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NO. 10-735

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC., *ET AL.*,
Petitioners,

v.

DEANIA M. JACKSON,
ON BEHALF OF HERSELF AND ALL OTHER PERSONS SIMILARLY SITUATED,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Fourth Circuit Court of Appeal

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Have Petitioners requested an inappropriate advisory opinion when the judgment below is supported by alternate proven causes of action in which their defenses are immaterial?

2. Does the Due Process Clause prohibit States from recognizing classwide causes of action, such as for increased risk of harm, that result in classwide injunctive remedies without requiring individualized proof?

3. Must a state court permit unfettered cross-examination of named class representatives to present evidence that is merely cumulative and largely immaterial?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

BRIEF FOR RESPONDENT IN OPPOSITION 1

COUNTERSTATEMENT OF THE CASE 1

A. Proceedings Below 1

B. Misstatements of Facts and Law in the Petition 6

REASONS FOR DENYING THE PETITION 10

I. The Petition Improperly Asks this Court for an Advisory Opinion 11

A. The Cause of Action Based on Nicotine Manipulation Does Not Require Reliance 11

B. Breach of an Assumed Duty Does Not Require Proof of Reliance 14

C. Louisiana Law Authorizes Relief Without Proof of Reliance 15

II. This Case Is Not a Suitable Vehicle to Consider Due Process Limitations on State Class Actions 16

A. Generic Complaints about State Class Actions Raise No Cert-worthy Issue in this Case 16

B. This Case Presents No Issue of Great National Importance or Conflict between Courts Concerning Representativeness in Class Actions 19

C. Limiting Cross-Examination of Named Plaintiffs Here Does Not Merit this Court's Attention 23

III. Individual Reliance Is Not Required by Due Process for All Forms of Class Actions 25

A. Many State Statutes Sounding in Fraud Eschew Proof of Reliance 25

B. Judicial Decisions Do Not Require Individualized Reliance for All Fraud Actions 28

C. Louisiana Law Does Not Require Direct Proof of Individualized Reliance 29

CONCLUSION 36

APPENDIX TABLE OF CONTENTS

APPENDIX A: Constitutional & Statutory Provisions 1a

TABLE OF AUTHORITIES

Cases

Altria Group, Inc. v. Good, 555 U.S. 70 (2008) 18

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) 20, 22

Banks v. New York Life Insurance Co., 737 So.2d 1275 (La. 1999) 35, 36

Basic, Inc. v. Levinson, 485 U.S. 224 (1988) 39

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) 19

Bonnette v. Conoco, Inc., 837 So.2d 1219 (La. 2003) 13

Bourgeois v. A.P. Green Industries, Inc., 716 So.2d 355 (La. 1998) 12, 16

Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639 (2008) 31, 32

Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331 (4th Cir. 1998) 24

Bujol v. Entergy Service, Inc., 922 So.2d 1113 (La. 2004) 15

Buxton v. McKendrick, 64 So.2d 844 (La. 1953) 35

Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) 1

Cordes & Co. Financial Services, Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91 (2d Cir. 2007) 1

Dean v. General Motors Corp., 301 F. Supp. 187 (E.D. La. 1969) 13

Dix v. American Bankers Life Assurance Co. of Florida, 415 N.W.2d 206 (Mich. 1987) 34

Dornak v. Lafayette General Hospital, 399 So.2d 168 (La. 1981) 15

Duplechin v. Adams, 665 So.2d 80 (La. Ct. App. 1995) 35

East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977) 22

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 14

Federal Trade Commission v. Brown & Williamson Tobacco Corp., 778 F.2d 35 (D.C. Cir. 1985) 29

Federal Trade Commission v. Figgie International, Inc., 994 F.2d 595 (9th Cir. 1993) 29, 30

Ford Motor Co. v. E.E.O.C., 458 U.S. 219 (1982) 21

Gauthier v. Sperry Rand, Inc., 252 So.2d 129 (La. Ct. App. 1971) 13

General Telephone Co. of Southwest v. Falcon, 457 U.S. 147 (1982) 23

Group Health Plan, Inc. v. Defendants Inc., 621 N.W.2d 2 (Minn. 2001) 29

Haines v. Liggett Group, Inc., 814 F.Supp. 414 (D.N.J. 1993) 18

Hansberry v. Lee, 311 U.S. 32 (1940) 20

Herb v. Pitcairn, 324 U.S. 117 (1945) 11

In re Linerboard Antitrust Litigation, 305 F.3d 145 (3d Cir. 2002) 24

McLaughlin v. American Tobacco Co., 522 F.3d 215 (2d Cir. 2008) 32

Mire v. Eatel Corp, Inc., 849 So.2d 608 (La. Ct. App.), *writ denied*, 855 So.2d 317 (La. 2003) 36, 37

Mire v. Eatelcorp, Inc., 927 So.2d 1113 (La. Ct. App. 2005) 37

Mitchell v. Limoges, 923 So.2d 906 (La. Ct. App. 2006) 26

Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co., 290 F.3d 578 (3d Cir. 2002) 30

Petrovic v. Amoco Oil Co., 200 F.3d 1140 (8th Cir. 1999) 23

Philip Morris USA v. Williams, 549 U.S. 346 (2007) 18

Richards v. Jefferson County, 517 U.S. 793 (1996) 20

Sanders v. Francis, 561 P.2d 1003 (Or. 1977) ... 31, 32

Scott v. American Tobacco Co., Inc., 949 So.2d 1266 (La. Ct. App. 2007), *writ denied*, 973 So.2d 740 (La. 2008) 4

Sosna v. Iowa, 419 U.S. 393 (1975) 22

Spencer v. Hartford Financial Services Group, Inc., 256 F.R.D. 284 (D. Conn. 2009) 32

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Straley v. Calongne Drayage & Storage, Inc., 346 So.2d 171 (La. 1977) 12

United States v. Philip Morris USA, Inc., 449 F.Supp.2d 1 (D.D.C. 2006), *aff'd in part, rev'd in part*, 566 F.3d 1095 (D.C. Cir. 2009), *cert. denied*, 130 S.Ct. 3501 (2010) 17, 37

Vasquez v. Superior Court, 484 P.2d 964 (Cal. 1971) 30, 33, 34

Waste Management Holdings, Inc. v. Mowbray, 208 F.3d 288 (1st Cir. 2000) 24

Watson v. Philip Morris Co., Inc., 551 U.S. 142 (2007) 18

Wilkinson v. *Austin*, 545 U.S. 209 (2005) 26

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Constitutional Provisions

U.S. Const. amend. XIV 10, 18, 29, 35

La. Const. art. V, § 10(B) 32

Statutes

18 U.S.C. § 1961 *et seq.*, ... 16

28 U.S.C. § 1332 16

La. Civ. Code art. 1953 31

La. Civ. Code art. 2315(A) 2, 7, 11

La. Civ. Code. art. 2315 13

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Memorandum from J. Michael Jordan, counsel for RJ Reynolds Tobacco Co. (Apr. 29, 1988) 17

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Rules

Fed. R. Civ. P. 23 1

S. Ct. R. 15 6

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Deania M. Jackson, on behalf of herself and all other persons similarly situated, respectfully requests that this Court deny the petition for writ of certiorari that seeks review of the decision of the Louisiana Fourth Circuit Court of Appeal.

