No. 18-552

IN THE
Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

MARY BROWN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RAYFIELD BROWN,

Respondent.

On Petition For A Writ Of Certiorari To The Florida First District Court Of Appeal

PETITION FOR A WRIT OF CERTIORARI

ANDREW L. FREY
LAUREN R. GOLDMAN
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2500

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

Counsel for Petitioner

QUESTION PRESENTED

This case presents the same question as the forthcoming petitions for writs of certiorari in *Philip Morris USA Inc. v. Boatright* and *R.J. Reynolds Tobacco Co. v. Searcy*:

Whether the Due Process Clause is violated by a rule of preclusion that permits plaintiffs to invoke the preclusive effect of a prior jury's findings to establish elements of their claims without showing that those elements were actually decided in their favor in the prior proceeding.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Petitioner Philip Morris USA Inc. is a wholly owned subsidiary of Altria Group, Inc. No publicly held company owns 10% or more of Altria Group, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Philip Morris USA Inc. ("PM USA") respectfully submits this petition for a writ of certiorari to review the judgment of the Florida First District Court of Appeal.

OPINIONS BELOW

The opinion of the Florida First District Court of Appeal is reported at 243 So. 3d 521. *See* Pet. App. 1a. The order of the Florida First District Court of Appeal denying rehearing is unreported. *See* Pet. App. 10a. An additional opinion of the Florida First District Court of Appeal in this case is reported at 96 So. 3d 468.

JURISDICTION

The Florida First District Court of Appeal issued its opinion on April 18, 2018, *see* Pet. App. 1a, and denied PM USA's motion for rehearing on May 29, 2018, *see id.* at 10a. Under Florida law, PM USA cannot seek review in the Florida Supreme Court because the First District's decision does not contain any analysis or citation. *See Fla. Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988). This Court therefore has jurisdiction to review the First District's decision under 28 U.S.C. § 1257(a) because the First District is "the highest court of [the] State in which a decision could be had." *See, e.g.*, *KPMG LLP v. Cocchi*, 565 U.S. 18, 19 (2011) (per curiam).

On September 12, 2018, Justice Thomas extended the deadline for PM USA to file a petition for a writ of certiorari to October 26, 2018. *See* No. 18A183.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1, cl. 2.

STATEMENT

Under longstanding and heretofore universally accepted common-law principles, plaintiffs seeking to rely on the outcome of a prior proceeding to establish elements of their claims must demonstrate that those elements were "actually litigated *and resolved*" in their favor in the prior proceeding. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (emphasis added; internal quotation marks omitted). This "actually decided" requirement is such a fundamental safeguard against the arbitrary deprivation of property that it is mandated by due process. *See Fayerweather v. Ritch*, 195 U.S. 276, 298-99, 307 (1904).

The Florida Supreme Court has acknowledged that the "actually decided" requirement is part of Florida's law of issue preclusion. *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 433 (Fla. 2013). In this case and thousands of similar suits, however, the Florida courts have jettisoned that requirement by applying a novel form of offensive claim preclusion previously unknown to the law. According to the Florida Supreme Court, members of the issues class of Florida smokers prospectively decertified in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam), can use the generalized findings rendered by the class-action jury—for example, that each defendant placed unspecified "cigarettes on the market that

were defective"—to establish the tortious-conduct elements of their individual claims without demonstrating that the *Engle* jury actually decided that the defendants engaged in tortious conduct relevant to their individual smoking histories. *Douglas*, 110 So. 3d at 424 (internal quotation marks omitted). In reality, the Florida courts' application of offensive claim preclusion in these "*Engle* progeny" cases is nothing more than issue preclusion stripped of its essential "actually decided" requirement.

The sweeping preclusive effect of the *Engle* jury's findings is not limited to state court. The Eleventh Circuit has held that full-faith-and-credit principles require affording equally broad effect to those findings in federal cases, *see Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1185-86 (11th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 646 (2018); *see also Burkhart v. R.J. Reynolds Tobacco Co.*, 884 F.3d 1068 (11th Cir. 2018), although a panel of the Eleventh Circuit recently expressed serious reservations about that outcome, *see Searcy v. R.J. Reynolds Tobacco Co.*, 902 F.3d 1342, 1353 (11th Cir. 2018) (noting that, in light of the "multiple acts of concealment . . . presented to the *Engle* jury" and the *Engle* jury's "general finding[s]," it is "difficult to determine whether the *Engle* jury's basis for its general finding of concealment was the particular concealments" alleged by the plaintiff).

