IN THE SUPREME COURT 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; Shariene 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; Deborah Tank; Christian Bigness; Kelly Davis; Christine Grom; Maria Guadalupe Eliosa Martinez; Carl Seyboldt and the Seyboldt Revocable Living Trust; Diane Turnbull; Joy Wilson; Richard Wilson; the Upward Bound Camp for Persons with Special Needs; and William Browning in his capacity as Personal Representative of the Estate of Delores Stowell,

Plaintiffs-Respondents, Cross-Appellants; Petitioners on Review,

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; Respondents on Review.

Multnomah County Circuit Court - 20CV33885
Oregon Court of Appeals - A183140
S072933

BRIEF ON THE MERITS OF PETITIONERS ON REVIEW

On Petition for Review of a decision of the Court of Appeals
Opinion filed: April 8, 2026
Opinion by Joyce, J., joined by Ortega and Hellman, JJ.

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STATEMENT OF THE CASE

This case arises from one of the largest disasters in Oregon's history. On Labor Day 2020, during a forecasted historic windstorm and despite pleas from top state officials, Defendants-Appellants PacifiCorp and Pacific Power (together, "PacifiCorp") chose to leave their power lines energized in places where the topography, tinder-dry forests, and winds created extreme fire conditions. As the wind blew, PacifiCorp's power lines ignited fires across the state. Residents were forced to flee through walls of fire, tens of thousands of acres and entire communities burned, and thousands of Oregonians suffered harm.

The lawsuits that followed confronted the trial court with a case unlike any in the state's history. Thousands of survivors of four PacifiCorp fires—the 242 Fire, the Echo Mountain Complex Fire, the South Obenchain Fire, and the Santiam Canyon Fire—claimed PacifiCorp harmed them through the same fundamental theory. They alleged that, for years, PacifiCorp had failed to reasonably maintain its power line infrastructure, clear vegetation around its power lines, and protect against fire. They further alleged that on

Labor Day 2020, PacifiCorp failed to shut off the power in the four fire areas despite dire warnings.

Facing thousands of similar claims, the trial court concluded that bifurcating proceedings between liability and damages and trying PacifiCorp's liability on a class basis was the best and most efficient way to adjudicate the fire survivors' claims. And because the certified class included members harmed by four fires, the trial court structured the class trial so the jury would decide liability and causation fire-by-fire. This structure let PacifiCorp contest each fire on that fire's evidence and prevail on any fire without regard to the others. This structure was likely the only way the survivors could seek justice in their lifetimes. The alternative—years of successive liability trials repeating the same witnesses, the same evidence, and the same arguments—would have tied up the trial court for a decade or more.

A landmark, eight-week trial followed, during which Plaintiffs proved PacifiCorp's culpability with evidence common to the entire class and tied those failures to each fire with fire-specific proof. The jury found that PacifiCorp caused each of the four fires and caused harm to every class member within their boundaries. Individual

damages trials followed, and by the time the Court of Appeals ruled, 19 damages-only trials had produced verdicts and judgments exceeding $1 billion.

The Court of Appeals, however, wiped all this away. The problem was not a lack of evidence—the Court of Appeals held the evidence was sufficient to support the jury's finding as to each fire and every class member. It reversed instead over one sentence in an otherwise unobjectionable instruction explaining how a class action works, finding both error and reversible prejudice.

The challenged instruction told the jury that, in a class action, the class representatives present evidence on behalf of absent class members, and so jurors "may assume that the evidence at trial applies to all class members." (ER-278–79.) The Court of Appeals held that sentence erroneous because, in its view, causation was not proven through common evidence—and emphasized that the trial court "has the authority on remand to reconsider its class certification decision." *James v. PacifiCorp*, 348 Or App 347, 380, 590 P3d 618 (2026). Yet the opinion contained no analysis of the Oregon Rule of Civil Procedure ("ORCP") 32 factors, no engagement with the trial court's certification rulings that found the evidence common,

and it afforded none of the required deference to the trial court's decision to certify the class. Colored by its view as to class certification, the Court of Appeals then hypothesized that the instruction could have led the jury to cast aside the trial court's careful case management and instead assume evidence of liability for one fire meant liability for the others, despite the full trial record conclusively demonstrating otherwise.

Plaintiffs petitioned for review of each aspect of the Court of Appeals' error-and-prejudice holdings, including the court's comments on the propriety of class certification. This Court allowed the petition.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

1. After a trial court has exercised its discretion to certify a class under ORCP 32, may the trial court inform the jury that absent class members will not be present to offer their own liability evidence by instructing the jury that it "may assume that the evidence at trial applies to all class members"?

   Proposed Rule of Law: Yes. Such an instruction describes the legal effect of class certification under ORCP 32, which is that named representatives present evidence on behalf of the entire class. When a class is properly certified under ORCP 32, the instruction is correct, and an appellate court may not reverse on the ground that the evidence was insufficiently common across the class without applying ORCP 32 and affording the trial court the deference its certification decision is owed.

2. May an appellate court deem a putative instructional error prejudicial under ORS 19.415(2) without considering evidence gleaned from the use of "appropriately tailored verdict forms," as the Court endorsed in *Purdy v. Deere & Co.*, 355 Or 204, 232 n 10, 324 P3d 455 (2014)?

   Proposed Rule of Law: No. When the trial court uses a specially "tailored" verdict form that poses separate liability questions and thus "provided greater insight into the basis for the jury's verdict," *id.* at 238 (Balmer, C.J., concurring), a reviewing court must evaluate the jury's differing responses to those separate liability questions when determining whether putative instructional error substantially and prejudicially affected the appellant's rights.

SUMMARY OF THE ARGUMENT

The Court of Appeals was wrong. Led off course by doubts about class certification, it focused on a single sentence in the jury instructions in isolation from the rest of the instructions, the structure of the jury verdict, and the evidence and arguments at trial. This path led it to effectively reverse the trial court's class certification decision without analyzing, under the properly deferential standard of review, whether the trial court acted within its discretion to determine that class treatment was superior under ORCP 32 B.

Performing that analysis demonstrates that the trial court was within its discretion to certify the issues class. The common evidence

and common theories of liability presented at trial support the trial court's decision to certify the class and to instruct the jury to decide liability on a fire-by-fire basis. Holding individual trials on the certified issues would have occupied a decade or more of the trial court's time, created pointless inefficiencies, and denied the survivors of PacifiCorp's fires access to justice. The trial court's two-phase class structure provided the best and likely only way to adjudicate this case in the survivors' lifetimes.

Under that framework, moreover, the jury instruction was legally correct. The challenged instruction correctly explained a basic tenet of class actions: that the named plaintiffs present evidence on behalf of absent class members, who are not obligated to appear in court and present evidence themselves. That tenet applies just as much to this issues class as it does to any other, and the instruction was appropriately modified to account for the structure of this trial.

Further, review of the trial record as a whole, a step the Court of Appeals apparently skipped, undermines any claim of prejudice, let alone reversible prejudice. From start to finish, the jury was tasked with assessing—and did assess—liability and causation on a fire-by-fire basis.

The decision of the Court of Appeals should be reversed, the trial court's class certification rulings should be affirmed, and the case should be remanded to the Court of Appeals for consideration of the remaining assignments of error.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Labor Day Fires Erupt

Leading up to Labor Day 2020, conditions across Oregon were ripe for fire. The summer had been hot and dry, the humidity was low, and the ground was parched. (Tr 2647, 3000–03.) The National Weather Service had projected a "historic September east wind event" and had issued a red flag warning indicating the presence of "critical fire conditions." (Tr 468–69, 471–72, 490, 6791.)[1] By Labor Day, it was warning of "extremely critical" fire weather. (Tr 475–76.)

As the east winds began to blow on Labor Day, the fire risk became so dire that around 8:00 p.m., the Governor's chief of staff and the Oregon Department of Forestry's top firefighter convened a call with PacifiCorp and other utilities to implore them to shut off the power. (Tr 625–634, 665–77.) Other utilities heeded the

[1] Citations to "Tr" refer to the Phase I trial transcript.

warnings. Consumers Power, the other utility serving the Santiam Canyon, acted proactively. By late morning it had disabled reclosing on its lines, so that any line that faulted would shut off and stay off; by 7:33 p.m., it had deenergized the lines it served in the Canyon. (Tr 1015–16, 4056.) PGE, another utility, shut off power around Mount Hood. (Tr 639, 1015–16, 4102, 5591.)

PacifiCorp did not. PacifiCorp sent a government affairs employee to attend the call but never meaningfully considered de-energizing its lines that night. (Tr 1143–46, 1233, 4087, 4603.) So as the wind sent trees crashing into power lines, PacifiCorp's lines ignited massive fires across the state.

In the early evening, before the call with the Governor's office, PacifiCorp's power lines started the 242 Fire near Chiloquin. (Tr 630–31, 2267–2272, 2564–67.) A short time later, PacifiCorp's power lines began igniting fires that raced across the Santiam Canyon, along Highway 22 east of Salem. (Tr 4257, 4442–44.) PacifiCorp still refused to act. So later that evening, PacifiCorp's power lines caused the Echo Mountain Complex Fire, which started in Otis, near Lincoln City. (Tr 2260–61, 2537–58.) And the next day, with the power still

on, PacifiCorp ignited the South Obenchain Fire near Eagle Point. (Tr 2273–78, 2282–87.)

