

No. 17-638

**In The
Supreme Court of the United States**

R.J. REYNOLDS TOBACCO CO.,

Petitioner,

v.

VIVIAN TURNER, as Personal
Representative of the Estate of Vivian Wilkinson,

Respondent.

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

BRIEF IN OPPOSITION

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December 13, 2017

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QUESTIONS PRESENTED

The common Question Presented in the petitions in this case and in *R.J. Reynolds Tobacco Co. v. Graham*, No. 17-415, is phrased to assume two key points that have been resolved against Petitioner repeatedly to yield a question that is simply not presented by this case. The question ignores the fact that *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), *cert. denied*, 552 U.S. 941 (2007), finally determined that the approved class findings applied equally to all class members and did not rest on particular types of cigarettes that were only smoked by particular class members or particular fraudulent statements that were only heard by particular class members. Thus, in order to reach the question crafted by Petitioner, the disputed questions that would actually be presented are:

1. Whether the Due Process Clause gives a defendant the right to relitigate the meaning of a verdict reached in a prior proceeding that resulted in a final judgment between the same parties involving the same claims.

2. If so, whether Petitioner is correct that “there is no way to tell” from the record of the original *Engle* Phase I class trial whether the jury found that Petitioner had a duty to disclose all material dangers it knew its product posed.

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BRIEF IN OPPOSITION

Vivian Turner, representing the estate of her deceased mother Vivian Wilkinson, respectfully submits that the Court should deny the petition for writ of certiorari filed by R.J. Reynolds Tobacco Company for at least three reasons, the last two of which also show why the Court should decline Reynolds's request to hold this case pending disposition of *R.J. Reynolds Tobacco Co. v. Graham*, No. 17-415.

First, the petition should be denied for the same reasons advanced by the respondents in *Graham* and the eighteen prior cases in which this Court denied certiorari petitions presenting the same due process questions. *See Graham* Br. in Opposition at 1a-18a (quoting questions in denied petitions). While this brief shows that the inverse is not true, Ms. Turner accepts Reynolds's concession that, if certiorari is denied in *Graham*, it should be denied here as well. (*See* Pet. at 11 (contending that the Court should "dispose of the petition in a manner consistent with its ruling in" *Graham*).)

Second, the due process challenge developed in the petition in this case was neither raised nor ruled upon below. Though it summarily noted an intent to preserve a due process claim in its appellate brief below, that brief identified no ruling being appealed, contained no actual argument or citation of supporting authorities, and in no way made the argument presented in the petition that the fraudulent concealment and conspiracy findings are based on fraudulent statements

and “there is no way to tell” which statements the *Engle* jury found to be fraudulent.

Third, even if the issue had been preserved and even if the *Graham* petition posed a cert-worthy question as to *Engle*-progeny claims for strict liability and negligence, the petition in this case should still be denied. Unlike Ms. Graham, Ms. Turner has a judgment resting on her fraudulent concealment and conspiracy claims. Whatever merit might be found in the *Graham* petition has no application to the judgment *in this case* because the *Engle* findings on the concealment and conspiracy claims merely established Reynolds had a duty to disclose the material dangers it knew its cigarettes posed. Reynolds’s claim that the findings depended on what statements each class member heard was expressly rejected by the Supreme Court of Florida. That court held that the *Engle* findings that depended on individual statements do not have *res judicata* effect, and it was Ms. Turner’s individual jury – not the *Engle* class jury – that identified the statements concealing material information on which Ms. Turner’s mother relied.



COUNTERSTATEMENT OF THE CASE

Though it contains two minor factual errors,¹ Ms. Turner otherwise adopts the Brief in Opposition filed

¹ First, Ms. Graham’s brief mistakenly suggests that the *Engle* “jury made additional findings about air holes, filters, and adulteration with glass fibers.” *Graham* Brief in Opposition at 21.

in *Graham*, which solely addressed the *Engle* litigation and approved findings relating to the class claims of negligence and strict liability. As that brief demonstrates, Reynolds seeks to present a question resting on two flawed premises.

