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, AND
GEORGE DUKE III, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SARAH DUKE,

Respondents.

On Petitions For A Writ Of Certiorari To The Florida Fourth District Court Of Appeal And The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF PHILIP MORRIS USA INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ANDREW L. FREY
KENNETH S. GELLER
LAUREN R. GOLDMAN
MICHAEL S. RAYFIELD
MAYER BROWN LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

MIGUEL A. ESTRADA
Counsel of Record
AMIR C. TAYRANI
ROBERT E. JOHNSON
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

STATEMENT 2

SUMMARY OF ARGUMENT 6

ARGUMENT 9

I. REVIEW IS NECESSARY TO FORESTALL A MASSIVE DUE PROCESS VIOLATION SPANNING THOUSANDS OF PENDING CASES 9

A. The *Engle* Progeny Litigation Threatens The Defendants With Massive, Serial Deprivations Of Their Due Process Rights 11

B. Only This Court Can Remedy This Unprecedented Violation Of Due Process 13

II. THE ISSUE PRESENTED BY THESE PETITIONS IS ONE OF SYSTEMIC IMPORTANCE TO THE JUDICIAL SYSTEM 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Comm'r v. *Sunnen*,
333 U.S. 591 (1948)....................12

De Sollar v. *Hanscome*,
158 U.S. 216 (1895)....................11

Engle v. *Liggett Group, Inc.*,
945 So. 2d 1246 (Fla. 2006) (per curiam)....................2, 3

Epstein v. *MCA, Inc.*,
179 F.3d 641 (9th Cir. 1999)....................17

Erie R.R. Co. v. *Tompkins*,
304 U.S. 64 (1938)....................13

Fayerweather v. *Ritch*,
195 U.S. 276 (1904)....................11, 16

FTC v. *Jantzen, Inc.*,
386 U.S. 228 (1967)....................19

G. & C. Merriam Co. v. *Saalfield & Ogilvie*,
241 U.S. 22 (1916)....................12

Gooch v. *Life Investors Ins. Co.*,
672 F.3d 402 (6th Cir. 2011)....................16, 17

Honda Motor Co. v. *Oberg*,
512 U.S. 415 (1994)....................9, 13, 19

Kremer v. *Chem. Constr. Corp.*,
456 U.S. 461 (1982)....................15

Logan v. *Zimmerman Brush Co.*,
455 U.S. 422 (1982)....................11

Nevada v. *United States*,
463 U.S. 110 (1983)..12

Oklahoma City v. *McMaster*,
196 U.S. 529 (1905)..12

Philip Morris USA Inc. v. *Douglas*,
110 So. 3d 419 (Fla.),
cert. denied, 134 S. Ct. 332 (2013)................*passim*

Phillips Petroleum Co. v. *Shutts*,
472 U.S. 797 (1985)..17

Richards v. *Jefferson Cnty.*,
517 U.S. 793 (1996)..19

Russell v. *Place*,
94 U.S. 606 (1877)..11

State v. *Homeside Lending, Inc.*,
826 A.2d 997 (Vt. 2003) 17

Stephenson v. *Dow Chem. Co.*,
273 F.3d 249 (2d Cir. 2001),
aff'd in relevant part by an equally divided Court,
539 U.S. 111 (2003)..17

OTHER AUTHORITIES

Principles of the Law of Aggregate
Litigation (2010) 18

Restatement (Second) of Judgments (1982)............12

Stephen M. Shapiro et al., *Supreme Court Practice* (10th ed. 2013) 19

Charles Alan Wright et al., *Federal Practice and Procedure* (3d ed. 2005).............................8, 18

BRIEF OF PHILIP MORRIS USA INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Philip Morris USA Inc. ("PM USA") is a defendant in thousands of pending *Engle* progeny cases that will be directly affected by the disposition of these two petitions for certiorari, and has filed its own petition for certiorari in *Philip Morris USA Inc.* v. *Barbanell*, No. 13-1180, which it has asked the Court to hold pending the resolution of these two petitions.

