to the detriment of the unpopular *Engle* defendants"—which itself "violate[s] the defendants' due process right to an impartial decision maker." App.48, 267. This intolerable situation demands this Court's review. No two courts can agree on how to give the *Engle* findings preclusive effect without violating due process because there is no way to do so. That was

clear to the very first court that confronted the question in *Brown I*, and it is even more obvious today. Indeed, *no* court has ever claimed the ability to ascertain what the *Engle* jury actually decided beyond that each defendant marketed some defective cigarette and engaged in some negligent act. Even *Walker* and the *en banc* majority were unwilling to make such an assertion, instead ascribing their all-cigarettes interpretation to *Douglas*, and then invoking full faith and credit principles to avoid having to defend it.[4]

The ultimate question thus remains: Can a defendant be precluded from contesting an issue when there is no way to ascertain whether the issue was actually decided by a prior fact-finder? Under

---

[4] The majority below made a half-hearted attempt to defend its all-cigarettes view by noting that the class presented "evidence that applied to all of the cigarettes made by the tobacco companies," and that the *Engle* post-trial opinion found that evidence "sufficient … to support th[e] verdicts." App.23. But as that same opinion explained, there was sufficient evidence to support numerous other theories too, many of which plainly do not apply to all cigarettes. *See Engle I*, 2000 WL 33534572, at *2-3. The majority also claimed that the *Engle* jury was instructed to resolve "common liability issues." App.21. In fact, the trial court "provided no such instruction." App.237 n.234 (Tjoflat, J.). Finally, the majority observed that the first two jury questions—whether cigarettes are addictive and cause disease—"most naturally [are] read to apply to *all* cigarettes." App.21. That may be true, but that a product is addictive and causes disease does not mean that it is defective, or that its sale is negligent. *See, e.g.*, Restatement (Third) of Torts: Prod. Liab. §2 cmt. a (1998) ("Products are not generically defective merely because they are dangerous."). If it did, then there would have been no need to separately ask the jury whether each defendant sold defective cigarettes or acted negligently.

traditional principles of issue and claim preclusion, the answer is no. This Court recognized as much over a century ago in *Fayerweather*, and in ten years of litigation, progeny plaintiffs have never identified a single non-*Engle* case suggesting otherwise. Simply put, there is no preclusion doctrine that allows plaintiffs to foreclose defendants from contesting every issue that a prior fact-finder *could* have found in the plaintiff's favor—for the obvious reason that such a doctrine would facilitate arbitrary deprivations of property.

II. The Eleventh Circuit's Preemption Ruling Conflicts With *FDA v. Brown & Williamson* And Decisions Of Numerous Other Courts.

Not only does the decision below sanction an enormous and recurring due-process violation; its distortion of the *Engle* findings gives them a meaning that creates an insuperable preemption problem. In *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), this Court held that Congress "foreclosed the removal of tobacco products from the market," and that a ban on tobacco products would "plainly contradict congressional policy." *Id.* at 137, 139, 143. The decision below effects just such a ban. If, as the *en banc* majority insisted, the *Engle* jury found cigarettes inherently defective, then using those findings to impose liability on defendants amounts to a state-law ban on cigarettes. Thus, even if the decision below reflected a defensible reading of *Douglas* and *Marotta*, using the *Engle* findings to impose liability simply for selling cigarettes would conflict with Congress' decision "to safeguard

consumers' right to choose whether to smoke or not to smoke." App.348 (Tjoflat, J.).

In *Brown & Williamson*, this Court considered whether the FDA had regulatory jurisdiction over cigarettes. After surveying the "six separate pieces of legislation" Congress had enacted to govern cigarette labeling and marketing, 529 U.S. at 143-56, the Court determined that the FDA lacked jurisdiction because its regulations would require it to ban cigarettes, which would conflict with Congress' "intent that tobacco products remain on the market." *Id.* at 138-39. Courts may not give effect to state laws that "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 886 (2000). And, as *Brown & Williamson* makes clear, tort claims that function as a ban on cigarettes do exactly that.

The panel opinion in this case, following the lead of multiple state and federal courts,[5] correctly held that, under *Walker*'s conception of the *Engle* findings, plaintiff's strict-liability and negligence claims are preempted. If those findings truly embrace the broadest of all possible theories—that all cigarettes

---

[5] *See, e.g.*, *De Jesus Rivera v. R.J. Reynolds Tobacco Co.*, 368 F. Supp. 2d 148, 154-55 (D.P.R. 2005); *Gault v. Brown & Williamson Tobacco Corp.*, No. 02-CV-1849-RLV, 2005 WL 6523483, at *5-8 (N.D. Ga. Mar. 31, 2005); *Johnson v. Brown & Williamson Tobacco Corp.*, 345 F. Supp. 2d 16, 21 (D. Mass. 2004); *Jeter v. Brown & Williamson Tobacco Corp.*, 294 F. Supp. 2d 681, 685 (W.D. Pa. 2003); *Insolia v. Philip Morris Inc.*, 128 F. Supp. 2d 1220, 1224-25 (W.D. Wis. 2000).

are defective and all tobacco companies acted negligently in placing them on the market—then imposing liability on that basis amounts to enforcing a duty not to sell cigarettes. App.358-59 (Tjoflat, J.). And such a duty would squarely conflict with Congress' "intent that tobacco products remain on the market." *Brown & Williamson*, 529 U.S. at 139. By concluding otherwise, the decision below breaks with this Court's precedent, deepens a division among the lower courts,[6] and injects further "uncertainty" into this Court's already "hazy" preemption law. App.285 (Tjoflat, J.).

