No. SJC-13330

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

PATRICIA WALSH GREENE, individually, and PATRICIA WALSH GREENE AND THOMAS WALSH, as personal representatives of the estate of FREDERICK DOUGLAS GREENE, JR.,
Plaintiffs-Appellees,

v.

PHILIP MORRIS USA INC.,
Defendant-Appellant,

and

STARS MARKETS COMPANY, INC.,
Defendant.

Appeal from the Commonwealth of Massachusetts Superior Court
Department of the Trial Court, Middlesex County
Case No. 1581-CV-01808

BRIEF FOR AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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December 14, 2022

CORPORATE DISCLOSURE STATEMENT

The National Consumer Law Center ("NCLC") is a Massachusetts non-profit corporation established in 1969 and incorporated in 1971. It is a national research and advocacy organization focusing specifically on the legal needs of low-income, financially distressed, and elderly consumers. NCLC operates as a tax-exempt organization under the provisions of § 501(c)(3) of the Internal Revenue Code. It has no parent corporations and no publicly held company owns 10% or more of its stock.

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STATEMENT OF IDENTITY & INTEREST

The National Consumer Law Center (NCLC) is recognized nationally as an expert in consumer credit issues. For more than 50 years, NCLC has drawn on this expertise to provide information, legal research, policy analyses and market insights to federal and state legislatures, administrative agencies, and the courts. NCLC also publishes a twenty-two volume Consumer Credit and Sales Legal Practice Series which includes Unfair and Deceptive Acts and Practices (10th ed. 2021) and Consumer Class Actions (10th ed. 2020). A major focus of NCLC's work is to increase public awareness of unfair and deceptive practices perpetrated against low-income and elderly consumers, and to promote access to justice protections against such practices.

STATEMENT REGARDING PREPARATION OF BRIEF

Pursuant to Mass. R. App. P.17(c)(5), Amicus make the following declarations:

No party of party's counsel authored this brief in whole or part;

No party or party's counsel contributed money that was intended to fund preparing or submitting this brief;

No person or entity—other than Amicus, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief; and

Neither Amicus nor its counsel represents or has represented any of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

INTRODUCTION

Philip Morris has asked this Court to take the unprecedented step of invalidating the General Court's longstanding choice to establish a specific, twelve percent pre- and post-judgment interest rate for tort claims. As the company sees it, this "punitive" interest rate violates its due process because it is "not rationally related to any legitimate government interest." Op. Br. at 25. Although deep-pocketed corporate defendants have frequently trumpeted this same argument in courts throughout the country, it has never been accepted—and for good reason. A legislature's choice to set a fixed interest rate for certain claims serves several legitimate goals, among them (1) "compensat[ing] a damaged party for" delay in receiving their lawfully owed damages, *McEvoy Travel Bureau, Inc. v. Norton Co.*, 408 Mass. 704, 717 (1990), (2) ensuring that defendants do not profit from a plaintiff's loss of the time-value of money by extending appeals and retaining damages for years after a jury has awarded them, *Matter of Oil Spill by Amoco Cadiz Off Coast of France on Mar. 16, 1978*, 954 F.2d 1279, 1332 (7th Cir. 1992), and (3) "encourag[ing] early settlement of claims," *Oden v. Schwartz*, 71 A.3d 438, 455–57 (R.I. 2013). No authority supports Philip Morris's novel theory that the Constitution somehow requires, as a matter of due process, that a legislature's chosen interest rate be tied to the market rate. To the contrary, the Massachusetts General Court has long

exercised its discretion to determine an appropriate interest rate that is specific to the type of claim.

