Filing # 40808139 E-Filed 04/27/2016 04:36:45 PM

RECEIVED, 04/27/2016 04:38:35 PM, Clerk, Supreme Court

Case No. SC16-218

SUPREME COURT OF FLORIDA

R.J. REYNOLDS TOBACCO COMPANY,

Defendant/Petitioner,

v.

PHIL J. MAROTTA, AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF PHIL F. MAROTTA,

Plaintiff/Respondent.

On Discretionary Review from a Decision of the
Fourth District Court of Appeal

BRIEF OF PETITIONER
R.J. REYNOLDS TOBACCO COMPANY

Gregory G. Katsas
Florida Bar No. 89091
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
Telephone: (202) 879-3930
Facsimile: (202) 626-1700

Eric L. Lundt
Florida Bar No. 0861715
Robert C. Weill
Florida Bar No. 009962
SEDGWICK LLP
2400 E. Commercial Blvd., Suite 1100
Fort Lauderdale, Florida 33308
Telephone: (954) 958-2500
Facsimile: (877) 541-2740

Counsel for Petitioner
(additional counsel listed on signature page)

TABLE OF CONTENTS

Page

TABLE OF CITATIONS iii
STATEMENT OF THE CASE AND FACTS 1
A. *Engle* Class Proceedings 1
B. *Engle* Progeny Litigation 5
C. Proceedings In This Case 8
SUMMARY OF ARGUMENT 11
ARGUMENT 13
I. FEDERAL LAW IMPLIEDLY PREEMPTS CLAIMS BASED ON THE *ENGLE* DEFECT AND NEGLIGENCE FINDINGS 13
A. Cigarette Manufacturers Cannot Be Held Liable For The Sale Of Ordinary Cigarettes 13
1. Federal law preempts state tort law that would interfere with a federal regulatory scheme 13
2. Congress has chosen to protect the market for tobacco products while mandating disclosure of their risks 16
3. Numerous state and federal decisions recognize that federal law preempts claims based on the generic risks of cigarettes 18
B. The Fourth District Erred in Reaching A Contrary Conclusion 23
1. State tort law is not exempt from implied preemption 23
2. The absence of express preemption is irrelevant to the implied-preemption question presented 27
3. State regulation of alcohol is irrelevant 28
4. The Tobacco Control Act is inapplicable 29
C. Mr. Marotta's Additional Arguments Are Meritless 30
D. Reynolds Is Entitled To Judgment, Or At Least A New Trial 39
1. Giving "claim preclusive" effect to the *Engle* defect and negligence findings conflicts with federal law 40
2. Alternatively, Reynolds is entitled to a new trial 42

TABLE OF CONTENTS
(continued)

Page

II. MR. MAROTTA'S USE OF THE *ENGLE* DEFECT FINDING IN THIS CASE VIOLATED DUE PROCESS 45

CONCLUSION 47

CERTIFICATE OF SERVICE 49

CERTIFICATE OF COMPLIANCE 50

TABLE OF CITATIONS

Page

CASES

Arizona v. United States,
132 S. Ct. 2492 (2012)....................15, 16

AT&T v. Cent. Office Tel. Co.,
524 U.S. 214 (1988)....................38

Barnett Bank of Marion Cnty., N.A. v. Nelson,
517 U.S. 25 (1996)....................15

Bates v. Dow Agrosciences,
544 U.S. 431 (2005)....................25, 26

Bridenbaugh v. Freeman-Wilson,
227 F.3d 848 (7th Cir. 2000)....................29

Brown Distrib. Co. v. Marcell,
890 So. 2d 1227 (Fla. 4th DCA 2005)....................43

Brown v. R.J. Reynolds Tobacco Co.,
611 F.3d 1324 (11th Cir. 2010)....................5

Cipollone v. Liggett Grp., Inc.,
505 U.S. 504 (1992)....................26

Cliff v. Payco Gen. Am. Credits, Inc.,
363 F.3d 1113 (11th Cir. 2004)....................27

Conley v. R.J. Reynolds Tobacco Co.,
286 F. Supp. 2d 1097 (N.D. Cal. 2002)....................22

Crosby v. Nat'l Foreign Trade Council,
530 U.S. 363 (2000)....................14, 37

Cruz Vargas v. R.J. Reynolds Tobacco Co.,
218 F. Supp. 2d 109 (D.P.R. 2002)....................22

Curd v. Mosaic Fertilizer, LLC,
39 So. 3d 1216 (Fla. 2010)....................24

Curtin v. Port Auth. of NY,
183 F. Supp. 2d 664 (S.D.N.Y. 2002) 28

De Jesus Rivera v. R.J. Reynolds Tobacco Co.,
368 F. Supp. 2d 148 (D.P.R. 2005) 21

Engle v. Liggett Grp., Inc.,
945 So. 2d 1246 (Fla. 2006) ....*passim*

Engle v. R.J. Reynolds Tobacco Co.,
No. 94-08273-CA-22, 2000 WL 33534572 (Fla. Cir. Ct. Nov. 6, 2000)...........42

Farina v. Nokia,
578 F. Supp. 2d 740 (E.D. Pa. 2008)..28

Fayerweather v. Ritch,
195 U.S. 276 (1904)..46

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000)..*passim*

Ferlanti v. Liggett Grp., Inc.,
929 So. 2d 1172 (Fla. 4th DCA 2006)..23

Gade v. Nat'l Solid Wastes Mgmt. Ass'n,
505 U.S. 88 (1992) 14

Gault v. Brown & Williamson Tobacco Corp.,
No. 1:02-CV-1849-RLV, 2005 WL 6523483 (N.D. Ga. Mar. 31, 2005) 20, 21

Geier v. American Honda Motor Co., Inc.,
529 U.S. 861 (2000)..*passim*

Graham v. R.J. Reynolds Tobacco Co.,
782 F.3d 1261 (11th Cir. 2015) ....*passim*

Hillman v. Maretta,
133 S. Ct. 1943 (2013)..14

Hines v. Davidowitz,
312 U.S. 52 (1941)..14

In re Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litig.,
621 F.3d 781 (8th Cir. 2010) 28

Insolia v. Philip Morris Inc.,
128 F. Supp. 2d 1220 (W.D. Wis. 2000) 22

James v. Mazda Motor Corp.,
222 F.3d 1323 (11th Cir. 2000) 37

Jeter v. Brown & Williamson Tobacco Corp.,
294 F. Supp. 2d 681 (W.D. Pa. 2003)..21

Johnson v. Brown & Williamson Tobacco Corp.,
345 F. Supp. 2d 16 (D. Mass. 2004)...21

Landgraf v. USI Film Prods.,
511 U.S. 244 (1994)...30

Langston v. State,
789 So. 2d 1024 (Fla. 1st DCA 2001) 43

Liggett Group, Inc. v. Davis,
973 So. 2d 467 (Fla. 4th DCA 2007).................................1, 19, 20, 23, 31, 35

Liggett Grp. Inc. v. Engle,
853 So. 2d 434 (Fla. 3d DCA 2003)...3, 19, 31

Lorillard Tobacco Co. v. Reilly,
533 U.S. 525 (2001)...18

Mash v. Brown & Williamson Tobacco Corp.,
No. 4:03CV0485, 2004 WL 3316246 (E.D. Mo. Aug. 26, 2004).......................21

McKean v. Warburton,
919 So. 2d 341 (Fla. 2005) 32

Mutual Pharmaceutical Co. v. Bartlett,
133 S. Ct. 2466 (2013)... 10, 11, 24, 25, 26, 45

Philip Morris USA, Inc. v. Arnitz,
933 So. 2d 693 (Fla. 2d DCA 2006)..23

Philip Morris USA, Inc. v. Douglas,
110 So. 3d 419 (Fla. 2013) .... *passim*

Pokorny v. Ford Motor Co.,
902 F.2d 1116 (3d Cir. 1990) 28, 37

PLIVA, Inc. v. Mensing,
564 U.S. 604 (2011).................... 24

Prado Alvarez v. R.J. Reynolds Tobacco Co.,
313 F. Supp. 2d 61 (D.P.R. 2004) 21

R.J. Reynolds Tobacco Co. v. Jewett,
106 So. 3d 465 (Fla. 1st DCA 2012) 43, 45

R.J. Reynolds Tobacco Co. v. Marotta,
182 So. 3d 829 (Fla. 4th DCA 2016).................... *passim*

Riegel v. Medtronic, Inc.,
552 U.S. 312 (2008).................... 26

San Diego Building Trades Council v. Garmon,
359 U.S. 236 (1959).................... 26

Soffer v. R.J. Reynolds Tobacco Co.,
No. SC13-139, 2016 WL 1065605 (Fla. Mar. 17, 2016) 34

Sprietsma v. Mercury Marine,
537 U.S. 51 (2002).................... 27

State v. Harden,
938 So. 2d 480 (Fla. 2006) 13, 14

Stogniew v. McQueen,
656 So. 2d 917 (Fla. 1995) 33

Teague v. Lane,
489 U.S. 288 (1989).................... 32

This, That & The Other Gift & Tobacco, Inc. v. Cobb Cnty., Ga.,
285 F.3d 1319 (11th Cir. 2002) 27

United States v. Locke,
529 U.S. 89 (2000) 38

Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.,
760 So. 2d 126 (Fla. 2000) 32

