IN THE SUPREME COURT OF FLORIDA

LINDA PRENTICE, as Personal Representative of the Estate of JOHN C. PRICE,

Petitioner,

Case No. SC20-291

vs.

R.J. REYNOLDS TOBACCO COMPANY,

L.T. Case Nos. 1D17-2104
2007-CA-11551

Respondent.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

PETITIONER'S REPLY BRIEF

GREGORY D. PRYSOCK
Florida Bar No. 0062420
KATHERINE M. MASSA
Florida Bar No. 0078316
ANTONIO LUCIANO
Florida Bar No. 105342
MORGAN & MORGAN, P.A.
76 S. Laura Street, Suite 1100
Jacksonville, FL 33202
Tel: (904) 398-2722
gprysock@forthepeople.com
kmassa@forthepeople.com
tluciano@forthepeople.com

KEITH R. MITNIK
Florida Bar No. 0436127

CELENE H. HUMPHRIES
Florida Bar No. 884881
THOMAS J. SEIDER
Florida Bar No. 86238
SHEA T. MOXON
Florida Bar No. 12564
BRANNOCK HUMPHRIES & BERMAN
1111 W. Cass Street, Suite 200
Tampa, FL 33606
Tel: (813) 223-4300
chumphries@bhappeals.com
tseider@bhappeals.com
smoxon@bhappeals.com
Secondary:
tobacco@bhappeals.com

MORGAN & MORGAN, P.A.
P.O. Box 7979
Orlando, FL 32808
Tel: (407) 849-2383
kmitnik@forthepeople.com

Counsel for Petitioner

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ARGUMENT IN REPLY

I. The First District's decision in *Prentice* must be quashed because it erroneously requires *Engle* progeny plaintiffs to prove the concealment actions by proving that the smoker relied on specific statements made by the *Engle* defendants.

In response, R.J. Reynolds ("RJR") repeats arguments it has made unsuccessfully for more than a decade before *Whitmire*, and so they were anticipated by our initial brief. Our reply is limited to two points.

First, we offer more evidence from the litigation to support our point. This Court has granted review of another RJR verdict, *R.J. Reynolds v. Sheffield*, 266 So. 3d 1230 (Fla. 5th DCA 2019), addressing a different legal issue. *Sheffield v. R.J. Reynolds*, No. SC19-601, 2020 WL 4695953 (Fla. Aug. 13, 2020). Just like this case, neither of the fraudulent concealment jury instructions given to the *Sheffield* jury required reliance on a statement. (SA170-72). But RJR did not appeal the *Sheffield* jury instruction, making clear that, at a minimum, a jury instruction that does not require reliance on a statement is not an abuse of discretion. Initial Brief, *R.J. Reynolds v. Sheffield*, 2017 WL 7300879 (Fla. 5th DCA 2017).

Second, we respond to RJR's brief argument on preemption. Initially, this argument was not preserved in the lower court of appeal. RJR filed two briefs in the First District Court of Appeal on this issue, but never asserted preemption. (AppR.38, 367). So, RJR cannot make this new legal argument now for the first time. *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990).

Turning to the argument, RJR argues that fraudulent concealment claims that are not premised on half-true statements are nothing more than a failure to warn claim, which is preempted. This argument fails because preemption under the Federal Cigarette Labeling and Advertising Act, as amended by the Public Health Cigarette Smoking Act of 1969, does not apply to any of the liability claims that may be brought in an *Engle*-progeny action. The Florida Supreme Court has said so explicitly: "Although compliance with the federal warnings preempted any claim based on failure to warn, it did not eliminate the other causes of action that the jury had to consider in Phase I." *Engle v. Liggett Group*, 945 So. 2d 1246,1273 (Fla. 2006) (*Engle III*). Also, the res judicata effect of the approved Phase 1 findings bars any consideration of preemption under the Labeling Act, because such preemption is an affirmative defense that the

tobacco companies could have raised in the *Engle* trial. *Cf. Philip Morris v. Lourie*, 198 So. 3d 975, 977 (Fla. 2d DCA 2016) ("[T]he tobacco companies cannot raise the implied preemption defense here even if they had not raised it in *Engle* because it *could have been* raised in *Engle*.") (emphasis in original); *see also Am. Maritime Officers Union v. Merriken*, 981 So. 2d 544, 547 (Fla. 4th DCA 2008) (federal preemption is an affirmative defense); *Engle III*, 945 So. 2d at 1259 (res judicata settles all issues that could have been litigated in the prior proceeding).

But even if that defense were not foreclosed by *Engle III*, preemption under the Labeling Act would still not apply to Plaintiff's claims. The relevant preemptive language of the Act states:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. §1334(b). As construed by the United States Supreme Court, this provision does not bar state-law claims against tobacco companies for fraudulently misrepresenting or concealing material facts, because those claims are based on the duty not to deceive

rather than a duty based on smoking and health. *See Altria Group, Inc. v. Good*, 555 U.S. 70, 81-82 (2008); *Cipollone v. Liggett Group*, 505 U.S. 504, 528-29 (1992). Even fraud claims based on deceptive cigarette advertising are not preempted. *See Altria*, 555 U.S. at 73, 82-84; *Cipollone*, 505 U.S. at 528-29. Claims of conspiracy to misrepresent or conceal material facts likewise are not preempted. *See Cipollone*, 505 U.S. at 530. And product liability claims (like negligence and strict liability) are not preempted, as long as they are not based on any allegation that the tobacco companies should have put additional warnings in their post-1969 advertising and promotions (which Plaintiff never alleged). *See Cipollone*, 505 U.S. at 524-25; *see also R.J. Reynolds v. Marotta*, 182 So. 3d 829, 833 (Fla. 4th DCA 2016) (rejecting argument that claims of negligence and strict liability are preempted by various federal statutes, including the Labeling Act).

II. Alternatively, the First District erred in granting a new trial on all issues—relief that RJR was not entitled to, and that RJR did not even ask for.

As to RJR's limited response to our alternative argument, we stand by our initial brief. Otherwise, we recognize RJR's point that prevailing on this issue (as well as issue one) may result in this Court

remanding for the First District Court of Appeal to consider RJR's four other appellate issues.

III. The *Engle* defendants' request to relitigate the common core issues raised in the year-long class-action trial must be denied, again.

A. Introduction

Joined by Philip Morris ("PM") appearing as an amicus party, RJR also asks this Court to reconsider its 2006 decision in *Engle III*, which partially decertified the class. Throughout the history of the post-*Engle III* litigation, the *Engle* defendants have strung out the proceedings by claiming the right to relitigate every issue raised in the year-long class-action trial and start from scratch. Having been rebuffed at every level of the state and federal judiciary, including thirty-four unsuccessful certiorari petitions to the United States Supreme Court, the *Engle* defendants persist in making their challenge. This Court should reject this argument, again.

Initially, the question the *Engle* defendants seek to present in this proceeding was not adequately presented to the court below, so it is not preserved here.

In addition, the time to challenge this Court's decisions in *Engle III* and *Philip Morris v. Douglas*, 110 So. 3d 419 (Fla. 2013), *cert.*

denied, 571 U.S. 889 (2013), has long since passed. Unlike precedents that this Court has recently overturned, the decisions challenged here involve the very same parties (the *Engle* defendants), making the very same argument. The renewal of that argument in this proceeding is better described as an untimely rehearing motion, filed 14 years after *Engle III* and 8 years after *Douglas*. Fla. R. App. P. 9.330. Even if procedurally proper, the argument fails because it requires review of the *Engle* class action trial record and that record no longer exists, and because the argument ignores that this is a class action.

The *Engle* defendants' argument also fails because the question they pose is not presented by the facts of this case. Even if one were to accept the *Engle* defendants' answer to the question they seek to present, the judgment under review would remain valid because this Court did, in fact, determine that the subject elements were decided in the *Engle* plaintiffs' favor by the jury in the class action trial.

The only due process question that is presented in this case is whether the Due Process Clause gives a defendant the right to relitigate the meaning of a verdict that resulted in a final judgment between the same parties involving the same claims when the

judgment is reversed for further proceedings on those claims, but the appellate court expressly determined the meaning of the verdict and how it would be applied during proceedings on remand. No such right exists.

As explained by Judge William Pryor, writing for the Eleventh Circuit Court of Appeals, sitting *en banc*, due process "requires only that the application of principles of res judicata by a state affords the parties notice and an opportunity to be heard so as to avoid an arbitrary deprivation of property." *Graham v. R.J. Reynolds*, 857 F.3d 1169, 1184 (11th Circ. 2017) (*en banc*), *cert. denied*, 138 S. Ct. 646 (2018). The *Engle* defendants do not claim that they were deprived adequate notice and opportunity to be heard. And, as explained by this Court in *Douglas* and by Judge Pryor in *Graham*, such a claim would have failed in any event.

B. Facts

Since the 1990s, the *Engle* defendants[1] have strung out the *Engle* litigation proceedings by claiming the right to relitigate every

[1] The defendants in the *Engle* class action litigation include a handful of cigarette companies and three industry organizations they created. (IB.1). The primary defendants in the *Engle* class action litigation, including this Court's decision in *Engle III*, and in the

issue raised in the year-long class-action trial and start from scratch. Remarkably, the defense briefs raise this same issue again.

However, those briefs omit most of the relevant history of this litigation, relying instead on selected quotes from appellate decisions and an isolated, few pages from the class action proceedings which span more than 100,000 pages of record and a year's worth of trial transcripts. And the *Engle* defendants fail to disclose that full consideration of this Court's fact-based analysis in *Engle III* is impossible because the record of the 1998-1999 class action trial has been destroyed.

In the event this Court decides to consider this argument yet again, we begin by providing as much of the pertinent history as possible, including the *Engle* defendants' decades-long history of successive challenges to the use of the common core findings from the *Engle* class action trial.

The *Engle* Defendants' Conduct

As we explained in our initial brief, the *Engle* cigarette companies conspired for decades to conceal that they intentionally

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progeny litigation are the Respondent in this proceeding (RJR) and the amicus party for RJR (PM).

design cigarettes to be addictive despite knowing that addictive smoking causes many deadly diseases. Like RJR, PM documented this conduct in previously confidential documents. Now that PM has appeared in this proceeding as an amicus party,[2] we provide this additional evidence of the *Engle* cigarette companies' global approach to designing this product and committing this fraud.

The modern, inhalable and extraordinarily addictive cigarette was no accident. The *Engle* cigarette companies spent billions of dollars to highly engineer the modern cigarette sold to the *Engle* class to be addictive. (R3:2533-36, 2551-52); *Philip Morris v. Boatright*, 217 So. 3d 166, 169 (Fla. 2d DCA 2017); *Whitney v. R.J. Reynolds*, 157 So. 3d 309, 311 (Fla. 1st DCA 2014). One previously secret PM document presented to the *Engle* jury, and the juries in progeny cases (including this one), noted "we are in the business of selling nicotine, an addictive drug." (R2:4371; SA196). Another stated, "Happily for the tobacco industry, nicotine is both habituating and unique in its variety of physiological actions." (R2:4579; SA200).

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[2] Sylvia H. Walbolt and Joseph H. Lang, Jr., *Amicus Briefs: Friend or Foe of Florida Courts?*, 32 Stetson L. Rev. 269, 276-78 (2003) (many amicus briefs in the Florida Supreme Court merely repeat a party's argument).