Philip Morris's attempt to extend this Court's holding in *Doull v. Foster*, 487 Mass. 1 (2021), far beyond *Doull*'s own limited application fares no better. In *Doull*, this Court held that a but-for causation requirement should apply to certain negligence claims. But the decision was carefully cabined in its scope. It recognized that applying such a standard to other types of claims—like Chapter 93A claims that raise no negligence theory at all or those that arise in toxic tort cases—would be inappropriate. As a result, this Court should decline Philip Morris's invitation to adopt a blanket application of a but-for causation standard for claims that don't fit within *Doull*'s intentionally defined category of claims. There is no public policy reason to do so. To the contrary, such an unwarranted extension would lead to unintended consequences neither contemplated nor intended by the law of the Commonwealth.

ARGUMENT

I. The General Court's longstanding decision to adopt a fixed twelve percent pre- and post-judgment statutory interest rate for tort claims is constitutional.

In its bid to overturn the General Court's decades-old decision to adopt a fixed twelve percent pre- and post-judgment interest rate for tort claims, Philip Morris insists that such a rate "violate[s] due process because [it] impose[s] what are effectively punitive damages that are not rationally related to any legitimate government interest."

Op. Br. at 46. If accepted, that theory would be unprecedented. No court—anywhere in the country—has ever held that a legislature's choice to employ a fixed pre- or post-judgment interest rate is somehow *constitutionally* impermissible. Just the opposite: American courts have uniformly rejected similar efforts to constitutionalize a state legislature's policy choice about how best to treat earned interest on litigation damages. In fact, across the country, courts have uniformly recognized that because a twelve percent statutory interest rate—the exact rate at issue here—is rationally related to important goals, it is constitutional.

Consider, first, the Rhode Island Supreme Court. In *Oden v. Schwartz*, it held that a twelve percent interest rate "rationally serves a legitimate government interest." 71 A.3d 438, 455–57 (R.I. 2013). The court recognized that a fixed interest rate was intended "to encourage early settlement of claims and to compensate an injured plaintiff for delay in receiving compensation to which he or she may be entitled." *Id.* at 457. In so holding, the court had little difficulty rejecting the argument that a twelve percent interest rate "deprives a defendant of . . . due process." *Id*. at 456. Because such an interest rate both encourages settlement and compensates plaintiffs, it easily passed muster under the "rational basis standard of review." *Id.* at 457.

The Vermont Supreme Court has said much the same thing. Confronting a similar claim that the Vermont Legislature's decision to adopt a twelve percent interest

rate "bears no rational relationship to the intended purpose of the pre- and post-judgment statutes," the Court disagreed. *Concord Gen. Mut. Ins. Co. v. Gritman*, 146 A.3d 882, 890–893 (Vt. 2016). It explained, the twelve percent rate "make[s] plaintiffs whole" by ensuring they are "fully compensate[d]" and "encourage[s] defendants to settle claims and make prompt payments after judgment." *Id.* at 892. Indeed, the court specifically approved of the Legislature's choice to use "a fixed rate of simple interest" rather "than a floating rate pegged to the national prime rate" because a fixed rate is a "more efficient and predictable way to calculate prejudgment and postjudgment interest." *Id.*

Other state courts have likewise rejected similar challenges. The New Mexico Supreme Court upheld its legislature's choice to adopt a fifteen precent prejudgment interest rate, finding that it was designed both "to compensate the plaintiff for damages resulting from loss of use of the funds," and to "help[] ease the burden on our crowded court system by fostering settlement and preventing delay." *Sunwest Bank of Albuquerque, N.A. v. Colucci*, 872 P.2d 346, 351 (N.M. 1994); *see also Martinez v. Pojoaque Gaming, Inc.*, 264 P.3d 725, 731 (N.M. 2011) (upholding fifteen percent statutory post-judgment interest rate). The Louisiana Supreme Court, too, has described the purpose of post-judgment interest as "to encourage prompt payment of amounts awarded in the judgment, *and* to compensate the victorious party for the other

party's use of funds to which the victor was entitled under the judgment." *Sharbono v. Steve Lang & Son Loggers*, 696 So. 2d 1382, 1386 (La. 1997). *See* Christine Abely, *Adjusting Pre- and Post-Judgment Interest Rates for Consumer Debt Collection Actions*, 88 Tenn. L. Rev. 219, 238 (2020) (explaining how a "fixed interest rate" provides defendants "a greater incentive than they would in the context of a market rate of interest to ensure that litigation occurs in a rapid manner and to shorten the phases of pre-trial litigation, including discovery and motion practice").

