IN THE COURT OF APPEALS OF 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
20CV33885

A183140

Appeal from the Limited Judgments of the
Multnomah County Circuit Court
Hon. Steffan Alexander, Presiding

BRIEF *AMICI CURIAE* OF OREGON TRIAL LAWYERS ASSOCIATION AND OREGON CONSUMER JUSTICE IN SUPPORT OF PLAINTIFFS-RESPONDENTS-CROSS APPELLANTS

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INTEREST AND ARGUMENTS OF *AMICI CURIAE*

The Oregon Trial Lawyers Association (OTLA) is a statewide organization of 900 attorneys who primarily represent plaintiffs in civil litigation. Oregon Consumer Justice (OCJ) is a nonprofit consumer advocacy organization that provides consumer protection to Oregonians through advocacy, litigation, education, and research targeted at creating an equitable and inclusive consumer marketplace that reflects the needs and experiences of everyone who lives in Oregon.

In this case, OTLA and OCJ do not wish to present a private interest of their own; instead, they seek to offer arguments grounded in both Oregon law and community experiences that make clear why issue class certification was particularly appropriate in this case, and why noneconomic damages are an available remedy to Plaintiffs and members of the class. Indeed, in *amici*'s view, the availability of noneconomic damages in this case is required by Oregon's common law as it has evolved over time, and limiting the availability of those damages would violate Oregon's remedy clause. For the reasons set forth in Plaintiffs' brief on the merits, and the additional reasons set forth below, this Court should affirm the trial court's limited judgment.

ARGUMENT

I. Issue class certification serves essential litigation and policy objectives and is particularly well-suited for this case.

This case, and the wildfires that gave rise to it, presents a paradigmatic example of how climate change, as well as the ever-expanding footprint of corporate actors, are reshaping tort litigation and creating new challenges for the adjudication of civil claims. As extreme weather events become more frequent, as corporations continue to expand, and as the impacts of corporate decision-making become widespread, courts increasingly confront cases involving thousands of victims harmed by a common course of conduct, each suffering their own individualized damages. As the trial court properly recognized, class certification under ORCP 32 G provides the essential judicial tool for managing these cases.

In this appeal, PacifiCorp challenges several of the trial court's rulings, but particularly takes issue with its decision to certify an issue class and bifurcate the trial of PacifiCorp's liability for class-wide harms from the trial of each wildfire survivor's damages. *Amici* wish to address that issue head-on—and to urge that ORCP 32 G, Oregon's civil rule providing for certification of issue classes, is intended—much like its federal analogue—specifically for cases like this. For all the reasons set forth in Plaintiffs' merits brief, as well as the reasons set forth below, the trial court properly used ORCP 32 G to manage and adjudicate the claims in this case.

A. ORCP 32 G was intended as a flexible tool for effective and efficient adjudication and management of claims.

Oregon's approach to issue class certification reflects both a legislative and judicial recognition that modern, complex litigation requires management tools that promote flexibility in courts' abilities to fairly adjudicate claims for relief. To serve those ends, including the context of a class action, ORCP 32 G provides for the "maintenance of class actions regarding particular issues":

> "**G Commencement or maintenance of class actions regarding particular issues; subclasses.** When appropriate an action may be brought or ordered maintained as a class action with respect to particular claims or issues or by or against multiple classes or subclasses. Each subclass must separately satisfy all requirements of this rule except for subsection A(1)."

ORCP 32 G.

This Court's decision in *Shea v. Chicago Pneumatic Tool Co.*, 164 Or App 198, 990 P2d 912 (1999), is the primary case in Oregon addressing issue class certification. In *Shea*, the Court affirmed the trial court's certification of a liability issue class under ORCP 32 G after denying full class certification under ORCP 32 C(1). In its analysis, the Court noted that ORCP 32 "does not require predominance as a *sine qua non* of certification of *any* class," *Shea*, 164 Or App at 207 (emphasis added), effectively recognizing that issue classes serve essential case management functions even where full class certification might be inappropriate, or where the predominance requirement may not independently be satisfied.

Shea correctly applies, and expressly recognizes, Oregon's intentional choice in 1992 to amend its class action rule, eliminating predominance as a requirement and making it simply one factor, among many, for trial courts to consider at the certification stage. As the Council on Court Procedures explained during the amendment process, it believed that the prior version's " 'flat prohibition on the required finding of 'predominance' of common questions of law or fact if any claims of individual class members are likely to require adjudication of any separate issues apart from ascertaining damages' " was " 'unduly rigid.' " *Shea*, 164 Or App at 207 (quoting Council on Court Procedures, Staff Comment, 1992, *reprinted in* Lisa A. Kloppenberg, *Oregon Rules of Civil Procedure 1997–98 Handbook*, 95 (1997)). Under the new version of the rule, predominance became merely "one of a number of factors that the trial court must take into account" when determining superiority. *Shea*, 164 Or App at 207. In other words, the presence or absence of predominance, by design, cannot categorically direct the class certification decision.

Shea makes clear that issue class certification is appropriate in cases like this. Where common corporate conduct (here, by PacifiCorp) creates identical liability questions across thousands of victims—but where individual damages vary—issue class certification provides the essential tool for efficient, fair, and effective case management and adjudication of class member claims. The trial

court properly used Oregon's issue class mechanism to manage the adjudication of the claims in this case.

