NO. 11-754

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

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

Other Authorities

Rules

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondent Mathilde Martin, as personal representative of the estate of Benny Martin, respectfully requests this Court deny the petition for writ of certiorari, seeking review of the Florida First District Court of Appeal's decision in this case.

This action and the other cases in which petitions were simultaneously filed were among the first *Engle v. Liggett Group, Inc.*[1] progeny cases tried in Florida. Each trial was distinct but similar in that each lasted several weeks and involved substantial testimonial and documentary evidence. The *Martin* trial commenced May 11, 2009 and reached final verdict on June 1, 2009. Plaintiff's presentation alone consumed more than 12 volumes of transcript testimony (not including *voir dire*). Counsel introduced several hundred exhibits, reflecting a 50-year conspiracy to commit fraud by concealment and acts in furtherance of that conspiracy. Mrs. Martin called five expert witnesses and an R.J. Reynolds ("RJR") corporate representative, along with numerous family members and other fact witnesses. RJR also called five experts.

To reach its verdict, the jury was required to find, and did find: (1) that Benny Martin's addiction to RJR-brand cigarettes was a legal cause of his death; (2) that RJR's conduct was a legal cause of his death warranting an allocation of fault (*i.e.,* that Mr. Martin's death was not caused solely by his own choice to smoke, as RJR argued); (3) that Mr. Martin

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[1] 945 So. 2d 1246 (Fla. 2006).

relied to his detriment on RJR's fraud, such that the fraud was a legal cause of his death; (4) that Mrs. Martin suffered damages as a result of Mr. Martin's death; (5) that consideration of punitive damages was warranted; and, in a second phase of trial, (6) that punitive damages were in fact appropriate as punishment.

The *Engle* classwide findings, around which RJR's entire argument revolves, were communicated in a single instruction among 26 other final instructions given to the jury at the end of the trial. The jury was told:

> The findings I have described to you do not establish that R.J. Reynolds is liable to Mrs. Martin. Nor do they establish whether Benny Martin 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 Benny Martin's death.

Martin Trial Tr. 24:3363 (hereinafter "Tr.").

Every jury finding pertained specifically to Mr. Martin and was based on evidence from both sides specific to him. The verdict followed nearly 15 years of class litigation and more than a year of case-specific pretrial fact and expert discovery, including 26 case-specific depositions.

RJR seeks this Court's intervention to prolong the reckoning that juries and courts in Florida have determined proven in this case—and in similar

matters. Still, RJR advances no viable reason for the exercise of this Court's discretion.

First, contrary to RJR's portrayal of it in the Petition, the *Martin* 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.

Second, 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.

Third, 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 *Martin* jury found that RJR's conspiracy to conceal information and actual concealment of such information was a legal cause of Mr. Martin'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 *Martin* 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.

Fourth, 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.

Moreover, this case exemplifies the principle "be careful what you ask for." When they believed they would prevail in the underlying class action, the defendant tobacco companies argued expansively in favor of the broadest preclusive effect. Because plaintiffs prevailed, RJR now asserts that the year-long classwide trial is fundamentally meaningless for all individual trials by class members. Equitable considerations counsel against further review, especially in light of the fact-bound nature of the inquiry RJR propounds.

Finally, the Petition should be denied because Florida's courts have fully comported with Due Process in conducting this litigation.

COUNTERSTATEMENT OF THE CASE

A. *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, Benny Martin, died from lung cancer after smoking Lucky Strike and Camel cigarettes from his teens until his death at age 66, Mathilde Martin, as surviving spouse, became a member of the class. RJR manufactured the Camel cigarettes Mr. Martin smoked, and his Lucky Strike cigarettes were manufactured by American Tobacco Company, for whom RJR has successor liability. 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 Appeal 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.

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. Dist. Ct. 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. Pet. App. 191a-207a. 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. 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, 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. 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 Benny Martin smoked—Camel and Lucky Strike. 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." 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.

On appeal, the court reversed the judgment. *Liggett Group, Inc. v. Engle*, 853 So. 2d 434 (Fla. Dist. Ct. 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 damages 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 1276-77. This Court subsequently denied review. 552 U.S. 941 (2007).

B. *Martin* Trial and Appeal.

As a member of the *Engle* class, Mathilde Martin timely filed her individual action for the death of her husband of 44 years, Benny. In 1995, at the age of 66, Mr. Martin died of lung cancer after smoking 30 cigarettes every day for 47 years. Mr.