That understanding accords with this Court's own. It has repeatedly recognized that the choice to employ a twelve percent fixed interest rate serves important objectives by "compensat[ing]" successful plaintiffs "for the loss of use" of their rightfully owed damages. *McEvoy Travel Bureau, Inc.*, 408 Mass. at 717. Because "[a] dollar today is worth more than a dollar tomorrow," a plaintiff deprived of the opportunity to immediately invest dollars that are rightfully theirs will necessarily be deprived of the ability to recoup the full value of those dollars. *Atl. Mut. Ins. Co. v. Comm'r*, 523 U.S. 382, 384 (1998). "The damaged party," therefore, "is entitled to a return on the money that the party would have had but for the other party's wrongdoing." *McEvoy Travel Bureau, Inc.*, 408 Mass. at 717. The interest thus "compensate[s] a damaged party for the loss of use or the unlawful detention of money." *Id.*; *see Bernier v. Bos. Edison Co.*,

380 Mass. 372, 388 (1980) ("Interest is awarded to compensate for the delay in the plaintiff's obtaining his money.").

Against this unanimous weight of authority, Philip Morris offers a lone policy argument. It claims that a fixed interest rate delivers an unfair "windfall" to plaintiffs because the market interest measured by yield on U.S. Treasury Securities has not exceeded 3% in the past decade. Op. Br. at 47. In the company's view, when the market rate is low, employing a fixed rate "no longer serve[s] to compensate plaintiffs for the lost time-value of their money" and instead "penaliz[es] defendants who choose to defend Lawsuits." *Id.* But when a defendant can take damages they owe and "reinvest the[] money in their business" and thus earn a "higher rate of return for the duration of the litigation," they "are in no position to complain when called on to pay prejudgment interest." *Matter of Oil Spill*, 954 F.2d at 1332. That is particularly true for large corporations that "have the ability to obtain a higher than usual return on their money." *Awards of Litigation Interest by Massachusetts Courts*, 35 Suffolk U. L. Rev. 453, 489 (2001). Indeed, for the past three years Philip Morris itself has been able to invest the damages it owes the plaintiffs in this case into investments to increase its own profits. With a current *net* profit margin of 11%, Philip Morris has had the ability to generate significant returns on the use of damages awards like the one here. *See* Macrotrends, *Philip Morris Profit Margin 2010-2022*, https://perma.cc/4ASS-XJH2; *see also* Jeremy

J. Siegel & Jeremy D. Schwartz, *Long-Term Returns on the Original S&P 500 Companies*, 62 Fin. Analysts J., 18, 23 (2006), https://perma.cc/TW32-JZJ2 (noting that Phillip Morris's annual return over the first 50 years of the S&P was 19.5%). In this way, a stable interest rate prevents a defendant from unjust profiting by dragging out a case.

There is, in any event, "no constitutional mandate that the statutory interest rate" be pegged to the national prime rate. *Concord Gen. Mut. Ins. Co.*, 146 A.3d at 890–893. That choice, instead, is appropriately left to the legislature. As this Court has explained, the General Court's choice of a pre- and post-judgment interest rate "enjoys a rebuttable presumption that it is a reasonable rate that would satisfy constitutional requirements." *Liberty Square Dev. Tr. v. City of Worcester*, 441 Mass. 605, 612 (2004). As a result, "the Legislature's decision to maintain the twelve per cent rate in certain contexts (e.g., tort judgments against private parties) despite fluctuating conditions is undoubtedly its prerogative." *Secretary of Admin. & Fin. v. Labor Rels. Comm'n*, 434 Mass. 340, 347 (2001); *see Specialty Materials, Inc. v. Highland Power Corp.*, 98 Mass. App. Ct. 1103 (2020) (rejecting the argument that a twelve percent interest rate for prejudgment interest "is unconstitutional").

