NO. 13-1193

In the
Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY,

Petitioner,

v.

ALVIN WALKER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ALBERT WALKER, AND GEORGE DUKE, III, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SARAH DUKE

Respondents.

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

REPLY BRIEF FOR PETITIONER

GREGORY G. KATSAS
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001
(202) 879-3939
ggkatsas@jonesday.com

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
STEPHEN V. POTENZA
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Petitioner

May 20, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

REPLY BRIEF

Respondents embrace a novel version of preclusion that requires neither a final judgment on any claim nor an actual decision on the issue precluded. That is as extraordinary a departure from traditional preclusion principles as this Court is likely to see. Yet it is a departure that has been embraced not just by Respondents, but by the Florida Supreme Court. And rather than correct this flagrant due process violation, the Eleventh Circuit has sanctioned it—albeit under a fundamentally inconsistent theory that Respondents conspicuously decline to defend. Thus, absent this Court's intervention, thousands of *Engle* progeny cases collectively involving claims for billions of dollars will be infected with massive due process violations justified under mutually exclusive theories.

Rather than explain why this Court should tolerate that untenable result, Respondents insist that the Court is foreclosed from addressing it because it has denied past petitions raising the same issue. That is nonsense. It is bedrock law that denials of certiorari have no preclusive effect. They do not even preclude parties from petitioning on the same issues in the same case—let alone in different cases, as Petitioner does here. The *Engle* plaintiffs themselves acknowledged as much when they urged this Court to deny the very petitions they now reference, insisting that it could always decide the due process question once the Eleventh Circuit weighed in. It is the ultimate bait and switch for the plaintiffs to resist review of this blatant due process

violation first because it was premature and then because those earlier petitions were denied.

Respondents' novel certiorari-stage preclusion argument is just the latest manifestation of the basic problem underlying *Engle* litigation. Having first persuaded the trial court to ask the *Engle* jury broad questions that it could answer affirmatively if it found *any* cigarette defective, plaintiffs then turned around and insisted that the jury's affirmative answers be given the same preclusive effect as a finding that *every* cigarette is defective. Then, after having convinced the Florida Supreme Court to sanction that result under a novel theory of preclusion that required no showing of what the *Engle* jury actually decided, plaintiffs managed to turn around and prevail in the Eleventh Circuit on a fundamentally inconsistent theory that the *Engle* jury actually decided that all cigarettes are defective. And now, after having convinced this Court that it was too soon to resolve the due process issue in earlier petitions, Respondents turn around and argue that this petition comes too late.

Enough is enough. This Court's past denials have no more preclusive effect than the *Engle* jury's 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. No court has identified a coherent theory for giving those findings preclusive effect consistent with due process because none exists. Respondents' only answer is that Petitioner received notice and an opportunity to

be heard, but notice and opportunity are a check on whether an application of traditional issue or claim preclusion rules comports with basic principles of fairness, not grounds for discarding core components of those rules. By foreclosing defendants from contesting issues without identifying either a final judgment or an actual decision entitled to preclusive effect, *Engle* litigation has dispensed with more than two centuries of preclusion law. The Florida Supreme Court did so explicitly by adopting its novel doctrine of offensive claim preclusion, and the Eleventh Circuit did so implicitly by attempting to sweep the matter under the rug, but both achieved the same result: massive and seriatim due process violations that this Court should not allow to stand.

ARGUMENT

I. Respondents' Effort To Preclude Petitioner From Seeking This Court's Review Is Utterly Meritless.

Having very little to say in defense of the unprecedented and dangerous form of preclusion that now pervades *Engle* progeny litigation, Respondents instead insist that Petitioner is "foreclosed" from seeking certiorari because the Court has denied other petitions raising the same due process question. Opp.14. That this is the best argument Respondents can muster is telling in and of itself—not just because it is patently wrong, but because the *Engle* plaintiffs opposed certiorari in the very petitions Respondents now invoke by urging that review of the question was then *premature*. This argument thus is just another variation on the same basic due process

problem that has pervaded *Engle* litigation from the start.