First, in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1257 (Fla. 2006), *cert. denied*, 552 U.S. 941 (2007), the Supreme Court of Florida clearly determined, based on the hundred-thousand page trial record including the 37,750-page transcript from the year-long Phase I trial, that the findings challenged in *Graham* applied to all cigarettes containing nicotine manufactured by each defendant. Reynolds's suggestion that the supreme court gave those findings preclusive effect without making that determination is simply not true.

Second, the *Engle* record fully supported that determination notwithstanding the fact that some of the evidence presented only applied to certain kinds of cigarettes, such as filtered cigarettes. The record shows that the defendants, including Reynolds, denied that their cigarettes were addictive or caused disease, but substantial evidence showed to the contrary across the board with no limitation to particular brands or types of cigarettes. Reynolds was fully aware (as was the

No such findings were made; the *Engle* jury only rendered findings applicable to all cigarettes containing nicotine sold by the defendants.

Second, in one place, Ms. Graham states that she prevailed on her intentional tort claims. *Id.* at 8. But as she correctly notes later on, her jury actually found for the defendants on those claims. *Id.* at 19; *Graham* Petition at App. 362.

trial court and other parties) that the Phase I trial was intended to resolve only issues common to the class and they argued over the proper form of the verdict with that in mind. In the hope they would prevail, the defendants made clear their desire that the findings apply to all class members as well. The supreme court had the benefit of this full record when it determined which findings would apply to all class members, and though it had no obligation to do so, the court reaffirmed that determination in *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (Fla.), *cert. denied*, 134 S. Ct. 332 (2013).

Ms. Turner also denies a third premise of Reynolds's position in this case that is not at issue in *Graham*. Specifically, Reynolds contends that *Engle* claims for fraud and conspiracy depend upon particular statements and then claims a due process violation because the class jury's findings on those claims do not identify which statements were fraudulent. (Pet. 4-5.) But a review of the history of the fraud and conspiracy claims demonstrates that they were based on a duty to disclose the dangers of defendants' cigarettes.

The class asserted two kinds of fraud claims – misrepresentation and concealment – and corresponding conspiracy claims for each fraud claim. The class offered numerous examples of clear misrepresentations, including myriad false and half-true statements about whether cigarettes cause cancer or are addictive, whether filters protect smokers, whether so-called “light” and

“low tar” cigarettes are safer, and the like. But it also presented substantial evidence that each defendant – who not only knew from internal studies that its cigarettes caused cancer and were addictive, but actually designed them to ensure they would have enough nicotine to be addictive – had a duty to disclose what it knew and had done both because of its superior knowledge and by publicly and voluntarily undertaking to discover and disclose any information suggesting its cigarettes caused disease or were addictive. The class also presented substantial evidence of a conspiracy among the main tobacco companies to actively conceal the dangers of smoking and form sham “scientific” and “research” organizations that would give the false appearance that they were researching any dangers and would disclose any adverse risks they discovered.

The Phase I verdict form confirms that, while the misrepresentation claims depend on statements, the concealment claims do not. The question for the misrepresentation claims (both direct misrepresentation by each defendant and a conspiracy to misrepresent) was whether the defendants made fraudulent statements, while the concealment claims (both direct and by conspiracy) asked whether the defendants had concealed or omitted information about the dangers of their products with no mention of statements.

Similarly, the questions on the Phase II verdict form on the misrepresentation claims asked the jury to determine whether each class representative relied on some statement the jury had found to be fraudulent, while the questions on the concealment claims asked

whether the defendants' concealment or omission caused the smokers' disease, again with no mention of statements.

After Phase II, a final judgment was entered awarding compensatory damages to the three class representatives and punitive damages to the entire class, and it was the appeal of this final judgment that led to the Supreme Court of Florida's decision. *Engle*, 945 So. 2d at 1254. The supreme court demonstrated the difference between the misrepresentation and concealment claims by concluding that the former findings would not have *res judicata* effect because they were "inadequate to allow a subsequent jury to consider individual questions of reliance and legal cause." *Id.* at 1255; *see also id.* at 1269 (noting that these findings are not retained for individual actions because they "involved highly individualized determinations"). In contrast, the court held that the concealment findings would have *res judicata* effect because they were "common to all class members and will not change from case to case." *Douglas*, 110 So. 3d at 428. This was a clear determination that these claims did not depend on whether a class member heard or relied upon any given statement and instead established that the defendants had undertaken a duty to disclose the dangers they knew their cigarettes posed.

