Nos. 12-13500-EE & 12-14731-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 12-13500-EE

PAULINE WALKER, ET AL.,

Plaintiff-Appellee,

v.

R.J. REYNOLDS TOBACCO CO.,

Defendant-Appellant.

No. 12-14731-EE

GEORGE DUKE, III,

Plaintiff-Appellee,

v.

R.J. REYNOLDS TOBACCO CO.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING OR REHEARING EN BANC

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October 16, 2013

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, *amicus curiae* The Product Liability Advisory Council, Inc. ("PLAC"), submits this list, which includes the judges in the trial court and all attorneys, persons, firms, partnerships, or corporations having an interest in the outcome of this matter. Asterisks indicate additions to the persons listed in the petition for rehearing of Appellant R.J. Reynolds Tobacco Co.:

1. Altria Group, Inc. (MO) – publicly held company and parent company of former Defendant Philip Morris USA, Inc.
2. Arnold, Keri – attorney for former Defendant Philip Morris USA, Inc.
3. Arnold & Porter, LLP – law firm for former Defendant Philip Morris USA, Inc.
4. Bancroft PLLC – law firm for Defendant-Appellant R.J. Reynolds Tobacco Co.
5. Barnett, Kathryn E. – attorney for Plaintiff Alvin Walker, as personal representative of the Estate of Albert Walker (Case No. 12-13500-EE) and Plaintiff George Duke, III, as personal representative of the Estate of Sarah Duke (Case No. 12-14731-EE).

6. Bassett, W. Randall – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

7. Bayuk, Frank T. – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

8. Bedell, Dittmar, DeVault, Pillans & Coxe, P.A. – law firm for former Defendant Lorillard Tobacco Co.

9. Bernstein-Gaeta, Judith – attorney for former Defendant Philip Morris USA, Inc.

10. Blasingame, Janna M. – attorney for Plaintiff Alvin Walker, as personal representative of the Estate of Albert Walker (Case No. 12-13500-EE) and Plaintiff George Duke, III, as personal representative of the Estate of Sarah Duke (Case No. 12-14731-EE).

11. * Bolian, Joshua S. – attorney for *amicus curiae* The Product Liability Advisory Council, Inc.

12. Bradford, II, Dana G. – attorney for former Defendant Philip Morris USA, Inc.

13. Brewer, Courtney – attorney for Plaintiff-Appellee Alvin Walker, as personal representative of the Estate of Albert Walker (Case No. 12-13500-EE) and Plaintiff-Appellee George Duke, III, as personal representative of the Estate of Sarah Duke (Case No. 12-14731-EE).

14. 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-Appellant R.J. Reynolds Tobacco Co.

15. Brown & Williamson Holdings, Inc. – holder of more than 10% of the stock of Reynolds American Inc., parent company of Defendant-Appellant R.J. Reynolds Tobacco Co.

16. Brown, Joshua R. – attorney for former Defendant Philip Morris USA, Inc.

17. Bucholtz, Jeffrey S. – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

18. Burnette, Jason T. – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

19. Byrd, Kenneth S. – attorney for Plaintiff-Appellee Alvin Walker, as personal representative of the Estate of Albert Walker (Case No. 12-13500-EE) and Plaintiff-Appellee George Duke, III, as personal representative of the Estate of Sarah Duke (Case No. 12-14731-EE).

20. Cabraser, Elizabeth J. – attorney for Plaintiff-Appellee Alvin Walker, as personal representative of the Estate of Albert Walker (Case No. 12-13500-EE) and Plaintiff-Appellee George Duke, III, as personal representative of the Estate of Sarah Duke (Case No. 12-14731-EE).

21. Casey, Jessica C. – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

22. Clement, Paul D. – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

23. Coll, Patrick P. – attorney for former Defendant Lorillard Tobacco Co.

24. Conway, Anne M. – Chief Judge of Middle District of Florida.

25. Corrigan, Timothy J. – Judge of Middle District of Florida.

26. Council for Tobacco Research, USA, Inc. – former Defendant.

27. Daboll, Bonnie C. – attorney for former Defendant Philip Morris USA, Inc.

28. Dalton, Jr., Roy B. – Judge of Middle District of Florida.

29. Davis, Stanley D. – attorney for former Defendant Philip Morris USA, Inc.

30. Deere, Stacey E. – attorney for former Defendant Philip Morris USA, Inc.

31. DeVault, III, John A. – attorney for former Defendant Lorillard Tobacco Co.

32. Dewberry, Michael J. – Special Master.

33. DLA Piper US, LLP – law firm for former Defendant Lorillard Tobacco Co.

34. Dorsal Tobacco Corp. – former Defendant.

35. Duke, III, George – Plaintiff (Case No. 12-14731-EE).

36. Duke, Thomas F. – former Plaintiff (Case No. 12-14731-EE).

37. Durham, II, William L. – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

38. Farah, Charlie E. – attorney for Plaintiff Alvin Walker, as personal representative of the Estate of Albert Walker (Case No. 12-13500-EE) and Plaintiff George Duke, III, as personal representative of the Estate of Sarah Duke (Case No. 12-14731-EE).

