No. __-___

IN THE

Supreme Court of the United States

R. J. REYNOLDS TOBACCO COMPANY AND LIGGETT GROUP LLC,

Petitioners,

v.

FINNA A. CLAY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JANIE MAE CLAY,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Kelly Anne Luther
KASOWITZ, BENSON, TORRES & FRIEDMAN LLP
1441 Brickell Avenue
Suite 1420
Miami, FL 33131
(305) 377-1666
KLuther@kasowitz.com

Karen H. Curtis
CLARKE SILVERGLATE, P.A.
799 Brickell Plaza
Suite 900
Miami, FL 33131

Counsel for Petitioner Liggett Group LLC

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

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

Counsel for Petitioner R. J. Reynolds Tobacco Company

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Additional counsel listed on signature page

QUESTION PRESENTED

The doctrine of issue preclusion prohibits a party from relitigating an issue that was actually decided against it in prior litigation. In this case, the courts below precluded litigation of critical disputed issues absent any determination that those issues had been previously decided.

The question presented is whether this dramatic departure from traditional and heretofore universal preclusion law violates the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

The sole plaintiff below was Respondent Finna A. Clay, as personal representative of the estate of Janie Mae Clay.

The original defendants below were Petitioner R. J. Reynolds Tobacco Company, Lorillard Tobacco Company, Lorillard, Inc., Petitioner Liggett Group LLC, Philip Morris USA, Inc., and Vector Group Ltd., Inc.

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 traded corporation. Brown & Williamson Holdings, Inc., and Invesco Ltd. each 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.

Petitioner Liggett Group LLC is a wholly-owned, indirect subsidiary of Vector Group Ltd. Vector is the only publicly held company that owns 10% or more of the membership interest in Liggett. Vector is publicly traded on the New York Stock Exchange (NYSE: VGR). No publicly held company owns 10% or more of Vector's stock.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTIONAL AND STATUTORY AUTHORITIES

OTHER AUTHORITIES

OPINIONS BELOW

The decision of the Florida First District Court of Appeal (Pet. App. 1a-2a) is reported at 84 So. 3d 1069 (Fla. Dist. Ct. App. Jan. 25, 2012).

JURISDICTION

The Florida First District Court of Appeal entered a final judgment on January 25, 2012. Pet. App. 1a. Reynolds filed a timely motion for rehearing, which was denied on April 4, 2012. Pet. App. 3a. On June 26, 2012, Justice Thomas granted an extension of time to file a petition for certiorari until September 1, 2012. Because the decision of the First District was a per curiam affirmance containing only an unelaborated citation, the Florida Supreme Court lacked jurisdiction to review it. *See, e.g.*, *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980). Accordingly, the First District was the highest state court from which a decision could be had, and this Court therefore has jurisdiction to review its decision. *See* 28 U.S.C. § 1257(a); *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 24 (2011); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2852-53 (2011); *Clark v. Arizona*, 548 U.S. 735, 746-47 (2006).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

> person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1, cl. 2.

STATEMENT OF THE CASE

Throughout Anglo-American legal history, the doctrine of issue preclusion has been limited to issues shown to have been "'*actually litigated and resolved* in a valid court determination essential to the prior judgment.'" *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (emphasis added and citation omitted). However, the Florida state courts have to date rejected this rule for thousands of individual cases brought by members of the class decertified in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), including this case. Accordingly, in these "*Engle* progeny" cases, the Florida courts now routinely apply preclusion to establish essential, otherwise disputed elements of various individual tort claims, absent any inquiry into whether a prior jury actually resolved those elements in plaintiffs' favor. This case presents the question whether that dramatic and unprecedented departure from traditional preclusion standards violates the Due Process Clause of the Fourteenth Amendment. As explained below, that question plainly warrants this Court's review.

While the Florida Supreme Court previously declined to evaluate this departure from bedrock principles of preclusion law, it now stands poised to decide the due-process question presented by this petition. In *Philip Morris USA, Inc. v. Douglas* (Fla. S. Ct. No. SC12-617), the court has ordered highly expedited briefing to address the question and has scheduled oral argument for September 6, 2012. Because this case presents the same important question

as *Douglas*, and because the Florida Supreme Court's impending decision in *Douglas* will significantly affect this Court's consideration of that question, the Court should hold this petition pending the *Douglas* decision. Depending on how the Florida Supreme Court resolves the issue in *Douglas*, this Court can either remand this case in light of *Douglas* or, if the *Douglas* court embraces the due process violation visited upon Petitioners below, this Court can use this case as a vehicle to review this important and recurring federal constitutional issue.

A. The *Engle* Class Action

1. In 1994, the *Engle* class action was filed against the major domestic cigarette manufacturers. As modified on appeal, the class consisted of "'all [Florida] citizens and residents, and their survivors, who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine.'" *Engle*, 945 So. 2d at 1256.

The *Engle* class alleged various tort claims, including strict liability, negligence, fraudulent concealment, and conspiracy to fraudulently conceal. 945 So. 2d at 1256-57 & n.4. The court divided the trial into three phases. During Phase I, the jury would consider supposedly "common issues relating exclusively to the defendants' conduct and the general health effects of smoking." *Id.* at 1256. During Phase II, the same jury would determine the defendants' liability to three individual class members, award appropriate compensatory damages to those individuals, and determine an amount of class-wide punitive damages. *Id.* at 1257. During Phase III,

new juries would decide the claims of the remaining hundreds of thousands of class members. *Id.* at 1258.

