

In the Supreme Court of the United States

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

v.

FRANKLIN D. CAMPBELL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BETTY JEAN CAMPBELL,
Respondent.

R.J. REYNOLDS TOBACCO COMPANY,
Petitioner,

v.

MATHILDE MARTIN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BENNY RAY MARTIN,
Respondent.

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

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

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**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 102 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, pesticides, pharmaceuticals, and medical devices. A list of PLAC's current corporate membership is included in an appendix to this brief.

PLAC's primary purpose is to file *amicus curiae* briefs in cases, such as those involved here, that raise issues affecting the development of product liability litigation and have potential impact on PLAC's members. 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. There also has been a growing effort to use multiple-phase proceedings and "issue" class actions to shoehorn

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* or its counsel, has made a monetary contribution to this brief's preparation or submission.

these sprawling lawsuits into the class action format. In many of these cases, state courts have displayed a troubling willingness to dilute or even eliminate safeguards traditionally enjoyed by defendants in the name of “efficiency,” “convenience,” or “pragmatism.” In the decisions below, the Florida appellate courts abandoned a bedrock safeguard in the doctrine of issue preclusion – the requirement that an issue precluded from relitigation have been “actually litigated” in a prior proceeding. Because PLAC’s members are often named as defendants in mass tort litigation, they have a vital interest in ensuring that state courts adhere to traditional, time-tested, due process limitations on the use of issue preclusion.

STATEMENT

The certiorari petitions in these cases (Nos. 11-741 and 11-754) and several other petitions currently pending before this Court (Nos. 11-752, 11-755, and 11-756) all raise an important and recurring question of federal constitutional law that affects approximately 8,000 pending state and federal cases and involves billions of dollars of potential liability. They raise the question whether due process bars the use of issue 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, the issues were resolved *in favor of* the party who is precluded from “relitigating” them in the second proceeding. The Florida appellate court’s approval of such an unprecedented use of issue preclusion violates due process and is clearly deserving of this Court’s attention.

1. The petitions set forth in detail the relevant background to this litigation, including the Florida Supreme Court’s novel decision in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), 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 11-741 Pet. 4-12; 11-754 Pet. 7-20. 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 highly generalized “findings” in Phase I of a class action that had been improperly certified would have unspecified “res judicata effect” in future cases filed by individual class members. 945 So. 2d at 1254, 1269. It also took the highly unusual steps of decertifying the class on a prospective basis only, and retrospectively certifying an “issues” class for the matters covered by Phase I of the *Engle* trial (the generalized issues decided by the jury). The Florida Supreme Court justified these unprecedented rulings as a “pragmatic solution” that allowed as much of *Engle* as possible to be preserved. *Id.* at 1269.

The decisions below represent an effort to come to grips with what the Florida Supreme Court meant in *Engle*. The federal courts have also grappled with that issue, see, e.g., *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324 (11th Cir. 2010), including most recently in a district court decision issued since the petitions in these cases were filed. See *Waggoner v. R.J. Reynolds Tobacco Co.*, 2011 WL 6371882 (M.D. Fla. Dec. 20, 2011).

2. The petitions arise from two decisions of the Florida First District Court of Appeal in *Engle* progeny cases. In No. 11-741, respondent Franklin Campbell sued in Florida trial court to recover damages for the illness and death of his wife, Betty Jean Campbell. The jury found for petitioners Philip Morris USA Inc. and Liggett Group LLC on respondent's claims of fraudulent concealment and conspiracy, but in favor of respondent on his strict liability claim; it awarded \$7.8 million in compensatory damages (which were reduced to \$3.35 million to account for Mrs. Campbell's comparative fault).

