No. 13-14590

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

EARL E. GRAHAM, *as personal representative of the* ESTATE OF FAYE DALE GRAHAM,

Plaintiff-Appellee,

v.

R.J. REYNOLDS TOBACCO COMPANY, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida
The Hon. Marcia M. Howard
D.C. Docket No. 3:09-cv-13602-MMH-JBT

EN BANC BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS, URGING REVERSAL

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April 22, 2016

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1.1, the undersigned counsel certifies that, in addition to the parties and entities identified in the Certificates of Interested Persons filed earlier by Appellants and Appellee, the following persons and entities may have an interest in the outcome of this case:

a. Washington Legal Foundation (WLF)

b. Cory L. Andrews, Senior Litigation Counsel for WLF

c. Richard A. Samp, Chief Counsel for WLF

d. Mark S. Chenoweth, General Counsel for WLF

The undersigned counsel further states that WLF is a nonprofit, tax-exempt corporation organized under Section 501(c)(3) of the Internal Revenue Code; it has no parent corporation, does not issue stock, and no publicly held company enjoys a 10% or greater ownership interest.

DATE: April 22, 2016 /s/ Richard A. Samp
RICHARD A. SAMP

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters in all 50 States, including Florida. WLF's primary mission is to defend and promote free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF has regularly appeared as *amicus curiae* before this and other federal and state courts to oppose the use of procedural shortcuts in cases where such efficiencies would ultimately deprive litigants of the opportunity to defend themselves fully and fairly. *See, e.g.*, *Exxon Mobil Corp. v. State of New Hampshire*, No. 15-993 (S. Ct., petition pending); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), *cert. denied*, 552 U.S. 841 (2007).

WLF is particularly troubled by the willingness of federal courts to ratify the Florida Supreme Court's disastrous ruling in *Engle*, which jettisoned longstanding procedural protections governing civil litigation in order to facilitate the resolution of a large number of similar claims. The district court's decision below is a stark example of that disturbing trend. By allowing an *Engle*-progeny plaintiff to rely on the purported "res judicata effect" of the original *Engle* jury's findings as a

[1] Pursuant to Fed. R. App. P. 29(c), *amicus* WLF states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief.

shortcut to proving Defendants' strict liability and negligence at trial, the district court abandoned traditional claim preclusion rules and effectively barred Defendants from meaningfully contesting every element of liability.

The basic guarantee of due process in a civil trial is that a defendant cannot be held liable (and deprived of property) without an adverse finding on *all* elements necessary to establish liability. That guarantee extends equally to defendants in class-action lawsuits. Yet the Florida Supreme Court has made clear that it fully intends state and federal courts to go on applying *Engle*'s unorthodox preclusion rules not only in *Engle*-progeny cases, but in *other* class actions involving "common issues."

Such an unprincipled approach to class-based litigation radically transforms the class action from a device designed to avoid the inefficiencies of deciding the same claims repeatedly into a device that alters substantive rights by excusing plaintiffs from proving all elements of their claims. The end result, as this case demonstrates, is not only patently unfair to defendants, but it contravenes fundamental notions of due process.

STATEMENT OF THE ISSUES

I. Whether individual plaintiffs may constitutionally use the *Engle* jury findings to establish essential elements of their tort claims.

II. Whether federal law impliedly preempts Plaintiff's strict-liability and negligence claims, which seek to impose liability based on the inherent health and addiction risks of all cigarettes.

STATEMENT OF THE CASE

This *en banc* appeal arises in the aftermath of the *Engle* class-action proceedings in the Florida courts. *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). The certified class consisted of all Floridians who suffered or died from diseases and medical conditions caused by their addiction to cigarettes. The *Engle* plaintiffs named all major tobacco companies as defendants.

The *Engle* trial court elected to proceed in three phases. Phase I—a year-long trial—addressed purportedly common issues arising from the defendants' conduct over more than four decades. The plaintiffs asserted numerous causes of action premised on many, alternative allegations of wrongdoing. The trial judge submitted to the jury a verdict form that did not require the jury to specify which of the many alternative allegations of misconduct it had accepted or rejected. The jury responded with generic findings that the evidence was sufficient to prove: (1) strict product liability; (2) fraud and misrepresentation; (3) fraud by concealment; (4)

civil conspiracy by misrepresentation and concealment; (5) breach of implied warranty; (6) breach of express warranty; (7) negligence; and (8) intentional infliction of emotional distress. But those generic findings did not specify which of the alternative factual allegations it had credited as the bases for its findings. For example, they did not specify which of the brands marketed by each defendant were defective, nor did they indicate the nature of any defect.

