No.

IN THE
Supreme Court of the United States

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

Petitioners,

v.

CHERYL SEARCY, AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF CAROL LASARD,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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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 Eleventh Circuit, the Florida Supreme Court's unorthodox approach to the preclusive effect of class-action findings is consistent with due process because the defendants had notice and 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.

R.J. Reynolds Tobacco Company is a wholly owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc., which is a wholly owned subsidiary of Reynolds American Inc., which in turn is an indirect, wholly owned subsidiary of British American Tobacco p.l.c., a publicly held corporation.

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.

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PETITION FOR A WRIT OF CERTIORARI

R.J. Reynolds Tobacco Co. and Philip Morris USA Inc. ("PM USA") respectfully submit this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit is reported at 902 F.3d 1342. Pet. App. 1a. The district court's post-trial orders are unreported but are electronically available at 2013 WL 4928230, *id.* at 44a, and 2013 WL 5421957, *id.* at 60a.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution and the Full Faith and Credit Act, 28 U.S.C. § 1738, are reproduced in the appendix to this petition. Pet. App. 78a.

STATEMENT

The Florida courts have condoned a constitutional farce unparalleled in Anglo-American legal history. Although this Court has repeatedly granted review in the past 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), the constitutional deficiencies in those earlier cases pale in comparison to the spectacle

currently playing out in Florida, where courts are 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.

To be sure, this Court has had several prior opportunities to intervene in this "*Engle* progeny" litigation but has denied petitions challenging the sweeping preclusive effect that the Florida state and federal courts have given to the jury's findings in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam), a class action brought on behalf of Florida smokers. In the earlier Eleventh Circuit cases in which the defendants sought certiorari, the court of appeals claimed that the *Engle* jury had actually decided issues common to all class members. *See*, *e.g.*, *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1182 (11th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 646 (2018). That was untrue, but if it were true, there would be no due-process objection to treating those findings as preclusive in subsequent trials.

But the Eleventh Circuit has since dropped that pretense altogether. Confronted with class members' claims for fraudulent concealment and conspiracy to fraudulently conceal—which were not at issue in *Graham*—the court has now squarely held that the defendants may be deprived of their property even though *no jury may ever have actually decided all the elements of those claims in the plaintiff's favor*. Due process is satisfied, according to the Eleventh Circuit,

so long as the defendant had an "*opportunity* to be heard" on those issues. Pet. App. 18a (emphasis added).

Accordingly, unlike the earlier petition in *Graham*, this petition presents a clean and straightforward legal question: Does the Due Process Clause require that an issue have been actually decided by a factfinder in prior litigation before it is treated as conclusively established, or, as the Eleventh Circuit has now held, is it enough that the defendant had an opportunity to present its side of the dispute?

The answer is equally straightforward. Until the Florida state and federal courts charted their unconstitutional course, it was universally acknowledged that a party seeking to have an issue treated as resolved based on the outcome of a prior proceeding must show that a factfinder in the previous case 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)). This "actually decided" requirement rests on the most basic requirement of due process: Before defendants can be deprived of their property, plaintiffs must prove each element of their claims. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). This Court has squarely held that the "actually decided" requirement is so fundamental that it is mandated by due process. *See Fayerweather v. Ritch*, 195 U.S. 276, 298-99, 307 (1904).

The deprivation of petitioners' due-process rights—the imposition of liability without any assurance that respondent proved each element of her claims—is manifest in this case, where respondent relied exclusively on the preclusive effect of the *Engle*