III. The Questions Presented Impact Thousands Of Cases, All With Plaintiffs Seeking Millions Of Dollars In Damages.

The practical impact of the questions presented is extraordinary. There are still more than 3,500 *Engle*-progeny cases pending, each of which seeks millions of dollars in damages using the truncated procedures the *en banc* court has now sanctioned. Indeed, taking only the handful of cases in which defendants anticipate filing "hold" petitions in conjunction with this petition, defendants face judgments of more than $80 million.

Moreover, the number and size of awards will, if anything, *increase* as the Florida Supreme Court continues to deprive tobacco companies of one defense after another. Just last year, for instance, the court ruled that any progeny plaintiff who proves class

---

[6] *Compare supra* n.5 *with, e.g.*, *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1045-48 (9th Cir. 2009) (rejecting implied preemption defense), *and Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 599-600 (8th Cir. 2005) (same), *and Marotta*, 214 So. 3d at 598, 600 (same).

membership may seek punitive damages, even on claims where the *Engle* class did not. *Soffer*, *v. R.J. Reynolds Tobacco Co.*, 187 So. 3d 1219 (Fla. 2016). At the same time, the court rejected limits on the class definition, *R.J. Reynolds Tobacco Co. v. Ciccone*, 190 So. 3d 1028 (Fla. 2016), and a statute-of-repose defense, *Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687 (Fla. 2015). And it is now considering whether punitive verdicts nearing *nine figures* would be constitutional. *See* Br. for Pet'r at 46, *Schoeff v. R.J. Reynolds Tobacco Co.*, No. SC15-2233 (Fla. July 12, 2016) (asking court to rule that "any amount less than $100 million" satisfies due process in progeny cases). 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.*, *Honda Motor Co. v. Oberg*, 512 U.S. 415, 418 (1994); *Richards*, 517 U.S. at 795.

Undoubtedly, plaintiff will reply with progeny plaintiffs' customary refrain: This Court has already denied several *Engle* petitions, so what is one more. Setting aside the reality that the bulk of those were just "hold" petitions, that protestation rings rather hollow given that this petition arises out of plaintiff's successful effort to convince the Eleventh Circuit that this case was so exceptionally important as to warrant *en banc* review. The issues do not become unimportant just because plaintiffs prevailed. And certainly Judge Tjoflat did not find the issue unimportant, as he wrote the longest opinion of his storied judicial career, detailing how progeny proceedings deviated from the demands of due process and the manifold ways in which courts have adopted

conflicting and convoluted opinions in an effort to deny that reality.

Moreover, while the *Engle* litigation is, of course, *sui generis* in several respects, that counsels in favor of certiorari, not against it. In mass and class actions across the country, courts (with the help of the plaintiffs' bar) are inventing bespoke procedural devices to simplify litigation for plaintiffs—at the cost of defendants' due process rights. The sheer novelty of those devices should not serve as get-out-of-cert-free cards for courts flouting established constitutional principles "to the unique detriment of … unpopular defendants." App.261 n.265 (Tjoflat, J.). The fundamental question is whether there are limits on how far courts can push the boundaries of civil procedure to ease the burden on plaintiffs. If there are, they surely were crossed here.

Indeed, every court to consider these issues is painfully aware that *Engle* did not produce the kind of truly common findings that would "drive the resolution of" individual claims. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). That is exactly what the Florida Supreme Court meant when it admitted that the *Engle* findings would be "useless in individual actions." *Douglas*, 110 So. 3d at 433. But the cruel irony is that courts have employed useless "common" findings that would not drive the resolution of individual cases to dispose of *entire elements* of individual progeny cases. Put differently, defendants are being precluded from litigating issues that could have been decided, but that it is impossible to determine were actually decided, by a jury in a class action that should never have been certified.

This sort of extreme departure from traditional practice has not been, and will not be, confined to tobacco cases. The abuse of the class-action device to harm unpopular defendants is nothing new. *See, e.g.*, *Dukes*, 564 U.S. at 342; *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). Nor is the invention of constitutionally problematic workarounds that give plaintiffs all the benefits of class treatment even when certification fails. *See, e.g.*, *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1781 (2017); *Lexecon Inc. v. Milberg*, 523 U.S. 26, 28 (1998). Absent this Court's intervention, nothing will stop the next court from adopting an equally problematic procedure that works "in favor of the plaintiffs and against a few unpopular defendants." App.179 n.160. Although lower courts have leeway to experiment with new procedures to facilitate efficient litigation—and are certainly not shy about doing so—practical "considerations of efficiency and convenience" do not trump basic constitutional protections. *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1959 (2015). This Court should put an end to the patently unconstitutional practice that the decision below sanctions before it infects thousands more cases, produces an avalanche of unlawful damages awards, and inspires other courts to follow in its footsteps.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

MIGUEL A. ESTRADA
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., NW
Washington, D.C. 20036
(202) 955-8500

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
MICHAEL D. LIEBERMAN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

ANDREW L. FREY
LAUREN R. GOLDMAN
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2500

Counsel for Philip Morris USA Inc.

MICHAEL A. CARVIN
YAAKOV ROTH
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939

Counsel for R.J. Reynolds Tobacco Company

September 15, 2017