Case No. S070771
IN THE SUPREME COURT OF THE STATE OF OREGON

ANDREW HUSKEY, Plaintiff-Appellant, Petitioner on Review v. OREGON DEPARTMENT OF CORRECTIONS AND OTHERS, Defendants-Appellees, Respondent on Review.	Marion County Circuit Court Case No. 22CV21140 Court of Appeals Case No. A180196 Supreme Court Case No. S070771

BRIEF OF AMICI CURIAE THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF OREGON IN SUPPORT OF PLAINTIFF–APPELLANT HUSKEY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

INTEREST OF AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the federal and state constitutions and our nation's civil rights laws. The American Civil Liberties Union of Oregon ("ACLU of Oregon") is the Oregon state affiliate of the national ACLU, with over 33,000 members in Oregon. The ACLU frequently appears before state and federal courts in cases involving incarcerated individuals. That work includes a focus on access to justice and the courts for those who suffer abuse in prison.

INTRODUCTION AND SUMMARY OF ARGUMENT

This breach-of-contract case arises from appellant Andrew Huskey's claim that the Oregon Department of Corrections (DOC) and certain DOC officials retaliated against him, in breach of a prior settlement agreement, and that this breach cost him job and training opportunities in prison. The Court of Appeals held that he cannot recover damages for those lost opportunities because of a provision of the Oregon Constitution that, as amici explain below, merely provides that prisoners lack a *standalone* right to prison jobs. That holding misapprehends contract law and the Oregon Constitution.

In April 2010, Mr. Huskey sued the DOC and various DOC officials under 42 USC § 1983, alleging medical negligence and inadequate treatment of certain gallstone and gallbladder issues. That case settled. As part of a settlement agreement, Mr. Huskey voluntarily dismissed his lawsuit, and the defendants agreed to change his prison placement and refrain from retaliation. But, according to Mr. Huskey, the defendants retaliated anyway; they included Mr. Huskey in training materials that portrayed him in a negative light. In his current case, filed in June 2022, Mr. Huskey alleges that this retaliation breached the prior contract, and he argues that this breach damaged him by causing him to lose prison job assignments and training opportunities.

Under basic contract law principles, this theory of breach and damages is valid. When two parties agree on a contract, they create enforceable legal rights in the performance of the contract. If one side breaches, the other side can recover damages caused by the breach. To be sure, there are limits to those damages. Most important, damages must be reasonably foreseeable consequences of a breach. *See Welch v. U.S. Bancorp Realty & Mortg. Tr*, 286 Or 673, 703, 596 P2d 947 (1979). But the plaintiff need not show that the damages

pertain to something in which the plaintiff had an enforceable right. For example, if a builder breaches a contract to build a rental property for a buyer, the buyer might be able to recover reasonably foreseeable lost profits due to her inability to rent out the property. But she would not have to prove a legal right to those lost profits.

As applied here, those principles mean that if the defendants breached their prior settlement with Mr. Huskey, then he can recover damages relating to lost prison job assignments and training opportunities so long as those losses were reasonably foreseeable consequences of the breach. He need *not* prove an altogether separate right to prison jobs and training.

But the Court of Appeals held otherwise. It pointed to section 41(3) of the Oregon Constitution, which mandates full-time work or on-the-job training for incarcerated individuals, but adds this disclaimer: "However, no inmate has a legally enforceable right to a job or to otherwise participate in work, on-the-job training or educational programs or to compensation for work or labor performed while an inmate of any state, county or city corrections facility or institution." Or Const, Art 1, §41(3). The Court of Appeals reasoned that Mr. Huskey cannot bring a contract suit alleging lost prison jobs

and training *as damages* because, under section 41(3), he lacks a standalone *enforceable right* to such jobs and training. (ER-74). This holding is incorrect for three reasons.

First, the Court of Appeals overlooked contract law. Because Mr. Huskey's contract case does not require him to prove an enforceable legal right to prison jobs or training opportunities, his case cannot be defeated by pointing to the absence of such a right under section 41(3).

Second, the text, structure, and history of section 41(3) make clear that its "however" clause bars, at most, lawsuits alleging that the first two sentences of section 41(3) create enforceable rights to prison jobs and training. Properly construed, section 41(3) does not abrogate any other legal claims, including contract claims.