If the decisions below are allowed to stand, each of the thousands of *Engle* progeny cases pending in state and federal courts throughout Florida will be infected by the same due process error that petitioner R.J. Reynolds Tobacco Co. ("Reynolds") asks this Court to remedy here. Like Reynolds, PM USA will be denied any ability to contest the tortious conduct elements of the plaintiffs' defect and negligence claims in those cases—and will thus be unable to dispute, for example, that the PM USA cigarettes smoked by each plaintiff contained a defect or that its conduct toward each plaintiff was negligent. Instead, those elements will be conclusively established

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[1] Pursuant to this Court's Rule 37.2(a), *amicus* gave at least 10 days' notice to all parties of its intent to file this brief, and letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission. No person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission.

by highly generalized findings rendered in the now-decertified *Engle* class action—even though those findings cannot be shown to be relevant to any particular progeny plaintiff who now stands to benefit from them.

Only this Court can provide PM USA and the other *Engle* defendants with relief from that massive and unprecedented due process violation. Although the Florida District Court of Appeal in *Brown* was gravely "concerned" by the due process implications of its holding, *Brown* Pet. App. 18, it considered itself bound to follow the course charted by the Florida Supreme Court in *Engle* and subsequently reaffirmed in *Philip Morris USA Inc.* v. *Douglas*, 110 So. 3d 419 (Fla.), *cert. denied*, 134 S. Ct. 332 (2013). And, in *Walker*, an Eleventh Circuit panel—in a decision issued after most of the cert-stage briefing in *Douglas* was completed—likewise deemed itself bound to defer to the Florida Supreme Court under an erroneous theory of full faith and credit that was not even advanced by the plaintiffs in that case. Now that the Eleventh Circuit has declined en banc rehearing, the due process question is fully ripe for this Court's review.

STATEMENT

A. The due process flaws in the *Brown* and *Walker* trials are obvious and elementary: plaintiffs will be permitted to take the defendant's property under the guise of a tort judgment without proving each of the elements that state law concededly prescribes before such a deprivation can take place. In both cases—but for different and mutually inconsistent reasons—this deprivation is to take place under the perceived compulsion of *Engle* v. *Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam),

an anomalous class-certification decision that this Court never reviewed.

Confronted with a sprawling, statewide class of Florida smokers, the Florida Supreme Court concluded in *Engle* that "continued class-action treatment" was "not feasible because individualized issues . . . predominate[d]." 945 So. 2d at 1268. Rather than decertify the class altogether, however, the court decided for "pragmatic" reasons to decertify the class only prospectively, retroactively certifying an issues class and authorizing class members to "initiate individual damages actions" in which "the Phase I common core findings will have res judicata effect." *Id.* at 1269. The court adopted this procedure even though the class members themselves had virtually nothing in common: they had smoked different brands of cigarettes with different designs and different alleged defects at various points over a fifty-year period.

In *Douglas*, 110 So. 3d 419, the Florida Supreme Court was squarely presented with the *Engle* defendants' argument that federal due process prohibits plaintiffs from relying on the Phase I findings to establish elements of their particular claims because it is impossible to determine whether the *Engle* jury actually decided those issues in their favor. In addressing that argument, the Florida Supreme Court acknowledged that the *Engle* class's theories of liability "included brand-specific defects"—*i.e.*, defects that applied only to some cigarettes and thus only some class members—as well as theories that could apply to all class members. *Id.* at 423. The court concluded that, as a result of the class's alternative theories of liability and the generality of the Phase I findings, the findings would be

largely "useless" to *Engle* progeny plaintiffs if issue preclusion applied because that doctrine requires proof that an issue was "actually decided" in the prior proceeding. *Id*. at 433.

