IN THE SUPREME COURT OF THE STATE OF OREGON

SONJA BOHR, TAMARA BARNES, KAREN FOGLESONG, and MARY WOOD, on behalf of themselves and all others similarly situated, Plaintiffs-Respondents,
Petitioners on Review,

v.

TILLAMOOK COUNTY CREAMERY ASSOCIATION, an Oregon cooperative corporation,
Defendant-Appellant,
Respondent on Review.

SONJA BOHR, TAMARA BARNES, KAREN FOGLESONG, and MARY WOOD, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,
Petitioners on Review,

v.

TILLAMOOK COUNTY CREAMERY ASSOCIATION, an Oregon cooperative corporation, Defendant-Respondent, Respondent on Review.

A17555

S069773

On petition for review of a decision of the Court of Appeals

On appeal from a judgment of the Multnomah County Circuit Court,
Hon. Kelly Skye

BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CONSUMER BRANDS ASSOCIATION, FOOD NORTHWEST, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., NATIONAL RETAIL FEDERATION, OREGON BUSINESS & INDUSTRY, AND RETAIL LITIGATION CENTER, INC.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENTS OF INTEREST OF *AMICI CURIAE*

The *amici* identified below (collectively, the "*Amici*") are a consortium of leading business associations. *Amici*'s members include both national and Oregon organizations representing businesses and brands that produce, market, and sell goods to consumers throughout the State of Oregon. *Amici* jointly submit this brief to highlight the significant economic and business ramifications of this Court's decision and the weight of authority supporting the reliance requirement in the consumer-products context. If the Court elects to extend businesses' liability to statements on which customers do not rely, the practical effect would be an explosion of massive and burdensome class actions including consumer plaintiffs who did not even see, let alone rely on, the alleged misrepresentations. The increased costs of these class actions would harm both Oregon businesses and consumers alike. The *Amici* listed below urge this Court to affirm the Court of Appeals' decision in favor of Tillamook County Creamery Association ("Tillamook").

The **Chamber of Commerce of the United States of America** (the "Chamber") is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before both

policymakers and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the business community.

Food Northwest is a non-profit mutual benefit corporation with members serving the food sector across Oregon, Washington, and Idaho. The organization is domiciled in the state of Oregon. Food Northwest has approximately 300 food and food-related member companies representing the second largest manufacturing employment sector in Oregon after semiconductors. Food Northwest provides advocacy and education that helps member companies produce sustainable wholesome food for consumers around the world.

Oregon Business & Industry ("OBI") is a non-profit mutual benefit corporation with members organized under the laws of the state of Oregon. OBI has approximately 1,600 members and, as a general business association, is recognized as the state chamber of commerce. OBI's members come from a variety of industries and all parts of the state geographically. OBI is the state affiliate of both the National Association of Manufacturers and the National Retail Federation. OBI exists to strengthen Oregon's economy to achieve a healthy, prosperous, and competitive Oregon for the benefit of present and future generations.

The **Retail Litigation Center, Inc.** (the "RLC") is a 501(c)(6) nonprofit organization that represents national and regional retailers, including many of the country's largest and most innovative retailers, across a breadth of retail verticals.

The RLC is the only trade organization solely dedicated to representing the retail industry in the courts. The RLC's members employ millions of people throughout the U.S., provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC offers retail-industry perspectives to courts on important legal issues and highlights the industry-wide consequences of significant cases. Since its founding in 2010, the RLC has filed more than 200 *Amicus* briefs on issues of importance to the retail industry. Its *amicus* briefs have been favorably cited by multiple courts, including the U.S. Supreme Court. *See, e.g., South Dakota v. Wayfair, Inc.*, 585 US ___, 138 S Ct 2080, 2097, 201 L Ed 2d 403 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 US 519, 542 133 S Ct 1351, 185 L Ed 2d 392 (2013); *State v. Welch*, 595 SW3d 615, 630 (Tenn 2020).

The **National Federation of Independent Business Small Business Legal Center, Inc.,** is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. ("NFIB"), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

The **Consumer Brands Association** represents the world's leading consumer-packaged goods companies, as well as local and neighborhood businesses. The consumer-packaged goods industry is the largest U.S. manufacturing employment sector, delivering products vital to the wellbeing of people's lives every day, and contributes $2 trillion to U.S. gross domestic product and supports more than 20 million American jobs. In the state of Oregon, the products residents rely on to power their day have a massive impact on the state's economy including $24 billion in gross domestic product and nearly 300,000 jobs.