Third, the Court of Appeals' rule, if upheld, would invite injustice and inefficiency. It would render parties to prison litigation incapable of entering into agreements that meaningfully protect prisoners from retaliation or other actions that may jeopardize their job and training opportunities. Without those protections, plaintiffs in prison litigation suits will be less likely to settle, bringing more cases to trial and ultimately straining the courts.

This Court should reverse the decision of the Court of Appeals.

ARGUMENT

I. A plaintiff in a breach-of-contract lawsuit can recover reasonably foreseeable damages, including damages as to which the plaintiff had no legally enforceable right.

In Oregon, plaintiffs who have suffered a breach of contract can recover damages that were reasonably foreseeably caused by the breach. The legal right entitling the plaintiff to those damages is the right to the performance of the contract itself. Under these foundational contract law principles, Mr. Huskey has stated facts sufficient to constitute a breach of contract claim and can recover damages relating to lost jobs and training opportunities so long as those losses were reasonably foreseeable consequences of the breach.

A. Contract plaintiffs can recover damages that are reasonably foreseeable consequences of a breach.

To state a claim for breach of contract under Oregon law, a plaintiff "must allege the existence of a contract, its relevant terms, plaintiff's full performance and lack of breach[,] and defendant's breach resulting in damage to plaintiff." *Slover v. State Bd. of Clinical Soc. Workers*, 114 Or App 565, 570, 927 P2d 1098 (1996) (internal quotation marks omitted). Causation is key to recovering damages. *See Logan v. D.W. Sivers Co.*, 343 Or 339, 353–54, 169 P3d

1255 (2007). Specifically, "consequential damages are recoverable if they are *reasonably foreseeable*." *Welch*, 286 Or at 703–06 (emphasis added); *State v. Ramos*, 358 Or 581, 596, 368 P3d 446 (2016) (same); *Zehr v. Haugen*, 318 Or 647, 658–59, 871 P2d 1006 (1994) (same). To determine whether damages are reasonably foreseeable, courts consider "whether a reasonable person in the defendant's position would have foreseen that someone in the [plaintiff]'s position could reasonably incur damages of the same general kind that the [plaintiff] incurred." *Ramos*, 358 Or at 597; *see also Logan*, 343 Or at 353–54.

For example, in *Welch*, a real estate developer and a lender entered into a contract for the lender to lend money to the developer to purchase and develop a certain parcel of land. 286 Or at 676–86. The lender allegedly failed to lend the money, and the developer sued for breach of contract. *See id.* A jury found for the developer and awarded damages that included lost profits from the anticipated real estate venture. On appeal, the lender argued that lost profits were "not a possible basis of recovery upon an untried business venture." *Id.* at 703. This Court rejected that argument. "Starting with fundamental concepts," this Court explained, "consequential

damages are recoverable if they are reasonably foreseeable." *Id.* In this case, because "the very purpose of the contract was to produce profit for the parties," the "[l]oss of profits from nonperformance of the agreement, if it occurred, was foreseeable." *Id.* at 703–04. Nor did it matter that the plaintiff could not precisely calculate the lost profits. "To hold otherwise," the Court explained, "would be tantamount to holding that the defendant could breach this particular contract with impunity." *Id.* at 705.

Similarly, in *Zehr v. Haugen*, this Court considered reasonable foreseeability in the context of an agreement to perform a tubal ligation. 318 Or 647 (1994). The plaintiffs, a husband and wife, entered into an agreement with the defendant, a doctor, to perform the tubal ligation while the wife was in the hospital for the birth of her second child. *Id.* at 650. The doctor did not perform the surgery, and the wife became pregnant and gave birth to a third child. *Id.* The plaintiffs brought a breach of contract claim against the doctor, alleging "economic damages in the form of expenses of raising the child and providing for the child's college education." *Id.* at 656. The defendant argued that these damages were "too 'speculative' to be recoverable," and filed a motion to dismiss, but this Court disagreed,

citing the fundamental rule for damages in Oregon: "consequential damages are recoverable if they are reasonably foreseeable." *Id.* at 659. Because the question of damages is for the jury, the Court held that the plaintiffs' complaint asserted damages that were "not, as a matter of law, too speculative to permit recovery." *Id.*

