18-653

No.

IN THE
Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

VICKIE MCKEEVER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF THEODORE MCKEEVER,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents the same question as the petitions for writs of certiorari filed today 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 that permits plaintiffs to invoke 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, based merely on the fact that the defendant had an opportunity to be heard on those issues in the prior proceeding and the possibility that the relevant issues might have been decided in the plaintiffs' favor in that 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 Fourth District Court of Appeal.

OPINIONS BELOW

The opinion of the Florida Fourth District Court of Appeal is reported at 207 So. 3d 907. *See* Pet. App. 1a. The orders of the Florida Supreme Court declining discretionary review are unpublished, but are electronically available at 2018 WL 3097030 and 2018 WL 3097011. *See* Pet. App. 3a, 5a.

JURISDICTION

The Florida Fourth District Court of Appeal issued its opinion on January 4, 2017. *See* Pet. App. 1a. The Florida Supreme Court declined both parties' requests to exercise discretionary jurisdiction on June 25, 2018. *See id.* at 3a, 5a. Respondent thereafter filed a motion for rehearing, which the Florida Supreme Court granted on October 23, 2018; the court remanded the case to the Florida Fourth District Court of Appeal with instructions that the case be further remanded for entry of an amended judgment that does not reduce the compensatory damages award based on the jury's allocation of comparative fault. *See id.* at 7a. The judgment is nevertheless final for purposes of this Court's review. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 n.42 (1982) (judgment final despite remand for recomputation of damages).

On September 19, 2018, Justice Thomas extended the deadline for PM USA to file a petition for a writ of certiorari to November 22, 2018. *See* No. 18A279.

This Court's jurisdiction is invoked 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.

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 has filed today petitions for writs of certiorari 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 ideal vehicles for plenary review of that question.

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* 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. 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 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 Federal Rule of Civil Procedure 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 Flor-

ida 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.

The en banc majority found support for this conclusion in its own "review[ ]" of "the *Engle* trial record" and its own determination of the issues actually decided by the *Engle* jury. *Graham*, 857 F.3d at 1182-83. The *Graham* court thus effectively circumvented the constitutional issue by construing the *Engle* jury's defect and negligence findings, as a factual matter, as bearing upon the claims of *all* class members.

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.

A few months later, a panel of the Eleventh Circuit addressed the same due-process question with respect to the *Engle* concealment and conspiracy claims—which had not been at issue in either *Douglas* or *Graham*—and concluded in *Burkhart v. R.J. Reynolds Tobacco Co.*, 884 F.3d 1068 (11th Cir. 2018), that "treating as preclusive the *Engle* jury's findings as to the conduct elements of" those claims "does not violate due process." *Id.* at 1091. But whereas the en banc court in *Graham* had based its decision on a *factual* interpretation of the *Engle* jury's defect and negligence findings, the *Burkhart* panel relied on a *legal* determination, holding that the "Due Process Clause requires *only* that the application of principles of res

judicata . . . affords the parties notice and an opportunity to be heard." *Id.* at 1092 (internal quotation marks omitted; emphasis added). According to the panel, the defendants had received the requisite "opportunity to be heard" during *Engle*. *Id.* at 1092-93.

D. Proceedings In This Case

Pursuant to the procedures established by the Florida Supreme Court in *Engle*, respondent brought this survival action as personal representative of the estate of her husband, Theodore McKeever, seeking to recover damages for Mr. McKeever's chronic obstructive pulmonary disease ("COPD") and lung cancer, which she alleged were caused by smoking. Respondent alleged that Mr. McKeever 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. McKeever was addicted to cigarettes containing nicotine and that his addiction was a legal cause of his COPD and lung cancer), 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* Trial Tr. 3699-703.

After respondent presented her case at trial, PM USA moved for a directed verdict on all claims, arguing that "federal due process requires the proponent of preclusion to establish that the specific issue relevant to her case was actually decided in her favor in the prior litigation." Mot. for Directed Verdict 2

(citing *Fayerweather*, 195 U.S. at 297-98). That requirement was not met here, PM USA continued, because "it is impossible to determine" whether the *Engle* jury actually decided the conduct elements of respondent's claims. *Id.* PM USA acknowledged that the Florida Supreme Court had "rejected this position" in *Douglas*, but explained that it "respectfully disagrees" with that decision and "preserves its position for appeal." *Id.* The trial court denied the motion. Trial Tr. 3234, 3578.

