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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

KATE COMERFORD TODD
SHELDON GILBERT
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H STREET, N.W.
Washington, D.C. 20062
(202) 463-5337

JOHN H. BEISNER
Counsel of Record
JESSICA DAVIDSON MILLER
GEOFFREY M. WYATT
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000
john.beisner@skadden.com

Attorneys for Amicus Curiae

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Chamber of Commerce of the United States of America ("Chamber") respectfully submits this brief as *amicus curiae* in support of petitioners Philip Morris USA Inc., Liggett Group LLC and R.J. Reynolds Tobacco Company.[1]

STATEMENT OF INTEREST

The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

Few issues are of more concern to American businesses than those affecting their fundamental right to defend themselves when they are sued. The

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that petitioners and respondent, upon timely receipt of notice of the Chamber's intent to file this brief, have consented to its filing.

Supreme Court of Florida's ruling threatens that very right in a mass of smoking cases percolating throughout federal and state courts in Florida. The court's decision approves the use of preclusion to bar litigation of specific claims based on a general verdict by a jury that may or may not have endorsed the precluded theory of liability. The direct impact of this procedural shortcut is profound: thousands of implicated cases are pending, and millions of dollars are potentially at stake in each. But review is all the more important given the risk that the reasoning applied below could be applied in future cases, both in Florida and in any other jurisdictions that follow the example of the Florida Supreme Court.

The Chamber's members have a strong interest in reversal of the ruling below because the Supreme Court of Florida's opinions are contrary to longstanding precedent of this Court and other federal authorities – and undermine the fundamental due-process rights of American businesses. If allowed to stand, the ruling has the potential to dramatically transform the law of preclusion and improperly increase the liability exposure of the Chamber's members and all companies doing business in the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

Preclusion doctrines must not be used "'as clubs but as fine instruments.'" Douglas J. Gunn, *The Offensive Use of Collateral Estoppel in Mass Tort Cases*, 52 Miss. L.J. 765, 798 (1982) (quoting *Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 421 F.2d 1313, 1316 (5th Cir. 1970)).

The decision below defied this maxim, effectively sanctioning the use of preclusion as a blunt weapon. It did so by allowing the use of highly general verdicts – which may have been premised on just a few of countless alternative theories – to foreclose litigation of highly specific issues in individual cases. The court justified this decision under a *claim*-preclusion theory, even though its approach carried most of the hallmarks of *issue* preclusion. The reason for the court's characterization is obvious: it needed to dispense with the universally recognized requirement that issue preclusion applies only to specific, identifiable issues that were actually and necessarily decided because adherence to these traditional and time-tested requirements would render the findings addressed by the Florida Supreme Court's ruling in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1269-70 (Fla. 2006), "useless."

Engle was a class action suit on behalf of substantially all Florida smokers against almost a dozen companies and two industry organizations. *E.g.*, *id.* at 1256 & n.3. The plaintiffs claimed injury as a result of addiction to cigarettes and sought compensatory and punitive damages. *Id.* at 1254, 1256. The class trial was to proceed in three phases – a first phase "to consider the issues of liability and entitle-

ment to punitive damages for the class as a whole," *id.* at 1256, followed by separate phases for trials of three individuals (in phase 2) and the remaining class members (in phase 3), *id.* at 1257-58.

Although the first phase covered a broad range of products made by different defendants at different times, the phase I verdict form did not require the jury to specify which brands or types of cigarettes were defective, what specific acts were negligent, when the allegedly tortious conduct took place, or whether all cigarettes were defective because they are addictive and disease-causing. (*See Engle* Phase I Verdict Form.) On appeal, despite vacating a $145 million punitive-damages award and determining that "problems with the three-phase trial plan negate the continued viability of this class action," the Florida Supreme Court also held that decertification should be prospective only, and it retrospectively certified an "issues class" for certain matters that were tried in phase I of the class trial. *Engle*, 945 So. 2d at 1267-68. The findings on these matters, the Florida Supreme Court declared, "will have res judicata effect in" subsequent trials commenced by individual class members. *Id.* at 1269.