Walker v. R.J. Reynolds Tobacco Co.,
734 F.3d 1278 (11th Cir. 2013) 6, 7, 8, 46

West v. Caterpillar Tractor Co., Inc.,
336 So. 2d 80 (Fla. 1976) 24

Wransky v. Dalfo,
801 So. 2d 239 (Fla. 4th DCA 2001) 43

CONSTITUTIONAL AND STATUTORY AUTHORITIES

U.S. Const. amend. XXI 29

7 U.S.C. § 1311(a) 17

15 U.S.C. § 1331 17

15 U.S.C. § 1334(b) 27, 31

15 U.S.C. § 4406(c) 37

21 U.S.C. § 387 30

21 U.S.C. § 387p 29

Alcohol and Drug Abuse Amendments of 1983,
Pub. L. No. 98-24, 97 Stat. 175 16

Alcohol, Drug Abuse, and Mental Health Administration Reorganization
Act, Pub. L. No. 102-321, § 202, 106 Stat. 388 (1992) 16

Comprehensive Smokeless Tobacco Health Education Act of 1986,
Pub. L. No. 99-252, 100 Stat. 30 ..... 16, 37, 38

Comprehensive Smoking Education Act,
Pub. L. No. 98-474, 98 Stat. 2200 (1984) 16

Family Smoking Prevention and Tobacco Control Act,
Pub. L. No. 111-131, 123 Stat. 1776 (2009) 29, 30

Federal Cigarette Labeling and Advertising Act,
Pub. L. No. 89-92, 79 Stat. 282 (1965)................................ 16, 26, 27, 28, 31, 32

Public Health Cigarette Smoking Act of 1969,
Pub. L. No. 91-222, 84 Stat. 87 (1970)..16

OTHER AUTHORITIES

Restatement (Second) of Torts § 402A..24

STATEMENT OF THE CASE AND FACTS

In *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the United States Supreme Court, citing a series of federal statutes enacted over a period of several decades, held as a matter of federal law that Congress has "foreclosed the removal of tobacco products from the market." *Id.* at 138–39. This appeal presents the question whether federal law therefore impliedly preempts tort claims premised on the inherent health and addiction risks of all cigarettes.

The Fourth District has given conflicting answers to that question. In *Liggett Group, Inc. v. Davis*, 973 So. 2d 467 (Fla. 4th DCA 2007), that court, applying *Brown & Williamson*, held that federal law does impliedly preempt strict-liability and negligence claims premised on the inherent health and addiction risk of all cigarettes. In this case, however, that court held the opposite. In so doing, it did not dispute that *Engle*-progeny plaintiffs raise strict-liability and negligence claims premised on the inherent health and addiction risks of all cigarettes. However, without attempting to distinguish either *Davis* or *Brown & Williamson*, the Fourth District held that federal law does not impliedly preempt such claims.

A. *Engle* Class Proceedings

1. In 1994, the *Engle* class action was filed against all of the leading cigarette manufacturers in the United States. As modified on appeal, the class definition included "all [Florida] citizens and residents, and their survivors, who have

suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1256 (Fla. 2006). The class raised various tort claims, including strict liability, negligence, fraudulent concealment, and conspiracy. *Id.* at 1256–57 & n.4.

The court developed a three-phase trial plan. During Phase I, the jury would consider issues regarding "the defendants' conduct and the general health effects of smoking." *Id.* at 1256. During Phase II, the same jury would determine the defendants' liability to three individual class members, award compensatory damages to those individuals, and award classwide punitive damages. *See id.* at 1257. During Phase III, new juries would decide the claims of the remaining class members. *See id.* at 1258.

2. Phase I addressed whether smoking causes various diseases and is addictive, various questions regarding the defendants' conduct between approximately 1953 and 1994, and class-wide entitlement to punitive damages. *See id.* at 1256. On the strict-liability and negligence claims, the class asserted broad allegations that all cigarettes are defective, and the sale of all cigarettes is negligent, because cigarettes are addictive and cause diseases. In the alternative, the class asserted various narrower allegations targeting design features in specific brands or types of cigarettes, such as unfiltered cigarettes, filtered cigarettes, light or low-tar ciga-

rettes, and cigarettes with specific additives.

At the end of Phase I, the *Engle* jury found that the defendants "placed cigarettes on the market that were defective and unreasonably dangerous" and "were negligent." *Engle*, 945 So. 2d at 1277. The findings did not specify which of the alternative allegations of defect and negligence the jury had credited. In Phase II-A, the jury found that the defendants were liable to three class representatives, and it awarded $12.7 million in compensatory damages. *See id* at 1257. In Phase II-B, the jury awarded $145 billion in punitive damages to the class. *See id.*

3. The defendants appealed before Phase III, and the Third District reversed. Among other things, it held that the class should never have been certified and that the punitive-damages award was premature and excessive. *Liggett Grp. Inc. v. Engle*, 853 So. 2d 434, 450–66 (Fla. 3d DCA 2003). The Third District also held that it was improper for class counsel to attack the defendants for refusing "get out of the business" of selling cigarettes. *Id.* at 460. The court explained that "[f]or more than sixty years, federal statutes have protected the right to sell cigarettes, even though Congress has recognized that cigarettes are dangerous," and, therefore, "[f]ederal law preempts claims that selling cigarettes is tortious or otherwise improper." *Id.* (citing *Brown & Williamson*, 529 U.S. 120).

The class sought review of that decision in this Court. Although it argued that the Third District had erred in overturning the *Engle* verdict based on improper

arguments, it did not contest the underlying holding that federal law impliedly preempts tort claims based on the inherent dangerousness of all cigarettes. *See* Pet'rs' Br. on the Merits, *Engle v. Liggett Grp., Inc.*, No. SC03-1856, 2004 WL 1452476 (Fla. June 17, 2004). To the contrary, in the Third District, the class had denied that the *Engle* verdict rested on any such claims. *See* Consolidated Answer Br. of Appellees, *Liggett Grp. Inc. v. Engle*, No. 3D00-3400 (June 7, 2002), at 233 (argument heading on implied preemption: "The Engle Class Never Asserted Any Claims Based On Defendants' Mere Act of Selling Cigarettes").[1]

4. This Court affirmed in part and reversed in part. On class certification, it held that "continued class action treatment for Phase III of the trial plan is not feasible," and it therefore decertified the class prospectively. *Engle*, 945 So. 2d at 1267–68. However, the Court authorized former class members to file individual actions within one year. *See id.* at 1270 n.12, 1277. It held that certain of the Phase I findings—including the defect and negligence findings at issue here—would have "res judicata effect" in such actions. *Id.* at 1269. Finally, it held that the many improper arguments by class counsel, although "very close to the line of reversible error," did not compel a new trial of Phase I. *See id.* at 1271–74.

[1] The *Engle* class's Consolidated Answer Brief to the Third District, as well as the other appellate briefs filed in *Engle*, can be found on a physical DVD of *Engle* record materials that is part of the record on appeal in this case and was transmitted to the Court by the clerk of the Fourth District on March 28, 2016.

B. *Engle* Progeny Litigation

1. In the wake of this Court's decision, more than 9,000 "*Engle* progeny" cases were filed by individuals claiming to be *Engle* class members. The meaning and proper use of the Phase I jury findings has been a central issue in these cases. Defendants have argued that the findings could rest on broader or narrower alternative theories of liability, such that their use to establish individual elements of progeny claims violates federal due process. Plaintiffs have urged a "broader view" that the findings "must mean that all cigarettes the defendants sold were defective and unreasonably dangerous because there is nothing to suggest that any type or brand of cigarette is any safer or less dangerous than any other type or brand." *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1335 (11th Cir. 2010) (summarizing plaintiffs' argument).

2. In *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013), this Court rejected defendants' argument that use of the defect and negligence findings to establish individual elements of progeny claims violates due process. The Court acknowledged that the "proof submitted on strict liability included brand-specific defects, but it also included proof that the *Engle* defendants' cigarettes were defective because they are addictive and cause disease." *Id.* at 423. However, the Court stated that "the class action jury was not asked to find brand-specific defects in the *Engle* defendants' cigarettes." *Id.* Moreover, it characterized the

Engle defect and negligence findings as "common to all class members." *Id.* at 428.

After so describing the *Engle* findings, this Court held that using them to establish the conduct elements of progeny claims does not violate due process. The Court reasoned that the "res judicata" mandated by *Engle* was "claim preclusion," which applies not only to matters actually decided in the prior proceeding, but also to matters that "'might with propriety have been litigated and determined'" in it. *Id.* at 432 (citation omitted). The Court thus concluded that the Phase I verdict "settled all arguments regarding the *Engle* defendants' conduct," *id.* at 431, and thereby "resolved all elements of the claims that had anything to do with the *Engle* defendants' cigarettes or their conduct," *id.* at 432.

3. In *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013), a panel of the U.S. Court of Appeals for the Eleventh Circuit addressed how to apply the *Engle* defect and negligence findings in light of *Douglas*. The court read *Douglas* to have held that the *Engle* jury actually decided that "all" cigarettes are defective, and the sale of "all" cigarettes is negligent, because cigarettes are addictive and cause various diseases. *Id*. at 1281, 1287. Based on that understanding, the *Walker* panel held that use of these findings to establish the conduct elements of strict-liability and negligence claims in progeny cases does not violate due process. *See id.* at 1289.

