IN THE SUPREME COURT OF THE STATE OF OREGON

Jeanyne James; Robin Colbert; Jane Drevo; Sam Drevo; Brooke Edge and Bill Edge, Sr.; Lori Fowler; Iris Hampton; James Holland; Rachelle McMaster; Kristina Montoya; Northwest River Guides, LLC; Shariene Stockton and Kevin Stockton, Victor Palfreyman; Palfreyman Family Trust; Duane Brunn, individually and on behalf of all others similarly situated; Alfred Cuozzo; Deborah Jo Fawcett; David Giller, Sr.; Richard Jensen; Scott Johnson; Frank King, individually and in his capacity as trustee of the King Revocable Trust; Stephen David Nielsen; Cory Staniforth; Deborah Tank; Christian Bigness; Kelly Davis; Christine Grom; Maria Guadalupe Eliosa Martinez; Carl Seyboldt and the Seyboldt Revocable Living Trust; Diane Turnbull; Joy Wilson; Richard Wilson; the Upward Bound Camp for Persons with Special Needs; and William Browning in his capacity as Personal Representative of the Estate of Delores Stowell,

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

and

Mary Kathleen Becherer, et al.,
Plaintiffs,

and

Oregon Department of Justice,
Creditor-Respondent,

v.

PacifiCorp, an Oregon corporation; and Pacific Power, an Oregon registered electric utility and assumed business name of PacifiCorp,
Defendants-Appellants, Cross-Respondents; Respondents on Review.

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

PETITIONERS ON REVIEW'S REPLY BRIEF ON THE MERITS

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

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INTRODUCTION

Faced with resolving thousands of individual claims, the trial court determined that an issues class followed by individual damages proceedings was the superior way to manage this case. After a lengthy discussion about the propriety of class certification, the Court of Appeals reversed on the basis that it was prejudicial error to instruct the jury that there was "no requirement that individual class members appear in court to prove their case," such that the jury "may assume that the evidence at the trial applies to all class members[.]" (ER-278-79.)

PacifiCorp offers little to support the conclusion that the instruction, read in context, erroneously stated the law. Rather, like the Court of Appeals, PacifiCorp devotes most of its brief to class certification. In PacifiCorp's view, there were "material variations" among class members, such that the class should not have been certified and the instruction was necessarily erroneous.

PacifiCorp's argument ignores the body of common evidence and issues that formed the basis for the trial court's class certification orders. It instead seeks to relitigate its version of the facts—one rejected by every factfinder below—and asks this Court to

substitute its own judgment for that of the trial court and the jury. With proper deference accorded to the trial court's decision to certify and maintain the issues class, and when the instructions are read as a whole, there was no error—let alone prejudicial error. This Court should reverse the Court of Appeals and affirm the trial court's judgments.

ARGUMENT

I. PacifiCorp's "Material Variation" Argument Confirms the Court Should Address and Affirm Class Certification.

In allowing review, this Court asked the parties to address how the merits of class certification inform the questions presented. PacifiCorp answers the Court's question by embedding the merits of class certification in its own question presented, telling the Court the issue for decision is whether, "given the trial court record" and "'material variation between the members of the class,'" the Class Questions instruction accurately stated the law. (Ans Br 7 (quoting *Strawn v. Farmers Ins. Co.*, 350 Or 336, 359, 258 P3d 1199 (2011)).) It then devotes its brief to arguing that the instruction was erroneous because of "material variation" among class members, based upon its own retelling of the facts.

In doing so, PacifiCorp confirms its real challenge is to class certification, and in particular, the trial court's factual determinations underlying its certification rulings. PacifiCorp's arguments, however, do not demonstrate any certification error. The trial court's factual determinations are reviewed under a deferential "no evidence" standard that PacifiCorp does not mention, let alone satisfy. The purported evidentiary differences it claims within the fire areas are illusory: for three of the four fires it identifies none, and in the Santiam Canyon, it ignores that every class member relied on the same three common bodies of causation evidence. And to the extent PacifiCorp is really disputing the sufficiency of that common proof, it ignores the objective nature of the causation inquiry and the substantial body of objective evidence supporting the liability finding.

