

No. 13-____

IN THE
Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY,
Petitioner,

v.

STELLA KOBALLA,
Respondent.

**On Petition for Writ of Certiorari to the
Florida Fifth District Court of Appeal**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents the same question as the petitions for certiorari filed by petitioner R.J. Reynolds Tobacco Company in *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013), and *R.J. Reynolds Tobacco Co. v. Jimmie Lee Brown*, 70 So. 3d 707 (Fla. Dist. Ct. App. 2011). The question presented is:

Whether the Due Process Clause permits use of generic findings from the decertified *Engle* class action to preclude defendants in thousands of cases from contesting essential elements of the plaintiffs' claims.

PARTIES TO THE PROCEEDING

Defendant-appellant below, who is petitioner before this Court, is R.J. Reynolds Tobacco Company, individually and as successor by merger to the Brown & Williamson Tobacco Corporation and the American Tobacco Company.

The sole plaintiff below was Respondent Stella Koballa.

CORPORATE DISCLOSURE STATEMENT

Petitioner R.J. Reynolds Tobacco Company is a wholly owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc., which in turn is a wholly owned subsidiary of Reynolds American Inc. (“RAI”), a publicly held company.

Brown & Williamson Holdings, Inc., holds more than 10% of the stock of RAI. British American Tobacco p.l.c. indirectly holds more than 10% of the stock of RAI through Brown & Williamson Holdings, Inc.

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OPINIONS BELOW

The decision of the Florida Fifth District Court of Appeal (Pet. App. 1a) is reported at 99 So. 3d 630. The order of the Florida Supreme Court denying review (Pet. App. 3a) is unreported.

JURISDICTION

This Court has jurisdiction to review the Fifth District's judgment under 28 U.S.C. § 1257(a). On October 26, 2012, the Fifth District entered a final judgment of affirmance. Pet. App. 2a. On February 14, 2014, the Florida Supreme Court declined to review that judgment. Pet. App. 3a.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part that “[n]o State shall . . . deprive any person of . . . property, without due process of law.” U.S. Const. amend. XIV, § 1, cl. 2.

STATEMENT OF THE CASE

Respondent Stella Koballa sued Petitioner R.J. Reynolds Tobacco Company for injuries from smoking. Ms. Koballa raised claims for strict liability and negligence, among others. Ms. Koballa did not, however, set out to prove each element of those claims, as plaintiffs would need to do in ordinary litigation. Instead, to establish the conduct elements of her claims, Ms. Koballa sought to rely entirely on the asserted “res judicata effect” of findings from the class action in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006).

That would be unobjectionable if the jury in *Engle* had actually decided issues relevant to Ms. Koballa's claims, but it did not, as the Florida Supreme Court

has definitively recognized. Instead, the generalized *Engle* findings are ambiguous in how if at all they apply to the claims of any individual smoker. As relevant here, those findings are that defendants sold some unidentified cigarettes that were defective and engaged in some unidentified conduct that was negligent. The *Engle* class had asserted multiple alternative allegations of defect and negligence—including allegations limited to specific brands or types of cigarettes such as filtered cigarettes, unfiltered cigarettes, light cigarettes, non-light cigarettes, and so on. Moreover, the class did not ask that the jury specify which of these allegations it accepted or rejected. It is thus impossible to determine whether the *Engle* findings decide anything relevant to the claims of any individual smoker. Indeed, as the Florida Supreme Court recently and definitively acknowledged, the *Engle* findings would be “useless in individual actions” if the plaintiff were required to show that the specific issues relevant to her claims were in fact actually decided in the plaintiff’s favor in *Engle*. *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 433 (Fla. 2013).

Nonetheless, both the Florida Supreme Court and the United States Court of Appeals for the Eleventh Circuit have now held that former class members may, consistent with federal due process, use the *Engle* findings to conclusively establish the conduct elements of their claims. *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013); *Douglas*, 110 So. 3d at 419. As explained below, the rationales of *Walker* and *Douglas* are radically different and mutually contradictory. *Walker* now governs more than 1100 *Engle*-progeny cases pending in the federal district courts in Florida, and *Douglas* now governs

nearly 3200 *Engle*-progeny cases pending in the Florida state courts. Plaintiffs in these cases collectively raise claims for tens of billions of dollars.

Today, Reynolds has filed petitions for certiorari in *Walker* and *R.J. Reynolds Tobacco Co. v. Jimmie Lee Brown*, 70 So. 3d 707 (Fla. Dist. Ct. App. 2011). These petitions present the same question as this one: whether federal due process permits plaintiffs to use the *Engle* findings to establish elements of their claims, and to preclude defendants from contesting those elements, without any showing that the *Engle* jury actually decided the issues relevant to a given plaintiff's claims.