Each time, Oregonians were forced to flee for their lives. They fled through walls of fire, with little to no notice, carrying the few things they could grab in the minutes they had to escape. (*See, e.g.*, Tr 746–55, 1429–31, 2410.) Entire communities were burned. Many lost everything. Thousands of Oregonians were left displaced and traumatized.

B. The Trial Court Certifies an Issues Class and Imposes a Two-Phase Trial Procedure.

Plaintiffs and the class are survivors of PacifiCorp's fires who lived or owned property in the four fire areas. Plaintiffs filed suit three weeks after the fires in September 2020 and, given the number of survivors and similarity of their claims, moved for class certification in 2021.

Plaintiffs proposed a two-phase procedure. A first phase would determine PacifiCorp's liability to the entire class through an issues-class liability trial under ORCP 32 G. (ER-56.) In a second phase, class members would separately prove their individual damages, and

PacifiCorp could present any individualized damages defenses. (ER-56.)

The circuit court granted the motion and certified a class to litigate particular issues. *See* ORCP 32 G. It defined the class as the owners and residents of privately owned real property wholly or partially within "the boundary of the maximum extent of burn" of the four fires whose property "experienced fire activity during those fires," along with the owners of mobile homes and other personal property located on such land. (ER-54.)

In the first phase, the class was to litigate the elements of its six claims. Specifically, the trial court identified 14 class issues which would collectively resolve the merits of the claims in the operative complaint. (ER-55.) In a lengthy order, the trial court considered whether those liability issues could be proven with common evidence and found that they could. (ER-55.) As the trial court framed it, Plaintiffs advanced three common factual theories across all class areas:

> First, 'facing extreme fire conditions, PacifiCorp did not de-energize its equipment anywhere.' Next, PacifiCorp failed to act despite knowing a windstorm would hit Oregon during critical fire conditions. Finally, PacifiCorp knew its history of

> vegetation management violations, unsafe equipment and operations, and years of indifference meant the storm would cause its equipment to ignite uncontrollable fires.

(ER-63 (internal citations omitted).) Similarly, the Court explained that PacifiCorp's defenses—that its actions were reasonable, that it did not cause the fires, and that the fires were unforeseeable and/or were an Act of God—were common across the class. (ER-68–73.) Nor did PacifiCorp "identify any particularized superseding or intervening causes (or other specific defenses to liability) that could not be resolved for the class as a whole." (ER-68.)

PacifiCorp's primary argument against class certification was that causation required tracing each fire's spread from ignition point to each separate property and was therefore individualized. (ER-68.) The trial court, however, explained that Plaintiffs' theories were based on specific fire ignition points and evidence of overall fire spread—to be proven using burn severity data showing the properties harmed in each fire area—across the entire class. (ER-68.) The court acknowledged that there would be "differences in fact-specific causes for each of the four geographic fire areas," but it concluded that those would "likely be addressed at trial by plaintiffs identifying or electing which factual theories support each of the four

geographic fire areas"—*i.e.*, by proving causation on a fire-by-fire basis. (ER-69.) And PacifiCorp was free to introduce individualized evidence to defeat the class's claims. (ER-69–70.)

Finally, the trial court adopted Plaintiffs' two-phase proposal, writing that "any phase two mini-trial or similar proceeding would be akin to a dispute in which the defendant has admitted liability and proceeded to trial only on damages." (ER-71.)

C. Common Evidence at Trial Establishes PacifiCorp's Failures in Preparing for, and Responding to, the Fires.

The trial played out as the trial court had predicted. The jury heard extensive evidence of PacifiCorp's common failures in preparing for and responding to the Labor Day fires. That evidence came in four categories.

First, Plaintiffs presented common evidence that PacifiCorp systemically underfunded its statewide wildfire mitigation program. In the years leading up to 2020, PacifiCorp skipped fire-safety upgrades to its system in favor of distributing $3 billion in dividends to its ultimate parent company, Berkshire Hathaway. (Tr 2627–28.) PacifiCorp opted not to insulate power lines, failed to install local weather tools, and deferred system and process upgrades that would

have helped prevent fires. (Tr 986–87, 991–94, 997–99, 1669–75, 4041–42, 6549–50, 7420.) In fact, PacifiCorp did not even include wildfire mitigation as a separate line item in its budget until 2019, and even then, it dedicated few resources to the task. (Tr 1841–44.)

Second, Plaintiffs presented common evidence of PacifiCorp's deeply flawed vegetation management program—its program for trimming trees and vegetation near power lines, which prevents fire by keeping the two apart. The Oregon Public Utility Commission ("OPUC") had repeatedly cited PacifiCorp for a "pattern of noncompliance" with required safety corrections, ultimately issuing the company its "sixth warning notice." (Tr 344–45, 839–48, 1687–88.) And OPUC staff called the number of contacts between trees and PacifiCorp's energized conductors "disturbing." (Tr 1687–88.) Vince Oatis, an expert in utility vegetation management practices, testified for the class that PacifiCorp's vegetation management program "isn't a viable" one. (Tr 1693.)

Third, and critically, Plaintiffs presented common evidence that PacifiCorp had no plan to proactively shut off power in any of the four fire areas. PacifiCorp had identified narrow areas of Oregon as "proactive de-energization zones" (or PDZs) and established

thresholds for activating "public safety power shutoffs" during dangerous fire conditions. (Tr 1165–67, 4039–40, 6479–80.) But none of the four fires fell within a PDZ. (Tr 6518.) And outside of those zones, PacifiCorp had no processes to proactively de-energize its lines, no matter how extreme the fire danger. (Tr 4040, 6516–17.) PacifiCorp instead consciously chose to focus on some areas of Oregon to the exclusion of others, leaving it without any plan to prevent igniting fire in those "other" areas. (Tr 4040, 6516–26.) That core failure, Plaintiffs argued, led to all four fires.

Fourth, Plaintiffs presented common evidence of PacifiCorp's uniform response—and uniform failures—once its fires began. PacifiCorp treated the windstorm as a "single incident" and set up an Emergency Operations Center (EOC) to coordinate "one large response." (Tr 6281–82.) Yet as scores of outage and fire-start reports poured in (Tr 818–19, 832–38, 1023–29, 1226–30), the EOC searched for "potential restoration opportunities"—that is, ways to keep the power on—even as it learned of power line faults caused by "wind" or "fire." (Tr 1226–30.) PacifiCorp was "just in [their] normal outage restoration response." (Tr 1232.) As a co-director of the EOC put it, just shutting off the power is something the company "would not"

consider. (Tr 1233.) Nor did the company consider disabling "reclosing," which would have shut power off to localized areas after a fault was detected on the lines—even though most utilities disable reclosing during fire season. (Tr 988–90, 1338–42, 1312–13.) The result was a "failure and absence of leadership" with dire consequences for the entire class. (Tr 1313–14.)

D. Plaintiffs Prove Causation on a Fire-By-Fire Basis

Consistent with the trial court's certification order, Plaintiffs then tied PacifiCorp's failures to each fire with fire-specific proof.

Plaintiffs proved the 242 Fire ignited early in the evening, outside of Chiloquin. A tree that PacifiCorp should have removed years earlier blew over in the winds and ripped a power line off a utility pole, sending electricity into the surrounding brush. (Tr 1363, 1912–31, 2189, 2261, 2266–72, 2564–67.) Plaintiffs proved that PacifiCorp started the Echo Mountain Complex Fire around midnight on Labor Day. There, vegetation contacted power lines in two areas (called the Kimberling and Echo Mountain ignitions)—causing electrical arcing and the ejection of molten aluminum into the surrounding dry brush. (Tr 1356–61, 1559–62, 2210–37, 2250–60, 2537–58.) And Plaintiffs proved that PacifiCorp ignited the South

Obenchain Fire the next day when high winds brought down another tree on an energized power line, where it ignited. (Tr 1365–66, 1892–1912, 2272–87, 2559–64.) Using burn severity data, Dr. Mark Buckley then identified the properties each fire affected. (ER-175–87; Tr 3327–50.)

PacifiCorp did not present any alternative cause of those fires and did not contest their spread or harm. Its arguments were limited to class-wide questions of negligence and fault. (Tr 8405–21, 8426–66.)

The Santiam Canyon differed from the other fire areas in scale: Plaintiffs argued that PacifiCorp ignited not one fire there but a conflagration of more than a dozen, up and down the Canyon. PacifiCorp disputed that account with a common defense. It claimed that all the fires it started were put out. (Tr 2678–79, 5081, 8377–78, 8383–85.) And PacifiCorp claimed that the Beachie Creek Fire, a naturally caused fire burning in the Opal Creek Wilderness about 20 miles from the Santiam Canyon, instead burned through the Canyon and caused harm to every class member there. (Tr 4751–52, 4814–16, 5147–48, 8358, 8365–76.)