A. PacifiCorp's "Material Variation" Argument Is a Challenge to Class Certification, Which This Court Reviews Deferentially.

Although whether common issues predominate has been described as a legal question, its resolution "can require, and even pivot on, the resolution of disputed facts." *Pearson v. Philip Morris, Inc.*, 358 Or 88, 108, 361 P3d 3 (2015). When it does, "an appellate

court must defer to the trial court's resolution of any disputed facts, reviewing the record only to determine if no evidence supports the trial court's express and implicit factual findings." *Id.* at 109. Further, the distinct, holistic determination that an issues class was the superior method of adjudication remains committed to the trial court's discretion. *Id.* at 104.

PacifiCorp contends that, factually, there was "material variation" among class members, such that individual issues predominated because class members relied on different evidence, either "within" the four fire areas or "between" them. (Ans Br 2, 7, 33-47.) As explained in detail below, that challenge to class certification rests on "disagree[ment] with the trial court on what factual conclusion to draw from the record," *Pearson*, 358 Or at 130, rather than any legal error in analyzing predominance or commonality under ORCP 32. (*Compare* Ans Br at 32-46 (arguing that the trial court failed to credit "PacifiCorp's location-specific defenses" and property-by-property causation theories) *with* ER-68-70 (finding that "location-specific considerations are not material under plaintiffs' factual theory" and PacifiCorp did not "identify any particularized superseding or intervening causes (or other specific

defenses to liability) that could not be resolved for the class as a whole") *and* ER-319-20 (incorporating ruling on class certification in denying motion for decertification)). The Court should decline PacifiCorp's invitation to "step[] out of its institutional role by substituting its judgment for that of the trial court in terms of the weight to be given to the competing evidence that the parties presented" regarding predominance. *Pearson*, 358 Or at 130.

B. PacifiCorp Does Not Identify Any Class Certification Error Within a Fire Area.

PacifiCorp argues that purported variations in proof within the fire areas made class treatment improper. But for three of the four fires—the 242, South Obenchain, and Echo Mountain Complex fires—PacifiCorp fails to identify *any* difference in the proof offered by class members, let alone show there was no evidence to support the trial court's factual findings. (*See* Ans Br 44-45.) It points only to differences in "the types of damages claimed" and whether "other causes intervened." (*Id.* at 45.) Those were not certified issues. What each class member lost, and whether something else also contributed to a particular loss, were reserved for the Phase II damages trials,

where PacifiCorp has raised and remains free to raise individualized defenses. (ER-71-72.)[1]

That leaves one fire area: the Santiam Canyon. There, PacifiCorp argues that "glaring evidentiary deficiencies and divisions within the Santiam Canyon" meant jurors could "not simply 'assume' evidence as to one plaintiff was evidence as to all plaintiffs" in the canyon. (Ans Br 33.) In PacifiCorp's telling, the Beachie Creek Fire entered the canyon early, and PacifiCorp's lines "only existed (and were active) in a portion of the canyon and part of the time." (*Id*. 37-40.) From that basis, PacifiCorp concludes "there was no aggregable evidence capable of explaining all property damage in the canyon." (*Id*. at 40 (emphases omitted).)

That reasoning invites exactly what *Pearson* forbids: "disagree[ment] with the trial court on what factual conclusion to draw from the record." *Pearson,* 358 Or at 130. As the trial court concluded, the Santiam Canyon class representatives proved class-wide causation with three bodies of evidence, and every class member in the canyon relied on all three.

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[1] PacifiCorp has always been, remains free to, and has presented individualized defenses in the Phase I and Phase II trials. (Ans Br 47-48.)

