Nos. 11-741, 11-754

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC., LIGGETT GROUP LLC,
Petitioners,
v.
FRANKLIN D. CAMPBELL, As Personal Representative of the Estate of Betty Jean Campbell,
Respondent.

R.J. REYNOLDS TOBACCO COMPANY,
Petitioner,
v.
MATHILDE MARTIN, As Personal Representative of the Estate of Benny Ray Martin,
Respondent.

On Petitions for a Writ of Certiorari to the Florida First District Court of Appeal

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Due Process Clause prohibits the use of issue preclusion to establish elements of a plaintiff's claim where it cannot be shown that the issues being given preclusive effect were actually decided in a prior proceeding.

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 States.[1] WLF's primary mission is the defense and promotion of free enterprise, individual rights, and a limited and accountable government. In particular, WLF devotes a substantial portion of its resources to advocating and litigating against excessive and improperly certified class action lawsuits.

Among the many federal and state court cases in which WLF has appeared to express its views on the proper scope of class action litigation are *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); and *Engle v. Liggett Group, Inc.,* 945 So. 2d 1246 (Fla. 2006), *cert. denied,* 552 U.S. 941 (2007).

WLF is particularly concerned by the willingness of some state courts to abandon traditional procedures governing civil litigation, in order to facilitate the quick resolution of a large number of similar claims. The decisions below are stark examples of that trend; the Florida First District Court of Appeal has abandoned traditional preclusion rules and thereby barred Petitioners from contesting numerous elements of the thousands of *Engle* claims that have been filed against them in the Florida courts.

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for WLF provided counsel for Respondents with notice of its intent to file. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

The basic guarantee of due process in a civil trial is that a defendant will not be held liable (and deprived of property) without a meaningful opportunity to contest all elements of liability. That guarantee has traditionally extended to lawsuits being handled as class actions. Yet the appeals court upheld substantial monetary judgments against Petitioners even though, based on an unprecedented application of issue preclusion, they had no opportunity to contest numerous elements of Respondents' causes of action. WLF is particularly concerned because the Florida courts apparently intend to apply this unorthodox issue preclusion rule to thousands of other *Engle* cases, and because the decisions below are part of a broader trend among state courts to jettison traditional procedural rules in the name of litigation efficiency.

Last term, the Court took a careful look at abuses of the class action device in federal courts. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). WLF respectfully submits that these cases represent a similar opportunity to examine due process limitations on the use of class actions in state courts.

STATEMENT OF THE CASES

These two cases arise in the aftermath of a massive class action proceeding in the Florida courts. As modified by the Florida Court of Appeal in 1996, the certified class consisted of all Floridians who suffered or died from diseases and medical conditions caused by their addiction to cigarettes. Named as defendants were all the major tobacco companies.

The trial court elected to conduct the trial in

three phases. Phase I – a year-long trial – addressed, among other things, common issues regarding the defendants' conduct over more than four decades. The plaintiffs asserted numerous causes of action; and for each cause of action, they asserted many alternative allegations of wrongdoing. The trial judge submitted to the jury a verdict form that did not require its verdict to specify which of the many alternative allegations it had accepted or rejected. The jury responded with general findings that the evidence was "sufficient to prove strict product liability; fraud and misrepresentation; fraud by concealment; civil conspiracy by misrepresentation and concealment; breach of implied warranty; breach of express warranty; negligence; and intentional infliction of emotional distress." Pet. App. 10a.[2] But those general findings did not specify which of the alternative factual allegations it had accepted as the bases for its findings. For example, they did not specify which of the brands marketed by each defendant were defective, and what the defect consisted of. The jury also determined that the class as a whole was entitled to punitive damages.

During Phase II, the jury considered the individual claims of three class representatives. It awarded damages to all three, and it awarded $145 billion in punitive damages to the entire class. *Id.* In November 2000, the trial court issued a judgment directing the defendants to deposit the $145 billion in punitive damages into the court registry for the benefit of the entire class, with interest on the award to begin

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[2] All references to "Pet. App." are to the Petition Appendix in *Campbell*, No. 11-741.

accruing immediately. Before the beginning of Phase III (which was to determine liability to and compensatory damages for each of the estimated 700,000 class members), the defendants appealed.