jury's generalized findings to establish the conduct elements of her claims. On her concealment and conspiracy claims, for example, she alleged that her mother, a deceased smoker, had been deceived by petitioners' statements about the health risks and addictiveness of so-called "low-tar" cigarettes, but she was not required to prove that those statements were fraudulent, relying instead on the findings of the *Engle* jury. The Eleventh Circuit panel acknowledged that respondent did not "offer any evidence" that the *Engle* jury actually "based its finding of concealment . . . on [petitioners'] conduct regarding the marketing of low-tar cigarettes." Pet. App. 17a. And it noted that, in light of the "multiple acts of concealment . . . presented to the *Engle* jury" and the *Engle* jury's "general finding[s]," it is "difficult to determine whether the *Engle* jury's basis for its general finding of concealment was the particular concealments regarding low-tar/low-nicotine cigarettes" at issue in this case. *Id.* at 19a. The panel nevertheless affirmed the judgment because petitioners had been afforded notice and an "opportunity to be heard" in *Engle*. *Id.* at 18a-20a.

To restore the due-process constraints on state preclusion standards—and to deter other courts from using unprecedented preclusion rules to facilitate the classwide adjudication of individualized claims—this Court should grant review in both this case and *Philip Morris USA Inc. v. Boatright*, which raises the same question in a case from Florida state court. The practical implications of the Florida courts' evisceration of the constitutional limits on preclusion are staggering. The decertified *Engle* class action has spawned thousands of individual claims, approximately 2,300 of which remain pending in Florida courts. Although only 10% of those cases have been tried, petitioners and the other defendants in those cases have already

been subjected to judgments in excess of three-quarters of a *billion* dollars. This Court should grant review to put a stop to the serial due-process violations being committed by Florida's state and federal courts.

A. The *Engle* Case

1. The *Engle* class action began in 1994 when six individuals filed a complaint in state court 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." *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 422 (Fla. 2013).

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 the span of five decades, including many allegations that pertained to only some cigarette brands or only some periods of time. For example, to support its strict-liability and negligence claims, the class asserted that *some* cigarette brands used genetically engineered high-nicotine tobacco, that other brands used filters

that contained harmful components, and that the ventilation holes in "light" or "low tar" cigarettes were improperly placed. *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 to increase addictiveness, *id.* at 36483-85, and the identity 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. To the contrary, class counsel 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,

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

would be too general to be used by subsequent juries resolving the claims of individual class members, who smoked different cigarettes at different times, and who were exposed to different advertising and other tobacco-industry statements. *Id.* at 423; *see also Engle* Tr. 35915-15. 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 mate-

rial 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.

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 no jury had made a liability finding in

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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.

favor of the class. *Engle*, 945 So. 2d at 1262-63. The court 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*

1. Pursuant to the Florida Supreme Court's invitation, thousands of individuals alleging membership in the *Engle* class filed claims in Florida state and federal courts. Approximately 2,300 of these *Engle* progeny cases remain pending. In each of these cases, the plaintiffs assert that the *Engle* findings relieve them of the burden of proving that the defendants engaged in tortious conduct with respect to themselves or their decedents and that it is therefore unnecessary for them to prove those elements at trial.

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. The first federal district court to consider the issue concluded that

due process prevents plaintiffs from relying on the *Engle* findings to establish elements of their claims because the findings are "equivalent to saying that the Defendants did something wrong without saying exactly what the Defendants did wrong and when." *Brown v. R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328, 1342 (M.D. Fla. 2008), *vacated on other grounds*, 611 F.3d 1324 (11th Cir. 2010).

On appeal, the Eleventh Circuit also recognized the difficulties with giving broad preclusive effect to the *Engle* findings, explaining that, to establish any factual issue under Florida preclusion law, *Engle* progeny plaintiffs must "show with a 'reasonable degree of certainty' that the specific factual issue was determined in [their] favor" in *Engle*. *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1335 (11th Cir. 2010) (quoting *Seaboard Coast Line R.R. v. Indus. Contracting Co.*, 260 So. 2d 860, 862 (Fla. Dist. Ct. App. 1972)). The court emphasized that "Florida courts have enforced the 'actually adjudicated' requirement with rigor." *Id.* at 1334 (quoting *Gordon v. Gordon*, 59 So. 2d 40, 44 (Fla. 1952)). Having concluded that Florida preclusion law so clearly imposed this "actually decided" requirement, the Eleventh Circuit deemed it unnecessary to consider whether federal due process did so as well. *See id.* Although the court remanded to afford the plaintiff an opportunity to demonstrate that the issues on which she sought preclusion had actually been decided against the defendants in *Engle*, it expressed skepticism that any *Engle* progeny plaintiff could satisfy the "actually decided" requirement. *See id.* at 1336 n.1 (Anderson, J., concurring) ("The generality of the Phase I findings present plaintiffs with a considerable task."); *id.* at 1336 n.11 (majority opinion adopting concurrence).

