No.

IN THE
Supreme Court of the United States

PHILIP MORRIS USA INC. AND LIGGETT GROUP LLC,

Petitioners,

v.

RICHARD BOATRIGHT AND DEBORAH BOATRIGHT,

Respondents.

On Petition For A Writ Of Certiorari To The Florida Second District Court Of Appeal

PETITION FOR A WRIT OF CERTIORARI

ANDREW L. FREY
LAUREN R. GOLDMAN
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2500

Counsel for Petitioner Philip Morris USA Inc.

MIGUEL A. ESTRADA
Counsel of Record
AMIR C. TAYRANI
BRANDON L. BOXLER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Petitioner Philip Morris USA Inc.

[Additional counsel listed on signature page]

QUESTION PRESENTED

The Florida Supreme Court has devised a new, class-action-specific doctrine of claim preclusion in order to facilitate the classwide adjudication of inherently individualized claims. Under this unprecedented approach to preclusion, the members of an issues class can rely on the class jury's findings to establish elements of their claims in individual suits against the class-action defendants without having to show that the class jury *actually* decided those issues in their favor. For preclusion to apply, it is sufficient that the class jury *might* have decided those issues. According to the Florida Supreme Court, this unorthodox approach to the preclusive effect of class-action findings is consistent with due process because the defendants had an "opportunity to be heard" in the class proceedings.

The question presented is whether the Due Process Clause is violated by a rule that permits plaintiffs to invoke a prior jury's findings to establish elements of their claims without showing that those elements were actually decided in their favor in the prior proceeding, based merely on the fact that the defendant had an opportunity to be heard on those issues in the prior proceeding and the possibility that the relevant issues might have been decided in the plaintiffs' favor in that proceeding.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Philip Morris USA Inc. is a wholly owned subsidiary of Altria Group, Inc. No publicly held company owns 10% or more of Altria Group, Inc.'s stock.

Liggett Group LLC is a wholly owned, indirect subsidiary of Vector Group Ltd. Vector Group Ltd. is the only publicly held company that owns 10% or more of the membership interest in Liggett. No publicly held company owns 10% or more of Vector Group Ltd.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Philip Morris USA Inc. ("PM USA") and Liggett Group LLC ("Liggett") respectfully submit this petition for a writ of certiorari to review the judgment of the Florida Second District Court of Appeal.

OPINIONS BELOW

The opinion of the Florida Second District Court of Appeal is reported at 217 So. 3d 166. Pet. App. 1a. The order of the Florida Supreme Court denying review is unreported but is electronically available at 2018 WL 3090430. *Id.* at 17a.

JURISDICTION

The judgment of the Florida Second District Court of Appeal was entered on April 12, 2017. The Florida Supreme Court denied petitioners' timely petition for review on June 22, 2018. Although the Florida Second District Court of Appeal "remand[ed] for the trial court to enter an amended judgment to reflect the full amount of the jury's verdict" without a reduction based on the allocation of comparative fault, Pet. App. 15a, the judgment is final for purposes of this Court's review, *see NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 n.42 (1982) (judgment final despite remand for recomputation of damages).

On September 14, 2018, Justice Thomas extended the deadline for petitioners to file a petition for a writ of certiorari to November 19, 2018. *See* No. 18A247. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall

any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1, cl. 2.

INTRODUCTION

This Court has repeatedly granted review to guard against abuses of the class-action device, *see Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011), and "extreme applications" of preclusion doctrines, *Richards v. Jefferson Cty.*, 517 U.S. 793, 797 (1996), that sacrifice basic constitutional protections for the sake of efficiency. In this case, the Florida courts compounded the due-process risks inherent in class-action procedures and preclusion rules by using the *combination* of a retroactively certified issues class action and a radical, heretofore-unknown doctrine of "offensive claim preclusion" to facilitate the imposition of hundreds of millions of dollars in judgments against petitioners and other defendants. In so doing, the Florida courts have provided a roadmap for other lower courts eager to use class actions to adjudicate inherently individualized claims long thought unsuitable for classwide resolution.

The Florida courts' unprecedented use of the class-action device in this litigation to adjudicate thousands of individualized tort claims by Florida smokers rests on an equally unprecedented rule of preclusion. For hundreds of years, the common law has required that a party seeking to preclude litigation of an issue demonstrate that the factfinder in the prior proceeding actually decided that "'precise question.'" *E.g.*, *De Sollar v. Hanscome*, 158 U.S. 216, 221-22 (1895) (quoting *Russell v. Place*, 94 U.S. 606, 608 (1876)). And more than a century ago, this Court held that such a showing is required by due process. *See Fayerweather v. Ritch*, 195 U.S. 276, 298-99, 307

(1904). The uniformity with which courts have applied this "actually decided" requirement reflects a universal recognition that it would be fundamentally unfair to preclude a party from litigating an issue based on the outcome of a prior proceeding in which the issue was not "actually litigated *and resolved*." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (emphasis added; internal quotation marks omitted).

But this universally acknowledged rule is no longer the law in Florida. In the name of expediency, the Florida Supreme Court has adopted a previously unknown rule of preclusion for issues class actions that dispenses with the "actually decided" requirement. *See Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 432-33 (Fla. 2013). The result is that members of a Florida issues class can assert a unique form of "claim preclusion" offensively: elements of their claims will be deemed established in subsequent litigation as long as those issues "*might* . . . have been" decided in their favor during the class phase. *Id.* at 432 (emphasis added; internal quotation marks omitted).

What the Florida Supreme Court calls "claim preclusion," however, bears no resemblance to claim preclusion at common law or in any other American jurisdiction today. Claim preclusion traditionally applies only when an *entire* claim was previously tried to judgment, and it bars *any further litigation* of the claim by either party. In those circumstances, there is no need to determine what questions were actually decided in the earlier litigation; all that matters is whether the judgment was procured in a proceeding that met minimum constitutional requirements. But claim preclusion has never applied, as it does now in

Florida, when a party seeks to preclude litigation of certain *elements* of a claim that is still being tried.

In short, the Florida Supreme Court created a doctrine that exhibits none of the hallmarks of claim preclusion and virtually all the hallmarks of issue preclusion—except for the "actually decided" requirement that due process mandates. In so doing, the court jettisoned a common-law procedure that "would have provided protection against arbitrary and inaccurate adjudication," *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430-31 (1994), and replaced it with an "extreme application[ ] of the doctrine of res judicata, *Richards*, 517 U.S. at 797.

