NO. 11-752

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 a Writ of Certiorari to the Florida First District Court of Appeal

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Does this Court have jurisdiction to review a judgment of an intermediate state appellate court where the application for extension of time to file the petition was submitted more than 90 days after the judgment and where the state supreme court lacked jurisdiction to review the judgment?

2. Where common facts established in a multi-phase statewide class action were given res judicata effect by the state supreme court for subsequent trials brought by individual class members, and where those class members still bore significant trial burdens to prove legal causation, individual reliance, apportionment, and damages, does Due Process require that defendant be given an opportunity to relitigate the original classwide factual findings?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondent Carolyn A. Gray, as personal representative of the estate of Charles Robert Gray, respectfully requests this Court deny the petition for writ of certiorari, seeking review of the Florida First District Court of Appeals' decision in this case.

Petitioner R.J. Reynolds Tobacco Company ("RJR") filed this petition, along with others,[1] arising from litigation originally brought as *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). Of the five cases in which certiorari is presently sought, *R.J. Reynolds v. Martin*, No. 11-741, comprises the only appellate decision to address substantively the res judicata effect of the jury's findings in *Engle*. As such, it has been designated as the lead case.

These five are the first of the *Engle* progeny cases tried and reviewed by the Florida courts. Contrary to their portrayal in the Petition, the cases required extensive evidence to achieve a favorable result. Each trial was distinct but similar in that each lasted several weeks and involved substantial testimonial and documentary evidence. The *Gray* trial commenced January 19, 2009, and reached final verdict on February 8, 2009. Plaintiff's presentation alone consumed eleven volumes of transcript testimony (not including *voir dire*) and the record on appeal stretched to 18,340 pages. Counsel introduced several hundred exhibits, including advertisements, medical records, and formerly secret internal

[1]The other petitions are *R.J. Reynolds Tobacco Co. v. Martin*, No. 11-741; *R.J. Reynolds v. Hall*, No. 11-755; *Philip Morris USA Inc. v. Campbell*, No. 11-754; *R.J. Reynolds Tobacco Co. v. Campbell*, No. 11-756.

industry documents reflecting the participation of defendant RJR in a 50-year fraud by concealment. Mrs. Gray called three expert witnesses and an RJR corporate representative, along with numerous family members and other fact witnesses. RJR's expert evidence included a historian, a public opinion and polling expert, and a psychiatrist who opined on Mr. Gray's addiction. RJR also called its vice president of product development as an expert witness to discuss RJR's purported efforts to make a safer cigarette and to explain its corporate conduct over a more than 50-year period. The same vice president returned in the punitive damage phase to contrast RJR's current corporate values with those from its past.

To reach its verdict, the jury was required to find, and did find, that: (1) Mr. Gray's addiction to RJR-brand cigarettes was the legal cause of his death; (2) RJR's misconduct was a cause of Mr. Gray's death, warranting an allocation of some fault to RJR (*i.e.*, that Mr. Gray's death was not caused solely by his own choice to smoke, as RJR argued); (3) Mr. Gray relied to his detriment on RJR's fraud, such that the fraud was a legal cause of his death; (4) Mrs. Gray suffered damages as a result of Mr. Gray's death; (5) consideration of punitive damages was warranted; and, in a second phase of trial, (6) punitive damages were in fact appropriate as punishment.

The *Engle* findings, around which RJR's entire argument revolves, were communicated in a single instruction among 27 other final instructions given to the jury at the end of trial. The jury was expressly instructed:

> The findings I have described to you do not establish that R.J. Reynolds Tobacco Company is liable to Mrs. Gray. Nor do they establish whether Charles Gray was injured by R.J. Reynolds Tobacco Company's conduct or the degree, if any, to which R.J. Reynolds Tobacco Company's conduct was the sole or contributing cause of Charles Gray's death . . . . [Y]our decision as to whether or to what extent R.J. Reynolds Tobacco Company's conduct was a contributing cause of Mr. Gray's death and whether punitive damages are warranted must be based upon the evidence presented at trial.

Gray Trial Tr. 27:3136 (hereinafter "Tr.")

RJR seeks this Court's intervention to postpone the reckoning that juries and courts in Florida have deemed appropriate in this case – and in similar matters after 18 years of litigation. Still, RJR advances no viable reason for the exercise of this Court's discretion.

First, the petition for certiorari is untimely. The 90-day requirement from final judgment is jurisdictional and mandatory. Because the Florida Supreme Court did not have discretionary jurisdiction over the decision of the District Court of Appeals, RJR's request for an extension of time came on the 109th day after final judgment. It is thus untimely and should be dismissed or denied.

Second, contrary to RJR's portrayal of it in the Petition, the *Gray* trial was extensive and well contested, covered all issues not settled in the earlier

trial of common issues to the class, and heard much of the same evidence produced in *Engle* in order to determine individual causation and damages. Thus, the record supports the judgment, and RJR's claim that liability was premised on unknown and unknowable determinations by an earlier jury is specious. Because the *Engle* findings are based on matters actually litigated, the question presented does not fairly arise from this case.

Third, the question presented also does not qualify as a matter of great federal significance nor one likely to arise in future litigation. The Florida Supreme Court, scholarly reviewers, and RJR itself have all recognized the unique nature of this litigation, and the Florida Supreme Court's prospective decertification of the class in 2006 ensures that it will neither be replicated nor serve as an exemplar in other states.

