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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Do this Court's prior denials of Petitioner's and other tobacco company co-defendants' repeated petitions for writs of certiorari from the same factual determinations in the same Florida proceedings, involving the same claims for relief, foreclose a recurring Petition raising the same argument?

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INTRODUCTION

Ten petitions for certiorari review filed in a single day. Certainly the dramatic effect is high, but neither the nine state-court Petitions nor this Petition from the Eleventh Circuit present any claim that has not been fully and finally determined by the Florida courts and on which this Court has not already denied review. The ten new Petitions—and the eight that preceded them[1]—all seek to reopen the factual issues resolved in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), *cert. denied*, 552 U.S. 941 (2007) (*Engle*).

If all this sounds familiar, it should. It was only seven months ago that the Court last denied a petition for certiorari raising the same breathless claim of a due process violation. *Philip Morris USA Inc. v. Douglas*, 110 So. 3d 419, 433 (Fla. 2013), *cert. denied*, 134 S. Ct. 332 (2013). In *Douglas,* the Florida Supreme Court held in clear, unmistakable terms that what are known as "the *Engle* progeny cases" benefit from the final class-action judgment on the conduct elements of various causes of action: "The *Engle* judgment was a final judgment on the merits

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[1] This Court denied every one. *See Philip Morris USA Inc. v. Douglas*, 134 S. Ct. 332 (2013); *R.J. Reynolds Tobacco Co. v. Clay*, 133 S. Ct. 650 (2012); *R.J. Reynolds Tobacco Co. v. Campbell*, 132 S. Ct. 1795 (2012); *R.J. Reynolds Tobacco Co. v. Hall*, 132 S. Ct. 1795 (2012); *R.J. Reynolds Tobacco Co. v. Martin*, 132 S. Ct. 1794 (2012); *Philip Morris USA Inc. v. Campbell*, 132 S. Ct. 1794 (2012); *R.J. Reynolds Tobacco Co. v. Gray*, 132 S. Ct. 1810 (2012); *R.J. Reynolds Tobacco Co. v. Engle*, 552 U.S. 941 (2007), *reh'g denied*, 552 U.S. 1056 (2007).

because it resolved substantive elements of the class's claims against the *Engle* defendants." 110 So. 3d 419 at 433.

The issue in the present case is simply whether a federal court exercising diversity jurisdiction erred in following the instructions given by the Florida Supreme Court for similar state-court cases. For all its rhetorical flights over due process, this Petition never identifies any principle that would command a federal court in a diversity action to deviate from controlling state-law authority. The Eleventh Circuit, in a decision by Judge Pryor, ruled that the scope of the preclusive effect was a question of fact that the state supreme court had conclusively resolved: "R.J. Reynolds next argues that it is impossible to tell whether the jury determined that it acted wrongfully in connection with some or all of its brands of cigarettes because the plaintiffs presented both general and brand-specific theories of liability, but the decision of the Supreme Court of Florida forecloses that argument." App. 23.

This Court already denied review in *Douglas* this Term, as it has with identical due process attacks on *Engle* on several other occasions. For the Petitioners, the question of the preclusive effect of the factual determinations in *Engle* is unaffected by the serial presentation to this Court. Petitioner here cavalierly disregards the question of the prior denials of certiorari,[2] but those denials, particularly

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[2] For example, all mention of the prior denials of certiorari is omitted by Petitioner from the Table of Authorities, contrary to legal citation conventions. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.7,

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in *Douglas,* make the collateral attack on final state-court rulings through the present Petition procedurally improper.

Put in the simplest terms, the denial of certiorari is not without consequences. In the words of Justice Jackson, "for the case in which certiorari is denied, its minimum meaning is that this Court allows the judgment below to stand with whatever consequences it may have upon the litigants involved under the doctrine of res judicata as applied either by state or federal courts." *Brown v. Allen*, 344 U.S. 443, 543 (1953) (Jackson, J., concurring); *see, e.g.*, *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 727-28 (2010) ("If certiorari were denied . . . the matter would be res judicata.").

