No. 13-1187

IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY,
Petitioner,

v.

JIMMIE LEE BROWN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROGER BROWN,
Respondent.

On Petition for a Writ of Certiorari to the Florida Fourth District Court of Appeal

BRIEF IN OPPOSITION

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May 1, 2014

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QUESTION PRESENTED

Did the Florida Supreme Court violate federal due process by applying Florida preclusion law to prevent class action defendants from relitigating class-wide conduct findings in subsequent trials brought by individual class members?

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INTRODUCTION

For the eighth time, a tobacco manufacturer asks this Court to review the Florida *Engle* tobacco litigation for federal due process concerns. *See Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (*Engle III*). In the past seventeen months, this Court has denied certiorari seven times on this single legal issue, most recently earlier this term, in addition to denying review in *Engle III* itself. *See R.J. Reynolds Tobacco Co. v. Engle*, 552 U.S. 941 (2007); *R.J. Reynolds Tobacco Co. v. Clay*, 84 So. 3d 1069, (Fla. 1st

DCA), *cert. denied*, 133 S.Ct. 650 (2012); *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. 1st DCA 28010), *rev. denied*, 67 So. 3d 1050 (Fla. 2011), *cert. denied*, 132 S. Ct. 1794 (2012); *R.J. Reynolds Tobacco Co. v. Gray*, 63 So. 3d 902 (Fla. 2010), *cert. denied*, 132 S.Ct. 1810 (2012); *Liggett Group LLC v. Campbell*, 60 So. 3d 1078 (Fla. 1st DCA 2011), *cert. denied*, *Philip Morris USA Inc. v. Campbell*, 132 S.Ct. 1794 (2012), and *cert. denied*, *R.J. Reynolds Tobacco Company v. Campbell*, 132 S.Ct. 1795 (2012); *R.J. Reynolds Tobacco Co. v. Hall*, 70 So. 3d 642 (Fla. 1st DCA 2011), *cert. denied*, 132 S.Ct. 1795 (2012); *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013), *cert. denied*, 134 S. Ct. 332 (2013).

Just as in the seven previous certiorari applications, R.J. Reynolds again argues that the Florida courts violated its federal due process rights by applying Florida preclusion law giving binding effect in individual progeny actions to the class-wide findings of the jury in Phase I of the *Engle* class action. Respondent Jimmie Lee Brown, as Personal Representative of the estate of Roger Brown, respectfully requests that this Court deny the petition for writ of certiorari. Nothing has changed since this Court's eight previous denials. Moreover, the Eleventh Circuit has now joined the unanimous chorus of Florida courts which rejected Petitioners' redundant due process arguments. *See Walker v. R.J. Reynolds Tobacco Co*., 734 F.3d 1278 (11th Cir. 2013). R.J.Reynolds, and the other defendant tobacco manufacturers in the *Engle* litigation, have received all constitutionally required due process throughout the course of this 20-year-old litigation. Certiorari should be denied.

COUNTERSTATEMENT OF THE CASE

In 1994, a class of smokers and their survivors sued various cigarette manufacturers for damages caused by smoking-related injuries and deaths. After class certification proceedings including appellate review, the class was defined to include "All [Florida] citizens and residents, and their survivors, who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *Douglas*, 110 So.3d at 422, *citing R.J. Reynolds Tobacco Co. v. Engle*, 672 So.2d 39, 40, 42 (Fla. 3d DCA 1999) (*Engle I*); *Engle III*, 945 So.2d at 1256.

In 1998, after the class definition was fixed, the *Engle* trial court developed a three phase trial plan. In Phase I, the jury was to decide "common issues relating exclusively to the defendants' conduct and the general health effects of smoking," including the "extent of the defendants' wrongful conduct." *Engle III*, 945 So.2d at 1256; *Douglas*, 110 So.3d at 422, 422 n.2, 423. In Phase IIA, the jury was to decide the liability and compensatory damage claims of the individual class representatives. Phase IIB involved a class-wide determination of punitive damages. In Phase III, individual class members other than the class representatives could bring law suits to determine individual liability and damages. *Engle III*, 945 So.2d at 1257; *Douglas*, 110 So.3d at 422-23.