Martin had begun smoking at age 14 and was a regular smoker by 17, heavily addicted to the nicotine in the Camels and Lucky Strikes he smoked. Tr. 8:841-42; 9:1032, 1049-51, 1053, 1056; 11:1374; 12:1397-98.

As a result of an RJR motion in limine, the jury heard the *Engle* findings near the end of the trial after Mrs. Martin had established herself as a class member. R. 9:1573, 1575, 1579; 12:2060. Even so, prior to trial, RJR stipulated that nicotine is addictive and that smoking causes lung cancer. Pet. App. 16a. There also was no dispute that Mr. Martin smoked only Camels and Lucky Strikes, which both contained nicotine. *Id*.

Although Mrs. Martin did not have to prove that RJR's conduct breached certain legal duties owed Mr. Martin as a class member because of the Phase I *Engle* findings, it remained her duty to prove that RJR's tortious conduct was a legal cause of Mr. Martin's death. 945 So. 2d at 1268, 1270, 1271; R. 3145-77. During more than two weeks of trial, Mrs. Martin presented sufficient evidence to meet her burden, presenting independent evidence that her husband's addiction to RJR's cigarettes was a legal cause of his death, and that RJR's misconduct was also a legal cause warranting an allocation of fault. *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1066, 1070 (Fla. Dist. Ct. App. 2010). Mrs. Martin also separately and fully demonstrated that Mr. Martin relied upon RJR's concealment and material omissions about the safety of their cigarettes, and that those fraudulent acts were a separate, legal cause of his death, independent of the negligence and product defect claims. *Id*. at 1066.

Mrs. Martin presented significant expert evidence explaining *how* nicotine addiction works, Tr. 11:1350-12:1464, how that addiction causes disease and death, Tr. 9:1021-1045, and how nicotine addiction causes lung cancer, Tr. 7:779; 8:895-910, 13:1605-1662. Expert testimony established that death from cigarette smoking occurs only in an addicted smoker, like Mr. Martin because of increased exposures to the carcinogens in smoke. Tr. 13:1653; 12:1394-95.

Expert testimony established that Mr. Martin was dependent on nicotine from an early age through use of a product designed and manufactured to deliver nicotine in an attractive, socially acceptable form. Tr. 9:1020-24, 1027; 12:1432. His free choice about his next cigarette was constrained by his chemical and biological dependence on nicotine. Tr. 7:894-98; 11:1377-78; 13:1617-18. Despite numerous attempts to quit, he was strongly addicted and could not refrain from smoking even after his lung cancer diagnosis. Tr. 9:1051, 1054.

Mrs. Martin's additional evidence established that RJR and other cigarette manufacturers manipulated the nicotine delivery of their products. Tr. 12:1432, 1437. Evidence showed that RJR had the ability to remove nicotine from cigarettes as early as 1935 to eliminate physical dependence and thereby greatly reduce smoking-related diseases and deaths. Tr. 10:1163-65, 1171, 1178, 1269-70; 13:1600; 14:1864-66. RJR made no effort to reduce the addictiveness of its cigarettes, Tr. 14:1855, instead, exploring *enhanced* nicotine delivery, including ways to enhance binding to receptors in the brain through additives. Tr 14:1809-10. Internal documents revealed RJR celebrated and explicitly

exploited the addictiveness of its cigarettes. Tr. 9:1080; 10:1142, 1170-71; 14:1856-57.

The jury also heard evidence demonstrating cancer's latency period. Approximately 30 years after RJR introduced the modern inhalable cigarette, lung cancer deaths began to accumulate. By the 1950s, scientific evidence indicated that smoking was a cause of lung cancer. Tr. 6:730, 746, 750-51, 759. Cigarette consumption precipitously dropped in 1953. Tr. 6:757-58; 9:1077-78. Mrs. Martin presented evidence that RJR joined other companies in fabricating a false "controversy" over smoking and health, as well as the addictive nature of nicotine-containing cigarettes. The disinformation campaign was organized, well-funded, and secretive until it was exposed in the late 1990s, after the *Engle* class action was filed and Mr. Martin had died. Tr. 8:855-60; 9:1066, 1075.

The disinformation campaign created, in the cigarette industry's own phrase, a "psychological crutch" for addicted smokers like Mr. Martin, reassuring him that smoking's effect on health was subject to scientific debate, so Mr. Martin and others would rationalize their continued smoking despite mounting scientific evidence of the associated harms. Tr. 9:1034-36, 1051, 1054; 10:1138, 1142, 1150. The cigarette companies disseminated false information while concealing their internal knowledge. Tr. 7:794, 797, 816; 9:1068-72, 1075-76, 1081-85, 1095.