2. In *Philip Morris USA, Inc. v. Douglas*, the Florida Supreme Court agreed with *Brown*'s understanding of Florida issue-preclusion law but nevertheless rejected its ultimate conclusion that Florida law required plaintiffs to satisfy the "actually decided" requirement in *Engle* progeny cases. It reached this result by devising a previously unknown doctrine of offensive claim preclusion that permits plaintiffs to rely on the *Engle* findings to establish the conduct elements of their claims without demonstrating that the *Engle* jury actually decided those elements in their favor. 110 So. 3d at 435.

At the outset of its analysis, the Florida Supreme Court recognized that the *Engle* class pursued multiple alternative theories of liability, including "brand-specific" theories that applied to only *some* cigarettes smoked by *some* class members. *Douglas*, 110 So. 3d at 423. The court acknowledged that the *Engle* findings would therefore be "useless in individual actions" if plaintiffs invoking their preclusive effect had to show what the *Engle* jury "actually decided," as issue preclusion requires. *Id.* at 423, 433.

To salvage the utility of the *Engle* findings, the Florida Supreme Court held that the doctrine of "claim preclusion" (which it also referred to as "res judicata") applies when individual class members sue on the "same causes of action" that were the subject of an earlier issues class action. *Douglas*, 110 So. 3d at 432 (emphasis omitted). Under this novel doctrine of offensive claim preclusion, the court stated, preclusion is applicable to any issue "which *might* . . . have been" decided during 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 findings on a basis pertinent to the smoking history of the plaintiff or decedent in a given progeny case. *Id.* In other words, any finding that the *Engle* jury *might* have made against the defendants could be invoked as preclusive in subsequent *Engle* progeny actions.

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 jury in *Engle* may or may not actually have *decided*—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).

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

In *Graham*, 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; *see also Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278, 1287-88 (11th Cir. 2013) (earlier panel opinion applying same reasoning), *cert. denied*, 134 S. Ct. 2727 (2014).

The en banc majority found support for this conclusion in its own review of the *Engle* record and its own determination of the issues actually decided by the *Engle* jury. *See Graham*, 857 F.3d 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."). 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.

Petitioners sought review in this Court. In opposing certiorari, the plaintiff in *Graham* maintained that the en banc Eleventh Circuit had correctly determined that "the factual predicates for liability were proven at trial in *Engle*." Br. in Opp. at 19, *Graham*, No. 17-415 (capitalization altered). The plaintiff urged the Court to deny review by invoking "this Court's normal reluctance to disturb findings of fact."

Id. at 20. The Court denied review. 138 S. Ct. 646 (2018)

D. The Eleventh Circuit's Decision In *Burkhart*

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.*, 884 F.3d 1068 (11th Cir. 2018), that "treating as preclusive the *Engle* jury's findings as to the conduct elements of" those claims "does not violate due process." *Id.* 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 about the requirements of due process. The panel held 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.'" 884 F.3d at 1092 (emphasis added); *see also id.* at 1093 ("[T]he due process question depend[s] upon an analysis of the defendant's opportunity to be heard in *Engle*."). The panel did not claim that the *Engle* jury had actually decided the issues relevant to the conduct elements of the plaintiff's concealment and conspiracy claims—*e.g.*, that the tobacco-industry statements on which the plaintiff allegedly relied were in fact fraudulent. Instead, according to the panel, all that mattered was that 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. These opportunities—along with the defendants' "right to litigate the causation and reliance elements" of the concealment and conspiracy claims in individual class members' cases—satisfied the panel that the defendants received the requisite due process, even if the *Engle* concealment and conspiracy findings are so "ambiguous" that it is impossible to determine the theories on which they rest. *Id.* at 1092, 1093.

