Supreme Court, U.S.
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No.

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

PETITION FOR A WRIT OF CERTIORARI

PAUL D. CLEMENT
ASHLEY C. PARRISH
King & Spalding LLP
1700 Pennsylvania Ave.
Washington, D.C. 20006
(202) 737-0500

Counsel for R. J. Reynolds Tobacco Company

ALAN E. UNTEREINER
Counsel of Record
MARK T. STANCIL
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
auntereiner@robbinsrussell.com

MIGUEL A. ESTRADA
AMIR C. TAYRANI
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Philip Morris USA Inc.

[Additional Counsel Listed on Inside Cover]

PHILLIP A. WITTMANN
DOROTHY H. WIMBERLY
Stone Pigman Walther Wittmann L.L.C.
546 Carondelet Street
New Orleans, LA 70130
(504) 581-3200

MARK A. BELASIC
KEVIN D. BOYCE
Jones Day
North Point
901 Lakeside Avenue
Cleveland, OH 44114-1190
(216) 586-3939

Counsel for R. J. Reynolds Tobacco Company

CARMELITE M. BERTAUT
Stone Pigman Walther Wittmann L.L.C.
546 Carondelet Street
New Orleans, LA 70130
(504) 581-3200

RICHARD A. SCHNEIDER
King & Spalding LLP
1180 Peachtree Street, N.E.
Atlanta, GA 30309
(404) 572-4600

Counsel for R. J. Reynolds Tobacco Company and Brown & Williamson Holdings, Inc. (formerly Brown & Williamson Tobacco Corporation, individually and as successor by merger to The American Tobacco Company)

CHARLES F. GAY, JR.
RONALD J. SHOLES
MARTIN A. STERN
JEFFREY E. RICHARDSON
Adams and Reese, LLP
4500 One Shell Square
New Orleans, LA 70139
(504) 581-3234

Counsel for Philip Morris USA Inc. and the Tobacco Institute, Inc.

STEVEN W. COPLEY
Gordon, Arata, McCollam, Duplantis & Eagan, LLC
201 St. Charles Avenue
Suite 4000
New Orleans, LA 70120
(504) 582-1111

GARY R. LONG
JENNIFER L. BROWN
Shook, Hardy & Bacon, L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
(816) 474-6550

Counsel for Lorillard Tobacco Company

QUESTION PRESENTED

The Louisiana courts certified a class of over 500,000 Louisiana smokers seeking the costs of smoking cessation treatment and other monetary relief. After aggregating in one lawsuit the class members' disparate, highly individualized tort claims—which targeted actions and statements of different defendants at different times over nearly 50 years—the Louisiana courts used classwide adjudication to determine not the individual claims of representative plaintiffs or other class members, but rather a single, "unitary" claim supposedly asserted by the "class as a whole." That unorthodox procedure eliminated individualized elements of liability (such as reliance on the alleged fraud) and affirmative defenses that unquestionably would have been adjudicated if class members had sued individually. The result was a massive $270 million award for smoking cessation relief for the "class as a whole" in a case where no one in the class was required to prove the elements of an individual claim—and both class representatives had already quit smoking well before the time of trial.

The question presented is:

Whether the Due Process Clause prevents state courts from employing the class-action device to eliminate fundamental substantive and procedural protections that would otherwise apply to adjudications of class members' individual claims.

RULE 14.1(B) STATEMENT

In addition to the parties named in the caption, petitioners include Brown & Williamson Holdings, Inc., R. J. Reynolds Tobacco Company, Lorillard Tobacco Company, and The Tobacco Institute, Inc. Respondent Deania Jackson is a class representative and, as such, purports to represent a class consisting of "all Louisiana residents who are or were smokers on or before May 24, 1996, of cigarettes manufactured by the" petitioners, and "who desire to participate in a program designed to assist them in the cessation of smoking and/or to monitor the medical condition of class members to ascertain whether they may be suffering from diseases caused by, contributed to, or exacerbated by the habit of cigarette smoking, provided the class member alleges that he or she commenced smoking before September 1, 1988, or that one or more defendants actively and intentionally engaged in a course of conduct designed to undermine or eliminate compliance with or attention to warnings on cigarette packaging."

In the lower courts, Gloria Scott (like respondent Deania Jackson) was a class representative. Ms. Scott died on May 17, 2007.

RULE 29.6 STATEMENT

Petitioner Philip Morris USA Inc. is a wholly owned subsidiary of Altria Group, Inc. Altria Group, Inc. is the only publicly held company that owns 10% or more of Philip Morris USA Inc.'s stock. No publicly held company owns 10% or more of Altria Group, Inc.'s stock.

Petitioner Brown & Williamson Holdings, Inc. is an indirect, wholly owned subsidiary of British American Tobacco p.l.c., a publicly traded corpora-

tion. Before August 2, 2004, Brown & Williamson Holdings, Inc. was known as Brown & Williamson Tobacco Corporation. On July 30, 2004, a transaction was completed whereby R. J. Reynolds Tobacco Company became the successor in interest to Brown & Williamson Tobacco Corporation's U.S. tobacco business.

Petitioner R. J. Reynolds Tobacco Company, a North Carolina corporation, is the successor by merger to R. J. Reynolds Tobacco Company, a New Jersey corporation. The existing R. J. Reynolds Tobacco Company is an indirect, wholly owned subsidiary of Reynolds American Inc., which is a North Carolina corporation and is publicly traded. British American Tobacco p.l.c. is a publicly traded corporation and it has an indirect, wholly owned subsidiary, Brown & Williamson Tobacco Holdings, Inc., that owns more than 10% of the stock of Reynolds American Inc. Invesco Ltd. is a publicly traded corporation and it has a subsidiary, Invesco Asset Management Limited, that owns more than 10% of the stock of Reynolds American Inc.

Petitioner Lorillard Tobacco Company is a wholly owned subsidiary of Lorillard Inc., a publicly traded company.

Petitioner The Tobacco Institute, Inc., is a dissolved not-for-profit corporation organized under New York law. During its existence, The Tobacco Institute, Inc. did not issue stock and had no parent corporation. In addition, since its dissolution, The Tobacco Institute, Inc. has not issued stock and has had no parent corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Philip Morris USA Inc., Brown & Williamson Holdings, Inc., R. J. Reynolds Tobacco Company, Lorillard Tobacco Company, and The Tobacco Institute, Inc. respectfully submit this petition for a writ of certiorari.

OPINIONS BELOW

The opinions of the Louisiana Fourth Circuit Court of Appeal issued in 2010 (App. 1a-30a), 2007 (App. 31a-79a), and 1998 (App. 281a-303a) are respectively reported at 36 So. 3d 1046, 949 So. 2d 1266, and 725 So. 2d 10. The order of the Louisiana Supreme Court denying review (App. 80a-81a) is reported at 44 So. 3d 707. The trial court's amended judgment (App. 82a-85a), judgment (App. 86a-87a), and accompanying "Reasons for Judgments" (App. 88a-99a), are all unpublished.