Established in 1911, the **National Retail Federation** (the "NRF") is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all sizes, formats, and channels of distribution, spanning all industries that sell goods and services to consumers. The NRF provides courts with the perspective of the retail industry on important legal issues impacting its members, particularly novel legal theories of liability such as the argument advanced by Petitioners here. To that end, the NRF often files *amicus* briefs expressing the views of the retail community on numerous topics, including on cases such as this that would dramatically expand NRF members' liability for alleged losses for plaintiffs who were not affected by or even aware of allegedly deceptive retail advertising.

INTRODUCTION & SUMMARY OF ARGUMENT

Reliance is a fundamental, longstanding, and widely accepted component of the causation element in misrepresentation actions under state unfair-trade-practice statutes. Essential to establishing causation, reliance forms the key link between an alleged misrepresentation and a party's alleged damages. Yet Petitioners ask this Court to abandon reliance, which formed the basis for one of its central holdings in *Pearson v. Philip Morris, Inc.*, 358 Or 88, 361 P3d 3 (2015). Namely, Petitioners would have this Court strike the requirement set forth in *Pearson* that a Plaintiff must prove reliance in the context of a consumer retail transaction. Eliminating the requirement that consumers must prove and plead reliance in this context would have broad negative public-policy consequences, which this Court should avoid.

The weight of authority cautions against eliminating reliance, which is especially essential for misrepresentation claims in the consumer-products context. Given the wide variety of factors that motivate a consumer to purchase a product, courts do not presume reliance on any particular alleged misrepresentation. And for good reason: As the Court of Appeals observed in this matter, "people choose different dairy products for myriad reasons," including many unrelated to the alleged misrepresentations. *Bohr v. Tillamook Cnty. Creamery Ass'n*, 321 Or App 213, 244, 516 P3d 284 (2022). Accepting Petitioners' argument would contradict *Pearson* and sever the critical causal link that reliance supplies between the alleged

misrepresentation, on the one hand, and the compensation paid to each individual plaintiff, on the other.

To remedy their inability to plead or prove reliance, Petitioners seek to import the "price inflation theory" from securities litigation into unfair-trade-practice claims. Over the course of decades, courts have repeatedly made a distinction regarding how and when the price-inflation theory applies such that a plaintiff is absolved from proving reliance. For securities markets, courts assume that virtually every participant has the same motivation: profits. *But see Halliburton Co. v. Erica P. John Fund, Inc.*, 573 US 258, 292–93, 134 S Ct 2398, 189 L Ed 2d 339 (2014) (Thomas, J., concurring in the judgment) (questioning that assumption); *Basic Inc. v. Levinson*, 485 US 224, 256, 108 S Ct 978, 99 L Ed 2d 194 (1988) (White, J., concurring in part and dissenting in part) (same). It follows from that assumption (and the further questionable assumption that securities markets accurately reflect public information) that a material misrepresentation about a security's value likely affected the market for that security to some degree. Whether or not these assumptions about securities markets are accurate, in the consumer retail market at least, purchasers' motivations are far less consistent.

Retail consumers buy products for all sorts of reasons. For example, some consumers might prefer a product because it's the same product they have always bought or that they grew up with, or because it is produced by a flagship local

company, or because it was on sale, or because they like the product's appearance on the shelf, or because it was the only type of product available in the retail store at the time—or some combination of these factors. Such extremely varied consumer motives explain why courts treat the retail and securities markets differently for purposes of putative class actions alleging fraud or misrepresentation. Petitioners ask this Court to ignore this critical distinction entirely. Without any authority under Oregon law, and contrary to case law from other jurisdictions, Petitioners ask this Court to turn Oregon law into a novel legal experiment. In its thorough survey of authority from Oregon and elsewhere, the Court of Appeals correctly concluded that the legal theory underlying Petitioners' proposed new form of tort liability is unpersuasive. To hold otherwise would contradict the reasoned analysis of many courts and commentators.