B. Federal courts have adopted a similar approach.

A majority of federal circuits has also endorsed the broad use of issue class certification, particularly in complex cases involving common corporate conduct and varying individual damages. At the federal level, and under Federal Rule of Civil Procedure (FRCP) 23, courts consistently have held that the predominance requirement is issue-specific; that is, issue class certification is appropriate "[e]ven if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted." *Valentino v. Carter-Wallace, Inc.*, 97 F3d 1227, 1234 (9th Cir 1996).

Valentino has long been precedent in the Ninth Circuit and is especially clear in that respect. There, the Ninth Circuit explained that certification may be warranted as to individual issues, rather than as to "the entire action." *Id.* Where that is true, a district court may "isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of th[o]se particular issues." *Id.* That is precisely the approach that *amici* urge here under Oregon's issue class analogue.

Several other federal circuits are in accord. In *Mejdrech v. Met-Coil Systems Corp.*, 319 F3d 910 (7th Cir 2003), the Seventh Circuit affirmed issue class certification in an environmental contamination case, emphasizing the

efficiency of resolving "issues identical across all the claimants * * * in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings." *Id.* at 911. This reasoning parallels the wildfire context present here, where corporate wildfire preparation and response create identical questions across all affected class members.

The Sixth Circuit, in *Martin v. Behr Dayton Thermal Products LLC*, 896 F3d 405, 411–12 (6th Cir 2018), termed this the "broad view" of issue class certification, emphasizing that, under that view, courts should focus on whether common questions predominate regarding the specific issues certified, not the entire case. *See id.* (citing *In re Nassau Cty. Strip Search Cases*, 461 F3d 219, 227 (2d Cir 2006) (permitting issue class certification "regardless of whether the claim as a whole satisfied Rule 23(b)(3)'s predominance requirement"); *Valentino*, 97 F3d at 1234; *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F3d 482, 491 (7th Cir 2012) ("Rule 23(c)(4) provides that 'when appropriate, an action may be brought or maintained as a class action with respect to particular issues.' The practices challenged in this case present a pair of issues that can most efficiently be determined on a class-wide basis, consistent with the rule just quoted."), *abrogated on other grounds by Phillips v. Sheriff of Cook Cty.*, 828 F3d 541, 559 (7th Cir 2016); *Pella Corp. v. Saltzman*, 606 F3d 391, 394 (7th Cir 2010) ("A district court has the discretion to split a case by certifying a class for some issues, but not others, or by certifying a class

for liability alone where damages or causation may require individualized assessments."); *Gunnells v. Healthplan Servs., Inc.*, 348 F3d 417, 439–45 (4th Cir 2003) (Rule 23(c)(4) allows certification of a class even though plaintiffs' claims, taken together, do not satisfy predominance)).[1]

Most recently, the Seventh Circuit adopted the approach of the Second, Third, Fourth, Sixth, and Ninth Circuits, holding that "as part of satisfying its burden under Rule 23, a party seeking certification of an issue class under Rule 23(c)(4) must show that common questions predominate in the resolution of the specific issue or issues that are the subject of the certification motion and not as to the cause of action, taken as a whole." *Jacks v. DirectSatUSA, LLC*, 118 F4th 888, 897 (7th Cir 2024) (internal quotation marks omitted).

The consensus on issue class certification under Rule 23 is clear. Federal courts across the board recognize the essential case management tool that issue class certification provides, and the different framework that applies when deciding whether to certify an issue for class-wide resolution. And in Oregon, under *Shea*, that framework is made even more straightforward by the

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[1] To be sure, there is also a "narrow view," which the Fifth Circuit has adopted, and pursuant to which an issue class cannot be certified unless predominance is satisfied for the class action as a whole. *See Castano v. Am. Tobacco Co.*, 84 F3d 734, 745 n 21 (5th Cir 1996) ("A district court cannot manufacture predominance through the nimble use of subdivision (c)(4). The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial.").

elimination of any bright-line predominance prerequisite that Rule 23 otherwise commands.

C. Issue class certification is particularly appropriate in this case.

Modern climate science demonstrates that extreme weather events—including the type of wind-driven wildfire conditions that occurred on Labor Day weekend of 2020—are becoming more frequent and severe due to climate change. These disasters create litigation patterns that differ fundamentally from traditional tort cases, making them well-suited for issue class certification.

Climate disasters affect entire regions, sometimes without warning, creating thousands of potential claims and often arising from a pattern of corporate conduct. Unlike some product liability cases, for instance, where harm might accumulate over time, climate disasters often create concentrated, simultaneous harm across vast geographic areas. While the corporate conduct causing these disasters is typically uniform (here, identical and systemic wildfire response failures), individual damages may vary significantly based on personal possessions, individual circumstances, and emotional harms. Meanwhile, climate disaster victims face immediate displacement, financial hardship, and evidence degradation that makes prolonged individual litigation particularly challenging. What is more, proving corporate liability in climate disaster cases requires extensive expert testimony, potentially complex document analysis, and technical evidence that individual plaintiffs often cannot

afford to develop in an individual case. Issue class certification is particularly well-suited for such cases.

Indeed, the facts here fit comfortably within established state and federal issue class precedents. PacifiCorp's wildfire preparation, infrastructure maintenance, and emergency response involved company-wide policies applied uniformly across a particular geographic area. Corporate actions, decision-making, and notice was relevant classwide. This creates precisely the type of common evidence that courts consistently have found appropriate for issue class treatment.