COUNTERSTATEMENT OF THE CASE

A. Proceedings Below

Plaintiffs, Deania M. Jackson and the late Gloria Scott, commenced this statewide class action in Louisiana on May 24, 1996 against the major cigarette companies and their trade association, the Tobacco Institute.[1] Class certification was denied for their original claim for compensatory damages arising from nicotine dependence. In 1997, the trial court certified an alternate, more limited class of Louisiana smokers, who, as of May 24, 1996, desired to participate in a smoking-cessation program or medical monitoring program, and who alleged that one or more defendants intentionally acted to undermine or eliminate compliance with or attention to cigarette packaging warnings. Pet. App. 283a-

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[1] The two named plaintiffs were originally part of a broader nationwide class action seeking compensatory and punitive damages that the U.S. Court of Appeals for the Fifth Circuit decertified largely because of how "variations in state law affect predominance and superiority" in conducting a class action. *Castano v. American Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996). *Castano's* reading of Rule 23, not relevant here, is not without controversy. *See, e.g., Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 109 (2d Cir. 2007).

284a.[2] The Court of Appeal affirmed the certification, and the Louisiana Supreme Court denied writs. *See* Pet. App. 62a, 281a-303a.

The case was tried in two phases over nine months between June 18, 2001 and May 21, 2004. The trial plan, after numerous writ applications and remands that altered the plan, was validated by Louisiana's appellate courts. *See* Pet. App. 34a, 260a-280a.

The Phase I trial on common issues of fault and causation took six months, during which 44 fact and expert witnesses testified and thousands of documents were admitted into evidence. Pet. App. 106a, 106a n.6. On a claim made pursuant to La. Civ. Code art. 2315(A), App. 1a, the jury found that defendants deliberately concealed the addictive qualities of the nicotine used in their cigarettes, which they knowingly designed and employed to addict smokers so that quitting became extremely difficult, if not impossible. Pet. App. 228a-234a (Jury Special Verdict 6-17). It further found, in accordance with Louisiana law, that the nicotine dependence caused by Defendants' misconduct constituted cognizable injury because it led to a significantly increased risk of contracting a latent disease. Pet. App. 234a (Jury Special Verdict 17). On the claim of fraud, the jury separately found that Defendants engaged in a massive half-century campaign to undermine health warnings and other information

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[2] The Louisiana courts have ruled throughout these proceedings that "individualized claims of class members for damages have been reserved, and will have to be litigated in the future," if at all. Pet. App. 65a.

about smoking and disease, which increased the risk of harm to the entire class. As part of this claim, the jury found Defendants had engaged in fraud by intentionally distorting the body of public knowledge about smoking and health, upon which an intended and foreseeable class of Louisiana citizens relied to their detriment. Pet. App. 235a-240a (Jury Special Verdict 19-30).

The jury also found the elements of conspiracy proven. Pet. App. 240a-243a. In addition, Defendants were held to have assumed and intentionally breached a duty not to market cigarettes to minors.[3] Pet. App. 244a-248a. The jury rejected Plaintiffs' product liability cause of action. Pet. App. 248a-52a. The jury then determined that each of the proven causes of action independently justified the remedy of smoking-cessation assistance. Pet. App. 193a-194a, 196a, 240a-243a, 252a-258a.

The trial court held Plaintiffs satisfied Louisiana's requirements for a class action seeking medical monitoring, but the jury declined to approve that remedy. It did, however, find that smoking-cessation assistance was warranted on this record. Pet. App. 193a-194a, 196a, 240a-243a, 252a-258a. The jury rejected Defendants' defense that smokers knew about the hazards and addicting qualities of cigarettes. Pet. App. 258a.

The trial court further held that, because the action sought a single, common, unitary, court-supervised fund by the class as a whole, "the only question of reliance is reliance of the class as a whole

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[3] Both named plaintiffs began smoking as minors.

and the Phase I jury found class wide reliance." Pet. App. 222a; *see also* Pet. App. 213a. The court then held that individual reliance was not a Phase II issue, which focused on the nature and scope of the cessation program, but held individual reliance was instead "reserved for Phase IV individual, monetary damage trials." Pet. App. 222a. The Louisiana Court of Appeal later agreed, and the Supreme Court denied further review. Pet. App. 46a, *writ denied*, 973 So.2d 740 (La. 2008).

The trial court noted that Defendants provided the court with "no controlling authority for the proposition that they have a 'due process' right to conduct an individualized jury trial for each class member" where Plaintiffs limited their claim to participating in a court-supervised remedial program. Pet. App. 199a. Defendants, it further noted, "have had the full and fair due process right to present evidence during the Phase I trial, which included all issues of liability and causation." Pet. App. 199a-200a.

The Phase II trial was designed to establish "the threshold requirements for the establishment" of smoking-cessation programs, eligibility for that assistance, and the scope and content of the programs. Pet. App. 198a. Phase II resulted in an order to establish a court-supervised smoking-cessation program and requiring Defendants to deposit $591,343,476.55 into the Registry of Court. Pet. App. 105a. Plaintiffs proposed a twelve-component program supported by uncontested expert evidence. Pet. App. 119a. Defendants conceded that five of the components were effective and endorsed by experts. Pet. App. 120a. The jury found all twelve

components appropriate. Although Plaintiffs asked for a 25-year program, the jury limited it to a ten-year program. *See, e.g.*, Pet. App. 173a.

Plaintiffs presented evidence that the class consisted of 505,000, while Defendants placed the number at 440,000. Pet. App. 122a. The jury accepted the 505,000 figure. The jury also accepted Plaintiffs' evidence that there would be 202,000 attempts to quit each year; Defendants' evidence "was essentially very similar." Pet. App. 126a, 129a. The jury determined that $591,342,476.55 was needed to fund the program for ten years, including administration. Pet. App. 131a. The cost of the program was not seriously challenged by Defendants. Pet. App. 128a.

