IN THE COURT OF APPEALS FOR THE STATE OF OREGON

JEANYNE JAMES, et al, individually and on behalf of all others similarly situated, Plaintiffs-Respondents, Cross-Appellants, and MARY KATHLEEN BECHERER et al, Plaintiffs, and OREGON DEPARTMENT OF JUSTICE, Creditor-Respondent, v. PACIFICORP, an Oregon Corporation, and PACIFIC POWER, an Oregon registered electric utility and assumed business name of PacifiCorp, Defendants-Appellants, Cross-Respondents.	Multnomah County Circuit Court Case No. 20CV33885 Court of Appeals No. A183140

BRIEF OF *AMICUS CURIAE* ASSOCIATED ELECTRIC & GAS INSURANCE SERVICES LIMITED

Appeal from the Limited Judgments of the Multnomah County Circuit Court, State of Oregon, Honorable Steffan Alexander

(continued on next page)

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Matthew J. Kalmanson, OSB No. 041280
HART WAGNER LLP
1000 SW Broadway, 20th Floor
Portland, OR 97205
Telephone: (503) 222-4499
mjk@hartwagner.com

John S. Pruitt, *pro hac vice*
Meghana D. Shah, *pro hac vice*
EVERSHEDS SUTHERLAND (US) LLP
The Grace Building, 40th Floor
1114 Avenue of the Americas
New York, NY 10036
Telephone: (212) 389-5099
johnpruitt@eversheds-sutherland.com
meghanashah@eversheds-sutherland.com

Of Attorneys for *Amicus Curiae* AEGIS

Keith A. Ketterling, OSB No. 913368
Timothy S. DeJong, OSB No. 940662
Cody Berne, OSB No. 142707
Emily A. Johnson, OSB No. 183791
Erin E. Roycroft, OSB No. 184371
STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
kketterling@stollberne.com
tdejong@stollberne.com
cberne@stollberne.com
ejohnson@stollberne.com
eroycroft@stollberne.com\

Per A. Ramfjord, OSB No. 934024
Brad S. Daniels, OSB No. 025178
Reilley D. Keating, OSB No. 073762
STOEL RIVES LLP
760 S.W. 9th Ave., Suite 3000
Portland, OR 97205
Telephone: (503) 224-3380
per.ramfjord@stoel.com
brad.daniels@stoel.com
reilley.keating@stoel.com

Alison L. Plessman, *pro hac vice*
Rajan S. Trehan, *pro hac vice*
rajan.trehan@hueston.com
Stephanie W. Xiao, *pro hac vice*
Khoa D. Nguyen, *pro hac vice*
HUESTON HENNIGAN LLP
523 West 6th Street, Suite 400
Los Angeles, CA 90014
Telephone: (213) 788-4340
aplessman@hueston.com
sxiao@hueston.com
knguyen@hueston.com

Douglas J. Dixon, *pro hac vice*
Craig A. Fligor, *pro hac vice*
HUESTON HENNIGAN LLP
620 Newport Center Drive, Suite 1300
Newport Beach, CA 92660
Telephone: (949) 229-6840
ddixon@hueston.com
cfligor@hueston.com

(counsel continued on next page)

Nicholas A. Kahl, OSB No. 101145
NICK KAHL, LLC
209 SW Oak St., Suite 400
Portland, Oregon 97204
Telephone: (971) 231-1342
nick@nickkahl.com

Matthew J. Preusch, OSB No. 134610
KELLER ROHRBACK L.L.P.
1129 State Street, Suite 8
Santa Barbara, California 93101
Telephone: (805) 456-1496
mpreusch@kellerrohrback.com

Yoona Park, OSB No. 980904
Sarah R. Osborn, OSB No. 222119
KELLER ROHRBACK L.L.P.
805 SW Broadway, Suite 2750
Portland, OR 97205
Telephone: (971) 253-4600
ypark@kellerrohrback.com
sosborn@kellerrohrback.com

