Nos. 18-649, 18-654

IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY, ET AL., *Petitioners*,
v.
CHERYL SEARCY, as personal representative of the Estate of Carol LaSard, *Respondent*.

PHILIP MORRIS USA INC., ET AL., *Petitioners*,
v.
RICHARD BOATRIGHT ET UX., *Respondents*.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit and the District Court of Appeal of Florida, Second District

BRIEF FOR *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

DARYL JOSEFFER
JONATHAN URICK
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

ANTON METLITSKY
(*Counsel of Record*)
ametlitsky@omm.com
O'MELVENY & MYERS LLP
7 Times Square
New York, N.Y. 10036
(212) 326-2000

Counsel for Amici Curiae

[Additional Counsel Listed On Inside Cover]

H. SHERMAN JOYCE
LAUREN S. JARRELL
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, N.W. Suite 400
Washington, D.C. 20036
(202) 682-1163

Counsel for the American Tort Reform Association

PETER C. TOLSDORF
LELAND P. FROST
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10TH STREET, N.W.
SUITE 700
WASHINGTON, D.C. 20001
(202) 637-3000

Counsel for the National Association of Manufacturers

JASON ZARROW
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Amici Curiae

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies. The Chamber represents the interests of its members before the courts, Congress, and the Executive Branch, and regularly files amicus briefs in cases that raise issues of vital concern to the Nation's business community.

The American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil-justice system to ensure fairness, balance, and predictability. For more than a decade, ATRA has filed amicus briefs in cases involving important liability issues.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of private-sector research and

---

[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received timely notice of the intent to file this brief. All parties have consented to the filing of this brief.

development in the Nation. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Amici have a strong interest in reversal of the rulings below because these opinions contradict this Court's longstanding precedent and undermine the fundamental due-process rights of American businesses. If allowed to stand, the decisions have the potential to transform dramatically the law of claim and issue preclusion and improperly expose *amici*'s members—and all companies doing business in the United States—to precisely the type of burdensome litigation that preclusion doctrine is designed to avoid.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Two decades ago, the Florida court system set out on an ambitious—albeit fundamentally misguided—project of putting virtually the entire cigarette industry on trial. At the heart of that litigation was a single class action designed to litigate multiple questions regarding cigarettes manufactured by multiple defendants over a span of forty years: (i) whether they were defective; (ii) whether cigarette manufacturers were negligent in marketing them; (iii) whether the manufacturers fraudulently concealed information; and (iv) whether the manufacturers engaged in a conspiracy to conceal.

Phase I of that litigation took the form of a yearlong trial that included numerous different theories of liability, many of which applied only to some (but

not all) manufacturers, some (but not all) products, and some (but not all) time periods. The jury was never asked to determine whether each of a particular manufacturer's products was defective, what specifically constituted the negligent marketing, or what information in particular was concealed. Rather, the jury was asked only to determine whether each manufacturer had engaged in each type of tortious conduct during the decades-long period.

The jury answered these questions in the affirmative—which it was required to do so long as it found that a manufacturer marketed some defective product, acted negligently, concealed information, or engaged in a concealment conspiracy at some point during the relevant period. The plan was to decide at a later phase (Phase III) of the litigation defendants' liability to individual class members. As the Florida Supreme Court itself explained, the Phase I jury findings "did not determine whether the defendants were liable to anyone." *Engle v. Liggett Grp., Inc.*, 945 So.2d 1246, 1263 (Fla. 2006) (quotation omitted). The liability phase of the litigation (Phase III) never happened, because the Florida Supreme Court held that individual issues predominated over common ones, so the class certified by the trial court could not continue. *Id.* at 1254.

The question here is whether the jury's Phase I findings can be given preclusive effect as to defendants' liability. That question answers itself—an absolute precondition for issue preclusion is that the question at issue must have been actually decided, and it is impossible to determine whether the jury actually decided any element of any individual plaintiff's claims. Yet, remarkably, the Florida Supreme

Court and the Eleventh Circuit have disagreed and imposed liability—albeit through very different paths, which are reflected in the petitions for certiorari in the *Boatright* (No. 18-654) and *Searcy* (No. 18-649) cases.