PM USA will be filing petitions for writs of certiorari on or about November 19, 2018, in *Boatright v. Philip Morris USA Inc.*, 217 So. 3d 166 (Fla. Dist. Ct. App. 2018), and *Searcy* presenting the same due-process question at issue in this case: whether it is consistent with due process to permit plaintiffs to invoke the preclusive effect of the generalized *Engle* jury findings to establish elements of their individual

claims without showing that those elements were actually decided in their favor by the *Engle* jury. *Boatright* and *Searcy* are better vehicles for plenary review of that question than this case because, unlike the per curiam affirmance issued by the Florida First District Court of Appeal here, the Florida Second District Court of Appeal and the Eleventh Circuit issued written opinions in those cases.

To be sure, this Court has had several prior opportunities to review the constitutionality of the preclusion standards applied in *Engle* progeny litigation. *See, e.g.*, *Philip Morris USA Inc. v. Douglas*, 571 U.S. 889 (2013) (denying certiorari); *R.J. Reynolds Tobacco Co. v. Graham*, 138 S. Ct. 646 (2018) (denying certiorari). But *Boatright* and *Searcy* will represent the Court's first opportunity to review an *Engle* progeny case after the Eleventh Circuit's decision in *Burkhart v. R.J. Reynolds Tobacco Co.*, which—together with the en banc decision in *Graham v. R.J. Reynolds Tobacco Co.*—conclusively rejects the *Engle* defendants' due-process argument. Now that both the state and federal courts in Florida have definitively rejected all facets of that argument, it is manifestly time for this Court to put an end to the unconstitutional *Engle* experiment, which has already produced judgments against the *Engle* defendants in excess of $800 million, with another 2,300 additional cases remaining to be tried.

The Court should hold this petition pending the disposition of *Boatright* and *Searcy*, and then dispose of the petition in a manner consistent with its ruling in those cases.

A. The *Engle* Class Action

The *Engle* litigation began in 1994 when six individuals filed a putative nationwide class action in Florida state court seeking billions of dollars in damages from PM USA and other tobacco companies. The *Engle* trial court ultimately certified a class of all Florida "citizens and residents, and their survivors, who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." 945 So. 2d at 1256 (internal quotation marks omitted).

The *Engle* trial court adopted a complex three-phase trial plan. During the year-long Phase I trial, the class advanced many different factual allegations regarding the defendants' products and conduct over the course of a fifty-year period, including many allegations that pertained to only some cigarette designs, only some cigarette brands, or only some periods of time. For example, the class asserted in support of its strict-liability and negligence claims that the filters on *some* cigarettes contained harmful components; that the ventilation holes in "light" or "low tar" cigarettes were improperly placed; and that *some* cigarette brands used ammonia as a tobacco additive to enhance addictiveness. *Engle* Class Opp. to Mot. for Strict Liability Directed Verdict at 3; *Engle* Tr. 11966-71, 16315-18, 36729-32.[1] Likewise, to support its fraudulent concealment and conspiracy to fraudulently conceal claims, the class identified numerous distinct categories of allegedly fraudulent statements by the defendants, including statements pertaining to the health risks of smoking, others pertaining to the

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[1] A CD containing the transcript and all other record materials from *Engle* cited herein is part of the record below.

addictiveness of smoking, and still others limited to certain designs and brands of cigarettes, such as "low tar" cigarettes. *See*, *e.g.*, *Engle* Tr. 36349-52, 36483-85, 36720-24.

Over the defendants' objection, the class sought and secured a Phase I verdict form that asked the jury to make only generalized findings on each of its claims. On the class's strict-liability claim, for example, the verdict form asked whether each defendant "placed cigarettes on the market that were defective and unreasonably dangerous." *Engle*, 945 So. 2d at 1257 n.4. On the concealment and conspiracy claims, the verdict form asked whether the defendants concealed information about the "health effects" *or* "addictive nature of smoking cigarettes." *Id.* at 1277. The jury answered each of those generalized questions in the class's favor, but its findings do not reveal which of the class's numerous underlying theories of liability the jury accepted, which it may have rejected, and which it may not even have reached.

In Phase II, the *Engle* jury determined individualized issues of causation and damages as to three class representatives. 945 So. 2d at 1257. It then awarded $145 billion in punitive damages to the class as a whole. *Id.* The defendants appealed before Phase III, where new juries would have been tasked with applying the Phase I findings to the claims of the other individual class members.

