No. 13-191

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondent.

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

REPLY BRIEF FOR PETITIONERS PHILIP MORRIS USA INC. AND LIGGETT GROUP LLC

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONERS PHILIP MORRIS USA INC. AND LIGGETT GROUP LLC

The Supreme Court of Florida has adopted an unheard-of rule of offensive "*claim* preclusion," which conclusively deems key elements of a plaintiff's case established regardless of whether *any* jury has ever found them. It is sufficient, in that court's view, that the relevant facts "*might have been*" found by an earlier issues-class jury. The upshot of Florida's new rule is that issues-class members can obtain petitioners' property without ever persuading any factfinder that a tort was committed as to them.

Respondent ignores what the Florida Supreme Court actually held, presumably lacking any way of defending it. Instead, he urges waiver, an argument that court necessarily rejected when it reached the merits. Respondent also insists that the Florida Supreme Court did not need to announce its novel preclusion doctrine, because the *Engle* jury supposedly decided only common questions directly relevant to each class member. Yet the court below did not think its rule unnecessary; to the contrary, it expressly recognized that the *Engle* jury's findings would be "*useless* in individual actions" if the traditional "actually decided" requirement were applied. Pet. App. 26a (emphasis added). That concession, which respondent does not acknowledge even once, is fatal to his claim that the result below is consistent with longstanding rules of preclusion.

Respondent also asserts that state and federal courts in Florida are unanimous, and that this Court previously declined to hear our due process challenge seven times. This is Ponzi-scheme accounting.

Those petitions arose from intermediate state court decisions that predated the Supreme Court of Florida's authoritative ruling here—and all but one were considered in a single conference. As for "unanimity," the state courts ruled against petitioners under the perceived compulsion of *Engle*—even as several expressed misgivings about the due process implications of their rulings. And, more recently, the Eleventh Circuit concluded that it "lack[s] the power" to decide the constitutional issue independently because 28 U.S.C. § 1738 "require[s] that [it] give full faith and credit to the decision" below. *Walker v. R.J. Reynolds Tobacco Co.*, 2013 WL 4767017, at *7 (11th Cir. Sept. 6, 2013). This hands-off attitude heightens, rather than lessens, the need for this Court's review.

Respondent is also wrong to claim that the question presented "has no significance beyond the parties to this case." Opp. 25, 29. The Florida Supreme Court adopted an extreme and unprecedented rule of preclusion, which will apply to *thousands* of pending *Engle* cases—representing *billions* of dollars in potential liability—*and* to all future issues classes in the State. This case therefore implicates an unusually large number of the reasons that, even in isolation, have justified this Court's review. *See*, *e.g.*, *Richards v. Jefferson County*, 517 U.S. 793, 797 (1996) (extreme application of preclusion); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420-21 (1994) (departure from common-law protections; issue limited to a single State); *FTC v. Jantzen, Inc.*, 386 U.S. 228, 229 (1967) (hundreds of cases affected); Eugene Gressman et al., SUPREME COURT PRACTICE 269 (9th ed. 2009) (citing cases) (large financial stakes).

I. THE FLORIDA SUPREME COURT'S DECISION REPRESENTS A RADICAL DEPARTURE FROM SETTLED PRECLUSION PRINCIPLES.

Respondent proffers a series of purported barriers to this Court's review. But neither those supposed procedural obstacles, nor respondent's feeble defense of the merits of the Florida Supreme Court's decision, withstands scrutiny.

A. "Common Issues"

1. Respondent contends that "this case is an inappropriate vehicle for the resolution of" the question presented because *Engle* supposedly resolved "factual issues of class-wide import." Opp. 21, 23. But the Florida Supreme Court did *not* accept that, as a factual matter, *Engle* decided only issues that apply to each and every class member. Nor could it have. The *Engle* jury was asked if petitioners *ever* produced a defective product and if petitioners *ever* were negligent. Its affirmative answers cannot be read to say that *every* cigarette petitioners produced was defective or negligently made.

