Nos. 13-1187, 13-1193

In The Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY,

Petitioner,

v.

JIMMIE LEE BROWN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROGER BROWN, DECEASED,

Respondent.

R.J. REYNOLDS TOBACCO COMPANY,

Petitioner,

v.

ALVIN WALKER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ALBERT WALKER, ET AL.,

Respondents.

On Petitions for Writs of Certiorari to the Florida Fourth District Court of Appeal and the United States Court of Appeals for the Eleventh Circuit

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

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

INTEREST OF THE *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit corporation with 104 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers of a variety of products, including automobiles, trucks, aircraft, electronics, cigarettes, tires, chemicals, pharmaceuticals, and medical devices. A list of PLAC's corporate members is appended to this brief.

PLAC's primary purpose is to file *amicus curiae* briefs in cases that raise issues affecting the development of product liability litigation and have potential impact on PLAC's members. These are such cases. In the decisions below, the Florida Court of Appeal and the Eleventh Circuit have upheld the use (over petitioner's vehement due process objections) of a radical new form of preclusion previously unknown to American law. The effect in both cases was to permit a tort plaintiff to obtain a money judgment without establishing every element

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

of his or her claim. Because PLAC's members are often named as defendants in tort and class-action litigation, they have a vital interest in ensuring that state and federal courts adhere to traditional, time-tested, due process limitations on the use of preclusion in those and in other litigation settings.

STATEMENT

The petitions for certiorari in these cases raise an important and recurring question of federal constitutional law that affects literally thousands of pending state and federal lawsuits and involves billions of dollars of potential liability. That common question is whether due process bars the use of preclusion to establish elements of a plaintiff's claim where it cannot be demonstrated that the precluded issues *were actually decided* in an earlier proceeding – and where it is even possible that, if they *were* previously decided, they were resolved *in favor of* the party who is being barred from "relitigating" them.

As explained below, the Florida Supreme Court's creation in *Engle* v. *Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), cert. denied, 552 U.S. 941 (2007), and *Philip Morris USA, Inc.* v. *Douglas*, 110 So. 3d 419 (Fla.), cert. denied, 134 S. Ct. 332 (2013), of an unprecedented and unrecognizable form of preclusion violates due process and clearly warrants this Court's review. And now that the Eleventh Circuit, in one of the decisions below, has declined to correct the due process violation in a decision that controls the defect and negligence issue in all of the pending federal *Engle* progeny cases, there will be no further percolation of this issue in the lower courts. Accordingly, although this Court has previously denied petitions raising the same due process

question, the issue is now undeniably ripe for the Court's review. Indeed, only this Court can now prevent the ongoing miscarriage of justice and unjustified deprivations of property occurring in the thousands of pending *Engle* progeny cases. Further review is needed.

1. The doctrine of res judicata "refers to the various ways in which a judgment in one action will have a binding effect in another." F. JAMES & G. HAZARD, JR., CIVIL PROCEDURE § 11.3, at 590 (3d ed. 1985) ("JAMES & HAZARD"). "Res judicata" comes in two basic forms: claim preclusion and issue preclusion. *Douglas*, 110 So. 3d at 432-33; JAMES & HAZARD, *supra*, § 11.3, at 590; RESTATEMENT (SECOND) OF JUDGMENTS §§ 17-19, 27 (1982) ("RESTATEMENT"). The distinct characteristics – and quite different effects – of these two forms of preclusion have long been recognized. See, *e.g.*, *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-53 (1878) (discussing contours of both doctrines). See generally JAMES & HAZARD, *supra*, § 11.3, at 591 (effects of claim preclusion include "extinguish[ment]" of entire claim, "merger" of prevailing plaintiff's claim into the judgment, and limitation of plaintiff's rights "to proceedings for the enforcement of the judgment"); RESTATEMENT § 17(1) (same); *id.* at §§ 17(3), 27 (describing the far more limited effects of issue preclusion).

2. The petitions set forth in detail the relevant background to these cases, including the Phase I jury trial and findings, the Florida Supreme Court's novel decision in *Engle*, the subsequent filing of thousands of state and federal lawsuits by individual plaintiffs who were part of the prospectively decertified *Engle*

class, and the Florida Supreme Court's 2013 decision in *Douglas* addressing the meaning of *Engle*. See 13-1187 Pet. 5-16; 13-1193 Pet. 5-16.

