No. 12-272

IN THE

Supreme Court of the United States

R. J. REYNOLDS TOBACCO COMPANY AND LIGGETT GROUP LLC,

Petitioners,

v.

FINNA A. CLAY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JANIE MAE CLAY,

Respondent.

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

REPLY BRIEF FOR PETITIONER

Kelly Anne Luther
KASOWITZ, BENSON, TORRES & FRIEDMAN LLP
1441 Brickell Avenue
Suite 1420
Miami, FL 33131
(305) 377-1666
KLuther@kasowitz.com

Karen H. Curtis
CLARKE SILVERGLATE, P.A.
799 Brickell Plaza
Suite 900
Miami, FL 33131

Counsel for Petitioner Liggett Group LLC

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

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

Counsel for Petitioner R. J. Reynolds Tobacco Company

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Additional counsel listed on signature page

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REPLY BRIEF FOR PETITIONER

The petition for certiorari raises the question whether it violates due process to preclude litigation of disputed factual questions absent any determination that a prior jury *actually decided* those questions. The Florida courts have said no, so long as there is sufficient evidence from which a jury *reasonably could have decided* the disputed questions. *See R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1067–68 (Fla. Dist Ct. App. 2010); Pet. App. 2a (applying *Martin*). As explained in the petition, this watered-down preclusion standard, used in thousands of *Engle* progeny cases in Florida, is so problematic and of such great real-world impact as to warrant this Court's review.

The brief in opposition is remarkable for what it does not say. The petition demonstrated that the actually-decided requirement of issue preclusion is constitutionally mandated under this Court's decision in *Fayerweather v. Ritch*, 195 U.S. 267 (1904), and under a centuries-long, unbroken common-law understanding. Pet. 16-22. Respondent does not dispute any of this; rather, she concedes that Petitioners have correctly stated the governing "principle of law" (Opp. 22)—from which it follows that the Florida courts are routinely applying a constitutionally erroneous standard. Respondent contends only that this case does not implicate that principle.

The petition explained, however, why this case, and *Engle* progeny cases generally, *do* implicate that principle. For each of the *Engle* jury's tortious-conduct findings, the generality of the question put to the jury, combined with the range of distinct alternative allegations made by the *Engle* class, make it im-

possible to determine which specific allegations the *Engle* jury actually decided. Pet. 4-7. For example, although the *Engle* jury found that each defendant "place[d] cigarettes on the market that were defective and unreasonably dangerous" (Pet. App. 224a-25a), it is impossible to determine whether that defect finding extends to all cigarettes, or only to filtered cigarettes, or unfiltered cigarettes, or light cigarettes, or to cigarettes with various ingredients—to name but a few of the allegations raised by the *Engle* plaintiffs. Pet. 4. It is thus also impossible to determine whether the *Engle* jury *actually decided* whether the particular brands or types of cigarettes smoked by any individual plaintiff *were defective*. Accordingly, under the legal rule conceded by Respondent, it violates due process to preclude litigation of that critical element of liability.

Respondent does not even attempt a refutation of our record-based showing that the *Engle* class raised numerous *alternative* allegations of defect, negligence, and concealment, many of which applied only to certain brands or types of cigarettes. Indeed, Respondent concedes that "it is true that some evidence supported various additional product defect, negligence, and fraud theories *that were only applicable to particular styles or brands of cigarettes*, such as filtered and 'light' cigarettes." Opp. 5 (emphasis added). That alone establishes that the decision below squarely implicates the question presented. If the *Engle* defect, negligence, and concealment findings rested on allegations about *light* cigarettes, for example, those findings could not possibly establish anything relevant about the *non*-light cigarettes smoked by Janie Mae Clay, and it would thus violate due process to preclude litigation of whether *those*

cigarettes were defective, negligently designed, or fraudulently sold.

Respondent offers only token opposition to our demonstration that the question presented warrants review, and that the petition should be held pending the Florida Supreme Court's imminent decision in *Douglas*.

I. *Engle* Progeny Cases Squarely Raise The Question Whether Due Process Bars Preclusion Of Issues That May Not Have Been Decided By Any Jury

Despite Respondent's admission, she argues that the *Engle* findings *must* have rested on allegations applicable to *all* brands and types of cigarettes. Respondent's various attempts to unravel her own critical concession about the *Engle* findings and record are unavailing.

