No. __-___

IN THE

Supreme Court of the United States

R. J. REYNOLDS TOBACCO COMPANY,
Petitioner,

v.

MATHILDE MARTIN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BENNY RAY MARTIN,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In its traditional formulation, the doctrine of issue preclusion prohibits a party from litigating an issue that was *actually decided* against it in prior litigation. In this case, the court below precluded litigation of issues that were not necessarily decided in prior litigation, based on its conclusion that a prior jury *reasonably could have decided* the issues. As a result, respondent obtained a $28.3-million judgment without either proving essential elements of her claims or demonstrating that a prior jury had actually decided those elements in her favor.

The question presented is whether this dramatic and unprecedented departure from traditional preclusion law—to impose liability based on earlier litigation without any assurance that the earlier litigation actually decided the precluded issue—violates the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

The sole plaintiff below was Respondent Mathilde Martin, as personal representative of the estate of Benny Ray Martin.

The original defendants below were Petitioner R. J. Reynolds Tobacco Company, Philip Morris USA, Inc., Lorillard Tobacco Company, Lorillard, Inc., Liggett Group, LLC, 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. hold 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 opinion of the Florida First District Court of Appeal (Pet. App. 1a-24a) is reported at 53 So. 3d 1060. The First District's order denying certification and rehearing en banc (Pet. App. 31a) is unreported. The Florida Supreme Court's order denying review (Pet. App. 32a) is reported at 67 So. 3d 1050.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The First District entered a final judgment on December 14, 2010. Pet. App. 1a. It then denied rehearing and refused to certify the case to the Florida Supreme Court. Pet. App. 31a. On July 19, 2011, the Florida Supreme Court declined jurisdiction. Pet. App. 32a. On October 7, 2011, Justice Thomas granted an extension of time to file a petition for certiorari until December 16, 2011. This Court has jurisdiction over the First District's judgment. *See, e.g.*, *KPMG LLP v. Cocchi*, No. 10-1521, slip op. at 1 (U.S. Nov. 7, 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 PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

> 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.

INTRODUCTION

Throughout Anglo-American legal history, the doctrine of issue preclusion has been limited to issues "'*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). That rule is uniformly reflected in "all the well considered authorities, ancient and modern," to have considered the question, *Burlen v. Shannon*, 99 Mass. 200, 203 (1868), and this Court has held that it is constitutionally compelled, *Fayerweather v. Ritch*, 195 U.S. 276, 299, 307 (1904). The rule could hardly be otherwise: judgments must be entered on *actual* findings by a jury, not based on speculation about what a jury *might* or *could* have found. Absent a determination that the prior litigation actually decided an issue, preclusion law would become a vehicle for depriving a litigant of property without ever having an issue decided against it. The requirement that the prior litigation actually decide the issue is as fundamental as the difference between litigation and relitigation. Thus, absent a showing that some prior jury actually resolved a disputed issue against the defendant, the plaintiff must prove that issue (if it is an element of the claim), and the defendant cannot be barred from contesting it. These fundamental principles have been universally followed for centuries, in state and federal courts throughout the Nation, until now.

This case, like thousands of others pending in the Florida courts, arises from the unprecedented statewide smoker class action in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). In *Engle*, the puta-

tive class raised various tort claims against major cigarette manufacturers, including Petitioner R. J. Reynolds Tobacco Company. During a sprawling, year-long trial of assertedly common issues, the class presented dozens of alternative allegations of defect, negligence, and concealment, many of which applied only to certain cigarette types or time periods. The *Engle* jury found that each defendant had sold defective cigarettes, committed negligence, and concealed information individually and through a conspiracy. But the jury did not specify, and over the defendants' objection was not asked to specify, which of the alternative theories of defect, negligence, and concealment it had adopted, which it had rejected, and which it had simply not addressed.

On appeal, the Florida Supreme Court decertified the *Engle* class based on its recognition that common issues did not predominate, and it vacated a class-wide, punitive-damages award as the product of an unlawful trial plan. At the same time, as part of what it deemed a "pragmatic solution" to preserve as much of *Engle* as possible, the Florida Supreme Court authorized individual actions in which the defect, negligence, concealment, and conspiracy findings would have unspecified "res judicata effect." 945 So. 2d at 1269.

This case is one of the subsequent individual actions envisioned by the *Engle* court. Respondent Mathilde Martin obtained a $28.3-million judgment against Reynolds for the death of her husband from smoking. Ms. Martin did not attempt to prove the tortious-conduct elements of her claims—for example, that the unfiltered Lucky Strike cigarettes smoked by her husband were defectively or negligently designed

or marketed, or that any statements on which he may have relied were misleading as a result of fraudulent omissions. Nor did Ms. Martin attempt to show that the *Engle* jury had actually decided those issues in her favor. Nonetheless, based on what it held to be the preclusive effect of the *Engle* findings, the trial court permitted Ms. Martin to establish liability merely by showing that her husband died from an addiction to smoking. In so doing, the court prevented Reynolds from even contesting any of the tortious-conduct elements of Ms. Martin's claims.

