No. A-

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC. AND LIGGETT GROUP LLC,

Petitioners,

v.

RICHARD BOATRIGHT AND DEBORAH BOATRIGHT,

Respondents.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SECOND 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") and Liggett Group LLC ("Liggett") respectfully request a 60-day extension of time, to and including November 19, 2018, within which to file a petition for a writ of certiorari to the Florida Second District Court of Appeal.*

---

* 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. Liggett Group LLC is a wholly owned, indirect subsidiary of Vector Group Ltd. Vector Group Ltd. is the only publicly held company that owns 10% or more of the membership interest in Liggett. No publicly held company owns 10% or more of Vector Group Ltd.'s stock.

The Second District Court of Appeal issued its opinion on April 12, 2017. *Philip Morris USA Inc. v. Boatright*, 217 So. 3d 166 (Fla. Dist. Ct. App. 2017). The Florida Supreme Court denied petitioners' timely petition for review on June 22, 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 20, 2018.

A copy of the Second 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, Plaintiffs Richard and Deborah Boatright brought this personal-injury action against PM USA and Liggett seeking to recover damages for Mr. Boatright's chronic obstructive pulmonary disease ("COPD") and Mrs. Boatright's loss of consortium. Plaintiffs claimed that Mr. Boatright 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. Boatright was a member of the *Engle* class, Plaintiffs would be permitted to invoke the preclusive effect of the *Engle* findings to establish the conduct elements of their claims and would not be required to prove those elements at trial.

The jury found that Mr. Boatright was an *Engle* class member and returned a verdict against PM USA on all four claims and against Liggett on the conspiracy claim. The jury awarded a total of $15 million in compensatory damages, as well as $19.7 million in punitive damages against PM USA and $300,000 against Liggett.

On appeal to the Second District Court of Appeal, petitioners argued that the "trial court violated federal due process by permitting Plaintiffs to use the *Engle* findings to establish the conduct elements of their claims even though it is impossible to determine whether the *Engle* jury resolved anything relevant to Mr. Boatright's claims." PM USA Br. at 46 (citing *Fayerweather v. Ritch*, 195 U.S. 276, 307 (1904)); *see also* Liggett Br. at 1 (joining PM USA's arguments). Petitioners acknowledged that "the Florida Supreme Court rejected this argument" in *Douglas*, but explained that they "wish[ed] to preserve it for review by the U.S. Supreme Court." PM USA Br. at 47.

The Florida Second District Court of Appeal affirmed with respect to petitioners' appeal. The court concluded that "the acceptance of the Phase I *Engle* findings as res judicata does not violate the *Engle* defendants' right to due process." 217 So. 3d at 173 (citing *Douglas*, 110 So. 3d at 436). The court reversed on Plaintiffs' cross-appeal, which challenged the trial court's reduction of the compensatory-damages award based on comparative fault.[1]

---

[1] Petitioners thereafter invoked the discretionary jurisdiction of the Florida Supreme Court on the comparative-fault question. "For purposes of preservation," petitioners also "invoke[d] the discretionary jurisdiction of the Florida Supreme Court to review th[e] [Second District's] decision permitting [Plaintiffs] to invoke the *Engle* Phase I findings" and "continue[d] to maintain that *Douglas* and th[e] [Second District's] decision in this

(Cont'd on next page)

2. This Court's review would be sought on the ground that the Second District Court of Appeal's decision—which rejected petitioners' due-process challenge to the broad preclusive effect afforded to the *Engle* findings—conflicts with this Court's due-process precedent by depriving petitioners of their property without any assurance that any jury actually found that petitioners committed tortious conduct that was a legal cause of Mr. Boatright's injuries.

For example, on the strict-liability and negligence claims, Plaintiffs were permitted to invoke the *Engle* jury's generalized findings that petitioners sold unspecified cigarettes at unspecified times that contained an unspecified defect to establish conclusively that the particular cigarettes Mr. Boatright smoked were defective. The Second District Court of Appeal upheld that result even though Plaintiffs made no attempt to show that the *Engle* jury actually decided this issue in their favor. Nor could Plaintiffs 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 petitioners' cigarettes that Mr. Boatright never smoked, or the use of certain additives in

---

(Cont'd from previous page)

case deny Petitioners their federal due process rights." Notice to Invoke at 2. The Florida Supreme Court denied review.

those brands—and that the jury found that the cigarettes that Mr. Boatright 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 petitioners, other tobacco companies, and various industry organizations; the jury returned only a generalized finding that petitioners 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 Plaintiffs to invoke the *Engle* findings to establish conclusively that the particular cigarettes smoked by Mr. Boatright 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. PM USA 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 PM USA and co-defendant R.J. Reynolds Tobacco Co. Like the opinion of the Second 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.

The petition in *Searcy* is due on December 4, 2018. Petitioners believe that this Court's consideration of the due-process issue would be facilitated by the simultaneous filing of the petition in this case and the petition in *Searcy*, which would enable the Court to consider the reasoning of the Florida state and federal courts at the same time and to receive a full picture of how the due-process issue is being treated by those courts. Petitioners therefore seek an extension of time until November 19, 2018, to file the

petition in this case. If the extension is granted, PM USA intends to file its petition in *Searcy* on approximately the same date.

CONCLUSION

Petitioners respectfully request that an order be entered extending the time to file a petition for a writ of certiorari by 60 days, to and including November 19, 2018.

Respectfully submitted.

ANDREW L. FREY
LAUREN R. GOLDMAN
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2500

Counsel for Petitioner
Philip Morris USA Inc.

KAREN H. CURTIS
CLARKE SILVERGLATE, P.A.
799 Brickell Plaza
Suite 900
Miami, FL 33131
(305) 377-0700

Counsel for Petitioner
Liggett Group LLC

MIGUEL A. ESTRADA
Counsel of Record
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Petitioner
Philip Morris USA Inc.

KELLY ANNE LUTHER
ANN M. ST. PETER-GRIFFITH
KASOWITZ, BENSON,
TORRES & FRIEDMAN, LLP
1441 Brickell Avenue
Suite 1420
Miami, FL 33131
(305) 377-1666

Counsel for Petitioner
Liggett Group LLC

September 10, 2018