Applying the Florida Supreme Court's novel version of claim preclusion for issues class actions, the Florida courts in this case permitted former smoker Richard Boatright and his wife to recover a $35 million personal-injury judgment without any assurance that any jury had ever found that petitioners actually engaged in tortious conduct that caused Mr. Boatright's injuries. On the strict-liability claim, respondents were not required to prove that the cigarettes smoked by Mr. Boatright contained a defect; on the negligence claim, they were not required to prove that petitioners committed negligent acts relevant to Mr. Boatright's smoking history; and on the fraudulent concealment and related conspiracy claims, they were not required to prove that any tobacco-industry statement Mr. Boatright saw or heard fraudulently omitted material information about cigarettes.

Respondents were instead permitted to establish those elements by relying on the jury findings from a prior issues class action, *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam), which found that petitioners manufactured unspecified defective

cigarettes, undertook unspecified negligent conduct, and engaged in (and conspired to engage in) unspecified acts of concealment at some point over a fifty-year period. Under the Florida Supreme Court's claim-preclusion framework, respondents were not required to demonstrate that the *Engle* jury had actually decided in their favor any of the specific issues on which their individual claims rested, which created a serious risk that petitioners were deprived of their property without a finding by any jury—either the jury in *Engle* or the jury in this case—that they engaged in tortious conduct that injured Mr. Boatright. It is hard to conceive of a more blatant departure from the principles of fundamental fairness that animate due process.

The consequences of the Florida Supreme Court's decision to abandon the procedural safeguards of traditional preclusion law are profound: The decertified *Engle* class action has spawned thousands of individual cases, approximately 2,300 of which remain pending in Florida courts. Although only 10% of these "*Engle* progeny" cases have been tried, petitioners and the other defendants in those cases have already paid judgments totaling more than $800 million. This Court should grant review to put a stop to the Florida courts' serial due-process violations, to reinforce the longstanding constitutional limitations on preclusion, and to prevent other state courts, which are increasingly approving the use of issues classes, from following the Florida Supreme Court's aberrant and unconstitutional lead.

To be sure, this Court has had several prior opportunities to review the constitutionality of the preclusion standards applied in *Engle* progeny litigation. *See*, *e.g.*, *Philip Morris USA Inc. v. Douglas*, 571 U.S. 889 (2013) (denying certiorari); *R.J. Reynolds Tobacco*

Co. v. Graham, 138 S. Ct. 646 (2018) (denying certiorari). But this is the Court's first opportunity to review an *Engle* progeny case arising out of a Florida state court after the Eleventh Circuit's decisions in *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169 (11th Cir. 2017) (en banc), and *Burkhart v. R.J. Reynolds Tobacco Co.*, 884 F.3d 1068 (11th Cir. 2018), conclusively rejecting the *Engle* defendants' due-process argument. Now that both the state and federal courts in Florida have definitively rejected all facets of that argument, it is manifestly time for this Court to end the flagrantly unconstitutional *Engle* saga by granting the petition in this case as well as the petition that PM USA and R.J. Reynolds Tobacco Co. are simultaneously filing today in *R.J. Reynolds Tobacco Co. v. Searcy*.

STATEMENT

A. The *Engle* Case

1. The *Engle* class action began in 1994, when six individuals filed a complaint in Miami seeking billions of dollars in damages from petitioners and other tobacco companies. The class ultimately certified encompassed all "Florida citizens and residents," "and their survivors, who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *Douglas*, 110 So. 3d at 422.

Over the defendants' objections, the *Engle* trial court adopted a complex three-phase trial plan, under which the jury would make findings in Phase I on purported "common" issues relating to the defendants' conduct and the general health effects of smoking. *Douglas*, 110 So. 3d at 422. In Phase II, the jury would apply its Phase I findings to the claims of three

individual class members and assess punitive damages for the class. *Id*. In Phase III, new juries would apply the Phase I findings in deciding the claims of the other individual class members. *Id.*

During the year-long Phase I trial, the class advanced a host of disparate factual allegations attacking the defendants' products and conduct over a span of five decades, including many allegations that pertained only to some cigarette designs and brands or at limited times. For example, to support its strict-liability and negligence claims, the class variously asserted that *some* cigarette brands used genetically engineered high-nicotine tobacco; that other brands had high nitrosamine levels, or ammonia, or higher smoke pH than necessary; and that the filters on *some* cigarettes contained harmful components. *See*, *e.g.*, *Douglas*, 110 So. 3d at 423-24; *Engle* Class Opp. to Mot. for Strict Liability Directed Verdict at 3; *Engle* Tr. 11966-71, 16315-18, 27377, 36349-55, 36479-85, 36729-32.[1]

The theories underlying the class's fraudulent concealment and conspiracy to fraudulently conceal claims were equally varied. As class counsel explained during trial, those claims were based on "thousands upon thousands of statements about" cigarettes. *Engle* Tr. 35955. The class's concealment and conspiracy evidence addressed the defendants' alleged failure to disclose, among other things, information about the disease-causing compounds in cigarette smoke, *id.* at 36720-24, the addictive nature of nicotine and its alleged manipulation by the defendants, *id.* at 36483-85, the health risks and addictiveness of low-tar cigarettes, *id.* at 36351-52, and the identity

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[1] A DVD containing the *Engle* record materials cited herein is part of the record below.

and health effects of cigarette additives, *id.* at 36703-05.

There was no suggestion that each of the class's theories related to *all* class members or to *all* of the defendants' products. Class counsel himself asserted that it was "a fallacy that every common issue has to apply to one hundred percent of the class members." *Engle* Tr. 24417-18.

At the conclusion of Phase I, the class made a critical strategic decision: It sought and secured a verdict form that asked the jury to make only generalized findings on each of the torts at issue. *Douglas*, 110 So. 3d at 424-25. The defendants objected on the ground that the jury's responses, if favorable to the class, would be too general to be used by subsequent juries trying the claims of individual class members, who smoked different cigarettes at different times, and saw and heard different advertising and other tobacco-industry statements. *Id.* at 423; *see also Engle* Tr. 35915-16. The trial court nevertheless sided with the class and accepted its non-specific verdict form. *See Douglas*, 110 So. 3d at 423.

The verdict form given to the *Engle* jury does not reveal which of the class's many theories of liability the jury accepted, which it may have rejected, and which it may not even have reached. Instead, it establishes, at most, that each defendant committed unspecified tortious acts at unspecified times during the five decades covered by the trial. On the class's strict-liability claim, the verdict form simply asked whether each defendant "placed cigarettes on the market that were defective and unreasonably dangerous." *Douglas*, 110 So. 3d at 424 (internal quotation marks omitted). Similarly, on the class's negligence claim, the verdict form asked whether each defendant "failed to

exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances." *Id*. at 425 & n.3 (internal quotation marks omitted). As formulated, these questions compelled a "yes" response if the jury agreed with *any* of the class's various theories of defect and negligence.

