IN THE SUPREME COURT OF THE STATE OF OREGON

JEANYNE JAMES, *et al.*, individually and on behalf of all others similarly situated,

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

Oregon Supreme Court
Case No. S072933

Oregon Court of Appeals
Case No. A183140

Multnomah County Circuit Court
Case No. 20-CV-33885

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

BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS ON REVIEW

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Edison Electric Institute ("EEI") is the trade association that represents all investor-owned electric companies in the United States. EEI's members, which include PacifiCorp and Pacific Power (collectively, "PacifiCorp"), provide electricity to nearly 250 million Americans and operate in all 50 states and the District of Columbia. The U.S. electric power industry, as a whole, supports more than 7 million jobs in communities across the United States and accounts for at least 5 percent of the nation's gross domestic product. Organized in 1933, EEI works to promote the long-term success of the electric power industry in its vital mission to provide reliable and cost-efficient electricity to customers nationwide.

EEI regularly files *amicus curiae* briefs in cases raising issues of significant concern for the electric power industry, including *amicus* filings before federal and state courts on issues related to investor-owned electric utilities' liability for wildfire-related damages. EEI submitted an *amicus* brief in support of PacifiCorp in the Court of Appeals in this case. EEI offers this *amicus* brief to provide a nationwide perspective on the practical, economic, and regulatory consequences to the industry and customers of imposing, via class actions, enormous and unpredictable civil liabilities on investor-owned utilities in connection with wildfires. EEI's brief also emphasizes the importance to this industry of decisions, like the Court of Appeals' ruling below, that ensure that trial courts observe and

adhere to traditional doctrinal guardrails critical to tort liability, particularly in the class-action context.

INTRODUCTION AND SUMMARY OF ARGUMENT

It was prejudicial error for the circuit court to instruct the jury that it could simply "assume" that the submitted evidence applied to all class members. As PacifiCorp persuasively explains, this Court has no reason to disturb the Court of Appeals' ruling.

EEI files this *amicus* brief not to duplicate PacifiCorp's legal arguments, but rather to highlight the broader economic and policy context in which this case arises, as well as the consequences of accepting plaintiffs' theory of class-wide, mass-tort liability untethered from individualized proof of liability and causation. This case must be understood against the background of the ratemaking, regulatory, and economic principles that govern the relationships among an investor-owned electric company, its state regulator, customers, investors, and creditors—a set of relationships often called the "regulatory compact." The regulatory compact, a concept recognized by Oregon law and other jurisdictions nationwide, consists of principles and legal rules that promote utility customers' interests by imposing intensive regulation of the rates, terms, and conditions of service provided by an investor-owned electric company. That regulation includes the company's obligation to serve all customers in a designated service area on a

nondiscriminatory basis, in exchange for an expectation that the company can recover costs prudently incurred in providing service, plus a reasonable return of and on invested capital.

To provide reliable and affordable electric service to customers over the long-term, investor-owned electric companies must be able to attract significant amounts of private capital—hundreds of billions of dollars, collectively among EEI's member companies—to build, operate, maintain, and improve large-scale grid infrastructure and systems. This is why, according to the principles of the regulatory compact, investor-owned electric companies are generally assured recovery of prudently incurred operating costs and expenses plus a reasonable rate of return. *See infra* Part I.

The regulatory compact, however, breaks down where mass-tort liability subjects an electric company to enormous yet unpredictable civil monetary liabilities. Massive civil monetary liabilities, particularly when imposed without due regard for doctrinal guardrails and limiting principles, such as individualized proof that a company's actions caused a particular plaintiff's harms, can threaten the financial stability of investor-owned electric companies. The downstream consequences include diverting private capital away from system maintenance and improvements, increasing the cost of raising additional private capital, and

ultimately increasing rates or affecting the reliability of electric service for customers. *See infra* Section II.A.

These adverse consequences for everyday customers have already played out in jurisdictions nationwide, in the specific context of wildfire-related litigation, creating increased credit risk and financial liability for investor-owned utilities. Such litigation often involves massive, enterprise-threatening claims of damages, arising from a complex matrix of causal phenomena largely outside of any electric company's control. In certain jurisdictions, the recent, sharp increase in wildfire-related litigation has strained electric companies' abilities to raise capital, procure insurance, maintain and improve service, and (in some instances) continue as a going concern. The problem is exacerbated by the reality that investor-owned electric companies have an obligation to serve all customers, even the increasing numbers who reside in or develop areas of heightened wildfire risk, as that regional wildfire risk stands to increase over the long term. *See infra* Section II.B.

