Nos. 17-415

In The Supreme Court of the United States

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

Petitioners,

v.

THERESA GRAHAM, AS PERSONAL REPRESENTATIVE
OF FAYE DALE GRAHAM,

Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit**

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

HUGH F. YOUNG, JR.
Product Liability
Advisory Council, Inc.
1850 Centennial Park Dr.
Suite 510
Reston, VA 20191
(703) 264-5300

ALAN E. UNTEREINER
Counsel of Record
Robbins, Russell, Englert,
Orseck, Untereiner &
Sauber LLP
1801 K Street, NW,
Suite 411
Washington, D.C. 20006
(202) 775-4500
auntereiner@robbinsrussell.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.................................... iii

INTEREST OF THE *AMICUS CURIAE*....................1

STATEMENT 2

INTRODUCTION AND SUMMARY OF ARGUMENT 6

ARGUMENT 10

I. THE ELEVENTH CIRCUIT'S DECISION ALLOWS WHOLESALE VIOLATIONS OF PETITIONERS' DUE PROCESS RIGHTS.........10

II. THE DUE PROCESS ISSUE IS IMPORTANT AND OFFERS A VALUABLE OPPORTUNITY TO CLARIFY THE LIMITS ON STATE-COURT AUTHORITY TO ABANDON TRADITIONAL SAFEGUARDS IN MASS LITIGATION......................................14

A. State And Federal Courts Are Making Increasing Use Of "Issues" Class Actions And Multi-Phase Proceedings To Adjudicate Common Issues In Mass Litigation 16

B. There Is A Substantial Need For Greater Guidance From This Court Concerning The Due Process Limits On Mass Litigation In The State Courts.......................18

TABLE OF CONTENTS—continued

Page

CONCLUSION 23

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases:

ACandS, Inc. v. *Godwin*,
667 A.2d 116 (Md. 1995)..16

Castano v. *American Tobacco Co.*,
84 F.3d 734 (5th Cir. 1996) 19

Cromwell v. *County of Sac*,
94 U.S. 351 (1878)...2, 3

DTD Enterprises, Inc. v. *Wells*,
558 U.S. 964 (2009) 22

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

Ex parte Flexible Prods. Co.,
915 So. 2d 34 (Ala. 2005) 16

Fayerweather v. *Ritch*,
195 U.S. 276 (1904)..8, 11

Fidelity Federal Bank & Trust v. *Kehoe*,
547 U.S. 1051 (2006)..14

FTC v. *Jantzen, Inc.*, 386 U.S. 228 (1967)................15

Gates v. *Rohm and Haas Co.*,
655 F.3d 255 (3d Cir. 2011) 17

Honda Motor Co. v. *Oberg*,
512 U.S. 415 (1994)..10, 11

Hovey v. *Elliott*, 167 U.S. 409 (1897) 11

TABLE OF AUTHORITIES—continued

Page(s)

McReynolds v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012) 17

Murray's Lessee v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856) 11

Parklane Hosiery Co. v. *Shore*, 439 U.S. 322 (1979) 3

Philip Morris USA, Inc. v. *Accord*, 552 U.S. 1239 (2008) 22

Philip Morris USA, Inc. v. *Douglas*, 110 So. 3d 419 (Fla. 2013) .... *passim*

Philip Morris USA Inc. v. *Scott*, 131 S. Ct. 3 (2010) 20, 21

Philip Morris USA v. *Williams*, 549 U.S. 346 (2007) 11

Scott v. *American Tobacco Co.*, 949 So. 2d 1266 (La. Ct. App. 2007) 16

State ex rel. Appalachian Power Co. v. *MacQueen*, 479 S.E.2d 300 (W. Va. 1996) 16

Taylor v. *Sturgell*, 553 U.S. 880 (2008) 19

United States v. *Armour & Co.*, 402 U.S. 673 (1971) 11

United States v. *Mitchell*, 463 U.S. 206 (1983) 14, 15

TABLE OF AUTHORITIES—continued

Page(s)

Wal-Mart Stores, Inc. v. *Dukes*,
131 S. Ct. 2541 (2011)....................................17, 19

Statutes and Rule:

28 U.S.C. § 1257(a)..10, 22

28 U.S.C. § 1332(d)..19

28 U.S.C. § 1738 5

28 U.S.C. § 2072 19

Fed. R. Civ. P. 23(c)(4)..17

Other Authorities and Materials:

AMERICAN LAW INSTITUTE PRINCIPLES OF THE
LAW OF AGGREGATE LITIGATION (2010) 17

Burch, *Constructing Issue Classes*,
101 VA. L. REV. 1855 (2015)................11, 12, 13, 17

Cabraser, *Life After* Amchem*: The Class Struggle Continues*, 31 LOY. L.A. L. REV. 373 (1998)...19

F. JAMES & G. HAZARD, JR., CIVIL PROCEDURE
(3d ed. 1985)..2, 3

Farleigh, *Splitting the Baby: Standardizing Issue Class Certification*,
64 VAND. L. REV. 1585 (2011) 17

Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567 (2004) 17

TABLE OF AUTHORITIES—continued

Page(s)

Lee & Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, Federal Judicial Center (2008) 19

Mulderig, Wharton & Cecil, *Tobacco Cases May Be Only the Tip of the Iceberg for Assaults on Privilege*, 67 DEF. COUNSEL J. 16 (2000)..21

Pet. for Certiorari, *Philip Morris USA, Inc.* v. *Accord*, No. 07-806, 2007 WL 4404253 (Dec. 17, 2007)...21, 22

RESTATEMENT (SECOND) OF JUDGMENTS (1982)......2, 3

S. Rep. No. 109-14 (2005)...................................19, 20

Thomas, *Constitutionalizing Class Certification*, 95 NEB. L. REV. 1024 (2017) 21

U.S. *Amicus* Brief, *DaimlerChrysler AG* v. *Bauman*, No. 11-965 (July 5, 2013) 14

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit corporation with 90 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers of a variety of products, including automobiles, trucks, aircraft, electronics, cigarettes, tires, chemicals, pharmaceuticals, and medical devices. A list of PLAC's corporate members is appended to this brief.

PLAC's primary purpose is to file *amicus curiae* briefs in cases that raise issues affecting the development of product liability litigation and have potential impact on PLAC's members. This is such a case. In the decision below, a divided Eleventh Circuit, sitting *en banc*, has definitively resolved how the federal courts in Florida must apply the novel form of preclusion originating in the Florida Supreme Court's unprecedented decision in *Engle* v. *Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). In the decade since *Engle*, the state and federal courts

---

[1] Written statements of consent from all parties to the filing of this brief have been lodged with the Clerk. Pursuant to S. Ct. Rule 37.2, PLAC states that all parties' counsel received timely notice of the intent to file this brief. Pursuant to S. Ct. Rule 37.6, *amicus* states that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission.

in Florida have struggled mightily to make sense of *Engle*'s vague and unprecedented directive regarding future "res judicata effects." Because PLAC's members are often named as defendants in mass litigation, they have a vital interest in ensuring that courts adhere to the traditional, time-tested, due process limitations on the use of preclusion – limits disregarded by the decision below as well as (in different but equally troubling ways) by decisions of the Florida Supreme Court.

STATEMENT

The petition for certiorari raises two important and recurring questions of federal constitutional law that affect literally thousands of pending state and federal lawsuits and billions of dollars of potential liability. This brief focuses on the due process issue. Further review is warranted to correct the Eleventh Circuit's deeply flawed decision and address the novel and manifestly unconstitutional rules of preclusion that have developed in the *Engle* progeny litigation.

1. The doctrine of res judicata "refers to the various ways in which a judgment in one action will have a binding effect in another." F. JAMES & G. HAZARD, JR., CIVIL PROCEDURE § 11.3, at 590 (3d ed. 1985) ("JAMES & HAZARD"). "Res judicata" comes in two forms: claim preclusion and issue preclusion. *Philip Morris USA, Inc.* v. *Douglas*, 110 So. 3d 419, 432-33 (Fla. 2013); JAMES & HAZARD, *supra*, § 11.3, at 590; RESTATEMENT (SECOND) OF JUDGMENTS §§ 17-19, 27 (1982) ("RESTATEMENT"). The distinctive characteristics – and quite different effects – of these two forms of preclusion have long been recognized. See, *e.g.*, *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-53

(1878) (discussing contours of both doctrines). See generally JAMES & HAZARD, *supra*, § 11.3, at 591 (effects of claim preclusion include "extinguish[ment]" of entire claim, "merger" of prevailing plaintiff's claim into the judgment, and limitation of plaintiff's rights "to proceedings for the enforcement of the judgment"); RESTATEMENT § 17(1) (same); *id.* at §§ 17(3), 27 (describing effects of issue preclusion). Whereas claim preclusion is deployed only defensively, issue preclusion may be used either defensively or offensively. See *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 329 (1979).

2. The petition sets forth in detail the relevant background to this case, including the extraordinary Phase I *Engle* jury trial and findings, the Florida Supreme Court's 2006 decision in *Engle*, the subsequent filing of thousands of state and federal lawsuits on behalf of individual plaintiffs who claimed to be part of the prospectively decertified *Engle* class, and the Florida Supreme Court's efforts to make sense of *Engle* in *Philip Morris USA, Inc.* v. *Douglas*. See Pet. 5-18; see also Pet. App. 9, 295, 306 (Phase I verdict form).

