No. 18-654

In The
Supreme Court of the United States

PHILIP MORRIS USA INC.
and LIGGETT GROUP LLC,

Petitioners,

v.

RICHARD BOATRIGHT
and DEBORAH BOATRIGHT,

Respondents.

On Petition For A Writ Of Certiorari To The Florida Second District Court Of Appeal

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Have Petitioners raised an issue worthy of this Court's consideration when the Court has declined review of the exact same issue in 24 previous petitions, the federal and state courts have repeatedly and uniformly rejected the issue, and the issue's impact is limited to a single state (and, even then, only to the few cases remaining after this Court first denied review 11 years ago)?

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INTRODUCTION

This case is one in a bundle of six cases in which Petitioners ask this Court, yet again, to review the Florida *Engle* tobacco litigation for federal Due Process concerns.[1] *See Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). In the past 11 years, going back to November 2007, this Court has denied certiorari petitions on the same issue 24 times.[2]

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[1] The reference to "Petitioners" is to Philip Morris USA Inc., R.J. Reynolds Tobacco Company and Liggett Group LLC who collectively seek review in the six cases now before the Court. The petition filed in this case was filed by two of them, Philip Morris USA Inc. and Liggett Group LLC.

[2] *R.J. Reynolds Tobacco Co. v. Graham*, 138 S. Ct. 646 (2018); *R.J. Reynolds Tobacco Co. v. Grossman*, 138 S. Ct. 748 (2018); *Philip Morris USA Inc. v. Naugle*, 138 S. Ct. 735 (2018); *R.J. Reynolds Tobacco Co. v. Turner*, 138 S. Ct. 736 (2018); *R.J. Reynolds Tobacco Co. v. Block*, 138 S. Ct. 733 (2018); *R.J. Reynolds Tobacco Co. v. Monroe*, 138 S. Ct. 923 (2018); *R.J. Reynolds Tobacco Co. v. Lewis*, 138 S. Ct. 923 (2018); *Philip Morris USA Inc. v. Lourie*, 138 S. Ct. 923 (2018); *R.J. Reynolds Tobacco Co. v. Walker*, 573 U.S. 913 (2014); *Philip Morris USA Inc. v. Barbanell*, 573 U.S. 904 (2014); *R.J. Reynolds Tobacco Co. v. Brown*, 573 U.S. 912 (2014); *R.J. Reynolds Tobacco Co. v. Kirkland*, 573 U.S. 905 (2014); *R.J. Reynolds Tobacco Co. v. Mack*, 573 U.S. 904 (2014); *Lorillard Tobacco Co. v. Mrozek*, 573 U.S. 904 (2014); *R.J. Reynolds Tobacco Co. v. Koballa*, 573 U.S. 905 (2014); *R.J. Reynolds Tobacco Co. v. Smith*, 573 U.S. 905 (2014); *R.J. Reynolds Tobacco Co. v. Sury*, 573 U.S. 905 (2014); *R.J. Reynolds Tobacco Co. v. Townsend*, 573 U.S. 905 (2014); *Philip Morris USA Inc. v. Douglas*, 571 U.S. 889 (2013); *R.J. Reynolds Tobacco Co. v. Clay*, 568 U.S. 1027 (2012); *R.J. Reynolds Tobacco Co. v. Gray*, 566 U.S. 905 (2012); *R.J. Reynolds Tobacco Co. v. Hall*, 566 U.S. 905 (2012); *R.J. Reynolds Tobacco Co. v. Campbell*, 566 U.S. 905 (2012); *R.J. Reynolds Tobacco Co. v. Martin*, 566 U.S. 905 (2012); *R.J. Reynolds Tobacco Co. v. Engle*, 552 U.S. 941 (2007).

As in their previous petitions, Petitioners argue that the Florida courts violated federal Due Process by applying Florida preclusion law to give binding effect to class-wide factual findings reached by the jury in Phase I of the *Engle* class action in the follow-along litigation by the individual class members against the same defendants.

