IN THE SUPREME COURT OF THE STATE OF OREGON

KERRIE BONNER, Personal Representative of the Estate of David W. Bonner, Deceased,
Plaintiff,

v.

AMERICAN GOLF CORPORATION OF CALIFORNIA, INC., dba Oregon Golf Club, fdba The Oregon Golf Club, a foreign corporation; and AMERICAN GOLF CORPORATION, dba Oregon Golf Club, fdba The Oregon Golf Club, a foreign corporation,
Defendants.

United States District Court for the District of Oregon
322CV01582SI

S070183

On Acceptance of the Certified Question from the
U.S. District Court for the District of Oregon, Portland Division
Hon. Marco A. Hernandez, Chief Judge

Question Certified on April 25, 2023

BRIEF OF AMICUS CURIAE OREGON ASSOCIATION OF DEFENSE COUNSEL

AMICUS CURIAE WILL FILE A BRIEF
ON THE MERITS IF REVIEW IS ALLOWED

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STATEMENT OF THE CASE

I. INTRODUCTION AND INTERESTS OF AMICUS CURIAE

Amicus Curiae Oregon Association of Defense Counsel ("OADC") appears in support of Defendants American Golf Corporation of California, Inc.'s position on review of the Certified Question. OADC addresses the expansion and misapplication of this court's opinion in *Horton v. OHSU*, 359 Or 168, 376 P3d 998 (2016), and the role and importance of both the judiciary and the legislature in establishing Oregon law.

The Court of Appeals' application of *Horton* in *Schutz v. La Costita III, Inc.*, 288 Or App 476, 488, 406 P3d 66 (2017) (*Schutz II*), is erroneous and strays far beyond the principles this court has articulated. After *Schutz v. La Costita III, Inc.*, 364 Or 536, 543, 436 P3d 776 (2019) (*Schutz III*), which partially reversed *Schutz II*, confusion abounds regarding the requirements of the Remedy Clause and the enforceability of ORS 471.565(1). *Horton*'s stated purpose was to recognize the legislature's plenary authority to enact laws to advance public policies and reject the notion of a static common law. But *Schutz II* seems to disregard that essential purpose, creating a one-way street where claims or causes of action may be created or adopted, but never abrogated or removed. Indeed, there is a tension between the *Horton* analysis and this Court's general deference to the legislature, which is necessary to avoid muddying of separation of powers, the intrusion of judicial review into legislative policy, and the potential for

unfettered expansion of claims and remedies with no method of contracting claims or remedies as public policy considerations change. In answering the Certified Question, this Court should take the opportunity to address the unprecedented restriction on the legislative branch and to reconnect the remedies clause to its historical roots.

II. CERTIFIED QUESTION ON REVIEW

This Court accepted the following certified question:

> "Does ORS 471.565(1) violate the Remedy Clause of the Oregon Constitution, Article I, § 10, by denying a remedy to a plaintiff who sustains injury due to his or her own voluntary intoxication and who sues a licensed server or social host in their role as such?"

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This is a personal injury case arising from injuries that the Plaintiff suffered after consuming alcohol served by Defendants and falling from a golf cart. (ER-8). Plaintiff's two claims—premises liability and "liquor liability"—allege that Defendant is liable for failing to prevent Plaintiff from being overserved and from misusing the golf cart. (ER-7-12.)

Oregon Golf Club moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, arguing that three premise-liability specifications and all liquor-liability specifications of negligence were barred by ORS 471.565(1). (SER-2-3.) Plaintiff opposed dismissal on the basis

that ORS 471.565(1) violates the Remedy Clause of the Oregon Constitution, and requested that the question be certified to this Court.

ARGUMENT

I. *SCHUTZ II* TAKES *HORTON* A BRIDGE TOO FAR

Over time, Oregon courts have adopted and rejected a number of tests and approaches for determining exactly what rights are protected by the remedy clause, and to what extent. *See Stewart v. Houk*, 127 Or 589, 591, 271 P 998, *on reh'g*, 127 Or 597, 272 P 893 (1928) (the purpose of the remedy clause is to "save from legislative abolishment those jural rights which had become well established prior to the enactment of our Constitution"); *Perozzi v. Ganiere*, 149 Or 330, 345, 40 P2d 1009 (1935) (the remedy clause does not prohibit the legislature from creating new rights or abolishing old rights under the common law); *Horton*, 359 Or at 218 ("Rather, for over 100 years, this court has debated the meaning of the clause, the latitude it gives the legislature, and the rights it protects.").