The Florida Supreme Court ultimately decertified the class and vacated the punitive damages award. *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), Pet. App. 31a-105a. Although concluding that the trial court had not abused its discretion in certifying the class initially, the Florida Supreme Court ruled that continued class treatment for Phase III of the trial plan was "not feasible because individualized issues such as legal causation, comparative fault, and damages predominate." *Id.* at 61a. It then adopted what it termed a "pragmatic solution" for dealing with the completed portions of the class action: in addressing anticipated claims from individual smokers, trial courts were directed to:

> [R]etain[ ] the jury's Phase I findings other than those on the fraud and intentional infliction of emotional distress claims, which involved highly individualized determinations, and the finding on entitlement to punitive damages questions, which was premature. Class members can choose to initiate damages actions and the Phase I common core findings we approved will have res judicata effect in those trials.

Id. at 65a. The court did not explain what "res judicata effect" it anticipated, nor did it suggest that trial courts should deviate from the normal common law preclusion rules traditionally applied in Florida courts.

These two Petitions involve the claims filed by two individual members of the decertified *Engle* class.[3] Their claims are among thousands of individual "*Engle* progeny" claims filed in the aftermath of the Florida Supreme Court's 2006 decision.

Throughout his adult life, Mr. Martin smoked Lucky Strike and Camel cigarettes. A jury ruled in Ms. Martin's favor on her strict-liability, negligence, concealment, and conspiracy-to-conceal claims. Upholding the jury's verdict, the trial court entered a judgment against Reynolds for $28.3 million, including $25 million in punitive damages.

On appeal, Reynolds objected (as it had at trial) to the trial judge's refusal to ask the jury – with respect to the strict-liability and negligence claims – whether the cigarettes Mr. Martin smoked were defectively or negligently designed or marketed, and whether any such defect or negligence caused his injury. With respect to the concealment and conspiracy claims, Reynolds objected to the trial judge's refusal to ask the jury whether any of Reynolds's statements about Lucky Strike or Camel cigarettes fraudulently omitted information regarding their health effects. The Florida First District Court of Appeal rejected those objections and affirmed the judgment. Pet. App. 8a-30a. Its ruling turned on its interpretation of the *Engle* decision. Disagreeing with a recent decision of the U.S. Court of

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[3] Respondent Mathilde Martin is the representative of the estate of deceased class member Benny Ray Martin. Respondent Franklin D. Campbell is the representative of the estate of deceased class member Betty Jean Campbell.

Appeals for the Eleventh Circuit,[4] the court held that *Engle* was intended to prevent any further litigation regarding whether the tobacco companies had engaged in wrongful conduct with respect to the former class members. It explained:

> [W]e do not agree [with *Brown* that] every *Engle* plaintiff must trot out the class action trial transcript to prove applicability of the Phase I findings. Such a ruling undercuts the Supreme Court's ruling. The Phase I jury determined "*common issues* relating exclusively to the defendants' conduct . . ." but not "whether any class members relied on Tobacco's misrepresentations or were injured by Tobacco's conduct." *Engle*, 945 So. 2d at 1256 (emphasis added). The common issues, which the jury decided *in favor of the class*, were the "conduct" elements of the claims asserted by the class, and not simply, as characterized by the Eleventh Circuit, a collection of facts *relevant* to those elements.

Pet. App. 19a (emphasis in original). Notably, in rejecting Reynolds's assertion that the trial court had applied issue preclusion far too broadly, the First District did not attempt to support its position by citing *any* Florida case law addressing issue preclusion; rather, it relied solely on its interpretation of *Engle*. Nor did

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[4] *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324 (11th Cir. 2010). The First District said it "generally agreed" with one of the Eleventh Circuit's holdings: that *Engle*'s use of the term "res judicata" was intended to refer to "issue preclusion" rather than "claim preclusion." Pet. App. 18a-19a.

the court respond to Reynolds's assertion that broad application of issue preclusion violated its rights to due process of law under the U.S. Constitution, by depriving Reynolds of a fair opportunity to contest each element of Ms. Martin's claims.