The Florida Supreme Court held that the punitive damages award could not stand because there had been no liability finding in favor of the class and that "continued class action treatment" was "not feasible because individualized issues . . . predominate[d]." *Engle*, 945 So. 2d at 1262-63, 1268. Based on "pragmatic" considerations, however, the court further

ruled, *sua sponte*, that some of the issues in Phase I of *Engle* were appropriate for class-wide adjudication under Florida's counterpart to Fed. R. Civ. P. 23(c)(4), which permits class certification "'concerning particular issues.'" 945 So. 2d at 1268-69 (quoting Fla. R. Civ. P. 1.220(d)(4)(A)). The court retroactively certified an issues class action, and stated that class members could "initiate individual damages actions" within one year of its mandate and that the "Phase I common core findings . . . will have res judicata effect in those trials." *Id.* at 1269.

B. The Florida Supreme Court's Decision In *Douglas*

After the Florida Supreme Court's decision in *Engle*, thousands of plaintiffs alleging membership in the *Engle* class filed "*Engle* progeny" actions in Florida state and federal courts. Approximately 2,300 of these *Engle* progeny cases remain pending in state courts across Florida. In each of these cases, the plaintiffs assert that the *Engle* findings relieve them of the burden of proving that the defendants engaged in tortious conduct with respect to themselves or their decedents and that they are entitled to this benefit without having to establish that the *Engle* jury actually decided any of those issues in their favor.

In *Douglas*, the Florida Supreme Court rejected the *Engle* defendants' argument that federal due process prohibits giving such sweeping preclusive effect to the *Engle* findings. 110 So. 3d at 422. The Florida Supreme Court acknowledged that the *Engle* class's multiple theories of liability "included brand-specific defects" that applied to only some cigarettes and that the *Engle* findings would therefore be "useless in individual actions" if the plaintiffs were required to show what the *Engle* jury had "actually decided," as Florida

issue-preclusion law required. *Id.* at 423, 433. Recognizing that progeny plaintiffs thus could not invoke issue preclusion, but wishing to salvage the utility of those findings, the court held that the doctrine of "claim preclusion" (which it also referred to as "res judicata") applies when class members sue on the "same causes of action" that were the subject of an earlier issues class action. *Id.* at 432 (emphasis omitted). Under claim preclusion, the court stated, preclusion is applicable to any issue "which *might* . . . have been" decided in the class phase, regardless of whether the issue was actually decided. *Id.* (emphasis added; internal quotation marks omitted). It was therefore "immaterial" that "the *Engle* jury did not make detailed findings" specifying the bases for its verdict. *Id.* at 433.

The Florida Supreme Court further held that its novel claim-preclusion rule—which is simply issue preclusion shorn of the "actually decided" requirement—comports with due process. The court reasoned that the "actually decided" requirement mandated by *Fayerweather*, 195 U.S. at 307, is irrelevant to the application of claim preclusion. *Douglas*, 110 So. 3d at 435. It concluded that "the requirements of due process" in the claim-preclusion setting are only "notice and [an] opportunity to be *heard*," and found that the *Engle* proceedings satisfied that truncated standard. *Id.* at 430-31, 436 (emphasis added).

C. The Eleventh Circuit's Decision In *Graham*

Several thousand *Engle* progeny cases were filed in or removed to federal court. In *Graham v. R.J. Reynolds Tobacco Co.*, the en banc Eleventh Circuit held in a divided opinion that giving full faith and

credit to the *Engle* jury's defect and negligence findings is consistent with due process. 857 F.3d at 1185. Notwithstanding *Douglas*'s unambiguous holding that "claim preclusion" is the proper framework and that analyzing the *Engle* findings under "issue preclusion" would render them "useless," 110 So. 3d at 433, the Eleventh Circuit majority insisted that the Florida Supreme Court had applied *issue*-preclusion principles and had determined in *Douglas* that the *Engle* jury had actually decided "that *all* cigarettes the defendants placed on the market were defective and unreasonably dangerous" when returning its strict-liability and negligence verdicts. *Graham*, 857 F.3d at 1182.

Although the en banc majority recognized that the "*Engle* Court defined a novel notion of res judicata," it held that there were no constitutional barriers to giving full faith and credit to the "res judicata effect" of the defect and negligence findings because "[t]he Due Process Clause requires only that the application of principles of res judicata by a state affords the parties notice and an opportunity to be heard." *Graham*, 857 F.3d at 1184. That standard was met, the en banc court concluded, because the "tobacco companies were given an opportunity to be heard on the common theories in [the] year-long [Phase I] trial." *Id.* at 1185.

Three judges wrote dissents, including a 227-page dissent from Judge Tjoflat that "detail[ed] layer upon layer of judicial error committed by numerous state and federal courts, culminating finally with the Majority's errors today." *Graham*, 857 F.3d at 1214.