On appeal, the First District found no due-process violation in precluding litigation of critical factual questions that the *Engle* jury may *or may not* have resolved. The court held that, for preclusion purposes, it was enough that the *Engle* jury *reasonably could have found* that all cigarettes were defectively or negligently designed or marketed, and were the subject of statements that fraudulently omitted material information. But the *Engle* verdict form contains no such finding, and the First District did not, and could not, dispute that the verdict may have rested on *narrower* theories that would *not* encompass the cigarettes smoked by Mr. Martin. The First District made no attempt to reconcile its holding with traditional preclusion or due-process standards. Instead, it entirely ignored Reynolds's due-process argument, and reasoned only that its unprecedented application of issue preclusion was compelled by the "pragmatic solution" of *Engle* itself. *See* Pet. App. 11a. The Florida Supreme Court, having authored *Engle* and suggested the "pragmatic solution," left this decision (and others like it) entirely undisturbed.

For several reasons, this Court should grant certiorari. *First*, the decision below squarely conflicts with this Court's decision in *Fayerweather*, and the bedrock due-process principle that it reflects. *Fayerweather* held, as a matter of due process, that if "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." 195 U.S. at 307. *Fayerweather* states a due-process rule of the most basic kind, for without it, a defendant could be stripped of its right to put on a defense—and ultimately its property—absent any resolution of disputed issues by any fact-finder.

Second, the decision below abrogates a centuries-old limitation of issue preclusion to questions *actually decided* by a prior fact-finder. When the Fourteenth Amendment was adopted, "all the well considered authorities, ancient and modern," agreed that a court could not preclude litigation of an issue absent an "inevitable" inference that the issue had been previously decided. *Burlen*, 99 Mass. at 203. That common-law rule persists to this day. *See*, *e.g.*, *Taylor*, 553 U.S. at 892. The First District's extreme and unprecedented departure from it warrants review and "raises a presumption" of a due-process violation. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994); *see Richards v. Jefferson Cnty.*, 517 U.S. 793, 797 (1996).

Third, the holding below is not some isolated departure from traditional principles, but will infect thousands of cases with constitutional error. The

holding—that *Engle* automatically establishes the defect, negligence, and concealment elements of all claims by former class members—governs thousands of pending "*Engle* progeny" cases, which were filed precisely to establish liability without either proving the substantive elements of tort liability or satisfying the traditional standards for issue preclusion. Under the unprecedented preclusion standard adopted below, the *Engle* defendants already have been subjected to over $375 million in adverse judgments in less than 60 of the thousands of pending cases. Moreover, trial dates are set for nearly 75 more suits for the next year alone. Absent prompt review by this Court, the blatant due-process violation in this case will replicate itself indefinitely.

STATEMENT OF THE CASE

This case arises out of the unprecedented statewide smoker class action in *Engle*. Despite decertifying that class and conceding that numerous errors occurred in the class-action proceedings, the Florida Supreme Court nonetheless decreed that certain verdict-form findings, made by the *Engle* jury prior to decertification, would have unspecified "res judicata effect" in individual actions brought by former class members. 945 So. 2d at 1269. Thousands of these individual actions, commonly called "*Engle* progeny" cases, are now pending in Florida.

The question presented arises in each of these cases. It is whether the Due Process Clause permits giving preclusive effect only to issues that the *Engle* jury *actually* decided, as Reynolds contends, or whether it also permits giving preclusive effect to all issues that the *Engle* jury reasonably *could have* decided, as the First District held. Reynolds's position is supported

by this Court's decision in *Fayerweather*, by centuries of common-law precedent, and by elemental notions of fairness. In contrast, the First District's position is supported, if at all, by nothing more than its understanding of the "pragmatic solution" decreed by the Florida Supreme Court in *Engle*.

A. The *Engle* Class Action

1. In 1994, the *Engle* class action was filed against major cigarette manufacturers. The putative class included individuals harmed by their smoking addiction. Defendants challenged class treatment on the ground that common questions did not predominate over individual ones. The trial court certified a nationwide class. On interlocutory appeal, the Third District Court of Appeal upheld the certification, but limited the class to Florida smokers. *R. J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 42 (Fla. Dist. Ct. App. 1996). The Florida Supreme Court denied review. *R. J. Reynolds Tobacco Co. v. Engle*, 682 So. 2d 1100 (Fla. 1996). As modified, 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.[1]

The *Engle* class alleged various tort claims, including strict liability, negligence, fraudulent conceal-

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[1] *Engle* thus became the only case to proceed as a class action for claims of personal injuries allegedly caused by smoking. Other state and federal appellate courts have uniformly held that such claims are far too individualized to proceed on a class basis. *See*, *e.g.*, *Philip Morris Inc. v. Angeletti*, 752 A.2d 200, 222-23 (Md. 2000) (collecting cases).

ment, 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 calculate the 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 wrongdoing. Most of those allegations concerned only particular types of cigarettes or time periods. Thus, although the class at times argued that all cigarettes are defective because of their inherent health and addiction risks, it also disavowed that theory to avoid a preemption objection under *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). *See, e.g.*, Pet. App. 209a ("A major fiction of Defendants' argument is that the Class predicated any claim on the Defendants' sale of cigarettes – a legal product."). And although the class at times argued that the defendants should have disclosed the inherent health and addiction risks of all cigarettes, it also presented narrower concealment theories that applied only to some cigarettes, to avoid the defense (*see* Pet. App. 401a-03a) that those generic risks were widely known (Pet. App. 224a, 254a-55a, 315a-17a, 393a-95a).