The Florida Supreme Court nevertheless held that progeny plaintiffs could rely on a heretofore-unknown doctrine of *offensive* "claim preclusion" to establish in their favor any issue that "might . . . have been" decided against the defendants by the Phase I jury. *Douglas*, 110 So. 3d at 432 (internal quotation marks omitted). The court held that this novel approach to preclusion comports with due process because claim preclusion, unlike issue preclusion, "has no 'actually decided' requirement." *Id.* at 435.

B. Reynolds' petitions for certiorari in *Brown* and *Walker* seek review of two of the thousands of *Engle* progeny actions that remain pending in Florida state and federal court.

Brown was filed as an *Engle* progeny suit in Florida state court. The trial court did not require the plaintiff to demonstrate that the *Engle* Phase I jury had actually decided issues relevant to Mr. Brown's smoking history, but nonetheless instructed the jury that the *Engle* findings conclusively established the conduct element of his claims. *Brown* Pet. App. 10-11. On appeal, the Florida Fourth District Court of Appeal affirmed, explaining that it was "concerned the preclusive effect of the *Engle* findings violates Tobacco's due process rights" but that it was "compelled to follow the mandate of the [state] supreme court." *Id.* at 18. The Florida Supreme Court held the case pending its decision in *Douglas* and thereafter declined jurisdiction.

Walker is a consolidated appeal from two *Engle* progeny actions tried in the United States District Court for the Middle District of Florida. As in *Brown*, the district court instructed the juries in both cases that the plaintiffs could rely on the *Engle* Phase I findings to establish the conduct elements of their claims and that the juries were not required to make any finding on those elements. *Walker* Pet. App. 16.

On appeal, Reynolds argued that permitting the plaintiffs to rely on the Phase I findings to establish elements of their claims violated federal due process and that the doctrine of offensive claim preclusion adopted by the Florida Supreme Court in *Douglas* was a constitutionally inadequate ground for affording such broad preclusive effect to the findings. The Eleventh Circuit, however, declined to address the constitutionality of *Douglas*'s unprecedented theory of claim preclusion. Instead, it read *Douglas* as having conducted the very examination of the *Engle* record that *Douglas* had expressly conceded could *not* produce any usable findings under the doctrine of issue preclusion. *Walker* Pet. App. 23. Indeed, whereas the Florida Supreme Court felt compelled to adopt a previously unknown version of claim preclusion to justify using the *Engle* findings in progeny trials, the Eleventh Circuit ascribed to the Florida Supreme Court an analysis that satisfied traditional issue-preclusion requirements, despite that court's express disclaimer of any such analysis.

According to the Eleventh Circuit, "[t]he Supreme Court of Florida looked through the jury verdict entered in Phase I to determine what issues the jury decided." *Walker* Pet. App. 18. Regardless of any doubts the Eleventh Circuit might have had

about the accuracy of the Florida Supreme Court's supposed examination of the *Engle* record, the court concluded that it was required to "give full faith and credit to the decision in *Engle*, as interpreted in *Douglas*," and was not permitted to undertake its own independent examination of the issues "actually decided" in *Engle*. *Id.* at 17, 23. The Eleventh Circuit reached that conclusion even though the plaintiffs themselves had not invoked the Full Faith and Credit Act in defense of the district court's judgment.

Reynolds filed petitions for certiorari in both *Brown* and *Walker*.[2]

SUMMARY OF ARGUMENT

The due process violations implicated in these petitions span thousands of cases and threaten defendants with staggering liability to plaintiffs who may never have proved the essential elements of their claims in any proceeding. This Court is the only forum in which PM USA and the other *Engle* defendants can obtain relief from the ongoing, serial deprivation of their constitutional rights by Florida's state and federal courts.

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[2] In addition, Reynolds filed six petitions asking this Court to hold the case pending the disposition of *Brown* and *Walker*. *See R.J. Reynolds Tobacco Co.* v. *Mack*, No. 13-1186; *R.J. Reynolds Tobacco Co.* v. *Kirkland*, No. 13-1188; *R.J. Reynolds Tobacco Co.* v. *Koballa*, No. 13-1189; *R.J. Reynolds Tobacco Co.* v. *Smith*, No. 13-1190; *R.J. Reynolds Tobacco Co.* v. *Townsend*, No. 13-1191; *R.J. Reynolds Tobacco Co.* v. *Sury*, No. 13-1192. Lorillard Tobacco Company also filed a hold petition in *Lorillard Tobacco Co.* v. *Mrozek*, No. 13-1185. And PM USA filed a hold petition in *Philip Morris USA Inc.* v. *Barbanell*, No. 13-1180.