In this response, Richard and Deborah Boatright respectfully request that this Court deny the petition for writ of certiorari. Nothing has changed since this Court's 24 previous denials, except that the Eleventh Circuit Court of Appeals has issued another two decisions rejecting Petitioners' argument. All seven available appellate courts have repeatedly and consistently rejected Petitioners' Due Process argument. There is no need for this Court to add its imprimatur to this unanimous precedent.

Plus, few plaintiffs remain to litigate against Petitioners anymore. Only about 1 percent of the original class met the deadline set by the Florida Supreme Court for continuing the litigation, and many of those people have passed away since the class action complaint was filed in 1994. With the passage of time, the majority of the remaining cases have either been tried (with each side winning about half of the cases), or the plaintiffs have either accepted nominal settlement offers or dropped their cases.

Finally, in this particular case, the issue is academic because Petitioners did not adequately present it below. In four appellate briefs, spanning 84 pages, Petitioners included only ***one sentence*** of argument

related to the subject of the petition before this Court. That is a tough fact for Petitioners to ignore when they have already filed and lost 24 previous petitions for writs of certiorari to this Court on the same issue.

COUNTERSTATEMENT OF THE CASE

The facts and procedures here were substantively identical to the other 24 *Engle* progeny cases in which the Court has denied certiorari. To avoid repetition, we adopt the discussions of the *Engle* litigation found in the other petitions currently pending in the latest round of petitions, including *R.J. Reynolds Tobacco Co. v. Searcy*, Case No. 18-649, and *Philip Morris USA Inc. v. Jordan*, Case No. 18-551. We write only to provide the circumstances of Petitioners' waiver in the class action trial, and to summarize the Boatrights' litigation.

The Development of the Cigarettes Sold to this Class of Addicted Smokers

Although tobacco smoking has been common for hundreds of years, lung cancer was extremely rare before the cigarette industry's development of the modern cigarette in the early 20th Century. *Engle* Tr. at 11560, 18707-08).[3] Smoking tobacco in its natural,

[3] The evidence presented to the *Engle* jury was comprehensively summarized by the *Engle* trial court in its Omnibus Final Judgment. *Engle v. R.J. Reynolds Tobacco Co.*, 2000 WL 33534572, at *2-4 (Fla. Cir. Ct. Nov. 6, 2000) ("Final Judgment"). Other courts hearing this same evidence have written comprehensively about

unprocessed form is harsh and unpleasant, making it difficult to inhale. *Engle* Tr. at 11080-81, 11258.

Petitioners developed the modern cigarette sold to the *Engle* class, by contrast, to allow tobacco smoke to be inhaled deep into the lungs. *Engle* Tr. 11080-81, 11258, 11947, 12045. By blending tobaccos and adding ingredients, Petitioners rendered the smoke milder and easier to inhale. *Engle* Tr. at 11080-81, 11258, 11947, 12045.

The development of this modern, inhalable cigarette had two dangerous consequences. First, by making it easy for its customers to draw smoke deeply into their lungs, the cigarette industry enhanced the delivery and physiological impact of the nicotine which is quickly absorbed into the bloodstream and delivered to the brain within seconds. *Engle* Tr. at 11947, 11986, 12007-10. This made smoking more pleasurable, but extraordinarily more addictive. *Engle* Tr. at 11947.

Second, approximately 70 different carcinogens (such as formaldehyde, arsenic and polonium 210) are deposited in the lungs, which are especially vulnerable to disease. *Engle* Tr. at 12132. These dangerous

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Tobacco's 50-year conspiracy to hide the dangers of smoking cigarettes from the public. The most detailed by far is found at *United States v. Philip Morris USA Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006), *affirmed*, 566 F.3d 1095, 1107 (D.C. Cir. 2009), *cert. denied*, 561 U.S. 1025 (2010). The table of contents in the District Court's opinion provides an excellent summary of the scope of Tobacco's misconduct.

substances turn lethal with the repeated exposures caused by addictive smoking. *Engle* Tr. at 15214-15.