39. Farah, Eddie E. – attorney for Plaintiff Alvin Walker, as personal representative of the Estate of Albert Walker (Case No. 12-13500-EE) and Plaintiff George Duke, III, as personal representative of the Estate of Sarah Duke (Case No. 12-14731-EE).

40. Farah & Farah, P.A. – law firm for Plaintiff Alvin Walker, as personal representative of the Estate of Albert Walker (Case No. 12-13500-EE) and Plaintiff George Duke, III, as personal representative of the Estate of Sarah Duke (Case No. 12-14731-EE).

41. Foster, Brian A. – attorney for former Defendant Lorillard Tobacco Co.

42. Fowler, Gregory L. – attorney for former Defendant Philip Morris USA, Inc.

43. Furr, Jeffrey L. – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

44. Gillen, Jr., William A. – attorney for former Defendant Philip Morris USA, Inc.

45. Goldman, Lauren R. – attorney for former Defendant Philip Morris USA, Inc.

46. Greenberg Traurig, LLP – law firm for former Defendant Lorillard Tobacco Co.

47. Gross, Jennifer – attorney for Plaintiff Alvin Walker, as personal representative of the Estate of Albert Walker (Case No. 12-13500-EE) and Plaintiff George Duke, III, as personal representative of the Estate of Sarah Duke (Case No. 12-14731-EE).

48. Grossi, Jr., Peter T. – attorney for former Defendant Philip Morris USA, Inc.

49. Hamelers, Brittany E. – attorney for former Defendant Philip Morris USA, Inc.

50. Hartley, Stephanie J. – attorney for Plaintiff Alvin Walker, as personal representative of the Estate of Albert Walker (Case No. 12-13500-EE) and Plaintiff George Duke, III, as personal representative of the Estate of Sarah Duke (Case No. 12-14731-EE).

51. Heimann, Richard M. – attorney for Plaintiff George Duke, III Plaintiff Alvin Walker, as personal representative of the Estate of Albert Walker (Case No. 12-13500-EE) and Plaintiff George Duke, III, as personal representative of the Estate of Sarah Duke (Case No. 12-14731-EE).

52. Homolka, Robert D. – attorney for former Defendant Philip Morris USA, Inc.

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

54. Hughes, Hubbard & Reed, LLP – law firm for former Defendant Lorillard Tobacco Co.

55. Invesco Ltd. – holder of more than 10% of the stock of Reynolds American Inc., parent company of Defendant-Appellant R.J. Reynolds Tobacco Co.

56. Issacharoff, Samuel – attorney for Plaintiff Alvin Walker, as personal representative of the Estate of Albert Walker (Case No. 12-13500-EE).

57. Jones Day – law firm for Defendant-Appellant R.J. Reynolds Tobacco Co.

58. Kamm, Cathy A. – attorney for former Defendant Philip Morris USA, Inc.

59. Katsas, Gregory G. – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

60. Keehfus, Jason E. – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

61. King & Spalding, LLP– law firm for Defendant-Appellant R.J. Reynolds Tobacco Co.

62. Klindt, James R. – Magistrate Judge of the Middle District of Florida.

63. Knight, II, Andrew J. – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

64. Kouba, David E. – attorney for former Defendant Philip Morris USA, Inc.

65. Kucharz, Kevin – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

66. Lantinberg, Richard J. – attorney for Plaintiff Alvin Walker, as personal representative of the Estate of Albert Walker (Case No. 12-13500-EE) and Plaintiff George Duke, III, as personal representative of the Estate of Sarah Duke (Case No. 12-14731-EE).

67. Laane, M. Sean – attorney for former Defendant Philip Morris USA, Inc.

68. Lieff, Cabraser, Heimann & Bernstein, LLP – law firm for Plaintiff Alvin Walker, as personal representative of the Estate of Albert Walker (Case No. 12-13500-EE) and Plaintiff George Duke, III, as personal representative of the Estate of Sarah Duke (Case No. 12-14731-EE).

69. Lifton, Diane E. – attorney for former Defendants Lorillard Tobacco Co. and Lorillard, Inc.

70. Liggett Group LLC – former Defendant.

71. London, Sarah R. – attorney for Plaintiff Alvin Walker, as personal representative of the Estate of Albert Walker (Case No. 12-13500-EE) and Plaintiff George Duke, III, as personal representative of the Estate of Sarah Duke (Case No. 12-14731-EE).

72. Lorillard, Inc. (LO) – former Defendant.

73. Lorillard Tobacco Company – former Defendant.

74. Mason, Lucy E. – attorney for former Defendant Philip Morris USA, Inc.

75. Mayer Brown, LLP – law firm for former Defendant Philip Morris USA, Inc.

76. Mayer, Theodore V.H. – attorney for former Defendants Lorillard Tobacco Co. and Lorillard, Inc.

77. Mills, John S. – attorney for Plaintiff-Appellee Alvin Walker, as personal representative of the Estate of Albert Walker (Case No. 12-13500-EE) and Plaintiff-Appellee George Duke, III, as personal representative of the Estate of Sarah Duke (Case No. 12-14731-EE).

