No. 11-741

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.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondent does not dispute that the question presented will arise in each of the thousands of *Engle* progeny cases pending in Florida state and federal courts—cases that have already generated over $375 million in judgments against the defendants. Nor does he take serious issue with the legal principles underlying our due process argument. Respondent asserts instead that (a) the petition is untimely, (b) the Phase I jury actually found that all cigarettes are defective, (c) the question presented is not ripe for review, and (d) the issue lacks importance. None of these assertions weighs against review.

A. The Petition Is Timely.

In a transparent attempt to distract the Court from the ample reasons for granting review, respondent first argues (Opp. 20-25) that the petition is untimely. That contention is frivolous. Under this Court's well-settled precedents, petitioners were obligated to seek review from the Florida Supreme Court ("FSC") before petitioning this Court. Only when such review was denied did the certiorari clock begin to run.

It is beyond cavil that, if further review before the state supreme court is *possible*, "it [i]s necessary for [a] petitioner [before this Court] to invoke that jurisdiction in order to make it *certain* that the case could go no farther" in the state courts. *Mich.-Wisc. Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 160 (1954) (emphasis added). Such certainty is achieved only after "jurisdiction [i]s declined" by the state supreme court. *Ibid.* Accordingly, "the limit of time for apply-

ing to this Court [runs] from the date when [discretionary review is] refused." *Ibid.*

Here, it is undisputed that FSC review was a possibility. See Opp. 23. The Court of Appeal disposed of petitioners' appeal by a per curiam, summary affirmance citing the companion *Martin* case (petition for cert. filed, No. 11-754). The defendant in *Martin*, R.J. Reynolds, sought review in the FSC. It is settled Florida law that a grant of review in *Martin* would have given the FSC jurisdiction to review the decision in this case, as well. *Florida Star* v. *B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988). It therefore was entirely possible that the FSC would have been the "the highest [state court] in which a decision could be had." 28 U.S.C. §1257(a). Only when the FSC denied review simultaneously here and in *Martin* was it "certain that the case could go no farther" before the Florida courts; the time for petitioning this Court consequently did not begin to run until then. *Calvert*, 347 U.S. at 160.

Under respondent's view, by contrast, this Court would have had jurisdiction over a petition filed within 90 days of the Court of Appeal's decision, but would have lost jurisdiction if the FSC had thereafter granted review in *Martin*, regaining it only after the FSC issued its decision. That absurd outcome cannot be squared with the rule stated in *Calvert*.

Respondent ignores *Calvert*'s clear and highly practical rule, offering instead semantic quibbles about the meaning of the word "pending" under Florida practice. Opp. 23-25. But all that matters for purposes of this Court's jurisdiction is whether fur-

ther review in the Florida courts was possible. It clearly was, and the petition therefore was timely.[1]

B. The Application Of Collateral Estoppel Here Violated Petitioners' Due Process Rights.

Fayerweather v. *Ritch*, 195 U.S. 276 (1904), held that due process bars issue preclusion absent a showing that the particular issues that the plaintiff is relieved of having to prove were actually decided in a prior proceeding. Pet. 17-21. The *Martin* court nevertheless ruled that *Engle* progeny courts must give preclusive effect to any theory of defect that the *Engle* jury *could have* decided in the class's favor, without the need to conduct any inquiry into what the *Engle* jury *actually* decided. Pet. App. 21a-22a.

Reluctant to defend this approach, respondent now takes an entirely different tack, claiming that the class presented—and the jury "necessarily" adopted—a single defect theory: that the addictiveness of cigarettes containing nicotine, combined with

