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

v.

PACIFICORP and PACIFIC POWER,

Defendants-Appellants.

Multnomah County Circuit Court
Case No. 20CV33885

Court of Appeals
No. A183140

AMICUS BRIEF OF OREGON PEOPLE'S UTILITY DISTRICTS

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AMICUS BRIEF OF OREGON PEOPLE'S UTILITY DISTRICTS

I. Interest of Amici Curiae

Amici curiae are six Oregon People's Utility Districts ("PUD"):

- Central Lincoln PUD (Newport, Oregon);
- Clatskanie PUD (Clatskanie, Oregon);
- Columbia River PUD (Deer Island, Oregon);
- Emerald PUD (Eugene, Oregon);
- Northern Wasco PUD (The Dalles, Oregon); and
- Tillamook PUD (Tillamook, Oregon).

PUDs are established under Oregon's Constitution to supply water and power to Oregon communities who, in turn, govern the PUDs via boards composed of community residents. Or Const Art XI, § 12. PUD board members are elected from and responsible to the communities they serve. ORS 261.405. A PUD board's responsibilities include setting customer rates sufficient to make payment of "all … obligations of any character" and "any other indebtedness or obligations which the district may be obligated to pay." ORS 261.465(2)(c) & (d). To that end, the PUD amici are keenly interested in the outcome of this case: A judgment with as broad a scope as the judgment against PacifiCorp below, if applied instead to a PUD, could be financially ruinous not to an investor-owned utility but to an Oregon community.

The PUD amici have no desire to downplay the difficult facts underlying this case. Wildfire risk is serious, and harm from wildfires can be devastating, as indeed it was for the plaintiffs in this case. The PUD amici take rightful pride in their efforts to mitigate wildfire risk in this increasingly challenging landscape. They accept that, as a general matter, actors that deviate from the standard of care that applies to wildfire mitigation and, as a result, cause harm will be responsible for that harm. However, in this matter it appears to the PUD amici that PacifiCorp is being held liable for harms it did not cause.[1] No level of effort by PUDs can completely avoid harms caused by events over which they have no control – lightning strikes, for example.

Accordingly, the goals of the PUD amici in this brief are twofold. First, the PUD amici respectfully request that the Court limit the plaintiff class to only members whose damages were actually caused by PacifiCorp and that the Court similarly limit liability to only damages that were actually caused by PacifiCorp, lest the rule in this case be applied in the future to hold PUDs responsible for harms they did not cause. Second, the PUD amici have an interest in ensuring the

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[1] This conclusion was bolstered when, on March 19, 2025, the Oregon Department of Forestry released a report determining that spot fires "caused by down powerlines [were] determined to not contribute to the spread of large fires in the Santiam Canyon." *See* "ODF publishes 2020 Santiam Canyon Wildfire Event investigation report" (Mar. 19, 2025), *available at* https://odffire.com/2025/03/19/odf-publishes-2020-santiam-canyon-wildfire-event-investigation-report/.

Court is aware of the potential impacts of its decision on Oregon communities who receive their electricity from PUDs.[2] Rather than providing a return for outside investors, the not-for-profit PUD amici serve their communities at rates that correspond directly to the cost of providing service. Therefore, PUDs recover all their costs from the communities they serve. This means that Oregon communities are responsible to pay all costs incurred by a PUD.

II. Summary of Argument

The Circuit Court made a series of decisions that resulted in PacifiCorp bearing financial responsibility for harm it did not cause. First, the Circuit Court certified a plaintiff class that included class members whose properties were harmed by fires that PacifiCorp did not cause. Second, the Circuit Court's jury instruction in the Phase I liability trial allowed the jury to find that PacifiCorp was liable for harm from fires that PacifiCorp did not cause. Third, the Circuit Court carried this erroneously broad theory of liability to the Phase II damages trial and allowed the jury to impose damages for harm from fires that PacifiCorp did not cause.

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[2] The PUDs acknowledge that they are "public bodies" subject to certain protections under Oregon law, *see*, ORS 30.260 *et seq.*, so their actual exposure to damages would likely differ from PacifiCorp's; however, these protections do not completely mitigate the possible harm to Oregon communities if a PUD were found liable for harm that PUD did not cause.