With regard to the strict liability claim, Mr. Campbell's complaint did not identify any specific defect in the particular brand or brands of cigarettes smoked by Mrs. Campbell, instead merely asserting that the "Defendants" (which included petitioners Philip Morris and Liggett) collectively had sold cigarettes that were "defective and unreasonably dangerous." 11-741 Pet. 13 n.10. Over petitioners' objections, the trial court ruled that the highly generalized *Engle* findings – including the finding that each petitioner had sold at least one, unspecified defective product (among dozens or more products that were challenged in *Engle* as defective on multiple theories) at some point over a 50-year period – relieved Mr. Campbell of any need to prove the wrongful conduct elements of his strict liability claim and, in turn, precluded Philip Morris and Liggett from disputing that the specific brand or brands smoked by Mrs. Campbell were defective at the particular time she smoked them. The underlying litigation in No. 11-754 followed a similar path to the same destination, except that the *Martin* jury relied on the *Engle* findings to establish tortious-conduct

elements of multiple tort claims and, in addition to awarding \$5 million in compensatory damages, imposed a punitive exaction of \$25 million. See 11-754 Pet. 15-17.

3. In both cases, the First District Court of Appeal affirmed. 11-741 Pet. App. 1a, 8a-30a. The highly generalized Phase I findings in *Engle*, the court explained, “establish the conduct elements” of an individual plaintiff’s claims, so that individual plaintiffs “need not independently prove up those elements or demonstrate the relevance of the findings to their lawsuits.” 11-741 Pet. App. 22a. The court did not expressly address the manufacturer’s argument that this novel version of issue preclusion violated due process because it nullified the traditional, time-tested requirement that the precluded issue have been “actually decided” in the prior litigation. Nor did the court address the possibility that the *Engle* Phase I findings might in fact reflect a *rejection* of the specific liability theories regarding specific products and time periods on which respondents’ design defect claims necessarily were predicated. In both cases, the Florida Supreme Court denied discretionary review.

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 petitioners here “place[d] cigarettes on the market that were defective and unreasonably dangerous.” 11-741 Pet. 6. The jury answered “yes” to that abstract and highly generalized question but, over petitioners’ vigorous objections, 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. In both of these cases, the Florida trial courts permitted plaintiffs to invoke that *Engle* finding as conclusively establishing tortious-conduct elements of their claims. In *Campbell*, for example, respondent was allowed to invoke this *Engle* finding to establish that the particular brands or types of cigarettes smoked by Mrs. Campbell (which the complaint never even specified) were defective. On the basis of that unprecedented use of issue preclusion, the Florida courts barred the petitioners in *Campbell* from disputing that these particular products were defective in the way claimed by Mr. Campbell at the time his wife used them.

I. The Florida courts' abandonment of the "actually decided" precondition for issue preclusion worked an egregious violation of petitioners' right to due process. As petitioners demonstrate, that component of issue preclusion is established by long and unbroken practice and usage in American courts. It serves as a vital safeguard, ensuring that a civil defendant's right to defend against a liability claim is unimpaired. The federal district court's recent decision in *Waggoner*, which rejected a due process challenge to the abandonment of the "actually decided" component of issue preclusion, is based on reasoning that is flawed at every turn.

II. This Court's intervention is urgently needed to correct a troubling precedent with far-reaching direct effects on thousands of pending federal and state

cases – and indirect effects on countless other cases across the country where inventive plaintiffs’ attorneys will no doubt attempt to invoke Florida’s unprecedented approach to issue preclusion (including with respect to the growing number of “issue” 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 or convenience, to vitiate a civil defendant’s fundamental right to defend against liability claims.

ARGUMENT

I. THE LOWER COURT’S ABANDONMENT OF THE REQUIREMENT THAT ISSUE PRECLUSION BAR THE ADJUDICATION OF ONLY THOSE ISSUES THAT WERE “ACTUALLY DECIDED” IN A PRIOR PROCEEDING VIOLATES DUE PROCESS

The Due Process Clause of the Fourteenth Amendment requires state courts to ensure that a party is accorded adequate procedural safeguards before being deprived of a property or liberty interest, see, *e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976), and it also protects 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 the “right to litigate the issues raised” in a lawsuit).

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 (1855). 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; see also *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877). 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.” *Oberg*, 512 U.S. at 430.

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 309. As petitioners persuasively demonstrate (11-741 Pet. 17-21; 11-754 Pet. 28-31), this “actually decided” requirement has been a core component of the doctrine of issue preclusion for centuries. This limit on issue preclusion has been repeatedly recognized in this Court’s decisions. 11-741 Pet. 17-20 & n.11 (citing and discussing cases); see also No. 11-754 Pet. 29-31 & nn.4-6 (collecting state court decisions uniformly recognizing this limitation).

