

No. __-__

IN THE
Supreme Court of the United States

R. J. REYNOLDS TOBACCO COMPANY,

Petitioner,

v.

CAROLYN A. GRAY, AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF CHARLES ROBERT GRAY,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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

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

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Eric E. Murphy
JONES DAY
325 John H. McConnell
Blvd., Ste. 600
P.O. Box 165017
Columbus, OH 43216

Counsel for Petitioner

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, applying *R. J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. Dist. Ct. App. 2010), the court precluded litigation of issues that the prior jury *may not* have decided.

The question presented is the same one presented in the petition for certiorari in *Martin*: whether this unprecedented expansion of preclusion law violates the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

The sole plaintiff below was Respondent Carolyn A. Gray, as personal representative of the estate of Charles Robert Gray.

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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CONSTITUTIONAL PROVISION

U.S. Const. amend. XIV, § 1, cl. 2 1

STATUTES

28 U.S.C. § 1257(a) 1

OPINIONS BELOW

The decision of the Florida First District Court of Appeal (Pet. App. 1a-2a) is reported at 63 So. 3d 902. The Florida Supreme Court's order denying review (Pet. App. 13a-14a) 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 June 17, 2011. Pet. App. 1a. On July 20, 2011, the Florida Supreme Court declined jurisdiction. Pet. App. 13a. On October 7, 2011, Justice Thomas granted an extension of time to file a petition for certiorari until December 17, 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 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 “*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, in *R. J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. Dist. Ct. App. 2010), the Florida First District Court of Appeal dramatically departed from that rule. *Martin* held that, in individual cases arising from the class action decertified in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), the defendants would be precluded from litigating issues that the *Engle* jury may *or may not* have resolved against them prior to decertification. In this case, the First District likewise applied *Martin* to preclude Petitioner R. J. Reynolds Tobacco Company from litigating issues that the prior jury may not have resolved against it.

In *Martin*, Reynolds today has filed a petition for certiorari presenting the question whether precluding a defendant from litigating issues that the prior jury may not have resolved against it violates the Due Process Clause of the Fourteenth Amendment. This case presents the same question.

A. The *Engle* Class Action

The petition for certiorari in *Martin* fully details the background in *Engle*. Accordingly, we provide only a brief summary here.

Engle was a putative class action brought against major cigarette manufacturers, including Reynolds, by allegedly addicted smokers. During Phase I of *Engle*, the class sought to establish that the defendants had sold defective cigarettes, committed acts of

negligence, and fraudulently concealed information about smoking, both individually and through a conspiracy, over a period encompassing more than four decades. The class presented dozens of alternative allegations of defect, negligence, and concealment, many of which applied only to certain cigarette types or time periods. See Pet. for Cert., in *R. J. Reynolds Tobacco Co. v. Martin*, No. ___, at 9-11 (Dec. 16, 2011) (“*Martin* Pet. ___”). At the end of Phase I, the 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 which of the alternative theories of defect, negligence, and concealment it had adopted, which it had rejected, and which it had simply not addressed. *Id.* at 11-12.

Ultimately, the Florida Supreme Court decertified the *Engle* class, but nonetheless “retain[ed] [some of the] Phase I findings,” including the defect, negligence, concealment, and conspiracy-to-conceal findings, for use in future litigation. 945 So. 2d at 1269. The court permitted former class members to file “individual damages actions” within a year, and it decreed that the retained findings “will have res judicata effect” in those actions. *Id.*

In the wake of *Engle*, thousands of these individual “*Engle* progeny” actions, including this case and *Martin*, were filed in state and federal courts throughout Florida. The precise “res judicata effect” of the *Engle* findings—and the due-process limitations on that “res judicata effect”—have been critical issues in all of these cases.

B. The *Martin* Decision

In *Martin*, the First District addressed the “res judicata effect” that the *Engle* findings should receive in individual progeny cases. In that case, the trial court held that the *Engle* findings establish the tortious-conduct elements of claims for strict liability, negligence, concealment, and conspiracy. The court thus did not require Ms. Martin to prove that the specific cigarettes smoked by her husband were defective, negligently designed or marketed, or the subject of any statements that fraudulently omitted information. As a result, she was permitted to establish liability based only on a showing that her husband had died from an addiction to smoking. *See Martin* Pet. 16.

The First District affirmed. It held that the *Engle* findings “establish the conduct elements of the asserted claims” in all progeny cases, “and individual *Engle* plaintiffs need not prove up those elements or demonstrate the relevance of the findings to their lawsuits.” *See* App. to Pet. for Cert., in *R. J. Reynolds Tobacco Co. v. Martin*, No. ___, at 15a (“*Martin* Pet. App. __a”). Thus, for example, the First District refused to require Ms. Martin to prove that the unfiltered Lucky Strike cigarettes smoked by her husband were defective, much less that any such defect was a proximate cause of his injuries. *Martin* Pet. App. 10a-17a.

