No. 18-___

IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY,
Petitioner,

v.

BARBARA JEAN JOHNSTON, Personal Representative of the Estate of FRANKLIN JAMES JOHNSTON,
Respondent.

On Petition for a Writ of Certiorari to the Florida Second 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 November 19, 2018 in *R.J. Reynolds Tobacco Co. v. Searcy* and *Philip Morris USA Inc. v. Boatright*:

Is the Due Process Clause 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 plaintiff below was respondent Barbara Jean Johnston as personal representative of the estate of Franklin James Johnston. The defendant below was petitioner R.J. Reynolds Tobacco Company ("Reynolds"). Petitioner Reynolds is a wholly owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc., which is a wholly owned subsidiary of Reynolds American Inc., which in turn is an indirect, wholly owned subsidiary of British American Tobacco p.l.c., a publicly held corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner R.J. Reynolds Tobacco Company respectfully petitions for a writ of certiorari to review the judgment of the Florida Second District Court of Appeal in this case.

OPINION BELOW

The decision of the Florida Second District Court of Appeal is unreported, *see* 253 So. 3d 576 (Fla. 2d DCA 2018) (Table), but is available electronically at 2018 WL 4655510 and reproduced in the appendix hereto at Pet. App. 1.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The Florida Second District Court of Appeal issued a per curiam opinion in this case on September 28, 2018. Pet. App. 1. That opinion is not reviewable in the Florida Supreme Court because it does not contain analysis or a citation to any other decision. *See The Florida Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988). As a result, the Second District Court of Appeal was "the highest court of a State in which a decision could be had," making it reviewable in this Court pursuant to § 1257(a). *See, e.g.*, *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 24 (2011) (per curiam) (reviewing decision of Florida District Court of Appeal).

On December 20, 2018, Justice Thomas extended the deadline for Reynolds to file a petition for writ of certiorari to January 10, 2019. *See* No. 18A639.

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). The Florida courts have, however, jettisoned the "actually decided" requirement for this case and thousands of similar suits by applying instead a novel form of offensive "claim preclusion" previously un-known 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" in an unspecified way—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 "claim preclusion" being applied in these *Engle* progeny cases is nothing more than issue preclusion stripped of its essential "actually decided" requirement.

The sweeping preclusive effect being given to the *Engle* jury's findings is not limited to state court. The Eleventh Circuit has held that the Florida Supreme Court's unorthodox approach to preclusion is consistent with due process because the defendants had notice and an "opportunity to be heard" in the *Engle* class action proceedings. *See Burkhart v. R.J. Reynolds Tobacco Co.*, 884 F.3d 1068, 1092–93 (11th Cir. 2018); *see also 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).

The Eleventh Circuit's most recent decision on this issue reached the same conclusion, though the panel expressed serious reservations about the outcome required by that circuit precedent. *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 that 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).

Reynolds and Philip Morris USA Inc. ("PM USA") filed a petition for a writ of certiorari on November 19, 2018 in *Searcy*, and PM USA filed a petition for a writ of certiorari on the same date in *Philip Morris USA Inc. v. Boatright*, 217 So. 3d 166 (Fla. 2d DCA 2017). Each petition presents the same due process question at issue in this case: whether due process allows plaintiffs to invoke 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—or, put differently, whether an issue may be treated as conclusively established by a prior proceeding if it *might* have been decided in that proceeding and the defendant had an opportunity to be heard on it.

To be sure, this Court has had several prior opportunities to review the constitutionality of the preclusion 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 *Searcy* and *Boatright* represent the Court's first opportunity to review an *Engle* progeny case after the Eleventh Circuit's decisions in *Searcy* and *Burkhart v. R.J. Reynolds Tobacco Co.*, which—together with the en banc decision in *Graham*—conclusively reject all facets of the *Engle* defendants' due process argument and, equally important, clarify the court's basis for doing so. It is now clear that neither the state nor the federal courts in Florida maintain even a pretense

that any jury actually has decided—or will be required to decide—all the elements of *Engle* progeny plaintiffs' tort claims. Instead, they deem it sufficient that the issues relevant to a progeny plaintiff's individual smoking history *might* have been decided in *Engle* and that the defendants had an opportunity to be heard on those issues in *Engle*. This Court should put an end to the unconstitutional *Engle* experiment, which already has produced judgments against the *Engle* defendants in excess of $800 million with another 2,300 cases remaining to be tried.

