No. 06-1545

In The

Supreme Court of the United States

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

Petitioners,

v.

HOWARD A. ENGLE, M.D., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. Should the Court exercise certiorari jurisdiction to determine the preclusionary effect of *Engle* findings in putative class members' cases that have not been adjudicated or even filed?

2. Should the Court exercise certiorari jurisdiction to determine federal preemption issues that cannot change the outcome of the case where the class representatives' judgments are supported by specific jury findings of pre-July 1, 1969 negligence, and where the Court will need to examine the two-year evidentiary record to determine issues that were not adequately presented or preserved in the Florida Supreme Court?

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INTRODUCTION

Petitioners, the domestic tobacco industry, arrive from the Florida Supreme Court after successfully challenging the class-wide punitive damages judgment and the compensatory damages judgment of class representative Frank Amodeo. Now petitioners ask this Court to completely erase all traces of the thirteen-year Florida class action that considered the conduct of petitioners and adjudicated the compensatory damages claims of class representatives Mary Farnan and Ralph Della Vecchia, as Personal Representative of the Estate of Angie Della Vecchia. The petition urges this Court to abandon deeply rooted precedent by entertaining petitioners' future hypothetical due process claims *now* and by imposing an *absolute* preemption bar that would grant immunity to tobacco companies for their misconduct.[1]

The questions raised in the petition are not certworthy for multiple reasons. Petitioners ask the Court to intervene in future lawsuits to prohibit trial courts from using certain Phase I findings for the benefit of class members, impermissibly seeking an advisory opinion. Petitioners' due process concerns are premature and not ripe for review. *Nike, Inc. v. Kasky*, 539 U.S. 654, 658 (2003). Significantly, petitioners do *not* challenge the Florida Supreme Court's decision to give preclusive effect to the Phase I findings with respect to addiction and the generic causation of 23 diseases. Pet. at 7-8, n.3. Rather, they only challenge Phase I findings of ultimate fact as to theories of liability. Although the Florida Supreme Court has spoken on the preclusion issue at the urging of petitioners, no court has yet to apply the findings. This Court should not prejudge whether certain class-wide findings are to be given preclusive effect in future actions, none of which have been tried, and most not even filed, because it

[1] By seeking to vacate the two class representatives' judgments based on federal preemption, judgments supported in part by specific jury findings of negligence *before* July 1, 1969 (App. 200a-204a; T.50385-86), petitioners effectively demand absolute immunity from liability for their wrongdoing.

would require the "premature adjudication of novel constitutional questions." *Nike, Inc.*, 539 U.S. at 658.[2]

The only final *judgment* here is one in favor of two class representatives who recovered compensatory damages in a trial court judgment entered in November, 2000.[3] This court reviews *judgments*, not statements in opinions. *California v. Rooney*, 483 U.S. 307, 311 (1987). Where statements or discussions in an opinion raise constitutional questions, "[t]hat admonition has special force . . . for it is our settled practice to avoid the unnecessary decision of such issues." *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 734-35 (1978). Petitioners concede that no due process issues are presented by the two compensatory damages awards: "The preclusion ruling, which is the subject of the due process challenge, has no effect on those two individuals." Pet. at 1-2. Petitioners' due process assertions relate only to the preclusionary effect of certain Phase I findings in future litigation brought by potential class members. "[F]ederal courts have never been empowered to issue advisory opinions." *Pacifica Foundation*, 438 U.S. at 735. As discussed *infra* the due process issue has not been adequately preserved.

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[2] Petitioners essentially argue that there may be a due process violation *if* a class member files a lawsuit raising the same claims as in *Engle*, and *if* the class member relies in part on certain class-wide findings, and *if* the trial judge gives preclusionary effect to one or more of the findings, and *if* the class member prevails on the remaining issues, including causation, affirmative defenses and damages, and *if* the *Engle* findings played a decisive role in obtaining the verdict, and *if* judgment is entered in favor of the class member. "There are . . . too many 'ifs' in that proposition to make our review appropriate at this stage." *California v. Rooney*, 483 U.S. 307, 312-13 (1987).

[3] Petitioners suggest the "possibility" that Farnan and Della Vecchia, the two class representatives, "may elect to seek punitive damages on remand." Pet. at 1. Class representatives Farnan and Della Vecchia will not be seeking punitive damages. They are in failing health and waive any claims for punitive damages. They only seek to recover their full compensatory damage verdicts with interest pursuant to the November, 2000 final judgment that was reinstated by the Florida Supreme Court.

The decision of the Florida Supreme Court which provided petitioners full relief from the $145 billion class-wide punitive damages verdict and several class-wide findings, came after thirteen years of litigation, multiple appeals and a two-year jury trial with 157 witnesses, hardly a prototype for a denial of due process of law.

Petitioners assert that "the verdicts, both class-wide and in favor of [Farnan and Della Vecchia] ... were barred by federal preemption" (Pet. at 1), despite specific jury findings of negligence occurring *prior* to July 1, 1969 (App. 200a-204a; T.50385-86), the effective date of the preemption clause of the *Public Health Cigarette Smoking Act of 1969*, 15 U.S.C. §1334(b) ["1969 Act"]. The preemption issue is not ripe for review as to class members whose cases have not yet been adjudicated or even filed. As to Farnan and Della Vecchia, who started smoking and became addicted years before July 1, 1969, preemption does not apply, at a minimum, to the pre-1969 jury findings and claims that are not barred as a matter of law. Thus, nothing the Court can decide on the preemption question can affect the judgments of Farnan and Della Vecchia, rendering the matter clearly uncertworthy. *Coleman v. Thompson*, 501 U.S. 722, 730 (1991).

Certiorari is also inappropriate where a consideration of petitioners' evidentiary-based objections would require a fact-intensive review of the 60,000 page evidentiary record. As for petitioners' objection to the jury instruction on pre-emption in Phase I, that instruction (as well as the preemption instruction given in Phase II-A), was a proper recitation of the law. In contrast, petitioners' proposed instruction was a misstatement of preemption law. Nor have the objections been properly preserved and presented. *See Adams v. Robertson*, 520 U.S. 83, 86 (1997). Petitioners complain that the Florida Supreme Court did not address preemption (Pet. at 29), an issue petitioners relegated to a passing sentence in their fifty-page brief on the merits in the state supreme court: a sentence that did not even cite *Cipollone,*[4] the

[4] *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

principal case on which petitioners now rely. The issue was not preserved for review. *Adams,* 520 U.S. at 86; *Duest v. Dugger*, 555 So.2d 849, 851-52 (1990).

STATEMENT OF THE CASE

Petitioners' Statement contains numerous factual errors, omits essential facts, and distorts the history of this complex state class action litigation and key aspects of the decision of the Florida Supreme Court.

I. BRIEF PROCEDURAL HISTORY

The *Engle* class action was filed in May, 1994 and was certified as a nationwide class of sick smokers and their survivors. The Florida district court of appeal affirmed class certification in 1996 but limited the class to Floridians. "Although certain individual issues will have to be tried as to each class member, principally the issue of damages, the basic issues of liability common to all members of the class will clearly predominate over the individual issues." *R.J. Reynolds Tobacco Co. v. Engle*, 672 So.2d 39, 41 (Fla. 3d DCA 1996). Notice was disseminated by publication throughout Florida in 1997, informing Floridians of the litigation and the common issues trial, and providing class members with the ability to opt-out to avoid being bound by the common findings.