After the supreme court decertified the class in *Engle* and directed class members to file progeny actions to litigate the individual phase of their claims, 945 So. 2d at 1277, Ms. Turner filed an individual action asserting claims of negligence, strict liability, fraudulent

concealment, and conspiracy to fraudulently conceal the dangers of smoking. Over the course of the ten-day jury trial, Ms. Turner presented evidence that her mother died of chronic obstructive pulmonary disease (“COPD”) caused by her addiction to Reynolds’s cigarettes and had not known all the dangers that Reynolds knew its cigarettes posed.

The jury was ultimately instructed that to find Ms. Turner’s mother was a member of the *Engle* class, it first had to determine that her COPD was not merely caused by smoking, but by an *addiction* to cigarettes. It was told that, if it found she was not a class member, its verdict would be for the defendant, but if it found she was a class member, then it would be required to apply the findings approved in *Engle* in making the rest of its determinations on liability. But it was prohibited from considering those findings “in any way” when it came to “determining whether punitive damages are warranted and, if so, the amount of punitive damages.”

It was instructed that to find for Ms. Turner on her negligence and strict liability claims, it had to determine whether cigarettes manufactured by Reynolds had caused her COPD. It was instructed that to find for Ms. Turner on her concealment claims:

[T]he issue for your determination is whether Vivian Wilkinson reasonably relied to her detriment on any statement of material fact by R.J. Reynolds Tobacco Company that concealed or omitted material information not otherwise known or available concerning the

health effects or addictive nature of smoking cigarettes and, if so, whether such reliance was a legal cause of Vivian Wilkinson's COPD.

And it was told that the statement must be "misleading because it conceals or omits a material fact," which the court defined as "one that is of such importance that Vivian Wilkinson would not have acted as she did but for the concealment or omission of that fact." It was given a similar instruction on the conspiracy claim, requiring reliance on "a statement made in furtherance of Reynolds's agreement to conceal or omit information concerning the health effects or addictive nature of cigarettes."

The jury first determined that Ms. Turner had proven her mother was a member of the class because her COPD was caused by her addiction to cigarettes. Next, it found that Reynolds had failed to prove its statute of limitations defense, which required it to show Ms. Turner's mother knew or should have known she had COPD caused by smoking before May 5, 1990. And it found for Ms. Turner on her negligence and strict liability claims by finding that it was Reynolds's cigarettes in particular that had caused her mother's COPD.

The jury found for Ms. Turner on her fraudulent concealment claim by finding that she had proven her mother had relied to her detriment on one or more statements by Reynolds of material fact that concealed or omitted material information about the dangers of smoking and this was a cause of her COPD. And it

found for her on the conspiracy claim by finding that her mother had relied on statements of material fact made in furtherance of the conspiracy that concealed or omitted material information about the dangers of smoking.

Reynolds appealed and in its brief stated, “Reynolds raises a single issue on appeal: the trial court’s error in excluding the testimony of Dr. Mark Farber, Reynolds’s expert pulmonologist, on an issue that was essential to Reynolds’s statute of limitations defense.” (Initial Br. of Appellant at 1.) Its brief did not identify any ruling by the trial court regarding the due process issue it seeks to raise in this Court, and the sum total of its “argument” on this issue was as follows:

Reynolds respectfully preserves its contention that allowing Plaintiff to use the *Engle* findings to prove the conduct elements of her individual claims violates Reynolds’s federal constitutional rights to due process and equal protection. Reynolds recognizes that this Court is bound by Florida Supreme Court precedent holding to the contrary. *See Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 432 (Fla. 2013).

(*Id.* at 23.)

The state intermediate appellate court affirmed the judgment without analysis or citations. (Pet. App. 1-2.)



REASONS FOR DENYING THE PETITION

I. **Certiorari Should Be Denied Here for the Same Reasons It Should Be Denied in *Graham*.**

Reynolds has already conceded that if certiorari is denied in *Graham*, it should be denied here as well. (See Pet. at 11 (contending that the Court should “dispose of the petition in a manner consistent with its ruling in” *Graham*).) While Ms. Turner denies the inverse and Parts II and III demonstrate why this petition should not be held pending *Graham*, she accepts Reynolds’s concession that a denial of certiorari in *Graham* requires denial of its petition in this case. Because Ms. Graham has already briefed many important reasons to deny certiorari in her case, Ms. Turner only supplements that argument.