Specifically, every class member in the Santiam Canyon relied on the same fire modeler and the same eyewitnesses to rebut PacifiCorp's defense that the lightning-caused Beachie Creek Fire caused their harm. (Ans Br 14-15.) On behalf of all class members, the class representatives presented expert fire-progression modeling placing the Beachie Creek Fire outside nearly the entire canyon until hours after PacifiCorp's fires ignited, spread, and forced the evacuation of the canyon. (Tr 3909-13.) Eyewitnesses confirmed it, chief among them Dean Warner, the incident management team's lead fire behavior analyst, who testified that the Beachie Creek Fire posed no threat to Gates when power-line fires began igniting. (Tr 3021-22, 3028.)

All also relied on the same evidence that PacifiCorp's fires, taken together, burned across the entire canyon. (Op Br 38-40.) Through eyewitness testimony, 911 calls, first-responder records, and expert testimony, Plaintiffs showed that swirling winds drove at least 14 power-line ignitions across the canyon as a conflagration. (*Id.* 18-20.) And because of PacifiCorp's spoliation, the jury was

permitted to infer the destroyed evidence would have shown additional ignitions and wider spread.[2] (Op Br 20-21, 39; ER-274.)

Finally, all relied on the same evidence that PacifiCorp's conflagration forced the hundreds of firefighters stationed in the canyon to protect it from the Beachie Creek Fire to evacuate, leaving the canyon defenseless against whichever fire reached it. (Op Br 21-22, 40.) PacifiCorp now says, without citation, that whether the evacuation mattered to a given owner "turned on where that owner's property sat." (Ans Br 40.) But that is not what it argued at trial, where it told the jury the evacuation affected no one. (Tr 8402-04.) Plaintiffs' theory and PacifiCorp's defense instead spanned the entire fire area.

The trial court found as a factual matter that each of those theories was common by its nature. It found at certification that the

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[2] The class relied in part on circumstantial proof to show the cause and extent of PacifiCorp's fires because PacifiCorp destroyed much of the physical evidence of what its equipment did that night. (Op Br 20-21.) The trial court instructed the jury that if PacifiCorp "willfully destroyed or failed to preserve evidence relating to the cause of the fires," PacifiCorp bore "the burden of proving that the evidence destroyed or not preserved would not have been adverse to defendant." (ER-274.) PacifiCorp does not challenge that instruction on review. Having destroyed much of the direct evidence of where its fires started and spread, PacifiCorp is in no position to fault the class for supplementing their proof with circumstantial evidence.

Santiam class would prove causation with common evidence (ER-68-69), and relying on that finding, it rejected PacifiCorp's contrary account—the same one PacifiCorp's brief now offers—when it denied decertification during and after trial. (ER-319-20; TCF-10/11/2023 at 2-8.) PacifiCorp's disagreement with that factual finding carries no weight on appeal. *See Pearson*, 358 Or at 130.

C. There Was No "Material Variation" Between Fire Areas.

PacifiCorp also argues that there were "material variations" *between* fire areas because the different fire areas involved different evidence. But the structure of this issues class action never allowed differences between fire areas to bear on any class question, so those differences cannot be "material variation" among the members from different fires.

A class member in the 242 Fire area and one in the Echo Mountain Complex Fire area never had a claim decided together, so a difference in their causation evidence or legal standards cannot be variation within any issue the jury decided. That was by design rather than error. The certification order anticipated "differences in the fact-specific causes for each of the four geographic fire areas" and appointed different class representatives for each fire, and the

verdict form required the jury answer every class question separately for each fire area. (ER-68-69, ER-77; ER-290-305.) The whole point of the fire-by-fire structure was to allow PacifiCorp to contest each fire on that fire's evidence and to require the jury consider each fire separately.

PacifiCorp's complaint appears to be that four fires should not have been tried in one proceeding. However, that is an objection to "a decision of judicial administration" on which "the trial court is customarily granted wide latitude." *Pearson*, 358 Or at 107 (quoting *Newman v. Tualatin Dev. Co.*, 287 Or 47, 51, 597 P2d 800 (1979)). PacifiCorp identifies no abuse of that discretion.