2. Phase I was a sprawling, year-long trial addressing whether cigarettes cause certain diseases and are addictive, and the defendants' conduct over more than four decades. For each claim, the class asserted many alternative allegations of tortious conduct, many of which concerned only some, but not all, brands or types of cigarettes:

Strict Liability. According to the class itself, there were "several alternative" defect allegations. Pet. App. 239a. Most of these theories applied only to certain types of cigarettes. For example, the class presented evidence and argument that:

- *filtered* cigarettes are defective because of misplaced ventilation holes in some brands, loose filter fibers in others, or glass filter fibers in still others (Pet. App. 156a, 348a, 702a-05a, 741a-51a, 765a-66a);
- *light* or *low-tar* cigarettes are defective because they cause smokers to increase smoking to "compensate" for the decreased nicotine yield (Pet. App. 376a, 707a-10a, 718a-28a, 733a-35a);
- cigarettes with *specific ingredients*—such as Y-1 tobacco—are defective (Pet. App. 156a, 348a, 796a-98a); or
- cigarettes made with *artificially manipulated levels of nicotine* are defective (Pet. App. 156a, 239a, 349a, 705a-06a, 717a-18a, 729a-32a, 739a-41a, 751a, 795a-97a).

Negligence. The jury instructions permitted a finding of negligence if a defendant failed to use reasona-

ble care in the "designing, manufacturing, testing, or marketing" of cigarettes. Pet. App. 811a. Thus, any of the design-defect allegations mentioned above could have supported a negligence finding based on negligent design, and any of the concealment allegations mentioned below could have supported a negligence finding based on negligent marketing. The class further alleged that the defendants had negligently marketed certain brands of cigarettes to minors, at various times between the 1950s and the 1990s. Pet. App. 186a-88a, 698a-700a, 712a-16a, 784a-86a, 790a-93a, 795a. And the class alleged that the defendants had negligently measured the tar and nicotine levels for "low-tar" (light) cigarettes. Pet. App. 808a-09a.

Concealment. The jury was instructed that fraudulent concealment requires intentional concealment of facts "necessary to make statements by [the] defendants not misleading." Pet. App. 810a. The class asserted that its concealment and conspiracy claims were based on "thousands upon thousands of statements about [cigarettes] [and] the relationship of smoking to disease over periods of years." Pet. App. 782a. Many of those statements, however, concerned only certain types of cigarettes. For example, the class presented evidence and argument that the defendants concealed that *light* cigarettes may not be safer than regular cigarettes, because smokers compensate for reduced nicotine by smoking more. Pet. App. 354a, 359a-61a, 376a-77a, 384a-85a, 700a-02a, 707a-10a, 718a-19a, 764a, 788a. Likewise, the class presented evidence and argument that the defendants concealed facts about *specific ingredients*. For example, the class alleged that the defendants had failed to disclose their use of ammonia for the sup-

posed purpose of increasing nicotine's addictive effect, but it was undisputed that ammonia was used only in certain brands of cigarettes at only certain times. Pet. App. 185a-86a, 368a, 718a, 757a-63a, 766a-69a, 788a, 790a, 795a-97a, 805a.

At the end of Phase I, the class persuaded the trial court, over defendants' objections, to adopt a verdict form that did not require the jury to specify which of the many alternative allegations it had accepted and which it rejected. Pet. App. 222a-38a. Accordingly, the *Engle* jury made only very general findings. For each defendant, it answered the following questions affirmatively:

> Did one or more of the Defendant Tobacco Companies place cigarettes on the market that were defective and unreasonably dangerous?
>
> Did one or more of the Defendants conceal or omit material information, not otherwise known or available, knowing the material was false and misleading [*sic*], or failed [*sic*] to disclose a material fact concerning or proving the health effects and/or addictive nature of smoking cigarettes?
>
> Did two or more of the Defendants enter into an agreement to conceal or omit information regarding the health effects of cigarette smoking, or the addictive nature of smoking cigarettes, with the intention that smokers and members of the public rely to their detriment?
>
> Have Plaintiffs proven that one or more of the Defendant Tobacco Companies failed to exercise the degree of care which a reasona-

> ble cigarette manufacturer would exercise under like circumstances?

Pet. App. 224a-25, 228a-30a, 231a, 235a-36a. The jury findings thus did *not* establish that *all* of Reynolds's or Liggett's cigarettes were defective, negligently designed or marketed, or fraudulently sold. Nor did the jury specify *which* types or brands of cigarettes it thought were defective, much less the specific defect; nor did it identify the specific conduct that it thought was negligent, or the specific statements or kind of statements that it thought contained fraudulent omissions.

The jury further found that smoking can cause some 20 different diseases, but not three others, and that nicotine is addictive. Pet. App. 222a-23a. It also found that the class was entitled to punitive damages. Pet. App. 237a-38a.

3. The same jury decided Phase II. In Phase II-A, it found that the defendants were liable to three class representatives, and it awarded some $12.7 million in compensatory damages. *Engle*, 945 So. 2d at 1257. In Phase II-B, the jury awarded $145 billion in punitive damages to the class. *Id.*

At the end of Phase II, the defendants reasserted directed-verdict motions contending that there was legally insufficient evidence to support the Phase I findings. The trial court rejected that argument in a final Omnibus Order. That order itself stressed the multiplicity and specificity of the class's various defect allegations. Thus, the court found legally "sufficient evidence" that cigarettes were defective in "many" different ways. Pet. App. 156a. As examples, it cited evidence that would have allowed the jury to find that "some cigarettes" had filters with ventila-

tion holes in the wrong place, that "some filters" contained glass fibers, and that nicotine levels were manipulated "sometime" through ammonia and "sometime" through high-nicotine tobacco. *Id.* Defendants likewise presented substantial evidence on each of these issues sufficient to support a finding in their favor. The court had no need (or ability) to identify the actual basis for any of the findings, and did not attempt to do so.

