UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-14590-U
EARL E. GRAHAM, *as personal representative of the* ESTATE OF FAYE DALE GRAHAM,
Plaintiff-Appellee,

v.

R.J. REYNOLDS TOBACCO CO. *et al.*,
Defendants-Appellants.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN TORT REFORM ASSOCIATION, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE BUSINESS COUNCIL OF ALABAMA AND THE ALABAMA CIVIL JUSTICE REFORM COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF REVERSAL ON REHEARING *EN BANC*

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Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, *amici curiae* provide the following Certificate of Interested Persons and Corporate Disclosure Statement:

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Pursuant to the Federal Rules of Appellate Procedure and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, *amici curiae* make the following statement as to corporate ownership:

Amicus curiae The Alabama Civil Justice Reform Committee does not have a parent corporation; nor does any publicly held corporation own 10% or more of its stock.

Amicus curiae The American Tort Reform Association does not have a parent corporation; nor does any publicly held corporation own 10% or more of its stock.

Amicus curiae The Business Council of Alabama does not have a parent corporation; nor does any publicly held corporation own 10% or more of its stock.

Amicus curiae The Chamber of Commerce of the United States of America does not have a parent corporation; nor does any publicly held corporation own 10% or more of its stock.

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STATEMENT OF INTEREST

Amicus curiae the Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing 300,000 direct members and representing indirectly the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every geographic region of the United States.[1] An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution intended to fund this brief's preparation or submission.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States. It is a national not-for-profit trade association representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Business Council of Alabama ("BCA") is a non-profit association comprising approximately 5,000 member companies that conduct business in Alabama. The BCA's business members are both large and small and include grocers, dry cleaners, plumbers, hardware stores, furniture stores, appliance stores, utilities, banks, and insurers. The BCA's members employ thousands of Alabama citizens in all 67 counties and are vitally interested in court decisions affecting the economic stability of business in Alabama. The BCA frequently appears in litigation as amicus curiae where the issues raised are of widespread importance and concern to its respective members.

The Alabama Civil Justice Reform Committee is a statewide trade association representing more than 100 trade associations and businesses working together to foster a fair and balanced civil justice system in Alabama. It has appeared in judicial proceedings to encourage the adoption of rules designed to promote those goals and each year develops a legislative agenda on civil justice reform.

Few issues are of more concern to American businesses, including businesses operating within the Eleventh Circuit, than those affecting their fundamental right to defend themselves when they are sued. The district court's ruling – as well as the decision by a panel of this Court in *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 2727 (2014) – threaten that very right in thousands of cases that have arisen in federal and state courts in Florida.

According to the district court, a plaintiff is entitled to invoke a novel form of preclusion that bars defendants from litigating breach of duty or general causation in subsequent cases brought by former class members, even if a class has been decertified. The roots of this doctrine were planted in the Florida Supreme Court's decision in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1269 (Fla. 2006). That ruling decertified a class action encompassing 700,000 plaintiffs but

paradoxically held that certain jury findings in Phase I of the class trial "will have *res judicata* effect in" subsequent trials commenced by individual class members.

This pronouncement led to confusion among courts attempting to give preclusive effect to *Engle*. The *Engle* trial involved many defendants, many products and a lengthy class period, and the *Engle* plaintiffs asserted many theories as to why particular products were defective. But the jury rendered a general verdict that the defendants "place[d] cigarettes on the market that were defective and unreasonably dangerous." (*Engle* Phase I Verdict Form at 2-3.) The jury did not specify whether it had found for plaintiffs on all theories, or just some of the theories, or only one of them.

Because it was not possible to determine which particular issues were actually decided by the *Engle* jury in reaching its general verdict, most plaintiffs bringing individual actions following *Engle* could not satisfy the traditional test for issue preclusion. Claim preclusion was also unworkable; after all, no claim was actually decided and there was no final judgment, as the Florida Supreme Court expressly recognized in *Engle*. 945 So. 2d at 1263.

