

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
11/15/2023 11:26 AM  
BY ERIN L. LENNON  
CLERK

NO. 102562-9

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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WASHINGTON STATE UNIVERSITY, an institution of higher education and agency of the State of Washington; KIRK H. SCHULZ, in his official capacities as the President of Washington State University and Chair of the Pac-12 Board of Directors; OREGON STATE UNIVERSITY, an institution of higher education and agency of the State of Oregon; and JAYATHI Y. MURTHY, in her official capacities as the President of Oregon State University and Member of the Pac-12 Board of Directors,

*Plaintiffs-Respondents,*

v.

THE PAC-12 CONFERENCE; and GEORGE KLIAVKOFF, in his official capacity as Commissioner of the Pac-12 Conference,

*Defendants,*

and

UNIVERSITY OF WASHINGTON, an institution of higher education and agency of the State of Washington

*Intervenor-Defendant-Petitioner.*

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**EMERGENCY MOTION FOR STAY PENDING REVIEW**

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ROBERT W. FERGUSON  
*Attorney General*

KARL D. SMITH, WSBA 41988  
MARSHA CHIEN, WSBA 47020  
*Deputy Solicitors General*  
OID No. 91087  
PO Box 40100  
Karl.Smith@atg.wa.gov  
Marsha.Chien@atg.wa.gov

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## I. INTRODUCTION

Oregon State University (OSU) and Washington State University (WSU) have obtained an extraordinary preliminary injunction that will grant them complete control over the Pac-12 Conference's Board of Directors on Monday at noon. A preliminary injunction is supposed to preserve the status quo, but this order gives OSU and WSU total control over the Conference and money meant to support the student-athletes of all twelve universities, including the University of Washington and five other public schools.

The order is also wrong on the merits. OSU and WSU's reading of the Pac-12's Bylaws is deeply flawed. The Bylaws stand for the unremarkable proposition that once a member *has left* the Conference—or attempted to leave—before the end of the Conference's media rights deals, it cannot participate in Conference governance.

OSU and WSU's contrary interpretation, under which a member loses its Board seat as soon as it announces *an intention*

to leave the Conference, leads to absurd results: the Bylaws would encourage members to keep secret any intention to leave, a result that would *worsen* potential conflicts of interest and that no reasonable parties would have accepted.

While evaluating the parties' arguments, the trial court initially granted a temporary restraining order (TRO) enjoining the Board from taking action without unanimous consent of all Board members. But the trial court then accepted OSU and WSU's interpretation and granted a preliminary injunction giving OSU and WSU complete control over Conference governance.

The University of Washington seeks an emergency stay of the trial court's preliminary injunction ruling. In its place, this Court should maintain the terms of the TRO and require the unanimous consent of all Board members for any action. It is at least debatable that the trial court erred in adopting OSU and WSU's interpretation of the Bylaws. And an emergency stay is necessary to preserve the status quo. If OSU and WSU seize

control of the Board, they will be free to swiftly re-write the Conference's rules, terminate or suspend members, and distribute the Conference's hundreds of millions of dollars in revenues to the detriment of the student-athletes of the ten remaining Conference members. Equity strongly counsels against depriving the University of Washington—and nine other members of the Pac-12—of their role in the governance of the Conference while their student-athletes continue to participate in Conference events.

## **II. STATEMENT OF RELIEF SOUGHT**

This Court should stay the trial court's preliminary injunction and instead maintain the status quo under the TRO, enjoining the Board from acting except by unanimous consent. Because the superior court's preliminary injunction otherwise goes into effect on Monday, November 20 at noon, the University of Washington requests a ruling by close of business on Friday, November 17.



### III. STATEMENT OF THE CASE

#### A. **The Pac-12 Bylaws Nowhere Penalize Members Who Withdraw After August 1, 2024**

Twelve member schools make up the Pac-12 Conference: UW, OSU, WSU and nine schools that are not parties to this action. App. 779. The Conference is governed according to the Pac-12 Constitution and Bylaws, as well as a range of other rules contained in the Pac-12 Handbook. App. 30-265. The Bylaws establish a Board of Directors, made up of the president or chancellor of each member institution, as the Conference's governing body. App. 41. The Commissioner and Conference staff serve at the direction of the Board. App. 43.

The Conference's primary source of funding is revenue from a series of media rights agreements that became effective in 2012 and extend through June 2024. App. 318. The Pac-12 Handbook provides for the equal distribution of net revenues to all Conference members, with limited exceptions. App. 52-56. In the 2023-24 academic/athletic year alone, the Conference expects to earn hundreds of millions of dollars under its media

agreements, which breaks down to *pro rata* distributions of \$37 million to each of its members. App. 318; 751.

The Conference's media agreements require that all twelve members assign their media rights to the Conference and play in Conference games and events through June 2024. App. 320-21. Chapter 2-3 of the Bylaws therefore bars members from withdrawing from the Conference before that date, because such a withdrawal would put the Conference in breach of its commitments to its media partners. Specifically, Chapter 2-3 provides that “[n]o member shall deliver a notice of withdrawal to the Conference in the period beginning on July 24, 2011, and ending on August 1, 2024,” one month after the expiration of the media agreements. App. 37.

If a member tries to withdraw, “the Conference shall be entitled to an injunction and other equitable relief to prevent such breach” or to retain that member's media and sponsorship rights, even if the member has already joined another conference. *Id.* Chapter 2-3 also provides that “if a member delivers notice of

withdrawal in violation of this chapter,” that member loses their seat on the Board of Directors. App. 37-38.

**B. Ten Member Schools Announce They Will Withdraw After August 1, 2024**

On June 30, 2022, University of California, Los Angeles (UCLA) and University of Southern California (USC) informed the Conference over telephone and Zoom of their intent to join the Big Ten after August 1, 2024, and issued public announcements to that effect the same day. App. 274, 279. USC’s announcement explained that both schools would be joining the Big Ten on “August 2, 2024, enabling both schools to remain in the Pac-12 Conference for the duration of the Pac-12’s existing media rights agreements.” App. 274. The Commissioner asserted UCLA and USC’s announcement triggered Chapter 2-3, but UCLA and USC strongly disputed that, stating that they had “not provided” the Conference “with a notice of withdrawal” and did not “intend to deliver a notice of withdrawal to the Pac-12 until August 2, 2024.” App. 285, 288; 783, 785. The disagreement was left unresolved. Chapter 2-4

explicitly reserves the power to sanction a school for violating the Bylaws to the Board, and the Board never directed the Conference to take further action, penalize, or sanction UCLA or USC for violating Chapter 2-3. App. 325.

In July 2023, the University of Colorado announced its intention to join the Big 12. App. 291-92; 785-86. Colorado explained that it had no plans to withdraw from the Conference before August 2024, App. 291-92, and that its announcement did not constitute a formal notice of withdrawal under Chapter 2-3. App. 294.

After Colorado, other schools began notifying the Conference of their intentions to withdraw after the current media rights agreements expired. In August 2023, UW, University of Oregon, University of Arizona, Arizona State University, and University of Utah announced plans to join other conferences beginning in the 2024-25 academic/athletic year. App. 297-303, 309-14. In early September, California and Stanford made a similar announcement. App. 788. Certain

schools provided notice to the Conference, but others did not. App. 786-88. Like USC, UCLA, and Colorado, UW, Oregon, and Stanford expressly informed the Commissioner that they were not providing a notice of withdrawal. App. 305-08; 788.

OSU and WSU also explored opportunities in other conferences. For example, WSU's President wrote on August 7 to the WSU community, "Be patient as we explore our next conference affiliation." App. 345. Other public statements and messages produced in discovery indicate that OSU and WSU are also considering adding schools to the Pac-12, which would entail paying to cover tens of millions in exit fees for schools leaving other conferences. App. 347-51, 627.

All twelve members of the Pac-12 continue to participate in the Conference's 2023-24 athletic events and continue to assign their media rights to the Conference through August 1, 2024.

**C. OSU and WSU Attempt to Exclude All Other Members From the Board**

On August 29, 2023, Commissioner Kliavkoff asked WSU President Schulz, who had become Board Chair, to convene the Board to vote on transition plans. App. 791. WSU President Schulz declined to call the meeting. *Id.* So the Commissioner called a Board meeting for September 13 and invited the representatives from all twelve schools. App. 792.

OSU and WSU then filed this action seeking to exclude UW and the other Conference members from being Board members or voting on any matter before the Board. App. 743-57. Although the trial court initially issued a limited TRO that prohibited the Conference from acting without the unanimous consent of all 12 members of the Board, *see* App. 1074-77, on November 14, 2023, the trial court granted OSU and WSU's motion for a broader preliminary injunction, making OSU and WSU the only two voting members of the Board effective Monday, November 20. App. 1084-89.