The Court of Appeals' decision aligns with and respects the regulatory and economic principles described above. The circuit court's jury instructions had the practical effect of excusing plaintiffs from meeting their evidentiary burden to prove liability and causation for all class members, rendering PacifiCorp, its customers, and shareholders, the de facto "insurers of last resort" for the wide-ranging damages arising from the Labor Day 2020 fires, regardless of the evidence

of PacifiCorp's actual fault as to any particular class member. The Court of Appeals, correctly identifying the circuit court's instructional error, bolstered the regulatory compact by guarding against unpredictable and unsupported monetary liabilities that can threaten the financial health of an investor-owned electric company and the availability of electric service to customers on a reliable, cost-effective, affordable, and nondiscriminatory basis. *See infra* Section II.C.

Relatedly, this brief provides perspective on why the class action framework can be particularly ill-suited for wildfire-related mass tort litigation, at least as the circuit court used it here, which attempted to aggregate claims by thousands of individual and geographically dispersed landowners affected by four separate fire events. *See infra* Section II.C.

ARGUMENT

I. The regulatory compact between an investor-owned electric company, its regulator, and its customers is fundamental to delivering reliable and affordable electric service.

A. The regulatory compact underpins utility regulation.

Most electric customers in the United States are served by investor-owned electric companies, like PacifiCorp, which provides electric service in Oregon, northern California, and southeastern Washington. *See* U.S. Dep't of Energy, *Transforming the Nation's Electricity System: The Second Installment of the Quadrennial Energy Review* A-28 (2017). https://perma.cc/JK4Z-PWE2 ("*Quadrennial Energy Review*"). Like other publicly traded companies, investor-

owned electric companies are for-profit enterprises, whose shareholders supply and ultimately own the company's assets and capital. But such companies are closely regulated by the jurisdictions that they serve. *Id.* at A-29. An investor-owned electric company's rate structure and terms and conditions of service are generally subject to intensive review and approval by the relevant state utility regulator and set forth in a published legal instrument known as a tariff. PacifiCorp, which is subject to the oversight of the Oregon Public Utility Commission ("PUC") within its jurisdiction, is no exception. *See* ORS 756.040 (powers of PUC); *Gearhart v. PUC* (*Gearhart II*), 356 Or 216, 219, 339 P3d 904 (2014) (explaining that investor-owned utilities "operate more efficiently as monopolies" and therefore are "closely regulated" (citation omitted)).

Utility regulators, like the PUC, set the rates, terms, and conditions of service, with the twin aims of providing customers with access to reliable, affordable electric service *and* ensuring that the company can recover prudently incurred operating costs and expenses and a reasonable rate of return of and on invested capital. *See Gearhart II*, 356 Or at 219-20 (similarly describing PUC's mandate of "fair and reasonable rates" and components of its ratemaking review (quoting ORS 756.040(1)). Utility regulation thus considers a range of factors, including the prudency of expenditures; the company's need to recover a reasonable rate of return to attract capital; the maintenance and hardening of

infrastructure to protect reliability and affordability; the balancing of usage characteristics across customer classes (i.e., residential, commercial, and industrial); and, in some cases, the furtherance of broader policy goals that may be reflected in applicable state or federal laws or adopted by state regulators, such as goals related to energy conservation, electrification, and energy-generation portfolio management. *See Gearhart II*, 356 Or at 220-21; *id.* at 221 (observing that "ratemaking * * * is governed by statute but largely left to the PUC's discretion"; the PUC "is empowered to make delegated policy choices of a legislative nature within the broadly stated legislative policy" (internal quotation marks and citation omitted)); *see also* James C. Bonbright, *Principles of Public Utility Rates* 48-62 (1961), https://perma.cc/646Z-22LA (leading treatise; explaining the "primary functions" of utility ratemaking, including "capital-attraction" and "production-motivation").

Utility regulation, by its nature, is both prospective and retrospective. Prospectively, the PUC must review and approve tariff language to govern the *future* provision of electric service and charges for the same. Retrospectively, the PUC must review an electric company's past and present cost data to determine which costs and expenses were prudently incurred to serve customers and thus may be recovered through rates. The ratemaking process is often lengthy and subject to iterative rounds of discovery, briefing, and hearing before the PUC, and

participation by a wide range of stakeholders. *See Gearhart II*, 356 Or at 220-21; *In re Portland Gen. Elec. Co.*, PUC Order No. 08-487, at 6-7 & n31 (Sept. 30, 2008), https://perma.cc/7JXN-MTX9. But investor-owned electric companies, generally speaking, are able to raise and invest private capital to serve the general welfare through reliable, affordable, and nondiscriminatory electric service based on the expectation that the company can later recover prudently incurred expenditures, and a reasonable rate of return, through customer rates. *See* Bonbright, *Principles of Public Utility Rates* at 49-50 ("Public utility companies are permitted to impose charges for their services largely in order to induce and enable them to supply these services and to make provision for their continuation and for their required expansion.").