Several narrower allegations of misconduct were asserted for each claim:

Strict Liability. According to the class itself, there were "several alternative" defect allegations. Pet. App. 211a. Many 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. 124a, 218a, 300a-03a, 339a-49a, 363a-64a);
- *light* or *low-tar* cigarettes are defective because they cause smokers to increase smoking to "compensate" for the decreased nicotine yield (Pet. App. 246a, 305a-08a, 316a-26a, 331a-33a);
- cigarettes with *specific ingredients*—such as Y-1 tobacco—are defective (Pet. App. 124a, 218a, 394a-96a); or
- cigarettes made with *artificially manipulated levels of nicotine* are defective (Pet. App. 124a, 211a, 219a, 303a-04a, 315a-16a, 327a-30a, 337a-39a, 349a, 393a-95a).

Many of the defect allegations, moreover, applied differently over time. For example, the evidence showed that technological innovations significantly lowered cigarette tar yields over the 40-year class period. Pet. App. 333a-36a, 350a-54a, 368a-73a, 396a-400a. Thus, the jury could have thought that certain brands were defective earlier (when they contained higher tar yields) but not later. Or, it could have thought that some brands were defective later (for

failure to incorporate technological improvements) but not earlier.

Negligence. The jury instructions permitted a finding of negligence if a defendant failed to use reasonable care in the "designing, manufacturing, testing, or marketing" of cigarettes. Pet. App. 409a. Thus, any of the design-defect theories mentioned above could have supported a negligent-design theory, and any of the concealment theories mentioned below could have supported a negligent-marketing theory. 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. 155a-56a, 296a-98a, 310a-14a, 382a-84a, 388a-91a, 393a. And the class alleged that the defendants had negligently measured the tar and nicotine levels for "low-tar" (light) cigarettes. Pet. App. 406a-07a.

Concealment. The jury was instructed that fraudulent concealment requires intentional concealment of facts "necessary to make statements by [the] defendants not misleading." Pet. App. 408a. The class asserted that its concealment and conspiracy claims were based on "thousands upon thousands of statements about [cigarettes], the relationship of smoking to disease over periods of years." Pet. App. 380a. Many of those statements involved only certain cigarette types or time periods. For example, the class presented evidence 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. 224a, 229a-31a, 246a-47a, 254a-55a, 298a-300a, 305a-08a, 316a-17a, 362a, 386a. Likewise, the class presented evidence that the defendants concealed facts about *specific in-*

gredients. For example, the class alleged that the defendants failed to disclose their supposed use of ammonia to increase nicotine's addictive effect, but that claim applied to only certain brands of cigarettes at only certain times. Pet. App. 153a-54a, 238a, 316a, 355a-61a, 364a-67a, 386a, 388a, 393a-95a, 403a.

At the end of Phase I, the class persuaded the trial court to adopt a verdict form that did not require the jury to specify which of the many alternative allegations it had accepted or rejected. Pet. App. 191a-207a. Class counsel conceded that there were "many hundreds and hundreds of things" at issue for each claim (Pet. App. 378a), but argued that, "[i]f we're going to start breaking down each of the counts, we're going to have a very, very lengthy verdict form" (Pet. App. 375a). The trial court thus rejected the defendants' repeated objections that the verdict form did not adequately identify what the jury actually decided. Pet. App. 376a-79a.

Accordingly, the *Engle* jury made only very general findings. For each defendant, it affirmatively answered the following questions:

> 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 prov-

> ing the health effects and/or addictive nature of smoking cigarettes? [2]
>
> 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 reasonable cigarette manufacturer would exercise under like circumstances?

Pet. App. 193a-94a, 197a-99a, 200a, 204a-05a. The jury findings thus did *not* determine that *all* of Reynolds'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 19 different diseases, and that nicotine is addictive. Pet. App. 191a-92a. It also found that the class was entitled to punitive damages. Pet. App. 206-07a.

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[2] The concealment interrogatory incoherently asked whether the defendants improperly "conceal[ed]" information they knew was "false and misleading." The defendants unsuccessfully objected to that bewildering question. Pet. App. 272a.

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 "sufficient evidence" that cigarettes were defective in "many" different ways. Pet. App. 124a. As examples, it cited evidence that "some cigarettes" had filters with ventilation 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.* However, the court did not attempt to identify the actual basis for any of the findings.