E. The Proceedings In This Case

1. Respondent filed this *Engle* progeny action against petitioners alleging that her mother, Carol LaSard, died from lung cancer caused by smoking. Respondent claimed that her mother was an *Engle* class member, and asserted causes of action for strict liability, negligence, fraudulent concealment, and conspiracy to fraudulently conceal. The district court ruled that, if respondent proved *Engle* class membership (*i.e.*, that Ms. LaSard was addicted to cigarettes containing nicotine and that her addiction was a legal cause of her lung cancer), she would be entitled to invoke the preclusive effect of the *Engle* findings to conclusively establish the conduct elements of her claims. Dist. Ct. D.E. 49.

At trial, respondent's evidence focused on petitioners' marketing of low-tar cigarettes, the type smoked by Ms. LaSard. During opening statements, for example, respondent's counsel argued that, "instead of telling Americans that . . . low tar cigarettes are not any safer, the cigarette companies . . . made a choice . . . to lie about those things." Trial Tr., Vol. 1 AM at 55:20-25. Counsel further argued that, if petitioners had told "the truth" about low-tar cigarettes,

"then Carol [LaSard] would have known what she was smoking." *Id.* at 58:20-25.

Respondent's witnesses also focused on low-tar cigarettes. One witness, for example, claimed that Ms. LaSard smoked low-tar cigarettes because "she thought they were healthier" based on "ads." Trial Tr., Vol. 3 AM at 70:3-22. Respondent likewise testified that Ms. LaSard smoked "low-tar cigarettes" because "she believed they were better and safer for her." Trial Tr., Vol. 2 PM at 134:20-135:5.

The jury was not required to find, however, that petitioners' low-tar cigarettes contained a defect, that their conduct with respect to low-tar cigarettes was negligent, or that they fraudulently concealed, or conspired to fraudulently conceal, material information about low-tar cigarettes. The jury was instead instructed that it "must" accept the *Engle* jury's findings that petitioners engaged in these various forms of tortious conduct. Trial Tr., Vol. 5 AM at 79:2-83:10.

The jury found that Ms. LaSard was an *Engle* class member and returned a verdict against petitioners on all four claims. Pet. App. 6a. It awarded respondent $6 million in compensatory damages, and also awarded $10 million in punitive damages against each petitioner. *Id.* Respondent was permitted to recover punitive damages only on her claims for concealment and conspiracy; she was not permitted to recover punitive damages on her strict-liability and negligence claims. *Id.* The jury apportioned 40% of the fault to Ms. LaSard, but the district court did not apply the jury's comparative-fault finding to offset the damages award, concluding that the claims for concealment and conspiracy were not subject to apportionment. *Id.* The district court did, however, remit

the compensatory damages to $1 million and the punitive damages to $1.67 million against each petitioner. *Id.* at 7a.

2. Petitioners appealed, and the case was fully briefed and argued prior to the Eleventh Circuit's en banc decision in *Graham* regarding the strict-liability and negligence claims. After that decision, the panel in this case issued an order directing the parties to address a series of questions regarding respondent's concealment and conspiracy claims; the questions principally concerned whether "the theory of concealment on which [respondent] focused" at trial was the same as the "specific acts of alleged fraudulent concealment that underlaid the *Engle* plaintiffs' claim" during the Phase I proceedings. Order of Jan. 19, 2018 at 4, 5. Before the completion of briefing on those questions, however, another panel of the Eleventh Circuit issued its decision in *Burkhart* holding that due process permits *Engle* class members to rely on the Phase I findings to establish the conduct elements of their concealment and conspiracy claims. 884 F.3d at 1092.

