Case No. SC20-291
First District Case No. 1D17-2104

IN THE SUPREME COURT OF FLORIDA

LINDA PRENTICE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN C. PRICE,

Petitioner,

v.

R.J. REYNOLDS TOBACCO COMPANY,

Respondent.

On Discretionary Review From
The First District Court of Appeal of Florida

AMICUS CURIAE BRIEF OF PHILIP MORRIS USA INC. IN SUPPORT OF RESPONDENT R.J. REYNOLDS TOBACCO COMPANY

Jesse Panuccio
Florida Bar No. 31401
BOIES SCHILLER FLEXNER LLP
401 E Las Olas Blvd Ste 1200
Fort Lauderdale, FL 33301-2211
Phone: 954-356-0011
Fax: 954-356-0011
jpanuccio@bsfllp.com

Geoffrey J. Michael
Florida Bar. No. 86152
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave NW
Washington, DC 20001-5369
Phone: 202-942-5000
Fax: 202-942-5999
geoffrey.michael@arnoldporter.com

Attorneys for Philip Morris USA Inc.

December 10, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae Philip Morris USA Inc. was one of the original *Engle* defendants. Today—twenty-six years after the case was filed—PM USA is a defendant in some 1,600 of the remaining *Engle* progeny cases. While PM USA fully agrees with Respondent's position on the conflict regarding the elements of progeny plaintiffs' claims for fraudulent concealment and conspiracy, it submits this brief to support Respondent's request that the Court reconsider the precedent-shattering preclusion framework established by *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), and *Philip Morris USA v. Douglas*, 110 So. 3d 419 (Fla. 2013). Under that framework, PM USA is precluded from contesting the wrongful conduct elements of progeny plaintiffs' claims. PM USA therefore has a substantial interest in whether this Court overrules the *Engle-Douglas* framework.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

> Once we have chosen to reassess a precedent and have come to the conclusion that it is clearly erroneous, the proper question becomes whether there is a valid reason *why not* to recede from that precedent.

State v. Poole, 297 So. 3d 487, 507 (Fla. 2020).

This Court should reconsider *Engle*'s questionable "res judicata" directive and *Douglas*'s clearly erroneous interpretation of *Engle*. Those decisions are so aberrational that they have been variously described by jurists as "harmful and

confusing precedent" and "problematic";[1] creating "confusion in the trial courts" and "a form of legal poker";[2] "exactly backward";[3] "unorthodox" and "a novel notion of res judicata";[4] and "strange," "startling," and "half baked."[5]

The *Engle-Douglas* preclusion framework has earned these monikers because, as Judge Tjoflat explained in his 110-page dissent in *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169 (11th Cir. 2017) (en banc), it is a glaring outlier that does not apply any previously known form of res judicata. It created a Frankenstein's monster of preclusion: claim preclusion that can be used offensively, prior to a final judgment, to establish issues without assurance that those issues were ever actually decided adversely to the precluded party. It is time for this Court to right this wrong—for the *Engle-Douglas* preclusion framework to be "borne away by the waves, and lost in darkness and distance." Mary W. Shelley, FRANKENSTEIN; OR, THE MODERN PROMETHEUS 177 (Sever, Francis, & Co. 1869). Unpopular as tobacco companies may be, they remain entitled to an evenhanded application of the law.

---

[1] *Engle*, 945 So. 2d at 1284 (Wells, J., concurring in part and dissenting in part).

[2] *R.J. Reynolds Tobacco Co. v. Brown*, 70 So. 3d 707, 718, 720 (Fla. 4th DCA 2011) (May, C.J., specially concurring).

[3] *Douglas*, 110 So. 3d at 437 (Canady, J., dissenting).

[4] *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1183, 1184 (11th Cir. 2017) (en banc).

[5] *Id.* at 1192, 1214, 1266 (Tjoflat, J., dissenting).