In a subsequent decision, the Eleventh Circuit relied on its "opportunity to be heard" reasoning in *Graham*—which had involved only the *Engle* strict-liabil-

ity and negligence claims—to reject the *Engle* defendants' due-process challenge to the preclusive effect of the concealment and conspiracy findings because the *Engle* defendants "had the opportunity to argue the conduct elements of the concealment and conspiracy claims brought against them" in Phase I of *Engle*. *Burkhart v. R.J. Reynolds Tobacco Co.*, 884 F.3d 1068, 1093 (11th Cir. 2018).

D. Proceedings In This Case

Pursuant to the procedures established by the Florida Supreme Court in *Engle*, respondent brought this wrongful-death action against PM USA alleging that her husband, Rayfield Brown, died from lung cancer caused by smoking. Respondent alleged that she was a member of the *Engle* class and asserted claims for strict liability, negligence, fraudulent concealment, and conspiracy to fraudulently conceal.

Over PM USA's objection, the trial court ruled that, if respondent proved *Engle* class membership (*i.e.*, that Mr. Brown was addicted to cigarettes containing nicotine and that his addiction was a legal cause of his death), she would be permitted to rely on the "res judicata effect" of the *Engle* jury findings to establish the conduct elements of her claims and would not be required to prove those elements with independent evidence at trial. *See* R. 34:6787-92.

After multiple mistrials, a jury found that Mr. Brown was an *Engle* class member and found in respondent's favor on the strict-liability, negligence, and conspiracy claims. R. 100:19585-88. The jury deadlocked on the other issues in the case, *see id.*, and a subsequent jury awarded respondent $4.375 million in compensatory damages and awarded her daughter

$2 million in compensatory damages. R. 134:26302-03.

PM USA appealed to the Florida First District Court of Appeal and argued, among other things, that the trial court "erred when it determined that [respondent] could rely on the *Engle* findings to establish the conduct elements of her claims." Initial Br. of PM USA 44 (Nov. 13, 2015). "That decision," PM USA explained, "violates PM USA's federal due process rights because it . . . disregards the longstanding requirement that preclusion is limited to issues 'actually decided' in an earlier proceeding." *Id.* (citing *Fayerweather*, 195 U.S. at 307); *see also id.* at 17 ("[P]ermitting [respondent] to rely on the *Engle* findings to establish the conduct elements of her claims violated PM USA's federal due process rights."). PM USA acknowledged that this federal due-process argument was foreclosed by the Florida Supreme Court's decision in *Douglas*, "but wishe[d] to preserve the issue for reconsideration by the Florida Supreme Court or review in the U.S. Supreme Court." *Id.* at 45.

The First District affirmed in a per curiam decision that did not contain any analysis or citation, *see* Pet. App. 1a, and that therefore was not subject to review in the Florida Supreme Court, *see Fla. Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988).

REASONS FOR GRANTING THE PETITION

As will be explained in detail in the petitions for writs of certiorari that will be filed no later than November 19, 2018, in *Philip Morris USA Inc. v. Boatright* and *R.J. Reynolds Tobacco Co. v. Searcy*, the Florida courts are engaged in the serial deprivation of the *Engle* defendants' due-process rights. Only 10% of the *Engle* progeny cases have been tried, but the

defendants have already paid judgments totaling more than $800 million, and there are approximately 2,300 additional cases that remain to be tried. This Court is the only forum that can provide PM USA with relief from the unconstitutional procedures that have now been endorsed by both the Florida Supreme Court and the Eleventh Circuit.

This petition raises the same due-process question as the forthcoming petitions in *Boatright* and *Searcy*: whether it is consistent with due process to permit plaintiffs to invoke the preclusive effect of the generalized *Engle* jury findings to establish elements of their individual claims without requiring them to show that those elements were actually decided in their favor by the *Engle* jury. *Boatright* and *Searcy* are ideal vehicles for plenary review of that question because, unlike this case, they culminated in written opinions. The Court should therefore hold this petition pending the outcomes of *Boatright* and *Searcy*, and then dispose of the petition consistently with its rulings in those cases.

I. THE FLORIDA COURTS' EXTREME DEPARTURE FROM TRADITIONAL PRECLUSION PRINCIPLES VIOLATES DUE PROCESS.

The Florida Supreme Court's decision in *Douglas* relieves *Engle* progeny plaintiffs from proving the most basic elements of their claims—for example, that the cigarettes they or their decedents smoked contained a defect—without requiring the plaintiffs to establish that those particular issues were actually decided in their favor in Phase I of *Engle*. In so doing, *Douglas* permits progeny plaintiffs to deprive PM USA and the other *Engle* defendants of their property despite the absence of any assurance that the plaintiffs have ever proved all the elements of their

claims—and despite the possibility that the *Engle* jury may have resolved at least some of those elements *in favor of the defendants*.