After the jury awarded $145 billion in punitive damages in Phase II (but before Phase III could determine liability to and compensatory damages for each of the 700,000 class members), the Florida Supreme Court prospectively decertified the class and vacated the punitive damages award. Although concluding that the trial court had not abused its discretion in initially certifying the class, the court ruled that continued class treatment for Phase III of the trial plan was "not feasible because individualized issues such as legal causation, comparative fault, and damages predominate." *Id.* at 1268. It then adopted a "pragmatic solution" for dealing with the Phase I findings of the class action. In trying claims from individual smokers, trial courts were directed to:

> [R]etain[ ] the jury's Phase I findings other than those on the fraud and intentional infliction of emotional distress claims, which involved highly individualized determinations, and the finding on entitlement to punitive damages questions, which was premature. Class members can choose to initiate damages actions and the Phase I common core findings we approved will have res judicata effect in those trials.

Id. at 1269. The court did not explain what "res judicata effect" it anticipated, nor

did it suggest that trial courts should deviate from the normal common law preclusion rules traditionally applied in Florida courts.

In the years following *Engle*, federal and state courts struggled to apply the Florida Supreme Court's enigmatic "res judicata" directive. In *Bernice Brown v. R.J. Reynolds Tobacco Co.*, for example, a panel of this Court concluded that the *Engle* Phase I findings should be given preclusive effect in later cases *only* when the plaintiff could establish that the Phase I jury "actually decided" that the defendant tobacco company acted wrongfully with respect to cigarettes that the plaintiff smoked. 161 F.3d 1324, 1334 (11th Cir. 2010) ("Florida courts have enforced the 'actually decided' requirement with rigor. Issue preclusive effect is not given to issues which could have, but may not have, been decided in an earlier lawsuit between the parties.") (quoting *Gordon v. Gordon*, 59 So. 2d 40, 44 (Fla. 1952)).

In 2013, the Florida Supreme Court finally revisited *Engle*, agreeing to answer a certified question regarding whether "accepting as res judicata" the Engle Phase I jury findings violated the tobacco companies' due process rights. *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013). The court answered that question in the negative, but in doing so muddled even further Florida's preclusion doctrine. The court "reject[ed] the defendants' argument that the Phase I findings are too general to establish any elements of an *Engle* plaintiff's claims, including a

causal connection between *Engle* defendants' conduct and injuries proven to be caused by addiction to smoking their cigarettes." 110 S. 3d 429. The court reasoned that giving binding effect to those findings does not violate the *Engle* defendants' due process rights because they were given ample "notice and opportunity to be heard as to whether their actions should subject them to liability to all class members under the theories alleged by the *Engle* class." *Id.* at 431.

In response to arguments that its "res judicata" directive constituted an extreme application of Florida's normal issue-preclusion rules, the court announced for the first time that *Engle* involved an application of *claim* preclusion, not issue preclusion. *Id.* at 432-35. Indeed, the court admitted that the Phase I findings would be rendered "useless in individual actions" if issue preclusion were applied. *Id*. at 433. Although conceding that the *Engle* jury "did not make detailed findings for which evidence it relied upon" in arriving at its verdict, the Court deemed the absence of such detailed findings irrelevant because the *Engle* jury had found in favor of the class as to the *claim* that defendants had acted wrongfully with respect to all members of the class. *Id.* at 433. Accordingly, the *Engle* Phase I findings were "a final judgment on the merits because [they] resolved substantive elements of the class's claims against the *Engle* defendants." *Id.* at 433-34.

In light of *Douglas,* another panel of this Court considered "whether giving full faith and credit to the decision in *Engle*, as interpreted in *Douglas*, would

arbitrarily deprive [defendants] of [their] property without due process of law." *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278, 1287 (11th Cir. 2013). In concluding that "the Supreme Court of Florida did not act arbitrarily," *id.* at 1288, the *Walker* panel made no effort to defend the notion that claim preclusion is available to *Engle*-progeny cases. Rather, observing that *Engle* and *Douglas* are more accurately viewed as exercises in issue preclusion, the panel concluded that the Florida Supreme Court determined that the *Engle* Phase I jury actually found that *every* brand of cigarette manufactured by *every Engle* defendant during *every* one of the 50 years at issue was wrongfully marketed. *Id.* at 1289 ("If due process requires that an issue was actually decided, then the Supreme Court of Florida made the necessary finding."). Without opining on whether it agreed with the Florida Supreme Court's determination, the panel insisted that "we cannot refuse to give full faith and credit to the decision in *Douglas* because we disagree with its holding about what the jury in Phase I decided." *Id.* at 1287.