In *Engle*, the Florida Supreme Court retroactively certified an issues class action that encompasses plaintiffs who share little in common except their use of some brand or brands of defendants' cigarettes during some portion of a fifty-year period and their subsequent development of a smoking-related illness. Because many of the alternative theories of liability pursued by the class applied only to limited subsets of class members, the Florida Supreme Court recognized that the generalized findings rendered by the class-action jury would be "useless" to *Engle* progeny plaintiffs under traditional preclusion principles. *Douglas*, 110 So. 3d at 433. To salvage the Phase I findings, the court therefore adopted a wholly unprecedented doctrine of offensive claim preclusion—even though no *claim* is being precluded in the progeny litigation—that binds a defendant with respect to any issue that "*might* . . . have been litigated and determined" against it in the prior lawsuit. *Id.* at 432 (emphasis added). This "radical departure" from common-law preclusion principles, *id.* at 439 (Canady, J., dissenting), permits *Engle* progeny plaintiffs to invoke the Phase I findings to establish any issue the *Engle* jury "might"—or might *not*—have decided in their favor. Relying on the sweeping preclusive effect of those findings, *Engle* progeny plaintiffs have already secured total judgments exceeding $450 million—and more than 95% of the progeny cases still remain to be tried.

Based on a gross misreading of *Douglas*, the Eleventh Circuit declined to examine the constitutionality of the Florida Supreme Court's novel theory of offensive claim preclusion. According to the Eleventh Circuit, the Florida Supreme Court had applied traditional issue-preclusion principles and determined, based on an examination of the *Engle* record,

that the *Engle* jury actually decided "all common liability issues for the class." *Walker* Pet. App. 14 (internal quotation marks omitted). In fact, the Florida Supreme Court expressly declined to undertake any such record-based examination of *Engle* because it was apparent to the court from the face of the record that application of the "actually decided" requirement would render the Phase I findings "useless." *Douglas*, 110 So. 3d at 433. It was for that reason that the Florida Supreme Court invoked claim preclusion, which "has no 'actually decided' requirement." *Id.* at 435.

Moreover, even if the Eleventh Circuit's reading of *Douglas* were correct, its deference to that decision would still reflect a fundamental misunderstanding of full faith and credit. The "actually decided" inquiry is one of constitutional magnitude because it would violate due process for a federal court to give preclusive effect to a state court jury's findings on issues that the jury did not actually decide. The Eleventh Circuit was therefore required to undertake an independent examination of the *Engle* record to identify those issues actually decided by the Phase I jury. Its failure to do so—in deference to the Florida Supreme Court's supposed record-based inquiry—is an inexcusable abdication of its constitutional obligations.

The implications of these decisions transcend the *Engle* progeny setting. Like the Florida Supreme Court in *Engle*, courts across the country are increasingly deploying the issues-class device to manage complex litigation. *See*, *e.g.*, 7AA Charles Alan Wright et al., *Federal Practice and Procedure* § 1790 & nn.18-20 (3d ed. 2005). The Florida Supreme Court's decisions in *Engle* and *Douglas* provide a

roadmap for other courts to facilitate classwide treatment of inherently individualized tort claims through the combination of issues-class certification and offensive claim preclusion. This Court should grant review to prevent the proliferation of this unprecedented and unconstitutional "abrogation of . . . well-established common-law protection[s]." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994).

