

No. 18-551

In The
Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

ELAINE JORDAN,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The question framed in the petition is not presented in this case. The only due process question actually presented is whether a defendant has the right to relitigate the meaning of a partial verdict that ultimately contributed to a final judgment between the same parties involving the same claims when the judgment is reversed for further proceedings on those claims, where the appellate court expressly determined the meaning of the partial verdict and how it would be applied during proceedings on remand. (There is no claim that the parties were deprived of notice or an opportunity to be heard at any point.)

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BRIEF IN OPPOSITION

Elaine Jordan respectfully submits that the Court should promptly deny the petition for writ of certiorari filed by Philip Morris USA Inc., and deny its request to delay disposition of this petition pending disposition of petitions Philip Morris says it will file in two other cases next month.

First, the question Philip Morris seeks to present to this Court was not adequately presented to the state courts below, so it is not preserved here.

Second, that question is not presented by the facts of this case in any event. Even if one were to accept Philip Morris's answer to the question it seeks to present, the judgment under review would remain valid because the Florida Supreme Court did, in fact, determine that the subject elements were decided in petitioner's favor by the jury in the class action trial. The only due process question that is actually presented in this case is whether the Due Process Clause gives a defendant the right to relitigate the meaning of a verdict that resulted in a final judgment between the same parties involving the same claims when the judgment is reversed for further proceedings on those claims, but the appellate court expressly determined the meaning of the verdict and how it would be applied during proceedings on remand. There are no reasons to grant certiorari on this question or any other iteration of it as there is no split of authority and no important, debatable issue of federal law warrants this

Court's review. There is no claim the defendant did not have adequate notice and opportunity to be heard.

Third, Philip Morris's request that the Court hold this petition pending resolution of petitions it intends to file in the future should be rejected as not only unsupported by precedent, but also as an abuse of the writ.

COUNTERSTATEMENT OF THE CASE

As in each of the **twenty-four** times Philip Morris or one of its codefendants have unsuccessfully petitioned this Court for certiorari on the same due process challenge to the Florida Supreme Court's holding in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006),¹ the dispute between the parties is less about

¹ *R.J. Reynolds Tobacco Co. v. Graham*, 138 S. Ct. 646 (2018); *R.J. Reynolds Tobacco Co. v. Grossman*, 138 S. Ct. 748 (2018); *Philip Morris USA Inc. v. Naugle*, 138 S. Ct. 735 (2018); *R.J. Reynolds Tobacco Co. v. Turner*, 138 S. Ct. 736 (2018); *R.J. Reynolds Tobacco Co. v. Block*, 138 S. Ct. 733 (2018); *R.J. Reynolds Tobacco Co. v. Monroe*, 138 S. Ct. 923 (2018); *R.J. Reynolds Tobacco Co. v. Lewis*, 138 S. Ct. 923 (2018); *Philip Morris USA Inc. v. Lourie*, 138 S. Ct. 923 (2018); *R.J. Reynolds Tobacco Co. v. Walker*, 134 S. Ct. 2727 (2014); *Philip Morris USA Inc. v. Barbanell*, 134 S. Ct. 2726 (2014); *R.J. Reynolds Tobacco Co. v. Brown*, 134 S. Ct. 2726 (2014); *R.J. Reynolds Tobacco Co. v. Kirkland*, 134 S. Ct. 2726 (2014); *R.J. Reynolds Tobacco Co. v. Mack*, 134 S. Ct. 2726 (2014); *Lorillard Tobacco Co. v. Mrozek*, 134 S. Ct. 2726 (2014); *R.J. Reynolds Tobacco Co. v. Koballa*, 134 S. Ct. 2727 (2014); *R.J. Reynolds Tobacco Co. v. Smith*, 134 S. Ct. 2727 (2014); *R.J. Reynolds Tobacco Co. v. Sury*, 134 S. Ct. 2727 (2014); *R.J. Reynolds Tobacco Co. v. Townsend*, 134 S. Ct. 2727 (2014); *Philip Morris USA Inc. v. Douglas*,

the resolution of any issue of constitutional law than it is a dispute over the factual history of this litigation.