Should the Court accept Petitioners' theory, class certification will become near automatic in consumer-misrepresentation cases. Plaintiff class members will no longer need to offer individualized evidence that they each relied on, or even were aware of, defendants' misrepresentations (*i.e.*, that *each* plaintiff's alleged injuries were *caused* by the alleged misrepresentations), leading to awards for plaintiffs who were not in fact damaged and *in terrorem* settlement demands that ultimately hurt both consumers and businesses.

Amici urge the Court to reject Petitioners' invitation to extend the price-inflation theory to consumer-misrepresentation claims and affirm the Court of Appeals.

ARGUMENT

I. Petitioners must plead and prove individual reliance to establish liability.

This Court should reaffirm and preserve *Pearson*'s central holding that reliance is essential to demonstrate the causation element of a consumer-goods misrepresentation claim under the Unlawful Trade Practices Act, ORS 646.605, *et seq.* ("UTPA"). That holding reflects fundamental tort-law principles and the decisions of courts across the country applying state unfair-trade-practices statutes.

A. *Pearson* unmistakably held that individual reliance is a necessary component of causation for consumer-misrepresentation claims.

Pearson provided a two-step framework for analyzing whether reliance is necessary for a UTPA claim. At the first step, the Court explained, "[w]hether reliance is required to establish causation turns on the nature of the unlawful trade practice and the ascertainable loss alleged." 358 Or at 126 (citing *State ex rel. Redden v. Discount Fabrics*, 289 Or 375, 384, 615 P2d 1034 (1980); *Sanders v. Francis*, 277 Or 593, 598–99, 561 P2d 1003 (1977)). "Causation is logically established if the purchaser shows that, without the misrepresentation, the purchaser would not have bought the product and thus should be entitled to a refund." *Id.*

At the second step, the Court held that, in the context of consumer transactions, *reliance is required*: "This is a more typical consumer transaction, one that involves consumer choices that implicate states of mind, perceptions, beliefs, and conscious and subconscious motivations." *Id.* at 133. Accordingly, the Court held that the plaintiffs, who alleged class-wide reliance, "failed to show that the reliance required to prove their refund theory of economic loss could be litigated through common evidence, rather than requiring individual inquiries of the class members." *Id.* at 135. The Court further stressed the distinction between the *objective* question of whether a misrepresentation was made, and the *subjective* question of whether a given plaintiff relied on the alleged misrepresentation: "As an objective inquiry, it would be common to the class. Reliance, however, is necessarily subjective—it turns on what individual purchasers in fact believed and whether their beliefs motivated their purchases." *Id.* at 135 n 26.

Based on this analysis, the takeaway from *Pearson* is two-fold. First, whether reliance is required depends on the nature of the transaction. And second, individual consumers inherently have countless distinct motivations in deciding to purchase a product. Therefore, because a consumer's decision to purchase a product is necessarily subjective, proof of individual reliance is required in consumer transactions.

B. The weight of authority from other jurisdictions demonstrates that reliance is a necessary component of causation for a misrepresentation claim under statutes like Oregon's UTPA.

Turning to other jurisdictions' approach to this same issue, courts and commentators alike agree that individualized proof of each plaintiff's reliance is essential for a consumer-misrepresentation claim under state unfair-trade-practices statutes.

Individual reliance is a fundamental element of a fraud or misrepresentation claim.[1] *See Restatement (Second) of Torts* § 548A (1977) ("A fraudulent misrepresentation is a legal cause of a pecuniary loss resulting from action or inaction *in reliance upon it* if, but only if, the loss might reasonably be expected to result *from the reliance*.") (emphases added); 10 *American Law of Torts* § 32:20 (explaining a defendant is liable only for fraud or misrepresentation if "reliance is a substantial factor in determining the course of conduct that results in [the plaintiff's] loss"). Accordingly, "[l]egal presumptions of class-wide reliance are rare." 2 *McLaughlin on Class Actions* § 8:11 (20th ed 2023) ("McLaughlin"); *see also CGC Holding Co., LLC v. Broad & Cassel*, 773 F3d 1076, 1095 (10th Cir 2014) ("[T]he presumption [of reliance] is uniquely applicable in the securities context and it has not gained traction in other fields of law."). Indeed, "the overwhelming

[1] While the elements of a UTPA claim are not identical to the elements of a common law fraud claim, both require causation, and the treatment of reliance in other contexts is instructive.

majority of courts have rejected efforts to export the fraud on the market theory of presumed reliance to common law or statutory fraud cases." 2 McLaughlin § 8:11 (internal citations omitted). "In particular, courts have refused to extend the presumption [of reliance] to consumer fraud cases, and have repeatedly recognized that the mere fact that a plaintiff allegedly paid an inflated price for a product is insufficient alone to establish reliance or causation." *Id.* (internal citations omitted). These holdings across jurisdictions confirm the basic principle that a cause of action for fraud or misrepresentation under the common law or statute requires individual reliance.