Although the issue- or claim-preclusive effect of a judgment is determined *not* by the court rendering the judgment but by the court in the *second* proceeding, the Florida Supreme Court in *Engle* declared that the jury's extremely generalized Phase I trial findings would have unspecified "res judicata effect" in all future cases by individual class members. *Engle*, 945 So. 2d at 1269. It also took the highly unorthodox steps of decertifying the massive class of Florida smokers *prospectively only*, and retrospectively certifying an "issues" class for the

matters covered by Phase I. The court justified these unprecedented rulings as a "pragmatic solution" that would allow as much of the *Engle* proceedings as possible to be preserved. *Ibid.*

3. Not surprisingly, the state and federal courts struggled to make sense of *Engle*'s unelaborated reference to the future "res judicata effect" of the Phase I findings. See Pet. 10-12. Finally, in 2013, the Florida Supreme Court addressed this issue in *Douglas*. The court acknowledged that, under Florida law, (a) *issue* preclusion requires proof that an issue was "actually decided" in the previous action, and (b) because of the extreme generality of the *Engle* findings, applying issue preclusion "would effectively make the Phase I findings * * * *useless* in individual actions." 110 So. 3d at 433, 435 (emphasis added).

Unwilling to allow such uselessness, the court proceeded to invent a new preclusion rule it claimed could be applied to "issue" class actions. The court first noted that the long-established "actually decided" requirement of issue preclusion has no bearing on *claim* preclusion. *Douglas*, 110 So. 3d at 433-35. It acknowledged that, ordinarily, a necessary prerequisite for *claim* preclusion – in Florida as in every other American jurisdiction – is the entry of a *final judgment on the merits* (*id.* at 433-34; see also *id.* at 438-39 (Canady, J., dissenting)), and that separation of an individual lawsuit into "liability and damages phases" would necessarily prevent the entry of such a judgment after only the liability stage so that claim preclusion *could not operate* at that point. *Id.* at 434. But "[w]hen class actions are certified to resolve less than

an entire cause of action," the court asserted, that traditional rule does not apply; instead, the decision in "the first trial on the common liability *issues* is entitled to" *claim*-preclusive effect "in the subsequent trial on individual issues," and even if the individual issues were not "actually decided" in the first proceeding. *Id.* at 434-35 (emphasis added). Beyond creating a form of claim preclusion that for the first time could be used offensively and without a final merits judgment, the court made no effort to explain how a valid claim preclusion rule could operate without *any* of that doctrine's traditional effects (extinguishment or merger of plaintiff's claim and limiting her rights to enforcement of the judgment).[2]

4. This case involves an *Engle* progeny lawsuit in the United States District Court for the Middle District of Florida. As has now become commonplace, plaintiff (respondent here) was allowed, over petitioners' due process objections, to use the abstract *Engle* Phase I findings to establish the tortious-conduct elements of her strict-liability and negligence claims. Pet. 15. The jury found for plaintiff on both those claims and awarded damages.

After the Eleventh Circuit panel reversed, the court of appeals granted rehearing *en banc*. Pet. App. 17, 311-359. A divided court, over several dissenting opinions, affirmed the judgment. Pet. App. 1-310. With respect to the due process issue, the majority first noted that it was required by the Full Faith and Credit Act, 28 U.S.C. § 1738, to give

---

[2] Justice Canady dissented, criticizing the majority's new preclusion rule as "a radical departure" from well-established Florida law. *Douglas*, 110 So. 3d at 439.

the same preclusive effect to a Florida court judgment as would the courts of that state, "subject to the requirements of the Due Process Clause." Pet. App. 18-19. But rather than enforce the Florida Supreme Court's conclusion in *Douglas* that the *Engle* Phase I findings were so general as to be "useless" in individual actions, or its adoption of a novel variant of claim preclusion, the Eleventh Circuit proceeded to give full faith and credit to an interpretation of *Engle* that was squarely at odds with *Douglas*. Thus, the majority concluded that the vague Phase I findings had in fact "actually decided" that *all* cigarettes are defective and that simply selling them is negligent. Pet. App. 19-28.

In dissent, Judge Tjoflat extensively reviewed the ever-shifting rationales and "layer upon layer of judicial error" committed by state and federal courts in their efforts to make sense of *Engle*'s "res judicata effect" pronouncement, and criticized the majority for approving "an unreasonable and arbitrary presumption of liability" that violates petitioners' due process rights. Pet. App. 48-49 (Tjoflat, J., dissenting); see also *id.* at 47 & n.7, 95, 112-269.

INTRODUCTION AND SUMMARY OF ARGUMENT

In Phase I of the sprawling *Engle* class-action trial, the jury was asked to decide whether petitioners R.J. Reynolds Tobacco Company and Philip Morris USA Inc. "place[d] cigarettes on the market that were defective and unreasonably dangerous." Pet. App. 295. Following a year-long trial, the jury answered "yes" to that abstract and highly generalized question but was never required to specify which of the many brands and types of

cigarettes sold by petitioners was defective, which of the many challenged features of those products rendered them defective, or when precisely (over a period of some four decades covered by the evidence) the defect(s) existed. The jury also answered "yes" to the highly generalized question whether, during that forty-year period, petitioners had ever "failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances," again without specifying how, when, or through what conduct, such negligence had occurred. Pet. App. 306.