Rafey S. Balabanian
Brandt Silver-Korn
Todd Logan
Edelson PC
150 California Street, 18th Floor
San Francisco, CA 94111
Telephone: (415) 212-9300
rbalabanian@edelson.com
bsilverkorn@edelson.com
tlogan@edelson.com

Blaine H. Evanson, *pro hac vice*
GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Drive
Irvine, CA 92612
Telephone: (949) 451-3800
bevanson@gibsondunn.com

Of Attorneys for Defendants-Appellants/Cross Respondents PacifiCorp and Pacific Power

Denise Fjordbeck, OSB No. 822578
Senior Assistant Attorney General
OREGON DEPARTMENT OF JUSTICE
400 Justice Building
1162 Court St., NE
Salem, OR 97301-4096
Telphone: (503) 378-4402
denise.fjordbeck@doj.oregon.gov

Of Attorneys for Creditor-Respondent

(counsel continued on next page)

Daniel Mensher, OSB No. 074636
Natida Sribhibhadh
KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101
Telephone: (206) 623-1900
dmensher@kellerrohrback.com
natidas@kellerrohrback.com

Nicholas Rosinia
Amy Hausmann
Zoe Seaman-Grant
Landon Webster
Megan Delurey
Alexander Glenn, Tievsky, *pro hac vice*
EDELSON PC
350 North LaSalle Street, 14th Floor
Chicago, Illinois 60654
Telephone: (312) 589-6370
nrosinia@edelson.com
abhausmann@edelson.com
zseaman-grant@edelson.com
lwebster@edelson.com
mdelurey@edelson.com
atievsky@edelson.com

Derek C. Johnson, OSB No. 882340
Marilyn A. Heiken, OSB No. 923308
JOHNSON JOHNSON LUCAS & MIDDLETON, PC
975 Oak Street, Suite 1050
Eugene, OR 97401
Telephone: (541) 484-2434
djohnson@justicelawyers.com
mheiken@justicelawyers.com

Of Attorneys for Plaintiffs-Respondents/
Cross-Appellants

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I. STATEMENT OF AMICUS CURIAE

Associated Electric & Gas Insurance Services Limited ("AEGIS") submits this *amicus* brief in support of the appeal filed by Defendants-Appellants PacifiCorp in this action.

As a mutual insurance company whose members consist of most of the public utilities in the United States, including PacificCorp, AEGIS has a strong interest in promoting and maintaining the stability of the insurance markets that support public utilities like PacifiCorp. AEGIS' mission is to "assure utility and related energy industry members consistently superior insurance and risk management services through a secure and stable market enabling members to achieve the lowest overall long-term cost of risk." AEGIS submits this *amicus* brief to bring to the Court's attention the disruptive and destabilizing consequences to the insurance markets of allowing the trial court's rulings to stand.

AEGIS is a mutual insurance company and a member of the small group of companies that insure utilities in the United States. AEGIS is owned by its policyholder members who comprise 99% of the investor-owned utilities in the United States, the key U.S. power cooperatives, and the majority of the top one hundred municipal utilities. More specifically, its policyholder members comprise electric, natural gas and water public utilities, public power suppliers, electric cooperatives, regional transmission organizations, and gas pipeline,

transmission and distribution companies. AEGIS was created by its founding members to address their need for stable and consistent property and casualty insurance.[1] The traditional insurance market was unable to provide sufficient support for the unique challenges present in the energy industry, and AEGIS was formed as a solution to fill this gap.

As a mutual insurer, AEGIS' relationship with its members (owners) is built on close collaboration with them to continually stay abreast of their emerging risks, including those unique to their industry, and to develop insurance products and services tailored to those risks. AEGIS has been providing coverage for these exposures since the 1970s and its expertise with respect to utility-specific risks like wildfire losses is unparalleled.

