No.

IN THE
Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

MARY BROWN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RAYFIELD BROWN,

Respondent.

On Petition For A Writ Of Certiorari To The Florida First District Court Of Appeal

PETITION FOR A WRIT OF CERTIORARI

ANDREW L. FREY
LAUREN R. GOLDMAN
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2500

MIGUEL A. ESTRADA
Counsel of Record
AMIR C. TAYRANI
BRANDON L. BOXLER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Petitioner

QUESTION PRESENTED

This case presents the same question as the forthcoming petitions for writs of certiorari in *Philip Morris USA Inc. v. Boatright* and *R.J. Reynolds Tobacco Co. v. Searcy*:

Whether the Due Process Clause is violated by a rule of preclusion that permits plaintiffs to invoke the preclusive effect of a prior jury's findings to establish elements of their claims without showing that those elements were actually decided in their favor in the prior proceeding.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Petitioner Philip Morris USA Inc. is a wholly owned subsidiary of Altria Group, Inc. No publicly held company owns 10% or more of Altria Group, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Philip Morris USA Inc. ("PM USA") respectfully submits this petition for a writ of certiorari to review the judgment of the Florida First District Court of Appeal.

OPINIONS BELOW

The opinion of the Florida First District Court of Appeal is reported at 243 So. 3d 521. *See* Pet. App. 1a. The order of the Florida First District Court of Appeal denying rehearing is unreported. *See* Pet. App. 10a. An additional opinion of the Florida First District Court of Appeal in this case is reported at 96 So. 3d 468.

JURISDICTION

The Florida First District Court of Appeal issued its opinion on April 18, 2018, *see* Pet. App. 1a, and denied PM USA's motion for rehearing on May 29, 2018, *see id.* at 10a. Under Florida law, PM USA cannot seek review in the Florida Supreme Court because the First District's decision does not contain any analysis or citation. *See Fla. Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988). This Court therefore has jurisdiction to review the First District's decision under 28 U.S.C. § 1257(a) because the First District is "the highest court of [the] State in which a decision could be had." *See*, *e.g.*, *KPMG LLP v. Cocchi*, 565 U.S. 18, 19 (2011) (per curiam).

On September 12, 2018, Justice Thomas extended the deadline for PM USA to file a petition for a writ of certiorari to October 26, 2018. *See* No. 18A183.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1, cl. 2.

STATEMENT

Under longstanding and heretofore universally accepted common-law principles, plaintiffs seeking to rely on the outcome of a prior proceeding to establish elements of their claims must demonstrate that those elements were "actually litigated *and resolved*" in their favor in the prior proceeding. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (emphasis added; internal quotation marks omitted). This "actually decided" requirement is such a fundamental safeguard against the arbitrary deprivation of property that it is mandated by due process. *See Fayerweather v. Ritch*, 195 U.S. 276, 298-99, 307 (1904).

The Florida Supreme Court has acknowledged that the "actually decided" requirement is part of Florida's law of issue preclusion. *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 433 (Fla. 2013). In this case and thousands of similar suits, however, the Florida courts have jettisoned that requirement by applying a novel form of offensive claim preclusion previously unknown to the law. According to the Florida Supreme Court, members of the issues class of Florida smokers prospectively decertified in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam), can use the generalized findings rendered by the class-action jury—for example, that each defendant placed unspecified "cigarettes on the market that

were defective"—to establish the tortious-conduct elements of their individual claims without demonstrating that the *Engle* jury actually decided that the defendants engaged in tortious conduct relevant to their individual smoking histories. *Douglas*, 110 So. 3d at 424 (internal quotation marks omitted). In reality, the Florida courts' application of offensive claim preclusion in these "*Engle* progeny" cases is nothing more than issue preclusion stripped of its essential "actually decided" requirement.