The manufacturers publicly disavowed any belief that cigarettes were hazardous to health and falsely promised that if their research ever identified any ingredient in cigarettes hazardous to human health, they would eliminate that ingredient. Tr.

10:1120, 1122, 1126, 1131-33, 1136-37. RJR specifically stated under oath that it expected consumers to rely on such statements and that consumer reliance was "justified." Tr. 10:1158-59.

RJR participated in this conspiracy from its inception in 1953. Tr. 9:1068. It helped create and operate the "shield" organizations intended to carry out the conspiracy of concealment. Tr. 9:1087-88, 1110-11. Statements continuing the false controversy appeared in all media and were so pervasive that every ordinary American was exposed to and influenced by them. Tr. 6:640-42; 10:1198-1202. Mr. Martin unquestionably received the industry's and RJR's false message, as RJR's own expert historian admitted under cross-examination. Tr. 10:1147, 1269; 20:2654.

More than 500 hundred exhibits, comprising thousands of pages, were admitted at trial, including advertisements for Camels and Lucky Strikes, as well as formerly secret internal industry documents reflecting RJR's concealment of material health information. Mrs. Martin demonstrated that Mr. Martin relied upon RJR's fraud, and that its tortious conduct caused Mr. Martin's death.

RJR presented defenses to Mrs. Martin's claims through five experts over several days, who testified regarding smoking, disease, and addiction. An RJR historian testified that it was common knowledge that cigarettes were addictive and deadly, so Mr. Martin should have known the dangers of smoking. Tr. 19:2514-16; 20:2625-2626, 2697-98. RJR also offered an expert who testified that cigarette addiction does not compel behavior and

that anyone can quit smoking. Tr. 23:3074-76, 3109-3110, 3172.

Two company vice presidents testified that RJR (and its corporate predecessor American Tobacco) sought to make their products safer and denied that RJR tried to make its products more addictive. Tr. 14:1732; 18:2394-2395, 2440; 22:2907.

Finally, RJR presented the testimony of a pathologist who testified that it was impossible to know whether smoking caused Mr. Martin's lung cancer. Tr. 21:2848.

The jury was instructed that if it found that Mr. Martin was addicted to RJR cigarettes containing nicotine and that his addiction was a legal cause of his death, then this case was part of the *Engle* class, otherwise the verdict should be for RJR. Tr. 24:3363. The jury was then instructed that if Mr. Martin was a member of the *Engle* class, the findings from Phase I of the *Engle* trial were binding and should be considered along with all the other evidence presented at trial to determine legal causation and then to allocate fault, if any, between Mr. Martin and RJR. Tr. 24:3363-64. The jury was told that Mr. Martin accepted some of the responsibility for his own death while RJR denied all such responsibility. Tr. 24:3364. Separately, the jury was instructed on Mrs. Martin's fraud claim and asked to determine whether that was a legal cause of his death. The court specifically instructed the jury that the *Engle* findings did not establish RJR's liability, or even whether its conduct had harmed Mr. Martin. Tr. 24:3363.

The jury found that Mr. Martin's addiction to RJR cigarettes containing nicotine was a legal cause of his death, that RJR's misconduct was a legal cause of his death warranting an allocation of fault, that Mr. Martin relied on RJR's fraudulent acts, and that RJR's conspiracy to conceal information and actual concealment of information concerning the health effects of smoking were separate legal causes of his death. Pet. App. 9a. It assessed comparative responsibility at 66 percent for RJR and 34 percent for Mr. Martin. *Id.* After apportionment, the court awarded Mrs. Martin $3.3 million in compensatory damages, and $25 million in punitive damages. *Id.* at 9a-10a.

The district court of appeal found "Mrs. Martin produced sufficient independent evidence to prove RJR's liability for her husband's death," Pet. App. 2a, and specifically concluded "Mrs. Martin produced sufficient evidence independent of the Engle findings to allow the jury to find RJR guilty of intentional misconduct or gross negligence." *Id.* at 19a. Mrs. Martin proved causation, detrimental reliance and entitlement to punitive damages. *Id.* at 24a. RJR unsuccessfully petitioned the Florida Supreme Court for review of the lower courts' application of its holding in *Engle*. 67 So. 3d 1050 (Fla. 2011).