Boatright. The *Boatright* case arises from the Florida courts. In *Engle*, the Florida Supreme Court decertified the class prospectively, but it retroactively certified an issue class and directed Florida courts to give the jury's generalized findings "res judicata effect." *Engle*, 945 So.2d at 1269-70. By res judicata, the Court later clarified, it meant claim preclusion—the *Engle* defendants were barred in follow-on individual suits from contesting the "claim" that they had acted unlawfully. *Philip Morris USA, Inc. v. Douglas*, 110 So.3d 419, 432 (Fla. 2013). While claim preclusion, as even its name indicates, bars relitigation of *claims*, not *issues*, the Florida courts precluded petitioners from contesting *issues* surrounding the lawfulness of their conduct, not respondent's *claim*, effectively relieving the respondent in *Boatright* of any burden of proving the *issues* of defect, negligence, or concealment. That is, in substance, issue preclusion, but without the "actually decided" requirement, and it must be analyzed as such regardless of the "descriptive labels" the Florida courts may have attached to its novel preclusion doctrine. *Hansberry v. Lee*, 311 U.S. 32, 40 (1940).

Searcy. The *Searcy* case arises from the Eleventh Circuit. That Circuit has criticized the Florida courts' invocation of claim preclusion as "unorthodox," *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 11183 (11th Cir. 2017) (en banc), and "novel," *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278,

1290 (11th Cir. 2013). Yet the Eleventh Circuit, too, has given the *Engle* findings preclusive effect.

In *Graham*, the en banc Eleventh Circuit, over a blistering, 227-page dissent by Judge Tjoflat, held that the *Engle* findings were entitled to *issue*-preclusive effect, 857 F.3d at 1181-82, even though the Florida Supreme Court had concluded that "issue preclusion"—with its "actually decided" requirement—would render the *Engle* findings "useless," *Douglas*, 110 So.3d at 433. *Graham*, the Eleventh Circuit clarified below, had merely "assumed" that due process required an issue to have been actually decided before being given issue-preclusive effect. *Searcy* App. 10a-11a. But the decision below concluded that this assumption was incorrect: On the basis of an intervening decision, *Burkhart v. R.J. Reynolds Tobacco Co.*, 884 F.3d 1068 (11th Cir. 2018), the Eleventh Circuit held that "due process is satisfied so long as the defendants had notice and an opportunity to be heard on the claims at issue." *Searcy* App. 18a. Bound by that prior precedent, the court below reluctantly gave preclusive effect to concealment and conspiracy "findings" on the ground that petitioners had the opportunity to litigate those issues, even though the specific concealment and conspiracy allegations at issue in *Searcy* may not have formed the basis for the *Engle* jury's verdict, and thus had not been decided by a court or jury. *Id.* at 20a.

* * *

By jettisoning the "actually decided" requirement, both the Florida courts' and Eleventh Circuit's approaches to preclusion are irreconcilable with set-

tled principles of preclusion law, which themselves derive from fundamental due-process principles.

Defendants possess a fundamental due-process right "to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quotations omitted). That right protects more than just a defendant's ability to present evidence and make arguments on disputed issues, as the Eleventh Circuit apparently believes—at its core, it necessarily entitles a defendant to a "judicial determination" of those contested issues before it is deprived of property. *W. & A. R.R. v. Henderson*, 279 U.S. 639, 642 (1929). Liability without adjudication, this Court has repeatedly held, is anathema to due process.

That principle animates the most basic rule of preclusion: a defendant cannot be barred from contesting an issue in a subsequent case unless that issue was actually decided against it in a prior one. This "actually decided" requirement ensures that preclusion doctrines, however styled, do not deprive a defendant of its right to a judicial determination of every issue necessary to establish liability.[2]

This Court has for more than a century recognized that this "actually decided" rule is compelled by due process. In *Fayerweather v. Ritch*, 195 U.S. 276 (1904), the Court recognized a constitutional right to a "judicial determination of the fact upon which" a deprivation of property rests. *Id.* at 298-99. Where, as here, "testimony was offered at the prior trial upon several distinct issues, the decision of any

[2] Collateral estoppel and issue preclusion describe the same concept. And both issue preclusion and its cousin, claim preclusion, fall under the broad header of *res judicata*.

one of which would justify the verdict"—in other words, where it is impossible to tell what was actually decided—due process requires that "the plea of *res judicata* must fail." *Id*. at 307.

