UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 12-13500-EE

PAULINE WALKER ET AL.,
Plaintiff-Appellee,

v.

R.J. REYNOLDS TOBACCO CO.,
Defendant-Appellant.

No. 12-14731-EE

GEORGE DUKE III,
Plaintiff-Appellee,

v.

R.J. REYNOLDS TOBACCO CO.,
Defendant-Appellant.

Appeals from the United States District Court
for the Middle District of Florida

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, *amicus curiae* The Chamber of Commerce of the United States of America provides the following Certificate of Interested Persons and Corporate Disclosure Statement:

1. The Chamber of Commerce of the United States of America (Kate Comerford Todd, Sheldon Gilbert), *amicus curiae*.
2. Skadden, Arps, Slate, Meagher & Flom, LLP (John H. Beisner, Jessica Davidson Miller, Geoffrey M. Wyatt), counsel for *amicus curiae* The Chamber of Commerce of the United States of America.

Pursuant to the Federal Rules of Appellate Procedure and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, *amicus curiae* The Chamber of Commerce of the United States of America makes the following statement as to corporate ownership:

Amicus curiae The Chamber of Commerce of the United States of America does not have a parent corporation, nor does any publicly held corporation own 10% or more of its stock.

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision in *Walker v. R.J. Reynolds Tobacco Co.* (11th Cir. Sept. 6, 2013), involves a question of exceptional importance because the panel's decision threatens to eviscerate core due-process protections by permitting the use of a novel "preclusion" doctrine 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. If allowed to stand, the panel's 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.

/s/ John H. Beisner
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STATEMENT OF ISSUES PRESENTED THAT MERIT EN BANC REVIEW

Whether federal due-process principles permit the application of preclusion to conclusively establish issues that were not actually and necessarily decided against the defendant in any prior proceeding.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Court should grant rehearing en banc because the panel embraced a decision by the Florida Supreme Court that threatens to eviscerate the due-process rights of defendants in a wide variety of lawsuits.

Although the Florida Supreme Court required in *Engle* that the class be decertified on a prospective basis, it subsequently held in *Douglas* that general factual findings from the liability phase of the *Engle* class action trial would be binding to establish elements of claims by individual plaintiffs in future cases. The Florida Supreme Court reached this conclusion by adopting a novel preclusion doctrine that does not require a plaintiff to show that the precluded issues were actually or necessarily decided in the prior proceeding. Rather, plaintiffs are permitted to rely on general, non-specific verdicts to foreclose litigation of highly specific issues that may never have been resolved in their favor. The panel went along with this fundamental violation of due process under the mistaken premise that full faith and credit principles required it to defer to the Florida Supreme

Court. Instead, it should have conducted its own due-process analysis and rejected Florida's unconstitutional procedural short-cut.

Due process mandates that preclusion applies only where there has been a finding on the particular issue subject to preclusion. Otherwise, a defendant can 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). In short, 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 panel here authorized the use of Florida's unique preclusion doctrine as a blunt weapon, with serious implications for American businesses. Class action defendants depend on federal courts to protect important due-process rights in class proceedings, which pose inherent risks to business due to their aggregation of claims. The panel here abdicated that role, signaling to courts in Florida and in other states that they are free to fashion new preclusion doctrines unmoored from traditional due-process protections.

The direct impact of this decision is profound: more than 1,000 *Engle* cases are still pending in federal court, and millions of dollars are potentially at stake in each. But rehearing en banc is all the more important given the risk that the reasoning applied by the Florida Supreme Court – and deferred to by the panel – could be applied in future cases in this Circuit and around the country. Under the reasoning of the Florida Supreme Court in *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013), *cert. denied*, 2013 WL 4079332 (U.S. Oct. 7, 2013), to which the panel deferred, 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.

If this approach is followed in other class actions based on Florida law (or under the law of any other state that might follow Florida's lead), manufacturers would face the prospect of significantly expanded 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 their customers suffer the adverse economic consequences of a new toxic litigation environment.

For all of these reasons, the Court should grant the petition for rehearing en banc.

ARGUMENT

I. THE PANEL'S DECISION EVISCERATED CORE DUE-PROCESS PROTECTIONS.

The guarantee of due process in the Fifth and Fourteenth Amendments provides a fundamental bulwark against arbitrary deprivations of property. The right to due process is often the last line of defense that American businesses have in cases like this one, where state courts have shirked their responsibility to ensure that common-law doctrines are applied reasonably and fairly.

The Supreme Court has long recognized that the use of preclusion doctrines, whether in federal or state court, is limited by due-process principles. *See Fayerweather v. Ritch*, 195 U.S. 276, 297-98 (1904). As the Supreme Court has made clear, these due-process protections apply to all types of preclusion doctrines, including claim preclusion, which prevents relitigation of the same claim by the same parties in subsequent proceedings following a final judgment, and issue preclusion, which may prevent the relitigation of the same issue in subsequent litigation against the same party. *See id.* With respect to issue preclusion, 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," a requirement rooted in due process. *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); *see also Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) ("abrogation of a well-established common-law protection . . . raises a presumption" of a due-process violation).

In accordance with these principles, the Supreme 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, 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.[1]

The courts are not free to depart from this rule in the class action context. As with individual litigation, a "class judgment . . . will be conclusive 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, the Supreme 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 employment-discrimination case despite prior class judgment that an employer did not engage in a pattern or practice of racial discrimination because that finding did

[1] *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.").

not necessarily decide whether the employer had discriminated against individual employees).