#### IV. GROUNDS FOR RELIEF

RAP 8.3 gives this Court “authority to issue orders, before . . . acceptance of review . . . to insure effective and equitable review, including authority to grant injunctive or other relief to a party.” The purpose of this rule is “to prevent destruction of the fruits of a successful appeal.” *Wash. Fed’n of State Emps. v. State*, 99 Wn.2d 878, 883, 665 P.2d 1337 (1983). Under RAP 8.3, injunctive relief is available if (1) “the moving party can demonstrate that debatable issues are presented on appeal,” (2) “the stay is necessary to preserve the fruits of the appeal for the movant,” and (3) relief is justified “after considering the equities of the situation.” *Confederated Tribes of the Chehalis Reserv. v. Johnson*, 135 Wn.2d 734, 759, 958 P.2d 260 (1998). A showing of debatable issues on appeal does not require the moving party to demonstrate ultimate success on the merits of the appeal, but simply that the issue is a debatable one. *See Kennett v. Levine*, 49 Wn.2d 605, 607, 304 P.2d 682 (1956).

This case readily satisfies the three criteria for such relief. First, the issues presented are more than debatable. The trial court's interpretation of Chapter 2-3 of the Bylaws fails to read the plain text harmoniously, is inconsistent with the parties' intent, and conflicts with the Bylaws' history. Second, injunctive relief is necessary to preserve the fruits of UW's appeal. The preliminary injunction irreversibly excludes UW from meaningfully participating in the Board's governance for much or all of the remaining 2023-24 academic year. Third, the equities strongly favor preserving the status quo pending appellate review. OSU and WSU's complete control of the Board threatens UW's ability to protect the well-being of its student-athletes who continue to compete in Pac-12 competitions today.

As such, this Court should return the parties to the status quo as it existed under the TRO and prohibit the Board from acting without the unanimous consent of all twelve Board members until this Court has the opportunity to review the trial court's preliminary injunction. Unless this Court grants a stay,



OSU and WSU can amend any provision of the Pac-12 Constitution, Bylaws, or Executive Regulations, and enter into agreements that would be difficult—if not impossible—to unwind after the fact, dramatically impacting other members.

**A. The Issues on Appeal Are More Than Debatable**

It is more than debatable that the superior court erred in granting preliminary injunctive relief. A preliminary injunction is an “extraordinary remedy,” *Kucera v. Department of Transportation*, 140 Wn.2d 200, 210, 995 P.2d 63 (2000), and its purpose is “to preserve the status quo until the trial court can conduct a full hearing on the merits.” *SEIU Healthcare 775NW v. State*, 193 Wn. App. 377, 392, 377 P.3d 214 (2016). A party seeking a preliminary injunction must show: (1) “a clear legal or equitable right”; (2) “a well-grounded fear of immediate invasion of that right”; and (3) “that the acts complained of are either resulting in or will result in actual and substantial injury[.]” *Kucera*, 140 Wn.2d at 210 (quoting *Tyler Pipe Indus., Inc. v. Dep’t of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982)).

**1. OSU and WSU cannot establish a clear legal or equitable right**

It is at least debatable whether OSU and WSU established a clear legal right to exclude ten of the twelve Pac-12 members from the Board. To do so, OSU and WSU would have to demonstrate that UW and the other Pac-12 members “deliver[ed] notice of withdrawal in violation of” the Bylaws. App. 37. But a “violation” occurs only when a member gives notice that it is withdrawing from the Pac-12 effective before August 1, 2024. UW and the other members have done no such thing. A notice of an intent to withdraw *after* August 1, 2024, does not breach the Bylaws. And some members haven’t delivered a notice of *any* kind to the Conference.

**a. Announcing a future intent is not a “notice of withdrawal”**

In interpreting an organization’s bylaws, courts apply contract law with the purpose of “ascertain[ing] the parties’ intent.” *Save Columbia CU Comm. v. Columbia Cmty. Credit Union*, 134 Wn. App. 175, 181, 139 P.3d 386 (2006). “In doing

so, [courts] give the bylaws' language a fair, reasonable, and sensible construction." *Id.* These ordinary rules of contract interpretation confirm that Chapter 2-3 does not trigger loss of a Board seat simply upon a member school's announcement of a post-August 1, 2024 withdrawal.

Chapter 2-3 prohibits members from "deliver[ing] a notice of withdrawal to the Conference" before August 1, 2024, and provides that a member loses its Board seat if it "delivers notice of withdrawal in violation of this chapter." A "fair, reasonable, and sensible construction" of Chapter 2-3 is that "a notice of withdrawal" refers to a document that has the effect of withdrawing before August 1, 2024. *See Save Columbia*, 134 Wn. App at 181. "[A] notice of withdrawal" is a term of art as the use of the indefinite article "a" in "a notice of withdrawal" shows that it is a particular document, not some generalized statement. This is confirmed by the requirement that the "notice of withdrawal" be "deliver[ed] . . . to the Conference," which contemplates the delivery of a particular document to a particular

party. App. 37. And that interpretation makes sense because, otherwise, any stray comment by a member school’s President, Athletic Director, or one of its coaches, could trigger loss of a Board seat. Moreover, Chapter 2-3 treats a member delivering a notice withdrawal as “*purporting* to withdraw,” demonstrating that a notice of withdrawal is the document with the legal effect of leaving the Conference.

Here, no member has delivered “a notice of withdrawal.” Two schools—Arizona and Utah—have not “deliver[ed] a notice” of *any* kind “to the Conference.” App. 787-88. Two others—UW and Oregon—delivered notices stating only that they would not agree to grant media rights beyond August 1, 2024. *Id.* And, while other schools communicated to the Conference a future intent to depart, none of those were “notices of withdrawal” within the meaning of Chapter 2-3. Of the schools who provided a notice of some kind to the Conference, multiple schools made explicitly clear that their announcements

are *not* “notice[s] of withdrawal” within the meaning of the Bylaws. App. 284-87, 294, 305-07, 788.

OSU and WSU contend that a public announcement of a future intent to leave the Conference triggers the loss of a Board seat. But that interpretation reads out the requirement that members “deliver” a notice “to the Conference.” *See Advanced Network, Inc. v. Peerless Ins. Co.*, 190 Cal. App. 4th 1054, 1063 (2010) (requiring courts “give significance to every word of a contract, when possible, and avoid an interpretation that renders a word surplusage” (internal quotation marks omitted)).

Chapter 2-3’s other provisions confirm that a notice of withdrawal violates the chapter only if withdrawal occurs before August 1, 2024. Specifically, the second clause allows the Conference to request an injunction “to prevent such breach.” But if a “breach” or “violation of this chapter” referred to the announcement of a post-August 1, 2024 departure, an injunction would prohibit the departing member from *talking* about its future withdrawal. Such an injunction would be ineffective (if

not unconstitutional). The same is true as to the second clause's alternative remedy, i.e., that member schools forfeit their media rights through August 1, 2024. The alternative remedy makes sense only if the Chapter prohibits an actual or attempted withdrawal before August 1, 2024—not the announcement of a post-August 1, 2024 withdrawal, when any existing media agreement would have already expired.

**b. To read the Bylaws otherwise leads to absurd results**

Contract interpretations generating nonsensical or absurd results are disfavored. *Eurick v. Pemco Ins. Co.*, 108 Wn.2d 338, 341, 738 P.2d 251 (1987). But OSU and WSU's interpretation, adopted by the trial court, does just that.

First, under OSU and WSU's interpretation, the Bylaws would create an incentive for members to keep their future plans secret, to the detriment of other members. OSU and WSU argue that *publicly announcing* an intent to leave the conference effective August 2, 2024, strips a member of its seat on the Board, but secretly deciding to join a new conference and waiting

until August 2, 2024, to surprise other members, upsetting settled expectations, does not. That makes no sense. No reasonable party would have agreed to such a provision, nor did the members do so here.

Second, OSU and WSU's interpretation would prohibit members from ever withdrawing from the Conference without breaching the Bylaws. Under the Bylaws no member may deliver a notice of withdrawal before August 1, 2024. App. 37. But every school must decide well in advance of August 1, 2024, whether to agree to a new media rights deal with the Pac-12 or some other conference. A member school that refuses to agree to a new media rights deal with the Pac-12 necessarily reveals its intentions to depart the Pac-12 and would breach the Bylaws. It cannot be correct that Chapter 2-3 makes it impossible for members to withdraw from the Conference—even *after* August 1, 2024—without breaching the Bylaws.

Third, OSU and WSU's interpretation leads to the bizarre conclusion that if OSU and WSU had succeeded in finding a new

conference—as discovery confirms they were attempting to do—the Conference would have been left with *no Board members at all* to govern the Conference. There is no reason to presume the parties intended such futility.

The absurd results that follow from OSU and WSU’s interpretation make clear that they have no clear legal or equitable right to exclude the other members of the Conference from the Board.

**c. Bylaw history confirms that an announcement to withdraw after August 1, 2024 does not trigger loss of a Board seat**

The history of Chapter 2-3 removes any doubt about its proper and reasonable construction today.