4. In *Graham v. R.J. Reynolds Tobacco Co.*, 782 F.3d 1261 (11th Cir. 2015), a different panel of the Eleventh Circuit held that federal law impliedly preempts claims predicated on the *Engle* defect and negligence findings. The panel concluded that, under *Walker*, these findings must be deemed to rest on the theory that "all" cigarettes are defective, and the sale of "all" cigarettes is negligent, because cigarettes "are addictive and cause disease." *Id.* at 1267–73. This construction of the findings was necessary, the panel explained, to avoid a due-process violation. *See, e.g.*, *id.* at 1273 ("Any 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 1280 ("To 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."). However, that same construction created a fatal preemption problem: while federal law does not generally preempt strict-liability or negligence claims against cigarette manufacturers, it does impliedly preempt claims "premised on the theory that all cigarettes are inherently defective." *Id.* at 1284–85. The court based that conclusion on settled principles of implied conflict preemption, under which states cannot impose tort liability for conduct that Congress specifically has allowed, and on a web of federal statutes specifically addressed to smoking and health, through which Congress had ex-

pressed its intent "that cigarettes and smokeless tobacco will continue to be sold in the United States." *Id.* at 1274–79 (citing *Brown & Williamson*, 529 U.S. at 139).

Subsequently, the Eleventh Circuit granted rehearing *en banc* in *Graham*. The court ordered the parties to brief not only the implied-preemption questions addressed in *Graham*, but also the due-process questions addressed in *Walker*. The *en banc* oral argument is scheduled for June 21, 2016.

C. Proceedings In This Case

1. In 2007, Plaintiff Phil Marotta sued Reynolds for the death of his father from smoking. Mr. Marotta claimed to be an *Engle* class member because his father had died from lung cancer caused by an addiction to smoking. R.43:8489–8505. Like other progeny plaintiffs, Mr. Marotta relied entirely on the *Engle* Phase I findings to establish the defect and negligence elements of his claims. *E.g.*, R.43:8495 ("the *Engle* Phase I findings conclusively establish that the cigarettes sold and placed on the market by Defendant were defective and unreasonably dangerous"). Moreover, he presented to the jury extensive evidence and argument that Reynolds had acted wrongly in choosing to sell an inherently dangerous and addictive product. *See, e.g.*, T.5:447, 451–52, 457; T.9:1018, 1022, 1043. Although Mr. Marotta at times argued that filters do not make cigarettes any safer, *see* T.5:452, 459–60; T.19:2641–43, he did not argue that filtered cigarettes are more dangerous than unfiltered cigarettes. To the contrary, his expert testified that

"[t]here's no difference between a filter and no filter." T.10:1296.

Over Reynolds's objection, the trial court instructed the jury that, if it found Mr. Marotta to be a member of the *Engle* class, then the defect and negligence elements of his strict-liability and negligence claims would be established. T.19:2565 ("R.J. Reynolds placed cigarettes on the market that were defective and unreasonably dangerous."); *id.* ("R.J. Reynolds was negligent, meaning it failed to exercise the degree of care that a reasonable product manufacturer would have exercised under like circumstances."); *see also* T.19:2564 (*Engle* findings "may not be denied or questioned, and they must carry the same weight they would have if you had determined them yourselves"). Reynolds requested an instruction at least clarifying that the jury could not impose liability for the mere sale of cigarettes. R.48:9384 ("The manufacture and sale of cigarettes is a lawful activity protected by federal law. Therefore, I instruct you that Reynolds cannot be held liable merely for manufacturing, selling, or advertising cigarettes."). The trial court refused to give that full instruction and instead gave the jury a significantly truncated version of it. *See* T.19:2580 (instructing the jury that "[t]he manufacture, advertisement and sale of cigarettes are lawful activities").

The jury found for Mr. Marotta on the question of *Engle* class membership and on the strict-liability claim. R.48:9499. The jury found for Reynolds on the negligence, concealment, and conspiracy claims. *Id.* at 9499–9500. The jury

awarded $6 million in compensatory damages, and it allocated 42% of the fault to Mr. Marotta's father and 58% to Reynolds. *See id.* at 9500–01. After reducing the damages to reflect the jury's comparative-fault determination, the trial court entered final judgment against Reynolds for $3.48 million. R.49:9605, 9629.

2. On appeal, the Fourth District held that federal law does not impliedly preempt strict-liability and negligence claims based on the inherent health and addiction risks of all cigarettes. First, embracing an argument that even Mr. Marotta had not made, the court held that tort damages cannot be "equat[ed]" with a "ban on cigarette sales" under positive law. *R.J. Reynolds Tobacco Co. v. Marotta*, 182 So. 3d 829, 832 (Fla. 4th DCA 2016). For that proposition, the court cited an Internet article from "Law360," and it dismissed with a footnoted, "but see" citation *Mutual Pharmaceutical Co. v. Bartlett*, 133 S. Ct. 2466 (2013), which it recognized to stand for the proposition that "implied preemption is not 'defeated by the prospect that a manufacturer could pay the state penalty for violating a state-law duty.'" *Marotta*, 182 So. 3d at 832 n.2 (quoting *Bartlett*, 133 S. Ct. at 2477). The Fourth District further reasoned that federal law does not expressly preempt the claims at issue here, that federal regulation of alcohol does not prevent states from banning it, and that a 2009 federal statute assertedly "acknowledges" the right of states "to prohibit the sale of tobacco." *See id.* at 832–33.

The Fourth District certified the following question as one of great public

importance: "Whether federal law implicitly preempts state law tort claims of strict liability and negligence by *Engle* progeny plaintiffs based on the sale of cigarettes." *Id.* at 834 (capitalization altered). This Court granted review.

SUMMARY OF ARGUMENT

I. Federal law impliedly preempts Mr. Marotta's claims for strict liability and negligence.

A. Reynolds cannot be held liable for the manufacture and sale of ordinary cigarettes. Conflict preemption bars any state tort claim that seeks to impose liability for conduct that Congress has specifically allowed, as the United States Supreme Court held in *Geier v. American Honda Motor Co.* Moreover, Congress has specifically allowed the sale of cigarettes and has foreclosed their removal from the market, as the Supreme Court further held in *Brown & Williamson*. Applying *Geier* and *Brown & Williamson*, numerous courts—including the Eleventh Circuit, the Third District, and the Fourth District—have held that federal law impliedly preempts strict-liability and negligence claims based on the inherent health and addiction risks of all cigarettes.

B. The Fourth District's contrary conclusion in this case was unjustified. First, that court's reasoning that a ban on cigarettes through tort law cannot be equated with a ban on cigarettes through positive law is flatly incompatible with several U.S. Supreme Court decisions—including *Bartlett*, which the Fourth Dis-

trict explicitly recognized as such. Second, the Fourth District's conclusion that the implied-preemption defense here must fail because no federal statute expressly preempts the claims at issue is likewise incompatible with numerous U.S. Supreme Court decisions, including *Geier* itself. Third, federal regulation of alcohol has nothing to do with the tobacco-related preemption question presented here. Fourth, the Tobacco Control Act, which Congress enacted in 2009, by its terms does not apply to cases pending before its effective date, including this one.

C. Mr. Marotta's various additional arguments against implied preemption fare no better. Nothing in *Engle* or *Douglas* addressed implied preemption. The "res judicata" effect of the *Engle* findings extends only to the conduct elements of plaintiffs' claims, and does not preclude defendants from raising implied-preemption or other defenses. And the supposedly "limited" scope of the *Engle* class definition does not prevent or cure the implied-preemption problem, which arises from the breadth of the underlying legal duty, not the number of plaintiffs in any particular case.

D. The proper remedy for the implied-preemption violation in this case is judgment for Reynolds. In *Douglas*, this Court gave claim-preclusive effect to the Phase I defect and negligence findings. Accordingly, those findings establish anything that the *Engle* jury might have decided in favor of the class—including its allegation that all cigarettes are "defective because they are addictive and cause

disease." Alternatively, Reynolds is entitled to a new trial because the trial court refused to give an instruction that would have prevented the jury from imposing liability based on the inherent health and addiction risks of all cigarettes.

II. Mr. Marotta's use of the *Engle* findings to establish the conduct elements of his claims violates federal due process. This Court rejected that argument in *Douglas*, but subsequent decisions have cast doubt on the rationale of that decision. Moreover, the Court should consider the interrelated implied-preemption and due-process issues together, just as the Eleventh Circuit is currently doing in *Graham.*

ARGUMENT

I. FEDERAL LAW IMPLIEDLY PREEMPTS CLAIMS BASED ON THE *ENGLE* DEFECT AND NEGLIGENCE FINDINGS

A. Cigarette Manufacturers Cannot Be Held Liable For The Sale Of Ordinary Cigarettes

1. Federal law preempts state tort law that would interfere with a federal regulatory scheme

Under the Supremacy Clause of the United States Constitution, "federal law may expressly or impliedly preempt state law." *State v. Harden*, 938 So. 2d 480, 485–86 (Fla. 2006). The U.S. Supreme Court has identified three distinct forms of preemption: "(1) express preemption where a federal statute contains 'explicit preemptive language'; (2) implied field preemption, where the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left

no room for the States to supplement it'; and (3) implied conflict preemption, in which 'compliance with both federal and state regulations is a physical impossibility' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 486 (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992)). At issue in this case is the last subcategory of conflict preemption (sometimes called "obstacle preemption")—whether tort claims premised on the *Engle* defect and negligence findings are impliedly preempted because they stand as an obstacle to the "purposes and objectives of Congress." This Court reviews that question *de novo*. *See id.* at 485.

In deciding questions of implied preemption, federal law directs courts to consider "[t]he nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law." *Hines v. Davidowitz*, 312 U.S. 52, 70 (1941); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects"). "To determine whether a state law conflicts with Congress' purposes and objectives," a court "must first ascertain the nature of the federal interest." *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2013). Once the federal interest has been determined, any conflicting state laws, whether imposed through tort law or by statute, must give way.