On further appeal, the Louisiana Court of Appeal concluded that Plaintiffs' claims were not novel legal theories and contained clear common issues of fact, making it susceptible to class treatment. Pet. App. 289a. Trying the case as a class, the court held, was the only economically feasible way to pursue the limited remedy sought. Pet. App. 290a, 302a. This was especially so after the court later held that the average yearly cost of smoking-cessation assistance per plaintiff is only $153, rendering the case uneconomic to try any other way. Pet. App. 27a. Still, the appeals court found the class improperly included Plaintiffs whose claims, if any, accrued after enactment of the 1988 Louisiana Products Liability Act (LPLA), La. Rev. Stat. §§ 9:2800.51 *et seq.*, and found the eligible class members numbered at least 250,000. Pet. App. 26a. Accepting a 40 percent utilization rate consistent with the jury's findings and accounting for death and

success at quitting, Pet. App. 27a & n.19, as well as a reduced program of four smoking-cessation components, the total cost for services was set at $230,038,560 to be paid into the court's registry in trust. Pet. App. 28a. The Court also sustained a five-percent third-party administration fee. Pet. App. 28a. The fund, the court held, "is in the nature of a trust fund, its oversight is a fiduciary obligation of the court." Pet. 28a. Thus, the court ordered that it be kept in an interest-bearing account in a federally insured depository institution, with Defendants retaining the right to assert claims to unspent or surplus funds. Pet. 28a-29a.

The appellate court also specifically held that the Defendants had the right to assert their "claims to any unspent or surplus funds" from the program. Pet. App. 29a.

The Louisiana Supreme Court denied further review and Defendants' request for a stay. Justice Scalia, acting as Circuit Justice, granted a stay on September 24, 2010.

B. Misstatements of Facts and Law in the Petition

Pursuant to S. Ct. R. 15, Plaintiffs are obliged to address misstatements of fact and law in the Petition. In the introduction to the Question Presented, Defendants overstate the size of the class at issue when they say the "Louisiana courts certified a class of over 500,000 Louisiana smokers." Pet. i. After appellate review, the eligible class members were reduced to 250,000. Pet. 26a. In the same introductory statement, Defendants peg the award to the class at $270 million. Pet. i. The remedy

ordered here, however, was the funding of a court-administered smoking-cessation program at a cost of $230,038,560, plus a five-percent third-party administrative fee of $11,501,928 to run the program. Pet. App. 28a. No damages were awarded to any plaintiff.

Defendants also assert that Plaintiffs advanced only three legal claims—product defect, fraud, and breach of an assumed duty. Pet. 4. Plaintiffs actually asserted five claims. For example, Plaintiffs pursued their cause of action for nicotine manipulation and addiction pursuant to La. Civ. Code art. 2315(A), App. 1a, a statute that establishes liability for acts causing damages and one that the Petition never mentions. *See* Pet. App. 73a (acknowledging that the cause of action arises under art. 2315). In addition, Plaintiffs made out a cause of action for conspiracy. *See* Pet. App. 240a-243a. Several of these causes of action, as explained *infra*, have no requirement that reliance be proven.

It is critical to understand, contrary to the false impression left by the Petition, that no money has been paid and "[n]ot a single habitual smoker has yet benefitted from the [smoking-cessation] program [ordered in this case]." Pet. App. 19a. Moreover, the "recipient of the award is not an individual or even a group of individuals; it is a court-established and court-supervised smoking cessation pro-gram with a limited ten-year life." Pet. App. 20a.

Defendants also characterize the record as containing "no evidence that the class representatives or *any* identifiable class member detrimentally relied on any alleged misstatement or

omission or had otherwise been injured by defendants' conduct." Pet. 5. Defendants add that the experts Plaintiffs called to testify "did not (and could not) connect their assertions [about smoking's health impact and disinformation campaign] to the class representatives or any other identifiable members." Pet. 5-6. This is false. Plaintiffs' experts were extensively cross-examined about the class representatives, their knowledge of smoking's health hazards, and their ability to quit on their own. For example, Defendants asked Plaintiffs' expert Dr. Cummings whether advertising was a factor in starting either Mrs. Jackson or Mrs. Scott smoking. He replied, "I think it did." Tr. 13590.[4]

Although the Petition is largely premised on an assertion that Defendants were prevented from presenting evidence on this subject, Defendants repeatedly asked Plaintiffs' experts about the knowledge of named Plaintiffs Scott and Jackson, eliciting precisely the evidence they now say should have been put before the jury—*and was.* As the trial court observed, "Defendants did present the jury with specific facts regarding Ms. Scott, Ms. Jackson, and their smoking histories, as well as their class-wide affirmative defenses." Pet. App. 152a (footnotes

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[4] Defendants also assert that both plaintiffs "knew of their addiction years before they filed suit, which time-barred their claims." Pet. 6. The courts below held otherwise, finding that the causes of action were continuing torts under Louisiana law and not barred. *See* Pet. App. 163a-164a, 165a-166a. *See also* Pet. App. 144a, 146a (discussing evidence that Defendants' intentional misconduct sought to induce continued smoking).

omitted).[5] *See also* Tr. 11984-11985 (Burns); Tr. 13584, 13589-13590 (Cummings); Tr. 15780-15783 (Arnett).

Defendants also assert that the Court of Appeal "speculated (with no record support)" on the number of class members left after reducing the class size to account for claims accruing after passage of the LPLA. Pet. 12. However, the court relied on expert evidence in the record that established the age ranges of members of the class and, on that basis, the court was able to conclude that passage of the LPLA eliminated about half of the class from eligibility, leaving approximately 250,000 of the original 505,000 figure eligible. Pet. App. 26a.

Defendants also erroneously claim that the Louisiana courts used a "nonsensical" 100 percent utilization rate to arrive at the $240 million" fund. Pet. 12. Yet, the Court of Appeal reduced the trial court's class from 505,000 to an eligible number of class members who number at least 250,000, and then employed the proven utilization rate to project an initial year utilization by 210,000 members, diminishing yearly so that in the tenth year of the program the class members seeking cessation services would be reduced to 101,010. Pet. App. 27a & n.19. Using a median annual cost per eligible class member of $153 per year, that Court reduced the funding required from an original assessment of $591 million to $230 million, plus a five percent

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[5] The trial court also noted that the "question of whether Ms. Scott or Ms. Jackson, individually, will participate in the court-supervised" program "is reserved for another day." Pet. App. 152a. Ms. Scott, now deceased, obviously will not.

third-party administrative fee of $11.5 million. Pet. App. 28a. Moreover, the funds will be held in trust, subject to a claim of reimbursement by Defendants for unused sums.

REASONS FOR DENYING THE PETITION

Unlike the impression left by the Petition, this case does not involve highly individualized, fact-intensive claims for monetary relief that are properly subject to individualized defenses. Instead, it involves Louisiana causes of action for a type of relief requiring no individualized proof once certified. Instead, Defendants and their *amici* have poured their generic complaints about state class actions generally into a vessel that cannot hold them.

The gist of Defendants' Due Process complaint is that the Louisiana courts "relieved plaintiffs of their burden to prove the requisite elements of their individual fraud-based claims." Pet. 7. No plaintiff could ever afford to bring an action like this one against defendants for smoking-cessation services valued at $153 per year and available for up to ten years as an individual claim. That Louisiana makes such a cause of action available as a class action without requiring proof of individualized reliance on misrepresentations does not implicate the Due Process Clause.

