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 Below,

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 Case No. 20CV33885
CA Case No. A183140, SC Case No. S072933

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.

BRIEF OF *AMICI CURIAE* OREGON ECONOMY GROUPS

September 2026

Andrew J. Lee, OSB No. 023646
Sara Kobak, OSB No. 023495
SCHWABE, WILLIAMSON & WYATT, P.C.
1211 SW Fifth Avenue, Suite 1800
Portland, OR 97204
Telephone: 503-222-9981
Email: skobak@schwabe.com; ajlee@schwabe.com

Attorneys for Amici Curiae
Oregon Business & Industry *et al.*

Per A. Ramfjord, OSB No. 934024
Brad S. Daniels, OSB No. 025178
Reilley D. Keating, OSB No. 073762
STOEL RIVES LLP
760 SW 9th Avenue, Suite 3000
Portland, OR 97205
Telephone: 503-224-3380
Email: per.ramfjord@stoel.com; brad.daniels@stoel.com
reilley.keating@stoel.com

Alison L. Plessman
Rajan S. Trehan
Stephanie W. Xiao
Khoa D. Nguyen
HUESTON HENNIGAN LLP
523 West 6th Street, Suite 400
Los Angeles, CA 90014
Telephone: 213-788-4340
Email: aplessman@hueston.com; rtrehan@hueston.com
sxiao@hueston.com; knguyen@hueston.com

Douglas J. Dixon
Craig A. Fligor
HUESTON HENNIGAN LLP
620 Newport Center Drive, Suite 1300
Newport Beach, CA 92660
Telephone: 949-229-6840
Email: ddixon@hueston.com; cfligor@hueston.com

Blaine H. Evanson
GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Drive
Irvine, CA 92612
Telephone: 949-451-3800
Email: bevanson@gibsondunn.com

Theodore J. Boutrous, Jr.
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 92612
Telephone: 213-229-7804
Email: tboutrous@gibsondunn.com

Attorneys for Defendants-Appellants, Cross-Respondents; Respondents on Review

Keith A. Ketterling, OSB No. 913368
Timothy S. DeJong, OSB No. 940662
Cody Berne, OSB No. 142797
Emily A. Johnson
Erin Roycroft, OSB No. 183791
Carsen Nies, OSB No. 224623
STOLL BERNE P.C.
209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: 503-227-1600
Email: kketterling@stollberne.com; tdejong@stollberne.com; cberne@stollberne.com; ejohnson@stollberne.com; eroycroft@stollberne.com; enies@stollberne.com

Matthew Preusch, OSB No. 134610
KELLER ROHRBACK LLP
801 Garden Street, Suite 301
Santa Barbara, CA 93101
Telephone: 805-456-1496
Email: mpreusch@kellerrohrback.com

Daniel Mensher, OSB No. 074636
Benjamin Gould, OSB No. 256994
Natida Sribhibhadh
KELLER ROHRBACK LLP
1201 3rd Avenue, Suite 3400
Seattle, WA 98101
Telephone: 206-623-1900
Email: dmensher@kellerrohrback.com;
bgould@kellerrohrback.com; natidas@kellerrohrback.com

Yoona Park, OSB No. 077095
Sarah R. Osborn, OSB No. 222119
KELLER ROHRBACK LLP
601 SW 2nd Avenue, Suite 1900
Portland, OR 97204
Telephone: 971-434-3005
Email: ypark@kellerrohrback.com; sosborn@kellerrohrback.com

Alexander G. Tievsky
Nicholas Rosinia
Megan Delurey
Schuyler Daum
Landon Webster
EDELSON PC
350 N. LaSalle Street, 14th Floor
Chicago, IL 60054
Telephone: 312-589-6370
Email: atievsky@edelson.com; nrosinia@edelson.com;
mdelurey@edelson.com; sdaum@edelson.com;
lwebster@edelson.com

Todd Logan, OSB No. 261139
Patrick Ntchobo
EDELSON PC
150 California Street, 18th Floor
San Francisco, CA 94111
Telephone: 415-212-9300
Email: tlogan@edelson.com; pntchobo@edelson.com

Ali Moghaddas
EDELSON PC
11601 Wilshire Boulevard, Suite 1970
Los Angeles, CA 90025
Telephone: 310-694-0331
Email: amoghaddas@edelson.com

Derek C. Johnson, OSB No. 882340
Marily A. Heiken, OSB No. 923308
JOHNSON JOHNSON LUCAS & MIDDLETON, PC
975 Oak Street, Suite 1050
Eugene, OR 97401
Telephone: 541-484-2434
Email: djohnson@justicelawyers.com; mheiken@justicelawyers.com

Nicholas A. Kahl, OSB No. 101145
NICK KAHL LLC
2246 E. Burnside Street, Suite A
Portland, OR 97214
Telephone: 971-231-1342
Email: nick@nickkahl.com

Attorneys for Plaintiffs-Respondents-Cross-Appellants; Petitioners on Review

Robert Koch
Senior Assistant Attorney General
OREGON DEPARTMENT OF JUSTICE
400 Justice Building
1162 Court Street, NE
Salem, OR 97301-4096
Telephone: 503-378-4402
robert.a.koch@doj.oregon.gov

Attorneys for Judgment Creditor State of Oregon

J. Aaron Landau
MILLER NASH LLP
1140 SW Washington Street, Suite 700
Portland, OR 97205
Telephone: 541-234-7622
aaron.landau@millernash.com

Jeremy C. Marwell, *pro hac vice forthcoming*
VINSON & ELKINS LLP
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, DC 20037
Telephone: 202-639-6507
jmarwell@velaw.com

Attorneys for Amicus Curiae
Edison Electric Institute

Irion Sanger
John Maxwell Greene
SANGER GREENE, P.C.
4031 SE Hawthorne Boulevard
Portland, OR 97214
Telephone: 503-756-7533
irion@sanger-law.com
max@sanger-law.com

Attorneys for Amici Curiae
Oregon People's Utility Districts

Elizabeth H. White
K & L GATES LLP
One SW Columbia Street, Suite 1900
Portland, OR 97204
Telephone: 503-228-3200
elizabeth.white@klgates.com

David R. Fine, *pro hac vice pending*
K & L GATES LLP
17 North Second Street, 18th Floor
Harrisburg, PA 17101
Telephone: 717-231-4500
david.fine@klgates.com

Attorneys for Amicus Curiae
Chamber of Commerce of the United States of America

Paul S. Stewart
PAINE HAMBLEN, P.S.
717 West Sprague Avenue, Suite 1200
Spokane, WA 99201
Telephone: 509-455-6000
paul.stewart@painehamblen.com

Attorneys for Amicus Curiae
PNW Investor-Owned Utilities

Jesse A. Buss
WILLAMETTE LAW GROUP, PC
411 Fifth Street
Regon City, OR 97045-2224
Telephone: 503-656-4884
jesse@wlgpnw.com

Attorneys for Amici Curiae
After the Fire USA and Go Alliance

Elizabeth Savage
ELIZABETH SAVAGE LAW LLC
11 NE Martin Luther King, Jr. Blvd., Suite 404
Portland, OR 97232
Telephone: 971-430-4030
elizabeth@savage-attorney.com

Attorneys for Amincus Curiae
Oregon Trial Lawyers Association

Matt Kirkpatrick
OREGON CONSUMER JUSTICE LAW
1235 SE Morrison Street, First Floor
Portland, OR 97214
Telephone: 503-901-8739
mk@ocjlaw.com

Attorneys for Amicus Curiae
Oregon Consumer Justice

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are entities investing in Oregon's economy. Taken together, their members include or employ hundreds of thousands of Oregonians. Most of *amici* are chambers of commerce or economic development associations dedicated to serving businesses and promoting economic prosperity.[1] Those organizations are joined by a local labor union,[2] a forests-related industry council,[3] and a statewide association of civil defense attorneys.[4] They all share an interest in an economically healthy state. That means good jobs should be plentiful, the private sector should be strong, and the tax base should provide adequate funding for critical public services. While three *amici*—Oregon Business & Industry, Oregon Forest Industries Council, and Oregon Association of Defense Counsel—appeared in this proceeding before the Oregon

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[1] Oregon Business & Industry, Oregon's statewide chamber of commerce, along with Astoria-Warrenton Area Chamber of Commerce, Cottage Grove Area Chamber of Commerce, Grants Pass and Josephine County Chamber of Commerce, Pendleton Chamber of Commerce, Portland Metro Chamber, and Umpqua Economic Development Partnership.

[2] International Brotherhood of Electrical Workers, Local 125.

[3] Oregon Forest Industries Council.

[4] Oregon Association of Defense Counsel.

Court of Appeals, most are appearing for the first time in this matter before this court. They do so to advance the interests of their respective members by addressing aspects of class actions and mass tort litigation, including the impropriety of the jury instruction at issue in this case.

INTRODUCTION

Civil litigation typically involves familiar procedures, with defined parties alleging discrete injuries. So, judges have a feel for it—from the law to who decides facts (generally the jury) and how (generally in a unitary trial). And that helps avoid error, or at least confine its impact. But the converse is also true, with errors both more likely and more consequential when judges are asked to veer from the familiar into class actions.

That seems to have happened here. By forcing the trial court to grapple with a rare procedural posture and then pushing the use of an out-of-state jury instruction, plaintiffs invited the trial court into basic instructional error. Absent the class context, it seems unlikely the trial court would have instructed the jury as if the court were a factfinder, or told the jury how it should resolve a factual dispute. (*See* OTLA-Br-5-6 (arguing that jury instruction reflected the trial court's factfinding).)

That was error because judges do not play factfinder, comment on the evidence, or tell the jury to "presume" or "assume" any fact. *See, e.g.*, ORCP 59 E; OEC 308; *Riley Hill Gen. Contractor v. Tandy Corp.*, 303 Or 390, 408 n 9, 737 P2d 595 (1987) (because of OEC 308, "the term 'presumption' should not be heard by the jury"). Jurors are presumed to follow instructions, making the error intrinsically prejudicial. This court should reject plaintiffs' and their *amici*'s arguments.

Merits of their appeal aside, plaintiffs and their *amici* want to focus on class certification. But they get much of the law wrong. Class actions are generally unsuited to circumstances where many people were affected by different events in different ways with different causes, because common issues of fact and law will not predominate. Such claims were neither the impetus for, nor an intended target of, Oregon's class action rules, as confirmed by a review of the rule's development.

Add to that, class actions for damages are ill suited to common-law torts for injuries. Procedurally, trying to isolate individual issues for trial or consolidating large numbers of plaintiffs into a single trial warps a jury trial, materially affecting outcomes. And constitutionally, a class action can impair parties' due-process rights to have claims and defenses

fully litigated, and also their jury-trial rights, if different juries are asked to decide intertwining issues—*e.g.*, liability, causation, comparative fault, damages, and punitive damages.

Class actions are only one of several procedural tools for courts to manage many claims arising out of an event or conduct. But as one commentator quips, "[i]f you build a super-highway, there will be a traffic jam." *See* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 Tex L Rev 1821, 1839-40 (1995). That is, attempts to improve judicial efficiency can *delay* resolution, with fewer and later trials forestalling appellate review of key legal issues likely to affect the parties' respective valuation of claims. In any event, once a mass-tort litigation is allowed to mature, settlements are common and patient courts rarely have cause to try the vast bulk of filed claims.