ARGUMENT

I. REVIEW IS NECESSARY TO FORESTALL A MASSIVE DUE PROCESS VIOLATION SPANNING THOUSANDS OF PENDING CASES.

In both *Brown* and *Walker*, the lower courts upheld damages awards against Reynolds in the absence of any assurance that the plaintiffs had proved each element of their claims. In upholding those awards, the state and federal forums devised inconsistent theories of preclusion. In the state courts, preclusion applies because, under *Douglas*, it does not matter whether or not the *Engle* jury actually decided any facts relevant to a particular progeny case; preclusion applies in state courts because the *Engle* jury *might* have decided such facts. In federal court, by contrast, preclusion is based on the demonstrably false notion that *Douglas* performed a traditional issue-preclusion analysis and identified particular facts that were *actually* decided by the *Engle* jury. Thus, whereas the state courts have embraced a new and radical preclusion regime that defies traditional norms of justice, the federal courts preclude defendants from litigating key facts by purporting to "defer" to a state preclusion rule that the state courts themselves expressly disclaim.

Respondents make much of the fact that this Court has declined to address the *Engle* progeny morass on several previous occasions. All but one of those petitions, however, arose from the lower state courts at a time when it was still possible that the Florida Supreme Court could reject, as a matter of state law, the abusive use of preclusion that has characterized this issues class. *Douglas*, where the highest state court first made clear that state law has indeed discarded the traditional safeguards of preclusion doctrine, represents the only previous instance where this Court denied review in a progeny case following exhaustion of all potentially available state processes. It was not clear at that time, however, that the Eleventh Circuit would deny all relief as well. Although the panel decision in *Walker* was issued before the Court considered *Douglas* at conference, the petition and brief in opposition had already been filed, and the possibility of panel or en banc rehearing remained.[3] Now that such remedies have likewise proved illusory, vindication of the *Engle* defendants' due process rights can only come from this Court.

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[3] In fact, after Reynolds petitioned for rehearing in *Walker*, the Eleventh Circuit panel *sua sponte* withdrew its initial opinion and issued a new opinion that corrected one of the blatant errors in its analysis. The panel's initial opinion had afforded full faith and credit to *Douglas*, even though Florida preclusion law requires mutuality, which was lacking because the plaintiffs in *Walker* were not parties in *Douglas*. The panel's amended opinion—which was issued after the denial of certiorari in *Douglas*—grants full faith and credit to "*Engle*, as interpreted in *Douglas*," *Walker* Pet. App. 17, 18, but does nothing to correct the other factual and legal flaws in its full-faith-and-credit analysis.

A. The *Engle* Progeny Litigation Threatens The Defendants With Massive, Serial Deprivations Of Their Due Process Rights.

For centuries, the common law has required that a plaintiff seeking to rely on the preclusive effect of prior litigation to establish the elements of a claim demonstrate that the prior finder of fact actually decided the "'precise question'" on which preclusion is sought. *De Sollar* v. *Hanscome*, 158 U.S. 216, 221 (1895) (quoting *Russell* v. *Place*, 94 U.S. 606, 608 (1877)). In *Fayerweather* v. *Ritch*, 195 U.S. 276 (1904), this Court held that the "actually decided" requirement is mandated by the Constitution because it would violate due process to accept as a "conclusive determination" a verdict "made without any finding of the fundamental fact." *Id.* at 297, 299. As this Court recognized in *Fayerweather*, the "actually decided" requirement is an essential safeguard against arbitrary deprivations of property because it ensures that a defendant is held liable only where the plaintiff has established *every* element of his claim against the defendant—either in the current proceeding or in some prior proceeding. *See Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) (due process guarantees the right to "have [the] merits" of a claim "fairly judged").

In contrast to the traditional common-law preclusion standard, the Florida Supreme Court's novel claim-preclusion theory permits *Engle* progeny plaintiffs to rely on the Phase I findings to establish any issue "which *might* . . . have been" decided in their favor by the *Engl*e jury, *Douglas*, 110 So. 3d at 432 (internal quotation marks omitted)—without requiring the plaintiffs to demonstrate based on an exami-

nation of the *Engle* record that those issues were *actually* decided in their favor.

