No.

IN THE

# Supreme Court of the United States

PHILIP MORRIS USA INC. AND
R.J. REYNOLDS TOBACCO CO.,

*Petitioners,*

*v.*

JAMES HARRIS LOURIE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BARBARA RUTH LOURIE,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Florida Second 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 respondent James Harris Lourie, as personal representative of the estate of Barbara Ruth Lourie.

The defendants below were petitioners Philip Morris USA Inc. and R.J. Reynolds Tobacco Co., as well as Lorillard Tobacco Co. By virtue of a merger that was finalized on June 12, 2015, R.J. Reynolds Tobacco Co. is now the successor-by-merger to Lorillard Tobacco Co., which no longer exists as a separate entity from R.J. Reynolds Tobacco Co. In addition, the complaint named as defendants Lorillard, Inc., 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.

Petitioner 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 a wholly owned subsidiary of British American Tobacco p.l.c., a publicly held corporation.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Philip Morris USA Inc. and R.J. Reynolds Tobacco Co. respectfully petition for a writ of certiorari to review the judgment of the Florida Second District Court of Appeal in this case.

## OPINIONS BELOW

The decision of the Florida Second District Court of Appeal is reported at 198 So. 3d 975. *See* Pet. App. 1a. The order of the Florida Supreme Court declining discretionary review is unpublished, but is electronically available at 2017 WL 2628171. *See* Pet. App. 12a.

## JURISDICTION

The Florida Second District Court of Appeal rendered its decision on August 10, 2016. *See* Pet. App. 1a. On June 19, 2017, the Florida Supreme Court declined to exercise discretionary jurisdiction over the case. *See* Pet. App. 12a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## 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).

Philip Morris USA Inc. 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. As a counterpart to *Graham*, the Court also may wish to grant plenary review in this case, which comes out of the Florida state-court system and was directly controlled by the Florida Supreme Court's decisions regarding the *Engle* findings.

The Court should either grant this petition or hold it 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 petitioners 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 diseases 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, other brands 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.

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, 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 negligence claim, the jury was asked whether the defendants "failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances." *Engle* Phase I Verdict Form

10. 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*, respondent James Lourie brought this suit against petitioners, as well as Lorillard Tobacco Co., to recover damages for the death of his wife, Barbara Lourie.[1] Respondent claimed that Mrs. Lourie was a member of the *Engle* class because she died from lung cancer caused by an addiction to cigarettes, and he 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 Mrs. Lourie's injuries and death. Instead, respondent alleged that the "*Engle* Phase I findings conclusively establish" the conduct elements of his claims. Second Am. Compl. ¶¶ 29, 32, 36, 40.

Over petitioners' objections, the trial court instructed the jury that, if it found that Mrs. Lourie was a member of the *Engle* class, the *Engle* Phase I findings would be binding on the jury. T. 4774-75. Thus, for respondent's strict-liability and negligence claims, the only liability question put to the jury after class membership was established was whether "smoking cigarettes manufactured and sold by each defendant was a legal cause of the lung cancer and death of Barbara Lourie." *Id.* at 4776.

The jury found that Mrs. Lourie was an *Engle* class member, found in favor of respondent on his strict-liability and negligence claims (but in favor of

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[1] By virtue of a merger that was finalized on June 12, 2015, R.J. Reynolds Tobacco Co. is now the successor-by-merger to Lorillard Tobacco Co., which no longer exists as a separate entity from R.J. Reynolds Tobacco Co.

petitioners on his concealment and conspiracy claims), and awarded $663,296 in compensatory damages to respondent and $708,253 to the Louries' son. *See* R. 74:14627-30. Those amounts were then reduced to account for the jury's assignment of 63% of the fault to Mrs. Lourie. *See id.*

Petitioners appealed to the Florida Second District Court of Appeal and argued, among other things, that "[t]he trial court violated [their] rights to due process by allowing [respondent] to use the *Engle* strict liability and negligence findings to establish the conduct elements of his individual claims for strict liability and negligence." Initial Br. of Appellants 33 (citing *Fayerweather*, 195 U.S. at 307). Petitioners acknowledged that their argument was foreclosed by the Florida Supreme Court's decision in *Douglas*, but invoked their right "to preserve it for further review." *Id.*

Petitioners also argued to the Second District that "federal law impliedly preempts [respondent's] *Engle*-based strict liability and negligence claims" because, under *Douglas*, the Phase I strict-liability and negligence findings establish that all cigarettes manufactured by the *Engle* defendants were defective. Initial Br. of Appellants 20 (footnote omitted). That across-the-board theory of liability, petitioners stated, "amounts to the imposition of a duty not to sell cigarettes—in direct contravention of the governing federal regulatory scheme," *id.* at 11.