C. Misstatements of Facts and Law in the Petition.

1. RJR premises its question presented on the assertions that Mrs. Martin did not have to prove "essential elements of her claims or demonstrat[e] that a prior jury had actually decided those elements in her favor" and that the court "impose[d] liability

based on earlier litigation." Pet. i, 3-4. The extensive trial described above refutes those assertions. The class, which included Mrs. Martin, proved the RJR cigarettes Mr. Martin smoked were addictive and carcinogenic during the time period RJR and the other manufacturers were denying both of these facts, thereby satisfying Florida's test for product defect. The *Martin* jury found that RJR, in furtherance of the conspiracy identified by the *Engle* jury, undertook acts that constituted a legal cause of Mr. Martin's death, imposed liability on the basis of the extensive record produced, and apportioned damages based on the evidence.

2. RJR gives the impression that it sought and was denied more specific jury interrogatories, asserting the *Engle* jury failed "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." Pet. 3. RJR further states that "the class persuaded the trial court to adopt a [general] verdict form." Pet. 10. Yet, the form adopted was the product of compromise between the parties. RJR had proffered a 31-page "blank-line" jury form containing generalized questions and calling for narrative juror responses, which the trial court found improper. The court repeatedly asked RJR to submit a more feasible alternative, but the company never did. Defendants also objected to more specific questions proffered by Plaintiffs. Changes were made to include subcategories of diseases, deletion of references to causation in the other questions, modification of the Florida standard negligence jury instruction, and insertion of language in the express warranty count at Defendants' request. The court finally adopted a

"middle ground" suggested by Brown & Williamson counsel. *Engle* Tr. 35969.

3. RJR characterizes the *Engle* decision as authorizing use of jury findings in individual actions with "unspecified 'res judicata effect.'" Pet. 3. The *Engle* decision, however, specified which findings were not subject to relitigation while identifying the issues that remained for individual determination. *See Engle*, 945 So. 2d at 1269.

4. RJR contends the First District Court of Appeal "reasoned only that its unprecedented application of issue preclusion was compelled by the 'pragmatic solution' of *Engle* itself." Pet. 4 (citing Pet. App. 11a). That court, however, "disagree[d] with RJR's characterization of the *Engle* findings" and concluded the "findings are common to all class members." Pet. App. 10a-11a. It thus rejected the factual premise for RJR's due-process challenge.

5. RJR tells this Court that the *Engle* class argued different brand-specific "defect allegations" to the jury during the Phase I trial, Pet. 9-10; however, the alternative "defect theories" described by RJR were never argued to the jury. Thus, the jury could not have rested its verdict on a brand-by-brand review of the evidence. The industry argued at the time that none of its cigarettes were addictive or proven to cause disease. As the First District ruled, the *Engle* jury's findings conclusively demonstrates that "Lucky Strike, the brand Mr. Martin primarily smoked, was one of the sixteen cigarette brands named by the class representatives and that the Phase I jury findings encompassed all the brands." Pet. App. 14a. Evidence supported a strict liability finding, the court added, because it showed all of the

cigarettes "contain carcinogens, nitrosamines, and carbon [mon]oxide, among other ingredients harmful to health which, when combined with nicotine cigarettes also contain, make the product unreasonably dangerous." *Id.* at 14a-15a.

6. RJR contends "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, or as a matter of due process." Pet. 21 (citations omitted). RJR's Petition was filed prior to the contrary decision in *Waggoner v. R.J. Reynolds Tobacco Co.,* No. 3:09-cv-10367-J-37JBT, 2011 WL 6371882 (M.D. Fla. Dec. 20, 2011), which held in a careful, well-reasoned opinion that RJR's Due Process arguments are meritless. It held the *Engle* findings could appropriately be used in individual class-member cases. Moreover, *Waggoner* reports that RJR conceded that "plaintiffs could preclusively establish conduct directly from the Phase I [*Engle*] record in a way that is consistent with their due process rights." 2011 WL 6371882, at *29 n.10. *Waggoner* is the only decision that directly addresses RJR's due-process argument, and it rejects it.

7. RJR mistakenly asserts that Mr. Martin "regularly smoked only unfiltered Lucky Strikes cigarettes." Pet. 15-16. Mr. Martin also smoked Camels, for which RJR also has liability. Pet. App. 5a n.1

8. RJR asserts that "the jury was asked to determine only whether Mr. Martin was an Engle class member—*i.e.*, whether a cigarette addiction caused his death," in order to return a plaintiff's verdict. Pet. 16. While the jury had to determine

whether Mr. Martin was a class member, it also had to determine whether addiction was a legal cause of his death and whether RJR's misconduct was a legal cause of his death warranting an allocation of fault. In addition, the jury was required to determine whether RJR's fraudulent acts were an independent legal cause of Mr. Martin's death. Tr. 24:3363-65, 3367-68,

REASONS FOR DENYING THE PETITION

I. 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 *Martin*, 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 *Martin* juries found it to be liable, as though Mrs. Martin was not put to her proof.