Even if Defendants are correct that individualized reliance is necessary for an action based on allegations of fraud, which Plaintiffs dispute, such a ruling would not change the judgment below because one or more of Plaintiffs' causes of action are not based on fraud and have no individualized reliance element, rendering the

Petition nothing more than a request for an advisory opinion.

I. THE PETITION IMPROPERLY ASKS THIS COURT FOR AN ADVISORY OPINION

This Court has repeatedly instructed litigants that it will not issue advisory opinions. *See, e.g., Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."). Here, Plaintiffs succeeded at trial on multiple theories of law, any one of which is sufficient to support the remedy ordered. Several of those causes of action do not even theoretically implicate the defenses that the Defendants allege they were prevented from presenting. Thus, even if this Court were to resolve their Question Presented favorably to Defendants, the judgment rendered in this case would remain unchanged and this Court's opinion would be merely advisory.

A. The Cause of Action Based on Nicotine Manipulation Does Not Require Reliance

Separate from Plaintiffs' fraud claim, Defendants were found liable for intentionally designing and manufacturing their cigarettes to promote and sustain addiction through the manipulation of nicotine content, *see* Pet. App. 193a, 212a, 228a, 233a-234a (Jury Findings 7, 15-17), pursuant to La. Civ. Code art. 2315(A), which provides in full that "[e]very act whatever of man

that causes damage to another obliges him by whose fault it happened to repair it."

This cause of action for increasing the risk of harm through nicotine manipulation does not require any proof of reliance. Elements for such a claim are "fault, causation and damage." *Straley v. Calongne Drayage & Storage, Inc.*, 346 So.2d 171, 175 (La. 1977) (citations omitted). For example, in *Bourgeois v. A.P. Green Industries, Inc.*, 716 So.2d 355 (La. 1998), the Louisiana Supreme Court held that an injunctive remedy, such as medical monitoring, was available to Plaintiffs suffering a significantly increased risk of contracting a serious latent disease where they can prove by competent expert testimony that they have suffered significant exposure to a hazardous substance. *See Bonnette v. Conoco, Inc.*, 837 So.2d 1219, 1231 (La. 2003) (characterizing *Bourgeois*).

Liability is thus premised on "'failure to exercise reasonable care in the adoption of a safe plan or design'" because "'*the design must measure up to what the community is entitled to expect* of those who persuade the public to buy their products-sometimes . . . by dint of tremendous advertising campaigns.'" *Gauthier v. Sperry Rand, Inc.*, 252 So.2d 129, 132 (La. Ct. App. 1971) (emphasis added) (quoting with approval, *Dean v. General Motors Corp.*, 301 F. Supp. 187, 190-91 (E.D. La. 1969)).

Here, the jury found that Defendants intentionally designed their cigarettes to engender addiction, hid that information, and "exposed the class of Louisiana smokers to significant levels of substances proven hazardous to human health sufficient to significantly increase the risk of

contracting a serious latent disease related to cigarettes." Pet. App. 234a (Verdict 17). *See also* Pet. App. 193a, 212a, 228a, 233a-234a. That and related findings completely satisfy the elements for this type of liability under Article 2315, involve common issues that can be tried on a class-wide basis, require no element of reliance, and are perfectly addressed by the remedy ordered.

Every testifying expert, Plaintiff or Defendant, agreed that nicotine was addicting, smokers suffer a significantly increased risk of harm, and cessation treatment should be available to all smokers who seek such assistance. Pet. App. 45a, 137a.

This claim required no proof of reliance, especially because the remedy specifically addressed the injury of increased risk of harm. Nor does it matter that the named plaintiffs had stopped smoking during the lengthy time between certification and trial, as the injury of addiction was still relevant to them, both because they undertook this lawsuit for help in quitting smoking, expended personal resources to achieve that end when the litigation dragged on, and still faced the danger of a relapse. Pet. App. 121a (evidence established that numerous barriers exist to quitting, that it takes six to ten attempts to succeed, and the risk of relapse persists for several years); 151a ("testimony in Phase I and Phase II established that Ms. Scott and Ms. Jackson remain susceptible to relapse") (footnote omitted). *See also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 169 (2000) (Breyer, J., dissenting) ("less than 3% of smokers succeed in quitting each year, although 70% want to quit"). In short, Defendants' purported additional defenses are

immaterial to liability imposed on the nicotine-manipulation count.

B. Breach of an Assumed Duty Does Not Require Proof of Reliance

Plaintiffs also proved Defendants breached an assumed duty not to market to children. Pet. App. 246a-248a. Liability for an assumed duty attaches either when a defendant's failure to exercise reasonable care increases risk of harm, *or* fails to perform the duty owed, *or* creates the harm because of reliance on the undertaking. *Bujol v. Entergy Serv., Inc.*, 922 So.2d 1113, 1129 (La. 2004). Reliance is merely an alternate condition precedent to liability and need not be present if one of the other conditions are present.

Defendants disingenuously cite *Dornak v. Lafayette General Hospital*, 399 So.2d 168, 170 (La. 1981), for the proposition that a claim for breach of an assumed duty "requires proof of causation and, in cases such as this, 'reliance on' the defendant's undertaking."[6] Pet. 4. *Dornak*, a case involving failure to disclose a medical condition revealed during a pre-employment examination, merely states that the plaintiff "was entitled to and did rely upon the expectation that she would be told of any dangerous condition actually disclosed by that examination." 399 So.2d at 170. The decision did not require proof of reliance, as Defendants contend, but merely means that plaintiffs properly should expect full disclosure from those undertaking an assumed duty. Here, as in *Dornak*, Defendants withheld

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[6] Defendants also cite *Restatement (Second) of Torts* § 323 (1965) for that proposition, Pet. 4, but the *Restatement* is not a reflection of Louisiana law.

information that should have been revealed to consumers, especially minors, thus constituting a basis for liability. *See* Pet. App. 244a-245a; 144a (summarizing record revealing five decades of "suppression, concealment and omission"). Reliance is not something that needs to be proven in the face of silence when there is nothing to rely upon.

C. Louisiana Law Authorizes Relief Without Proof of Reliance

It is worth noting that Louisiana law recognizes that a claim for medical monitoring can be brought as a class action and requires no proof of reliance, where the need for medical help constitutes the injury. In *Bourgeois*, 716 So.2d at 360-61, the Louisiana Supreme Court set out the requirements for such an action to be: (1) significant exposure to a proven hazardous substance; (2) increased risk of a serious latent disease from that exposure; and, (3) the existence of a medical monitoring procedure that is different from what might be recommended absent the exposure, which is also reliable, prescribed by a qualified physician, and capable of early detection of the disease.

These *Bourgeois* factors are also applicable to the remedy of a court-administered smoking-cessation program and were followed by the courts below. Pet. App. 58a-62a; 147a. The jury found that no reliable, physician-prescribed medical monitoring procedure was available and declined to find that relief appropriate here. Pet. App. 255a-257a. They did, however, conclude that smoking-cessation assistance was warranted. Pet. App. 257a-258a.

