

No.

In the Supreme Court of the United States

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

v.

FRANKLIN D. CAMPBELL, AS PERSONAL REPRESENTA-
TIVE OF THE ESTATE OF BETTY JEAN CAMPBELL,
Respondent.

**On Petition for a Writ of Certiorari to the
Florida First District Court of Appeal**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause prohibits the use of issue preclusion to establish elements of a plaintiff's claims where it cannot be shown that the issues being given preclusive effect were actually decided in a prior proceeding.

RULE 14.1(b) STATEMENT

The plaintiff below was respondent Franklin D. Campbell, as personal representative of the estate of Betty Jean Campbell.

The appellants below were petitioners Philip Morris USA Inc. and Liggett Group LLC, as well as R.J. Reynolds Tobacco Company, which is filing its own petition in this case. Lorillard Tobacco Co., Lorillard, Inc. and Vector Group Ltd. were named as defendants in the complaint but were dismissed and were not parties to the appeal.

RULE 29.6 STATEMENT

Petitioner Philip Morris USA Inc. (“PM USA”) is a wholly owned subsidiary of Altria Group, Inc. Altria Group, Inc. is the only publicly held company that owns 10% or more of Philip Morris USA Inc.’s stock. Altria Group, Inc. is a publicly held company. No publicly held company owns 10% or more of Altria Group, Inc.’s stock.

Petitioner Liggett Group LLC (“Liggett”) is a Delaware limited liability company and is a wholly owned, indirect subsidiary of Vector Group Ltd. (“Vector”). Vector is the only publicly held company that owns 10% or more of the membership interest in Liggett. Vector is publicly traded on the New York Stock Exchange (NYSE: VGR). No publicly held company owns 10% or more of Vector’s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Philip Morris USA Inc. and Liggett Group LLC respectfully petition for a writ of certiorari to review the judgment of the Florida First District Court of Appeal in this case.

OPINIONS BELOW

The *per curiam* order of the Florida First District Court of Appeal (App., *infra*, 1a) is reported at 60 So. 3d 1078. That ruling, affirming the trial court's judgment (App., *infra*, 3a-7a), consisted only of a citation to the First District's prior opinion in *R.J. Reynolds Tobacco Co. v. Martin* (App., *infra*, 8a-30a), which is reported at 53 So. 3d 1060. The Florida Supreme Court's order denying discretionary review in this case (App., *infra*, 2a), along with two other similar cases, is unofficially reported at 67 So. 3d 1050 (Table) (Fla. Jul. 19, 2011).

JURISDICTION

The order of the Florida Supreme Court denying discretionary review was entered on July 19, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) over this final judgment of the Florida First District Court of Appeal, as "the highest court of a State in which a decision could be had." On October 7, 2011, Justice Thomas granted an extension of time for filing the petition to and including December 16, 2011.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of Amendment XIV to the United States Constitution provides in pertinent part: "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT

This case is one of approximately 8,000 pending individual personal injury claims filed in the wake of the decision of the Florida Supreme Court in the *Engle* case, a sprawling class action against the major domestic cigarette manufacturers. At the core of every one of those cases is the same fundamental constitutional question: whether the Due Process Clause allows a court to apply issue preclusion where there is no assurance that the particular issues that the plaintiff is relieved of having to prove were actually decided in a prior proceeding.¹ Longstanding, universally recognized principles of Anglo-American law, including an express ruling by this Court, make clear that the answer to that question is “no.”

Nevertheless, the Florida District Court of Appeal in this case—and in three other cases that are currently before this Court on petitions for certiorari—held otherwise, affirming individual judgments (and multi-million-dollar damages awards) that plaintiffs obtained without having to prove, and without petitioners being able to contest, crucial elements of their claims. These appellate decisions, and other similar rulings from the Florida trial courts, derive from a decision of the Florida Supreme Court prospectively decertifying the *Engle* class but nevertheless upholding certain findings rendered by the *Engle* jury and stating that those findings should receive “res judicata” effect in follow-on cases brought by individual class members. App., *infra*, 31a-105a.

¹ Petitioners raised the federal due process issue at every stage of the proceedings below. See, *e.g.*, R.52:9358-61; R.48:8504-05.

The problem for the follow-on (or “progeny”) cases like this one is that the *Engle* class had, as to each of its tort claims, asserted various theories of wrongdoing that applied only to some class members’ claims. And the verdict form did not specify which of those theories the jury actually adopted; instead, the jury found only that each defendant had engaged in some unidentified misconduct as to each claim. As a result, there can be no assurance that the *Engle* jury’s findings actually apply to the circumstances of any particular class member.

Application of the findings in the case below, and in the other progeny cases, therefore threatens to deprive petitioners of property without any assurance that *any* jury actually found that petitioners committed wrongful conduct relevant to respondent’s claim. That is a manifest violation of due process, which if not addressed by this Court will be repeated in thousands of other *Engle* “progeny” cases currently pending in Florida courts.

Over 50 of those cases have already been tried to verdict in the Florida state courts. The companies face judgments of more than \$375 million in the cases they have lost to date. Nearly 75 more progeny cases are set for trial in 2012, and hundreds more are now in discovery. While many of the cases present other issues—such as class membership, statute of limitations, causation, reliance, and damages—this petition is confined to the preclusion issue that is a threshold question in *every* case brought by putative members of the *Engle* class. The magnitude of the stakes is enormous. This Court’s review is urgently needed.

A. Legal Background

1. *The Engle Litigation*

Engle began in 1994, when six individuals filed a class action complaint in Florida state court seeking billions of dollars in compensatory and punitive damages from the defendants, the five major domestic tobacco companies and two industry-related organizations. The *Engle* plaintiffs brought claims for product defect, negligence, fraud by misrepresentation and by concealment, breach of warranty, and conspiracy related to the manufacture and sale of the defendants' cigarettes over a 50-year period. See App., *infra*, 31a-33a. A class ultimately was certified consisting of Floridians (and their survivors) who, during the class period, "have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *Id.* at 36a.