The Florida Supreme Court ignored these legal hurdles in *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013), by creating a new preclusion doctrine. Although there was no final judgment in *Engle*, and no specific findings by the jury with respect to the multiple theories of liability proffered, the court

concluded that *res judicata* could operate to foreclose litigation of any theory that was or could have been decided by the jury in that case. As a result, Florida courts have allowed plaintiffs to apply the *Engle* ruling offensively in later cases without requiring the plaintiffs to show that any specific theory or issue was decided in *Engle*. *See id.* at 432. And in *Walker*, a panel of this Court determined that federal courts must defer to *Douglas* as a matter of full faith and credit, although it recast *Douglas*'s bizarre new form of preclusion as a species of "issue preclusion" under which the jury's findings on "common liability" were deemed sufficient to establish "certain elements of the plaintiffs' claims." 734 F.3d at 1288-89.

As explained below, the procedural shortcut invented by the Florida Supreme Court and effectively endorsed by the *Walker* panel violates due process and creates a profound threat to a variety of businesses. At the time *Walker* was decided, there were over a thousand *Engle* cases pending in federal courts, with millions of dollars potentially at stake in each. As such, *Walker* created the possibility of enormous liability flowing from proceedings unlike the normal trials guaranteed by due process, in which a plaintiff must prove each of the elements of his or her claims. More broadly, these decisions pose a grave risk of similarly unjustified liability being sought against other product manufacturers.[2]

[2] In early 2015, certain parties to the *Engle* litigation proceeding in federal courts announced an agreement to settle those cases, but the settlement did not *(cont'd)*

Amici and their members have a strong interest in reversal of the district court's ruling – and abrogation of the decision reached in *Walker* – because these decisions are contrary to longstanding Supreme Court precedent and other federal authorities and undermine the fundamental due-process rights of American businesses. If allowed to stand, these rulings have the potential to dramatically transform the law of preclusion and improperly increase the liability exposure of *amici*'s members and all companies doing business in the United States by relieving countless plaintiffs of the burden of proving fundamental elements of their causes of action.

STATEMENT OF ISSUES

Does the district court's decision to give preclusive effect to the Phase I jury findings regarding defectiveness of cigarettes in *Engle* violate the tobacco companies' rights under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, notwithstanding the panel's holding in *Walker*, 734 F.3d 1278?

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resolve cases in state court; nor did it resolve federal cases that, like this one, had already been tried or were pending on appeal at the time. *See, e.g.*, Richard Craver, *Big 3 Tobacco Companies Agree To Settle Federal* Engle *Cases In Florida*, Winston-Salem J., Feb. 25, 2015, *available at* http://www.journalnow.com/business/business_news/local/big-tobacco-companies-agree-to-settle-federal-engle-cases-in/article_e1ab7fb0-bd08-11e4-b17b-dbd432b86435.html.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici submit this brief to address the third issue posed by the en banc Court in its March 23 briefing memorandum and to underscore the grave due-process implications of giving preclusive effect to the Phase I jury findings in the *Engle* class action trial. The Court should overturn *Walker* and hold that reliance on general, non-specific verdicts to foreclose litigation of highly specific issues that may never have been resolved in a plaintiff's favor constitutes a fundamental violation of due process.

Although the Florida Supreme Court required in *Engle* that the class be decertified on a prospective basis, it held that certain findings by the Phase I jury would have "res judicata" effect in subsequent individual cases.[3] The Florida Supreme Court reiterated that position in *Douglas*, holding that general factual findings from the liability phase of the *Engle* class action trial would be binding to establish elements of claims by individual plaintiffs in future cases. The Florida Supreme Court reached this conclusion by adopting a novel preclusion doctrine

[3] As the Florida Supreme Court recognized in *Engle*, the case could not properly be maintained as a class action to resolve completely the claims of any plaintiff because many issues, "including individual causation and apportionment of fault," were "highly individualized and do not lend themselves to class treatment." 945 So. 2d at 1254. It thus decertified the class prospectively. *Id.* As such, the complications posed by the *Engle* decision on preclusion are distinct from those presented in other circumstances – for example, in the case of a properly certified class settlement.

that does not require a plaintiff to show that an issue was actually or necessarily decided in the prior proceeding. Rather, plaintiffs are permitted to rely on general, non-specific verdicts to preclude litigation of highly specific issues that may never have been resolved in their favor. The *Walker* panel went along with this fundamental violation of due process (despite recognizing that the *Douglas* holding was "novel" and attempting to rationalize it as a distorted form of "issue preclusion") under the mistaken premise that full faith and credit principles required it to defer to the Florida Supreme Court. Instead, it should have conducted its own due-process analysis and rejected Florida's unconstitutional procedural shortcut.