A. This Court's Past Denials Have No Preclusive Effect.

As this Court has reminded time and again, a denial of certiorari "should not be taken in any way as sanctioning the proceedings or of approving of the judgments below." *Martin v. Texas*, 382 U.S. 928, 929 (1965). It is thus black-letter law that a denial does not preclude consideration of the same issue in a later petition. *See* Stern & Gressman, *Supreme Court Practice* § 5.7 (9th ed. 2007). That is true even when petitions are filed by the same petitioner—indeed, even when they are filed *in the same case*. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 526 (1996). In short, Petitioner is just as entitled to seek review of the due process violation in this case as it was to seek review of the due process violations in the progeny cases that preceded it.

Justice Jackson's unremarkable observation that a final judgment is "res judicata" once certiorari is denied is entirely inapposite. *See Brown v. Allen*, 344 U.S. 443, 543 (1953) (Jackson, J., concurring). Petitioner is not "collaterally attacking" *Engle* or *Douglas* (neither of which produced final judgments as to *Respondents*' claims anyway); nor is Petitioner asking this Court to "second-guess the Florida Supreme Court's interpretation of Florida law." Opp.15, 17. Petitioner is asking this Court to decide whether the novel and dangerous form of preclusion embraced by the Florida Supreme Court and applied below comports with due process. As Respondents

concede, none of the various doctrines they invoke bars courts from deciding whether giving preclusive effect to a *prior* state court proceeding in a *later* case would violate due process. Opp.16; *see also, e.g.*, *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482 (1982). Nor does anything about this Court's decision to decline review of that issue in past petitions preclude the Court from reviewing it now.

That Respondents would even attempt to argue otherwise is extraordinary. After all, it was the *Engle* plaintiffs who opposed certiorari in *Engle* by arguing that the due process issue was "not ripe" because it was not yet "tied to any class member with a judgment, or even a determination of liability." Br. in Opp., *R.J. Reynolds Tobacco Co. v. Engle*, No. 06-1545, 2007 WL 2363238, at *10 (U.S. Aug. 15, 2007). And they continued to insist that review was premature *even after* the *Engle* findings were used in cases that proceeded to final judgment, arguing that the question was "certain to arise in future cases." Br. in Opp., *R.J. Reynolds Tobacco Co. v. Hall*, No. 11-755, 2012 WL 642517, at *16 (U.S. Feb. 24, 2012); *see also, e.g.*, Br. in Opp., *R.J. Reynolds Tobacco Co. v. Gray*, No. 11-752, 2012 WL 642515, at *28 (U.S. Feb. 24, 2012).

More remarkable still, the plaintiffs *explicitly* urged the Court to wait for the Eleventh Circuit to consider the due process question, contending that this Court should not "pretermit that review and be the first federal appellate court to address the issue." *Hall* Br. in Opp., 2012 WL 642517, at *21-*22. Indeed, even as recently as *Douglas*, the plaintiffs

advocated denial because the Court could consider the due process question *in this very case*. Br. in Opp., *Philip Morris USA Inc. v. Douglas*, No. 13-191, 2013 WL 4631202, at *20 (U.S. Aug. 28, 2013).[1] It is the ultimate bait and switch for the *Engle* plaintiffs, after having urged denials of past petitions as premature, to turn around and insist that those denials preclude review now that the issue is ripe.

B. Respondents' Latest Argument Is Just Another Variation on the Same Due Process Problem that Has Pervaded *Engle* Progeny Litigation All Along.

Respondents' flawed certiorari-stage preclusion argument is just the latest manifestation of the same problem that has pervaded *Engle* litigation from the start: At every turn, courts and progeny plaintiffs have changed the rules of the game to preclude *Engle* defendants from obtaining an actual decision on whether they committed the tortious conduct alleged.

This began back in *Engle* itself, when the class made a conscious decision not to ask the jury to decide whether *all* cigarettes are defective. Indeed, on direct appeal, the class insisted that it had never even "asserted any claims based on Defendants' mere act of selling cigarettes" (in order to avoid the federal preemption problem that otherwise would arise).

---

[1] Although this case was decided shortly before the Court denied review in *Douglas*, the time for seeking rehearing *en banc* and/or certiorari had yet to expire, meaning it remained the case—as the *Douglas* respondents emphasized—that the *Walker* parties would "have their opportunity to seek review" should *Douglas* be denied. *Douglas* Br. in Opp., 2013 WL 4631202, at *20.