Although contract plaintiffs must prove that their alleged damages were reasonably foreseeable consequences of a breach, they are *never* required to prove an enforceable legal right in whatever was damaged. That's because, in a breach of contract case, the relevant legal right giving rise to the cause of action is the plaintiff's right to the performance of the contract. "Contract obligations are based on the manifested intention of parties to a bargaining transaction[.]" *Moody v. Oregon Cmty. Credit Union*, 371 Or 772, 779, 542 P3d 24 (2023). Once "the parties have agreed upon the performance expected by the plaintiff and promised by the defendant in terms that commit the defendant to that performance," that agreement creates mutual obligations, and with them enforceable rights to the performance of the contract. *Zehr*, 318 Or at 654. And those rights—rights in the performance of the contract, not rights to what was allegedly damaged in consequence of a breach of the

contract—are the only legal rights that contract plaintiffs must prove.

Thus, in *Welch*, the plaintiff developer had a legal right to the performance of the contract with the lender, and it recovered lost profits from an anticipated development that had never come into existence. The developer never had to prove a *legal right* to those profits. Similarly, in *Zehr*, the plaintiff couple certainly had no *legal right* to avoid having, and paying for, a third child. What they had was a legal right, under contract, to the performance of a tubal ligation. When the defendant breached that contractual right, the couple could recover reasonably foreseeable damages, including the cost of raising another child. *See also, e.g.*, *Gillett v. Tucker*, 317 Or App 570, 584, 507 P3d 323 (2022) (affirming finding of breach of contract when lessors of an apartment building failed to make major repairs "which they were under contractual duty to make," and remanding "for a determination of damages stemming from that breach of contract by defendants").

B. Mr. Huskey has stated a valid claim for breach of contract.

Under these contract principles, Mr. Huskey has alleged facts sufficient to constitute a breach of contract. In his complaint, Mr. Huskey alleges (1) the existence of a contract between himself and the defendants, (2) the relevant terms of said contract, including a promise not to retaliate against him, (3) Mr. Huskey's full performance (the dismissal of the 2010 lawsuit), and (4) defendants' breach in the form of retaliation, (5) resulting in damage to Mr. Huskey. (ER-3–9 (Second Amended Complaint at ¶¶ 11–13, 15–28)). *See Slover*, 114 Or App at 570 (listing the elements of a breach of contract claim). These allegations cover each required element of a contract claim.

Ultimately, under the contract principles above, whether Mr. Huskey can recover his alleged damages will depend on whether he can prove it was reasonably foreseeable that retaliating against him would cost him job and training opportunities. But the availability of those damages will not depend on whether Mr. Huskey had an enforceable legal right to jobs and training, because contract law does not require plaintiffs to prove a legal right to what was

damaged. Damages hinge on factual causation, not legal entitlements.

II. Article I, Section 41(3) of the Oregon Constitution does not bar incarcerated individuals from bringing breach-of-contract cases alleging damages relating to work assignments or training opportunities.

The Court of Appeals held that Mr. Huskey's claim is barred by Article I, section 41(3) of the Oregon Constitution. Since 1994, that provision has mandated that "[e]ach inmate shall begin full-time work or on-the-job training immediately upon admission to a corrections institution." Or Const, Art I, § 41(3). But since 1997, it has also said: "However, no inmate has a legally enforceable right to a job or to otherwise participate in work, on-the-job training or educational programs or to compensation for work or labor performed while an inmate of any state, county or city corrections facility or institution." *Id.* Although the Court of Appeals concluded that Mr. Huskey's claim is incompatible with the "however" sentence, that conclusion contradicts contract law and is inconsistent with the text, structure, and history of section 41(3).

A. Section 41(3) has no bearing on the availability of damages in contract cases.

The Constitutional language on which the Court of Appeals relied is, quite simply, irrelevant to Mr. Huskey's contract claim. As explained in Part I, a breach-of-contract claim alleging damages related to lost prison jobs or training does not require the plaintiff to prove a legal right to prison jobs or training. For that reason, the claim simply cannot be defeated by a legal provision—even a constitutional provision—negating the existence of such a right. The existence or nonexistence of a legally enforceable right to a prison job may be relevant to whether a plaintiff can bring a cause of action for the denial of an asserted right to a prison job. But it has no bearing on whether that plaintiff can bring a *contract* claim.