AEGIS is uniquely positioned to provide insights for the Court on the likely consequences of its decision in this appeal. AEGIS offers a perspective that underscores how affirming certain of the trial court's rulings will impair insurers' ability to accurately price risk, which will almost certainly reduce the availability and affordability of essential insurance coverage, and ultimately adversely impact the financial health of utilities.

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[1] AEGIS is incorporated under the laws of Bermuda and operates in the United States through its affiliated services company, AEGIS Insurance Services, Inc., a New Jersey corporation. AEGIS is approved as an eligible excess and surplus lines insurer on the National Association of Insurance Commissioners *Quarterly Listing of Alien Insurers.*

II. INTRODUCTION AND BACKGROUND

This matter is an appeal from a class action arising out of numerous, unrelated wildfires that swept through Oregon during windstorms in the fall of 2020. Familiarity with the facts of this case as set forth in the Defendants-Appellants' brief is assumed for purposes of this *amicus* submission. *See* Defendants-Appellants' Br at 14-32.

The trial court issued a number of rulings that, if affirmed by this Court, will erode the legal predictability on which insurers rely to price risk. This will result at least in increased premiums as well as the increased likelihood of reduced insurance coverage in the Oregon market. This will destabilize the insurance markets and impair the ability of utilities to serve their communities.

There are three critical rulings that are likely to produce these disruptive effects. First, the trial court allowed the case to proceed as a class action when at issue was property damage in distinct regions of the state caused by multiple fires that began in different ways, at different times, over large geographic areas. *Id.* at 33-44. Second, the trial court instructed the jury that it could "assume" evidence presented by a class representative applied to every class member, even though it was undisputed that class members were harmed by different fires with different causes at different times. Phase I Tr. 8072; Defendants-Appellants' Br at 63-69. Finally, contrary to Oregon law, the trial

court awarded noneconomic damages for losses solely arising from harm to property. Defendants-Appellants' Br at 78-90.

These rulings conflict with established Oregon precedent on which insurers rely to price risk.[2] Predictability of losses is crucial for the availability and affordability of insurance coverage in Oregon. Affirming the trial court's rulings would negate insurers' ability to rely on legal precedent to reliably project risk and losses and efficiently calculate the premium necessary to provide coverage to those risks. This would have cascading negative impacts for insurers, Oregon businesses including utilities, and ultimately all Oregonians.

These considerations take on particular importance in the context of claims against PacifiCorp and other AEGIS members, who as regulated utilities provide an essential public service by building and maintaining the nation's electricity infrastructure and by delivering a critical energy supply. If a utility, or indeed any business, is subject to unlimited class-wide liability and

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[2] *See, e.g.*, *Meyer v. 4-D Insulation Co.*, 60 Or App 70, 72, 652 P2d 852 (1982) (holding damages for mental distress are not available solely on the basis of negligence); *Bailey v. Polygon Nw. Co., LLC*, Case No 3:22-cv-00292, 2022 WL 17184309 at *7 (D Or Aug 23, 2022), *report and recommendation adopted in relevant part*, 2022 WL 17178268 (D Or Nov 23, 2022) (holding "damages for emotional distress are not recoverable in an action alleging only damage to property via negligence"); *Pearson v. Philip Morris, Inc.*, 358 Or 88, 111, 361 P3d 3 (2015) (noting, in considering the predominance standard for class certification, that court must determine "if proof as to one class member will be proof as to all, or whether dissimilarities among the class members will require individualized inquiries").

unpredictable noneconomic damages unauthorized by law, they will become uninsurable. The unavailability or unaffordability of insurance harms a business' financial health because it increases its risk and deters capital investors. In short, affirming these rulings threatens to destabilize the risk-bearing structures on which Oregon's businesses, including utilities, rely. AEGIS respectfully urges this Court to consider these profound economic consequences in deciding this appeal.