Although it is hornbook law that the issue- or claim-preclusive effect of a judgment is determined *not* by the court rendering the judgment but by the court in the *second* proceeding, the Florida Supreme Court in *Engle* declared that the jury's extremely generalized findings in Phase I of the trial would have unspecified "res judicata effect" in all future cases filed by individual class members. *Engle*, 945 So. 2d at 1269. It also took the highly unorthodox steps of decertifying the massive class of Florida smokers *on a prospective basis only*, and retrospectively certifying an "issues" class for the matters covered by Phase I (the highly generalized issues decided by the jury). The Florida Supreme Court justified these unprecedented rulings as a "pragmatic solution" that would allow as much of the *Engle* proceedings as possible to be preserved. *Ibid.*

3. The petition in No. 13-1187 arises from one of the *Engle* progeny cases that was litigated to a final judgment in the Florida state courts. After the trial court entered a $600,000 judgment in favor of respondent Jimmie Lee Brown, who had brought suit to recover for the death of her husband, Roger, a longtime smoker, the Fourth District Court of Appeal affirmed. See 13-1187 Pet. 12-13.

The critical issue both at trial and on appeal involved the proper use and preclusive effect of the highly generalized and abstract *Engle* Phase I findings. Over petitioner's due process objections, the Florida trial court ruled that those findings relieved respondent Brown of any need to prove the

wrongful conduct elements of her individual strict-liability and negligence claims, and barred petitioner from disputing that it had engaged in any negligent conduct vis-à-vis Mr. Brown individually or that the particular brands he smoked were defective at the time he smoked them. Although it affirmed, the Florida appellate court expressed "concern[]" that this procedure was an "'extreme application[] of the doctrine of res judicata'" that "violates [*Engle* defendants'] due process rights." 13-1187 Pet. App. 18 (quoting *Richards* v. *Jefferson County*, 517 U.S. 793, 797 (1996)).

4. In 2013, the Florida Supreme Court issued its decision in *Douglas*. As an initial matter, the court acknowledged that (a) the doctrine of *issue* preclusion requires proof that an issue was "actually decided" in the previous action, and (b) because of the extreme generality of the *Engle* findings, application of issue preclusion "would effectively make the Phase I findings . . . *useless* in individual actions." 110 So. 3d at 433, 435 (emphasis added).

Unwilling to allow the *Engle* findings to become useless, the Florida Supreme Court proceeded to invent a new preclusion rule it claimed could be applied to "issues" class actions. The court first noted that the long-established "actually decided" requirement of issue preclusion has no bearing on *claim* preclusion. *Douglas*, 110 So. 3d at 433-35. It acknowledged that, ordinarily, a necessary prerequisite for *claim* preclusion – in Florida as in every other American jurisdiction – is the entry of a *final judgment on the merits* (*id.* at 433-34; see also *id.* at 438-39 (Canady, J., dissenting)), and that in an individual lawsuit, the separation of the case into

"liability and damages phases" would prevent the entry of such a judgment after completion of the liability stage only, with the consequence that claim preclusion *could not operate*. *Id.* at 434. But "[w]hen class actions are certified to resolve less than an entire cause of action," the court asserted, that traditional rule simply does not apply; instead, the decision in "the first trial on the common liability *issues* is entitled to" claim-preclusive effect "in the subsequent trial on individual issues," and this is true whether or not the individual issues were "actually decided" in the first proceeding. *Id.* at 434-35 (emphasis added). The Florida Supreme Court made no effort to explain how a valid rule of claim preclusion could operate without *any* of that doctrine's traditional effects (no extinguishment or merger of the plaintiff's claim, no limitation of plaintiff's rights to enforcement of the judgment).[2]

5. The petition in No. 13-1193 seeks review of the first federal appellate opinion issued in an *Engle* progeny case after the Florida Supreme Court's decision in *Douglas*. In the district court, as has now become commonplace, the respondents were allowed to use the abstract *Engle* Phase I findings to establish the tortious-conduct elements of their strict-liability claims (and were required to prove only causation and damages). 13-1193 Pet. 17; see also *ibid.* (same for respondent Walker's negligence claim). On appeal, the Eleventh Circuit affirmed. 13-1193 Pet. App. 1-25.

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[2] Justice Canady dissented, criticizing the majority's new preclusion rule as "a radical departure" from well-established Florida law. 110 So. 3d at 439.

