NO. 102562-9

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE UNIVERSITY, an institution of higher education and agency of the State of Washington, et al.,

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.

UNIVERSITY OF WASHINGTON'S REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING REVIEW

I. INTRODUCTION

OSU and WSU offer no persuasive reason to deny a stay. A stay of the extraordinary preliminary injunction in this case is necessary to preserve the status quo and limit harm to all parties. UW highlights three critical points on reply.

First, UW easily satisfies the requirement that the issues be "debatable." The abuse-of-discretion standard provides no shelter for a trial court's errors of law, which are necessarily an abuse of discretion.

Second, the preliminary injunction should be stayed because it would upend the status quo and effectively determine the merits of the action. This is directly contrary to the purpose of a preliminary injunction.

Third, a stay will protect the fruits of the appeal for all parties. OSU and WSU would remain full Board members under an emergency stay—and even, as provided in the trial court's temporary restraining order, retain a veto over Board actions. If the injunction is *not* stayed, by contrast, UW and the other departing schools will immediately lose their Board seats and rights to vote—harms that OSU and WSU agree are irreparable. OSU and WSU profess concern about their ability to immediately plan for the Conference's future, but they identify no actual barrier to such planning under the TRO. UW has

already made clear it will not participate in Conference discussions about future plans that do not affect the current academic year.

This Court should grant a stay that preserves the status quo and keeps in place the trial court's original restraining order pending this Court's review. UW does not oppose an accelerated briefing schedule for discretionary review.

II. ARGUMENT

The relief UW seeks is limited: a stay of a highly unusual preliminary injunction pending this Court's review. It is undisputed that UW, along with nine universities in five other states, will suffer immediate and irreparable loss of their Board seats if a stay is not granted; the same is not true of OSU and WSU, who will *retain* Board representation under a stay. It is more than debatable that the trial court erred in interpreting the Bylaws—and the equities strongly favor a temporary stay.

A. UW Raises Debatable Issues on Appeal

UW's interpretation of the Bylaws presents, at a minimum, debatable questions on appeal.

1. OSU and WSU cannot hide behind the abuse-of-discretion standard

Under both RAP 8.3 and RAP 8.1(b)(3), Washington appellate courts consider whether "debatable issues are presented on appeal[.]" *See Confederated Tribes of the Chehalis Rsrv. v. Johnson*, 135 Wn.2d 734, 759, 958 P.2d 260 (1998) (same for RAP 8.3). WSU and OSU attempt to obscure the trial court's flawed legal analysis by invoking the abuse-of-discretion standard. Opp'n to Mot. for Emergency Stay (Opp.) 16-17. But while preliminary injunctions are reviewed for abuse of discretion, "an error of law necessarily constitutes an abuse of discretion." *In re Dependency of L.C.S.*, 200 Wn.2d 91, 100, 514 P.3d 644 (2022); *see also Noble v. Safe Harbor Fam. Pres. Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009) ("Untenable reasons include errors of law."). Where, as here, there are no disputed facts, contractual interpretation—like the interpretation of

Conference Bylaws—"is a question of law," which courts review de novo. *Tyrrell v. Farmers Ins. Co. of Wash.*, 140 Wn.2d 129, 133, 994 P.2d 833 (2000). Accordingly, the right question is whether UW raises a debatable issue as to whether the trial court erred in its interpretation of the Bylaws. UW clearly has. Emergency Mot. 12-24.

2. OSU and WSU misapprehend the language of the Bylaws

The parties do not dispute that Chapter 2-3 prohibits members from leaving the Conference *before* August 1, 2024, and permits them to withdraw *after* August 1, 2024. Equally undisputed is the *reason* for that date: it coincides with the end of the Conference's current media rights agreements.

The question is whether it is a "violation of this chapter" for a school to announce, *before* August 1, 2024, a plan to leave the Conference *after* August 1, 2024. For two reasons, the answer is plainly no.

First, "a notice of withdrawal" is a document, delivered to the Conference, that legally *effects* withdrawal, either now or at

some determined future date. It is *not* a public announcement, without legally binding effect, of a future intent to withdraw. The trial court erred in interpreting this language to include press releases to the public: a construction that reads the words "deliver" and "to the Conference" out of the phrase "deliver a notice of withdrawal to the Conference." That matters here. At least two members—Arizona and Utah—have sent no notice of *any* kind to the Conference or Commissioner. App. 787-88. And *no* member has delivered a document effecting its withdrawal from the Conference, either now or at any determined future date.

