No. 13-191

In the Supreme Court of the United States

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

Petitioners,

v.

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

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS–cont'd

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

Statutes and Rules

Other Authorities and Materials

TABLE OF AUTHORITIES – cont'd

Page(s)

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit corporation with 107 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers of a variety of products, including automobiles, trucks, aircraft, electronics, cigarettes, tires, chemicals, pharmaceuticals, and medical devices. A list of PLAC's corporate membership is appended to this brief.

PLAC's primary purpose is to file *amicus curiae* briefs in cases that raise issues affecting the development of product liability litigation and have potential impact on PLAC's members. This is such a case. In the decision below, the Florida Supreme Court has committed one of the largest states to a radical new path by abandoning in the context of any "issues" class action a crucial due process safeguard in the doctrine of preclusion – the requirement that an issue precluded from litigation have been "actually decided" in a prior proceeding. Because PLAC's

[1] Letters of consent from all parties to the filing of this brief have been lodged with the Clerk. Pursuant to S. Ct. Rule 37.2, PLAC states that all parties' counsel received timely notice of the intent to file this brief. Pursuant to S. Ct. Rule 37.6, *amicus* states that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission.

members are often named as defendants in mass tort litigation, including "issues" class actions, they have a vital interest in ensuring that state courts adhere to traditional, time-tested, due process limitations on the use of preclusion.

STATEMENT

The petition for certiorari raises an important and recurring question of federal constitutional law that affects more than 4,500 pending state and federal cases and involves billions of dollars of potential liability. It presents the fundamental question whether due process bars the use of preclusion to establish elements of a plaintiff's claim where it cannot be demonstrated that the precluded issues *were actually decided* in an earlier proceeding – and where it is even possible that, if they *were* previously decided, they resolved *in favor of* the party who is barred from "relitigating" them. The Florida Supreme Court's creation of an unprecedented and unrecognizable form of preclusion for "issues" class actions violates due process and clearly warrants this Court's review.

1. The doctrine of res judicata "refers to the various ways in which a judgment in one action will have a binding effect in another." F. JAMES & G. HAZARD, JR., CIVIL PROCEDURE § 11.3, at 590 (3d ed. 1985) ("JAMES & HAZARD"). "Res judicata" comes in two basic forms: claim preclusion and issue preclusion. Pet. App. 25a-26a; JAMES & HAZARD, *supra*, § 11.3, at 590; RESTATEMENT (SECOND) OF JUDGMENTS §§ 17-19, 27 (1982) ("RESTATEMENT"). The distinct characteristics – and quite different effects – of these two forms of preclusion have long

been recognized. See, *e.g.*, *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-53 (1878) (discussing contours of both doctrines). See generally JAMES & HAZARD, *supra*, § 11.3, at 591 (effects of claim preclusion include "extinguish[ment]" of entire claim, "merger" of prevailing plaintiff's claim into the judgment, and limitation of plaintiff's rights "to proceedings for the enforcement of the judgment"); RESTATEMENT § 17(1) (same); *id.* at §§ 17(3), 27 (describing far more limited effects of issue preclusion).

2. The petition sets forth the relevant background to this litigation, including the Florida Supreme Court's novel decision in *Engle* v. *Liggett Group, Inc.*, 945 So. 2d 1246 (2006) (Pet. App. 66a-140a), and the subsequent filing of thousands of state and federal lawsuits by individual plaintiffs who were part of the prospectively decertified *Engle* class (the "*Engle* progeny cases"). See Pet. 5-9.

Although it is hornbook law that the issue- or claim-preclusive effect of a judgment is determined *not* by the court rendering the judgment but by the court in the *second* proceeding, the Florida Supreme Court in *Engle* declared that the jury's extremely generalized "findings" in Phase I of the trial would have unspecified "res judicata effect" in all future cases filed by individual class members. Pet. App. 67a, 100a, 116a; see also *id.* at 7a-8a, 72a-73a & n.4 (describing Phase I findings). It also took the highly unorthodox steps of decertifying the massive class of Florida smokers *on a prospective basis only*, and retrospectively certifying an "issues" class for the matters covered by Phase I (the highly generalized issues decided by the jury). The Florida Supreme Court justified these unprecedented rulings as a

"pragmatic solution" allowing as much of the *Engle* proceedings as possible to be preserved even though the gigantic class action had been improperly certified in the first place. Pet. App. 100a.

