IN THE SUPREME COURT OF THE STATE OF OREGON

KEVIN RAINS and MITZI RAINS,
Plaintiffs-Respondents-Petitioners on Review,

v.

STAYTON BUILDERS MART, INC., JOHN DOE LUMBER SUPPLIER, JOHN DOE LUMBER MILL and FIVE STAR CONSTRUCTIONS, INC.,
Defendants.

STAYTON BUILDERS MART, INC.,
Third-Party Plaintiff-Respondent,

v.

RSG FOREST PRODUCTS, INC., *et al.*,
Third-Party Defendants,

and

WEYERHAEUSER COMPANY,
Third-Party Defendant-Appellant
Respondent on Review.

WEYERHAEUSER COMPANY,
Fourth-Party Plaintiff,

v.

RODRIGUEZ & RAINS CONSTRUCTION, an Oregon corporation,
Fourth-Party Defendant.

July 2015

WITHERS LUMBER COMPANY,
Fourth-Party Plaintiff,

v.

SELLWOOD LUMBER CO., INC. and WEYERHAEUSER COMPANY,
Fourth-Party Defendants.

WESTERN INTERNATIONAL FOREST PRODUCTS, INC.,
Fourth-Party Plaintiff,

v.

BENITO RODRIGUEZ, KEVIN RAINS, RODRIGUEZ & RAINS CONSTRUCTION,
Fourth-Party Defendants.

SELLWOOD LUMBER CO., INC., an Oregon corporation,
Fifth-Party Plaintiff,

v.

SWANSON BROS. LUMBER CO., INC., an Oregon corporation,
Fifth-Party Defendant.

Marion County Circuit Court No. 06C21040

Court of Appeals No. A145916

Supreme Court No. S062939

BRIEF OF *AMICI CURIAE* WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION

On review of decision of the Court of Appeals on appeal from the Judgment of the Marion County Circuit Court

Honorable Dennis Graves, Judge
Court of Appeals Opinion filed: August 13, 2014
Reconsideration denied by Order: December 10, 2014
Author of Opinion: Ortega, P.J.
Concurring judges: Sercombe and Hadlock, JJ.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

The interests of Washington Legal Foundation ("WLF") and the Allied Educational Foundation ("AEF") are set out more fully in the accompanying motion to appear as *amici curiae*. In brief, WLF and AEF are organizations that have regularly appeared before this and other courts across the country to support the right of legislatures to adopt reasonable limits on the size of judgments awarded in civil litigation. In particular, in 1997 they filed a brief in *Lakin v. Senco Products, Inc.*, 329 Or 62, 987 P2d 463 (1999), urging the Court to uphold the constitutionality of Oregon's $500,000 cap on the award of noneconomic damages.

This case presents to the Court an opportunity to revisit *Lakin* and also to address important questions about the proper role of the legislative branch in adopting statutes that govern the law to be applied in civil actions. In deciding cases that have come before it, the Court has struggled for several decades to balance, on the one hand, the rights of the people through their elected representatives to adopt such statutes with, on the other hand, the constitutionally protected rights of individual litigants to obtain redress in the courts.

The Remedy Clause of Article I, § 10 of the Oregon Constitution provides significant protections for individual litigants seeking redress for

injuries. The scope of the Remedy Clause has not been at issue in this case. WLF and AEF respectfully submit that the Remedy Clause ought to be the Court's principal focus when balancing the rights of the legislature to adopt laws to be applied in civil actions, against the rights of individual litigants. They submit that the balancing process has been muddled when the Court has focused instead on rights protected by the Jury Clause, Article I, § 17.

Properly understood, the Jury Clause protects the right of all litigants to a jury trial on claims or requests that are properly categorized as "civil" or "at law." But the language of the Jury Clause ("In all civil cases the right of Trial by Jury shall remain inviolate") was never understood, when adopted in the constitutions both of Oregon and of numerous other States, to protect the rights of plaintiffs to assert any specific causes of action.

In its 1999 *Lakin* decision, the Court nonetheless ruled for the first time that the Jury Clause does, in fact, protect the rights of plaintiffs in civil actions to assert causes of action that were recognized by the common law at the time of adoption of the Oregon Constitution in 1857. *Lakin* was a misstep that misinterpreted the Jury Clause and has led to considerable confusion—both within this Court and throughout the legal community—regarding the legislature's power (now and in 1857) to amend the common law. It ought to be overruled.

Amici agree with Weyerhaeuser Co.'s argument that even if the Court adheres to *Lakin*, the legislature's cap on noneconomic damages is constitutional as applied to Plaintiffs' claims. This brief does not, however, address that argument. Nor does it address Plaintiffs' claim that the cap violates Article VII (Amended), section 3 (prohibiting any "fact tried by a jury" from being "re-examined in any court unless no evidence supports the verdict"); that claim is insubstantial, given that the cap on noneconomic damages does not purport to re-examine any findings of fact.