D. The Common Evidence Was Sufficient to Support the Verdict.

To the extent PacifiCorp's factual challenge is intended to dispute whether the common evidence was sufficient, rather than whether it was common, it still fails. PacifiCorp primarily cites *Strawn*, 350 Or at 356, which considered the question of when, in a consumer fraud class action, the element of "reliance can be determined through common, rather than individualized evidence." But as the Court observed in *Pearson*, this problem arises in the reliance context because "[r]eliance * * * is necessarily subjective—it

turns on what individual purchasers in fact believed and whether their beliefs motivated their purchases[.]" *Pearson*, 358 Or at 135 n26. That differentiates reliance from "an objective inquiry," which "would be common to the class." *Id.*

None of the classwide issues here involve subjective inquiries into class members' state of mind. Rather, only objective evidence could support Plaintiffs' causation case across all four fire areas: that "facing extreme fire conditions, PacifiCorp did not de-energize its equipment anywhere," that it failed to act despite knowing a windstorm would hit Oregon during critical fire conditions, and that its history of mismanagement meant the storm would cause its equipment to ignite fires. (ER-63; Op Br 10-11.)

Put another way, a jury that credited Dean Warner and the other witnesses in the canyon could find, objectively, that PacifiCorp's fires burned uncontrolled across the canyon hours before the Beachie Creek Fire arrived. And a jury could find, again objectively, that PacifiCorp's fires left every parcel in the canyon undefended.

That is why PacifiCorp has lost this sufficiency argument every time it has made it: the jury found that PacifiCorp's negligence was a

cause of harm to every class member affected by the Santiam Canyon fire (ER-292), and the Court of Appeals rejected PacifiCorp's assignment of error asserting an "absence of evidence that a PacifiCorp-caused fire harmed every member of the class." *James v. PacifiCorp*, 348 Or App 347, 379, 590 P3d 618 (2026).[3]

PacifiCorp has never accepted the trial court's class certification ruling or the jury's finding that its grossly negligent conduct caused harm to the entire class in each fire area. But a party's disagreement with factfinders does not amount to improper class certification or failure of classwide proof.

II. The Class Questions Instruction Accurately Stated the Law for the Class That Was Certified.

Typically, an appeal based on an asserted instructional error considers whether the instructions, read as a whole and in context, "correctly state the law, are based on the current pleadings in the case, and are supported by evidence." *Purdy v. Deere & Co.*, 355 Or 204, 227, 324 P3d 455 (2014) (citation omitted). But PacifiCorp, like the Court of Appeals, hardly engages with that analysis and cannot demonstrate the instruction was legally wrong.

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[3] PacifiCorp did not cross-petition on the Court of Appeals' ruling on sufficiency of the evidence.

The class questions instruction told the jury that although the absent class members were not in the courtroom, the class representatives had presented the evidence on their behalf. Rather than analyze the instruction as a whole, *see State v. Woodman*, 341 Or 105, 118, 138 P3d 1 (2006), PacifiCorp focuses narrowly on the passage that the jury "may assume that the evidence at the trial applies to all class members" (ER-278-79). In doing so, PacifiCorp never explains how its reading of the challenged sentence fits with the sentences around it, especially the immediately preceding sentence, which told the jury "[t]here is no requirement that individual class members appear in court to prove their case" (*id.*). Nor does PacifiCorp mention the instruction's critical final sentence: "Each class question is broken down by fire." (ER-279.)

And even in isolating the single challenged sentence, PacifiCorp does not engage with its plain meaning. As Plaintiffs explained, to "apply" is to have "a bearing," to be "pertinent"—so that, although the absent class members would never appear, the class representatives presented evidence that was pertinent for the class. (Op Br 49-50.) PacifiCorp does not say why or how "applies" could mean "to prove" or "suffices to prove." It says only that "[j]urors

do not consult Webster's Third when delivering verdicts[.]" (Ans Br 54.) But this Court does when it decides what an instruction told the jury. *See, e.g., Martineau v. McKenzie-Willamette Med. Ctr.*, 371 Or 247, 256, 533 P3d 1, opinion adh'd to as modified on recons, 371 Or 408 (2023) (construing uniform instruction by dictionary definition of its terms).