Even a quick glance at the Questions Presented in the various Petitions shows that this is precisely the sort of relitigation condemned by Justice Jackson. The present Petition challenges the use of "generic" findings of fact "to excuse thousands of plaintiffs in follow-on cases from proving essential elements of their claims." That is the spitting image of the Question Presented to this Court in *Engle*: "Whether the Due Process Clause prohibits a state court from giving preclusive effect to a jury verdict

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at 101 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010) ("Whenever a decision is cited in full, give the entire subsequent history of the case, but omit denials of certiorari or denials of similar discretionary appeals, *unless the decision is less than two years old or the denial is particularly relevant*.") (emphasis added).

when it is impossible to discern which of numerous alternative grounds formed the basis for the jury's findings of wrongful conduct."[3] And as presented again in *Clay*: "the courts below precluded litigation of critical disputed issues absent any determination that those issues had been previously decided. . . . The question presented is whether this dramatic departure from traditional and heretofore universal preclusion law violates the Due Process Clause of the Fourteenth Amendment."[4] Then again in *Douglas*: "whether the Due Process Clause is violated by the Florida Supreme Court's new rule of preclusion, which permits *Engle* class members to establish petitioners' liability without being required to prove essential elements of their claims or establishing that those elements were actually decided in their favor in a prior proceeding."[5] This recurring Question has received a consistent answer: "cert. denied."

Not only are the legal issues raised in this appeal identical, but in *Douglas*, Reynolds already asked this Court to overrule *Walker*.[6] In other words,

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[3] Petition for a Writ of Certiorari, *R.J. Reynolds Tobacco Co. v. Engle*, No. 06-1545, 2006 U.S. Briefs 1545 (May 21, 2007), *cert. denied*, 552 U.S. 941 (2007), *reh'g denied*, 552 U.S. 1056 (2007).

[4] Petition for a Writ of Certiorari, *R.J. Reynolds Tobacco Co. v. Clay*, No. 12-272, 2012 U.S. Briefs 44452 (Aug. 31, 2012), *cert. denied*, 133 S. Ct. 650 (2012).

[5] Petition for a Writ of Certiorari, *Philip Morris USA Inc. v. Douglas*, No. 13-191, 2013 U.S. Briefs 191 (Aug. 9, 2013), *cert. denied*, 134 S. Ct. 332 (2013).

[6] *See* Reply Br. for Pets., *Philip Morris USA Inc. v.*

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Petitioner already tried to place the present case before this Court on certiorari review. Having been apprised of the Eleventh Circuit's decision, this Court saw no reason to intervene. 134 S. Ct. 332. Since then, there have been no newly discovered facts and no intervening changes in Florida law—nothing that mandates a different result. *See Miroyan v. United States*, 439 U.S. 1338, 1338-39 (1978) (Rehnquist, Circuit Justice) (stating that certiorari will be denied "unless applicants can demonstrate a conflict among the Courts of Appeals of which this Court was unaware at the time of the previous denials of certiorari, or which has developed since then"). Because Reynolds chose to put the *Walker* opinion before this Court as part of the *Douglas* petition for certiorari, further review is barred not only by res judicata but also by the law of the case. *See Arizona v. California*, 460 U.S. 605, 618 (1983) (holding that a "decision should continue to govern the same issues in subsequent stages in the same case."); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (finding that "[t]his rule of practice promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.' ") (citation omitted).

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Douglas, No. 13-191, 2013 U.S. Briefs 191, at *6 (Sept. 11, 2013) ("In light of the Eleventh Circuit's *Walker* decision, the due process issue is now fully ripe for this Court's review.") (heading altered); *id.* at *9, 12 (arguing it was "imperative for this Court to intervene" as "[t]he Eleventh Circuit's misguided analysis makes crystal clear that only this Court can prevent massive due process violations."), *cert. denied*, 134 S. Ct. 332 (2013).

Even if the same issue had not been resolved previously in the same *Engle* matter, the Petition would still be improper as a collateral attack on state-court rules of decision. At bottom, Petitioner seeks to find legal error in the Eleventh Circuit granting full faith and credit to final and dispositive rulings of the Florida Supreme Court as to which this Court has already denied review. But full faith and credit further prevents Petitioner from waging a collateral attack in federal court. *See Exxon Mobil Corp. v. Saudi Basic Indus.*, 544 U.S. 280, 282 (2005) (holding that "[w]hen there is parallel state and federal litigation," once the "state-court adjudication is complete" the state court's decision governs disposition of the federal action). In short, because the Full Faith and Credit Act required the Eleventh Circuit to "accept the rules chosen by the State from which the judgment is taken," the court was duty-bound to accord "preclusive effect to state-court judgments" where "the courts of the State from which the judgments emerged would do so." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 482 (1982).