The Phase I trial lasted a year, ending in July of 1999. *Engle III*, 945 So.2d at 1256. The trial was conducted as contemplated in the trial plan. All parties presented extensive evidence on all issues including the defects in the *Engle* defendants' cigarettes and the defendants' negligence. As the Petition states, the evidence in the year long trial

included extensive testimony and exhibits concerning numerous design features of cigarettes, such as placement of ventilation holes, filter design, ammoniating, and manipulation of nicotine levels. (Pet. at 7). In addition to proving these brand specific defects, the *Engle* class in the Phase I trial established that all cigarettes sold to the class were defective because they were addictive and caused disease. The *Engle* defendants presented evidence to support their claim that none of their cigarettes were addictive and that their cigarettes had not been proven to cause disease. They also presented evidence asserting they had designed the safest cigarette possible. They urged the jury to find that none of their cigarettes were defective. (*Engle* Tr. at 36845-46, 36886-91, 37102-03, 37319, 37332.). The Phase I evidence included testimony from over 150 witnesses generating over 57,000 pages of record testimony, together with thousands of exhibits. *Douglas*, 110 So.3d at 424.

During the Phase I trial all parties knew that under the trial plan, the defect product claims about the defendants' cigarettes sold to the class in general, not merely the existence of a series of brand specific defects such as those listed in Petitioner's brief, would be decided by the jury. At the end of Phase I, the trial court instructed the jury to decide "all common liability issues" concerning "the conduct of the tobacco industry," consistent with the trial plan expectation that the Phase I trial would resolve class-wide common issues related to the *Engle* defendants' conduct. *Douglas*, 110 So.3d at 423.

Nothing in the trial plan deprived the *Engle* defendants of the opportunity to submit a verdict form to require the jury to decide brand specific and/or time specific defects, or otherwise to break down and obtain

the jury's specific findings of product defects and negligence. Instead, the defendants proposed a narrative verdict form, which would ask the jury to provide narrative written explanations identifying specific defects and tortious acts. The trial court rejected this proposed narrative form as unworkable and gave the *Engle* defendants the opportunity to provide a substitute, but they never did. *Engle* Tr. at 35967-70; *Douglas*, 110 So.3d at 423. Ultimately, the trial court gave the jurors a verdict form containing twelve pages with 240 questions.

On this verdict form the Phase I jury found, among other things, that cigarettes in general caused various diseases, that nicotine in cigarettes was addictive, that the *Engle* defendants had placed cigarettes on the market which were defective and unreasonably dangerous, and that the defendants were negligent. *Engle III*, 945 So.2d at 1256, 1277; *Douglas*, 110 So.3d at 424. After the conclusion of Phases IIA and IIB, on November 8, 2000, the *Engle* trial court entered a final judgment, primarily but not entirely in favor of the class members. *Engle III*, 945 So.2d at 1257.

After further appeals, in 2006 the Florida Supreme Court issued its opinion in *Engle III*. The *Engle III* opinion decided that the class should be decertified prospectively, and authorized class members to bring individual actions within one year from the court's mandate. *Engle III*, 945 So.2d at 1277. In these individual actions, generally referred to by the parties as "progeny cases", some but not all of the Phase I findings were given "res judicata effect." *Engle III*, 945 So.2d at 1255, 1277. The Florida Supreme Court held that the Phase I findings as to fraud and conspiracy to commit fraud by (affirmative) misrepresentation, and intentional infliction of emotional distress, were too

"nonspecific" to apply class-wide in the progeny cases; but the court also found that other Phase I findings, including the findings on addiction, general disease causation, negligence, and placing defective and unreasonably dangerous products on the market, should "stand" and be applied as "res judicata" in the progeny actions. *Engle III*, 945 So.2d at 1255, 1277; *Douglas*, 110 So.3d at 424-25.[1] Case specific issues, such as membership in the *Engle* class, individual addiction, individual causation, comparative fault, and damages, remained for resolution by juries in individual progeny actions. *See Engle III*, 945 So.2d at 1254 ("individual causation" issues to be left to the individual claims); *Douglas*, 110 So.3d at 430 (explaining proof of individual causation, class membership and damages required for individual progeny plaintiffs to prevail).