The Eleventh Circuit in *Walker* acknowledged that the Florida Supreme Court's version of claim preclusion is "unorthodox and inconsistent with the federal common law." *Walker* Pet. App. 23. In fact, the doctrine of offensive claim preclusion is unprecedented in our legal tradition. As traditionally understood, claim preclusion is available only when there has been a final judgment that "'puts an end to *the cause of action*.'" *Nevada* v. *United States*, 463 U.S. 110, 130 (1983) (emphasis added) (quoting *Comm'r* v. *Sunnen*, 333 U.S. 591, 597 (1948)). A "verdict" or "finding" that leaves issues to be determined later "is not sufficient" for claim-preclusion purposes. *Oklahoma City* v. *McMaster*, 196 U.S. 529, 532-33 (1905); *see also G. & C. Merriam Co.* v. *Saalfield & Ogilvie*, 241 U.S. 22, 28-29 (1916); Restatement (Second) of Judgments § 13 cmt. b (1982).

"Claim preclusion," as its name suggests, applies only where a *claim* is being precluded—that is, where it merges into a final judgment, barring further litigation on that claim entirely. Under 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. Thus, if claim preclusion did apply in the *Engle* progeny litigation, the progeny plaintiffs' claims would be completely barred.

But, in fact, no claim is being precluded in the progeny litigation; rather, the plaintiffs' claims are being *litigated*, and the question is whether preclusion applies to particular issues central to those claims. In such circumstances, it is critical to know

whether the prior proceedings resulted in an actual decision on those issues, and what that 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 prior proceeding.

The Florida Supreme Court's formulation of an "offensive" version of claim preclusion to give sweeping preclusive effect to the Phase I findings is nothing more than issue preclusion stripped of its due process safeguards. The court's novel invocation of claim preclusion makes it possible for *Engle* progeny plaintiffs to recover without proving the essential elements of their claims in their individual suits or demonstrating that those issues were actually decided in their favor in *Engle*. The result is an "arbitrary and inaccurate" procedure that deprives the defendants of their property in the absence of any assurance that a factfinder has ever found each element of the plaintiffs' claims. *Honda Motor Co.*, 512 U.S. at 430.

B. Only This Court Can Remedy This Unprecedented Violation Of Due Process.

As a federal court sitting in diversity, the Eleventh Circuit was required to accept the rule of claim preclusion adopted in *Douglas* as an authoritative statement of Florida preclusion law, just as the court was required to accept laws passed by the Florida legislature as controlling on state-law questions. *See Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). But federal courts have an independent duty to determine whether state laws are constitutional when, as here, they are invoked by one party as a basis for de-

priving another party of its property in a federal proceeding. That constitutional obligation applies with equal force to state statutes and common law: when a party invokes state judge-made doctrines in federal court, federal courts can no more "defer" to state courts on the question of constitutionality than they can defer to state legislatures on the same question with respect to statutes.

In *Walker*, however, the Eleventh Circuit declined to address the constitutionality of the rule of offensive claim preclusion adopted by the Florida Supreme Court in *Douglas* and invoked by the *Engle* progeny plaintiffs as the basis for depriving Reynolds of its property. Instead of discharging its obligation to determine the constitutionality of that rule of preclusion, the Eleventh Circuit dodged the question by relying on a factually and legally flawed application of the Full Faith and Credit Act—and, in so doing, guaranteed that no other panel of the Eleventh Circuit will be able to address the merits of the *Engle* defendants' federal due process argument. As a result, this Court is the only remaining forum in which the *Engle* defendants can vindicate their due process rights.