In reaching that result, the court of appeals avoided ruling on petitioner's due process challenge to the radical new doctrine of claim preclusion announced in *Douglas*. As petitioner explains, the Eleventh Circuit did so by first adopting an interpretation of the holding of *Douglas* that was manifestly inconsistent with what the Florida Supreme Court *actually said* in that case, and then concluding that it was bound to give "full faith and credit" to *Engle*, as supposedly "interpreted by" *Douglas*. See 13-1193 Pet. 18-19. Specifically, the Eleventh Circuit held that *Douglas* had in fact "look[ed] beyond the jury verdict" and found that the *Engle* Phase I jury had "*actually decided* . . . *only* issues of common liability." 13-1193 Pet. App. 19-20 (emphasis added). And because the *Engle* jury had decided only class-wide issues, the Eleventh Circuit explained, those findings could be given issue-preclusive effect without running afoul of the "actually decided" requirement.

INTRODUCTION AND SUMMARY OF ARGUMENT

In Phase I of the sprawling *Engle* class-action trial, the jury was asked to decide whether petitioner R.J. Reynolds Tobacco Company "place[d] cigarettes on the market that were defective and unreasonably dangerous." 13-1187 Pet. App. 34-35; 13-1193 Pet. App. 141-142. The jury answered "yes" to that abstract and highly generalized question but was never required to specify which of the many brands and types of cigarettes sold by R.J. Reynolds was defective, which of the many challenged features of those products rendered them defective, or when precisely (over a period of some five decades) the

defect(s) existed. By the same token, the jury answered "yes" to the highly generalized question whether R.J. Reynolds had ever "failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances," without ever specifying how, or precisely when, or through what conduct, such negligence had occurred. 13-1187 Pet. App. 47-48; 13-1193 Pet. App. 154-55.

In the decisions below, state and federal trial courts in Florida permitted respondents to invoke these abstract *Engle* findings as conclusively establishing the tortious-conduct elements of their particular negligence and/or strict-liability claims against R.J. Reynolds with respect to the particular cigarettes smoked by the decedents whose estates respondents represent. Both the Florida appellate courts and the United States Court of Appeals for the Eleventh Circuit rejected petitioner's due process challenge to this highly unorthodox procedure, which involved eliminating traditional and essential safeguards from the time-tested doctrine of preclusion applied by Anglo-American courts since time immemorial.

I. The lower courts' abandonment of the "actually decided" precondition for preclusion worked an egregious violation of petitioner's due process rights. As petitioner has demonstrated, that component of issue preclusion is established by long and unbroken practice in American courts. It serves as a vital safeguard, protecting a civil defendant's fundamental right to defend against a liability claim. Thus, as this Court recognized in *Fayerweather* v. *Ritch*, 195 U.S. 276, 308-09 (1904), it is required by the Due

Process Clause. The appellate-court decisions in these cases have eviscerated this requirement in *Engle* progeny cases – and for no apparent reason other than judicial expediency.

The Florida Supreme Court's suggestion in *Douglas* that the essential "actually decided" safeguard could be dispensed with by resorting to the doctrine of *claim* preclusion is flawed at every turn.

"Claim preclusion," as its name suggests, applies where a claim has been precluded – that is, where it merges into a final judgment, barring further litigation on that claim entirely. In those circumstances, it does not matter what the jury actually decided in reaching the final judgment; the judgment itself demonstrates that the claim has been fully resolved against the losing party. But here no claim is being precluded; on the contrary, the plaintiff's claim *is being litigated*, and the problem is whether preclusion applies to particular issues central to that claim. In such circumstances, it is critical to know whether the prior proceedings resulted in an actual decision on those issues, and what that actual decision was – otherwise, a party could be precluded from litigating issues that may not have been decided at all or may even have been decided in the precluded party's *favor* in the earlier proceeding. That is the situation in these cases: The Florida Supreme Court has created a novel and unrecognizable preclusion rule for "issues" class actions in order to uphold the entry of judgment even though no factfinder has ever demonstrably determined that petitioner's conduct specifically relating to any particular plaintiff constituted negligence or that R.J. Reynolds' products used by

any particular plaintiff were in fact defective. Indeed, it is possible that the *Engle* jury *rejected* the specific negligence and/or defect theories upon which respondents' claims rest.