This modern, inhalable and extraordinarily addictive cigarette was no accident. Petitioners' cigarettes are engineered to be addictive. *Engle* Tr. at 13471-72, 13475-76. One previously secret Philip Morris document presented to the *Engle* jury, and the jury in this case, noted "we are in the business of selling nicotine, an addictive drug." *Engle* Plf's Exh. 796. Another stated, "Happily for the tobacco industry, nicotine is both habituating and unique in its variety of physiological actions." *Engle* Plf's Exh. 3150.

Although Petitioners can eliminate nicotine from cigarettes, they choose not to. *Engle* Tr. at 11989, 14880. To the contrary, Petitioners studied addiction extensively, and carefully monitored nicotine levels to ensure that they delivered precisely the nicotine dose to best achieve the desired impact on their customer base. *Engle* Tr. at 12044-45, 13698. The reason is obvious – the industry knew that, absent nicotine, no one would buy their cigarettes. *Engle* Tr. at 19386-87.

Other previously confidential industry documents show the Petitioners working together for decades to secretly conspire to hide all of this from the public and their consumers, and to attack any research saying otherwise. *Engle* Plf's Exh. 78, 796, 3150. Publicly, they said there was no proven link between cigarettes and disease, but they would continue to research the issue and let the public know if any health risks were found. *Engle* Plf's Exh. 18. The companies also created and

funded organizations which, they claimed, would research whether cigarettes actually posed a health risk. But in reality, these organizations were merely a public relations ploy, and served as the cigarette industry's mouthpiece to create a false controversy over whether cigarettes cause disease. Tr. 2712-16. In a previously secret company document, Philip Morris was clear about this: "[O]ur product [i]s doubt . . . and our competition [i]s the body of anti-cigarette fact that exists in the public mind. . . . Doubt is our product since it is the best means of competing with the 'body of fact' that exists in the mind of the general public. It is also the means of establishing a controversy." R. 17282.

Arguments to the *Engle* Jury

The *Engle* litigation started as a statewide class action brought on behalf of addicted Florida smokers who suffered from diseases caused by their addiction to the nicotine in cigarettes. The case was to be tried in phases. Phase I addressed issues of class-wide application, such as whether nicotine cigarettes are addictive, whether Petitioners' nicotine cigarettes cause various fatal illnesses, whether Petitioners' cigarettes were defective, whether Petitioners were negligent, and whether Petitioners had concealed and engaged in a conspiracy to conceal the addictive and dangerous nature of their nicotine cigarettes. Later phases would determine Petitioners' liability to individual class members, and the amount of compensatory and punitive damages.

It took a year to try Phase I to a jury. At the end of the trial, the parties offered competing interrogatory forms for the jury's verdict. Petitioners' proposed form amounted to an "essay test" and included numerous blank lines to be filled in by the jurors with narrative explanations for their verdict. *Engle* Certain Defs. Prelim. Draft Phase I Verdict Form; *Engle* Tr. at 35967-70. The judge rejected the form as improper. Despite conceding that it was "incumbent upon all of us" to provide additional "enumerated" statements for a more detailed verdict form (*Engle* Tr. at 35954), and despite repeated requests from the trial judge, Petitioners failed to file a feasible alternative verdict form. *Engle* Tr. at 35967-68.

The interrogatories the jury ultimately used followed Petitioners' oral suggestion of a "middle ground" (*Engle* Tr. at 35969), and consisted of 12 pages with more than 240 questions including subparts. *Engle* Phase I Verdict Form.

There was no doubt that all parties understood that the findings made in the Phase I verdict form would have class-wide impact. *Engle* Tr. at 37558. Indeed, that is ***exactly what Petitioners wanted***. Petitioners repeatedly demanded that all jury findings have full preclusive effect. Thus, Petitioners proclaimed, "if the defendants win, we want as many people as possible bound" (*Engle* May 6, 1996, hrg. at 11), and if the jury answers "no . . . then not a single Florida smoker can recover." *Engle* Tr. at 36007. Petitioners then acknowledged that a verdict for the plaintiffs would enable "other class members, however

many thousands or hundreds of thousands it may be . . . [to] recover." *Engle* Tr. at 38878, 38896-97.