III. ARGUMENT

Wildfire losses are expected to continue to soar. Public utilities like PacifiCorp need to be able to depend on available and affordable insurance protection to continue to supply essential services while managing catastrophic risk like wildfire. Insurers need to be able to depend on long-established legal precedent to accurately price risk and maintain market stability.

The trial court's errors erode this predictability by (i) radically expanding the availability of noneconomic damages beyond common law and statutory prohibitions and (ii) significantly lowering standards for class certification and class-wide liability. Without predictability in the legal standards and processes that determine the scale of the losses that insurance covers, liability becomes more difficult to calculate and coverage inevitably becomes unaffordable or entirely unavailable. Impeding utilities' access to affordable insurance, the tool that enables them to spread and absorb the impact of their losses, will degrade

their financial condition and diminish their capacity to provide an essential public function.

A. Utility Services Require Significant and Sustained Capital Investment

Public utilities like PacifiCorp provide services vital to everyday life in their communities.[3] PacifiCorp is the second largest provider of electricity in Oregon and delivers essential electric service to Oregon homes, businesses, and communities. It provides energy for 2.1 million customers supplied by its 11,700 megawatts of generation capacity from a diverse mix of hydro, wind, natural gas, coal, solar and geothermal resources. *Powering a Bright Future*, PacifiCorp, Energy, https://www.pacificorp.com/energy.html (last visited April 2, 2025). It owns and operates transmission lines, the "interstate freeways for electricity," to deliver reliable power to its customers and communities. *Transmission Projects*, PacifiCorp, Transmission, https://www.pacificorp.com/transmission/transmission-projects.html (last visited March 20, 2025). The magnitude of the operations necessary to provide

[3] According to the U.S. Cybersecurity & Infrastructure Security Agency, "[t]he U.S. energy infrastructure fuels the economy of the 21st century. Without a stable energy supply, health and welfare are threatened and the U.S. economy cannot function. Presidential Policy Directive 21 identifies the Energy Sector as uniquely critical because it provides an 'enabling function' across all critical infrastructure sectors." *Energy Sector*, US Cybersecurity & Infrastructure Sec Agency, Topics, Critical Infrastructure Security and Resilience, Critical Infrastructure Sectors, https://www.cisa.gov/topics/critical-infrastructure-security-and-resilience/critical-infrastructure-sectors/energy-sector (last visited March 7, 2025).

these services requires a substantial and long-term commitment of capital. Attracting that investment depends on a utility's financial stability and its ability to provide a consistent return on capital. A critical tool for any business in maintaining that financial stability is its ability to manage the financial impact of its known hazards, like wildfire, by purchasing insurance.

B. Public Utilities Need Insurance to Protect Their Financial Stability

Ensuring the long-term and reliable delivery of utility services demands that utilities mitigate their financial risks even when faced with catastrophic events like wildfires. Utilities must have the capital available to invest in the maintenance and development of infrastructure, access to new energy sources, and hazard mitigation.

The importance of ongoing access to affordable and robust insurance coverage for public utilities operating in wildfire-prone areas cannot be overstated. When utilities cannot manage their financial risks their credit ratings are jeopardized, resulting in higher borrowing costs, reduced access to investment capital and, potentially, insolvency. Without insurance, public utilities may be unable to absorb the financial impact of a catastrophe like wildfire. In that case, state and local governments will likely need to intervene to ensure continued access to essential utility services, resulting in increased financial burdens on Oregon's citizens and businesses.

To ensure their own financial solvency, and to attract the capital investment they need, insurers must provide coverage to their insureds at rates that are reasonable and actuarially sound. To do so, they rely on numerous factors to predict the likelihood and magnitude of covered losses. Legal standards governing liability and the award of damages are critically important factors in this analysis. Allowing untethered noneconomic damages, and loosening class certification and liability standards, in contravention of Oregon law, undermines the reliability of these predictions. If this Court does not reverse the trial court's rulings, defendants in Oregon will be exposed to incalculable liability risks and their insurers will have little choice but to increase premium and limit, or entirely withdraw, their essential coverage.