There was also a clear basis in this case for bifurcating the trial of liability and damages, consistently with an issue class approach. Although not binding on this Court, the Advisory Committee Notes to Rule 23 specifically contemplate the bifurcated approach the trial court took, noting that in certain circumstances an action "may retain its 'class' character only through the adjudication of liability to the class," and "the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims." Fed. R. Civ. P. 23 Advisory Committee Notes (1966). That bifurcated framework applies squarely to cases like this; again, corporate wildfire preparation and emergency response decisions represent company-wide policies and procedures that create identical evidence across all affected class members that may be tried in an initial liability phase. *See, e.g.*, *In re Am. Med.*

Sys., Inc., 75 F3d 1069 (6th Cir 1996) ("where the defendant's liability can be determined on a class-wide basis because the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs, a class action may be the best suited vehicle to resolve such a controversy" (quoting *Sterling v. Velsicol Chem. Corp.*, 855 F2d 1188, 1196–97 (6th Cir 1988)).

* * * * *

The trial court's certification of this issue class aligns with established precedent from both state and federal courts facing similar mass-disaster-related litigation. It also serves important rule-of-law and access-to-justice ends—ensuring that Oregonians can fully access the remedies the law affords, and that Oregon courts can effectively and efficiently adjudicate their claims for relief. The alternative—thousands of individual trials to re-establish identical corporate conduct—would create exactly the type of wasteful duplication of resources that issue class certification is designed to prevent.

II. Emotional distress damages are available in this case.

Oregon's law addressing the recovery emotional distress damages in the absence of physical injury has evolved significantly in recent years, culminating—at least most recently—in the Oregon Supreme Court's decision in *Moody v. Oregon Community Credit Union*, 371 Or 772, 542 P3d 24 (2023). This evolution makes clear that, where defendants violate legally protected interests beyond the general duty of reasonable care, particularly when those

violations involve heightened culpability, emotional distress damages are available.

This case—involving public nuisance, private nuisance, and trespass claims—falls squarely within the framework established in *Moody* and the cases that preceded it. As Plaintiffs explain in their brief on the merits, their tort claims provide the "independent bases of liability" required under *Moody*, while the devastating and far-reaching consequences of catastrophic wildfires are precisely the type of "sufficiently important and circumscribed" interests that Oregon law protects. *See* 371 Or at 790 ("We have not devised a 'test' for determining when an interest is so protected; rather we have looked for factors that demonstrate, to our satisfaction, that we will not be creating 'indeterminate and potentially unlimited liability,' and that the interest in question is 'sufficiently important' and sufficiently circumscribed to support the imposition of liability for emotional distress damages.").

A. The Oregon Supreme Court has expanded the availability of emotional distress damages in civil cases.

As early as *Hinish v. Meier & Frank Co.*, 166 Or 482, 113 P2d 438 (1941), Oregon courts held that "where the wrongful act constitutes an infringement of a legal right, mental suffering may be recovered for, if it is the direct, proximate and natural result of the wrongful act." *Id.* at 506. This foundational principle recognized that certain legally protected interests,

beyond freedom from physical harm, can support pure emotional distress claims.

Norwest v. Presbyterian Intercommunity Hospital, 293 Or 543, 652 P2d 318 (1982), provides the oft-cited analytical framework for these claims. In *Norwest*, the court explained that plaintiffs generally can recover emotional distress damages in three circumstances: (1) when they are physically injured; (2) when the defendant's conduct was "either intentional or equivalently reckless"; or (3) "when it when it infringed some legally protected interest apart from causing the claimed distress, even when only negligently." 293 Or at 559. By way of example, the court explained that it "has found infringements of legal rights in an invasion of privacy, in the negligent removal of the remains of a deceased spouse, and in the negligent delivery of a passport that allowed plaintiff's child to be taken from this country." *Id.* (citing *Hinish*, 166 Or 482; *Hovis v. City of Burns*, 243 Or 607, 415 P2d 29 (1966); *McEvoy v. Helikson*, 277 Or 781, 562 P2d 540 (1977)).

In 2016, the Supreme Court further expanded this framework in *Philibert v. Kluser*, 360 Or 698, 385 P3d 1038 (2016), where the court rejected the restrictive "physical impact rule" of *Saechao v. Matsakoun*, 78 Or App 340, 717 P2d 165 (1986), and recognized that emotional distress damages should be available when defendants violate legally protected interests "of sufficient importance as a matter of public policy to merit protection from emotional

impact." *Philibert*, 360 Or at 704–05. And in 2018, in *Tomlinson v. Metropolitan Pediatrics, LLC*, 362 Or 431, 412 P3d 133 (2018), the Supreme Court expanded the availability of noneconomic damages further, by recognizing parents' legally protected interest in making informed reproductive decisions as sufficiently important to support emotional distress damages without physical injury.

Moody is the most recent decision in this series. There, the Supreme Court held that insureds possess a legally protected interest in proper claim handling under Oregon's insurance statutes, allowing negligence claims for emotional distress damages without physical impact in those circumstances. Importantly, *Moody* emphasized that the key inquiry is whether there exists a "legal source of liability" independent of simple negligence and foreseeability. 371 Or at 784–85; id. at 785 (" '[T]he injury's foreseeability, standing alone, is insufficient to establish the defendant's liability[;] there must also be another 'legal source' of liability for the plaintiff to recover emotional distress damages.' " (quoting *Philibert*, 360 Or at 703).