Several thousand progeny actions were filed in Florida state and federal courts, including this law suit filed by Ms. Brown. At trial the jury was instructed as to the findings the *Engle III* court decided had res judicata effect, and the jury was also instructed that these findings were binding.

The first Florida appellate court to construe *Engle III* was the Florida First District Court of Appeal in

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[1] The Phase I *Engle* jury also made findings regarding fraud by concealment and conspiracy to commit fraud by concealment, which the *Engle III* court also gave res judicata effect. In the case below, the trial court entered a directed verdict in Reynolds' favor on the fraud by concealment and conspiracy counts, so only the negligence and strict liability counts were submitted to the jury. *R.J. Reynolds Tobacco Co. v. Brown*, 70 So.3d 707, 711 and n.6. (Fla. 4th DCA 2011). Accordingly, the Respondent will address only the negligence and strict liability counts of her complaint in this response.

R.J. Reynolds Tobacco Co. v. Martin, 53 So.3d 1060 (Fla. 1st DCA 2010), which held that the *Engle* Phase I jury decided "the 'conduct' elements of the claims asserted by the class . . ." in favor of the class. *Martin*, 53 So.3d at 1067. The *Martin* court also held that *Engle* progeny plaintiffs could "rely" on the Phase I findings to "establish the conduct elements of the asserted claims," and further that *Engle* progeny juries could be instructed on the preclusive effect of those findings. *Martin*, 53 So.3d at 1069.

In this case, which was the second Florida appellate opinion, the Florida Fourth District Court of Appeal agreed with the *Martin* court that "individual post-*Engle* plaintiffs need not prove the conduct elements in negligence and strict liability claims . . ." *R.J. Reynolds Tobacco Co. v. Brown*, 70 So.3d 707. 715 (Fla. 4th DCA 2011). The *Brown* court also agreed with the *Martin* decision finding the appropriate mechanism for implementing the preclusive effect of the *Engle* was through instructions informing the jury of their preclusive effect.[2]

Presumably because it was only the second reported opinion on a progeny case, a concurring opinion in *Brown*, to which R.J. Reynolds cites repeatedly in its petition, expressed some uncertainty as to the appropriate method of applying *Engle III* in the progeny cases. *Brown*, 70 So.3d at 718-20 (May, J., specially concurring).[3] Nevertheless, other Florida

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[2] The *Brown* trial court gave additional causation instructions beyond those required by *Martin* or *Douglas*, which the Fourth District approved. *Brown*, 70 So.3d at 716-18.

[3] *See Brown*, 70 So.3d at 714 ("From a jurisprudence standpoint, the issue of how to apply the *Engle* findings is in its infancy.").

trial courts continued to instruct progeny juries on the preclusive effect of the Phase I findings in accordance with *Martin* and the *Brown* majority opinion. If any uncertainty as suggested by the single concurring judge remained as to the Florida law concerning the preclusive effect of *Engle III*, it was clarified and the law was made certain and definite by the Florida Supreme Court in *Douglas*. In *Douglas*, Florida's highest court reaffirmed the preclusive effect of the *Engle* Phase I instructions and expressly adopted the *Martin* opinion's ruling on the appropriate jury instructions implementing the binding nature of the findings. *Douglas*, 110 So.3d at 430.

In Ms. Brown's case, the jury determined in a preliminary first trial phase, conducted before any findings were presented to the jury, that decedent Roger Brown was an *Engle* class member. To make this finding of class membership the jury was required to decide that Roger Brown was addicted to R.J. Reynolds' cigarettes containing nicotine and that addiction to R.J. Reynolds cigarettes was a legal cause of his death. The addiction issue was contested at trial through testimony from both expert and lay witnesses. *Brown*, 70 So.3d at 711-13, 717.