Each of these decisions constitutes legal error. On the first point, certification of a plaintiff class rests on an analysis of the extent to which common issues predominate the claims of all class members. ORCP 32(B)(3); *Bernard v. First Nat'l Bank of Oregon*, 275 Or 145, 148-155 (Or 1976); *see also Pearson v. Philip Morris, Inc.*, 358 Or 88, 111 (2015); *see also James v. PacifiCorp*, 323 Or App 764 (2023) (the Court reviews predominance determinations for legal error). In this case, the class certified by the Circuit Court includes some members whose properties the jury found were harmed by fires caused by PacifiCorp, while other members' properties were harmed by fires *not* caused by PacifiCorp. Because of this material difference, including both sets of fire victims in the same class was error. *See Pearson*, 358 Or at 114 (affirming decision not to certify class based on "legitimate and legally material factual differences among the class members"); *cf. Migis v. Autozone, Inc.*, 282 Or App 774, 782 (2016), *adh'd to on recons*, 286 Or App 357, *rev. den*, 362 Or 300 (2017) (affirming determination to certify class based on predominance finding where differences among class members were not material).

On the second and third points, the Circuit Court's jury instructions and the jury's award of damages both stem from plaintiffs' theories of liability. All of Plaintiffs' claims include an element of causation. *See Chapman v. Mayfield*, 358 Or 196, 205 (2015) (negligence); *Daniels v. Johnson*, 306 Or App 252, 255 (2020)

(nuisance); *Martin et ux. v. Reynolds Metals Co.*, 221 Or 86, 98 (1960) (trespass). In other words, PacifiCorp must have actually caused the harm to Plaintiffs in order for Plaintiffs to establish liability. The Circuit Court's decisions to the contrary were error. *See*, *e.g.*, *Chapman*, 358 Or at 205 (explaining that a negligence plaintiff must prove "that the [defendant's] conduct in fact caused … harm to the plaintiff").

These errors by the Circuit Court pose serious risks to Oregon PUDs. PUDs are electric utilities that do not create profits for shareholders but rather serve the very same communities that govern them. ORS 261.405. These PUDs take great pains to ensure their equipment does not cause wildfires. However, those efforts cannot bring the risk of fire to zero; it is always possible that some intervening cause will spark a fire. If Oregon PUDs are held liable for harm they do not cause, as the Circuit Court held PacifiCorp liable for harm it did not cause, it will be those PUDs' customer owners – Oregon communities – that are ultimately responsible for that liability. ORS 261.465(2). The sheer scope of the damages imposed against PacifiCorp in this matter, if applied to a PUD, could be financially catastrophic for an Oregon community. For that reason, the PUD amici respectfully request that the Court of Appeals overturn the decisions of the Circuit Court: 1) certifying a class that includes members whose harm PacifiCorp did not cause; and 2) establishing liability for harm PacifiCorp did not cause.

III. Argument

a. Certifying a Class Including Members Whose Harm PacifiCorp Did Not Cause Was Legal Error.

The Circuit Court erred in certifying the plaintiff class because some members' harm was caused by PacifiCorp and other members' harm was caused by independent sources over which PacifiCorp had no control, such as a lightning strike. This sharp and material distinction among these class members legally precludes a finding that common issues predominate, a key element of class certification.

Class actions are governed by ORCP 32. ORCP 32(B) provides that "[a]n action may be maintained as a class action if [certain prerequisites] are satisfied and, in addition, the court finds that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The rule goes on to set forth factors "pertinent to this finding" including, relevant here, "[t]he extent to which questions of law or fact common to the members of the class predominate over any questions affecting only individual members[.]" ORCP 32(B)(3).

Ultimately, then, certification of a plaintiff class requires a finding of superiority founded in part on an analysis of the extent to which common issues predominate the claims of all class members. *Bernard*, 275 Or 145 at 148-155. The Circuit Court has discretion to weigh the superiority factors set forth above,

Pearson, 358 Or at 97-99; nevertheless "[t]he finding that common questions of fact predominate is a conclusion of law" and the Court of Appeals is "not bound by the trial court's conclusion regarding predominance[.]" *Bernard*, 275 Or at 154. In the end, a finding of predominance is legally incorrect where there are material differences among class members that will affect a defendant's ultimate liability. *Bernard*, 275 Or at 162 & 169 (reversing Circuit Court's class certification due to plaintiff's failure to establish predominance); *see also Pearson*, 358 Or at 114 (affirming decision not to certify class based on "legitimate and legally material factual differences among the class members"); *cf. Migis*, 282 Or App at 782 (affirming determination to certify class based on predominance finding where differences among class members were not material). It is the plaintiff's burden to establish predominance. *Bernard*, 275 Or at 162-163.

In this case, the class certified by the Circuit Court includes some members who were harmed by fires caused by PacifiCorp, while other members were harmed by fires *not* caused by PacifiCorp. PacifiCorp's brief discusses the facts underlying this conclusion in some detail, and this brief will not repeat that discussion in full. However, a few specific points are worth noting. First, the Beachie Creek fire that caused damage to class members located in the Santiam Canyon was initially caused by a lightning strike. *Appellant-Defendant PacifiCorp and Pacific Power's Opening Brief* at 15 ("Appellant-Defendant's Brief").