This Court's decision in *Coats v. State*, 334 Or 587, 54 P3d 610 (2002), illustrates this point. In *Coats*, the Oregon Department of Transportation (ODOT) contracted with a construction contractor (the plaintiff) to pave a portion of a state highway. 334 Or. at 589. The contract required the plaintiff to pay its workers under wage and hour rules adopted by the Oregon Bureau of Labor and Industries (BOLI). *Id.* The plaintiff did not comply with those rules, and as a

result ODOT did not pay the plaintiff. *Id.* The plaintiff sued ODOT for breach of contract, arguing that the BOLI wage and hour rules were legally invalid and that, in consequence, they could not be enforced as a contract term.

This Court disagreed. It held that the validity of BOLI's rules was simply "not relevant" to the contract dispute. *Id.* at 597. Even if the rules were invalid, and thus even assuming the plaintiff would have had no obligation to pay its workers in accordance with BOLI rules in the absence of the contract, the plaintiff "nonetheless could bind himself to do so by contract, as he did here." *Id.*

Eleven years later, this Court reaffirmed *Coats* in *Homestyle Direct, LLC v. Department of Human Services*, 354 Or 253, 311 P3d 487 (2013). The plaintiff, Homestyle Direct, was an Idaho corporation that prepares frozen meals and entered into an agreement with the Oregon Department of Human Services (DHS) to provide home-delivered meals to Medicaid recipients in Oregon. *Id.* at 255–57. DHS reimbursed Homestyle for the meals. *Id.* at 257. Part of the contract agreement was that Homestyle must comply with certain Home Delivery Meal or "HDM" nutrition standards. *Id.* at 257–58. Homestyle did not comply, and DHS issued a notice that it was

ending the agreement with Homestyle and would no longer reimburse them for meals. *Id.* at 258. In an administrative proceeding, Homestyle contended that the standards at issue "were unenforceable because they amounted to unpromulgated administrative rules." *Id.*

This Court held that *Coats* "squarely control[led]" the dispute. *Id.* at 265. Specifically, "even assuming that Homestyle could not be forced to comply with the HDM standards by operation of [law,] it nonetheless could bind itself to do so by contract, as it did here." *Id.* "It necessarily follows," the Court explained, that "the validity of the HDM standards, as rules, is irrelevant" to the breach of contract claim. *Id.*

Under *Coats* and *Homestyle Direct*, if prisoners have no freestanding right to jobs and training under the Oregon Constitution, then they arguably cannot bring a standalone cause of action for the denial of a right to jobs and employment. But prison officials can still enter contracts that make the officials liable to pay prisoners for lost jobs and training opportunities. That is what occurred here. By agreeing not to retaliate against Mr. Huskey, and by subsequently retaliating in ways that allegedly cost Mr. Husky

jobs and training opportunities, the officials made themselves contractually liable for those damages.

The Court of Appeals did not examine *Coats*, *Homestyle Direct*, or any contract principles. Instead, it reasoned that if an adult in custody (AIC) "has no legally enforceable right to work assignments or training opportunities" under the constitution, "then it follows that an AIC may not sue for breach of contract for lost income associated with the loss of such opportunities." (ER-21). That reasoning is mistaken. As the contract principles described above demonstrate, *see supra* Part I.A, and as *Coats* and *Homestyle Direct* confirm, a plaintiff can establish a defendant's liability to pay for items due to a contract even though, absent the contract, the plaintiff would have no legal right to such payments. Here, even assuming prisoners cannot bring lawsuits asserting a constitutional right to job and training opportunities, the DOC "nonetheless could bind itself" by contract to not sabotage those opportunities. *See Coats*, 334 Or at 589; *Homestyle*, 354 Or at 265. The Court of Appeals erred in holding otherwise.

B. Section 41(3) performs a narrow function that does not implicate contract cases.

The text, structure, and history of section 41(3) confirm that it does not abrogate any prisoner's contractual rights or remedies. This Court interprets a constitutional provision by "examining the text, in its historical context and in light of relevant case law, to determine the meaning of the provision at issue most likely understood by those who adopted it." *Knopp v. Griffin-Valade*, 372 Or 1, 9, 543 P3d 1239 (2024). When interpreting a constitutional amendment adopted by a ballot measure, the Court focuses on the intent of the voters as evidenced by the amendment's text and context. *Id.* Here, those interpretive tools demonstrate that the sole effect of the "however" clause in section 41(3), on which the Court of Appeals relied, is to bar prisoners from bringing causes of action under the first two sentences of section 41(3), which mandate full-time work and on-the-job training for all people incarcerated in Oregon.

