No. 13-14590-EE

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.

Appeal from the United States District Court
for the Middle District of Florida,
D.C. No. 3:09-cv-13602

PETITION FOR REHEARING EN BANC OR PANEL REHEARING

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In compliance with Local Rule 26.1-1, the undersigned certifies that the following is a complete list of all trial judge(s), attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular case or appeal, and includes subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held company that owns 10% or more of the party's stock, and other identifiable legal entities related to a party.

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

RULE 35 STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance: whether congressional intent to preempt state common law can properly be inferred from the absence of congressional action.

I further express a belief, based on a reasoned and studied professional judgment, that the Panel decision in this appeal is contrary to the following decisions of this Circuit and of the United States Supreme Court: *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 2727 (2014); *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183 (11th Cir. 2004); *Wyeth v. Levine*, 555 U.S. 555 (2009); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002); and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

Consideration by the full Court is necessary to secure and maintain the uniformity of decisions within this Circuit.

Dated: April 28, 2015

/s/ *Samuel Issacharoff*
Samuel Issacharoff
Counsel for Plaintiff-Appellee

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STATEMENT OF ISSUES WARRANTING EN BANC CONSIDERATION

Rehearing is necessary to correct the Panel decision's sweeping federal preemption holding, which stands in direct conflict with the law of this Circuit and of the United States Supreme Court. It was less than two years ago that this Court upheld two verdicts in these coordinated proceedings against constitutional attack. *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 2727 (2014). The Panel decision here overturns a materially identical verdict on constitutional grounds, adopting a never-before-seen theory of preemption resulting from congressional *inaction*. The Panel's theory, moreover, is exactly the same theory this Court refused to credit in *Walker*. R.J. Reynolds further pursued this argument in its *Walker* en banc petitions, and this Court denied those petitions, with no judges dissenting. The conflict between *Walker* and *Graham* is open and obvious, and *Graham*'s departure from settled law on preemption extends well beyond the realm of tobacco litigation.

First, the *Graham* Panel infers preemption from the fact that Congress has not acted to ban cigarettes, allowing congressional inaction to displace the traditional authority of States over the health and safety of their citizens. The Panel opinion is an unprecedented expansion of implied obstacle preemption to create a law-free domain where Congress has not acted and the States are forbidden to enter. Although the Panel references a handful of federal statutes that

address aspects of cigarette production and labeling, the core of the opinion is a dormant power that removes customary state police powers: "Congress possesses the constitutional authority to ban cigarettes. *See* U.S. Const., art. I, § 8, cl. 3. It has never done so." Opn. 30. The force of such preemption would turn the States into subsidiary institutions whose common law powers would exist only at the sufferance of Congress. Under such a theory, "deliberate federal inaction could always imply pre-emption, which cannot be." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). An unbroken line of authority "explicitly rejects the notion that mere congressional silence on a particular issue may be read as pre-empting state law." *Wyeth v. Levine*, 555 U.S. 555, 602-03 (2009) (Thomas, J., concurring) (citation omitted). Under *Graham*, however, traditional state authority is reduced to the level of an administrative agency dependent on an express grant of congressional authority.

Second, the Panel rejects the core ruling of the Supreme Court of Florida and of this Court in *Walker* that the common findings under *Engle I* correspond to the ***conduct*** of these specific Defendants. The entire Panel preemption analysis is grounded in the argument that *Engle* erects a blanket prohibition on the sale of cigarettes, contrary to some unarticulated federal policy. Thus, *Graham* turns the heart of the *Engle* findings away from the wrongful conduct of the largest tobacco companies and into a matter of *per se* findings about tobacco the product: "there is

only one common issue we can be sure the Phase I jury 'actually decided' as to the entire class: all plaintiffs smoked cigarettes containing nicotine that are addictive and cause disease." Opn. 21. But that is again the *opposite* of what *Walker* held. According to *Walker*, the *Engle* findings regarding the Defendants' negligence and strict liability are not generic to all cigarettes but rather "'go to the *defendants' underlying conduct* which is common to all class members' and . . . establish certain elements of the plaintiffs' claims." 734 F.3d at 1289 (emphasis added) (quoting *Philip Morris USA Inc. v. Douglas*, 110 So. 3d 419, 428 (Fla. 2013), *cert. denied*, 134 S. Ct. 332 (2013)). Indeed, this was a central basis for the Court's determinations in *Walker* that R.J. Reynolds had not been deprived of due process and that *Engle* must be given full faith and credit. 734 F.3d at 1287-89.

Together, these two facets of *Graham* not only reject the settled law of this Circuit on the *Engle* progeny cases, but create an unprecedented intrusion into the reserved powers of the States. Rehearing is absolutely necessary.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This case is a continuation of a state-court class action against several major cigarette manufacturers and trade groups. The facts are extensively recited in the opinions of this Court in *Graham* and *Walker*. In sum, after a year-long trial focusing on the Defendants' conduct common to the class, the jury rendered findings of fact and awarded the class punitive damages. The Supreme Court of

Florida vacated the punitive damages award but permitted individual class members to seek relief in follow-on trials. The Court held that eight common "Phase I" findings of the *Engle* jury were to be given preclusive effect in these follow-on cases, known as the *Engle* progeny cases. *Engle v. Liggett Grp., Inc*., 945 So. 2d 1246, 1276-77 (Fla. 2006). These include findings that Defendants (1) acted negligently, and (2) placed unreasonably dangerous and defective cigarettes on the market. *Id*. at 1277.

Earl Graham brought a timely *Engle* progeny case, alleging, *inter alia*, that his wife belonged to the class because she died of lung cancer as a result of her addiction to smoking Defendants' cigarettes during the relevant time period. Upon removal and trial, a jury returned a plaintiff's verdict on the negligence and strict liability claims, which a Panel of this Court reversed as preempted. Opn. 23-24.[1]

REASONS TO GRANT THE PETITION

I. THE PANEL DECISION CREATES AN INTRA-CIRCUIT SPLIT.

Graham squarely conflicts with *Walker*, where plaintiffs relied on the same common findings in winning strict liability and negligence verdicts against R.J. Reynolds. 734 F.3d at 1286. *Walker* held that the federal courts "must give full faith and credit to the decision of the Supreme Court of Florida" mandating such preclusion, and rejected all contrary arguments. *Id*. at 1290. *Graham* holds the

[1] The Panel opinion is attached hereto as Exhibit A. This Court's decision in *Walker* is attached as Exhibit B.

same procedure unconstitutional, and reverses.

These panel decisions simply cannot be reconciled. This is particularly so because, in *Walker*, R.J. Reynolds raised the very preemption argument that the *Graham* Panel embraced. *See* Brief of Appellant R.J. Reynolds Tobacco Co. at 47-48, *Walker*, Nos. 12-13500 & 12-14731, Docket Entry dated Aug. 13, 2012 ("Because federal law 'foreclose[s] the removal of tobacco products from the market,' it impliedly preempts any tort claim that would seek to impose liability for merely selling cigarettes despite their inherent dangers." (citation omitted)). The *Walker* Court refused to credit this argument in affirming the judgments. 734 F.3d at 1280. Thereafter, R.J. Reynolds reasserted preemption in two unsuccessful en banc petitions.[2] The Supreme Court denied certiorari. 134 S. Ct. 2727 (2014).

Preemption was thus raised and rejected in *Walker* before being accepted in *Graham*, creating a direct conflict between the two decisions. *See United States v. Johnson*, 528 F.3d 1318, 1320 (11th Cir. 2008) (fact that panel elects not to expressly address an argument challenging its holding does not alter decision's binding effect), *rev'd on other grounds by Johnson v. United States*, 559 U.S. 133 (2010). Under *Walker*, preclusive application of the *Engle* strict liability and

[2] *See Walker*, Nos. 12-13500 & 12-14731, Docket Entries dated Oct. 7, 2013 (First Pet. at 14-15) ("[T]he panel decision creates a fundamental problem of implied preemption."); Nov. 13, 2013 (Second Pet. at 13) ("[D]eeming the *Engle* jury to have found all cigarettes defective . . . creat[es] an implied-preemption problem.").

negligence findings is constitutionally mandated under full faith and credit. Under *Graham*, the same findings are constitutionally foreclosed as preempted. En banc review is designed to resolve exactly this sort of conflict.

II. THE PANEL DECISION STANDS SUPREME COURT PREEMPTION DOCTRINE ON ITS HEAD.

Preemption law begins—and usually ends—with an analysis of relevant federal statutes or regulations. But the *Graham* analysis erroneously infers preemptive intent from congressional silence, endorsing a sweeping view of federal authority never before recognized and without a logical stopping-point.

A. The Panel's Reasoning Would Nullify State Authority Absent Congressional Authorization.

Graham holds that Congress preempts products liability lawsuits if it takes any action with respect to the product, such as requiring a warning label, but declines to impose a nationwide ban. Far from being "narrow indeed" (Opn. 49), this novel holding would work a revolution in the common law by disabling state regulation even of inherently dangerous products if Congress had ever acted in that product's regulatory space (Opn. 41-43). Setting aside that the *Engle* findings are *not* that all cigarettes are categorically and inherently defective, the sweep of *Graham*'s position is astounding. Virtually every product that reaches American consumers encounters some federal regulation on its journey to market.

Consider some of the most regulated products on the market today. Under

Graham, every state law cause of action against "inherently dangerous" pharmaceuticals would be preempted, no matter what the specific conduct in the manufacture or application. *Contra Wyeth v. Levine*, 555 U.S. 555 (2009). Similarly, an "inherently dangerous" pesticide would be immunized from suit, even if it destroyed a farmer's crops. *Contra Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005). No person injured by an "inherently defective" seatbelt could recover. *Contra Williamson v. Mazda Motor of Am., Inc*., 562 U.S. 323 (2011). Indeed, common law liability would be hollowed out since, by definition, prohibited products are unavailable to consumers.

Under *Graham*, there could be no strict liability, for example, in the classic case of blasting if Congress had acted to regulate the sale and labeling of the explosives but never banned them. Following *Graham*, because the only way to avoid liability for injuries would be to refrain from this ultrahazardous activity, any judgment based on strict liability would be preempted. Plainly, that is not the law.

B. Congressional Silence Cannot Give Rise to Preemption.

The States' independent sovereignty yields the longstanding presumption that their "historic police powers" are "not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth,* 555 U.S. at 565 (citations omitted). This Panel, however, looks to what is *absent* from federal law—a cigarette ban—rather than what is *manifest* in federal tobacco legislation—

limited preemption clauses covering disclosures and advertising only, as well as savings clauses specifically preserving traditional common law remedies like those here. *Graham* does grave violence to the Supreme Court's command that "[t]here is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it. . . . [P]re-emption, if it is intended, must be explicitly stated." *Isla Petroleum*, 485 U.S. at 503. The law abhors a vacuum and "explicitly rejects the notion that mere congressional silence . . . may be read as pre-empting state law." *Wyeth*, 555 U.S. at 602-03 (Thomas, J., concurring) (citation omitted). That is why, even at the outer bounds of this Court's implied preemption case law, federal preemption holdings have always resulted from some positive federal enactment. *See, e.g.*, *Baptista v. JP Morgan Chase Bank, N.A.*, 640 F.3d 1194 (11th Cir. 2011) (OCC regulation).

Here, based on the mere absence of a federal prohibition of cigarettes, the Panel discerns a "clear purpose" that does not appear anywhere in the text of any federal law—Congress intended to "leav[e] to adult consumers the choice whether to smoke cigarettes or to abstain." Opn. 33-34, 43. But a congressional decision to *forgo* federal regulation cannot supersede preexisting state law. The Supreme Court accordingly rejects the Panel's view "that the absence of regulation itself constitutes regulation" with preemptive force. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286 (1995); *cf. Sprietsma v. Mercury Marine*, 537 U.S. 51, 67 (2002)

(the situation is different if Congress takes the "further step of deciding that, as a matter of policy, the States and their political subdivisions should not" exercise their regulatory authority). "[O]therwise, deliberate federal inaction could always imply pre-emption, which cannot be." *Isla Petroleum*, 485 U.S. at 503.

In *Sprietsma*, a boat's outboard motor propeller struck and killed the plaintiff's wife. 537 U.S. at 54. The defendant maintained that federal inaction preempted the strict liability claim because, while the Coast Guard could have banned the product, it decided to "take no regulatory action" after a year and a half of study. *Id.* at 61, 65-66. The Supreme Court of Illinois, in a manner similar to *Graham*, "concluded 'that the Coast Guard's failure to promulgate a propeller guard requirement here equates to a ruling that no such regulation is appropriate[.]'" *Id.* at 66 (citation omitted). This was "quite wrong," the Supreme Court held. *Id.* at 65. A decision not to regulate at the federal level "is fully consistent with an intent to preserve state regulatory authority"—the simple absence of federal regulation does "not convey an 'authoritative' message of a federal policy" that can have any preemptive effect. *Id.* at 65, 67.

Wyeth v. Levine drives home this elementary point about the dual sovereignty commands of federalism. The plaintiff alleged that a prescription drug gave her gangrene and her forearm had to be amputated. 555 U.S. at 559. Even though the FDA knew of the drug's risks (as Congress knew of scientific studies

finding that smoking carries various risks), the FDA had declined to ban it. *Id.* at 561-62. The Supreme Court held that, far from preempting state law, the absence of a federal ban weighed heavily *against* preemption: Congress's "silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation," supplied "powerful evidence" that Congress did not intend to take away traditional remedies. *Id.* at 575.

Yet *Graham* in effect decrees a regulatory field preempted whenever Congress has taken action with respect to a product but not banned its sale. That is contrary to Supreme Court law, and even congressionally-declared field preemption leaves room for the operation of "well established state power" in generally applicable laws, as the Court confirmed just last week. *Oneok, Inc. v. Learjet, Inc.*, __ U.S. ___, 2015 U.S. LEXIS 2808, at *21-23 (Apr. 21, 2015) (finding that the "broad applicability of state antitrust law supports a finding of no pre-emption," even though natural gas prices are set pursuant to federal ratemaking). However customary the antitrust laws are, the venerable common law of torts goes back many centuries. By contrast, *Graham* rests on the rejected logic of the dissent in *Oneok*, that preemption lies if "the right to act is in any way regulated by the Federal Act." *Id.* at *21, 31.