Fourth, even if one were to accept RJR's exaggerated argument that the nonintentional torts of product defect and negligence are premised on unknowable factual findings made by the original *Engle* jury, the *Gray* jury found that RJR's conspiracy to conceal information and actual concealment of such information was a legal cause of Mr. Gray's death. There can be no question as to the basis for the original *Engle* jury's fraud finding, because the finding itself states that it concerned RJR's concealment of information relating to the health effects and addictiveness of its products, which is precisely the evidence the *Gray* jury considered in reaching its verdict on the fraud claim. Thus, even if one ignores the nonintentional tort claims, the verdict on conspiracy to conceal and actual concealment stands independently, sustains

this verdict, and moots the question presented. The Petition therefore seeks an improper advisory opinion and should be denied.

Fifth, there is no conflict between the Florida courts and the federal courts about the law governing application of proven facts from an earlier trial between the same parties on the same dispute. For nearly a century, Florida has estopped parties from litigating in a second suit issues or points in common to both causes of action and actually adjudicated between them. Federal law follows an identical rule. Given that, RJR's dispute focuses solely on whether the Florida courts correctly applied the facts in this record to an undisputed rule of law. As this Court's rules make plain, a petition for a writ of certiorari is rarely granted when the asserted error is "the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Sixth, cases that may more properly raise the question presented are being heard in other jurisdictions within Florida and in federal court, providing the potential for a more suitable record and the benefit of decisions that squarely address the due-process issue posed by RJR. Prudence suggests that this Court await a more apt vehicle, should this Court be inclined to hear the question presented.

Finally, there is no conflict between what the Florida courts have done in the *Engle* progeny cases and due process.

COUNTERSTATEMENT OF THE CASE

A. The *Engle* Class Action.

Engle was filed in 1994 as a nationwide class action encompassing people injured by addiction to cigarettes manufactured by RJR and other cigarette companies. When her husband, Charles Gray, died from lung cancer after smoking Winston and Camel cigarettes from his teens until his death at age 58, Carolyn Gray, as surviving spouse, became a member of the class. RJR manufactured both the Camel and Winston cigarettes Mr. Gray smoked. The court certified the class as consisting of those "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. In 1996, the Third District Court of Appeals affirmed class certification, but limited the class to Florida citizens and residents. *Id.* Class members had to have manifested a smoking disease by November 21, 1996. *Id.*

The class action went to trial in July 1998 under a three-part plan. Phase I focused on "common issues relating exclusively to defendants' conduct and the general health effects of smoking." Phase II-A addressed the class representatives' compensatory damages. Phase II-B tried class-wide punitive damages. It was then anticipated that class members would proceed with individualized determination of remaining issues and compensatory damages before different juries as Phase III. Record at 31276-80, *Engle v. R.J. Reynolds Tobacco Co.*, No. 94-05273 (Fla. Cir. Ct.) (hereinafter "*Engle* R.").

During the Phase I trial of "basic issues of liability common to all members of the class," *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 40 (Fla. App. 1996), which began in July 1998, the jury heard from 86 witnesses, 61 called by Plaintiffs and 25 by Defendants, over the course of nearly a year. At the end of the trial, the parties offered competing interrogatory forms for the jury's verdict. RJR's proffered form ran 31 pages and included numerous blank lines to be filled by the jurors with narrative explanations for their verdict. It was held improper under Florida law. RJR was given an opportunity to submit a revised set of jury interrogatories. Though RJR's counsel stated it was "incumbent upon all of us" to provide additional "enumerated" statements for a more detailed verdict form, *Engle* Tr. 35954, and repeated requests from the trial court, RJR failed to submit a feasible alternative verdict form, *Engle* R. 49258-72; 49296-49322; *Engle* Tr. 35967-68, taking the position that it was not the "defendants' job." *Engle* Tr. 36298-99.

The jury interrogatories ultimately utilized followed a defense-counsel suggestion of middle ground, *Engle* Tr. 35969, and consisted of 12 pages with more than 240 questions, including subparts. *See* Petition for Writ of Certiorari at 191a-207a, *R.J. Reynolds Tobacco Co. v. Martin*, No. 11-741 (hereinafter "*Martin* Pet."). Pursuant to Florida's standard jury instructions, *see, e.g.*, Fla. Std. Jury Inst. PL5, the jury was instructed to determine whether Defendants' cigarettes were "unreasonably dangerous," an objective determination that a "product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer, or the risk of danger in the design

outweighs the benefits." *Engle* Tr. 37571. On the class's claim of fraud by concealment and conspiracy, the jury was asked to consider specific issues relating to the addictiveness of nicotine and the industry's creation of a "false controversy" concerning the health effects of cigarettes and their addictiveness. The verdict form required the jury to resolve these issues for cigarettes produced both before and after July 1, 1974 for each defendant. *Martin* Pet. App. 193a-94a.

On the class's negligence claim, the jury considered claims that revolved around the industry's failure properly to address the health effects and addictiveness of its products, including its failure to produce cigarettes with reasonably safe nicotine levels and its concealment of information pertaining to the dangers of smoking.

