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, DECEASED

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

Like the Florida Supreme Court, Respondent embraces a novel version of preclusion that requires neither a final judgment on any claim nor an actual decision on the issue precluded. This doctrine is so unprecedented that Respondent candidly acknowledges that it is neither traditional claim preclusion nor traditional issue preclusion, but instead reflects an entirely new, *sui generis* doctrine that she dubs "*Engle* preclusion." According to Respondent, this extreme departure from universally accepted preclusion principles comports with the Constitution because due process requires nothing more than notice and an opportunity to be heard. But more than two centuries of preclusion and due process law make clear that preclusion is available only when the notice and opportunity to be heard in the first litigation resulted in either a final judgment on a claim or an actual decision on an issue. Because it forecloses the defendant's opportunity to be heard on crucial issues without either of those prerequisites having been satisfied, the version of preclusion being applied in *Engle* cases is both entirely unprecedented and entirely unconstitutional.

Remarkably, "*Engle* preclusion" is not just the fanciful concoction of progeny plaintiffs. In fact, this heretofore-unheard-of doctrine is precisely what the Florida Supreme Court sanctioned in *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013). It is a dangerous *offensive* version of *claim* preclusion that requires no final judgment in the ordinary sense and precludes no claims. Instead, "*Engle* preclusion" may

be invoked by plaintiffs to preclude defendants from contesting *issues* relevant to their claims, without regard to whether those issues were litigated to final judgment or an actual decision. This is no minor innovation; rather, it blurs the basic distinction between litigation and relitigation. It is one thing to prevent relitigation of issues that were actually decided in earlier litigation, and another to prevent a plaintiff who litigated her claims to final judgment from trying again. But to prevent a defendant from contesting an *issue* that was not actually decided simply because it *might* have been decided in a case that was never even litigated to final judgment is wholly unprecedented. It is an extreme departure from traditional preclusion principles that violates due process and merits this Court's review.

Both the Florida Supreme Court and the Eleventh Circuit now have concluded that the truncated procedures being employed in progeny cases pass constitutional muster—albeit for different and fundamentally conflicting reasons. Accordingly, it falls to this Court to put a stop to all of this before "*Engle* preclusion" injects massive due process violations into thousands of cases collectively involving claims for billions of dollars. Whether in this case, *Walker*, or both, the Court should grant certiorari and reject once and for all the extreme departure from traditional preclusion principles that *Engle* has spawned.

I. The Form Of Preclusion That Respondent Defends Is An Extreme And Dangerous Departure From Traditional Principles.

Respondent effectively concedes that the *Engle* litigation has produced as "extreme [an] application[] of the doctrine of res judicata" as this Court is likely to see. *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 797 (1996). Respondent candidly acknowledges that the doctrine being applied in progeny cases is neither claim preclusion nor issue preclusion, but rather a novel amalgam of the two that she labels "*Engle* preclusion." Opp.15. That is reason enough for suspicion, as constitutional concerns arise whenever a state court "abrogat[es] … a well-established common-law protection against arbitrary deprivations of property." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994). Although Respondent gamely attempts to demonstrate that this extreme departure from universally accepted preclusion principles is not "inconsistent with a federal right that is 'fundamental in character,'" *Richards*, 517 U.S. at 797, her efforts are futile.

Respondent largely glosses over the critical distinctions between claim and issue preclusion. But they are two very different doctrines with "two very different effects." 18 Wright & Miller, *Fed. Prac. & Proc. Juris.* § 4402 (2d ed.). "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.'" *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). "Issue preclusion, in contrast, bars

'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment[.]'" *Id.* These doctrines have very different effects because each is triggered by something very different: claim preclusion by a final judgment, and issue preclusion by the resolution of an issue. In other words, only because claim preclusion requires a final judgment may it foreclose claims entirely, no matter what issues were (or were not) decided in the course of reaching that judgment.

No one understood the differences between these two doctrines better than the Florida Supreme Court in *Douglas*. As the court acknowledged, under Florida preclusion law (as under the law of every other state in the Nation), issue preclusion may be invoked to preclude parties from relitigating only issues "that were litigated *and actually decided*" in a prior proceeding. *Douglas*, 110 So. 3d at 433 (emphasis added). But as the court also acknowledged, the *Engle* findings would be "*useless* in individual actions" if progeny plaintiffs were required to show what the jury "actually decided," *id.* (emphasis added), as there is no way of telling which of the varying brand-specific and often contradictory theories the jury accepted or rejected in reaching its generic findings that each defendant marketed some unspecified defective cigarette(s), and engaged in some unspecified negligent act(s), at some unspecified time(s) during a 50-year period. Yet rather than follow that conclusion to its logical end—that most of the *Engle* findings cannot be given the

preclusive effect progeny plaintiffs seek—the court simply declared the findings entitled to a novel *offensive* version of *claim* preclusion, attempting to defend this maneuver by noting that "claim preclusion, unlike issue preclusion, has no 'actually decided' requirement." *Id.* at 435.

