

Nos. 13-1187 & 13-1193

In The Supreme Court of the United States

R.J. REYNOLDS TOBACCO CO.,
Petitioner,

v.

JIMMIE LEE BROWN, as Personal Representative
the Estate of Roger Brown, Deceased,
Respondent.

R.J. REYNOLDS TOBACCO CO.,
Petitioner,

v.

ALVIN WALKER, as Personal Representative of the
Estate of Albert Walker, and GEORGE DUKE, III, as
Personal Representative of the Estate of Sarah Duke,
Respondents.

**On Petitions for Writs of Certiorari to the
Florida Fourth District Court of Appeal and the
U.S. Court of Appeals for the Eleventh Circuit**

**MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF OF WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER**

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Date: May 5, 2014

**MOTION OF WASHINGTON LEGAL FOUNDATION
FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of the Petitions in Nos. 13-1187 and 13-1193. Counsel for Petitioner has consented to the filing of this brief, as has counsel for Respondents in No. 13-1193. Counsel for Respondent in No. 13-1187 stated that his client “takes no position” on WLF’s request that he consent to the filing of its brief. Accordingly, this motion for leave to file is necessary.

WLF is a non-profit public interest law firm and policy center with many supporters. WLF’s primary mission is to defend and promote free enterprise, individual rights, a limited and accountable government, and the rule of law. In particular, WLF devotes a substantial portion of its resources to advocating and litigating against excessive and improperly certified class-action lawsuits.

Among the many federal and state court cases in which WLF has appeared to express its views on the proper scope of class-action litigation are *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); and *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), *cert. denied*, 552 U.S. 841 (2007).

WLF is particularly troubled by the willingness of some state courts to jettison traditional procedures governing civil litigation in order to facilitate the quick resolution of a large number of similar claims. The

decisions below are stark examples of that trend. The Florida Supreme Court has abandoned traditional preclusion rules and thereby barred Petitioner from contesting numerous elements of the thousands of *Engle* claims that have been filed against it in the Florida courts. The Eleventh Circuit has declined to meaningfully consider whether that abandonment violates Petitioner's due process rights. The basic guarantee of due process in a civil trial is that a defendant will not be held liable (and deprived of property) without an actual finding that it has wronged the plaintiff. Yet the courts below did precisely that by applying preclusion doctrine in an unprecedented manner. WLF is particularly concerned both because the Florida courts apparently intend to apply their unorthodox preclusion rules to thousands of other *Engle* cases, and because the decisions below are part of a broader trend among state courts to jettison traditional procedural rules in the name of litigation efficiency.

The Court recently has scrutinized abuses of the class-action device in federal courts. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). WLF seeks to file this brief to urge the Court to undertake a similar examination of the use of class actions in state courts.

WLF has no direct interest in the outcome of this litigation, financial or otherwise. Accordingly, WLF can provide the Court with a perspective not shared by any of the parties.

For the foregoing reasons, the Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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QUESTIONS PRESENTED

The Question in No. 13-1187 is:

Can the generic findings from the decertified *Engle* class action—findings the Florida Supreme Court deemed “useless” for issue preclusion purposes—be used to excuse thousands of plaintiffs in follow-on cases from proving essential elements of their claims without violating defendants’ due process rights?

The Question in No. 13-1193 is:

Do either full faith and credit principles or due process permit generic findings from the decertified *Engle* class action—findings the Florida Supreme Court deemed “useless” for issue preclusion purposes—to be used to excuse thousands of plaintiffs in follow-on cases from proving essential elements of their claims?

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**BRIEF OF WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER**

INTERESTS OF *AMICUS CURIAE*¹

The interests of the Washington Legal Foundation (WLF) are set out more fully in the attached motion for leave to file. In brief, WLF is a non-profit public interest law firm and policy center with many supporters. WLF devotes a substantial portion of its resources to advocating and litigating against excessive and improperly certified class-action lawsuits.

WLF is particularly troubled by the willingness of some state courts to jettison traditional procedures governing civil litigation in order to facilitate the quick resolution of a large number of similar claims. The decisions below are stark examples of that trend. The Florida Supreme Court has abandoned traditional preclusion rules and thereby barred Petitioner from contesting numerous elements of the thousands of *Engle* claims that have been filed against it in the Florida courts.