Plaintiffs' common causation case was built on three parts. *First*, Plaintiffs eliminated the Beachie Creek Fire as a source of fire in the Santiam Canyon on the night of Labor Day 2020. Plaintiffs' expert, Dr. John Bailey, modeled the Beachie Creek Fire's spread and determined that it could not have reached Gates before 2:00 a.m., Mill City before 4:00 a.m., or Lyons and Mehama before 1:00 a.m. on September 8—hours after PacifiCorp's fires ignited. (Tr 3909:8–3910:16.) Eyewitnesses corroborated that timing. (Tr 3902–3906; 2807–10, 2814–16, 2867–68, 3090–91.)

Chief among them was Dean Warner, a central eyewitness in the Santiam Canyon. Warner served as the lead fire behavior analyst—the specialist who predicts where a fire will move—for the interagency incident management team dispatched to fight the Beachie Creek Fire. (Tr 2991–96, 5814–15.) Warner testified that the Beachie Creek Fire was not in the Santiam Canyon when fires began igniting under PacifiCorp's power lines; he saw five such power-line fires himself. (Tr 2995, 3004–06, 3015–25, 3028, 6172.) Every class member in the Santiam Canyon depended on this same body of proof, because every class member faced PacifiCorp's Beachie Creek defense.

Second, Plaintiffs proved that PacifiCorp's *own* fires burned through the Santiam Canyon, rather than the Beachie Creek fire alone. As the Governor's office and the Oregon Department of Forestry's chief firefighter explained to PacifiCorp during their call on the evening the fires started, fire risk was particularly high in river canyons like the Santiam Canyon because the terrain would funnel hot winds coming down the west slope of the Cascades. (Tr 606, 617–18, 671.) Shortly after that warning, a downed PacifiCorp power line started a fire in Gates. (Tr 2652–54.) Within an hour, PacifiCorp had started three more fires nearby, at Potato Hill, mile marker 34 along Santiam Highway, and the Gates School. (Tr 2656–59, 3004–05, 4267–4319, 4402–09.) Witnesses reported seeing flashes and arcing from power lines and transformers, as well as hearing loud bangs. (Tr 2778–80, 2795–2806, 3006, 3016, 3019, 3024–25.) Ultimately, the fire at the Gates School grew into a "fully involved" fire with flames reaching "50 feet in the air." (Tr 2659.)

Soon thereafter, PacifiCorp's power lines started a fire in the neighboring town of Mill City, followed by another ignition nearby. (Tr 4362–73, 4380–90.) Another fire spanning hundreds of acres then erupted at nearby Kelly Lumber. (Tr 2830, 4321–38.) Further down

the road toward Lyons, PacifiCorp's power lines ignited the Fisherman's Bend campground. (Tr 4338–61.) Ultimately, Plaintiffs' cause-and-origin expert Larry Pelton connected PacifiCorp's power lines to 14 separate ignitions in the Santiam Canyon that night.[2] That evidence was supported by numerous eyewitnesses, who fled through the fires that night and reported seeing fires under PacifiCorp's power lines spreading throughout the Canyon. (*E.g.*, Tr 2741–43, 2809–24, 3822–24.)

And the fires did not stay where they started. The National Weather Service had forecasted 65- to 75-miles-per-hour-wind gusts that night (Tr 854), and the Canyon's terrain funneled those winds. (Tr 502–03, 618, 1708–09.) Witnesses testified that there were swirling winds and fires spreading both to the east and to the west in the Canyon, at times "really, really fast." (Tr 4643, 4651–52, 6157.) Eyewitnesses testified that they saw PacifiCorp's fires spread

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[2] *See* Tr 4267–95 (Gates School); 4296–4317 (Potato Hill); 4321–38 (Kelly Lumber—two ignitions); 2851–70, 4338–61 (Fishermen's Bend); 4362–73 (832 N. Santiam Highway); 4380–90 (Anderson House); 4391–4401 (Gates Bridge East); 4402–09, 5081–84 (Milepost 34); 4414–20 (Gates Hill Road); 4420–27 (Milepost 35); 4427–29 (Kingwood Ave.); 4429–30 (Remine Rd.); 4430–33 (Dogwood Rd.); 4438–42 (Minten Road).

uncontained from the Gates School to the south and east (Tr 2783–84), saw a fire north of Mill City that was hundreds of acres (Tr 2830), and reported PacifiCorp's fires converging "along the road all the way to Lyons and Mehama" at the western boundary of the class (Tr 3023–25, 3823–3824). Ultimately, the conflagration was enough for the National Interagency Command Center, which publishes daily updates on large federal fires, to report that the Beachie Creek Fire "had been renamed" the Santiam Canyon Fire "due to the fact of numerous suspected power line fires in the canyon." (Tr 4258.)

Layered atop all this was the fact that after the fires, PacifiCorp destroyed most of the evidence of what occurred that night. The evidence at trial was therefore mostly limited to what eyewitnesses saw as they fled for their lives. (Tr 4444–45.) Plaintiffs' expert Larry Pelton explained that when he arrived to investigate the fires in their immediate aftermath, he found that "[p]ower lines and poles had been fixed or replaced, evidence of splicing in conductors, [and] trees had been cut down and removed"—something he observed throughout the Canyon. (Tr 4413; *see also* Tr 4264–67, 4273–74, 4297–98, 4323–25, 4332, 4337–38, 4340–41, 4358–59, 4372, 4389, 4405–07, 4421–23, 4444–45.)

The evidence showed that PacifiCorp's general counsel's office started a "confidential investigation" into the cause and origin of the fires the day after the storm (Tr 2459), but never told the employees in the field (Tr 3305–06). As a result, in violation of its own policies to document and preserve evidence, PacifiCorp took the evidence to the "dump" and discarded it. (Tr 2454.) PacifiCorp also failed to preserve, and ultimately deleted, most of its internal chat communications from that night. Only a handful were found in a "purges" folder. Those chats showed company employees watching fires ignite under their lines in real time. (Tr 539–40, 3965–67, 3977.)[3]

The third aspect of Plaintiffs' causation case was proof that PacifiCorp caused harm to all class members in the Santiam Canyon by driving out the firefighters stationed to defend it. About 150 firefighters were stationed at the Gates School, which was the

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[3] As a result, the trial court ultimately instructed the jury that "if you find the plaintiffs have proved that defendant willfully destroyed or failed to preserve evidence relating to the cause of the fires at issue, then the defendant has the burden of proving that the evidence destroyed or not preserved would not have been adverse to defendant." (ER-274.) PacifiCorp never offered any reason to believe the destroyed evidence was not adverse to it and does not challenge the instruction on appeal.

"Incident Command Center", and another 100–150 firefighters were stationed in nearby Mill City at the Fishermen's Bend campground. They were there for one reason: to defend against the Beachie Creek Fire. (Tr 2851–52, 3004–05, 3708–09, 3761, 4644.) When PacifiCorp's power lines instead began igniting fires across the Canyon, however, both wildland firefighting teams were overrun by power line fires and had to evacuate. (Tr 2664–66, 2856–66, 3006, 3013–28, 5108–09, 6159–60.) The wildland firefighters stationed at the Gates School were forced to evacuate soon after PacifiCorp's power line ignited a fire there and a number of other fires in the area, and PacifiCorp's later ignition at Fishermen's Bend drove out the second camp of wildland firefighters. (Tr 2856–66, 4351–52, 4644, 4654–55.) They were joined by many of the firefighting departments within the Santiam Canyon. (Tr 2664–66, 5108–09.) Whatever fires burned any given property afterward, Plaintiffs contended, the Santiam Canyon met them undefended because of PacifiCorp.

As with the other three fires, Dr. Buckley used burn severity data to identify the class properties that the Santiam Canyon Fire harmed. (Tr 3334–40.) And as with the other fires, class members in the Canyon relied on the same evidence as one another: the same

rebuttal of the Beachie Creek defense, the same ignition proof, the same spoilation of evidence, the same evacuation testimony, and the same burn data.

E. The Class Jury Instructions

As the trial came to a close, the parties and court discussed how best to instruct the jury. Several disputes concerned the class instruction. As PacifiCorp's lawyer put it, "the jury needs to be told that when they're answering the class question, their answer will bind that class." (Tr 7812.) To do so, the parties proposed competing instructions drawn from a California pattern jury instruction for class actions, CACI No. 115. (*See* TCF-06/07/23 (Defendant's Submission Re Draft Jury Instructions and Draft Verdict Forms) at 17.) [4]

The Court ultimately gave two class instructions. The first, "Class Defined," explained a class action and defined the class. The second, "Class Questions Defined," specifically explained the class questions:

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[4] Citations to "TCF" are to the trial court file for case number 20CV33885, published on the Oregon eCourt Case Information system: https://publicaccess.courts.oregon.gov/PublicAccessLogin/login.aspx.