B. Public nuisance, private nuisance, and trespass provide the independent bases of liability required under *Moody*.

The tort theories underlying this case—public nuisance, private nuisance, and trespass—provide the type of "independent bases of liability" that *Moody* requires for emotional distress recovery. Public nuisance, for instance, is rooted in the common-law obligation to prevent harm to public rights and interests—

an obligation separate from ordinary negligence. Again, as *Moody* emphasized, emotional distress damages are appropriate when defendants violate statutorily protected interests that are "sufficiently important and sufficiently circumscribed" to merit protection. 371 Or at 790.

Oregon's wildfire public nuisance statute, ORS 477.064, provides precisely this type of circumscribed protection, declaring that uncontrolled fires constitute "a public nuisance by reason of [their] menace to life, forest resources or property." The statute protects not only against actual harm, but also against the "menace" itself—a concept that inherently encompasses emotional and psychological impacts. Permitting emotional distress damages " 'would be consistent with this statute, appropriate for promoting its policy, and needed to ensure its effectiveness.' " *Moody*, 371 Or at 796 (quoting *Doyle v. City of Medford*, 356 Or 336, 337 P3d 797 (2014)).

Oregon courts have also recognized that private nuisance and trespass support emotional distress recovery. In cases spanning *Douglas v. Humble Oil & Refining Co.*, 251 Or 310, 317, 445 P2d 590 (1968) ("[I]f mental suffering is the direct and natural result of a specific trespass or other tort, a jury can take such suffering into account."),[2] through *Macca v. General Telephone Co.*, 262 Or 414, 420, 495 P2d 1193 (1972),[3] to *Edwards v. Talent Irrigation District*,

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[2] 251 Or at 317 (citing *Hinish*, 166 Or 482; *Hovis*, 243 Or 607).

[3] "[T]he weight of authority which allows, as a separate and distinct element of damages, recovery for the personal inconvenience, annoyance and

280 Or 307, 309–10, 570 P2d 1169 (1977) ("[D]amages for mental anguish are recoverable in a negligence action when they are a result of defendant's interference with the use and enjoyment of plaintiffs' land."), courts consistently have held that defendants who commit private nuisance or trespass are liable for resulting emotional distress damages.

And consistently with *Moody*, these tort theories protect distinct legal interests: private nuisance protects the right to use and enjoy one's property free from unreasonable interference, while trespass protects the right to exclude others from one's property. Both represent "legal sources of liability other than foreseeability" and simple negligence that justify emotional distress recovery. *Moody*, 371 Or at 784-85. Thus, just as *Moody* recognized that insurance relationships create legally protected interests worthy of emotional distress protection, wildfire cases involving established tort theories—public nuisance, private nuisance, and trespass—have also have long supported such recovery. Indeed, cases like this exemplify the analysis set forth in *Moody* and the cases before it: the legal source of liability is distinct, as *Moody* requires, while the bounded nature of liability—involving specific defendants whose conduct contributed to specific fires affecting identifiable communities—addresses any concern about indeterminate liability that *Philibert* and *Moody* seek to prevent.

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discomfort to the occupant of the premises caused by the nuisance." *See id.* & n 1 (citing *Hinish*, 166 Or 482; *Hovis*, 243 Or 607).

C. Emotional distress damages are uniquely appropriate for this case.

Plaintiffs' brief on the merits, as well as the cases set forth above, demonstrate that Oregon decisional law supports emotional distress recovery in this context. *Amici* note, however, that it is equally important to understand why wildfire disasters present uniquely compelling circumstances that justify—indeed, require—such recognition. Wildfire cases differ from traditional individual tort cases in ways that make emotional distress damages both necessary and appropriate.

Modern wildfire disasters occur against the backdrop of climate change, which has fundamentally altered both the frequency and severity of catastrophic fires across the country, including in Oregon. In recent years, Oregon has experienced increasingly devastating wildfires, with the 2020 Labor Day fires alone burning over one million acres and destroying thousands of structures. These are not isolated events; they are part of a documented pattern of worsening wildfire conditions driven by rising temperatures, extended drought periods, and changed weather patterns. This context creates several considerations that distinguish wildfire cases from traditional tort litigation.

For instance, unlike individual accidents that affect discrete parties, catastrophic wildfires traumatize entire communities through a single event. Whole neighborhoods, towns, and ecosystems are destroyed at one time, creating collective trauma that extends far beyond individual property losses.

This community-wide impact means that emotional distress is not an idiosyncratic reaction by individual plaintiffs, but a predictable and severe consequence affecting broad populations.

Climate-driven wildfires also create ongoing anxiety about future vulnerability that distinguishes them from discrete accidents. Survivors may experience fear that another catastrophic fire could occur, fundamentally altering their relationship with their environment and sense of security. This ongoing trauma, again, is qualitatively different from emotional distress following individual incidents.

Furthermore, wildfire disasters create categories of loss that cannot adequately be addressed through traditional property damage awards, making emotional distress damages essential for meaningful compensation. As the record in this case establishes, victims frequently lose family photographs, heirlooms, artwork, collections, and other items with profound personal meaning but low market value. Insurance and property damage awards cannot compensate for these irreplaceable losses, which often cause the most severe and lasting emotional impacts. And when entire communities burn, victims lose not just their homes and personal possessions, but also their social networks, community gathering places, familiar landscapes, and sense of belonging. These social and cultural losses have no economic equivalent but cause profound and lasting emotional harm.