There can be no serious dispute about this. As the Eleventh Circuit recognized in *Brown*, there is "nothing in the [*Engle*] record, and there is certainly nothing in the jury findings themselves, to support [the] factual assertion" that the "jury's finding must mean that all cigarettes the defendants sold were defective." *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1335 (11th Cir. 2010). In fact, the Florida Supreme Court conceded here—as class counsel had conceded in *Engle*—that the class advanced not only a global theory that might apply to all cigarettes but also brand-specific theories that could not possibly benefit all class members. Pet. 6, 11-12. The

court adopted its novel claim-preclusion theory precisely because it recognized that *no one can tell* which of these theories the *Engle* jury chose. If identifying the actual grounds for decision were required, *Engle* would be "useless in individual actions." Pet. App. 26a.

To be sure, the principal *effect* of the preclusion analysis below is that *Engle* is now to be treated *as if* it had decided liability on a common basis. The point of the "res judicata" analysis is to "allow[] members of the decertified class to pick up litigation" with "common liability . . . established." Pet. App. 24a. But this presumption of liability is why the decision below is arbitrary, not a reflection of any "common issue" that *Engle* actually found. *Engle* itself repeatedly emphasized that the verdict "did not constitute a 'finding of liability'" and "'did *not* determine whether the defendants were liable to anyone.'" *Id.* at 86a.[1]

2. None of defendants' representations to the *Engle* trial court was inconsistent with their current position in this Court. For example, their statement that, "'if the jury answers 'no . . . then not a single Florida smoker can recover,'" Opp. 22 (quoting *Engle* Tr. 26007), simply reflects the fact that a "no" re-

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[1] For these reasons, the Eleventh Circuit was wrong to suggest that the decision below examined the record, as required by *Fayerweather*, and determined as a "question of fact" that *Engle* "actually decided" only common issues. *Walker*, 2013 WL 4767017, at *10. The Florida Supreme Court rejected *Fayerweather* as irrelevant to "claim preclusion" (Pet. App. 30a-31a), and left no doubt that all class members get the benefit of preclusion without "trot[ting] out" the record for review. *Id.* at 26a. Indeed, the court emphasized the "specific importance to this case" of the fact "that claim preclusion, unlike issue preclusion, has no 'actually decided' requirement." *Id.* at 30a.

sponse to a verdict-form question would necessarily establish that the jury had rejected all of the class's alternative theories of liability. Nor did the defendants ever suggest to the *Engle* trial court that the "jury's verdict will enable 'other class members, however many thousands or hundreds of thousands it may be . . . [to] recover.'" *Id.* (quoting *Engle* Tr. 388878, 38896-97). Respondent manufactures that assertion by appending the word "recover"—uttered by one of the defendants' counsel at the end of his opening statement—to a wholly unrelated statement nineteen pages earlier. *See Engle* Tr. 38878.

3. Finally, respondent suggests that our position "ignores the Due Process rights of *Engle* class members." Opp. 5. But where, as here, a plaintiff cannot establish that specific facts were decided in his favor by a former adjudication, the default rule in our system is that he must prove each element of his claim. Undoubtedly, it would help plaintiffs if essential elements of their claims were deemed established by dint of mere assertion, or if defendants were precluded from interposing a defense before their property is taken. But it would be difficult to describe that regime as "fair." There is no "Due Process right[]" to help oneself to another person's property.

B. "Waiver"

Respondent also asserts that petitioners "waived" their right to challenge the expansive preclusive effect that the courts below afforded the *Engle* findings by failing to "submit[] a proper jury verdict form." Opp. 23. Although respondent argued waiver below (Fla. S. Ct. Br. 29), that argument was *not* adopted (or even mentioned) by the Florida Supreme Court, which decided the merits of the due process issue raised here. Because an alleged waiver

will bar this Court's review only when the state court "actually . . . relied on [it] as an independent basis for its disposition," *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985), respondent's waiver argument is frivolous. *See also Walker*, 2013 WL 4767017, at *3 (describing petitioners' detailed objections).

Respondent's waiver argument is also wrong on its own terms. This case is not an appeal challenging the legal adequacy of the verdict form in *Engle*; it is about the preclusive effect of that verdict in subsequent litigation. Because the burden of establishing preclusion is always on the party who asserts it, it was incumbent upon class counsel—not the *Engle* defendants—to propose a verdict form that would be useful to them in meeting that burden. Respondent cites no case for the extraordinary proposition that defendants are legally obligated to ensure that verdicts are specific enough to aid their opponents in future litigation.