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[1] Respondent's characterizations (Opp. 21-24) of the FSC's rulings in this case and in *Harrison* v. *Hyster Co.*, 515 So. 2d 1279 (Fla. 1987), are highly misleading. The FSC described the filing submitted in this case as a "petition for review * * * submitted to the Court on jurisdictional briefs." Pet. App. 2a. In declining review, moreover, the court explained not that it lacked jurisdiction over the First District's decision but that it "decline[d] to accept jurisdiction" (*ibid.*)—the same language used in rejecting the *Martin* petition. Similarly, in *Harrison*, the FSC dismissed its grant of review as improvident because it cannot "accept[] jurisdiction" on the merits in cases like this one unless it first elects to review the case cited in the per curiam affirmance. 515 So. 2d at 1280. Respondent neglects to mention the critical fact that review had been granted in *Harrison* only *after* the FSC had denied review in *Small*.

the health risks that all such cigarettes carry, renders all cigarettes containing nicotine defective. Opp. 5, 27. Respondent further suggests that it was permissible to relieve him of the burden of proving defect because he had to prove his claim's other elements before he could recover damages. Both arguments are irrelevant to the pure question of law presented here and, in any event, meritless.

1. There are at least two problems with respondent's revisionist history. *First*, there is no basis to conclude that the *Engle* jury actually found that cigarettes were defective because they contain nicotine, because they can cause disease, or both. *Second*, even if the jury's finding did rest on such a theory, it *still* did not necessarily apply across the board.

a. To begin with, it is unclear that respondent's all-inclusive defect theory was put to the *Engle* jury at all. See Pet. 22. As class counsel presumably realized, such a theory risked running afoul of Florida law that inherently dangerous products are not *ipso facto* defective. See, *e.g.*, *Liggett Group, Inc.* v. *Davis*, 973 So. 2d 467, 475 (4th DCA 2007). But assuming arguendo that such a theory had been presented to the jury and that the jury *could* have found that all cigarettes containing nicotine are defective by virtue of their addictiveness and health risks, that certainly would not have been the *only* possible basis for an affirmative answer to the defect question.

As explained at Pet. 22-23, the class propounded numerous alternative defect theories that applied to some, but not all, cigarettes. Respondent now baldly claims (Opp. 27), without any record-based demonstration, that these "alternative theories of wrongdoing * * * did not, standing alone, constitute discrete defects in cigarettes." But that is not what the

class argued at the time. Rather, the class's proposed jury instructions asserted that the jury could find cigarettes defective based upon any one of several "alternative" theories. R. 48459-48498. The class continued that theme in opposing the defendants' directed verdict motion (R. 57327-57332), identifying no fewer than eleven distinct theories of defect, including those the petition discusses.

In denying the defendants' directed verdict motion, the trial court confirmed the multiplicity of defect theories, observing that the evidence allowed the jury to find "*some* cigarettes * * * manufactured" with "breathing air holes * * * too close to the lips," or "*some* [cigarettes with] filters" that were "test marketed," or "*some*[]" cigarettes containing "ammonia" to have been defective. *Engle* v. *R.J. Reynolds Tobacco Co.*, 2000 WL 33534572, at *2 (Fla. Cir. Ct. 2000) (emphasis added). Any one of these findings would alone have supported an affirmative answer to the defect question.

b. Even if the jury's finding did rest on the addictive properties of nicotine or the health risks of smoking, it does not follow that it applied to all cigarettes at all times. With respect to nicotine, for example, the trial judge found that the Phase I jury could have concluded that cigarettes were defective only "*sometime[s],*" when they had "a higher nicotine content." *Engle*, 2000 WL 33534572, at *2 (emphasis added). And, indeed, the evidence showed that nicotine levels fell substantially over time and varied widely among brands at any given time. T. 29050-57, 32787-90, PX0111, DX36834-35. Thus, even if the addictiveness of nicotine did underlie the jury's defect finding, the jury could have found that brands

with nicotine levels above some threshold were defective, while others with levels below it were not.

The same is true of disease causation. Voluminous evidence established that the health risks of smoking were proportionate to the levels of disease-causing compounds in cigarette smoke, and that (like nicotine yields) those levels fell over time and varied widely among brands at any given time. T. 27641-42, 29050-57, 29069-76, 32787-90; PX0111; DX36834; DX36835. Thus, even if the defect finding necessarily had been based on disease causation, it again is possible that only brands with compounds above a certain level were found to be defective, while others with lower levels were not.