The dynamic described above—regulated cost recovery in exchange for the provision of reliable, affordable electric service on a nondiscriminatory basis in a defined service area—underpins what is known in the industry as the "regulatory compact." *See Quadrennial Energy Review* at A-9. As described by one federal judge, "[t]he utility business represents a compact of sorts; a monopoly on service in a particular geographical area * * * is granted to the utility in exchange for a regime of intensive regulation, including price regulation." *Jersey Cent. Power & Light Co. v. Fed. Energy Regul. Comm'n*, 810 F2d 1168, 1189 (DC Cir 1987) (Starr, J., concurring).

The regulatory compact flows from an investor-owned electric company's need to attract significant amounts of private capital, typically by issuing debt or selling stock, to construct, maintain and improve the infrastructure, systems, and other assets needed to provide reliable, affordable service over the long term and across a geographically dispersed and diverse customer base. Indeed, in 2025 alone, EEI's member companies, collectively, invested an estimated $204 billion in capital expenditures, a number that has steadily climbed over the previous decade. *See* Edison Elec. Inst., *2025 Financial Review: Annual Report of the U.S. Investor-Owned Electric Utility Industry* 8 (2026), https://perma.cc/9R2Y-SH59.

A company's ability to raise the private capital required to build, operate, and maintain large-scale, long-lived infrastructure is possible only if investors are reasonably assured that the company will be able to recover prudently incurred costs and expenses, as well as a reasonable rate of return. That expectation has long been reflected in PUC precedent and common law. *See* PUC Order No. 08-487 at 5-6 nn25-27 (citing *Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm'n of W. Va.*, 262 US 679, 693, 43 S Ct 675, 67 L Ed 1176 (1923), and *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 US 591, 603, 64 S Ct 281, 88 L Ed 333 (1944)). And Oregon, like many other jurisdictions, has codified the expectation in statute. *See* ORS 756.040(1)(b) (providing that "fair and reasonable" rate of return must provide "a return to the equity holder that is," in part, "[s]ufficient to ensure

confidence in the financial integrity of the utility, allowing the utility to maintain its credit and attract capital").

B. The regulatory compact reflects the importance of cost recovery and predictable legal regimes for electric companies' ability to provide efficient and cost-effective service to their customers.

An investor-owned electric company's ability to raise private capital largely reflects the perceived or actual degree of risk that the company will be able to recover its costs and expenses and provide a satisfactory rate of return to investors—much like any other private enterprise. Indeed, "[w]hen investors perceive higher risk, the corresponding costs of debt and equity [i.e., the cost to raise private capital] increase." John Quakenbush, Nat'l Ass'n of Regul. Util. Comm'rs, *A Cost of Capital and Capital Markets Primer for Utility Regulators* 9 (2020), https://perma.cc/4DSV-WZ8U. Accordingly, "the type of regulation best designed to maintain corporate ability to raise capital," and the "view * * * accepted by modern rate regulation," "is one which goes as far as feasible toward protecting the security holders against the risks of financial loss." Bonbright, *Principles of Public Utility Rates* at 64.

The PUC has recognized this economic relationship and its effect on the provision of electric service. Disallowing the recovery of certain prudently incurred costs, the PUC has concluded, "would * * * be to the detriment of customers" as much as the electric company's investors. PUC Order No. 08-487 at

70-71 & n.253. "Because investors would consider [the company] to be a 'riskier' investment, [the company's] costs would go up, including its cost of capital and cost of debt," which inevitably "would result in higher rates for customers." *Id.*

The regulatory compact, in sum, recognizes that "[a]lthough the interests of customer and [a utility's] investors are competing, they are also interrelated and reinforcing. A utility cannot provide adequate service to customers without the ability to attract capital." *Id.* at 6. The assurance of a fair return upon investment, and the predictable application of ratemaking principles, work to lower an electric company's cost of attracting capital, which ultimately benefits customers. *See Missouri ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm'n of Mo.,* 262 US 276, 308, 43 S Ct 544, 67 L Ed 981 (1923) (Brandeis, J., concurring) ("The community can get cheap service from private companies, only through cheap capital. * * * It can get ample service through private companies only if investors may be assured of receiving continuously a fair return upon the investment."); *see also In re Portland Gen. Elec. Co.*, PUC Order No. 03-024, at 3 (Jan. 13, 2003), https://perma.cc/Q548-TT6R ("[The utility's] ability to keep capital costs low directly affects its ability to acquire utility property and facilities and to improve and maintain its service."). Consequently, when the regulatory compact breaks down, it becomes difficult (or, at best, more expensive) for an electric company to

raise capital to maintain and improve its infrastructure and service, diminishing its capacity to provide reliable and affordable service to customers over the long run.