3. The instant petition arises from one of the *Engle* progeny cases that was litigated to a final judgment in the Florida state courts on claims of strict liability and negligence. After the trial court entered a $2.5 million judgment in favor of respondent James Douglas, who had brought suit to recover for the death of his wife, Charlotte, a longtime smoker, the Second District Court of Appeal affirmed. Pet. App. 41a-59a.

The critical issue both at trial and on appeal involved the proper use and preclusive effect of the highly generalized and abstract *Engle* Phase I findings. Over petitioners' due process objections, the Florida trial court ruled that those findings relieved respondent of any need to prove the wrongful conduct elements of his individual strict-liability and negligence claims, and barred petitioners from disputing that they had engaged in any negligent conduct vis-à-vis Mrs. Douglas individually or that the particular brands she smoked were defective at the time she smoked them. Although it affirmed, the Court of Appeal recognized that the due process issue "is one of wide-ranging impact" and "great public importance" and accordingly certified it to the Florida Supreme Court. Pet. App. 43a, 59a.

4. The Florida Supreme Court upheld the strict-liability and negligence verdicts. Pet. App. 1a-40a. It acknowledged that the doctrine of *issue* preclusion requires proof that an issue was "actually decided" in the previous action, a requirement flowing from the

Due Process Clause under this Court's decision in *Fayerweather* v. *Ritch*, 195 U.S. 276, 308-09 (1904). Pet. App. 22a-31a. It also acknowledged that, because of the extreme generality of the *Engle* findings, application of issue preclusion "would effectively make the Phase I findings . . . useless in individual actions." Pet. App. 26a.

Unwilling to allow the *Engle* findings to have the extremely modest effect required by traditional state preclusion law (including its incorporated federal due process safeguards), the Florida Supreme Court invented a new preclusion rule applicable only to "issues" class actions. The court first opined that the fundamental due process requirement recognized in *Fayerweather* has no bearing on *claim* preclusion. It acknowledged that, ordinarily, a necessary prerequisite for *claim* preclusion – in Florida as in every other American jurisdiction – is the entry of a *final judgment on the merits* (Pet. App. 26a-27a, 29a; see also *id.* at 36a-39a (Canady, J., dissenting)), and that in an individual lawsuit, the separation of the case into "liability and damages phases" would prevent the entry of such a judgment after completion of the liability stage, with the consequence that claim preclusion *could not operate*. *Id.* at 28a. But "[w]hen class actions are certified to resolve less than the entire cause of action," the court asserted, that traditional rule simply does not apply; instead, the decision in "the first trial on common liability *issues* is entitled to" claim-preclusive effect "in the subsequent trial on individual issues," and this is true whether or not the individual issues were "actually decided" in the first proceeding. *Id.* at 29a-30a (emphasis added). The court made no effort to explain how a valid rule of claim preclusion could

operate without *any* of that doctrine's traditional effects (no extinguishment or merger of the plaintiff's claim, no limitation of plaintiff's rights to enforcement of the judgment).

Judge Canady dissented, criticizing the majority's new preclusion rule as "a radical departure" from well-established Florida law. Pet. App. 33a-40a.

INTRODUCTION AND SUMMARY OF ARGUMENT

In Phase I of the sprawling *Engle* class-action trial, the jury was asked to decide whether each of the tobacco-company petitioners here "place[d] cigarettes on the market that were defective and unreasonably dangerous." Pet. App. 7a. The jury answered "yes" to that abstract and highly generalized question but was never required to specify which of the many brands and types of cigarettes sold by each petitioner was defective, which of the many challenged features of those products rendered them defective, or when precisely (over a period of five decades) the defect existed. By the same token, the jury answered "yes" to the highly generalized question whether each petitioner here "w[as] negligent" without ever specifying how, or when, or through what conduct, such negligence had occurred. Pet. App. 8a. In this case, a Florida trial court permitted respondent to invoke these abstract *Engle* findings as conclusively establishing the tortious-conduct elements of his negligence and strict-liability claims against petitioners with respect to the particular cigarettes smoked by Mrs. Douglas and the time period of her smoking. The Florida Supreme Court rejected a due process challenge to such preclusion.