In particular, tort claims are preempted to the extent that they seek to impose liability for conduct that Congress specifically has allowed. For example, in *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000), the U.S. Supreme Court held that federal law preempted strict-liability and negligence claims based on an automobile manufacturer's failure to install airbags, because the governing federal regulations specifically allowed manufacturers "a range of choices among different passive restraint devices," including but not limited to airbags. *Id.* at 875. The Court reasoned that the plaintiffs' tort action "depend[ed] upon [their] claim that manufacturers had a duty to install an airbag" and "would have required manufacturers of all similar cars to install airbags rather than other passive restraint systems." *Id.* at 881. Because that claim "presented an obstacle to the variety and mix of devices that the federal regulation sought," it was impliedly preempted. *Id.*; *see also Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (finding obstacle preemption where a "Federal Statute authorizes national banks to engage in activities that the State Statute expressly forbids").

In *Arizona v. United States*, 132 S. Ct. 2492 (2012), the U.S. Supreme Court similarly held that federal law impliedly preempted a state law that made it illegal for an "unauthorized alien" to "knowingly apply for work." *Id.* at 2505. The Court reasoned that the law was inconsistent with Congress's "deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized

employment." *Id.* at 2503–04. Because the law thus "would interfere with the careful balance struck by Congress," it was preempted. *See id.* at 2505.

2. Congress has chosen to protect the market for tobacco products while mandating disclosure of their risks

Just as federal law specifically allows use of seatbelts instead of airbags, it also specifically allows the sale of cigarettes. In fact, Congress has made a "deliberate choice" to protect the market for ordinary cigarettes despite their known and inherent health and addiction risks.

In *Brown & Williamson*, the U.S. Supreme Court held that "Congress … has foreclosed the removal of tobacco products from the market," 529 U.S. at 137, and that "[a] ban of tobacco products … would therefore plainly contradict congressional policy," *id.* at 138–39. The Court based these conclusions on an extensive collection of "tobacco-specific legislation that Congress ha[d] enacted" in various federal statutes. *Id.* at 143.[2] As the Court explained, this legislation comprehensively regulated tobacco products, but "stopped well short of ordering a ban" on their sale. *Id.* at 138. To the contrary, Congress had expressly provided that "[t]he

[2] *See*, *e.g.*, Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965); Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970); Alcohol and Drug Abuse Amendments of 1983, Pub. L. No. 98-24, 97 Stat. 175; Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200 (1984); Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252, 100 Stat. 30; Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub. L. No. 102-321, § 202, 106 Stat. 388 (1992).

marketing of tobacco constitutes one of the great basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare." 7 U.S.C. § 1311(a) (2000).[3] Even though Congress was, at all relevant times, "aware of tobacco's health hazards and its pharmacological effects," *Brown & Williamson*, 529 U.S. at 155, it deliberately chose to strike a balance: Congress closely regulated the labeling and advertising of tobacco products, but established a policy that "commerce and the national economy may be … protected to the maximum extent consistent with" consumers being "adequately informed about any adverse health effects." 15 U.S.C. § 1331.

In *Brown & Williamson*, the Supreme Court held that the FDA lacked authority to regulate cigarettes and other tobacco products. The FDA had asserted such authority on the theory that nicotine is a "drug" within the meaning of federal law. *See* 529 U.S. at 125–27. The dispositive objection was that the FDA's position would have compelled the removal of cigarettes from the market, because (1) drugs may be sold only if found by the FDA to be "safe," and (2) tobacco is widely known to be unsafe. *See id.* at 134–35. As the Court explained, such a ban on cig-

[3] This provision was enacted in 1938, *see* c. 30, Title III, § 311(a), 52 Stat. 45 (Feb. 16, 1938), and repealed in 2004, *see* Pub. L. No. 108-357, § 611(a). It therefore was effective at all times relevant to this lawsuit, which involves conduct beginning in 1953 and ending no later than 1994, when Mr. Marotta's father passed away.

arettes would obviously conflict with the governing statutory scheme:

> When Congress enacted these statutes [regulating tobacco], the adverse health consequences of tobacco use were well known, as were nicotine's pharmacological effects. Nonetheless, Congress stopped well short of ordering a ban…. Congress' decisions to regulate labeling and advertising and to adopt the express policy of protecting "commerce and the national economy to the maximum extent" reveal its intent that tobacco products remain on the market. Indeed, *the collective premise of these statutes is that cigarettes and smokeless tobacco will continue to be sold in the United States*. A ban of tobacco products by the FDA would therefore plainly contradict congressional policy.

Id. at 138–39 (internal citations omitted) (emphasis added); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001) (reiterating federal policy that "the sale and use of tobacco is lawful for adults").

3. Numerous state and federal decisions recognize that federal law preempts claims based on the generic risks of cigarettes

In the wake of *Geier* and *Brown & Williamson*, many courts have held that federal law preempts strict-liability and negligence claims based on the health and addiction risks of all cigarettes. As these courts have explained, such claims rest on a legal duty, grounded in state tort law and in direct contravention of the federal regulatory scheme, to refrain from selling cigarettes.

Most recently, the Eleventh Circuit recognized that Congress "designed 'a distinct regulatory scheme' to govern [tobacco's] advertising, labeling, and—most importantly—sale." *Graham*, 782 F.3d at 1279. After comprehensively reviewing

the half-century of federal legislation specifically addressing the issue of smoking and health, the Court concluded that this federal scheme impliedly preempted state tort claims "premised on the theory that all cigarettes are inherently defective." *Id.* at 1274–79, 1284–85. And the court further recognized that the federal scheme reflects a "carefully calibrated" balance between competing interests—which states impermissibly interfere with when they ban cigarettes or significantly limit their availability. *Id*. at 1277. Although the *Graham* opinion has been vacated pending the Eleventh Circuit's *en banc* reconsideration of due-process and implied-preemption issues in *Engle*-progeny litigation, it is by far the most thorough analysis of the question presented here. It remains persuasive, albeit not controlling.

Two district courts of appeal have recognized the same principles. In *Engle* itself, the Third District held that "[f]ederal law preempts claims that selling cigarettes is tortious or otherwise improper." 853 So. 2d at 460; *see id.* at 460 n.35 ("Because the sale of cigarettes is subject to federal regulation, attempts to impose contradictory requirements or prohibitions under state law are subject to at least implied preemption."). This Court did not disturb that implied-preemption ruling, which the class did not even raise as a ground for reversal.

Likewise, in *Liggett v. Davis*, the Fourth District held that federal law impliedly preempts negligence claims based on the theory that cigarettes "pose[ ] a significant danger to the health of smokers." 973 So. 2d at 472. The court ex-

plained that such claims "would necessitate all manufacturers" to "refrain[ ] from producing cigarettes," which "would be contrary to Congress's intent to protect commerce and not to ban tobacco products." *Id.* at 472–73. The court further held that federal law impliedly preempts strict-liability claims based on the theory that cigarettes are unreasonably dangerous, at least absent "evidence of a safer design for cigarettes." *See id.* at 474 ("the federal government's pronouncement that the continued manufacture of cigarettes is a sanctioned activity precludes application of this theory to cigarettes"). Although the Fourth District rejected implied preemption in this case, it did not even mention its prior decision in *Davis.*

Many federal district courts agree with *Graham*, *Engle*, and *Davis*. For example, *Gault v. Brown & Williamson Tobacco Corp.*, No. 1:02-CV-1849-RLV, 2005 WL 6523483 (N.D. Ga. Mar. 31, 2005), held that federal law impliedly preempts strict-liability and negligence claims based on allegations that cigarettes "contained dangerous substances likely to cause injury and death" and "had addictive and habit-forming characteristics." *See id.* at *7. The court explained:

> This allegation effectively seeks to impose a duty on the defendants not to manufacture or sell cigarettes because they are likely to cause injuries and be habit forming. The problem with this proposed duty is that it would subject the defendant to tort liability via negligence each time a cigarette was sold on the market and force the defendant to make one of two decisions; the first being to continue selling cigarettes and expose itself to tort liability each time a cigarette is sold; the second being to immediately cease manufacturing cigarettes in order to

> avoid this liability. This court concludes that each of these pathways leads to the same inevitable result—cigarettes being removed from the market. This result conflicts with Congress's decision to protect the national economy by itself choosing to regulate the tobacco industry and to allow tobacco products to remain on the market, despite their known harmful effects.

Id. *De Jesus Rivera v. R.J. Reynolds Tobacco Co.*, 368 F. Supp. 2d 148, 154–55 (D.P.R. 2005), held that federal law preempts strict-liability and negligence claims based on allegations that cigarettes are "an inherently dangerous product." *Johnson v. Brown & Williamson Tobacco Corp.*, 345 F. Supp. 2d 16, 21 (D. Mass. 2004), held that federal law preempts strict-liability claims based on allegations that cigarettes are carcinogenic, which would "impermissibly override the congressional decision to allow their continued sale." *Prado Alvarez v. R.J. Reynolds Tobacco Co.*, 313 F. Supp. 2d 61, 73 (D.P.R. 2004), *aff'd*, 405 F.3d 36 (1st Cir. 2005), held that federal law preempts strict-liability and negligence claims based on allegations that cigarettes "have health risks and are allegedly addictive." *Mash v. Brown & Williamson Tobacco Corp.*, No. 4:03CV0485, 2004 WL 3316246, at *6 (E.D. Mo. Aug. 26, 2004), held that federal law preempts strict-liability claims alleging that nicotine in cigarettes is a defect. *Jeter v. Brown & Williamson Tobacco Corp.*, 294 F. Supp. 2d 681, 685 (W.D. Pa. 2003), held that federal law preempts strict-liability and negligence claims based on allegations that "cigarettes are 'unreasonably dangerous' because they contain carcinogens and nicotine, both

of which are inherent characteristics present in all cigarettes." *Cruz Vargas v. R.J. Reynolds Tobacco Co.*, 218 F. Supp. 2d 109, 117–18 (D.P.R. 2002), *aff'd*, 348 F.3d 271 (1st Cir. 2003), held that federal law preempts strict-liability and negligence claims based on "the inherent characteristics of tobacco and cigarettes." And *Insolia v. Philip Morris Inc.*, 128 F. Supp. 2d 1220, 1224–25 (W.D. Wis. 2000), held that federal law preempts negligence claims based on allegations that cigarettes are known to be dangerous.