II. The Court of Appeals correctly preserved a critical guardrail against massive, unsupported civil monetary liabilities, and thereby protected utility customers under the regulatory compact.

Large civil monetary liabilities often present an unanticipated, unpredictable disruption to the regulatory compact, as well as a potentially significant cost to an investor-owned electric company that may not be recoverable through customer rates and that may adversely affect the company's credit and overall financial health. Particularly in the context of the massive liabilities presented in wildfire litigation, it is critical that courts respect the traditional doctrinal guardrails that protect electric companies, no less than other defendants, from unpredictable and unsupported liability. The Court of Appeals correctly held that the jury instruction here improperly excused plaintiffs from meeting their basic evidentiary burden to show that PacifiCorp's actions caused each plaintiff's harms. In defending that jury instruction, Petitioners advance legal and policy positions that would have serious adverse economic and practical consequences for investor-owned utilities, and for the regulatory compact more broadly.

A. Unpredictable, unsupported civil monetary liabilities can frustrate an electric company's ability to raise and deploy necessary capital to serve customers.

As explained above, the regulatory compact strikes a careful balance between different and, at times, competing interests, to set fair and reasonable service rates that benefit both the electric company and customers alike. Enormous civil monetary liabilities of the kind that are often presented in wildfire cases risk distorting that careful balance and, ultimately, can translate into higher rates for a company's customer base.

An electric company is not always guaranteed to recover the costs associated with a large monetary judgment. State regulators sometimes have retreated from traditional cost-recovery principles and disallowed recovery for extreme, high-cost events, like wildfires or ice storms. *See In re Portland Gen. Elec. Co.*, PUC Order No. 22-129, at 52-54 (Apr. 25, 2022), https://perma.cc/7CY2-XJLN; Order Denying Rehearing of Decision (D.) 17-11-033, Decision No. 18-07-025, at 3-4 (Cal Pub Utils Comm'n July 12, 2018), https://perma.cc/PDE3-CKMP. EEI and its members disagree with an approach that distorts the regulatory framework and effectively treats electric companies as insurers of last resort.

But where recovery is disallowed—i.e., the regulator prohibits the electric company from recovering its liabilities through customer rates—negative consequences for utility customers are likely to arise. In the short term,

underrecovery would likely lead a company to cut costs or raise additional (and increasingly costly) capital to bridge the shortfall. *See* Arthur Abal et al., Nat'l Ass'n of Regul. Util. Comm'rs, *Primer on Rate Design for Cost-Reflective Tariffs* 11 (2021), https://perma.cc/GZ7V-DLSD. The former approach reduces the company's capacity to invest in maintenance and upgrades, including those that minimize or mitigate wildfire risk. *Id.* The latter merely shifts financial burdens into the future by increasing the utility's cost of raising capital. *Id.*

In the longer term, continued underrecovery would doubtless increase the cost of capital and lead to higher customer rates. *See also* Bonbright, *Principles of Public Utility Rates* at 50 ("Rates below [the level to cover prudently incurred operating costs plus a reasonable return on investment] are deemed deficient because, at least in the long run, they will not enable the company to live up to its obligations to serve the community."). Such a trend may cause underinvestment in infrastructure, requiring the electric company to rely on older and less productive or reliable equipment and facilities, or may limit its ability to make the kinds of prospective investments needed to create a durable and resilient electric system for future generations, including responding to and mitigating wildfire risk. *See* Abal, *Primer on Rate Design* at 11. In other words, while a "disallowance" scenario might at first blush seem to "solve" the problem by forcing an electric company and its shareholders to shoulder the cost, customers will eventually be affected as

well, by the company's increased cost of capital and potential degradation in the reliability and quality of its service. In short, there is no "free lunch," either under core tenets of utility regulation or as a matter of basic economics.

Imposing effectively uncapped wildfire liabilities without regard for traditional principles of causation and fault also implicates two particular features of utility ratemaking: the filed-rate doctrine and liability-limiting tariff provisions. Those principles help explain both why regulated electric companies, unlike other private businesses, generally cannot take self-help steps to mitigate the impacts of unexpected monetary liabilities and, in turn, why it is critically important to respect traditional guardrails on mass-tort liability.