Because Philip Morris never made an appellate record of raising this issue in the trial court below, there are no record documents about most of the procedural history of this case during its class phases to include in the appendix hereto. The few citations Philip Morris provides in its petition are not to the record in this case. Accordingly, if the Court were to grant certiorari and consider the merits of the question Philip Morris seeks to present, it would have to allow the parties to go beyond the record below and provide materials from the hundreds of thousands of pages of record generated in the class proceedings. Here is what those documents would ultimately demonstrate:

Elaine Jordan is a member of the class defined in a class action complaint filed in Florida state court in 1994 against Philip Morris and some other major cigarette manufacturers that asserted claims for strict liability, negligence, fraud, and conspiracy to commit fraud as well as other claims not at issue here.

After class certification was affirmed on interlocutory appeal, there was a year-long jury trial on the issues the trial court determined were common to the

134 S. Ct. 332 (2013); *R.J. Reynolds Tobacco Co. v. Clay*, 133 S. Ct. 650 (2012); *R.J. Reynolds Tobacco Co. v. Gray*, 132 S. Ct. 1810 (2012); *R.J. Reynolds Tobacco Co. v. Hall*, 132 S. Ct. 1795 (2012); *R.J. Reynolds Tobacco Co. v. Campbell*, 132 S. Ct. 1795 (2012); *R.J. Reynolds Tobacco Co. v. Martin*, 132 S. Ct. 1794 (2012); *R.J. Reynolds Tobacco Co. v. Engle*, 552 U.S. 941 (2007).

class, followed by trials on the individual elements of three class representative claims and punitive damages for the class.

Philip Morris had full notice and an opportunity to be heard on the issues to be tried during that phase as well as on the phrasing of the special verdict form to be used and the jury instructions to be given. All parties were well aware that the purpose of the verdict was to resolve liability elements that were common to all class members' claims.

After the jury returned a special verdict largely in favor of the class, Philip Morris had full notice and an opportunity to be heard in the trial court on the meaning and effect of the jury's verdict. After two further trial phases, after which Philip Morris again had full notice and opportunity to be heard on the meaning and effect of the original verdict, the trial court entered a final judgment for \$145 billion in punitive damages for the class and \$12.7 million in compensatory damages for the three class representatives.

After an intermediary appellate court reversed the judgment in total, the Florida Supreme Court granted review, approved the original decision to certify the class, affirmed the compensatory damage awards to the class representatives, reversed the award of punitive damages to the class as both premature and excessive, and held that each class member would have to prove their claims in individual proceedings to follow.

During this appeal, Philip Morris again had full notice and opportunity to be heard on the meaning and effect of the jury's original findings. The Florida Supreme Court reviewed each finding and determined which findings applied to all class members and which findings were not common to the class.

In its initial opinion, the Florida Supreme Court determined that several findings were common to the class, while others were too generalized to be applied on a class-wide basis. Concluding that the remaining issues to be resolved on remand were too individualized for continued class treatment, the court decertified the class and gave class members one year to file individual actions to complete the litigation of their claims. It held that the findings it had approved as common to the class would have "res judicata effect" in those further proceedings on remand.

Philip Morris and the other defendants sought rehearing, arguing that some of the findings that had been approved were not common to the class. The court granted rehearing in part and changed its ruling as to some, but not all of the approved findings.

The finally approved findings at issue here are that Philip Morris was negligent, that its cigarettes were unreasonably dangerous (the liability element on the strict liability claim), that it had fraudulently concealed the dangers of its cigarettes, and that it conspired with others to fraudulently conceal those dangers. The findings that the Florida Supreme Court held were too individualized to have res judicata effect

included findings that Philip Morris had made fraudulent misrepresentations about the dangers of its cigarettes and had conspired with others to make such fraudulent misrepresentations.

Philip Morris and the other defendants sought certiorari in this Court raising essentially the same due process challenge raised here. This Court denied certiorari.

Turning to matters that at least were reflected in the record on appeal below, Jordan instituted these individual proceedings on remand through an *Engle*-progeny complaint filed in Florida state court. After an eleven-day trial (excluding jury selection) in 2015, the jury concluded that (1) Jordan had proven that she was a member of the class entitled to prevail on her negligence and strict liability claims because she had developed chronic pulmonary disease (“COPD”) as a result of becoming addicted to smoking Philip Morris’s cigarettes, (2) Philip Morris had failed to prove its statute of limitation defense that she should have known she had COPD before May 5, 1990, and (3) Jordan had proven that Philip Morris’s concealment of the dangers of smoking (both individually and through its conspiracy) was a legal cause of her COPD. (T:4652-60; R:17,818-19.) It determined that Jordan was also negligent and apportioned sixty percent of fault to Philip Morris and forty percent to Jordan, and awarded \$7,795,000 in compensatory damages, and \$3,205,000 in punitive damages. (R:17,820-21, 18,085.)