Although the Florida Supreme Court ultimately decertified the massive and unwieldy class of hundreds of thousands of Florida smokers, it did so on a prospective basis only – and then proceeded to take the unorthodox steps of (a) retrospectively certifying an "issues" class for the matters covered in Phase I, and (b) declaring that the jury's extremely generalized Phase I findings would have unspecified "res judicata effect" in all future cases filed by individual class members. *Engle* v. *Liggett Group, Inc.*, 945 So. 2d 1246, 1269 (Fla. 2006). For the past eleven years, the federal and state courts in Florida have struggled to make sense of that highly unusual declaration, leaving a trail of conflicting decisions featuring sharply divergent interpretations and rationales. This Court's intervention is needed to prevent the wholesale violation of petitioners' due process rights in thousands of pending cases.

I. In this lawsuit, petitioners R.J. Reynolds and Philip Morris were barred from contesting core elements of respondent's claims for negligence and product defect, which were taken as having been

established by the highly generalized *Engle* Phase I findings. The Eleventh Circuit's decision to bless that troubling result is tantamount to an abandonment or nullification of the "actually decided" precondition for issue preclusion, because (as the Florida Supreme Court has ruled) there is simply no way to ascertain from those vague findings whether the *Engle* jury ever concluded that the products *at issue in this particular lawsuit* were either defective or negligently manufactured. Indeed, it is possible the *Engle* jury *rejected* the specific theories upon which respondent's claims rest.

To impose multimillion dollar (or any) liability under these circumstances is the quintessence of arbitrary, not to mention potentially inaccurate, decision-making. As petitioners have demonstrated, the "actually decided" requirement of issue preclusion is established by long and unbroken practice in American courts. As this Court has recognized, it is also required by the Due Process Clause. *Fayerweather* v. *Ritch*, 195 U.S. 276, 308-09 (1904).

The Eleventh Circuit's reasons for upholding issue preclusion in this setting do not withstand scrutiny. According to the *en banc* majority, it was obliged to give full faith and credit to the Phase I findings by according them the same preclusive effect as would the Florida courts. But the Florida Supreme Court has clearly said the Phase I findings are *useless* for issue preclusion because they are so vague it is impossible to tell what they actually decided regarding the liability elements of individual plaintiffs' claims. For that reason, the Florida

Supreme Court took the extraordinary step of creating for the state courts a novel and unrecognizable form of *claim* preclusion custom-made for the *Engle* findings.

But claim preclusion, as its name suggests, applies only where a claim has been precluded – that is, where it merges into a final merits judgment, barring further litigation on that claim entirely. In that circumstance, there is no need to inquire what issues were decided en route to reaching the valid judgment. But here no claim is being precluded; on the contrary, the plaintiff's claim *is being litigated*, and the question is whether preclusion applies to particular issues that are central to that claim. Far from solving the due process problem, the Florida Supreme Court's "solution" exacerbates it.

The wholesale due process violations (and egregious unfairness to petitioners) worked by the Eleventh Circuit's and Florida Supreme Court's handling of the preclusion issue was compounded, moreover, by those courts' make-it-up-as-you-go, serial innovations. These doctrinal somersaults have created dueling preclusion regimes in Florida state and federal courts that petitioners could scarcely have imagined at the time of the Phase I trial.

II. This Court's intervention is needed to bring clarity as well as to reverse erroneous precedents with (a) far-reaching direct effects on thousands of pending state and federal *Engle* progeny cases, (b) massive financial consequences for petitioners, and (c) application to countless other cases in Florida and across the country where plaintiffs undoubtedly will invoke Florida's novel preclusion approach (including in the growing number of "issues" class actions).

Rarely has this Court been asked to review lower-court decisions with greater practical impact on ongoing litigation or larger financial consequences.

Moreover, further review would also provide much-needed guidance to the state courts on the limits imposed by due process on their authority, in mass litigation, to restrict a civil defendant's fundamental right to defend against liability claims on grounds of "efficiency," "convenience," or "pragmatism." This issue has arisen with increasing regularity, including in a number of significant cases involving unpopular tobacco company defendants. Those cases often evade this Court's review because of limits on the Court's jurisdiction under 28 U.S.C. § 1257(a) and the pressures favoring settlement once a class is both certified and made subject to a novel procedure threatening a defendant's right to offer a full defense. This case is an excellent vehicle for providing the state courts with the needed due process guidance.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S DECISION ALLOWS WHOLESALE VIOLATIONS OF PETITIONERS' DUE PROCESS RIGHTS

The Due Process Clause of the Fourteenth Amendment requires state courts to provide litigants with adequate procedural safeguards and protections against "arbitrary and inaccurate adjudication." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994). The basic guarantee of due process in a civil trial is that a defendant will not be held liable (and deprived of property) without a meaningful opportunity to contest all elements of liability and raise all

affirmative defenses. See, *e.g.*, *Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007); *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971) (due process safeguards the "right to litigate the issues raised" in lawsuit); *Hovey* v. *Elliott*, 167 U.S. 409, 443 (1897) (recognizing "the inherent right of defense secured by the due process of law clause").

