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,
Petitioner on Review,

and

MARY KATHLEEN BECHERER *et al.*,
Plaintiffs,

and

OREGON DEPARTMENT OF JUSTICE,
Creditor-Respondent,

v.

PACIFICORP, an Oregon Corporation, and PACIFIC POWER an Oregon registered electric utility and assumed business name of Pacificorp,
Defendants-Appellants, Cross-Respondents,
Respondent on Review.

Multnomah County Circuit Court
20CV33885

A183140

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 *AMICUS CURIAE* OF OREGON TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS ON REVIEW

August 2026

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INTEREST OF *AMICUS CURIAE*

The Oregon Trial Lawyers Association (OTLA) is a statewide organization of 900 attorneys who primarily represent plaintiffs in civil litigation. In this case, OTLA does not wish to present a private interest of its own; instead, it seeks to offer arguments grounded in Oregon law and its members' experiences that make clear why issue class certification was particularly appropriate in this case. OTLA's members routinely investigate, litigate, and seek to try cases under ORCP 32 G, in exactly the circumstance this case presents: a single course of corporate conduct that harms many people in different ways.

INTRODUCTION

This case is about whether a trial court can certify an issue class under ORCP 32 G and then tell the jury, in plain language, what that certification means without risking reversal by an appellate court that views the certification decision differently than the trial court did. Petitioners' brief exhaustively demonstrates that the trial court's instruction was correct and that nothing in the record suggests that the jury misused it. OTLA joins, but does not repeat, that analysis. It writes separately to explain a structural problem with the Court of Appeals' approach that the next case, and the case after that, will face in the absence of additional guidance from this Court.

Every class trial requires the court to tell the jury why the people sitting in the courtroom are trying the case for people who are not. The instruction this trial court used says that clearly: the class representatives present the evidence, the absent members need not appear, and the jury may treat that evidence as applying to the claims of the class.

The Court of Appeals held that instruction legally erroneous because, in its retrospective view, "certain evidence at trial, particularly related to causation, did not necessarily apply to every class member." *James v. PacifiCorp*, 348 Or App 347, 350, 590 P3d 618 (2026). It then held that error prejudicial on the theory that it might have led the jury to misunderstand its task, *id.* at 377–78, without ever identifying what the instruction would have needed to say instead to survive review. Stated another way, the Court of Appeals disagreed with the trial court's conclusion that common evidence predominated and that issue class treatment was the superior method of adjudicating this dispute. But rather than take on the trial court's *certification decision*—a decision properly within the trial court's discretion and subject to deference on review—the Court of Appeals chose to address the problem it perceived by reviewing the trial court's *jury instruction*—an instruction the Court of Appeals could take on de novo.

OTLA writes to make clear that the practical effect of that approach. It certainly will not be fairer class trials, nor will it be the framework the Council

on Court Procedures intended when it crafted ORCP 32. Instead, it will threaten class trials in Oregon, regardless of how carefully the next trial court manages its case, opening the trial court's class action management decisions to de novo review under the guise of instructional error. This Court should reverse, and in doing so restore the distinction the opinion below erased: a certification decision, reviewed for abuse of discretion on the record before the trial court, and an instruction, reviewed on whether it accurately states the law.

ARGUMENT

ORCP 32 G lets a trial court certify a class action "with respect to particular claims or issues" even where the case as a whole may not qualify or be best adjudicated as a full class. Oregon adopted that flexibility deliberately: in 1992, it eliminated a predominance requirement that the Council on Court Procedures viewed as "unduly rigid." Thereafter, the Court of Appeals' decision in *Shea v. Chicago Pneumatic Tool Co.*, 164 Or App 198, 207, 990 P2d 912 (1999), confirmed that predominance is one of several factors bearing on whether class treatment is superior—not a threshold requirement a plaintiff must clear before an issue class can be certified. A trial court's finding that a class, including an issue class, is a superior method of adjudicating the dispute is reviewed for abuse of discretion. *Pearson v. Philip Morris, Inc.*, 358 Or 88, 106–07, 361 P3d 3 (2015).

Issue-class certification exists for particular cases, including those where one defendant's conduct, common to everyone affected, sits alongside individualized questions of damages or circumstances that vary from person to person. The device lets a court resolve the common questions once, through a single trial, while preserving each class member's right to prove individualized damages (or other individual issues) separately. That structure is precisely what the trial court used here, certifying the class on the questions of PacifiCorp's liability and fire-by-fire causation, while reserving damages for hundreds of individual, sequential trials. Whether the trial court properly applied that framework to this record is addressed in Petitioners' opening brief. *See* Pet Br at 31–45.

I. An instruction that accurately describes a properly certified class is not independently reviewable for how "common" the evidence turned out to be.

A class certification order, standing alone, does not itself tell a jury how to consider and sort the evidence it hears at trial. Instead, it resolves—before the jury is ever empaneled—a legal question for the court: whether the certified issues can be tried on common proof. The only way a jury learns what an issue class means—that the class representatives are trying the case on behalf of members who are not present, and that its answers will bind the class—is through the instructions the court gives at trial.

That makes the instruction and the certification order two faces of one decision, not two independent opportunities for a defendant to relitigate the same objection under the guise of different rulings. Once a certification order is entered, the instruction that tells the jury what it means cannot be independently "wrong" unless it misstates what certification does. In other words, an instruction that accurately explains a properly certified class cannot be transformed into reversible error by a reviewing court's own disagreement about how "common" the evidence really was.

