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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

The objections respondent raises to the petition are uniformly baseless. Her assertion that PM USA "did not adequately preserve a due process argument" defies the record, Opp. 8, which—as catalogued in the materials reproduced in the appendix to this brief—makes clear that PM USA consistently raised that argument at every phase of the proceedings below. Respondent's attempt to evade the due-process question by reimagining the Florida Supreme Court's holdings in *Engle* and *Douglas* is equally unavailing. As addressed at length in the petitions that PM USA is filing today in *Philip Morris USA Inc. v. Boatright* and *R.J. Reynolds Tobacco Co. v. Searcy*, the Florida Supreme Court has never held that the tortious-conduct elements of *Engle* progeny plaintiffs' claims were *actually* "decided in [their] favor" in *Engle*. *Id.* at 1. To the contrary, the impossibility of determining whether the *Engle* jury actually decided those elements in favor of any individual class member is precisely why the Florida Supreme Court resorted to devising its unprecedented doctrine of offensive claim preclusion, which has no "actually decided" requirement. *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 435 (Fla. 2013).

Respondent also complains that it would be "prejudicial" if the Court held this petition pending the disposition of the petitions in *Boatright* and *Searcy*, Opp. 15, but fails to disclose that she will continue to earn above-market interest on her judgment as long as this case remains pending. In reality, considerations of fairness weigh strongly *in favor* of a hold because this petition presents the same due-process question as *Boatright* and *Searcy*, and respondent should not be

permitted to recover her multimillion-dollar judgment if the Court decides that question in PM USA's favor in one or both of those cases.

1. The record squarely refutes respondent's assertion that PM USA "did not preserve any due process issue below." Opp. 7 (capitalization altered). In fact, the lead argument in PM USA's motion for a directed verdict, filed at the close of respondent's case at trial, was that

> permitting Plaintiff to use the *Engle* findings to eliminate her burden of proving the conduct elements of her claims violates PM USA's federal constitutional rights to due process . . . because it is impossible to determine what specific conduct by PM USA was found to be tortious by the *Engle* jury.

Reply App. 2a. The motion explained that "federal due process requires the proponent of preclusion to establish that the specific issue relevant to her case was actually decided in her favor in the prior litigation," *id.* at 3a (citing *Fayerweather v. Ritch*, 195 U.S. 276, 297-98 (1904)), but that this requirement was not met here because there was no way to "determine that the *Engle* jury actually had decided" anything about the cigarettes respondent smoked or the tobacco-industry statements on which she allegedly relied, *id.* PM USA also noted that it "disagrees with" the Florida Supreme Court's decision in *Douglas* because the decision relieved *Engle* progeny plaintiffs "of their burden to prove the conduct elements" of their claims based on the preclusive effect of the *Engle* Phase I findings. *Id.* at 2a.

PM USA's motion to set aside the jury verdict filed after trial reiterated these due-process arguments and

continued to maintain that *Douglas* was wrongly decided. *See* Reply App. 9a-14a. The trial court denied that motion. R. 1:19453-55.

On appeal, PM USA again raised its due-process argument and again preserved its position that *Douglas* was wrongly decided. *See* Pet. 10-11; *see also* Opp. 7. The First District Court of Appeal issued a per curiam affirmance. Pet. App. 1a.

Although neither of the lower courts accepted PM USA's due-process argument (they were bound by the Florida Supreme Court's controlling decision in *Douglas*), neither the trial court nor the First District suggested that the argument had not been preserved. Indeed, respondent actually criticized PM USA for "continuing" to make a due-process argument that is "foreclosed by controlling case law," Opp. to Mot. to Set Aside Verdicts 1-2, and never once contended in the lower courts—as she now contends in this Court—that the argument was not preserved.

Respondent's related argument that "the record in this case does not include . . . excerpts from the [*Engle*] record" is a red herring. Opp. 8; *see also id*. at 3 (arguing that granting certiorari would require going "beyond the record below"). PM USA is not asking the Court to grant plenary review in this case, but instead asks the Court to hold the petition pending the disposition of *Boatright* and *Searcy*, and then to dispose of the petition consistently with its ruling in those cases. *See* Pet. 4, 12, 16. A review of "excerpts from the" *Engle* record is unnecessary to determine whether a GVR may be warranted based on the overlap between the questions presented here and in *Boatright* and *Searcy*.

In any event, this Court does not need to consult the *Engle* record to conclude that the Florida Supreme Court's novel rule of claim preclusion—adopted in *Douglas* and applied by the lower courts here—violates due process. By discarding the "actually decided" requirement, *Douglas* enables *Engle* progeny plaintiffs to establish that the specific types of cigarettes they smoked contained a defect, that the defendants' specific conduct with respect to them was negligent, and that the specific advertisements and other industry statements they saw were fraudulent, even though there is no way to know whether the *Engle* jury actually decided those issues in their favor. This ruling is clear on the face of the Florida Supreme Court's opinion in *Douglas*. *See* 110 So. 3d at 432 (adopting a rule of preclusion that extends to every "matter which might . . . have been litigated and determined" in Phase I of *Engle* (internal quotation marks omitted)). No review of the *Engle* record is necessary to conclude that a rule permitting the application of preclusion to any issue that *might* have been decided in a prior proceeding—without regard to whether it was *actually* decided—is precisely the type of "extreme application[ ] of the doctrine of res judicata" that due process protects against. *Richards v. Jefferson Cty.*, 517 U.S. 793, 797 (1996).