STATEMENT OF THE CASE

Plaintiff Kevin Rains suffered severe injuries when a board on which he was standing broke, causing him to fall 16 feet to the ground. His lawsuit against Stayton Builders Mart, Inc. (which supplied the board to the site of the accident) proceeded to trial based on a strict product liability claim. Stayton filed a third-party complaint for indemnity against Weyerhaeuser Co., alleging that Weyerhaeuser supplied it with the board that broke. The jury awarded Kevin Rains $5,237,000 in economic damages and $3,125,000 in noneconomic damages, and it awarded his wife, Plaintiff Mitzi Rains, $1,012,500 in noneconomic damages for loss of consortium. Because the jury found Kevin Rains 25 percent at fault for his injuries, the trial judge entered a limited judgment for Plaintiffs equaling 75 percent of the jury award. Accordingly, the

limited judgment includes $3,928,275 for economic damages and $3,103,125 for noneconomic damages. The judge also determined that Stayton was entitled to indemnification from Weyerhaeuser.

Oregon law provides, with certain exceptions inapplicable here, that "in any civil action seeking damages arising out of bodily injury, the amount awarded for noneconomic damages shall not exceed $500,000." ORS 31.710. Weyerhaeuser contends that ORS 31.710 requires that the Plaintiffs' award of noneconomic damages be limited to $1 million, thereby reducing the total award from $7.0 million to $4.9 million.

Citing *Lakin,* and *Klutschkowski v. PeaceHealth*, 354 Or 150, 311 P3d 461 (2013), the Court of Appeals concluded that the statutory cap on noneconomic damages violated the Jury Clause (and therefore was unconstitutional) as applied to Mitzi Rains's loss of consortium claim but was enforceable as applied to the noneconomic damages awarded to Kevin Rains. *Rains v. Stayton Builders Mart, Inc.*, 264 Or App 636, 659-66, 336 P3d 483 (2014). The appeals court reasoned that the legislature was entitled to impose limitations on Kevin Rains's recovery under his cause of action (strict product liability) because that cause of action did not exist when the Oregon Constitution was adopted in 1857. *Id.* at 664.

SUMMARY OF ARGUMENT

Article I, § 17 of the Oregon Constitution grants litigants the "right to Trial by Jury" in "all civil cases." Oregon courts have consistently understood that provision as granting both plaintiffs and defendants the right to insist that a jury decide all contested issues of fact in cases arising at law; a trial judge may not conduct a bench trial in such cases over the objection of one of the parties. *See, e.g., M.F.K. v. Miramontes*, 352 Or 401, 425, 287 P3d 1045 (2012) (stating that Article I, § 17 along with Article VII (Amended), § 3 "guarantee a right to jury trial on claims or requests that are properly categorized as 'civil' or 'at law,'" and whenever the claims or request for relief are *not* "equitable in nature" and thus would not "have been tried to a court without a jury at common law.").

Nothing in either the language or history of Article I, § 17 indicates that the provision was intended—as Plaintiffs assert—to give juries a right to determine the legal consequences of their factual findings or to limit the authority of the legislature to revise statutes in a manner that affects those legal consequences. The great majority of states whose Constitutions contain identical or nearly identical Jury Clauses have rejected Plaintiffs' assertion; they hold that legislatively enacted damage caps do not infringe on the right to a jury trial.

Lakin reached a contrary conclusion in 1999. But it provided no evidentiary or case-law support for its conclusion that the Jury Clause was intended to hold inviolate all common law causes of action recognized in Oregon in 1857 and that "these common-law actions carry with them fundamental rights to a jury determination of the right to receive, and the amount of, damages." *Lakin*, 329 Or at 77. There is no such support. Moreover, as the decision below well illustrates, *Lakin* has created considerable uncertainty regarding when the legislature's cap on noneconomic damages may constitutionally be applied and when it may not. *Lakin* should be overruled.

In the 1850s, citizens in Oregon and elsewhere explicitly recognized that the legislature possessed authority to amend the common law. Thus, even if *Lakin* were correct (and it is not) that the 1850s common law protected plaintiffs' rights to insist that a jury make the *final* determination "of the right to receive, and the amount of, damages," the legislature was entitled to change that common-law rule. Indeed, while the Jury Clause is silent regarding changes in common-law rules affecting civil litigants, another 1857 constitutional provision (Article XVIII, § 7) expressly recognizes the right of the legislature to amend all existing laws (which included the common law). As such, legislative initiatives—such as the cap on noneconomic damages—that allegedly alter common law powers ascribed to 1850s juries are fully consistent with the

contemporaneous understanding of the powers of legislatures.

Lakin appears to have been based on an outmoded, eighteenth-century conception of the common law that by 1857 was no longer accepted. Eighteenth-century legal theorists tended to view the common law as a fixed set of principles that should govern the resolution of disputes in all civilized societies, principles that wise judges or legislators could discover through reason:

> [O]ur lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, * * * and that what is not reason is not law.

1 William Blackstone, *Commentaries on the Laws of England* section 1 at 70 (1765).

But by the nineteenth century, the common law was no longer viewed as a static body of law; rather, judges recognized that common law is not so much "discovered" as it is continually created by judges on the basis of their experiences:

> The flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.