The class action came to trial in July, 1998 pursuant to a trifurcated trial plan providing for "common issues of liability and causation" to be tried in Phase I on behalf of the class, followed by Phase II-A, the class representatives' compensatory damages trial and Phase II-B, the class-wide punitive damages trial. Class members would then proceed (in Phase III) before different juries to determine remaining issues and compensatory damages. R.31276-80. Petitioners defended the common issues' trial, calling 25 witnesses and cross examining 61 witnesses called by the class during Phase I. T.11135-34678. The twelve-page special interrogatory verdict form included questions regarding the generic causation of 23 diseases associated with cigarette smoking, a question on addiction, and a series of questions as to ultimate

factual issues presented under each theory of liability, including differing time frames. The verdict form had over 240 questions, including subparts. App. 192a-206a. The jury, which heard Phase I evidence for close to a full year, deliberated for seven days and answered all the questions.[5]

During the Phase II-A trial, the same jury considered claims of three class representatives, Mary Farnan, Frank Amodeo and Angie Della Vecchia.[6] The Phase II-A eighteen-page single-spaced verdict form had 276 questions, including sub-parts. The jury found in favor of the class representatives on most issues, tempered by comparative fault. Farnan was awarded $2,850,000, and the statutory beneficiaries of Della Vecchia, a total of $4,023,000. T.50373-91. The trial court's Final Judgment and Omnibus Order of November, 2000 found that the jury's verdicts were based on "an enormous amount of evidence" and that "after sitting for two years in trial, it is inconceivable that this jury ignored or misconceived the evidence or the merits of the case." App. 182a.

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[5] Petitioners, citing various transcript pages, mischaracterize the Phase I *Engle* trial as "sprawling proceedings," where "respondents purported to substantiate their negligence and product defect claims by referring to scores of different cigarette types and brands marketed at different times by different manufacturers." Pet. at 15. But that evidence, which was from petitioners' agents and representatives, constituted largely irrelevant testimony introduced by petitioners to confound and obfuscate the issues. The litigation was focused on the petitioners' methods of addicting class members to cigarettes and keeping them addicted.

[6] Petitioners asserted that Farnan's lung cancer was of a type (bronchiolalveolar carcinoma) that had been found by the jury in Phase I not to be caused from smoking, T.38812-27. According to petitioners, Della Vecchia's lung cancer that metastasized to her brain and caused her death, was actually scar tissue unrelated to cigarette smoking. T.42730-37. Similarly, they argued that Amodeo's laryngeal cancer, that was diagnosed in 1987 and caused him to be unable to eat or drink anything by mouth since that time and to receive all nourishment through a feeding tube, was caused by "wood dust." T.38865-68. The jury rejected those defenses. However the jury found that Frank Amodeo knew or should have known that his throat cancer was caused from smoking and that he was addicted to smoking prior to May, 1990, precluding him from recovery under Florida's statute of limitations. The jury findings as to Amodeo were upheld by the district court and the Florida Supreme Court.

The Florida district court of appeal reversed the class certification that it previously upheld, barred all punitive damages claims, vacated the compensatory damage judgments of the three class representatives, and reversed on additional alternative grounds. App. 68a-126a. The Florida Supreme Court quashed the district court's misapplication of res judicata with respect to its erroneous extinguishment of punitive damages claims, reinstated class certification for Phases I and II-A, ordered that the class be *prospectively* decertified on remand for remaining class members' issues, reinstated two of the three compensatory damages awards (against all petitioners except Liggett and Brooke (App. 43a)), but vacated the class-wide punitive damages award.[7] The Florida Supreme Court wrote: "[A] review of the verdicts reveals that each verdict reflected a careful and differentiated analysis as to comparative fault and individual damages and in no way justifies the Third District's overall conclusion that this was a runaway jury." App. 39a. At the request of petitioners, the court also considered the future effect of the class-wide Phase I liability findings, determining that certain findings would *not* be given preclusive effect in class members' future actions, i.e., (i) fraud and misrepresentation, (ii) conspiracy to commit fraud, (iii) intentional infliction of emotional distress and (iv) entitlement to punitive damages.[8]

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[7] The decision analyzed the extended procedural history of *Engle*, (noting that the district court in *Engle II* had misapplied Florida's doctrine of law of the case), explained the absence of choice of law issues where only Florida law applies, and discussed the reasons why the court reinstated class certification. App. 23a-33a. It is disingenuous for petitioners to suggest that the Florida Supreme Court "concluded, with no analysis, that the trial court did not abuse its discretion in certifying the class." Pet. at 9-10. It is also misleading for petitioners to state that the Florida Supreme Court "recognized that class action treatment was inappropriate and ordered the class decertified." Pet. at 1-2. Rather, the court found that class treatment was proper for completed Phases I and II-A but inappropriate for future proceedings involving only individual issues.

[8] Petitioners (other than Liggett and Brooke) have never challenged the sufficiency of the evidence to support the Phase I or Phase II-A findings in any appellate forum below; nor do they do so here.

II. THE PETITION OMITTED ESSENTIAL FACTS BEARING DIRECTLY ON THE QUESTIONS PRESENTED

Pursuant to U.S. Sup. Ct. Rule 15, the following additional facts, the significance of which is explained more fully *infra*, constitute further reasons for denying the petition.

Due Process: Petitioners' due process argument is predicated on their objections to the Phase I special interrogatory verdict form that they describe as too "generalized." Pet. at 1. But a special interrogatory verdict form was used, not a general verdict. It is also inaccurate for petitioners to suggest that the trial court "adopted respondents' generalized [verdict] form." Pet. at 7. As discussed *infra*, petitioners had substantial input in developing the verdict form that was used.

Contrary to their position here, petitioners had previously proposed far more general questions for the Phase I verdict form than the questions of ultimate fact contained in the verdict form that was used. R.33722-33811. Although *R.J. Reynolds Tobacco Company* represented to the trial court that it was "incumbent upon all of us" to provide additional "enumerated" statements for a more detailed verdict form (T.35954), petitioners never did so. Despite being repeatedly requested to do so by the trial court, petitioners failed to submit a feasible alternative verdict form. R.49258-72; 49296-49322; T.35967-68. Petitioners also objected to a series of additional questions proposed by the class which were based on allegations in the amended complaint. R.49258-72; T.35967. Petitioners Brown & Williamson Tobacco and American Tobacco announced their preference for the verdict form that was used as a "middle ground," although they now challenge it in their due process argument. T.35969.

