No. 18-654

IN THE
# Supreme Court of the United States

PHILIP MORRIS USA INC. AND LIGGETT GROUP LLC,

*Petitioners*,

v.

RICHARD BOATRIGHT AND DEBORAH BOATRIGHT,

*Respondents*.

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

## REPLY BRIEF FOR PETITIONERS


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

*Counsel for Petitioner Philip Morris USA Inc.*

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 Philip Morris USA Inc.*

*[Additional counsel listed on signature page]*

## RULE 29.6 STATEMENT

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

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

## REPLY BRIEF FOR PETITIONERS

Respondents do not dispute that the Florida courts permitted them to use the *Engle* findings to establish the tortious-conduct elements of their claims and secure a $35 million verdict without showing that any finder of fact—in this case or in *Engle*—actually decided those elements against petitioners. According to respondents, the Court should simply turn a blind eye to this fundamental due-process violation, which has already infected scores of verdicts and threatens to taint several thousand more unless this Court intervenes, 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. Contrary to respondents' assertion that "[n]othing has changed since" those prior denials of review, Opp. 2, this is the first petition to seek review of an *Engle* progeny case arising out of a Florida state court since the Eleventh Circuit's decisions in *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169 (11th Cir. 2017) (en banc), and *Burkhart v. R.J. Reynolds Tobacco Co.*, 884 F.3d 1068 (11th Cir. 2018), which definitively reject all aspects of the *Engle* defendants' due-process arguments and make clear that the Eleventh Circuit has joined the Florida Supreme Court in jettisoning the "actually decided" requirement in favor of an "opportunity to be heard" standard. This Court is now all that stands between the *Engle* defendants and the replication of this constitutional error in each of the remaining *Engle* progeny cases.

Respondents' attempt to downplay the significance of the question presented—asserting that only a "few plaintiffs remain to litigate against Petitioners," Opp. 2—blinks reality. In fact, approximately 2,300 *Engle* progeny cases remain pending in Florida courts, each seeking millions of dollars in damages and each squarely implicating the same due-process issue presented here. And 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. Thus, far from "dwindling," *id.* at 10, the financial implications of the question presented are already staggering and quickly increasing.

Respondents' assertion (at 15) that petitioners "did not preserve" their due-process argument fares no better. Petitioners raised that argument in every court below, *see* Pet. 15-17, and the Florida Second District Court of Appeal expressly passed on the merits of the issue, concluding that "the acceptance of the Phase I *Engle* findings as res judicata does not violate the *Engle* defendants' right to due process," Pet. App. 14a (citing *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 436 (Fla. 2013)). The constitutionality of the unorthodox preclusion standard adopted in *Douglas* and applied in this case is therefore squarely presented for this Court's review.

Ultimately, respondents are left trying to defend *Douglas*'s holding—now fully embraced by the Eleventh Circuit—that permitting plaintiffs to invoke the *Engle* findings to establish elements of their claims

does not violate due process because the *Engle* defendants had an "opportunity to be heard." Opp. 12 (citing *Douglas*, 110 So. 3d at 429-31). 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. 19-23. 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 that "might . . . have been" decided by the *Engle* jury, *Douglas*, 110 So. 3d at 433 (internal quotation marks omitted), are no less arbitrary, unfair, and unconstitutional.

## I. DENIALS OF CERTIORARI IN OTHER CASES DO NOT PRECLUDE REVIEW.

Respondents reiterate again and again that this Court has denied certiorari in other *Engle* progeny cases. *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 omitted), a prior denial in no way suggests that the question presented does not warrant review in a subsequent case. Last Term, for example, 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.

Nor does the "unanimous precedent" rejecting petitioners' due-process argument foreclose review here, Opp. 2—just as it did not foreclose review in *Gundy, see* U.S. Br. in Opp. at 21, *Gundy* (emphasizing that "[e]very court of appeals" to address the petitioner's argument had "rejected it"). Indeed, both state and federal judges have repeatedly raised constitutional concerns about affording far-reaching preclusive effect to the Phase I 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 because the findings are "equivalent to saying that the Defendants did something wrong without saying exactly what the Defendants did wrong and when"), *vacated on other grounds*, 611 F.3d 1324 (11th Cir. 2010).

Moreover, several judges on the Eleventh Circuit remain uneasy with giving preclusive effect to the *Engle* findings even though that court has now conclusively endorsed Florida's novel preclusion doctrine. When the en banc court rejected petitioners' due-process challenge to the preclusive effect of the defect and negligence findings, three judges wrote separately in dissent, including a 227-page opinion by Judge Tjoflat that exhaustively catalogued the "judicial error committed by numerous state and federal courts." *Graham*, 857 F.3d at 1214. And in *Searcy v. R.J. Reynolds*

*Tobacco Co.*, 902 F.3d 1342 (11th Cir. 2018), an Eleventh Circuit panel exhibited substantial reservations about giving preclusive effect to the concealment and conspiracy findings, requesting extensive supplemental briefing on the issue before reluctantly concluding that it was "bound" to give preclusive effect to those findings by the decision of a different Eleventh Circuit panel in *Burkhart*—even though the *Searcy* panel was "unable to discern" whether the *Engle* jury "actually decided" anything about the specific theory of concealment at issue, *id.* at 1353-54.

