No. 17-___

IN THE

Supreme Court of the United States

R. J. REYNOLDS TOBACCO COMPANY,
Petitioner,

v.

JAMES LEWIS, as personal representative of the Estate of Rosemary Lewis,
Respondent.

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

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 September 15, 2017, in *R.J. Reynolds Tobacco Co. v. Graham*, No. 17-415.

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 parties to the proceedings in the Florida Fifth District Court of Appeal were James Lewis, as personal representative of the Estate of Rosemary Lewis, and petitioner R.J. Reynolds Tobacco Company.

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. ("RAI"), which in turn is an indirect, wholly owned subsidiary of British American Tobacco p.l.c., a publicly held corporation.

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PETITION FOR A WRIT OF CERTIORARI

This case presents the same questions that are 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 Fifth District Court of Appeal is unreported, but available electronically at 2017 WL 1829633 (Fla. Dist. Ct. App. May 2, 2017). Pet. App.1a.

JURISDICTION

The Florida Fifth District Court of Appeal affirmed the judgment in an unpublished, per curiam opinion on May 2, 2017. Pet. App.1a. Because the Florida Supreme Court lacks jurisdiction to review such dispositions, *Fla. Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988), the Fifth District's decision constitutes a final judgment from "the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a).

On July 26, 2017, Justice Thomas extended the deadline for Reynolds to file a petition for writ of certiorari to September 29, 2017. *See* No. 17A95. Reynolds timely filed this petition.

CONSTITUTIONAL PROVISIONS 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.

The Supremacy Clause of the Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority 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, § VI, cl. 2.

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 certiorari pending*, No. 17-415 (filed Sept. 15, 2017).

In addition, both the Florida Supreme Court and the 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 Co.*, 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).

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 and implied-preemption questions as this petition: (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. 17-415. *Graham*—a fractured decision in which Judge Tjoflat authored a 200-plus-page dissent—is an ideal vehicle for this Court to consider the two issues presented in this case and the thousands of other *Engle* progeny cases pending in state and federal courts across Florida.

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

A. The 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. They sought relief under a variety of theories, including strict liability, negligence, fraudulent concealment, and conspiracy to fraudulently conceal. *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1256–57 & n.4 (Fla. 2006) (per curiam). And they sought that relief on behalf of a class that, as later modified on appeal, included "all [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." *Id.* at 1256.

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 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. 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, *Engle* 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.

Several years after *Douglas*, 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. Under the rationale of *Douglas*, which concerns itself with what could have been decided rather than what was actually decided, *id.* at 593, the possibility of a narrower liability theory was enough to save the strict-liability and negligence findings from implied preemption.

B. The Proceedings In This Case

Rosemary Lewis began smoking in the 1960s. In 1997, she sued R.J. Reynolds Tobacco Company. She then died of cancer in 1998. After her death, her husband commenced a new lawsuit as personal representative of her estate.

At trial, and as relevant here, Mr. Lewis claimed relief under theories of strict liability and negligence. 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 Mrs. Lewis to be a member of the *Engle* class, it should conclude that Reynolds was negligent (an element of the negligence claim) and that it sold defective products (an element of the strict-liability claim). Over Reynolds's objection, the trial court gave these instructions. *See, e.g.*, Trial Tr. at 3509.

The jury found for Lewis on his negligence and strict-liability claims. Reynolds appealed to Florida's Fifth District Court of Appeal. There, it raised two arguments that are relevant here. First, 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 Mrs. Lewis. Second, Reynolds argued that federal law preempted the defect and negligence claims to the extent the *Engle* findings were construed as resting on the theory that all cigarettes are defective.

The Fifth District affirmed in a per curiam, unpublished decision that contains no reasoning. And because the Florida Supreme Court lacks jurisdiction to review to such decisions, *Fla. Star*, 530 So. 2d at 288 n.3, Reynolds had exhausted its state remedies.

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

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

On the due-process issue, the *Graham* majority 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 defendants' 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.

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 an opinion that ran to more than 200 pages, 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)).

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

REASONS FOR GRANTING THE PETITION

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

The Court should therefore hold this petition pending the outcome of *Graham* and then dispose of this petition consistently 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 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 Lewis 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 her 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, Mrs. Lewis may have smoked a type of Reynolds cigarette that the *Engle* jury found was *not* defective.

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

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. Federal Law Preempts The *Engle* Strict-Liability And Negligence Findings To The Extent They Indict All Cigarettes.

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. 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.

As explained in the *Graham* petition, 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." *Id.* at 137.[1]

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[1] *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 of 1983, Pub. L. No. 98-24, 97 Stat. 175; Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200 (1984); Comprehensive Smokeless Tobacco Health Education Act of 1986, 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).

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 forty years 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 due-process requirement of an actual decision on every essential element of a claim 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 strict-liability and negligence claims is unlawful. This Court should therefore grant review in *Graham* to consider both the due-process and implied-preemption questions. Indeed, in his dissent in *Graham*, Judge Tjoflat "urged" this "Court to clarify the hazy state of preemption law," "given the uncertainty surrounding this particular issue and preemption generally." 857 F.3d at 1299–1300 (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 dismissed the defendants' implied-preemption argument by relying on *Douglas*'s holding that the findings establish anything that the *Engle* jury could have decided. The court reasoned that because the *Engle* jury could have based its strict-liability and negligence findings on brand-specific evidence that "the defendants intentionally manipulated nicotine levels in their products," *Marotta*, 214 So. 3d at 601–02, the findings can be understood as applying to fewer than all cigarettes. But just as the *Engle* jury could have opted for a brand-specific theory, so too could it have opted for an all-cigarettes one. And in any case, the cumulative effect of deeming the *Engle* jury to have decided against the defendants every brand-specific tort theory that it could have decided is to indict all cigarettes sales as tortious (just piecemeal rather than in one fell swoop). And so, even if *Marotta* were to carry the day, the implied-preemption question would still be presented.

III. The Court Should Hold This Petition Pending Resolution Of *Graham*.

The Court should hold this petition pending the resolution of the petition for a writ of certiorari 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 and implied-preemption questions 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 or implied preemption prohibits *Engle*-progeny plaintiffs from relying on the Phase I findings to establish elements of their claims, then it would be fundamentally unfair to permit the constitutionally infirm judgment in this case to stand. Thus, the Court should hold this petition pending the resolution of *Graham* and, if this Court grants review and vacates or reverses in *Graham*, it should thereafter grant, vacate, and remand in this case.

CONCLUSION

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

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