78. Molony, Daniel F. – attorney for former Defendant Philip Morris USA, Inc.

79. Monde, David M. – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

80. Morse, Charles R.A. – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

81. Moseley, Prichard, Parrish, Knight & Jones – law firm for Defendant-Appellant R.J. Reynolds Tobacco Co.

82. Murphy, Jr., James B. – attorney for former Defendant Philip Morris USA, Inc.

83. Nealey, Scott P. – attorney for Plaintiff Alvin Walker, as personal representative of the Estate of Albert Walker (Case No. 12-13500-EE) and Plaintiff

George Duke, III, as personal representative of the Estate of Sarah Duke (Case No. 12-14731-EE).

84. Nelson, Robert J. – attorney for Plaintiff Alvin Walker, as personal representative of the Estate of Albert Walker (Case No. 12-13500-EE) and Plaintiff George Duke, III, as personal representative of the Estate of Sarah Duke (Case No. 12-14731-EE).

85. Openchowski, Mallori B. – attorney for former Defendant Philip Morris USA, Inc.

86. Parker, Stephanie E. – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

87. Parrish, Robert B. – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

88. Patryk, Robb W. – attorney for former Defendants Lorillard Tobacco Co. and Lorillard, Inc.

89. Persons, W. Ray– attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

90. Philip Morris USA, Inc. – former Defendant.

91. Prichard, Jr., Joseph W. – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

92. Rabil, Joseph M. – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

93. Reeves, David C. – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

94. Reynolds American Inc. (RAI) – publicly held company and parent company of Defendant-Appellant R.J. Reynolds Tobacco Co.

95. R.J. Reynolds Tobacco Company – Defendant-Appellant.

96. * Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP – law firm for *amicus curiae* The Product Liability Advisory Council, Inc.

97. Rogers Towers, P.A. – law firm for Special Master.

98. Ross, David L. – attorney for former Defendant Lorillard Tobacco Co.

99. Rumberger, Kirk & Caldwell, P.A. – law firm for former Defendant Philip Morris USA, Inc.

100. Sagafi, Jahan Crawford Reza – attorney for Plaintiff Alvin Walker, as personal representative of the Estate of Albert Walker (Case No. 12-13500-EE).

101. Salcedo, Maria – attorney for Defendant Philip Morris USA, Inc.

102. Sankar, Stephanie S. – attorney for former Defendant Philip Morris USA, Inc.

103. Sears, Connor J. – attorney for former Defendant Philip Morris USA, Inc.

104. Sexton, Terrence, J. – attorney for former Defendant Philip Morris USA, Inc.

105. Shook, Hardy & Bacon, LLP – law firm for former Defendant Philip Morris USA, Inc.

106. Smith, Gambrell & Russell, LLP – law firm for former Defendant Philip Morris USA, Inc.

107. Sprie, Jr., Ingo W. – attorney for former Defendant Philip Morris USA, Inc.

108. Strom, Lydia J. – attorney for Plaintiff Alvin Walker, as personal representative of the Estate of Albert Walker (Case No. 12-13500-EE) and Plaintiff George Duke, III, as personal representative of the Estate of Sarah Duke (Case No. 12-14731-EE).

109. Sullivan, Thomas C. – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

110. Swerdloff, Nicolas – attorney for former Defendants Lorillard Tobacco Co. and Lorillard, Inc.

111. The Mills Firm, P.A. – law firm for Plaintiff-Appellee Alvin Walker, as personal representative of the Estate of Albert Walker (Case No. 12-13500-EE) and Plaintiff-Appellee George Duke, III, as personal representative of the Estate of Sarah Duke (Case No. 12-14731-EE).

112. * The Product Liability Advisory Council, Inc. – *Amicus curiae* in support of rehearing or rehearing en banc.

113. The Tobacco Institute, Inc. – former Defendant.

114. The Wilner Firm – law firm for Plaintiff Alvin Walker, as personal representative of the Estate of Albert Walker (Case No. 12-13500-EE) and Plaintiff George Duke, III, as personal representative of the Estate of Sarah Duke (Case No. 12-14731-EE).

115. Toomey, Joel B. – Magistrate Judge of Middle District of Florida.

116. Tye, Michael S. – attorney for former Defendant Philip Morris USA, Inc.

117. * Untereiner, Alan E. – attorney for *amicus curiae* The Product Liability Advisory Council, Inc.

118. Vector Group, Ltd., Inc. (VGR) – former Defendant.

119. Walden, Michael L. – attorney for former Defendant Philip Morris USA, Inc.

120. Walker, Alvin – Plaintiff-Appellee (Case No. 12-13500-EE).

121. Walker, Charles – former Plaintiff (Case No. 12-13500-EE).

122. Walker, John M. – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

123. Walker, Pauline – former Plaintiff (Case No. 12-13500-EE).

124. Warren, Edward I. – attorney for Plaintiff Alvin Walker, as personal representative of the Estate of Albert Walker (Case No. 12-13500-EE).

125. Weaver, Kurt D. – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

126. Weiner, Daniel H. – attorney for former Defendants Lorillard Tobacco Co. and Lorillard, Inc.

127. Wernick, Aviva L. – attorney for former Defendants Lorillard Tobacco Co. and Lorillard, Inc.

128. Williams, Cecily C. – attorney for former Defendants Lorillard Tobacco Co. and Lorillard, Inc.

129. Wilner, Norwood S. – attorney for Plaintiff Alvin Walker, as personal representative of the Estate of Albert Walker (Case No. 12-13500-EE) and Plaintiff George Duke, III, as personal representative of the Estate of Sarah Duke (Case No. 12-14731-EE).