If the class had been pursuing the single, broad theory of defect now claimed, it would have been a simple matter to ask the jury whether all cigarettes are defective because nicotine is addictive and cigarettes cause disease. Instead, at the class's behest, the jury was asked to determine no more than whether each defendant had "place[d] cigarettes on the market that were defective and unreasonably dangerous." Pet. 6. The most that may be gleaned from the jury's answer is that it believed at least *some* unspecified brands of cigarettes were defective for at least *some* unspecified reasons at *some* unspecified times. It simply is not true that the Phase I verdict "*necessarily*" found "*all* cigarettes containing nicotine" to be defective. Opp. 5 (emphasis added).[2]

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[2] Respondent asserts (Opp. 7-12) that the *Engle* defendants did not object to, but instead embraced, the generality of the verdict form. That is both irrelevant and false.

(continued)

2. Respondent's invocation of the volume and complexity of the evidence that he adduced to prove class membership, causation, and damages (Opp. 1-3, 16-19; *Waggoner* v. *R.J. Reynolds Tobacco Co.*, 2011 WL 6371882, at *19, *22 (M.D. Fla. 2011)) is entirely beside the point. The central element of a strict liability cause of action is proof of product defect, which the jury in this case was instructed to take as established. Every defendant has a due process right to require the plaintiff to prove *each* element of a claim against it, unless—but *only* unless—it can be shown with reasonable certainty that an issue was not only litigated but *actually decided* against the defendant in a prior proceeding. The constitutional dimensions of that principle—most clearly expressed in *Fayerweather*—have been set-

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It is irrelevant because, to benefit from preclusion under settled law, respondent was required to show that the issues subject to preclusion were actually decided by the Phase I jury. Without that showing, preclusion is unavailable regardless of the reason for the uncertainty. Indeed, if the *Engle* class wished to use the Phase I verdicts preclusively in subsequent individual cases, our adversary system placed the burden on them (not the defendants) to propose a verdict form adequate to accomplish that purpose. Moreover, the fact that the defendants wished to ensure that a verdict in their favor would enable them to invoke preclusion (see Opp. 12-13) is entirely irrelevant; such a verdict would have been entitled to broad preclusive effect because it would necessarily have entailed rejection of all of the class's defect theories.

In any event, respondent's account is false. The *Engle* defendants consistently argued *against* putting such generic conduct questions to the jury, making clear their position that the resulting verdicts, if favorable to the class, would be of limited use in later proceedings. T. 35887-35901, 35914-17; *see also* T. 35969-71 (defense counsel describing, but *opposing*, the "middle ground" approach).

tled for more than one hundred years. See Pet. 17-21; PLAC *Amicus* Br. 7-15.

Petitioners have been denied that right in this case. And under the Florida courts' radical revision of the traditional rules of issue preclusion for the *Engle* progeny cases, they will continue to be denied that right in each of the thousands of *Engle* follow-on trials. This Court's intervention accordingly is imperative.

C. Further Percolation Is Unnecessary And Would Result In Irreparable Constitutional Injury On A Vast Scale.

Respondent's contention (*Hall* Opp. 16-30) that the Court should await further "percolation" of the question presented in the lower courts provides no basis for denying the petition. The question presented is fully developed for this Court's immediate review.

1. Percolation in the lower courts has a well understood purpose: allowing additional "state and federal appellate courts" to "serve as laboratories in which the issue receives further study" helps ensure a "better informed and more enduring final pronouncement by this Court." *Arizona* v. *Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

Such considerations provide no reason for denying review here. Although the *Engle* litigation was long and complex, the question presented here is not. Rather, petitioners simply seek application of longstanding and heretofore universally applied principles governing issue preclusion. And as it stands, numerous federal and state courts already have weighed in on the question presented and reached conflicting rulings about the availability of preclu-

sion in thoroughly elaborated decisions. Compare *Brown* v. *R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328, 1344-1346 (M.D. Fla. 2008) (categorical preclusive application of the Phase I verdict violates due process), and *R.J. Reynolds Tobacco Co.* v. *JL Brown*, 70 So. 3d 707, 716 (4th DCA 2011) (expressing "concern" about the due process issue), with *Waggoner*, 2011 WL 6371882, at *27 (no due process violation), and *Martin*, Pet. App. 19a-22a (upholding categorical preclusive application of the Phase I verdicts). Further review by other tribunals is unlikely to shed useful additional light on the straightforward legal principles at stake here.[3]