The sweeping preclusive effect of the *Engle* jury's findings is not limited to state court. The Eleventh Circuit has held that full-faith-and-credit principles require affording equally broad effect to those findings in federal cases, *see Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1185-86 (11th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 646 (2018); *see also Burkhart v. R.J. Reynolds Tobacco Co.*, 884 F.3d 1068 (11th Cir. 2018), although a panel of the Eleventh Circuit recently expressed serious reservations about that outcome, *see Searcy v. R.J. Reynolds Tobacco Co.*, 902 F.3d 1342, 1353 (11th Cir. 2018) (noting that, in light of the "multiple acts of concealment . . . presented to the *Engle* jury" and the *Engle* jury's "general finding[s]," it is "difficult to determine whether the *Engle* jury's basis for its general finding of concealment was the particular concealments" alleged by the plaintiff).

PM USA will be filing petitions for writs of certiorari on or about November 19, 2018, in *Boatright v. Philip Morris USA Inc.*, 217 So. 3d 166 (Fla. Dist. Ct. App. 2018), and *Searcy* presenting the same due-process question at issue in this case: whether it is consistent with due process to permit plaintiffs to invoke the preclusive effect of the generalized *Engle* jury findings to establish elements of their individual

claims without showing that those elements were actually decided in their favor by the *Engle* jury. *Boatright* and *Searcy* are better vehicles for plenary review of that question than this case because, unlike the per curiam affirmance issued by the Florida First District Court of Appeal here, the Florida Second District Court of Appeal and the Eleventh Circuit issued written opinions in those cases.

To be sure, this Court has had several prior opportunities to review the constitutionality of the preclusion standards applied in *Engle* progeny litigation. *See*, *e.g.*, *Philip Morris USA Inc. v. Douglas*, 571 U.S. 889 (2013) (denying certiorari); *R.J. Reynolds Tobacco Co. v. Graham*, 138 S. Ct. 646 (2018) (denying certiorari). But *Boatright* and *Searcy* will represent the Court's first opportunity to review an *Engle* progeny case after the Eleventh Circuit's decision in *Burkhart v. R.J. Reynolds Tobacco Co.*, which—together with the en banc decision in *Graham v. R.J. Reynolds Tobacco Co.*—conclusively rejects the *Engle* defendants' due-process argument. Now that both the state and federal courts in Florida have definitively rejected all facets of that argument, it is manifestly time for this Court to put an end to the unconstitutional *Engle* experiment, which has already produced judgments against the *Engle* defendants in excess of $800 million, with another 2,300 additional cases remaining to be tried.

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

A. The *Engle* Class Action

The *Engle* litigation began in 1994 when six individuals filed a putative nationwide class action in Florida state court seeking billions of dollars in damages from PM USA and other tobacco companies. The *Engle* trial court ultimately certified a class of all Florida "citizens and residents, and their survivors, who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." 945 So. 2d at 1256 (internal quotation marks omitted).

The *Engle* trial court adopted a complex three-phase trial plan. During the year-long Phase I trial, the class advanced many different factual allegations regarding the defendants' products and conduct over the course of a fifty-year period, including many allegations that pertained to only some cigarette designs, only some cigarette brands, or only some periods of time. For example, the class asserted in support of its strict-liability and negligence claims that the filters on *some* cigarettes contained harmful components; that the ventilation holes in "light" or "low tar" cigarettes were improperly placed; and that *some* cigarette brands used ammonia as a tobacco additive to enhance addictiveness. *Engle* Class Opp. to Mot. for Strict Liability Directed Verdict at 3; *Engle* Tr. 11966-71, 16315-18, 36729-32.[1] Likewise, to support its fraudulent concealment and conspiracy to fraudulently conceal claims, the class identified numerous distinct categories of allegedly fraudulent statements by the defendants, including statements pertaining to the health risks of smoking, others pertaining to the

[1] A CD containing the transcript and all other record materials from *Engle* cited herein is part of the record below.

addictiveness of smoking, and still others limited to certain designs and brands of cigarettes, such as "low tar" cigarettes. *See*, *e.g.*, *Engle* Tr. 36349-52, 36483-85, 36720-24.