Numerous courts have provided a thorough and sound analysis as to the importance of reliance in consumer-fraud cases. For example, *Thorogood v. Sears, Roebuck & Co.*, 547 F3d 742, 743–44 (7th Cir 2008), involved a class action alleging that clothing dryers marketed as having a stainless steel drum did not, in fact, contain a drum that was entirely stainless steel. In the Court's opinion reversing the trial court's certification of a class action under various state consumer-protection statutes, the *Thorogood* Court echoed *Pearson*'s holding that a consumer's reliance is necessarily a subjective inquiry: "In granting class certification, the district judge said that because 'Sears marketed its dryers on a class wide basis * * * reliance can be presumed.' Reliance on what?" *Id.* at 748. "[T]he proposition that the other half million buyers, apart from Thorogood, shared his understanding of Sears's

representations and paid a premium to avoid rust stains is, to put it mildly, implausible * * *." *Id.* The court further explained that, like the Petitioners here, the class members could have purchased the product based on any one of a "host of features that might matter to consumers." *Id.* at 747. Therefore, each class member's claim required individualized hearings, precluding class certification. *Id.*

As another example, in *Weinberg v. Sun Co., Inc.*, 565 Pa 612, 618, 777 A2d 442, 446 (2001) the Pennsylvania Supreme Court refused to presume that each member of a plaintiff class relied on the defendants' statements under Pennsylvania's Unfair Trade Practices and Consumer Protection Law. The plaintiffs alleged that the defendant's advertising convinced them that their vehicles needed higher octane gasoline. *Id.* at 614, 777 A2d at 443. In affirming the denial of class certification, the court explained: "There is no authority which would permit a private plaintiff to pursue an advertiser because an advertisement *might* deceive members of the audience and *might* influence a purchasing decision when the plaintiff himself was neither deceived nor influenced." *Id.* at 617–18, 777 A2d at 445–46 (emphases added). The Court further reasoned that "[t]he statute clearly requires, in a private action, that a plaintiff suffer an ascertainable loss *as a result of* the defendant's prohibited action." *Id.* at 618, 777 A2d at 446 (emphasis in original). "That means, in this case, a plaintiff must allege reliance, that he purchased [the

gasoline] *because* he heard and believed Sunoco's false advertising that [it] would enhance engine performance." *Id.* (emphasis added).

Consistent with *Thorogood* and *Weinberg*, well-reasoned analyses from numerous jurisdictions hold that consumer plaintiffs must prove individual reliance to recover for fraud or misrepresentation, including under states' consumer-protection statutes. *See, e.g., Hunt v. U.S. Tobacco Co.*, 538 F3d 217, 222 (3d Cir 2008), as amended (Nov. 6, 2008) ("The Supreme Court of Pennsylvania has consistently interpreted the Consumer Protection Law's private-plaintiff standing provision's causation requirement to demand a showing of justifiable reliance, not simply a causal connection between the misrepresentation and the harm."); *Bumpers v. Cmty. Bank of N. Virginia*, 367 NC 81, 88, 747 SE2d 220, 226 (2013) (holding that a claim under North Carolina's unfair and deceptive practices statute "stemming from an alleged misrepresentation does indeed require a plaintiff to demonstrate reliance on the misrepresentation in order to show the necessary proximate cause" and "[s]uch a requirement has been the law [in North Carolina] for quite some time"); *White v. Wyeth*, 227 W Va 131, 140, 705 SE2d 828, 837 (2010) ("[W]hen consumers allege[, under West Virginia's Consumer Credit Protection Act,] that a purchase was made because of an express or affirmative misrepresentation, the causal connection between the deceptive conduct and the loss would necessarily include proof of reliance on those overt representations."); *Oliveira v. Amoco Oil*

Co., 201 Ill 2d 134, 155, 776 NE2d 151, 164 (2002) ("[T]o properly plead the element of proximate causation in a private cause of action for deceptive advertising brought under the [Illinois Consumer Fraud] Act, a plaintiff must allege that he was, in some manner, deceived.").

