Nos. 12-13500-EE & 12-14731-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ALVIN WALKER, etc.,
Plaintiff-Appellee,
v. No. 12-13500-EE
R.J. REYNOLDS TOBACCO CO.,
Defendant-Appellant.

GEORGE DUKE III,
Plaintiff-Appellee,
v. No. 12-14731-EE
R.J. REYNOLDS TOBACCO CO.,
Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with 11th Cir. R. 26.1-1, the undersigned certifies that the following is a complete list of all trial judge(s), attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular case or appeal, and includes subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held company that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

1. Altria Group, Inc. (MO) – publicly held company and parent company of former Defendant Philip Morris USA, Inc.
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Reynolds Tobacco Company

14. Brown & Williamson Holdings, Inc. – holder of more than 10% of the stock of Reynolds American Inc., parent company of Defendant-Appellant R.J. Reynolds Tobacco Company

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23. Corrigan, Timothy J. – Judge of Middle District of Florida

24. Council for Tobacco Research, USA, Inc. – former Defendant

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30. Dewberry, Michael J. – Special Master

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93. R.J. Reynolds Tobacco Company – Defendant-Appellant

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116. Walker, Charles – former Plaintiff (Case No. 12-13500-EE)

117. Walker, John M. – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

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127. Yarbrough, Jeffrey A. – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

/s/ *Elizabeth J. Cabraser*
Attorney for Appellees Alvin Walker (No. 12-13500) and George Duke, III (No. 12-14731)

STATEMENT REGARDING ORAL ARGUMENT

Appellees join Appellant's request for oral argument, for a different reason. The sole issue raised by Appellant concerning the scope of the preclusive effect of the *Engle* findings on the *Engle* progeny trials has been conclusively resolved by the Supreme Court of Florida in *Philip Morris USA, Inc. v. Douglas*, No. SC12-617, 2013 WL 978259 (Fla. Mar. 14, 2013) ("*Douglas*"). Because *Douglas* was decided after Appellant filed its principal brief, and Appellant will therefore be addressing the *Douglas* decision for the first time in its reply brief, Appellees will be disadvantaged by not having seen Appellant's argument. Oral argument is necessary to redress this prejudice.

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STATEMENT OF JURISDICTION

Appellees accept Appellant's statement of jurisdiction. Appellees filed their complaints directly in District Court. There was complete diversity of citizenship.

These cases do not implicate jurisdiction over the removed *Engle* progeny cases under the "mass action" provisions of the Class Action Fairness Act, which was recently decided by this Court in *4432 Individual Tobacco Plaintiffs v. Various Tobacco Cos.*, No. 13-90003 (Apr. 2, 2013).

STATEMENT REGARDING RECORD ON APPEAL

Each of the cases consolidated in this appeal was assigned two different case numbers in the District Court, because each was severed from an earlier multi-plaintiff proceeding.

Appellee Walker's case was originally styled *Culp v. R.J. Reynolds Tobacco Co.*, No. 3:07-cv-00818-TJC-HTS. After severance, it became *Walker v. R.J. Reynolds Tobacco Co.*, No. 3:09-cv-10598-RBD-JBT.

Appellee Duke's case was originally styled *Overman v. R.J. Reynolds Tobacco Co.*, No. 3:07-cv-00784-TJC-HTS. After severance, it became *Duke v. R.J. Reynolds Tobacco Co.*, No. 3:09-cv-10104-RBD-JBT.

The record on appeal encompasses filings in all these District Court case numbers. The record cites use the first name of the case followed by the docket number and the page number(s) following a colon. Thus, "*Walker* 1-4:2-3" refers to pages 2 to 3 of document 1-4 in the docket for *Walker v. R.J. Reynolds Tobacco Co.*, No. 3:09-cv-10498-RBD-JBT.

Certain portions of the record are included in an Addendum, incorporated herein. Cites to those portions use (A.[tab number]). (*In re: Engle cases*, 3:08-CV-10000-TJC-JBT)

The record in the *Engle Master* proceeding includes a DVD containing a substantial portion of the original *Engle* trial record as Exhibit A to *Master* Doc.

655. Citations to this DVD are to "*Master*:655," with an accompanying pinpoint to the page number. Each cite to the *Engle* trial record has a corresponding Addendum reference with the full cite to the DVD folder and document within the folder. Citations to the transcripts on the disc will be by date and the last four numbers in the file name. For example, "*Master*:655 at 10450" refers to the folder called "TranscriptsTrial," and the document titled "9-Oct-1998_W01629190-9241," at page 10450.

STATEMENT OF THE ISSUE

Appellees deny these appeals present the question posed by Appellant: "Whether the Due Process Clause permits use of issue preclusion to establish contested elements of a claim absent any determination whether the prior jury actually decided those elements".

If there were any due process issue to be presented in these cases, it would be whether, consistent with the Due Process Clause, the approved *Engle* Phase I conduct findings can be given the same preclusive effect in the federal *Engle* progeny cases that they are being given in the Florida state court *Engle* progeny cases, under Florida preclusion law as established by the Florida Supreme Court.

STATEMENT OF THE CASE

In these *Engle* progeny[1] lawsuits brought by individual members of a now-decertified class of Florida smokers, Appellant R.J. Reynolds Tobacco Co. ("Reynolds") contends that the District Court[2], state trial courts, and Florida's appellate courts[3] have been serially violating its due process rights by following

[1] "*Engle* progeny" refers to the cases brought by former members of the statewide class of injured smokers described in *Engle III*, within the one-year savings period set by that decision, which ended on January 11, 2008. *See Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) ("*Engle* III") at 1276-77.

[2] *Waggoner v. R.J. Reynolds Tobacco Co.*, 83 F. Supp. 1244 (M.D. Fla. 2011)

[3] *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. 1st DCA 2010) ("*Martin*"), *rev. denied*, 67 So. 3d 1050 (Fla. 2011), *cert. denied*, 132 S. Ct. 1795 (2012); *R.J. Reynolds Tobacco Co. v. Brown*, 70 So. 3d 707 (Fla. 4th DCA 2011)

Florida law as directed by the Florida Supreme Court in *Engle III*, *cert. denied*, 552 U.S. 1056, 128 S. Ct. 96 (2007), and reaffirmed in *Douglas*. Appellees Alvin Walker and George Duke III, as personal representatives of the estates of two deceased smokers ("Plaintiffs"), are *Engle* class members who recovered modest judgments in the District Court for $27,500 and $7,676.25, respectively. Because Appellant's statement of the case is inaccurate and incomplete, the Plaintiffs provide their own. Like Reynolds, it begins with a summary of the *Engle* class litigation.

A. *Engle* Class Litigation

Nearly twenty years ago, Dr. Howard Engle and others filed a class action against Reynolds and other cigarette companies to recover damages for diseases caused by their addiction to cigarettes containing nicotine manufactured by the defendants. *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 40 (Fla. 3d DCA 1996), *rev. denied*, 682 So. 2d 1100 (Fla. 1996). Their claims included strict liability, negligence, fraud, 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.* The appellate court affirmed class certification, limited to Florida citizens, because "basic issues of liability

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("*Jimmie Lee Brown*"); *Philip Morris USA, Inc. v. Douglas*, No. SC12-617, 2013 WL 978259 (Fla. Mar. 14, 2013) ("*Douglas*").

common to all members of the class" predominated. *Id.* at 41.

1. The Phase I Common Issues Trial Plan

The trial court then issued a three-phase trial plan. (*Engle III*, 945 So. 2d at 1256; *Master*:655 - Feb. 4, 1998 *Engle* Trial Plan (A.1).) Phase I was a year-long trial on all issues that applied to "the class as a whole." *Engle III*, 945 So. 2d at 1256. Phase I "involved only common issues relating . . . to the defendants' conduct and the general health effects of smoking." *Id*.

Defendants knew that Phase I was going to lead to findings applicable to every member of the class. Indeed, that is exactly what they wanted. In the midst of *voir dire*, nearly a year before the jury reached its verdict, Defendants advocated for all the common issues to be resolved at once in a manner that would bind all class members—to their benefit or detriment:

> We should be trying -- we should be submitting common questions. That, I believe, is what the trial plan says, and that's what the Third DCA has said and that's what makes sense.
>
> And I think the second touchstone is that the common questions should mean something. They should apply. And what I mean by meaning something is that they should apply to all of the class members. They shouldn't just be something that gets decided but can't be applied across the board to the thousands of people that are in the class, because if we don't figure out a way to do that, then whatever the benefit or detriment is to the plaintiffs or defendants, depending upon the answer, it's not going to hold up. It's got to apply across the board in order for it to work.

(Statement of Robert Heim, Counsel for Philip Morris, *Master*:655 at 6527 (A.10).) Reynolds got just what it sought: a trial directed to the common conduct

of the cigarette companies, independent of direct application to any particular litigant's claim for compensation.

2. The Phase I Closing Arguments

At the conclusion of Phase I, the parties argued the common conduct relating to strict liability, negligence, warranty, and concealment claims (along with the addictive nature of cigarettes and medical causation). Neither side asked the jury to return a verdict based on any brand-specific defect or lack thereof, such as the position of holes in the filter or lights, or any of the other particular "micro" defects listed in Reynolds' brief. Instead, both plaintiffs and defendants focused their arguments on the class-wide nature of the jury's task. Reynolds argued that cigarettes were not addictive and were not proven to cause disease, including lung cancer, and that it could not be held strictly liable because it had attempted to make the safest possible cigarette. (*Master*:655 at 37053-63 (A.19); *id.* at 37276, 37354-63 (A.20).)[4]

The class plaintiffs responded that a strict liability finding was appropriate as to all cigarette brands because each contained "carcinogens, nitrosamines, and carbon [mono]oxide, among other ingredients harmful to health which, when combined with the nicotine cigarettes also contain, make the product unreasonably

[4] Reynolds and Philip Morris, selling the same story they had been selling since the 1950s, continued to argue that neither the addictive qualities of cigarette smoking, nor the connection to disease had been sufficiently proven. (*Master*:655 at 36845-46 (A.17); *id*. at 36886-91 (A.18); *id*. at 37319, 37332 (A.20).)

dangerous." *Martin*, 53 So. 3d at 1068. (*See Master*:655 at 36668 (A.16), 37431-35(A.20); *Engle v. RJ Reynolds Tobacco Co.*, No. 94-08273, 2000 WL 33534572, at *2-4 (Fla. Cir. Ct. Nov. 6, 2000) ("Final Judgment").) Indeed, there is no dispute now on general causation: every brand of nicotine-containing cigarettes Reynolds sold to the class during the relevant time period was in fact addictive and disease-causing.

