No. 13-191

In The
Supreme Court of the United States

PHILIP MORRIS USA INC., R.J. REYNOLDS TOBACCO COMPANY, AND LIGGETT GROUP, LLC,

Petitioners,

v.

JAMES L. DOUGLAS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLOTTE M. DOUGLAS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In managing a unique multi-phase class action trial, did the Florida Supreme Court violate Due Process by applying Florida preclusion law to prevent defendants from relitigating class-wide factual findings in subsequent trials brought by individual class members, when the same parties had already litigated the very same factual issues to verdict in an earlier phase of the trial?

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BRIEF IN OPPOSITION

Petitioners, for the eighth time, ask this Court to review the Florida *Engle* tobacco litigation for federal Due Process concerns. *See Engle v. Liggett Group, Inc*., 945 So. 2d 1246 (Fla. 2006) (Pet. App. 66a). As in their previous seven petitions, Petitioners argue that the Florida courts violated federal Due Process by applying Florida preclusion law to give binding effect to class-wide factual findings reached by the jury in Phase I of the *Engle* class action, in the follow-along litigation by the individual class members against the same defendants.

In this response, James L. Douglas, as personal representative of the estate of his late wife, Charlotte Douglas, respectfully requests that this Court deny the petition for writ of certiorari. Nothing has changed since this Court's seven previous denials, except that the Florida Supreme Court has joined the unanimous chorus of state and federal courts rejecting Petitioners' Due Process arguments. Pet. App. 1a. As we discuss below, Petitioners and the other defendants in the *Engle* litigation ("Tobacco") have been given as much due process in this nearly 20-year-old litigation as any defendants in history. Certiorari should be denied.

Mr. Douglas' case started as a statewide class action brought on behalf of all addicted Florida smokers who suffered from a disease caused by their addiction to the nicotine in cigarettes. The case was to be tried in phases. Phase I addressed issues of

class-wide application, such as whether the cigarettes Petitioners sold to the class were defective, whether Petitioners were negligent in the sale of those cigarettes, whether nicotine in cigarettes is addictive, and whether Petitioners concealed and engaged in a conspiracy to conceal the addictive and dangerous nature of smoking cigarettes containing nicotine. Later phases would determine Petitioners' liability to each individual addicted class member, and the amount of compensatory and punitive damages.

At the conclusion of Phase I, which took a year to try, the Phase I jury returned a verdict with a number of class-wide factual findings designed to be used by members of the class in subsequent phases of the litigation. The question presented by the Petition boils down to whether the Florida courts violated Due Process by giving preclusive effect to those findings in the subsequent phases of the litigation by the individual class members.

The Petition should be denied. First, with the exception of two early federal district court decisions which have now been reversed, every state and federal court to consider Petitioners' Due Process argument has rejected it. *Douglas* is merely the latest case to confirm that result. There is no need for this Court to add its imprimatur to this unanimous precedent.

Second, Petitioners' Due Process argument is built on an erroneous factual premise, which makes this case a poor vehicle to review the issue. Contrary to the impression left by Petitioners, the very issues

Petitioners demand to relitigate were litigated and decided during the first phase of the *Engle* class litigation. Plaintiffs did not ask the jury for a verdict that applied to only some of Petitioners' brands. Nor did Petitioners defend brand by brand or argue some of its cigarettes sold to the class were defective while others were not. Instead, Phase I was designed to address claims of misconduct that applied to every member of the class, regardless which brand they smoked, and the parties focused their arguments accordingly. It is wholly inaccurate for Petitioners to argue that they face liability for questions that were never litigated or decided.

To the extent Petitioners claim that the questions asked of the jury in Phase I were too vague to be of use in subsequent phases of the litigation, their claim ignores how Phase I was tried, and, in any event, comes far too late. As noted above, plaintiffs and Tobacco asked for an up or down, class-wide vote applicable to all of Tobacco's brands, and neither suggested to the jury that it was ruling on particular defects or misconduct that applied to only some of the class members.

Moreover, Petitioners knew that the findings were to apply to every class member in subsequent phases of the litigation. If Petitioners thought the jury verdict form was inadequate for that purpose, Petitioners should have accepted the trial court's invitation to submit a legally sufficient alternative, which they failed to do. Petitioners' decision not to submit a viable alternative jury verdict form is now

water under the bridge and they must live with the consequences of that strategic decision.

Third, certiorari should be denied because the Florida Supreme Court's *Douglas* decision did nothing more than recite and apply black letter Florida preclusion law. In this regard, Florida black letter law on preclusion is entirely consonant with federal preclusion law. The court's decision that principles of claim preclusion were best suited to the unusual factual situation presented by this case does not present the sort of question worthy of this Court's limited resources. This unique litigation, while of great importance to the parties, has little or no impact on other cases, and Petitioners offer no example of any such impact.

In any event, Petitioners' long discussion of claim versus issue preclusion is academic, as several courts have already observed. The point is, under either test, Petitioners' negligence as well as the defective nature of all of Petitioners' cigarettes sold to this class was actually litigated and decided. There is nothing unfair about preventing Petitioners from relitigating these same questions again perhaps thousands more times.

Finally, the many courts below have not violated Petitioners' Due Process rights by giving preclusive effect to the Phase I findings. Florida and federal law have long given preclusive effect to general verdicts, without requiring the parties to prove exactly what the trier-of-fact decided in reaching that conclusion. Indeed, Petitioners' centerpiece case, *Fayerweather v.*

Ritch, applies res judicata to a will contest even when defendants had evidence that the trial judge had not considered an important defense in reaching his conclusion. 195 U.S. 276 (1904). The fact that the trial court ruled against the defendants was enough to apply res judicata to prohibit relitigation, regardless of the wording of the court's ruling.

Significantly, Petitioners' complaint about Due Process completely ignores the Due Process rights of the *Engle* class members. These class members have been waiting for their day in court since 1994, when the *Engle* litigation began. Acceptance of Petitioners' arguments would not mean this litigation disappears. Instead, it would mean that, after nearly twenty years, every class member will effectively have to start over in proving the Petitioners' well-known and common course of misconduct in trials that will be much longer than the typical *Engle* progeny case under the current trial plan.

