IN THE COURT OF APPEALS OF THE STATE OF OREGON

Jeanyne James; Robin Colbert; Jane Drevo; Sam Drevo; Brooke Edge and Bill Edge, Sr.; Lori Fowler; Iris Hampton; James Holland; Rachelle McMaster; Kristina Montoya; Northwest River Guides, LLC; Sharlene Stockton and Kevin Stockton, Victor Palfreyman; Palfreyman Family Trust; Duane Brunn, individually and on behalf of all others similarly situated; Alfred Cuozzo; Deborah Jo Fawcett; David Giller, Sr.; Richard Jensen; Scott Johnson; Frank King, individually and in his capacity as trustee of the King Revocable Trust; Stephen David Nielsen; Cory Staniforth; and Deborah Tank,

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.

Multnomah County Circuit Court No. 20CV33885

Court of Appeals No. A183140

BRIEF OF AMICUS CURIAE OREGON BUSINESS & INDUSTRY ASSOCIATION IN SUPPORT OF APPELLANTS PACIFICORP AND PACIFIC POWER

Appeal from the Circuit Court of Oregon,
Multnomah County
The Honorable Steffan Alexander

April 2025

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TABLE OF CONTENTS

Page

I. INTRODUCTION AND INTERESTS OF THE *AMICUS CURIAE* 1

II. SUMMARY OF ARGUMENT 3

III. ARGUMENT 7

A. Oregonians Are Harmed By The Trial Court's Class Action Decisions Which, If Affirmed, Effectively Lower Class Certification and Proof Requirements So Much That a Business Can Be (And In Fact Has Been) Found Liable For A Disaster It Did Not Cause 7

1. Class Certification Under ORCP 32 Should Be Reserved For Cases Where There Are Negative-Value Claims And Common, Class-Wide Proof Of Causation. 7

a. This Case Could Not Be Fairly Tried As A Class Action Because Plaintiffs Failed To Present Proof That PacifiCorp Caused Harm To All Class Members. 8

b. The Substantial Claims of Each Class Member Support Finding This Case Is Inappropriate For Class Treatment 11

2. Even After Certification, Class Members Should Be Required To Individually Prove Their Claims. 12

3. If Affirmed, The Trial Court's Decision To Certify A Disparate Class And Then Eliminate The Requirement To Prove Each Class Claim Leads To Unpredictable, Expanded Liability That Hurts Oregon Businesses And Consumers. 13

TABLE OF CONTENTS
(continued)

Page

B. If Affirmed, The Trial Court's Decisions Ignoring ORS 477.089 And Expanding The Availability Of Noneconomic Damages To Individuals Who Have Not Suffered Physical Injury Will Hurt Oregon Businesses, And By Extension, Oregonians. 17

1. Limits And Prohibitions On Noneconomic Damages Are A Rational Response To The Historical Rise In Pain And Suffering Awards And Their Unpredictability. 17

a. The Unpredictability Of Noneconomic Damage Awards Leads To Due Process Concerns And Unfair Treatment. 22

b. This Case Illustrates Why Juries Reach Inflated, Arbitrary Noneconomic Damage Awards. 24

c. Oregon Is Among Many States That Have Enacted Reasonable Laws Limiting the Recoverability of Noneconomic Damages. 27

2. Oregon Businesses Are Particularly Vulnerable To Excessive "Nuclear Verdicts" Like the Ones Here..... 31

IV. CONCLUSION..... 36

APPENDIX .....

TABLE OF AUTHORITIES

Page(s)

Cases

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134 Or 574, 294 P 605 (1930) 18

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I. INTRODUCTION AND INTERESTS OF THE *AMICUS CURIAE*

Founded in 2017, following the merger of Oregon's two most significant statewide business organizations, Associated Oregon Industries ("AOI") and the Oregon Business Association ("OBA"), Oregon Business & Industry Association ("OBI") is the state's largest and most effective statewide business advocacy group. OBI strives to strengthen Oregon's economy to achieve a healthy, prosperous, and competitive state for the benefit of present and future generations. OBI has taken on this lofty mission because a strong private sector is necessary to ensure that all Oregonians have access to good jobs that support thriving families. A strong private sector is also necessary to generate adequate funding for critical public services, including public schools, public transportation, and public safety.

With more than 1,600 members who employ more than 250,000 people in every corner of the state of Oregon, OBI represents the diversity of Oregon's mighty business community. OBI's members range from small businesses to the state's largest employers, representing virtually every sector. These businesses come together as the Oregon Business & Industry Association because they are committed to building a stronger Oregon.

OBI is recognized statewide as a leader in advocacy and policy development; its team works tirelessly to ensure its members' voices are heard in discussions that will affect their businesses. OBI stands

on a long and successful history as the voice for business in Oregon. AOI was founded in Salem, Oregon in 1895 and grew to become the most influential business organization in the state. AOI worked on the belief that free market principles, *predictable* law, regulations, and ordinances, and efficient use of tax dollars would allow Oregon's economy to thrive. OBA was founded in Portland, Oregon in 2000 as a nonpartisan voice for business committed to collaboration and problem solving. The core beliefs of those two organizations remain guideposts for OBI's work today.

OBI's membership includes a wide range of companies that rely upon certainty when assessing potential legal liability. OBI has a strong interest in ensuring that the legal environment in which its members operate is consistent and fair. Predictability, consistency, and fairness allow businesses, big and small, to thrive. OBI is therefore well-suited to offer a perspective on the impact of a relaxation of class action requirements and extra-contractual damages on Oregon businesses.

OBI agrees with (1) PacifiCorp about the class certification requirements, the proper interpretation of Oregon's wildfire statute, ORS 477.089 (which specifically allows for recovery of all objectively verifiable monetary losses), and the common-law limitation of noneconomic damages; (2) Amicus Curiae Oregon Forest Industries Council ("OFIC") about the proper interpretation of ORS 477.089; and (3) Amicus Curiae Oregon Association of Defense Counsel

("OADC") about the common-law limitation of noneconomic damages.[1] But OBI writes here for a different purpose: to explain the harmful effect that the trial court's rulings will have on OBI's members and Oregonians generally.

II. SUMMARY OF ARGUMENT

If affirmed, the trial court decisions in this case set a dangerous precedent for Oregon businesses and the communities they serve. The decisions on review substantially lowered class action requirements while at the same time opening the floodgates to large noneconomic damages awards. These decisions have large real-world impacts and dramatically expand the risk profile and potential liability of Oregon businesses, inevitably leading businesses to raise prices, reduce investment, cut jobs, and potentially even leave the state.

