

**SUPREME COURT OF THE STATE OF WASHINGTON**

WASHINGTON STATE  
UNIVERSITY, et al,

Plaintiffs-Respondents,

v.

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

Defendants,

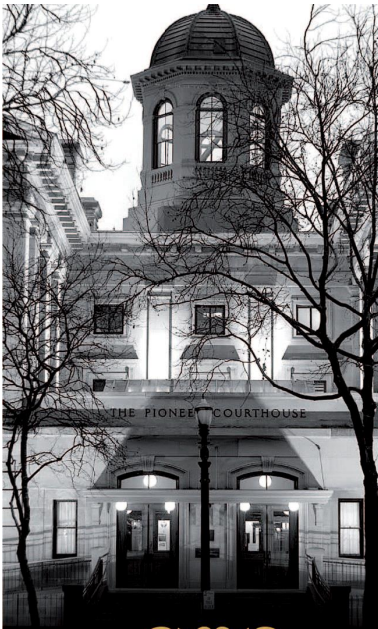
and

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

Intervenor-Defendant-Petitioner.

APPENDIX IN  
SUPPORT OF  
REPLY IN  
SUPPORT OF  
EMERGENCY  
MOTION TO STAY  
PROCEEDINGS  
PENDING REVIEW

Transcript of Proceedings Held on  
Tuesday, November 14, 2023  
(Preliminary Injunction Hearing)..... 1



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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 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,

vs.

NO. 23-2-00273-38

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

Defendant;

and

University of Washington, an institution of higher education and agency of the State of Washington,

Intervenor Defendant.

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**TRANSCRIPT OF PROCEEDINGS**

**HELD ON  
TUESDAY, NOVEMBER 14, 2023  
2:01 P.M.**

**BEFORE THE HONORABLE GARY LIBEY  
SUPERIOR COURT JUDGE**

**COLFAX, WASHINGTON**

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**APPEARANCES**

**Appearing on behalf of Plaintiff, OSU:**

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**APPEARANCES (Continued)**

**Appearing on behalf of Defendant, Pac 12 Conference:**

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**Appearing on behalf of Intervenor Defendant, UW:**

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**Appearing on behalf of Intervenor Defendants, UW and  
remaining nine amici schools:**

DANIEL LEVIN, ESQUIRE

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**APPEARANCES (Continued)**

**Also Present:**

- Mark Ellington, Esquire, Counsel for nine amici schools
- James McPhee, Esquire, Counsel for nine amici schools
- Steven Dixon, Esquire, Counsel for nine amici schools
- Hailyn Chen Esquire, Counsel for nine amici schools
- Scott Petersmyer, Esquire, Pac 12
- John Cadagan, Esquire, Pac 12
- Rebecca Gose, Esquire, OSU
- Scott Barnes, Athletic Director, OSU
- Kirk Schulz, President, WSU
- Pat Chun, Athletic Director, WSU
- David Silbert, Esquire
- Franco Muzzio, Esquire
- Taylor Reeves, Esquire

**TRANSCRIPT OF PROCEEDINGS**

**HELD ON**

**TUESDAY, NOVEMBER 14, 2023**

**2:01 P.M.**

**BEFORE THE HONORABLE GARY LIBEY**

**SUPERIOR COURT JUDGE**

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8 **THE COURT:** Good afternoon, ladies and gentlemen.  
9 Please be seated. Welcome to Whitman County Superior Court  
10 where we are on the record in open court. I want to thank  
11 everybody for their attendance today. I understand there  
12 may be over 300 people on Zoom for some reason.

13 Let me just formally introduce the case. We all  
14 know what it is, but I'll just read the caption here. For  
15 the record -- and also, if I don't speak loud enough that  
16 people cannot hear me, just raise your hand and either I'll  
17 speak louder or we'll get some headphones for you. But I  
18 know sometimes I don't speak as loud as I should, but I'm  
19 going to try today. Again, just raise your hand if you  
20 can't hear me. I'll make sure you restate.

21 All right. So today's case is Washington State  
22 University, an institution of higher education and agency of  
23 the State of Washington; Kirk H. Schulz, in his official  
24 capacities as the President of Washington State University  
25 and Chair of the Pac-12 Board of Directors; Oregon State

1 University, an institution of higher education and agency of  
2 the State of Oregon; and Jayathi Y. Murthy, in her official  
3 capacities as the President of Oregon State University and  
4 Member of the Pac-12 Board of Directors,  
5 Plaintiffs --

6 **AUTOMATED VOICE:** Recording in progress.

7 **THE COURT:** That's good. Recording in progress.

8 -- versus the Pac-12 Conference; and George  
9 Kliavkoff, in his official capacity as Commissioner of the  
10 Pac-12 Conference, Defendants. And University of  
11 Washington, an institution of higher education and agency of  
12 the State of Washington, Intervenor Defendant. All right.  
13 So that is the, yeah, official caption. Case Number 23-2-  
14 00273-38. And try to organize myself here.

15 Okay. So let's go and if I would have -- we can  
16 go ahead and have the plaintiffs introduce -- I think it's  
17 Eric MacMichael will be representing the plaintiffs today?

18 **MR. MACMICHAEL:** Yes, Your Honor. Good afternoon.  
19 Eric MacMichael. Seated at counsel table is my partner,  
20 Nick Goldberg, and my client, Ms. Gose, the general counsel  
21 of Oregon State University. And in the stands we have Scott  
22 Barnes, the Athletic Director of Oregon State University.  
23 And I'll let my colleague on behalf of Washington State  
24 introduce their attendees.

25 **THE COURT:** All right. Thank you, Mr. MacMichael.

1           **MS. SCAVETTI:** Good afternoon, Your Honor.  
2 Arianna Scavetti of Weil, Gotshal on behalf of Washington  
3 State University. I'm joined by my colleague, Katie  
4 Clemmons, as well as Nathan Deen from the Office of the  
5 Attorney General. We also have with us today President  
6 Schulz, President Kirk Schulz, the President of Washington  
7 State University, and Athletic Director Pat Chun. President  
8 Schulz had to fight through some fog and flight  
9 cancellations to be here, so we're glad to have him with us  
10 today.

11           **THE COURT:** Thank you. And could I just have you  
12 spell your last name?

13           **MS. SCAVETTI:** Absolutely. Scavetti, S-c-a-v, as  
14 in victor, -e-t-t-i.

15           **THE COURT:** All right. Thank you, Ms. Scavetti.  
16 All right. That takes care of the plaintiffs.

17           Let's go now to the Pac-12 Conference, and that  
18 would be Mr. John Cadagan or Mr. Gregory Merchant.

19           **MR. LAMBERT:** Mr. Mark Lambert.

20           **THE COURT:** Mark Lambert?

21           **MR. LAMBERT:** Yes.

22           **THE COURT:** Okay. I missed them all. All right.

23           **MR. LAMBERT:** Good morning, Your Honor. I'm Mark  
24 Lambert on behalf of the conference defendants. With me at  
25 counsel table are the general counsel of the Pac 12, Scott



1 Petersmyer, and our local counsel, John Cadagan.

2 **THE COURT:** Good afternoon, counsel.

3 All right. And let's go then to the University of  
4 Washington. And I believe that is James Buder, but I might  
5 be incorrect.

6 **MR. BUDER:** A hundred percent correct, Your Honor.  
7 Thank you. I'm used to mispronunciations, and that was not  
8 one. James Buder, Assistant Attorney General for the  
9 University of Washington. And here with me with pending pro  
10 hac vice applications, Your Honor, are Dan Levin, Bryan  
11 Heckenlively, and Hailyn Chen.

12 **THE COURT:** Okay. And I think I've signed orders  
13 for them to appear pro --

14 **MR. BUDER:** Have you, Your Honor?

15 **THE COURT:** Well, I think -- I signed a bunch.  
16 I'm not sure, but I will if you want me to today.

17 **MR. BUDER:** Yes, please.

18 **THE COURT:** All right.

19 **MR. BUDER:** Thank you, sir.

20 **THE COURT:** You can hand those up to the clerk,  
21 and we'll get those signed. All right.

22 And then we have the amicus curiae nine absent  
23 schools, and I think they're represented here by, I think,  
24 Mark Ellington, James McPhee, Steven Dixon, but I may be  
25 wrong.

1           **MR. LEVIN:** Your Honor, Daniel Levin from Munger  
2 Tolles & Olson. And we are representing the nine --

3           **THE COURT:** Yeah, if you could --

4           **THE CLERK:** Just remember to use the mic, please.

5           **THE COURT:** The overhead.

6           **MR. LEVIN:** Good afternoon, Your Honor. Daniel  
7 Levin from Munger Tolles & Olson, and we are also  
8 representing the amici schools.

9           **THE COURT:** And is Daniel Leves, L-e-v-e-s?

10          **MR. LEVIN:** L-e-v-i-n.

11          **THE COURT:** I-n. Thank you.

12          **MR. LEVIN:** Thank you.

13          **THE COURT:** The clerk's new to all these names and  
14 she's got to take them down and put them in the minutes, so  
15 we try to get the spellings correct. Okay. So no Mr. James  
16 McPhee or Mr. Mark Ellington. Okay. All right.

17                 All right. Well, as you all know, this matter is  
18 before the court today on a motion for a preliminary  
19 injunction by the plaintiffs and a motion to dismiss by the  
20 Pac 12, the University of Washington, and the amicus curiae  
21 nine absent schools. I think there are more attorneys in  
22 this case than the total combined in Whitman County, Adams  
23 County, Asotin County, Columbia County, Garfield, and  
24 Lincoln Counties together. Just my observation. I vote in  
25 all those counties, and they don't have as many as what you

1 have here -- what we have here.

2 So, a few preliminary comments. Just to let you  
3 know, Colfax is known to have one of the greatest ghost  
4 institutions in the world. Yes, the old St. Ignatius  
5 Building just down Main Street is known to have many ghosts  
6 who continuously haunt the building and who bring hundreds  
7 of thousands of ghost hunters right here to Colfax every  
8 year.

9 Why do I mention this, you ask. Well, because a  
10 few hours ago when my court administrator and I were pulling  
11 in chairs from the jury room, there's a ladder up through  
12 the hole, and I could hear -- I thought I heard a voice  
13 coming down for me while I was in the jury room. And it  
14 sounded like a faint voice, sounded like somebody familiar.

15 I listened carefully, and as certain as the voice  
16 was, it was that of Bill Walton who was proclaiming the Pac  
17 12 the conference of champions, kind of pretty eerie when  
18 you think about it. I thought that was -- I've heard that  
19 so many times. Okay.

20 We would like to introduce our courtroom security,  
21 Whitman County Deputy Sheriff is here, and he'll -- we  
22 didn't get Cory Alcantar, apparently.

23 **SECURITY OFFICER:** You have to wait until  
24 Thursday.

25 **THE COURT:** Okay. All right. Cory Alcantar, he

1 was -- he's the biggest, toughest deputy sheriff we have,  
2 but we've got the second here. So we've got -- we've got  
3 security. We've got security. All right. Okay.

4 Okay. The court administrator set this case for  
5 one hour today, but there is nothing else scheduled in court  
6 today, so I suspect we will take as much time as you need,  
7 so we've got -- there is -- there was no mention of any  
8 testimony for today, so my understanding is the court will  
9 decide the issues today based upon the declarations,  
10 memorandum, and I also understand that for purposes of  
11 today, there are no material issues of fact, and you can  
12 correct me if I'm wrong when you respond.

13 The court has read all of your materials,  
14 actually, two and three times, and thank you for all  
15 providing organized bench copies. They're all up here in  
16 order, and the court has read hundreds of pages of legal  
17 memos, declarations, and attached exhibits, well over 500  
18 pages.

19 The Pac 12 bylaws, alone, are about 250 pages,  
20 which have been provided twice in the materials. And by the  
21 way, there is -- and one of the things I noted when I read  
22 that was there's no dispute resolution clause and no  
23 jurisdiction or venue clause in the event of a dispute. In  
24 my 41 years of private practice, I cannot recall drafting a  
25 contract without a dispute resolution clause, including a

1 jurisdiction venue clause.

2 Note to the conference, you better look over your  
3 bylaws because you having no dispute resolution clause may  
4 come back to haunt you.

5 All right. And also, missing from the bylaws is a  
6 liquidated damages clause or a penalty for leaving early  
7 clause, which had I read about other conference like  
8 University of Maryland had to pay \$30 million to leave the  
9 ACC. I do not see that in the bylaws, but if I missed that,  
10 I'm sure I will be corrected.

11 This court has also received two three-ring  
12 binders of cases printed in full from the University of  
13 Washington, some 50 cases here in these notebooks without  
14 any synopsis or explanation what each case was relevant to.  
15 The court has also received another three-ring binder of  
16 cases printed in full, with concurring and dissenting  
17 opinions, some 15 more cases without any synopsis or  
18 explanation which each case was relevant to. So the court  
19 is not sure what you wanted the court to do with some 75  
20 cases.

21 Again, there was no synopsis brief or short  
22 summary of each case. By reading all these cases without a  
23 synopsis is not a realistic request to this court nor a  
24 meaningful way to support your clients' positions. I have  
25 them, but without some reason to read them, I did not.

1 The filing of the 75 cases without a synopsis,  
2 brief, or explanation of what you want the court to  
3 specifically read, I believe, is not a good way to enhance  
4 or support your arguments. Nevertheless, they are here, and  
5 if you want to point to them in your argument, you may do  
6 so.

7 Okay. Just a few notes. My big note here is that  
8 I was optimistic that you all would not be back here today,  
9 that the very experience of a retired federal court judge  
10 could successfully mediate your disputes. That's too bad  
11 because now the resolution of this most challenging case is  
12 no longer in your hands. Now the resolution is in the hands  
13 of the court where decisions usually displease all  
14 concerned.

15 I'm going to just have this question answered  
16 later: Does any party here think that if you all had more  
17 time to mediate, that a resolution of this case could be  
18 resolved? I'd like you to answer that when we get started.

19 This court has the discretion to allow amicus  
20 curiae participation; that is, friends of the court, who in  
21 this case are the nine remaining universities of the Pac 12,  
22 if such participation would be helpful to the court. The  
23 court so finds, and the court is glad to recognize amicus  
24 curiae and for amicus curiae to participate in this case.

25 Note to public, amicus curiae are not officially

1 parties in this case but certainly want their voices heard  
2 in this lawsuit since the outcome will and may probably  
3 affect them.

4 Okay. We'll start out by each of the three  
5 parties, the plaintiffs, Oregon State University, Washington  
6 State University; then the defendant Pac 12; then the  
7 defendant University of Washington; and then the amicus  
8 curiae, stating what they want and why in about ten minutes.

9 We'll then go back around in the same order with  
10 replies of five minutes from each party and from the amicus  
11 curiae. The court will have some questions as you proceed.  
12 I also have a list of questions if they are not addressed in  
13 argument.

14 We all know that this case will be ultimately  
15 decided by the nine justices in Olympia or Washington, D.C.,  
16 so whatever decision this court makes today will only last  
17 as long as it takes for this case to get there for review  
18 unless we can work out a settlement or an agreeable  
19 resolution with all concerned today, which would be  
20 something that we could -- that I hope can be achieved.