The panel in this case addressed the implied-preemption implications of *Walker*. The panel concluded that the only construction of the *Engle* jury findings that could avoid serious due-process problems was one based on the single theory that "all" cigarettes smoked by any progeny plaintiff are defective because they "are addictive and cause disease." *Graham v. R.J. Reynolds Tobacco Co.*, 782 F.3d 1261, 1267-73 (11th Cir. 2015). "Any findings more specific could not have been 'actually decided' by the [*Engle*] jury, and their claim-preclusive application would raise the specter of violation of due process." *Id.* at 1273.[4]

[4] In truth, it cannot even be said that the general finding of defect that the panel concluded could be extracted from the *Engle* verdict was "actually decided" *(cont'd)*

Because the core of due process is that "'everyone should have his own day in court,'" *Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008) (quoting *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996)), courts have insisted that "[p]roof that the identical issue was involved . . . is 'an absolute due process prerequisite to the application of collateral estoppel,'" 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4417 (2d ed. 2002) (quoting *Goodson v. McDonough Power Equip., Inc.*, 443 N.E.2d 978, 985 (Ohio 1983)); *see also Wickham Contracting Co. v. Bd. of Educ.*, 715 F.2d 21, 28 (2d Cir. 1983) (requirement that issue was "necessary and essential to the judgment in the earlier action" is "necessary in the name of procedural fairness, if not due process itself") (internal quotation marks, citation and alteration omitted). In short, preclusion doctrines must not be used "'as clubs but as fine instruments.'" Douglas J. Gunn, *The Offensive Use of Collateral Estoppel in Mass Tort Cases*, 52 Miss. L.J. 765, 798

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consistent with due-process principles, which mandate that preclusion applies only where there has actually been a finding on the *particular* issue subject to preclusion. Construing the *Engle* jury findings as deeming "all" cigarettes smoked by any progeny plaintiff to be defective is necessarily far too abstract a finding to be applied to any particular case in accordance with those principles. For example, to the extent the jury even found that all brands of cigarettes are defective (which is far from clear), it could have done so for a variety of reasons, making it impossible to know if the underlying theories of defect it accepted would apply in any particular case going forward.

(1982) (quoting *Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 421 F.2d 1313, 1316 (5th Cir. 1970)).

The *Walker* panel and the district court in this case authorized the use of Florida's unique preclusion doctrine as a blunt weapon, with serious implications for American businesses. If left undisturbed, these rulings would potentially authorize the use of any general verdict against defendants in mass-tort proceedings to foreclose litigation over basic liability issues as to all defendants and all products for the entire time they were on the market – even if, in the most extreme example, the jury's general verdict is premised on a distinct flaw in a distinct time period far removed from the type and time of injury alleged by the plaintiff. As a result, manufacturers would face the prospect of significantly expanded liability – to thousands or even millions of consumers – in the event of a single adverse jury verdict that might be based on isolated product defects. These pressures will exponentially increase incentives to settle even the most frivolous mass-tort suits, resulting in substantial costs that must be passed along to consumers. Thus, any "victory" in these proceedings would be enjoyed primarily by plaintiffs' lawyers, while businesses and their customers suffer the adverse economic consequences of unjustified litigation.

For all of these reasons, the Court should reverse the district court's ruling and overturn the panel decision in *Walker*.

ARGUMENT

I. THE DISTRICT COURT'S DECISION AND THE *WALKER* PANEL'S DECISION EVISCERATED CORE DUE-PROCESS PROTECTIONS.

The Supreme Court has long recognized that the use of preclusion doctrines, whether in federal or state court, is limited by due-process principles. *See Fayerweather v. Ritch*, 195 U.S. 276, 297-98 (1904). As the Supreme Court has made clear, these due-process protections apply to all types of preclusion doctrines, including claim preclusion, which prevents relitigation of the same claim by the same parties in subsequent proceedings following a final judgment, and issue preclusion, which may prevent the relitigation of the same issue in subsequent litigation against the same party. *See id.* With respect to issue preclusion, it is well established that issue-preclusive effect may be accorded only to precise issues that were "actually litigated and resolved in a valid court determination essential to the prior judgment," a requirement rooted in due process. *Taylor*, 553 U.S. at 892 (internal quotation marks and citation omitted); *see also, e.g.*, *Cooper v. North Olmsted*, 795 F.2d 1265, 1268 (6th Cir. 1986) ("an *absolute* due process prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action") (emphasis added) (citation omitted); 18 Wright § 4417 (requirement that precise issue has been

decided in the prior proceeding is rooted in due process); John P. Burns et al., *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 Vand. L. Rev. 573, 689 (1983) ("The courts . . . have acknowledged that due process and fairness considerations limit the use of collateral estoppel and that these considerations rightfully prevail over the desire to achieve judicial economy."). "[E]xtreme applications" of preclusion law that deviate from its traditional use "may be inconsistent with a federal right that is 'fundamental in character.'" *Richards*, 517 U.S. at 797 (citation omitted); *see also Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) ("abrogation of a well-established common-law protection . . . raises a presumption" of a due-process violation).

