No. 13-191

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC., R.J. REYNOLDS TOBACCO COMPANY, AND LIGGETT GROUP LLC,
Petitioners,

v.

JAMES L. DOUGLAS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLOTTE M. DOUGLAS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

BRIEF *AMICUS CURIAE* OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS IN SUPPORT OF PETITIONERS

JOHN T. WHATLEY
ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC.
1401 Eye Street, NW
Suite 900
Washington, DC 20005
(202) 326-5500

JOHN M. THOMAS
Counsel of Record
DYKEMA GOSSETT PLLC
2723 South State Street
Suite 400
Ann Arbor, MI 48104
(734) 214-7613
jthomas@dykema.com

Counsel for Amicus Curiae

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STATEMENT OF INTEREST[1]

The Alliance of Automobile Manufacturers ("the Alliance") is an association of twelve major vehicle

[1] Pursuant to this Court's Rule 37.2, all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of Court. In accordance with Supreme Court Rule 37.6, *amicus* states that this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than the *amicus* or its counsel.

manufacturers accounting for approximately 77 percent of all car and light truck sales in the United States. The members of the Alliance are often subject to class action litigation in which plaintiffs claim (1) that numerous vehicle types and models are "uniformly defective," regardless of acknowledged differences in design and performance, and (2) that the defendants "uniformly failed to disclose" potential risks, regardless of acknowledged differences in the information provided to consumers. Occasionally, state and federal courts erroneously certify classes in such cases, accepting plaintiffs' assertion that they will prove that all of the vehicle models are defective, and all of the disclosures were inadequate, regardless of those acknowledged differences.

And yet, plaintiffs in such cases typically continue to rely on evidence and theories unique to specific models and specific disclosures. Further, when such class cases are tried, juries—like the jury in the class trial here—are typically instructed in ways that require them to return the equivalent of a general verdict for plaintiffs if they find that *any* of plaintiffs' theories have merit. The opinion of the Florida Supreme Court, if allowed to stand, would allow courts to assume that such a general verdict applied to all vehicles owned by all member of the purported class—even though the specific findings actually made by the jury could well apply only to some vehicles owned by some members of the purported class.

In short, the Florida Supreme Court's decision allowing general, undifferentiated findings of a jury to be applied to everyone in a purported class has the potential to significantly affect much of the class action litigation filed against members of the Alliance.

SUMMARY OF ARGUMENT

The issue presented in this case lurks, often unrecognized, in countless class actions filed against product manufacturers and others, regardless of whether plaintiffs are seeking true "issue classes." As in *Engle,* plaintiffs often seek to certify classes to litigate whether multiple different products with different designs and performance characteristics are defective (or whether multiple different disclosures are inadequate). Plaintiffs' argument for class certification in such cases—occasionally accepted, as it was in *Engle*—is that they will prove that *all* of the products are defective, and all of the disclosures are inadequate, regardless of the differences. But there is no constitutional way to properly submit such a claim to the jury consistent with an order certifying the class. Rather, the choice is between two obviously unconstitutional alternatives: (1) instruct the jury that it must find for the defendant as to the entire class if it finds that any one class member purchased a product that was not defective (thereby violating the due process rights of the remaining class members who may have purchased defective products), or, (2) as in *Engle,* instruct the jury that it must find for the entire class if it finds that even one class member purchased a defective product (thereby denying due process to the defendant by holding it liable to the remaining class members who may have purchased non-defective products). The fact that the first alternative is unacceptable does not justify the use of the second.

In federal court, certifying a class under these circumstances would violate Fed. R. Civ. P. 23. In state courts not bound by Rule 23, applying a jury's

undifferentiated findings in such a case to bind either class members or the defendants violates due process.

STATEMENT OF THE CASE

The Alliance accepts Petitioners' Statement of the Case, but for purposes of the argument which follows would like to highlight a few of the basic facts.

1. During the year-long class trial in *Engle,* the plaintiffs advanced multiple theories to support their claims that cigarettes were defectively or negligently designed or manufactured. Many of these theories pertained only to some cigarettes during some limited times. For example, plaintiffs asserted that *some* cigarette brands used genetically engineered tobacco in the 1990's; that *some* brands had higher smoke pH than necessary; that the filters on *some* cigarettes contained harmful components; that *unfiltered* cigarettes had unduly high tar or nicotine yields; and that the ventilation holes in "light" or "low tar" cigarettes were improperly placed. Similarly, plaintiffs asserted that cigarettes were accompanied by inadequate warnings in a variety of ways at different times.