Other previously confidential industry documents show the *Engle* defendants working together for decades to secretly conspire to hide all of this from the public and their consumers, and to attack any research saying otherwise. (R2:3701, 4368, 4577; SA207, 193, 198). Publicly, they said there was no proven link between cigarettes and disease, but they would continue to research the issue and let the public know if any health risks were found. (R2:3419; SA192). The companies also created and funded organizations which, they claimed, would research whether cigarettes actually posed a health risk. (R3:2590-96). But in reality, these organizations were merely a public relations ploy, and served as the cigarette industry's mouthpiece to create a false controversy over whether cigarettes cause disease. (R3:2590-96).

In a previously secret company document, PM was clear about this: "[O]ur product [i]s doubt … and our competition [i]s the body of anti-cigarette fact that exists in the public mind.… Doubt is our product since it is the best means of competing with the 'body of fact' that exists in the mind of the general public. It is also the means of establishing a controversy." (R2:3471; SA226).

The *Engle* Class Litigation

1. The *Engle* Class Complaint

The starting and ending point for determining the legal theories asserted by the class is the class complaint.[3] The *Engle* class complaint framed four claims that are routinely pursued in *Engle* litigation today: strict liability, negligence, fraudulent concealment and conspiracy to fraudulently conceal. Class Representation Amended Class Action Complaint for Compensatory and Punitive Damages, *Engle v. R.J. Reynolds*, No. 94-08273CA(20), 1994 WL 16494897, at Counts I-III, VI (Fla. Cir. Ct. May 5, 1994). It also included claims for fraudulent misrepresentation, conspiracy to fraudulently misrepresent, breach of express and implied warranty,

[3] *See Ocean Bank v. Caribbean Towers Condo. Ass'n*, 121 So. 3d 1087, 1090 (Fla. 3d DCA 2013) ("The principle that relief is limited to the matters pled, embedded in Florida Rule of Civil Procedure 1.110, serves as a procedural bar to a party requesting relief outside the pleadings in almost all circumstances ...."). While a defendant can consent to the trial of issues not pled, the *Engle* defendants were successful in preventing the *Engle* class from expanding its claims beyond what was pled in the complaint. *See Soffer v. R.J. Reynolds*, 187 So. 3d 1219, 1226 (Fla. 2016) (explaining how the *Engle* defendants prevented class from asking jury to award punitive damages on strict liability and negligence claims because they were not demanded on these counts of complaint).

intentional infliction of emotional distress, and medical monitoring. *Id.* at Counts IV-V, VII-VIII.

The strict liability and negligence counts applied solely to the cigarette companies named as defendants, whom the complaint described as cigarette manufacturers that "manipulated the level of nicotine in their tobacco products so as to make these products addictive." *Id.* at ¶29. One of these defendants, Florida's Dosal Tobacco Corp., was dropped before the verdict, and the complaint made no allegations regarding cigarettes manufactured by other manufacturers, such as Nat Sherman, Inc., and Santa Fe Natural Tobacco Co., Inc. *See, e.g.,* http://www.revenue.nebraska.gov/cig/manufacturer.html (listing manufacturers, including over a dozen not named as defendants in *Engle*) (last visited Mar. 1, 2021).

These two counts alleged that the defendants manipulated nicotine levels in their cigarettes to ensure addiction, failed to use available safer alternative designs, and failed to warn consumers of what they had done. Amended Class Action Complaint, *Engle*, 1994 WL 16494897, at ¶85, 140. The *Engle* defendants' answers (except Liggett) claimed that the nicotine in their cigarettes occurred

naturally and not through manipulation, and that their cigarettes were not addicting. (SA12-21, 31-33, 35-36, 58, 81-83, 85-87).

The counts for fraudulent concealment and conspiracy to conceal alleged that, "[a]lthough each of the Defendants possess scientific data establishing nicotine is addictive, and linking cigarette smoking with cancer and other serious illnesses, these Defendants intentionally and fraudulently suppressed material facts from the public, including the representative Plaintiffs and members of the class," and further that "[t]here has been a conspiracy to completely hide all scientific data proving that nicotine is addictive and that smoking cigarettes causes serious illnesses, …." Amended Class Action Complaint, *Engle*, 1994 WL 16494897, at ¶90, 107.

On this, the *Engle* defendants' answers offer the internally contradictory defense that the public is informed of the alleged risks of smoking.[4] (SA18, 42, 92).

[4] Marking a split that would continue throughout the *Engle* litigation, including separate briefing, *Liggett* did not make this argument. (SA56-79).

2. Class Action Proceedings

Class certification: The trial court certified a nationwide 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." *R.J. Reynolds v. Engle*, 672 So. 2d 39, 40 (Fla. 3d DCA 1996) ("*Engle I*"). The certification included no limitations to those who smoked certain types of cigarettes (e.g., filtered, light, low-tar, etc.) or aspects of the concealment conspiracy. *Id.* at 40-41. The *Engle* defendants appealed on the ground that there were too many individual issues to sustain class treatment. *Id.* at 41.

Although it narrowed the class to Florida smokers, the Third District Court of Appeal otherwise affirmed class certification because "the basic issues of liability common to all members of the class will clearly predominate over the individual issues." *Id.*

This Court denied review of that decision. *R.J. Reynolds v. Engle*, 682 So. 2d 1100 (Fla. 1996).

Phase 1 trial: On remand, the trial court formulated a three-phase trial plan. Phase 1 was a year-long trial that was limited to "common issues relating exclusively to defendants' conduct and the

general health effects of smoking." *Liggett Group v. Engle*, 853 So. 2d 434, 441 (Fla. 3d DCA 2003) ("*Engle II*"). The common issues included whether nicotine cigarettes are addictive, whether the *Engle* cigarette companies' nicotine cigarettes cause various fatal illnesses, whether the *Engle* cigarette companies' nicotine cigarettes were defective, whether the *Engle* cigarette companies were negligent, and whether the *Engle* defendants had concealed and engaged in a conspiracy to conceal the addictive and dangerous nature of their nicotine cigarettes. Phase 1 also addressed entitlement to punitive damages for the class as a whole. *Engle III*, 945 So. 2d at 1256.

Phase 1 proposed verdict form: At the end of the Phase 1 trial, the parties offered competing interrogatory forms for the jury's verdict. The *Engle* defendants' form proposed an impractical essay-style verdict form that would have required the jury to identify in narrative form every defect it found for every brand of cigarette and every time period. (SA108-11, 246-48). The trial judge rejected the form as improper, but made clear that, if the *Engle* defendants "want specificity, then there is a way of doing it." (SA247-48).

Despite conceding that it was "incumbent upon all of us" to provide additional "enumerated" statements for a more detailed

verdict form (SA244-45), and despite repeated requests from the trial judge, the *Engle* defendants failed to file a feasible alternative verdict form. (SA246-47). The *Engle* defendants never proposed a yes/no verdict form for specific kinds or brands of cigarettes or instances of fraudulent concealment because there were no limited, specific allegations pled by the class.

The interrogatories the jury ultimately used followed the *Engle* defendants' oral suggestion of a "middle ground" (SA248), and consisted of 12 pages with more than 240 questions including subparts. Verdict Form for Phase I, *Engle*, 1999 WL 35138926 (Fla. Cir. Ct. July 7, 1999).

There was no doubt that all parties understood that the findings made in the Phase 1 verdict form would have class-wide impact. (SA329-30). Indeed, that is ***exactly what the* Engle *defendants wanted.*** The *Engle* defendants repeatedly demanded that all jury findings have full preclusive effect.

The *Engle* defendants proclaimed, "if the defendants win, we want as many people as possible bound" (SA231), and if the jury answers "no … then not a single Florida smoker can recover." (SA251). The *Engle* defendants then acknowledged that a verdict for

the plaintiffs would enable "other class members, however many thousands or hundreds of thousands it may be … [to] recover." (SA336-39).

Phase 1 closing arguments: The *Engle* defendants then focused their arguments to the jury on the class-wide nature of the jury's decision-making task, tracking the defenses they had raised in their answers. The *Engle* defendants' argument was that cigarettes were not addictive and were not proven to cause disease, and that they could not be held strictly liable, or found negligent, because they had attempted to make the safest possible cigarette. (SA288-97, 301-02, 307-16).[5] Likewise, they took an all-or-nothing approach to the fraud allegations, arguing that none of them concealed anything from the public and, even so, the public already knew everything. (SA317-19). The *Engle* defendants described the conspiracy action as laughable because the *Engle* defendants are all "bitter, bitter

[5] Liggett did concede that cigarette smoking was addictive for "some people" and could cause certain diseases. (SA298-99). RJR and PM, 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. (SA277-79, 281-86, 303-06).

competitors who fight, scratch and quarrel over every inch of the market share." (SA320-26).

Phase 1 jury instructions and verdict form: At the conclusion of Phase 1, 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. (SA329-31). Specifically, its role was to "address[] the conduct of the tobacco industry." (SA310-12, 329-31).

The jury instructions and verdict form tracked the class-wide evidence and argument.

Strict liability: The trial court instructed the jury that the class had to satisfy one of two tests to prevail on their strict liability claims—that each defendant's cigarettes "fail[ed] to perform as safely as an ordinary consumer would expect when used as intended" or that "the risk of danger in the design outweighs the benefits." (SA332-33).

The strict liability verdict form question asked whether each *Engle* cigarette company defendant had "place[d] cigarettes on the market that were defective and unreasonably dangerous." Verdict

Form for Phase I, *Engle*, 1999 WL 35138926, at Question 3. The jury answered yes for each defendant separately. *Id.*

Negligence: The trial court also instructed that to prevail on the negligence claim, the class had to prove that each defendant was "negligent in designing, manufacturing, testing, or marketing of cigarettes [and] prior to July 1, 1969, in failing to warn smokers of the health risks of smoking or the addictiveness of smoking." (SA334).

The negligence question on the verdict form posited the existence of a non-negligent manufacturer, asking whether each *Engle* cigarette company defendant had "failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances." Verdict Form for Phase I, *Engle*, 1999 WL 35138926, at Question 8. The jury was provided yes/no answer blanks for each *Engle* cigarette company defendant and for time periods before, after, and both before and after July 1, 1969, and it answered yes for all *Engle* cigarette company defendants and all time periods. *Id.*

Fraudulent concealment and conspiracy to fraudulently conceal: As to the fraud claims, the jury considered the *Engle*

defendants' concealment of information pertaining to the dangers of cigarettes. (SA235-37, 239-42, 256-69, 271-75); (A10-12).

The fraud and conspiracy claims were divided into four verdict form questions, asking whether each *Engle* defendant (1) made a false statement of material fact, (2) fraudulently concealed the dangers of smoking, (3) conspired with others to misrepresent the effects of smoking, and (4) conspired with others to conceal the dangers of smoking. Verdict Form for Phase I, *Engle*, 1999 WL 35138926, at Questions 4-5a. The jury answered yes for all defendants except one (Brooke Group, Ltd.). *Id.*

The *Engle* defendants' gamble for defeating every "single Florida smoker" claim with the findings' preclusive effect did not pay off. (SA235, 250-51). Instead, the plaintiffs won most of their allegations. So, as the *Engle* defendants had fully acknowledged before the verdict, these class-wide findings go to the *Engle* defendants' underlying misconduct, which applies equally to every class member, "however many thousands or hundreds of thousands it may be … [to] recover." (SA337-39).