The Eleventh Circuit premised its full-faith-and-credit analysis on a fundamental misreading of *Douglas*. The Florida Supreme Court expressly declined to examine the *Engle* record to determine the issues actually decided by the *Engle* jury because, as the court explained, application of the "actually decided" requirement would render the Phase I findings "useless." 110 So. 3d at 433. In the Eleventh Circuit's view, however, the Florida Supreme Court had supposedly conducted just such an inquiry in

Douglas and had determined that the *Engle* jury was asked to decide only "'all common liability issues for the class,' not brand specific defects." *Walker* Pet. App. 19 (quoting *Douglas*, 110 So. 3d at 423). At a minimum, that astounding misreading of *Douglas* warrants summary reversal. *See Walker* Pet. 21.[4]

More fundamentally, where federal due process rights are at stake, a federal court is not permitted simply to take a state court at its word that federal constitutional guarantees are being adequately safeguarded. Although federal courts sitting in diversity must accept the Florida Supreme Court's interpretations of state preclusion law, they have an independent duty to determine whether those state preclusion rules are *constitutional*. *See Kremer* v. *Chem. Constr. Corp.*, 456 U.S. 461, 481 (1982). Thus, even if the Florida Supreme Court had examined the *Engle* record in *Douglas* to determine the issues actually decided by the Phase I jury, the Eleventh Circuit still would have been required to undertake its own independent examination of the *Engle* record. The "actually decided" inquiry is one of constitutional dimension because it would violate due process for a feder-

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[4] In discussing the background of the *Engle* litigation, the *Douglas* opinion refers to the *Engle* verdicts several times as embodying "common" findings of liability to the class. *See*, *e.g.*, *Douglas*, 110 So. 3d at 422, 423. In light of the specific analysis that followed in later parts of the *Douglas* opinion—in which the court recognized the impossibility of demonstrating from the *Engle* trial record what had been actually decided in Phase I—it is plain that the Florida Supreme Court was referring to its rationale for validating *Engle* as an issues class and to the *effect* of the findings under its claim-preclusion holding, and was not making a record-based determination of the issues actually decided by the *Engle* jury.

al court to give preclusive effect to the verdict of a state court jury on issues that the jury did not actually decide. *See Fayerweather*, 195 U.S. at 307. A federal court therefore must determine for itself what issues the state court jury actually decided, rather than deferring to the state court's examination of the record. After all, *Walker* is not simply a collateral attack on a state court judgment; it is an independent proceeding in federal court that could lead to a deprivation *by the federal court* of Reynolds' property without due process if preclusion is unconstitutionally applied.

To be sure, the lower federal courts do not follow a uniform approach when asked to decide whether giving preclusive effect to a state court judgment would violate due process. The Eleventh Circuit's deference to the Florida Supreme Court's supposed examination of the *Engle* record—and refusal to undertake an independent examination of the issues actually decided by the Phase I jury—deepened an existing circuit split on the question whether federal courts are required to defer to a state court's determination that its own proceedings complied with due process. In accordance with this Court's precedent, the Sixth Circuit has correctly held that a federal court asked to afford preclusive effect to a state court judgment must undertake an independent review of the state court proceeding to ensure that giving preclusive effect to the judgment would not violate due process. *See Gooch* v. *Life Investors Ins. Co.*, 672 F.3d 402, 420-22 (6th Cir. 2011) (conducting an independent examination of the adequacy of a state court class-action settlement even though the state supreme court had previously upheld the settlement as

adequate). This obligation, the Sixth Circuit explained, "flows from the Supreme Court's observation that 'a court adjudicating a dispute may not be able to predetermine the res judicata effect of its own judgment.'" *Id.* at 420 (quoting *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 805 (1985)); *see also Stephenson* v. *Dow Chem. Co.*, 273 F.3d 249, 257 (2d Cir. 2001), *aff'd in relevant part by an equally divided Court*, 539 U.S. 111, 112 (2003) (same, in context of prior federal class action); *cf. State* v. *Homeside Lending, Inc.*, 826 A.2d 997, 1017 (Vt. 2003).

In contrast, the Ninth Circuit in *Epstein* v. *MCA, Inc.*, 179 F.3d 641 (9th Cir. 1999), refused to conduct such an examination when asked to give preclusive effect to a state class-action settlement, concluding that the parties resisting the full-faith-and-credit effect of the judgment lacked the "right to challenge collaterally the adequacy of representation." *Id.* at 647. According to the Ninth Circuit, it was required under the Full Faith and Credit Act to defer to the state court's own determination of that issue. *Id.* at 650.