Engle reviewed a final judgment so there is nothing unusual about applying *res judicata* effect to the findings that were affirmed in favor of the class. While the class was decertified and class members were directed to file progeny actions to complete their individual claims, the fact remains that not only was Reynolds a party to the *Engle* final judgment, but so, too, was each class member, including Ms. Turner. See *Soffer v. R.J. Reynolds Tobacco Co.*, 187 So. 3d 1219, 1224 (Fla. 2016) (approving observation in lower court opinion (that was otherwise quashed) that “[p]rogeny plaintiffs wear the same shoes, so to speak, as the plaintiff in *Engle* because they are the plaintiffs from *Engle*”); *Douglas*, 110 So. 3d at 432 (“[O]ur decision in *Engle* allowed members of the decertified class to pick up

litigation of the approved six causes of actions right where the class left off. . . .”).

And while the class action and progeny actions were different proceedings in the sense that they have separate case numbers, each progeny action merely asserts the exact same causes of action asserted and partially resolved by *Engle*. Thus, there is nothing unusual or inappropriate about affording the affirmed parts of the judgment with *res judicata* effect and precluding further litigation on these common issues between the same parties involving the same causes of action.

This is no different than an individual case where the appellate court affirms part of the judgment but reverses another part for a new trial only on the remaining issues while making clear that the affirmed issues may not be relitigated on remand. The court rejected the dissent’s concern that this would involve subsequent juries re-examining findings made by the original jury. *Compare id.* at 1270 *with id.* at 1286-87 (Wells, J., dissenting in part). And it plainly resolved with finality the question of which *Engle* findings applied uniformly to all class members and which depended on the kind of cigarette each class member smoked or the statements each class member heard. Reynolds and the other defendants challenged that determination in this Court raising the same due process question urged here, and the Court denied their petition and then denied rehearing. *R.J. Reynolds Tobacco Co. v. Engle*, 552 U.S. 941, *reh’g denied*, 552 U.S. 1056 (2007).

Regardless of whether Reynolds wanted to accept determination, that should have been the end of the litigation on this issue because even the traditional doctrine of claim preclusion applies to subsequent litigation between the same parties on the same causes of action. *Douglas*, 110 So. 3d at 433. Issue preclusion, on the other hand, prevents the same parties from relitigating the same issues that were litigated and actually decided in a second suit involving a different cause of action. Applying that doctrine here – to the same causes of action from the class action as opposed to a different cause of action – would be improper, as the supreme court found. *Id.* (citation omitted).

In any event, whether the court applied the doctrine of claim preclusion or issue preclusion should make little difference because the court had actually determined that each approved finding applied the same to each class member. *See Walker v. R.J. Reynolds Tobacco*, 734 F.3d 1278, 1289 (11th Cir. 2013) (“If due process requires a finding that an issue was actually decided, then the Supreme Court of Florida made the necessary finding. . . .”), *cert. denied*, 134 S. Ct. 2727 (2014). The court’s statement that the findings would be “useless” if the court had meant issue preclusion, *id.*, does not mean, as Reynolds suggests, that the court had been unable to determine from the record of the year-long *Engle* Phase I trial whether the findings applied to all cigarettes manufactured by the defendants. Rather, it clearly meant that they would be useless in terms of saving any time and effort to avoid relitigation in the progeny actions because each class member

would be required to “trot out the class action trial transcript to prove applicability of the phase I findings.” *Id.* (quoting *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1067 (Fla. 1st DCA 2010)).

At bottom, Reynolds claims a due process right to relitigate the meaning of a verdict reached in a prior proceeding that resulted in a final judgment between the same parties involving the same claims. It cites no precedent supporting this claim, and ample precedent cited and developed in Ms. Graham’s brief flatly rejects it. Reynolds then asks this Court to review the hundred-thousand-page record from *Engle*, including the nearly 40,000-page transcript from the Phase I trial, to reach a different factual conclusion than the courts below, an endeavor this Court’s rules warn is rarely undertaken. *See* Rule 10 (“A petition is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”); *see also Hernandez v. New York*, 500 U.S. 352, 366 (1991) (“Our cases have indicated that, in the absence of exceptional circumstances, we would defer to the state-court factual findings, even when those findings relate to a constitutional issue.”).

