

No. 13-____

IN THE
Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY AND
LORILLARD TOBACCO COMPANY,
Petitioners,

v.

ROBERT SURY, AS PERSONAL REPRESENTATIVE OF THE
ESTATE OF WILLIAM SURY,
Respondent.

**On Petition for Writ of Certiorari to the
Florida First 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

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

The sole plaintiff below was Respondent Robert Sury, as personal representative of the estate of William Sury.

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.

Petitioner Lorillard Tobacco Company is a wholly-owned subsidiary of Lorillard Inc. (stock symbol: LO), shares of which are publicly traded.

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The First District Court of Appeal entered a final judgment on June 24, 2013. Pet. App. 1a. The Florida Supreme Court declined to exercise its discretionary jurisdiction over the case on January 31, 2014. Pet. App. 9a.

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 Robert Sury sued petitioners R.J. Reynolds Tobacco Company and Lorillard Tobacco Company for the death of his father, William Sury, from smoking. Respondent raised claims for strict liability, negligence, concealment, and conspiracy. Respondent 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 his claims, respondent 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 Mr. Sury'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, engaged in some unidentified conduct that was negligent, and concealed some unidentified information about the health risks of smoking, both individually and through a conspiracy. In the *Engle* case, the class had asserted multiple alternative allegations of defect, negligence, and concealment—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 his 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 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 petitioners, by allegedly addicted smokers. During Phase I of *Engle*, the class sought to establish that the defendants had sold defective cigarettes, committed acts of negligence, and fraudulently concealed information about smoking, both individually and through a conspiracy, over a period encompassing more than four decades. The class presented various alternative allegations of defect, negligence, and concealment, 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, engaged in some negligent conduct, and concealed some information individually and through a conspiracy. But despite defendants' warning that such generalized findings would be useless in subsequent litigation, the class refused to ask the jury to specify which of the alternative allegations of defect, negligence, concealment and conspiracy 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, negligence, concealment, and conspiracy 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 3,200 of these cases remain pending in the Florida state courts, and more than 1,100 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 consistent 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, 1344-46 (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 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 re-

solve 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 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 Robert Sury sued Petitioners R.J. Reynolds Tobacco Company, Lorillard Tobacco Com-

pany, and other cigarette manufacturers for the death of his father from smoking. Respondent pleaded claims for strict liability, negligence, fraudulent concealment, and conspiracy to fraudulently conceal. Pet. App. 36a-42a. To establish the conduct elements of his claims, Respondent sought to rely entirely on the *Engle* jury findings. *Id.* at 31a-32a, 33a-34a.

In a pretrial motion filed in all *Engle* progeny cases pending in Duval County, petitioners and other defendants moved for an order on the extent to which progeny plaintiffs may rely on the *Engle* findings to establish essential elements of their claims. Pet. App. 69a. Defendants argued that “there is no way to identify the conduct that the [*Engle*] jury found tortious,” and thus “no way to determine whether the conduct or defect that allegedly caused Plaintiffs’ injuries is the same conduct or defect found in *Engle* to be tortious.” *Id.* at 74a. Under these circumstances, defendants explained, use of the *Engle* findings to establish the conduct elements of individual progeny claims would “offend due process.” *Id.* at 76a.

The trial court denied the motion and held that the *Engle* findings conclusively establish all of the conduct elements of all of the claims by all *Engle* class members. Pet. App. 25a.

