No. A-

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

VICKIE MCKEEVER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF THEODORE MCKEEVER,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA FOURTH 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 this Court's Rule 13.5, Philip Morris USA Inc. ("PM USA") respectfully requests a 60-day extension of time, to and including November 23, 2018, within which to file a petition for a writ of certiorari to the Florida Fourth District Court of Appeal.*

The Fourth District Court of Appeal issued its opinion on January 4, 2017. *Philip Morris USA Inc. v. McKeever*, 207 So. 3d 907 (Fla. Dist. Ct. App. 2017) (per curiam). The Florida Supreme Court denied petitioner's timely petition for review on June 25,

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* Pursuant to this Court's Rule 29.6, undersigned counsel state that PM USA is a wholly owned subsidiary of Altria Group, Inc. No publicly held company owns 10% or more of Altria Group, Inc.'s stock.

2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). Unless extended, the time within which to file a petition for a writ of certiorari will expire on September 24, 2018.

A copy of the Fourth District's decision is attached hereto as Exhibit A. A copy of the Florida Supreme Court's order denying review is attached as Exhibit B.

1. 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—for example, on a claim for strict liability, that the particular cigarettes smoked by the class member contained a defect that was a 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.) ("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).

Pursuant to the procedures established in the Florida Supreme Court's *Engle* decision, Plaintiff Vickie McKeever, as personal representative of the estate of her husband, Theodore McKeever, brought this survival action against PM USA seeking to recover damages for Mr. McKeever's chronic obstructive pulmonary disease and lung cancer, which she alleged were caused by smoking. Plaintiff claimed that Mr. McKeever was an *Engle* class member, and asserted causes of action for strict liability, negligence, fraudulent concealment, and conspiracy to commit fraudulent concealment. The trial court ruled that, upon proving that Mr. McKeever was a member of the *Engle* class, Plaintiff would be permitted to invoke the preclusive effect of the *Engle* findings to establish the conduct elements of her claims and would not be required to prove those elements at trial.

The jury found that Mr. McKeever was an *Engle* class member and returned a verdict against petitioner on all four claims. The jury awarded a total of $5.798 million in

compensatory damages, as well as $11.625 million in punitive damages. It allocated 60% of the fault to petitioner and 40% of the fault to Mr. McKeever.

On appeal to the Fourth District Court of Appeal, petitioner argued that "it violated 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." PM USA Br. 49 (citing *Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904)). Petitioner acknowledged that "the Florida Supreme Court . . . rejected this argument" in *Douglas*, but explained that petitioner "wishes to preserve it for review by the U.S. Supreme Court." *Id.*

The Fourth District Court of Appeal affirmed on all issues except petitioner's argument that the trial court erred in failing to reduce "the compensatory damages award in proportion to Mr. McKeever's share of fault." 207 So. 3d at 907. As to the due-process issue, the court stated that "there is binding case law rejecting [petitioner's] arguments that due process precluded giving the *Engle* findings preclusive effect." *Id.* (citing *Douglas*, 110 So. 3d at 419).[1]

2. This Court's review would be sought on the ground that the Fourth District Court of Appeal's decision—which rejected petitioner's due-process challenge to the

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[1] Petitioner thereafter invoked the discretionary jurisdiction of the Florida Supreme Court on the question whether Plaintiff's strict-liability and negligence claims were impliedly preempted by federal law. "For purposes of preservation," petitioner also "invoke[d] the discretionary jurisdiction of the Florida Supreme Court to review th[e] [Fourth District's] decision permitting Plaintiff to invoke the *Engle* Phase I findings" and "continue[d] to maintain that *Douglas* and th[e] [Fourth District's] decision in this case deny [petitioner] its federal due process rights." Notice to Invoke at 1-2. The Florida Supreme Court denied review.

broad preclusive effect afforded to the *Engle* findings—conflicts with this Court's due-process precedent by depriving petitioner of its property without any assurance that any jury actually found that petitioner committed tortious conduct that was a legal cause of Mr. McKeever's injuries.

For example, on the strict-liability and negligence claims, Plaintiff was permitted to invoke the *Engle* jury's generalized findings that petitioner had sold unspecified cigarettes at unspecified times that contained an unspecified defect to establish conclusively that the particular cigarettes Mr. McKeever smoked were defective. The Fourth District Court of Appeal upheld that result even though Plaintiff made no attempt to show that the *Engle* jury actually decided that 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 brands of petitioner's cigarettes that Mr. McKeever never smoked, or the use of certain additives in those brands—and that the jury found that the cigarettes that Mr. McKeever smoked were *not* defective.

Likewise, to support the class's conspiracy to commit fraudulent concealment claim, the *Engle* jury was presented with numerous distinct categories of allegedly fraudulent statements by petitioner, other tobacco companies, and various industry organizations; the jury returned only a generalized finding that petitioner 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 tobacco-industry 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 smoked by Mr. McKeever were defective, and that any tobacco-industry statements he may have seen and read were fraudulent, violates due process. *See, e.g.*, *Fayerweather*, 195 U.S. at 299, 307 (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.

3. Petitioner intends to file a petition for a writ of certiorari raising these due-process issues in *Searcy v. R.J. Reynolds Tobacco Co.*, __ F.3d __, No. 13-15258, 2018 WL 4214594 (11th Cir. Sept. 5, 2018), an *Engle* progeny case tried in federal court that culminated in a judgment against petitioner and co-defendant R.J. Reynolds Tobacco Co.

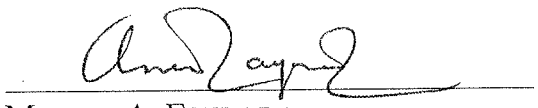
Like the opinion of the Fourth District Court of Appeal in this case, the Eleventh Circuit's opinion in *Searcy* concluded that affording preclusive effect to the *Engle* jury's generalized findings does not violate due process. The Eleventh Circuit nevertheless acknowledged that "multiple acts of concealment had been presented to the *Engle* jury, and their general finding did not indicate which acts of concealment may have underlain their finding versus which allegations of concealment they might have rejected," which creates a "difficult[y]" in "determin[ing] whether the *Engle* jury's basis for its general finding of concealment" was the same theory pursued by an individual *Engle* plaintiff. *Id.* at *7.

Petitioner intends to file a petition for a writ of certiorari in *Searcy* as well as a simultaneous petition in *Philip Morris USA Inc. v. Boatright*, 217 So. 3d 166 (Fla. Dist. Ct. 2017), and has separately requested an extension of time to file the petition in *Boatright* until November 19, 2018. An extension of time until November 23, 2018, is warranted to permit petitioner to take account of the recent decision in *Searcy* and to file the petition in this case as close in time as possible to the forthcoming petitions in *Searcy* and *Boatright*, which would enable the Court to consider these petitions together.

CONCLUSION

Petitioner respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari by 60 days, to and including November 23, 2018.

Respectfully submitted.



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