This rule is as old as the Western legal tradition itself. Common law courts gave preclusive effect only to determinations "directly upon the point"; "any matter to be inferred by argument from the judgment," by contrast, could not be used as "a bar." *The Duchess of Kingston's Case*, 20 Howell's State Trials 538 (House of Lords 1776). "[A]brogation of a well-established common-law protection" presumptively violates due process, *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994), and any tampering with the "actually decided" requirement certainly violates due process by depriving a defendant of its right to a judicial determination on every disputed element of the plaintiff's claim.

That basic principle obviously applies to class actions, just as it does to individual actions. The class action is a procedural vehicle that must leave "the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion). Class procedures cannot be used to deprive defendants of their right to litigate, and have a judge or jury determine, the issues raised. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011).

The rejection of these principles by the courts below is an invitation to abuse of the class vehicle. Absent badly needed correction by this Court, *Engle* and its progeny threaten to usher in a new era of

mass-tort litigation in which generic, all-encompassing "issue" classes are tried. Under this novel regime, so long as the evidence is sufficient to support the jury's finding on any *one* theory of liability, defendants in subsequent litigation will be barred from contesting *all* of them. A single jury verdict, in other words, could spell doom for an entire industry, ratcheting up already-immense settlement pressures and raising the stakes beyond recognition for any liability-phase issue trial.

This Court's review is needed to ensure that class litigation, its effects magnified by permissive preclusion doctrines, is not abused in this manner. And even more important, the Court's intervention is required to reestablish the basic principle of Anglo-American jurisprudence that a defendant cannot be deprived of property without a judicial determination of its liability.

The petitions should be granted.

ARGUMENT

I. CLASS-ACTION DEFENDANTS HAVE A DUE-PROCESS RIGHT TO A JUDICIAL DETERMINATION OF EVERY ELEMENT OF THE PLAINTIFF'S CLAIM

No one would dispute that if *Engle* had been an individual action against an individual defendant, the defendant could not be held liable in that proceeding without a judicial determination of every issue necessary to hold the defendant liable. Nor would anyone dispute that, absent such a determination, the defendant could not be precluded from contesting those issues in subsequent litigation, even

if that defendant had a full and fair opportunity to be heard. It should be just as obvious that the same rules apply in class actions. Class-action defendants have the same right as individual defendants to a judicial determination of the claims against them. *See, e.g.*, *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984) (rejecting issue preclusion in discrimination case despite prior class judgment that an employer did not engage in pattern or practice of discrimination because that finding did not necessarily decide whether the employer had discriminated against particular employees). And due process forbids foreclosing a defendant from contesting an issue unless that issue has already been judicially decided.

A. Defendants Have A Due-Process Right To A Judicial Determination Of Every Issue Necessary To Establish Liability

Defendants have a fundamental due process right to "present every available defense." *Lindsey*, 405 U.S. at 66 (quoting *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)). "The right to be heard," this Court has explained, "must necessarily embody a right to … raise relevant issues," *Holt v. Virginia*, 381 U.S. 131, 136 (1965), and must allow the defendant to "test the sufficiency" of the plaintiff's case by offering "evidence in explanation or rebuttal," *ICC v. Louisville & N.R. Co.*, 227 U.S. 88, 93 (1913); *Saunders v. Shaw*, 244 U.S. 317, 319 (1917); *see also Bell v. Burson*, 402 U.S. 535, 542 (1971).