The petition portrays the preclusion ruling as an extraordinary event, but when petitioners thought they would prevail on the merits in Phase I, they repeatedly acknowledged the preclusionary effect of the findings, proclaiming: "[I]f the defendants win, we want as many people as possible

bound" (R.10708-10809 at 96) and if the jury answers "no . . . then not a single Florida smoker can recover." T.36007.[9]

Preemption: In their brief on the merits before the Supreme Court of Florida, petitioners included one sentence on preemption, without a reference to *Cipollone*, not preserving that issue for review. Here, petitioners' preemption arguments challenge *all* claims, but petitioners argued otherwise in the trial court. There, petitioners sought *only* partial summary judgment on preemption issues, asserting that limited portions of certain claims were subject to federal preemption under *Cipollone* and the *1969 Act*. R.12960-63; 12974-13066. Their pretrial motion was granted in part and allegations were stricken from various counts, including the fraud and conspiracy claims, refuting petitioners' argument here that "the incantation of these words [fraud, conspiracy, etc.] sufficed to defeat petitioners' preemption defense." Pet. at 24. Moreover, until now, petitioners acknowledged that not all *Engle* claims were preempted: "[T]here is no contention that . . . [the *1969 Act*] preempts express warranty or affirmative fraud, misrepresentation, or conspiracy for affirmative fraud, misrepresentation" (T.48171, 48290); "Defendants have not tried to argue that all of plaintiffs' claims are preempted." R.15243-51. Petitioners' pre-trial motion for partial summary judgment did *not* seek to preempt any allegations as to why smokers start to smoke, including allegations of youth marketing, nor did they seek to

[9] Although they now attack the Phase I findings through their due process argument, petitioners told the jury during Phase II-A that "Your verdict is in. We accept it. It's over with. It's there forevermore" (T.38829) and will "resonate forever" to enable "other class members, however many thousands or hundreds of thousands it may be . . . [to] recover," and "ensure that all class members have a day in court." T.38878, 38896-97. The petition asserts that the "jury's findings provide no clue" as to petitioners' misconduct (Pet. at 16), but during the punitive damages phase their theme was each defendant "has gotten the message," (T.51366); we know what we did wrong and we have changed and should not be punished. T.51072-73; 51085; 51253-54; 51366; 57201; 57407; 57483; 57514; 57596. Dan Webb, lead counsel for Philip Morris, argued that Philip Morris' CEO "is going to tell you he understands your verdict very very well. He is not going to tell you he does not know what your verdict means. He is not going to tell you that at all." T.51085.

preempt in whole or part the claims of breach of implied warranty and express warranties. R.12974-13066.

Petitioners fail to disclose that the two compensatory damages judgments are also supported by specific jury findings in Phases I and II-A of negligence that occurred *before* July 1, 1969 (App. 200a-204a; T.50385-86), findings that are not subject to federal preemption. In support of their evidence-based preemption argument, petitioners now challenge evidence that was admitted in response to their defenses of consumer expectations and awareness of the risks of smoking. Although petitioners argue here that such evidence is "functionally equivalent" to claims preempted in *Cipollone* (Pet. at 20-24), they announced at the beginning of the trial that "this case [is] about what people knew about the health risks of smoking when they made the choice to smoke," (T.10950), and "Why [do] young people smoke?" T.10956. "[T]he issues in this case [are] whether smokers can quit [and] why smokers start smoking." T.37410.

Although petitioners object to the Phase I jury instructions on preemption, which represented a combination of the litigants' submissions, class counsel twice offered to modify the instruction: "I have volunteered to take out the language they had a problem with," (T.36285, 36152-53), but petitioners declined: "I don't think a shortened instruction . . . is an appropriate way to go." T.36153. So the trial court gave the longer combined instruction on preemption. T.37569-70. The petition also ignores the more expansive Phase II-A preemption instruction given during the Farnan and Della Vecchia trials that included the "neutralization" language petitioners now mistakenly assert was lacking, writing incorrectly: "[T]he court gave an instruction that said nothing about neutralization." Pet. at 24, n.10 and 8-9.

REASONS FOR DENYING THE PETITION

I. THE COURT SHOULD NOT ADDRESS PETITIONERS' HYPOTHETICAL DUE PROCESS CLAIMS

Petitioners concede that "[t]he preclusion ruling, which is the subject of the due process challenge, has no effect" on class representatives' Farnan and Della Vecchia who have a final judgment.[10] Thus, the posited due process issues apply only to purported class members in future cases that have not yet been tried (or not filed). No absent class member has a judgment that depends on the preclusion ruling that petitioners challenge here. No court has yet to even apply the findings. Moreover, petitioners concede that preclusion is proper with respect to the general causation and addiction findings. Thus, the question posed is *not* whether the Phase I findings can or should be given preclusive effect, but rather, whether giving preclusive effect to certain findings may, *in the future*, implicate due process.

A. The Due Process Claim Is Not Ripe for Review

Petitioners' claim of future due process violations is illusory and speculative. It is not tied to any class member with a judgment, or even a determination of liability. App. 18a. Petitioners fail to demonstrate "actual prejudice" because their "due process claims are speculative and premature." *U.S. v. Marion*, 404 U.S. 307, 325-26 (1971). When considering a claim of a due process violation, "[t]he

[10] Where petitioners do *not* challenge the use of the Phase I findings in the Phase II-A trials of Farnan and Della Vecchia before the same jury, it is apparent that petitioners' "extreme application of the doctrine of res judicata" argument is a disguised Seventh Amendment re-examination argument, which also explains petitioners' reliance on *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), a re-examination decision. Pet. at 17. The Florida Supreme Court found there was no violation of Article I, §22 of the Florida Constitution, noting that the Seventh Amendment does not apply to actions brought in state court. App. 31a-32a. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 432 (1996) ("The Seventh Amendment ... governs proceedings in federal court, but not in state court.").

criterion is not the possibility of conceivable injury." *Dusenberry v. U.S.*, 534 U.S. 161, 170-71 (2002), citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). *In accord*, *U.S. v. Lovasco*, 431 U.S. 783, 790 (1977) ("Proof of prejudice is generally a necessary but not sufficient element of a due process claim"); *U.S. v. Valenzuela-Bernal*, 458 U.S. 858, 868-69 (1982) (same). If a lower court ever upholds a specific verdict in favor of a plaintiff/class member, in which the preclusive effect of a finding approved by the Florida Supreme Court is decisive, petitioners may choose to seek review with respect to the new judgment where all the facts are known.[11]

A writ of certiorari was dismissed as improvidently granted in *Nike, Inc.*, 539 U.S. at 667, 663, "[a]fter receiving 34 briefs on the merits (including 31 *amicus* briefs) and hearing oral argument." "[T]his Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. . . . The novelty and importance of the constitutional questions presented in this case provide good reason for adhering to that rule." *Id.* That reasoning applies here since a review of the due process and preemption issues that have been raised as to class members requires "the study of a full factual record." *Nike*, 539 U.S. at 664-65 (Stevens, J., concurring). The due process claims (as well as the preemption claims as to putative class members) are plainly premature and the Court should deny review for that reason alone. *See also California v. Rooney*, 483 U.S. 307, 311-14 (1987) (refusing review where "too many 'ifs'" were present and later review available if the "ifs" became reality).

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[11] It is disingenuous for petitioners to suggest that "defendants' defenses would be reduced to a charade" were this Court to deny certiorari. Pet. at 4. Class members must still establish liability in individual cases. Since the state supreme court decision, there have been fewer than 100 cases filed, including the cases referenced in the petition (Pet. at 18-19 and n.8), where petitioners have raised 24 affirmative defenses, including federal preemption, and have also challenged the preclusive effect of certain *Engle* Phase I findings.