Petitioners previously sought to use their extravagant due process claim in *Douglas* to obtain review of *Walker*'s ruling on full faith and credit.[7] Now they seek to use *Walker*'s ruling on full faith and credit to obtain review of *Douglas* on due process grounds. But fundamental principles of respect for state law mean that this circular logic cannot be entertained. As the Eleventh Circuit correctly held:

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[7] Reply Br. for Pets., *Philip Morris USA Inc. v. Douglas*, No. 13-191, 2013 U.S. Briefs 191, at *9-10 (Sept. 11, 2013), *cert. denied*, 134 S. Ct. 332 (2013).

"If due process requires a finding that an issue was actually decided, then the Supreme Court of Florida made the necessary finding when it explained that the approved findings from Phase I 'go to the defendants[']underlying conduct which is common to all class members and will not change from case to case' and that 'the approved Phase I findings are specific enough' to establish certain elements of the plaintiffs' claims. *Douglas*, 110 So. 3d at 428." App. 23. And this was before the cert. denial in *Douglas*.

There is simply no tenable due process argument here. Two federal juries found that cigarette smoking was responsible for the death of the two smokers in these cases. Even with the *Engle* Phase I findings, the juries found that R.J. Reynolds was only 10 percent and 25 percent responsible, placing the overwhelming bulk of the responsibility on the smokers themselves. The judgments that underlie this claimed deprivation of constitutional due process were for $27,500 and $7,676.25. Not only have all the issues in this Petition been presented to and rejected by this Court, but the underlying trial results speak to the fact that Reynolds was well capable of defending its interests.

STATEMENT OF THE CASE

A. The *Engle* Class Litigation.

The history of the underlying tobacco litigation has been presented to this Court nearly a dozen times in different petitions for certiorari, and is again set forth in the opinion below. App. 5-10. The basic facts emerge from a case begun twenty years ago when Dr. Howard Engle and others filed a class action against Reynolds and other cigarette

manufacturers to recover damages for diseases caused by their addiction to smoking the defendants' cigarettes containing nicotine. *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 40 (Fla. 3d DCA 1996), *review denied*, 682 So. 2d 1100 (Fla. 1996). They brought claims for, *inter alia*, strict liability, negligence, fraud, fraudulent concealment, conspiracy, and intentional infliction of emotional distress. *Id.* The trial court certified a class of plaintiffs "who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *Id.*

To organize the proceedings, the trial court developed a three-phase trial plan. *Engle*, 945 So. 2d at 1256. Phase I was a lengthy trial on all issues that applied to "the class as a whole." *Id.* After the class prevailed on all counts, including winning a determination of entitlement to punitive damages, the court conducted a two-part Phase II trial. The same jury first resolved the remaining individual issues for the three named class representatives' claims, and then determined the total amount of punitive damages for the class as a whole. *Id.* At the conclusion of Phase II, the trial court awarded compensatory damages to the three class representatives and entered a final judgment in favor of the *Engle* class on all counts but one. *Id.*

Before the trial court could proceed to Phase III, the Florida Supreme Court reviewed the entire proceeding, reversing parts (such as the punitive damages award), but affirming the core findings on the wrongful conduct of the cigarette companies. *Engle*, 945 So. 2d at 1262-65. The Florida Supreme

Court held that class certification had been appropriate for Phase I but that the class would be decertified going forward because all the common questions had been answered in Phase I. The remaining issues of specific causation, comparative fault, and damages were too individualized for continued class treatment, the court explained. *Id.* at 1267-68.

The Florida Supreme Court further held that a subset of the factual findings determined by the jury in the class trial would be retained. Giving class members one year to file individual suits, the court decreed that these "common core findings" from the Phase I class trial would have *res judicata* effect. *Engle*, 945 So. 2d at 1269, 1276-77.

The court explained that the Phase I findings sufficiently specific to be common to the entire class would apply in the individual suits, while the findings that "involved highly individualized determinations," i.e., those relating to affirmative fraud and emotional distress, would not. *Id.* at 1269. Among the findings that the court found properly determined on a class-wide basis were that each defendant had acted negligently and sold cigarettes that were defective and unreasonably dangerous. *Id.* at 1255, 1277. Based on the factual determination that these findings apply equally to the class members regardless of particular circumstances (e.g., what brand of cigarettes they smoked, when they began smoking, and so forth), the Florida Supreme Court directed that individual class members could proceed with the common findings having "*res judicata* effect in any subsequent trial between individual class members and the

defendants." *Id.* at 1277.