The prior version in effect before 2011 provided that “[a] withdrawing member shall provide written notice at least 90 days before the commencement of a two-year withdrawal period which shall begin on the July 1 after the receipt of the written notice.” App. 366. The former Bylaws further provided, “Effective on the date that a member delivers notice of



withdrawal, the member’s representative to the CEO Group shall automatically cease to be a member of the CEO Group[.]” *Id.* In other words, the old version of Chapter 2-3 said what OSU and WSU wish the current version did—that a member school loses its Board seat “effective on the date that a member delivers notice of withdrawal.”

But the Conference amended the Bylaws and changed the requirements. Loss of a Board seat is no longer tied to the date a notice of withdrawal is delivered. In fact, only a “notice of withdrawal” that is “in violation of [Chapter 2-3],” a “breach” that may be “prevent[ed]” by injunction, triggers the loss of a Board seat at all. That material difference confirms the parties’ intent to alter the conditions of Board membership for withdrawing members.

**d. Conduct related to UCLA and USC does not show a relevant course of performance**

To date, OSU and WSU’s primary argument has been based on their view of the course of performance. On their telling, when USC, UCLA, and later Colorado announced their

future departures, the Pac-12 and its members adopted the interpretation that OSU and WSU now advance. But, even if it were accurate, it would not be legally significant.

The Board has never taken any action against USC, UCLA, Colorado, or any other departing member. App. 320. The Board has not alleged that any of those schools violated Chapter 2-3, or voted to remove their seats. *Id.* And while it was an agenda item in July 2022, the Board never imposed penalties on schools that announced future departures. App. 642.

To be sure, a dispute about Chapter 2-3 arose in June 2022. Conference staff, including the Commissioner, took the position that USC and UCLA had delivered “a notice of withdrawal” and were no long members of the Board. *E.g.*, App. 281, 283. USC and UCLA vigorously disagreed. App. 285-86, 288-89. And there the dispute remained, largely dormant, until September 2023. In the interim, USC and UCLA did not attend Board meetings, the other ten schools communicated on a separate email list, and some publications by Conference staff described

the Board as having only ten members. But USC and UCLA never retreated from their position, and the Board, the only body with authority to remove members, App. 38, took no action to exclude any of the departing schools from the Board. App. 320. Sending and receiving emails on a ten-member listserv created by the Commissioner’s staff hardly rises to the level of ratification of the Commissioner’s position. In fact, the most recent version of the Bylaws—published in December 2022—makes no mention of a different status of USC or UCLA or their representation on the Board. App. 37, 41.

But even if the events following USC and UCLA’s announcements reflected the position of the Board, it would still not help OSU and WSU. A course of performance, or the parties’ “practical construction” of the contract, is relevant only when a contract is “ambiguous or uncertain,” which the Bylaws here are not. *See Bohman v. Berg*, 54 Cal. 2d 787, 795, 356 P.2d 185 (1960). Further, a course of performance is relevant only when it *precedes* a dispute about a contract. *See Warner Constr. Corp. v.*

*City of Los Angeles*, 2 Cal. 3d 285, 296, 466 P.2d 996 (1970) (noting importance of “acts and conduct of the parties . . . *before any controversy has arisen as to its meaning*” (emphasis added)); *see also Carlyle v. Majewski*, 174 Wash. 687, 690, 26 P.2d 79 (1933) (“course of conduct over a long period of years, *without protest or dissent on either side*, must be held to be a practical construction of the meaning of the contract by the parties” (emphasis added)). In *Warner*, for example, the California Supreme Court held the trial court erred when it admitted course of conduct evidence that occurred after “the parties had reached a stage of clear disagreement.” 2 Cal. 3d at 297.

Here, all of the course of performance evidence comes *after* a controversy arose regarding the status of USC and UCLA. When, in summer 2022, they announced their future intent to depart, Conference staff took the position that Chapter 2-3 applied, and USC and UCLA strongly took the position that it did not. App. 285-86, 288-89. This was “a stage of clear disagreement,” and the ensuing positions are not relevant

evidence of a course of conduct. *Warner*, 2 Cal. 3d at 297. As a result, that evidence simply does not support OSU and WSU’s interpretation.

**2. OSU and WSU cannot establish a well-grounded fear of immediate invasion of any right**

For the reasons discussed above, OSU and WSU cannot establish their claimed “right to control and govern the Pac-12.” App. 23. Pursuant to its Bylaws, the Pac-12 is governed by a Board consisting of representatives from each of the twelve members of the Conference. App. 41.

Beyond their generic assertions of a right to usurp control of the Board—and unilaterally control the millions of dollars of net revenue generated by student-athletes from all twelve member schools—OSU and WSU also assert that the departing members are “conflicted.” App. 24. The answer to their concern is that all of the Board members owe a basic duty of loyalty to the Conference. The way to satisfy that duty is to recuse from decisions that, unlike those involving withholding 2023-24 revenue distributions, impact only the post-August 1, 2024 future

of the Conference. UW has already assured the Conference that it would not seek to vote on certain matters affecting only OSU and WSU, such as future media rights agreements and new Conference member considerations. *See* App. 306. OSU and WSU therefore cannot establish a well-grounded fear of immediate invasion of any right.

**3. OSU and WSU cannot establish actual and substantial injury**

OSU and WSU also cannot satisfy the third requirement for a preliminary injunction because they cannot establish actual and substantial injury. OSU and WSU rely on concerns about dissolution of the Conference and speculative claims about misuse of Conference assets. Neither establishes actual and substantial injury.

OSU and WSU's concerns about dissolution are insufficient for two reasons. First, they're entirely speculative. *See* App. 26 (speculating that departing schools "are now incentivized to dissolve the Pac-12" and asserting that "the departing schools would be free to dissolve the Conference").

That is a far cry from the required *actual* injury. *Kucera*, 140 Wn.2d at 210. Second, the injunction would not prevent dissolution. Under clear California law governing voluntary associations like the Pac-12, dissolution is a decision for a majority of the Conference membership—not the Board. *See* Cal. Corp. Code § 18410(b) (if “the association’s governing documents do not provide a method for dissolution,” “[a]n unincorporated association may be dissolved . . . by the affirmative vote of a majority of the voting power of the association[.]”). The default rule applies here because the Pac-12’s “governing documents do not provide a method for dissolution.” *Id.* The “voting power of the association” is “the total number of votes that can be cast *by members* on a particular issue at the time the member vote is held.” Cal. Corp. Code § 18330(e) (emphasis added).

OSU and WSU’s concerns about misuse of Conference resources are also entirely speculative. As they have been since 2010, the Conference’s net revenues are scheduled to be

distributed equally among Conference members, App. 781, and OSU and WSU identify no evidence suggesting that will change. Moreover, where parties can obtain monetary damages, they cannot demonstrate that “they are entitled to the extraordinary remedy of injunctive relief.” *Kucera*, 140 Wn.2d at 210. If the departing schools were to misuse Conference money, that would be redressable by money damages. OSU and WSU’s speculative concerns do not establish any actual and substantial injury.

\* \* \*

Because OSU and WSU cannot establish any of the requirements for a preliminary injunction—much less all of them—it is at least debatable that the trial court erred in granting a preliminary injunction.

**B. The Equities Support Injunctive Relief Under RAP 8.3**

The preliminary injunction seriously impairs UW’s interest, but the relief sought by this stay poses no comparable harm to OSU and WSU.



Awarding sole Board control to OSU and WSU excludes UW and the other nine members of the Conference from participating in the governance affecting themselves and their student-athletes. It also runs the risk that OSU and WSU will, as a two-member board, act in their own interests, penalize the other ten members, and reduce the net revenue distributions to departing schools. Indeed, public statements and messages produced in discovery indicate that OSU and WSU are discussing adding schools to the Pac-12, which would entail paying to cover tens of millions in exit fees for schools leaving other conferences. App. 1042, 1044-45. UW (presumably like all schools) has budgeted for certain Conference distributions this year. App. 321.

If OSU and WSU reduce those distributions, UW will be deprived of money that is needed to pay for critical services, such as mental health counseling and academic support for student-athletes. App. 629-31. Regardless of what UW receives in distributions when it joins the Big Ten next year, these services

would be severely impacted today by a decision not to distribute funds this year. App. 630-31, 634. And that is entirely inequitable. The trial court's order turns the Pac-12 into a two-tier association in which ten out of twelve members generate hundreds of millions of dollars of revenue this year without any ability to make decisions about how that money is spent.

On the other side of the equation, there is no inequity to OSU and WSU from the relief sought by this stay. UW is not asking this Court for the full relief that would follow from denying the preliminary injunction. UW seeks only a stay that maintains the status quo from the TRO and prevents OSU and WSU from obtaining full control of the Board prior to appellate review. This modest relief is decidedly equitable.