Over the defendants' objections, the *Engle* trial court adopted a complex three-phase trial plan. Phase I was a year-long trial of asserted "common issues" relating to the defendants' conduct and the general health effects of cigarette smoking. App., *infra*, 37a. The diversity of evidence and allegations at issue in Phase I was staggering. The plaintiffs presented evidence of many different kinds of alleged misconduct, involving numerous distinct cigarette designs and brands and a variety of public statements and advertisements by the various defendants, occurring at different times over more than five decades.

For example, in connection with their strict liability claim, the plaintiffs challenged the design of "Lights" cigarettes, first sold in 1971, on the basis of

a phenomenon known as “compensation”—*i.e.*, that they could be smoked in a way that would cause smokers to take in as much tar and nicotine as they would from “full-flavored” (non-Lights) cigarettes. R.52:9407 (*Engle* Phase II-A Directed Verdict Opp. at 3).² These allegations, of course, applied only to Lights cigarettes and not to full-flavored brands. Separately, the plaintiffs argued that the defendants had used ammonia to increase the pH of cigarette smoke, which was asserted to be a defect because it allegedly enhanced the addictive effects of nicotine. *Ibid.* But it was undisputed that ammonia was used only in certain brands of cigarettes and only at certain times. *Id.* (*Engle* Tr. 25741-42, 25749-50, 25766, 27753-54, 27920-21, 37105, 37211-12).

The plaintiffs also challenged the design of unfiltered cigarettes, popular in the 1950s and 1960s, which they claimed were defective because of their allegedly excessive tar and nicotine yields; this claim plainly was inapplicable to the many filtered brands at issue in the litigation. R.52:9407 (*Engle* Phase II-A Directed Verdict Opp. at 3). Similarly diverse theories were advanced in connection with the plaintiffs’ other claims. *Engle* class counsel himself candidly acknowledged that not all of the evidence and allegations of tortious conduct would be relevant to the claim of every class member. R.52:9407 (*Engle* Tr. 24417-18).

² Non-transcript portions of the *Campbell* record on appeal in the lower court are cited as “R.[volume:page].” The *Campbell* trial transcript is cited as “T.[page number].” A CD containing the *Engle* transcript and other record materials from *Engle* is part of the record below, see R.52:5407, and a copy is being lodged with the Clerk.

Despite the breadth and diversity of the plaintiffs' theories and factual allegations, the plaintiffs proposed—and the court adopted over the defendants' vigorous objections—a phase I verdict form that did not require the jury to specify which brands or types of cigarettes were defective or which of their features were defective, what specific acts of the defendants were negligent, what facts were fraudulently concealed, or when and for how long the torts found by the jury persisted. R.52:9407 (*Engle* Tr. 35891-92, 35915-18, 35953-54).

For example, with respect to the product defect allegations—the only basis for liability in the instant case—the verdict form asked the jury merely whether each defendant “place[d] cigarettes on the market that were defective and unreasonably dangerous.” R.52:9407 (*Engle* Phase I Verdict Form at 2). The jury was free to answer this in the affirmative if it determined that *any* of the brands that each defendant sold at *any* time during the designated periods³ were defective for *any* reason. Importantly, the jury was not required to find that all cigarettes were defective or that all of plaintiffs' allegations of wrongdoing had merit in order to return a plaintiffs' verdict. Thus, there is absolutely no way to determine which particular theory or theories of defect the jury

³ The time periods referenced in several verdict-form questions related not to any particular alleged defect, concealment, or other wrongful act or omission, but rather to statutory defenses that defendants contended set time limits on various claims. The findings that the defendants' alleged torts were committed both before and after the specified times remain too vague to provide meaningful insight into the specifics of the jury's conclusions.

credited, which it rejected, and which it did not consider at all.⁴

In Phase II-A, the same jury determined that certain (again unspecified) conduct that it had found wrongful in Phase I caused injury to each of three named plaintiffs, awarding compensatory damages totaling \$12.7 million. R.52:9407 (*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. See App., *infra*, 38a.

The defendants appealed before individual trials as to each class member commenced in what would have been Phase III. The intermediate appellate court reversed, holding that a class trial was improper and that the punitive award was both premature and excessive. *Liggett Grp. Inc. v. Engle*, 853 So. 2d 434 (Fla. 3d DCA 2006). On further review, the Florida Supreme Court agreed that the punitive damages award could not stand (App., *infra*, 37a) and also held that the predominance of individual issues and “problems with the three-phase trial plan negate the continued viability of this class action.” *Id.* at 61a.

A majority of the court further concluded, however, that decertification should be prospective only, and it retrospectively certified an “issues class” for the matters tried in Phase I of the class trial. App.,

⁴ In addition to opining on whether the various defendants had ever in some unspecified manner committed the torts identified above, the jury also found that smoking can cause certain specified diseases and that cigarettes containing nicotine are addictive. R.52:9407 (*Engle* Phase I Verdict Form at 1-2). Petitioners accept that these findings are sufficiently specific that there is no constitutional problem with giving them preclusive effect.

infra, 61a-67a. In so doing, the court set aside the Phase I findings of fraud by misrepresentation and of intentional infliction of emotional distress, but it preserved others, including those relating to strict liability, negligence, and concealment. *Id.* at 65a. The court then adopted what it termed a “pragmatic solution” for what would happen next: “Class members can choose to initiate individual damages actions [within one year of the mandate] and the Phase I common core findings that were approved above will have res judicata effect in those trials.” *Ibid.*

After an unsuccessful request for rehearing, the defendants petitioned for certiorari. They argued, *inter alia*, that giving the Phase I findings broad “res judicata effect” in subsequent progeny trials would violate their due process rights. The *Engle* defendants asked this Court to address that constitutional issue immediately because of the number of cases potentially affected and the “waste of resources that would occur if review is deferred.” No. 06-1545 Pet.18, 2007 WL 1494692 (U.S. May 21, 2001). In response, plaintiffs asserted that the due process issue was “premature and not ripe for review.” Opp. 1 2007 WL 2363238 (U.S. Aug. 15, 2007). They argued that “[i]f a lower court ever upholds a specific verdict in favor of a plaintiff/class member, in which the preclusive effect of a finding approved by the Florida Supreme Court is decisive, petitioners may choose to seek review with respect to the new judgment where all the facts are known.” *Id.* at 11. The Court denied the petition. 552 U.S. 1056 (2007).

