No. 13-___

IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY,
Petitioner,

v.

LYANTIE TOWNSEND, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANK TOWNSEND,
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

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 Lyantie Townsend, as personal representative of the estate of Frank Townsend.

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 initial decision of the Florida First District Court of Appeal (Pet. App. 10a) is reported at 90 So. 3d 307. The first order of the Florida Supreme Court denying review (Pet. App. 35a) is reported at 110 So. 3d 441. The decision of the District Court of Appeal on remand (Pet. App. 1a) is reported at 118 So. 3d 844. The second order of the Florida Supreme Court denying review (Pet. App. 8a) is unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). On June 13, 2013, the First District Court of Appeal entered a final judgment of affirmance. Pet. App. 1a. On February 13, 2014, the Florida Supreme Court declined to review that judgment. Pet. App. 8a.

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 Lyantie Townsend sued petitioner R.J. Reynolds Tobacco Company for the death of her husband, Frank Townsend, 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 her 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 Mrs. Townsend'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 defendants had sold defective cigarettes, committed acts of negligence, and fraudulently concealed information about smoking, both individually and through a con-

spiracy, 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 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, 1344-46 (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 requirement of an actual decision on the issues rele-

vant to the plaintiffs' claims was satisfied. *See id.* at 1289.

D. The Proceedings in This Case

Respondent Lyantie Townsend sued Petitioner R.J. Reynolds Tobacco Company for the death of her husband from smoking. Respondent pleaded claims for strict liability, negligence, fraudulent concealment, and conspiracy to fraudulently conceal. Pet. App. 91a, 92a-94a. To establish the conduct elements of her claims, she sought to rely entirely on the *Engle* jury findings. *Id.* at 87a-88a.

In a pretrial motion, Reynolds sought "to resolve . . . the extent to which" Mrs. Townsend could "rely on certain jury findings from the *Engle* trial to establish elements of [her] tort claims." Pet. App. 97a. Reynolds argued that the plaintiff's "proposed use of the findings would also offend due process." *Id.* at 100a.

The trial court denied the motion and ordered that "the jury will be advised of the *Engle* . . . findings during jury selection, opening and closing statements, and Plaintiff's case-in-chief," and that "[t]he jury will be instructed that they are to accept these findings as fact." Pet. App. 53a.

In line with this ruling, the trial court instructed the jury that Reynolds had "placed cigarettes on the market that were defective and unreasonably dangerous," Pet. App. 143a, and "was negligent," *id.* at 142a. 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. On the claim for fraudulent concealment, the court instructed the jury to determine whether the fraudulent

omissions found in *Engle* were a "legal cause" of Mr. Townsend's death. *Id.* at 143a-45a. But the court did not, and could not, tell the jury whether the fraudulent omissions found in *Engle* encompassed all cigarettes, filtered cigarettes, unfiltered cigarettes, light cigarettes, non-light cigarettes, or any number of other allegations raised by the class. On the claim for conspiracy, the jury was asked only whether Mr. Townsend "relied on statements" made pursuant to the conspiracy found in *Engle*. *Id.* at 145a. 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. Townsend was tortious.

The jury found for Mrs. Townsend on all claims. It determined that Mr. Townsend was an *Engle* class member and, on the merits, found for Mrs. Townsend on strict liability, negligence, concealment, and conspiracy. Pet. App. 146a-48a. The jury found Reynolds 51 percent responsible, and Mr. Townsend 49 percent responsible, for Mr. Townsend's injuries. *Id.* at 147a-48a. It awarded Mrs. Townsend $10.8 million in non-economic compensatory damages and $80 million in punitive damages. *Id.* at 148a.

In a post-trial motion, Reynolds renewed its argument that the use of the *Engle* findings to establish the conduct elements of Mrs. Townsend's claims violated due process. Pet. App. 103a-04a ("Affording the generic *Engle* findings preclusive effect with respect to the individualized elements of Plaintiff's claims (as the Court did here) violates . . . Reynolds' due process

rights."). The trial court denied the motion. *Id.* at 44a. After reducing the compensatory and punitive awards in accordance with the jury's comparative-fault finding, to $5.508 million and $40.8 million respectively, the court then entered a final judgment of $46.308 million. *Id.* at 47a.