1. The "However" clause of section 41(3) merely limits the effect of the preceding two sentences.

Article I, section 41(3), contains two sentences guaranteeing certain opportunities to prisoners, followed by a "however" sentence

barring prisoners from suing to enforce those guarantees. The provision reads:

> Each inmate shall begin full-time work or on-the-job training immediately upon admission to a corrections institution, allowing for a short time for administrative intake and processing. The specific quantity of hours per day to be spent in work or on-the-job training shall be determined by the corrections director, but the overall time spent in work or training shall be full-time. However, no inmate has a legally enforceable right to a job or to otherwise participate in work, on-the-job training or educational programs or to compensation for work or labor performed while an inmate of any state, county or city corrections facility or institution. . . .

Or Const, Art I, § 41(3).

The plain text and structure of this provision make clear that the language at issue here—"However, no inmate has a legally enforceable right to a job or to otherwise participate in work"—clarifies that the first portion of the provision does not provide a cause of action allowing prisoners to sue, under section 41(3), to enforce a constitutional right to work in prisons. Indeed, Oregon case law is clear that the term 'however' at the beginning of a provision is "most naturally read as a limitation on the" immediately preceding text. *SIF Energy, LLC v. State*, 275 Or App 809, 816, 365 P3d 664 (2015); *see In re Marriage of Carroll & Murphy*, 186 Or App 59, 68,

61 P3d 964 (2003) ("A sentence that begins with the word 'however,' followed by a comma, operates similarly to the word 'but,' and thus qualifies what is described previously."); *Beitey v. Benefit Ass'n of Ry. Emp.*, 226 Or 522, 524, 360 P2d 620 (1961) (a phrase "follow[ing] the word 'however' must have been used to qualify and explain" the clause immediately preceding the phrase); *Shoemaker v. Johnson*, 241 Or 511, 521, 407 P2d 257 (1965) (finding that "[t]he word 'However' in the second sentence" of a statute "is a reservation upon the general right of election of remedies granted in the prior sentence"). "In this context, 'however' is an adverb meaning 'in spite of that: on the other hand: BUT.'" *SIF Energy*, 275 Or App at 816.

The Court of Appeals did not consider the word "however" in section 41(3), nor did it consider the case law instructing courts to interpret the word "however" as a restriction on what *immediately* precedes it. The Court of Appeals then proceeded to interpret the "however" clause of section 41(3) not as a narrow bar against causes of action under the first two sentences of section 41(3), but instead as a sweeping abrogation of any legal claim implicating a prisoner's lost jobs or training. The text and governing case law simply do not support this broad view of the "however" clause.

Moreover, the text of section 41(3) provides no reference to contract law. It does not say, for example, that normal contract principles are abridged.[1] Nor does it purport to limit the ability of individuals or corrections officers and the department of corrections from contracting.[2] And it is not as though the drafters of the provision did not know how to state that existing law does not apply to the prison work context. Section 41(8), for example, provides that compensation for those engaged in prison work programs "shall not be subject to existing public or private sector minimum or prevailing wage laws." Or Const, Art I, § 41(8). The same provision also

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[1] *Cf.* Or Const, Art XI, § 7 (prohibiting certain contracts and providing that "every contract of indebtedness entered into or assumed by or on behalf of the state in violation of the provisions of this section shall be void and of no effect"); Okla Const, Art XXII, § 8 ("Any provision of a contract, express or implied, made by any person, by which any of the benefits of this Constitution is sought to be waived, shall be null and void."); Ariz Const, Art X, § 8 (declaring "null and void" certain land contracts "not made in substantial conformity with" the Enabling Act)

[2] *Cf.* Or Const, Art IX, § 11 ("Neither the state nor any political subdivision of the state shall contract to guarantee any rate of interest or return on the funds in a retirement system or plan established by law, charter or ordinance for the benefit of an employee of the state or a political subdivision of the state."); Ga Const, Art VII, para IV ("The state, and all state institutions, departments and agencies of the state are prohibited from entering into any contract," subject to certain exception).

exempts incarcerated worker compensation from unemployment compensation taxes and workers compensation law. *See id.* These provisions show that the drafters of section 41 explicitly considered how the provision would interact with existing state and federal law and yet remained silent about any interaction with contract law. Put simply, there is no indication in the text of the provision that it was meant to circumvent contract law in any way.