Campbell involves claims by another former *Engle* class member against three tobacco companies: Philip Morris USA, Inc.; Liggett Group LLC; and Reynolds.[5] Over Petitioners' objections, the trial court held that the *Engle* Phase I findings conclusively established the wrongful conduct elements of Mr. Campbell's individual claims – without the need for Mr. Campbell to introduce any additional evidence. The jury returned a verdict for Mr. Campbell on his strict liability claim and awarded $7.8 million in compensatory damages. After taking into account the jury's comparative fault finding, the trial court entered judgment for $3.35 million.

The First District affirmed. Its one-sentence order consisted of a citation to its previous decision in *Martin*. Pet. App. 1a. Once again, the First District did not address Petitioners' due process claims. The Florida Supreme Court thereafter denied requests for discretionary review filed in both *Martin* and *Campbell*.

REASONS FOR GRANTING THE PETITION

These cases raise issues of exceptional importance. Under traditional notions of due process,

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[5] Reynolds's efforts to obtain review in *Campbell* are the subject of a separate certiorari petition, No. 11-756, which raises identical due process claims.

a defendant in a civil trial will not be held liable (and deprived of property) without a meaningful opportunity to contest all elements of liability. The Court has explicitly held that due process imposes limits on use of preclusion principles to prevent a litigant from contesting an issue of fact or law. *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008). Under common law principles adopted in Florida and elsewhere, a party can be precluded from litigating an issue of fact or law under the doctrine of issue preclusion if and only if the issue "was actually litigated and resolved in a valid court determination essential to the prior judgment." *Id.* at 892. The Florida courts determined in this case, however, that that basic guarantee must give way to "pragmatic" considerations that arise in class action litigation. The First District held that *Engle* plaintiffs asserting issue preclusion need not "trot out the class action trial transcript to prove applicability of the Phase I findings." Pet. App. 19a. Rather, it held that the *Engle* Phase I jury should be deemed, under issue preclusion principles, to have resolved *every* wrongful conduct issue in favor of *every* individual class member, without regard to whether Campbell or Martin could demonstrate that the general findings of the Phase I jury actually resolved the specific factual claims applicable to their cases.

The First District so held notwithstanding Petitioners' showing that the Phase I jury was presented with numerous alternative allegations of wrongdoing and was not asked to specify which of the allegations were the bases of its findings. Nor did the First District make any effort to support its holding by citing Florida case law articulating common law issue preclusion principles. Review is warranted to determine

whether this significant departure from traditional issue preclusion principles violates Petitioners' rights to due process of law.

Review is particularly warranted in light of the dramatic impact of the decision below. Petitioners have demonstrated that the issue preclusion rules applied here have led to massive liability on cigarette manufacturers – over $375 million in adverse judgments in the small number of cases that have been tried to date. In light of the thousands of *Engle* progeny cases that are awaiting trial and to which the unorthodox issue preclusion rules are to be applied, the importance of the Question Presented is readily apparent.

Review is also warranted because the decisions below are part of a broader trend among state courts to jettison traditional procedural rules in the name of litigation efficiency. In order to allow for quick resolution of numerous claims raising similar issues, a number of state courts have sanctioned novel use of class actions – often resulting in defendants being denied an opportunity to contest all elements of the claims asserted by class members. Last term, the Court took a careful look at abuses of the class action device in federal courts. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). WLF respectfully submits that these cases represent a similar opportunity to examine due process limitations on the use of class actions in state courts.

I. THE PETITIONS RAISE IMPORTANT ISSUES REGARDING WHETHER FLORIDA'S EXTREME DEVIATION FROM STANDARD ISSUE PRECLUSION PRINCIPLES VIOLATES DUE PROCESS

As Petitioners have well documented, the decision of the Florida courts to bar Petitioners from contesting numerous elements of Respondents' claims represents a marked deviation from common law principles of issue preclusion adopted in Florida and elsewhere. Review is warranted to determine whether that deviation – which is likely to affect the outcome of thousands of *Engle* progeny cases – violates due process rights protected by the 14th Amendment.

This Court has long recognized that "traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994). Adherence to traditional judicial procedures "protect[s] against arbitrary and inaccurate adjudication" and thereby provides assurance that litigants will receive due process of law. *Id.*; *see also Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) (the Due Process Clause ensures "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.").