On appeal, Reynolds repeated its due-process argument, Pet. App. 107a-09a, and further argued that the damages were excessive, *id.* at 114a-22a. The First District Court of Appeal rejected the due-process argument based on its prior decision in *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. Dist. Ct. App. 2010). Pet. App. 11a-12a. In *Martin*, the First District had held that, regardless of what the *Engle* trial record disclosed, the *Engle* findings conclusively establish all of the conduct elements of all of the claims made by all *Engle* class members. *See* 53 So. 3d at 1068 ("unlike the Eleventh Circuit [in *Bernice Brown*], we conclude that the Phase I findings establish the conduct elements of the asserted claims, and individual *Engle* plaintiffs need not independently prove up those elements or demonstrate the relevance of the findings to their lawsuits"). On the claims for excessiveness, a divided panel upheld the $10.8 million compensatory award as being "at the outer limit of reasonableness," Pet. App. 16a, but set aside the reduced $40.8 million punitive award as excessive, *id.* at 24a. Judge Wetherell dissented from the decision as to compensatory damages because, in his view, "juries do not have free rein to turn widows of life-long smokers into decamillionaires simply because RJR is a deep-

pocket defendant and a present-day popular villain." *Id.* at 26a-27a (internal quotation marks omitted).[1]

Reynolds sought review in the Florida Supreme Court on both the due-process and excessiveness issues. Pet. App. at 124a. The Florida Supreme Court denied review. *Id.* 35a.

On remand, the trial court remitted the punitive award to $20 million and entered a final judgment of $25.508 million. Pet. App. 41a-42a; *id.* at 22a.

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[1] In his *Townsend* dissent, Judge Wetherell predicted that the decision would open the floodgates to eight-digit "non-economic damage awards in future *Engle* progeny cases." Pet. App. 28a n.15 (Wetherell, J., dissenting). That is exactly what has happened. *See, e.g.*, *R.J. Reynolds v. Smith*, 131 So. 3d 18 (Fla. Dist. Ct. App. 2013) (citing *Townsend* to justify $10 million compensatory award for non-economic damages to living smoker); *id.* at 20 (Wetherell, J., concurring) ("it appears that the *Townsend*-fueled *Engle* verdict lottery and its jackpot-sized damages awards will continue in the trial courts within this court's jurisdiction (and around the state) simply because non-economic damages are difficult to measure and the tobacco companies are perceived to have sufficiently-deep pockets to pay these awards"); *id.* at 20-21 (Makar, J., concurring) ("I concur in affirmance, but with much reluctance for many of the reasons expressed by Judge Wetherell. If this case had arisen prior to [*Townsend*], it would be exceptionally difficult to justify the $10 million award for non-economic damages"); *Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67, 78-79 (Fla. Dist. Ct. App. 2013) (citing *Townsend* to justify a $10 non-economic compensatory award in an *Engle*-progeny case); *Philip Morris USA, Inc. v. Cohen*, 102 So. 3d 11, 18-19 (Fla. Dist. Ct. App. 2012) (same). Reynolds today has filed a petition for certiorari in *Smith*, which raises the same due-process question as this case. Reynolds asks that *Smith*, like this case, be held pending the disposition of the petitions for certiorari in *Walker* and *Jimmie Lee Brown*.

Reynolds appealed and argued that the remitted punitive award was still excessive. Despite the binding adverse precedent in *Martin*, Reynolds renewed for preservation purposes its due-process argument that the "use of the *Engle* findings to establish essential elements of individual claims violates . . . federal due process." Pet. App. 127a. While the second *Townsend* appeal was pending, the Florida Supreme Court decided *Douglas*. Accordingly, the *Townsend* panel rejected Reynolds's due-process argument based on *Douglas*. *Id.* at 2a n.2. The court also held that the $25 million award was not excessive. *Id.* at 2a. Reynolds again sought further review in the Florida Supreme Court, *id.* at 130a-32a, which again denied review, *id.* at 8a.

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. Townsend smoked Pall Mall, Kool, and Salem cigarettes—which were full-flavored (non-light) cigarettes. Pet. App. 133a-35a, *id.* at

137a-42a. 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. *See, e.g.*, *id.* at 151a-66a. If the *Engle* defect findings rested on those allegations, they would have no possible applicability to smokers who, like Frank Townsend, 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* defect allegations encompassing the non-light cigarettes smoked by Mr. Townsend. Yet despite all of that, the jury in this case was not asked to determine whether the non-light cigarettes smoked by Mr. Townsend 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, Reynolds has been subjected to a massive judgment of over $25 million without any ascertainable adjudication—in this case or in *Engle*—of the conduct elements of Respondent's claims. In this case, Mrs. Townsend 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 be-

cause the *Engle* jury *could have decided* that question.

This is a due-process violation of the most basic and obvious sort. In this case alone, it produced a $25 million judgment that all of the judges below thought was close to—or over—the upper bounds of reasonableness. Moreover, the same due-process violation has been replicated in more than 100 *Engle* progeny cases so far tried to judgment, including several eight-figure judgments like the one at issue here. *See supra* note 1. 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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