The now-vacated panel in this case attempted to resolve the important conflict-preemption implications that naturally flowed from *Walker*'s holding. After recounting the checkered history of *Engle*-progeny litigation, the panel read *Walker* as holding that the *Engle* findings boil down to a single theory of liability that every cigarette smoked by every *Engle*-progeny plaintiff is defective because it was "addictive and cause[d] disease." *Graham v. R.J. Reynolds Tobacco Co.*,

782 F.3d 1261, 1267-73 (11th Cir. 2015). As the panel explained, this construction of *Engle* was grounded in constitutional avoidance considerations: "[a]ny findings more specific could not have been 'actually decided' by the [*Engle*] jury, and their claim-preclusive application would raise the specter of violating due process." *Id.* at 1273. In other words, the panel elaborated, "[t]o avoid a due process violation, the [*Engle*] findings must turn on the only common conduct presented at trial—that the defendants produced, and the plaintiffs smoked, cigarettes containing nicotine that are addictive and cause disease." *Id.*at 1280.

That necessary construction of the *Engle* findings, the panel recognized, raises significant conflict preemption concerns, because states cannot impose tort liability for conduct that Congress has specifically allowed. The panel exhaustively detailed the elaborate federal scheme of tobacco legislation and regulation that, since 1965, "rests on the assumption that [cigarettes] will still be sold." *Id.* at 1278. Yet the preclusive effect of the *Engle* Phase I findings is premised on the theory "that *all* cigarettes are inherently defective and that *every* cigarette sale is an inherently negligent act." *Id.* at 1284-85. That result, the panel concluded, "is inconsistent with the full purposes and objectives of Congress, which has sought for over fifty years to safeguard consumers' right to choose whether to smoke or not to smoke." *Id*. at 1280.

SUMMARY OF ARGUMENT

The district court's decision below, by barring Defendants from contesting important elements of Plaintiff's claims, represents an extreme departure from common law principles of res judicata. That deviation, no matter how faithful it may be to the Florida Supreme Court's ever-evolving, post-*Engle* preclusion doctrine, violates Defendants' right to due process, which guarantees that "everyone should have his own day in court." *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996). The unorthodox nature of the preclusion principles applied here is readily apparent when one considers that this Court in *Walker* interpreted *Douglas* as having adopted a preclusion rule more akin to issue preclusion than to claim preclusion—yet all the while the Florida Supreme Court insists that it has not applied issue preclusion and that doing so would render the *Engle* Phase I findings "useless."

In deference to the Florida Supreme Court's decisions in *Engle* and *Douglas*, the district court below permitted Plaintiff to establish Defendants' liability without proving the essential elements of negligence and strict liability, and without establishing that those elements were actually decided in his favor in any prior proceeding. Yet federal courts are constitutionally bound to strictly adhere to traditional preclusion principles consistent with their common-law origins. Since it is impossible to determine the precise issues decided by the *Engle* Phase I jury

verdict with respect to individual claims against particular defendants, that verdict simply cannot satisfy the traditional elements of issue preclusion. Likewise, because factual issues—not causes of action—were decided in Phase I, and nothing was litigated to final judgment, the Florida Supreme Court's newfound insistence on claim preclusion cannot withstand constitutional scrutiny.

To avoid any due process violation, as the panel in this case recognized, "the [*Engle*] findings must turn on the only common conduct presented at trial—that the defendants produced, and the plaintiffs smoked, cigarettes containing nicotine that are addictive and cause disease." *Graham*, 782 F.3d.at 1280. But that conclusion unavoidably rushes headlong into the Supremacy Clause, as federal law impliedly preempts strict-liability and negligence claims that are based on nothing more than the inherent health and addiction risks of all cigarettes. That is because the "collective premise" of all federal tobacco legislation and regulation since 1965 has been to ensure that "cigarettes … will continue to be sold in the United States." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137 (2000).

In arguing that his strict-liability and negligence claims are not preempted, Plaintiff urges the Court to embrace a "presumption against preemption." Plaintiff's argument misses the mark. As this Court has long recognized, such a presumption, if ever appropriate, has little persuasive force in cases involving implied conflict or obstacle preemption. Accordingly, Defendants deserve to have

their preemption arguments evaluated on the best available evidence of an actual conflict, not based on an *a priori* presumption that bears no apparent relation to that question.