Procedural shortcuts like preclusion must be applied in a manner that ensures that there has been a finding on a particular issue before a party may be barred from contesting it. Otherwise, a defendant may be held liable even though no jury has ever found that all the elements of the plaintiffs' claim are satisfied. Indeed, because the core of due process is that "'everyone should have his own day in court,'" *Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008) (quoting *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798

(1996)), courts have insisted that "[p]roof that the identical issue was involved . . . is 'an absolute due process prerequisite to the application of collateral estoppel,'" 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4417, at 413 n.1 (2d ed. 2002) (quoting *Goodson v. McDonough Power Equip., Inc.*, 443 N.E.2d 978, 985 (Ohio 1983)); *see also Wickham Contracting Co. v. Bd. of Educ.*, 715 F.2d 21, 28 (2d Cir. 1983) (requirement that issue was "necessary and essential to the judgment in the earlier action" is "necessary in the name of procedural fairness, if not due process itself") (internal quotation marks, citation and alteration omitted).

Shorn of these protections, the use of preclusion would portend devastating ills for American businesses. In the *Engle* progeny litigation alone, the ruling below potentially affects thousands of cases, each one likely seeking millions of dollars in damages. If that decision remains good law, basic liability issues could be deemed decided in every single case – without regard to whether any jury has ever decided the issue of fault with respect to the specific product during the specific time period at issue in each case.

More broadly, the ruling below has also cleared the way for a new breed of mass-tort litigation, in which a highly generic, all-encompassing "issues phase" is tried, implicating any number of manufacturers and any number of products over a multi-decade time span. Under the reasoning of the court below, any such proceeding resulting in a general verdict against the defendants could be used to foreclose litigation over basic liability issues as to all manufacturers and all products for the entire time period – even if, in the most extreme example, the

jury's general verdict is premised on a distinct flaw in a distinct time period far removed from the type and time of injury alleged by the plaintiff.

The availability of such "*Engle* proceedings" would spark an explosion in both the number and scope of mass-tort filings. And with the specter of automatic preclusion looming, manufacturers sued in *Engle* proceedings would face the prospect of unfathomable liability – to thousands or even millions of consumers – in the event of a single adverse jury verdict that might be based on isolated product defects. These pressures will exponentially increase incentives to settle even the most frivolous mass-tort suits, resulting in substantial costs that must be passed along to consumers. Thus, any "victory" in these proceedings would be enjoyed by plaintiffs' lawyers alone, while businesses and customers suffer the adverse economic consequences of a new toxic litigation environment.

For all of these reasons, the Court should grant the petition for writ of certiorari to ensure that Florida courts do not become the destination of choice for exploitation of common-law preclusion doctrines that deprive our nation's industries of the fundamental due-process right to defend themselves when they are sued.

ARGUMENT

I. The Decision Below Eviscerated Core Due-Process Protections.

The Fourteenth Amendment's guarantee of due process provides a fundamental bulwark against arbitrary deprivations of property. Importantly, the right to due process is often the last line of defense

that American businesses have in cases where – as here – state courts have shirked their responsibility to ensure that common-law doctrines are applied reasonably and fairly.

As set forth more fully below, that fundamental protection is particularly important in cases involving preclusion doctrines. Otherwise, a court may rely (as the Florida Supreme Court did here) on a single jury's highly generalized – and potentially aberrational – findings in a form verdict to conclusively establish the elements of a plaintiff's cause of action. Such an approach, particularly when used to foreclose litigation of entire categories of inquiry in thousands of subsequent cases, is patently unfair and contrary to the dictates of due process.

This Court has long recognized that the use of preclusion doctrines, whether in federal or state court, is governed by the limitations of due process. *See Fayerweather v. Ritch*, 195 U.S. 276, 297-98 (1904). As the Court has made clear, these due-process protections apply to all manner of preclusion doctrines – be it claim preclusion, which prevents relitigation of the same claim by the same parties in subsequent proceedings, or issue preclusion, which may prevent the relitigation of the same issue in subsequent litigation against the same party. *See id.*