2. Respondent nevertheless claims that percolation is warranted because, "[t]o resolve this dispute, [the] court will have to plumb the depths of the 100,000-plus page *Engle* record and a year's worth of trial transcripts" (*Hall* Opp. 18); allowing the lower courts that opportunity first, he implies, would assist this Court in its resolution of the question presented. This is incorrect.

It is precisely the point of the *Martin* decision that the preclusive effect of the Phase I verdict has been established categorically by *Engle* and thus that the progeny plaintiffs need *not* "trot out the class action trial transcript to prove applicability of the Phase I findings." Pet. App. 19a. The unconstitutionality of that approach is evident from a comparison of the ambiguous verdict form, on the one hand, with the trial court's denial of the *Engle* defendants' directed verdict motion (identifying the many theo-

[3] No progeny case is currently pending before the Eleventh Circuit, and in any event a decision from that court would not bind the Florida courts. See *Hall* Reply Br. 3-4.

ries of defect that *might* have supported the verdict), on the other. No deep review of the *Engle* record is required.[4]

3. Not only would "percolation" achieve nothing, but it would come at tremendous cost. When the petition was filed, the judgments outstanding against the *Engle* defendants as a result of the unconstitutional Florida process totaled more than *$375 million* (Pet. 3)—and there have been more than $20 million in additional jury verdicts since then. A delay in this Court's review for months or years would ensure that the current total grows substantially and would force petitioners to make payments that they have no chance of recovering if and when this Court eventually rules on the issue. That itself is reason to grant review now.

D. Proper Resolution Of The Question Presented Is Of Great Importance.

Respondent characterizes this case as a "unique" and "private dispute" unlikely to arise again beyond "this one instance," and he therefore contends that it has no "broad legal or social significance." *Martin* Opp. 26-32. That claim is untenable.

This Court in *Fayerweather* recognized that issue preclusion—which implicates fundamental consider-

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[4] Contrary to respondent's contention (see *Martin* Opp. 31-32), petitioners agree that the Phase I verdicts are entitled to preclusive effect in the progeny trials as to issues the jury actually decided against the losing parties; the question is whether that preclusive effect extends beyond that to matters that may *not* actually have been decided by the *Engle* jury. It should be evident that respondent cannot make the necessary showing; indeed, no progeny plaintiff has ever suggested how the *Engle* record could be marshaled successfully in such an enterprise.

ations of finality, fairness, and efficient use of judicial resources—by its nature involves questions of both "[p]rivate right and public welfare." 195 U.S. at 299. That is especially true in this case, given that the preclusive effect of the Phase I verdict governs not just the instant proceedings, but *thousands* of other cases just like it pending in state and federal courts throughout Florida. The public interest in the fair and efficient resolution of these suits is manifest. Cf. *Fed. Sav. & Loan Ins. Corp.* v. *Ticktin*, 490 U.S. 82, 84 (1989).

And the question presented implicates far more than mere application of settled law to fact. See *Martin* Opp. 29-31. Taking vague cues from the FSC in *Engle* itself, the Florida courts have entirely reconceived the doctrine of collateral estoppel as applied to the progeny cases, abolishing the requirement that any particular issue *actually* and *necessarily* have been decided by the Phase I verdict. It is petitioners' challenge to the constitutionality of that legal principle—not its particular application in this or any other individual case—that forms the basis for this petition. In light of the thousands of *Engle* cases pending throughout Florida, the magnitude of the liabilities being imposed, the fundamental nature of the rights at stake, and the egregiousness of the constitutional error, this Court's review is critical.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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