This unbroken line of cases 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 an identical element of his or her claim (or an identical 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, issue preclusion merely prevents the *relitigation* of identical issues that a factfinder has conclusively resolved.

Without a showing that a liability element or defense was “actually litigated and resolved” in an earlier proceeding, however, there is no assurance that a 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 litigated and resolved” requirement thus opens up the possibility that a defendant will be held liable (and here, in No. 11-754, subjected to a \$25 million *punishment*) without *any* factfinder having determined that the elements of a plaintiff’s claim

have been proven – an “arbitrary . . . adjudication,” *Oberg*, 512 U.S. at 430, if there ever was one.

These cases are a good example. In Phase I of the *Engle* trial, the jury was asked to decide merely whether each of the petitioners here “place[d] cigarettes on the market that were defective and unreasonably dangerous.” 11-741 Pet. 6. Over petitioners’ objections, the *Engle* jury was not required to specify which of many particular brands sold by each defendant was defective, which of many challenged features of those products was defective, or when the supposed defects existed. 11-741 Pet. 21-24. The *Engle* jury’s “yes” answer to the highly generalized question presented to it relating to *some* unspecified product defect in *some* unspecified brand or cigarette type sold by each petitioner at some point over a 50-year span says absolutely nothing, for example, about whether the particular cigarettes smoked by Mrs. Campbell were defective. Indeed, for all we know the *Engle* jury may have *rejected* the (unelaborated) defect theory underlying Mr. Campbell’s strict liability claim. The “actually decided” requirement was therefore needed to prevent an “inaccurate adjudication,” *Oberg*, 512 U.S. at 430, forbidden by due process.

B. The *Waggoner* Court’s Rejection Of The Due Process Argument Was Mistaken

Since the filing of the petitions for certiorari in these cases, a federal district court has rejected the argument that due process bars the elimination of the “actually decided” requirement of issue preclusion. See *Waggoner*, 2011 WL 6371882, at *18-27 (Corrigan, J.). The court’s reasons for rejecting the

due process challenge, however, are flawed at every turn.

1. The district court in *Waggoner* acknowledged that this Court, in *Fayerweather*, concluded that “a state or federal court’s preclusive application of a state court judgment can, under certain circumstances, directly violate the fundamental constitutional protection against arbitrary deprivation of property.” 2011 WL 6371882, at *22. But *Waggoner* sought to limit this Court’s due process holding in *Fayerweather* to cases where the preclusion turns on a single factual or legal issue “upon which alone” the deprivation of property rests, as that was the circumstance in *Fayerweather* (where plaintiffs’ right to share in an estate turned solely on the validity of certain releases they had executed). *Id.* at *19; see also *id.* at *22.

This misreads *Fayerweather* and misunderstands due process. This Court mentioned the validity of the releases as the only contested issue *not* as a limitation on its holding, but merely as a description of the facts of the case. In addition, there is simply no basis for limiting the due process principles at issue here to cases where only one issue is at stake, and *Waggoner* cited nothing to support that novel limitation. On the contrary, as explained above, due process forbids depriving a defendant of its property without a judicial determination of all elements of a plaintiff’s claim. See, e.g., *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3 (2010) (Scalia, J., in chambers) (court decision that “eliminated any need for plaintiffs to prove, and denied any opportunity for [defendants] to contest” the element of reliance in a fraud claim, would give rise to due process concerns);

Williams, 549 U.S. at 353 (due process requires opportunity “to present every available defense”). Thus, the district court was simply wrong to suggest that completely relieving an *Engle* progeny plaintiff (such as Mr. Campbell) from having to prove that petitioners’ conduct was tortious (*i.e.*, that the cigarettes smoked by Mrs. Campbell were defective) did not offend due process because Mr. Campbell was required to prove *other* elements of his claim (such as class membership and damages).