21 The court has outlined each of the parties'  
22 motions, briefs, and declarations. I will probably refer to  
23 my notes from time to time as I have questions noted and  
24 comments noted. And let me just review the outline of the  
25 documents that I have reviewed. I've reviewed them all, as

1 I say, two or three times.

2 The October Pac 12's motion to dismiss. The  
3 October 9th amicus curiae in support of the University of  
4 Washington motion to dismiss. The October 12th University  
5 of Washington's response to motion to intervene. There  
6 wasn't any objection to that, of course. October 12th, the  
7 University of Washington's motion to dismiss. October 20th,  
8 the plaintiffs' consolidated opposition to the defendants'  
9 motion to dismiss. And October 25th -- and I'm using the  
10 date stamps here. The plaintiff's motion for preliminary  
11 injunction.

12 October 25th, a proposed order granting  
13 preliminary injunction. An October 27th University of  
14 Washington's reply in support of its motion to dismiss. The  
15 November 2nd Pac 12 opposition to plaintiffs' motion for  
16 preliminary injunction. The -- on November 2nd, the  
17 University of Washington's opposition to plaintiffs' motion  
18 for preliminary injunction. October 9th, the plaintiffs'  
19 consolidated reply in support of motion for preliminary  
20 injunction. And that is -- oh, there is another reply on  
21 November 9th. That's all part of the plaintiffs'  
22 consolidated reply.

23 So I've read, reviewed, and outlined on those  
24 yellow legal paper the points that you each want to make. I  
25 want to say one thing here before we get -- before we get



1 into argument. When the court makes its decision, please do  
2 not make any reactions here in court, no shouting, ringing,  
3 high-fiving, or any tomatoes. This isn't a football game,  
4 and thank you for your cooperation.

5 All right. So let's start with the plaintiffs'  
6 motion for a preliminary injunction and the reasons why.

7 **MR. MACMICHAEL:** Thank you, Your Honor. Eric  
8 MacMichael on behalf of Oregon State. And with the court's  
9 permission, we've prepared a PowerPoint presentation if I  
10 can hand it up to the court?

11 **THE COURT:** You may, sure.

12 **MR. MACMICHAEL:** Thank you, Your Honor.

13 **THE COURT:** All right. Thank you.

14 **MR. MACMICHAEL:** And just so I understand, Your  
15 Honor, you like me to keep my comments to roughly ten  
16 minutes at this point?

17 **THE COURT:** Well, how long do you think you need?

18 **MR. MACMICHAEL:** Well, to be honest, to get  
19 through the entire presentation I had budgeted a lot more  
20 time, but I'm happy to try to hit the high notes for the  
21 court now and then follow up on any aspects that you would  
22 like me to elaborate on for --

23 **THE COURT:** Well, I want you to be -- I want  
24 everybody to be able to have time to say what they want to  
25 say. But we've got -- it's 2:15. We've got some time

1 limitation. Let's start out with a --

2 **MR. MACMICHAEL:** Okay.

3 **THE COURT:** How about if we start out with a 20-  
4 minute first round?

5 **MR. MACMICHAEL:** Okay. I'm happy to do that, Your  
6 Honor, and I'll try to police myself on the time, but thank  
7 you.

8 Thank you, Your Honor, for hearing this very  
9 important matter. It's nice to be back in Colfax. We, the  
10 plaintiffs, are here today seeking a preliminary injunction  
11 which preserves the plaintiffs' governance rights under the  
12 bylaws of the Pac 12 as the sole remaining members of the  
13 conference and also preserves the interpretation of the  
14 bylaws that the defendants and the vast majority of the  
15 departing schools adopted and ratified time and time again  
16 for more than a year leading up to this dispute.

17 And Your Honor, I've organized my comments today  
18 around four key points which you can see on slide 2 of the  
19 presentation. And the first key point is that Washington  
20 State and Oregon State are likely to prevail on their claim  
21 here that, under the bylaws of the Pac 12, members who  
22 deliver notice that they are leaving the conference to join  
23 competitors are no longer entitled to sit on the board or  
24 vote on behalf of the Pac 12.

25 It is the exact same issue that we took up back in

1 September, and the evidence produced in discovery since the  
2 temporary restraining order only confirms that the court's  
3 preliminary ruling was correct.

4 We have a mountain of evidence that's been  
5 produced in discovery, and it overwhelmingly supports the  
6 plaintiffs' interpretation that, under the Pac 12 bylaws, if  
7 you deliver notice that you are going to leave the  
8 conference, that at that moment you are automatically off  
9 the board and you are no longer entitled to vote on any  
10 matter pending before the board because you have a conflict  
11 of interest, and you are no longer able to represent the  
12 Pac-12 Conference loyally as board members are required to.

13 The second key point is that the parties' prior  
14 court of conduct uniformly supports the plaintiffs in this  
15 case. The evidence shows that for 13 months leading up to  
16 this dispute, the conference applied the bylaws in a  
17 consistent manner that supports our interpretation and  
18 rejects the parting schools' interpretation.

19 For 13 months, the board of the Pac 12 ratified  
20 that interpretation time and time again by meeting and  
21 making significant decisions as a board of 10, not as a  
22 board of 12. And for 13 months, neither the conference nor  
23 the ten remaining board members ever said that they  
24 disagreed with our interpretation of the bylaws, not once.  
25 So this interpretation that the University of Washington is

1 coming into court with is just a direct reversal of the  
2 position that it, the conference, and the vast majority of  
3 the departing schools took for 13 months.

4 And there isn't a single document that's been  
5 produced which shows that the University of Washington  
6 thought that this was the correct position until it provided  
7 its notice of withdrawal, and now the shoe is on the other  
8 foot. But parties are not allowed to just blatantly flip-  
9 flop on the meaning of contractual provisions just so they  
10 can have their cake and eat it, too, Your Honor.

11 The third key point here is that Oregon State and  
12 Washington State will suffer irreparable harm without a  
13 preliminary injunction. It is no understatement to say that  
14 this is a crucial time for the Pac-12 Conference, and the  
15 board needs to be able to act now. And plaintiffs are the  
16 only eligible members to sit on the board because we are the  
17 only members who are not hopelessly conflicted.

18 If Oregon State and Washington State are not  
19 entitled to act as the board now, as the bylaws dictate and  
20 require, then there very likely will not be a conference  
21 left to save by the time that our rights are fully  
22 adjudicated through the final resolution of this case. So  
23 now is the time that the plaintiffs need to be able to act  
24 as the board, as the bylaws require, and based entirely on  
25 the actions of the departing schools, who have announced

1 that they're leaving to join competitors.

2 And finally, Your Honor, I want to address a  
3 couple of the red herrings in the departing schools' briefs  
4 to explain to the court why several of the arguments they're  
5 making we think are really just an effort to distract from  
6 the central question before the court, which is: Whose  
7 interpretation of the bylaws is more likely to prevail in  
8 this case. That is the key question for the court. So let  
9 me dive right into that, Your Honor.

10 And I'm going to jump to slide 4 of my  
11 presentation. The fundamental question here is whether  
12 under the bylaws, schools who have provided notice that they  
13 are leaving the Pac 12 and joining competitor conferences  
14 are still entitled to vote on behalf of the board during  
15 their remaining time in the conference.

16 Or alternatively, is it the case that if you  
17 provide notice that you're going to leave, you are  
18 automatically removed from the board and no longer entitled  
19 to vote on behalf of the Pac 12. And plaintiffs  
20 respectfully submit that the bylaws provide a direct answer  
21 to that exact question.

22 So if you turn to slide 5, Your Honor, which  
23 contains Chapter 2, Section 3 of the Pac 12 bylaws, and I  
24 know the court is well familiar with this language at this  
25 point in time, so I won't belabor it. But there's a couple

1 points I want to make here.

2 As it pertains to the dispute that is before the  
3 court today, there are two critical provisions in Chapter 2,  
4 Section 3. The first is the very first clause of this which  
5 says that no member shall deliver a notice of withdrawal to  
6 the conference in the period beginning July 24, 2011 and  
7 ending August 1, 2024.

8 And Your Honor, a notice of withdrawal is exactly  
9 what it sounds like, a notice that you are going to  
10 withdraw. And this is saying in plain language, during the  
11 current media rights deal, don't give notice that you are  
12 going to leave and join a competitor because that will hurt  
13 the conference. The Pac 12, like any organization, has a  
14 commercial interest in making sure that its members stay and  
15 also in making sure that its members stay loyal while  
16 they're in the conference.

17 And there's no dispute that the notices of  
18 withdrawal provided by USC and UCLA caused significant harm  
19 and significant injury to the Pac 12, so this clause is  
20 trying to provide a disincentive to members leaving the  
21 conference, and it's saying during the current media rights  
22 deal, don't give notice that you plan to leave and join a  
23 competitor.

24 And the second critical provision, Your Honor, is  
25 in the last sentence, which we've also highlighted, and that

1 says very clearly, additionally, if you do deliver a notice  
2 of withdrawal prior to August 1, 2024, then you are  
3 automatically off the board and no longer entitled to vote.  
4 And that rule makes perfect sense because members who have  
5 announced that they're leaving at that point have a conflict  
6 of interest. They no longer have a duty of loyalty to the  
7 Pac 12, and they can no longer act on behalf of the  
8 conference.

9 So Your Honor, this middle section in Chapter 2,  
10 Section 3, the unhighlighted language, this is where the  
11 departing schools focus all of their analysis and all of  
12 their attention. They barely mention the first clause or  
13 the last sentence. Instead, they focus all of their  
14 analysis on that middle part.

15 But that middle part is addressing a separate  
16 concern that is not present in this case. And it's  
17 important to remember, Your Honor, that the drafters of the  
18 bylaws had to consider two possible scenarios. If a member  
19 said that they were going to withdraw, that could either be  
20 they're going to withdraw before the expiration of the  
21 current media rights deal on August 1, 2024, or they can  
22 provide notice that they're going to withdraw after.

23 So if they're going to withdraw before, that would  
24 put the conference in breach of its media rights deal, and  
25 the conference would need to have the ability to seek

1 injunctive relief to prevent that. But if the notice  
2 provided said that they were going to withdraw after August  
3 1, 2024, which is what happened here, then this -- the  
4 injunctive relief in this middle clause is not necessary and  
5 not relevant.

6 But the remedy provided in the last sentence  
7 becomes paramount and that kicks in. And that's why the  
8 remedy in the last sentence begins with the word  
9 "additionally." It's providing a separate and distinct  
10 remedy from what's contained in the prior sentence, and that  
11 remedy is to remove board members once they announce their  
12 intent to leave, because it's at that point that they no  
13 longer have loyalty to the conference.

14 And so our interpretation, the interpretation that  
15 the court preliminarily adopted at the TRO, is the only way  
16 to read this section as a whole, giving meaning to each  
17 part, which is what the court, of course, is supposed to do.

18 If you look at slide 6, you can see the court's  
19 temporary restraining order ruling which found that the  
20 plaintiffs are likely to prevail in their claim and adopted  
21 the interpretation preliminarily that we just walked  
22 through.

23 So Your Honor, let me spend just a minute or two  
24 talking about the departing schools' interpretation of this  
25 section. The departing schools, led by the University of



1 Washington, are now, and I really cannot emphasize strongly  
2 enough the word "now," are now coming to court and saying  
3 that our interpretation is absurd, it makes no sense. They  
4 say that it's atextual, which is a word that I honestly had  
5 to look up.

6 **THE COURT:** What's it mean?

7 **MR. MACMICHAEL:** I'm still not sure I know, so --  
8 and they proffer a different interpretation of this  
9 provision. And while they spend many pages explaining what  
10 that is, I think it can be distilled down to what's on slide  
11 7 of our presentation.

12 And what the departing schools are essentially  
13 arguing, as I understand it, Your Honor, is that when the  
14 bylaws say no member shall deliver a notice of withdrawal  
15 during this period, what the bylaws really mean is no  
16 members shall withdraw from the conference during that  
17 period. The departing schools' entire argument hinges on  
18 delivery of notice of withdrawal to mean actual withdrawal.  
19 And the departing schools are saying that this entire  
20 chapter only applies in a situation in which the member  
21 actually withdraws prior to August 1, 2024.

22 They're saying that this chapter does not address  
23 in any way the current situation in which a member announces  
24 that they're planning to leave after August 1, 2024 to join  
25 a competitor. And according to them, there's no consequence

1 at all to a member who announces that they are planning to  
2 leave to join a rival conference.

3 According to them, they're still entitled to be on  
4 the board, they're still entitled to vote, and they're still  
5 entitled to vote on crucial issues like how to allocate the  
6 remaining revenue over the next year, whether or not to make  
7 any provision for the liabilities that the conference has  
8 incurred during the time that they were in the conference  
9 but which liabilities will not come due until after they  
10 leave.

11 They get to decide, according to them, how the  
12 conference should invest that money to regrow for the future  
13 or whether it shouldn't invest any money to regrow for the  
14 future. So that's their interpretation of this. But there  
15 are just several fundamental problems with that  
16 interpretation, and I'll go through them very quickly, just  
17 in the interest of time. But if the court has any questions  
18 about what any of these problems are, I'm happy to stop and  
19 explain.

20 **THE COURT:** Sure.

21 **MR. MACMICHAEL:** The first problem is it's just  
22 not what the bylaws say, Your Honor. The bylaws say don't  
23 deliver a notice of withdrawal during this period. It  
24 doesn't say withdraw. That easily could have been written  
25 differently, but they triggered the remedy to the delivery

1 the notice because that's when the injury occurs to the  
2 conference.

3 The other key point here, Your Honor, is that  
4 under the prior version of the bylaws, it's undisputed  
5 between all the parties in front of you today that the term  
6 "notice of withdrawal" meant deliver a notice before you  
7 actually withdraw. That's what it mean in the prior version  
8 of the bylaws.

9 And by using that same term and carrying that term  
10 forward into the current version of the bylaws, I think the  
11 court should assume that the drafters intended for that same  
12 meaning to come along with it. It would be very unusual to  
13 take a term with a specific understood meaning and apply it  
14 again but intend to change the meaning without signaling  
15 that in any way.

16 Now, on that same point, it was also the case in  
17 the prior version that if a member did provide notice, they  
18 were automatically off the board. And again, there's not a  
19 single piece of evidence to suggest that anyone intended to  
20 change that result between the prior version and the current  
21 version. So I think when you look at the history of the  
22 bylaws, again, it confirms and supports our interpretation.

23 It also renders -- I'm on slide 9 now. Their  
24 interpretation renders the last sentence of this provision  
25 entirely meaningless. Why would you need to specify that

1 people who had actually withdrawn are no longer on the board  
2 and can no longer vote because they would not actually be in  
3 the conference at that point, so there would be no need to  
4 actually say that you're off the board.

5           So their provision basically reads that last  
6 sentence of this chapter entirely out of the bylaws. And  
7 that's a real problem, and I'm on slide 11 now, because that  
8 sentence actually begins with the word "additionally." And  
9 it's a well understood canon of contract interpretation that  
10 whenever you begin a sentence with the word "additionally,"  
11 what follows is intended to be a separate and distinct  
12 provision in the section. So that's why they say,  
13 additionally, setting aside everything else, if you provide  
14 a notice of withdrawal, you're off the board. And that's  
15 intended to address this conflict of interest problem that  
16 existed in the prior version and also in the current  
17 version.

18           So just going through, Your Honor, I want to -- I  
19 want to jump to slide 15 -- or actually, let me jump to  
20 slide 17, if the court will allow me to jump ahead.

21           **THE COURT:** Sure.

22           **MR. MACMICHAEL:** And this is really a critical  
23 issue in this case, which is I have a timeline here on slide  
24 17. And what the evidence that's been produced since the  
25 TRO shows uniformly is that between June 30th of 2022, when

1 USC and UCLA announced their departures, and August 2023 of  
2 this year, the conference and the remaining ten board  
3 members took the position that schools who announce that  
4 they were leaving after the expiration of the current media  
5 deal were automatically removed from the board. That was  
6 the course of conduct during this entire time from June  
7 30th, 2022 all the way up through August of this year.