Second, "Plaintiffs did not offer any expert (or other evidence) to support their theory that PacifiCorp-caused fires burned the entire canyon." *Appellant-Defendant's Brief* at 25. Third, Plaintiffs' evidence did show that "the Beachie Creek Fire had already damaged at least some class member properties before any [of] the earliest alleged PacifiCorp fires even ignited." *Appellant-Defendant's Brief* at 27. It follows from these basic points that there is at least one material difference – causation – between class members located outside of the Santiam Canyon (who suffered harm caused by PacifiCorp) and those located within the Santiam Canyon (at least some of whom did not suffer harm caused by PacifiCorp).

Because of this material difference, including both sets of fire victims in the same class was error. *See Bernard*, 275 Or at 162 (reversing class certification where "plaintiffs have not carried the burden of proof of the predominance of common questions").

b. Establishing Liability for Harm PacifiCorp Did Not Cause Was Legal Error.

This Court should hold that, as a matter of law, PacifiCorp cannot be held liable for harm it did not cause. Simply put, causation is a legal question that the Circuit Court applied incorrectly in this case. The PUD amici do not dispute that PacifiCorp should be held liable for any harm caused by negligent, grossly

negligent, or willful conduct; however, PacifiCorp should not and legally cannot be held liable for harm caused by sources completely out of its control.

All claims for which PacifiCorp was found liable here – negligence, gross negligence, private nuisance, public nuisance and trespass – include an element of causation. *See Chapman v. Mayfield*, 358 Or 196, 205 (2015) (negligence); *Daniels v. Johnson*, 306 Or App 252, 255 (2020) (nuisance); *Martin et ux. v. Reynolds Metals Co.*, 221 Or 86 (1960) (trespass). In other words, PacifiCorp must have actually caused the harm Plaintiffs suffered in order for Plaintiffs to establish liability under Oregon law.

The Circuit Court's jury instructions in the Phase I trial establishing liability and the jury's award of damages in the Phase II trial both stem from these theories of liability, and both resulted in the imposition of liability and damages for harm PacifiCorp did not cause.

In the Phase I trial, the Circuit Court instructed the jury that it "may assume that the evidence at the trial applies to all class members." *Appellant's Brief* at 67 (quoting Tr 8071:15-16). PacifiCorp's brief analyzes this instruction through various lenses, but on a more fundamental level the PUD amici recommend that this Court consider the practical impact of the Circuit Court's instruction: evidence establishing causation as to some class members was applied to other class members for whom the evidence is that PacifiCorp did *not* cause harm. In

effect, the court imposed liability under theories of negligence, nuisance, and trespass without any evidence of causation. This was legal error. *See Chapman*, 358 Or at 205; *Daniels*, 306 Or App at 255; *Martin et ux.*, 221 Or at 86.

Effectively the same analysis applies to Phase II, where the Circuit Court instructed the jury that PacifiCorp was "the cause" of the fires for which liability was established in Phase I. *Appellant-Defendant's Brief* at 98 (quoting Phase II Trial I, Tr 30:15-32:24). The Circuit Court's prior decisions on class certification and liability were compounded to apply causation to class members for whom the evidence is that PacifiCorp did *not* cause harm. In effect, the court imposed damages for negligence, nuisance, and trespass without any evidence of causation. This was legal error. *See Chapman*, 358 Or at 205; *Daniels*, 306 Or App at 255; *Martin et ux.*, 221 Or at 86.

In sum, liability and damages under theories of negligence, nuisance, and trespass must be founded on a finding that the defendant caused the harm claimed by plaintiffs. The Circuit Court's decisions eliding this requirement were error. *See*, *e.g.*, *Chapman*, 358 Or at 205 (explaining that a negligence plaintiff must prove "that the [defendant's] conduct in fact caused … harm to the plaintiff").

c. Allowing the Circuit Court's Decision to Stand Would Create Significant Risks for Oregon Communities Served by PUDs.

This brings us to the crux of the PUD amici's argument: The Circuit Court's series of decisions resulting in the imposition of liability on PacifiCorp for harm it did not cause poses serious risks to PUDs and, therefore, to Oregon communities.

In the "Interest of Amici Curiae" section above, the PUD amici offered a brief explanation of PUDs in Oregon. A more fulsome explanation is necessary to establish the potential harm to Oregon communities if the Court allows electric utilities to be held liable for harm they have not caused.