First, the trial court's decision to certify and maintain this case as a class action without requiring Plaintiffs to prove up the claims of each class member has resulted in manifest injustice and must be reversed. Class actions are intended to be an exception to the well-established rule that an aggrieved party should pursue and prove up their claim on an individual basis. Accordingly, the class vehicle may

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[1] OBI agrees and adopts in full PacifiCorp's arguments in support of its Sixth, Seventh, Eighth, Ninth, and Tenth Assignments of Error in PacifiCorp's Opening Brief (at 78-94); Section I of Amicus Curiae OFIC's *amicus* brief; and Section B.i-ii of Amicus Curiae OADC's *amicus* brief. *See* ORAP 5.77(1), (4).

only be used in cases where class treatment is "*superior* to other available methods for the *fair* and efficient adjudication of the controversy." ORCP 32 B (emphasis added). Here, the trial court's superiority determination was incorrect because there were no common issues or proof of causation, making the case impossible to manage fairly as a class action. The trial court's superiority determination was also incorrect because the claims of each individual class member were significant enough to incentivize traditional, individual suits.

The trial court's error in certifying this case as a class action (and refusing to de-certify it as the case progressed) was magnified by the trial court's problematic instruction that the jury could "assume that the evidence at the trial applies to all class members." (ER-258.) This instruction violated the long-established rule that plaintiffs in a class action "must prove" each element of each claim for all class members. *Strawn v. Farmers Ins. Co. of Oregon*, 350 Or 336, 358, 258 P3d 1199 (2011). The instruction also violated basic due process principles, which prohibit class action procedures from depriving a defendant of the procedural and substantive right to raise a defense to each class member's claim. *C.f. Bernard v. First Nat'l Bank of Or.,* 275 Or 145, 159–60, 550 P2d 1203 (1976).

The inherent unfairness of the trial court's "rough justice" approach to class action litigation is evidenced by the fact that PacifiCorp has now been found liable for the Santiam Canyon fire's

destruction of over 1,000 homes, *despite the Oregon Department of Forestry ("ODF") confirming there is no evidence that PacifiCorp caused that fire*.

Should this Court affirm the trial court's faulty interpretation of class action requirements in this case, there will be very real impacts on the Oregon business community. Lowering class action standards negatively impacts business growth and investment by creating an unpredictable legal environment, which in turn causes businesses to raise prices, cut jobs, and even consider leaving the state for a jurisdiction with a more stable legal environment.

Second, the trial court's decision to allow multi-million dollar noneconomic damage awards in this case further harm Oregon businesses. Noneconomic damage awards are subjective and unpredictable. "There is no standard for the measurement of pain and suffering," *DeMaris v. Whittier*, 280 Or 25, 29, 569 P2d 605 (1977), or "even a conception of those damages or what they represent." Dan B. Dobbs, *Law of Remedies § 8.1(4)*, at 383 (2d ed 1993).[2] Juries are "left with nothing but their consciences to guide them." Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Cal L Rev 772, 778 (1985).

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[2] *See also* Restatement (Second) of Torts § 903 cmt a (1965) ("There is no scale by which the detriment caused by suffering can be measured and hence there can be only a very rough correspondence between the amount awarded as damages and the extent of the suffering.").

Historically, noneconomic damage awards were modest and noncontroversial. But in the past 50 years, noneconomic damages awards have ballooned to the point that they outpace other types of liability. The increasing size of noneconomic damages, *their unpredictability*, and the potential for runaway awards—like in this case—threaten the economic stability of businesses and the affordability of liability insurance. In response, many states have not only placed reasonable upper limits on such awards, but also prohibited individuals from recovering such damages.

When the Oregon legislature enacted ORS 477.089, it struck a careful balance. In exchange for not allowing individuals harmed by a wildfire to recover noneconomic damages, the legislature allowed those individuals to recover two other types of remedies, which now serve as "the exclusive remedies for damages or injury to property caused by a wildfire." ORS 477.089(4). These exclusive remedies do not include noneconomic damages. The Oregon legislature, like lawmakers in sister states, sought to maintain economic stability for all Oregonians by choosing a substantial, but not unlimited, remedy for the few Oregonians who may find themselves as plaintiffs seeking to recoup losses for harm from wildfires.

The trial court's failure to follow ORS 477.089 in this case not only violates separation of powers principles but also increases the risk that Oregon businesses will face "nuclear verdicts" in wildfire cases. These massive verdicts drive up the cost of doing business,

ultimately pushing business, business investment, and jobs away from Oregon.

III. ARGUMENT

A. Oregonians Are Harmed By The Trial Court's Class Action Decisions Which, If Affirmed, Effectively Lower Class Certification and Proof Requirements So Much That a Business Can Be (And In Fact Has Been) Found Liable For A Disaster It Did Not Cause.

The decisions below improperly lowered class action standards, and. if affirmed by this Court, Oregon businesses and consumers will suffer the impacts of the trial court's imprecise, "rough justice" approach to class actions for years to come.

1. Class Certification Under ORCP 32 Should Be Reserved For Cases Where There Are Negative-Value Claims And Common, Class-Wide Proof Of Causation.

To certify a class under ORCP 32, the court must find that a class action is "*superior* to other available methods for the *fair* and efficient adjudication of the controversy." ORCP 32 B (emphasis added). When deciding whether the class vehicle is superior, there are several pertinent factors, including the predominance of common issues, management difficulties in maintaining the case as a class action, and whether the individual claims are "insufficient" in amount to be pursued individually. ORCP 32 B(3), (7), (8).

Accordingly, class treatment is inappropriate under ORCP 32 B where the plaintiffs fail to show that the defendant caused damages

on a class-wide basis, especially where the claims of each class member are sufficiently large to be brought as standalone suits.

a. This Case Could Not Be Fairly Tried As A Class Action Because Plaintiffs Failed To Present Proof That PacifiCorp Caused Harm To All Class Members.

The trial court decision in this case improperly found the class vehicle superior, despite the fact that common issues did not predominate and there were insurmountable management challenges in maintaining this case as a class action.

Here, class members were affected by different fires with different causes. The trial court granted certification based on Plaintiffs' claim that PacifiCorp harmed every class member in a vaguely similar way (*i.e.,* by allegedly allowing power equipment to cause different fires, miles apart, throughout the state). (TCF-02/16/22 (Plaintiffs' Supplemental Brief).) The trial court's reasoning appears to be that class certification requires only that each class member be harmed in a generally similar way—even if the harms were caused in different ways by different events—but that reasoning marks a dangerous expansion of ORCP 32 and led to an incorrect class-wide verdict on causation in this case.

