No. 12-13500-EE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PAULINE WALKER, ET AL.,

Plaintiff-Appellee,

v.

R.J. REYNOLDS TOBACCO CO.,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida, Jacksonville Division, in
Case No. 3:09-cv-10598-RBD-JBT

BRIEF OF APPELLANT R.J. REYNOLDS TOBACCO COMPANY

Paul D. Clement
BANCROFT PLLC
1919 M Street, N.W.
Suite 470
Washington, DC 20036
(202) 234-0090

Stephanie E. Parker
Counsel of Record
Jason T. Burnette
JONES DAY
1420 Peachtree Street, N.E.,
Suite 800
Atlanta, GA 30309
(404) 581-8552

Gregory G. Katsas
Charles R.A. Morse
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Attorneys for Appellant R.J. Reynolds Tobacco Company

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Defendant-Appellant R.J. Reynolds Tobacco Company furnishes the following Certificate of Interested Persons and Corporate Disclosure Statement:

1. Altria Group, Inc. (MO)—publicly held company and parent company of Defendant Philip Morris USA, Inc.
2. Arnold, Keri—attorney for Defendant Philip Morris USA, Inc.
3. Barnett, Kathryn E.—attorney for the Estate of Albert Walker
4. Bayuk, Frank T.—attorney for Defendant R.J. Reynolds Tobacco Co.
5. Bernstein-Gaeta, Judith—attorney for Defendant Philip Morris USA, Inc.
6. Blasingame, Janna M.—attorney for the Estate of Albert Walker
7. Bradford, II, Dana G.—attorney for Defendant Philip Morris USA, Inc.
8. British American Tobacco p.l.c.—through its ownership interest in Brown & Williamson Holdings, Inc., the indirect holder of more than 10% of the stock of Reynolds American Inc., parent company of Defendant R.J. Reynolds Tobacco Company
9. Brown & Williamson Holdings, Inc.—holder of more than 10% of the stock of Reynolds American Inc., parent company of Defendant R.J. Reynolds Tobacco Company
10. Brown, Joshua R.—attorney for Defendant Philip Morris USA, Inc.

11. Bucholtz, Jeffrey S.—attorney for Defendant R.J. Reynolds Tobacco Co.

12. Burnette, Jason T.—attorney for Defendant R.J. Reynolds Tobacco Co.

13. Byrd, Kenneth S.— attorney for the Estate of Albert Walker

14. Cabraser, Elizabeth J.—attorney for the Estate of Albert Walker

15. Casey, Jessica C.—attorney for Defendant R.J. Reynolds Tobacco Co.

16. Clement, Paul D.—attorney for Defendant R.J. Reynolds Tobacco Co.

17. Coll, Patrick P.—attorney for Defendant Lorillard Tobacco Co.

18. Corrigan, Timothy J.—Judge of Middle District of Florida

19. Council for Tobacco Research, USA, Inc.—former Defendant

20. Daboll, Bonnie C.—attorney for Defendant Philip Morris USA, Inc.

21. Dalton, Jr., Roy B.—Judge of Middle District of Florida

22. Davis, Stanley D.—attorney for Defendant Philip Morris USA, Inc.

23. Deere, Stacey E.—attorney for Defendant Philip Morris USA, Inc.

24. DeVault, III, John A.—attorney for Defendant Lorillard Tobacco Co.

25. Dewberry, Michael J.—Special Master

26. Dosal Tobacco Corp.—former Defendant

27. Durham, II, William L.—attorney for Defendant R.J. Reynolds Tobacco Co.

28. Farah, Charlie E.—attorney for the Estate of Albert Walker

29. Farah, Eddie E.—attorney for the Estate of Albert Walker

30. Foster, Brian A.—attorney for Defendant Lorillard Tobacco Co.

31. Gillen, Jr., William A.—attorney for Defendant Philip Morris USA, Inc.

32. Goldman, Lauren R.—attorney for Defendant Philip Morris USA, Inc.

33. Gross, Jennifer—attorney for the Estate of Albert Walker

34. Grossi, Jr., Peter T.—attorney for Defendant Philip Morris USA, Inc.

35. Hamelers, Brittany E.—attorney for Defendant Philip Morris USA, Inc.

36. Hartley, Stephanie J.—attorney for the Estate of Albert Walker

37. Heimann, Richard M.—attorney for the Estate of Albert Walker

38. Homolka, Robert D.—attorney for Defendant Philip Morris USA, Inc.

39. Huck, Paul C.—Judge of Southern District of Florida, sitting by designation in the Middle District of Florida

40. Invesco Ltd.—holder of more than 10% of the stock of Reynolds American Inc., parent company of Defendant R.J. Reynolds Tobacco Company

41. Issacharoff, Samuel—attorney for the Estate of Albert Walker

42. Kamm, Cathy A.—attorney for Defendant Philip Morris USA, Inc.

43. Katsas, Gregory G.—attorney for Defendant R.J. Reynolds Tobacco Co.

44. Klindt, James R.—Magistrate Judge of Middle District of Florida

45. Knight, II, Andrew J.—attorney for Defendant R.J. Reynolds Tobacco Co.

46. Kucharz, Kevin—attorney for Defendant R.J. Reynolds Tobacco Co.

47. Lantinberg, Richard J.—attorney for the Estate of Albert Walker

48. Laane, M. Sean—attorney for Defendant Philip Morris USA, Inc.

49. Lifton, Diane E.—attorney for Defendants Lorillard Tobacco Co. and Lorillard, Inc.

50. Liggett Group LLC—former Defendant

51. London, Sarah R.— attorney for the Estate of Albert Walker

52. Lorillard, Inc. (LO)—former Defendant

53. Lorillard Tobacco Company—former Defendant

54. Mayer, Theodore V.H.—attorney for Defendants Lorillard Tobacco Co. and Lorillard, Inc.

55. Molony, Daniel F.—attorney for Defendant Philip Morris USA, Inc.

56. Monde, David M.—attorney for Defendant R.J. Reynolds Tobacco Co.

57. Morse, Charles R.A.—attorney for Defendant R.J. Reynolds Tobacco Co.

58. Murphy, Erin—attorney for Defendant R.J. Reynolds Tobacco Co.

59. Murphy, Jr., James B.—attorney for Defendant Philip Morris USA, Inc.

60. Nealey, Scott P.—attorney for the Estate of Albert Walker

61. Nelson, Robert J.—attorney for the Estate of Albert Walker

62. Parker, Stephanie E.—attorney for Defendant R.J. Reynolds Tobacco Co.

63. Parrish, Robert B.—attorney for Defendant R.J. Reynolds Tobacco Co.

64. Patryk, Robb W.—attorney for Defendants Lorillard Tobacco Co. and Lorillard, Inc.

65. Persons, W. Ray—attorney for Defendant R.J. Reynolds Tobacco Co.

66. Philip Morris USA, Inc.—former Defendant

67. Prichard, Jr., Joseph W.—attorney for Defendant R.J. Reynolds Tobacco Co.

68. Rabil, Joseph M.—attorney for Defendant R.J. Reynolds Tobacco Co.

69. Reeves, David C.—attorney for Defendant R.J. Reynolds Tobacco Co.

70. Reynolds American Inc. (RAI)—publicly held company and parent company of Defendant R.J. Reynolds Tobacco Company

71. R.J. Reynolds Tobacco Company—Defendant–Appellant

72. Ross, David L.—attorney for Defendant Lorillard Tobacco Co.

73. Salcedo, Maria—attorney for Defendant Philip Morris USA, Inc.

74. Sankar, Stephanie S.—attorney for Defendant Philip Morris USA, Inc.

75. Sears , Connor J.—attorney for Defendant Philip Morris USA, Inc.

76. Sexton, Terrence J.—attorney for Defendant Philip Morris USA, Inc.

77. Sprie, Jr., Ingo W.—attorney for Defendant Philip Morris USA, Inc.

78. Strom, Lydia J.—attorney for the Estate of Albert Walker

79. Sullivan, Thomas C.—attorney for Defendant R.J. Reynolds Tobacco Co.

80. Swerdloff, Nicolas—attorney for Defendants Lorillard Tobacco Co. and Lorillard, Inc.

81. The Tobacco Institute, Inc.—former Defendant

82. Toomey, Joel B.—Magistrate Judge of Middle District of Florida

83. Vector Group, Ltd., Inc. (VGR)—former Defendant

84. Walker, Alvin—Plaintiff–Appellee

85. Walker, Charles—former Plaintiff

86. Walker, Pauline—former Plaintiff

87. Warren, Edward I.—attorney for the Estate of Albert Walker

88. Weiner, Daniel H.—attorney for Defendants Lorillard Tobacco Co. and Lorillard, Inc.

89. Wernick, Aviva L.—attorney for Defendants Lorillard Tobacco Co. and Lorillard, Inc.

90. Williams, Cecily C.—attorney for Defendants Lorillard Tobacco Co. and Lorillard, Inc.

91. Wilner, Norwood S.—attorney for the Estate of Albert Walker

92. Yarber, John F.—attorney for Defendant R.J. Reynolds Tobacco Co.

93. Yarbrough, Jeffrey A.—attorney for Defendant R.J. Reynolds Tobacco Co.

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STATEMENT OF JURISDICTION

The district court had diversity jurisdiction under 28 U.S.C. § 1332(a) because Plaintiff Alvin Walker sought more than $75,000 in damages and complete diversity exists between the parties. Plaintiff represents the estate of Albert Walker, who was a Florida citizen, *see id.* § 1332(c)(2), and Defendant R.J. Reynolds Tobacco Company, which is incorporated in and maintains its principal place of business in North Carolina, is a North Carolina citizen, s*ee id.* § 1332(c)(1).

On May 29, 2012, the district court entered a final judgment for Plaintiff. Doc. 197, Final Judgment, at 1. On June 28, 2012, Reynolds filed a timely notice of appeal. Doc. 208. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the Due Process Clause permits use of issue preclusion to establish contested elements of a claim absent any determination whether the prior jury actually decided those elements.

