No. 17-415

IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY AND PHILIP MORRIS USA INC.,

Petitioners,

v.

TERESA GRAHAM, as personal representative of Faye Dale Graham.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This *amicus curiae* brief addresses the following question only:

If the *Engle* jury's findings are deemed to establish that all cigarettes are inherently defective, are claims based on those findings preempted by the many federal statutes that manifest Congress's intent that cigarettes continue to be lawfully sold in the United States?

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INTEREST OF *AMICUS CURIAE*[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting free enterprise, individual rights, limited government, and the rule of law. To that end, WLF has regularly appeared as *amicus curiae* before this Court in cases raising federal preemption issues to emphasize the many inefficiencies that result when liability under state tort law threatens the predictability and uniformity provided by federal regulatory schemes. *See, e.g.*, *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015); *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013); *Bruesewitz v. Wyeth*, 562 U.S. 223 (2011).

WLF is troubled by the willingness of federal courts to ratify the Florida Supreme Court's deeply misguided ruling in *Engle*, which jettisoned longstanding substantive and procedural protections in order to facilitate the resolution of a large number of similar claims against unpopular defendants. The Eleventh Circuit's *en banc* decision below is now the latest—and starkest—example of that disturbing trend. Not only does the appeals court's decision

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[1] Pursuant to Supreme Court Rule 37.6, 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. Pursuant to Supreme Court Rule 37.2(a), more than 10 days prior to the due date for this brief, counsel for WLF notified counsel of record for all parties of WLF's intention to file. All parties have filed with the Clerk blanket consents to the filing of *amicus curiae* briefs.

effectively bar petitioners from being able to meaningfully contest every element of liability, but—by holding that *Engle*-progeny plaintiffs may rely on the *Engle* findings to impose massive liability on petitioners merely for manufacturing and selling cigarettes—it stands athwart Congress's clear intention that cigarettes lawfully remain on the market.

STATEMENT OF THE CASE

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

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 a verdict form to the jury that did not require it 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 liability under eight different theories, including strict product liability and negligence. But those generic findings did not specify which of the *Engle* plaintiffs' distinct factual allegations the jury 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 juries 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. The court 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 that "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, an Eleventh Circuit panel concluded that the *Engle* Phase I findings should be given preclusive effect in later cases *only* if the plaintiff could establish that

the Phase I jury "actually decided" that the defendant tobacco company acted wrongfully based on the plaintiff's particular smoking history. 161 F.3d 1324, 1334 (11th Cir. 2010).

In 2013, the Florida Supreme Court finally revisited *Engle*, agreeing to answer a certified question on whether "accepting as res judicata" the Engle Phase I jury findings violated the tobacco defendants' 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 law by announcing 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. In other words, 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. Among those substantive elements were "that the *Engle* defendants' cigarettes were defective because they are addictive and cause disease." *Id.* at 423.

In light of *Douglas*, another Eleventh Circuit panel 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, *Walker* 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 had determined that the *Engle* Phase I jury actually found that *every* brand of cigarette manufactured by *every Engle* defendant during *every* one of the nearly 50 years at issue was wrongfully marketed. *Id.* at 1289. Without opining on whether it actually agreed with the Florida Supreme Court's determination, the *Walker* 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 decision in this case attempted to resolve the important conflict-preemption implications that followed 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." Pet. App. 331. 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 332. 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 348.

That saving 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." Pet. App. 279. Yet, according to *Walker*, 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 358. 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 348.

At respondent's urging, the Eleventh Circuit granted *en banc* review, vacating the panel opinion. Pet. App. 17. In affirming the judgments below, the *en banc* Eleventh Circuit explicitly deferred to the Florida Supreme Court's supposed conclusion in *Douglas* "that all cigarettes the defendants placed on the market were defective and unreasonably dangerous," Pet. App. 20. Nonetheless, the *en banc* court rejected petitioner's preemption argument because it could "discern no 'clear and manifest purpose' to displace tort liability based on the dangerousness of all cigarettes manufactured by the tobacco companies." *Id*. at 41.