2. The history and context of the "However" clause confirm that it does not abrogate contract law.

The history and context of the "however" clause of section 41(3) confirm that its reach is narrow rather than broad. Section 41 was originally added to the Oregon Constitution by Oregon Measure 17, adopted by the people on November 8, 1994. *Oregon Measure 17, Require Full-Time Work for State Prison Initiative 1994*, Ballotpedia, https://ballotpedia.org/Oregon_Measure_17,_Require_Full-Time_Work_for_State_Prison_Inmates_Initiative_(1994) (last visited July 1, 2024).

As originally adopted, section 41(3) provided:

> Each inmate shall begin full-time work or on-the-job training immediately upon admission to a corrections institution, allowing for a short time for administrative

> intake and processing. The specific quantity of hours per day to be spent in work or on-the-job training shall be determined by the corrections director, but the overall time spent in work or training shall be fulltime. The corrections director may reduce or exempt participation in work or training programs by those inmates deemed by corrections officials as physically or mentally disabled, or as too dangerous to society to engage in such programs.

Phil Keisling, Or. Sec. of State, Voters' Pamphlet: State of Oregon General Election November 8, 1994 (Oct. 17, 1994), available at https://statelibraryor.recollectcms.com/nodes/view/24575.

Following section 41's enactment, people incarcerated in Oregon prisons began to sue the state and state officials, claiming that section 41 "grant[ed] them enforceable rights." Phil Keisling, Or. Sec. of State, Voters' Pamphlet: State of Oregon Special Election—May 20, 1997 (Apr. 21, 1997), available at https://statelibraryor.recollectcms.com/nodes/view/24584. According to then-Governor John Kitzhaber, following section 41's adoption the state began seeing "suits in which inmates have attempted to claim a right to a job." *Id.*

In 1997, in response to those lawsuits, the Oregon House of Representatives proposed an amendment adding the "however" sentence to section 41. *Id.* The voters approved the amendment that

same year. The materials surrounding this amendment made clear that its purpose was to limit standalone claims asserting a constitutional right to work in prison, not to prevent prisoners and prison officials from entering into *agreements* making prisons liable for denying work and training to specific prisoners. For example, the Explanatory Statement in the Official 1997 May Special Election Voter's Pamphlet stated that the measure responded to incarcerated plaintiffs "currently suing the state claiming that existing state constitutional provisions grant them enforceable rights." *Id.* Similarly, the Legislative Argument in Support stated that the change "specifies that inmates have an obligation, not a right to work," which will "reduce frivolous lawsuits by inmates." *Id.* And Governor Kitzhaber wrote that the change sought to "provid[e] the legal basis for the rejection of suits in which inmates have attempted to claim a right to a job." *Id.*

The Department of Corrections appears to have shared that same understanding of the proposed amendment. Shortly before the election, the DOC's public affairs director explained that the amendment was in response to lawsuits asserting freestanding rights to work in prison: "[W]e didn't believe voters wanted inmates

to be able to sue the state for a job . . . . Some inmates say they have a right. We don't think they do." Jennifer Schmitt, *Measure 49 would amend 17*, Oregon Daily Emerald (May 8, 1997), available at https://oregonnews.uoregon.edu/lccn/2004260239/1997-05-08/ed-1/seq-4.pdf (internal quotation marks omitted).

These materials nowhere suggest that the amendment to section 41(3) was meant to bar incarcerated plaintiffs from recovering on a contract claim for lost income due to alleged retaliatory activity by the DOC. In fact, they do not mention contract law at all. Instead, the language was inserted to clarify and restrict the first two sentences of section 41(3), in response to an increase in lawsuits brought by incarcerated plaintiffs claiming that section 41(3) gave them an enforceable right in and of itself.

