No.

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

JAMES NAUGLE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LUCINDA NAUGLE, DECEASED,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents questions also raised in the petition for a writ of certiorari filed today in *R.J. Reynolds Tobacco Co. v. Graham*, No. 17-__:

1. When there is no way to tell whether a prior jury found particular facts against a party, does due process permit those facts to be conclusively presumed against that party in subsequent litigation?

2. Are strict-liability and negligence claims based on the findings by the class-action jury in *Engle v. Liggett Group, Inc.* preempted by the many federal statutes that manifested Congress's intent that cigarettes continue to be lawfully sold in the United States?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The plaintiff below was Lucinda Naugle; after Ms. Naugle passed away, respondent James Naugle was substituted as the personal representative of her estate.

The defendant below was petitioner Philip Morris USA Inc. The complaint also named as defendants R.J. Reynolds Tobacco Co., Lorillard, Inc., Lorillard Tobacco Co., Liggett Group LLC, and Vector Group, Ltd., but those entities were dismissed before trial and were not parties to the appeal.

Petitioner Philip Morris USA Inc. is a wholly owned subsidiary of Altria Group, Inc., which is the only publicly held company that owns 10% or more of Philip Morris USA Inc.'s stock. No publicly held company owns 10% or more of Altria Group, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Philip Morris USA Inc. ("PM USA") respectfully petitions for a writ of certiorari to review the judgment of the Florida Fourth District Court of Appeal in this case.

OPINIONS BELOW

The decision of the Florida Fourth District Court of Appeal is unreported, but is electronically available at 2017 WL 1507615. *See* Pet. App. 1a. The order of the Florida Supreme Court declining discretionary review of an earlier decision in the case is reported at 135 So. 3d 289. *See* Pet. App. 3a. Additional opinions of the Florida Fourth District Court of Appeal in the case are reported at 103 So. 3d 944, *see* Pet. App. 6a, and 182 So. 3d 885.

JURISDICTION

The Florida Fourth District Court of Appeal rendered its decision on April 27, 2017. *See* Pet. App. 1a. Under Florida law, PM USA cannot seek review in the Florida Supreme Court because the Fourth District's decision does not contain any analysis or citation. *See Fla. Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988). This Court therefore has jurisdiction to review the Fourth District's decision under 28 U.S.C. § 1257(a) because the Fourth District is "the highest court of [the] State in which a decision could be had." *See*, *e.g.*, *KPMG LLP v. Cocchi*, 565 U.S. 18, 19 (2011) (per curiam).

On July 18, 2017, Justice Thomas extended the deadline for PM USA to file a petition for a writ of certiorari to September 24, 2017. *See* No. 17A67.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1, cl. 2.

Article VI of the United States Constitution provides in pertinent part: "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

STATEMENT

Under longstanding and heretofore universal 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 case. *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 jettisoned the "actually decided" requirement. According to the Florida Supreme Court, members of the class of Florida smokers prospectively decertified in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam), can rely on the generalized findings rendered by the class-action jury before decertification—for example, that each defendant "placed cigarettes on the market that

were defective and unreasonably dangerous"—to establish the tortious conduct elements of their claims, without demonstrating that the *Engle* jury actually decided that the defendants had engaged in tortious conduct relevant to their individual smoking histories. *Philip Morris USA Inc. v. Douglas*, 110 So. 3d 419, 424 (Fla.) (internal quotation marks omitted), *cert. denied*, 134 S. Ct. 332 (2013). The en banc Eleventh Circuit recently held that full-faith-and-credit requirements obligate federal courts to give equally broad preclusive effect to the *Engle* jury's findings (although on an entirely different preclusion rationale from that of the Florida Supreme Court). *See Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1186 (11th Cir. 2017) (en banc), *petition for certiorari pending*, No. 17-__ (filed Sept. 15, 2017).

In addition, both the Florida Supreme Court and Eleventh Circuit have disregarded previously well-recognized principles of implied preemption by permitting plaintiffs to rely on the *Engle* strict-liability and negligence findings, which may rest on a determination that all cigarettes produced by the *Engle* defendants were defective—a theory of liability that directly conflicts with federal statutes resting on the "collective premise . . . that cigarettes . . . will continue to be sold in the United States." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 139 (2000). In *Graham*, for example, the en banc Eleventh Circuit interpreted the Florida Supreme Court's decision in *Douglas* as holding that the *Engle* jury found that all cigarettes are defective based on their inherent health risks and addictiveness, but nonetheless concluded that claims relying on that sweeping theory of liability are compatible with Congress's carefully calibrated regulatory approach to cigarettes and therefore are not impliedly preempted. *See Graham*,

857 F.3d at 1186, 1191; *see also R.J. Reynolds Tobacco Co. v. Marotta*, 214 So. 3d 590, 605 (Fla. 2017) (holding that federal law does not preempt *Engle* progeny plaintiffs' strict-liability and negligence claims).

PM USA and R.J. Reynolds Tobacco Co. have filed a petition for a writ of certiorari today seeking review of the Eleventh Circuit's decision in *Graham*, which presents due-process and implied-preemption questions that are also directly at issue in this case: (1) whether due process prohibits plaintiffs from relying on the preclusive effect of the generalized *Engle* jury findings to establish elements of their individual claims, and (2) whether *Engle* progeny plaintiffs' claims for strict liability and negligence are impliedly preempted by federal law. *See R.J. Reynolds Tobacco Co. v. Graham*, No. 17-__. *Graham*—a fractured decision in which Judge Tjoflat authored a more-than-200-page dissent—is an ideal vehicle for this Court to consider the two issues presented in this case and the thousands of other *Engle* progeny cases pending in state and federal courts across Florida.

