

No. 13-____

IN THE
Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY,
Petitioner,

v.

LEROY EDWARD KIRKLAND,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Paul D. Clement
BANCROFT PLLC
1919 M Street, N.W.
Suite 470
Washington, DC 20036

Gregory G. Katsas
Counsel of Record
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939
ggkatsas@jonesday.com

Counsel for Petitioner

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 1297 (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 Leroy Edward Kirkland, who is respondent in this Court.

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 Second District Court of Appeal (Pet. App. 1a) is unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The Second District Court of Appeal issued a per curiam opinion in this case on December 18, 2013. Pet. App. 1a-2a. That opinion is not reviewable in the Florida Supreme Court because it does not contain analysis or a citation to any other decision. *See The Florida Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988). Therefore, the Second District Court of Appeal was “the highest court of a State in which a decision could be had,” as required by § 1257(a). *See, e.g., KPMG LLP v. Cocchi*, 132 S. Ct. 23, 24 (2011) (per curiam) (reviewing decision of Florida District Court of Appeal).

On March 14, 2014, Justice Thomas extended Petitioner’s deadline to file its petition for a writ of certiorari until April 17, 2014.

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 Leroy Kirkland sued petitioner R.J. Reynolds Tobacco Company for injuries that he alleged were caused by smoking. Respondent pleaded 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. Kirkland’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 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 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* fully 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 that the defend-

ants 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 their 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 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 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 (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" pre-

clusion. 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 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 Leroy Kirkland sued Petitioner R.J. Reynolds Tobacco Company for injuries he alleged were caused by smoking. Respondent pleaded claims for strict liability, negligence, fraudulent concealment, and conspiracy to fraudulently conceal. Pet. App. 30a-35a. To establish the conduct elements of his claims, he sought to rely entirely on the *Engle* jury findings. Pet. App. 24a, 28a-29a.

In a pretrial motion concerning all pending *Engle* progeny cases in Hillsborough County, defendants (including Reynolds) argued that it would violate federal due process to allow class members to use the *Engle* findings to establish the elements of their claims. Pet. App. 21a-22a. They explained that there was "no way to determine what conduct the *Engle* jury found wrongful," and thus no way to determine whether "it is the same conduct that could have caused each plaintiff's alleged injuries here." Pet. App. 19a. They specifically argued that, under these circumstances, use of the *Engle* findings to establish the conduct elements of individual progeny claims would "violat[e] . . . federal . . . due process." Pet. App. 21a-22a.

The trial court denied the motion and held that the *Engle* findings conclusively establish all of the conduct elements of all of the claims made by all *Engle* class members. Pet. App. 14a-15a.

During trial, Reynolds again raised the due-process issue in its directed-verdict motion. Pet. App. 52a-66a. The trial court denied the motion. Pet. App. 98a-99a.

At the close of evidence, the jury was asked to determine whether Mr. Kirkland was a member of the *Engle* class, and if so, whether Reynolds was liable to him. See Pet. App. 7a.

For the latter inquiry, Reynolds requested that the jury be asked to determine all elements of Mr. Kirkland's claims, including the conduct elements of defect, negligence, and concealment. Pet. App. 37a-51a. The trial court refused to do so. Instead, it instructed the jury that if Mr. Kirkland was a class member, the *Engle* findings "may not be denied or questioned" and that Mr. Kirkland could thus prove his claims by showing that "smoking cigarettes" was a "legal cause" of his injuries. Pet. App. 103a-105a; *id.* at 7a. In so doing, the court did not, and could not, tell the jury which brands or types of cigarettes the *Engle* jury had found defective, or which acts by the *Engle* defendants had been found negligent. Similarly, on the claim for fraudulent concealment, the court instructed the jury that the only open liability issue was whether Mr. Kirkland relied to his detriment on "statements by the defendant . . . that omitted material information concerning the health effects of cigarettes or their addictive nature or both." Pet. App. 107a-09a; *id.* at 8a. Again, 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*. Finally,

the jury was instructed that Reynolds “conspired with other cigarette companies to conceal or omit information regarding the health effects of cigarettes or their addictive nature, or both, with the intention that smokers and the public would rely on this information to their detriment.” Pet. App. 104a. As with the underlying concealment claim, 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. At no point was the jury asked whether any specific conduct that injured Mr. Kirkland was tortious.

The jury found that Mr. Kirkland was an *Engle* class member. Pet App. 7a. On the merits, it found that “smoking cigarettes” and the “concealment or omission of material information” were a “legal cause” of Mr. Kirkland’s injuries. *Id.* at 7a-8a. The jury found Mr. Kirkland 90% responsible for his injuries, and Reynolds 10% responsible. It awarded Mr. Kirkland \$100,000 in compensatory damages and \$250,000 in punitive damages. Pet. App. 8a, 10a

In a post-trial motion, Reynolds renewed its argument that the use of the *Engle* findings to establish the conduct elements of Mr. Kirkland’s claims violated due process. Pet. App. 68a-85a. The trial court denied the motion, but reduced the compensatory award to \$10,000 in accordance with the jury’s comparative-fault finding, for a total award of \$260,000. *Id.* at 3a, 5a.

On appeal, Reynolds again raised the same due-process argument. Pet. App. 87a. The Second District Court of Appeal affirmed the judgment of the trial court in a per curiam affirmance. Pet. App. 2a.

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. Respondent smoked roll-your-own, Pall Mall, and Salem cigarettes—none of which were “light” cigarettes. Pet. App. 90a-95a. Yet the *Engle* class made extensive defect, negligence, and concealment 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, and the allegation that the *Engle* defendants concealed these facts from smokers. Pet. App. 111a-26a. If the *Engle* defect findings rested on those allegations, they would have no possible applicability to smokers who, like Mr. Kirkland, 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* concealment and conspiracy allegations encompassing the non-light

cigarettes smoked by Mr. Kirkland. Yet despite all of that, the jury in this case was not asked to determine whether the non-light cigarettes smoked by Mr. Kirkland were defective, whether the sale of non-light cigarettes was negligent, or whether the *Engle* defendants fraudulently concealed any information about non-light cigarettes.

In sum, liability was imposed on Reynolds absent any ascertainable adjudication, either in *Engle* or this case, of the elements of Mr. Kirkland's claims. In this case, Mr. Kirkland was entirely relieved of his 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, absent intervention by this Court, it 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,

Paul D. Clement
BANCROFT PLLC
1919 M Street, N.W.
Suite 470
Washington, DC 20036

Gregory G. Katsas
Counsel of Record
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939
ggkatsas@jonesday.com

Counsel for Petitioner