Before trial, petitioners asked that the jury be instructed to determine all elements of respondent’s claims, including the conduct elements of defect, negligence, concealment, and conspiracy. Pet. App. 43a-60a; *id.* at 63a-66a. The trial court refused to give those instructions. *Id.* at 101a-03a, 104a. Instead, it instructed the jury that petitioners “placed cigarettes on the market that were defective and unreasonably dangerous” and “were negligent.” *Id.* at 101a-02a. 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. On the claim for fraudulent concealment, the court instructed the jury that the only open liability issue was “whether the concealment or omission of material information concerning the health risks or addictive nature of cigarette smoking by [petitioners] was a legal cause of the death of William Sury.” *Id.* at 103a. But the court did not, and could not, tell the jury whether the concealment found by the jury in *Engle* encompassed all cigarettes, filtered cigarettes, unfiltered cigarettes, light cigarettes, non-light cigarettes, or any number of other allegations raised by the class in *Engle*. On the claim for conspiracy, the court instructed the jury that petitioners “agreed with other tobacco companies to conceal or omit information regarding the health effects of cigarettes or their addictive nature.” *Id.* at 102a. As with the underlying concealment finding, the court did not, and could not, tell the jury whether the conspiracy encompassed all cigarettes, filtered cigarettes, unfiltered cigarettes, light cigarettes, non-light cigarettes, or some other alternative. The court further instructed the jury that the *Engle* findings were “binding upon you, the Court, and the parties.” *Id.* at 101a. At no point was the jury asked whether any specific conduct that injured Mr. Sury was tortious.

The jury found for plaintiff on all claims. First, it found that Mr. Sury was an *Engle* class member. Pet. App. 15a. On the merits, it found for plaintiff on the claims for strict liability, negligence, concealment, and conspiracy. *Id.* at 16a-17a. It awarded damages of \$1,000,000, and assigned 20% of the fault

to Reynolds, 20% to Lorillard, and 60% to Mr. Sury. *Id.* at 18a-19a.

In a post-trial motion, petitioners renewed their argument that the trial court's use of the *Engle* findings violated due process. Pet. App. 81a-85a. The trial court denied the motion. *Id.* at 11a-12a.

On appeal, petitioners raised the same due-process argument. Pet. App. 87a-89a. The First District Court of Appeal affirmed the judgment of the trial court, in an opinion that cited the Florida Supreme Court's decision in *Engle*, but did not explicitly address petitioners' due-process argument. *Id.* at 2a & n.1. The Florida Supreme Court declined to exercise its discretionary jurisdiction on January 31, 2014. *Id.* at 9a.

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. Mr. Sury primarily smoked Kent, Doral, and other filtered cigarette brands. Pet. App. 93a-95a; *id.* at 99a-100a. Yet in the *Engle* trial, there

was extensive evidence that public-health officials viewed filtered cigarettes as safer than unfiltered ones. *See, e.g.*, Pet. App. 127a-31a. Thus, the *Engle* findings could rest on the theory that *unfiltered* cigarettes were defective and negligently designed for failure to include a filter, and that the defendants concealed information about the full extent of the risks of unfiltered cigarettes. If so, then the *Engle* findings would have little application to smokers who, like Mr. Sury, primarily smoked filtered cigarettes.

On the other hand, the *Engle* jury might have credited the class's alternative (and contradictory) allegation that *filtered* cigarettes are defective because they are more dangerous than an ordinary consumer would expect (because the filters do not work), and that the defendants concealed this information from the public. Pet. App. 105a-06a, 108a, 111a-14a, 114a-18a, 125a-27a. That at least would connect the findings in *Engle* to the type of cigarettes smoked by Mr. Sury. But even in that event, the jury in this case was never asked to determine whether the ineffectiveness of filters caused Mr. Sury's death even if, say, he would have simply smoked unfiltered cigarettes but for any filter-related misconduct. *Id.* at 15a-20a.

In sum, without any basis for determining the theory of defect, negligence, or concealment underlying the *Engle* findings, there is no way to determine whether those findings even encompassed the filtered cigarettes smoked by Mr. Sury, much less whether Mr. Sury's injury was caused by the specific misconduct found in *Engle*. Yet despite all of that, the jury in this case was not asked to determine whether the

filtered cigarettes smoked by Mr. Sury were defective, whether the sale of filtered cigarettes was negligent, or whether the *Engle* defendants fraudulently concealed any information about filtered cigarettes.

Liability was imposed on petitioners absent any ascertainable adjudication—in this case or in *Engle*—of the conduct elements of Respondent’s claims. In this case, Respondent was entirely relieved of his burden of proof with regard to the most basic conduct elements of his claims, and petitioners were 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 filtered cigarettes. Rather, petitioners and the other *Engle* defendants were 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, which has been replicated in more than 100 *Engle* progeny cases so far tried to judgment and which, without intervention by this Court, 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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