JURISDICTION

The Court of Appeal issued its decision on April 23, 2010, and denied rehearing on May 12, 2010. On September 3, 2010, the Louisiana Supreme Court denied applications for writs of certiorari or review. App. 80a-81a. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the U.S. Constitution and the Louisiana Code of Civil Procedure, La. C.C.P. arts. 591, 592, and 593.1 (1996), are reproduced at App. 304a-06a.

STATEMENT

The handling of this case by the Louisiana courts represents a profound departure from "traditional" procedure. *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994). The basic guarantee of due process in a civil trial is that a defendant will not be held liable (and deprived of property) without a meaningful opportunity to contest all elements of liability and raise all affirmative defenses. Class actions, a relatively modern innovation, comply with that basic guarantee only insofar as they adjudicate individual claims, asserted by selected class members, that truly represent the individual claims of all other class members. See, *e.g.*, *Hansberry* v. *Lee*, 311 U.S. 32, 42-45 (1940).

That due process guarantee was eviscerated by the proceedings below. In conflict with long-settled practice, the Louisiana courts permitted members of a class of over 500,000 smokers to recover without ever proving the individualized elements of liability—or withstanding the individualized affirmative defenses—that Louisiana law establishes in tort suits brought by individual plaintiffs. Instead, the courts below jettisoned the class members' disparate and individualized tort claims and adjudicated instead a "common unitary claim" supposedly held by the "class as a whole." App. 63a; see also App. 35a, 46a. So complete was the Louisiana courts' abandonment of *representative* litigation that they even dismissed as "harmless error" the denial of defendants' right to a full and fair opportunity to cross-examine the class representatives at trial. App. 48a-49a. The end result was a $270 million judgment requiring defendants to pay for smoking-cessation services for *every* member of the class even though *no*

class member ever proved the established elements of his or her individual claim or confronted any individual defenses, and both class representatives had quit smoking before trial.

As Justice Scalia noted in staying the judgment, the rulings below "eliminated any need for plaintiffs to prove, and denied any opportunity for [defendants] to contest, that any particular plaintiff who benefits from the judgment (much less all of them)" actually relied upon the defendants' alleged fraud. *Philip Morris USA Inc.* v. *Scott*, No. 10A273, slip op. at 3 (Sept. 24, 2010) (Scalia, J., in chambers). With those fundamental safeguards eliminated, the trial in this case took on an Alice-in-Wonderland quality, lacking any resemblance to either traditional one-on-one civil adjudication or any constitutional form of "representative" litigation. Review of the Louisiana courts' decisions upholding these highly unorthodox procedures is warranted to resolve "important" and recurring questions regarding "[t]he extent to which class treatment may constitutionally reduce the normal requirements of due process" in state court litigation. *Ibid.*

A. Pretrial and Trial Proceedings

On May 23, 1996, the Fifth Circuit decertified a nationwide class of smokers in part because individualized issues such as reliance and causation predominated over common issues and precluded class adjudication. *Castano* v. *American Tobacco Co.*, 84 F.3d 734 (1996). One day later, two of the class representatives in *Castano*—Gloria Scott (now deceased) and respondent Deania Jackson—filed this lawsuit in the Civil District Court for the Parish of Orleans, bringing parallel claims against the same

defendants on behalf of a purported statewide class of current and former Louisiana smokers.

Plaintiffs advanced three legal claims—product defect, fraud, and breach of an assumed duty—and eventually sought to recover the costs of medical monitoring and smoking cessation services. Under Louisiana law, the essential elements of a fraud claim include proof that the plaintiff justifiably relied on a misrepresentation of material fact that caused the plaintiff to suffer an injury. *Banks* v. *New York Life Ins. Co.*, 737 So. 2d 1275, 1281-83 (La. 1999). Similarly, a tort claim for breach of an assumed duty requires proof of causation and, in cases such as this, "reliance on" the defendant's undertaking. RESTATEMENT (SECOND) OF TORTS § 323 (1965); *Dornak* v. *Lafayette General Hosp.*, 399 So. 2d 168, 170 (La. 1981). In response to these claims, defendants raised a number of individualized affirmative defenses, including comparative fault and prescription (the Louisiana term for statute of limitations). App. 50a, 222a.

1. *Class Certification and Pretrial Proceedings.* Notwithstanding the highly individualized nature of plaintiffs' claims and defendants' defenses, the trial court certified a class consisting of all Louisiana smokers and former smokers who "desire to participate" in a medical monitoring or smoking cessation program. See page ii, *supra* (setting forth full class definition). The court rejected defendants' arguments that individualized issues predominated over any common issues and therefore (as in *Castano*) precluded class certification. See, *e.g.*,, R.2:558-59.

On interlocutory review, the Louisiana Court of Appeal for the Fourth Circuit affirmed class certifi-

cation. App. 281a-303a. Although it recognized that certification of "mass tort" cases is "disfavored," in part because it "skew[s] trial outcomes" and "magnifies and strengthens the number of unmeritorious claims," the appellate court concluded that class-action treatment was appropriate because the liability alleged here relied on a "common theory" of liability. App. 286a, 290a-91a. According to the court, the case "boil[ed] down to one fundamental question: Is a cigarette that contains nicotine a defective product?" App. 286a.

On remand, the trial court established a two-phase trial plan. Phase I would address all "common" issues of fault and causation, as well as any classwide defenses, to determine defendants' liability to the "class as a whole." Phase II, if necessary, would address "the items of damage common to the class." App. 220a. On interlocutory appeal, the Louisiana Supreme Court approved the trial plan, App. 260a-280a, but cautioned that the trial court should "formulate a plan for a subsequent phase of trial in which sub-classes might be formed and more individualized issues, such as comparative fault and prescription, might be addressed." App. 267a.

2. *The Phase I Trial.* During Phase I, the trial court excused plaintiffs from proving their individual claims. There was no evidence that the class representatives or *any* identifiable class member had detrimentally relied on any alleged misstatement or omission or had otherwise been injured by defendants' conduct. Instead, plaintiffs based their case entirely on expert witnesses who opined about smoking's general physical effects and defendants' advertising and other public communications over nearly half a century. Those witnesses did not (and could not) connect their assertions to the class

representatives or any other identifiable class members. See, *e.g.*, 2003-01-23 Tr. 11575-76; 2003-02-11 Tr. 13404, 13430, 13457-58, 13464-65; 2003-02-21 Tr. 14568.

The only class members called by plaintiffs to testify at trial were the two class representatives, Scott and Jackson. On direct examination, both declared that they were class members and desired smoking cessation services. In their pretrial depositions and elsewhere, however, both had admitted facts that conclusively negated their claims. Both had smoked for reasons *unrelated* to any supposed misstatement or omission by defendants. See, *e.g.*, 2003-03-27 Tr. 17360-63; 2003-03-31 Tr. 17510-15. Both admittedly knew of their alleged addiction years before they filed suit, which time-barred their claims. And neither needed cessation assistance: both had quit smoking years before trial (Scott in 2000, Jackson in 2001). See, *e.g.*, R.85:25625; R.86:25632-37, 25640; 2003-03-27 Tr. 17274-82, 17366, 17391-92; 2003-03-31 Tr. 17448-54, 17476, 17483-84.