The *Martin* jury sat from May 11, 2009, until final verdict was rendered June 1, 2009. Mrs. Martin presented numerous expert witnesses and voluminous documentary evidence. The jury was not instructed on the *Engle* findings until the end of trial. *Engle* conclusively established RJR's tortious conduct in manufacturing heavily addictive nicotine-

laced cigarettes containing high levels of carcinogens during the periods of time relevant to this limited class. The *Martin* jury found that Mr. Martin's addiction to those 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. Martin'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. Martin's life, disease, and eventual death. Testimony established Mr. Martin's smoking history, his nicotine addiction, and his reliance on industry misstatements. The jury also heard cross-examination of an RJR corporate representative about cigarette design, manipulation of nicotine, and previously secret industry documents discussing addiction and the smoking-and-health question, including a document establishing that as early as 1935, Lucky Strike cigarettes could be made without nicotine, but that the manufacturer instead maintained "rigid control" over nicotine content. Tr. 14:1864-67.

The jury also received fact testimony from Mrs. Martin, their children, and Mr. Martin's siblings about his addiction to nicotine and his many efforts to quit.

RJR presented five expert witnesses, including a historian who testified about public knowledge concerning the dangers of smoking, a pathologist who testified on case-specific disease causation, a psychiatrist who testified on case-specific addiction, and two RJR vice presidents.

More than 500 exhibits were admitted, including advertisements, medical records, and formerly secret internal industry documents reflecting RJR's internal knowledge, which was contrasted with its public statements and those of the industry groups it helped create.

Mrs. Martin 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).

Mrs. Martin's independent evidence proved her husband died as a result of addiction to RJR's Lucky Strikes and Camels, 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 the time Mr. Martin was smoking were defective, 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 have rested on narrower theories [of defect] that would not encompass the cigarettes smoked by Mr. Martin." Pet. 4 (emphasis in original). That slender reed of speculation is patently insufficient to justify this Court's review. The First District ruled the *Engle* jury's findings conclusively demonstrates that "Lucky Strike, the brand Mr. Martin primarily smoked, was one of the sixteen cigarette brands named by the class representatives and that the Phase I jury findings encompassed all the brands." Pet. App. 14a. 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 acknowledges will occur. Pet. 14 n.3.

RJR speculates that Lucky Strikes, which Mr. Martin primarily smoked, may not have had the defect that generated a liability finding. Pet. 25-26. This argument ignores the central role of the addiction finding in establishing the product defect. Equally telling, the *Engle* jury specifically found that Lucky Strike, a brand smoked by each of the *Engle*

class representatives, was dangerous and defective. *Engle v. RJ Reynolds Tobacco Co.*, No. 94-08273, 2000 WL 33534572, at *1-*2 (Fla. Cir. Ct. Nov. 6, 2000). In addition, Mrs. Martin still also had to prove causation, overcome affirmative defenses, address relative fault, and establish damages.

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. Federal Reserve 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. Martin). Even then, the evidence and jury determinations made by the *Martin* jury provided a sufficient basis to support the judgment. The question presented is theoretical rather than real.

II. THE PETITION SEEKS AN IMPROPER ADVISORY OPINION.

This Court has repeatedly instructed litigants that it has no warrant to issue advisory opinions. *See, e.g., Herb v. Pitcairn*, 324 U.S. 117, 126 (1945)

("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.").

Here, even if this Court were to resolve the question presented favorably to RJR as to the nonintentional tort claims, the company's liability to Mrs. Martin would remain as to the conspiracy to conceal and actual concealment, *i.e.,* the fraud. The *Engle* jury specifically found that RJR and every other defendant agreed to conceal and actually concealed information regarding the health effects of cigarette smoking, including its addictiveness. Pet. App. 197a-99a, 200a. RJR's argument that the basis for the findings is unknown or unknowable simply does not apply to the fraud finding because the finding itself reveals its factual basis and the fraud perpetrated was not brand-specific. It is the same fraud identified in a RICO action brought by the United States and detailed by the district court:

> From at least 1953 until at least 2000, each and every one of these Defendants repeatedly, consistently, vigorously—and falsely—denied the existence of any adverse health effects from smoking. Moreover, they mounted a coordinated, well-financed, sophisticated public relations campaign to attack and distort the scientific evidence demonstrating the relationship between smoking and disease, claiming that the link between the two was still an "open question." Finally, in doing so, they ignored the massive documentation in their internal

> corporate files from their own scientists, executives, and public relations people.

