Nos. 11-741 and 11-754

In the Supreme Court of the United States

PHILIP MORRIS USA INC., LIGGETT GROUP LLC.,
Petitioners,

v.

FRANKLIN D. CAMPBELL,
Respondent.

R.J. REYNOLDS TOBACCO COMPANY,
Petitioner,

v.

MATHILDE MARTIN,
Respondent.

On Petitions for Writs of Certiorari To The Florida First District Court of Appeal

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America ("Chamber") respectfully submits this brief as *amicus curiae* in support of petitioners Philip Morris USA Inc. and Liggett Group LLC in *Philip Morris USA Inc. v. Campbell*, No. 11-741, and in support of petitioner R.J. Reynolds Tobacco Company in *R.J. Reynolds Tobacco Co. v. Martin*, No. 11-754.[1]

STATEMENT OF INTEREST

The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

Few issues are of more concern to American businesses than those affecting their fundamental

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that petitioners and respondents, upon timely receipt of notice of the Chamber's intent to file this brief, have consented to its filing.

right to defend themselves when they are sued. The lower court's rulings threaten that very right in a mass of smoking cases percolating throughout federal and state courts in Florida. These decisions approve the use of collateral estoppel to take broad categories of argument off the table at trial, based entirely on a general verdict that could have endorsed any number of alternative theories of liability, without any assurance that the issues precluded in subsequent trials were actually and necessarily decided by the general verdict. The direct impact of these procedural shortcuts is profound in and of itself: thousands of implicated cases are pending, and millions of dollars are potentially at stake in each. But review is all the more important given the risk that the reasoning applied below could be applied in future cases, both in Florida and in any other jurisdictions that follow the example of the court below.

The Chamber's members have a strong interest in reversal of the rulings below because the Florida District Court of Appeal's opinions are contrary to longstanding precedent of this Court and other federal authorities – and undermine the fundamental due-process rights of American businesses. If allowed to stand, the rulings have the potential to dramatically transform the law of issue preclusion and improperly increase the liability exposure of the Chamber's members and all companies doing business in the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

Preclusion doctrines must not be used "'as clubs but as fine instruments.'" Douglas Gunn, *The Offensive Use of Collateral Estoppel in Mass Tort Cases*, 52 Miss. L.J. 765, 798 (1982) (quoting *Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 421 F.2d 1313, 1316 (5th Cir. 1970)).

The decisions below defied this maxim, treating collateral estoppel as a blunt weapon. They did so by allowing the use of highly general verdicts – which may have been premised on just one of countless alternative theories – to foreclose litigation of highly specific issues in individual cases. In so doing, they dispensed with the universally recognized requirement that collateral estoppel applies only to specific, identifiable issues that were actually and necessarily decided, on the basis that adherence to these traditional and time-tested requirements would render the Florida Supreme Court's ruling in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1269-70 (Fla. 2006), a "nullity."

Engle was a class action suit on behalf of 700,000 smokers against almost a dozen companies and two industry organizations, seeking compensatory and punitive damages arising out of injuries allegedly sustained from smoking. *Id.* at 1254, 1256 & n.3. The class trial was to proceed in three phases – a first phase "to consider the issues of liability and entitlement to punitive damages for the class as a whole," *id.* at 1256, followed by separate phases for individual trials of the named plaintiffs (in phase 2) and the remaining class members (in phase 3). Significantly, although the first phase covered a broad

range of products made by different defendants at different times, the phase I verdict form did not require the jury to specify which brands or types of cigarettes were defective, what specific acts were negligent, or when the allegedly tortious conduct took place. (*See* Engle Phase I Verdict Form.) On appeal, despite vacating a $145 million punitive-damages award and determining that "problems with the three-phase trial plan negate the continued viability of this class action," the Florida Supreme Court also held that decertification should be prospective only, and it retrospectively certified an "issues class" for certain matters that were tried in Phase I of the class trial. *Engle*, 945 So. 2d at 1267-68. The findings on these matters, the Florida Supreme Court declared, "will have *res judicata* effect in" subsequent trials commenced by individual class members. *Id.* at 1269. The *Engle* opinion gave no guidance to lower courts on how to implement this mandate; nor did it state that it was requiring courts to depart from the long-standing limitations on preclusion doctrines.