Each of these cases recognizes reliance's fundamental role in establishing the causal connection between the alleged misrepresentation and the plaintiff's alleged harm. As one commentator summarizes: "In a misrepresentation class action, reliance-causation ties the plaintiff's loss to an injustice by the defendant. Reliance-causation thus links 'doer and sufferer,' or institutionally speaking, the plaintiff and the defendant." Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance As an Essential Element*, 43 Harv J on Legis 1, 42–43 (2006) (citing Ernest J. Weinrib, *Causation and Wrongdoing*, 63 Chi-Kent L Rev 407, 414, 429-30 (1987)). "Reliance identifies *this specific* plaintiff as someone entitled to recover for her injury from all the persons who heard or saw the defendant's misrepresentation. Because tort law functions within a litigation system, this understanding forms the basis of the entire structure of the tort system * * *." *Id.* at 43. (citing Weinrib, 63 Chi-Kent L Rev at 414). Eschewing this link between plaintiff and defendant will open the door to all purchasers to seek damages for a harm they never suffered in the first place.

C. Adopting the price-inflation theory for consumer torts would improperly blur the distinction between private rights of action and state enforcement rights.

Courts have also recognized that preserving the reliance element also appropriately preserves the distinction between private rights of action and the Oregon Department of Justice's ("ODOJ") distinct—and more expansive—enforcement rights to preserve market integrity. This Court has previously recognized the distinction between these two separate causes of action. "Unlike a private litigant, who 'may bring a UTPA claim only if it has suffered an ascertainable loss of money or property as a result of a willful violation of the statute, [those] requirements do not apply when the state brings a UTPA claim.'" *See State ex rel. Rosenblum v. Johnson & Johnson*, 275 Or App 23, 32–33, 362 P3d 1197, 1203 (2015) (quoting *Rathgeber v. James Hemenway*, Inc., 335 Or 404, 413 n 5, 69 P3d 710 (2003)). In other words, consumers must demonstrate individual reliance while the ODOJ need not provide "proof that any consumer has suffered economic loss or other injury as a result of the unlawful practice." *Pearson*, 358 Or at 116 & n 17 (explaining that ODOJ need not show private loss of money or property because some trade practices are contrary to public policy even though they may not result in a loss).

Other courts are in accord. For example, in *New Jersey Citizen Action v. Schering-Plough Corp.*, 367 NJ Super 8, 16, 842 A2d 174, 178–79 (NJ Super Ct

App Div 2003), the Court rejected an effort to use the price-inflation theory to prove that a restaurant overcharged for soft drinks. It reasoned that "adopting plaintiffs' version of causal nexus would also effectively eliminate the distinction in the Act itself respecting private rights of action created for consumers, * * * and the rights created to permit the Attorney General to pursue a remedy, even in the absence of harm to any particular individual." *Id.* (internal citations omitted).

Here, ODOJ has every right to bring its own enforcement action if it deems it appropriate under the UTPA and the requirements of the statute are met. But the UTPA does not deputize private plaintiffs to recover without proving causation. Allowing such claims would effectively turn private UTPA claims into a claim on behalf of the public at large, which the UTPA does not permit. "[T]he theory on which plaintiffs seek to rely would virtually eliminate the requirement that there be a connection between the misdeed complained of and the loss suffered." *New Jersey Citizen Action*, 367 NJ Super at 16, 842 A2d at 178–79. To adopt Petitioners' "theory would therefore fundamentally alter the concept of causation in the [Consumer Fraud Act] context [and] the relationship between the alleged misstatement and the ascertainable loss suffered would become so attenuated that it would effectively disappear." *Id.* To preserve the distinction between the UTPA's *private* right of

action and ODOJ's *public* enforcement power, the Court should decline Petitioners' efforts to abandon reliance altogether.[2]

II. The price-inflation theory is inapplicable in the consumer retail market context.

To rectify their inability to plead or prove reliance, Petitioners seek to create a new creature of Oregon tort and consumer-protection law. They ask this Court to adopt their price-inflation theory, which the vast majority of other jurisdictions have rejected as illogical and inapplicable to consumer fraud or misrepresentation claims. Consistent with these jurisdictions, this Court should reject this approach under Oregon law.