2. With respect to the strict liability claim, the verdict form submitted to the jury in the class trial simply asked whether defendants "placed cigarettes on the market that were defective and unreasonably dangerous." With respect to the negligence claim, the jury was simply asked whether the defendants exercised reasonable care. As formulated, these questions demanded a "yes" answer if the jury agreed with *any* of plaintiffs' theories of defect or negligence. A "no" answer would have been appropriate only if the jury rejected *all* of plaintiffs' theories.

3. The *Engle* trial judge denied defendants' motion for directed verdict, finding that the evidence was more than sufficient to support a conclusion that the cigarettes marketed by defendants were "defective in many ways." According to the trial judge, for example, the jury could have found that cigarettes were defective because levels of nicotine were "*sometime*[s]" manipulated "by utilization of ammonia," "*sometimes*" by using Y-1 tobacco (with a higher nicotine content), and *sometimes* by manipulating tar and nicotine levels. *Philip Morris USA, Inc. v. Douglas,* 110 So.3d 419, 423 (Fla. 2013) (emphasis added). The trial judge also relied on evidence that "*some* cigarettes were manufactured with the breathing air holes in the filter being too close to the lips," which had the effect of "increasing the amount of the deleterious effect," and evidence that "*some* filters being test marketed utilize glass fibers that could produce disease and deleterious effects if inhaled." *Id.* at 424 (emphasis added).

4. In short, assuming that the evidence was sufficient to support a finding that cigarettes marketed by defendants were "defective in many ways," the only thing logically established by the *Engle* verdict is that at least some cigarettes were defective in at least one of these many ways. It does not logically establish that all of the cigarettes were defective in all of the ways claimed by plaintiffs; indeed, the jury could have rejected all of plaintiffs' theories but one (the glass fiber theory, for example, applicable only to some filters). The actual findings made by the jury cannot be known.

ARGUMENT

THE ISSUE PRESENTED BY THIS CASE IS OF GREAT SIGNIFICANCE TO CLASS ACTION LITIGATION GENERALLY

The petition and the amicus brief filed on behalf of the Product Liability Advisory Council, Inc., ("PLAC") fully explain why it was a denial of due process for the Florida Supreme Court—purporting to apply an almost unrecognizable version of the doctrine of res judicata—to allow Plaintiff to recover without having to prove essential elements of his claim or establishing that those elements were actually decided in his favor by the *Engle* jury. The petition and the PLAC amicus brief also explain why this issue is of grave importance in light of the increasing use of "issues classes," i.e., classes certified to litigate only certain issues pursuant to Fed. R. Civ. P. 23(c)(4). The Alliance does not intend to repeat any of these arguments; rather, the Alliance intends to demonstrate that the significance of the due process issue in this case extends even beyond "issues classes" to any class action where—like the plaintiffs in *Engle*—the plaintiff claims that a manufacturer sold multiple different products that are "uniformly defective" and that the manufacturer failed to disclose this "uniform defect."

This type of claim is routinely made by plaintiffs in litigation filed against manufactures of many different kinds of products, including motor vehicles, televisions, telephones, microwaves, refrigerators, etc.[2] As

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[2] *See, e.g., Weske v. Samsung Elecs. Am., Inc.*, Civ. No 2:10-4811, 2013 WL 1163501 (D.N.J. Mar. 19, 2013) (refrigerators); *Johnson v. Harley-Davidson Motor Co. Group, LLC,* 285 F.R.D. 573 (E.D. Cal. 2012) (motorcycles); *In re Hitachi Television Optical Block Cases*, No. 08cv1746, 2011 WL 4499036 (S.D. Cal.

in *Engle*, plaintiffs in such cases typically define the purported class broadly enough to cover many different models and many different designs, and to cover a period of time in which numerous design changes, and numerous different disclosures, were made. As in *Engle,* plaintiffs in such cases typically seek class certification based on their claim that they will prove that all models and designs were defective in some respect, and that all of the disclosures were inadequate. And yet, as in *Engle,* plaintiffs are typically unwilling to abandon the strongest claims applicable only to some models and some designs, or to some disclosures. Even if plaintiffs themselves rigorously disavow reliance on their best evidence because it is applicable only to some models, designs or disclosures—and thereby potentially sacrifice the strongest claims available to some class members—the defendants will have no choice but to rely on their best evidence with respect to their best-performing models and designs, and their most complete disclosures.