Philip Morris appealed the resulting judgment to the Florida First District Court of Appeal, which affirmed without elaboration. Philip Morris had raised several issues on appeal, but the only due process argument it made was as follows (quoting it in its entirety):

PM USA preserves its position that it violates due process to allow Plaintiff to use the *Engle* findings to establish the conduct elements of her claims because it is impossible to determine whether the *Engle* jury resolved anything relevant to Plaintiff's claims. *Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904). Although the Florida Supreme Court has rejected this argument, *Douglas*, 110 So. 3d at 430-36, Defendants preserve it for review by the U.S. Supreme Court.

(Amended Initial Brief at 49.) If Philip Morris believed it had raised this issue anywhere in the more than 5000-page record on appeal, it did not advise the appellate court. Indeed, it did not reference any ruling by the trial court on this issue.

REASONS FOR DENYING THE PETITION

I. Philip Morris Did Not Preserve Any Due Process Issue Below.

At no point in either the petition before this Court or the initial brief filed in the state appellate court below has Philip Morris preserved a due process

argument by pointing to any ruling by the trial court on the due process claim it seeks to make here. Indeed, the record in this case does not include even excerpts from the record of the class proceedings. For this Court to address the merits of the issue Philip Morris seeks to have it review, it would have to go beyond the record and look at the hundreds of thousands of pages of transcripts and filings that were not presented to the court below.

This Court’s Rule 14.1(g)(i) required Philip Morris to specify the “stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised,” including the “method or manner of raising them and the way in which they were passed on by those courts . . . with specific references to the places in the record where the matter appears . . . so as to show that the federal question was timely and properly raised.” Florida’s preservation law and procedural rules similarly require the appellant to brief how an issue was raised in and disposed of in the trial court with record citations and to provide more than “only conclusory argument” to preserve an argument for appellate review. Fla. R. App. P. 9.210(b)(3), (5); *Hammond v. State*, 34 So. 3d 58, 59 (Fla. Dist. Ct. App. 2010); *see also Hamilton v. R.L. Best Int’l*, 996 So. 3d 233, 235 (Fla. Dist. Ct. App. 2008) (“It is the decision of the lower tribunal that is reviewed on appeal, not the issue.”).

In short, because Philip Morris did not adequately preserve a due process argument in the lower courts,

this Court should deny certiorari even if it otherwise found the question to be worthy of review. *See, e.g., Wood v. Milyard*, 566 U.S. 463, 473 (2012) (“For good reason, appellate courts ordinarily abstain from entertaining issues that have not been raised and preserved in the court of first instance.”); *United States v. Jones*, 565 U.S. 400, 413 (2012) (arguments not preserved below are forfeited); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 194 (2007) (declining to consider claims not considered below).

II. The Only Due Process Issue Arguably Presented by the Facts of This Case Is Not Worthy of Certiorari Review.

Even if Philip Morris had made the same arguments in the trial court as it makes here, certiorari would still be unwarranted. As an initial matter, the question phrased in the petition regarding elements of Respondent’s claims – whether due process requires a “showing that those elements were actually decided in their favor in the prior proceeding” – is not even presented in this case. Even assuming Philip Morris is correct that its question should be answered in the affirmative, Philip Morris’s rights were not violated because Respondent can easily make such a showing.

After all parties, including Philip Morris, had full notice and opportunity to be heard at every turn in the trial court, intermediate court of appeals, and Florida Supreme Court, the latter court reviewed the hundreds of thousands of pages of appellate record and

determined that the jury's findings did, in fact, satisfy the common elements of all class members' claims.

This was far from a complete victory for the class. Not only did the court fully reverse the award of punitive damages, it also held that some of the jury's findings were insufficient to establish those elements. For example, it held that the jury's findings that the defendants made fraudulent misrepresentations was not common to every member of the class for the obvious reason that not all class members could have heard each misrepresentation and thus depended on "highly individualized determinations." *Engle*, 945 So. 2d at 1255, 1269.

On the other hand, it approved the fraudulent concealment findings because they did not rely on specific fraudulent statements, but instead simply relied on the jury's necessary conclusion that "the tobacco companies had a duty to disclose" the dangers they knew their cigarettes posed. *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1067-68 (Fla. Dist. Ct. App. 2011), *cert. denied*, 566 U.S. 905 (2012); *accord Philip Morris USA Inc. v. Duignan*, 243 So. 3d 426, 443 (Fla. Dist. Ct. App. 2017).