In this case, the trial court permitted respondent to rely on the *Engle* findings to establish that the PM USA cigarettes Mr. Brown smoked contained a defect without requiring her to establish that the Phase I jury had actually decided that issue in her favor. Indeed, the *Engle* findings do not state whether the jury found a defect in PM USA's filtered cigarettes, or its unfiltered cigarettes, or in only some of its brands but not in others. For all we know, Mr. Brown may have smoked a type of PM USA cigarette that the *Engle* jury found was *not* defective.

The trial court likewise permitted respondent to rely on the Phase I findings to establish that the advertisements and other statements by the tobacco industry on which Mr. Brown supposedly relied were fraudulent. The generalized Phase I verdict form, however, did not require the jury to identify which statements it found to be fraudulent from among the "thousands upon thousands of statements" on which the class's conspiracy to fraudulently conceal claim rested. *Engle* Tr. 35955. And because the *Engle* verdict form asked whether the defendants had conspired to conceal material information about the "health effects" *or* "addictive nature" of smoking, *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 424 (Fla. 2013), the *Engle* jury may have found that the defendants' only fraud pertained to certain advertisements that concealed the "health effects" of smoking, whereas the jury in this case may have premised its conspiracy verdict exclusively on Mr. Brown's alleged reliance on tobacco-industry statements about addiction that the *Engle* jury did *not* find to be fraudulent.

Because it is impossible to determine whether the *Engle* jury actually decided the conduct elements of respondent's claims in her favor, allowing her to invoke the *Engle* findings to establish those elements—including that the particular cigarettes Mr. Brown smoked were defective and that the statements on which he allegedly relied were fraudulent—violates due process. *See, e.g.*, *Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904) (holding, as a matter of federal due process, that where preclusion is sought based on findings that may rest on any of two or more alternative grounds, and it cannot be determined which alternative was actually the basis for the finding, "the plea of *res judicata* must fail").

This Court has "long held . . . that extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is fundamental in character." *Richards v. Jefferson Cty.*, 517 U.S. 793, 797 (1996) (internal quotation marks omitted). Few propositions are more fundamental to due-process jurisprudence than that a person may not be deprived of life, liberty, or property unless every element of the cause of action justifying the deprivation is duly established. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). This bedrock principle is clearly violated by a proceeding that allows a plaintiff to use preclusion to establish crucial elements of her claims—and to recover millions of dollars in damages—without any assurance that those elements were actually decided in her favor in the prior proceeding. Indeed, the "whole purpose" of the Due Process Clause is to protect citizens against this type of "arbitrary deprivation[ ] of liberty or property." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 434 (1994).

Nor can claim-preclusion principles be used to justify such an outcome. It is true, of course, that where claim preclusion applies, there is no need to establish the issues that were actually decided in the proceeding giving rise to the preclusion. But that is because claim preclusion operates only where there has been a final judgment with respect to a claim, such that further litigation of the claim may properly be precluded. *See Nevada v. United States*, 463 U.S. 110, 129-30 (1983). In such circumstances, the precise course of litigation that led to the final judgment is irrelevant; all that matters is that the proceeding met basic requirements of notice and opportunity to be heard, so that it was capable of producing a constitutionally valid judgment. But where, as here, preclusion is sought with respect to particular *issues*, the "actually decided" requirement plays an essential role in protecting parties' rights and cannot be jettisoned in the interests of judicial efficiency.

Now that both the Florida Supreme Court and the Eleventh Circuit have upheld the constitutionality of these unprecedented and fundamentally unfair procedures, this Court's review is urgently needed to prevent the replication of this constitutional violation in each of the thousands of pending *Engle* progeny cases.

II. THE COURT SHOULD HOLD THIS PETITION PENDING RESOLUTION OF *BOATRIGHT* AND *SEARCY*.

The Court should hold this petition pending the resolution of the forthcoming petitions for writs of certiorari in *Philip Morris USA Inc. v. Boatright* and *R.J. Reynolds Tobacco Co. v. Searcy*, which will be filed no later than November 19, 2018.

To ensure similar treatment of similar cases, this Court routinely holds petitions that implicate the

same issue as other pending cases, and, once the related case is decided, resolves the held petitions in a consistent manner. *See, e.g.*, *Saldana Castillo v. Sessions*, 138 S. Ct. 2709 (2018); *Flores v. United States*, 137 S. Ct. 2211 (2017); *Merrill v. Merrill*, 137 S. Ct. 2156 (2017); *Innovention Toys, LLC v. MGA Entm't, Inc.*, 136 S. Ct. 2483 (2016); *see also Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (per curiam) (noting the Court has "GVR'd in light of a wide range of developments, including [its] own decisions"); *id.* at 181 (Scalia, J., dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided.") (emphasis omitted).