Not everything contained within an opinion of the state's highest court is subject to review by certiorari.[12] This Court reviews judgments, not statements in opinions. *Johnson v. De Grandy*, 512 U.S. 997, 1003, n.5 (1994); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 734-35 (1978) (the admonition that the Court reviews judgments, not statements in opinions, "has special force when the statements raise constitutional questions, for it is our settled practice to avoid the unnecessary decision of such issues.... Federal courts have never been empowered to issue advisory opinions.").

There is no extant *judgment* in favor of class members or unnamed plaintiffs in future lawsuits. "When this Court reviews the state court's decision on direct review pursuant to 28 U.S.C. §1257, it is reviewing the *judgment*; if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do." *Coleman*, 501 U.S. at 730. The only individuals with *judgments* are respondents Farnan and Della Vecchia. The petitioners concede that nothing this Court could do *vis a vis* petitioners' due process claim can affect those judgments.

B. There Has Been No Possible Deprivation Of Petitioners' Due Process Rights

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). *See also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The cases relied upon by petitioners for their "extreme

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[12] The Court noted in *Matsushita Electrical Industrial Co., Ltd. v. Epstein*, 516 U.S. 367, 375 (1996) that "usually, a state court will not have occasion to address the specific question [of] whether a state judgment has issue or claim preclusive effect in a later action ... ", citing *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 381-82 (1985). Although the district court opinion did not address the verdict forms or the Phase I findings, petitioners challenged the verdict forms and findings in the state supreme court, asking that court to hold that the "generalized verdict ... cannot be used to determine anyone's claims in Phase III (or in any individual suit)." Brief on Merits at 21, 27-28. The court's consideration of the preclusive effect of the findings, at petitioners' urging, does not change the rule that this Court will not review premature and hypothetical issues.

application of the doctrine of *res judicata*" argument, raise due process concerns when a litigant, who was *not* a party to an earlier proceeding, is nonetheless bound by the judgment. *See Richards v. Jefferson County*, 517 U.S. 793, 797 (1996) (judgment in prior action is not binding on individuals who "neither participated in, nor had the opportunity to participate in," prior case); *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 168 (1999) (plaintiffs in second case were strangers to earlier litigation and judgment); *Hansberry v. Lee*, 311 U.S. 32, 40-46 (1940) (absent parties who had no notice or opportunity to participate in prior litigation not bound where class representatives had actual conflict with absent class members' interests). Here, petitioners have fully defended through trial and appeal and cannot claim any violation of the right to be heard.[13]

C. Due Process Issues Have Not Been Adequately Preserved

Under federal and Florida law, petitioners have not adequately raised and preserved their due process arguments that are predicated on their objections to the Phase I special interrogatory verdict form.

The verdict form used was not a general verdict but rather a special interrogatory verdict form pursuant to Florida law, with multiple questions broken down by defendants under different time frames, as requested by petitioners.[14] The verdict form that was used included changes requested by petitioners,

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[13] None of the cases relied upon by petitioners lend support to their due process argument. For example, in *Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904), the Court held that an earlier judgment was properly given *res judicata* effect although there were no formal or special findings of fact. Thus, a true general verdict, without the *Engle* verdict form's breakdown of legal issues and ultimate issues of fact, was nevertheless given *res judicata* effect through "an examination of the record." *Id.* at 307.

[14] *See Flores v. Allstate Ins. Co.*, 819 So.2d 740, 743 (Fla. 2002); *Standard Jury-Civil Cases (No. 98.1)*, 711 So.2d 1 (Fla. 1998). It was not a "generalized" verdict with "vague jury findings," contrary to petitioners' mischaracterization. Pet. at 1, 3.

i.e., the inclusion of subcategories of diseases under the generic causation question, deletion of references to causation in the other questions, modification of the Florida standard jury instruction for negligence, insertion of language in the express warranty count and the adoption of petitioners' question on entitlement to punitive damages. The verdict form represented a compromise of the litigants' positions. Petitioners now challenge questions they urged the trial court to adopt. For example, in discussing the finding of negligence, petitioners now state: "This finding is a cipher" (Pet. at 16), but petitioners argued below that the same question was very meaningful because "an adverse finding is very harmful to the defense . . . where the question is exactly what the trial plan says we're supposed to be trying [and] . . . it's not a happy event if that's decided against us." T.35918-19.

Petitioners have also been inconsistent with respect to the common issues to be tried during the Phase I trial, taking multiple varying positions, contrary to Florida law. *See McKee v. State*, 450 So.2d 563, 564 (Fla. 3d DCA 1984); *Salcedo v. Asociacion Cubana, Inc.*, 368 So.2d 1337, 1338-40 (Fla. 3d DCA 1979). Petitioners first proposed the "more manageable issue": "Was it common knowledge among the class . . . that smoking carried significant health risks and that some people find smoking difficult to stop?" R.20712.[15] Then petitioners proposed addressing only addiction issues: "[W]hat we ought to do is try the issue of whether or not all the members of this class are unable to quit smoking because they are addicted to nicotine. . . . Because if the defendants win on those issues, we can all go home." R.13653-54. Petitioners subsequently submitted a proposed verdict form with six general questions, including: "Was the 'Special Projects' division of the Council for Tobacco Research established for the purpose of concealing medical

[15] Petitioners argued below that the "common knowledge" issue was "dispositive of the product defect claim . . . because if the product is not more dangerous than expected by the ordinary consumer, it is not defective." *Id.*

research under the misuse of the attorney-client privilege? Yes __ No ___" R.33772-33811.[16]

In their reply brief before the district court, petitioners acknowledged that "[a] generalized verdict form may be appropriate even in a bifurcated class action with separate juries, if the pleadings and proof provide sufficient particularity to establish precisely what the jury found to be unlawful." Reply Brief at 32. Petitioners now say the opposite: "The highly generalized and decidedly ambiguous nature of these findings prevents any other jury from applying them consistent with due process." Pet. at 16.[17] Petitioners ultimately proposed a "blank-line" verdict form with narrative questions where the jury would be required to provide extensive identifying information about specific scientific studies, including dates, times and locations, as well as other evidentiary data; an overwhelming task for a jury following a one-year trial with thousands of pages of exhibits and testimony from 86 witnesses in Phase I alone.[18]

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[16] Petitioners' proposed question addressed the concealment of medical research and is also inconsistent with petitioners' argument here that all concealment claims are preempted under *Cipollone* (Pet. at 21-22), a position refuted by *Cipollone*, 505 U.S. at 530 and n.28.

[17] But even if this were a general verdict form, which it is not, the Court recognized in *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 569-72 (1951) that a general verdict may be given preclusive effect with "an examination of the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the court," relying on *Sealfon v. U.S.*, 332 U.S. 575, 578 (1948). *In accord, Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 484-85 (1968) (general verdict in action brought by U.S. under anti-trust laws was given preclusive effect in subsequent private action for treble damages, relying on *Emich*). Cases cited by petitioners also hold that extrinsic evidence may be properly considered when giving preclusive effect to a "general" verdict. *See De Sollar v. Hanscome*, 158 U.S. 216, 221 (1895), citing *Russell v. Place*, 94 U.S. 606, 608 (1876). *See also Fayerweather*, 195 U.S. at 307 (res judicata effect after an "examination of the record"). Subsequent courts may properly examine the record here, if further detail is warranted.