In his exhaustive 227-page dissent, Judge Tjoflat suggested that the *Engle* saga is best understood as "a state law enacted by the Florida

Supreme Court" that applies an "irrebuttable presumption of liability" to "the unique detriment of a single group of unpopular defendants." Pet. App. 261. That law, he explained, which "deems all cigarettes defective, unreasonably dangerous, and negligently produced," *id.* at 285, operates as a functional ban on cigarettes, which is preempted by federal law. Because all federal regulation of tobacco is premised on consumers' ability to purchase cigarettes, and because Florida has imposed a legal duty not to sell cigarettes contrary to federal law, Judge Tjoflat "urge[d] the Supreme Court to clarify the hazy state of preemption law." *Id.* at 285-86.

SUMMARY OF ARGUMENT

This case presents an issue of exceptional importance. WLF believes that individual freedom and the American economy both suffer when state law—including state tort law—imposes on an industry additional, prohibitive duties that are in serious conflict with the objectives of federal law. Such conflicting state law duties not only frustrate the operation of specific federal regulatory regimes, but they also interfere with the explicit aims of Congress.

In its attempt to avoid *Engle*'s myriad due process deficiencies, the *en banc* Eleventh Circuit held that *Engle*'s preclusive findings are bottomed on the lowest common denominator established at trial: "that the defendants produced, and the plaintiffs smoked, cigarettes containing nicotine that are addictive and cause disease." Pet. App. 348. But that conclusion—even if it were actually true—unavoidably rushes headlong into the Supremacy

Clause, because federal law impliedly preempts the states from imposing liability based on nothing more than the inherent health and addiction risks of all cigarettes. After all, 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).

Under this Court's preemption precedents, even when a state purports to be acting within its acknowledged sphere of power, its laws are preempted if they stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). Because *Engle*'s judicially created preclusion doctrine—now ratified by the *en banc* Eleventh Circuit in a decision that rests on the assumption that the *Engle* jury found all cigarettes to be inherently defective—imposes a functional ban on manufacturing and selling cigarettes in contravention of congressional policy, the decision below creates an unavoidable implied-preemption problem and warrants further review.

As Judge Tjoflat recognized in his exhaustive dissent, "we cannot give effect to the Florida Supreme Court's decisions in a manner that operates as a ban on the sale of cigarettes without elevating state law over federal law, which the Supremacy Clause forbids." Pet. App. 286. As a result, the interests of fairness, predictability, and the rule of law were all injured in this case. WLF joins with petitioners in urging certiorari.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT BETWEEN THE HOLDING BELOW AND THIS COURT'S DECISION IN *FDA v. BROWN & WILLIAMSON*

State tort law—like all state law—is subject to the restrictions imposed by the Supremacy Clause of the U.S. Constitution. *See* U.S. Const. art. VI, cl. 2 (establishing that the "Constitution" and the "Laws of the United States" are "the Supreme law of the Land"). Under this Court's longstanding preemption jurisprudence, courts "must not give effect to state laws that conflict with federal laws." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015). Because the Eleventh Circuit *en banc* majority's application of *Engle*'s preclusion rule effectively operates as a ban on cigarettes, it stands as an obstacle to federal law, frustrates the policy objectives of Congress, and so is impliedly preempted. Review is thus necessary to resolve the obvious intractable conflict between the decision below and this Court's own preemption case law.

A. *Brown & Williamson* Makes Clear That Imposing Liability Solely for the Marketing or Sale of Cigarettes Contravenes Federal Policy

Whether a state law or rule is preempted by federal law turns on the intent of Congress, which is the "ultimate touchstone." *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992). In assessing the extent to which state law "stands as an obstacle to the accomplishment and execution of the full purposes

and objectives of Congress," *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2013), this Court's preemption rulings begin "by examining the federal statute[s] as a whole and identifying [their] purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000). As for identifying the "purpose and intended effects" of federal tobacco policy as embodied in federal law, this Court has already undertaken such an examination.