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

A. The *Engle* Litigation

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 petitioner 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 who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." 945 So. 2d at 1256.

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 Strict Liability Directed Verdict at 3; *Engle* Tr. 11966–71, 16315–18, 27377, 36664–65.[1] Likewise, to support its fraudulent concealment and conspiracy to fraudulently conceal claims, the class identified numerous distinct categories of allegedly fraudulent statements by the defendants, including statements pertaining to the health risks of smoking, others pertaining to the 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, 36483–84, 36720–21.

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

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[1] A DVD containing the transcript and other record materials from *Engle* cited herein is part of the record below in both *Searcy* and *Boatright*.

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 rejected, and which it did not even reach.

In Phase II, the *Engle* jury determined individualized issues of causation and damages as to three class representatives. *Id.* 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 applied 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]." *Id.* at 1262–63, 1268. Based on "pragmatic" considerations, however, the court further ruled, *sua sponte*, that some of the issues in Phase I 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.'" *Id.* 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 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 it is unnecessary for them 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 on progeny plaintiffs' defect and negligence claims. 110 So. 3d at 422. The Florida Supreme Court recognized 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. 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.* at 432–33 (emphasis added; internal quotation marks omitted). It was therefore "immaterial" that the "*Engle* jury did not make detailed findings" specifying the basis for its verdict. *Id.*

The Florida Supreme Court further held that its novel claim-preclusion rule 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, which "has no 'actually decided' requirement." *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 that the *Engle* proceedings satisfied that truncated standard. *Id.* at 430–31, 436.

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 treating the *Engle* jury's defect and negligence findings as conclusively establishing the conduct elements of all *Engle* progeny plaintiffs' defect and negligence claims is consistent with due process. 857 F.3d at 1185. Notwithstanding *Douglas*'s unambiguous holding that "claim preclusion" is the proper framework and its recognition that analyzing the *Engle* findings under "issue preclusion" would render them "useless," 110 So. 3d at 433, the Eleventh Circuit majority insisted that the Florida Supreme Court had applied *issue*-preclusion principles and had determined in *Douglas* that the *Engle* jury actually decided "that *all* cigarettes the defendants placed on the market were defective and unreasonably dangerous" when returning its strict-liability and negligence findings. *Graham*, 857 F.3d at 1182. The en banc majority found support for that conclusion in its own review of the *Engle* trial record. *See id.* at 1181

("After reviewing the *Engle* trial record, we are satisfied that the Florida Supreme Court determined that the *Engle* jury found the common elements of negligence and strict liability against Philip Morris and R.J. Reynolds."). The *Graham* court thus effectively circumvented the due-process issue by construing the *Engle* jury findings, as a factual matter, as applying to the conduct elements of *all* class members' defect and negligence claims.

In addition to stating that issue preclusion could constitutionally be applied because the *Engle* jury had actually decided the conduct elements of all progeny plaintiffs' defect and negligence claims, the en banc majority also stated that there were no constitutional barriers to giving full faith and credit to the "res judicata effect" of the defect and negligence findings, because "[t]he Due Process Clause requires only that the application of principles of res judicata by a state affords the parties notice and an opportunity to be heard." *Id.* at 1184. That standard was met, the en banc court concluded, because "[t]he tobacco companies were given an opportunity to be heard on the common theories in [the] year-long [Phase I] trial." *Id.* at 1185.