First, an investor-owned electric company is generally prohibited from changing the rates, terms, or conditions of service set forth in its published (regulator-approved) tariff, until changes are submitted for review and approved with prospective effect. This is often referred to as the "filed-rate" or "filed-tariff" doctrine. *See* ORS 757.225; PUC Order No. 08-487 at 32-36; *see also Pac. Nw. Bell Tel. Co. v. Eachus*, 135 Or App 41, 49, 898 P2d 774 (1995) ("[R]ates that have been approved and are in force may be adjusted only pursuant to the process described in the statutes."). In practice, the filed-rate doctrine limits a regulated utility's ability to take the types of steps that an unregulated business might take to react to, or insulate its enterprise from exposure to liability, such as bargaining for

individualized or additional limitations of liability, scaling back or declining to provide service, or raising prices.

Second, utility tariffs typically include—with regulators' approval—provisions limiting certain tort-related liabilities. *See Garrison v. Pac. Nw. Bell*, 45 Or App 523, 531, 608 P2d 1206 (1980) (observing validity of liability-limiting provisions "so long as they do not purport to grant immunity or limit liability for gross negligence"). The underlying rationale is that "because a utility's rate of return is regulated by the State, investors are only willing to contribute capital based on the assumption the utility will not face the exposure that an unregulated utility may face"; the "public interest," in that respect, lies "in protecting the financial integrity of public utilities." *Houston Lighting & Power Co. v. Auchan USA, Inc.*, 995 SW2d 668, 675 (Tex 1999) (cleaned up).

These concepts illustrate a general principle: Without predictable adherence to the traditional regulatory and doctrinal guardrails against unconstrained tort liability, the risk of effectively uncapped civil liabilities imposed without due regard for elements such as fault and causation could hinder an investor-owned electric company's ability to provide reliable and affordable service, disserving the goals and foundational principles of the regulatory compact, to the detriment of all stakeholders.

B. Recent wildfire litigation around the country illustrates the adverse consequences that unpredictable civil monetary liabilities have for electric companies and their customers.

This case is far from the first attempt to hold an investor-owned electric company liable for wildfire-related damages. Those previous efforts underscore that the concerns outlined above are far from theoretical. Wildfire litigation has threatened the regulatory compact—creating negative consequences for customers—by diminishing the predictability of legal regimes and by raising the specter of unpredictable, uncapped, and (to some extent) unavoidable civil liabilities.

Since 2020, credit rating agencies (e.g., Moody's, S&P Global Ratings) have issued credit downgrades for nearly 100 electric companies nationwide, often citing factors such as the existence of multi-billion-dollar monetary judgments, more expensive or unavailable wildfire insurance coverage, the need to set aside capital as self-insurance against liabilities, the increasing costs of wildfire mitigation measures, and the risk that "regulators may be hesitant to approve significant hikes" to cover liabilities, system improvements, or hardening. *See* Andrew Dressel, Charles River Assocs., *Wildfires Threaten Utility Financial Stability* 2-4 (2024), https://perma.cc/UN6A-X6L6; *see also* Mark Chediak, *Wildfire Threats Make Utilities Uninsurable in U.S. West*, Bloomberg (June 24,

2024), https://perma.cc/MTA8-FA4J (explaining how liabilities can often outstrip insurance coverage and further escalate insurance costs).

Credit downgrades adversely affect a company's ability to attract capital and "make[] it more expensive * * * to borrow money, further exacerbating financial stress." Dressel, *Wildfires Threaten Utility Financial Stability* at 2. The consequences of those trends can adversely affect an electric company's customer base, whether through higher rates or diminished service. *See* PUC Order No. 03-024 at 3. Increasing the cost of capital can also have the practical effect of "crowd[ing] out essential investment[s]" in electric infrastructure, ranging from renewable energy to necessary grid upgrades. *See* John J. McWilliams, Ctr. on Glob. Energy Pol'y, Columbia Univ., *Out of Control: The Impact of Wildfires on Our Power Sector and the Environment* (Jan. 28, 2020), https://perma.cc/KZ52-96CJ.

Indeed, wildfire risk, and the attendant threat of mass-tort litigation, has increasingly become "a material credit consideration for exposed utilities" and has generated "stress fractures" in the regulatory compact, to the detriment of electric companies' financial health and ultimately all stakeholders, including customers. Kyle M. Loughlin & Daria Babitsch, *Wildfire-Exposed U.S. Investor-Owned Utilities Face Increasing Credit Risk Without Comprehensive Solutions*, S&P Global (Nov. 6, 2024), https://perma.cc/D69F-854K. Credit risk, moreover, affects

not only investor-owned utilities, which serve the majority of customers nationwide, but also not-for-profit electric providers, like municipal utilities and cooperatives, which must likewise attract capital to maintain and improve service.

