

No. 17-638

In the
Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY,
PETITIONER,

v.

VIVIAN TURNER, AS PERSONAL REPRESENTATIVE OF THE
ESTATE OF VIVIAN WILKINSON,
RESPONDENT.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

I. The Brief In Opposition Underscores The Split Between The Eleventh Circuit And The Florida Supreme Court

The brief in opposition highlights the due process shell game that petitioner faces. The respondent in *Graham* insists that *Engle* preclusion is *issue* preclusion. *Graham* BIO 1 (referring to “the issue preclusive rulings”). Respondent here, in contrast, insists that *Engle* preclusion is *claim* preclusion, even going so far as to declare that applying issue preclusion in *Engle* progeny cases “would be improper.” BIO 12.

The disagreement between respondents mirrors the split between the en banc Eleventh Circuit and the Florida Supreme Court. Respondent in this case sides with the Florida Supreme Court, which expressly took issue preclusion off the table, stating that *Engle* preclusion rests on “res judicata (not issue preclusion).” *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 432 (Fla. 2013). And the Florida Supreme Court made clear that its reliance on claim preclusion was fully intentional, explaining that

to decide here that we really meant issue preclusion even though we said res judicata in *Engle* would effectively make the Phase I findings regarding the *Engle* defendants’ conduct useless in individual actions.

Id. at 433. See also *R.J. Reynolds Tobacco Co. v. Marotta*, 214 So. 3d 590, 593 (Fla. 2017) (“This Court clarified [in *Douglas*] that the ‘res judicata’ effect in *Engle III* is claim preclusion, not issue preclusion.”).

Yet the Eleventh Circuit insists that the *Engle* jury found all cigarettes defective and negligently marketed—so that the *Engle* jury’s findings apply to all cigarettes at issue in progeny actions and issue preclusion can be applied consistent with due process. See *Graham* Pet. 16–17, *Graham* Pet. App. 23. The Eleventh Circuit did not purport to review the *Engle* record and reach its own conclusion that the *Engle* jury’s findings apply to all cigarettes; instead, it attributed that conclusion to the Florida Supreme Court and claimed it was bound to defer to it. *Graham* Pet. App. 20–23 (“The only way to make sense of these proceedings is that the Florida courts determined that the *Engle* jury actually decided issues common to the class . . .”). But in reality the Eleventh Circuit turned the Florida Supreme Court’s conclusion upside-down: if the *Engle* findings applied to all cigarettes, they would be quite useful for issue preclusion—not “useless,” as the Florida Supreme Court was forced to acknowledge. Moreover, the Florida Supreme Court addressed the issue again in *Marotta* shortly before the en banc decision in *Graham* and explicitly reaffirmed *Douglas* and rejected the notion that the *Engle* defect and negligence findings were uniformly applicable to all cigarettes. See *Marotta*, 214 So. 3d at 604–05.

Engle was decided 11 years ago. More than 200 progeny cases have been tried. *Engle* preclusion has been used to take hundreds of millions of dollars from petitioner and other *Engle* defendants. By now, it should not be hard to say what *Engle* preclusion is. The fact that the Eleventh Circuit and the Florida Supreme Court, and even progeny plaintiffs them-

selves, cannot agree is a sure sign that something is amiss.

The explanation for this anomalous state of affairs is simple: *Engle* preclusion is not an actual, legitimate preclusion doctrine. It is not issue preclusion, or at least not a constitutional version of issue preclusion, because there is no way to tell whether the *Engle* jury’s “conduct” findings resolved the issues raised by any given progeny plaintiff’s claims. See Pet. 13–15; *Graham* Pet. 20–26. In this respect, the Florida Supreme Court was half-right in *Douglas*: because there is no way to ascertain what specific facts the *Engle* jury found, the findings really would be useless in progeny actions under issue preclusion.

But the preclusion being used against petitioners is not claim preclusion either. Claim preclusion is a defense to further litigation between the same parties on the same claim. *Baker by Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 233 n.5 (1998) (describing “what we now call claim preclusion” as meaning that “a valid final adjudication of a claim precludes a second action on that claim or any part of it”). Offensive claim preclusion is an oxymoron; one might as well refer to a defensive field goal. Under claim preclusion as universally understood outside of the *Engle* context, if the *Engle* judgment had claim-preclusive effect as to respondent’s claim, that would mean that respondent could not have pursued this action. See *In re Senate Joint Resolution of Legislative Apportionment 2-B*, 89 So. 3d 872, 883–84 (Fla. 2012) (“Where a judgment on the merits was reached in a prior action, the principle of res judicata will bar ‘a

subsequent action between the same parties on the same cause of action.”). In this respect, the Eleventh Circuit was half-right in *Graham*: if it had taken the Florida Supreme Court at its word that the applicable doctrine was claim preclusion, it would have had to dismiss the plaintiff’s claim, so the Eleventh Circuit recognized that it had to apply issue preclusion instead if the *Engle* enterprise were to continue.