The verdict-form questions on the class's concealment and conspiracy claims were, if anything, even more problematic. Not only did those questions fail to require the jury to identify the specific ground for any affirmative finding, but they also presented the jury with alternative theories of concealment and conspiracy—asking whether the defendants concealed material information about the "health effects" *or* "addictive nature" of smoking—without requiring the jury to identify whether it adopted one or both theories when it responded affirmatively. *Douglas*, 110 So. 3d at 424.

The jury answered all of these questions with a simple "yes," leaving the parties with no hint as to the specific grounds for its findings. *Douglas*, 110 So. 3d at 423.[2]

In Phase II-A, the same jury determined individualized issues of legal causation as to three named plaintiffs, found liability as to each, and awarded those three plaintiffs compensatory damages. *Engle* Phase II-A Verdict Form. In Phase II-B, the jury awarded a lump sum of $145 *billion* in punitive damages to the class as a whole. *Engle*, 945 So. 2d at 1257.

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[2] The *Engle* jury made only two findings that are specific enough to have meaningful, and constitutional, application in progeny cases: (1) that smoking is a medical cause of twenty specific diseases; and (2) that cigarettes containing nicotine are addictive. *Engle*, 945 So. 2d at 1276-77.

Before Phase III commenced, the defendants appealed.

2. The intermediate appellate court reversed, holding that the case could not be maintained as a class action, and that the punitive-damages award was both premature and excessive. *See Liggett Grp. Inc. v. Engle*, 853 So. 2d 434, 441-42 (Fla. Dist. Ct. App. 2003), *approved in part and quashed in part*, 945 So. 2d 1246 (Fla. 2006).

On further review, the Florida Supreme Court agreed that the punitive-damages award could not stand because there had been no liability finding in favor of the class. *Engle*, 945 So. 2d at 1262-63. It also concluded that "continued class action treatment" was "not feasible because individualized issues such as legal causation, comparative fault, and damages predominate." *Id.* at 1268. Based on "pragmatic" considerations, however, the court further ruled, *sua sponte*, that some of the issues in Phase I of *Engle* were appropriate for class-wide adjudication under Florida's counterpart to Federal Rule of Civil Procedure 23(c)(4), which permits class certification "'concerning particular issues.'" 945 So. 2d at 1268-69 (quoting Fla. R. Civ. P. 1.220(d)(4)(A)). The court retroactively certified the case as an issues class action, and stated that class members could "initiate individual damages actions" within one year of its mandate and that the "Phase I common core findings . . . will have res judicata effect in those trials." *Id.* at 1269.

B. The Florida Supreme Court's Decision In *Douglas*

Pursuant to the Florida Supreme Court's invitation, thousands of individuals alleging membership in the *Engle* class filed claims in Florida state and fed-

eral courts. Approximately 2,300 of these *Engle* progeny cases remain pending in state courts across Florida.

In the immediate aftermath of *Engle*, state and federal courts struggled to give effect to the Florida Supreme Court's "res judicata" language without contravening settled Florida preclusion law or depriving defendants of their due-process rights. In *Douglas*, the Florida Supreme Court expressly considered these questions and concluded that permitting plaintiffs to rely on the *Engle* findings to establish the tortious-conduct elements of their claims does not violate due process. 110 So. 3d at 435. In so doing, the court adopted a new rule of offensive claim preclusion for issues class actions and held that due process is satisfied even if essential elements of *Engle* progeny plaintiffs' claims have never been actually decided in their favor by *any* jury.

The plaintiff in *Douglas* had prevailed on his strict-liability and negligence claims. 110 So. 3d at 425. In considering the defendants' due-process challenge to the judgment, the Florida Supreme Court acknowledged that the class's theories on those claims in Phase I of *Engle* "included brand-specific defects"—*i.e.*, defects that applied to only *some* cigarettes smoked by *some* class members. *Id.* at 423. In fact, the court quoted at length from the *Engle* trial court's ruling denying the defendants' motion for a directed verdict, which had recited the class's evidence that the defendants' cigarettes "'were defective in many ways.'" *Id.* at 424 (quoting *Engle v. R.J. Reynolds Tobacco Co.*, 2000 WL 33534572, at *2 (Fla. Cir. Ct. Nov. 6, 2000)).

The Florida Supreme Court further stated that the *Engle* trial "*also* included proof that the *Engle* defendants' cigarettes were defective because they are addictive and cause disease," and "included" arguments that the defendants were negligent by "fail[ing] to address the health effects and addictive nature of cigarettes." *Douglas*, 110 So. 3d at 423 (emphasis added). The court reasoned that these alternative contentions could have allowed the *Engle* jury to decide the defendants' "common liability to the class." *Id.*

Recognizing that the doctrine of issue preclusion requires proof that an issue was "actually decided," the court concluded that, in light of the disparate theories pursued by the *Engle* class, the generalized Phase I findings would be "useless" to *Engle* progeny plaintiffs if that doctrine were applied. *Douglas*, 110 So. 3d at 433. To salvage the utility of those findings, the court held that the doctrine of "claim preclusion" (which it also referred to as "res judicata") applies when class members sue on the "same causes of action" that were the subject of an earlier issues class action. *Id.* at 432 (emphasis omitted). Under claim preclusion, the court stated, preclusion is applicable to any issue "which *might* . . . have been" decided in the class phase. *Id.* at 433 (emphasis added; internal quotation marks omitted). It was therefore "immaterial" that the "*Engle* jury did not make detailed findings" specifying the basis for its verdict. *Id.* It was sufficient that the *Engle* jury "might" have rendered its defect and negligence findings on a basis pertinent to Mrs. Douglas's smoking history. *Id.*

The Florida Supreme Court further held that this claim-preclusion rule comports with due process. The court reasoned that "the requirements of due process"

in the claim-preclusion setting are only "notice and [an] opportunity to be *heard*"—regardless of what the juries in *Engle* and *Douglas* were asked to *decide*—and found that truncated standard satisfied based on the defendants' opportunity to present a defense in the class proceedings and (on issues not deemed resolved by *Engle*) in the plaintiff's *Engle* progeny case. *Douglas*, 110 So. 3d at 431 (emphasis added); *see also R.J. Reynolds Tobacco Co. v. Marotta*, 214 So. 3d 590, 593 (Fla. 2017) (reaffirming that "the 'res judicata' effect in *Engle* . . . is claim preclusion, not issue preclusion") (citing *Douglas*, 110 So. 3d at 432).