In *FDA v. Brown & Williamson Tobacco Corp.*, the Court considered whether the Food and Drug Administration's (FDA) statutory authority to regulate "drugs" and "devices" under the Food, Drug, and Cosmetic Act (FDCA) gave the agency regulatory jurisdiction over tobacco products. The Court began by acknowledging Congress's view that "[t]he marketing of tobacco constitutes one of the greatest 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." 529 U.S. at 137 (quoting 7 U.S.C. § 1311(a)). The Court went on to explain that "this is not a case of simple inaction by Congress * * * [.] To the contrary, Congress has enacted several statutes addressing the particular subject of tobacco and health, creating a distinct regulatory regime for cigarettes." *Id.* at 155.

After carefully reviewing "six separate pieces" of "tobacco-specific legislation" enacted by Congress

over the preceding half-century,[2] the Court held that FDA lacked jurisdiction over tobacco because the agency's own regulations would require it to ban cigarettes, which would defeat the will of Congress. *Brown & Williamson*, 529 U.S. at 143-56. The Court explained that there "are no directions that could make tobacco products safe for obtaining their intended effects" under the FDCA's regulatory scheme. *Id.* at 135-36.

Although Congress was well aware of the known health dangers[3] of smoking cigarettes when it enacted an array of laws from 1965 to 1992 to regulate the marketing, labeling, and sale of tobacco, Congress always "stopped well short of ordering a ban" on cigarettes. *Id.* at 138. Instead, the Court concluded, "the collective premise of these statutes is that cigarettes and smokeless tobacco products will

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[2] *See* Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92 (July 27, 1965), 79 Stat. 282; Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222 (Apr. 1, 1970), 84 Stat. 87; Alcohol and Drug Abuse Amendments of 1983, Pub. L. No. 98-24 (Apr. 26, 1983), 97 Stat. 175; Comprehensive Smoking Education Act, Pub. L. No. 98-474 (Oct. 12, 1984), 98 Stat. 2200; Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252 (Feb. 27, 1986), 100 Stat. 30; Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub. L. No. 102-321, § 202 (July 10, 1992), 106 Stat. 394.

[3] In a highly publicized 1964 report, for example, the U.S. Surgeon General announced that "cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate." Advisory Comm. to the Surgeon Gen. of the Public Health Serv., U.S. Dep't of Health, Educ., & Welfare, *Smoking and Health* 33 (1964).

continue to be sold in the United States." *Id.* at 139. Because Congress's regulatory scheme "foreclosed the removal of tobacco products from the market," *id.* at 137, *Brown & Williamson* held that "[a] ban of tobacco products * * * would therefore plainly contradict Congressional policy." *Id.* at 138-39.

Despite ultimately granting FDA the authority to regulate cigarettes in 2009, Congress has never renounced its long stated policy that cigarettes—despite their harmful or addictive properties—shall continue to be sold and that consumers shall continue to enjoy a "right to choose to smoke or not to smoke." H.R. Rep. No. 89-449 (1965).

Since *Brown & Williamson*, this Court has reaffirmed in a related context that Congress's goal in federal tobacco policy is to ensure that "a State could not do through negative mandate (*e.g.*, banning all cigarette advertising) that which it already was forbidden to do through positive mandate (*e.g.*, mandating particular cautionary statements)." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 549 (2001) (quoting *Cipollone*, 505 U.S. at 539 (Blackmun, J., joined by Kennedy and Souter, JJ., concurring in part and dissenting in part)). *Lorillard* overturned on federal preemption grounds a Massachusetts regulation that "would upset federal legislative choices * * * in order to address concerns about smoking and health." *Id.* at 551. As *Lorillard* explained, that "type of regulation, which is inevitably motivated by concerns about smoking and health, squarely contradicts [federal law]." *Id.* at 550.

