

No. 13-\_\_\_

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IN THE  
**Supreme Court of the United States**

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R.J. REYNOLDS TOBACCO COMPANY,  
*Petitioner,*

v.

VERNELL SMITH, AS PERSONAL REPRESENTATIVE OF  
THE ESTATE OF EMMON SMITH,  
*Respondent.*

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**On Petition for Writ of Certiorari to the  
Florida First District Court of Appeal**

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**PETITION FOR WRIT OF CERTIORARI**

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Paul D. Clement  
BANCROFT PLLC  
1919 M Street, N.W.  
Suite 470  
Washington, DC 20036

Gregory G. Katsas  
*Counsel of Record*  
JONES DAY  
51 Louisiana Avenue, N.W.  
Washington, DC 20001  
(202) 879-3939  
ggkatsas@jonesday.com

*Counsel for Petitioner*

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## QUESTION PRESENTED

This case presents the same question as the petitions for certiorari filed by petitioner R.J. Reynolds Tobacco Company in *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013), and *R.J. Reynolds Tobacco Co. v. Jimmie Lee Brown*, 70 So. 3d 707 (Fla. Dist. Ct. App. 2011). The question presented is:

Whether the Due Process Clause permits use of generic findings from the decertified *Engle* class action to preclude defendants in thousands of cases from contesting essential elements of the plaintiffs' claims.

**PARTIES TO THE PROCEEDING**

Defendant-appellant below, who is petitioner before this Court, is R.J. Reynolds Tobacco Company, individually and as successor by merger to the Brown & Williamson Tobacco Corporation and the American Tobacco Company.

The sole plaintiff below was Respondent Vernell Smith, as personal representative of the estate of Emmon Smith.

### **CORPORATE DISCLOSURE STATEMENT**

Petitioner R.J. Reynolds Tobacco Company is a wholly owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc., which in turn is a wholly owned subsidiary of Reynolds American Inc. (“RAI”), a publicly held company.

Brown & Williamson Holdings, Inc., holds more than 10% of the stock of RAI. British American Tobacco p.l.c. indirectly holds more than 10% of the stock of RAI through Brown & Williamson Holdings, Inc.

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## OPINIONS BELOW

The decision of the Florida First District Court of Appeal (Pet. App. 1a) is reported at 131 So. 3d 18. The order of the Florida Supreme Court dismissing for lack of jurisdiction (Pet. App. 9a) is unreported.

## JURISDICTION

This Court has jurisdiction to review the First District's judgment under 28 U.S.C. § 1257(a). The First District entered a final judgment on November 20, 2013 (Pet. App. 1a), and denied a timely motion for rehearing *en banc* on February 6, 2014 (Pet. App. 11a). On March 13, 2014, the Florida Supreme Court held that it lacked jurisdiction to review the First District's judgment. Pet. App. 9a.

## CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part that “[n]o State shall . . . deprive any person of . . . property, without due process of law.” U.S. Const. amend. XIV, § 1, cl. 2.

## STATEMENT OF THE CASE

Emmon Smith sued Petitioner R.J. Reynolds Tobacco Company for injuries from smoking. Mr. Smith passed away during the pendency of this appeal; Respondent Vernell Smith was substituted as his personal representative. Mr. Smith raised claims for strict liability, negligence, concealment, and conspiracy. Mr. Smith did not, however, set out to prove each element of those claims, as plaintiffs would need to do in ordinary litigation. Instead, to establish the conduct elements of his claims, Mr. Smith sought to rely entirely on the asserted “res judicata effect” of

findings from the class action in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006).