This court's *Horton* test departed from previous case law. However, in *Schutz II* and other cases, the Court of Appeals has leapt far beyond the scope of the original *Horton* rule.

A. *Horton's Stated Purpose is to Recognize Flexibility in the Common Law, and the Legislature's Authority to Enact Law to Meet Evolving Societal Needs and Public Policies*

Horton overturned the "bright-line rule" from *Smothers v. Gresham Transfer, Inc*., 332 Or 83, 86, 23 P3d 333 (2001), and turned to pre-*Smothers* cases for the unexceptionable point that "the common law is not inflexible but changes to meet the changing needs of the state." *Horton*, 359 Or at 218. This court anchored its rejection of *Smothers* in this perceived need for greater flexibility, stating that *because* the common law is flexible, "*Smothers* clearly erred in holding that the remedy clause locks courts and the legislature into a static conception of the common law as it existed in 1857." *Id.* at 218-19. This new rule recognized and sought to protect both the expansion *and contraction* of rights and remedies, and allowed the legislature to alter "either [the] common-law duties or the remedies available for [the] breach of those duties." *Id.* at 219.

The *Horton* test sought greater flexibility by anchoring its analysis not to a moment in time, but to the importance of the rights at issue in a particular statute by measuring and balancing the degree of departure from a common law claim against the justification for doing so. Going forward, this court directed: "[t]o the extent that those cases turn on the bright line rule that *Smothers* drew (all injuries for which common-law causes of action existed in 1857 require a remedy while injures for which no cause of action existed in 1857 are entitled to no protection), then those cases must be taken with a grain of salt." *Id.* at 220.

However, rather than proceeding with the advised "grain of salt," the Court of Appeals in *Schutz II* and other cases has discarded not just the "bright-line rule" from *Smothers*, but ignored the very flexibility of the common law that *Horton* sought to reaffirm and protect.

B. *Schutz II Simply Replaced One Static Conception of Common Law with Another*

In *Schutz II,* 288 Or App at 485,the Court of Appeals indicated that "instead of looking to the common law as it existed in 1857, the remedy-clause analysis focuses on the effect of [the] legislation on the common law as it existed when the legislature acted." But, rather than analyzing the common law's development over time, *Schutz II* held that "it is the common-law causes of action and remedies that exist *at the time legislation is enacted* that provide the 'baseline for measuring the extent to which [that] legislation conforms to the basic principles of the remedy clause—ensuring the availability of a remedy for persons injured in their person, property, and reputation.'" *Id.*, *quoting Horton*, 359 Or at 218 (emphasis in original).

Though the court cited to *Horton* for the statement italicized above, the *Horton* opinion did not contain this direction. This Court did not direct that *only* the common law as of the *moment* of legislative action is relevant. Rather, *Horton* seemingly requires a consideration of the full historical development of the common-law claim or remedy at issue in deciding the constitutionality of

subsequent legislation that removed or abrogated it. And that makes sense. Otherwise, a long-standing common-law rule prohibiting certain claims could be overturned by an appellate court, then the legislature would immediately seek to return the law to its long-understood state, only to be unable to do so because it is abrogating the common law as it exists in the moment the legislature acts.

However, in *Schutz II*, the Court of Appeals merely substituted the static moment of 1857 for the static moment of 2001, when ORS 471.565 was enacted. The history and development of the relevant common law prior to 2001 is nuanced and should inform the analysis of the "the extent to which the legislature has departed from the common-law model measured against its reasons for doing so." *Horton*, 359 Or at 220.