4. The defendants appealed before Phase III, and the Florida Third District Court of Appeal reversed. Among other things, it held that the class should never have been certified and that the punitive-damages award was premature and excessive. *Liggett Grp. Inc. v. Engle*, 853 So. 2d 434, 450-66 (Fla. Dist. Ct. App. 2003).

In turn, the Florida Supreme Court affirmed in part and reversed in part. It agreed that the punitive-damages award was premature and excessive. *See* 945 So. 2d at 1262-65. It also agreed that "problems with the three-phase trial plan negate[d] the continued viability of this class action." *Id.* at 1267-68. Nonetheless, in decertifying the class, the court chose to "retain[] [some of the] Phase I findings," including the defect, negligence, concealment, and conspiracy-to-conceal findings, for use in future litigation. *Id.* The court thus permitted former class members to file their own "individual damages actions" within a year, and it decreed that the retained findings "will have res judicata effect" in those actions. *Id.*

The defendants filed a petition for certiorari in this Court, arguing that use of the *Engle* findings to establish essential elements of claims in future indi-

vidual actions would violate due process. The class successfully opposed certiorari on the ground that, until the findings were applied in such individual cases, the due-process issue was "premature and not ripe for review." Br. in Opp'n at 1, *R. J. Reynolds Tobacco Co. v. Engle*, No. 06-1545 (U.S. Aug. 15, 2007).

B. *Engle* Progeny Litigation

In the wake of the Florida Supreme Court's decision, thousands of individual *Engle* progeny cases were filed. At present, about 8000 plaintiffs have cases pending in the Florida state or federal courts. Approximately 65 of these cases have already been tried to verdict, and *Engle* progeny plaintiffs have been awarded final judgments exceeding $300 million. *See* Affidavit of Thomas Adams, Exhibit 1, *Townsend v. R.J. Reynolds Tobacco Co.*, No. 01-2008-CA-003978 (Alachua, Fla. Cir. Ct.) (May 7, 2012) (Pet. App. 250a-309a).

In each of these cases, a central issue has been the extent of the "res judicata effect" of the *Engle* findings. Defendants contend that the *Engle* findings establish only those facts shown to have been decided by the *Engle* jury, consistent with bedrock principles of Florida preclusion law and federal due process. For example, defendants acknowledge that the *Engle* defect finding establishes that each company sold "cigarettes" that were "defective and unreasonably dangerous" (Pet. App. 85a), but they dispute that this finding establishes that the particular brands or types of cigarettes smoked by an individual progeny plaintiff were defective. In contrast, plaintiffs contend that the *Engle* findings establish in their favor *all* tortious-conduct issues in progeny litigation, even

absent any inquiry into what the *Engle* jury actually and necessarily decided.

The Florida intermediate appellate courts have agreed with the plaintiffs. Four of the five Florida District Courts of Appeal have ruled in plaintiffs' favor on this issue. *Frazier v. Philip Morris USA Inc.*, 89 So. 3d 937, 948 (Fla. Dist. Ct. App. 2012); *Philip Morris USA, Inc. v. Douglas*, 83 So. 3d 1002, 1010 (Fla. Dist. Ct. App. 2012); *R.J. Reynolds Tobacco Co. v. Brown*, 70 So. 3d 707, 715-16 (Fla. Dist. Ct. App. 2011); *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1067-69 (Fla. Dist. Ct. App. 2010). These decisions made no attempt to justify their holdings under normal standards of issue preclusion or due process. Instead, the appellate courts reasoned primarily that their holdings were compelled by their reading of the Florida Supreme Court's decision in *Engle*. *See*, *e.g.*, *Martin*, 53 So. 3d at 1066 (asserting that contrary ruling "would essentially nullify" *Engle*); *Brown*, 70 So. 3d at 715 ("[w]e are constrained by the Florida Supreme Court's decision in *Engle*"). And they did so, in some instances, despite expressing significant concerns about due process. *See id.* at 716 ("we are concerned the preclusive effect of the *Engle* findings violates Tobacco's due process rights, but remain compelled to follow the mandate of the supreme court"); *see also id.* at 720 (May, C.J., concurring) ("What the trial courts are playing is a form of legal poker. They must use the legal cards they have been dealt—the *Engle* factual findings are binding. But * * * a lurking constitutional issue hovers over the poker game: To what extent does the preclusive effect of the *Engle* findings violate the manufacturer's due process rights?").