Nonetheless, in professing fidelity to the *Engle* precedent, the lower courts betrayed petitioners' fundamental rights. Procedural shortcuts like collateral estoppel must be applied in a manner that ensures that there has been a finding in favor of the plaintiff on a particular issue before the defendant may be barred from contesting it. Indeed, because the core of due process is that "'everyone should have his own day in court,'" *Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008) (quoting *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996)), courts have insisted that "[p]roof that the identical issue was involved . . . is 'an absolute due process prerequisite to the application of collateral estoppel,'" 18 C. Wright et al., *Fed-*

eral Practice and Procedure § 4417, at 413 n.1 (2d ed. 2002) (quoting *Goodson v. McDonough Power Equip., Inc.*, 443 N.E.2d 978, 985 (Ohio 1983)); *see also Wickham Contracting Co. v. Board of Education*, 715 F.2d 21, 28 (2d Cir. 1983) (requirement that issue was "necessary and essential to the judgment in the earlier action" is "necessary in the name of procedural fairness, if not due process itself") (alteration, citation, and internal quotation marks omitted).

Shorn of these protections, collateral estoppel would portend devastating ills for American businesses. In the *Engle* progeny litigation alone, the rulings below potentially affect thousands of cases, each one likely seeking millions of dollars in damages. If those decisions remain good law, basic liability issues could be deemed admitted in every single case – without regard to whether any jury has ever decided the issue of fault with respect to the specific product during the specific time period at issue in each case.

More broadly, the rulings below have also cleared the way for a new breed of mass-tort litigation, in which a highly generic, all-encompassing "issues phase" is tried, implicating any number of manufacturers and any number of products over a multi-decade time span. Under the reasoning of the courts below, any such proceeding resulting in a general verdict against the defendants could be used to foreclose litigation over basic liability issues as to all manufacturers and all products for the entire time period – even if, in the most extreme example, the jury's general verdict is premised on a single flaw in a single model of one manufacturer's product at one moment in time.

The availability of such "*Engle* proceedings" would spark an explosion in both the number and scope of mass-tort filings. And with the specter of automatic collateral estoppel looming, manufacturers sued in *Engle* proceedings would face the prospect of unfathomable liability – to thousands or even millions of consumers – in the event of a single adverse jury verdict that might not even be based on their products. These pressures will exponentially increase incentives to settle even the most frivolous mass-tort suits, resulting in substantial costs that must be passed along to consumers. Thus, any "victory" in these proceedings would be enjoyed by plaintiffs' lawyers alone, while businesses and customers suffer the adverse economic consequences of a new toxic litigation environment.

For all of these reasons, the Court should grant the petitions for writs of certiorari to ensure that Florida courts do not become the destination of choice for exploitation of common-law preclusion doctrines that deprive our nation's industries of the fundamental due-process right to defend themselves when they are sued.

ARGUMENT

I. The Decisions Below Eviscerated Core Due-Process Protections.

The Fourteenth Amendment's guarantee of due process provides a fundamental bulwark against arbitrary deprivations of property. Importantly, the right to due process is often the last line of defense that American businesses have in cases where – as here – state courts have shirked their responsibility

to ensure that common-law doctrines are applied reasonably and fairly.

As set forth more fully below, that fundamental protection is particularly important in cases involving the doctrine of issue preclusion. Otherwise, a court may rely (as the lower court did here) on a single jury's highly generalized – and potentially aberrational – findings in a form verdict to conclusively establish the elements of a plaintiff's cause of action. Such an approach, particularly when used to foreclose litigation of entire categories of inquiry in thousands of subsequent cases, is patently unfair and contrary to the dictates of due process.