A. The *Engle* Class Action

The petitions for certiorari in *Walker* and *Jimmie Lee Brown* detail the background in *Engle*. Accordingly, we provide only a brief summary here.

Engle was a putative class action brought against major cigarette manufacturers, including petitioner, by allegedly addicted smokers. During Phase I of *Engle*, the class sought to establish, among other things, that the defendants had sold defective cigarettes and committed acts of negligence, over a period encompassing more than four decades. The class presented various alternative allegations of defect and negligence, many of which (such as allegations about filtered cigarettes, unfiltered cigarettes, light cigarettes, non-light cigarettes, and so on) applied only to certain cigarette types or time periods. At the end of Phase I, the jury found that each defendant had sold some defective cigarettes and engaged in some negligent conduct. But despite defendants' warning that such generalized findings would be use-

less in subsequent litigation, the class refused to ask the jury to specify which of the alternative allegations of defect and negligence it had adopted, which it had rejected, and which it had simply not addressed. *See* Pet. for Cert., *Walker v. R.J. Reynolds Tobacco Co.*, No. 13-____, at Statement, Part A (Mar. 28, 2014); Pet. For Cert., *R.J. Reynolds Tobacco Co. v. Jimmie Lee Brown*, No. 13-____, at Statement, Part A (Mar. 28, 2014).

Ultimately, the Florida Supreme Court decertified the *Engle* class. But rather than simply admit that the massive class action was a failure, the court purported to “retain[]” some of the *Engle* jury findings, including the defect and negligence findings, for use in future litigation. 945 So. 2d. at 1269. The court permitted former class members to file individual actions within a year, and it decreed that the retained findings “will have res judicata effect” in those actions. *Id.*

Following the Florida Supreme Court’s decision, thousands of plaintiffs filed individual actions seeking the benefit of that asserted “res judicata effect.” These individual actions are commonly referred to as “*Engle* progeny” cases. Nearly 3200 of these cases remain pending in the Florida state courts, and more than 1100 remain pending in the federal district courts. In each of these cases, plaintiffs seek to use the *Engle* findings to establish the conduct elements of their individual claims, and defendants contend that such use of the findings would violate federal due process.

Both federal and state courts struggled with how the generic *Engle* findings could be given meaningful effect in former class members’ individual suits con-

sistent with due process. Some courts concluded that they could not, see *Bernice Brown v. R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328 (M.D. Fla. 2008), *vacated on other grounds*, 611 F.3d 1324 (11th Cir. 2010), and others recognized that giving them effect would raise serious due-process concerns, *Jimmie Lee Brown*, 70 So. 3d at 716; *id.* at 719-20 (May, C.J., concurring).

B. The *Douglas* Decision

In *Douglas*, the Florida Supreme Court rejected a due-process challenge to use of the *Engle* findings to establish individual elements of progeny claims. The Florida Supreme Court conceded that the *Engle* findings would be “useless in individual actions” as a matter of issue preclusion, given their ambiguity and the universal rule that issue preclusion can apply only to issues shown to have been actually decided in the prior action. See 110 So. 3d at 433. As a result, the court invented a doctrine of offensive “claim” preclusion. Under that theory, the court held that the *Engle* findings could be used in progeny cases to establish not only issues shown to have been *actually decided* by the jury in *Engle*, but also to issues that the *Engle* jury *could have decided*. See *id.* at 433-35. While the court termed this doctrine “claim preclusion,” it applies to the issues litigated in Phase I of *Engle* and not to any claims, as Phase I did not resolve any claims. In holding this unprecedented use of offensive “claim” preclusion to be constitutional, the court reasoned that “claim preclusion, unlike issue preclusion, has no ‘actually decided’ requirement.” *Id.* at 435. By labeling the governing doctrine as one of “claim” preclusion, the court thus sought to sidestep the requirement of an actual decision on the

issues subject to preclusion, which this Court has held is required by due process. *See Fayerweather v. Ritch*, 195 U.S. 276, 300 (1904).

C. The *Walker* Decision

In *Walker*, the Eleventh Circuit reached the same result as *Douglas*, but on different and inconsistent grounds. Adopting a rationale that even the plaintiffs had not pressed, the Eleventh Circuit held itself bound, under the Full Faith and Credit Act, 28 U.S.C. § 1738, to accept what it said was the *Douglas* court's determination of what the *Engle* jury had found. *See* 734 F.3d at 1286-87. Then, the court construed *Douglas* to say the exact opposite of what it in fact had said about the *Engle* findings: Whereas *Douglas* had said that those findings would be "useless" if used to establish only those issues shown to have been actually decided in *Engle*, the Eleventh Circuit read *Douglas* as having determined that the *Engle* findings applied to all cigarettes sold by the defendants. *See id.* at 1287-88. Accepting that determination as binding, the court held that the due-process requirement of an actual decision on the issues relevant to the plaintiffs' claims was satisfied. *See id.* at 1289.