Petitioners and the plaintiffs then focused their arguments to the jury on the class-wide nature of the jury's decision-making task. Petitioners' argument was that cigarettes were not addictive and were not proven to cause disease, including chronic obstructive pulmonary disease ("COPD"), and that they could not be held strictly liable, or found negligent, because they had attempted to make the safest possible cigarette. *Engle* Tr. at 37053-63, 37276, 37354-63.[4] Likewise, they took an all-or-nothing approach to the fraud allegations, arguing that none of them concealed anything from the public and, even so, the public already knew everything. *Engle* Tr. at 37375-76. Petitioners also described the conspiracy action as laughable because the Petitioners are all "bitter, bitter competitors who fight, scratch and quarrel over every inch of the market share." *Engle* Tr. at 37378-84.

At the conclusion of Phase I, the *Engle* jury was instructed that the case was a class action and that the jury's role was to determine "all common liability issues" relevant to the class. *Engle* Tr. at 37557-59. Specifically, its role was to "address[] the conduct of the tobacco industry." *Engle* Tr. at 36357-58, 37557-59.

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[4] Liggett did concede that cigarette smoking was addictive for "some people" and could cause certain diseases. *Engle* Tr. at 37102-03. Philip Morris and R.J. Reynolds, selling the same story they had been selling since the 1950s, continued to argue that neither the addictive qualities of cigarette smoking nor the connection to disease had been sufficiently proven. *Engle* Tr. at 36845-46, 36886-91, 37319, 37332.

Based on the class-wide evidence and argument, the jury was asked whether Petitioners' cigarettes were unreasonably dangerous; that is, (1) did they fail to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer, or (2) did the risks outweigh the benefits? *Engle* Tr. at 37571. Similarly, as to the class's negligence and fraud claims, the jury considered the industry's failure to address the health risks and addictiveness of its products, including Petitioners' manipulation of nicotine levels, and their concealment of information pertaining to the dangers of cigarettes. *Engle* Tr. at 11988-90, 13475-77, 36451, 36472-80, 36484-85, 36717, 36729-32; *Engle* Final Judgment.

Petitioners' gamble for defeating every "single Florida smoker" claim with the findings' preclusive effect did not pay off. *Engle* Tr. at 36007; *Engle* May 6, 1996, hrg. at 11. Instead, plaintiffs won most of their allegations. So, as Petitioners had fully acknowledged before the verdict, these class-wide findings go to the Petitioners' underlying misconduct, which applies equally to every class member, "however many thousands or hundreds of thousands it may be . . . [to] recover." *Engle* Tr. at 38878, 38896-97.

Engle **Litigation**

Initially, there were "hundreds of thousands" of class members; approximately 700,000. *Engle*, 945 So. 2d at 1258. That was back in the mid-1990s. Few class

members now remain to litigate against Petitioners anymore. Only about 1 percent of the original class members met the deadline set by the Florida Supreme Court for continuing the litigation. Reynolds American Inc. Form 10-K (https://www.sec.gov/Archives/edgar/data/1275283/000095014409001505/g17683e10vk.htm) (last visited Jan. 16, 2019). And, of those approximately 8,000 viable cases, most of the smokers have already died. That is because the class members, by definition, are people who manifested fatal diseases caused by nicotine cigarettes no later than 1996 (22 years ago). *Engle*, 945 So. 2d at 1275-76. Also, because these are people who started smoking as early as the 1930s, most times their family members have passed away too, thereby eliminating a possible wrongful death action.

As to the remaining cases, during the 12 years since the Florida Supreme Court's *Engle* decision, less than 300 have made it to trial (with each side winning about half the cases). In other cases, the plaintiffs have voluntarily given up the fight or have accepted nominal settlements. A dwindling number continue to wait for their day in court.

Richard and Deborah Boatright

Richard Boatright and his wife Deborah timely filed this *Engle* progeny lawsuit against Petitioners, Philip Morris and Liggett, before the 2007 deadline. Seven years later, their case went to trial on the causation and damages issues, lasting almost a month and generating a record in excess of 70,000 pages (in

addition to the original *Engle* record). At trial, Richard Boatright proved that he was a life-long heavy smoker, he was addicted to Petitioners' products, and his addiction caused his COPD. As a result, the jury returned a verdict in Mr. & Mrs. Boatright's favor.

