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No. 13-191

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC., R. J. REYNOLDS TOBACCO COMPANY, AND LIGGETT GROUP LLC,

Petitioners,

v.

JAMES L. DOUGLAS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLOTTE M. DOUGLAS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), the Florida Supreme Court partially upheld a massive class action brought on behalf of Florida smokers, ruling that certain "issues"—including defect and negligence—were suitable for class adjudication under Florida's analog to Fed. R. Civ. P. 23(c)(4). The *Engle* jury was presented with multiple theories of defect and negligence, many of which applied only to a subset of class members, and the verdict form required the jury to find against the defendants if any one of the class's theories was proven.

In this case—one of more than 4,500 suits filed by alleged *Engle* class members—the Florida Supreme Court did not believe it is possible to determine which of the class's alternative theories of defect and negligence the *Engle* jury actually found. Indeed, the court conceded that the *Engle* findings would be "useless" if class members were required to establish what was actually decided in *Engle*. To make the findings useful to members of the "issues class" certified in *Engle*, the court devised a new doctrine of offensive *claim* preclusion under which the class verdict is conclusively deemed to establish any issue that *might have been* decided in *Engle*. The court upheld this unprecedented application of preclusion against a due process challenge.

The question presented is whether the Due Process Clause is violated by the Florida Supreme Court's new rule of preclusion, which permits *Engle* class members to establish petitioners' liability without being required to prove essential elements of their claims or establishing that those elements were actually decided in their favor in a prior proceeding.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The plaintiff below was respondent James L. Douglas, as personal representative of the estate of Charlotte M. Douglas.

The original defendants below were petitioner Philip Morris USA Inc., petitioner R. J. Reynolds Tobacco Company, petitioner Liggett Group LLC, Lorillard Tobacco Co., and Vector Group Ltd., Inc.

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

Petitioner R. J. Reynolds Tobacco Company is a wholly owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc., which in turn is a wholly owned subsidiary of Reynolds American Inc. ("RAI"), a publicly held company. Brown & Williamson Holdings, Inc. holds more than 10% of the stock of RAI. British American Tobacco p.l.c. indirectly holds more than 10% of the stock of RAI through Brown & Williamson Holdings, Inc.

Petitioner Liggett Group LLC is a wholly owned, indirect subsidiary of Vector Group Ltd. Vector Group Ltd. is the only publicly held company that owns 10% or more of the membership interest in Liggett. No publicly held company owns 10% or more of Vector Group Ltd.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Philip Morris USA Inc., R. J. Reynolds Tobacco Company, and Liggett Group LLC respectfully petition for a writ of certiorari to review the judgment of the Florida Supreme Court in this case.

OPINIONS BELOW

The opinion of the Florida Supreme Court (Pet. App. 1a) in this case is reported at 110 So. 3d 419. The opinion of the Florida Second District Court of Appeal (Pet. App. 41a) in this case is reported at 83 So. 3d 1002. The opinion of the Florida Supreme Court in *Engle v. Liggett Group, Inc.* (Pet. App. 66a) is reported at 945 So. 2d 1246.

JURISDICTION

The judgment of the Florida Supreme Court was entered on March 14, 2013. Pet. App. 1a. On May 30, 2013, Justice Thomas granted an extension of time for filing a petition for a writ of certiorari until August 11, 2013. No. 12A1155. This Court has jurisdiction under 28 U.S.C. § 1257(a).

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.

INTRODUCTION

Since time immemorial the common law has required that a party seeking to preclude litigation of an issue demonstrate that a prior proceeding actually decided that "'precise question.'" *E.g.*, *De Sollar v.*

Hanscome, 158 U.S. 216, 221-22 (1895) (quoting *Russell v. Place*, 94 U.S. 606, 608 (1877)). That remains the universal rule today: A party can rely on the outcome of a prior proceeding to establish the elements of his or her claims only upon demonstrating that those elements were "actually litigated *and resolved* in a valid court determination." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (emphasis added; internal quotation marks omitted). This Court held more than a century ago that such a showing is required by due process. *See Fayerweather v. Ritch*, 195 U.S. 276, 298-99, 307 (1904).

The decision below radically departs from this uniform course of decisions. In the name of expediency, it adopts an unprecedented rule of preclusion for issues class actions that dispenses with the "actually decided" requirement. The Florida Supreme Court first ruled, in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam), that an "issues class" could be certified on highly general questions—*e.g.*, whether each defendant *ever* marketed a defective cigarette over the course of five decades. *Id.* at 1268-69. The court then ruled here that the "issues" decided in the *Engle* class trial must be given what it called *claim*-preclusive effect.

Under the court's view, members of an issues class can assert "claim preclusion" offensively: certain elements of their claims will be deemed established, regardless of whether they can show that the prior proceeding actually decided those specific issues in their favor. The court held that "[w]hen class actions are certified to resolve less than an entire cause of action," Pet. App. 29a, it would be "improper" to apply the rules of "issue preclusion" in the subsequent trial on individual issues and that claim pre-

clusion must apply "in the context of [such a] class action." *Id.* at 26a, 27a; *see also id.* at 29a. Because the issues decided by the *Engle* verdict are so general, the court believed that application of issue preclusion—especially the "actually decided" requirement—would render that verdict "useless." *Id.* at 26a. In ruling "claim preclusion" applicable, the court gave "specific importance" to the fact that "claim preclusion . . . has no 'actually decided' requirement." *Id.* at 30a.

But what the Florida Supreme Court called "claim preclusion" would not be recognized as such either at common law or by any other American jurisdiction today: Claim preclusion traditionally applies only when an *entire* claim was previously tried to judgment, and it bars any further litigation of the claim by *either* party. Indeed, traditional claim preclusion has no offensive application; it is purely defensive. It has never applied when, as here, a party seeks to prosecute a claim that has *not* been fully adjudicated and to preclude litigation of certain *elements* of that claim.