Oregon's decades-long evolution toward broader recognition of emotional distress damages absent physical injury provides a clear framework that supports recovery in this case, which involves public nuisance, private nuisance, and trespass. These claims present independent bases of liability beyond simple negligence, involve legally protected interests of the utmost importance, and cause precisely the type of severe, circumscribed harm that Oregon law protects. The trial court's recognition of emotional distress damages represents the natural and appropriate application of Oregon's established legal principles, not, as PacifiCorp claims, an impermissible expansion of tort liability. On that basis, the Court should affirm the trial court's limited judgment.

III. ORS 477.089 cannot constitutionally foreclose noneconomic damages.

Article I, section 10, of the Oregon Constitution—Oregon's "remedy clause"—provides that "every man shall have remedy by due course of law for injury done to him in his person, property, or reputation." Or Const art I, § 10. The remedy clause operates as a substantive limitation on the legislature's ability to alter or adjust a plaintiff's right to remedy. *Horton v. Oregon Health & Sci. Univ.*, 359 Or 169, 183, 376 P3d 998 (2016). To the extent Defendants interpret ORS 477.089 to eliminate remedies for emotional distress damages in this case, would violate Article I, section 10, by denying substantial remedies for severe personal harms caused by Defendants' conduct.[4] This Court should reject that argument.

Oregon's remedy clause jurisprudence has also evolved significantly in recent years. In *Horton*, and more recently in *Busch v. McGinnis Waste Systems, Inc.*, 366 Or 628, 468 P3d 419 (2020), the Oregon Supreme Court provided critical guidance on the nature and scope of the remedy clause protection. *Amici* briefly summarize that guidance, as relevant to this case, as follows:

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[4] Indeed, the statute itself recognizes this constitutional limitation. ORS 477.089(4) provides that the statutory remedies "are the exclusive remedies for damages or injury to property caused by a wildfire," but this exclusivity is expressly made "subject to Article I, section 10, of the Oregon Constitution."

(1) The remedy clause protects causes of action regardless of their viability at common law in 1857. Thus, it protects not only those injuries that were recognized at common law in 1857, but also those injuries recognized under the common law as it has been altered (by the legislature or the courts) or has developed and evolved over time.

(2) To determine whether a legislative restriction leaves a plaintiff with a constitutionally sufficient remedy, courts must consider the extent to which the legislature has departed from common-law model measured against its reasons for doing so. In other words, the legislature's purpose and common-law principles matter in the remedy clause analysis.

(3) Finally, *Horton* holds that providing an insubstantial remedy for a breach of a recognized duty also violates the remedy clause.

In this case, Defendants urge that ORS 477.089 forecloses noneconomic damages as an available remedy for members of the certified class. Under modern remedy clause jurisprudence, that cannot constitutionally be correct. In this case, where Plaintiffs and class members seek noneconomic damages for the harms that Defendants caused them in the Labor Day fires, Defendants' reading would foreclose a remedy entirely. That is a drastic departure from the common-law model, and would effectively leave class members with no remedy at all.

A. *Horton* untethered the remedy clause from founding-era common-law causes of action, recognizing that the remedy clause protects causes of action as they evolve over time.

Because it is foundational to the Court's remedy clause analysis, *amici* begin with *Horton*. *Horton* was a medical malpractice case that arose under the Oregon Tort Claims Act (OTCA). There, the plaintiff's six-month-old son underwent a surgical procedure during which he suffered significant injuries from the doctors' negligence. *Id.* at 171. The plaintiff sued the doctors and the hospital (OHSU), which admitted liability and proceeded to trial only on the issue of damages. The jury found that the plaintiff's son had sustained and would sustain economic damages in the amount of $6,071,190.38, and noneconomic damages in the amount of $6,000,000. After the verdict, on the defendants' motion, the trial court reduced the jury's verdict from $12,071,190.38 to $3,000,000, the statutory cap for individual claims under the OTCA.

On appeal, the plaintiff challenged the damages reduction as a violation of, among other things, the remedy clause of Article I, section 10. The relevant question, then, was whether the damages cap set forth under the OTCA—in that case, $3 million—violated the remedy clause when the trial court applied it to reduce the jury's $12 million verdict. The Supreme Court held that it did not. In reaching that holding, the court overruled its prior remedy clause framework,

called into question several earlier remedy clause cases, and set forth a new remedy clause framework that applies in this case.

Before *Horton*, Oregon's remedy clause analysis was governed by the Supreme Court's 2001 decision in *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 23 P3d 333 (2001). *Smothers* was a workers' compensation act case in which the Supreme Court held that the exclusive-remedy provision of the workers' compensation act, as applied in that case, violated the remedy clause.

In doing so, the *Smothers* court had held that Oregon's remedy clause analysis required courts to ask two questions: "The first [was] 'whether the plaintiff ha[d] alleged an injury to one of the absolute rights that Article I, section 10 protects.' " *Horton*, 359 Or at 175 (quoting *Smothers*, 332 Or at 124). Because, under *Smothers*, an "injury" was a "wrong or harm for which a cause of action existed when the drafters wrote the Oregon Constitution in 1857," *Smothers* framed that first question as follows: "[W]hen the drafters wrote the Oregon Constitution in 1857, did the common law of Oregon recognize a cause of action for the alleged injury?" *Id.* If the answer to that question was yes, *Smothers* held that the remedy clause "mandates that a constitutionally adequate remedy for that injury be available." *Id.* Thus, *Smothers* formulated a second question: "If the legislature has abolished a common-law cause of action for protected injuries, has the legislature 'provided

a constitutionally adequate substitute remedy for the common-law cause of action for that injury.' " *Id.* (quoting *Smothers*, 332 Or at 124).