Florida courts, in line with all American courts, have a long civil litigation tradition of permitting a plaintiff to recover damages only if he proves each of the elements of his claim and only after the defendant has been permitted to dispute that evidence. In light of that tradition, this Court has held unequivocally, "[T]he Due

Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'" *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)).

Of course, once an issue has been fully litigated and resolved against a party in a valid court proceeding, considerations of efficiency and fairness dictate that limitations be imposed on the party's right to re-litigate the issue. But, similar to the issue preclusion rules in all other States, Florida's normally-applicable rules place a heavy evidentiary burden on the party seeking to invoke issue preclusion.

Under Florida law, for issue preclusion to apply, five factors must be present:

> (1) an identical issue must have been presented in the prior proceeding; (2) the issue must have been a critical and necessary part of the prior determination; (3) there must have been a fair opportunity to litigate the issue; (4) the parties in the two proceedings must be identical; and (5) the issues must have been actually litigated.

Goodman v. Aldrich & Ramsey Enters., Inc., 804 So. 2d 544, 546-47 (Fla. 2d DCA 2002). Issue preclusion is not applied by Florida courts to issues that could have been, but may not have been, decided in an earlier lawsuit between the parties. *See, e.g., Acadia Partners, L.P. v. Tompkins*, 673 So.2d 487, 488-89 (Fla. 5th DCA 1996).

The second of the five *Goodman* factors is most pertinent here. The First District held that Petitioners were precluded from contesting any relevant facts regarding their alleged tortious conduct – including that *throughout* the time periods that Mr. Martin and Ms. Campbell smoked, the brands of cigarettes they smoked were defectively and negligently designed and marketed, and that Petitioners concealed and conspired to conceal the adverse health effects of those brands. It is readily apparent from the Phase I trial record that those alleged plaintiff-specific factual findings were *not* a "critical and necessary part" of the Phase I jury's verdict. In response to a verdict form that required little specificity, the jury made general findings that each of the defendants had, at some time and with respect to at least some of its cigarette brands, engaged in tortious conduct of the types alleged. But one cannot conclude, for example, based solely on the verdict rendered, that the jury concluded that the Lucky Strikes smoked by Mr. Martin were defectively designed or marketed during the years he smoked.

As Petitioners have demonstrated, during Phase I class counsel pressed numerous alternative allegations of wrongdoing. For example, counsel alleged that "Light" cigarettes sold by the defendants were defective because they caused smokers to "compensate" by drawing in more tobacco smoke. The Phase I jury's general finding that Philip Morris, Liggett, and Reynolds sold cigarettes that were defectively designed or marketed may have been based on a conclusion that those companies' Light cigarettes were defective, not that the cigarettes actually smoked by Mr. Martin and Ms. Campbell were defective. A finding that those brands of cigarettes (which were *not* Light) were

defective was not "a critical and necessary part" of the Phase I jury's verdict.

The courts below departed sharply from the traditional understanding of issue preclusion, as outlined in *Brown*, 611 F.3d at 1336. The First District explicitly rejected *Brown*'s admonition that *Engle* plaintiffs must point to the Phase I record to demonstrate that the Phase I jury made specific findings. Pet. App. 19a. Rather, it deemed itself bound by *Engle* to hold that all factual issues regarding Petitioners' tortious conduct should be deemed conclusively decided in favor of Respondents. *Id.* In rejecting Petitioners' claims that Respondents should be required to prove that Plaintiffs' had acted tortiously *toward them*, the First District did not cite *any* Florida case law addressing issue preclusion and instead relied solely on its interpretation of *Engle*.

Whether the First District accurately interpreted *Engle* is open to serious question. The Florida Supreme Court said that "the Phase I common core findings we approved will have res judicata effect" in an subsequent lawsuits filed by class members. *Id.* at 65a. That statement does not indicate the extent to which those findings would prevent defendants from contesting allegations that they acted tortiously with respect to individual plaintiffs, only that the Phase I findings would not be vacated and thus that individual plaintiffs could attempt to make use of those findings under normal issue preclusion principles. Moreover, it is counter-intuitive to suggest that *Engle* was attempting to dictate the preclusive effect of Phase I findings on later proceedings, because issue preclusion case law uniformly holds that it is the province of the second

trial court – which knows both what the earlier findings were and how they relate to the later case – to determine whether issue preclusion is applicable. *See, e.g. Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 396 (1996) (Souter, J., concurring in part and dissenting in part); *Midway Motor Lodge v. Innkeepers' Telemanagement & Equip. Corp.*, 54 F.3d 406, 409 (7th Cir. 1995); 18 C. Wright & A. Miller, *Federal Practice and Procedure* § 4413 (2d ed. 2002) (noting "general rule that a court cannot dictate preclusion consequences at the time of deciding a first action").