Graham strips the States of their sovereign authority to afford legal remedies to their citizens absent a green light from Congress. This unprecedented holding

reduces the States to the functional equivalent of administrative agencies, which are creatures of statute and cannot "act . . . unless and until Congress confers power upon [them]." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

The analogy to administrative agencies is not fanciful. Amazingly, *Graham*'s preemption analysis relies on an administrative law decision, *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120 (2000), to buttress a (nonexistent) congressional intent to occupy the field of tobacco regulation. The Panel draws this conclusion from the Supreme Court's "holding that the FDA lacked jurisdiction to regulate cigarettes because it would have otherwise been required by statute to prohibit their sale." Opn. 34. It should go without saying that States are not administrative agencies and that Congress's failure to authorize state action does not foreclose the customary operation of state law.

To the contrary, it is only an "immediate constitutional repugnancy that can by implication alienate and extinguish a preexisting right of [state] sovereignty." *Goldstein v. California*, 412 U.S. 546, 554-55 (1973) (quoting Hamilton, *The Federalist No. 32*).[3] The lack of any conflict with federal law and public policy in

[3] The Panel's legal analysis resembles a dormant Commerce Clause analysis, but Defendants made no claim that Florida tort law burdens interstate tobacco commerce in a way that could violate a tacit congressional policy. *See, e.g.*, *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987) (noting role of silence in dormant Commerce Clause jurisprudence); *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917) (holding that state "blue sky" laws prohibiting securities fraud do not burden interstate commerce in violation of the Commerce Clause).

this area is well reflected by the fact that the federal government itself prosecuted civil claims against Defendants based upon the same violations. *See United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006), *aff'd in pertinent part*, 566 F.3d 1095 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 3501-02 (2010).

C. The Panel Overlooks the Relevant Statutory Provisions and Binding Decisions Applying Them.

To return to standard preemption analysis, one begins with the text of what Congress enacted, keeping in mind that none of the tobacco statutes invoked by *Graham* even existed when the decedent here began smoking, in the early 1950s. And when Congress did act, it in fact expressed the intent to *preserve* common law suits against these Defendants as well as state regulation and potential prohibition of tobacco products. *See, e.g.*, 21 U.S.C. § 387p(a)(1) ("[N]othing in this chapter . . . shall be construed to limit the authority of . . . a State . . . to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure with respect to tobacco products that is . . . more stringent than, requirements established under this subchapter, including a law, rule, regulation, or other measure relating to or prohibiting the sale . . . or use of tobacco products by individuals of any age").

Graham overlooks both this provision and the "narrowly phrased" preemption clauses that preserve historic state "police regulations" of cigarette products. S. Rep. No. 91-566 at 12 (1969) (preemption clauses in the Public Health Cigarette Smoking Act are "limited entirely to State or local requirements

or prohibitions in the advertising of cigarettes."). The Panel's approach is inconsistent with Supreme Court precedent, which makes clear that when Congress has enacted such "an express pre-emption clause, our 'task of statutory construction must in the first instance focus on the plain wording of the clause[.]'" *Sprietsma*, 537 U.S. at 62-63 (citation omitted). Even an implied preemption analysis is to "begin . . . with the relevant text." *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1985 (2011).

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992), established the recognized framework for adjudicating preemption questions in cigarette litigation—a framework the *Graham* Panel neither applies nor acknowledges. The *Cipollone* plurality held that such preemption determinations turn on whether the legal duty underlying a cause of action "constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . *advertising or promotion*[.]" *Id.* at 524 (emphasis added) (citing 15 U.S.C. § 1334(b)). *Graham* simply cannot be reconciled with *Cipollone*, which upheld claims for fraudulent misrepresentation, conspiracy, and breach of warranty, and found only a failure to warn claim preempted by the federal regulation of cigarette labeling.[4] 505 U.S. at 520-30.

[4] In *Engle*, the Supreme Court of Florida issued a similarly limited preemption holding. 945 So. 2d at 1273 ("Although compliance with the federal warnings

[Footnote continued on next page]

Until *Graham*, this Court properly followed *Cipollone*. In *Spain v. Brown & Williamson Tobacco Corp.*, the Court found no preemption of various common law claims under Alabama law, including a negligence claim that—like the parallel negligence claim here—stemmed from allegations that Defendants "wantonly designed and manufactured their cigarettes." 363 F.3d 1183, 1195 (11th Cir. 2004). *Graham* not only repudiates the Supreme Court's *Cipollone* holding, it creates an intra-circuit conflict with *Spain*.[5] Somehow, negligence claims against these Defendants are now preempted in Florida. Not so in Alabama.

III. THE PANEL'S DUE PROCESS CONCLUSION CONFLICTS WITH THIS COURT'S DECISION IN *WALKER*.

Graham also invokes a due process argument that directly contravenes the core holding of *Walker* with respect to the negligence and strict liability claims by positing that "[a]ny findings more specific" than "the bare assertion that cigarettes are inherently defective—and cigarette manufacturers inherently negligent"[6]—

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preempted any claim based on failure to warn, [*Cipollone*] did not eliminate the other causes of action" at issue in this litigation).

[5] Other Circuits, too, have applied *Cipollone* rather than accepting Defendants' overly broad preemption argument. *See Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 598-600 (8th Cir. 2005); *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1043-48 (9th Cir. 2009). The Circuit split created by *Graham* alone necessitates rehearing. *See* Fed. R. App. P. 35(b)(1)(B).

[6] *But compare* Opn. 11 n.4, 21, *with Douglas*, 110 So. 3d at 428 (holding it is "[b]ecause these [strict liability and negligence] findings go to the defendants' underlying conduct, which is common to all class members and will not change from case to case," that "these approved 'Phase I common core findings . . . have res judicata effect' in . . . 'individual damages actions.'" (citation omitted)).

"could not have been 'actually decided' by the Phase I jury, and their claim-preclusive application would raise the specter of violating due process." Opn. 22, 41, 43. In *Walker*, however, this Court determined there is no due process violation "[b]ecause R.J. Reynolds had a full and fair opportunity to be heard in the Florida class action and the application of res judicata under Florida law does not cause an arbitrary deprivation of property[.]" 734 F.3d at 1280. *Walker* further held that the "actually decided" issue for the negligence and strict liability claims was conclusively resolved by the Supreme Court of Florida as a "question of fact" that commands deference under the Full Faith and Credit Act. *Id*. at 1288-89. *Graham* not only reopens this question but bases its preemption decision on a rejection of *Walker*'s "actually decided" holding. Opn. 22, 43.

CONCLUSION

Plaintiff-Appellee respectfully submits that this Court must grant the Petition to resolve the conflicts and exceptionally important issues of law described above.

Dated: April 28, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

On April 28, 2015, I electronically filed this document through the ECF system, which will send a notice of electronic filing to all counsel of record. Pursuant to Eleventh Circuit Rule 35-1, I also caused fifteen (15) true and correct copies to be filed with the Court.

/s/ *Elizabeth J. Cabraser*
Elizabeth J. Cabraser

EXHIBIT A

Graham v. R.J. Reynolds Tobacco Co., __ F.3d __, 2015 WL 1546522, 2015 U.S. App. LEXIS 5657 (11th Cir. Apr. 8, 2015)

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-14590

D.C. Docket No. 3:09-cv-13602-MMH-JBT

EARL E. GRAHAM,
as PR of Faye Dale Graham, deceased,

Plaintiff - Appellee,

versus

R.J. REYNOLDS TOBACCO COMPANY,
individually and as successor by merger to the Brown and Williamson Tobacco Corporation and The American Tobacco Company,
PHILIP MORRIS USA, INC.,

Defendants - Appellants,

LORILLARD TOBACCO COMPANY, et al.,

Defendants.

Appeal from the United States District Court
for the Middle District of Florida

(April 8, 2015)

Before TJOFLAT, JILL PRYOR and COX, Circuit Judges.

TJOFLAT, Circuit Judge:

In 1996, a Florida District Court of Appeal approved certification of a class-action lawsuit originating in the Circuit Court of Dade County that encompassed an estimated 700,000 Floridians who brought state-law damages claims against the major American tobacco companies for medical conditions, including cancer, "caused by their addiction to cigarettes that contain nicotine." *R.J. Reynolds Tobacco Co. v. Engle* ("*Engle I*"), 672 So. 2d 39, 40 (Fla. 3d Dist. Ct. App. 1996) (quotation marks omitted). A year-long, class-wide trial was conducted on the issue of liability, and "the jury rendered a verdict for the class on all counts." *Liggett Grp. Inc. v. Engle* ("*Engle II*"), 853 So. 2d 434, 441 (Fla. 3d Dist. Ct. App. 2003). The Florida Supreme Court then decertified the class but held that the jury findings would nonetheless have "res judicata effect" in cases thereafter brought against one or more of the tobacco companies by a former class member. *Engle v. Liggett Grp. Inc.* ("*Engle III*"), 945 So. 2d 1246, 1269 (Fla. 2006) (per curiam).

Here, a member of that now-decertified class—a so-called *Engle*-progeny plaintiff—successfully advanced strict-liability and negligence claims that trace their roots to the original *Engle* jury findings. Over the defendants' objection, the District Court instructed the jury that "you must apply certain findings made by the *Engle* court and they must carry the same weight they would have if you had

listened to all the evidence and made those findings yourselves." Among them: that the defendants "placed cigarettes on the market that were defective and unreasonably dangerous" and that "all of the *Engle* [d]efendants were negligent."

When the jury found in favor of the plaintiff on both claims, the defendants renewed their motion for a judgment as a matter of law, contending, among other things, that federal law preempted the jury's imposition of tort liability as based on the *Engle* jury findings. The District Court denied the motion, and the defendants appealed. We must decide whether federal law preempts this suit because it stands as an obstacle to the purposes and objectives of Congress.

I.

A.

Like so many of her generation, Faye Graham started each morning with a cup of coffee and a smoke. By day's end, she usually burned through one-and-a-half to two packs of cigarettes. According to her brother, "she smoked right on up until she wasn't able to smoke." Doctors diagnosed Graham with non-small cell lung cancer. She died on November 18, 1993, at age fifty-eight.

Faye was survived by her husband, Earl Graham, a tugboat captain. He filed, as personal representative of his wife's estate, a wrongful-death suit against R.J. Reynolds Tobacco Co. and Phillip Morris USA, Inc. ("R.J. Reynolds" and

"Phillip Morris")[1] in the United States District Court for the Middle District of Florida.[2] Among other things, the complaint alleged that Faye Graham was addicted to cigarettes manufactured by the defendants and that the addiction caused her death. The complaint contained seven counts, two of which are relevant to this appeal: a strict-liability claim, based on the fact that "the cigarettes sold and placed on the market by [the defendants] were defective and unreasonably dangerous," and a negligence claim, based on the fact that the defendants were negligent

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[1] Graham's first-amended complaint included as defendants Lorillard Tobacco Co. and Liggett Group LLC, but his claims against them were subsequently dismissed with prejudice during the course of the litigation. R.J. Reynolds and Phillip Morris are the only two tobacco companies that remain involved in the lawsuit.

[2] The Florida Wrongful Death Act provides that

> [w]hen the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, . . . and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person . . . that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act notwithstanding the death of the person injured . . . .

Fla. Stat. § 768.19. The statute specifies that "[t]he action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate all damages . . . caused by the injury resulting in death." *Id.* § 768.20. Damages recoverable under the Act center on the injuries suffered by the decedent's survivors—not the decedent—and include the survivor's "(1) loss of past and future support and services; (2) loss of companionship and protection; and (3) . . . mental pain and suffering from the date of the injury." *Martin v. United Sec. Servs., Inc.*, 314 So. 2d 765, 769 (Fla. 1975).

Graham's second-amended complaint also sought damages under the Florida Survival Statute. That statue permits a decedent's personal representative to recover on the basis of the decedent's pain and suffering, medical expenses, and loss of earnings, among other things. Fla. Stat. § 46.021; *see also Martin*, 314 So.2d at 767. The District Court held that Graham could not pursue an "independent" survival claim—that is, separate and apart from his wrongful-death claim—because he had reframed it as such "without leave of the Court and after discovery had closed." Graham was permitted, however, to pursue his claim under the Survival Statute in the alternative. The parties stipulated before trial that Graham's case was to be litigated as a wrongful-death suit.

"[w]ith respect to smoking and health and the manufacture, marketing and sale of their cigarettes."

B.

1.

This is no ordinary tort suit, however: Graham's is an *Engle*-progeny case. The *Engle* litigation epic began in 1994, when six Floridians filed a putative class-action lawsuit seeking over $100 billion in both compensatory and punitive damages against the major domestic tobacco companies: Philip Morris, Inc.; R.J. Reynolds Tobacco Co.; Brown & Williamson Tobacco Co., individually and as successor by merger to The American Tobacco Company; Lorillard Tobacco Co.; and Liggett Group, Inc. *Engle II*, 853 So. 2d at 441 & n.1. Two years after the plaintiffs filed their initial complaint, the Third District Court of Appeal approved class certification on interlocutory appeal, defining the class as "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 I*, 672 So. 2d at 40, 42 (alteration omitted) (quotation marks omitted). The class included an estimated 700,000 members. *Engle II*, 853 So. 2d at 442.

The trial court charged with managing this class action devised a trial plan consisting of three phases. In Phase I, the court conducted a year-long trial on

"common issues relating exclusively to defendants' conduct and the general health effects of smoking." *Id.* at 441. At the trial's conclusion, "the jury rendered a verdict for the class on all counts." *Id*.

To reach that verdict, the jury answered special interrogatories submitted by the Phase I trial court, at least two of which concerned the claims litigated here: First, did each tobacco company "place cigarettes on the market that were defective and unreasonably dangerous"? *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278, 1282 (11th Cir. 2013). And second, did each tobacco company "fail to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances"? *Id.* (alteration omitted). The tobacco companies argued that these questions "did not ask for specifics about the tortious conduct of the tobacco companies, rendering the jury findings useless for application to individual plaintiffs." *Id.* (alterations omitted) (quotation marks omitted). But the trial court overruled their objection, and the jury answered "yes" to both questions. *Id.*

In Phase II, the same jury found the tobacco companies liable for the injuries of three class representatives, awarded them compensatory damages of $12.7 million, and calculated punitive damages for the entire class to be $145 billion. *Engle II*, 853 So. 2d at 441. Before the trial reached Phase III, in which new juries were to have decided individual causation and damages claims for the 700,000

class members, *id.* at 442, the Third District Court of Appeal decertified the class and vacated the class-wide punitive-damages award, *id.* at 450, 456.