When defendants' counsel sought to cross-examine Scott and Jackson about these admissions and other facts that would disprove their claims or support affirmative defenses, the trial court refused to allow that questioning. See 2003-03-29 Tr. 17261-62 (threatening to hold counsel in contempt for raising any questions related to individualized issues). Such facts, the court declared, related to issues that were "individualized" and could not be adjudicated in the Phase I trial. See 2003-03-24 Tr. 16856-58 (refusing to "allow questions of these class representatives having to do with" various "individualized issues").

Over defendants' objections, the trial court's jury charge then formally relieved plaintiffs of their burden to prove the requisite elements of their individual fraud-based claims. It instructed that, although "[u]nder Louisiana law, three basic elements are usually necessary to prove a case of fraud"—misrepresentations, an intent to deceive, and justifiable reliance—"plaintiffs in this case ... do *not* have to establish individual reliance on specific concealments or misrepresentations allegedly made by these defendants." 2003-07-24 Tr. 23506 (emphasis added). Instead, the court announced that plaintiffs needed to prove only that defendants "intentionally engaged in actions designed to *distort the body of public knowledge* concerning smoking and health"; that "an intended and foreseeable class of Louisiana citizens" reasonably relied to their detriment on "this distorted body of knowledge"; and that such reliance by the group somehow "caused or contributed to the need for ... cessation of smoking programs." *Id.* at 23507 (emphasis added); accord App. 225a-59a (special verdict form).[1]

At the end of Phase I, the "one fundamental question" that had supposedly justified class treatment—whether cigarettes were a "defective" product—was answered by the jury in *defendants'* favor. The jury also found that medical monitoring

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[1] The trial court's sole authority for using the "distortion of public knowledge" concept to excuse proof of individualized reliance (see App. 215a-216a) was a RICO decision by Judge Weinstein, *Falise* v. *American Tobacco Co.*, 94 F. Supp. 2d 316, 335 (E.D.N.Y. 2000). That decision cited no supporting authority and was later repudiated. See *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215, 224 (2d Cir. 2008).

was unnecessary. The jury, however, returned a verdict in plaintiffs' favor on their fraud and assumed duty claims, but did so without finding that either of the class representatives or any other identifiable class member had relied on any supposed "distortion" or was injured by defendants' conduct. The jury also accepted plaintiffs' request for smoking cessation relief. App. 225a-59a.

3. *Post-Phase I Rulings.* The jury's Phase I verdict, rejecting plaintiffs' product defect claim—the "one fundamental question" that supposedly justified class treatment—should have prompted the trial court to decertify the class. Instead, the court ruled that various individualized liability issues that unquestionably would be the focal point of any trial of an individual class member's suit were now legally *irrelevant*. App. 199a-201a, 221a-22a. In particular, the court ruled that classwide reliance and causation had been fully adjudicated in Phase I for all class members, notwithstanding the court's prior recognition (in restricting cross-examination of the named plaintiffs) that such issues were inherently individualized. It concluded that there were no remaining liability issues because the Phase I trial had established defendants' liability on "a single, common, unitary" claim held by the "class as a whole," *i.e.*, that defendants had "distort[ed] the body of public knowledge." App. 194a, 199a, 222a.

The trial court also summarily invalidated all affirmative defenses as to each and every class member. It held that comparative fault was never to be tried, and that prescription *had* been tried—despite the absence of any findings regarding when any class member became aware of his or her claim—and was overridden for all class members by the "continuing tort" doctrine. App. 221a-22a. The

court declared that Phase II would be limited to deciding the scope and cost of a cessation remedy, and any issue of individualized reliance by any class member would be "reserved" for a later phase if and when any class member sought damages for personal injury. App. 220a, 222a. (No such phase ever occurred.)

4. *The Phase II Trial and Entry of Judgment.* In Phase II, plaintiffs sought more than $1 billion for a 25-year smoking cessation program consisting of 12 components (only the first four of which involved traditional cessation aids such as nicotine gum and patches). After hearing testimony from experts for both sides, the jury accepted plaintiffs' cost calculation formula and all 12 components but limited the program's duration to ten years. To fund the program, the jury awarded approximately $592 million. App. 171a-87a.[2]

B. Appellate and Remand Proceedings

1. *The Court of Appeal's 2007 Decision.* The Court of Appeal affirmed in part, reversed and amended the judgment in part, and remanded. App., 31a-79a. The appellate court was untroubled by the trial court's glaring due process errors. App. 43a-48a, 62a-65a. Although it acknowledged that as a matter of Louisiana law a fraud claim "requires causation in the form of reliance," and that plaintiffs had not established detrimental reliance as to any class member, the court held that proof of

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[2] In so doing, the jury adopted plaintiffs' estimates of class size and the rate at which class members would utilize the 12-component program, finding that 40% of 505,949 supposed class members would participate. App. 24a, 171a-87a.

individualized reliance was unnecessary in the context of a class action. App. 46a. In the court's view, "reliance" by "the class as a whole" was sufficient, and could rest on a "distort[ion of] the entire body of public knowledge," rather than on any identifiable misstatements or omissions. *Ibid.* Similarly, the court upheld liability for breach of an assumed duty without requiring proof of individualized causation or reliance as to any class member.

The appellate court also affirmed the trial court's nullification of affirmative defenses and its refusal to allow defendants to cross-examine the class representatives on essential elements and defenses. It made no difference, the court concluded, why the named plaintiffs began and continued smoking, whether they relied on any supposed misstatements or omissions, whether they were addicted, why they stopped smoking, or when they had notice of their claims. According to the court, the denial of cross-examination was "harmless" because there was ample evidence that defendants had distorted the overall body of public knowledge to the detriment of "the class as a whole." App. 48a-57a.

Although the Court of Appeal refused to set aside the proceedings on due process grounds, it did find two errors affecting the jury's verdict. *First*, it held that defendants had been improperly held liable to a "large group of plaintiffs" whose claims accrued on or after September 1, 1988 and were therefore barred by the Louisiana Products Liability Act (LPLA), La. Rev. Stat. Ann. § 9:2800.51 *et seq.* App. 38a-43a, 62a. *Second*, the court invalidated components 5 through 12 of the cessation program, finding that

those components were "not legally recoverable." *Id.* at 71a.[3]

2. *The Remand Proceedings.* On remand, the trial court rejected defendants' request for further evidentiary proceedings. Instead, the court simply eliminated the amount for program components 5-12 ($328 million), and reinstated the full $264 million award for components 1-4. The court thus refused to make two necessary reductions in the award, to reflect (a) the exclusion of LPLA-barred smokers, and (b) the decrease in the program's "utilization rate" (the percentage of class members expected to use the program) caused by eliminating components 5-12, which included massive advertising expenditures to boost utilization. In a remarkable understatement, the trial court acknowledged that the award "may be too large," but it denied any need for a "recalculation of class size, and/or quantum." App. 89a-90a.