ARGUMENT

I. THE DISTRICT COURT'S RADICAL DEPARTURE FROM SETTLED PRECLUSION PRINCIPLES VIOLATES DUE PROCESS

The Supreme Court has long recognized that "traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994). The right to due process ensures "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights." *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877). Faithful adherence to traditional judicial procedures "protect[s] against arbitrary and inaccurate adjudication" and thereby provides assurance that litigants will receive due process of law. *Oberg*, 512 U.S. at 430. Among those traditional judicial procedures that ensure fundamental fairness is the law of res judicata, which the Supreme Court has repeatedly held is "subject to due process limitations." *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008).

The term "res judicata" encompasses limits on both the claims and the issues that may be raised in future proceedings. Under claim preclusion, a final judgment bars "successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit." *New Hampshire v. Maine*, 532 U.S.

742, 748 (2001). In the class-action context, "[a] judgment in favor of the plaintiff class extinguishes their claim, which merges into the judgment granting relief," while a "judgment in favor of the defendant extinguishes the claim, barring a subsequent action on that claim." *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984). By contrast, issue preclusion or "collateral estoppel" bars subsequent litigation by the same parties "of an issue of fact or law *actually litigated and resolved* in a valid court determination essential to the prior judgment," even if the issue subsequently arises in the context of a different claim. *New Hampshire*, 532 U.S. at 748 (emphasis added); *Montana v. United States*, 440 U.S. 147, 153 (1979) ("Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.").

These same common-law preclusion principles are followed in every American jurisdiction, including Florida, where they were firmly in place in 2006 when the Florida Supreme Court adopted its "pragmatic solution" for salvaging the "findings" of the decertified *Engle* class. *See Topps v. State*, 865 So. 2d 1253, 1254-55 (Fla. 2004) ("The doctrine of res judicata bars relitigation in a subsequent cause of action not only of claims raised, but also claims that could have been raised."); *City of Oldsmar v. State*, 790 So. 2d 1042, 1046 n.4 (Fla. 2001) ("Under

Florida law, collateral estoppel, or issue preclusion, applies when the 'identical issue has been litigated between the same parties or their privies,' [and] determined in a contest that results in a final decision.") (quoting *Gentile v. Bauder*, 718 So. 2d 781, 783 (Fla. 1998)).

Due process requires that both state and federal courts exercise caution in applying claim or issue preclusion to any given case, as "extreme applications" of preclusion law "may be inconsistent with a federal right that is fundamental in character." *Richards*, 517 U.S. at 797. Consistent with these principles, the Supreme Court has long cautioned courts not to apply issue preclusion to prior determinations unless the court "is certain that the precise fact was determined by the former judgment." *DeSollar v. Hanscome*, 158 U.S. 216, 221 (1895); *Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904) ("[W]here the evidence is that testimony was offered at the prior trial upon several distinct issues, the decision of any one of which would justify the verdict or judgment, … the plea of res judicata must fail."). Because the district court permitted the jury to rely on an extreme application of preclusion law to establish Defendants' liability, the verdict below should be vacated.

A. Defendants Easily Satisfy Each of the Supreme Court's Factors in *Mathews v. Eldridge* for Establishing a Due-Process Deprivation

The Fifth Amendment prohibits federal courts from depriving anyone of "life, liberty, or property, without due process of law." U.S. Const. amend. V. In

Mathews v. Eldridge, 424 U.S. 319 (1976), the Supreme Court articulated the proper analytical framework for determining the minimal protections necessary to ensure that a citizen is not deprived of due process. Although the *Mathews* framework sprang out of the administrative context, for four decades the Supreme Court has applied *Mathews*'s now-familiar balancing test in a wide array of contexts to determine the "specific dictates of due process." *Id.* at 334. Under *Mathews*, a court must consider (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used"; and (3) "the Government's interest, including the function involved and the fiscal and the administrative burdens that the additional or substitute procedural requirement would entail." *Id*. at 334-35. In this case, consideration of each of these factors reveals that the district court failed to meet minimal constitutional standards.

In resisting the application of unfair preclusion rules, Defendants unquestionably have important private property interests at stake. Because adverse money judgments "deprive [defendants] of a significant amount of their money," *Vlandis v. Kline*, 412 U.S. 441, 452 (1973), any damages award not adequately supported by liability findings "would amount to a 'taking' of property without due process." *Philip Morris USA v. Williams*, 549 U.S. 346, 349 (2007). Here, Defendants' property interests are not simply limited to the relatively modest

$825,000 in damages awarded in this case, although that amount would more than suffice. Rather, defendants face the imposition of massive liability in *thousands* of pending *Engle*-progeny cases—without the assurance that a factfinder has decided every element of any claim against them. And the scores of progeny cases litigated to verdict so far have resulted in judgments totaling more than $900 million against the *Engle* defendants.