**C. This Motion Must Be Decided on an Emergency Basis to Preserve the Fruits of the State's Appeal**

Unless this Court acts, the fruits of UW's appeal will be lost. Absent a stay, UW will be unable to vote on decisions that directly impact its student-athletes, who continue to participate in Pac-12 competitions this academic year. Such decisions

include whether to place a member on probation, suspension or terminate its membership for violations of the Bylaws or NCAA regulations. Being excluded from a seat at the table, while its student-athletes continue to play for the Conference, is precisely the action that UW aims to prevent in its appeal. And the preliminary injunction will last indefinitely, as no trial date is currently scheduled. The net result is that, absent a stay, the preliminary injunction will exclude UW from the Board membership for most—if not all—of the time that it remains in the Conference, destroying the fruits of an appeal.

## **V. CONCLUSION**

This Court should enter an order enjoining the Board from acting without the unanimous consent of all 12 members, pending further order of this Court.

This document contains 4989 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 15th day of  
November, 2023.

ROBERT W. FERGUSON

*Attorney General*

*s/ Karl D. Smith*

KARL D. SMITH, WSBA 41988

MARSHA CHIEN, WSBA 47020

*Deputy Solicitors General*

OID No. 91087

1125 Washington Street SE

PO Box 40100

Olympia, WA 98504-0100

(360) 753-6200

Karl.Smith@atg.wa.gov

Marsha.Chien@atg.wa.gov

## CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that the foregoing was electronically filed in the Washington State Supreme Court and electronically served on the following parties, according to the Court's protocols for electronic filing and service:

Matthew Mesnik  
Max K. Archer  
RIVERSIDE LAW GROUP, PLLC  
905 W. Riverside Ave., Ste. 208  
mam@riverside-law.com  
mka@riverside-law.com  
*Attorney for Plaintiffs Oregon State University  
& Jayathi Y. Murthy*

Eric H. MacMichael (pro hac vice)  
Nicholas S. Goldberg (pro hac vice)  
David J. Silbert (pro hac vice)  
Taylor Reeves (pro hac vice)  
Nathaniel H. Brown (pro hac vice)  
KEKER, VAN NEST & PETERS LLP  
633 Battery Street  
San Francisco, CA 94111  
emacmichael@keker.com  
ngoldberg@keker.com  
dsilbert@keker.com  
treeves@keker.com  
nbrown@keker.com  
*Attorneys for Plaintiffs Oregon State University  
& Jayathi Y. Murthy*

Michael B. Merchant  
Britta Warren  
Timothy B. Crippen  
BLACK HELTERLINE, LLP  
805 SW Broadway, Suite 1900  
Portland, OR 97211  
mike.merchant@bhlaw.com  
britta.warren@bhlaw.com  
tim.crippen@bhlaw.com  
*Attorneys for Plaintiffs Oregon State University  
& Jayathi Y. Murthy*

Nathan Deen  
Assistant Attorney General  
332 French Administration Building  
PO Box 641031  
Pullman, WA 99164-1031  
nathan.deen@atg.wa.gov  
*Attorney for Plaintiffs Washington State University  
& Kirk H. Schulz*

Andrew S. Tulumello (pro hac vice)  
Arianna M. Scavetti (pro hac vice)  
WEIL, GOTSHAL & MANGES LLP  
2001 M Street NW, Suite 600  
Washington, D.C. 20036  
Drew.tulumello@weil.com  
Arianna.scavetti@weil.com  
*Attorney for Plaintiffs Washington State University  
& Kirk H. Schulz*

John D. Cadagan  
GORDON TILDEN THOMAS & CORDELL LLP  
421 W. Riverside Ave., Suite 670  
Spokane, WA 99201  
jcadagan@gordontilden.com  
*Attorney for Defendants*

Mark Wilner  
GORDON TILDEN THOMAS & CORDELL LLP  
600 University St., Ste. 2915  
Seattle, WA 98101  
mwilner@gordontilden.com  
*Attorney for Defendants*

Whitty Somvichian  
Ashley Kemper Corkery  
Hannah Pollack  
COOLEY LLP  
3 Embarcadero Center, 20th Floor  
San Francisco, CA 94111  
wsmovichian@cooley.com  
acorkery@cooley.com  
hpollack@cooley.com  
*Attorneys for Defendants*

Mark Lambert  
Gregory Merchant  
COOLEY LLP  
3175 Hanover Street  
Palo Alto, CA 94304  
mlambert@cooley.com  
gmerchant@cooley.com  
*Attorneys for Defendants*

DATED this 15th day of November 2023, at Olympia,

Washington.

*s/ Leena Vanderwood*  
LEENA VANDERWOOD  
*Paralegal*  
Washington Street SE  
PO Box 40100  
Olympia, WA 98504-0100  
leena.vanderwood@atg.wa.gov

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
11/15/2023 11:26 AM  
BY ERIN L. LENNON  
CLERK

NO.

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE  
UNIVERSITY, an institution of  
higher education and agency of  
the State of Washington; KIRK H.  
SCHULZ, in his official capacities  
as the President of Washington  
State University and Chair of the  
Pac-12 Board of Directors;  
OREGON STATE  
UNIVERSITY, an institution of  
higher education and agency of  
the State of Oregon; and  
JAYATHI Y. MURTHY, in her  
official capacities as the President  
of Oregon State University and  
Member of the Pac-12 Board of  
Directors.

Plaintiffs-Respondents,

v.

THE PAC-12 CONFERENCE;  
and GEORGE KLIAVKOFF, in  
his official capacity as  
Commissioner of the Pac-12  
Conference,

Defendants,

and

UNIVERSITY OF  
WASHINGTON, an institution of  
higher education and agency of  
the State of Washington,

Intervenor-Defendant-  
Petitioner.

DECLARATION OF  
BRYAN H.  
HECKENLIVELY IN  
SUPPORT OF  
PETITIONER  
UNIVERSITY OF  
WASHINGTON'S  
EMERGENCY  
MOTION FOR STAY  
OF PRELIMINARY  
INJUNCTION



I, Bryan H. Heckenlively, declare the following to be true and correct under penalty of perjury under the laws of the State of Washington:

1. I am over the age of eighteen and competent to testify in a court of law.

2. I am one of the counsel of record for the University of Washington in the above-captioned matter.

3. On November 9, 2023, Deputy Solicitor General Karl D. Smith, another counsel of record for the University of Washington, sent an email with the subject line: "Potential Emergency Motion (Tuesday, 11/14)" to the Washington State Supreme Court. That email copied opposing counsel and other counsel of record for Intervenor-Defendant-Petitioner University of Washington and Defendant The Pac-12 Conference. That email specifically stated that the University of Washington might seek "an immediate ruling on an emergency motion on the afternoon of Tuesday, November 14." A true and correct copy of that email is attached as Exhibit A.

4. Thereafter, on November 9, 2023, I sent an email with the subject line: “WSU/OSU v. Pac-12 - Notice of Potential Direct Appeal to Washington Supreme Court” to opposing counsel, and to other counsel of record for the University of Washington and The Pac-12 Conference. A true and correct copy of that email is attached as Exhibit B.

5. On November 14, 2023, the Whitman County Superior Court issued an order granting Washington State University and Oregon State University’s motion for a preliminary injunction in this matter. The superior court stayed its order until Monday, November 20, 2023, at 12:00pm Pacific Time.

6. That same day, at 5:01pm Pacific Time, Deputy Solicitor General Karl D. Smith sent an email with the subject line: “Re: Potential Emergency Motion (Tuesday, 11/14)” to the Washington State Supreme Court informing the Court and copied counsel of record for all other parties of the University of Washington’s intent to file an emergency motion on Wednesday,

November 15, seeking expedited consideration. A true and correct copy of that email is attached as Exhibit C.

7. In addition, that same day, and following the hearing in the superior court, I communicated in-person about the University's intent to seek an emergency motion with Nicholas Goldberg, one of the attorneys for Oregon State University, and Scott Petersmeyer, the General Counsel of The Pac-12 Conference.

8. This Court should decide the University of Washington's motion for stay of the preliminary injunction on an emergency basis because, as described further in the motion and supporting materials, the fruits of the appeal will be lost in the absence of a stay.

9. Specifically, without a stay of the preliminary injunction from this Court, Washington State University (WSU) and Oregon State University (OSU) will—as specified in the superior court's order—become the sole voting members of the Board of Directors of the Pac-12 Conference. The University of

Washington—along with nine other major universities across Oregon, California, Colorado, Arizona, and Utah—will immediately lose their seats on the Board and WSU and OSU will be in a position to divert all Conference revenues for their own purposes without any security to ensure that they or the Conference can satisfy a later judgment for money damages.

10. If this Court does not stay the preliminary injunction, the University of Washington and the nine other members of the Conference will lose their Board seats on Monday, November 20 at noon, and will suffer irreparable harm pending resolution of the appeal.