Duke, Doc. 205-3 at 233. Instead, the class argued numerous theories applicable only to specific brands and/or times, then asked the jury only whether each defendant marketed *a* defective cigarette. *See* Pet.6-9. Yet when *Engle* defendants later sought to litigate whether the particular brands at issue in progeny cases were defective, the plaintiffs turned around and insisted that the *Engle* findings were entitled to the same preclusive effect as a finding that *all* cigarettes are defective—even though the jury never was asked to decide that question, and there is no way of knowing whether it actually did so (or in whose favor it decided it, if it did).

The massive due process problem that this anomalous version of preclusion would produce was not lost on every "single reviewing court." Opp.18. The first federal court to consider the issue held this extreme departure from settled preclusion principles unconstitutional. *See Brown v. R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328 (M.D. Fla. 2008). And that was hardly the last court to recognize the glaring problem with foreclosing litigation of issues that there is no way of knowing whether any fact-finder decided. *See, e.g.*, *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324 (11th Cir. 2010); *R.J. Reynolds Tobacco Co. v. Brown*, 70 So. 3d 707, 719-20 (Fla. Dist. Ct. App. 2011) (May, C.J., specially concurring), *cert. pending* No. 13-1187 (filed Mar. 28, 2014).

Yet when finally confronted with the issue, the Florida Supreme Court pulled its own bait and switch: Contrary to the views of every court to

consider the question—not to mention its decision in *Engle*, which emphasized that Phase I "'did *not* determine whether the defendants were liable to anyone,'" *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1263 (Fla. 2006)—*Douglas* concluded that what the *Engle* jury actually decided is irrelevant because its findings (which are manifestly not a final judgment) are entitled to a never-before-seen *offensive* form of *claim* preclusion that precludes no claims, but instead precludes defendants from contesting *issues*. *See Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 435 (Fla. 2013).

To make matters worse, when the defendants' day in federal appellate court finally arrived, the rug was pulled out from under them once again. Rather than explain how the novel version of preclusion adopted in *Douglas* is remotely consistent with due process, the Eleventh Circuit insisted that *Douglas* had made a record-based determination that (contrary to reality) the *Engle* jury actually decided that all cigarettes are defective. In fact, *Douglas* specifically emphasized that it purported to apply claim preclusion (albeit without precluding any claims) because the findings would be "useless in individual actions" if progeny plaintiffs were required to prove what the *Engle* jury actually decided, and because "claim preclusion, unlike issue preclusion, has no 'actually decided' requirement." *Id.* at 433, 435. And now, when the due process issue is at last indisputably ripe for *this* Court's review, Respondents insist that the Court cannot even consider whether any of this is constitutional because

it denied earlier petitions that the *Engle* plaintiffs themselves labeled premature.

Respondents' latest preclusion argument is no more persuasive than those that preceded it. Petitioner is entitled to an actual decision from some fact-finder on whether it committed the tortious conduct Respondents alleged, and it is entitled to an actual decision from the Eleventh Circuit on whether the novel form of preclusion embraced by *Douglas* comports with due process. Petitioner is just as entitled to seek this Court's review of the decision below, which denies it both.

II. Respondents' Defense Of "*Engle* Preclusion" Only Underscores Its Fatal Flaws.

Respondents fare no better with their strained effort to reconcile with due process the novel form of preclusion applied below. Tellingly, Respondents do not even attempt to defend the Eleventh Circuit's effort to duck that issue by claiming that *Douglas* "look[ed] beyond the jury verdict" and found that the jury "*actually decided* … *only* issues of common liability." Pet.App.19, 20 (emphasis added). Nor could they, as *Douglas* candidly acknowledged that the Phase I findings would be "*useless* in individual actions" if progeny plaintiffs were required to prove what the jury actually decided. *Douglas*, 110 So. 3d at 433 (emphasis added). Instead, Respondents simply insist—repeatedly and adamantly—that the *only* thing due process requires is "notice and the opportunity to be heard." Opp.22. Thus, in their view, whether *Engle* produced a final judgment or an actual decision is entirely beside the point; all that

matters is that the *Engle* defendants were allowed to participate in the fundamentally flawed class-action proceeding that created this whole mess.

