NO. 13-191

In the
Supreme Court of the United States

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

Petitioners,

v.

JAMES L. DOUGLAS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLOTTE M. DOUGLAS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Florida

REPLY BRIEF FOR PETITIONER R.J. REYNOLDS TOBACCO COMPANY

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September 13, 2013

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER R.J. REYNOLDS TOBACCO COMPANY

The Supreme Court of Florida has adopted an utterly novel conception of claim preclusion that is wholly alien to every other judicial system in the Nation. As a result, thousands of trials will now proceed under a mode of adjudication that allows a plaintiff to invoke a heretofore-unheard-of *offensive* version of *claim preclusion* to establish *issues* against a defendant, even though no claim is being precluded, no court has ever adjudicated the plaintiff's claim to final resolution, and no fact-finder has ever resolved the issue in the plaintiff's favor. This is a textbook example of the kind of extreme departure from core res judicata principles that violates due process and merits this Court's review.

The Eleventh Circuit recently described the res judicata principles applied by the Florida Supreme Court as "unorthodox and inconsistent with the federal common law." *Walker v. R.J. Reynolds Tobacco Co.*, --- F.3d ----, 2013 WL 4767017, at *10 (11th Cir. Sept. 6, 2013). That is a considerable understatement. This is not an issue where there is a distinct federal approach with some states following the federal rule while others pursue a minority approach. Florida stands completely alone in even suggesting that claim preclusion can be applied offensively. In the federal system and every one of the other 49 states, offensive claim preclusion is an oxymoron. But rather than recognize that Florida's "unorthodox" approach violates due process, the Eleventh Circuit mistakenly viewed itself bound by full faith and credit principles to defer to it. To

add insult to injury, the Eleventh Circuit misconstrued the Florida Supreme Court's reasoning in ways that create insurmountable preemption problems without ameliorating the due process objections.

That means that only this Court can put an end to this massive due process violation. Unlike previous instances in which this Court has intervened to correct extreme applications of res judicata affecting only a handful of cases, the decision below is guaranteed to infect thousands of cases with constitutional error. Absent this Court's review, both federal and state courts will perpetuate a due process violation and apply rules alien to basic Anglo-American principles of adjudication. And the notion that, once approved, this extreme departure from res judicata principles will be confined to tobacco cases, and not applied to the next unpopular litigant, is simply wishful thinking. This issue is now fully ripe, and this Court's intervention is badly needed.

I. The Florida Supreme Court's Extreme Departure From Traditional Res Judicata Principles Is A Due Process Violation Of The First Order.

It does not take a searching review of the *Engle* record to understand the basic flaw in respondent's insistence that Phase I of the *Engle* trial produced "class-wide" liability findings. It is beyond dispute that the jury was presented with multiple theories of liability, some of which applied to the entire class, but many of which did not. Indeed, the Florida Supreme Court explicitly acknowledged as much

below, as have courts before and after it. Pet.App.4a; *Waggoner v. R.J. Reynolds Tobacco Co.*, 835 F. Supp. 2d 1244, 1263 (M.D. Fla. 2011) ("the *Engle* class did not pursue a single theory of defect, but rather alleged a number of discrete design defects"); *Walker*, 2013 WL 4767017, at *2 ("the plaintiffs presented evidence about some defects that were specific to certain brands or types of cigarettes and other defects common to all cigarettes").

There is also no dispute that the jury was never asked "to identify specific tortious actions" any defendant committed, Pet.App.4a, which makes it impossible to determine which theories formed the basis for its findings. Instead, those findings are "equivalent to saying that the Defendants did something wrong without saying exactly what the Defendants did wrong and when." *Brown v. R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328, 1342 (M.D. Fla. 2008) ("*Brown I*"), *vacated by Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1335 (11th Cir. 2010) ("*Brown II*") ("there is certainly nothing in the jury findings themselves" to show that they "must mean that all cigarettes the defendants sold were defective").