11. If, by contrast, this Court stays the preliminary injunction pending its resolution of the University of Washington's request for review, the status quo created by the temporary restraining order will remain in place. Under that status quo, both WSU and OSU retain their current Board seats and will not suffer irreparable harm pending resolution of the appeal.

12. In addition, in the absence of a stay from this Court, WSU and OSU will be able to assert the power to do further irreparable injury to the University of Washington and the remaining nine Conference members.

13. If this Court does not stay the preliminary injunction, WSU and OSU—as the sole voting members of the Board—will be able to assert the power to unilaterally amend the governing Bylaws and alter the status quo, as detailed in the emergency motion. WSU and OSU will also be able to assert the power to levy punitive actions upon the remaining 10 members of the Conference, including the University of Washington. In the hearing before the superior court, counsel arguing for WSU and OSU did not disavow an intent to take such measures.

14. If, by contrast, this Court stays the preliminary injunction pending its resolution of the appeal, the status quo under the temporary restraining order (TRO) issued by the superior court will remain in place. A true and correct copy of the TRO is attached as Exhibit D. Under the TRO, any Board

action requires the unanimous approval of all 12 Conference members. Under the existing TRO, no Board action adverse to WSU and OSU, including amendments to the Bylaws, may be enacted without their consent.

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 15th day of November, 2023 at Oakland, California.

/s/ Bryan H. Heckenlively

Bryan H. Heckenlively (pro hac vice pending)

MUNGER, TOLLES & OLSON LLP

560 Mission Street

Twenty-Seventh Floor

San Francisco, CA 94105

Phone: (415) 512-4000

Email: Bryan.Heckenlively@mto.com

*Attorney for Petitioner  
University of Washington*

## CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that the foregoing was electronically filed in the Washington State Supreme Court and electronically served on the following parties, according to the Court's protocols for electronic filing and service:

Matthew Mesnik  
Max K. Archer  
RIVERSIDE LAW GROUP, PLLC  
905 W. Riverside Ave., Ste. 208  
mam@riverside-law.com  
mka@riverside-law.com  
*Attorney for Plaintiffs Oregon State University  
& Jayathi Y. Murthy*

Eric H. MacMichael (pro hac vice)  
Nicholas S. Goldberg (pro hac vice)  
David J. Silbert (pro hac vice)  
Taylor Reeves (pro hac vice)  
Nathaniel H. Brown (pro hac vice)  
KEKER, VAN NEST & PETERS LLP  
633 Battery Street  
San Francisco, CA 94111  
emacmichael@keker.com  
ngoldberg@keker.com  
dsilbert@keker.com  
treeves@keker.com  
nbrown@keker.com  
*Attorneys for Plaintiffs Oregon State University  
& Jayathi Y. Murthy*

Michael B. Merchant  
Britta Warren  
Timothy B. Crippen  
BLACK HELTERLINE, LLP  
805 SW Broadway, Suite 1900  
Portland, OR 97211  
mike.merchant@bhlaw.com  
britta.warren@bhlaw.com  
tim.crippen@bhlaw.com  
*Attorneys for Plaintiffs Oregon State University  
& Jayathi Y. Murthy*

Nathan Deen  
Assistant Attorney General  
332 French Administration Building  
PO Box 641031  
Pullman, WA 99164-1031  
nathan.deen@atg.wa.gov  
*Attorney for Plaintiffs Washington State University  
& Kirk H. Schulz*

Andrew S. Tulumello (pro hac vice)  
Arianna M. Scavetti (pro hac vice)  
WEIL, GOTSCHAL & MANGES LLP  
2001 M Street NW, Suite 600  
Washington, D.C. 20036  
Drew.tulumello@weil.com  
Arianna.scavetti@weil.com  
*Attorney for Plaintiffs Washington State University  
& Kirk H. Schulz*

John D. Cadagan  
GORDON TILDEN THOMAS & CORDELL LLP  
421 W. Riverside Ave., Suite 670  
Spokane, WA 99201  
jcadagan@gordontilden.com  
*Attorney for Defendants*



Mark Wilner  
GORDON TILDEN THOMAS & CORDELL LLP  
600 University St., Ste. 2915  
Seattle, WA 98101  
mwilner@gordontilden.com  
*Attorney for Defendants*

Whitty Somvichian  
Ashley Kemper Corkery  
Hannah Pollack  
COOLEY LLP  
3 Embarcadero Center, 20th Floor  
San Francisco, CA 94111  
wsmovichian@cooley.com  
acorkery@cooley.com  
hpollack@cooley.com  
*Attorneys for Defendants*

Mark Lambert  
Gregory Merchant  
COOLEY LLP  
3175 Hanover Street  
Palo Alto, CA 94304  
mlambert@cooley.com  
gmerchant@cooley.com  
*Attorneys for Defendants*

DATED this 15th day of November 2023, at Olympia,

Washington.

*s/ Leena Vanderwood*  
LEENA VANDERWOOD  
*Paralegal*  
Washington Street SE  
PO Box 40100  
Olympia, WA 98504-0100  
leena.vanderwood@atg.wa.gov

# Exhibit A

**From:** [Smith, Karl David \(ATG\)](mailto:Smith, Karl David (ATG)@supreme.courts.wa.gov)  
**To:** [supreme@courts.wa.gov](mailto:supreme@courts.wa.gov)  
**Cc:** [mam@riverside-law.com](mailto:mam@riverside-law.com); [mka@riverside-law.com](mailto:mka@riverside-law.com); [emacmichael@keker.com](mailto:emacmichael@keker.com); [ngoldberg@keker.com](mailto:ngoldberg@keker.com); [dsilbert@keker.com](mailto:dsilbert@keker.com); [treeves@keker.com](mailto:treeves@keker.com); [nbrown@keker.com](mailto:nbrown@keker.com); [Mike.merchant@bhlaw.com](mailto:Mike.merchant@bhlaw.com); [Britta.warren@bhlaw.com](mailto:Britta.warren@bhlaw.com); [Tim.crippen@bhlaw.com](mailto:Tim.crippen@bhlaw.com); [Deen, Nathan \(ATG/WSU\)](mailto:Deen, Nathan (ATG/WSU)@drew.tulumello@weil.com); [Drew.tulumello@weil.com](mailto:Drew.tulumello@weil.com); [Arianna.scavetti@weil.com](mailto:Arianna.scavetti@weil.com); [Zach.schreiber@weil.com](mailto:Zach.schreiber@weil.com); [Katie.clemmons@weil.com](mailto:Katie.clemmons@weil.com); [icadagan@gordontilden.com](mailto:icadagan@gordontilden.com); [mwilner@gordontilden.com](mailto:mwilner@gordontilden.com); [mlambert@cooley.com](mailto:mlambert@cooley.com); [gmerchant@cooley.com](mailto:gmerchant@cooley.com); [acorkery@cooley.com](mailto:acorkery@cooley.com); [mattanasio@cooley.com](mailto:mattanasio@cooley.com); [lnorton@cooley.com](mailto:lnorton@cooley.com); [Buder, James K \(ATG\)](mailto:Buder, James K (ATG)@chen.hailyn@heckenlively.com); [Chen, Hailyn](mailto:Chen, Hailyn@heckenlively.com); [Heckenlively, Bryan](mailto:Heckenlively, Bryan@levin.daniel.com); [Levin, Daniel](mailto:Levin, Daniel@brian.brad.com); [Chien, Marsha \(ATG\)](mailto:Chien, Marsha (ATG)@kerwin.david.m.com); [Kerwin, David M. \(ATG\)](mailto:Kerwin, David M. (ATG)@vanderwood.leena.com); [Vanderwood, Leena \(ATG\)](mailto:Vanderwood, Leena (ATG)@kerwin.david.m.com)  
**Subject:** Potential Emergency Motion (Tuesday, 11/14)  
**Date:** Thursday, November 9, 2023 12:41:19 PM

---

Good afternoon,

On behalf of the University of Washington, I write to inform the Court of the possible need for an immediate ruling on an emergency motion on the afternoon of Tuesday, November 14. This relates to *Washington State University v. The Pac-12 Conference*, Whitman County Superior Court No. 23-2-00273-38. Counsel for all parties are included on this email.

The plaintiffs in the case have filed a motion for a preliminary injunction, which is noted for hearing on Tuesday, November 14 at 2:00pm. The University of Washington has opposed that motion. Depending on whether the superior court rules that day and on the substance of the ruling, the University of Washington may need to seek immediate, temporary relief from this Court.

Please let us know if the Court would like any additional materials or information. The University of Washington will notify this Court following the hearing on November 14 whether it anticipates filing an emergency motion that day.