Hurtado v. California, 110 US 516, 530 (1884) (citing to Sir James Macintosh's *History of England*, Vol. 1 (1830)).

When Oregon's provisional legislature adopted legislation making "the common law" applicable to Oregon, it understood that it was adopting

background legal principles that could assist judges in deciding controversies, not a predetermined and fixed set of rules that judges should strive to discover. It further understood that courts' resolutions of those controversies were likely to change over time based on judges' and legislators' experiences in addressing new problems facing the State. The Court decided *Lakin*, on the other hand, on the anachronistic notion that the drafters of the 1857 Constitution viewed "the common law" at the time as a fixed rational set of Nature's rules, to be eternally preserved. Because that was not the drafters' view, they could not have intended the Jury Clause to encapsulate that view.

The Oregon Constitution does, however, contain one provision that, unlike the Jury Clause, is intended to limit the legislature's authority to significantly impair the rights of injured claimants to seek redress in the courts. That provision is the Remedy Clause of Article I, § 10—a provision not relied on by Plaintiffs in their appeal. But unlike *Lakin*, this Court's decisions construing the Remedy Clause have correctly recognized that the drafters of the 1857 Constitution did not intend to cast in stone all then-existing legal remedies. *See Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 124, 23 P3d 333 (2001) ("[T]he remedy clause does not freeze in place common-law causes of action that existed when the drafters wrote the Oregon Constitution in 1857.")

Rather, the Court has recognized that the Remedy Clause permits the

legislature to modify or even eliminate common-law remedies available in the 1857 Constitution, requiring only that the legislature creates an alternative remedy that gives injured claimants an opportunity to seek a meaningful level of redress.

If the expansive view of the Jury Clause embraced by *Lakin* is correct, the rights created by the Remedy Clause would be rendered superfluous. *Any* legislative effort to modify common law remedies that could be challenged successfully under the Remedy Clause would also be invalidated under the Jury Clause, and parties who brought a Jury Clause challenge would not need to demonstrate (as they must in a Remedy Clause challenge) that the legislature's modifications leave them without a meaningful remedy. *Lakin*, 329 Or at 81 ("[W]e do not assess the constitutionality of [the noneconomic damages cap] under Article I, section 17, based on the amount of the statutory cap; rather, we assess its constitutionality *because it is a cap* on the jury's determination of noneconomic damages.") (emphasis in original). Well accepted rules of textual interpretation counsel against an interpretation of the Jury Clause that would render the Remedy Clause largely superfluous.

ARGUMENT

I. THE JURY CLAUSE IMPOSES NO RESTRICTIONS ON LEGISLATIVE AUTHORITY TO MODIFY COMMON LAW

Article I, § 17 of the Oregon Constitution, the Jury Clause, grants litigants an "inviolate" "right to Trial by Jury" in "all civil cases." Plaintiffs' right to a jury trial was honored in this case: their claims were heard by a jury, and it made factual findings that they suffered, due to the tortious conduct of others, economic and noneconomic injuries totaling more than $9 million dollars. No party to these proceedings is seeking to overturn those factual findings.

Plaintiffs contend that the Jury Clause *also* entitles them to recover the full amount of the damages awarded to them by the jury and that any law that seeks to deprive them of the right to such a recovery violates the Jury Clause.[1]

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[1] Actually, Plaintiffs are quite selective in their challenge to laws that result in a variation between a jury's determination of the damages incurred by a claimant and the judgment ultimately awarded to that claimant. For example, Plaintiffs do not contest the $2.3 million reduction in the judgment based on comparative negligence law. The reduction was not mandated by the jury. Although the jury found that Kevin Rains was 25 percent responsible for his accident, it never directed that its award of damages should be reduced to take account of his negligence; that reduction occurred at the direction of the trial judge. Plaintiffs' failure to contest the $2.3 million reduction is likely a product of their recognition that, had the case been subject to the contributory negligence principles that governed Oregon tort law in 1857, Kevin Rains's negligence would have precluded *any* recovery.

They contend that ORS 31.710, which imposes a $500,000 per-person cap on noneconomic damages arising out of a bodily injury claim, is unconstitutional as applied to their claims, and thus that the trial court's award of $3,103,125 in noneconomic damages should be upheld.

Nothing in either the language or history of the Jury Clause indicates that the provision was intended to grant plaintiffs the substantive recovery rights asserted by Plaintiffs. While their assertion is supported by this Court's decision in *Lakin*, that decision was wrongly decided and should be overruled.

A. The Language and History of the Jury Clause Indicate That It Does Not Give Juries a Right to Determine the Legal Consequences of Their Factual Findings

Throughout the state's history, Oregon courts have consistently understood the Jury Clause to provide both plaintiffs and defendants the right to insist that a jury decide all contested issues of fact in cases arising at law. A trial judge may not conduct a bench trial in such cases when one of the parties requests a jury trial on any issue that would have been tried before a jury at common law. For example, in *M.F.K. v. Miramontes*, the Court held that a trial court violated the Jury Clause when, over the *defendant's* objections, it conducted a bench trial in a case in which the plaintiff sought both injunctive relief and damages; the Court held that the defendant was entitled to a jury trial on the claim for damages. *Miramontes*, 352 Or at 425. Until the Court decided

Lakin in 1999, it had never invoked the Jury Clause as the source of plaintiffs' rights not only to have a jury hear and decide contested issues of fact, but also to insist that they have an inviolate right, as a matter of law, to recover whatever damages the jury determines that they incurred.