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

D. The Eleventh Circuit's Decisions in *Burkhart* and *Searcy*

In subsequent decisions, the Eleventh Circuit relied on its "opportunity to be heard" reasoning in *Graham*—which had involved only the *Engle* strict-liability and negligence claims—to reject the *Engle* defendants' due-process challenge to the preclusive effect of the concealment and conspiracy findings because the *Engle* defendants "had the opportunity to argue the conduct elements of the concealment and conspiracy claims brought against them" in Phase I of *Engle*. *See Searcy*, 902 F.3d at 1353; *Burkhart*, 884 F.3d at 1093.

As noted, the en banc majority in *Graham* concluded that the *Engle* jury had actually decided the conduct elements of all progeny plaintiffs' defect and negligence claims. In *Burkhart* and *Searcy*, in contrast, the Eleventh Circuit did not attempt to maintain that the *Engle* jury had actually decided the conduct elements of those plaintiffs' concealment and conspiracy claims. To the contrary, the *Searcy* court noted that "Plaintiff does not argue, or offer any evidence to support an argument, that the *Engle* jury necessarily based its finding of concealment against the tobacco company defendants on the defendants' conduct regarding the marketing of low-tar cigarettes," which was the plaintiff's concealment theory at trial in *Searcy*. 902 F.3d at 1352–53. "This being Plaintiff's position," the court explained, "we therefore have to assume that the *Engle* jury *did not* actually decide that question." *Id*. at 1353.

The *Searcy* court nonetheless held that under circuit precedent, that question had to be deemed conclusively resolved by *Engle*. In *Burkhart*, the court had

held that "the due process question" as to the plaintiff's concealment and conspiracy claims "depended upon an analysis of the defendant's opportunity to be heard in *Engle*." 884 F.3d at 1093. And *Burkhart* had rejected the due-process objection because "[a]s with the negligence and strict-liability claims, Appellants had the opportunity to argue the conduct elements of the concealment and conspiracy claims brought against them" in *Engle*. *Id*. The *Searcy* court thus concluded that it was bound to hold that "due process is satisfied so long as the defendants had notice and an opportunity to be heard on the claims at issue." 902 F.3d at 1353. Given *Burkhart*'s "categorical" holding, the court emphasized that *Burkhart* "ends any debate in this court as to whether the *Engle* jury findings related to the concealment claims are to be given preclusive effect. The answer is: they will." *Id*. at 1354.

E. Proceedings in This Case

Pursuant to the procedures established by the Florida Supreme Court in *Engle*, respondent brought this personal-injury action against petitioner to recover damages for her husband Franklin Johnston's death from lung cancer, which she claimed was caused by an addiction to smoking. R:561. Respondent alleged that her husband was a member of the *Engle* class and asserted claims for strict liability, negligence, fraudulent concealment, and conspiracy to fraudulently conceal. R:565–68.

At the end of respondent's case, petitioner moved for a directed verdict on all claims, contending that the application of the *Engle* findings to establish the conduct elements of respondent's claims violates petitioner's federal due process rights and that respondent

had not presented evidence sufficient to meet all the elements of her claims without the benefit of the *Engle* findings. R:10760–66. The trial court denied petitioner's motion. T.3339.

Petitioner also proposed jury instructions and a verdict form that would have required respondent to prove all the elements of her claims under Florida law without the use of the *Engle* findings. R:9902–24. But the trial court declined to give these proposed instructions and verdict form in light of *Douglas*, and instead instructed the jury that if respondent proved *Engle* class membership (*i.e.*, that Mr. Johnston was addicted to cigarettes containing nicotine and that his addiction was a legal cause of his lung cancer), respondent 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. T.3493–95.

The jury returned a verdict for respondent on all counts and awarded her $7.5 million in compensatory damages. T.3841–43. Following a second phase of trial, the jury awarded respondent $14 million in punitive damages. T.4127–28.