As to the class negligence claims, the class presented evidence and argued, on a class-wide basis, that the industry unreasonably failed to address the health risks and addictiveness of its products, manipulated nicotine levels and concealed information pertaining to the dangers of smoking. (*E.g.*, *Master*:655 at 11988-90 (A.11), *Master*:655 at 13475-77 (A.12); *Master*:655 at 36451, 36472-80, 36484-85 (A.15), *Master*:655 at 36717, 36729-32 (A.16).) Reynolds defended these claims, arguing that their conduct was categorically reasonable. (*Master*:655 at 37009 (A.18) and at 37054, 37067 (A.19).)

Consistent with the Phase I trial plan, both sides asked the jury for an up or down vote on the industry's conduct toward the class. That, for better or for worse, was exactly what the parties got. To deconstruct this now contradicts the reality of the trial, and belies Reynolds' choice on how to spend its day in court.

3. The Phase I Jury Instructions

Consistent with the trial plan, the Phase I *Engle* jury instructions specifically

directed the factfinders to assess each defendant's conduct toward the *Engle* class. For example, the court instructed the jury that Phase I was a "common issue trial" addressing the conduct of the tobacco industry:

> The Florida Class is a statewide class consisting of all Florida citizens and residents and their survivors, who have diseases or medical conditions or who have died from diseases or medical conditions that are claimed to be caused from smoking cigarettes.
>
> Because of the size of the Florida Class and the complexity of the issues, the Court determined that all common liability issues would be tried before a jury in a single trial. This common issue trial has addressed the conduct of the tobacco industry.

(*Master*:655 at 37558 (A.21.) The court further instructed in Phase 1 that any verdict for the plaintiffs would be for the *class* as a whole, not just some of them:

> If the greater weight of the evidence does not support the claims of the Florida class against one or more of the defendant tobacco companies, then your verdict on that claim should be for one or more of the defendants.
>
> However, if the greater weight of the evidence does support the claims of the Florida class against one or more of the defendants, then your verdict should be in favor of the Florida class and against one or more of the defendants.

(*Id*. at 37578-79 (A.21).)

4. The Phase I Verdict Form

Defendants submitted an essay test verdict form with blanks for the jury to write in each defect identified by year and brand, each negligent act, each misrepresentation, each act in further of the conspiracy, as well as the date for each event. (*Master*:655 – Defs.' Proposed Verdict form (A.2).) The trial judge

deemed it impractical. (*Master*:655 at 44-45 (A.9).) Consistent with Florida law (as reflected in the operative Florida pattern jury instructions), the jury was not asked in Phase I to consider or choose any one defect theory; it was asked to consider whether cigarettes were unreasonably dangerous on risk/benefit or consumer expectations, (*Master*:655 at 37570-71 (A.21); Florida Pattern Jury Instructions at PL-5 (1999); *Master*:655 at 36139-45 (A.14)), and said yes (*Master*:655 - Verdict Form for Phase I (A.3); *Master*:655 at 37734-35 (A.22).)

Defendants never proposed a legitimate, alternative, more specific verdict form. The parties had preliminary verdict form discussions and exchanged submissions even before opening statements. (*E.g.*, *Master*:655 at 6524-77 (A.10); *Master*:655 at 30-55 (A.9).) The formal charge conference spanned several days, and both the class and the court submitted alternative proposals in an effort to accommodate the defendants' requests for more specificity. (*E.g.*, *Master*:655 at 35966-69 (A.13).) Instead, defendants kept "going around in circles":

> THE COURT: That's what I think – the purpose of this may not have been done according to your liking in particular. But the concept is there, that if you want specificity, then there is a way of doing it. And saying, all right, let's look at what the defendants -- the plaintiffs have alleged in their complaint and what did they prove, and then use those questions to determine whether the jury says they were proven or not.
>
> ***
>
> MR. SCHNEIDER: The plaintiffs have suggested, instead, a roll call of argumentative questions. I oppose that. I still think that our

> submission is the way to go. What I said was, if the Court is not going to go in our direction, I don't think they should go to the plaintiffs' direction.
>
> And the middle direction, which I don't support, but the middle direction is: Ask a simple question, argue in closing what you're going to argue, and whatever use can be made of that can be made of that.
>
> We still think the proper way to go is ask the question, let the jury specify.
>
> THE COURT: We're just going around in circles. Okay.

(*Id*. at 35968-71 (A.13).) Defendants rejected each alternative presented and, despite the court's request, never submitted a verdict form to achieve their purported goal consistent with Florida law. (*See generally*, *id*. at 35831-36303.)

5. The Verdict, Phase II, and Final Judgment

After the class prevailed on all counts as to all defendants, including a determination of entitlement to punitive damages, the court conducted a two-part Phase II trial, where the jury was to determine the remaining individual issues in the three named class representatives' claims (Phase IIA) and then decide the total amount of punitive damages for the class as a whole (Phase IIB). *Engle III*, 945 So. 2d at 1257. Phase IIA spanned nearly five months. Before deliberations on the class representatives' individual claims, the court instructed the jury that in Phase I, it had already "determined all the common liability issues…concerning the conduct of the tobacco industry through [its] verdict." (*Master*:655 at 50235-36 (A.24); *see also Master*:655 at 50093 (A.23).) The jury reached a verdict in favor

of all three class representatives (*Master*: 655 - Verdict Form for Phase II (A.4)); and went on to eventually award punitive damages to the class. (*Master*:655 at 57816-17 (A.25).)

At the conclusion of Phases I and II, after nearly two years of proceedings, 56,000 pages of trial record, thousands of exhibits and hundreds of witnesses, the trial court entered a final judgment in favor of the *Engle* class on all counts but one; it granted a directed verdict on a claim for equitable relief that is not at issue herein. Final Judgment, 2000 WL 33534572.

In the Final Judgment, the trial judge determined that the jury's Phase I findings were supported by the evidence and were sufficient to stand in favor of the class as a whole to be used in the follow-on proceedings. *Waggoner*, 835 F. Supp. at 1255. On strict liability, the Final Judgment found ample evidence that the combination of the addictive properties of nicotine with the deleterious properties of other chemicals in all the defendants' cigarettes rendered them all unreasonably dangerous and defective, that filtered and "light" cigarettes were no safer, and that the defendants had employed various means of manipulating nicotine to ensure addiction. 2000 WL 33534572, at *2. On negligence, the judgment cited evidence that the defendants "well knew from their own research, that cigarettes were harmful to health and were carcinogenic and addictive." *Id.* at *4. By allowing the sale and distribution of said product under those

circumstances without taking reasonable measures to prevent injury, constitutes … negligence." *Id.*

The Final Judgment upheld the jury's awards of damages to the class representatives and listed the specific brands each had smoked, including Winston, Winston Light, Camel, and Pall Mall (i.e., the same brands smoked by the decedents in these cases). (*Compare* Final Judgment, 2000 WL 3354572, at *1-4 *with Walker* 203:493-04 (A.33); 216:1158 (A.37); *and Duke* 149:31 (A.26); 157:50, 52 (A.29).)

B. *Engle*'s Appellate Odyssey

Before the trial court could proceed to Phase III, the defendants appealed. *Engle III*, 945 So. 2d at 1258. The intermediate appellate court reversed both the Final Judgment in its entirety and the class certification order it had previously affirmed. *Liggett Group Inc. v. Engle*, 853 So. 2d 434 (Fla. 3d DCA 2003) ("*Engle II*").

On review, the Supreme Court of Florida quashed *Engle II*, but held that class certification had been a proper exercise of the trial court's discretion for Phase I, but the class should nonetheless be decertified going forward, because the common questions had been answered in Phase I. *Engle III*, 945 So. 2d at 1267-68. The remaining issues of causation, comparative fault, and damages were too individualized for continued class treatment. *Id.*

Engle III held that certain conduct findings made in the class trial would be retained, gave class members one year to file individual lawsuits, and explained that these "common core findings" from the Phase I class trial would have "*res judicata* effect." *Id* at 1268, 1276-77. *Engle III* explained that the Phase I findings that it determined were sufficiently specific to be truly common to the entire class would apply in the individual lawsuits, while those findings that "involved highly individualized determinations" would not. *Id.* at 1269. The sufficiently specific, classwide findings are referred to in *Brown* as the "Phase I 'approved' findings." 611 F.3d at 1328-29.

Engle III also affirmed the judgments in favor of two class representatives. *Id.* at 1255-56. In doing so, the Florida Supreme Court necessarily determined that the trial court did not err in rejecting the Defendants' proposed narrative verdict form and following the Florida pattern instructions in fashioning its interrogatories to the jury. *See id.*

Among the findings that the court found properly determined on a class-wide basis were that all the specified defendants (including Reynolds) were negligent and had sold cigarettes that were defective and unreasonably dangerous. *Id.* at 1255, 1277. By contrast, it concluded that the findings that the defendants engaged in fraudulent misrepresentation and intentionally inflicted emotional distress were "nonspecific" and therefore "inadequate to allow a subsequent jury to

consider individual questions of reliance and legal cause." *Id.* at 1255.