Because it had notice and an opportunity to be heard on this issue in *Engle* (and again in *Douglas* and again in *Walker* and yet again in *Graham*), Reynolds’s claim to a due process right to relitigate this issue over and over again is frivolous. In short, Reynolds’s claim that “there is no way to tell” whether the findings applied to each class member was long ago finally

litigated between these parties. Reynolds lost and it identifies no precedent whatsoever suggesting it has a due process right to relitigate that issue.

II. The Court Should Not Hold and Should Promptly Deny the Petition Regardless of *Graham* Because Ms. Turner’s Judgment Would Survive Even if the Court Grants Certiorari and Vacates *Graham*.

The due process claims serially brought by Reynolds and its co-defendants do not challenge the *res judicata* effect of all of the approved *Engle* findings. Instead, Reynolds and its co-defendants have only raised a due process challenge to the findings where they posit that “there is no way to tell” whether the findings applied to all class members equally. For example, Reynolds does not dispute the *res judicata* effect of the findings that nicotine in cigarettes is addictive and smoking cigarettes causes COPD, lung cancer, and other diseases. (See, e.g., *Graham* Reply at 5-6 (conceding that these findings are sufficiently specific to have preclusive effect).)

In *Graham* (and all eighteen prior petitions), Reynolds and its co-defendants have repeatedly argued “there is no way to tell” whether the negligence and strict liability findings apply only to certain types of cigarettes (e.g., filtered cigarettes) or to all cigarettes sold by the defendants. But whether this claim gives Reynolds the right to relitigate the preclusive effect of those findings is an issue that can have no effect on Ms.

Turner’s judgment because, even if this Court were to reverse the judgment to the extent it relies on those claims, the fact remains that her judgment would stand on her concealment or conspiracy claims. Thus, Reynolds can get no relief in this case simply by prevailing on its argument in *Graham*. It would unduly prejudice Ms. Turner’s rights to hold her petition for a decision that can have no effect on her judgment.²

This is why Reynolds makes an additional argument in the petition in this case that it did not make in *Graham*. It argues here that applying the concealment and conspiracy findings violates its due process rights for a different reason – because, it asserts, those claims depend on statements and there is no way to tell which statements the *Engle* jury found to have fraudulently concealed information about the dangers it knew its cigarettes posed. (Petition at 4-5.) Accordingly, the only reason to hold this petition pending *Graham* or to ever grant certiorari in this case would be if Reynolds had perfected a meritorious and cert-worthy due process challenge to the concealment and conspiracy findings. It did neither.

² Due to a unique statute benefitting only these tobacco companies, Reynolds does not have to pay the judgment against it until it has exhausted review in this Court. § 569.23, Fla. Stat. (2017); *R.J. Reynolds Tobacco Co. v. Sikes*, 191 So. 3d 491, 494-95 (Fla. Dist. Ct. App. 2016). Thus, these cases are not like most other cases where holding a petition does not preclude the respondent from enforcing the judgment absent petitioner showing specific reasons why a stay is justified, as required by this Court’s Rule 23.3.

A. Reynolds Failed to Raise a Due Process Challenge to the Concealment and Conspiracy Findings Below.

This Court’s Rule 14.1(g)(i) required Reynolds to specify the “stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised,” including the “method or manner of raising them and the way in which they were passed on by those courts . . . with specific references to the places in the record where the matter appears . . . so as to show that the federal question was timely and properly raised.”

Reynolds seeks to comply with Rule 14.1(g)(i)’s requirement of showing how and when it raised the issue at trial by pointing to a pretrial colloquy between its counsel and the trial court indicating that Reynolds had previously made some unstated “objection to the application of the *Engle* findings” and was “assuming the Court is going to stand with its prior rulings and allow the plaintiffs to use and read the *Engle* findings.”³ (Pet. App. 4.) The trial court merely stated, “I don’t understand why I wouldn’t.” *Id.*

³ Ms. Turner is aware of no other place in this record where Reynolds made any due process argument specifically challenging the concealment and conspiracy findings it challenges for the first time here. Should Reynolds file a reply that identifies something else in the record it claims preserved the issue in this case, the Court should disregard it. Rule 14.1(g)(i) requires this showing to be made in the petition so that the respondent will have the opportunity to address it.