I. In Phase I of the *Engle* class action trial, the jury made certain generic factual findings. Those findings did not result in a final judgment in favor of the class on any claim. Instead, additional issues were to be tried in individual trials to establish whether defendants were liable to individual class members. When this Court first heard *Engle*, it was sitting in review of a rendering court for res judicata purposes. Yet, this Court sua sponte did something "unique" (in its own words): it took on the role of a recognizing trial court and pronounced, as a "pragmatic solution," that "the Phase I common core findings . . . will have res judicata effect" in progeny trials. 945 So. 2d at 1269, 1270 n.12.

The actual recognizing courts—those presiding over progeny cases—were left to grapple with what this Court's "res judicata" directive meant. *See Hochstadt v. Orange Broad.*, 588 So. 2d 51, 53 (Fla. 3d DCA 1991) ("Courts often use the term 'res judicata' to encompass both issue preclusion and claim preclusion."). The Eleventh Circuit found that the only possible meaning was issue preclusion. *See Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1333 (11th Cir. 2010). But, finding that *Engle's* "pragmatic solution" would prove "useless" if subjected to the requirements of issue preclusion, *Douglas* recast *Engle* as having directed recognizing courts to apply claim preclusion. 110 So. 3d at 432-33.

This was "exactly backward," as Justice Canady explained in dissent, 110 So.3d at 437 (Canady, J., dissenting)—and "startling," as Judge Tjoflat characterized

it, *Graham*, 857 F.3d at 1214 (Tjoflat, J., dissenting). Each preclusion doctrine has traditional requirements that safeguard the rights of precluded parties. A longstanding prerequisite for issue preclusion is a sufficient showing that the issue was actually decided against the precluded party. A longstanding, indispensable touchstone for claim preclusion is a final judgment, which ensures courts do not unfairly block a party from pursuing a claim or defense. *Douglas* erred by melding the two—permitting preclusion of issues (elements of progeny plaintiffs' claims) in the absence of either (i) enough specificity in the Phase I findings to determine that the issues were actually decided or (ii) a final judgment.

Douglas held that claim preclusion applied because progeny cases involve the same claims between the same parties as *Engle*. But that fact alone is not sufficient to trigger claim preclusion, as is evident from the law-of-the-case doctrine. Law of the case applies where the same claims are being litigated between the same parties, but it is nevertheless governed by issue-preclusion principles. In addition to identity of claims and parties, a prior judgment on the merits is necessary for claim preclusion. But *Engle* did not result in any such judgment, much less one in all progeny plaintiffs' favor. That is why Mrs. Prentice's claims had to be tried; reliance was one of a number of issues that needed to be resolved prior to entry of judgment. Preclusion in this case thus applied not to claims, but only to issues—but with no

assurance that they had previously and actually been decided against Reynolds. The *Engle-Douglas* framework is a clearly erroneous outlier in preclusion jurisprudence.

II. The *Engle-Douglas* framework cannot be saved by *stare decisis*. **A.** It created a *sui generis* procedural regime, in which reliance interests are at their nadir. But no individual's primary conduct was undertaken in reliance on the framework created by those decisions, which long postdated the close of the *Engle* class. This Court has not hesitated to correct clearly erroneous precedent in other cases involving evidentiary and procedural rules, and there is no reason to shy away from doing so here. Given that the many remaining *Engle* progeny cases will otherwise proceed unfairly, the case for reconsideration is compelling. **B.** There would be no significant adverse practical consequences from overruling the *Engle-Douglas* framework. Experience shows that the absence of preclusion does not result in protracted, burdensome tobacco trials. **C.** The Court should reject any assertion that, in *Engle*, defendants waived arguments based on the generality of the Phase I verdict form. The violation of defendants' rights did not occur until the progeny trials. Regardless, defendants clearly objected to the general verdict form proposed by the class in the original *Engle* proceedings on the grounds raised in progeny cases.