Engle III also addressed the scope of the jury's findings with regard to another constitutional issue raised by the defendants, i.e., whether allowing the juries to assess comparative fault in the subsequent individual trials would violate the defendants' state constitutional right to a jury trial because the second jury would be re-examining the first jury's findings. *Id.* at 1270-71. *Engle III* rejected this argument because the retained findings from the first jury with regard to the defendants' conduct were common to all class members. By contrast, the juries in the subsequent individual cases would make findings addressing the issues unique to each class member, such as the degree to which the defendants' conduct was the sole or contributing cause of the class member's injuries. *Id.* at 1271.

Because it determined that these findings were common to every class member without regard to their individual circumstances (e.g., what type of cigarettes they smoked, or when they began smoking), the court held that individual class members would be permitted to proceed individually with these liability findings having "*res judicata* effect in any subsequent trial between individual class members and the defendants." *Id.* at 1277.

C. The Plaintiffs' Individual Lawsuits

Although there were an estimated 700,000 members of the *Engle* class, only a fraction actually filed progeny lawsuits. *Compare Engle III*, 945 So. 2d at 1258

(estimating total class size at 700,000), *with Waggoner*, 835 F. Supp. 2d at 1250 (noting that there were only "an estimated 9,000 individual suits"). Several hundred individuals filed multi-plaintiff complaints in federal court in 2007 asserting that they or their decedents were members of the *Engle* class, including Appellees. (*Culp* 1; *Overman* 1.)

These complaints alleged the decedents had died as a result of diseases caused by their addiction to Reynolds' cigarettes. (*Culp* 1; *Overman* 1.) Their complaints asserted the same claims prosecuted by the *Engle* class, and the Plaintiffs asserted that the *res judicata* effect of the approved *Engle* findings established the defense conduct elements of their claims, including that Reynolds was negligent and that its cigarettes containing nicotine were unreasonably dangerous and defective. (*Culp* 1:2-5; *Overman* 1:2-6.)

The defendants disputed this and moved under Federal Rule of Civil Procedure 16 to determine the effect the District Court would give the *Engle* findings in these cases. (*Culp* 17; *Overman* 17.) In global orders entered *sua sponte* in both cases, the District Court deferred ruling on those motions pending the appeal of the Rule 16 order entered in another *Engle* progeny case, *Brown v. R.J. Reynolds Tobacco Co.*, No. 3:07-cv-00761-MMH-HTS, and then stayed the cases altogether pending the *Brown* appeal. (*Culp* 41, 42; *Overman* 44, 45.)

After this Court reversed in *Brown* and the stay was lifted, Plaintiffs filed

amended complaints reasserting their individual claims. (*Walker* 20; *Duke* 21.) The District Court held Rule 16 proceedings in another *Engle* progeny case, *Waggoner v. R.J. Reynolds Tobacco Co.*, No. 3:09-cv-10367-TJC-JBT, and ultimately incorporated its *Waggoner* preclusion decision, along with the underlying briefing and oral argument transcript, into both Plaintiffs' proceedings. (*Walker* 96; *Duke* 98.) *Waggoner* held, among other things, that the approved *Engle* conduct findings established that Reynolds was both negligent and strictly liable for injuries its cigarettes caused class members; that Reynolds had fraudulently concealed its knowledge of the health effects and addictive nature of its cigarettes; and that Reynolds had conspired with others to fraudulently conceal what the industry knew about these dangers. *Waggoner*, 835 F. Supp. 2d at 1261-62. These cases therefore proceeded to separate trials on the issues of class membership, the remaining elements of Plaintiffs' claims, and Reynolds' affirmative defenses.

In a six-day trial, Walker offered sufficient evidence from fact and expert witnesses to establish that his father had smoked for at least fifty years at the time of his death in 1994, was addicted to cigarettes containing nicotine, and as a result of that addiction, died from lung cancer caused by smoking cigarettes manufactured by Reynolds and by manufacturers Reynolds had acquired. (*Walker* 202:376 (A.32); 203:420, 456-57, 493-94 (A.33); 217:883-84, 887 (A.38);

216:1158 (A.37).) Specifically, his father smoked the following brands: Camel, Winston, and Pall Mall. (*Walker* 203:493-94 (A.33); 216:1158 (A.37).) Reynolds challenged Walker's claims that his father was addicted to cigarettes and that his lung cancer was caused by addiction to nicotine. (*Walker* 212:1221 (A.35); 219:1454-1468 (A.39).) Reynolds also offered evidence and argument to support its affirmative defense that the decedent was also at fault. (*Walker* 213:1607, 1615-18, 1623, 1641-42 (A.36).)

In a seven-day trial, Duke offered sufficient evidence from fact and expert witnesses to establish that his mother had been smoking since she was a teenager in the early 1940s, was addicted to nicotine in cigarettes, and as a result, died from lung cancer caused by smoking cigarettes manufactured by Reynolds. (*Duke* 149:17 (A.26); 155:33, 94, 106, 108 (A.27); 156:149-152 (A.28); 157:47-52 (A.29).) Mrs. Duke primarily smoked Winstons and Winston Lights. (*Duke* 149:31 (A.26); 157:50, 52 (A.29).) Reynolds countered that it was impossible to determine when Mrs. Duke started smoking or what brand she smoked before Winston was introduced in 1954, noted that she smoked another tobacco company's cigarettes in her later years, and challenged Duke's claims that his mother was addicted to cigarettes or that her lung cancer was caused by smoking. (*Duke* 149:25, 31, 86, 107, 140 (A.26); 155:119-120 (A.27); 159:47, 132, 159-64 (A.30).) Reynolds also offered evidence and argument on affirmative defenses that

Duke's claims were barred by the statute of limitations, because his mother should have known she was injured from smoking before May 5, 1990, and that she was also at fault. (*Duke* 165:50-56, 77-78, 86-89 (A.31).)

In both cases, plaintiffs introduced evidence that all cigarettes containing nicotine are categorically defective. For example, plaintiffs offered evidence and testimony that no cigarette containing nicotine is any safer than any other. (*Duke* 155:77-78 (A.27).) Likewise, they offered proof that none of defendants' cigarettes containing nicotine were non-addictive. (*Walker* 211:1040 (A.34).) Plaintiffs also offered proof that Reynolds' negligence, including its manipulation of nicotine and campaign of doubt, was a legal cause of their decedents' injuries, including documents introduced in *Engle*. (*Walker* 217:835-36, 863-65 (A.38).)

Both juries concluded that Plaintiffs had proven *Engle* class membership by demonstrating that their decedents' addiction to cigarettes containing nicotine was a legal cause of their death. (*Walker* 193:1 (A.7); *Duke* 164:1 (A.5).) Walker's jury found that he had proven that his father's death was caused both by Reynolds' negligence and by its placement of cigarettes on the market. (*Walker* 193:2 (A.7).) Duke's jury found he had proven that his mother's death was caused by Reynolds' placement of cigarettes on the market, but not by Reynolds' negligence. (*Duke* 164:2 (A.5).) Both juries found that the Plaintiffs had failed to prove that their respective decedent's death was caused by Reynolds's individual concealment or

conspiracy to conceal what they knew about the dangers of smoking. (*Walker* 193:2-3 (A.7); *Duke* 164:2-3 (A.5).) Both juries rejected Reynolds' statute of limitations defense. (*Walker* 193:4 (A.7); *Duke* 164:4 (A.5).)

The *Walker* jury found that the decedent's spouse had suffered $275,000 in non-economic damages as a result of his death, but that the decedent was 90% at fault. (*Walker* 193:3-4 (A.7).) The Duke jury found that the decedent's surviving son had suffered no non-economic damages as the result of her death, that her estate incurred $30,705 in medical or funeral expenses, and that the decedent was 75% at fault. (*Duke* 164:3-4 (A.5).) Both juries found that the Plaintiffs had failed to prove their remaining claims or entitlement to punitive damages. (*Walker* 193:4 (A.7); *Duke* 164:4 (A.5).) Reynolds filed no post-trial motions in either case, and the clerk entered judgments for the Plaintiffs in the amounts of the jury verdicts, reduced by the decedents' percentages of fault: $27,500 and $7,676.25, respectively. (*Walker* 197 (A.8); *Duke* 177 (A.6).) Reynolds does not dispute the sufficiency of the evidence for the findings the juries made in these two cases or raise any other case-specific error.

D. The *Brown* Order and Appeal

The only ruling Reynolds raises on appeal is the District Court's Rule 16 ruling in *Waggoner*, which followed this Court's reversal of the earlier Rule 16

ruling in *Brown*. Thus, an understanding of those proceedings is important to resolution of these appeals.

In *Brown v. R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328 (M.D. Fla. 2008), *rev'd*, 611 F.3d 1324 (11th Cir. 2010), the District Court (Schlesinger, J.) rejected the Florida Supreme Court's *Engle III* determination that the approved conduct findings were common to all class members, held they could not be used to establish any element of the class members' claims, and opined that using the findings to establish the conduct elements of those claims would violate the defendants' due process rights. (*Walker* 1-4; *Duke* 1-4.)

This Court accepted interlocutory review of that order and reversed in *Brown*, holding that, pursuant to the Full Faith and Credit Act, 28 U.S.C. § 1738, the District Court was required to give preclusive effect to the *Engle* findings to the same extent Florida state courts would. 611 F.3d at 1331-33. *Accord Waggoner*, 835 F. Supp. 2d at 1261-62 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938).

The Court emphasized that in *Engle* Phase I, "the same parties as in the present lawsuit litigated 'common issues' relating to 'the ***defendants' conduct*** and the general health effects of smoking.'" *Id.* at 1333 (emphasis added). It further noted, "the defendants had their day in court on the 'common issues' of fact that were decided in Phase I, and later approved by the Florida Supreme Court, but they

did not have their day in court on the broader questions involving the causes of action the class asserted, which were left undecided." *Id.* In this Court's view, the inquiry boiled down to determining how Florida courts would apply the *Engle* findings. *Id.* at 1333-34.