As Defendants have argued in their Answering Brief, first-party common-law claims against a social host or server for harms arising from *voluntary* intoxication were not recognized in Oregon for the majority of the time period leading up to the enactment of ORS 471.565, and the legislature in 2001 sought to expeditiously *return* the law to that state after this court announced a contrary rule in *Fulmer v. Timber Inn Restaurant & Lounge., Inc.*, 330 Or 413, 9 P3d 710 (2000). Even if that were not the case, the common law surrounding first-party claims arising from voluntary intoxication cannot be unraveled from the history of prohibition and the passage of the Dram Shop Act in 1913. *Schutz II* does not consider that history.

C. *Schutz II* Miscategorized the Statute Under the *Horton* Analysis

Under the *Horton* analysis, this Court explained that prior cases evaluating the constitutionality of a statute under the remedy clause considered three general categories of legislation:

> (1) legislation that did not alter the common-law duty but denies or limits the remedy a person injured as a result of that breach of duty may recover;
>
> (2) legislation that sought to adjust a person's rights and remedies as part of a larger statutory scheme that extends benefits to some while limiting benefits to others (a *quid pro quo*); or
>
> (3) legislation that modified common-law duties or eliminated a common-law cause of action when the premises underlying those duties and causes of action have changed.

359 Or at 219. Recognizing "the varied ways that the legislature can and has gone about achieving its goals," the Court explained that the evaluation of statutes under the remedy clause ultimately requires courts to "consider the extent to which the legislature has departed from the common-law model measured against its reasons for doing so." *Horton*, 359 Or at 220.

In *Schutz II*, the Court of Appeals chose to place ORS 471.565 in the first category, holding that the statute did not alter a common-law duty in eliminating a cause of action against servers for persons injured from their own voluntary intoxication but, instead, denied only a remedy for breach of that duty. 288 Or App at 487. But, the differences between the first category and the third category are not readily apparent.

The legislature's decision to eliminate claims arising from involuntary intoxication are justified by societal circumstances Specifically, the legislature's decision to restore the historical common-law rule barring claims arising from injuries from voluntary intoxication, which was understood to be Oregon law before *Fulmer*, reflects a policy choice to promote personal responsibility in the consumption of alcohol, while also preventing the over-service of alcohol by recognizing a claim for innocent third-parties harmed by service to visibly intoxicated persons.

To properly determine the degree of departure from the common law and whether that departure is justified, the development of that common law— *i.e.*, whether it has existed at common law for a century or for only five minutes; whether it arose from a particular historical movement or represented a much-needed modernization—are inarguably relevant and should be considered. This court should perform this kind of analysis here in considering the certified question.

D. *The Remedy Clause Does Not Create a One-Way Street Where Claims and Remedies May be Created but Never Eliminated or Reduced*

In deciding the Certified Question, this Court should clarify the scope and application of the *Horton* rule and reject *Schutz II*. At a minimum, the lower courts should consider not a moment in time, but the broader context of common law rights and remedies in determining the constitutionality of statutes

eliminating claims or reducing damages. Otherwise, any time a court decides to expand a claim, that decision would cloak itself with constitutional protections. In other words, decisional law in tort cases would automatically expand constitutional rights, and the legislature would be powerless to act. This outcome is contrary to the stated purpose in *Horton* of protecting the flexibility of the common law.

II. THE REMEDY CLAUSE HAS BEEN TAKEN OUT OF CONTEXT

In overruling *Smothers*, this court attempted to provide more flexibility in the law and more recognition of the legislature's authority to adjust the law in recognition of the societal circumstances. It is notable, then, that the Court of Appeals' application of *Horton* in *Schutz II* significantly conflict with the principles of *Perozzi* and its progeny. Most importantly, *Perozzi* rejected the notion that the legislature could not constitutionally curtail a significant remedy at common law:

> "The common law is not a fixed and changeless code for the government of human conduct. Its applicability depends to a large extent upon existing conditions and circumstances at any given time. For example, as the complexity of industrial relations has increased, we have seen engrafted on the common law the defenses of the fellow-servant doctrine, contributory negligence and assumption of risk. Due to their harshness as directed against the workman, these common-law defenses have been by legislation abolished in many of the states during the last two decades.
>
> If we were to give to article I, § 10, the construction contended for by plaintiff, we should be obliged to declare unconstitutional much of the legislation of recent years, such, for

> example, as the workmen's compensation law, which deprives the injured workman of the remedy which he had at common law."