ARGUMENT

I. THE *ENGLE-DOUGLAS* FRAMEWORK RADICALLY DEPARTS FROM TRADITIONAL PRECLUSION LAW

Judge Tjoflat's dissent in *Graham* thoroughly documents the history of the *Engle* litigation, which he characterizes as "layer upon layer of judicial error," culminating in the *Engle-Douglas* preclusion framework, which "drastically . . . alter[ed] . . . Florida's preclusion doctrines and tort law." 857 F.3d at 1214 (Tjoflat, J., dissenting).[6] PM USA recites some of that history below to show how radically the *Engle-Doulas* preclusion framework departs from traditional preclusion law.

Engle began in 1994, when six individuals filed a class action complaint in Miami-Dade County against PM USA, Reynolds, and other defendants. The plaintiffs brought claims for, *inter alia*, strict liability, negligence, fraudulent concealment, and conspiracy to conceal. As ultimately certified, the class encompassed all "Florida citizens and residents," "and their survivors, who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *Engle*, 945 So. 2d at 1274.

The circuit court adopted a three-phase trial plan. In Phase I, the jury returned a series of findings that fell into two categories. The first category established that

[6] Given that the Eleventh Circuit had to defer to this Court's interpretation of Florida law, *Graham* does not represent an endorsement of the *Engle-Douglas* framework. Indeed, while not finding a due process violation, the court deemed the framework an "unorthodox" and "novel notion of res judicata." 857 F.3d at 1183-84.

smoking causes twenty diseases and is addictive. *See id.* at 1276-77. The second category established that each defendant engaged in various types of tortious activity related to the class's claims. But those findings did not identify any particular act or omission that the jury found to be tortious from among the many disparate allegations—spanning nearly 50 years—the class had sought to prove in Phase I.

To take an example apropos to this appeal, the class's concealment-related allegations included purportedly misleading statements regarding disease-causing compounds in smoke (App. 24-25), the nature and manipulation of nicotine (App. 16-18), the identity and health effects of additives (App. 22), the purpose and function of certain research organizations (App. 23), the intent and effect of advertising (App. 12-16), and "light" or "low tar" cigarettes (App. 29-31). The concealment claims were thus predicated, in the words of class counsel, on "thousands upon thousands of statements about" cigarettes. App. 8.

But the jury was not asked to identify which of the class's theories of concealment it accepted (or rejected, or did not pass upon). The jury merely answered "yes" to the following generic questions:

- "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], of failed [sic] to disclose a material fact concerning or proving the health effects and/or addictive nature of smoking cigarettes?" App. 36 (Question No. 4a).

- "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?" App. 38 (Question No. 5a).

The same was true as to the other four questions that form the basis of the Phase I conduct findings preserved in *Engle*. *See Engle*, 945 So. 2d at 1277; App. 33 (Question No. 3); App. 39-42 (Questions No. 6, 7, and 8).

In Phase II-A, the same jury determined individualized issues of legal causation and compensatory damages as to three named plaintiffs. *See id.* at 1257. In Phase II-B, the jury assessed class-wide punitive damages. *See id*. In Phase III, separate juries were to have decided for other class members what the original jury decided in Phase II-A for the named plaintiffs: were defendants liable to that class member, and, if so, the amount of compensatory damages. *Id.* at 1258. But before Phase III trials commenced, defendants appealed.

The Third District decertified the class, explaining that "virtually all courts that have addressed the issue have concluded that certification of smokers' cases is unworkable and improper." *Liggett Group Inc. v. Engle*, 853 So. 2d 434, 443-44 (Fla. 3d DCA 2003). The court put aside "the emotional appeal of the class representatives' claims" and explained: "our job as appellate judges is not to be swayed by emotion where to do so results in violating established legal principles." *Id.* at 442. It directed the circuit court "to allow all class members whose claims have not yet been tried to proceed individually." *Id.* at 450. And the Third District

properly made no mention of what preclusive effect, if any, the Phase I findings would have in those individual trials. As Judge Tjoflat has explained:

> Both issue preclusion and claim preclusion operate across a two-lawsuit continuum . . . . [T]he first court is the 'rendering' court and the second is the 'recognizing' court . . . . [T]he rendering court does not declare or predict whether, and if so to what extent, a recognizing court will give preclusive effect to its judgment . . . . To do so would result in mere dicta.