**Karl D. Smith**

Deputy Solicitor General

Washington State Attorney General's Office  
t 360.664.2510 f 360.664.2963  
[karl.smith@atg.wa.gov](mailto:karl.smith@atg.wa.gov)

# Exhibit B

**From:** [Heckenlively, Bryan](mailto:Heckenlively, Bryan)  
**To:** [mam@riverside-law.com](mailto:mam@riverside-law.com); [mka@riverside-law.com](mailto:mka@riverside-law.com); [emacmichael@keker.com](mailto:emacmichael@keker.com); [ngoldberg@keker.com](mailto:ngoldberg@keker.com); [dsilbert@keker.com](mailto:dsilbert@keker.com); [treeves@keker.com](mailto:treeves@keker.com); [nbrown@keker.com](mailto:nbrown@keker.com); [Mike.merchant@bhlaw.com](mailto:Mike.merchant@bhlaw.com); [Britta.warren@bhlaw.com](mailto:Britta.warren@bhlaw.com); [Tim.crippen@bhlaw.com](mailto:Tim.crippen@bhlaw.com); [Deen, Nathan \(ATG/WSU\)](mailto:Deen, Nathan (ATG/WSU)); [Drew.tulumello@weil.com](mailto:Drew.tulumello@weil.com); [Arianna.scavetti@weil.com](mailto:Arianna.scavetti@weil.com); [Zach.schreiber@weil.com](mailto:Zach.schreiber@weil.com); [Katie.clemmons@weil.com](mailto:Katie.clemmons@weil.com); [jcadagan@gordontilden.com](mailto:jcadagan@gordontilden.com); [mwilner@gordontilden.com](mailto:mwilner@gordontilden.com); [mlambert@cooley.com](mailto:mlambert@cooley.com); [gmerchant@cooley.com](mailto:gmerchant@cooley.com); [acorkery@cooley.com](mailto:acorkery@cooley.com); [mattanasio@cooley.com](mailto:mattanasio@cooley.com); [lnorton@cooley.com](mailto:lnorton@cooley.com)  
**Cc:** [Buder, James K \(ATG\)](mailto:Buder, James K (ATG)); [Chen, Hailyn](mailto:Chen, Hailyn); [Heckenlively, Bryan](mailto:Heckenlively, Bryan); [Levin, Daniel](mailto:Levin, Daniel); [Brian, Brad](mailto:Brian, Brad); [Chien, Marsha \(ATG\)](mailto:Chien, Marsha (ATG)); [Kerwin, David M. \(ATG\)](mailto:Kerwin, David M. (ATG)); [Vanderwood, Leena \(ATG\)](mailto:Vanderwood, Leena (ATG))  
**Subject:** WSU/OSU v. Pac -12 - Notice of Potential Direct Appeal to Washington Supreme Court  
**Date:** Thursday, November 9, 2023 3:23:04 PM  
**Attachments:** [Potential Emergency Motion \(Tuesday 11\\_14\).eml \(19.4 KB\).msg](#)

---

Dear Counsel,

I am writing to notify you that, should the trial court grant WSU/OSU's motion for preliminary injunction in the manner requested, we will file a direct appeal to the Washington Supreme Court.

If appeal is necessary, we will immediately be filing a motion, on an emergency basis pursuant to RAP 17.4(b), to vacate the preliminary injunction. If we file a notice of appeal and our motion for emergency relief on Tuesday, we will, of course, serve you with a copy. We also plan to ask the trial court to enter any appropriate orders to allow for sufficient time for the Supreme Court to rule on our RAP 17.4(b) motion.

Out of respect for the Court, we have notified the Clerk's Office of the potential for an emergency motion that seeks immediate relief. A copy of that communication is attached.

Please let us know if you have any questions.

Best,  
Bryan

Bryan H. Heckenlively ([he/him](mailto:he/him)) | Munger, Tolles & Olson LLP  
560 Mission Street | San Francisco, CA 94105  
Tel: 415.512.4015 | [bryan.heckenlively@mto.com](mailto:bryan.heckenlively@mto.com) | [www.mto.com](http://www.mto.com)

\*\*\*NOTICE\*\*\*

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# Exhibit C

**From:** [Smith, Karl David \(ATG\)](#)  
**To:** [OFFICE RECEPTIONIST, CLERK](#)  
**Cc:** [mam@riverside-law.com](#); [mka@riverside-law.com](#); [emacmichael@keker.com](#); [ngoldberg@keker.com](#); [dsilbert@keker.com](#); [treeves@keker.com](#); [nbrown@keker.com](#); [Mike.merchant@bhlaw.com](#); [Britta.warren@bhlaw.com](#); [Tim.crippen@bhlaw.com](#); [Deen, Nathan \(ATG/WSU\)](#); [Drew.tulumello@weil.com](#); [Arianna.scavetti@weil.com](#); [Zach.schreiber@weil.com](#); [Katie.clemmons@weil.com](#); [jcadagan@gordontilden.com](#); [mwilner@gordontilden.com](#); [mlambert@cooley.com](#); [gmerchant@cooley.com](#); [acorkery@cooley.com](#); [mattanasio@cooley.com](#); [lnorton@cooley.com](#); [Buder, James K \(ATG\)](#); [Chen, Hailyn](#); [Heckenlively, Bryan](#); [Levin, Daniel](#); [brad.brian@mto.com](#); [Chien, Marsha \(ATG\)](#); [Kerwin, David M. \(ATG\)](#); [Vanderwood, Leena \(ATG\)](#)  
**Subject:** RE: Potential Emergency Motion (Tuesday, 11/14)  
**Date:** Tuesday, November 14, 2023 5:01:10 PM

---

Good afternoon,

I am following up to let you know that the University of Washington will be not be filing an emergency motion this afternoon. The University intends to file an emergency motion seeking expedited consideration tomorrow.

Thank you.

**Karl D. Smith**  
Deputy Solicitor General

Washington State Attorney General's Office  
t 360.664.2510 f 360.664.2963  
[karl.smith@atg.wa.gov](mailto:karl.smith@atg.wa.gov)

---

**From:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Sent:** Thursday, November 9, 2023 1:34 PM  
**To:** Smith, Karl David (ATG) <karl.smith@atg.wa.gov>  
**Cc:** [mam@riverside-law.com](#); [mka@riverside-law.com](#); [emacmichael@keker.com](#); [ngoldberg@keker.com](#); [dsilbert@keker.com](#); [treeves@keker.com](#); [nbrown@keker.com](#); [Mike.merchant@bhlaw.com](#); [Britta.warren@bhlaw.com](#); [Tim.crippen@bhlaw.com](#); [Deen, Nathan \(ATG/WSU\)](#) <nathan\_deen@wsu.edu>; [Drew.tulumello@weil.com](#); [Arianna.scavetti@weil.com](#); [Zach.schreiber@weil.com](#); [Katie.clemmons@weil.com](#); [jcadagan@gordontilden.com](#); [mwilner@gordontilden.com](#); [mlambert@cooley.com](#); [gmerchant@cooley.com](#); [acorkery@cooley.com](#); [mattanasio@cooley.com](#); [lnorton@cooley.com](#); [Buder, James K \(ATG\)](#) <james.buder@atg.wa.gov>; [Chen, Hailyn](#) <Hailyn.Chen@mto.com>; [Heckenlively, Bryan](#) <bryan.heckenlively@mto.com>; [Levin, Daniel](#) <daniel.levin@mto.com>; [brad.brian@mto.com](#); [Chien, Marsha \(ATG\)](#) <marsha.chien@atg.wa.gov>; [Kerwin, David M. \(ATG\)](#) <david.kerwin@atg.wa.gov>; [Vanderwood, Leena \(ATG\)](#) <leena.vanderwood@atg.wa.gov>  
**Subject:** RE: Potential Emergency Motion (Tuesday, 11/14)

[EXTERNAL]

Thank you for the notification.