Perozzi, 149 Or at 348-49. It would appear, based on the discussion of the workman's compensation statute in *Perozzi*, that it would fall into the third category of *Horton* cases, *i.e.*, legislation that "modified common-law duties . . . [or] eliminated [a] common-law causes of action when the premises underlying those duties and causes of action have changed." *Horton*, 359 Or at 219.

Looking at the decision in *Schutz II*, this court's attempt to free the legislature from the confines of those remedies recognized in 1857 has not resulted in the desired "flexibility" of common law and legislative policy. Instead, the *Schutz II* decision wrongly swaps one moment in time for another, holding that once a common-law cause of action is recognized, the legislature is powerless to eliminate it even if the cause of action conflicts with the legislature's different policy choices arising from the changing social, scientific, and political realities.

The courts are ill-equipped to decide policy in comparison with the legislature, and the remedy clause does not conceive of an ever-expanding common law that grows without meaningful and substantive shaping from the legislature. To be sure, in applying *Horton* in recent years, this Court has undertaken to evaluate whether the legislature, in abrogating recovery, has delivered a benefit that meets constitutional muster by analyzing, for example,

"the legislature's reasons for enacting the damages cap" in ORS 31.710, to determine whether they adequately "counterbalance" the loss of the full damages caused by the defendant's tortious conduct. *Busch v. McInnis Waste Sys.*, 366 Or 628, 647, 468 P3d 419, 431 (2020). However, when the legislature has made a policy choice to eliminate a cause of action, that choice was historically entitled to deference. *See Bennett v. Farmers Ins. Co.*, 332 Or 138, 149, 26 P3d 138 (2001) ("the creation of law for reasons of public policy … is a task assigned to the legislature, not to the courts"). That deference should not be omitted from the Remedy Clause analysis the Court may announce here.

A. *The Approach in Schutz II Raises Separation of Powers Concerns*

Justice Thomas Phillips of the Texas Supreme Court observed that "the remedies clause is clearly in tension with the separation of powers doctrine that is the genius of the American system." *Phillips,* 78 NYUL Rev at 1340-41. And, when the "legislature clearly expresses its desire to limit the remedies available, the court should be especially cautious before striking down such a law, lest the open courts clause be used to undermine the very separation of powers which the provision was intended to foster." Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 Or L Rev 1279, 1316-17 (1995).

A vast majority of states have constitutional or statutory provisions providing that the common law shall control *unless and until* changed by

statutory law. Phillips, 78 NYUL Rev at 1340-41. So does Oregon. *See also* Or Const, Art IV, § 1 ("The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives."); Or Const, Art XVIII, § 7 (giving the legislature the prerogative to alter or repeal the common law). The remedies guarantee must be harmonized with the legislature's constitutionally enshrined role to make broad policy. "How do courts supply content to the provision without overstepping their traditional role and legislating themselves?" *Fireman's Fund Am. Ins. Co. v. Coleman*, 394 So 2d 334, 351 (Ala. 1980). The answer to that question becomes more critical and less clear in light of decisions like *Schutz II*.

It is inarguable that the legislature has a long history of responding differently to the changing policy needs than the courts, and is better suited to weighing the competing interests and policies involved. For example, Oregon's former tort for alienation of affection of a spouse began as an action available only to the husband. *Norwest v. Presbyterian Intercommunity Hosp*., 293 Or 543, 562-67, 652 P2d 318 (1982). This court eventually changed the common law, holding that the act removing a wife's civil disabilities allowed her to sue for alienation of her husband's affection. *Id.* However, subsequently, the legislature decided to address equality with respect to alienation of affections not by making the claim available to wives but by abolishing it altogether, along with the tort of

criminal conversation. Or Laws 1975, ch 562. The legislative history makes clear that despite their intentional character and the resulting emotional harm to the injured spouse, these torts for invasion of the family relationship were considered to be outmoded given changing views of marriage, divorce, and sexual relations, and could no longer be supported as a matter of public policy. *Norwest*, 293 Or at 567.