That left the Florida Supreme Court in a difficult position—one it successfully avoided for years until an intermediate court finally forced the issue by certifying the question. The Florida Supreme Court indicated in *Engle* that the Phase I findings would be given "res judicata effect" in subsequent cases. *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1254 (Fla. 2006) (per curiam). Res judicata is often used as a blanket term to cover the distinct doctrines of issue

preclusion and claim preclusion. *Black's Law Dictionary* (9th ed. 2009). But neither doctrine fit. Claim preclusion as traditionally understood was a complete non-starter. It is a defense that, as its name suggests, would preclude litigation of progeny plaintiffs' claims. Thus, every court to consider the question, until the Florida Supreme Court below, assumed the *Engle* court must have meant issue preclusion. But it is black-letter law that issue preclusion cannot apply unless it is demonstrable that the issue was actually decided in a prior proceeding. And, thanks to the class's successful urging of a generally worded set of verdict form questions, it is not demonstrable that the *Engle* jury decided issues that would conclusively determine elements of plaintiffs' claims in follow-on cases. All that can be ascertained with any degree of certainty is that the jury decided, after considering multiple different and sometimes mutually exclusive theories, that each defendant marketed at least one defective product and committed at least one negligent act. As the Florida Supreme Court thus candidly acknowledged, applying any recognizable version of issue preclusion "would effectively make the Phase I findings … useless in individual actions." Pet.App.26a.

The court's solution to this predicament was to invent out of whole cloth an *offensive* version of *claim* preclusion that allows an *Engle* class member to invoke Phase I findings to resolve every *issue* the *Engle* jury *could have* decided in its favor, without making any showing that *either the issue or the claim* was resolved in prior litigation. This novel amalgam of issue and claim preclusion, under which plaintiffs

gain all the benefits of both doctrines without giving the defendant the core protections of either, is precisely the sort of "extreme application[] of the doctrine of res judicata" that is "inconsistent with a federal right that is 'fundamental in character.'" *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 797 (1996). There is no claim preclusion mechanism in the history of the Anglo-American legal system that a *plaintiff* may invoke *offensively* to establish *elements* of a claim in its favor when that claim was not even litigated to final judgment. Nor is there any version of issue preclusion that a plaintiff may invoke without first establishing that some fact-finder actually decided the issue in its favor. That is because depriving a defendant of the opportunity to litigate issues no fact-finder has actually decided in the plaintiff's favor is a blatant violation of the Constitution's due process guarantee.

Unsurprisingly, respondent devotes the bulk of his brief in opposition to manufacturing vehicle problems rather than defending the Florida Supreme Court's never-before-seen version of preclusion. As explained in our co-petitioners' reply, those meritless contentions are no obstacle to review. Nor does respondent provide any remotely persuasive justification for allowing this flagrant due process deprivation to stand. This is not some one-off issue that matters only to the parties to this case. It is an issue that was certified to the Florida Supreme Court precisely because it will govern *thousands* of *Engle* progeny cases, collectively exposing defendants to *billions* of dollars in potential damages. That those trials are occurring in a single state hardly renders this immensely consequential question any less

worthy of this Court's attention. *See, e.g.*, *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) (addressing unique Oregon procedure); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702 (2010) (addressing unique Florida land-use regulation).

II. In Light Of The Eleventh Circuit's *Walker* Decision, The Due Process Issue Is Now Fully Ripe For This Court's Review.

Although the Eleventh Circuit recognized that the Florida Supreme Court's novel concept of offensive claim preclusion was "unorthodox and inconsistent with the federal common law," *Walker*, 2013 WL 4767017, at *10, it nonetheless declined to intervene. Rather than closely review the Florida Supreme Court's "unorthodox" departure from bedrock res judicata principles to ensure that petitioners' due process rights were respected, the Eleventh Circuit mistakenly concluded—without the issue having been briefed by the parties—that full faith and credit principles required it to "defer" to the Florida Supreme Court. That is plainly incorrect.