8 The evidence also shows that the ten remaining  
9 schools, including the University of Washington, and its  
10 president, who was the chair of the board during most of  
11 this time, knew that USC and UCLA had been removed from the  
12 board. They knew why USC and UCLA had been removed from the  
13 board. And they repeatedly ratified that decision, and they  
14 repeatedly ratified the interpretation of the contract -- of  
15 the bylaws that we are advancing.

16 So the evidence on course of performance in this  
17 case overwhelmingly supports the plaintiffs' position and  
18 confirms that we have demonstrated a likelihood of success  
19 on the merits of our claim. And Your Honor, it's not like  
20 there was nothing happening at the Pac 12 during this entire  
21 period of time that's laid out in our timeline.

22 If you look at the next page, what you can see is  
23 there were more than 24 meetings of the Pac 12 during this  
24 time period during which USC and UCLA were not entitled to  
25 attend a single one and not entitled to vote on a single

1 issue. During this entire time, this was a board of ten  
2 because two of those schools, USC and UCLA, had said, we're  
3 going to leave in August of 2024. And everybody agreed that  
4 means you're off the board and you can't vote, which is what  
5 we're saying in this case.

6 And these are all very smart people, these  
7 chancellors and presidents of these universities. They know  
8 how to count. They know the difference between 12 members  
9 of the board versus 10 members of the board, and they were  
10 told exactly why USC and UCLA were off because they had  
11 provided notices of withdrawal, and they knew exactly what  
12 interpretation of the bylaws the conference was taking, and  
13 they never disagreed with it. Instead, they ratified it  
14 again and again and again.

15 So for them to come in here and say that our  
16 interpretation is absurd or it makes no sense, it's atextual  
17 is very ironic, given that the University of Washington, the  
18 conference, and eight of the ten departing schools all  
19 agreed that that was the right interpretation for more than  
20 13 months, and they only suddenly decided that it was the  
21 wrong interpretation after they all announced that they were  
22 leaving to join competitor conferences, and now the remedies  
23 that they had imposed on others were going to be imposed on  
24 them, and that's how we arrived at this newfound  
25 interpretation.

1           **THE COURT:** Was there any actions the board took  
2 for -- against USC or UCLA for withdrawing from the  
3 conference, or did they just lose their board seat, or was  
4 there anything done with respect to their interests?

5           **MR. MACMICHAEL:** Sure. Very good question, Your  
6 Honor. So they twice -- at least twice in the record that  
7 we've seen, the board, which means the conference and the  
8 remaining members, considered imposing penalties on USC and  
9 UCLA. They considered reducing their distributions, and  
10 this is literally laid out in the presentations. They  
11 considered doing that. They never actually did.

12           But during the time that USC and UCLA were off the  
13 board, the board did make decisions like reducing  
14 distributions for everyone. They made critical decisions  
15 like how to allocate cash reserves to budget shortfalls.  
16 They made decisions about setline litigation.

17           So the board of ten was making very significant  
18 decisions that had real-world impacts on USC and UCLA,  
19 including reducing the money that they were getting and have  
20 received, and nonetheless, they still were not entitled to  
21 attend, vote, or even know what was happening because they  
22 were automatically removed as the bylaws require.

23           So the -- and the suggestion in the departing  
24 schools' briefing that the ten board members didn't know  
25 what had happened with respect to USC and UCLA, that it was

1 somehow opaque to them has just completely been disproven by  
2 the record. We -- in the presentation -- I don't have time  
3 to go through all the slides. I'm happy to show you if you  
4 want. But they were specifically told on multiple occasions  
5 about the fact that these schools had provided a notice of  
6 withdrawal. They were therefore off the board.

7 And they knew that they were still in the  
8 conference but they were planning to withdraw in the future,  
9 and that meant they were off the board. So everybody knew  
10 that that was the right interpretation until that  
11 interpretation no longer suited them, and then suddenly it  
12 was the wrong interpretation.

13 So Your Honor, I want to jump ahead, just in my  
14 remaining few minutes, to slide 39, if I may. And I want to  
15 hit the third key point in this case, which is that  
16 Washington State and Oregon State will suffer irreparable  
17 harm without the preliminary injunction that we've  
18 requested.

19 **THE COURT:** Which page are you on?

20 **MR. MACMICHAEL:** I'm sorry, I'm on slide 39 of the  
21 presentation.

22 **THE COURT:** Okay. Gotcha.

23 **MR. MACMICHAEL:** And I'm sorry if I'm moving fast.  
24 I'm trying to lay out as much as I can here.

25 **THE COURT:** Sure.



1           **MR. MACMICHAEL:** So unless a preliminary  
2 injunction is granted, the plaintiffs will lose their  
3 governance rights guaranteed to them under the bylaws to act  
4 as the board of the Pac 12, and they will lose the chance to  
5 try to chart a path forward for this conference.

6           And we cited numerous cases in our briefing, Your  
7 Honor, stating that the loss of governance rights  
8 constitutes irreparable harm and gives rise to a preliminary  
9 injunction, and the defendants had no response whatsoever to  
10 those cases because there is not one, frankly.

11           And courts have, as we laid out, consistently  
12 recognized the unique and intrinsic value that governance  
13 rights confer, and they also recognize that if you are  
14 deprived of your governance rights within an organization,  
15 that that harm is irretrievable and cannot be measured by  
16 monetary damages. It cannot be redressed later if you're  
17 deprived of your right to govern in an organization, if you  
18 have that right.

19           And I don't know how there could be a more clear  
20 demonstration of that rule that the loss of governance  
21 rights constitutes irreparable harm than the situation you  
22 have here when you consider two things. One is, as I said  
23 earlier, now is the crucial time for the Pac 12 to try to  
24 plot a course forward. The board needs to be able to act  
25 now, and the board needs to be able to act in the best

1 interest of the conference, not in the best interest of  
2 individual members whose agendas no longer align with the  
3 Pac-12 Conference.

4           The second key point is that without the  
5 preliminary injunction, essentially what we are doing is  
6 saying that the conference's future is going to be decided  
7 by ten members who are hopelessly conflicted and no longer  
8 have any loyalty to the Pac 12 because they pledged their  
9 futures to competitors. They have no incentive to invest  
10 one dollar in the Pac 12 because they're all leaving to join  
11 the Big 10, the Big 12, or the ACC.

12           And the opposition brief that we received from the  
13 University of Washington, I think, confirms very frankly  
14 what the departing schools' plans are if they are granted  
15 any authority to govern this association. They want to  
16 distribute all the revenue to the members, mostly to  
17 themselves. They don't want to invest a dollar in going out  
18 and regrowing the Pac 12. They don't want to invest a  
19 dollar in recruiting new members because there's no upside  
20 for them in the Pac 12 growing or going on.

21           They're going to conferences to compete against  
22 the Pac 12, so they have no incentive to do anything other  
23 than distribute the money to themselves, leave their  
24 liabilities in the conference, leave the conference to deal  
25 with all of that. And that just cannot be the way that this

1 is going to play out moving forward.

2 And so let me get to the last slide.

3 **THE COURT:** And if you need more time, we're not -  
4 - I don't want to rush anybody today. I want everybody to  
5 be able to present their -- their side, so --

6 **MR. MACMICHAEL:** Sure. And I hope this won't be  
7 my only time to address the court this afternoon. I  
8 understand there's multiple people. We'll sort of pass the  
9 mic around, but there's certainly a lot more I want to say.

10 So let me -- the last slide basically summarizes  
11 what we're asking for by way of our preliminary injunction,  
12 Your Honor. What we are asking for is no more than trying  
13 to validate our rights under the bylaws and to prevent the  
14 departing schools from trampling on those rights just  
15 because they outnumber us 10 to 2.

16 And I think it's important to remember, Your  
17 Honor, that the relief we are seeking in this case, which is  
18 that we should be recognized as the only two members of the  
19 board as the bylaws dictate and as everybody understood for  
20 more than a year. That relief is the direct result of the  
21 actions of the departing schools who chose to prioritize  
22 their own self-interest over the interest of the conference,  
23 and they did so knowing full well what the consequences to  
24 them would be because they imposed those exact same  
25 consequences on USC, UCLA, and Colorado when they all

1 announced -- when those schools announced that they were  
2 going to leave.

3           So they made their decisions knowing exactly what  
4 the consequence would be. So for them to come in and say  
5 that this is unfair to them, that it can't possibly be the  
6 case that these two schools are the only two board members,  
7 it's not only what the bylaws require, but it's what they  
8 knew the bylaws required because they adopted and ratified  
9 that interpretation more times than I can county, frankly.  
10 So that's what we're asking for. I'm happy to answer any  
11 questions, also happy to talk to Your Honor in a few  
12 minutes.

13           **THE COURT:** Sure, sure. I take it you didn't see  
14 any point of continuing the hearing for more time for  
15 mediation?

16           **MR. MACMICHAEL:** You know, Your Honor, I think  
17 we're at a point where the parties need to know whose  
18 interpretation of the bylaws is more likely to prevail in  
19 this case. I've respectfully would submit that the  
20 irreparable harm to the plaintiffs, if we are -- if we  
21 demonstrated a likelihood of success, if we convince the  
22 court that our interpretation is more likely to prevail,  
23 which I respectfully submit we have, then the plaintiffs  
24 need to be empowered to act now and not later, when it's  
25 going to be too late.

1 I think the irreparable harm is actually an easier  
2 question here, both, because under the law it's just clear  
3 that the loss of governance rights is irreparable harm, but  
4 also given the critical time period that the conference  
5 finds itself in right now. So I think the parties are at a  
6 place where they would benefit from judicial guidance on  
7 whose interpretation is more likely to prevail in this case,  
8 and then that could potentially help. I don't know. I  
9 don't make all the decisions.

10 **THE COURT:** Okay. Thank you, counsel. Appreciate  
11 that.

12 All right. So now we'll take up the Pac 12.  
13 Counsel?

14 **MR. LAMBERT:** Good afternoon, Your Honor. Before  
15 I make a few brief points in support of the conference  
16 defendant's positions, I would like to update the court on a  
17 current state of conference operations since the September  
18 11th TRO hearing.

19 This is important to both motions before the court  
20 today, although I note that we are focusing on the  
21 preliminary injunction motion. To begin, since the court  
22 entered the TRO, which allows the conference to carry on its  
23 business in the normal course and to take other actions for  
24 which there is unanimous written support of the members, the  
25 commissioner, and the conference to achieve the following

1 vital actions.

2 After the September 11 hearing, in fact, the day  
3 after and the day before the disputed board meeting, the  
4 commissioner secured unanimous support from the members on  
5 the employee retention plan that I discussed with the court  
6 on September 11th. That happened a day after the meeting.  
7 Within a week -- a day after the hearing.

8 Within a week of the hearing, the commissioner  
9 secured the unanimous written support from the members on  
10 the scope of services plan. The commissioner intended for  
11 this plan to streamline the business and to preserve  
12 optionality for Washington State and Oregon State as  
13 remaining members.

14 And since the hearing with its workforce intact,  
15 the conference has been able to perform the obligations that  
16 are essential to driving the business for the benefit of all  
17 members. The conference has been able to maintain  
18 productive neutrality in operating the business of the  
19 conference while the members work to resolve their  
20 differences in and out of the court.

21 Since the outset of the litigation, and even in  
22 the weeks of chaos leading up to it, the laser focus of the  
23 conference and the commissioner has been the orderly and  
24 sustainable conduct of conference business, maintaining its  
25 critical workforce, defining the scope of its services to

1 meet present challenges, and the successful performance of  
2 conference business to maximize value, and to support  
3 competition among member teams and athletes.

4           The TRO preserved the status quo that has allowed  
5 the conference and the commissioner to succeed, and all  
6 members have enjoyed the benefits of the successful Fall  
7 season of Pac 12 action. The conference and commissioner  
8 are concerned that the outcome of the PI motion will disrupt  
9 that as the new interim order sought by plaintiffs will  
10 likely throw into chaos the operational status quo that  
11 preceded this litigation and continued under the TRO.

12           **THE COURT:** Why do you say that? Why do you say  
13 it will be chaos?

14           **MR. LAMBERT:** I think the key is the conference  
15 and the commissioner are neutral on who the board is.

16           **THE COURT:** Right.

17           **MR. LAMBERT:** What the plaintiffs don't address is  
18 they don't address what they plan to do. There's no agenda  
19 for that first planned board meeting. We don't -- and it's  
20 something that the plaintiffs have not addressed, and it is  
21 a grave uncertainty, I think, that causes a great deal of  
22 consternation among the members. What is going to happen if  
23 that shift of power is given in a preliminary hearing?

24           We don't know what they'll do. They seem to  
25 accuse each other of taking all the money and icing the

1 group without the power out of the benefits of the  
2 conference, and that would lead -- that's the chaos that it  
3 would lead to. We're concerned about interlocutory appeals,  
4 collateral litigation, and the other kinds of chaotic  
5 actions that make performing the conference's daily, weekly,  
6 monthly action for the remainder of the 23-24 school year.

7 There's going to be a Pac 12 championship football  
8 game that needs to be produced on December 1st. There's a  
9 Pac 12 basketball conference in the spring. All of these  
10 things are very important revenue-producing events that  
11 stand to benefit the entirety of the conference.

12 **THE COURT:** Do you think that -- do you think that  
13 if the plaintiffs obtain the two board positions, they would  
14 in any way affect the future sports that have been  
15 scheduled?

16 **MR. LAMBERT:** I don't know. We don't have an  
17 agenda. We have no idea. We have -- we have fear,  
18 uncertainty, and doubt from both the departing schools, on  
19 the one hand, and the plaintiff schools on the other.

20 And what our main point today is that the court  
21 listened very carefully to the parties on September 11th,  
22 decided that that order would preserve the status quo as the  
23 law requires in a circumstance like this. And in the nine  
24 weeks since that time, business has been conducted. Revenue  
25 has been generated through the performance of the



1 conference's obligations to its contracting partners and  
2 others, and in that course of nine weeks, nothing has  
3 changed. And yet, the plaintiffs want to -- they want a new  
4 order.

5           And I think that that is another thing that is of  
6 concern to us is that we don't see what has changed in that  
7 time period and the uncertainty about what their first  
8 action will be and what their second action will be, not  
9 because we have a horse in that race, it's just that we have  
10 to carry things out and get work done while the consequences  
11 of those actions are litigated and disputed between the  
12 disputing members. That is the concern.

13           And we think that the conference and the  
14 commissioner believe that a lot can be lost that -- which is  
15 the subject matter that's being fought over here, if those  
16 disputes are too disruptive and too dislocating.

17           **THE COURT:** Does the Pac 12 want to continue in  
18 its business in the future?

19           **MR. LAMBERT:** That is up to -- frankly, that is up  
20 to Oregon State and Washington State at this point, and the  
21 conference and the commissioner are sensitive to those  
22 issues and also sensitive to the notion that without a  
23 board, that that makes things difficult. But the -- we  
24 think that the status quo and the TRO does facilitate both,  
25 you know, on the one hand, preparation for a trial that

1 could lead to a final judgment but hopefully, in the interim  
2 of that, looming under that shadow, a resolved dispute  
3 through further discussions of the parties.