After the jury determined class membership, the trial court instructed the jury on the relevant *Engle* findings that R.J. Reynolds had placed defective and unreasonably dangerous cigarettes on the market and had failed to exercise reasonable care. The court instructed the jury that these findings were binding since Roger Brown was a class member. *Brown*, 70 So.3d at 713. The *Brown* trial proceeded with further evidence from both parties on the issues of legal causation, comparative fault, and damages. The jury found in favor of Brown on legal causation but also

found 50% comparative fault on Brown. The jury awarded compensatory damages of $1,200,000, reduced in the final judgment to $600,000 on account of the 50% comparative negligence finding. *Brown*, 70 So.3d at 713-14.

After being affirmed in the Florida Fourth District Court of Appeal, *Brown* was held by the Florida Supreme Court pending its decision in *Douglas*. After the *Douglas* opinion the Florida Supreme Court dismissed the then pending petition for review. The now pending petition to this Court followed.

REASONS FOR DENYING THE PETITION

I. IN LIGHT OF THE UNANIMITY OF OPINION AMONG THE STATE AND FEDERAL COURTS, THERE IS NO REASON TO GRANT THE PETITION.

This is the eighth time the *Engle* defendants have asked this Court to review the *Engle III* result. In addition to their unsuccessful attempt to obtain review of *Engle III* itself, in the past seventeen months they have petitioned this Court seven times for review of *Engle* progeny cases, based on the same argument that giving the *Engle III* findings preclusive effect violates their federal Due Process rights. In each application this Court has denied review. Nothing has changed since the most recent denial of certiorari in *Douglas* earlier this term, except that the federal Eleventh Circuit Court of Appeals has now agreed with the unanimous view of the Florida state courts that there is no constitutional violation in giving the *Engle* findings their intended preclusive effect. *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.2d 1278, 1287-89 (11th Cir. 2013). R.J. Reynolds can point to nothing warranting a different result from what it urged in the

previous seven unsuccessful attempts to obtain review by this Court of the *Engle* progeny process. The Court should decline review for the eighth and hopefully final time.

II. FLORIDA LAW AS TO THE PRECLUSIVE EFFECT OF THE *ENGLE* FINDINGS IS SETTLED AND PROVIDES NO BASIS FOR REVIEW BY THIS COURT.

Even before the Florida Supreme Court opinion in *Douglas*, Florida law as established in *Martin* and the *Brown* opinion below held that the *Engle III* findings were preclusive as to the conduct elements of the progeny plaintiffs' claims, including both the conduct of distributing defective and unreasonably dangerous products and the negligent conduct which the progeny juries should be instructed was decided. *Douglas* reaffirmed the view taken uniformly by the intermediate Florida appellate courts that this was the proper approach as a matter of Florida law. The Respondent mentions this point only because the Petitioner relies heavily on the special concurrence in *Brown*, in which the concurring judge speculated there could be uncertainty as to the proper interpretation and application of *Engle*. (Pet. at 14-15, 20); 70 So.3d at 718-20 (May, J., specially concurring). It should be emphasized that Judge May was writing at a relatively early stage of the *Engle* progeny litigation. If any uncertainty remained as to the Florida courts' approach in giving preclusive effect to the *Engle* findings it was clarified and put to rest by *Douglas*.

Florida's preclusion law is a matter for Florida courts to decide. Limited only by the requirements of federal due process, the federal courts are to give "preclusive effect to a state court judgment to the same

extent as would courts of the state in which the judgment was entered." *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278, 1286 (11th Cir. 2013), *citing Kahn v. Smith Barney Shearson, Inc.*, 115 F.3d 930, 933 (11th Cir. 1997), *Battle v. Liberty National Life Ins. Co.*, 877 F.2d 877, 882 (11th Cir. 1989); *Taylor v. Sturgell*, 553 U.S. 880, 891 n.4 (2008) ("For judgments in diversity cases, federal law incorporates the rules of preclusion applied by the State in which the rendering court sits."). So long as the *Engle* progeny process is consistent with federal due process, the approach of the Florida courts in implementing *Engle* is no concern for this Court and provides no basis for review.