Graham, 857 F.3d at 1214-15 (Tjoflat, J., dissenting). *See id.* at 1218 n.77 ("[T]he Florida Supreme Court had, for more than a century, consistently implemented the common-law principle that the recognizing court decides [preclusion] for itself.").

This Court affirmed the Third District's decertification (but only prospectively), concluding that class treatment for individual class members' claims "is not feasible because individualized issues such as legal causation, comparative fault, and damages predominate." *Engle*, 945 So. 2d at 1268. Like the Third District, this Court directed class members to "initiate individual damages actions." *Id.* at 1269. But this Court parted ways with the Third District by declaring—sua sponte—that the Phase I findings would have preclusive effect. *See Graham*, 857 F.3d at 1211 & n.55 (Tjoflat, J., dissenting) ("[I]f the Court had requested briefing . . . [t]he . . . question would [have left] defendants bewildered, since the Phase I findings were not before the Court at all.").

This Court stated that because "the Phase I trial ha[d] been completed," a "pragmatic solution" was needed—and so the Court, though sitting in review of a

rendering court, anticipated its potential future role in reviewing a recognizing court and announced that the "Phase I common core findings . . . will have *res judicata* effect in those trials." *Engle*, 945 So. 2d at 1269. Responding to Justice Wells' criticism that this created "'harmful and confusing precedent,'" the majority stated (in a footnote) that "the procedural posture of this case is unique and unlikely to be repeated." *Id.* at 1270 n.12 (quoting *id.* at 1285 (Wells, J., concurring in part and dissenting in part)). The majority thus effectively admitted that its unprecedented declaration was "a departure from traditional principles . . . an aberration—a ticket good for this day and this train only." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2584 (2019) (Thomas, J., concurring in part and dissenting in part).

But *Engle* failed to elaborate on just what that "*res judicata* effect" would mean for progeny trials; Florida courts thereafter embarked on a multi-year mission to define it. Some courts applied issue preclusion, recognizing that the traditional requirements for claim preclusion were not met. *See Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1333 (11th Cir. 2010); *R.J. Reynolds Tobacco Co. v. Brown*, 70 So. 3d 707, 715 (Fla. 4th DCA 2011). Other courts, perhaps fearing that application of issue preclusion would not be pragmatic enough given that doctrine's "actually-decided" requirement, *see, e.g.*, *Topps v. State*, 865 So. 2d 1253, 1255 (Fla.

2004),[7] applied claim preclusion. *See Philip Morris USA, Inc. v. Douglas*, 83 So. 3d 1002, 1010 (2d DCA 2012); *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. 1st DCA 2011).

Seven years after *Engle*, this Court issued *Douglas*. The majority found that the findings would be "useless" if issue preclusion applied, 110 So. 3d at 433, and instead held that the findings had a claim-preclusive effect—"prevent[ing] *the same parties* from relitigating *the same causes of action* in a second lawsuit and [were] conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated in that action." *Id.* at 432. But just a few paragraphs later, the Court revealed that it was not applying traditional claim preclusion, stating that "relitigation of *the elements* of the class's causes of action established by the Phase I findings would be barred." *Id.* at 433 (emphasis added). Thus, a Frankenstein version of preclusion was animated—part claim preclusion (no actually-decided

[7] Unlike the specific Phase I findings on disease causation and addiction, the conduct findings are generic. They thus cannot be used to determine that the jury actually decided elements common to all progeny plaintiffs' claims against defendants—a requirement that must be met under issue preclusion to bar re-litigation of elements. For example, on the concealment claims, one verdict form question asked about the concealment of "the health effects *and/or* addictive nature of smoking;" the other about concealment of "the health effects . . . *or* the addictive nature of smoking." App. 36, 38 (emphases added). Thus, even if the class had pursued just one "health" theory and one "addiction" theory, it would still be impossible to determine whether the findings rest on just one of them and, if so, which. And, as described above, the class alleged many types of statements within each category.

requirement) and part issue preclusion (operating without a prior final judgment to preclude issues from being relitigated). Like the Frankenstein creature's body, the parts did not fit together well—they were assembled "exactly backward," *id.* at 437 (Canady, J., dissenting). *See also Graham*, 857 F.3d at 1214-18 (Tjoflat, J., dissenting) ("Res Judicata 101").