ARGUMENT

I. The California-based jury instruction is not suited to a class action under Oregon law.

Oregon has no uniform jury instructions specific to class actions. That is because class actions are subject to the same substantive requirements and burdens of proof as individual actions. *See, e.g.*, *Shady Grove Ortho. Assocs., P.A. v. Allstate Ins. Co.*, 559 US 393, 408, 130 S Ct

1431, 176 L Ed 2d 311 (2010) (class-action certification "leaves the parties' legal rights and duties intact and the rules of decision unchanged"). To identify that a case involves a class action and explain what that posture means to the jury's decision, however, courts normally give a special instruction to the jury on the nature of class actions.

Here, the trial court accepted plaintiffs' request to adopt a version of an out-of-state instruction, California Civil Jury Instruction ("CACI") No. 115, to define a class action. Although parts of CACI 115 mesh with ordinary explanations of class actions, the special instruction given in this case included a broad statement instructing that the jury "may assume that the evidence at trial applies to all class members" without exception. That instruction, however, is not compatible with Oregon law. Nor does it work with complex class actions of this nature generally. If allowed under Oregon law where it is disputed whether the common evidence at trial is sufficient to establish an issue on a classwide basis, the instruction would fundamentally alter class actions in Oregon and raise serious concerns about violating jury-trial rights and basic due-process protections. This court should reject that result.

A. Oregon law does not permit courts to comment on the evidence or to tell juries to "assume" disputed facts.

Jury instructions "must be complete and accurate in all respects." *Schwarz v. Philip Morris Inc.*, 348 Or 442, 454, 235 P3d 668 (2010), *adh'd to as modified on recons*, 349 Or 521, 246 P3d 479 (2010). Parties "to any jury case are entitled to have the jury instructed in the law which governs the case in plain, clear, simple language." *Williams v. Portland Gen. Elec.*, 195 Or 597, 610, 247 P2d 494 (1952). Instructions that "mislead or confuse" are grounds for reversal and a new trial. *Id.* In reviewing the correctness of a jury instruction, "the touchstones are legal accuracy and clarity." *Schwarz*, 348 Or at 454.

In instructing a jury, it is axiomatic that courts may not comment on the evidence or otherwise shift the burden of proof on any issue of fact. *See* ORCP 59 E (courts "shall not instruct with respect to matters of fact, nor comment thereon"). Even where an evidentiary presumption applies as a matter of law, Oregon law forbids courts from instructing a jury to "presume" or "assume" the existence of a particular fact; instead, courts give effect to presumptions by instructing the jury as to the party with the burden of proof on that issue. OEC 308; *see Riley Hill*, 303 Or at 408 n 9 (OEC 308 changed Oregon practice on presumptions and a "jury

should never hear the word 'presumption'" in a jury instruction); *Purdy v. Deere & Co.*, 281 Or App 407, 426, 386 P3d 2 (2016) (*Purdy III*) (when instruction used "the word 'assumes' instead of the word 'presumes,' the court's use of a synonym for 'presume' does not save the instruction" from violating OEC 308). A court impermissibly comments on the evidence at trial where it instructs the jury to draw an inference that shifts the burden of proof. *State v. Hayward*, 327 Or 397, 411, 963 P2d 667 (1998); *see also, e.g., State v. Wiltse*, 373 Or 1, 19, 559 P3d 380 (2024) ("A trial court cannot intrude on the jury's role by commenting on the evidence in violation of ORCP 59 E.").

These fundamental rules apply equally in the context of class actions. A class action is a "procedural device and does not erode the substantive rights of parties or deprive [a] defendant of presenting factual and legal defenses." *Pearson v. Philip Morris, Inc.*, 358 Or 88, 106, 361 P3d 3 (2015) (summarizing *Bernard v. First Nat'l Bank*, 275 Or 145, 159-60, 550 P2d 1203 (1975)); *Lamps Plus, Inc. v. Varela*, 587 US 176, 204, 139 S Ct 1407, 203 L Ed 2d 636 (2019) (Sotomayor, J., dissenting) ("[a] class action is simply 'a procedural device' that allows multiple plaintiffs to aggregate their claims"). In trying to justify the

jury instruction given in this case, however, plaintiffs mistakenly treat a class-certification order as making conclusive factual findings that are binding on the jury at trial. (Pl-Br-30-31.) The premise underlying all of plaintiffs' arguments is simply not correct.

To certify a class action under ORCP 32, a court must ensure that the plaintiffs have satisfied certain requirements to show that the claims are appropriate for class resolution. Two related requirements are commonality and predominance. *Pearson*, 358 Or at 106. Those inquiries look at whether there are questions of law or fact common to the class and then, more searchingly, whether those common issues predominate, such that individual adjudications are ultimately unnecessary. *Id.* Resolving those issues is a pragmatic and forward-looking exercise, aimed at predicting "how specific issues will play out at trial." *Id.* at 108 (internal citations and quotation marks omitted). Although it is not a trial of the merits, resolution of issues in the certification process frequently requires resolution of factual disputes related to the merits of the claims "for the limited purpose of the class certification decision." *Id.* Where that is true, however, the rulings made at certification do not result in issue preclusion or any kind of evidentiary assumptions at trial.

Id. (citing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 NYU L Rev 97, 100, 114 (2009), for rule that such decisions have "no issue preclusive effect"); *see also* 5 *Moore's Fed. Prac.—Civil* § 23.84[2] (3d ed 2026) ("Inquiry into merits issues at this stage does not prejudice the parties, as the court's determinations at the certification stage do not bind the ultimate factfinder.").

Plaintiffs' defense of the jury instruction rests on a fundamentally different view of the certification decision. As plaintiffs see it, a finding of commonality and predominance at the class-certification stage is a conclusive finding that common evidence applies on a classwide basis to all class members. (Pl-Br-34-35, 45*; see* OTLA-Br-2 (characterizing Court of Appeals decision as disagreeing with certification findings).) Taking that view, plaintiffs argue that a jury is properly instructed that the "evidence for one is evidence for all" in class actions as a general matter—even in cases, like this one, where a defendant's entire defense at trial is predicated on disputing the evidentiary support for a classwide inference on an issue. (Pl-Br-45.) But plaintiffs' view of the import of a certification decision is irreconcilable with basic tenets of class-action law.

A determination of commonality and predominance at the class-certification stage does not relieve plaintiffs of their burden to prove that evidence applies on a classwide basis at trial. Nor does the determination of commonality standing alone somehow preclude a defendant from contesting whether evidence at trial applies on a classwide basis, even if it may be sufficient to support individual claims. Although there may be cases where the classwide nature of the evidence is undisputed or otherwise is resolved on summary judgment or in some other pretrial ruling, that is far from true in all class actions and especially in complicated ones like this case. The decision in *Strawn v. Farmers Insurance Co.*, 350 Or 336, 258 P3d 1198 (2011), illustrates that point.

Strawn involved a class action against an insurer for fraud in the claim-handling process. On appeal, the defendant insurer challenged the denial of its motion for directed verdict, alleging that the plaintiffs proffered insufficient evidence at trial to show classwide reliance on its misrepresentation. In considering that challenge, this court readily agreed that the plaintiffs had the burden to proffer evidence establishing classwide reliance, not simply reliance by some individual class members. *Id.* at 359 ("To prevail in a class action for fraud, the class

plaintiff must prove reliance on the part of all class members."). The court explained, however, that it is reasonable for a jury to infer such classwide reliance where "the same misrepresentation [has been made] without material variation to the members of the class." *Id*. at 358-59. Because the evidence in *Strawn* applied uniformly to all class members, the court held that a jury could reasonably infer that the common evidence supported a finding of classwide reliance. *Id*. at 362. Notably, *Strawn* did not approve the use of a jury instruction telling a jury that the evidence as to one class member was evidence for all class members. Instead, as this court noted in *Pearson*, the *Strawn* defendant "was entitled to contest the plaintiffs' proof of reliance" and "offer individualized evidence to that end" to show "fatal dissimilarities in the class" to dispute classwide reliance. *Pearson*, 358 Or at 131 n 24.

If accepted as proper under Oregon law, the jury instruction used in this case would markedly depart from *Strawn* and *Pearson* by creating a presumption that all evidence applies on a classwide basis in a class-action trial. As the Court of Appeals noted, that is not the intent of CACI 115, which is drafted to be specifically refined in individual cases where classwide application of evidence is disputed and which recognizes that

the instruction may not be appropriate in any form in complex or unique cases. *James v. PacifiCorp*, 348 Or App 347, 377, 590 P3d 618 (2026); *see also* CACI 115 (providing for modification to conform to trial evidence).

The instruction as given also is not consistent with Oregon law in any event. In creating an improper presumption, the instruction wrongly shifts the burden of proof to the defendant. And, even setting aside that it is not a defendant's evidentiary burden, the jury also is "left to guess how to balance evidence against the legal assumption," as there is no instruction for how the defendant may show that evidence does not apply to all class members. *Purdy III*, 281 Or App at 441. If accepted as permissible, the instruction would fundamentally change the rights of litigants in Oregon class-action proceedings. By prevailing on the merely predictive class-certification issues, plaintiffs would effectively eliminate their burden of proof to prove their claims as to every class member with an "assume that evidence for one is evidence for all" jury instruction. That is not Oregon law, and the acceptance of such a jury instruction in highly disputed cases, like this one, would raise serious jury-trial right and due-process concerns. This court should reject that approach.

B. An instruction telling a jury that it may "assume" a disputed issue of fact is inherently prejudicial.

Where "an instruction tells the jury to apply the wrong legal rule and the erroneous instruction permits the jury to reach an incorrect result, this court consistently has held that the error substantially affects the party's rights." *Wallach v. Allstate Ins. Co.*, 344 Or 314, 322 P3d 19 (2008). Here, as described above, the jury instruction wrongly shifted the burden of proof to defendants and prevented them from challenging the sufficiency of the evidence on a classwide basis. Because jurors are likely to be influenced by the judge's take on disputed issues of fact, the prejudice from the challenged instruction is intrinsic and undeniable. This court should reject plaintiffs' and their *amici*'s arguments.

II. For a trial court to certify a class action seeking damages, the predominance of common issues of fact or law is critical.

Under ORCP 32, class actions can be certified in only limited circumstances. Before this court, those limitations do not appear to be at issue. *See James*, 348 Or App at 380 (merely "emphasiz[ing]" the trial court's authority to reconsider class certification).

Still, plaintiffs defend the propriety of certification and seem to criticize the Court of Appeals for signaling its concerns. (*See e.g.*, Pl-Br-

32-44.) In plaintiffs' view, it seems, a trial court may readily certify a class action seeking damages. They downplay the importance of the predominance test (*see* Pl-Br-32 (citing ORCP 32 B(3), *inter alia*)), and suggest that certification is favored if different juries reviewing the same evidence would be prone to reach different verdicts on liability (*see* Pl-Br-42 (citing ORCP 32 B(1)(a))), and the trial court and plaintiffs perceive efficiencies from a class action (*see* Pl-Br-41-43 (citing ORCP 32 B(6)-(8))). In other words, plaintiffs and their *amici* suggest that the crux of the certification inquiry is litigation efficiency.