Likewise, the risk of an erroneous deprivation of Defendants' property interest is grave because neither issue nor claim preclusion may be used to establish individual elements of progeny claims that were never actually decided or reduced to judgment in the first place. As is readily apparent from the *Engle* Phase I trial record, the factual findings necessary to satisfy the defect and negligence elements of Plaintiff's claims under Florida law were *not* "a critical and necessary part" of the Phase I jury's verdict. In response to a verdict form that required little specificity, the *Engle* jury made general findings that each of the defendants had, at some time and at least with respect to some of its cigarette brands, engaged in tortious conduct of the types alleged.

But one cannot conclude, for example, based solely on the verdict rendered, that the *Engle* jury found that *any* of the cigarettes that Faye Graham smoked were defectively designed by Defendants. Whether understood as a matter of issue preclusion or claim preclusion, the result is fundamentally unfair. *See* 18 Charles

A. Wright, *et al.*, *Federal Practice & Procedure* § 4420, at 536 (2d ed. 2002) (explaining that if a "general verdict is opaque, there should be no reliance or sense of repose growing out of the disposition of individual issues"). To hold otherwise would "prevent a hearing or a determination on the merits even though there had not been a hearing or determination in the first case." *Happy Elevator No. 2 v. Osage Constr. Co.*, 209 F.2d 459, 461 (10th Cir. 1954).

Lastly, any competing interests in judicial economy simply pale in comparison to the manifest risk of an erroneous deprivation of Defendants' property rights. As a preliminary matter, it is far from clear now—ten years after it was decided—that *Engle* has actually advanced judicial economy in any meaningful way. After all, *Engle* has spawned thousands of progeny cases advancing billions of dollars in claims, as well as multiple state and federal appeals, including this *en banc* appeal. And even when (as here) trial courts slavishly implement *Engle*'s fundamentally unfair preclusion requirements, plaintiffs invariably seek (and are permitted) to introduce individualized evidence of defendants' allegedly tortious conduct for purposes of comparative fault and punitive damages.

Of course, once an issue has been *fully litigated and resolved* against a party in a valid court proceeding, considerations of efficiency and fairness dictate that limitations be imposed upon that party's right to relitigate the issue. But that is not

this case. Rather than adopt abbreviated trial procedures to enable the speedy resolution of claims, the Florida Supreme Court's *Engle* and *Douglas* decisions have relieved individualized plaintiffs from ever having to litigate—much less prove—the particulars of their claims. Here, not only was each element of Plaintiff's claims never adjudicated against Defendants, but each element of Plaintiff's claims was *never adjudicated at all*. Because no mere desire for efficiency can ever justify such an arbitrary shortcut, the judgment below should be vacated.

B. The District Court's Application of Claim Preclusion Impermissibly Diminishes Defendants' Substantive Rights

"The extent to which class treatment may constitutionally reduce the normal requirements of due process is an important question." *Philip Morris USA v. Scott*, 131 S. Ct. 1, 4 (2010). A natural temptation exists for all courts—which invariably face crowded dockets and limited resources—to adopt procedures designed to quickly resolve multiple cases raising similar issues. One efficiency-enhancing procedure to which both federal and state courts regularly resort has been the class action. Yet the "systematic urge to aggregate litigation must not be allowed to trump [the] dedication to individual justice, and [this Court] must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation." *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d. Cir. 1992). The Due Process Clause has been the principle shield

protecting litigants from efforts by courts to adopt efficiency-enhancing procedures that may deny them "with 'an opportunity to present every available defense.'" *Williams*, 549 U.S. at 353 (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)).

The Supreme Court has consistently held that class certification cannot provide individuals a right to relief in federal court that the Constitution would otherwise deny them if they sued separately. *See, e.g.*, *Scott*, 131 S. Ct. at 3 (recognizing a due process violation where "individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action"). Indeed, "[t]empting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected." *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012,1020 (7th Cir. 2002), *cert. denied*, 537 U.S. 11005 (2003).