As this Court has long recognized, "traditional practice provides a touchstone for constitutional analysis." *Oberg*, 512 U.S. at 430; see also *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856). Adherence to time-tested methods of adjudication "protect[s] against arbitrary and inaccurate adjudication" and is the very essence of due process. *Oberg*, 512 U.S. at 430. Accordingly, the "abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that" the resulting "procedures violate the Due Process Clause." *Ibid*.

a. In *Fayerweather* v. *Ritch*, 195 U.S. 276 (1904), this Court made clear that "the plea of *res judicata* must fail" where preclusion is sought based on an earlier jury verdict that might rest on any of two or more grounds, but there is no way of telling on which ground it rested. *Id*. at 307. This traditional limitation on preclusion, the Court explained, was a requirement of due process. *Id*. at 308-09.

In *Douglas*, the Florida Supreme Court expressly recognized that, because of the extreme generality of the *Engle* findings, application of issue preclusion "would effectively make the Phase I findings * * * *useless* in individual actions." 110 So. 3d at 433 (emphasis added). See also Burch, *Constructing Issue Classes*, 101 VA. L. REV. 1855, 1901 (2015)

(*Engle* "provides a textbook example of the perils of imprecision"). In the decision below, however, the *en banc* majority reached the opposite conclusion, even while purporting to give "full faith and credit" to the Florida Supreme Court's views on the preclusive effect of the *Engle* findings. But the Florida Supreme Court actually held that Florida issue-preclusion law's "actually decided" requirement could *not* be satisfied by the *Engle* Phase I findings, which are too highly generalized to be of any use in individual lawsuits with respect to the elements of product defect and negligence. It is those conclusions to which full faith and credit should have been given, which would have required the *en banc* majority to turn to the question of the constitutionality of *Douglas*'s claim-preclusion rationale.

b. *Douglas*'s rationale is no more consistent with due process. In that case, the Florida Supreme Court concluded it could avoid the "actually decided" requirement and due process problem by declining to rely on *issue* preclusion and instead invoking *claim* preclusion. But as petitioners demonstrate (Pet. 24-26), that conclusion was flawed at every turn. The novel preclusion rule invented by the court in *Douglas* bears no resemblance to the traditional doctrine of *claim* preclusion as universally applied by Florida and other American jurisdictions. See pages 2-3, 4-5, *supra*.

c. The due process violation was compounded here by the Florida Supreme Court's (and Eleventh Circuit's) make-it-up-as-you-go, serial innovations, which together have created two different preclusion regimes for the state and federal courts, neither of which petitioners could have imagined at the time of

the Phase I trial. At that time, (1) Florida law would have treated the findings as qualifying at most for issue but not claim preclusion, and then only if an individual plaintiff demonstrated that the specific issue(s) on which preclusion was sought at the progeny trial had been actually decided by the *Engle* jury; (2) Florida law applied claim preclusion only to a judgment on the merits (which the Phase I verdict assuredly was not); (3) Florida claim preclusion had the effect of extinguishing plaintiff's entire claim and merging it into the judgment, not an effect indistinguishable from that of issue preclusion; (4) there was no special rule of issue or claim preclusion for "issues" class actions; (5) *Engle* itself was not even an "issues" class action but something broader (the "issues" class was created retroactively);[3] and (6) whether a judgment or findings had preclusive effect was something the subsequent court, not the issuing court, decided. These were the traditional "res judicata" ground rules that petitioners were dealing with when the *Engle* Phase I trial took place.

Those time-tested ground rules are light-years removed from the novel regimes created after-the-fact by the Eleventh Circuit and Florida Supreme Court in conferring preclusive effects on the *Engle* Phase I findings. Petitioners could not possibly have anticipated that, as a consequence of the decision below, in future *federal* lawsuits courts would be required to give "full faith and credit" to the issue-preclusive effect of Phase I findings that the Florida Supreme Court had declared were "useless" for that

---

[3] See also Burch, *supra*, 101 VA. L. REV. at 1901 ("[T]he initial trial court [in *Engle*] never intended to conduct an issue class, so the class-wide findings were imprecise").

purpose. Equally unforeseeable was the unprecedented version of *claim* preclusion adopted by the Florida Supreme Court. No amount of foresight would have allowed petitioners, at the time of the *Engle* Phase I trial, to foresee the creation of these novel preclusion rules that depart in so many ways from traditional limitations and restraints. See U.S. *Amicus* Brief, *DaimlerChrysler AG* v. *Bauman*, No. 11-965, at 26-28 (July 5, 2013) (Due Process Clause requires non-arbitrariness as well as "fair warning" of attribution rules for measuring minimum contacts with forum).