Over the defendants' objection, the class sought and secured a Phase I verdict form that asked the jury to make only generalized findings on each of its claims. On the class's strict-liability claim, for example, the verdict form asked whether each defendant "placed cigarettes on the market that were defective and unreasonably dangerous." *Engle*, 945 So. 2d at 1257 n.4. On the concealment and conspiracy claims, the verdict form asked whether the defendants concealed information about the "health effects" *or* "addictive nature of smoking cigarettes." *Id.* at 1277. The jury answered each of those generalized questions in the class's favor, but its findings do not reveal which of the class's numerous underlying theories of liability the jury accepted, which it may have rejected, and which it may not even have reached.

In Phase II, the *Engle* jury determined individualized issues of causation and damages as to three class representatives. 945 So. 2d at 1257. It then awarded $145 billion in punitive damages to the class as a whole. *Id.* The defendants appealed before Phase III, where new juries would have been tasked with applying the Phase I findings to the claims of the other individual class members.

The Florida Supreme Court held that the punitive damages award could not stand because there had been no liability finding in favor of the class and that "continued class action treatment" was "not feasible because individualized issues . . . predominate[d]." *Engle*, 945 So. 2d at 1262-63, 1268. Based on "pragmatic" considerations, however, the court further

ruled, *sua sponte*, that some of the issues in Phase I of *Engle* were appropriate for class-wide adjudication under Florida's counterpart to Fed. R. Civ. P. 23(c)(4), which permits class certification "'concerning particular issues.'" 945 So. 2d at 1268-69 (quoting Fla. R. Civ. P. 1.220(d)(4)(A)). The court retroactively certified an issues class action, and stated that class members could "initiate individual damages actions" within one year of its mandate and that the "Phase I common core findings . . . will have res judicata effect in those trials." *Id.* at 1269.

B. The Florida Supreme Court's Decision In *Douglas*

After the Florida Supreme Court's decision in *Engle*, thousands of plaintiffs alleging membership in the *Engle* class filed "*Engle* progeny" actions in Florida state and federal courts. Approximately 2,300 of these *Engle* progeny cases remain pending in state courts across Florida. In each of these cases, the plaintiffs assert that the *Engle* findings relieve them of the burden of proving that the defendants engaged in tortious conduct with respect to themselves or their decedents and that they are entitled to this benefit without having to establish that the *Engle* jury actually decided any of those issues in their favor.

In *Douglas*, the Florida Supreme Court rejected the *Engle* defendants' argument that federal due process prohibits giving such sweeping preclusive effect to the *Engle* findings. 110 So. 3d at 422. The Florida Supreme Court acknowledged that the *Engle* class's multiple theories of liability "included brand-specific defects" that applied to only some cigarettes and that the *Engle* findings would therefore be "useless in individual actions" if the plaintiffs were required to show what the *Engle* jury had "actually decided," as Florida

issue-preclusion law required. *Id.* at 423, 433. Recognizing that progeny plaintiffs thus could not invoke issue preclusion, but wishing to salvage the utility of those findings, the court held that the doctrine of "claim preclusion" (which it also referred to as "res judicata") applies when class members sue on the "same causes of action" that were the subject of an earlier issues class action. *Id.* at 432 (emphasis omitted). Under claim preclusion, the court stated, preclusion is applicable to any issue "which *might* . . . have been" decided in the class phase, regardless of whether the issue was actually decided. *Id.* (emphasis added; internal quotation marks omitted). It was therefore "immaterial" that "the *Engle* jury did not make detailed findings" specifying the bases for its verdict. *Id.* at 433.

The Florida Supreme Court further held that its novel claim-preclusion rule—which is simply issue preclusion shorn of the "actually decided" requirement—comports with due process. The court reasoned that the "actually decided" requirement mandated by *Fayerweather*, 195 U.S. at 307, is irrelevant to the application of claim preclusion. *Douglas*, 110 So. 3d at 435. It concluded that "the requirements of due process" in the claim-preclusion setting are only "notice and [an] opportunity to be *heard*," and found that the *Engle* proceedings satisfied that truncated standard. *Id.* at 430-31, 436 (emphasis added).