Nothing in the text of the Jury Clause supports the existence of such a right. It grants a right to a specific procedure—a "Trial by Jury"—and makes no mention of a substantive right to any specific legal outcome. Juries have traditionally been understood to possess authority to decide all issues of fact, but no party in this appeal challenges the jury's factual determination that Kevin and Mitzi Rains collectively incurred $4.1 million in noneconomic damages as a result of Kevin's fall. A court's imposition of a legislatively mandated cap on damages is an application of legal principles to the jury's factual findings; it cannot plausibly be understood to constitute a re-examination of a jury's findings regarding the extent of damages actually incurred.

As Justice John Paul Stevens has explained:

> It is well settled that jury verdicts are not binding on either trial judges or appellate courts if they are unauthorized by law. A verdict may be insupportable as a matter of law either because of deficiencies in the evidence *or because an award of damages is larger than permitted by law*. If an award is excessive as a matter of law—in a diversity case if it is larger than applicable state law permits—a trial judge has a duty to set it aside. A failure to do so

> is an error of law that the court of appeals has a duty to correct on appeal.

Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 442 (1996) (Stevens, J., dissenting) (emphasis added).[2]

What eventually became Article I, § 17 apparently did not engender much discussion among delegates who met in 1857 to draft the Oregon Constitution. But the discussion surrounding adoption of Article I, § 16, which addresses the powers of juries in criminal cases, suggests that the drafters did not intend to grant civil juries the extremely broad powers urged by Plaintiffs. As originally proposed by the Judiciary Committee of the Constitutional Convention, Article I, § 16 (then numbered § 19) would have read, "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." *See* Charles Carey, *The Oregon Constitution* (1926) at 120. Proponents of the initial language championed it as an endorsement of the right of jury nullification; that is, the right to conclude that a "law was unconstitutional" and thus to refuse to enforce it. *Id.* at 313. The Convention

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[2] Although Justice Stevens wrote in dissent, he and the *Gasperini* majority fully agreed that the Seventh Amendment to the U.S. Constitution does not preclude appellate review of a jury's damage award on the grounds that the award is larger than permitted by law, even when the district court has approved the award. *Id*. at 436, 442.

did not accept the proposed language and instead revised the language to make clear that the authority of criminal juries to determine the law was cabined considerably. *Id.* at 327.

As finally adopted and ratified, the relevant clause of Article I, § 16 reads as follows: "In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the Court as to the law, and the right of new trial, as in civil cases." This Court has recognized that Article I, § 16 imposes considerable restrictions on the powers of criminal juries:

> It will be borne in mind that the clause of our Constitution under consideration [Article I, § 16] confers upon the jury in all criminal cases the right to determine the law and the facts, "under the direction of the court as to the law," *thereby restricting the authority of the jury to a much greater extent* than is prescribed by the organic law of Indiana or of Maryland or by the statute of Illinois, to which notice has been directed.

State v. Daley, 54 Or 514, 521-22, 103 P 502 (1909) (emphasis added). It seems highly unlikely that the drafters of the 1857 Constitution intended to grant civil juries the broad power to determine the legal consequences of their factual findings at the same time that they cabined the authority of criminal juries to make findings of law—particularly given that Article I, § 16's cabining language makes an explicit reference to the parallel authority of judges in civil cases.

Moreover, the language of the Jury Clause is identical to or nearly identical to language contained in the constitutions of many other States, and courts in a significant majority of those States have concluded that legislatively enacted damage caps do not infringe on the right to a jury trial. The courts of Indiana — its 1851 constitution was the model for the 1857 Oregon Remedy and Jury clauses (its right-to-jury provision was identical to Oregon's)[3]—have repeatedly held that legislatively imposed caps on damage awards do not violate the right to trial by jury or any other provision of the Indiana Constitution. *See, e.g., Johnson v. St. Vincent Hosp., Inc.*, 273 Ind 374, 400-01, 404 NE2d 585 (1980); *Indiana Patient's Compensation Fund v. Wolfe*, 735 NE2d 1187, 1193 (Ind. App. 2000).

Courts that have concluded that legislative caps on noneconomic damage awards do not violate constitutional provisions declaring "inviolate" the right to trial by jury have noted that a contrary result would call into question a broad range of well-accepted statutes, such as statutes of limitations. As the Idaho Supreme Court has explained:

> [T]he legislature has enacted statutes of limitations and repose which can effectively prevent plaintiffs from recovering damages

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[3] Indiana Constitution, Article I, § 20: "In all civil cases, the right of trial by jury shall remain inviolate."

> in personal injury cases. We can discern no logical reason why a statutory limitation on a plaintiff's remedy is any different than other permissible limitations on the ability of plaintiffs to recover in tort actions.