To grasp just how significant a departure *Douglas* was from traditional preclusion law, one must understand why issue preclusion has an actually-decided requirement and claim preclusion does not. A defendant has a fundamental right to defend itself on every issue. *See Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007); *Rollins, Inc. v. Butland*, 951 So. 2d 860, 874 (Fla. 2d DCA 2006). Issue and claim preclusion have different safeguards to prevent a court from depriving a defendant of that right. For issue preclusion, the safeguard is the actually-decided requirement. If it cannot be shown with sufficient assurance that an issue was previously litigated and actually decided against the defendant, then the defendant cannot be said to have had its day in court on the issue and cannot be precluded. *See* Restatement (Second) of Judgments § 27 (1982) ("One of the most difficult problems in . . . [issue preclusion] is to delineate the issue on which litigation is, or is not, foreclosed" so as "not to deprive a litigant of an adequate day in court").

By contrast, claim preclusion applies to an entire claim regardless of whether specific issues subsumed within the claim were actually decided. Its final-judgment

rule ensures that a court does not "blockade[] unexplored paths that may lead to truth." *Brown v. Felsen*, 442 U.S. 127, 132 (1979). If there is a final judgment, the defendant previously had a full and fair opportunity to litigate to finality any and all aspects of that claim. If so—and only if so—application of an actually-decided requirement is not necessary to ensure that the defendant had its day in court.

This background underlies what had previously been the unvarying rule in Florida, as stated by Justice Canady: "A factual finding made in a prior adjudication that did not result in a final judgment on the merits may serve as the basis for issue preclusion, but such a finding is an inadequate basis for claim preclusion." *Douglas*, 110 So. 3d at 437 (Canady, J., dissenting). And, while the *Douglas* majority held that "the *Engle* judgment was a final judgment on the merits," *id.* at 433, that recharacterization cannot be squared with *Engle*'s correct statement that "the Phase I jury 'did not determine whether the defendants were liable to anyone,'" *id.* at 439 (Canady, J., dissenting) (quoting *Engle*, 945 So.2d at 1263).

This point is plain from the very existence of the progeny litigation. Had *Engle* resulted in a "final judgment on the merits" of progeny plaintiffs' claims, then those claims would have merged into the judgment and further litigation would be barred. *See Felder v. State, Dep't of Mgmt. Servs., Div. of Ret.*, 993 So. 2d 1031, 1034 (Fla. 1st DCA 2008) (Claim preclusion "bars 'a subsequent suit between the same parties based upon the same cause of action.'" (quoting *Gordon v. Gordon*, 59

So.2d 40, 44 (Fla.1952)). That is why claim preclusion is traditionally synonymous with the defenses of "merger" and "bar." Restatement (Second) of Judgments §§ 18, 19 (1982). But that is not what happened here. Rather, elements of class members' claims continue to be tried in progeny cases. Even employing the *Engle-Douglas* framework, progeny juries must determine multiple issues, including some aspects of causation (*e.g.*, medical, addiction, and product use), comparative fault, reliance, and damages. None of this could occur under traditional claim preclusion.

Douglas's failure to apply the final-judgment requirement cannot be seen as anything other than a radical, and clearly erroneous, departure from traditional preclusion law. Prior to *Douglas*, Florida had followed a longstanding, unbroken tradition of applying claim preclusion only where there has been a "judgment on the merits." *Fla. Dept. of Transp. v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001).[8] Indeed, to PM USA's knowledge, no court has applied claim preclusion to issues within a partially adjudicated claim.