On a first read, that has some superficial appeal. But in the context of a proposed class action seeking only damages as a remedy, a plaintiff must establish predominance, with the remaining considerations in ORCP 32 B tending only to cut against certification. *See Pearson*, 358 Or at 106 (predominance "frequently drives class certification decisions"). Understanding *why* that is the case means reviewing this court's case law construing the predominance test and reviewing the historical development of class actions.

As shown below, class actions for damages developed as a narrow exception to the rule that judgments can bind only named parties. In

Oregon, the 1973 legislature adopted the federal model—for which the predominance requirement was noted to generally forestall the use of class actions to litigate "mass accidents"—and further narrowed the availability of class actions seeking damages. While the Council on Court Procedures (CCP) later modified that legislative enactment, including reorganizing aspects of it in 1992, the operative provisions of ORCP 32 B trace directly to the 1973 legislature and, in most instances, indirectly to the federal rule. This history supplies vital context and serves to impeach plaintiffs' suggestion that class actions for damages are readily certified, including in the absence of a predominating common issue of fact or law.

A. ORCP 32 B(3)'s predominance test has a settled meaning.

Oregon's class action rules are set forth in ORCP 32. Under section A, a court must deny certification of a class action seeking damages absent five requirements. ORCP 32 A. The first four requirements—numerosity, common issues of law or fact, typicality, and a representative that can protect the class's interest—are shared with FRCP 23(a), the model for ORCP 32 A; the fifth creates a pre-filing notice requirement, which ensures that the defendant has an opportunity to undertake a nonjudicial cure, if it wants. ORCP 32 A.

Assuming none of the section A criteria are disqualifying, the trial court then makes findings under section B about whether "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." ORCP 32 B. The rule identifies eight nonexclusive "matters pertinent to this finding," including predominance—specifically, "[t]he extent to which questions of law or fact common to the members of the class predominate over any questions affecting only individual members." ORCP 32 B(3).

In *Pearson*, 358 Or at 111-14, this court surveyed its decisions regarding predominance and readily identified a throughline: "whether common issues predominate … depends on a pragmatic assessment of how a case, if fairly and fully tried, is likely to be litigated." That inquiry is forward looking (predictive), and "looks not only to how a plaintiff can prove its *prima facie* case; it considers, as well, the nature of the plaintiff's claim more generally, the defenses to the claim, the legal and factual issues framed by the parties' positions, and the record made on the disputed issues of fact." *Id.* at 114. Throughout, "[d]issimilaries within the proposed class are what have the potential to impede the generation of common answers." *Id.* at 110 (quoting Nagareda, 84 NYU

L Rev at 100, 132). That means that "[i]f the record suggests legitimate and legally material factual differences among the class members that a defendant is entitled to expose through individualized inquiries—what Professor Nagareda terms 'fatal dissimilarities' among the class—the predominance inquiry must take those individualized inquiries into account." *Id*. (quoting Nagareda, 84 NYU L Rev at 107, 131).

Stated differently, the predominance test might be satisfied in a putative class action for damages for injury to property if a defendant's sole opposition to certification is founded on affirmative defenses, all of which are based on constructive knowledge common to the class members. *See Hurt v. Midrex Div. of Midland Ross Corp.*, 276 Or 925, 556 P2d 1337 (1976) (employer's emissions damaged employees' vehicles in parking lot). In such a circumstance, the affirmative defenses—while capable of defeating *substantive* claims but turning on a commonality—can be thought to involve a "fatal similarity," which further *supports* certification. *See Pearson*, 358 Or at 114 n 16 (so reasoning).

In contrast, common issues will not predominate when a claim may fail on an element that defies class-wide common proof. In *Pearson*, 358 Or 88, for example, the plaintiffs challenged the trial court's denial of

class certification of a UTPA claim seeking damages on behalf of smokers who purchased Marlboro Lights. This court affirmed the trial court's finding that predominance was lacking because "the representation of 'inherent' lightness on which plaintiffs rely depends significantly on interpretation and what purchasers understood the [labeling] to imply, which added to the potential for the class members to have varying motivations for buying Marlboro Lights." *Id*. at 136.

As the court emphasized in *Pearson*, the predominance criterion plays a pivotal (and often dispositive) role in policing the distinction between claims that necessarily rise or fall together, and those that must be decided individually for the benefit of all parties, such that a jury can reach a fair verdict. In other words, it would be impossible to "fully and fairly tr[y]" the reliance issue on a classwide basis. *Id*. at 114. And if a trial court still tried to do so, the trial would either obviate a lack of reliance for weaker claims, on the one hand, or saddle stronger claims with an adverse verdict based on a mass of weaker claims, on the other.

Reframed slightly around a hypothetical verdict form, while it may have been simple to ask a jury about whether including "light" in the product name was a misrepresentation—that was a common course of

conduct—a class-wide interrogatory about reliance would have presented a false dichotomy. The binary choice between "yes" and "no" fails to account for the fact that, if it were able to scrutinize each individual's reliance, the jury would necessarily be entitled to find reliance for some class members and not others. Indeed, just this dynamic would seem to be present if a trial court believed it had cause to pose separate interrogatories to the jury about an essential element of a claim for a class representative versus the class as a whole—as evidently happened here in relation to specific causation. (Verdict at 2-3, TCF 6/14/23.) In other words, the notion that a class representative might recover *to the exclusion of the entire class* should serve to alert a trial court that there are likely "legitimate and legally material factual differences among the class members that a defendant is entitled to expose through individualized inquiries[.]" *Pearson*, 358 Or at 110; *see also, e.g.*, *Webb v. Exxon Mobil Corp.*, 856 F3d 1150, 1156 (8th Cir 2017) (class certification inappropriate when liability for a pipeline breaching easements "would necessarily devolve into a parcel-by-parcel analysis").

Without saying as much, Oregon's courts seem to get that issues like reliance and causation are apt to present that manner of *non sequitur*

in the context of some class action asserting common-law tort claims for damages. Repeatedly, its courts have declined to certify mass-tort class actions or approved rulings where those issues seem insusceptible to class-wide proof.[5] And those rulings are well aligned with the historical development of class actions seeking damages.

B. Class actions seeking damages developed as a narrow exception to the rule that a judgment does not bind nonparties.

Under traditional Anglo-American jurisprudence, "one is not bound by a judgment in personam in a litigation in which [they are] not designated as a party." *Hansberry v. Lee*, 311 US 32, 40, 61 S Ct 115, 85 L Ed 22 (1940). For legal actions, the earliest exception was enacted in the mid-nineteenth century in the New York Code of Procedure, commonly called the Field Code. *Am. Timber & Trading Co. v. First Nat'l Bank*, 263 Or 1, 5, 500 P2d 1204 (1972) (explaining same). It authorized

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[5] *See Joachim v. Crater Lake Lodge, Inc.*, 48 Or App 379, 390-93, 617 P2d 632 (1980) (affirming denial in relation to illness from contaminated water); *Cook v. Salishan Props., Inc.*, 279 Or 333, 335-36 & n 3, 569 P2d 1033 (1977) (noting denial of class certification of claims for erosion damage); *Bernard*, 275 Or at 164 (endorsing *City of San Jose v. Superior Ct.*, 12 Cal 3d 447, 115 Cal Rptr 797, 525 P2d 701, 709 (1974), which denied certification where property owners alleged nuisance and inverse condemnation based on an airport's noise pollution).

representative litigation "when the question is one of common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court." *Laws of the State of New York, Seventy Second Session of the Legislature*, ch 438, § 119, p 639 (1849), *available at* https://access.heinonline.com/HOL/P?h=hein.ssl/ssny0446&i=645. But despite it being widely adopted by other states, *see Clackamas Cty. v. Gay*, 146 Or App 706, 714 n 2, 934 P2d 551 (1997) (Landau, J., concurring), the Field Code does not appear to have led to class actions for injuries to persons or property.

That makes sense. The Field Code's class procedure built on the period's joinder rules, such that if "an actual joinder would be improper, then the suit by … one as a representative would be improper." John N. Pomeroy, *Remedies and Remedial Rights by the Civil Action*, § 392, p 433 (1876), *available at* https://access.heinonline.com/HOL/Page?handle=hein.beal/rerecaar0001&id=1. And "[w]hen a tort of a personal nature … is committed upon two or more, the right of action must … be several," unless there was "some prior bond of legal union between the persons injured, such as a partnership relation, of such nature that the tort interferes with it, and by virtue of that very interference produces a

wrong and consequent damage common to all." *Id*., § 231, p 275; *see also Hellams v. Switzer*, 24 SC 39, 47-48 (1885) (quoting same).

In its modern form, class-action procedure arrived in 1966, when FRCP 23 was completely rewritten.[6] Beyond the four requirements for certification that it shares with ORCP 32 A, s*ee* FRCP 23(a), the rule authorizes class litigation to address one of three scenarios: (1) certain cases where the absent parties would otherwise be required parties; (2) certain injunctive or declaratory relief; and (3) certain common issues. S*ee* FRCP 23(b) & 1966 Comm. Notes. In particular, the third type was authorized only if "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and … a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FRCP 23(b)(3).

This category, the committee cautioned, "is not as clearly called for as in [the other two categories]," and—properly utilized—must not "sacrific[e] procedural fairness or bring[] about other undesirable

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[6] An earlier version of FRCP 23, promulgated in 1938, was a bust, *see* Wright & Miller, 7A *Fed. Prac. & Proc. Civ.* § 1752 (4th ed.) (collecting critiques), and "largely eschewed." Linda S. Mullenix, *Aggregate Litig. and the Death of Democratic Dispute Resolution*, 107 Nw U L Rev 511, 517 (2013).

results." FRCP 23, 1966 Comm. Note. But with those caveats, the committee's purpose was to further "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all," by allowing them to "aggregat[e] the relatively paltry potential recoveries into something worth someone's … labor." *Amchem Prods. v. Windsor*, 521 US 591, 617, 117 S Ct 2231, 138 L Ed 2d 689 (1997) (quotation marks and authority omitted). In contrast, the committee "did not believe [their rule] was appropriate for use in the tort law context." *See* Alexandra D. Lahav, *Mass Tort Class Actions - Past, Present, and Future*, 92 NYU L Rev 998, 999 (2017) (recounting interview with the reporter for the 1966 rule).

Indeed, the predominance requirement was intended to narrow the types of damages claims suitable for aggregate litigation. The committee stressed that:

> "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried."

FRCP 23, 1966 Comm. Note (citations omitted).

C. In 1973, Oregon's legislature enacted a class device, which was based on federal procedure, but narrower.

Oregon's history with class actions is short. When the legislature adopted Oregon's first procedural code in 1862, it drafted off the Field Code, but limited representative litigation to equitable "suits." *See Am. Timber & Trading Co.*, 263 Or at 4-7 (recounting same). That made sense because "the simultaneous decision of a vast number of individual claims [is] not a suitable function for a jury." *Id.* at 10-11. And the law remained unchanged in 1972, when this court held that "there is no such thing as a class action in Oregon," including for bank overcharges "so small that litigation would not otherwise be justified." *Id.* at 4, 11.