In short, to salvage findings that concededly cannot be used under traditional issue-preclusion principles, Pet. App. 26a, the Florida Supreme Court created a doctrine that bears none of the hallmarks of claim preclusion and virtually all the hallmarks of issue preclusion—except for the "actually decided" limitation that due process requires. In so doing, the court jettisoned a common-law procedure that "would have provided protection against arbitrary and inaccurate adjudication," *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430-31 (1994), and replaced it with an "extreme application[ ] of the doctrine of res judicata" previously unknown in American law. *Richards v.*

Jefferson Cnty., 517 U.S. 793, 797 (1996). As a result, petitioners are barred from disputing elements of class members' claims that may never have been decided against them—and that may, in fact, have been decided in their *favor* by the *Engle* jury.

According to the Florida Supreme Court, this arbitrary and irrational outcome is compatible with due process because petitioners were afforded an "opportunity to be heard" in *Engle* and in this case. Pet. App. 21a. But an opportunity to be heard, no matter how extensive, is constitutionally meaningless absent an ascertainable decision at the end of the hearing. Due process requires an assurance that some finder of fact, either in the prior proceeding or the current one, has actually found each element of the plaintiff's claim. *See Fayerweather*, 195 U.S. at 299 (due process requires both "an opportunity to present" the issue *and* that "the question was decided" in the prior proceeding).

This Court has repeatedly recognized the need to ensure that the rules of preclusion are administered in accordance with due process. *See, e.g., Hansberry v. Lee*, 311 U.S. 32, 40 (1940). Now that the Florida Supreme Court has upheld the constitutionality of these unprecedented and fundamentally unfair procedures for the thousands of *Engle* progeny cases—and for all issues class actions in Florida—intervention by this Court is warranted. Indeed, *Engle* progeny litigation alone has already subjected petitioners to verdicts totaling more than $500 million in only about 2% of pending cases—despite the real possibility that essential elements of the plaintiffs' claims have never been decided. This Court's review will also prevent other state courts, which are increasingly resorting to the use of issues classes,

see, e.g., Principles of the Law of Aggregate Litigation ch. 2 (2010), from following the Florida Supreme Court's lead.

STATEMENT

A. The *Engle* Case

1. The *Engle* class action began in 1994, when six individuals filed a complaint in Miami seeking billions of dollars in damages from petitioners and other tobacco companies. The class ultimately certified encompassed 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." Pet. App. 2a-3a.

Over the defendants' objections, the *Engle* trial court adopted a complex three-phase trial plan, under which the jury would make findings in Phase I on purported "common issues" relating to the defendants' conduct and the general health effects of smoking. In Phase II, the jury would apply its Phase I findings to the claims of three individuals and assess punitive damages for the class. In Phase III, new juries would apply the Phase I findings in adjudicating the claims of other individual class members. *See Liggett Grp. Inc. v. Engle*, 853 So. 2d 434, 441-42 (Fla. Dist. Ct. App. 2003), *approved in part and quashed in part*, 945 So. 2d 1246.

During the year-long Phase I trial, the class advanced a host of different factual allegations attacking the defendants' products and conduct over a span of five decades, including many allegations that pertained only to some cigarette designs and brands or at limited times. For example, to support its strict-liability and negligence claims, the class variously

asserted that *some* cigarette brands used genetically engineered high-nicotine tobacco in the 1990s; that other brands had high nitrosamine levels, or ammonia, or higher smoke pH than necessary; that the filters on *some* cigarettes contained harmful components; that unfiltered cigarettes had unduly high tar and nicotine yields; that the ventilation holes in "light" or "low tar" cigarettes were improperly placed; and that the marketing of cigarettes was false, or misleading, or accompanied by inadequate warnings in a variety of ways at different times. *E.g.*, Pet. App. 4a-6a; *Engle* Class Opp. to Strict Liability Directed Verdict at 3; *Engle* Tr. 11966-71, 16315-18, 27377, 36664-65.[1]

None of those theories was linked to the circumstances of any particular class member, and, indeed, the trial court barred all references to individual class members' knowledge, conduct, or medical condition. *Engle* Tr. 37558-59. Nor was there any suggestion that each of these theories related to *all* class members or to *all* of the defendants' products. Class counsel himself asserted that it was "a fallacy that every common issue has to apply to one hundred percent of the class members." *Id.* at 24417-18.

At the conclusion of Phase I, the class made a critical strategic decision: It sought and secured a verdict form that asked the jury to make only generalized findings on each of the torts at issue. Those findings do not reveal which of the class's many theories of liability the jury accepted, and which it rejected. Instead, they establish, at most, that each

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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, *see* R.68-73:12634-13734, and a copy is being lodged with the Clerk.

defendant committed unspecified tortious acts at unspecified times during the five decades covered by the trial. Pet. App. 7a-8a & n.3. Petitioners objected on the ground that the jury's responses, if favorable to the class, would be too general to be used by subsequent juries trying the claims of individual class members, who smoked different cigarettes at different times, and saw and heard different advertising. The trial court nevertheless sided with the class and rejected the defendants' proposed verdict form, which would have required the jury to render specific findings on all the theories asserted by the class. *See Engle* Tr. 35915-16, 35953-54; *Engle* Defs. Objections and Counterproposals to Class Proposed Verdict Form at 9. The court expressly instructed the jury to decide "*only those issues* that I submit for determination by your verdict." *Engle* Tr. 37559 (emphasis added).

On the class's strict-liability claim, the verdict form simply asked whether each defendant "placed cigarettes on the market that were defective and unreasonably dangerous." Pet. App. 7a. Similarly, on the class's negligence claim, the verdict form asked whether each defendant "failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances." *Id.* at 8a n.3. As formulated, these questions compelled a "yes" response if the jury agreed with *any* of the class's alternative theories of defect and negligence, and prohibited a "no" response unless the jury rejected *all* of those alternative theories.

The jury answered both questions in the affirmative. Pet. App. 5a. As one federal court noted, those findings are "equivalent to saying that the Defendants did something wrong without saying exactly

what the Defendants did wrong and when." *Brown v. R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328, 1342 (M.D. Fla. 2008), *vacated on other grounds*, 611 F.3d 1324 (11th Cir. 2010).[2]

2. The "Phase I [findings] did *not* determine whether the defendants were liable to anyone." *Engle*, 945 So. 2d at 1263. Thus, in Phase II-A, the same jury determined individualized issues of legal causation as to three named plaintiffs, found liability as to each, and awarded those three plaintiffs compensatory damages. *Engle* Phase II-A Verdict Form. In Phase II-B, the jury awarded a lump sum of $145 *billion* in punitive damages to the class as a whole. *Engle*, 945 So. 2d at 1257.