United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 208 (D.D.C. 2006), *aff'd in part, vacated in part*, 566 F.3d 1095 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 3501 (2010).

Under Florida law, "[f]raud in the inducement and deceit are independent torts for which compensatory and punitive damages may be recovered." *Burton v. Linotype Co.*, 556 So. 2d 1126, 1128 (Fla. Dist. Ct. App. 1989), *rev. denied,* 564 So. 2d 1086 (Fla. 1990) (citations omitted). It is unconnected to the product defect finding that is an alternative basis of liability. To prove this claim, Mrs. Martin was required to "show that Benny Martin relied on statements by either R.J. Reynolds Tobacco Company or any of the other companies involved in the conspiracy that omitted material information concerning the health effect of cigarettes or their addictive nature or both" and that that reliance was a legal cause of Mr. Martin's death. Tr. 24:3367. Mrs. Martin met her burden. Pet. App. 37a.

The jury did not speculate about which acts the *Engle* jury might have found were taken in furtherance of the conspiracy. All it had to consider was whether *some act* in furtherance of the conspiracy contributed to Mr. Martin's death. Because Florida law does not require that every act taken in furtherance of the conspiracy must have injured the plaintiff, it simply requires that Mr. Martin relied upon at least one for it to be a legal cause of his death. *See Liappas v. Augoustis*, 47 So. 2d 582, 582 (Fla. 1950).

Under black-letter Florida law, where there is a reasonable probability that the result would have been the same absent an alleged error, the judgment must be affirmed. Fla. Stat. § 59.041 (2009); *see also Whitman v. Castlewood Int'l Corp.,* 383 So. 2d 618, 619 (Fla. 1980) ("[r]eversal is improper where no error is found as to one of two issues submitted to the jury on the basis that the appellant is unable to establish that he has been prejudiced") (citation omitted). The rule applies where, as here, actions "can be brought on two theories of liability, but where a single basis for damages applies." *First Interstate Dev. Corp. v. Ablanedo*, 511 So. 2d 536, 538 (Fla. 1987).

Thus, even if giving res judicata effect to the Phase I findings on the nonintentional torts violates due process, the error was harmless because it does not apply to the conspiracy finding. RJR remains liable for the entire compensatory and punitive damage judgment rendered below based on the conspiracy and concealment claims. Because any decision on the question presented will not change the result, RJR's Petition constitutes a request for an advisory opinion and should be denied.

III. THIS CASE DOES NOT RAISE "AN IMPORTANT QUESTION OF FEDERAL LAW".

This Court does not sit as a court of error to hear and correct potentially erroneous rulings by lower courts. Rather, it exercises its discretionary jurisdiction cautiously, granting certiorari "only for compelling reasons" and only in cases that raise "important question[s] of federal law." Sup. Ct. R. 10. This is not such a case.

A. This Matter Is Unique and Unlikely to Be Repeated.

This matter comprises unique litigation to resolve a particularly complex, private dispute. The Florida Supreme Court recognized that the "procedural posture of this case is unique and unlikely to be repeated." 945 So. 2d at 1270 n.12. RJR unconsciously echoes that judgment, asserting that the approach taken in the Florida courts in the *Engle* progeny cases marks the first time any court has done so, contrasting it with "centuries" of consistent federal and state practice. Pet. 2, 26. RJR further concedes that all other courts "have uniformly held such claims are far too individualized to proceed on a class basis." Pet. 7 n.1. Thus, RJR admits that the question it raises, if there at all, is entirely peculiar to this one instance. Scholars agree that the case is unlikely to ever to be duplicated. James A. Henderson, Jr. & Aaron D. Twerski, *Reaching Equilibrium in Tobacco Litigation*, 62 S.C. L. Rev. 67, 91 (2010) ("*Engle* and its progeny represent a unique phenomenon.").

Even if one takes RJR's assertions at face value and assumes *arguendo* that Florida has carved a different preclusive approach to common issues among class members, the issue RJR asks this Court to review is of practical interest only to the *Engle* parties. This Court has advised that questions of "great practical importance to these litigants" "is ordinarily not sufficient reason for our granting certiorari." *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994). After all, at least since the Judiciary Act of 1925, this Court has not sat as a court of last resort, concerned primarily with correcting errors

and vindicating the rights of particular litigants, but it instead resolves conflicts among the circuits and articulates legal rules and principles in cases with broad legal or social significance. *Cf. Stack v. Boyle*, 342 U.S. 1, 13 (1951) (Jackson, J., concurring) (Supreme Court only grants certiorari if case represents a general and important problem). There is no warrant to depart from that approach here. This Court has emphasized:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants.