[18] The Second Circuit rejected a "blank-line" interrogatory verdict form where there had been over 150 exhibits and 25 witnesses because completing the verdict form would "require the jury to perform super

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In June, 1998, prior to the commencement of trial, the trial judge advised petitioners that their proposed open-ended verdict form was unacceptable.[19] Defense counsel tentatively agreed to revise the verdict form so that the jury can "choose" rather than fill-in-the-blanks (R.36273-76), but defendants never did so.[20]

Petitioners also objected to a series of interrogatory questions taken from allegations in the amended complaint, to be answered "yes" or "no." R.48404-17; T.35950-51; T.35967-68. Petitioners declined the trial court's repeated invitation to revise the verdict form, saying that it was not "defendants' job" to prepare and submit an acceptable form. T.36298-99.[21] The trial court responded: "We are just going around in circles." T.35971. In exercising his broad discretion, he utilized a special interrogatory verdict form that was a combination of the litigants'

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human acts of memory," and "demand of the jury a recall of Homeric proportions." *U.S. v. Ogando*, 968 F.2d 146, 148-49 (2d Cir. 1992).

[19] The trial court stated that "You can go ad infinitum before you get an answer to . . . 'Identify the scientific studies concealed by the defendants and when such studies were concealed.'" R.36226-92 at 44-45. "[L]eaving a question like that open-ended to a jury could have results you can't even think about. . . . [R]ather than leave an open-ended question, you can make a list of those studies which were either proven or at least brought up . . . [a]nd pick off which one." R.36318-19.

[20] Counsel for *R.J. Reynolds Tobacco* similarly said to the trial court that it was "incumbent upon all of us" to make certain changes to the verdict form for Phase I, including "enumerated" misstatements that the jury would consider (T.35954). Petitioners never acted on that incumbency.

[21] Petitioners were wrong. Florida law requires that a litigant who objects to a verdict form present a reasonable alternative to preserve his objection. *See J.T.A. Factors, Inc. v. Philcon Services, Inc.*, 820 So.2d 367, 371-72 (Fla. 3d DCA 2002) (it was within the discretion of the trial court to reject "*J.T.A.*'s more complex interrogatory verdict form"); *S & S Toyota Inc. v. Kirby*, 649 So.2d 916, 918 (Fla. 5th DCA 1995) (burden is on litigant that requests a particular type of special verdict form to propose and offer a form with the requisite findings); *Whitman v. Castlewood Int'l Corp.*, 383 So.2d 618, 619-20 (Fla. 1980) (same); *E.F. Hutton v. Sussman*, 504 So.2d 1372, 1373 (Fla. 3d DCA 1987) ("it was *Hutton*'s burden to offer special verdict forms, which would have required the finding *Hutton* now complains was lacking, and since it failed to do so, we find no error").

proposals. R.48564-78; 35903-05; 35987; 35994-36005; 35900-01; 35942; R.49075-49123. *Brown & Williamson Tobacco* and *American Tobacco* preferred the special interrogatory verdict form ultimately used, rather than the more specific interrogatory questions prepared by the Class, referring to the former as a preferable "middle ground." T.35969. There was no error, and certainly no preservation of arguable error of constitutional dimension.

Finally, the litigants always recognized that the Phase I class-wide common issues verdict was intended to be given preclusive effect in subsequent Phase III individual trials pursuant to *Engle I* and the trial plan. Petitioners told the jury in Phase II-A that every class member would have a day in court because their Phase I findings were "forevermore" and would "resonate forever." T.38829-38878, 38896-97. And up until the time the jury returned its Phase I verdict, petitioners repeatedly acknowledged and requested that all Floridians be bound by the Phase I verdict and by the questions answered "No." Defense counsel argued during Phase I that if the jury answered "No" to a particular question "then not a single Florida smoker can recover." T.36007. Petitioners' *heads I win, tails you lose* concept of due process is unacceptable. Moreover, it cannot be the basis for certiorari review.[22]

[22] A further example of petitioners' one-sided view of the class action was their urging an expansive notice program to ensure that all absent class members would be bound by the Phase I verdict: "If the defendants win, we want as many people as possible bound;" "We expect to win the case. When we win the case, I want to be able to say, 'You're bound by it . . . I want them bound'." "[W]hen defendants prevail in this case, the absent class members will be bound." R.10804; 9809.

II. CERTIORARI SHOULD BE DENIED ON THE PREEMPTION ISSUES BECAUSE THEY WERE NOT ADEQUATELY PRESENTED IN THE STATE SUPREME COURT; THEY REST ON CLAIMS OF IMPROPER ADMISSION OF EVIDENCE WHICH ARE BOTH FACTUALLY AND LEGALLY WITHOUT MERIT; AND THE ULTIMATE OUTCOME OF THE CASE WILL NOT BE AFFECTED BECAUSE THE JUDGMENTS ARE SUPPORTED BY SPECIFIC JURY FINDINGS OF PRE-JULY 1, 1969 NEGLIGENCE.

A. Petitioners Did Not Adequately Present and Preserve Preemption Before The Florida Supreme Court

Petitioners seek review of their preemption issue, but the preliminary question is whether preemption was adequately preserved and presented to the state supreme court. "[W]e have adhered to the rule in reviewing state court judgments under 28 U.S.C. §1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997), citing *Yee v. Escondido*, 503 U.S. 519, 533 (1992). Where "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due for want of proper presentation." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983), citing *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974). Although acknowledging that the Florida Supreme Court did not address the issue of preemption, other than with a "fleeting reference" (Pet. at 10, n.4), petitioners say they properly addressed the issue in their brief on the merits before the Florida Supreme Court (Pet. at 11, n.6), and that the "failure to address the preemption issue does not render this case unworthy of review." Pet. at 29. Petitioners do not disclose that their "briefing" on

preemption consisted of a single sentence in a 50 page brief.[23]

On page 49 of their brief on the merits, petitioners limited their preemption argument to this sentence as part of a paragraph and footnote that raised *nine* other issues: "For example the trial court improperly allowed plaintiffs to assert claims preempted by federal law." That does not preserve the point. *See Beck v. Washington*, 369 U.S. 541, 553 (1962) and *Sag Harbour Marine, Inc. v. Fickett*, 484 So.2d 1250, 1256 (Fla. 1st DCA 1986).[24] Under Florida law, an issue is not preserved for review by referencing arguments made in other briefs or pleadings. *Duest v. Dugger*, 555 So.2d 849, 852 (Fla. 1990) ("Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").[25] U.S. Sup. Ct. Rule 14(g)(i) requires that petitioners seeking review in cases from state courts specify:

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[23] Perhaps petitioners were reluctant to argue their federal preemption issue before the state supreme court because during the Phase I trial, petitioners' CEOs and witnesses testified that the federally mandated warnings on cigarettes were *not true* (T.14222-23; 15301; 19322-23; 19901); that science does not know the cause of lung cancer and cigarette smoking has not been proven to be a hazard with respect to lung cancer (T.28216; 28138); that smoking is not addictive – it is as addictive as eating "gummy bears" or "carrots," and that anyone can quit smoking. T.14223; 14765; 14780; 15790-92; 20797-98; 21407-08. Petitioners asserted during Phase I that smoking does not cause disease and that the Surgeons General and their Reports were wrong. T.14218-19; 15293-94; 20392-93; 20562.