The practical result for the Plaintiffs will be that the overwhelming majority will perish before their cases ever come to trial. The practical result for the court system would be to exponentially increase the burden presented by this litigation. In sum, the ruling sought by Petitioners would defeat the very purpose for trying the misconduct of Tobacco as a class action and return the thousands of *Engle* progeny cases to the starting line. Due Process does not require such an unfair result.

COUNTERSTATEMENT OF THE CASE

Mr. Douglas' lawsuit originated nineteen years ago as a class action against Petitioners and other members of the tobacco industry seeking damages for diseases caused by addiction to cigarettes. *Engle*, 945 So. 2d at 1256. The trial court certified a class of all Americans[1] "who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *Id.* The class was certified under Florida Rule of Civil Procedure 1.220(b)(3), which requires common questions to "predominate" over individual questions. *Id*.

The case then proceeded under the three-phase trial plan summarized in the Petition. Pet. 5. The first phase concerned the claims common to the entire class – the misconduct of Petitioners. After a year-long trial in which the jury heard from hundreds of witnesses and reviewed thousands of documents, the jury reached findings applicable to every member of the class concerning the conduct of Petitioners. *Engle* Phase I Verdict Form; *Engle* Phase II Verdict Form. Among other findings, the jury found that Petitioners sold a defective and unreasonably dangerous product, were negligent in the sale of that product, and engaged in concealment and a conspiracy to conceal the

[1] On appeal, the class was narrowed to only Florida smokers. *Engle*, 945 So. 2d at 1256.

addictive nature and health risks of smoking cigarettes containing nicotine from the class.

Petitioners attack the strict liability and negligence findings, however, as too vague or general to be binding on the class.[2] In light of this argument, we focus on the evidence supporting these claims and, in particular, the arguments of the parties to the *Engle* jury and the development of the jury verdict forms in Phase I of *Engle*.

The Development of the Cigarettes Sold to this Class of Addicted Smokers

Although tobacco smoking has been common for hundreds of years, lung cancer was extremely rare before the industry's development of the modern cigarette in the early 20th Century. *Engle* Tr. 11560, 18707-78; *Douglas Tr.* 1065.[3] Smoking tobacco in its

[2] The jury ruled against Mr. Douglas on fraud and concealment. Pet. App. 43a. Thus, Petitioners do not focus on those findings.

[3] The evidence presented to the *Engle* jury was comprehensively summarized by the *Engle* trial court in its Final Judgment and Amended Omnibus Order. *Engle v. R.J. Reynolds Tobacco Co.*, No. 94-08273, 2000 WL 33534572, at *2-4 (Fla. Cir. Ct. Nov. 6, 2000) ("*Engle* Final Judgment"). Other courts, after hearing this same evidence, have written comprehensively about Tobacco's 50-year conspiracy to hide the dangers of smoking cigarettes from the public. The most detailed by far is found at *United States v. Philip Morris USA Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006), *affirmed*, 566 F.3d 1095, 1107 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 3501 (2010). The table of contents in the

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natural, unprocessed form is harsh and unpleasant, making it difficult to inhale. *Engle* Tr. 11080-81, 11258.

Petitioners developed the modern cigarette sold to the *Engle* class to allow tobacco smoke to be inhaled deep into the lungs, making the smoke milder by blending tobaccos and adding ingredients. *Engle* Tr. 11080-81, 11258, 11947, 12045; *Douglas* Tr. 1160-68.

This modern, inhalable cigarette had two dangerous consequences. First, by making it easy for its customers to draw smoke deeply into their lungs, the industry enhanced the delivery and physiological impact of the nicotine. *Engle* Tr. 11947, 11986, 12007-10; *Douglas* Tr. 1160-68. This made smoking more pleasurable, but extraordinarily more addictive. *Engle* Tr. 11947; *Douglas* Tr. 1160-68.

Second, this inhalable cigarette causes carcinogens and other toxic substances to deposit themselves deep in the lungs. *Engle* Tr. 12132; *Douglas* Tr. 1059-62, 1160-68. These dangerous substances turn lethal with the repeated exposures caused by addictive smoking. *Engle* Tr. 15214-15; *Douglas* Tr. 1059-62, 1160-68.

This modern, inhalable and extraordinarily addictive cigarette was no accident. Petitioners' cigarettes are engineered to be addictive. *Engle* Tr. 13471-72,

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District Court's opinion provides an excellent summary of the scope of Tobacco's misconduct.

13475-76. One secret R.J. Reynolds' document presented to the *Engle* jury, and the jury in this case, described the cigarette as "a vehicle for [the] delivery of nicotine designed to deliver the nicotine in a generally acceptable and attractive form." *Engle* Plf.'s Exh. 145; *Douglas* Tr. 1302.

Although Petitioners can eliminate nicotine from cigarettes, they choose not to. *Engle* Tr. 11989, 14880; *Douglas* Tr. 1302-03. To the contrary, Petitioners studied addiction extensively, and carefully monitored nicotine levels to ensure that they delivered precisely the nicotine dose to best achieve the desired impact on their customer base. *Engle* Plf.'s Exh. 3198; *Engle* Tr. 12044-45, 13698. The reason is obvious – absent nicotine, no one would buy their cigarettes. *Engle* Tr. 19386-87; *Douglas* Tr. 1162.