Petitioners appealed to the Second District Court of Appeals, raising ten issues, (*Philip Morris USA Inc. v. Boatright*, 2015 WL 13776239, at *ii-iii (PM USA Brief, 2015); *Philip Morris USA Inc. v. Boatright*, 2015 WL 13776238, at *ii (Liggett Brief, 2015)), and spending only one sentence on their Due Process argument. *Philip Morris USA Inc. v. Boatright*, 2015 WL 13776239, at *46-47 (PM USA Brief, 2015). The appellate court affirmed. Pet. App. 15a. Almost two years later (21 months), Petitioners ask this Court to review that one sentence of argument on the Due Process issue (an issue which this Court has previously denied review 24 times).

During this time, Mr. Boatright's decades-long battle with COPD has not gone well. The damage to his lungs required transplants of both of his lungs. T.2242-45, 2463. Twice. The two double-lung transplants have spawned a host of very serious and life-threatening side effects. And he lives this battle everyday.

REASONS FOR DENYING THE PETITION

I. In light of the unanimity of opinion among the state and federal courts, there is no reason to grant the Petition.

There is no good reason for this Court to spend its resources to address Petitioners' Due Process argument.

There is no split of authority. In fact, the Florida Supreme Court and the Eleventh Circuit Court of Appeals have agreed, repeatedly.

As we discuss in the next section, both courts determined that Petitioners had notice and the opportunity to be heard on the issue of their misconduct toward the class. *Philip Morris USA Inc. v. Douglas*, 110 So. 3d 419, 429-31 (Fla. 2013); *Burkhart v. R.J. Reynolds Tobacco Co.*, 884 F.3d 1068, 1091-93 (11th Cir. 2018); *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1180-85 (11th Cir. 2017); *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278, 1280-81 (11th Cir. 2013). Both courts determined that the jury was not asked to find specific instances of misconduct or defect, but to decide common liability issues for the class. *Douglas*, 110 So. 3d at 423-29; *Burkhart*, 884 F.3d at 1091-93; *Graham*, 857 F.3d at 1180-85; *Walker*, 734 F.3d at 1285-87. And, both courts determined that Petitioners had every opportunity to protest the jury instructions. *Burkhart*, 884 F.3d at 1092-93; *Walker*, 734 F.3d at 1287.

The Eleventh Circuit opinions were careful to note that court's limited role in these proceedings. *Burkhart*, 884 F.3d at 1093; *Graham*, 857 F.3d at 1184-85; *Walker*, 734 F.3d at 1288-89. It was for the Florida Supreme Court, not a federal court, to determine how to manage the class. So long as the supreme court's decisions did not prevent Petitioners from having a full and fair opportunity to litigate their class-wide liability, the Florida Supreme Court's decision was entitled to the full faith and credit of the federal courts.

In short, there is no reason for this Court's intervention. The procedures and instructions utilized in the six cases currently before this Court are substantively identical to the 24 cases which this Court previously declined to review. For the same reasons review was previously denied, review should be denied in this and the other five cases in which Petitioners have sought review.

Desperate to cast their most recent loss in the Eleventh Circuit, *Searcy v. R.J. Reynolds Tobacco Co.*, 902 F.3d 1342 (11th Cir. 2018), as justifying review, Petitioners argue that this is the first opportunity for the Court to address the Due Process argument "unencumbered by . . . the factual assessment of what the *Engle* jury supposedly decided in rendering its defect and negligence findings." Pet. p. 33.

There are two fundamental flaws with this claim. First, Petitioners ignore that the first decision by the Eleventh Circuit on this point was *Burkhart*, not *Searcy.* Petitioners chose not to seek review of *Burkhart*.