That would be unobjectionable if the jury in *Engle* had actually decided issues relevant to Mr. Smith's claims, but it did not, as the Florida Supreme Court has definitively recognized. Instead, the generalized *Engle* findings are ambiguous in how if at all they apply to the claims of any individual smoker. As relevant here, those findings are that defendants sold some unidentified defective cigarettes, engaged in some unidentified conduct that was negligent, and concealed some unidentified information about the health risks of smoking, both individually and through a conspiracy. The *Engle* class had asserted multiple alternative allegations of defect, negligence, and concealment—including allegations limited to specific brands or types of cigarettes such as filtered cigarettes, unfiltered cigarettes, light cigarettes, non-light cigarettes, and so on. Moreover, the class did not ask that the jury specify which of these allegations it accepted or rejected. It is thus impossible to determine whether the *Engle* findings decide anything relevant to the claims of any individual smoker. Indeed, as the Florida Supreme Court recently and definitively acknowledged, the *Engle* findings would be “useless in individual actions” if the plaintiff were required to show that the specific issues relevant to his claims were in fact actually decided in the plaintiff's favor in *Engle*. *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 433 (Fla. 2013)

Nonetheless, both the Florida Supreme Court and the United States Court of Appeals for the Eleventh Circuit have now held that former class members may, consistent with federal due process, use the

*Engle* findings to conclusively establish the conduct elements of their claims. *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013); *Douglas*, 110 So. 3d 419. As explained below, the rationales of *Walker* and *Douglas* are radically different and mutually contradictory. *Walker* now governs more than 1100 *Engle*-progeny cases pending in the federal district courts in Florida, and *Douglas* now governs nearly 3200 *Engle*-progeny cases pending in the Florida state courts. Plaintiffs in these cases collectively raise claims for tens of billions of dollars.

Today, Reynolds has filed petitions for certiorari in *Walker* and *R.J. Reynolds Tobacco Co. v. Jimmie Lee Brown*, 70 So. 3d 707 (Fla. Dist. Ct. App. 2011). These petitions present the same question as this one: whether federal due process permits plaintiffs to use the *Engle* findings to establish elements of their claims, and to preclude defendants from contesting those elements, without any showing that the *Engle* jury actually decided the issues relevant to a given plaintiff's claims.

#### A. The *Engle* Class Action

The petitions for certiorari in *Walker* and *Jimmie Lee Brown* detail the background in *Engle*. Accordingly, we provide only a brief summary here.

*Engle* was a putative class action brought against major cigarette manufacturers, including petitioner, by allegedly addicted smokers. During Phase I of *Engle*, the class sought to establish that the defendants had sold defective cigarettes, committed acts of negligence, and fraudulently concealed information about smoking, both individually and through a conspiracy, over a period encompassing more than four

decades. The class presented various alternative allegations of defect, negligence, and concealment, many of which (such as allegations about filtered cigarettes, unfiltered cigarettes, light cigarettes, non-light cigarettes, and so on) applied only to certain cigarette types or time periods. At the end of Phase I, the jury found that each defendant had sold some defective cigarettes, engaged in some negligent conduct, and concealed some information individually and through a conspiracy. But despite defendants' warning that such generalized findings would be useless in subsequent litigation, the class refused to ask the jury to specify which of the alternative allegations of defect, negligence, and concealment it had adopted, which it had rejected, and which it had simply not addressed. See Pet. for Cert., *Walker v. R.J. Reynolds Tobacco Co.*, No. 13-\_\_\_\_, at Statement, Part A (Mar. 28, 2014); Pet. for Cert., *R.J. Reynolds Tobacco Co. v. Jimmie Lee Brown*, No. 13-\_\_\_\_, at Statement, Part A (Mar. 28, 2014).

Ultimately, the Florida Supreme Court decertified the *Engle* class. But rather than simply admit that the massive class action was a failure, the court purported to “retain[]” some of the *Engle* jury findings, including the defect, negligence, concealment, and conspiracy findings, for use in future litigation. 945 So. 2d. at 1269. The court permitted former class members to file individual actions within a year, and it decreed that the retained findings “will have res judicata effect” in those actions. *Id.*

Following the Florida Supreme Court's decision, thousands of plaintiffs filed individual actions seeking the benefit of that asserted “res judicata effect.” These individual actions are commonly referred to as

“*Engle* progeny” cases. Nearly 3200 of these cases remain pending in the Florida state courts, and more than 1100 remain pending in the federal district courts. In each of these cases, plaintiffs seek to use the *Engle* findings to establish the conduct elements of their individual claims, and defendants contend that such use of the findings would violate federal due process.