If classes are certified in this type of routine litigation, as they sometimes are, the certification will necessarily rest on a finding that the existence of a defect, and the adequacy of the disclosures, are common questions suitable for resolution on a classwide basis. *See, e.g., Butler v. Sears Roebuck & Co.*, __ F.3d __, 2013 WL 4478200 (7th Cir. July 8, 2013); *In re Whirlpool Corp. Front Loading Washer*

Sept. 27, 2011) ("*Hitachi*") (televisions); *Hennigan v. General Elec. Co.*, No. 09-11912, 2010 WL 3905770 (E.D. Mich. Sept. 29, 2010) (microwaves); *Schweinfurth v. Motorola, Inc.*, No. 1:05cv0024, 2007 WL 6025288 (N.D. Ohio Dec. 3, 2007) (cell phones); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 982 F. Supp. 388 (E.D. La. 1997) (vehicles).

Prods. Liab. Litig., 722 F.3d 838 (6th Cir. 2013) ("*Whirlpool*"); *Neale v. Volvo Cars of N. Am., LLC*, No. 2:10-cv-4407, 2013 WL 1223354 (D.N.J. Mar. 26, 2013). Therefore, the verdict form submitted to the jury is likely to be similar to the one used in *Engle,* i.e., a verdict form that requires the jury to determine whether the defendant sold defective products, or whether it sold the products without making an adequate disclosure—with no opportunity for the jury to distinguish among models, designs, or disclosures. Indeed, asking the jury to make such distinctions would be inconsistent with the order certifying the class and the finding that the questions were common to the entire class. If the decision of the Florida Supreme Court is correct, the "judgment" entered after the class trial—whether on the entire claim or only certain elements of the claim—can bind the defendant with respect to the broadest, most all-encompassing theory presented to the jury, either in the same case or in subsequent individual cases. *This is so even though the jury may have rejected that claim.* As a result, a verdict for plaintiffs in such cases necessarily will present the same due process problem as this case, regardless of whether the certified class is properly characterized as an "issues class."

That this fundamental due process problem lies at the core of much modern class action litigation can be demonstrated by examining, in detail, the Sixth Circuit's decision in *Whirlpool*. The case happens to involve front-loading washing machines, but the claims made against the multiple different washing machines there are similar to the claims made against multiple different cigarettes in *Engle* and typical of claims made against manufacturers of numerous other products.

In *Whirlpool,* a plaintiff purchased a Duet HT front-loading washing machine in 2005, and another plaintiff purchased a Duet Sport in 2006. They filed a class action in which they purported to represent all purchasers of these two models, as well as all purchasers of Duet and Duet Sport HT models. They claimed that "all of the Duets share a common design defect," i.e., "their failure to clean or rinse their own components to remove soil residues on which fungi and bacteria feed, producing offensive odors." *Id.* at 847.

"[A]ll washing machines can potentially develop some mold or mildew after a period of use." *Ibid.* Further, all front-loading washing machines tend to "promote mold or mildew more readily because of the lower water levels used and the higher moisture content within the machines, combined with reduced ventilation." *Ibid.* Thus, the defect alleged could not be the mere potential for mold to develop—a potential that exists with all washing machines, and particularly front-loading machines—but an *unreasonably high potential* for mold. The evidence was undisputed that Duet washing machines were built on two separate platforms, the "Horizon" platform and the "Access" platform. To support their claims, the plaintiffs relied on defendant's own documents from 2004 showing that the "Access" platform's webbed tub structure was "extremely prone" to water and soil deposits, and the aluminum basket cross-bar was "highly susceptible" to corrosion because of biofilm. As a result, "Whirlpool made certain design changes to later generations of Duets," *id.* at 848, including changes to the tub design. *Id.* at 854.

By 2011, there were 21 different models built on two different platforms over the course of 9 years. The district court certified a "liability class" consisting of

all Ohio residents who purchased any of these models for personal, family, or household purposes. *Id.* at 849. The court "reserved all issues concerning damages for individual determination." *Id.* at 860. The Sixth Circuit affirmed on July 18, 2013, holding that "[e]vidence will either prove or disprove as to all class members whether the alleged design defect caused the collection of biofilm, promoting mold growth." *Id.* at 859. Any petition for a writ of certiorari will be due on October 16, 2013.

If the trial court's order is ultimately affirmed, the nature of the class trial is not difficult to predict. Plaintiffs will claim that all 21 models have an unreasonably high potential for mold, but they will continue to rely heavily on the 2004 documents in which Whirlpool employees themselves opined that the "Access" platform washers in particular were "highly susceptible" and "extremely prone" to problems because of the tub and cross-bar design. Whirlpool will be entitled to present evidence that the "Horizon" platform utilized different tub and cross-bar designs, that it changed the tub and cross-bar design on "Access" models after 2004 for the precise purpose of reducing the potential for problems, and that the potential was in fact reduced for later models. Plaintiffs likely would try to respond with evidence and argument that the acknowledged differences between "Access" and "Horizon" models, and between early "Access" models and later ones, are not significant, either because they all have the same potential for problems or because the potential for problems, while lower in some models, was still unacceptably high.