Significantly, when Defendants anticipated a favorable verdict, defense counsel emphasized the importance of holding all Floridians bound by the Phase I verdict and all questions it resolved. Counsel argued that, if the jury returned a "no" verdict to a particular question, "then not a single Florida smoker can recover." *Engle* Tr. 36007. A similar stance had been taken on class notice. *See Engle* R. 10804, 9809 ("If the defendants win, we want as many people as possible bound."); ("We expect to win the case. When we win the case, I want to be able to say, 'You're bound by it. . . . I want them bound.'").

The jury deliberated for seven days, answered all questions, and found for Plaintiffs on all counts, including strict liability, negligence, conspiracy to conceal, and actual concealment. The jury also found for the class on its claims for fraud by

misrepresentation, intentional infliction of emotional distress and entitlement to punitive damages, *Martin* Pet. App. 199a-207a, although the Florida Supreme Court later declined to give these findings res judicata effect.

The jury specifically found smoking cigarettes causes 20 specific diseases, including four out of five types of lung cancer and chronic obstructive pulmonary disease. *Martin* Pet. App. 191a-92a. It found that cigarettes "that contain nicotine" are "addictive or dependence producing." *Id.* at 193a.

The same jury heard the Phase II-A trial, involving RJR's liability to the three class representatives, who smoked a variety of cigarettes (filtered and unfiltered, full flavor and lights), specifically including the brands Charles Gray smoked – Camel and Winston. *Martin* Pet. App. 123a. The trial court held that the jury's verdicts were based on "an enormous amount of evidence" and that "after sitting for two years in trial, it is inconceivable that this jury ignored or misconceived the evidence or the merits of the case." *Martin* Pet. App. 185a. All three class representatives were awarded compensatory damages, reduced by comparative fault. During the Phase II-B trial, the same jury returned a $145 billion punitive-damage verdict in favor of the class.

The district court of appeal reversed the judgment. *Liggett Group, Inc. v. Engle*, 853 So. 2d 434 (Fla. App. 2003). The Florida Supreme Court subsequently reinstated class certification but ordered that the class be prospectively decertified on remand for remaining class members' issues. It also reinstated two of the three compensatory damage

awards (against all but two defendants) and vacated the class-wide punitive damages. 945 So. 2d at 1277.

The Court carefully considered each of the jury's Phase I findings and approved only those findings common to the class. 945 So. 2d at 1255, 1269 (finding the fraud by misrepresentation and intentional infliction of emotional distress claims involved "highly individualized determinations"). It held that "issues related to Tobacco's conduct" had been decided, but questions of legal causation, comparative fault, reliance on fraud, and individual damages remained to be proven through individual trials. The Court held that the "Phase I common core findings" approved "will have res judicata effect in those trials." *Id.* at 1269.

As to the individual cases of the three class representatives, it held that a "review of the verdicts reveals that each verdict reflected a careful and differentiated analysis as to comparative fault and individual damages," *id.* at 1274, but found one barred by the applicable statute of limitations. *Id.* at 1277. This Court subsequently denied review. 552 U.S. 941 (2007).

B. The *Gray* Litigation.

Mrs. Gray timely filed her individual post-*Engle* suit seeking damages for the death of Charles Gray, her husband of 39 years. In 1994, Mr. Gray died of lung cancer due to smoking a pack-and-a-half to two packs of RJR cigarettes every day for more than 40 years. Tr. 9:830; 16:1804-05; 18:1948-49. Mr. Gray picked up his first RJR cigarette at the age of 12 or 13, and was a regular smoker of RJR cigarettes by the age of 16. Tr. 16:1720, 1725. He initially

smoked RJR's unfiltered Camel cigarettes as a young teenager, Tr. 16:1721, 1725, and later switched to smoking RJR's first filtered cigarette brand, Winston, in the 1950s. Tr. 9:945-46, 962; 12:1315-16.

Although Mr. Gray came to hate smoking and regretted the day he started as a child, he was strongly addicted and never able to permanently quit. Tr. 16:1745-46, 1804-05; 18:1948-49. Mr. Gray tried numerous smoking-cessation aids, but always relapsed, continuing to smoke, even after his diagnosis of terminal lung cancer, until his death. Tr. 16:1800-03, 1807-08; 17:1894; 18:1909, 1992.

Two of the *Engle* class representatives smoked both Camel and Winston cigarettes as Mr. Gray did, and the *Engle* jury specifically found that RJR was liable for placing cigarettes on the market that were unreasonably dangerous and defective. *Martin* Pet. App. 123a, 124a. The defectiveness of Camel and Winston cigarettes, and the other tortious conduct of RJR with respect to smokers of Camel and Winston cigarettes, was specifically established in the *Engle* case. *Id*. at 122a.

The defendants in all pending *Engle* progeny cases in Florida's First Circuit filed a motion concerning the effect and proper application of the *Engle* findings. Pet. App. 36a. The circuit court held that the Florida Supreme Court clearly intended that the *Engle* Phase I findings would have res judicata effect. It would be inappropriate, the court reasoned, to re-litigate the class-wide findings that successfully withstood intense appellate scrutiny, effectively voiding the 15 preceding years of class litigation approved by the supreme court. R. 3587.

RJR also filed a motion in limine in this case regarding the use of the jury's findings in *Engle*, contending that the *Engle* findings should not be introduced until after the jury found Mrs. Gray was a member of the class. Pet. App. 72a. The court ruled that the jury would not be instructed on *Engle* findings until the end of trial. R. 3603.