A. The economic assumptions supporting the price-inflation theory do not hold for the consumer retail market.

The price-inflation theory is a corollary to the "fraud on the market" theory.[3] "The 'fraud-on-the-market' doctrine refers to a rebuttable presumption establishing the reliance element in securities fraud cases." *State v. Marsh & McLennan Companies, Inc*., 353 Or 1, 3 n 1, 292 P3d 525 (2012). The logic of this theory is premised on the assumption that "the price of a security traded in an efficient market

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[2] Oregon has no statute analogous to California's Private Attorneys General Act. *See* Cal Lab Code § 2698, *et seq.* (authorizing plaintiffs to file suits on behalf of other aggrieved parties). In fact, in 2021, the Oregon legislature considered but did not pass a bill that would have authorized private citizens to bring an action for violations of state law enforceable by state officials. HB 2205 (2021).

[3] The Court of Appeals correctly recognized that the fraud-on-the-market theory and price-inflation theories rest upon the same logic. *Bohr*, 321 Or App at 239–40.

will reflect all publicly available information about a company[.]" *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 US 455, 458, 133 S Ct 1184, 1190, 185 L Ed 2d 308 (2013). The fraud-on-the-market theory posits that the price of a security, and thereby each purchaser or seller of that security, factors in all available material public information about the security. *See id.*; *Basic*, 485 US at 246 (1988); *but see id.* at 255–56 (White, J., concurring in part and dissenting in part) (disputing the assumptions supporting the fraud-on-the-market theory).

"Courts have generally limited the use of the fraud-on-the-market theory to securities fraud cases" because in that context, they accept the general assumption that "[w]hen a purchaser buys stock at market price, he necessarily relies on any material misrepresentations incorporated into the price." *Appletree Square I, Ltd. P'ship v. W.R. Grace & Co*., 29 F3d 1283, 1287 (8th Cir 1994). But courts and commentators agree that this assumption simply does not apply in the context of consumer retail transactions. The Second Circuit provides a succinct explanation of this difference: "[W]e cannot assume that, regardless of whether individual [customers] were aware of defendants' misrepresentation, the market at large internalized the misrepresentation to such an extent that all plaintiffs can be said to have relied on it." *McLaughlin*, 522 F3d at 224. While courts assume an efficient securities market "capable of rapidly assimilating public information into stock prices[,] * * * the market for consumer goods * * * is anything but efficient." *Id.*

Similarly, in an article *amici* Oregon Trial Lawyers Association and Oregon Consumer Justice cite,[4] one commentator articulates precisely why the consumer market is not efficient: "[Securities] markets differ from more familiar markets for consumer goods and services * * * in that (1) prices are set by impersonal market mechanisms, rather than by face-to-face bargaining; and (2) securities are typically not being purchased for any form of personal consumption, instead of or in addition to for investment and resale." Charles R. Korsmo, *Market Efficiency and Fraud on the Market: The Danger of Halliburton*, 18 Lewis & Clark L. Rev. 827, 868 (2014). If a market, such as the consumer goods market (*e.g.*, groceries), is not efficient, it follows that there is simply no viable way to tether the alleged misrepresentations to Petitioners' claimed losses that resulted from those alleged misrepresentations.

The OCJ/OTLA Brief acknowledges that the securities market and consumer markets are "fundamentally different."[5] However, those *amici* attempt to sidestep this key distinction by claiming "principles of supply and demand do just as well" as market efficiency to demonstrate the requisite causation, and "[a]dvertising creates demand, more demand drives up prices."[6] But this fails to account for the myriad forces beyond the alleged misrepresentations that affected the marketplace,

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[4] Brief of *Amici* Curiae Oregon Consumer Justice & Oregon Trial Lawyers Association ("OCJ/OTLA Brief"), at 18 n 4.

[5] OCJ/OTLA Brief, at 21 n 5.