Like the Ninth Circuit, the Eleventh Circuit in *Walker* declined to undertake an independent examination of the *Engle* record to determine whether giving preclusive effect to the Phase I findings would deny Reynolds its due process rights, reasoning that "we cannot refuse to give full faith and credit to the decision in *Engle* because we disagree with the decision in *Douglas* about what the jury in Phase I decided." *Walker* Pet. App. 18. Thus, in addition to addressing the due process question that hangs over all the *Engle* progeny litigation, granting certiorari in *Walker* would enable this Court to resolve that

split and make clear that a state court's rulings cannot supersede a federal court's independent obligation to ensure that giving preclusive effect to state court proceedings does not violate due process.

II. THE ISSUE PRESENTED BY THESE PETITIONS IS ONE OF SYSTEMIC IMPORTANCE TO THE JUDICIAL SYSTEM.

The due process violation at issue in these cases has profound consequences for both the *Engle* defendants and for other class-action defendants in state and federal courts across the country.

In the absence of this Court's review, the constitutional error that both the Florida Supreme Court and the Eleventh Circuit have failed to correct will infect every one of the thousands of *Engle* progeny cases currently pending in Florida's state and federal courts. These suits implicate immense potential liability and represent a substantial portion of the docket in one of the Nation's largest States. The due process violations in *Brown* and *Walker* will assuredly be repeated in each of those cases, exposing PM USA and the other *Engle* defendants to liability to plaintiffs who may never have proved the essential elements of their claims in any court.

Moreover, the implications of these decisions transcend the *Engle* setting. It is already becoming increasingly common for courts to invoke the issues-class device—under either Federal Rule of Civil Procedure 23(c)(4) or state-law analogues—to bypass well-established and constitutionally compelled restraints on the arbitrary deprivation of property. *See* Principles of the Law of Aggregate Litigation ch. 2 (2010); 7AA Wright et al., *supra*, § 1790 & nn.18-20. The *Engle* progeny litigation is likely to accelerate

that trend because the Florida Supreme Court's decision in *Douglas* provides a roadmap for other courts to use the combination of issues certification and preclusion law to facilitate classwide adjudication of inherently individualized claims: Class counsel need only present an issues-class jury with a mix of classwide and non-classwide theories and *all* of those issues will then be deemed conclusively established in favor of the class members in their subsequent individual actions as long as the class-action jury finds for the plaintiffs on *any* one of those issues.

Particularly given these broader implications, *Brown* and *Walker* involve an unusually large number of the considerations that, even in isolation, have justified this Court's review. *See*, *e.g.*, *Richards* v. *Jefferson Cnty.*, 517 U.S. 793, 797 (1996) (extreme application of preclusion); *Honda Motor Co.*, 512 U.S. at 420-21 (departure from common-law protections; issue limited to a single State); *FTC* v. *Jantzen, Inc.*, 386 U.S. 228, 229 (1967) (hundreds of cases affected); Stephen M. Shapiro et al., *Supreme Court Practice* 269-70 (10th ed. 2013) (citing cases) (large financial stakes). Absent review, the constitutional violation in these cases will be endlessly replicated both in the thousands of pending *Engle* progeny cases and in the copycat issues-class actions that will inevitably be filed against other industries in courts across the country—confronting the *Engle* defendants and other targets of the plaintiffs' bar with massive potential liability based on findings that a prior jury "might," or might not, have made. Due process and fundamental fairness require far more.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW L. FREY
KENNETH S. GELLER
LAUREN R. GOLDMAN
MICHAEL S. RAYFIELD
MAYER BROWN LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

MIGUEL A. ESTRADA
Counsel of Record
AMIR C. TAYRANI
ROBERT E. JOHNSON
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Amicus Curiae

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