To be sure, Philip Morris continues to disagree with the Florida Supreme Court's determinations in *Engle* by contending that the negligence and strict liability findings might not have been common to all class members because they could have only applied to certain kinds of cigarettes but not others. And it continues to speculate that the fraudulent concealment findings

might not have been common to all class members because they might have involved concealing information only relevant to certain kinds of cigarettes. The point is that this was a dispute that was resolved between these very parties (respondent as a member of the *Engle* class) in the litigation of the same claims on which the judgment below is based.

Philip Morris cites no case that would require a party be given the opportunity to relitigate these kinds of issues after the highest appellate court with jurisdiction has made its final ruling. Instead, it should be clear that when a party had notice and opportunity to be heard, there is no due process violation no matter how forcefully a party contends the ruling was erroneous. This is the reason that the Florida Supreme Court and the Eleventh Circuit Court (sitting en banc no less) rejected the due process challenge Philip Morris continues to bring to this Court again and again and again. *Philip Morris USA Inc. v. Douglas*, 110 So. 3d 419, 430-36 (Fla.),² cert. denied, 571 U.S. 889 (2013); *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1181-86 (11th Cir. 2017) (en banc), cert. denied, 138

² The court’s statement that the findings would be “useless” if the court had meant issue preclusion, *id.* at 433, does not mean, as Philip Morris suggests, that the court had been unable to determine from the record of the year-long *Engle* Phase I trial whether the findings applied to all cigarettes manufactured by the defendants. Rather, it clearly meant that they would be useless in terms of saving any time and effort to avoid relitigation in the progeny actions because each class member would be “required to ‘trot out the class action trial transcript to prove applicability of the phase I findings.’” *Id.* (quoting *Martin*, 53 So. 3d at 1067).

S. Ct. 646 (2018); *see also Burkhart v. R.J. Reynolds Tobacco Co.*, 884 F.3d 1068, 1090-93 (11th Cir. 2018) (Tjoflat, J.) (dissenter in *Graham* explaining why *Graham*'s due process holding controls as to all findings the Florida Supreme Court determined in *Engle* satisfied conduct elements of all class members' claims).

Whether the doctrine is labeled issue preclusion, claim preclusion, res judicata, law of the case, or anything else, the fact remains that this dispute was fully litigated by these parties and finally resolved against Philip Morris. *See Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278, 1289 (11th Cir. 2013) ("If due process requires a finding that an issue was actually decided, then the Supreme Court of Florida made the necessary finding. . . ."), *cert. denied*, 134 S. Ct. 2727 (2014).

There is simply no good reason for this Court to use its resources to address this issue. There is no split of authority period, much less between federal courts of appeal and/or state courts of last resort. And the issue is limited to *Engle*-progeny litigation, in any event. This is a finite group of claims. All but a handful of federal *Engle*-progeny cases have been fully resolved, by settlement or adjudication.

Nor is there anything all that remarkable about the *Engle* court's rationale once one understands that the class trial was not some separate prior proceeding, but merely the first phase of these proceedings between Respondent and Philip Morris. *Engle* reviewed a final judgment; there is nothing unusual about applying res judicata effect to the findings that were

affirmed in favor of the class. While the class was decertified and class members were directed to file progeny actions to complete their individual claims, the fact remains that not only was Philip Morris a party to the *Engle* final judgment, but so, too, was each class member, including Respondent. *See Soffer v. R.J. Reynolds Tobacco Co.*, 187 So. 3d 1219, 1224 (Fla. 2016) (approving observation in lower court opinion (that was otherwise quashed) that “[p]rogeny plaintiffs wear the same shoes, so to speak, as the plaintiff in *Engle* because they are the plaintiffs from *Engle*”); *Douglas*, 110 So. 3d at 432 (“[O]ur decision in *Engle* allowed members of the decertified class to pick up litigation of the approved six causes of actions right where the class left off. . . .”).

And while the class action and progeny actions were different proceedings in the sense that they have separate case numbers, each progeny action merely asserts the same causes of action asserted and partially resolved by *Engle*. Thus, there is nothing unusual or inappropriate about affording the affirmed parts of the judgment with res judicata effect and precluding further litigation on these common issues between the same parties involving the same causes of action.