2. Engle “Progeny” Litigation

Today, in the wake of the Florida Supreme Court’s decision, approximately 8,000 persons claiming to have been *Engle* class members have suits

pending in state and federal courts across Florida (the “*Engle* progeny” cases). In each of those cases, the plaintiff has asserted that the *Engle* findings relieve him or her of the burden of proving that the defendants engaged in tortious conduct—for example, in a strict liability case, that the particular brand of cigarettes smoked by the plaintiff was defective in the relevant time period. The Florida state courts have uniformly allowed this approach. As a result, in each case the defendants have been barred from arguing or presenting evidence that the conduct at issue was not tortious or from offering affirmative defenses (other than the statute of limitations).⁵

Whether this broad application of preclusion is consistent with both state law and due process has been a threshold issue in all of the progeny cases tried to date. Several of those cases have now resulted in appellate rulings, most significantly the Eleventh Circuit’s interlocutory appeal decision in *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324 (11th Cir. 2010); the Florida First District Court of Appeal’s decision in *R.J. Reynolds Tobacco Co. v. Martin*, App., *infra*, 8a-30a; and the Florida Fourth District Court of Appeal’s decision in *R.J. Reynolds Tobacco Co. v. Jimmie Lee Brown*, 70 So. 3d 707 (2011) (“*JL Brown*”).

a. The Eleventh Circuit *Brown* case arose from a set of *Engle* progeny cases filed in the Middle District of Florida. The defendants moved for an order determining the role that the *Engle* findings would play at trial of the federal court cases. After reviewing

⁵ The plaintiff still must prove class membership (*i.e.*, injury caused by addiction to cigarettes), causation, reliance (with respect to a concealment claim), and damages.

the record, the district court held that it “would have to embark on sheer speculation to determine what issues were actually decided during the Phase I trial and how to apply them to the individual claims before this Court,” and that doing so would violate both established Florida preclusion law and federal due process. *Brown v. R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328, 1341, 1348 (M.D. Fla. 2008).

On interlocutory appeal, the Eleventh Circuit agreed that, as a matter of Florida law, “the Phase I approved findings may not be used to establish facts that were not actually decided by the jury.” 611 F.3d at 1334. The court noted that the findings themselves failed to show what specific claims had been decided against the defendants by the jury. *Id.* at 1335. Consequently, to ensure that progeny plaintiffs were not able to use the findings to establish matters that the *Engle* jury had not actually decided, the court of appeals required them, if they could, to

show with a “reasonable degree of certainty” that the specific factual issue was determined in its favor. The entire trial record may be considered for that purpose * * *.

Id. at 1335 (internal citation omitted).⁶

⁶ In a concurrence that was expressly approved by the majority (*id.* at 1336 n.11), Judge Anderson observed that the “generality of the Phase I findings present plaintiffs with a considerable task” in trying to show “with the requisite degree of certainty that all facts necessary to establish any particular element of any plaintiff’s cause of action had been actually adjudicated and actually decided by the Phase I jury” (*id.* at 1336 & n.1).

Having held that state law limited the use of the findings in this way, the Eleventh Circuit reserved judgment on the defendants' argument that the same result was required by due process. *Id.* at 1334 (“We need not decide that constitutional issue, because under Florida law the findings could not be used for that purpose anyway.”).

b. Five months later, the Florida First District Court of Appeal decided *Martin*, the first state appellate opinion to address the preclusion issue in a progeny case. App., *infra.*, 8a-30a. *Martin* expressly rejected the Eleventh Circuit's application of Florida preclusion law: “[W]e do not agree [that] every *Engle* plaintiff must trot out the class action trial transcript to prove applicability of the Phase I findings.” *Id.* at 19a. Rather than requiring progeny plaintiffs to show, if they could, specific facts the *Engle* jury actually determined, the First District decreed that “the Phase I findings establish the conduct elements of the asserted claims, and individual *Engle* plaintiffs need not independently prove up those elements or demonstrate the relevance of the findings to their lawsuits.” *Id.* at 22a. *Martin* did not address defendants' argument that federal due process barred this use of the *Engle* findings.

After the First District declined to certify its ruling in *Martin* for review by the Florida Supreme Court, the defendant (R.J. Reynolds) sought discretionary review in the Florida Supreme Court, which was denied without comment. No. SC11-483, 67 So. 3d 1050 (Table) (Fla. Jul. 19, 2011).⁷ Reynolds is pe-

⁷ The Florida Supreme Court is a court of limited jurisdiction. As relevant here, the court can hear only cases that a district court of appeal certifies to be “of great public importance,” that

tioning for a writ of certiorari seeking review of *Martin*.

c. On September 21, 2011, the Fourth District decided *JL Brown*. Agreeing with *Martin* on the preclusion issue, the court held that “individual post-*Engle* plaintiffs need not prove the conduct elements in negligence and strict liability claims.” 70 So. 3d at 715. But, unlike the First District in *Martin*, which failed even to acknowledge Reynolds’ federal due process arguments, the Fourth District expressed “concern[that] the preclusive effect of the *Engle* findings violates Tobacco’s due process rights.” *Id.* at 716 (citing the statement in *Richards v. Jefferson Cty.*, 517 U.S. 793, 797 (1996), that “We have long held * * * that extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is ‘fundamental in character.’”). Despite this concern about the constitutionality of its preclusion ruling, the Fourth District nevertheless viewed itself as “compelled to follow the mandate of the supreme court.” *Ibid.* In a special concurrence endorsed by the majority, Chief Judge May characterized the thousands of *Engle* progeny cases as little more than “a form of legal poker” and described the due process question as “the lurking constitutional issue that hovers over the poker game.” *Id.* at 720.⁸