III. The Court of Appeals' approach discourages reasonable settlements and encourages needless trials.

Beyond being legally incorrect, interpreting section 41(3) to bar contract claims would also significantly undermine the ability of both incarcerated plaintiffs and prison officials to enter into enforceable agreements. The actual or perceived unenforceability of these

agreements would, in turn, discourage litigation settlements, strain the courts, and undermine prisoners' rights.

A. Settlements are essential to prison litigation.

Settlements are a vital part of the legal system in general and prison litigation in particular. Incarcerated people who experience wrongs often turn to the legal system for redress of unjust treatment, abuse, or unconstitutional conditions. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 UC Irvine L Rev 153, 155 (2015); Ashley Dunn, *Flood of Prisoner Rights Suits Brings Effort to Limit Filings*, NY Times (Mar. 21, 1994), https://www.nytimes.com/1994/03/21/nyregion/flood-of-prisoner-rights-suits-brings-effort-to-limit-filings.html. But prison litigation is costly and time-consuming for both parties, making settlement an attractive option. *See, e.g.*, Bill Quigley & Sara Godchaux, *Prisoner Human Rights Advocacy*, 16 Loy J Pub Int L 359, 361 (2015) ("Traditional litigation for prisoners . . . is extremely costly, lawyer intensive, and time consuming."). In fact, the Prison Litigation Reform Act expressly contemplates the settlement of prison civil rights suits via consent decrees or private settlement agreements. 18 USC § 3626(c).

Prison litigation is far more likely to settle than it is to go to trial. Nationwide, approximately 6–7% of federal prison litigation formally ends in settlement, and another 6% ends in voluntary dismissals that, in turn, can arise from agreements between the parties. *See Data Update*, Incarceration and the Law: Cases and Materials, https://incarcerationlaw.com/resources/data-update/#TableC (last visited Aug. 13, 2024); Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, Prison Policy Initiative (April 26, 2021). In contrast, cases go to trial 0.5% of the time. *See Data Update*, *supra*.

Data from the United States District Court for the District of Oregon shows similar trends. Between 1988 and June 30, 2024, approximately 6% of prison litigation cases settled, and 9% resulted in voluntary dismissals. Fed. Jud. Ctr., Integrated Database (IDB), https://www.fjc.gov/research/idb (last visited August 22, 2024).[3] In

[3] The Federal Judicial Center's Integrated Database (IDB) "contains data on civil case and criminal defendant filings and terminations in the district courts." Fed. Jud. Ctr., Integrated Database (IDB), https://www.fjc.gov/research/idb (last visited Aug. 22, 2024). To calculate the numbers for prison litigation cases in

contrast, 0.8% went to trial. *Id.* Thus, both nationwide and in Oregon, prison litigation is many times more likely to settle than to go to trial.

These settlements provide important assurances for prisoners and prison officials alike. Prisoners often litigate their cases *pro se*[4] and face barriers to legal research, interviewing witnesses, conducting discovery, and covering litigation expenses. *See* Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 Geo J Legal Ethics 271, 275–285 (2010); Margo

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Oregon, amici used the "interactive view" of "Civil cases filed, terminated, and pending from SY 1988 to present." *See id.*; Fed Jud. Ctr., IDB Civil 1988-present, https://www.fjc.gov/research/idb/interactive/24/IDB-civil-since-1988 (last visited Aug. 22, 2024). Amici filtered the data by the District of Oregon and "nature of suit" as either "Prisoner Petitions – Mandamus and Other," "Prisoner – Civil Rights," or "Prisoner – Prison Conditions." *See* Fed Jud. Ctr., IDB Civil 1988-present, https://www.fjc.gov/research/idb/interactive/24/IDB-civil-since-1988; Fed Jud. Ctr., Integrated Data Base Civil Documentation, Field Descriptions, https://www.fjc.gov/sites/default/files/idb/codebooks/Civil%20Codebook%201988%20Forward%20102520 23.pdf (last visited Aug. 22, 2024). The result was 11,067 cases. Amici then filtered cases by disposition, which demonstrated that 663 cases "settled," 1,001 cases were "voluntarily" dismissed, and 96 cases went to trial ("jury verdict," "directed verdict," or "court trial").

[4] U.S. Cts., Just the Facts, Trends in Pro Se Civil Litigation from 2000 to 2019 (Feb. 11, 2021), https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019.