Supreme Court Clerk's Office

---

**From:** Smith, Karl David (ATG) <[karl.smith@atg.wa.gov](mailto:karl.smith@atg.wa.gov)>  
**Sent:** Thursday, November 9, 2023 12:41 PM  
**To:** OFFICE RECEPTIONIST, CLERK <[SUPREME@COURTS.WA.GOV](mailto:SUPREME@COURTS.WA.GOV)>  
**Cc:** [mam@riverside-law.com](mailto:mam@riverside-law.com); [mka@riverside-law.com](mailto:mka@riverside-law.com); [emacmichael@keker.com](mailto:emacmichael@keker.com);  
[ngoldberg@keker.com](mailto:ngoldberg@keker.com); [dsilbert@keker.com](mailto:dsilbert@keker.com); [treeves@keker.com](mailto:treeves@keker.com); [nbrown@keker.com](mailto:nbrown@keker.com);  
[Mike.merchant@bhlaw.com](mailto:Mike.merchant@bhlaw.com); [Britta.warren@bhlaw.com](mailto:Britta.warren@bhlaw.com); [Tim.crippen@bhlaw.com](mailto:Tim.crippen@bhlaw.com); Deen, Nathan  
(ATG/WSU) <[nathan\\_deen@wsu.edu](mailto:nathan_deen@wsu.edu)>; [Drew.tulumello@weil.com](mailto:Drew.tulumello@weil.com); [Arianna.scavetti@weil.com](mailto:Arianna.scavetti@weil.com);  
[Zach.schreiber@weil.com](mailto:Zach.schreiber@weil.com); [Katie.clemmons@weil.com](mailto:Katie.clemmons@weil.com); [icadagan@gordontilden.com](mailto:icadagan@gordontilden.com);  
[mwilner@gordontilden.com](mailto:mwilner@gordontilden.com); [mlambert@cooley.com](mailto:mlambert@cooley.com); [gmerchant@cooley.com](mailto:gmerchant@cooley.com);  
[acorkery@cooley.com](mailto:acorkery@cooley.com); [mattanasio@cooley.com](mailto:mattanasio@cooley.com); [lnorton@cooley.com](mailto:lnorton@cooley.com); Buder, James K (ATG)  
<[james.buder@atg.wa.gov](mailto:james.buder@atg.wa.gov)>; Chen, Hailyn <[Hailyn.Chen@mto.com](mailto:Hailyn.Chen@mto.com)>; Heckenlively, Bryan  
<[bryan.heckenlively@mto.com](mailto:bryan.heckenlively@mto.com)>; Levin, Daniel <[daniel.levin@mto.com](mailto:daniel.levin@mto.com)>; [brad.brian@mto.com](mailto:brad.brian@mto.com);  
Chien, Marsha (ATG) <[marsha.chien@atg.wa.gov](mailto:marsha.chien@atg.wa.gov)>; Kerwin, David M. (ATG)  
<[david.kerwin@atg.wa.gov](mailto:david.kerwin@atg.wa.gov)>; Vanderwood, Leena (ATG) <[leena.vanderwood@atg.wa.gov](mailto:leena.vanderwood@atg.wa.gov)>  
**Subject:** Potential Emergency Motion (Tuesday, 11/14)

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Good afternoon,

On behalf of the University of Washington, I write to inform the Court of the possible need for an immediate ruling on an emergency motion on the afternoon of Tuesday, November 14. This relates to *Washington State University v. The Pac-12 Conference*, Whitman County Superior Court No. 23-2-00273-38. Counsel for all parties are included on this email.

The plaintiffs in the case have filed a motion for a preliminary injunction, which is noted for hearing on Tuesday, November 14 at 2:00pm. The University of Washington has opposed that motion. Depending on whether the superior court rules that day and on the substance of the ruling, the University of Washington may need to seek immediate, temporary relief from this Court.

Please let us know if the Court would like any additional materials or information. The University of Washington will notify this Court following the hearing on November 14 whether it anticipates filing an emergency motion that day.

**Karl D. Smith**  
Deputy Solicitor General



Washington State Attorney General's Office

t 360.664.2510 f 360.664.2963

[karl.smith@atg.wa.gov](mailto:karl.smith@atg.wa.gov)

# Exhibit D

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**SEP 11 2023**  
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23-2-00273-38  
OR 55  
Order  
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF WHITMAN

WASHINGTON STATE UNIVERSITY,  
an institution of higher education and  
agency of the State of Washington; KIRK  
H. SCHULZ, in his official capacities as  
President of Washington State University  
and Chair of the Pac-12 Board of  
Directors; OREGON STATE  
UNIVERSITY, an institution of higher  
education and agency of the State of  
Oregon; and JAYATHI Y. MURTHY, in  
her official capacities as the President of  
Oregon State University and Member of  
the Pac-12 Board of Directors,

Plaintiffs,

v.

THE PAC-12 CONFERENCE, and  
GEORGE KLIAVKOFF, in his official  
capacity as Commissioner of the Pac-12  
Conference

Defendants.

Case No. *23-2-00273-38*

**ORDER GRANTING  
PLAINTIFFS' MOTION FOR  
TEMPORARY RESTRAINING  
ORDER**

[PROPOSED] ORDER GRANTING  
PLAINTIFFS' MOTION FOR TRO

1 This matter came for hearing before this Court on the motion of Plaintiffs  
2 Washington State University, Kirk H. Schulz, in his capacities as President of Washington  
3 State University and Chair of the Pac-12 Board of Directors, Oregon State University, and  
4 Jayathi Y. Murthy, in her capacities as President of Oregon State University and Member  
5 of the Pac-12 Board (collectively, “Plaintiffs”), for a temporary restraining order (“TRO”).  
6 Plaintiffs seek a TRO that the Pac-12 Conference and George Kliavkoff, in his official  
7 capacity as Commissioner of the Pac-12 Conference (collectively, “Defendants”), may not  
8 convene a meeting of the Pac-12 Board of Directors or take certain other actions set forth  
9 below until this Court can determine through a preliminary injunction hearing or other  
10 suitable proceeding the authorized representatives of the Board of Directors under the Pac-  
11 12 Conference Bylaws.

12 Having considered Plaintiffs’ motion and all pleadings submitted in support of and  
13 in opposition to the motion, the arguments of counsel for the parties, and the applicable  
14 law, and in order best to preserve the status quo and avoid possible irreparable harm to any  
15 party, Plaintiffs’ motion for a TRO is hereby GRANTED.

16 Plaintiffs have a clear legal and equitable right to enforce the Pac-12 Conference  
17 Bylaws and prevent unauthorized Board action by the Pac-12 Conference, and Plaintiffs  
18 have established that they are likely to prevail on the merits of the claim. The Pac-12  
19 Conference Bylaws state unambiguously that if a member delivers a notice of withdrawal  
20 to the Conference before August 1, 2024, that member’s representative “shall automatically  
21 cease to be a member of the Pac-12 Board of Directors and shall cease to have the right to  
22 vote on any matter before the Pac-12 Board of Directors.” Bylaws, Ch. 2, Sec. 3. Ten  
23 members of the Pac-12 Conference—the University of Arizona, Arizona State University,  
24 the University of California, Berkeley, the University of California, Los Angeles, the  
25 University of Colorado, Boulder, the University of Oregon, the University of Southern  
26 California, Stanford University, the University of Utah, and the University of  
27 Washington—have delivered notice of withdrawal from the Conference and, therefore,

1 their respective Board representatives “automatically cease[d] to be a member” of the  
2 Board and “cease[d] to have the right to vote on any matter before” the Board. *Id.*

3 Further, Plaintiffs have demonstrated that, absent a TRO, they will suffer actual,  
4 substantial, and immediate irreparable harm. Defendants have scheduled a “Board  
5 Meeting” for September 13, 2023, at 7:00 a.m. PT, at which representatives of all twelve  
6 Pac-12 Conference members will be asked to vote on matters of importance to the Pac-  
7 12’s future, including a retention plan for Pac-12 employees and a “go forward governance  
8 approach.” Unless Defendants are enjoined from holding the Board meeting, ineligible  
9 representatives of the ten departing Conference members may purport to take actions on  
10 behalf of the Pac-12 Conference that irreparably harm Plaintiffs and would be difficult or  
11 impossible to reverse.

12 Finally, the Court finds that the balance of equities weighs in favor of granting a  
13 TRO, and Defendants will not be significantly burdened by an injunction that preserves the  
14 status quo until the Court can conduct a preliminary injunction hearing.

15 Accordingly, the Court hereby enters the following TEMPORARY  
16 RESTRAINING ORDER: Pending further order of the Court, Defendants and their  
17 officers, directors, members, employees, agents, representatives, attorneys, successors, and  
18 assigns, and all other persons acting in concert with them shall be prohibited from:

19 1. Holding, or taking any steps to hold, a Pac-12 Conference Board meeting  
20 ~~that includes representatives of the ten Pac-12 Conference members who have delivered~~  
21 ~~notice of their withdrawal from the Conference,~~<sup>1</sup> pending a preliminary injunction hearing  
22 or other suitable proceeding to determine the authorized representatives of the Pac-12  
23 Conference Board of Directors under the Conference Bylaws;

24  
25 <sup>1</sup> For the avoidance of doubt, the ten Pac-12 Conference members that have delivered  
26 notice of withdrawal from the Conference are: University of Arizona; Arizona State  
27 University; University of California, Berkeley; University of California, Los Angeles;  
28 University of Colorado, Boulder; University of Oregon; University of Southern California;  
Stanford University; University of Utah; and University of Washington.