Respondent first reasons that the *Engle* findings must apply to all cigarettes because the *Engle* class was certified on the premise that common questions predominated. Opp. 4. But as *Engle* class counsel acknowledged, "[i]t's a fallacy that every common issue has to apply to one hundred percent of the class members." Reply App. 7a; *see id.* ("There are common issues, but not every common issue is common to one hundred percent of the class."). Florida class-action law makes this clear. *See, e.g.*, *Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 107 (Fla. 2011) ("commonality prong only requires that resolution of a class action affect all *or a substantial number* of the class members" (emphasis added)). Accordingly, the mere fact that a class was certified cannot support a presumption that every finding made by the jury applied to every class member, nor does it justify pre-

tending that allegations about filtered cigarettes apply to smokers of unfiltered cigarettes, that allegations about light cigarettes apply to smokers of non-light cigarettes, or that allegations about youth marketing in the 1970s and 1980s apply to individuals born in the 1930s or 1940s.

Without any record citation, Respondent next asserts that "everyone present during the phase I trial understood" that the *Engle* findings encompassed *all* brands or types of cigarettes sold by the defendants. Opp. 7. That assertion is false. The class itself presented evidence and argument on various brand-specific, type-specific, and time-specific allegations about cigarettes. Pet. 4-6. Moreover, the trial court, in denying the defendants' directed-verdict motion, found legally "sufficient evidence" to support "many" of the brand-specific or type-specific allegations involving filtered cigarettes, ammoniated cigarettes, and the like. Pet. App. 156a. Finally, while defendants did seek "nothing short of complete vindication" (Opp. 6), that means only that they defended against each of the class's alternative allegations. Thus, while a defense verdict would have required the jury to reject each of the alternative allegations, a verdict for the class required the jury to accept only one.

Respondent suggests that the Florida Supreme Court in *Engle* itself determined what the *Engle* jury had actually decided for purposes of issue preclusion. Opp. 8-11. In fact, the opinion gives no indication whatever that the court reviewed the *Engle* trial record to determine what the jury had actually decided. Moreover, that question was not even presented: plaintiffs sought reinstatement of the original class certification, and defendants sought affirmance of the

intermediate appellate court's decision to decertify the class in its entirety. *See Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1256-58 (Fla. 2006). The due-process question arose only after the Florida Supreme Court adopted *sua sponte* what it characterized as the "pragmatic solution" of decertifying the class but retaining certain findings for use in subsequent individual progeny cases. *See id.* at 1269-70. And the class, in successfully opposing rehearing and certiorari, argued that any due-process challenge to that approach would be unripe until individual plaintiffs sought to give the findings preclusive effect in progeny cases. Pet. 8-9.

Respondent next argues that the *Martin* court determined that the *Engle* findings actually encompass all brands and types of cigarettes sold by the defendants. Opp. 13-14. But the court in *Martin* expressly *refused* to engage in that inquiry; it squarely held that progeny plaintiffs do *not* need to "trot out the class action trial transcript to prove applicability of the Phase I findings" to their claims. *Martin*, 53 So. 3d at 1067. Moreover, *Martin* held that, for preclusion purposes, "the evidentiary foundation for the Phase I jury's findings" was established in the order denying the *Engle* defendants' motion for a directed verdict. *Id.* at 1068. That order did not determine which of the alternative allegations the *Engle* jury had *actually decided* against the defendants. To the contrary, it merely determined that several of those allegations *reasonably could have been decided* against the defendants—the Florida standard for directed-verdict motions. *See, e.g., Howell v. Winkle*, 866 So. 2d 192, 195 (Fla. 1st DCA 2004). Rather than providing a legitimate basis for preclusion, the directed-verdict order does just the opposite: it confirms

that preclusion cannot constitutionally apply, precisely because the *Engle* findings could have rested on any of the "many" alternative allegations applicable to "some" but not all cigarettes. Pet. App. 156a. The existence of alternative allegations supported by legally sufficient evidence merely underscores the impossibility of ascertaining which of those allegations were actually decided.

Respondent further suggests that "the defendants' characterization of these findings has been resoundingly rejected" (Opp. 13) even by the federal courts to have addressed the issue. Opp. 13 n.8, 16. Nothing could be farther from the truth: while the Florida federal courts are divided on the *legal* question raised in the petition, *none* of them adopts Respondent's characterization of the *Engle* findings as encompassing all brands and types of cigarettes. Indeed, two federal district courts have held that using the *Engle* findings to establish elements of progeny claims violates due process, precisely because "it is impossible to determine the precise issues decided by the [*Engle*] Phase I jury." *Brown v. R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328, 1346 (M.D. Fla. 2008); *see also Burr v. Philip Morris, USA*, 2008 U.S. Dist. LEXIS 66228 at *1-*2 (M.D. Fla. Aug. 28, 2008) (adopting *Brown*). Respondent's assertion that the Eleventh Circuit "reversed" those holdings on appeal (Opp. 13) is false. Instead, that court *agreed* with defendants that, to establish any factual issue through preclusion, *Engle* progeny plaintiffs must "show with a 'reasonable degree of certainty' that the specific factual issue was determined in [their] favor," considering the "entire trial record." *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1335 (11th Cir. 2010) (citation omitted). The panel expressed considerable