In striking a carefully calibrated balance among several competing policy interests, Congress has sent an unmistakable message that the myriad federal regulatory measures it has adopted provide the appropriate level of controls over cigarette manufacturers—all while simultaneously ensuring that cigarettes will remain available on the market. It follows that any state law that imposes liability on tobacco companies simply for manufacturing and selling cigarettes is impliedly preempted by federal law because it stands as an obstacle to the objectives of Congress. Here, by holding that the original *Engle* findings are broad enough to impose liability on *all* brands and types of cigarettes, the Eleventh Circuit has ratified just such a theory of liability.

B. Because Florida's Common-Law Liability Regime Operates as a Functional Ban on Cigarettes, It Stands as an Obstacle to the Aims of Congress

The Eleventh Circuit *en banc* majority conceded that its construction of the *Engle* verdict recognized "state tort claims based on the dangerousness of all the cigarettes manufactured by the tobacco companies." Pet. App. 30. But as *Brown & Williamson* makes clear, federal law not only specifically allows for the manufacture and sale of cigarettes, but it also "foreclose[s] the removal of tobacco products from the market." *Brown & Williamson*, 529 U.S. at 137. Consistent with that congressional policy determination, petitioners cannot be held liable under state tort law merely for manufacturing and selling cigarettes. To hold otherwise by recognizing a tort-based duty *not* to sell

cigarettes, as the Eleventh Circuit did here, is to erect "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier*, 529 U.S. at 873-74 (holding that permitting state court juries to find car manufacturers liable for failing to install air bags would create an irreconcilable conflict with federal regulation giving consumers the choice to purchase cars without air bags).

In its attempt to avoid *Engle*'s myriad due process deficiencies, the *en banc* Eleventh Circuit held that *Engle*'s preclusive findings were bottomed on the lowest common denominator established at trial: "that the defendants produced, and the plaintiffs smoked, cigarettes containing nicotine that are addictive and cause disease." Pet. App. 348. But if, as the Eleventh Circuit insists, Mr. Graham's strict-liability and negligence claims were satisfied solely by virtue of the generic defect and negligence findings from the original *Engle* verdict, then petitioners' liability unquestionably rests on a theory that *all* cigarettes are defective. And if all cigarettes are defective, then the sale of *any* cigarette is per se negligent, given the inherent health and addiction risks of all cigarettes.

Under *Engle*'s rarefied theory of liability, then, every cigarette that causes injury gives rise to "common-law liability," just as every cigarette sold by petitioners breaches some "state-law obligation." *Cf. Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008). Even though the common-law remedy is limited to damages, such "a liability award 'can be, indeed, is designed to be, a potent method of governing conduct and controlling policy.'" *Id.*

(quoting *Cipollone*, 505 U.S. at 521). Stated differently, a state-law duty that is breached every time a cigarette is sold constitutes a duty *not* to sell cigarettes. Such a duty cannot be squared with a clear congressional intent that cigarettes "will continue to be sold in the United States." *Brown & Williamson*, 529 U.S. at 139.[4]

Although the *en banc* majority acknowledged that its construction of the *Engle* verdict was tantamount to a finding that all cigarettes are inherently defective, it rejected the panel's preemption finding. Instead, it concluded that federal law merely requires uniform labeling for tobacco and does not preclude "more stringent regulation generally," including state tort law that is equivalent to a ban on cigarette sales. Pet. App. 33. But that conclusion flies in the face of this Court's repeated admonitions in *Lorillard* and *Cipollone* that federal tobacco policy seeks to ensure that "a State could not do through negative mandate * * * that which it already was forbidden to do through