This is no different than an individual case where the appellate court affirms part of the judgment but reverses another part for a new trial only on the remaining issues while making clear that the affirmed issues may not be relitigated on remand. The court rejected the dissent’s concern that this would involve subsequent juries re-examining findings made by the

original jury. *Compare* 945 So. 2d at 1270, with *id.* at 1286-87 (Wells, J., dissenting in part). And it plainly resolved with finality the question of which *Engle* findings applied uniformly to all class members and which depended on the kind of cigarette each class member smoked or the statements each class member heard. Philip Morris and the other defendants challenged that determination in this Court raising the same due process question urged here, and the Court denied their petition and then denied rehearing. *R.J. Reynolds Tobacco Co. v. Engle*, 552 U.S. 941 (2007).

Regardless of whether Philip Morris wanted to accept those determinations, that should have been the end of the litigation on this issue because even the traditional doctrine of claim preclusion applies to subsequent litigation between the same parties on the same causes of action. *Douglas*, 110 So. 3d at 433. Issue preclusion, on the other hand, prevents the same parties from relitigating the same issues that were litigated and actually decided in a second suit involving a different cause of action. Applying that doctrine here – to the same causes of action from the class action as opposed to a different cause of action – would be improper, as the supreme court found. *Id.* (citation omitted).

At bottom, Philip Morris claims a due process right to relitigate the meaning of a verdict finally adjudicated in a prior appellate proceeding that resulted in a final judgment between the same parties involving the same claims. Philip Morris essentially asks this Court to review the more than 100,000-page record

from *Engle*, including the nearly 40,000-page transcript from the Phase I trial, to reach a different factual conclusion than the courts below, an endeavor this Court's rules warn is rarely undertaken. *See Rule 10* ("A petition is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *see also Hernandez v. New York*, 500 U.S. 253, 266 (1991) ("Our cases have indicated that, in the absence of exceptional circumstances, we would defer to the state-court factual findings, even when those findings relate to a constitutional issue.").

III. The Court Should Not Hold and Should Promptly Deny the Petition.

The Court should reject Philip Morris's request to hold this petition pending some other petitions it plans to file next month. Not only does Philip Morris cite no precedent for this bizarre request,³ but it does not make logical sense and is prejudicial.

It does not make sense because there is no reason Philip Morris could not have filed certiorari petitions in those cases along with this petition. Moreover, the decisions simply reject due process challenges based on prior precedents over which this Court has already denied certiorari. *See Boatright v. Philip Morris USA Inc.*, 217 So. 3d 166, 173 (Fla. Dist. Ct. App. 2018)

³ The cases it cites all involve instances where the Court held petitions pending disposition of lead petitions filed earlier than the "hold petitions."

(summarily rejecting due process by simply citing *Douglas*); *Searcy v. R.J. Reynolds Tobacco Co.*, 902 F.3d 1342, 1354 (11th Cir. 2018) (recognizing court is bound to reject due process argument in light of *Graham*).⁴

Moreover, holding this petition unduly prejudices Respondent due to a unique Florida statute benefitting only these tobacco companies. Philip Morris does not have to pay the judgment against it until it has exhausted review in this Court. Fla. Stat. § 569.23 (2017); *R.J. Reynolds Tobacco Co. v. Sikes*, 191 So. 3d 491, 494-95 (Fla. Dist. Ct. App. 2016). Thus, these cases are not like most other cases where holding a petition does not preclude the respondent from enforcing the judgment absent petitioner showing specific reasons why a stay is justified, as required by this Court’s Rule 23.3.

There is simply no reason to delay ruling. The Court should promptly deny certiorari so Respondent

⁴ That two members of the *Searcy* panel expressed confusion and “intrigue” over *Graham*’s application to the fraudulent concealment and conspiracy findings does not make that decision any more worthy of review. *Searcy* recognized that *Burkhart* is a binding Eleventh Circuit panel opinion holding that *Graham* does so apply. Resolution of intellectual disagreements between judges of a court of appeals is a matter that might be suited to en banc review, but not review by this Court. And in any event, the Eleventh Circuit had already given the issue close en banc review in *Graham*, a decision over which this Court denied certiorari.

In any event, a review of the relevant history and case law related above, as well as Judge Martin’s concurring opinion, readily dispel the misapprehensions under which the *Searcy* majority was apparently laboring until it concluded that *Burkhart* controls.

can finally recover the remedy she is due on her claims that have taken over twenty years to litigate.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be promptly denied.

Respectfully submitted,

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