Schlanger, *Inmate Litigation*, 116 Harv L Rev 1555, 1611 (2003). Even if they have a strong case, the barriers to successfully trying it in front of a jury create a strong incentive to settle. And for prison officials, reaching an agreement with a prisoner whereby they dismiss their lawsuit saves time and resources associated with litigation and avoids bad publicity from the suit.

B. Oregon courts have a duty to enforce settlement agreements.

Oregon courts recognize that they play an essential role in giving meaning to the assurances that parties make to each other in settlement agreements. The Court of Appeals' decision in this case, if upheld, would jeopardize that role.

"This Court strongly encourages settlement of all kinds of legal disputes." *Weems v. Am. Int'l Adjustment Co.*, 319 Or 140, 145, 874 P2d 72 (1994). "Certainty and judicial economy are served when parties can negotiate settlement of their disputes with confidence that their settlement agreements will be upheld and enforced by the courts." *Knutson v. Yamhill Cnty.*, 130 Or App 173, 178, 881 P2d 156 (1994) (quoting *Lindgren v. Berg,* 307 Or 659, 665, 772 P2d 1336 (1989)); *see also, e.g.*, James A. Wall, et al., *Judicial Participation in*

Settlement, 1984 J Disp Resol 25, 26 (1984) ("The settlement process and agreement benefit the clients, the court, and society."). Thus, this Court has emphasized that "[t]he law favors voluntary settlements of controversies between the parties," even if the settlement "may not be what the court would have adjudged had the controversy been brought before it for decision." *G.F. Hodges Agency v. Rees*, 202 Or 139, 157–58, 272 P2d 216 (1954); *see also Ellingsworth v. Jackson*, 170 Or 34, 45–46, 131 P2d 781 (1942).

The Oregon judiciary's duty to enforce settlement agreements is especially important because, when those agreements take the form of contracts, federal courts often cannot enforce them. In *Kokkonen v. Guardian Life Insurance Company of America*, 511 US 375 (1994), the U.S. Supreme Court held that typically, unless a federal court retains jurisdiction over a settlement agreement, "enforcement of the settlement agreement is for state courts." *Id.* at 381–82. The Court reasoned that breach of settlement suits are claims "for breach of a contract, part of the consideration for which was dismissal of an earlier" lawsuit." *Id.* at 381. But because federal courts generally lack jurisdiction over contract disputes, they cannot

enforce contracts absent some independent basis for federal jurisdiction. *Id.* at 377–78.

Put together, these Oregon and federal precedents make two things clear: first, Oregon courts have a responsibility to enforce contracts settling prison litigation, and second, if they do not discharge that duty, no one else will.

Yet, under the Court of Appeals' approach, Oregon courts could not meaningfully discharge this duty. If the Court of Appeals' approach is allowed to stand, prison officials would seemingly be permitted to deny work and training opportunities, with impunity, to any prisoner at any time for any reason. They could do so even if it means violating the express provisions of a settlement agreement. And they could do so in retaliation for bringing, or even threatening to bring, civil rights lawsuits.

It is unclear what prisoner, in that legal environment, would have the courage to even bring a civil rights lawsuit, let alone attempt to settle it out of court. Without any assurance that settlement agreements will be enforced via contract law, prisoners who choose to bring lawsuits may believe that their only hope is to go to trial. That dynamic would drastically diminish the value of

settlements for incarcerated Oregonians who have suffered harm caused by prisons, and thus it would also diminish their ability to vindicate their legal rights.

Prison officials, too, would presumably become less able to settle lawsuits. Even when they promise not to retaliate against prisoners—as Mr. Huskey alleges here—and even when they fully intend to abide by those promises, prisoners would have reason to doubt the enforceability of those promises. In consequence, cases that would normally settle—to the satisfaction of all parties—would instead needlessly go to trial.

Fortunately, for the reasons stated above in Parts I and II, the Oregon Constitution does not compel this inequitable and inefficient.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

DATED this 27th day of August, 2024.

Respectfully submitted,

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COMBINED CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS AND CERTIFICATES OF FILING AND SERVICE

In accordance with ORAP 8.15(3), the *amicus* brief shall be subject to the same rules as those governing briefs of parties.

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I certify that this brief complies with the word-count limitation in ORAP 5.05, which word count is 5,988 words.

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I further certify that I will provide a courtesy copy to the parties via electronic mail at the e-mail addresses listed above.

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