Making its best prediction of how Florida courts would apply Florida preclusion law, this Court concluded that each plaintiff class member had the burden of demonstrating to a "reasonable degree of certainty" that the jury made the specific factual findings being asserted, that this showing had to be based on the *Engle* trial record. *Id*. at 1333-35.

The Court concluded that it was for the District Court on remand "to apply Florida law as we have outlined it and decide in the first instance precisely what facts are established when preclusive effect is given to the approved findings." *Id.* at 1336. As to the constitutional issues, the Court characterized the defendant's argument as asserting "that using the findings to establish facts that were not decided by the jury would violate their due process rights." *Id.* at 1334. The Court concluded that it did not have to reach the question of whether this would violate due process "because under Florida law the findings could not be used for that purpose anyway." *Id.*

E. The *Waggoner* Proceedings

Before the District Court could "apply Florida law as [this Court had]

outlined it" in *Brown*, "the landscape of Florida preclusion law—specifically as it pertains to *Engle*—changed." *Waggoner*, 835 F. Supp. 2d at 1253. Two Florida appellate courts rendered decisions, holding that the findings approved by the Florida Supreme Court in *Engle III* necessarily established the conduct elements of their respective claims.[5] As *Martin* concluded, "the Phase I findings establish the conduct elements of the asserted claims and individual *Engle* plaintiffs need not independently prove up those elements or demonstrate the relevance of the findings to their lawsuits, assuming they assert the same claims raised in the class action." 53 So. 3d at 1069. *Martin* affirmed that plaintiffs were also required to prove their class member status to use the findings. *Id.* at 1065.

Martin and *Jimmie Lee Brown* concluded that the *Engle* findings were binding in *Engle* progeny cases because the Florida Supreme Court in *Engle III* had determined that those findings (as opposed to the non-specific findings the supreme court rejected) did determine the conduct elements of all class members' claims. *Martin*, 53 So. 3d at 1067; *Jimmie Lee Brown*, 70 So. 3d at 715.

In *Waggoner*, Reynolds conceded that the District Court was required to follow *Martin* and *Jimmie Lee Brown* in determining what Florida preclusion law required. 835 F. Supp. 2d at 1255-56. But, Reynolds contended, Florida law violated the Due Process clause, and that the only way to constitutionally apply the

[5] *Martin*, 53 So. 3d at 1067; *Jimmie Lee Brown*, 70 So. 3d at 775.

Engle findings was to require each class member to definitively prove, based on the *Engle* trial record, that the jury had actually adjudicated, at a granular level, the conduct elements of that class member's claims. *Id*.

The Plaintiffs countered by arguing that the state court decisions correctly determined that the conduct elements had been actually adjudicated in *Engle*. *Id.* at 1256 (citing Master 67). Plaintiffs also cited to the Final Judgment, which was not discussed in this Court's *Brown* opinion (although it was a basis for the subsequent state court rulings in *Martin* and *Douglas*), and which explained the evidence supporting the jury's findings of strict liability and negligence. *See* 835 F. Supp. 2d at 1255.[6] Plaintiffs also argued that they could independently satisfy the proffer requirement this Court set forth in *Brown*, if necessary, and submitted voluminous excerpts from the *Engle* trial record as their "*Brown* proffer". *Id*. at 1265. The plaintiffs contended that the foregoing materials from the *Engle* trial record showed, to at least a reasonable degree of certainty, that the jury had done what was expected of it—rendered conduct findings applicable to all class members. *Waggoner*, 835 F. Supp. at 1265-66.

After conducting a lengthy hearing, and allowing supplemental briefing to fully address the new decision in *Jimmie Lee Brown* (*id*. at 1253-59), the District

[6] *See Martin*, 53 So. 2d at 1068 ("The Final Judgment sets out the evidentiary foundation for the Phase I jury's findings and demonstrates that the verdict is conclusive as to the conduct elements of the claims.").

Court (Corrigan, J.) entered a detailed order analyzing and rejecting the defendants' arguments: the same arguments Defendants raise again in this appeal. *Id.* at 1267-77. The court began its analysis by reviewing the language of the verdict questions the *Engle* jury answered. The court concluded that these findings were "reasonably specific." *Id.* at 1262-63. He acknowledged that the defendants were correct that, given the range of evidence presented, the verdict itself "fails to foreclose all alternative theories upon which the Phase I jury could have reached its verdict." *Id*. at 1264.

The court first considered the *Brown* proffer to determine whether Waggoner had satisfied the preclusion standard *Brown* had predicted Florida courts would apply. *Id.* at 1265-67. But after hearing the defendants' position that no showing could provide sufficiently definitive proof to foreclose, to their satisfaction, the possibility that the jury theoretically could have reached its findings only with regard to some brands and types of cigarettes, Judge Corrigan decided "the more appropriate approach is to tackle head-on Defendants' position that the application of Florida preclusion law in *Martin* and *Jimmie Lee Brown* is inconsistent with due process." *Waggoner*, 835 F. Supp. at 1267.

After extensive analysis, 835 F. Supp. at 1267-1277, *Waggoner* concluded that *Engle III*, *Martin*, and *Jimmie Lee Brown* did not combine to deny defendants' constitutional due process rights; that defendants had full notice and an opportunity

to be heard in the year-long *Engle* trial; that "special jury findings that individually addressed each Defendant's conduct" went against them; and that the *Engle III* decision to give those findings preclusive effect in *Engle* progeny cases was a "constitutionally permissible application" of Florida preclusion law. *Id*. at 1279. The *Waggoner* decision enabled federal trials to commence. Twelve trials have been completed. Six have resulted in defense or $0 damage verdicts; six have resulted in damage awards to plaintiffs. The damages in Reynolds' consolidated appeal total approximately $35,000.

On March 14, 2013, the Florida Supreme Court issued the *Douglas* decision, expressly endorsing *Waggoner's* due process analysis and the *Martin* evidentiary sufficiency findings. *Douglas*, 2013 WL 978259.

F. Standard of Review

Plaintiffs agree that the due process issue raised by Reynolds is reviewed *de novo*.

SUMMARY OF ARGUMENT

Appellant seeks reversal of two judgments of a few thousand dollars each, on the same grounds that failed in the Florida courts of appeal, failed in *Waggoner*, and have now failed in the Florida Supreme Court. One searches in vain to find litigants who have received more process than the tobacco companies in *Engle* litigation. Reynolds' claim that its due process rights have been violated because

"issue preclusion [has been used] to establish contested elements of a claim absent any determination whether the prior jury actually decided those elements" fails of its weight.

There have been multiple determinations that the prior jury in *Engle* Phase I actually decided the conduct elements of the class members' claims for negligence and strict liability; those determinations were made in *Engle* itself by both the trial and supreme court, by the Florida intermediate courts in *Martin* and *Jimmy Lee Brown*, by the District Court in *Waggoner*, and finally once again by the Florida Supreme Court in *Douglas*.

The time-honored doctrine of finality called *res judicata*, which means the "thing adjudicated," applies in *Engle* progeny cases precisely because the "thing" at issue in these cases, the conduct elements of the class members' claims, was the thing that was "adjudicated" in *Engle* between the same parties. The brand of *res judicata* (e.g., claim preclusion vs. issue preclusion) should therefore be irrelevant.

An insistence on form over function may accompany Reynolds' appetite for endless relitigation. Were Reynolds to recast its entire issue to assert that application of *res judicata* violates its due process rights, such an argument would fail, because Reynolds had ample opportunity to litigate the specificity of the verdict form in *Engle*, and that is all due process requires.

Given *Douglas*' holding, Reynolds' complaint boils down to dissatisfaction

with the degree of detail in verdict forms that became the approved *Engle* Phase I findings, also now dressed up as a due process collateral challenge. This complaint is at odds with the definitive iteration of the Florida preclusion principles that apply to these findings. Reynolds had a full and fair opportunity at trial to increase the number, or to put a finer point on, those findings. It chose not to do so, and its failure to do so became final and binding through the appellate process of *Engle*, once again culminating in a denial of certiorari. Reynolds faces a greater burden in its collateral due process attack on the *Engle III* final judgment than the showing required to establish plain error on direct appeal.

The operation of *res judicata* in *Engle* progeny cases, as specified in *Douglas*, is fully consistent with *Waggoner's* adoption of Florida preclusion law from *Martin* and *Jimmie Lee Brown*. The issue is whether *Waggoner's* application of Florida preclusion law conforms to due process—it does. *Douglas* confirms that *Waggoner's* interpretation of Florida preclusion law is correct, and echoes *Waggoner's* holding that its application to *Engle* progeny cases affords the requisite due process.

The Florida state courts have spoken, the Florida Supreme Court, with the experience of the *Engle* progeny trials, has confirmed in *Douglas* the *res judicata* judgment in *Engle III*, and the District Court's comprehensive analysis in *Waggoner* has demonstrated such preclusion does not violate Defendants' due

process rights. This Court should now end this due process debate once and for all exactly where it began its analysis in *Brown*:

> The defendants had their day in court on the 'common issues' of fact that were decided in Phase I, and later approved by the Florida Supreme Court.

Brown, 611 F.3d at 1333.

ARGUMENT

Few, if any, litigants in American history have received as much process as Reynolds and its co-conspirators. Mirroring the conspiracy that got them here in the first place (denying that it has ever been proven that their cigarettes are addictive and deadly), they now seek to relitigate *Engle* in federal court under the guise of a due process argument. Their own framing of the issue pretends that there has never been "any determination whether the prior jury actually decided" the conduct elements of the *Engle* class members' claims for negligence and strict liability.

The Court should reject this argument for at least three reasons: (I) there have in fact been multiple determinations that the jury decided the conduct elements of all class members' claims; (II) the form of *res judicata* is a red herring because, under any doctrine, the precise "thing adjudicated" in *Engle* was the conduct elements of these claims; and (III) application of *res judicata* clearly comports with due process because the Defendants had a full and fair opportunity

to litigate the only thing that is really in dispute – the specificity of the *Engle* verdict form.