Class Questions Defined

> Only some questions on the verdict form are common to all class members. Those questions are called the class questions. The class questions will be specified on the verdict form that you will use in the jury room. In answering the class questions, you must determine the answer as to the class. Because the case is a class action, you can answer the class questions based on evidence that applies to the class as a whole. There is no requirement that individual class members appear in court to prove their case. You may assume that the evidence at trial applies to all class members. You should interpret the class questions according to these instructions and the verdict form, understanding that for the purposes of these class questions, the class is considered the plaintiff. Each class question is broken down by fire.

(ER-278–79.)[5]

The instruction explained the basic proposition that, in a class action, the class representatives introduce evidence on behalf of the entire class. It also reiterated that the jury was to decide liability on a fire-by-fire basis and directed jurors to refer to the verdict form to interpret the class questions.

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[5] Another dispute at this time was whether the jury would be permitted to find PacifiCorp liable to part of the class in a given fire area. The trial court rejected Plaintiffs' proposal to permit that result. Given the trial court's ruling, Plaintiffs therefore moved orally to modify the class boundary within the Santiam Canyon, to excise the eastern portion of the Canyon where few class members resided. PacifiCorp opposed that motion. The trial court denied the motion on grounds of prejudice to PacifiCorp. (ER-258–63.)

F. The Verdict Form

The verdict form likewise required the jury to determine liability and causation on a fire-by-fire basis. For each claim for relief, the verdict form asked whether Plaintiffs had proven PacifiCorp's liability "as to the Plaintiffs and the entire class within the boundaries of the fire areas." (ER-290, 293, 295, 296, 299, 301, 303–04.) The form then separately asked whether PacifiCorp's conduct was "a cause of harm to the Plaintiffs within the boundaries of the fire areas" and whether PacifiCorp's conduct was "a cause of harm to the entire class within the boundaries of the fire area." (ER-291–92, 294–95, 297–98, 300–01, 302–03, 304–05.) The jury was required to answer these questions separately for the four fires, resulting in 80 fire-by-fire questions. (ER-290–305.)

The instructions within the verdict form similarly explained that a "no" on liability for a fire area meant a verdict for PacifiCorp "*for that fire area*." (ER-291.) It also explained that a "no" on class causation for a given fire meant a verdict "*against a finding of causation* as to the entire class *for that fire area*." (ER-292.)

Both parties' closing arguments then emphasized the fire-by-fire structure of the jury instructions and verdict form, and each

separately addressed fire causation for each fire. PacifiCorp's lawyer told the jury, without objection: "Now, there are four classes. One for each fire at issue in this matter. And Plaintiffs must prove causation for the entire class within each fire area." (Tr 8363.) PacifiCorp's lawyer also argued without objection that "[t]o obtain a verdict for all class members, [Plaintiffs] have to prove causation for each and every single one." (Tr 8363; *see also* Tr 8473 ("So if you don't think plaintiffs have met their standard for even one class member, then you have to check 'no.'").)

G. The Jury's Question

After the jury retired to deliberate, it asked the trial court whether a finding of causation as to the named plaintiffs meant causation as to the entire class. (TCF-06/08/23 (Juror Question and Additional Jury Instructions); Tr 8572.) Specifically, the jury asked:

> Does a decision for named plaintiffs automatically extend to class members? Example: Question 2 – jury finds yes or no for plaintiffs, would the jury automatically extend that yes or no [to] the full class in Question 3.

(TCF-06/08/23 (Juror Question and Additional Jury Instructions); Tr 8572.) In response, PacifiCorp argued that—under its theory of the case—the jury could find differently between the class

representatives and the class. (Tr 8573–74.) The Court agreed, explaining that scenario could arise, for example, "in the Santiam Canyon, if [jurors] accepted defense's theory of the case that there were no power lines east of Gates and plaintiff did not carry its burden of proving causation to the entire class within the boundary of the Santiam Canyon." (Tr 8575.)

As a result, the Court instructed the jury: "No, not necessarily in all circumstances. With respect to your example, an answer of 'yes' or 'no' to question 2 does not automatically extend that 'yes' or 'no' to question 3." (TCF-06/08/23 (Juror Question and Additional Jury Instructions); Tr 8589:12–18.) The trial court thus told the jury not to assume that evidence of causation for one class member meant causation as to the entire class.

H. The Jury Finds PacifiCorp Liable for Each Fire and to the Entire Class, and Phase II Begins.

The jury found PacifiCorp liable to the class on every claim except inverse condemnation. (ER-290–312.) The verdict demonstrated the jury followed its fire-by-fire remit and decided the case individually for each fire. On the class's claims for negligence, for example, the jury voted 11-1 in the class's favor for the Echo

Mountain Complex, 242, and South Obenchain Fires, and 9-3 in the class's favor for the Santiam Canyon. (*E.g.*, ER-292.)

The jury further found that PacifiCorp had acted recklessly and willfully, and was a cause of harm to every class member. (ER-290–312.) After additional proceedings, the jury awarded punitive damages against PacifiCorp. (ER-313–18.)

Following the liability verdict, PacifiCorp insisted that every class member try their damages claims to a jury. To accommodate PacifiCorp's preference, the trial court set a Phase II trial schedule by which Plaintiffs would present their damages claims in groups of roughly 10. By the time of the Court of Appeals' decision, juries had conducted 19 such trials and awarded more than $1 billion to 201 victims of PacifiCorp's negligent and reckless conduct.

I. The Decision on Appeal

On April 8, 2026, the Court of Appeals reversed the Phase I jury verdict on the sole ground that the trial court erred in instructing the jury that it may "assume that the evidence at the trial applies to all class members." *James*, 348 Or App at 380. The Court of Appeals held that sentence was "legally erroneous" because, in its view, "certain evidence at trial, particularly related to

causation, did not necessarily apply to every class member" because the four fires burned in different locations. *Id.* at 350. The court also held the sentence sufficiently prejudicial to warrant reversal on the theory that it might have caused the jury to misunderstand its task to adjudicate causation separately for each fire. *Id.* at 377–78.

The Court of Appeals went further. Without engaging with any element of certification under ORCP 32 or the evidence the trial court weighed at certification and the jury heard at trial, or affording the trial court the deference owed to certification decisions, the Court of Appeals opined on the propriety of class certification. It suggested that the case is more appropriately tried as four class actions, or decertified in some other way. *Id.* at 380.

At the same time, however, the Court of Appeals held that the evidence was sufficient to support the jury's finding that PacifiCorp caused harm to every class member for each fire, including in the Santiam Canyon. *Id.* at 379.

ARGUMENT

I. There Was No Instructional Error.

The Court of Appeals found legal error in a standard instruction explaining how a class action works. It did so because, in

its view, "aspects of causation were not proven through use of common evidence." *James*, 348 Or App at 380. That reasoning collapsed the ORCP 32 class certification framework into instructional review. Whether the certified issues could be, and ultimately were, proven through common evidence is the predominance question that ORCP 32 B(3) commits to the trial court in the first instance. And whether class certification is appropriate is logically antecedent to whether a class instruction accurately states the law. Class certification is a separate inquiry governed by a different standard of review. By reviewing only instructional error under the guise of *de novo* instructional review, the Court of Appeals effectively reversed the trial court's class certification decision without affording it any deference at all. That was error.

This Court's order allowing review recognized the connection between the two inquiries, inviting the parties to address how the merits of class certification inform both questions presented. Plaintiffs accordingly proceed in that order. Section A shows that the trial court acted well within its discretion in certifying the issues class and structuring it fire-by-fire. Section B shows that the

instruction accurately stated the law for the class as properly certified.

A. The Trial Court Acted Squarely Within Its Discretion to Certify the Issues Class.

The trial court properly exercised its discretion to manage this case through an issues class under ORCP 32 G. Common issues drove the resolution of PacifiCorp's liability to the class as a whole, as the trial confirmed. And the challenged instruction accurately described the legal effect of that certification to the jury.

1. The trial court's decision on class certification is reviewed deferentially.

ORCP 32 G authorizes a court, "[w]hen appropriate," to maintain a class action "with respect to particular claims or issues." Issues class certification is one of the techniques within a court's "management tool-box" for handling complex litigation, and certifying liability issues is "likely the most typical use of issue certification." W. Rubenstein, *2 Newberg and Rubenstein on Class Actions*, §§ 4:80, 4:92 (6th ed.) The issues proposed for class treatment must satisfy the criteria of ORCP 32 A—numerosity, commonality, typicality, adequacy, and prelitigation notice. *See Pearson v. Philip Morris, Inc.*, 358 Or 88, 106, 361 P3d 3 (2015).

Here, the trial court's ORCP 32 A findings are not challenged on appeal.

Certification also requires a finding "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." ORCP 32 B. The rule lists eight matters "pertinent" to the superiority finding. *See id.* And while the third matter—"[t]he extent to which" questions common to the class "predominate" over individual ones, ORCP 32 B(3)—often drives class certification decisions,

> "[n]either the 'predominance' factor nor any of the other seven * * * is controlling. Rather, the trial court has considerable discretion in weighing all of the factors that apply in a given case and determining if a class action will be a superior means of litigating the class claims."

