No. 18-649

IN THE
Supreme Court of the United States

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

Petitioners,

v.

CHERYL SEARCY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CAROL LASARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

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

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REPLY BRIEF FOR PETITIONERS

Respondent does not dispute that the Eleventh Circuit upheld her use of the *Engle* findings to establish the tortious-conduct elements of her concealment and conspiracy claims simply because petitioners "had notice and an opportunity to be heard regarding those claims" in *Engle*—even though the Eleventh Circuit was "unable to discern what the [*Engle*] jury actually decided in making its findings on those claims." Pet. App. 19a. That holding warrants this Court's review because its legal error is egregious and its consequences are enormous.

According to respondent, however, the Court should turn a blind eye to the shortcomings in the Eleventh Circuit's due-process analysis because this Court has denied review of prior *Engle* progeny cases. But those denials of certiorari—most of which involved "hold" petitions rather than requests for plenary review—are no reason for this Court to countenance the ongoing deprivation of petitioners' due-process rights through the application of the Florida Supreme Court's unprecedented preclusion standard. Those prior denials of review do not render the "[p]etition procedurally improper" or operate as "law of the case." Opp. 16. And much has changed since those prior denials: Although prior Eleventh Circuit decisions (erroneously) concluded that the *Engle* jury had actually decided the precise issues given preclusive effect in those cases, its subsequent decisions in *Burkhart v. R.J. Reynolds Tobacco Co.*, 884 F.3d 1068 (11th Cir. 2018), and in this case make clear that the Eleventh Circuit has now definitively rejected the "actually decided" requirement in favor of an "opportunity to be heard" due-process standard. This Court is now all that stands between the *Engle* defendants

and the application of the Florida Supreme Court's constitutionally flawed version of claim preclusion in each of the remaining *Engle* progeny cases.

Respondent's attempt to downplay the significance of the question presented—asserting that the question "implicate[s] only the six remaining cases pending in federal court," Opp. 1-2—has no footing in reality. Approximately 2,300 *Engle* progeny cases remain pending in Florida state court, each seeking millions of dollars in damages and each squarely implicating the same due-process issue presented here. Respondent also cherry-picks a few progeny cases with relatively small damages awards, *see id.*, but those outliers do not tell the full story. Although fewer than 300 progeny cases have been tried to verdict, the *Engle* defendants have already paid more than $800 million in judgments. That number will increase dramatically if this Court denies certiorari here: The nine progeny cases now pending before the Court involve judgments totaling more than $150 million.

Nor can respondent evade the question presented by suggesting that the concealment and conspiracy findings rest on "across-the-board conduct" that applies to all class members. Opp. 21. That may have been a reason to deny review in *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169 (11th Cir. 2017) (en banc)—where the court "review[ed] the *Engle* trial record" to make its own determination that the jury's defect and negligence findings supposedly rest on the ground that all cigarettes cause disease and are addictive, *id.* at 1182—but it is not the case with respect to the Eleventh Circuit's treatment of the concealment and conspiracy findings. Indeed, the panel in this case went so far as to "assume that the *Engle* jury *did not*

actually decide" issues relevant to Ms. LaSard's smoking history. Pet. App. 17a. Bound by the earlier decision in *Burkhart*, however, the panel was compelled to uphold the verdict. *Id.* at 18a.

Respondent is therefore left trying to defend the Eleventh Circuit's "opportunity to be heard" reasoning. Opp. 28. But a mere "opportunity to be heard" is not a constitutionally adequate basis to give preclusive effect to a prior jury's findings, as confirmed by centuries of common-law authority, this Court's due-process precedents, and simple common sense. *See* Pet. 20-24. No one—except perhaps the *Engle* plaintiffs and the Florida courts—would say that a State has satisfied due process by giving defendants an opportunity to defend themselves at trial but then treating *every* issue as resolved against the defendants in subsequent proceedings as long as the first jury decided at least *one* issue in the plaintiffs' favor. *Engle* progeny judgments produced by giving preclusive effect to every issue on which the defendants had an "opportunity to be heard" in *Engle*, Pet. App. 18a, are no less arbitrary, unfair, and unconstitutional.