But the right to "litigate the issues raised," *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971), protects a still more fundamental due-process guar-

antee—*viz.*, the right to have those issues *actually decided* before liability is imposed. Due process would be a hollow guarantee if it safeguarded a defendant's right to contest the plaintiff's evidence and allegations but not the right to a "judicial determination of issues involving life, liberty, or property." *Henderson*, 279 U.S. at 642; *see Fayerweather*, 195 U.S. at 298-99 (recognizing constitutional right to a "judicial determination of the fact upon which" a deprivation of property rests). This Court has thus explained that procedures that allow for liability without adjudication are irreconcilable with our system of justice. *See, e.g.*, *Henderson*, 279 U.S. at 642 (presumption "that operates to deny a fair opportunity to repel it[] violates the due process clause"); *Louisville & N. R.R.*, 227 U.S. at 91, 93 (rejecting contention that rate-setting orders of the Interstate Commerce Commission could be "conclusive" or based on findings "not formally proved at the hearing"); *see also Philip Morris USA, Inc. v. Scott*, 131 S. Ct. 1, 3 (2010) (Scalia, J., in chambers) (state-court decision that "eliminated any need for [plaintiffs] to prove, and denied any opportunity for [defendants] to contest," an element of a claim gives rise to significant due process concern).

B. The "Actually Decided" Precondition To Preclusion Protects This Right In The Context Of Multiple Adjudications

These fundamental principles apply equally in the context of multiple adjudications. The Court has thus long recognized that use of preclusion doctrines, whether in federal or state court, is circumscribed by due process. *See Fayerweather,* 195 U.S. at 297-99. "Th[e] doctrine of res judicata," this Court has ex-

plained, "is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice," *Hart Steel Co. v. R. Supply Co.*, 244 U.S. 294, 299 (1917), that sounds in due process itself, *see, e.g.*, *Richards v. Jefferson Cty.*, 517 U.S. 793, 797 & n.4 (1996); *Postal Telegraph Cable Co. v. City of Newport, Ky.*, 247 U.S. 464, 476 (1918). Chief among these due-process protections is the common-sense requirement that an issue have been actually and necessarily decided against the defendant in a prior litigation before the defendant can be precluded from contesting it in a future one.

1. Adherence to time-tested judicial procedures "protect[s] against arbitrary and inaccurate adjudication" and ensures that litigants receive due process of law. *Oberg*, 512 U.S. at 430; *see also, e.g.*, *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877). For that reason, the "touchstone" of the analysis is "traditional practice." *Oberg*, 512 U.S. at 430. "[A]brogation of a well-established common-law protection against arbitrary deprivations," *id.*—including "extreme applications of the doctrine of res judicata," *Richards*, 517 U.S. at 797—"raises a presumption that a due process violation has occurred," *Oberg*, 512 U.S. at 430.

The actually-decided requirement is precisely such a well-established protection. It has deep historical roots, and its abrogation deprives a defendant of due process of law.

a. The rule "that parties should not be permitted to relitigate issues that have been resolved by courts of competent jurisdiction ... predates the Republic," *San Remo Hotel, L.P. v. City & Cty. of San Francisco*,

545 U.S. 323, 336 (2005), and the "actually decided" requirement has long been a key precondition to this doctrine. "Every estoppell," noted Sir Edward Coke in 1628, "must be certaine to every intent, and [is] not to be taken by argument or inference." 2 Coke, *The First Part of the Institutes of the Laws of England; or, A Commentary upon Littleton* § 667(f) & 325b (London, W Clarke 1817). That rule was famously affirmed in 1776 in *The Duchess of Kingston's Case*: A party may only be precluded by a determination "directly upon the point," and not by a finding that can only be "inferred by argument." 20 Howell's State Trials 538. The "rule enunciated in *The Duchess of Kingston's Case*," one treatise later observed, is "concise, comprehensive and complete" and has been "universally adopted in England and America." J.C. Wells, *A Treatise on the Doctrines of Res Adjudicata and Stare Decisis* 173 (1878).