In the class certification order, the trial court relied on Plaintiffs' promises to establish class-wide harm with class-wide proof. The trial court's certification order repeatedly referenced Plaintiffs' expert, Brewer, who was supposed to testify that

PacifiCorp caused all fires in the class area, including the Santiam Canyon fire. (*See* ER-64-65.) This Court denied review of the class certification order, similarly relying on Plaintiffs' promise to "use predominantly common evidence in the first phase" of the trial to prove causation. *James v. PacifiCorp*, 323 Or App 764, 776, 524 P3d 506 (2023). But as explained more fully in PacifiCorp's Opening Brief, that evidence was never introduced. *See* PacifiCorp's Opening Brief at 25-30, 41-43.

This failure of common proof was damning and should have prevented the Court from finding that a class action was a superior method for resolving this case. There was no common evidence that a single act of misconduct or even pattern of misconduct by PacifiCorp caused every fire within the class definition, as required to show predominance. *Pearson v. Philip Morris, Inc.*, 358 Or 88, 111, 361 P3d 3 (2015) (explaining that the predominance inquiry is "designed to 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"). This failure to present a coherent, unifying causation theory also made it impossible to fairly manage this case as a class action. *See Bernard*, 275 Or at 159 (explaining that maintaining a class action when the defendant has a "legitimate issue or defense which will require an individual inquiry of a considerable number of the claimants" results in an "unmanageable proceeding").

After the verdict, ODF concluded there is no evidence that the fire damage in the Santiam Canyon (impacting almost half of the class members) was caused in any way by powerline ignitions; indeed, ODF determined the Santiam Canyon fire was most likely caused by a spot fire jumping from the already-burning Beachie Creek Fire that was started by a lightning strike.[3] The ODF report, thus, demonstrates that it is impossible to fairly manage a class action when the central question of *causation* is not capable of class-wide adjudication.

A new Multnomah County Circuit Court opinion issued on April 10, 2025, highlights the importance of the ODF report. (*See* App-1-2 (Order on Plaintiffs' Partial Motion for Summary Judgment entered on April 10, 2025, in *Lange Winery, LLC, et al. v. PacifiCorp*, Multnomah County Circuit Court, Case No. 24CV25661).) In *Lange Winery*, several wineries sued PacifiCorp arguing that their grape harvest was damaged or destroyed by the traveling smoke from the Santiam Canyon fire. The wineries argued on summary judgment that the verdict from this case was issue preclusive as to PacifiCorp's liability for the Santiam Canyon fire damage. The trial court (Russell, J.) rejected that argument, in part, because the ODF "report concludes that PacifiCorp facilities did not cause the Santiam

[3] The ODF Incident Investigation Report is located in record at ER-833-53.

Canyon fire"; accordingly, the court held that "inconsistent findings now exist as to the causation of the Santiam Canyon fires * * *."

b. The Substantial Claims of Each Class Member Support Finding This Case Is Inappropriate For Class Treatment.

Allowing this case to proceed as a class action was also problematic given the average value of each class member's claim. As embodied in ORCP 32 B(8), the class action vehicle is intended for negative value claims, not for cases (like this one) with large individual claims. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 US 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." (quoting *Mace v. Van Ru Credit Corp*., 109 F3d 338, 344 (7th Cir 1997)). Here, each of the class members to try their claims has recovered multiple millions of dollars. Class actions should not be used to aggregate such high-value claims, especially those with disparate facts and causation theories. Because the individual claims at issue in this case are large enough to incentivize standalone suits, the procedural shortcuts afforded in a class action were unnecessary, further showing that a class action was not a "superior" or "fair" way to try this case.

In sum, the trial court's initial "superiority" decision and its subsequent decision to maintain this case as a class action, despite

Plaintiffs' failure to provide class-wide proof of causation, the inherent management concerns in trying such disparate claims together, and the reality that each class member had a high-value, standalone claim, sets a dangerous precedent. As explained *infra*, relaxing class action certification requirements in this manner leads to more class actions, more pressure to settle (even if the claims are meritless), and real harm to Oregon businesses and consumers.

2. Even After Certification, Class Members Should Be Required To Individually Prove Their Claims.

Compounding the harm of the trial court' s problematic certification decision was its instruction that the jury could "assume that the evidence at the trial applies to all class members." (ER-258.)

Under the trial court's rule, once a class is certified, plaintiffs will only need to prove the claim of a class representative in order to establish liability for the entire class—regardless of whether the evidence introduced shows the defendant is liable to every class member. This is directly contrary to Oregon law and violates fundamental due process principles.

In Oregon, plaintiffs in a class action "must prove" each element of each claim for all class members. *Strawn*, 350 Or at 358. This fundamental principle makes sense because, as the Oregon Supreme Court recognized in *Bernard*, class action procedures should not be used to deprive a defendant of valuable procedural and substantive rights. *Bernard*, 275 Or at 159–60. Even in a class

action setting the defendant must be allowed to present bona fide defenses. *Id.* If individual inquiries are necessary to permit the defendant to litigate legitimate issues relevant to its defense, then maintaining a class action is inappropriate because class certification should not impact the defendant's right to put all individual class members to their proof. *Id.*; *see Heiner v. Donnan*, 285 US 312, 329 (1932) ("a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment"); *Vlandis v. Kline*, 412 US 441, 445 (1973) ("Statutes creating permanent rebuttable presumptions have long been disfavored").

Here, the trial court's decision to maintain this case as a class action while preventing PacifiCorp from raising meritorious defenses relevant to individual claims is unjust and contrary to Oregon law. Again, the ODF report on the cause of the Santiam Canyon fire demonstrates the manifest injustice in certifying a disparate class and then instructing the jury to assume if one claim is proven, liability for all claims is established.

3. If Affirmed, The Trial Court's Decision To Certify A Disparate Class And Then Eliminate The Requirement To Prove Each Class Claim Leads To Unpredictable, Expanded Liability That Hurts Oregon Businesses And Consumers.

The trial court's decision to certify a class with thousands of high-value claims—and then allow a liability finding as to the whole

class without Plaintiffs producing class-wide proof of causation—marks an unprecedented lowering of Oregon's class action standards. Based on the trial court's reasoning, Oregon businesses are justifiably concerned that they could be held liable for various injuries even if there is no credible evidence they caused or contributed to those injuries so long as a creative plaintiff advances a theory that the business caused a vaguely similar injury to others. This lowering of class action standards has real impacts on Oregon businesses and consumers.