The Court should hold this petition pending the disposition of *Graham*, and then dispose of the petition in a manner consistent with its ruling in *Graham*.

A. The *Engle* Class Action

The *Engle* litigation began in 1994 when six individuals filed a putative nationwide class action in Florida state court seeking billions of dollars in damages from PM USA and other tobacco companies. The *Engle* trial court ultimately certified a class of all Florida "citizens and residents, and their survivors, who have suffered, presently suffer or have died from dis-

eases and medical conditions caused by their addiction to cigarettes that contain nicotine." 945 So. 2d at 1256.

The *Engle* trial court adopted a complex three-phase trial plan. In Phase I, the jury would make findings on purported "common issues" relating to the defendants' conduct and the health effects of smoking. 945 So. 2d at 1256. In Phase II, the same jury would address the specific claims of the class representatives and assess class-wide punitive damages. *Id.* at 1257. And in Phase III, new juries would apply the Phase I findings to the claims of individual class members. *Id.* at 1258.

During the year-long Phase I trial, the class advanced many different factual allegations regarding the defendants' products and conduct over the course of four decades, including many allegations that pertained to only some cigarette designs, only some brands of cigarettes, or only some periods of time. For example, the class asserted in support of its strict-liability and negligence claims that some cigarette brands had unduly high nitrosamine levels, others used ammonia as a tobacco additive to enhance addictiveness, and others had higher smoke pH than necessary; that the filters on some cigarettes contained harmful components; and that the ventilation holes in "light" or "low tar" cigarettes were improperly placed. *Engle* Class Opp. to Strict Liability Directed Verdict at 3; *Engle* Tr. 11966-71, 16315-18, 27377, 36664-65. Likewise, to support its fraudulent concealment and conspiracy claims, the class identified numerous distinct categories of allegedly fraudulent statements by the defendants, including statements pertaining to the health risks of smoking, others pertaining to the addictiveness of smoking, and still others limited to

certain designs and brands of cigarettes, such as "light" cigarettes. In fact, class counsel acknowledged that the class's concealment allegations rested on "*thousands upon thousands* of statements about" cigarettes. *Id.* at 35955 (emphasis added).

Over the defendants' objection, the class sought and secured a Phase I verdict form that asked the jury to make only generalized findings on each of its claims. On the class's strict-liability claim, for example, the verdict form asked whether each defendant "placed cigarettes on the market that were defective and unreasonably dangerous." *Engle*, 945 So. 2d at 1257 n.4. On the concealment and conspiracy claims, the jury was asked whether the defendants concealed information about the "health effects" *or* "addictive nature of smoking cigarettes." *Id.* at 1277. The jury answered each of those generalized questions in the class's favor, but its findings do not reveal which of the class's numerous underlying theories of liability the jury accepted, which it did not consider at all, and which it rejected.

In Phase II, the *Engle* jury determined individualized issues of causation and damages as to three class representatives. 945 So. 2d at 1257. It then awarded $145 billion in punitive damages to the class as a whole. *Id.*

On appeal, the Florida Supreme Court held that "continued class action treatment" was "not feasible because individualized issues . . . predominate[d]," and that the punitive damages award could not stand because there had been no liability finding in favor of the class. *Engle*, 945 So. 2d at 1262-63, 1268. Based on "pragmatic" considerations, however, the court stated that class members could "initiate individual damages actions" within one year of its mandate and

that the "Phase I common core findings . . . will have res judicata effect in those trials." *Id.* at 1269.

In the wake of the Florida Supreme Court's decision, approximately 9,000 plaintiffs alleging membership in the *Engle* class filed "*Engle* progeny" actions in Florida state and federal courts, invoking the "res judicata effect" of the Phase I findings to establish the tortious-conduct elements of their individual claims. In *Douglas*, the Florida Supreme Court rejected the *Engle* defendants' argument that federal due process prohibits giving such sweeping preclusive effect to the *Engle* findings. 110 So. 3d at 422. In so doing, the Florida Supreme Court recognized that the *Engle* class's multiple theories of liability "included brand-specific defects" that applied to only some cigarettes and that the *Engle* findings would therefore be "useless in individual actions" if plaintiffs invoking their preclusive effect had to show what the *Engle* jury had "actually decided," as Florida issue-preclusion law required. *Id.* at 423, 433. The court nevertheless held that the findings could be given preclusive effect under principles of claim preclusion, which "unlike issue preclusion, has no 'actually decided' requirement" and applies to any issue that the *Engle* jury "*might*" have decided against the defendants. *Id.* at 435 (emphasis added). It was therefore "immaterial" that the "*Engle* jury did not make detailed findings" sufficient to identify the actual basis for its verdict. *Id.* at 433.

Subsequently, the Florida Supreme Court held in *Marotta* that federal law does not "implicitly preempt state law tort claims of strict liability and negligence by *Engle* progeny plaintiffs." 214 So. 3d at 605 (alterations omitted). According to the court, "permitting *Engle* progeny plaintiffs to bring state law strict liability and negligence claims against *Engle* defendants

does not conflict" with federal law because Congress did not "intend[ ] to preclude the States from banning cigarettes." *Id.* at 596, 600. Even if it did, the court continued, "tort liability like that in *Engle* does not amount to such a ban" because the *Engle* jury's strict-liability and negligence verdicts could have rested on a variety of grounds, including the ground that the defendants "intentionally increased the amount of nicotine in their products," rather than on "the inherent characteristics of all cigarettes." *Id.* at 601. In so holding, *Marotta* reiterated that the *Engle* findings must be given claim-preclusive effect without regard to what the jury "actually decided." *Id.* at 593.