II. THE DUE PROCESS ISSUE IS IMPORTANT AND OFFERS A VALUABLE OPPORTUNITY TO CLARIFY THE LIMITS ON STATE-COURT AUTHORITY TO ABANDON TRADITIONAL SAFEGUARDS IN MASS LITIGATION

As petitioners point out (Pet. 2, 19), the due process issue presented in this case has a direct bearing on thousands of *Engle* progeny cases currently pending in the lower courts. Billions of dollars in potential liability are at stake in that litigation tsunami. Under this Court's traditional approach, these undisputed facts are more than enough to demonstrate that the due process issue presented here is sufficiently important and recurring to warrant this Court's attention.[4]

---

[4] See, *e.g.*, *Fidelity Federal Bank & Trust* v. *Kehoe*, 547 U.S. 1051 (2006) (Scalia, J., joined by Alito, J., concurring in the denial of certiorari) (noting that "enormous potential liability" is "a strong factor in deciding whether to grant certiorari"); *United States* v. *Mitchell*, 463 U.S. 206, 211 & n.7 (1983) (granted issue was "of substantial importance" because it

Review is also warranted because the importance of this case extends beyond even the *Engle* progeny cases. In *Douglas*, the Florida Supreme Court has committed one of the largest states to an unprecedented new doctrine of "claim" preclusion that presumably applies – even in the absence of any final judgment on the merits, up until now a necessary prerequisite for claim preclusion – to all "issues" class actions in the Florida state courts. And in the decision below, the Eleventh Circuit has allowed core elements of tort liability to be established in individual cases based on highly generalized jury findings that did not ascertainably establish that the jury actually decided those issues.

If this Court declines to intervene, it is entirely predictable that the well-organized plaintiffs' class-action bar will attempt to extend these decisions and spread the "lessons" of *Engle* to other jurisdictions and categories of cases. The Eleventh Circuit's decision will also encourage the use of broadly worded questions in issues class actions that later courts may be persuaded to interpret as having decided matters that they did not. And the Florida courts predictably will become a magnet for "issues" class actions that can be leveraged, through the novel *claim* preclusion doctrine adopted in *Douglas*, into "judgments" (and, of course, settlements) obtainable without the need for plaintiffs to prove every element of their claims.

---

involved more than $100 million of potential government liability); *FTC* v. *Jantzen, Inc.*, 386 U.S. 228, 229 (1967) (taking note of almost 400 pending administrative orders like the one challenged).

A. State And Federal Courts Are Making Increasing Use Of "Issues" Class Actions And Multi-Phase Proceedings To Adjudicate Common Issues In Mass Litigation

The Florida Supreme Court's decision in *Engle* to decertify a class action, retroactively certify an "issues" class action, and make pronouncements about the future "res judicata effect" of the Phase I jury's findings was unprecedented. But *Engle* is only one of a number of class actions in recent years that have employed a segmented, multi-phased trial plan – including an initial phase directed toward resolving highly generalized liability issues – to adjudicate many thousands of individual claims. Indeed, there is a growing trend to attempt mass tort aggregation through generic trial proceedings involving disparate claims relating to similar products.[5]

What is more, in recent years there has been a marked increase in "issues" class actions dedicated to resolving one or more issues – often highly

[5] See, *e.g.*, *Scott* v. *American Tobacco Co.*, 949 So. 2d 1266, 1271-72 (La. Ct. App. 2007) (smokers' class action); *Ex parte Flexible Prods. Co.*, 915 So. 2d 34, 38, 40-43 (Ala. 2005) (approving plan for generic product liability trial in 1600 consolidated cases involving chemical used in industrial applications); *State ex rel. Appalachian Power Co.* v. *MacQueen*, 479 S.E.2d 300, 304-05 (W. Va. 1996) (approving plan to consolidate thousands of asbestos claims into two-phase trial, with first phase to adjudicate general negligence questions); *ACandS, Inc.* v. *Godwin*, 667 A.2d 116, 343-46, 392-404 (Md. 1995) (approving four-phase plan including determination of negligence and strict liability of six asbestos defendants and then application of those general findings to individual claims by 8,549 plaintiffs).

generalized or abstract in nature – on an aggregate basis. See generally Burch, *supra*, 101 VA. L. REV. at 1857 (issues classes are "experiencing a renaissance"); Farleigh, *Splitting the Baby: Standardizing Issue Class Certification*, 64 VAND. L. REV. 1585, 1595-1602 (2011) (describing emergence of "issues" class actions beginning in late 1980s and their increasing acceptance by courts); Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567, 582-86 (2004) (same); *id.* at 586 ("District courts everywhere are inundated with requests for certification of issue class actions [under Fed. R. Civ. P. 23(c)(4)] as an alternative option to (b)(3) class actions * * * .").

This trend has continued in recent years, spurred in part by (a) publication of the American Law Institute's PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §§ 2.02-2.05 (2010) ("PRINCIPLES"), which endorses the use of "issues" class actions under certain circumstances, see *Gates* v. *Rohm and Haas Co.*, 655 F.3d 255, 273 (3d Cir. 2011), and (b) renewed efforts of plaintiffs' class counsel, in the aftermath of *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), to use "issues" class actions as a way to ensure class certification is not defeated because of the absence of commonality or predominance over all elements of class members' claims. See, *e.g.*, *McReynolds* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 487-91 (7th Cir. 2012) (upholding certification of "issues" class action regarding whether two employment policies were unlawful under disparate impact theory).