When class certification and proof standards are lowered, the pressure of potentially massive damages coerce businesses into settling, even if the claims lack merit. *C.f. Wal-Mart Stores, Inc. v. Dukes*, 564 US 338, 349-51 (2011) (emphasizing the need for rigorous analysis in class certification to prevent abusive litigation); *Microsoft Corp. v. Baker*, 582 US 23, 29 (2017) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."). This settlement pressure is magnified by the trial court's decision; Oregon businesses must now decide whether to broker a settlement (regardless of the merits of the claims) or face the risk of defending against a large, disparate class without the opportunity to present a defense against all class claims. This puts Oregon businesses in an untenable position.

Lowering class action standards in this fashion also negatively impacts business growth and investment by creating an unpredictable legal environment. Weak class certification and proof standards encourage the filing of speculative claims, and the real risk of being tagged with a nuclear verdict in such suits leads to businesses diverting resources away from growth, innovation, and employment.[4]

To offset increased litigation risk, companies raise prices, reduce investment, cut jobs, and potentially even leave the state.[5]

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[4] *See, e.g.,* HR Rep No. 115-25, 115th Cong, 1st Sess, 4 (2017) (discussing class actions and stating that "ultimately these costs are paid by consumers, workers, and investors, throughout the economy–because the diversion of hundreds of millions of dollars away from productive purposes, as well as the time and attention of entrepreneurs, means prices are higher, new products are not brought to market, and new jobs are not created.").

[5] *See e.g.,* U.S. Chamber of Commerce Inst. for Legal Reform, *Nuclear Verdicts: Trends, Causes, and Solutions* 5-6 (May 2024) ("*Nuclear Verdict*), https://shorturl.at/RqEfA (accessed Apr. 3, 2025). In a 2019 survey, 89 percent of companies reported that a state's litigation environment is likely to impact important business decisions, such as where to locate or to do business. U.S. Chamber of Commerce Inst. for Legal Reform, *2019 Lawsuit Climate Survey: Ranking the States: A Survey of the Fairness and Reasonableness of State Liability Systems* (Sept. 2019), https://shorturl.at/xzAY3 (accessed Apr. 3, 2025). In another survey, 61% of small businesses reported adjusting their pricing models to account for litigation costs. U.S. Chamber Inst. for Legal Reform, *Tort Liability Costs for Small Businesses* (July 2010), https://instituteforlegalreform.com/wp-content/uploads/2020/10/ilr_small_business_2010_0.pdf; *see also* Lisa Litwiller, *Why Amendments to Rule 23 Are Not Enough: A Case for the Federalization of Class Actions*, 7 Chap L Rev 201, 202 (2004) ("Businesses spend millions of dollars each year to defend against the

Coerced settlements and nuclear verdicts also increase the cost of doing business; as explained *infra,* the high cost of doing business is a "push factor" that tends to push business and business investment away from Oregon. *See infra* Pages 32-33. This all comes at a time when new business start-ups in Oregon are down and the number of business "deaths" in Oregon continues to rise.[6]

In sum, the trial court's class action decisions, effectively lowering class certification and proof requirements in a way that defies logic (*i.e.,* allowing a business to be held liable for a fire it did not cause just because the fire occurred somewhat near another fire that the business *may* have caused), should not be affirmed. If the trial court's approach to class actions is sanctioned by this Court, Oregon businesses will face increased uncertainty and costs, which will have real-world economic impacts on all Oregonians.

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filing and even the threat of frivolous class action lawsuits. Those costs, which could otherwise be used to expand business, create jobs, and develop new products, instead are being passed on to consumers in the form of higher prices.") (citation omitted).

[6] Oregon Department of Administrative Services, *Oregon Economic and Revenue Forecast* (March 2025), https://www.oregon.gov/das/oea/Documents/OEA-Forecast-0325.pdf (accessed Apr. 3, 2025).

B. If Affirmed, The Trial Court's Decisions Ignoring ORS 477.089 And Expanding The Availability Of Noneconomic Damages To Individuals Who Have Not Suffered Physical Injury Will Hurt Oregon Businesses, And By Extension, Oregonians.

1. Limits And Prohibitions On Noneconomic Damages Are A Rational Response To The Historical Rise In Pain And Suffering Awards And Their Unpredictability.

Historically, the availability of noneconomic damages and inability to objectively measure pain and suffering did not raise serious concerns because "personal injury lawsuits were not very numerous and verdicts were not large." Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective Review of the Problem and the Legal Academy's First Responses*, 34 Cap U L Rev 545, 560 (2006). In addition, before the twentieth century, courts often reversed large noneconomic awards. *See* Ronald J. Allen & Alexia Brunet Marks, *The Judicial Treatment of Noneconomic Compensatory Damages in the Nineteenth Century*, 4 J Empirical Legal Stud 365, 369 (2007) (finding "literally no cases affirmed on appeal prior to 1900 that plausibly involved noneconomic compensatory damages in which the total damages (noneconomic and economic combined) exceeded $450,000" in 2007 dollars).

Early awards for pain and suffering in Oregon followed the national trend. For example, in 1900, the Oregon Supreme Court affirmed a $10,000 pain and suffering award—the equivalent of

about $325,594 today[7]—to a 21-year-old passenger who lost both her legs due to a train starting suddenly as she exited. *See Smitson v. Southern Pac. Co.*, 37 Or 74, 60 P 907 (1900). Thirty years later, the Oregon Supreme Court determined that a $23,256.60 award for pain and suffering and loss of future earnings to a 38-year-old railroad worker who suffered a severe spinal injury, at times causing temporary paralysis, was not excessive. *Adskim v. Oregon Washington R. &. Co.*, 134 Or 574, 294 P 605 (1930) (reversing judgment on other grounds). That amount is the equivalent of $350,000 today.[8] And when medical malpractice resulted in a patient suffering complete loss of vision in one eye and partial vision loss in the other eye in 1942, the Oregon Supreme Court determined that a general damage award of $18,000 (about $365,826 today) was "large" but permissible. *Shives v. Chamberlain*, 168 Or 676, 687, 126 P2d 28 (1942).

In sum, today's multi-million noneconomic damage awards, like the ones here, represent a dramatic and unwarranted departure from amounts that Oregon courts have traditionally found reasonable.

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[7] Estimate based on U.S. Department of Labor, Bureau of Labor Statistics, CPI Inflation Calculator (the "CPI Inflation Calculator"), https://data.bls.gov/cgi-bin/cpicalc.pl, which indicates that $10,000 in 1913 (the earliest year available) has the same buying power as $325,594 in February 2025.