Rice v. Sioux City Mem'l Park Cemetery, 349 U.S. 70, 74 (1955) (internal citations omitted).

Rather, "'it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties.'" *Id.* at 79 (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)).

This case does not raise issues of importance to the public. As RJR acknowledges, the principles of preclusion doctrine are already clear and do not require reconsideration or rearticulation by this Court.

B. RJR Merely Seeks a Different Application of the Facts to a Properly Stated Rule of Law.

At bottom, RJR simply does not like the way the Florida courts have applied clearly established and undisputed doctrine in this case. But, as Rule 10 makes clear, certiorari should rarely, if ever, be granted "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

RJR claims the *Engle* progeny cases, alone among cases throughout history, failed to give proper scope to preclusion doctrine. Pet. 2. Yet, Florida law, as articulated in *Engle* itself, marks no departure from this historic approach. 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 (quoting *Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001) (alteration in original), quoting in turn *Kimbrell v. Paige*, 448 So. 2d 1009, 1012 (Fla. 1984)). RJR conceded in earlier briefing in this case that "*Engle* did not purport to modify" "well settled principles of

preclusion law." Pet. App. 42a. Instead, it has told other courts that *Martin* is "inconsistent with existing Florida preclusion law." *Waggoner*, 2011 WL 6371882, at *29 n.25. If so, that is a question for the Florida Supreme Court, not this Court.

Under Florida law, res judicata (what RJR characterizes as issue preclusion) applies to matters litigated or that properly could have been litigated between the same parties based upon the same cause of action. The rule estops parties from litigating in a second suit issues or points common to both causes of action, including those "actually adjudicated" in prior litigation. *Gordon v. Gordon*, 59 So. 2d 40, 43 (Fla.), *cert. denied*, 344 U.S. 878 (1952). Florida has applied these principles consistently for a century. *See, e.g., Prall v. Prall*, 50 So. 867, 870 (Fla. 1909).

The Florida approach reflects the same judgment articulated in *Restatement (Second) of Judgments* § 27 (1982), the law of all states, *see, e.g., Hernandez v. Region Nine Housing Corp.*, 684 A.2d 1385, 1392 (N.J. 1996); *Sutphin v. Speik*, 99 P.2d 652, 655 (Cal. 1940); and decisions of this Court. *See, e.g., United States v. Munsingwear, Inc.*, 340 U.S. 36, 38 (1950); *Southern Pac. R.R. v. United States*, 168 U.S. 1, 48 (1897). Thus, it cannot be questioned that "[u]nder 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." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 466 n.6 (1982). In fact, the "desire that judicial determinations be conclusive between the parties has been fundamental in all systems of law that have contributed to our jurisprudence." Note, *Developments in the Law of Res Judicata*, 65 Harv.

L. Rev. 818, 820 (1952) (noting its presence in ancient Roman times). Given its venerable history, preclusion as consistently articulated across all courts cannot violate due process.

Because the applicable legal principle is not in dispute,[2] at best, the Petition asserts that the Florida courts have misapplied a correct principle of law to these facts by treating as actually litigated facts RJR believes remain unproven. No Florida court reviewing this record agrees. As this Court's rules makes plain, claims of misapplication do not constitute viable grounds for a grant of certiorari. Sup. Ct. R. 10.

C. The Parties Always Assumed the *Engle* Findings Would Have Res Judicata Effect, and Equity Advises Against Granting the Petition.

RJR believed it would prevail at the *Engle* trial. The *Engle* defendants, including RJR, repeatedly asserted that all jury findings would have full preclusive effect. Thus, it proclaimed that "if the defendants win, we want as many people as possible bound," *Engle* R.10708-10809, and if the jury answers "no . . . then not a single Florida smoker can recover." *Engle* Tr. 36007. Even after the verdict was in, but before any punitive damages were assessed,

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[2] In separate *Engle*-progeny litigation, RJR "now concede[s] at least the possibility that plaintiffs could preclusively establish conduct directly from the [*Engle*] Phase I record in a way that is consistent with [its] due process rights." *Waggoner*, 2011 WL 6371882, at *29 n.10. That concession, based on a records-based showing, further suggests that no certworthy issue is presented here.

defendants told the jury: "Your verdict is in. We accept it. It's over with. It's there forevermore," *Engle* Tr. 38829, while acknowledging that it will enable "other class members, however many thousands or hundreds of thousands it may be . . . [to] recover." *Engle* Tr. 38878, 38896-97.