In sum, the judgment here is fully supported on alternative grounds from that which is the subject of Defendants' Petition. This case does not provide a proper vehicle for this Court's review of the issue raised by Defendants, and the Petition should be denied.

II. THIS CASE IS NOT A SUITABLE VEHICLE TO CONSIDER DUE PROCESS LIMITATIONS ON STATE CLASS ACTIONS

A. Generic Complaints about State Class Actions Raise No Cert-worthy Issue in this Case

Defendants and their *amici* attempt to fit the round peg of their generic complaints about how states conduct class actions into the square hole of this litigation. It does not fit. Whether the object of their ire is the limited reach of the Class Action Fairness Act, 28 U.S.C. § 1332, Pet. 31, a complaint improperly addressed to this Court, or the potential for "bet-the-company" liability because of a class-action judgment, Pet. 32, a grievance that rings particularly hollow for an industry that is built on the most successful and longest running fraud in American corporate history, one that has been adjudicated a violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.*, *United States v. Philip Morris USA, Inc.*, 449 F.Supp.2d 1 (D.D.C. 2006), *aff'd in part, rev'd in part*, 566 F.3d 1095 (D.C. Cir. 2009), *cert. denied*, 130 S.Ct. 3501 (2010), and has been before this Court a number of times. *See, e.g., Altria Group, Inc. v. Good*, 555 U.S. 70 (2008); *Philip Morris USA v. Williams*,

549 U.S. 346 (2007); *Watson v. Philip Morris Co., Inc.*, 551 U.S. 142 (2007).

Contrary to its portrayal by Defendants, the Louisiana courts handled this case with an unusually high solicitude for the due-process rights of Defendants and represents careful adherence to preexisting state law and procedure. During 14 years of litigation, the Louisiana courts indulged a wide and time-consuming range of Defendants' objections, requests, arguments, and trial tactics,[7] while providing an unheard-of number of discretionary reviews and according Defendants substantial relief throughout that process. Before trial, more than 200 motions were decided, as were a significant number during the trial. Pet. App. 191a. Defendants sought and received months of *voir dire*. Thousands of pages of deposition testimony were contested and ruled upon, as were additional thousands of pages of documentary evidence. Pet. App. 191a. Forty-four fact and expert witnesses testified and were cross-examined, and the Phase I trial record ran more than 30,000 pages and took six months. Pet. App. 191a-192a. Defendants filed more than 50 writs and appeals[8] and received multiple court-ordered

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[7] The tobacco companies' penchant for trial delay and litigation by attrition to outlast its opponents is well documented. *See, e.g., Haines v. Liggett Group, Inc.*, 814 F.Supp. 414, 421 (D.N.J. 1993) (citing Memorandum from J. Michael Jordan, counsel for RJ Reynolds Tobacco Co. (Apr. 29, 1988)); William E. Townsley & Dale K. Hanks, *The Trial Court's Responsibility to Make Cigarette Disease Litigation Affordable and Fair*, 25 Cal. W. L. Rev. 275, 276-77 (1989).

[8] Prior to this petition, Defendants had filed 31 writ applications and four appeals to the Louisiana Court of Appeal, 22 writ applications to the Louisiana Supreme Court, and one

reductions in the size of the eligible class (from 505,000 to 250,000) and in the monetary assessment made by the jury (from $591 million to $230 million). The due process observed in this litigation was at its zenith.

In support of certiorari, Defendants complain that state courts "lack the uniform protections of Rule 23 and the Rules Enabling Act," Pet. 31, so they seek to interpose some of those requirements as a function of the Due Process Clause, as if the constitutional guarantee were an empty vessel to be filled with a litigant's most fervent desires. It plainly is not. *See BMW of No. Am., Inc. v. Gore*, 517 U.S. 559, 598-99 (1996) (Scalia, J., dissenting) (the clause is not "a secret repository of substantive guarantees against 'unfairness.'"). Moreover, "fidelity to the Rules Enabling Act," *Amchem Products., Inc. v. Windsor*, 521 U.S. 591, 629 (1997), is not a requirement of state class actions, which must be measured instead by fidelity to state law.

In fact, this Court has long recognized that the Due Process Clause does not "compel the [States'] adoption of the particular rules thought by this court to be appropriate for the federal courts." *Hansberry v. Lee*, 311 U.S. 32, 42 (1940). Instead, states are "generally free to develop their own rules for protecting against . . . the piecemeal resolution of disputes," and are only overridden when they adopt "extreme applications" "inconsistent with a federal right that is 'fundamental in character.'" *Richards v. Jefferson County*, 517 U.S. 793, 797 (1996).

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prior petition for certiorari and one stay application to this Court.

Louisiana's courts do not adopt rules of procedure in the manner that common-law courts do. Its procedures are dictated by statute, and compliance with those statutes here was complete. No extreme application occurred, and no fundamental right abridged.

B. This Case Presents No Issue of Great National Importance or Conflict between Courts Concerning Representativeness in Class Actions

The large overarching theme that underlies Defendants' Petition is a claim that the "departure from representative litigation was so extreme" because both class representatives had already quit smoking years before trial. Pet. 12-13; *see also* Pet. 6, 26. Putting aside the lack of legal merit in the allegation for just a moment, the assertion is so bizarre on its face that it can be rejected out of hand.

It asserts that, in order to maintain this class action begun in 1996 and certified in 1997, Ms. Scott and Ms. Jackson were obligated to keep smoking throughout the course of this case, or at least during the period between 2001 and 2004 when it was tried. While Ms. Jackson and the late Ms. Scott quit smoking in 2000 and 2001, respectively, while fearing a relapse, *see* Pet. App. 151a, they certainly had no obligation to continue to jeopardize their health to maintain this action, while quitting satisfied an obligation to mitigate damages. *See Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 232 n.15 (1982) (citing with approval, C. McCormick, *Law of Damages* 127 (1935), for "the general rule" that the

plaintiff must "use such means as are reasonable . . . to avoid or minimize the damages.").

Defendants seek more and state that the "constitutional question raised by these proceedings" amounts to: "Does a class action permit the aggregation of individual claims only where the named plaintiffs are truly representative of absent class members?" Pet. 13. *See also* Pet. 14 ("The Louisiana courts ignored the core due process safeguard—representativeness—that legitimizes class-action litigation"). That question is not an unanswered issue of great national importance, does not constitute a question that various courts have answered differently, and is not presented by the proceedings in this case.

It is axiomatic that a class representative must be a member of the class at the time the class is certified. *Sosna v. Iowa*, 419 U.S. 393, 403 (1975). When it is only later that plaintiffs are no longer class members or are otherwise inappropriate representatives, class claims are neither mooted nor destroyed. *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 406 n.12 (1977). Thus, "once a case is certified as a class action, the named plaintiff may lose that status which had qualified him to bring the suit and still be acceptable as a party to prosecute the suit to conclusion on behalf of the class." *Sosna*, 419 U.S. at 412 (White, J., dissenting) (characterizing majority holding). *See also* Herbert R. Newberg & Alba Conte, *Newberg on Class Actions* § 2.28 (3d ed. 1992) (courts have generally permitted a class representative to continue acting in a representative capacity on behalf of his or her class, as "the claims of absent

members remain viable independently from those of the class representative").