[24] It is presumptuous for petitioners to suggest that the Florida Supreme Court "abdicated its responsibilities by affirming judgments contrary to the federal constitution and statutes without addressing those claims" (Pet. at 29), when the preemption claim was not properly raised before that court. Moreover, the Florida Supreme Court did mention preemption in a sentence explaining, consistent with *Cipollone* and the *1969 Act*, that "[a]lthough compliance with the federal warnings preempted *any* claim based on failure to warn, it did not *eliminate* the other causes of action that the jury had to consider in Phase I." (Emphasis supplied.) App. 38a. That *Cipollone* and the *1969 Act* do not preempt all claims is clearly a correct statement of the law.

[25] The Florida Supreme Court has repeatedly held that issues are waived and not properly preserved if presented as a "conclusory argument." *See Jones v. State*, 928 So.2d 1178, 1182 (Fla. 2006) ("other

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> The stage of the proceedings, both in the court of first instance and in the appellate court, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgments on a writ of certiorari.

Petitioners do not even attempt to make that showing with respect to their evidence-based preemption issues. Pet. at 21-23. They have not demonstrated that the evidence was *not* properly admitted on non-preempted grounds, to counteract petitioners' defenses of consumer expectations, consumer awareness and why smokers start smoking.

Petitioners erroneously state that the Florida district court of appeal "did not address petitioners' . . . Labeling Act preemption." Pet. at 3, 29. But the issue was addressed by that court in connection with petitioners' jury nullification argument (App. 106a-107a and n.35). On that point, the Florida Supreme Court disagreed, finding that "[T]hese arguments were not an attempt to tell the jury to ignore the law." App. 39a.[26]

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claims present merely conclusory arguments insufficient to state an issue"); *Anderson v. State*, 822 So.2d 1261, 1268 (Fla. 2002) ("Anderson failed to brief and explain what the alleged cumulative errors are, and what their impact is on this case. Thus, the claim is waived."); *Randolph v. State*, 853 So.2d 1051, 1063, n.12 (Fla. 2003) ("References to arguments below without further elucidation does not suffice to preserve issues and these claims are deemed to have been waived."); *Farina v. State*, 937 So.2d 612, 617 (Fla. 2006) ("Claim 6 (cumulative errors deprived Anthony of a fair trial) presents a conclusory argument insufficient to state an issue."); *Donald v. State*, 952 So.2d 484, 489 (Fla. 2007) ("We reject several other claims that present merely conclusory arguments insufficient to state an issue.").

[26] Because the Florida district court of appeal did not reverse on the preemption issues, although it did address one aspect of petitioners' preemption arguments, petitioners now contend that the district court showed a "manifest disregard . . . for federal preemption . . . [and] acquiesced in the subversion of controlling federal law." Pet. at 29. But it is more likely that the district court found petitioners' fact-bound

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Petitioners object to the instruction on preemption, but their argument here has not been properly presented or preserved. Petitioners assert that "the court gave an instruction that said nothing about neutralization" (Pet. at 24, n.10), but the relevant preemption instruction given in connection with the trials of Farnan and Della Vecchia's claims, stated in part: "Federal Law . . . preempts any claim that cigarette advertising and promotion neutralized the federally mandated warnings after July 1, 1969." T.50252-54. The jury instructions on preemption that were given at petitioners' request during Phases I and II-A were a combination of the parties' submissions. Class counsel had twice offered to modify the language in their proposed "failure to warn" instruction, "I have volunteered to take out the language they had a problem with," (T.36285), but petitioners declined the offer, rejecting the "shortened instruction." T.36153. Petitioners' proposed preemption instruction in the common-issues trial (App. 190a-191a) was highly argumentative and erroneously suggested that *all* claims against tobacco companies are barred after July 1, 1969, contrary to *Cipollone*. *See* T.36148-36155; 36279. Petitioners' proposed instruction refused to acknowledge that certain post-July 1, 1969 evidence was properly admitted on non-preempted grounds (i.e. relevant to consumer expectations, consumer awareness and why smokers start to smoke), and sought to erroneously instruct the jury, without limitation, "to ignore any such claims or suggestions or evidence." App. 191a.

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evidentiary and jury instruction preemption arguments to be without merit, particularly where the jury's specific pre-July 1, 1969 findings of negligence, at a minimum, are *not* preempted and those negligence findings alone fully support the verdicts and judgments. App. 200a-204a; T.50385-86. Moreover, the intermediate appellate court's reasons for not addressing the preemption issues in more detail is not relevant to any issue before this Court.

B. The Claims Of Improper Admission Of Evidence Do Not Present An Appropriate Question For Review In This Court

Although nearly silent on the matter of preemption before the state supreme court, petitioners now challenge "the verdicts, both class-wide and in favor of two individual respondents" (Pet. at 1), on the basis of selected trial evidentiary rulings and a jury instruction. But petitioners ignore the fact that the jury also found them liable on pre-1969 failure to warn claims that are not subject to preemption. App. 200a-204a. They engage in selective and partial recitation of certain evidence admitted at trial, while ignoring the context and the record as a whole, violating basic appellate and evidentiary principles, including the discretion of Florida state court judges in determining the admissibility of evidence. Petitioners do not limit their challenges here to the judgments of Farnan and Della Vecchia, arguing that absent class members' future hypothetical claims should also be preempted, without any information about those claims including whether the claimants started smoking before or after July 1, 1969.

Essentially, petitioners seek to undermine *all* of the claims, including future claims, by equating snippets of evidence during a two-year trial to the limited *claims* in *Cipollone* that this Court found preempted (e.g. failure to warn post-July 1, 1969 and neutralization of federally mandated warnings). But federal preemption under *Cipollone* and the *1969 Act* relates to the preemption of *claims*, not *evidence*. "[W]e must look to each of petitioners' common-law *claims* to determine whether it is in fact preempted." (Emphasis supplied). *Cipollone*, 505 U.S. at 523.[27]

[27] Preemption issues are ordinarily raised and determined prior to trial. Here, the trial court entered a partial summary judgment finding that certain allegations under various claims were preempted. Significantly, in their February, 1997 motion seeking *only partial* summary judgment, petitioners did not assert that any claims in their entirety were preempted, but only paragraphs or subparagraphs within limited claims, representing approximately 20% of the 154 paragraphs in the amended class action complaint. R.12960-63; 12974-13066. Petitioners did *not* seek to preempt the allegations in the complaint relevant to their defenses of

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And even as to those snippets of challenged evidence, petitioners do not attempt to demonstrate that (a) a proper objection was made in the record for each item, (b) the admission of the evidence raised preemption problems, (c) the evidence was not admissible on some other basis that did not raise preemption issues, and (d) the evidence was not merely cumulative of properly admitted evidence, so that any error is rendered harmless.