This Court has long recognized that the use of preclusion doctrines, whether in federal or state court, is governed by the limitations of due process. *See Fayerweather v. Ritch*, 195 U.S. 276, 297-98 (1904). Consistent with the basic due-process right to a day in court, it is equally well established that collateral estoppel effect may be accorded only to precise issues that were "actually litigated and resolved in a valid court determination essential to the prior judgment." *Taylor*, 553 U.S. at 892; *see also* 18 Wright §4417, at 413 n.1 (requirement that precise issue has been decided in the prior proceeding is rooted in due process); JoEllen Lind, *The End of Trial on Damages? Intangible Losses and Comparability Review*, 51 Buffalo L. Rev. 251, 323 (2003) (recognizing fundamental due-process principle "that the party to be estopped has had a full and fair individual opportunity to litigate the facts in question"); John P. Burns & G. Edward Cassady, III et al., *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 Vand. L. Rev. 573,

689 (1983) ("The courts . . . have acknowledged that due process and fairness considerations limit the use of collateral estoppel and that these considerations rightfully prevail over the desire to achieve judicial economy."). "[E]xtreme applications" of preclusion law that deviate from its traditional use "may be inconsistent with a federal right that is 'fundamental in character.'" *Richards*, 517 U.S. at 797 (citation omitted).

Accordingly, this Court and lower courts have routinely rejected attempts to apply issue preclusion in cases where there is no guarantee that the precise issues to be precluded have actually been determined in a prior proceeding. *See, e.g.*, *Bobby v. Bies*, 556 U.S. 825, 129 S. Ct. 2145, 2152 (2009) ("If a judgment does not depend on a *given* determination, relitigation of that determination is not precluded.") (emphasis added); *Brown v. R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328, 1341, 1348 (M.D. Fla. 2008) (holding that court "'would have to embark on sheer speculation to determine what issues were actually [previously] decided'" and, thus, application of issue preclusion would violate federal due process) (citation omitted). Indeed, "almost all" jurisdictions apply this rule. Joshua M.D. Segal, *Rebalancing Fairness and Efficiency: The Offensive Use of Collateral Estoppel in § 1983 Actions*, 89 B.U.L. Rev. 1305, 1309 (2009).

For example, where "testimony was offered at the prior trial upon several distinct issues, the decision of any one of which would justify the verdict . . . then the conclusion must be that the prior decision is not an adjudication upon any particular issue . . . and the plea of *res judicata* must fail." *Fayerweather*, 195 U.S. at 307; *see also* A. Vestal, *Res Judi-*

cata/Preclusion V-192 (1969) ("[p]reciseness in defining issues is necessary if issue preclusion is to be applied reasonably"). As such, in traditional practice, the "inability to determine from a general verdict whether the issue was decided" is "[a]mong the most common reasons that prevent prior litigation of an issue from achieving preclusion." 18 Wright § 4407, at 146.[2]

The rule is no different in the class-action context. As with individual litigation, a "class judgment . . . will be conclusive on the issues *actually* and *necessarily* litigated and decided." 17 C. Wright et al., *Federal Practice and Procedure* § 1789, at 558 (3d ed. 2005) (emphases added). But just as in individual litigation, "[c]are must be taken" in the class context to "delineat[e] *exactly* what issues were decided, . . . since *only identical* issues will be precluded in subsequent litigation." *Id.* at 558-59 (emphases added). Indeed, this Court has long recognized the application of the fundamental requirements of collateral estoppel in the class context. *See, e.g.*, *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984) (rejecting issue preclusion in employee-

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[2] *See also, e.g.*, *Postlewaite v. McGraw-Hill, Inc.*, 333 F.3d 42, 49 (2d Cir. 2003) (rejecting application of issue preclusion where party invoking the doctrine did not show "with clarity and certainty what was determined by the prior judgment") (internal quotation marks and citation omitted); *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1197-99 (10th Cir. 2000) (holding that issue preclusion did not apply where "the general finding under the negligence instruction fails to identify what the jury found sustained by the evidence"); *Mitchell v. Humana Hospital-Shoals*, 942 F.2d 1581, 1583-84 (11th Cir. 1991) ("[B]ecause we cannot be certain what was litigated and decided . . . issue preclusion cannot operate.").

discrimination case despite prior class judgment that an employer did not engage in a pattern or practice of racial discrimination because that finding did not necessarily decide whether the employer had discriminated against individual employees).