And with that context, the challenged sentence told the jury only that the evidence the class representatives presented bore on the claims of the class members they represent—"broken down by fire"—and left what that evidence proved to the burden-of-proof and causation instructions. That is a correct statement of how a class action works.

The same omissions undo PacifiCorp's other textual argument. PacifiCorp observes that the "User Guide" for the California pattern instruction on which the challenged instruction was based states that the instructions must be adapted where "'unique or complex circumstances prevail.'" (Ans Br 50-51 (quoting User Guide).) But the trial court did what the User Guide directs: it adapted the pattern instruction to this case, adding the sentence telling the jury that "[e]ach class question is broken down by fire" and directing the jury

to a verdict form that asked every class question separately for each fire area. (ER-279; ER-290-305.) PacifiCorp's complaint that the court gave a stock instruction in a complex case is wrong.

Read as a whole, *Woodman*, 341 Or at 118, the instruction correctly stated the law for the class as certified. PacifiCorp, as the party asserting instructional error, has the burden to show the instruction was improper. *Purdy*, 355 Or at 225. Other than by arguing that class certification was improper, which it was not, PacifiCorp hardly attempts to meet that burden.

III. The Class Questions Instruction Did Not Prejudice PacifiCorp.

Last, the trial court's jury instruction did not, as PacifiCorp puts it, "allow[] Plaintiffs to escape their failure to establish liability on a classwide basis." (Ans Br 60.) Like the Court of Appeals, PacifiCorp presumes prejudice from a small portion of the instruction without addressing the rest of the record, which disproves any such prejudice.

From the start, PacifiCorp applies the wrong legal standard to the prejudice analysis. This Court has long held that ORS 19.415(2) "imposes a burden on the party asserting an error to demonstrate that the error had the required prejudicial effect." *Purdy*, 355 Or at

225. Yet PacifiCorp argues that it is automatically entitled to reversal "[i]f the instruction was erroneous" because "Plaintiffs do not offer any basis for the Court to conclude it was not prejudicial." (Ans Br 61.)

That turns the framework on its head. Under the correct legal standard, the presumption that a jury follows its instructions "does not mean * * * that all or most instructional error substantially affects a party's rights for the purposes of ORS 19.415(2)." *Purdy*, 355 Or at 227. Rather, the objecting party must demonstrate that prejudice, and the Court decides whether it has done so by considering "the instructions as a whole" and "the instructions in the context of the evidence at trial and the parties' theories of the case." *Id.* at 227-28.

PacifiCorp does not conduct the "record-based review" this Court requires. *See id.* It offers no analysis of the fire-by-fire structure of the trial, the 80-question fire-by-fire verdict form, the instructions as a whole, the jury's question to the trial court, or the jury's verdict. It instead reads the challenged sentence in isolation to argue the error was "not simply that the jury could have applied proof of one fire to another fire, but that the jury was permitted to

apply evidence about class representatives to all class members." (Ans Br 62 (emphases omitted).) PacifiCorp then says Plaintiffs' counsel "amplified" that purported error in closing. (*Id*. at 57.)

As to Plaintiffs' closing, PacifiCorp does not attempt to explain how it "amplified" the purported error. Each reference in Plaintiffs' closing conveyed the correct meaning of the instruction—that each class member need not appear in court. (Tr 8348, 8495.) Nor does PacifiCorp explain why any perceived misstatement in Plaintiffs' closing was not corrected by its own closing in which it told the jury, without objection, there were "four classes" and that Plaintiffs had "to prove causation for each and every single one." (Ans Br 60-63; Tr 8363.)

And as to "apply[ing]" evidence about class representatives to the class, the trial court's instruction in response to the jury's question eliminated any possible misconception. When the jury asked during deliberations whether "a decision for named plaintiffs automatically extend[s] to class members," the court answered, "[n]o, not necessarily in all circumstances," and instructed that an answer of yes or no as to the class representatives "does not automatically extend that yes or no" to the entire class. (Tr 8572, 8589; TCF-

06/08/23.) A jury is presumed to follow the court's instructions, *Wallach v. Allstate Ins. Co.*, 344 Or 314, 326, 180 P3d 19 (2008), and PacifiCorp supplies no reason to believe, let alone record evidence to show, that the jury disregarded this instruction and did the opposite.

