

No. A-

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

MARY BROWN, AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF RAYFIELD BROWN,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA FIRST 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 25-day extension of time, to and including September 21, 2018, within which to file a petition for a writ of certiorari to the Florida First District Court of Appeal.*

The First District Court of Appeal issued its opinion on April 18, 2018. *Philip Morris USA Inc. v. Brown*, No. 1D15-2337, 243 So. 3d 521 (Fla. Dist. Ct. App. 2018) (per curiam). It denied PM USA's motion for rehearing on May 29, 2018. The First

* 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.

District's opinion is not reviewable in the Florida Supreme Court because it does not contain analysis or a citation to any other decision. *See Fla. Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988). Accordingly, this Court has jurisdiction to review the First District's decision under 28 U.S.C. § 1257(a) because the First District was "the highest court of a State in which a decision could be had." *See, e.g., KPMG LLP v. Cocchi*, 132 S. Ct. 23, 24 (2011) (per curiam). Unless extended, the time within which to file a petition for a writ of certiorari will expire on August 27, 2018.

A copy of the First District's decision is attached hereto as Exhibit A; a copy of its order denying rehearing 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 against the defendants—for example, on a claim for strict liability, that the particular cigarettes smoked by the class member contained a defect that was the 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 Mary Brown brought this wrongful-death action against PM USA to recover damages for the death of her husband, Rayfield Brown, from lung cancer, which she alleged was caused by smoking. Plaintiff asserted claims for strict liability, negligence, fraudulent concealment, and conspiracy to commit fraudulent concealment. The trial court ruled that, upon proving that Mr. Brown was a member of the *Engle* class, Plaintiff would be permitted to rely on the “res judicata effect” of the *Engle* findings to establish the conduct elements of her claims and would not be required to prove those elements at trial.

After multiple mistrials, a jury found that Mr. Brown was an *Engle* class member and found in Plaintiff’s favor on her strict-liability, negligence, and conspiracy claims; that jury deadlocked on the other issues in the case, but a subsequent jury awarded Plaintiff \$4.375 million in compensatory damages and awarded her daughter, Jennifer Brown, \$2 million in compensatory damages.

On appeal to the First District Court of Appeal, PM USA raised several challenges to the judgment under state law. In addition, PM USA expressly preserved its position that the trial court violated federal due process by permitting Plaintiff to rely on the *Engle* findings to establish the tortious conduct elements of her claims.¹ The First District Court of Appeal affirmed in a *per curiam* opinion without citation or analysis.

2. This Court’s review would be sought on the ground that the First District Court of Appeal’s decision—which rejected PM USA’s due-process challenge to the broad preclusive effect afforded to the *Engle* Phase I findings—conflicts with this Court’s due-process precedent by depriving PM USA of its property without any assurance that any jury actually found that PM USA committed tortious conduct that was the legal cause of Plaintiff’s injuries. For example, on the strict-liability and negligence claims, Plaintiff

¹ See PM USA Initial Br. 44 (“The trial court also erred when it determined that Plaintiff could rely on the *Engle* findings to establish the conduct elements of her claims. That decision violates PM USA’s federal due process rights because it represents an ‘extreme application[] of the doctrine of res judicata’”) (quoting *Richards v. Jefferson Cty.*, 517 U.S. 793, 797 (1996)) (citation omitted). PM USA “acknowledge[d] that the Florida Supreme Court rejected this federal due process argument in *Douglas*, 110 So. 3d at 422,” but noted its intention “to preserve the issue for reconsideration by the Florida Supreme Court or review in the U.S. Supreme Court.” PM USA Initial Br. 44.

was permitted to invoke the *Engle* jury’s generalized findings that PM USA sold unspecified cigarettes at unspecified times that contained an unspecified defect to establish conclusively that the particular cigarettes Mr. Brown smoked were defective. The First District Court of Appeal upheld that result even though Plaintiff made no attempt to show that the *Engle* jury actually decided this 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 a brand of PM USA’s cigarettes that Mr. Brown never smoked, or the use of certain additives in that brand—and that the jury found that the cigarettes that Mr. Brown did smoke 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 PM USA, other tobacco companies, and various industry organizations; the jury returned only a generalized finding that PM USA 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.

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