In accordance with these principles, the Supreme Court has rejected attempts to apply issue preclusion in cases where there is no guarantee that the precise issues to be precluded have actually been determined in a prior proceeding. *See, e.g.*, *Bobby v. Bies*, 556 U.S. 825, 834 (2009) ("If a judgment does not depend on a *given* determination, relitigation of that determination is not precluded.") (emphasis added); *see also Angstrohm Precision, Inc. v. Vishay Intertech., Inc.*, 567 F. Supp. 537, 541 (E.D.N.Y. 1982) ("Where several counts have been submitted to the jury and the jury's verdict leaves unclear the grounds upon which its determination is based, the precision as to identity of issues which collateral estoppel demands is absent."). For example, where "testimony was offered at the

prior trial upon several distinct issues, the decision of any one of which would justify the verdict . . . then the conclusion must be that the prior decision is not an adjudication upon any particular issue . . . and the plea of *res judicata* must fail." *Fayerweather*, 195 U.S. at 307; *accord Graham*, 782 F.3d at 1271 ("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.") (citing *Fayerweather*, 195 U.S. at 307). As such, the "inability to determine from a general verdict whether the issue was decided" is "[a]mong the most common reasons that prevent prior litigation of an issue from achieving preclusion." 18 Wright § 4407.[5]

The courts are not free to depart from this rule in the class action context. As with individual litigation, a "class judgment . . . will be conclusive on the issues *actually* and *necessarily* litigated and decided." 7AA Charles Alan Wright et al., *Federal Practice and Procedure* § 1789 (3d ed. 2005) (emphases added). Just as in individual litigation, "[c]are must be taken" in the class context to "delineat[e]

[5] *See also, e.g.*, *Mitchell v. Humana Hosp.-Shoals*, 942 F.2d 1581, 1583-84 (11th Cir. 1991) ("[B]ecause we cannot be certain what was litigated and decided . . . issue preclusion cannot operate."); *Postlewaite v. McGraw-Hill, Inc.*, 333 F.3d 42, 49 (2d Cir. 2003) (rejecting application of issue preclusion where party invoking the doctrine did not show "*with clarity and certainty* what was determined by the prior judgment") (internal quotation marks and citation omitted); *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1197-99 (10th Cir. 2000) (holding that issue preclusion did not apply where "the general finding under the negligence instruction fails to identify what the jury found sustained by the evidence").

exactly what issues were decided . . . since *only identical* issues will be precluded in subsequent litigation." *Id.* (emphases added). Indeed, the Supreme Court has long recognized the application of the fundamental requirements of collateral estoppel in the class context. *See, e.g.*, *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984) (rejecting issue preclusion in employment-discrimination case despite prior class judgment that an employer did not engage in a pattern or practice of racial discrimination because that finding did not necessarily decide whether the employer had discriminated against individual employees).

In *Douglas*, the Florida Supreme Court discarded this longstanding requirement that the precise issues be actually and necessarily decided to have preclusive effect by allowing the plaintiff to foreclose litigation on fundamental elements such as breach of duty and general causation based on the general verdicts in the *Engle* case. Had the Supreme Court of Florida properly characterized the preclusion at play as issue preclusion,[6] that doctrine's "actually

