No. 17-___

IN THE

Supreme Court of the United States

R. J. REYNOLDS TOBACCO COMPANY,
Petitioner,

v.

JAN GROSSMAN, as personal representative of the Estate of Laura Grossman, deceased,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a question also raised in the petition for a writ of certiorari filed September 15, 2017, in *R.J. Reynolds Tobacco Co. v. Graham*, No. 17-415:

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?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The plaintiff below was Jan Grossman, as personal representative of the estate of his deceased wife, Laura Grossman.

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

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

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This case presents a question that is also presented by the petition for a writ of certiorari in *R.J. Reynolds Tobacco Co. v. Graham*, No. 17-415. Petitioner R.J. Reynolds Tobacco Company respectfully asks this Court to hold this petition pending resolution of the petition in *Graham*, and to dispose of this case in a manner consistent with the Court's resolution of *Graham*.

OPINIONS BELOW

The decision of the Florida Fourth District Court of Appeal is reported at 211 So. 3d 221. Pet.App.3a. The order of the Florida Supreme Court declining discretionary review is available at 2017 WL 3751318. Pet.App.1a. An earlier opinion of the Fourth District Court of Appeal in the same case is reported at 96 So. 3d 917 and the order of the Florida Supreme Court declining discretionary review on that occasion is reported at 135 So. 3d 289.

JURISDICTION

The Florida Fourth District Court of Appeal affirmed the judgment in a published opinion on January 4, 2017. Pet.App.3a. Both parties then invoked the discretionary jurisdiction of the Florida Supreme Court. On August 31, 2017, the Florida Supreme Court declined review of the question presented by Petitioner. Pet.App.1a. Respondent's notice invoking the Florida Supreme Court's jurisdiction remains pending, but addresses a question (whether the award of compensatory damages should be reduced to reflect comparative fault, Pet.App.19a), that cannot affect the federal issue presented in this petition. Even if the Florida

Supreme Court takes jurisdiction and increases the award of compensatory damages, the due-process issue discussed below "will survive and require decision." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 480 (1975); *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 n.42 (1982) (reasoning that a state court's judgment was final, even though it had "remanded for a recomputation of damages"); *New York v. Cathedral Acad.*, 434 U.S. 125, 128 n.4 (1977) (deeming case final though the state court had remanded to "determine the amount of the Academy's claim" under the statute at issue); *Radio Station WOW v. Johnson*, 326 U.S. 120, 124–27 (1945) (concluding that a case was final where property was ordered transferred, but the matter had been remanded for "an accounting of profits from such property"). Accordingly, this Court has jurisdiction under 28 U.S.C. § 1257(a).

Reynolds timely filed this petition.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in relevant part: "No State shall … deprive any person of life, liberty, or property, without due process of law …." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

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.), *cert. denied*, 134 S. Ct. 332 (2013). The en banc Eleventh Circuit recently rejected a due-process challenge to this misuse of the *Engle* findings. *See Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1186 (11th Cir. 2017) (en banc), *petition for cert. pending*, No. 17-415 (filed Sept. 15, 2017).

Reynolds and Philip Morris USA Inc., its co-defendant in *Graham*, have filed a petition for a writ of certiorari seeking review of the Eleventh Circuit's decision in that case. That petition presents the same due-process question as this petition: whether due process prohibits plaintiffs from relying on the preclusive effect of the generalized *Engle* jury

findings to establish elements of their individual claims. *See R.J. Reynolds Tobacco Co. v. Graham*, No. 17-415. *Graham*—a fractured decision in which Judge Tjoflat authored a 200-plus-page dissent—is an ideal vehicle for this Court to consider the issue 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 and dispose of it consistent with the disposition of *Graham*.

A. The History Of The *Engle* Litigation

1. The failed class action in *Engle*

The massive class action that gave rise to this case began in 1994, when a group of smokers filed suit in Florida state court against every major domestic tobacco manufacturer. As later modified on appeal, the plaintiff class included "[a]ll [Florida] citizens and residents, and their survivors, who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *Engle*, 945 So. 2d at 1256. The class sought relief under a variety of theories, including strict liability, negligence, fraudulent concealment, and conspiracy to fraudulently conceal. *Id.* at 1256–57 & n.4.