The cigarette companies sought review of *Engle* in this Court, contending that the approved jury findings were too vague to have prospective preclusive effect. This Court denied certiorari. *R.J. Reynolds Tobacco Co. v. Engle*, 552 U.S. 941 (2007), *reh'g denied*, 552 U.S. 1056 (2007).

B. The Decision in *Douglas*.

In *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013), the Florida Supreme Court upheld the procedures established in *Engle* and rejected the cigarette companies' due process claim. Upon a review of the *Engle* record, the *Douglas* court reaffirmed that the common core issues of the cigarette companies' decades of wrongful acts, as they pertained to the various state-law causes of action, had been tried and determined on a class-wide basis. *Id.* at 429-31, 436. The court likewise reaffirmed that substantial evidence supported the findings on the cigarette companies' common conduct with regard to the class of smokers. *Id.* at 428, 433 (holding that progeny plaintiffs may efficiently rely upon the approved jury findings "[b]ecause these findings go to the defendants' underlying conduct, which is common to all class members and will not change from case to case"). Thus, the Florida Supreme Court confirmed the propriety of using these findings in individual class-member trials. *Id.* at 433, 436.

Reynolds and the other cigarette companies had argued in *Douglas* that *Fayerweather v. Ritch*, 195 U.S. 276 (1904), foreclosed the preclusive use of the common *Engle* jury findings on due process

grounds. The Florida Supreme Court rejected Reynolds' argument. *Douglas*, 110 So. 3d at 435.[8] The court concluded that the cigarette companies' due process rights had not been abridged for the simple reason that they had received notice and an opportunity to be heard during the *Engle* class-action proceedings. *Id.* at 431-32. Reynolds had also claimed that the *Engle* findings were insufficiently specific to be given preclusive effect in light of the trial record, but the *Douglas* court held that "by accepting some of the Phase I findings and rejecting others based on lack of specificity, this Court in *Engle* necessarily decided that the approved Phase I findings are specific enough." *Id.* at 428 (citing *Engle*, 945 So. 2d at 1255).

The cigarette companies again sought certiorari on their due process claim. Their Petition was denied. *Philip Morris USA Inc. v. Douglas*, 134 S. Ct. 332 (2013).

C. The Proceedings Below.

1. Trial in *Walker* and *Duke*.

In *Walker*, the Eleventh Circuit heard appeals from two judgments entered on jury verdicts in *Engle* progeny cases that were in federal court on diversity jurisdiction. App. 13. The first case was brought on behalf of the deceased Charles Walker, who began smoking as a teenager and smoked two packs a day until his death from lung cancer fifty

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[8] The lone dissenter in *Douglas* found no due process violation but disagreed with the majority's interpretation and application of Florida's claim preclusion rules.

years later. The second case was brought on behalf of Sarah Duke, who similarly began smoking cigarettes in her late teens and for nearly fifty years smoked one to two packs a day until she too was diagnosed with lung cancer, and died at age 70.

Both cases were tried to a jury. In each, the district judge instructed the jury with the approved common *Engle* findings. App. 16. Each jury determined that addiction to smoking R.J. Reynolds' cigarettes was the cause of death. In *Walker*, the jury found for the plaintiff on the strict liability and negligence claims, allocating 10 percent of the fault to Reynolds and 90 percent of the fault to the smoker. The court entered judgment for $27,500. App. 16. In *Duke*, the jury found for the plaintiff on the strict liability claim, allocating 25 percent of the fault to Reynolds and 75 percent of the fault to the smoker. The court entered judgment for $7,676.25. App. 16.

2. The Eleventh Circuit's *Walker* Decision.

On appeal in *Walker*, the Eleventh Circuit stated that, sitting in diversity, it was obligated to apply Florida law as decreed by the Florida Supreme Court to the state-law issues. App. 12 ("[F]ederal courts sitting in diversity are bound by the decisions of state courts on matters of state law."). Therefore, under the Full Faith and Credit Act, 28 U.S.C. § 1738, the court's task was "not to decide whether the decision in *Douglas* was correct as a matter of Florida law." App. 18 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). Rather, the court undertook the limited inquiry of "whether giving full faith and credit to the decision in *Engle*, as

interpreted in *Douglas*, would arbitrarily deprive R.J. Reynolds of its property without due process of law." App. 18. The court thus declined Reynolds' invitation to "conduct a searching review of the *Engle* class action and apply what amounts to *de novo* review of the analysis of Florida law in *Douglas*," because it "lack[ed] the power to do so." App. 18.