130. Womble Carlyle Sandridge & Rice, PLLC – law firm for Defendant-Appellant R.J. Reynolds Tobacco Co.

131. Yarber, John F. – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

132. Yarbrough, Jeffrey A. – attorney for Defendant-Appellant R.J. Reynolds Tobacco Co.

133. * Young, Hugh F., Jr. – attorney for *amicus curiae* The Product Liability Advisory Council, Inc.

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, *amicus curiae* PLAC makes the following statement as to corporate ownership:

Amicus curiae PLAC does not have a parent corporation, nor does any publicly held corporation own 10% or more of its stock.

STATEMENT AS TO BASIS FOR REHEARING EN BANC

Pursuant to Eleventh Circuit Rules 35-5(c) and 35-6, counsel states and certifies as follows:

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance:

- Whether the Florida Supreme Court's novel and unprecedented rule of "claim" preclusion for "issues" class actions, which enables plaintiffs to establish a defendant's liability without either proving essential elements of their claims or establishing that those elements were actually decided in their favor in a prior proceeding, violates the Due Process Clause of the Constitution. The panel's resolution of that issue, if left uncorrected, will have profound and far-reaching ramifications not only in the approximately 1200 "*Engle* progeny" lawsuits pending within the Eleventh Circuit but also more broadly given the rise of "issues" class actions in mass tort litigation.

Dated: October 16, 2013

/s/ Alan E. Untereiner

ATTORNEY OF RECORD FOR

The Product Liability Advisory Council, Inc., as *Amicus Curiae*

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT C-1

STATEMENT AS TO BASIS FOR REHEARING EN BANC i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

ISSUE WARRANTING EN BANC CONSIDERATION 2

STATEMENT 2

INTRODUCTION AND SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. COURTS ARE MAKING INCREASING USE OF "ISSUES" CLASS ACTIONS AND MULTI-PHASE PROCEEDINGS TO ADJUDICATE COMMON ISSUES IN MASS LITIGATION 7

II. FLORIDA'S RADICAL DEPARTURE FROM TRADITIONAL PRECLUSION PRINCIPLES VIOLATES DUE PROCESS 10

CONCLUSION 15

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

ADDENDUM

TABLE OF AUTHORITIES

Page(s)

Cases

ACandS, Inc. v. *Godwin*,
667 A.2d 116 (Md. 1995) 7, 10

Allen v. *Int'l Truck & Engine Corp.*,
358 F.3d 469 (7th Cir. 2004) 10

Castano v. *American Tobacco Co.*,
84 F.3d 734 (5th Cir. 1996) 8

Cromwell v. *County of Sac*,
94 U.S. 351 (1877) 3

Engle v. *Liggett Group, Inc.*,
945 So. 2d 1246 (Fla. 2006) 2, 3

Ex parte Flexible Prods. Co.,
915 So. 2d 34 (Ala. 2005) 7

* *Fayerweather* v. *Ritch*,
195 U.S. 276, 25 S. Ct. 58 (1904) 11

Gates v. *Rohm & Haas Co.*,
655 F.3d 255 (3d Cir. 2011) 9

In re Rhone-Poulenc Rorer, Inc.,
51 F.3d 1293 (7th Cir. 1995) 10

McReynolds v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*,
672 F.3d 482 (7th Cir. 2012) 9

Mullen v. *Treasure Chest Casino, LLC*,
186 F.3d 620 (5th Cir. 1999) 10

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* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES—continued

Page(s)

Philip Morris USA Inc. v. *Scott*,
131 S. Ct. 1 (2010) 13

* *Philip Morris USA, Inc.* v. *Douglas*,
110 So. 3d 419 (Fla. 2013) 4, 11, 12

Richards v. *Jefferson County*,
517 U.S. 793, 116 S. Ct. 1761 (1996) 6

Scott v. *American Tobacco Co.*,
949 So. 2d 1266 (La. Ct. App. 2007) 7

State ex rel. Appalachian Power Co. v. *MacQueen*,
479 S.E.2d 300 (W. Va. 1996) 7

Wal-Mart Stores, Inc. v. *Dukes*,
131 S. Ct. 2541 (2011) 9

Treatises

28 U.S.C. § 1738 ..... 1, 5

Fed. R. App. P. 29(c) 1

Other Authorities

Farleigh, *Splitting the Baby: Standardizing Issue Class Certification*,
64 Vand. L. Rev. 1585 (2011) 8

Hines, *Challenging The Issue Class Action End-Run*, 52 Emory L.J.
709 (2003) 8

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567 (2004) 8

Jackson, *Recent Rulings May Lead to More Issue Classes*, Nat'l L.J.
Online (July 8, 2013) 9

F. JAMES & G. HAZARD, JR., CIVIL PROCEDURE (3d ed. 1985) 3

TABLE OF AUTHORITIES—continued

Page(s)

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Principles of the Law of Aggregate Litigation (2010).....9

RESTATEMENT (SECOND) OF JUDGMENTS (1982).....3

18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE (2d ed. 2002).....14

INTEREST OF THE *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit corporation with 107 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers of a variety of products, including automobiles, trucks, aircraft, electronics, cigarettes, tires, chemicals, pharmaceuticals, and medical devices. A list of PLAC's corporate members is appended to this brief. PLAC's primary purpose is to file *amicus curiae* briefs in cases that raise issues affecting the development of product liability litigation and have potential impact on PLAC's members. PLAC has filed more than 1000 *amicus* briefs in the federal and state courts.