C. Insurers Need Predictable Legal Standards to Properly Price Risks

The predictability of the legal standards applicable to a risk is vital to the contract of insurance, which involves the transfer of that risk in exchange for an appropriate premium. "Essentially, insurance is a contract by which one party (the insurer), for a consideration that usually is paid in money, either in a lump sum or at different times during the continuance of the risk, promises to make a certain payment, usually of money, upon the destruction or injury of 'something' in which the other party (the insured) has an interest." Plitt *et al*, 1 *Couch on Insurance* § 1:6 (3d ed 2024).

The appropriateness of the premium impacts the stability of the broader insurance markets. To meet its contractual obligations, an insurer must collect premiums from a pool of policyholders, not all of whom will suffer loss, so that it can "accept each risk at a slight fraction of the possible liability upon it." Plitt *et al*, 1 *Couch on Insurance* § 1.9 (3d ed 2024). The ability to predict the aggregate losses from a specific risk is critical to the establishment of actuarially sound premium (rates).

When courts deviate from well-established precedent, insurers are unable to reliably consider some of the most important factors in calculating premium. Insurers calculate the rates (premium) they will charge policyholders, based on actuarial principles. The industry's leading actuarial credentialing organization, the Casualty Actuarial Society ("CAS"), has devised a set of principles to guide insurers in sound ratemaking, which emphasize that "[i]t is important that proper actuarial procedures be employed to derive rates that protect the insurance system's financial soundness and promote equity and availability for insurance consumers." Casualty Actuarial Soc, *Statement of Principles Regarding Property and Casualty Ratemaking* at 1 (1988, rescinded 2020, reinstated 2021). The CAS principles also identify the importance of considering "external influences" in ratemaking, including the "judicial environment, regulatory and legislative changes." *Id.* at 5.

The premiums an insurer charges must collectively cover policyholder losses. Insurers estimate losses using tools that measure event likelihood, frequency, and amount, relying on historical loss data that is driven in part by legal precedent. For example, if Oregon law prohibits noneconomic damages awards for property loss absent bodily injury, insurers will rely on the data reflecting the consistent application of that law. If the application of legal standards is unreliable, then insurers will need to factor in that uncertainty by increasing premium or limiting coverage.

D. The Trial Court's Rulings Undercut Insurers' Ability to Predict Loss Costs

Oregon law has long provided clear and predictable limits on both noneconomic damages and class certification for damages awards. Here, the trial court's rulings disregarded these important legal standards and have brought into question the reliability of the application of the law in Oregon courts. As discussed above, this degree of uncertainty is toxic to the management of risk through insurance.

1. *The Trial Court's Ruling Awarding Noneconomic Damages Abrogates Oregon Precedent on Which Insurers Rely.*

Insurers need to be able to rely on the clear prohibition of noneconomic damages on the facts before the Court. Well-established Oregon law, *see*, *e.g.*, *Meyer v. 4-D Insulation Co.*, 60 Or App at 72-73; *Bailey*, 2022 WL 17184309 at *7, and ORS 477.089, bars noneconomic damages in this case. Specifically,

Oregon common law permits noneconomic damages in only narrow, well-defined situations, and ORS 477.089 provides: "in a civil action for property damage caused by a wildfire, the recoverable damages are … economic and property damages"—and these are the "exclusive remedies for damages" "to property caused by a wildfire." ORS 477.089(2), (4). Oregon law thus prohibits noneconomic damages from being awarded in the context of wildfire damages to real and personal property.