Bound by *Burkhart*, the panel affirmed. It acknowledged that the *Engle* class had advanced "numerous theories of concealment . . . at the *Engle* trial," Pet. App. 12a, and that the *Engle* jury's "general finding did not indicate which acts of concealment may have underlain their finding versus which allegations of concealment they might have rejected," *id.* at 19a. As a result, the panel explained, it is "difficult to determine whether the *Engle* jury's basis for its general finding of concealment was the particular concealments regarding low-tar/low-nicotine cigarettes" that were the focus of respondent's case at trial. *Id.* In fact, the panel continued, respondent did "not argue,

or offer any evidence to support an argument, that the *Engle* jury necessarily based its finding of concealment against the tobacco company defendants on the defendants' conduct regarding the marketing of low-tar cigarettes," and the panel "therefore ha[d] to assume that the *Engle* jury *did not* actually decide that question." *Id.* at 17a. The panel thus identified the relevant legal question as whether, "for purposes of granting preclusion consistent with the due process clause," it is "enough that a defendant had a right to be heard on a plaintiff's claims in a first action, if ultimately one is unable to discern what the jury actually decided in making its findings on those claims." *Id.* at 19a.

The panel nevertheless held, with evident reluctance, that it was "bound to follow" *Burkhart* as circuit precedent. Pet. App. 20a. In so ruling, the panel recognized that the *Burkhart* panel did not attempt to examine the *Engle* record to identify the basis of the concealment and conspiracy findings, as the court had attempted to do for the defect and negligence findings in *Graham*, but had instead deemed it constitutionally sufficient that "the *Engle* defendants had notice and an opportunity to be heard regarding" the concealment and conspiracy claims. *Id.* at 18a-19a.

The *Searcy* panel concluded "that the [*Burkhart*] panel's rejection of a due process challenge to the application in progeny cases of the *Engle* jury findings regarding concealment claims was categorical." Pet. App. 20a. Thus, even if "one is unable to discern what the [*Engle*] jury actually decided in making its findings on" the concealment and conspiracy claims, *id.* at 19a, the court was "required to reject [petitioners'] . . . due process argument," *id.* at 20a. The court emphasized that *Burkhart* "ends any debate in this court as

to whether the *Engle* jury findings related to the concealment claims are to be given preclusive effect. The answer is: they will." *Id*.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit has guaranteed "arbitrary and inaccurate adjudication," *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430-31 (1994), by sanctioning Florida's novel rule of preclusion that prevents a defendant from disputing any issue that "*might* . . . have been" decided in favor of the plaintiff in a prior proceeding, *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 433 (Fla. 2013) (emphasis added; internal quotation marks omitted). In affirming the constitutionality of that rule, the Eleventh Circuit applied an "opportunity to be heard" due-process standard that departs from centuries of common-law authority limiting the availability of preclusion to issues that were *actually* decided in a prior proceeding. That "opportunity to be heard" standard also squarely conflicts with this Court's decision in *Fayerweather v. Ritch*, 195 U.S. 276 (1904), which held that the "actually decided" requirement is constitutionally mandated and that, standing alone, the "opportunity to present" an issue is not a constitutionally sufficient basis for precluding a party from contesting that issue in subsequent litigation. *Id.* at 299, 307.

Put simply, it violates due process to conclusively presume that an element of a plaintiff's claim is satisfied, and thus to preclude a defendant from contesting that element, unless *some* adjudicator has so found. Yet, the decision below sanctions a regime under which the *Engle* plaintiffs are permitted to prevail—and deprive the defendants of their property—based on the mere possibility that a jury "might . . . have"

found that the defendants committed tortious acts against them.

It is hard to conceive of a more blatant departure from principles of fundamental fairness or—given the more than $800 million in judgments already paid by the *Engle* defendants and the 2,300 cases that remain to be tried—a more consequential one.