The First District rested its decision on a final Omnibus Order entered by the *Engle* trial court, which denied the defendants’ motion for a directed verdict. *Martin* Pet. App. 14a-15a. That order did not seek to determine which of the alternative defect, negligence, and concealment allegations the *Engle*

jury had actually accepted. Instead, it concluded only that there was legally sufficient evidence to support the *Engle* findings. *Martin* Pet. App. at 124a. In so doing, it specifically highlighted misconduct theories that applied only to “some”—but not all—brands or types of cigarettes. *Id.*

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

C. The Proceedings In This Case

Respondent Carolyn A. Gray sued Reynolds for the death of her husband from smoking. Mr. Gray began smoking Camel cigarettes in the 1940s, and switched to Winston cigarettes in the 1950s. Pet. App. 222a-24a. Ms. Gray pleaded claims for strict liability, negligence, fraudulent concealment, and conspiracy to fraudulently conceal. Pet. App. 29a-33a.

As in *Martin*, a critical issue in the case was the extent of the “res judicata effect” of the *Engle* findings. And, as in *Martin*, the plaintiff sought to establish liability without proving that the cigarettes smoked by her husband were defective, negligently designed or marketed, or fraudulently marketed. Pet. App. 26a-33a.

In a pretrial motion filed in all *Engle* progeny cases pending in Escambia County, Reynolds moved for a determination that, given the generality of the *Engle* findings and the number of alternative theories litigated in *Engle*, use of those findings to establish elements of a plaintiff’s individual claims would violate both Florida preclusion law and federal due process.

Pet. App. 36a, 49a-70a. The trial court rejected this argument and held that the *Engle* findings conclusively established the tortious-conduct elements of progeny plaintiffs' claims. Pet. App. 3a-7a.

On the eve of trial, Reynolds moved to determine the proper use of the *Engle* findings in Ms. Gray's case. Pet. App. 72a. It renewed its argument that using the findings to establish elements of Ms. Gray's claims would violate Florida preclusion law and federal due process. Pet. App. 72a-74a. The trial court again rejected those arguments and denied the motion. Pet. App. 8a-9a.

Over Reynolds's continuing objections (Pet. App. 89a-92a), the trial court instructed the jury that, if Mr. Gray was an *Engle* class member, the *Engle* findings established essential elements of each of Ms. Gray's claims. Thus, on the strict-liability and negligence claims, the trial court instructed the jury that Reynolds had "placed cigarettes on the market that were defective and unreasonably dangerous" and "was negligent." Pet. App. 229a. The trial court further instructed the jury that, if class membership was established, it should consider no other element of liability on those claims, but rather should allocate fault and fix damages. Pet. App. 229a-34a. On the fraudulent-concealment and conspiracy claims, the court instructed the jury that Reynolds had "concealed or omitted material information, not otherwise known or available, knowing the material was false or misleading [*sic*], or failed to disclose material facts concerning the health effects or addictive nature of smoking cigarettes," and "agreed with other companies to conceal or omit information regarding the health effects of cigarettes or their addictive nature."

Pet. App. 229a-30a. The trial court, however, did not instruct the jury to determine which particular statements Mr. Gray relied upon, or whether those statements fraudulently omitted information. Pet. App. 234a-36a.

The court gave these instructions even though the *Engle* verdict form does not specify which brands or types of cigarettes the jury had found defective, much less what that defect was. Nor does it specify what conduct the jury had found negligent, or what statements fraudulently omitted information, or what conduct was undertaken in furtherance of any conspiracy. Moreover, the court never disputed Reynolds's argument that the *Engle* findings could have rested on defect, negligence, concealment, or conspiracy theories that would not apply to Mr. Gray.

The jury found that Mr. Gray was a class member, allocated 60% of the fault to Reynolds and 40% of the fault to Mr. Gray, and assessed compensatory damages of \$7 million. Pet. App. 16a-17a. The jury further found that the unspecified concealment and conspiracy were a legal cause of Mr. Gray's death. Pet. App. 17a. After further proceedings, the jury awarded Ms. Gray \$2 million in punitive damages. Pet. App. 19a-20a.

In its post-trial motion, Reynolds once again argued that the trial court's use of the *Engle* findings violated due process. Pet. App. 122a, 127a-39a. The court denied the motion. Pet. App. 10a-12a. After reducing the compensatory-damages award to reflect the jury's apportionment of fault, the court entered a final judgment for Ms. Gray of \$6.2 million. Pet. App. 15a.

On appeal, Reynolds again argued that the trial court violated due process in precluding litigation over whether the cigarettes smoked by Mr. Gray were defective, negligently designed or marketed, or the subject of statements that fraudulently omitted information. Pet. App. 194a-210a. The First District affirmed the judgment of the trial court, in a per curiam order that cited *Martin* but contained no additional reasoning. Pet. App. 1a-2a.

Reynolds asked the Florida Supreme Court to take jurisdiction of the case while considering the state-law and federal due-process questions posed in *Martin* and, ultimately, to reverse on the same basis that it should reverse in *Martin*. Pet. App. 215a-19a. The Florida Supreme Court held the case pending its disposition of Reynolds's petition for review in *Martin*. After it refused to accept jurisdiction in *Martin*, it likewise refused to accept jurisdiction in this case. Pet. App. 13a-14a.