More importantly, regardless whether the First District properly deemed itself bound by *Engle* to bar Petitioners from contesting that they acted tortiously toward Mr. Martin and Ms. Campbell, there is no serious argument that the application of issue preclusion by the courts below was anything other than a radical departure from the common law issue preclusion rules normally applied in the Florida courts. The stark contrast between the decision below and the Eleventh Circuit's *Brown* decision illustrates just how far the First District deviated from Florida's traditional preclusion rules. In light of the highly unorthodox issue preclusion rules applied here, there is serious question whether Petitioners' due process rights under the U.S. Constitution have been violated – an issue that Petitioners raised at each stage of the proceedings.

As noted above, "traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994). Adherence to traditional judicial procedures "protect[s] against arbitrary and inaccurate adjudication" and thereby provides assurance that litigants will receive due

process of law. *Id.* Among those traditional judicial procedures is issue preclusion law, which the Court has held is "subject to due process limitations." *Taylor*, 553 U.S. at 891. In direct conflict with the decision below, the Court held in *Fayerweather v. Ritch*, 195 U.S. 276 (1904), that the Due Process Clause bars preclusion of issues that may not have been litigated and resolved in prior litigation. Review is warranted to determine whether the decision below – which applied issue preclusion without even addressing whether the issues precluded were actually decided in the prior litigation – violated Petitioners' due process rights.

Review is particularly warranted in light of the dramatic impact of the decision below. Petitioners have demonstrated that the issue preclusion rules applied here have led to massive liability on cigarette manufacturers – over $375 million in adverse judgments in the small number of cases that have been tried to date. In light of the thousands of *Engle* progeny cases that are awaiting trial and to which the unorthodox issue preclusion rules are to be applied, the importance of the Question Presented is readily apparent.

II. THE DECISIONS BELOW ARE PART OF A BROADER TREND AMONG STATE COURTS TO JETTISON TRADITIONAL PROCEDURAL RULES IN THE NAME OF LITIGATION EFFICIENCY

There is a constant temptation for federal and state courts – which invariable face crowded dockets and limited resources – to adopt procedures designed to achieve quick resolution of cases raising similar issues. *See, e.g.*, Jack B. Weinstein, *Some Thoughts on the*

"Abusiveness" of Class Actions, 58 F.R.D. 299, 301-02 (1973). The Due Process Clause has been the principal shield protecting litigants from efforts by state courts to adopt efficiency-enhancing procedures that may deny them "an opportunity to present every available defense." *Williams*, 549 U.S. at 353.

An efficiency-enhancing procedure to which both federal and state court regularly resort has been the class action. This Court has been vigilant in ensuring that federal courts do not allow use of class actions procedures to adversely affect the substantive rights of any parties. *See, e.g., Shady Grove Orthopedic Assocs., Inc. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion) (classwide adjudication enables the trial of claims of "multiple parties at once, instead of in separate suits," but "leaves the parties' legal rights and duties intact and the rules of decision unchanged"). *See also In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002) ("Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected"), *cert. denied*, 537 U.S. 1105 (2003). Most recently, the Court overturned a class action trial plan under which back pay awards to millions of class members were to be extrapolated from findings drawn from a small sample of class members because, under the Rules Enabling Act, "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart Stores*, 131 S. Ct. at 2561. The Court held that class action defendants are entitled under Fed.R.Civ.P. 23 and the Rules Enabling Act to "individualized determinations" regarding the separate claims of absent class members. *Id.* at 2560.

State supreme courts have not been as vigilant in protecting the rights of class action defendants. The Florida courts are not the only state courts that have sanctioned questionable use of class actions in the name of litigation efficiency and pragmatism. WLF respectfully submits that review is warranted to determine the extent to which the Due Process Clause imposes limitations on class action litigation in state courts.