The *Engle* trial court adopted a complex multi-phase trial plan. Phase I, which lasted a year, was the phase in which the jury was charged with making findings on purported "common issues" relating to the defendants' conduct and the health effects of smoking. *Id.*

During the Phase I trial, the *Engle* class broadly alleged that all cigarettes are defective, and that the

sale of all cigarettes is negligent, because cigarettes are addictive and cause disease. But the class also pressed narrower, more brand-specific theories of defect and negligence. For example, the class offered evidence that "*some* cigarettes were manufactured with the breathing air holes in the filter being too close to the lips so that they were covered by the smoker." *Douglas*, 110 So. 3d at 424 (emphasis added). There was "also evidence at trial that *some* filters … utilize[d] glass fibers that could produce disease." *Id.* (emphasis added). There was evidence that *some* cigarettes used "a higher nicotine content tobacco called Y-1." *Id.* at 423. Evidence suggested that ammonia was "*sometimes*" used to increase nicotine levels. *Id.* (emphasis added). Some evidence focused on "light" cigarettes, while other evidence addressed "low-tar" cigarettes.

The arguments made to support the class's fraudulent-concealment and conspiracy claims were similarly diverse. The class identified many distinct categories of allegedly fraudulent statements by the defendants, some 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. Class counsel acknowledged that the class's concealment allegations rested on "*thousands upon thousands* of statements about" cigarettes. *Engle* Trial Tr. at 35955 (emphasis added).

The upshot was that "[o]ver the course of the yearlong trial," witnesses distinguished "among cigarette brands, filtered and nonfiltered, in terms of their tar and nicotine levels and the way in which they were designed, tested, manufactured,

advertised, and sold." *Graham*, 857 F.3d at 1198 (Tjoflat, J., dissenting). And this evidence "spann[ed] decades of tobacco-industry history," from 1953 until 1994. *Id.*

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.

The Florida Supreme Court ultimately decertified the class action. *Engle*, 945 So. 2d at 1245. But it did so only prospectively. In other words, rather than ending the ligation altogether, the court broke up the class action but permitted class members to pursue individual actions. *Id.* Of critical importance here, *Engle* also made the "pragmatic" decision to "retain[] the jury's Phase I findings" on numerous issues—including the jury's defect, negligence, and concealment findings—and to accord those findings "*res judicata* effect" in the subsequent individual actions. *Id.* at 1269. But it did not explain what it meant by "*res judicata* effect." *See id.* at 1284 (Wells,

J., concurring in part and dissenting in part) (objecting to this "problematic" directive).

2. The *Engle*-progeny litigation

Following the Florida Supreme Court's *Engle* decision, 9,000 class members filed timely individual actions in state and federal courts in Florida. *Waggoner v. R.J. Reynolds Tobacco Co.*, 835 F. Supp. 2d 1244, 1250 (M.D. Fla. 2011). These are known as "*Engle*-progeny" cases. In each *Engle*-progeny case, the plaintiff invokes the "res judicata effect" of the Phase I findings to establish the tortious-conduct elements of his 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 432–33.

B. The Proceedings In This Case

From the time Laura Grossman and Respondent Jan Grossman met at Respondent's variety store, where Laura went to purchase cigarettes, Laura was a "heavy smoker." *R.J. Reynolds Tobacco Co. v. Grossman*, 96 So. 3d 917, 919 (Fla. Dist. Ct. App. 2012). She developed lung cancer and passed away in 1995. *See id.* Respondent, as personal representative of her estate, filed this *Engle*-progeny case against Reynolds in 2007, alleging (as the *Engle* class definition requires) that addiction to cigarettes caused Laura's lung cancer and death.

At trial, and as relevant here, Respondent claimed relief under theories of strict liability, negligence, fraudulent concealment, and conspiracy. He sought to take advantage of the res judicata effect accorded to the *Engle* findings, arguing that the *Engle* jury verdict established defect, negligence, fraudulent concealment, and conspiracy in all progeny cases. He thus asked the Court to instruct the jury that, if it found he was a member of the *Engle* class, it should conclude that Reynolds was negligent (an element of the negligence claim); that it sold defective products (an element of the strict-liability claim); that it concealed information about the health effects or addictive nature of smoking (an element of fraudulent concealment); and that it concealed this information in agreement with other companies and industry organizations (an element of conspiracy). Over Reynolds's objection, the trial court gave these instructions. *See, e.g.*, Trial Tr. at 3742–44 (Apr. 27, 2010).

The first trial ended in a mistrial. *See* Pet.App.5a. A second trial ended in a verdict for Respondent on strict liability (but no other claim). The jury awarded just under $2 million in compensatory damages and apportioned 70% of fault to Laura Grossman, 25% to Reynolds, and 5% to Respondent himself. *Grossman*, 96 So. 3d at 919. Reynolds appealed to Florida's Fourth District Court of Appeal and Respondent cross-appealed. In its appeal, Reynolds argued that the trial court violated the Due Process Clause by giving the *Engle* findings preclusive effect, notwithstanding the impossibility of determining whether those findings establish conduct that harmed Laura Grossman. The Fourth District rejected that argument. *See id.* But the court accepted Respondent's argument on cross-appeal that the jury should not have been allowed to apportion any fault to him. The court allowed the verdict on *Engle* class membership to stand, but ordered a new trial on liability and damages. Reynolds sought—and was denied—review by the Florida Supreme Court. *See R.J. Reynolds Tobacco Co. v. Grossman*, 135 So. 3d 289 (Fla. 2014).