It is no accident that not one of the numerous courts before *Douglas*—both state and federal—to wrestle with the difficulty the *Engle* findings posed had seized upon claim preclusion as the solution: Claim preclusion, as traditionally understood, is a complete misfit in the *Engle* context. Claim preclusion requires a final judgment (which *Engle* did not produce as to any progeny plaintiff) and invariably operates, as its name suggests, to preclude litigation of *claims*. It is a shield to be invoked against litigious plaintiffs, not a sword to be wielded by plaintiffs. *Douglas'* invention of offensive claim preclusion to solve the "*Engle* problem" was thus wholly unprecedented and entirely unconstitutional.

Claim preclusion is not some mere variation that may be invoked whenever the prerequisites for issue preclusion are not satisfied. It is a powerful doctrine with distinct prerequisites, consequences, and limitations. Precisely because it precludes *all* claims and issues related to them—even those that could have been litigated but were not—it is bedrock law that claim preclusion may be invoked only when there has been "a final judgment on the merits," *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 466 n.6 (1982), something that Phase I of *Engle* plainly did not produce. Moreover, claim preclusion is a *defense*

that "foreclos[es] litigation of a matter" *in its entirety*, because the matter either already was litigated to final judgment or "should have been advanced in an earlier suit" that was so litigated. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984).[1] The very notion of "offensive" claim preclusion is an oxymoron—no plaintiff wants to bar litigation of her own claim, and to the extent a plaintiff wants to prevent a defendant from contesting an issue, there is a distinct doctrine for that (*i.e.*, issue preclusion) with distinct requirements.

In cavalierly discarding these core requirements, the *Douglas* court managed to concoct a version of claim preclusion that is both unprecedented and dangerous, as it effectively blurs the line between litigation and relitigation. Not only does "*Engle* preclusion" require no final judgment in the ordinary sense, but it may be invoked *offensively* to preclude *defendants* from contesting *elements* of a plaintiff's *claim*, while having no effect whatsoever on the plaintiff's ability to litigate the claim itself. Worse still, it allows a defendant's property to be taken without any showing that the defendant has ever had

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[1] *See also, e.g.*, Restatement (Second) of Judgments § 24 (1982) ("(1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar …, the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction … out of which the action arose"); *id.* § 18 ("[t]he plaintiff cannot thereafter maintain an action on the original claim or any part thereof").

a chance to litigate *to final judgment or actual decision* core elements of the plaintiff's claim. That is precisely the outcome that universally accepted preclusion law is supposed to prevent.

II. The Mere Opportunity To Participate In Earlier Litigation Is No Substitute For The Protections Developed By Two Centuries Of Preclusion Law.

Remarkably, the basic premise of Petitioner's due process claim is not even in serious dispute. Respondent does not and cannot contend that *Engle* produced a final judgment on her claims.[2] And Respondent does not and cannot contend that *Douglas* adopted any recognizable form of claim preclusion; if it had, she would be foreclosed from litigating her own claims (as would every other progeny plaintiff). At the same time, Respondent does not and cannot contend that *Douglas* adopted any recognizable form of issue preclusion—*i.e.*, one that requires an actual decision on the issue to be precluded. To the contrary, she readily concedes that

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[2] Respondent notes that *Phase II* of *Engle* produced a final judgment, Opp.15, but that was only as to the three class representatives whose claims were tried to completion. As the progeny plaintiffs emphasized in urging this Court to deny review of the due process issue in *Engle* as premature, *Engle* did not produce "a judgment, or even a determination of liability," as to any other class members. Br. in Opp., *R.J. Reynolds Tobacco Co. v. Engle*, No. 06-1545, 2007 WL 2363238, at *10 (U.S. Aug. 15, 2007); *see also Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1263 (Fla. 2006) (Phase I "'did *not* determine whether the defendants were liable to anyone'"). The *Douglas* court's mere decision to label the *Engle* findings a final judgment cannot convert them into something they obviously are not.

the *Engle* jury was presented with "extensive testimony" relating to "brand specific defects," Opp.4, and identifies nothing in the verdict form or the *Engle* record that required the jury to decide which theories it accepted or rejected. In short, Respondent effectively concedes the premise of Petitioner's due process claim—namely, that the *Engle* findings are being used to preclude Petitioner from litigating issues that there is no way of knowing whether the *Engle* jury actually decided.

Respondent contends that this extraordinary result should not trouble this Court in the slightest because, while they may not have gotten a final judgment as to any progeny plaintiff or an actual decision on the relevant issues, the *Engle* defendants were afforded "notice and an opportunity to be heard." Opp.12. That is a complete non-sequitur. To be sure, notice and the opportunity to be heard are core components of due process. But whether a defendant had notice and the opportunity to be heard in an *earlier* proceeding matters only if that proceeding produced a final judgment or an actual decision on the issue precluded. When *neither* of those core prerequisites exists, notice and an opportunity to be heard on an issue in an *earlier* proceeding can hardly justify the denial of notice and the opportunity to be heard on that issue in the proceeding in which the defendant is being deprived of its property.