Pearson, 358 Or at 106–07; *see Shea v. Chicago Pneumatic Tool Co.*, 164 Or App 198, 207, 990 P2d 912 (1999) ("[T]he fact that the trial court concluded that common questions of law and fact did not predominate the action as a whole does not mean that, as a matter of law, the trial court cannot certify an issue class.").

ORCP 32 commits the weighing of those eight factors to the trial court in the first instance. The trial court "is customarily

granted wide latitude" in determining whether and in what form class treatment is superior to other means of resolving the controversy because class certification "is largely a decision of judicial administration," that is, a decision about "how the trial shall proceed." *Newman v. Tualatin Development Co., Inc.*, 287 Or 47, 51, 597 P2d 800 (1979). Courts and commentators generally agree that issues class certification is warranted when the certified class issues will "address[] the core of the dispute in a manner superior to other realistic procedural alternatives, so as to generate significant judicial efficiencies." Myriam Gilles & Gary Friedman, *The Issue Class Revolution*, 101 BU L Rev 133, 151 (2021) (quoting *Principles of the Law of Aggregate Litigation* § 2.02(a)(1) (Am Law Inst 2009)). In those circumstances, absent issues class certification, "[e]very damages claimant would otherwise need to reinvent the wheel of proving liability * * * at great expense and trouble." *Id.* at 152.

This court reviews for abuse of discretion a trial court's finding that a class action is superior, and it reviews for legal error the trial court's finding that common questions predominate within the class. *Delgado v. Del Monte Fresh Produce, N.A., Inc.*, 260 Or App 480, 489,

317 P3d 419 (2014); *see also Pearson*, 358 Or at 106 (referring to a trial court's "considerable discretion" in determining superiority).

2. The trial confirmed that common questions predominated for the certified issues.

PacifiCorp's primary challenge to issues class certification throughout this case has been to predominance, and specifically to whether the proposed class issues can be resolved by common evidence. The Court of Appeals essentially adopted that premise as its own when it concluded that "aspects of causation were not proven through use of common evidence." *James*, 348 Or App at 380. But as the trial court properly found, the class issues were susceptible to common proof at trial and addressed the core of this dispute.

A question is "common" for certification purposes if the same evidence can be used by all class members to establish a prima facie case of liability. *See, e.g.*, *Bohr v. Tillamook County Creamery Ass'n*, 373 Or 343, 361, 567 P3d 413 (2025) (discussing whether "causation and reliance could be proved by proof common to the class"); W. Rubenstein, *2 Newberg & Rubenstein on Class Actions* § 4.50 (6th ed) ("issues are characterized as common or individual primarily based on the nature of the evidence" and "[i]f the same evidence will suffice

for each member to make a prima facie showing * * * then it is a common issue") (cleaned up). At bottom, the "predominance inquiry" asks "how central are the common questions" to the claims at issue. *Pearson*, 358 Or at 110.

As explained below, the 14 issues certified for class treatment collectively resolved PacifiCorp's liability for each fire. The same corporate-level evidence of the same corporate conduct proved PacifiCorp's culpability for the entire class, and within each fire area, the same ignition evidence, the same expert testimony, and the same burn data proved causation for everyone in that area.

i. Plaintiffs proved PacifiCorp's culpability with corporate-level evidence that applied to every class member.

To begin with, Plaintiffs' evidence of PacifiCorp's culpability was "common" by definition, because all class members used the same evidence to establish their prima facie case. Plaintiffs' proof concerned PacifiCorp's corporate-level decision-making directed at no class member in particular. So, absent certification, every class member would have relied on this same evidence to show that PacifiCorp's conduct was culpable. *See Delgado*, 260 Or App at 491

(claims targeting a defendant's "custom or practice" will "necessarily require[] class-wide common proof").

That was true of each of Plaintiffs' four categories of common proof of PacifiCorp's culpability. First, PacifiCorp underfunded wildfire mitigation as a matter of corporate policy (Tr 986–87, 991–94, 1669–75, 1841–44, 4041–42, 6549–50, 7418–7420), and had no formal models "to quantify [wildfire] risk reduction or [electrical-grid] hardening efforts" to deal with extreme weather (Tr 987:11–12). Second, PacifiCorp's vegetation management—crucial to preventing power line ignitions—was deficient across the state, as the Public Utility Commission repeatedly warned. (Tr 839–48, 1685–94.)

Third, PacifiCorp had no plan to shut off power in any of the four fire areas: all four lay outside PacifiCorp's handful of PDZs (Tr 6518), and outside those zones PacifiCorp had done no shutoff planning, was not set up to receive detailed weather data, and did not consider pre-emptive shutoffs (Tr 485, 819–20, 2138–41, 3232–35, 4040, 6516–6518). And fourth, PacifiCorp's response once the fires began was equally uniform. There were not different groups of PacifiCorp executives making separate decisions for different class members based on different information at different times. Instead,

as PacifiCorp's emergency operations manager testified, the corporation considered its response to the Labor Day fires "*one large response from the company*" and a "*single incident*." (Tr 6281–82 (emphasis added).) The geographic separation of the fires was thus irrelevant to whether proof of culpability was common to the class. PacifiCorp's single course of corporate conduct applied equally to each fire.

Common proof of PacifiCorp's corporate-level decisions therefore applied to everyone in the class alike.

ii. Plaintiffs proved causation with evidence common to each fire area.

The second set of class questions concerned the cause of harm within each fire area. The certification order anticipated "differences in fact-specific causes for each of the four geographic fire areas" and provided that Plaintiffs would prove causation fire-by-fire. (ER-68–69.) That is what happened. Within each fire area, Plaintiffs' causation evidence was common to every class member.

For three of the four fire areas, there is no real dispute that common questions of causation predominated. Plaintiffs pinpointed the specific ignition points and mechanisms for those fires, and the

scope of fire spread there was undisputed. (Tr 2211–14, 2260–61, 2537–58 (Echo Mountain Complex Fire); 2267–72, 2564–67 (242 Fire); 2282–87, 2559–63 (South Obenchain Fire).) On appeal, PacifiCorp has not argued that those fires' origin and spread created individual issues.

Plaintiffs likewise proved the Santiam Canyon Fire with common evidence of PacifiCorp's ignitions across the Canyon.

Plaintiffs proved that PacifiCorp's fires, rather than the Beachie Creek fire or the Beachie Creek fire alone, burned the Santiam Canyon. To rebut PacifiCorp's common defense theory—that the naturally caused Beachie Creek Fire alone caused the Santiam Canyon's devastation—every class member would have needed the same evidence that the class representatives presented at the class trial: the fire-progression modeling and eyewitness testimony that placed the Beachie Creek Fire well outside the Santiam Canyon until hours after PacifiCorp's ignitions.[6] (*Supra* at

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[6] On appeal, PacifiCorp continues to state that Plaintiffs' evidence shows that the Beachie Creek Fire reached the Santiam Canyon early in the evening. That is simply not true. The maps produced by Plaintiffs' experts show that the Beachie Creek Fire was miles away when fires were starting near electrical equipment at Potato Hill, along Gates Road East, at Fishermen's Bend, and in

17–20.) Similarly, because PacifiCorp destroyed nearly all the physical evidence, each class member relied on the same cascade of circumstantial proof—the same ignitions, the same uncontained spread, the same swirling winds—to show that PacifiCorp's fires burned across the Santiam Canyon as a whole. (*Supra* at 17–23.) Well-settled Oregon law authorizes that manner of proof. *See Sullivan v. Mountain States Power Co.*, 139 Or 282, 294, 9 P2d 1038 (1932) (holding that circumstantial evidence is sufficient to prove causation in power line fire cases).

The spoliation instruction reinforced the point: it permitted the jury to infer—class-wide—that the evidence PacifiCorp destroyed would have shown additional ignitions and wider spread. (ER-274; *see also* OEC 311(1)(c).) The Court of Appeals saw in this record only "particular ignitions at particular locations." *James*, 348 Or App at 372. But under Plaintiffs' theory, and PacifiCorp's own Beachie Creek defense, no ignition was ever proof about one property alone.

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other locations in the Santiam Canyon. Trial testimony also makes that clear. While some power-line fires were sparked in the 8:00 and 9:00 p.m. hours of September 7 (Tr 4290, 4295, 4314, 4398), and others shortly before midnight (Tr 4326–27, 4333, 4364–65, 4411–13, 4428, 4441), the nearby Beachie Creek Fire did not reach the Santiam Canyon until well after midnight (Tr 3902–06, 3909–11).

Each was proof of PacifiCorp's Canyon-wide conflagration that led federal fire authorities to rename the Beachie Creek Fire the "Santiam Canyon Fire." (Tr 4257–58.)

In addition, on behalf of all class members in the Santiam Canyon, the class representatives showed that PacifiCorp's conflagration of ignitions overwhelmed the hundreds of wildland firefighters stationed to defend the entire Canyon and forced them to evacuate. (Tr 5108–09, 5131–34; *supra* at 21–22.) That proof was also common by its nature. The evacuations left every property in the Santiam Canyon undefended alike. Whichever fire ultimately burned any particular parcel, the proof that the Santiam Canyon met it without hundreds of firefighters was identical for every class member.