Consistent with those authorities, this Court has squarely held that "due process … prevents the use of class actions from abridging the substantive rights of any party." *Sacred Heart Health Sys. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1176 (11th Cir. 2010). In *Sacred Heart*, this Court reversed the district court's certification of a class of hospitals alleging that an HMO breached various reimbursement contracts. The hospitals' individualized agreements contained "payment terms that variously bolster[ed] or detract[ed] from [the

HMO's] non-frivolous argument that [its] rates [we]re contractually valid." 601 F.3d at 1175. Although litigating as a class would undoubtedly allow the plaintiffs "to stitch together the strongest contract case based on language from various [contracts], with no necessary connection to their own contract rights," the Court nonetheless held that they could not "lawfully 'amalgamate' their disparate claims in the name of convenience." *Id.* at 1176. Recognizing that due process "prevents the use of class actions from abridging the substantive rights of any party," the Court reversed class certification. *Ibid.*

Other circuits agree. *See, e.g., Carerra v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) ("A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be [used] in a way that eviscerates this right or masks individual issues."); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008) (holding that when "the mass aggregation of claims" is used "to mask the prevalence of individual issues," the "right of defendants to challenge the allegations of individual plaintiffs is lost, resulting in a due process violation").

After doubling down on its drastic revision of claim-preclusion doctrine, the Florida Supreme Court in *Douglas* "limited" that controversial holding to *all* class actions. Whereas claim preclusion in an individual action requires "a monetary award … for a final judgment," the court reasoned, in class actions "common

issues (including elements of claims) are often tried to final judgment separately from individual issues." *Douglas*, 110 So. 3d at 434. Based on that distinction, the court reiterated its view that the *Engle* Phase I findings were "conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which *might* with propriety *have been* litigated and determined in that action." *Id.* at 425 (quoting *Engle*, 945 So. 2d at 1259). In other words, the court concluded, "[t]he *Engle* judgment was a final judgment on the merits because it resolved substantive elements of the class's claims against the *Engle* defendants" when the jury determined "the *Engle* defendants' common liability to the class under several legal theories." *Id.* at 433-34.[2]

By ratifying that sweeping, unorthodox application of claim preclusion, the district court in this case permitted the class-action device to diminish Defendants' substantive rights in violation of due process of law. Had Plaintiff litigated Phase I individually, he would not be relieved of the need to prove every element of his defect and negligence claims in a subsequent trial before a different jury. In that situation, as even *Douglas* acknowledged, the requirement of a final judgment for claim preclusion would render any earlier findings nugatory. 110 So. 3d at 433

[2] The court made no coherent attempt to explain how its "claim preclusion" holding could be squared with its explicit holding in *Engle* that "the Phase I jury did not determine whether the defendants were liable to anyone." *Engle*, 945 So. 2d at 1263.

(acknowledging that "a 'purely technical,' non-merits judgment 'may not be used as a basis for the operation of the doctrine of res judicata'") (quoting *Kent v. Sutker*, 40 So. 2d 145, 147 (Fla. 1949)).

The district court's reflexive embrace of *Douglas* also diminishes Defendants' substantive rights under Florida strict-liability law. Under Florida law, a plaintiff must prove that the specific product he used was either defectively or negligently designed or marketed. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 87 (Fla. 1976). In contrast, the district court permitted recovery here based on a generic showing that Defendants either sold defective cigarettes or were otherwise "negligent" toward class members—albeit not to the decedent Mrs. Graham herself.

Defendants unquestionably have a due process right to be governed by the same substantive law that would have applied in individual actions. *See, e.g.*, *Dukes*, 131 S. Ct. at 2561 ("[A] class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims.") (citations omitted); *Shady Grove Orthopedic Assocs., Inc. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (insisting that class-wide adjudication merely enables the trial of claims of "multiple parties at once, instead of in separate suits," but "leaves the parties' legal rights and duties intact and the rules of decision unchanged"); Richard A. Epstein, *Class Actions: Aggregation, Amplification, and*

Distortion, 2003 U. Chi. Legal F. 475, 490 (2003) ("[W]e should hold the substantive law constant regardless of whether the plaintiffs proceed by individual action, permissive joinder, or class action. … The substantive outcomes should not be distorted by the choice of procedural vehicle."). The district court flouted this constitutional principle, and no amount of expediency can possibly justify abridging Defendants' substantive rights in this way.