Prior to trial, RJR stipulated that nicotine in cigarettes is addictive and that the RJR cigarettes Mr. Gray smoked contained nicotine. R. 3480. RJR also stipulated that Mr. Gray's lung cancer was caused by smoking cigarettes, but not RJR cigarettes, and not by his addiction to cigarettes. R. 3480-81.

The trial court followed the procedures established by the Florida Supreme Court in *Engle*: the Phase I jury findings in *Engle* were binding, but did not prove liability or that RJR's conduct injured Mr. Gray. R. 5205. Although Mrs. Gray did not have to prove that RJR's misconduct breached various legal duties generally because, as a member of the *Engle* class, that had been proven in the *Engle's* Phase I trial, it was still her duty to show that RJR's tortious conduct was a legal cause of her husband's death. R. 5202-07, 5223.

Mrs. Gray presented "substantial, competent evidence" to meet this burden. Pet. App. 11a. At a trial that lasted three weeks, Mrs. Gray demonstrated through her own evidence that her husband's addiction to RJR's cigarettes was a legal cause of his death. Pet. App. 16a. Mrs. Gray also demonstrated that RJR's conspiracy to conceal information and actual concealment in furtherance of

that conspiracy was a legal cause of her husband's death. Pet. App. 17a.

Although the *Engle* Phase I jury findings established that the nicotine in cigarettes is addictive and that cigarettes cause lung cancer and RJR stipulated to those facts, Mrs. Gray presented competent evidence from several expert witnesses explaining *how* nicotine addiction works, Tr. 8:697, 705-21; 13:1399-1400, 1422-23, how that addiction causes disease and death, Tr. 13:1399, and how nicotine addiction causes lung cancer, Tr. 8:734-35; 13:1392-93, 1404, 1407-08. RJR now admits that smoking cigarettes is addictive and causes lung cancer, Tr. 10:986-87; 24:2735-37; 26:2951, but never made such admissions publicly during Mr. Gray's lifetime. The year that Mr. Gray died, RJR's top executive denied under oath before Congress that cigarettes were addictive. Tr. 10:1089-91. At the same time, RJR argued, as it had for 40 years, that there was no proven connection between smoking cigarettes and lung cancer. Tr. 12:1344.

Even though the Phase I jury findings in *Engle* established that RJR conspired to conceal and actually concealed information about the health effects and addictiveness of their products, Mrs. Gray presented substantial evidence of this concealment and RJR's conspiracy to deceive the public, along with competent evidence that RJR and the rest of the cigarette industry had long known that the nicotine in their products was addictive and that smoking cigarettes causes lung cancer. Tr. 12:1346-47; 10:978-82, 985-89, 1014-16, 1032-34, 1081-89. RJR and the rest of the industry concealed those facts from the public and created a false controversy about the state of scientific knowledge. Tr. 10:983-89.

The evidence presented by Mrs. Gray established that RJR conspired with other cigarette companies to conceal the health risks and addictive nature of smoking, Tr. 10:983-89, to cast doubt on health warnings about smoking cigarettes, and to justify a smokers' continued use of their products. Tr. 10:983-89, 1034-44, 1050-52; 26:2968-69. At the same time, RJR and the rest of the cigarette industry pledged to the public that they would study and report the health risks of smoking, Tr. 10:991-94, remove any toxic substances in their products, Tr. 10:1017-18, and stop selling cigarettes if it were proven that they were dangerous. Tr. 1030-31. This misinformation was ubiquitous and widely accepted as credible at the time. Tr. 20:2098, 2158; 10:969-70, 1092-94. Mrs. Gray introduced more than 300 exhibits during the course of the three-week trial, many directed to fraud by concealment and Mr. Gray's reliance on RJR's fraud. Tr. 10:991-94.

Mrs. Gray also demonstrated that RJR misled the public by fostering a belief in the effectiveness of its filtered cigarettes while omitting internal knowledge to the contrary. Tr. 9:899, 945; 21:2237. Mr. Gray switched from unfiltered Camel cigarettes to Winston, RJR's first filtered cigarette about the time the RJR began marketing Winston cigarettes. Tr. 9:945-46, 962; 12:1315-16. What the jury learned (but Mr. Gray never did) was that, although RJR advertised filtered Winston cigarettes as safer, Tr. 9:957-58; 12:1316; 26:2935-36, RJR knew that the smoke from their filtered Winstons contained more carcinogens and delivered more tar and nicotine than smoke from the unfiltered Camel cigarettes, Tr. 9:901-02, 951-57; 21:2254-60, the brand from which Mr. Gray switched in the first place.

The jury heard evidence that Mr. Gray had relied on the misinformation campaign perpetrated by RJR and the other cigarette companies. Much of the trial in this case focused on these issues. Substantial evidence showed that Mr. Gray heard and relied upon the industry's misinformation campaign. He began smoking without knowing of his eventual injuries and fate. Tr. 20:2164. When RJR started falsely promoting filtered cigarettes as healthier, Mr. Gray switched to filtered Winston, RJR's most popular and heavily advertised filtered brand. Tr. 10:945-46, 962; 12:1315-16; 21:2258-60. RJR's lengthy internal 1984 study of Winston's success in the mid-1950s concluded that it was the influence of RJR's marketing messages on young men of Mr. Gray's age that propelled the brand to new heights. Tr. 9:892-98; 28:3310. Even when scientific evidence and warnings about the harmful effects of smoking emerged, the misinformation campaign developed by RJR and its co-conspirators ensured that these warnings were not taken seriously by their customers. Tr. 16:1771-72.