2. Equally mistaken was *Waggoner*’s suggestion that there was no due process violation because the *Engle* Phase I jury had resolved “issues related to the Defendants’ conduct which were common to the *entire class*.” 2011 WL 6371882, at *26. This verbal sleight of hand cannot relieve the courts of the duty to examine what actually happened at the *Engle* trial. The core liability issues the Florida courts barred petitioners from litigating in these cases manifestly were *not* common to the entire class. As petitioners point out, “the *Engle* plaintiffs did not pursue a single strict-liability theory” but rather a wide variety of such theories, and there is no basis in the *Engle* Phase I findings for concluding that the jury determined that petitioners had engaged in tortious conduct – much less the *same type* of tortious conduct – with regard to every class member. 11-741 Pet. 22. Even the *Waggoner* court elsewhere acknowledged that the *Engle* jury “could have accepted the ammonia defect theory while rejecting the others (such as the allegation of misplaced ventilation holes in ‘light’ or ‘low-tar’ cigarettes), and still answered ‘yes’ to the defect question.” 2011 WL 6371882, at *15.

3. *Waggoner* also opined that there was no due process violation because petitioners were not denied an “opportunity to be heard” in the *Engle* Phase I trial. 2011 WL 6371882, at *24 (internal quotation marks omitted). That argument proves too much, because it would allow states to routinely eliminate the “actually decided” requirement in most cases in which issue preclusion is invoked. It also misses the mark. The due process violation in this case arises from the limits imposed on petitioners’ opportunity to offer a defense in *this* case. It is precisely because one cannot tell from the highly generalized jury findings in *Engle* whether the jury *actually determined* that the cigarettes smoked by Mrs. Campbell or Mr. Martin were defective that due process forbids using issue preclusion in *these* cases to relieve respondents of their obligation to establish that element of their respective design defect claims. That is no less true if the issues not actually determined by the *Engle* jury were vigorously disputed in the Phase I trial.

4. Finally, *Waggoner* expressed skepticism that the Florida courts’ abandonment of the “actually decided” requirement of issue preclusion worked a deprivation of any “fundamental right,” criticizing this due process theory as “underdeveloped” and as lacking support in this Court’s jurisprudence. See 2011 WL 6371882, at *19, *21-22.

This reflects a surprising unfamiliarity with this Court’s decisions. The 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. In *McVeigh v. United States*, 78 U.S. (11 Wall.) 259 (1871), the government

sought to obtain the forfeiture of land owned by a Confederate soldier under the authority of a statute authorizing confiscation of rebel property under certain circumstances. After the soldier, still engaged in the active rebellion within Confederate lines, sought to defend by filing a claim through an attorney in the forfeiture action, the government moved to strike the claim and the district court granted the motion. *Id.* at 261, 263. Unanimously reversing, this Court explained that the property owner's status as an "alien enemy" was irrelevant: "Whatever may be the extent of the disability of an alien enemy *to sue* in the courts of the hostile country, it is clear that he is liable *to be sued*, *and this carries with it the right to use all the means and appliances of defence.*" *Id.* at 267 (emphasis added; citation omitted).

Five years later, this Court emphatically reaffirmed that principle in *Windsor v. McVeigh*, 93 U.S. 274 (1876), holding that the original confiscation in *McVeigh v. United States* was void because the district court had not permitted the claimant to defend against the forfeiture. See *id.* at 277 ("Wherever one is assailed in his person or his property, there he may defend, *for the liability and the right are inseparable.* This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations.") (emphasis added). Because the "liability and the right are inseparable," a civil defendant plainly has a right to resist a plaintiff's efforts to establish liability, including proof as to each element of a claim.