In 1973, consumer advocates responded by urging the Oregon legislature to adopt FRCP 23 outright. *See* Mins., Senate Comm. on Consumer & Bus. Affairs, SB 163, at 2 (Feb 1, 1973) (so explaining). But class actions for damages received "unusual attention." *Bernard*, 275 Or at 151. Opponents argued the federal rule's scope was too broad, which in some cases would confound a fair resolution on the merits—"the substantive elements of a cause of action are overlooked, individual defenses are ignored, and no meaningful proof is required of liability or

damages." App B at 2, 4, Senate Comm. on Consumer & Bus. Affairs, SB 163, Feb 7, 1973 (written testimony of Norman Wiener).

To address some of these concerns and further "circumscribe[]" the availability of class actions seeking damages, the Oregon legislature adopted several recommendations published by the American College of Trial Lawyers. *Bernard*, 275 Or at 151-52. The final bill further limited the types of actions that could be certified as follows (with material additions to the federal rule underlined):

> "SECTION 2. … (2) An action may be maintained as a class action if the prerequisites of subdivision (1) are satisfied, and in addition:
>
> "(a) [certain cases where the absent parties would otherwise be required parties]; or
>
> "(b) [certain cases involving injunctive or declaratory relief]; or
>
> "(c) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. <u>Common questions of law or fact shall not be deemed to predominate over questions affecting only individual members if the court finds it likely that final determination of the action will require separate adjudications of the claims of numerous members of the class, unless the separate adjudications relate primarily to the calculation of damages.</u> The matters pertinent to the findings include:

> "(A) The interest of members of the class in individually controlling the prosecution or defense of separate actions;
>
> "(B) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
>
> "(C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum;
>
> "(D) The difficulties likely to be encountered in the management of a class action.
>
> "(E) The likelihood the damages to be recovered by individual class members if judgment for the class is entered are so minimal as not to warrant the intervention of the court;
>
> "(F) After a preliminary hearing or otherwise, the determination by the court that the probability of sustaining the claim or defense is minimal.
>
> "(3) In an action commenced pursuant to paragraph (c) of subsection (2) of this section, the court shall consider whether justice in the action would be more efficiently served by maintenance of the action in lieu thereof as a class action pursuant to paragraph (b) of subsection (2) of this section."

Or Laws 1973, ch 349, § 2 (emphasis added). In other words, the legislature adopted the federal categories, but further narrowed the third category, the basis for certifying class actions seeking damages.

D. In 1992, the Council on Court Procedures amended ORCP 32 B.

After initially reorganizing the state's class-litigation statutes as ORCP 32, the CCP amended it on several occasions. As material here, in 1992, CCP largely adopted a proposal from the "Flegal Report," published as *Report and Recommendations of the Special [ABA] Committee on Class Action Improvements*, 110 FRD 195 (1986). While the Flegal Report's proposal was never adopted by the federal rules committee or elsewhere, the council followed it, restructuring ORCP 32 B to replace the "tripartite classification scheme of the former section" with "a unitary structure" by converting the old "defining characteristics … into a range of factors which are to be considered in any action for which class certification is sought." CCP, 1992 Promulgation, ORCP 32, Comment, *available at* https://counciloncourtprocedures.org/Content/Legislative_History_of_Rules/ORCP_32_promulgations_all_years.pdf. In conjunction with that reorganization, several components of the category for common issues were struck or redistributed, with the requirement for finding "superiority" becoming a general requirement, and various subparts bearing on that finding newly applicable to all types of class actions.

Those changes are as follows (material additions underlined and omissions struck):

> **"B. Class action maintainable**. An action may be maintained as a class action if the prerequisites of section A of this rule are satisfied, and in addition, the court finds that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to this finding include:
>
> "B.(1) The extent to which the prosecution of separate actions by or against individual members of the class ~~would~~ create<u>s</u> a risk of
>
> > "B.(1)(a) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or
> >
> > "B.(1)(b) Adjudications with respect to ~~individual~~ members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests;
>
> "B.(2) ~~The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final~~ The extent to which the relief sought would take the form of injunctive relief or corresponding declaratory relief with respect to the class as a whole; ~~or~~
>
> "B.(3) The ~~court finds that the~~ extent to which questions of law or fact common to the members of the class predominate over any questions affecting only individual members~~, and that a class action is superior~~

~~to other available methods for the fair and efficient adjudication of the controversy. Common questions of law or fact shall not be deemed to predominate over questions affecting only individual members if the court finds it likely that final determination of the action will require separate adjudications of the claims of numerous members of the class, unless the separate adjudications relate primarily to the calculation of damages. The matters pertinent to the findings include:~~;

"B.(4) ~~(a)~~ The interest of members of the class in individually controlling the prosecution or defense of separate actions;

"B.(5) ~~(b)~~ The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

"B.(6) ~~(c)~~ The desirability or undesirability of concentrating the litigation of the claims in the particular forum;

"B.(7) ~~(d)~~ The difficulties likely to be encountered in the management of a class action that will be eliminated or significantly reduced if the controversy is adjudicated by other available means; and

"B.(8) ~~(e)~~ Whether or not the claims of individual class members are insufficient in the amount or interest involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class[7]

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[7] In 1980, the council replaced the original provision about minimal value claims with this provision. *See* CCP, 1980 Promulgation, ORCP 32.

> "~~(f) After a preliminary hearing or otherwise, the determination by the court that the probability of sustaining the claim or defense is minimal~~."

Id. (changes shown in original).

With those 1992 amendments, ORCP 32 B took its currently published form.

E. Although ORCP 32 B contains eight factors, a plaintiff moving to certify a class action that seeks damages as its only remedy must satisfy the predominance test.

As shown, the material provisions of ORCP 32 B were largely enacted in 1973—albeit reorganized or in some instances clarified. But the 1992 reorganization changed little for a plaintiff seeking certification of a class action that seeks damages as its only remedy. Certain provisions remained inapplicable. *See* ORCP 32 B(1) (certain types of necessary parties); ORCP 32 B(2) (certain types of injunctive and declaratory relief). And for a damages claim, the trial court's task remained unchanged. It still needed to find superiority, *see* ORCP 32 B, while taking account of the same considerations that, if present, can militate against certification, *see* ORCP 32 B(4)-(8). As a logical imperative then, while no one factor is "controlling" of whether a putative class action seeking damages can be certified, *Pearson*, 358 Or at 106-07,

a plaintiff seeking damages as their only remedy must at a minimum establish for purposes of ORCP 32 B(3) the existence of one or more common issues of fact or law that predominates. *See id.* at 106 (noting same "frequently drives class certification decisions").

In suggesting otherwise, plaintiffs seem to misunderstand many of these provisions. To begin, plaintiffs suggest (at 42) that a trial court deciding whether to certify a class seeking damages may also consider ORCP 32 B(1)(a)—whether multiple adjudications might "establish incompatible standards of conduct for [a defendant]." That type of class, however, was established in 1973 by the legislature, which copied it verbatim from FRCP 23. It addresses circumstances when multiple parties might separately call upon courts to order an actor to alter the status quo, raising the specter that the actor "might be called upon to act in inconsistent ways." FRCP 23, 1966 Comm. Notes. Examples include declaring a bond issue invalid, adjudicating the rights and duties of riparian owners, or an injunction against a nuisance. *Id.* In 1992, the CCP viewed it similarly, with its subcommittee reporting that this category relates to "parties whose joinder [is] regarded as necessary for just adjudication." Members of the Subcomm. Formed to Consider

Proposed Amendments to ORCP 32 - Class Actions, *Rep't of Recommended ORCP 32 Amendments for Consideration by Council at Its Aug. 1, 1992 Meeting* at 2 (July 19, 1992) ("CCP July 1992 Rep't").[8] That provision is simply inapplicable to a set of individual common-law claims for damages. *See, e.g.*, *McDonnell Douglas Corp. v. United States Dist. Court for Cent. Dist.*, 523 F2d 1083, 1086 (9th Cir 1975) (so holding following airplane crash).

Plaintiffs also invoke two *countervailing* considerations, ORCP 32 B(6) and (7), which they suggest concern "judicial efficiency." (Pl-Br-41-42.) Those provisions, however, also trace back to FRCP 23, where they were part of a set of four factors that courts were to consider in relation to the superiority of aggregating damages claims. The 1966 drafters explained that this set of factors relates generally to "the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit." FRCP 23, 1966 Comm. Note. That is, these factors do not relate primarily to "judicial efficiency,"

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[8] The subcommittee's retained records are published at https://counciloncourtprocedures.org/Content/1991-1993%20Biennium/Committee%20Work%20Product/Rule%2032%20Committee%20--%20Class%20Actions.pdf.

other than that section B(7) allows consideration of "the problems of management which are likely to *arise in the conduct of a class action*." *Id*. (emphasis added). Indeed, the 1993 amendments further clarify that subsection B(7) is about management difficulties "that will be *eliminated or significantly reduced* if the controversy is adjudicated *by other available means*." ORCP 32 B(7) (emphasis added).

Plaintiffs also point (at 42-43) to ORCP 32 B(8), arguing that it supports certification if litigating individual claims is not economical. But on its face, that provision is a counterweight *against* class certification; it implicates claims that "are insufficient in the amount or interest involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class." ORCP 32 B(8). In other words, it addresses circumstances in which significant relief is not feasible *by the class mechanism*. And that interpretation is confirmed by its history. When the council adopted that phrasing in 1980, it intended only to "more clearly express[] the idea" the 1973 legislature set forth in subsection E of the category for common issues. CCP, 1980 Promulgation, ORCP 32, Notes. There, the legislature had required courts to consider the likelihood that, *even with* class

certification, recoverable damages would be "so minimal as not to warrant the intervention of the court[.]" Or Laws 1973, ch 349, § 2(2)(c)(E). In other words, the legislature intended to "circumscribe[]" (not expand) certification of class actions. *See Bernard*, 275 Or at 152 (so construing subsection E).

For a party moving to certify a class action seeking damages as the sole remedy, that leaves the third factor as the only potential support, whether common issues predominate, ORCP 32 B(3). And here, some might be tempted to read the CCP's 1992 reorganization of ORCP 32 B as, in effect, diluting the importance of predominance. One of plaintiffs' *amici*, for example, notes that the council struck the second sentence, which had excluded from certification those cases implicating "separate adjudications of the claims of numerous members of the class," because it reflected an "unduly rigid" approach. (OTLA-Br-3 (quoting CCP, 1992 Promulgation, ORCP 32, Comment).)