“expressly and directly conflict[] with a decision of another district court of appeal or of the supreme court on the same question of law,” or “that expressly construe[] a provision of the state or federal constitution.” Florida Const. art. V, sec. 3(b). Even if one of those criteria is met, the supreme court’s jurisdiction is discretionary, not mandatory. *Id.*

⁸ Despite its misgivings, the Fourth District, like the First District in *Martin*, declined to certify its ruling in *JL Brown* for review by the Florida Supreme Court. A petition for discretionary review by the Florida Supreme Court has been filed. No. SC11-

B. Proceedings In The Instant Case

In this *Engle* progeny case, respondent Franklin Campbell filed suit in Florida state court against petitioners and other cigarette manufacturers to recover damages for his wife's illness and death from chronic obstructive pulmonary disease (COPD). R.3:396-99 (2d Severed Amended Complaint). He asserted claims for strict liability, negligence, fraudulent concealment, and conspiracy to fraudulently conceal. *Id.* The complaint did not identify any specific defect, act of negligence,⁹ or act of concealment that respondent claimed to have been the cause of his wife's injuries and death; respondent instead simply invoked the *Engle* findings.¹⁰ *Id.*

Over petitioners' objections, the trial court held that the *Engle* findings conclusively established the wrongful conduct elements of respondent's individual

2201 (filed Nov. 4, 2011). In addition, the Fourth District disagreed with the First District regarding the showing that progeny plaintiffs must make in order to establish causation. That issue, however, is not germane to this petition.

⁹ Campbell voluntarily dismissed his negligence claim before trial.

¹⁰ For example, the totality of the allegations in the complaint regarding the strict liability claim was as follows:

19. Defendants placed cigarettes on the market that were defective and unreasonably dangerous.

22. Defendants sold or supplied cigarettes that were defective.

29. The *Engle* Phase I findings conclusively establish that the cigarettes sold and placed on the market by the defendants were defective and unreasonably dangerous.

R.3:396-99 (2d Severed Amended Complaint at 396-97).

claims—even though respondent made no showing that any specific fact needed to establish those claims was actually decided in *Engle*. App., *infra*, 3a-7a. As a consequence of that ruling, respondent was not required to offer any proof that petitioners had engaged in tortious conduct that affected Mrs. Campbell; nor were petitioners permitted to dispute that they had done so. Instead, the *Engle* findings were read to the jury, which was instructed that it was bound by them if it found that Mrs. Campbell was a class member. T.89:4463-65.

The jury did find that Mrs. Campbell was a class member, and it returned a verdict for respondent on the strict liability claim, allocating fault 57% to Mrs. Campbell, 39% to Reynolds, 2% to Liggett, and 2% to PM USA. T.89:4487-88. It found for petitioners on the concealment and conspiracy claims because respondent had failed to prove reliance; those claims therefore are not at issue in this petition. *Id.* The jury awarded \$7.8 million in compensatory damages, T.89:4488, which were reduced to about \$3.35 million to account for Mrs. Campbell's comparative fault. R.49:8848.

Petitioners appealed to the First District Court of Appeal. While the appeal was pending, that court issued its ruling in *Martin*. App., *infra*, 8a-30a. The First District then affirmed the trial court's judgment in this case in a *per curiam* order, the entire substance of which was a citation to *Martin*. App., *infra*, 1a.

Petitioners then sought discretionary review in the Florida Supreme Court, which again denied review without comment. App., *infra*, 2a. At the same time, the Florida Supreme Court rejected similar petitions for review in two other *Engle* progeny cases

that had likewise been designated as “tag along” cases to *Martin*. *R.J. Reynolds Tobacco Co. v. Hall*, No. SC11-1165, 67 So. 3d 1050 (Table) (Fla. Jul. 19, 2011); *R.J. Reynolds Tobacco Co. v. Gray*, No. SC11-1323, 67 So. 3d 1050 (Table) (Fla. Jul. 20, 2011).

Like this case, both of those cases resulted in jury verdicts for the plaintiffs that were affirmed by the First District based merely on a citation to the *Martin* decision. *R.J. Reynolds Tobacco Co. v. Hall*, 70 So. 3d 642 (Fla. 1st DCA 2011) (*per curiam*); *R.J. Reynolds Tobacco Co. v. Gray*, 63 So. 3d 902 (Fla. 1st DCA 2011) (*per curiam*). Petitions in all of these cases—*Martin*, *Hall*, *Gray*, and this case—are now pending before the Court.

REASONS FOR GRANTING THE PETITION

This Court has rarely been presented with a constitutional issue that immediately and powerfully affects as many cases as the issue presented by this petition. In this case and dozens of others like it tried to date, petitioners have been deprived of the most fundamental rights safeguarded by the Due Process Clause—the right to require the plaintiff to prove every element of his case and the correlative right to present a defense—even though it cannot be shown that the precluded issues have previously been decided against them. This manifestly unfair result departs from centuries of settled law, including this Court’s announced due process requirements for issue preclusion. Given the magnitude of the stakes, the prospect of similar, ongoing violations of petitioners’ rights in literally thousands of future cases, and the gravity of the constitutional violations involved, this case cries out for prompt review by this Court.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S RULINGS AND CONSTITUTES A FUNDAMENTAL DUE PROCESS VIOLATION.