Petitioners challenge evidence that was admitted in response to petitioners' "awareness" and "consumer expectations" defenses; evidence that was addressed by petitioners beginning in their opening statements: "What this case is about [is] what people knew about the health risks of smoking when they made the choice to smoke," (T.10950); "Why [do] young people smoke?" (T.10956); "What people knew?" (T.10957).[28] *Cipollone* and the *1969 Act* were never intended to strip claimants of their ability to refute and respond to petitioners' consumer awareness and consumer expectations defenses.

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consumer awareness and why smokers start to smoke, including allegations of marketing to youth (R.12974-13066, paragraphs 45(kk)(ll)(nn)(zz), 73, 80, 110, 119), and did not challenge certain claims at all (e.g., breach of implied warranty and express warranty). R.12974-13066. Petitioners do not challenge the order granting partial summary judgment here.

[28] During opening statements, defense counsel also addressed the issue of whether cigarettes are defective, arguing that the jury will be asked to determine "whether or not the average consumer was aware of the risks of smoking, [the] health risks." 11070-71. During opening statements in Phase II-A "awareness" issues were once again center-stage (T.38777): "Information regarding the health risks associated with smoking were available to Mrs. Farnan virtually from the time she began to smoke throughout all of the intervening years" (T.38779); "Mrs. Farnan was aware of the risks of smoking throughout all of the time that she smoked" (T.38825); "You're going to find out what two individual people knew about whether smoking was risky or not" (T.38878); "[W]hy both of these folks began smoking." T.38900. In discussing the Phase II-A verdict form during closing arguments in the compensatory damages trial of Farnan and Della Vecchia, defense counsel said to the jury: "Awareness evidence applies to a whole bunch of different questions that you're going to be asked" (T.37275-76), and "the issues in this case [are] whether smokers can quit [and] why smokers started smoking." T.37410.

Because petitioners' preemption argument is predicated on the admission of evidence at trial and therefore fact-specific, this Court would need to examine the evidentiary record in order to make factual determinations on disputed points.[29] That use of certiorari is unavailing. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 664 (1987) ("we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task"); *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) (Court would not undertake to review "lengthy and complex record . . . reached after a 3-week trial"); *N.L.R.B. v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 177 (1981) (certiorari was improvidently granted where the Supreme Court is "presented primarily with a question of fact which does not merit Court review"); *U.S. v. Johnston*, 268 U.S. 220, 227 (1925) ("we do not grant certiorari to review evidence and discuss specific facts.").

C. Key Factual Premises Upon Which The Preemption Claims Are Based Are False

Petitioners argue that "[r]espondents' claims are functionally equivalent to those held preempted in *Cipollone*," (Pet. at 20) and then misstate the *Engle* evidence and theories of liability in order to support their erroneous premise. Contrary to petitioners' contentions, respondents never asserted that "post-1969 advertising and promotions should have included additional, or more clearly stated warnings," (Pet. at 21) or that "petitioners' marketing activities . . . undermined or 'neutralized' the federal warning labels." Pet. at 22. Why people smoke and why they started smoking were issues raised by petitioners in connection with consumer expectation and awareness defenses.[30]

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[29] For example, pre-July 1, 1969 tobacco advertisements were properly admitted under the viable pre-1969 failure to warn claims and post-July 1, 1969 advertisements were properly admitted that contained false information, pursuant to *Cipollone*, 505 U.S. at 524, 528-29.

[30] In addition to raising defenses that opened the door to limited testimony about smoking initiation, including youth marketing, *during*

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Petitioners state that there was "testimony concerning a presentation focusing on 65-70 different tobacco advertisements, including an ad for Camel cigarettes, Chesterfields, and Virginia Slims," referring to T.12879-82. Pet. at 6, n.1. But they are referring to *voir dire* examination, not testimony before the jury. Moreover, the "presentation" was *excluded* by the trial court. T.12894-95. Thomas L. Petty, M.D., a pulmonologist who collected old tobacco advertisements as a hobby, had a presentation of tobacco ads from the 1930s, 40s and 50s, years *before* the federally mandated warnings, that he made at medical schools. T.12867, 12875. He was permitted to only identify his old ads, without making his presentation or expressing any opinions regarding the tobacco advertisements, and identified approximately six ads, not 65-70. T.12945-49, 12951.

Petitioners also erroneously state: "Witnesses testified that petitioners failed to warn smokers that nicotine was addictive. T.12020-27; T.13479-80." Pet. at 21. The first reference (T.12020-27) is to a side-bar conference, outside the presence of the jury, during the testimony of Dr. Neal Benowitz, a nicotine specialist who *never* testified that petitioners failed to warn smokers that nicotine was addictive. Instead, it was counsel for petitioners who expressed his *belief* that a particular tobacco internal document offered into evidence during Benowitz' testimony was intended "to show that the defendants suppressed, concealed or otherwise should have warned about the contents of this document." T.12020. But the document was offered to demonstrate petitioners' *knowledge* of the addictiveness of nicotine in 1972, since petitioners denied

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Phase I Philip Morris conducted a $100 million national television advertising campaign with "T.V. commercials . . . directed at saying peer pressure is why kids smoke." T.17835; 16727; 16258. The class was powerless to stop the Philip Morris advertising campaign (T.17113; 17832-38), or Brown & Williamson Tobacco's website that was launched during Phase I and also addressed "marketing to youth and Brown & Williamson's youth responsibility program," as well as other *Engle* issues. R.46923-46996. Now petitioners argue that references to youth marketing are preempted. (Pet. at 23, n.9).

at trial that nicotine was addictive. T.12020-21. The class did not raise any failure to warn claims post-July 1, 1969. Nor did Dr. Michael Siegel testify that "petitioners failed to warn smokers that nicotine was addictive." T.13479-80. Pet. at 21. Dr. Siegel testified as to scientific information that was not shared with the *public health community*. His testimony did not address warnings. T.13480.[31]

Petitioners inaccurately assert that "one of respondents' experts testified that the use of 'healthy and vigorous' people in tobacco advertising minimized the impact of the warnings on smokers and potential smokers, including minors," citing T.17265; 11377-78; 17210. Pet. at 22. The transcript references are to the testimony of Dr. Jeffrey Arnett and former U.S. Surgeon General Julius Richmond, M.D. Dr. Arnett's testimony responded to "Why do young people smoke?" the question posed in petitioners' opening statements (T.10956, 11063), and refuted petitioners' assertions that advertising does not cause children or anyone to start smoking but rather only impacts smokers' decisions to switch brands. T.16227-29; 16233; 18465; 20301; 20933. Dr. Arnett testified that cigarette advertising influences non-smoking adolescent smoking initiation (T.17210, 17264-65), but he never testified about warnings or their impact on youth or anyone else. Nor did Dr. Richmond testify about warnings. Pet. at 22. He testified on redirect examination that certain advertisements influence smoking initiation by youth, a subject introduced by petitioners through cross examination about whether peer pressure results in the initiation of smoking. T.11376-78.

