

No. 18-552

In The
Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

MARY BROWN,
AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF RAYFIELD BROWN,

Respondent.

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

BRIEF IN OPPOSITION

JOHN S. MILLS
Counsel of Record
COURTNEY BREWER
THE MILLS FIRM, P.A.
325 North Calhoun Street
Tallahassee, Florida 32301
(850) 765-0897
jmills@mills-appeals.com

November 5, 2018

Counsel for Respondent

QUESTION PRESENTED

This case presents the same question in *Philip Morris USA Inc. v. Jordan*, No. 18-551:

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.)

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	ii
BRIEF IN OPPOSITION	1
COUNTERSTATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION.....	4
CONCLUSION.....	5

TABLE OF AUTHORITIES

Cases

<i>Engle v. Liggett Group, Inc.</i> , 945 So. 2d 1246 (Fla. 2006), cert. denied, 442 U.S. 941 (2007).....	1, 2, 3, 4
<i>Fayerweather v. Ritch</i> , 195 U.S. 276 (1904).....	2
<i>Richards v. Jefferson Cnty.</i> , 517 U.S. 793 (1996).....	2

BRIEF IN OPPOSITION

Mary Brown, as personal representative of the estate of her deceased husband Rayfield Brown, 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.

Except as supplemented to address largely immaterial procedural differences, Brown refers the Court to the brief in opposition filed in *Philip Morris USA, Inc. v. Jordan*, No. 18-551. The cases are materially indistinguishable and all relief sought by Philip Morris should be denied for the same reasons here as in *Jordan*.

COUNTERSTATEMENT OF THE CASE

Brown, who is a member of the class addressed in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), *cert. denied*, 442 U.S. 941 (2007), refers the Court to the counterstatement of the case set forth in the brief in opposition filed in *Jordan* for a description of the procedural history of this case up through the filing of Brown's individual proceedings pursuant to the remand in *Engle*.

After three mistrials, a fourth trial covering ten days (excluding jury selection) in 2013, the jury concluded that (1) Brown had proven that she was a

member of the class entitled to prevail on her negligence and strict liability claims because her husband had developed lung cancer as a result of becoming addicted to smoking Philip Morris's cigarettes and (2) Brown had proven that Philip Morris's participation in the conspiracy to conceal the dangers of smoking was a legal cause of her husband's lung cancer. (T:3483-89; R:100:19,585-88.) That jury was hung on the remaining issues, but a fifth trial before a subsequent jury in 2015 covering seven days resulted in an additional verdict awarding \$6,375,277.41 in compensatory damages, but declining to award punitive damages. (R:134:26,302-03.)

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):

The trial court also erred when it determined that Plaintiff could rely on the *Engle* findings to establish the conduct elements of her claims. *See* R.34:6787-6792 [App. Tab A at ¶ 14]. That decision violates PM USA's federal due process rights because it represents an "extreme application[] of the doctrine of res judicata," *Richards v. Jefferson Cnty.*, 517 U.S. 793, 797 (1996), that disregards the long-standing requirement that preclusion is limited to issues "actually decided" in an earlier proceeding. *See Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904). Plaintiff did not demonstrate

that the issues that she sought to establish based on the preclusive effect of the *Engle* Phase I findings were actually decided in her favor by the *Engle* jury—nor could she have done so given the multiple, alternative theories of liability pursued by the *Engle* class and the generalized language of the Phase I findings.

PM USA acknowledges that the Florida Supreme Court rejected this federal due process argument in *Douglas*, 110 So. 3d at 422, but wishes to preserve the issue for reconsideration by the Florida Supreme Court or review in the U.S. Supreme Court.

(Initial Brief at 44-45.)

The only citation in its brief for a trial court ruling on the due process issue was an order that did not address due process at all. (R:34:6787-92.) They referenced a single line in that order that states, in its entirety, “Defendant PM USA’s Motion No. 14—Motion for an Order Defining the Role of The Engle Phase I Findings in this Case is DENIED.” (R:34:6789.) That motion did not directly raise any due process challenge whatsoever. (T:14:2822-2877.) It did state the following in a footnote:

PM USA expressly preserves, and incorporates by reference as if fully stated herein, the arguments set forth in its Rule 1.200 Motion to Determine Preclusive Effect of the *Engle* Phase I Findings (filed June 16, 2009) (“Rule 1.200 Mot.”) regarding the scope of the

“*res judicata* effect” of the *Engle* Phase I findings and related issues.

(R:14:2823-24 n. 2.) The “Rule 1.200” motion referenced therein was not included in the record on appeal below and does not appear to be referencing a motion that was ever filed in this case.

REASONS FOR DENYING THE PETITION

All relief sought in the petition in this case should be denied for precisely the same reasons set forth in the brief in opposition filed in *Jordan*, No. 18-551. *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.

CONCLUSION

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

JOHN S. MILLS
Counsel of Record
COURTNEY BREWER
THE MILLS FIRM, P.A.
325 North Calhoun Street
Tallahassee, Florida 32301
(850) 765-0897
jmills@mills-appeals.com

November 5, 2018

Counsel for Respondent