This appeal raises an issue of considerable importance to PLAC and its members. Relying on a mistaken understanding of the Full Faith and Credit Act, 28 U.S.C. § 1738, the panel accepted and applied a radical Florida preclusion rule that abandons in the context of any "issues" class action a crucial due process safeguard—the requirement that an issue precluded from litigation have been "actually decided" in a prior proceeding. Because PLAC's members are often

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[1] Pursuant to Fed. R. App. P. 29(c), PLAC states that no party's counsel authored this brief in whole or in part, and no party, party's counsel, nor other person other than PLAC and its counsel contributed money intended to fund the preparation or submission of this brief. While Appellant R.J. Reynolds Tobacco Co. is a corporate member of PLAC, membership is neither necessary nor sufficient to obtain PLAC's *amicus* support. R.J. Reynolds made no contribution to the fee paid for this brief (other than its ordinary dues as paid by all corporate members of PLAC). PLAC never accepts funds earmarked for *amicus* briefs.

named as defendants in mass tort litigation, including increasingly common "issues" class actions, they have a vital interest in ensuring that courts adhere to traditional, time-tested, due process limitations on the use of preclusion.

ISSUE WARRANTING EN BANC CONSIDERATION

"Issues" class actions, which seek to adjudicate on an aggregate basis class-wide issues (often cast in highly general or abstract terms, and often representing only some of the plaintiff class's legal claims or liability theories), are increasingly prevalent in mass tort litigation. This case involves an "issues" class action that has ramifications for approximately 1200 individual federal lawsuits, and, due to its high visibility and prominence, the Court's decision will affect many more "issues" class actions in other contexts. The issue warranting en banc consideration is whether the panel erred in holding that Florida's novel and unprecedented preclusion rule for "issues" class actions—itself only the latest of multiple departures from settled, traditional principles of res judicata occurring throughout the *Engle* litigation—does not violate the Due Process Clause even though it enables plaintiffs to establish a defendant's liability without either proving essential elements of their claims or establishing that those elements were actually decided in their favor in a prior proceeding.

STATEMENT

This case is the latest chapter in the long-running litigation rooted in *Engle*

v. *Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). In "Phase I" of the *Engle* trial, a gigantic class of Florida smokers asserted various theories of wrongdoing against various companies that sold various brands of cigarettes over five decades. The jury answered "yes" to highly generalized questions such as whether "the defendants placed cigarettes on the market that were defective and unreasonably dangerous" and whether "all of the defendants were negligent." *Id.* at 1277. Given the nature of these questions, there could be no assurance that the jury's findings actually applied to any particular class member, product, liability theory, or time period. Nonetheless, the Florida Supreme Court—decertifying the class but on a prospective basis only, and retroactively certifying the case as an "issues" class action—held that smokers could bring individual product-liability actions within one year and that the *Engle* jury findings would have "res judicata effect" in these actions. *Id.* at 1269.[2] And the suits came; plaintiffs have filed over 4,500 product-liability actions in the wake of *Engle*.

[2] The doctrine of res judicata "refers to the various ways in which a judgment in one action will have a binding effect in another." F. JAMES & G. HAZARD, JR., CIVIL PROCEDURE § 11.3, at 590 (3d ed. 1985). "Res judicata" comes in two basic forms: claim preclusion and issue preclusion. *Ibid.*; RESTATEMENT (SECOND) OF JUDGMENTS §§ 17-19, 27 (1982). The distinct characteristics—and quite different effects—of these two forms of preclusion have long been recognized. See, *e.g.*, *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-53 (1877) (discussing contours of both doctrines). See generally JAMES & HAZARD, *supra*, § 11.3, at 591 (effects of claim preclusion include "extinguish[ment]" of entire claim, "merger" of prevailing plaintiff's claim into the judgment, and limitation of plaintiff's rights "to proceedings for the enforcement of the judgment"); RESTATEMENT, *supra*, § 17(1) (same); *id.* §§ 17(3), 27 (describing far more limited effects of issue preclusion).

The Florida Supreme Court explained what *Engle* meant by "res judicata effect"—and introduced a theretofore-unheard-of preclusion rule—in *Philip Morris USA, Inc.* v. *Douglas*, 110 So. 3d 419 (Fla. 2013), cert. denied, __ S. Ct. __, 82 U.S.L.W. 3088 (2013), which arose from one of the follow-on suits. Even though *Engle* had retroactively certified an "*issues*" class, the *Douglas* court held that *claim* preclusion, not *issue* preclusion, applied to the *Engle* findings in later individual suits. In practice, this meant that individual *Engle* plaintiffs no longer had to show—as the common law and constitutional due process require—that the *Engle* jury had *actually decided* the "issues" elements of their claims. Given the highly generalized nature of the *Engle* findings, the Florida Supreme Court in *Douglas* conceded that applying the venerable "actually decided" requirement "would effectively make the Phase I findings . . . useless in individual actions." *Id.* at 433.