C. "Opportunity To Be Heard"

Respondent contends that the Florida Supreme Court's decision to jettison the "actually decided" requirement was not an "extreme application[] of the doctrine of res judicata," *Richards*, 517 U.S. at 797, because petitioners purportedly had "a full and fair opportunity to be heard" in *Engle*. That claim is wrong for two reasons.

First, it is the instant case in which petitioners' property is to be taken, and the preclusion ruling clearly deprived them of an opportunity to litigate the most essential elements of respondent's claim here. Second, the due process right is not merely to a "hearing" but to a *decision*; an opportunity to be heard is meaningless if liability is ultimately im-

posed on the basis of facts *no* fact-finder necessarily found to be true. The traditional rule of preclusion does not turn on whether hearings were provided, but on whether a particular issue was *actually decided* at the conclusion of those hearings. Pet. 30-31. Indeed, far from establishing that petitioners have been afforded due process, the length of Phase I of *Engle*—the "57,000 pages of testimony, 150 witnesses, and thousands of exhibits" generated over the course of one year (Opp. 31)—underscores the complexity of that proceeding and the impossibility of determining which of the multiple, alternative theories of tortious conduct asserted by the class were actually found by the Phase I jury.

Contrary to respondent's assertion, *Fayerweather v. Ritch*, 195 U.S. 276 (1904), provides no support for his claim that a "full and fair opportunity to litigate a particular claim" is sufficient to give a prior jury's general verdict preclusive effect on every issue that might have been decided by that jury. Opp. 34. The Court's holding that due process requires not only an opportunity to be heard but also an actual decision could not have been clearer: Where "testimony was offered at the prior trial upon several distinct issues, the decision of any one of which would justify the verdict or judgment, . . . the plea of *res judicata* must fail." 195 U.S. at 307.

Respondent strains to read *Fayerweather* for the opposite conclusion, urging that an "examination of the record" is not necessary before a judgment will be deemed to preclude "all claims." Opp. 34. But the Court in *Fayerweather* undertook just such "an examination of the record" to decide whether the relevant question "was actually determined." 195 U.S. at 307. Respondent questions the necessity of this

analysis based on the *Fayerweather* Court's refusal to consider testimony from the state court trial judge, Opp. 34, but that was an evidentiary ruling on the competency of the judge as a witness, not a statement of preclusion principles. *See Fayerweather*, 195 U.S. at 306-07 (testimony "was obviously incompetent"); *see also* Fed. R. Evid. 605.

Here, the Florida Supreme Court acknowledged that the type of evidentiary examination undertaken in *Fayerweather*—together with application of the "actually decided" requirement—would render the Phase I findings "useless in individual actions." Pet. App. 26a. Precisely for that reason, it developed a new rule of offensive "claim preclusion" that presumes that the class won on all issues "which *might* . . . *have* been" decided in its favor in the class phase. *Id.* at 25a (emphases added). It would be difficult to conceive of a clearer end-run around this Court's preclusion precedent or a more abrupt departure from "the basic procedural protections of the common law" to which those decisions give effect. *Honda Motor Co.*, 512 U.S. at 430. Yet this key aspect of the decision goes undefended and unmentioned by respondent.

D. "Unanimous Opinions"

1. Respondent is also wrong to tout the purported "unanimity of opinion in the Florida courts" on the question presented. Opp. 19. No "unanimity" exists on the question whether verdicts in issues class actions are preclusive on every issue that "might . . . have been" decided by the jury. Pet. App. 25a. The Florida Supreme Court's decision in this case is the *only* decision ever to have endorsed that remarkable proposition, and it conflicts with an unbroken line of federal and state authority establishing that preclu-

sion is appropriate only when the relevant question was "*actually* decided." *See* Pet. 21 & n.3.