Phase 2 trials: After the class prevailed on all counts, including winning a determination of entitlement to punitive damages, the

court conducted a two-part Phase 2 trial. In Phase 2A, the same jury resolved the remaining individual issues for the three named class representatives' claims, including causation and compensatory damages). *Engle III*, 945 So. 2d at 1257, *cert. denied*, 552 U.S. 941 (2007).

In Phase 2B, the jury assessed a lump-sum of $145 billion in punitive damages for the entire class. *Engle III*, 945 So. 2d at 1257. At the conclusion of Phase 2, the trial court awarded compensatory damages to the three class representatives and entered a final judgment in favor of the *Engle* class on all but one count, including punitive damages. *Id.*

Phase 3 trial: The class plan required Phase 3 trials to determine causation and compensatory damages for the remaining individual class members. *Engle III*, 945 So. 2d at 1258. That phase would have consisted of new juries determining the individual elements for the claims of the rest of the class, estimated to exceed 700,000, with the punitive damage award to be equally divided among all successful class members. *Engle II*, 853 So. 2d 442.

Post-trial order: Post-trial, the *Engle* defendants renewed their directed verdict motions, including the counts tried in this progeny case.

Strict liability: The trial court found there was sufficient evidence that the *Engle* defendants' cigarettes contain carcinogens and other harmful chemicals and that they manipulated the levels of nicotine, although it also noted evidence that some cigarettes had various issues with their filters. (A10). The trial court relied on case law holding that "a design defect which renders the product more addictive than it could be or addictive when it need not be at all, may render the cigarette unreasonably dangerous in conjunction with its harmful qualities." (A10) (citing *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515 (D. Kan. 1995), and *Rogers v. R.J. Reynolds*, 557 N.E.2d 1045 (Ind. Ct. App. 1990)).

Negligence: The trial court's analysis again tracked the parties' pleadings and the presentation of evidence and argument to the jury: "The defendants according to the testimony, well knew from their own research, that cigarettes were harmful to health and were carcinogenic and addictive. By allowing the sale and distribution of

said product under those circumstances without taking reasonable measures to prevent injury, constitutes … negligence." (A12).

Fraudulent concealment and conspiracy to conceal: The trial court likewise found sufficient evidence of the overall "concealment of known information which affected the health of the public at large." (A11).

3. *Engle III*

Before the trial court could proceed to Phase 3, this Court reviewed the entire proceeding. As they do now, the *Engle* defendants argued that preclusive use of the Phase 1 findings violates their due process rights. Brief on the Merits, *Engle III*, 2004 WL 1671058, at *10-13, 27-28; Answer Brief on the Merits of Respondents Liggett Group Inc. and Brooke Group Holding, Inc., *Engle III*, 2003 WL 23678664, at *1; *see also* (SA115-20); (A65-67, 69-73, 76-78). The argument is the same one they make now, 17 years later: "[T]he trial plan violates due process by allowing boundless 're-examination' of the Phase I verdict: Phase III juries are free to hold defendants liable for conduct that the Phase I jury may never have considered unlawful, much less punishable." Brief on the Merits, *Engle III*, 2004 WL 1671058, at *27.

This Court held that class certification had been appropriate for most of the findings made in Phase 1. *Engle III*, 945 So. 2d at 1254-55, 1265-67, 1269-71. This Court reviewed the class action record and made the factual determination that most of the findings applied equally to the class members regardless of particular circumstances (e.g., what brand of cigarettes they smoked, when they began smoking, and so forth) because they were sufficiently specific to be common to the entire class. *Id.* at 1269. These conduct findings involved only "common issues relating exclusively to the defendants' conduct and the general health effects of smoking." *Engle III*, 945 So. 2d at 1257. Specifically, the common findings on the *Engle* defendants' conduct established on a class-wide basis that each *Engle* cigarette company defendant had acted negligently and had sold cigarettes that were defective and unreasonably dangerous, and that all of the *Engle* defendants (including the industry organizations) had concealed or omitted material information not otherwise known concerning the health effects or addictive nature of cigarettes, and had agreed to so conceal. *Engle III*, 945 So. 2d at 1255, 1269-71, 1276-77.

Accordingly, this Court affirmed the use of the common findings as the basis for the liability determination and the compensatory damages awarded to two of the three class representatives in the Phase 2A trial (the third class representative's action was barred by the statute of limitations). *Id.* at 1276.

Nonetheless, this Court decertified the *Engle* class. This Court held that the class action could not proceed to the Phase 3 trials because it was required to reverse the Phase 1 and Phase 2B findings on punitive damages, for two reasons.

First, this Court held that the Phase 1 finding on entitlement to punitive damages was premature as to every class member, even those addressed in Phase 2A. *Engle III*, 945 So. 2d at 1269. This Court explained that a finding of liability is required before punitive damages entitlement can be determined, and that liability attaches only if the class members establish causation and reliance in Phase 2A (class representatives) or Phase 3 (the rest of the class). *Engle III*, 945 So. 2d at 1262-63. Said another way, findings for the *Engle* defendants on causation and reliance as to the individual class members precludes the jury from awarding punitive damages. *Id.* So, the Phase 1 finding of entitlement to punitive damages for the

class as a whole was error, necessarily requiring reversal of the Phase 2B award of punitive damages. *Id.*

Second, this Court reversed the Phase 2B class-wide punitive damages assessment because a determination of compensatory damages is required before the punitive damages amount can be decided. *Engle III*, 945 So. 2d at 1263-65. Both rulings required decertification of the class as to the remaining individual class members. *Engle III*, 945 So. 2d at 1269.

This Court concluded that the "pragmatic solution" was to allow the class members to file "individual damages actions" and, despite the decertification, to afford res judicata effect to the "common core findings," as intended. *Id.* at 1268-70, 1276-77. These individual suits (termed the "*Engle* progeny cases") would address the individual issues relating to specific causation, comparative fault, reliance and damages. *Id.* at 1262-65, 1267-68. Punitive damages would also be addressed in those individual trials, only if the progeny plaintiff established liability first. *Id.* at 1262-63, 1269. The roughly 700,000 class members were given one year to file their individual suits. *Id.* at 1269, 1276-77.

This Court did not afford res judicata effect to all of the Phase 1 findings regarding the *Engle* defendants' conduct. This Court held that the Phase 1 findings on fraudulent misrepresentation and intentional infliction of emotional distress were not common to the entire class because they "involved highly individualized determinations." *Id.* at 1269.

For example, as to the fraudulent misrepresentation finding, the *Engle* defendants had argued that the Phase 3 juries would never know which statements had been found to be unlawful. Brief on the Merits, *Engle III*, 2004 WL 1671058, at *10, 27; Liggett Answer Brief, *Engle III*, 2003 WL 23678664, at *1. The class action jury's Phase 1 finding on fraudulent misrepresentation was that "the defendants made a false or misleading statement of material fact with the intention of misleading smokers." *Engle III*, 945 So. 2d at 1257 n.4. When this Court partially decertified the class, it adopted the *Engle* defendants' argument as to the fraudulent misrepresentation finding, holding that the finding is "'inadequate to allow a subsequent jury to consider individual questions of reliance and legal cause.'" *Engle III*, 945 So. 2d at 1255; *see also id.* at 1269, 1277.

The *Engle* defendants moved for rehearing. (SA121-56); (A99). Initially, the *Engle* defendants pointed out the opinion had not applied the fraudulent misrepresentation holding to the finding on conspiracy to fraudulently misrepresent. (A89-90). The *Engle* defendants argued that the conspiracy claim was just as individualized as the fraudulent misrepresentation claim, because both are dependent on fraudulent statements. (A89-90). This Court agreed, and made that correction. (SA157-58).

Otherwise, the *Engle* defendants sought rehearing as to the preclusive effect afforded the other findings on the *Engle* defendants' conduct, including fraudulent concealment, conspiracy to fraudulently conceal, negligence, and strict liability. (SA122-40); (A99 n.1). Their rehearing motion repeated the argument that was made in the merits briefing and is made again in this proceeding—"[a]pplying the preserved findings will subject defendants to liability for conduct that no one can say the Phase 1 jury found to be unlawful." (SA122); *see also* (A99 n.1). Those arguments were rejected again. (SA157-58).

The *Engle* defendants sought review of *Engle III* in the United States Supreme Court, contending that the approved Phase 1 jury

findings were too vague to have prospective preclusive effect. Petition for a Writ of Certiorari, *R.J. Reynolds v. Engle*, 2007 WL 1494692, at *12-18 (May 21, 2007). The United States Supreme Court twice denied certiorari. *R.J. Reynolds v. Engle*, 552 U.S. 941, *reh'g denied*, 552 U.S. 1056 (2007).

4. The Progeny Litigation

Initially, there were "hundreds of thousands" of class members; approximately 700,000. *Engle III,* 945 So. 2d at 1258. That was back in the 1990s. Few class members now remain to litigate against the *Engle* defendants anymore. Only about 1 percent of the original class members met the deadline set by this Court for continuing the litigation. (A102). And, of those approximately 8,000 viable cases, most of the smokers have already died. That is because the class members, by definition, are people who manifested fatal diseases caused by nicotine cigarettes no later than 1996 (25 years ago). *Engle III,* 945 So. 2d at 1275-76. Also, because these are people who started smoking as early as the 1930s, many times their family members have passed away too, thereby eliminating a possible wrongful death action.

As to the remaining cases, only 354 have made it to trial during the 14 years since this Court's *Engle III* decision. A dwindling number continue to wait for their day in court. We have yet to see how many have survived the COVID-19-caused suspension of jury trials, which began a year ago.[6]

The *Engle* Defendants' Attempts at Successive Review

1. *Douglas*

In *Douglas*, this Court reaffirmed that the critical *Engle* findings on the common, core issues of the *Engle* defendants' decades of wrongful acts, as they pertained to the various causes of action, had been tried and determined on a class-wide basis. 110 So. 3d at 429-31, 436. This Court likewise reaffirmed that substantial evidence supported the findings on the *Engle* defendants' common conduct with regard to the class of smokers. *Id.* at 428, 433 (holding that progeny plaintiffs may rely upon the approved jury findings "[b]ecause these findings go to the defendants' underlying conduct, which is common to all class members and will not change from case

[6] Fla. Admin. Order No. AOSC 20-13 (Fla. Mar. 13, 2020), https://www.floridasupremecourt.org/content/download/631744/7178881/AOSC20-13.pdf.

to case"). Thus, this Court confirmed the propriety of using these findings in individual class-member trials, as it had done with regard to the Phase 2A trial of the named class members in *Engle* itself. *Id.* at 433, 436.

RJR and PM had argued in *Douglas* that *Fayerweather v. Ritch*, 195 U.S. 276 (1904), foreclosed the preclusive use of the common *Engle* jury findings on due process grounds. Initial Brief, *Douglas*, 2012 WL 3078033, at *40-48 (Fla. May 30, 2012); Reply Brief, *Douglas*, 2012 WL 3078034, at *14-15 (Fla. June 18, 2012). This Court rejected that argument. *Douglas*, 110 So. 3d at 435. This Court concluded that the *Engle* defendants' due process rights had not been abridged for the simple reason that they had received notice and an opportunity to be heard during the *Engle* class-action proceedings. *Id.* at 431-32.