For as long as it has been recognized in the Anglo-American legal tradition, issue preclusion has been available only where it can be shown that the specific issue to be precluded was actually determined in a prior proceeding. Thus, where preclusion is sought based on a jury verdict that may rest on any of two or more alternative grounds, and there is no way to tell with certainty which alternative was actually the basis for the jury's finding, "the plea of *res judicata* must fail." *Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904). This Court expressly held in *Fayerweather* that this limitation on preclusion is a requirement of due process. *Id.* at 299. And for good reason: it is fundamentally unfair to deprive a litigant of the ability to dispute an issue that may never actually have been determined against it. Such a procedure arbitrarily imposes liability without the plaintiff having to prove all the elements of his claim and without the defendant having the opportunity adequately to defend itself—perhaps the most fundamental right secured by the Due Process Clause.

The Florida courts in this case overrode this core constitutional restriction on the use of issue preclusion. Respondent was allowed to invoke the *Engle* jury's verdict form findings that defendants, including petitioners, at some (unspecified) times, sold (unspecified) cigarettes that were defective (in some unspecified way) to establish conclusively that the particular cigarettes smoked by Mrs. Campbell were defective. The First District Court of Appeal approved that result even though respondent did not even at-

tempt to show, and could not have shown, that the *Engle* jury actually determined any case-specific factual issues in his favor. That violates due process in exactly the way that this Court warned against in *Fayerweather*.

This unconstitutional use of preclusion is the core issue not only in this case and the other *Engle* progeny cases now before this Court, but also in the thousands of similar cases now pending across Florida. Under these circumstances, certiorari is needed to undo the due process violations that have already occurred and to prevent the tsunami of additional violations that will flow from the Florida courts' use of preclusion.

A. Due Process Limits Issue Preclusion To Matters That Can Be Shown With Assurance To Have Been Actually Determined In The Prior Proceeding.

Until the *Engle* progeny cases, it was universally accepted that issue preclusion—the species of “res judicata” also known as collateral estoppel—is limited to matters that were “actually litigated and resolved in a valid court determination essential to the prior judgment.” *Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 & n.5 (2008). Thus, as this Court has repeatedly explained, a prior judgment cannot be given preclusive effect in a subsequent case unless “it is certain that the precise fact was determined by the former judgment.” *De Sollar v. Hanscome*, 158 U.S. 216, 221 (1895); see also *Russell v. Place*, 94 U.S. 606, 608 (1877) (preclusion improper unless it can be shown that “the precise question was raised and determined in the former suit”).

The rule that issue preclusion requires assurance that the precise issue was actually decided in a prior proceeding was entrenched in English law as early as 1628, when Sir Edward Coke noted that “[e]very estoppel * * * must be certaine to every intent, and [is] not to be taken by argument or inference.” 2 Coke, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY ON LITTLETON* § 667 ¶ 352b (London, W. Clarke 1817); see also *The Duchess of Kingston’s Case*, 20 Howell’s State Trials 538 (House of Lords 1776) (preclusion requires a determination “directly upon the point” and may not be applied to any finding that can only “be inferred by argument”), quoted in 1 Greenleaf, *A TREATISE ON THE LAW OF EVIDENCE* 697-98 (10th ed. 1860).

By the time of the Fourteenth Amendment, American courts had uniformly ruled that a party cannot be precluded from litigating an issue in a subsequent case unless it is certain that the same issue had been actually decided against it in prior litigation. See, e.g., *Cromwell v. County of Sac*, 94 U.S. 351, 353 (1876) (“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. Only upon such matters is the judgment conclusive in another action.”); *Cecil v. Cecil*, 19 Md. 72, 1862 WL 2345, at *5 (1862); *Sawyer v. Woodbury*, 7 Gray 499, 502-04 (Mass. 1856); Wells, *A TREATISE ON THE DOCTRINES OF RES ADJUDICATA AND STARE DECISIS* 173 (1878).

This Court embraced this rule throughout the nineteenth century, consistently rejecting efforts to invoke preclusion where several discrete issues had been litigated in a prior case and the resulting verdict was too general to reveal which had actually

been decided. In *Russell v. Place*, for example, the Court invoked the “settled law” that issue preclusion was improper “if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered.” 94 U.S. at 608.¹¹

Ultimately, in *Fayerweather, supra*, the Court held that this limitation is so fundamental that abandoning it would violate due process. In that case, a federal court dismissed the plaintiffs’ suit on the ground that the issues they wanted to litigate were foreclosed by a prior state-court judgment. This Court’s jurisdiction depended on the presence of a constitutional issue. See 195 U.S. at 299. The Court determined that it could hear the case, because the scope of issue preclusion implicated due process. It held that the Constitution does not allow a court to give “unwarranted effect to a decision” by accepting as “a conclusive determination” a verdict “made without any finding of the fundamental fact.” *Id.* at 298-99. *Fayerweather* thus established, 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

¹¹ See also, *e.g.*, *De Sollar*, 158 U.S. at 221-22 (rejecting issue preclusion because the instructions in the prior suit had “left it open to the jury to find for the defendant upon either of the two propositions, and the verdict [did] not specify upon which the jury acted”); *Washington, Alexandria, & Georgetown Steam-Packet Co. v. Sickles*, 65 U.S. 333, 344-45 (1860) (refusing to give preclusive effect to a general verdict that encompassed “a number of issues” without clear proof of exactly which of the possible grounds had actually been decided).

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 principle that issue preclusion cannot apply unless it can be shown with assurance that the precise issue to be precluded was actually and necessarily decided in the prior proceeding remains the universal rule today. As this Court recently said:

Issue preclusion bars successive litigation of “an issue of fact or law” that “is actually litigated and determined by a valid and final judgment, and * * * is essential to the judgment.” Restatement (Second) of Judgments § 27 (1980) (hereinafter Restatement). If a judgment does not depend on a given determination, relitigation of that determination is not precluded. *Id.*, § 27, Comment h.