Reversing certification would therefore accomplish nothing but repetition. In individual trials, each of the hundreds of Santiam Canyon class members would call the same fire-progression expert to place the Beachie Creek Fire, the same cause-and-origin expert to establish PacifiCorp's uncontained ignitions, and the same eyewitnesses like Dean Warner to prove the same spread and the same evacuations. The trial court committed no error in concluding

that common questions predominated within the class issues, and thus that class treatment was the superior way to address the core of this dispute.

iii. An issues class was the superior, and perhaps only, way to efficiently handle this controversy.

In inviting the trial court to revisit whether a single class is appropriate, the Court of Appeals bypassed not only predominance but the rest of the superiority determination. There are seven other factors that ORCP 32 B makes "pertinent," none of which its opinion engages. The trial court weighed those factors, and its determination that an issues class was the superior means of adjudicating this controversy was well within its discretion for multiple reasons.

First, there are considerations of judicial efficiency. *See* ORCP 32 B(6), (7). Without certification, each plaintiff or small group of plaintiffs would have to present the same case over and over: a different jury would hear the same witnesses describe PacifiCorp's failures before and during the fires, and the same expert testimony about why those efforts fell short of its duty, and, within each fire area, the same evidence of causation. Presenting that common evidence repeatedly—eight weeks of it in Phase I—would consume

years of court time before any individual issue was reached. The Phase II proceedings show what that would mean in practice. The 19 damages trials held to date concerned only the limited issue of each plaintiff's damages, yet simply to hold them within a reasonable timeframe, the Multnomah County Circuit Court assigned five judges to preside over one trial per week in 2026, and two trials per week throughout 2027. If each of those trials were full blown liability trials instead, with the same evidence presented in each as PacifiCorp insists, Multnomah County would struggle to hold any other civil trial for years.

Trying the same liability case over and over again would also create the possibility of inconsistent results among similarly situated plaintiffs, as well as the "establish[ment] of incompatible standards of conduct" for PacifiCorp. ORCP 32 B(1)(a). It would make it possible for one jury to exculpate PacifiCorp and another jury to hold it liable on the same theories and evidence of culpability.

Even worse, it would have been wastefully expensive for individual Plaintiffs to separately litigate PacifiCorp's liability using the same evidence of culpability and causation. *See* ORCP 32 B(8). While experience has shown that Plaintiffs' damages can be

significant, no reasonable plaintiff would bank on such an award when assessing the feasibility of proceeding individually. The expected value of the litigation, therefore, would be insufficient to justify proceeding individually, given the cost of litigation. *Cf. Giles v. St. Charles Health Sys., Inc.*, 294 FRD 585, 596 (D Or 2013) (concluding that federal superiority criterion was met because individual litigation would involve duplicative discovery, and "recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis") (citation omitted). And while it has become clear over time that the value of the litigation is substantial, one cannot obtain the benefits of aggregate litigation and only then conclude that the trial never should have happened in the first place.

PacifiCorp has complained that having one liability trial rather than thousands impedes settlement efforts. But a litigant's decision to only settle under particular circumstances is no basis to cabin a trial court's discretion under ORCP 32 B. PacifiCorp may have found it more difficult to settle with class members for its preferred figures after it lost a class liability trial, but PacifiCorp's preference for small out-of-court settlements has nothing to do with "fair and efficient *adjudication*." ORCP 32 B (emphasis added).

Individual liability trials thus might have saved PacifiCorp money by encouraging plaintiffs to accept a small fraction of the damage PacifiCorp caused, but they would not have promoted the administration of justice. *Cf. State v. Kuhnhausen*, 201 Or 478, 536, 272 P2d 225 (1954) ("The constitutional mandate for trial without delay applies to civil and criminal cases."); ORCP 1 B. Many of PacifiCorp's victims are older. Nearly 100 plaintiffs have died since this litigation began. And many are struggling as they attempt to rebuild their lives following PacifiCorp's fires. *Their* interests are served by resolving liability in one fell swoop. Those class members cannot afford to wait for PacifiCorp to get the trial result it wants. Indeed, for many class members, there is no realistic alternative to a class trial.

The trial court weighed all of this—efficiency, consistency, cost, and class members' access to justice—when it certified the issues class and structured it fire-by-fire. The Court of Appeals' invitation to revisit that judgment weighed none of it. And because the trial court properly certified and structured the class, the remaining question is whether the instruction accurately stated the law for the class as certified. It did, as explained next.

B. The Class Questions Instruction Was Appropriate for This Class and This Case.

Because the trial court properly certified and structured the class, *see supra* § I.A, it also properly instructed the jury on the effect of that certification. The trial court appropriately modified a standard instruction, developed for the purpose of explaining to the jury the nuances of a class action, to account for the court's case-management decisions.

"In determining whether it was error to give a particular instruction, [the Court] read[s] the instructions *as a whole* to determine whether they state the law accurately." *State v. Woodman*, 341 Or 105, 118, 138 P3d 1 (2006) (emphasis added). "The goal of jury instructions is to 'reduce the relevant law to terms readily grasped by the jury without doing violence to the applicable legal rule.'" *Martineau v. McKenzie Willamette Med. Ctr.*, 371 Or 247, 252–53, 533 P3d 1 (2023) (quoting *Rogers v. Meridian Park Hosp.*, 307 Or 612, 616, 772 P2d 929 (1989)).

Here, the trial court's "Class Questions Defined" instruction provided, in relevant part:

> "In answering the class questions, you must determine the answer as to the class. Because

> the case is a class action, you can answer the class questions based on evidence that applies to the class as a whole. There is no requirement that individual class members appear in court to prove their case. *You may assume that the evidence at trial applies to all class members.* You should interpret the class questions according to these instructions and the verdict form * * *. Each class question is broken down by fire."

(ER-278–79 (emphasis added).)

The challenged instruction conveyed the "relevant law" as to the effect of class certification: that only the named plaintiffs would appear, and the absent class members would be bound by the jury's answer to the class questions. An instruction covering these points is a routine part of a class trial. W. Rubenstein, *4 Newberg & Rubenstein on Class Actions* § 11:22 (6th ed) ("most class action trials employ some version of a 'class action explanatory' jury instruction"). Jury instructions in a class trial typically convey, for instance, "that most of the class will not be present for the trial" and instruct the jury "not to hold that fact against the absent class members," and that the "verdict will apply to all members of the class." *Id.* In this case, even defense counsel was clear that these points must be

included in the instructions because they are "not within the common knowledge of the jury." (Tr 7812.)

The trial court thus instructed the jury that, for each question, it "must determine the answer as to the class." (ER-278.) To do so, the instruction explained that "[b]ecause the case is a class action, you can answer the class questions based on evidence that applies to the class as a whole." (ER-278.) The instruction then specifically clarified *who* presents that evidence in a class action: "[t]here is no requirement that individual class members appear in court to prove their case." (ER-278–79.) Instead, "[y]ou may assume that the evidence at the trial applies to all class members." (ER-279.)

Homing in on the challenged sentence, the Court of Appeals reasoned that "aspects of causation were not proven through use of common evidence," *James*, 348 Or App at 380, and that accordingly, the jury might take the sentence to mean that evidence that PacifiCorp caused one wildfire could prove causation for a different wildfire entirely, *see id.*, 348 Or App at 372–374.

But read where it sits—immediately after "[t]here is no requirement that individual class members appear in court to prove their case"—the challenged sentence simply told the jury *who* would

prove the class's claims, not *what* any piece of evidence proved. It expressed the unremarkable proposition that absent class members need not appear at trial because the named plaintiffs are responsible for proving the class's claims. *See Pearson*, 358 Or at 114.

That is the only way the instruction was invoked at trial. In closing argument, Plaintiffs' counsel reiterated that "[i]t's not as though each and every class member is required to be in this Court and explain what happened that night to you. That would be unreasonable." (Tr 8348.) Counsel later emphasized that the instruction meant that "you don't need to hear from each and every class member to say there's a fire that harmed my property." (Tr 8495.) And just to ensure there was no confusion, PacifiCorp's lawyers then explained, without objection, that:

> "proving causation for the entire class within each fire area doesn't mean that plaintiffs can just prove causation for only some of the class members, but not others and declare a victory. No. To obtain a verdict for all class members, they have to prove causation for each and every single one."

(Tr 8363.) That was what everyone in the courtroom understood was required.

The Court of Appeals focused on the word "applies" in the challenged instruction. But that word did not (and could not) mean, as the Court of Appeals posited, that the evidence applied *in the same exact way* to every class member. Simply because evidence "applies" to a class member does not mean it "proves" that member's individual case.

The ordinary meaning of the word confirms the distinction. To "apply" is "to have a valid connection, agreement, or analogy: to have a bearing: to be pertinent." Webster's Third New Int'l Dictionary 105 (unabridged ed 2002); *see also Foster v. Texas Dep't of Crim. Just.*, 344 SW3d 543, 549 n 10 (Tex App 2011) (same). The challenged sentence thus told the jury what it could assume about the reach of the record: although the absent class members would never appear—as the immediately preceding sentence explained (ER-278)—the evidence the class representatives presented still counted in every class member's case. Whether that evidence proved anything was governed by other instructions entirely: the burden-of-proof instruction (ER-274–75), the separate causation standards the trial court gave, and the direction that "[e]ach class question is broken

down by fire," (ER-279). No sense of the word "applies"—in Webster's Third or anywhere else—means "suffices to prove."