Arguments to the *Engle* Jury

At the conclusion of Phase I, the parties argued the strict liability, negligence, and other claims to the jury. Contrary to the impression left by the Petition, plaintiffs did not ask the jury to find brand-specific defects based on the various alternative "defect theories" described by the Petition, such as the position of holes in the filter or the use of particular additives or ingredients. Instead, both plaintiffs and Tobacco focused their arguments on the class-wide nature of the jury's task. Tobacco argued cigarettes were not addictive and were not proven to cause disease, including lung cancer and COPD. Tobacco maintained

it could not be held strictly liable because it had attempted to make the safest possible cigarette. *Engle* Tr. 37053-63, 37276, 37354-63.[4]

Plaintiffs responded that a strict liability finding was appropriate as to all cigarette brands because each contained "carcinogens, nitrosamines, and carbon [mon]oxide, among other ingredients harmful to health which, when combined with nicotine cigarettes also contain, make the product unreasonably dangerous." *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1068 (Fla. 1st DCA 2010). *See Engle* Tr. 36668, 37431-35, *Engle* Final Judgment, 2000 WL 33534572, at *2. Indeed, there is no dispute now that every brand of nicotine-containing cigarettes Tobacco sold to the class during the relevant time period was, in fact, addictive and disease-causing. Based on this class-wide evidence, the jury was asked whether Tobacco's cigarettes were unreasonably dangerous; that is, (1) did they fail to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer, or (2) did the risks outweigh the benefits? *Engle* Tr. 37571.

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[4] Liggett did concede that cigarette smoking was addictive for "some people" and could cause certain diseases. *Engle* Tr. 37102-03. R.J. Reynolds and Philip Morris, selling the same story they had been selling since the 1950s, argued that neither the addictive qualities of cigarette smoking nor the connection to disease had been sufficiently proven. *Engle* Tr. 36845-46, 36886-91, 37319, 37332.

Similarly, as to the class's negligence, warranty, and fraud claims, the jury considered the industry's failure to address the health risks and addictiveness of its products, including Tobacco's manipulation of nicotine levels and its concealment of information pertaining to the dangers of smoking. *Engle* Tr. 11988-90, 13475-77; 36451, 36472-80, 36484-85, 36717, 36729-32; *Engle* Final Judgment.

In short, the class-wide findings go to the Petitioners' underlying misconduct, which applied equally to every class member.

Development of the *Engle* Phase I Jury Verdict Form

At the conclusion of Phase I, the *Engle* jury was instructed that the case was a class action and that the jury's role was to determine "all common liability issues" relevant to the class. *Engle* Tr. 37557-59. Specifically, its role was to "address[ ] the conduct of the tobacco industry." *Engle* Tr. 36357-58, 37557-59.

Contrary to the argument in the Petition, Petitioners never submitted a proper jury verdict form containing more detailed or specific questions concerning the strict liability, negligence, warranty, or other claims. At the end of the trial, the parties offered competing interrogatory forms for the jury's verdict. Tobacco's proffered form amounted to an "essay test" and included numerous blank lines to be filled in by the jurors with narrative explanations for their verdict. *Engle* Certain Defs. Prelim. Draft Phase

I Verdict Form; *Engle* Tr. 35967-70. The judge rejected the form as improper. Despite conceding that it was "incumbent upon all of us" to provide additional "enumerated" statements for a more detailed verdict form (*Engle* Tr. 35954), and despite repeated requests from the trial judge, Defendants failed to submit a proper alternative verdict form. *Engle* Tr. 35967-68.

The jury interrogatories ultimately utilized followed a defense-counsel suggestion of a "middle ground" (*Engle* Tr. 35969), and consisted of 12 pages with more than 240 questions including subparts. *Engle* Phase I Verdict Form.

All parties understood that the findings would have class-wide impact. *Engle* Tr. 37558. Indeed, that is exactly what Tobacco wanted. Tobacco repeatedly demanded that all jury findings have full preclusive effect. Thus, Tobacco proclaimed, "if the defendants win, we want as many people as possible bound" (*Engle* May 6, 1996, hrg. at 11), and if the jury answers "no . . . then not a single Florida smoker can recover." *Engle* Tr. 36007. Tobacco then acknowledged that the jury's verdict will enable "other class members, however many thousands or hundreds of thousands it may be . . . [to] recover." *Engle* Tr. 38878, 38896-97.

The *Engle* Verdict

Answering these 240 interrogatories, the *Engle* jury reached the conclusions outlined above: Cigarettes were addictive and caused various diseases

including COPD and lung cancer; Tobacco was negligent and breached warranties, sold an unreasonably dangerous product; and individually, and as part of a conspiracy, worked to hide the addictive nature and health risks of tobacco from their customers and potential customers. *Engle* Phase I Verdict Form.

Utilizing these common findings, the trial court then tried the damages claims of the named class representatives. The jury awarded compensatory damages to the class representatives and then awarded punitive damages on behalf of the entire class. *Engle* Phase II Verdict Form. The trial court entered judgment and Tobacco filed its appeal. *Engle* Final Judgment.

The Third District reversed, finding the original class certification to be in error. *Liggett Group, Inc. v. Engle*, 853 So. 2d 434, 442 (Fla. 3d DCA 2003).

The Florida Supreme Court's *Engle* Decision

The Florida Supreme Court granted review and reversed, holding that "the trial court did not abuse its discretion in certifying the class." *Engle*, 945 So. 2d at 1267.

The court agreed, however, that the case could not proceed further as a class action because, going forward, individual issues such as legal causation, comparative fault, and damages would predominate. *Id.* at 1267-68. Instead, the court held that individual class members could continue their cases by filing

separate, individual actions within a year of the *Engle* mandate. *Id*. at 1277. The findings reached by the *Engle* jury concerning Tobacco's misconduct would have a "res judicata effect" in the subsequent, individual trials brought by class members. *Id.* at 1269.

In reaching this conclusion, the court examined each finding and, based on its review of the *Engle* trial record, gave res judicata effect to only those factual findings that were applicable to the entire class.

On rehearing, Tobacco articulated the specific arguments raised here – that the Florida Supreme Court's decision violated established Florida principles of res judicata and federal Due Process. *Engle* Respondents' Motion for Rehearing. In response, the court modified its opinion to ensure that it had approved only those findings applicable to the entire class. *Engle* Fla. Sup. Ct. Order on Rehearing. Tobacco's arguments were otherwise rejected and this Court denied certiorari.