Philip Morris, of course, remains free to make its policy arguments in the appropriate forum. In fact, the General Court is currently considering a bill to adjust the prejudgment interest rate to tie it to the market rate. *See* Mass. H.693 (2021). And

the General Court has shown that it is fully capable of choosing and adjusting the pre- and post-judgment interest rates to best suit the cause of action at issue. In addition to providing plaintiffs with compensation to make them whole, a stable rate gives notice to the parties of what the exact costs of continuing a case will be, which encourages settlement. And in some contexts, the General Court has determined that a stable rate best serves a statutes' goals. *See, e.g.*, (G. L. c., 229, §11) (setting an interest rate of 12% for pre- and post-judgment wrongful death claims); (M. G. L. c., 231, §6C) (setting 12% post-judgment interest rate for contract claims). In other contexts, however, the General Court has chosen to peg the interest rate to the market rate. *See, e.g.*, (G. L. c., 231, §60K) (pegging the pre-judgment interest rate for certain claims against health care providers to the "maturity Treasury yield plus 2 percent"); (G. L. c., 79, §37) (pegging the prejudgment interest rate for eminent domain claims to maturity treasury yield). This Court should decline Philip Morris's invitation to substitute its own judgment for that of the General Court.

II. This Court's decision in *Doull* to adopt a but-for causation standard for certain negligence claims does not apply to Chapter 93A claims or toxic torts.

In *Doull v. Foster*, 487 Mass. 1 (2021), this Court held that the but-for causation standard, rather than the substantial contributing factor test, should apply in most negligence claims. Given "the confusing terminology presented by the terms 'substantial

factor,'" the Court determined that "the substantial contributing factor test should no longer be used in most negligence cases." *Id.* at 19. Instead, the Court found, the "but-for standard is the proper standard in most negligence cases, as but-for causes can be identified and conduct that had no causal effect can be excluded." *Id.* at 10. But both *Doull*'s actual holding and its analysis was carefully limited: It expressly adopted the but-for standard *only* for a certain subset of negligence-based claims. Claims falling outside this intentionally limited category—either because they don't sound in negligence or because they involve toxic torts—are not subject to *Doull*'s requirements. This Court should therefore reject Philip Morris's attempt to revise and expand *Doull*.

Philip Morris's first claim is that *Doull* is not limited to negligence cases at all—and so should be read to apply to a broad sweep of non-negligence claims. But even the company admits, as it must, that all of "the claims in *Doull* were negligence-based." Reply at 19. And Philip Morris is unable to point to anywhere in this Court's opinion that indicates its holding applied to anything other than negligence claims. The most it can muster is the assertion that, because "the word 'negligence' doesn't even appear in the Court's summary of its holding," the holding should not be so limited. *Id.* But each time the Court described its causation "conclu[sion]," it was careful to limit that conclusion to "most negligence cases." *Doull*, 487 Mass. at 10; *see id.* at 16–17. ("In sum . . . in the majority of negligence cases, the jury should be instructed on factual

cause using a but-for standard as well as legal causation."); *see id.* at 19 ("We conclude that the substantial contributing factor test should no longer be used in most negligence cases."). And this Court was likewise careful to "clarify" that the question at issue on appeal was "how a jury should be instructed on causation in negligence." *Id*. at 6.