III. GIVING THE *ENGLE* PHASE I FINDINGS PRECLUSIVE EFFECT AS REQUIRED BY THE FLORIDA SUPREME COURT DOES NOT VIOLATE DEFENDANT'S FEDERAL DUE PROCESS RIGHTS

The Petitioner's principal argument is the redundant claim that giving the *Engle III* findings preclusive effect for the conduct elements of the progeny plaintiffs' strict liability and negligence claims, as required by *Martin*, *Brown* below, and *Douglas*, somehow violates federal due process rights. Besides being an attempt to revisit the denial of certiorari in *Douglas* earlier this term and the six other denials in the past seventeen months, the Petitioner's due process argument has no support in law or the record.

A. The *Engle* Defendants Have Received Notice, Representation and an Opportunity to be Heard

"State courts are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes." *Richards v. Jefferson County*, 517 U.S.793, 797 (1996). This doctrine of state freedom to develop preclusion rules adapted to each state's circumstances is subject to the requirements of federal due process under the Fourteenth Amendment. The due process issues contemplated in *Richards*, however, were only the basic and fundamental due process concepts requiring each litigant to receive notice and an opportunity to be heard. *See Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950). The issue in *Richards* was whether the decision in a prior action by a city finance official challenging an Alabama county's tax was binding upon private individuals who did not participate in and were not represented in the prior action. The Court concluded that because of the lack of adequate representation of the private litigants in the prior action, due process would be denied if they were bound by the prior proceedings outcome. *Richards*, 517 U.S. at 802. However, the *Richards* court recognized that constitutionally adequate representation in a prior action could and often did come from class representatives in a class action, because all class members would be in privity with the class representatives and would be adequately represented by them. *Richards*, 517 U.S. at 798-99; *see Hansberry v. Lee*, 311 U.S. 32, 40 (1940)("To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, to which

some members of the class are parties, may bind members of the class or those represented who were not made parties to it."); *Taylor*, 553 U.S. at 894 (non-party class members are "adequately represented" by class representatives in a "properly conducted class action.").

In the *Engle* proceedings there was no lack of representation, notice, or the opportunity to be heard for any party. The class representatives who represented the class members were in privity with them. The same tobacco product manufacturers who were the defendants in *Engle*, or their successors by merger or corporate reorganization, are the defendants in the *Engle* progeny suits. The parties in *Engle* received notice of the trial plan, were fully aware of it, participated in it, and understood that under the trial plan Phase I would address class-wide common issues pertaining to the *Engle* defendants' conduct, including their sale of defective products and their negligence. The *Engle* defendants had every opportunity during the year long Phase I trial to argue and prove that their products were not defective and likewise to prove that they had not been negligent. Moreover, they had the opportunity to and did present evidence on these issues just as the *Engle* class representatives had the burden to and did prove with sufficient evidence that the products were defective and that the defendants were negligent. The *Engle* defendants, like the *Engle* class itself, asked for a class-wide verdict on the ultimate facts pertaining to the causes of action for defective products and negligence.

In its brief the Petitioner points out that the parties had the opportunity to and did produce evidence as to a wide variety of specific design features in the

defendants' cigarettes, some of which applied only to certain brands or time periods. When provided the opportunity to present a verdict form requiring findings as to each brand specific or time period specific defect, however, the defendants failed to present the trial judge a workable verdict form and thereby waived any claims for greater specificity in the verdict. *See Whitman v. Castlewood International Corp.*, 383 So.2d 618, 619-20 (Fla. 1980)(Under Florida law, a party waives objections to a general verdict form by failing timely to request a special verdict form). The parties in *Engle* received what they were on notice from the trial plan they were to receive, which is what they actually litigated, and thus they received verdicts on the defects in the defendants' products in general and also on the defendants' negligence.