4. The defendants appealed before Phase III, and the Third District reversed. *Liggett Grp. Inc. v. Engle*, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003). It held that the class should never have been certified (*id.* at 442-50); that the punitive-damages award was premature and excessive (*id.* at 450-58); and that repeated incendiary statements by class counsel—such as gratuitous comparisons of defendants' conduct to slavery, genocide, and the Holocaust—mandated reversal (*id.* at 458-66).

5. The Florida Supreme Court affirmed in part and reversed in part. It recognized various funda-

mental problems with the *Engle* trial: *first*, the trial plan had required an unlawfully premature adjudication of punitive damages (945 So. 2d at 1262-63); *second*, the $145-billion punitive-damages award—the largest punitive award that any jury has ever rendered—was clearly excessive (*id.* at 1263-65 & n.8); *third*, class counsel had made "a series of improper remarks" designed to "incite racial passions" of the jury (*id.* at 1271-74); and *fourth,* "problems with the three-phase trial plan negate[d] the continued viability of this class action" (*id.* at 1267-68).[3]

Despite these numerous problems, the Florida Supreme Court *sua sponte* adopted what it characterized as a "pragmatic solution" designed to preserve as much of *Engle* as possible. *Id.* at 1269. That "pragmatic solution" was to "decertify the class," but nonetheless "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, which argued that use of the *Engle* findings in future litigation would violate due process. The class successfully opposed certiorari on the ground that, until the findings were applied in individual cases, the due-process issue was "premature and not ripe for review." Br. in

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[3] Although this petition raises only a due-process challenge to misuse of the *Engle* findings, Reynolds reserves its right to challenge other aspects of *Engle* in other progeny cases.

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. A dedicated website tracks their progress. *See* http://info.courtroomview.com/engle-verdict-tracker (last visited Dec. 14, 2011).

In state court, over 50 cases have been tried to verdict. In each case, plaintiffs successfully argued that the Phase I findings establish the tortious-conduct elements of their individual claims. Plaintiffs have prevailed in 36 cases, and have obtained jury verdicts totaling $495 million. *See id.* After apportionment for the plaintiffs' comparative fault, these verdicts have resulted in pending final judgments against the *Engle* defendants exceeding $375 million. At present, the state courts try at least two cases per month. *Id.*

In federal court, trials initially were stayed pending appeals on the permissible use of the *Engle* findings. Following decisions on that question by the First District here, and by the Eleventh Circuit in *Brown v. R. J. Reynolds Tobacco Co.*, 611 F.3d 1324 (11th Cir. 2010) ("*Bernice Brown*"), federal trials are scheduled to begin in February 2012.

C. *Martin* and Related Cases

In this *Engle* progeny case, Mathilde Martin sued Reynolds for the death of her husband from smoking. She asserted strict-liability, negligence, concealment, and conspiracy claims. Mr. Martin, who was born in 1929, regularly smoked only unfiltered Lucky Strike

cigarettes. Pet. App. 279a-86a. Throughout the case, a critical issue was the permissible use of the *Engle* findings.

1. The trial court ruled that the Phase I findings conclusively established the tortious-conduct elements of Ms. Martin's claims (Pet. App. 25a-27a), despite Reynolds's contention that such use of the findings would violate due process (Pet. App. 70a-74a). The court thus instructed the jury that Reynolds "placed cigarettes on the market that were defective and unreasonably dangerous"; that it "was negligent"; that it "concealed or omitted material information, not otherwise known or available, knowing that material was false or misleading [*sic*], or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both"; and that it "conspired with other companies to conceal or omit information regarding the health effect[s] of cigarettes or their addictive nature or both." Pet. App. 289a.

On the strict-liability and negligence claims, the court refused to ask the jury whether the cigarettes that Mr. Martin smoked were defectively or negligently designed or marketed, or whether any such defect or negligence caused Mr. Martin's injury. Instead, the jury was asked to determine only whether Mr. Martin was an *Engle* class member—*i.e.*, whether a cigarette addiction caused his death. Pet. App. 290a-91a. If so, the jury was required to return a plaintiff's verdict, and the only further questions were comparative fault and damages. Pet. App. 291a-92a.

On the concealment and conspiracy claims, the court refused to ask the jury whether any statements

about cigarettes smoked by Mr. Martin fraudulently omitted information. Instead, the jury was asked to determine only whether his death was caused by "the conspiracy" or by "acts proven in furtherance of that conspiracy." Pet. App. 293a. To find such causation, the jury was required to conclude that Mr. Martin had "relied on statements" by the *Engle* defendants "that omitted material information concerning the health effect[s] of cigarettes or their addictive nature or both." Pet. App. 294a. But the jury was not asked to determine which statements had omitted such information, or whether any such omissions had been done knowingly and with an intent to induce reliance.

The jury returned a plaintiff's verdict. It found that Mr. Martin was a class member, allocated 66% of fault to Reynolds and 34% of fault to Mr. Martin, and awarded Ms. Martin $5 million in compensatory damages. Pet. App. 36a-37a. It also found that the "conspiracy to conceal information" and "actual concealment of information" caused Mr. Martin's death and that punitive damages were warranted. Pet. App. 37a. In a second phase, the jury awarded $25 million in punitive damages. Pet. App. 39a. The trial court again rejected Reynolds's constitutional objection to the misuse of the *Engle* findings (*see* Pet. App. 87a-89a), reduced the compensatory award to reflect the comparative-fault finding, and entered judgment for $28.3 million. Pet. App. 29a-30a, 34a-35a.