STATEMENT OF THE CASE

The facts of these cases are set out in detail in the Petitions. WLF wishes to highlight several facts of

¹ Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Ten days prior to the due date, counsel for WLF provided counsel for Respondents with notice of its intent to file.

particular relevance to the issues on which this brief focuses.

These two cases arise in the aftermath of a massive class-action proceeding (“*Engle*”) in the Florida courts. The certified class consisted of all Floridians who suffered or died from diseases and medical conditions caused by their addiction to cigarettes. Named as defendants were all the major tobacco companies.

The trial court elected to conduct the trial in three phases. Phase I—a year-long trial—addressed, among other things, purportedly common issues regarding the defendants’ conduct over more than four decades. The plaintiffs asserted numerous causes of action; and for each cause of action, they asserted many alternative allegations of wrongdoing. The trial judge submitted to the jury a verdict form that did not require the jury to specify which of the many alternative allegations it had accepted or rejected. The jury responded with general findings that the evidence was sufficient to prove strict product liability; fraud and misrepresentation; fraud by concealment; civil conspiracy by misrepresentation and concealment; breach of implied warranty; breach of express warranty; negligence; and intentional infliction of emotional distress. But those general findings did not specify which of the alternative factual allegations it had accepted as the bases for its findings. For example, they did not specify which of the brands marketed by each defendant were defective, and what the defect consisted of. The jury also determined that the class as a whole was entitled to punitive damages.

Following the Phase II trial, the jury awarded \$145 billion in punitive damages to the entire class. Before the beginning of Phase III (which was to determine liability to and compensatory damages for each of the 700,000 class members), the defendants appealed.

The Florida Supreme Court prospectively decertified the class and vacated the punitive damages award. *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). Although concluding that the trial court had not abused its discretion in certifying the class initially, the Florida Supreme Court ruled that continued class treatment for Phase III of the trial plan was “not feasible because individualized issues such as legal causation, comparative fault, and damages predominate.” *Id.* at 1268. It then adopted what it termed a “pragmatic solution” for dealing with the completed portions of the class action. In addressing anticipated claims from individual smokers, trial courts were directed to:

[R]etain[] the jury’s Phase I findings other than those on the fraud and intentional infliction of emotional distress claims, which involved highly individualized determinations, and the finding on entitlement to punitive damages questions, which was premature. Class members can choose to initiate damages actions and the Phase I common core findings we approved will have res judicata effect in those trials.

Id. at 1269. The court did not explain what “res judicata effect” it anticipated, nor did it suggest that trial courts should deviate from the normal common law

preclusion rules traditionally applied in Florida courts.

In the years that followed, federal and state courts struggled to apply *Engle*'s enigmatic “*res judicata*” ruling. The U.S. Court of Appeals for the Eleventh Circuit concluded in *Bernice Brown v. R.J. Reynolds Tobacco Co.*, 161 F.3d 1324, 1336 (11th Cir. 2010), that the findings of the Phase I *Engle* jury should be given preclusive effect in a later case *only* when the plaintiff could establish that the Phase I jury actually decided that the defendant tobacco company acted wrongfully with respect to cigarettes that the plaintiff smoked. By the time the claims at issue here went to trial, however, several Florida intermediate appellate courts had issued decisions that conflicted with the Eleventh Circuit, ruling that *Engle* conclusively established that all tobacco companies had acted wrongfully with respect to all cigarettes they marketed throughout the class period. *See, e.g., R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1066-67 (Fla. 1st DCA 2011).

These two Petitions involve claims filed by three individual members of the decertified *Engle* class. Their claims are among thousands of individual “*Engle* progeny” claims filed in the aftermath of the Florida Supreme Court’s 2006 decision.

In each case, the trial court instructed the jury that it had already been determined in a prior trial that the cigarettes smoked by the decedents were defective and that Petitioner had acted negligently in placing

them on the market.² The juries were instructed to resolve three issues only: (1) were the decedents members of the *Engle* class; (2) were the decedent's injuries caused by Petitioner's wrongdoing; and (3) if so, what damages should the plaintiff recover? Each of the three juries found against Petitioner and awarded damages.