I. THE ELEVENTH CIRCUIT'S "OPPORTUNITY TO BE HEARD" STANDARD CONFLICTS WITH LONGSTANDING COMMON-LAW REQUIREMENTS AND THIS COURT'S DUE-PROCESS PRECEDENT.

Under the Full Faith and Credit Act, federal courts are required to give the *Engle* Phase I findings the same preclusive effect they would receive in a Florida state court, 28 U.S.C. § 1738, *unless* the Florida Supreme Court's expansive conception of the "res judicata effect" of those findings violates due process, *see Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481 (1982).

By adopting an "opportunity to be heard" due-process standard, the Eleventh Circuit has made it possible for *Engle* progeny plaintiffs to deprive petitioners of their property without any assurance that they have *ever* successfully proven 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 and its "actually decided" requirement is to protect against this type of "arbitrary deprivation[ ] of liberty or property." *Oberg*, 512 U.S. at 434; *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 consistently 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).

American courts uniformly followed this rule from the time of the Founding, through the ratification of the Fourteenth Amendment, and beyond. *See*, *e.g.*, *Packet Co. v. Sickles*, 72 U.S. (5 Wall.) 580, 591-93 (1866). As one state supreme court explained in the mid-19th century, "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.). 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 (1876). 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, the traditional rule has been followed uniformly by the federal and state appellate courts.[3] 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

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[3] *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).

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).

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). Unless a prior factfinder actually decided an issue in the plaintiff's favor, treating that issue as conclusively established is an obvious violation of due process because a defendant cannot be deprived of property when no adjudicator has found every element necessary for liability.

In *Fayerweather v. Ritch*, 195 U.S. 276 (1904), 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 id.* 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 ques-

tion 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 has continued consistently to apply the "actually decided" requirement in its subsequent preclusion decisions. *See*, *e.g.*, *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008).

B. The Eleventh Circuit's "Opportunity To Be Heard" Standard Does Not Comport With Due Process.

According to the Eleventh Circuit, "for purposes of giving res judicata effect to *Engle* findings, due process is satisfied so long as the defendants had notice and an opportunity to be heard on the claims at issue." Pet. App. 18a (citing *Burkhart v. R.J. Reynolds Tobacco Co.*, 884 F.3d 1068, 1092 (11th Cir. 2018)). The Eleventh Circuit's holding that an "opportunity to be heard" is a constitutionally sufficient basis for applying preclusion to a disputed factual issue cannot be reconciled with *Fayerweather* or with the settled common-law authority confirming that the "actually decided" requirement is mandated by due process. *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").

It also defies common sense. The opportunity to defend, to be meaningful at all, must come with an assurance that the defense was actually adjudicated. Depriving a defendant of property without actually deciding that it is liable is hardly justified by the fact that the defendant was allowed to *contest* liability in a prior proceeding that did not ascertainably *adjudicate* liability.

1. The Court made clear in *Fayerweather* that merely affording a party an opportunity to be heard in a proceeding is not a constitutionally sufficient justification for using the outcome of that proceeding as a basis for precluding the party from disputing issues in subsequent litigation. Rather, 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. 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 were actually decided in the plaintiff's favor in *Engle*. If they were not, then the defendant's opportunity to be heard in *Engle* is insufficient 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 disputed factual issues.[4] At the same time, one would search in vain for a single case, until the *Engle* litigation, in which issue preclusion has been justified simply on the ground of a full and fair opportunity to litigate in the prior proceeding.

Furthermore, contrary to the Eleventh Circuit's reasoning, *see Burkhart*, 884 F.3d at 431, the 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 defendants of their 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.

To be sure, *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. But that is because claim preclusion is a rule against claim-splitting. It operates to bar a plaintiff

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[4] *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).

from pursuing additional litigation where there has been a final judgment on the same or a sufficiently related claim. *See Nevada v. United States*, 463 U.S. 110, 129-30 (1983). In such circumstances, the precise course of litigation that led to the final judgment is irrelevant; all that matters is that the proceeding met basic requirements of notice and opportunity to be heard, so that it was capable of producing a constitutionally valid judgment.