We do not mean to suggest that federal law preempts *all* strict-liability and negligence claims against cigarette manufacturers. For example, in *Conley v. R.J. Reynolds Tobacco Co.*, 286 F. Supp. 2d 1097 (N.D. Cal. 2002), the court held that federal law does not preempt strict-liability claims based on a theory of defect narrower than the inherent dangerousness of all cigarettes. Such a narrower theory, the court explained, "is not automatically tantamount to the categorical ban on tobacco products." *Id.* at 1106. Nonetheless, the court stressed that federal law would preempt claims based on "a design defect in the cigarettes smoked by the decedent that are so inherent in 'tobacco products' that it would not be scientifically or commercially feasible to remove the defect." *Id.* at 1107. As the court explained, holding defendants liable for risks that are inherent in cigarettes "would effectively constitute a ban on the manufacture of tobacco products, a result that would undeniably conflict with Congressional policy." *Id.* at 1107–08; *see also*

Philip Morris USA, Inc. v. Arnitz, 933 So. 2d 693, 695 (Fla. 2d DCA 2006) (no preemption of claims based on harmful "additives or flavorants" used in certain flue-cured tobacco "that had been exposed to toxic exhaust fumes from propane heaters"); *Ferlanti v. Liggett Grp., Inc.*, 929 So. 2d 1172, 1173–74 (Fla. 4th DCA 2006) (no preemption of claims based on allegations that a particular brand of cigarettes had unreasonably high tar and nicotine yields).

B. The Fourth District Erred in Reaching A Contrary Conclusion

In this case, contrary to *Liggett v. Davis*, the Fourth District held that federal law does not impliedly preempt tort claims based on the inherent health and addiction risks of all cigarettes. The Fourth District rejected *Graham*'s 50 pages of analysis with two pages of its own. But, its reasoning cannot withstand scrutiny.

1. State tort law is not exempt from implied preemption

First, the Fourth District asserted that imposing tort liability for selling cigarettes cannot be "equat[ed]" with a ban on cigarettes. *See* 182 So. 3d at 832. Numerous U.S. Supreme Court decisions hold otherwise.

In *Geier*, the Court rejected a precisely analogous argument that there was no conflict between state tort law and federal regulatory standards because manufacturers could simply choose to pay tort damages for engaging in the federally approved activity. As the Court explained, tort liability rests on the breach of a "legal duty"—for example, to avoid selling defective products or to exercise a duty of

care. 529 U.S. at 881–82. This bedrock principle is equally true in Florida, where negligence liability rests on the breach of a legal "duty, or obligation … requiring the [defendant] to conform to a certain standard of conduct, for the protection of others against unreasonable risks." *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216, 1227 (Fla. 2010). And claims for strict liability are "in conformity with the principles set forth in the Restatement (Second) of Torts § 402A," *West v. Caterpillar Tractor Co., Inc.*, 336 So. 2d 80, 86 (Fla. 1976), under which liability also "signals the breach of a duty," *Bartlett*, 133 S. Ct. at 2473. Common-law duties enforced through the tort system, no less than statutory or regulatory duties, are binding legal obligations.

Moreover, "pre-emption cases do not ordinarily turn on such compliance-related considerations as whether a private party in practice would ignore state legal obligations," but rather "*assume* compliance with the state-law duty in question"—regardless of whether it is imposed by statute or through the common law. *Geier*, 529 U.S. at 882. In other words, implied-preemption analysis must assume that manufacturers will not sell defective products or breach duties of care, rather than breach those duties and pay damages. *See*, *e.g.*, *Bartlett*, 133 S. Ct. at 2477 n.3 (implied preemption is not "defeated by the prospect that a manufacturer could 'pa[y] the state penalty' for violating a state-law duty" imposed by tort law (citing *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 618 (2011)).

The Fourth District acknowledged that *Bartlett* was directly contrary to its holding, *see* 182 So. 3d at 832 n.2 ("but see" citation), but instead invoked a "Law360" Internet article, *see id.* at 832, which in turn cited *Bates v. Dow Agrosciences*, 544 U.S. 431 (2005). In *Bartlett*, however, the Supreme Court expressly rejected an argument that *Bates* distinguished between common-law and statutory duties, because both sources of law "require a manufacturer to choose between leaving the market and accepting the consequences of its actions (in the form of a fine or other sanction)." 133 S. Ct. at 2479. Moreover, that view prevailed not only with a majority of the Supreme Court, but also with two of the dissenting Justices who agreed that "conflicting state law that requires a company to withdraw from the State *or pay a sizable damages remedy* in order to avoid the conflict between state and federal law may nonetheless 'stan[d] as an obstacle to the accomplishment' of the federal law's objective, in which case the relevant state law is preempted." *Id.* at 2481 (Breyer, J., dissenting) (emphasis added).

Far from supporting the Fourth District's analysis, *Bates* itself affirmatively undercuts it. That case involved express preemption under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), which by its terms prohibits states from imposing "any requirements for labeling or packaging in addition to or different from those required under this subchapter." *See* 544 U.S. at 442–43. In addressing that question, the Supreme Court specifically held that there was no dif-

ference for preemption purposes between state statutes and state common-law. *Id.* at 443 ("the term 'requirements' in [FIFRA] reaches beyond positive enactments, such as statutes and regulations, to embrace common-law duties"). In that respect, *Bates* is consistent not only with implied-preemption decisions such as *Bartlett* and *Geier*, but also with other express-preemption decisions. *See*, *e.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 323–24 (2008) ("common-law causes of action for negligence and strict liability" impose a "requirement" under Medical Device Amendments of 1976); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 522 (1992) (plurality opinion) (state tort claims impose a "requirement or prohibition" under Federal Cigarette Labeling and Advertising Act ("Labeling Act")). *Bates* went on to reject express preemption in the case before it, but only because the claims at issue did not involve "labeling or packaging." *See* 544 U.S. at 444.

Applying preemption principles to state tort law also makes good sense. As the Supreme Court has explained, state regulation "can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959). This is particularly true in the context of smoking-and-health litigation, where individual judgments often run into millions of dollars, and aggregate exposure is orders of magnitude greater than that. In law

as well as in logic, an obligation to pay tens or hundreds of millions of dollars in damages for selling ordinary cigarettes is not meaningfully different from a ban on selling ordinary cigarettes. Because both upset the federal scheme permitting the sale of cigarettes, both are preempted.

2. The absence of express preemption is irrelevant to the implied-preemption question presented

The Fourth District also noted that the Labeling Act contains an express-preemption clause, which states that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this subchapter." 15 U.S.C. § 1334(b). The court reasoned that this provision does not preempt the claims at issue here, and any state law not expressly preempted must also not be impliedly preempted. 182 So. 3d at 833.

Again, the Fourth District ignored binding precedent: "Congress' inclusion of an express pre-emption clause 'does *not* bar the ordinary working of conflict preemption principles.'" *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002) (quoting *Geier*, 529 U.S. at 869); *see also Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1122 (11th Cir. 2004) ("[E]ven if Congress has neither expressly preempted state law nor occupied the field, state law is preempted when it actually conflicts with federal law."); *This, That & The Other Gift & Tobacco, Inc. v. Cobb Cnty., Ga.*, 285 F.3d 1319, 1323 n.1 (11th Cir. 2002) ("The existence of an express

preemption clause … neither bars the ordinary working of conflict preemption principles nor by itself precludes a finding of implied pre-emption .”).[4]

Moreover, the Labeling Act was only one of many statutes through which Congress had “foreclosed the removal of tobacco products from the market.” *Brown & Williamson*, 529 U.S. at 137; *see supra* nn. 2–3. The Fourth District thus missed the threefold distinction between *express* preemption under the *Labeling Act* of claims challenging the *advertising or promotion* of cigarettes and *implied* preemption under *various statutes* of claims based on a *duty not to sell cigarettes*. The latter arises not from the express-preemption clause in the Labeling Act, but from the “collective premise” of many statutes “that cigarettes and smokeless tobacco will continue to be sold in the United States.” 529 U.S. at 139.