skepticism that any plaintiff could satisfy this requirement. *See id.* at 1336 n.1 (Anderson, J., concurring) ("The generality of the Phase I findings present plaintiffs with a considerable task."); 611 F.3d at 1336 n.11 (majority opinion adopting concurrence). And it specifically *reserved* the question whether this then-settled requirement of Florida preclusion law was also mandated by due process. *See id.* at 1334.

Finally, Respondent suggests that *Waggoner v. R.J. Reynolds Tobacco Co.*, 835 F. Supp. 2d 1244 (M.D. Fla. 2011), is consistent with Petitioners' view of due process, but inconsistent with our view about the *Engle* findings and record. Opp. 16. Just the opposite is true. As to due process, the *Waggoner* court held that issue preclusion may constitutionally be applied even to factual questions not shown to have been actually decided by the prior jury. *See id.* at 1267-77. As noted above, even Respondent cannot bring herself to defend that position.[1] As to the

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[1] *Waggoner*'s reasoning is in fact indefensible. First, *Waggoner* attempted to limit this Court's decision in *Fayerweather* to its facts (*see* 835 F. Supp. 2d at 1268), even though *Fayerweather* expressly establishes a general requirement for issue preclusion. *See* 195 U.S. at 307; Pet. 17-18. Second, *Waggoner* dismissed traditional practice as entirely irrelevant to due process (*see* 835 F. Supp. 2d at 1270), even though this Court repeatedly has held that it is the "touchstone" of due process. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994); Pet. 19-20. Third, *Waggoner* held that arbitrarily establishing *some* elements of claims is just fine, so long as defendants are allowed to contest *other* elements. *See* 835 F. Supp. 2d at 1272. In contrast, this Court has held that defendants have a due-process right to "'present *every* available defense.'" *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (citation omitted). Fourth, *Waggoner* held that defendants had an "opportunity to be heard" in *Engle* itself.

Engle findings, *Waggoner*, using the strict-liability claim as an example, expressly agreed with defendants that "the *Engle* class did not pursue a single theory of defect, but rather alleged a number of discrete design defects" covering some but not all cigarettes. 835 F. Supp. 2d at 1263.

II. The Conspiracy Claim Does Not Independently Support The Judgment

Respondent argues that the question presented does not affect her conspiracy claim, which independently supports the judgment. These arguments are also wrong.

Respondent asserts that Petitioners below raised their due-process argument only with regard to the strict-liability claim. Opp. 23. That is a pure fabrication, as even a quick skim of the brief below will confirm. Among other things, Petitioners identified the defect, negligence, concealment, and conspiracy findings as the subject of their due-process argument (Pet. App. 18a-19a); identified the defect, negligence, concealment, and conspiracy instructions as wrongly establishing elements of claims (Pet. App. 21a-22a); argued that the trial court had erred in refusing to ask the jury whether they had "engaged in *any* tortious conduct that injured Mrs. Clay" (Pet. App. 39a) (emphasis added); and argued at length that *Martin*—which by its terms applies to claims for strict liability, negligence, concealment, and conspiracy, *see* 53 So. 2d at 1069—was wrong to hold the *Engle* find-

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See 835 F. Supp. 2d at 1276. That may be so, but it is still impossible to determine what specific allegations the *Engle* jury resolved against them.

ings establish "'the conduct elements' of *all* class members' claims" (Pet. App. 39a (emphasis added and citation omitted)).

Without citing the *Engle* trial record, Respondent next asserts that "no evidence" in *Engle* would support a conspiracy finding limited to certain brands or types of cigarettes. Opp. 23. But as shown in the petition (Pet. 5-6), the class made various alternative brand-specific and type-specific allegations of concealment, which included allegations of concerted as well as unilateral activity. *E.g.*, Pet. App. 718a (alleged concerted concealment of facts about *light* cigarettes); Pet. App. 764a (same). Moreover, the *Engle* trial court, in denying defendants' directed-verdict motion as to the conspiracy claim, found legally sufficient evidence to support the allegation that certain smokers had been harmed by "industry wide lies" about "'light' cigarettes." Pet. App. 385a. Whatever the merits of that allegation, it has no possible application to individuals, like Janie Clay, who smoked only *non*-light cigarettes.