C. The Eleventh Circuit's Decision In *Graham*

Several thousand *Engle* progeny cases were filed in or removed to federal court. In *Graham v. R.J. Reynolds Tobacco Co.*, the en banc Eleventh Circuit concluded in a divided opinion that it is consistent with due process to afford preclusive effect to the *Engle* jury's defect and negligence findings. 857 F.3d at 1185. Notwithstanding *Douglas*'s unambiguous holding that "claim preclusion" is the proper framework and that analyzing the *Engle* findings under "issue preclusion" principles would render them "useless," 110 So. 3d at 433, the Eleventh Circuit majority insisted that the Florida Supreme Court had applied *issue*-preclusion principles and had determined in *Douglas* that the *Engle* jury had actually decided "that *all* cigarettes the defendants placed on the market were defective and unreasonably dangerous" when returning its strict-liability and negligence verdicts, *Graham*, 857 F.3d at 1182.

The en banc majority found support for this conclusion in its own "review[ ]" of "the *Engle* trial record"

and its own determination of the issues actually decided by the *Engle* jury. *Graham*, 857 F.3d at 1182. The *Graham* court thus effectively circumvented the constitutional issue by construing the *Engle* jury's defect and negligence findings, as a factual matter, as bearing upon the claims of *all* class members.

Three judges dissented. Judge Julie Carnes wrote that the *Engle* findings "are too non-specific to warrant them being given preclusive effect in subsequent trials" and that "defendants' due process rights were therefore violated." 857 F.3d at 1191. Judge Wilson agreed. *Id.* at 1314. And in a 227-page dissent, Judge Tjoflat "detail[ed] layer upon layer of judicial error committed by numerous state and federal courts, culminating finally with the Majority's errors." *Id.* at 1214. As he explained, although the Florida Supreme Court has adopted a claim-preclusion rationale that the en banc majority "correctly, albeit implicitly, recognize is unconstitutional," the majority proceeded to apply its own rationale, which "is similarly sullied with constitutional errors." *Id.* at 1302.

A few months later, a panel of the Eleventh Circuit addressed the same due-process question with respect to the *Engle* concealment and conspiracy claims—which had not been at issue in either *Douglas* or *Graham*—and concluded in *Burkhart v. R.J. Reynolds Tobacco Co.* that "treating as preclusive the *Engle* jury's findings as to the conduct elements of" those claims "does not violate due process." 884 F.3d at 1091. But whereas the en banc court in *Graham* had based its decision on a *factual* interpretation of the *Engle* jury's defect and negligence findings, the *Burkhart* panel relied on a *legal* determination, holding that the "Due Process Clause requires *only* that the application of principles of res judicata . . . affords

the parties notice and an opportunity to be heard." *Id.* at 1092 (emphasis added; internal quotation marks omitted). According to the panel, the defendants had received the requisite "opportunity to be heard" during *Engle* because they "had the opportunity to argue the conduct elements of the concealment . . . claims," "had the opportunity to protest the jury instructions," and "enjoyed the benefit of appellate review" of those instructions. *Id.* at 1093.

D. The Proceedings In This Case

Respondents filed this *Engle* progeny action against PM USA and Liggett seeking to recover damages for Mr. Boatright's chronic obstructive pulmonary disease ("COPD") and Mrs. Boatright's loss of consortium. Respondents claimed that Mr. Boatright was an *Engle* class member, and alleged causes of action for strict liability, negligence, fraudulent concealment, and conspiracy to fraudulently conceal. The trial court ruled that, if respondents proved that Mr. Boatright was an *Engle* class member (*i.e.*, that he was addicted to cigarettes containing nicotine and that his addiction was a legal cause of his COPD), he would be entitled to invoke the preclusive effect of the *Engle* findings and would not be required to prove the tortious-conduct elements of his claims at trial. *See* Trial Tr. 5100-01, 5320-25. Accordingly, the verdict form presented to the jury did not require the jury to find that the cigarettes smoked by Mr. Boatright contained a defect, that petitioners engaged in negligent acts, or that they fraudulently concealed, or conspired to fraudulently conceal, material information about cigarettes. *See* R. 79:15716-26.

After respondents presented their case at trial, petitioners moved for a directed verdict on all claims, ex-

plaining that "federal due process [requires] the proponent of preclusion to establish that the specific issue relevant to [her] case was actually decided in her favor in the prior litigation." PM USA Mot. for Directed Verdict at 2 (citing *Fayerweather*, 195 U.S. at 297-98); *see also* Liggett Notice of Adoption and Joinder. That due-process requirement was not met here, petitioners continued, because it is "impossible to determine" whether the *Engle* jury actually decided the conduct elements of respondents' claims. PM USA Mot. at 2. The court denied the motion. Trial Tr. 4647.

The jury found that Mr. Boatright was an *Engle* class member and returned a verdict against PM USA on all four claims and against Liggett on the conspiracy claim. Pet. App. 2a, 6a.[3] The jury awarded a total of $15 million in compensatory damages, as well as $19.7 million in punitive damages against PM USA and $300,000 against Liggett. *Id.* at 6a-7a.

On appeal, petitioners argued, among other things, that the "trial court violated federal due process by permitting [respondents] to use the *Engle* findings to establish the conduct elements of their claims even though it is impossible to determine whether the *Engle* jury resolved anything relevant to Mr. Boatright's claims." PM USA Br. 46-47 (citing *Fayerweather*, 195 U.S. at 307); *see also* Liggett Br. 1 (joining PM USA's arguments). Petitioners acknowledged that "the Florida Supreme Court rejected this argument" in *Douglas*, but explained that they "wish[ed] to preserve it for review by the U.S. Supreme Court." PM USA Br. 47.

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[3] At the close of respondents' case, the trial court granted Liggett's motion for a directed verdict on all claims other than conspiracy. Pet. App. 5a.

The Florida Second District Court of Appeal affirmed with respect to petitioners' appeal. The court concluded that "the acceptance of the Phase I *Engle* findings as res judicata does not violate the *Engle* defendants' right to due process." Pet. App. 14a (citing *Douglas*, 110 So. 3d at 436). The court reversed on respondents' cross-appeal, which challenged the trial court's reduction of the compensatory-damages award based on comparative fault. *Id.* at 15a.