In 2011, the Florida Fourth District Court of Appeal affirmed the judgment against Petitioner in No. 13-1187. Brown Pet. App-1 to App-27. The court concluded that the Florida Supreme Court, when it stated in *Engle* that the jury's Phase I findings were to be given "*res judicata* effect," (1) was referring to issue preclusion; and (2) intended to preclude tobacco companies from contesting that they had acted wrongfully with respect to any of the thousands of members of the *Engle* class. *Id.* at App-16 (stating that "the *Engle* findings preclusively establish the conduct elements of the strict liability and negligence claims as pled in this case."). The court stated that it was "concerned the preclusive effect of the *Engle* findings violates Tobacco's due process rights" but that it interpreted *Engle* as requiring that result and that it was "compelled to follow the mandate of the supreme court." *Id.* at App. 18a.³

² These instructions were given over Petitioner's objection that the *Engle* Phase I jury did not find that any specific cigarette was defective or negligently marketed, and that the Due Process Clause of the Fourteenth Amendment protected its right to introduce evidence that it had not acted wrongfully with respect to the plaintiff.

³ The court emphasized the extent of its discomfort with *Engle* by suggesting that it constituted an "extreme applicatio[n] of

In 2013, the Florida Supreme Court finally revisited *Engle*, agreeing to answer a certified question regarding whether “accepting as res judicata” the *Engle* Phase I jury findings violated the tobacco company’s due process rights. The court answered that question in the negative, but in the course of doing so totally revamped the rationale for giving those findings preclusive effect. *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla. 2013).

Douglas initially explained that the *Engle* Phase I jury findings are binding in every *Engle* progeny case, regardless whether the plaintiff introduces evidence establishing that the Phase I jury actually decided that the defendant tobacco company acted wrongfully with respect to cigarettes that the plaintiff smoked. The court stated, “[W]e reject the defendants’ argument that the Phase I findings are too general to establish any elements of an *Engle* plaintiff’s claims, including a causal connection between the *Engle* defendants’ conduct and injuries proven to be caused by addiction to smoking their cigarettes.” 110 So. 3d at 429.

The court reasoned that giving binding effect to those findings does not violate the *Engle* defendants’ federal due process rights because they were provided adequate “notice and opportunity to be heard as to whether their actions should subject them to liability to all class members under the theories alleged by the *Engle* class.” *Id.* at 431. Nor can the *Engle* defendants claim that they “are being arbitrarily deprived of their property,” the court reasoned, because they are still

the doctrine of res judicata.” *Ibid.*

entitled to raise other defenses, such as individual causation and damages. *Id.* at 431-32.

Finally, in response to arguments that its preclusion ruling entailed an extreme application of Florida's normal issue preclusion rules, the court stated that *Engle* was actually an application of claim preclusion, not issue preclusion. *Id.* at 432-35. The court conceded that the *Engle* jury was presented with numerous alternative allegations of wrongdoing and that the jury "did not make detailed findings for which evidence it relied upon" in arriving at its verdict. *Id.* at 433.⁴ It deemed the absence of such factual findings irrelevant, however, because it viewed the verdict as a finding in favor of the class as to the *claim* that the defendants had acted wrongfully with respect to all members of the class. *Ibid.* In other words, the court concluded, "[t]he *Engle* judgment was a final judgment on the merits because it resolved substantive elements of the class's claims against the *Engle* defendants. . . . [T]he class jury resolved the substantive matter of the *Engle* defendants' common liability to the class under several legal theories." *Id.* at 433-34.⁵ While conceding

⁴ Indeed, the court conceded that the Phase I findings would be rendered "useless in individual actions" if issue preclusion were applied, because of the difficulty in proving that the jury actually decided that the tobacco companies acted wrongfully with respect to the cigarettes smoked by an individual plaintiff. *Ibid.*

⁵ The court made no coherent attempt to explain how the Phase I jury findings could realistically be characterized as a "final judgment" in the absence of a judgment that the defendants were responsible for anyone's injuries, and given that the findings were made in connection with proceedings designated as "Phase I" of a three-phase trial proceeding. Nor did the court attempt to explain

that issue preclusion is inappropriate unless the issue was actually litigated and determined in prior proceedings, the court noted that “claim preclusion, unlike issue preclusion, has no ‘actually decided’ requirement but, instead, focuses on whether a party is attempting to relitigate the same claim, without regard to the arguments or evidence that were presented to the first jury that decided the claim.” *Id.* at 435.