The *Douglas* Lawsuit

Mr. and Mrs. Douglas timely filed this *Engle* progeny lawsuit against Petitioners, R.J. Reynolds, Philip Morris, and Liggett. R.127:20318-31. The complaint alleges Mrs. Douglas was a member of the *Engle* class because she was addicted to cigarettes containing nicotine which caused her death from COPD and lung cancer. R.127:20320, 20324-26. Mr. and Mrs. Douglas then claimed the benefit of the

findings of Petitioners' misconduct reached by the *Engle* jury.[5]

Prior to trial, Petitioners attacked the procedures established by the Florida Supreme Court in *Engle*. R.31:5656-5846. Petitioners argued for a very narrow interpretation of "res judicata effect" that would render the *Engle* findings meaningless and require every *Engle* progeny plaintiff to retry the misconduct of Tobacco in every *Engle* progeny case. R.31:5656-5846. The trial court rejected Petitioners' arguments, and the case proceeded to trial. R.95:17740.

The Trial Below

The trial on the causation and damages issues took eight days (much less than the average *Engle* progeny case) and generated a 25,000 page record (in addition to the original *Engle* record). At trial, Plaintiff proved that Mrs. Douglas, a life-long heavy smoker, was addicted to Petitioners' products and that her addiction caused her COPD, lung cancer, and untimely death.

Petitioners argued Mrs. Douglas' death was not caused by her addiction, but rather by her decision to start and continue smoking. *Douglas* Tr. 957, 966, 989, 997, 2250-98. Because it is possible to quit,

[5] Mrs. Douglas passed during the trial-level litigation and Mr. Douglas was substituted as her personal representative. Pet. App. 42a fn.1.

Petitioners argued, Mrs. Douglas bore the sole responsibility for her failure to quit and her resulting illness. *Douglas* Tr. 1363. Plaintiff responded that Mrs. Douglas began smoking in an era when Petitioners were still denying cigarette smoking was addictive and before there were any formal warnings about the addictive nature of smoking and the connection between smoking and COPD and lung cancer. *Douglas* Tr. 952, 2219-20. Plaintiff's experts testified about the powerful nature of nicotine addiction and how difficult it is to quit smoking for some, regardless of their strength of will. *Douglas* Tr. 1182-83, 1270-77, 1316-17. Indeed, statistics show that 97% of those who quit smoking in a particular year relapse by the next year. *Douglas* Tr. 1151-52, 1319, 1403-04.

The Verdict

At the conclusion of the eight-day trial, the jury concluded that Mrs. Douglas' addiction caused her death, and thus that Mrs. Douglas was a member of the *Engle* class and entitled to rely on the *Engle* findings, including the findings of strict liability, warranty, and negligence. Pet. App. 45a-46a. The jury also found that smoking R.J. Reynolds, Philip Morris, and Liggett brands were each a cause of her death. Pet. App. 46a-47a; Jury Verdict Form. As to comparative fault, it divided responsibility 5% to R.J. Reynolds, 18% to Philip Morris, 27% to Liggett, and 50% to Mrs. Douglas. Pet. App. 43a. The trial court entered judgment accordingly. Pet. App. 42a; R.65:12121-22. Aside from their complaint about the use of the

Engle findings, Petitioners do not contest that there was competent substantial evidence to support the jury's verdict.

Post-Trial Proceedings and Appeal

Defendants filed post-trial motions attacking *Engle* and reiterating their arguments that the *Engle* procedures violated due process, and that it was error to instruct the jury to give the *Engle* findings "res judicata effect." R65 12190-248, 12249-50, R66 12251-12633, R68-73 12634-13734. The court denied all post trial motions, and Petitioners filed their timely appeal. R108 19951-52, 19953-54, 19955-56.

The Second District affirmed. Joining Florida's other intermediate appellate courts, the court held that the trial court had properly applied *Engle* and that giving res judicata effect to the *Engle* findings did not violate Due Process. Pet. App. 57a-58a. The court, however, certified the Due Process question to the Florida Supreme Court. Pet. App. 59a.

The Florida Supreme Court affirmed. The court's extensive opinion reaffirmed the procedures established in *Engle* and rejected Petitioners' arguments that applying the findings from the *Engle* trial violated Due Process. Pet. App. 32a. Reexamining the *Engle* record, the court reiterated that the issue of Tobacco's misconduct, including strict liability and negligence, was tried and determined on a class-wide basis, not on the brand specific defects argued in the Petition. Pet. App. 4a. Based on its examination of the

record, the court also determined that there was competent substantial evidence to support the Petitioners' common liability to the class. Thus, each element of Plaintiff's cause of action was established: negligence and defect in the year-long *Engle* Phase I trial, and specific causation and damages in the eight-day individual trial. Pet. App. 18a-19a.

The lone dissent found no violation of Due Process, but merely disagreed with the rest of the court in its interpretation and application of Florida rules of claim preclusion. Pet. App. 33a-40a.

REASONS FOR DENYING THE PETITION

I. In Light of the Unanimity of Opinion Among the State and Federal Courts, there is no Reason to Grant the Petition.

This is the eighth time Petitioners have come to this Court complaining that the procedures established in *Engle* violate Due Process. Petitioners sought review of the *Engle* decision itself, which this Court denied. *R.J. Reynolds Tobacco Co. v. Engle*, 552 U.S. 941 (2007). Petitioners then sought review unsuccessfully six more times from intermediate Florida decisions in *Engle* progeny cases rejecting their due process arguments.[6] *Douglas* merely joins this unanimous

[6] *R.J. Reynolds Tobacco Co. v. Clay*, 84 So. 3d 1069, (Fla. 1st DCA 2012), *cert. denied*, 133 S. Ct. 650 (2012); *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. 1st DCA 2010), *rev. denied*, 67 So. 3d 1050 (Fla. 2011), *cert. denied*, 132 S. Ct. 1794

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chorus and changes nothing. Review should be denied again.