In these consolidated cases (which are also individual *Engle* suits), the panel followed the lead of the *Douglas* court. It recognized that *Douglas*'s version of preclusion was "unorthodox and inconsistent with the federal common law," slip op. 24,[3] but it nonetheless declined to intervene. Rather, it held that the *Douglas* holding was entitled to full faith and credit and "did not arbitrarily deprive R.J. Reynolds of property without due process of law." Slip op. 19.

[3] The slip opinion is attached to RJR's petition for rehearing.

INTRODUCTION AND SUMMARY OF ARGUMENT

Rehearing or rehearing en banc is warranted because the panel's holding threatens grave consequences on a massive scale. It accepts, as consistent with due process, an unprecedented doctrine of preclusion that enables plaintiffs to hold a defendant liable without actually establishing each element of their claims. Relying as it does on a flawed understanding of the Full Faith and Credit Act, 28 U.S.C. § 1738, and according unwarranted deference to a state court's resolution of a federal constitutional issue, the panel's opinion blesses a manifestly incorrect and unconstitutional preclusion rule that, without further action, will taint the more than a thousand *Engle* progeny cases pending in this Circuit, in which tens of billions of dollars are at stake. And the importance of this case extends well beyond the *Engle* litigation. If the holding stands, it is entirely predictable that the well-organized plaintiffs' class-action bar will try to spread the "lessons" of *Engle* and *Douglas* to "issues" class actions in other contexts and in other jurisdictions. In so doing, it would leverage the novel preclusion doctrine that the panel approved into judgments (and, of course, settlements) obtainable without the need for plaintiffs to prove every element of their claims. These potentially dire results make the due process issue in this case exceptionally important and show why this Court should grant rehearing or rehearing en banc.

I. The *Engle* litigation is but a high-profile example of the "issues"

class-action procedure. Plaintiffs increasingly have used "issues" class actions—in mass tort contexts ranging from toxic torts to employment discrimination—to resolve certain liability issues on a class-wide basis. Then, because the class-wide issues do not predominate over party-specific issues, they try ultimate liability in individualized trials. Courts and commentators have raised concerns that this more and more common two-step procedure, without close scrutiny, is ripe for abuse. Due to *Engle*'s prominence, and the more than a thousand pending federal cases affected by the panel's decision, this case is the right vehicle to curb that potential abuse.

II. Rather than confirming that well-established due process safeguards apply to "issues" class actions, the panel here endorsed (and worse yet, deferred to) a Florida preclusion rule that enables plaintiffs to hold defendants liable without establishing every element of their claims. And the Florida Supreme Court's novel and unprecedented rule of "claim" preclusion for "issues" class actions was only the latest in a make-it-up-as-you-go series of departures from settled, traditional principles of res judicata law stretching back to *Engle* itself—representing, both individually and collectively, an "extreme application[] of the doctrine of res judicata" (*Richards* v. *Jefferson County*, 517 U.S. 793, 797, 116 S. Ct. 1761, 1765 (1996)) that the defendants in *Engle* could not possibly have imagined (much less had constitutionally required fair notice of) at the time of the *Engle* Phase I trial.

The Florida Supreme Court has thereby opened the doors of federal courts to state-law preclusion doctrines antithetical to the common law and to the due process guaranteed by the Constitution.

ARGUMENT

I. COURTS ARE MAKING INCREASING USE OF "ISSUES" CLASS ACTIONS AND MULTI-PHASE PROCEEDINGS TO ADJUDICATE COMMON ISSUES IN MASS LITIGATION

The Florida Supreme Court's decision in *Engle* to decertify a class action, retroactively certify an "issues" class action, and make pronouncements about the future "res judicata effect" of the Phase I jury's findings was unprecedented. But *Engle* is only one of a number of large class actions in recent years that have employed a segmented, multi-phased trial plan—including an initial phase directed toward resolving highly generalized liability issues—to deal with the adjudication of large numbers of claims. Indeed, there is a growing trend to attempt mass tort aggregation through generic trial proceedings involving disparate claims relating to similar products.[4]

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[4] See, *e.g.*, *Scott* v. *American Tobacco Co.*, 949 So. 2d 1266, 1271-72 (La. Ct. App. 2007) (smokers' class action); *Ex parte Flexible Prods. Co.*, 915 So. 2d 34, 38, 40-43 (Ala. 2005) (approving plan for generic product liability trial in 1,600 consolidated cases involving chemical used in industrial applications); *State ex rel. Appalachian Power Co.* v. *MacQueen*, 479 S.E.2d 300, 304-05 (W. Va. 1996) (approving plan to consolidate thousands of asbestos claims into two-phase trial; first phase would adjudicate general negligence questions); *ACandS, Inc.* v. *God-win*, 667 A.2d 116, 120-22, 144-50 (Md. 1995) (approving four-phase trial plan that determined whether each of six asbestos defendants "was negligent and/or