2. On appeal, Reynolds renewed its argument that the *Engle* findings could not constitutionally be applied to preclude litigation of issues that the *Engle* jury may not have resolved against it. Pet. App.

101a-05a. Despite that argument, the First District affirmed.

The First District expressly disagreed with the Eleventh Circuit's earlier decision in *Bernice Brown*, which had determined the preclusive effect of the *Engle* findings on an interlocutory appeal. The Eleventh Circuit had held that, under Florida law, issue preclusion extends only to issues that were "actually adjudicated in prior litigation." 611 F.3d at 1334-35. The Eleventh Circuit explained that the *Engle* findings on their face do not establish that *all* cigarettes (or the specific cigarettes smoked by any progeny plaintiff) were defectively or negligently designed or marketed, or the subject of statements that included fraudulent omissions. *Id.* at 1335. The court left open the possibility that progeny plaintiffs could show, to a reasonable degree of certainty, that these issues were "actually adjudicated" in *Engle*, but it expressed considerable doubt that any plaintiff could do so. *Id.* at 1336 n.11; *id.* at 1337 n.1 (Anderson, J., concurring).

The First District rejected that reasoning. In particular, it did "not agree" that "every *Engle* plaintiff must trot out the class action trial transcript to prove applicability of the Phase I findings" to his or her case. Pet. App. 12a. Instead, it held that the *Engle* findings "establish the conduct elements of the asserted claims" in all progeny cases, "and individual *Engle* plaintiffs need not independently prove up those elements *or demonstrate the relevance of the findings to their lawsuits*." Pet. App. 15a (emphasis added). The First District reasoned that the Omnibus Order in *Engle*—which held that the class had presented legally sufficient evidence for the Phase I

findings—established the "evidentiary foundation" of those findings for preclusion purposes. Pet. App. 14a.

The First District made no attempt to justify its ruling under normal standards of issue preclusion or due process. Instead, it entirely ignored Reynolds's arguments on both points, and simply asserted that a contrary ruling "would essentially nullify" *Engle*. Pet. App. 11a.

Given the conflict between the First District and the Eleventh Circuit, and the thousands of affected cases, Reynolds moved the First District to certify its decision for review by the Florida Supreme Court. The First District refused. Pet. App. 31a. Reynolds then sought discretionary review in the Florida Supreme Court, which "decline[d] to accept jurisdiction." Pet. App. 32a.

3. The question presented here also arose in three other appeals decided by the First District. In these cases, the trial courts gave the *Engle* findings a similarly broad preclusive effect, and Reynolds challenged those decisions on federal due-process grounds. In all three, the First District issued per curiam affirmances citing the decision below and containing no further reasoning. *R. J. Reynolds Tobacco Co. v. Gray*, 63 So. 3d 902 (Fla. Dist. Ct. App. 2011); *R. J. Reynolds Tobacco Co. v. Hall*, 70 So. 3d 642 (Fla. Dist. Ct. App. 2011); *Liggett Grp., LLC v. Campbell*, 60 So. 3d 1078 (Fla. Dist. Ct. App. 2011). In each case, the Florida Supreme Court denied discretionary review. *R. J. Reynolds Tobacco Co. v. Gray*, 67 So. 3d 1050 (Fla. 2011); *R. J. Reynolds Tobacco Co. v. Hall*, 67 So. 3d 1050 (Fla. 2011); *R. J. Reynolds Tobacco Co. v. Campbell*, 67 So. 3d 1050 (Fla. 2011). In each case,

Reynolds is today filing a petition for certiorari presenting the same question as this petition.

4. Since the decision below, the Fourth District Court of Appeal has also addressed the permissible use of the *Engle* findings in progeny litigation. *R. J. Reynolds Tobacco Co. v. Brown*, 70 So. 3d 707 (Fla. Dist. Ct. App. 2011) ("*Jimmie Brown*"). The Fourth District agreed with the First District that the *Engle* findings establish all wrongful-conduct elements in all progeny suits. *Id.* at 715. Like the First District in the decision below, the Fourth District did not dispute that those findings could have rested on allegations that would not apply to the individual progeny plaintiff. Indeed, quoting *Richards v. Jefferson County*, 517 U.S. 793, 797 (1996), for the proposition that "'extreme applications of the doctrine of res judicata'" may be unconstitutional, the Fourth District said "we are concerned the preclusive effect of the *Engle* findings violates Tobacco's due process rights." *Jimmie Brown*, 70 So. 3d at 716; *see id.* at 720 (May, C.J., concurring) (noting same concern). Yet despite that concern, the Fourth District felt itself "compelled" by *Engle* to rule for the plaintiffs. 70 So. 3d at 716. Like the First District, the Fourth District also refused to certify its decision for review by the Florida Supreme Court.