The novel preclusion rules created for the *Engle* progeny cases will only spur the plaintiffs' bar to

bring *more* "issues" class actions, not just in Florida but in all other jurisdictions. In every "issues" class action, the question potentially arises of what preclusive effect will be given in subsequent proceedings to the jury's findings on the certified issues. The Eleventh Circuit's and Florida Supreme Court's flawed answers to that question ensure that a defendant may be held liable based on vague answers to highly abstract liability questions without individual plaintiffs ever having had to actually prove every element of their claims. Review here will clarify the due process limits on preclusion, especially in the increasingly important setting of "issues" class actions.

B. There Is A Substantial Need For Greater Guidance From This Court Concerning The Due Process Limits On Mass Litigation In The State Courts

Further review would also provide much-needed guidance concerning the due process limits on the authority of state courts to abandon traditional procedural safeguards in mass litigation in the name of efficiency, practicality, or convenience. In *Engle*, the Florida Supreme Court justified its highly unorthodox decisions to retroactively certify an "issues" class action and make declarations about the future "res judicata effect" of the Phase I findings as a "pragmatic solution" that preserved as much of *Engle* as possible. 945 So. 2d at 1269. Similarly, in *Douglas*, the court justified its novel rule of "claim" preclusion partly on the ground that the rule preserved a significant effect for both the Phase I findings and the court's prior decision in *Engle*. 110 So. 3d at 433.

In recent decades, there has been a substantial increase in large class actions and other forms of mass litigation involving product liability, consumer fraud, and other tort claims, including in the state courts. See Lee & Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, Federal Judicial Center, at 1 (2008) (noting 72% increase in class-action activity between 2001 and 2007); Cabraser, *Life After* Amchem*: The Class Struggle Continues*, 31 LOY. L.A. L. REV. 373, 386 (1998) ("It is no secret that class actions – formerly the province of federal diversity jurisdiction – are being brought increasingly in the state courts."). Over the years, this Court (and the lower federal courts) have taken some meaningful steps to safeguard the fundamental fairness of mass litigation in the *federal* courts, primarily through the interpretation of Rule 23 and other federal rules and statutes that embody due process safeguards. See, *e.g.*, *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011); *Taylor* v. *Sturgell*, 553 U.S. 880 (2008); *Castano* v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (decertifying smokers' class action).

In contrast, the *state* courts – which lack the uniform protections of Federal Rule 23 and statutes such as the Rules Enabling Act, 28 U.S.C. § 2072 – have been particularly fertile ground for class actions that deviate from traditional modes of adjudication. Indeed, in enacting the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), Congress specifically noted the precipitous increase in class actions filed in state courts in which "the governing rules are applied inconsistently[,] * * * frequently in a manner that contravenes basic fairness and due process considerations." S. Rep. No. 109-14, at 4 (2005); see

also *id.* at 14 (same). As Congress correctly recognized, the *state* courts have been far less solicitous of traditional due process safeguards in mass tort cases – and far more willing to cut corners and jettison traditional protections enjoyed by defendants in the name of "efficiency," "convenience," or "pragmatism."

Douglas and *Engle* provide a textbook illustration. *Engle* represents perhaps the most radical use of an "issues" class action to date (not only in its *retroactive* certification but also its willingness to certify issues of stunning breadth and generality). And, in *Douglas*, the Florida Supreme Court added another round of radical innovation to *Engle*'s novel declaration of *prospective* "res judicata" effects by creating an unprecedented and unrecognizable doctrine of "claim" preclusion that lacks many of the traditional *attributes* of claim preclusion, may be invoked offensively, and operates *without the traditional prerequisite* of a prior judgment on the merits.

Unfortunately, the Florida courts' willingness to deprive a civil defendant of the right to insist on proof of every element of a claim because of the practicalities of aggregate litigation is hardly an isolated occurrence. It is reminiscent, for example, of the Louisiana courts' decision (in another long-running case involving unpopular tobacco defendants) to "eliminate[] any need for [plaintiffs] to prove, and den[y] any opportunity for [defendants] to contest," the traditional element of individualized reliance in a fraud claim on the ground that individual plaintiffs' claims "were aggregated with others' through the procedural device of the class

action." *Philip Morris USA Inc.* v. *Scott*, 131 S. Ct. 1, 3-4 (2010) (Scalia, J., in chambers). See also Thomas, *Constitutionalizing Class Certification*, 95 NEB. L. REV. 1024, 1036-41 (2017) (discussing several more recent examples of this phenomenon in class actions in the Montana and Pennsylvania courts). As Justice Scalia explained in *Scott*, "[t]he extent to which class treatment may constitutionally reduce the normal requirements of due process is an important question." 131 S. Ct. at 4. A grant of review in this case would allow the Court to provide needed guidance on the due process limits on such procedural "innovations" in mass litigation in the state courts.