RJR and PM had also claimed that the *Engle* findings were insufficiently specific to be given preclusive effect in light of the trial record. Initial Brief, *Douglas*, 2012 WL 3078033, at *2-3, 6-11, 16-17, 21-39; Reply Brief, *Douglas*, 2012 WL 3078034, at *3-14. This Court rejected that argument too, holding that "by accepting some of the Phase I findings and rejecting others based on lack of specificity,

this Court in *Engle* necessarily decided that the approved Phase I findings are specific enough." *Id.* at 428 (citing *Engle III*, 945 So. 2d at 1255).

RJR and PM again sought certiorari to the United States Supreme Court on their due process claim, which was denied. *Philip Morris v. Douglas*, 571 U.S. 889 (2013).

2. *Walker*

In *Walker v. R.J. Reynolds*, 734 F.3d 1278, 1284 (11th Cir. 2013), *cert. denied*, 573 U.S. 913 (2014), the Eleventh Circuit, in an opinion by Judge William Pryor, held that "federal courts sitting in diversity are bound by the decisions of state courts on matters of state law." Therefore, the Eleventh Circuit's limited inquiry was "whether giving full faith and credit to the decision in *Engle,* as interpreted in *Douglas,* would arbitrarily deprive R.J. Reynolds of its property without due process of law." *Id.* at 1287.

The Eleventh Circuit rejected the basic premise of the *Engle* defendants' argument: "R.J. Reynolds argues that the Supreme Court held in *Fayerweather* … that parties have a right, under the Due Process Clause, to the application of the traditional law of issue preclusion, but we disagree." *Id.* at 1289. The court explained that,

in fact, the United States Supreme Court "had no occasion in *Fayerweather* to decide what sorts of applications of issue preclusion would violate due process." *Id.* The Eleventh Circuit further held that, "[i]f due process requires a finding that an issue was actually decided, then the Supreme Court of Florida made the necessary finding…." *Id.* Judge Pryor held that this Court's *Douglas* decision did so "when it explained that the approved findings from Phase I 'go to the defendants underlying conduct which is common to all class members and will not change from case to case.'" *Id.* (quoting *Douglas*, 110 So. 3d at 428).

In rejecting RJR's due process argument, the Eleventh Circuit concluded that "R.J. Reynolds had a full and fair opportunity to litigate the issues of common liability in Phase I." *Id.* at 1288. Additionally, "R.J. Reynolds also has had an opportunity to contest its liability in these later cases brought by individual members of the *Engle* class … [and] has vigorously contested the remaining elements of the claims, including causation and damages." *Id.* Accordingly, the Eleventh Circuit affirmed the verdicts on review, and refused to disturb *Douglas* "[b]ecause R.J. Reynolds had a full and fair opportunity to be heard in the Florida class action and the

application of res judicata under Florida law does not cause an arbitrary deprivation of property [.]" *Id.* at 1280-81.

Certiorari was again denied. *R.J. Reynolds v. Walker*, 573 U.S. 913 (2014).

3. *Graham*

In *Graham*, the Eleventh Circuit sat *en banc* to correct a panel ruling holding that use of the *Engle* findings was preempted by Congress's decision not to ban the sale of cigarettes. 857 F.3d 1169. At the *Engle* defendants' request, the court also permitted briefing on the due process questions decided in *Walker.* The *en banc* court, again in an opinion by Judge Pryor, "reaffirm[ed]" *Walker*'s due process holding. *Id.* at 1174.

The court reiterated, point-for-point, what it had said in *Walker.* "R.J. Reynolds and Philip Morris do not … contend that they were denied notice or an opportunity to be heard, the central features of due process." *Id.* Due process "does not require a state to follow the federal common law of res judicata and collateral estoppel." *Id.* Instead, "[t]he Due Process Clause requires only that the application of principles of res judicata by a state affords the parties notice and an opportunity to be heard so as to avoid an arbitrary deprivation of

property." *Id.* In this case, "[t]he tobacco companies were given an opportunity to be heard on the common theories in a year-long trial followed by an appeal to the Florida Supreme Court and later individual trials and appeals on the remaining issues of proximate causation, comparative fault, and damages." *Id.* at 1185.

Finally, and of critical importance, Judge Pryor examined and rejected the *Engle* defendants' claim that the *Engle* findings were without evidentiary foundation in the record. The court concluded that *Douglas*'s holding was well-supported. *Id.* at 1182 ("After reviewing the *Engle* trial record, we are satisfied that the Florida Supreme Court determined that the *Engle* jury found the common elements of negligence and strict liability against Philip Morris and R.J. Reynolds."); *see also Walker*, 734 F.3d at 1289 ("If due process requires a finding that an issue was actually decided, then the Supreme Court of Florida made the necessary finding when it explained that the approved findings from Phase I 'go to the defendants' underlying conduct which is common to all class members and will not change from case to case' and that 'the approved Phase I findings are specific enough' to establish certain

elements of the plaintiffs' claims.") (quoting *Douglas*, 110 So. 3d at 428).

The United States Supreme Court again denied certiorari. *R.J. Reynolds v. Graham*, 138 S. Ct. 646 (2018).

4. *Burkhart*

After certiorari was denied in *Graham,* the *Engle* defendants argued to the Eleventh Circuit that the holdings of *Walker* and *Graham* did not apply to the *Engle* findings regarding fraudulent concealment and conspiracy. In *Burkhart,* the Eleventh Circuit held that the "rationale[] employed by this court in *Walker* and *Graham*[] applies equally to the Florida Supreme Court's similar grant of preclusive weight to *Engle* progeny plaintiffs' concealment and conspiracy claims." *Burkhart v. R.J. Reynolds*, 884 F.3d 1068, 1092-93 (11th Cir. 2018).

Judge Gerald Tjoflat (who had dissented in *Graham*) explained that "[t]he concealment and conspiracy claims were litigated alongside the negligence and strict-liability claims in *Engle* [and] as with the negligence and strict-liability claims, [the *Engle* defendants] had the opportunity to argue the conduct elements of the concealment and conspiracy claims," including "the opportunity to

protest the jury instructions given," and "the benefit of appellate review of the jury instructions as to those claims." *Id.* at 1093. And they had the opportunity to contest "the Florida Supreme Court's factual finding in *Douglas* that the *Engle* jury's verdict though ambiguous, established the individualized conduct elements of the plaintiffs' negligence, strict liability, fraudulent concealment, and conspiracy claims." *Id.* Finally, the *Engle* defendants "still enjoyed and continue to enjoy the right to litigate the causation and reliance elements of those intentional tort claims." *Id.*

Post-opinion, the *Engle* defendants sought the full Court's review, but the *en banc* request was denied without any judge calling for a vote. *Burkhart v. R.J. Reynolds,* No. 14-14708 (11th Cir. order filed May 2, 2018).

The *Engle* defendants continued to argue due process in the Eleventh Circuit, even after the court rejected those arguments *en banc* in *Graham* and even after Judge Tjoflat recognized and applied the *Graham* holding in *Burkart*. Those arguments have failed. *See, e.g., Kerrivan v. R.J. Reynolds*, 953 F.3d 1196, 1201 n.2 (11th Cir. 2020).

5. The United States Supreme Court

During the 14 years since this Court decided *Engle III*, the *Engle* defendants have filed thirty-four unsuccessful certiorari petitions to the United States Supreme Court.[7]

[7] *R.J. Reynolds v. Odom*, 139 S. Ct. 1311 (2019); *R.J. Reynolds v. Nally*, 139 S. Ct. 1273 (2019); *R.J. Reynolds v. Johnston*, 139 S. Ct. 1273 (2019); *Philip Morris v. Boatright*, 139 S. Ct. 1263 (2019); *Philip Morris v. Brown*, 139 S. Ct. 1263 (2019); *Philip Morris v. McKeever*, 139 S. Ct. 1263 (2019); *R.J. Reynolds v. Searcy*, 139 S. Ct. 1262 (2019); *R.J. Reynolds v. Pardue*, 139 S. Ct. 1261 (2019); *Philip Morris v. Jordan*, 139 S. Ct. 1261 (2019); *R.J. Reynolds v. Monroe*, 138 S. Ct. 923 (2018); *R.J. Reynolds v. Lewis*, 138 S. Ct. 923 (2018); *Philip Morris v. Lourie*, 138 S. Ct. 923 (2018); *R.J. Reynolds v. Grossman*, 138 S. Ct. 748 (2018); *R.J. Reynolds v. Turner*, 138 S. Ct. 736 (2018); *Philip Morris v. Naugle*, 138 S. Ct. 735 (2018); *R.J. Reynolds v. Block*, 138 S. Ct. 733 (2018); *Graham*, 138 S. Ct. 646 (2018); *Walker*, 573 U.S. 913 (2014); *R.J. Reynolds v. Brown*, 573 U.S. 912 (2014); *R.J. Reynolds v. Kirkland*, 573 U.S. 905 (2014); *R.J. Reynolds v. Koballa*, 573 U.S. 905 (2014); *R.J. Reynolds v. Smith*, 573 U.S. 905 (2014); *R.J. Reynolds v. Sury*, 573 U.S. 905 (2014); *R.J. Reynolds v. Townsend*, 573 U.S. 905 (2014); *Philip Morris v. Barbanell*, 573 U.S. 904 (2014); *R.J. Reynolds v. Mack*, 573 U.S. 904 (2014); *Lorillard v. Mrozek*, 573 U.S. 904 (2014); *Douglas*, 571 U.S. 889 (2013); *R.J. Reynolds v. Clay*, 568 U.S. 1027 (2012); *R.J. Reynolds v. Gray*, 566 U.S. 905 (2012); *R.J. Reynolds v. Hall*, 566 U.S. 905 (2012); *Philip Morris v. Campbell*, 566 U.S. 905 (2012); *R.J. Reynolds v. Campbell*, 566 U.S. 905 (2012); *R.J. Reynolds v. Martin*, 566 U.S. 905 (2012); *Engle*, 552 U.S. 941 (2007).

Linda Prentice's Case

1. The trial

In addition to the findings from *Engle,* Linda Prentice introduced evidence that John Price started smoking as a young boy, well before any warnings appeared on cigarette packs, and relied on the fraudulent concealment of addiction and danger, and that he smoked filtered cigarettes, which RJR falsely marketed as a healthier alternative. (R3:2353-54, 3255, 3353, 4562, 4571, 4667-68). Linda Prentice also introduced extensive evidence of the fraudulent concealment of addiction and danger in the specific filtered cigarettes smoked by Mr. Price. (R3:2401, 2449-52, 2456, 2458, 2463-67, 2471-73, 2524, 2668-71, 2830-31, 3199, 3353, 3598-99, 3646-50, 3682-83, 4569-70).

Mr. Price smoked compulsively for 44 years. (R3:3178-79, 3193-96, 3198-99). Mr. Price had enormous difficulty quitting smoking, trying prescribed over-the-counter medications, a smoking-cessation clinic, nicotine gum, acupuncture injections in his eyes and face, and hypnosis. (R3:3194-96, 3741-42, 4437-38, 4585-86). It was not until Mr. Price was prescribed a nicotine patch—a newly available product—that that he was able to finally quit smoking.