Bobby v. Bies, 556 U.S. 825, 129 S. Ct. 2145, 2152 (2009). See also, e.g., *Postlewaite v. McGraw-Hill, Inc.*, 333 F.3d 42, 49 (2d Cir. 2003) (rejecting application of issue preclusion where party asserting preclusion failed to show “with clarity and certainty what was determined by the prior judgment”) (citation omitted); *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1197-99 (10th Cir. 2000) (rejecting application of collateral estoppel where “the general finding under the negligence instruction fails to identify what the jury found sustained by the evidence”); *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 309 (2d Cir. 1999) (“when a court cannot ascertain what was litigated and decided, issue preclusion cannot operate”); *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.”); 18 Moore’s Federal Practice § 132.03[2][g] (3d ed. 1998); Restatement (Second) Judgments § 27, cmt. i (1982) (“If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone.”).

Abandonment of this fundamental limitation on the application of preclusion is precisely the kind of “extreme application[] of the doctrine of res judicata” (*Richards v. Jefferson County*, 517 U.S. 793, 797 (1996)) and “abrogation of a well-established common-law protection against arbitrary deprivations of property” that “raises a presumption” that a due process violation has occurred (*Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994)). Yet that is precisely what the Florida courts did here.

B. It Is Impossible To Know The Specific Grounds On Which The *Engle* Findings Rest.

The *Engle* plaintiffs offered a wide variety of alternative theories of wrongdoing in connection with each of the conduct findings made by the Phase I jury. At the plaintiffs’ insistence, however, the jury was asked to make only a highly generalized series of findings that do not indicate which of plaintiffs’ theories the jury accepted and which it did not. As a result, there is no way to determine what precise facts the *Engle* jury actually decided. In such circumstances, as described above, due process does not allow progeny plaintiffs like respondent to invoke those findings to establish crucial elements of their

individual claims. That constitutional problem infects all of the conduct findings, and can clearly be seen in connection with the *Engle* strict-liability finding on which the judgment below rests.

1. The *Engle* plaintiffs did not pursue a single strict-liability theory, let alone confine themselves to a theory that would apply to all cigarettes. Instead, they claimed that a diverse array of discrete cigarette characteristics constituted design defects. The various defects that plaintiffs alleged did not all apply equally to all cigarette brands, all class members, all time periods, or all diseases at issue. To the contrary, most pertained only to some cigarettes, only to some class members, only to some medical conditions, or only to some time periods. Plaintiffs' counsel acknowledged as much, telling the *Engle* trial court: "It's a fallacy that every common issue has to apply to one hundred percent of the class members * * * *. There are common issues, but not every common issue is common to one hundred percent of the class." R.52:9407 (*Engle* Tr. 24417-18).

For example, the plaintiffs' allegations about Lights cigarettes being defective because of the phenomenon of nicotine "compensation" (see p. 5, *supra*) apply *only* to Lights cigarettes. They have nothing to do with "full-flavor" cigarettes, and would not even theoretically apply to a progeny plaintiff like Mrs. Campbell, who did not smoke Lights and whose strict-liability claims, by necessity, are unrelated to defendants' conduct in making or marketing such brands. Similarly, the theories advanced by the *Engle* plaintiffs about the effects of ammonia in certain cigarette brands have no bearing on the claims of a plaintiff who did not smoke ammoniated brands; and design features alleged to cause cancer would have

no relevance to a progeny plaintiff claiming that she has smoking-related heart disease.¹²

Just as these defect allegations by the *Engle* plaintiffs did not apply to all cigarettes, they also did not apply equally throughout the 50-year period spanned by the class's evidence. During *Engle* Phase I, witnesses explained that each defendant had developed various technological innovations that dramatically lowered average tar yields between the 1950s and 1990s. R.52:9407 (*Engle* Tr. 25620-26, 29051-57, 37048-49). Such evidence could have led the jury to conclude that certain cigarette brands were defective when they had high tar yields but were not when they later incorporated the new tar-reducing technologies. Alternatively, the jury could have concluded that some brands were not defective in the 1950s and 1960s because they comported with the state of the art at the time, but were defective later because they allegedly did not incorporate all the latest technology.

¹² Numerous other strict liability theories were presented by the class. They included: the use of genetically engineered tobacco in certain cigarettes; the excessively high temperature at which cigarettes burn; the higher tar and nicotine yields of unfiltered cigarettes; the presence of nitrosamines, carbon monoxide and other deleterious compounds in cigarette smoke; the use of various additives and flavorants in certain cigarettes; the failure to produce a cigarette without nicotine; the claim that cigarettes with cellulose filters were defective in that cellulose fibers could be inhaled by smokers; the claim that cigarettes with charcoal filters were defective because bits of charcoal could be inhaled by smokers; the claim that inadequate warnings were provided prior to 1969; and the claim that in-house testing of Virginia Slims cigarettes showed high nitrosamine levels. R.52:9407 (*Engle* Phase II-A Directed Verdict Opp. at 3; *Engle* Tr. 15380-82, 27377).

2. Despite having alleged this wide array of supposed defects, the *Engle* plaintiffs did nothing to ensure that the Phase I verdict would identify which of the various strict-liability theories the jury accepted and which it did not. To the contrary, class counsel persuaded the trial court, over the defendants' objections, to ask the jury merely whether defendants had sold defective "cigarettes" during certain years, without calling upon the jury to specify *which* of the many brands of cigarettes it might have in mind in responding to this query and without asking *which* properties of defendants' various products the jury found defective. R.52:9407 (Phase I Verdict Form at 2; *Engle* Tr. 35891-93, 35896-900, 35915-16, 35952-54). Although this verdict form made it very easy for the jury to answer "yes" so long as it could conclude that even a single brand sold by each defendant during the specified time periods was defective for a single reason, the verdict form does not allow a subsequent court to know whether the jury found fault with any particular product that any particular *Engle* progeny plaintiff used at any time during the half-century covered by the *Engle* class litigation.