[8] Estimate based on the CPI Inflation Calculator, which indicates that $23,256.60 in January 1930 has the same buying power as $433,951 in February 2025.

Following World War II, the average size of pain and suffering awards expanded, as personal injury lawyers became adept at finding ways to enlarge these awards. *See generally* Melvin M. Belli, *The Adequate Award*, 39 Cal L Rev 1 (1951); *see also* Merkel, 34 Cap U L Rev at 560-65 (examining post-war expansion of pain and suffering awards). Early academic concerns over the rise in noneconomic damage awards were voiced, but were ignored. *See, e.g.*, Marcus L. Plant, *Damages for Pain and Suffering*, 19 Ohio St LJ 200, 210 (1958) (expressing concern over the ease of proof of pain and suffering and the unpredictability of such awards and proposing "a fair maximum limit on the award").

By the late 1950s and 1960s, plaintiffs' lawyers began the controversial and now ubiquitous practice of summation "anchoring," in which they suggest to juries—who struggle with assigning a monetary value to pain and suffering—an extraordinary amount for such an award.[9] *See* Joseph H. King, Jr., *Counting Angels and Weighing Anchors: Per Diem Arguments for Noneconomic Personal Injury Tort Damages*, 71 Tenn L Rev 1, 13 (2003). The anchor establishes an arbitrary but powerful baseline for jurors to accept or negotiate upward or downward. *See id.* at 37-40. Empirical evidence

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[9] Plaintiffs' lawyers also began "urg[ing] courts to combine the trials of multiple, unrelated plaintiffs—whose only connection is that they allege an injury from the same product—because this prejudicial tactic hides inadequacies in individual cases and substantially raises the likelihood of a jury finding a defendant liable and returning a nuclear verdict." *Nuclear Verdicts* at 5.

confirms that anchoring "dramatically increases" noneconomic damage awards. John Campbell, et al., *Time is Money: An Empirical Assessment of Non-Economic Damages Arguments*, 95 Wash U L Rev 1, 14 (2017). Research indicates that "the more you ask for, the more you get." Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 Applied Cognitive Psychol 519, 526 (1996).

The Oregon Supreme Court initially questioned whether such arguments are permissible. *See Hoyle v. Van Horn*, 236 Or 205, 207-08, 387 P2d 985 (1963) (assuming, without deciding, that asking a jury to award $25 per day for pain and suffering was improper, but finding that a mistrial was unnecessary because the trial court instructed the jury to disregard the reference). The Oregon Supreme Court later joined courts that permit anchoring practices, which drive up noneconomic damage awards. *See DeMaris v. Whittier*, 280 Or 25, 29-30, 569 P2d 605 (1977); Campbell, 95 Wash U L Rev at 33-48 (providing fifty-state survey).[10]

By the 1970s, "in personal injuries litigation the intangible factor of 'pain, suffering, and inconvenience' constitute[d] the largest

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[10] Some courts prohibit anchoring practices, finding that they intrude into the jury's domain, are not founded on admissible evidence, create an illusion of certainty, and can result in a noneconomic damage award of whatever amount counsel suggests. *See, e.g.*, *Henne v. Balick*, 146 A2d 394, 398 (Del 1958); *Caley v. Manicke*, 182 NE2d 206, 208 (Ill 1962); *Henman v. Klinger*, 409 P2d 631, 634 (Wyo 1966).

single item of recovery, exceeding by far the out-of-pocket 'specials' of medical expenses and loss of wages." *Nelson v. Keefer*, 451 F2d 289, 294 (3d Cir 1971).

This trend has continued in the 21st Century. According to the Bureau of Justice Statistics, the median damage award in medical liability jury trials in state courts, adjusted for inflation, was 2.5 times higher in 2005 ($682,000) than in 1992 ($280,000). *See* Lynn Langton & Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts*, 2005, at 10 tbl 11 (Bur of Justice Stats, Apr. 9, 2009). The median damage award in state court product liability jury trials grew even more substantially; adjusted for inflation, product liability awards were *five times higher* in 2005 ($749,000) than in 1992 ($54,000). *Id.* Noneconomic damages accounted for approximately half of these awards. *See* Thomas H. Cohen, *Tort Bench and Jury Trials in State Courts*, 2005, at 6 fig 2 (Bur of Justice Stats, Nov. 2009).

As Judge Paul Neimeyer of the U.S. Court of Appeals for the Fourth Circuit observed, in the modern era, "[m]oney for pain and suffering * * * provides the grist for the mill of our tort industry." Paul Neimeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va L Rev 1401, 1401 (2004). Indeed, pain and suffering awards in the United States are often more than ten times those in the most generous of other nations.

Stephen D. Sugarman, *A Comparative Look at Pain and Suffering Awards*, 55 DePaul L Rev 399, 399 (2006).

a. The Unpredictability Of Noneconomic Damage Awards Leads To Due Process Concerns And Unfair Treatment.

Not only have noneconomic damage awards increased in size, but their subjective nature makes them "highly variable, unpredictable, and abjectly arbitrary." Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L Rev 163, 185 (2004). As one scholar observed:

> "It is also clear that jurors uniformly commented on the difficulty of putting a price on pain and suffering and used different methods of calculating the awards. Some [juries] roughly split the difference between the defendant's and the plaintiff's suggested figures. One juror doubled what the defendant said was fair, and another said it should be three times medical expenses. * * * A number of jurors assessed pain and suffering on a per month basis * * *."

Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 Duke LJ 217, 254-55 (1993) (footnote omitted and emphasis added). This unpredictability not only poses a due process concern for defendants and complicates the ability to settle cases, it also raises significant issues of "horizontal equity" for plaintiffs. *See* Oscar G. Chase, *Helping Jurors Determine Pain and*

Suffering Awards, 23 Hofstra L Rev 763, 769 (1995) (observing that "variability * * * undermines the legal system's claim that like cases will be treated alike").

Juries may award two plaintiffs with similar injuries vastly different amounts for pain and suffering. *See* Merkel, 34 Cap U L Rev at 567 (noting that noneconomic damages "for the same injury" can "vary substantially from case to case"); Randall J. Bovbjerg, et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering*," 83 Nw U L Rev 908, 924 (1989) (observing that an "absence of 'horizontal' equity" in noneconomic damage awards for similar injuries leads to similarly situated parties being treated differently, erodes confidence in the civil justice system, and undercuts the deterrence function of tort law).