Moreover, this unanimity of opinion in the Florida courts, representing each of Florida's five District Courts of Appeal and now the Florida Supreme Court, is mirrored by the binding federal precedent applicable to the *Engle* litigation. *See Waggoner v. R.J. Reynolds Tobacco Co*., 835 F. Supp. 2d 1244 (M.D. Fla. 2011). In *Waggoner*, the federal district judge directing the federal *Engle* progeny litigation issued a lengthy and scholarly opinion applying claim preclusion to the *Engle* findings and rejecting Petitioners' due process arguments. *Id.* As a result, the federal *Engle* progeny trials following the same basic procedures as in state court, and the first several of these verdicts are now under review in the Eleventh Circuit, which has not spoken to the issue since the Florida appellate decisions interpreting *Engle* began to be issued.[7]

(2012); *R.J. Reynolds Tobacco Co. v. Gray*, 63 So. 3d 902 (Fla. 2010), *cert. denied*, 132 S. Ct. 1810 (2012); *Liggett Group LLC v. Campbell*, 60 So. 3d 1078 (Fla. 1st DCA 2011), *cert. denied*, *Philip Morris USA Inc. v. Campbell*, 132 S. Ct. 1794 (2012) and *cert. denied*, *R.J. Reynolds Tobacco Company v. Campbell*, 132 S. Ct. 1795 (2012); *R.J. Reynolds Tobacco Co. v. Hall*, 70 So. 3d 642 (Fla. 1st DCA 2011), *cert. denied*, 132 S. Ct. 1795 (2012).

[7] Very early in the *Engle* progeny litigation, the Eleventh Circuit in *Bernice Brown v. R.J. Reynolds Tobacco Co*., 611 F.3d 1324 (11th Cir. 2010), reversed a district court decision that had erroneously determined that the *Engle* findings should be given virtually no useful preclusive effect. Writing before any Florida court weighed in on the issue of the preclusive nature of the

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We fully expect the Eleventh Circuit to defer to the Florida Supreme Court and to deny Petitioners' Due Process claim. But in the unlikely event that the Eleventh Circuit should disagree with *Douglas*, *Engle*, *Waggoner*, and their progeny on the issue of Due Process, Petitioners will have their opportunity to seek review at that point. Until then, and in light of the uniformity of opinions on the issue, there is no reason for this Court to expend its limited resources on this case. Sup. Ct. R. 10. *See Bunting v. Mellen*, 541 U.S. 1019, 1021 (2004) (denial of certiorari justified in light of the absence of a direct conflict).

II. The Petition is Based on Faulty Factual Premises.

As we discuss in Point III below, the Florida Supreme Court applied well-settled principles of claim and issue preclusion to this case – principles that mirror the federal approach. The Florida Supreme

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Engle findings, the Eleventh Circuit determined that principles of issue preclusion, rather than claim preclusion applied. Importantly, however, the Court recognized that the Florida courts would have the last word on the subject. 611 F.3d at 1331-32. Moreover, *Brown* recognized that the findings must have meaning and that ("[Petitioners] 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." *Bernice Brown*, 611 F.3d at 1333. *Brown* however, did not reach the practical question of how the *Engle* findings would actually apply in the progeny litigation, leaving that question for later, and declined to declare *Engle* a violation of Due Process. *Bernice Brown*, 611 F.3d at 1334-36.

Court's decision on how to apply these well-settled principles to the unique facts of this case does not afford a basis for review. As this Court's rules make plain, claims of misapplication of well-settled law "rarely" constitutes a viable ground for a grant of certiorari. Sup. Ct. R. 10.

This limiting principle is all the more applicable here when Petitioners' entire argument is based on a faulty factual premise. *See Rogers v. United States*, 522 U.S. 252, 253 (1998) (denying certiorari because the question is not fairly presented by the record); Petitioners' Due Process argument is based on their suggestion that plaintiffs in Phase I tried a series of brand-specific defects, such that the jury might have found that some brands were defective and others were not. Pet. at 22-23.

This argument ignores the way Phase I was tried and how the jury was instructed. All parties went into Phase I knowing the purpose was to try factual issues of class-wide import. *Engle* 945 So. 2d at 1256. Indeed, the jury was specifically instructed the case was a class action and the jury's role was to determine "all common liability issues" relevant to the class. *Engle* Tr. 37557-59. Specifically, its role was to "address[ ] the conduct of the tobacco industry." *Engle* Tr. 36357-58, 37557-59.

Moreover, that class-wide focus is precisely what Petitioners wanted, because Petitioners were convinced they were going to win Phase I and wanted every class member to be bound by their hoped-for

victory. Tobacco repeatedly demanded that all jury findings have a full preclusive effect. Thus, Tobacco proclaimed, "if the defendants win, we want as many people as possible bound" (*Engle* May 6, 1996, hrg. at 11), and if the jury answers "no . . . then not a single Florida smoker can recover." *Engle* Tr. 36007. Tobacco acknowledged that the jury's verdict will enable "other class members, however many thousands or hundreds of thousands it may be . . . [to] recover." *Engle* Tr. 38878, 38896-97.

Consistent with this class-wide focus, plaintiffs presented evidence that every brand of cigarettes sold to this class was defective because each was designed to be addictive and each contained dangerous ingredients which, when combined with the addictive nature of the product, made the product unreasonably dangerous. *Martin*, 53 So. 3d at 1068. *Engle* Tr. 36668, 37431-35; *Engle* Final Judgment, 2000 WL 33534572 at *2-4. Tobacco responded that none of its cigarettes were addictive and were not proven to cause disease, and that it could not be held strictly liable because it had attempted to make the safest possible cigarette. *Engle* Tr. 37053-63, 37276, 37354-63.

Similarly, as to negligence, the class presented evidence and argued, on a class-wide basis, that Tobacco unreasonably failed to address the health risks and addictiveness of its products, manipulated nicotine levels, and concealed information pertaining to the dangers of smoking. *Engle* Tr. 11988-90, 13475-77, 364151, 36472-80, 36484-85, 36717, 36729-32. Tobacco defended these claims, arguing that its conduct

was categorically reasonable. *Engle* Tr. 37009, 37054, 37067.