As the petition demonstrates, the Florida Supreme Court's ruling effectively applied a new brand of issue preclusion – one in which the party claiming the preclusive effect is relieved from the usual burden of proving that the precise issue was decided in

the prior proceeding. Pet. at 24-25.[2] This doctrine – whatever it is called – violates due process. It is well established that issue-preclusive effect may be accorded only to precise issues that were "actually litigated and resolved in a valid court determination essential to the prior judgment." *Taylor*, 553 U.S. at 892 (internal quotation marks and citation omitted); *see also* 18 Wright § 4417, at 413 n.1 (requirement that precise issue has been decided in the prior proceeding is rooted in due process); John P. Burns et al., *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 Vand. L. Rev. 573, 689 (1983) ("The courts . . . have acknowledged that due process and fairness considerations limit the use of collateral estoppel and that these considerations rightfully prevail over the desire to achieve judicial economy."). "[E]xtreme applications" of preclusion law that deviate from its traditional use "may be inconsistent with a federal right that is 'fundamental in character.'" *Richards*, 517 U.S. at 797 (citation omitted).

Consistent with these principles, this Court has rejected attempts to apply issue preclusion in cases where there is no guarantee that the precise issues to be precluded have actually been determined in a prior proceeding. *See, e.g.*, *Bobby v. Bies*, 556 U.S. 825,

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[2] Although the Florida Supreme Court purported to apply claim preclusion, such preclusion is proper only where a whole cause of action is brought to a full and complete judgment – and *Engle* expressly stated that the jury's findings "did *not* determine whether the defendants were liable to anyone." 945 So. 2d at 1263 (internal quotation marks and citation omitted). Claim preclusion does not apply where, as here, a party seeks to preclude litigation of certain elements of a claim. Pet. at 3, 24-27.

834 (2009) ("If a judgment does not depend on a *given* determination, relitigation of that determination is not precluded.") (emphasis added). Indeed, "almost all" jurisdictions apply this rule. Joshua M. D. Segal, *Rebalancing Fairness and Efficiency: The Offensive Use of Collateral Estoppel in § 1983 Actions*, 89 B.U. L. Rev. 1305, 1309 (2009).

For example, where "testimony was offered at the prior trial upon several distinct issues, the decision of any one of which would justify the verdict . . . then the conclusion must be that the prior decision is not an adjudication upon any particular issue . . . and the plea of *res judicata* must fail." *Fayerweather*, 195 U.S. at 307; *see also* Allan D. Vestal, *Res Judicata/Preclusion* V-192 (1969) ("[p]reciseness in defining issues is necessary if issue preclusion is to be applied reasonably"). As such, in traditional practice, the "inability to determine from a general verdict whether the issue was decided" is "[a]mong the most common reasons that prevent prior litigation of an issue from achieving preclusion." 18 Wright § 4407, at 146 n.3.[3]

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[3] *See also, e.g.*, *Postlewaite v. McGraw-Hill, Inc.*, 333 F.3d 42, 49 (2d Cir. 2003) (rejecting application of issue preclusion where party invoking the doctrine did not show "*with clarity and certainty* what was determined by the prior judgment") (internal quotation marks and citation omitted); *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1197-99 (10th Cir. 2000) (holding that issue preclusion did not apply where "the general finding under the negligence instruction fails to identify what the jury found sustained by the evidence"); *Mitchell v. Humana Hosp.-Shoals*, 942 F.2d 1581, 1583-84 (11th Cir. 1991) ("[B]ecause we cannot be certain what was litigated and decided . . . issue preclusion cannot operate.").

The rule is no different in the class action context. As with individual litigation, a "class judgment . . . will be conclusive only on the issues *actually* and *necessarily* litigated and decided." 7AA Charles Alan Wright et al., *Federal Practice and Procedure* § 1789, at 558 (3d ed. 2005) (emphases added). Just as in individual litigation, "[c]are must be taken" in the class context to "delineat[e] *exactly* what issues were decided, . . . since *only identical* issues will be precluded in subsequent litigation." *Id.* at 558-59 (emphases added). Indeed, this Court has long recognized the application of the fundamental requirements of collateral estoppel in the class context. *See, e.g.*, *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984) (rejecting issue preclusion in employee-discrimination case despite prior class judgment that an employer did not engage in a pattern or practice of racial discrimination because that finding did not necessarily decide whether the employer had discriminated against individual employees).