The class appealed, and the Florida Supreme Court affirmed the Third District Court of Appeal's decision to decertify the class and to vacate the punitive-damages award.[3] *Engle III*, 945 So. 2d at 1268 (explaining that "continued class action treatment . . . is not feasible because individualized issues such as legal causation, comparative fault, and damages predominate"). Following decertification, the court reasoned that "[c]lass members can choose to initiate individual damages actions and the Phase I common core findings . . . will have res judicata effect in those trials." *Id.* at 1269. In particular, the Florida Supreme Court approved affording the following Phase I findings res judicata effect:

> (i) [T]hat smoking cigarettes causes certain named diseases including COPD and lung cancer; (ii) that nicotine in cigarettes is addictive; (iii) that the *Engle* defendants placed cigarettes on the market that were defective and unreasonably dangerous; (iv) that the *Engle* defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both; (v) that the *Engle* defendants agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment; (vi) that all of the *Engle* defendants sold or supplied cigarettes that were defective; (vii) that all of the *Engle* defendants sold or supplied cigarettes that, at the time of sale or supply, did not conform to

[3] The Florida Supreme Court also reversed the Third District Court of Appeal's decision on several other grounds not relevant to our discussion. *See Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1276–77 (Fla. 2006).

> representations of fact made by said defendants; and (viii) that all of the *Engle* defendants were negligent.

Phillip Morris USA, Inc. v. Douglas, 110 So. 3d 419, 424–25 (Fla. 2013) (alterations omitted) (footnote omitted) (quotation marks omitted) (quoting *Engle III*, 945 So. 2d at 1276–77 (Fla. 2006)). But what, exactly, does that mean?

2.

After the Florida Supreme Court decided *Engle III*, individual members of the defunct class scattered, making their way into both state and federal courts. Uncertainty about the Phase I findings abounded. In fact, three Florida District Courts of Appeal, joined by the United States District Court for the Middle District of Florida and a panel of our court, produced a four-way split as to how the Phase I findings should inform *Engle*-progeny cases in light of *Engle III*. The disagreement centered on two open questions: first, whether *Engle III*'s use of the term "res judicata" referred to issue preclusion or claim preclusion; and second, how juries should assess the causation element of an *Engle*-progeny plaintiff's claim.

a.

Our court issued the first opinion on the subject. In *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324 (11th Cir. 2010), we recognized that the term "res judicata" can refer to "claim preclusion, to issue preclusion, or to both." *Id.* at 1332. We understood *Engle III* as referring to issue, not claim, preclusion

"[b]ecause factual issues and not causes of action were decided in Phase I." *Id.* at 1333. Noting that "issue preclusion only operates to prevent the re-litigation of issues that were decided, or 'actually adjudicated,' between the parties in an earlier lawsuit," *id.* at 1334 (citation omitted), we permitted an *Engle*-progeny plaintiff to rely on the Phase I jury findings to the extent he could show "to a reasonable degree of certainty that the jury made the specific factual determination that is being asserted," *id.* at 1335.

To do so, an *Engle* plaintiff would bear the burden of rummaging through the Phase I trial record and identifying "specific parts of it to support [his] position." *Id.* But our court declined "to address whether [the Phase I] findings by themselves establish any elements of the plaintiffs' claims," observing only that such an inquiry would be "premature" "[u]ntil the scope of the factual issues decided in the Phase I approved findings is determined." *Id.* at 1336. We directed the district court on remand

> to determine, for example, whether the jury's [strict-liability finding] establishes only that the defendants sold some cigarettes that were defective and unreasonably dangerous, or whether the plaintiffs have carried their burden of showing to a reasonable degree of certainty that it also establishes that all of the cigarettes that the defendants sold fit that description.

Id. We eyed this task skeptically, though, noting that "plaintiffs have pointed to nothing in the record, and there is certainly nothing in the jury findings themselves" to support the conclusion that "all cigarettes the defendants sold were

defective and unreasonably dangerous because there is nothing to suggest that any type or brand of cigarette is any safer or less dangerous than any other type or brand." *Id.* at 1335.

b.

The First District Court of Appeal disagreed. *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1067 (Fla. 1st Dist. Ct. App. 2010). The First District found it unnecessary to distinguish between claim and issue preclusion and held that an *Engle* plaintiff need not "trot out the class action trial transcript to prove applicability of the Phase I findings." *Id*. As a result, "[t]he common issues, which the [Phase I] jury decided *in favor of the class*, were the 'conduct' elements of the claims asserted by the class, and not simply . . . a collection of facts *relevant* to those elements." *Id*. Under this reading, a plaintiff thus had no burden to prove, to a reasonable degree of certainty, that the Phase I jury had actually decided the factual issue relevant to his claim—for example, how the cigarettes that the plaintiff smoked were defective or negligently designed.

The *Martin* court supported this conclusion by referencing the Final Judgment and Amended Omnibus Order entered by the Phase I trial judge in denying the tobacco companies' motion for a directed verdict. *Id*. at 1068 (citing *Engle v. R.J. Reynolds Tobacco Co.* ("*Engle F.J.*"), No. 94-08273 CA-22, 2000 WL 33534572, at *1 (Fla. Cir. Ct. Nov. 6, 2000)). The *Martin* court read *Engle*

F.J. to "set[] out the evidentiary foundation for the Phase I jury's findings . . . and demonstrate[] that the verdict is conclusive as to the conduct elements of the claims." *Id.*[4] This meant that "individual *Engle* plaintiffs need not independently prove up those elements [established by the Phase I findings] or demonstrate the relevance of the findings to their lawsuits, assuming they assert the same claims raised in the class action." *Id.* at 1069. In short, the plaintiffs had already proved the duty and breach elements of their tort claims.

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[4] As to the strict-liability claim, the trial court wrote that the evidence presented at trial

> was more than sufficient . . . to support the jury verdict that cigarettes manufactured and placed on the market by the defendants were defective in many ways including the fact that the cigarettes contained many carcinogens, nitrosamines, and other deleterious compounds such as carbon monoxide. That levels of nicotine were manipulated, sometime by utilization of ammonia to achieve a desired "free basing effect" of pure nicotine to the brain, and sometime by using a higher nicotine content tobacco called Y-1, and by other means such as manipulation of the levels of tar and nicotine [sic]. The evidence more than sufficiently proved that nicotine is an addictive substance which when combined with other deleterious properties, made the cigarette unreasonably dangerous. The evidence also showed some cigarettes were manufactured with the breathing air holes in the filter being too close to the lips so that they were covered by the smoker thereby increasing the amount of the deleterious effect of smoking the cigarette. There was also evidence at trial that some filters being test marketed utilize glass fibers that could produce disease and deleterious effects if inhaled by a smoker.

Engle v. R.J. Reynolds Tobacco Co. ("*Engle F.J.*"), No. 94-08273 CA-22, 2000 WL 33534572, at *2 (Fla. Cir. Ct. Nov. 6, 2000). The trial court went on to discuss the jury's findings regarding negligence:

> The [*Engle*] defendants according to the testimony, well knew from their own research, that cigarettes were harmful to health and were carcinogenic and addictive. [A]llowing the sale and distribution of said product under those circumstances without taking reasonable measures to prevent injury, constitutes . . . negligence.

Id. at *4.

As for causation, the *Martin* court affirmed the following jury instruction:

> The first issue for your determination is whether [the plaintiff] was a member of the *Engle* class. In order to be a member of the *Engle* class, the plaintiff must prove that [he] was addicted to R.J. Reynolds cigarettes containing nicotine, and, if so, that his addiction was the legal cause of his death. Addiction is a legal cause of death if it directly and in a natural and continuous sequence produces or contributes substantially to producing such death so that it can reasonably be said that, but for the addiction to cigarettes containing nicotine, the death would not have occurred.

Id. at 1069 (alterations omitted) (quotation marks omitted).

c.

Less than a year after *Martin*, the Fourth District Court of Appeal joined the fray. *R.J. Reynolds Tobacco Co. v. Jimmie Lee Brown*, 70 So. 3d 707 (Fla. 4th Dist. Ct. App. 2011). *Jimmie Lee Brown* agreed with *Martin* that the Phase I findings were due res judicata effect; that is, they established the duty and breach elements of the plaintiffs' claims. *Id.* at 715. But it read *Martin* as "equating the legal causation instruction used on the issue of addiction with a finding of legal causation on the plaintiff's strict liability and negligence claims." *Id.* at 716. Membership in the *Engle* class, the court reasoned, was not enough to satisfy a plaintiff's burden of proof regarding the causation elements of a strict-liability or negligence action. Instead, "a jury must be asked to determine (i) whether the defendant's failure to exercise reasonable care was a legal cause of decedent's

death; and (ii) whether the defective and unreasonably dangerous cigarettes were a legal cause of decedent's death." *Id.* at 715.

Pause to consider the difference between the causal inquiries proposed by *Martin* and *Jimmie Lee Brown*. In *Martin*, class membership and cause were essentially collapsed. *Martin* imposed no additional causal requirement beyond the class definition itself, namely, that a plaintiff's injuries be "caused by [his] addiction to cigarettes that contain nicotine." *Engle I*, 672 So. 2d at 40. Under *Martin*'s approach, an *Engle* plaintiff need only prove that his addiction to cigarettes caused his injury. He need not prove that the *defendants' conduct*—the defendants' defective product or the defendants' negligence, for example—was a legal cause of that injury as well. *Jimmie Lee Brown*'s approach demands more: for an *Engle* plaintiff to succeed on his claim, he must causally link specific tortious acts by the defendants to his injury.

d.

Enter the United States District Court for the Middle District of Florida. Faced with an *Engle*-progeny case after these three cases had been decided, the court first held that it was bound to give the Phase I findings the same preclusive effect as had *Martin* and *Jimmie Lee Brown*. *Waggoner v. R.J. Reynolds Tobacco Co.*, 835 F. Supp. 2d 1244, 1278 (M.D. Fla. 2011). It then considered whether doing so violated due process.

The tobacco companies argued that, because the plaintiffs pursued a number of different theories during the Phase I trial, it was impossible to discern which theory undergirded the jury's answers to the special interrogatories. For instance, when the jury said that all defendants placed cigarettes on the market that were defective and unreasonably dangerous, was that because the defendants sold cigarettes containing ammoniated tobacco? Or was it because the defendants sold cigarettes containing glass filter fibers? The jury could have answered "yes" to the first question for some defendants and "yes" to the second question for the others; "yes" to the first question and "no" to second; or "no" to the first question and "yes" to the second—the answer to the special interrogatory would have been the same. Under all three scenarios, the jury would have concluded that all defendants sold defective and unreasonably dangerous cigarettes. But no one could ever know which defendants produced which brand or brands of cigarettes with what defect or defects. And that result, the tobacco companies contended, stretched any application of res judicata past its constitutional breaking point. Although the District Court candidly admitted that "the *Engle* progeny litigation is unlike any this Court has seen or is likely to see again," *id.* at 1277, it rejected the defendants' due process argument, stressing that "[s]uch a unique situation demands some flexibility to accommodate the due process interests of *both* the Defendants *and* the thousands of *Engle* progeny plaintiffs," *id.*

Regarding causation, the court recognized that "plaintiffs' burden of proving causation is one of the primary procedural safeguards erected by the Florida Supreme Court in *Engle III*." *Id.* at 1278. The court therefore adopted the approach used in *Jimmie Lee Brown*—not *Martin*—as "the better way to proceed because it requires a specific causal link between Defendants' conduct and a progeny plaintiff's injuries and damages." *Id.* at 1279.

e.

The Second District Court of Appeal offered a final way of handling *Engle*-progeny claims: it split the difference between *Martin* and *Jimmie Lee Brown*'s disagreement about causation. *Phillip Morris USA, Inc. v. Douglas*, 83 So. 3d 1002 (Fla. 2d Dist. Ct. App. 2012). The court adopted *Martin*'s approach for the strict-liability claim. *Id.* at 1005 (approving a jury instruction directing the jury to determine "whether smoking cigarettes manufactured and sold by one or more of the defendants was a legal cause of the death of Decedent"). But the court held that the defendants were entitled to a more specific causal instruction on the negligence claim, much like the instruction approved in *Jimmie Lee Brown*. *Id.* at 1010 n.8 (faulting the trial court for failing to "ask the jury if it was the Tobacco Companies' failure to exercise reasonable care that was the legal cause of [the decedent's] injury"). At the same time, it certified to the Florida Supreme Court the constitutional question overhanging all *Engle*-progeny cases: whether res

judicata application of the Phase I findings comported with due process. *Id.* at 1011.

3.

The Florida Supreme Court resolved these conflicts in *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013). The court held that affording the Phase I findings res judicata effect was an application of claim preclusion, not issue preclusion. *Id.* at 432. An application of issue preclusion "would [have effectively made] the Phase I findings regarding the *Engle* defendants' conduct useless in individual actions." *Id.* at 433. That is because "[i]ssue preclusive effect is not given to issues which could have, but may not have, been decided in an earlier lawsuit between the parties." *Brown*, 611 F.3d at 1334 (collecting Florida cases applying issue preclusion's "actually adjudicated" requirement). Claim preclusion, by contrast, extends to issues actually decided in a prior litigation, as well as "every other matter which might with propriety have been litigated and determined in that action." *Douglas*, 110 So. 3d at 432 (quotation marks omitted). As a result, the court made clear that the Phase I findings were to be given claim-preclusive effect in subsequent trials and that the "conduct elements" of plaintiffs' tort claims—duty, breach, and "general causation"[5]—had already been

[5] The court defined general causation as "the connection between the *Engle* defendants' addictive cigarettes and the diseases in question." *Phillip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 428 (Fla. 2013).

conclusively established in favor of the class. *Id.* at 428. Although claim preclusion is generally understood to apply only upon issuance of a final judgment, *e.g.*, *Fla. Dept. of Transp. v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001), *Douglas* held that the Phase I jury findings produced a "final judgment" in the sense that they resolved all common liability issues in favor of the class, *Douglas*, 110 So. 3d at 434.

The court went on to hold that affording the Phase I findings claim-preclusive effect did not violate due process. It reasoned that the tobacco companies were not entitled, under the Due Process Clause, to an application of issue, rather than claim, preclusion. And because claim preclusion, unlike issue preclusion, has no "actually decided" requirement, *Douglas* found that "there was competent substantial evidence to support the *Engle* defendants' common liability to the class," evidence of which the tobacco companies had notice and on which they had an opportunity to be heard during the Phase I trial. *Id*. at 433.

As for the causation issue, the court wholeheartedly embraced *Martin*'s approach. *Id.* at 428–29. The court rejected "the [tobacco companies'] argument that the Phase I findings are too general to establish . . . a causal connection between the *Engle* defendants' conduct and injuries proven to be caused by addiction to smoking their cigarettes." *Id.* at 429. All that remained to be litigated were "individual causation"—"the connection between the *Engle* defendant's

addictive cigarettes and the injury that an individual plaintiff actually sustained"—and damages. *Id.* at 428. In other words, "to prevail on either strict liability or negligence *Engle* claims, individual plaintiffs must establish (i) membership in the *Engle* class; (ii) individual causation, i.e., that addiction to smoking the *Engle* defendants' cigarettes containing nicotine was a legal cause of the injuries alleged; and (iii) damages." *Id.* at 430.[6]

4.