Twenty years after *Windsor*, in *Hovey v. Elliott*, 167 U.S. 409, 443 (1897), this Court held that a

defendant's answer could not be stricken and a default judgment entered as a punishment for contempt of court. In so ruling, the Court repeatedly emphasized "the inherent right of defense secured by the due process of law clause of the constitution." *Ibid.*; see also *id.* at 444 (describing "the fundamental right of one summoned in a cause to be heard in his defense" as "an essential element of due process of law"). This Court's recognition of that bedrock principle continues to the present day. See *Williams*, 549 U.S. at 353 (due process prohibits award of punitive damages "without first providing [the defendant] with an opportunity to present every available defense") (internal quotation marks omitted). Contrary to *Waggoner's* suggestion, then, this Court's cases firmly establish that due process protects a civil defendant's right to defend against liability, including the right to insist upon an adverse finding by *some* factfinder of all the elements necessary to establish liability.²

II. THE ISSUE PRESENTED IS IMPORTANT, RECURRING, AND ILLUSTRATIVE OF THE NEED FOR GUIDANCE CONCERNING THE DUE PROCESS LIMITS ON STATE COURT AUTHORITY TO ABANDON TRADITIONAL SAFEGUARDS IN MASS LITIGATION

As petitioners point out (11-741 Pet. 31-32; 11-754 Pet. 15), the issue presented in these cases has a direct bearing on approximately 8,000 cases currently

² For purposes of due process, it does not matter whether the property sought to be obtained from a defendant through a judicial proceeding is real property (as in the Confederate soldier cases) or, as here, a damages award running into the millions of dollars. See *Fayerweather*, 195 U.S. at 297-98.

pending in the state and federal courts. Moreover, the proper resolution of the due process issue has a pervasive effect on how every one of these individual cases is adjudicated. And billions of dollars in potential liability are at stake in this tsunami of litigation. See 11-741 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. As its denial of discretionary review in these and other cases makes clear, the Florida Supreme Court has apparently washed its hands of any need to address the federal due process implications of its unprecedented ruling in *Engle*. That leaves this Court as the only forum that can correct the constitutional violation underlying the multimillion-dollar judgments in these cases. The fact that these cases involve unpopular defendants that have been subjected to highly unorthodox rulings by state courts that show no interest in even addressing the federal due process implications of

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) (explaining that issue on which review was granted was "of substantial importance" because it involved more than \$100 million of potential liability of the United States); *FTC v. Jantzen, Inc.*, 386 U.S. 228, 229 (1967) (taking note of almost 400 pending administrative orders like the one being challenged). See generally E. GRESSMAN ET AL., SUPREME COURT PRACTICE § 4.13, at 269 (9th ed. 2007) (discussing additional cases).

their decisions, moreover, only underscores the need for this Court's intervention. Nor can there be any serious doubt about the need for clarification of the due process issue. As the *Waggoner* court observed, "[n]early five years removed from" the Florida Supreme Court's decision in *Engle*, the state and federal courts in Florida "continue to struggle with" the issue preclusion questions – and must do so against the backdrop of "the lurking constitutional issue" raised by this petition. *Waggoner*, 2011 WL 6371882, at *12. The Court should grant review to remove this cloud from thousands of pending cases.

Review is also warranted because the importance of these cases – and the value of a decision by the Court on the issue presented – extends well beyond the *Engle* progeny litigation and the constitutional limits on the use of issue preclusion in the state courts. Although *Waggoner* recently suggested that the *Engle* progeny litigation is "unique" (2011 WL 6371882, at *27), it is entirely predictable, if the decisions below and others like them are permitted to stand, that the plaintiffs' bar will attempt to spread the "lessons" of *Engle* to other jurisdictions given the enormous economic stakes of mass tort litigation today and the continued use by both federal and state courts of segmented, multi-phase litigation plans and "issue" class actions.

A. State And Federal Courts Are Making Increasing Use Of "Issue" 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

“issue” 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 tort 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 “issue” class actions dedicated to resolving one or more issues (often highly generalized or abstract in nature) on an aggregate basis. See generally Farleigh, *Splitting the Baby: Standardizing Issue Certification*, 64 VAND. L. REV. 1585, 1596-1602 (2011) (describing emergence of “issue” class actions beginning in the late 1980s and their increasing acceptance by the courts); Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L. J. 567, 582-

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, 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).

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)(A)] as an alternative to (b)(3) class actions . . .”). Although some courts and commentators have rejected the use of “issue” class actions as an end run around the “predominance” requirement 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), they 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 “issue” class actions regardless of whether the claim as a whole satisfies Rule 23(b)(3)’s predominance requirement).