REASONS FOR GRANTING THE PETITION

In their conduct of *Engle* progeny litigation, the Florida state courts are engaged in serial due-process violations that threaten the defendants with literally billions of dollars of liability. In none of these cases has any plaintiff undertaken to prove the tortious-conduct elements of his or her individual claims. Nor has any plaintiff undertaken to show, based on the

Engle findings and trial record, that the *Engle* jury resolved those specific elements in his or her favor. And no such showing would be possible: given the *generality* of the *Engle* findings, and the number of *alternative* allegations of defect, negligence, and concealment presented during the year-long Phase I trial, it is impossible to determine which allegations the *Engle* jury accepted, which it rejected, and which it simply did not reach. Neither the First District here, nor the Fourth District in *Jimmie Brown*, disputed that critical point. Given all of this, it is hardly surprising that every federal judge to have considered the question has held that the *Engle* findings cannot be used to establish individual elements in progeny cases, either as a matter of Florida law, *see Bernice Brown*, 611 F.3d at 1333-37; *Merlob v. Philip Morris Inc.*, No. 08-60074-CIV-UNGARO, slip op. at 7-8 (S.D. Fla. Aug. 8, 2008), or as a matter of due process, *see Brown v. R. J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328, 1344-46 (M.D. Fla. 2008); *Burr v. Philip Morris, USA*, No. 8:07-cv-1429-T-23MSS, slip op. at 1 (M.D. Fla. Aug. 28, 2008).

In rejecting this uniform federal precedent, the Florida state courts have made no attempt to justify their rulings under traditional preclusion or due-process standards. Instead, they have asserted only that their rulings are compelled by *Engle*. Pet. App. 11a; *Jimmie Brown*, 70 So. 3d at 716. The defendants disagree, and have argued in the state courts that *Engle*'s unelaborated reference to "res judicata" (945 So. 2d at 1269) must be understood as a directive to apply, not depart from, settled preclusion standards. In any event, the more fundamental point is that the decision below, whether understood as a

faithful or unfaithful application of *Engle*, cannot be reconciled with federal due-process standards.

In its traditional formulation, issue preclusion (also known as direct or collateral estoppel) "'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*, 553 U.S. at 892 (emphasis added and citation omitted). In this case, by contrast, the First District adopted a dramatically different preclusion standard. Rather than asking whether the *Engle* findings *actually* rest on allegations that would apply to Mr. Martin, it asked whether such allegations were supported by *sufficient evidence* to withstand a directed-verdict motion. Pet. App. 14a-15a ("evidentiary foundation" of findings established by denial of directed verdict). Moreover, it reached that holding despite the presence of *alternative* theories that would *not* apply to Mr. Martin and that were themselves supported by sufficient evidence, at least according to the Omnibus Order cited by the First District. Pet. App. 124a. In effect, the First District extended preclusion to any issue that the *Engle* jury *reasonably could have resolved* against the defendants. Pet. App. 14a-15a. Such a ruling would be remarkable even in a case where a verdict could have rested on two alternative theories of liability; in a case where the verdict could have rested on dozens if not hundreds of alternative theories, it is nothing short of stunning.

The Court should grant certiorari to consider whether this extreme and unprecedented expansion of issue preclusion comports with due process.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S CASES PLACING DUE-PROCESS LIMITS ON RES JUDICATA

The Court should grant certiorari because the decision below conflicts with its due-process cases.

A. 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*, 517 U.S. at 797 (citation omitted).

In *Fayerweather*, this Court held that the Due Process Clause bars preclusion of issues that may not have been 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).

B. Modern standards reinforce this traditional rule. The Court has identified three factors to gauge whether state procedure comports with the "fundamental fairness" required by due process: (1) "the private interest that will be affected"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

These factors confirm that courts cannot preclude litigation of issues that a prior jury may not have decided. First, the private interest is a defendant's property. *See Philip Morris USA v. Williams*, 549 U.S. 346, 349, 353 (2007) (an award of punitive damages not supported by proper liability findings "would amount to a 'taking' of property without due process," including the opportunity "'to present every available defense'" (citation omitted)). Second, the risk of erroneous deprivation is substantial: preclusion in these circumstances "might well prevent a hearing or a determination on the merits even though there had not been a hearing or determination in the first case." *Happy Elevator No. 2 v. Osage Constr. Co.*, 209 F.2d

459, 461 (10th Cir. 1954). Finally, any countervailing interests would be minimal, for where a "general verdict is opaque, there should be no reliance or sense of repose growing out of the disposition of individual issues." 18 Charles A. Wright, *et al.*, *Federal Practice & Procedure* § 4420, at 536 (2d ed. 2002).

C. The preclusion rule adopted in this case sharply conflicts with this Court's decisions. Under *Fayerweather*, 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 the decision below, preclusion would apply so long as sufficient evidence existed to support the allegations at issue, no matter how many "distinct" alternatives are present, and no matter which of them the jury actually rested on. Pet. App. 14a-15a. The preclusion rule adopted below thus *imposes liability* merely because the plaintiff has adduced *sufficient evidence* to get to a jury. But liability determinations have always rested on *actual* jury findings, not on what a reasonable jury *could or could not* have found. In holding to the contrary, the decision below violates both the traditional due-process rule of *Fayerweather* and the modern due-process standards of *Mathews*.