Instead of articulating a due process challenge to the concealment and conspiracy findings, the objection Reynolds made was directed at the finding that smoking causes numerous diseases and had nothing to do with due process. Specifically, Reynolds asked the court to only tell the jury about the finding that smoking causes COPD and not all the various forms of cancer because COPD was the disease at issue in this case. That request had nothing to do with the federal issue Reynolds asserts in its petition.

Even if it had raised the issue in the trial court, Reynolds never made any due process argument about the concealment and conspiracy findings on appeal. To the contrary, it told the appellate court that the “single issue on appeal” it was raising involved the exclusion of testimony by one of its witnesses on its statute of limitations defense. (Initial Br. of Appellant at 1.) It did have a later statement about due process, but the sum total of that statement was as follows:

Reynolds respectfully preserves its contention that allowing Plaintiff to use the *Engle* findings to prove the conduct elements of her individual claims violates Reynolds’s federal constitutional rights to due process and equal protection. Reynolds recognizes that this Court is bound by Florida Supreme Court precedent holding to the contrary. *See Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 432 (Fla. 2013).

(Id. at 23.) The failure to articulate the basis for an argument or provide authorities in support in the initial

brief constitutes an abandonment of the issue under Florida procedural law. *See, e.g., Hammond v. State*, 34 So. 3d 58, 59 (Fla. Dist. Ct. App. 2010) (“Claims for which an appellant has not presented any argument, or for which he provides only conclusory argument, are insufficiently presented for review and are waived.”).

In short, because Reynolds never presented its due process argument about the concealment and conspiracy claims in the lower courts, this Court should deny certiorari even if it otherwise found the question to be worthy of review. *See, e.g., Wood v. Milyard*, 566 U.S. 463, 473 (2012) (“For good reason, appellate courts ordinarily abstain from entertaining issues that have not been raised and preserved in the court of first instance.”); *United States v. Jones*, 565 U.S. 400, 413 (2012) (arguments not preserved below are forfeited); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 194 (2007) (declining to consider claims not considered below).

B. The Concealment and Conspiracy Findings Did Not Rely on Statements and Instead Merely Established Reynolds’s Duty to Disclose the Dangers It Knew Its Product Posed.

Even if the issue had been preserved, whether applying the *Engle* concealment and conspiracy findings violates Reynolds’s due process rights is not an issue worthy of this Court’s review. Reynolds does not cite a single appellate opinion even examining this issue other than *Engle* itself. The argument is not addressed

in the Supreme Court of Florida's decision in *Douglas* or the Eleventh Circuit's decisions in *Graham* and *Walker*, because the defendants prevailed on the concealment and conspiracy claims in each of those cases. So not only is there no conflict of decisions, there are no decisions examining this issue **at all**.

The absence of any case law on this point despite all these years of litigation and attempting to relitigate *Engle* speaks volumes. Again, Reynolds's due process challenge to the concealment and conspiracy findings is based on the premise that those claims rest on fraudulent statements and Reynolds's otherwise valid claim that "there is no way to tell" which statements the *Engle* jury found to be fraudulent. But this argument confuses the concealment findings with the misrepresentation findings. Based on much the same reasoning Reynolds employs here, the Supreme Court of Florida held that the findings on the class claims for misrepresentation would not have *res judicata* effect because they were "inadequate to allow a subsequent jury to consider individual questions of reliance" and "involved highly individualized determinations." *Engle*, 945 So. 2d at 1255, 1269. This is consistent with long-standing Florida law prohibiting class treatment of claims based on fraudulent statements because a statement upon which one class member might rely might not be heard by or be material to another. *E.g.*, *Lance v. Wade*, 457 So. 2d 1008, 1010-11 (Fla. 1984).