Respondents halfheartedly criticize petitioners for choosing "not to seek review of *Burkhart*," Opp. 13, but petitioners' decision to await the outcome of the long-pending *Searcy* case before seeking review was eminently reasonable and does not make the due-process issue any less cert-worthy. Nor does it change the fact that this is the first state-court case in which the *Engle* defendants have sought review since the Eleventh Circuit in *Graham*, *Burkhart*, and *Searcy* joined the Florida Supreme Court in *Douglas* by definitively rejecting all facets of their due-process argument. Now that the Eleventh Circuit has slammed the door on any possible relief, this Court is the only forum in which the *Engle* defendants can vindicate their due-process rights.

Respondents attempt to diminish the significance of the Eleventh Circuit's recent opinions in *Burkhart* and *Searcy* by emphasizing that petitioners "have long-treated the arguments for the fraud findings and the defect/negligence findings as the same." Opp. 13. That is true for litigation in state court, where *Douglas*'s claim-preclusion reasoning—that the preclusive effect of the *Engle* findings extends to any issue "which might . . . have been" decided by the *Engle*

jury—unambiguously applies to all of the findings. 110 So. 3d at 433 (internal quotation marks omitted). But that is not true in federal court, where the Eleventh Circuit in *Graham* "review[ed]" the "*Engle* trial record" in an attempt to determine what the *Engle* jury actually decided as the basis for its defect and negligence findings, but performed no similar record review for the concealment and conspiracy findings, which were not at issue in that case. 857 F.3d at 1182. In *Burkhart* and *Searcy*, however, the Eleventh Circuit abandoned this record-based approach and instead adopted the Florida Supreme Court's reasoning in *Douglas* that, no matter what the *Engle* jury actually decided, "due process is satisfied so long as the defendants had notice and an opportunity to be heard on the claims at issue." *Searcy*, 902 F.3d at 1353 (citing *Burkhart*, 884 F.3d at 1092).

Because the Florida Supreme Court and Eleventh Circuit have now squarely embraced the same due-process reasoning, the petitions in both this case and *Searcy* present the Court with a clean legal question that applies to all of the *Engle* findings and every progeny case that remains to be tried: whether due process is violated by a rule of preclusion that gives preclusive effect to any issue that might have been decided by a prior jury merely because the defendant had an opportunity to be heard in that prior proceeding.

## II. PETITIONERS DID NOT WAIVE THE DUE-PROCESS ISSUE.

The record resoundingly refutes respondents' assertion that petitioners "did not preserve" the due-process issue. Opp. 15. Petitioners raised their due-process argument in every court below, *see* Pet. 15-17, and none of those courts as much as hinted that the

argument was waived. That ends the matter: Only when a state court "clearly and expressly" relies on waiver as an independent basis for its disposition is there a jurisdictional barrier to this Court's review of a federal question. *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) (internal quotation marks omitted). Far from unambiguously identifying a state procedural barrier to review, the Second District Court of Appeal expressly rejected petitioners' due-process argument *on the merits* based on the controlling precedential force of *Douglas*. *See* Pet. App. 14a.

Respondents' other procedural argument—that petitioners failed to submit a "feasible alternative verdict form" during the *Engle* trial, Opp. 7—is both factually wrong and legally irrelevant. It is factually wrong because the *Engle* defendants proposed a verdict form that would have required the jury to identify "specific defects and tortious actions," but "the trial court rejected it." *Douglas*, 110 So. 3d at 423. And it is legally irrelevant because petitioners are not challenging the adequacy of the *Engle* verdict form; they are challenging the expansive preclusive effect the Florida courts have given to the jury findings reflected on that form. Because the burden of establishing preclusion always rests on the party invoking it, *see Taylor v. Sturgell*, 553 U.S. 880, 907 (2008), the *Engle* class—not the defendants—bore the burden of proposing a verdict form that would be useful to the class members in subsequent individual suits. Respondents cite no case for the extraordinary proposition that defendants are legally obligated to ensure that verdict forms are specific enough to aid their opponents in future litigation.

Nor were the defendants' statements to the *Engle* trial court inconsistent with petitioners' position here.