In order for a court to evaluate a legislative choice such as the one to eliminate the tort of alienation of affection under the *Horton* rule, a court must somehow assess the value of the policy choice and whether it justifies abolishing a common-law claim. As Justice Phillips cautioned: "The standards articulated by courts for conducting this balance typically provide little guidance to constrain the judges' personal preferences." Phillips, 78 NYUL Rev at 1336. *Horton* considered, "among other things, whether the common-law cause of action that was modified continues to protect core interests against injury to persons, property, or reputation or whether, in light of changed conditions, the legislature permissibly could conclude that those interests no longer require the protection formerly afforded them." 359 Or at 219-20. Here, as explained in Defendant's answering brief, claims for injuries from voluntary intoxication were not recognized in Oregon for the majority of the time period leading up to the enactment of ORS 471.565, and the legislature in 2001 sought to expeditiously *return* the law to that state after this court announced a contrary rule in *Fulmer*,

330 Or 413. That policy choice serves to protect the general public by promoting personal responsibility in the consumption of the alcohol with the denial of first-party claims for injuries resulting from voluntary consumption. That policy choice also serves to protect the general public by discouraging over-service with the recognition of third-party claims for injuries resulting from the service of alcohol to visibly intoxicated persons. Although reasonable minds may differ over the best ways to reduce harms from alcohol use, the choice is left to the legislature, and ORS 471.565 reflects the legislature's view that those engaging in voluntary intoxication should bear the risks of that conduct.

B. ***Is the Court bound by the Remedy Clause as well?***

The Court of Appeals' analysis in *Schutz II* arguably imbues all new judicially recognized claims with constitutional protection and prevents them from being refined or abrogated by the legislature unless the legislature gives a *quid pro quo*, entirely eliminates a duty, or engages in some other balancing of interest. However, nothing in this court's opinion in *Horton* or the text of the remedy clause—"every man shall have remedy by due course of law for injury done him in his person, property, or reputation"—would restrict the application of the clause to legislative action. Or Const, Art I, § 10; *see generally* 359 Or 168. Arguably, *the court itself* is bound to protect any remedy that is judicially, or even legislatively, created.

Indeed, courts and commentators have grappled with the application of a state remedy clause to protect only the common law against only the actions of the legislative branch. *See Neher v. Chartier*, 319 Or 417, 879 P2d 156 (1994) (recognizing abandonment of distinction between statutory and common-law claim); David Schuman, *The Right to a Remed*y, 65 Temp L Rev 1197, 1217 (1992) ("To distinguish between common-law and legislative causes of action is to elevate form over substance."). Of course, courts are not able to offer a *quid pro quo*, and usually cannot abrogate duties or engage in the other balancing actions identified in *Horton* as means to permissibly alter the common law. If the legislature cannot permissibly eliminate common-law remedies without providing a substitute, arguably the courts cannot either. *Horton* and its subsequent application by the Court of Appeals, have created a scenario where tort law can expand without bounds, but cannot contract, which directly contradicts the goal of flexibility identified in *Horton*, and which finds no historical support in the reason for having a remedies clause in our Constitution.

In sum, the Court should redirect this line of cases toward the legislative flexibility it recognized in *Horton*, and to center the remedy clause analysis more firmly in its historical context.

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Dated this 17th day of August, 2023.

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CERTIFICATE OF COMPLIANCE

Brief length: I certify that this brief complies with the word-count limitation in ORAP 5.05 and 9.05(3), and the word count of this brief is 3,631 words.

Type size: I hereby certify that the size of the type in this brief is not smaller than 14 points for both text and footnotes as required by ORAP 5.05(3)(b)(ii).

Dated this 17th day of August, 2023.

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CERTIFICATE OF FILING AND SERVICE

I certify that on August 17, 2023 I electronically filed the foregoing **BRIEF OF AMICUS CURIAE OREGON ASSOCIATION OF DEFENSE COUNSEL** with the State Court Administrator and therefore served all parties registered for electronic service and additionally served unregistered parties entitled to service by U.S. Mail.

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