No. 11-755

IN THE
Supreme Court of the United States

R. J. REYNOLDS TOBACCO COMPANY,
Petitioner,

v.

AMANDA JEAN HALL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ARTHUR L. HALL, SR.,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In this case, the Florida First District Court of Appeal, applying its decision in *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060 (Fla. Dist. Ct. App. 2010), precluded Reynolds from litigating issues based solely on its conclusion that a prior jury in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), *reasonably could have resolved* the disputed issues against Reynolds. In its petition for certiorari in *Martin* (No. 11-754), Reynolds demonstrated why that unprecedented expansion of issue preclusion violates the Due Process Clause of the Fourteenth Amendment and warrants further review by this Court. This case presents the same question as *Martin*, and thus should also be granted or, at a minimum, held pending this Court's disposition of *Martin*.

In her brief in opposition, Ms. Hall does not even attempt to defend the constitutionality of the *Martin* preclusion standard on the merits. Instead, her principal contention is that the question presented needs further percolation. That contention is wrong, for reasons explained at length below. Ms. Hall further argues that the petition for certiorari is untimely, and that the question presented does not encompass her conspiracy claim. Those arguments echo points made in the briefs in opposition in *Martin* and in *R.J. Reynolds Tobacco Co. v. Campbell* (No. 11-756). For reasons explained at length in the reply briefs in those cases, these arguments are also wrong.

I. FURTHER PERCOLATION IS UNNECESSARY AND INAPPROPRIATE

A. The petition for certiorari in *Martin* explained at length why the constitutional question presented here and there urgently warrants this Court's review.

That question arises in, and is central to the conduct of, each individual *Engle* progeny case. Almost 60 of those cases have been tried to judgment; approximately 75 more are scheduled for trial within the next year; and approximately 8000 individuals have pending *Engle* progeny cases. Moreover, under the preclusion standard uniformly followed in the Florida trial courts and embraced by the First District in these cases, Reynolds and other *Engle* defendants already face over $375 million in adverse judgments. By any rational measure, a question so important and recurring warrants this Court's attention. *See, e.g.*, *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); *United States v. Centennial Sav. Bank FSB*, 499 U.S. 573, 578 n.3 (1991). Indeed, in *Richards v. Jefferson County*, 517 U.S. 793 (1996), this Court granted certiorari to correct a state court's unconstitutional application of preclusion law that affected only one pending case, in which the parties harmed by the erroneous preclusion ruling faced nothing even remotely approaching the nine-figure liabilities at issue here. *See id.* at 794-95.

In response, Ms. Hall does not dispute our contentions in any relevant particular. To the contrary, she compiles a chart of some 57 completed *Engle* progeny cases in which the question presented has arisen (Opp. App. 27-45), and she herself notes, with considerable understatement, that "the question RJR seeks to present is certain to arise in future cases" as well (Opp. 16). She also grudgingly concedes that "the defendants' complaints that they are facing several [hundreds of] million dollars worth of judgments to date are certainly not insubstantial." Opp. 27. Nonetheless, she invites this Court to defer its review pending possible future decisions by the Florida Dis-

trict Courts of Appeal, by the Florida Supreme Court, or by the United States Court of Appeals for the Eleventh Circuit. Opp. 21-25. Again with considerable understatement, she recognizes that, under this view, Reynolds and other *Engle* defendants "will pay some judgments before the issue becomes ripe for this Court's review." Opp. 26. She seeks to dismiss that concern as insubstantial because the *Engle* defendants continue to pay dividends (Opp. 27-28), and because no "other industry" besides Reynolds's "is facing any sort of imminent peril as a result of the *Engle* litigation" (Opp. 26). Ms. Hall's arguments for delay are unpersuasive at every turn.

To begin with, there is little chance of meaningful further percolation in the Florida appellate courts. In each of the 57 *Engle* progeny cases tried to judgment in state court, the defendants have raised strenuous due-process objections to use of the *Engle* findings to establish elements of individual progeny claims. Yet the state courts, including the First and Fourth District Courts of Appeal, uniformly have concluded the Florida Supreme Court itself compelled this result in *Engle*, *see Martin* Pet. App. 10a-11a; *R.J. Reynolds Tobacco Co. v. Brown*, 70 So. 3d 707, 716 (Fla. Dist. Ct. App. 2011) ("*Jimmie Brown*"), despite grave "concern[s]" that such use of the *Engle* findings "violates Tobacco's due process rights," *id.*; *see also id.* at 720 (May, C.J., concurring). The decisions of the First and Fourth Districts are presently binding on "all Florida trial courts," *see Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992), and Ms. Hall gives no reason to believe that the Second, Third, or Fifth Districts may someday buck the uniform view of the lower-court state judges. Moreover, the Florida Supreme Court already has refused to exercise its