(R3:3195, 3198-99, 3522, 3678-81, 3855, 4585, 4597). Even then, though, he had to go through three cycles of patches before he could wean his body of its dependence on nicotine. (R3:3195, 3198-99, 4597). But it was too late to avoid the COPD that would kill him in 2010. (R2:2557; R3:3355, 3366, 4421-22, 4623).

The jury determined that addiction to smoking RJR's cigarettes was the cause of Mr. Price's death and found in favor of his estate on the negligence, strict liability, and concealment conspiracy claims. (R2:5114-15). As often occurs in the complicated fact presentations of cigarette cases, the jury found for RJR on the fraudulent concealment claim, and apportioned the majority of fault (60%) to Mr. Price. (R2:5115). The jury awarded $6.4 million in compensatory damages. (R2:5115). The jury also found that RJR's conduct warranted punitive damages, so the parties proceeded to a second phase of trial. (R2:5115).

In phase two, RJR leveraged the jury's compensatory damages award into a zero-dollar punitive-damages verdict. RJR argued repeatedly that it had been punished enough by the jury's compensatory award. (R3:5757, 6214-15, 6217-18, 6221-24, 6237). Plaintiff repeatedly (and unsuccessfully) objected that the two types

of damages serve two entirely different purposes. In the end, the jury declined to award "more money" (R3:6227), returning a phase-two verdict of zero dollars. (R2:5130).

2. The appeal to the First District Court of Appeal

RJR appealed to the First District Court of Appeal, raising seven issues. (AppR:38, 367). In 100 pages of appellate briefing, RJR spent only one sentence on its due process argument. (AppR:95) ("Plaintiff's use of the *Engle* findings in establishing the conduct elements of her claims violated federal due process.").

More than three years (38 months) later, RJR asks this Court to review that one sentence of argument, an issue which this Court has twice rejected, the Eleventh Circuit has repeatedly rejected (including an *en banc* proceeding), and the United States Supreme Court has consistently denied review (34 times).

And RJR adds a new argument it never made to the First District—that, even if not a due process violation, the *Engle III* decision departed from Florida preclusion law.

C. RJR has not preserved its argument.

RJR waived these arguments in three, independent ways.

First, RJR did not preserve these arguments in the lower court of appeal. The only argument presented to the First District Court of Appeal was this: "Plaintiff's use of the *Engle* findings in establishing the conduct elements of her claims violated federal due process. *See Fayerweather v. Ritch*, …. The Florida Supreme Court rejected this argument in *Douglas*, 110 So. 3d 419, but Reynolds preserves it for further review." (AppR:95).

As this Court held in *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990) (per curiam), "[m]erely making reference to arguments [ ] without further elucidation does not suffice to preserve issues," and such flimsy briefing means a court should find that "these claims are deemed to have been waived." *See also Hammond v. State*, 34 So. 3d 58, 59 (Fla. 4th DCA 2010) ("Claims for which an appellant has not presented any argument, or for which he provides only conclusory argument, are insufficiently presented for review and are waived.").

At a minimum, RJR waived all arguments that are not tethered to RJR's claim of a due process violation.

Second, in the First District appeal, RJR did not even brief how the issue was raised and disposed of in the trial court with record citations, as required by Florida's procedural rules. (AppR:95). So, regardless of whether the trial court ever ruled on the issue, it was not preserved for appellate review. Fla. R. App. P. 9.210(b)(3); *see also Hamilton v. R.L. Best Int'l*, 996 So. 2d 233, 235 (Fla. 1st DCA 2008) ("It is the decision of the lower tribunal that is reviewed on appeal, not the issue.").

Even in its brief to this Court, RJR string cites its arguments to the trial court, but again does not identify a trial court ruling to be reviewed on appeal. (AB.8 n.2). And the limited references to RJR's argument are generally irrelevant. RJR's allegations in its pleading are not a request for a ruling. And the arguments found in RJR's motion for directed verdict and jury instructions are all from the end of the trial. By this point, the case had already been tried based on the *Engle* findings, and the jury had heard about them repeatedly.

Third, RJR conceded its appellate waiver. Plaintiff's answer brief in the First District asserted the above-explained waivers. (AppR:285). RJR's reply brief did not disagree. (AppR:367). Instead, RJR said nothing, effectively conceding Plaintiff's argument of waiver.

See Agee v. Brown, 73 So. 3d 882, 886 (Fla. 4th DCA 2011) ("As such, we treat [Appellee]'s failure to address this issue in his answer brief as a concession that such relief was never sought."); *Anderson v. Ewing*, 768 So. 2d 1161, 1166 n.1 (Fla. 4th DCA 2000) ("[Appellee] as much as conceded this issue by failing to address it at all in his answer brief.").

D. The law of the case precludes relitigation of this issue.

The *Engle* defendants have been complaining about *Engle III* without success, in this and other courts, for 14 years. In this latest attempt, they cite no case that would require a party be given the opportunity to relitigate an issue after the highest appellate court with jurisdiction has made its final ruling. The arguments made here were decided against them with finality long ago and, therefore, are not subject to relitigation. *See Delta Property Management v. Profile Investments, Inc.*, 87 So. 3d 765 (Fla. 2012); *Brunner Enterprises, Inc. v. Dept. of Revenue*, 452 So. 2d 550 (Fla. 1984).

When a court makes clear that its decision is intended to be a final resolution of the issue, that decision is law of the case. *Wells Fargo Armored Services Corp. v. Sunshine Sec. and Detective Agency, Inc.*, 575 So. 2d 179 (Fla. 1991). If this was not clear enough in *Engle*

III, this Court was unquestionably clear in *Douglas*, saying: "We disagree and decline defendants' invitation to revisit our decision in *Engle*." *Douglas*, 110 So. 3d at 427. The *Engle* defendants' latest invitation here is subject to the same fate. Further review now is barred not only by res judicata, but also by the law of the case.

This Court has never tolerated recalcitrant litigants. *See, e.g., Johnson v. Inch*, 2020 WL 6888143 (Fla. Nov. 24, 2020); *Wetzel v. State*, 272 So. 3d 1228 (Fla. 2019); *Hawkin v. Jones*, 211 So. 3d 993 (Fla. 2017); *Gafney v. Turker*, 79 So. 3d 744 (Fla. 2012). It should not do so now.

We note as well that, while the 34 denials by the United States Supreme Court may not have jurisprudential stare decisis effect, they are nonetheless significant: "for the case in which certiorari is denied, its minimum meaning is that this Court allows the judgment below to stand with whatever consequences it may have upon the litigants involved under the doctrine of res judicata as applied either by state or federal courts." *Brown v. Allen*, 344 U.S. 443, 543 (1953) (Jackson, J., concurring).

E. The *Engle* defendants' stare decisis challenge fails.

The only new arguments made in the defense briefs are those tethered to the fact that this Court has recently receded from a handful of precedents. Since the first of these recent decisions was issued in December 2019, at least 149 briefs have been filed in Florida's appellate courts (58 briefs in this Court), addressing arguments to overturn precedent.[8] Many are aptly described as trying to place a square peg into a round hole. That is certainly true of the *Engle* defendants' argument.

Emboldened by this Court's recent decisions, RJR declares, "The time has come to abandon these clearly erroneous precedents." (AB.31). PM filed an amicus brief, agreeing that "now" is the time to "correct" this Court's "clearly erroneous" decisions in *Engle* and *Douglas*. (PM Br.15).

As Judge Pryor noted, the *Engle* defendants' arguments include logic fallacies, like the straw man argument made in *Graham*, 857 F.3d at 1185. This too is a straw man argument because it assumes that the law of receding from precedent applies. The *Engle*

[8] Westlaw search: "stare decisis" & DA(aft 2019).

defendants cite no case extending the doctrine to allow a party to relitigate issues after the highest appellate court with jurisdiction has made its final ruling. Indeed, this Court has declined to recede from *Douglas* on numerous occasions.[9] As explained above, the *Engle* defendants' argument is simply an improper attempt to relitigate.

In an abundance of caution, however, we explain that, even if a party could repurpose this doctrine to relitigate issues decided with finality, the *Engle* defendants' attempt fails for multiple reasons.

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[9] Many (but not all) of the *Engle* defendants' filings are now available on Westlaw. *See* Brief on Jurisdiction, *Philip Morris v. Tullo*, 2013 WL 6844505, at *7-8 (Fla. Oct. 28, 2013); Brief on Jurisdiction, *R.J. Reynolds v. Buonomo*, 2014 WL 671026, at *7-8 (Fla. Jan. 21, 2014); Brief of Petitioner, *R.J. Reynolds v. Marotta*, 2016 WL 1722005, at *39-46 (Fla. Apr. 27, 2016); Brief on Jurisdiction, *Philip Morris v. Allen*, 2017 WL 5998694, at *10 (Fla. Nov. 27, 2017); Defendants/Petitioners' Response to Court's Show Cause Order, *Philip Morris v. Lourie*, 2017 WL 10439053, at *3 (Fla. May 10, 2017); Answer Brief, *Irimi v. R.J. Reynolds*, 2018 WL 6199591, at *44-45 (Fla. Nov. 19, 2018); Petitioners' Response to Court's Show Cause Order, 2018 WL 834871, at *5 (Fla. Feb. 5, 2018); Petitioners' Response to Order to Show Cause, *R.J. Reynolds v. Ahrens*, 2018 WL 843977, at *3 (Fla. Feb. 5, 2018); Respondent's Response to Order to Show Cause, *Grossman v. R.J. Reynolds*, 2018 WL 834868, at *3 (Fla. Feb. 5, 2018); Petitioner's Response to Order to Show Cause, *R.J. Reynolds v. Dion*, 2018 WL 843986, at *2-3 (Fla. Feb. 5, 2018).

A pivotal failing, which we explain later, is that the *Engle* defendants have not met the "clearly erroneous" standard. *See, e.g., Wilsonart, LLC v. Lopez*, 2020 WL 7778226, at *2 (Fla. Dec. 31, 2020); *Thompson v. DeSantis*, 301 So. 3d 180, 184 (Fla. 2020); *see generally Brown v. Nagelhout*, 84 So. 3d 304, 309 (Fla. 2012).

Even if they had, receding from precedent is not automatic. Various considerations "set a high (but not insurmountable) bar for overruling a precedent, and they therefore limit the number of overrulings and maintain stability in the law." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J. concurring).

One such consideration is whether overruling the prior decision would unduly upset reliance interests. *State v. Poole*, 297 So. 3d 487, 507 (Fla. 2020). In *Knight v. State*, 286 So. 3d 147, 154 (Fla. 2019), this Court explained that reliance interests are lower in cases that address procedural and evidentiary rules because those cases "do not 'serve as a guide to lawful behavior.'" *Id.* at 154 (quoting *United States v. Gaudin*, 515 U.S. 506, 521 (1995)). In contrast, precedent that addresses property and contract rights binds others who are faced with the same circumstance, causing them to change legal positions regarding those rights in reliance on precedent. *Poole*, 297

So. 3d at 507. This circumstance risks serious injustice, and so militates against receding from precedent. *Brown*, 84 So. 3d at 309-310.