At that point, the key question becomes adequacy of representation, *id.* at 403, which "serves to uncover conflicts of interest between the named parties and the class they seek to represent." *Amchem Prods.*, 521 U.S at 625. The adequacy requirement "tend[s] to merge" with the commonality and typicality, which "serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiffs claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *General Tele. Co. of Southwest v. Falcon*, 457 U.S. 147, 157, n.13 (1982).

Unquestionably, "it is enough that they 'share common objectives and legal or factual positions.'" *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999). Here, the named plaintiffs fully qualified as class representatives at the time of certification.[9] The Louisiana courts repeatedly reviewed the adequacy, commonality, and typicality of named plaintiffs' claims and representation, and were

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[9] Defendants attacked their status, *inter alia*, because they allegedly were not deceived by Defendants into beginning their smoking habit. That attack was rebuffed by the courts because Ms. Scott and Ms. Jackson established they were smokers and in need of smoking-cessation assistance, which were the essential allegations made on behalf of the class. Pet. App. 150a. Moreover, as the record showed, even the allegations of fraud were focused on how Defendants' misrepresentations and omissions were aimed at encouraging existing smokers to keep smoking.

satisfied that no conflict existed and representation was vigorous. *See* Pet. 150a n.134 (listing judicial review of adequacy in 1998, 1999, 2000, 2001, and 2002).

Defendants rely upon *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998), Pet. 18, to assert that the representatives' defects caused a denial of Defendants' opportunity to assert every defense. Defendants overstate *Broussard's* holding, which was premised on conflicts of interest within the class and statute of limitations defenses based on oral misrepresentations from individual franchisor representatives and not continuous company-wide efforts, defects not present here. Still, most courts have rejected *Broussard's* treatment of a limitations defense as a *per se* disqualifier for class certification. *See In re Linerboard Antitrust Litig.*, 305 F.3d 145, 162 (3d Cir. 2002) (rejecting *Broussard* and declaring "most courts have refused to deny class certification simply because there will be some individual questions raised during the proceedings"); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000) ("As long as a sufficient constellation of common issues binds class members together, variations in the sources and application of statutes of limitations will not automatically foreclose class certification under Rule 23(b)(3)" (citing 5 James Wm. Moore, *et al.*, *Moore's Federal Practice* § 23.46[3], at 23-210 to -211 (3d ed. 1999))). If the conflict between *Broussard* and other federal circuits is worthy of this Court's attention, it is worthy only to resolve differences between federal courts over federal rules and not state implementation of their own class-action requirements.

C. Limiting Cross-Examination of Named Plaintiffs Here Does Not Merit this Court's Attention

Defendants' assertion that they were not permitted to raise every possible defense comes down to the fact that their cross-examination of the named plaintiffs was limited. Defendants asserted below that they needed that cross examination to show that the two class representatives smoked for reasons unrelated to any alleged misconduct; that they had received warnings about the risks of smoking from doctors, family, and the media; that they were fully aware of the federally-mandated health warnings; and, that they were aware of their alleged injury many years prior to the filing of this lawsuit. Pet. App. 48a.

The court below called the denial of cross-examination, at most, "harmless error," because the jury ruled in Defendants' favor on Plaintiffs' products liability theory relating to why members of the class began smoking, but against Defendants on the causes of action relating to the cause of Plaintiffs' continued smoking. Pet. App. 48a-49a. It further found the other information Defendants sought to elicit from the named representatives "irrelevant" because it was proven that "defendants consciously withheld information vitally important to an informed decision to smoke or not." Pet. App. 49a.

Further cross-examination going to whether the statute of limitations had expired was also ruled irrelevant by the Court of Appeal because Louisiana recognized Defendants' conduct as a continuing tort during the relevant time period. Pet. App. 52a-54a. Under Louisiana precedent, that court held, "the

continuous tort doctrine does not encompass the plaintiff's knowledge in order to decide when prescription will begin to run." Pet. App. 53a (citation omitted).

Perhaps, equally important, the information Defendants sought through cross was merely cumulative. *See Mitchell v. Limoges*, 923 So.2d 906, 908 (La. Ct. App. 2006) (no error in excluding cumulative testimony entered into the record by other means). As demonstrated *supra* 8-9, and conceded by Defendants' own extensive transcript citations, *see* Pet. 6, this information of questionable relevancy made it into evidence and was considered by the Louisiana courts in Defendants' repeated attacks on the named plaintiffs' representativeness. Pet. App. 150a n.134. The Louisiana Constitution authorizes the Court of Appeal to consider facts *de novo,* La. Const. art. V, § 10(B), and it did.

For good reason in applying due process, this Court has "declined to establish rigid rules and instead ha[s] embraced a framework to evaluate the sufficiency of particular procedures." *Wilkinson* v. *Austin*, 545 U.S. 209, 224 (2005) (internal quotation marks and alteration omitted). The procedures employed by the Louisiana courts in providing multiple reasoned reviews, including the evidence supposedly excluded, satisfies that standard. It is not even a close call. Defendants' complaint really comes down to its disagreement with the reasoning of the Louisiana courts. That complaint provides no warrant for this Court to review this matter.

Based on the length of this litigation, the Court of Appeal observed that "[f]urther delay in rendering judgment will unnecessarily and, more

importantly, unfairly impair the possibilities of aging smokers to cease their habits and to surely improve their own lives, not to mention the lives of their family members and co-workers." Pet. 19a. Society has no interest in restarting litigation because named plaintiffs quit smoking before the remedy was ordered or implemented. The Petition should be denied.

III. INDIVIDUAL RELIANCE IS NOT REQUIRED BY DUE PROCESS FOR ALL FORMS OF CLASS ACTIONS

Defendants claim proof of individualized reliance is "indispensible" as a matter of Due Process to establish fraud and was improperly eliminated in this case in order to make class adjudication possible. Pet. 12. Statutes and precedent demonstrate otherwise and render Defendants' claim erroneous.

A. Many State Statutes Sounding in Fraud Eschew Proof of Reliance

If Defendants' radical claim was correct, nearly every state's consumer protection statute would violate Due Process. These laws do not require reliance in order to state a claim under their respective consumer-fraud or unfair-and-deceptive-trade-practices acts. *See* Bob Cohen, *Right to Private Action Under State Consumer Protection Act-Preconditions to Action*, 117 A.L.R. 5th 155, 222-44 (2004).[10] Of those states that require proof of

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[10] Referred to as "little FTC Acts", these consumer protection laws, now present in every state, Jeff Sovern, *Private Actions under the Deceptive Trade Practices Acts: Reconsidering*

reliance, "most" adopt "a[n] [objective] standard similar to the test under the [Federal Trade Commission] Act: whether the act has the tendency or capacity to mislead consumers, regardless of whether the plaintiff actually and reasonably relied on the misrepresentation." *See* Victor E. Schwartz, *Common-Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1, 18 (2005).