STATEMENT OF THE CASE

Throughout Anglo-American legal history, the doctrine of issue preclusion has been limited to issues shown to have been "'*actually litigated and resolved* in a valid court determination essential to the prior judgment.'" *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (quoting *New Hampshire v. Maine*, 532 U.S. 732, 748–49 (2001)) (emphasis added). Here, by contrast, the district court applied issue preclusion to establish contested elements of a plaintiff's tort claims without determin-

ing whether the prior jury had *actually decided* the facts necessary to establish those elements. In so doing, it embraced recent Florida precedent permitting the use of issue preclusion so long as there was legally sufficient evidence from which the prior jury *reasonably could have decided* the necessary facts. The question presented is whether this dramatic deviation from traditional issue-preclusion principles—to preclude litigation of critical issues that no prior jury may have decided—is consistent with the Due Process Clause of the Constitution.

This case arises out of the unprecedented statewide smoker class action in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). Before *Engle* was decertified, a jury made findings of fact to the effect that the defendants had engaged in various broadly-specified categories of tortious conduct—for example, that each defendant sold defective cigarettes and committed unspecified acts of negligence. For each claim in *Engle*, the class had made many alternative allegations of tortious conduct, and the jury did not specify which of those allegations it had accepted or rejected. In this case, the district court acknowledged that the *Engle* jury findings could have rested on allegations with no relevance to the individual claims of particular plaintiffs. Nonetheless, the court held that the *Engle* findings conclusively establish all tortious-conduct elements of all individual claims brought by thousands of former class members. This appeal raises a due-process challenge to that holding.

A. The *Engle* Class Action

1. In 1994, the *Engle* class action was filed against several major United States cigarette manufacturers, including Defendant R.J. Reynolds Tobacco Company. The putative class included individuals harmed by their smoking addiction. As modified on appeal, the class consisted of "all [Florida] citizens and residents, and their survivors, who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *See Engle*, 945 So. 2d at 1256.

The *Engle* class alleged various tort claims, including strict liability, negligence, fraudulent concealment, and conspiracy to fraudulently conceal. *Id.* at 1256–57 & n.4. The court divided the trial into three phases. During Phase I, the jury would consider supposedly "common issues relating exclusively to the defendants' conduct and the general health effects of smoking," but would not determine liability on any individual claim. *See id.* at 1256. During Phase II, the same jury would determine the defendants' liability to three individual class members, award appropriate compensatory damages to those individuals, and fix the amount of class-wide punitive damages. *Id.* at 1257. During Phase III, new juries would decide the claims of the remaining hundreds of thousands of class members. *Id.* at 1258.

2. Phase I was a sprawling, year-long trial addressing whether cigarettes cause certain diseases and are addictive, and the defendants' conduct between approximately 1953 and 1994. For each claim, the class asserted distinct allegations of tortious conduct that covered different brands or types of cigarettes.

By its own reckoning, the class asserted "several alternative" defect allegations supporting its claim for strict liability. Doc. 252-4 (Addendum Tab 4). Many of these allegations were limited to specific brands or types of cigarettes. For example, the class presented evidence and argument that:

- *filtered* cigarettes are defective because of misplaced ventilation holes in some brands, loose filter fibers in others, or glass filter fibers in still others (Docs. 252-1 at 4; 252-5 at 3; 252-9 at 11968–71, 16315–18, 16393–400, 27650–51) (Addendum Tabs 1, 3, 9);
- *light* or *low-tar* cigarettes are defective because they cause smokers to increase smoking or inhale more deeply in order to "compensate" for the decreased nicotine yield (Docs. 252-7 at 13; 252-9 at 12131–34, 13476–77, 13617–24, 13649–51, 15400–01, 15418) (Addendum Tabs 7, 9);
- cigarettes with *specific ingredients*—such as Y-1 tobacco—are defective (Docs. 252-1 at 4; 252-5 at 3, 252-10 at 36730–32) (Addendum Tabs 1, 5, 10); or
- cigarettes made with *artificially manipulated levels of nicotine* are defective (Docs. 252-1 at 4; 252-4 at 2.4; 252-5 at 3; 252-9 at 12044–45, 13475–76, 13697–98, 14926–28, 15983–85, 17804; 252-10 at 36729–32) (Addendum Tabs 1, 5, 9, 10).

Many of the defect allegations also varied over time. For example, technological innovations significantly lowered tar and nicotine yields during the four decades at issue. Docs. 252-9 at 15839–42, 25622–26; 252-10 at 29051–57, 37048–52 (Ad-

dendum Tabs 9, 10). Thus, the jury could have thought that some brands of cigarettes were defective earlier (when they contained higher tar and nicotine yields) but not later. Or it could have thought that some brands were defective later (for failure to incorporate available technology) but not earlier.

The negligence instructions permitted a finding of liability if a defendant failed to use reasonable care in the "designing, manufacturing, testing, or marketing" of cigarettes. Doc. 252-10 at 37577 (Addendum Tab 10). Thus, any of the design-defect allegations mentioned above could have supported a negligence finding under a theory of negligent design. Moreover, the class alleged that the defendants had negligently marketed certain brands of cigarettes to minors, at various times between the 1950s and the 1990s. Docs. 252-1 at 34–36; 252-9 at 10477–79, 13452–57; 252-10 at 36480–83, 36664–65, 36673–74, 36729 (Addendum Tabs 1, 9, 10). And the class alleged that the defendants had negligently measured the tar and nicotine levels for light cigarettes. Doc. 252-10 at 37564 (Addendum Tab 10).[1]

[1] The concealment and conspiracy allegations were equally wide-ranging. The class itself stressed that its concealment and derivative conspiracy claims were based on "thousands upon thousands of statements about [cigarettes], the relationship of smoking to disease over periods of years." Doc. 252-10 at 35955 (Addendum Tab 10). Many of those statements involved only certain brands or types of cigarettes. For example, the class presented evidence and argument that the defendants concealed that *light* cigarettes may not be safer than regular cigarettes, because smokers compensate for reduced nicotine by smoking more or inhaling more

At the end of Phase I, the trial court adopted a verdict form that did not require the jury to specify which of the many alternative allegations it had accepted, and which it had rejected or simply not reached. Doc. 252-2 at 1–12 (Addendum Tab 2). Class counsel conceded that there were "many hundreds and hundreds of things" at issue for each claim (Doc. 252-10 at 35953) (Addendum Tab 10), but successfully argued that, "[i]f we're going to start breaking down each of the counts, we're going to have a very, very lengthy verdict form" (*id.* at 35893). Defendants unsuccessfully requested a verdict form that would have required the jury to specify the basis for any tortious-conduct findings. *Id.* at 35915-16.

The *Engle* jury thus made only very general findings of tortious conduct. As relevant here, it affirmatively answered the following questions for each defendant:

> Did one or more of the Defendant Tobacco Companies place cigarettes on the market that were defective and unreasonably dangerous?
>
> Did one or more of the Defendants conceal or omit material information, not otherwise known or available, knowing the material was false and misleading [*sic*], or failed [*sic*] to disclose a material fact concerning or prov-

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deeply. Docs. 252-6 at 2–3, 7–9; 252-7 at 13–15, 21–23; 252-9 at 11966–68, 12131–34, 13476–77, 27402; 252-10 at 36484–85 (Addendum 6, 7, 9, 10). Likewise, the class presented evidence that the defendants concealed facts about *specific ingredients*. For example, the class alleged that the defendants failed to disclose their supposed use of ammonia to increase the addictive effect of nicotine in certain brands of cigarettes at certain times. Docs. 252-1 at 32–34; 252-7 at 5–6; 252-9 at 13476, 25740–42, 25749–50, 25766–68; 252-10 at 27753–54, 27920–21, 36664, 36729–32, 37211 (Addendum Tabs 1, 7, 9, 10).

> ing the health effects and/or addictive nature of smoking cigarettes?[2]
>
> Did two or more of the Defendants enter into an agreement to conceal or omit information regarding the health effects of cigarette smoking, or the addictive nature of smoking cigarettes, with the intention that smokers and members of the public rely to their detriment?
>
> Have Plaintiffs proven that one or more of the Defendant Tobacco Companies failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances?

Doc. 252-2 at 2–3, 5–8, 10–11 (Addendum Tab 2). The jury was not asked to determine whether *all* of Reynolds's cigarettes were defective or negligently designed or marketed. Nor did it specify *which* types or brands of cigarettes it thought were defective, much less *what* the defect was or *when* the defect existed; nor did it identify the *conduct* that it found to be negligent.

The jury further found that smoking can cause 20 different diseases, but not three others, and that nicotine is addictive. Doc. 252-2 at 1–2 (Addendum Tab 2). It also determined that the class was entitled to punitive damages. *Id.* at 12.

3. The same jury decided Phase II. In Phase II-A, the jury found that the defendants were liable to three class representatives, and it awarded some $12.7

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[2] The concealment interrogatory incoherently asked whether the defendants improperly "conceal[ed]" information that they knew was "false and misleading." The defendants unsuccessfully objected to that bewildering question. Doc. 252-8 at 4. (Addendum Tab 8).

million in compensatory damages. *Engle*, 945 So. 2d at 1257. In Phase II-B, the jury awarded $145 billion in punitive damages to the class. *Id.*

At the end of Phase II, the defendants reasserted directed-verdict motions contending that there was legally insufficient evidence to support the Phase I findings. The trial court rejected that argument in a final Omnibus Order. *Engle v. R.J. Reynolds Tobacco Co.*, No. 94-08273 CA-22, 2000 WL 33534572, at *2–*7 (Fla. Cir. Ct. Nov. 6, 2000). That order itself rested on the premise that the class had made many alternative allegations addressing different brands or types of cigarettes. Thus, the court found legally "sufficient evidence" that cigarettes were defective in "many" different ways. *Id.* at *2. As examples, it cited evidence that "some cigarettes" had filters with ventilation holes in the wrong place, that "some filters" contained glass fibers, and that nicotine levels were manipulated "sometime" through ammonia and "sometime" through high-nicotine tobacco. *Id.* The court had no occasion to determine, and did not attempt to determine, the actual bases for any of these findings.