What is more, in recent years there has been a marked increase in "issues" class actions dedicated to resolving one or more issues (often highly generalized or abstract in nature) on an aggregate basis. See generally Farleigh, *Splitting the Baby: Standardizing Issue Class Certification*, 64 Vand. L. Rev. 1585, 1595-1602 (2011) (describing emergence of "issues" class actions beginning in late 1980s and their increasing acceptance by courts); Hines, *The Dangerous Allure of the Issue Class Action*, 79 Ind. L.J. 567, 582-86 (2004) (same); *id.* at 586 ("District courts everywhere are inundated with requests for certification of issue class actions [under Fed. R. Civ. P. 23(c)(4)] as an alternative to (b)(3) class actions . . . ."). Although some courts and commentators have rejected the use of "issues" class actions as an end run around the "commonality" and "predominance" requirements of Federal Rule 23 (and its state equivalents), see *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996); Hines, *Challenging The Issue Class Action End-Run*, 52 Emory L.J. 709, 714 (2003), the critics represent a minority view today, see Farleigh, *supra*, 64 Vand. L. Rev. at 1601 (noting that at least six circuits have disagreed with *Castano* and approved "issues" class actions regardless whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement).

This trend has continued in recent years, spurred in part by (i) publication of

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strictly liable" and applied finding to individual claims by 8,549 plaintiffs).

the American Law Institute's Principles of the Law of Aggregate Litigation §§ 2.02-2.05 (2010), which endorses the use of "issues" class actions under certain circumstances, see *Gates* v. *Rohm & Haas Co.*, 655 F.3d 255, 273 (3d Cir. 2011), and (ii) renewed efforts by plaintiffs' class counsel, in the aftermath of *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), to use "issues" class actions as a way to ensure that class certification is not defeated because of the absence of commonality or predominance in a more broadly defined class-action proceeding. See, *e.g.*, *McReynolds* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 487-91 (7th Cir. 2012) (upholding certification of "issues" class action targeting whether two particular employment policies gave rise to liability under disparate impact theory). According to one lawyer who represents plaintiffs in class actions, "As defendants continue to challenge a court's ability to certify classes that require individualized proof of damages, one can expect plaintiffs to increasingly seek—at least in the alternative—certification of issues classes involving a single cause of action or the issue of liability using Rule 23(c)(4)." Jackson, *Recent Rulings May Lead to More Issue Classes*, Nat'l L.J. Online (July 8, 2013).

This case affords this Court the opportunity to address the exceptionally important issue of what procedural limits must govern these increasingly common "issues" class actions. In every such case, the question potentially arises of what preclusive effect will be given in subsequent proceedings to the findings made by

the factfinder on the certified issues. Ordinarily, *issue* preclusion (not surprisingly) has always governed "issues" class actions. *E.g.*, *Allen* v. *Int'l Truck & Engine Corp.*, 358 F.3d 469, 472 (7th Cir. 2004); *Mullen* v. *Treasure Chest Casino, LLC*, 186 F.3d 620, 628 (5th Cir. 1999); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995); *ACandS, Inc.* v. *Godwin*, 667 A.2d 116, 146-47 (Md. 1995). But the panel has condoned a novel *claim* preclusion rule whereby courts may answer that question by holding defendants liable based on vague answers to highly abstract liability questions without individual plaintiffs ever having had to actually prove every element of their claims. Left unchecked, this rule will only spur the plaintiffs' bar to bring more "issues" class actions—and to invite more troubling violations of due process.

II. FLORIDA'S RADICAL DEPARTURE FROM TRADITIONAL PRECLUSION PRINCIPLES VIOLATES DUE PROCESS

With the newness of the "issues" class action has come a dearth of governing law. At the behest of plaintiffs, the Florida state courts have filled this void with novel "procedures" and preclusion rules that are unknown to traditional civil litigation. Specifically, in the name of pragmatism and efficiency, the Florida Supreme Court in *Douglas* and *Engle* has repeatedly moved the procedural goalposts mid-litigation by, among other things, adopting an unprecedented preclusion rule for "issues" class actions that permits the imposition of enormous liability on defendants even though plaintiffs may not have established every element of their

claims. Such outcomes comport with no cognizable notion of due process; yet, because *Engle* is the bellwether of "issues" class actions, they threaten to become commonplace. The full Court should step up where the panel stepped back and prevent such lapses in due process from taking root.

To begin with, the Florida Supreme Court's rule—countenanced by the panel—has deprived the *Engle* defendants of the basic guarantee of due process in a civil trial: that a defendant will not be held liable (and deprived of property) without an adverse finding by *some* factfinder on all the elements necessary to establish liability. See *Fayerweather* v. *Ritch*, 195 U.S. 276, 307, 25 S. Ct. 58, 68 (1904) ("[W]here 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, . . . the plea of *res judicata* must fail."). In particular, the Florida Supreme Court has held that there is "no 'actually decided' requirement" in "issues" class-action preclusion. *Douglas*, 110 So. 3d at 435. Without a showing that a liability element or defense was actually litigated and resolved, however, there is no assurance that any factfinder has resolved that element or defense against a defendant—and no basis for preventing the defendant from exercising the right to defend with respect to that element or defense. Nor, in that circumstance, is there any basis for relieving the plaintiff of the burden of proving every element of his or her claim. Elimination of the "actually decided" requirement thus creates the risk

that a defendant will be held liable without any factfinder having determined that all the elements of a plaintiff's claim have been proven.