This longstanding requirement was discarded by the decisions below, which allowed the respondents to foreclose litigation on basic elements of their claims based on the general verdicts on liability in the *Engle* case. The precise factual conclusions of the *Engle* jury can only be guessed at: while the *Engle* plaintiffs asserted many theories with respect to product defect, all that the *Engle* jury found was that each defendant "place[d] cigarettes on the market that were defective and unreasonably dangerous." (*Engle* Phase I Verdict Form at 2.) But that finding could have been based on any number of theories presented in the *Engle* trial, many of which have no application to respondents' cases here. For example, one of the theories of defectiveness was premised on the phenomenon of compensation. This phenomenon applies only to "Light" cigarettes, which were never used by Mrs. Campbell. In other words, there is no assurance that the precise issues to be precluded – e.g., whether the *particular* cigarettes smoked by respondents were defective – were actually decided in a prior proceeding. Nonetheless, the decisions below treated every issue that was *possibly* decided by the general verdict as though it was *actually* decided by it, foreclosing litigation of the particular issues in these cases. They erred in doing so and violated the petitioners' fundamental rights. This Court should therefore grant review and reverse.

II. The Decisions Below Pose A Grave Threat To American Businesses.

The decisions below – and their liberalization of collateral estoppel doctrine – pose a serious threat to American businesses. Far from solving the problems associated with mass-tort litigation, these decisions threaten enormous economic implications for proceedings in *Engle* progeny cases, which number in the thousands. Moreover, the decisions are an invitation to abuse – meaning more lawsuits, broader in scope than ever before; a dramatic increase in settlements of frivolous claims; and higher costs for businesses and their consumers.

The *Engle* litigation itself is ground zero for the potentially deleterious ramifications posed by Florida's liberal collateral estoppel standard. There are approximately 8,000 *Engle* progeny actions pending in state and federal courts across Florida. The vast majority of these cases have not yet gone to trial. If allowed to stand, the lower court's ruling will give courts the green light to apply Florida's new brand of freewheeling collateral estoppel in the thousands of pending *Engle* progeny cases. And by sweeping away plaintiffs' burden of proof with respect to key issues of liability, the ruling all but guarantees crippling damages verdicts, which would harm not only the *Engle* defendants, but also the countless businesses and consumers that are in any way connected to the tobacco industry.

Even beyond the *Engle* litigation, the decisions below are likely to have far-reaching consequences. As this Court long ago recognized, the doctrine of offensive collateral estoppel – even when properly limited – promotes litigation. *Parklane Hosiery Co. v.*

Shore, 439 U.S. 322, 329-30 (1979) ("[O]ffensive use of collateral estoppel will likely increase rather than decrease the total amount of litigation, since potential plaintiffs will have everything to gain and nothing to lose by not intervening in the first action."). The reason is simple: once one plaintiff prevails, others may perceive the barriers to their own success in litigation to be lowered by virtue of the possible estoppel effect that might be accorded to issues necessarily decided in the first suit.

The incentive to litigate only increases when the ordinarily strict rules limiting the use of collateral estoppel are loosened. *See, e.g.*, Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 Tex. L. Rev. 1039, 1080 (1986) ("exploitation of the doctrine burdens defendants with additional litigation, thereby increasing the volume of litigation"); Michael Weinberger, *Collateral Estoppel and the Mass Produced Product: A Proposal*, 15 New Eng. L. Rev. 1, 22 (1979) (collateral estoppel in product-liability litigation "could spawn a massive increase in the number of lawsuits initiated each year"). In other words, the more likely the estoppel effect, the more attractive additional filings become to new plaintiffs.

The decisions below will amplify this effect in two dimensions. First, Florida's uniquely low threshold for applying collateral estoppel in class actions – i.e., without regard to whether the precise issue to be litigated in the second suit was actually and necessarily decided in the first – will encourage a greater number of filings, just as this Court predicted in *Parklane*. Second, Florida's doctrine will also encourage the filing of "class" complaints with striking breadth –

complaints that cover decades of product lines by every manufacturer in the industry. Indeed, under the decision below, the broader, the better: for enterprising plaintiffs' lawyers, one bad apple will be sufficient to spoil the whole bunch as long as a jury returns a general verdict of liability in a "class" case offering myriad alternative theories of liability.