Kirkland by & ex rel. Kirkland v. Blaine County Med. Ctr., 134 Id 464, 468, 4 P3d 1115 (2000).

Moreover, if a legislative cap on damages violates constitutional provisions requiring that the right to trial by jury remain inviolate, then so too does a statute mandating *increases* in damage awards, but Plaintiffs do not make that argument, and *amici* are unaware of any court decision so holding. For example, no Oregon court has suggested that the Jury Clause calls into question the constitutionality of ORS 646.780, which permits claimants to recover three times the damages that a jury determines they suffered as a result of a defendant's antitrust violations. As the Ohio Supreme Court observed—in concluding that Ohio's cap on noneconomic damages did not violate the constitutional right to trial by jury—the legislature, by enacting "numerous" statutes that treble jury damage awards in certain causes of action:

> demonstrated a clear policy choice to modify the amount of jury awards. We have never heard that the legislative choice to *increase* a jury award as a matter of law infringes upon the right to a trial by jury; the corresponding *decrease* as a matter of law cannot logically violate that right.

Arbino v. Johnson & Johnson, 116 Ohio St 3d 468, 476, 880 NE 2d 420 (2007).

B. *Lakin* Is an Aberration That Should Be Overruled; It Lacks Any Support in Oregon Case Law and Has Created Considerable Uncertainty Regarding Legislative Power

The only decision from this Court that supports Plaintiffs' interpretation of the Jury Clause is *Lakin*.[4] *Lakin* held that Oregon's $500,000 statutory cap on noneconomic damages violated the Jury Clause as applied to "a common-law action . . . for which, until recently, no statutory limitation on noneconomic damages had existed." *Lakin*, 329 Or at 77. The Court explained that "these common-law actions [that existed at the time of adoption of the 1857 Oregon Constitution] carry with them fundamental rights to a jury determination of the right to receive and the amount of damages." *Ibid.*

Lakin was wrongly decided and should be overruled. Indeed, it provided no evidentiary or case law support for its conclusion that the Jury Clause was intended to hold inviolate all common-law causes of action recognized in Oregon in 1857. The Oregon case law it cited stands only for the proposition recently reaffirmed in *Miramontes*: that the Jury Clause grants both plaintiffs

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[4] The Court's 2013 *Klutschkowski* decision did not directly address the issue. *Klutschkowski* noted that "neither party has asked us to reconsider our decisions under Article I, section 10, or Article I, section 17"; it stated, therefore, that the only constitutional question raised by the case was "whether, in 1857, the common law recognized a claim for the type of injuries that occurred in this case." *Klutschkowski*, 354 Or at 168.

and defendants in civil cases a broad procedural right to insist that a jury decide all contested issues of fact in cases that would have been tried before a jury at common law. *See, e.g., Lakin*, 329 Or at 69-70 (citing *Molodyh v. Truck Ins. Exchange*, 304 Or 290, 295, 297-98 744 P2d 992 (1987); *State v. 1920 Studebaker Touring Car*, 120 Or 254, 259, 251 P 701 (1927); *Tribou v. Strowbridge*, 7 Or 156, 159 (1879)). *Lakin* also cites an 1869 Oregon circuit court opinion for the proposition that "compensation is the fundamental principle of the law of damages," *id.* at 73, a proposition understood by *Lakin* to mean that when a jury determines both that a plaintiff has been injured as a result of another's wrongful conduct and the extent of his damages, the law requires that the plaintiff be fully compensated for his damages. The cited circuit court opinion, *Oliver v. North Pac. Transp. Co.*, 3 Or 84 (1869), provides no support for that proposition. *Oliver* is simply a report of the jury charge given to the jury in a personal injury action. The trial judge instructed the jury:

> If the evidence satisfies you that the plaintiff is entitled to recover, it will be for you to determine from the evidence what amount of damages the plaintiff has sustained. . . . The defendant is not liable for anything beyond the actual loss and injury sustained by the plaintiff. And the plaintiff, if entitled to anything, is entitled to such a sum of money as will fully compensate him for all loss and injury to him, caused by the negligent or wrongful act.

Oliver, 3 Or at 87. In other words, the trial judge was simply providing the jury

with instructions regarding how it should go about making factual determinations regarding the extent of the damages suffered by a personal injury plaintiff. Nothing in those instructions provides any support for *Lakin*'s assertion that the judge was telling the jury that it was empowered to decide, as a matter of law, that the plaintiff was entitled to a monetary judgment equal to the amount of his damages. *Lakin* is undoubtedly correct that "the assessment of damages was a function of a common law jury in 1857," 329 Or at 74, but as other courts across the country have recognized, a legislature does nothing to impair a jury's fact-finding role when it enacts laws that establish the legal effects of the jury's fact-finding. *See, e.g., Etheridge v. Medical Center Hospitals*, 237 Va 87, 96, 376 SE 2d 525 (1989).