Second, and more fundamentally, Petitioners themselves have long-treated the arguments for the fraud findings and the defect/negligence findings as the same. The first time was 12 years ago, in their petition from the Florida Supreme Court's 2006 *Engle* decision, where they argued that the "sweeping consequences of the preclusion ruling warranted immediate review." *Philip Morris USA Inc. v. Engle*, 2000 WL 34014081 (Jan. 31, 2000). This Court denied review. *R.J. Reynolds Tobacco Co. v. Engle,* 552 U.S. 941 (2007).

Petitioners likewise argued the Due Process issue collectively against all of the findings, including fraud findings in many of their 24 unsuccessful petitions to this Court. *See*, *e.g.*, *Philip Morris USA Inc. v. Naugle*, 2017 WL 4117832 (Sept. 15, 2017); *R.J. Reynolds Tobacco Co. v. Gray*, 2011 WL 6370530 (Dec. 16, 2011). All were denied review. *See*, *e.g.*, *Philip Morris USA Inc. v. Naugle,* 138 S. Ct. 735 (2018); *R.J. Reynolds Tobacco Co. v. Gray,* 566 U.S. 905 (2012).

Plus, Petitioners have themselves recognized in multiple appeals to intermediary courts that the Florida Supreme Court's precedent in *Douglas* is binding authority as to the fraud counts too, despite their claim to the contrary here. *See, e.g.*, *Philip Morris USA Inc. v. Cooper*, 2016 WL 6569587, at *34 (Initial Brief, 2016); *Philip Morris USA Inc. v. Caprio*, 2015 WL 10352948, at *44 (Initial Brief, 2015). In fact, Petitioners made the same acknowledgement in their briefs to the lower court in this case. *Philip Morris USA Inc. v. Boatright*, 2015 WL 13776239, at *46-47 (PM USA Brief, 2015).

Finally, we respond to an argument made by Petitioners' reply briefs filed in support of some of their other pending petitions. Petitioners chastise the respondents there for not understanding the arguments made now. Implicitly, Petitioners are trying to argue that they have made a new argument not found in the previous, unsuccessful petitions. Even if this were true and Petitioners are now making a new, previously unconsidered argument, waiting 12 years and dozens of trials later to, for the first time, make an argument that binds the litigation amounts to a waiver of sorts, foreclosing their arguments now.

We also note that Petitioners cannot have it both ways. If they are now making a new argument not found in any of the previous petitions to this Court, they have implicitly conceded that the arguments they were making below ***in this case*** during the same time frame as the prior petitions are now different. Which means this new argument is not preserved in this case and certainly has not percolated through the lower courts yet.

II. Philip Morris and Liggett did not preserve any Due Process issue here.

Faced with the body of written opinions rejecting their due process argument, Petitioners routinely fail to even litigate the Due Process argument. In this case, for example, Petitioners included only ***one sentence*** of argument. *Philip Morris USA Inc. v. Boatright*, 2015 WL 13776239, at *46-47 (PM USA Brief, 2015). The pattern is repeated in other petitions currently pending for this Court's review. Other similar briefs are available on Westlaw. *See, e.g.*, *Philip Morris USA Inc. v. Cooper*, 2016 WL 6569587, at *34 (Initial Brief, 2016); *Philip Morris USA Inc. v. Caprio*, 2015 WL 10352948, at *44 (Initial Brief, 2015).

Florida law is clear that this is insufficient. "Claims for which an appellant has not presented any argument, or for which he provides only conclusory argument, are insufficiently presented for review and are waived." *See Hammond v. State*, 34 So. 3d 58, 59 (Fla. Dist. Ct. App. 2010); *see also Caldwell v. Fla. Dep't of Elder Affairs*, 121 So. 3d 1062, 1064, n.2 (Fla. Dist. Ct. App. 2013). On top of that, Petitioners did not even

brief how the issue was raised in and disposed of in the trial court with record citations, as required by Florida's procedural rules. Fla. R. App. P. 9.210(b)(3); *see also Hamilton v. R.L. Best Int'l*, 996 So. 2d 233, 235 (Fla. Dist. Ct. App. 2008) ("It is the decision of the lower tribunal that is reviewed on appeal, not the issue).