REASONS FOR GRANTING THE PETITION

This case raises the same question as the petition for certiorari in *Martin*—whether the Due Process Clause prohibits state courts from deviating from the centuries-old, common-law rule limiting issue preclusion to issues *actually decided* in prior litigation. The Court should grant certiorari in this case to resolve that issue. Alternatively, it should hold this petition pending its resolution of the petition for certiorari in *Martin*.

I. THE QUESTION PRESENTED WARRANTS REVIEW IN THIS CASE

This case squarely presents the same question as *Martin*. For the reasons explained at length in the petition for certiorari in *Martin*, that question war-

rants this Court’s review. *First*, the preclusion standard applied by the First District here and in *Martin* conflicts with this Court’s decision in *Fayerweather v. Ritch*, 195 U.S. 276 (1904), which held, as a matter of due process, that issue preclusion cannot apply where a previous verdict could have rested on grounds different from those sought to be precluded. *Id.* at 299, 307. *Second*, the First District’s preclusion standard dramatically departs from a centuries-old and uniformly followed common-law rule—that issue preclusion does not apply when the verdict from the prior suit could have rested on grounds other than the one for which preclusion is sought. Such a stark abrogation of common-law protections warrants review by this Court and “raises a presumption” of a due-process violation. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994). *Third*, the First District’s constitutionally suspect preclusion standard affects thousands of pending *Engle* progeny cases.

This case illustrates the serious constitutional problems with the First District’s preclusion standard. In particular, the *Engle* findings could have rested on many alternative allegations that would have no possible application to Mr. Gray. For example, the *Engle* defect finding could rest on the allegation that “light” cigarettes cause the smoker to inhale more deeply (*Martin* Pet. 9), but Ms. Gray disclaimed any theory of liability based on light cigarettes because Mr. Gray’s “periodic[]” smoking of light cigarettes at the “very end” of his smoking history was “too late to matter” (Pet. App. 221a, 226a-27a). Likewise, the *Engle* negligence finding could rest on youth marketing alleged to have occurred during the 1960s, 1970s, and 1980s (*Martin* Pet. 10), but Mr. Gray was fully grown by then (Pet. App. 223a-25a).

Finally, the *Engle* concealment and conspiracy findings could rest on allegations that the defendants withheld information about the distinctive health risks of light cigarettes (*Martin* Pet. 10), which, by Ms. Gray's admission, had nothing to do with Mr. Gray's injury (Pet. App. 221a, 226a-27a). In sum, Reynolds was precluded from litigating critical elements of the claims, not because it was shown that the *Engle* jury *actually decided* the pertinent issues against Reynolds, but only because the *Engle* jury *could have decided* those issues.

This case also confirms the breadth of the First District's preclusion standard. Mr. Martin and Mr. Gray had significantly different smoking histories: Mr. Martin smoked Lucky Strike cigarettes (*Martin* Pet. 15-16), whereas Mr. Gray smoked primarily Camel and Winston cigarettes (Pet. App. 222a-27a). But despite these very different smoking histories, the First District rejected Reynolds's due-process challenge with nothing more than an unreasoned citation to *Martin*. Pet. App. 1a-2a. That dismissive disposition leaves no doubt that the Florida courts will now apply the *Engle* findings to each and every brand or type of cigarettes and to each and every allegation of tortious conduct referenced in the year-long *Engle* class trial. Such a sweeping use of issue preclusion—to encompass anything that reasonably could have been decided against the defendants during the year-long Phase I trial in *Engle*—is flatly inconsistent with *Fayerweather*, unprecedented in Anglo-American jurisprudence, and profoundly unfair to the *Engle* defendants.

II. ALTERNATIVELY, THE COURT SHOULD HOLD THIS CASE FOR *MARTIN*

If the Court does not grant review here, it at least should hold this case pending its resolution of *Martin*. To ensure the similar treatment of similar cases, the Court routinely holds petitions that implicate the same issue as other cases pending before the Court, and, once the related case is decided, it resolves the held petitions in a consistent manner. *See, e.g., IMS Health, Inc. v. Schneider*, 131 S. Ct. 3091, 3091 (2011); *Am. Home Prods. Corp. v. Ferrari*, 131 S. Ct. 1567, 1567 (2011); *State Farm Mut. Auto. Ins. Co. v. Willes*, 551 U.S. 1111, 1111 (2007); *see also Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (noting that the Court has “GVR’d in light of a wide range of developments, including [its] own decisions”); *id.* at 181 (Scalia, J., dissenting) (“We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted *in order that* (if appropriate) they may be ‘GVR’d’ when the case is decided.”).

Because this case raises the same question presented in *Martin*, the Court should follow that course here. Under its normal scheduling practices, the Court will likely consider this petition and the *Martin* petition at the same conference. If it should grant review in *Martin*, then it should at a minimum hold this case pending resolution of *Martin* on the merits.

CONCLUSION

The petition should be granted. Alternatively, the petition should be held pending resolution of *Martin*.

Respectfully submitted,

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

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

Eric E. Murphy
JONES DAY
325 John H. McConnell
Blvd., Ste. 600
P.O. Box 165017
Columbus, OH 43216

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Counsel for Petitioner