I. THERE HAVE BEEN MULTIPLE DETERMINATIONS THAT THE FINDINGS APPLY TO ALL CLASS MEMBERS, AND IT IS REASONABLY CERTAIN THAT THEY WERE CORRECT.

This Court in *Brown* sought to anticipate how Florida appellate courts would review actual *Engle* progeny trials for compliance with Florida preclusion law, and determined that they would require Class Members to go behind the judicial determination in *Engle III* and prove from the trial record what had been determined, and thus directed the District Court to undertake that task. When the District Court considered the question in *Waggoner*, prediction was no longer necessary: two Florida appellate decisions, *Martin* and *Jimmie Lee Brown*, which reviewed *Engle* progeny trials, determined that the evidentiary foundation for the Phase I jury's findings as approved by the Florida Supreme Court in *Engle III* "demonstrate that the verdict is conclusive as to the conduct elements of the claims," *Martin*, 53 So. 2d at 1068, and affirmed the application of Florida preclusion law to these conduct elements. *Waggoner's* reliance on *Martin* and *Jimmie Lee Brown* proved prescient: the Florida Supreme Court in *Douglas* confirmed that the conduct of Defendants had indeed been decided in *Engle*, and that the conduct element findings were entitled to preclusive effect in *Engle* progeny trials.

Whatever ambiguity there may have been when the Court decided *Brown* regarding what facts were deemed preclusively established under Florida law has now been resolved. The Florida Supreme Court has twice held, first in *Engle III* and now in *Douglas*, that the *Engle* class trial jury's answers to the specific conduct questions known as the "approved *Engle* findings" were common to the entire class, and therefore must be given preclusive effect as between the defendants and the members of the class.

With respect to the specificity of each finding, as *Douglas* notes, "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." *Douglas*, 2013 WL 978259, at *7; *Engle III*, 945 So. 2d at 1255. As *Douglas* points out, *Engle III* had carefully sorted and unanimously agreed on which findings were sufficiently specific to have preclusive effect in the former class members' individual cases, and which were not. *Douglas*, 2013 WL 978259, at *7-8, citing *Engle III*, 945 So. 2d at 1255.

Douglas further explained that there was no surprise to the defendants as to how the Phase I findings would be applied in subsequent phases—indeed that was the trial plan. *Id.* at *8. Nor was there anything unusual or unprecedented "in holding that a defendant's common liability may be established through a class action and given binding effect in subsequent individual damages actions." *Id.*

(citing, *inter alia*, *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) (recognizing that a class action may be decertified after the liability trial with the liability findings used in subsequent damages actions).

Douglas thus reaffirms the Florida Supreme Court's *Engle III* ruling, which gave *res judicata* effect to a selected set of specific conduct findings upon comprehensive review of the trial record.

Judge Corrigan's well-reasoned decision in *Waggoner* is consistent with every Florida state decision that has examined the issue in giving preclusive effect to the elements of defendants' wrongful conduct that were subject to adverse final rulings. The *Engle* findings answer common questions regarding defendants' conduct (questions, says *Douglas* expressly, that do not vary from class member to class member)[7] that were posed by the *Engle* trial court at the conclusion of the

[7] Reynolds makes, in passing, an undeveloped argument that the *Engle* findings cannot apply to all of its cigarettes because such would somehow be "preempted" by federal law. The time to raise this argument has passed. The trial court and the Florida Supreme Court rejected preemption arguments, and Reynolds had its opportunity to seek review on any federal preemption issue in the Supreme Court of the United States, but chose not to pursue this argument. Final Judgment, 2000 WL 33534572, at *6-7; *Engle III*, 945 So. 2d at 1273-74.

Even if the Court were to entertain it, the argument is baseless. Nobody here is seeking to ban the sale of cigarettes. This is not about all manufacturers of all cigarettes at all times. The *Engle* Phase I jury was asked only to determine the culpability of each defendant, for its own conduct during the relevant period, and relating to a specific type of product; i.e., cigarettes containing nicotine. The Supreme Court has already determined, twice, that tort claims like those asserted in the *Engle* progeny cases are not preempted. *Altria Group v. Good*, 555 U.S. 70, 129 S. Ct. 538 (2008) (consumer claim asserting violation of tobacco companies'

evidence and arguments, answered by the *Engle* jury, and affirmed (twice) by the Florida Supreme Court, which determined they were supported by the trial record and thus binding on the parties to the trial.

While the *Waggoner* plaintiffs offered a full proffer of the support to be found in the *Engle* record, what the court below termed "a belt and suspenders" approach, the District Court ruled such an examination unnecessary by the intervening Florida appellate decisions, *Martin* and *Jimmie Lee Brown*, which it correctly viewed as controlling on how Florida law would treat the evidentiary sufficiency of the record: "such a showing is not required by Florida preclusion law." *Id.* at 1256.

Douglas confirms that *Waggoner's* rendition is indeed the state of Florida law, and that the Supreme Court's *Engle III* decision was, itself, an examination of the sufficiency of the *Engle* trial record for this exact purpose, and the propriety of these findings as preclusive on the questions of defendants' conduct. Otherwise, and the Florida Supreme Court hardly could have been clearer on this issue: "our holding allowing the common liability findings to stand would serve no purpose and would in fact be obliterated if the *Engle* defendants were permitted to relitigate matters pertaining to their conduct." 2013 WL 978259 at *8. *Brown* agreed. 611

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duty not to deceive not preempted); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608 (1992) (smokers' claims based upon warranty, fraud and conspiracy not preempted). The *Engle* progeny cases present no legitimate preemption concerns.

F.3d at 1335.

All Reynolds can do is present hypotheticals, turning the *Engle* trial record into a series of random findings that never included findings as to its conduct and its cigarettes. But as *Douglas* pointed out, this was not a trial about isolated facts; rather, the *Engle* jury decided the conduct elements of the claims asserted by the class, "not simply a collection of facts relevant to those elements." *Douglas*, 2013 WL 978259, at *11 (citing *Martin*, 53 So.3d at 1067). Indeed, that is what the *Engle* jury was asked to do. "Few tenets are more fundamental to our jury trial system than the presumption that juries obey the court's instructions." *United States v. Stone*, 9 F.3d 934, 938 (11th Cir. 1993). Defendant's attempt to pluck bits of the *Engle* trial record in isolation to demonstrate conflicts or inconsistencies runs counter to the reality of the trial: the *Engle* jury was instructed to consider the totality of conduct.

Douglas is crystalline:

> That the *Engle* jury did not make detailed findings for which evidence it relied upon to make the Phase I common liability findings is immaterial. As the *Engle* trial court recognized in its final judgment, there was competent substantial evidence to support the *Engle* defendants' common liability to the class, and, by approving the use of the Phase I findings for that purpose in individual actions in *Engle*, we agreed.

Id. at *12.

Reynolds still contends it is impossible to know whether the jury was thinking about all its nicotine cigarettes when it found that Reynolds had placed unreasonably dangerous and defective cigarettes on the market. This contention is at odds with Reynolds acknowledgment that findings one and two are entitled to *res judicata*:

> Moreover, some Phase I findings clearly do have significant effect in progeny litigation—such as the *Engle* jury's determination that cigarettes cause various diseases and are addictive [], issues that the defendants had hotly contested prior to Engle.

Walker Appellant Br. at 49. Reynolds is not confused as to which cigarettes cause disease, or which cigarettes are addictive—they concede that these findings are sufficiently clear to apply to every class members' cigarettes. *Id.* Reynolds demands more specific findings, now that the Phase I trial is over, but cannot really deny that all of its cigarettes containing nicotine are defective under Florida products law.

As this Court explained in *Brown*, the class members have an argument that:

> [T]he jury's findings can be combined with facts that can be proven through other means to establish an element of a claim. For example, a Phase I approved finding that the defendant sold cigarettes that were defective and unreasonably dangerous might be combined with proof in this lawsuit that all cigarettes are equally defective and unreasonably dangerous.

Id. at 1335 n.9. For example, the Court noted that the plaintiffs had pointed out that Philip Morris admitted on its website that all cigarette types and brands are

equally dangerous, although that website had not been presented to the Engle jury. *Id.* at 1335 n.8. But the Court did not reach that argument because the *Brown* plaintiffs had not briefed it, as the Plaintiffs in these cases now do.

The *Engle* class members have consistently taken the position throughout this litigation that all of Reynolds' cigarettes containing nicotine are equally defective under Florida law, and Reynolds has never denied that. All Reynolds says is that the *Engle* jury might not have felt it had to reach that conclusion to answer "yes" to question 3. But the Plaintiffs doubt Reynolds would claim in its reply brief or at oral argument that, in fact, some of the nicotine cigarettes smoked by the *Engle* class members were safer than others. Appellees are confident that Reynolds will never claim that because a federal court, after holding a nine-month trial in many ways an analog of *Engle* Phase I, albeit civil RICO proceedings, has permanently enjoined it and its co-conspirators from making such a false contention. *United States v. Philip Morris USA*, 449 F. Supp. 2d 1, 938 (D.D.C. 2006), *affirmed in relevant part and vacated in part on other issues*, 566 F.3d 1095 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1502 (2010), *reh'g denied*, 131 S. Ct. 57 (2010). Accordingly, any need to prove anew in each individual trial that all Reynolds' cigarettes are equally dangerous is moot; that fact is now beyond dispute.

In sum, the *Engle* findings have been subjected to second, third, fourth, and fifth judicial looks. There have been multiple determinations that the *Engle* findings are sufficiently specific to apply to the entire class, and it is reasonably certain these determinations were correct. Indeed, as these courts all concluded, that was the whole point of Phase I; to determine common liability issues affecting the entire class concerning the tobacco industry's conduct. Reynolds was fully aware from the outset that the determinations made would bind it in every subsequent individual trial.