To impose multimillion dollar (or any) liability under these circumstances is the quintessence of arbitrary, not to mention potentially inaccurate, decision-making. And the due process violation (and egregious unfairness) is compounded by the Florida Supreme Court's and Eleventh Circuit's make-it-up-as-you-go, serial innovations), which have created a preclusion regime that petitioner could scarcely have imagined at the time of the Phase I trial. Seldom has this Court been asked to review lower-court decisions that have jettisoned traditional due process protections that were so universally accepted in Anglo-American law and so vitally important to protect litigants against unjustified and unfair deprivations of property.

II. This Court's intervention is needed to correct a radical precedent with (a) far-reaching direct effects on thousands of pending state and federal *Engle* progeny cases, (b) massive financial consequences for petitioner and other *Engle* defendants, and (c) predictable, indirect effects on countless other cases in Florida and across the country where plaintiffs will invoke Florida's novel preclusion approach (including in the growing number of "issues" class actions). Seldom has this Court been asked to review lower-court decisions of greater practical impact on ongoing litigation or with larger financial consequences. Further review would also provide much-needed guidance to the state courts on the limits imposed by due process on their

authority, on grounds of "efficiency," "convenience," or "pragmatism," to restrict a civil defendant's fundamental right to defend against liability claims.

ARGUMENT

I. THE FLORIDA SUPREME COURT'S NOVEL PRECLUSION RULE VIOLATES DUE PROCESS

The Due Process Clause of the Fourteenth Amendment requires state courts to provide litigants with adequate procedural safeguards and protections against "arbitrary and inaccurate adjudication." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994). The basic guarantee of due process in a civil trial is that a defendant will not be held liable (and deprived of property) without a meaningful opportunity to contest all elements of liability and raise all affirmative defenses. See, *e.g.*, *Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007); *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971) (due process safeguards "right to litigate the issues raised" in lawsuit); *Hovey* v. *Elliott*, 167 U.S. 409, 443 (1897) (recognizing "the inherent right of defense secured by the due process of law clause").[3]

As this Court has long recognized, "traditional practice provides a touchstone for constitutional analysis." *Oberg*, 512 U.S. at 430; see also *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856). Adherence to time-tested

[3] The fundamental right to defend against deprivations of property in judicial proceedings has deep roots in this Court's jurisprudence, stretching back at least to the Civil War. See, *e.g.*, *McVeigh* v. *United States*, 78 U.S. (11 Wall.) 259, 261, 263, 267 (1871); *Windsor* v. *McVeigh*, 93 U.S. 274, 277 (1876).

methods of adjudication "protect[s] against arbitrary and inaccurate adjudication" and is the very essence of due process. *Oberg*, 512 U.S. at 430. Accordingly, the "abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that" the resulting "procedures violate the Due Process Clause." *Ibid*.

Even in cases involving state-court decisions of far less impact and practical importance than the decisions underlying these petitions, this Court has not hesitated to invalidate on due process grounds "extreme applications of the doctrine of res judicata." *Richards* v. *Jefferson County*, 517 U.S. 793, 797 (1996) (reversing Alabama Supreme Court decision); see also *South Central Bell Tel. Co.* v. *Alabama*, 526 U.S. 160, 167-68 (1999) (same). Nor has this Court been reluctant in recent years to rein in wayward individual state-court systems that have ignored the limits on their authority imposed by the Due Process Clause. See, *e.g.*, *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 131 S. Ct. 2846 (2011) (reversing North Carolina Court of Appeal's novel and expansive exercise of personal jurisdiction); *J. McIntyre Machinery, Ltd.* v. *Nicastro*, 131 S. Ct. 2780 (2011) (same for New Jersey Supreme Court). Similar intervention is necessary in these cases.

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 explained, was a requirement of due process. *Id.* at 308-09. As petitioner persuasively demonstrates (13-1187 Pet. 22 & n.3), the "actually decided" requirement has been a core component of issue preclusion for centuries, repeatedly recognized by this Court.

This unbroken line of decisions makes eminent sense. In civil litigation, a plaintiff traditionally must prove all the elements of his or her claim; a defendant must be allowed to dispute that proof and establish available defenses; and a factfinder must decide the controversy between the litigants under established burdens of proof. Where there is a demonstration by a plaintiff that a particular element of his or her claim (or a particular affirmative defense) was "actually litigated and resolved" against the defendant through "a valid court determination essential to [a] prior judgment," *Taylor* v. *Sturgell*, 553 U.S. 880, 892 (2008) (internal quotation marks omitted), there is no impairment of the right to defend because the defendant already had a fair opportunity to prevail on these issues – and unambiguously lost. In that circumstance, preclusion merely prevents the *relitigation* of any issues previously 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 any factfinder has resolved that element or defense against a defendant – and no basis for preventing the defendant from exercising the right to defend with respect to that element or defense. Nor, in that circumstance, is there any basis for relieving the plaintiff of the burden of proving every element

of his or her claim. Elimination of the "actually decided" requirement thus creates the risk that a defendant will be held liable without *any* factfinder having determined that all the elements of a plaintiff's claim have been proven – an "arbitrary . . . adjudication," *Oberg*, 512 U.S. at 430, if there ever was one.