The Second District affirmed. It explained that *Douglas* had "rejected the argument that 'accepting the Phase I findings as res judicata violates the tobacco company defendants' due process rights.'" Pet. App. 5a (quoting *Douglas*, 110 So. 3d at 430) (alterations omitted). The Second District also relied on *Douglas* in rejecting petitioners' implied-preemption

argument, reasoning that *Douglas* "made clear that the[ ] Phase I findings appropriately established the tobacco company defendants' common liability and are entitled to res judicata effect," and that, as a result, petitioners "are now precluded from arguing in individual actions that they did not engage in conduct sufficient to subject them to liability." Pet. App. 2a-3a (internal quotation marks omitted). The Second District further "reject[ed] the tobacco company defendants' implied preemption defense on its merits" because, in the court's view, "federal law does not prohibit states from banning cigarette sales" and, in any event, "the *Engle* Phase I findings do not amount to a ban on selling cigarettes." Pet. App. 5a, 7a, 9a.

Petitioners sought discretionary review of the due-process and implied-preemption issues in the Florida Supreme Court, which at the time had granted review in *Marotta*—a case that squarely presented the implied-preemption issue. *See* Notice to Invoke Discretionary Jurisdiction 1-2 (Sept. 8, 2016).

After the Florida Supreme Court decided *Marotta* and rejected the *Engle* defendants' implied-preemption argument, the court issued an order to show cause why it should not deny petitioners' pending request for review in this case. Order of Apr. 25, 2017, *Philip Morris USA, Inc. v. Lourie* (Fla.). Petitioners responded by acknowledging that "*Marotta* dispenses entirely with the implied-preemption issue" and that "*Douglas* . . . currently controls the due process issue," while simultaneously "maintain[ing] that federal law impliedly preempts *Engle* progeny plaintiffs' non-intentional tort claims" and that "*Douglas* and the Second [District's] decision in this case deny Petitioners their federal due process rights." Defs./Pet'rs Resp. to

the Ct.'s Show Cause Order 2-3. The Florida Supreme Court thereafter denied review. *See* Pet. App. 12a.

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

A few weeks after the Florida Supreme Court denied review 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)).

Petitioners 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 grant this petition in tandem with *Graham* or hold it pending the outcome of *Graham* and then dispose of the petition consistently with the 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 petitioners 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 the *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 respondent to rely on the *Engle* Phase I findings to establish that the cigarettes Mrs. Lourie smoked contained a defect without requiring respondent to establish that the Phase I jury had actually decided that issue in his favor. Indeed, the *Engle* findings do not state whether the jury found a defect in petitioners' filtered cigarettes, or their unfiltered cigarettes, or in only some of petitioners' brands but not in others. For all we know, Mrs. Lourie may have smoked types of petitioners' cigarettes that the *Engle* jury found were *not* defective.

In these circumstances, allowing respondent to invoke the *Engle* findings to establish the conduct ele-

ments of his claims—including that the particular cigarettes Mrs. Lourie smoked were defective—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 his claims—and recover hundreds of thousands of dollars in damages—without any assurance that those issues were actually decided in his 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 tantamount 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

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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).

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.

## III. THE COURT SHOULD GRANT PLENARY REVIEW TOGETHER WITH *GRAHAM* OR HOLD THIS PETITION PENDING RESOLUTION OF *GRAHAM*.

The Court may wish to grant plenary review in this case as a state-court counterpart to be briefed and argued together with *Graham*. Alternatively, the Court should hold this petition pending the resolution of the petition for a writ of certiorari that petitioners 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 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 (if it does not grant plenary review) 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, at a minimum, 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 grant plenary review together with *Graham* or hold this petition pending the disposition of *Graham* and then dispose of the petition consistently with its ruling in that case.

Respectfully submitted.

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September 15, 2017

# APPENDIX

# APPENDIX A

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA**
**SECOND DISTRICT**

| | |
|---|---|
| PHILIP MORRIS USA, INC., AND R.J. REYNOLDS TOBACCO COMPANY,<br>Appellant,<br>v.<br>JAMES HARRIS LOURIE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BARBARA RUTH LOURIE, DECEASED,<br>Appellee. | Case No. 2D14-5403 |

Opinion filed August 10, 2016.

Appeal from the Circuit Court for Hillsborough County; William P. Levens, Judge.