The Florida Supreme Court declined to review the first set of *Engle* progeny cases to be decided in the district courts of appeal. The affected defendants then filed petitions for certiorari raising the due-process question flagged as troubling in *Brown*. Five coordinated petitions were filed: *Philip Morris USA Inc. v. Campbell* (No. 11-741); *R.J. Reynolds Tobacco Co. v. Gray* (No. 11-752); *R.J. Reynolds Tobacco Co. v. Martin* (No. 11-754); *R.J. Reynolds Tobacco Co. v. Hall* (No. 11-755); and *R.J. Reynolds Tobacco Co. v. Campbell* (No. 11-756). In coordinated briefs in opposition, the plaintiffs argued at length that review in this Court would be premature because the Florida Supreme Court had not yet addressed the due-process question. *See Campbell* Br. in Opp'n at 26 (Nos. 11-741 & 11-756); *Gray* Br. in Opp'n at 28 (No. 11-752); *Hall* Br. in Opp'n at 16-30 (No. 11-755); *id.* at 26 ("[w]hile it is true that RJR will pay some judgments before the issue becomes ripe for this Court's review, that is no reason for a hasty grant of certiorari"). This Court denied certiorari, and defendants accordingly were forced to pay a total of over $50 million in final judgments. Pet. App. 246a-248a.

Subsequently, in *Douglas*, the Second District Court of Appeal certified the due-process question as one of great public importance warranting review by the Florida Supreme Court. The Second District framed the question as follows:

> Does accepting as res judicata the eight Phase I findings approved in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), violate the tobacco companies' due process rights guaranteed by the Four-

> teenth Amendment of the United States Constitution?

Douglas, 83 So. 3d at 1011. On May 15, 2012, the Florida Supreme Court accepted jurisdiction to answer that question in *Douglas*. Pet. App. 145a. Simultaneously, the court set a highly expedited briefing schedule, under which merits briefing was completed by June 18, 2012. *Id.* The court subsequently scheduled oral argument for September 6, 2012, the second argument date following that court's summer recess. Pet. App. 143a.

C. The Proceedings In This Case

Respondent Finna A. Clay sued Petitioners Reynolds and Liggett for the death of her mother Janie Mae Clay from smoking. Respondent pleaded claims for strict liability, negligence, fraudulent concealment, and conspiracy to fraudulently conceal. Pet. App. 139a-141a. As in all other *Engle* progeny cases, a critical issue in the case was the extent of the "res judicata effect" of the *Engle* findings. Specifically, Mrs. Clay sought to establish liability without proving that the cigarettes smoked by her mother were defective, negligently designed or marketed, or fraudulently marketed. Pet. App. 135a, 137a-139a.

In a pretrial motion, Petitioners moved for a determination that use of the *Engle* findings to establish elements of Mrs. Clay's individual claims would violate both Florida preclusion law and federal due process. Petitioners explained that, given the generality of the *Engle* findings and the number of alternative allegations raised in *Engle*, it cannot be determined whether the *Engle* jury actually found that the cigarettes smoked by Respondent's mother were defective, negligently designed or marketed, or fraudu-

lently sold. Pet. App. 843a-848a. The trial court rejected this argument without any inquiry into whether the *Engle* jury had actually decided any of those questions. Pet. App. 852a-854a. Petitioners renewed their objections at trial, Pet. App. 58a-74a, and the court again ruled against them, Pet. App. 8a-9a.

Over Petitioners' continuing objections (Pet. App. 76a-79a), the trial court instructed the jury that the *Engle* findings established all of the wrongful-conduct elements of Mrs. Clay's tort claims. Thus, on the strict-liability and negligence claims, the trial court instructed the jury that Petitioners had "placed cigarettes on the market that were defective and unreasonably dangerous"; that Petitioners "were negligent"; and that the only open liability issue was "whether smoking cigarettes manufactured by each defendant was a legal cause of [Janie] Clay's death." Pet. App. 677a-79a. Similarly, on the concealment and conspiracy claims, the court instructed the jury that Reynolds, Liggett, and the other *Engle* defendants had "conceal[ed] or omit[ted] information regarding the health effects of cigarettes or their addictive nature or both." Pet. App. 677a. The court instructed the jury to determine whether Janie Clay had relied on statements by any *Engle* defendant "involved in the agreement to withhold material information," but it did not instruct the jury to determine whether any of the statements on which she may have relied had themselves fraudulently omitted information. Pet. App. 685a. In giving these instructions, the court never disputed that the *Engle* findings could have rested on defect, negligence, concealment, or conspiracy allegations entirely unrelated to the cigarettes smoked by Janie Clay.

The jury found that Janie Clay was an *Engle* class member; allocated 60% of the fault to Reynolds, 10% of the fault to Liggett, and 30% of the fault to Janie Clay; and assessed compensatory damages of almost $3.5 million. Pet. App. 11a-12a. After further proceedings, the jury awarded Mrs. Clay an additional $18 million in punitive damages. Pet. App. 14a-15a. After reducing the compensatory-damages award to reflect the jury's apportionment of fault, the court entered a final judgment for Mrs. Clay in the amount of $20,447,860.66. Pet. App. 5a-6a.

On appeal, Petitioners again argued that the trial court violated due process in precluding litigation on the question whether the cigarettes smoked by Janie Clay were defective, negligently designed or marketed, or the subject of statements that fraudulently omitted information. Pet. App. 38a-42a. Based on its *Martin* decision, the First District affirmed the judgment in a per curiam order, which foreclosed further review in the Florida courts. Pet. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

In its traditional formulation, the doctrine of issue preclusion "'bars successive litigation of an issue of fact or law *actually litigated and resolved* in a valid court determination essential to the prior judgment.'" *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (emphasis added and citation omitted). By contrast, in the *Engle* progeny cases the Florida appellate courts have systematically permitted plaintiffs to invoke preclusion without any showing that the contested issues were actually resolved in their favor. While defendants have no quarrel with giving specific findings—such as those establishing that smoking can cause certain specific diseases—preclusive effect, the

Florida courts have sanctioned something very different. Generic findings that could have been supported by any number of distinct theories have been used to preclude any litigation over the elements of the progeny plaintiffs' causes of action, despite substantial risks that the first jury's finding was premised, for example, on a defect not present in the cigarettes actually smoked. So here, Mrs. Clay was permitted to establish liability without proving that the cigarettes smoked by her mother were defective, negligently designed or marketed, or fraudulently marketed, and without showing that the *Engle* jury resolved those issues against the defendants. This case presents the question whether that extreme and unprecedented extension of issue preclusion violates federal due process.