Before Phase III commenced, the trial court entered a final judgment in favor of the three class members whose claims were tried in Phase II-A, and on the class-wide punitive damages award. The defendants appealed.

3. The intermediate appellate court reversed, holding that the case could not be maintained as a class action, and that the punitive damages award was both premature and excessive. *Engle*, 853 So. 2d 434.

On further review, the Florida Supreme Court agreed that the punitive damages award could not

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[2] The *Engle* jury made only two findings that were specific enough to have meaningful application in progeny cases: (1) that smoking is a medical cause of 20 diseases, including lung cancer and chronic obstructive pulmonary disease, but not of three others, and (2) that cigarettes that contain nicotine are addictive. *Engle*, 945 So. 2d at 1276-77. Petitioners have never disputed that those findings are entitled to preclusive effect in individual suits.

stand because there had been no liability finding in favor of the class. *Engle*, 945 So. 2d at 1262-63. It also concluded that "continued class action treatment" was "not feasible because individualized issues such as legal causation, comparative fault, and damages predominate." *Id.* at 1268. Based on "pragmatic" considerations, however, the court also ruled 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. The court stated, *sua sponte*, 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.

4. After an unsuccessful request for rehearing, petitioners sought certiorari. They argued, *inter alia*, that affording the Phase I findings broad "res judicata effect" would violate their due process rights. In response, the class disputed the existence of a final judgment (or indeed any judgment) on the preclusion question, and argued that "[i]f a lower court ever upholds a specific verdict in favor of a plaintiff/class member, in which the preclusive effect of a finding approved by the Florida Supreme Court is decisive, petitioners may choose to seek review with respect to the new judgment where all the facts are known." Opp. 1, 11, 2007 WL 2363238 (U.S. Aug. 15, 2007). This Court denied review. 552 U.S. 941 (2007).

B. The Proceedings In This Case

There are approximately 6,000 persons claiming to be *Engle* class members in more than 4,500 suits pending in state and federal courts across Florida.

In each of these "*Engle* progeny" 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.

1. Respondent James Douglas filed this case in Florida state court, seeking to recover for the death of his wife, Charlotte Douglas, a longtime smoker diagnosed with lung cancer and chronic obstructive pulmonary disease. As relevant here, respondent asserted claims for strict liability and negligence. R.1:74-85 at ¶¶ 28-30, 43-45.

Over petitioners' objections, the trial court ruled that the "*res judicata* effect" of the *Engle* findings relieved respondent of his burden of proving that petitioners engaged in tortious conduct relevant to Mrs. Douglas's smoking history; nor were petitioners permitted to dispute that they had done so. Thus, the jury was asked to determine only whether Mrs. Douglas was a member of the *Engle* class and whether "smoking cigarettes" was a legal cause of her death. The jury found that Mrs. Douglas was a class member because her injuries resulted from her addiction to cigarettes containing nicotine. R.65:12112-14. It awarded respondent $5 million in compensatory damages. The court reduced the damages award to $2.5 million based on comparative fault. Pet. App. 12a, 42a-43a.

2. The Second District Court of Appeal affirmed solely on the basis of respondent's strict-liability claim. Pet. App. 41a.

The court concluded that it was bound by *Engle* to hold that the findings conclusively establish the "conduct elements" (*i.e.*, defect and negligence) of re-

spondent's claims. Pet. App. 55a, 57a. It further held, however, that under longstanding Florida law respondent additionally was required to "prove legal causation"—*i.e.*, to demonstrate that the tortious conduct found in *Engle* proximately caused Mrs. Douglas's injury. *Id.* at 57a. The court set aside the negligence verdict because the jury in this case had not been asked to make that finding, but concluded that respondent sufficiently established causation as to strict liability. *Id.* at 58a n.8.

The Second District certified to the Florida Supreme Court the question whether "accepting as res judicata the . . . Phase I findings . . . violate[s] the tobacco companies' due process rights guaranteed by the Fourteenth Amendment of the United States Constitution." Pet. App. 59a (capitalization altered).

3. The Florida Supreme Court upheld the strict-liability and negligence verdicts. Pet. App. 2a. In so doing, it adopted a new rule of preclusion for issues class actions, holding that the verdicts satisfied due process even if essential elements of respondent's claims were never actually decided in his favor by *any* jury. *Id.* at 20a-31a.

The court acknowledged that the class's theories of liability in Phase I of *Engle* "included brand-specific defects"—*i.e.*, defects that applied only to *some* cigarettes. Pet. App. 4a. Indeed, the court quoted at length from the *Engle* trial court's ruling denying a directed verdict, which had recited the class's evidence that petitioners' cigarettes "were defective in many ways[,] including" the use of assorted harmful compounds, the placement of ventilation holes in "some cigarettes," and the use of harmful fibers in "some filters." *Id.* at 5a-6a.

The court emphasized, however, that the *Engle* trial "*also* included proof that [petitioners'] cigarettes were defective because they are addictive and cause disease" and "included" arguments that petitioners were negligent by "fail[ing] to address the health effects and addictive nature of cigarettes" and by "manipulat[ing] nicotine levels." Pet. App. 4a-5a (emphasis added). The court reasoned that these alternative contentions could have allowed the *Engle* jury to decide petitioners' "common liability to the class." *Id.* at 7a.

The court rejected petitioners' argument that ordinary principles of issue preclusion apply where, as here, a class member seeks to make offensive use of the verdict in an earlier issues class action. Recognizing that the doctrine of issue preclusion requires proof that an issue was "actually decided," Pet. App. 30a, the court concluded that the Phase I findings would be largely "useless" to respondent and other *Engle* progeny plaintiffs if that doctrine were applied here. *Id.* at 25a-26a. Instead, the court held that the doctrine of "claim preclusion" (which it also referred to as "res judicata") must apply when class members are suing on the "same causes of action" that were the subject of an issues class action.