3. *The Court of Appeal's 2010 Decision.* The Court of Appeal amended the judgment in part and affirmed. App. 1a-30a. Although it recognized that the trial court had failed to conduct appropriate proceedings on remand, App. 18a, the appellate court declared that further evidentiary proceedings were

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[3] After both sides unsuccessfully sought further review in the Louisiana Supreme Court, defendants unsuccessfully sought review in this Court. *Philip Morris USA Inc.* v. *Jackson*, 553 U.S. 1094 (2008) (order) (No. 07-1272). The petition for certiorari was limited to a request for a "hold" pending the resolution of certain federal preemption issues in *Altria Group, Inc.* v. *Good*, 129 S. Ct. 538 (2008). Plaintiffs opposed review on the ground that there was no "final judgment" under 28 U.S.C. § 1257(a).

unnecessary, concluding that it could resolve the remaining factual issues itself (see App. 19a-28a) on the basis of the same evidentiary record that had prompted it in 2007 to "remand this matter for further proceedings" (App. 74a). *First*, the appellate court speculated (with no record support) that the individual claims of "at least 210,000" class members had accrued before September 1, 1988 and thus were not barred by the LPLA. App. 27a. *Second*, it assumed, contrary to all record evidence (including plaintiffs' admissions at trial), a nonsensical *100%* utilization rate for the scaled-back cessation program. App. 23a, 27a-28a; see also note 2, *supra*. Using those invented assumptions, the court re-calculated the cost of components 1-4 at $242 million, a mere $22 million reduction from the $264 million originally awarded by the jury for the same components, but for a group more than *twice* as large. App. 27a-28a. The court ordered immediate payment of the full amount (currently $270 million with accrued interest).

For the second time, the Louisiana Supreme Court denied review and also denied defendants' request for a stay. On September 24, 2010, Justice Scalia, acting as Circuit Justice, stayed execution of the judgment.

REASONS FOR GRANTING THE PETITION

This case turns on whether the Due Process Clause permits state courts to impose massive liability in a class action without a truly representative trial of individual claims. The courts below candidly acknowledged that elements and defenses that would have been indispensable in individual cases were eliminated to make this case "work" as a class action. The departure from representative

litigation was so extreme that defendants were denied any meaningful opportunity to cross-examine the class representatives, and hundreds of millions of dollars were awarded for a smoking cessation remedy where both class representatives had already quit smoking years before trial.

The constitutional question raised by these proceedings is of vital importance. Simply put: Does a class action permit the aggregation of individual claims only where the named plaintiffs are truly representative of absent class members—advancing and proving individual claims that typify those of absent class members—or may a state court use the class-action device to excuse the class representatives from proving such claims by eliminating fundamental substantive and procedural rights that would have been enforced in any individual suit? The Louisiana courts cast their lot with the latter view. As Justice Scalia explained in staying the judgment, the "apparent consequence ... is that individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action." Slip op. at 3 (Scalia, J., in chambers).

This Court's review is warranted because the decisions below conflict with longstanding methods of adjudication and with precedent governing the limited circumstances in which courts can depart from traditional one-on-one adjudication. Moreover, despite the increasing prevalence of class actions—and state courts' growing reliance on novel procedures to facilitate certification of highly individualized claims—it is rare for state-court class actions to reach this Court after a trial and final judgment. The Court should take this opportunity to

provide much-needed guidance on the due process boundaries of classwide adjudication.

I. The Louisiana Courts Departed From The Due Process Precedents Of This Court And Other Courts By Using The Class-Action Device To Abridge Fundamental Rights Available In Individual Actions

The Louisiana courts ignored the core due process safeguard—representativeness—that legitimizes class-action litigation and in doing so swept aside centuries of precedent permitting classwide adjudication only in "limited" circumstances where named plaintiffs "adequately represent[] ... the same interests" as absent class members. *Richards* v. *Jefferson County*, 517 U.S. 793, 798 (1996) (internal quotations omitted) (citing *Hansberry* v. *Lee*, 311 U.S. 32, 41-42 (1940); see also *Smith* v. *Swormstedt*, 57 U.S. (16 How.) 288, 302-03 (1853) (named plaintiffs must "fairly represent[]" other class members). Because the courts below abrogated "well-established common-law protection[s] against arbitrary deprivations of property," there is "a presumption that [their] procedures violate[d] the Due Process Clause." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994).

A. Class Actions Comport With Due Process Only When They Permit Adjudication Of Individualized Claims And Defenses

As this Court has long recognized, "traditional practice provides a touchstone for constitutional analysis." *Oberg*, 512 U.S. at 430; see also *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 457 (1993); *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277

(1855). Adherence to time-tested methods of adjudication "protect[s] against arbitrary and inaccurate adjudication" and is the very essence of due process. *Oberg*, 512 U.S. at 430; see also *Pennoyer* v. *Neff*, 95 U.S. 714, 733 (1877) (the Due Process Clause ensures "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights").

Traditionally, a plaintiff must prove the elements of his or her claim; a defendant must be allowed to dispute that proof and establish available defenses; and a factfinder must decide the controversy between the litigants before the court under established burdens of proof. See, *e.g.*, *Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007); *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972). And an essential safeguard of the defendant's right to dispute proof and establish defenses is the availability of cross-examination, which ensures the defendant a full and fair opportunity to persuade the jury that it should refuse to impose liability or limit any relief. See, *e.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970).

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano* v. *Yamasaki*, 442 U.S. 682, 700-01 (1979). Because it would be inefficient to try what is effectively the same lawsuit over and over again, the claims of numerous similarly situated individuals may, in appropriate circumstances, be aggregated in a single trial in which a few named plaintiffs present proof that effectively establishes the core elements of their own and all other individuals' claims simultaneously.

Although "[s]tate courts are generally free to develop their own rules for protecting against ... the piecemeal resolution of disputes," it is well settled "that extreme applications" of this principle "may be inconsistent with a federal right that is 'fundamental in character.'" *Richards*, 517 U.S. at 797. Because "one-on-one 'traditional' modes [of adjudication] ... reflect ... the very culture of the jury trial," and "find expression in defendants' right to due process," *In re Fibreboard Corp.*, 893 F.2d 706, 710-11 (5th Cir. 1990) (Higginbotham, J.), deviation from traditional individualized litigation is tolerated only "in certain limited circumstances" and only under specific conditions that ensure due process protections for both class members and defendants alike. *Richards*, 517 U.S. at 798 (citing *Hansberry*, 311 U.S. at 41-42).

From the earliest days of class-action litigation, this Court has held that an essential premise of the class-action procedure is that the named plaintiffs function as *representatives* of the remainder of the class. See *Smith*, 57 U.S. (16 How.) at 302-03 (in "all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried"). That is, class actions rest on the assumption that it is unnecessary to bring every claimant into court because the class representatives—and their individual claims—are effective proxies for the absent class members and their claims. It is this "class cohesion that legitimizes representative action in the first place." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623 (1997). Aggregation thus does not and cannot *change* the claims asserted or the

ultimate scope of a defendant's liability; it merely avoids the burdens and inefficiencies of deciding the same claims repeatedly. "[N]o less than traditional joinder (of which it is a species)," classwide adjudication enables the trial of claims of "multiple parties at once, instead of in separate suits," but "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Associates, P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion). A class action is therefore "a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 332 (1980).