The most recent chapter in the *Engle* litigation tome was written by this court in *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013). In *Douglas*'s aftermath, the tobacco companies brought yet another due process challenge to the res judicata effect of the Phase I findings.

They began their argument by agreeing with the Florida Supreme Court's admission in *Douglas* that an application of issue preclusion to the Phase I findings

[6] The Florida Supreme Court described a typical *Engle*-progeny trial this way:

> [T]o gain the benefit of the Phase I findings in the first instance, individual plaintiffs must prove membership in the *Engle* class. . . . [P]roving class membership often hinges on the contested issue of whether the plaintiff smoked cigarettes because of addiction or for some other reason (like the reasons of stress relief, enjoyment of cigarettes, and weight control argued below). Once class membership is established, individual plaintiffs use the Phase I findings to prove the conduct elements of the six causes of action this Court upheld in *Engle*; however, for the strict liability and negligence claims at issue here, they must then prove individual causation and damages. If an individual plaintiff receives a favorable verdict, it is then subject to appellate review.

Id. at 431–32.

would render those findings "useless." That is because, under Florida preclusion law, issue-preclusive effect is only given to issues that were "actually decided" in a prior litigation. Because the Phase I findings could rest on any number of theories against any number of defendants, it is impossible to tell what was "actually decided." Any attempt to do so would violate due process. *See Fayerweather v. Ritch*, 195 U.S. 276, 307, 25 S. Ct. 58, 68, 49 L. Ed. 193 (1904) ("[W]here the evidence is that testimony 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, and the plea of *res judicata* must fail.").

The tobacco companies charged *Douglas* with eliding this predicament entirely by relying on claim preclusion instead. Claim preclusion has no "actually decided" requirement, so the generic nature of the Phase I findings was not the obstacle it would have otherwise been under an issue-preclusion rubric. But this line of reasoning, the tobacco companies contended, was unpersuasive. First, claim preclusion has traditionally been understood as a defense. *Douglas*'s application of claim preclusion, by contrast, affords plaintiffs an offensive weapon against the tobacco companies by relieving the plaintiffs of their obligation to prove the duty and breach elements of their claims and by preventing the defendants from contesting the plaintiffs' proof on those claims. Second, claim

preclusion is relevant only when there has been a final judgment. According to the tobacco companies, the Phase I findings were not a final judgment because, by the Florida Supreme Court's own admission, the Phase I jury "did not determine whether the defendants were liable to anyone." *Engle III*, 945 So. 2d at 1263 (quotation marks omitted).

The tobacco companies thus concluded that under either umbrella—claim preclusion or issue preclusion—*Douglas* was soaked. In their view, the decision marked such an "extreme" departure from the doctrine of res judicata that it violated due process of law. *See Richards v. Jefferson Cnty.*, 517 U.S. 793, 797, 116 S. Ct. 1761, 1765, 135 L. Ed. 2d 76 (1996).[7]

Walker rejected these arguments. First, it explained that the descriptive label attached by the Florida Supreme Court to its application of res judicata carries little weight. How a state court describes a state-law doctrine is "no concern of ours." *Walker*, 734 F.3d at 1289. Second, it sought to ameliorate any due process concerns surrounding *Douglas* by reframing the inquiry: "If due process requires a finding that an issue was actually decided, then the Supreme Court of Florida made the necessary finding when it explained that the approved findings from Phase I go to the defendants underlying conduct which is common to all class members and

[7] For a more complete account of the arguments offered by the tobacco companies in *Walker*, see generally Consolidated Reply Brief of Appellant, *Walker v. R.J. Reynolds*, 734 F.3d 1278 (11th Cir. 2013) (No. 12-13500), 2013 WL 2288547.

will not change from case to case . . . ." *Id.* (citation omitted) (quotation marks omitted).

We take *Walker* to read *Douglas* to interpret the Phase I findings as involving only issues common to the class. Under this view, the brand-specific evidence presented to the Phase I jury matters not; that evidence is not common to the class. Different plaintiffs smoked different cigarettes with different defects over different periods of time. There is only one common issue we can be sure the Phase I jury "actually decided" as to the entire class: all plaintiffs smoked cigarettes containing nicotine that are addictive and cause disease. *Id.* at 1287 ("Based on [the Florida Supreme Court's] review of the class action trial plan and the jury instructions, the court concluded that the jury had been presented with arguments that the tobacco companies acted wrongfully toward all the plaintiffs and that all cigarettes that contain nicotine are addictive and produce dependence." (citing *Douglas*, 110 So.3d at 423)). As *Douglas* held and as *Walker* reaffirmed, the Phase I findings transcend brand-specific defects:

> [I]n Phase I, the class action jury was *not* asked to find brand-specific defects in the *Engle* defendants' cigarettes or to identify specific tortious actions. Instead, in instructing the jury, the *Engle* trial court explained that it was to determine "all common liability issues" for the class concerning "*the conduct of the tobacco industry*." . . . During Phase I, 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*.

Douglas, 110 So. 3d at 423 (emphasis added); *see also Walker*, 734 F.3d at 1287. ("Although the proof submitted to the jury included both general and brand-specific defects, the court concluded that the jury was asked only to determine all common liability issues for the class, not brand specific defects." (quotation marks omitted)).

It follows that the jury's conclusions regarding strict liability and negligence rest on what is essentially the least common denominator: the inherent defectiveness of cigarettes containing nicotine and the inherent lack of ordinary care exercised when a defendant placed such a defective product on the market to be sold. Any findings more specific could not have been "actually decided" by the Phase I jury, and their claim-preclusive application would raise the specter of violating due process.[8]

II.

Unsurprisingly, this background featured prominently in Earl Graham's wrongful-death suit. His case went to trial on May 13, 2013. The trial spanned nine days. The District Court first instructed the jury that "[t]o be a member of the *Engle* class, Mr. Graham must prove by a preponderance of evidence that Mrs. Graham was addicted to cigarettes containing nicotine and that such addiction was

[8] We understand *Walker* to discuss only *Engle*-progeny strict-liability and negligence claims. We express no opinion regarding what effect—if any—*Walker* or *Walker*'s reasoning may have on other *Engle*-progeny claims, for example, fraudulent concealment or conspiracy to fraudulently conceal.

a legal cause of her death." If the jury found Faye Graham to be a member of the *Engle* class, the District Court then employed the framework articulated in *Douglas* to instruct the jury as follows:

> Mr. Graham's first claim is for negligence. One of the *Engle* findings was that the Defendants were negligent with respect to their manufacture and sale of cigarettes and you must accept that determination.
>
> Mr. Graham's second claim is for strict liability. One of the *Engle* findings was that the Defendants placed cigarettes on the market that were defective and unreasonably dangerous and you must accept that determination.
>
> The issue for your decision on both Mr. Graham's negligence and strict liability claims is, as to each Defendant, whether smoking cigarettes manufactured by that Defendant was a legal cause of Mrs. Graham's death.

R.J. Reynolds and Phillip Morris objected to these instructions on a number of grounds, including that they "invite the jury to improperly base its verdict on claims or theories that are in whole or in part preempted by federal law."[9]

The jury found for Graham on both his strict-liability and negligence claims, awarding him $2.75 million in compensatory damages. The jury also determined that Faye Graham was 70 percent responsible for her death, that R.J. Reynolds was 20 percent responsible for her death, and that Phillip Morris was 10 percent responsible for her death. The District Court then entered judgment against R.J.

[9] The defendants first asserted the preemption argument as the fourth affirmative defense in their answer to Graham's complaint. They also raised the issue in the joint pretrial statement and in their motion for judgment as a matter of law pursuant to Rule 50(a).

Reynolds for $550,000 and against Phillip Morris for $275,000 in light of the jury's allocation of fault. The defendants renewed their motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b).[10] Specifically, they argued that federal law preempted the jury's imposition of tort liability because it would frustrate the congressional objective "to foreclose the removal of tobacco products from the market despite the known health risks and addictive properties." Relying on the doctrine of express preemption, the District Court denied the motion. The defendants now appeal.

"We review the denial of a motion for judgment as a matter of law *de novo*." *Gowski v. Peake*, 682 F.3d 1299, 1310 (11th Cir. 2012) (per curiam). "Under Rule 50, a court should render judgment as a matter of law when there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." *Id.*

III.

Our constitutional system contemplates "that both the National and State governments have elements of sovereignty the other is bound to respect." *Arizona v. United States*, ___ U.S. ___, ___, 132 S. Ct. 2492, 2500, 183 L. Ed. 2d 351 (2012). When state and federal law "conflict or [otherwise work] at cross-purposes," *id.*, the Supremacy Clause commands that federal law "shall be the

[10] The defendants moved, in the alternative, for a new trial under Rule 59.

supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," U.S. Const. art. VI. Simply put, state laws that "interfere with, or are contrary to," federal law cannot hold sway—they "must yield." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211, 6 L. Ed. 23 (1824).

Federal law may preempt state law in three ways. First, Congress has the authority to expressly preempt state law by statute. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372, 120 S. Ct. 2288, 2293, 147 L. Ed. 2d 352 (2000). Second, even in the absence of an express preemption provision, "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447 (1947). Third, federal and state law may impermissibly conflict, for example, "where it is impossible for a private party to comply with both state and federal law," *Crosby*, 530 U.S. at 373, 120 S. Ct. at 2294; or where the state law at issue "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L. Ed. 581 (1941).[11] It is this last subcategory of conflict preemption—obstacle preemption—we consider here.

[11] In surveying this taxonomy, however, we must keep in mind that "[c]ategories and labels are helpful, but only to a point, and they too often tend to obfuscate instead of illuminate." *Fla. State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1167 (11th Cir. 2008); *see*

In the District Court, R.J. Reynolds and Phillip Morris advanced both express- and obstacle-preemption arguments in renewing their motion for a judgment as a matter of law. The District Court's order denying that motion, however, discussed only express preemption. But it is well-established that a lack of express preemption "does *not* bar the ordinary working of conflict pre-emption principles." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869, 120 S. Ct. 1913, 1919, 146 L. Ed. 2d 914 (2000); *see also This That & The Other Gift & Tobacco, Inc. v. Cobb Cnty.*, 285 F.3d 1319, 1323 n.1 (11th Cir. 2002) ("The existence of an express preemption clause, however, neither bars the ordinary working of conflict preemption principles nor by itself precludes a finding of implied preemption."). To the extent the District Court's order suggests the contrary, the District Court erred. On appeal, though, R.J. Reynolds and Phillip Morris appear to have abandoned their express-preemption theory and argue in favor of obstacle preemption alone. Accordingly, that is the only type of preemption we address. *Cf. Hillman v. Maretta*, ___ U.S. ___, ___, 133 S. Ct. 1943, 1949, 186 L. Ed. 2d 43 (2013) (holding a state law invalid under obstacle preemption without discussing the scope of the federal statute's express-preemption clause).

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also English v. Gen. Elec. Co., 496 U.S. 72, 79 n.5, 110 S. Ct. 2270, 2275, 110 L. Ed. 2d 65 (1990) ("By referring to these three categories, we should not be taken to mean that they are rigidly distinct."); *cf.* Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 264 (2000) ("[T]he labels that one uses to describe different types of rules do not capture anything very important about preemption doctrine.").

A.

Obstacle preemption leaves R.J. Reynolds and Phillip Morris with a tough row to hoe. Supreme Court precedent teaches that "a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Chamber of Commerce v. Whiting*, ___ U.S. ___, ___, 131 S. Ct. 1968, 1985, 179 L. Ed. 2d 1031 (2011) (quotation marks omitted). Indeed, "[i]mplied preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives." *Id.* (quotation marks omitted). That is because "such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law." *Id.* (quotation marks omitted).

In addition to overcoming this "high threshold," R.J. Reynolds and Phillip Morris must also confront the presumption against preemption—namely, that "we start with the assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress." *Rice*, 331 U.S. at 230, 67 S. Ct. at 1152.[12] The presumption is a "cornerstone[] of our pre-emption jurisprudence."[13] *Wyeth v. Levine*, 555 U.S.

[12] It is unclear whether *Whiting* applies the presumption against preemption, albeit *sub silentio*, or whether it imposes an additional hurdle, above and beyond the presumption, to making a successful obstacle-preemption argument.

[13] The presumption against preemption has been hotly debated, particularly when applied to issues of statutory interpretation in cases involving express preemption. *Compare, e.g.*, *PLIVA, Inc. v. Mensing*, ___ U.S. ___, ___, 131 S. Ct. 2567, 2580, 180 L. Ed. 2d 580 (2011) (Thomas, J.) (plurality opinion) ("[C]ourts should not strain to find ways to reconcile federal law

555, 565, 129 S. Ct. 1187, 1194, 173 L. Ed. 2d 51 (2009). And its logic carries particular force where, as here, "federal law is said to bar state action in fields of traditional state regulation." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 115 S. Ct. 1671, 1676, 131 L. Ed. 2d 695 (1995). We must recognize, therefore, "the historic primacy of state regulation of matters of health and safety," which can be enforced through state statutes and state tort law alike.[14] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 2250, 135 L. Ed. 2d 700 (1996). Given the "great latitude" that states possess "under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons," *id.* at 475, 116 S. Ct. at 2245

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with seemingly conflicting state law."), *with id.* at ___, 131 S. Ct. at 2591 (Sotomayor, J., dissenting) ("In the context of express pre-emption, we read federal statutes whenever possible not to pre-empt state law."). In the absence of an express preemption provision, however, the presumption appears to rest on less contested ground, at least for the time being. *Wyeth v. Levine*, 555 U.S. 555, 589 n.2, 129 S. Ct. 1187, 1208, 173 L. Ed. 2d 51 (2009) (Thomas, J., concurring) ("Because it is evident from the text of the relevant federal statutes and regulations themselves that the state-law judgment below is not pre-empted, it is not necessary to decide whether, or to what extent, the presumption should apply in a case such as this one, where Congress has not enacted an express-pre-emption clause."). That said, the presumption has a tendency to make sporadic appearances in the Court's preemption jurisprudence; among the five preemption cases decided during the 2011 Term, for example, not one discussed the presumption. Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 Sup. Ct. Rev. 253, 331.