Smothers essentially "tied the meaning of the remedy clause to the Oregon common law in 1857 in two ways." *Id.* at 177. "First, if the common law of Oregon provided a cause of action for an injury to person, property, or reputation in 1857," *Smothers* held that the law "must continue to provide some remedy for that historically defined injury." *Id.* Second, "in determining whether the law provides a constitutionally adequate remedy, the court looked to the common law in 1857 as a model." *Id.* Common-law remedies for historically recognized injuries "would be constitutionally adequate," but "the remedy clause [did] not prevent the legislature from modifying a remedy for those injuries as long as the remedy remains a substantial one." *Id.*

Horton expressly overruled *Smothers* in this respect, rejecting the *Smothers* analysis to the extent that it tied the remedy clause to a static or unchanging view of Oregon's common law in the founding era. *Id.* at 182. As the *Horton* court explained,

> "When the framers drafted Oregon's constitution in 1857, they would not have viewed the common law as static or unchanging—a proposition that is apparent from Article XVIII, section 7, which both continued the common law, as modified to meet Oregon's needs, and recognized that the common law remained subject to change."

Id. at 182 (citing *Peery v. Fletcher*, 93 Or 43, 52, 182 P 143 (1919)); *see also* Or Const Art XVIII, § 7 ("All laws in force in the Territory of Oregon when

this Constitution takes effect, and consistent therewith, shall continue in force until altered, or repealed."). *Horton* further observed that, consistent with the framers' recognition, "the common law has continued to evolve as the premises on which it rests have changed." *Id.* (citing *Buchler v. Or. Corrs. Div.*, 316 Or 499, 518, 853 P2d 798 (1993)) ("the beauty and strength of the common-law system is its infinite adaptability to societal change").[5] And the remedy clause should be construed accordingly:

> "[W]hen the framers drafted the Oregon Constitution in 1857, they would have understood that the common law was not tied to a particular point in time but instead continued to evolve to meet changing needs. Put differently, nothing suggests that, when the framers drafted the remedy clause, they would have sought to tie the protections of that clause to the common law as it existed in single point in time. We find no basis in the text of the remedy clause, its context, or its history from which we can conclude that the framers intended to limit the meaning of that clause to the concept of injury as it was defined in 1857."

Id. at 183 (citing *State v. Supanchick*, 354 Or 737, 765, 323 P3d 231 (2014)). Having rejected "the bright-line rule that *Smothers* drew (all injuries for which common-law causes of action existed in 1857 require a remedy while injuries for which no cause of action existed in 1857 are entitled to no protection)," the

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[5] By way of example, the *Horton* court noted that in 1975 the legislature abolished the common-law torts of criminal conversation and alienation of affections because those "actions for invasion of the family relationship were considered outmoded by changing views of marriage, divorce, and sexual relations," *id.* at 182 (citing *Norwest*, 293 Or at 563), and that more recent "legislative changes to joint defendants' liability" made the concept of common-law indemnity no longer "necessary or justified," *id.* (citing *Eclectic Investment, LLC v. Patterson*, 357 Or 25, 38, 346 P3d 468 (2015)).

Horton court expressly held that cases that rely on that bright-line rule "must be taken with a grain of salt." 359 Or at 220.

After overruling *Smothers*, untethering remedy clause protections from the common law as it existed in 1857, the *Horton* court went on to identify three categories of legislation in which remedy clause issues generally arise:

> "First, when the legislature has not altered a duty but has denied a person injured as a result of a breach of that duty any remedy, our cases have held that the complete denial of a remedy violates the remedy clause. *See Noonan [v. City of Portland]*, 161 Or. [213,] 222–35, 88 P.2d 808 [(1939)] . . . . Similarly, our cases have held that providing an insubstantial remedy for a breach of a recognized duty also violates the remedy clause. *Compare Clarke [v. Or. Health & Sci. Univ.]*, 343 Or. [581,] 608, 610[, 175 P.3d 418] ($200,000 capped damages not substantial in light of $12,000,000 in economic damages and $17,000,000 in total damages), with *Howell [v. Boyle]*, 353 Or. [359] 376, 298 P.3d 1 [2013] ($200,000 capped damages substantial in light of $507,500 in total damages).
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> "Second, the court has recognized that the reasons for the legislature's actions can matter. For example, when the legislature has sought to adjust a person's rights and remedies as part of a larger statutory scheme that extends benefits to some while limiting benefits to others, we have considered that *quid pro quo* in determining whether the reduced benefit that the legislature has provided an individual plaintiff is "substantial" in light of the overall statutory scheme. *Hale*, 308 Or. at 523, 783 P.2d 506.
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> "Third, the legislature has modified common-law duties and, on occasion, has eliminated common-law causes of action when the premises underlying those duties and causes of action have changed. In those instances, what has mattered in determining the constitutionality of the legislature's action is the reason for the legislative change measured against the extent to which the legislature has departed from the common law. *See Perozzi [v. Ganiere]*, 149 Or. [330] 348, 40 P.2d 1009 [(1935)]. That is, we have considered, among other things, whether the common-law

> cause of action that was modified continues to protect core interests against injury to persons, property, or reputation or whether, in light of changed conditions, the legislature permissibly could conclude that those interests no longer require the protection formerly afforded them. *See Norwest [v. Presbyterian Intercommunity Hosp.]*, 293 Or. [543,] 563, 652 P.2d 318 [(1982)] (discussing legislative abolition of common-law torts of criminal conversation and alienation of affections)."