Significantly, neither side asked the jury to return a verdict based on any brand-specific defect or negligence, or lack thereof, such as the position of holes in the filter or lights, or any of the particular "micro" defects listed in Petitioners' brief. Instead both plaintiffs and Tobacco focused their arguments on the class-wide nature of the jury's task, as the closing arguments make clear. *See generally Engle* Tr. 36333-36533; 36553-37531.

In short, as the trial judge recognized after presiding over the year-long Phase I and as the Florida Supreme Court understood after its careful review of the record in both *Douglas* and *Engle*, the issue actually litigated and decided in this case was Tobacco's liability to each member of the class, not brand-specific defects. Thus, even if this Court were interested in the Due Process questions raised by Petitioners, this case is an inappropriate vehicle for the resolution of those questions.

Similarly, Petitioners' complaint about the jury verdict form is factually inaccurate, too late, and irrelevant. Petitioners leave the impression they fought for a more specific verdict form and lost. To the contrary, Tobacco never submitted a proper jury verdict form containing more detailed or specific questions concerning the strict liability, negligence, warranty, or other claims. The closest they came was their "essay test" form asking for fill-in-the-blank and narrative

answers, which the judge quite properly rejected. *Engle* Certain Defs.' Proposed Phase I Verdict Form. Tobacco failed to offer another more detailed form, despite requests from the trial judge.

Petitioners' failure to offer a proper verdict form has waived their argument that the verdict form should have been more detailed. Under Florida law, to preserve an argument for a jury instruction or verdict form, a party must propose a version which itself is accurate and not objectionable. *See* 1.1470, Fla. R. Civ. P.; *Whitman v. Castlewood Int'l*, 383 So. 2d 618, 619-20 (Fla. 1980) (to properly object to a general verdict form, party must submit a proper special verdict form).

In short, if Petitioners believed there was something unfair about the design of the jury verdict form or that it was insufficient to serve its intended purpose of establishing class-wide liability, they should have submitted a proper verdict form with the questions they believed were necessary to protect their interests in the subsequent phases of the trial. *See 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).

Similarly, if the Petitioners felt that the rejection of their narrative jury verdict form was erroneous, the time for that challenge was in the original *Engle* appeal. Any issues relating to the adequacy of the Phase I verdict form were long ago settled.

Of course, Petitioners did not ask for a more detailed verdict form because they had no interest in a brand-by-brand determination of the various "micro" defects discussed in the Petition. Pet. at 22-23. Nor did they have any interest in distinguishing among their brands. Petitioners chose to go "all or nothing," arguing to the jury that *none* of their cigarettes were defective. Having placed that bet and lost, it is too late to complain that only some of their brands were defective.

In summary, Petitioners' issues are entirely academic because they are inconsistent with the facts of the case and contrary to other dispositive principles of Florida law. Review would serve no useful purpose to the parties or anyone else and should be denied.

III. The Court's Application of Black Letter Florida Law on Issue and Claim Preclusion to the Facts of this Case Provides no Basis for Review.

This Court determined that the Phase I jury verdict would have "res judicata effect" in subsequent *Engle* progeny trials. *Engle*, 945 So. 2d at 1269, 1277.[8] This is the equivalent of "claim preclusion" under federal law. *Hart v. Yamaha-Parts Distributors, Inc*., 787 F.2d 1468, 1470 (11th Cir. 1986) (res judicata is "a doctrine of claim preclusion"). Under Florida and

[8] Petitioners concede that the preclusive effect of *Engle* Phase I is a matter of state law. Pet. at 18.

federal law, claim preclusion means, once two parties have litigated a claim between them, the matter is fully settled, and the same parties are prevented from relitigating the same claim. *Cromwell v. Sac County*, 94 U.S. 351, 352-53 (1876); *Stogniew v. McQueen*, 656 So. 2d 917, 919 (Fla. 1995). Moreover the preclusive effect extends to every matter within the subject matter of that claim, whether litigated or not. *Cromwell*, 94 U.S. at 352-53; *Stogniew*, 656 So. 2d at 919.

Res judicata is distinguished from collateral estoppel ("issue preclusion") which applies when two parties litigate *different* claims or causes of action that happen to have some factual or issue overlap.[9] *E.g.*, *Stogniew*, 656 So. 2d at 919 (collateral estoppel applies to different causes of action); *Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004) (same). Thus, if a particular issue relevant to one claim also has relevance to an entirely separate claim, the parties are bound by the earlier resolution of the issue they litigated in the first case. *Stogniew*, 656 So. 2d at 919. Because collateral estoppel focuses on issues, not claims, the party seeking to apply estoppel to a different claim must focus on the issues that were actually litigated and demonstrate that the parties have

[9] Complete identity of parties is still required in Florida for the application of collateral estoppel. *Compare Mobil Oil Corporation v. Shevin*, 354 So. 2d 372, 374 (Fla. 1977), *with Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 349-50 (1971) (identity of parties not required in federal court).

already had a full and fair opportunity to litigate that particular issue to conclusion. *Id.* Federal law is in accord. *See*, *e.g.*, *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (collateral estoppel applies in new litigation when party had a "full and fair opportunity to litigate that issue in the earlier case"); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 323-24 (1971).

In this case, the claim that Tobacco's cigarettes sold to the class were defective and that Tobacco was negligent in selling these cigarettes was fully litigated, decided, and appealed all the way to this Court. *Engle* and *Douglas* stand for the unremarkable conclusion that, having litigated these claims against the class and lost, Tobacco has no right to relitigate these identical claims in the individual progeny lawsuits brought by the same class members. Pet. App. 1a-40a; Pet. App. 66a-140a. What legal or equitable principle gives Petitioners thousands more bites at the same apple, when they already had the opportunity to present their claims and defenses to the court, the jury, and the appellate courts, and lost?[10]

[10] This Court's decision in *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008), answers our rhetorical question by making clear that 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 legal system and is incompatible with Due Process.