4. The defendants appealed before Phase III, and the Florida Third District Court of Appeal reversed. Among other things, it held that the class should never have been certified; that the punitive-damages award was premature and excessive; and that repeated incendiary statements by class counsel—such as gratuitous comparisons of defendants' conduct to slavery, genocide, and the Holocaust—

independently mandated reversal. *Liggett Grp. Inc. v. Engle*, 853 So. 2d 434, 450–66 (Fla. 3rd DCA 2003).

5. The Florida Supreme Court affirmed in part and reversed in part. It recognized several problems with the *Engle* trial: *first*, the trial plan had required a premature adjudication of punitive damages (*Engle*, 945 So. 2d at 1262–63); *second*, the $145-billion punitive-damages award—the largest punitive award by far that any jury has ever rendered—was clearly excessive (*id.* at 1263–65 & n.8); *third*, class counsel made "a series of improper remarks" designed to "incite racial passions" of the jury (*id.* at 1271–74); and *fourth,* "problems with the three-phase trial plan negate[d] the continued viability of this class action" (*id.* at 1267–68).

Despite these problems, the Florida Supreme Court *sua sponte* adopted what it characterized as a "pragmatic solution" to preserve as much of *Engle* as possible. *Id.* at 1269. That "pragmatic solution" was to "decertify the class," but nonetheless "retain[] [some of the] Phase I findings," including the defect, negligence, concealment, and conspiracy-to-conceal findings, for possible use in future litigation. *Id.* The court permitted former class members to file their own "individual damages actions" within a year, and it decreed that the retained findings "will have res judicata effect" in those actions. *Id.* The court did not elaborate on the nature or extent of that "res judicata effect."

B. Use Of The Phase I Findings In *Engle* Progeny Litigation

After the Florida Supreme Court's decision, plaintiffs filed thousands of subsequent individual cases, which are now commonly described as "*Engle* progeny" cases, in state and federal court. The proper use of the Phase I findings is a critical issue in all of these cases. In each of them tried to date, the plaintiff has argued that the Phase I findings conclusively establish the tortious-conduct elements of his or her strict-liability, negligence, concealment, and conspiracy claims, without any determination whether those findings encompass the specific brands or types of cigarettes smoked by the individual plaintiff, and thus are relevant to the claims of that plaintiff. Defendants have responded that such use of the findings—to establish contested issues that no prior jury may have resolved for the plaintiff—would violate both Florida preclusion law and federal due process. Several federal and state courts have addressed these questions.

1. Early in the progeny litigation, in a case pending the Middle District of Florida, Reynolds and other defendants moved under Federal Rule of Civil Procedure 16(c) for a determination that the Phase I findings may not be used to establish any element of any plaintiff's claim. The district court agreed, as a matter of both Florida preclusion law and federal due process. *Brown v. R. J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328 (M.D. Fla. 2008) ("*Bernice Brown*"). Given the generalized nature of the tortious-conduct findings and the multiple alternative al-

legations of tortious conduct raised by the *Engle* class, the court concluded that it was "impossible to discern what specific issues were actually decided by the Phase I jury, and what facts and allegations were necessary to its decision." *Id.* at 1344. Therefore, as a matter of Florida preclusion law, the court held it improper to "give the Phase I findings preclusive effect with respect to the elements of any of the *Engle* plaintiffs' claims." *Id.*

The district court further held that federal due process mandates the same result. It recognized that "basic common law procedures serve to protect against arbitrary deprivations of property, and any abrogation or misuse of such procedures raises a presumption of a due process violation." *Id.* at 1345 (citing *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994)). One such common-law rule, the court explained, is the limitation of issue preclusion to facts shown to have been actually decided in prior litigation; thus, "'if it appears that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,'" issue preclusion does not apply. *Id.* (quoting *Russell v. Place*, 94 U.S. 606, 608 (1876)). The court observed that in *Fayerweather v. Ritch*, 195 U.S. 276 (1904), the Supreme Court held that this restriction is constitutionally required. *Bernice Brown*, 576 F. Supp. 2d at 1345–46. Applying the rule, the district court held that "since it is impossible to determine the precise issues decided by the

Phase I jury," it would violate federal due process to treat the Phase I findings "as establishing any part of Plaintiffs' claims." *Id.* at 1346.[3]

In an interlocutory appeal, this Court largely agreed with the district court on the state-law question. Specifically, this Court held that, to establish any factual issue under Florida preclusion law, *Engle* progeny plaintiffs must "show with a 'reasonable degree of certainty' that the specific factual issue was determined in [their] favor," considering the "entire trial record" in *Engle*. *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1335 (11th Cir. 2010) (quoting *Seaboard Coast Line R.R. Co. v. Indus. Contracting Co.*, 260 So. 2d 860, 862 (Fla. 4th DCA 1972)). The Court explained that "Florida courts have enforced the 'actually decided' requirement with rigor. Issue preclusive effect is not given to issues which could have, but may not have, been decided in an earlier lawsuit between the parties." *Id.* at 1334 (quoting *Gordon v. Gordon*, 59 So. 2d 40, 44 (Fla. 1952)). The Court expressed skepticism that any plaintiff could satisfy the actually-decided requirement. *See id.* at 1336 n.1 (Anderson, J., concurring) ("The generality of the Phase I findings present plaintiffs with a considerable task."); 611 F.3d at 1336 n.11 (majority opinion adopting concurrence). Having concluded that Florida preclusion law so

[3] Soon after the district court decision in *Bernice Brown*, another judge in the Middle District of Florida adopted that decision in its entirety. *Burr v. Philip Morris, USA*, No. 8:07-cv-1429-T-23MSS, 2008 U.S. Dist. LEXIS 66228, at *1–*2 (M.D. Fla. Aug. 28, 2008).

clearly imposed this requirement, the Court declined to consider whether federal due process did so as well. *See id.* at 1334.

2. In *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. 1st DCA 2010), the Florida First District Court of Appeal rejected the traditional Florida preclusion standard set forth in *Bernice Brown*. The *Martin* court held that, "[n]o matter the wording of the findings on the Phase I verdict form" (*id.* at 1067), those findings automatically "establish the conduct elements of the asserted claims" in all *Engle* progeny cases, *id.* at 1069. The court held that a progeny plaintiff need not show, to any degree of certainty, that the *Engle* jury had resolved in the plaintiff's favor the specific factual issue for which the plaintiff was seeking preclusion. In so doing, it specifically rejected what it described as this Court's ruling that "every *Engle* plaintiff must trot out the class action trial transcript to prove applicability of the Phase I findings" to the progeny case. *Id.* at 1067; *see also id.* at 1069 (progeny plaintiffs "need not … demonstrate the relevance of the findings to their lawsuits"). The court reasoned that the tortious-conduct issues adjudicated in Phase I of *Engle* were "common issues" for purposes of class certification, that the Omnibus Order in *Engle* had established the "evidentiary foundation" of the Phase I findings for preclusion purposes, and that any contrary result "would essentially nullify" the Florida Supreme Court's decision in *Engle*. *See id.* at

1066–68. Although Reynolds argued at length that this result violated due process, the First District did not separately address that contention.

Three other District Courts of Appeal have agreed with the preclusion holding of *Martin*. *See Frazier v. Philip Morris USA Inc.*, 89 So. 3d 937, 947 n.10 (Fla. 3rd DCA 2012); *Philip Morris USA, Inc. v. Douglas*, 83 So. 3d 1002, 1010–11 (Fla. 2nd DCA 2012); *R.J. Reynolds Tobacco Co. v. Brown*, 70 So. 3d 707, 715 (Fla. 4th DCA 2011) ("*Jimmie Lee Brown*"). In *Jimmie Lee Brown*, the court did so despite expressing significant concerns about whether use of the *Engle* findings to establish elements of claims violates due process. *See id.* at 716 ("we are concerned [that] the preclusive effect of the *Engle* findings violates Tobacco's due process rights"); *id.* at 720 (May, C.J., concurring) ("What the trial courts are playing is a form of legal poker. They must use the legal cards they have been dealt—the *Engle* factual findings are binding. But … a lurking constitutional issue hovers over the poker game: To what extent does the preclusive effect of the *Engle* findings violate the manufacturer's due process rights?"). In *Douglas*, the court certified the due-process question as one of great public importance warranting review by the Florida Supreme Court. *See* 83 So. 3d at 1010. The Florida Supreme Court has accepted jurisdiction to decide that question for *Engle* progeny cases pending in the Florida state courts. *Philip Morris USA, Inc. v. Douglas*, No. SC12-617 (Fla.

May 15, 2012). Briefing is complete, and oral argument is set for September 6, 2012.

3. After *Martin* was decided, the federal district courts began to follow that decision, rather than *Bernice Brown*, on questions regarding the applicability of *state* preclusion law to the *Engle* findings. However, defendants have continued to argue that use of the Phase I findings to establish essential elements of individual progeny claims is inconsistent with *federal* due process. Following the district court's briefing instructions (*All Engle Cases*, Doc. 174 at 1), the defendants filed a Rule 16 motion in *Waggoner v. R.J. Reynolds Tobacco Co.*, No. 3:09-cv-10367-TJC-JBT, to resolve the due-process question in all *Engle* progeny cases pending in the Middle District of Florida, including this case. *See Waggoner* Doc. 35. Judge Corrigan rejected the defendants' due-process argument and expressly disagreed with Judge Schlesinger's prior decision in *Bernice Brown*. *Waggoner v. R.J. Reynolds Tobacco Co.*, 835 F. Supp. 2d 1244, 1266–78 & n.33 (M.D. Fla. 2011). The *Waggoner* court acknowledged that "the *Engle* class did not pursue a single theory of defect, but rather alleged a number of discrete design defects" covering some but not all cigarettes. *Id.* at 1263. Nonetheless, the court refused to consider whether the *Engle* jury had actually decided anything relevant to the individual claims of Mr. Waggoner, Mr. Walker, or any other progeny plaintiff. *See id.* at

1265–67. Instead, it held as a matter of law that due process does not require an actual decision on the specific fact subject to issue preclusion.