I. The lower court's abandonment of the "actually decided" precondition for preclusion worked an egregious violation of petitioners' due process rights. As petitioners demonstrate, that component of issue preclusion is established by long and unbroken practice in American courts. It serves as a vital safeguard, protecting a civil defendant's fundamental right to defend against a liability claim. As this Court recognized in *Fayerweather* v. *Ritch*, 195 U.S. 276, 308-09 (1904), it is required by the Due Process Clause. The Florida Supreme Court's suggestion that this essential safeguard could be dispensed with by resorting to the doctrine of *claim* preclusion is flawed at every turn.

The lower court has created a novel and unrecognizable preclusion rule for "issues" class actions in order to uphold the entry of a judgment – and award of $2.5 million – even though no factfinder has ever demonstrably determined that petitioners' conduct specifically relating to Mrs. Douglas constituted negligence or that their products used by her were in fact defective. Indeed, it is possible that the *Engle* jury *rejected* the specific negligence and defect theories upon which respondent's claims rest. To impose multimillion dollar (or any) liability under these circumstances is the quintessence of arbitrary, not to mention potentially inaccurate, decision-making. And the due process violation (and egregious unfairness) is compounded here by the Florida Supreme Court's make-it-up-as-you-go, serial innovations (both here and in *Engle* itself), which have created a preclusion regime that petitioners could not possibly have anticipated at the time of the Phase I trial.

II. This Court's intervention is urgently needed to correct a radical precedent with (a) far-reaching direct effects on thousands of pending state and federal *Engle* progeny cases, and (b) predictable, indirect effects on countless other cases in Florida and across the country where plaintiffs will invoke Florida's novel preclusion approach (including in the growing number of "issues" class actions). Further review would also provide much-needed guidance to the state courts on the limits imposed by due process on their authority, on grounds of "efficiency," "convenience," or "pragmatism," to restrict a civil defendant's fundamental right to defend against liability claims.

ARGUMENT

I. THE FLORIDA SUPREME COURT'S NOVEL PRECLUSION RULE FOR "ISSUES" CLASS ACTIONS VIOLATES DUE PROCESS

The Due Process Clause of the Fourteenth Amendment requires state courts to provide litigants with adequate procedural safeguards and protections against "arbitrary and inaccurate adjudication." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994). The basic guarantee of due process in a civil trial is that a defendant will not be held liable (and deprived of property) without a meaningful opportunity to contest all elements of liability and raise all affirmative defenses. See, *e.g.*, *Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007); *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971) (due process safeguards "right to litigate the issues raised" in lawsuit); *Hovey* v. *Elliott*, 167 U.S. 409, 443 (1897) (punishment for contempt of court cannot include striking defendant's answer and entering default

judgment, as that would violate "the inherent right of defense secured by the due process of law clause").[2]

As this Court has long recognized, "traditional practice provides a touchstone for constitutional analysis." *Oberg*, 512 U.S. at 430; see also *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856). Adherence to time-tested methods of adjudication "protect[s] against arbitrary and inaccurate adjudication" and is the very essence of due process. *Oberg*, 512 U.S. at 430. Accordingly, the "abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that" the resulting "procedures violate the Due Process Clause." *Ibid.*

Even in cases involving state-court decisions of far less impact and practical importance than the decision below, this Court has not hesitated to invalidate on due process grounds "extreme applications of the doctrine of res judicata." *Richards* v. *Jefferson County*, 517 U.S. 793, 797 (1996) (reversing Alabama Supreme Court decision); see also *South Central Bell Tel. Co.* v. *Alabama*, 526 U.S. 160, 167-68 (1999) (same). Nor has this Court been

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[2] See also *Philip Morris USA Inc.* v. *Scott*, 131 S. Ct. 1, 3 (2010) (Scalia, J., in chambers) (state-court decision that "eliminated any need for plaintiffs to prove, and denied any opportunity for [defendants] to contest," element of reliance in fraud claim would give rise to due process concerns). The fundamental right to defend against deprivations of property in judicial proceedings has deep roots in this Court's jurisprudence, stretching back at least to the Civil War. See, *e.g.*, *McVeigh* v. *United States*, 78 U.S. (11 Wall.) 259, 261, 263, 267 (1871); *Windsor* v. *McVeigh*, 93 U.S. 274, 277 (1876) ("Wherever one is assailed in his person or his property, there he may defend, *for the liability and the right are inseparable*.") (emphasis added).

reluctant in recent years to rein in wayward individual state-court systems that have ignored the limits on their authority imposed by the Due Process Clause. See, *e.g.*, *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 131 S. Ct. 2846 (2011) (reversing North Carolina Court of Appeal's novel and expansive exercise of personal jurisdiction); *J. McIntyre Machinery, Ltd.* v. *Nicastro*, 131 S. Ct. 2780 (2011) (same for New Jersey Supreme Court).