The Full Faith and Credit Act, 28 U.S.C. § 1738, accords to state judicial proceedings only the preclusive effect they would have under state law. Florida preclusion law requires mutuality. *Stogniew v. McQueen*, 656 So. 2d 917 (Fla. 1995). Thus, whatever binding effect the decision below may have on state courts as a matter of *stare decisis*, it has no *preclusive* effect in cases brought by *different plaintiffs*. And, of course, a state court's disposition of a federal constitutional issue has no *stare decisis* effect in federal court. The Eleventh Circuit's

"deference" to *Douglas* therefore was based on a plainly mistaken legal premise. But even setting aside that obvious problem, full faith and credit principles could not relieve the Eleventh Circuit of its obligation to determine whether applying the version of preclusion adopted by *Douglas* would violate petitioners' due process rights. *See Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482 (1982) (obligation to give full faith and credit is subject to due process constraints).

And the problems with the Eleventh Circuit's analysis do not end there. At the same time that it purported to defer to the Florida Supreme Court, the Eleventh Circuit minimized the due process problem by fundamentally misreading the *Douglas* opinion as having concluded that the *Engle* jury actually decided broad issues of liability that would apply to all progeny plaintiffs' claims. That conclusion is impossible to square with the decision below or with the *Engle* proceedings. It simply wishes away the dilemma that confronted the Florida Supreme Court and ignores *Douglas*' *express* acknowledgement that applying issue preclusion and its "actually decided" requirement "would effectively make the Phase I findings … *useless* in individual actions." Pet.App.26a (emphasis added). That conclusion would make absolutely no sense if the court had already "found" that the *Engle* jury *did* actually decide liability on a class-wide basis. More fundamentally, the Florida Supreme Court would have had no reason to concoct its novel version of offensive *claim preclusion* if it had already concluded—contrary to reality—that the Phase I findings were broad enough to be highly useful, as

opposed to "useless," in follow-on trials. The court invented its extreme departure from settled claim preclusion principles precisely because it had already concluded that the Phase I findings were "useless" under traditional issue preclusion principles.

It thus simply defies reality to dismiss the Florida Supreme Court's invocation of claim preclusion, rather than issue preclusion, as a matter of "[l]abeling." *Walker*, 2013 WL 4767017, at *10. The Florida Supreme Court itself considered its invocation of "claim preclusion" "[o]f specific importance to this case." Pet.App.30a. In its view, attaching that label rendered what the *Engle* jury actually decided *irrelevant* because "claim preclusion, unlike issue preclusion, has no 'actually decided' requirement." Pet.App.30a.

The Eleventh Circuit's reading of *Douglas* conflicts not just with that opinion, but with the reality of the *Engle* trial. The Eleventh Circuit did not even attempt to identify anything in the *Engle* record to support the finding it misattributed to the Florida Supreme Court. That is because, as court after court (including the court below) has recognized, nothing of the sort exists. Pet.App.4a; *Brown I*, 576 F. Supp. 2d at 1342; *Brown II*, 611 F.3d at 1335; *Engle v. R.J. Reynolds Tobacco*, No. 94-08273CA-22, 2000 WL 33534572 (Fla. Cir. Ct. Nov. 6, 2000) (post-trial decision detailing multiple and often conflicting liability theories presented to *Engle* jury). The findings themselves certainly do not reveal what the jury actually decided, beyond the bare and "useless" fact that each defendant marketed at least one defective cigarette and committed at least one

negligent act under the multitude of often conflicting theories presented.

What is more, the Eleventh Circuit's misreading of *Douglas* creates yet another problem that the Florida Supreme Court's novel offensive claim preclusion theory elided. If the *Engle* jury had actually decided that every cigarette marketed by defendants was defective simply by virtue of being a cigarette, that finding would be highly useful, but also preempted by federal law. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137 (2000) (federal law "foreclose[s] the removal of tobacco products from the market"); *Liggett Grp., Inc. v. Davis*, 973 So. 2d 467, 472–73 (Fla. 4th DCA 2007) (same), *rev. dismissed*, 997 So. 2d 400 (Fla. 2008). In the proceedings below, petitioners pointed out the preemption difficulties with concluding that the jury actually decided in Phase I that all cigarettes were defective. *See* Initial Br. for Pet'rs 34 n.7 (Fla. May 30, 2012). The Florida Supreme Court evaded that argument the same way it avoided the fundamental problem that neither traditional claim preclusion nor traditional issue preclusion principles could render the Phase I findings materially useful in subsequent cases: by inventing a wholly novel doctrine of offensive claim preclusive that requires neither a final judgment nor that anything in particular be actually decided.