3. State regulation of alcohol is irrelevant

The Fourth District further reasoned that implied preemption of state tobacco regulation is inconsistent with this Nation’s history of alcohol regulation. “[N]umerous so-called dry counties,” it explained, “exist throughout the United States today despite federal regulation of alcohol.” 182 So. 3d at 833. However,

[4] Thus, many courts have found implied conflict preemption under statutes that contain an inapplicable express-preemption clause. *See, e.g.*, *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1120–25 (3d Cir. 1990) (National Traffic and Motor Vehicle Safety Act); *In re Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litig.*, 621 F.3d 781, 792–97 (8th Cir. 2010) (Organic Foods Production Act); *Farina v. Nokia*, 578 F. Supp. 2d 740, 761, 770 (E.D. Pa. 2008) (Federal Communications Act); *Curtin v. Port Auth. of NY*, 183 F. Supp. 2d 664, 669, 671–72 (S.D.N.Y. 2002) (Federal Aviation Act).

the Constitution expressly allows states to ban the consumption of "intoxicating liquors." U.S. Const. Am. XXI, § 2; *see Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 851 (7th Cir. 2000) (under Twenty-First Amendment, any "state that wanted to remain dry could … do so"). There is no comparable constitutional provision for tobacco. And Congress, exercising its broad powers under the Commerce Clause, has "foreclosed the removal of tobacco products from the market." *Brown & Williamson*, 529 U.S. at 137. The history of alcohol regulation thus has no bearing on the entirely distinct federal scheme governing the sale of cigarettes.

4. The Tobacco Control Act is inapplicable

Finally, the Fourth District invoked the Family Smoking Prevention and Tobacco Control Act ("TCA"), Pub. L. No. 111-131, 123 Stat. 1776, which Congress enacted in 2009. The court asserted that the TCA "acknowledges . . . a state's right to prohibit the sale of tobacco." 182 So. 3d at 833. Specifically, it invoked a savings clause stating that "nothing in this subchapter"—*i.e.*, in the TCA—should be construed to prohibit states from banning tobacco sales or to restrict their ability to impose tort liability. 21 U.S.C. § 387p(a)(1) & (b). By its terms, the TCA thus does not address the preemptive effect of the various *other* statutes addressed in *Brown & Williamson*.

In any event, the TCA is clearly inapplicable to *Engle*-progeny cases. By its terms, the TCA does not "affect any action pending in Federal, State, or tribal

court" on the date of its enactment in 2009. 21 U.S.C. § 387 note (TCA § 4(a)(2)). Because this case was filed in 2008, the TCA is thus inapplicable to it. And because all *Engle*-progeny cases had to be filed by then, *see Engle*, 945 So. 2d at 1277, the TCA is likewise inapplicable to any of them. Moreover, the *Engle* class is limited to individuals who were injured before November 21, 1996. *See id.* at 1275. And the TCA, which contains no express indication of retroactive effect, is thus inapplicable to claims arising from conduct and injuries that occurred more than a decade prior to its enactment. *See*, *e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). Nor can the TCA retroactively abrogate the U.S. Supreme Court's conclusion that, at least before 2009, Congress had deliberately chosen to "foreclose[ ] the removal of tobacco products from the market." *Brown & Williamson*, 529 U.S. at 137.

C. Mr. Marotta's Additional Arguments Are Meritless

In his brief in the Fourth District, Mr. Marotta raised various additional scattershot arguments against implied preemption. The Fourth District did not credit any of these further arguments, and this Court likewise should not.

1. *This Court did not decide implied preemption in* Engle. Mr. Marotta's contention that this Court decided the implied-preemption question in *Engle* rests on a single sentence from that opinion: "Although compliance with the federal warnings preempted any claim based on failure to warn, it did not eliminate the

other causes of action . . . ." 945 So. 2d at 1273. That sentence addresses express preemption under the Labeling Act, which preempts health-based tort claims "with respect to the advertising or promotion" of cigarettes. 15 U.S.C. § 1334(b). As explained above, an argument for express preemption under the Labeling Act of "advertising or promotion" claims is entirely distinct from an argument for implied preemption of claims premised on the inherent dangerousness of all cigarettes. This Court rejected the former, but did not address the latter. *See*, *e.g.*, *Davis*, 973 So. 2d at 472. And as explained, it is hornbook federal law that the failure of an express-preemption defense "does not bar the ordinary working of conflict preemption principles." *Geier*, 529 U.S. at 869.

The context of *Engle* reinforces this conclusion. In *Engle*, the Third District held that federal law impliedly preempts strict-liability and negligence claims based on the inherent dangerousness of all cigarettes. Citing *Brown & Williamson*, it explained: "For more than sixty years, federal statutes have protected the right to sell cigarettes, even though Congress has recognized that cigarettes are dangerous. Federal law preempts claims that selling cigarettes is tortious or otherwise improper." 853 So. 2d at 460. After losing that issue in the Third District, the class did not even bother to raise it in this Court. Pet'rs' Br. on the Merits, *Engle*, 2004 WL 1452476. And it could hardly have done so credibly because, faced with defendants' argument for implied preemption in the Third District, the class opposed it

not by arguing that federal law permits tort claims premised on the inherent health risks of all cigarettes, but by falsely denying that they had pursued any such claims. *See supra* at 4. Against that backdrop, this Court's brief reference to an express-preemption argument cannot fairly be read as having reversed the Third District's unchallenged implied-preemption ruling *sub silentio*.[5]

2. *This Court did not decide implied preemption in* Douglas. Mr. Marotta stretches even further in contending that *Douglas* decided the question presented. *Douglas* decided a certified question about due process, and because the Court did not say a word about preemption—express or implied—its decision is not binding on this issue. *See*, *e.g.*, *McKean v. Warburton*, 919 So. 2d 341, 346 (Fla. 2005) ("no decision is authority on any question not raised and considered, although it may be involved in the facts of the case" (citations omitted)); *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 132 (Fla. 2000) (stare decisis inapplicable because "the Court's holding simply did not reach this issue").

As Mr. Marotta noted below, the defendants in *Douglas* briefly mentioned implied preemption (in a single footnote of a 50-page merits brief) as one of many considerations reinforcing their due-process argument. Initial Br. for Pet'rs at *34

[5] Mr. Marotta's further contention that this issue was resolved by the denial of certiorari in *Engle* is equally meritless. The only preemption question raised in the petition for certiorari was one of express preemption under the Labeling Act. Moreover, it is axiomatic that denials of certiorari are not merits decisions and have no precedential value. *See, e.g.*, *Teague v. Lane*, 489 U.S. 288, 296 (1989).

n.7, *Philip Morris USA, Inc. v. Douglas*, No. SC12-617, 2012 WL 3078033 (Fla. May 30, 2012) ("the Phase I findings cannot be read to establish that all cigarettes are inherently defective because that result would be preempted by federal law"). However, the defendants did not raise implied preemption as an independent basis for relief. And, because this Court chose not to address implied preemption, that question remains open here.[6]

3. Engle*'s "res judicata" effect does not extend to implied preemption.* Mr. Marotta further argued that, regardless of what this Court actually decided in *Engle* and *Douglas*, the implied-preemption argument is foreclosed by the "res judicata effect" of *Engle*. This is a remarkable contention: even though the class lost implied preemption in the Third District and then failed to raise that issue as a basis for reversal in this Court, Mr. Marotta nonetheless argues that this Court's decision effectively resolved implied preemption in *his* favor, not because of anything this Court actually said, but because of what it could have said.

Not surprisingly, *Engle* does not remotely support that argument. To the contrary, this Court simply gave the preserved Phase I findings "res judicata effect" as to the *conduct elements* of progeny claims—the findings establish, for ex-

[6] Mr. Marotta has not argued that *Douglas* is entitled to any preclusive (as opposed to precedential) effect in this case. Nor could he, given the lack of mutuality between the parties in this case and in *Douglas*. *See*, *e.g.*, 110 So. 3d at 433; *Stogniew v. McQueen*, 656 So. 2d 917, 919 (Fla. 1995).

ample, that the defendants sold defective cigarettes, breached duties of care, and concealed information about the health or addiction risks of cigarettes. *See Engle*, 945 So. 2d at 1257 n.4. Neither the findings themselves, nor this Court's analysis of them, say anything about defenses at all. Moreover, because the class lost implied preemption in the Third District and then failed to raise that issue in this Court, any "res judicata effect" with regard to implied preemption would apply *against Engle*-progeny plaintiffs.

Subsequent decisions confirm that this Court, in prohibiting the *Engle* defendants from contesting the conduct elements of liability in progeny cases, did not go further and also prevent them from raising defenses. Thus, in *Douglas*, this Court was careful to specify that the "res judicata" effect of the *Engle* findings is that "individual plaintiffs do not have to reprove those [conduct] *elements of their claims*." 110 So. 3d at 432–33 (emphasis added); *see also id.* at 432 ("the Phase I verdict against the *Engle* defendants resolved all *elements of the claims* that had anything to do with the *Engle* defendants' cigarettes or their conduct" (emphasis added)). And just last month, this Court once again confirmed that the preclusive effect of *Engle* is limited to the "Phase I common core findings"—and does not apply to any other issues which would "expand the res judicata effect of *Engle* beyond the parameters set by this Court" in *Engle* itself. *Soffer v. R.J. Reynolds Tobacco Co.*, No. SC13-139, 2016 WL 1065605, at *8 (Fla. Mar. 17, 2016).

4. ***The "limited" scope of the*** **Engle** ***class is irrelevant.*** Mr. Marotta further argued against implied preemption on the ground that the *Engle* defect and negligence findings do not apply to all cigarettes, but only to cigarettes containing nicotine and manufactured by the *Engle* defendants during the times at issue. However, all cigarettes contain some amount of nicotine; the *Engle* defendants included all of the leading United States cigarette manufacturers; and the times at issue spanned some four decades. Needless to say, it is highly unlikely that Congress wanted to allow the sale of cigarettes, but only by tiny manufacturers or only outside a decades-long class period. In any event, the critical point is not the breadth of the class, but the breadth of its theory of liability. After all, if the claims of a *single smoker* are preempted to the extent they rest on a theory attacking the inherent product risks of all cigarettes, *see*, *e.g.*, *Davis*, 973 So. 2d at 472–73, then so too are the claims of a class of smokers estimated at the time to comprise some 700,000 individuals. The implied-preemption problem does not somehow vanish because it will arise in progeny litigation thousands of times over.