In *Douglas*, the Florida Supreme Court discarded this longstanding requirement that the precise issues be actually and necessarily decided to have preclusive effect by allowing the plaintiff 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 and necessarily decided" requirement would have rendered the *Engle* jury's findings – by the court's own admission – "useless" in this case. 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 Verdict 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 appellee'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 Mr. Walker 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 *Douglas* court 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.

The panel described the approach taken by *Douglas* as "unorthodox and inconsistent with the federal common law." Nonetheless, the panel held that full faith and credit principles obligated it to defer to that court's application of preclusion doctrine. But no such obligation exists because a judgment must satisfy the requirements of due process in order to be entitled to full faith and credit. *See e.g.*, *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481-82 (1982) (before full faith and credit is due, "[t]he State must . . . satisfy the applicable requirements of the Due Process Clause"); *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985) (full faith and credit given to a state's determination of the preclusive effect of a judgment is "subject to the requirements of . . . the Due Process Clause"); *Matsushita Electric Indus. Co. v. Epstein*, 516 U.S. 367, 388 (1996) ("A state-court judgment generally is not entitled to full faith and credit unless it satisfies the requirements of the Fourteenth Amendment's Due Process Clause.") (Ginsburg, J., concurring in part and dissenting in part). Thus, a federal court's obligation to give preclusive effect to a state-court judgment under the Full Faith and Credit Act must yield to constitutional limitations.

In short, the defendants here should have been allowed to litigate the facts concerning whether the particular cigarettes at issue in this case were defectively designed. That question has not necessarily been decided by any jury; instead, under Florida's new preclusion doctrine, the issue was deemed established based on the strength of a supposedly common jury verdict that could have been premised on defects in other cigarettes. This approach deprived the defendants of their basic due-process right to contest liability, and the panel should not have ignored that constitutional deprivation in the name of full faith and credit.

II. THE PANEL'S DECISION POSES A GRAVE THREAT TO AMERICAN BUSINESSES.

The panel's decision poses a serious threat to American businesses by abdicating the fundamental role that federal courts play in ensuring that federal due-process rights are respected and enforced. It will also encourage abusive litigation tactics in federal and state courts in this Circuit going forward, with adverse consequences for business.

First, the panel decision invites the innovation of abusive preclusion doctrines in the state courts. The panel's approach ignored the Supreme Court's clear command that a "State may not grant preclusive effect . . . to a constitutionally infirm judgment," and that a federal court should not do so in the name of full faith and credit. *Kremer*, 456 U.S. at 483. This approach signals to the states that the Court will not exercise its duty to ensure that due process is

satisfied before affording full faith and credit under any and every preclusion doctrine a state might create.

Second, the decision has profound consequences for business. The *Engle* litigation itself is ground zero for the potentially deleterious ramifications posed by Florida's flimsy preclusion standard. Over 1,000 *Engle* progeny actions are pending in federal courts. The vast majority of these cases have not yet gone to trial. If allowed to stand, the panel's ruling will require federal courts to apply Florida's new freewheeling preclusion doctrine in the pending *Engle* progeny cases, significantly increasing the likelihood of crippling damages verdicts. The tremendous liability that could follow is further reason for this Court to grant rehearing en banc. *See, e.g.*, *W. Pac. R. Corp. v. W. Pac. R. Co.*, 345 U.S. 247, 270-71 (1953) (Frankfurter, J., concurring) ("Hearings en banc may be a resort also in cases extraordinary in scale – either because the amount involved is stupendous or because the issues are intricate enough to invoke the pooled wisdom of the circuit."); *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 996 (9th Cir. 2003) (en banc resolution appropriate where there were "billions of dollars at stake").

But the panel's decision could also have consequences beyond *Engle*. Florida's new, expansive preclusion rule is sure to invite a new wave of class action filings brought under Florida law, whose preclusion principles bind federal

courts sitting in diversity. *See, e.g.*, *Taylor*, 553 U.S. at 891 n.4 ("For judgments in diversity cases, federal law incorporates the rules of preclusion applied by the State in which the rendering court sits."). After all, the incentive to litigate inevitably increases when preclusion principles are expanded. *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"). The greater the preclusive effect, the greater the incentive to file suit. The panel's decision will amplify this effect by encouraging enterprising plaintiffs' lawyers to craft new lawsuits that seek to take advantage of the *Engle/Douglas* preclusion doctrine. Such suits, if allowed, could massively expand liability for conduct that never would have been found tortious in individual proceedings, to the detriment of American businesses and ultimately, American consumers.

CONCLUSION

For the foregoing reasons, and those stated by the appellant, the Court should grant the petition for rehearing en banc.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief Of The Chamber Of Commerce Of The United States Of America As *Amicus Curiae* In Support Of Appellant's Petition For Rehearing En Banc was filed via the Court's electronic filing system on October 17, 2013, which will serve electronic notice to all parties of record.

/s/John H. Beisner
John H. Beisner

CERTIFICATE OF COMPLIANCE

Counsel certifies as follows:

1. This brief complies with Eleventh Circuit Rules 35-6 and 40-6 because this brief is less than 15 pages in length, excluding the parts of the brief exempted by Eleventh Circuit Rules 32-4 and 35-6; and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/John H. Beisner
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