First, the court attempted to distinguish *Fayerweather* on its facts. That case held that a prior decision could constitutionally preclude litigation about the validity of certain releases, but only because it was clear that the prior decision had actually determined their validity. *See* 195 U.S. at 307–08. The district court reasoned that *Fayerweather* governs only where liability turns *entirely* upon the fact for which preclusion is sought. *See Waggoner*, 835 F. Supp. 2d at 1268.

Second, the court dismissed common-law preclusion precedents as entirely irrelevant to the constitutional question presented, on the ground that they "do not mention due process." *See id.* at 1270.

Third, the court reasoned that use of the *Engle* findings to establish some elements of progeny claims does not violate due process "in and of itself," because plaintiffs still must prove other elements such as class membership and legal causation. *See id.* at 1274.

Fourth, the court reasoned that the touchstone of due process is an "opportunity to be heard," and that the *Engle* defendants received such an opportunity in *Engle* itself. *See id.* at 1276.

Fifth, the court reasoned that, if the *Engle* jury could constitutionally use the Phase I findings in determining the claims of three plaintiffs in Phase II-A, then

different juries could constitutionally use the Phase I findings in determining the claims of *Engle* progeny plaintiffs. *See id.* at 1277.

Finally, the court suggested that due-process standards could be relaxed because *Engle* progeny litigation "is *sui generis*." *See id.*

The district court incorporated its *Waggoner* order, as well as the underlying briefing record and argument transcript, into the record of all *Engle* progeny cases pending in the Middle District of Florida, including this case. Doc. 96 at 3–6.

C. Proceedings Below In This Case

In this *Engle* progeny case, Plaintiff Alvin Walker (who replaced former Plaintiffs Pauline Walker and Charles Walker) sued Reynolds for the death of his father, Albert Walker, from smoking. Plaintiff asserted claims for strict liability, negligence, concealment, and conspiracy.[4] Like all of the other *Engle* progeny plaintiffs whose cases have been tried to date, Plaintiff sought to use the Phase I findings to "conclusively establish" the tortious-conduct elements of his claims. *See* Doc. 20 at 6–8.

At trial, the evidence showed that Albert Walker was born in 1927. Doc. 202 at 310. He began smoking unfiltered Camel cigarettes, then later smoked filtered Winston and Pall Mall cigarettes. *Id.*; Doc. 212 at 1158, 1173. None of

[4] Plaintiff also brought two warranty claims, but voluntarily dismissed those claims before trial. *See* Doc. 105.

those brands are light cigarettes, and Mr. Walker's family did not recall him ever smoking light cigarettes. Doc. 211 at 970–71. Mr. Walker contracted lung cancer in 1990, and died in 1994. Doc. 202 at 311, 312.

Reynolds proposed jury instructions that would have required Plaintiff to establish every element of his tort claims. The district court struck those instructions and directed the parties to eliminate instructions inconsistent with the *Waggoner* Rule 16 order. Doc. 88 at 3. Reynolds complied, but repeatedly noted its continuing objection to use of the *Engle* findings to establish elements of Mr. Walker's claims. Doc. 91-12 at 5–6; Doc. 212 at 1366–67.

The district court instructed the jury that the Phase I findings conclusively established the tortious-conduct elements of Plaintiff's claims. Thus, the court instructed the jury that Reynolds "placed cigarettes on the market that were defective and unreasonably dangerous"; that it "was negligent"; that it "concealed or omitted material information, not otherwise known or available, knowing that material was false or misleading [*sic*] or failed to disclose a material fact concerning the health effects and/or addictive nature of smoking cigarettes"; and that it "agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and public may rely on this information to their detriment." Doc. 214 at 1699–1702. In particular, on the strict-liability and negligence claims, the court refused to ask the jury whether the brands or types of

cigarettes that Albert Walker had smoked were defective or negligently designed or marketed. Instead, those issues were deemed established by the *Engle* findings, and the only liability question submitted to the jury was "whether the conduct of the defendant was a 'legal cause' of Mr. Walker's death." *Id.* at 1699, 1700. The jury was not asked to identify the "conduct of the defendant" that affected Mr. Walker or to decide whether that conduct was tortious.

The jury returned a split verdict. It found that Mr. Walker was a member of the *Engle* class, found for Mr. Walker on the strict-liability and negligence claims, and found for Reynolds on the concealment and conspiracy claims. Doc. 193 at 1–3. The jury allocated 10% of fault to Reynolds and 90% of fault to Mr. Walker, and it awarded $275,000 in compensatory damages. *Id.* at 3–4. The jury found that punitive damages were unwarranted. *Id.* at 4. The district court reduced the compensatory award to reflect the comparative-fault finding and entered judgment for $27,500. Doc. 197. This appeal followed.

STANDARD OF REVIEW

This Court reviews due-process questions de novo. *See, e.g.*, *United States v. Shaygan*, 652 F.3d 1297, 1310 (11th Cir. 2011). The Court also reviews de novo whether jury instructions "misstate the law or mislead the jury." *Badger v. S. Farm Bureau Life Ins. Co.*, 612 F.3d 1334, 1339 (11th Cir. 2010).

SUMMARY OF ARGUMENT

I. The district court violated due process by allowing Plaintiff to establish essential elements of his claim through issue preclusion, absent any determination that the *Engle* jury actually decided the issues necessary to establish those elements. The due process clause prohibits the imposition of liability absent an actual decision by some jury on each element of the claim. This conclusion follows from the specific due-process holding of *Fayerweather v. Ritch*, from a uniform and clear common-law tradition that has endured for several centuries, and from elemental considerations of fundamental fairness. In this case, it is impossible to determine whether the *Engle* jury actually decided any elements of Plaintiff's claims, given both the generality of the Phase I findings and the number of alternative brand-specific or type-specific allegations pursued by the *Engle* class. For example, the *Engle* defect finding could rest on allegations that light cigarettes are defective because they induce smokers to smoke more or inhale more deeply, and the *Engle* negligence finding could rest on allegations that the defendants negligently marketed cigarettes to youth at various times between 1953 and 1994. Neither theory would have any possible application to Mr. Walker, who never smoked light cigarettes, and who became an adult in 1945.

II. The contrary arguments in *Waggoner* and *Martin* do not withstand scrutiny. The *Waggoner* court failed to distinguish *Fayerweather* and wrongly dis-

regarded centuries of common-law precedent. Its reasoning that there is no due-process violation because *some* elements of the claims of progeny plaintiffs are not subject to preclusion, and because the defendants received an opportunity to be heard in *Engle* itself, makes little sense. Its analogy to Phase II-A merely confirms the due-process problem here, and its general desire for flexibility cannot justify eliminating the need, before liability may be imposed, for some jury to ascertainably decide each element of the claim. The *Martin* decision did not analyze due process at all. Moreover, despite *Martin*'s reasoning to the contrary, the mere fact of class certification cannot justify dispensing with the requirement of an actual decision on each element, the Omnibus Order in *Engle* confirms the existence of multiple alternative allegations that could have supported the Phase I findings, and a straightforward application of basic due-process principles would in no way nullify the Florida Supreme Court decision.

ARGUMENT

While the amount of the individual *Walker* judgment may be modest, the constitutional question presented here governs thousands of pending *Engle* progeny cases, and is extremely important in each of them. As the district court recognized, "[t]he preclusive use of the Phase I approved findings permeates all aspects of the *Engle* progeny litigation, from discovery to trial." *Waggoner*, 835 F. Supp. 2d, at 1259–60. At issue in all these cases is nothing less than the question wheth-

er a plaintiff may establish liability—and then seek to recover potentially large sums of compensatory and punitive damages—without either proving essential elements of his claim or demonstrating that a prior jury actually decided the facts underlying those elements.

In its traditional formulation, the doctrine of issue preclusion does not permit that startling result. For that doctrine to apply, a plaintiff invoking preclusion must show that a prior suit "'actually litigated and resolved'" any specific issue for which preclusion is sought. *See Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (quoting *New Hampshire v. Maine*, 532 U.S. 732, 748–49 (2001)). Otherwise, the plaintiff must prove each element of each claim to the jury in his individual case. Either way, the plaintiff is required to prove, and the defendant is permitted to contest, each element of each claim before one jury or another. In other words, before liability may be imposed, *some* jury must ascertainably resolve *each* element of the claim. For the reasons explained below, due process requires nothing less.

I. THE DISTRICT COURT VIOLATED DUE PROCESS BY PRECLUDING LITIGATION OVER CRITICAL ELEMENTS OF CLAIMS ABSENT ANY DETERMINATION THAT A PRIOR JURY HAD ACTUALLY DECIDED THOSE ELEMENTS

In their conduct of *Engle* progeny litigation, the Florida courts are engaged in serial due-process violations that threaten the defendants with massive liability. In none of these cases has any plaintiff undertaken to prove the defect, negligence, or concealment elements of the tort claims asserted, and in none of the cases has a

jury been asked to find whether those elements were satisfied. Nor has any plaintiff undertaken to show, based on the *Engle* trial record, that the *Engle* jury actually decided the issues required to resolve those elements for the plaintiff. And no such showing would be possible: given the generality of the *Engle* findings, and the many alternative brand-specific, type-specific, and time-specific allegations on which those findings could have rested, it cannot be determined which allegations the *Engle* jury accepted, and whether those allegations relate at all to the smoking of individual plaintiffs or their decedents. For example, if the *Engle* defect finding rested on allegations about *filtered* cigarettes, it would not apply to individuals who smoked unfiltered cigarettes; if the *Engle* defect finding rested on allegations about *light* cigarettes, it would not apply to individuals who smoked non-light cigarettes; and if the *Engle* negligence finding rested on allegations of *youth marketing* between 1953 and 1994, it would not apply to individuals who began smoking as adults, or to individuals who became adults before 1953.