Indeed, if notice and opportunity to be heard in the earlier proceeding were enough, then two centuries of preclusion law centered around the need

for a final judgment or an actual decision on the relevant issue would not have developed. That two centuries of doctrine—with which Respondent identifies not a *single* conflicting decision other than *Engle* cases—cannot now be dispatched by Respondent's vague suggestion that Petitioner already had its day in court. Surely progeny plaintiffs could not preclude *Engle* defendants from contesting issues litigated during the *Engle* trial if the class had been decertified after the close of evidence but before the jury returned its verdict. Yet that is exactly the result that would follow from Respondent's crabbed notion of due process as requiring nothing more than notice and an opportunity to be heard in the earlier proceeding. Indeed, by Respondents' logic, preclusion would still be appropriate even if—as may well be the case—the *Engle* jury actually decided that certain brands of cigarettes were *not* defective. As these untenable results illustrate, it is simply incoherent to talk about whether an application of preclusion comports with due process without first identifying something entitled to preclusive effect.

Respondent makes much the same mistake in arguing that the *Engle* defendants somehow "waived" their right to object to unconstitutional uses of the *Engle* findings in future litigation by failing to ensure that the *Engle* jury produced more specific findings. Opp.14. Petitioner's objection is not that the *Engle* defendants lacked notice that class members hoped to use any favorable findings in future litigation, or were prevented from objecting to the verdict form the

class proposed. It is that the findings do not embody actual decisions on the issues progeny plaintiffs seek to preclude. No amount of notice or opportunity to be heard in *Engle* can cure that basic defect in progeny cases. Respondent emphasizes that the jury was not asked to decide "brand specific defects," Opp.16, but that is precisely the problem: The jury concededly was presented with theories that pertained only to certain types of cigarettes and certain times, yet it was not asked to identify which of those theories it accepted (or rejected) in reaching its generic findings that each defendant marketed some unspecified defective cigarette(s), and engaged in some unspecified negligent act(s), at some unspecified time(s) during a 50-year period.

In any event, the *Engle* defendants *did* object to the verdict form for exactly that reason: They argued that the generic questions the class proposed were bound to produce findings "useless for application to individual plaintiffs" in future litigation. SR-344-48. The defendants can hardly be blamed for the fact that the plaintiffs and the trial court failed to heed their warnings. Indeed, if it was anyone's job to fix the problem with the verdict form, surely it was the plaintiffs who hoped to use the findings to their benefit in pursuing their individual claims, not the defendants who hoped to obtain a verdict that would foreclose those claims entirely.

Respondent fares no better with her argument that Petitioner has nothing to complain about since it was not precluded from litigating *other* elements of her claims. On the most critical element of those

claims, the jury was simply instructed that Petitioner "[p]laced cigarettes on the market that were defective and unreasonably dangerous" and "[f]ailed to exercise the degree of care that a reasonable cigarette manufacturer would exercise under like circumstances." Phase II Jury Instr. No. 3. That the court did not go the final mile and instruct the jury that it should treat *all* elements of Respondent's claims as established hardly lessens the severity of the due process violation. Nor does the fact that, unlike in many other progeny cases, Petitioner was able to defeat a claim for *punitive* damages cure the due process violation that produced the liability determination and compensatory damages award.[3]

Respondent alternatively contends that review is unnecessary because Florida law on the preclusive effect of the *Engle* findings is now "settled." Opp.10. But that just underscores the need for this Court's intervention to answer the question presented, which is whether that preclusive effect is "consistent with federal due process" (as Respondent concedes it is required to be). Opp.11; *see also* Opp.10, 12. Unlike when this Court denied *Engle* progeny petitions in the past, there is no more uncertainty about what

[3] Respondent suggests that denying the *Engle* findings the preclusive effect progeny plaintiffs seek would impose "considerabl[e] … burdens on the *Engle* plaintiffs." Opp.19. But Respondent neglects to mention that most of the evidence at issue already is presented by progeny plaintiffs for punitive damages and comparative fault purposes. The only question is whether juries should be able to consider that evidence for liability purposes as well.

preclusive effect the *Engle* findings will be given.[4] Nor, as was still the case when the petition in *Douglas* was denied—at which point en banc petitions had not even been filed in *Walker*—is there any realistic possibility of obtaining further review of the due process question in the Eleventh Circuit. Accordingly, it falls to this Court to determine whether it really is the case that Petitioner may be precluded from litigating issues that no fact-finder has actually decided, arising out of claims that no court has resolved, simply because Petitioner had notice and an opportunity to be heard in a fundamentally flawed class action that produced generic findings utterly incapable of meaningful application to progeny plaintiffs' claims. If due process really does require nothing more than that, then this Court should be the one to say so.

[4] Respondent's attempt to minimize the concerns expressed by the concurring judge below as reflecting nothing more than uncertainty about the meaning of Florida preclusion law blinks reality. The concern Judge May expressed was whether "the *Engle* findings violate the manufacturer's *due process rights*[.]" Pet.App.27 (emphasis added).

CONCLUSION

This Court should grant this petition or hold it pending disposition of *Walker*, then dispose of it consistently with its ruling in that case.

Respectfully submitted,

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