[6] OCJ/OTLA Brief, at 21 n 5.

and which make price-inflation theory particularly inappropriate in consumer markets. In the securities context, purchasers internalize factors such as supply, demand, risk, profit, and long-term viability. It is hardly realistic to assume that retail consumers internalize the same factors.

The Court of Appeals correctly observed that factors beyond the alleged misrepresentations, such as personal preferences and different product features, can, and undoubtedly did, affect consumer demand and necessarily the price of Tillamook products. *Bohr*, 321 Or App at 244. This distinction between consumer market behavior and securities market behavior is precisely why courts across the country reject the price-inflation theory for consumer fraud and misrepresentation claims.

B. Courts in other jurisdictions routinely reject the price-inflation or fraud-on-the-market theories for consumer fraud or misrepresentation claims, including under state consumer protection statutes.

"The overwhelming majority of courts have rejected efforts to export the fraud on the market theory of presumed reliance to common law or statutory fraud cases." 2 McLaughlin § 8:11. For example, in *Harnish v. Widener Univ. Sch. of Law*, 833 F3d 298, 312–13 (3d Cir 2016), the Court recognized that "state courts have refused to recognize either [the price-inflation or fraud-on-the-market] theory outside the federal securities fraud context." In *Harnish*, the class-action plaintiffs alleged that the defendant law school violated New Jersey's and Delaware's consumer-fraud

statutes by misrepresenting alumni's employment statistics. *Id.* at 302. As a result, the plaintiffs argued, these misrepresentations inflated student demand for the school and caused the class members "to pay more for their education than it was truly worth."[7] *Id.* at 309. In rejecting the plaintiffs' argument, the Court observed: "The state courts, like the District Court in this case, have emphasized that recognizing 'price inflation' as a 'cause' of 'ascertainable loss' is essentially the same as extending the fraud-on-the-market presumption to all consumer-fraud cases." *Id.* at 312. "The practical effect of both theories is indeed the same, and both depend on the existence of an efficient market." *Id.* at 312–13. Because the higher education market was not an efficient market, however, the Court held that these theories were not viable. *Id.*

Echoing *Harnish*, courts have recognized that the fraud-on-the-market or price-inflation theory simply does not apply outside securities litigation. *See McLaughlin*, 522 F3d at 230 (rejecting the price-inflation theory because of "the possibility that damages could have resulted from factors unrelated to the defendant's alleged acts of fraud"); *Rosenstein v. CPC Int'l, Inc.*, CIV.A. 90-4970, 1991 WL 1783, at *4 (ED Pa Jan 8, 1991) ("This [fraud-on-the-market] theory, however, has been generally limited to the securities law context * * * . Such

[7] The *Widener* plaintiffs' increased-demand argument is virtually identical to OCJ and OTLA's supply-and-demand argument. *See* OCJ/OTLA Brief, at 21 n 5.

presumptions cannot be made with respect to 'non-perfect' markets, such as the consumer market.") (internal quotations/citations omitted); *CGC Holding Co,* 773 F3d at 1095 ("[T]he presumption [of reliance] is uniquely applicable in the securities context and it has not gained traction in other fields of law."); *In re POM Wonderful LLC,* ML 10-02199 DDP RZX, 2014 WL 1225184, at *4 (C.D. Cal. Mar. 25, 2014) (rejecting fraud-on-the-market theory because consumer market does not "operate[] efficiently"); *Int'l Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co., Inc.*, 192 NJ 372, 392, 929 A2d 1076, 1088 (2007) ("We have rejected the fraud on the market theory as being inappropriate in any context other than federal securities fraud litigation."); *Glassford v. Dufresne & Associates, P.C.,* 199 Vt 422, 435 n 7, 124 A3d 822, 830 n 7 (2015) ("[C]ourts have been firm in striking down the fraud-on-the-market theory for negligent misrepresentation and requiring, instead, actual reliance on the information by the aggrieved plaintiffs."); *Farmers Ins. Exch. v. Benzing,* 206 P3d 812, 822 (Colo 2009) (rejecting the fraud-on-the-market theory in commercial-insurance context because plaintiffs must "prove reliance"); *Strauss v. Long Island Sports, Inc.,* 60 AD2d 501, 510, 401 NYS2d 233, 237 (NY App Div 1978) (rejecting application of fraud-on-the-market theory to purchase of sporting-event tickets).