Moreover, where proof of reliance is required, it is often not necessary to prove reliance by direct evidence, *e.g.*, consumer testimony or circumstantial evidence such as consumer surveys, consumer reaction tests, or market research. *See, e.g.*, *Group Health Plan, Inc. v. Defendants Inc.*, 621 N.W.2d 2, 14 (Minn. 2001) (where allegations are based on "lengthy course of prohibited conduct that affected a large number of consumers, the showing of reliance that must be made . . . need not include direct evidence of reliance by individual consumers of defendants' products."); *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993) ("proof of individual reliance by each purchasing customer is not needed."); *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35 (D.C. Cir. 1985) (joined by Scalia, J.) (rejecting the "contention that consumer survey evidence must, as a matter of law, be presented to support a finding that an advertisement has a

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the FTC Act as Rule Model, 52 Ohio St. L.J. 437, 446 (1991), were the product of a joint endeavor by the Federal Trade Commission (FTC) and Council on State Governments to encourage States to adopt supplementary consumer protection beyond what the resources available to the FTC could accomplish. Steven J. Cole, *State Enforcement Efforts Directed Against Unfair or Deceptive Practices*, 56 Antitrust L.J. 125, 126 (1987).

tendency to deceive and violates section 5 of the FTC Act").

Instead, reliance may be established by expert testimony. 1A Rudolf Callmann, *The Law of Unfair Competition, Trademarks and Monopolies* § 51.6, at 92 (Louis Altman ed., 4th ed. 1994). It also "may be inferred from the circumstances attending the transaction which oftentimes afford much stronger and more satisfactory evidence of the inducement which prompted the party defrauded to enter into the contract than his direct testimony to the same effect." *Vasquez v. Superior Court*, 484 P.2d 964, 972 (Cal. 1971) (internal quotation marks omitted). Rebuttal evidence is, of course, permitted; a defendant may cross-examine plaintiffs' experts or have its own experts testify that a reasonably prudent person would not have so relied. But where direct evidence of individualized reliance is not required to make a *prima facie* showing of fraud or consumer deception, neither is there a basis to demand that individual consumers nonetheless be cross-examined. *See Figgie Int'l*, 994 F.2d at 608-09.

Under the Lanham Act, liability arises for false or deceptive advertising. *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 586 (3d Cir. 2002). When "challenged commercial claims are 'literally false,' a court may grant relief without considering whether the buying public was actually misled." *Id.* (citation omitted). When "consumer deception can be determined by examining the challenged name or advertising on its face, the plaintiff is excused from the burden of demonstrating actual deception." *Id.* at 587. Individual reliance is obviously not required.

That none of these remedial schemes foregoing proof of reliance engender federal due process problems demonstrates that Defendants' Petition does not present a due process question meriting this Court's consideration.

B. Judicial Decisions Do Not Require Individualized Reliance for All Fraud Actions

Courts have not held reliance to be a constitutionally "indispensible" feature of fraud claims. Nor is it "a general limitation on civil recovery in tort.'" *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 655-56 (2008) (citations omitted). In *Bridge,* this Court rejected an argument that claims predicated on mail fraud must prove reliance on the defendant's misrepresentation. Instead, it recognized that "a person can be injured 'by reason of' a pattern of mail fraud even if he has not relied on any misrepresentation." *Id.* at 649. Its absence obviously does not violate due process.

Various state courts have reached similar conclusions. The Oregon Supreme Court, for example, has held that whether the state's consumer protection act "requires reliance as an element of causation necessarily depends on the particular unlawful practice alleged." *Sanders v. Francis*, 561 P.2d 1003, 1006 (Or. 1977). Accordingly, for example, under Oregon law, "when the representation takes the form of a failure to disclose . . . it would be artificial to require a pleading that plaintiff had relied on that non-disclosure." *Id.*

Defendants rely heavily on *McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008),

to assert that a trial plan that determined damages to the class as a whole before assessing individual claims violates Due Process. Pet. 20. Yet, a court within that circuit has held, after this Court's decision in *Bridge*, *McLaughlin* is "no longer good law on the question of whether a plaintiff must show that he or she was personally a recipient of a material misrepresentation." *Spencer v. Hartford Fin. Servs. Group, Inc.*, 256 F.R.D. 284, 297 (D. Conn. 2009). Defendants' other precedent, *Stonebridge Life Insurance Co. v. Pitts*, 236 S.W.3d 201 (Tex. 2007), was only decertified because issues of consent removed the predominance issue from the class. *Id.* at 206. On the other hand, consent was authoritatively determined to be absent here. Pet. App. 258a.

Plainly, Due Process does not require proof of individualized reliance in the form of direct testimony (subject to cross-examination) by consumers in order for a defendant to be held liable for fraud.

C. Louisiana Law Does Not Require Direct Proof of Individualized Reliance

Defendants do not provide a fair description of what the Court of Appeal held Louisiana law requires in order to prove fraud. The Court of Appeal did not hold, as Defendants maintain, that the requisite showing of reliance depends on whether the fraud claim proceeds on an individualized or class basis. The court instead concluded that the requisite proof of reliance turns on the nature of the fraud and the remedy sought. Where, as here, fraud occurred by concealment, suppression, or omission, and the

remedy sought did not seek individual damages but a remedial program administered by the court, plaintiffs may establish, through expert testimony, reliance on an objective basis and may be proven class-wide. *See* Pet. App. 46a-47a. The same would be true if the case had been brought as an individual action seeking a smoking-cessation remedy. That objective, reasonable-person reliance standard is constitutionally unassailable, as is its application here, and thus the Petition should be denied.

Contrary to Defendants' contention, the Court of Appeal's phrase "class-wide reliance," Pet. App. 47a, while perhaps imprecise, cannot fairly be read to mean that the court eliminated any need to show reliance. The phrase "class-wide reliance" was used to refer to an objective, reasonableness standard. *See* Pet. App. 47a, 46a (noting that the jury found that reliance was reasonable).

It is a standard that is widely utilized. For instance, in *Vasquez*, a class action concerning fraud in the inducement of contracts, the California Supreme Court concluded: "The requirement that reliance must be justified in order to support recovery [for fraud] may also be shown on a class basis." 484 P.2d at 973 n.9. Reliance on a "class basis" means that "[i]f the court finds that a reasonable man would have relied upon the alleged misrepresentations, an inference of justifiable reliance by each class member would arise." *Id.* at 973 n.9.

Similarly, in *Dix v. American Bankers Life Assurance Co. of Florida*, 415 N.W.2d 206, 209 (Mich. 1987), which concerned allegations of fraud by purchasers of tax-sheltered annuities, the Michigan

Supreme Court held that reliance called for an objective inquiry and could be established class-wide. It explained:

> members of a class proceeding under the Consumer Protection Act need not individually prove reliance on the alleged misrepresentations. It is sufficient if the class can establish that a reasonable person would have relied on the representations.