In the shadow of Florida's bold new collateral estoppel doctrine, businesses do not stand a fighting chance against such lawsuits. As it is, traditional collateral estoppel doctrine already "place[s] enormous pressure on resolution of th[e] first case," Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 Ind. L.J. 567, 575 (2004), at least where the litigation pertains to a single product and a single manufacturer, and the issues are narrowly defined. This pressure results from the possibility that, with "the decision of a single jury, composed of perhaps six to twelve people, a company . . . could be bankrupted as thousands of plaintiffs . . . seek to take advantage of the single jury's finding." Byron G. Stier, *Another Jackpot (IN)Justice: Verdict Variability and Issue Preclusion in Mass Torts*, 36 Pepp. L. Rev. 715, 717 (2009); *accord* Kurt Erlenbach, *Offensive Collateral Estoppel and Products Liability: Reasoning with the Unreasonable*, 14 St. Mary's L.J. 19, 20 (1982) ("plaintiffs alleging design defects have been given a potent new weapon seemingly capable of wiping out whole industries with a single judgment; that weapon is the offensive use of collateral estoppel").

Indeed, a loud chorus of courts and commentators alike have criticized even the traditional, more limited concept of collateral estoppel – i.e., where an is-

sue was clearly ruled on in the prior trial – due to its potential to foreclose further litigation based on an erroneous verdict. In *Parklane*, for example, this Court cautioned that "[a]llowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant." 439 U.S. at 330-31 n.14; *see also Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 346 (5th Cir. 1982) ("One jury's determination should not, merely because it comes later in time, bind another jury's determination of an issue over which there are equally reasonable resolutions of doubt."). Commentators have echoed this concern, pointing out that the same logic suggests it would be dangerous to afford collateral estoppel effect when the first jury verdict favors a plaintiff, given the significant possibility that other juries would have found differently. *See* Stier, *supra*, at 717 ("[W]hat if the *first* jury, which happened to find defectiveness in a mass tort case, *would have* in fact conflicted with most of the subsequent juries?") (emphases added); *cf.* Jack Ratliff, *Offensive Collateral Estoppel and the Option Effect*, 67 Tex. L. Rev. 63, 82 (1988) (highlighting that "there is no requirement that the first and controlling case be fairly representative of the issue to be decided"). Accordingly, issue preclusion already poses the real "possibility that an erroneous decision in a hotly contested case will receive dispositive weight in all future cases." Richard A. Epstein, *The Consolidation of Complex Litigation: A Critical*

Evaluation of the ALI Proposal, 10 J.L. & Com. 1, 59 (1990).[3]

For these reasons, manufacturers facing mass-tort litigation must invest disproportionately in the first case. Hines, *supra*, at 575 (highlighting "how dramatic an effect the prospect of offensive estoppel can have on a defendant's litigation efforts" in mass tort cases and that, as a result, "defendants [may] likely devote excessive resources to the first of any potentially mass tort claim"); *see also* Steven P. Nonkes, *Reducing the Unfair Effects of Nonmutual Issue Preclusion Through Damages Limits*, 94 Cornell L. Rev. 1459, 1481 (2009) (suggesting that "defendant [would] face great pressure to overlitigate the first suit"). And losing such suits can have an enormously negative effect on business. Indeed, "the defendant's stockholders, employees, creditors, in-