Further complicating matters, the problem of wildfire risk within particular service areas is unlikely to simply go away. Regulated electric companies generally have a legal obligation to serve all customers within their designated service area, new and existing alike. *See* ORS 757.020; *Reynolds v. Juniper Util. Co.*, PUC Order No. 01-827, 2001 WL 34001633 (Sept. 25, 2001) (interpreting ORS 757.020 to impose "a duty to provide service to current and future customers"). That obligation exists even as more and more customers choose to locate, invest, build, and otherwise encroach upon areas of increased wildfire risk—sometimes referred to as "wildland-urban interface," where human development meets or intermingles with flammable vegetation.

Oregon, California, and Washington have seen significant human development within wildland-urban interfaces for decades. *See* Roger B. Hammer et al., *Wildland-Urban Interface Housing Growth During the 1990s in California, Oregon, and Washington*, 16 Int'l J. of Wildland Fire 255, 261-64 (2007), https://perma.cc/EZL8-L3NT. Encroachment on the wildland-urban interface has often occurred in parallel with government implementation of strong fire suppression policies, which can result in the accumulation of fuel and contribute to

increasingly devastating outcomes when a large-scale fire does occur, as well as the increased likelihood of human-ignited fires. *See* Stijn Hantson et al., *Human-Ignited Fires Result in More Extreme Fire Behavior and Ecosystem Impacts*, 13 Nature Commc'ns 2717, at 4-6 (2022), https://perma.cc/DB6H-NS4P; Jennifer K. Balch et al., *Human-Started Wildfires Expand the Fire Niche Across the United States*, 114 Proc. of Nat'l Acad. of Scis. 2946, 2948–50 (2017), https://perma.cc/TD5D-DR8Y.

To illustrate, based on recent state-wide mapping efforts, significant portions of Oregon's areas affected by the fires at issue in this case are between "Very High Loss" to "Moderate Loss" in terms of Integrated Expected Wildfire Risk ("IEWR").[1] The IEWR scores account for factors affecting wildfire risk (e.g., likelihood of fire occurrence, intensity of potential fire) and exposure and susceptibility to burning of nearby assets and resources (e.g., property, infrastructure, drinking water, timber, ecological health). *See Oregon Integrated Expected Wildfire Risk (2023)*, Oregon Explorer, https://perma.cc/XWL9-C8ME (last updated Oct. 9, 2024). Unfortunately, scientists project continued increases in the scale, intensity, and frequency of wildfire activity across the western United States. *See, e.g.*, U.S. Glob. Change Rsch. Program, *Fifth National Climate*

[1] *See Oregon CWPP Planning Tool*, Oregon Explorer https://oregon-explorer.apps.geocortex.com/webviewer/?app=fccd4dfc5a974213aa1fa6a01b9c07e1 (last accessed Sept. 15, 2026).

Assessment: Focus on Western Wildfires, at F2-5 to F2-6 (2023), https://perma.cc/HXK2-T3T5.

In short, investor-owned electric companies are often caught in a Catch-22 with respect to wildfires. On the one hand, they are obligated to provide electric service to those in their service area, typically on a nondiscriminatory basis. On the other hand, the provision of that service, especially in places of higher wildfire risk, could increase the perceived risk of significant civil monetary liabilities, negatively affecting the company's financial health and operations to serve customers, even where some wildfires are not its fault. To be sure, PacifiCorp and other electric companies have made enormous *ex ante* efforts to reduce or mitigate wildfire risk in their service areas. *See* Edison Elec. Inst., *Issues & Policy: Wildfire Mitigation & Liability*, https://perma.cc/9FVU-EQWT (last accessed Sept. 8, 2026). But from an *ex post* perspective, companies like PacifiCorp rely on sound, stable, and predictable legal regimes that do not impose potentially disabling civil liabilities without observing key doctrinal guardrails, such as proof by plaintiffs of a demonstrated causal connection to a defendant's conduct or actions.