While the due process issue in this case arose in connection with post-class action proceedings, the issue had its origins in an effort by the Florida courts to use the class action device in a manner designed to adjudicate thousands of claims in a single proceeding. The result was an overbroad class; and the effort to issue "common" findings of fact inevitably gave rise to generalized findings with little utility in the trial of individualized claims.

Other state courts have approved use of class actions in ways that led to similar infringements on defendants' due process rights. For example, the California courts have held that absent class members need not demonstrate reliance in class actions raising fraud claims, so long as at least one named class member demonstrates that he relied on the defendant's alleged misrepresentation. *Alcoser v. Thomas*, 2011 Cal. App. Unpub. LEXIS 1180 (Cal. App.), *review denied*, 2011 Cal. LEXIS 5907 (Cal.), *cert. denied*, 81 L. Ed. 2d 350 (2011). The appeals court reasoned that evidence that "representations were made to certain members of the class" was a sufficient basis for concluding that "representations were made to others in the class." *Id.* at *23. It concluded that evidentiary requirements

should not stand in the way of the efficiency-enhancing goals of class actions: "it thus would defeat the purpose of class action" if absent class members were required to appear in court in order to establish their reliance. *Id.* at *21. The California courts brushed aside the defendants' repeated assertions that imposing fraud liability without requiring absent class members to prove reliance violated the defendants' due process rights under the U.S. Constitution.

A divided Oregon Supreme Court similarly did away with the reliance requirement in class actions alleging fraud. Insurance policies sold by the defendant to consumers included a provision promising that the defendant would pay policyholders' reasonable medical expenses. The plaintiff policyholders claimed that that promise was fraudulent, and the trial court certified a plaintiff class consisting of all similarly situated policyholders who detrimentally relied on the alleged fraud. The Oregon Supreme Court rejected the defendants' due process challenge to the class-wide fraud judgment. *Strawn v. Farmers Ins. Co. of Oregon*, 350 Ore. 336, *reconsideration denied*, 350 Ore. 521 (2011), *cert. pending*, No. 11-445 (U.S., pet. filed Oct. 5, 2011). Although the plaintiffs provided no evidence that absent class members relied on the fraudulent promise, the court held that due process did not require such evidence. 350 Ore. at 361 (holding that, in a class action, no evidence was required that absent class members relied on the misrepresentation because "a person who purchases a motor vehicle policy to meet the financial responsibility requirements of Oregon law does not need to read the policy to justifiably rely on its provisions"); 350 Ore. at 528 (denying due process challenge).

The Louisiana courts upheld a $242 million fraud judgment in favor of a class consisting of hundreds of thousands of current and former Louisiana smokers. *Scott v. American Tobacco Co.*, 36 S. 3d 1046 (La. App. 2009), *review denied*, 44 So. 3d 707 (La. 2010), *cert. denied sub nom., Philip Morris USA, Inc. v. Jackson*, 131 S. Ct. 3057 (2011). The Louisiana courts upheld the judgment without requiring any evidence that absent class members relied on the alleged misrepresentations, even though in Louisiana the tort of fraud normally requires proof of such reliance. In granting a temporary stay of judgment while this Court decided whether to review the case, Justice Scalia observed that "[t]he extent to which class treatment may constitutionally reduce the normal requirements of due process is an important question." *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., as Circuit Justice). Justice Scalia deemed it "significantly possible," were the Court to grant review, that it would reverse the Louisiana judgment on the basis of the applicant's due process claim. *Id*. at 4.

The Court ultimately decided not to review the Louisiana judgment. The *Campbell* and *Martin* cases, which involve an even more extreme departure from traditional judicial procedures than did *Scott*, provide the Court with a more focused opportunity to consider the extent to which the Due Process Clause limits the authority of States to significantly alter those procedures in the name of increased judicial efficiency. Given the increasing frequency with which state courts have been willing to jettison traditional procedural rules in the name of litigation efficiency in the class action context, review of the decisions below is particularly warranted.

CONCLUSION

Amicus curiae Washington Legal Foundation requests that the Court grant the petitions for writs of certiorari.

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