D. The Proceedings in This Case

Respondent Stella Koballa sued Petitioner R.J. Reynolds Tobacco Company for injuries from smoking. Ms. Koballa pleaded claims for strict liability and negligence, among others. Pet. App. 31a-34a. To establish the conduct elements of her claims, she sought to rely entirely on the *Engle* jury findings. *Id.* at 29a-30a.

In a pretrial motion, Reynolds moved for a determination that use of the *Engle* findings to estab-

lish elements of Ms. Koballa's individual claims would violate federal due process. Reynolds explained that, given the generality of the *Engle* findings and the number of alternative allegations raised in *Engle*, it cannot be determined whether the *Engle* jury actually found that the cigarettes smoked by respondent were defective or whether their sale was negligent. Pet. App. 36a-41a. The trial court denied the motion and ordered that the "common core findings in *Engle* are not to be relitigated in these cases." *Id.* at 18a. Reynolds renewed its objections at trial, and the court again ruled against them. *Id.* at 89a-91a; *id.* at 105a-07a.

The trial proceeded in two phases. *See* Pet. App. 14a. In Phase I, the jury determined that Ms. Koballa was a member of the *Engle* class, *i.e.*, that an addiction to cigarettes was a legal cause of her lung cancer. *Id.* at 10a. In Phase II, Reynolds requested that the jury be instructed to determine all elements of Ms. Koballa's claims, including the conduct elements of the defect and negligence claims. *Id.* at 44a-63a.

The trial court refused to give those instructions. Pet. App. 112a-15a, 117a-22a, 125a-26a. Instead, it instructed the jury that it must accept the *Engle* Phase I findings that Reynolds had "placed cigarettes on the market that were defective and unreasonably dangerous" and that Reynolds "was negligent." *Id.* at 130a-31a. In so doing, the court did not, and could not, tell the jury *which* brands or types of cigarettes were defective, or *which* acts had been found negligent. Yet, on the claims for strict liability and negligence, the instructions nonetheless compelled a plaintiff's verdict upon a determination of *Engle* class

membership. *Id.* at 133a-34a, 138a-40a. The court further instructed the jury that the *Engle* findings were “binding upon you, the Court, and the parties to this lawsuit.” *Id.* at 130a. At no point was the jury asked whether any specific conduct that harmed Ms. Koballa was tortious.

The jury returned a split verdict. It rejected all proposed potential “legal cause[s]” of Ms. Koballa’s lung cancer: (1) “the negligence on the part of R.J. Reynolds”; (2) “the defective and unreasonably dangerous cigarettes placed on the market by R.J. Reynolds”; and (3) “R.J. Reynolds’ agreement to conceal information and actual concealment of information.” Pet. App. 11a-12a. Even so, the jury found damages of \$1,000,000, and assigned 30% of the fault to Reynolds, and 70% to Ms. Koballa. *Id.*

In a post-trial motion, Reynolds renewed its argument that the trial court’s use of the *Engle* findings to establish the conduct elements of Ms. Koballa’s claims violated due process and also argued that the jury’s negative findings on legal causation required that judgment be entered in its favor. Pet. App. 65a-72a. The trial court rejected both arguments. *Id.* at 7a. Remarkably, the court concluded that the verdict amounted to a determination of liability on the claims for strict liability and negligence, despite the jury’s determination that neither defective cigarettes nor Reynolds’s negligence was a legal cause of Ms. Koballa’s injuries. Accordingly, the court entered final judgment for Ms. Koballa. *Id.* at 5a.

On appeal, Reynolds again argued that the use of the *Engle* findings to establish essential elements of progeny claims violates federal due process. Pet. App. 79a-87a. The Fifth District Court of Appeal af-

firmed the judgment of the trial court in an opinion that cited *Philip Morris USA, Inc. v. Douglas*, 83 So. 3d 1002 (Fla. Dist. Ct. App. 2012). Pet. App. 2a. In *Douglas*, the Second District had held that regardless of what the *Engle* trial record disclosed, the *Engle* findings conclusively established all of the conduct elements of all of the claims made by all *Engle* class members. See 83 So. 3d at 1007-08 (“[W]e do not agree [with *Bernice Brown* that] every *Engle* plaintiff must trot out the class action trial transcript to prove applicability of the Phase I findings.” (internal quotation and citation omitted)). However, the Second District recognized that the due-process issue “is one that will be applicable to the many individual class member cases now being considered by the trial courts of this state,” and therefore certified the issue to the Florida Supreme Court the “question as being one of great public importance.” *Id.* at 1010-11. In this case, the Fifth District likewise certified the same due-process question as one of “great public importance.” Pet. App. 2a.