In fact, this rule is older than the common law itself: "The authority of the *res judicata*, with the limitations under which it is admitted, is derived ... from the Roman law and the Canonists." *Wash., A. & G. Steam Packet Co. v. Sickles*, 65 U.S. 333, 341 (1860); *see* Note, *Collateral Estoppel By Judgment*, 52 Colum. L. Rev. 647, 647 n.1 (1952). The Roman principle *exceptio rei judicatæ*, Ulpian explained, was "an effective bar to any proceeding in which the same question as that which has *already been decided* is put in controversy again between the same parties." Dig. 44.2.7.4 (quoted in George S. Bower, *The Doctrine of Res Judicata* § 377 (1924)) (emphasis added); *see also, e.g.*, J.E. Goudsmit, *The Pandects; A Treatise on the Roman Law* 330 (1873) ("It was necessary that the new action should present for decision the same

question as had *already been determined* by the first suit." (emphasis added)). Other scholars trace the origin of the actually decided requirement to Germanic law, which "had been brought into English law before the reception of the Roman principle." *Developments in the Law Res Judicata*, 65 Harv. L. Rev. 818, 820 (1952) ("The binding force of specific determinations where the second suit is on a different cause of action, known today as collateral estoppel, was derived from medieval Germanic law, which had developed a preclusion based on what was alleged and proved at the trial." (citing Robert W. Millar, *Historical Relation of Estoppel by Record to Res Judicata*, 35 Ill. L. Rev. 41, 41-44 (1940)).

b. The requirement that an issue be "actually litigated and resolved" before a party can be precluded from contesting it has long been a staple of American jurisprudence. *Taylor v. Sturgell*, 553 U.S. 880, 892 & n.5 (2008). As early as 1821, this Court noted the "general rule, that a fact which has been directly tried, and decided .... puts an end to all further controversy concerning the points thus decided between the parties to such suit." *Hopkins v. Lee*, 19 U.S. 109, 113 (1821). That rule, the Court observed, "has found its way into every system of jurisprudence" and was applicable to all judgments "so far as they profess to decide the particular matter." *Id.* at 114. But for points that "could only be inferred by arguing from the decree," no preclusive effect would lie. *Id.*

This Court has since uniformly insisted that preclusion is improper unless it is "certain that the precise fact was determined by the former judgment." *De Sollar v. Hanscome*, 158 U.S. 216, 221 (1895); *see Bobby v. Bies*, 556 U.S. 825, 834 (2009) ("If a judg-

ment does not depend on a given determination, relitigation of that determination is not precluded."); *Russell v. Place*, 94 U.S. 606, 608 (1876) (holding preclusion improper unless it can be shown that "the precise question was raised and determined in the former suit"); *accord Cromwell v. Cty. of Sac*, 94 U.S. 351, 353 (1876); *Sickles*, 65 U.S. at 344-45.

The Court explained in *Fayerweather* that this requirement not only derives from common law, but is mandated by due process. *Fayerweather* concerned the plaintiffs' right to share in an estate, which was contingent on the validity of certain releases. 195 U.S. at 298. The federal court dismissed the plaintiffs' suit on the ground that prior state proceedings had already decided the validity of the releases. This Court held that it had jurisdiction over the plaintiffs' appeal on the ground that it presented a question under the Fifth Amendment: If the state jury never made "any finding of the vital fact" of the validity of the releases, the federal court's application of res judicata would have "tak[en] away and depriv[ed] them of their property" in violation of due process. *Id.* at 298-99. Due process, the Court held, does not permit a court to give "unwarranted effect to a decision" by accepting "as a conclusive determination" a judgment "without any judicial determination of the fact upon which alone [the] deprivation could be justified." *Id.* Specifically, 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," then due process requires that "the plea of *res judicata* must fail." *Id.* at 307.

2. It is easy to see why the "actually decided" requirement is constitutionally mandated. In all civ-

il trials, the plaintiff must put on evidence establishing the elements of her claim, the defendant must be allowed to contest that proof and establish any available defenses, and the factfinder must decide controverted issues. Where the plaintiff demonstrates that an element of her claim (or an affirmative defense) was "actually litigated and resolved" against the defendant in a prior proceeding, *Taylor*, 553 U.S. at 892, there is no impairment of the defendant's right to a judicial determination of its liability, because the defendant has *already* been afforded that right. The defendant has received "one full and fair opportunity for judicial resolution of the same issue," *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 328 (1971), and is merely foreclosed from having it *re*-decided.