Petitioners erroneously assert that class counsel "expressly invited the jury to disregard the law." Pet. at 6. But the Florida Supreme Court found otherwise: "These arguments were *not* an attempt to tell the jury to ignore

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[31] Several of petitioners' references are to arguments of counsel outside the presence of the jury, not evidence (T.10480, 16871-81; Pet. at 23), or to argument of counsel where no objections were raised. (T.16900; Pet. at 23), (T.36371; Pet. at 26), (T.40247-51; Pet. at 22), (T.36436; Pet. at 23). In all instances, the evidence challenged by petitioners was admissible on non-preempted grounds.

the law." (Emphasis supplied). App. 39a. "Context is crucial." App. 35a. The petitioners describe the trial court judge as acting in a contemptuous fashion with "manifest disregard . . . for federal preemption." Pet. at 8, 29. Petitioners fail to disclose that in each referenced instance where Judge Kaye expressed disagreement and frustration with preemption, *he nevertheless ruled in favor of the petitioners*, sustaining objections and instructing the jury to disregard the evidence or testimony (T.16626-27; 27879). Petitioners state: "When petitioners objected, the court expressed contempt for the very idea of federal preemption, saying that it '[b]oils my blood and boggles my mind,'" referring to T.16621-22. Pet. at 8. What actually happened is that Judge Kaye commented, outside the presence of the jury, that the application of preemption prevented important advances in science from being shared with the public, and then defense counsel, Richard Kirby said: "It boils your blood, I can tell." To which Judge Kaye responded: "Boils my blood and boggles my mind." Mr. Kirby responded: "I know it does and I appreciate your personal feeling about it." T.16622. Although the trial judge was frustrated by petitioners' platitude: "That's what preemption does," he nevertheless repeatedly sustained petitioners' objections on preemption and granted their requests for curative instructions. T.27878-79; 27886. Thus, the petitioners have offered a misleading presentation of the colloquy and ignore the fact that Judge Kaye adhered to preemption principles and *Cipollone*, even when he believed they were contrary to public health interests.[32]

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[32] *Compare Cipollone*, 505 U.S. at 544, Blackmun, J., Kennedy and Souter, J.J., concurring in part and dissenting in part: "By finding federal preemption of certain state common-law damages claims, the decision today eliminates a critical component of the States' traditional ability to protect the health and safety of their citizens."

D. There Is No Conflict Warranting A Reexamination Of *Cipollone*

Petitioners suggest that there is a conflict among courts that requires this Court's attention and its reexamination of *Cipollone*. There is no conflict where petitioners concede that the Florida Supreme Court's "fleeting reference to preemption" (Pet. at 10, n.4), "fail[ed] to address the preemption issue." Pet. at 29. The requisite "real or intolerable conflict on the same matter of law or fact," ROBERT L. STERN ET AL., SUPREME COURT PRACTICE at p.225 (8th ed. 2002) is not present. Petitioners assert: "This Court's review is needed to resolve the conflict as to whether characterizing failure-to-warn and neutralization claims as fraudulent conduct claims defeats preemption." Pet. at 24. But the Florida courts, below, did *not* render any preemption decisions based on how a claim was labeled. For example, addressing an objection to evidence class counsel described as "false advertising [where] . . . there's no preemption," (T.2786), the trial court found that under *Cipollone* "it leans more toward neutralization," and sustained the objection. T.27877-79. The order granting petitioners' motion for partial summary judgment on preemption determined that allegations contained within claims for fraud, conspiracy, negligence and strict liability, were preempted. R.12960-63; 12974-13066. Nor was the labeling of a claim dispositive in determining preemption issues in any of the post-*Cipollone* cases cited in the petition and Appendix G.[33]

Farnan and Della Vecchia started smoking and were addicted to cigarettes prior to July 1, 1969 and are subject to essentially *no* preemption defenses as to their claims that

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[33] Petitioners have expanded their petition with an eight page single-spaced "Appendix G" containing a list of 45 post-*Cipollone* smokers' decisions, captioned: *Post-Cipollone Decisions Addressing Preemption of "Concealment" and "Neutralization" Claims,* with a description of each case prepared by petitioners. App. 207a-214a. "Counsel should of course be sensitive not to include material [in the appendix] that may be perceived as an attempt to avoid the court's page limits." STERN *supra* at 609.

arose *before* the 1969 law went into effect (e.g. pre-1969 failure to warn claims), and on those pre-1969 claims, alone, their judgments must be affirmed. Thus, as to the jury findings of pre-1969 negligence (App. 200a-204a; T.50385-86) nothing the Court can determine with respect to the preemption issue can affect Farnan and Della Vecchia's judgments, rendering this matter particularly uncertworthy and an inappropriate vehicle for asserting conflict. In contrast to other class members whose cases have not been adjudicated, the final judgments of Farnan and Della Vecchia are also supported by the fraud and conspiracy findings in Phases I and II-A that the jury found were a legal cause of damage or death to the two class representatives. The Florida Supreme Court's determination that the Phase I fraud and conspiracy counts are not to be given preclusive effect in future claims of putative class members, has no impact on the class representatives' final judgments that were reinstated by the court. The fraud and conspiracy counts provide additional non-preempted claims in support of the two verdicts and judgments. *See Cipollone*, 505 U.S. at 530-31 and n.28.

Petitioners argue that because of the "massive" number (700,000) of Florida's victims (Pet. at 1, 2, 5), and the magnitude of petitioners' "wrongdoing [and] misconduct occurring over more than five decades," (Pet. at 5), "immediate review is both necessary and efficient [to save petitioners from] . . . years of delay and expense." Pet. at 19. After litigating for over thirteen years, petitioners know that the longer they are able to delay these proceedings, the fewer lawsuits petitioners will ultimately face due to the tragically high attrition rate of sick smokers, particularly with a class cut-off date of over one-decade ago, of November 21, 1996. App. 41a. Petitioners' alternative request for a "GVR" (Pet. at 30), is unwarranted and would serve no purpose other than to further protract the litigation where absent class members have waited more than thirteen years for relief.[34]

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[34] A GVR was never intended to grant petitioners a second appeal on preemption, an issue they did not adequately raise and preserve

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After thirteen years of protracted litigation, with over a dozen appellate proceedings in state and federal courts, a two-year trial that was subject to full appellate review, in which petitioners largely prevailed on appeal, and where legal notice has been disseminated by publication throughout Florida in 1997 and 2007, "*enough is enough.*"[35]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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before the state supreme court under federal and Florida law. *Beck*, 369 U.S. at 553; *Duest*, 555 So.2d at 852; *Sag Harbour*, 484 So.2d at 1256. Nor is a GVR appropriate where preemption was addressed by the district court and also addressed in a sentence by the Florida Supreme Court, commensurate with petitioners' fleeting reference to that issue in one sentence on page forty-nine of a fifty-page brief. And a GVR makes no sense at all in a case where there are specific pre-July 1, 1969 jury findings of negligence supporting the two judgments so that any consideration of preemption could not change the ultimate outcome. The cases cited by petitioners are inapposite. *See Lawrence v. Chater*, 516 U.S. 163, 174-75 (1996) (GVR would give Court of Appeals opportunity to consider "new interpretation of the Social Security Act"); *Youngblood v. West Virginia*, 126 S.Ct. 2188, 2190 (2006) ("Youngblood *clearly presented* a federal constitutional Brady claim to the State Supreme Court [and] . . . the dissenting Justices discerned the significance of the issue raised") (emphasis supplied).

[35] *Federal Election Com'n v. Wisconsin Right To Life, Inc.*, 127 S.Ct. 2652, 2672 (2007).