After the *Engle* Phase I and IIA trials, the defendants appealed to the Florida intermediate appellate court and Florida Supreme Court, and now seek the same relief from this Court, which was denied in 2007. *See R.J. Reynolds Tobacco Co. v. Engle*, 552 U.S. 941 (2007). In the ensuing *Engle* progeny actions, the Petitioner and the other *Engle* defendants have vigorously litigated the individual issues remaining for resolution including addiction, class membership, individual causation, comparative negligence and damages.

As the result in the case below illustrates, the *Engle* defendants frequently have success in litigating these individual issues. For example, in this case, the Petitioner succeeded in obtaining a directed verdict on the intentional tort counts, was subjected to no punitive damages, and persuaded the trial court to reduce its compensatory damage liability by half

through the application of Florida comparative negligence law. They have taken full advantage of their appellate rights, including the appeal below, seeking review in the Florida Supreme Court, and now asking for certiorari in the pending Petition. After twenty years of *Engle* litigation, the defendants continue to be provided with, and take advantage of, their opportunity to be heard. They have had twenty years of due process and it continues.

B. Whether Viewed As a Form of Claim Preclusion or Issue Preclusion, *Engle* Preclusion is Not a Denial of Due Process

In *Douglas*, the Florida Supreme Court indicated that *Engle* res judicata preclusion operated as a form of claim preclusion, since the progeny actions involved the litigation of the same causes of action between the same parties as in *Engle*. *Douglas*, 110 So.3d at 432-33. In the view of the *Douglas* court, the final judgment resolving the *Engle* claims was the final judgment of November 8, 2000 in *Engle* Phase IIA. *Douglas*, 110 So.3d at 433. If the *Engle* Phase IIA judgment had not been final, there would have been no appeal from it to result in the *Engle III* opinion six years later.

Res judicata in the sense of claim preclusion has long been recognized by federal law, including decisions in cases the Petitioner cites. *See Cromwell v. County of Sac*, 94 U.S. 351 (1876) (judgment in a prior action "a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which

might have been offered for that purpose."); *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008), *citing New Hampshire v. Maine*, 532 U.S. 742, 748 (2001)("Under the doctrine of claim preclusion, a final judgment forecloses 'successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit'"). To the extent the Petition is an attack on the constitutionality of claim preclusion itself, it is far too late.

The Petitioner suggests that the reasoning in *Douglas* is inconsistent with the analysis in *Walker* suggesting that *Engle* preclusion involves issue rather than claim preclusion, and that this alleged inconsistency warrants review. (Pet. at 16-17, 19-20).

First, *Douglas* and *Walker* are consistent both in reaffirming the preclusive effect of the approved *Engle* Phase I findings and in holding the preclusive application of those findings to be fully consistent with due process. In both *Douglas* and *Walker* the courts concluded that the *Engle* defendants had received both notice and the opportunity to be heard regarding the claims of their misconduct toward the class. *Douglas*, 110 So. 3d at 431; *Walker*, 734 F.3d at 1280, 1288. In both cases the courts found that substantial evidence had been presented in *Engle* that the cigarettes sold to the *Engle* class were defective because they were addictive and caused disease. *Douglas*, 110 So. 3d at 433; *Walker*, 734 F.3d at 1287. In both cases the courts determined that the *Engle* Phase I jury had been asked to decide common liability issues for the class rather than brand specific defects. *Douglas*, 110 So. 3d at 423; *Walker*, 734 F.3d at 1287.

Secondly, whatever difference in terminology exists between *Douglas* and *Walker*, it provides no ground for review since *Engle* preclusion, whether analyzed as

claim or issue preclusion, is fully consistent with due process. As the court in *Martin* explained, in either event the Phase I findings resolve the conduct elements of the class claims and prevent the *Engle* defendants from relitigating them. That is why the *Martin* court deemed it "unnecessary" to decide whether the term "res judicata" used to describe *Engle* preclusion referred to issue or claim preclusion; in either event the preclusion had the same effect, known and contemplated by the parties under the trial plan. *Martin*, 53 So.3d at 1067. This Court has also recognized that the term "res judicata" may refer either to claim or issue preclusion. *See Taylor*, 553 U.S. at 892 ("The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as "res judicata."). Whether viewed as a form of claim preclusion, as *Douglas* suggests, or as a form of issue preclusion as *Walker* suggests, what matters is whether *Engle* preclusion is consistent with the due process requisites of notice and an opportunity to be heard. *Cf. Walker*, 734 F.3d at 1289, *citing Fayerweather v. Ritch*, 195 U.S. 276, 297 (1904) ("[i]n determining what is due process of law, regard must be had to substance, not to form.").