4 We think that that is the best way for the most  
5 members, and certainly for Washington State and Oregon  
6 State, to have the clearest and smoothest future. But that  
7 is what -- that's -- in some ways, that's the extent of what  
8 the conference and the commissioner have to say here today  
9 about the -- about the event that's before the court, which  
10 is to change the TRO provisions, which were really  
11 important, allow the conference clearly to continue in the  
12 normal course, which includes communicating with its  
13 constituent members, listening, explaining things, providing  
14 information, not deciding things that would require a board.  
15 Obviously can't do that.

16 But there's a certain functionality that the  
17 conference and the commissioner need in order to serve the  
18 interest of the members. And the members have interests  
19 whether they have a board seat or not for the remainder of  
20 this school year. And we realize that there are many  
21 disputes over assets and revenue and things like that, but  
22 we think that discussion, dispute resolution among the  
23 parties is the better way to do that than through an  
24 alteration of the TRO to put in place what the plaintiffs  
25 are seeking here.

1           **THE COURT:** Okay. So the Pac 12 is satisfied with  
2 the TRO and basically wants a TRO extended pending further  
3 negotiations or subject litigation between the parties?

4           **MR. LAMBERT:** That is our preference.

5           **THE COURT:** Okay. Okay. Gotcha.

6           **MR. LAMBERT:** I can -- I sense that there may be a  
7 fair amount of arguing from the table over here to my left.  
8 I'm happy to address a few additional points, but really, my  
9 main legal point -- it is a legal point, too, not just a  
10 pragmatic point about maintaining the status quo.

11           And while on the -- I understand the plaintiffs'  
12 argument is that the status quo is a board of Washington  
13 State and Oregon State because the bylaw, by their  
14 interpretation, is self-executing, I understand that  
15 logically, but what it does is that making that  
16 determination in -- at a preliminary injunction stage opens  
17 -- it opens -- it empowers them to change the status quo in  
18 a variety of ways.

19           And again, we're somewhat agnostic to what they  
20 would do. We just don't know what it is. And if it's  
21 something drastic, we think that ultimately the ensuing  
22 dislocation hurts the conference and hurts the members by  
23 virtue of that.

24           **THE COURT:** All right. Thank you, Counsel, Mr.  
25 Lambert, sir. Thank you. Appreciate that argument.

1 All right. So next up will be the intervenor,  
2 University of Washington.

3 **MR. LEVIN:** Thank you, Your Honor. Daniel Levin  
4 on behalf of the intervenor defendant, the University of  
5 Washington, and thank you for giving us the opportunity,  
6 Your Honor, to speak with you this afternoon, and I'll try  
7 to stick to the 20 minutes.

8 **THE COURT:** Well, I think we've already went past  
9 that, so I think we pushed that to 25 already, so you're  
10 welcome --

11 **MR. LEVIN:** Thank you, Your Honor. I'll try to  
12 keep my eye on the clock.

13 **THE COURT:** All right.

14 **MR. LEVIN:** Your Honor, preliminary injunctions  
15 are about preserving the status quo, but plaintiffs are  
16 asking this court to change the status quo, to hand them  
17 control of the conference right now, when the University of  
18 Washington and the nine other members who will be departing  
19 at the end of this year, are still full members of the  
20 conference, are still competing on the field and on the  
21 court, and are still critical to the conference earning  
22 revenue this year, which all of the schools use to support  
23 their student athletes.

24 This is not about making decisions for the future  
25 of the conference. When the University of Washington told

1 the conference about its future plans, it said in that  
2 letter sent on August 4th, that it understood it would be  
3 excluded from conference discussion pertaining to the  
4 future, in particular, a new media rights deal or talking  
5 with new members.

6           What this is about today is control of the board  
7 this year and, in particular, control of the conference  
8 revenue this year, which is being earned by all of the  
9 schools competing and which all of the schools rely on to  
10 support their student athletes across the whole range of  
11 revenue and nonrevenue sports. What the plaintiffs are  
12 asking for is not fair. It threatens directly harm to the  
13 University of Washington and the other nine departing  
14 schools, and it's not what the bylaws require.

15           I want to start, if I may, Your Honor, with the  
16 bylaws. They're a contract, and so we can start with the  
17 text of the contract and its history. Then I'd like to  
18 talk, if I could, second, about the course of performance  
19 argument and why the actions over the last year don't  
20 support the plaintiffs' position, and then last, I want to  
21 turn and talk about the equities which we feel do not  
22 support the entry of the requested preliminary injunction.

23           So Your Honor, if I may, I'm going to hand out --  
24 I just have one slide with the bylaw Chapter 23 on it that I  
25 just thought it would be helpful to have in front of us when

1 we talk about the bylaws. May I approach, Your Honor?

2 **THE COURT:** Sure. You bet. Come on up. Thank  
3 you, counsel. All right.

4 **MR. LEVIN:** Your Honor, I want to start and talk  
5 about the text from the beginning to the end and how it all  
6 works together and how it doesn't do what the plaintiffs say  
7 it does.

8 So let me start with that first clause. No member  
9 shall deliver a notice of withdrawal to the conference in  
10 the period beginning in 2011 and ending August 1st of next  
11 year. That period is significant because it relates to the  
12 media rights agreement that the Pac 12 has. And when you  
13 read this entire provision as a whole, the main thing that  
14 it does is make sure that members stay within the conference  
15 for the full term of the media rights agreement, and, in  
16 fact, it gives the conference the right to go out and get an  
17 injunction to keep schools in the conference until August  
18 1st of next year so that the conference doesn't breach its  
19 media rights deal.

20 So the question is: What does this period mean?  
21 What does it mean to say you can't deliver a notice of  
22 withdrawal in the period beginning July 24, 2011, ending  
23 August 1, 2024. And we submit that it means that you cannot  
24 tell the conference that you are leaving in that period.  
25 You can't tell them with a year's notice. You can't tell

1 them today that you're walking out the door, tomorrow, but  
2 what you can do and what no one in this case, as far as I  
3 can tell, disputes, is you can leave on August 2nd, 2024.

4 That is, no one has said the University of  
5 Washington or any of the other departing schools is in  
6 violation of the bylaws by leaving on August 2nd. And  
7 that's important. I'll get to that in a minute.

8 **THE COURT:** Okay.

9 **MR. LEVIN:** But I want to go, then, to the next  
10 clause because counsel for the plaintiffs said, well, that's  
11 about something different. That's about leaving in the  
12 prohibited period. And I agree, it is about leaving in the  
13 prohibited period, but it's not separate and distinct  
14 because the language doesn't support that.

15 So look at what it says, Your Honor. It says  
16 provided that if any member does deliver a notice of  
17 withdrawal prior to August 1, in violation of this chapter,  
18 the conference shall be entitled to an injunction or other  
19 relief to prevent such a breach. The breach there is  
20 obviously leaving before August 1. It cannot possibly be  
21 saying before August 1 that you are going to leave in the  
22 future. That injunction wouldn't make any sense. What are  
23 you going to enjoin, that you can't talk about it anymore?  
24 You have to do a take back?

25 It's not -- the only plausible reading of that

1 provision is that the breach is leaving before August 1. So  
2 maybe even now, it's if USC and UCLA had announced last  
3 summer they were leaving in one year, that would have been a  
4 breach because it would have been a 2023 departure. If you  
5 announce you're leaving after August 1, 2024, not a breach,  
6 not a violation.

7 The provision goes on and talks about an  
8 alternative remedy that even if you try to leave, withdraw,  
9 or attempt to withdraw, the conference keeps your media  
10 rights. Makes it very hard to leave. It also means the  
11 conference can satisfy its obligations to its media  
12 partners.

13 And then we get to the last sentence, and it says  
14 in addition -- additionally, if a member delivers a notice  
15 of withdrawal in violation of this chapter, you lose our  
16 board seat. So what does that mean? What is the violation?

17 Well, Your Honor, I submit it's the same as the  
18 breach from the second clause. It is a withdrawal or the  
19 announcement of the withdrawal before August 1, 2024. That  
20 reading harmonizes the entire section. Every clause works  
21 together. It's not that the center clauses are about  
22 something totally different. They're all about the same  
23 thing, and they're all about keeping members in the  
24 conference during the term of the media rights agreement.

25 And I would contrast that, Your Honor, to the pre-



1 2011 bylaws because the pre-2011 bylaws did something very  
2 different. They said you must give notice two years in  
3 advance. If you want to leave, you must give notice. And  
4 when you do, you lose your board seat effective on the day  
5 you tell them that. And it said that clearly in that prior  
6 version. All of that language came out.

7 That is, they got rid of this prior notice  
8 requirement, and they got rid of that language that said,  
9 effective on the date that you deliver this notice, you lose  
10 your board seat. They changed it, and they changed it  
11 instead to have this protected period from 2011 through  
12 2024, which corresponds to the media rights agreement.

13 So I think it's very hard to look at the history  
14 and the change from 2011 to the current bylaw and say, it  
15 supports the plaintiffs' reading when in fact the prior  
16 bylaw was clear that if you gave notice and you were  
17 required to do that, you were off the board.

18 The difference between having that requirement in  
19 the current bylaw is that under the current bylaw, where  
20 there is no withdrawal pre-announcement requirement, there's  
21 no requirement to give two years' notice on a withdrawal, it  
22 would be encouraging subterfuge. It would be encouraging  
23 people to keep their plans secret for as long as possible so  
24 as not to be in violation of the bylaw.

25 **THE COURT:** Well, wouldn't that help the

1 conference not having a -- notices on we're leaving and --  
2 wouldn't that -- doesn't that damage the conference by just  
3 having a team -- or school, I should say, university say,  
4 we're going to withdraw at -- on August 1st, 2024? Doesn't  
5 --

6 **MR. LEVIN:** I don't think so, Your Honor. I don't  
7 think it helps anyone to have a school have a plan to leave  
8 in 2024. But to keep that secret -- because it doesn't --  
9 it says giving notice and publicly announcing in some form  
10 to the conference. And if you are encouraging people --  
11 they want to keep their board seats -- to say, we're just  
12 not going to tell anyone, that's not a situation you want to  
13 have. Now you have board members who have plans that you  
14 don't know about. It makes it very hard to plan for the  
15 future. It makes it hard to -- to decide about future media  
16 rights deals and so forth.

17 You certainly don't want a situation where you  
18 have schools that have made a decision that are incentivized  
19 not to tell anyone about it, which is the upshot of their  
20 reading. And what we'd say is that is not a reasonable  
21 construction of the paragraph to say they wrote something  
22 that took out that notice requirement, took out that two-  
23 year notice requirement and still met if you tell people  
24 about your future plans, which all of the schools did  
25 because it's the right thing to do, that you then

1 automatically lose your board seat. It's not what the  
2 provision is designed to do anymore. That was the prior  
3 provision, but it's not the current one.

4 The other thing I'd say, which the conference  
5 pointed out in one of its papers, is it does lead you down  
6 the road to a board of zero, and we all know from the  
7 evidence in the record that Oregon State and Washington  
8 State did pursue other conference opportunities. Now, they  
9 haven't yet found another conference opportunity, but they  
10 did pursue them.

11 And if they had decided to leave, there would be  
12 no board under this provision. And their answer is, well,  
13 in that situation sort of everyone comes back on and does  
14 something, but that's not at all what the bylaws say. That  
15 would just be writing a new provision of the bylaws to say,  
16 well, some point when everyone's kicked off, everyone just  
17 comes back on. And that might be fine, but it's not what  
18 they wrote.

19 **THE COURT:** Wouldn't the Pac 12 be able to file a  
20 petition for a dissolution and move forward that way  
21 without, hey, we lost all our board members, so we're  
22 petitioning the court for dissolution.

23 **MR. LEVIN:** I don't think so, Your Honor. It  
24 might be able to do that, but I don't think so because  
25 there's actually a bylaw provision, 1-4, that deals with

1 dissolution, and it gives the board a role in that  
2 dissolution in terms of deciding how assets are distributed.  
3 So there was a contemplation that the board would play a  
4 role in that. There's no contemplation in the bylaws that  
5 the organization can ever have a board of zero, and there is  
6 a provision that says the board directs the operations of  
7 the Pac 12. So there's no contemplation anywhere in the  
8 bylaws that there could be a board of zero.

9           Again, it -- it is the inevitable outcome of the  
10 plaintiffs' interpretation of the bylaws to say as soon as  
11 you tell people, as soon as you announce it, you lose your  
12 board seat. The other point they say, well, it's because  
13 this is dealing with conflict of interest, right? Their  
14 argument is, well, you need to have this automatic  
15 expulsion. As soon as you've announced you have another  
16 intention, you have a conflict of interest, and, therefore,  
17 it makes sense to kick you off the board.

18           And Your Honor, what I'd submit is no. Having  
19 announced your future intention does not mean you have an  
20 intractable conflict any more than it meant than the  
21 plaintiffs had an intractable conflict when they were  
22 talking to the Big 12 or the ACC or any other conference and  
23 trying to get a bid to join one of those conferences.  
24 That's not an intractable conflict of interest.

25           All of the schools have an interest in their own

1 student athletes. They all have an interest in promoting  
2 their own programs. And yet, they all have a duty, when  
3 they sit as board members, to act responsibly in the service  
4 of the conference and all of the schools together, which  
5 they have done for years and years and years. Even when one  
6 -- the schools disagree and even when one school might have  
7 different interests or even interests that are aligned with  
8 their own school as opposed to other schools.

9 So there's not a reason to say it's impossible for  
10 these schools to serve on the board, and, in fact, that's  
11 why the University of Washington recognized when it said it  
12 was leaving, that it would not participate in decisions  
13 about adding new members, and that it would not participate  
14 in decisions about a new media rights deal for next year  
15 because it understood that those are decisions that are best  
16 left to the two schools that are currently remaining.

17 So let me turn now to this course of dealing, and  
18 I do want to be conscious of the time.

19 **THE COURT:** You've got time.

20 **MR. LEVIN:** Oh, great.

21 So let me make a preliminary point about the  
22 course of performance, a legal point, and then I want to  
23 talk about the facts on this.

24 There's two legal points I want to make. The  
25 first is -- and we cite this case in our brief, and it's

1 essentially un rebutted, is that what the California Supreme  
2 Court and Washington law have both said is that the type of  
3 course of performance evidence applies when parties are not  
4 in a dispute about the meaning of the contract. That is  
5 when predispute, if all parties to a contract all see it the  
6 same way, then it is important evidence. But that's not at  
7 all factually what happened here.

8 All of this, all of their evidence is the shadow  
9 of a dispute, all of it. That's one. The second legal  
10 point I want to make is --

11 **THE COURT:** Well, there wasn't any dispute until  
12 USC and UCLA announced they were leaving, right? I mean,  
13 that's when it --

14 **MR. LEVIN:** It came up in the context of a  
15 dispute, Your Honor, is what I'd say. There was no -- no  
16 one -- there's nothing in the record to say anyone had given  
17 any thought to this until USC and UCLA announced. And what  
18 happened was the conference -- I know counsel sent a letter  
19 a few days later, on the 4th of July, saying: We think  
20 you're off the board.

21 USC and UCLA immediately responded and said, we  
22 disagree. We don't think you're reading this right. We  
23 think we're still on the board. Now, they didn't sue, and  
24 they didn't try to barge their way into the meeting, I  
25 guess. But they clearly disputed it.

1           So we do think that all of this, this whole  
2 course, was under the -- there was a dispute going on, and  
3 it's true that University of Washington and others attended  
4 board meetings during this period that UCLA and USC were not  
5 at, but the board itself never took a vote and never adopted  
6 -- you know, it never said USC and UCLA are formally  
7 expelled. It did go on and talked about the future in those  
8 meetings, and it went on. And then there was another letter  
9 to Colorado. We understand that's in the record. And  
10 again, Colorado disputed it. So we -- we're still under the  
11 umbrella of a dispute.