This Court reviews a jury instruction by asking whether it "state[s] the law accurately," not by asking whether the trial record independently satisfies the reviewing court, and certainly not by asking whether the evidence in a class trial was sufficiently "common" to support the trial court's decision to certify. *State v. Woodman*, 341 Or 105, 118, 138 P3d 1 (2006). Yet that is exactly what happened here. To hold the instruction legally erroneous, the Court of Appeals had to decide not that it inaccurately stated the law, but that "certain evidence at trial, particularly related to causation, did not necessarily apply to every class member"—a judgment about how common the evidence was. *James*, 348 Or App at 350. That is an inquiry that ORCP 32 B(3) commits to the trial court in the first instance, reviewed for legal error, with the court's ultimate superiority finding reviewed for abuse of discretion. *Pearson*, 358 Or at 106–07. The Court of Appeals did not conduct *any* inquiry under ORCP 32. It did not walk

through a single ORCP 32 B factor, did not identify what the trial court found common that in fact was not, and did not explain why the trial court's contrary finding—reached after years of certification proceedings and an eight-week trial—was unreasonable. It simply substituted its own characterization of the evidence for the trial court's, and did so through a holding that never called itself a certification ruling at all. A defendant who cannot show an abuse of discretion in certification should not be able to obtain the same reversal by attacking, on identical grounds, the instruction that implements it.

The point is underscored by what the two courts had in front of them. The trial court made its finding on a complete eight-week trial record—the same record the Court of Appeals later reviewed. Two courts examining an identical, finished record reached opposite conclusions about how common the evidence was, and nothing in the opinion below explains which characterization should govern the next case. That is not a flaw the trial court could have anticipated or drafted its instruction around. A trial court cannot instruct a jury around a standard that consists of a reviewing panel's after-the-fact disagreement with its own reasonable reading of the same evidence. That is not how the system works.

II. The Court of Appeals' decision threatens class trials, and its cost will fall on Oregon's courts and its injured citizens, not on this defendant.

The impact of the Court of Appeals' approach is significant. Before the decision below, the trial court had a schedule in place for 160 additional damages trials, involving more than 1900 class members, proceeding multiple times a month through 2028—on top of the twenty completed trials in which juries had already delivered substantial compensatory damages awards. That class framework worked because the common liability questions had been resolved once, for everyone, precisely as ORCP 32 G contemplates. The decision below does not merely delay that schedule; on PacifiCorp's own account, it may extinguish it.

But the effects of the Court of Appeals' decision are not limited to this case. For trial courts, class actions will become infinitely more difficult to manage, as trial courts face the risk of appellate review of each of their class action management decisions—decisions traditionally (and properly) within the special purview of the trial court judge. That is not an outcome that is consistent with ORCP 32. And it doesn't happen because Oregon law disfavors class actions—that's not the case at all—but because no available instruction can satisfy a standard that, as explained above, turns on what facts in the trial court record a reviewing panel chooses to emphasize. The rule also will not become more protective of class members' individualized claims; if anything, it will simply become a reason not to certify class cases, forcing thousands of

claimants back into duplicative individual trials of the same corporate conduct, over and over, in front of different juries, at a cost of years of court time—the very inefficiency ORCP 32 exists to prevent.

Litigants will also respond. Plaintiffs' counsel bear the cost of proving the same corporate conduct again and again if certification cannot be achieved (or relied on); many may decline to seek issue-class treatment for claims that would otherwise justify it, leaving claimants with no realistic path to relief. Defendants, by contrast, can try the common issues to a jury, and if the verdict is adverse, look for any individualized evidence to recast as reversible error, regardless of what the trial record shows. That option removes any incentive to resolve common liability questions short of trial, because an adverse verdict is no longer a real risk—it is a setback that is potentially correctable on appeal almost as a matter of course.

And the cost of that is not only borne by the class members—injured Oregonians who must still wait years before seeking any relief—but also by Oregon's trial courts, which lose the principal tool the Council on Court Procedures gave them for managing cases exactly like this one, at a time when they can least absorb it: as OTLA explained in its brief in support of review, statewide civil filings have grown roughly fourteen percent since 2020, to approximately 192,000 civil cases in fiscal year 2024 alone. *See* Or Judicial Dep't, OJD Civil Overview, Presentation to Joint Committee on Ways and

Means Subcommittee on Public Safety (Feb 4, 2025); Or Leg Assembly, 2025–27 Budget Review—Judicial Dep't; OJD Civil Caseload Overview (2025). It is also borne by future claimants—wildfire survivors, employees, consumers, patients—who are told that the class device exists on paper but, as a practical matter, cannot be achieved in the courtroom.

CONCLUSION

The facts here—uniform corporate decision-making, geographically or individually varied harm—are not unique to utility wildfire litigation. It is common to mass-harm litigation generally: a single unlawful prison policy that injured every adult in custody to different degrees; a single data-security failure that exposed customers who suffered different downstream harms; a single defective design installed in products used in different ways. OTLA's members litigate cases of precisely this type across the state.

This Court should restore the distinction the opinion below erased: a challenge to certification is a challenge to certification, reviewed for abuse of discretion on the full record before the trial court; a challenge to an instruction is a challenge to whether the instruction correctly states the law about what a properly certified class means, reviewed de novo and subject to the ordinary requirement that a defendant show a real likelihood of prejudice from the record as a whole, not a hypothetical one assembled after the fact.

For the reasons set forth above, OTLA urges the Court to reverse the decision of the Court of Appeals.

Respectfully submitted this 13th day of August, 2026.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word-count limitation in ORAP 5.05(1)(b)(ii)(B) because the word count on this brief (as described in ORAP 5.05(1)(d)(i)) is 2186.

I certify that the size of the type in this brief is not smaller than fourteen points for both the text of the brief and footnotes, as required under ORAP 5.05(3)(b)(ii).

DATED this 13th day of August, 2026.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 13, 2026, I directed the original **BRIEF OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS ON REVIEW** to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon the following:

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