The Petitioner, presupposing that *Engle* preclusion is a form of issue rather than claim preclusion, relies heavily on dicta in *Fayerweather*. As Petitioner argues, the *Fayerweather* court indicated that issue preclusion is limited to issues actually litigated and decided in the prior action. *Fayerweather*, 195 U.S. at 307. Notably, this statement was dicta in *Fayerweather* itself because the Court in that decision held that the matter in contention, the validity of certain releases, had been litigated and was binding on the parties in the second action, notwithstanding testimony from the trial judge in the first action that he had not intended

to rule on their validity. *Fayerweather*, 195 U.S. at 308 ("Nothing can be clearer from this record than that the question of the validity of the releases was not only before the state courts, but was considered and determined by them and the regularity of the procedure was sustained by the highest court of the state.").

In any event, the *Fayerweather* dicta hardly bears the weight the Petitioner puts on it; nothing in *Fayerweather* suggests either that the traditional applications of claim and issue preclusion are unconstitutional or that general findings fully and fairly litigated between the parties should not be given their preclusive effect. It is clear under *Richards* that states are free to craft their own preclusion doctrines and are not rigidly limited to the procedures of nineteenth and early twentieth century federal common law, so long as their solution comports with the due process requisites of notice and an opportunity to be heard as the *Engle* procedure does.

The application of *Engle* preclusion, regardless of its label, comports fully with due process. There is no doubt that, under the *Engle* trial plan, the *Engle* defendants had notice that the Phase I trial would resolve the common conduct elements of the class members' claims. The parties tried the case on that basis and the jury made verdict findings accordingly. The *Engle* defendants had the opportunity to submit a brand specific verdict form, but failed to do so, thereby waiving any objection to the form of the conduct findings they now claim to be too general. There was no deficiency either in notice or in opportunity to be heard in the *Engle* proceedings.

Furthermore, the *Engle* defendants continue to receive due process. The *Engle* findings never result in an automatic victory for the plaintiffs; instead,

Engle progeny plaintiffs, in order to recover at all, must still meet their burden to prove a number of case specific facts such as individual medical and legal causation, addiction, and class membership. Even if the plaintiffs prevail on these issues, they must still prove damages and are still subject to affirmative defenses including comparative negligence. For example, in the proceedings below the Petitioner totally defeated any claim for punitive damages, obtained a directed verdict in its favor on the intentional tort claims, and won a fifty per cent comparative fault reduction in the compensatory damage award. The Petitioner below held Brown to her burden and took full advantage of its affirmative defenses.

The Respondent finally notes pragmatically that in the event the Court grants review and ultimately decides to overturn the *Engle* process, the result will not be the end of the *Engle* plaintiffs' litigation. The plaintiffs will instead retry their cases with additional elements to prove, requiring longer trials and additional proof. This result will not add to the due process already afforded the *Engle* defendants, but will add considerably to the burdens on the *Engle* plaintiffs, who have already been litigating since 1994, as well as the burdens on the judicial systems dealing with the *Engle* progeny litigation.

Whether viewed as claim or issue preclusion, *Engle* preclusion is completely consistent and compatible with traditional notions of due process and in no way deprives *Engle* defendants of their ability to defend progeny actions vigorously. *Engle* preclusion merely prevents the *Engle* defendants from relitigating the matters they fully and vigorously litigated in the year-long Phase I trial. There is no violation of due process

in the *Engle* process, and nothing warranting reconsideration of this Court's denial of certiorari in *Douglas*.

CONCLUSION

For the foregoing reasons, the Petition for writ of certiorari should be promptly denied.

Respectfully submitted,

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