Shifting away from the actual text of this Court's opinion, Philip Morris turns to a few of the authorities that *Doull* cited which discuss intentional torts. *See* Reply at 19–20 (emphasizing that *Doull* "referenced" a few treatises and cases that "involve[ed]" intentional torts). But regardless of what else those authorities discuss, this Court focused on their commentary on negligent torts. *See Doull*, 487 Mass. at 19 (adopting "the Restatement (Third)'s own recent criticism and rejection" of the substantial factor standard to "conclude that [that standard] should no longer be used in most negligence cases"); *id.* at 7 (citing Prosser & Keeton on Torts § 41 to support the proposition that "[g]enerally, a defendant is a factual cause of harm if the harm would not have occurred 'but for' the defendant's negligent conduct"); *id.* (citing *Paroline v. United States*, 572 U.S. 434 (2014), to support a point about how to ensure "defendants will only be liable for harms that are actually caused by their negligence"). In fact, the three authorities Philip Morris references were included as part of the opinion's description of "basic causation principles" and the "bedrock principle[s] of negligence law." *Doull*, 487 Mass.

at 6–8. This Court never stated—either explicitly or impliedly—that either its causation holding or analysis applied to any claims other than negligence ones.

It is for this reason that nothing in *Doull* should be understood to apply to Chapter 93A claims like those in this case—a point even Philip Morris doesn't contest. *See* Op. Br. at 37–38, 45. For starters, Chapter 93A claims don't sound in negligence. *See Com. v. Brien*, 67 Mass. App. Ct. 309, 313 (2006) (explaining generally that Chapter 93A "provid[es] strict liability . . . for violations of consumer protection law"). They also aren't even tort claims. *See Travis v. McDonald*, 397 Mass. 230, 232 (1986) (explaining that Chapter "93A establishes a new cause of action" that is "neither wholly tortious nor wholly contractual in nature," rather it "involve[s] new substantive rights not subject to the traditional limitations of pre-existing causes of action"); *H1 Lincoln, Inc. v. S. Washington St., LLC*, 489 Mass. 1, 24 (2022) ("[A] cause of action under c. 93A is not dependent on traditional tort or contract law concepts for its definition."). Under *Doull*, a claim must sound both in negligence and tort for the but-for causation standard to apply; Chapter 93A claims sound in neither.

Nor are the reasons that led this Court in *Doull* to adopt the but-for causation standard for certain negligence claims implicated at all by Chapter 93A claims. For instance, *Doull* concluded that the "but-for factual causation standard is the appropriate standard to be employed" in most negligence cases because the "terminology of the

substantial factor standard . . . leads to confusion" for juries. 487 Mass. at 2, 13. As the Court explained, the substantial factor standard's "confusing terminology has been found to invite jurors to skip the factual causation inquiry altogether . . . and impose liability on someone whose negligence lacks the requisite causal effect." *Id.* at 14. Thus, the Court warned, "[a]bsent a but-for requirement, a jury presented with negligence that is 'substantial' may decide to impose liability without coming to terms with whether the negligence was even a cause of the harm." *Id.* But none of these concerns are relevant for Chapter 93A claims for the simple fact that there "is no right to a trial by jury for actions cognizable under G.L. c. 93A." *Nei v. Burley*, 388 Mass. 307, 315 (1983).

Doull also made clear that not all negligence claims are properly subject to a but-for causation standard. *See Doull,* 487 Mass. at 10, 17, 19 (specifically limiting its holding to "most negligence cases" and "the majority of negligence cases"). Applying the "but-for standard" to certain negligence cases, this Court recognized, "fails" because it creates "unjust and illogical results." *Id.* at 9, 17–18. One category of negligence cases that meets this exception is toxic torts. In those cases, as *Doull* described, "it can be difficult, if not impossible, for the plaintiff to identify which particular exposures were necessary to bring about the harm." *Id.* at 9–10. Although "[i]t may be clear that a toxic substance . . . caused the harm, and that the defendants exposed the plaintiffs to the

toxic substance . . . it may not be possible to determine which exposures were necessary to have caused the harm." *Id.* If courts apply the but-for causation standard to toxic tort cases, *Doull* found, defendants would "avoid liability despite their negligent exposure of the plaintiffs to the substances." *Id.* So, "if anyone is to be held liable for [toxic tort] harms, there must be an exception to the but-for standard." *Id.* As a result, this Court concluded, in toxic tort cases courts should use the "substantial factor test" rather than but-for causation. *Id.*[1]