These two half-right conclusions lead inexorably to the conclusion that *Engle* preclusion does not work, and cannot be made to work, consistent with due process. There simply is no recognized preclusion doctrine that facilitates—as opposed to bars—subsequent lawsuits by deeming elements of the plaintiff’s claim conclusively established based on a prior verdict that cannot be shown to have resolved the necessary issues.

Grasping for some doctrinal footing, respondent contends that *Engle*’s preclusive effect in respondent’s case is “no different” from the situation where an appellate court affirms in part and remands in part. BIO 11. The *Graham* respondent did not make this argument, and it is plainly without merit. The Florida Supreme Court has held that res judicata does not apply when a case is remanded for further proceedings. *Florida Dep’t of Transp. v. Julian*, 801 So. 2d 101, 107 (Fla. 2001). In that scenario, the applicable doctrine is instead “law of the case,” which “is narrower in application in that it bars consideration only of those legal issues that were *actually considered and decided* in a former appeal.” *Id.* (emphasis added). Even respondent’s formulation gives this point away. BIO 11 (appellate court “mak[es] clear

that *the affirmed issues* may not be relitigated on remand”) (emphasis added). This inapt analogy thus leads right back to issue preclusion and the insurmountable problem: there is no way to tell whether the issues raised by respondent’s individual claims—*e.g.*, whether the cigarettes her mother smoked were defective—were “actually considered and decided” in *Engle*.

Ultimately, respondent joins in the judicial nihilism at the core of *Engle* jurisprudence, declaring that “whether the court applied the doctrine of claim preclusion or issue preclusion should make little difference.” BIO 12.¹ This nonchalance about the basic doctrinal grounding of the preclusion that helped respondent obtain a \$12.4 million judgment, and the continued befuddlement—or studied vagueness—of courts and progeny plaintiffs on this fundamental question, 11 years into the litigation, confirms that what is happening in the lower courts is not the due process of law. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416–17 (2003) (“This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary

¹ Similarly, despite feeling compelled to point out the *Graham* respondent’s error in claiming that the *Engle* jury made “findings about air holes, filters, and adulteration with glass fibers,” respondent dismisses this error as “minor”—as if whether the jury actually made a finding on a relevant issue were a minor detail. BIO 2 & n.1.

coercion.”) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring)).

Respondent’s disagreement with the *Graham* respondent, like the Eleventh Circuit’s refusal to take the Florida Supreme Court at its word, belies respondent’s claim that “nothing unusual” is happening in *Engle* cases. BIO 10. To be sure, labels are not dispositive in due process analysis. See *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). But the reality that no label known to American law fits what is happening in *Engle* cases is an unmistakable red flag, as “traditional practice” is the “touchstone” for procedural due process and novel departures from it raise constitutional suspicions. See *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994).

If the lower courts openly acknowledged that neither issue preclusion nor claim preclusion can be made to work here and declared that they therefore had invented “tobacco preclusion,” the due process problem would be obvious. The state and federal courts struggled in vain for a decade to obscure that reality, but Judge Tjoflat’s dissent, and the conflicting rationales for continuing the *Engle* enterprise offered by the Eleventh Circuit and the Florida Supreme Court, lay that reality bare. The Court should grant certiorari before *Engle* preclusion inflicts untold millions of dollars more in unconstitutional deprivations of property—and before the lower court’s example inspires other courts and similarly unconstitutional schemes victimize other industries.

II. Respondent's Attempt To Create Vehicle Issues At Best Raises Issues To Be Addressed On Remand.

Respondent raises a variety of arguments for why the judgment below supposedly rests on grounds that would not be affected by a reversal in *Graham*. But the court below issued a mere per curiam affirmance without opinion and did not identify any independent basis for its judgment. As explained below, respondent's arguments lack merit; more fundamentally, respect for the Florida courts requires giving them an opportunity to decide in the first instance how any federal-law ruling in *Graham* affects this case.

In the court below, respondent did not challenge preservation or argue harmless error in responding to petitioner's argument regarding the *Engle* findings. Rather, respondent's entire argument on the due process issue presented here was:

Reynolds concedes that its argument regarding due process has been rejected by precedent. *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 430–36 (Fla.), *cert. denied*, 134 S. Ct. 332 (2013).