Nor did the jury instructions imbue the findings with any greater specificity. The jury was instructed that "[o]n the claim of strict liability, the issues are whether one or more of the defendants designed, manufactured and marketed cigarettes which were defective and unreasonably dangerous to smokers." R.52:9407 (*Engle* Tr. 37562, 37570-71). These instructions did not limit the jury to one particular defect theory out of the many the class asserted. Based on the instructions, the jury could have found as it did if the jurors accepted any *one* of the many factual theories that the class proffered—even if it rejected all the others.

In short, there is no basis in the *Engle* findings or record for determining what particular cigarette types, brands, or features the Phase I jury found to be defective, let alone that the jury actually and necessarily determined that all cigarettes are defective. See *Brown*, 611 F.3d at 1335. The strict-liability findings do not establish anything more specific than what they actually say: that each defendant, at some unspecified times over the course of 50 years, sold some unspecified cigarettes that were defective in some unspecified way.

C. The Ruling Below That The *Engle* Findings Establish The Conduct Element Of Respondent’s Claims Violates Due Process.

Despite this fundamental uncertainty about what specific facts the *Engle* jury actually found, the Florida courts allowed respondent to forgo presentation of evidence on the subject and instead use the strict-liability finding to establish conclusively—and prevent defendants from contesting—that the cigarettes Mrs. Campbell smoked were defective. That result violates the fundamental constitutional limits on issue preclusion recognized by this Court in *Fayerweather* and the long line of cases before and after. None of the explanations that the Florida courts or progeny plaintiffs have offered changes that reality.

1. The court of appeal’s affirmance of the judgment here was based on its prior ruling in *Martin*, which held that “[n]o matter the wording of the findings on the Phase I verdict form,” those findings “establish the conduct elements of the asserted claims, and individual *Engle* plaintiffs need not independently prove up those elements or demonstrate the

relevance of the findings to their lawsuits.” App., *infra*, 22a.

In reaching that conclusion, *Martin* did not purport to find, based on the *Engle* record, that the Phase I jury actually decided that defendants engaged in any particular wrongful conduct that might be at issue in a given progeny plaintiff’s case. To the contrary, the court expressly rejected the Eleventh Circuit’s holding that progeny plaintiffs must demonstrate from the findings themselves or the underlying record that the particular matters they wish to treat as precluded were actually resolved by the jury. Compare *Brown*, 611 F.3d at 1335 (“the issue preclusion standard requires the asserting party to show with a reasonable degree of certainty that the specific factual issue was determined in its favor”), with *Martin*, (App., *infra*, 19a) (“we do not agree every *Engle* plaintiff must trot out the class action trial transcript to prove applicability of the Phase I findings”). By allowing progeny plaintiffs to invoke preclusion to establish the elements of their claims without satisfying the “actually decided” requirement, *Martin* creates precisely the due process problem that the Eleventh Circuit sought to avoid. See *Brown*, 611 F.3d at 1334.

The First District offered no viable justification for that result. First, *Martin* relied on the *Engle* trial court’s directed-verdict order, which rejected defendants’ arguments that they were entitled to judgment as a matter of law on the class’s various claims. App., *infra*, 20a-21a. But the fact that the *Engle* plaintiffs may have introduced enough evidence on their claims to survive a directed verdict motion has nothing to do with whether (or to what extent) the jury’s findings can be given preclusive ef-

fect. All that the directed-verdict order (reproduced in relevant part at App., *infra*, 106a-107a) shows is that a reasonable jury *could* have decided certain factual issues based on the evidence presented. It does not purport to address—let alone determine—what the jury actually found.¹³ By conflating what *might have* been decided with what was *actually* decided, *Martin* allows progeny plaintiffs, including respondent, to use issue preclusion to bar defendants from contesting matters that may not actually have been resolved against them at all. That is exactly what due process forbids. See, e.g., *Cromwell*, 94 U.S. at 353 (“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”).

Second, *Martin* relied on its understanding of the Florida Supreme Court’s ruling in *Engle*, suggesting

¹³ The directed-verdict ruling only underscores the ambiguity of the *Engle* findings. In that ruling, the *Engle* trial court mentioned three alternative defect theories on which the strict-liability finding could have rested: (1) evidence that “some filters * * * utilize glass fibers that could produce disease”; (2) evidence that “some cigarettes were manufactured with the breathing air holes in the filter being too close”; and (3) evidence that “levels of nicotine [were] manipulated.” App., *infra*, 106a-107a. There is no basis for concluding—and the trial court certainly did not find—that the jury actually rested its verdict on all or any particular one of these theories. Indeed, the finding itself is equally consistent with the jury accepting the glass fibers theory while rejecting the air holes theory as it is with the jury rejecting the former and accepting the latter. This example illustrates the critical difference between upholding an ambiguous generalized verdict against a sufficiency challenge and relying on that verdict to preclude future litigation of particular issues that the first jury may or may not have actually determined.

that any other result “would essentially nullify it.” App., *infra*, 17a. But even assuming that the *Engle* decision compelled the result that *Martin* reached,¹⁴ that would not make it any less unconstitutional. Petitioners here, and other defendants in *Engle* progeny cases, may not be deprived of their due process rights simply because a state supreme court might think that to be a “pragmatic solution.” *Engle*, App., *infra*, 65a. The “Constitution recognizes higher values than speed and efficiency.” *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

Third, *Martin* suggested that it was appropriate to deviate from the Eleventh Circuit’s insistence that progeny plaintiffs show that the precise issues to be precluded were actually decided because *Engle* Phase I was the trial of a certified class action. App., *infra*, 18a. But the fact that *Engle* was a class action does not mean that every theory that the plaintiffs litigated (or on which the verdicts *may* have rested) was actually decided and actually applied to all class members. The *Engle* plaintiffs themselves disclaimed that idea. R.52:9407 (*Engle* Tr. 24417-18) and for good reason: as discussed above, it is clear from the *Engle* record, which *Martin* ignored, that

¹⁴ Petitioners have argued, without success in the state courts, that *Engle* is best read not as dictating a particular result, but merely as instructing courts hearing progeny cases to give the findings such preclusive effect as is permissible under the established rules governing preclusion. That reading is reinforced by the fact that “a court does not usually ‘get to dictate to other courts the preclusion consequences of its own judgment.’ Deciding whether and how prior litigation has preclusive effect is usually the bailiwick of the second court.” *Smith v. Bayer Corp.*, 564 U.S. ___, 131 S. Ct. 2368, 2375 (2011) (quoting 18 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4405, at 82 (2d ed. 2002)).

the *Engle* plaintiffs advanced numerous factual allegations that applied only to some class members but not others.