But without a showing that a disputed issue was actually decided in the prior litigation, there can be no assurance that the defendant has ever been afforded its right to a judicial determination of the issue at all. The only functional effect of issue preclusion in that circumstance is to relieve the plaintiff of the burden of proving every element of her claim. Basic notions of fairness mandate that a defendant—whether in an individual or class action, *see, e.g.*, *Cooper*, 467 U.S. at 876—cannot be deprived of its property on so slender a reed, which is why courts, including this one, have insisted that "[p]roof that the identical issue was involved ... is an absolute due process prerequisite to the application of collateral estoppel." 18 C. Wright et al, *Federal Practice and Procedure* § 4417 (2d ed. 2002) (quotations omitted) ("Wright & Miller").

C. The Decisions Below Are Inconsistent With These Fundamental Principles

Although the courts below applied different preclusion doctrines, both sanction extreme and repeated due-process violations by allowing issue preclusion where an issue has not actually been decided.

1. These errors are obvious in the Eleventh Circuit's decision in *Searcy*. There, the jury awarded $20 million in punitive damages principally on the theory that defendants had unlawfully marketed their low-tar/low-nicotine cigarettes as safer than other types. *Searcy* App. 6a; *see also Searcy* Pet. 15-16. But as the Eleventh Circuit candidly acknowledged, respondent could not "offer any evidence" to support the argument "that the *Engle* jury necessarily based its finding of concealment … on the defendants' conduct regarding the marketing of low-tar cigarettes." *Searcy* App. 17a. "[M]ultiple acts of concealment" were "presented to the *Engle* jury, and their general finding did not indicate which acts of concealment may have underlain their finding," making it especially "difficult to determine whether the *Engle* jury's basis for its general finding of concealment was the particular concealments regarding low-tar/low-nicotine cigarettes." *Id*. at 19a. Consequently, the Eleventh Circuit was forced to "assume that the *Engle* jury *did not* actually decide that question." *Id*. at 17a.

Yet the court below affirmed a decision in which the jury was "essentially told that the *Engle* jury found [low-tar/low-nicotine] concealment to have occurred" and that the jury "should consider it to have been proved" in this case. *Id*. at 19a-20a. It did so

based entirely on the unprecedented rule that it was "enough" that petitioners "had a right to be heard on a plaintiff's claims in a first action," even though the court was "unable to discern what the jury actually decided in making findings on those claims." *Id.* at 19a. That result is as wrong as it sounds—and it confuses a *necessary* condition for issue preclusion (a full and fair opportunity to litigate the issue) with a *sufficient* one.

2. *Boatright* also gave preclusive effect to the *Engle* findings but, unlike *Searcy*, did so under the banner of claim preclusion. That is because the Florida Supreme Court had previously recognized (correctly) that the jury's general verdict is "useless" for issue preclusion purposes because it is impossible to tell what the jury actually and necessarily decided. *Douglas*, 110 So.3d at 433. While the *Engle* plaintiffs asserted myriad theories of liability, all the *Engle* jury found was that each defendant "placed cigarettes on the market that were defective and unreasonably dangerous," "concealed or omitted material information," conspired to conceal such information, and "w[as] negligent," 945 So.2d at 1277, sometime during the relevant forty-year period.

These finding could have been based on any number of rationales, many of which will necessarily have no application in a follow-on case, as even the Eleventh Circuit has recognized. *Searcy* App. 19a. The jury's verdict could have been premised on a finding that some cigarettes use high-nicotine tobacco called Y-1 or that ammonia was sometimes used to increase nicotine levels—or not. Or it could have been premised on a finding that defendants concealed information regarding the safety of low-tar

cigarettes—or not. There simply can be no assurance that the precise issues to be precluded in Mr. Boatright's case, Pet. 15, were actually decided by the jury in the prior proceeding.