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

The Florida Supreme Court in *Douglas* took the view that it could avoid the due process problem by declining to rely on *issue* preclusion and instead invoking *claim* preclusion. But as petitioner explains (*e.g.*, 13-1187 Pet. 18-19, 21-24, 25-26), that conclusion was flawed at every turn. The *substance* of what occurred below was a determination of the preclusive effect of the *Engle* Phase I liability *findings* on issues in the underlying tort lawsuits – specifically, whether certain elements of the respondents' claims could be deemed established by the Phase I findings. Regardless of the label attached to it, that is issue preclusion in every meaningful sense – except, of course, for the omitted "actually decided" protection required by due process.

Moreover, the novel preclusion rule invented by the Florida Supreme Court also bears no resemblance to the traditional doctrine of *claim* preclusion as universally applied by Florida and other American jurisdictions. As noted above (at pages 3, 9), the traditional consequence of claim preclusion is to *extinguish* an entire claim, leaving intact only the judgment on the merits and (in the

case of "merger") whatever remedies are available to a prevailing plaintiff to enforce that judgment. That obviously was not the effect of "claim preclusion" here. See also 13-1187 Pet. 25-26. Here, there was no extinguishment and no merger; if there had been, further litigation in individual cases would have been barred. What is more, as Justice Canady correctly noted in dissent in *Douglas*, claim preclusion cannot apply here because the *Engle* litigation "did not result in a final judgment on the merits with respect to the members of the class," only "findings of the jury" that were (at most) "determinations of fact on particular issues" (again, a classic instance of issue preclusion). *Douglas*, 110 So. 3d at 439 (dissent). The application of claim preclusion to a proceeding that "did not fully adjudicate any claim and did not result in a final judgment on the merits" constitutes a "radical departure" from well-established Florida law. *Ibid.*; see also *Richards*, 517 U.S. at 797 (invalidating on due process grounds a similarly "extreme application[] of . . . res judicata").

The due process violation was compounded here by the Florida Supreme Court's and Eleventh Circuit's make-it-up-as-you-go, serial innovations, which together have created a preclusion regime that petitioner could scarcely have even imagined at the time of the Phase I trial. At that time, (1) Florida law would have treated the findings as qualifying at most for issue but not claim preclusion, and then only if an individual plaintiff demonstrated that the same issue was actually decided by the *Engle* jury; (2) Florida law applied claim preclusion only to a judgment on the merits (which the Phase I verdict assuredly was not); (3) Florida claim preclusion had

the effect of extinguishing the plaintiff's entire claim and merging it into the judgment, not an effect comparable to that of issue preclusion (nor was claim preclusion a doctrine that could be used offensively); (4) there was no special rule (of issue or claim preclusion) for "issues" class actions; (5) *Engle* was not even an "issues" class action but something broader (the "issues" class was created retroactively); and (6) the preclusive effect of a judgment or findings was something the subsequent court, not the issuing court, decided. These were the traditional "res judicata" ground rules that petitioner was dealing with when it tried Phase I of *Engle*. Those ground rules are light-years removed from the novel regime created after-the-fact by the Florida Supreme Court to measure the preclusive effects of the findings that resulted from the Phase I trial. Nor could petitioner have possibly anticipated that in future *federal* lawsuits, courts would be required to give "full faith and credit" to a supposed ruling in *Douglas* on *issue* preclusion (when *Douglas* itself clearly relied on *claim* preclusion and declared the Phase I findings "useless" for purposes of issue preclusion). See U.S. *Amicus* Brief, *DaimlerChrysler AG* v. *Bauman*, No. 11-965, at 26-28 (July 5, 2013) (Due Process Clause requires non-arbitrariness as well as "fair warning" of attribution rules for measuring minimum contacts with forum).