Both federal and state courts struggled with how the generic *Engle* findings could be given meaningful effect in former class members’ individual suits consistent with due process. Some courts concluded that they could not, see *Bernice Brown v. R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328, 1344-46 (M.D. Fla. 2008), *vacated on other grounds*, 611 F.3d 1324 (11th Cir. 2010), and others recognized that giving them effect would raise serious due-process concerns, *Jimmie Lee Brown*, 70 So. 3d at 716; *id.* at 719-20 (May, C.J., concurring).

### **B. The *Douglas* Decision**

In *Douglas*, the Florida Supreme Court rejected a due-process challenge to use of the *Engle* findings to establish individual elements of progeny claims. The Florida Supreme Court conceded that the *Engle* findings would be “useless in individual actions” as a matter of issue preclusion, given their ambiguity and the universal rule that issue preclusion can apply only to issues shown to have been actually decided in the prior action. See 110 So. 3d at 433. As a result, the court invented a doctrine of offensive “claim” preclusion. Under that theory, the court held that the *Engle* findings could be used in progeny cases to establish not only issues shown to have been *actually decided* by the jury in *Engle*, but also to issues that

the *Engle* jury *could have decided*. *See id.* at 433-35. While the court termed this doctrine “claim preclusion,” it applies to the issues litigated in Phase I of *Engle* and not to any claims, as Phase I did not resolve any claims. In holding this unprecedented use of offensive “claim” preclusion to be constitutional, the court reasoned that “claim preclusion, unlike issue preclusion, has no ‘actually decided’ requirement.” *Id.* at 435. By labeling the governing doctrine as one of “claim” preclusion, the court thus sought to sidestep the requirement of an actual decision on the issues subject to preclusion, which this Court has held is required by due process. *See Fayerweather v. Ritch*, 195 U.S. 276, 300 (1904).

### C. The *Walker* Decision

In *Walker*, the Eleventh Circuit reached the same result as *Douglas*, but on different and inconsistent grounds. Adopting a rationale that even the plaintiffs had not pressed, the Eleventh Circuit held itself bound, under the Full Faith and Credit Act, 28 U.S.C. § 1738, to accept what it said was the *Douglas* court’s determination of what the *Engle* jury had found. *See* 734 F.3d at 1286-87. Then, the court construed *Douglas* to say the exact opposite of what it in fact had said about the *Engle* findings: Whereas *Douglas* had said that those findings would be “useless” if used to establish only those issues shown to have been actually decided in *Engle*, the Eleventh Circuit read *Douglas* as having determined that the *Engle* findings applied to all cigarettes sold by the defendants. *See id.* at 1287-88. Accepting that determination as binding, the court held that the requirement of an actual decision on the issues rele-

vant to the plaintiffs' claims was satisfied. *See id.* at 1289.

#### D. The Proceedings in This Case

Emmon Smith sued Petitioner R.J. Reynolds Tobacco Company for injuries from smoking. Mr. Smith passed away during the pendency of this appeal, and Respondent Vernell Smith was substituted as his personal representative. Pet. App. 1a, 7a n.13. Mr. Smith pleaded claims for strict liability, negligence, fraudulent concealment, and conspiracy to fraudulently conceal. *Id.* at 57a-63a. To establish the conduct elements of his claims, he sought to rely entirely on the *Engle* jury findings. *Id.* at 51a, 52a, 54a-56a.

Before trial, Mr. Smith moved for partial summary judgment to resolve whether “certain findings from the Phase I *Engle* trial were to be given *res judicata* effect in subsequent individual *Engle* progeny cases.” Pet. App. 33a. Mr. Smith argued that the findings resolved in his favor all of the conduct elements of all of his claims, and left open for adjudication only questions regarding “*Engle* class membership, medical causation and damages.” *Id.* at 34a. In opposing the motion, Reynolds explained that there was “no way to identify the conduct that the jury found tortious,” and thus “no way to determine whether the conduct or defect that allegedly caused Plaintiff’s injuries here is the same conduct or defect found in *Engle* to be tortious.” *Id.* at 41a. Under these circumstances, Reynolds argued, use of the *Engle* findings to establish the conduct elements of individual progeny claims would “offend due process.” *Id.* at 44a.