C. The Court of Appeals' jury-instruction holding vindicated key guardrails essential to mass-tort litigation.

Those systemic pressures are precisely why the specific guardrail the Court of Appeals preserved matters. The Court of Appeals furthered the stability and

predictability of Oregon's mass-tort regime, and the broader regulatory compact, by correcting a critical error in the circuit court's jury instructions that had effectively relieved plaintiffs of their burden of proof to show that PacifiCorp's actions were the cause of each class member's harms. As the Court of Appeals explained, the circuit court erred by instructing the jury that it "may assume that the evidence at the trial applies to all class members." *James v. PacifiCorp*, 348 Or App 347, 371, 377, 590 P3d 618 (2026). That instruction was erroneous because, as is frequently true in wildfire litigation, "much of the evidence introduced during the * * * trial related to particular issues concerning particular wildfires * * * and the jury could not * * * simply 'assume' that the evidence applied 'to all class members.'" *Id.* at 372.

The erroneous instruction improperly invited the jury to simply assume that the evidence applied class-wide—i.e., that *all* class members were affected in the same way and to the same degree, and that "evidence demonstrating that plaintiffs were harmed in one wildfire due to PacifiCorp could be 'assumed' to be applicable to plaintiffs who were harmed in a different wildfire entirely." *Id.* at 375; *id.* at 372 (noting "[t]he difficulty" with "appl[ying]" certain evidence to plaintiffs "whose property was destroyed miles away, in a different part of the Santiam Canyon, due to a different fire caused by a different ignition" (internal quotation marks omitted)). Whether or not certain evidence in the record could be

understood to apply class-wide, it is certainly not the case that *all* evidence could be so applied, given the "material variations" within and across the fire areas and the variety of tort claims being pursued. *See Strawn v. Farmers Ins. Co.*, 350 Or 336, 358-59, 258 P3d 1199 (2011).

The jury instruction here departs from the approach of courts in other jurisdictions in cases regarding liability for fire-related damages. *Cf. Bryant v. Intercont'l Terminals Co. LLC*, No. 4:19-cv-01460, 2023 WL 4108844, at *7, 13-14 (SD Tex June 21, 2023) (although the putative class shared commonality as to "how the [fire] started and who was responsible," individualized questions as to whether "Defendants' negligence in causing the [fire] was proximately connected to the specific injuries complained of" predominated and precluded class certification (internal quotation marks and citation omitted)). For instance, the California Court of Appeal explained in a decision upholding denial of class certification in a wildfire tort case for lack of commonality, "[t]he more modern view is that many causative factors combine[] to determine the path and intensity of the fires, and the fact of damage negligently caused by [the defendant electric company] will remain an individualized inquiry, due in part to the wide geographical scope of the affected areas and the variety of potentially significant causative factors." *Downing v. San Diego Gas & Elec. Co.*, 2010 WL 4233033, at *21 (Cal Ct App Oct. 27, 2010) (nonprecedential).

Allowing a jury instruction that relieves plaintiffs of their burden as to the elements of their claims, especially causation, is particularly problematic for the regulatory compact. That is because it raises the prospect of massive, class-wide liability, imposed without regard to whether a company's conduct was shown to be the cause of a plaintiff's alleged harms. Particularly given the inevitable downstream effects on customers and ratepayers and the future provision of electric service, courts should not impose those kinds of enterprise-threatening costs on electric companies, and in turn their customers, absent valid findings connecting the company's conduct to specific harms to each plaintiff.

Those risks were particularly acute here, given the circuit court's decision to certify a class of thousands of people affected by four different fires across a geographically dispersed area and asserting a variety of distinct tort claims, glossing over the necessary individualized questions of fact and law. Courts must respect traditional guardrails that apply at both the class-certification and merits stages of a case, and they must give defendants a fair opportunity to litigate the kinds of highly individualized questions that frequently arise in wildfire cases. These include the ignition source of a particular fire, whether that ignition was attributable to the defendant's action, the path of a particular fire from ignition to a particular class member's property, and the extent to which a particular fire caused

the asserted injury. *See* ORCP 32(B)(3); *Pearson v. Philip Morris, Inc.*, 358 Or 88, 110-11, 361 P3d 3 (2015).

The jury instruction here undermined not only the general regulatory framework for electric companies, but essential principles of due process. Due process encompasses a defendant's opportunity to "present every available defense," *Lindsey v. Normet*, 405 US 56, 66, 92 S Ct 862, 31 L Ed 2d 36 (1972) (citation omitted), which cannot be brushed aside simply because a class-action vehicle is used, *see Wal-Mart Stores, Inc. v. Dukes*, 564 US 338, 367, 131 S Ct 2541, 180 L Ed 2d 374 (2011). By instructing the jury that it could "assume that the evidence at the trial applies to all class members," *James*, 348 Or App at 371, the circuit court necessarily deprived PacifiCorp of the opportunity to present defenses specific to a particular class plaintiff. Indeed, if the evidence at trial is assumed to apply to all class plaintiffs, then particularized defenses are effectively extinguished.