Razvan Axente and Bonnie Daboll of Shook, Hardy & Bacon, L.L.P., Tampa; Geoffrey J. Michael of Arnold & Porter, LLP, Washington, D.C.; Gregory G. Katsas of Jones Day, Washington, D.C.; and Charles R.A.

Morse of Jones Day, New York, New York, for Appellants.

David J. Sales of David J. Sales, P.A., Jupiter; Laurie Briggs of Searcy, Denney, Scarola, Barnhart & Shipley, P.A., West Palm Beach; Steven L. Brannock, Celene Humphries, and Philip J. Padovano of Brannock & Humphries, Tampa; and Brent Bigger of Knopf/Bigger, Tampa, for Appellee.

In this Engle-progeny case,[1] Philip Morris USA, Inc., and R.J. Reynolds Tobacco Co. timely appeal the final judgment entered in favor of James Lourie, as personal representative of the Estate of Barbara Ruth Lourie. The tobacco company defendants argue that federal law implicitly preempts state law tort claims of strict liability and negligence for the sale of cigarettes because federal law effectively prohibits states from banning cigarette sales and the Engle Phase I findings amount to a ban on selling cigarettes. We affirm because the implied preemption argument is not only barred by res judicata but is also without merit.

## I. RES JUDICATA

"[T]he Phase I verdict against the Engle defendants resolved all elements of the claims that had anything to do with the Engle defendants' cigarettes or their conduct." Philip Morris USA, Inc. v. Douglas, 110 So. 3d 419, 432 (Fla. 2013). The Florida Supreme Court has made clear that these Phase I findings ap-

[1] A concise history of Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006) (Engle III), and its progeny can be found in Philip Morris USA, Inc. v. Douglas, 110 So. 3d 419, 422-25 (Fla. 2013).

propriately established the tobacco company defendants' common liability and are entitled to res judicata effect. Id. at 432-33 (citing Engle v. Liggett Grp., Inc., 945 So. 2d 1246, 1269 (Fla. 2006) (Engle III)). The companies are now "precluded from arguing in individual actions that they did not engage in conduct sufficient to subject them to liability." Id.

This is because

> res judicata prevents *the same parties* from relitigating *the same cause of action* in a second lawsuit and "is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action."

Id. at 432 (quoting Engle III, 945 So. 2d at 1259). In other words, the tobacco companies cannot raise the implied preemption defense here even if they had not raised it in Engle because it could have been raised in Engle. See id.

But the tobacco companies did in fact raise this argument in Engle. When they appealed the final judgment in Engle to the Third District, they plainly challenged the Engle trial court's rulings on the ground of implied preemption:

A. Plaintiffs' Attacks On The Sale of Cigarettes Were Barred By A Series Of Federal Statutes . . . .

> The court's rulings were erroneous. For more than 60 years, federal statutes have protected the right to sell cigarettes, even while Congress recognized that cigarettes were dangerous. Federal law thus preempts claims that

> selling cigarettes is tortious or otherwise improper. . .. In addition, because the sale of cigarettes is subject to federal regulation, attempts to impose contradictory requirements or prohibitions under state law are subject to at least implied preemption.

Combined Initial Brief of All Appellants other than Liggett and Brooke at 132-34, Liggett Group Inc. v. Engle, 853 So. 2d 434 (Fla. 3d DCA 2003) (Engle II) (No. 3D00-3400). The Third District agreed with the tobacco company defendants' position, specifically stating that "[b]ecause the sale of cigarettes is subject to federal regulation, attempts to impose contradictory requirements or prohibitions under state law are subject to at least implied preemption." Engle II, 853 So. 2d at 460 n.35. The Third District's decision was approved in part and quashed in part by the Florida Supreme Court in Engle III, 945 So. 2d 1246. Though the supreme court only mentioned the defendants' "preemption defense" in passing, see id. at 1273, it is clear that this defense was before the court. And the court necessarily rejected this argument in holding that certain Phase I findings had res judicata effect. Id. at 1255, 1269 (stating that a majority of the court "concludes that it was proper to allow the jury to make findings in Phase I on Questions 1 (general causation), 2 (addiction of cigarettes), 3 (strict liability), 4(a) (fraud by concealment), 5(a) (civil-conspiracy-concealment), 6 (breach of implied warranty), 7 (breach of express warranty), and 8 (negligence)," and further explaining that "the Phase I common core findings we approved above will have res judicata effect in [individual damages] trials"). The United States Supreme

Court denied certiorari, opting not to address the issue. See R.J. Reynolds Tobacco Co. v. Engle, 552 U.S. 941 (2007). Accordingly, the claim has been finally determined and cannot be raised again in Engle-progeny cases like this one.