RJR put on a vigorous defense, including expert evidence that provided several days of testimony regarding smoking, disease, and addiction. RJR presented the testimony of an historian and a public opinion/polling expert who each told the jury that it was "common knowledge" that cigarettes were addictive and deadly, so that, even if addicted, Mr. Gray had only himself to blame in order to convince the jury to exonerate RJR on the class membership question (addiction as cause of death), or on the tort causation question (by allocating no fault to RJR), and/or on the reliance question as it pertained to fraud as a legal cause of Mr. Gray's death. Tr. 21:2234. RJR's psychiatrist and addiction expert

reinforced this defense with case-specific testimony pertaining to Mr. Gray. Tr. 23:2519-52; 24:2611-95. RJR attacked this point yet again through testimony of a physician who treated Mr. Gray for a bladder cancer in the 1980s and who advised Mr. Gray the cancer was smoking-related. Tr. 22:2438-2509. The jury also heard extensive testimony from RJR's vice president of product development, who testified regarding its corporate culture, research and development history, cigarette design, and its purported efforts to make its cigarettes safer. RJR argued that Mr. Gray's lung cancer was caused entirely by his informed choice to smoke. Tr. 27:3080-83, 3115. Mrs. Gray conceded in the complaint that her husband bore some responsibility for his own smoking-related injuries and death, Pet. App. 29a, and the jury assessed Mr. Gray 40 percent comparative fault. Pet. App. 17a; R. 5523.

The jury was instructed that if it found that Mr. Gray's addiction to RJR cigarettes containing nicotine was a legal cause of his death, then this case was part of the *Engle* class, otherwise the verdict should be for RJR. The jury was then instructed that if Mr. Gray was a member of the *Engle* class, the findings from Phase I of the *Engle* trial were binding. R. 5202-07.

The jury found that Mr. Gray's addiction was a legal cause of his death, that RJR's misconduct was a legal cause of his death, warranting an allocation of fault to RJR, and, independently, that RJR's conspiracy to conceal and acts in furtherance of that conspiracy were a freestanding legal cause of his death. It assessed compensatory damages of $7 million, Pet. App. 16a-17a, and punitive damages of $2 million. Pet. App. 19a. The trial court confirmed

the jury's verdict (reducing the compensatory damages by 40 percent for Mr. Gray's share of fault) and found that Mrs. Gray produced "substantial, competent evidence" to prove RJR's liability for Mr. Gray's death. Pet. App. 11a-12a. The court of appeals affirmed per curiam, ruling on the use of the *Engle* findings based on its holding in *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. App.), *rev. denied*, 67 So. 3d 1050 (Fla. 2011), *pet. for cert. pending*, No. 11-741. RJR petitioned the Florida Supreme Court for review of the lower courts' application of its holding in *Engle*, but that court denied review. Pet. App. 13a-14a.

C. Misstatements of Facts and Law in the Petition.

1. RJR asserts this Court has jurisdiction by measuring the time from which it must apply to this Court for a writ of certiorari or an extension of time from the date on which the Florida Supreme Court declined jurisdiction. Pet. 1. However, because the Florida Supreme Court never had subject-matter jurisdiction over the First District's decision, as explained *infra* at 20-22, the proper date of measurement was the date of disposition in the First District, June 17, 2011. Thus, RJR's application for an extension of time was filed 109 days after decision and was untimely.

2. RJR's description of what was required in the *Martin* trial and what was proven is at odds with *Martin's* description in her Brief in Opposition. Mrs. Gray adopts the rendition of the facts and proceedings in that brief by reference here.

3. Similarly, the parties in *Gray* are in dispute about what was required and proven in this trial. RJR asserts that the trial court instructed the jury that the "Engle findings established essential elements of each of Ms. Gray's claims," and their job was to merely "allocate fault and fix damages." Pet. 6. Yet, Mrs. Gray needed to, and did, establish that Mr. Gray's addiction to RJR-brand cigarettes was a legal cause of his death, that RJR's misconduct was a legal cause of Mr. Gray's death warranting an allocation of fault, and, independently, that RJR's conspiracy to conceal and acts in furtherance legally caused Mr. Gray's death. Given the extensive rendition of the trial provided in this brief, *supra* 10-17, and the Florida courts' consistent finding that Mrs. Gray produced "substantial, competent evidence" to prove RJR's liability for Mr. Gray's death, there was considerably more to the trial of this case than allocating fault and fixing damages.

4. RJR chides the *Engle* jury for failing to specify which cigarette brands were found defective. Pet. 7. However, the Engle jury's findings, including the findings of defect were "common to all class members" during the time the industry denied the addictiveness and adverse health effects of their products. 53 So. 2d at 1067. The two brands at issue here, Camel and Winston, both contain nicotine.