A. The "Actually Decided" Requirement Is A Vital Due Process Safeguard

In *Fayerweather* v. *Ritch*, 195 U.S. 276 (1904), this Court made clear that "the plea of *res judicata* must fail" where preclusion is sought based on an earlier jury verdict that might rest on any of two or more grounds, but there is no way of telling on which ground it rested. *Id.* at 307. This limitation on preclusion, the Court expressly held, was a requirement of due process. *Id.* at 308-09. As petitioners persuasively demonstrate (Pet. 19-22), the "actually decided" requirement has been a core component of issue preclusion for centuries, repeatedly recognized by this Court. See Pet. 20-22 (discussing cases).

This unbroken line of decisions makes eminent sense. In civil litigation, a plaintiff traditionally must prove all the elements of his or her claim; a defendant must be allowed to dispute that proof and establish available defenses; and a factfinder must decide the controversy between the litigants under established burdens of proof. Where there is a demonstration by a plaintiff that a particular element of his or her claim (or a particular affirmative defense) was "actually litigated and resolved" against

the defendant through "a valid court determination essential to [a] prior judgment," *Taylor* v. *Sturgell*, 553 U.S. 880, 892 (2008) (internal quotation marks omitted), there is no impairment of the right to defend because the defendant already had a fair opportunity to prevail on these issues – and unambiguously lost. In that circumstance, preclusion merely prevents the *relitigation* of any issues.

Without a showing that a liability element or defense was "actually litigated and resolved" in an earlier proceeding, however, there is no assurance that any factfinder has resolved that element or defense against a defendant – and no basis for preventing the defendant from exercising the right to defend with respect to that element or defense. Nor, in that circumstance, is there any basis for relieving the plaintiff of the burden of proving every element of his or her claim. Elimination of the "actually decided" requirement thus creates the risk that a defendant will be held liable (and, as here, compelled to pay millions in damages) without *any* factfinder having determined that all the elements of a plaintiff's claim have been proven – an "arbitrary . . . adjudication," *Oberg*, 512 U.S. at 430, if there ever was one.

B. The Florida Supreme Court's Purported Reliance On Claim Rather Than Issue Preclusion Does Not Avoid The Due Process Problem

The Florida Supreme Court took the view that it could avoid the due process problem by declining to rely on *issue* preclusion and instead invoking *claim* preclusion. As petitioners persuasively demonstrate (Pet. 25-31), that conclusion was flawed at every

turn. The *substance* of what occurred below was a determination of the preclusive effect of the *Engle* Phase I liability *findings* on the need for liability *findings* in this lawsuit. Regardless of the label attached to it, that is issue preclusion in every meaningful sense – except, of course, for the omitted "actually decided" element required by due process.

Moreover, the novel preclusion rule for "issues" classes invented by the Florida Supreme Court also bears no resemblance to the traditional doctrine of *claim* preclusion as applied by Florida and other American jurisdictions. As noted above (at pages 2-3), the traditional consequence of claim preclusion is to *extinguish* an entire claim, leaving intact only the judgment on the merits and (in the case of "merger") whatever remedies are available to the prevailing plaintiff to enforce it. That obviously was not the effect of "claim preclusion" here. See also Pet. 15, 26-27. Here, there was no extinguishment and no merger; if there had been, further litigation in this individual case would have been barred. What is more, as Judge Canady correctly noted in dissent, claim preclusion cannot apply here because the *Engle* litigation "did not result in a final judgment on the merits with respect to members of the class," only "findings of the jury" that were "determinations of fact on particular issues" (again, a classic instance of issue preclusion). Pet. App. 38a-39a. The application of claim preclusion to a proceeding that "did not fully adjudicate any claim and did not result in any final judgment on the merits" constitutes a "radical departure" from well-established Florida law. *Ibid.*; see also Pet. 26; *Richards*, 517 U.S. at 797 (invalidating on due process grounds a similarly "extreme application[] of res judicata").