But the council's purpose was clear. To justify the omission of the second sentence, the CCP's subcommittee "substantial[ly] agree[d]" with the rationale proffered by members of the plaintiff's bar: it was "unnecessary" because "the second sentence … is similar (but not

identical) to the second sentence of existing Federal Rule 23(b)(3)," which set forth the four matters that cut against certification of a class to address common issues. CCP July 1992 Rep't at 2 (setting forth agreement and citing plaintiff's bar's proposed explanatory text at Appendix A); *id*. at App A, p 12 (explanation). As to the reorganization itself, the council's subcommittee seemed to endorse the Flegal Report's explanation that the presence of countervailing factors should not be viewed as "insuperable stumbling blocks" to certification. Flegal Rep't, 110 FRD at 204; *see also* CCP July 1992 Rep't at 2 (cross referencing same). But "the thrust of these proposed amendments [was] to abolish the sharply differentiated *notice requirements* mandated … for class actions maintained under ORCP 32 B(3)," which were expensive, versus the discretionary notice requirements for other types of class litigation. CCP July 1992 Rep't at 2 (emphasis added); *see also* Flegal Rep't, 110 FRD at 203 (expressing desire to eliminate "enormous amounts of energy and money [that] are often devoted to the characterization battle"). In sum, the 1992 amendments to ORCP 32 were not intended to materially alter the showing required of a plaintiff seeking to certify a putative class action seeking exclusively damages as a remedy.

Indeed, if the council had intended to materially alter the types of claims for damages that can be certified as class actions, there would be good reason to conclude that the council exceeded its authority. Under Oregon's rules enabling statute, the council can neither "abridge, enlarge or modify the substantive rights of any litigant," nor alter "rules of appellate procedure." ORS 1.735(1). But the availability of certification affects parties' rights to interlocutory review, for example. *See* ORS 19.225 (authorizing same in class actions). So too various substantive rights, as set forth in other parts of ORCP 32—*e.g.*, the parties' freedom to contract, *see* ORCP 32 D (court must approve compromise), ORCP 32 M (court controls class-representative's attorney fees); the tolling of statutes of limitations, *see* ORCP 32 N; and, upon particular findings from the court, a defendant's liability to pay certain parties that are not class members and are not alleged to have been damaged by the defendant's conduct, *see* ORCP 32 O. While materially altering certification standards is thus beyond the council's remit, for the reasons explained above, the better interpretation is that the council continued the 1973 requirement that, if a plaintiff seeks certification of

a class action for damages, they must at a minimum establish predominance.

Anglo-American procedure long precluded representative litigation of legal claims. While exceptions now exist, they are codified, limited exceptions that require a plaintiff moving to certify a class action for damages to establish that common issues of fact or law predominate.

III. Class-action certification and trial plans can introduce lurking procedural and constitutional errors, which are acute in relation to common-law claims for damages.

Serious procedural and constitutional problems can arise in class actions, particularly if the role served by the predominance test is undercut. One way that might happen is if parties are given license to establish commonality across otherwise disparate claims for damages by reaching for high levels of abstraction.[9] (*See, e.g.*, Pl-Br-35-37 (pointing

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[9] In the context of punitive damages, courts have rejected attempts by plaintiffs to concoct "repeated misconduct" by resort to high levels of abstraction. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 US 408, 420, 422-24, 123 S Ct 1513, 155 L Ed 2d 585 (2003) ("The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance," which the plaintiffs argued included other instances of fraud that allegedly arose out of "national scheme to meet corporate fiscal goals," but in fact "bore no relation" to plaintiffs' claims); *Williams v. ConAgra Poultry Co.*, 378 F3d 790, 797 (8th Cir 2004) ("By defining his or her harm at a sufficiently high level of abstraction, a plaintiff can make virtually

to "corporate-level decision making" regarding funding priorities, vegetation management "across the state," inadequate planning for four areas, and fire responses).) Another way the predominance test might be undercut is if so called issue-class, as authorized by FRCP 23(c)(4) and ORCP 32 G, are certified without regard to the predominance of the common issue relative to the claims as a whole. (*See, e.g.*, Pl-Br-32 (citing *Shea v. Chicago Pneumatic Tool Co.*, 164 Or App 198, 207, 990 P2d 912 (1999)).)

Again, some context is warranted. To begin, even though the trial court certified an issue class, the jury decided the case as a liability class action—with the Court of Appeals not reaching the assignment of error relating to that midtrial switch. Regardless, plaintiffs' approach does not fully comport with the rule's history. And equally, diluting or diminishing the role of predominance would tend to have cascading effects, undercutting the basic "procedural fairness" that must be

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any prior bad acts of the defendant into evidence of recidivism."); *Philip Morris USA, Inc. v. Rintoul*, 342 So 3d 656, 664-65 (Fla Dist Ct App 2022) (e-cigarette evidence could not support punitive-damages award in combustible cigarette case though both products contained nicotine); *Butte Fire Cases*, 24 Cal App 5th 1150, 235 Cal Rptr 3d 228, 249 (2018) (defendant's involvement with other wildfire and pipeline explosion too dissimilar to support punitive-damages claim).

respected in every damages class actions. FRCP 23, 1966 Comm. Note. Isolating discrete common issues for trial before one jury and then trying damages claims by the dozen before other juries creates real problems with the fairness of the trials. Add to that, an issue-class that proceeds from a trial plan that severs various interrelated issues across trials is apt to infringe on a defendant's constitutional rights to due process and relating to jury trials. To appreciate these reasons, some basic tort law is helpful.

A. Oregon tort law intertwines many issues.

At first blush, it may be tempting to view a tort claim as discrete issues that can be considered sequentially and in isolation. But that impression is wrong, more often than not. In negligence, for example, "the issue of liability for harm actually resulting from defendant's conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff." *Fazzolari v. Portland Sch. Dist.*, 303 Or 1, 17, 734 P2d 1326 (1987). In other words, neither harm nor causation presents an inquiry that is truly isolated from foreseeability because the issue of foreseeability is informed by both.

A jury is also often called upon to apportion fault, whether to co-defendants, third-party defendants, settled parties, or the plaintiff. ORS 31.600(2); ORS 31.605. To do so, the jury assesses "the degree to which [each party's] behavior fell short [of faultless conduct]," and—based on a comparison of all parties' fault—records the proportionate fault of each. *Sandford v. Chevrolet Div. of General Motors,* 292 Or 590, 607-09, 642 P2d 624 (1982). That is a searching inquiry. In *Dahl v. Bayerische Motoren Werke (BMW)*, 304 Or 558, 748 P2d 77 (1987), for example, this court considered comparative fault in relation to a plaintiff who was blameless for a car accident and the alleged design defects in the vehicle. Still, a jury was entitled to apportion fault to the plaintiff for failing to wear a seatbelt because the apportionment of fault relates to "the sum total of events which resulted in the plaintiff's injuries." *Id*. at 562. In other words, comparative fault requires "a focus on the plaintiff's damages" and whether "the plaintiff took some action or failed to take some action" that foreseeably "would increase the risk of harm" for the plaintiff's claimed injuries. *Id*. at 563

A punitive-damages claim also implicates a front-to-back review of all issues. When awarding punitive damages, a jury may consider (a) the

nature of the misconduct, *Parrott v. Carr Chevrolet, Inc.*, 331 Or 537, 561, 17 P3d 473 (2001); (b) a reasonable ratio to plaintiff's damages, as reduced for any comparative fault, *Goddard v. Farmers Ins. Co.*, 344 Or 232, 269, 179 P3d 645 (2008); and (c) defendant's then-existing financial condition, including as affected by prior damages awards (if sought by the defendant), *State ex rel. Young v. Crookham*, 290 Or 61, 69, 618 P2d 1268 (1980).

In other words, under Oregon law, a claim will often intertwine issues of liability, causation, damages, comparative fault, and punitive damages, as well as—in some cases—issues exogenic to the claim, such as the financial condition of the defendant at the time of trial, or prior awards in other, similar claims.

B. ORCP 32 G does not provide a court *carte blanche* to certify issue classes to litigate common issues.

Taken to its logical conclusion, plaintiffs' interpretation of ORCP 32 G would seem to authorize certification of an issue class whenever any common issues of fact or law exists. In other words, mere efficiency interests could justify a trial about a common issue *even if* a finding that the defendant is or is not liable to the class representative

may not resolve claims as to the class as a whole. That approach, however, seems to conflict with the rule's origins.

In its original form, ORCP 32 G duplicated FRCP 32(c)(4). *See* Or Laws 1973, ch 349, § 6. The point of that rule was that it may sometimes be possible to "adjudicat[e] … liability to the class[,]" with only proof of damages to be resolved by separate proceedings. FRCP 23, 1966 Comm. Note. It did not authorize plaintiffs to "manufacture predominance through the nimble [identification of issues]." *Castano v. American Tobacco Co.*, 84 F3d 734, 745 n 21 (5th Cir 1996). In other words, a jury's determination of liability as to the plaintiff also adjudicated the class's claim, save damages.

In 1992, the CCP modified ORCP 32 G as follows (additions underlined; omissions struck):

> "**G. Commencement or maintenance of class actions regarding particular issues; ~~division of class;~~ subclasses.** When appropriate: ~~G.(1) A~~an action may be brought or ordered maintained as a class action with respect to particular claims or issues~~;~~ or ~~G.(2) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly~~ by or against multiple classes or subclasses. Each subclass must separately satisfy all requirements of this rule except for subsection A.(1)."

CCP, 1992 Promulgation, ORCP 32 (emphasis in original). As to issue classes, the CCP's comment explains that it was "clarify[ing] that certain specified … issues subsumed within an action filed as a class action may be certified for class treatment[.]" *Id*. According to Professor Holland, who served on the CPP's subcommittee, "[t]he proposed amendment to [ORCP] 32 G is simply in the interest of better draftsmanship." M. Holland, *Memorandum re: the 1980 Proposed Amendments to ORCP 32* (May 26, 1992); *see also* CCP July 1992 Rep't at 8 (no indication of any material change).

Text and intent aside, plaintiffs' approach to issue-classes simply misses the point of predominance in the first place. For purposes of damages class actions, it is the "mission" of the predominance inquiry to "assure the class cohesion that legitimizes representative action in the first place." *Amchem Prods.*, 521 US at 623.

On these bases, this court should not treat ORCP 32 G as short-circuiting the predominance test, as advocated by plaintiffs, by narrowly focusing on common issues to the exclusion of other aspects of claims that may pose Professor Nagareda's "fatal dissimilarities." *See also generally* Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 Ind

LJ 567 (2004); Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 Emory LJ 709 (2003).

C. Combining many unrelated tort plaintiffs in a single trial warps a jury trial.

A trial court's certification of a class action for damages was never intended to tilt the eventual trial for or against any party—and the predominance test helps guard against that.[10] As this court explained in *Pearson*, 358 Or at 114, predominance requires a "pragmatic assessment of how a case, if fairly and fully tried, is likely to be litigated." But unfair trials are likely to arise from attempts to use issue classes in the way envisioned by plaintiffs.

That is in part because issue classes pose real problems when it comes to trying the claims of many plaintiffs—an issue that also arises

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[10] *See* ORCP 32 B (superiority finding requires determination that class action will be result in a "fair and efficient adjudication of the controversy"); FRCP 23, 1966 Comm. Note (procedure is intended to protect "procedural fairness"); *Amchem Prods.*, 521 US at 615 (holding that superiority and predominance tests serve to ensure a class action "achieve[s] economies of time, effort, and expense, and promote … uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results" (quoting FRCP 23, 1966 Comm. Notes)); *Bernard*, 275 Or at 159 (declining to construe class-action statute to "deprive defendants of their substantial rights to cross-examine the claimants under oath").

when a party moves to consolidate actions that involve "a common question of law or fact" for trial. ORCP 53. Either circumstance can prod courts into a "'[t]ry-as-many-as-you-can-at-one-time'" approach. *See Cain v. Armstrong World Industries*, 785 F Supp 1448, 1457 (SD Ala 1992) (cautioning against same). While the desire for efficiency is understandable, "[t]he benefits of efficiency can never be purchased at the cost of fairness." *See Malcolm v. Nat'l Gypsum Co.*, 995 F2d 346, 354 (2d Cir 1993) (collecting authorities). In the context of fair trials, that cost commonly takes two forms.