Certainly, this Court has never suggested that the mere fact of class certification is somehow dispositive of the scope of that proceeding's preclusive effect. To the contrary, the Court has long recognized that "the considerations which may induce a court" to permit classwide adjudication "may differ from those which must be taken into account in determining whether the absent parties are bound by the decree or, if it adjudged that they are, in ascertaining whether such an adjudication satisfies due process." *Hansberry v. Lee*, 311 U.S. 32, 42 (1940).¹⁵

Martin thus was wrong insofar as it relied on the class-action form to approve an application of issue preclusion that clearly would not have been permissible in an individual case.¹⁶ Far from overcoming the due process problem, that result exacerbates it by

¹⁵ See also *Blyden v. Mancusi*, 186 F.3d 252, 266-69, 271-72 (2d Cir. 1999) (in bifurcated class proceeding, question whether class should have been certified at all was analytically distinct from failure of the liability jury's verdict form to establish classwide liability on particular issues in subsequent individualized damage trials). See generally Geoffrey C. Hazard, *et al.*, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849 (1998) (examining history of preclusion doctrine as applied to class proceedings).

¹⁶ Florida law prior to *Martin* has always been clear that preclusion requires a showing that the precise issue was actually decided in the prior proceeding. See, *e.g.*, *Bagwell v. Bagwell*, 14 So. 2d 841, 843 (Fla. 1943); *Seaboard Coast Line R.R. Co. v. Indus. Contracting Co.*, 260 So. 2d 860, 864-65 (Fla. 4th DCA 1972) (explaining that under Florida law issue preclusion is limited to "precise issue" that was "actually adjudicated in the prior litigation").

impermissibly using the procedural device of the class action to impair defendants' substantive rights on a massive scale. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (explaining that the class action device merely enables a court "to adjudicate claims of multiple parties at once, instead of in separate suits"; "it leaves the parties' legal rights and duties intact and the rules of decision unchanged"); cf. *Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S. Ct. 2541, 2561 (2011) (disapproving of "novel" form of class certification that would abridge defendant's right to litigate statutory defenses to individual claims).

2. In sum, the use of the *Engle* findings approved by the Florida courts in this case caused petitioners to be held liable without any proof that the cigarettes Mrs. Campbell smoked were defective, without being allowed to contest the defect issue, and without any assurance that the issue was ever decided against them by any jury. That strikes at the heart of the right to a fair trial. See *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (due process requires that litigants have "an opportunity to present every available defense" (citation omitted)); *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971) ("right to litigate the issues involved" is guaranteed by due process). As this Court recognized in *Fayerweather*, invoking preclusion to foreclose litigation of an issue without such assurances "is not to be considered a mere error in the progress of a trial" (195 U.S. at 297) but instead is a deprivation of property "without any judicial determination of the fact upon which such a deprivation could be justified" (*id.* at 299). What occurred here thus is a paradigmatic violation of the safeguard against arbitrary

deprivations that is the “whole purpose” of the Due Process Clause. *Oberg*, 512 U.S. at 434.

II. THE CHALLENGED RULING DIRECTLY AND FUNDAMENTALLY AFFECTS THOUSANDS OF CASES.

In allowing respondent to use the *Engle* findings to establish elements of his claim, the First District Court of Appeal decided an important constitutional issue in a way that conflicts with this Court’s precedents. While that circumstance on its own would justify certiorari (see S. Ct. R. 10(c)), the need for review here is especially pressing given the sheer number of cases affected by the Florida courts’ unconstitutional application of issue preclusion.

The four cases currently before the Court (*Martin*, *Grey*, *Hall*, and the instant case) barely scratch the surface of what is presently unfolding in Florida. There are approximately 8,000 *Engle* progeny plaintiffs with claims pending in state and federal courts across Florida. Over 50 of those cases have already been tried to verdict, nearly 75 more are set for trial in 2012, and hundreds more are now in discovery. While also raising other factual and legal issues, every one of those cases raises the same threshold due process issue presented here. In each, plaintiffs are seeking (or have already been allowed) to use the *Engle* findings to relieve themselves of the burden of proving crucial elements of their individual claims, without regard to whether they can show that those precise issues were decided in favor of the class by the *Engle* jury. In thousands of cases, defendants may be barred from adjudicating issues that may never have been resolved against them and thus deprived arbitrarily of their basic due process right to

require the plaintiff to prove all elements of his claim.

Indeed, under that constitutionally flawed procedure, *Engle* progeny judgments exceeding \$375 million have already been entered against the *Engle* defendants. Over \$50 million of that total comes from the four cases that are now before this Court alone. If the present petitions are denied, those judgments will become final, and defendants will have no way of recovering their property even if the Court in a future progeny case rejects the First and Fourth Districts' approach as a violation of due process. This makes prompt review of the issue all the more imperative.

In sum, certiorari is urgently needed to undo the judgments that plaintiffs have already obtained in violation of due process and to prevent an unprecedented barrage of future constitutional violations. *E.g.*, *United States v. Centennial Sav. Bank FSB*, 499 U.S. 573, 578 n.3 (1991) (certiorari granted "in light of the significant number of pending cases" affected).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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