Petitioners thereafter invoked the discretionary jurisdiction of the Florida Supreme Court on the comparative-fault question. "For purposes of preservation," petitioners also "invoke[d] the discretionary jurisdiction of the Florida Supreme Court to review th[e] [Second District's] decision permitting Respondent[s] to invoke the *Engle* Phase I findings" and "continue[d] to maintain that *Douglas* and th[e] [Second District's] decision in this case deny Petitioners their federal due process rights." Notice to Invoke at 2. The Florida Supreme Court denied review. Pet. App. 17a.

REASONS FOR GRANTING THE PETITION

The Florida Supreme Court has devised an unprecedented approach to preclusion that authorizes members of an issues class to invoke the class jury's findings in subsequent litigation to establish every issue that "might . . . have been" decided by the jury, without any showing that those issues were *actually* decided in their favor. *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 433 (Fla. 2013) (internal quotation marks omitted). Applying that rule to the *Engle* litigation, the court held that *Engle* class members can rely on the Phase I jury's highly generalized findings to establish the tortious-conduct elements of their claims without demonstrating that the *Engle* jury actually decided that the cigarettes they smoked

contained a defect, that the defendants' conduct with respect to them was negligent, or that any advertisements or other tobacco-industry statements they saw or heard fraudulently concealed material information about cigarettes. The court called this "claim preclusion" in order to avoid the "actually decided" requirement of issue preclusion, which the court acknowledged could not be met due to the generality of the Phase I findings and the various, disparate theories of liability pursued by the *Engle* class. *Id.*

The Florida Supreme Court's novel rule of offensive claim preclusion for issues class actions represents an "extreme application[ ] of the doctrine of res judicata," *Richards v. Jefferson Cty.*, 517 U.S. 793, 797 (1996), that abandons longstanding common-law restrictions on the use of preclusion that were well-settled by the time the Fourteenth Amendment was adopted and that are still universally followed by every other American jurisdiction (other than the Eleventh Circuit). It also conflicts with *Fayerweather v. Ritch*, 195 U.S. 276 (1904), which holds that due process forbids precluding litigation of an issue unless it is clear that the issue was actually decided in a prior adjudication. *Id.* at 307.

Because the Florida courts in this case were bound to follow *Douglas*—and respondents were therefore permitted to rely on claim preclusion to establish the tortious-conduct elements of their claims at trial—there is a constitutionally unacceptable risk that petitioners are being deprived of their property without respondents' having ever proven each of the elements of their claims to any finder of fact. Preventing such arbitrary deprivations of property is precisely the reason that due process imposes the "actu-

ally decided" requirement on litigants seeking to establish an issue based on the outcome of a prior proceeding. The Court should not countenance that profoundly unfair outcome here—or in any of the 2,300 *Engle* progeny cases that remain to be tried.

I. THE FLORIDA SUPREME COURT'S UNPRECEDENTED APPROACH TO PRECLUSION CONFLICTS WITH LONGSTANDING COMMON-LAW REQUIREMENTS AND THIS COURT'S DUE-PROCESS PRECEDENT.

The Florida Supreme Court's decision in *Douglas* permits respondents and the thousands of other *Engle* progeny plaintiffs to deprive petitioners of their property without any assurance that the plaintiffs have *ever* successfully proven each of the essential elements of their claims in *any* proceeding—and despite the possibility that the *Engle* jury may even have resolved some of those elements *in petitioners' favor*. The "whole purpose" of the Due Process Clause is to protect against this type of "arbitrary deprivation[ ] of liberty or property." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 434 (1994); *see also Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974).

A. The "Actually Decided" Requirement Is Universally Accepted And Constitutionally Mandated Where Preclusion Is Applied To Issues.

1. The common law has long required that a party seeking to establish an issue based on the outcome of a prior proceeding demonstrate with reasonable certainty that the finder of fact in the prior proceeding actually determined the issue. Thus, since at least the 18th century, courts have refused to apply issue preclusion where a verdict from a prior suit *might* have

rested on a ground other than the one on which preclusion is sought. That rule originated with early English authorities, which held that a judgment is not "evidence" of "any matter to be inferred by argument from [it]." *Duchess of Kingston's Case* (H.L. 1776), in 2 Smith, *A Selection of Leading Cases on Various Branches of the Law* 425 (1840); *see also* 2 Coke, *The First Part of the Institutes of the Laws of England; or, a Commentary on Littleton* ¶ 352b (London, W. Clarke 1817) ("[E]very estoppell . . . must be certaine to every intent, and not . . . taken by argument or inference.").

When the Fourteenth Amendment was adopted in 1868, American courts uniformly followed this rule. *See Packet Co. v. Sickles,* 72 U.S. (5 Wall.) 580, 591-93 (1866). At that time, "according to all the well considered authorities, ancient and modern," the "inference" that an issue was decided in prior litigation had to "be inevitable, or it [could not] be drawn." *Burlen v. Shannon*, 99 Mass. 200, 203 (1868); *see also Steam-Gauge & Lantern Co. v. Meyrose*, 27 F. 213, 213 (C.C.E.D. Mo. 1886) (Brewer, J.) (this "doctrine is affirmed by a multitude of courts"). Thus, where "it be doubtful upon which of several points the verdict was founded, it will not be an estoppel as to either." *People v. Frank*, 28 Cal. 507, 516 (1865). In other words, "a verdict will *not* be an estoppel[ ] merely because the testimony in the first suit was *sufficient to* establish a particular fact"; instead, "[i]t must appear, that was the very fact, on which the verdict was given, and no other." *Long v. Baugas*, 24 N.C. (2 Ired.) 290, 295 (1842) (emphases added).

As early as 1877, this Court explained that "the inquiry must always be as to the point or question actually litigated *and determined* in the original action,

not what *might have been* thus litigated and determined." *Cromwell v. Cty. of Sac.*, 94 U.S. 351, 353 (1876) (emphases added). Preclusion is therefore unavailable where "several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating . . . upon which the judgment was rendered." *Russell v. Place*, 94 U.S. 606, 608 (1877). In *De Sollar v. Hanscome*, 158 U.S. 216 (1895), for example, this Court held that a prior judgment did not establish that the defendant had assented to a contract because, although the trial judge in the prior proceeding instructed the jury that assent was "'the chief question for your consideration,'" the prior jury *could* have resolved the case on alternative grounds. *Id.* at 219. The central requirement, the Court explained, is "that it is *certain* that the *precise fact* was determined by the former judgment." *Id.* at 221 (emphases added).