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

As petitioner points out (*e.g.*, 13-1187 Pet. 31), the due process issue presented in these cases has a direct bearing on more than four thousand *Engle* progeny cases currently pending in the state and federal courts. Tens of billions of dollars in potential liability are at stake in that tsunami of litigation. See 13-1187 Pet. 31-32. 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.[4]

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

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[4] 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) (granted issue was "of substantial importance" because it involved more than $100 million of potential government liability); *FTC* v. *Jantzen, Inc.*, 386 U.S. 228, 229 (1967) (taking note of almost 400 pending administrative orders like the one being challenged).

absence of any final judgment on the merits, up until now a necessary prerequisite for claim preclusion – to all class action litigation in the Florida courts.

In addition, it is entirely predictable, if this Court declines to intervene, that the well-organized plaintiffs' class-action bar will attempt to spread the "lessons" of *Engle* (and *Douglas*) to other categories of cases. The Florida courts will become a magnet for "issues" class actions that can be leveraged, through the novel claim preclusion doctrine adopted in *Douglas*, into judgments (and, of course, settlements) obtainable without the need for plaintiffs to prove every element of their claims. And the plaintiffs' class-action bar will doubtless attempt to spread these radical legal doctrines to other jurisdictions, given both the enormous economic stakes of mass tort litigation today and the rising incidence of "issues" class actions in both federal and state courts. As explained above (at page 12), this Court has stepped in to correct "extreme" applications of the doctrine of res judicata (and other due process violations by individual state-court systems) that had nowhere near the practical importance or far-reaching impact of the decisions below.

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

The Florida Supreme Court's decision in *Engle* to decertify a class action, retroactively certify an "issues" class action, and make pronouncements about the future "res judicata effect" of the Phase I

jury's findings was unprecedented. But *Engle* is only one of a number of large class actions in recent years that have employed a segmented, multi-phased trial plan – including an initial phase directed toward resolving highly generalized liability issues – to deal with the adjudication of large numbers of claims. Indeed, there is a growing trend to attempt mass tort aggregation through generic trial proceedings involving disparate claims relating to similar products.[5]

What is more, in recent years there has been a marked increase in "issues" class actions dedicated to resolving one or more issues (often highly generalized or abstract in nature) on an aggregate basis. See generally Farleigh, *Splitting the Baby: Standardizing Issue Class Certification*, 64 VAND. L. REV. 1585, 1595-1602 (2011) (describing emergence of "issues" class actions beginning in late 1980s and their increasing acceptance by courts); Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567, 582-86 (2004) (same); *id.* at 586 ("District courts everywhere are inundated with requests for

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

certification of issue class actions [under Fed. R. Civ. P. 23(c)(4)] as an alternative option to (b)(3) class actions . . . ."). This trend has been encouraged by publication of the American Law Institute's PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §§ 2.02-2.05 (2010) ("PRINCIPLES"), which endorses the use of "issues" class actions under certain circumstances, see *Gates* v. *Rohm and Haas Co.*, 655 F.3d 255, 273 (3d Cir. 2011).[6]

The novel preclusion rule created by the Florida Supreme Court will only spur the plaintiffs' bar to bring *more* "issues" class actions, not just in Florida but also in other jurisdictions. In every "issues" class action, the question potentially arises of what preclusive effect will be given in subsequent proceedings to the findings made by the factfinder on the certified issues. The Florida Supreme Court's flawed answer to that question ensures that a defendant may be held liable based on vague answers to highly abstract liability questions without individual plaintiffs ever having had to actually prove every element of their claims. A grant of review in these cases will clarify the due process limits on preclusion, especially in the increasingly important setting of "issues" class actions.

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[6] In sharp contrast to *Douglas*, the ALI's recent scholarly review of the law of aggregate litigation recognizes that "[a]ggregate treatment of a common issue by way of a class action" will "generate only issue preclusion" (and for claim preclusion to apply, there would have to be "aggregate treatment of related claims"). See PRINCIPLES, *supra*, § 2.01 cmt. d.

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

Further review would also provide much-needed guidance concerning the due process limits on the authority of state courts to abandon traditional procedural safeguards in mass litigation in the name of efficiency, practicality, or convenience. In *Engle*, the Florida Supreme Court justified its highly unorthodox decisions to retroactively certify an "issues" class action and make declarations about the future "res judicata effect" of the Phase I findings as a "pragmatic solution" that preserved as much of *Engle* as possible. 945 So. 2d at 1269. Similarly, in *Douglas*, the Florida Supreme Court justified its new rule of "claim" preclusion partly on the ground that the rule preserved a significant effect for both the Phase I findings and the court's prior decision in *Engle*. 110 So. 3d at 433 ("[T]o decide here that [in *Engle*] we really meant issue preclusion . . . would effectively make the Phase I findings . . . useless in individual actions.").