[6] Although the Florida Supreme Court purported to apply *claim* preclusion (also known as *res judicata*), such preclusion is proper only where a whole cause of action is brought to a full and complete judgment – and *Engle* expressly stated that the jury's findings "did *not* determine whether the defendants were liable to anyone." 945 So. 2d at 1263 (internal quotation marks and citation omitted). Claim preclusion does not apply where, as here, a party seeks to preclude litigation of certain elements of a claim. *See Nevada v. United States*, 463 U.S. 110, 129-30 (1983) (claim preclusion applies when there has been a final judgment that "'puts an end to *the cause of action*'") (emphasis added) (quoting *Comm'r v. Sunnen*, 333 *(cont'd)*

and necessarily decided" requirement would have rendered the *Engle* jury's findings – by the court's own admission – "useless" in this case. *Douglas*, 110 So. 3d at 433. The precise factual conclusions of the *Engle* jury can only be guessed at: while the *Engle* plaintiffs asserted many theories with respect to product defect, all that the *Engle* jury found was that each defendant "place[d] cigarettes on the market that were defective and unreasonably dangerous." (*Engle* Phase I Verdict Form at 2-3.) That finding could have been based on any number of theories presented in the *Engle* trial – for example, that certain "Light" cigarettes are defective because they result in the phenomenon of compensation, or that certain cigarettes are defective because they contain ammonia – and there is no way to know whether the accepted theory or theories would apply here.

The *Walker* panel described the approach taken by *Douglas* as "unorthodox and inconsistent with the federal common law." *Walker*, 734 F.3d at 1289. Nonetheless, the panel held that full faith and credit principles obligated it to defer to that court's application of preclusion doctrine. *Id.* In fact, no such obligation existed because state court judgments must, of course, comply with the United States Constitution, including the Due Process Clause of the Fourteenth Amendment, in order to be entitled to full faith and credit. *See, e.g.*, *Kremer v.*

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U.S. 591, 597 (1948)); *see also Schuler v. Israel*, 120 U.S. 506, 509 (1887) ("the whole cause of action" must be brought to a "full and complete judgment").

Chem. Constr. Corp., 456 U.S. 461, 481-82 (1982) (before full faith and credit is due, "[t]he State must . . . satisfy the applicable requirements of the Due Process Clause"); *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985) (full faith and credit given to a state's determination of the preclusive effect of a judgment is "subject to the requirements of . . . the Due Process Clause"); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 388 (1996) ("A state-court judgment generally is not entitled to full faith and credit unless it satisfies the requirements of the Fourteenth Amendment's Due Process Clause.") (Ginsburg, J., concurring in part and dissenting in part). The *Walker* panel should have recognized this requirement, applied it to *Douglas*, and declined to endorse that decision's new preclusion theory. Because *Walker* did not do so, the district court in this case concluded that *Douglas* was "controlling Florida state law" and rejected defendants' argument that giving preclusive effect to the *Engle* jury's findings violated their due-process rights. (Order Den. Defs.' Ren. Mot. for J. as a Matter of Law or, in the Alternative, for a New Trial, at 6-7, Dkt. No. 286 (M.D. Fla. Sept. 10, 2013).)

On appeal, the panel in this case reversed, holding that "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" – a finding that was squarely preempted by federal law. *Graham*, 782 F.3d at 1282. The panel reasoned that "[a]ny 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." *Id.* at 1273.

But even this bare finding cannot be afforded preclusive effect consistent with due process. Indeed, the panel was fully aware that "it is impossible to discern the extent to which the Phase I findings specifically match up with each of the *Engle* defendants," identifying this issue as the "central problem" in the appeal. *Id.* at 1281. As the panel explained:

> 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.

Id. The panel was nonetheless forced under *Walker* to conclude that the *Douglas* 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.'" *Id.*

As already explained, however, *res judicata* can only apply where a whole cause of action is brought to a full and complete judgment – a requirement the *Engle* court expressly recognized was not satisfied. Moreover, the single

purportedly "common liability" finding – i.e., that "cigarettes are inherently defective" – is not remotely common across the *Engle* class, which asserted a "litany" of defects, any one or combination of which could have formed the basis of the *Engle* jury's determination of defectiveness. *Id.*

That central problem mars any attempt to give preclusive effect to the *Engle* jury's findings. Due process required that defendants here be allowed to litigate the facts concerning whether the particular cigarettes at issue in this case were defectively designed. That question was not necessarily decided by any jury; instead, under Florida's "unorthodox" preclusion doctrine, the issue was *deemed* established based on the strength of a supposedly common jury verdict that could have been premised on any number of specific defects in any number of other cigarettes. "[T]o permit plaintiff[] to attempt to prove damages flowing from acts with respect to which there has been no conclusive determination that such acts took place or the unlawfulness thereof would be manifestly unjust." *Angstrohm Precision*, 567 F. Supp. at 543. Because the *Douglas* procedural shortcut deprived the defendants of their basic due-process right to contest liability, the *en banc* Court should reject application of full faith and credit and reverse.