Respondent argues that, because the *Engle* findings establish the existence of *some* conspiracy, a progeny jury need only determine whether the plaintiff suffered harm from "some act in furtherance of the conspiracy." Opp. 24. But without any idea as to which conspiracy allegations were accepted by the *Engle* jury, and thus no idea as to the *scope* of the conspiracy, the progeny jury cannot possibly determine what acts were done "in furtherance" of it. For example, if the *Engle* conspiracy finding rested on the theory that defendants jointly concealed the possibility that *light* cigarettes may not be safer than non-light cigarettes, then no failure to disclose infor-

mation about *non*–light cigarettes would be done "in furtherance" of the conspiracy. Moreover, the jury in this case was not asked to determine for itself the scope of any conspiracy; rather, it was instructed to take the conspiracy found in *Engle* as a given. Pet. App. 677a, 684a-85a. For that reason, Respondent's further contention that her jury "heard ample independent evidence" of conspiracy (Opp. 25-26) is beside the point.

III. The Question Presented Is Certworthy

Apart from the two extended distractions addressed above, Respondent offers only token arguments against certiorari.

Respondent contends that "nothing material has changed" since this Court denied certiorari in *Martin* and its companion cases. Opp. 19. That is incorrect. The Fifth District Court of Appeal recently rejected the same due-process argument raised here, but certified the question as one of "great public importance" warranting review by the Florida Supreme Court. *R.J. Reynolds Tobacco Co. v. Koballa*, No. 5D11-2914 (Fla. 5th DCA Oct. 26, 2012) (slip op. at 1-2). Reply App. 2a. Now, each of the five district courts of appeal has resolved the due-process question; two of them have certified the question as one of great public importance; and a third has expressed grave misgivings about the constitutionality of its holding. *See id.*; Pet. 10. Moreover, since certiorari was denied in *Martin*, the Florida Supreme Court has agreed to review the due-process question in *Douglas*, established a highly-expedited briefing and argument schedule, and now stands poised to resolve that question. Pet. 11-12. Those developments substantially undercut the contention, made at length in the coordinated

briefs in opposition filed in *Martin* and its companion cases, that review by this Court would be premature.

Respondent further argues that the due-process question has no general significance because it affects only *Engle* progeny cases. Opp. 29. But there are thousands of such cases, with adverse judgments already exceeding $300 million. Pet. 23. As Respondent concedes, "exactly the same" due-process question arises in each of them. Opp. 1. Those considerations more than justify certiorari.

IV. The Petition Should Be Held For *Douglas*

The petition explained why the Court, rather than granting this petition outright, can and should hold it for *Douglas*. Respondent's contrary arguments are unconvincing.

First, Respondent predicts that a reversal in *Douglas* is unlikely. Opp. 30-31. Even if so, an affirmance in *Douglas* would squarely tee up the due-process question and remove the possibility that the Florida Supreme Court would moot the issue by ruling in Petitioners' favor.

Second, Respondent notes that the plaintiff in *Douglas* prevailed only on claims for strict liability and negligence. Opp. 31. That is correct, but the due-process question before the Florida Supreme Court applies to all *Engle* progeny claims, and, as explained above, there is no record-based reason to treat the concealment and conspiracy claims any differently from the strict-liability or negligence claims.

Third, Respondent argues that the due-process issue "will never merit this Court's review" absent a split of authority between the Florida Supreme Court and the Eleventh Circuit. However, if the Florida

Supreme Court agrees with the defendants, this Court would only need to GVR in light of its decision. Pet. 26. And if that court agrees with plaintiffs, the conflict between its decision and *Fayerweather*, and the recurring nature of the question presented, would more than justify review. *See* S. Ct. Rule 10(c) (certiorari appropriate where "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court").

CONCLUSION

The petition should be held pending the Florida Supreme Court's decision in *Douglas* and then disposed of as appropriate in light of that decision.

Respectfully submitted,

Kelly Anne Luther
KASOWITZ, BENSON, TORRES
& FRIEDMAN LLP
1441 Brickell Avenue
Suite 1420
Miami, FL 33131
(305) 377-1666
KLuther@kasowitz.com

Karen H. Curtis
CLARKE SILVERGLATE, P.A.
799 Brickell Plaza
Suite 900
Miami, FL 33131

Counsel for Petitioner
Liggett Group LLC

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

Jason T. Burnette
JONES DAY
1420 Peachtree St., N.E.
Suite 800
Atlanta, GA 30309

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

Counsel for Petitioner
R. J. Reynolds Tobacco
Company

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