Following its *Douglas* decision, the Florida Supreme Court dismissed its review of Petitioner’s appeal in *Brown*. *Brown* Pet. App-30.

In light of the *Douglas* decision, the Eleventh Circuit affirmed the judgment in favor of Respondents Walker and Duke. *Walker* Pet. App-26 to App-50. The appeals court explained that its inquiry was “narrow”: “whether giving full faith and credit to the decision in *Douglas* would arbitrarily deprive R.J. Reynolds of its property without due process of law.” *Id.* at App-43. It affirmed on the basis of its conclusion that “the Supreme Court of Florida did not act arbitrarily.” *Id.* at App-45.

The Eleventh Circuit made no effort to defend the notion that claim preclusion is applicable to this case; indeed, the Eleventh Circuit expressed doubts about the Florida Supreme Court’s characterization of its ruling as one based on claim preclusion. Rather, the Eleventh Circuit asserted, *Engle* and *Douglas* are really exercises in issue preclusion, and the Florida Supreme

how its “claim preclusion” holding could be squared with its holding in *Engle* that “the Phase I jury did not determine whether the defendants were liable to anyone.” *Engle*, 945 So. 2d at 1263.

Court actually determined that the *Engle* Phase I jury found that *every* brand of cigarette manufactured by *every Engle* defendant during *every one* of the 50 years at issue in *Engle* was wrongfully marketed. *Id.* at App-43 to App-48. Without commenting on whether it agreed with that alleged determination, the Eleventh Circuit said, “[W]e cannot refuse to give full faith and credit to the decision in *Douglas* because we disagree with its holding about what the jury in Phase I decided.” *Id.* at App-43.

The Eleventh Circuit deemed it irrelevant that the Florida Supreme Court purported to be applying claim preclusion doctrine, so long as its decision could meet due process standards if analyzed as an application of issue preclusion:

Labeling the relevant doctrine as claim preclusion instead of issue preclusion may be unorthodox and inconsistent with the federal common law about those doctrines, but the Supreme Court has instructed us that, “[i]n determining what is due process of law, regard must be had to substance, not to form.” . . . Whether the Supreme Court of Florida calls the relevant doctrine issue preclusion, claim preclusion, or something else, is no concern of ours.

Id. at App-48 to App-49 (quoting *Fayerweather v. Ritch*, 195 U.S. 276, 297 (1904)).

REASONS FOR GRANTING THE PETITION

These cases present issues of exceptional

importance to the business community. Under traditional notions of due process, a defendant in a civil trial will not be held liable (and deprived of property) without a meaningful opportunity to contest all elements of liability. The Court has explicitly held that due process imposes limits on use of preclusion principles to prevent a litigant from contesting an issue of fact or law. *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008). Review is warranted to determine whether the Florida Supreme Court's unorthodox and extreme application of preclusion principles denies Petitioner and other *Engle* defendants a meaningful opportunity to contest claims that they acted wrongfully toward individual smokers.

The Florida Supreme Court and the Eleventh Circuit assert that there has been no due process violation because the *Engle* defendants were on notice that the plaintiffs were seeking class-wide findings of wrongdoing and that the defendants "had every reason to litigate each potential theory of liability to the fullest extent possible." *Douglas*, 110 So. 3d at 431; *Walker*, App-46. But adequate notice is not by itself sufficient to satisfy due process concerns. Rather, the issue is whether it is consistent with due process to apply unorthodox preclusion principles in a case in which there is no evidence that the jury actually made a determination that all defendants acted wrongfully at all times. The unorthodox nature of the preclusion principles applied here is apparent when one considers that the Eleventh Circuit interpreted *Douglas* as having adopted a preclusion rule more akin to issue preclusion than to claim preclusion—yet all the while the Florida Supreme Court insists that it has *not* applied issue preclusion and that doing so would render the *Engle*

Phase I findings “useless.”

The Supreme Court of Florida and the Eleventh Circuit also assert that *Engle* defendants cannot demonstrate a due process violation unless they show that they have been arbitrarily deprived of property. *Douglas*, 110 So. 3d at 431-32; *Walker*, App-46. Both courts note that although defendants in *Engle* progeny trials are denied the opportunity to contest wrongdoing, they are still permitted to contest other elements of the claims, including membership in the *Engle* class, causation, and comparative fault. *Ibid.* But this Court has never suggested that due process concerns are eliminated so long as the defendant is provided a sporting chance and is allowed to assert most of his defenses. Rather, as the Court has repeatedly made clear, “the Due Process Clause prohibits a State from punishing an individual without first providing that individual with an opportunity to present *every* available defense.” *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (emphasis added). Review is warranted to determine whether the courts below denied Petitioner its due process rights when they precluded Petitioner from contesting wrongdoing toward Respondents, despite the absence of any Phase I findings directly applicable to its conduct toward Respondents.

