No. _____

In the
Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY, ET AL.,

Applicants,

v.

MARY FARICY PARDUE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN N. FARICY,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME IN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA FIRST DISTRICT COURT OF APPEAL

TO: THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT

Pursuant to Supreme Court Rule 13.5, R.J. Reynolds Tobacco Company ("Reynolds") and Philip Morris USA Inc. ("PM USA")[1] respectfully request a 10-day extension of time, to and including September 21, 2018, to file a petition for a writ

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[1] R.J. Reynolds Tobacco Company is a wholly owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc., which is a wholly owned subsidiary of Reynolds American Inc., which in turn is an indirect, wholly owned subsidiary of British American Tobacco p.l.c., a publicly held corporation. Philip Morris USA Inc. is a wholly owned subsidiary of Altria Group, Inc. No publicly held company owns 10 percent or more of the stock of Altria Group, Inc.

of certiorari to the Florida First District Court of Appeal. Unless extended, the deadline for filing a petition for a writ of certiorari will expire on September 11, 2018. Applicants have not previously requested an extension from this Court.

In support of this request, applicants state as follows:

1. The Florida First District Court of Appeal issued its decision on June 13, 2018. *See Philip Morris USA Inc. v. Pardue*, 247 So. 3d 415 (Fla. 1st Dist. App. 2018) (per curiam) (attached as Exhibit A). The decision is not reviewable in the Florida Supreme Court because it does not contain analysis or a citation to any other decision. *See The Florida Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988). Accordingly, this Court has jurisdiction to review the First District's decision under 28 U.S.C. § 1257(a) because the First District was "the highest court of a State in which a decision could be had." *See*, *e.g.*, *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 24 (2011) (per curiam).

2. This case is one of approximately 8,000 individual personal-injury claims filed in the wake of the Florida Supreme Court's decision in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam), which prospectively decertified a sprawling class action against the major domestic cigarette manufacturers filed on behalf of "[a]ll [Florida] citizens and residents, and their survivors, who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *Id.*

at 1256 (internal quotation marks omitted). When it decertified the class, however, the Florida Supreme Court preserved several highly generalized jury findings from the first phase of the *Engle* class-action proceedings—for example, that each defendant "placed cigarettes on the market that were defective and unreasonably dangerous" in some unspecified manner and at some unspecified time over a 50-year period. *Id.* at 1257 n.4. The Florida Supreme Court stated that those findings would have "res judicata effect" in subsequent cases filed by individual class members. *Id.* at 1269.

In each of the thousands of follow-on "*Engle* progeny" cases filed in state and federal courts across Florida, the plaintiffs have asserted that the generalized *Engle* findings relieve them of the burden of proving the tortious conduct elements of their individual claims against the defendants—for example, on a claim for strict liability, that the particular cigarettes smoked by the class member contained a defect that was the legal cause of the class member's injury. Relying exclusively on *claim* preclusion principles, the Florida Supreme Court has held that affording such broad preclusive effect to the generalized *Engle* findings is consistent with federal due process. *See Philip Morris USA, Inc. v. Douglas,* 110 So. 3d 419, 436 (Fla. 2013) ("That certain elements of the prima facie case are established by the Phase I findings does not violate the *Engle* defendants' due process rights…."), *cert. denied*, 134 S. Ct. 332 (2013).

3. Pursuant to the procedures established in *Engle*, Plaintiff brought this *Engle* progeny lawsuit alleging that her husband, Professor John Faricy, died from renal failure as a result of smoking cigarettes manufactured by PM USA and Reynolds. The trial court ruled that upon proving she was a member of the *Engle* class, Plaintiff would be permitted to rely on the "res judicata effect" of the *Engle* findings to establish the conduct elements of her claims. The jury found that Plaintiff was an *Engle* class member, found in her favor on all of her claims, and awarded nearly $18 million in compensatory and punitive damages.

On appeal to the First District Court of Appeal, Reynolds and PM USA raised several challenges to the judgment under state law. In addition, both appellants expressly preserved their position that the trial court violated federal due process by permitting Plaintiff to rely on the *Engle* findings to establish the tortious conduct elements of her claims. *See* Reynolds Initial Br. at 49 ("Defendants preserve their position that the application of the *Engle* findings to establish the conduct elements of Plaintiff's claims violated their due process rights because it is impossible to determine whether the *Engle* jury resolved anything relevant to Professor Faricy. . . . Although the Florida Supreme Court has rejected these arguments, Defendants preserve them for review by the U.S. Supreme Court."); PM USA Initial Br. at 1 ("join[ing] and adopt[ing] in its entirety the initial brief filed by" Reynolds).