[14] "[C]ommon-law damages actions . . . are premised on the existence of a legal duty . . . . [I]t is the essence of the common law to enforce duties that are either affirmative *requirements* or negative *prohibitions*. . . . At least since *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), we have recognized the phrase 'state law' to include common law as well as statutes and regulations." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 522, 112 S. Ct. 2608, 2620, 120 L. Ed. 2d 407 (1992) (plurality opinion) (interpreting an express preemption provision contained in the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 5(b), 84 Stat. 87 (codified at 15 U.S.C. § 1334(b)).

(quotation marks omitted), we will not ascribe to Congress the intent "cavalierly [to] pre-empt state-law causes of action," *id.* at 485, 116 S. Ct. at 2250. To do otherwise would ignore altogether that "[t]he allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, ___ U.S. ___, ___, 131 S. Ct. 2355, 2364, 180 L. Ed. 2d 269 (2011).

The lodestar of any preemption inquiry is congressional intent. *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103, 84 S. Ct. 219, 223, 11 L. Ed. 2d 179 (1963). In assessing the extent to which state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines*, 312 U.S. at 67, 61 S. Ct. at 404, "[w]hat [constitutes] a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects," *Crosby*, 530 U.S. at 373, 120 S. Ct. at 2294. To begin, then, "we must first ascertain the nature of the federal interest." *Hillman*, ___ U.S. at ___, 133 S. Ct. at 1950.

B.

By our count, Congress has enacted at least seven statutes regulating tobacco products in the past fifty years. We examine their text and structure, which provide the most reliable indicia of what Congress has resolved itself to achieve.

CTS Corp. v. Waldburger, ___ U.S. ___, ___ 134 S. Ct. 2175, 2185, 189 L. Ed. 2d 62 (2014). This amounts to the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination." *United States v. Fausto*, 484 U.S. 439, 453, 108 S. Ct. 668, 676–77, 98 L. Ed. 2d 830 (1988).

We start with first principles. Congress possesses the constitutional authority to ban cigarettes. *See* U.S. Const., art. I, § 8, cl. 3. It has never done so. This, despite an ever-growing body of research documenting the health risks associated with smoking. In 1964, for example, the Surgeon General issued a report concluding that "[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." Advisory Comm. to the Surgeon Gen. of the Public Health Serv., U.S. Dep't of Health, Educ., & Welfare, *Smoking and Health* 33 (1964), *available at* http://profiles.nlm.nih.gov/ps/access/NNBBMQ.pdf. The report warned "that cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate." *Id.* at 31.

These findings spurred legislative action. Congress's first attempt to address cigarette smoking and its consequences came in the Federal Cigarette Labeling and Advertising Act (the "Labeling Act"), Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331–1341). The Labeling Act aimed to

"establish a comprehensive Federal program to deal with cigarette labeling and advertising." *Id.* § 2. Central to this comprehensive program was a requirement that all cigarette packages display the warning statement, "Caution: Cigarette Smoking May Be Hazardous to Your Health." *Id.* § 4.

For our purposes, the Labeling Act is instructive because it encapsulates the competing interests Congress has sought to reconcile when regulating cigarettes. On the one hand, Congress has recognized that smoking can cause serious physical harm, even death. On the other hand, Congress has also acknowledged the important role tobacco production and manufacturing plays in the national economy. Congress has carefully calibrated these policy considerations by promoting full disclosure to consumers about the attendant risks tobacco products carry, thereby permitting free but informed choice. The plain language of the Labeling Act summarizes well this approach:

> It is the policy of the Congress . . . [that]
>
> > (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
> > (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations . . . .

Id. § 2.[15]

Since the Labeling Act's passage, Congress's basic goals have remained largely unchanged. For example, Congress has tinkered with the text of the warning labels affixed to cigarette packages in an effort to arm consumers with more complete and accurate information. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 4, 84 Stat. 87 (codified as amended at 15 U.S.C. § 1333); Comprehensive Smoking Education Act, Pub. L. No. 98-474, § 4, 98 Stat. 2200 (1984) (codified at 15 U.S.C. § 1333). To promote transparency, Congress has required the Secretary of Health and Human Services to issue a report to Congress every three years regarding the "addictive property of tobacco." Alcohol and Drug Abuse Amendments of 1983, Pub. L. No. 98-24, 97 Stat. 175. Congress has stepped in to regulate smokeless tobacco products, too. Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252, 100 Stat.

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[15] Senator Neuberger (D-OR), who introduced a version of the Labeling Act in the Senate, put it this way:

> I do not carry around with me a pair of scissors to cut off burning cigarettes in the mouths of those I meet. I have never attacked a cigarette stand with a hatchet. I have never equated smoking with sin. Abstention from tobacco is not a condition of employment with my staff. I have never introduced legislation nor have I ever delivered a speech calling for the abolition of cigarettes. . . .
>
> What have I advocated, then? Briefly, I believe there are four general sectors of Government activity in which remedial action is justified: first, education of both the presmoking adolescent and the adult smoker; second, expanded research into the technology of safer smoking; third, reform of cigarette advertising and promotion; and fourth, cautionary and informative labeling of cigarette packages.

111 Cong. Rec. S13899 (daily ed. June 16, 1965) (statement of S. Neuberger).

30. And Congress has even incentivized states to prohibit the sale of tobacco products to minors by conditioning block grants on the creation of programs "to discourage the use of . . . tobacco products by individuals to whom it is unlawful to sell or distribute such . . . products." Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub. L. No. 102-321, § 202, 106 Stat. 323 (1992) (codified at 42 U.S.C. § 300x-22).

All this, but no ban on the sale of cigarettes to adult consumers. No ban even though over the last fifty years a scientific consensus has emerged that smoking can kill. The Surgeon General has reaffirmed this, at least twice. Office of the Surgeon Gen., U.S. Dep't of Health & Human Servs., *The Health Consequences of Smoking: Nicotine Addiction* (1988), *available at* http://profiles.nlm.nih.gov/ps/access/NNBBZD.pdf; Office of the Surgeon Gen., U.S. Dep't of Health & Human Servs., *The Health Consequences of Smoking—50 Years of Progress* (2014), *available at* http://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf. The Environmental Protection Agency has classified secondhand smoke as a known human carcinogen. Office of Health & Envtl. Assessment, *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders* 4 (1992), *available at* http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=2835. The Food and Drug Administration (the "FDA") has published research indicating

that "[t]he pharmacological processes that cause [nicotine addiction] are similar to those that cause addiction to heroin and cocaine." FDA, Jurisdictional Determination, 61 Fed. Reg. 44619, 44631 (Aug. 28, 1996). These are, of course, but a few examples.

In short, Congress has known about the dangers of cigarettes for many years. Congress has regulated cigarettes for many years. But it has never banned them. Indeed, regulation of cigarettes rests on the assumption that they will still be sold and that consumers will maintain a "right to choose to smoke or not to smoke." H.R. Rep. No. 89-449 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2350, 2352.

The Supreme Court has so concluded, holding that the FDA lacked jurisdiction to regulate cigarettes because it would have otherwise been required by statute to prohibit their sale. *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 161, 120 S. Ct. 1291, 1315–16, 146 L. Ed. 2d 121 (2000). This result, the Court determined, would have contravened the intent of Congress, given that "the collective premise of these statutes is that cigarettes and smokeless tobacco will continue to be sold in the United States." *Id.* at 139, 120 S. Ct. at 1304.

And although Congress has overruled this decision, granting the FDA regulatory authority over cigarettes in 2009, Congress nonetheless stated that the FDA "is prohibited from" "banning all cigarettes" or "requiring the reduction of nicotine yields of a tobacco product to zero." Family Smoking Prevention and

Tobacco Control Act (the "TCA"), Pub. L. No. 111-31, § 907(d)(3)(A)–(B), 123 Stat. 1776 (2009) (codified at 21 U.S.C. § 387g). To be sure, the TCA does not "affect any action pending in Federal . . . court" prior to its enactment—including this one. *Id.* § 4(a)(2); *see Engle III*, 945 So. 2d at 1277 (noting that *Engle* progeny cases must be filed within one year of the issuance of the case's mandate). It merely makes textually explicit what was already evident by negative implication: Congress has never intended to prohibit consumers from purchasing cigarettes. To the contrary, it has designed "a distinct regulatory scheme" to govern the product's advertising, labelling, and—most importantly—sale. *Brown & Williamson*, 529 U.S. at 155, 120 S. Ct. at 1312.

C.

We now turn to how these federal objectives interact with state law. Federal law can expressly or impliedly preempt a state tort suit. *E.g.*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000) (finding implied preemption of state tort suit); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) (plurality opinion) (finding express preemption of certain state tort suits); *see generally Williamson v. Mazda Motor of Am., Inc.*, ___ U.S. ___, ___, 131 S. Ct. 1131, 1136, 179 L. Ed. 2d 75 (2011) (collecting cases). A tort is "a breach of a duty that the law imposes on persons who stand in a particular relation to one another." Black's Law Dictionary 1626

(9th ed. 2009). As such, successful tort actions "are premised on the existence of a legal duty." *Cipollone*, 505 U.S. at 522, 112 S. Ct. at 2620 (plurality opinion); *see also Geier*, 529 U.S. at 881, 120 S. Ct. at 1925 (characterizing a successful tort action as "a state law—*i.e.*, a rule of state tort law imposing . . . a duty"). Strict-liability and negligence claims like those at issue here are no exception. *Mutual Pharm. Co. v. Bartlett*, ___ U.S. ___, ___, 133 S. Ct. 2466, 2474 n.1, 186 L. Ed. 2d 607 (2013) ("[M]ost common-law causes of action for negligence and strict liability . . . exist . . . to . . . impose affirmative duties."); *Samuel Friedland Family Enters. v. Amoroso*, 630 So. 2d 1067, 1068 n.3 (Fla. 1994) (recognizing, in the strict-liability context, that "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . is subject to liability for physical harm thereby caused" even though "the seller has exercised all possible care in the preparation and sale of his product" (quoting Restatement (Second) of Torts § 402A)); *Curd v. Mosaic Fertilizer LLC*, 39 So. 3d 1216, 1227 (Fla. 2010) (noting that a negligence claim requires identification of "[a] duty, or obligation, recognized by the law, requiring the [defendant] to conform to a certain standard of conduct, for the protection of others against unreasonable risks" (citation omitted) (second alteration in original)).

These duties, moreover, can stand as just as much of an obstacle to the purposes and objectives of Congress as a state statute or administrative regulation.

E.g., *Williamson*, ___ U.S. at ___, 131 S. Ct. at 1136; *Geier*, 529 U.S. at 886, 120 S. Ct. at 1928. That is because, like any statute, common-law duties amount to "either affirmative *requirements* or negative *prohibitions*." *Cipollone*, 505 U.S. at 522, 112 S. Ct. at 2620 (plurality opinion). Our job, then, is to determine whether the legal duties underpinning Graham's strict-liability and negligence claims impermissibly stand as an obstacle to the achievement of federal objectives—here, regulating, but not banning, the sale of cigarettes. To accomplish this task, we must return to *Engle*.

Three aspects of that litigation inform how we characterize the duty it has come to impose on cigarette manufacturers. First, the *Engle* class definition does not distinguish among types of smokers, types of cigarette manufacturers, or types of cigarettes. It applies across the board. The class definition thus creates a "brandless" cigarette, one produced by all defendants and smoked by all plaintiffs at all times throughout the class period.

Second, the Phase I findings, given claim-preclusive effect by *Douglas* reading *Engle III*, concern conduct common to the class. This approach reinforces the brandless nature of the *Engle* litigation because it is impossible to determine which pieces of brand-specific evidence the Phase I jury found relevant in reaching the conclusion that all defendants had breached duties owed to the class. To avoid a due process violation, the Phase I 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.

Third, the *Douglas* causation instruction removes the need to litigate brand-specific defects in *Engle*-progeny trials altogether. Progeny plaintiffs must only prove how their addiction to cigarettes containing nicotine caused their injuries, not how the specific conduct of a specific defendant caused their injuries.

Taken together, these three factors compel the conclusion that *Engle* strict-liability and negligence claims have imposed a duty on all cigarette manufacturers that they breached every time they placed a cigarette on the market. That result is inconsistent with the full purposes and objectives of Congress, which has sought for over fifty years to safeguard consumers' right to choose whether to smoke or not to smoke.

1.

First, *Engle* is a class-action lawsuit filed against the major American tobacco manufacturers on behalf of all Florida smokers. Class members were not sorted by the brands they smoked, the nature of their smoking habits, or the injuries they alleged. The class included any Floridian who suffered injuries caused by his or her addiction to cigarettes that contained nicotine. The result: the *Engle* Phase I trial plan "enabled the plaintiffs to try fifty years of alleged misconduct that they never would have been able to introduce in an individual

trial, which was untethered to any individual plaintiff" and thereby "created 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." *Engle II*, 853 So. 2d at 467 n.48.

This class was certified despite Florida Rule of Civil Procedure 1.220(b)(3)'s instruction that

> [a] claim or defense may be maintained on behalf of a class if the court concludes that . . . questions of law or fact common to . . . the claim or defense of each member of the class predominate over any question of law or fact affecting only individual members of the class, and class representation is superior to other available methods for the fair and efficient adjudication of the controversy.

"Florida Rule of Civil Procedure 1.220, which establishes the guidelines for class actions, was modeled after Federal Rule of Civil Procedure 23." *Johnson v. Plantation Gen. Hosp. Ltd. P'ship*, 641 So. 2d 58, 59 (Fla. 1994).

It is therefore noteworthy that at least two federal circuit courts have refused to certify similar classes, which attempted to aggregate the claims of injured smokers against the major tobacco companies. *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998) (upholding the denial of certification for a Rule 23(b)(2) medical-monitoring class, in part on the ground that "plaintiffs were 'exposed to different . . . products, for different amounts of time, in different ways, and over different periods'" (alteration in original) (quoting *Amchem Prods., Inc. v.*

Windsor, 521 U.S. 591, 624, 117 S. Ct. 2231, 2250, 138 L. Ed. 2d 689 (1997))); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 752 (5th Cir. 1996) (reversing as an abuse of discretion the District Court's decision to certify a Rule 23(b)(3) class and observing that "[t]he collective wisdom of individual juries is necessary before this court commits the fate of an entire industry or, indeed, the fate of a class of millions, to a single jury").

And at least one Justice on the Florida Supreme Court has taken a similar view. *Engle III*, 945 So. 2d at 1282 (Wells, J., concurring in part and dissenting in part) ("The bottom line is that this was not properly a class action.").

2.