Horton, 359 Or. at 219.[6]

According to the Supreme Court, the legislation at issue in *Horton*, the OTCA, fell into the second category of cases the court described—an effort by the legislature to adjust a person's rights and remedies as part of a larger statutory scheme that extends benefits to some while limiting benefits to others. The OTCA, in other words, reflects a legislatively created *quid pro quo*:

> "The Tort Claims Act indemnifies state employees for liability in tort for acts occurring in the performance of their public duty but caps the amount of their liability at the amount for which the state has waived its sovereign immunity. ORS 30.285(1), (6). In so doing, the Tort Claims Act accommodates the state's constitutionally recognized interest in asserting its sovereign immunity with the need to indemnify its employees for liability that they incur in carrying out state functions.
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> "Moreover, the Tort Claims Act gives plaintiffs something that they would not have had if the state had not partially waived its immunity. The act ensures that a solvent defendant will be available to pay any damages up to $3,000,000—an assurance that would not be present if the only person left to pay an injured person's damages were an uninsured, judgment-proof state employee. There is, in short, a *quid pro quo*."

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[6] *Cf. Busch*, 366 Or at 638 n.6 (noting that *Horton*'s three categories are "descriptive only").

359 Or at 222–23.

Horton provides this Court with a set of general principles for addressing remedy clause challenges:

First, *Horton* held that the remedy clause protects causes of action regardless of their viability at common law in 1857. 359 Or at 183 ("[N]othing suggests that, when the framers drafted the remedy clause, they would have sought to tie the protections of that clause to the common law as it existed at a single point in time."); *id.* at 218–19 (the remedy clause does not "loc[k] courts and the legislature into the static conception of the common law as it existed in 1857"). Indeed, it protects not only those injuries that were recognized at common law in 1857, but also those injuries recognized under the common law as it has been altered (by the legislature or the courts) or has developed and evolved over time. *See id.* at 182; *see also id.* at 193 (legislature may alter or amend the common law "to meet the 'existing conditions and circumstances' of a given time" (quoting *Perozzi v. Ganiere*, 149 Or 330, 348, 40 P2d 1009 (1935)).

Second, *Horton* held that providing an insubstantial remedy for a breach of a recognized duty also violates the remedy clause. *Id.* at 219 (citing *Clarke v. Or. Health & Sci. Univ.*, 343 Or 581, 608, 610, 175 P3d 418 (2007); *Howell v. Boyle*, 353 Or 359, 376, 298 P3d 1 (2013)).

Third, *Horton* held that, in remedy clause cases, in determining whether the legislative restriction leaves a plaintiff with a constitutionally sufficient remedy, courts must consider and examine the "extent to which the legislature has departed from common-law model measured against its reasons for doing so." *Id.* at 221.[7] In other words, common-law principles matter for remedy clause purposes.

B. Under *Busch*, noneconomic damages are afforded remedy clause protection, and the reasons for the legislative restriction is critical.

Four years after *Horton*, in *Busch v. McGinnis Waste Systems, Inc.*, the Supreme Court revisited its remedy clause analysis, this time in the context of ORS 31.710, Oregon's statutory cap on noneconomic damages in injury cases. 366 Or 628, 468 P3d 419 (2020). In *Busch*, the plaintiff had suffered severe injuries when he was struck by a garbage truck in downtown Portland. *Id.* at 630. The defendant admitted liability, and the parties proceeded to trial on the

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[7] In the specific context of the OTCA, *Horton* held that the OTCA is an example of a legislatively created *quid pro quo*; an attempt to "accommodate the state's constitutionally recognized interest in sovereign immunity and a plaintiff's constitutional right to a remedy." *Id.* at 224. In that context—i.e., in the context of the state's constitutionally recognized interest in sovereign immunity and the *quid pro quo* that the Tort Claims Act provides—the court concluded that the OTCA cap in that case ($3,000,000) provided a constitutionally adequate remedy under Article I, section 10. But its conclusion was limited accordingly: "Our holding today is limited to the circumstances that [*Horton*] presents, and it turns on the presence of the state's constitutionally recognized interest in sovereign immunity, the *quid pro quo* that the Tort Claims Act provides, and the tort claims limits in [that] case." *Id.* at 225.

issue of damages. *Id.* The jury determined that the plaintiff had sustained $3,021,922 in economic damages and $10,500,000 in noneconomic damages. *Id.* On the defendant's motion, the trial court applied ORS 31.710(1) to reduce the jury's noneconomic damages award to $500,000. *Id.* at 631.[8] On review, the Supreme Court held that "application of ORS 31.710(1), as a limit on the noneconomic damages that a court can award to a plaintiff, violates Article I, section 10." 366 Or at 652.