Moreover, the result in this case cannot possibly be sustained under the proper constitutional standard. As shown in detail above (*see supra* at 9-11), for each of the claims at issue, the *Engle* jury could have rested on one or more of a large number of distinct alternative allegations that simply did not apply to the unfiltered Lucky Strike cigarettes smoked by Mr. Martin. For example, on the strict-liability claim, the defect finding could have rested on allegations that applied only to *filtered* or *light* cigarettes. Pet. App.

124a, 218a, 246a, 300a-03a, 305a-08a, 316a-26a, 331a-33a, 339a-49a, 363a-64a. The negligence finding could have rested on similarly narrow allegations, or on evidence of youth-marketing campaigns alleged to have occurred decades after Mr. Martin had become an adult. Pet. App. 155a-56a, 296a-98a, 310a-14a, 382a-84a, 388a-91a, 393a. And the concealment and conspiracy findings could have rested on extended allegations that the defendants concealed that "light" cigarettes were not safer than other cigarettes due to smoker "compensation." Pet. App. 224a, 229a-31a, 246a-47a, 254a-55a, 298a-300a, 305a-08a, 316a-17a, 362a, 386a.

In its reasoning and result, the decision below conflicts with *Fayerweather* and *Mathews* by extending issue preclusion to alternative allegations that may or may not underlie a verdict. Review in this Court is therefore warranted.

II. THE DECISION BELOW CONFLICTS WITH A COMMON-LAW RULE UNIVERSALLY FOLLOWED BY STATE AND FEDERAL COURTS

The decision below sharply deviates not only from *Fayerweather* itself, but also from the background common-law rule that *Fayerweather* incorporated into the Due Process Clause. Under the common law, the limitation of preclusion to issues actually decided by a prior jury is as solid as bedrock: it has been universally followed for centuries, and, 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. The Florida courts' sharp departure from that rule, justified neither in *Engle* itself nor in

the progeny decisions that purport to apply *Engle*, independently warrants this Court's review.

A. "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 "very few" cases "in which a party has complained of [the] denial" of such a common-law protection, the Court has 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).

Such departures often do violate due process. In *Oberg*, for example, this Court held that "Oregon's abrogation of a well-established common-law protection"—judicial review of punitive-damage awards, which was conducted everywhere except in Oregon—violated due process. 512 U.S. at 430. Likewise, in *Oliver,* the Court held that secret contempt proceedings violate due process, because it could not "find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country." 333 U.S. at 266. And in *Richards*, it held that courts could not constitutionally apply preclusion against non-parties to the prior judgment, based on the "'historic tradition that everyone should have his own day in court.'" 517 U.S. at 798 (citation omitted).

B. The common-law protection at issue here is just as firmly established. For centuries, 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*, 99 Mass. at 203; *see 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").

This Court's decision in *Sickles* provides a good example. There, in the first case, the plaintiffs alleged that the defendants had breached two contracts, but the verdict did not identify which contract the jury

found to have been breached. 72 U.S. at 591-92. In the second case, the plaintiffs sought to preclude the defendant from arguing that it did not make the first contract. The Court refused to apply issue preclusion because, given the alternative theories in the prior case, the evidence "failed to show that the contract in controversy in the present suit was necessarily determined in the former." *Id.* at 592.

State courts likewise held that a verdict cannot preclude litigation on a specific issue if it 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").[4]

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[4] Old authorities on this point are legion. *See*, *e.g.*, *Strauss v. Meertief*, 64 Ala. 299, 311 (1879); *Solly v. Clayton*, 12 Colo. 30, 38-40 (1888); *Dickinson v. Hayes*, 31 Conn. 417, 423-25 (1863); *Evans v. Birge*, 11 Ga. 265, 272-75 (1852); *Kitson v. Farwell*, 132 Ill. 327, 339-41 (1890); *Dygert v. Dygert*, 4 Ind. App. 276, 280-81 (1892); *Lindley v. Snell*, 80 Iowa 103, 109-10 (1890); *Hill v. Morse*, 61 Me. 541, 543 (1873); *Augir v. Ryan*, 63 Minn. 373, 376 (1896); *Greene v. Merchants' & Planters' Bank*, 73 Miss. 542, 549-50 (1895); *Dickey v. Heim*, 48 Mo. App. 114, 119-20 (1892); *Kleinschmidt v. Binzel*, 14 Mont. 31, 55-61 (1894); *Hearn*

"Modern practice is consistent with these earlier authorities." *Oberg*, 512 U.S. at 426. The traditional rule has been followed uniformly by the federal courts of appeals[5] and state appellate courts.[6] Thus, 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

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v. Boston & Me. R.R., 67 N.H. 320, 321-23 (1892); *Bell v. Merrifield*, 109 N.Y. 202, 211-14 (1888); *Fahey v. Esterley Harvesting Mach. Co.*, 3 N.D. 220, 221-24 (1893); *Lore's Lessee v. Truman*, 10 Ohio St. 45, 53-56 (1859); *Cook v. Burnley*, 45 Tex. 97, 115-17 (1876); *Aiken v. Peck*, 22 Vt. 255, 260 (1850); *Chrisman's Adm'x v. Harman*, 70 Va. 494, 499-501 (1877); *Wentworth v. Racine Cnty.*, 99 Wis. 26, 32 (1898).