As this Court has recognized, the traditional law of issue preclusion would not apply in these circumstances. *See Bernice Brown*, 611 F.3d at 1335–36. However, under the watered-down preclusion standards adopted for *Engle* progeny cases, it does not matter whether the *Engle* jury *actually decided* the issue for which preclusion is sought; instead, the only relevant question is whether there was legally sufficient evidence under which the *Engle* jury *reasonably could have decided*

that issue. *See Martin*, 53 So. 3d at 1068. Whether or not that ruling is correct as a matter of Florida preclusion law, it is inconsistent with settled principles of federal due process.

A. The Due Process Clause Mandates The "Actually Decided" Requirement For Issue Preclusion

For centuries, it has been settled that issue preclusion cannot apply where "several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered." *Russell v. Place*, 94 U.S. 606, 608 (1876). Precedent, history, and fairness all show that due process requires this traditional limitation on the use of issue preclusion.

1. Supreme Court Precedent

The Supreme Court has long held that preclusion law is "subject to due process limitations," *Taylor*, 553 U.S. at 891, and that "extreme applications" of preclusion law "may be inconsistent with a federal right that is 'fundamental in character,'" *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797 (1996) (citation omitted). *Fayerweather* establishes one of those "due process limitations."

In *Fayerweather*, the Supreme Court held that the Due Process Clause bars the use of issue preclusion without a showing that the disputed issue was actually decided in prior litigation. In that case, the plaintiffs sought shares of an estate and alleged that, although they had signed releases waiving their rights to recover, the

releases were invalid. *See* 195 U.S. at 297–98. Applying issue preclusion, the federal circuit court dismissed the suit on the ground that a state court had already found the releases valid. *See id.* at 298–99. The Supreme Court's jurisdiction turned on whether the circuit court's decision also "involve[d] the application of the Constitution." *Id.* at 297. The Supreme Court held that it had jurisdiction because the decision below did involve application of the Due Process Clause, which the Court said prohibits treating a prior judgment as a "conclusive determination" if it was "made without any finding of the fundamental fact." *Id.* at 299.

Turning to the merits of the due-process question, the Court held that "where the evidence is that 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 the conclusion must be that the prior decision is not an adjudication upon any particular issue or issues, and the plea of *res judicata* must fail." *Id.* at 307. Applying that standard, the Court concluded that preclusion was appropriate, but only because "[*n*]*othing can be clearer* from this record than that the question of the validity of the releases was not only before the state courts, but was considered *and determined* by them." *Id.* at 308 (emphases added).

In its jurisdictional determination and merits ruling, *Fayerweather* thus makes clear that due process requires an actual decision on the specific issue for which preclusion is sought.

2. Universal Practice

The decision in *Fayerweather* is firmly rooted in established common-law practice, which has always provided a touchstone for due-process analysis. Under the common law, the rule that preclusion applies only to issues actually decided by a prior jury is as solid as bedrock: courts have universally followed it for centuries, and, despite exhaustive research on this point, we have found no case in the history of Anglo-American jurisprudence departing from this rule outside the context of *Engle* progeny litigation. Moreover, in dozens of prior briefs, no *Engle* progeny plaintiff has identified any such counterexample.

a. "Because the basic procedural protections of the common law have been regarded as so fundamental," the "abrogation of a well-established common-law protection … raises a presumption" of a due-process violation. *Oberg*, 512 U.S. at 430; *see, e.g.*, *In re Winship*, 397 U.S. 358, 361–62 (1970); *Tumey v. Ohio*, 273 U.S. 510, 523–24 (1927); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276–77 (1855). That is because the phrase "due process" has generally been understood to "'mean[] 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.'" *Burnham v. Superior Ct. of Cal., Cnty. Of Marin*, 495 U.S. 604, 609 (1990) (plurality op.) (citation omitted); *see also Sun Oil Co. v. Wortman*, 486 U.S. 717, 728 n.2 (1988) ("This Court

has regularly relied on traditional and subsisting practice in determining the constitutionally permissible authority of courts.").

Consistent with these general principles, the Supreme Court has often looked to traditional common-law procedures to establish a wide range of due-process rules, ranging from personal jurisdiction, *see, e.g.*, *Burnham*, 495 U.S. at 609 (plurality op.); to recusal obligations for judges, *see Tumey*, 273 U.S. at 523–24; to public-trial rights, *see In re Oliver*, 333 U.S. 257, 266 (1948). *Oberg* provides a good example. There, the Court held that "Oregon's abrogation of a well-established common-law protection"—in that case, judicial review of punitive-damage awards for excessiveness—violated due process. 512 U.S. at 430. As the Supreme Court explained, judicial review had been "a safeguard against excessive verdicts for as long as punitive damages have been awarded," *id.* at 421, which was used by "[c]ommon-law courts in the United States" both at the time of the Fourteenth Amendment's adoption and today. *Id.* at 424–26. Oregon's departure from that rule violated due process because the state had not "provid[ed] any substitute procedure" to this traditional protection, despite the continuing risk of arbitrary punitive awards. *See id.* at 432.

Traditional practice has also played a leading role in determining the due-process limits on preclusion doctrines. In *Richards*, the Supreme Court held that due process prohibits the application of preclusion to parties that did not participate

in a prior litigation. *See* 517 U.S. at 798. In doing so, it relied heavily on this country's "'deep-rooted historic tradition that everyone should have his own day in court.'" *Id.* (quoting *Martin v. Wilks*, 490 U.S. 755, 761–62 (1989)).

b. The traditional protection at issue here is just as firmly established as these other constitutionally-compelled protections. For centuries, courts have refused to apply issue preclusion where a verdict from a prior suit could have rested on an issue other than the one for which preclusion is sought. That rule originated with early English authorities, which held that a judgment is not "evidence" of "any matter to be inferred by argument from [it]." *Duchess of Kingston's Case* (H.L. 1776), *in* 2 Smith, *A Selection of Leading Cases on Various Branches of the Law* 425 (1840); *see* 2 Coke, *The First Part of the Institutes of the Laws of England; or, a Commentary on Littleton* ¶ 352a (London, W. Clarke 1817) ("Every estoppell … must be certaine to every intent, and not … be taken by argument or inference.").

When the Fourteenth Amendment was adopted, American courts routinely followed this rule. *See, e.g.*, *Cromwell v. Cnty. of Sacramento*, 94 U.S. 351, 353 (1876) ("[T]he inquiry must always be as to the point or question *actually litigated and determined* in the original action, not what *might have been* thus litigated and determined." (emphases added)); *Russell*, 94 U.S. at 608 (no issue preclusion where "several distinct matters may have been litigated, upon one or more of

which the judgment may have passed, without indicating which of them was thus litigated"); *see also De Sollar v. Hanscome*, 158 U.S. 216, 221 (1895) (to preclude litigation of an issue, court must be "certain that the precise fact was determined by the former judgment"). At that time, "according to all the well considered authorities, ancient and modern," the "inference" that an issue was decided by prior litigation had to "be inevitable, or it [could not] be drawn." *Burlen v. Shannon*, 99 Mass. 200, 203 (1868); *see Cromwell*, 94 U.S. at 355 ("The precise point has been adjudged in numerous instances."); *Steam-Gauge & Lantern Co. v. Meyrose*, 27 F. 213, 213 (C.C.E.D. Mo. 1886) (Brewer, J.) ("doctrine is affirmed by a multitude of courts"); 1 Simon Greenleaf, *Treatise on the Law of Evidence* § 528, at 676–77 (3d ed. 1846) ("general rule" of the *Duchess of Kingston's Case* "has been repeatedly confirmed and followed, without qualification").

Packet Co. v. Sickles, 72 U.S. 580 (1866), illustrates the traditional approach. There, in the first case, the plaintiffs alleged that the defendants had breached two contracts, but the plaintiffs' verdict did not identify which contract the jury found to have been breached. *See id.* at 591–92. In the second case, the plaintiffs sought to preclude the defendant from arguing that it did not make the first contract. The Supreme Court refused to apply issue preclusion because, given the alternative allegations in the prior case, the evidence "failed to show that the contract in controversy in the present suit was necessarily determined in the former." *Id.* at 592.

This rule was not limited to the federal courts. Early state authorities were equally unanimous that preclusion could not apply where the prior verdict might have rested on grounds other than the specific issue for which preclusion was sought. In those circumstances, where "it be doubtful upon which of several points the verdict was founded, it will not be an estoppel as to either." *People v. Frank*, 28 Cal. 507, 516 (1865). Put another way, "a verdict will *not* be an estoppel merely because the testimony in the first suit was *sufficient* to establish a particular fact"; instead, "[i]t must appear, that was the very fact, on which the verdict was given, *and no other*." *Long v. Baugas*, 24 N.C. 290, 295, 1842 WL 976, at *2 (1842) (emphases added); *Lentz v. Wallace*, 17 Pa. 412, 1851 WL 5887, at *4 (1851) (no preclusion where "record of the former judgment does not show upon which ground the recovery was obtained").[5]

[5] Authorities on this point are legion. *See, e.g.*, *Strauss v. Meertief*, 64 Ala. 299, 311 (1879); *Solly v. Clayton*, 12 Colo. 30, 38–40 (1888); *Dickinson v. Hayes*, 31 Conn. 417, 423–25 (1863); *Evans v. Birge*, 11 Ga. 265, 272–75 (1852); *Kitson v. Farwell*, 132 Ill. 327, 339–41 (1890); *Dygert v. Dygert*, 4 Ind. App. 276, 280–81 (1892); *Lindley v. Snell*, 80 Iowa 103, 109–10 (1890); *Hill v. Morse*, 61 Me. 541, 543 (1873); *Augir v. Ryan*, 63 Minn. 373, 376 (1896); *Greene v. Merchants' & Planters' Bank*, 73 Miss. 542, 549–50 (1895); *Dickey v. Heim*, 48 Mo. App. 114, 119–20 (1892); *Kleinschmidt v. Binzel*, 14 Mont. 31, 55–61 (1894); *Hearn v. Boston & Me. R.R.*, 67 N.H. 320, 321–23 (1892); *Bell v. Merrifield*, 109 N.Y. 202, 211–14 (1888); *Fahey v. Esterley Harvesting Mach. Co.*, 3 N.D. 220, 221–24 (1893); *Lore's Lessee v. Truman*, 10 Ohio St. 45, 53–56 (1859); *Cook v. Burnley*, 45 Tex. 97, 115–17 (1876); *Aiken v. Peck*, 22 Vt. 255, 260 (1850); *Chrisman's Adm'x v. Harman*, 70 Va. 494, 499–501 (1877); *Wentworth v. Racine Cnty.*, 99 Wis. 26, 32 (1898).