12           And then eventually, we get to the point where the  
13 conference realizes it is on the road to a board of zero, it  
14 is on the road to chaos, and it changes, frankly, its  
15 position and says, we aren't so sure anymore about what this  
16 provision means, in its current position is, I believe, that  
17 this is something that should be left to the parties and to  
18 the court.

19           But all of the -- all of the course of dealings is  
20 under the shadow of dispute. In all of the course of  
21 dealings, it does not unequivocally say that everyone  
22 understood the bylaws that way because, I would submit, that  
23 Oregon State and Washington State, there's evidence that  
24 they didn't understand the bylaws necessarily that way.

25           And I point to Exhibit 15 of the Heckenlively

1 declaration that we submitted, which is a letter -- maybe  
2 it's an email -- from the lawyer at Washington State, Mr.  
3 Deen, to the general counsel of the Pac 12. This is an  
4 August of 2023, August 5th, the day after five schools  
5 announced they were leaving.

6 And it says: Has any school, including USC or  
7 UCLA, delivered to the conference what you would consider or  
8 what could arguably be considered a notice of withdrawal  
9 under the conference's constitution and bylaws.

10 Has anyone done it? On August 5th, 2023, more  
11 than a year after USC and UCLA left, USC and UCLA have not  
12 been sitting on the board, but the lawyer at Washington  
13 State says, has anyone done this. That is evidence that  
14 people were not thinking about this in terms of everyone was  
15 in agreement that there'd been a breach of the bylaws by USC  
16 and UCLA.

17 It's true everyone realized they weren't there.  
18 Of course. They weren't in the room. People understood  
19 that. There were meetings. They weren't there. But  
20 there's evidence that people didn't understand it this way  
21 until we got into litigation and everyone started pointing  
22 fingers about who said what when.

23 My point, Your Honor, is that ultimately this  
24 comes back what is the most plausible and sensible reading  
25 of the text. The behavior under the last year I don't think



1 points one way or another. I don't think it helps  
2 illuminate the question. I think the question is what does  
3 the bylaw mean; what did the parties intend; is it a  
4 reasonable construction to say it prohibits departure in the  
5 prohibited period or is it a reasonable construction to say,  
6 no, it prohibits talking about departure in the appropriate  
7 period. And we would submit it's the former.

8 I'd also say -- and Your Honor asked a question  
9 there about USC and UCLA. The board took no action against  
10 USC and UCLA, and as Your Honor noted, there is no  
11 liquidated damages provision. There is no penalty. There  
12 is no exit fee in the bylaws. There is a provision --  
13 excuse me. There was a provision of penalties. There is no  
14 exit fee. We don't believe the penalty provision has been  
15 triggered in any way. Obviously, if there's a board of two,  
16 we would be very concerned that they could try to extract  
17 the penalties.

18 Let me turn, though, finally, to the balance of  
19 equities question.

20 **THE COURT:** All right.

21 **MR. LEVIN:** And as I understand the record, there  
22 has been no real evidence submitted about what the  
23 plaintiffs intend to do when they take over the board. But  
24 instead, they've said it is irreparable harm for us not to  
25 control the board because we think we're allowed to control

1 it, and it's irreparable harm if we're not allowed to  
2 control it.

3 Your Honor, one, I'd submit that that is not what  
4 the Wisdom case that they cite says exactly. It says that  
5 it may if you have a bargain for minority right. The Second  
6 Circuit in New York said it may be irreparable harm in some  
7 circumstances. It doesn't say automatically it's  
8 irreparable harm, and we do address that in our brief. It's  
9 on page 25. It is the end, but we do address it.

10 But let me talk a little bit about what the record  
11 shows in terms of actual harm that will take place with a  
12 two-member board that will make -- has made, as far as I can  
13 tell, no commitment to equitably distribute revenue as has  
14 always occurred in the past and as the executive  
15 regulations, Section 1, require.

16 They have said they'd like to set aside money for  
17 liabilities, and I'll talk about liabilities in a moment,  
18 and they've said they would like to try to recruit new  
19 members, including presumably by paying them this year's  
20 revenue money; that is paying the Mountain West teams to  
21 leave that conference to break up that conference and join  
22 them in a new Pac 12.

23 That -- those actions, taking conference money,  
24 spending it on other teams, would irreparably harm the  
25 University of Washington. We've put in evidence of that.

1 We've put in declarations showing what the University of  
2 Washington spends the money on. They spend it on their  
3 student athletes. They spend it on scholarships. They  
4 spend it on counseling. They spend it on academic support.  
5 They spend it on their programs that are non-revenue sports.  
6 They spend it on the teams that are still to compete in the  
7 Winter and the Spring. That's the state of the record.

8 And with no guarantee of that money being  
9 equitably distributed, that is a real threat of irreparable  
10 harm to the University of Washington and the other departing  
11 schools.

12 And the other thing I would say, your Honor, we  
13 are aware, and it happened after we filed our brief, but  
14 there was a University of -- or excuse me, Oregon State  
15 submitted a presentation to the Oregon State Legislature  
16 about their plans, and I have a copy of it if Your Honor  
17 would like.

18 **THE COURT:** You can tell me.

19 **MR. LEVIN:** If I may approach and I'll send it to  
20 you.

21 **THE COURT:** You can just -- okay. Oh, you've got  
22 something? Okay. Sure.

23 **MR. LEVIN:** Yeah.

24 **THE COURT:** Thank you. All right.

25 **MR. LEVIN:** Your Honor, and I'll represent to the

1 court that this was on the Oregon State University web page,  
2 and I believe it was part of a November 7 presentation to  
3 the state legislature. And I would only -- I direct your  
4 attention to page 3 of the slide.

5 Oregon State is still showing its budget for this  
6 year, 40 million-plus of Pac 12 money. Your Honor, and that  
7 gives us a serious concern that there's an intent to  
8 distribute money to them and not to the remaining members,  
9 and we would submit that would be enormously unfair. It  
10 would be a violation of the current bylaws, a clear  
11 violation which would say that money needs to be distributed  
12 pro rata to all 12 members. And we've heard nothing to say  
13 from any of the plaintiffs that they have -- that they have  
14 other intentions.

15 So Your Honor, let me finally turn to the remedy.  
16 And Your Honor, we think the injunction should be denied.  
17 But if Your Honor is worried about going that far, we would  
18 have two suggestions. One would be to keep the TRO in place  
19 until there's a final hearing on this, and a second, Your  
20 Honor, would be to say -- to do what essentially the  
21 University of Washington committed to doing when it first  
22 announced its future plans, which is to say that the -- it  
23 should have a voice and the departing schools should have a  
24 voice in decisions about this year and about how the money  
25 is distributed this year, about how it's spent responsibly,

1 and the decision about a future media rights deal or about  
2 admitting members next year should be in the hands of the  
3 departing members.

4 **THE COURT:** Let me just ask you a question. You  
5 mentioned the court could consider keeping the TRO in place  
6 until a final hearing. How far out do you -- I mean, how do  
7 you perceive a final hearing in this?

8 **MR. LEVIN:** I mean, Your Honor, I think -- I think  
9 we would -- it -- I think what we would be prepared to do at  
10 a final hearing is talk in a little more detail about what  
11 the actual plans are and what the actual harms are, which we  
12 have not released any evidence of. Obviously, we would be  
13 prepared to move quickly to a hearing. We're not going to  
14 ask for a huge, long period of time. We certainly aren't  
15 going to stand in the way of getting efficient relief.

16 **THE COURT:** Okay. Gotcha.

17 **MR. LEVIN:** And Your Honor, I owe -- you did ask  
18 about more mediation or settlement, so let me just say I  
19 believe the parties have worked in good faith, all the  
20 parties, in the mediation. We've not been able to reach a  
21 resolution, and I think at this point I'm not sure and I  
22 heard what Mr. MacMichael said, and I'm not sure that  
23 additional days would meaningfully move the needle.

24 Thank you, Your Honor, unless you have other  
25 questions.

1           **THE COURT:** All right. Thank you. I'll be back  
2 with questions. Thank you.

3           All right. So now we'll hear from the amicus  
4 curiae, Mr. Levin?

5           **MR. LEVIN:** Your Honor, that's -- I think I've  
6 covered all the points of the amicus. I don't need  
7 additional time.

8           **THE COURT:** Okay. All right. Well, we are back.  
9 I thought there'd be more time burned up, but all right. We  
10 will go back to the plaintiffs' counsel, Mr. MacMichael.

11           **MR. MACMICHAEL:** Thank you, Your Honor. I'm happy  
12 to address any questions the court has after hearing from  
13 the departing schools. Otherwise, I'll try to respond to  
14 what I think were the key points that I heard.

15           So I heard counsel for the departing schools  
16 saying that the prior version of the bylaws, that there's  
17 nothing in there that is supportive of our interpretation of  
18 the contract. So let me just show you exactly the words.

19           So if you could turn to page -- slide 12 of my  
20 presentation, Your Honor. This is what was previously int  
21 eh bylaws prior to 2011. This is the section entitled  
22 withdrawal. And the way it was set up was very clear, you  
23 had to provide a notice of withdrawal before you actually  
24 withdrew. So that term, Your Honor, notice of withdrawal,  
25 had a clear understanding under the prior version of the

1 bylaws, which was a notice prior to an actual withdrawal.

2           And then it had a sentence that said, effective on  
3 the date that you deliver the notice of withdrawal, you are  
4 off the board and can't vote on anything. And the  
5 significance of this, Your Honor, is twofold. One is  
6 because they took that exact same term, notice of  
7 withdrawal, and they carried it forward into the current  
8 version of the bylaws and they said the breach is if you  
9 provide a notice of withdrawal prior to August 2024.

10           It makes no sense for them to say that that phrase  
11 now has a different and new meaning than it did before. By  
12 choosing that phrase, they clearly were intending to keep  
13 the same meaning, which is it's a notice of withdrawal, not  
14 an actual withdrawal. Their interpretation is that,  
15 literally, the phrase "notice of withdrawal," those three  
16 words meant one thing under the prior version of the bylaws  
17 and a completely separate thing under the new version.

18           The other problem, Your Honor, is that their  
19 interpretation would represent a monumental departure in the  
20 prior version of the bylaws as compared to the current  
21 version because it would now suddenly allow members who had  
22 announced that they were going to leave and join new  
23 conferences to stay on the board. There's no dispute that  
24 under the prior version of the bylaws, if you provide notice  
25 that you're going to leave, you're off the board that minute

1 because that's when you have a conflict.

2           Their interpretation is that the new bylaws  
3 changed all of that and suddenly everyone decided they  
4 wanted conflicted board members who had announced that they  
5 were leaving to now stay on the board. There is zero  
6 evidence in this record that they have put forward to  
7 suggest that that's what anyone intended, what anyone  
8 understood, so they are proposing a monumental departure in  
9 the meaning of these bylaws with no evidence to support it.  
10 And when you line up the language in the prior version with  
11 the language in the current version, which is on slide 13,  
12 Your Honor. On slide 13, what we've done is we put directly  
13 on top and on bottom -- the top half of this slide is the  
14 last sentence in the prior version of the bylaws, and the  
15 bottom half is the last sentence in the current version of  
16 the bylaws.

17           And what you can see is that these two sentences  
18 are remarkably similar. They both say that if you provide a  
19 notice of withdrawal, you are automatically off the board  
20 and you cannot vote on any issue before the board. So their  
21 argument that the new bylaws mean to change and disrupt all  
22 of this, first of all, there's no evidence to support that.  
23 But second of all, it cannot be reconciled with the fact  
24 that they kept essentially the same language in that  
25 sentence. If they were trying to represent a monumental



1 departure from that rule, they really did a poor job of, you  
2 know, reviewing that.

3 Let me take now, head on, this idea about this  
4 conflict of interest, which we represent and submit that  
5 this remedy is intended to -- this language is intended to  
6 remedy. The departing schools have no good answer to the  
7 argument that they can no longer be on the board of the Pac  
8 12 because they are now under a conflict of interest and  
9 have no loyalty to the conference.

10 As I understand their argument, they're basically  
11 saying, Your Honor, that the court and we should just trust  
12 them to tell us when their conflict allows them to vote or  
13 when it doesn't allow them to vote. But there's several  
14 problems with that. One is it's not what the bylaws say.  
15 The bylaws say if you provide notice, you cannot vote on any  
16 matter.

17 So this whole idea that, oh, they'll just recuse  
18 when they think there's a conflict for them is completely  
19 anathema to the bylaws which say, you cannot vote on any  
20 matter, and that's exactly how this was applied against USC  
21 and UCLA -- and I'm going to get to you in a second -- with  
22 the full knowledge of the University of Washington and  
23 everyone else for over a year. You don't vote on anything.  
24 There's no hybrid model where you can recuse but still vote  
25 on some things if you care about those things. That's not

1 it.

2           The other problem with this argument is that it  
3 presupposes that there's some clear demarcation between  
4 decisions that only affect what happens in the next nine  
5 months versus decisions that only affect what happens after  
6 August 2024 when they're going to be gone. But there is no  
7 such delineation. As is true in any organization, decisions  
8 you make in the short term will have a significant impact in  
9 your future and, frankly, whether you're going to have a  
10 future.

11           So to take one example, the University of  
12 Washington has argued that the decision about what to do  
13 with the net revenue over the next nine months, that's a  
14 short-term decision, and they should be entitled to vote on  
15 that.

16           **THE COURT:** Well, tell me what would the -- what  
17 would be the -- what are the plaintiffs' intentions?

18           **MR. MACMICHAEL:** Your Honor, the plaintiffs have  
19 been very straightforward, which is we don't have a plan  
20 yet. What we want to do is to try to become the board and  
21 try to chart a path forward for the conference. We have no  
22 secret plan that we are sitting on that we haven't disclosed  
23 to anybody. So it's not like we're being coy about this.

24           We are trying to explore all options. We have  
25 many people working significant amount of time trying to

1 figure out what those different options are, but we can't do  
2 anything right now because we're shackled with -- to ten  
3 people who have no interest in seeing this conference  
4 survive or move forward or even have a future. All they  
5 want is to get every last dollar that they can out of the  
6 Pac 12 before they leave and join the Big 10, the Big 12, or  
7 the ACC. So we can't do anything in this state of paralysis  
8 that we're currently in. And that's why the TRO is  
9 fundamentally no longer workable for the plaintiffs.

10 I think it was very clear when I was last before  
11 you and the court was ruling on the TRO, that the counsel  
12 for the Pac 12 stood up and said that there were a couple of  
13 short-term decisions and they really wanted to not see those  
14 short-term decisions get thrown off the rails. And so we  
15 agreed to address those specific issues that we would allow  
16 unanimity to address those specific issues.

17 But I think it was understood, at least by me, and  
18 I think by everyone else in this courtroom, that that relief  
19 was intended to get us to a preliminary injunction hearing  
20 where we could decide, based on a more fulsome record, whose  
21 interpretation of the bylaws is more likely to prevail.  
22 That's the likelihood of success prong.

23 Then we get to the will we suffer irreparable harm  
24 if our governance rights are trampled and the ten dominate  
25 the two, not because they're right and not because they have

1 any entitlement to vote, but just because they're ten and  
2 we're two. That's the irreparable harm prong.

3           So I do not think that the TRO is workable, and  
4 the reason that they're arguing for it is because they know  
5 that they're ten and we're two, and they can simply stop us  
6 from doing anything to try to save this conference. If the  
7 unanimity requirement continues on, we can't spend a dollar  
8 on the Pac 12's future unless they agree to it. But they've  
9 already made their position very clear. Don't spend a  
10 dollar trying to regrow this conference. Don't spend a  
11 dollar trying to plan for the future unless you give us the  
12 same exact amount of money.