The due process violation was compounded here by the Florida Supreme Court's make-it-up-as-you-go, serial innovations (both here and in *Engle* itself), which together have created a preclusion regime that petitioners could scarcely have imagined at the time of the Phase I trial. At that time, (1) Florida law would have treated the findings as qualifying at most for issue but not claim preclusion, and then only if a plaintiff demonstrated that the same issue was actually decided by the *Engle* jury; (2) Florida law applied claim preclusion only to a judgment on the merits, and the Phase I verdict did not qualify; (3) Florida claim preclusion had the effect of extinguishing the plaintiff's entire claim and merging it into the judgment, not an effect comparable to that of issue preclusion; (4) there was no special rule (of issue or claim preclusion) for "issues" class actions; (5) *Engle* was not even an "issues" class action but something broader (the "issues" class was created retroactively); and (6) the preclusive effect of a judgment or findings was something the enforcing court, not the issuing court, decided. These were the traditional "res judicata" ground rules that petitioners were dealing with when they tried Phase I of *Engle*. They are worlds removed from the novel regime created after-the-fact by the Florida Supreme Court to measure the preclusive effects of the findings that resulted from that trial. See U.S. *Amicus* Brief, *DaimlerChrysler AG* v. *Bauman*, No. 11-965, at 26-28 (July 5, 2013) (Due Process Clause's limits on states' power to adopt attribution rules for measuring minimum contacts with forum include not only prohibition against arbitrary rules but also requirement that potential litigants have "fair warning" of those rules).

II. THE ISSUE PRESENTED IS EXCEEDINGLY IMPORTANT AND OFFERS A VALUABLE OPPORTUNITY TO CLARIFY THE DUE PROCESS LIMITS ON STATE-COURT AUTHORITY TO ABANDON TRADITIONAL SAFEGUARDS IN MASS LITIGATION

As petitioners point out (Pet. 9), the issue presented in these cases has a direct bearing on approximately 4,500 *Engle* progeny cases currently pending in the state and federal courts. Tens of billions of dollars in potential liability are at stake in that tsunami of litigation. See Pet. 32. Under this Court's traditional approach, these undisputed facts are more than enough to demonstrate that the federal constitutional issue presented here is sufficiently important and recurring to warrant this Court's attention.[3]

But there is more. Review is also warranted because the importance of this case – and the value of a decision by the Court on the issue presented – extends well beyond the *Engle* progeny litigation. In the decision below, the Florida Supreme Court has now committed one of the largest states to an unprecedented new doctrine of "claim" preclusion that applies – even in the absence of any final

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[3] See, *e.g.*, *Fidelity Federal Bank & Trust* v. *Kehoe*, 547 U.S. 1051 (2006) (Scalia, J., joined by Alito, J., concurring in the denial of certiorari) (noting that "enormous potential liability" is "a strong factor in deciding whether to grant certiorari"); *United States* v. *Mitchell*, 463 U.S. 206, 211 & n.7 (1983) (issue on which review was granted was "of substantial importance" because it involved more than $100 million of potential government liability); *FTC* v. *Jantzen, Inc.*, 386 U.S. 228, 229 (1967) (taking note of almost 400 pending administrative orders like the one being challenged).

judgment on the merits, up until now a necessary prerequisite for claim preclusion – to all "issues" class actions litigated in the Florida courts. And because the res judicata effect of a state-court judgment is governed by state law, see 28 U.S.C. § 1738, the *Engle* Phase I findings (and findings in other Florida "issues" class actions) will also have an impact in related lawsuits in the federal courts.

Nor is this all. It is entirely predictable, if the decision below is permitted to stand, that the well-organized plaintiffs' class-action bar will attempt to spread the "lessons" of *Engle* (and the decision below) to other categories of cases. The Florida courts will become a magnet for "issues" class actions that can be leveraged, through the novel claim preclusion doctrine adopted below, into judgments (and, of course, settlements) obtainable without the need for plaintiffs to prove every element of their claims. And the plaintiffs' class-action bar will doubtless attempt to spread these radical legal doctrines to other jurisdictions, given both the enormous economic stakes of mass tort litigation today and the rising incidence of "issues" class actions in both federal and state courts. As explained above (at pages 9-10), this Court has stepped in to correct "extreme" applications of the doctrine of res judicata (and other due process violations by individual state-court systems) that had nowhere near the practical importance or far-reaching impact of the decision below.