Second, the Phase I jury findings do not apply to specific brands. According to the Florida Supreme Court, those findings—which have claim-preclusive effect on trials conducted after the class decertification—involve the "conduct of the tobacco industry" as a whole. *Phillip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 423 (Fla. 2013); *see also Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278, 1285 (11th Cir. 2013) ("[T]he jury was asked only to determine all common liability issues for the class, not brand specific defects." (quotation marks omitted)). To be sure, the Phase I jury considered brand-specific evidence during the trial. *See supra* note 4 (quoting *Engle v. R.J. Reynolds Tobacco Co.* ("*Engle F.J.*"), 2000 WL 33534572 (Fla. Cir. Ct. Nov. 6, 2000)). But the specific findings

cited in *Engle F.J.* are symptomatic of the central problem presented by this appeal: although the Phase I jury reviewed a litany of evidence regarding various brand-specific defects, the Phase I interrogatories shed no light on which defects the jury found relevant in determining how each defendant breached a duty to refrain from selling a defective product or from failing to exercise ordinary care.

We are left to rely on the interpretations of the Delphic Phase I findings offered in *Douglas* and *Walker*. Both cases have recognized that at this point, sitting over a decade's remove from the Phase I verdict, it is impossible to discern the extent to which the Phase I findings specifically match up with each of the *Engle* defendants. *See Douglas*, 110 So. 3d at 433; *Walker*, 734 F.3d at 1287. The Florida Supreme Court interpreted Florida law in a way that eliminates this problem, both by using claim preclusion to afford the Phase I findings res judicata effect and by interpreting the Phase I findings to address only "common liability issues." *Douglas*, 110 So. 3d at 423. Our court has sanctioned the constitutionality of that approach, but only to the extent the Phase I findings go to conduct common to the class. *Walker*, 734 F.3d at 1289.

Scoured of any evidence regarding brand-specific defects, the Phase I findings regarding strict-liability and negligence amount to the bare assertion that cigarettes are inherently defective—and cigarette manufacturers inherently negligent—because cigarettes are addictive and cause disease. And because "[o]ne

who sells any product in a defective condition unreasonably dangerous to the user or consumer . . . is subject to liability for physical harm thereby caused," *Amoroso*, 630 So. 2d at 1068 n.3 (quoting Restatement (Second) of Torts § 402A), and because one must "conform to a certain standard of conduct, for the protection of others against unreasonable risks," *Curd*, 39 So. 3d at 1227, the *Engle* defendants breached a state-law duty every time they placed a cigarette on the market to be sold.

3.

Third, the *Douglas* causation instruction does not necessarily require brand-specific defects to *ever* be litigated in *Engle*-progeny trials. All plaintiffs need prove is class membership, damages, and what the Florida Supreme Court has deemed "individual causation," that is, proof that addiction to smoking an *Engle* defendant's cigarettes was a legal cause of the injuries alleged. *Douglas*, 110 So. 3d at 430. Plaintiffs do not need to casually link specific conduct by a defendant—how a defendant was negligent, for example—to succeed. *But see Waggoner v. R.J. Reynolds Tobacco Co.*, 835 F. Supp. 2d 1244, 1278 (M.D. Fla. 2011) ("[P]laintiffs' burden of proving causation is one of the primary procedural safeguards erected by the Florida Supreme Court in *Engle III*."). According to the Florida Supreme Court, this issue was already decided in Phase I because cigarettes containing nicotine are addictive and cause disease. *E.g.*, *Douglas*, 110

So.3d at 429 ("[T]he Second District properly applied *Engle* when holding that legal causation for the strict liability claim was established by proving that addiction to the *Engle* defendants' cigarettes containing nicotine was a legal cause of the injuries alleged.").

In sum, brand-specific defects were not determined during Phase I; they do not need to be determined during *Engle*-progeny trials, either. And the class definition is of no help, because it does not distinguish among plaintiffs who smoked different brands at different times—all addicted smokers are the same; so, too, are all cigarettes. Thus, as a result of the interplay between the Florida Supreme Court's interpretations of the *Engle* findings and the strictures of due process, the necessary basis for Graham's *Engle*-progeny strict-liability and negligence claims is that all cigarettes sold during the class period were defective as a matter of law. This, in turn, imposed a common-law duty on cigarette manufacturers that they necessarily breached every time they placed a cigarette on the market. Such a duty operates, in essence, as a ban on cigarettes. Accordingly, it conflicts with Congress's clear purpose and objective of regulating—not banning—cigarettes, thereby leaving to adult consumers the choice whether to smoke cigarettes or to abstain. We therefore hold that Graham's claims are preempted by federal law.

D.

It is no answer to characterize Graham's tort suit as a cost of doing business instead of a ban. Although R.J. Reynolds and Phillip Morris can pay damages and continue selling cigarettes, "pre-emption cases do not ordinarily turn on such compliance-related considerations as whether a private party in practice would ignore state legal obligations—paying, say, a fine instead—or how likely it is that state law actually would be enforced." *Geier*, 529 U.S. at 882, 120 S. Ct. at 1926; *cf. Cipollone*, 505 U.S. at 521, 112 S. Ct. at 2620 (plurality opinion) (noting that state regulation "can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." (quotation marks omitted)).

Admittedly, how compliance-related considerations should factor into preemption analysis—if at all—remains something of open question. "The Court has on occasion suggested that tort law may be somewhat different, and that related considerations—for example, the ability to pay damages instead of modifying one's behavior—may be relevant for pre-emption purposes." *Geier*, 529 U.S. at 882, 120 S. Ct. at 1926.[16] We do not write on a blank slate, however.

[16] For this proposition, *Geier* relies on a trio of cases relating to field preemption and the Atomic Energy Act, which are far removed, both factually and legally, from this appeal. *English v. Gen. Elec. Co.*, 496 U.S. 72, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990); *Goodyear Atomic*

Justice Blackmun's opinion for himself and two other Justices in *Cipollone* forcefully contended that tort law should be treated differently from positive enactments for preemption purposes. 505 U.S. at 536–37, 112 S. Ct. at 2627–28 (Blackmun, J., concurring in part and dissenting in part) ("The effect of tort law on a manufacturer's behavior is necessarily indirect. . . . The level of choice that a defendant retains in shaping its own behavior distinguishes the indirect regulatory effect of the common law from positive enactments such as statutes and administrative regulations."). But he lost that argument: his opinion did not command a majority. And critically, his logic was called into question by a majority of the Court in *Geier*. 529 U.S. at 882, 120 S. Ct. at 1926 ("[T]his Court's pre-emption cases ordinarily *assume* compliance with the state-law duty in question."). Absent more specific guidance from the Supreme Court, we must follow *Geier*'s lead in assuming that R.J. Reynolds and Phillip Morris will comply with whatever state-law duties Florida may impose.

Nor is it convincing to argue that Congress, well aware of state tort litigation against the tobacco companies, would not have intended to preempt state-law claims similar to the two at issue here. *See Wyeth v. Levine*, 555 U.S. 555, 574–75,

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Corp. v. Miller, 486 U.S. 174, 108 S. Ct. 1704, 100 L. Ed. 2d 158 (1988); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984). As such, these three cases are far too thin a reed on which to base our reasoning. And in any event, *Geier* itself clearly places a thumb on the scale in favor of assuming compliance with the duties imposed through a successful state tort suit. 529 U.S. at 882, 120 S. Ct. at 1926.

129 S. Ct. 1187, 1200, 173 L. Ed. 2d 51 (2009) ("If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision . . . . Its silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend [to preempt state tort suits.]"); *cf. Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–67, 109 S. Ct. 971, 986, 103 L. Ed. 2d 118 (1989). That proposition may be true at a high level of generality. But as we have explained in great detail, Graham's is not a run-of-the-mill tort suit. If it were, our analysis would be radically different. Make no mistake: we should not be taken to mean that we believe Congress intended to insulate tobacco companies from all state tort liability. To the contrary, there is nothing in the text, structure, or legislative history of the federal statutes we have examined to support such a far-reaching proposition. *See Richardson v. R.J. Reynolds Co.*, 578 F. Supp. 2d 1073 (E.D. Wis. 2008).

We merely conclude that, having surveyed both federal and state law, it is clear that Congress would have intended to preempt Graham's strict-liability and negligence claims, rooted as they are in the *Engle* jury findings, which have been interpreted by the Florida courts to possess unprecedented breadth. We express no opinion as to other state-law suits that may rest on significantly narrower theories of liability than the *Engle* litigation.

E.

Graham's remaining arguments against preemption are unpersuasive.

First, Graham argues that his claims are not expressly preempted. Fair enough. But that is of little import. A lack of express preemption "does *not* bar the ordinary working of conflict pre-emption principles." *Geier*, 529 U.S. at 869, 120 S. Ct. at 1919.

Second, Graham contends that his suit is otherwise shielded by the saving clause in the Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252, § 7, 100 Stat. 30 (codified at 15 U.S.C. § 4406). This argument suffers from a similar misunderstanding of basic preemption doctrine: a "saving clause (like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles." *Geier*, 529 U.S. at 869, 120 S. Ct. at 1919.

Third, Graham believes that our court's decision in *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183 (11th Cir. 2004), controls the outcome of this case. Hardly. *Spain* concerns express preemption of Alabama state tort claims. It has nothing to do with either obstacle preemption or Florida law, much less *Engle*-progeny claims.

Fourth, Graham says that the presumption against preemption should tilt the balance of this case in his favor. The presumption provides him no refuge. We are, of course, mindful that "the historic police powers of the States [are] not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447 (1947); *see also supra* part III.A. But the presumption is just that—a presumption, to be applied as "tiebreaker" of sorts when the case is close. Here, we have no difficulty concluding that the clear and manifest purpose of Congress has been to keep cigarettes legally available for adult consumers despite known health risks. The Florida courts have come to interpret the *Engle* Phase I jury findings to demand an outcome Congress has sought to avoid, namely, the imposition of a duty that was breached every time a cigarette manufacturer placed a cigarette on the market to be sold—the functional equivalent of a flat ban.

Fifth, Graham insists that by preempting his strict-liability and negligence claims, we will leave *Engle*-progeny plaintiffs a right without a remedy. Not true. To begin, we express no opinion as to the validity of other *Engle* claims, for example, fraudulent concealment or conspiracy to conceal. And as we have explained, nothing in our reasoning prevents an injured plaintiff from bringing a state-law tort suit against a tobacco company, provided he does not premise his suit on a theory of liability that means all cigarettes are defective as a matter of law

(and provided that he can actually prove his case). Nor does our conclusion necessarily foreclose *Engle*-progeny plaintiffs from bringing state-law strict-liability or negligence claims, so long as they do not rely on the *Engle* jury findings to do so. The subtext of Graham's legal analysis seems to suggest that his claims are immune from preemption simply because the *Engle* litigation has managed to survive for twenty years and has now grown too-big-to-fail. Thankfully, our Constitution lends credence to no such argument.

IV.

Cigarette smoking presents one of the most intractable public health problems our nation has ever faced. It was not so long ago that anyone would walk a mile for a Camel: cigarette smoke once filled movie theaters, college classrooms, and even indoor basketball courts. For fifty years, the States and the federal government have worked to raise awareness about the dangers of smoking and to limit smoking's adverse consequences to the greatest extent possible, all without prohibiting the sale of cigarettes to adult consumers. To that end, the State of Florida may ordinarily enforce duties on cigarette manufacturers in a bid to protect the health, safety, and welfare of its citizens. But it may not enforce a duty, as it has through the *Engle* jury findings, premised on the theory that *all* cigarettes are inherently defective and that *every* cigarette sale is an inherently negligent act. So our holding is narrow indeed: it is only these specific, sweeping bases for state tort

liability that we conclude frustrate the full purposes and objectives of Congress. As a result, Graham's *Engle*-progeny strict-liability and negligence claims are preempted, and we must reverse the District Court's denial of judgment as a matter of law.

For these reasons, the judgment of the District Court is

REVERSED.

EXHIBIT B

Walker v. R.J. Reynolds Tobacco Co.,
734 F.3d 1278 (11th Cir. 2013),
cert. denied, 134 S. Ct. 2727 (2014)

Walker v. R.J. Reynolds Tobacco Co.

No. 12-13500, No. 12-14731

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

734 F.3d 1278; 2013 U.S. App. LEXIS 22152; CCH Prod. Liab. Rep. P19,219; 24 Fla. L. Weekly Fed. C 759

October 31, 2013, Decided

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by, Motion granted by R.J. Reynolds Tobacco Co. v. Walker, 2014 U.S. LEXIS 4161 (U.S., June 9, 2014)

OPINION BY: PRYOR

OPINION

[*1280] PRYOR, Circuit Judge:

We sua sponte vacate and reconsider our original opinion in this matter. We substitute the following opinion for our original opinion.

This appeal by R.J. Reynolds Tobacco Company of money judgments in favor of the survivors of two smokers requires us to decide whether a decision of the Supreme Court of Florida in an earlier class action is entitled to full faith and credit in federal court. Florida smokers and their survivors filed in state court a class action against the major tobacco companies that manufacture cigarettes in the United States. In the first phase of the class action, a jury decided that the tobacco companies breached a duty of care, manufactured defective cigarettes, and concealed material information, but the jury did not decide whether the tobacco companies were liable for damages to individual members of the class. The Supreme Court of Florida approved the [**5] jury verdict, but decertified the class going forward. Engle v. Liggett Grp., Inc., 945 So. 2d 1246, 1254 (Fla. 2006). Members of the class then filed individual complaints in federal and state courts. The Supreme Court of Florida later ruled that the findings of the jury in the class action have res judicata effect for common issues decided against the tobacco companies and in favor of the smokers and that the only unresolved issues in the individual lawsuits filed afterward involve specific causation and damages. Philip Morris USA, Inc. v. Douglas, 110 So. 3d 419, 432 (Fla. 2013). R.J. Reynolds argues that the application of res judicata in later suits filed by individual smokers violates its constitutional right to due process of law because the jury verdict in the class action is so ambiguous that it is impossible to tell whether the jury found that each tobacco company acted wrongfully with respect to any specific brand of cigarette or any individual plaintiff. After the district court ruled that giving res judicata effect to the findings of the jury in the class action does not violate the rights of the tobacco companies to due process, two juries awarded money damages to the [**6] survivors of two smokers in their suits against R.J. Reynolds. Because R.J. Reynolds had a full and fair opportunity to be heard in the Florida class action and the application of res judicata under Florida law does not cause an arbitrary deprivation of property, we affirm the judgments against [*1281] R.J. Reynolds and in favor of the survivors of the smokers.