The clear distinction the supreme court drew in approving the concealment findings for *res judicata* effect was a patent rejection of the notion that those

claims depended on class members hearing any particular statements. As the supreme court has emphasized, it determined that each of the approved findings were “common to all class members and will not change from case to case.” *Douglas*, 110 So. 3d at 428. The only way the concealment findings can be common to all class members and not change from case to case depending on which statements each smoker heard and relied upon is if they depended not on statements, but on a duty to disclose.

Indeed, the very first Florida appellate decision to apply the concealment findings explained that these findings necessarily meant that the class had proven “the tobacco companies had a duty to disclose” material facts they knew would affect their customers’ decision to smoke. *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1068 (Fla. 1st DCA 2010), *cert. denied*, 566 U.S. 905 (2012). More recently, a Florida appellate court rejected Reynolds’s argument that the concealment claims depend on the smoker hearing and relying on statements and explained that the *Engle* trial record established defendants’ duty to disclose material facts regarding the dangers of their cigarettes. *Philip Morris USA, Inc. v. Duignan*, No. 2D15-5055, 2017 WL 5471866, *9-11 (Fla. Dist. Ct. App. Nov. 15, 2017).

This means that a class member can prevail by proving either reliance on a statement that omitted material information that renders it misleading or reliance on a simple misapprehension of the dangers of smoking that would have been remedied had Reynolds disclosed what it knew. *Id.*; *see also R.J. Reynolds*

Tobacco Co. v. O'Hara, No. 1D15-5764, 2017 WL 4526819 (Fla. 1st DCA Oct. 11, 2017) (noting that jury instruction allowed class member to prove concealment claim by showing either reliance on a statement omitting information or that Reynolds's concealment was a legal cause of his cancer); *R.J. Reynolds Tobacco Co. v. Calloway*, 201 So. 3d 753, 766 (Fla. Dist. Ct. App. 2016) (holding that a class member need not prove reliance on any statement unless the facts of the particular progeny case warrant it), *cert. denied*, 138 S. Ct. 163 (2017).

Thus, Reynolds is mistaken when it claims that Ms. Turner relied on the *Engle* findings on concealment and conspiracy to conceal to “establish that the advertisements and other statements by Reynolds on which her mother supposedly relied were fraudulent.” (Petition at 13.) She only used the *Engle* findings to establish that Reynolds had a duty to disclose the material dangers it knew its cigarettes presented. She had to prove to the jury in her case that her mother relied on statements by Reynolds that were rendered misleading by failing to disclose these dangers.

While the jury instructions and verdict form demonstrated that she did prove her mother had relied on statements, they equally showed that she had to prove to the jury in her individual case that the statements on which her mother relied were misleading because they omitted material facts. Her jury had to determine that the omitted information was sufficiently material to her mother to render them misleading. In other words, her individual jury determined the

statements were fraudulent by omission and relied on the *Engle* findings only to establish Reynolds's duty to disclose.

Moreover, the jury awarded punitive damages on the concealment and conspiracy claims⁴ after being told that it could not consider the *Engle* findings "in any way" for purposes of determining whether punitive damages were warranted and, if so, the amount. Thus, there can simply be no doubt that this jury identified the specific fraudulent conduct underlying the judgment.

To the extent Reynolds seeks to make some new claim in its reply brief that there is no way to tell which dangers the *Engle* jury found it had to disclose should not only be rejected as coming too late, but also because Ms. Turner had to prove materiality in her progeny action. Reynolds cannot seriously argue that it only had a duty to disclose some material dangers, but not others.

In short, it was the *Engle* jury that found that Reynolds had a duty to disclose the dangers it knew its cigarettes posed, and it was Ms. Turner's individual jury that identified the specific statements that were fraudulent for violating this duty. The petition therefore fails to state even a colorable claim that use of the concealment and conspiracy findings violated

⁴ The jury was instructed that it could only award punitive damages in this case if it found for Ms. Turner on these claims. It was prohibited from considering punitive damages on the negligence and strict liability claims.

Reynolds's right to due process. It makes no argument that it was denied notice and opportunity to be heard at either the class stage or in Ms. Turner's progeny action. It was afforded and exercised the opportunity to fully litigate and defend Ms. Turner's claims, and there is no reason to spend additional judicial resources and further delay finality in this already protracted litigation.

◆

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be promptly denied.

Respectfully submitted,

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December 13, 2017