Indeed, the instruction's closing reminder that "[e]ach class question is broken down by fire," and its directive to "interpret the class questions according to * * * the verdict form" (ER-279) show that the instruction was appropriate for this issues trial. The trial court carefully crafted the verdict form, an explicit source of interpretive guidance, to require the jury to answer liability and causation questions separately for each fire and each cause of action. The jury accordingly answered a total of 80 fire-by-fire questions—following precisely the way the evidence was presented at the trial, just as the trial court had envisioned at certification. The form further explained that a "no" on liability for a fire area meant a verdict for defendant "*for that fire area*." (ER-291 (emphasis added).) It also explained that a "no" on class causation for a given fire meant a verdict "*against a finding of causation* as to the entire class *for that fire area*." (ER-292 (emphases added).) Thus, contrary to the Court of Appeals' conclusion, there was no room for a juror to carry a causation finding from one fire to another.

Nor was the jury's ability to give different answers for different fire areas inconsistent with the certification of a single class. *See Tyson Foods, Inc. v. Bouaphakeo*, 577 US 442, 460-462 (2016) (discussing need to review jury's verdict to see, based on jury's assessment of common evidence, which class members are entitled to recover and which are not, without suggesting that presence of uninjured class members somehow defeats certification); *Messner v. Northshore HealthSystem*, 669 F3d 802, 819 (7th Cir 2012) (rejecting argument that common evidence must apply *in the same way* to all class members' claims, noting that the federal predominance rule requires "a showing of common questions," not "a showing of common answers to those questions").

Ultimately, the instruction at issue conveyed the basic proposition that the class representatives, not absent class members, adduced the evidence at trial, and the jury was to use that to determine the answers to the class questions "based on evidence that applies to the class as a whole." It was not error to instruct the jury on that basic function of class action law.

II. The Challenged Instruction Did Not Prejudice PacifiCorp

The Court of Appeals also misapplied this Court's precedent on prejudice from instructional error.

Oregon law provides that "[n]o judgment shall be reversed or modified except for error *substantially* affecting the rights of a party." ORS 19.415(2) (emphasis added). Reversal "is the exception, not the rule." *Shoup v. Wal-Mart Stores, Inc.*, 335 Or 164, 173, 61 P3d 928 (2003). When a losing party seeks reversal based on a claimed instructional error, a reviewing court performs a whole-record review to determine whether the error substantially affected the party's rights. This Court reads the jury instructions as a whole and asks whether, in "the context of the evidence at trial and the parties' theories of the case with respect to the various charges, claims, and defenses at issue," there is a real likelihood the jury reached a legally erroneous result. *Purdy*, 355 Or at 227–28, 232.

This Court has emphasized that "it is insufficient to speculate that the error might have changed the outcome in the case." *Id.* at 225. Rather, "an error must cause something more than the 'possibility' of a different result." *Shoup*, 335 Or at 173 (emphasis in

original). An error "affecting" a party's rights must therefore "*produce* a material influence" or "have a detrimental influence" on those rights, "not merely" be "one that 'might' have changed the outcome of the case." *Id.* (emphasis in original).

These requirements reflect Oregon's deliberate policy choice. Because "it is almost always possible that an error at trial affected the outcome," treating the possibility of prejudice as sufficient for reversal "would lead to retrial of most, if not all, cases in which there was trial court error." *Shoup*, 335 Or at 173 (emphasis in original). "That result is the opposite of the policy determination that ORS 19.415(2) embodies." *Id.* Reversal is therefore "the exception, not the rule." *Id.*

Fidelity to this framework has rarely mattered more. But in what may be the largest civil action in Oregon history, the Court of Appeals reversed a landmark class verdict without apparently reviewing the full trial record.

Across just two pages assessing prejudice, the Court of Appeals hypothesized that the challenged sentence influenced the result in two ways: first, that the jury might have misunderstood its task of adjudicating causation separately for each of the four fires; and

second, for the Santiam Canyon Fire specifically, that the jury might have assumed that evidence of one ignition applied to class members in other parts of the Canyon. *James*, 348 Or App at 378. PacifiCorp pressed a third theory—that the instruction deprived it of its due process right to "present every individual defense"—which the Court of Appeals did not adopt.

The record refutes each theory in turn.

A. The Record Disproves the Court of Appeals' Theory That the Jury Could Have Found Proof of One Fire Was Proof of All Fires.

The Court of Appeals first hypothesized that the jury might have misunderstood its obligation to adjudicate causation separately for each of the four fires. It reasoned, for example, that the challenged instruction might have led the jury to believe that evidence that a plaintiff had "property destroyed by the Echo Mountain Complex Fire" could be "'assumed' to apply to plaintiffs over a hundred miles away whose property was destroyed by a different wildfire entirely." *James*, 348 Or App at 372. That theory, however, fails every aspect of the required whole-record review. *See Purdy*, 355 Or at 226–28.

First, given the evidence at trial and the parties' theories and defenses, the Court of Appeals' hypothetical would have been implausible to anyone in the courtroom. Across eight weeks of trial, no one suggested that evidence of PacifiCorp's ignitions or other actions specific to one fire somehow proved causation in another. No witness drew that inference, no exhibit invited it, and no lawyer argued it. Instead, the parties described and contested the cause and spread of each fire, with separate theories of causation for each fire area.

Then, during closing argument, Plaintiffs' counsel explained the causation of each fire individually and told the jury to decide each fire *separately*. (*See, e.g.*, Tr 8250–65 (Echo Mountain Complex fire); 8266–71 (242 and South Obenchain Fires); 8280–99 (Santiam Canyon Fire).) So clear was the jury's task that, when its turn came, PacifiCorp's lawyer told the jury without objection that, in reality, "there are four classes. One for each fire at issue in this matter." (Tr 8363:9–10.) He continued: "proving causation for the entire class within each fire area doesn't mean that plaintiffs can just prove causation for only some of the class members * * *. To obtain a verdict for all class members, they have to prove causation for each

and every single one." (Tr 8363:13–19.)[7] No one objected, because that was everyone's understanding of the task. The trial court's instruction did, as the Court of Appeals observed, inform the jury that there was a single class. *James*, 348 Or App at 357–58. But in light of the evidence and the arguments presented, no juror would have understood that instruction to mean that the jury's task was to adjudicate liability uniformly across the class and between fires.

In short, the inference the Court of Appeals imagined—that proof PacifiCorp caused harm in one fire area was proof it caused harm in another—would have had to originate in the jury room, unprompted, in open defiance of "the evidence at trial and the parties' theories of the case." *Purdy*, 355 Or at 227–28. PacifiCorp

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[7] Plaintiffs also referenced the challenged instruction twice during closing, and each reference conveyed its correct meaning. In the primary closing, Plaintiffs' counsel said: "So you can assume—this is in your jury instructions—that the evidence at trial applies to all class members. *It's not as though each and every class member is required to be in this courtroom* and to explain what happened that night to you. That would be unreasonable. So you can assume based on the evidence." (Tr 8348:13–20 (emphasis added).) In rebuttal, counsel again explained that "[y]ou can assume that the evidence that came in applies to the class members as a whole" because "[t]he Judge has instructed that *you don't need to hear from each and every class member* to say there's a fire that harmed my property, et cetera." (Tr 8495:14–19 (emphasis added).)

pointed to no evidence, and the Court of Appeals relied on none, suggesting any such thing occurred.

And even if that were theoretically possible, the trial court's special verdict form ensured (and confirmed) that no such assumption arose. *See id.* at 237 (Balmer, C.J., concurring) (observing that special verdict forms in particular "can clearly demonstrate that an error did—or did not—affect the verdict" so litigants are not left "at the mercy of an appellate court trying to determine from the record whether trial court error 'affected' the judgment 'a little,' 'some,' or 'a lot'").

The special verdict form here required the jury to determine liability and causation on a fire-by-fire basis, and to determine causation separately for the class representatives and for the entire class. (ER-290–312.) It contained 80 separate, fire-by-fire questions. (ER-290–312.) The trial court's special verdict form left no room for the assumption the Court of Appeals hypothesized, and there is no significant likelihood that the jury made it. This is precisely the use of "appropriately tailored verdict forms" that this Court has acknowledged: parties "remain free to use special verdict forms * * * if they believe that doing so will create a clearer record" for review,

Purdy, 355 Or at 232 n 10, and the completed form here "provided greater insight into the basis for the jury's verdict," *id.* at 238 (Balmer, C.J., concurring).