REASONS FOR DENYING THE PETITION

I. THIS COURT LACKS JURISDICTION BECAUSE THE PETITION IS UNTIMELY

Pursuant to federal law, a "writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court

for review shall be taken or applied for within ninety days after the entry of such judgment or decree." 28 U.S.C. § 2101(c). This Court has "repeatedly held that this statute-based filing period for civil cases is jurisdictional," *Bowles v. Russell*, 551 U.S. 205, 212 (2007), and "mandatory." *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990).

To determine timeliness, this Court stated that a

> "petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review."

Sup. Ct. R. 13.1. Here, the decision of the Florida District Court of Appeal was not subject to discretionary review by the Florida Supreme Court. Thus, this Court measures the 90-day requirement from the date of disposition by that intermediate appellate court. The First District entered a final judgment on June 17, 2011. Pet. App. 1a. RJR moved for an extension of time to file its petition on October 4, 2011, which was granted on October 7, 2012. *R.J. Reynolds Tobacco Co. v. Gray*, No. 11A356. That application for an extension, however, came on the 109th day after final judgment had been entered. It is thus untimely, and this Court lacks jurisdiction over the matter.

RJR did apply to the Florida Supreme Court for review, which review was denied without explanation, Pet. App. 13a, but that application was

ineffective. Under state law, the Florida Supreme Court had no discretionary jurisdiction to entertain the application for review.

The reason the Florida Supreme Court lacks jurisdiction was previously explained in response to a certified question from this Court. *The Florida Star v. B.J.F.*, 484 U.S. 984 (1987) (Mem.). In answering the certified question, the Florida Supreme Court indicated that it had discretionary jurisdiction to review a district court's decision only if that decision "expressly addresses a question of law within the four corners of the opinion itself." *The Florida Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988) (footnote omitted). The Florida court explained that the district court's "opinion must contain a statement or citation effectively establishing a point of law upon which the decision rests." *Id.* In contrast, however, the court stated it did not have

> subject-matter jurisdiction over a district court opinion that fails to expressly address a question of law, such as opinions issued without opinion or citation. Thus, a district court decision rendered without opinion or citation constitutes a decision from the highest state court empowered to hear the cause, and appeal may be taken directly to the United States Supreme Court. Moreover, *there can be no actual conflict discernible in an opinion containing only a citation to other case law unless one of the cases cited as controlling authority is pending before this Court*, or has been reversed on appeal or review, or receded from by

> this Court, or unless the citation explicitly notes a contrary holding of another district court or of this Court.

Id. n.3 (emphasis added).

The *Gray* decision was an "opinion containing only a citation to other case law," but the case cited – *Martin* – was not pending before the Florida Supreme Court in the manner necessary to permit *Gray* to claim appropriate jurisdiction in that court. The Florida Supreme Court has made it clear that "pending before this Court" means that review has been granted and disposition on the merits is forthcoming.

The issue whether a mere application for review constitutes "pending before this Court" was resolved in *Harrison v. Hyster Co.*, 515 So. 2d 1279 (Fla. 1987). There, the Florida Supreme Court granted review in *Harrison*, even though that opinion contained no analysis and relied entirely on *Small v. Niagara Machine & Tool Works*, 502 So. 2d 943 (Fla. App. 1987). *See Harrison*, 515 So. 2d at 1280. A petition for review had been filed in *Small*, but was ultimately denied. *Small v. Niagara Machine & Tool Works*, 511 So. 2d 999 (Fla. 1987). The Court was then confronted with whether it had subject-matter jurisdiction over *Harrison*, which had been granted in anticipation of *Small* but which contained no analysis of the question raised. The Court concluded it did not. It held that pending before this Court for jurisdictional purposes "refers to a case in which the petition for jurisdictional review has been granted and the case is pending for disposition on the merits." *Harrison*, 515 So. 2d at 1280. As a result, the Court was compelled to dismiss the *Harrison* petition for review as improvidently

issued. *Id*. Florida's law on this issue is not open to doubt. *See B.F. v. AMS Staff Leasing*, 70 So. 3d 586, 2011 WL 3802202 (Fla. Aug. 26, 2011); *Koenenmund v. State*, 42 So. 3d 234, 2010 WL 2770540 (Fla. July 10, 2010); *Cadore v. State*, 22 So. 3d 67, 2009 WL 3384813 (Fla. Oct. 20, 2009); *Rudisill v. Fla. Highway Patrol*, 19 So. 3d 986, 2009 WL 3064903 (Fla. Sept. 24, 2009);*Williams v. McNeil*, 2008 WL 5099694 (M.D. Fla. Nov. 26, 2008). Thus, prudent counsel knows it must file its petition for certiorari with this Court within 90 days of the District Court's disposition. RJR did not do this.

Because the application for an extension was not filed within the jurisdictionally mandatory 90 days set by statute and this Court's rules, the Petition should be dismissed as untimely.

II. THIS CASE FAILS TO PROVIDE A BASIS FOR ANSWERING THE QUESTION PRESENTED

The facts of this case do not provide a basis for examining the issue presented by RJR. Based on RJR's presentation of the record, one might think that members of the *Engle* class could run to court, armed with the *Engle* findings, and merely ask a new jury to assess damages. Nothing is further from the truth. *Engle* progeny cases, such as *Gray*, are highly contested matters requiring significant expert evidence and are far from assured of success. As RJR concedes, it prevails in a significant number of these cases. Pet. 15. RJR trivializes the evidence upon which both the *Engle* and *Gray* juries found it to be liable, as though Mrs. Gray was not put to her proof.