II. RES JUDICATA APPLIES BECAUSE THE "THING ADJUDICATED" IN *ENGLE* PHASE I WAS THE CONDUCT ELEMENTS OF THE SAME CAUSES OF ACTION BETWEEN THE SAME PARTIES.

Reynolds has long made the distinction between the two main doctrines governing the preclusive effect of earlier litigation (claim preclusion and issue preclusion) a defining feature of its argument, and has used its vision of "issue preclusion" as a vehicle to demand an *ex post facto* artificial deconstruction of the *Engle* findings. This ploy must fail. The District Court and the Florida courts have correctly explained that this dichotomy is beside the point because the "thing adjudicated" in *Engle* was the set of approved conduct elements of the class members' causes of action, *e.g.*, for negligence and strict liability. As this Court explained in *Brown*, "[t]he term "res judicata" is translated from the Latin as 'a thing adjudicated.'" 611 F.3d at 1331. In *Brown*, this Court opined that in *Engle*

III, when the Florida Supreme Court said "*res judicata* effect," it was referring to the brand of *res judicata* known as "issue preclusion," and not to "claim preclusion."[8] 611 F.3d at 1333-34. Thus, this Court predicted that the Florida Supreme Court meant issue preclusion, which requires "the asserting party to show with a 'reasonably degree of certainty' that the specific factual issue was determined in its favor." *Id*. at 1334-35.

The Florida appellate courts subsequently held that the claim preclusion/issue preclusion labeling dispute was much ado about nothing because, under Florida law, it simply did not matter what form of preclusion was applied. Either way, "the thing adjudicated" to the Florida Supreme Court's satisfaction in *Engle* was the set of conduct elements of the class members' negligence and strict liability causes of action (and others not at issue here):

> While we generally agree with the Eleventh Circuit's analysis of issue preclusion versus claim preclusion, we find it unnecessary to distinguish between the two or to define what the supreme court meant by "res judicata" to conclude the factual determinations made by the Phase I jury cannot be relitigated by RJR and the other *Engle* defendants. More importantly we do not agree every *Engle* plaintiff must trot out the class action trial transcript to prove the applicability of the Phase I findings. Such a requirement undercuts the supreme court's ruling. The Phase I jury determined "**common issues** relating exclusively to the defendants' conduct …" …. The common issues, which the jury decided **in favor of the class** were the "conduct"

[8] Presaging the ultimate irrelevance of these labels, the *Brown* plaintiff at oral argument urged that function, not form, was what mattered: that is, that *Engle III* gave preclusive effect to the approved findings, whether denominated elements, issues, or simply things decided. *Id.* at 1333 n.7.

> elements of the claims asserted by the class, and not simply, as characterized by the Eleventh Circuit, a collection of facts **relevant** to those elements.

Martin, 53 So. 3d at 1067 (emphasis added); *see also Jimmie Lee Brown*, 70 So. 3d at 715 (largely agreeing with *Brown* that issue preclusion applied, but disagreeing that reference to the trial transcripts was required because the court was "constrained" by the supreme court's adjudication in *Engle III* that the conduct elements of the class members' claims had been established).

As these courts recognized, "adjudication" is not conducting a brain scan to determine what the prior jury must have been thinking answered Phase I verdict form. It is not a matter of ruling out any theoretical possibility that jurors may have answered "yes" based on a mistaken belief that they were not resolving matters common to the entire class—a virtual impossibility in the case given the jury's constant awareness that their role was in Phase I of the class trial was to determine the conduct of the tobacco industry directed to the class as a whole. (*Master*.655 at 37558 (A.13).)

Reynolds acts as if *res judicata* turns on the supposed thoughts of the jury; that misconstrues the fundamental nature of *res judicata*. The "adjudicate" in *res judicata* means adjudication, which is not simply a jury's answer on a piece of

paper. Rather, it is understood to encompass the process of judicially deciding a case.[9]

Reynolds' entire argument is based on the premise that the jurors in their heads might have thought they were presented with alternative theories of liability on each count. That is extremely unlikely as a practical matter. While Reynolds cites arguments the parties made to the trial court, such as the possibility of submitting alternative theories to the jury, there is no cited instance of the trial court or counsel—ever suggesting to the jury that there were alternative theories to support any of these elements. That just did not happen.

Instead, the trial court told the jury that Phase I was limited to determining issues that applied to the class as a whole. Both sides tailored all of the closing arguments to the all-or-nothing approach that the jury was answering "yes" or "no" for each question on a basis that would apply to every class member, regardless of individual circumstances (e.g., what type or brand of cigarettes containing nicotine they smoked). But even if one were to disregard everything the jurors were told during this year-long trial, the issue of whether the conduct elements had been established for all class members was still *adjudicated* against the defendants.

As the Florida Supreme Court found, ultimately the defendants' due process argument is really a form of collateral attack on a judgment that is final and has

[9] "To adjudicate is: To settle in the exercise of judicial authority. . . ." *Haney v. Nence-Stark Co.*, 216 P. 757, 762-63 (Or. 1923).

been all the way through a denial of certiorari to the United States Supreme Court. *See Douglas*, 2013 WL 978259 at *11 ("At its core, the defendants' due process argument is an attack on our decision in *Engle* ...."). Reynolds faces a greater burden in its collateral due process attack on the *Engle III* final judgment than the showing required to establish plain error on direct appeal. *Henderson v. Kibbe*, 431 U.S. 45, 54 (1977).

The one thing that is clear under either preclusion theory is that once a specific matter has been adjudicated in a proper legal proceeding it cannot be challenged in subsequent litigation between the same parties. Win or lose, the conduct elements were adjudicated in *Engle III*, and this should end the due process debate regardless of whether claim preclusion or issue preclusion is involved.

Thus far, Reynolds has only addressed the issue preclusion standard, which is whether there is reasonable certainty that an issue was actually decided in the prior proceeding. *Brown*, 611 F.3d at 1334. While that test is certainly met here, as this brief shows, it is not the applicable test because the Florida Supreme Court has now made clear in *Douglas* that when it said "*res judicata* effect" in *Engle III*, it meant claim preclusion.[10] 2013 WL 978259 *11-14.

[10] The court had previously made clear that it considered the terms "*res judicata*" and "claim preclusion" to be synonymous. *Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004).

Reynolds has not made any argument against using *res judicata* (claim preclusion) to give preclusive effect to the adjudication in *Engle III* that the class members have proven the conduct elements of their negligence and strict liability claims. It founded its appeal on its crabbed interpretation of issue preclusion, not the *res judicata* grant of *Engle III*, which *Douglas* recently reconfirmed.

If Reynolds stays true to form, it will likely claim a due process right to recast the issue and claim that applying claim preclusion also violates its due process rights. That would be futile, because any doctrinal differences between issue preclusion and claim preclusion invite an academic debate about Florida law that is inappropriate under *Erie*, because due process inheres in function not form, and because, regardless of label, claim preclusion as applied by the Florida Supreme Court to *Engle* does not offend due process.

As to any further debate over whether issue preclusion or claim preclusion is applicable under Florida law, federal courts do not engage in that exercise when the state supreme court has spoken so clearly. As *Brown's* author has repeatedly and elegantly explained:

> From our perspective, state law is what the state supreme court says it is, and a state supreme court's pronouncements on the subject are binding on every state and federal judge. By contrast, 'when we write to a state law issue, we write in faint and disappearing ink: . . . once the state supreme court speaks the effect of anything we have written vanishes like the proverbial bat in daylight, only faster.'

Le Frere v. Quezada, 582 F.3d 1260, 1262 (11th Cir. 2009) (quoting *Sultenfuss v. Snow*, 35 F.3d 1494, 1504 (11th Cir. 1994) (Carnes, J., dissenting)).

While the terminological debate over the proper label may be fodder for an academic debate, it simply does not drive any practical or due process question in *Engle* litigation. The Florida Supreme Court decided, in its judgment, that claim preclusion is the proper concept because the same "claims," in the ordinary sense of the word, are at issue in the earlier and subsequent proceedings – i.e., the class members' claim that the defendants were negligent and their claim that the defendants manufactured unreasonably dangerous and defective products. *Engle* decided the common conduct elements of such claims, *Douglas*, 2013 WL 978259 at *11, and *Douglas* makes no assertion that any of the class members' causes of action have been entirely determined. It states just the opposite.

Reynolds does not take issue with the propriety of the decision in *Engle III* to approve the use of "issue" class litigation. That decision simply followed an approach many other courts and commentators have approved as the superior procedure to adjudicate claims when a single course of conduct has injured thousands of potential plaintiffs who could never litigate all of their claims in their lifetimes on a purely individual basis. *See Douglas*, 2013 WL 978259 at *13-14 (collecting cases and treatises approving multi-phase class litigation). As Judge Corrigan explained in *Waggoner*, due process is neither rigid nor formalistic, and it

must be flexible if it is to accommodate the legitimate procedural interests of both sides. In the *Engle* litigation, fundamental fairness to both sides recognizes the progeny cases as logical and predictable extensions of the Phase I adjudication:

> The *Engle* progeny cases are in essence a *sui generis* extension of the original litigation; the Phase I findings may be given the preclusive effect afforded them by *Engle III*, *Martin* and *Jimmie Lee Brown* without running afoul of the Due Process Clause.

Waggoner, 835 F. Supp. 2d at 1277 (citing *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 483, 102 S. Ct. 1883, 1898 (1982)).

As shown in the next section, the Florida Supreme Court's application of *res judicata* to the approved *Engle* findings, proclaimed in *Engle III*, forecast in *Waggoner*, and reaffirmed in *Douglas*, does not violate due process; it promotes it.