13           So this whole notion that we can't spend money  
14 unless it benefits them pro rata is just fundamentally  
15 illogical because what's in the best interest of the Pac 12  
16 is completely mutually exclusive with what's in the best  
17 interest of the ten who were leaving. So that's why I think  
18 there needs to be clarity on, under the bylaws, who is  
19 entitled to be on the board.

20           Your Honor, this suggestion, and I've got to say  
21 it was a very well-delivered argument that I heard from Mr.  
22 Levin about the bylaws and how this just doesn't make any  
23 sense, but I just cannot help myself to say if that was the  
24 interpretation, why did the University of Washington and  
25 eight of the other ten departing schools and the conference

1 take the exact opposite interpretation, our interpretation  
2 for more than 13 months. They just cannot give you a good  
3 answer to that.

4 So instead what they try to say is that, well, all  
5 of that evidence is not really relevant because it occurred  
6 after this dispute began. That's what they say. But  
7 they're conflating two completely separate disputes in an  
8 effort to try to sweep all of that evidence under the rug.  
9 The dispute that brings us here today in court is a dispute  
10 between Oregon State, Washington State, and the conference,  
11 and the departing schools. That's the dispute we're here  
12 for today.

13 That dispute did not begin until September of this  
14 year when the conference suddenly reversed its  
15 interpretation of this provision, no doubt, at the urging  
16 and at the behest of the ten departing schools who were  
17 leaving who suddenly no longer liked that interpretation.  
18 That's when this dispute began.

19 But all of the -- all of the evidence that's laid  
20 out in our presentation about the board, about the  
21 conference consistently adopting our interpretation time and  
22 time again for 13 months, all of that preceded this dispute.  
23 And it wasn't like those interpretations, Your Honor, were  
24 some made-for-litigation contrivance. It wasn't like it was  
25 some kind of settlement communication or prelitigation

1 dispute.

2 The interpretation that we are advocating for here  
3 today was the interpretation that the conference and the  
4 ten-member board used to govern itself for more than 13  
5 months to make many significant decisions that had real-  
6 world consequences. This was not a made-for-litigation  
7 interpretation. This was how the conference governed itself  
8 for 13 months. That is textbook course of performance, and  
9 that means that our interpretation is right and their  
10 interpretation is wrong.

11 And they're also wrong, Your Honor -- sorry.

12 **THE COURT:** Go ahead.

13 **MR. MACMICHAEL:** Okay.

14 **THE COURT:** I've got my list at four pages of  
15 questions, so I'll need to know --

16 **MR. MACMICHAEL:** Okay. No, no. Let me stop.  
17 Sorry. I sometimes get ahead of myself. So please, I'm  
18 happy to answer any questions the court has.

19 **THE COURT:** Thank you for your passionate argument.  
20 Question: Are the plaintiffs really claiming that by losing  
21 their seats on the board, those ten other universities are  
22 forfeiting their share of proceeds for this year all by the  
23 Pac 12?

24 **MR. MACMICHAEL:** No, Your Honor. We're not saying  
25 that by virtue of the fact that they have announced their

1 withdrawal and that they've been removed from the board,  
2 that that automatically triggers a forfeiture of any  
3 remaining revenue.

4 No decisions have been made by OSU and WSU about  
5 what -- how resources are going to be allocated and to whom  
6 and in what manner. We will make reasonable decisions as  
7 board members that are in the best interest of the Pac 12,  
8 not in the best interest of any one individual member.  
9 That's what any board member is supposed to do.

10 So we're not saying that they automatically lose  
11 their money, but it's actually funny that you raise that  
12 question because if you look at slide 32, Your Honor,  
13 please, this was a memo summarizing a board meeting that  
14 occurred between July 27th of this year and August 4th of  
15 this year. So this was after Colorado announced on July  
16 27th that Colorado is leaving.

17 And let me just walk you through that just as one  
18 example. We have multiple examples of this playing out in  
19 the presentation, but let me just give you a flavor of this,  
20 Your Honor, so you can get a feel for the evidence. If you  
21 look at slide 29, and I can do this very quick.

22 **THE COURT:** That's all right.

23 **MR. MACMICHAEL:** So slide 29 is a July 27, 2023  
24 text from Chancellor DiStefano at the University of  
25 Colorado, to the commissioner, saying just so you know,

1 later today our board is going to vote to join the Big 12 in  
2 August of 2024, which is what they announced.

3 So he just texted him and said, we're going to  
4 leave. So here's what happened, Your Honor. If you look on  
5 slide 30, that very same day the ten -- or sorry, at that  
6 time the nine-member board of the Pac 12, which included the  
7 University of Washington, included eight other members,  
8 included the conference and the commissioner, had a board  
9 meeting.

10 And what the board members were told is that CU  
11 has provided formal notice of withdrawal. They were told in  
12 plain language that by saying that they were going to leave  
13 in August of 2024, that was, quote, "formal notice of  
14 withdrawal." That means they adopted our interpretation.  
15 They told it to the nine-member board.

16 Do you know how many of those members objected and  
17 said we don't agree, that that's not right? Zero. And  
18 that's exactly the same thing that happened when USC and  
19 UCLA withdrew. The board was told in plain language, if you  
20 say you're going to leave, you're off the board because  
21 that's a notice of withdrawal. No one objected.

22 They then talked to the board -- the next bullet  
23 point is board of directors. Who is the board? Colorado  
24 was not allowed to attend a single board meeting from this  
25 point forward. Again, they talked about it. They agreed on



1 it.

2 If you look at the next slide, Your Honor, slide  
3 31, the very next day, the general counsel of the Pac 12,  
4 who's seated behind me, drafted a letter, sent it to the  
5 general counsel of the University of Colorado, and said, you  
6 have delivered notice of withdrawal, and under Chapter 2,  
7 Section 3, you're automatically off the board. Again,  
8 that's our interpretation of the bylaws, not theirs.

9 And then if you look at slide 32, and this is  
10 where I began, the board then had a discussion about  
11 reducing the anticipated distributions to our departing  
12 members. That was Colorado, USC, and UCLA. It's not a  
13 coincidence that \$105 million just happens to represent the  
14 sum total of the distributions for those three schools, as  
15 anticipated going forward. And they also said that they're  
16 considering options, including seeking considerable  
17 financial penalties against them.

18 This is what was discussed with the nine remaining  
19 members of the board. And it's interesting because you  
20 could only be talking about penalties if these people were  
21 in breach of the bylaws, which would require you to take our  
22 interpretation, but it's also interesting because they're  
23 coming into court and telling you that it would be egregious  
24 and unfair if we reduced their distributions by one dollar  
25 when, apparently, nine of them had no problem with that

1 concept when the roles were reversed.

2 And this is just yet another example where the  
3 departing schools are taking a position in court that is  
4 directly contrary to the position that they took during the  
5 relevant time period.

6 **THE COURT:** Now, is it your position that if the  
7 plaintiffs do something wrong and contrary to the -- to what  
8 the ten other schools believe should not be done, they can  
9 sue WSU and Oregon State University for damages?

10 **MR. MACMICHAEL:** I -- Your Honor, I have no doubt  
11 that if they think that they've been wronged or aggrieved in  
12 any way or if they thing that they don't get all the money  
13 that they're entitled to, we will hear about it in court.  
14 And we will be in some court somewhere to deal with it, but  
15 that's not the issue that we need to deal with today. And  
16 this is again why we believe that these are all red  
17 herrings, and that's how we position them in our brief.

18 And so if you turn to slide 47, this again is  
19 something that we anticipated is they're saying they want to  
20 turn this into a discussion about what can we do as the  
21 board and what can we not do as the board. Not  
22 surprisingly, it all seems to revolve around money as far as  
23 they're concerned.

24 That's not what is before the court today. What's  
25 before the court today is whose interpretation of the bylaws

1 is more likely to prevail and would we, Oregon State and  
2 Washington State, suffer irreparable harm if our governance  
3 rights are denied to us in violation of the bylaws. Those  
4 are the two issues before the court.

5 **THE COURT:** So I'm getting ahead of what you said.  
6 I'm getting ahead of what we're really dealing with today.

7 **MR. MACMICHAEL:** At their urging. I mean, that's  
8 why they want to change the discussion, sort of change the  
9 conversation to that because when you look at the bylaws,  
10 when you look at their course of performance and you look at  
11 the sort of undeniable fact that if our governance rights  
12 are stripped from us unfairly, that that would constitute  
13 irreparable harm, then you need to have something else to  
14 talk about. And that's why they want to talk about, well,  
15 we can't do this.

16 We've never said that we're going to distribute  
17 all the money to ourselves or do anything else that they're  
18 complaining about. All of that is speculation. All of it  
19 is just unfounded sort of trying to ask the court to  
20 predetermine every possible future scenario, and I don't  
21 think that makes a lot of sense.

22 What we've said is that we will make reasonable  
23 decisions. If they don't like our decisions, they'll have  
24 every ability to address them, but that's not what we're  
25 here to decide today. And, again, I'm more than happy to

1 answer questions. In fact, I really want to address  
2 whatever is concerning the court because I --

3 **THE COURT:** Sure. Well, would the relationship  
4 with the two universities remaining, the plaintiffs, would  
5 they have a fiduciary relationship with the ten departing  
6 and vice versa?

7 **MR. MACMICHAEL:** I don't -- that's a good legal  
8 question, Your Honor. I don't know that I'm the right one  
9 to answer that, but I don't know that in an unincorporated  
10 association like this that the members necessarily owe  
11 fiduciary duties. But I think any board member has a duty  
12 to act reasonably to the association to make decisions that  
13 are in the best interest of the association and to comport  
14 themselves that way. Again, those are all legal issues that  
15 we can hash out down the road if we need to.

16 But if you look at slide 48, and this gets back to  
17 something I think the conference argued more than the  
18 departing schools, they're trying to say that we somehow are  
19 asking for a deviation from the status quo through this.  
20 That's exactly wrong, Your Honor.

21 If you look at slide 48, for more than 13 months,  
22 the status quo was that if you provided a notice of  
23 withdrawal, you were automatically removed from the board  
24 that very minute. And the board would continue to meet and  
25 make decisions without you, and that was just a universal

1 rule that this conference operated in for more than a year,  
2 with the knowledge, with the consent of all of the members.

3 And that's exactly what our preliminary injunction  
4 seeks to do. It seeks to preserve the rightful composition  
5 of the board pursuant to the bylaws, no more, no less. And  
6 the fact that they want these modifications, they want to  
7 hamstring us and say, you can't spend a dollar if you're the  
8 board, which, by the way, there's no support in the bylaws  
9 for that at all, I think that just exposes their conflict of  
10 interest.

11 They don't want the board or the conference to  
12 spend any money on the conference's future because their  
13 futures are no longer tied to the conference's futures. But  
14 that's not how board members are supposed to assess  
15 decisions as a representative of an organization as what's  
16 in my best interest. You're supposed to focus on what's in  
17 the best interest of the organization.

18 Last thing I want to say is this interpretation in  
19 no way encourages subterfuge or encourages people to keep  
20 their intentions secret. There are other provisions in the  
21 bylaws that say very clearly that you have to communicate in  
22 good faith and openly with your fellow members. So there  
23 are provisions in the bylaws that address this idea that  
24 you're going to keep, you know, things secret. And frankly,  
25 I don't think it's realistic in today's world for somebody -

1 - for a school to be able to negotiate with another  
2 conference and keep that a secret.

3           So this idea that the bylaws are sort of  
4 encouraging subterfuge I don't think makes any sense. What  
5 it's saying is that if you are going to leave, which you  
6 obviously need to tell us, then at that moment you have a  
7 conflict and you can no longer be on the board and you're  
8 automatically excluded. Exactly as it as in the prior  
9 version of the bylaws with virtually identical language  
10 carried forward to the next version.

11           And then the last hypothetical that they throw  
12 out, again, not the facts we're dealing with today, is what  
13 if Oregon State and Washington State provided a notice of  
14 withdrawal and you have a board of zero? Those aren't the  
15 facts today. We're not going -- we're not intending to go  
16 anywhere. We want to stay in the conference. We want to  
17 try to regrow it. So positing all of these possible future  
18 speculative scenarios and saying how that should affect  
19 today I just don't understand.

20           I think we should deal with the facts that are in  
21 front of us, and those facts are that under the bylaws, we  
22 are the board and we should be entitled to act as the board  
23 now and not have to wait for nine months or eight months  
24 when it will be too late and also not have to make every  
25 decision with their consent because we know exactly what

1 that's going to result in. No money for regrowing, period,  
2 full stop. That's their position. So it's just not  
3 workable.

4 I hope I've addressed everything, Your Honor.  
5 Again, I'm happy to answer any questions the court has.

6 **THE COURT:** I think the questions I had probably  
7 don't apply anymore because they've been answered in one way  
8 or another.

9 I know there's a motion before the court to  
10 dismiss for lack of jurisdiction over the nine schools who  
11 claim sovereign immunity. Any mention on that?

12 **MR. MACMICHAEL:** Your Honor, I would defer to my  
13 colleague, Ms. Scavetti, if you have any questions on the  
14 motion to dismiss. I focused most of my energies on the  
15 preliminary injunction, but if you have any questions about  
16 the preliminary injunction -- I'm sorry, the motion to  
17 dismiss, she'd be more than happy to answer them.

18 **THE COURT:** Okay. We'll have her come up and  
19 answer those questions.

20 Counsel, I appreciate your response to the court's  
21 question. How do you -- what's your client's position?

22 **MS. SCAVETTI:** Absolutely, Your Honor. And thank  
23 you for giving me the chance to address it. The -- there is  
24 no requirement for the nine other departing schools to be  
25 parties to this case under either CR 19 or the Declaratory

1 Judgment Act.

2 Under those provisions, a party is only necessary  
3 if its interests will not be adequately represented by the  
4 parties that are already in the case. And what we know  
5 about the nine departing members' interests is that they  
6 want to see the case dismissed. They want the preliminary  
7 injunction denied. And I suspect if we keep going, they'll  
8 want to see the declaratory judgment that the plaintiffs  
9 requested denied as well.

10 All of those positions are being adequately  
11 represented by the University of Washington and by the  
12 conference, which is moving to dismiss, opposing the  
13 preliminary injunction and I suspect opposing the  
14 declaratory judgment that the plaintiffs are seeking as  
15 well.

16 And in fact, the interests of the nine members are  
17 being represented by their own counsel. Mr. Levin is the  
18 counsel for those nine departing members, and he came up  
19 here and told you when we talked about the preliminary  
20 injunction, that there was no additional arguments that he  
21 had to make on behalf of those nine departing members. And  
22 their amicus brief says the same thing. It says they  
23 support and agree with the University of Washington's  
24 arguments.

25 So what we have here, Your Honor, is a case very



1 similar to the Wilbur case that we've cited in our brief.  
2 In the Wilbur case, the issue there was a club that had  
3 decided to remove a pool that belonged to the club. And the  
4 issue was whether or not the club had the authority to  
5 remove that pool. So one of the pro-pool members of the  
6 club sued the club seeking declaratory judgment and  
7 injunctive relief and one of the anti-pool members  
8 intervened and said, Your Honor, you have to dismiss this  
9 case. They haven't joined all of the members of the club,  
10 and all of the members of the club have an interest in this  
11 pool.