The Eleventh Circuit proceeded to reject the basic premise of Reynolds' argument: "R.J. Reynolds argues that the Supreme Court held in *Fayerweather*, 195 U.S. at 299, 25 S. Ct. at 64, that parties have a right, under the Due Process Clause, to the application of the traditional law of issue preclusion, but we disagree." App. 22. The Eleventh Circuit explained that, in fact, this Court "had no occasion in *Fayerweather* to decide what sorts of applications of issue preclusion would violate due process." *Id*. The Eleventh Circuit further held that, "[i]f due process requires a finding that an issue was actually decided, then the Supreme Court of Florida made the necessary finding . . . ." App. 23. The *Douglas* court did so "when it explained that the approved findings from Phase I 'go to the defendants[']underlying conduct which is common to all class members and will not change from case to case.' " App. 23 (quoting *Douglas*, 110 So. 3d at 428).

In rejecting Reynolds' due process argument, the Eleventh Circuit concluded that "R.J. Reynolds had a full and fair opportunity to litigate the issues of common liability in Phase I." App. 20. Additionally, "R.J. Reynolds also has had an opportunity to contest its liability in these later cases brought by individual members of the *Engle*

class . . . [and] has vigorously contested the remaining elements of the claims, including causation and damages." App. 21. Accordingly, the Eleventh Circuit affirmed the verdicts and refused to disturb *Douglas* "[b]ecause R.J. Reynolds had a full and fair opportunity to be heard in the Florida class action and the application of res judicata under Florida law does not cause an arbitrary deprivation of property[.]" App. 3.

REASONS TO DENY THE WRIT

I. Certiorari Is Foreclosed Because This Court Has Denied Multiple Petitions, From State High Court Rulings on State Law, Making the Same Due Process Claim in the Same Proceedings.

Petitioner and its cigarette company co-defendants continue to bombard this Court with broken-record petitions making the same due process claim this Court has declined to entertain in this *Engle* litigation. In the words of an early rock 'n' roll song, this issue has been decided "over and over and over again." But unlike in some tales of forlorn love, there are consequences to invoking the certiorari jurisdiction of this Court. While the denial of certiorari may not have precedential force for stare decisis purposes, it does have preclusive effect for the litigation *sub judice*: "for the case in which certiorari is denied, its minimum meaning is that this Court allows the judgment below to stand with whatever consequences it may have upon the litigants involved under the doctrine of res judicata as applied either by state or federal courts." *Brown*, 344 U.S. at 543 (Jackson, J., concurring).

The present Petition is just an attempt to evade the finality of the denial of certiorari in the appeals from the Florida Supreme Court. The preclusive finality from the denial of certiorari in *Engle* and *Douglas* has full effect here because *Walker* is simply the federal-court application of the *Engle* progeny case directive issued by the Florida Supreme Court. In *Douglas*, the Florida Supreme Court confronted the same argument raised in this Petition: whether preclusive use of the *Engle* findings infringes the cigarette companies' constitutional due process rights. *Douglas*, 110 So. 3d at 435-36. The court squarely held that the *Engle* findings are to be accorded preclusive effect under Florida law. *Id.* at 428.

The Eleventh Circuit had no warrant to second-guess the Florida Supreme Court's interpretation of Florida law. The Full Faith and Credit Act, 28 U.S.C. § 1738, requires federal courts sitting in diversity to "accept the rules chosen by the State from which the judgment is taken." *Kremer*, 456 U.S. at 481-82. Hence the Eleventh Circuit properly recognized it was bound to give "preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." *Id.*; App. 16-17; *see also Taylor v. Sturgell*, 553 U.S. 880, 891 n.4 (2008) (holding that federal courts reviewing state law must "incorporate[] the rules of preclusion applied by the State in which the rendering court sits").