Where, as here, however, a plaintiff wishes to continue—rather than bar—further litigation on a claim and seeks to preclude litigation on an issue relevant to that claim, the fact that the defendant had an opportunity to be heard on the issue in an earlier proceeding, no matter how extensive, is constitutionally meaningless absent a clear showing that the issue was actually decided.

2. The Eleventh Circuit's holding that the *Engle* defendants' "opportunity to be heard" is a constitutionally adequate ground for giving the Phase I findings their "res judicata effect" under Florida law has profound consequences for the fundamental due-process rights of *Engle* defendants. Affording full faith and credit to the Florida Supreme Court's unorthodox approach to claim preclusion necessarily invites "arbitrary and inaccurate adjudication," *Oberg*, 512 U.S. at 430-31, because *Engle* defendants are being deprived of their property without any court's having determined that the plaintiffs actually 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 alleged 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. 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). In light of the alternative theories pursued by the class and the generality of the verdict-form questions, the Florida Supreme Court conceded that the Phase I findings would be "useless in individual actions" under Florida law's issue-preclusion principles. *Id.* at 433.

Under the Florida Supreme Court's new claim-preclusion standard, however, respondent was permitted to rely on the preclusive effect of the *Engle* findings to establish that the specific cigarettes Ms. LaSard smoked contained a defect and that petitioners' conduct with respect to Ms. LaSard was negligent. Respondent was permitted to invoke the "res judicata effect" of those findings even though there is no way to know whether the *Engle* jury *actually* decided those issues in her favor. That means no court has ever determined that respondent has proven each essential element of her strict-liability and negligence claims to any finder of fact. *See Graham*, 857 F.3d at 1260 n.183 (Tjoflat, J., dissenting) ("That 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).").[5]

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 effects" of cigarettes, the "addictive nature" of cigarettes, or both—as well as from the various distinct theories of concealment and conspiracy pursued by the *Engle* class. 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,

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[5] In *Graham*, the Eleventh Circuit stated that the Florida Supreme Court had examined the *Engle* trial record and determined that the "jury decided common elements of the negligence and strict liability of the tobacco companies for all class members," 857 F.3d at 1182—namely, that "all of the companies' cigarettes cause disease and addict smokers," *id.* at 1176. But *Graham*'s suggestion that the defect and negligence findings rest on the determination that all cigarettes share a common defect is impossible to reconcile with *Douglas*'s description of the alternative theories of defect and negligence pursued by the class, its conclusion that the findings would be "useless" if the "actually decided" requirement were applied, 110 So. 3d at 433, and the Florida Supreme Court's subsequent decision confirming the impossibility of determining whether the defect and negligence findings rest on an all-cigarettes theory, *see R.J. Reynolds Tobacco Co. v. Marotta*, 214 So. 3d 590, 601-02 (Fla. 2017) (reasoning that the findings do not rest "solely on the inherent dangers of cigarettes" because the jury heard evidence of other theories).

Engle Tr. 36479-86, white papers 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 to increase the potency of nicotine, *see id.* at 36483-85.

As the Eleventh Circuit panel acknowledged in this case, "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 of "low-tar" fraud pursued by respondent. Pet. App. 19a. Indeed, because the *Engle* verdict form does not reveal which categories of allegedly concealed information formed the basis of the jury's findings, it is possible that the *Engle* jury *rejected* (or never reached) the class's allegations about low-tar cigarettes and instead based its findings on the concealment of information about brands of cigarettes that Ms. LaSard never smoked. And even if the *Engle* jury *did* find that petitioners concealed information about low-tar cigarettes, the jury may have found that the concealment occurred only in connection with advertisements that Ms. LaSard never saw, or industry-organization publications that she never read, or public appearances by company executives of which she was unaware.