The *Engle* defendants rely on this language to claim that the reliance interests are minimal here because the preclusive effect of the *Engle* findings "is exactly the sort of 'procedural [or] evidentiary rule[ ]' that does not engender reliance issues that count for purposes of stare decisis." (AB.40). That argument fails for three reasons.

First, this Court's reliance discussion makes our earlier point that the context here is altogether different. None of the circumstances described involve a party relitigating an issue that has already been decided with finality between the same parties. The factual underpinning of the reliance consideration is the impact of an appellate decision on non-parties.

Second, "[the] doctrine of res judicata is not a mere matter of practice or procedure.... 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...." *Hart Steele Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917) (quotation omitted). The Supreme Court's words are even more compelling now, "in view

of today's crowded dockets." *Federated Dept. Stores, Inc. v Moitie*, 452 U.S. 394, 402 (1981).

Preclusion here 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, avoids significantly longer trials. Absent preclusive effect, every one of the thousands of *Engle* class members would be required to repeat the Phase 1 trial. The court system cannot 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.

Third, the class members have relied on these decisions. At a minimum, the *Engle* defendants ignore the many class members whose appeals are pending. Those class members justifiably relied on this Court's pronouncements in *Engle* and *Douglas* (and more than a decade of the cigarette companies losing this issue) when they invoked the class findings at trial. In every case where the argument is preserved, the verdict would fall.

A change in course at this late date would also expose many more class members to significant attorneys' fees and costs claims.

Here, for example, there were 31 pretrial motions filed, RJR's post-trial filings were 104 pages long (508 with attachments), 4 days of hearings and 15 days of trial, an appeal including 9 legal issues, and review by this Court. In all, 7 law firms and at least 20 lawyers have appeared on behalf of RJR and PM, including Arnold & Porter Kaye Scholer; Boies Schiller Flexner; Hill Ward Henderson; Jones Day; Moseley, Prichard, Parrish, Knight & Jones; Shook, Hardy & Bacon; and Smith Gambrell & Russell.

The three defense briefs offer no other substantive arguments. Instead, they attempt two claims of negative consequences caused by *Engle III*.

First, the amicus brief submitted by the Florida Justice Reform Institute catalogs a list of horribles that will flow from the *Engle III* decision. This is not new. The *Engle* defendants have been forecasting doom since this Court issued *Engle III* in 2006. Contrary to these "sky is falling" fears, nothing during the last 14-plus years suggests that the issue in this unique set of cases has arisen outside the context of *Engle* litigation in Florida. This is because, as this Court emphasized, the procedural posture of the *Engle* litigation is

"unique and unlikely to be repeated." *Engle III*, 945 So. 2d at 1270 n.12.

Second, and remarkably, both amicus briefs claim that the partial decertification generated the extensive litigation in Florida's appellate courts. This is a false cause (or "post hoc") fallacy because it assumes a cause for an event where there is no evidence that one exists.[10] Logic fallacies like this are meaningless.

Indeed, closer examination makes clear it is wrong. The proliferation of *Engle* progeny appeals has nothing to do with the preclusive effect of the *Engle* findings. Rarely (perhaps never) has there been a litigant who has raised as many appellate issues, in effect reshaping Florida jurisprudence. A few examples:

- Hearsay, state of mind exception: *R.J. Reynolds v. Hamilton*, 2021 WL 509654 (Fla. 4th DCA 2021).
- Witness credibility: *Philip Morris v. Chadwell*, 306 So. 3d 174 (Fla. 3d DCA 2020).
- Expert testimony required to prove medical causation: Petitioners' Brief, *Philip Morris v. Santoro*, 2020 WL 6115495 (Fla. Oct. 9, 2020).
- The law of the case: *R.J. Reynolds v. Howard*, 286 So. 3d 936 (Fla. 2d DCA 2019).

[10] *See* https://www.merriam-webster.com/dictionary/post%20hoc%2C%20ergo%20propter%20hoc.

- Withdrawal of comparative negligence defense: *R.J. Reynolds v. Schlefstein*, 284 So. 3d 584 (Fla. 4th DCA 2019).
- Prejudgment interest on taxable costs. *R.J. Reynolds v. Lewis*, 275 So. 3d 747 (Fla. 5th DCA 2019).
- Hearsay, doctor's statements to husband: *Philip Morris v. Gloger*, 273 So. 3d 1046 (Fla. 3d DCA 2019).
- Intentional tort exception, waiver: *R.J. Reynolds v. Thomas*, 264 So. 3d 199 (Fla. 4th DCA 2019).
- Adult children damages: *Odom v. R.J. Reynolds*, 254 So. 3d 268 (Fla. 2018).
- Intentional tort exception to apportionment: *Schoeff v. R.J. Reynolds*, 232 So. 3d 294 (Fla. 2017).
- Punitive damages ratio to compensatory damages: *Schoeff v. R.J. Reynolds,* 232 So. 3d 294 (Fla. 2017).
- Juror nondisclosure: *R.J. Reynolds v. Allen*, 228 So. 3d 684 (Fla. 1st DCA 2017).
- Hearsay, public records exception: *Philip Morris v. Pollari*, 228 So. 3d 115 (Fla. 4th DCA 2017).
- Jury selection process: *R.J. Reynolds v. Grossman*, 211 So. 3d 221 (Fla. 4th DCA 2017).
- Improper closing argument: *R.J. Reynolds v. Calloway*, 201 So. 3d 753 (Fla. 4th DCA 2016).
- Jury cause challenge: *Philip Morris v. Putney*, 199 So. 3d 465 (Fla. 4th DCA 2016).
- Statute of repose: *Hess v. Philip Morris*, 175 So. 3d 687 (Fla. 2015).
- Jury deadlock: Initial Brief, *Philip Morris v. Caprio*, 2015 WL 10352948 (Fla. 4th DCA Dec. 10, 2015).

The real reason for the volume of appellate litigation is the intentional litigation strategy of these defendants. Its implementation (and success) was well-described by outside counsel for RJR in a 1988 memorandum:

> [T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making that other son of a bitch spend all his.

Smith v. R.J. Reynolds Tobacco Co., 630 A.2d 820, 826 n.7 (N.J. App. 1993) (quoting RJR memo); *see also* (SA209). The same is true of the *Engle* litigation. (SA216, 222) ("RJR Tobacco and its affiliates… have not settled, and currently… do not intend to settle, any smoking and health tobacco litigation claims. It is the policy of RJR Tobacco and its affiliates to vigorously defend all tobacco-related litigation claims."); ("Each of the [PM companies] has defended, and will continue to defend, vigorously against litigation challenges.").

In the *Engle* litigation, the *Engle* defendants appeal almost every verdict, no matter the size.[11] In contrast, the *Engle* class members rarely appeal.

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[11] For example, the three tobacco defendants in *Philip Morris v. Weingart,* No. 4D11-3878, appealed a judgment in which the jury found the plaintiff 91% at fault and awarded no damages. (SA162). After the trial court granted an additur of $150,000, the net judgment against the three tobacco defendants was $4,500 each. Thus, by the time the defendants paid the filing fee and paid their lawyers to

F. Res judicata applies because the "thing adjudicated" in *Engle* Phase 1 was the conduct elements of the same causes of action between the same parties.

The *Engle* defendants have 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 their argument to demand an *ex post facto* artificial deconstruction of the *Engle* findings. This Court correctly explained that this dichotomy is beside the point because the "thing adjudicated" in *Engle III* was the set of approved conduct elements of the class members' causes of action—negligence, strict liability, fraudulent concealment and conspiring to conceal. *Douglas*, 110 So. 3d at 427-28.

The *Engle* defendants' arguments all rest on their core claim that "the *Engle* record makes it impossible to determine whether the *Engle* jury in fact decided anything relevant to the claims of any particular *Engle*-progeny plaintiff." (AB.48). This, in turn, 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.

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perfect the appeal and record, they had already spent more than was at issue.

As *Douglas*, *Walker*, etc. recognized, "adjudication" is not conducting a brain scan to determine what the prior jury must have been thinking when it answered the Phase 1 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. 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.

Plus, the *Engle* defendants' claim is a virtual impossibility given the jury's constant awareness that their role in Phase 1 of the class trial was to determine the conduct of the tobacco industry directed to the class as a whole. As summarized by Judge Pryor in *Graham*:

> The smokers presented a substantial body of evidence that all of the cigarettes manufactured by the named defendants contained carcinogens that cause disease, including cancer and heart disease, and that nicotine addicts smokers. *Douglas,* 110 So. 3d at 423. They presented evidence that the tobacco companies "failed to address the health effects and addictive nature of cigarettes, manipulated nicotine levels to make cigarettes more addictive, and concealed information about the dangers of smoking." *Id.*

857 F.3d at 1175.

While the *Engle* defendants cite 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 1 was limited to determining issues that applied to the class as a whole. As both this Court and the Eleventh Circuit has found, the purpose of Phase 1 was to address claims of misconduct that applied to every member of the class, and the parties focused their arguments accordingly. 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.

Further proof of the class-wide adjudication in Phase 1 is the verdicts for the named class representatives. In the original *Engle* litigation, based on the Phase 1 findings, the jury awarded compensatory damages to the named plaintiffs in Phase 2A, a

judgment adverse to the *Engle* defendants that was upheld on all appeals. *Engle III*, 945 So. 2d at 1255-56; *Engle*, 552 U.S. 941.

We also note that the *Engle* defendants accept that the first question (whether cigarettes cause cancer and other diseases) and the second question (whether cigarettes that contain nicotine are addictive) were specific enough to yield binding findings of fact. (AB.45-47; PM Br.6-7). Each of the ensuing questions about negligence, strict liability, and concealment similarly addressed the ***conduct*** of the tobacco companies in the sale of ***all*** cigarettes in the relevant period.

It does not follow that because some cigarettes had additional defects (e.g., being mentholated, or sold as "light," or having air holes to compound the entry of nicotine into the lungs), the common defects found as to all of the *Engle* defendants' cigarettes cease to apply. Or that because the concealment conspiracy was a broad attack on the public's knowledge that spanned fifty years, the common conduct found as to all of the *Engle* defendants ceases to apply.

Accordingly, the *Engle* trial "court ruled that the evidence supported a finding that *all* of the tobacco companies' cigarettes were

defective even if some of the cigarettes had brand-specific dangers." *Graham,* 857 F.3d at 1177 (emphasis in original). The evidence, "the court ruled," further supported "a finding that the tobacco companies were negligent in producing and selling *all* of their cigarettes." *Id.* at 1178 (emphasis in original). Similarly, the *Engle* trial court found sufficient evidence to support class-wide findings on counts of fraudulent concealment and conspiracy. (A11) ("Abundant evidence was adduced at trial to support … the jury verdict of the Count of Fraud and Misrepresentation."); *id.* ("The Court finds sufficient and more than adequate evidence to … support the jury verdict that the defendants acted in concert to misinform and deceive.").

PM's amicus brief makes another argument, challenging the concealment and conspiracy findings on the basis that the verdict form asked the jury to determine whether the *Engle* defendants concealed the health effects of smoking, its addictive nature, or both. (PM Br.11 n.7). This theory is nonsensical. Addiction and disease are inextricably intertwined not only because addiction leads to disease, but because concealing addiction *is* concealing disease, and vice versa. Both addiction *and* disease are central to the structure of *Engle* cases; the very first burden on *Engle* progeny plaintiffs is to

show that they are class members by proving they have a disease caused by cigarettes and that they are addicted to cigarettes. *See, e.g., Douglas,* 110 So. 3d at 426 n.4.