C. The Full Faith and Credit Act Does Not Supersede Defendants' Right to Due Process

In *Walker*, a panel of this Court held that it was bound, under the Full Faith and Credit Act, to accept the Florida Supreme Court's view expressed in *Douglas* that the *Engle* jury actually found that "all cigarettes that contain nicotine are addictive and produce dependence," and that the sale of any cigarette is therefore negligent. *Walker*, 734 F.3d at 1287. Relying on that understanding, the *Walker* panel swept aside Defendants' contention that the use of the *Engle* Phase I findings violates due process, concluding that "[i]f due process requires a finding that an issue was actually decided, then the Supreme Court of Florida made the necessary finding." *Id.* at 1289.

This Court's acquiescence to the fundamental unfairness that flows from the Florida Supreme Court's holding is *not* required by the Full Faith and Credit Act, which merely requires that the "judicial proceedings" of any state court "shall have the same full faith and credit in every court within the United States." 28 U.S.C. §

1738. While it may be true that this Court "cannot refuse to give full faith and credit to the decision in *Douglas* because [it] disagree[s] with [the Florida Supreme Court] about what the jury in Phase I decided," *Walker*, 734 F.3d at 1287, it *can* and *must* refuse to give full faith and credit to any unconstitutional deprivation of due process that flows from that decision.

Regardless whether the district court faithfully applied Florida's post-*Engle*, make-it-up-as-you-go preclusion law to bar Defendants from contesting that they acted tortiously toward Mrs. Graham, there can be no serious argument that the court's application of preclusion was anything other than a radical departure from the common law preclusion rules normally applied in federal *and* Florida courts. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (recognizing that due process "prevent[s] the States from denying potential litigants use of established adjudicatory procedures"); *Eastman Kodak Co. v. Atl. Retail, Inc.*, 456 F.3d 1277, 1287 (11th Cir. 2006) ("The most basic principles of res judicata require the full relief must have been available in the first action in order for the second action to be barred.").

Simply put, the Full Faith and Credit Act does not supersede the Due Process Clauses of the Fifth and Fourteenth Amendments, nor can it ever excuse federal courts from their duty to comport with traditional notions of due process of law. Like all statutes, the Full Faith and Credit Act is "subject to the requirements

of … the Due Process Clause." *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985); *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).

So while it is true that full faith and credit should be given to a state's judicial proceedings, a federal court is not bound by a constitutionally infirm state-court judgment. *See, e.g., Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482-83 (1982) ("A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment."); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682 (1930) ("[W]hile it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law."); *Grantham v. Avondale Indus., Inc.*, 964 F.2d 471, 473 (5th Cir. 1992) ("It is beyond cavil that we are not bound by a state court's interpretation of federal law regardless of whether our jurisdiction is based on diversity of citizenship or a federal question."). Accordingly, this Court should revisit the panel's holding in *Walker* that the preclusive use of *Engle*'s Phase I findings is consistent with due process.

II. BECAUSE THE LEGAL THEORY OF STRICT LIABILITY AND NEGLIGENCE UPON WHICH THE JURY'S VERDICT WAS BASED CONFLICTS WITH FEDERAL LAW, NO "PRESUMPTION AGAINST PREEMPTION" SHOULD APPLY

As the panel in this case persuasively demonstrated, federal law impliedly preempts strict-liability and negligence claims that are based on nothing more than the inherent health and addiction risks of all cigarettes. Because the "collective premise" of all federal tobacco legislation and regulation since 1965 has been to ensure that "cigarettes … will continue to be sold in the United States," Congress has "foreclosed the removal of tobacco products from the market." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 137-39. Yet the preclusive effect of the *Engle* Phase I findings is premised on the single theory that any and all cigarettes smoked by an *Engle*-progeny plaintiff are defective because they "are addictive and cause disease." *Walker*, 734 F.3d at 1289. That result, as the panel in this case rightly concluded, "is inconsistent with the full purposes and objectives of Congress, which has sought for over fifty years to safeguard consumers' right to choose whether to smoke or not to smoke." *Graham*, 782 F.3d at 1280.

In arguing before the panel that his strict-liability and negligence claims are not preempted, Plaintiff urged the Court's adoption of the so-called presumption against preemption. Plaintiff's reliance on a presumption against preemption misses the mark, however, because such a presumption, if ever appropriate, should not apply in cases involving implied conflict or obstacle preemption, which arises

whenever state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Once such a federal-state conflict is established, preemption is "inescapable and requires no inquiry into congressional design." *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

Because conflict preemption rests upon a finding of conflict, rather than any express statement of congressional desire to displace certain state laws, "a narrow focus on Congress's intent to supersede state law is misdirected." *City of New York v. FCC*, 486 U.S. 57, 64 (1988). Rather, conflict preemption analysis requires first determining whether any particular federal policy or statute is authorized. If the exercise of that federal policy or statute is legitimate, then any conflicting state law or policy is preempted. Conflict preemption cases thus represent the paradigmatic operation of the Supremacy Clause to resolve conflicts between state and federal law.