Review is particularly warranted in light of the dramatic impact of the decision below. Petitioner has demonstrated that the issue preclusion rules applied here have led to massive liability on cigarette manufacturers—over \$450 million in adverse judgments in just the small number of cases that have been tried to date. In light of the thousands of *Engle* progeny cases that await trial and to which the unorthodox preclusion

rules are to be applied, the importance of the Questions Presented is readily apparent.

Review is also warranted because the decisions below are part of a broader trend among state courts to jettison traditional procedural rules in the name of litigation efficiency. A number of state courts have sanctioned novel use of class actions—often resulting in defendants being denied an opportunity to contest all elements of the claims asserted by class members. The Court recently took a careful look at abuses of the class action device in federal courts. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). WLF respectfully submits that these cases represent a similar opportunity to examine due process limitations on the use of class actions in state courts.

I. The Petitions Raise Important Issues Regarding Whether Florida’s Extreme Deviation from Standard Preclusion Principles Violates Due Process

As Petitioner has well documented, the decisions below, barring Petitioner from contesting important elements of Respondents’ claims, represent a marked deviation from common law principles of issue preclusion adopted in Florida and elsewhere. Review is warranted to determine whether that deviation—which is likely to affect the outcome of thousands of *Engle* progeny cases—violates due process rights protected by the 14th Amendment.

This Court has long recognized that “traditional practice provides a touchstone for constitutional analysis.” *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430

(1994). Adherence to traditional judicial procedures “protect[s] against arbitrary and inaccurate adjudication” and thereby provides assurance that litigants will receive due process of law. *Id.*; *see also Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) (stating that the Due Process Clause ensures “a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.”).

Florida courts and other American courts have a long tradition of permitting a plaintiff to recover damages only if he proves each of the elements of his claim and the trier of fact has determined that those elements have been proven. This Court has held unequivocally, “[T]he Due Process Clause prohibits a State from punishing an individual without first providing that individual with ‘an opportunity to present every available defense.’” *Williams*, 549 U.S. at 353 (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)).

Of course, once an issue has been fully litigated *and* resolved against a party in a valid court proceeding, considerations of efficiency and fairness dictate that limitations be imposed on the party’s right to re-litigate the issue. But, similar to the issue preclusion rules in all other States, Florida’s normally-applicable rules place a heavy evidentiary burden on the party seeking to invoke issue preclusion.

Under Florida law, for issue preclusion to apply, five factors must be present:

- (1) an identical issue must have been presented

in the prior proceeding; (2) the issue must have been a critical and necessary part of the prior determination; (3) there must have been a fair opportunity to litigate the issue; (4) the parties in the two proceedings must be identical; and (5) the issues must have been actually litigated.

Goodman v. Aldrich & Ramsey Enters., Inc., 804 So. 2d 544, 546-47 (Fla. 2d DCA 2002). Issue preclusion is not applied by Florida courts to issues that could have been, but may not have been, decided in an earlier lawsuit between the parties. *See, e.g., Acadia Partners, L.P. v. Tompkins*, 673 So.2d 487, 488-89 (Fla. 5th DCA 1996).

The second of the five *Goodman* factors is most pertinent to any issue preclusion claims arising in *Engle* progeny cases. If issue preclusion is applied in progeny cases, the defendant is precluded from contesting any relevant facts regarding its allegedly tortious conduct—including that *throughout* the time periods that the individual plaintiff smoked, the brands of cigarettes they smoked were defectively and negligently designed and marketed, and that the manufacturer concealed and conspired to conceal the adverse health effects of those brands. But issue preclusion is appropriate under the second *Goodman* factor only if such findings were “a critical and necessary part” of the *Engle* Phase I jury findings.