For all these reasons, this Court and the Eleventh Circuit unequivocally held: "'the Phase I verdict against the *Engle* defendants resolved all elements of the claims that had anything to do with the *Engle* defendants' cigarettes or their conduct.'" *Graham*, 857 F.3d at 1179 (quoting *Douglas*, 110 So. 3d at 432).

G. The *Engle* defendants' argument fails because they have not provided this Court with the *Engle* class action trial record.

As explained above, this Court held in *Engle* and *Douglas* that the trial record shows that all parties, the trial court, and the jury knew that these questions were being argued and decided on a global basis applying to all class members, regardless of the brands, the time periods they smoked, and the *Engle* defendants' fraudulent concealment conduct. Those decisions were based on review of the original *Engle* Phase 1 record which consisted of a year's worth of trial testimony (nearly 38,000 transcript pages), 150 witnesses, and thousands of exhibits. *Douglas,* 110 So. 3d at 424, 431.

Reconsideration of this Court's prior factual conclusion requires review of the entire record again, but the *Engle* defendants did not provide it. Instead, they provide 27 pages of transcript, cited in isolation. For this reason alone, the *Engle* defendants' argument fails. Without the trial record, this Court cannot reconsider the evidentiary basis for its previous decisions. *See Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1980) (holding that, without an adequate record, review is futile); *Esaw v. Esaw*, 965 So. 2d 1261, 1264-65 (Fla. 2d DCA 2007) (opinion by Canady, J.) ("The appellant has the burden of providing a proper record to the reviewing court, and the failure to do so is 'usually fatal' to the appellant's claims.").

While we have provided some additional trial transcript excerpts in support of the Court's previous two decisions, we are not able to locate the full record from the 1990s trial. It is our understanding that it was destroyed years ago.

H. *Engle* and *Douglas* do not violate due process.

1. The nomenclature of the preclusion doctrine does not drive the due process inquiry.

The *Engle* defendants' due process argument is premised on a debate as to the nomenclature of preclusion doctrines. This too is a straw man argument.

The purpose of preclusion doctrines is "protecting against the relitigation of common issues or the piecemeal resolution of disputes." *Richards v. Jefferson Cnty.*, 517 U.S. 793, 797 (1996). Due process requires only that rules of preclusion avoid "extreme applications" that are "inconsistent with a federal right that is 'fundamental in character.'" *Jefferson Cnty.*, 517 U.S. at 797 (citing *Postal Tel. Cable Co. v. City of Newport, Ky*, 247 U.S. 464, 475 (1918)); *see also Parklane Hosiery Co. v Shore*, 439 U.S. 322, 328 (1979) (stating that the "most significant safeguard" of due process is "whether the party against whom [preclusion] is asserted had a full and fair opportunity to litigate") (citation omitted).

Where a party has been furnished notice and a fair and full opportunity to be heard, the "minimum procedural requirements" of

due process have been satisfied, *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 481-82 (1982), and even unorthodox preclusion rules pass constitutional muster, *see Parklane Hosiery*, 439 U.S. at 328 (approving non-traditional application of preclusion rules against a party that was provided an opportunity to be heard); *Blonder-Tongue Labs, Inc., v. University of Ill. Found.*, 402 U.S. 313, 329-30 (1971) (allowing non-traditional application of preclusion rules when the party was afforded an "opportunity for full and fair trial").

The three defense briefs do not even cite *Parklane, Blonder-Tongue, or Kremer*—the controlling cases on the due process boundaries of preclusion—or in any way distinguish them.

Instead, RJR claims that the Constitution essentially freezes in place the laws of preclusion because traditional practice provides a touchstone for constitutional analysis and, therefore, any deviation carries a presumption of unconstitutionality. (AB.42) (citing *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994)). Yet the case cited for the latter proposition expressly disclaims it: "Of course, not all deviations from established procedures result in constitutional infirmity.... [T]o hold all procedural change unconstitutional would be to deny every quality of the law but its age, and to render it

incapable of progress or improvement." *Oberg,* 512 U.S. at 430-31 (internal quotation marks and citation omitted). Due process does not and cannot mandate adhering to the ancient strictures of the common law. *Cf. Rogers v. Tennessee,* 532 U.S. 451, 466-67 (2001) (holding that a state's decision to discard a longstanding common law rule was "a routine exercise of common law decisionmaking in which the court brought the law into conformity with reason and common sense.").

The *Engle* defendants' errant argument turns on a long-forgotten scrap of dicta from an inapposite decision, *Fayerweather*, 195 U.S. at 307. In *Fayerweather,* the Supreme Court concluded that an inheritance contest fully litigated in state court barred a later attempt to reopen the contest in federal court. *Id.* at 306. The Supreme Court had ***no occasion*** to decide what sorts of preclusion rules might violate due process. The Supreme Court has never cited *Fayerweather* for the proposition attributed to it by the *Engle* defendants. *Fayerweather* plays no role in modern preclusion law or due process law, and rightly goes unmentioned in *Taylor v. Sturgell*, 553 U.S. 880 (2008), the Supreme Court's most recent comprehensive account of preclusion law.

In reality, the Supreme Court has confined the due process inquiry in the application of preclusion law to the issues of notice and the opportunity to be heard, ascertaining "whether the litigant whose rights have thus been adjudicated has been afforded such *notice* and *opportunity to be heard* as are requisite to the due process which the Constitution prescribes." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (emphasis added).

The *Engle* defendants were afforded both. As Judge Pryor explained:

> The Florida courts provided them notice that the jury findings would establish the "conduct elements of the class's claims," *Douglas*, 110 So. 3d at 429. And the year-long trial provided them "a full and fair opportunity to litigate the issues of common liability in Phase I." *Walker,* 734 F.3d at 1288. Both tobacco companies seized that opportunity, presenting "testimony that cigarettes were not addictive and were not proven to cause disease and that they had designed the safest cigarette possible." *Douglas,* 110 So. 3d at 423. And they continue to contest liability in individual actions by class members, in which new juries determine issues of individual causation, apportionment of fault, and damages. *Id.* at 430; *Engle III*, 945 So. 2d at 1254.

Graham, 857 F.3d at 1184; *accord Burkhart*, 884 F.3d at 1093.

In addition, the *Engle* defendants had every opportunity to propose a workable verdict form that could have provided the specificity they desired, but chose not to do so. Instead, they clung to a fill-in-the-blank, essay-style verdict form that did not comport with Florida law or reality. 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. First, the product is defective; and, second, the defect caused the plaintiffs' injuries." *R.J. Reynolds v. Brown*, 70 So. 3d 707, 717 (Fla. 4th DCA 2011) (citing *Liggett Group, Inc. v. Davis*, 973 So. 2d 467, 475 (Fla. 4th DCA 2007)).

When the *Engle* defendants proposed their 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.

Principle Brief of Appellees, *Walker v. R.J. Reynolds*, 2013 WL 1934840, at *43 (11th Cir. May 1, 2013) (quoting *Engle* transcript). Despite requests from the judge to provide a verdict form with special interrogatories that could be answered "yes/no" consistent with Florida law, the *Engle* defendants refused to do so. (*E.g.*, SA247-49). In failing do so, for whatever strategic reason, the *Engle* defendants accepted the risk of any ambiguity in the jury's answer. *See* Fla. R. Civ. P. 1.1470; *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 objected and submitted a proper special verdict form identifying the theories); *see also Florida E. Coast Ry. Co. v. Gonsiorowski*, 418 So. 2d 382, 384 (Fla. 4th DCA 1982) (to preserve the issue, defendant was required to present a special verdict form). The *Engle* 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.

Judge Pryor explained that, while the robust procedure allowing the *Engle* defendants to contest common liability in the *Engle* Phase 1 trial was critical to due process, equally significant are the ***limits*** of the *Engle* findings. That is, even with those findings:

> [N]o tobacco company can be held liable to any smoker without proof at trial that the smoker belongs to the *Engle* class, that she smoked cigarettes manufactured by the company during the relevant class period, *and* that smoking was the proximate cause of her injury. Every tobacco company must also be afforded the opportunity to contest the smokers' pleadings and evidence and to plead and prove the smokers' comparative fault. Indeed, in this appeal, after the district court instructed it, the jury reduced Graham's damages award for his deceased spouse's comparative fault. And in other *Engle* progeny litigation, tobacco companies have won defense verdicts.

Graham, 857 F.3d at 1185.

On that last point, the underlying trial results speak to the fact that *Engle* defendants have been given ample opportunity to defend their interests. The *Engle* defendants continue to win a significant number of cases. There have now been 364 *Engle* progeny trials.

(SA173-84). Plaintiffs obtained 191 verdicts awarding compensatory damages (52%) including 103 (28%) where punitive damages were also awarded. (SA173-78). The *Engle* defendants have won 113 defense verdicts (36%). (SA179-82). And, if one counts a mistrial as a defense victory, as do the *Engle* defendants, they have prevailed in 173 trials (47%). (SA179-84); (SA210) (PM press release bragging that it "has won or mistried approximately two-thirds of its *Engle* cases to go to trial since the beginning of 2011"); (SA212) (account from shareholder meeting for RJR's parent company noting that C.E.O. bragged that mistrials are "successes").

Even when plaintiffs win a verdict, many are more accurately characterized as defense wins because the damages are low. *See, e.g., Walker*, 734 F.3d at 1286 (noting judgments in two cases at issue were for $7,676.25 and $27,500). (SA185). And juries find plaintiffs, on average, approximately fifty percent at fault, although ten juries found the plaintiff to be 90% or more at fault. (SA186). And, as we explained in our initial brief, the *Engle* defendants often win the claims for fraudulent concealment and conspiracy to conceal.

This is hardly the record of defendants who are being deprived of due process.

In this case, a jury found that cigarettes were responsible for the death of John Price. Even with the *Engle* Phase 1 findings, the jury found for RJR on the fraudulent concealment claim, and placed a significant portion of the responsibility (60%) on Mr. Price himself. (R2:5115).

Consequently, applying the *Engle* findings "in this trial did not violate the tobacco companies' rights to due process of law." *Graham*, 857 F.3d at 1184.

2. The facts underling the *Engle* findings have been independently established in other final proceedings.

Nor is there anything exceptional about the approved *Engle III* findings themselves. Take, for instance, the first finding that cigarette smoking causes several diseases, including lung cancer. *Engle III,* 945 So. 2d at 1277. This finding of fact was also made in another case against the *Engle* defendants. *United States v. Philip Morris,* 449 F. Supp. 2d 1, 147 (D.D.C. 2006), *aff'd in pertinent part,* 566 F.3d 1095 (D.C. Cir. 2009), *cert. denied,* 561 U.S. 1025 (2010) ("Cigarette smoking causes lung cancer."). The second *Engle III* finding is also non-controversial: nicotine is addictive. 945 So. 2d at 1277. This fact, too, was found in the government's civil RICO action:

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

449 F. Supp. 2d at 208-09.

The *Engle* defendants claim it is unconstitutional to lend preclusive effect to other *Engle III* findings on the cigarette companies' long-running conspiracy to fraudulently conceal that their cigarettes are dangerously defective. 945 So. 2d at 1277. But, again, the government's RICO action yielded parallel conclusions that the *Engle* defendants:

> intentionally maintained and coordinated their position on addiction and nicotine as an important part of their overall efforts to influence public opinion and persuade people that smoking was not dangerous; in this way, the cigarette company Defendants could keep more smokers smoking, recruit more new smokers, and maintain or increase their earnings. Additionally, Defendants have sought to discredit evidence of addiction in order to preserve their "smoking is a free choice" argument in smoking and health litigation.