The Eleventh Circuit properly adhered to the state supreme court ruling that the *Engle* findings have preclusive effect for class members in follow-on trials. App. 18. Because a federal court lacks power

to redefine Florida law, the Eleventh Circuit identified its sole task as inquiring into whether Florida law may run afoul of the Due Process Clause. App. 17-18. Here too the Eleventh Circuit was revisiting an argument that had been presented to the Florida Supreme Court in *Douglas*—and to this Court in the *Douglas* certiorari Petition.[9] As found by the Florida Supreme Court: "That certain elements of the prima facie case are established by the Phase I findings does not violate the *Engle* defendants' due process rights because they were parties to and had notice and opportunity to be heard in the class action where those elements were decided." *Douglas*, 110 So. 3d at 436.

Again, *Douglas* and *Walker* are the state and federal bookends of the same inquiry. *Compare Douglas*, 110 So. 3d at 430-31 ("[T]he United States Supreme Court has identified the requirements of due process as *notice and opportunity to be heard* and has recognized that applying res judicata to deny a party those rights offends due process.") (emphasis added), *with* App. 20 ("Because R.J. Reynolds had a *full and fair opportunity to be heard* in the Florida class action . . . the application of res judicata under Florida law does not cause an arbitrary deprivation of property.") (emphasis added). *Walker* and *Douglas* employed the same legal reasoning, on the same facts, to reach the same conclusion. There is no basis for a different result in *Walker* than in *Douglas*. Nothing has changed—

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[9] Petition for a Writ of Certiorari, *Philip Morris USA Inc. v. Douglas*, No. 13-191, 2013 U.S. Briefs 191 (Aug. 9, 2013), *cert. denied*, 134 S. Ct. 332 (2013).

neither governing law nor material facts—since this Court denied certiorari in *Douglas*, as indeed it had previously in *Engle*. 552 U.S. 941 (2007), *reh'g denied*, 552 U.S. 1056 (2007).

In effect, Petitioner seeks to evade the jurisdictional consequences of a denial of certiorari review under 28 U.S.C. § 1257 by collaterally attacking a final state-court judgment, and then demanding certiorari review from the entirely proper federal-court deference to the final state-court judgment on matters of state law. That outcome is barred by the jurisdictional limit of Section 1257, which "vests authority to review a state court's judgment solely in this Court." *Exxon*, 544 U.S. at 292. While federal courts retain the authority to adjudicate an "independent claim," *id.* at 292-93, they are without jurisdiction to exercise appellate review of the adequacy of a final state-court ruling. The entire argument in *Walker* was an attempt to obtain federal relief from a state judgment that was not to Petitioner's liking. As this Court held in *Exxon*, that form of review is jurisdictionally limited to certiorari review in this Court from the final judgment itself, not through collateral challenge in the federal courts. That Petitioner now attempts to circumvent *Exxon* by seeking certiorari to the Eleventh Circuit does not alter the correctness of the decision below to afford finality to the factual determinations of the Florida state courts.

The decision of the Eleventh Circuit to treat as final and binding a state supreme court determination of the preclusive effects of its own judgment cannot serve as the basis for certiorari jurisdiction—and particularly not when this Court

has repeatedly denied several petitions in the same matter making the very same argument.

II. There Is No Conflict of Law to Resolve and This Case Presents a Single Fact-Specific Question of the Application of Florida State Law.

A circuit split would be impossible here; by its terms, the Question Presented is confined to a limited pool of partially proven cases arising from a single Florida proceeding. Although Petitioners have trotted out their fanciful due process claim dozens of times, not a single reviewing court has found their arguments meritorious. Moreover, the *Engle* progeny cases are a finite number of tobacco personal injury cases mostly in the Florida state courts; they involve only Florida law and raise no broader issues even in Florida.

As the Florida Supreme Court has found, the procedural history of this case is "unlikely to be repeated." *Engle,* 945 So. 2d at 1270 n.12. Reynolds nonetheless speculates that the "next unpopular defendant" might suffer some unspecified harm, failing to say how, what the harm might be, or how such speculative harm to unknown future parties could justify certiorari review. Pet. 36. To the contrary, that the fact-bound resolution of a complex Florida case has no determinate future implications is further reason the Petition should be denied. *See Rice v. Sioux City Mem'l Park Cemetery,* 349 U.S. 70, 79 (1955) (recognizing the importance of limiting grants of certiorari to cases "of importance to the public, as distinguished from that of the parties") (citation omitted).