The court reasoned that the requirements for claim preclusion are satisfied "in the context of [an issues] class action"—even though they would not be satisfied in bifurcated proceedings in a "single case"—because the class-wide adjudication of "substantive elements of the class's claims" results in a "final judgment." Pet. App. 27a-28a. As a consequence, the court found that preclusion applies to any issue "which might . . . have been" decided in the class phase. *Id.* at 25a (internal quotation marks

omitted). It was accordingly "immaterial" that the "*Engle* jury did not make detailed findings" sufficient to establish the basis for its verdict. *Ibid.*

The court confirmed that this unprecedented rule of preclusion applies to all issues class actions in Florida: "When class actions are certified to resolve less than an entire cause of action, the final judgment from the first trial on the common liability issues is entitled to res judicata effect in the subsequent trial on individual issues." Pet. App. 29a.

The court further held that its rule comports with due process. Although *Fayerweather v. Ritch*, 195 U.S. 276 (1904), held that the "actually decided" requirement is a rule of due process, the court believed it has no bearing on the constitutional standards governing claim preclusion. Pet. App. 29a-31a. The court instead held that "the requirements of due process" in this setting are only "notice and [an] opportunity to be *heard*"—regardless of what the jury was asked to *decide*—and found that truncated standard satisfied here. *Id.* at 21a (emphasis added); *see also id.* at 17a, 31a.

Justice Canady dissented. Pet. App. 32a. He rejected the majority's adoption of claim-preclusion principles in the context of an issues class action. He explained that the *Engle* Phase I findings "were determinations of fact on particular *issues*; the jury's verdict did not fully adjudicate any *claim* and did not result in a final judgment on the merits." *Id.* at 38a (emphases added). "The application of claim preclusion in such circumstances," Justice Canady concluded, "is a radical departure from the well established Florida law concerning claim preclusion." *Ibid.*

REASONS FOR GRANTING THE PETITION

The Florida Supreme Court concluded that issues determined in a class action "certified to resolve less than an entire cause of action" are entitled to claim-preclusive effect in a "subsequent trial on individual issues." Pet. App. 29a. Applying that rule to the *Engle* litigation, the court held that the "issues" it certified for class treatment in *Engle* must be given preclusive effect in progeny cases, regardless of whether *any* jury has ever found the specific elements of progeny plaintiffs' claims in their favor. The court called this "claim preclusion" in order to avoid the "actually decided" requirement of issue preclusion, which the court acknowledged could not be met here due to the generality of the Phase I findings and the alternative theories of liability pursued by the *Engle* class. *Id.* at 25a-26a.

The Florida Supreme Court's creation of a novel rule of preclusion for issues class actions to preserve the utility of the Phase I findings conflicts with *Fayerweather v. Ritch*, 195 U.S. 276 (1904), which holds that due process forbids precluding litigation of an issue unless it is clear that the same issue was actually decided in a prior adjudication. Even if *Fayerweather* alone were not dispositive, the Florida Supreme Court violated due process by adopting an "extreme application[ ] of the doctrine of res judicata," *Richards v. Jefferson Cnty.*, 517 U.S. 793, 797 (1996), that abandons longstanding common-law restrictions on the use of preclusion—restrictions that are universally followed by every other American jurisdiction today and that are essential to the protection of property against arbitrary deprivation. Even where a defendant has had a full opportunity to be heard, a State may not deprive a defendant of its

property by judicial process unless there is some assurance that the plaintiff has proven (and *some* fact-finder has actually found) every element of the cause of action. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). The main point of the novel "claim preclusion" doctrine announced by the decision below is to permit class members to evade those protections.

The appropriate application of claim-preclusion doctrine is far different from what transpired here: Claim preclusion is about *whether* a claim can be tried, whereas issue preclusion is about *how* a claim can be tried. Under claim preclusion, a valid final judgment on an entire claim *extinguishes* that claim and makes it unnecessary to determine which issues were actually decided. But when, as here, a claim is being further prosecuted, fundamental fairness requires a showing that the elements on which preclusion is sought have been actually decided in the plaintiff's favor.

Indeed, the decision below is a radical departure from Florida's *own*, previously well-settled rules of preclusion. After examining those rules, the Eleventh Circuit concluded that the *only* conceivably applicable preclusion doctrine in *Engle* cases was issue preclusion. "Because factual issues and not causes of action were decided in Phase I" of *Engle*, the Eleventh Circuit explained, "the Florida Supreme Court's direction that the approved findings were to have 'res judicata effect' . . . necessarily refers to issue preclusion." *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1333 & n.7 (11th Cir. 2010). The Eleventh Circuit declined to entertain a due process challenge to the findings because it was confident that the Florida courts would not permit those findings to be used "to

establish facts that were not decided by the [*Engle*] jury." *Id.* at 1334.

Now that the Florida Supreme Court has confounded this prediction and dispensed with the "actually decided" rule, the constitutional issue is ripe for this Court's decision. Guidance in this area is especially warranted because the lower courts are increasingly certifying issues classes under Rule 23(c)(4) and its state-law equivalents. *See, e.g.*, Principles of the Law of Aggregate Litigation §§ 2.02 & cmt. e, 2.03, 2.08, 2.12 & cmt. b (2010); 7AA Charles Alan Wright et al., *Federal Practice and Procedure* § 1790 & nn.18-20 (3d ed. 2005). Fair rules of preclusion are essential to the proper administration of every issues class, and Florida's unprecedented rule evades the fundamental, and constitutionally required, principle that the class-action device cannot diminish parties' substantive rights. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558-59 (2011); *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1176 (11th Cir. 2010); *Stonebridge Life Ins. Co. v. Pitts*, 236 S.W.3d 201, 205 (Tex. 2007) (per curiam).