Douglas incorrectly reasoned that claim preclusion applies because progeny cases involve the same claims and the same parties as *Engle*. *See* 110 So. 3d at 432. But an identity of claims and parties alone has never been deemed sufficient to trigger claim preclusion. For confirmation, consider the law-of-the-case doctrine. It

[8] *See also State v. McBride*, 848 So. 2d 287, 290 (Fla. 2003); *Kent v. Sutker*, 40 So. 2d 145, 146 (Fla. 1949); *United States Gypsum Co. v. Columbia Cas. Co.*, 169 So. 532, 534 (Fla. 1936).

applies where the same parties are litigating the same claims, but is nevertheless governed by issue preclusion principles. *See State v. McBride*, 848 So. 2d 287, 289 (Fla. 2003) (the law-of-the-case doctrine requires that issues "actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings" (quoting *Juliano*, 801 So. 2d at 105)).[9]

At the end of the day, traditional preclusion principles are designed to ensure that a defendant is not denied its basic right to defend itself in whole or in part. Centuries of jurisprudence have thus found preclusion to be tolerable *only* when either 1) it can be sufficiently established that an issue was actually decided against the defendant; or 2) further litigation of a claim is barred by a final judgment. The *Engle-Douglas* framework requires neither and is therefore a clearly erroneous departure from preclusion law—one that this Court should now correct.

---

[9] *Douglas* cited three cases in which courts found that class-wide findings could have preclusive effect in individual trials. *See* 110 So. 3d at 434. But two of those cases applied issue preclusion where, unlike here, the issue was ascertainably decided and relevant to all class members. *See Daenzer v. Wayland Ford, Inc.*, 2002 WL 1050209, at *2 (E.D. Mich. May 7, 2002) (defendant failed to give purchasers copies of paperwork containing cost-of-credit disclosure); *Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558, 560 (S.D. Fla. 1973) (whether defendant negligently provided tainted food or water to cruise passengers was subject to a "clear-cut" and "uniform determination" that would be "applicable to any prospective claimant"). And the third case applied claim preclusion to bar a plaintiff from pursuing a claim on which the class had lost in a final judgment. *See McCormack v. Abbott Labs.*, 617 F. Supp. 1521, 1524 (D. Mass. 1985).

II. THERE IS NO COMPELLING REASON TO MAINTAIN THE ERRONEOUS *ENGLE-DOUGLAS* PRECLUSION FRAMEWORK

In recent years, this Court has explained that its paramount consideration is correctly applying the law. The Court has thus been willing to revisit and overrule erroneous precedent. Indeed, this Court has explained that "[o]nce [it] ha[s] chosen to reassess a precedent and ha[s] come to the conclusion that it is clearly erroneous, the proper question becomes whether there is a valid reason *why not* to recede from that precedent." *Poole*, 297 So. 3d at 507. *See also Lawrence v. State*, 2020 WL 6325895, at *6 (Fla. Oct. 29, 2020) (same); *Phillips v. State*, 299 So. 3d 1013, 1023 (Fla. 2020) ("Perpetuating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the court.").

As explained above, the *Engle-Douglas* framework is a radically incorrect application of the law—"unique" in *Engle*'s own words, and worse still in the words of other jurists. Accordingly, the question is whether there is any valid reason why the Court should not recede from that precedent. There is none.

A. The *Engle-Douglas* Framework Is Not Entitled To *Stare Decisis*

As this Court has explained, "the critical consideration [for *stare decisis*] ordinarily will be reliance." *Poole*, 297 So. 3d at 507. *Engle* and *Douglas* engender no reliance interests that warrant deference. No party's primary conduct was, or could have been, affected by *Engle* or *Douglas*, as both came more than a decade after the close of the class period. Moreover, "reliance interests are lowest in cases—