Just as a "'person who agrees to be bound by the determination of issues in an action between others is bound in accordance with the terms of the agreement,'" *Taylor v. Sturgell*, 553 U.S. 880, 893 (2008) (quoting with approval, 1 *Restatement (Second) of Judgments* § 40, at 390 (1980)), same-party litigants must be bound. Due Process provides no license to evade the consequences of those fully litigated findings.

Even so, the Phase I findings do not determine the outcome of any individual lawsuit. RJR has won its share of *Engle* progeny cases and continues to litigate each vigorously.[3] The findings have not been outcome-determinative and do not merit this Court's review.

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

RJR premises its Petition largely on an alleged conflict with *Fayerweather v. Ritch*, 195 U.S. 276 (1904). The claim is unavailing. In

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[3] An online "Engle Verdict Tracker" reports, as of November 15, 2011, the defense has prevailed in 16 of 53 cases tried to verdict. http://info.courtroomview.com/engle-verdict-tracker/ (last visited Feb. 18, 2012).

Fayerweather, the Court 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.

Fayerweather was tried before a court, rather than a jury, and the judge made no special findings of fact. *Id*. at 301-02. Each reviewing court, including this Court, examined the record and held there was sufficient evidence to sustain the judgment. Thus, this Court held that "the omission of special findings means nothing, for the judgment implies a finding of all necessary facts." *Id*. at 307. It added, "[n]othing can 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, and the regularity of the procedure sustained by the highest court of the state." *Id*. at 308.

RJR latches onto a single line of *dicta* to seek this Court's review: where "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. Upon this observation, RJR

places the weight of its entire case, based on the simplistic notion that evidence was introduced of multiple cigarette product defects, and the jury findings specify manufacturers, rather than brands. RJR contends the verdict is thus too general. While Mrs. Martin disputes that characterization of the detailed, multi-paged verdict utilized, this Court has repeatedly approved giving preclusive effect to general verdicts, indicating that *Fayerweather* did not establish the rule RJR now advances. *See, e.g., Emich Motors Corp. v. Gen. Motors Corp.*, 340 U.S. 558, 569-72 (1951) (general verdict may be given preclusive effect after "examination of the record"); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481, 484-85 (1968) (general verdict in federal antitrust action given preclusive effect in subsequent private action).

RJR's argument particularly has no traction in the face of the jury findings and record below. The jury found that during the time period the defendants were actively denying the addictiveness and health effects of their cigarettes, every brand of nicotine-containing cigarettes they sold during the relevant time period was in fact addictive, disease-causing, and thus defective, specifically including, as found in Phase II, the Lucky Strike and Camel brands that Mr. Martin smoked. Evidence further established that the industry could produce nicotine-free cigarettes and decided not to do so. Tr. 10:1177-78, 14:1866-67, 18:2455; Ex. LP-2850. RJR never challenged the sufficiency of the evidence on the addiction finding as a product defect, stipulated to nicotine's addictive effect, and surely does not now suggest that its cigarettes are not addictive. It also

does not explain how its complaint applies to the *Engle* and *Martin* juries' fraud findings.

Recently, a federal *Engle* progeny case became the first to expressly address RJR's claim of a conflict with *Fayerweather* and rejected it. In *Waggoner v. R.J. Reynolds Tobacco Co.,* No. 3:09-cv-10367-J-37JBT, 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.* (citing *Blonder-Tongue Labs., Inc., v. Univ. of Ill. F.*, 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. Martin satisfied those prerequisites.[4]

RJR's other federal cases concerning an "extreme application of res judicata" are inapposite, as each concerned litigants who were not parties to an earlier proceeding. *See Richards v. Jefferson Cnty.*, 517 U.S. 793, 797 (1996) (judgment in prior action not binding on individuals who "neither participated in, nor had the opportunity to participate in" prior case); *Taylor v. Sturgell*, 553 U.S. 880 (2008) (rejecting "virtual" representation); *Ashe v. Swenson*, 397 U.S. 345, 444 (1970) (confined to collateral estoppel in criminal cases and permitting an examination of the record to apply the rational-juror test).

Even so, *Richards* 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." 517 U.S. at 797. Doing so does not conflict with Due Process, and certiorari should not lie in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[4] 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.*, Case No. 3:09-cv-10530-J-37JBT (M.D. Fla. Feb. 17, 2012).

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