As noted above, PUDs are established under Oregon's Constitution to serve as electric and water utilities for Oregon communities who, in turn, govern the PUDs by electing board members. Or Const Art XI, § 12; ORS 261.405. This section of the Oregon Constitution was adopted following Ballot Measure Nos. 324-325 in Oregon's 1930 general election. *See* Oregon Secretary of State, *Proposed Constitutional Amendments and Measures* at 49 (Nov. 4, 1930).[3] The proponents of the measure explained that "[t]he purpose of this amendment to the state constitution is to give the people of the state an undisputed right to organize themselves into districts for the purpose of supplying water, water power and electricity to any one who may want any or all of these." *Proposed Constitutional*

[3] Available at https://digitalcollections.library.oregon.gov/nodes/view/24458.

Amendments and Measures at 51. Indeed, the measure was necessary to ensure rural communities could access reliable, affordable power. Before communities could organize PUDs and other forms of public power, private, investor-owned utilities generally would not supply power to rural communities or would only do so at great cost to those communities. *See*, *e.g.*, Public Power Council, *Public Power Chronicle* at 20 (2016) (discussing the circumstances behind Oregon's 1930 ballot measure on PUDs). The ballot measure was designed to remedy that disparity and empower communities.

Following the measure's success at the ballot box, the legislature sought to carry out this purpose in enacting ORS Chapter 261. So, for example, the Legislature adopted a policy statement that "[t]he purpose of this chapter is to … authoriz[e] … the establishment of people's utility districts to develop the water and energy resources of this state for the benefit of the people of this state and to supply public utility service, including water, water power and electric energy for all uses and users." ORS 261.007. The Legislature did not establish PUDs as a norm or default, but rather as tools of self-governance: "When a majority of all votes cast, at an election within the boundaries of any proposed district to determine whether or not the district is to be formed, favors formation, the district shall be created." ORS 261.105(2).

Upon creating a PUD, a community must elect a board to govern that PUD. ORS 261.190. Board candidates are drawn from the community – they "must be electors of this state, must have resided in the proposed district continuously for not less than two years next preceding the date of the election, and must continue to reside in the district during their term of office." ORS 261.190(2) (applying to the initial board); *see also* ORS 261.405(3) (applying to subsequent boards). The elected board has an obligation to "supervise and regulate every utility owned, operated or owned and operated by the district" and to fix rates "sufficient … [f]or payment of any … indebtedness or obligations which the district may be obligated to pay." ORS 261.465.

This model – where communities establish and govern the utilities that provide them power – differs significantly from the investor-owned utility model that PacifiCorp and other amici in this case follow. Those utilities are governed by ORS Chapters 756 and 757, which establish a system of intensive regulation of investor-owned utilities by the Oregon Public Utility Commission and set forth a number of more stringent requirements. The policy calculus behind all this is that investor-owned utilities are subject to the so-called "regulatory compact" whereby the state grants investor-owned utilities an exclusive franchise to operate in exchange for broad regulation by the state, including in particular the right of the state to determine rates for utility customers. This construct is necessary in part

because investor-owned utilities are ultimately owned by, and therefore responsible to, shareholders who expect a profit from their utility investments. PUDs, on the other hand, have no investors to satisfy and are directly answerable to their communities.[4] To that end, they are directly exempted from the definition of "public utility" under ORS 757.005, *see* ORS 757.006, and operate via home rule principles.

Because they are entities established by and for their communities, PUDs go to significant lengths to ensure their equipment does not cause wildfires. Amicus Columbia River PUD, for example, has "conducted a Risk Analysis to develop fire mitigation strategies" and, based on that analysis, employs a number of mitigation strategies including active year-round vegetation management, cyclical inspection of all facilities, and a detailed protocol for public safety power shutoffs, among other things. *See* Columbia River PUD Wildfire Mitigation Plan at 6, 9-11, and 17-18 (2023).[5] Columbia River PUD's plan is directly responsive to the community it serves, taking into account the "population of residents in a certain area" and potential impacts to "crucial services such as medical facilities, water providers, or fire and police departments" to avoid harm to "the greater community

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[4] As will be discussed further below, this also means that a PUD's customer-owners ultimately are responsible to pay for all expenses of a PUD through their utility rates.