like this one—involving procedural and evidentiary rules." *Id.* (quotations omitted). The *Engle-Douglas* framework is a procedural regime devised out of whole cloth. It has proven difficult to apply, generating years of litigation across multiple appellate courts—litigation which has highlighted, time and again, the framework's deficiencies. This Court has repeatedly corrected erroneous precedent concerning procedural and evidentiary rules. *See Phillips*, 299 So. 3d at 1023 (overruling prior case requiring retroactive application of a "procedural rule"); *In re Amendments to the Fla. Evidence Code*, 278 So. 3d 551, 554 (Mem.) (Fla. 2019) ("[T]he Daubert amendments remedy deficiencies of the Frye standard."); *cf. Samara v. Matar*, 419 P.3d 924, 933 (Cal. 2018) (when overruling prior precedent on preclusion, explaining that the prior holding "is not the sort of 'rule of property' that encourages strict adherence to precedent"). The Court should do so here.

B. Overruling The *Engle-Douglas* Framework Will Not Cause Practical Problems

No "pragmatic" consideration should warrant depriving a defendant of its day in court. In fact, however, the *Engle-Douglas* framework yields no practical benefits. Specifically, it is not needed in order to ensure that progeny trials are manageable in length.

So far, PM USA has been a defendant in 125 *Engle* progeny trials in state court in which the jury returned a verdict. *See* App. 48-60. Since *Engle*, PM USA has been a defendant in four non-*Engle* personal injury/wrongful death cases tried

to verdict in Florida state court. *See* App. 61. The non-*Engle* trials were, on average, 4% *shorter* (13.7 days including jury selection compared to 14.3 days).

It might seem counter-intuitive that an *Engle* and a non-*Engle* tobacco trial would take approximately the same time (and thus impose the same burden on trial courts). But progeny plaintiffs need to litigate class membership, some aspects of causation, comparative fault, and reliance—and often introduce extensive conduct evidence to pursue punitive damages. Thus, in both types of cases, the same types of fact witnesses testify, including the smoker (or the personal representative), family members, and treating physicians. And the same types of experts testify, including experts on addiction, the history of the tobacco industry, and the diagnosis, treatment, and cause of smoking-related diseases.

In sum, the "unique" *Engle-Douglas* framework has not created "pragmatic" efficiencies. Overruling it would not result in Florida courts being inundated with repeats of the original *Engle* trial and appellate proceedings.

C. Defendants Did Not Waive

In some prior cases, progeny plaintiffs have asserted that defendants somehow waived any right to challenge preclusion because of the generic nature of the verdict form questions in the original *Engle* proceedings. Not so.

To begin with, the violation of a defendants' rights does not occur until, in a progeny case heard by a recognizing court, the plaintiff is relieved of the obligation

of proving an element of a claim. It is therefore only then that a defendant is obliged to raise an objection. *See Graham*, 857 F.3d at 1219 (Tjoflat, J., dissenting) ("Res Judicata 102"). Indeed, in *Engle*, when defendants moved this Court for rehearing of its preclusion determination, the class opposed on the grounds that the issue was "premature" and should be decided by courts adjudicating progeny plaintiffs' individual suits. App. 45.[10] And defendants do raise their objections in progeny cases, as Reynolds did here. *See* Answer Br. of Resp. at 8 & n.2.

In any event, defendants did object "to the plaintiffs' proposed verdict-form questions, which were generic rather than disaggregated and specific." *Graham*, 857 F.3d at 1200 (Tjoflat, J., dissenting). Defendants also presciently warned the circuit court and class counsel that "a generic verdict form would make it 'completely impossible to import intelligently and rationally the findings from the verdict form in Phase I to any particular plaintiff in [subsequent individual trials].'" *Id.*

Finally, under no view of waiver was it defendants' responsibility to protect plaintiffs' ability to satisfy preclusion requirements.[11] If a defendant's failure to

[10] This Court denied the motion without commenting on defendants' preclusion arguments. That denial has no preclusive effect (nor even precedential value) because it could have been based on any "number of reasons," including, as the class argued, that the objections were "premature." *Topps*, 865 So. 2d at 1257 & n.5.

