

Nos. 11-741, 11-754

IN THE
Supreme Court of the United States

PHILIP MORRIS USA INC., *ET AL.*,
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 Writs of Certiorari
to the Florida First District Court of Appeal**

**BRIEF OF PROFESSORS AARON TWERSKI
AND JAMES A. HENDERSON JR. AS *AMICI
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 claims where it cannot be shown that the issues being given preclusive effect were actually decided in a prior proceeding.

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INTEREST OF AMICI CURIAE

Amici Twerski and Henderson are law professors at Brooklyn Law School and Cornell Law School, respectively.¹ *Amici* have taught in the fields of torts and

¹ Pursuant to this Court's Rule 37.2(a), *amici* certify that counsel of record for all parties received timely notice of *amici*'s intent to file this brief, and that all parties consented to the filing of the brief. Copies of petitioners' consent have been filed with the Clerk. Copies of respondents' consent are being filed with the Clerk along with this

products liability for over four decades. They have also published extensively on both topics and were co-reporters of the *Restatement (Third) of Torts: Products Liability* (1998). In addition, one of the *amici* (Twerski) has taught and published in the field of conflict of laws for several decades. *Amici* write because they are convinced that the issue before the Court in these cases is of great significance and warrants this Court's review.

ARGUMENT

Amici will not repeat petitioners' substantive arguments in this case, although *amici* have reviewed them carefully and agree with petitioners' conclusion. Instead, *amici* wish to address why the Court should grant review at this juncture. It is not merely that the courts below seriously erred in their holdings. It is also because of the decisions' enormous consequences for thousands of cases potentially worth billions of dollars—and for mass-tort litigation generally.

First, the state courts' application of issue preclusion will have a direct and immediate impact on thousands of pending cases. Eight thousand cases have grown out of *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), the case on which issue preclusion here was premised. It is hard to think of another example where the finding of a single state-court decision will potentially affect the outcomes of so many cases currently pending in a single court system. If the cases to be litigated in the next

brief. Pursuant to this Court's Rule 37.6, *amici* certify that no counsel for any party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici*, its members, and its counsel made such a monetary contribution.

decade follow the pattern of the decisions below, defendants could face judgments in the billions of dollars—without any opportunity to contest essential elements of the claims against them. The sheer enormity of the decisions’ consequences justifies this Court’s attention.

Second, of equal if not greater concern, the *Engle* decision will have a profound impact on innumerable cases that have yet to be filed. There should be no mistake—*Engle* and its progeny are high-profile matters. Lawyers nationwide are watching them. Allowing the decisions below to go unreviewed will send a strong signal to other courts throughout the Nation that judicial efficiency trumps due process. The formula is simple: Whether the case be brought as a class action or in multi-district litigation where so-called “representative cases” are chosen for trial, litigant after litigant will seek to use prior general findings of fact to dictate the outcomes of cases that are very different from those actually litigated. That will be especially true when the targets of litigation are large corporations who are out of popular favor and especially vulnerable to attack.

Third, and finally, these cases do not merely present issues of enormous practical and immediate importance to thousands of other cases currently in litigation. Nor do they merely create precedent that will inevitably affect outcomes in still more future cases brought across this Nation. They also raise an issue of fundamental fairness that is the very essence of due process. If state courts can simply conjure up their own novel views of issue preclusion to prevent a defendant from contesting elements of a plaintiff’s claims that were not necessarily decided in a prior proceeding, then the defendant’s right to fair and just litigation will be seriously compromised.

CONCLUSION

For the foregoing reasons and those stated in the petitions, the petitions should be granted.

Respectfully submitted.

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