The record here supplies direct evidence of the jury's understanding. During deliberations, the jury asked whether "a decision for named plaintiffs automatically extend[s] to class members?" (Tr 8572:7–11.) The trial court answered "[n]o, not necessarily in all circumstances," and instructed the jury that an answer of yes or no as to the named plaintiffs "does not automatically extend" that answer to the entire class. (Tr 8589:12–18; TCF-06/08/23.) The court thus instructed the jury that it *could not* simply assume that evidence supporting liability as to one class member supported liability as to all.

Finally, the verdict itself shows the jury differentiated among the fires rather than assuming the evidence PacifiCorp caused one fire proved it caused another. As to the claims for negligence, private nuisance, and trespass, the verdict as to causation was 11-1 in favor of Plaintiffs for the Echo Mountain, South Obenchain, and 242 Fires, but 9-3 for the Santiam Canyon Fire. (*See* ER-290–303.)

QUESTION 3: Was the Defendant's negligence a cause of harm to the entire class within the boundaries of the fire areas below?

Echo Mountain Complex fire	YES ✓	NO	2 N	8 Y	11 Y	24 Y	32 Y	37 Y
			44 Y	48 Y	61 Y	69 Y	83 Y	96 Y
Santiam Canyon fire	YES ✓	NO	2 N	8 Y	11 Y	24 Y	32 Y	37 N
			44 Y	48 N	61 Y	69 Y	83 Y	96 Y
South Obenchain fire	YES ✓	NO	2 N	8 Y	11 Y	24 Y	32 Y	37 Y
			44 Y	48 Y	61 Y	69 Y	83 Y	96 Y
242 fire	YES ✓	NO	2 N	8 Y	11 Y	24 Y	32 Y	37 Y
			44 Y	48 Y	61 Y	69 Y	83 Y	96 Y

(ER-292.)

The Court of Appeals arrived at its prejudice theory only by looking past that record. Its opinion omitted any reference to the jury's question, or to the trial court's answer telling the jury that findings for the named plaintiffs do "not automatically extend" to the

class. It omitted any reference to the completed verdict, whose differing vote margins showed the jury distinguishing among the fires. And it omitted any reference to PacifiCorp's own closing argument, which told the jury that "there are four classes" and that causation had to be proven "for each and every single one." (Tr 8363.)

Reviewed as a whole, the record leaves no likelihood—much less a significant one—that the jury made the assumption the Court of Appeals hypothesized.

B. The Santiam Canyon Evidence Applied to Every Class Member in the Santiam Canyon.

The Court of Appeals' second prejudice theory was that, for the Santiam Canyon Fire, the jury improperly assumed evidence of one fire ignition applied to all class members in the canyon. 348 Or App at 377–78; *see also id.* at 372. That theory misunderstands Plaintiffs' causation case. It was not improper for the jury to "assume" that evidence of one ignition applied canyon-wide. The evidence did apply canyon-wide, under Plaintiffs' theory and under PacifiCorp's own defense.

First, Plaintiffs proved with evidence common to every class member that PacifiCorp's fires burned through the Santiam Canyon.

Again: every class member from the Canyon faced PacifiCorp's Beachie Creek defense, and every class member's answer to it was the same fire-progression modeling and testimony from eyewitnesses like Dean Warner that placed the Beachie Creek Fire outside the Santiam Canyon until hours after PacifiCorp's ignitions. (*Supra* pp 17, 41.) And because PacifiCorp destroyed nearly all the physical evidence, every class member relied on the same cascade of circumstantial proof—the same massive, uncontained power line ignitions and the same swirling winds—to show that PacifiCorp's fires burned across the Santiam Canyon as a whole. (*Supra* at 18–20, 38–39.) *See Sullivan*, 139 Or at 294 (holding that circumstantial evidence is sufficient to prove causation in power-line fire cases). That is why the challenged sentence worked no prejudice here, nor was it error in the first instance: under Plaintiffs' theory, a jury that credited this proof as to one Canyon class member credited it as to all.

Second, as also shown above, Plaintiffs proved that PacifiCorp's ignitions, along with the chaos of other fires PacifiCorp started, forced the evacuation of the wildland firefighters tasked with defending the entire Santiam Canyon. (*Supra* at 22, 40.) That proof

was common by its nature: the evacuations left every property in the Santiam Canyon undefended alike. Plaintiffs' counsel made that point the centerpiece of the Santiam Canyon closing:

> "Think about it, two full camps there to protect the canyon that night. The firefighting resources in the canyon that night all have to flee, have to leave the canyon early in the night. Leaving the canyon, the entire Santiam Canyon, defenseless against fires both already there and those that come that night.
>
> "Stripping the canyon of any fighting chance, any fighting chance they may have had that night because of PacifiCorp's power line fires. PacifiCorp stole the canyon's fighting chance. That's what happened on Labor Day 2020."

(Tr 8291:6–19.)

Critically, the Court of Appeals itself found this same evidence sufficient to support the jury's verdict as to each and every class member in the Santiam Canyon fire area. *James*, 348 Or App at 379. Ultimately, then, there was no significant likelihood that the jury reached its verdict through improper or impermissible assumptions.

C. PacifiCorp Was Not Deprived of Its Ability to Present Individualized Defenses.

PacifiCorp also offered a third prejudice theory the Court of Appeals noted but did not adopt: that the challenged instruction

deprived PacifiCorp of due process because it was unable to "present every individual defense." *Id.* at 370.[8]

This theory fails because PacifiCorp cannot point to any moment in the Phase I trial when PacifiCorp was prevented from offering any individualized evidence. For instance, PacifiCorp made individual arguments as to the named plaintiffs, explaining why—in its view—its conduct was not a cause of their injuries. (Tr 8363, 8470–73.) It also made other individualized arguments specific to the class representatives. (*See, e.g.*, Tr 2950–51 (PacifiCorp asking Kevin Stockton if he could have preserved personal property if he had evacuated sooner); 3768–69 (PacifiCorp asking Sam Drevo if he had ever alerted the company to vegetation growing around power lines); 4704–05 (PacifiCorp questioning whether Lori Fowler's anxiety was attributable to the 2020 Labor Day fires or to earlier experiences with extreme weather).)

More than that, PacifiCorp thereafter sought and received its preferred verdict form, which required the jury to determine (a)

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[8] That opportunity has continued into Phase II, where PacifiCorp has remained free to offer any individualized defenses it may have for any individual class member's damages outside of arguing, for the Santiam Canyon, that the Beachie Creek fire caused the harm.

whether PacifiCorp was liable "as to the Plaintiffs and *the entire class*" and (b) whether its conduct "was a cause of harm *to the entire class*" for each cause of action and each fire area. (ER-290–92 (emphasis added); Tr 8136.) Its lawyers then explained to the jury what that structure meant: if Plaintiffs failed to prove liability and causation for a *single class member* in a fire area—or if PacifiCorp had a defense as to just a single member—PacifiCorp would defeat the entire class's claims for that fire area. (Tr 8363 ("To obtain a verdict for all class members, they have to prove causation for each and every single one.").)

To be clear, that structure gave PacifiCorp the most favorable terrain a class action defendant can occupy. To defeat the class for a fire area, PacifiCorp needed only doubt about one class member; to prevail, Plaintiffs had to prove causation as to all of them. *Cf.* W. Rubenstein, *1 Newberg & Rubenstein on Class Actions* § 2:3 (6th ed) ("the possibility that a well-defined class will nonetheless encompass some class members who have suffered no injury * * * is generally unproblematic"). The jury, instructed on exactly that all-or-nothing structure, found that Plaintiffs carried their burden for every class member in every fire area. And the Court of Appeals held the

evidence sufficient to support that finding. *James*, 348 Or App at 379. In the end, the jury simply did not buy PacifiCorp's individualized defenses and arguments. That was not a denial of due process but rather the application of justice.

* * *

As the party seeking reversal, PacifiCorp bore the burden of making an affirmative showing of prejudice from the record. *Shoup*, 335 Or at 174, 178–79. It identified none—no evidence showing some, let alone a significant, likelihood that any error affected the result. What the record shows instead is a jury that heard each fire's evidence separately and returned different verdicts for different fires. That is not a jury that misunderstood its task. It is a jury that performed it. Because "it is insufficient to speculate that the error might have changed the outcome in the case," *Purdy*, 355 Or at 225, the Phase I judgment cannot be reversed under ORS 19.415(2).

CONCLUSION

The decision of the Court of Appeals should be reversed, the trial court's class certification rulings should be affirmed, and the case should be remanded to the Court of Appeals for consideration of the parties' remaining assignments of error.

Dated this 6th day of August, 2026.

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COMBINED CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b)(i)(A) the word count of this brief (as described in ORAP 5.05(1)(d)(i)) is 13,043 words.

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 as required in ORAP 5.05(1)(d)(ii).

DATED this 6th day of August, 2026.

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CERTIFICATE OF FILING AND SERVICE

I certify that on August 6, 2026, I filed the foregoing **BRIEF ON THE MERITS OF PETITIONERS ON REVIEW** with the Supreme Court using the Appellate Court's Electronic Filing System.

I further certify that on August 6, 2026, electronic service of the foregoing was accomplished via the Appellate Court's Electronic Filing System at the email addresses on record on the date of service in the appellate e-Filing system upon the following registered eFilers:

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