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[4] While it is sometimes true that a defendant may honor conflicting state and federal regulatory regimes by ceasing operations altogether, this Court has held that an implied preemption claim cannot be defeated simply because a tort defendant could "avoid liability" by "paying the state penalty" or "ceas[ing] to act altogether." *Bartlett*, 133 S. Ct. at 2476 ("Our pre-emption cases presume that an actor seeking to satisfy both his federal and state-law obligations is not required to cease acting altogether in order to avoid liability."); *see also Geier*, 529 U.S. at 882 ("This Court's pre-emption cases assume compliance with the state law duty in question, and do not turn on such compliance-related questions as whether a private party would ignore state legal obligations.").

positive mandate." *Lorillard*, 533 U.S. at 549 (quoting *Cipollone*, 505 U.S. at 539 (Blackmun, J., joined by Kennedy and Souter, JJ., concurring in part and dissenting in part)). Indeed, common-law tort duties always amount to "affirmative *requirements* or negative *prohibitions*." *Cipollone*, 505 U.S. at 522 (plurality opinion) (rejecting plaintiff's argument that federal law's pre-emptive scope is limited "to positive enactments by legislatures and agencies").

As Judge Tjoflat concluded in his trenchant dissent, "having surveyed both federal and state law, it is clear that Congress would have intended to preempt Graham's strict-liability and negligence claims, rooted as they are in a broadly applicable state law set forth by the Florida Supreme Court that deems all cigarettes defective, unreasonably dangerous, and negligently produced." Pet. App. 285.

II. REVIEW IS WARRANTED BECAUSE THE ELEVENTH CIRCUIT'S PREEMPTION RULING CONFLICTS WITH DECISIONS OF NUMEROUS OTHER FEDERAL COURTS

Given the *sui generis* nature of post-*Engle* Florida law, the Eleventh Circuit stands alone among federal courts of appeals to have considered the questions presented by the petition. Yet when confronted with nearly identical common-law claims that seek to impose state tort liability on the theory that *all* cigarettes are inherently defective or that *every* cigarette sale is an inherently negligent act, federal district courts throughout the country have found those claims to be preempted. None of those decisions can be squared with the flawed holding of

the Eleventh Circuit's *en banc* majority.

In *Johnson ex rel. Estate of Johnson v. Brown & Williamson Tobacco Corp.*, 345 F. Supp. 2d 16 (D. Mass. 2004), for example, the executor of the decedent's estate sought to hold the defendant strictly liable for defectively designing cigarettes smoked by the decedent. In granting summary judgment for the defendant, the court explained that a product is defective "only where the product [is sold] in a condition not contemplated by the ultimate consumer." 345 F. Supp. 2d at 21 (quoting Rest. (Second) of Torts, § 402A, cmt. g). More importantly, the court explained that "cigarettes, although cancer causing, cannot be ruled generally defective based upon the dangers of smoking" because "[d]oing so would impermissibly override the congressional decision to allow their continued sale." *Id.* (citing *Brown & Williamson* and *Lorillard*). "To sanction such a claim," the court held, "would be tantamount to imposing the categorical liability that courts have declined to impose." *Id.*

In *Insolia v. Philip Morris Inc.*, 128 F. Supp. 2d 1220 (W.D. Wis. 2000), the court revisited its earlier dismissal of an ordinary negligence claim against a cigarette manufacturer for "continued sales of a product recognized as dangerous." 128 F. Supp. 2d at 1223. Relying on *Geier*, the court explained that "[i]f Congress gives express sanction to an activity, the states cannot declare that activity tortious." *Id.* at 1224. It then went on to apply that rule to the case at hand:

> Just as it would have interfered with the federal government's policy on air

> bags to allow state tort actions against automobile manufacturers who relied on the safety standard to omit air bags from their vehicles, allowing tort actions against cigarette manufacturers and sellers for the allegedly negligent act of continuing to make and sell cigarettes would interfere with Congress's policy in favor of keeping cigarettes on the market.