Philip Morris and Liggett violate similar rules of this Court. This Court's Rule 14.1(g)(i) required them to specify the "stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised," including the "method or manner of raising them and the way in which they were passed on by those courts . . . with specific references to the places in the record where the matter appears . . . so as to show that the federal question was timely and properly raised."

Of course, the arguments made now in the 34-page petition were never made to the state appellate court, where the briefs included only one sentence of argument. Likewise, Philip Morris and Liggett have not cited this Court to any ruling by the trial court on the Due Process claim they vocalize now. Instead, they direct this Court to eight pages of transcript, all from the end of the trial in this case, during arguments on directed verdict motions and jury instructions. Pet. 15-16. By this point, the case had already been tried based on the *Engle* findings and the jury had heard about them repeatedly. Obviously, by that time, the Due-Process-ship had long since sailed.

On top of that, the record in this case does not even include excerpts from the record of the class proceedings. For this Court to address the merits of the issue Philip Morris and Liggett seek to have it review, it would have to look at hundreds of thousands of pages of *Engle* transcripts and filings that were not argued to the court below.

III. The Petition is based on faulty factual premises.

At a minimum, Petitioners' Due Process argument is built on an erroneous factual premise, which makes this case a poor vehicle to review the issue. Contrary to Petitioners' argument, the very issues that Petitioners demand to relitigate were litigated and decided during the first phase of the *Engle* class litigation. Plaintiffs did not ask the jury for a verdict that applied to only some of Petitioners' brands or some of Petitioners' conduct. Nor did Petitioners defend brand by brand, or by particular instances of misconduct. Instead, as both state and federal courts have found, the purpose of Phase I was to address claims of misconduct that applied to every member of the class, and the parties focused their arguments accordingly. Thus, it is wholly inaccurate for Petitioners to argue that they face liability for questions that were never litigated or decided.

To the extent Petitioners claim that the questions asked on the Phase I verdict form were too vague to be of use in subsequent phases of the litigation, their claim ignores how Phase I was tried, and, in any event,

comes far too late. As noted above, both Petitioners and plaintiffs asked for an up or down, class-wide vote that would be applicable to all of Petitioners' conduct, and neither party suggested to the jury that it was ruling on particular defects or misconduct that would apply to only some of the class members.

Moreover, Petitioners knew that the findings were to apply to every class member in subsequent phases of the litigation. If Petitioners thought the jury verdict form was inadequate for that purpose, Petitioners should have offered a legally sufficient alternative, which they failed to do. Under Florida law, to preserve an argument for a jury instruction or verdict form, a party must propose a version which itself is accurate and not objectionable. *See* 1.470, Fla. R. Civ. P.; *Whitman v. Castlewood Int'l*, 383 So. 2d 618, 619-20 (Fla. 1980) (to properly object to a general verdict form, party must submit a proper special verdict form); *Florida E. Coast Ry. Co. v. Gonsiorowski*, 418 So. 2d 382, 384 (Fla. Dist. Ct. App. 1982) (to preserve the issue, defendant was required to present a special verdict form).

Petitioners' decision not to submit a viable alternative jury verdict form is now water under the bridge, and they must live with the consequences of that strategic decision. *Burkhart*, 884 F.3d at 1092-93; *Walker*, 734 F.3d at 1287.

Of course, the reason that Petitioners did not ask for a more detailed verdict form was that they had no interest in the specific instances of defect and conduct

discussed in the Petition. Petitioners chose to go "all or nothing," arguing to the jury that ***none*** of their cigarettes were defective, and that they had not behaved negligently or committed fraud. Having placed that bet and lost, it is too late to complain.

In summary, Petitioners' issues are entirely academic because they are inconsistent with the facts of the case, and review would serve no useful purpose to the parties or anyone else. Plus, these were settled long ago in *Engle*, which Petitioners appealed to the Florida Supreme Court and lost, and then unsuccessfully sought review in this Court. At their core, the six petitions currently before the Court amount to little more than an improper attempt to relitigate the Florida Supreme Court's original *Engle* decision.