449 F. Supp. 2d at 209.

As the D.C. District Court found across an entire volume of the federal reporter, addiction and disease are not only intertwined but the obfuscation of each was at the heart of the longstanding conspiracy to conceal the dangers of cigarettes. Today, the *Engle* defendants are under federal court order to publish corrective statements acknowledging, among other things, that cigarettes are dangerous, nicotine is addictive, and "low tar" and "light" cigarettes are no safer than any other cigarette. *See United States v. Philip Morris,* 801 F.3d 250, 254 (D.C. Cir. 2015). This extraordinary remedial order was justified by the conspiratorial fraud to obscure danger *and* addiction. *See id.* at 253-54.

There is nothing extraordinary or offensive about this Court according preclusive effect to a set of facts that have been demonstrated here as elsewhere.

3. The *Engle* defendants ignore the plaintiffs' right to due process.

The *Engle* defendants' 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 the *Engle* defendants'

arguments does not mean that this litigation will disappear. Instead, it means that, after 27 years, every class member will effectively have to start over in proving the *Engle* defendants' 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 almost all of the few remaining class members will die of their cigarette-induced disease before their cases ever go to trial. Also, because these are people who started smoking as early as the 1930s, many times their family members have passed away too, thereby eliminating a possible wrongful death action.

Combined with the *Engle* defendants' propensity to delay litigation and payment of judgments as long as possible, each additional barrier to finality is especially troublesome. And the practical result for the court system would be to exponentially increase the burden presented by this litigation. In sum, the ruling sought by the *Engle* defendants here would defeat the original purpose for trying the misconduct of the *Engle* defendants as a class action and return the remaining *Engle* progeny cases to the starting line. Due process does not require such an unfair result.

PM's amicus brief disagrees, claiming that the *Engle* findings do not shorten the length of the progeny trials. In support, PM says that its four non-*Engle* trials were shorter, on average, than all of its *Engle* trials. There are three problems with this argument.

First, a data pool of only four trials is far from sufficient to draw any statistical conclusions. *See* Sample Size Determination, https://en.wikipedia.org/wiki/Sample_size_determination (last viewed, Mar. 1, 2021).

Second, this argument is another false cause (or "post hoc") fallacy because it assumes a cause for an event where there is no evidence that one exists. Indeed, there are many other factors that are potentially responsible for those four non-*Engle* trials being shorter. For example, a plaintiff may have not pursued some of the claims typically brought in the *Engle* progeny trials. In the first case listed by PM, the plaintiff dropped two claims—fraudulent concealment and the conspiracy to conceal. Verdict, *Whitney v. Philip Morris*, 2013 WL 6162038 (Fla. Cir. Ct. June 19, 2013). Perhaps something similar happened in the other three cases, like in the *Douglas* case where the plaintiff did not pursue punitive damages. 110 So. 3d at 425.

Regardless, this spurious correlation seems improbable. PM never explains how, on the one hand, the *Engle* findings allow the progeny juries to "assume" that these elements of the plaintiff's claims are satisfied (without giving the *Engle* defendants "a fair chance to contest" them) (AB.42-43), and on the other hand the non-*Engle* trials are shorter when the plaintiff has to prove the existence of negligence and a defective product and the five decades of the fraudulent concealment conspiracy, over the *Engle* defendants' vigorous defense.

We note also that *Whitney* is an example of the real impact of delay in this litigation. The First District reversed PM's verdict, *Whitney*, 157 So. 3d at 314, but Karen Whitney died from lung cancer before her case was able to be retried. (SA163). The *Engle* defendants count this as a victory. (SA210, 212).

I. This Court should once again decline the *Engle* defendants' invitation to undo *Engle III*'s application of preclusion law.

The *Engle* defendants also reprise their challenge to this Court's use of the term "res judicata," rather than "issue preclusion," in describing the *Engle* jury's findings. In this round of briefing, the *Engle* defendants cite select snippets of Judge Pryor's opinion in

Graham, like that the terminology was "unorthodox." *Graham*, 857 F.3d at 1183-84. But they omit that Judge Pryor did not take issue with *Engle III* or *Douglas* for this, noting that "[t]he preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years." *Id.* at 1184.

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. The "fiscal and administrative burdens" entailed in the *Engle* defendants' claimed right to endless re-trials weigh in the balance against it. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). *Engle* preclusion accommodates the interests of access, efficiency, and economy.

This Court 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*, 110 So. 3d at

433-34, 429 (collecting cases and treatises approving multi-phase class litigation); *see also 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). This Court decided that claim preclusion is the proper concept because the same parties are involved and 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 *Engle* defendants were negligent, manufactured unreasonably dangerous and defective products, and engaged in a fifty-year conspiracy to fraudulently conceal this information from the American public. *Id.* at 432-33.

In this way, the Court preserved the function of the class action, which is deciding common issues for all class members, once and only once—despite decertifying the class. *See Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 107 (Fla. 2011); Fla. R. Civ. P. 1.220(a)(2). It effectively made each progeny suit a continuation of the class action, similar to damage determinations that have to be made in some class actions. *See Sosa*, 73 So. 3d at 113. While the class was decertified and class members were directed to file progeny

actions to complete their individual claims, the fact remains that not only were the *Engle* defendants parties to the *Engle* final judgment, but so, too, was each class member, including John Price. *See Soffer v. R.J. Reynolds,* 187 So. 3d 1219, 1224 (Fla. 2016) (approving observation in lower court opinion (that was otherwise quashed) that "[p]rogeny plaintiffs wear the same shoes, so to speak, as the plaintiff in *Engle* because they are the plaintiffs from *Engle*").

The progeny cases are logical and predictable extensions of the Phase 1 adjudication. Other than the fact that they do not all burden the same trial court and proceed under different case numbers, it is hard to distinguish an *Engle* progeny trial from the Phase 3 proceedings envisioned in the class trial plan. Although most class members drop the two breach of warranty claims, experience is otherwise consistent with this Court's observation that class members merely "pick up litigation of the approved six causes of action right where the class left off -- i.e., with the *Engle* defendants' common liability for those claims established." *Douglas*, 110 So. 3d at 432.

The *Engle* defendants' attempt to avoid this by claiming that this Court's statement in *Douglas* that the findings would be "useless" if

the Court had meant issue preclusion, 110 So. 3d at 433, means that the Court had been unable to determine from the record of the year-long *Engle* Phase 1 trial whether the findings applied to all of the *Engle* defendants' cigarettes and their fraudulent concealment conspiracy. Rather, this Court clearly meant that they would be useless in terms of saving any time and effort to avoid relitigation in the progeny actions because each class member would be "required to 'trot out the class action trial transcript to prove applicability of the phase I findings.'" *Id.* (*R.J. Reynolds v. Martin,* 53 So. 3d 1060, 1067 (Fla. 1st DCA 2010)). *Douglas* simply made clear that this issue had already been fully litigated and decided against the *Engle* defendants in *Engle III* and, therefore, was not subject to relitigation in each progeny case on remand.

CONCLUSION

On issue one, we ask the Court to quash the decision of the First District in *Prentice*, and to approve the decisions in *Chadwell* and *Burgess*. At a minimum, *Prentice* should be quashed because the jury instruction given here was not an abuse of discretion; it adequately addressed the applicable legal standard.

Alternatively, on issue two, we ask this Court to quash the First District's decision in part because it erroneously granted a new trial on all actions and claims, not just the concealment and conspiracy actions, particularly since RJR did not even make such a broad request.

Finally, on issue three, this Court should decline the *Engle* defendants' invitation to reconsider its previous two decisions rejecting these very same arguments challenging the preclusive effect of the Phase 1 findings.

GREGORY D. PRYSOCK
Florida Bar No. 0062420
KATHERINE M. MASSA
Florida Bar No. 0078316
ANTONIO LUCIANO
Florida Bar No. 105342
MORGAN & MORGAN, P.A.
76 S. Laura Street, Suite 1100
Jacksonville, FL 33202
Tel: (904) 398-2722
gprysock@forthepeople.com
kmassa@forthepeople.com
tluciano@forthepeople.com

KEITH R. MITNIK
Florida Bar No. 0436127
MORGAN & MORGAN, P.A.
P.O. Box 7979
Orlando, FL 32808
Tel: (407) 849-2383

/s/Celene H. Humphries
CELENE H. HUMPHRIES
Florida Bar No. 884881
THOMAS J. SEIDER
Florida Bar No. 86238
SHEA T. MOXON
Florida Bar No. 12564
BRANNOCK HUMPHRIES & BERMAN
1111 W. Cass Street, Suite 200
Tampa, FL 33606
Tel: (813) 223-4300
chumphries@bhappeals.com
tseider@bhappeals.com
smoxon@bhappeals.com
Secondary:
tobacco@bhappeals.com

Counsel for Petitioner

kmitnik@forthepeople.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via the Florida Court's E-Filing Portal on all counsel in the Service List below on this 1st day of March 2021.

SERVICE LIST

Counsel for Respondent:

Jason T. Burnette
Jones Day
1420 Peachtree St., N.E.,
Suite 800
Atlanta, GA 30309
jtburnette@JonesDay.com
Secondary:
ecbaker@jonesday.com
Secondary:
emcarter@jonesday.com

Charles R.A. Morse
Jones Day
250 Vesey Street
New York, NY 10281
cramorse@jonesday.com

Troy A. Fuhrman
Marie A. Borland
Hill Ward Henderson
101 E. Kennedy Blvd., Suite
3700 Tampa, FL 33602
troy.fuhrman@hwhlaw.com
marie.borland@hwhlaw.com

Amicus Counsel for Philip Morris USA:

Jesse Pannuccio
Boies Schiller Flexner LLP
401 E. Las Olas Blvd., Suite 1200
Ft. Lauderdale, FL 33301
jpanuccio@bsfllp.com

Geoffrey J. Michael
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave. N.W.
Washington, DC 20001
geoffrey.michael@arnoldporter.com

Amicus Counsel for Florida Justice Reform Institute:

William W. Large
Florida Justice Reform Institute
210 S. Monroe St.
Tallahassee, FL 32301
william@fljustice.com

Christine R. Davis

Secondary:
reynolds@hwhlaw.com

Joseph H. Lang, Jr.
Carlton Fields, P.A.
215 S. Monroe St., Suite 500
Tallahassee, FL 32301
cdavis@carltonfields.com
jlang@carltonfields.com
sdouglas@carltonfields.com
kathompson@carltonfields.com
tpaecf@cfdom.net

/s/Celene H. Humphries
CELENE H. HUMPHRIES
Florida Bar: 884881

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b). This brief contains 15,722 words. Petitioner has simultaneously filed a request to exceed and the word limitation requirements of Florida Rule of Appellate Procedure 9.210(a)(2)(B).

/s/Celene H. Humphries
CELENE H. HUMPHRIES
Florida Bar: 884881