Id. at 1224-25. Therefore, the court concluded, permitting a "claim of negligence for otherwise faultless sale or manufacture" of cigarettes "would run afoul of the congressional policy that the sale of cigarettes is legal." *Id.* (citing *Brown & Williamson*).

Similarly, in *De Jesus Rivera v. R.J. Reynolds Tobacco Co.*, 368 F. Supp. 2d 148 (D.P.R. 2005), plaintiffs brought a products liability suit alleging that the defendant "negligently manufactured and marketed an inherently dangerous product." 368 F. Supp. 2d at 155. Relying in part on *Brown & Williamson*, the district court explained that "Congress has foreclosed the removal of tobacco products from the market." *Id.* Accordingly, the court reasoned, "[a]llowing tort actions against cigarette manufacturers and sellers for the allegedly negligent act of continuing to make and sell cigarettes would interfere with Congress' policy in favor of keeping cigarettes on the market." *Id.* at 154 (quoting *Cruz Vargas v. R.J. Reynolds Tobacco Co.*, 218 F. Supp. 2d 109, 118 (D.P.R. 2002) (internal quotations omitted)). Granting summary judgment to the defendant, the court held that "[d]efendants cannot

be liable under Puerto Rico law for manufacturing and selling cigarettes." *Id.*

In *Gault v. Brown & Williamson Tobacco Corp.*, No. 02-CV-1849-RLV, 2005 WL 6523483, *5-*8 (N.D. Ga. Mar. 31, 2005), the plaintiffs brought negligence and design defect claims against the defendant for "designing, manufacturing, selling, and promoting cigarettes which it knew or should have known contained dangerous substances likely to cause injury and death and which had addictive and habit-forming characteristics." *Id.* at *7. In evaluating whether a negligence claim seeking to hold the defendant liable for simply manufacturing and distributing cigarettes was impliedly preempted, the district court reasoned:

> 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.

Id. The court went on to conclude that either way, "each of these pathways leads to the same inevitable

result—cigarettes being removed from the market." *Id.*

But that result, the court aptly recognized, "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.* Extending the same reasoning to the plaintiff's design defect claim, the court held: "It would be in conflict with Congress's decision to keep tobacco products on the market for this court to now hold [the defendant] liable for designing a product that contains and delivers tobacco and nicotine to the body." *Id; see also Cassady v. R.J. Reynolds Tobacco Co.*, No. CV 313-092, 2014 WL 5410220, *5 (S.D. Ga. Oct. 23, 2014) ("In short, these and similar allegations of product liability are nothing more than Plaintiff seeking to hold Defendants liable simply because they sold a dangerous and addictive product on the market—a claim that is impliedly preempted.").

And in *Jeter ex rel. Estate of Smith v. Brown & Williamson Tobacco Corp.*, 295 F. Supp. 2d 681 (W.D. Pa. 2003), the executor of the decedent's estate brought negligence and strict liability claims against the defendant on the theory that "cigarettes are 'unreasonably dangerous' because they contain carcinogens and nicotine." 295 F. Supp. 2d at 685. Granting summary judgment for the defendant on those claims, the district court explained that Congress, "[i]n response to the health risks of smoking cigarettes," has chosen "to regulate the sale of cigarettes instead of completely banning them." *Id.* Relying on this Court's decisions in *Geier* and

Brown & Williamson, the court held that the plaintiff's "claims are impliedly preempted because, if allowed to stand, it would essentially render selling or manufacturing a cigarette to be a tort, thereby interfering with 'Congress's policy in favor of keeping cigarettes on the market.'" *Id.* (quoting *Insolia*, 128 F. Supp. 2d at 1224-25).