First, a single trial of several plaintiffs' claims poses a risk of prejudice from spillover evidence—that is, evidence material to fewer than all claims or tending to cross-bolster damages allegations. *See Cantrell v. GAF Corp.*, 999 F2d 1007, 1011 (6th Cir 1993) (observing same in two-plaintiff action); *Cain*, 785 F Supp at 1457 (similar in 13-plaintiff action). In other words, a jury hears a synthetic case, which is more persuasive than any one plaintiff's claim. *Cf. State v. Pinnell*, 311 Or 98, 106 n 14, 806 P2d 110 (1991) ("Unrelated misconduct evidence has been described as the most prejudicial evidence imaginable against an accused." (Quotation marks and citation omitted.)).

Second, presenting multiple plaintiffs can overwhelm the jury, which is ill-equipped to reach a "simultaneous decision of a vast number of individual claims." *Am. Timber & Trading Co.*, 263 Or at 10. Such risks are well illustrated by *Cain*, 785 F Supp at 1450, which involved an asbestos trial of 13 plaintiffs' claims. *Id.* at 1450. Despite precautionary measures—juror notebooks, cautionary instructions, and special interrogatories—the jury awarded fixed amounts for each injury type, "lump[ing] the personal injury plaintiffs into two categories." *Id.* at 1455. Recognizing that it had "unleashed" on the jury the "impossible task" of finding facts about "thirteen plaintiffs' cases that varied greatly in so many critical aspects," the court ordered new trials. *Id.* at 1456-57.

That same dynamic has evidently arisen here. On several occasions, juries tasked with simultaneously deciding more than a dozen plaintiffs' claims awarded fixed amounts of noneconomic damages to adults versus children, or persons present or absent from their property on Labor Day 2020. (*See, e.g.*, Verdict at 19-20, TCF 6/14/23 (setting aside a business, each of 16 plaintiffs was awarded one of two amounts); Verdict at 3-18, *Nordmo v. PacifiCorp*, Case No. 25CV46772, TCF 02/25/2026 (same).)

While *amici* do not suggest that trial planning presents the only procedural landmine in relation to class actions seeking damages, it unquestionably poses significant risks of error. The more prudent practice, this court might want to caution trial courts, is to sharply limit the number of plaintiffs presenting claims in a single trial, particularly early in a mass tort. *See, e.g.*, *In re Allied Chem. Corp.*, 227 SW3d 652, 655 (Tex 2007) (overturning consolidation of five claims because "courts should 'proceed with extreme caution' in setting consolidated trials in immature mass torts"); *Hasman v. G.D. Searle & Co.*, 106 FRD 459, 460 (ED Mich 1985) (declining to consolidate three IUD cases); *Purdue Pharma, L.P. v. Estate of Heffner*, 904 So 2d 100, 103 (Miss 2004) ("Depending on the complexity of the case, individualized evidence pertaining to as few as two plaintiffs against a single defendant or a single plaintiff against two defendants may be prejudicial to a party."); Eldon E. Fallon *et al.*, *Bellwether Trials in Multidistrict Litig.*, 82 Tul L Rev 2323, 2333-37 (2008) (describing setting individual claims for individual trial in mass-tort litigation involving pharmaceuticals).

D. Issue classes pose profound constitutional issues.

American concepts of justice are coextensive with the systems that provide it. When injured persons may seek recourse, it is available "by due course of law," Or Const, Art I, § 10, and not arbitrarily, *see Oberg v. Honda*, 512 US 415, 434, 114 S Ct 2331, 129 L Ed 2d 336 (1994). More often than not, decision about disputed facts must be made by a jury, Or Const, Art I, § 17, which is "an essential attribute of liberty." *Horton v. Or. Health & Sci. Univ.*, 359 Or 168, 235-36, 376 P3d 998 (2016). Oregon further requires that verdicts be reached by at least three-fourths of the jurors, Or Const, Art VII (Amended), § 5(7), and then insulates their findings from being later "re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict." Or Const, Art VII (Amended), § 3. Just as these bedrock rights are readily vindicated in a typical trial, they are readily impinged when claims are aggregated or disputes are tried piecemeal.

In its earliest decision addressing class actions predicated on common issues, this court tacitly recognized the primacy of due-process rights. *See Bernard*, 275 Or at 159 (declining to construe class-action statute to "deprive defendants of their substantial rights to cross-

examine the claimants under oath"). And other courts have put a finer point on it. "A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues." *Carrera v. Bayer Corp.*, 727 F3d 300, 307 (3d Cir 2013), *reh'g den en banc*, 2014 WL 3887938 (3d Cir 2014); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 US 338, 366-67, 131 S Ct 2541, 180 L Ed 2d 374 (2011) (defendant had due-process right to litigate causation disputes on an employee-by-employee basis—*i.e.*, raising other lawful reasons for an employment decision—and "any affirmative defenses" rather than submit to a "Trial by Formula").

A separate but related infringement of constitutional rights often arises when attempts are made to try tort claims piecemeal across two or more juries. In contrast to doing so with a single jury—which can be proper, *see, e.g., Bremner v. Charles*, 312 Or 274, 821 P2d 1080 (1991), *adh'd to on recons*, 313 Or 339, 832 P2d 454 (1992) (liability and damages split)—requiring separate juries to find facts necessary to a verdict on a party's claim or decide interrelated issues impinges two aspects of Oregon's constitutional right to a jury trial.

The first is the same-nine rule. As noted, a valid verdict in Oregon requires the concurrence of at least three-fourths of the jurors. Or Const, Art VII (Amended), § 5(7). That means "not less than nine jurors must agree to the verdict and the same nine jurors must agree on all issues determined by the verdict." *Shultz v. Monterey*, 232 Or 421, 424, 375 P2d 829 (1962); *see also Clark v. Strain*, 212 Or 357, 364, 319 P2d 940 (1957) ("the minimum legal number of jurors required for a valid verdict must be the same jurors voting similarly on each separate issue demanding resolution"). Stated differently, a jury verdict is invalid absent the same nine jurors (out of a jury of twelve) agreeing on "every separate element required for the verdict." *Sandford,* 292 Or at 613; *see also Munger v. State Indus. Accident Comm'n*, 243 Or 419, 422, 414 P2d 328 (1966) (stating rule).

This is a rule of consistency. If a jury's "findings are inconsistent, a verdict based on them is invalid." *Munger*, 243 Or at 426. To ensure consistency when interdependent issues are present—such as the elements of a single negligence claim—at least "the same [nine] jurors must concur in the answer to all questions which are necessary to support a judgment." *Munger*, 243 Or at 424-25. Conversely, where claims or

issues are wholly independent or separate, the same-nine rule is inapplicable because it poses no risk of "logical inconsistency." *Kennedy v. Wheeler*, 356 Or 518, 541, 341 P3d 728 (2014). Thus, to comply with the constitutional same-nine rule, different juries may decide only those claims or issues that are clearly distinct and separable.

While the same nine-rule crystalizes that a party is entitled to try interrelated issues to a single jury, that same entitlement is also intrinsic to Oregon Constitution, Article I, section 17—"[i]n all civil cases the right of Trial by Jury shall remain inviolate"—and Article VII (Amended), section 3—"no fact tried by a jury shall be otherwise re-examined in any court of this state[.]" From a historical perspective, that protection is obvious; in Oregon, the procedure authorizing bifurcation substantially postdates these constitutional provisions. *See State ex rel. Perry v. Sawyer*, 262 Or 610, 612, 500 P2d 1052 (1972) (no procedure in 1972). Add to that, having two juries decide issues that are interrelated necessarily involves a second jury "re-examin[ing]" some facts as found by the first jury.

Moreover, for nearly a century, the federal courts have also recognized that parties cannot be forced to try interrelated issues across

separate juries. Similar to Oregon's constitution, the Seventh Amendment to the United States Constitution states that "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." In *Gasoline Products Co. v. Champlin Refining Co.*, 283 US 494, 51 S Ct 513, 75 L Ed 1188 (1931), the Supreme Court considered whether two juries' verdicts—there, one on liability and another on damages—can be amalgamated into a judgment. That "would amount to a denial of a fair trial" if an issue before one jury is "so interwoven" with issues before another that it "cannot be submitted to the jury independent of the [other] without confusion and uncertainty." *Id.* at 500; *see also Houseman v. United States Aviation Underwriters*, 171 F3d 1117, 1126 (7th Cir 1999) (relating same to reexamination clause); *Lutz v. Glendale Union High Sch., Dist. No. 205*, 403 F3d 1061, 1067 n 6 (9th Cir 2005) (similar). In other words, inherent in the constitutional right to a jury "is the general right of a litigant to have only one jury pass on a common issue of fact." *McDaniel v. Anheuser-Busch, Inc.*, 987 F2d 298, 305 (5th Cir 1993) (quoting *Alabama v. Blue Bird Body Co.*, 573 F2d 309, 518 (5th Cir 1978); emphasis omitted).

To be sure, it can sometimes be proper to have separate juries determine liability and the amount of damages. *See, e.g., Brown v. Bonesteele*, 218 Or 312, 334-35, 344 P2d 928 (1959) (ordering retrial limited to the issue of damages because liability existed as a matter of law and the plaintiff had no comparative negligence). In many tort cases, however, issues overlap or interrelate, which precludes attempts to litigate claims piecemeal to separate juries.

Courts recognize as much. In relation to liability, this court has said, "[e]vidence of fault can influence the jury's measurement of damages," or "the kind and degree of injuries may influence [the] evaluation of the evidence on liability." *Maxwell v. Portland T. R. Co.*, 253 Or 573, 577, 456 P2d 484 (1969). Indeed, it is common for issues such as liability, degree of culpability, causation, and damages to present "a tangled or complex fact situation" that defies separation. *Pryer v. C.O. 3 Slavic*, 251 F3d 448, 455 (3d Cir 2001) (quotation marks and citation omitted). The tangle means that, in the context of applying the same-nine rule to a contested negligence claim, "the same jurors must concur on at least three issues—negligence, injury, and damages." *Munger*, 243 Or at 425; *see also Clark*, 212 Or at 366 ("the same nine jurors who found

[negligence] liability … must be the same nine who agree on the measure of damages").

That entanglement only grows once punitive damages are sought. As the Ninth Circuit has explained, "when a plaintiff seeks exemplary or punitive damages, … liability issues are necessarily interwoven with damages issues because the [punitive] damages depend upon the degree of culpability of the defendant." *Marroquin v. City of Los Angeles*, 112 F4th 1204, 1211 (9th Cir 2024) (citation and quotation marks omitted); *see also, e.g., Simone v. Golden Nugget Hotel & Casino*, 844 F2d 1031, 1041 (3d Cir 1988) (a single jury was required to hear all liability and damages issues for false imprisonment claim where jury "would first have to find at what points the unlawful detention began and ended" and additionally assess defendant's conduct to decide whether and to what extent punitive damages were warranted).