Certain safeguards are necessary to ensure that the trial conducted through the named plaintiffs on their individual claims is representative of all class members' individual claims and allows a full and fair presentation of applicable defenses. In the federal system, these objectives are achieved principally through Rule 23's requirements of commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a)(2)-(4). And in class actions brought under Fed. R. Civ. P. 23(b)(3)—the category most analogous to plaintiffs' suit here for classwide monetary relief—common questions must "predominate over any questions affecting only individual members." This "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. Moreover, in all federal class actions, the Rules Enabling Act prohibits the use of any procedural device (including the class-action procedures of Rule 23) to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

Although state courts are not bound by these federal-law requirements, they are bound by the *constitutional* requirement that representative plaintiffs in a class action serve as true proxies for the remainder of the class. As this Court has emphasized, the "Due Process Clause ... *requires* that the named plaintiff at all times adequately represent the interests of the absent class members." *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985) (emphasis added); see also *Amchem*, 521 U.S. at 626, n.20 (noting that the due process adequacy-of-representation requirement tends to merge with Rule 23's typicality and commonality requirements).

This representativeness requirement is essential to the basic fairness of class-action proceedings—for defendants and plaintiffs alike. The defendant must have the opportunity to defend against *all* of the class members' claims even though only a few plaintiffs (the class representatives) are present for trial. If, for example, many of the absent class members' claims suffer from defects that the class representatives' claims do not, then the defendant has been denied an opportunity to assert every defense and—if ordered to pay a judgment—is deprived of property without due process of law. See, *e.g.*, *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) (Wilkinson, J.). By the same token, if the named plaintiffs' claims fail because they are atypical and *weaker* than the absent class members', then—if the certified class proceeds to judgment—the absent class members have lost *their* opportunity to be heard.

This Court has recognized that traditional concepts of representation are deeply rooted in due process. In *Taylor* v. *Sturgell*, 553 U.S. 880 (2008),

for example, the Court unanimously rejected the notion of virtual representation, holding that "due process limitations" require that "[r]epresentative suits" rest on *actual* and direct representation of one party by another. *Id.* at 891, 894. The Court thus rejected the suggestion that representation need be only "close enough." *Id.* at 898. Notably, the Court specifically emphasized the representative character of "*properly conducted* class actions," and rightly placed that representative relationship on par with "suits brought by trustees, guardians, and other fiduciaries." *Id.* at 894 (emphasis added).

The absence of genuine representation divorces a class action from its foundation in our traditional adversarial system. If named plaintiffs fail to act as true proxies for the rest of the class, then the lawsuit is no longer the aggregate litigation of *individuals'* claims. It becomes instead something very different, detached from reality and the "traditional" moorings that are essential to due process. *Oberg*, 512 U.S. at 430. Once that break occurs, and the named plaintiffs are excused from their obligation to function as representatives litigating individual claims (and confronting individual defenses) typical of the class, a defendant's liability is distorted because class members are able to recover simply because they are members of the class, and not because of the merits of their individual claims.

Courts have regularly rejected such radical departures from the procedure of one-on-one adjudication established at common law, because forcing the defendant to defend against a classwide claim that differs from the class members' individual claims gives class representatives the undue "advantage of being able to litigate not on behalf of themselves but on behalf of a 'perfect plaintiff' pieced

together for litigation." *Broussard,* 155 F.3d at 344-45; see also *Fibreboard,* 893 F.2d at 711 (condemning class action in which "the claim of a unit of 2,990 persons" is adjudicated instead of "the individual claims of 2,990 persons" because it will "inevitably restate[] the dimensions of tort liability").

In *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008), for example, the court of appeals invalidated a plan to "estimat[e] the gross damages to the class as a whole and only subsequently allow[] for the processing of individual claims." The Second Circuit explained that the plan would "alter defendants' substantive right to pay damages reflective of their actual liability," and recognized—critically for present purposes—that permitting such a plan would "offend[]... the Due Process Clause." *Ibid.*; see also *id.* at 232 (condemning substitution of the "class as a whole" for the individual members of a class as a "fantastic procedure" that would violate "due process") (quoting *Eisen* v. *Carlisle & Jacquelin,* 479 F.2d 1005, 1018 (2d Cir. 1973), vacated on other grounds, 417 U.S. 156 (1974)); *Stonebridge Life Ins. Co.* v. *Pitts*, 236 S.W.3d 201, 206-07 (Tex. 2007) (reversing class certification premised upon "a common telemarketing effort"); *Rollins, Inc.* v. *Butland*, 951 So. 2d 860, 872 (Fla. Dist. Ct. App. 2006) (rejecting plaintiffs' attempt to prove reliance through proof of a "common scheme[]").

By the same token, courts have recognized that the Due Process Clause forbids arbitrary exactions imposed on a classwide basis that are grossly out of proportion to a defendant's actual liability to individual plaintiffs. See, *e.g., Avery* v. *State Farm Mutual Auto. Ins. Co.*, 835 N.E.2d 801, 832-34 (Ill. 2005) (rejecting method of calculating aggregate

damages for a nationwide class as "so speculative and uncertain" that it violates due process because of the uncertainty concerning the degree to which the award matches the outcome of individual adjudications); *Bell* v. *Farmers Ins. Exchange*, 9 Cal. Rptr. 3d 544, 579-80 (Cal. Ct. App. 2004) (rejecting aggregate damages award lacking support in any "foundational calculations"). As the Second Circuit put it: The "systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation." *In re Brooklyn Navy Yard Asbestos Litigation*, 971 F.2d 831, 853 (2d Cir. 1992); see also *Southwestern Refining Co.* v. *Bernal*, 22 S.W.3d 425, 437 (Tex. 2000).

B. In Conflict With Decisions Of This Court And Other Courts, The Louisiana Courts Erroneously Jettisoned The Essential Representative Nature Of A Class Action And Abridged Rights Available In Individual Suits

The Louisiana courts refused to adhere to these fundamental limits on class actions. Instead, the courts broke with the precedent of this Court and other lower courts—as well as with centuries of traditional practice—by imposing liability through a novel procedure that failed to adjudicate *any* class member's individual claim, representative or otherwise. The result was a class action in name only—a lawsuit that fundamentally altered the plaintiffs' burden of proving their underlying fraud-based claims, deprived defendants of a trial on critical components of their defenses, abridged

defendants' fundamental right to cross-examine the class representatives, and imposed a wholly arbitrary damages award untethered to any finding of actual liability.