III. GIVING PRECLUSIVE EFFECT TO THE APPROVED *ENGLE* FINDINGS PROMOTES DUE PROCESS.

As this Court determined in *Brown*, "the defendants had their day in court on the 'common issues' of fact that were decided in Phase I, and later approved by the Florida Supreme Court. *Brown*, 611 F.3d at 1333. *Accord Engle III*, 945 So. 2d at 1263; *Waggoner*, 835 F. Supp. 2d at 1276. Reynolds had a full and fair opportunity to be heard on the conduct elements given preclusive effect in these trials. It enjoyed all the process to which it was due, and perhaps even more than that, in light of decertification.

First, Reynolds had ample notice that the *Engle* findings would be applied as

preclusive in these cases. Specifically, "the class action trial plan put the *Engle* defendants on notice that if the Phase I jury found against them, the conduct elements of the class's claims would be established, leaving only plaintiff-specific issues for individual trials." *Douglas*, 2013 WL 978259, at *8. (*See also* Trial Plan (A.1).)

Second, Reynolds had a year-long opportunity to offer evidence countering every possible liability theory. As summarized by the District Court, this "day in court" involved "a *year*-long trial in which myriad defect, negligence and fraud theories were vigorously litigated," for the "explicit purpose of determining issues related to the Defendants' conduct which were common to the entire class, meaning Defendants had every reason to litigate each potential theory of liability to the fullest extent possible." *Waggoner*, 835 F. Supp. 2d at 1276 (citing *Engle III*, 945 So. 2d at 1256). *Accord Douglas*, 2013 WL 978259 at *11. Reynolds does not argue it lacked the opportunity to offer any evidence or pursue any possible defense theory regarding its conduct.

Third, Reynolds had every opportunity to propose a workable verdict form that could have provided the specificity it desired, but chose not to do so. Instead, it clung to a fill-in-the-blank essay-style verdict form that did not comport with

Florida law or reality.[11] (A.1.) When Reynolds proposed its verdict form, nearly a year before the jury deliberated, the judge indicated it would reject this approach:

> THE COURT: My only comment at this point, without making any definitive ruling, is I would love to be in the jury room when the jury considers Questions 6, 8, 10, 13 and 17 on the defendants' verdict form. I mean, I can anticipate we all getting beards by the time they come out [with a] decision
>
> ***
>
> THE COURT: --just take Question 5, for example: Did one or more defendants conceal the results of scientific studies not otherwise known?
>
> The answer is yea or nay.
>
> If yea, 6 is: Identify the scientific studies concealed by the defendants and when such studies were concealed? You can go ad infinitum before you get an answer to that one.

(*Master*:655 at 44-45 (A.9).) Despite requests from the judge to provide a verdict form with special interrogatories that could be answered "yes/no" consistent with Florida law, Reynolds refused to do so. (*E.g.*, *Master*:655 at 35968-71) (A.13).) In failing do so, for whatever strategic reason, the defendants accepted the risk of any ambiguity in the jury's answer. *See* 1.1470, Fla. R. Civ. P.; *Whitman* v. *Castlewood Int'l*, 383 So. 2d 618, 619-20 (Fla. 1980) (to preserve claim that a general verdict on liability rested on a particular theory, the party must have

[11] For example, Florida products liability law does not require identification of a particular defect. "Product liability cases under Florida law require proof of two things," *Jimmie Lee Brown*, 70 So.3d at 717 (citing *Liggett Group, Inc. v. Davis*, 973 So.2d 467, 475 (Fla. 4th DCA 2007)). "First, the product is defective; and, second, the defect caused the plaintiffs' injuries." *Id.*

objected and submitted a proper special verdict form identifying the theories). *See* also *Florida E. Coast Ry. Co.* v. *Gonsiorowski*, 418 So. 2d 382, 834 (Fla. 4th DCA 1982) (to preserve the issue, defendant was required to present a special verdict form). The defendants clearly did not want to increase the chances the jury would "split the baby" and find entire brands or styles of its cigarettes to be defective, and instead pursued the all-or-nothing strategy, hoping the jury would completely exonerate them.

Fourth, just as in Phase II, Reynolds got another full and fair opportunity to present its defense in the *Walker* and *Duke* trials. *Engle III* did not approve a class-wide damages judgment against Reynolds. Reynolds has every opportunity to "continue to vigorously litigate each and every progeny suit," *Waggoner*, 835 F. Supp. 2d at 1272, including these cases, "meaning that preclusive application of the Phase I approved findings in no way deprives [it] of property without 'judicial determination of the fact upon which alone' would result in favor of any progeny plaintiff." *Id.* *Accord Douglas*, 2013 WL 978259 at *11 ("As illustrated by the *Douglas* trial record, which is ten thousand pages long, individual plaintiffs do not simply walk into court, state that they are entitled to the benefit of the phase I findings, prove their damages, and walk away with a judgment against *Engle* defendants."). Indeed, the Phase I jury "did not determine whether the defendants were liable to anyone." *Waggoner*, 835 F. Supp. 2d at 1272 (citation omitted).

Accord Brown, 611 F.3d at 1333 ("[defendants] did not have their day in court on the broader questions involving the causes of action the class asserted, which were left undecided."). As the District Court recognized, "[b]y decertifying the class and requiring progeny plaintiffs to bring individualized damages claims, the Florida Supreme Court gave Defendants *greater procedural protection* than they enjoyed under the original class action posture." *Waggoner*, 835 F. Supp. 2d at 1277 (emphasis added).

In fact, Reynolds concedes that its due process rights were not violated in Phase II(A), essentially the same procedure as *Walker* and *Duke*. As the District Court correctly pointed out:

> These attempts to distinguish Phase II's importance are unpersuasive, given the unique structure of this litigation. Defendants do not deny that they had their day in court, in a class action setting, on the "common issues" of the claims asserted by the *Engle* class. Progeny plaintiffs, to take advantage of the Phase I findings, must assert the same claims raised in the class action. As such, it simply does not make sense as a matter of due process that it was acceptable for Farnan and Della Vecchia to match the Phase I findings with the Phase II findings, but it is unacceptable for subsequent plaintiffs, each of whom were members of the same class, to do the exact same thing. Such a conclusion ignores that had the *Engle* class never been decertified, the Phase I findings would have already conclusively established the conduct elements for every member of the class, including the Waggoners.

Waggoner, 835 F. Supp. 2d at 1277. Reynolds has no rejoinder to this, especially in light of the fact that the Plaintiffs smoked the same brands and styles of cigarettes as the class representatives.

Douglas echoes *Waggoner*'s insight:

> The *Engle* defendants have the same procedural safeguards against the arbitrary deprivation of property as are present in any other case, namely that each plaintiff must prove a prima facie case against each defendant. 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, 2013 WL 978259, at *15. This is all that due process requires.

On "day in court" matters, preclusion is the rule. "State courts are generally free to develop their own rules for protecting against the relitigation of common issues, as long as the state's application of its preclusion doctrines complies with due process." *Richards v. Jefferson County*, 517 U.S. 793, 797, 116 S. Ct. 1761 (1996). *Douglas* and *Waggoner* are consistent with modern federal preclusion cases, which stand for the proposition that once a losing party has its day in court, the consequences of the outcome may be felt in subsequent suits without any due process concerns. The modern cases on the interplay of preclusion and due process, *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326-28, 99 S. Ct. 645 (1979) and *Taylor v. Sturgell*, 553 U.S. 880, 128 S. Ct. 2161 (2008), confirm that class-wide determinations are consistent with due process, so long as there is sufficient opportunity to be heard, directly or through adequate representation. [12]

[12] This Court recently considered the preclusion/due process intersection in *Juris v. Inamed Corp.*, 685 F.3d 1294, 1322 (11th Cir. 2012), and held class

As the District Court pointed out, Reynolds fails to articulate with clarity or consistency what additional procedures the trial court was obligated to provide. Appellant's stance on what, if any, preclusion standard could satisfy due process has shifted throughout the federal *Engle* proceedings. It remains elusive today. On remand in *Waggoner*, Appellant represented to the District Court that the "version of Florida preclusion law that the Eleventh Circuit understood would apply in *Brown* would have satisfied the [*Fayerweather*] due process standard." 835 F. Supp. 2d at 1265 (quoting Doc. 55 at 2). *Accord Waggoner* 65:21 ("if you do *Brown* right, then that satisfies due process."). As the District Court recognized, "this position marked a subtle shift in Defendants' due process argument." *Waggoner*, 835 F. Supp. 2d at 1256 n.10. The court further explained: "in contrast to their previous position, Defendants now concede at least the possibility that plaintiffs could preclusively establish conduct directly from the Phase I record in a way that is consistent with their due process rights. (*See Engle* Master Docket, Doc. 171 at 66-67)." *Id.*

Despite its lip service to *Brown*, Reynolds pressed the arguments that its due

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settlement binding on an absent class member, barring her later individual suit consistent with due process because the class was adequately represented in the first suit. *Id.* A party may be bound by a prior adjudication even where her representatives had ceded the opportunity to present any evidence or be heard on any element on any claim and even where no issues were "actually decided" in the previous suit (much less determined with the kind of specificity Reynolds seeks here), so long as her interests were adequately represented in the previous proceeding. *Id.*

process rights would be violated *no matter what* the trial record showed:

> THE COURT: But they could give any proffer they could possibly give, and it would still be your position that the Phase I findings are not going to have the preclusive effect that they want; right?
>
> MR. CLEMENT: Well, sure, but it's not because we're being pigheaded. It's because of the nature of the *Engle* trial. And, you know, we've tried to provide this to you in the briefs and you've looked at this material, so I don't want to belabor the point.
>
> THE COURT: So what that means is that no matter how -- no matter what happens, that if the Phase I findings get applied in the way in which the *Martin* court says they're going to be applied or the way in which the plaintiffs are asking they be applied, or any one of them get applied that way, because your view is that the plaintiffs can never satisfy the test that has been given for them in *Brown*, that ipso facto, that is going to violate the tobacco companies' due process rights; right?
>
> MR. CLEMENT: I don't really disagree with that summary, but I mean, I don't think there's any kind of bait and switch or any kind of magic here. It's not that they --there was nothing wrong in the Eleventh Circuit's analysis. These findings, in the abstract, if the *Engle* trial had been tried differently.