By any fair measure, that question warrants this Court's review. First, the Florida appellate courts' resolution of the due-process question squarely conflicts with this Court's decision in *Fayerweather v. Ritch*, 195 U.S. 267 (1904). Second, that resolution also conflicts with centuries of common-law precedent, which itself makes the resolution constitutionally suspect. *See*, *e.g.*, *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994). Third, the question presented is central to the conduct of thousands of pending *Engle* progeny cases, which together involve claims for tens of billions of dollars in damages. Indeed, with only about 65 *Engle* progeny cases so far tried to verdict, the defendants already have suffered adverse judgments exceeding $300 million—even though *no* progeny jury has been permitted to adjudicate *any* issue of tortious conduct, and *no* progeny court has inquired whether the *Engle* findings ad-

dress *any* of the specific conduct at issue in the progeny case.

Finally, whatever concerns this Court may have had about reviewing this issue before allowing the Florida courts a full opportunity to rectify this error have been eliminated by the Florida Supreme Court's decision to provide expedited review in *Douglas*. The imminent decision in *Douglas* will critically impact the appropriate disposition of this petition: an affirmance in *Douglas* will eliminate any concern about prematurity and the need for further percolation, and a reversal in *Douglas* will make the decision below unsustainable and thus warrant a GVR. Petitioners submit that, given the unusual circumstances presented here, this Court should hold the petition for the brief interval until the Florida Supreme Court renders its decision in *Douglas*, and then dispose of this petition as appropriate in light of that decision.

I. THE QUESTION PRESENTED WARRANTS THIS COURT'S REVIEW

Under the rule adopted by the Florida courts for the *Engle* progeny cases, plaintiffs are being relieved of the need to prove the wrongful-conduct elements of their claims, and substantial money judgments are being entered against the defendants, even though there can be no assurance that those crucial elements of the torts were ever decided against the defendants—or, indeed, despite the fact that they may actually been decided *in defendants' favor*. This fundamentally unfair procedure is inconsistent with centuries of well-established legal precedent, and with decisions of this Court dating back over a century recognizing that such a mode of procedure violates due process.

A. The Florida Appellate Decisions Squarely Conflict With *Fayerweather*

1. This Court has long held that preclusion law is "subject to due process limitations," *Taylor*, 553 U.S. at 891, and that "extreme applications" of preclusion law "may be inconsistent with a federal right that is 'fundamental in character,'" *Richards v. Jefferson Cnty.*, 517 U.S. 793, 797 (1996) (citation omitted).

In *Fayerweather*, this Court held that the Due Process Clause bars the application of issue preclusion absent a determination that the disputed issue was actually resolved in prior litigation. The plaintiffs sought shares of an estate based on the asserted invalidity of releases that they had signed. 195 U.S. at 297-98. Applying issue preclusion, the federal circuit court dismissed their suit on the ground that a state court had already found the releases valid. *Id.* at 298-99. This Court's jurisdiction turned on whether the circuit court's decision "involve[d] the application of the Constitution." *Id.* at 297. The Court held that the decision involved application of the Due Process Clause, which it said prohibits a court from treating a prior judgment as a "conclusive determination" of a fact if it was "made without any finding of the fundamental fact." *Id.* at 299.

Turning to the merits of the due-process question, the Court held that "where the evidence is that testimony was offered at the prior trial upon several distinct issues, the decision of any one of which would justify the verdict or judgment, then the conclusion must be that the prior decision is not an adjudication upon any particular issue or issues, and the plea of *res judicata* must fail." *Id.* at 307. Applying that standard, the Court concluded that preclusion was

appropriate in the case, but only because "[n]othing [could] be clearer from this record than that the question of the validity of the releases was not only before the state courts, but was considered *and determined* by them." *Id.* at 308 (emphasis added).

2. The preclusion rule adopted by the Florida appellate courts for *Engle* progeny cases sharply conflicts with *Fayerweather*. Under that decision, if a prior verdict could have rested on "distinct issues," the verdict cannot preclude litigation of any one of those issues. 195 U.S. at 307. But under district court of appeal decisions such as *Martin* and *Douglas*, preclusion would apply no matter how many "distinct" alternatives are present, and no matter which of them the jury actually rested on. *See*, *e.g.*, *Martin*, 53 So. 3d at 1067-69.

Moreover, the result in this case cannot be sustained under the proper constitutional standard. As shown in detail above, for each of the tort claims at issue, the *Engle* jury could have rested on any of several alternative allegations that simply would not apply to the cigarettes smoked by Janie Clay. For example, on the strict-liability claim, the defect finding could have rested on allegations that applied only to *light* cigarettes, but Janie Clay never smoked light cigarettes. Pet. App. 451a, 156a, 348a, 376a, 702a-05a, 707a-10a, 718a-28a, 733a-35a, 741a-51a, 765a-66a. The negligence finding could have rested on similarly narrow allegations, or on evidence of youth-marketing campaigns alleged to have occurred decades after Janie Clay, who was born in 1944, became an adult. Pet. App. 186a-88a, 698a-700a, 712a-16a, 784a-86a, 790a-93a, 795a. And the concealment and conspiracy findings could have rested on extended

allegations—entirely irrelevant to Janie Clay—that the defendants concealed that "light" cigarettes were not safer than other cigarettes due to smoker "compensation." Pet. App. 354a, 359a-61a, 376a-77a, 384a-85a, 700a-02a, 707a-10a, 718a-19a, 764a, 788a.