By faithfully applying this Court's preemption precedents in light of *Brown & Williamson* and *Lorillard*, these courts have demonstrated their commitment to respecting the broad preemptive sweep of federal tobacco law. The Eleventh Circuit, in contrast, did not meaningfully grapple with the preemption implications of its broad construction of the *Engle* findings. Its *en banc* decision allows cigarette manufacturers to honor federal law only to the extent that doing so does not conflict with Florida tort law. But that gets preemption exactly backwards: the "Constitution" and the "Laws of the United States" are "the Supreme law of the Land." U.S. Const. art. VI, cl. 2.

III. REVIEW IS WARRANTED BECAUSE THE ELEVENTH CIRCUIT'S HOLDING IS INCONSISTENT WITH THE FLORIDA SUPREME COURT'S OWN DECISION IN *MAROTTA*

At the same time the Eleventh Circuit failed to seriously grapple with the preemption problem that it created in *Walker*, it sidestepped the Florida Supreme Court's own decision in *R.J. Reynolds Tobacco Co. v. Marotta*, 215 So. 3d 590 (Fla. 2017), which rejected the *Walker* panel's broad saving construction of the *Engle* jury's findings (*i.e.*, that all cigarettes are "addictive and cause disease"). WLF

respectfully suggests that the Eleventh Circuit's inability to harmonize its holding with *Marotta* only serves to increase the cert-worthiness of this case.

After the *en banc* Eleventh Circuit heard oral argument in this case, but before it issued its opinion, the Florida Supreme Court issued its opinion in *R.J. Reynolds Tobacco Co. v. Marotta.* The court rejected the Eleventh Circuit's premise in *Walker*—that *Engle*'s liability findings rested solely on a theory that all cigarettes are defective. Though acknowledging that the *Engle* jury heard evidence about "the inherent dangers of all cigarettes," *Marotta* suggested that the jury *could have* based liability on a narrower theory, including "that the defendants intentionally manipulated the nicotine levels in their products." 214 So. 3d at 601-02. Thus, the Florida Supreme Court concluded that using the *Engle* findings to impose liability posed no conflict with federal law. *Id.* In the alternative, the court held that federal law does not preempt state tort claims based on the inherent defects of all cigarettes. *Id.* at 600-01.

While the Eleventh Circuit's decision in this case echoed *Marotta*'s no-preemption holding, it rejected without explanation a central premise on which that decision relied. Whereas *Marotta* held that the *Engle* jury "could have" based liability on a narrow theory, the Eleventh Circuit doubled down on its saving construction that the *Engle* verdict recognized "state tort claims based on the dangerousness of all the cigarettes manufactured by the tobacco companies." Pet. App. 30. Yet, despite all its emphasis on giving full faith and credit to state court decisions, the appeals court never attempted to

harmonize its conclusion with the Florida Supreme Court's contrary holding in *Marotta*.

The Eleventh Circuit cannot have it both ways. That is, the court cannot simultaneously insist that the *Engle* jury's findings must be given a broad preclusive effect (to avoid the due process problem that it is impossible to ascertain what liability issues the *Engle* jury actually decided), while simultaneously insisting that such sweeping preclusion poses no preemption problem under federal law. In other words, the *Engle* jury's findings either have a discernable meaning or they do not. They cannot mean whatever the Eleventh Circuit (or the Florida Supreme Court) deems they mean at any given time merely to avoid the latest constitutional infirmity raised in this litigation.

* * *

In sum, the purported basis for the *en banc* court's due-process saving construction of the *Engle* findings simply cannot be squared with this Court's longstanding preemption doctrine. Nor can it be squared with the Florida Supreme Court's latest word on what the *Engle* jury actually decided.

In light of the thousands of pending *Engle* progeny suits seeking many millions of dollars in judgments, the intractable preemption problems raised by the petition are not going away. *See Philip Morris USA, Inc. v. Lourie*, No. 17-401 (pet. pending); *Philip Morris USA, Inc. v. Naugle*, No. 17-400 (same). Only this Court—by granting the petition—can rescue Congress's policymaking prerogatives from usurpation by Florida state court judges and juries.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court grant the petition.

Respectfully submitted,

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