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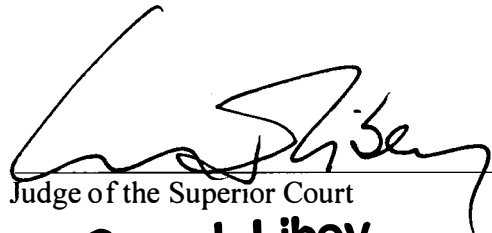
2. ~~Allowing, or taking any steps to allow, representatives of the ten Pac-12 Conference members who have delivered notice of their withdrawal from the Conference, to attend, participate in, or vote in any Pac-12 Conference Board meeting; and~~

3. ~~Transacting, or taking any steps to transact, any business or affairs of the Pac-12 Conference based on votes cast by the representatives of the ten Pac-12 Conference members who have delivered notice of their withdrawal from the Conference.~~  
*The PAC 12 Commission may transact business in the normal course. If members agree Unanimously on any subject, then such action may be adopted.*

The parties shall be permitted to conduct expedited discovery in advance of a preliminary injunction hearing. The parties shall meet and confer on an appropriate schedule for expedited discovery and briefing and hearing a motion for a preliminary injunction, and submit a proposal to the Court.

**IT IS SO ORDERED.**

Dated: *9/10/2023*

By:   
Judge of the Superior Court  
**Gary J. Libey**

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
11/15/2023 11:26 AM  
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SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF WHITMAN

WASHINGTON STATE UNIVERSITY, an institution of higher education and agency of the State of Washington; KIRK H. SCHULZ, in his official capacities as the President of Washington State University and Chair of the Pac-12 Board of Directors; OREGON STATE UNIVERSITY, an institution of higher education and agency of the State of Oregon; and JAYATHI Y. MURTHY, in her official capacities as the President of Oregon State University and Member of the Pac-12 Board of Directors,

Plaintiffs,

v.

THE PAC-12 CONFERENCE; and GEORGE KLIAVKOFF, in his official capacity as Commissioner of the Pac-12 Conference,

Defendants,

and

UNIVERSITY OF WASHINGTON, an institution of higher education and agency of the State of Washington,

Intervenor-Defendant.

No. 23-2-00273-38

CERTIFICATE OF SERVICE

Date: November 14, 2023

Time: 2:00 p.m.

Judge: Hon. Gary Libey

Date Filed: September 8, 2023

Trial Date: TBD

JAMES K. BUDER, WSBA #36659  
Assistant Attorney General  
University of Washington Division

Washington Attorney General's Office  
University of Washington Division  
4333 Brooklyn Avenue NE, 18th Floor  
Seattle, Washington 98195-9475  
Phone: (206) 543-4150  
Facsimile: (206) 543-0779  
E-mail: james.buder@atg.wa.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the 15th day of November, 2023, the following document was delivered to the below individuals in the manner indicated:

- Notice for Discretionary Review.

**Counsel for Plaintiffs Oregon State University and Jayathi Y. Murthy**

Matthew A. Mensik  
Max K. Archer  
Riverside Law Group, PLLC  
905 W. Riverside Avenue, Suite 404  
Spokane, WA 99201

- By Hand Delivery
- By U.S. Mail, postage prepaid
- By Overnight Mail
- By Facsimile Transmission
- By Via Electronic Mail
- [mam@riverside-law.com](mailto:mam@riverside-law.com)
- [mka@riverside-law.com](mailto:mka@riverside-law.com)

**Co-Counsel for Plaintiffs Oregon State University and Jayathi Y. Murthy**

Eric H. MacMichael (Pro Hac Vice)  
Nicholas S. Goldberg (Pro Hac Vice)  
David J. Silbert (Pro Hac Vice)  
Taylor Reeves (Pro Hac Vice)  
Nathaniel H. Brown (Pro Hac Vice)  
Keker, Van Nest & Peters, LLP  
633 Battery Street, Suite 4  
San Francisco, CA 94111

- By Hand Delivery
- By U.S. Mail, postage prepaid
- By Overnight Mail
- By Facsimile Transmission
- By Via Electronic Mail
- [emacmichael@keker.com](mailto:emacmichael@keker.com)
- [ngoldberg@keker.com](mailto:ngoldberg@keker.com)
- [dsilbert@keker.com](mailto:dsilbert@keker.com)
- [treeves@keker.com](mailto:treeves@keker.com)
- [nbrown@keker.com](mailto:nbrown@keker.com)

**Co-Counsel for Plaintiffs Oregon State University and Jayathi Y. Murthy**

Michael B. Merchant (Pro Hac Vice)  
Britta Warren (Pro Hac Vice)  
Timothy B. Crippen (Pro Hac Vice)  
Black Helterline, LLP  
805 SW Broadway, Suite 1900  
Portland, OR 97211

- By Hand Delivery
- By U.S. Mail, postage prepaid
- By Overnight Mail
- By Facsimile Transmission
- By Via Electronic Mail
- [Mike.merchant@bhlaw.com](mailto:Mike.merchant@bhlaw.com)
- [Britta.warren@bhlaw.com](mailto:Britta.warren@bhlaw.com)
- [Tim.crippen@bhlaw.com](mailto:Tim.crippen@bhlaw.com)

**Counsel for Plaintiffs Washington State University and Kirk H. Schulz**

Nathan Deen  
Office of the Attorney General  
332 French Administration Building  
Pullman, WA 99164

- By Hand Delivery
- By U.S. Mail, postage prepaid
- By Overnight Mail
- By Facsimile Transmission
- By Via Electronic Mail
- [Nathan\\_deen@wsu.edu](mailto:Nathan_deen@wsu.edu)



1 **Co-Counsel for Plaintiffs Washington State**  
2 **University and Kirk H. Schulz**  
3 Andrew S. Tulumello (*Pro Hac Vice*)  
4 Arianna M. Scavetti (*Pro Hac Vice*)  
5 Weil, Gotshal & Manges, LLP  
6 2001 M Street, NW, Suite 600  
7 Washington, DC 20036

- By Hand Delivery
  - By U.S. Mail, postage prepaid
  - By Overnight Mail
  - By Facsimile Transmission
  - By Via Electronic Mail
- [Drew.tulumello@weil.com](mailto:Drew.tulumello@weil.com)  
[Arianna.scavetti@weil.com](mailto:Arianna.scavetti@weil.com)

6 **Co-Counsel for Plaintiffs Washington State**  
7 **University and Kirk H. Schulz**  
8 Zachary A. Schreiber (*Pro Hac Vice*)  
9 Mary K. Clemmons (*Pro Hac Vice*)  
10 Weil, Gotshal & Manges, LLP  
11 767 Fifth Avenue  
12 New York, NY 10153

- By Hand Delivery
  - By U.S. Mail, postage prepaid
  - By Overnight Mail
  - By Facsimile Transmission
  - By Via Electronic Mail
- [Zach.schreiber@weil.com](mailto:Zach.schreiber@weil.com)  
[Katie.clemmons@weil.com](mailto:Katie.clemmons@weil.com)

11 **Counsel for Defendants PAC-12 Conference and**  
12 **George Kliavkoff**  
13 John D. Cadagan  
14 Gordon Tilden Thomas & Cordell, LLP  
15 421 W. Riverside Avenue, Suite 670  
16 Spokane, WA 99201

- By Hand Delivery
  - By U.S. Mail, postage prepaid
  - By Overnight Mail
  - By Facsimile Transmission
  - By Via Electronic Mail
- [jcadagan@gordontilden.com](mailto:jcadagan@gordontilden.com)

15 **Co-Counsel for Defendants PAC-12 Conference**  
16 **and George Kliavkoff**  
17 Mark Lambert (*Pro Hac Vice*)  
18 Cooley, LLP  
19 3175 Hanover Street  
20 Palo Alto, CA 94304-1130

- By Hand Delivery
  - By U.S. Mail, postage prepaid
  - By Overnight Mail
  - By Facsimile Transmission
  - By Via Electronic Mail
- [mlambert@cooley.com](mailto:mlambert@cooley.com)

21 /s/ James K. Buder  
22 **JAMES K. BUDER, WSBA #36659**  
23 Assistant Attorney General  
24 University of Washington Division  
25 4333 Brooklyn Avenue NE, 18<sup>th</sup> Floor  
26 Seattle, Washington 98195-9475  
27 Phone: (206) 543-4150  
28 Facsimile: (206) 543-0779  
E-mail: james.buder@atg.wa.gov

*Attorney for Intervenor-Defendant  
University of Washington*

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November 15, 2023 - 11:26 AM

## Filing Motion for Discretionary Review of Superior Court (RAP 15.2(h))

### Transmittal Information

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** Case Initiation  
**Trial Court Case Title:** Washington State University Et Al Vs the Pac-12 Conference Et Al  
**Trial Court Case Number:** 23-2-00273-38 (JIS Number: 23-2-00273-1)  
**Trial Court County:** Whitman Superior Court  
**Signing Judge:** Honorable Gary Libey  
**Judgment Date:** 11/14/2023

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Motion 1 - Stay  
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Motion 2 - Declaration in Support of Motion  
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**Filing on Behalf of:** Karl David Smith - Email: karl.smith@atg.wa.gov (Alternate Email: SGOOlyEF@atg.wa.gov)

Address:  
PO Box 40100  
1125 Washington St SE  
Olympia, WA, 98504-0100  
Phone: (360) 570-3411

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