It is readily apparent from the Phase I trial record that such plaintiff-specific factual findings were *not* a “critical and necessary part” of the Phase I jury’s verdict. In response to a verdict form that required little specificity, the jury made only general findings that each of the defendants had, at some time and with

respect to at least some of its cigarette brands, engaged in tortious conduct of the types alleged. But one cannot conclude, for example, based solely on the verdict rendered, that the jury found that the brands of cigarettes smoked by Roger Brown, Albert Walker, and Sarah Duke were defectively designed or marketed during the years they smoked.

Indeed, the Florida Supreme Court in *Douglas* explicitly recognized the inapplicability of issue preclusion to this case, concluding that application of issue preclusion rules would render the Phase I jury findings “useless in individual actions” because of the difficulty in proving that the Phase I jury actually decided that the *Engle* defendants wrongfully with respect to the cigarettes smoked by any individual plaintiff. *Douglas*, 110 So. 3d at 433. To avoid rendering the Phase I jury findings “useless,” the Florida Supreme Court ruled that *Engle* was actually an application of claim preclusion, not issue preclusion. *Id.* at 432-435. The court concluded that the trial court at the conclusion of Phase I had entered a “final judgment” against the tobacco companies on the issue of wrongdoing with respect to all members of the class, and that that final judgment conclusively determined, in any subsequent proceedings, claims by any member of the *Engle* class that an *Engle* defendant acted wrongfully in marketing its cigarettes to him or her. *Ibid.*

As the Eleventh Circuit recognized, applying claim preclusion to *Engle* progeny cases is highly “unorthodox.” Walker Pet. App-48. *Douglas*’s claim preclusion ruling collides with the traditional Florida rule that claim preclusion applies only where there has

been a prior final judgment “on the merits.” *Kimbrell v. Paige*, 448 So. 2d 1009, 1012 (Fla. 1984). A “final judgment” for claim preclusion purposes has heretofore been understood in Florida and elsewhere to exist only where there has been a full adjudication on the merits; that is, the judgment on the claim “is not tentative, provisional, or contingent [but] represents the completion of *all* steps in the adjudication of the claim by the court, short of any steps by way of execution or enforcement that may be consequent upon the particular kind of adjudication.” RESTATEMENT (SECOND) OF JUDGMENTS § 13 cmt. b (1982) (emphasis added). The Phase I jury findings cannot plausibly be labeled a “final judgment,” as that term is normally understood, in the absence of a judgment that the defendants were responsible for anyone’s injuries, and given that the findings were made in proceedings designated as “Phase I” of a three-phase trial proceeding.

The Eleventh Circuit declared that the Florida Supreme Court’s decision to “labe[l] the relevant doctrine as claim preclusion” was “inconsistent with the federal common law.” Walker Pet. App 48. It asserted that regardless how the doctrine was labeled, the Florida Supreme Court had applied preclusion principles based on a determination that the *Engle* Phase I jury had decided a “common” issue: *Douglas* determined that the jury found that *every* brand of cigarette manufactured by *every Engle* defendant during *every one* of the 50 years at issue in *Engle* was wrongfully marketed. *Id.* at App-43 to App-48.

As noted above, however, *Douglas* determined as a matter of Florida law that issue preclusion is *not*

applicable to the *Engle* Phase I jury findings, and that interpreting *Engle*'s "res judicata effect" language, 945 So. 2d at 1269, as a reference to issue preclusion would render the Phase I findings "useless in individual actions." *Douglas*, 110 So. 3d at 433.⁶

Although the decisions are mutually inconsistent, in both instances the result is to deny Petitioner its due process right to a meaningful opportunity to contest every element of its alleged tort liability. The Court has explicitly held that due process imposes limits on use of preclusion principles to prevent a litigant from contesting an issue of fact or law. *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008). Review is warranted to determine whether the Florida Supreme Court's unorthodox and extreme application of preclusion principles denies Petitioner and other tobacco companies a meaningful opportunity to contest claims that they acted wrongfully toward individual smokers.

The courts below asserted that there has been no due process violation because the *Engle* defendants were on notice that the plaintiffs were seeking class-wide findings of wrongdoing and thus that the defendants

⁶ Without commenting on whether it agreed with *Douglas*'s alleged issue preclusion determination, the Eleventh Circuit said, "[W]e cannot refuse to give full faith and credit to the decision in *Douglas* because we disagree with its holding about what the jury in Phase I decided." Walker Pet. App-43. But, of course, the Eleventh Circuit was *not* giving "full faith and credit" to the Florida Supreme Court's decision, in light of the latter's explicit holding that it was *not* applying issue preclusion and that application of Florida issue preclusion rules would render the Phase I findings "useless in individual actions" as a matter of Florida law.