Respondent scored a more decisive win in the third trial—he prevailed on all his claims. The apportionment of fault was a mirror image of the second trial's: 75% to Reynolds and 25% to Laura Grossman. Damages were much greater: $15 million in compensatory damages and $22.5 million in punitive damages. The jury also awarded medical and funeral expenses. After rejecting Reynolds's request that compensatory damages be reduced by 25% to reflect comparative fault, the trial judge

entered judgment for a little under $38 million. Pet.App.7a.

Reynolds appealed a second time to the Fourth District. It raised several arguments, including, again, a due-process objection to the use of the *Engle* findings. Reynolds also argued that the compensatory-damages awards should have been reduced by 25% to reflect comparative fault. The Fourth District agreed on the last point—compensatory damages should have been reduced—but otherwise rejected Reynolds's arguments, including the due-process one. *See id.* at 11a–17a.

Both parties invoked the jurisdiction of the Florida Supreme Court. On August 31, 2017, the Florida Supreme Court declined jurisdiction in Reynolds's case. Respondent's request—which presents the comparative-fault question—remains pending, but the question presented here is certain to survive that proceeding. Accordingly, the judgment is sufficiently final to permit this Court's exercise of certiorari. *See Cox Broad.*, 420 U.S. at 480; *supra* page 2.

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

In May of this year, 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. 857 F.3d at 1186.

The *Graham* majority refused to accept *Douglas*'s literal holding that the *Engle* findings establish anything that the *Engle* jury *could have* found.

Instead, the majority construed *Douglas* as containing a holding about what the *Engle* jury *actually* found—namely, that when the jury rendered a verdict for the class on strict liability and negligence, what it had in mind was "that all of the companies' cigarettes cause disease and addict smokers." 857 F.3d at 1176. The *Graham* majority regarded itself as bound to give full faith and credit to this version of the findings that it thought it detected in *Douglas*. *Id.* at 1185. And this, in the majority's view, defeated the due-process argument that "the jury did not actually decide common issues of negligence and strict liability." *Id.* at 1184.

Three judges wrote separately in dissent. In an opinion that ran to more than 200 pages, Judge Tjoflat concluded that giving preclusive effect to the *Engle* findings violates due process. 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 Julie Carnes 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 *Id.* at 1314–15 (Wilson, J., dissenting) (quoting *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481 (1982)).

Reynolds, along with PM USA, petitioned for a writ of certiorari in *Graham*.

REASONS FOR GRANTING THE PETITION

This petition raises the due-process question that is 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. 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*. 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 this petition consistent with its ruling in that case.

I. The Florida Courts' Decision To Relieve Plaintiffs Of The Burden Of Establishing Essential Elements Of Their Tort Claims Violates Due Process.

As explained at length in the petition for a writ of certiorari filed 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 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 remain pending, each seeking millions of dollars in damages.

The Florida Supreme Court's decision in *Douglas* and the en banc Eleventh Circuit's decision in *Graham* allow each *Engle*-progeny plaintiff to use the *Engle* findings to prove that the defendants engaged in tortious conduct that led to that plaintiff's injuries (or the decedent's death) without requiring the plaintiff to establish that the *Engle* jury actually decided any such thing. And so those decisions empower progeny plaintiffs to deprive *Engle* defendants of their property without any assurance that any factfinder has adjudicated critical elements of their claims—indeed, 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 Reynolds cigarettes his wife smoked contained a harmful defect without requiring him to establish that the Phase I jury had actually decided that issue in his favor. The *Engle* findings do not state whether the jury found a defect in Reynolds's filtered cigarettes, or its unfiltered cigarettes, or in only some of its brands but not in others. For all we know, Laura Grossman may have smoked a type of Reynolds cigarette that the *Engle* jury found was *not* defective.

The trial court likewise permitted Respondent to use the Phase I findings to establish that the advertisements and other statements by Reynolds on which Laura Grossman 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 Reynolds'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 Laura Grossman's alleged reliance on statements about addiction that the *Engle* jury did not find to be fraudulent.

In these circumstances, allowing Respondent to invoke the *Engle* findings to establish the conduct elements of his claims—including that the particular cigarettes Laura Grossman 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").

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. 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 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 the same due-process question as *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 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 consistent with its ruling in that case.

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