5. ***Reynolds is not judicially estopped from raising implied preemption.*** Mr. Marotta argued that Reynolds should be judicially estopped from raising conflict preemption in this case because it acknowledged in *Brown & Williamson* that cigarettes had been "historically regulated" by the states. Br. for Resp't R.J. Reynolds Tobacco Co. at *45, *FDA v. Brown & Williamson*, No. 98-1152, 1999 WL

712566 (U.S. Sept. 10, 1999). However, none of the state regulations discussed by Reynolds involved anything remotely akin to a ban. *See id.* Moreover, Reynolds argued at length that banning cigarettes would conflict with various "tobacco-specific statutes." *See id.* at *36–43. And it explained that "Congress decided that tobacco products would not be banned but would bear warnings, that advertising them on television and radio would be prohibited, that 'the addictive property of tobacco' would be the subject of reports to Congress from the Department of Health and Human Services," and "that the States would be given financial incentives to enact and effectively enforce restrictions on underage access." *Id.* at *4. The U.S. Supreme Court accepted that argument in holding that "[a] ban of tobacco products . . . would [ ] plainly contradict congressional policy," as reflected in the various "tobacco-specific legislation that Congress has enacted." *Brown & Williamson*, 529 U.S. at 139, 143. In this case, Reynolds seeks nothing more than to have this Court apply that same rule of federal law.

6. ***Any presumption against preemption is overcome.*** Mr. Marotta urged below a "heightened" presumption against preemption in general and a "high threshold" for conflict preemption in particular. But, the U.S. Supreme Court has rejected any "special burden" for conflict preemption beyond the basic inquiry into whether the challenged state action stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier*, 529 U.S. at

873–74; *see Crosby*, 530 U.S. at 374 n.8 (2000) ("presumption against preemption" must give way whenever state law "presents a sufficient obstacle to the full accomplishment of Congress's objectives"). A ban on the sale of all cigarettes, whether imposed by FDA regulations or by a state through its tort law, would obviously frustrate Congress's considered judgment to "foreclose[ ] the removal of tobacco products from the market." *Brown & Williamson*, 529 U.S. at 137.

7. *The CSTHEA's savings clause is irrelevant.* Mr. Marotta invoked the savings clause of the Comprehensive Smokeless Tobacco Health Education Act of 1986 ("CSTHEA"), which provides that "[n]othing in this Chapter shall relieve any person from liability at common law." 15 U.S.C. § 4406(c). However, savings clauses like this one do not "foreclose or limit the operation of ordinary pre-emption principles." *Geier*, 529 U.S. at 869; *see also id.* at 870 (U.S. Supreme Court "has repeatedly declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law"); *James v. Mazda Motor Corp.*, 222 F.3d 1323, 1326 (11th Cir. 2000) (despite savings clause, "courts should apply normal implied preemption principles to determine if a state common law action stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (internal quotation marks omitted)); *Pokorny*, 902 F.2d at 1125 ("it is well-established that a savings clause … does not 'save' common law actions that would subvert a federal statutory or

regulatory scheme"). Thus, while savings clauses routinely are construed to limit the operation of express-preemption clauses to common-law claims, the U.S. Supreme Court has often applied conflict preemption even where the statute at issue contained a savings clause indistinguishable from the CSTHEA's. *See, e.g.*, *Geier*, 529 U.S. at 871–81; *United States v. Locke*, 529 U.S. 89, 104–05 (2000); *AT&T v. Cent. Office Tel. Co.*, 524 U.S. 214, 227–28 (1988). Accordingly, the provision cited by Mr. Marotta at most prevents *express* preemption under the CSTHEA—which, as its name suggests, governs only *smokeless tobacco*. It does not prevent *implied* preemption of claims that attack the sale of all *cigarettes.*

8. *Implied preemption is not based on Congressional silence.* Mr. Marotta has asserted that the implied-preemption argument is based on nothing more than Congressional silence. He is mistaken. As the U.S. Supreme Court explained in *Brown & Williamson*, the conclusion that Congress has "foreclosed the removal of tobacco products from the market," 529 U.S. at 137, rests soundly on "tobacco-specific legislation that Congress has enacted" in various federal statutes. *Id.* at 143. The Court's analysis did "not rely on Congress' failure to act," but rather on the "several statutes" that Congress enacted "addressing the particular subject of tobacco and health, creating a distinct regulatory scheme for cigarettes and smokeless tobacco." *Id.* at 155.

9. *Implied preemption would not leave plaintiffs without any remedy.* Mr. Marotta argued that our implied-preemption argument would leave injured plaintiffs without any remedy. However, the argument raised here does not extend to concealment and conspiracy claims. Nor does it extend to strict-liability and negligence claims that rest on any theory of defect or negligence other than that cigarettes are defective because of their inherent product risks. Here, Mr. Marotta could and did pursue concealment and conspiracy claims, and he could have pursued traditional strict-liability and negligence claims by attempting to connect his father's injuries to a cigarette defect, or to an act of negligence, not involving the inherent dangerousness of all cigarettes.

D. Reynolds Is Entitled To Judgment, Or At Least A New Trial

The claim-preclusion rationale of *Douglas* makes the Phase I defect and negligence findings apply to all cigarettes based on their inherent health and addiction risks, regardless of what the *Engle* jury actually decided. Because federal law impliedly preempts such a wholly generic attack on the sale of all cigarettes, Reynolds is entitled to judgment as a matter of law. On the other hand, if this Court were to narrow the preclusive effect of the findings, then Reynolds would be entitled at least to a new trial, because the jury was never instructed that it could not impose liability based on the inherent risks of all cigarettes.

1. Giving "claim preclusive" effect to the *Engle* defect and negligence findings conflicts with federal law

In *Douglas*, this Court held that the "res judicata" effect of the Phase I findings was one of claim preclusion. Under that reasoning, the findings establish not only theories of defect and negligence actually decided by the Phase I jury in favor of the class, but also any theories of defect and negligence that "'might with propriety have been litigated and determined'" by the Phase I jury. *See* 110 So. 3d at 432 (citation omitted). Moreover, the "proof submitted on strict liability" included, at least in part, "proof that the *Engle* defendants' cigarettes were defective because they are addictive and cause disease." *Id.* at 423. Accordingly, the Phase I findings must be assumed to rest on that entirely generic theory of defect and negligence, regardless of whether or not they actually do. And, as explained above, that is precisely the theory that federal law impliedly preempts.

Confirming this conclusion, *Douglas* further held that, on claims for strict liability and negligence, liability is established by nothing more than a determination of class membership—*i.e.*, a determination that the smoker was *addicted* to cigarettes containing nicotine and suffered from a *disease* or medical condition caused by that addiction. *See id.* at 430 ("The negligence Phase I finding coupled with the *Douglas* jury's finding that Mrs. Douglas' addiction to smoking the defendants' cigarettes containing nicotine was a legal cause of her death amounts to negligence."). So, in any individual case, claims for strict liability and negligence turn

entirely on characteristics inherent in all cigarettes—that they are addictive and cause disease. They do not, and cannot, turn on theories of defect or negligence limited to specific brands or types of cigarettes, which federal law would not impliedly preempt.

Mr. Marotta argued his case in just this fashion, by repeatedly highlighting the inherent risks of all cigarettes. For example, during opening statements, his counsel emphasized that "smoking can cause cancer of the lung and other diseases." T.5:447; *accord*, *e.g.*, T.5:451 ("smoking contains about 70 cancer-causing agents in smoke"); T.5:452 ("the constituents in smoke caused cancer"); T.5:457 ("[I]n 1964 … the Surgeon General comes out with a report linking smoking to lung cancer in men."). Later, Mr. Marotta offered expert testimony about the addictiveness and carcinogenicity of cigarettes in general—without reference to any distinctive features in the particular brands or types of cigarettes smoked by his father. *See*, *e.g.*, T.9:1018 (Surgeon General's conclusion "that cigarettes and other forms of tobacco are addicting"); T.9:1022 (Surgeon General's conclusions regarding "the dangers of secondhand smoke" and "nicotine addiction"); T.9:1043 ("the truth about the health effects of smoking and the addictive nature in nicotine"). At times, Mr. Marotta suggested that filters do not make cigarettes any safer, *see* T.5:452, 459–60; T.19:2641–43, but he did not argue that filtered cigarettes are

more dangerous than unfiltered cigarettes, and his own expert testified that "[t]here's no difference between a filter and no filter." T.10:1296.