Petitioner appealed to the Florida Second District Court of Appeal and argued, among other things, that "the trial court violated the federal Due Process clause by permitting Plaintiff to use the *Engle* findings to establish the conduct elements of her claims." Initial Br. of Appellant Reynolds 40 (Sept. 5, 2017). Petitioner acknowledged that its federal due process argument was foreclosed by the Florida Supreme Court's decision in *Douglas*, but raised the argument to preserve it for further review. *Id.*

The Second District Court of Appeal affirmed the judgment of the trial court in a per curiam affirmance that did not contain any analysis or citation, *see* Pet. App. 1, and that therefore was not subject to review in the Florida Supreme Court, *see Fla. Star*, 530 So. 2d at 288 n.3.

REASONS FOR GRANTING THE PETITION

As explained in full in the petitions for writs of certiorari that were filed on November 19, 2018 in *R.J. Reynolds Tobacco Co. v. Searcy* and *Philip Morris USA Inc. v. Boatright*, the Florida state and federal courts are engaged in the serial deprivation of the *Engle* defendants' due process rights. The 250 *Engle* progeny cases that have been tried have already yielded judgments totaling more than $800 million, and more than 2,300 remain to be resolved. This Court is the only forum that can provide petitioner 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 *Searcy* and *Boatright*: whether due process allows plaintiffs to invoke the preclusive effect of the generalized *Engle* jury findings to establish elements of their individual claims without showing that the *Engle* jury actually decided those elements in their favor. The Court should therefore hold this petition pending the disposition of *Searcy* and *Boatright* 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 or that the allegedly false statements they or their decedents relied on were in fact false—without requiring the plaintiffs to establish that those issues were actually decided in their favor in Phase I of *Engle*. In so doing, *Douglas* permits progeny plaintiffs to deprive the *Engle* defendants of their property without 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 cigarettes her husband 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 petitioner's filtered cigarettes, or its unfiltered cigarettes, or in only some of its brands but not in others. For all we know, Mr. Johnston may have smoked a type of 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 ad-

vertisements and other statements by the tobacco industry on which Mr. Johnston 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 fraudulent concealment and conspiracy to fraudulently conceal claims rested. *Engle* Tr. 35955. And because the *Engle* verdict form asked whether the defendants had concealed, and conspired to conceal, material information about the "health effects" *or* "addictive nature" of smoking, *Douglas*, 110 So. 3d at 424, 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. Johnston's alleged reliance on statements about addictiveness 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 her husband smoked were defective and that the statements on which he allegedly relied were fraudulent—violates due process. *See*, *e.g.*, *Fayerweather*, 195 U.S. at 307 (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 which issues 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 an opportunity to be heard, so that it was capable of producing a constitutionally valid judgment precluding further litigation of the claim.

But respondent here *pursued* further litigation of the claims at issue in *Engle*. If claim preclusion applied based on the *Engle* findings, those findings would have precluded respondent's action. Instead, respondent pursued her action and obtained a multi-million-dollar judgment. No semantics can obscure that reality. And where a plaintiff wishes to continue—rather than bar—further litigation on a claim and seeks to preclude litigation on an issue relevant to that claim, an opportunity to be heard on the issue, no matter how extensive, is constitutionally meaningless absent an ascertainable decision after such hearing that makes it possible to determine that the issue was actually decided. In the circumstances here, 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 and clarified that their upholding of *Engle* preclusion rests on a constitutionally invalid basis, 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 *SEARCY* AND *BOATRIGHT*

The Court should hold this petition pending the resolution of the petitions for writs of certiorari in *R.J. Reynolds Tobacco Co. v. Searcy* and *Philip Morris USA Inc. v. Boatright*, filed on November 19, 2018.

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

Because this case raises the same due-process question that is directly at issue in *Searcy* and *Boatright*, the Court should follow that course here to ensure that this case is resolved in a consistent manner. If this Court grants certiorari in *Searcy* or *Boatright* 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 *Searcy* and *Boatright* and, if the 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 *Searcy* and *Boatright* and then dispose of this petition consistently with its action in those cases.

Respectfully submitted.

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