Id. at 209.

It further must be recalled that Louisiana's action for fraud is statutory. Louisiana Civil Code article 1953 provides that "[f]raud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction." Construing that provision, the Louisiana courts have held that "to recover for negligent misrepresentation, there must be a legal duty on the part of the defendant to supply correct information, a breach of that duty, and damage to the plaintiff caused by the breach." *Duplechin v. Adams*, 665 So.2d 80, 84 (La. Ct. App. 1995). To emphasize, venerable holdings of the Louisiana Supreme Court establish that "'[t]wo things are necessary to constitute fraud: the intention to defraud, and actual loss or damage, or such strong probability of it as will induce a court to interfere.'" *Buxton v. McKendrick*, 64 So.2d 844 (La. 1953) (citation omitted). Both were amply satisfied at trial.

Defendants' Petition is premised on a flawed understanding of what proof of reliance is required under Louisiana law to establish fraud. Defendants argue that Louisiana law requires proof of individualized reliance. Pet. 4 (citing *Banks v. New York Life Ins. Co.*, 737 So.2d 1275 (La. 1999)). They then characterize the decision below as "h[olding] that proof of individualized reliance was unnecessary in the context of a class action," Pet. 9-10, by which Defendants mean that the Court of Appeal believed that proof of individualized reliance otherwise would be necessary in the context of an individual action. *See id.*; *see also id.* at 22. That is a gross misreading of the decision below.

Nowhere in its Petition do Defendants mention that the Court of Appeal authoritatively rejected this reading of *Banks*, *see* Pet. App. 46a, and may not be second-guessed on its reading.[11] That court distinguished *Banks* because its fraud involved only affirmative misrepresentations made individually by different agents to different customers. *Id.* It held, however, that in cases concerning "fraud of suppression, concealment, and omission" accomplished through "indirect communications," Pet. App. 46a, such as in the instant case, Louisiana law did not require "direct evidence of reliance by consumers," but; rather, reliance could be established on a class basis. Pet.

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[11] Defendants may disagree with this reading of *Banks*, but the Court of Appeal's understanding of state law, which the Louisiana Supreme Court let stand and which the Louisiana Constitution recognizes as authoritative, La. Const. art. V, § 10(B), is due deference by this Court as the definitive exposition of state law.

App. 47a. If this were an individual case, reliance could be established on an objective basis.

Defendants further contend, Pet. 22, that no Louisiana court had ever permitted reliance to be proved on a class basis, but that is not correct. In *Mire v. Eatel Corp, Inc.*, 849 So.2d 608 (La. Ct. App.), *writ denied*, 855 So.2d 317 (La. 2003), for example, the court explained that, under Louisiana law, "the inquiry under a redhibition claim does not involve the buyer's subjective knowledge or reliance, but rather is an objective inquiry into the deficiency and whether it diminishes the product's value or renders it so inconvenient that the reasonable buyer would not have purchased it had he known of the deficiency." *Id.* at 614. Whether the defendant in that case was liable to the claimants was "obviously common to all [of them]," and thus the Court of Appeal affirmed "the trial court's finding that questions of law or fact common to the members of the entire class predominate over those affecting only individual members."[12] *Id.*

The evidence of the type of reliance required by Louisiana law was overwhelming in this case—a conclusion shared by other fact finders presented with the same expert testimony. *See United States v. Philip Morris USA, Inc.*, 449 F.Supp.2d 1 (D.D.C. 2006) (finding that tobacco companies' statements regarding health effects of smoking evidenced specific intent to defraud the public), *aff'd in part, rev'd in part*, 566 F.3d 1095 (D.C. Cir. 2009), *cert.*

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[12] The class was later de-certified after plaintiffs failed to state a claim for redhibition. *See* 927 So.2d 1113 (La. Ct. App. 2005).

denied, 130 S.Ct. 3501 (2010); *see also id.* at 204 (crediting a corporate executive's testimony that "[w]hen Philip Morris made statements about smoking and health, the company intended the public—including consumers and public health authorities—to rely on them"); *Williams v. Philip Morris USA, Inc.*, 127 P.3d 1165, 1170 n.1 (Or. 2006) ("As a for-profit corporation, [Philip Morris] would not spend over 40 years of time, effort, and money to deceive people, unless it thought it was succeeding), *rev'd on other grounds*, 127 S.Ct. 1057 (2007), *aff'd on remand,* 176 P.3d 1255 (Or. 2008), *pet. for cert. dismissed as improvidently granted*, 129 S.Ct. 1436 (2009).

Plaintiffs proved through expert testimony that a reasonably prudent person who began smoking prior to 1988 would have relied on Defendants' indirect communications, made between December 1953 and May 24, 1996, that smoking is neither addictive nor severely harmful, in continuing to smoke. *See* Pet. App. 47a-48a, 51a-52a. Defendants had a full opportunity to rebut this evidence; in fact, they cross-examined these experts and put their own experts on the stand in an effort to rebut plaintiffs' expert testimony about reliance, presenting an exhaustive review of the common knowledge available to smokers since the time of Christopher Columbus through a historian, Dr. Norrell, presented as an expert witness on public awareness of smoking. Pet. App. 168a. Defendants cross-examined Plaintiffs' experts about the named plaintiffs' motivations for smoking and other reliance-related issues. *See* Counterstatement, *supra*, pp. 8-9.

After deliberating, "[t]he jury specifically found that there was detrimental reliance on Defendants' omissions and disinformation campaign concerning smoking and health by a class of Louisiana citizens, that there was detrimental reliance on the distorted knowledge concerning the properties of nicotine, *and that such reliance was reasonable*." Pet. App. 46a (emphasis added).

What the Court of Appeal did not require, however, is proof of reliance by the two class representatives. Pet. App. 49a. Evidence of such reliance was irrelevant, the court concluded, "because the information upon which plaintiffs could rely to make an informed decision was severely lacking due to defendants' misrepresentations." *Id.* Given that in cases concerning omissions, fraud "results precisely from defendant's reliance on [plaintiff's] ignorance," it would have been "artificial" to require Plaintiffs in this case to prove individualized reliance on a non-disclosure. *See also Basic, Inc. v. Levinson*, 485 U.S. 224, 245 (1988) (citations omitted) (observing that requiring a plaintiff to show how he would have acted if omitted material information had been disclosed or if the misrepresentation had not been made places an "unnecessarily unrealistic evidentiary burden" on a plaintiff).

The Louisiana courts plainly followed Louisiana law, applicable to individuals and classes alike, and courts have not held the Due Process Clause to require a departure from that law. The Petition should be denied, as it fails to meet this Court's criteria for the exercise of its discretion.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

February 2, 2011

Respectfully submitted,

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