I. RESPONDENT'S PROCEDURAL ARGUMENTS ARE BASELESS.

Respondent repeatedly emphasizes that this Court has denied review of other progeny cases and suggests that those denials somehow preclude review here. *See*, *e.g.*, Opp. 13-15. As this Court has "often stated," however, the "'denial of a writ of certiorari imports no expression of opinion upon the merits of the case.'" *Teague v. Lane*, 489 U.S. 288, 296 (1989). Given the "variety of considerations that underlie denials of the writ," *id.* (internal quotation marks omit-

ted), a prior denial in no way suggests that the question presented does not warrant review in a subsequent case.

Indeed, just last Term, the Court granted review in *Gundy v. United States*, 138 S. Ct. 1260 (2018), even though the Court previously had declined—more than a *dozen* times—to review the same question presented, *see* U.S. Br. in Opp. at 20-22, *Gundy*, No. 17-6086 (Dec. 18, 2017), 2017 WL 8132119. And two Terms ago, the Court granted review in *Murphy v. NCAA*, 138 S. Ct. 1461 (2018), even though the Court had previously denied review of the same question in a petition filed by the same petitioner in the same litigation, *see Christie v. NCAA*, 573 U.S. 931 (2014).

Respondent is also wrong in characterizing this petition as a "collateral attack" on the Florida Supreme Court's judgment in *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013). Opp. 16-17. That a decision in petitioners' favor would have the effect of rejecting the due-process standard applied by the Florida Supreme Court in *Douglas*—while leaving the judgment in favor of Mr. Douglas intact—hardly precludes this Court's review of that question.

Respondent fares no better in arguing that the Full Faith and Credit Act "require[s]" federal courts "to 'accept'" the sweeping preclusive effect that the Florida Supreme Court has afforded the *Engle* findings. Opp. 17. The Full Faith and Credit Act does not demand reflexive adherence to state law. To the contrary, federal courts must give full faith and credit to a state-court judgment *only* where the state rules of preclusion "satisfy the applicable requirements of the Due Process Clause." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482 (1982). Florida's novel rule of "of-

fensive claim preclusion"—which extends to every issue that "might . . . have been" decided by the *Engle* jury, *Douglas*, 110 So. 3d at 433 (internal quotation marks omitted)—is manifestly incompatible with due process and thus not entitled to full faith and credit, *see* Pet. 24-31.

Nor does the lack of a conflict between the Florida Supreme Court and the Eleventh Circuit foreclose review. Opp. 19. This Term alone, the Court will be deciding multiple cases in which it granted review of important federal questions in the absence of a conflict among the lower courts, *see*, *e.g.*, *Sturgeon v. Frost*, 138 S. Ct. 2648 (2018); *Royal v. Murphy*, 138 S. Ct. 2026 (2018), and at least one case in which all eleven courts of appeals to address the petitioner's argument had rejected it, *see Gundy*, 138 S. Ct. 1260.

Respondent's "no conflict" argument also ignores that both state and federal judges have repeatedly raised constitutional concerns about affording far-reaching preclusive effect to the *Engle* findings. *See*, *e.g.*, *R.J. Reynolds Tobacco Co. v. Brown*, 70 So. 3d 707, 718-20 (Fla. Dist. Ct. App. 2011) (May, J., specially concurring) (expressing "concern" about the "constitutional issue hover[ing] over" progeny litigation); *Brown v. R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328, 1342 (M.D. Fla. 2008) (concluding that due process prevents plaintiffs from relying on the *Engle* findings), *vacated on other grounds*, 611 F.3d 1324 (11th Cir. 2010). Indeed, several judges on the Eleventh Circuit remain uneasy with giving preclusive effect to the *Engle* findings. When the en banc court rejected petitioners' due-process challenge to the preclusive effect of the defect and negligence findings in *Graham*, three judges wrote separately in dissent.

See Pet. 13. And the panel in this case exhibited substantial reservations about giving preclusive effect to the concealment and conspiracy findings before reluctantly concluding that it was "bound" by *Burkhart* to do so. Pet. App. 20a. Thus, scratching the surface of the lower courts' unanimity reveals serious doubts about the constitutionality of the Florida Supreme Court's unprecedented approach to preclusion.