IV. The Florida Supreme Court's application of Florida preclusion law does not violate Due Process.

We adopt here the arguments made by the respondents in the other petitions pending before this Court, including *R.J. Reynolds Tobacco Co. v. Searcy*, Case No. 18-649, and *Philip Morris USA Inc. v. Jordan*, Case No. 18-551. We write to make three additional points.

First, the unanimity of the state and federal rejection of Petitioners' Due Process claims is not surprising. Indeed, it is likely that no defendants in the history of Florida litigation have ever had more Due Process. The cornerstone of Due Process, of course, is a

full and fair opportunity to be heard. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Petitioners have certainly been heard. The original *Engle* Phase I record on the misconduct claims consisted of 57,000 pages of testimony, 150 witnesses, and thousands of exhibits, and the case took a year to try. *Douglas*, 110 So. 3d at 424. Petitioners appealed Phase I to the Florida Supreme Court and then unsuccessfully sought review on their Due Process questions in this Court and lost. In the instant case, the trial below on the causation and damages issues took more than three weeks and generated a 71,000-page record with a 5,700-page transcript. Petitioners appealed to the District Court of Appeal, sought review in the Florida Supreme Court, and once again seeks review in this Court.

Thus, as this case demonstrates, by the end of an *Engle* progeny trial, every conceivable defense has been litigated by Petitioners. In the year-long Phase I *Engle* trial, Petitioners had every opportunity to convince the jury that the cigarettes they sold to the class were not defective, that they were not negligent, and that they did not commit fraud. Petitioners failed. In the typical two- to four-week individual *Engle* progeny trial, Petitioners have every opportunity to demonstrate why the particular individual smoker should not prevail. Sometimes Petitioners succeed; sometimes they fail. The point is, Petitioners have already been given every opportunity to litigate their class-wide claims and defenses, and in the progeny trials they

enjoy every opportunity to litigate the individual claims and defenses before a judgment is finally rendered.[5]

Second, Due Process requires that Petitioners have the opportunity to litigate their case. It does not give them the right to relitigate those claims *ad infinitum* if they are dissatisfied with the initial result.

Third, Petitioners' complaint about Due Process completely ignores the Due Process rights of the *Engle* class members. These class members have been waiting for their day in court since 1994, when the *Engle* litigation began. Acceptance of Petitioners' arguments does not mean that this litigation will disappear. Instead, it means that, after almost 25 years, every class member will effectively have to start over in proving the defendants' well-known and common course of misconduct in trials that will be much longer than the typical *Engle* progeny case under the current trial plan.

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[5] Contrary to the tenor of the Petition, Petitioners have fared quite well in defending these claims, winning a sizable percentage of cases tried to date. As an amicus brief filed in the Eleventh Circuit in *Walker* details, of the 107 *Engle* progeny trials that had taken place as of the date of that brief, plaintiffs prevailed in 61 cases, Tobacco had won 28, and 18 ended in mistrials. If one counts a mistrial as a defense victory, as Petitioners do, they had prevailed in 43% of the trials to date. Moreover, a sizable percentage of plaintiffs' victories resulted in a small or nominal verdict, as *Walker* itself demonstrates. *See Walker*, 734 F.3d at 1288 (the *Walker* opinion considers two plaintiffs' verdicts, one for $28,000 in *Walker* and another for $8,000 in the companion *Duke* case). Indeed, as of the time of the amicus brief in *Walker*, only ten plaintiffs, after 19 years of litigation, had successfully navigated their cases to payment of a judgment.

The practical result for the plaintiffs will be that almost all of the few remaining class members will die of their cigarette-induced disease before their cases ever go to trial. And the practical result for the court system would be to exponentially increase the burden presented by this litigation. In sum, the ruling sought by Petitioners here would defeat the original purpose for trying the misconduct of Petitioners as a class action and return the remaining *Engle* progeny cases to the starting line. Due Process does not require such an unfair result.

CONCLUSION

For the foregoing reasons and for the reasons articulated in the oppositions filed in the *Searcy* and *Jordan* cases, the Petition for Writ of Certiorari should be promptly denied.

Respectfully submitted,

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