At the conclusion of such a trial, where plaintiffs own evidence would support different conclusions with respect to the various models, the trial court would be

confronted with a conundrum: How can such a case properly be submitted to the jury? There are only three possibilities, but all of them are unacceptable:

- First, the district court could ask the jury to make 21 separate determinations with respect to each model of washing machine. But asking 21 individual questions, with the potential for different answers, would be a recognition that a jury could reach different conclusions with respect to different models and that the question of design defect is not in fact common—i.e., that the class was not properly certified to begin with.
- Second, the court could instruct the jury to return a verdict for the class if and only if it found that *all* 21 models were defective. This at least would be consistent with the theory on which plaintiffs asked that the class be certified, i.e., their representation that they would prove that all models were defective. But this would require the jury to return a verdict for the defendant if it concluded that just one model was not defective, even if it concluded that the remaining 20 models were defective. This would deprive due process to the owners of the remaining 20 models.[3]

[3] There is a variation of this alternative that would avoid this problem but create others. The court could submit a special interrogatory simply asking the jury whether all models are defective and then either (1) enter judgment on liability against the defendant if the jury's answer is "yes," or (2) dismiss the case without prejudice if the jury's answer is "no," leaving all class members free to pursue individual claims. But this would result in a trial that the defendant could only lose and could never win,

- Finally—and most likely—the court could instruct the jury as the jury in *Engle* was instructed, i.e., in a way that requires it to return a verdict for plaintiffs if they find that any one model was defective. But this would require a verdict for plaintiffs even if the jury concluded that only one model was defective—an early "Access" model for example—even if the jury also found that the remaining 20 models were not defective. Quite plainly, however, this would deny due process to the defendant.

The due process violation here is just as obvious as the due process violation in the third hypothetical based on *Whirlpool*. And it would be just as obvious in any other case where plaintiffs propose to have classes certified by claiming that multiple different products with multiple different designs and performance characteristics are all "uniformly defective." And such cases are far from rare; on the contrary, they are disturbingly common. *See supra* note 2.

In federal courts, the ultimate solution lies not in how the case is submitted to the jury. As the *Whirlpool* hypothetical shows, there is no proper way to submit such a case to a jury without violating the due process rights of class members or the defendant. Rather, as numerous courts have recognized, the solution in such cases is to deny class certification because the purportedly common question is not in fact common and the requirements of Fed. R. Civ. P.

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and it would establish that a class action was not in fact an efficient or superior method of litigating the dispute.

23 have not been met.[4] This Court can and should so hold in an appropriate case. State courts, of course, are not bound by Rule 23. Nevertheless, as the *Whirlpool* example shows, applying the findings resulting from such a class trial will inevitably violate the due process rights of one party or the other.

In this case, it is Defendants' due process rights that have been violated. No jury has made a finding that all of Defendant's products are defective, and yet Defendants are being held liable in this case as if such a finding has in fact been made. The same potential due process violation—or others of equal concern—exists in countless other class actions routinely filed in state and federal courts across the country.

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[4] *See, e.g.*, *Daniel v. Ford Motor Co.*, No. Civ 2:11-02890, 2013 WL 3146810, at *4-6 (E.D. Cal. June 18, 2013); *Johnson*, 285 F.R.D. at 582-84; *Cholakyan v. Mercedes-Benz USA, LLC*, 281 F.R.D. 534, 551-56 (C.D. Cal. 2012); *Hitachi*, 2011 WL 4499036, at *3-5; *Oscar v. BMW of N. Am., LLC*, 274 F.R.D. 498, 510-11 (S.D.N.Y. 2011); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 194 F.R.D. 484, 490-95 (D.N.J. 2000).

CONCLUSION

This case raises fundamental due process concerns that will inevitably arise in countless class actions that are routinely filed against product manufacturers, including motor vehicle manufacturers. The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN T. WHATLEY
ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC.
1401 Eye Street, NW
Suite 900
Washington, DC 20005
(202) 326-5500

JOHN M. THOMAS
Counsel of Record
DYKEMA GOSSETT PLLC
2723 South State Street
Suite 400
Ann Arbor, MI 48104
(734) 214-7613
jthomas@dykema.com

Counsel for Amicus Curiae

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