Thus, review is inappropriate for several reasons. First, the Florida Supreme Court's determination that principles of claim preclusion rather than issue preclusion were more appropriate in the unique context of this case, is a matter of Florida, not federal, law and should be of no interest to this Court. *Richards v. Jefferson County*, 517 U.S. 793, 797 (1996) ("State courts are generally free to develop their own rules for protecting against relitigation of common issues, as long as the state's application of preclusion doctrines complies with due process."). Moreover, even if the Florida Supreme Court's application of these black letter principles raised Due Process concerns, the application of these principles to the unique facts of this case is not worthy of review. As legal scholars have noted, the issues raised by the *Engle* litigation are highly fact specific and unlikely to be repeated. James A. Henderson, Jr. & Aaron D. Twerski, *Reaching Equilibrium in Tobacco Litigation*, 62 S.C. L. Rev. 67, 91 (2010) ("*Engle* and its progeny represent a unique phenomenon."). This one-time application of well-settled principles to an unusual set of facts counsel's against this Court's intervention. Sup. Ct. R. 10.

Second, the largely semantic dispute about whether the Florida Supreme Court was applying claim or issue preclusion is academic, as several Florida appellate courts have held. *Martin*, 53 So. 3d at 1067 ("we find it unnecessary to distinguish between [issue and claim preclusion] . . . to conclude the factual determinations made by the Phase I jury cannot be

relitigated by RJR and the other *Engle* defendants"); *R.J. Reynolds Tobacco Co. v. Jimmie Lee Brown*, 70 So. 3d 707, 715 (Fla. 4th DCA 2011) (even if issue preclusion applied, the court was "constrained" by the Florida Supreme Court's adjudication in *Engle* that the conduct elements of the class members' claims had been established).

As these decisions recognize, both claim and issue preclusion apply to issues actually litigated and decided. As discussed above, Tobacco's liability to the class, and in particular, the class members' negligence and strict liability causes of action, were actually litigated and decided. Both sides tailored their 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). Tobacco's class-wide liability has been adjudicated and decided.

Finally, the case has no significance beyond the parties to this case. The fact that the case may be of "great practical importance to these litigants" "is ordinarily not sufficient reason for our granting certiorari." *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994). After all, at least since the Judiciary Act of 1925, this Court has not sat as a court of last resort, concerned primarily with correcting errors and vindicating the rights of particular litigants, but it instead resolves conflicts among the circuits and articulates legal rules and principles in cases with broad legal or

social significance. *Cf. Stack v. Boyle*, 342 U.S. 1, 13 (1951) (Jackson, J., concurring) (Supreme Court only grants certiorari if case represents a general and important problem); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (certiorari should be granted only in cases of great importance to the public, as distinguished from the parties).

On this point, the Petition spends only a few lines suggesting that *Engle* could have an impact on the litigation of class actions. Pet. at 32-34. Petitioners cite no examples, however, and offer no support for this proposition. To the contrary, there is nothing new or unique about *Engle*, other than the unusual posture of the case. The modern cases on the interplay of preclusion and Due Process have long confirmed that class-wide determinations are consistent with Due Process, so long as there is sufficient opportunity to be heard, directly or through adequate representation. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326-28 (1979); *Taylor v. Sturgell*, 553 U.S. 880 (2008).

This case has no significance beyond the parties and does not warrant this Court's review.

IV. The Florida Supreme Court's Application of Florida Preclusion Law Does Not Violate Due Process.

The unanimity of the state and federal rejection of Petitioners' Due Process claims is not surprising. Perhaps no defendants in the history of Florida litigation have ever had more Due Process. The cornerstone

of Due Process, of course, is a full and fair opportunity to be heard. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Petitioners certainly have been heard. The original *Engle* Phase I record on the misconduct claims consisted of 57,000 pages of testimony, 150 witnesses, and thousands of exhibits, and the case took a year to try. *Engle* Final Judgment, 2000 WL 33534572 at *1. Petitioners appealed Phase I to the Florida Supreme Court and unsuccessfully sought review on their Due Process questions in this Court and lost. The trial below on the causation and damages issues took 8 days and generated a 25,000-page record. Petitioners lost again and, once again, took an appeal all the way to the Florida Supreme Court and once again seek review in this Court.

Thus, by the end of an *Engle* progeny trial, every conceivable defense has been litigated by Tobacco. In the year-long Phase I of *Engle*, Tobacco had every opportunity to convince the jury that the cigarettes it sold to the class were not defective and that it was not negligent in selling those cigarettes. It failed. In the typical two-to-three week individual *Engle* progeny trial, Tobacco has every opportunity to demonstrate why the particular individual smoker should not prevail. Sometimes Tobacco succeeds; sometimes it fails. The point is, Tobacco has already been given every opportunity to litigate its class-wide claims and defenses, and in the progeny trials, enjoys every

opportunity to litigate the individual claims and defenses before a judgment is finally rendered.[11]

And what about plaintiffs' rights to Due Process? Could any result be more violative of Due Process than to send the *Engle* progeny cases back to square one after 19 years of litigation and a long series of trial and appellate court victories? For the many aging *Engle* progeny plaintiffs who will die in the meantime, such a ruling would completely deprive them of a remedy.[12]

Petitioners' legal argument is even weaker. Essentially, Petitioners attack the doctrine of res judicata itself as unconstitutional. According to Petitioners, a general finding of liability on a claim of negligence, strict liability, warranty, or concealment can have no preclusive effect in subsequent litigation on the same claims against the same parties unless the jury answers special interrogatories on all of the underlying evidentiary foundations for the claim. No state or federal case has ever imposed this requirement. To the contrary, as we discussed in

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[11] Contrary to the tenor of the Petition, Tobacco has fared quite well in defending these claims, winning a sizable percentage of cases tried to date. Of the 107 *Engle* progeny trials that have taken place to date, plaintiffs prevailed in 61 cases, Tobacco has won 28, and 18 ended in mistrials. If one counts a mistrial as a defense victory, as does Tobacco, it has prevailed in 43% of the trials to date. Moreover, a sizable percent of plaintiffs' victories result in a small or nominal verdict.

[12] Mrs. Douglas, unfortunately, is a tragic example.

detail in Point III above, courts routinely apply claim preclusion to all claims, litigated or not, without a re-examination of the evidence or defenses, and without the need for specific issue by issue interrogatories. No case in the history of American jurisprudence has ever held that this routine application of res judicata violates the Constitution.