Modern practice is equally settled. With the exception of the *Engle* progeny litigation—no small exception, given the huge sums at stake and thousands of cases involved—the traditional rule has been followed uniformly by the federal and state appellate courts.[4] Thus, if a prior "judgment might have been based upon one or more of several grounds, but does not expressly rely upon any one of them, then none is conclusively established under the doctrine of collateral estoppel, since it is impossible for another court to tell which issue or issues were adjudged." *Ettin v. Ava Truck Leasing, Inc.*, 251 A.2d 278, 287 (N.J. 1969) (internal quotation marks omitted); *see also Ashe v. Swenson*, 397 U.S. 436, 444 (1970).

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[4] *See*, *e.g.*, 18 Charles A. Wright et al., *Federal Practice and Procedure* § 4420 nn.1, 13 (2d ed. 2002); Restatement (Second) of Judgments § 27, reporter's note, cmt. e (1982).

2. "The universality of the actually decided requirement is no accident; the requirement helps facilitate due process." *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1216 (11th Cir. 2017) (en banc) (Tjoflat, J., dissenting). In *Fayerweather*, this Court confirmed that the "actually decided" requirement is constitutionally mandated. In that case, a federal court dismissed a suit on the ground that the plaintiffs' claims were precluded by a prior state-court judgment. The plaintiffs maintained that the state court had not decided the relevant issues. By statute, this Court's jurisdiction depended on whether the plaintiffs' challenge to the preclusion ruling presented a constitutional issue. *See* 195 U.S. at 297-98. The Court held that it had jurisdiction, explaining that it would violate due process to give "unwarranted effect to a judgment" by accepting as a "conclusive determination" a verdict "made without any finding of the fundamental fact." *Id.* at 297, 299.

Although the Court upheld preclusion on the particular facts of *Fayerweather*—finding that the question on which preclusion was sought had been "considered and determined" in the prior suit, 195 U.S. at 308—it confirmed as a constitutional rule that where

> testimony was offered at the prior trial upon several distinct issues, the decision of any one of which would justify the verdict or judgment, then the conclusion must be that the prior decision is not an adjudication upon any particular issue or issues, and the plea of *res judicata* must fail.

Id. at 307.

The Court further made clear that merely affording a party an opportunity to be heard in a proceeding is not a constitutionally sufficient basis for precluding

the party from disputing issues based on the outcome of that proceeding. As the Court explained, due process requires both that the party "had an opportunity to present" the issue *and* that "the question was decided" in the prior proceeding. *Fayerweather*, 195 U.S. at 299.

B. The Florida Supreme Court's Departure From The "Actually Decided" Requirement Violates Due Process.

The Florida Supreme Court's decision in *Douglas* cannot be reconciled with *Fayerweather*, or with the settled common-law requirements underpinning its due-process holding. *See Oberg*, 512 U.S. at 430 (the "abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that [the] procedures violate the Due Process Clause").

1. The Florida Supreme Court's Use Of The "Claim Preclusion" Label Does Not Change The Due-Process Analysis.

On the basis of *Douglas*'s claim-preclusion framework, respondents and other *Engle* progeny plaintiffs are permitted to rely on the *Engle* Phase I findings to establish the tortious-conduct elements of their claims without demonstrating that those issues were actually decided in their favor by the *Engle* jury. According to the Florida Supreme Court, it is sufficient for claim-preclusion purposes that those issues "might . . . have been" decided in the plaintiffs' favor in *Engle*. *Douglas*, 110 So. 3d at 433 (internal quotation marks omitted).

Characterizing the result in *Engle* progeny litigation as an application of "claim preclusion," however,

does not change the *substance* of what occurs or excuse Florida courts from complying with the constitutionally mandated "actually decided" requirement. Although "[s]tate courts are free to attach . . . descriptive labels to litigations before them as they may choose," those labels are not binding for purposes of determining whether state-court proceedings violate due process. *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). To the contrary, this Court has an independent "duty . . . to examine the course of procedure" in order to determine whether it satisfies "the due process which the Constitution prescribes." *Id.* That duty reflects that the Constitution's requirements and prohibitions are "levelled at the thing, not the name." *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866).

When "tested . . . by its substance—its essential and practical operation—rather than its form or local characterization," *Air-Way Elec. Appliance Corp. v. Day*, 266 U.S. 71, 82 (1924), it is clear that the "claim preclusion" invented by *Douglas* is issue preclusion in every meaningful way, save for the essential protection of the "actually decided" requirement, and that it shares none of the attributes of traditional claim preclusion. It is, after all, preclusion applied to particular issues—the very definition of *issue* preclusion.

To be sure, genuine claim preclusion can be applied without regard to what was actually decided in the prior proceeding and upon a showing of nothing more than that the procedures that produced the judgment in the prior proceeding met minimum constitutional requirements—*i.e.*, notice and an opportunity to be heard. That is because the consequence of claim preclusion is to *bar* any further litigation of the claim, rendering the actual grounds of decision immaterial. But where a claim is being *litigated*, rather than

barred, the rules governing claim preclusion are entirely inapt.

No other court, state or federal, applies "claim preclusion" to issues within a partially adjudicated claim. Claim preclusion is available only when there has been a final judgment that "'puts an end to *the cause of action*,'" as opposed to a subset of the elements of a cause of action. *Nevada v. United States*, 463 U.S. 110, 129-30 (1983) (emphasis added) (quoting *Comm'r v. Sunnen*, 333 U.S. 591, 597 (1948)). A "verdict" or "finding" that leaves issues to be determined later "is not sufficient" for claim-preclusion purposes. *Oklahoma City v. McMaster*, 196 U.S. 529, 532-33 (1905).

If claim preclusion as traditionally understood did apply here, respondents' claims would be completely barred because that is the necessary consequence of claim preclusion: There is no such thing as *offensive* claim preclusion. Under both ancient and modern authorities, a "claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law *upon any ground whatever*." *Cromwell*, 94 U.S. at 353 (emphasis added); *see also Rivet v. Regions Bank of La.*, 522 U.S. 470, 476 (1998). Thus, when there is a final judgment disposing of an entire claim, it makes no difference what issues were actually decided because the judgment itself precludes any further proceedings on the claim. When there is no final judgment as to an entire claim, in contrast, the court faced in subsequent litigation on the claim with a request for preclusion on specific issues must determine whether those issues have already been resolved in earlier litigation.

The Florida Supreme Court justified its new rule of offensive claim preclusion on the ground that *Engle*—like all issues classes—was litigated as a class

action that presented "common issues." *Douglas*, 110 So. 3d at 434. It is well settled, however, that the same "[b]asic principles of res judicata (merger and bar or claim preclusion) and collateral estoppel (issue preclusion) apply" to cases tried as class actions, *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984), and that a class action cannot be used to alter or diminish substantive rights available to parties in traditional individual adjudications, *see Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011).