B. The Florida Appellate Decisions Conflict With A Longstanding And Universal Common-Law Rule

The Florida appellate decisions sharply deviate not only from *Fayerweather* itself, but also from the background common-law rule that *Fayerweather* held to be mandated by due process. Under the common law, the limitation of preclusion to issues actually decided by a prior jury has been universally followed for centuries. Despite exhaustive research on this point, we have found no case in the history of Anglo-American jurisprudence departing from this rule outside the context of *Engle* progeny litigation. In prior briefing, plaintiffs have identified none. The sharp deviation from deeply rooted procedural protections independently warrants review.

1. "Because the basic procedural protections of the common law have been regarded as so fundamental," the "abrogation of a well-established common-law protection . . . raises a presumption" of a due-process violation. *Oberg*, 512 U.S. at 430; *see, e.g.*, *In re Winship*, 397 U.S. 358, 361-62 (1970); *Tumey v. Ohio*, 273 U.S. 510, 523-24 (1927); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276-77 (1856). Thus, in the cases "in which a party has complained of [the] denial" of such a common-law protection, the Court has often granted certiorari to determine whether the departure comports with minimum due-process standards. *Oberg*, 512 U.S. at 430;

see, e.g., *Richards*, 517 U.S. at 798; *In re Oliver*, 333 U.S. 257, 266-73 (1948).

The common-law protection at issue here has been firmly established for centuries. From time immemorial, courts have refused to apply issue preclusion where a verdict from a prior suit could have rested on an issue other than the one for which preclusion is sought. That rule originated with early English authorities, which held that a judgment is not "evidence" of "any matter to be inferred by argument from [it]." *Duchess of Kingston's Case* (H.L. 1776), in 2 Smith, *A Selection of Leading Cases on Various Branches of the Law* 425 (1840); *see* 2 Coke, *The First Part of the Institutes of the Laws of England; or, a Commentary on Littleton* ¶ 352a (London, W. Clarke 1817) ("Every estoppell . . . must be certaine to every intent, and not . . . be taken by argument or inference.").

When the Fourteenth Amendment was adopted, American courts followed this rule. *See, e.g.*, *Russell v. Place*, 94 U.S. 606, 608-10 (1876); *Packet Co. v. Sickles*, 72 U.S. 580, 591-93 (1867). At that time, "according to all the well considered authorities, ancient and modern," the "inference" that an issue was decided by prior litigation had to "be inevitable, or it [could not] be drawn." *Burlen v. Shannon*, 99 Mass. 200, 203 (1868); *see also Steam-Gauge & Lantern Co. v. Meyrose*, 27 F. 213, 213 (C.C.E.D. Mo. 1886) (Brewer, J.) ("doctrine is affirmed by a multitude of courts"); 1 Simon Greenleaf, *Treatise on the Law of Evidence* § 528, at 676-77 (3d ed. 1846) ("general rule" of the *Duchess of Kingston's Case* "has been repeatedly confirmed and followed, without qualification").

State courts likewise held that a verdict cannot preclude litigation on a specific issue if the verdict could have rested on alternative grounds. In those circumstances, where "it be doubtful upon which of several points the verdict was founded, it will not be an estoppel as to either." *People v. Frank*, 28 Cal. 507, 516 (1865). Put another way, "a verdict will *not* be an estoppel merely because the testimony in the first suit was *sufficient* to establish a particular fact"; instead, "[i]t must appear that was the very fact on which the verdict was given, and no other." *Long v. Baugas*, 24 N.C. 290, 295 (1842) (emphases added); *Lentz v. Wallace*, 17 Pa. 412, 1851 WL 5887, at *4 (1851) (no preclusion where "record of the former judgment does not show upon which ground the recovery was obtained").

Modern practice is equally settled. The traditional rule has been followed uniformly by the federal courts of appeals[1] and state appellate courts.[2] Thus,

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[1] *See, e.g.*, *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 309 (2d Cir. 1999); *United States v. Rigas*, 605 F.3d 194, 217-19 (3d Cir. 2010); *Haywood v. Ball*, 634 F.2d 740, 743 (4th Cir. 1980); *United States v. Patterson*, 827 F.2d 184, 187-90 (7th Cir. 1987); *Chew v. Gates*, 27 F.3d 1432, 1438 (9th Cir. 1994); *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1198-99 (10th Cir. 2000); *Lary v. Ansari*, 817 F.2d 1521, 1524-25 (11th Cir. 1987).