Certainly, *Fayerweather v. Ritch*, Petitioners' centerpiece Due Process case, does not. 195 U.S. 276 (1904). Reaching deep into precedent, Petitioners attempt to build a constitutional claim out of one line of *dicta* in this 1904 decision. The holding of *Fayerweather*, however, reaches precisely the opposite result. This Court gave full preclusive effect to a general verdict and specifically rejected the need to re-examine the facts supporting that verdict.

In *Fayerweather*, the decedent left the bulk of his estate to charity, attempting to circumvent state court laws that required a certain percentage of the estate be left to his surviving spouse and children. In the course of the state court litigation, the surviving relatives entered into a release waiving their challenges to the charitable devise, but later pressed their claims despite the release. The state court ultimately entered judgment in favor of the estate – without discussing or addressing the release. The result was affirmed on appeal.

The surviving relatives then repeated their same claims in federal court. Not surprisingly, the federal trial court rejected their claims on res judicata

grounds. Challenging this result in this Court, the survivors alleged that the application of res judicata violated Due Process because no one could be sure whether the trial judge had considered or ruled on the validity of the release – virtually the identical argument raised by Petitioners here. In fact, the survivors' argument was stronger. The survivors presented testimony from the trial judge himself who testified that he had not, in fact, ruled on the release.

Despite this direct evidence of what the trier of fact actually ruled, this Court held there was no constitutional violation resulting from the application of res judicata. The survivors had the opportunity to litigate their claims relating to the devise, including the release issue, and lost. The fact that the trial judge did not mention the release, and even the fact that the trial judge later disclaimed any ruling on the release, was irrelevant. *Id*. at 307. The general verdict settled all claims that were litigated and could have been litigated in connection with the will challenge, including the release issue. *Id*. at 302. As the *Fayerweather* Court explained: "the omission of special findings means nothing, for the judgment implies a finding of all necessary facts." *Id*. at 307.

Simply put, once the parties have had a full and fair opportunity to litigate a particular claim, the matter is settled. As *Fayerweather* makes clear, the judgment settles all claims, without the need to go behind the judgment with an evidentiary examination of the record. *Id*. at 302 ("a judgment without

any special findings, like a general verdict of a jury, is tantamount to a finding of the successful party of all the facts necessary to sustain the judgment"). Applying this principle, this Court rejected the survivors' proposed evidentiary analysis as irrelevant. *Id.* at 307.

In the course of reaching its holding, this Court stated that it would violate Due Process to give res judicata effect to a matter that had not been litigated. *Id*. at 307. What Petitioners misunderstand, however, is that this requirement does not mean that the subsequent court must analyze the first trial to see what particular evidence was offered, or not offered, or what arguments were raised or not raised. The Court made this clear by rejecting the evidence from the trial judge who said that he did not rule on the release. What the Court requires is a determination that the actual claim – the will challenge – was litigated. If it was, the same parties cannot litigate that same claim again, regardless whether the first judge was in error or new arguments were to be raised. The *Fayerweather dicta* was simply a recognition of the unremarkable concept that it would violate Due Process to apply res judicata in a will challenge case, if the survivors did not actually have a fair opportunity to challenge the will the first time around. But the survivors litigated the case to judgment, and that was all that was required. Further

delving into the evidentiary record was unnecessary.[13] *Id*. at 307-08.

The recent *Waggoner* decision analyzed Petitioners' due process arguments in great detail before rejecting them. 835 F. Supp. 2d 1244 (M.D. Fla. 2011). *Waggoner* confirms that the preclusive effect of *Engle* is for the state courts, *id*. at 1267, and rejects Petitioners' analysis of the *Fayerweather* holding. *Id*. at 1270-76. Most importantly, *Waggoner* rejects Petitioners' suggestion that *Fayerweather* sets a constitutional bar that prevents state courts from determining what preclusive effect is appropriate in a particular case. *Id*. at 1269-70. To the contrary, *Waggoner* recognized that any hard look at *Fayerweather* "cripples [Petitioners'] argument that due process and traditional preclusion law are one and the same." *Id*.

Then, turning the clock forward, *Waggoner* analyzes this Court's more recent controlling authority on preclusion and applies them to the *Engle* litigation. As *Waggoner* cogently describes, this Court's precedent focuses on the opportunity to be heard. *Id*. at 1270-76, *citing Kremer v. Chem. Const. Corp*., 456 U.S. 461, 481-84 (1982). Because, as the district court found, there was no interference with Petitioners'

[13] For example, suppose that the survivors had, for whatever reason, failed to present the release issue at all in the first case and the Court had rejected their will challenge. It is absolutely clear that the survivors could not relitigate the will challenge in another forum, because the release argument could have been raised. *Fayerweather*, 195 U.S. at 307-08.

opportunity present all of its claims and defenses to the jury and the Court, Petitioners have been afforded due process. The Constitution imposes no further limits on the flexibility of state courts in applying the doctrine of res judicata. *Id*. at 1270-76; *Kremer*, 456 U.S. at 483 ("the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation").

Thus, the question here is not what pieces of evidence or particular arguments the jury found persuasive in *Engle* Phase I. The question is whether Petitioners were given the opportunity to present their facts and defenses to the jury and litigate them to judgment. They were and that settles the Due Process question.[14]

Due Process requires that Petitioners have the opportunity to litigate their case. It does not give them the right to relitigate those claims *ad infinitum* if they are dissatisfied with the first result. Petitioners have had their day in court and much more. Their Petition for review should be denied.

[14] Petitioners' other cases are equally off point or support our position. In *Richards v. Jefferson County*, the Supreme Court rejected the application of res judicata in a case where the litigant was not even a party to the original litigation. 517 U.S. 793, 805 (1996). *De Sollar v. Hanscome* is a classic collateral estoppel case where the parties were litigating a different claim in a separate case. 158 U.S. 216, 221-22 (1895).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be promptly denied.

Respectfully submitted,

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August 28, 2013