This longstanding requirement was discarded by the decision below, which allowed the respondent to foreclose litigation on basic elements of his claims based on the general verdicts in the *Engle* case. Had the Supreme Court of Florida properly characterized the preclusion at play as issue preclusion, that doctrine's "actually decided" requirement would have rendered the *Engle* jury's findings – by the court's own admission – "useless" in this case. Pet. App. 26a. The precise factual conclusions of the *Engle* jury can only be guessed at: while the *Engle* plaintiffs asserted many theories with respect to product defect, all that the *Engle* jury found was that each defendant "place[d] cigarettes on the market that were defective and unreasonably dangerous." (*Engle* Phase I Ver-

dict Form at 2-3.) But that finding could have been based on any number of theories presented in the *Engle* trial, many of which have no application to respondent's case here.

For example, one of the theories of defectiveness was premised on the phenomenon of compensation. This phenomenon applies only to "Light" cigarettes, which Mrs. Douglas never smoked. In other words, there is no assurance that the precise issues to be precluded – e.g., whether the *particular* cigarettes smoked by respondent were defective – were actually decided in a prior proceeding. Nonetheless, the decision below treated every issue that was *possibly* decided by the general verdict as though it was *actually* decided by it – each one in favor of the class – foreclosing litigation of the particular issues in these cases. It erred in doing so and violated the petitioners' fundamental rights. This Court should therefore grant review and reverse.

II. The Decision Below Poses A Grave Threat To American Businesses.

The decision below – and its radical new preclusion doctrine – poses a serious threat to American businesses. Far from solving the problems associated with mass-tort litigation, it threatens enormous economic implications for proceedings in *Engle* progeny cases, which number in the thousands. Moreover, the decision is an invitation to abuse: more lawsuits, broader in scope than ever before; a dramatic increase in settlements of frivolous claims; and higher costs for businesses and their consumers.

The *Engle* litigation itself is ground zero for the potentially deleterious ramifications posed by Flori-

da's flimsy preclusion standard. There are thousands of *Engle* progeny actions pending in state and federal courts across Florida. The vast majority of these cases have not yet gone to trial. If allowed to stand, the Florida Supreme Court's ruling will give courts the green light to apply Florida's new freewheeling preclusion doctrine in the thousands of pending *Engle* progeny cases. And by sweeping away plaintiffs' burden of proof with respect to key issues of liability, the ruling significantly increases the likelihood of crippling damages verdicts, which would harm not only the *Engle* defendants, but also the countless businesses and consumers that are in any way connected to the tobacco industry. The potentially mind-boggling liability that could follow is reason enough for this Court to grant review. *See, e.g.*, *Fid. Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in denial of certiorari) (noting that the threat of "enormous" liability "is a strong factor in deciding whether to grant certiorari"); Eugene Gressman et al., *Supreme Court Practice* § 4.13, at 269 (9th ed. 2007) ("The fact that especially large amounts of money are involved . . . may also be a persuasive factor" in support of review.).

Even beyond the *Engle* litigation, the decision below is likely to have far-reaching consequences. The incentive to litigate only increases when the ordinarily strict rules limiting the use of preclusion are loosened. *See, e.g.*, Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 Tex. L. Rev. 1039, 1080 (1986) ("exploitation of the doctrine burdens defendants with additional litigation, thereby increasing the volume of litigation"); Michael Weinberger, *Collateral Estoppel and the Mass Produced Product: A Proposal*, 15 New Eng.

L. Rev. 1, 22 (1979) (collateral estoppel in product-liability litigation "could spawn a massive increase in the number of lawsuits initiated each year"). In other words, the more likely the preclusive effect, the more attractive additional filings become to new plaintiffs.

The decision below will amplify this effect. Florida's doctrine will encourage the filing of "class" complaints with striking breadth – complaints that cover decades of product lines by every manufacturer in the industry. For enterprising plaintiffs' lawyers, one bad apple will be sufficient to spoil the whole bunch as long as a jury returns a general verdict of liability in a "class" case offering myriad alternative theories of liability. Unless courts rigorously apply the requirement that the precise issues presented in particular cases were "actually decided" in the ostensibly common phase, this approach could massively expand liability for conduct that never would have been found to be tortious in individual proceedings.