Few petitions combine constitutional violations that are so clear with consequences of such magnitude. Petitioners have already incurred adverse verdicts totaling more than $500 million in the tiny fraction of *Engle* progeny cases that have been tried, and are confronted with the possibility of substantially greater additional liability in the more than 4,500 suits that remain pending. It is impossible to conclude with any certainty in any of these cases that any jury in any proceeding has ever decided all the elements of the plaintiff's claims in his or her favor. This Court's review is urgently needed to pre-

vent the Florida courts from discarding essential due process protections and replicating the radical, inequitable, and unconstitutional result below in thousands of future trials.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DUE PROCESS DECISION IN *FAYERWEATHER* AND WITH LONGSTANDING COMMON-LAW REQUIREMENTS OF PRECLUSION.

It is axiomatic that a plaintiff ordinarily may obtain a judgment against a defendant only by establishing every element of his or her claim. Under well-established Florida substantive law, which the court below did not purport to change, every plaintiff pursuing a strict-liability claim must prove that the defendant manufactured a product that contained a defect and that this defect was a legal cause of the plaintiff's injuries. *See, e.g.*, *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 86 (Fla. 1976); Fla. Standard Jury Instr. 5.2. Similarly, a negligence claim requires proof that the defendant breached a duty of reasonable care and that this breach was a legal cause of the plaintiff's injuries. *See, e.g.*, *Clay Elec. Coop., Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003); Fla. Standard Jury Instr. 5.1; *see also* Fla. Standard Jury Instr. 401.12.

The decision below excuses respondent and the thousands of other *Engle* progeny plaintiffs from proving the essential elements of their claims in two respects. First, based on the purported preclusive effect of the *Engle* findings, the court held that *Engle* progeny plaintiffs are not required to prove the most basic "conduct elements" of their claims—*i.e.*, that the cigarettes smoked by the class member contained a specific defect, or that petitioners' conduct toward

the class member was negligent. Second, because it is impossible to identify which specific conduct the *Engle* jury found tortious, the court held that progeny plaintiffs are not required to prove the ordinary legal-causation element of their claims—*e.g.*, that the specific defect they allege (as opposed to some other aspect of the product) caused the injury for which they seek compensation—and instead need prove only that addiction to petitioners' cigarettes caused the injury.

These rulings permit progeny plaintiffs to deprive petitioners of their property without any assurance that they have *ever* successfully proven in *any* adjudication all elements that state law defines as essential to their claims—and despite the possibility that the *Engle* jury may even have resolved some of those elements *in petitioners' favor*. 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); *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974). Due process also "requires that class actions not be used to diminish the substantive rights of any party to the litigation." *Stonebridge Life Ins. Co.*, 236 S.W.3d at 205. Yet that is precisely what the decision below accomplishes when it excuses progeny plaintiffs from proving elements of their claims that any other Florida tort plaintiff would be required to establish, merely because *Engle* was an issues class action.

A. The "Actually Decided" Requirement Is A Universally Accepted—And Constitutionally Mandated—Principle Of Issue Preclusion.

1. The common law has long required the party invoking preclusion to establish that a prior proceeding actually determined the issue on which preclusion is sought. Indeed, since at least the 18th century, courts have refused to apply issue preclusion where a verdict from a prior suit *could* have rested on a ground other than the one on which preclusion is sought. That rule originated with early English authorities, which held that a judgment is not "evidence" of "any matter to be inferred by argument from [it]." *Duchess of Kingston's Case* (H.L. 1776), in 2 Smith, *A Selection of Leading Cases on Various Branches of the Law* 425 (1840); *see also* 2 Coke, *The First Part of the Institutes of the Laws of England; or, a Commentary on Littleton* ¶ 352b (London, W. Clarke 1817) ("[E]very estoppell . . . must be certaine to every intent, and not . . . taken by argument or inference."); 1 Simon Greenleaf, *Treatise on the Law of Evidence* § 528, at 676 (3d ed. 1846) (the "general rule" of the *Duchess of Kingston's Case* "has been repeatedly confirmed and followed, without qualification").

When the Fourteenth Amendment was adopted in 1868, American courts uniformly followed this rule. *Packet Co. v. Sickles,* 72 U.S. 580, 591-93 (1867). At that time, "according to all the well considered authorities, ancient and modern," the "inference" that an issue was decided in prior litigation had to "be inevitable, or it [could not] be drawn." *Burlen v. Shannon,* 99 Mass. 200, 203 (1868); *see also Steam-Gauge & Lantern Co. v. Meyrose,* 27 F. 213,

213 (C.C.E.D. Mo. 1886) (Brewer, J.) (this "doctrine is affirmed by a multitude of courts"). Thus, where "it be doubtful upon which of several points the verdict was founded, it will not be an estoppel as to either." *People v. Frank*, 28 Cal. 507, 516 (1865). In other words, "a verdict will *not* be an estoppel merely because the testimony in the first suit was *sufficient to* establish a particular fact"; instead, "[i]t must appear that was the very fact on which the verdict was given, and no other." *Long v. Baugas*, 24 N.C. 290, 295 (1842) (emphases added); *Lentz v. Wallace*, 17 Pa. 412, 415 (1851) (no preclusion where "record of the former judgment does not show upon which ground the recovery was obtained").

As early as 1877, this Court explained that "the inquiry must always be as to the point or question actually litigated *and determined* in the original action, not what *might have been* thus litigated and determined." *Cromwell v. Cnty. of Sac*, 94 U.S. 351, 353 (1877) (emphases added). Preclusion is therefore unavailable where "several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating . . . upon which the judgment was rendered." *Russell v. Place*, 94 U.S. 606, 608 (1877). In *De Sollar v. Hanscome*, 158 U.S. 216 (1895), for example, this Court held that a prior judgment did not establish that the defendant had assented to a contract because, although the trial judge in the prior proceeding instructed the jury that assent was "'the chief question for your consideration,'" the prior jury *could* have resolved the case on alternative grounds. *Id.* at 219. "[I]t is the essence of estoppel by judgment," the Court explained, "that it is *certain* that the *precise fact* was determined by the former judgment." *Id.* at 221 (emphases added).