The circuit court's approach, in fact, starkly contrasts with instances where courts in other jurisdictions have taken great care to safeguard the rights of class-action defendants to raise their defenses to individual class member's claims. For instance, in *In re Fibreboard Corp.*, the Fifth Circuit invoked "defendants' right to due process" while reversing a district court's procedure that required the parties to litigate liability and damages based on 41 selected plaintiffs, the result of which

would be extrapolated, with the aid of "expert testimony," across a 3,000-member asbestos-litigation class. *See* 893 F2d 706, 709, 711 (5th Cir 1990). The problem, the Fifth Circuit explained, was that there were "too many disparities among the various plaintiffs for their common concerns to predominate" and that any of several disparities (e.g., disease, method or degree of exposure, lifestyle) could have given rise to a causation- or damages-related defense as to an individual plaintiff. *Id.* at 712.[2] Here, the circuit court failed to respect those precedents and principles when it certified a sweeping class and instructed the jury to assume evidence applied to all members.

These foundational problems regarding inherently individualized claims are why courts in other jurisdictions have correctly denied class certification in mass-tort actions premised on complex theories of fire or wildfire liability. *See Downing*, 2010 WL 4233033, at *9 (predominance); *Cortez v. San Diego Gas &*

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[2] *See also, e.g.*, *Cimino v. Raymark Indus., Inc.*, 151 F3d 297, 311-19 (5th Cir 1998) (reversing judgment after class-wide trial because the trial "was not designed or intended to, and did not, provide any trial or any determination of whether" the defendant had caused any individual plaintiff's damage); *In re Agent Orange Prod. Liab. Litig.*, 818 F3d 145, 164-66 (2d Cir 1987) (class certification inappropriate because of the "highly individualistic" nature of determining whether a dangerous chemical "cause[d] harm and to whom"; "the class action would have allowed generic causation to be determined without regard to [an individual plaintiff's] characteristics and the individual's exposure"); *Eisen v. Carlisle & Jacquelin*, 479 F2d 1005, 1018 (2d Cir 1973) (substituting "'the class as a whole'" "for the individual members of the class as claimants" would be "an unconstitutional violation of the requirement of due process"), *vacated and remanded on other grounds*, 417 US 156, 94 S Ct 2140, 40 L Ed 2d 732 (1974).

Elec. Co., 2010 WL 4233034, at *2 (Cal Ct App Oct. 27, 2010) (nonprecedential) (finding that putative wildfire class lacked commonality, typicality, superiority, and ascertainability); *Bryant*, 2023 WL 4108844, at *11 (predominance); *In re Bastrop Cnty. Complex Fire Litig*., No. 2012- MCF-01, 2015 WL 13631338, at *3-5 (Tex Dist Ct Mar. 3, 2015) (concluding that "the most critical issues in this case—liability, causation, comparative negligence or damages—cannot be resolved on a class-wide basis").

Courts around the country have recognized that even if class plaintiffs "were to prove [the electric company's] failures, it would still remain for each class member to show that those failures" caused the asserted injury, which could prompt the putative class action to "degenerate in practice into multiple lawsuits separately tried." *Bellermann v. Fitchburg Gas & Elec. Light Co.*, 470 Mass 43, 54-55, 59-60, 18 NE3d 1050 (Mass 2014) (internal quotation marks and citation omitted) (loss of electric service); *see also Muise v. GPU, Inc*., 371 NJ Super 13, 37-46, 851 A2d 799 (NJ Super Ct App Div 2004); *Tegnazian v. Consol. Edison, Inc.*, 730 NYS2d 183, 186-87, 89 Misc 2d 152 (NY Sup Ct 2000); *Entergy Gulf States, Inc. v. Butler,* 25 SW3d 359, 361-64 (Tex App 2000).

* * *

In short, the circuit court departed here, in striking ways, from the approach taken by other jurisdictions that have grappled with similar problems of

adjudicating large numbers of tort claims in the wildfire context. In so doing, the circuit court abandoned key doctrinal guardrails that protect defendants against inappropriate and unpredictable monetary judgments. Those guardrails play a particularly important role in the context of cases involving regulated electric companies, where uncapped and unpredictable liability can irreparably damage the regulatory compact, to the ultimate detriment of electric companies' customers.

CONCLUSION

The Court of Appeals correctly held that plaintiffs may not be relieved of their burden to prove that PacifiCorp's conduct caused each class member's harm. Preserving that guardrail protects more than the parties to this case: it protects the regulatory compact that allows investor-owned utilities to attract the capital needed to deliver reliable and affordable service to customers across Oregon. For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

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