In the end, the Petition is nothing more than a complaint that case-specific facts were found against the Petitioner, a wholly inadequate basis for a grant of certiorari. The court below found that, even were Petitioner's due process contentions accepted, the facts defeat any constitutional claim:

> If due process requires a finding that an issue was actually decided, then *the Supreme Court of Florida made the necessary finding* when it explained that the approved findings from Phase I "go to the defendants['] underlying conduct which is common to all class members and will not change from case to case" and that "the approved Phase I findings are *specific enough*" to establish certain elements of the plaintiffs' claims.

App. 23 (emphasis added) (quoting *Douglas*, 110 So. 3d at 428). Logically, "by accepting some of the Phase I findings and rejecting others based on lack of specificity," the Supreme Court of Florida "necessarily decided that the approved Phase I findings are specific enough." App. 23 (quoting *Douglas*, 110 So. 3d at 428).

Accordingly, the Petition fails to identify any issue meriting this Court's review.

III. The Decision Below Is Manifestly Correct.

A. States May Craft Their Own Preclusion Rules Within Broad Constitutional Limits.

Petitioner wishes to draw this Court into an esoteric debate on the nomenclature of preclusion doctrines, as if the terminology used by the Florida Supreme Court were a matter of constitutional concern. This Court has long held otherwise: "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) (citing, *inter alia*, *Postal Tel. Cable Co. v. Newport*, 247 U.S. 464, 475 (1918) ("Res judicata like other kinds of estoppel, ordinarily is a matter of state law."); *Hansberry v. Lee*, 311 U.S. 32, 42 (1940) ("[T]he Fourteenth Amendment does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments")); *accord Taylor*, 553 U.S. at 891 n.4 (federal courts reviewing state law must "incorporate[] the rules of preclusion applied by the State in which the rendering court sits"). As aptly summed up below, "[w]hether the Supreme Court of Florida calls the relevant doctrine issue preclusion, claim preclusion, or something else, is no concern of ours." App. 24.

Federal courts are required to honor state preclusion rules insofar as they comport with the "minimum procedural requirements" of the Due Process Clause. *Kremer*, 456 U.S. at 481-82 (federal courts may not "employ their own rules of res

judicata in determining the effect of state judgments," because principles of full faith and credit "go[] beyond the common law and command[] a federal court to accept the rules chosen by the State from which the judgment is taken."). The States are afforded wide latitude in this context: due process requires only that they avoid "extreme applications" that are "inconsistent with a federal right that is 'fundamental in character.' " *Jefferson County*, 517 U.S. at 797 (citing *Postal Tel.*, 247 U.S. at 475); *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 328 (1979) (stating that the "most significant safeguard" of due process is "whether the party against whom [preclusion] is asserted had a full and fair opportunity to litigate").

Where a party has been furnished notice and a fair and full opportunity to be heard, the "minimum procedural requirements" of due process have been satisfied, *Kremer*, 456 U.S. at 481-82, and even unorthodox preclusion rules pass constitutional muster, *see Parklane Hosiery*, 439 U.S. at 328 (approving non-traditional application of preclusion rules against a party that was provided an opportunity to be heard); *Blonder-Tongue Labs., Inc. v. University of Ill. Found.*, 402 U.S. 313, 329-30 (1971) (allowing non-traditional application of preclusion rules when the party was afforded an "opportunity for full and fair trial.").

Against these authorities, Reynolds claims that the Constitution essentially freezes in place the laws of preclusion because "traditional practice provides a touchstone for constitutional analysis," and therefore any deviation carries a "presumption of unconstitutionality." Pet. 22 (citing *Honda Motor Co.*

v. Oberg, 512 U.S. 415, 430 (1994)). Yet the case cited for the latter proposition expressly disclaims it: "Of course, not all deviations from established procedures result in constitutional infirmity. . . . [T]o hold all procedural change unconstitutional would be to deny every quality of the law but its age, and to render it incapable of progress or improvement." *Oberg*, 512 U.S. at 430-31 (internal quotation marks and citation omitted). Due process does not and cannot mandate that the States rigidly adhere to the ancient strictures of the common law. *Cf. Rogers v. Tennessee*, 532 U.S. 451, 466-67 (2001) (holding that a State's decision to discard a longstanding common law rule was "a routine exercise of common law decisionmaking in which the court brought the law into conformity with reason and common sense.").