This is just such a case. This Court itself has made clear that cases involving how cigarette exposure increases the odds of cancer fall within "the context of toxic torts." *Donovan v. Philip Morris USA, Inc.*, 455 Mass. 215, 227 (2009). And that understanding accords with the weight of authority throughout the country. A claim that cigarette smoke "causes cancer" is a prime example of a "toxic tort case." *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1239 (11th Cir. 2005); *see, e.g.*, *Hoefling v. U.S.*

[1] Cigarette-exposure cases aren't the only toxic torts for which the substantial factor test applies. The standard is "particularly suited to injury from chronic exposure to toxic chemicals where the sequent manifestation of biological disease may be the result of a confluence of causes." *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 174 (Mo. Ct. App. 1988); *see, e.g.*, *Bostic v. Georgia-Pac. Corp.*, 439 S.W.3d 332, 336 (Tex. 2014) (recognizing that "the standard of substantial factor causation" applies to "mesothelioma cases" and rejecting the argument that a plaintiff is "required to prove that but for . . . exposure to . . . [an] asbestos-containing joint compound," he "would not have contracted mesothelioma"); *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 770 (Tex. 2007) (applying the "substantial factor" test to "asbestos cases").

Smokeless Tobacco Co., LLC, 576 F. Supp. 3d 262, 274 (E.D. Pa. 2021); *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 133 F. Supp. 2d 162, 169–74 (E.D.N.Y. 2001). That is because they "involve claims for relief arising from chronic and latent illnesses or diseases allegedly caused by exposure to toxic substances." *Whiteley v. Philip Morris Inc.*, 117 Cal. App. 4th 635, 700 (2004) ("Injuries due to cigarette smoke easily fit the description of toxic torts") (quoting 1 Madden & Owen on Product Liability (3d ed. May 2003) § 12:5).

As *Doull* explained, for "toxic tort cases" that involve exposure to toxic substances, "it is nearly impossible for a plaintiff or a jury to determine with any certainty which exposures were necessary to bring about the harm." *Doull*, 487 Mass. at 11. So when a plaintiff is harmed from exposure to a toxic substance like cigarette smoke, "the but-for standard is inadequate" because it would "frustrate the ability of plaintiffs to recover for negligent conduct that caused their harm." *Id.* at 10–11. As a result, "[i]n those few situations, where there are concurrent independent causes," to ensure a defendant "cannot escape responsibility for his negligence on the ground that identical harm would have occurred without it," the "proper rule . . . is that the defendant's conduct is a cause of the event because it is a material element and a substantial factor in bringing it about." *Mitchell v. Gonzales*, 54 Cal. 3d 1041, 1049 (1991); *see also Union Pac. R.R. Co. v. Ameron Pole Prods. LLC*, 43 Cal. App. 5th 974,

981 (2019); *Basko v. Sterling Drug, Inc.*, 416 F.2d 417, 429 (2d Cir. 1969) (recognizing that the but-for test "will not work . . . where two independent forces concur to produce a result which either of them alone would have produced," because "either force can be said to be the cause in fact of the harm, despite the fact that the same harm would have resulted from either force acting alone"); *Perkins v. Entergy Corp.*, 782 So. 2d 606, 611 (La. 2001) ("Where there are concurrent causes of an accident, the proper inquiry is whether the conduct in question was a substantial factor in bringing about the accident."). The lower court's decision not to impose a but-for causation standard to the claims in this case was therefore fully consistent with both with *Doull* and fundamental causation principles.

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the applicable provisions of Mass. R. A. P. 17 and 20. This brief complies with the applicable length limitation set forth in Mass. R. A. P. 20, because it is in Adobe Garamond, a proportionally spaced font, 14 point, and contains fewer than 7,500 non-excluded words.

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CERTIFICATE OF SERVICE

I certify that on December 14, 2022 I filed Amicus Curiae's brief in Greene v. Philip Morris USA Inc., SJC-13330, with the Massachusetts Supreme Judicial Court through the Court's electronic filing service all parties by electronic means.

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