B. Proceedings In This Case

Pursuant to the procedures established by the Florida Supreme Court in *Engle*, Lucinda Naugle brought this personal-injury action against PM USA to recover damages for her emphysema.[1] Ms. Naugle claimed to be a member of the *Engle* class because her emphysema was caused by an addiction to cigarettes, and she asserted claims for strict liability, negligence, fraudulent concealment, and conspiracy to commit fraudulent concealment. The complaint did not identify any specific defect, act of negligence, or act of concealment that allegedly caused Ms. Naugle's injuries. Instead, the complaint invoked the *Engle* findings and alleged that the conduct elements of Ms. Naugle's claims were already "conclusively established in this action" because she was a member of the decertified *Engle* class. Am. Compl. ¶ 28.

Over PM USA's objection, the trial court ruled that, upon proving that she was a member of the

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[1] Ms. Naugle died on November 1, 2013, and respondent James Naugle was substituted as her personal representative.

Engle class, Ms. Naugle would be permitted to rely on the "res judicata effect" of the *Engle* jury findings to establish the conduct elements of her claims and would not be required to prove those elements at trial. S.R. 5:831-35; T. 3736.

The jury ultimately found that Ms. Naugle was an *Engle* class member, found in her favor on all claims, and awarded her approximately $57 million in compensatory damages and $244 million in punitive damages. Pet. App. 8a. The trial court remitted the total award to approximately $37 million. Pet. App. 8a.

PM USA appealed to the Florida Fourth District Court of Appeal and argued, among other things, that the trial court violated the "'actually decided' requirement . . . mandated by due process" when it gave preclusive effect to the *Engle* findings. Initial Br. of Appellant PM USA 15. On the negligence claim, for example, PM USA maintained that the trial court "should have ruled out any use" of the *Engle* findings "to establish that PM USA engaged in negligent conduct related to Ms. Naugle's injuries" because "it is impossible to say that the *Engle* jury actually decided that PM USA was negligent in some specific manner that could have harmed Ms. Naugle." *Id.* at 30. The court could not circumvent this problem, PM USA explained, by construing the finding as resting on the "uniform allegation that all cigarettes were defective at all times" because "federal law would preempt that kind of claim." *Id.* at 24. PM USA likewise argued that the *Engle* jury's concealment finding "does not establish, to any degree of certainty, that PM USA was guilty of any wrongful conduct that harmed Ms. Naugle." *Id.* at 28-29 (emphasis omitted). For those reasons, PM USA stated, the trial court violated "Defendants' due process rights . . . in relying on the

Engle findings to excuse Ms. Naugle from proving that PM USA engaged in wrongful conduct relevant to this case." *Id.* at 30.

The Fourth District held that controlling precedent "foreclose[d]" PM USA's argument that "application of the *Engle* findings to this progeny case violates [PM USA's] due process rights." Pet. App. 8a-9a (citing *R.J. Reynolds Tobacco Co. v. Brown*, 70 So. 3d 707 (Fla. Dist. Ct. App. 2011)). The court agreed with PM USA, however, that the damages awards "were infected by passion and prejudice," and remanded for a new trial on the amount of compensatory and punitive damages. Pet. App. 13a.

PM USA then sought discretionary review in the Florida Supreme Court, which at the time had granted review in *Douglas*—a case that squarely presented PM USA's due-process challenge to the preclusive effect of the *Engle* Phase I findings. *See* PM USA's Notice to Invoke Discretionary Jurisdiction 2. After the Florida Supreme Court decided *Douglas* and rejected the *Engle* defendants' due-process argument, the court issued an order to show cause why it should not deny PM USA's pending request for review in this case. Order of May 17, 2013, *Philip Morris USA, Inc. v. Naugle* (Fla.). PM USA responded by acknowledging that "*Douglas* forecloses the arguments raised in PM USA's petition." PM USA's Response to May 17, 2013 Order to Show Cause 6. The Florida Supreme Court thereafter denied review. *See* Pet. App. 3a.

While PM USA's request for review was pending before the Florida Supreme Court, the retrial on damages proceeded in the trial court, and a new jury awarded Ms. Naugle $4.1 million in compensatory damages and $7.5 million in punitive damages.

PM USA appealed again to the Fourth District, which remanded the case for a juror interview regarding possible juror misconduct. *See Philip Morris USA, Inc. v. Naugle*, 182 So. 3d 885 (Fla. Dist. Ct. App. 2016) (per curiam). After the interview, PM USA moved for a new trial, which the trial court denied. The Fourth District affirmed in an unpublished per curiam opinion that did not contain any analysis or citation, *see* Pet. App. 1a, and that therefore was not subject to review in the Florida Supreme Court, *see Fla. Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988).

C. The Eleventh Circuit's En Banc Decision In *Graham*

Several weeks after the Fourth District issued its final opinion in this case, the en banc Eleventh Circuit issued its opinion in *Graham v. R.J. Reynolds Tobacco Co.*, which held by a 7-3 vote that permitting plaintiffs to rely on the *Engle* findings to establish the conduct elements of their strict-liability and negligence claims does not violate due process, and further held that federal law does not impliedly preempt those claims. 857 F.3d at 1186, 1191.

On the due-process issue, the *Graham* majority did not adopt *Douglas*'s novel claim-preclusion theory, but instead construed *Douglas* as having held that the *Engle* strict-liability and negligence findings rest on a single common theory applicable to all class members—*i.e.*, "that all of defendants' cigarettes cause disease and addict smokers." 857 F.3d at 1176. According to the court, the defendants "were afforded the protections mandated by the Due Process Clause" because they received "notice" of and an "opportunity to be heard on the common theories" during the *Engle* trial, and it was obligated to "give full faith and credit"

to the *Engle* jury's findings on those "common theories." *Id.* at 1185.