The trial court held that it would “give *res judicata* effect to the *Engle* Phase I findings” upon a showing

that Mr. Smith was an *Engle* class member, and that it would “strike specific affirmative defenses” that were “barred by the *Engle* Phase I findings.” Pet. App. 26a.

Reynolds moved for an order clarifying whether the intended “res judicata effect” was to establish the conduct elements of Mr. Smith’s tort claims. Pet. App. 46a. Reynolds argued that “the *Engle* findings, even if given preclusive effect under the Court’s prior ruling, do not relieve Plaintiff of the burden to prove that [Reynolds] engaged in specific tortious conduct that harmed him, and that such conduct was a legal cause of his injuries.” *Id.* at 47a.

The trial court denied Reynolds’s motion based on the First District’s decision in *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. Dist. Ct. App. 2010). Pet. App. 23a-24a. In *Martin*, the First District held that, regardless of what the *Engle* trial record disclosed about what had been actually decided in *Engle*, the *Engle* findings conclusively established all of the conduct elements of all of the claims made by all *Engle* class members. *See* 53 So. 3d at 1068 (“unlike the Eleventh Circuit [in *Bernice Brown*], we conclude that the Phase I findings establish the conduct elements of the asserted claims, and individual *Engle* plaintiffs need not independently prove up those elements or demonstrate the relevance of the findings to their lawsuits”).

Before trial, Reynolds asked the court to instruct the jury to determine all elements of Mr. Smith’s claims, including the conduct elements of defect, negligence, concealment, and conspiracy. Pet. App. 77a-93a; *id.* at 70a-75a. The trial court refused to give those instructions. Instead, it instructed the jury

that Reynolds “placed cigarettes on the market that were defective and unreasonably dangerous” and “was negligent.” *Id.* at 134a. In so doing, the court did not, and could not, tell the jury *which* brands or types of cigarettes were defective, or *which* acts by the *Engle* defendants had been found negligent. On the claim for fraudulent concealment, the court instructed the jury that the only open liability issue was whether “Mr. Smith relied [upon fraudulent omissions] to his detriment.” *Id.* at 135a. But the court did not, and could not, tell the jury whether the fraudulent omissions found in *Engle* encompassed all cigarettes, filtered cigarettes, unfiltered cigarettes, light cigarettes, non-light cigarettes, or any number of other allegations raised by the class. Finally, the jury was instructed that Reynolds “agreed with other tobacco companies and groups to conceal material information about the health effects or addictive nature of cigarettes.” *Id.* at 136a. As with the underlying concealment claim, the court did not, and could not, tell the jury whether the conspiracy encompassed all cigarettes, filtered cigarettes, unfiltered cigarettes, light cigarettes, non-light cigarettes, or some other alternative. The court further instructed the jury that the *Engle* findings were “binding upon you, the Court, and the parties.” *Id.* at 134a. At no point was the jury asked whether any specific conduct that harmed Mr. Smith was tortious.

The jury found for Mr. Smith on all claims. First, it found that Mr. Smith was an *Engle* class member. Pet. App. 18a-19a. On the merits, it found that Reynolds’s defective products, negligence, concealment, and agreement to conceal were a legal cause of Mr. Smith’s injuries. *Id.* at 19a-20a. It found non-economic damages of \$10,000,000, and assigned 70%

of the fault to Reynolds, and 30% to Mr. Smith. *Id.* at 20a. In a second phase of trial, the jury awarded \$20,000,000 in punitive damages. *Id.* at 22a. After reducing the compensatory award to reflect the jury's allocation of comparative fault, the trial court entered a final judgment for Mr. Smith of \$27 million. *Id.* at 13a-15a.