In reaching such amounts, juries may be influenced by whether they relate to the plaintiff, or other conscious or subconscious biases for or against a party, rather than the level of the harm. *See generally* Dobbs, *2 Law of Remedies*, § 8.1(4), at 398 ("[V]erdicts vary enormously, raising substantial doubts whether the law is evenhanded in the administration of damage awards or whether in fact it merely invites the administration of biases for or against individual parties."). Juries may also be influenced by improper factors such as *a desire to punish a defendant*, which should be reserved for consideration of punitive damages, or a view that a defendant has "deep pockets" and can afford to pay more. *See*

generally Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into 'Punishment*, 54 SC L Rev 47 (2002).

b. This Case Illustrates Why Juries Reach Inflated, Arbitrary Noneconomic Damage Awards.

The case before this Court illustrates how juries can be led to reach extraordinary verdicts for pain and suffering and the unjustified variability of such awards.

Here, the jury verdicts awarded more than $140 million in damages against PacifiCorp to date, an average award of more than $4 million per Plaintiff,[11] and untold future damages, as the trial court has scheduled multiple additional damages-only trials based on the same erroneous rulings that will continue through 2025.

Specifically, in June 2023, the jury returned a verdict in favor of Plaintiffs. A non-unanimous jury found in favor of the individual Plaintiffs and the class as a whole on all claims except the inverse condemnation claim. (ER-290-305.) The jury awarded the class representatives a total of $4.38 million in economic damages and *almost 15.5 times that amount in noneconomic damages—a total of*

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[11] This amount is the equivalent of what the average Oregon family earns in 45 years. *See* U.S. Census, *Historical Income Tables: Households, tbl H-8, Median Household Income by State*, https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-households.html (reporting average household income in Oregon was $88,740 in 2023).

$67.5 million. (ER-306-09.) Based on testimony describing their sentimental attachment to their property, each plaintiff received $4.5 million in noneconomic damages, except for three plaintiffs who, for some unknown reason, each received $1.5 million less. (*Id.*) The jury also awarded a class-wide punitive damages multiplier, which increased by 25 percent the damages of both the class representatives before the court in Phase I *and any future plaintiffs*. (ER-313-18.) The economic damages were then doubled to $8.75 million under ORS 477.089(2)(b).

Following the Phase I verdict, the trial court scheduled the first Phase II damages trial. The first Phase II jury rendered a verdict in January 2024. The second Phase II damages trial was held just a few weeks later, and a verdict was rendered in March 2024. Contrary to the trial court's originally contemplated trial plan, the juries in both Phase II trials were instructed that liability and causation had already been decided against PacifiCorp, PacifiCorp was "the" cause of Plaintiffs' injuries,[12] and the only issue for

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[12] The recent ODF Santiam Canyon Wildfire Event investigation report shows that this is not true. (ER-837 and ER-850 (Incident Investigation Report at A1, A14 ("**ODF investigators did not find any evidence that reported powerline ignitions had contributed to the overall spread of the fire in the Santiam Canyon. * * * The most probable explanation for these ignitions is spot fires from the main Beachie Creek Fire, which was burning upwind of the ignitions in the Santiam Canyon.** With a megafire, such as those that occurred prior to and through Labor Day weekend 2020, the rising heat and gases can create a large convection column that may carry fire brands away

resolution was the amount of damages owed to individual class members. (ER-463-79; ER-499-516.)

In support of their claims of up to $25 million in noneconomic damages, and like the Phase I Plaintiffs, the Phase II Plaintiffs presented evidence concerning the mental and emotional distress that they experienced because the fire had damaged their real and personal property. Plaintiffs testified, for example, about the sentimental meaning associated with personal property such as cars, tools, collectibles, family photographs, and animals, and their loss of enjoyment in the aesthetic value of the land and surrounding vegetation. *The juries in the damages trials have awarded every class member an average of more than $4 million in noneconomic damages.* (ER-480-89; ER-517-26.)

The noneconomic damages awarded in this case also demonstrate the arbitrariness of pain and suffering awards and how

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from the fire and start spot fires.")) (boldface added); Zach Urness, *What caused the 2020 Santiam wildfires? Investigation sheds light on deadly fires*, Statesman Journal (published Mar. 19, 2025, updated Mar. 20, 2025) https://www.statesmanjournal.com/story/news/local/oregon/2025/03/19/oregon-department-forestry-report-pacificorp-2020-santiam-wildfires/82529071007/ ("The report's main conclusion is that power lines, mainly owned by utility giant PacifiCorp, were not to blame for the deadly and destructive fires, and that embers from the Beachie Creek Fire, which had been active for weeks in the Opal Creek Wilderness, caused the majority of destruction. That finding was almost the opposite of a Portland jury ruling in June 2023 that PacifiCorp was not only liable, but grossly negligent for the fires.").

they do not necessarily reflect the level of harm. For example, here, based on testimony describing their sentimental attachment to their property, each plaintiff received $4.5 million in noneconomic damages, but somehow three of those plaintiffs each received about $1.5 million less. (*Id.*) Could it be that the jury penalized the three plaintiffs because two of them were not at home on the day of the fires and one of them only lost timber, not his home? (*Id.*) But if those plaintiffs had a sentimental attachment to their property, why is their "pain and suffering" lower? Put simply, noneconomic damages awarded in this case demonstrate the arbitrariness of pain and suffering awards and how they do not necessarily reflect the level of harm.

c. Oregon Is Among Many States That Have Enacted Reasonable Laws Limiting the Recoverability of Noneconomic Damages.[13]

In an effort to provide more certainty and efficiency, and to combat the attempts of federal agencies (particularly in the fire-

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[13] As noted above, rather than repeating sound arguments, OBI adopts PacifiCorp's and OADC's arguments that under Oregon law, noneconomic damages caused by ordinary negligence are not recoverable except in limited circumstances not present here—that is, plaintiffs' damages for emotional distress are not recoverable absent physical injury. *See Hammond v. Cent. Lane Commc'ns Ctr.*, 312 Or 17, 22, 816 P2d 593 (1991); *Lowe v. Philip Morris USA, Inc.*, 207 Or App 532, 551, 142 P3d 1079 (2006), *aff'd*, 344 Or 403, 183 P3d 181 (2008). OBI also adopts OFIC's argument that ORS 477.089 prescribes the exclusive remedies for damages or injury to property from a wildfire.

prone western United States) to seek the recovery of substantial damage awards under state laws from private parties for fires that damage federal lands and property, at least four Western states—including Oregon—"have amended their laws or enacted legislation to clarify liability exposure and recoverable damages resulting from forest fires. These statutes either eliminate or reduce the recovery of noneconomic (for example, 'ecological') damages, and better define the specific types of economic damages that are available." Amanda Hemmerich, *From Fire Comes Life: Why Courts Assessing Forest Fire Damages Should Recognize Ecological Benefits*, 46 Envtl L Rep News & Analysis 10608, 10612 (2016).