Second, reading Chapter 2-3 as a whole, the Chapter prohibits, as a "violation" of the Bylaws, delivering a notice that effects withdrawal *prior to August 1, 2024*.

Under Chapter 2-3, a member that delivers a "notice of withdrawal in violation of this chapter" suffers three potential consequences. The first is injunctive relief "to prevent such breach"; the second is retention by the Conference, "through August 1, 2024," of the member's media rights; and the third is

the loss of a Board seat. Contrary to Plaintiffs' argument, Opp. 19, the third provision is not surplusage. Chapter 2-3 clearly contemplates *attempted* pre-August 1, 2024 withdrawals; that "member purporting to withdraw" would lose its Board seat even if a court "prevent[s]" it from leaving the Conference.

The injunction provision to "prevent such breach" plainly corresponds to an attempted withdrawal before August 1, 2024; enjoining an *announcement* that has already occurred would make no sense, and the parties agree that members may withdraw *after* August 1, 2024. The provision for retention of media rights "through August 1, 2024" can likewise refer only to a withdrawal effected "prior to August 1, 2024." Indeed, Plaintiffs rightly acknowledged below, *see* Reply App. 22-23, that both of the remedies above can apply only when a member attempts to withdraw before August 1, 2024.

The last sentence of Chapter 2-3, which, like the first, refers to a notice delivered "in violation of this chapter," concerns the same act contemplated by the rest of the Chapter:

an attempted withdrawal to be "prevent[ed]" by injunction or, failing that, compensated by retention of media rights. Plaintiffs' contrary interpretation depends on reading the remedial clauses in Chapter 2-3 in isolation, such that each addresses a different scenario: an implausible construction of a single paragraph with consistent language throughout.

And Plaintiffs' reading exacerbates their conflict-of-interest concerns. Under Plaintiffs' interpretation, a member that intends to leave after August 1, 2024—but successfully keeps that intention secret—would retain its seat on the Board of Directors until it surprised its fellow Conference members on the way out the door. Recognizing this problem, Plaintiffs now imply that some *other* duty or implicit obligation in the Bylaws compels members to disclose plans for future withdrawal. Reply App. App. 76. But that means the members are *required* to announce future, permissible withdrawals while Chapter 2-3 simultaneously makes that announcement a "*violation*" of the Bylaws. Under Plaintiffs' paradoxical view, post-August 1, 2024

withdrawals, which all parties agree are permissible, become impossible. Even simply declining to sign a new media rights agreement (which would need to be finalized well in advance of August 1, 2024, App. 318) would reveal a member's intention to depart and—under Plaintiffs' overbroad reading of "a notice of withdrawal to the Conference"—constitute a "violation" of the Bylaws, stripping the departing member of its Board seat and allowing other members to confiscate an entire year's worth of revenue. That is no mere "incentiv[e] . . . not to leave." Opp. 20.

3. Plaintiffs' course-of-performance argument is wrong

OSU and WSU rely on a course-of-performance argument, alleging that UW and the other nine schools ratified statements by the Conference Commissioner that support OSU and WSU's interpretation of Chapter 2-3. Opp. 21. But course-of-performance evidence "applies only to acts performed under the contract *before any dispute has arisen*," and all of Plaintiffs' evidence fails that test. *Warner Constr. Corp. v. City of Los Angeles*, 2 Cal.3d 285, 296, 466 P.2d 996, 85 Cal. Rptr. 444

(1970) (emphasis added); *see Carlyle v. Majewski*, 174 Wash. 687, 690, 26 P.2d 79 (1933).

OSU and WSU concede that only *pre-dispute* course of performance is legally relevant, but cite a pair of 2022 letters from Conference counsel to USC and UCLA, *see* App. 280-83, and claim a course-of-performance arose *prior* to the parties' dispute because "the Conference communicated its interpretation . . . before anyone disputed it." Opp. 22-23. That is ludicrous. USC and UCLA *immediately* disputed the Conference's interpretation. App. 284-89. A letter accusing a party of breach is no more "pre-dispute" than the first punch thrown in a boxing match.