The First District Court of Appeal affirmed in a *per curiam* decision without citation or analysis.

4. This Court's review would be sought on the ground that the First District Court of Appeal's decision—which rejected applicants' due-process challenge to the broad preclusive effect afforded to the *Engle* Phase I findings—conflicts with this Court's due-process precedent by depriving applicants of their property without any assurance that any jury actually found that they committed tortious conduct that was the legal cause of Plaintiff's injuries. For example, on the strict-liability and negligence claims, Plaintiff was permitted to invoke the *Engle* jury's generalized findings that applicants sold unspecified cigarettes at unspecified times that contained an unspecified defect to establish conclusively that the *particular* cigarettes Professor Faricy smoked were defective. The First District Court of Appeal upheld that result even though Plaintiff made no attempt to show that the *Engle* jury actually decided this issue in her favor. Nor could Plaintiff conceivably have made such a showing: In the *Engle* proceedings, the class presented many alternative theories of defect, several of which applied only to particular designs or brands of cigarettes, rather than to every design and brand, and it is impossible to determine from the *Engle* findings or the *Engle* record which of those theories the *Engle* jury actually accepted. It is possible, for example, that the defect found by the *Engle* jury was a flaw in the filters of a brand of cigarettes

manufactured by one or both of the applicants that Professor Faricy never smoked, or the use of certain additives in that brand—and conversely that the jury found that the cigarettes that Professor Faricy did smoke were *not* defective.

Likewise, to support the class's claim for conspiracy to commit fraudulent concealment, the *Engle* jury was presented with numerous distinct categories of allegedly fraudulent statements by applicants, other tobacco companies, and various industry organizations; the jury returned only a generalized finding that the applicants agreed to "conceal or omit information regarding the health effects of cigarettes or their addictive nature." *Engle,* 945 So. 2d at 1277. The *Engle* jury's verdict does not indicate which statements were the basis for its finding, or whether that finding rested on the concealment of information about the health effects of smoking, the addictive nature of smoking, or both.

In these circumstances, allowing Plaintiff to invoke the *Engle* findings to establish conclusively that the particular cigarettes Professor Faricy smoked were defective, and that any tobacco industry statements he may have seen and read were fraudulent, violates due process. *See*, *e.g.*, *Fayerweather v. Ritch*, 195 U.S. 276, 299, 307 (1904) (holding, as a matter of federal due process, that where preclusion is sought based on a jury verdict that may rest on any of two or more alternative grounds, and it cannot be determined with certainty which alternative was actually the basis for the jury's finding, "the plea of res judicata must fail");

Richards v. Jefferson Cty., 517 U.S. 793, 797 (1996) ("We have long held . . . that extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is fundamental in character." (internal quotation marks omitted)); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) ("[A State's] abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause."). That manifest due-process violation is being repeated in the thousands of pending *Engle* progeny cases in Florida.

PM USA is currently evaluating whether to file a petition for a writ of certiorari raising these due-process issues in *Philip Morris USA Inc. v. Boatright*, 217 So. 3d 166 (Fla. 2d DCA 2017), an *Engle* progeny case that culminated in a verdict of more than $30 million in favor of the plaintiff. A petition in *Boatright* would be due on September 20, 2018. *Boatright* is a better vehicle for plenary review than this case because, unlike the *per curiam* affirmance issued by the First District Court of Appeal here, the Second District Court of Appeal issued a written opinion in *Boatright* affirming the judgment. If PM USA files a petition for a writ of certiorari in *Boatright*, applicants plan to file a petition in this case asking the Court to hold this case pending the Court's disposition of the petition in *Boatright*. A 10-day extension is thus warranted to permit this Court to consider a petition in this case in conjunction with the potential petition in *Boatright*.

CONCLUSION

Accordingly, applicants respectfully request that an order be entered extending the time to file a petition for a writ of certiorari by 10 days, to and including September 21, 2018.

Respectfully submitted.

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