12 And the court said that's not required. There are  
13 only two positions in the case is what the court said in  
14 Wilbur. Either the club has authority to remove the pool or  
15 it doesn't. And those positions were both adequately  
16 represented by the parties in the case. And that's exactly  
17 where we are here.

18 There are only two positions in the case. Either  
19 the bylaws mean what they say that the members who deliver  
20 notice of withdrawal are automatically removed from the  
21 board or they don't. And the University of Washington and  
22 the conference are here and able to articulate those  
23 positions, so those members are not necessary.

24 And even if they were necessary, Your Honor, and  
25 we really submit that they're not, that their interests are

1 being protected, dismissal for nonjoinder is reserved as a  
2 drastic remedy to be exercised sparingly only when there's  
3 no alternative. And if the court can proceed in equity and  
4 good conscience without those members, then it is able to  
5 proceed and they're not indispensable.

6 And we would submit that here, where their counsel  
7 is in the room, where they're aware of the proceedings,  
8 where they've had the opportunity to submit an amicus brief,  
9 that their interests are sufficiently protected and the  
10 prejudice to them is mitigated.

11 Whereas, on the other hand, if the court were to  
12 dismiss for nonjoinder, then plaintiffs Washington State and  
13 Oregon State would have no opportunity to secure judicial  
14 intervention to have the bylaws enforced and interpreted as  
15 they are written. And so in that case, the prejudice to us  
16 is substantially greater and the equities weigh in favor of  
17 proceeding even without the nine members as parties but  
18 continuing to allow them to participate in the amicus  
19 capacity. And certainly, if they wanted to join and  
20 intervene, they're welcome to do so.

21 **THE COURT:** Okay. Thank you, counsel. I've been  
22 mispronouncing the word amicus all my life. All right.

23 Let's hear, then, from Mr. Lambert.

24 **MR. LAMBERT:** Very briefly, Your Honor. In  
25 September, I think one of my main arguments was that the

1 record shows that this is very clearly a dispute among the  
2 members and that we are caught in the middle.

3 **THE COURT:** That's clear.

4 **MR. LAMBERT:** We moved to dismiss the case because  
5 we were sued. And we don't believe -- and we believe that  
6 the complaint has some flaws to it, certainly with respect  
7 to us.

8 I'll make two points on the motion to dismiss.  
9 First, the DJ claim under the Uniform Declaratory Judgment  
10 Act fails because the conference and the commissioner have  
11 no legal interest in the rights that plaintiffs seek.

12 **THE COURT:** Well, it sounds like they are not  
13 pursuing the Declaratory Judgment Act at this time; that  
14 they're simply pursuing or directly pursuing an equitable  
15 remedy of a preliminary injunction.

16 **MR. LAMBERT:** The -- but -- well, I understand the  
17 relief they want, the remedy. And a preliminary injunction  
18 -- a permanent injunction is a remedy, but it's not a cause  
19 of action. It has to be supported by a cause of action, and  
20 in this case it's the DJ, it's the declaratory judgment  
21 claim.

22 And my argument -- my argument is that in the  
23 complaint on the pleading, they seek a declaration that the  
24 presidents and chancellors of the schools that have  
25 delivered notice of withdrawal from the Pac 12 are no longer

1 members of the Pac 12 Board of Directors and may not vote on  
2 any matter before the Pac 12 Board of Directors.

3 The reason why that claim fails against the  
4 conference and the commissioner is that neither the  
5 conference nor the commissioner are on the Pac 12 Board of  
6 Directors and neither of those parties has the right to  
7 vote.

8 I think very illustrative of this is that even if  
9 the conference wanted to settle that declaration of rights,  
10 it has no power to alter the rights that are at issue in the  
11 declaratory judgment claim. We can't -- we don't have the  
12 power under the bylaws to say who wins, to say who's on the  
13 board and who's not on the board. We have -- we've made  
14 that opinion in writing at various stages along the road,  
15 and things changed when chaos reigned. We don't run away  
16 from what we've said about this along the way.

17 But for a declaratory judgment, seeking that  
18 declaration in a complaint against us, we think it fails the  
19 DJ Act. The act requires that the claim between the --  
20 requires that the claim is between parties having genuine  
21 and opposing interests. That's from the Osborne case. On  
22 that matter, the conference does not have genuine and  
23 opposing interests with the plaintiff.

24 It's the unnamed members whose interests are at  
25 stake. They're here now. And we think that that makes the

1 conversation more coherent and the argument more pertinent  
2 to what's actually at hand.

3 The conference and the commissioner are not the  
4 representatives in this case of any member. We've not been  
5 designated as members, as required by law, and there's no  
6 evidence of a special trust relationship that we have a  
7 representative capacity with any of the members, whether  
8 they're on the plaintiffs' side of the V or on the defense  
9 side of the V, at least with respect to the members.

10 So with that -- and the last argument in the  
11 sentence, the breach of contract claim is based on that same  
12 declaration of rights. That's what they're seeking.  
13 They're seeking a remedy under the breach of contract to  
14 declare the Board of Directors. And for the same reasons  
15 that the declaratory judgment claim fails, we argue that  
16 that fails, again, as a matter of law. And with that, I'll  
17 submit on what we've written.

18 **THE COURT:** Thank you, counsel. All right.

19 Then we'll hear back from Mr. Levin.

20 **MR. LEVIN:** Thank you, Your Honor. And I'm going  
21 to speak to the points about the preliminary injunction and  
22 then my colleague, Mr. Heckenlively, will talk about the  
23 motion to dismiss for a few minutes, if that's okay.

24 **THE COURT:** Sure.

25 **MR. LEVIN:** Let me start -- and again, Your Honor,

1 I'm happy to answer any questions along the way that I  
2 haven't answered, but let me start with the text in this  
3 question of the notice of withdrawal and what it means.

4 And I want to start, too, with the prior version  
5 because Mr. MacMichael gave an eloquent argument about why  
6 effectively the new version kept intact the requirements of  
7 the prior version. And I would submit, Your Honor, that it  
8 just did not do that when you look at the actual words on  
9 the page. And I'm looking at his slide 13.

10 But the prior version had a whole -- and it's not  
11 on this slide, but the prior version began with the first  
12 sentence that said, you must give an advance notice. And  
13 that sentence dropped out entirely. It's gone. And then at  
14 the end it said, effective on the date that a member  
15 delivers notice of withdrawal, its board representation  
16 (inaudible). That was the old version before 2011.

17 It now does not have the prior notice requirement,  
18 and it now says, additionally, if a member delivers notice  
19 of withdrawal in violation of this chapter, and I understand  
20 the point that a notice of withdrawal could be a  
21 notification of a plan to withdraw, but I would submit that  
22 it is only in violation of the chapter if that plan to  
23 withdraw is before August 1 of 2024.

24 And we know that from the rest of the text of the  
25 current bylaw. And if we look back at that text, if we look

1 at that first clause, it says, no member shall deliver a  
2 notice of withdrawal to the conference in this prohibited  
3 period. It doesn't say -- it does not link that to -- it  
4 either -- well, let me say it this way.

5           You could read that to say it links delivery to  
6 the period or withdrawal to the period, but go on to the  
7 next clause. The next clause says, if any member does  
8 deliver a notice of withdrawal prior to August 1, 2024, in  
9 violation of this chapter, then there's an injunction to  
10 keep them in the conference.

11           That clause can only mean -- and I think I hear  
12 plaintiffs agreeing that this particular clause can only  
13 mean if you try to leave before 2024, August 1, 2024, you  
14 can be enjoined and told to stay. But if that's true, and I  
15 believe it is. I believe it's the only way to read that,  
16 then that's the violation.

17           And then you go down to the last sentence. It is  
18 exactly the same language, withdraw in violation of this  
19 chapter. A notification of a future plan to leave after  
20 August 1, 2024 is not a violation of the chapter. It's not  
21 a violation. And therefore, there's not an expulsion from  
22 the board.

23           Now, if you said, I'm going to leave during the  
24 prohibited period and you gave advance notice of that, then  
25 this clause would apply. It's exactly when it would apply.

1 But not if you say you're leaving after. So that's the  
2 textual argument.

3 Let me then address this argument about there's no  
4 loyalty, there's a conflict, because let's start, Your  
5 Honor, if I can with the purpose of the conference and it's  
6 right in the bylaws. Section 1, Chapter 1 -- Section 2.  
7 Chapter 1, Section 2. Two purposes of the bylaws. It says,  
8 the purpose of the conference is to provide its members with  
9 a jointly governed body for sponsoring, supervising, and  
10 regulating intercollegiate athletics. And then (b) is to  
11 assist its members in funding and promoting their  
12 intercollegiate athletic programs.

13 All 12 members have an interest in that conference  
14 purpose today. All the departing members will have an  
15 interest in that purpose up until the day they leave. The  
16 conference is organized for the benefit of its members.  
17 It's organized to -- in order to put on athletic  
18 competitions and to generate revenue that supports each  
19 school's student athletes.

20 And all of the members have an interest in that.  
21 And they will continue to have an interest in that until  
22 they leave. They are not hopelessly conflicted from all  
23 decisions, as the plaintiffs keep saying. They have an  
24 absolute interest in the purpose as reflected in the bylaws.

25 So then let me turn to say to Your Honor's



1 question you posed to the plaintiffs, which is: What is the  
2 plan? What's going to happen if they're given sole control?

3 And Your Honor, what I hear them to be saying is  
4 give us the keys but we don't know where we're driving. We  
5 don't have a plan. And then when you asked: Are you going  
6 to deny them any money, the answer was, we don't know, and  
7 then there was a long answer that says, but we absolutely  
8 have the right to do so, and in fact, some people talked  
9 about it in a memo back in August. I read that to say, good  
10 luck to the departing members. You may get no money this  
11 year to the detriment of all of our student athletes. And  
12 that, Your Honor, is not fair.

13 It's inconsistent with the purpose of the  
14 association, and it would materially harm the departing  
15 members and, frankly, cause them irreparable harm, and it  
16 would not be in the interest to grant a preliminary  
17 injunction to do that.

18 I would say one thing about that exchange of  
19 memos. The memo in which an individual at the Pac 12  
20 suggested that there could be a penalty imposed, that is a  
21 memo from a governor relations individual at the Pac 12.  
22 There's no evidence in the record that the board ever  
23 seriously considered that, and there's no evidence in the  
24 record that the board actually took any action with respect  
25 to any penalties as to everyone.

1 And I would also say the penalty provision in 2-4  
2 says any penalties have to be imposed pursuant to a  
3 discipline policy, which, Your Honor, does not exist. The  
4 conference has no discipline policy. It was never adopted  
5 by the board.

6 So there's going to be -- this is a road that no  
7 one wants to go down or at least no one in the departing  
8 team wants to go down, but Your Honor, it is -- it would be  
9 a disaster for the departing schools to get no revenue this  
10 year because it's being spent in the service of trying to  
11 convince Mountain West schools to jump ship and join the Pac  
12 12.

13 **THE COURT:** Isn't the Pac 12's survival of utmost  
14 concern of all parties here?

15 **MR. LEVIN:** All the parties want to see Oregon  
16 State and Washington State have a future. We're happy to  
17 see them have a future in the Pac 12 or elsewhere, but  
18 there's a difference between being responsible about the  
19 future of the conference, which no one is claiming that  
20 we're out to end the conference and saying all of the money  
21 should be spent to that end and not to the purpose of  
22 supporting the current student athletes in the conference  
23 today. That's the fundamental issue, Your Honor.

24 **THE COURT:** When do -- when would distributions  
25 normally come from the Pac 12 this year?

1           **MR. LEVIN:** They normally come on a sequence. I  
2 understand that the ordinary first distribution would be in  
3 December. I understand that there have been times when  
4 they've paid an October distribution. They did not do that  
5 this year, and I think they would come in a cadence starting  
6 in December and then through the rest of the academic year.

7           **THE COURT:** So at this point there hasn't been any  
8 distributions that have been stopped as a result of this  
9 case?

10           **MR. LEVIN:** At this point, no distributions have  
11 been made. There was no October distribution made, which I  
12 understand has occurred in some years. There was none this  
13 year.

14           **THE COURT:** Okay.

15           **MR. LEVIN:** But no money has been distributed this  
16 year.

17           **THE COURT:** Okay. Thank you.

18           **MR. LEVIN:** Let me turn for one minute, and then  
19 I'd happily answer any questions, to this question of  
20 remedy. Because there was a lot of discussion from the  
21 plaintiffs about harms being speculative; that is, if we're  
22 excluded from the board, the University of Washington and  
23 the departing members, any harm to us is speculative because  
24 we don't know what they're going to do. That is, what  
25 Oregon and Washington State would do as board members.

1           And Your Honor, my reaction is I think they have  
2 it backwards because the burden of proof is on the  
3 plaintiffs in a preliminary injunction hearing. And they  
4 have put in no evidence about what they intend to do.  
5 They've put in no evidence that anyone has stopped them from  
6 doing what they want to do because they can't say and won't  
7 say what they intend to do.

8           And it's their burden to show that they have some  
9 harm. But instead, what we're left with is speculating  
10 about what they might do other than if they say, well, we're  
11 not being allowed to run the conference as a board of two.  
12 And frankly, Your Honor, I don't believe that's enough to  
13 meet their burden of proof to get a preliminary injunction.

14           They have to make a showing, and they've just put  
15 in no facts to show what they plan to do with the money.  
16 And so we're all shooting at ghosts, Your Honor, and I  
17 understand --

18           **THE COURT:** Speaking of ghosts, you have to go  
19 visit that place.

20           **MR. LEVIN:** I'm looking forward to it, Your Honor.  
21 But my point, and I think it's apt, I guess, that we're here  
22 in Colfax to talk about it, is if you can't come in and ask  
23 the court to grant you emergency relief or preliminary  
24 relief, without a showing of what you're actually going to  
25 do if you're handed the keys to the conference. So we'd

1 submit on that, Your Honor, the preliminary injunction  
2 should be denied. And I'm happy to answer any remaining  
3 questions Your Honor has on that.

4 **THE COURT:** Well, okay. I -- you know, I had a  
5 list of four pages of questions, but your arguments and your  
6 points have taken most of my -- answered most of my  
7 questions. So thank you, counsel.

8 **MR. LEVIN:** Thank you, Your Honor. And I'll let  
9 my colleague, Mr. Heckenlively, if he can, just address the  
10 motion to dismiss questions.

11 **THE COURT:** Yeah, absolutely.  
12 Counsel?

13 **MR. HECKENLIVELY:** All right. Thank you, Your  
14 Honor. I was hoping to work ghosts into my comments. I'm  
15 glad Mr. Levin figured out a way to do that already.

16 I want to address the motion to dismiss that the  
17 University of Washington filed. I think there's actually  
18 two issues. I understand that the declaratory relief claim  
19 is not being pursued at this time, so that drops us down  
20 from three issues to two.

21 I'll start with the issue that Your Honor raised,  
22 which about the indispensable parties. The second issue is  
23 about the abstention doctrine. On the indispensable parties  
24 issue, counsel's argument appears to be that it's fine that  
25 the other nine schools aren't here. We shouldn't worry

1 about that because their interests are adequately  
2 represented by the University of Washington --

3 **THE COURT:** And the conference.

4 **MR. HECKENLIVELY:** And the conference. I think  
5 that's a much harder argument for them.

6 **THE COURT:** Oh. Are they? Are they?

7 **MR. HECKENLIVELY:** I don't think so, Your Honor.  
8 And I think that Washington law is pretty clear on this.  
9 Washington law, including the Matheson case that we cite and  
10 the Angst case says that if you've got a contract dispute,  
11 all the parties to the contract are necessary parties.  
12 They're saying that we're not necessary parties, that the  
13 departing schools are not necessary parties because they're  
14 represented by the University of Washington.