Modern practice is the same. The traditional rule has been uniformly followed by the federal courts of appeals[6] and state appellate courts.[7] Moreover, as this Court detailed in *Bernice Brown*, prior to *Engle* progeny litigation, Florida courts themselves had long followed the traditional rule that "preclusive effect is not given to issues which could have, but may not have, been decided in an earlier lawsuit between the parties." *See* 611 F.3d at 1334. Thus, under recent as well as ancient precedents, if a prior "'judgment might have been based upon one or more of several grounds, but does not expressly rely upon any one of them, then none of them is conclusively established under the doctrine of collateral estoppel, since it is

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[6] *See, e.g.*, *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 309 (2d Cir. 1999); *United States v. Rigas*, 605 F.3d 194, 217–19 (3d Cir. 2010); *Haywood v. Ball*, 634 F.2d 740, 743 (4th Cir. 1980); *United States v. Patterson*, 827 F.2d 184, 187–90 (7th Cir. 1987); *Kelly v. Armstrong*, 141 F.3d 799, 801–02 (8th Cir. 1998); *Chew v. Gates*, 27 F.3d 1432, 1438 (9th Cir. 1994); *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1198–99 (10th Cir. 2000); *Lary v. Ansari*, 817 F.2d 1521, 1524–25 (11th Cir. 1987).

[7] *See, e.g.*, *Moody v. Rambo*, 727 So. 2d 116, 118 (Ala. Civ. App. 1998); *JeToCo Corp. v. Hailey Sales Co.*, 596 S.W.2d 703, 706–07 (Ark. 1980); *Brake v. Beech Aircraft Corp.*, 229 Cal. Rptr. 336, 343 (Cal. Ct. App. 1986); *Dowling v. Finley Assocs.*, 727 A.2d 1245, 1251–53 (Conn. 1999); *Major v. Inner City Prop. Mgmt., Inc.*, 653 A.2d 379, 382–83 (D.C. 1995); *Herzog v. Lexington Twp.*, 657 N.E.2d 926, 931 (Ill. 1995); *Conn. Indem. Co. v. Bowman*, 652 N.E.2d 880, 883 (Ind. Ct. App. 1995); *Day v. Crowley*, 172 N.E.2d 251, 254 (Mass. 1961); *People v. Gates*, 452 N.W.2d 627, 631–32 (Mich. 1990); *Parker v. MVBA Harvestore Sys.*, 491 N.W.2d 904, 906 (Minn. Ct. App. 1992); *In re Breuer's Income Tax*, 190 S.W.2d 248, 250 (Mo. 1945); *Manard v. Hardware Mut. Cas. Co.*, 207 N.Y.S.2d 807, 809 (App. Div. 1960); *Buckeye Union Ins. Co. v. New England Ins. Co.*, 720 N.E.2d 495, 501 (Ohio 1999); *Nealis v. Baird*, 996 P.2d 438, 458–59 (Okla. 1999); *Lee v. U.S. Fid. & Guar. Co.*, 538 P.2d 359, 361 (Or. 1975).

impossible for another court to tell which issue or issues were adjudged.'" *Ettin v. Ava Truck Leasing, Inc.*, 53 N.J. 463, 480 (1969) (citation omitted); *see Ashe v. Swenson*, 397 U.S. 436, 444 (1970) (issue preclusion does not apply when a "'rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration'" (citation omitted)).

3. Fundamental Fairness

It should be obvious why this traditional limitation on issue preclusion is so ubiquitous—the contrary rule would be fundamentally unfair. Unless it can be shown that the prior jury actually decided the contested issue, applying preclusion "would serve an unjust cause: it would become a device by which a decision not shown to be on the merits would forever foreclose inquiry into the merits." *United States v. Int'l Bldg. Co.*, 345 U.S. 502, 506 (1953).

The same conclusion follows from the general considerations that inform the Supreme Court's due-process analysis in the absence of a firm historical tradition. The Court has identified three factors to assess whether "fundamental fairness" requires a particular procedural protection: (1) "the private interest that will be affected"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedur-

al requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). These considerations readily confirm the unfairness of applying issue preclusion absent any assurance that the prior jury actually decided the issue in question.

First, defendants resisting issue preclusion have important interests at stake. Adverse judgments, of course, can "deprive [defendants] of a significant amount of their money." *Vlandis v. Kline*, 412 U.S. 441, 452 (1973); *see Philip Morris USA v. Williams*, 549 U.S. 346, 349 (2007) (award of punitive damages not supported by proper liability findings "would amount to a 'taking' of property without due process"); *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) ("prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference"). And because defendants cannot dispute the precluded issues, the preclusion ruling "deprive[s] … defendant[s] of the procedural protections … that the Constitution would [otherwise] demand," *Turner v. Rogers*, 131 S. Ct. 2507, 2518 (2011)—namely, the right to make the plaintiff prove each element of the claim, and the right "'to present every available defense.'" *Williams*, 549 U.S. at 353 (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (noting that due process "prevent[s] the States from denying potential litigants use of established adjudicatory procedures"). The interests at stake are particularly acute for

Engle defendants, who face literally thousands of case in which plaintiffs are seeking to impose liability without either proving essential elements of their claims or showing that the *Engle* jury actually resolved those elements in their favor.

Second, the risk of erroneous deprivation is substantial. Courts do not apply issue preclusion when the basis for a general verdict is unclear, precisely because of the risk that the prior jury did not resolve the issue for which preclusion is sought. *See, e.g.*, *Chew v. Gates*, 27 F.3d 1432, 1438 (9th Cir. 1994) (in such circumstances, the court could "only speculate as to which injury or injuries underlay the verdict"); *Haywood v. Ball*, 634 F.2d 740, 743 (4th Cir. 1980) (same). Put another way, the historic rule that "[e]very estoppell … must be certaine to every intent," Coke, *Institutes of the Laws of England* 352a, exists for the very reason that "[t]o hold otherwise might well prevent a hearing or a determination on the merits even though there had not been a hearing or determination in the first case," *Happy Elevator No. 2 v. Osage Constr. Co.*, 209 F.2d 459, 461 (10th Cir. 1954). Again, this concern is particularly acute in *Engle* progeny litigation, where the prior verdict could have rested not simply on *one* allegation distinct from the one for which preclusion is sought, but, according to the *Engle* class itself, on perhaps *dozens* of distinct alternative allegations.

Third, any competing interests in judicial economy are insubstantial and in any event outweighed by the serious risk of an erroneous property deprivation. To

begin with, preclusion in *Engle* progeny cases barely advances judicial economy at all, because plaintiffs invariably introduce evidence of tortious conduct for purposes of comparative fault and punitive damages. Thus, the dispute here does not affect the scope of progeny trials; instead, it involves only the question whether the progeny jury will be instructed to arbitrarily assume that all of the conduct at issue was tortious or, alternatively, whether the jury will be instructed to make that determination for itself. In any event, as leading commentators have explained in defense of the traditional rule, if a "general verdict is opaque, there should be no reliance or sense of repose growing out of the disposition of individual issues." 18 Charles A. Wright, *et al.*, *Federal Practice and Procedure* § 4420, at 536 (2d ed. 2002). This case does not involve the imposition of truncated procedures for the adjudication of claims; rather, it involves the question whether each element of a claim must be ascertainably adjudicated *at all*. Even if it were more efficient for courts simply not to bother with adjudicating each element, the arbitrariness of that shortcut is self-evident. As to the question presented, surely "'the Constitution recognizes higher values than speed and efficiency.'" *Vlandis*, 412 U.S. at 451 (quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)).

* * * *

In sum, precedent, history, and considerations of fundamental fairness all confirm this basic point: preclusion can constitutionally apply only to issues actual-

ly decided by a prior jury. To hold otherwise would be to subject the defendant to the imposition of liability without any ascertainable determination—by the first or second jury—of essential elements of the claim. It is difficult to imagine a more fundamental violation of due process.

B. It Is Impossible To Determine Whether The *Engle* Jury Actually Decided Any Elements Of Plaintiff's Claims

Under constitutional standards, the district court's application of issue preclusion cannot stand. To establish a claim for strict liability under Florida law, Plaintiff was required to prove that the cigarettes *smoked by Albert Walker* were defective and that this defect was a legal cause of Mr. Walker's injury. *See, e.g.*, *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 87 (Fla. 1976). It was not enough to prove simply that Reynolds sold some defective cigarettes at some point and that Mr. Walker was harmed by smoking. Similarly, to establish a claim for negligence under Florida law, Plaintiff was required to prove that Reynolds breached a duty of care *owed to Albert Walker* and that the breach was a legal cause of Mr. Walker's injury. *See*, *e.g.*, *Meyers v. City of Jacksonville*, 754 So. 2d 198, 202 (Fla. 1st DCA 2000). It was not enough to prove simply that there was negligence in the air and that Mr. Walker was harmed by smoking. The Phase I findings from *Engle* cannot be shown to have actually decided any of the requisite elements.