[11] Indeed, parties may intentionally seek a general verdict "precisely because it reduces the risks of issue preclusion." 18 Edward H. Cooper, *Federal Practice and Procedure* § 4420 (3d ed. 2020).

procure a sufficiently specific verdict to satisfy the actually-decided requirement constituted a waiver of its objection to preclusion, one would expect to find a decision somewhere saying so. But there is none. Rather, the question is whether the party seeking preclusion has carried *its* burden of demonstrating that the issues were actually decided. *See, e.*g., *Meyers v. Shore Indus., Inc.*, 597 So. 2d 345, 345-46 (Fla. 2d DCA 1992). It was thus incumbent upon the class—not defendants—to propose a verdict form sufficient to allow that showing in subsequent cases. *See Douglas*, 110 So. 3d at 437 (Canady, J., dissenting) (obtaining jury findings that would be preclusive "was the plaintiffs' responsibility and cannot be laid at the door of the defendants"). Florida courts, like others, routinely apply the actually-decided requirement in such cases to reject preclusion, not a waiver theory to enforce it. *See, e.g., Acadia Partners, L.P. v. Tompkins*, 673 So. 2d 487, 488-89 (Fla. 5th DCA 1996); *Allstate Ins. Co. v. A.D.H., Inc.*, 397 So. 2d 928, 929-30 (Fla. 3d DCA 1981); *Seaboard Coast Line R.R. Co. v. Indus. Contracting Co.*, 260 So. 2d 860, 862, 864-65 (Fla. 4th DCA 1972).

CONCLUSION

This Court should overrule the *Engle-Douglas* preclusion framework.

Dated: December 10, 2020

Respectfully submitted,

/s/ Geoffrey J. Michael
Geoffrey J. Michael
Florida Bar No. 86152
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
Telephone: (202) 942-5000
Facsimile: (202) 942-5999
geoffrey.michael@arnoldporter.com

Jesse Panuccio
Florida Bar No. 31401
BOIES SCHILLER FLEXNER LLP
401 E Las Olas Blvd Ste 1200
Fort Lauderdale, FL 33301-2211
Telephone: 954-356-0011
Facsimile: 954-356-0011
jpanuccio@bsfllp.com

Counsel for Philip Morris USA Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the following was filed using the Florida Courts E-Filing Portal and served by Electronic Mail to all counsel listed below this 10th day of December, 2020.

Counsel for Plaintiff/Petitioner:

Celene H. Humphries, Esq.
Thomas J. Seider, Esq.
Shea T. Moxon, Esq.
BRANNOCK HUMPHRIES & BERMAN
1111 W. Cass Street, Suite 200
Tampa, FL 33606
chumphries@bhappeals.com
tseider@bhappeals.com
tobacco@bhappeals.com

Gregory D. Prysock, Esq.
Katherine M. Massa, Esq.
Antonio Luciano, Esq.
MORGAN & MORGAN, P.A.
76 S. Laura Street, Suite 1100
Jacksonville, FL 33202
gprysock@forthepeople.com
kmassa@forthepeople.com
tluciano@forthepeople.com

Keith R. Mitnik, Esq.
MORGAN & MORGAN, P.A.
P.O. Box 7979
Orlando, FL 32808
kmitnik@forthepeople.com

Counsel for Respondent R.J. Reynolds Tobacco Co.:

Jason T. Burnette, Esq.
Brian Charles Lea, Esq.
JONES DAY
1420 Peachtree St., N.E., Ste. 800
Atlanta, GA 30309-3053
jtburnette@jonesday.com
blea@jonesday.com

Troy A. Fuhrman, Esq.
Marie A. Borland, Esq.
HILL WARD HENDERSON
101 East Kennedy Boulevard,
Suite 3700
Tampa, FL 33601
troy.fuhrman@hwhlaw.com
marie.borland@hwhlaw.com

/s/ Geoffrey J. Michael
Counsel for Philip Morris USA Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), counsel for Philip Morris USA Inc. hereby certifies that the foregoing brief complies with the applicable font requirements because it is written in 14-point Times New Roman font.

Dated: December 10, 2020

/s/ Geoffrey J. Michael
Counsel for Philip Morris USA Inc.