On the implied-preemption issue, the *Graham* majority held that federal law does not foreclose tort liability premised on the theory that all cigarettes are defective because, in the court's view, "[n]othing" in any federal statute "reflects a federal objective to permit the sale or manufacture of cigarettes." 857 F.3d at 1188. As a result, federal law does not displace state-law "tort liability based on the dangerousness of all cigarettes manufactured by the tobacco companies." *Id.* at 1191.

Three judges wrote separately in dissent. In a more-than-200-page dissent, Judge Tjoflat concluded that giving preclusive effect to the *Engle* findings violates due process and that, in the alternative, the *Engle* progeny plaintiffs' strict-liability and negligence claims are impliedly preempted. He emphasized that the *Engle* Phase I verdict form "did not require the jury to reveal the theory or theories on which it premised its tortious-conduct findings" and that the defendants "have never been afforded an opportunity to be heard on whether the[ ] unreasonably dangerous product defect(s) or negligent conduct" found by the *Engle* jury caused harm to any specific progeny plaintiff. *Graham*, 857 F.3d at 1194, 1201 (Tjoflat, J., dissenting). Judge Tjoflat further explained that "the way in which the *Engle*-progeny litigation has been carried out has resulted in a functional ban on cigarettes, which is preempted by federal regulation premised on consumer choice." *Id.* at 1194.

Judge Julie Carnes sided with the majority on the implied-preemption issue, but agreed with Judge Tjoflat on the due-process issue, reasoning that the *Engle* findings "are too non-specific to warrant them

being given preclusive effect in subsequent trials." *Graham*, 857 F.3d at 1191 (Carnes, J., concurring in part and dissenting in part). Finally, Judge Wilson was "not content that the use of the *Engle* jury's highly generalized findings in other forums meets 'the minimum procedural requirements of the Due Process Clause,'" and would have remanded in light of the due-process violation without reaching the implied-preemption issue. *Id.* at 1314-15 (Wilson, J., dissenting) (quoting *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481 (1982)).

PM USA and R.J. Reynolds Tobacco Co. today have filed a petition for a writ of certiorari in *Graham*.

REASONS FOR GRANTING THE PETITION

This petition raises due-process and implied-preemption questions that are also directly at issue in *Graham*: whether due process prohibits *Engle* progeny plaintiffs from relying on the generalized Phase I findings to establish the tortious-conduct elements of their individual claims, and whether federal law impliedly preempts *Engle* progeny plaintiffs' strict-liability and negligence claims. Although this Court has denied several previous petitions raising a due-process challenge to the preclusive effect of the *Engle* findings, those petitions all predated the Eleventh Circuit's divided en banc decision in *Graham* as well as the Florida Supreme Court's preemption ruling in *Marotta*. Now that both the Florida Supreme Court and en banc Eleventh Circuit have addressed the due-process and preemption issues, the questions presented are fully ripe for review in *Graham*.

The Court should therefore hold this petition pending the outcome of *Graham* and then dispose of the petition consistently with its ruling in that case.

I. THE FLORIDA COURTS' EXTREME DEPARTURE FROM TRADITIONAL PRECLUSION PRINCIPLES VIOLATES DUE PROCESS.

As explained at length in the petition for a writ of certiorari filed today in *Graham*, the Florida state and federal courts are engaged in the serial deprivation of the *Engle* defendants' due-process rights. This Court is the only forum that can provide PM USA with relief from the unconstitutional procedures that have now been endorsed by both the Florida Supreme Court and the en banc Eleventh Circuit. Almost 200 progeny cases have been tried, and thousands more cases remain pending, each seeking millions of dollars in damages.

The Florida Supreme Court's decision in *Douglas* and the Eleventh Circuit's decision in *Graham* relieve *Engle* progeny plaintiffs from proving the most basic elements of their claims—for example, that the cigarettes they smoked were defective—without requiring the plaintiffs to establish that those particular issues were actually decided in their favor in Phase I of *Engle*. In so doing, those decisions permit progeny plaintiffs to deprive PM USA and the other *Engle* defendants of their property in the absence of any assurance that the plaintiffs have ever proved all the elements of their claims—and despite the possibility that the *Engle* jury may have resolved at least some of those elements *in favor of the defendants*.

In this case, the trial court permitted Ms. Naugle to rely on the *Engle* Phase I findings to establish that the PM USA cigarettes she smoked contained a defect without requiring her to establish that the Phase I jury had actually decided that issue in her favor. Indeed, the *Engle* findings do not state whether the jury found a defect in PM USA's filtered cigarettes, or its

unfiltered cigarettes, or in only some of its brands but not in others. For all we know, Ms. Naugle may have smoked a type of PM USA cigarette that the *Engle* jury found was *not* defective.

The trial court likewise permitted Ms. Naugle to rely on the Phase I findings to establish that the advertisements and other statements by PM USA on which she supposedly relied were fraudulent. The generalized Phase I verdict form, however, did not require the jury to identify which statements it found to be fraudulent from among the "thousands upon thousands of statements" on which the class's concealment claim rested. *Engle* Tr. 35955. For example, the *Engle* jury may have found that PM USA's only fraudulent statements pertained to the "health effects" of smoking and not to its "addictive nature"—as the disjunctively worded verdict form would have permitted, *Engle*, 945 So. 2d at 1277—but the jury in this case may have premised its fraudulent-concealment verdict exclusively on Ms. Naugle's alleged reliance on statements about addiction that the *Engle* jury did not find to be fraudulent.