Oregon law is consistent with the Restatement rule, and widely adopted common law doctrine, establishing that noneconomic damages are not available for harms, such as those suffered here, that are limited to property loss. *See Restatement (Second) of Torts*: Remedies § 911 cmt e (1979) (stating, in determining "value" of damages particular to the owner, that "[c]ompensatory damages are not given for emotional distress caused merely by the loss of ... things ... ."); *Fright, Shock, and Mental Disturbance*, 38 Am Jur 2d § 19 (2025) ("Subject to some exceptions, generally, under ordinary circumstances, there can be no recovery for mental anguish suffered by a plaintiff in connection with an injury to his or her property.").

These common law and statutory prohibitions against awarding noneconomic damages for property loss reflect important public policy considerations, including (but not limited to) promoting an environment of legal predictability. An *ad-hoc*, judicially-created exception to this important

limitation will preclude insurers' future reliance on these legal standards, compromising the predictability essential to the insurance transaction.

2. *The Trial Court's Rulings Concerning Class Certification and Causation Likewise Erode Insurers' Ability to Price Risk.*

The same concern applies with respect to the trial court's rulings concerning class-wide liability and damages.[4] The certification decision, if affirmed, has the potential to dramatically weaken the requisite level of commonality for class actions in Oregon, further eroding the predictability of the financial risk and the reliability of the application of law in the Oregon courts. As detailed below, departing from these well-established recognized precedents will ultimately render insurance both less available and less affordable to utilities, impacting all Oregonians.

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[4] Under longstanding Oregon precedent, a class should not be certified unless questions common to the class predominate over individualized inquiries—meaning that a case should only proceed as a class action when "proof as to one class member will be proof as to all," and not when "dissimilarities among the class members will require individualized inquiries" to determine whether they have proved their claims. *Pearson*, 358 Or at 111. Here, although there was no single fire event that harmed every class member, the trial court granted class certification, concluding that because the plaintiffs alleged that PacifiCorp harmed every class member in a vaguely similar way (*i.e.*, by allegedly allowing some piece of power equipment to cause some fire at some time), the case could properly be litigated as a class action.

E. Affirming the Trial Court Would Put the Availability and Affordability of Insurance for Public Utilities at Risk

1. *Increased Legal Uncertainty Reduces Insurance Affordability.*

In any insurance market, increased uncertainty as to losses makes insurance less affordable. *See, e.g.*, David J Cummins, Scott E Harrington, & Robert W Klein, *Cycles and Crises in Property/Casualty Insurance: Causes and Implications for Public Policy, Executive Summary,* 10 J Ins Reg at 65-66 (1991) (citing studies and observing that "much of the growth in premiums … was caused by growth in the expected value and uncertainty of future liability claim costs rather than by cyclical influences" and "increased uncertainty would be expected to lead to increases in prices needed to cover expected future costs including the cost of capital … ."). The less predictable the cost of damages arising from wildfire, the more difficult it is for insurers to determine adequate rates for insurance.

If insurers are unable to predict the amount of losses because they cannot rely on the limits imposed by legal precedent, they will be forced to charge rates high enough to cover the highest conceivable loss, rather than moderate those rates based on historical loss awards. *See, e.g.*, U.S. Gov't Accountability Off, GAO-03-702, *Medical Malpractice Insurance: Multiple Factors Have Contributed To Increased Premium Rates* at 22 (2003) (noting that "when losses on claims are hard to predict, insurers will generally adopt more

conservative expectations regarding losses—that is, they will assume losses will be toward the higher end of a predicted range of losses.").

Large noneconomic damages verdicts, combined with significantly lowered class certification and liability standards, will incentivize plaintiffs' lawyers to treat every claim as a class-wide exposure and push for large noneconomic damages awards in resolving claims. *Id.* (noting that "large losses on individual claims can raise plaintiffs' expectations for damages on similar claims, ultimately resulting in higher losses across both claims that are settled and those that go to trial."). Defendants and their insurers, faced with the threat of a catastrophic verdict, experience tremendous pressure to resolve claims at higher amounts. *See, e.g.*, Chad Marzen *et al*, *Nuclear Verdicts, Tort Liability, and Legislative Responses*, 42 J Ins Reg at 13 (2023) ("[F]ear of a nuclear verdict may lead potential defendants to agree to larger settlements."). This dynamic leads not only to exaggerated losses, as plaintiffs' lawyers push for higher settlements, it also leads to greater loss variability. As the Edison Electric Institute ("EEI") has observed:

> When wildfires do happen and electric company equipment may be involved, plaintiffs' attorneys rush to court to seek from electric companies both economic and non-economic damages, including emotional distress, that can reach into the tens of millions of dollars. While it may take years for litigation to reach a conclusion, the threat of this liability can immediately destabilize the financial health of electric companies, challenging their ability to raise capital to continue to provide affordable, resilient clean power for all customers.

Edison Electric Inst., *a Holistic Approach to Wildfire Risk Mitigation for Electric Companies and Their Customers*, https://www.eei.org/issues-and-policy/Wildfires (last visited March 5, 2025).

2. Increased Legal Uncertainty Reduces the Availability of Insurance.

Higher and less predictable losses typically result in fewer insurers offering coverage. With less price competition among the remaining insurers, and greater and less predictable costs associated with underwriting and managing risk, insurance becomes not only more expensive, but also less available.

Expanding coverage to account for losses outside of predictable parameters requires—at minimum— significantly higher premiums. However, insurers may need to do more than increase premiums to manage these ongoing exposures. The uncertainty presented by virtually limitless class-wide exposure and unpredictable noneconomic damages verdicts will necessarily reduce the overall capacity for the remaining insurers. They may need to reduce the number of new policies issued, cap the amount of coverage they are offering, purchase additional reinsurance coverage, or simply withdraw from the market. The American Property & Casualty Insurance Association ("APCIA") summarized the adjustments insurers may find necessary:

> [W]hen faced with growing catastrophic exposure and costs, insurers may need to adjust through one or more ways, such as

> raise premiums or purchase additional reinsurance to help pay for future losses, limit their exposure by writing fewer policies, or require certain mitigation to reduce the chance of loss as a condition of writing coverage.

Am Property and Casualty Ins. Ass'n, *Managing Wildfire Risk in the Wild, Wild, West – The Growing Challenges Property Insurers Face in the Wildland-Urban Interface* at 1 (2022).

Insurers may also be forced to make changes to programs, reinsurance attachment thresholds, exclusions and limitations of liability to manage the uncertainty and lack of predictability. Certain insurers may choose (or effectively be required) to reduce product offerings or coverages, or decide to exit the market completely, reducing the availability of insurance overall.

For their part, insureds may be unable to afford full coverage, opting for lesser coverage in the form of coverage with higher deductibles, lower limits, more exclusions, and greater appetite to "self-insure." Retaining such risks on their balance sheets does not enhance the insureds' financial stability.

The lack of legal predictability created by the trial court's rulings, which affect class and tort liability exposures for all Oregonians, will have a ripple effect throughout Oregon's insurance market that is far broader than its impact on the utility sector. As has been seen in so many states that have experienced unbridled growth in liability awards, the end result will likely be an insurance market where consumers and businesses are left with fewer choices, higher

costs, and inadequate coverage. For the sake of continued availability and affordability of insurance, it is critical that this Court reverse the trial court and restore the legal predictability that allows insurers to meaningfully price risk.

IV. CONCLUSION

The increasing frequency and severity of wildfire risk is driving up rates and reducing coverage in both the specialty insurance market for public utilities and, for the same reasons, in the private property and casualty insurance market at large. These events threaten insurers' ability to continue to provide casualty and liability coverage to their insureds at reasonable, actuarially sound rates. The reliable application in the trial courts of clear and well-established legal precedent is essential to preserving the predictability needed to insure future losses.

Respectfully submitted this 8th day of April 2025.