[5] Available at https://edocs.puc.state.or.us/efdocs/HAQ/ro14haq134248.pdf.

and many citizens' lives." Columbia River PUD Wildfire Mitigation Plan at 7. Central Lincoln PUD directly centers its community in its wildfire mitigation plan, leading with a policy statement that its "overall goal is to provide safe, reliable and affordable electric service to its communities" and "[t]o that end, Central Lincoln strives to design, construct, operate and maintain its electrical lines and equipment in a manner that minimizes the risk of wildfire ignition." Central Lincoln PUD Wildfire Mitigation Plan at 4 (2025).[6] The plan goes on to identify objectives to "[e]nsure public safety[,]" "minimize fire ignitions[,]" and "[m]inimize the impacts of a wildfire to the utility and communities served[,]" objectives that – as with Columbia River PUD – are supported by robust analysis and thorough mitigation strategies. Central Lincoln PUD Wildfire Mitigation Plan at 4. The other PUD amici have similarly robust plans that detail their efforts to mitigate wildfire risk. *See* Clatskanie PUD Wildfire Mitigation Plan (2024);[7] Emerald PUD Wildfire Mitigation and Response Plan (2022);[8] Northern Wasco County PUD Wildfire Mitigation Plan (2024);[9] Tillamook PUD Wildfire Mitigation Plan (2024).[10]

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6 Available at https://edocs.puc.state.or.us/efdocs/HAQ/ro14haq334620113.pdf.

7 Available at https://edocs.puc.state.or.us/efdocs/HAQ/ro14haq328288024.pdf.

8 Available at https://edocs.puc.state.or.us/efdocs/HAQ/ro14haq1634.pdf.

9 Available at https://edocs.puc.state.or.us/efdocs/HAQ/ro14haq327809055.pdf.

10 Available at https://edocs.puc.state.or.us/efdocs/HAQ/ro14haq93217.pdf.

However, those efforts cannot bring the risk of fire to zero; it is always possible that some intervening cause will spark a fire.

The PUD amici are therefore deeply concerned about the Circuit Court's series of decisions extending liability to and imposing damages on PacifiCorp for harm it did not cause. If this approach to wildfire liability were extended to Oregon PUDs, the result would be that those PUDs' customer owners – Oregon communities – are ultimately responsible for that liability. ORS 261.465(2).

This is not the case for investor-owned utilities. True, investor-owned utilities similarly pass on costs to their customers in rates, and those rates generally must "provide adequate revenue both for operating expenses of the public utility … and for capital costs of the utility, with a return on equity[.]" ORS 756.040(1). However, damages such as those imposed on PacifiCorp in this case may be passed on to the company's investors rather than recovered in rates. *See* Oregon Public Utility Commission, Docket No. UE 433, Order No. 24-447 at 16-20 (Dec. 19, 2024) (discussing recovery of costs associated with the *James* litigation in PacifiCorp's customer rates). This is a risk that investors take on in exchange for the potential reward offered by the "return on equity" that generally must be included in rates.

For PUDs, however, owners and customers are one and the same. An award of damages against a PUD will be borne by the community that PUD serves, one

way or another. The most likely avenue would look something like this: A court imposes a damages award against a PUD. The PUD secures financing to pay the damages award. The PUD would then have an obligation on its books to repay the institution providing financing. That obligation would be added to the PUD's other necessary expenses – purchasing electric power, building and maintaining poles and wires, owning and operating vehicles and other equipment, paying utility staff, and maintaining insurance, to name a few examples – and used to determine the total cost of providing service to the PUD's customers. The cost of service would be set on an annual basis and divided by the amount of power the utility expects to provide in a given year, resulting in a dollar-per-kilowatt-hour rate that would then be charged to customers. In short, although it would be bundled in with other costs, effectively a damages award against a PUD would be borne directly by the PUD's customer-owners. It would be one thing if those damages were fairly imposed for harm caused by a PUD's misfeasance, but entirely another to subject a community to damages for harm that has some other cause.

Put simply, the sheer scope of the damages imposed against PacifiCorp in this matter for harm PacifiCorp did not cause, if applied to a PUD, would be inequitable and could impose tremendous costs on Oregon communities for harm *they* do not cause. For this reason, the PUD amici respectfully request that the

Court ensure PacifiCorp is held liable only for the harm it actually caused, as is required by law.

IV. Conclusion

For the reasons set forth above – and in particular because of the potential harm to Oregon communities served by PUDs – the PUD amici respectfully request that the Court of Appeals reverse and remand the decisions of the Circuit Court: 1) certifying a class that includes members whose harm PacifiCorp did not cause; and 2) establishing liability for harm PacifiCorp did not cause.

DATED: April 8, 2025

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CERTIFICATE OF COMPLIANCE
WITH WORD-COUNT LIMITATION AND TYPE SIZE REQUIREMENTS

I certify that this brief complies with the word-count limitation in ORAP 5.05, which word count is 4009.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes.

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CERTIFICATE OF FILING AND SERVICE

I certify that I filed this brief with the Appellate Court Administrator on this date.

I certify that service of a copy of this brief 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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