Because this case raises the same due-process question that is directly at issue in *Boatright* and *Searcy*, the Court should follow that course here to ensure that this case is resolved in a consistent manner. If this Court grants certiorari in *Boatright* or *Searcy*, and rules that giving preclusive effect to the generalized *Engle* findings violates due process, then it would be fundamentally unfair to permit the constitutionally infirm judgment in this case to stand. Thus, the Court should hold this petition pending the resolution of *Boatright* and *Searcy*, and, if this Court grants review and vacates or reverses in one or both of those cases, it should thereafter grant, vacate, and remand in this case.

CONCLUSION

The Court should hold this petition pending the disposition of *Boatright* and *Searcy*, and then dispose of this petition consistently with its ruling in those cases.

Respectfully submitted.

ANDREW L. FREY
LAUREN R. GOLDMAN
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2500

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

Counsel for Petitioner

October 26, 2018

APPENDIX

APPENDIX A

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D15-2337

PHILIP MORRIS USA INC.,

Appellant/Cross-Appellee,

v.

MARY BROWN, as personal representative of the Estate of Rayfield Brown,

Appellee/Cross-Appellant.

On appeal from the Circuit Court for Duval County. Harvey L. Jay, III, Judge.

April 18, 2018

PER CURIAM.

AFFIRMED.

B.L. THOMAS, C.J., and BILBREY, J., concur; WINSOR, J., dissents with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

WINSOR, J., dissenting.

The main question in this case is what happens when a deadlocked jury is instructed to reach whatever partial verdict it can—and to do so without any further deliberations. On the unusual facts of this case, I would hold that such an instruction leaves the jury incapable of producing a valid verdict. From the time jury deliberations begin until the time the jury reaches its final decision, jurors must be free to weigh and consider arguments and evidence, to consider other jurors' points of view, to attempt to persuade fellow jurors, to argue and debate—in other words, the jury must be free to deliberate until the very end. Because this jury did not have that opportunity, we should reverse and remand for a new trial.

Mary Brown filed a wrongful-death action against Phillip Morris USA, Inc., alleging that her husband died from smoking-related illnesses. She alleged strict liability, negligence, fraudulent concealment, and conspiracy to commit fraudulent concealment. The litigation lasted years: One trial was continued during jury selection, and another ended in a mistrial after this court granted a writ of prohibition, *see Philip Morris USA Inc. v. Brown*, 96 So. 3d 468 (Fla. 1st DCA 2012). A third trial ended with a deadlocked jury.

In the next trial—the trial at issue here—the jury's verdict form asked (among other things) whether Philip Morris's actions legally caused the husband's death, the amount of any compensatory damages, the relative percentages of fault, and whether punitive damages were warranted. After deliberating for approximately four or five hours, the

jury sent out a note saying it was "stuck on the percentage" and asking "[w]hat are our options?"

After conferring with counsel, the court told the jury to follow instructions already given. The jury continued deliberating for some two additional hours before sending out another note. This one explained that jurors "have not been able to agree on question #4 [regarding comparative fault] and therefore we cannot go any further." After more discussion with counsel, the court delivered a standard *Allen*[1] charge, asking the jury to continue its deliberations. But after roughly an hour more, the jury sent out another note: "Now hung on question #2 [regarding fraudulent concealment]. Some have change[d] their mind. It started out on question #4. Some say yes, and some no. Now need white out for question #2. Yesterday it was yes now today it hung [sic]."

Lawyers for both sides offered their views on how the court should proceed. Both sides agreed the court could not give a second *Allen* charge.[2] Philip Morris

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[1] An *Allen* charge is a supplemental instruction courts frequently give when a jury struggles to reach a verdict. *Gahley v. State*, 567 So. 2d 456, 459 (Fla. 1st DCA 1990) (citing *Allen v. United States*, 164 U.S. 492 (1896)).