The Florida courts were able to avoid this "actually decided" requirement because they said that they were applying claim preclusion rather than issue preclusion. But the entire premise of *claim* preclusion is that a defendant can be precluded from litigating a *claim* when that *claim*—including the issues that comprise it—has already been litigated and decided. In that circumstance, a judge or jury has already determined all issues necessary to support liability, and so, if the prior proceeding was fair, there is no principle that would allow relitigation of the claim. Here, however, the Florida courts did not preclude petitioners from litigating Mr. Boatright's *claims*—he was still required to prove the *issues* of specific causation and damages. *Douglas*, 110 So.3d at 432. The only preclusion principle that could have applied here was issue preclusion, plain and simple, but without the "actually decided" requirement. Regardless what the Florida courts called the novel doctrine they were applying, *Hansberry*, 311 U.S. at 40, precluding a defendant from contesting the *issue* of the unlawfulness of its conduct without that *issue* having already been decided violates basic notions of due process, *supra* Section I.B.

3. While the doctrinal path to liability may be conflicting, one thing is clear as day: In Florida, whether in State or federal court, defendants have been forever precluded from contesting the unlawfulness of their conduct notwithstanding the fact that no jury has ever ascertainably found that the

conduct they engaged in was actually unlawful. As Justice Scalia cautioned, "[t]he extent to which class treatment may constitutionally reduce the normal requirements of due process is an important question." *Scott*, 131 S. Ct. at 4 (Scalia, J., in Chambers). That question is all the more important here given the flagrant due-process violations sanctioned by the courts below, which, absent this Court's intervention, will be repeated in *every Engle*-progeny case. The Court should grant the petitions for certiorari and reverse.

II. THE DECISIONS BELOW INVITE ABUSIVE "ISSUE" CLASS ACTIONS AND HARM AMERICAN BUSINESSES

This Court's review is also warranted to ensure that so-called "issue" classes, coupled with novel applications of preclusion doctrines, are not used by state and federal courts to trample defendants' due-process rights.

A. Issue Classes And Broad Preclusion Rules Inevitably Lead To Litigation Abuse

Unless carefully regulated, issue classes can be used—as they were by the Florida Supreme Court in *Engle*—to circumvent the ordinary requirements that "assure the class cohesion that legitimizes representative action in the first place." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). If all it takes for class certification is the predominance of a common question as to the particular issue to be certified—rather than the predominance of common legal and factual issues generally—then the ordinary class-certification requirements designed to safe-

guard due process are effectively meaningless. After all, a creative lawyer invariably will be able to identify at least one legal or factual issue subject to common proof. As one commentator has observed, issue classes threaten to "fundamentally revamp the nature of class actions" by subjecting every mass-tort case to at least partial class treatment. Jon Romberg, *Half a Loaf is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 Utah L. Rev. 249, 263 (2002) (asserting that "cases that do not otherwise meet the predominance and superiority requirements of Rule 23(b)(3) can be certified as issue classes").

Issue classes are problematic in their own right, but combining them with expansive preclusion doctrines would magnify exponentially the opportunities for abuse. Normally, issue classes are justified on the ground that the supposedly common issue will be litigated at the outset, then the remaining individual issues of liability will be determined later in the same proceedings. But the expansive use of preclusion doctrines—as in the decisions below—serves as an end run around even that safeguard, thus foreclosing litigation of those issues altogether. Once the "issue" of liability is determined in the abstract, no one has to prove that any defendant is actually liable to any plaintiff—under the approaches adopted below, individual plaintiffs can collect their money later in what are essentially claims-administration proceedings, without any opportunity for defendants to contest issues that have never actually been determined against them.