A. State And Federal Courts Are Making Increasing Use Of "Issues" Class Actions And Multi-Phase Proceedings To Adjudicate Common Issues In Mass Litigation

The Florida Supreme Court's decision in *Engle* to decertify a class action, retroactively certify an "issues" class action, and make pronouncements about the future "res judicata effect" of the Phase I jury's findings was unprecedented. But *Engle* is only one of a number of large class actions in recent years that have employed a segmented, multi-phased trial plan – including an initial phase directed toward resolving highly generalized liability issues – to deal with the adjudication of large numbers of claims. Indeed, there is a growing trend to attempt mass tort aggregation through generic trial proceedings involving disparate claims relating to similar products.[4]

What is more, in recent years there has been a marked increase in "issues" class actions dedicated to resolving one or more issues (often highly generalized

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[4] See, *e.g.*, *Scott* v. *American Tobacco Co.*, 949 So. 2d 1266, 1271-72 (La. Ct. App. 2007) (smokers' class action); *Ex parte Flexible Prods. Co.*, 915 So. 2d 34, 38, 40-43 (Ala. 2005) (approving plan for generic product liability trial in 1600 consolidated cases involving chemical used in industrial applications); *State ex rel. Appalachian Power Co.* v. *MacQueen*, 479 S.E.2d 300, 304-05 (W. Va. 1996) (approving plan to consolidate thousands of asbestos claims into two-phase trial; first phase would adjudicate general negligence questions); *ACandS, Inc.* v. *Godwin*, 667 A.2d 116, 343-46, 392-404 (Md. 1995) (approving four-phase trial plan that determined whether each of six asbestos defendants "was negligent and/or strictly liable" and applied finding to individual claims by 8,549 plaintiffs).

or abstract in nature) on an aggregate basis. See generally Farleigh, *Splitting the Baby: Standardizing Issue Class Certification*, 64 VAND. L. REV. 1585, 1595-1602 (2011) (describing emergence of "issues" class actions beginning in late 1980s and their increasing acceptance by courts); Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567, 582-86 (2004) (same); *id.* at 586 ("District courts everywhere are inundated with requests for certification of issue class actions [under Fed. R. Civ. P. 23(c)(4)] as an alternative to (b)(3) class actions . . . ."). Although some courts and commentators have rejected the use of "issues" class actions as an end run around the "commonality" and "predominance" requirements of Federal Rule 23 (and its state equivalents), see *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996); Hines, *Challenging The Issue Class Action End-Run*, 52 EMORY L.J. 709, 714 (2003), the critics represent a minority view today, see Farleigh, *supra*, 64 VAND. L. REV. at 1601 (noting that at least six circuits have disagreed with *Castano* and approved "issues" class actions regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement).

This trend has continued in recent years, spurred in part by (a) publication of the American Law Institute's PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §§ 2.02-2.05 (2010) ("PRINCIPLES"), which endorses the use of "issues" class actions under certain circumstances, see *Gates* v. *Rohm and Haas Co.*, 655 F.3d 255, 273 (3d Cir. 2011), and (b) renewed efforts of plaintiffs' class counsel, in the aftermath of *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), to use "issues" class actions as a way to ensure that class certification is not defeated because

of the absence of commonality or predominance in a more broadly defined class-action proceeding. See, *e.g.*, *McReynolds* v. *Merrill Lynch, Pierce, Fenner & Smith*, 672 F.3d 482, 487-91 (7th Cir.) (upholding certification of "issues" class action targeting whether two particular employment policies gave rise to liability under disparate impact theory), cert. denied, 133 S. Ct. 338 (2012).[5] According to one lawyer who represents plaintiffs in class actions, "As defendants continue to challenge a court's ability to certify classes that require individualized proof of damages, one can expect plaintiffs to increasingly seek – at least in the alternative – certification of issues classes involving a single cause of action or the issue of liability using Rule 23(c)(4)." Jackson, *Recent Rulings May Lead to More Issue Classes*, Nat'l L.J. Online (July 8, 2013).

The novel preclusion rule created by the Florida Supreme Court for "issues" class actions will only spur the plaintiffs' bar to bring *more* such lawsuits, not just in Florida but also in other jurisdictions. In every "issues" class action, the question potentially arises of what preclusive effect will be given in subsequent proceedings to the findings made by the factfinder on the certified issues. The Florida

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[5] In sharp contrast to the decision below, the ALI's recent scholarly review of the law of aggregate litigation recognizes that "[a]ggregate treatment of a common issue by way of a class action" will "generate only issue preclusion" (and for claim preclusion to apply, there would have to be "aggregate treatment of related claims"). See PRINCIPLES, *supra*, § 2.01 cmt. d. Unlike the Florida Supreme Court, the ALI also recognizes that the scope of preclusion in cases such as this "is closely related to dictates of constitutional due process." *Id.* § 2.02 cmt. e.