Although Oregon law is well developed that a punitive damages claim is interwoven with other issues, *see* § III.A, *supra*, the same is not true of the development of the constitutional limits associated with allowing separate juries to decide issues relating to punitive damages. On the one hand, in *Talbert v. Farmers Ins. Exch.*, 166 Or App 599, 604,

5 P3d 510 (1999), the court concluded that "[r]emanding this case for a retrial on punitive damages alone creates the potential for inconsistent verdicts." On the other hand, in *Wolf v. Nordstrom, Inc.,* 291 Or 828, 835, 546 P2d 1055 (1981), this court remanded for a limited retrial of punitive damages, treating it as an "exceptional" case that fell outside "the general rule of *Maxwell* that retrial should be on all factual issues" because the plaintiff was entitled to a directed verdict on the disputed liability issue. But that exception is necessarily quite narrow. Unless it is known precisely what conduct the first jury found to support a claim for punitive damages, allowing a second jury to punish a defendant raises the risk of the defendant being punished for conduct that did not cause harm to the plaintiff or was not sufficiently reprehensible to warrant punishment, violating a defendant's due-process rights. *See State Farm Mut. Auto. Ins. v. Campbell*, 538 US 408, 423, 123 S Ct 1513, 155 L Ed 2d 585 (2003) (punitive damages may be imposed only for sufficiently reprehensible conduct that was proven to harm the plaintiff).[11]

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[11] For this reason, little stake can be placed in *Schwarz v. Philip Morris, Inc.,* 348 Or 442, 460 & n 6, 235 P3d 668 (2010), where, with no real analysis, the court departed from the *Maxwell* rule to allow a limited retrial of the amount of punitive damages. The court did not address due-process concerns, which were not raised.

Finally, there is the issue of apportioning fault, whether on account of the fault of the plaintiff or another party. Because of their interrelated nature—including the degree of culpability—the issues of negligence and allocation of fault are too overlapping to be adjudicated by different juries. *See, e.g., Veberes v. Knappton Corp.*, 92 Or App 378, 382, 759 P2d 279 (1988) (same-nine juror requirement was satisfied where "[n]ine of the same jurors who found [fault] agreed on the allocation of fault and the amount of damages").

This constitutional prohibition on presenting intertwined issues to separate juries has confounded numerous class actions. In *In re Rhone-Poulenc Rorer Inc.*, 51 F3d 1293 (7th Cir 1995), for example, plaintiffs wanted to litigate a class action on behalf of hemophiliacs who contracted HIV from blood products. That was improper for various reasons, including that the associated trial plan envisions a second jury deciding proximate cause and comparative fault, which violated the defendant's jury-trial rights. *Id.* at 1303. And other courts have followed suit. *See e.g.*, *Castano*, 84 F3d at 751 (same in context of tobacco litigation); *Benner v. Becton Dickinson & Co.*, 214 FRD 157, 174 (SDNY 2003) (same in relation to needle-stick injuries); *see also Johnson v. Nextel Communs.*

Inc., 780 F3d 128, 150 n 27 (2d Cir 2015) (noting issue in employment litigation, but declining to reach it because class certification failed on other grounds); *Olden v. Lafarge Corp.*, 383 F3d 495, 509 n 6 (6th Cir 2004) (acknowledging concerns about jury-trial rights, but concluding that issue was not ripe). Moreover, because of the problems posed by overwhelming a jury, *see* § III.C, *supra*, courts also cannot address the constitutional deficiencies by placing more and more issues that are specific to individual class members before a jury deciding classswide liability.

With good reason, courts have repeatedly concluded that the class-device is a kludge, unsuited to mass-tort litigation. *See, e.g.*, *Georgine v. Amchem Prods., Inc.*, 83 F3d 610, 617 (3d Cir 1996) (denying asbestos-related certification that pushed court to "choose between forging a solution to a major social problem on the one hand, and preserving its institutional values on the other"); Lahav, 92 NYU L Rev at 1006 ("[t]here have been very few mass tort class actions, fewer still that have survived appeal").

IV. In the context of mass litigation, courts have various procedural tools for increasing efficiency, but their use can delay resolution of individual claims.

Amici have sympathies for Oregon's courts, which face large dockets. In 2025, for example, more than 650,000 new matters were filed into our trial courts. *See* Or. Judicial Dep't, About OJD, Reports, Statistics & Key Performance Measures, Statewide Circuit Court Statistics, *available at* https://www.courts.oregon.gov/about/pages/reports-measures.aspx (linking annual cases-filed reports). And while that annual figure fluctuates significantly—it hit more than 780,000 in 2018 but fell to around 455,000 in 2020—it is at all times large. *See id.* So, it is natural to look at how that load might be lightened.

No doubt, part of the problem is that adjudications undertaken by traditional means are inefficient at base. But such problems are longstanding; the initial impetus for the Star Chamber, to take an extreme example, included its efficiency relative to the courts. Richard Lorren Jolly, *The Administrative State's Jury Problem*, 98 Wash L Rev 1187, 1196 (2023). And modern legislatures have certainly experimented with alternatives to juries and judicial procedure. *See, e.g., id.* (arguing that civil sanctions are sometimes made available in lieu of criminalizing

conduct). In relation to personal injuries, for example, legislatures have sometimes enacted no-fault schemes to better balance public policy concerns—*e.g.*, shielding a societal good that is imperiled by litigation, augmenting existing public benefits, or reducing disparities in recoveries among injured persons. *See, e.g.*, National Vaccine Injury Compensation Program, 42 USC §§ 33aa-10 *et seq.*; Black Lung Benefits Act, 30 USC §§ 901 *et seq.*; 11 USC § 524(g) (discharge provisions of bankruptcy code, including for certain asbestos-related liabilities); Workers' Compensation Law, ORS ch 656; Wildland Fire Planning and Cost Recovery Act, Utah Code § 54-24-101 *et seq.* (2020).

While such programs surely reduce new case filings, they can be controversial—not least with parties invested in the status quo. Entire segments of the bar are dedicated to litigating mass torts, and in some instances, cultivating new mass tort actions. *See* McGovern, 73 Tex L Rev at 1829-34 (noting same). For courts, that dynamic would seem to caution against diverting resources to mass torts. As noted, super-highways breed traffic jams. *See id.* at 1839-40 (documenting that management can "backfire," increasing demands for trial dates and new filings themselves). And that is all the more assured today, with

plaintiffs attorneys newly powered by "[h]edge funds and private-equity" desiring to "dictate outcomes" in mass torts. *See* Samir D. Parikh, *Opaque Capital and Mass-Tort Financing*, 133 Yale LJ Forum 32, 36 (2023).

Faced with a substantial number of new filings relating to a single type of product, event, or other commonality, our courts have various tools to reduce the judicial burdens. Plainly, courts can specially assign all matters involving a particular topic to an individual judge. *Cf. McDowell v. Allied Bldg. Prods. Corp.*, 235 Or App 12, 22, 230 P3d 552 (2010) (referencing orders regarding "the court's administration and management of its asbestos case docket"). Beyond that, courts can consolidate actions "involving a common question of law or fact [that are] pending before the court," ORCP 53 A, whether for all purposes or limited "to pretrial proceedings, including pleadings and discovery." 8 *Moore's Fed. Prac.—Civil* § 42.10. And of course, class actions seeking damages are sometimes pursued, but often improper. *See Pearson*, 358 Or 88.

Looking outside of Oregon, courts have a similar set of tools—which should offer some comfort that, realistically speaking, only a small fraction of cases require trials, even in mass tort actions. The federal

courts, for example, often transfer individual actions to a dedicated multidistrict litigation (MDL) proceeding to coordinate and consolidate pleadings, discovery, and various pretrial matters. *See* 28 USC § 1407 (authorizing same); *In re Patenaude*, 210 F3d 135, 142-46 (3d Cir 2000) (discussing the transferee court's authority). Such rulings then apply to the many individual actions, which may be tens or even hundreds of thousands in number. *See* Brendan Pierson, *How 3M earplug litigation got to biggest MDL in history*, Reuters (Apr 2, 2021), https://www.reuters.com/article/world/how-3m-earplug-litigation-got-to-be-biggest-mdl-in-history-idUSKBN2BP1BP/ (noting 230,000 actions for earplug-related injuries). Furthering that judicial efficiency, *Daubert* issues in federal court may well thwart some or all claims before trial. *See, e.g.*, *Coning v. Bayer Pharma AG (In re Mirena IUS Levonorgestrel-Related Prods. Liab. Litig.)*, 982 F3d 113 (2d Cir 2020) (in appeal from Mirena MDL, upholding order granting summary judgment following exclusion of general-causation experts on *Daubert* grounds). And for those claims that remain, the typical "endgame" is global settlement. Fallon, 82 Tul L Rev at 2332-37 (quoting Richard A. Nagareda, *Mass Torts in a World of Settlement* ix (2007)).

To get there, however, the litigation often must reach "maturity." *Id*. at 2341 (discussing Nagareda). That notion is not confined to MDLs—it seems to have been posited initially in relation to asbestos litigation. *See* McGovern, 73 Tex L Rev at 1843; *In re Bristol-Myers Squibb Co.*, 975 SW 2d 601 (Tex 1998) (quoting same). The theory's gist is that mass-tort litigation often proceeds through phases, with early successes for plaintiffs (*e.g.*, "overcoming legal barriers to establishing liability") apt to further any "backlog of litigation" by prompting new filings and hindering resolution in part by creating in plaintiffs' counsel a perception "[un]warranted by the rational circumstances." McGovern, 73 Tex L Rev at 1842-43. In the next phase, a defendant typically better marshals "law, evidence, and public opinion," resulting in "proportionately more success," including "lower verdict amounts." *Id*. at 1843. As the litigation continues, the "law, procedure, evidence, strategy, and public perception stabilize," eventually becoming a "mature" mass tort, making global or large-scale resolutions more feasible. *Id*.

Trials thus may be a necessary-but-not-sufficient occurrence before settlements in a mass-tort litigation become common. As explained by Judge Fallon, the federal judge assigned to the separate MDLs for two

pharmaceuticals, Vioxx and Propulsid, settlement can be promoted by undertaking several "bellwether" trials, which are "binding upon the parties to the specific case," but not "on the consolidated claimants." Fallon, 82 Tul L Rev at 2332-37. But if "maturity" is lacking for other reasons—the parties are still exploring new trial strategies, anticipating new evidence, or awaiting appellate review of significant or novel legal issues—global resolution may still be frustrated. *See* McGovern, 73 Tex L Rev at 1843.