Even within the confines of the *Engle* progeny litigation, respondent overstates the significance of this supposed "unanimity." Before the decision below discovered a heretofore-unknown doctrine of offensive "claim preclusion," *every* appellate court in Florida had concluded that the preclusive effect of the findings is governed by *issue* preclusion. *See*, *e.g.*, *Brown*, 611 F.3d at 1333 & n.7; *R.J. Reynolds Tobacco Co. v. J.L. Brown*, 70 So. 3d 707, 715 (Fla. Dist. Ct. App. 2011). The state courts rejected petitioners' objections to preclusion because they viewed themselves bound by *Engle*'s "res judicata" directive—even as several expressed misgivings about the due process implications of their rulings. *J.L. Brown*, 70 So. 3d at 716; *id.* at 720 (May, C.J., concurring).

Similarly, although a federal court in Florida long ago concluded that granting preclusive effect to *Engle* violates due process, *Brown v. R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328, 1342 (M.D. Fla. 2008), *vacated on other grounds*, 611 F.3d 1324, the Eleventh Circuit has now concluded that federal courts "lack the power" even to examine that constitutional question independently; they must instead defer to the decision below under the Full Faith and Credit Act—even if that decision is "unorthodox and inconsistent with the federal common law." *Walker*, 2013 WL 4767017, at *8, 10.

If anything, these decisions highlight the compelling need for this Court's intervention, rather than any "unanimity" on the merits of the due process question. If, on the one hand, state courts are hierarchically bound by *Engle* and the decision below

and, on the other, federal courts will not be permitted by the Eleventh Circuit to address the constitutional issue independently, then only this Court can now correct the profoundly unconstitutional path on which the Florida Supreme Court has placed the judicial system of an entire State of the Union.

2. The fact that this Court previously denied review in *Engle* itself—and in two sets of *Engle* progeny cases (five petitions considered together in March 2012 and another in November 2012)—is no reason to deny review here. Opp. 18-19. Far from "chang[ing] nothing," *id.* at 19, the decision below eliminates the possibility that state law will be found to provide protections that parallel those traditionally afforded by the common law, and thus any possibility that the federal question can be avoided on non-constitutional grounds.

Indeed, the respondents opposing the 2012 petitions argued that review was premature absent guidance from Florida's highest court, and asserted that forgoing review then would "not preclude consideration of a future petition" after such guidance. *See*, *e.g.*, Opp. 22, *R.J. Reynolds Tobacco Co. v. Martin*, 132 S. Ct. 1794 (2012) (No. 11-754), 2012 WL 642516. Now that Florida's highest court has embraced a sweeping and unprecedented rule of offensive "claim preclusion" as a matter of state law—and has expressly considered and rejected petitioners' due process objections to that rule—the federal constitutional question is squarely and unavoidably presented, and is ripe for this Court's review.

II. THE FLORIDA SUPREME COURT'S DECISION HAS PROFOUND IMPLICATIONS BOTH FOR THOUSANDS OF PENDING PROGENY CASES AND FOR FUTURE ISSUES CLASS ACTIONS.

Respondent contends that review is not warranted because "[t]his case has no significance beyond the parties." Opp. 30. That contention is meritless.

The Florida Supreme Court's decision is directly controlling in thousands of *Engle* progeny cases—collectively exposing defendants to *billions* of dollars in potential liability—currently pending in the Florida state courts. The decision therefore affects a substantial portion of the docket in one of the Nation's largest States; and, if allowed to stand, will result in an ongoing constitutional violation in *every single one* of those pending cases. This flagrant constitutional violation will continue for years. This Court has granted review of due process questions that affect far fewer cases, or that have far more limited financial consequences. *See Honda Motor Co.*, 512 U.S. 415; *Richards*, 517 U.S. 793.

Moreover, the implications of the decision below vastly transcend the *Engle* setting. The Florida Supreme Court's new rule of preclusion for issues class actions provides a roadmap for other courts—which are already increasingly invoking the issues class device (Pet. 33)—to use the combination of issues certification and preclusion law to facilitate class-wide adjudication of inherently individualized claims. For that reason, it will be impossible to cabin the Florida Supreme Court's decision to the tobacco setting. As the *amicus* briefs filed in support of the petition make clear, the likely mischief that this decision will promote deeply concerns many industries frequently targeted by class actions. *See*, *e.g.*, Br. of

Alliance of Automobile Manufacturers. Denial of review in this case would give the green light to the plaintiffs' bar to invoke similarly unprecedented, and equally unconstitutional, procedures against other defendants.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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