[2] In *Tomlinson v. State*, 584 So. 2d 43 (Fla. 4th DCA 1991), the Fourth District followed *United States v. Seawell*, 550 F.2d 1159 (9th Cir. 1977), and adopted a per se rule that giving a second *Allen* charge is fundamental error. No other district in this state has adopted this rule, *Nottage v. State*, 15 So. 3d 46, 49 (Fla. 3d DCA 2009), and many federal courts have explicitly rejected it, *see, e.g., United States v. Davis*, 779 F.3d 1305, 1313 (11th Cir. 2015) ("We have never adopted a *per se* rule against successive *Allen* charges. Other circuits have held there is *not* a *per se* rule."

argued the court should grant a mistrial since the jury could not reach consensus after its *Allen* charge. Mrs. Brown, though, argued that the court should accept a partial verdict on the issues the jury did decide. Ultimately, the court brought the jury back and told them to return to the jury room, to white out verdict-form responses on which the jury was no longer unanimous, and to fill in answers where there was unanimity. The court specifically told the jurors to not deliberate any further in doing so.

After about six minutes in the jury room, the jury returned with a partial verdict, answering two of the verdict form's six questions. The jury agreed that the husband was a member of the *Engle* class, *see Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246 (Fla. 2006), and that Philip Morris's conspiracy to conceal was a legal cause of the husband's death. Because the jury found liability on one intentional-tort theory, its inability to provide verdicts on other theories or on comparative-fault percentages was not critical, *see* § 768.81(4), Fla. Stat. (2013); *see also Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294, 304 (Fla. 2017) ("[T]he comparative fault statute does not apply to *Engle* progeny cases in which the jury finds for the plaintiff on the

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(collecting cases)). Florida's standard jury instructions do include a comment that the deadlock instruction "should be given only once," but that comment is based solely on *Tomlinson*, Fla. Std. Jury Instr. (Civ.) 801.3, and standard jury instructions are not binding precedent, *BellSouth Telecomms., Inc. v. Meeks*, 863 So. 2d 287, 292 (Fla. 2003); *see also In re Std. Jury Instrs. in Civil Cases—Report No. 09-01 (Reorganization of the Civil Jury Instrs.)*, 35 So. 3d 666, 671 (Fla. 2010) (cautioning "that any comments associated with the instructions reflect only the opinion of the Committee and are not necessarily indicative of the views of this Court as to their correctness or applicability").

intentional tort claims."). But there remained the unanswered questions of the amount of compensatory damages and whether punitive damages were warranted.

Over Philip Morris's objection (and motion for mistrial), the court accepted the partial verdict and scheduled another trial to resolve the remaining issues. At the end of that trial, the jury awarded compensatory damages but found Philip Morris not liable for punitive damages. Philip Morris appealed, contending that the trial court was wrong to accept the partial verdict.

On appeal, Philip Morris's opening position is that Florida does not recognize partial civil verdicts, that courts must declare mistrials whenever juries cannot agree on all issues. Philip Morris argues that no Florida appellate court has ever sanctioned a partial verdict like this one. But neither has Philip Morris cited a Florida appellate decision explicitly precluding the practice. Partial verdicts are routinely used in Florida criminal cases, *see, e.g.*, *State v. Muhammad*, 148 So. 3d 159, 159-60 (Fla. 1st DCA 2014); *Avilla v. State*, 86 So. 3d 511, 513 (Fla. 2d DCA 2012), and they have been accepted in civil cases in federal courts, *see, e.g.*, *Kerman v. City of New York*, 261 F.3d 229, 242 n.9 (2d Cir. 2001) ("Kerman also argues that [the] decision to accept a partial verdict was error because there is no authority for this procedure. We disagree. In the absence of authority prohibiting such a partial verdict in a civil case, and Kerman cites none, we believe that at the very least a trial judge, in the exercise of sound discretion, may follow such a course."); *see also Bristol Steel & Iron Works v. Bethlehem Steel Corp.*, 41 F.3d

182, 190 (4th Cir. 1994); *Bridges v. Chemrex Specialty Coatings, Inc.*, 704 F.2d 175, 180 (5th Cir. 1983).

Regardless of whether partial verdicts are categorically prohibited, I would hold that the specific circumstances of this case warrant a new trial. With any partial verdict, there is a "risk that the jury will 'prematurely] conver[t] . . . a tentative jury vote into an irrevocable one," *United States v. Moore*, 763 F.3d 900, 911 (7th Cir. 2014); *accord United States v. Wheeler*, 802 F.2d 778, 781 (5th Cir. 1986), and when a jury had been unanimous on certain points and is later told to return to the jury room to answer whatever questions they can—without further deliberating—some jurors will feel compelled to vote consistent with their earlier position.

"It has long been the law that a trial court should not couch an instruction to a jury or otherwise act in any way that would appear to coerce any juror to reach a hasty decision or to abandon a conscientious belief in order to achieve a unanimous position." *Thomas v. State*, 748 So. 2d 970, 976 (Fla. 1999). In deciding whether a court's instructions have violated this principle, we examine de novo the totality of the circumstances to see if the instructions "create a serious risk of coercion." *Id.* at 978. Considering the totality of the unique circumstances here, a new trial is warranted.