Modern practice is equally settled. The traditional rule has been followed uniformly by the federal and state appellate courts.[3] Thus, if a prior "judgment might have been based upon one or more of several grounds, but does not expressly rely upon any one of them, then none is conclusively established under the doctrine of collateral estoppel, since it is impossible for another court to tell which issue or issues were adjudged." *Ettin v. Ava Truck Leasing, Inc.*, 251 A.2d 278, 287 (N.J. 1969) (internal quotation marks omitted); *see also Ashe v. Swenson*, 397 U.S. 436, 444 (1970).

2. In *Fayerweather*, this Court confirmed that the "actually decided" requirement of preclusion doctrine is mandated by due process. In that case, a federal court dismissed a suit on the ground that the plaintiffs' claims were precluded by a prior state court judgment. The plaintiffs maintained that the state court had not decided the relevant issues. By statute, this Court's jurisdiction depended on whether the plaintiffs' challenge to the preclusion ruling presented a constitutional issue. *See* 195 U.S. at 297-98. The Court held that it had jurisdiction, explaining that it would violate due process to give "unwarranted effect to a judgment" by accepting as a "conclusive determination" a verdict "made without any finding of the fundamental fact." *Id.* at 297, 299.

Although the Court upheld preclusion on the particular facts of *Fayerweather*—finding that the question on which preclusion was sought had been "considered and determined" in the prior suit (195

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[3] *See, e.g.*, 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4420 nn.1, 13 (2d ed. 2002); Restatement (Second) of Judgments § 27, reporter's note, cmt. e (1982) (hereinafter "Restatement").

U.S. at 308)—it established as a constitutional rule that where

> testimony was offered at the prior trial upon several distinct issues, the decision of any one of which would justify the verdict or judgment, then the conclusion must be that the prior decision is not an adjudication upon any particular issue or issues; and the plea of *res judicata* must fail.

Id. at 307. This constitutional rule applies whenever a party seeks to have *any* kind of preclusive effect given to a finding in an earlier litigation, no matter the label. *Id.* at 298.

B. The Florida Supreme Court's Departure From The "Actually Decided" Requirement Violates Due Process.

1. The Florida Supreme Court's decision in this case cannot be reconciled with *Fayerweather* because respondent cannot establish that the issues to which preclusion was applied were actually decided in his favor by the *Engle* jury. The court acknowledged that the *Engle* class had asserted numerous "brand-specific" and type-specific alternative theories of defect in the year-long Phase I trial—theories that did *not* apply to all cigarette brands, all class members, all time periods, or all diseases at issue. Pet. App. 4a; *see also id.* at 5a-6a (quoting directed verdict order). For example, the class claimed that "light" cigarettes—which there is no evidence that Mrs. Douglas ever smoked—were defective because smokers could "compensate" by covering up the ventilation holes, inhaling more deeply, taking more puffs, or smoking more cigarettes. *Engle* Tr. 11966-71; *Engle* Class Opp. to Strict Liability Directed Verdict at 3.

The Florida Supreme Court nevertheless concluded that the class *also* asserted a more comprehensive theory of defect (and presumably of negligence)—*i.e.*, that all cigarettes are addictive and cause disease—that, if found by the jury, potentially would have supported a verdict encompassing all types of cigarettes. On that basis, the court held that the findings conclusively established that the particular cigarettes smoked by Mrs. Douglas contained a defect relevant to her injuries and that petitioners had engaged in negligent conduct with respect to Mrs. Douglas. Pet. App. 25a.

But even if the class did advance *some* theories that potentially encompassed all cigarettes, the class undoubtedly advanced other theories that applied only to a subset of cigarettes. Thus, this case still poses precisely the problem identified by *Fayerweather* and the other cases discussed above because there is no way to know which theory the jury relied upon in rendering its verdicts. Indeed, the class's own proposed jury instructions expressly stated that the class was proceeding on "several *alternative*" theories of defect. *Engle* Class Proposed Jury Instructions at 2.4 (emphasis added). The *Engle* jury was never asked whether it accepted the theory that all cigarettes were defective, and its response to the broad question it *was* asked gives no indication whether it accepted, rejected, or even considered such a theory. *Fayerweather* makes clear that applying preclusion in these circumstances is unconstitutional because a global theory of defect was at most *one* of the "several distinct issues" on which the *Engle* verdict *might* be based. 195 U.S. at 307.

In any event, the decision below would run afoul of the Due Process Clause even if *Fayerweather* had

never been decided. Because "traditional practice provides a touchstone for constitutional analysis," Florida's "abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause." *Honda Motor Co.*, 512 U.S. at 430; *see also Richards*, 517 U.S. at 797. That presumption is strongly reinforced here by the fact that *all* other jurisdictions remain constant in the view that the "actually decided" requirement is workable and essential to the fair application of preclusion.

As this Court noted in *Honda Motor*, "[b]ecause the basic procedural protections of the common law have been regarded as so fundamental," States rarely deny those protections and, when they do, usually attempt to provide some "similar substitute for the protection." 512 U.S. at 430-31. Far from providing a suitable alternative protection, the decision below discards the "actually decided" requirement in its entirety in order to make *Engle* "useful" and facilitate recoveries by *Engle* class members. This is done in blatant disregard of the risk that petitioners will be held liable for conduct never decided against them in *Engle* or any other proceeding. Indeed, because the ambiguity of the *Engle* verdict also impelled the Florida Supreme Court to water down the separate legal cause element, the decision below excuses class members from demonstrating the two most important components of each tort—wrongful conduct and causation.

2. The Florida Supreme Court did not dispute that the "actually decided" requirement is a constitutional prerequisite to the application of issue preclusion. Nor did the court suggest that respondent

could establish that the *Engle* jury actually decided that petitioners committed tortious conduct relevant to Mrs. Douglas's smoking history. Indeed, the court acknowledged that enforcing that requirement would render the findings "useless." Pet. App. 26a. The court nevertheless concluded that class members can benefit from findings that *no* jury may have made under the doctrine of "claim preclusion," which bars litigation of questions arising from the same transaction that could have been adjudicated in the prior proceeding.