In these circumstances, allowing Ms. Naugle to invoke the *Engle* findings to establish the conduct elements of her claims—including that the particular cigarettes she smoked were defective and that the statements on which she allegedly relied were fraudulent—violates due process. *See*, *e.g.*, *Fayerweather*, 195 U.S. at 307 (holding, as a matter of federal due process, that where preclusion is sought based on findings that may rest on any of two or more alternative grounds, and it cannot be determined which alternative was actually the basis for the finding, "the plea of *res judicata* must fail").

This Court has "long held . . . that extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is fundamental in character." *Richards v. Jefferson Cty.*, 517 U.S. 793, 797 (1996) (internal quotation marks omitted). There can be no more extreme application than permitting a plaintiff to use preclusion to establish the elements of her claims—and recover millions of dollars in damages—without any assurance that those issues were actually decided in her favor in the prior proceeding. Indeed, the "whole purpose" of the Due Process Clause is to protect citizens against this type of "arbitrary deprivation[ ] of liberty or property." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 434 (1994).

Now that both the Florida Supreme Court and the en banc Eleventh Circuit have upheld the constitutionality of these unprecedented and fundamentally unfair procedures, this Court's review is urgently needed to prevent the replication of this constitutional violation in each of the thousands of pending *Engle* progeny cases.

II. UNDER BOTH *GRAHAM* AND *MAROTTA*, THE *ENGLE* STRICT-LIABILITY AND NEGLIGENCE FINDINGS RAISE INSUPERABLE PREEMPTION PROBLEMS.

Construing the generalized *Engle* findings as resting on the common theory that all cigarettes are defective—as the en banc Eleventh Circuit did in *Graham*, 857 F.3d at 1176—might help satisfy the "actually decided" requirement, but that construction ignores the actual *Engle* record and the repeated pronouncements of the Florida Supreme Court. It also runs head first into a preemption problem: Congress has decided that cigarettes are a lawful product that should remain on the market and has enacted several

federal statutes to further that policy objective. That preemption problem is no less serious in state-court cases controlled by the Florida Supreme Court's reasoning in *Marotta*.

As explained in the petition filed today in *Graham*, conflict preemption bars the imposition of state-law tort liability based on conduct that Congress has specifically authorized. *See*, *e.g.*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2000) (explaining that federal law impliedly preempts state laws that "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (internal quotation marks omitted). Through a web of "tobacco-specific legislation that Congress has enacted over the past" fifty-plus years, *Brown & Williamson*, 529 U.S. at 140, Congress has manifested its intention that cigarettes remain available on the market—despite their inherent health risks and addictiveness—and has thereby "foreclosed the removal of tobacco products from the market" through the operation of state law, *id.* at 137.[2]

Interpreting the *Engle* strict-liability and negligence findings as establishing that all cigarettes are defective based on their health risks and addictiveness—which the *Graham* majority did—is tanta-

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[2] *See*, *e.g.*, Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965); Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970); Alcohol and Drug Abuse Amendments, Pub. L. No. 98-24, 97 Stat. 175 (1983); Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200 (1984); Comprehensive Smokeless Tobacco Health Education Act, Pub. L. No. 99-252, 100 Stat. 30 (1986); Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub. L. No. 102-321, 106 Stat. 394 (1992).

mount to imposing a state-law ban on the sale of cigarettes. That across-the-board theory of liability means that every cigarette sold in the State of Florida during the four decades covered by the *Engle* proceedings would have been defective based on the inherent qualities of tobacco and that the only way for manufacturers to avoid liability would have been to remove cigarettes from the market. That state-law duty to refrain from selling cigarettes would have directly conflicted with Congress's goal of ensuring that "cigarettes . . . will continue to be sold in the United States." *Brown & Williamson*, 529 U.S. at 139.

As a result, it is impossible to give preclusive effect to the *Engle* strict-liability and negligence findings without either violating the "actually decided" requirement imposed by due process or creating an intractable conflict with federal law. Either way, permitting plaintiffs to invoke the preclusive effect of the *Engle* findings to establish elements of their individual claims is unlawful. This Court should therefore grant review in *Graham* to consider both the due-process and implied-preemption questions. Indeed, in his dissent in *Graham*, Judge Tjoflat "urged" this "Court to clarify the hazy state of preemption law," "given the uncertainty surrounding this particular issue and preemption generally." 857 F.3d at 1299-300 (Tjoflat, J., dissenting).

To be sure, the Florida Supreme Court in *Marotta* rejected the Eleventh Circuit's all-cigarettes-are-defective reading of the findings. It instead relied on *Douglas*'s claim-preclusion reasoning to dismiss the defendants' implied-preemption argument because the *Engle* jury could have based its strict-liability and negligence findings on evidence that "the defendants intentionally manipulated nicotine levels in their

products." *Marotta*, 214 So. 3d at 601-02. The Florida Supreme Court acknowledged, however, that the *Engle* jury *also* heard evidence about "the inherent dangers of all cigarettes." *Id.* at 601. Because it is possible that the *Engle* jury's strict-liability and negligence findings rest on that preempted theory of liability, the preemption question in *Graham*, if resolved in petitioners' favor, would undermine the validity of the judgment in this case.[3]

III. THE COURT SHOULD HOLD THIS PETITION PENDING RESOLUTION OF *GRAHAM*.

The Court should hold this petition pending the resolution of the petition for a writ of certiorari that PM USA and R.J. Reynolds Tobacco Co. filed today in *Graham*.

