NO. _____

IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY

Petitioner,

v.

MARLENE NALLY, as Personal Representative of the Estate of JOSEPH NALLY, SR.,

Respondent.

APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SECOND DISTRICT COURT OF APPEAL

TO: THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

Pursuant to Supreme Court Rule 13.5, Petitioner R.J. Reynolds Tobacco Company ("Reynolds")[1] respectfully requests a 14-day extension of time, up to and including January 10, 2019, to file a petition for writ of certiorari to the Florida Second District Court of Appeal. Unless extended, the deadline for filing that petition will expire on December 27, 2018. This Application is timely because it has been filed at least ten days prior to that date. Reynolds has not previously requested an extension from this Court.

[1] Pursuant to Rule 29.6, R.J. Reynolds Tobacco Company is a wholly owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc., which is a wholly owned subsidiary of Reynolds American Inc., which in turn is an indirect, wholly owned subsidiary of British American Tobacco p.l.c., a publicly held corporation.

In support of this request, Reynolds states as follows:

1. The Second District Court of Appeal issued its opinion on September 28, 2018. *See R.J. Reynolds Tobacco Co. v. Nally*, 253 So. 3d 576 (Fla. 2d DCA 2018) (per curiam) (attached as Exhibit A). That decision is not reviewable in the Florida Supreme Court because it does not contain analysis or a citation to any other decision. *See The Florida Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988). As a result, this Court has jurisdiction to review the Second District's decision under 28 U.S.C. § 1257(a) because the Second District was "the highest court of a State in which a decision could be had." *See, e.g.*, *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 24 (2011) (per curiam).

2. This case is one of approximately 8,000 individual personal-injury claims filed in the wake of the Florida Supreme Court's decision in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam), which prospectively decertified a sprawling class action against the major domestic cigarette manufacturers filed on behalf of "[a]ll [Florida] citizens and residents, and their survivors, who have suffered, presently suffer or who have died from disease and medical conditions caused by their addiction to cigarettes that contain nicotine." *Id.* at 1256 (quotation marks omitted). When it decertified the class, however, the Florida Supreme Court preserved several highly generalized jury findings from the first phase of the *Engle* class-action proceedings—for example, that each defendant "placed cigarettes on the market that were defective and unreasonably dangerous" in some unspecified manner and at some unspecified time over a 50-year period. *Id.* at 1257 n.4. The

Florida Supreme Court stated that those findings would have "res judicata effect" in subsequent cases filed by individual class members. *Id.* at 1269.

In each of the thousands of follow-on "*Engle* progeny" cases filed in state and federal courts across Florida, the plaintiffs have asserted that the generalized *Engle* findings relieve them of the burden of proving the tortious-conduct elements of their individual claims—for example, on a claim for strict liability, that the particular cigarettes smoked by the class member contained a defect that was a legal cause of the class member's injury. Relying exclusively on *claim* preclusion principles, the Florida Supreme Court has held that affording such broad preclusive effect to the generalized *Engle* findings is consistent with federal due process. *See Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 436 (Fla. 2013) ("That certain elements of the prima facie case are established by the Phase I findings does not violate the *Engle* defendants' due process rights . . . ."), *cert. denied*, 134 S. Ct. 332 (2013).

Pursuant to the procedures established in *Engle*, Plaintiff brought this *Engle* progeny lawsuit alleging that her husband, John Nally, Sr., died from lung cancer as a result of smoking cigarettes manufactured by Reynolds. The trial court ruled that upon proving she was a member of the *Engle* class, Plaintiff would be permitted to rely on the "res judicata effect" of the *Engle* findings to establish the conduct elements of her claims. The jury found that Plaintiff was an *Engle* class member, found in her favor on all of her claims, and awarded her $18 million in compensatory and punitive damages.

On appeal to the Second District Court of Appeal, Reynolds argued, among other things, that "the trial court violated federal due process by permitting Plaintiff to use the *Engle* findings to establish the conduct elements of her claims." Reynolds Br. at 40. Reynolds acknowledged that "the Florida Supreme Court rejected this argument in *Douglas*," but "preserve[d] the argument for further review in the Supreme Court of the United States." *Id.* The Second District Court of Appeal affirmed in a *per curiam* decision without citation or analysis.

3. This Court's review would be sought on the ground that the Second District Court of Appeal's decision—which rejected Reynolds' due-process challenge to the broad preclusive effect afforded to the *Engle* findings—conflicts with this Court's due process precedent by depriving Reynolds of its property without any assurance that any jury actually found that it committed tortious conduct that was a legal cause of Plaintiff's injuries. Under longstanding common-law principles, plaintiffs seeking to rely on the outcome of a prior proceeding to establish elements of their claims must demonstrate that those elements were "actually litigated *and resolved*" in their favor in the prior proceeding. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (emphasis added; internal quotation marks omitted). This "actually decided" requirement is such a fundamental safeguard against the arbitrary deprivation of property that it is mandated by due process. *See Fayerweather v. Ritch*, 195 U.S. 276, 298-99, 307 (1904). In this case and thousands of similar suits, however, the Florida courts have adopted a novel form of offensive claim preclusion that permits putative members of the *Engle* class to use the generalized findings rendered by the class-action jury—for

example, that each defendant placed unspecified "cigarettes on the market that were defective"—to establish the tortious-conduct elements of their individual claims without demonstrating that the *Engle* jury actually decided that the defendants engaged in tortious conduct relevant to their individual smoking histories. *Douglas*, 110 So. 3d at 424 (internal quotation marks omitted).

Recently, Reynolds has filed a petition for review in *R.J. Reynolds Tobacco Company v. Searcy* (No. 18-649) (docketed Nov. 20, 2018) and petitions in other cases to be decided consistent with the petition in *Searcy* and with the petition for review filed by Philip Morris USA, Inc. in *Philip Morris USA Inc. v. Boatright* (No. 18-654) (docketed Nov. 20, 2018). Both *Searcy* and *Boatright* present the question whether the Due Process Clause is violated by the preclusion rules adopted by Florida courts for *Engle* progeny cases. *Searcy* and *Boatright* are better vehicles for plenary review than this case because, unlike the per curiam affirmance issued by the Second District Court of Appeal here, the Eleventh Circuit (in *Searcy*) and the Second District Court of Appeal (in *Boatright*) issued written opinions affirming the judgment. Reynolds thus plans to file a petition for a writ of certiorari in this case asking the Court to hold this case pending the Court's disposition of the petitions in *Searcy* and *Boatright*.

4. Good cause exists for this requested extension. Undersigned counsel are currently involved in numerous trials and appeals, and an extension is necessary to ensure that counsel has sufficient time to prepare the petition. *See* Shapiro, *et al.*, *Supreme Court Practice* 402 (10th ed. 2013) ("The pressure of counsel's other

professional commitments, such as jury trials or other appellate or Supreme Court litigation, is a frequently advanced reason for seeking an extension."). Additionally, intervening holidays warrant an extension of time. The printing company employed to produce the petition for writ of certiorari and petition appendix is closed on December 24 and 25, and will have only limited staff from December 26 through January 1. Moreover, undersigned counsel have personal commitments related to the holidays. In light of undersigned counsel's professional and personal commitments and the disruptions to the printing company's business operations, a 14-day extension is warranted.

WHEREFORE, Reynolds respectfully requests that an order be entered extending the time to file a petition for writ of certiorari for 14 days, up to and including January 10, 2019.

Respectfully submitted,

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