1. Most egregiously, the courts below transformed hundreds of thousands of individual tort claims into a single "claim" purportedly asserted by "the class as a whole" to excuse plaintiffs from proving reliance or causation as to any class member. And the Louisiana courts applied this novel "class as a whole" theory—which had no prior basis in Louisiana authority (see note 1, *supra*)—without prior notice to defendants. Cf. *Bouie* v. *City of Columbia*, 378 U.S. 347, 352 (1964) (state court's "unforeseeable and retroactive" interpretation of legal requirements violated due process). In particular, the trial court instructed the Phase I jury that plaintiffs did "not have to establish individual reliance," even though such proof "usually" would be required under Louisiana law. 2003-07-24 Tr. 23506; see also App. 201a, 222a. The Court of Appeal likewise concluded that, although plaintiffs had not established detrimental reliance as to any class member, "reliance" by "the class as a whole" was sufficient. App. 46a. That worked a complete denial of the basic guarantee that class actions adjudicate representative *individual* claims. Here, the act of aggregation gave plaintiffs fundamentally different and better claims than any individual plaintiff possessed. The Louisiana courts thus approved a class action that did not *aggregate* the plaintiffs' individual claims—each of which required proof of individual reliance and causation—but rather *transformed* them into a disembodied, abstract claim that rendered the conduct and circumstances of actual class members irrelevant. See *Fibreboard*,

893 F.2d at 710, 712 (expressing "profound disquiet" over aggregation procedure that "lift[s] the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation" and condemning such a procedure as "something other than a trial within our authority"). The whole of plaintiffs' burden was rendered far less than the sum of its parts.

Having converted thousands of individual claims into a single claim as to which the concept of representative litigation retained no meaning, the courts below also had to remake the essence of the claim itself. Plaintiffs' original pleading asserted, consistent with Louisiana law, that defendants had directly misled each of the named plaintiffs—as well as each of the other hundreds of thousands of class members—about the health risks of smoking. R.1:20-21 (Pls.' Pet. ¶¶ 41, 45, 48). The claim eventually asserted by the "class as a whole," however, was based on the notion that, over a span of nearly five decades, defendants had caused a "distortion of the body of public knowledge." By eliminating the need to prove any individual class member's reliance on the "distortion" (much less on identifiable misstatements or omissions), the lower courts created the very antithesis of representative litigation: the lawsuit failed to decide the claims of *any* class member. Instead, it devolved into an abstract inquiry regarding the "body of public knowledge," with no attempt to show that the named plaintiffs or any other identifiable class member had been affected by defendants' conduct. The named plaintiffs were no longer representing other individual class members—or even, for that matter, themselves.

Moreover, following completion of the Phase I trial, the trial court summarily invalidated various individualized affirmative defenses. For example, the lower courts ruled that the individualized defense of prescription, which hinges on what each plaintiff knew and when, was categorically inapplicable because "[t]he jury's findings that defendants intentionally withheld information from *the general public* as to the addictive nature of their products ... constitutes a continuing tort." App. 53a-54a (emphasis added); see also App. 211a-13a, 222a. Thus, expressly relying on its invented theory that a "public distortion" affected the "class as a whole," the Court of Appeal nullified the individualized prescription defense as to all class members, even those (such as both class representatives) who knew the risks of smoking years before the suit was filed.[4]

The Louisiana courts' use of the class-action device to transform plaintiffs' individual claims into a single class-as-a-whole claim—and their corresponding nullification of defendants' individualized defenses—cannot be reconciled with the traditional common-law requirements of representative adjudication. See *Smith*, 57 U.S. (16 How.) at 302-03. The rulings below also cannot be reconciled with numerous decisions holding that a class action (like common-law joinder) "leaves the parties' legal rights and duties intact," *Shady Grove Orthopedic Associates*, 130 S. Ct. at 1443 (plurality opinion); see also, *e.g.*, *McLaughlin*, 522 F.3d at 232; *Broussard*,

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[4] By their own pretrial admissions, the named plaintiffs had actual notice of their alleged addiction well outside the one-year period of prescription. See page 6, *supra*; see also La. C.C. art. 3492.

155 F.3d at 345, and further contravene prohibitions against the imposition of arbitrary and irrational classwide relief, see *Avery*, 835 N.E.2d at 832-34. All of these precedents embody a basic constitutional principle: "due process requires that class actions not be used to diminish the substantive rights of any party to the litigation" (*Stonebridge*, 236 S.W.3d at 205; *Bernal*, 22 S.W.3d at 437 (same))—a principle squarely rejected by the Louisiana courts below.

Most federal and state courts have thus refused to certify mass tort cases as class actions *precisely because* of the highly individualized nature of tort claims. That is especially true in cases involving putative class actions brought by smokers. See, *e.g.*, *Barnes* v. *American Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998); *Castano*, 84 F.3d at 746-50; *Estate of Mahoney* v. *R.J. Reynolds Tobacco Co.*, 204 F.R.D. 150 (S.D. Iowa 2001); *Badillo* v. *American Tobacco Co.*, 202 F.R.D. 261 (D. Nev. 2001); *Arch* v. *American Tobacco Co.*, 175 F.R.D. 469, 488-89 (E.D. Pa. 1997); *Philip Morris, Inc.* v. *Angeletti*, 752 A.2d 200, 238-39 (Md. 2000). The Louisiana courts could permit what these numerous other courts forbade only by eliminating the basic representational premise of the class action and using it as a device to adjudicate claims in a way that no individual litigant ever could.[5]

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[5] In the lower courts, plaintiffs occasionally sought to analogize their case to actions certified under Fed. R. Civ. P. 23(b)(2), which permits certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Ibid.* The analogy is baseless. As the Court of Appeal acknowledged (App. 42a-43a), plaintiffs are *not* seeking "final

2. The Louisiana courts' "novel approach to class-action liability" (slip op. at 4 (Scalia, J., in chambers)) did not stop at merely transmuting hundreds of thousands of individual claims into a single claim brought by the "class as a whole" and depriving defendants of a trial on crucial defenses. The trial court magnified these errors—and underscored the fact that the class action here was anything but representative litigation—by prohibiting defendants from cross-examining the class representatives on essential elements of their individual claims, affirmative defenses, and their entitlement to relief. For example, Scott and Jackson both admitted during discovery that they had started and continued smoking for reasons unrelated to anything defendants had said or done, and that they had stopped smoking long before trial. These admissions conclusively established that neither class representative could prove reliance or causation—which were indisputably elements of liability under Louisiana law—or had any need for cessation relief. See page 6, *supra*. And Scott and Jackson both admitted facts demonstrating that their claims were time-barred. *Ibid.*

Remarkably, the trial court prohibited defendants from presenting these (and other) admissions to the jury by barring any meaningful cross-examination of

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injunctive relief or corresponding declaratory relief" but rather the *legal* remedy of the costs of smoking cessation treatment. Moreover, as noted above, plaintiffs alleged a broad diversity of acts and omissions by different defendants at various times over nearly half a century—allegations that preclude any finding that defendants "acted or refused to act" uniformly with respect to class members, as required by Rule 23(b)(2).

the class representatives. As explained above, the trial court ruled that such "individualized" inquiries were irrelevant to establishing liability. See 2003-03-24 Tr. 16857-58 (disallowing questions "having to do with individualized issues"); see also 2003-03-27 Tr. 17396; 2003-03-31 Tr. 17516-17. The Court of Appeal agreed, concluding that it made no difference why the class representatives began and continued smoking, whether they relied on any supposed misstatements or omissions, whether they were addicted, or why they stopped smoking. The Court of Appeal even reached the astonishing conclusion that the denial of cross-examination was "harmless error." App. 48a-49a.