II. THERE IS NO WAY TO TELL WHETHER ANY JURY HAS ACTUALLY DECIDED ALL ELEMENTS OF RESPONDENT'S CLAIMS.

In an attempt to avoid scrutiny of the Eleventh Circuit's "opportunity to be heard" reasoning, respondent contends that all "factual predicates for liability" in this case "were proven at trial in *Engle*," which supposedly culminated in findings about "across-the-board conduct by the tobacco companies." Opp. 21-22. But both the Florida Supreme Court and the Eleventh Circuit have rejected the notion that the *Engle* jury actually decided all liability theories against the defendants, which is precisely why those courts have adopted the novel theory that the defendants can constitutionally be bound on issues *not* "actually decided" by that jury. The opinion below makes this perfectly clear.

To be sure, the *Engle* class did pursue some classwide theories of liability. But, as the Florida Supreme Court emphasized in *Douglas*, the class also pursued theories that applied to only a subset of class members, such as allegations of "brand-specific defects" applicable to only some types of cigarettes during only some periods of time. 110 So. 3d at 423; *see also Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278, 1281 (11th Cir. 2013) ("In Phase I of the trial, the plaintiffs presented evidence about some defects that

were specific to certain brands or types of cigarettes and other defects common to all cigarettes.").

Because "the class action jury was not asked . . . to identify specific tortious actions" committed by the defendants, *Douglas*, 110 So. 3d at 423, there is no way to know which of these disparate theories the *Engle* jury accepted in rendering its verdict, *see* Pet. 28-30. It was for this reason that the Florida Supreme Court adopted its novel form of preclusion. The court recognized that the *Engle* findings would be "useless in individual actions" if plaintiffs were required to show what the jury "actually decided." *Douglas*, 110 So. 3d at 433. The court therefore attempted to salvage those findings by replacing the "actually decided" requirement with a "might . . . have been" decided standard, *id.* (internal quotation marks omitted), which it deemed consistent with due process because the *Engle* defendants had been afforded an "opportunity to be heard," *id.* at 431.

The Eleventh Circuit has now embraced *Douglas*'s stark violation of basic due-process rights. Like the Florida Supreme Court in *Douglas*, the Eleventh Circuit panel in this case acknowledged that the *Engle* class advanced "numerous theories of concealment," Pet. App. 12a, and that the *Engle* jury's "general finding did not indicate which acts of concealment may have underlain their finding versus which allegations of concealment they might have rejected," *id.* at 19a. As a result, the court was compelled "to assume that the *Engle* jury *did not* actually decide" that petitioners fraudulently concealed information about the specific low-tar cigarettes smoked by Ms. LaSard. *Id.* at 17a. The court nevertheless permitted respondent to use the *Engle* findings to establish that petitioners *did* en-

gage in concealment as to those low-tar cigarettes because, "for purposes of granting preclusion consistent with the due process clause," it is "enough" under the Eleventh Circuit's controlling decision in *Burkhart* "that [petitioners] had a right to be heard" in *Engle*. *Id.* at 19a.

Accordingly, every state and federal court in Florida now subscribes to the view that due process permits precluding the *Engle* defendants from disputing any issue that was litigated in *Engle*, regardless of whether the jury actually decided the issue in favor of the class.[1]

Respondent further argues that it does not matter what the *Engle* jury actually decided because "there was ample independent evidence of Petitioners' misconduct" introduced in this case. Opp. 25. Regardless of the volume of evidence introduced at trial, however, the jury in this case was not required to find that the cigarettes smoked by Ms. LaSard contained a defect, that petitioners' conduct with respect to her was negligent, or that any tobacco-industry statements on which she may have relied were fraudulent. As the panel explained, if the jury found that Ms. LaSard was an *Engle* class member, "the *Engle* jury findings took care of the rest and established that Defendants had acted tortiously." Pet. App. 9a. The "independent evidence" introduced at trial therefore cannot compensate for the absence of any discernable finding by *any*

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[1] Respondent inaccurately characterizes petitioners' due-process argument as attacking "the adequacy of [the] verdict form in the *Engle* state court trial." Opp. 25. The legal sufficiency of the *Engle* verdict form to support the class jury's findings is not at issue here. The due-process question instead centers on the preclusive effect that can be constitutionally afforded to those findings in *subsequent* cases.

jury that respondent had proved the tortious-conduct elements of her claims.