2. Respondent also argues that the question presented "is not presented by the facts of this case" because the Florida Supreme Court supposedly "determine[d] that the subject elements were decided in [the class members'] favor" by the *Engle* jury. Opp. 1. But, as detailed in the petitions filed today in *Boatright* and *Searcy*, the Florida Supreme Court made no such determination in either *Engle* or *Douglas*. Indeed, the Florida Supreme Court acknowledged in *Douglas* that to apply "issue preclusion . . . would effectively make

the Phase I findings regarding the *Engle* defendants' conduct useless in individual actions." 110 So. 3d at 433. To salvage the utility of the Phase I findings, the court adopted its unorthodox doctrine of offensive claim preclusion, which permits *Engle* progeny plaintiffs to invoke the Phase I findings to establish any issues "which might . . . have been" decided in their favor in the class phase. *Id.* (internal quotation marks omitted).[1]

Because respondent was permitted to rely on this novel claim-preclusion standard to establish the conduct elements of her claims at trial—without demonstrating that any of those issues were actually decided in her favor in *Engle*—the question presented is squarely teed up for this Court's consideration here, as well as in *Boatright* and *Searcy*. And, as explained in detail in those petitions, that question warrants this Court's review because the Florida Supreme Court's holding that a mere "opportunity to be heard"

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[1] Respondent tries to explain away *Douglas*'s language that the findings would be "useless" under traditional issue-preclusion principles, arguing that the court meant that the findings "would be useless in terms of saving . . . time and effort" in future individual suits because the *Engle* record would have to be reviewed in each case to determine the findings' applicability. Opp. 11 n.2. But respondent simultaneously contends that the Florida Supreme Court itself reviewed the *Engle* record in *Douglas* and "determined that the jury's findings did, in fact, satisfy the common elements of *all* class members' claims." *Id.* at 9-10 (emphasis added). If respondent is right that *Douglas* determined that the class jury decided the common elements of "all class members' claims," then the court would have had no reason for concern about the "time and effort" required to examine the *Engle* record in future cases because the court supposedly had already examined the record and concluded that the findings satisfied the common elements of "all" individual claims.

in the original proceeding is sufficient to preclude a defendant from relitigating any issue that "might . . . have been" decided against it is impossible to reconcile with this Court's due-process jurisprudence or the centuries of common-law authority on which it rests. *See*, *e.g.*, *Fayerweather*, 195 U.S. at 299 (due process requires both that a party "had an opportunity to present" the issue *and* that "the question was decided" in the prior proceeding).

3. Respondent contends that it would be "bizarre" and "prejudicial" for the Court to hold this petition pending the disposition of *Boatright* and *Searcy*. Opp. 15. The opposite is true. This Court routinely holds petitions that implicate the same issue as other pending cases to ensure "the basic principle of justice that like cases should be treated alike." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005); *see also* Pet. 15. The delay entailed in holding this case until the Court acts on the petitions in *Boatright* and *Searcy* is modest. The Court will likely consider those petitions by February 2019, and if it denies review in those cases, it will presumably deny review promptly in this case, as well.

If, on the other hand, the Court grants certiorari in *Boatright* and/or *Searcy* and concludes that giving preclusive effect to the generalized *Engle* findings violates due process, it would be fundamentally unfair to permit respondent to recover her multimillion-dollar judgment, which would rest on the same unlawful imposition of preclusion as the judgments in *Boatright* and *Searcy*.

Even if the Court were to affirm the decisions in *Boatright* and *Searcy* following plenary review, respondent would not be materially prejudiced by the delay in the final resolution of her case. PM USA has

posted a supersedeas bond to secure the judgment, and respondent is earning interest on her judgment at a rate of 5.53% per year, which far exceeds commercially available rates. *See* Fla. Stat. § 55.03(1); Florida Division of Accounting and Auditing, Judgment Interest Rates, https://www.myfloridacfo.com/division/aa/vendors/ (last visited Nov. 15, 2018).

Finally, the prior denials of review in *Engle* progeny cases are no barrier to a hold and potential GVR here. Until the Eleventh Circuit's recent decisions in *Burkhart v. R.J. Reynolds Tobacco Co.*, 884 F.3d 1068 (11th Cir. 2018), and *Searcy v. R.J. Reynolds Tobacco Co.*, 902 F.3d 1342 (11th Cir. 2018), it remained possible that the Eleventh Circuit would reach the correct resolution of the question presented. Moreover, unlike the Eleventh Circuit's earlier decision in *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169 (11th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 646 (2018)—which rested on the court's assessment of what the *Engle* jury actually decided in rendering its defect and negligence findings—the Eleventh Circuit made no pretense in *Burkhart* or *Searcy* of determining what the *Engle* jury had actually decided in making its concealment and conspiracy findings. Those decisions make clear that the Eleventh Circuit has now fully embraced the Florida Supreme Court's reasoning in *Douglas* that a mere "opportunity to be heard" is sufficient to preclude a defendant from relitigating an issue even if it is impossible to determine whether that issue was actually decided against the defendant in the prior proceeding.

At this point, only this Court stands between the *Engle* defendants and the serial deprivation of their due-process rights in 2,300 pending *Engle* progeny cases.

CONCLUSION

The Court should hold this petition pending the disposition of *Boatright* and *Searcy*, and then dispose of this petition consistently with its ruling in those cases.

Respectfully submitted.

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