As *Busch* explains, ORS 31.710(1) falls into *Horton*'s first category of remedy clause cases—that is, where "the legislature has not altered a duty but has denied a person injured as a result of a breach of that duty any remedy." *Horton*, 359 Or at 219; *see Busch*, 366 Or at 650 ("In adopting ORS 31.710(1), the legislature did not alter the common-law duty of reasonable care and it did not alter a plaintiff's common-law right to bring a claim for breach of that duty."). The *Busch* court made clear that, in those circumstances, critical to the *Horton* analysis are "the reasons for the legislature's actions in enacting a damages cap." *Busch*, 366 Or at 647; *id.* ("Our task under *Horton* is to

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[8] At that time, ORS 31.710(1) provided that "[e]xcept for claims subject to ORS 30.260 to 30.300 and ORS chapter 656, in any civil action seeking damages arising out of bodily injury, including emotional injury or distress, death or property damage of any one person including claims for loss of care, comfort, companionship and society and loss of consortium, the amount awarded for noneconomic damages shall not exceed $500,000." After the Supreme Court's decision in *Busch*, the statute was amended to align with the court's holding in that case.

determine whether a plaintiff's remedy is constitutionally sufficient, considering 'the extent to which the legislature has departed from the common-law model measured against its reasons for doing so.' "). The court concluded that ORS 31.710(1) "did not alter the common-law duty of reasonable care," "did not alter a plaintiff's common-law right to bring a claim for breach of that duty," and simply "required a trial court to override the jury's verdict and enter judgment for a specified amount that is not tied to the extent of the plaintiff's injuries." *Id.* at 650–51. For those reasons, it violates the remedy clause.

The remedy clause problem was particularly clear, explained the *Busch* court, given the absence of any legislatively created *quid pro quo* in the enactment of ORS 31.710(1). *Id.* at 651. Although *Busch* did not hold that the absence of *quid pro quo* is always fatal to the remedy clause analysis, it observed that "[t]he failure to provide a *quid pro quo* to counterbalance a plaintiff's right to a remedy under Article I, section 10, strikes a real blow to the defense of ORS 31.710(1)." *Id.*

Busch made one additional point relevant to this case. There, as is true here, the statute at issue purported to limit a plaintiff's right to recover *noneconomic* damages. The defendant in *Busch* had argued that the "nature and purpose" of noneconomic damages were such that they were afforded less protection under Oregon's remedy clause. The Supreme Court rejected that argument, holding that what was important for remedy clause purposes was

what economic and noneconomic damages have in common: both "are intended to compensate a plaintiff for [their] injuries." *Id.* at 645. They are therefore treated equally in the remedy clause analysis. *Id.* at 647.

C. Construing ORS 477.089 to bar noneconomic damages would violate Oregon's remedy clause.

Applying Horton and Busch, and Oregon's modern remedy clause framework, interpreting ORS 477.089 to eliminate emotional distress remedies would be constitutionally impermissible, for several reasons.

First, as noted above, Oregon's common law clearly recognizes emotional distress claims for public nuisance, private nuisance, and trespass—the very theories at issue in this case. *See Edwards v. Talent Irrigation Dist.*, 280 Or 307, 570 P2d 1169 (1977); *Macca v. Gen. Tele. Co.*, 262 Or 414, 495 P2d 1193 (1972); *Douglas v. Humble Oil & Refining Co.*, 251 Or 310, 445 P2d 590 (1968). These remedies are based on established common-law rights that have developed and evolved over time. Construing ORS 477.089 to eliminate a remedy for those rights would place the statute squarely into *Horton*'s first category of remedy clause cases—cases where "the legislature has not altered a duty but has denied a person injured as a result of a breach of that duty any remedy." 359 Or at 219. The departure from the common-law model in this case is significant.[9]

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[9] Plaintiffs suggest that it is more significant than the departure from the common-law model in the context of the damages caps in *Busch* and *Horton*.

And unlike the OTCA in *Horton*, which reflected a legislatively created *quid pro quo* and involved the State's constitutionally recognized interest in sovereign immunity, ORS 477.089 provides no similar justification for eliminating personal emotional distress remedies. Indeed, as Plaintiffs explain, the statute appears intended simply to standardize property damage recovery in wildfire cases, *not* to eliminate all personal injury claims arising from those wildfires and the negligent conduct that causes them. In the absence of any other justification eliminating established personal injury remedies would constitute the type of "bare reduction in a remedy" that, as the Supreme Court explained in *Busch*, violates the remedy clause.

Catastrophic wildfires cause severe personal emotional harm for which the law provides a remedy. Eliminating those remedies entirely would violate the very principles the remedy clause seeks to protect. Adopting Defendants' interpretation—which is at odds with the Supreme Court's decisions in both *Horton* and *Busch*—would violate bot the statute itself and Oregon's remedy clause.

Amici respectfully disagree but do not believe that the differential departure makes a difference in this case. In both contexts, the departure is more significant than the remedy clause permits.

CONCLUSION

For the reasons set forth above, *amici* respectfully urge the Court to affirm the trial court's limited judgment.

Respectfully submitted this 2nd day of September, 2025.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word-count limitation in ORAP 5.05(1)(b)(ii)(B) because the word count on this brief (as described in ORAP 5.05(1)(d)(i)) is 7,699.

I certify that the size of the type in this brief is not smaller than fourteen points for both the text of the brief and footnotes, as required under ORAP 5.05(3)(b)(ii).

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on September 2, 2025, I directed the original **BRIEF *AMICI CURIAE* OF OREGON TRIAL LAWYERS ASSOCIATION AND OREGON CONSUMER JUSTICE IN SUPPORT OF PLAINTIFFS-RESPONDENTS-CROSS APPELLANTS** to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon the following:

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