In the shadow of Florida's bold new approach, businesses do not stand a fighting chance against such lawsuits. As it is, "[c]ertification of the class is often, if not usually, the prelude to a substantial settlement by the defendant because the costs and risks of litigating further are so high." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1206 (2013); *see also, e.g.*, Byron G. Stier, *Another Jackpot (IN)Justice: Verdict Variability and Issue Preclusion in Mass Torts*, 36 Pepp. L. Rev. 715, 717, 742 (2009) ("As Judge Posner opined in class actions, . . . 'one jury, consisting of six persons . . . will hold the fate of an industry in the palm of its hand.'") (citation and footnote omitted). Losing such suits can have an

enormously negative effect on business. Indeed, "the defendant's stockholders, employees, creditors, insurers, customers, and occasionally the entire industry, can be seriously shaken by a finding of defect." Kurt Erlenbach, *Offensive Collateral Estoppel and Products Liability: Reasoning with the Unreasonable*, 14 St. Mary's L.J. 19, 22 (1982).

The use of a vaguely defined preclusion doctrine in issues classes like the sort endorsed here – in which supposedly "common" findings of an exceedingly general nature can later be applied to bar litigation of the specifics in follow-on suits – greatly enhances these risks. Because the supposedly "common" segment of the litigation embraces a much broader range of conduct than could ever plausibly have been resolved in a unitary class action, the potential economic consequences of an adverse verdict in the initial case could be much more severe than traditional class verdicts. And the looser the application of preclusion doctrines, the more likely an adverse judgment will "put[] the survival of entire industries at risk based on a single, possibly erroneous, judgment." Meiring de Villiers, *Technological Risk and Issue Preclusion: A Legal and Policy Critique*, 9 Cornell J.L. & Pub. Pol'y 523, 524 (2000). The inevitable result of these pressures will be increasingly unfavorable settlements for businesses – if not bankruptcy. *See, e.g.*, *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995) (vacating certification of issues class in product liability suit on mandamus in part because the risk that a single verdict could "hurl the industry into bankruptcy" would "likely" force a settlement regardless of the merits); *cf. also* Steven P. Nonkes, *Reducing the Unfair Effects of Nonmutual Issue Preclusion Through Damages Lim-*

its, 94 Cornell L. Rev. 1459, 1483 n.144 (2009) (explaining that the risk of collateral estoppel may promote settlement in order to avoid the consequences of "an aberrational finding in" the first suit).

Even if bankruptcy is avoided, the settlement of meritless claims has negative and far-reaching consequences for the American economy. For example, businesses may be forced to increase prices to compensate for the added litigation costs. *See* Weinberger, *supra*, at 22. Similarly, the elimination of entire product lines can undermine consumers' freedom of choice in the marketplace. *Id.* at 23. Moreover, the preclusive effect of a single jury's presumed finding that a product is defective could destroy countless jobs that rely on the distribution of the allegedly defective product – without any assurance that such a defect finding was actually made. *Id.*; Stier, *supra*, at 752-53 ("Mass tort litigation involves vast resources, sometimes with settlements in the billions of dollars, and affects thousands of workers in the industry, as well as consumers. Spending more on procedure via multiple juries that supply more accurate information . . . may be a sound social investment.") (footnote omitted). In the end, nobody wins – except the plaintiffs' lawyers.

In sum, the court below departed dramatically from the traditional principles that have historically limited preclusion doctrines and safeguarded litigants' rights. The harmful impact that this ruling would have on American businesses makes it all the more important for the Court to grant review and hold that the decision below improperly trespassed on petitioners' fundamental rights.

CONCLUSION

For the foregoing reasons, and those stated by the petitioners, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

KATE COMERFORD TODD
SHELDON GILBERT
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H STREET, N.W.
WASHINGTON, D.C. 20062
(202) 463-5337

JOHN H. BEISNER
Counsel of Record
JESSICA DAVIDSON MILLER
GEOFFREY M. WYATT
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000
john.beisner@skadden.com

Attorneys for Amicus Curiae The Chamber of Commerce of the United States of America

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