The *Gray* jury sat from January 19, 2009, and reached final verdict on February 8, 2009. Plaintiff's presentation alone consumed eleven volumes of transcript testimony (not including *voir dire*) and the record on appeal stretched to 18,340 pages. Mrs. Gray presented numerous expert witnesses and voluminous documentary evidence. The jury was not instructed on the *Engle* findings until the end of trial. The *Gray* jury found that Mr. Gray's addiction to RJR cigarettes was a legal cause of his death, and that RJR's misconduct was a legal cause of his death warranting an allocation of fault (the jury being free to exonerate RJR with no allocation if it found otherwise).

Mrs. Gray's expert witnesses covered nearly every conceivable subject relevant to smoking and health, including: the history of tobacco and its mass advertising; the industry's response to growing scientific knowledge on the health effects of smoking and its decision to create a false "controversy" about the science while concealing known health information; RJR's specific role in creating and sustaining this half-century disinformation campaign; all aspects of nicotine addiction including its impact on attempts to quit, perception of health warnings, perception of industry misstatements, and its causative role in cigarette-related disease and death, specifically applied to Mr. Gray's life, disease, and eventual death. Testimony established Mr. Gray's smoking history, his nicotine addiction, and his reliance on industry misstatements.

Mrs. Gray established RJR's liability by trying the case and not solely relying on earlier findings in this litigation. To be sure, some of the evidence adduced necessarily overlapped with evidence in

Engle. This is common practice. Class action rules contemplate multiple phases, segments and even trials as part of the management of the action, but the prohibition against reexamination of jury determinations "is not against having two juries review the same evidence, but rather against having two juries decide the same essential issues." *In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444, 452 n.5 (3d Cir. 1997) (citation omitted).

Mrs. Gray's independent evidence proved her husband died as a result of addiction to RJR's cigarettes, her husband's reliance on RJR's and its co-conspirators' extensive 50-year misinformation campaign, and RJR's liability for punitive damages. RJR stipulated that its cigarettes contain nicotine and were addictive. The *Engle* jury found all nicotine-containing cigarettes sold during which the industry denied the addictiveness and adverse health effects of their products and Mr. Gray was smoking, and that conclusion was actually and fully tried and not subject to relitigation.

RJR premises its entire due-process argument that this 18-year-old litigation must restart at square one on the claim that the *Engle* jury's verdict may not have decided that RJR engaged in misconduct relevant to its liability to Mr. Gray. Pet. i. That slender reed of speculation is patently insufficient to justify this Court's review.

As the *Martin* decision demonstrates, the First District ruled the *Engle* jury's findings conclusively demonstrates that 16 cigarette brands, including those that Mr. Gray smoked, were determined to be defective. *Martin*, 53 So.3d at 1068. That the Florida Supreme Court found no reason to review this

intermediate appellate decision suggests that RJR has only a dispute on the sufficiency of evidence and not one worthy of this Court's review. Denial of the Petition will not preclude consideration of a future petition where the record more readily supports review, as RJR readily acknowledges will occur. Pet. 14 n.3.

The *Engle* litigation extensively examined the issues determined. The Phase I jury's findings followed a one-year jury trial in which 86 witnesses were called. The litigation focused on and proved that the defendants' nicotine-laced cigarettes were engineered to create and sustain addiction among class members at the very time the defendants were conspiring to conceal the addictiveness and health effects of their products. Contrary to RJR's contentions, class action practice does not require an individualized "finding with respect to each and every matter on which there is testimony in the class action." *Cooper v. Fed. Res. Bank of Richmond*, 467 U.S. 867, 881 (1984).

Based on this extensive record and unquestioned findings, res judicata effect was given to jury findings actually litigated and resolved between RJR and the class (including Mrs. Gray). Even then, the evidence and jury determinations made by the *Gray* jury provided a sufficient basis to support the judgment. The question presented is theoretical rather than real.

III. BECAUSE THIS PETITION SEEKS REVIEW ON THE SAME BASIS AS THE *MARTIN* PETITION, IT SUFFERS THE SAME FLAWS

The *Gray* Petition echoes the reasons for review described at greater length in the *Martin* Petition and relies on the latter petition to make its case. As such, it suffers the same flaws detailed in the *Martin* Brief in Opposition. This brief adopts by reference those arguments. Nevertheless, for the Court's convenience, those arguments will be briefly described here.

First, the *Engle* litigation and its progeny cases are unique and unlikely to be repeated. Accordingly, it lacks status as a matter of great public importance worthy of this Court's review. In fact, because it is unlikely to be repeated in Florida or replicated elsewhere, as the *Martin* brief more fully explains, it merely constitutes a matter that may be of "great practical importance to these litigants" "but this Court has advised that that status is "ordinarily not sufficient reason for our granting certiorari." *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994).

Second, it constitutes a request for an advisory opinion because even if brand-specific jury findings were somehow required before the misconduct that supported liability for nonintentional torts of product defect and negligence could be deemed conclusively established, the cause of action based on RJR's conspiracy to conceal information and actual concealment of such information was designed and executed on an industry-wide basis so that all brands benefited. The jury found this form of fraud to be a

legal cause of Mr. Gray's death, and it independently supports the assessment of damages. Because it is independently sufficient to support the judgment regardless of the disposition of the other causes of action, the judgment must be affirmed as a matter of Florida law. *See* Fla. Stat. § 59.041 (2009); *see also Whitman v. Castlewood Int'l Corp.*, 383 So. 2d 618, 619 (Fla. 1980); *First Interstate Dev. Corp. v. Ablanedo*, 511 So. 2d 536, 538 (Fla. 1987). Therefore, it moots the question presented and exposes it as an improper request for an advisory opinion.