Characterizing the result in this case as an application of "claim preclusion," however, does not change the *substance* of what occurred or remotely resolve the conflict between the decision below and the due process principles embodied in *Fayerweather*. Although "[s]tate courts are free to attach descriptive labels to litigations before them as they may choose," those labels are not binding for purposes of determining whether state court proceedings violate due process. *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). To the contrary, this Court has an independent "duty . . . to examine the course of procedure" to determine whether it satisfies "the due process which the Constitution prescribes." *Ibid.* That duty reflects that the Constitution's requirements and prohibitions are "levelled at the thing, not the name." *Cummings v. Missouri*, 71 U.S. 277, 325 (1866).

When "tested . . . by its substance—its essential and practical operation—rather than its form or local characterization," *Air-Way Elec. Appliance Corp. v. Day*, 266 U.S. 71, 82 (1924), it is clear that the "claim preclusion" invented by the opinion below is issue preclusion in every meaningful way, save for the essential protection of the "actually decided" require-

ment, and that it shares *none* of the attributes of traditional claim preclusion. It is, after all, preclusion applied to particular issues in the course of ongoing litigation—the very definition of issue preclusion.

No court, state or federal, applies "claim preclusion" to issues within a partially adjudicated claim. Claim preclusion is available only when there has been a final judgment that "'puts an end to *the cause of action*,'" as opposed to a subset of the elements of a cause of action. *Nevada v. United States*, 463 U.S. 110, 129-30 (1983) (emphasis added) (quoting *Comm'r v. Sunnen*, 333 U.S. 591, 597 (1948)). That is, "the whole cause of action" must be brought to a "full and complete judgment," *Schuler v. Israel*, 120 U.S. 506, 509 (1887), "leaving nothing to be done at the court of first instance save execution of the judgment." *Clay v. United States*, 537 U.S. 522, 527 (2003). 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*, 241 U.S. 22, 28-29 (1916); Restatement § 13 cmt. b.

If claim preclusion as traditionally understood did apply here, respondent's action would be completely barred because there is no such thing as *offensive* claim preclusion. Under both ancient and modern authorities, a "claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law *upon any ground whatever*." *Cromwell*, 94 U.S. at 353 (emphasis added); *Rivet v. Regions Bank of La.*, 522 U.S. 470, 476 (1998); Restatement §§ 18, 19 (rules of merger and bar). Thus, when there is a final judgment

disposing of an entire claim, it makes no difference what issues were actually decided because the judgment itself precludes any further proceedings on the claim. When there is no final judgment as to an entire claim, in contrast, the court in subsequent litigation on the claim must determine which issues have already been resolved.

Nor is there any basis here for invoking the aspect of claim preclusion foreclosing litigation of matters that were not previously decided. The rules of claim preclusion "reflect[ ] the expectation that parties who are given the capacity to present their *'entire controversies'* shall in fact do so." Restatement § 24 cmt. a (emphasis added); *see also United States v. Cal. & Or. Land Co.*, 192 U.S. 355, 358 (1904). Like other procedural rules, this aspect of claim preclusion channels the parties' rights to assert claims and defenses based on the default expectation that a controversy will be adjudicated only once. *See Montana v. United States*, 440 U.S. 147, 153 (1979) (doctrine conserves judicial resources). But this aspect of claim preclusion has no application when, as here, the first proceeding was designed to adjudicate only a *portion* of a controversy. It would be fundamentally unfair to strip petitioners of the constitutional protection provided by the "actually decided" rule in this context.

The Florida Supreme Court nevertheless asserted that "claim" rather than "issue" preclusion *must* apply in an individual suit that follows a class determination of issues relating to the "same causes of action." Pet. App. 25a-26a. That view is so inconsistent with common-law authorities that the contrary proposition literally is hornbook law. *See* Restatement § 27 & cmt. g (issue preclusion makes pre-

vious determinations "conclusive in a subsequent action between the parties, *whether on the same or a different claim*"); 18 Wright et al., *supra*, § 4416 ("Issue preclusion, moreover, is available whether or not the second action involves a new claim or cause of action.").

The Florida Supreme Court similarly erred in asserting that claim preclusion is applicable because the *Engle* jury "resolved substantive elements of the class's claims against the *Engle* defendants" and not merely "procedural or technical" elements. Pet. App. 27a. The application of claim preclusion depends not on whether the *Engle* jury decided *elements* that were "substantive" or "procedural or technical," but on whether the class members' *claims* were reduced to a judgment. Plainly they were not: A decision on an *element* of a claim is nothing more than a "preliminary determination of the . . . jury," and does not extinguish any claims. *McMaster*, 196 U.S. at 533. Indeed, when it announced its new rule of claim preclusion for issues classes, the Florida Supreme Court explicitly recognized that the initial class proceeding need not resolve an entire claim. The court stated: "When class actions are certified to resolve *less than* an entire cause of action, the final judgment from the first trial on the common liability *issues* is entitled to res judicata effect in the subsequent trial on individual issues." Pet. App. 29a (emphasis added).

The Florida Supreme Court also justified its broad rule of preclusion on the ground that *Engle*—like all issues classes—was litigated as a class action that presented "common issues." Pet. App. 27a. It is well settled, however, that the same "[b]asic principles of res judicata (merger and bar or claim preclusion) and collateral estoppel (issue preclusion) ap-

ply" to cases tried as class actions, *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984), and that a class action cannot be used to alter or diminish substantive rights available to parties in traditional individual adjudications. *See Dukes*, 131 S. Ct. at 2558-59.

It is true, of course, that in some cases "common liability may be established through a class action and given binding effect in subsequent individual damages actions." Pet. App. 17a. But such adjudications involve the application of *issue* preclusion following the determination of common issues relating to liability, and in no way support the invocation of "claim preclusion" or barring parties from litigating issues that were *not* ascertainably resolved (or waived) in the initial phase or case.