C. The Eleventh Circuit's Decision In *Graham*

Several thousand *Engle* progeny cases were filed in or removed to federal court. In *Graham v. R.J. Reynolds Tobacco Co.*, the en banc Eleventh Circuit held in a divided opinion that giving full faith and

credit to the *Engle* jury's defect and negligence findings is consistent with due process. 857 F.3d at 1185. Notwithstanding *Douglas*'s unambiguous holding that "claim preclusion" is the proper framework and that analyzing the *Engle* findings under "issue preclusion" would render them "useless," 110 So. 3d at 433, the Eleventh Circuit majority insisted that the Florida Supreme Court had applied *issue*-preclusion principles and had determined in *Douglas* that the *Engle* jury had actually decided "that *all* cigarettes the defendants placed on the market were defective and unreasonably dangerous" when returning its strict-liability and negligence verdicts. *Graham*, 857 F.3d at 1182.

Although the en banc majority recognized that the "*Engle* Court defined a novel notion of res judicata," it held that there were no constitutional barriers to giving full faith and credit to the "res judicata effect" of the defect and negligence findings because "[t]he Due Process Clause requires only that the application of principles of res judicata by a state affords the parties notice and an opportunity to be heard." *Graham*, 857 F.3d at 1184. That standard was met, the en banc court concluded, because the "tobacco companies were given an opportunity to be heard on the common theories in [the] year-long [Phase I] trial." *Id.* at 1185.

Three judges wrote dissents, including a 227-page dissent from Judge Tjoflat that "detail[ed] layer upon layer of judicial error committed by numerous state and federal courts, culminating finally with the Majority's errors today." *Graham*, 857 F.3d at 1214.

In a subsequent decision, the Eleventh Circuit relied on its "opportunity to be heard" reasoning in *Graham*—which had involved only the *Engle* strict-liabil-

ity and negligence claims—to reject the *Engle* defendants' due-process challenge to the preclusive effect of the concealment and conspiracy findings because the *Engle* defendants "had the opportunity to argue the conduct elements of the concealment and conspiracy claims brought against them" in Phase I of *Engle*. *Burkhart v. R.J. Reynolds Tobacco Co.*, 884 F.3d 1068, 1093 (11th Cir. 2018).

D. Proceedings In This Case

Pursuant to the procedures established by the Florida Supreme Court in *Engle*, respondent brought this wrongful-death action against PM USA alleging that her husband, Rayfield Brown, died from lung cancer caused by smoking. Respondent alleged that she was a member of the *Engle* class and asserted claims for strict liability, negligence, fraudulent concealment, and conspiracy to fraudulently conceal.

Over PM USA's objection, the trial court ruled that, if respondent proved *Engle* class membership (*i.e.*, that Mr. Brown was addicted to cigarettes containing nicotine and that his addiction was a legal cause of his death), she would be permitted to rely on the "res judicata effect" of the *Engle* jury findings to establish the conduct elements of her claims and would not be required to prove those elements with independent evidence at trial. *See* R. 34:6787-92.

After multiple mistrials, a jury found that Mr. Brown was an *Engle* class member and found in respondent's favor on the strict-liability, negligence, and conspiracy claims. R. 100:19585-88. The jury deadlocked on the other issues in the case, *see id.*, and a subsequent jury awarded respondent $4.375 million in compensatory damages and awarded her daughter

$2 million in compensatory damages. R. 134:26302-03.