HART WAGNER LLP

By: /s/ *Matthew J. Kalmanson*

Matthew J. Kalmanson, OSB No. 041280
mjk@hartwagner.com

Of Attorneys for Amicus Curiae AEGIS

EVERSHEDS SUTHERLAND (US) LLP

/s/ *Meghana D. Shah*
John S. Pruitt, *pro hac vice*
Meghana D. Shah, *pro hac vice*
johnpruitt@eversheds-sutherland.com
meghanashah@eversheds-sutherland.com

Of Attorneys for Amicus Curiae AEGIS

CERTIFICATE OF FILING AND SERVICE

I certify that on the 8th day of April 2025, I filed the original **BRIEF OF AMICUS CURIAE ASSOCIATED ELECTRIC & GAS INSURANCE SERVICES LIMITED** with the State Court Administrator by Electronic Filing.

I further certify that on same day, I caused the foregoing be served upon the following counsel of record by electronic filing and/or email:

Keith A. Ketterling
Timothy S. DeJong
Cody Berne
Emily A. Johnson
Erin Roycroft
Stoll Stoll Berne Lokting & Shlachter P.C.
209 SW Oak Street, Suite 500
Portland, Oregon 97204
kketterling@stollberne.com
tdejong@stollberne.com
cberne@stollberne.com
ejohnson@stollberne.com
eroycroft@stollberne.com

Matthew J. Preusch
Keller Rohrback L.L.P.
801 Garden Street, Suite 301
Santa Barbara, California 93101
mpreusch@kellerrohrback.com

Nicholas A. Kahl
Nick Kahl, LLC
2246 E Burnside St, Suite A
Portland, Oregon 97214
nick@nickkahl.com

Yoona Park
Sarah R. Osborn
Keller Rohrback L.L.P.
601 SW 2ndAve., Ste 1900
Portland, Oregon 97204
ypark@kellerrohrback.com
sosborn@kellerrohrback.com

Daniel Mensher
Natida Sribhibhadh
Keller Rohrback L.L.P.
1201 Third Avenue, Suite 3200
Seattle, Washington 98101
dmensher@kellerrohrback.com
natidas@kellerrohrback.com

Rafey S. Balabanian
Brandt Silver-Korn
Todd Logan
Edelson PC
150 California Street, 18th Floor
San Francisco, California 94111
rbalabanian@edelson.com
bsilverkorn@edelson.com
tlogan@edelson.com

Alexander Tievsky
Edelson PC
350 North LaSalle Street, 14th Floor
Chicago, Illinois 60654
atievsky@edelson.com

Denise G. Fjordbeck
Senior Assistant Attorney General
Oregon Department of Justice
400 Justice Building
1162 Court St., NE
Salem, Oregon 97301-4096
denise.fjordbeck@doj.oregon.gov

Derek C. Johnson
Marilyn A. Heiken
Johnson Johnson Lucas & Middleton, PC
975 Oak Street, Suite 1050
Eugene, Oregon 97401
djohnson@justicelawyers.com
mheiken@justicelawyers.com

Brad Daniels
Per A Ramfjord
Reilley Keating
Stoel Rives LLP
760 SW Ninth Ave Ste 3000
Portland, Oregon 97205
brad.daniels@stoel.com
per.ramfjord@stoel.com
reilley.keating@stoel.com

Blaine Evanson
Gibson, Dunn & Crutcher LLP
34161 Michelson Drive
Irvine, California, 92612
bevanson@gibsondunn.com

DATED the 8th day of April 2025.

HART WAGNER. LLP

By: /s/ *Matthew J. Kalmanson*
Matthew J. Kalmanson, OSB No. 041280
mjk@hartwagner.com
Of Attorneys for *Amicus Curiae* AEGIS

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HART WAGNER. LLP

By: /s/ *Matthew J. Kalmanson*

Matthew J. Kalmanson, OSB No. 041280
mjk@hartwagner.com
Of Attorneys for *Amicus Curiae* AEGIS