It is hard to imagine a more fundamental deviation from the model of representative litigation than a case in which defendants are denied a full and fair opportunity to cross-examine the class representatives. Class representatives are the linchpin of the fairness of a class action. Here, for example, massive liability was imposed for *smoking cessation* even though both class representatives had *ceased smoking* long before trial. In any representational litigation worthy of the name, that fact would have been front and center before the jury through cross-examination. Here, it was deemed *irrelevant*. The Court of Appeal's conclusion that the weaknesses of the named plaintiffs' claims had no bearing on this case demonstrates just how far the lower courts departed from traditional methods of adjudication.

Numerous courts have recognized that effective cross-examination of class representatives is an essential component of a legitimate class action. In *Small* v. *Lorillard Tobacco Co.*, 252 A.D.2d 1 (N.Y. App. Div. 1998), for example, the appellate court denied certification to a proposed class of smokers

precisely because individual questions of reliance and causation made the necessary cross-examination impractical. *Id.* at 12 ("proposed class action would be unmanageable because ... [d]efendants have a *due process right to cross-examine each member*, a task that would take hundreds of years") (emphasis added); see also *Barnes*, 161 F.3d at 145-46; *Broussard*, 155 F.3d at 344-45; *Arch*, 175 F.R.D. at 489 n.21. As Judge Wilkinson explained in reversing class certification in *Broussard*, forcing a class-action defendant "to defend against a fictional composite" denies him "the benefit of ... cross-examining the disparate individuals behind the composite creation." 155 F.3d at 344-45.[6]

II. The Question Presented Is Of National Importance

Preserving the essential representative function of class actions is a matter of nationwide significance. As Justice Scalia observed in granting

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[6] Once this class action was divorced from the representative function that this Court's precedents demand of aggregate litigation, further deviations and departures from longstanding methods of civil adjudication were all but inevitable. As noted above (at pages 9, 11-12 & n.2, *supra*), the Court of Appeal, piling due process error upon due process error, simply conjured up the number of plaintiffs whose claims had accrued and then speculated that 100% would use the judicially curtailed cessation remedy. The resulting total disconnect between the massive $270 million award and any actual liability was a textbook illustration of arbitrary decisionmaking—albeit a predictable consequence of the Louisiana courts' wholesale abandonment of representational litigation. Cf. *McLaughlin*, 522 F.3d at 231 (an order to pay must be "reflective of [defendants'] actual liability"); *Walls* v. *Miss. State Dep't of Pub. Welfare*, 730 F.2d 306, 326 (5th Cir. 1984) (same).

a stay in this case, "[t]he extent to which class treatment may constitutionally reduce the normal requirements of due process is an important question." Slip op. at 3. Class actions pose a danger that the "systemic urge to aggregate litigation" will, as here, trump "individual justice." *In re Repetitive Stress Injury Litigation*, 11 F.3d 368, 373 (2d Cir. 1993) (citing *Brooklyn Navy Yard*, 971 F.2d at 853).

Class actions occupy an increasingly prominent role in the modern legal landscape. They directly affect tens of millions of Americans who find themselves members of a class in connection with the most ordinary purchases or activities. See Lee & Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, Federal Judicial Center, at 1 (2008) (noting 72% increase in class-action activity between 2001 and 2007). This case is illustrative. The certified class was estimated to include more than 500,000 members. See also *Dukes* v. *Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (en banc) (upholding certification of class estimated by the district court to encompass 1.5 million female Wal-Mart employees advancing employment discrimination claims), pet. for cert. filed, 79 U.S.L.W. 3128 (Aug. 25, 2010) (No. 10-277). Class actions also indirectly affect countless more consumers who ultimately bear the enormous costs imposed on the economy by misconceived or meritless class-action litigation—burdens that will only increase if the highly unorthodox proceedings and judgment below are permitted to stand. Confining class actions to their constitutionally permissible boundaries is thus a matter of the utmost importance.

As class actions have expanded to encompass ever larger classes and ever more disparate claims, many

courts have tried to accommodate these gargantuan creations by resorting to procedures that depart from traditional modes of adjudication. These attempts have included segmented proceedings, in which questions of liability (often cast in highly generalized terms bearing little resemblance to traditional legal categories) are subdivided into multiple phases and further separated from remedial questions, with different factfinders sometimes assigned to different phases. See, *e.g.*, *Perrine* v. *E.I. du Pont de Nemours & Co.*, 694 S.E.2d 815, 837-38 (W. Va. 2010); *State ex rel. Chemtall Inc.* v. *Madden*, 655 S.E.2d 161, 167 (W. Va. 2007). Other courts have carved up cases by certifying "issue" classes designed to extract common questions from their individualized surroundings. See, *e.g.*, *Pella Corp.* v. *Saltzman*, 606 F.3d 391 (7th Cir. 2010), petition for cert. filed, 79 U.S.L.W. 3149 (Sept. 13, 2010) (No. 10-355); *Engle* v. *Liggett Group, Inc.*, 945 So. 2d 1246, 1256-58 (Fla. 2006). Still other courts have, like the decisions below, attempted to reconceptualize the theory of liability as running to the "class as a whole" in an effort to define away the individualized components of the class members' claims. See, *e.g.*, *Schwab* v. *Philip Morris USA, Inc.*, 449 F. Supp. 2d 992 (E.D.N.Y. 2006), rev'd sub nom. *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008); see also Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 101, 103 (2009) (noting the "deep and increasingly important trend" toward such conceptual battles at the class-certification stage). Similarly, other courts have attempted to make classwide determinations of liability or damages by extrapolating from a handful of individual data points. *E.g.*, *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 195 (1st

Cir. 2009); *Cimino* v. *Raymark Indus.*, 151 F.3d 297, 317-19 (5th Cir. 1998); *Hilao* v. *Estate of Marcos*, 103 F.3d 767, 782-83 (9th Cir. 1996).

State courts—which lack the uniform protections of Rule 23 and the Rules Enabling Act—have been particularly fertile ground for class actions that deviate from traditional modes of adjudication. Indeed, in enacting the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. § 1332(d), Congress specifically noted the precipitous increase in class actions filed in state courts in which "the governing rules are applied inconsistently[,] ... frequently in a manner that contravenes basic fairness and due process considerations." S. Rep. No. 109-14, at 4 (2005); see also *id.* at 14 (observing that state courts are often less faithful to the procedural requirements "intended to protect the due process rights of both unnamed class members and defendants"). CAFA partially addresses that problem by expanding federal removal jurisdiction over multistate class actions, thereby channeling such actions into the federal system.