California has a specific statute governing liability for a negligently set fire, which makes the tortfeasor "liable to the owner of such [burned] property for any damages to the property caused by the fire." Cal Health & Safety Code §13007 (West 2012). California also enacted a statute limiting the ability of "public agencies" (including the federal government) to recover noneconomic damages in cases involving the unintentional escape of a fire onto public or private property. *Id.* §13009. Although the law continues to provide for the recovery of certain "ecological and environmental damages," it also requires that these damages be both quantifiable and reasonable in relation to the pre-fire fair market value of the damaged property. *Id.* §13009.2(a); Richard W. Goeken, *States Begin to React to Large*

Recoveries for Escaped Wildfires by Limiting Landowners' Liability for Non-Economic Damages, Forest Landowner, Sept. 6, 2013, at 19.

Three other states—Idaho, Oregon, and Montana—have passed legislation that either limits or entirely prohibits the recovery of noneconomic environmental damages. In 2013, *Idaho* enacted a statute that specifically limits the damages that are recoverable when a person negligently allows a fire to escape from their land. Idaho Code §38-107(2) (West 2013); Goeken, at 19. The statute allows the following damages: reasonable suppression costs, economic damages, and either the diminution of the fair market value of the property or the actual costs for restoration of the property, but not intangible environmental damages. Idaho Code §38-107(2). To remove any ambiguity about what damages are recoverable, the Idaho legislature included a statement of legislative intent, which provides that "intangible environmental damages are clearly speculative in nature and should not be recoverable." 2013 Idaho H.B. 132 (2013).

Similarly, in 2013, *Oregon* enacted a law, ORS 477.089, clarifying the liability rules for escaped wildfires. ORS 477.089 provides for the recovery of "economic and property damage," which is defined as the lesser of either the difference in the fair market value of the property immediately before and immediately after a fire or the cost of restoring property to the condition the property was in immediately before a fire, plus any other objectively verifiable

monetary losses. *Id.* The law also clarifies that double damages apply only if the wildfire is the result of willful, malicious, or grossly negligent violations of state law, while simply negligent conduct will result in liability only for the actual amount of economic and property damages. ORS 477.089(2)(a); Goeken, at 19. And regardless of whether the fire was caused negligently or willfully, any unreimbursed firefighting expenses can also be recovered. ORS 477.089(2)(a). The law does not allow a party to recover noneconomic damages. *See generally* ORS 477.089.

Montana has also passed legislation that limits liability for forest or range fires. Montana's law provides that for a negligent or unintentional forest fire, recoverable damages are limited to the reasonable costs for controlling or extinguishing the fire; economic damages; and either: the diminution of fair market value of the damaged property; or the restoration costs associated with restoring the damaged property to its undamaged state. Mont. Code Ann. § 50-63-104 (West 2013). The law defines economic damages as "objectively verifiable monetary loss, including but not limited to out-of-pocket expenses, loss of earnings, loss of use of property, and loss of business or employment opportunities." *Id.* There is no mention of noneconomic damages.

These limits recognize that the broader public good is served when liability remains reasonable and predictable. These laws were designed to address outlier cases, promote uniform treatment of

individuals with comparable injuries, facilitate fair settlements, and limit arbitrariness that may raise due process and horizontal equity concerns.[14]

Without a statutory limit, a utility may face billions of dollars in liability for a tragic, but more and more common, wildfire. An every-summer fire can result in demands for exorbitant awards for pain and suffering, driving up insurance rates for all utilities and businesses, generally. The enforcement of a sound statutory prohibition on noneconomic damages significantly reduces the potential for runaway verdicts and unreasonable settlement demands.

Accordingly, this Court should reverse the trial court and respect the Oregon's legislature's decision to limit recoverable damages in wildfire cases, particularly when those damages are highly subjective, standardless, and unpredictable.

2. Oregon Businesses Are Particularly Vulnerable To Excessive "Nuclear Verdicts" Like the Ones Here.

Unless courts, like this Court, correct judicial errors, nuclear verdicts will keep trending up and hurting business, large and small.

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[14] *See Gilbert v. Daimler Chrysler Corp.*, 685 NW2d 391, 400 n.22 (Mich 2004) ("A grossly excessive award for pain and suffering may violate the Due Process Clause even if it is not labeled 'punitive.'"); *Neimeyer*, 90 Va L Rev at 1414 ("The relevant lesson to be learned from the punitive damage experience is that when the tort system becomes infected by a growing pocket of irrationality, state legislatures must step forward and act to establish rational rules.").

This is not hyperbole. When excluding the COVID-19 pandemic years, the data regarding "1,288 reported nuclear verdicts (jury verdicts of $10 million or more) in personal injury and wrongful death cases over a 10-year period between January 1, 2013, and December 31, 2022," shows an upward trend in the frequency of reported "nuclear verdicts" at all levels over that period.[15] "Approximately half of nuclear verdicts during this period were between $10 million and $20 million, and over one-third were between $20 million and $50 million. The remaining 19% of nuclear verdicts exceeded $50 million; a group that included 115 'mega' nuclear verdicts of $100 million or more. Awards at higher levels have become more common since the previous study [in 2022]. There were a record number of mega nuclear verdicts in 2022, which preliminary data indicates was again broken in 2023. *The median nuclear verdict during the study period was $21 million* * * *. The median nuclear verdict in product liability cases peaked at $36 million in 2022—a 50% rise over a decade." *Nuclear Verdicts* at 3 (emphasis added).

This matters because nuclear verdicts drive up the cost of doing business, with all the attendant harms. The high cost of doing business in Oregon is one of the "push factors," "factors that tend to

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[15] *Nuclear Verdicts* at 8, 10.

push business and business investment away from Oregon,"[16] repelling businesses (and jobs) away from Oregon.[17]

In a recent paper, the U.S. Chamber of Commerce Institute for Legal Reform (the "Chamber") explained the real-world implications of nuclear verdicts:

> "Nuclear verdicts adversely affect society. The prospect of a nuclear verdict makes it more difficult to fairly resolve claims, leading to unnecessary litigation and appeals. Nuclear verdicts can threaten the viability of a business or the availability of a needed product, or create insurability problems for an entire industry. For example, due in large part to nuclear verdicts, fewer companies offer

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[16] Business Oregon, *New Study Provides Insight to Guide Oregon Business Development Strategies*, Mar. 19, 2025, https://www.oregon.gov/biz/Publications/releases/New%20Study%20Provides%20Insight%20to%20Guide%20Oregon%20Business%20Development%20Strategies.pdf.