III. A MERE "OPPORTUNITY TO BE HEARD" DOES NOT SATISFY DUE PROCESS.

According to respondent, "the Court has confined the due process inquiry in the application of state preclusion law to the issues of notice and the opportunity to be heard." Opp. 28. But as this Court explained long ago, due process prohibits a plaintiff from invoking preclusion to establish an element of her claim unless the defendant both "had an opportunity to present" the issue *and* "the question was decided" against the defendant in the prior proceeding. *Fayerweather v. Ritch*, 195 U.S. 276, 299 (1904); *see also* Pet. 21-24.

To belabor the obvious, liability for tortious conduct cannot be *imposed* on a defendant unless a jury has *decided* the defendant is liable, and neither the jury in this case nor the jury in *Engle* ascertainably decided that petitioners fraudulently concealed information about the health effects of low-tar cigarettes. Holding petitioners liable absent such a finding violates due process, and that violation is in no way ameliorated because petitioners had an opportunity to raise that issue before liability was imposed. In short, although petitioners may have had an opportunity to litigate the conduct elements of respondent's claims in *Engle*, that opportunity is insufficient to satisfy due process because, in light of the highly generalized *Engle* verdict form, there is no way to know whether the jury actually decided those issues in respondent's favor.

Respondent urges the Court to ignore *Fayerweather* as "a long-forgotten scrap of dicta," Opp. 28, and instead follow *Hansberry v. Lee*, 311 U.S. 32

(1940), and subsequent cases that have applied an "opportunity to be heard" standard to determine the constitutionality of a preclusion rule. *See* Opp. 27-28. But the basic principle that liability must be *decided* before it is *imposed* is hardly obscure dicta; it is a self-evident truism about the basic requirements of due process. None of the cases cited by respondent undermines this fundamental due-process principle. In *Hansberry*, for example, the Court held that a finding from an earlier lawsuit could not be given preclusive effect because the defendants against whom preclusion was invoked were not adequately represented in the prior proceeding. 311 U.S. at 46. This establishes that a prior verdict is prospectively binding only if there is *both* a prior finding actually deciding the precluded issue *and* an opportunity to be heard before that prior finding is made; it hardly suggests that a defendant can be found liable absent the requisite prior finding. Respondent's other cases are equally inapposite. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332-33 (1979) (addressing whether mutuality is a prerequisite to offensive collateral estoppel); *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971) (addressing whether mutuality is a prerequisite to defensive collateral estoppel).

Thus, nothing in *Hansberry* or any of this Court's other cases calls into question *Fayerweather*'s due-process holding or the centuries of common-law authority establishing that an issue must have been "actually litigated *and resolved*" in a prior proceeding in order for preclusion to apply. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (internal quotation marks omitted; emphasis added); *see also* Pet. 21-23.

IV. THIS CASE PRESENTS SIGNIFICANT AND RECURRING QUESTIONS.

Respondent contends that the question presented affects only a handful of lawsuits because the "Eleventh Circuit is addressing the tail end of the few remaining appeals" in *Engle* progeny cases. Opp. 19. Although progeny litigation in *federal* court may be nearing an end, the due-process question presented in this case is also directly at issue in each of the more than 2,300 progeny suits that are still pending in *state* court. The financial stakes are therefore enormous—*Engle* defendants have already paid nearly $1 billion in judgments—and far exceed the stakes in other cases in which this Court has intervened to prevent extreme departures from settled procedural norms. *See*, *e.g.*, *Richards v. Jefferson Cty.*, 517 U.S. 793, 795 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 418 (1994).

Moreover, the importance of the question presented extends beyond *Engle* progeny cases, as more and more courts are turning to "generic, aggregate trial proceedings" in an attempt to enhance judicial efficiency. Chamber Br. 20-21. Granting certiorari would allow the Court to clarify the due-process limits on these bespoke procedural innovations that rely on the combination of expansive preclusion doctrines and broadly defined issues classes to foster precisely the type of "arbitrary and inaccurate" outcomes that due process prohibits. *Oberg*, 512 U.S. at 430-31.

CONCLUSION

The Court should grant the petition for a writ of certiorari along with the petition in *Philip Morris USA Inc. v. Boatright*, No. 18-654.

Respectfully submitted.

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February 5, 2019