Fayerweather—along with the centuries of common-law authority on which it rests—leaves no doubt

that applying preclusion in these circumstances is unconstitutional because the specific theory of concealment and conspiracy on which respondent relied in this case is at most *one* of the "several distinct issues" on which the *Engle* verdict *might* be based. 195 U.S. at 307.

* * *

The Eleventh Circuit's decision rests on an unprecedented conception of due process and the limits of preclusion. While the en banc court's earlier decision in *Graham* rejected petitioners' due-process challenges on fact-specific grounds—what the court believed the *Engle* jury had actually decided—*Burkhart* and this case make clear that the Eleventh Circuit is no longer purporting to limit *Engle* preclusion to issues supposedly decided by the *Engle* jury. Thus, the only question for this Court is now a purely legal one: whether affording a party an "opportunity to be heard" on an issue is constitutionally sufficient to preclude that party from disputing the issue in a subsequent proceeding even where it is impossible to determine whether the issue was actually decided in the prevailing party's favor. By discarding the "actually decided" requirement in favor of requiring no more than a mere "opportunity to be heard," the Eleventh Circuit has opened the door to due-process violations on a massive scale. The Court should grant certiorari to put an end to this dangerous experimentation with fundamental due-process rights and correct the "layer upon layer of judicial error" committed by Florida's state and federal courts in the *Engle* litigation. *Graham*, 857 F.3d at 1214 (Tjoflat, J., dissenting).

II. THE QUESTION PRESENTED HAS FAR-REACHING CONSEQUENCES FOR THOUSANDS OF PENDING CASES AND FOR FUTURE ISSUES CLASS ACTIONS.

The practical impact of the question presented is extraordinary. 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 virtually unprecedented financial consequences.

The consequences also extend beyond the *Engle* progeny setting. In class actions across the country, courts are relying on unorthodox procedural devices to simplify litigation for plaintiffs, often "to the unique detriment of . . . unpopular defendants." *Graham*, 857 F.3d at 1288 n.265 (Tjoflat, J., dissenting). In particular, like the Florida Supreme Court in *Engle*, lower courts are increasingly utilizing 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 due process prohibits federal courts from giving full faith and credit to the outcome of such proceedings where a

state court has attempted to make an end-run around basic constitutional protections by using the combination of issues classes and novel rules of preclusion.

The prior denials of certiorari in other *Engle* progeny cases are no barrier to review here. This is the first petition seeking review of the Eleventh Circuit's conclusion—announced for the first time in *Burkhart* and confirmed in this case—that an issue may be deemed conclusively established consistent with due process so long as the defendant had an opportunity to be heard on the issue, regardless of whether the issue was actually decided. The plaintiff in *Graham* successfully argued against review in this Court by emphasizing the fact-bound nature of the task of determining what the *Engle* jury actually decided. That task is irrelevant now. The question presented here is a purely legal one: Does due process require an actual decision on issues before those issues may be given preclusive effect in subsequent litigation, or is it sufficient that a party had an opportunity to be heard?

This petition—and the companion petition filed today in *Philip Morris USA Inc. v. Boatright*—represent the Court's first opportunity since *Burkhart* was decided to resolve the question presented. It is now clear that neither the state nor the federal courts in Florida maintain even a pretense that any jury actually has decided—or will be required to decide—all the elements of *Engle* progeny plaintiffs' claims. Instead, they deem it sufficient that the issues relevant to a progeny plaintiff's individual smoking history *might* have been decided in *Engle* and that the defendants had an opportunity to be heard on those issues. Imposing liability without requiring an *actual* decision in plaintiffs' favor on each element of their claims is a

blatant deprivation of the defendants' property without due process of law.

CONCLUSION

The Court should grant the petition for a writ of certiorari along with the petition in *Philip Morris USA Inc. v. Boatright*.

Respectfully submitted.

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November 19, 2018