[17] Institute for Policy Research & Engagement School of Planning, Public Policy, and Management University of Oregon, January 2025 Final Report: *External Business Recruitment: Are businesses leaving Oregon, and if so, why?* (January 2025) at iii, https://www.oregon.gov/biz/Publications/Biz_Recruitment.pdf ("A concerning number of businesses indicated they were choosing to expand outside of Oregon due to tax and regulatory burdens, challenges attracting and retaining talent, and an unfavorable business climate."); *id.* at 47 ("Oregon ranked 48th of 50 states in CNBC's 'Top States for Business 2024.' CNBC measures business friendliness as follows: 'Companies follow the path of least resistance. That includes a legal and regulatory framework that does not overburden business. We measure each state's lawsuit and liability climates, regulatory regimes covering areas such as trade and labor, as well as overall bureaucracy.")

> insurance to commercial trucking companies and the cost has led many independent businesses to stop operating. Meanwhile, premiums for healthcare professionals in areas known for nuclear verdicts, such as Georgia and Illinois, are rising. Nuclear verdicts resulting from New York's "Scaffold Law" have made it significantly more expensive to build schools and bridges, and difficult to develop needed affordable housing.
>
> "More nuclear verdicts also mean more 'nuclear settlements,' as plaintiffs' lawyers make higher demands, and businesses, understanding the risk, agree to settlement levels that would have been rejected as unreasonable only a few years earlier. This litigation inflation contributes to the increasing costs of everyday items and services—including food, housing, and medical care—and the cost of automobile, homeowners, and commercial insurance. Rising lawsuit costs can also inhibit job growth and new investments for businesses or industries.
>
> "And the wildly varying damage awards to individuals who have experienced similar injuries and losses erode basic confidence in the rule of law." *Nuclear Verdicts* at 5-6.[18]

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[18] *Nuclear Verdicts* at 2 ("This analysis focuses on these extreme and fundamentally unpredictable verdicts because these jury awards play an outsized role in the civil justice system. They are 'nuclear' in the sense that such a verdict can have devastating impacts on businesses, entire industries, and society at large, even when a verdict is later thrown out or substantially reduced by an appellate court. These verdicts can drive up the costs of goods and services, adversely affect the cost and availability of insurance, and undermine fundamental fairness and predictability in the rule of law.").

One of the solutions the Chamber presents is that

> "Legislators can adopt sound civil justice reforms that reduce the likelihood of excessive damage awards before they occur and respond to unjust awards that do occur.
>
> * * *
>
> "Finally, legislators can reject proposals backed by the plaintiffs' bar that would authorize more subjective forms of damages or weaken or repeal laws that have helped ensure that damages awarded provide reasonable compensation for a plaintiff's injury. Together, these actions can restore confidence, fairness, and predictability in jury awards." *Nuclear Verdicts* at 6.

Here, as noted above, the Oregon legislature has enacted a law, ORS 477.089, that does not authorize the recovery of a subjective form of damages in wildfire cases. The trial court should have followed that law.

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IV. CONCLUSION

For the reasons stated above, OBI strongly supports the position of PacifiCorp in this case and respectfully requests that this Court reverse the trial court's decision. Justice requires reversal.

DATED this 21st day of April, 2025.

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COMBINED CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS AND CERTIFICATES OF FILING AND SERVICE

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I certify that this brief complies with the word-count limitation in ORAP 5.05, which word count is 8,239 words.

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I certify that service of a copy of this Brief of *Amicus Curiae* Oregon Business & Industry Association will be accomplished on the following participant(s) in this case via the appellate court's eFiling system, if applicable, and by email:

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

COUNTY OF MULTNOMAH

LANGE WINERY, LLC, et al., Plaintiffs, vs. **PACIFICORP,** an Oregon corporation, Defendant.	**CASE NO. 24CV25661** **ORDER ON PLAINTIFFS' PARTIAL MOTION FOR SUMMARY JUDGMENT**

Plaintiffs' Motion for Partial Summary Judgment came before the court for argument on September 19, 2024. Plaintiffs appeared through their counsel Dustin Dow. Defendant appeared through its counsel Rajan Trehan and Sara Cotton. The court having reviewed the parties' written briefing and considered the oral arguments of counsel, finds as follows:

Plaintiffs move for partial summary judgment seeking issue preclusion as to the causation of the Santiam Canyon fires of September 2020 based on the jury verdict in *James v. PacificCorp* (Multnomah County Case No. 20CV3885). Put simply, Plaintiffs argue the *James* jury conclusively determined that Defendant's negligence caused or contributed to starting and/or growing the Santiam Canyon fires, and that Defendant should not be allowed to relitigate those issues in the instant proceedings. Defendant argues that the *James* verdict must not be given preclusive effect for two reasons: (1) Plaintiffs cannot show that the necessary elements of issue preclusion have been met because the general nature of the verdict as to causation and negligence cannot support issue preclusion; and (2) new evidence recently came to light in the form of the final report issued by the Oregon Department of Forestry in late March 2025. That

report concludes that PacifiCorp facilities did not cause the Santiam Canyon fire, thus inconsistent determinations now exist on the exact issue Plaintiffs ask the Court to preclude.

The Court is persuaded by Defendant's analysis that the requirements for issue preclusion have not been met. A review of the *James* verdict and jury instructions reveals that the questions answered by the jury were specific to the damages suffered by the plaintiffs and class within the Santiam Canyon fire geographic boundaries. Here, the Plaintiffs are wineries located many miles away from the fires, who allege that their grape harvest was damaged or destroyed by the traveling smoke, far outside the fire boundaries at issue in *James*. Conduct that the jury in *James* found unreasonable might be found to be reasonable under the circumstances present in the instant case. Plaintiffs cannot meet the first and most crucial requirement for issue preclusion as the issue in the two proceedings is not identical.

In addition, while the Court is not ruling on the admissibility of the ODF report or any of the information contained in it at this time, the fact that inconsistent findings now exist as to the causation of the Santiam Canyon fires supports finding against issue preclusion.

For these reasons Plaintiffs' Motion for Partial Summary Judgment is DENIED.

DATED this 10th day of April, 2025.

Shelley D. Russell

SHELLEY D. RUSSELL
Circuit Court Judge