In a post-trial motion, Reynolds renewed its argument that the trial court's use of the *Engle* findings to establish the conduct elements of Mr. Smith's claims violated due process. Pet. App. 113a-14a; *id.* at 95a-112a. The trial court denied the motion. *Id.* at 16a-17a.

On appeal, Reynolds again raised the same due-process argument. Pet. App. 117a-19a. The First District Court of Appeal affirmed the \$27 million judgment, in a per curiam order that contained no legal analysis and thus no discussion of the due-process issue. *Id.* at 2a.

Two judges concurred separately to note their view that the \$27 million damages award in this case—and the many similar awards upheld in other *Engle*-progeny cases—were excessive. *Id.* at 5a-6a (Wetherell, J., concurring) (“it appears that the . . . *Engle* verdict lottery and its jackpot-sized damages awards will continue in the trial courts within this Court's jurisdiction (and around the state) simply because noneconomic damages are difficult to measure and the tobacco companies are perceived to have sufficiently deep pockets to pay these awards”); *id.* at 6a (Makar, J., concurring) (“I concur in affirmance, but with much reluctance for many of the reasons expressed by Judge Wetherell.”). These judges nonetheless felt compelled to uphold the \$10 million

award for non-economic compensatory damages in this case, based on First District precedent upholding a \$10.8 million award for non-economic compensatory damages in another *Engle*-progeny case. *See R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307 (Fla. Dist. Ct. App. 2012).<sup>1</sup> The concurring judges affirmatively invited Florida Supreme Court review of their determination of non-excessiveness. Pet. App. 5a (Wetherell, J., concurring) (“I remain hopeful that the court will at some point squarely address whether there is any limit on the noneconomic damages that can be awarded in *Engle* progeny cases short of the \$10.8 million award approved in *Townsend*.”). Yet the panel then denied Reynolds’s post-decision motion to publish one of the concurrences as a majority opinion in order to facilitate such review. *Id.* at 11a.<sup>2</sup> In addition, the full court denied Reynolds’s alternative motion for review *en banc*. *Id.*

Reynolds then sought review in the Florida Supreme Court. It argued that, because that Court routinely follows the methodology in *Marks v. United States*, 430 U.S. 188 (1977), for interpreting fragmented opinions, the two concurrences below consti-

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<sup>1</sup> Reynolds today has filed a petition for certiorari in *Townsend*, which raises the same due-process question as this case. Reynolds asks that *Townsend*, like this case, be held pending the disposition of the petitions for certiorari in *Walker* and *Jimmie Lee Brown*.

<sup>2</sup> The Florida Supreme Court lacks jurisdiction to review per curiam affirmances that contain no reasoning and are non-precedential. *See, e.g., The Florida Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988).

tuted a reviewable majority opinion on their points of agreement. Pet. App. 122a-28a. To maximize the possibility that its brief on jurisdiction would actually be read, Reynolds attempted to file it on the first day that the case appeared on the Florida Supreme Court's public docket—several days ahead of the deadline for such briefs. *Id.* at 159a-61a. Nonetheless, the Florida Supreme Court dismissed the case for lack of jurisdiction before Reynolds could even file its brief on jurisdiction. *Id.* at 9a, 159a-61a. The order dismissing the \$27 million appeal appears to have been entered by the clerk's office, without the involvement of any judicial officer.

#### REASONS FOR GRANTING THE PETITION

A. This case raises the same question as the petitions for certiorari in *Walker* and *Jimmie Lee Brown*: whether use of the *Engle* findings to conclusively establish elements of individual progeny plaintiffs' claims is consistent with federal due process. For reasons explained at length in those petitions, that question amply warrants this Court's review. It is central to the conduct of thousands of ongoing cases involving tens of billions of dollars of claims. Moreover, its recent resolution by the Florida Supreme Court and the Eleventh Circuit has produced opinions that are both mutually exclusive and individually indefensible.