Lakin also asserted that the U.S. Supreme Court has "reached the same conclusion under the Seventh Amendment" that *Lakin* did in its interpretation of the Jury Clause. 329 Or at 74 n.8. In other words, the U.S. Supreme Court supposedly interprets the Seventh Amendment as restricting the power of Congress to abrogate or limit causes of action recognized under the common law. A case-by-case refutation of *Lakin*'s assertion is unnecessary; *Lakin* has badly misinterpreted each of the U.S. Supreme Court decisions it cites, as *amici*'s prior discussion of *Gasperini* well illustrates. The Supreme Court has repeatedly upheld federal statutes that abrogate common-law causes of action.

See, e.g., Riegel v. Medtronic, Inc., 552 US 312 (2008).

Overruling *Lakin* is warranted for the additional reason that, as this case well illustrates, *Lakin* has created considerable uncertainty regarding when the legislature's cap on noneconomic damages may constitutionally be applied and when it may not. *Lakin* held that "[t]he legislature may not interfere with the full effect of a jury's assessment of noneconomic damages." 329 Or at 82. But it limited its holding to "civil cases in which the right to jury trial was customary in 1857, or in cases of like nature." *Ibid*.

In the 16 years since *Lakin* was decided, this Court and lower courts have repeatedly struggled over whether a currently recognized cause of action was one "in which the right to jury trial was customary in 1857" or whether it is "of like nature" to such a cause of action. *See, e.g., Hughes v. PeaceHealth*, 344 Or 142, 178 P3d 225 (2008) (wrongful death cause of action); *Lawson v. Hoke*, 339 Or 253, 119 P3d 210 (2005) (negligence action by uninsured driver injured in car accident).

Plaintiffs' case demonstrates the difficulty in administering the *Lakin* standard. Their case proceeded to trial on a strict product liability claim, a cause of action that was not recognized in Oregon until the 1960s. They assert that they nonetheless are entitled to invoke the Jury Clause protections recognized by *Lakin* because, they assert, their strict product liability claim is a

case "of a like nature" to common-law negligence claims recognized in 1857. But the "of a like nature" standard is inherently vague, and lower courts cannot reasonably apply it in a manner that will result in consistent rulings. Moreover, as Justice Landau recently pointed out, "there is the unavoidable problem of determining the proper level of generality with which to analyze claims that may have existed at common law in 1857," given that modern-day tort actions often involve devices and factual situations that were unheard of in 1857. *Klutschkowski*, 354 Or at 191-92 (Landau, J., concurring).

Amici agree with Weyerhaeuser that the best reading of *Lakin* is that Plaintiffs' strict product liability claim is not entitled to the expanded Jury Clause protections that *Lakin* afforded to pre-1857 common-law causes of action. The Court of Appeals was nonetheless sufficiently confused by the issue that it apparently decided simply to split the baby: it upheld application of the statutory cap to Kevin Rains's claims but ruled that the cap violated the Jury Clause as applied to Mitzi Rains's claims. *Rains*, 264 Or App at 660-66. It did so even though her damages arose under the very same cause of action (strict product liability) as did his. The appeals court reasoned that her injuries consisted of loss of consortium and that common-law claims for loss of consortium predate 1857, *id.* at 665, yet she would not have been entitled to any compensation for those losses in the absence of her husband's twentieth-century

strict product liability claim. The difficulty that the Court of Appeals experienced in attempting to apply the *Lakin* rule to modern-day tort actions is all too typical and provides additional grounds for jettisoning a rule that lacks either textual support or historical antecedents.

C. The Drafters of the 1857 Oregon Constitution Recognized That the Legislature Possessed Authority to Amend the Common Law

Lakin is premised on a conclusion that the drafters of the 1857 Constitution adopted the Jury Clause in order to preserve for all time the common-law causes of action recognized in 1857 Oregon and to prevent subsequent legislation or judicial decisions from imposing any new limits on the power of a jury to award compensation to injured claimants. That premise is factually incorrect—nineteenth century Oregonians did not view the common law as a static body of precepts that should be impervious to change, nor did they perceive a need to prevent the legislature from amending the common law.

Oregon history amply demonstrates the central role played by the legislative branch in adopting and shaping common law within the State. As *Lakin* recognized, it was Oregon's provisional legislature that introduced the common law into Oregon in 1844. *Lakin*, 329 Or at 71-72 (citing Or Laws, Art

III, § 1, p.100 (1843-49)).[5] To say the least, it is incongruous to suggest that the governmental body responsible for making the common law applicable in Oregon lacks the authority to make changes in that law. Indeed, the legislation quoted in the footnote expressly reserved to the legislative branch the authority to "modif[y]" the common law by statute.

The following year, Oregon adopted the Organic Act of 1845, which preserved the right to trial by jury (Article I, § 2) while simultaneously providing that the common law should govern *only* "when no statute Law has been made or adopted." Organic Law of the Provisional Government of Oregon (reprinted in General Laws of Oregon (Deady 1845-64)). Those provisions are a clear indication that Oregonians in that era perceived no incompatibility between the right to trial by jury and legislative changes in the common law. Moreover, the territorial legislature on occasion exercised its authority to change the common law with respect to damages awardable in civil

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[5] As quoted in *Lakin*, the 1844 legislation provided:

> All the statute law of Iowa territory passed at the first session of the Legislative Assembly of said Territory, and not of a local character, and not incompatible with the condition and circumstances of this country, shall be the law of this government unless otherwise modified; and the common law of England and principles of equity, not modified by the statutes of this government and not incompatible with its principles, shall constitute a part of the law of this land.

trials; *e.g.*, in 1853 it adopted legislation modifying the remedy for the tort of timber trespass by providing for treble damages. *The Statutes of Oregon* (1853), Ch I, title II, § 17.