Finally, as this Court is no doubt aware, tobacco companies frequently are on the receiving end of dramatic state-court departures from settled practice in mass litigation. In this regard, *Engle* (and *Scott*) are hardly outliers. See also, *e.g.*, Mulderig, Wharton & Cecil, *Tobacco Cases May Be Only the Tip of the Iceberg for Assaults on Privilege*, 67 DEF. COUNSEL J. 16, 19-23 (2000) (explaining that Minnesota trial court, in response to sheer number of documents whose privileged status was disputed by plaintiffs, abandoned traditional safeguard of document-by-document review and instead used unprecedented mass categorization procedure that yielded demonstrably inconsistent privilege rulings); Pet. for Cert., *Philip Morris USA, Inc.* v. *Accord*, No. 07-806, 2007 WL 4404253 (Dec. 17, 2007) (challenging as barred by due process West Virginia courts' use of "reverse bifurcation" in consolidated mass tort trial, whereby a defendant's liability for *punitive* damages to hundreds of plaintiffs is adjudicated, based entirely on aggregate proof, prior

to any finding of compensatory liability to even a single plaintiff) (see 552 U.S. 1239 (2008) (order denying review)). The list goes on and on.

Many of these state-court rulings, however, evade this Court's review because of either the tremendous pressure they create to settle or because of limits on the Court's jurisdiction. See 28 U.S.C. § 1257(a); see also *DTD Enterprises, Inc.* v. *Wells*, 558 U.S. 964, 964-65 (2009) (statement of Kennedy, J., joined by Roberts, C.J. and Sotomayor, J., respecting denial of certiorari) (although petition raised "a serious due process issue" concerning whether defendant in New Jersey class action could be forced to bear the cost of class notification "without any consideration of the underlying merits of the suit," review should be denied because "the petition is interlocutory" and "would * * * require [us] to construe New Jersey law without the aid of a reasoned state appellate court decision"). This case, in contrast, is an excellent vehicle – and this Court has given the lower courts every opportunity to clean up the mess. Additional guidance from this Court would greatly assist the state courts in evaluating when departures from traditional safeguards in mass tort and other complex litigation are constitutionally permissible.

* * *

The decision below – and the Florida Supreme Court's decisions in *Engle* and *Douglas* – are of grave concern to all of PLAC's members. Although this Court has previously denied petitions raising the significant due process issue presented here, that was before the Eleventh Circuit *en banc* panel provided its final word on the matter. Only this Court can now prevent the flagrant due process

violations from occurring in thousands upon thousands of pending state and federal lawsuits, and in similar mass proceedings that are sure to follow.

CONCLUSION

For the foregoing reasons, and those set forth in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

HUGH F. YOUNG, JR.
Product Liability Advisory Council, Inc.
1850 Centennial Park Dr. Suite 510
Reston, VA 20191
(703) 264-5300

ALAN E. UNTEREINER
Counsel of Record
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, NW, Suite 411
Washington, D.C. 20006
(202) 775-4500
auntereiner@robbinsrussell.com

October 19, 2017

APPENDIX

PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
LIST OF CORPORATE MEMBERS

3M
Altec, Inc.
Altria Client Services Inc.
Astec Industries
Bayer Corporation
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
The Boeing Company
Bombadier Recreational Products, Inc.
Boston Scientific Corporation
Bridgestone Americas, Inc.
Bristol-Myers Squibb Corporation
C.R. Bard, Inc.
Caterpillar Inc.
CC Industries, Inc.
Celgene Corporation
Chevron Corporation
Cirrus Design Corporation
Continental Tire the Americas LLC
Cooper Tire & Rubber Company
Cordis Corporation
Crane Co.
Crown Equipment Corporation
Daimler Trucks North America LLC
Deere & Company
Delphi Automotive Systems
The Dow Chemical Company
E.I. duPont de Nemours and Company
Emerson Electric Co.

Exxon Mobil Corporation
FCA US LLC
Ford Motor Company
Fresenius Kabi USA, LLC
General Motors LLC
Georgia-Pacific LLC
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Hankook Tire America Corp.
Harley-Davidson Motor Company
The Home Depot
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works Inc.
Intuitive Surgical, Inc.
Isuzu North America Corporation
Jaguar Land Rover North America, LLC
Johnson & Johnson
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Kubota Tractor Corporation
Lincoln Electric Company
Magna International Inc.
Mazak Corporation
Mazda Motor of America, Inc.
Medtronic, Inc.
Merck & Co., Inc.
Meritor WABCO
Michelin North America, Inc.
Microsoft Corporation
Mitsubishi Motors North America, Inc.
Mueller Water Products
Newell Brands Inc.

Novartis Pharmaceuticals Corporation
Novo Nordisk, Inc.
Pella Corporation
Pfizer Inc.
Polaris Industries, Inc.
Porsche Cars North America, Inc.
RJ Reynolds Tobacco Company
Robert Bosch LLC
The Sherwin-Williams Company
Sony Electronics Inc.
Stryker Corporation
Subaru of America, Inc.
TAMCO Building Products, Inc.
Teleflex Incorporated
Toyota Motor Sales, USA, Inc.
Trinity Industries, Inc.
The Viking Corporation
Volkswagen Group of America, Inc.
Volvo Cars of North America, Inc.
Wal-Mart Stores, Inc.
Western Digital Corporation
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
ZF TRW