PacifiCorp's cases do not change that conclusion. In *Wallach* and *Pine*, the instruction misstated an element of a claim or defense, so any jury that followed it would err; the chance a jury reached a permissible result anyway was "too slight." *Wallach*, 344 Or at 322, 326; *see also State v. Pine*, 336 Or 194, 200, 210, 82 P3d 130 (2003). By contrast, the instruction here stated no element. PacifiCorp agrees the instruction is proper in the ordinary class case (Ans Br 26, 50-51), and the Court of Appeals agreed that "the error is not in CACI No. 115 in the abstract, but in giving it in this case," *James*, 348 Or App at 380. Where, as here, the claimed error lies in an instruction's fit with the record, it is the record that shows whether there is "some likelihood" that the jury adopted the erroneous reading. *Purdy*, 355 Or at 232. The record here shows the opposite: the jury was told over and over not to make the assumption that PacifiCorp posits, and nothing suggests it did so.

PacifiCorp also points to *Elan v. Tate*, 294 Or App 76, 86-87, 430 P3d 179 (2018), where the jury was instructed on permanent injury, and counsel emphasized the instruction although no evidence supported a permanence finding. In like manner, PacifiCorp argues the jury must have misread the instruction here because "Plaintiffs did not prove that PacifiCorp harmed each class member." (Ans Br 62.) The jury, the trial court, and the Court of Appeals have each rejected that premise, and PacifiCorp did not seek review of the Court of Appeals' holding. *Supra* Part I.B; *James*, 348 Or App at 379. PacifiCorp has lost that sufficiency argument three times, and it does not now supply the prejudice required for reversal.

* * *

Ultimately, this class action worked as ORCP 32 envisions. Thousands of Oregonians were harmed because of common corporate recklessness. The trial court exercised its discretion to manage the case in the only way that would allow PacifiCorp's victims resolution in their lifetime. In doing so, the trial court leveled the playing field between everyday people and a multibillion-dollar corporation, and paved the way for those harmed by PacifiCorp to seek full justice that would otherwise be unavailable.

PacifiCorp distracts from the issues on appeal by claiming it has "settled thousands of cases" and paid "$2.2 billion" to date. (Ans Br 28-29.) Nearly all the settlements PacifiCorp trumpets, however, were driven by and followed the class verdict here. Beyond that, PacifiCorp declines to specify who has received that $2.2 billion. Much of that has gone to government entities, corporations and insurers, rather than survivors. And by settling with the insurers before the survivors, PacifiCorp has derived a substantial benefit: after resolving the insurers' subrogation claims for pennies on the dollar, PacifiCorp has turned around and offset 100% of the insurance benefits paid from class members' judgments. *See* Plaintiffs-Respondents' Answering Brief and Opening Brief on Cross-Appeal, at 123-42.

As to the survivors, PacifiCorp destroyed homes, entire communities and livelihoods, and has left thousands with lasting trauma. It has since wielded its superior resources to wait out the survivors for more than six years, resulting in a desperation that has forced some to accept far less than their full losses. Yet before this Court now are thousands of survivors who have yet to receive a single dollar from PacifiCorp and who seek full justice and

accountability. They ask this Court to affirm the trial court, including on class certification, and reverse the Court of Appeals.

Dated this 6th day of October, 2026.

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COMBINED CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b)(i)(E) the word count of this brief (as described in ORAP 5.05(1)(d)(i)) is 3981 words.

I certify that the size of the type in this brief is not smaller than 14-point for both the text of the brief and footnotes as required in ORAP 5.05(1)(d)(ii).

DATED this 6th day of October, 2026.

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CERTIFICATE OF FILING AND SERVICE

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

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

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