“had every reason to litigate each potential theory of liability to the fullest extent possible.” *Douglas*, 110 So. 3d at 431; *Walker*, App-46. But adequate notice is not by itself sufficient to satisfy due process concerns. Rather, the issue is whether it is consistent with due process to apply unorthodox preclusion principles in a case in which there is no evidence that the jury actually made a determination that all defendants acted wrongfully at all times. *See, Richards v. Jefferson County*, 517 U.S. 793, 803-04 (1996) (because “the guarantee of due process is not a mere form,” the Due Process Clause prohibits a State’s judiciary from depriving a litigant of existing rights or defenses “unless there is, or was, afforded to him some real opportunity to protect it.”); *id.* at 797 (“extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is fundamental in character.”). Review is warranted to determine whether it is appropriate to deny Petitioner an opportunity to assert that it did not act wrongfully in marketing the cigarettes smoked by Brown, Walker, and Duke.

The courts below also asserted that defendants cannot demonstrate a due process violation unless they show that they have been arbitrarily deprived of property. *Douglas*, 110 So. 3d at 431-32; *Walker*, App-46. Both courts noted that although defendants in *Engle* progeny trials are denied the opportunity to contest wrongdoing, they are still permitted to contest other elements of the claims, including membership in the *Engle* class, causation, and comparative fault. *Ibid.* But this Court has never suggested that due process concerns are eliminated so long as the defendant is provided a sporting chance and is allowed to assert most of his defenses. Rather, as the Court has repeatedly

made clear, “the Due Process Clause prohibits a State from punishing an individual without first providing the individual with an opportunity to present *every* available defense.” *Williams*, 549 U.S. at 353 (emphasis added).

In *Oberg*, this Court emphasized the importance of the procedural component of the Due Process Clause, suggesting that due process is violated whenever a State departs arbitrarily from traditional procedures with roots in the common law. 512 U.S. at 430 (“As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis.”). In that case, the Court recognized that Oregon’s sharp “deviation from established common-law procedures” violated the defendant’s due process rights. *Id.* at 421. The Court held that Oregon’s abolition of a right to judicial review of punitive damages awards violated due process, even though the defendant had been permitted a full and fair opportunity to argue to the jury that a punitive damages award was unwarranted. It held that a presumption of unconstitutionality attaches whenever a state court abrogates “a well-established common-law protection against arbitrary deprivations of property,” especially “when the absent procedures would have provided protection against arbitrary and inaccurate adjudication.” *Id.* at 430. Similarly, review is warranted here to determine whether the Florida Supreme Court’s application of unorthodox preclusion rules to bar assertion of an important defense, as well as the Eleventh Circuit’s conclusion that it was required to defer to the Florida ruling, deprive Petitioner of a well-established protection against arbitrary deprivation of property.

II. Review Is Warranted to Address The Broader Trend Among State Courts To Jettison Traditional Procedural Rules In The Name Of Litigation Efficiency

Commentators have long recognized that there is a constant temptation for trial courts to adopt procedures designed to achieve quick resolution of cases raising similar issues. *See, e.g., Lisa Litwiller, Why Amendments to Rule 23 Are Not Enough: A Case for the Federalization of Class Actions*, 7 *Chapman L. Rev.* 201 (2004); Jack B. Weinstein, *Some Thoughts on the “Abusiveness” of Class Actions*, 58 *F.R.D.* 299, 301-02 (1973). One efficiency-enhancing procedure which both state and federal courts regularly authorize has been the class action. At the same time, this Court has been vigilant in ensuring that federal courts do not allow use of class actions procedures to adversely affect the substantive rights of any party. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

Unfortunately, as the petitions make all too clear, the Florida courts succumbed to temptation in this case. Despite the implausibility of assertions that more than a handful of issues of fact were common to all class plaintiffs, the trial court devised a trial plan that entailed a year-long trial devoted to examining the conduct of Petitioners over more than half a century. It certainly saved judicial resources to allow the jury to make generalized findings, based on that half-century of evidence, as to whether Petitioner acted negligently or sold defective products—and to then make the findings binding on Petitioner with respect to *all* class plaintiffs. It also saved resources for the Florida Supreme Court to preserve the Phase I jury findings despite decertifying

the class. But for all the reasons set forth in the Petitions, such “pragmatic” decisions were made at the expense of Petitioner’s due-process rights. Review is thus warranted to consider whether such resource-saving class-action devices adequately respect all parties’ substantive legal rights.