[2] *See, e.g.*, *Moody v. Rambo*, 727 So. 2d 116, 118 (Ala. Civ. App. 1998); *JeToCo Corp. v. Hailey Sales Co.*, 596 S.W.2d 703, 706-07 (Ark. 1980); *Brake v. Beech Aircraft Corp.*, 229 Cal. Rptr. 336, 343 (Cal. Ct. App. 1986); *Dowling v. Finley Assocs.*, 727 A.2d 1245, 1251-53 (Conn. 1999); *Major v. Inner City Prop. Mgmt., Inc.*, 653 A.2d 379, 382-83 (D.C. 1995); *Herzog v. Lexington Twp.*, 657 N.E.2d 926, 931 (Ill. 1995); *Conn. Indem. Co. v. Bowman*, 652 N.E.2d 880, 883 (Ind. Ct. App. 1995); *Day v. Crowley*, 172 N.E.2d 251, 254 (Mass. 1961); *People v. Gates*, 452 N.W.2d

under modern as well as ancient precedents, if a prior "'judgment might have been based upon one or more of several grounds, but does not expressly rely upon any one of them, then none of them is conclusively established under the doctrine of collateral estoppel, since it is impossible for another court to tell which issue or issues were adjudged.'" *Ettin v. Ava Truck Leasing, Inc.*, 53 N.J. 463, 480 (1969) (citation omitted); *see Ashe v. Swenson*, 397 U.S. 436, 444 (1970) (issue preclusion does not apply when "'rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration'" (citation omitted)).

2. The Florida appellate decisions thus mark an unprecedented departure from a centuries-old rule. Rather than ask whether the *Engle* jury decided the precise facts for which a progeny plaintiff is seeking preclusion, the district courts of appeal have held that such an inquiry is entirely unnecessary, despite the presence of numerous alternative allegations in *Engle*. *See*, *e.g.*, *Douglas*, 83 So. 3d at 1010; *Martin*, 53 So. 3d at 1067 ("we do not agree every *Engle* plaintiff must trot out the class action trial transcript to prove applicability of the Phase I findings"). This dramatic departure from traditional practice violates due process and warrants this Court's review.

627, 631-32 (Mich. 1990); *Parker v. MVBA Harvestore Sys.*, 491 N.W.2d 904, 906 (Minn. Ct. App. 1992); *In re Breuer's Income Tax*, 190 S.W.2d 248, 250 (Mo. 1945); *Manard v. Hardware Mut. Cas. Co.*, 207 N.Y.S.2d 807, 809 (App. Div. 1960); *Buckeye Union Ins. Co. v. New England Ins. Co.*, 720 N.E.2d 495, 501 (Ohio 1999); *Nealis v. Baird*, 996 P.2d 438, 458-59 (Okla. 1999); *Lee v. U.S. Fid. & Guar. Co.*, 538 P.2d 359, 361 (Or. 1975).

C. The Question Presented Governs Thousands Of Pending Cases

The due-process question presented by use of the *Engle* findings to establish individual elements of progeny claims is important and recurring, and it cries out for prompt resolution.

There are approximately 8,000 *Engle* progeny cases pending in Florida courts. In each case tried to verdict so far, courts have issued preclusion rulings akin to those made here. As explained above, the First, Second, Third, and Fourth Districts have now squarely held that the *Engle* findings establish *all* tortious-conduct elements of *all Engle* progeny claims, without any inquiry into whether those findings rest on allegations relevant to the individual plaintiff. The trial courts are now trying at least two new *Engle* progeny cases each month, and are scheduled to try approximately 75 *Engle* progeny cases in the current year. Without this Court's prompt review, the due-process violation that occurred in this case will repeat itself indefinitely. And the massive liability imposed on the *Engle* defendants—which currently stands at over $300 million in adverse judgments—will likewise steadily increase as *Engle* progeny trials continue with no end in sight. Those considerations alone amply justify this Court's review. *See, e.g.*, *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); *United States v. Centennial Sav. Bank FSB*, 499 U.S. 573, 578 n.3 (1991).

II. THE COURT SHOULD HOLD THIS CASE FOR *DOUGLAS*

A. It is an axiomatic principle of fairness that like cases should receive like treatment. To implement that principle, this Court routinely holds petitions for

certiorari presenting the same question at issue in other cases pending in this Court. *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).

The Court also sometimes holds petitions for certiorari pending other developments, including decisions by state supreme courts. As the leading treatise on Supreme Court practice explains, "a petition for certiorari may be held, without the Court's taking any action, until some event takes place that will aid or control the determination of the matter. It may be held until a decision is reached by the Court in a pending case raising identical or similar issues, or until decision is reached in another part of the same case, *or until an imminent state court decision is reached on a controlling issue of state law*, or until some anticipated event occurs that may make the case moot." Gressman, *et al.*, *Supreme Court Practice* 339 (9th ed. 2007) (emphasis added); *see also id.* at 483-484 (this Court may defer action on a petition "pending some anticipated legal event (such as further proceedings below or *the rendition of an opinion in a related case*) that may affect the appropriateness of certiorari" (emphasis added)). This practice makes good sense, as it would offend basic "interests of justice" for similar cases to be treated differently, based on nothing more than the vagaries of "timing of litigation in different courts." *Id.* at 818-821.

For example, in *Lambert v. Blackwell*, No. 97-8812, a habeas case, this Court held the petition for certiorari for almost three years, apparently awaiting the outcome of state proceedings on the availability of

postconviction relief and en banc review by the Court of Appeals for the Third Circuit. *See* Brief of Amici Curiae Nat'l Assoc. of Crim. Def. Lawyers, *Lambert v. Blackwell*, No. 97-8812, 1998 WL 34102853, at *1 (May 26, 1998).[3]

The Court has apparently held not only petitions for certiorari, but even petitions for rehearing of denials of certiorari, pending anticipated lower-court decisions. In one case, disappointed petitioners sought rehearing of a denial of certiorari in light of two imminent decisions from the Court of Appeals for the District of Columbia Circuit, as well as the deferral of their petition for rehearing pending those decisions. *See* Petition for Rehearing 5-10, *Boumediene v. Bush*, 2007 WL 1279631 (April 27, 2007) (No. 06-1195). After deferring consideration of these motions for some two months, the Court granted rehearing and certiorari, allowed for normal briefing in the ordinary course, and ordered supplemental briefing "upon the issuance of any decision" in the D.C. Circuit cases at issue. *See Boumediene v. Bush*, 551 U.S. 1160 (June 29, 2007) (mem.).