To ensure similar treatment of similar cases, the Court routinely holds petitions that implicate the same issue as other cases pending before it, and, once the related case is decided, resolves the held petitions in a consistent manner. *See*, *e.g.*, *Flores v. United States*, 137 S. Ct. 2211 (2017); *Merrill v. Merrill*, 137 S. Ct. 2156 (2017); *Innovention Toys, LLC v. MGA Entm't, Inc.*, 136 S. Ct. 2483 (2016); *see also Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (per curiam) (noting that the Court has "GVR'd in light of a wide range

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[3] Although the jury found in Ms. Naugle's favor on her two intentional-tort claims—in addition to her strict-liability and negligence claims—a decision by this Court holding that the *Engle* plaintiffs' strict-liability and negligence claims are impliedly preempted would still require reversal of the judgment in this case because the jury was prejudiced by the introduction of evidence that was relevant only to the strict-liability and negligence claims (including, for example, evidence about the design of PM USA's cigarettes). That evidence likely infected the jury's consideration of the other issues in the case.

of developments, including [its] own decisions"); *id.* at 181 (Scalia, J., dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided.") (emphasis omitted).

Because this case raises due-process and implied-preemption questions that are also directly at issue in *Graham*, the Court should follow that course here to ensure that this case is resolved in a consistent manner. If this Court grants certiorari in *Graham* and rules that due process or implied preemption prohibits *Engle* progeny plaintiffs from relying on the Phase I findings to establish elements of their claims, then it would be fundamentally unfair to permit the constitutionally infirm judgment in this case to stand. Thus, the Court should hold this petition pending the resolution of *Graham* and, if this Court grants review and vacates or reverses in *Graham*, it should thereafter grant, vacate, and remand in this case.

CONCLUSION

The Court should hold this petition pending the disposition of *Graham*, and then dispose of this petition consistently with its ruling in that case.

Respectfully submitted.

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September 15, 2017

APPENDIX

APPENDIX A

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

PHILIP MORRIS USA, INC.,
Appellant,

v.

JAMES NAUGLE, as Personal Representative of the **ESTATE OF LUCINDA NAUGLE,**
Appellee.

No. 4D16-1807

[April 27, 2017]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Jack Tuter, Judge; L.T. Case No. 2007-CV-036736 (19).

Joseph H. Lang, Jr. of Carlton Fields Jorden Burt, P.A., Tampa, and Lauren R. Goldman of Mayer Brown LLP, New York, New York, for appellant.

Richard B. Rosenthal of The Law Offices of Richard B. Rosenthal, P.A., Miami, and Robert W. Kelley, John J. Uustal and Todd R. McPharlin of Kelley Uustal, PLC, Fort Lauderdale, for appellee.

PER CURIAM.

Affirmed.

CIKLIN, C.J., GROSS and CONNER, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

APPENDIX B

Supreme Court of Florida

THURSDAY, FEBRUARY 13, 2014

2ND AMENDED ORDER

CASE NO.: SC13-261

Lower Tribunal No(s).: 4D10-1607;

4D10-3574; 08-80000 19

PHILIP MORRIS USA, INC.	vs. LUCINDA NAUGLE

CASE NO.: SC13-343

Lower Tribunal No(s).: 4D10-1607;

4D10-3574; 08-80000 19

LUCINDA NAUGLE.	vs. PHILIP MORRIS USA, INC.
Petitioner/Respondent(s)	Respondent/Petitioner(s)

Philip Morris USA, Inc.'s Motion to Stay and Motion for an Extension of Time to File and Serve Jurisdictional Brief are denied.

This Court having determined that it should decline to accept jurisdiction, it is ordered that the petitions for review are denied. No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d)(2).

POLSTON, C.J., and LEWIS, QUINCE, CANADY, and LABARGA, JJ., concur.

A True Copy
Test:

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John A. Tomasino

Clerk, Supreme Court

kb
Served:

STEVEN L. BRANNOCK

CELENE HARRELL HUMPHRIES

TYLER K. PITCHFORD

JOSEPH HAGEDORN LANG, JR.

STEPHEN N. ZACK

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TODD R. McPHARLIN

JOHN JOSEPH UUSTAL

RICHARD BRIAN ROSENTHAL

HON. HOWARD FORMAN, CLERK

HON. MARILYN BEUTTENMULLER, CLERK
HON. JEFFREY EARL STREITFELD, JUDGE

APPENDIX C

PHILIP MORRIS USA, INC., Appellant,

v.

Lucinda NAUGLE, Appellee.

Nos. 4D10–1607, 4D10–3574.

District Court of Appeal of Florida, Fourth District.

Dec. 12, 2012.

Gary L. Sasso and Joseph H. Lang, Jr., of Carlton Fields, Tampa, Andrew S. Brenner and Stephen N. Zack of Boies, Schiller & Flexner LLP, Miami, for appellant.

Richard B. Rosenthal of Richard B. Rosenthal, P.A., Joel S. Perwin of Joel S. Perwin, P.A., Miami, and Robert W. Kelley, John J. Uustal and Todd McPharlin of Kelley Uustal, PLC, Fort Lauderdale, for appellee.

ON MOTION FOR REHEARING

PER CURIAM.

We grant the appellant's motion for rehearing, withdraw our slip opinion, dated June 22, 2012, and substitute the following in its place.

Philip Morris USA, Inc. (PM USA) appeals the final judgment awarding appellee, Lucinda Naugle,

$36,760,500, after finding PM USA liable for Naugle's injuries caused by her addiction to PM USA-manufactured cigarettes. PM USA raises five issues on appeal. For the reasons set forth below, we reverse and remand for a new trial only on compensatory and punitive damages.