Furthermore, the 1857 Constitution explicitly recognized the power of the legislature to amend all laws then in effect, including the common law. Article XVIII, § 7 of the Constitution provided, "All laws in force in the Territory of Oregon when this Constitution takes effect, and consistent therewith, shall continue in force *until altered or repealed*." (Emphasis added.)

Plaintiffs' contention that the Jury Clause was intended to preserve for all time the right to recover damages recognized by the common law in 1857 is inconsistent with Article XVIII, § 7's recognition that laws in effect in 1857 were subject to alteration or repeal. There is no evidence that common law in the 1850s protected plaintiffs' rights to insist that a jury make the *final* determination "of the right to receive, and the amount of damages." *Lakin*, 329 Or at 77.[6] But even if *Lakin*'s view of 1850s common law were correct, the Constitution's explicit recognition of the legislature's right to change the

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[6] *See, e.g.*, Ronald J. Allen and Alexia Brunet, "The Judicial Treatment of Noneconomic Compensatory Damages in the 19th Century," 4 J. Empirical Legal Studies 365 (2007) (reporting on an empirical study concluding that nineteenth-century judges routinely reduced jury damage awards based on a finding that the awards were larger than permitted by law).

common law logically encompasses the authority to alter the legal effect of a jury's damage determinations. As such, legislative initiatives—such as the cap on noneconomic damages—that allegedly alter common law powers ascribed to 1850s juries are fully consistent with 1850s understandings of the powers of legislatures.

More fundamentally, *Lakin* appears to have been based on the eighteenth-century conception of the common law that by 1857 was no longer accepted. Legal theorists of the 1700s tended to view the common law as a fixed rational set of principles that should govern the resolution of disputes in all civilized societies, principles that wise judges or legislators would discover through reason. *See generally*, *Sosa v. Alvarez-Machain*, 542 US 692, 722 (2004) (likening the eighteenth-century view of the common law to a "brooding omnipresence in the sky"). Under this conception, the received view of the common law was subject to change only if a later generation of jurists concluded that a prior generation had employed flawed reasoning.

By the mid-nineteenth century, the common law was no longer viewed as a static body of law; rather, judges recognized that "the law is not so much found or discovered as it is either made or created." *Id.* at 725. Justice Joseph Story wrote this in 1825:

> If the English common law were perfect in itself, and

> were susceptible of no improvement, it might justly refuse any foreign admixture. But no one will be so rash as to advance a pretension of this sort. The common law is gradually changing its old channels and wearing new.

3 William W. Story, ed., *Miscellaneous Writings of Joseph Story* at 278 (1852), reprinting an 1825 article by Justice Story in *The North American Review*.

As Oliver Wendell Holmes would state in his famous nineteenth-century aphorism, "The life of the law has not been logic; it has been experience." Oliver Wendell Holmes, *The Common Law* at 1 (Howe ed. 1963). Moreover, constant change in the common law came to be viewed positively as a reflection of increasing judicial experience in addressing issues that tended to arise frequently.

Thus, when the provisional legislature adopted English common law as the law of Oregon in 1844, it provided explicitly that the common law was subject to " modif[ication] by the statutes of this government." Subsequent legislation included similar caveats, as did the 1857 Constitution itself. Moreover, under nineteenth-century understandings of the common law, pre-1857 Oregon lawyers and judges would have recognized that the common law was not intended to supply complete answers to all possible legal controversies but that, instead, judges and legislators would need to craft new rules as experience dictated.

Despite the absence of any mention of the common law in the Jury

Clause, *Lakin* concluded that: (1) the "common law" in 1857 protected plaintiffs' right to insist that a jury make the *final* determination of the amount of damages to be awarded to the plaintiff; and (2) the Jury Clause was intended to enshrine and preserve that rule for all time. The first conclusion lacks any historical support. The second conclusion is antithetical to the nineteenth-century view of the evolving nature of the common law; the drafters of the 1857 Constitution would have categorically rejected any effort (of the sort epitomized by *Lakin*) to freeze superseded eighteenth-century common law principles into the Jury Clause.

II. THE DRAFTERS OF THE CONSTITUTION ADOPTED THE REMEDY CLAUSE TO GRANT SUBSTANTIVE RIGHTS TO INJURED CLAIMANTS, YET *LAKIN* RENDERS THOSE RIGHTS TOTALLY SUPERFLUOUS.

The Remedy Clause of Article I, § 10 of the Oregon Constitution provides significant protections for individual litigants seeking redress for injuries. The scope of the Remedy Clause is not at issue in this case. WLF and AEF respectfully submit that the Remedy Clause ought to be the Court's principal focus when balancing the rights of the legislature to adopt statutes governing laws to be applied in civil action and the rights of individual litigants; they submit that the balancing process has been muddled when the Court has, as in *Lakin* , focused instead on rights protected by the Jury Clause, Article I, § 17.