B. This case is a textbook example of one that should be held pending a lower-court decision. To begin with, *Douglas* and this case present the same question, and that question warrants this Court's review. Moreover, expedited briefing is already complete in *Douglas*, and oral argument has been set in the Florida Supreme Court for September 6, 2012.

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[3] The Court also has deferred action on pending petitions for certiorari for far more prosaic reasons, including the fact of ongoing settlement discussions. *See*, *e.g.*, *Zipes v. Trans World Airlines, Inc.*, 442 U.S. 916 (1979) (mem.)

Pet. App. 143a. Furthermore, that court's decision in *Douglas* will likely have dispositive significance on the petition for certiorari in this case: On the one hand, if the Florida Supreme Court were to affirm the decision of the Second District, that affirmance would remove any possible contention that review in this Court would be premature and should await further percolation in the Florida state courts. On the other hand, if the Florida Supreme Court were to reverse the decision of the Second District, and agree with Petitioners that use of the *Engle* findings to establish individual elements in progeny cases violates due process, then the decision below would be unsustainable under the Florida Supreme Court's understanding of federal due process, and this case plainly would warrant the Court to grant the petition for certiorari, vacate the decision below, and remand for reconsideration in light of *Douglas*. *See Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996) ("[w]e have GVR'd in light of a wide range of developments, including . . . State Supreme Court decisions"); *see also, e.g.*, *Arizona v. Gant*, 540 U.S. 963 (2003) (mem.) (GVRing in light of intervening state supreme court decision); *Alabama v. Ritter*, 454 U.S. 885 (1981) (mem.) (same).

In light of the pendency of the expedited proceedings in *Douglas*, the balance of hardships weighs decisively in favor of holding this petition for *Douglas.* On the one hand, denying the petition would force Petitioners to pay a judgment in excess of $20 million, despite substantial and unresolved concerns about its constitutionality and the possibility that the Florida Supreme Court could confirm the unconstitutionality of the award in a matter of weeks. On the other hand, holding the petition for *Douglas* would

cause no cognizable prejudice to Mrs. Clay, who at most would have to wait a brief period of time—during which her judgment would continue to accrue substantial interest—for the resolution of a pending, highly expedited, and likely dispositive appeal. Finally, holding the petition in these circumstances would impose no significant administrative or other burden on this Court. Under the Court's normal scheduling practices, this petition will not be considered until the start of the October 2012 Term. By then, *Douglas* will have been fully briefed and argued on an expedited basis, and a decision will likely be imminent. The administrative burdens from holding this case for a brief period of time would be minimal, and the unusual circumstances justifying a hold in this case would be unlikely to recur frequently.

One final consideration warrants mention. In the district courts of appeal, this case and *Douglas* proceeded on roughly contemporaneous tracks: the Second District rendered its decision in *Douglas* on March 30, 2012, and the First District denied rehearing in this case on April 4, 2012. Given these dates, one might have expected the Florida Supreme Court *itself* to hold this case pending its decision in *Douglas*. That course of action is impossible, but only because the Florida Supreme Court lacks jurisdiction to review district court of appeal decisions rendered as per curiam affirmances. *See, e.g.*, *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980). Thus, had the First District in this case rendered a one-sentence opinion construing the Due Process Clause not to apply, Reynolds and Liggett could have invoked the jurisdiction of the Florida Supreme Court, *see* Fla. Const. Art. V, § 3(b)(3), and then made what would have been an entirely unremarkable request for that

Court to hold this case pending its decision in *Douglas*. *See*, *e.g.*, *Stabler v. State*, No. SC08-2006 (Fla. May 10, 2012); *Pollard v. K.C. Cromwell, Inc.*, 18 So. 3d 975, 975 (Fla. 2009); *Buitrago v. Landry's*, 3 So. 3d 1192, 1192 (Fla. 2009). It is perverse that Petitioners should lose their opportunity to receive like treatment of these like cases merely because the First District's decision was entirely unreasoned. And it is hardly unfair that Mrs. Clay, having avoided on that basis a hold-for-*Douglas* by the Florida Supreme Court, should instead be subject to a brief hold-for-*Douglas* by this Court.

CONCLUSION

The petition should be held pending the Florida Supreme Court's decision in *Douglas* and then disposed of as appropriate in light of that decision.

Respectfully submitted,

Kelly Anne Luther
KASOWITZ, BENSON, TORRES
& FRIEDMAN LLP
1441 Brickell Avenue
Suite 1420
Miami, FL 33131
(305) 377-1666
KLuther@kasowitz.com

Karen H. Curtis
CLARKE SILVERGLATE, P.A.
799 Brickell Plaza
Suite 900
Miami, FL 33131

Counsel for Petitioner
Liggett Group LLC

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

Jason T. Burnette
JONES DAY
1420 Peachtree St., N.E.
Suite 800
Atlanta, GA 30309

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

Counsel for Petitioner
R. J. Reynolds Tobacco
Company

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