(*Waggoner* 65:24-25.)

Hence, Reynolds announced a due process "Catch 22": to satisfy due process, plaintiffs must satisfy the *Brown* standard—but here's the catch, as the District Court exposed it—"even if plaintiffs were to compile the most thorough *Brown* proffer imaginable to support their all-cigarettes-are-defective theory, it *still* would not satisfy either the Eleventh Circuit's requirements or federal due process such that the Phase I findings could be applied in the manner plaintiffs seek." *Waggoner*, 835 F. Supp. 2d at 1266.

Reynolds now takes the position that the *Brown* "reasonable degree of certainty" standard is not only impossible to meet, but would be unconstitutional even if, *mirabile dictum*, it were. According to Reynolds, giving any preclusive effect to the conduct findings violates due process, because the verdict form, while defendant-specific, and while relating to the course of conduct addressed in a year-long trial designed specifically to determine common issues, was not broken out, as they would prefer, at the granular, brand-specific, or gambit-specific level (e.g., the "light cigarette" marketing strategy, or ammoniated cigarettes). Reynolds argues that in this context; i.e., a class-wide common issues trial followed by individual damages determinations, the constitution requires either an essay-test-fill-in-the-blank narrative verdict form, or a brain scan of each juror, or possibly both. Appellant can cite no authority in the last century for this bizarre reading of preclusion law.

After a careful and comprehensive analysis of Reynolds' due process arguments—the same ones advanced here—the District Court came to the same conclusion as every court that has looked at this issue: Reynolds has not identified any fundamental right, recognized in contemporary constitutional jurisprudence, that is infringed by giving preclusive effect to the common conduct findings. *Id*. at

1277; *Douglas*, 2013 WL 978259, at *15.[13]

Reynolds' entire due process argument turns on a heroic heralding of long-forgotten *Fayerweather v. Ritch*, 195 U.S. 276 (1904), excavated for this case. *Waggoner* concluded correctly that *Fayerweather* does not establish a fundamental right to any particular "traditional" application of preclusion. At most, *Fayerweather* "recognize[d] that improper preclusive application of a state court judgment in a later federal or state trial *can* be inconsistent with Fifth or Fourteenth Amendment procedural due process." *Waggoner*, 835 F. Supp. 2d at 1268 (citing *Fayerweather*, 195 U.S. at 297-99) (emphasis in original).

The constitutional question in *Fayerweather* was whether a trial court had determined the validity of releases executed by the plaintiffs—"the fact upon which *alone* the petitioners would be deprived of their right to share in the estate"—because an application of *res judicata* absent proper determination of that fact work an arbitrary deprivation of petitioners' property." *Id.* (citing *Fayerweather*, 195 U.S. at 298-299). Since *Fayerweather* determined that the validity of the releases had been decided in the earlier proceeding, and that the application of res judicata was proper, the "due process implications *did not factor into the Court's decision whatsoever*." *Id.* at 1269 (emphasis in original).

[13] The ruling was a tour de force. There is no need to replicate the entire decision here, as Appellants would not even attempt articulate its reasoning in any clearer terms.

Waggoner was entirely correct in concluding that *Fayerweather* cannot stand for the broader proposition that any application of state preclusion law which fails to foreclose all alternative theories of liability necessarily violates due process. 835 F. Supp. 2d at 1269. Indeed, *Fayerweather* upheld the application of collateral estoppel, even though the judgment giving preclusive effect arose from a general verdict and, bizarrely, the finder of fact specifically disavowed having determined the fact in question. *Id.* As the *Fayerweather* Court explained: "the omission of special findings means nothing, for the judgment implies a finding of all necessary facts." 195 U.S. at 307. Ironically, the *Fayerweather* Court would have affirmed *Engle III* on preclusion because even if there were some undisclosed evidence that the jury did not really decide these issues on a basis common to all class members, the *Engle III* judgment that the issues were resolved on that basis implies a finding of those necessary facts.

The District Court thus concluded that a hard look at *Fayerweather* "cripples Defendants' argument that due process and traditional preclusion law are one and the same." *Waggoner*, 835 F. Supp. 2d at 1269-70. Reynolds provided no other case to support this point, and as *Waggoner* concluded correctly, modern post-*Erie* Supreme Court jurisprudence further undermines any claim that there is a transcendent federal body of preclusion principles that may be applied to the findings of state courts. *Id.* at 1270-76. The Florida Supreme Court agreed.

Douglas, 2013 WL 978259 at *14-15.

Any so-called *Fayerweather* "doctrine" is ersatz law.[14] *Fayerweather* has been eclipsed. The last time the Supreme Court mentioned *Fayerweather* with connection to preclusion was in *Partmar Corp. v. Paramount Pictures Theatres Corp.*, 347 U.S. 89, 90 n.1, 74 S. Ct. 414 (1954), and then for something far removed its present invocation. *Fayerweather* goes unmentioned in the Supreme Court's refinement of modern federal preclusion law. *See Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 323-27, 91 S. Ct. 1434 (1971) and *Parklane Hosiery*, 439 U.S. at 326-28. And when the Supreme Court turned for a comprehensive overview of the due process and preclusion law in *Taylor*, 553 U.S. 880, *Fayerweather* went again unmentioned.

As *Taylor* instructs, it is insistence on multiple opportunities to be re-heard on the same matters, not preclusion, that thwarts the legitimate interests of other beneficiaries of the judicial system, and is incompatible with due process. 553 U.S. at 892. Under *Taylor*, preclusion does the due process and public policy work. "By precluding parties from contesting matters that they have had a full and fair opportunity to litigate," doctrines of claim preclusion and issue preclusion, collectively referred to as "*res judicata*," "protect against the vexation, expense and attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance

[14] To prop up their reading of *Fayerweather*, Defendants proffer a "legion" of decisions of similar vintage.

on judicial action by minimizing the possibility of inconsistent decisions." *Id*.

Fundamental fairness belongs to all litigants and to the public. The "fiscal and administrative burdens" entailed in Reynolds' claimed right to endless re-trials weigh in the balance against it. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). *Engle III* elegantly solved the problem that arose when a sustained common course of conduct caused a multitude of individual injuries. *Engle* preclusion accommodates the interests of access, efficiency, and economy in a model of due process balance. *See Waggoner*, 835 F. Supp. 2d at 1279 ("We must bear in mind that no single model of procedural fairness, let alone a particular form of procedure, is dictated by the due process clause. The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.") (citing *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 481, 102 S. Ct. 1883 (1982)).

Given the "panoply of protections against erroneous property deprivation" afforded Reynolds, *Waggoner*, 835 F. Supp. 2d at 1273, the competing public interests are substantial. Reynolds is incorrect that preclusion is not a significant state interest and "barely advances judicial economy at all." *Walker* Appellant Br. at 35. Indeed, preclusion "serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case." *Baptiste v. Commissioner*, 29 F.3d 1533, 1540 (11th Cir. 1994).

Preclusion protects litigants, the judicial system, and the public from "vexation"—from burdensome multiplication or protraction of litigation, from the attendant expense, delay, and burden to the system, and from inconsistent decisions, which undermine public "reliance on judicial action." *Taylor*, 553 U.S. at 892. Further, "[the] doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, "of public policy and of private peace," which should be cordially regarded and enforced by the courts…'" *Id.* (quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299, 37 S. Ct. 506, 508 (1917) (alterations in original)).

Preclusion here—i.e., enforcing the convergent view of *Engle III*, *Martin*, *Jimmie Lee Brown*, *Waggoner* and *Douglas* that the *Engle* approved common conduct element findings have preclusive effect in *Engle* progeny trials—advances not only the substantial state interest in not relitigating matters already decided, and promotes the peace that flows therefrom, but also, as a practical matter, means the difference between a year-long trials for eternity and the days-long trials that are being conducted in state and federal *Engle* progeny cases.

Absent preclusive effect, every one of thousands of *Engle* progeny would be required to repeat the Phase I trial. Neither the state nor federal court systems can accommodate this, even were they to concentrate judicial and juror resources on

these cases to the exclusion of all others. To do so would impinge upon the due process rights of many other parties in many other cases.[15]

In sum, "Defendants had "full notice and an opportunity to be heard in the year-long trial of Phase I . . ." *Waggoner*, 835 F. Supp. 2d at 1279; *Douglas*, 2013 WL 978259 at *10, and again in these progeny trials. *Duke* and *Walker* had seven and six days in court, respectively, to prove their diseases were caused by addiction to nicotine cigarettes, to defend their own conduct as smokers and to show the Reynolds shared some fault for their harm, and to translate that harm into damages. They prevailed on some claims, but lost on others, including their demand for punitive damages, and their paltry compensatory damage awards were reduced substantially based on the juries' findings on comparative fault (75 percent and 90 percent). Each netted a few thousand dollars as compensation for the loss of their loved ones. The remaining federal *Engle* progeny seek the same opportunity to be heard on the individual elements of their claims, akin to their state court counterparts. As the District Court observed in *Waggoner*, due process runs both ways.

[15] In some contexts, but not the *Engle* litigation, the designation of the binding effect to be given to the conduct element finding as *res judicata*, claim preclusion, or issue preclusion might matter. Here, however there is no operational divergence. These terms are harmonized, as they were in *Taylor*, 553 U.S. at 892, by their uniform due process function in the *Engle* progeny cases.

CONCLUSION

For the foregoing reasons, the judgments below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Rule 32(a)(7), Federal Rules of Appellate Procedure as modified by Eleventh

Circuit Rule 32-4, in that it contains 13,681 words (including words in footnotes) according to Microsoft Word 2010, the word-processing system used to prepare this brief.

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