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

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 present[ ]" its due-process argument to the state courts defies the record, Opp. 4, 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 4. 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 "an abuse of the writ" if the Court held the petition pending the disposition of the petitions in *Boatright* and *Searcy*, Opp. 5, but PM USA is simply asking the Court to do what it has done many times before: hold a petition that presents the same question as another case, and then resolve the cases in a consistent manner. *See* Pet. 15-16. Following that practice here will not prejudice respondent, who will continue to earn

above-market interest on her judgment as long as this case remains pending.

1. The record squarely refutes respondent's assertion that PM USA did "not preserve[ ]" its due-process arguments in the lower courts. Opp. 4. In fact, the lead argument in PM USA's motion for a directed verdict during the September 2013 trial of this case was that

> permitting Plaintiff to use the *Engle* findings to eliminate her burden of proving the conduct elements of her claim would violate 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 "it is necessary under federal due process for the proponent of preclusion to establish that the specific issue relevant to his case was actually decided in his favor in the prior litigation," *id.* at 3a (citing *Fayerweather v. Ritch*, 195 U.S. 276, 297-98 (1904)), but that requirement was not met here because there is no way to "determine that the *Engle* jury had actually decided" anything about the cigarettes Mr. Brown smoked or the statements on which he allegedly relied, *id.* at 4a. PM USA also noted that it "disagrees with" the Florida Supreme Court's decision in *Douglas* because the decision "relieve[d] progeny plaintiffs of their burden to prove the conduct elements of their individual claims." *Id.* at 2a-3a. The trial court denied the motion, but recognized that PM USA had "preserved th[e] due process arguments." Trial Tr. 3273-74; *see also id.* at 3274 ("And the argument is preserved, but I will follow *Douglas*.").

PM USA's motion to set aside the jury verdict from the September 2013 trial reiterated these due-process arguments and continued to maintain that *Douglas* was wrongly decided. *See* Reply App. 11a-16a. The trial court denied that motion, as well. R. 20954.

Because the September 2013 trial resulted in only a partial verdict, the case went to trial again in April 2015. At that trial, PM USA renewed its motion for a directed verdict, arguing again that "permitting Plaintiff to use the *Engle* findings to eliminate her burden of proving the conduct elements of her claims violated PM USA's federal constitutional rights to due process," and reiterating that "PM USA respectfully disagrees with" *Douglas*. Reply App. 19a-20a. PM USA also moved to set aside the jury verdict, making the same due-process arguments yet again. *See id.* at 27a-32a. The trial court denied both motions. *See* Trial Tr. 2531-32, 2540-41; S.R. 15-16.

PM USA later preserved these arguments in briefing before the Florida First District Court of Appeal, *see* Pet. 11; *see also* Opp. 2-3, which issued a per curiam affirmance, *see* 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 never once contended in the lower courts—as she now contends in this Court—that the argument was not preserved.[1]

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[1] Respondent also incorporates the argument in the brief in opposition in *Philip Morris USA Inc. v. Jordan*, No. 18-551, that the record in that case did not include excerpts from the *Engle*

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. 4. 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.* (emphasis added; internal quotation marks omitted).

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" 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

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proceedings. That argument is inapposite here because the record in this case contains a CD of materials from *Engle*. *See* Pet. App. 3a, 12a.

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 an "abuse of the writ" for the Court to hold this petition pending the disposition of *Boatright* and *Searcy*. Opp. 5. But 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. 15-16. 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 commer-

cially 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).

Accordingly, holding this petition pending the resolution of *Boatright* and *Searcy* will ensure the consistent and evenhanded administration of justice without prejudicing either party to this case.

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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