This case illustrates the rank unfairness of the unprecedented preclusion rules that now govern *Engle* progeny litigation. Mr. Smith smoked Camel, Pall Mall, and Lucky Strike cigarettes—all of which were full-flavored (non-light) cigarettes. Pet. App. 130a-33a. Yet the *Engle* class made extensive defect, negligence, and concealment allegations specific to *light*

cigarettes—including, for example, the allegation that light cigarettes are defective and negligently designed because they cause smokers to “compensate” for reduced nicotine yields by choosing to smoke more or to inhale more deeply, and the allegation that the *Engle* defendants concealed these facts from smokers. *Id.* at 138a-39a, 141a-58a. If the *Engle* findings rested on those allegations, they would have no possible applicability to smokers who, like Mr. Smith, smoked only *non*-light cigarettes. Even worse, for all one can discern from the *Engle* findings and record, the *Engle* jury may have actually *rejected* allegations encompassing the non-light cigarettes smoked by Mr. Smith. Yet despite all of that, the jury in this case was not asked to determine whether the non-light cigarettes smoked by Mr. Smith were defective, whether the sale of non-light cigarettes was negligent, or whether the *Engle* defendants fraudulently concealed any information about non-light cigarettes.

In sum, Reynolds has been subjected to a massive \$27 million liability without any ascertainable adjudication—in this case or in *Engle*—of the conduct elements of Mr. Smith’s claims. In this case, Mr. Smith was entirely relieved of his burden of proof with regard to the most basic conduct elements of his claims, and Reynolds was entirely precluded from contesting those elements. And in *Engle*, so far as anyone can tell, the jury did not *actually decide* that the defendants’ tortious conduct extended to non-light cigarettes. Rather, Reynolds was precluded from litigating that issue merely because the *Engle* jury *could have decided* that question.

This is a due-process violation of the most basic and obvious sort. In this case alone, it produced a

\$27 million judgment that two of the three appellate judges who reviewed the issue thought was excessive. Moreover, the same due-process violation has been replicated in more than 100 *Engle*-progeny cases so far tried to judgment, including several eight-figure judgments like the one at issue here. *See* Pet. App. 2a-6a (Wetherell, J., concurring). And without intervention by this Court, the same due-process violation will be replicated in thousands more pending progeny cases. Review by this Court is urgently needed.

**B.** The Court should hold this case pending its resolution of *Walker* and *Jimmie Lee Brown*. To ensure the similar treatment of similar cases, the Court routinely holds petitions that implicate the same issue as other cases pending before the Court, and, once the related case is decided, it resolves the held petitions in a consistent manner. *See, e.g., IMS Health, Inc. v. Schneider*, 131 S. Ct. 3091, 3091 (2011); *Am. Home Prods. Corp. v. Ferrari*, 131 S. Ct. 1567, 1567 (2011); *State Farm Mut. Auto. Ins. Co. v. Willes*, 551 U.S. 1111, 1111 (2007); *see also Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (noting that the Court has “GVR’d in light of a wide range of developments, including [its] own decisions”); *id.* at 181 (Scalia, J., dissenting) (“We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted *in order that* (if appropriate) they may be ‘GVR’d’ when the case is decided.”).

Because this case raises the same due-process question presented in *Walker* and *Jimmie Lee Brown*, the Court should follow that course here. Under its normal scheduling practices, the Court will likely consider this petition and the *Walker* and

*Jimmie Lee Brown* petitions at the same conference. If it should grant review in either or both of those cases, then it should hold this case pending resolution of *Walker* and *Jimmie Lee Brown* on the merits.

**CONCLUSION**

The petition for certiorari should be held pending the disposition of the petitions for certiorari in *Walker* and *Jimmie Lee Brown*, then disposed of consistent with those cases.

Respectfully submitted,

Paul D. Clement  
BANCROFT PLLC  
1919 M Street, N.W.  
Suite 470  
Washington, DC 20036

Gregory G. Katsas  
*Counsel of Record*  
JONES DAY  
51 Louisiana Avenue, N.W.  
Washington, DC 20001  
(202) 879-3939  
ggkatsas@jonesday.com

*Counsel for Petitioner*