The Eleventh Circuit's misguided analysis makes crystal clear that only this Court can prevent massive due process violations. And that is precisely the role this Court plays in protecting against extreme departures from fundamental due process

guarantees. It is difficult for a regional court of appeals to conclude that one of the three state court systems within its jurisdiction is operating outside the bounds of the Due Process Clause. But when state court systems have deviated from fundamental precepts of adjudication—whether through extreme departures from ordinary res judicata principles, *Richards*, 517 U.S. at 797, or elimination of meaningful judicial review, *Oberg*, 512 U.S. at 425—this Court has not hesitated to intervene. The decision below is as extreme a departure from ordinary res judicata principles as this Court is likely to see. The difference between traditional issue and claim preclusion and the offensive claim preclusion sanctioned below is as fundamental as the difference between adjudicating liability and simply assigning it.

It is no answer to say defendants had a full and fair opportunity to litigate in *Engle*. Having a full and fair opportunity to litigate one issue does not deprive a litigant of a full and fair opportunity to litigate another issue, except when the prerequisites for claim preclusion are satisfied. And even then, claim preclusion operates only as a shield, not a sword. The novel amalgam applied by the Florida Supreme Court eliminates the safeguards guaranteed by traditional preclusion principles and due process. Issue preclusion requires the precise issue to have been actually and demonstrably decided. Claim preclusion operates only after the parties have had one fair chance to litigate to final judgment claims arising out of an occurrence. The notion that a defendant's opportunity to defend itself against one issue (*e.g.*, petitioners marketed at least

one defective product) in a case that does not go to final judgment somehow prevents the defendant from contesting a different issue (*e.g.*, all cigarettes are defective) is completely alien to the law.

Such an extreme departure from the settled preclusion practices of every other judicial system in the Nation is simply not the kind of thing this Court should allow to go unreviewed—particularly when that departure will govern thousands of future trials with billions of dollars in potential liability. If defendants truly have no choice but to face deprivation after deprivation of their property with no assurance that any fact-finder has ever found them legally responsible for the injuries plaintiffs assert, then at the very least, this Court should be the one to say so.

To be sure, recognizing the decision below for what it is—an extreme and unconstitutional departure from universally accepted preclusion principles—would have the unfortunate consequence of requiring litigation that could have been avoided had the *Engle* jury been asked to make different findings. As a party who has expended considerable resources of its own in both *Engle* and progeny cases, petitioner is not insensitive to that reality. But if anyone is to blame for this regrettable situation, it is surely not the *Engle* defendants whose due process rights are being violated. After all, as the Eleventh Circuit reiterated, defendants warned the class all the way back during *Engle* that the jury findings it sought would be "'useless for application to individual plaintiffs,'" *Walker*, 2013 WL 4767017, at *3, yet the class forged ahead. Defendants then sought this

Court's review of *Engle*, but plaintiffs insisted the Court should wait and see how the progeny trials played out. And defendants repeatedly sought certiorari as progeny trials concluded, but plaintiffs yet again insisted the Court should stay its hand, this time invoking the prospect of future review by the Florida Supreme Court and the Eleventh Circuit.

The plaintiffs have finally run out of excuses. The highest state court and the only court of appeals with jurisdiction over progeny cases have now abandoned bedrock due process principles in favor of an "unorthodox" yet pragmatic "solution." Pragmatism is an important consideration in any legal system, but it cannot trump due process. The novel doctrine of offensive claim preclusion invented by the decision below is not merely unorthodox; it is an affront to due process. It was designed to deprive defendants of the protections afforded by traditional, well-established principles of claim and issue preclusion. Now that the Eleventh Circuit has mistakenly deemed itself bound to defer to, rather than correct, this massive due process violation, it becomes imperative for this Court to intervene.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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