Reynolds sought further review in the Florida Supreme Court. *Id.* at 75a-78a. On February 14, 2014, the Florida Supreme Court declined jurisdiction, thereby leaving undisturbed the Fifth District’s decision. *Id.* at 3a.

REASONS FOR GRANTING THE PETITION

A. This case raises the same question as the petitions for certiorari in *Walker* and *Jimmie Lee Brown*: whether use of the *Engle* findings to conclusively establish elements of individual progeny plaintiffs’ claims is consistent with federal due process. For reasons explained at length in those petitions, that question amply warrants this Court’s review. It is

central to the conduct of thousands of ongoing cases involving tens of billions of dollars of claims. Moreover, its recent resolution by the Florida Supreme Court and the Eleventh Circuit has produced opinions that are both mutually exclusive and individually indefensible.

This case illustrates the rank unfairness of the unprecedented preclusion rules that now govern *Engle* progeny litigation. Ms. Koballa smoked primarily full-flavored (non-light) Lucky Strike, Tareyton, and Belair cigarettes. Pet. App. 96a-103a. Yet the *Engle* class made extensive defect and negligence allegations specific to *light* cigarettes—including, for example, the allegation that light cigarettes are defective and negligently designed because they cause smokers to “compensate” for reduced nicotine yields by choosing to smoke more or to inhale more deeply. *Id.* at 143a-46a, 148a-63a. If the *Engle* findings rested on those allegations, they would not apply to smokers who, like Ms. Koballa, smoked only *non-light* cigarettes. Even worse, for all one can discern from the *Engle* findings and record, the *Engle* jury may have actually *rejected* allegations encompassing the non-light cigarettes smoked by Ms. Koballa. Yet despite all of that, the jury in this case was not asked to determine whether the non-light cigarettes smoked by Ms. Koballa were defective or whether their sale was negligent.

In sum, liability for negligence and strict liability was imposed on Reynolds without any ascertainable adjudication in this case or in *Engle* of the conduct elements of Ms. Koballa’s claims. In this case, Ms. Koballa was entirely relieved of her burden of proof with regard to the most basic conduct elements of the

claims, and Reynolds was entirely precluded from contesting those elements. And in *Engle*, so far as anyone can tell, the jury did not *actually decide* that the defendants' tortious conduct extended to non-light cigarettes. Rather, Reynolds was precluded from litigating that issue merely because the *Engle* jury *could have decided* that question.

This is a due-process violation of the most basic and obvious sort. It has been replicated in more than 100 *Engle* progeny cases so far tried to judgment, and without intervention by this Court, the same due-process violation will be replicated in thousands more pending progeny cases. Review by this Court is urgently needed.

B. The Court should hold this case pending its resolution of *Walker* and *Jimmie Lee Brown*. To ensure the similar treatment of similar cases, the Court routinely holds petitions that implicate the same issue as other cases pending before the Court, and, once the related case is decided, it resolves the held petitions in a consistent manner. *See, e.g., IMS Health, Inc. v. Schneider*, 131 S. Ct. 3091, 3091 (2011); *Am. Home Prods. Corp. v. Ferrari*, 131 S. Ct. 1567, 1567 (2011); *State Farm Mut. Auto. Ins. Co. v. Willes*, 551 U.S. 1111, 1111 (2007); *see also Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (noting that the Court has “GVR’d in light of a wide range of developments, including [its] own decisions”); *id.* at 181 (Scalia, J., dissenting) (“We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted *in order that* (if appropriate) they may be ‘GVR’d’ when the case is decided.”).

Because this case raises the same due-process question presented in *Walker* and *Jimmie Lee Brown*, the Court should follow that course here. Under its normal scheduling practices, the Court will likely consider this petition and the *Walker* and *Jimmie Lee Brown* petitions at the same conference. If it should grant review in either or both of those cases, then it should hold this case pending resolution of *Walker* and *Jimmie Lee Brown* on the merits.

CONCLUSION

The petition for certiorari should be held pending the disposition of the petitions for certiorari in *Walker* and *Jimmie Lee Brown*, then disposed of consistent with those cases.

Respectfully submitted,

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