Indeed, there already has been a marked increase in the use of generic, aggregate trial proceed-

ings designed to do just that. Perhaps the most startling example—besides the *Engle* cases—is *Scott v. American Tobacco Co.*, another smoker class action where the court certified a class against multiple manufacturer defendants for a "[g]eneralized" trial on "fault and causation." 949 So.2d 1266, 1271 (La. Ct. App. 2007). When the jury found that the defendants had committed fraud, the court understood that later proceedings would be overwhelmed by individualized issues, so it solved that problem by simply holding that reliance was not an element of the plaintiffs' claims. *Id.* at 1277; *see Scott*, 131 S. Ct. at 3 (Scalia, J., in chambers). In *In re Whirlpool Corporation Front-Loading Washer Products Liability Litigation*, the Sixth Circuit affirmed a "liability class" designed to determine the defectiveness of 21 different models of front-loading washing machines over a period of 9 years. 722 F.3d 838, 844 (6th Cir. 2013). And in *Ex parte Flexible Products Co.*, the court affirmed consolidated proceedings brought by more than 1,500 plaintiffs against 11 manufacturer defendants to culminate in a "consolidated common issues trial ... on all issues as to liability and causation." 915 So.2d 34, 38, 40-43 (Ala. 2005). And these are just examples: Courts across the country have been confronted with similar requests to hold generic "liability" trials with perfunctory individualized proceedings to be held later.

B. Issue Classes And Broad Preclusion Rules Harm American Businesses And Consumers

This adventuresome use of aggregate litigation and preclusion doctrine, if left unchecked, invites

abuse and poses a serious threat to American businesses.

As this Court long ago recognized, offensive issue preclusion—even if carefully circumscribed—promotes litigation. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-30 (1979). And the more likely the estoppel effect, the more likely follow-on litigation will be. The reason is simple: Giving estoppel effect to prior judgments makes future ones easier to secure by relieving plaintiffs of their burden to prove all the elements of their claims. That is all the more true when estoppel effect is given to broadly-defined issue classes. Class counsel can avoid the ordinarily-stringent requirements of Rule 23 (or its state law analogues) by carving out discrete "liability" issues for certification. And under the decisions below, the broader the better: So long as the jury finds in plaintiffs' favor on *one* of any number of theories on a generalized verdict form, *all* of them will have estoppel effect in future suits, even if they were never actually proved at trial.

The stakes for American businesses will be staggering. As it is, traditional issue preclusion poses the real "possibility that an erroneous decision in a hotly contested case will receive dispositive weight in all future cases." Richard A. Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal*, 10 J.L. & Com. 1, 59 (1990). And the more liberal the application of preclusion doctrine, 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 is tremendous pressure to settle even meritless claims. *See* Steven P. Nonkes, *Reducing the Unfair Effects of Nonmutual Issue Preclusion Through Damages Limits*, 94 Cornell L. Rev. 1459, 1483 n.144 (2009) (explaining that collateral estoppel may cause a defendant to settle to avoid the consequences of "an aberrational finding in" the first suit). And again, that pressure is only magnified in the context of issue class actions, where an aberrational verdict in the class portion of the proceedings is virtually certain to have adverse consequences in the proceedings that follow. *See, e.g.*, *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995) (vacating certification of issue class in part because of the risk that a single verdict could "hurl the industry into bankruptcy" and would "likely" force a settlement, regardless of the merits).

The ripple effects of permissive class and preclusion rules will be felt throughout the economy, harming businesses and consumers alike. Litigation costs and settlement payouts are ultimately passed along, at least in part, to consumers in the form of higher prices, to employees in the form of lower wages, and to investors in the form of lower returns. And in the end, nobody wins—except the lawyers. Defense lawyers generate massive fees and plaintiffs' lawyers are rewarded with immense bounties, often well out of proportion to the value of the class's claims.

This Court's review is needed to forestall such abusive litigation and restore preclusion doctrine to its proper place.

CONCLUSION

The petitions should be granted.

Respectfully submitted,

DARYL JOSEFFER
JONATHAN URICK
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

ANTON METLITSKY
(*Counsel of Record*)
ametlitsky@omm.com
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036
(212) 326-2000

Counsel for Amici Curiae

H. SHERMAN JOYCE
LAUREN S. JARRELL
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, N.W., Suite 400
Washington, D.C. 20036
(202) 682-1163

Counsel for the American Tort Reform Association

JASON ZARROW
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Amici Curiae

PETER C. TOLSDORF
LELAND P. FROST
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10TH STREET, N.W.
SUITE 700
WASHINGTON, D.C. 20001
(202) 637-3000

Counsel for the National

Association of Manufacturers

December 2018