Against that backdrop, the zealous pursuit of judicial efficiency may well slow the progression toward maturity for several related reasons. To start, consolidation may itself delay trials. *See* Fallon, 82 Tul L Rev at 2330 (remarking that MDLs are often equated with "excessive delay" and a "dearth of jury trials"). Further, consolidation can prolong uncertainty about legal issues. Not only are there fewer trials and thus fewer appeals, but in unconsolidated actions, critical legal issues would be vetted by multiple trial judges—somewhat akin to an appellate panel—increasing the likelihood that misinterpretations of the law are caught and corrected early in the litigation's lifecycle. Add to that, consolidation imposes on all litigants and the entire litigation a single

decision maker and a common set of legal issues, with error apt to require a do-over for all parties years into the litigation. *See, e.g.*, *Amador v. 3M Co. (In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.)*, 9 F4th 768 (8th Cir 2021) (in an MDL created in 2015, reversing order granting summary judgment against all plaintiffs on *Daubert* grounds).

Oregon's courts have typically avoided such logjams, leaving consolidation to other forums. That has certainly been true of personal injury litigation, whether involving claims as varied as sexual abuse within organizations or consumer products, such as tobacco and asbestos.[12] And the same has been true of property claims.[13] Indeed—

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[12] *See, e.g.*, *Doe v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 352 Or 77, 81-82, 280 P3d 377 (2012) (after four plaintiffs joined in single action claiming institutions negligently allowed sexual abuse of minors, one plaintiff tried claim, leading to order to publicly release 1,247 "ineligible volunteer" files admitted into evidence); *Williams v. Philip Morris, Inc.*, 340 Or 35, 127 P3d 1165 (2006) (in individual's action against tobacco company, "[t]he jury also could have found that Williams was one of thousands of Oregonians who received [Philip Morris]'s message, acted on it, and, like him, suffered cancer or other diseases as a result" (quoting earlier decision)); *Keller v. Armstrong World Indus.*, 342 Or 23, 147 P3d 1154 (2006) (stand-alone claim against asbestos manufacturer).

[13] *See e.g.*, *Idaho Power Co. v. Bean*, 341 Or App 696, 576 P3d 1059, *rev den*, 374 Or 616, 583 P3d 309 (2025) (stand-alone condemnation claim related to a 293-mile powerline), *Cook*, 279 Or at 335-336 & n 3 (noting denial of class certification for erosion damage).

and setting to the side the issue of how many such claims may be fairly tried, *see* § III.C, *supra*—in 2023 and 2024, nearly one hundred wineries filed several nonclass actions for damage to personal and real property, which are now resolved.[14]

As stated, *amici* have substantial sympathies for the courts, which have legitimate reasons to seek opportunities to improve efficiency. But for mass tort litigation, there are substantial reasons to conclude that, on the whole, consolidating all related cases does a disservice to the litigants and—in many ways—the courts themselves.

CONCLUSION

The Court of Appeals' suggestion that the trial court revisit class certification is well taken, and its reversal on the basis of instructional error is correct. This court should affirm that decision in all respects.

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[14] The resolved actions were filed by 12 plaintiffs in Yamhill County, *see Elk Cove Vineyards, Inc. v. PacifiCorp*, No. 23CV28258, 5 plaintiffs in Marion County, *see Willamette Valley Vineyards, Inc. v. PacifiCorp*, No. 23CV29519, and 75 plaintiffs in Multnomah County, *see Lange Winery LLC v. PacifiCorp*, No. 24CV25661; *The Lumos Wine Co. v. PacifiCorp*, No. 24CV51872; *Sokol Blosser, Ltd. v. PacifiCorp*, No. 24CV03044.

DATED this September 24, 2026

SCHWABE, WILLIAMSON & WYATT, P.C.

By: /s/ *Andrew J. Lee*

Andrew J. Lee, OSB No. 023646
Sara Kobak, OSB No. 023495
1211 SW Fifth Avenue, Suite 1800
Portland, OR 97204
Telephone: 503-222-9981

Of Attorneys for *Amici Curiae*
Oregon Business & Industry,
Oregon Forest Industries Council,
Oregon Association of Defense Counsel,
International Brotherhood of Electrical Workers, Local 125,
Astoria-Warrenton Area Chamber of Commerce,
Cottage Grove Area Chamber of Commerce,
Grants Pass and Josephine County Chamber of Commerce,
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By: /s/ *Sara Kobak*
Sara Kobak, OSB No. 023495

Of Attorneys for *Amici Curiae*

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I certify that I filed the BRIEF OF *AMICUS CURIAE* with the Supreme Court Administrator through the e-filing system on this date. I further certify that I served the BRIEF OF *AMICUS CURIAE* to the following participants through the e-filing System on this date:

Keith A. Ketterling, OSB No. 913368
Timothy S. DeJong, OSB No. 940662
Cody Berne, OSB No. 142797
Emily A. Johnson
Erin Roycroft, OSB No. 183791
Carsen Nies, OSB No. 224623
STOLL STOLL BERN LOKTING & SCHYLACHTER, P.C.
209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: 503-227-1600
kketterling@stollberne.com
tdejong@stollberne.com
cberne@stollberne.com
ejohnson@stollberne.com
eroycroft@stollberne.com
enies@stollberne.com

Matthew Preusch, OSB No. 134610
KELLER ROHRBACK LLP
801 Garden Street, Suite 301
Santa Barbara, CA 93101
Telephone: 805-456-1496
mpreusch@kellerrohrback.com

Daniel Mensher, OSB No. 074636
Benjamin Gould, OSB No. 256994
Natida Sribhibhadh
KELLER ROHRBACK LLP
1201 3rd Avenue, Suite 3400
Seattle, WA 98101
Telephone: 206-623-1900

dmensher@kellerrohrback.com
bgould@kellerrohrback.com
natidas@kellerrohrback.com

Yoona Park, OSB No. 077095
Sarah R. Osborn, OSB No. 222119
KELLER ROHRBACK LLP
601 SW 2nd Avenue, Suite 1900
Portland, OR 97204
Telephone: 971-434-3005
ypark@kellerrohrback.com
sosborn@kellerrohrback.com

Alexander G. Tievsky
Nicholas Rosinia
Megan Delurey
Schuyler Daum
Landon Webster
EDELSON PC
350 N. LaSalle Street, 14th Floor
Chicago, IL 60054
Telephone: 312-589-6370
atievsky@edelson.com
nrosinia@edelson.com
mdelurey@edelson.com
sdaum@edelson.com
lwebster@edelson.com

Todd Logan, OSB No. 261139
Patrick Ntchobo
EDELSON PC
150 California Street, 18th Floor
San Francisco, CA 94111
Telephone: 415-212-9300
tlogan@edelson.com
pntchobo@edelson.com

Ali Moghaddas
EDELSON PC
11601 Wilshire Boulevard, Suite 1970
Los Angeles, CA 90025
Telephone: 310-694-0331
amoghaddas@edelson.com

Derek C. Johnson, OSB No. 882340
Marily A. Heiken, OSB No. 923308
JOHNSON JOHNSON LUCAS & MIDDLETON, PC
975 Oak Street, Suite 1050
Eugene, OR 97401
Telephone: 541-484-2434
djohnson@justicelawyers.com
mheiken@justicelawyers.com

Nicholas A. Kahl, OSB No. 101145
NICK KAHL LLC
2246 E. Burnside Street, Suite A
Portland, OR 97214
Telephone: 971-231-1342
nick@nickkahl.com

Attorneys for Plaintiffs-Respondents-Cross-Appellants; Petitioners on Review

Per A. Ramfjord, OSB No. 934024
Brad S. Daniels, OSB No. 025178
Reilley D. Keating, OSB No. 073762
STOEL RIVES LLP
760 SW 9th Avenue, Suite 3000
Portland, OR 97205
Telephone: 503-224-3380
per.ramfjord@stoel.com
brad.daniels@stoel.com
reilley.keating@stoel.com

Alison L. Plessman
Rajan S. Trehan
Stephanie W. Xiao
Khoa D. Nguyen
HUESTON HENNIGAN LLP
523 West 6th Street, Suite 400
Los Angeles, CA 90014
Telephone: 213-788-4340
aplessman@hueston.com
rtrehan@hueston.com
sxiao@hueston.com
knguyen@hueston.com

Douglas J. Dixon
Craig A. Fligor
HUESTON HENNIGAN LLP
620 Newport Center Drive, Suite 1300
Newport Beach, CA 92660
Telephone: 949-229-6840
ddixon@hueston.com
cfligor@hueston.com

Blaine H. Evanson
GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Drive
Irvine, CA 92612
Telephone: 949-451-3800
bevanson@gibsondunn.com

Theodore J. Boutrous, Jr.
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 92612
Telephone: 213-229-7804
tboutrous@gibsondunn.com

Attorneys for Defendants-Appellants, Cross-Respondents; Respondents on Review

Robert Koch
Senior Assistant Attorney General
OREGON DEPARTMENT OF JUSTICE
400 Justice Building
1162 Court Street, NE
Salem, OR 97301-4096
Telephone: 503-378-4402
robert.a.koch@doj.oregon.gov

Attorneys for Creditor

J. Aaron Landau
MILLER NASH LLP
1140 SW Washington Street, Suite 700
Portland, OR 97205
Telephone: 541-234-7622
aaron.laudau@millernash.com

Jeremy C. Marwell, *pro hac vice forthcoming*
VINSON & ELKINS LLP
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, DC 20037
Telephone: 202-639-6507
jmarwell@velaw.com

Attorneys for Amicus Curiae Edison Electric Institute

Irion Sanger
John Maxwell Greene
SANGER GREENE, P.C.
4031 SE Hawthorne Boulevard
Portland, OR 97214
Telephone: 503-756-7533
irion@sanger-law.com
max@sanger-law.com

Attorneys for Amici Curiae Oregon People's Utility Districts

Elizabeth H. White
K & L GATES LLP
One SW Columbia Street, Suite 1900
Portland, OR 97204
Telephone: 503-228-3200
elizabeth.white@klgates.com

David R. Fine, *pro hac vice pending*
K & L GATES LLP
17 North Second Street, 18th Floor
Harrisburg, PA 17101
Telephone: 717-231-4500
david.fine@klgates.com

Attorneys for Amicus Curiae
Chamber of Commerce of the United States of America

Paul S. Stewart
PAINE HAMBLEN, P.S.
717 West Sprague Avenue, Suite 1200
Spokane, WA 99201
Telephone: 509-455-6000
paul.stewart@painehamblen.com

Attorneys for Amicus Curiae
PNW Investor-Owned Utilities

Jesse A. Buss
WILLAMETTE LAW GROUP, PC
411 Fifth Street
Regon City, OR 97045-2224
Telephone: 503-656-4884
jesse@wlgpnw.com

Attorneys for Amici Curiae
After the Fire USA and Go Alliance

Elizabeth Savage
ELIZABETH SAVAGE LAW LLC
11 NE MLK Jr. Boulevard, Suite 404
Portland, OR 97232
Telephone: 971-430-4030
elizabeth@savage-attorney.com

Attorneys for Amincus Curiae
Oregon Trial Lawyers Association

Matt Kirkpatrick
OREGON CONSUMER JUSTICE LAW
1235 SE Morrison Street, First Floor
Portland, OR 97214
Telephone: 503-901-8739
mk@ocjlaw.com

Attorneys for Amicus Curiae
Oregon Consumer Justice

DATED: September 24, 2026

By: s/ *Sara Kobak*
Sara Kobak, OSB No. 023495