Nor is this concern abstract—the *Engle* litigation provides a textbook illustration of the noxious consequences of this rule. The Phase I jury answered "yes" to the highly generalized questions of whether the tobacco companies "placed cigarettes on the market that were defective and unreasonably dangerous" and whether the companies were "negligent." See *id.* at 424-25. In other words, the jury found that each defendant marketed at least one defective product and committed at least one negligent act. But, in the Florida courts' view, these highly abstract findings suffice to establish the tortious-conduct elements of plaintiffs' negligence and strict-liability claims with respect to the particular cigarettes smoked by each individual plaintiff at a particular point in time. *Id.* at 430. And this result is by no means confined to *Engle* litigation. The Florida Supreme Court has announced that its new rule shall apply wherever the "same parties" litigate the "same causes of action." *Id.* at 432 (emphasis omitted). In other words, the novel rule of preclusion will henceforth govern all Florida "issues" class actions (but in every other kind of litigation, Florida courts will continue to observe the traditional limits on issue and claim preclusion).

Unfortunately, the Florida Supreme Court's willingness to deprive a civil defendant of the right to insist on proof of every element of a claim because of the

practicalities of aggregate litigation is hardly an isolated occurrence. It is reminiscent, for example, of the Louisiana courts' recent decision (in another case involving unpopular defendants) to "eliminate[] any need for plaintiffs to prove, and den[y] any opportunity for [defendants] to contest," the traditional element of individualized reliance in a fraud claim on the ground that individual plaintiffs' claims "were aggregated with others' through the procedural device of the class action." *Philip Morris USA Inc.* v. *Scott*, 131 S. Ct. 1, 3, 4 (2010) (Scalia, J., in chambers). "The extent to which class treatment may constitutionally reduce the normal requirements of due process is an important question." *Id.* at 4. Greater guidance from this Court would substantially assist the lower courts in evaluating whether and when departures from traditional safeguards in mass tort and other complex litigation are constitutionally permissible.[5]

But it gets worse. If the *Engle* litigation is any indicator, "issues" class actions are susceptible to make-it-up-as-you-go, serial innovations, which together may create a preclusion regime that the defendants could scarcely have imagined (much less had fair notice of) at the outset of the litigation. At the time of Phase I

[5] Tobacco companies frequently are on the receiving end of dramatic departures from settled practice in mass litigation. See, *e.g.*, Mulderig, Wharton & Cecil, *Tobacco Cases May Be Only the Tip of the Iceberg for Assaults on Privilege*, 67 Def. Counsel J. 16, 19-23 (2000) (explaining that Minnesota trial court, in response to sheer number of documents whose privileged status was disputed by plaintiffs, abandoned traditional safeguard of document-by-document review and instead used unprecedented mass categorization procedure that yielded demonstrably inconsistent results).

of *Engle*, for example, (1) Florida law would have treated the jury's findings as qualifying at most for issue but not claim preclusion, and then only if a plaintiff demonstrated in later litigation that the same issue had been actually decided by the *Engle* jury; (2) Florida law applied claim preclusion only to *a judgment on the merits*, and the Phase I verdict did not qualify; (3) Florida claim preclusion had the effect of extinguishing the plaintiff's entire claim and merging it into the judgment, not an effect (as here) comparable to that of issue preclusion; (4) there was no special rule (of issue or claim preclusion) for "issues" class actions; (5) *Engle* was not even an "issues" class action but something broader (the "issues" class was created *retroactively*); and (6) the preclusive effect of a judgment or findings was something the enforcing court, not the issuing court, ordinarily decided, see 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4413 (2d ed. 2002) (noting "general rule that a court cannot dictate preclusion consequences at the time of deciding a first action," except where it seeks to limit preclusive effect). See also note 2, *supra*. These were the traditional "res judicata" ground rules that the defendants were dealing with when they tried Phase I of *Engle*. They are worlds removed from the novel regime created after-the-fact by the Florida Supreme Court to measure the preclusive effects of the findings that resulted from that trial.

The panel here sidestepped or overlooked all of these problems, holding that

its inquiry was constrained by the Full Faith and Credit Act and that, at any rate, the Florida Supreme Court had determined that the relevant issues were actually decided. As the rehearing petition persuasively demonstrates, that is wrong. PLAC submits this brief to underscore that the panel's holding was no run-of-the-mill error. Far from it: The holding canonizes a preclusion rule that elides the most basic due process protections in increasingly common proceedings poised to extract billions of dollars from class-action defendants. These far-reaching effects cry out for the Court's en banc consideration or, at the very least, reconsideration by the panel.

CONCLUSION

The Court should grant rehearing or rehearing en banc.

Respectfully submitted,

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October 16, 2013

CERTIFICATE OF COMPLIANCE

Counsel certifies as follows:

1. This brief complies with the Eleventh Circuit Rules 35-6 and 40-6 because this brief is 15 pages in length, excluding the parts of the brief exempted by Eleventh Circuit Rules 32-4 and 35-6; and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: October 16, 2013

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