OSU and WSU next argue that even if a dispute regarding Chapter 2-3's meaning arose in 2022, this case somehow involves some new dispute. Opp. 23. But OSU and WSU's failure to include UCLA and USC as Defendants in this action does not make it a new dispute. The interpretive dispute remains

the same: what constitutes a violation of Chapter 2-3 of the Bylaws.

UW's interpretation of Chapter 2-3 is right and raises, at a minimum, debatable issues. That is all that is required for a stay under RAP 8.1 and 8.3.

B. A Stay Will Preserve the Status Quo that the Preliminary Injunction Would Irreparably Change

A stay is necessary to preserve the status quo. The status quo is decidedly *not* a two-member Board with OSU and WSU in sole control.

The purpose of a preliminary injunction is "to preserve the status quo" pending trial. *Nw. Gas Ass'n v. Wash. Utils. & Transp. Comm'n*, 141 Wn. App. 98, 114-16, 168 P.3d 443 (2007). The preliminary injunction here did precisely the opposite, upending the status quo and impermissibly "granting all the relief that could be obtained by a final decree" while "practically dispos[ing] of the whole case." *State ex rel. Pay Less Drug Stores v. Sutton*, 2 Wn.2d 523, 532, 98 P.2d 680 (1940). The injunction—if not stayed—will deprive a supermajority of

Conference members of their seats and rights to vote on Conference affairs this year, grant OSU and WSU sole control over governance and hundreds of millions of dollars in revenues, and give them unilateral amendment power over the Bylaws. That order does not "preserve the status quo"; it destroys it.

OSU and WSU's sole response is that, under their view of the Bylaws, they *should have* been the sole members of the Board when they filed suit. Opp. 12-13. But "[t]he status quo ante in Washington is 'the last *actual*, peaceable, noncontested condition which *preceded* the pending controversy.'" *Gen. Tel. Co., of the Nw., Inc. v. Wash. Utils. & Transp. Comm'n*, 104 Wn.2d 460, 466, 706 P.2d 625 (1985) (emphasis added) (quoting *State ex rel Pay Less*, 2 Wn.2d at 529). Plaintiffs cannot define the "status quo" to presume they have already won.

C. A Stay Will Preserve the Fruits of the Appeal for All Parties

The fundamental inquiry underlying both RAP 8.1(b)(3) and RAP 8.3 is the same. These overlapping rules "'permit appellate courts to grant preliminary relief in aid of their

appellate jurisdiction so as to prevent the destruction of the fruits of a successful appeal.'" *Cronin v. Cent. Valley Sch. Dist.*, 12 Wn. App. 2d 123, 130, 456 P.3d 857 (2020) (quoting *Wash. Fed'n of State Emps. v. State*, 99 Wn.2d 878, 883, 665 P.2d 1337 (1983). UW's requested relief satisfies both rules, because the preliminary injunction's immediate harm to UW exceeds any injury to OSU and WSU if the trial court's original TRO remains in effect.

1. A stay protects all parties; a denial does not

A stay pending this Court's consideration of UW's request for review would preserve the fruits of appeal for all parties. The reverse is not true.

If the trial court's preliminary injunction is *not* stayed, the fruits of appeal for UW will be irreparably lost. Absent a stay, it is undisputed that UW and the other nine schools will immediately lose their Board seats and their rights to vote on Conference affairs. As OSU and WSU concede, "governance rights" of this kind have "'intrinsic value'" that are

"'irretrievably lost upon breach.'" App. 24 (quoting *Wisdom Imp. Sales Co. v. Labatt Brewing Co.*, 339 F.3d 101, 114 (2d Cir. 2003)). If this Court *does* issue a stay keeping the original TRO in place, by contrast, OSU and WSU will *retain* their Board seats, as well as their veto power, while this Court decides whether to grant review. In other words, OSU and WSU will have *greater* rights under a stay from this Court than they did under the status quo before they filed suit.

2. No evidence supports OSU and WSU's claims about scheduling plans

OSU and WSU repeatedly insist that they must immediately be given sole control over the Conference to plan for the Conference's post-2024 future. *See* Opp. 1-2, 24, 28. But their arguments fail.

First, OSU and WSU claim that UW's presence on the Board would block their plans for the future—but have identified no future plans *at all*, Reply App. 65 ("[W]e don't have a plan yet."), much less a plan that UW would thwart. To the contrary, UW has affirmatively committed to *not* participating in

"Conference discussions pertaining to matters occurring after August 1, 2024, such as media rights agreements and new Conference member considerations." App. 306. OSU and WSU offer no evidence to suggest that UW or any departing school would prevent any future plan—unless OSU and WSU intend to confiscate *current-year revenues*.