While attorneys argued about how to handle the jury's last note, the jury, having already changed its collective mind on some issues, remained together in the jury room. And there is no reason to suppose the jurors' fluid deliberations stopped while the attorneys argued. *Cf. United States v. Byrski*, 854 F.2d 955, 962

(7th Cir. 1988) (noting that "the state of jury deliberations is ever-changing"). When later told to end their deliberations (essentially to memorialize where they left off earlier), reasonable jurors might not have understood their options. They might not have understood that they were not locked into the positions they held immediately before sending their last note—that their vote could accommodate any new view intervening discussions produced. They might not have understood that their remaining duty was more than a ministerial duty to record their earlier positions. *Cf. Harrison v. Gillespie*, 640 F.3d 888, 899 (9th Cir. 2011) (explaining that jurors' preliminary votes can play important roles in the deliberative process but that these informal polls "do not constitute a final verdict"); *cf. also Brutton v. State*, 632 So. 2d 1080, 1083 (Fla. 4th DCA 1994) ("The court's questioning created an impression that the juror did not have an absolute right to recede from her vote in the jury room during the polling process.").

When the jurors' last note told the court they were "hung" on some issues, no juror was then obligated to maintain his or her tentative vote on any issue. *See United States v. Straach*, 987 F.2d 232, 243 (5th Cir. 1993) ("[A] jury has not reached a valid verdict until deliberations are over . . . ." (quoting *United States v. Taylor*, 507 F.2d 166, 168 (5th Cir. 1975))). Yet any juror wanting to explain (or even identify) his or her changed view would feel restricted by the court's specific instruction to cease deliberations. To the point of the final instruction, juror deliberations had been fluid—the jury found (and then lost) agreement on some issues— but by precluding further deliberations,

the court precluded further opportunities for additional changed minds. *Cf. Straach*, 987 F.2d at 243 (noting that "continuing deliberations may shake views expressed on counts previously considered" (quoting *Taylor*, 507 F.2d at 168)).

It is no answer to say that the jury was polled, with each juror announcing that the verdict was his or her own. The question is not whether all jurors did, in fact, vote for the ultimate verdict; the question is whether all jurors did so knowing they could change their minds—or try to change others' minds. The subsequent poll offers therefore no cure. *See Moore*, 763 F.3d at 910 (determining that trial court's error in instructing jury to return a partial verdict while deliberations were ongoing was not cured by polling of the jury).

For these reasons, I would reverse and remand for a new trial. This would make it unnecessary to address Philip Morris's independent argument that alleged juror misconduct requires a new trial. As to Mrs. Brown's conditional cross appeal, I would reject Philip Morris's *Tipsy Coachman* arguments, and I would hold that Mrs. Brown may seek punitive damages on her negligence and strict-liability claims in a new trial. *See Soffer v. R.J. Reynolds Tobacco Co.*, 187 So. 3d 1219, 1221 (Fla. 2016). But Mrs. Brown asserted she would abandon her cross appeal if she prevailed in the main appeal, which—despite my view—she now has.

Amir C. Tayrani of Gibson, Dunn & Crutcher LLP, Washington, DC; Geoffrey J. Michael of Arnold & Por-

ter LLP, Washington, DC; Hassia Diolombi and Kenneth J. Reilly of Shook, Hardy & Bacon LLP, Miami; and W. Edwards Muñiz of Shook, Hardy & Bacon LLP, Tampa, for Appellant/Cross-Appellee.

John S. Mills and Courtney Brewer of The Mills Firm, PA, Tallahassee; and John S. Kalil of Law Offices of John S. Kalil, P.A., Jacksonville, for Appellee/Cross-Appellant.

APPENDIX B

DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850)488-6151

May 29, 2018

CASE NO.: 1D15-2337
L.T. No.: 2007-CA-11175-BXXX-M

Philip Morris USA Inc.	v.	Mary Brown, as Personal Representative etc.
Appellant / Petitioner(s),		Appellee / Respondent(s)

BY ORDER OF THE COURT:

Appellant's motion filed May 3, 2018, for rehearing, rehearing en banc, written opinion and certification is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

John S. Mills
John S. Kalil
Kenneth Reilly
Geoffrey J. Michael
Leslie J Bryan
Amir C. Tayrani

Dana G. Bradford
Courtney Brewer
W. Edward Muniz
Hassia Diolombi
Michael L. Walden

jm

/s/ Kristina Samuels

KRISTINA SAMUELS,
CLERK