The Remedy Clause provides that "every man shall have remedy by due course of law for injury done hm in his person, property, or reputation." In a long series of cases dating back to at least 1901, the Court has considered Remedy Clause challenges to a variety of statutes whose effect was to limit remedies otherwise available in common-law actions. The initial question in such cases is whether the 1857 common law would have recognized the cause of action that the legislature subsequently limited; if not, then the Remedy Clause is not implicated. *Howell v. Boyle*, 353 Or 359, 371, 298 P3d 1 (2013). If the answer is yes, then the Court "must determine whether a challenged limitation renders the common-law remedy inadequate." *Id.* The Court has emphasized:

> Article I, section 10 does not eliminate the power of the legislature to vary and modify both the form and the measure of recovery for an injury, as long as it does not leave the injured party with an "emasculated" version of the remedy that was available at common law.

Clarke v. OHSU, 343 Or 581, 606, 175 P3d 418 (2007).

Remedy Clause decisions have often focused on whether the modified remedy is constitutionally adequate. *See, e.g.*, *Smothers v. Gresham Transfer, Inc.*, 332 Or at 124. Importantly, "the mere fact that the statutory limitation resulted in a reduction in the amount that plaintiff otherwise would have been awarded, by itself, does not establish a violation" of the Remedy Clause.

Howell, 353 Or at 375. *Clarke* held that a modified remedy was constitutionally inadequate where it deprived the plaintiffs of 99% of the award that they would otherwise have received. But the Court has routinely affirmed the adequacy of the modified remedy, and rejected Remedy Clause claims, where the remedy provides the plaintiffs with 35 percent or more of the remedy that would have been available but for the modification. *See, e.g.*, *Howell*, 353 Or at 374-77; *Griest v. Phillips*, 322 Or 281, 290-92, 906 P2d 789 (1995).

In light of existing case law, it is unsurprising that Plaintiffs have not raised a Remedy Clause claim. Even if the cap on noneconomic damages were applied to the claims of both Plaintiffs, they still would recover $4.9 million, 70 percent of the damages that the jury determined they incurred. That recovery would be deemed adequate under all of the Court's Remedy Clause case law, and the cap cannot plausibly be said to have "emasculated" the remedy to which they would have been entitled in the absence of the cap.

Yet, if the expansive view of the Jury Clause embraced by *Lakin* is correct, the rights created by the Remedy Clause would be rendered superfluous. *Any* legislative effort to modify common law remedies that could be challenged successfully under the Remedy Clause would also be invalidated under the Jury Clause, and those bringing a Jury Clause challenge would not need to demonstrate (as they must in a Remedy Clause challenge) that the

legislature's modifications leave them without a meaningful remedy. *Lakin* could not have been more explicit that it is no defense to a Jury Clause claim that the legislative modification of common-law rules governing the award of damages still affords the plaintiff an adequate remedy; *any* reduction in the previously available common-law recovery is unconstitutional:

> This Court's Article I, section 17, jurisprudence never has established a "substantial" remedy test in defining the scope and meaning of the right to a jury trial. Moreover, we do not assess the constitutionality of [the statutory cap on noneconomic damages] under Article I, section 17, based on the amount of the statutory cap; rather, we assess its constitutionality *because it is a cap* on the jury's determination of noneconomic damages.

Lakin, 329 Or at 81 (emphasis in original).

Thus, by writing into the Jury Clause a prohibition against modification of common-law actions, *Lakin* has emasculated the Remedy Clause by turning it into mere surplusage. Well accepted rules of textual interpretation counsel against such an interpretation of the Jury Clause. *See, e.g., Bolt v. Influence, Inc.*, 333 Or 572, 580-81, 43 P3d 425 (2002) ("[W]e are to construe multiple [statutory] provisions, if possible, in a manner that will give effect to all.") There is no reason to construe constitutional provisions differently, and it is highly unlikely that the drafters of the 1857 Constitution would have undertaken the pointless exercise of including the Remedy Clause in the Oregon Constitution if they simultaneously included the Jury Clause for the purpose of

prohibiting every common-law modification that could possibly be covered by the Remedy Clause.

CONCLUSION

Amici curiae Washington Legal Foundation and Allied Educational Foundation respectfully request that the Court affirm the decision of the Court of Appeals to the extent that it upheld the constitutionality of ORS 31.710 as applied to the noneconomic damage claims of Kevin Rains and reverse the decision of the Court of Appeals to the extent that it held ORS 31.710 unconstitutional as applied to the noneconomic damage claims of Mitzi Rains.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

This brief complies with the word count limit of ORAP 5.05(2) and contains 7,299 words in 14-point Times New Roman font.

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CERTIFICATE OF FILING AND SERVICE

I certify that on July 2, 2015, I filed the foregoing Brief of *Amici Curiae* Washington Legal Foundation and Allied Educational Foundation with

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