PM USA appealed to the Florida First District Court of Appeal and argued, among other things, that the trial court "erred when it determined that [respondent] could rely on the *Engle* findings to establish the conduct elements of her claims." Initial Br. of PM USA 44 (Nov. 13, 2015). "That decision," PM USA explained, "violates PM USA's federal due process rights because it . . . disregards the longstanding requirement that preclusion is limited to issues 'actually decided' in an earlier proceeding." *Id.* (citing *Fayerweather*, 195 U.S. at 307); *see also id.* at 17 ("[P]ermitting [respondent] to rely on the *Engle* findings to establish the conduct elements of her claims violated PM USA's federal due process rights."). PM USA acknowledged that this federal due-process argument was foreclosed by the Florida Supreme Court's decision in *Douglas*, "but wishe[d] to preserve the issue for reconsideration by the Florida Supreme Court or review in the U.S. Supreme Court." *Id.* at 45.

The First District affirmed in a per curiam decision that did not contain any analysis or citation, *see* Pet. App. 1a, and that therefore was not subject to review in the Florida Supreme Court, *see Fla. Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988).

REASONS FOR GRANTING THE PETITION

As will be explained in detail in the petitions for writs of certiorari that will be filed no later than November 19, 2018, in *Philip Morris USA Inc. v. Boatright* and *R.J. Reynolds Tobacco Co. v. Searcy*, the Florida courts are engaged in the serial deprivation of the *Engle* defendants' due-process rights. Only 10% of the *Engle* progeny cases have been tried, but the

defendants have already paid judgments totaling more than $800 million, and there are approximately 2,300 additional cases that remain to be tried. This Court is the only forum that can provide PM USA with relief from the unconstitutional procedures that have now been endorsed by both the Florida Supreme Court and the Eleventh Circuit.

This petition raises the same due-process question as the forthcoming petitions in *Boatright* and *Searcy*: whether it is consistent with due process to permit plaintiffs to invoke the preclusive effect of the generalized *Engle* jury findings to establish elements of their individual claims without requiring them to show that those elements were actually decided in their favor by the *Engle* jury. *Boatright* and *Searcy* are ideal vehicles for plenary review of that question because, unlike this case, they culminated in written opinions. The Court should therefore hold this petition pending the outcomes of *Boatright* and *Searcy*, and then dispose of the petition consistently with its rulings in those cases.

I. THE FLORIDA COURTS' EXTREME DEPARTURE FROM TRADITIONAL PRECLUSION PRINCIPLES VIOLATES DUE PROCESS.

The Florida Supreme Court's decision in *Douglas* relieves *Engle* progeny plaintiffs from proving the most basic elements of their claims—for example, that the cigarettes they or their decedents smoked contained a defect—without requiring the plaintiffs to establish that those particular issues were actually decided in their favor in Phase I of *Engle*. In so doing, *Douglas* permits progeny plaintiffs to deprive PM USA and the other *Engle* defendants of their property despite the absence of any assurance that the plaintiffs have ever proved all the elements of their

claims—and despite the possibility that the *Engle* jury may have resolved at least some of those elements *in favor of the defendants*.

In this case, the trial court permitted respondent to rely on the *Engle* findings to establish that the PM USA cigarettes Mr. Brown smoked contained a defect without requiring her to establish that the Phase I jury had actually decided that issue in her favor. Indeed, the *Engle* findings do not state whether the jury found a defect in PM USA's filtered cigarettes, or its unfiltered cigarettes, or in only some of its brands but not in others. For all we know, Mr. Brown may have smoked a type of PM USA cigarette that the *Engle* jury found was *not* defective.

The trial court likewise permitted respondent to rely on the Phase I findings to establish that the advertisements and other statements by the tobacco industry on which Mr. Brown supposedly relied were fraudulent. The generalized Phase I verdict form, however, did not require the jury to identify which statements it found to be fraudulent from among the "thousands upon thousands of statements" on which the class's conspiracy to fraudulently conceal claim rested. *Engle* Tr. 35955. And because the *Engle* verdict form asked whether the defendants had conspired to conceal material information about the "health effects" *or* "addictive nature" of smoking, *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 424 (Fla. 2013), the *Engle* jury may have found that the defendants' only fraud pertained to certain advertisements that concealed the "health effects" of smoking, whereas the jury in this case may have premised its conspiracy verdict exclusively on Mr. Brown's alleged reliance on tobacco-industry statements about addiction that the *Engle* jury did *not* find to be fraudulent.