I. BACKGROUND

In 1994, six individuals filed a putative class action in a Florida court against the major domestic manufacturers of cigarettes, including R.J. Reynolds, and two tobacco industry organizations. Brown v. R.J. Reynolds Tobacco Co., 611 F.3d 1324, 1326 (11th Cir. 2010). The plaintiffs sought more than $100 billion in damages for injuries allegedly caused by smoking cigarettes. Id. Their complaint asserted claims of strict liability, negligence, breach of express warranty, breach of implied warranty, fraud, conspiracy to commit fraud, and intentional infliction of emotional distress. Id. A Florida court of appeals approved the certification of a

plaintiff class of all Florida citizens and residents who have suffered or died from medical conditions caused by their addiction to cigarettes and the survivors of those citizens and [**7] residents. R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39, 40, 42 (Fla. 3d Dist. Ct. App. 1996).

The trial court divided the class action in three phases. Phase I of the class action "consisted of a year-long trial to consider the issues of liability and entitlement to punitive damages for the class as a whole." Engle, 945 So. 2d at 1256. During that phase, the jury considered only "common issues relating exclusively to the defendants' conduct and the general health effects of smoking," id. at 1256, but the jury did not decide whether the tobacco companies were liable to any of the class representatives or members of the class, id. at 1263. In Phase II of the trial, the same jury determined the liability of the tobacco companies to three individual class representatives, awarded compensatory damages to those individuals, and fixed the amount of class-wide punitive damages. Id. at 1257. According to the trial plan, in Phase III of the class action, new juries were to decide the claims of the rest of the class members. Id. at 1258.

In Phase I of the trial, the plaintiffs presented evidence about some defects that were specific to certain brands or types of cigarettes and other defects [**8] common to all cigarettes. For example, "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." Douglas, 110 So. 3d at 423. "Similarly, arguments concerning the class's negligence, warranty, fraud, and conspiracy claims included whether the Engle defendants failed to address the health effects and addictive nature of cigarettes, manipulated nicotine levels to make cigarettes more addictive, and concealed information about the dangers of smoking." Id. The trial plan called for the jury "to decide issues common to the entire class, including general causation, [and] the Engle defendants' common liability to the class members for the conduct alleged in the complaint." Id. at 422.

At the conclusion of Phase I, the trial court submitted to the jury a verdict form with a series of questions to be answered "yes" or "no." The trial court instructed the jury that "all common liability issues would be tried before [the] jury" and that Phase I of the trial "did not address issues as to the conduct or damages of individual members of the Florida class." The [**9] first question on the verdict form asked the jury whether "smoking cigarettes cause[s]" a list of enumerated diseases, and the jury found that smoking causes 20 specific diseases, including various forms of cancer. The second question asked the jury whether "cigarettes that contain nicotine [are] addictive and dependence producing," and the jury found that cigarettes are addictive and dependence producing.

[*1282] The jury then answered "yes" to each of the following questions for each tobacco company:

> o Did the tobacco company "place cigarettes on the market that were defective and unreasonably dangerous";
>
> o Did the tobacco company "make a false statement of a material fact, either knowing the statement was false or misleading, or being without knowledge as to its truth or falsity, with the intention of misleading smokers";
>
> o Did the tobacco company "conceal or omit material information, not otherwise known or available, knowing that the material was false and misleading, or fail[ ] to disclose a material fact concerning or proving the health effects and/or addictive nature of smoking cigarettes";
>
> o Did the tobacco company "enter into an agreement to misrepresent information relating to the health [**10] effects of cigarette smoking, or the addictive nature of smoking cigarettes, with the intention that smokers and members of the public rely to their detriment";
>
> o Did the tobacco company "enter into an agreement to conceal or omit information regarding the health effects of cigarette smoking, or the addictive nature of smoking cigarettes, with the intention that smokers and members of the public rely to their detriment";
>
> o Did the tobacco company "sell or

> supply cigarettes that were defective in that they were not reasonably fit for the uses intended";
>
> o Did the tobacco company "sell or supply cigarettes that, at the time of sale or supply, did not conform to representations of fact made by [the tobacco company], either orally or in writing";
>
> o Did the tobacco company "fail[ ] to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances";
>
> o Did the tobacco company "engage[] in extreme and outrageous conduct or with reckless disregard relating to cigarettes sold or supplied to Florida smokers with the intent to inflict severe emotional distress."

The final question asked the jury whether "the conduct of [each tobacco company] rose to a level [**11] that would permit a potential award or entitlement to punitive damages," and the jury answered "yes" for each tobacco company.

The tobacco companies unsuccessfully objected to the verdict form that the trial court submitted to the jury in Phase I. They argued that the verdict form did not "ask for specifics" about the tortious conduct of the tobacco companies, "render[ing] [the jury findings] useless for application to individual plaintiffs." They requested that the trial court submit to the jury a more detailed verdict form that would have asked the jury to identify the brands of cigarettes that were defective and the information the companies concealed from the public. The trial court rejected that proposed verdict form as too detailed and impractical.

In Phase II of the trial, the same jury determined that the defendants were liable to three named plaintiffs. The jury awarded compensatory damages of $12.7 million to those three named plaintiffs, and the jury awarded punitive damages of $145 billion to the class. Brown, 611 F.3d at 1328.

Before Phase III of the trial began, the tobacco companies filed an interlocutory appeal of the verdicts in Phases I and II, and the Supreme Court [**12] of Florida approved in part and vacated in part the verdicts. Engle, 945 So. 2d at 1246. The court concluded that the trial court did not abuse its discretion when it certified the [*1283] Engle class for purposes of Phases I and II of the trial, but that the class must be decertified going forward so that members of the class could pursue their claims to finality in individual lawsuits. Id. at 1267-69. The court explained that "problems with the three-phase trial plan negate the continued viability of this class action" and that "continued class action treatment for Phase III of the trial plan is not feasible because individualized issues such as legal causation, comparative fault, and damages predominate." Id. at 1267-68. The court held as follows that most findings of the jury in Phase I should have "res judicata effect" in the ensuing individual trials:

> The pragmatic solution is to now decertify the class, retaining the jury's Phase I findings other than those on the fraud and intentional infliction of emotion[al] distress claims, which involved highly individualized determinations, and the finding on entitlement to punitive damages questions, which was premature. Class members can choose [**13] to initiate individual damages actions and the Phase I common core findings we approved above will have res judicata effect in those trials.

Id. at 1269 (emphasis added). The court concluded that the findings about fraud and misrepresentation and intentional infliction of emotional distress cannot have preclusive effect because "the non-specific findings in favor of the plaintiffs" on those questions were "inadequate to allow a subsequent jury to consider individual questions of reliance and legal cause." Id. at 1255. The court also vacated the finding about civil conspiracy-misrepresentation because it relied on the underlying tort of misrepresentation. But the court stated that the other findings, now known as the approved findings from Phase I, have res judicata effect. Id. The court also vacated the award of punitive damages on the ground that it was excessive and premature, affirmed the damages award in favor of two of the named plaintiffs, and vacated the judgment in favor of the third named plaintiff because the statute of limitations barred his claims. Engle, 945 So. 2d at 1254-56.

After the decision of the Supreme Court of Florida, members of the Engle class filed thousands [**14] of individual cases in both state and federal courts. A central issue in these cases is whether plaintiffs may rely on the approved findings from Phase I to establish the "conduct" elements of their claims against the tobacco companies. The dispute concerns the meaning of the ruling in Engle that the approved findings from Phase I "will have res judicata effect." The plaintiffs interpreted the ruling to mean that the tobacco companies could dispute only specific causation and damages in the individual lawsuits. The plaintiffs argued that the approved findings from Phase I establish that the tobacco companies breached a duty of care and failed to disclose material information to every member of the Engle class. See Brown, 611 F.3d at 1329. The tobacco companies argued that, although the jury in Phase I found that they acted negligently in some way or concealed some information, the findings are not specific enough to establish that they acted negligently in connection with any particular brand of cigarette or concealed material information from any particular plaintiff.

We were the first appellate court to consider the res judicata effect of the approved findings from Phase I, and we [**15] concluded that the findings have preclusive effect in a later case only when the plaintiff can establish that the jury in Phase I actually decided that a tobacco company acted wrongfully regarding cigarettes that the plaintiff smoked. Brown, 611 F.3d at 1336. We explained that, when the Supreme Court of Florida stated in Engle that the approved findings from Phase I [*1284] "were to have res judicata effect," the court "necessarily refer[red] to issue preclusion" and not claim preclusion because "factual issues and not causes of action were decided in Phase I." Id. at 1333. We explained that issue preclusion applies only to issues that were "actually decided" in a prior litigation, and we remanded the matter for the district court to consider in the first instance whether the approved findings from Phase I establish that the tobacco companies acted wrongfully toward each plaintiff. Id. at 1334-35. We explained that, to determine whether a specific factual issue was determined in favor of the plaintiff, the district court should look beyond the face of the verdict and consider "[t]he entire trial record." Id. at 1334-36. The tobacco companies argued in that appeal that "using the findings to [**16] establish facts that were not decided by the jury would violate their due process rights," but we avoided that question because, "under Florida law[,] the findings could not be used for that purpose anyway." Id. at 1334.

Several Florida courts of appeal then held that the approved findings from Phase I establish the conduct elements of the each class member's claims against the tobacco companies, and they rejected our decision in Brown that smokers must establish from the trial record that an issue was actually decided in his or her favor. See Frazier v. Philip Morris USA Inc., 89 So. 3d 937, 947 (Fla. 3d Dist. Ct. App. 2012); Philip Morris USA, Inc. v. Douglas, 83 So. 3d 1002, 1010 (Fla. 2d Dist. Ct. App. 2012); R.J. Reynolds Tobacco Co. v. Brown, 70 So. 3d 707, 715 (Fla. 4th Dist. Ct. App. 2011); R.J. Reynolds Tobacco Co. v. Martin, 53 So. 3d 1060, 1066-67 (Fla. 1st Dist. Ct. App. 2010). In Martin, the court disagreed with our decision in Brown that "every Engle plaintiff must trot out the class action trial transcript to prove applicability of the Phase I findings." Martin, 53 So. 3d at 1067. The court held, "No matter the wording of the findings on the Phase I verdict form, the [**17] jury considered and determined specific matters related to the defendants' conduct. Because the findings are common to all class members, [the plaintiff] . . . was entitled to rely on them in her damages action against [R.J. Reynolds]." Id. For example, the plaintiff in Martin brought a claim for fraudulent concealment, and the court held that the Phase I finding about concealment "encompassed all the brands" and that R.J. Reynolds could not relitigate whether it had concealed any material information. Id. at 1068.

Because federal courts sitting in diversity are bound by the decisions of state courts on matters of state law, those decisions of the Florida courts of appeal supplanted our interpretation of Florida law in Brown. See Allstate Life Ins. Co. v. Miller, 424 F.3d 1113, 1116 (11th Cir. 2005) (explaining that "in diversity cases we are required to adhere to the decisions of the Florida appellate courts absent some persuasive indication that the Florida Supreme Court would decide the issue otherwise"). The tobacco companies could no longer argue that the approved findings from Phase I have no preclusive effect as a matter of Florida law. Instead, they argued that giving the approved [**18] findings preclusive effect would violate their federal rights to due process. The tobacco companies raised that argument in each of the cases filed in the district court, which consolidated those cases in Waggoner v. R.J. Reynolds Tobacco Co., 835 F. Supp. 2d 1244 (M.D. Fla. 2011).

The district court in Waggoner held that giving preclusive effect to the approved findings from Phase I does not violate a right of the tobacco companies to due process of law. Id. at 1279. The district court concluded that "a state's departure from common law issue preclusion principles [*1285] does not implicate the Constitution unless that departure also violates 'the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause.'" Id. at 1270 (quoting Kremer v. Chem. Constr. Corp., 456 U.S. 461, 481, 102 S. Ct. 1883, 1897, 72 L. Ed. 2d 262 (1982)). And the district court concluded that the decisions of the Florida courts of appeal do not violate those procedural requirements because those decisions do not arbitrarily deprive the tobacco companies of property, Waggoner, 835 F. Supp. 2d at 1272-74, and because the tobacco companies had a full and fair opportunity to litigate the conduct elements at Phase I of [**19] the class action, id. at 1274-77.

After the district court decided Waggoner, the Supreme Court of Florida in Douglas held, as a matter of Florida law, that the approved findings from Phase I establish the conduct elements of the claims brought by members of the Engle class. Douglas, 110 So. 3d at 428. The court acknowledged that "the Engle jury did not make detailed findings for which evidence it relied upon to make the Phase I common liability findings." Id. at 433. But the court explained that, "[n]o matter the wording of the findings on the Phase I verdict form, the jury considered and determined specific matters related to the [Engle] defendants' conduct." Id. (quoting Martin, 53 So. 3d at 1067) (second alteration in original). The court explained that, although the proof submitted at the Phase I trial included both general and brand-specific defects, "the class action jury was not asked to find brand-specific defects in the Engle defendants' cigarettes," but only to "determine 'all common liability issues' for the class." Id. at 423. The court concluded that the approved findings from Phase I concern conduct that "is common to all class members and will not change from case to [**20] case," and that "the approved Phase I findings are specific enough" to establish some elements of the plaintiffs' claims. Id. at 428.

The Supreme Court of Florida also held in Douglas that giving preclusive effect to the approved findings from Phase I does not violate a right of the tobacco companies to due process. Id. at 430. The court stated that the tobacco companies had notice and an opportunity to be heard and were not arbitrarily deprived of property. Id. at 431-32. The court explained that, when it stated in Engle that the approved findings have "res judicata effect," it addressed claim preclusion, not issue preclusion. Id. at 432. The court stated that claim preclusion "prevents the same parties from relitigating the same cause of action in a second lawsuit," id. at 432, while issue preclusion "prevents the same parties from relitigating the same issues that were litigated and actually decided in a second suit involving a different cause of action," id. at 433. "Because the claims in Engle and the claims in individual actions like this case are the same causes of action between the same parties," the court concluded that "res judicata (not issue preclusion) applies." Id. at 432. [**21] The court stated that "to decide here that we really meant issue preclusion even though we said res judicata in Engle would effectively make the Phase I findings regarding the Engle defendants' conduct useless in individual actions." Id. at 433.

The tobacco companies had argued that, based on Fayerweather v. Ritch, 195 U.S. 276, 25 S. Ct. 58, 49 L. Ed. 193 (1904), they had a constitutional right to have issue preclusion apply to the approved findings from Phase I, but the Supreme Court of Florida rejected this argument. Douglas, 110 So. 3d at 435. The court stated that, "as a constitutional matter, the Engle defendants do not have the right to have issue preclusion, as opposed to res judicata, apply to the Phase I findings." Id. The [*1286] court explained that "claim preclusion, unlike issue preclusion, has no 'actually decided' requirement but, instead, focuses on whether a party is attempting to relitigate the same claim, without regard to the arguments or evidence that were presented to the first jury that decided the claim." Id. The court concluded that, because it was applying claim preclusion instead of issue preclusion, the "decision in Fayerweather does not impose a constitutional impediment against [**22] giving the Phase I findings res judicata effect." Id.