II. THE DISTRICT COURT'S DECISION AND THE PRECLUSION DOCTRINE ENDORSED BY THE *WALKER* RULING POSE A GRAVE THREAT TO AMERICAN BUSINESSES.

The approach to preclusion taken by the district court and in the *Walker* decision poses a serious threat to American businesses by abdicating the fundamental role that federal courts play in ensuring that federal due-process rights are respected and enforced. It will also encourage abusive litigation tactics in federal and state courts in this Circuit going forward.

As noted above, the district court and *Walker* panel ignored the Supreme Court's clear command that a "State may not grant preclusive effect . . . to a constitutionally infirm judgment," and that a federal court should not do so in the name of full faith and credit. *Kremer*, 456 U.S. at 482. In so doing, they have sent an inescapable message to the states that federal courts will not exercise their duty to ensure that due process is satisfied before affording full faith and credit under any and every preclusion doctrine a state might create. That message is not consistent with the mandate of federal courts. To the contrary, federal courts have an important role to play in ensuring that state doctrines conform with federal requirements and in preventing the spread of state-law creations that abrogate due process for the sake of expediency.

Florida's new preclusion doctrine – and the message it sends to courts and would-be mass tort plaintiffs – have profound consequences for business. The

Engle litigation itself demonstrated that Florida's novel preclusion standard is damaging to defendants. Despite raising critically important due-process challenges repeatedly in the courts, the rights of the defendants in these cases have largely been ignored, resulting in several adverse verdicts. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Reaching Equilibrium in Tobacco Litigation*, 62 S.C. L. Rev. 67, 90 n.152 (2010) (arguing that the "post-*Engle* Florida cases . . . violate fundamental res judicata principles and constitutional due process norms"); *see also, e.g.*, *id.* at 90 ("Of course, the possibility exists that the special verdicts being given preclusive effect in *Engle* are making the claims less costly to litigate and are responsible for the more favorable plaintiff verdicts."); *id.* at 90 n.151 ("trial court instruction on all of the Phase I holdings has had a strong effect on juries"); 5-56 Products Liability § 56.01 (2015) ("Plaintiffs around the country have also begun to invoke offensive collateral estoppel to convince courts to adopt favorable findings by the Florida Supreme Court.").

Florida's expansive preclusion rule also invites a new wave of class action filings brought in Florida courts, whose preclusion principles bind federal courts sitting in diversity. *See, e.g.*, *Taylor*, 553 U.S. at 891 n.4 ("For judgments in diversity cases, federal law incorporates the rules of preclusion applied by the State in which the rendering court sits."). After all, the incentive to litigate inevitably increases when preclusion principles are expanded. *See, e.g.*, Linda S. Mullenix,

Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act, 64 Tex. L. Rev. 1039, 1080 (1986) ("exploitation of the doctrine burdens defendants with additional litigation, thereby increasing the volume of litigation"); Michael Weinberger, *Collateral Estoppel and the Mass Produced Product: A Proposal*, 15 New Eng. L. Rev. 1, 22 (1979) (collateral estoppel in product-liability litigation "could spawn a massive increase in the number of lawsuits initiated each year"). The *Walker* decision will continue to amplify this effect by encouraging enterprising plaintiffs' lawyers to craft new lawsuits that seek to take advantage of the *Engle/Douglas/Walker* preclusion doctrine. Such suits, if allowed, could massively expand liability for conduct that never would have been found tortious in individual proceedings, to the detriment of American businesses and ultimately, American consumers.

CONCLUSION

For the foregoing reasons, and those stated by the appellants, the Court should reverse the district court's ruling.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief Of The Chamber Of Commerce Of The United States Of America, The American Tort Reform, The National Association of Manufacturers, The Business Council of Alabama And The Alabama Civil Justice Reform Committee As *Amici Curiae* In Support Of Reversal of The District Court's Ruling On Rehearing *En Banc* was filed via the Court's electronic filing system on April 22, 2016, which will serve electronic notice to all parties of record.

/s/John H. Beisner
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CERTIFICATE OF COMPLIANCE

Counsel certifies as follows:

1. This brief complies with Eleventh Circuit Rule 35-8, Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,039 words, excluding the parts of the brief exempted by Eleventh Circuit Rule 32-4; and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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