As conceived in *Douglas* and as argued here, the strict-liability and negligence claims are impliedly preempted.[7]

2. Alternatively, Reynolds is entitled to a new trial

Because, under the claim-preclusion rationale of *Douglas*, the *Engle* defect and negligence findings necessarily result in the imposition of tort liability for the sale of ordinary cigarettes, the implied-preemption violation is not curable through jury instructions, and the proper remedy is thus entry of judgment for Reynolds. If, however, this Court wishes to mitigate the implied-preemption problem by retreating from *Douglas*, and holding that the defect and negligence findings can some-

[7] In the Fourth District, Mr. Marotta argued that the *Engle* defect finding rests on the theory that all cigarettes sold by the defendants are defective, because those particular companies manipulated nicotine levels so as to make their own cigarettes more addictive than others. However, under the claim-preclusion rationale of *Douglas*, the defect finding establishes more broadly that "the *Engle* defendants' cigarettes were defective because they are addictive and cause disease." 110 So. 3d at 423. Under that theory of defect, there is no conceivable basis for distinguishing cigarettes sold by the *Engle* defendants from cigarettes sold by any other cigarette manufacturer. Moreover, as the *Engle* trial court explained, the class's allegations of nicotine manipulation did *not* encompass *all* cigarettes, but rather varied from brand-to-brand and from time-to-time. *See Engle v. R.J. Reynolds Tobacco Co.*, No. 94-08273-CA-22, 2000 WL 33534572, at *2 (Fla. Cir. Ct. Nov. 6, 2000) (summarizing evidence "[t]hat levels of nicotine were manipulated, sometime by utilization of ammonia . . . and sometime by using a higher nicotine content tobacco called Y-1, and by other means such as manipulation of the levels of tar and nicotine"). Thus, there is no legal or factual basis for Mr. Marotta's attempt to reverse-engineer a theory of defect that applies to all cigarettes sold by the *Engle* defendants, but not to other cigarettes.

how be used to establish a theory of defect and negligence that does *not* encompass all cigarettes, Reynolds still would be entitled to a new trial. At a minimum, the Phase I defect and negligence findings *might* rest on the theory that all cigarettes are defective "because they are addictive and cause disease." *Douglas*, 110 So. 3d at 423. And here, the jury was not only permitted, but indeed was affirmatively compelled, to impose liability on that basis.

Reynolds sought an instruction to mitigate that problem in this case, and the trial court committed reversible error in refusing to give it. A trial court's refusal to give a requested instruction is reviewed for abuse of discretion. *See*, *e.g.*, *Langston v. State*, 789 So. 2d 1024, 1026 (Fla. 1st DCA 2001). Nonetheless, a trial court "is required to instruct the jury regarding the law applicable to the facts in evidence and the law of the case." *Wransky v. Dalfo*, 801 So. 2d 239, 243 (Fla. 4th DCA 2001) (citation omitted). The failure to give requested instructions is thus reversible error if the "'instructions contained an accurate statement of the law, … the facts in the case supported a giving of the instructions, and … the instructions were necessary for the jury to properly resolve the issues.'" *Brown Distrib. Co. v. Marcell*, 890 So. 2d 1227, 1232 (Fla. 4th DCA 2005) (citation omitted); *see also R.J. Reynolds Tobacco Co. v. Jewett*, 106 So. 3d 465, 469 (Fla. 1st DCA 2012).

Each of these elements is satisfied here. *First*, Reynolds's proposed instruction correctly stated the law. The instruction would have informed the jury that a

defendant "cannot be liable merely for manufacturing, selling, or advertising cigarettes." *See* R.48:9384; *see also* T.19:2550–51, 2555–91. As explained above, the instruction reflects well-settled federal preemption law. *Second*, the facts of this case supported giving the instruction. The jury here was instructed only that, according to the *Engle* jury, Reynolds "placed cigarettes on the market that were defective and unreasonably dangerous." T.19:2565. Without further elaboration, the jury could readily have understood the *Engle* defect finding as applying to all cigarettes based on their inherent product risks. *Third*, the instruction was necessary to ensure that the jury did not impose liability on that impermissible basis. Given the unelaborated instruction that Reynolds sold defective cigarettes, and Mr. Marotta's evidence and argument attacking the inherent risks of all cigarettes, the jury could readily have concluded that the underlying defect *was* the inherent health and addiction risks of all cigarettes.

In the Fourth District, Mr. Marotta argued that the trial court did well enough by instructing the jury that "[t]he manufacture, advertisement and sale of cigarettes are lawful activities." T.19:2580. However, the trial court refused to finish the thought by explaining that, because these are lawful activities, "Reynolds *cannot be held liable* merely for manufacturing, selling, or advertising cigarettes." R.48:9384 (emphasis added). This lay jury, steeped in neither the principles of implied preemption nor the details of tobacco-specific federal statutes, could have

easily—and erroneously—concluded that it would be permissible to impose tort liability for the lawful activity of selling a dangerous product. After all, dissenting justices have advocated that position from time-to-time, albeit unsuccessfully. *See*, *e.g.*, *Bartlett*, 133 S. Ct. at 2489 (Sotomayor, J., dissenting). Because "the jury might reasonably have been misled" by the trial court's refusal to instruct that it could not impose liability based on the inherent health and addiction risks of all cigarettes, a new trial is necessary. *Jewett*, 106 So. 3d at 469.[8]

II. MR. MAROTTA'S USE OF THE *ENGLE* DEFECT FINDING IN THIS CASE VIOLATED DUE PROCESS

The trial court erred in allowing Mr. Marotta to use the Phase I findings to establish the defect element of his claims. That finding could rest on theories that simply do not apply to this case. For example, it could rest on the theory that *unfiltered* cigarettes should have had filters, in which case the finding would have no possible application to Mr. Marotta's father, who smoked only *filtered* cigarettes. *See* T.14:1867, 1898. Under these circumstances, use of an ambiguous jury finding—to preclude litigation of an element of liability that the prior jury may or may not have actually decided for the plaintiff—would violate due process. *See*, *e.g.*,

[8] The same instruction is necessary under *Douglas*. That decision prevents progeny juries from deciding any question of defect or negligence, *see* 110 So. 3d at 432–33, but does not prevent them from deciding comparative fault and punitive damages. As to the latter issues, federal law impliedly preempts the imposition of increased damages based on the inherent health and addiction risks of all cigarettes, just as it impliedly preempts the imposition of liability on the same basis.

Graham, 782 F.3d at 1273, 1280; *Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904).

We recognize that this Court rejected that argument in *Douglas*. However, subsequent decisions have cast doubt on the soundness of its claim-preclusion rationale, which one Eleventh Circuit panel described as "unorthodox and inconsistent with the federal common law," *Walker*, 734 F.3d at 1289, and which another Eleventh Circuit panel described as raising significant "due process concerns," *Graham*, 782 F.3d at 1272. Moreover, as is now clear, in the context of *Engle*-progeny litigation, due process and implied preemption present opposite sides of the same coin: either the defect and negligence findings from Phase I ascertainably rest on the theory that all cigarettes are defective "because they are addictive and cause disease" (*Douglas*, 110 So. 3d at 423), in which case the implied-preemption problem is insurmountable, or they do not, in which case the due-process problem is insurmountable. For all of these reasons, the Court should use the implied-preemption ramifications of its due-process decision as an occasion not only to consider implied preemption in isolation, but also as an occasion to consider both issues together—just as the Eleventh Circuit is now doing in *Graham*.

CONCLUSION

The judgment of the Fourth District should be reversed with directions for the trial court to enter judgment in favor of Reynolds. Alternatively, the case should be remanded for a new trial on Mr. Marotta's strict-liability claim.

Respectfully submitted,

/s/ Eric L. Lundt

Eric L. Lundt
Florida Bar No. 0861715
eric.lundt@sedgwicklaw.com
Robert C. Weill
Florida Bar No. 009962
robert.weill@sedgwicklaw.com
david.saltares@sedgwicklaw.com (secondary)
SEDGWICK LLP
2400 E. Commercial Blvd., Suite 1100
Fort Lauderdale, FL 33308
Phone: (954) 958-2500
Fax: (877) 541-2740

Gregory G. Katsas
Florida Bar No. 89091
ggkatsas@jonesday.com
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
Phone: (202) 879-3939
Fax: (202) 626-1700

Charles R.A. Morse
Florida Bar No. 0091561
cramorse@jonesday.com
preichert@jonesday.com (secondary)
JONES DAY
222 East 41st Street
New York, NY 10017-6702
Phone: (212) 326-3939
Fax: (212) 755-7306

Counsel for Petitioner
R.J. Reynolds Tobacco Company

CERTIFICATE OF SERVICE

I certify that on April 27, 2016, this brief was e-filed with the Court and a copy was e-mailed to:

Richard B. Rosenthal, Esq.
Richard B. Rosenthal, P.A
169 East Flagler Street, Suite 1422
Miami, FL 33131
rbr@rosenthalappeals.com
Counsel for Respondent

Randy Rosenblum, Esq.
Philip Freidin, Esq.
Freidin Dobrinsky Brown & Rosenblum, P.A.
One Biscayne Tower, Suite 3100
2 South Biscayne Blvd.
Miami, FL 33131
rrosenblum@fdlaw.net
ssorrentino@fdlaw.net (secondary)
pfreidin@fdlaw.net
Counsel for Respondent

Robert E. Schack, Esq.
Law Office of Robert E. Schack, P.A.
9155 S. Dadeland Blvd., Suite 1412
Miami, FL 33156
reslegal@hotmail.com
iestevez4@hotmail.com (secondary)
Counsel for Respondent

Lora Damiani, Esq.
Lora Damiani, P.A.
c/o Law Office of Robert E. Schack P.A.
9155 S. Dadeland Blvd., Suite 1412
Miami, FL 33156
loradlaw@att.net
Counsel for Respondent

Alex Alvarez, Esq.
The Alvarez Law Firm
355 Palermo Avenue
Coral Gables, FL 33134
alex@integrityforjustice.com
Counsel for Respondent

/s/ Eric L. Lundt
Counsel for Petitioner R.J. Reynolds Tobacco Company

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), counsel for Petitioner hereby certifies that the foregoing brief complies with the applicable font requirements because it is written in 14-point Times New Roman font.

DATED: April 27, 2016

/s/ Eric L. Lundt
Counsel for Petitioner R.J. Reynolds Tobacco Company