Because it is impossible to determine whether the *Engle* jury actually decided the conduct elements of respondent's claims in her favor, allowing her to invoke the *Engle* findings to establish those elements—including that the particular cigarettes Mr. Brown smoked were defective and that the statements on which he allegedly relied were fraudulent—violates due process. *See*, *e.g.*, *Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904) (holding, as a matter of federal due process, that where preclusion is sought based on findings that may rest on any of two or more alternative grounds, and it cannot be determined which alternative was actually the basis for the finding, "the plea of *res judicata* must fail").

This Court has "long held . . . that extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is fundamental in character." *Richards v. Jefferson Cty.*, 517 U.S. 793, 797 (1996) (internal quotation marks omitted). Few propositions are more fundamental to due-process jurisprudence than that a person may not be deprived of life, liberty, or property unless every element of the cause of action justifying the deprivation is duly established. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). This bedrock principle is clearly violated by a proceeding that allows a plaintiff to use preclusion to establish crucial elements of her claims—and to recover millions of dollars in damages—without any assurance that those elements were actually decided in her favor in the prior proceeding. Indeed, the "whole purpose" of the Due Process Clause is to protect citizens against this type of "arbitrary deprivation[ ] of liberty or property." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 434 (1994).

Nor can claim-preclusion principles be used to justify such an outcome. It is true, of course, that where claim preclusion applies, there is no need to establish the issues that were actually decided in the proceeding giving rise to the preclusion. But that is because claim preclusion operates only where there has been a final judgment with respect to a claim, such that further litigation of the claim may properly be precluded. *See Nevada v. United States*, 463 U.S. 110, 129-30 (1983). In such circumstances, the precise course of litigation that led to the final judgment is irrelevant; all that matters is that the proceeding met basic requirements of notice and opportunity to be heard, so that it was capable of producing a constitutionally valid judgment. But where, as here, preclusion is sought with respect to particular *issues*, the "actually decided" requirement plays an essential role in protecting parties' rights and cannot be jettisoned in the interests of judicial efficiency.

Now that both the Florida Supreme Court and the Eleventh Circuit have upheld the constitutionality of these unprecedented and fundamentally unfair procedures, this Court's review is urgently needed to prevent the replication of this constitutional violation in each of the thousands of pending *Engle* progeny cases.

II. THE COURT SHOULD HOLD THIS PETITION PENDING RESOLUTION OF *BOATRIGHT* AND *SEARCY*.

The Court should hold this petition pending the resolution of the forthcoming petitions for writs of certiorari in *Philip Morris USA Inc. v. Boatright* and *R.J. Reynolds Tobacco Co. v. Searcy*, which will be filed no later than November 19, 2018.

To ensure similar treatment of similar cases, this Court routinely holds petitions that implicate the

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

Because this case raises the same due-process question that is directly at issue in *Boatright* and *Searcy*, the Court should follow that course here to ensure that this case is resolved in a consistent manner. If this Court grants certiorari in *Boatright* or *Searcy*, and rules that giving preclusive effect to the generalized *Engle* findings violates due process, then it would be fundamentally unfair to permit the constitutionally infirm judgment in this case to stand. Thus, the Court should hold this petition pending the resolution of *Boatright* and *Searcy*, and, if this Court grants review and vacates or reverses in one or both of those cases, it should thereafter grant, vacate, and remand in this case.

CONCLUSION

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

Respectfully submitted.

ANDREW L. FREY
LAUREN R. GOLDMAN
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2500

MIGUEL A. ESTRADA
Counsel of Record
AMIR C. TAYRANI
BRANDON L. BOXLER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Petitioner

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