[5] *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).

[6] *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 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 (N.Y. 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).

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)).

C. The First District's decision thus marks an unprecedented departure from a centuries-old rule. Rather than ask itself whether the *Engle* jury decided the precise facts for which Ms. Martin sought preclusion, the First District instead asked the very different question whether the testimony in the first suit was sufficient to establish those facts. As explained above, the First District held that, for preclusion purposes, the Omnibus Order established the "evidentiary foundation" of the Phase I findings. Pet. App. 14a. But in denying a directed-verdict motion, that order did not resolve what alternative allegations the *Engle* jury *actually* decided; it simply concluded that a "reasonable jury *could* render a verdict" for the class—the Florida standard for directed-verdict motions. *Howell v. Winkle*, 866 So. 2d 192, 195 (Fla. Dist. Ct. App. 2004) (emphasis added). And, in so doing, it specifically found sufficient evidence based on allegations having *no* possible application to Mr. Martin, such as allegations limited to filtered cigarettes. Pet. App. 124a. Thus, rather than providing a legitimate basis for preclusion, the Omnibus Order does exactly the opposite: it demonstrates that the *Engle* judgment might have rested on one or more of several alternative grounds and that,

as a result, issue preclusion cannot apply. The First District's dramatic departure from that rule warrants this Court's review.

III. THE QUESTION PRESENTED GOVERNS THOUSANDS OF PENDING CASES

Lastly, the Court should grant certiorari because of the important and recurring nature of the question presented, the need for its immediate resolution, and the absence of any better vehicle to resolve it.

The decision below impacts pending *Engle* progeny cases brought by about 8000 plaintiffs. In each of those cases tried to verdict so far, Florida trial courts have issued preclusion rulings akin to those made here. Moreover, the First District and the Fourth District have now squarely held that the *Engle* findings establish all tortious-conduct elements of all *Engle* progeny claims, absent any inquiry into whether those findings rest on allegations relevant to the individual plaintiff. Under Florida law, that holding "bind[s] all Florida trial courts," *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992), which are now trying at least two new *Engle* progeny cases each month, and which are scheduled to try 75 *Engle* progeny cases in the next 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 $375 in adverse judgments—will likewise steadily increase as *Engle* progeny trials continue with no end in sight. Those considerations 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).

Furthermore, there is no better vehicle in sight for resolving this question. In every progeny case tried to date, the defendants have raised strenuous due-process objections to use of the *Engle* findings to establish elements of progeny claims. Yet the state courts have uniformly concluded that *Engle* itself compels this result, and they have therefore either ignored the due-process objection entirely, as did the decision below, or else brushed it aside as foreclosed by *Engle*, as did the Fourth District (*Jimmie Brown*, 70 So. 3d at 716). Moreover, despite the obvious importance of the question presented, the District Courts of Appeal have repeatedly refused to certify their decisions for review by the Florida Supreme Court, and the Florida Supreme Court has refused on four separate occasions to exercise discretionary jurisdiction to determine whether the lower state courts have properly construed its own *Engle* decision to effect a revolution in the law of issue preclusion and due process. For all of these reasons, the prospects for meaningful further percolation in the Florida state courts are at best remote.

In federal court, the two district judges to have addressed the due-process question presented here have agreed with Reynolds's position. *See Bernice Brown*, 576 F. Supp. 2d at 1344-46; *Burr*, No. 8:07-cv-1429-T-23MSS, slip op. at 1. But because the Eleventh Circuit agreed with Reynolds's position on state-law grounds and reserved the due-process question, *Bernice Brown*, 611 F.3d at 1334, federal district courts are only now beginning to reconsider whether the preclusion standard adopted below (which binds the federal courts as to questions of state law) is consistent with federal due process. One district court has held oral argument on that question, in the context of

a pretrial conference under Federal Rule of Civil Procedure 16(c), but has not yet rendered any decision. *Waggoner v. R. J. Reynolds Tobacco Co.*, No. 3:09-cv-10367 (M.D. Fla.) (argued Sept. 7, 2011). Given the early stages of the federal cases, the timeline for the question presented reaching this Court through the Eleventh Circuit is likely measured in years rather than months—even assuming that plaintiffs, were they not to prevail in the Eleventh Circuit, would seek review in this Court at all. Moreover, given the clarity of the ongoing due-process violations in the state courts, the number of state trials that will occur before any federal case could reach this Court, and the massive aggregate liability to which Reynolds and its fellow defendants would be subjected in the interim, we submit that the better course is to resolve the due-process question now, rather than at some unknown point in the distant future.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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