As an *Engle*[1]-progeny case, the trial was conducted in two phases in the manner we approved of in *R.J. Reynolds Tobacco Co. v. Brown,* 70 So.3d 707 (Fla. 4th DCA 2011). The evidence presented in Phase I revealed that Naugle smoked PM USA-manufactured cigarettes from 1968 (age 20) until 1993. When she began smoking cigarettes, she had never heard of nicotine or its addictive nature. She became addicted and was eventually diagnosed with severe chronic obstructive pulmonary disease (COPD) with exacerbation. The Phase I jury found that Naugle was an *Engle* class member (i.e., she had been addicted to cigarettes containing nicotine and the addiction was a legal cause of her emphysema).

Phase II involved issues of causation, comparative fault, and damages. The trial court instructed the Phase II jury that based on the Phase I verdict, Naugle was entitled to the following *Engle* findings: (1) PM USA was negligent; (2) PM USA sold or supplied cigarettes that were defective; (3) PM USA placed cigarettes on the market that were defective and unreasonably dangerous; (4) PM USA concealed or omitted material information not otherwise known or available, concerning the health effects or addictive

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[1] *Engle v. Liggett Group, Inc.,* 945 So.2d 1246 (Fla.2006).

nature of smoking cigarettes; and (5) PM USA agreed with other tobacco companies to conceal or omit information concerning the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment.

After Phase II, the trial court instructed the jury on legal causation as to each of Naugle's claims. The jury found PM USA ninety percent at fault and Naugle ten percent at fault and awarded compensatory damages in the following amounts: $90,000 for past medical expenses; $3.7 million for future medical expenses; $12.2 million for past pain and suffering; and $40.6 million for future pain and suffering. The jury further determined, by clear and convincing evidence, that punitive damages were warranted in the amount of $244 million.

The trial court granted PM USA's postverdict motion for remittitur and reduced the non-economic compensatory damages to $9,825,000, for a total compensatory damages award of $12,982,500, after applying comparative fault. The trial court also reduced the punitive damages award from $244,000,000 to $25,965,000, a 2:1 punitive to-compensatory ratio. Naugle accepted the remitted amount of $38,947,500, and the trial court entered an amended final judgment in the amount of $36,760,500. PM USA now appeals the amended final judgment.

The trial court correctly applied *Engle* and correctly instructed the jury as to legal causation.

PM USA conceded at oral argument that our decision in *Brown* forecloses the first two issues raised in its brief—whether application of the *Engle* findings to

this progeny case violates appellant's due process rights and whether the trial court properly instructed the jury as to legal causation.[2]

The trial court properly denied PM USA's motion for directed verdict as to the fraudulent concealment and conspiracy claims.

PM USA argues that Naugle did not prove reliance, and in any event, her claims are barred by the statute of repose. "[A] trial court should direct a verdict against the plaintiff only if there is no evidence, or reasonable inferences therefrom, upon which a jury may find for the nonmoving party." *NITV, L.L.C. v. Baker,* 61 So.3d 1249, 1252 (Fla. 4th DCA 2011) (citation omitted). We review this issue *de novo. Contreras v. U.S. Sec. Ins. Co.,* 927 So.2d 16, 20 (Fla. 4th DCA 2006).

Fraud can occur by omission, and one who undertakes to disclose material information has a duty to disclose that information fully. *ZC Ins. Co. v. Brooks* 847 So.2d 547, 551 (Fla. 4th DCA 2003) (citing *Gutter v. Wunker,* 631 So.2d 1117, 1118–19 (Fla. 4th DCA 1994)). "[A] claim of fraudulent misrepresentation and/or concealment requires proof of detrimental reliance on a material misrepresentation." *Soler v. Secondary Holdings, Inc.,* 771 So.2d 62, 69 (Fla. 3d DCA 2000) (citing *Johnson v. Davis,* 480 So.2d 625, 627

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[2] Here, as in *Brown*, the trial court did not allow the jury to use the Phase I findings to determine legal causation, and thus liability, in Phase II. Instead, the jury was properly instructed on legal causation as to Naugle's claims in Phase II and was required to make causation findings on the Phase II verdict form. We find no error. *See Brown*, 70 So.3d at 715–18.

(Fla. 1985)). "If a plaintiff claims to be misled, but cannot demonstrate a causal connection between the defendant's conduct and the plaintiff's misapprehension, the plaintiff cannot recover." *Humana, Inc. v. Castillo,* 728 So.2d 261, 265 (Fla. 2d DCA 1999) (citation omitted). However,

> [i]t is not necessary that a direct statement be made to the representee in order to give rise to the right to rely upon the statement, for it is immaterial whether it passes through a direct or circuitous channel in reaching him, provided it be made with the intent that it shall reach him and be acted on by the injured party.

Harrell v. Branson, 344 So.2d 604, 606 (Fla. 1st DCA 1977) (citation omitted).

Florida's statute of repose requires that any action "founded upon fraud" be filed within twelve years "after the date of the commission of the alleged fraud, regardless of the date the fraud was or should have been discovered." § 95.031(2)(a), Fla. Stat. (2007). *Engle* was filed on May 5, 1994; thus, any concealment claim in this case had to be based on conduct that occurred after May 5, 1982. Because fraudulent concealment requires proof of reliance, Naugle's claim is barred unless the record demonstrates that she justifiably relied on statements or omissions made after that date. *Joy v. Brown & Williamson Tobacco Corp.,* No. 96– 2645CIV–T24(B), 1998 WL 35229355, at *5 (M.D.Fla. May 8, 1998).