We also conclude that barring the tobacco company defendants from raising this defense again does not violate the tobacco companies' due process rights. The supreme court has explicitly rejected the argument that "accepting the Phase I findings as res judicata violates [the tobacco company defendants'] due process rights." Douglas, 110 So. 3d at 430. Due process requires that a party must be given notice and an opportunity to be heard, and it is true that the principle of res judicata should not be applied to deny a party those rights. Id. However, here the tobacco company defendants not only had a full and fair opportunity to raise this defense but actually did raise it in Engle. Though they may disagree with the resulting final determination, there has been no violation of their due process rights.

## II. IMPLIED PREEMPTION

We also reject the tobacco company defendants' implied preemption defense on its merits. As a threshold issue, we note that the tobacco companies relied heavily on the Eleventh Circuit's decision in Graham v. R.J. Reynolds Tobacco Co., 782 F.3d 1261 (11th Cir. 2015), to support their implied preemption claim. But the Eleventh Circuit has since vacated the panel opinion in Graham and granted rehearing en banc. Graham v. R.J. Reynolds Tobacco Co., 811 F.3d 434 (11th Cir. 2016) (vacating the panel opinion and granting rehearing en banc). So the Graham panel opinion no

longer has any precedential value. See Blank v. Bethlehem Steel Corp., 738 F. Supp. 1380, 1381 (M.D. Fla. 1990). The reasoning in the Graham panel opinion has also been recently rejected in R.J. Reynolds Tobacco Co. v. Marotta, 182 So. 3d 829 (Fla. 4th DCA 2016), review granted, No. SC16-218, 2016 WL 934971 (Fla. Mar. 8, 2016), and Berger v. Philip Morris USA, Inc., 3:09-CV-14157, 2016 WL 2593841 (M.D. Fla. May 5, 2016). We agree with the sound reasoning set forth in Marotta and Berger.

The tobacco company defendants argue that federal law implicitly preempts state law tort claims of strict liability and negligence for the sale of cigarettes because federal law effectively prohibits states from banning cigarette sales and the Engle Phase I findings amount to a ban on selling cigarettes. We disagree.

The United States Supreme Court has explained that "because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996). So "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' " such as the protection of public health and safety, the court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Id. (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Indeed, congressional purpose is the ultimate touchstone in every preemption case. Id. (citing Retail

Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)). Implied preemption claims, like the one advanced here, are particularly difficult to prove because there is no express preemption provision to interpret and "a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." Chamber of Commerce of the U.S. v. Whiting, 563 U.S. 582, 607 (2011) (quoting Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 110 (1992)).

First, federal law does not prohibit states from banning cigarette sales. "Although the federal government has chosen to regulate aspects of the cigarette industry while stopping *itself* short of banning cigarettes, it did not intend to force *the states* to accept that cigarettes must remain on *their* markets." Berger, 2016 WL 2593841, at *8. The tobacco companies refer to a number of federal statutes that they claim effectively prohibit states from banning the sale of cigarettes. But this claim is belied by the federal acts themselves. For example, the Federal Cigarette Labeling and Advertising Act only prevents the states from imposing separate regulations on the labeling and advertising of cigarettes. See 15 U.S.C. § 1334(b) (2014) ("No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."). Nothing in this Act indicates an intent to preempt states from banning cigarette sales altogether. Similarly, the Family Smoking Prevention and Tobacco Control Act grants the U.S. Food and Drug Administration (FDA) authority to regulate cigarettes and prohibits the FDA from banning cigarettes. See 21 U.S.C. §§ 387a(a),

387g(d)(3) (2014). But it does not prevent the states from banning cigarettes—indeed, it expressly preserves the states' authority to "prohibit[] the sale . . . of tobacco products." 21 U.S.C. § 387p(a)(1). It also specifically provides that "[n]o provision of this subchapter relating to a tobacco product shall be construed to modify or otherwise affect any action or the liability of any person under the product liability law of any State." 21 U.S.C. § 387p(b).

We also note that, just as "Congress knew about the addictive and hazardous properties of cigarettes, it also surely knew about widespread tort litigation dealing with tobacco's ravaging effects on health." Berger, 2016 WL 2593841, at *10 (citing Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184-85 (1988), for the proposition that "[w]e generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts"). And "[y]et Congress has never manifested a preemptive impulse toward state law remedies of which it presumably knew when it acted." Id. Further, the tobacco companies' suggestion that state and local governments cannot ban any product that Congress has regulated "cannot withstand the test of experience and logic," Marotta, 182 So. 3d at 833, and "would represent a breathtaking expansion of obstacle preemption that would threaten to contract greatly the states' police powers," Berger, 2016 WL 2593841, at *10. The fact that "dry counties" exist even though the federal government regulates alcohol exemplifies just how sharply the companies' position contrasts with the current state of the law. See Marotta, 182 So. 3d at 833. Ultimately, we believe that even though Congress does regulate certain as-

pects of the sale of cigarettes, "a state's power to regulate matters of health and safety encompasses the power to regulate cigarettes, or even to ban their sale entirely." Berger, 2016 WL 2593841, at *9.