That argument 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 was given those protections in an *earlier* proceeding matters only if that proceeding produced a final judgment or an actual decision on the issue precluded. Without either one of those bedrock prerequisites, notice and an opportunity to be heard on an issue in an *earlier* proceeding cannot excuse the denial of notice and opportunity to be heard on that issue in the proceeding in which the defendant's property is taken. Respondents identify not a single (non-*Engle*) case in the history of Anglo-American jurisprudence even suggesting otherwise. That is because a final judgment or an actual decision are not "ancient strictures of the common law" with which state courts may dispense at will, Opp.22; they are the irreducible minimum of any lawful application of preclusion. Indeed, the very notion that preclusion could be invoked without first identifying something entitled to preclusive effect is nonsensical.[2]

---

[2] Respondents highlight the *Engle* findings that smoking is addictive and causes certain diseases, Opp.24-25, but the *Engle* defendants do not dispute that, unlike the jury's generic defect and negligence findings, those finding apply to *all* cigarettes and *all* class members. *See, e.g., Duke*, Appellant's Br. 50 (Dec. 21, 2012). Respondents also note *other cases* that have produced findings on issues that progeny plaintiffs seek to preclude defendants from litigating, Opp.25, but they do not and

Unsurprisingly, the Eleventh Circuit did not—and could not—endorse the extreme and dangerous departure from traditional preclusion principles that Respondent defends. The court never even reached the question, opting to convert *Douglas* into a decision about what the *Engle* jury "actually decided" rather than attempt to defend *Douglas* on its own terms. Given Respondents' refusal to defend that wholesale rewrite of *Douglas*, at the very least, the Court should summarily reverse and instruct the Eleventh Circuit to decide whether the version of preclusion *Douglas actually* sanctioned comports with due process. But the far better course is to grant plenary review and reject once and for all Respondents' exceedingly narrow conception of due process. As the numerous petitions filed before this Court confirm, this is no one-off dispute with no "future implications." Opp.18. The same question governs *thousands* of progeny cases with potentially *billions* of dollars at stake. Indeed, in just the ten pending petitions, nearly *$75 million* in damages have been awarded. That progeny cases are confined to Florida hardly deprives them of "'importance to the public.'" Opp.18.

Respondents attempt to reduce the due process question to an "esoteric debate" over "nomenclature." Opp.20-21. But that nomenclature exists because there are real differences between issue and claim preclusion. *See* 18 Wright & Miller, *Fed. Prac. & Proc. Juris.* § 4402 (2d ed.); Reply Br. 3-7, *R.J.*

---

cannot explain what that has to do with the preclusive effect to which *the Engle findings* are entitled.

Reynolds Tobacco Co. v. Brown, No. 13-1187 (U.S. May 20, 2014). No one understood this better than the Florida Supreme Court, which purported to apply claim preclusion because "claim preclusion, unlike issue preclusion, has no 'actually decided' requirement." *Douglas*, 110 So. 3d at 435. But claim preclusion has no such requirement only because, unlike issue preclusion, it requires "a final judgment," *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008)—something that Phase I of *Engle* did not produce—and precludes *claims*, not *issues*. In dispensing with those core principles, *Douglas* adopted a version of preclusion that is both unprecedented and dangerous.

Indeed, it is difficult to imagine a more "extreme application[] of the doctrine of res judicata," *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 797 (1996), than an *offensive* version of *claim* preclusion that allows plaintiffs to preclude litigation of *issues* without first obtaining either a final judgment or an actual decision on those issues. By effectively eliding the distinction between litigation and relitigation, *Douglas* arrived at a form of preclusion that is utterly "inconsistent with a federal right that is 'fundamental in character.'" *Id.* Whether in this case, *Brown*, or both, the Court should grant certiorari and reject this novel doctrine before it infects thousands of progeny cases with massive constitutional error.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

GREGORY G. KATSAS
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001
(202) 879-3939
ggkatsas@jonesday.com

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
STEPHEN V. POTENZA
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Petitioner

May 20, 2014