The jury found that Mr. McKeever was an *Engle* class member and returned a verdict against PM USA on all four claims. R. 55:10700-02. The jury awarded a total of $5.798 million in compensatory damages and $11.625 million in punitive damages. R. 55:10699-702. It allocated 60% of the fault to PM USA and 40% to Mr. McKeever. R. 55:10700.

PM USA thereafter moved to set aside the verdict, arguing that "permitting Plaintiff to use the *Engle* findings to eliminate her burden of proving the conduct elements of her claims violated PM USA's federal constitutional rights to due process." Mot. to Set Aside Verdicts 2. PM USA also reiterated its position that *Douglas* was wrongly decided. *Id.* The trial court denied the motion. R. 64:12419-20.

PM USA appealed to the Florida Fourth District Court of Appeal and argued, among other things, "that it violated due process to allow Plaintiff to use the *Engle* findings to establish the conduct elements of her claims because it is impossible to determine whether the *Engle* jury resolved anything relevant to Plaintiff's claims." Initial Br. of PM USA 49 (citing *Fayerweather*, 195 U.S. at 307). PM USA acknowledged that "the Florida Supreme Court . . . rejected

this argument" in *Douglas*, but "wishe[d] to preserve it for review by the U.S. Supreme Court." *Id.*

In a two-paragraph per curiam opinion, the Fourth District affirmed on all issues except PM USA's argument that the trial court erred by failing to reduce "the compensatory damages award in proportion to Mr. McKeever's share of fault." Pet. App. 2a. As to the due-process issue, the court stated that "there is binding case law rejecting [PM USA's] arguments that due process precluded giving the *Engle* findings preclusive effect." *Id.* (citing *Douglas*, 110 So. 3d at 419).

PM USA then invoked the discretionary jurisdiction of the Florida Supreme Court on the question whether federal law impliedly preempted respondent's strict-liability and negligence claims. "For purposes of preservation," PM USA also "invoke[d] the discretionary jurisdiction of the Florida Supreme Court to review th[e Fourth District's] decision permitting Plaintiff to invoke the *Engle* Phase I findings" and "continue[d] to maintain that *Douglas* and th[e Fourth District's] decision in this case deny [PM USA] its federal due process rights." Notice to Invoke at 2-3. The Florida Supreme Court denied PM USA's request for review. *See* Pet. App. 3a.

REASONS FOR GRANTING THE PETITION

As explained in detail in the petitions for writs of certiorari filed today 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 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. 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. McKeever 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. McKeever 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. McKeever 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 concealment and conspiracy verdicts exclusively on Mr. McKeever'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. McKeever 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 petitions for writs of certiorari filed today in *Philip Morris USA Inc. v. Boatright* and *R.J. Reynolds Tobacco Co. v. Searcy*.

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.

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November 19, 2018

APPENDIX

APPENDIX A

PHILIP MORRIS USA INC., Appellant,

v.

Vickie MCKEEVER, as Personal Representative of the Estate of Theodore McKeever, Appellee.

No. 4D15-2493

District Court of Appeal of Florida,
Fourth District.

[January 4, 2017]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; John J. Murphy III, Judge; L.T. Case No. 2010CV037561 (19).

Geoffrey J. Michael of Arnold & Porter LLP, Washington, DC, and Geri Howell of Shook, Hardy & Bacon LLP, Miami, for appellant.

John S. Mills and Courtney Brewer of The Mills Firm, P.A., Tallahassee, and Robert W. Kelley, Todd R. McPharlin and Eric S. Rosen of Kelley Uustal, PLC, Fort Lauderdale, for appellee.

Per Curiam.

In this *Engle* [1] progeny case that was tried as a survival action, Philip Morris USA, Inc., appeals a final judgment awarding Vickie McKeever, the personal representative of the estate of her late husband, Theodore McKeever, $5,798,170.45 in compensatory damages (including $2 million for loss of consortium) and $11,625,000 in punitive damages. We affirm on all issues except appellant's argument that it is entitled to a reduction in the compensatory damages award in proportion to Mr. McKeever's share of fault. On this issue, we reverse. *See R.J. Reynolds Tobacco Co. v. Schoeff*, 178 So.3d 487 (Fla. 4th DCA 2015), *rev. granted*, No. SC15–2233, 2016 WL 3127698 (Fla. 2016).