Appellee's Answer Br. 26.

Now, however, respondent unleashes a battery of procedural arguments that she never raised in either of the courts below. To the extent respondent has not already forfeited these arguments, she is free to raise them on remand if the Court grants certiorari and remands in this case. But these manufactured issues would not justify denying certiorari if petitioner prevails on the due process issue in *Graham*.

No doubt hoping that this Court will not delve deeply into the record below in this “hold” petition, respondent takes liberties with the record, misstating key parts with bold factual assertions that often lack any citation. Although these matters are properly addressed on remand, petitioner briefly outlines some of the inaccuracies here.

For instance, respondent asserts that petitioner objected only to the reading of *Engle* findings concerning diseases not at issue in this case. See BIO 16–17. But in the passage respondent selectively quotes, the trial court agreed that it was overruling petitioner’s objection to allowing “the plaintiffs *to use and read the Engle findings.*” Pet. App. 4 (emphasis added). And after the trial court made the statement quoted by respondent, petitioner’s counsel made clear (in language respondent ignores) that “we have an objection to the application of the *Engle* findings *I don’t want to have waived.*” *Id.* (emphasis added). If respondent thought this objection was somehow insufficient, the time to speak up was then. But neither respondent nor the trial court raised any concern about preservation.

Likewise, respondent’s assertion that she “is aware of no other place in this record where Reynolds made any due process argument specifically challenging the concealment and conspiracy findings it challenges for the first time here,” BIO 16 n.3, ignores that petitioner filed a lengthy motion on the due process issue before the trial. See Def.’s Mot. for a Ruling with Respect to the Role of the *Engle* Phase I Findings in this Case (filed Mar. 18, 2016). That motion made clear that petitioner was “preserv[ing] for

appeal [its] position that permitting Plaintiff to use the *Engle* findings”—without any limitation—“to remove her burden to prove the conduct elements of her claims would violate Reynolds’ federal constitutional rights to due process and equal protection under the law because, as explained below, it is impossible to determine what specific conduct by Reynolds was found to be tortious by the *Engle* jury.” *Id.* at 1–2. Respondent’s assertion that petitioner never presented its due process argument to the trial court is incorrect.

Similarly erroneous is respondent’s claim that petitioner’s citation of *Douglas* in the court below was insufficient to preserve its due process argument. BIO 17–18. *Douglas* addressed and rejected petitioner’s due process argument, and it was binding on the courts below. That is why *respondent’s* argument on the due process issue cited only a single decision—*Douglas*. If that was good enough then, it is good enough now.²

Respondent’s attempt to distance this case from *Graham* fails as well. It does not matter that in *Graham* the defendants prevailed on the plaintiff’s

² Respondent seizes on a statement in petitioner’s initial brief below that its appeal raised a “single issue.” BIO 17. Since the court below was bound by *Douglas* to reject petitioner’s due process argument, it was a single issue appeal for all practical purposes. Nonetheless, petitioner preserved its due process argument by specifically enumerating its objection to the use of the *Engle* findings in its summary of argument and raising the due process objection (with citation to *Douglas*) in the argument section. Appellant/Cross-Appellee’s Initial Br. on Appeal 14, 23. No more was required.

fraud claims while here respondent prevailed on her fraud claims, because the due process objection to applying the *Engle* findings is the same. Respondent goes to great lengths to suggest that the *Engle* concealment finding rested solely on a failure to speak. BIO 18–23. But the *Engle* trial court instructed the jury that the issue presented was “whether one or more of the defendants omitted or concealed material facts that would be *necessary to make statements by said defendants* not misleading.” *Engle* Tr. 37,572 (emphasis added).

In any event, respondent is in no position to argue here that the *Engle* findings on concealment and conspiracy were irrelevant to her \$12.4 million judgment, as she relied on those findings in her closing argument to the jury:

We know, *we know with the findings we have*, the *Engle* findings, they did it. They concealed material information. They failed to disclose material facts.

The question is whether she relied on their fraud, all right? And then the next question on this topic, on this issue, first let’s talk about fraud, what they concealed. All right?

Trial Tr. 2891–92 (emphasis added).

To be clear, this Court need not resolve these issues. Petitioner seeks only to have this case held pending the disposition of *Graham* and then disposed of consistent with the Court’s action in *Graham*. If this Court grants certiorari in *Graham* and then rules for the petitioners, it should issue a GVR order in this case. The Florida courts can then consider on

remand any preserved arguments that respondent may wish to make.

CONCLUSION

The Court should hold this petition pending the disposition of *Graham* and then dispose of this petition consistent with its decision in that case.

Respectfully submitted.

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