In short, the weight of authority from other jurisdictions confirms that the price-inflation theory does not work in the context of consumer fraud or misrepresentation claims.

III. Eliminating reliance or permitting the price-inflation theory for consumer fraud or misrepresentation claims will harm businesses and consumers.

The reliance requirement has traditionally served the important role of ensuring that the members of a putative class have actually suffered a real harm. Without that highly individualized requirement, class certification is more likely to be treated as near-automatic and result in *in terrorem* settlement demands that will have real-world economic impacts. This is simply not warranted under Oregon law because the existing suite of remedies—a private right of action for plaintiffs who relied on misrepresentations and a public right of action by OJD to preserve market integrity—is already sufficient. Requiring a causal connection between the alleged misrepresentation and the alleged harm avoids these improper results.

As the United States Supreme Court has explained, "Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Microsoft Corp. v. Baker*, 582 U.S. 23, 29, 137 S. Ct. 1702, 1708, 198 L. Ed. 2d 132 (2017) (quoting *Coopers & Lybrand v. Livesay*, 437 US 463, 476, 98 S Ct 2454, 57 L Ed 2d 351 (1978)); *see also AT&T Mobility LLC v. Concepcion*, 563

US 333, 350, 131 S Ct 1740, 179 L Ed 2d 742 (2011) (noting "the risk of 'in terrorem' settlements that class actions entail"). Those settlement pressures are only growing, as companies face more class actions and must spend more to defend them. In 2022, U.S. corporate spending on class actions ballooned to $3.64 billion while companies faced an average of 9.6 class action matters, up from an average of 8.9 in 2021. *See* 2023 Carlton Fields Class Action Survey at 5, 14, available at https://ClassActionSurvey.com (last visited December 21, 2023). If this Court accepts Petitioners' invitation to expand tort liability by dropping the reliance requirement, Oregon businesses will likely face these same trends, as class-action defendants *may be liable for harms they did not cause*, and plaintiffs extort inflated windfall settlements.

Even in the securities context, where courts have generally applied the fraud-on-the-market theory, courts have concluded that causation serves the important purpose of "polic[ing] the realm of § 10(b) [securities fraud claims] claims, guarding against their use as an *in terrorem* device to force companies to settle claims simply to avoid the cost and burden of litigation." *Meyer v. Greene*, 710 F3d 1189, 1196 (11th Cir 2013) (citing *Dura Pharms., Inc. v. Broudo*, 544 US 336, 347–48, 125 S Ct 1627, 161 L Ed 2d 577 (2005)); *see also Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 US 148, 163, 128 S Ct 761, 169 L Ed 2d 627 (2008) (pointing to potential for "plaintiffs with weak claims to extort settlements from innocent

companies" in securities context). Extending the price-inflation theory to the consumer-retail market will embolden class-action counsel to bring broad class claims on behalf of large groups that never cared about the alleged misrepresentation and were never harmed, notwithstanding their inability to plead or prove reliance or causation. Such plaintiffs will receive a windfall without regard to the fact that they obtained precisely the product they were seeking. This dramatic departure from bedrock princples of tort and consumer-protection law is not warranted.

CONCLUSION

At its core, Petitioners' theory for relief is incompatible with the decisions of this Court and courts across the country. The vast majority of courts have rejected the price inflation theory because it is inconsistent with fundamental principles of causation and its necessary economic assumptions simply do not reflect the marketplace. Consumer markets fundamentally differ from the securities market. Extending a questionable economic theory from securities litigation to the consumer retail context would be a dramatic and unwarranted expansion of liability in Oregon, destroying the longstanding reliance requirement for consumer fraud and misrepresentation claims, and drastically harming Oregon's business community. As this Court held in *Pearson*, consistent with courts across the country, individual reliance is a fundamental element of such claims. *Amici* respectfully request that this Court affirm the Court of Appeals.

Respectfully submitted this 21st day of December, 2023.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limitation in ORAP 5.05, which word count is 5840.

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CERTIFICATE OF FILING

I hereby certify that on December 21, 2023, I filed electronically with the Oregon Supreme Court the foregoing brief.

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I hereby certify that I served the foregoing brief on the following attorneys on the date stated below by electronic delivery from the Court's e-filing system and by sending a courtesy e-mail to:

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