We also briefly address appellant's due process and preemption arguments. As appellant acknowledges, there is binding case law rejecting appellant's arguments that due process precluded giving the *Engle* findings preclusive effect and that the plaintiff's strict liability and negligence claims were preempted by federal law. *See Philip Morris USA, Inc., v. Douglas*, 110 So.3d 419 (Fla. 2013); *R.J. Reynolds Tobacco Co. v. Marotta*, 182 So.3d 829 (Fla. 4th DCA 2016), *rev. granted*, No. SC16–218, 2016 WL 934971 (Fla. 2016). We affirm on these issues, but note that appellant wishes to preserve these arguments for possible further review.

Affirmed in part and Reversed in part.

Taylor, Levine and Conner, JJ., concur.

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[1] *Engle v. Liggett Group, Inc.*, 945 So.2d 1246 (Fla. 2006).

APPENDIX B

Supreme Court of Florida

MONDAY, JUNE 25, 2018

CASE NO.: SC17-160
Lower Tribunal No(s).:
4D15-2493;
062010CA037561AXXXCE

PHILIP MORRIS USA, INC.	vs.	VICKIE MCKEEVER, ETC.
Petitioner(s)		Respondent(s)

This Court declines to exercise jurisdiction in this case because *R.J. Reynolds Tobacco Co. v. Marotta*, 214 So. 3d 590 (Fla. 2017), and *Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294 (Fla. 2017), are controlling.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and LAWSON, JJ., concur.

A True Copy
Test:

/s/ John A. Tomasino
John A. Tomasino
Clerk, Supreme Court

db
Served:

ROBERT W. KELLEY
ALEX ALVAREZ
ERIC S. ROSEN
GERI ELAINE HOWELL
PETER MICHAEL HENK
JOHN S. MILLS
COURTNEY BREWER
TODD R. MCPHARLIN
GEOFFREY J. MICHAEL
HON. LONN WEISSBLUM, CLERK
HON. JOHN JOSEPH MURPHY, III, JUDGE
HON. BRENDA D. FORMAN, CLERK

APPENDIX C

Supreme Court of Florida

MONDAY, JUNE 25, 2018

CASE NO.: SC17-198
Lower Tribunal No(s).:
4D15-2493;
062010CA037561AXXXCE

VICKIE MCKEEVER, ETC.	vs.	PHILIP MORRIS USA, INC.
Petitioner(s)		Respondent(s)

This Court declines to exercise jurisdiction in this case because *R.J. Reynolds Tobacco Co. v. Marotta*, 214 So. 3d 590 (Fla. 2017), and *Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294 (Fla. 2017), are controlling.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and LAWSON, JJ., concur.

A True Copy
Test:

/s/ John A. Tomasino
John A. Tomasino
Clerk, Supreme Court

db
Served:

ERIC S. ROSEN
JONATHAN L. STERN
ALEX ALVAREZ
JOHN S. MILLS
COURTNEY BREWER
HILDY M. SASTRE
GERI ELAINE HOWELL
PETER MICHAEL HENK
TODD R. MCPHARLIN
GEOFFREY J. MICHAEL
KIMBERLY WALD
ROBERT W. KELLEY
HON. BRENDA D. FORMAN, CLERK
HON. LONN WEISSBLUM, CLERK
HON. JOHN JOSEPH MURPHY, III, JUDGE

APPENDIX D

Supreme Court of Florida

TUESDAY, OCTOBER 23, 2018

CASE NO.: SC17-198
Lower Tribunal No(s).:
4D15-2493;
062010CA037561AXXXCE

VICKIE MCKEEVER, ETC.	vs.	PHILIP MORRIS USA, INC.
Petitioner(s)		Respondent(s)

The motion for rehearing is hereby granted. This Court accepts jurisdiction in this case, summarily quashes the decision under review, and remands to the Fourth District Court of Appeal with instructions that this case be further remanded for the reinstatement of the jury verdict in light of our decision in *Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294 (Fla. 2017).

It is so ordered.

CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and LAWSON, JJ., concur.

A True Copy
Test:

/s/ John A. Tomasino
John A. Tomasino
Clerk, Supreme Court

lc
Served:

ERIC S. ROSEN
ALEX ALVAREZ
COURTNEY BREWER
TODD R. MCPHARLIN
GERI ELAINE HOWELL
GEOFFREY J. MICHAEL
HON. BRENDA D. FORMAN, CLERK
HON. JOHN JOSEPH MURPHY, III, JUDGE
HON. LONN WEISSBLUM, CLERK
JOHN S. MILLS
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PETER MICHAEL HENK
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ROBERT W. KELLEY