Thus, as the Supreme Court has noted, any "presumption against preemption" must give way whenever "the state [law] represents a sufficient obstacle to the full accomplishment of Congress's objectives." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000). After all, there is every reason to assume that Congress desires to preempt state laws that stand as obstacles to its policies. Except for the extremely rare case in which there is actual evidence

that Congress intended to permit state regulation that tends to undermine Congress's purposes and objectives, the Court will assume that Congress does *not* so intend:

> Why, in any event, would Congress not have wanted ordinary pre-emption principles to apply where an actual conflict with a federal objective is at stake? Some such principle is needed. In its absence, state law could impose legal duties that would conflict directly with federal regulatory mandates. … Insofar as petitioner's argument would permit common-law actions that "actually conflict" with federal regulations, it would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives that the Constitution, through the operation of ordinary preemption principles, seeks to protect.

Geier v. Am. Honda Motor Co., 529 U.S. 861, 871-72 (2000).

That is why this Court has long declined to apply a presumption against preemption in implied conflict preemption cases. *See, e.g., Fla. State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1179 n.13 (2008) ("Contrary to the state's argument, there is no presumption against preemption."); *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir. 1998) ("When considering implied preemption, no presumption against preemption exists."); *Lewis v. Brunswick Corp.*, 107 F.3d 1494, 1502 (1997) ("In deciding whether the [plaintiffs'] claims conflict with the purposes of [federal law], we do not apply a presumption against preemption, even though common law tort claims are a mechanism of the police powers of the state.").

Defendants here contend that any liability arising solely from manufacturing

and marketing cigarettes is impliedly preempted by federal law because it stands as an obstacle to the objectives of Congress. Defendants deserve to have their preemption arguments evaluated on the best available evidence of an actual conflict, not based on an *a priori* presumption that bears no apparent relation to that question. As this Court explained in *Browning*:

> [I]n practice it is difficult to understand what a presumption in conflict preemption cases amounts to, as we are surely not requiring Congress to state expressly that a given state law is preempted using some formula or magic words. Either Congress intended to displace certain state laws or it did not. Federal law is not obliged to bend over backwards to accommodate contradictory state laws, as should be clear from the Supremacy Clause's blanket instruction that federal law is the "supreme Law of the land … any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

522 F.3d at 1168 (quoting U.S. Const., art. VI, cl. 2). The *en banc* Court should use this opportunity to reiterate that, whatever the viability of a presumption against preemption may be under other circumstances, it has no value in cases of this sort.

Nor is Florida's sovereign interest in tort law sufficient to override straightforward preemption principles. Indeed, "whether an area of law is one of traditional state regulation" is no reason for this Court to "put a thumb on the scale against giving effect to what Congress intended." *Ibid.* That understanding echoes the considered view of the Supreme Court, which has repeatedly emphasized that "'[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided

that the federal law must prevail.'" *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)) (explaining that the principle that "state law is nullified to the extent that it actually conflicts with federal law" is "not inapplicable here simply because real property law is a matter of special concern to the States").

Indeed, even where the state has a clearly "compelling interest" in preservation of its law, "under the Supremacy Clause, for which our preemption doctrine is derived, *any* state law … which interferes with or is contrary to federal law, must yield." *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (internal quotations and citations omitted) (emphasis added); *DeCanas v. Bica*, 424 U.S. 351, 357 (1976) (confirming that even state regulations "designed to protect vital state interests" must "give way" to contrary federal policy).

In sum, because Plaintiff's expansive theory of liability clearly stands as an obstacle to Congress's "distinct regulatory scheme for cigarettes," which expressly allows their sale, Plaintiff's claims—to the extent they rely on *Engle* Phase I findings to establish liability—are preempted.

CONCLUSION

For the foregoing reasons, *amicus* Washington Legal Foundation respectfully requests that the Court vacate the judgment below.

Date: April 22, 2016

Respectfully submitted,

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COMBINED CERTIFICATIONS

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,968 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

Dated: April 22, 2016

/s/ Richard A. Samp
Richard A. Samp

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d), I hereby certify that on April 22, 2016, the foregoing *amicus curiae* brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system, which will electronically send notification of filing to registered counsel of record.

/s/ Richard A. Samp
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