In recent decades, there has been a substantial increase in large class actions and other forms of mass litigation involving product liability, consumer fraud, and other tort claims, including in the state courts. See Lee & Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, Federal Judicial Center, at 1 (2008) (noting 72% increase in class-action activity between 2001 and 2007); Cabraser, *Life After* Amchem*: The Class Struggle Continues*, 31 LOY. L.A. L. REV. 373, 386 (1998) ("It is no secret that class actions – formerly

the province of federal diversity jurisdiction – are being brought increasingly in the state courts."). Over the years, this Court (and the lower federal courts) have taken some meaningful steps to safeguard the fundamental fairness of mass litigation in the *federal* courts, primarily through the interpretation of Rule 23 and other federal rules and statutes that embody due process safeguards. See, *e.g.*, *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011); *Taylor* v. *Sturgell*, *supra*; *Castano* v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (decertifying smokers' class action).

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

The decisions in *Douglas* and *Engle* provide a textbook illustration. *Engle* represents perhaps the most radical use of an "issues" class action to date (not only in its *retroactive* certification but also in its willingness to certify issues of stunning breadth and generality). And, in *Douglas*, the Florida Supreme Court added another round of radical innovation to *Engle*'s novel declaration of *prospective* "res judicata" effects by creating an unprecedented and

unrecognizable doctrine of "claim" preclusion that lacks virtually all of the traditional *effects* of claim preclusion and operates *without the traditional prerequisite* of a prior judgment on the merits.

Unfortunately, the Florida Supreme Court's willingness to sacrifice traditional safeguards in the name of expediency or efficiency is hardly an isolated occurrence. See, *e.g.*, *Philip Morris USA Inc.* v. *Scott*, 131 S. Ct. 1, 3-4 (2010) (Scalia, J., in chambers) (involving the Louisiana courts). "The extent to which class treatment may constitutionally reduce the normal requirements of due process is an important question." *Id.* at 4. Additional guidance from this Court would greatly assist the state courts in evaluating when departures from traditional safeguards in mass tort and other complex litigation are constitutionally permissible.

* * *

The decisions below – and the Florida Supreme Court's decisions in *Engle* and *Douglas* – are of grave concern to all of PLAC's members. Although this Court has previously denied petitions raising the significant due process issue presented here, that was before the Eleventh Circuit made clear that it would decline to address that constitutional issue. Now that both the Florida Supreme Court and the Eleventh Circuit have definitively spoken, the due process issue is ripe for this Court's consideration. Indeed, only this Court can now prevent the flagrant due process violations from occurring in thousands upon thousands of pending state and federal lawsuits. In view of the enormous legal and economic impact of this issue, and the radical departures made by the Florida Supreme Court from

traditional concepts of preclusion, it is difficult to imagine a stronger case for this Court's intervention.

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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APPENDIX

PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
LIST OF CORPORATE MEMBERS

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

The Dow Chemical Company
E.I. duPont de Nemours and Company
Eisai Inc.
Eli Lilly and Company
Emerson Electric Co.
Exxon Mobil Corporation
Ford Motor Company
General Electric Company
General Motors LLC
Georgia-Pacific Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
The Home Depot
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.
KBR, Inc.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Lincoln Electric Company
Lorillard Tobacco Co.
Magna International Inc.
Mazak Corporation
Mazda Motor of America, Inc.
Medtronic, Inc.
Merck & Co., Inc.
Meritor WABCO

Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Mueller Water Products
Novartis Pharmaceuticals Corporation
Novo Nordisk, Inc.
PACCAR Inc.
Peabody Energy
Pella Corporation
Pfizer Inc.
Pirelli Tire, LLC
Polaris Industries, Inc.
Porsche Cars North America, Inc.
RJ Reynolds Tobacco Company
SABMiller Plc
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.
TASER International, Inc.
Techtronic Industries North America, Inc.
Teva Pharmaceuticals USA, Inc.
TK Holdings Inc.
Toyota Motor Sales, USA, Inc.
TRW Automotive
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen Group of America, Inc.
Volvo Cars of North America, Inc.
Wal-Mart Stores, Inc.

Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.