As Justice Scalia noted in granting a stay (slip op. at 3-4), however, CAFA does not provide federal court jurisdiction over many class actions in which more than two-thirds of the members of the proposed class are citizens of the forum state. 28 U.S.C. § 1332(d)(4); see also *id.* § 1332(d)(3) (permitting district courts to decline jurisdiction over certain class actions where between one-third and two-thirds of the members are citizens of the forum state and certain considerations are present). Even where CAFA's home-state exception does not apply, removal to federal court is far from a foregone conclusion. See, *e.g.*, *Tanoh* v. *Dow Chem. Co.*, 561 F.3d 945, 953 (9th Cir. 2009) (applying general

presumption against removal over defendant's objection that plaintiffs filed copycat suits to evade federal removal jurisdiction under CAFA's "mass action" provisions). Thus, despite Congress's concern with inconsistent and abusive state-court practices, the opportunities for abuse persist unabated where, as here, a class comprises citizens of a single state.

Finally, establishing proper constitutional limits on state class actions is especially important because certification of a large class action produces an all-but-overwhelming incentive to settle. The risk of error is compounded by the sheer number of claims aggregated in a single action. See *Thorogood* v. *Sears, Roebuck & Co.*, 2010 WL 4286367, at *6-8 (7th Cir. Nov. 2, 2010). Large class actions are often bet-the-company cases, and class-action defendants can rarely tolerate the crippling liability risk of a single, massive verdict. See, *e.g.*, Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, And CAFA*, 106 COLUM. L. REV. 1872, 1875 (2006) (the "overwhelming majority" of certified class actions result in settlements). As this Court has recognized, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). This phenomenon led the normally reticent Judge Friendly to condemn class settlements induced by the small probability of an immense judgment as legalized "blackmail." H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973).

The high-stakes nature of class-action litigation means that procedural guarantees, like the ability to cross-examine the class representative and to

present applicable defenses, must be scrupulously observed. Here, the class-action device was the excuse for eliminating those guarantees altogether. If the constitutional requirement of representativeness is jettisoned, due process error upon due process error are sure to result.

III. This Case Is An Ideal Vehicle For Resolving The Due Process Issue

This case presents a rare opportunity for review of a class action tried to final judgment and stands in an ideal posture for determining the minimum standards that the Due Process Clause places on class actions. The record is fully developed after a two-phase trial on the merits, and defendants have exhausted their appeals in the Louisiana courts, resulting in a series of published opinions. As explained above, it is unusual that defendants can afford to bear the risks of trial and appeals once a massive class has been certified. Consequently, this Court has precious few opportunities to review the merits of a class action tried to a final judgment.

The comprehensive record below leaves no doubt, moreover, concerning the Louisiana courts' position on the question raised in this petition. Defendants asserted their due process objections at every stage of the litigation—including repeatedly seeking decertification when further proceedings confirmed that the plaintiffs' claims were highly individualized—but were rebuffed at every turn. They pressed their due process challenges at all necessary junctures in the trial court; in two separate appeals to the Louisiana Court of Appeal; and then in two successive petitions for review in the Louisiana Supreme Court. The Louisiana courts have had every opportunity to rectify the due process problems

infecting the trial and judgment but have pointedly refused to do so, instead ordering defendants to pay the $270 million judgment immediately (a directive now stayed by Justice Scalia). See, *e.g.*, App. 9a, 45a-49a. And there can be no doubt that the constitutional question presented is essential to validity of the judgment below and the outcome of this case.

The opportunity to review a class action arising out of state court is particularly rare. In federal court, Rule 23(f) allows the interlocutory appeal of class-certification orders, affording a far shorter path to potential review by this Court on that fundamental threshold issue. With state class actions, by contrast, obtaining this Court's review is far more difficult. Plaintiffs often assert, for example, that any judgment is not sufficiently final to support this Court's jurisdiction under 28 U.S.C. § 1257(a). Indeed, plaintiffs did exactly that when defendants filed a certiorari petition in 2008. Moreover, federal cases are unlikely to supply comprehensive guidance on due process issues because they are often resolved based on interpretation of particular provisions of Rule 23 or the Rules Enabling Act without addressing underlying due process principles. See, *e.g.*, *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 172 n.10 (1974) (declining to reach constitutional questions).

This case perfectly illustrates the enormous time, expense, and uncertainty defendants face in bringing a state class action to an ultimate conclusion that is fully ripe for this Court's review. Defendants have sought to vindicate their due process rights in the state courts for more than a decade, expending massive resources and facing enormous liability before finally being able to present their constitutional challenges to this Court. Defendants had little choice but to follow this long and tortuous

path to obtain review in a federal forum. But few defendants will be willing or able to go the distance and, as here, present this Court with a comprehensive record of the treatment given to due process claims in state class actions. This case therefore presents a valuable opportunity for this Court to clarify the due process standards that apply in state class actions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
ASHLEY C. PARRISH
King & Spalding LLP
1700 Pennsylvania Ave.
Washington, D.C. 20006
(202) 737-0500

PHILLIP A. WITTMANN
DOROTHY H. WIMBERLY
Stone Pigman Walther Wittmann L.L.C.
546 Carondelet Street
New Orleans, LA 70130
(504) 581-3200

Counsel for R. J. Reynolds Tobacco Company

ALAN E. UNTEREINER
Counsel of Record
MARK T. STANCIL
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
auntereiner@robbinsrussell.com

MIGUEL A. ESTRADA
AMIR C. TAYRANI
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Philip Morris USA, Inc.

MARK A. BELASIC
KEVIN D. BOYCE
Jones Day
North Point
901 Lakeside Avenue
Cleveland, OH 44114-1190
(216) 586-3939

Counsel for R. J. Reynolds Tobacco Company

CHARLES F. GAY, JR.
RONALD J. SHOLES
MARTIN A. STERN
JEFFREY E. RICHARDSON
Adams and Reese, LLP
4500 One Shell Square
New Orleans, LA 70139
(504) 581-3234

Counsel for Philip Morris USA Inc. and the Tobacco Institute, Inc.

CARMELITE M. BERTAUT
Stone Pigman Walther Wittmann L.L.C.
546 Carondelet Street
New Orleans, LA 70130
(504) 581-3200

STEVEN W. COPLEY
Gordon, Arata, McCollam, Duplantis & Eagan, LLP
201 St. Charles Avenue
Suite 4000
New Orleans, LA 70120
(504) 582-1111

RICHARD A. SCHNEIDER
King & Spalding LLP
1180 Peachtree Street, N.E.
Atlanta, GA 30309
(404) 572-4600

Counsel for R. J. Reynolds Tobacco Company and Brown & Williamson Holdings, Inc. (formerly Brown & Williamson Tobacco Corporation, individually and as successor by merger to The American Tobacco Company)

GARY R. LONG
JENNIFER L. BROWN
Shook, Hardy & Bacon, L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
(816) 474-6550

Counsel for Lorillard Tobacco Company

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