Second, the Engle Phase I findings do not amount to a ban on selling cigarettes. Cigarettes are sold throughout Florida, and many people still choose to purchase and smoke them.

> Had the Phase I verdict created a ban on cigarette sales, those sales would have ended two decades ago. Cigarette makers want to eat their cake and have it too. Trying to erect a purported ban on cigarette sales to evade liability, they continue to profit from their products, feeling, as they do so, no real-world constraint or restriction from the Phase I verdict. *Res ipsa loquitor*.

Berger, 2016 WL 2593841, at *8.

The argument that the Engle Phase I findings amount to a ban on the sale of cigarettes hinges on the claim that the Phase I jury's findings were overly broad, essentially determining that cigarettes are inherently defective and that cigarette manufacturers are inherently negligent. The Graham panel opinion posited that the Engle Phase I findings created a " 'brandless' cigarette, one produced by all defendants and smoked by all plaintiffs at all times throughout the class period" and that this "imposed a duty on all cigarette manufacturers that they breached every time they placed a cigarette on the market." Graham, 782 F.3d at 1279-80. But the Florida Supreme Court has already rejected the claim that the Engle Phase I findings are overly broad:

> Notwithstanding our holding in Engle, the defendants attempt to avoid the binding effect of the Phase I findings by arguing that they are not specific enough to establish a causal link between their conduct and damages to individual plaintiffs who prove injuries caused by addiction to smoking the Engle defendants' cigarettes. But, by accepting some of the Phase I findings and rejecting others based on lack of specificity, this Court in Engle necessarily decided that the approved Phase I findings are specific enough. . . .
>
> Accordingly, we reject the defendants' argument that the Phase I findings are too general to establish any elements of an Engle plaintiff's claims . . . .

Douglas, 110 So. 3d at 428-29.

Indeed, the Engle I findings were much more specific than the tobacco company defendants and the Graham panel suggest. Not every tobacco company selling cigarettes in Florida was a defendant in Engle, only smokers who had suffered certain specific harms are part of the class, and the jury determined whether the conduct at issue occurred during certain time periods. See Verdict Form for Phase I (completed), Engle v. RJ Reynolds Tobacco Co., No. 94-08273 CA-22 (Fla. 11th Cir. Ct. Nov. 6, 2000); see also Berger, 2016 WL 2593841, at *7-8. The companies were not held liable for simply placing cigarettes on the market or the inherent characteristics of cigarettes. Rather, based on evidence that the companies had manipulated the nicotine levels in their cigarettes to make them more addictive and manufactured cigarettes with filters that

increased the cigarettes' inherently deleterious effects, the companies were found liable for placing cigarettes on the market that were defective and unreasonably dangerous. They were also found liable for failing to exercise a degree of care that a reasonable cigarette manufacturer would exercise under like circumstances—a standard that assumes cigarettes could be sold in a reasonable manner. Accordingly, we reject the tobacco company defendants' "characterization of the Phase I liability findings as being based on nothing more than the inherent properties of cigarettes," Berger, 2016 WL 2593841, at *8, and with it the claim that the Engle Phase I findings operate as a ban on the sale of cigarettes.

Affirmed.

BLACK and SALARIO, JJ., Concur.

## APPENDIX B

## SUPREME COURT OF FLORIDA

MONDAY, JUNE 19, 2017

| | |
|---|---|
| PHILIP MORRIS USA, INC., ET AL.<br>*Petitioner(s)*<br>vs.<br>JAMES HARRIS LOURIE, ETC.<br>*Respondent(s)* | Case No.: SC16-1629<br>Lower Tribunal No(s).:<br>2D14-5403;<br>292007CA018137A001HC |

Upon review of the responses to this Court's order to show cause dated April 25, 2017, the Court has determined that it should decline to accept jurisdiction in this case. See R.J. Reynolds v. Marotta, 214 So. 3d 590 (Fla. 2017). The petition for discretionary review is, therefore, denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d)(2).

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

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Test:

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Clerk, Supreme Court

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HON. WILLIAM PHILIP LEVENS, JUDGE