Supreme Court's flawed answer to that question ensures that a defendant may be held liable based on vague answers to highly abstract liability questions without individual plaintiffs ever having had to actually prove every element of their claims. A grant of review in this case will clarify the due process limits on preclusion in the increasingly important setting of "issues" class actions.

B. There Is A Substantial Need For Greater Guidance From This Court Concerning The Due Process Limits On Mass Litigation In The State Courts

Finally, there is yet another reason why the petition should be granted. A decision on the merits would provide much-needed guidance concerning the due process limits on the authority of state courts to abandon traditional procedural safeguards in mass litigation in the name of efficiency, practicality, or convenience. In *Engle*, the Florida Supreme Court justified its highly unorthodox decisions to retroactively certify an "issues" class action and make declarations about the future "res judicata effect" of the Phase I findings as a "pragmatic solution" that preserved as much of *Engle* as possible. Pet. App. 100a. Similarly, in the decision below, that court justified its new rule of "claim" preclusion for "issues" class actions partly on the ground that the rule preserved a significant effect for both the Phase I findings and the court's prior decision in *Engle*. See Pet. App. 26a ("[T]o decide here that [in *Engle*] we really meant issue preclusion . . . would effectively make the Phase I findings . . . useless in individual litigation.").

In recent decades, there has been a substantial

increase in large class actions and other forms of mass litigation involving product liability, consumer fraud, and other tort claims, including in the state courts. See Lee & Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, Federal Judicial Center, at 1 (2008) (noting 72% increase in class-action activity between 2001 and 2007); Cabraser, *Life After* Amchem*: The Class Struggle Continues*, 31 LOY. L.A. L. REV. 373, 386 (1998) ("It is no secret that class actions – formerly the province of federal diversity jurisdiction – are being brought increasingly in the state courts."). Over the years, this Court (and the lower federal courts) have taken some meaningful steps to safeguard the fundamental fairness of mass litigation in the *federal* courts, primarily through the interpretation of Rule 23 and other federal rules and statutes that embody due process safeguards. See, *e.g.*, *Wal-Mart* v. *Dukes*, *supra*; *Taylor* v. *Sturgell*, *supra*; *Castano, supra* (decertifying smokers' class action).

In contrast, the *state* courts – which lack the uniform protections of Federal Rule 23 and statutes such as the Rules Enabling Act, 28 U.S.C. § 2072 – have been particularly fertile ground for class actions that deviate from traditional modes of adjudication. Indeed, in enacting the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), Congress specifically noted the precipitous increase in class actions filed in state courts in which "the governing rules are applied inconsistently[,] . . . frequently in a manner that contravenes basic fairness and due process considerations." S. Rep. No. 109-14, at 4 (2005); see also *id.* at 14 (same). As Congress correctly recognized, the *state* courts have been far less

solicitous of traditional due process safeguards in mass tort cases – and far more willing to cut corners and jettison traditional protections enjoyed by defendants in the name of "efficiency," "convenience," or "pragmatism."

The decision below (and *Engle* itself) provide a textbook illustration. *Engle* represents perhaps the most radical use of an "issues" class action to date (not only in its *retroactive* certification but also in its willingness to certify issues of stunning breadth and generality). And, in the decision below, the Florida Supreme Court has now added another round of radical innovation to *Engle*'s novel declaration of *prospective* "res judicata" effects by creating an unprecedented and unrecognizable doctrine of "claim" preclusion that lacks virtually all of the traditional *effects* of claim preclusion and operates *without the traditional prerequisite* of a prior judgment on the merits. This novel rule of claim preclusion will henceforth govern all Florida "issues" class actions (but in every other kind of litigation, Florida courts will continue to observe the traditional limits on issue and claim preclusion). Taken together, the Florida Supreme Court's actions have deprived petitioners of the basic guarantee of due process in a civil trial: that a defendant will not be held liable (and deprived of property) without an adverse finding by *some* factfinder of all the elements necessary to establish liability.