On their face, the Phase I findings do not establish the tortious-conduct elements of Plaintiff's claims. The defect finding establishes only that Reynolds, at

unspecified times before and after July 1, 1974, "place[d] cigarettes on the market that were defective and unreasonably dangerous." Doc. 252-2 at 2–3 (Addendum Tab 2). That finding does not reveal whether the jury thought that *all* cigarettes sold by Reynolds were defective; *which brands or types* of cigarettes the jury thought were defective; whether the jury thought that the brands or types of cigarettes *smoked by Mr. Walker* were defective; or *what* the jury thought the defect or defects were, given the many alternative allegations raised by the class. Similarly, the negligence finding establishes only that Reynolds, at unspecified times before and after July 1, 1969, "failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances." *Id.* at 10. That finding likewise does not reveal which brands or types of cigarettes the jury thought had been negligently designed or sold, or what acts or omissions the jury thought were negligent.

Plaintiff has not argued that the *Engle* trial record imbues the Phase I findings with any greater clarity, and any such argument would be demonstrably erroneous. As explained in detail above, the *Engle* record shows without question that the class pursued numerous alternative brand-specific, type-specific, and time-specific allegations of defect. The trial court in *Engle* recognized as much, in describing the class's case as involving "hundreds" or even "thousands" of discrete allegations of tortious conduct. Doc. 252-10 at 35813 (Addendum Tab 10). The

Engle class recognized as much, in proposing jury instructions that would have underscored their allegation that the defendants' cigarettes were "defective and unreasonably dangerous to smokers *for several alternative reasons*." Doc. 252-4 at 2.4 (emphasis added) (Addendum Tab 4). The directed-verdict order in *Engle* recognized as much, in setting forth various defect allegations made by the *Engle* class and applicable to "some" but not all brands or types of cigarettes. *Engle*, 2000 WL 33534572, at *2. And perhaps most significantly, the district court in *Waggoner* recognized as much, in acknowledging that "the *Engle* class did not pursue a single theory of defect, but rather alleged a number of discrete design defects" encompassing some but not all brands or types of cigarettes. *Waggoner*, 835 F. Supp. 2d at 1263.

Under these circumstances, it is impossible to demonstrate, to any degree of certainty, that the *Engle* jury actually decided the tortious-conduct elements of Plaintiff's claims. Most obviously, the Phase I findings could have rested on allegations having no relevance at all to Albert Walker's smoking. For example, the *Engle* defect finding could have rested on allegations that *light* cigarettes are defective because they cause smokers to smoke more and inhale more deeply. Docs. 252-7 at 13; 252-9 at 12131–34, 13476–77, 13617–24, 13649–51, 15400–01, 15418 (Addendum Tabs 7, 9). Such a finding would do nothing to establish Plaintiff's claim, because Mr. Walker never smoked light cigarettes. *See* Doc. 211 at

970–71. Similarly, the *Engle* negligence finding could have rested on the theory that light cigarettes are negligently designed. Or it could have rested on allegations that the defendants negligently marketed cigarettes *to minors* at various times between 1953 and 1994. Doc. 252-1 at 34–36; 252-9 at 10477–79, 13452–57; 252-10 at 36480–83 (Addendum Tabs 1, 9, 10). That theory also would have no possible application to Mr. Walker, who became an adult in 1945 (Doc. 202 at 310). Because the *Engle* jury did not ascertainably decide elements of the claims at issue here, it was unconstitutional to deem those elements established through preclusion.[8]

II. THE CONTRARY ANALYSIS IN *WAGGONER* AND *MARTIN* DOES NOT WITHSTAND SCRUTINY

Neither the district court in *Waggoner*, nor the First DCA in *Martin*, suggested that use of the *Engle* findings to establish elements of individual progeny

[8] Moreover, even as to allegations with some possible relevance to Mr. Walker, uncertainty about what the *Engle* jury actually decided makes it impossible to conduct the legal-cause inquiry mandated by Florida law. For example, if the Phase I defect finding rested on allegations that *unfiltered* cigarettes have unduly high tar yields, then the jury in this case would have to determine whether that defect in the unfiltered Camel cigarettes smoked by Mr. Walker caused his injury. Alternatively, if the Phase I defect finding rested on allegations that *filtered* cigarettes have misplaced ventilation holes or dangerous ingredients in the filter, then the jury in this case would have to determine whether that defect in the filtered Winston and Pall Mall cigarettes smoked by Mr. Walker caused his injury. Either way, without knowledge of the relevant defect, there is no way to undertake the legal-cause inquiry mandated by Florida law—linking the plaintiff's injury not simply to smoking, but to a defect. In short, no jury can assess whether a defect was the legal cause of the plaintiff's injury if it does not know what the defect was.

claims is consistent with the traditional requirement that a prior jury must have ascertainably decided the issue for which preclusion is sought. Instead, those courts articulated various rationales for why the traditional rule may be disregarded. None of these rationales is sound.

A. The *Waggoner* decision wrongly held that due process does not bar use of the *Engle* findings to establish elements of individual progeny claims. Its reasoning is erroneous in several respects.

First, the district court misinterpreted *Fayerweather* in several ways. Seizing upon one snippet from *Fayerweather*, the court attempted to limit that case's constitutional holding to cases where preclusion is used to establish "'the fact upon which *alone*'" a party would be deprived of its property. *See Waggoner*, 835 F. Supp. 2d, at 1268 (quoting *Fayerweather*, 195 U.S. at 299) (emphasis added in *Waggoner*); *see also id.* at 1272 (quoting same language with same emphasis added). It is true that the validity of the releases was the only disputed issue in *Fayerweather*, but the Court in no way limited its holding to that unusual circumstance. To the contrary, the Court reasoned in general terms. In describing why a due-process question was presented, the Court framed the question as whether a prior decision could be given "conclusive" effect "without any finding of the fundamental fact" for which preclusion was sought. *See* 195 U.S. at 299. And in resolving the due-process question on the merits, the Court announced a constitutional rule

that 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 the conclusion must be that the prior decision is not an adjudication upon any particular issue or issues, and the plea of *res judicata* must fail." *See id.* at 307. Nothing in the Court's rule or rationale turned on whether the fact for which preclusion is sought is *one* essential element of a claim, or the *only* disputed element of a claim.

Even more broadly, the district court asserted that because the Supreme Court in *Fayerweather* "ultimately determined that the application of collateral estoppel was proper, the doctrine's due process implications *did not factor into the Court's decision whatsoever*." 835 F. Supp. 2d at 1269. The court erred insofar as it meant to suggest that the due-process ruling was dicta. The Supreme Court announced a constitutional rule that "the plea of *res judicata* must fail" where the prior verdict could have rested "upon several distinct issues," and it then applied the rule to the case before it. *See* 195 U.S. at 307. This reasoning did not somehow become unnecessary to the decision just because, in *Fayerweather* itself, the validity of the releases in question was clearly "considered and determined" in the prior proceeding (*see id.* at 308), and the requirement of an ascertainable actual decision was therefore satisfied. The Court held that the due-process objection failed, but that hardly converts a necessary aspect of that holding—the articulation of the governing due-process standard—into dicta.

Equally wrong is the district court's related assertion (835 F. Supp. 2d at 1269–70) that *Fayerweather* "bifurcated" its analysis into a due-process and a common-law component. To the contrary, the Supreme Court's jurisdiction in *Fayerweather* turned on whether the lower court's decision "involve[d] the application of the Constitution." 195 U.S. at 297. The Supreme Court first considered whether it had jurisdiction and then, after finding jurisdiction because due process was implicated, "pass[ed] … to consider the merits of the case." 195 U.S. at 299. So the only "bifurcation" was between the Court's analysis of jurisdiction and the merits, not between due process and the common law. The merits question was necessarily a constitutional one, and the Court addressed it as such.

Second, the district court's dismissive treatment of common-law preclusion precedents misses the point. As explained above, courts—including the Supreme Court—for centuries have limited issue preclusion to facts actually decided by a prior jury. The district court swept all of this aside with a terse observation that these precedents "do not mention due process at all." 835 F. Supp. 2d at 1270. But the point is not that the many cases applying the traditional rule explicitly rest on the Due Process Clause; rather, the point is that the Supreme Court, from its "first due process cases," has relied on traditional common-law practice as the "touchstone" for due-process analysis. *Oberg*, 512 U.S. at 430. Moreover, tradition is particularly important where it is as deep and unbroken as here; "unanimous

adherence" to a particular mode of procedure "reflect[s] a profound judgment about the way in which law should be enforced and justice administered." *Winship*, 397 U.S. at 361–62. In brushing aside this tradition, the district court could not cite a single instance, outside the context of *Engle* progeny litigation, where a court has precluded litigation of an issue without determining that some prior jury (or other trier of fact) had actually decided the issue. At a minimum, the district court should have treated the unprecedented departure from this rule in *Martin* not as a matter of unfettered preference, but as at least raising a strong presumption of a due-process violation. *See Oberg*, 512 U.S. at 430.

Third, the district court reasoned that arbitrarily establishing the tortious-conduct elements of *Engle* progeny claims would not "in and of itself" work a due-process violation, because defendants retain what the court described as a "panoply of procedural protections" against arbitrary deprivation of their property. *See* 835 F. Supp. 2d at 1273–74. But the "panoply" of protections described by the court amounts to nothing more than the fact that *Engle* progeny plaintiffs still must prove *other* elements of their claims, such as class membership and legal causation. *See id.* As explained above, the rule of *Fayerweather* applies regardless of whether a plaintiff seeks to use preclusion to establish one or all of the contested elements of a claim. Moreover, precedent aside, the district court's reasoning makes little sense. Due process entails "'an opportunity to present every available defense,'"

not simply a few. *Williams*, 549 U.S. at 353 (citation omitted). In contrast, the district court's reasoning implies that courts may arbitrarily deem various elements of a claim to be established, so long as some other elements remain open for litigation. To state that proposition is to refute it.