Third, the dispute between these parties is about the application of an undisputed rule of law to the facts in this record. There is no conflict between the Florida courts and the federal courts about the law governing res judicata. The *Engle* Court, in resolving the res judicata effect to be given Phase I trial findings, quoted earlier Florida decisions:

> A judgment on the merits rendered in a former suit between the same parties or their privies, upon the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.

945 So. 2d at 1259 (quotations omitted). This Court has defined the doctrine in similar words. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 467 n.6 (1982) ("Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could

have been raised in that action."). Given that there is no dispute about the legal principle to be applied, this dispute comes down to a disagreement about the application of the facts to this uncontroversial and agreed-upon principle. This Court's Rule 10 makes plain that such a dispute is ordinarily not one worthy of certiorari as involving only an allegation concerning the misapplication of a properly stated rule of law.

IV. IF THIS COURT WERE INCLINED TO CONSIDER THE QUESTION PRESENTED, BETTER VEHICLES FOR THAT CONSIDERATION ARE WORKING THEIR WAY THROUGH THE FLORIDA AND FEDERAL COURTS

For the many reasons described above, this case is a poor vehicle to resolve the question presented, even if this Court thought it was worthy of review. Prudential considerations suggest that this Court await a petition in a case better suited through the development of a proper record and with the benefit of decisions that have explored and resolved the issue explicitly. The Brief in Opposition in the companion case of *R.J. Reynolds Tobacco Co. v. Hall*, No. 11-755, ably details the many other cases percolating up through the Florida court system and the Florida federal courts that may more properly raise the question presented. Mrs. Gray respectfully suggests that certiorari be denied in this case to allow the issues be more fully ventilated in several courts, should this Court deem the question presented one in which its discretion should be exercised.

V. FLORIDA'S RULINGS DO NOT CONFLICT WITH *FAYERWEATHER* OR DUE PROCESS

RJR asserts that the ruling below conflicts with this Court's holding in *Fayerweather v. Ritch*, 195 U.S. 276 (1904). For the reasons detailed in the *Martin* Brief in Opposition, the claim is unavailing. *Fayerweather* held that an earlier judgment was properly given *res judicata* effect even though there were no formal or special findings of fact. Thus, a true general verdict, which this verdict was not, nevertheless was given res judicata effect through "an examination of the record." *Id.* at 307.

Fayerweather restates the familiar principle upon which the Florida courts acted: "a question once adjudicated by a court of competent jurisdiction shall, except in direct proceedings to review, be considered finally settled and conclusive on the parties." *Id*. at 299.

Significantly, the only court to expressly address RJR's claim of a conflict with *Fayerweather* rejected it. In *Waggoner v. R.J. Reynolds Tobacco Co.*, __ F. Supp. 2d. __, 2011 WL 6371882 (M.D. Fla. Dec. 20, 2011), RJR argued that Due Process requires more specific jury findings to bar relitigation. *Id*. at *19. After reviewing what it termed "reasonably specific" jury findings, *id*. at *15, and holding the findings supported by the record, the court then examined *Fayerweather*. It concluded that *Fayerweather* neither establishes "a 'fundamental federal right' to a strict application of traditional preclusion law," nor "stand[s] for the broader proposition that an application of state preclusion law which fails to foreclose all alternate theories of

liability necessarily violates due process." *Id*. at *20. The court rejected as "patently incorrect" RJR's claim that *Fayerweather* "expressly held" Due Process requires giving conclusive determinative effect to a general verdict. *Id*. Moreover, the Court found that "the federal common law of issue preclusion is not strictly coextensive with due process." *Id*. at n.32 (citing *Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.*, 402 U.S. 313, 323-27 (1971)).

To use *Engle* findings under *Waggoner*, a plaintiff must prove addiction to an *Engle* defendant's cigarettes containing nicotine, addiction as the legal cause of disease or death, disease manifesting itself within the class membership time period, and the absence of any other procedural bar to the claim. *Id.* at *23. Mrs. Gray satisfied those prerequisites.[2]

In *Richards v. Jefferson County*, 517 U.S. 793, 797 (1996), this Court recognized that "[s]tate courts are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes." *Id.* at 797. Doing so does not conflict with Due Process, and certiorari should not lie in this case.

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[2] On February 16, 2012, RJR won the first federal *Engle* progeny trial, which, based on *Waggoner*, used the same approach to the *Engle* findings used in *Martin. Gollihue v. R.J. Reynolds Tobacco Co.*, No. 3:09-cv-10530-J-37JBT (M.D. Fla. Feb. 17, 2012). Even more recently, a tobacco defendant won a Florida appeal in an *Engle* progeny case. *Philip Morris USA, Inc. v. Barbanell,* ___ So.3d ___, 2012 WL 555402 (Fla. App. Feb. 22, 2012). The cases remain highly contested.

CONCLUSION

The petition for a writ of certiorari should be denied.

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