Not surprisingly, federal and state courts confronted with analogous certification orders recognize that *issue* preclusion applies to *issues* classes and—unlike the decision below—preserve a defendant's right to have *some* jury decide all the required elements of each claim. *See, e.g., Allen v. Int'l Truck & Engine Corp.*, 358 F.3d 469, 472 (7th Cir. 2004) (Easterbrook, J.) ("once one jury (in individual or class litigation) has resolved a factual dispute, principles of issue preclusion can bind the defendant to that outcome in future litigation") (emphasis omitted); *ACandS, Inc. v. Godwin*, 667 A.2d 116, 146-47 (Md. 1995) (issue preclusion applies to findings from first phase of asbestos litigation); Principles of the Law of Aggregate Litigation § 2.01 cmt. d ("Aggregate treatment of a common issue by way of a class action . . . would generate only issue preclusion, with the remaining issues in the litigation to be addressed in subsequent proceedings."). Those cases directly

contradict the Florida Supreme Court's new rule that claim preclusion applies to "class actions [that] are certified to resolve less than an entire cause of action." Pet. App. 29a.

Finally, despite reducing *Engle* class members' burden of proof and restricting petitioners' defenses, the Florida Supreme Court declared that petitioners' due process rights have not been violated because petitioners had an opportunity to be heard in *Engle* and in each progeny case. Pet. App. 21a-23a. But *Fayerweather* held that due process prohibits applying preclusion unless the parties "had an opportunity to present" the issue *and* "the question was decided" in the prior proceeding. 195 U.S. at 299. Thus, it is not enough that petitioners had an opportunity to be heard in *Engle*; what matters is whether they received due process in *this* case, in which a judgment has been entered that would deprive petitioners of their property. *Most cases* in which the common law and *Fayerweather* would not allow preclusion presumably involved a full and fair former adjudication; the problem is not the adequacy of the process used in the previous adjudication but the unfairness of using its outcome *now* for more than was actually established there.

Due process is not satisfied by providing hearings that do not fairly and reliably establish *all* the essential facts that the relevant law requires before a person may lose liberty or property. *See, e.g., Bell v. Burson*, 402 U.S. 535, 542 (1971). With respect to the Clause's parallel protection of liberty, for example, the most exquisitely elaborate trial will not save a judgment if one of the essential elements was taken from the jury. *In re Winship*, 397 U.S. 358, 364 (1970); *Francis v. Franklin*, 471 U.S. 307, 314, 317

(1985). And because due process guarantees a party not merely the right to present his case but also the right to "have its merits fairly judged," *Logan*, 455 U.S. at 433, an adjudication based on a coin toss could not be saved by any preceding hearings, however extensive. *Cf. Tumey v. Ohio*, 273 U.S. 510, 522-23 (1927).

Moreover, contrary to the Florida Supreme Court's analysis, *see* Pet. App. 23a, the fact that progeny plaintiffs must still prove *some* elements of their claims (such as class membership and damages) scarcely justifies relieving them from proving *others*. Due process requires "an opportunity to present *every* available defense," not just some. *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (emphasis added; internal quotation marks omitted). The court below dispensed with concededly required elements without any assurance that—indeed, with deep indifference to whether—those elements were decided in *Engle*. The extensiveness, adequacy, or overall fairness of the *Engle* proceedings is irrelevant in assessing whether this decision complies with due process.

* * *

The Florida Supreme Court's decision in this case—which sacrifices petitioners' traditional constitutional protections against arbitrary deprivations of property on the altar of the court's "pragmatic" desire to salvage value from the *Engle* case—is an "extreme application[ ] of the doctrine of res judicata." *Richards*, 517 U.S. at 797. It is also a miscarriage of justice on a massive scale. That arbitrary and unfair decision warrants this Court's review.

II. THE FLORIDA SUPREME COURT'S UNPRECEDENTED RULE OF PRECLUSION FOR ISSUES CLASS ACTIONS HAS FAR-REACHING CONSEQUENCES.

Review is warranted here due to the sheer number of cases that are directly governed by the Florida Supreme Court's manifestly unconstitutional application of preclusion principles. There are more than 4,500 *Engle* progeny cases pending in Florida courts. Approximately 90 of those cases have already been tried to verdict—resulting in verdicts that currently stand at more than $500 million against the *Engle* defendants—and the Florida courts are now trying an average of at least two new *Engle* progeny cases each month. Every one of those cases raises the same threshold due process question—and arises out of the same unconstitutional use of the class-action device—presented here. Thus, the due process violation that occurred in this case will be almost endlessly replicated, with virtually unprecedented financial consequences.

Although these considerations alone amply justify this Court's review, the consequences of the Florida Supreme Court's decision also extend beyond the *Engle* progeny setting. The court departed from constitutionally required principles of preclusion to make the class-action device useful in cases, like this one, that other courts have uniformly viewed as unsuited to class treatment because individualized issues predominate over common ones. *See, e.g., Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). Its new rule of preclusion for issues classes—under which "claim preclusion" applies to "issues" that are litigated in class actions "certified to resolve less than an entire cause of action," Pet. App. 29a—

governs all issues class adjudication in Florida. It also serves as a model for other lower courts, which have increasingly utilized the issues class device, *see* Principles of the Law of Aggregate Litigation ch. 2; 7AA Wright et al., *supra*, § 1790 & nn.18-20, to bypass well-established and constitutionally compelled restraints on the arbitrary deprivation of property.

This Court should grant review and reaffirm that the class-action procedure cannot be employed to evade fundamental constitutional limitations on preclusion. A class action is "a procedural right only, ancillary to the litigation of substantive claims," *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980), and it therefore "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion). As a result, the federal rules on class certification must be informed by due process protections. *See, e.g.*, *Dukes*, 131 S. Ct. at 2558-59; *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008). In both federal and state court, those protections "require[] that class actions not be used to diminish the substantive rights of any party to the litigation." *Stonebridge Life Ins. Co.*, 236 S.W.3d at 205.

Yet the Florida Supreme Court effectively achieved in two steps—"issues" certification in *Engle* plus a radical expansion of preclusion here—what no court in the country would permit under the due process constraints that govern individual cases or ordinary class certification decisions: an "efficient" adjudication of mass liability that is wholly unrelated to each defendant's liability to individual class members. Although lower courts are free to certify issues classes—and are increasingly doing so—this Court

should grant review and make clear that lower courts are not free, as here, to make an end-run around basic constitutional protections by using the combination of issues classes and unprecedented rules of preclusion to deprive defendants of their property without any assurance that a finder of fact has found all the essential elements of the plaintiffs' individual claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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