Not surprisingly, federal and state courts confronted with analogous certification orders recognize that *issue* preclusion applies to *issues* classes and—unlike *Douglas*—preserve a defendant's right to have *some* jury decide all the required elements of each claim. *See*, *e.g.*, *Allen v. Int'l Truck & Engine Corp.*, 358 F.3d 469, 472 (7th Cir. 2004) (Easterbrook, J.) ("once one jury (in individual or class litigation) has resolved a factual dispute, principles of issue preclusion can bind the defendant to that outcome in future litigation" (emphasis omitted)); *ACandS, Inc. v. Godwin*, 667 A.2d 116, 146-47 (Md. 1995) (same). Those cases directly contradict the Florida Supreme Court's new rule that claim preclusion applies to "class actions [that] are certified to resolve less than an entire cause of action." *Douglas*, 110 So. 3d at 434.

Nor is the *Engle* defendants' "opportunity to be heard" in *Engle* sufficient to reconcile the Florida Supreme Court's unprecedented claim-preclusion standard with the constitutional constraints on preclusion. *Douglas*, 110 So. 3d at 431-32. Under *Fayerweather*, due process prohibits a plaintiff from invoking preclusion on an issue unless the defendant "had an oppor-

tunity to present" the issue *and* "the question was decided" against the defendant in the prior proceeding. 195 U.S. at 299; *see also id.* at 297 (a court may "give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with [due process]" (internal quotation marks omitted)). Thus, it is not enough that the defendants had an opportunity to be heard in *Engle*; what matters is whether the issues that they are prohibited from contesting in each *Engle* progeny case based on the preclusive effect of the Phase I findings were actually decided in the plaintiff's favor in *Engle*. If they were not, then the defendant's opportunity to be heard in *Engle* does nothing to support the constitutionality of the judgment in the class member's individual *Engle* progeny case.

Indeed, the annals of cases rejecting preclusion claims are replete with instances in which the adequacy of the parties' opportunity to litigate in the prior proceeding was unquestioned, yet the court refused to permit the application of preclusion to factual issues not clearly decided in that proceeding.[5] At the same time, one would search in vain for a single case, until the *Engle* progeny litigation, in which issue preclusion has been justified simply on the ground of full and fair opportunity to litigate in the prior proceeding.

Furthermore, contrary to the Florida Supreme Court's reasoning, *see Douglas*, 110 So. 3d at 431, the

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[5] *See*, *e.g.*, *De Sollar*, 158 U.S. at 221-22; *Russell*, 94 U.S. at 609; *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1198-99 (10th Cir. 2000); *United States v. Patterson*, 827 F.2d 184, 189-90 (7th Cir. 1987); *Dowling v. Finley Assocs.*, 727 A.2d 1245, 1251-53 (Conn. 1999); *City of Sunland Park v. Macias*, 75 P.3d 816, 820-21 (N.M. 2003).

fact that progeny plaintiffs must still prove *some* elements of their claims (such as class membership and damages) in their individual suits scarcely justifies relieving them from proving *other* elements. Due process requires plaintiffs to prove *every* element of their claims before depriving a defendant of its property, *see Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982), and requires affording defendants "an opportunity to present *every* available defense," *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (emphasis added; internal quotation marks omitted). Neither of those requirements is met in *Engle* progeny litigation.

2. Elimination Of The "Actually Decided" Requirement Makes *Engle* Progeny Litigation Fundamentally Unfair.

The Florida Supreme Court's decision to jettison the "actually decided" requirement has profound consequences for the fundamental fairness of *Engle* progeny trials. In light of the multiple, alternative theories of liability pursued by the *Engle* class—coupled with the generality of the Phase I findings—the application of *Douglas*'s unorthodox approach to claim preclusion creates an unacceptable risk that *Engle* progeny defendants are being deprived of their property without any jury in any proceeding having found that the plaintiffs proved each element of their claims.

On the strict-liability and negligence claims, the Florida Supreme Court acknowledged in *Douglas* that the *Engle* class had asserted numerous "brand-specific" and type-specific alternative theories of defect in the Phase I trial—theories that did *not* apply to all cigarette brands, all class members, or all time periods at issue. 110 So. 3d at 423. For example, the class

claimed that "'levels of nicotine were manipulated, *sometimes* by utilization of ammonia . . . and *sometimes* by using a higher nicotine content tobacco'"; that "'*some* cigarettes were manufactured with the breathing air holes in the filter being too close to the lips'"; and that "'*some* filters being test marketed utilized glass fibers that could produce disease.'" *Id.* at 423-24 (emphases added) (quoting directed-verdict order).

There is no way to know which theory or theories the Phase I jury relied on in rendering its strict-liability and negligence verdicts because the jury's generalized findings do not identify the theories it accepted, those it rejected, and those it did not even reach. As Judge Tjoflat emphasized, "[t]hat a defendant sold some negligently produced, defective, and unreasonably dangerous cigarettes of an unspecified brand at an unspecified point in time [is] not probative as to whether [a particular *Engle* class member's] injuries were caused by the defendant's negligent conduct or unreasonably dangerous product defect(s)." *Graham*, 857 F.3d at 1260 n.183 (Tjoflat, J., dissenting). Yet, respondents here were permitted, on the basis of *Douglas*'s "might have been decided" rationale, to rely on the preclusive effect of the *Engle* findings to establish those elements of their strict-liability and negligence claims, even though there is simply no way to know whether the *Engle* jury found that the cigarettes smoked by Mr. Boatright contained a defect or whether petitioners' conduct with respect to him was negligent.

It is equally impossible for *Engle* progeny plaintiffs to establish whether the Phase I jury actually decided anything relevant to their individual concealment and conspiracy claims. The impossibility of that

task results both from the disjunctively worded verdict-form questions in Phase I of *Engle*—which do not identify whether the jury's verdicts rested on the concealment of information about the "health risks" of cigarettes, the "addictiveness" of cigarettes, or both—as well as from the various distinct theories of concealment and conspiracy pursued by the *Engle* class at trial. Those theories included, for example, allegations that defendants concealed information in a variety of different formats, such as product advertisements disseminated by the defendants themselves, *Engle* Tr. 36479-86, white papers and other materials generated by tobacco-industry organizations, *id.* at 36707-09, and congressional testimony and other public appearances by the defendants' executives, *id.* at 36710-12, 37457-58, and on a variety of subjects, such as the health risks and addictiveness of low-tar cigarettes, *id.* at 36351-52, and the alleged use of ammonia in cigarettes to increase the potency of nicotine, *see id.* at 36483-85.