In this appeal, R.J. Reynolds challenges the decision of the district court in Waggoner and appeals the jury verdicts in favor of two plaintiffs, Alvin Walker and George Duke III. Walker filed an amended complaint in federal court for the death of his father, Albert Walker, and Duke filed an amended complaint in federal court for the death of his mother, Sarah Duke. Walker and Duke asserted claims for strict liability, negligence, fraudulent concealment, and conspiracy to fraudulently conceal. The

juries decided those cases after the district court decided Waggoner, but before the Supreme Court of Florida decided Douglas. In both cases, the district court instructed each jury that, under the decision in Waggoner, the jury in Phase I conclusively established the tortious-conduct elements of the plaintiffs' claims. The district court instructed the juries that R.J. Reynolds "placed cigarettes on the market that were defective and unreasonably dangerous" and that R.J. Reynolds "was negligent." The only issues for those juries to resolve were whether the decedents were members of the Engle class, causation, and damages. The juries in [**23] both cases returned split verdicts. The jury found in favor of Walker on the claims of strict liability and negligence, allocated 10 percent of the fault to R.J. Reynolds and 90 percent of the fault to Walker, and entered a judgment of $27,500. The jury found in favor of Duke only on the claim of strict liability, allocated 25 percent of the fault to R.J. Reynolds and 75 percent of the fault to Duke, and entered a judgment of $7,676.25.

II. STANDARD OF REVIEW

"We review questions of constitutional law de novo." Nichols v. Hopper, 173 F.3d 820, 822 (11th Cir. 1999).

III. DISCUSSION

The Full Faith and Credit Act, 28 U.S.C. § 1738, requires federal courts to "give preclusive effect to a state court judgment to the same extent as would courts of the state in which the judgment was entered." Kahn v. Smith Barney Shearson Inc., 115 F.3d 930, 933 (11th Cir. 1997) (quoting Battle v. Liberty Nat'l Life Ins. Co., 877 F. 2d 877, 882 (11th Cir. 1989)). But the Act, like all statutes, is "subject to the requirements of . . . the Due Process Clause." Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 380, 105 S. Ct. 1327, 1332, 84 L. Ed. 2d 274 (1985). And the law of preclusion is also "subject to due process [**24] limitations." See Taylor v. Sturgell, 553 U.S. 880, 891, 128 S. Ct. 2161, 2171, 171 L. Ed. 2d 155 (2008). Although "[s]tate courts are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes[,] . . . extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is fundamental in character." Richards v. Jefferson Cnty., Ala., 517 U.S. 793, 797, 116 S. Ct. 1761, 1765, 135 L. Ed. 2d 76 (1996) (internal quotation marks omitted). These principles require that we 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. Kremer, 456 U.S. at 481, 102 S. Ct. at 1897. R.J. Reynolds argues that [*1287] this appeal is governed by the Due Process Clause of the Fifth Amendment, but in the district court they argued that the case was governed by the Due Process Clause of the Fourteenth Amendment. See Waggoner, 835 F. Supp. 2d at 1271. Our analysis is the same under either clause because "the reaches of the [Due Process Clauses of the] Fourteenth and Fifth Amendments are coextensive." Rodriguez-Mora v. Baker, 792 F.2d 1524, 1526 (11th Cir. 1986).

Our [**25] inquiry is a narrow one: whether giving full faith and credit to the decision in Engle, as interpreted in Douglas, would arbitrarily deprive R.J. Reynolds of its property without due process of law. See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel, 830 F.2d 374, 380, 265 U.S. App. D.C. 226 (D.C. Cir. 1987) (holding that the decision of a prior court on a question of preclusion law did not violate due process because it was not arbitrary). R.J. Reynolds argues that we should conduct a searching review of the Engle class action and apply what amounts to de novo review of the analysis of Florida law in Douglas, but we lack the power to do so. Our task is not to decide whether the decision in Douglas was correct as a matter of Florida law. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 822, 82 L. Ed. 1188 (1938). And we cannot refuse to give full faith and credit to the decision in Engle because we disagree with the decision in Douglas about what the jury in Phase I decided. See Am. Ry. Express Co. v. Kentucky, 273 U.S. 269, 273, 47 S. Ct. 353, 355, 71 L. Ed. 639 (1927) ("It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings [**26] does not deprive the unsuccessful party of property without due process of law.").

The decision of the Supreme Court of Florida to give preclusive effect to the approved findings from Phase I did not arbitrarily deprive R.J. Reynolds of property without due process of law. The Supreme Court of Florida looked through the jury verdict entered in Phase I to determine what issues the jury decided. Based on its review of the class action trial plan and the jury instructions, the court concluded that the jury had been presented with arguments that the tobacco companies acted wrongfully toward all the plaintiffs and that all cigarettes that contain nicotine are addictive and produce

dependence. Douglas, 110 So. 3d at 423. Although the proof submitted to the jury included both general and brand-specific defects, the court concluded that the jury was asked only to "determine 'all common liability issues' for the class," not brand specific defects. Id. The Supreme Court of Florida was entitled to look beyond the jury verdict to determine what issues the jury decided. See Fayerweather, 195 U.S. at 308, 25 S. Ct. at 68 (explaining that courts may look beyond a general verdict to the "entire record [**27] of the case" to determine what issues were decided in a prior litigation); Russell v. Place, 94 U.S. 606, 610, 606, 24 L. Ed. 214, 1877 Dec. Comm'r Pat. 301 (1876) (explaining that, although "an estoppel must 'be certain to every intent,'" the "uncertainty [may] be removed by extrinsic evidence showing the precise point involved and determined"); Precision Air Parts, Inc. v. Avco Corp., 736 F.2d 1499, 1502 (11th Cir. 1984) (looking beyond the face of a prior judicial opinion to "examine the record as a whole" and determine those issues that the finder of fact actually decided); 18 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 4420 at 520 (2d ed. 2002) (explaining that "the first step in resolving uncertainty as to the identity of the issues actually decided lies in painstaking examination of the record of the prior action"). We sanctioned a similar inquiry in Brown, where we stated that, although the jury [*1288] verdict in Phase I was ambiguous on its face, members of the Engle class should be allowed an opportunity to establish that the jury in Phase I actually decided particular issues in their favor. Brown, 611 F.3d at 1335. We ordinarily presume that a jury followed its instructions, [**28] see United States v. Stone, 9 F.3d 934, 940 (11th Cir. 1993), and the Supreme Court of Florida did not act arbitrarily when it applied this presumption and concluded that the jury found only issues of common liability.

The decision of the Supreme Court of Florida in Douglas is consistent with its earlier decision in Engle. In Engle, the Supreme Court of Florida explained that the approved findings from Phase I "will have res judicata effect" in the later individual cases. Engle, 945 So. 2d at 1269. But the court did not approve all of the findings from Phase I. Instead, the court stated that the findings of the jury in Phase I about fraud and intentional infliction of emotional distress cannot have preclusive effect because "the non-specific findings in favor of the plaintiffs" on those questions were "inadequate to allow a subsequent jury to consider individual questions of reliance and legal cause." Id. at 1255. That the court in Engle denied preclusive effect to those findings on the ground that they were not specific enough suggests that the court determined that the jury findings about the other claims were specific enough to apply in favor of every class plaintiff. See Douglas, 110 So.3d at 428 [**29] (explaining that, "by accepting some of the Phase I findings and rejecting others based on lack of specificity, this Court in Engle necessarily decided that the approved Phase I findings are specific enough").

R.J. Reynolds had a full and fair opportunity to litigate the issues of common liability in Phase I. "The opportunity to be heard is an essential requisite of due process of law in judicial proceedings." Richards, 517 U.S. at 797 n.4, 116 S. Ct. at 1765 n.4. During Phase I, R.J. Reynolds had an opportunity to contest its liability and challenge the verdict form that the trial court submitted to the jury. After the trial court declined to adopt the jury verdict form proposed by the tobacco companies and the jury decided against the tobacco companies on the issues of common liability, R.J. Reynolds challenged those decisions before the Supreme Court of Florida, but that court rejected its arguments. See Engle, 945 So. 2d at 1254-55. And R.J. Reynolds petitioned the Supreme Court of the United States to review the decision of the Supreme Court of Florida, but the Supreme Court of the United States denied its petition. See R.J. Reynolds Tobacco Co. v. Engle, 552 U.S. 941, 128 S. Ct. 96, 169 L. Ed. 2d 244 (2007) [**30] (denying the petition for writ of certiorari).

R.J. Reynolds also has had an opportunity to contest its liability in these later cases brought by individual members of the Engle class. Although R.J. Reynolds has exhausted its opportunities to contest the common liability findings of the jury in Phase I, it has vigorously contested the remaining elements of the claims, including causation and damages. The modest sums received by the plaintiffs in this appeal--less than $28,000 for Walker and less than $8,000 for Duke--suggest that the juries fairly considered the questions of damages and fault.

R.J. Reynolds argues that "traditional practice provides a touchstone for constitutional analysis" under the Due Process Clause, Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 430, 114 S. Ct. 2331, 2339, 129 L. Ed. 2d 336 (1994), and that the decision in Douglas extinguishes the protection against arbitrary deprivations of property embodied in the federal common law of issue preclusion,

which bars relitigation only of "issues actually decided in a prior [*1289] action." See Gjellum v. City of Birmingham, Ala., 829 F.2d 1056, 1059 (11th Cir. 1987) (emphasis added). R.J. Reynolds fails to identify any court that has ever held [**31] that due process requires application of the federal common law of issue preclusion. Nor does R.J. Reynolds identify any other court that has declined to give full faith and credit to a judgment of a state court as later interpreted by the same state court on the ground that the later state court decision was so wrong that it amounted to a violation of due process.

R.J. Reynolds argues that the Supreme Court held in Fayerweather, 195 U.S. at 299, 25 S. Ct. at 64, that parties have a right, under the Due Process Clause, to the application of the traditional law of issue preclusion, but we disagree. The Supreme Court stated in Fayerweather that the Due Process Clause is implicated when a party argues that a court has given preclusive effect to an issue that was not actually decided in a prior litigation. Id. But the Supreme Court held that no violation of the Due Process Clause had occurred because the issue had been actually decided in the prior litigation. Id. at 301, 308, 25 S. Ct. at 65, 68. The Supreme Court had no occasion in Fayerweather to decide what sorts of applications of issue preclusion would violate due process.

R.J. Reynolds next argues that it is impossible to tell whether [**32] the jury determined that it acted wrongfully in connection with some or all of its brands of cigarettes because the plaintiffs presented both general and brand-specific theories of liability, but the decision of the Supreme Court of Florida forecloses that argument. Whether a jury actually decided an issue is a question of fact, see Starr Tyme, Inc. v. Cohen, 659 So. 2d 1064, 1068 (Fla. 1995), and the Supreme Court of Florida looked past the ambiguous jury verdict to decide this question of fact.

If due process requires a finding that an issue was actually decided, then the Supreme Court of Florida made the necessary finding when it explained that the approved findings from Phase I "go to the defendants underlying conduct which is common to all class members and will not change from case to case" and that "the approved Phase I findings are specific enough" to establish certain elements of the plaintiffs' claims. Douglas, 110 So. 3d at 428. Labeling the relevant doctrine as claim preclusion instead of issue preclusion may be unorthodox and inconsistent with the federal common law about those doctrines, but the Supreme Court has instructed us that, "[i]n determining what is due process [**33] of law, regard must be had to substance, not to form." Fayerweather, 195 U.S. at 297, 25 S. Ct. at 64 (quotation marks omitted). "State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States." Hansberry v. Lee, 311 U.S. 32, 40, 61 S. Ct. 115, 117, 85 L. Ed. 22 (1940). Our deference to the decision in Douglas does not violate the constitutional right of R.J. Reynolds to due process of law. Whether the Supreme Court of Florida calls the relevant doctrine issue preclusion, claim preclusion, or something else, is no concern of ours.

We must give full faith and credit to the decision of the Supreme Court of Florida about how to resolve this latest chapter of the intractable problem of tobacco litigation. For several decades, R.J. Reynolds and the other major companies of the tobacco industry have "remained under the long shadow of litigation, that chronic potential spoiler of their financial well-being." Richard Kluger, Ashes to Ashes: America's Hundred-Year Cigarette War, [*1290] the Public Health, [**34] and the Unabashed Triumph of Philip Morris 760 (1996). "The tobacco industry was primed to meet these ever larger challenges as a cost of doing business, and it did not lack for plausible, even persuasive, defenses." Id. Courts, after all, long ago recognized the inherent risks of cigarette smoking. See, e.g., Austin v. State, 101 Tenn. 563, 48 S.W. 305, 306 (Tenn. 1898) (Cigarettes are "wholly noxious and deleterious to health. Their use is always harmful, never beneficial. They possess no virtue, but are inherently bad, and bad only."). And physicians "suspected a link between smoking and illness for centuries." Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 513, 112 S. Ct. 2608, 2615, 120 L. Ed. 2d 407 (1992). In 1604, King James I wrote "A Counterblaste to Tobacco," that described smoking as "a custom loathsome to the eye, hateful to the nose, harmful to the brain, dangerous to the lung, and the black stinking fume thereof, nearest resembling the horribly Stygian smoke of the pit that is bottomless." See Kluger, supra, at 15 (quoting "A Counterblaste to Tobacco"). And popular culture too recognized those risks. See, e.g., Tex Williams, "Smoke! Smoke! Smoke! (That Cigarette)" (Capitol Records 1947) ("Smoke,

smoke, [**35] smoke that cigarette. / Puff, puff, puff, and if you smoke yourself to death, / Tell Saint Peter at the Golden Gate / That you hate to make him wait / But you've just got to have another cigarette."). So juries often either discounted or rejected the claims of smokers who sought to hold tobacco companies liable for the well-known harms to their health caused by smoking. But a "wave of suits, brought by resourceful attorneys representing vast claimant pools," Kluger, supra, at 760, continued. We cannot say that the procedures, however novel, adopted by the Supreme Court of Florida to manage thousands of these suits under Florida law violated the federal right of R.J. Reynolds to due process of law.

IV. CONCLUSION

We **AFFIRM** the judgments against R.J. Reynolds and in favor of Walker and Duke.