Given these developments, it is only a matter of time before courts will routinely face questions like those created by the *Engle* decision with respect to the preclusive effect of decisions in “issue” class actions (or other types of segmented, multi-phase mass litigation) focusing on generalized liability questions. A grant of review in these cases will help to clarify the due process limits on issue preclusion in those increasingly important settings.

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

There is yet another reason why the issue presented here is important and further review is desirable. If the Court were to resolve the issue raised in these cases, it 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 or convenience. In *Engle*, the Florida Supreme Court justified its unorthodox decision to retroactively certify an “issues” class action and make declarations about the future “res judicata effect” of the *Engle* Phase I findings as a “pragmatic solution” that preserved as much of *Engle* as possible. 945 S.2d at 1254, 1269.

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 appellate courts) have taken meaningful steps to safeguard the fundamental fairness of mass litigation in the *federal* courts, primarily through the interpretation of Rule 23, other federal rules, and federal statutes (such as the Rules Enabling Act) that embody or effectuate due process protections. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Taylor v. Sturgell*, *supra*; *Castano*, *supra* (decertifying smokers’ class action). See also 28 U.S.C. § 2072(b) (prohibiting use of any procedural device to “abridge, enlarge or modify any substantive

right”).

In contrast, the *state* courts – which lack the uniform protections of Rule 23 and the Rules Enabling Act – 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 (observing that state courts are often less faithful to the procedural requirements “intended to protect the due process rights of both unnamed class members and defendants”). Congress’s assessment is entirely accurate: 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.”

These cases are an extreme illustration of the troubling propensity of state courts to cut due process corners in mass litigation. *Engle* itself represents perhaps the most radical use of an “issue” 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 decisions below, the Florida appellate court abandoned a fundamental safeguard of issue preclusion doctrine – the requirement that an issue precluded from relitigation have been “actually decided” in a prior proceeding. Those rulings 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. It also relieved respondents of the obligation to prove all the elements of their respective claims – there is simply no way of determining if certain elements were resolved by the *Engle* jury. Indeed, the Florida courts did all this even though it is possible that the *Engle* jury *rejected* respondents’ specific design-defect (and other) theories.

The Florida courts’ willingness to deprive a defendant of the right to require 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*, *supra*, 131 S. Ct. at 3, 4 (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.⁵

⁵ 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*

CONCLUSION

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

Respectfully submitted.

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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); No. 07-806 Pet. for Cert., *Philip Morris USA, Inc. v. Accord*, 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) (Feb. 25, 2008)).

APPENDIX

**PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
LIST OF CORPORATE MEMBERS**

3M
Altec, Inc.
Altria Client Services Inc.
Astec Industries
Bayer Corporation
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boehringer Ingelheim Corporation
The Boeing Company
Bombardier Recreational Products, Inc.
BP America Inc.
Bridgestone Americas, Inc.
Brown-Forman Corporation
Caterpillar Inc.
Chrysler Group LLC
Cirrus Design Corporation
CLASS of America Inc.
Continental Tire the Americas LLC
Cooper Tire and Rubber Company
Crown Cork & Seal Company, Inc.
Crown Equipment Corporation
Daimler Trucks North America LLC
Deere & Company
The Dow Chemical Company
E.I. duPont de Nemours and Company
Emerson Electric Co.
Engineered Controls International, LLC
Environmental Solutions Group

Estee Lauder Companies
Exxon Mobil Corporation
FMC Corporation
Ford Motor Company
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
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
Johnson Controls, Inc.
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Lincoln Electric Company
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
Mitsubishi Motors North America, Inc.
Mueller Water Products

Mutual Pharmaceutical Company, Inc.
Navistar, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic Corporation of North America
Pella Corporation
Pfizer Inc.
Polaris Industries, Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.
Remington Arms Company, Inc.
RJ Reynolds Tobacco Company
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.
Thor Industries, Inc.
TK Holdings Inc.
The Toro Company
Toyota Motor Sales, USA, Inc.
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen Group of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.

Yokohama Tire Corporation
Zimmer, Inc.