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[3] *See also, e.g.*, Michael J. Waggoner, *Fifty Years of Bernhard v. Bank of America is Enough: Collateral Estoppel Should Require Mutuality But Res Judicata Should Not*, 12 Rev. Litig. 391, 410 (1993) ("[T]here can be little doubt that many cases are decided incorrectly."); Edwin H. Greenebaum, *In Defense of the Doctrine of Mutuality of Estoppel*, 45 Ind. L.J. 1, 2 (1969) ("The fallibility of the litigation process is the most fundamental basis for the mutuality requirement . . . ; no one should ever undertake to guarantee the accuracy of the results of litigation"); Peter H. Schuck, *Judicial Avoidance of Juries in Mass Tort Litigation*, 48 DePaul L. Rev. 479, 480 (1998) ("The variability in trial outcomes – even assuming that the underlying facts are identical – may be significant."); Allison Kennamer, *Issues Raised by the Potential Application of Non-Mutual Offensive Collateral Estoppel in Texas Products Liability Cases*, 30 Tex. Tech. L. Rev. 1127, 1137 (1999) ("Another danger inherent in the application of non-mutual offensive collateral estoppel is the possibility that a plaintiff might unfairly try to use an inconsistent or aberrant result to support his or her claim of collateral estoppel").

surers, customers, and occasionally the entire industry, can be seriously shaken by a finding of defect." Erlenbach, *supra*, at 22. These consequences are even greater in the context of an "issues" class action, in which an aberrational verdict in the class portion of the proceedings is virtually certain to have adverse consequences in the proceedings that follow.

Not surprisingly, "the liberal application of collateral estoppel . . . greatly magnifies th[is] effect," *id.*, requiring investment of even greater resources in defending litigation (no matter how frivolous), and significantly multiplying the economic consequences of an adverse verdict in the initial case. Moreover, the more liberal the application, the more likely an adverse judgment will "put[] the survival of entire industries at risk based on a single, possibly erroneous, judgment." Meiring de Villiers, *Technological Risk and Issue Preclusion: A Legal and Policy Critique*, 9 Cornell J. L. & Pub. Pol'y. 523, 524 (2000). Florida's doctrine is "liberal" to the extreme, wholly abandoning the age-old requirement that the precise issue in the second case have been actually and necessarily decided in the first, raising the stakes of collateral estoppel to new and dizzying heights.

The inevitable result of these pressures – if not bankruptcy – is an unfair pressure to settle. *See, e.g.*, Nonkes, *supra*, at 1483 n.144 (explaining that the risk of collateral estoppel may promote settlement in order to avoid the consequences of "an aberrational finding in" the first suit). Already, "offensive collateral estoppel rules create asymmetrical stakes in mass tort and products cases that give weak claims too much settlement value." Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on*

Probability and Rule 11, 44 UCLA L. Rev. 65, 104 (1996). At the same time, however, the procedural protections afforded by traditional limitations on the use of collateral estoppel give manufacturers some freedom to take calculated risks in product-liability litigation, since they retain their right to litigate issues that were not actually and necessarily decided in prior proceedings.

Florida's rule, by contrast, would automatically apply collateral estoppel effect to broad, general verdicts like the one in *Engle* – transforming jury findings that might rest on just one or a narrow range of products into de facto verdicts on general liability as to disparate products made by different manufacturers engaged in different conduct at different times. As other courts have recognized in the context of improperly certified product-liability class actions, such general-liability verdicts inevitably drive defendants to settle, even if there is no merit to the underlying claims. *See, e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low."); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) (applying adverse generic liability verdict to all plaintiffs would require defendant to settle all outstanding claims, even though defendant had previously won twelve of thirteen individual lawsuits).

The settlement of meritless claims has negative and far-reaching consequences for the American economy. For example, businesses may very well be forced to increase prices to compensate for the added litigation costs. *See* Weinberger, *supra*, at 22. Simi-

larly, the elimination of entire product lines can undermine consumers' freedom of choice in the marketplace. *Id.* Moreover, the preclusive effect of a single jury's presumed finding that a product is defective could destroy countless jobs that rely on the distribution of the allegedly defective product – without any assurance that such a defect finding was actually made. *Id.* In the end, nobody wins – except the plaintiffs' lawyers.

In sum, the courts below sanctioned a dramatic departure from the traditional principles that have historically limited preclusion doctrines and safeguarded litigants' rights. The harmful impact that these rulings would have on American businesses makes it all the more important for the Court to grant review and hold that the decisions below improperly trespassed on petitioners' fundamental rights.

CONCLUSION

For the foregoing reasons, and for those stated by the petitioners, the Court should grant the petitions for writs of certiorari.

Respectfully submitted,

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