Reynolds' errant argument turns on a long-forgotten scrap of dicta from an inapposite decision, *Fayerweather v. Ritch*, 195 U.S. 276 (1904). In *Fayerweather*, this Court concluded that a will contest fully litigated in state court barred a later attempt to reopen the contest in federal court. *Id.* at 306. The Court had *no occasion* to decide what sorts of state preclusion rules might violate due process. This Court has never cited *Fayerweather* for the proposition attributed to it by Reynolds. *Compare* Pet. 23-24, *with* App. 22. And, in reality, the Court has confined the due process inquiry in the application of state preclusion law to the issues of notice and the opportunity to be heard:

> [W]hen the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due

> process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such *notice* and *opportunity to be heard* as are requisite to the due process which the Constitution prescribes.

Hansberry, 311 U.S. at 40 (emphasis added).

This is exactly what the courts below found had been afforded to Petitioner. First,

> [d]uring Phase I, R.J. Reynolds had an opportunity to contest its liability and challenge the verdict form that the trial court submitted to the jury. After the trial court declined to adopt the jury verdict form proposed by the tobacco companies and the jury decided against the tobacco companies on the issues of common liability, R.J. Reynolds challenged those decisions before the Supreme Court of Florida, but that court rejected its arguments. And R.J. Reynolds petitioned the Supreme Court of the United States to review the decision of the Supreme Court of Florida, but the Supreme Court of the United States denied its petition.

App. 21. Second, Reynolds is currently being afforded—and is definitely availing itself of—the opportunity to contest plaintiffs' claims in the subsequent proceedings:

> R.J. Reynolds also has had an opportunity to contest its liability in these later cases brought by individual members of the *Engle* class. Although R.J. Reynolds has exhausted its opportunities to contest the common liability findings of the jury in Phase I, it has vigorously contested the remaining elements of the claims, including causation and damages. The modest sums received by the plaintiffs in this appeal—less than $28,000 for Walker and less than $8,000 for Duke—suggest that the juries fairly considered the questions of damages and fault.

App. 21. Consequently, the Eleventh Circuit could not "say that the procedures . . . adopted by the Supreme Court of Florida to manage thousands of these suits under Florida law violated the federal right of R.J. Reynolds to due process of law." App. 25.

B. The Facts Underlying the *Engle* Findings Have Been Independently Established in Other Final Proceedings.

Nor is there anything exceptional about the approved *Engle* findings themselves. Take, for instance, the first finding that cigarette smoking causes several diseases, including lung cancer. *Engle*, 945 So. 2d at 1277. This unassailable finding of fact was also made in a similar case to which Reynolds was a defendant—the United States government's civil RICO action, in which this Court denied the cigarette companies' Petition for a Writ of

Certiorari. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 346 (D.D.C. 2006), *aff'd in pertinent part*, 566 F.3d 1095 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 3501-02 (2010) ("Cigarette smoking causes lung cancer.").

The second *Engle* finding is also non-controversial: nicotine is addictive. 945 So. 2d at 1277. This fact, too, was found in the United States government's civil RICO action:

> Since the 1950s, Defendants have researched and recognized, decades before the scientific community did, that nicotine is an addictive drug, that cigarette manufacturers are in the drug business, and that cigarettes are drug delivery devices. The physiological impact of nicotine explains in large part why people use tobacco products and find it so difficult to stop using them.

449 F. Supp. 2d at 531-32.

Reynolds claims it is unconstitutional to lend preclusive effect to two other *Engle* findings on the cigarette companies' long-running conspiracy to fraudulently conceal the health hazards of smoking. 945 So. 2d at 1277. But, again, parallel conclusions have been reached in other actions, such as the government action in which the fact finder determined that Reynolds and its co-conspirators:

> intentionally maintained and coordinated their position on addiction and nicotine as an important part of their overall efforts to influence public

> opinion and persuade people that smoking was not dangerous; in this way, the cigarette company Defendants could keep more smokers smoking, recruit more new smokers, and maintain or increase their earnings. Additionally, Defendants have sought to discredit evidence of addiction in order to preserve their "smoking is a free choice" argument in smoking and health litigation.

449 F. Supp. 2d at 531-32.

There is nothing extraordinary or offensive about the Florida courts according preclusive effect to a set of facts that have been demonstrated here as elsewhere, and that this Court has uniformly declined to review.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari must be denied.

Respectfully Submitted,

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