Unfortunately, the Florida Supreme Court's willingness to deprive a civil defendant of the right to insist on proof of every element of a claim because of the practicalities of aggregate litigation is hardly an isolated occurrence. It is reminiscent, for example, of

the Louisiana courts' recent decision (in another case involving unpopular defendants) to "eliminate[] any need for plaintiffs to prove, and den[y] any opportunity for [defendants] to contest," the traditional element of individualized reliance in a fraud claim on the ground that individual plaintiffs' claims "were aggregated with others' through the procedural device of the class action." *Philip Morris USA Inc.* v. *Scott*, 131 S. Ct. at 3, 4 (2010) (Scalia, J., in chambers). "The extent to which class treatment may constitutionally reduce the normal requirements of due process is an important question." *Id.* at 4. Greater guidance from this Court would substantially assist the state courts in evaluating when departures from traditional safeguards in mass tort and other complex litigation are constitutionally permissible.[6]

* * *

Contrary to respondent's contention (Opp. 25, 29-30), the Florida Supreme Court's decision is not of

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[6] Tobacco companies frequently are on the receiving end of dramatic state-court departures from settled practice in mass litigation. See, *e.g.*, Mulderig, Wharton & Cecil, *Tobacco Cases May Be Only the Tip of the Iceberg for Assaults on Privilege*, 67 DEF. COUNSEL J. 16, 19-23 (2000) (explaining that Minnesota trial court, in response to sheer number of documents whose privileged status was disputed by plaintiffs, abandoned traditional safeguard of document-by-document review and instead used unprecedented mass categorization procedure that yielded demonstrably inconsistent results); Pet. for Cert., *Philip Morris USA, Inc.* v. *Accord*, No. 07-806, 2007 WL 4404253 (Dec. 17, 2007) (challenging as barred by due process West Virginia courts' use of "reverse bifurcation" in consolidated mass tort trial, whereby a defendant's liability for *punitive* damages to hundreds of plaintiffs is adjudicated, based entirely on aggregate proof, prior to any finding of compensatory liability to even a single plaintiff) (see 552 U.S. 1239 (order denying review) (2008)).

interest only to the parties. It is of great concern to all of PLAC's members. Nor is it just an isolated error or instance of injustice that, however glaring, this Court traditionally does not sit to correct. Rather, the decision below reflects a state-court system that has set itself upon an egregiously unconstitutional path, with predictably far-reaching effects on the litigation (and settlement) of "issues" class actions in Florida and elsewhere. This Court's intervention is urgently needed.

CONCLUSION

For the foregoing reasons, and those set forth in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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September 11, 2013

APPENDIX

PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
LIST OF CORPORATE MEMBERS

3M
Altec, Inc.
Altria Client Services Inc.
Anadarko Petroleum Corporation
AngioDynamics
Ansell Healthcare Products LLC
Astec Industries
Bayer Corporation
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boehringer Ingelheim Corporation
The Boeing Company
Bombardier Recreational Products, Inc.
Bridgestone Americas, Inc.
Brown-Forman Corporation
Caterpillar Inc.
CC Industries, Inc.
Celgene Corporation
Chrysler Group LLC
Cirrus Design Corporation
CNH America LLC
Continental Tire the Americas LLC
Cooper Tire & Rubber Company
Crane Co.
Crown Cork & Seal Company, Inc.
Crown Equipment Corporation
Daimler Trucks North America LLC
Deere & Company
Delphi Automotive Systems

Discount Tire
The Dow Chemical Company
E.I. duPont de Nemours and Company
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, LLC
Exxon Mobil Corporation
Ford Motor Company
General Electric Company
General Motors LLC
Georgia-Pacific Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works Inc.
Isuzu Motors America, Inc.
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Kawasaki Motors Corp., U.S.A.
KBR, Inc.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Lincoln Electric Company
Lorillard Tobacco Co.
Magna International Inc.
Marucci Sports, L.L.C.
Mazak Corporation
Mazda Motor of America, Inc.
Medtronic, Inc.
Merck & Co., Inc.
Meritor WABCO

Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Mueller Water Products
Mutual Pharmaceutical Company, Inc.
Navistar, Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
Novo Nordisk, Inc.
PACCAR Inc.
Panasonic Corporation of North America
Peabody Energy
Pella Corporation
Pfizer Inc.
Pirelli Tire, LLC
Polaris Industries, Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.
RJ Reynolds Tobacco Company
SABMiller Plc
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.
Techtronic Industries North America, Inc.
Teva Pharmaceuticals USA, Inc.
TK Holdings Inc.
Toyota Motor Sales, USA, Inc.
Vermeer Manufacturing Company
The Viking Corporation

Volkswagen Group of America, Inc.
Volvo Cars of North America, Inc.
Wal-Mart Stores, Inc.
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.