In fact, OSU declined to answer the trial court's questions about what it would do with other schools' equal shares—while securing a codicil to the injunction giving OSU and WSU express control over "the decision to make distributions," App. 1089; Reply App. 69-73.

OSU and WSU can support their future plans with more than $200 million in guaranteed post-2024 revenue, in the two years after the ten schools depart. App. 320. But the ten departing schools rely on their equal shares of current-year revenues *now*, to fund hundreds of sports teams and programs *this year*. This is not, contrary to OSU and WSU's suggestions, purely a financial concern. As UW showed below with unrebutted evidence, cuts

to current distributions translate directly to fewer services for student-athletes *this year*, while UW and nine other schools remain full members of the Pac-12 Conference. App. 628-34. Any increase in funds next year will not be an adequate substitute for the student-athletes UW serves now. These harms are clear and undisputed.

III. CONCLUSION

UW respectfully requests this Court to stay the preliminary injunction pending review.

This document contains 2,464 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 22nd 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

JAMES K. BUDER, WSBA 336659
Assistant Attorney General
University of Washington Division
433 Brooklyn Ave. NE, 18th Floor
Seattle, WA 98105-9475
James.Buder@atg.wa.gov

BRAD D. BRIAN*
DANIEL B. LEVIN*
HAILYN J. CHEN*
Munger, Tolles & Olson LLP
350 South Grantd Ave., 50th Floor
Los Angeles, CA 90071-3426
Brad.Brian@mto.com
Daniel.Levin@mto.com
Hailyn.Chen@mto.com
**Pro Hac Vice*

BRYAN H. HECKENLIVELY*
Munger, Tolles & Olson LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105
Bryan.Heckenlively@mto.com
**Pro Hac Vice*

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)
Nathanial 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
Attorneys 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 22nd day of November 2023, at Olympia, Washington.

s/ Leena Vanderwood
LEENA VANDERWOOD
Paralegal
Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200
leena.vanderwood@atg.wa.gov

SOLICITOR GENERAL OFFICE

November 22, 2023 - 4:17 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,562-9
Appellate Court Case Title:	WSU et al. v. The PAC-12 Conference et al.
Superior Court Case Number:	23-2-00273-1

The following documents have been uploaded:

- 1025629_Answer_Reply_20231122161611SC602349_8526.pdf
  This File Contains:
  Answer/Reply - Reply to Answer to Motion
  The Original File Name was _ReplyISOMotEmStay.pdf
- 1025629_Other_20231122161611SC602349_6575.pdf
  This File Contains:
  Other - Appendix in Support of Reply
  The Original File Name was _AppxISOReply.pdf

A copy of the uploaded files will be sent to:

- Brad.Brian@mto.com
- Bryan.Heckenlively@mto.com
- Daniel.Levin@mto.com
- Greg.Silbert@weil.com
- Hailyn.Chen@mto.com
- Jacob.Altik@weil.com
- James.Buder@atg.wa.gov
- acorkery@cooley.com
- alicia.young@atg.wa.gov
- arianna.scavetti@weil.com
- britta.warren@bhlaw.com
- chudson@gordontilden.com
- crjsvpef@ATG.WA.GOV
- drew.tulumello@weil.com
- dsilbert@keker.com
- emacmichael@keker.com
- emma.grunberg@atg.wa.gov
- fmuzzio@keker.com
- gmerchant@cooley.com
- jcadagan@gordontilden.com
- jlucien@gordontilden.com
- katie.clemmons@weil.com
- kelly.paradis@atg.wa.gov
- lnorton@cooley.com
- mam@riverside-law.com
- marsha.chien@atg.wa.gov
- mattanasio@cooley.com
- mbm@bhlaw.com
- mka@rnwlg.com

- mlambert@cooley.com
- mwilner@gordontilden.com
- nathan_deen@wsu.edu
- nbrown@keker.com
- ngoldberg@keker.com
- tanya.green@bhlaw.com
- tim.crippen@bhlaw.com
- treeves@keker.com
- zach.schreiber@weil.com

Comments:

Sender Name: Kelsi Zweifel - Email: Kelsi.Zweifel@atg.wa.gov
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

Note: The Filing Id is 20231122161611SC602349