At trial, Naugle testified that by 1970, she was aware that smoking could be dangerous to her health. However, the *Engle* findings prove "that [PM USA]

concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both." *Engle,* 945 So.2d at 1277; *Brown,* 70 So.3d at 710. Although Naugle was aware that smoking **could have been** dangerous to her health, the *Engle* findings preclusively establish that PM USA **knew** that smoking cigarettes presented dangerous health consequences and that it concealed material information relating to the true health effects of smoking as well as the addictive nature of smoking.

As the First District held in *R.J. Reynolds Tobacco Co. v. Martin,* 53 So.3d 1060 (Fla. 1st DCA 2010),[3] this concealed information was designed to create doubt in the smoker as to **all** of the known health hazards created by smoking cigarettes. Moreover, the record in this case demonstrates that PM USA continued to conceal material information relating to the true health effects of smoking well after 1982.[4] We therefore hold that it was for the jury to determine (1)

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[3] The *Martin* court held that the record contained abundant evidence from which the jury could infer reliance on the false controversy created by the tobacco industry aimed at creating doubt among smokers that cigarettes were hazardous to health. *Martin,* 53 So.3d at 1069.

[4] Specifically, testimony, as well as PM USA's own internal business records, revealed that PM USA publicly denounced the Surgeon General's conclusion in 1988 that smoking was addictive, and PM USA did not admit that smoking was the cause of various diseases, including emphysema and lung cancer, until

whether Naugle would have continued to smoke PM USA's cigarettes if not for PM USA's nondisclosures; and (2) whether Naugle justifiably relied on the false controversy created by the tobacco industry after May 5, 1982. The jury found for Naugle on these issues, and as the jury's findings are supported by competent substantial record evidence, we do not disturb these findings on appeal.

The trial court abused its discretion in denying PM USA's motion for new trial based on the compensatory and punitive damages awards.

The trial court found that the non-economic and punitive damages were excessive pursuant to section 768.74(5), Florida Statutes (2007):

> I am [ ] convinced that the jury panel was conscientious, intelligent, and sincerely intent on doing justice. However, I must conclude that **the jury was moved by passions—sympathy** for [Naugle's] suffering and **anger toward PM USA's** conduct and strategy, resulting in the failure to follow my instructions that the damages

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October 2000, when PM USA altered its website to state that PM USA agrees with the opinions articulated by the Surgeon General. In addition, a video clip from 1994 was admitted into evidence, wherein PM USA executives, including PM USA's CEO, testified before Congress that smoking was not proven to be harmful and nicotine was not addictive. At trial, Doctor Kenneth Cummings testified that in 1994, "there was no doubt" within the medical community that smoking was the cause of diseases like lung cancer and emphysema, and that such information "had been known for decades." Dr. Cummings testified that "as early as 1958, [PM USA] scientists had indicated that cigarette smoking had been the cause of lung cancer."

> awarded shall be based solely on PM USA's conduct directed to this Plaintiff, and the harm caused to this Plaintiff. [Emphasis added.]

The trial court granted PM USA's motion for remittitur and denied its motion for new trial. PM USA argues that because the trial court expressly found that both the compensatory and punitive damages awards were infected by passion and prejudice, and that the jury disregarded the court's instructions, likely including punishment for non-party harms in awarding punitive damages, the awards must be set aside because these errors cannot be cured by remittitur. Instead, PM USA argues a new trial is the proper remedy. Under the unique facts of this case, we agree.

In reviewing a trial court's grant or denial of a motion for new trial, this court applies an abuse of discretion standard. *Philip Morris v. French,* 897 So.2d 480, 490 (Fla. 3d DCA 2004). Orders of remittitur are likewise reviewed for an abuse of discretion. *Adams v. Saavedra,* 65 So.3d 1185, 1188 (Fla. 4th DCA 2011). In support, PM USA relies on *Lassitter v. International Union of Operating Engineers,* 349 So.2d 622 (Fla.1977), wherein the Florida Supreme Court stated: "In the absence of improper influences a remittitur may be appropriate, but here the District Court concluded that the verdicts were indicative of improper influences of passion and prejudice working on the jury." *Id.* at 627. PM USA argues that this language demonstrates that remittitur cannot cure a jury's disregard for its instructions.

PM USA further relies on *Waste Management, Inc. v. Mora,* 940 So.2d 1105 (Fla.2006), and *Olivas v. Peterson,* 969 So.2d 1138 (Fla. 4th DCA 2007), for the

proposition that even where a defendant's motion for remittitur is granted, the party seeking the remittitur may still be "a party adversely affected" under section 768.74, Florida Statutes, the remittitur statute. While PM USA never presented these cases to the trial court at the hearing on their motion for remittitur/new trial, nor to us until filing a notice of supplemental authority two business days before the scheduled oral argument, it was clear that PM USA was still seeking a new trial after the trial court granted the remittitur. Notwithstanding the very late presentation of this case law, the principle announced in *Mora* is still good law and binding on this court.

In its motion for rehearing, appellant argues we should reverse because the trial court erred by striking twenty-three of its affirmative defenses, specifically its statute of repose defense. Simply put, appellants made no argument regarding this point in its initial brief, and instead, merely acknowledged the order's existence in its statement of the facts. Therefore, the argument on rehearing was waived because it was not argued in appellant's initial brief. *See Ayer v. Bush,* 775 So.2d 368, 370 (Fla. 4th DCA 2000) ("It is a rather fundamental principle of appellate practice and procedure that matters not argued in the briefs may not be raised for the first time on a motion for rehearing....").

Accordingly, we affirm the final judgement as to its findings of liability for compensatory and punitive damages, but remand for a new trial on the issue of damages.

Affirmed in part; Reversed and Remanded in part.

POLEN, TAYLOR and HAZOURI, JJ., concur.