The *Engle* defendants never suggested that the jury's "verdict would enable 'other class members, however many thousands or hundreds of thousands it may be . . . [to] recover.'" Opp. 7-8 (alterations in original) (quoting *Engle* Tr. 388878, 38896-97). Respondents literally invent that statement by stitching together the word "recover" with an unrelated statement *nineteen pages earlier* in the *Engle* trial transcript. And the *Engle* defendants' statement that, "if the jury answers 'no . . . then not a single Florida smoker can recover,'" *id.* at 7 (alteration in original) (quoting *Engle* Tr. 36007), simply reflects that a "no" response would necessarily have meant that the jury had rejected *all* of the class's alternative theories of liability. A "yes" response, in contrast, provides no indication about which theories the jury accepted, which it rejected, and which it declined to reach.

Finally, respondents falsely claim that this case "does not even include excerpts from the record of the [*Engle*] class proceedings." Opp. 17. In reality, a DVD containing *Engle* record materials—which petitioners filed with their motion for a directed verdict—is part of the record. R.14768. In any event, no review of the *Engle* record is necessary to conclude that the Florida Supreme Court's heretofore-unknown rule of "offensive claim preclusion" is an "extreme application[ ] of the doctrine of res judicata" that violates due process. *Richards v. Jefferson Cty.*, 517 U.S. 793, 797 (1996).

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

According to respondents, due process requires no more than that "Petitioners have the opportunity to litigate their case." Opp. 21. But as this Court explained long ago—in an opinion respondents altogether ignore—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. 19-23. Although petitioners may have had an opportunity to litigate the conduct elements of respondents' claims in *Engle*, that opportunity is insufficient to satisfy due process because, in light of the highly generalized *Engle* verdict form and the multiplicity of theories pursued by the class, there is no way to know whether the jury actually decided those issues in respondents' favor.

Respondents counter that "the purpose of Phase I was to address claims of misconduct that applied to every member of the class." Opp. 17. 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. 28-31. 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)—a previously unknown approach to preclusion that is certain to foster precisely the type of "arbitrary and inaccurate" outcomes that due process prohibits, *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430-31 (1994).

## IV. THIS CASE PRESENTS SIGNIFICANT AND RECURRING QUESTIONS.

Respondents seek to diminish the significance of this case by arguing that "[o]nly about 1 percent" of the *Engle* class ever filed individual claims and only a "few" of those cases remain. Opp. 2. But the original class was huge: The 1% filing rate thus equated to nearly 8,000 individual lawsuits, *see id.* at 9-10, more than 2,300 of which remain pending in Florida courts. And although fewer than 300 cases have been tried, *id.* at 10, large verdicts like the $35 million verdict in this case are not uncommon.[1] In fact, the *Engle* defendants have already paid nearly $1 billion in judgments—each one tainted by the same constitutional error.

Moreover, the importance of the question presented extends beyond *Engle* progeny cases, as more

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[1] *See*, *e.g.*, *Philip Morris USA, Inc. v. Ledoux*, 230 So. 3d 530, 541 (Fla. Dist. Ct. App. 2017) (affirming $35 million verdict); *Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67, 83 (Fla. Dist. Ct. App. 2013) ($33 million); *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1073 (Fla. Dist. Ct. App. 2010) ($28.3 million).

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.

Finally, respondents exaggerate the inefficiencies that would result if progeny plaintiffs were required to prove each element of their claims instead of relying on the *Engle* findings. Opp. 22. Most progeny plaintiffs already present substantial evidence of defendants' conduct in an attempt to establish entitlement to punitive damages; the trial in this case, for example, lasted "almost a month" and generated "a record in excess of 70,000 pages." *Id.* at 10-11. In any event, the pragmatic goal of reducing burdens on plaintiffs cannot displace the constitutional mandates of due process. The Due Process Clause was specifically "designed to protect [against] . . . the overbearing concern for efficiency and efficacy" that was the driving force behind the Florida Supreme Court's decision to afford sweeping preclusive effect to the *Engle* findings. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

## CONCLUSION

The Court should grant the petition for a writ of certiorari along with the petition in *R.J. Reynolds Tobacco Co. v. Searcy*, No. 18-649.

Respectfully submitted.

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

*Counsel for Petitioner*
*Philip Morris USA Inc.*

KAREN H. CURTIS
CLARKE SILVERGLATE, P.A.
799 Brickell Plaza
Suite 900
Miami, FL 33131
(305) 377-0700

*Counsel for Petitioner*
*Liggett Group LLC*

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*
*Philip Morris USA Inc.*

KELLY ANNE LUTHER
ANN M. ST. PETER-GRIFFITH
KASOWITZ BENSON
TORRES LLP
1441 Brickell Avenue
Suite 1420
Miami, FL 33131
(305) 377-1666

*Counsel for Petitioner*
*Liggett Group LLC*

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