Fourth, the court reasoned that, as to the tortious-conduct elements subject to preclusion, the defendants had the requisite "opportunity to be heard" in *Engle* itself. *See* 835 F. Supp. 2d at 1276. But an "opportunity to be heard" has due-process significance only as part of the process for *actually deciding* contested issues based on the evidence adduced. For example, it cannot possibly be consistent with due process to give the parties an "opportunity to be heard" on contested issues, but then to decide those issues based on a coin-toss, or to definitively resolve different issues. Here, the defendants may have had an opportunity to litigate tortious-conduct issues in *Engle*, but it is simply impossible to determine whether the *Engle* jury decided against Reynolds on the specific issues for which Mr. Walker seeks preclusion. Indeed, for all that can be gleaned from the *Engle* findings and record, Reynolds may have *prevailed* on the specific issues relevant to his claims.

Fifth, the district court reasoned that, if it did not violate due process for the *Engle* jury *itself* to use the Phase I findings in adjudicating the individual claims at issue in Phase II-A, then it cannot violate due process for *different* juries to use those findings in adjudicating the individual claims of progeny plaintiffs. *See* 835

F. Supp. 2d at 1277. However, the *Engle* jury in Phase II-A was not instructed to arbitrarily assume that all of the defendants' conduct was tortious, and then to assess whether that conduct was the legal cause of the plaintiff's injury. Instead, the Phase II-A jury was instructed to "determine whether defendants' conduct *upon which you based your Phase I verdict* was the legal cause of injury" to the individual plaintiffs. Doc. 252-10 at 50236 (Addendum Tab 10) (emphasis added). Knowing what it had *actually decided* in Phase I of *Engle*, the Phase II-A jury obviously could determine whether *that* conduct, already adjudicated to be tortious, was the legal cause of the plaintiffs' injuries. Here, however, neither the district court nor the progeny jury had any basis for determining whether the findings of the *Engle* jury encompassed the specific issues that Mr. Walker sought to establish through preclusion. Far from supporting the district court's conclusion, the analogy to Phase II-A merely underscores its error.

Finally, the district court reasoned that *Engle* progeny litigation is "sui generis" and therefore "demands some flexibility." 835 F. Supp. 2d at 1277. But as explained above, the utterly unprecedented nature of what is happening in that litigation must count against, not in favor, of its constitutionality. *See, e.g.*, *Oberg*, 512 U.S. at 430. Moreover, "[t]he systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a

towering mass litigation." *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992). To be sure, due process does allow for a degree of "flexibility," and, as an example of that point, the district court cited a Supreme Court decision holding that due process does not prevent affording issue-preclusive effect to the adjudicatory decisions of administrative agencies as well as to those of courts. *See Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 483 (1982) ("[N]o single model of procedural fairness, let alone a particular form or procedure, is dictated by the Due Process Clause."), *quoted in* 835 F. Supp. 2d at 1279. But to conclude that preclusion may constitutionally attach to an *actual adjudication* by a state agency is light-years removed from what the district court held: that preclusion may constitutionally attach absent any ascertainable resolution of the issue in question by any prior jury, judge, agency, or other adjudicatory tribunal of any kind.

B. The *Martin* decision offered three further, *Engle*-specific justifications for using the Phase I findings to establish elements of individual progeny claims. None of them directly responds to the federal due-process problems discussed at length above. In any event, they are unconvincing even on their own terms.

Common Issues. The First DCA reasoned that the Phase I findings should be given preclusive effect across-the-board because they addressed issues that were "common" for purposes of class certification. 53 So. 3d at 1067; *see also Douglas*, 83 So. 3d at 1010; *Jimmie Lee Brown*, 70 So. 3d at 715. But as *Engle* class coun-

sel acknowledged, "[i]t's a fallacy that every common issue has to apply to one hundred percent of the class members." Doc. 252-9 at 24417–18 (Addendum Tab 9); *see id.* ("There are common issues, but not every common issue is common to one hundred percent of the class."). Florida class-action law makes this clear. *See, e.g.*, *Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 107 (Fla. 2011) ("commonality prong only requires that resolution of a class action affect all or *a substantial number* of the class members" (emphasis added)). The mere fact that a class was certified cannot justify pretending that allegations about filtered cigarettes apply to smokers of unfiltered cigarettes, that allegations about light cigarettes apply to smokers of non-light cigarettes, or that allegations about youth marketing in the 1970s and 1980s apply to individuals born in 1927.

Nor can the Phase I findings be read to have established that all cigarettes are defective or that any sale of cigarettes is negligent. The *Engle* class expressly disclaimed that allegation. *See* Doc. 252-3 at 233 (Addendum Tab 3) ("The *Engle* Class never asserted any claims based on defendants' mere act of selling cigarettes." (capitalization altered)). Moreover, to the extent that allegation was made at all, it was merely one among several alternative allegations, and there is no basis for determining whether the jury accepted it. Finally, construing the Phase I findings as establishing that all cigarettes are defective would create a dispositive preemption objection: Because federal law "foreclose[s] the removal of tobacco

products from the market," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137 (2000), it impliedly preempts any tort claim that would seek to impose liability for merely selling cigarettes despite their inherent dangers. *See*, *e.g.*, *Liggett Grp., Inc. v. Davis*, 973 So. 2d 467, 472–73 (Fla. 4th DCA 2007), *rev. dismissed*, 997 So. 2d 400 (Fla. 2008).

Omnibus Order. The *Martin* court also suggested that the *Engle* trial court's Omnibus Order establishes the "evidentiary foundation" of the Phase I findings for preclusion purposes. *See* 53 So. 3d at 1068 (citing *Engle*, 2000 WL 33534572, at *1–*3). But in denying a directed-verdict motion, the Omnibus Order did not resolve what alternative allegations the *Engle* jury *actually* decided (the standard for preclusion); it simply concluded that a "reasonable jury *could* render a verdict" for the class (the standard for directed-verdict motions). *See Howell v. Winkle*, 866 So. 2d 192, 195 (Fla. 1st DCA 2004) (emphasis added); *accord Swilley v. Econ. Cab Co. of Jacksonville*, 56 So. 2d 914, 915 (Fla. 1951). Rather than providing a legitimate basis for preclusion, the Omnibus Order does the opposite: it confirms that preclusion cannot apply because a "'rational jury could have grounded" the Phase I findings "upon an issue other than that which [Plaintiff] seeks to foreclose from consideration.'" *Ashe*, 397 U.S. at 444 (citation omitted). Specifically, the order states that the defect finding could have rested on "many" alternative theories of defect that apply to "some" but not all cigarettes, which highlights the impossi-

bility of concluding that the *Engle* jury adopted any one of those theories over all the rest. *See Engle*, 2000 WL 33534572, at *2.

Nullifying Engle. Finally, the *Martin* court reasoned that allowing litigation of tortious-conduct questions in progeny litigation "would essentially nullify" the Florida Supreme Court's decision in *Engle*. *See* 53 So. 3d at 1066–67; *see also Douglas*, 83 So. 3d at 1010; *Jimmie Lee Brown*, 70 So. 3d at 718. That is incorrect. The Florida Supreme Court's statement that the Phase I finding should be given "res judicata effect" served to prevent the decertification itself from foreclosing any possible use of the *Engle* findings; without that statement, there would have been uncertainty about whether the mutuality and finality requirements for issue preclusion could be met, because no final judgment had been entered at the time of decertification, except as to the three class members whose claims were tried in Phase II-A of *Engle*. *Cf. Key v. Gillette Co.*, 782 F.2d 5, 7 (1st Cir. 1986) ("decertification" prevents "adverse res judicata effects"). Moreover, *some* Phase I findings clearly *do* have significant effect in progeny litigation—such as the *Engle* jury's determination that cigarettes cause various diseases and are addictive (Doc. 252-2 at 1-2 (Addendum Tab 2)), issues that the defendants had hotly contested prior to *Engle*.

In any event, the Florida Supreme Court did not elaborate on the nature and extent of the "res judicata effect" of the preserved Phase I findings, and its bare in-

struction to give those findings "res judicata effect" cannot fairly be read as having elliptically effected a revolution in the previously-settled law of issue preclusion and due process. *See Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002) ("this Court does not intentionally overrule itself sub silentio"). Finally, to the extent that the Florida state courts have lowered due-process standards based on that understanding of *Engle*, their decisions are neither persuasive nor, of course, binding here. This Court may appropriately defer to the DCAs' understanding of Florida law, but it must not defer to their narrow understanding of the federal Constitution. *See, e.g.*, *Wilder v. Turner*, 490 F.3d 810, 814 (10th Cir. 2007); *RAR, Inc. v. Turner Diesel*, 107 F.3d 1272, 1276 & n.1 (7th Cir. 1997); *Grantham v. Avondale Indus., Inc.*, 964 F.2d 471, 473 (5th Cir. 1992).

CONCLUSION

The judgment below should be reversed, and the case should be remanded for a new trial on the negligence and strict-liability claims. In that trial, Plaintiff should be required to prove all legal elements of those claims.

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Respectfully submitted,

/s/ Stephanie E. Parker

Stephanie E. Parker
Counsel of Record
Jason T. Burnette
JONES DAY
1420 Peachtree Street, N.E.
Suite 800
Atlanta, GA 30309
(404) 581-8552
separker@jonesday.com
jtburnette@jonesday.com

Gregory G. Katsas
Charles R.A. Morse
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939
ggkatsas@jonesday.com
cramorse@jonesday.com

Attorneys for Defendant/Appellant
R.J. Reynolds Tobacco Co.

Paul D. Clement
BANCROFT PLLC
1919 M Street, N.W.
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,563 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.

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/s/ Stephanie E. Parker
Attorney for Appellant
R.J. Reynolds Tobacco Co.

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I hereby certify that, on August 13, 2012, I caused two copies of the foregoing Brief of Appellant R.J. Reynolds Tobacco Co. to be deposited in first class United States mail with adequate postage affixed to the following:

Norwood Sherman Wilner
Janna Blasingame
Richard J. Lantinberg
THE WILNER FIRM
2nd Floor
444 E Duval St
Jacksonville, FL 32202

Elizabeth J. Cabraser
Richard M. Heimann
Robert J. Nelson
Scott P.Nealey
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111

/s/ Stephanie E. Parker
Attorney for Appellant
R.J. Reynolds Tobacco Co.