The issue presented by the Petitions is not unique to Florida; it is part of a disturbing trend across the country. The Due Process Clause has been a principal shield protecting litigants from efforts by state courts to adopt efficiency-enhancing procedures that may deny them “an opportunity to present every available defense.” *Williams*, 549 U.S. at 353.

This Court has overturned a class-action trial plan under which back pay awards to millions of class members were to be extrapolated from findings drawn from a small sample of class members because, under the Rules Enabling Act, a class cannot be certified under Fed.R.Civ.P. 23 “on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims.” *Wal-Mart Stores*, 131 S. Ct. at 2561. The Court held that class-action defendants are entitled under Rule 23 to “individualized determinations” regarding the separate claims of absent class members. *Id.* at 2560.

In contrast, state supreme courts often have been less vigilant in protecting the rights of class-action defendants. The due process issues in this case arise from an initial effort by the Florida courts to use the class-action device in a manner designed to adjudicate thousands of widely disparate claims in a single proceeding. Other state courts have approved use of

class actions in ways that similarly infringed defendants' due process rights.

For example, the Oregon Supreme Court has largely eliminated individualized reliance requirements in class actions alleging fraud. In one recent case, insurance policies sold to consumers included a provision promising that the defendant would pay policyholders' reasonable medical expenses. The plaintiff policyholders claimed that that promise was fraudulent, and the trial court certified a plaintiff class consisting of all similarly situated policyholders who detrimentally relied on the alleged fraud. The Oregon Supreme Court rejected the defendants' due process challenge to the class-wide fraud judgment. *Strawn v. Farmers Ins. Co. of Oregon*, 350 Ore. 336, reconsideration denied, 350 Ore. 521 (2011), cert. denied, 132 S. Ct. 1142 (2012). Although the plaintiffs provided no evidence that absent class members relied on the fraudulent promise, the court held that due process did not require such evidence. 350 Ore. at 361; *id.* at 528 (denying due process challenge).

The Louisiana courts wrongly upheld a \$242 million fraud judgment in favor of a class consisting of hundreds of thousands of current and former Louisiana smokers. *Scott v. American Tobacco Co.*, 36 S. 3d 1046 (La. App. 2009), review denied, 44 So. 3d 707 (La. 2010), cert. denied sub nom., *Philip Morris USA, Inc. v. Jackson*, 131 S. Ct. 3057 (2011). The Louisiana courts upheld the judgment without requiring any evidence that absent class members relied on the alleged misrepresentations, even though in Louisiana the tort of fraud normally requires proof of such reliance. In granting a temporary stay of judgment while this Court

decided whether to review the case, Justice Scalia observed that “[t]he extent to which class treatment may constitutionally reduce the normal requirements of due process is an important question.” *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., as Circuit Justice). Justice Scalia deemed it “significantly possible,” were the Court to grant review, that it would reverse the Louisiana judgment on the basis of the applicant’s due process claim. *Id.* at 4.

See also Allstate Ins. Co. v. Jacobsen, 371 Mont. 393 (2013), *cert. denied*, 2014 WL 348243 (May 5, 2014) (authorizing class action in which defendant is prohibited from raising defenses to claims of individual class members).

In each of those cases, the state courts were driven—as here—by a desire to provide procedural short-cuts that would permit large numbers of claims to be adjudicated simultaneously while minimizing the expenditure of judicial resources. While WLF understands the desire of state courts to adopt resource-saving measures, it respectfully submits that oversight is necessary to ensure that such measures are not adopted at the expense of procedural fairness to defendants. Review is warranted to provide guidance to state courts regarding constitutional limitations on procedural short-cuts that can end up depriving litigants of an the opportunity to defendant themselves fully and fairly.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court grant the Petitions. Alternatively, WLF requests that the Court grant one of the Petitions and hold the second Petition pending resolution of the first.

Respectfully submitted,

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