A panel of the Eleventh Circuit—although bound by circuit precedent to reject the defendants' due-process argument—recently acknowledged the constitutional difficulties with permitting *Engle* progeny plaintiffs to rely on the class jury's concealment and conspiracy findings to establish elements of their claims. As the court explained, "multiple acts of concealment had been presented to the *Engle* jury, and their general finding did not indicate which acts of concealment may have underlain their finding versus which allegations of concealment they might have rejected," which creates a "difficult[y]" in "determin[ing] whether the *Engle* jury's basis for its general finding of concealment" was the same theory pursued by an individual *Engle* plaintiff. *Searcy v. R.J. Reynolds Tobacco Co.*, 902 F.3d 1342, 1353 (11th Cir. 2018); *see*

also id. at 1354 (rejecting the defendants' due-process argument based on *Burkhart v. R.J. Reynolds Tobacco Co.*, 884 F.3d 1068 (11th Cir. 2018)).

Accordingly, under this Court's due-process precedent, the concealment and conspiracy findings cannot be given preclusive effect because it is impossible to determine on which of these "several distinct issues" the Phase I jury relied when rendering its verdicts. *Fayerweather*, 195 U.S. at 307. For all we know, the Phase I jury's findings may have rested on congressional testimony by petitioners' executives that Mr. Boatright never saw or read about.

* * *

For more than a decade, Florida's state and federal courts have grappled with the meaning of the Florida Supreme Court's "res judicata" directive in *Engle*. Ultimately, neither the Florida Supreme Court nor the Eleventh Circuit has been able to reconcile the broad preclusive effect of the *Engle* findings with the fundamental principles of due process embodied in this Court's precedent and reflected in centuries of common-law jurisprudence. As the Eleventh Circuit's recent decisions in *Burkhart* and *Searcy* make clear, that court has now fully embraced the Florida Supreme Court's reasoning in *Douglas* that a mere "opportunity to be heard" on an issue is constitutionally sufficient to preclude a party from relitigating that issue, even if it is impossible to determine whether that issue was actually decided in the prior proceeding. Now that both the Florida Supreme Court and the Eleventh Circuit have turned their backs on settled preclusion law, this Court should grant review to extinguish this "extreme application[ ] of the doctrine of res judicata." *Richards*, 517 U.S. at 797.

II. THE FLORIDA SUPREME COURT'S UNPRECEDENTED APPROACH TO PRECLUSION HAS FAR-REACHING CONSEQUENCES FOR THOUSANDS OF PENDING *ENGLE* PROGENY CASES AND FOR FUTURE ISSUES CLASS ACTIONS.

Review is warranted here due to the sheer number of cases that are directly governed by the Florida Supreme Court's manifestly unconstitutional application of preclusion principles. Approximately 2,300 *Engle* progeny cases remain pending in Florida courts. Several hundred of these cases have already been tried to verdict—resulting in more than $800 million in judgments paid by the *Engle* defendants—and the Florida courts are continuing to try an average of at least two new *Engle* progeny cases each month. Every one of those cases raises the same threshold due-process question presented here. Thus, in the absence of this Court's intervention, the due-process violation that occurred in this case will be almost endlessly replicated, with staggering financial consequences.

The consequences of the Florida Supreme Court's decision in *Douglas* also extend beyond the *Engle* progeny setting. Its new rule of preclusion for issues classes—under which "claim preclusion" applies to "issues" that are litigated in class actions "certified to resolve less than an entire cause of action," *Douglas*, 110 So. 3d at 434—serves as a model for other lower courts, which have increasingly utilized the issues class device, *see* American Law Institute, *Principles of the Law of Aggregate Litigation* ch. 2 (2010); 7AA Charles A. Wright et al., *Federal Practice and Procedure* § 1790 & nn. 18-20 (3d ed. 2018), to bypass well-established and constitutionally compelled restraints on the arbitrary deprivation of property. Although lower courts are free to certify issues classes, this

Court should grant review to make clear that lower courts are not free, as here, to make an end-run around basic constitutional protections by using the combination of issues classes and unprecedented rules of preclusion to deprive defendants of their property without any assurance that a finder of fact has found all the essential elements of the plaintiffs' individual claims.

The prior denials of certiorari in other *Engle* progeny cases are no barrier to review here. Until recently, it remained possible that the Eleventh Circuit would reach the correct resolution of the due-process question without this Court's intervention. The Eleventh Circuit's divided decision in *Graham* upholding the preclusive effect of the *Engle* jury's defect and negligence findings—and its subsequent decision in *Burkhart* fully endorsing *Douglas*'s "opportunity to be heard" reasoning with respect to the concealment and conspiracy findings—foreclosed that possibility. This petition—and the companion petition filed today in *R.J. Reynolds Tobacco Co. v. Searcy*—represent the Court's first opportunity since *Burkhart* was decided to resolve the question presented. And, unlike the earlier petition in *Graham*, this petition is unencumbered by the Eleventh Circuit's factual assessment of what the *Engle* jury supposedly decided in rendering its defect and negligence findings; the Florida Supreme Court did not even purport to make such a factual finding in *Douglas* but instead upheld the application of preclusion to all issues that "might . . . have been" decided by the *Engle* jury. 110 So. 3d at 433 (internal quotation marks omitted).

Because both the Eleventh Circuit and Florida Supreme Court have now decisively rejected petitioners' due-process argument and explicitly displaced the

"actually decided" requirement with an "opportunity to be heard" standard, the Court should grant review to end the Florida courts' dangerous experimentation with heretofore-settled principles of preclusion law.

CONCLUSION

The Court should grant the petition for a writ of certiorari along with the petition in *R.J. Reynolds Tobacco Co. v. Searcy*.

Respectfully submitted.

ANDREW L. FREY
LAUREN R. GOLDMAN
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2500

Counsel for Petitioner
Philip Morris USA Inc.

KAREN H. CURTIS
CLARKE SILVERGLATE, P.A.
799 Brickell Plaza
Suite 900
Miami, FL 33131
(305) 377-0700

Counsel for Petitioner
Liggett Group LLC

MIGUEL A. ESTRADA
Counsel of Record
AMIR C. TAYRANI
BRANDON L. BOXLER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Petitioner
Philip Morris USA Inc.

KELLY ANNE LUTHER
ANN M. ST. PETER-GRIFFITH
KASOWITZ, BENSON,
TORRES & FRIEDMAN, LLP
1441 Brickell Avenue
Suite 1420
Miami, FL 33131
(305) 377-1666

Counsel for Petitioner
Liggett Group LLC

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