discretionary jurisdiction to determine whether decisions like *Martin* have been faithfully construing its own *Engle* decision to effect, *sub silentio*, a revolution in the law of issue preclusion and due process. *Martin* Pet. 19; *see* Fla. Const. art. V, § 3(b)(3). And despite the obvious public importance of the preclusion and due process questions presented, the First and Fourth Districts both refused to certify their respective decisions in *Martin* and *Jimmie Brown* for review in the Florida Supreme Court on that basis. *Martin* Pet. 33; *see* Fla. Const. art. V, § 3(b)(4). Ms. Hall gives no reason to believe that future attempts to seek review in the Florida Supreme Court, based on either appellate conflicts or the importance of the question presented, will prove any more successful. To the contrary, as her own argument makes clear, now that the Florida Supreme Court has denied review in *Martin*, it will even lack jurisdiction to review future District Court of Appeal decisions that are per curiam affirmances citing *Martin*. *See*, *e.g.*, *Jollie v. State*, 405 So. 2d 418, 421 (Fla. 1981) (per curiam).

There is also little chance of an Eleventh Circuit decision any time soon. As Ms. Hall acknowledges (Opp. 21-22), there are no appeals pending in the Eleventh Circuit that present the question presented here. To the contrary, only one *Engle* progeny case pending in federal court has been tried to verdict, and the defendants prevailed in that case. The second *Engle* progeny trial in federal court did not commence until March 6, 2012. Finally, as Ms. Hall herself explains (Opp. 21), the District Court for the Middle District of Florida has addressed the question presented here, in an order governing "all active *Engle* progeny cases pending" before it, but has refused to certify that order for interlocutory review. Absent

some form of extraordinary expedition, a decision by the Eleventh Circuit on the question presented here is likely years away. In the meantime, the due-process violation that occurred in this case will repeat itself indefinitely as thousands of pending cases wind their way through the Florida state courts, and nine-digit accumulated liabilities will continue to mount. Under these circumstances, further percolation is neither necessary nor appropriate.

B. Apart from her general plea for delay, Ms. Hall also contends that prompt review is inappropriate because this Court, in order to decide the question presented, would "have to plumb the depths of the 100,000-page *Engle* record and a year's worth of trial transcripts" to determine what factual issues were or were not resolved in *Engle*. Opp. 18. That argument has nothing to do with the optimal timing of any review, and it is also mistaken. In the *Martin* decision applied in this case, the First District did not engage in its own review of the *Engle* trial record to determine what specific factual issues were ascertainably resolved against the defendants. To the contrary, the First District held that it need not examine the record at all, by expressly rejecting the Eleventh Circuit's ruling that "*Engle* plaintiff[s] must trot out the class action trial transcript to prove applicability of the Phase I findings" to their individual claims. *Martin* Pet. App. 12a (rejecting *Brown v. R.J. Reynolds Tobacco Co.,* 611 F.3d 1324, 1335-36 (11th Cir. 2010)). Instead, incorporating the standard used for directed-verdict motions, the First District held that, as a matter of law, the *Engle* jury must be deemed to have resolved against the defendants any of the class's allegations supported by legally sufficient evidence. *Martin* Pet. App. 14a. Thus, *Martin* and this

case present a pure legal question—whether the preclusion standard adopted by the First District is consistent with due process. Finally, to the extent that Ms. Hall seeks to defend the result in *Martin* on alternative fact-based grounds, that is hardly good reason to let stand *Martin*'s sweeping and unconstitutional legal rule. In any event, as shown in the *Martin* petition (at 8-11), it is not difficult to conclude, without "plumb[ing] the depths" of the *Engle* trial record, that the *Engle* jury was presented with multiple alternative allegations of fraud, negligence, and concealment, many of which were limited to certain brands or types of cigarettes.

II. THERE IS NO FURTHER BASIS FOR DENYING REVIEW IN THIS CASE

Aside from her argument about percolation, Ms. Hall contends that the petition for certiorari is untimely (Opp. 11-16) and that the question presented is inapplicable to her conspiracy claim (Opp. 31-34). Those arguments re-hash points made in the briefs in opposition in *Martin* and *Campbell.* For the reasons explained in Reynolds's reply briefs in those cases, neither of them has merit.

CONCLUSION

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

Respectfully submitted,

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