15 **THE COURT:** Couldn't those parties have petitioned  
16 the court like the University of Washington, move to  
17 intervene?

18 **MR. HECKENLIVELY:** Could they, Your Honor? Sure,  
19 they could. But I think that would be intruding on their  
20 sovereign immunity. We have seven of those nine schools  
21 that are sovereign entities that are state entities in six  
22 other states.

23 The whole point of this doctrine, and most of  
24 these cases involve tribes for a reason, is that those  
25 parties shouldn't be expected to have to come in and answer

1 in the courts of a different sovereign and in the -- with  
2 respect to the other two schools, that gets to all nine,  
3 they don't have personal jurisdiction in this court. They  
4 shouldn't have to subject themselves to personal  
5 jurisdiction simply because the plaintiffs chose this forum.  
6 And University of Washington is here. I think counsel's  
7 right, the outcome that UW wants is the same as the outcome  
8 that the other schools want.

9 But this is not a case about a swimming pool in a  
10 country club, Your Honor. This is a much more complicated  
11 dispute where there are different facts that are relevant to  
12 each of the schools. Mr. MacMichael's primary argument  
13 today and certainly in their briefs is about what happened  
14 after UCLA and USC left the conference and then -- and  
15 announced that they were planning to leave the conference  
16 and then what happened after Colorado did the same.

17 Well, they can't seriously sit here and say that  
18 USC and UCLA weren't in those board meetings but somehow  
19 took the same action to what they determined or what they  
20 say was ratify their removal from the board. And in fact,  
21 in the record, you see letters from USC and UCLA objecting  
22 and making the specific argument that they weren't removed  
23 from the board.

24 **THE COURT:** But then they let it go at that and  
25 didn't pursue any litigation, didn't really pursue any, come

1 on, we want back on the board.

2 **MR. HECKENLIVELY:** You're right, Your Honor.  
3 There was no lawsuit filed. As Mr. Levin said, the  
4 presidents and chancellors of those schools didn't barge  
5 into any of the board meetings that we saw on plaintiffs'  
6 slides. That's right.

7 But they said very clearly in their letters to the  
8 conference that we don't agree with this, and I think Your  
9 Honor saw that there's a reason why Mr. Deen and Oregon  
10 State's general counsel as well were asking questions in  
11 August about has anybody delivered a notice of withdrawal.  
12 I think this issue was never settled.

13 And their key argument is about what the remaining  
14 schools did after UCLA and USC stopped attending board  
15 meetings. They can't seriously say that USC and UCLA are  
16 similarly situated to those other schools or back to those  
17 board meetings.

18 And Your Honor, I think the case that's really  
19 worth focusing on here is the Automotive United Trades  
20 Organization case from the Washington Supreme Court. And  
21 both parties talk about that in our papers. That's another  
22 case where you had everybody that was argued to be an  
23 indispensable party. In that case, they were tribes. They  
24 were parties to a contract. They -- it was a gaming  
25 contract.



1 And the court said, of course, those are necessary  
2 parties. The only question is whether they're indispensable  
3 parties, whether we can proceed in their absence because  
4 they're sovereign and they don't have to be here if they  
5 don't want to. And the court looked at the four equitable  
6 factors that are laid out in the case law, and it said that  
7 every single one of those factors favored dismissing the  
8 case and determining that they were indispensable party  
9 except for the last one.

10 The last one was whether there was another forum  
11 where the dispute could be litigated. And in that case,  
12 nobody identified to the court another forum where the case  
13 could proceed other than the legislature. And the Supreme  
14 Court looked at that and they said, you know, I've read  
15 Marbury versus Madison. I know that if you've got an  
16 argument that the government is doing something  
17 unconstitutional, that's something that should be in court,  
18 not in the legislature.

19 Well, there's no argument here of unconstitutional  
20 conduct by the government. What we're dealing with here is  
21 a dispute between members of a voluntary association. And  
22 in fact, there has been an alternative forum that's been  
23 identified. The conference identified the U.S. Supreme  
24 Court's original jurisdiction as the place where a dispute  
25 between states rests. And I think that's right. There are

1 pretty clear cases that lay out disputes between states  
2 being within the original jurisdiction of the Supreme Court.

3 And their argument is the Supreme Court could  
4 decline to exercise jurisdiction, won't always take those  
5 cases. That's true. But one thing I think is really  
6 important, Your Honor, is that this is not a dispute between  
7 two states that we're talking about. This isn't a river  
8 that's flowing from Washington into Idaho or Washington to  
9 Oregon where there's two states. Maybe they could figure out  
10 that dispute on their own.

11 We've got six different states. We've got a  
12 dispute between six different sovereigns. And respectfully,  
13 that's what the original jurisdiction the Supreme Court is  
14 meant to address. It seems a little bit ridiculous to be  
15 talking about the Supreme Court dealing with questions about  
16 what's going to happen in college athletics, but I think  
17 this is a case where that is the right place for this  
18 dispute to be litigated if it's important for everyone to be  
19 present.

20 The other argument I --

21 **THE COURT:** Can I just enter an order referring  
22 this to the Supreme Court for decision?

23 **MR. HECKENLIVELY:** I don't know if there's one of  
24 those in the file box over there, Your Honor, but --

25 **THE COURT:** I can write one out.

1           **MR. HECKENLIVELY:** We wouldn't object to that.

2           And what I'd say, Your Honor, is that the bottom  
3 line here is that we're talking about a remedy that the  
4 plaintiffs are seeking that's obviously going to affect the  
5 interests of the nine other departing schools.

6           We've got, according to the commissioner's  
7 declaration, over \$400 million in revenue coming into the  
8 conference this year. For all the reasons we're talking  
9 about in the preliminary injunction motion, that's money  
10 that the nine departing schools that aren't here in court  
11 today are expecting to have distributed pro rata so that  
12 they can use it to fund their student athletes and all the  
13 programs that they rely on to put on sports, including the  
14 non-revenue sports.

15           On the abstention issue, Your Honor, I think this  
16 is another independently sufficient basis for dismissing or,  
17 at a minimum, staying the case. There's been a lot of  
18 argument today about what's the right reading of the bylaws  
19 and who has the better one. We, of course, think that our  
20 reading is better.

21           But in order to dismiss under the abstention  
22 doctrine you don't have to agree with us. You don't have to  
23 think that our reading is better. The principle of these  
24 abstention cases is that if there's a voluntary association,  
25 unless they're doing something that, quote, "plainly

1 contravenes," close quote, the bylaws of the association,  
2 then it's for the members of the association to figure out  
3 amongst themselves. The court doesn't get involved unless  
4 what's being done plainly contravenes the bylaws.

5 **THE COURT:** And that's where the plaintiffs are  
6 claiming that the actions plainly contravene the bylaws.

7 **MR. HECKENLIVELY:** That's their argument. And I  
8 think even if you don't get all the way towards accepting  
9 that our reading is better, I think at a minimum I hope  
10 we've convinced the court that our reading doesn't plainly  
11 contravene what the bylaws say in light of the ambiguity.

12 And what the case law says is that it has to be  
13 arbitrary or unreasonable to read the bylaws in the way that  
14 we're asking the court to read it. And I think we've  
15 crossed that threshold pretty easily, Your Honor. And I  
16 think the cases on this point, you know, the argument on the  
17 other side is, well, this is an important issue. It goes  
18 directly to the governance of the conference. Surely, the  
19 court should get involved. But that's the same fact pattern  
20 in the cases that we cite.

21 And I think the California Trial Lawyers case is  
22 instructive here. That was a dispute about who was going to  
23 be the president-elect and then subsequently the president  
24 of the association. There was an argument by some members  
25 that the person had been appointed president-elect in

1 violation of the bylaws. There was a dispute about that,  
2 and the court said: You know what?

3 We're not going to figure this out. That's an  
4 issue -- there's reasonable interpretations on both sides.  
5 We're going to let you all figure it out even though it  
6 determines who's going to be the leader of the association.

7 It's the same fact pattern here, and we think the  
8 abstention doctrine is independently sufficient basis for  
9 dismissal. I'm happy to answer any questions about the  
10 motion to dismiss.

11 **THE COURT:** I think you've answered that. I've  
12 got four pages of questions, and they've been one by one  
13 chipped off the list here, so I don't have any --

14 **MR. HECKENLIVELY:** All right. Thank you, Your  
15 Honor.

16 **THE COURT:** Thank you, counsel.

17 All right. We have time for one more round from  
18 all three attorneys. Okay.

19 Mr. MacMichael, we only have -- it's only 4:08,  
20 and the bell will ring at 5, I hope.

21 **MR. MACMICHAEL:** Okay. Thank you, Your Honor.  
22 And again, if you have any questions, I'm happy to address  
23 them. The argument that I heard that we haven't met our  
24 burden to show irreparable injury because we haven't  
25 proposed some specific plan of action, I don't understand

1 that. Nothing in the case law requires that.

2 What we are arguing is that under the bylaws, we  
3 have governance rights. As the two remaining members of the  
4 conference, we are entitled to govern. They are trying to  
5 deprive us of our governance rights in violation of the  
6 bylaws. The cases all say that that alone is irreparable  
7 injury.

8 You don't need to then say, well, I would have  
9 gone out and done this or done that because the reality is  
10 if they're depriving us of our right to govern, we can't go  
11 do those things. We can't go negotiate with anyone or talk  
12 to anybody or make plans because there is, right now, a  
13 complete lack of clarity about who the board of the Pac 12  
14 is.

15 So to say that we haven't met our burden because  
16 we haven't come in and said, here's our turnkey plan, when  
17 we can't even get to a turnkey plan because they're denying  
18 us of our rights to be the board does -- it just seems to  
19 put the cart directly before the horse.

20 So the fact that they're taking away our  
21 governance rights unfairly, unjustly, and in violation of  
22 the bylaws, there's no question that that constitutes  
23 irreparable harm, both as a matter of law and as a matter of  
24 fact. Again, you have to consider what they think the right  
25 result here is. They think the right result is that they

1 should be entitled to make decisions on behalf of the Pac 12  
2 over the next nine months.

3 And I found two particular exchanges during the  
4 last round to be very, very interesting. You asked Mr.  
5 Lambert who doesn't want the Pac 12 to have a future and who  
6 should decide that, and he said Oregon State and Washington  
7 State should decide the Pac 12's future. That's what I  
8 heard him say. But we can't because they refuse to accept  
9 the consequences of their decisions, and they are refusing  
10 to let us act as the board, as is required under the bylaws.

11 You then asked Mr. Levin, well, wait, doesn't the  
12 Pac 12 have an interest in having a future? This is when he  
13 said, we don't want them spending a dollar going out and  
14 trying to find new schools or regrowing this conference.

15 And you asked him, well, wait, isn't the point of  
16 the Pac 12 to exist in the future and isn't the point of the  
17 Pac 12 to go on and survive? And he kind of ducked the  
18 question and he said, well, we are fine with Oregon State  
19 and Washington State having a future, but he didn't answer  
20 the question of: Do they care at all about the Pac 12  
21 having a future?

22 Because the reality is they don't. And this --  
23 you can see this so clearly through their position that all  
24 of the net revenue should be distributed out and just  
25 flushed out through the waterfall, you know, immediately.

1 Again, that issue is not before the court today.

2 But if that were to happen, Your Honor -- and I  
3 think it's very telling that they keep saying give us all  
4 the revenue, give us all the revenue -- they don't want to  
5 make a single provision for any of the significant  
6 liabilities that were incurred while they were in the  
7 conference but are not going to come due until after they're  
8 gone.

9 So what organization in the world would send out  
10 all of the revenue and make no provision for the  
11 liabilities? That doesn't make any sense to me at all as  
12 far as sound management. But of course, it doesn't matter  
13 to them because they won't be here when the liabilities hit,  
14 and that will destroy the conference right then.

15 They also make no provision at all for how any of  
16 that money should be used for the Pac 12's future because,  
17 of course, they're not going to be a part of that future.  
18 So -- so this idea that we have to come in and say, here's  
19 all of our actions 1 through 100 that we're going to take if  
20 we're the board is just not the standard, and I think it's  
21 self-evident that we will suffer irreparable harm unless  
22 we're entitled to act and to act now as the board of the  
23 conference.

24 I heard about the harm to student athletes.  
25 Again, I think that's a red herring, Your Honor. No harm



1 has befallen any student athletes for USC and UCLA or  
2 Colorado since they've been removed from the board. There  
3 are councils that are set up with in the Pac 12 to deal with  
4 on-field activities, to deal with student athletes. All of  
5 those have proceeded apace throughout the last 13, 14  
6 months, as those schools were removed.

7 So everybody is operating on the same playing  
8 field, no pun intended, with respect to student athletes and  
9 with respect to keeping all of this going over the next  
10 year, which will happen regardless of who the board is.

11 The question, again, boils down to who's more  
12 likely to be correct under the bylaws, us or them? And if  
13 we're right that our interpretation is correct, should we be  
14 empowered to act now, or do we have to wait for six, eight,  
15 nine, ten, eleven months when it's going to be too late  
16 because decision -- if the Pac 12 is going to have a future,  
17 it's got to start acting now and making decisions in  
18 preparation for that.

19 And we can't do that with -- if we're handcuffed  
20 to ten members who care about one thing and one thing only,  
21 and that's draining all the money out of the conference and  
22 leaving all of their liabilities in he conference on their  
23 way out the door. There will be no future if they have a  
24 say in it.

25 And Mr. Levin also said, and I think I got the

1 quote down exactly, he said: We're not out to end the  
2 conference. And I think that's interesting because they  
3 spend two and a half or three pages of their brief coming up  
4 with this very novel and creative argument that they can  
5 dissolve the conference even if they're not the board.  
6 They're wrong about that, and that's another red herring  
7 that we've listed.

8 But think about that for a second, Your Honor.  
9 The fact that they're spending that much time and energy and  
10 money to develop these novel legal arguments that they can  
11 dissolve this conference even if they lose this motion and  
12 even if they're not the board, just imagine what they're  
13 going to do if they are the board and just imagine what  
14 they're going to do if they have some sort of veto right or  
15 unanimity right that we put in place for a temporary period  
16 to get from the TRO to where we are today.

17 And I -- again, I'll -- I don't want to take the  
18 bait, but the suggestion that this USC and UCLA issue was  
19 that there was -- you know, a pin was put in that or that  
20 this wasn't decided, if I can just spend two or three  
21 minutes showing Your Honor how that all unfolded because the  
22 facts are just directly the opposite.

23 So if you look at slide 19, Your Honor.

24 **THE COURT:** I'm got it.

25 **MR. MACMICHAEL:** So we all know June 30th, 2022 --

1 and again, this goes directly to who's more likely to  
2 prevail on their interpretation of the bylaws. That was the  
3 day that USC and UCLA announced publicly that they were  
4 going to join the Big 10, but they weren't going to join for  
5 another two years until August of 2024.

6 That same day the commissioner said, get me the  
7 other ten presidents and ADs or chancellors. Get me the  
8 other ten board members on the phone with the ADs.  
9 Obviously, the point of this was to talk about, what are we  
10 going to do about USC and UCLA announcing they're going to  
11 leave and what does this mean as far as their governance  
12 rights are concerned?

13 Four days later, the very next slide, the general  
14 counsel of the Pac 12 sends a letter to the general counsel  
15 of USC and UCLA and says, you have delivered notice of  
16 withdrawal when you told us on a Zoom call or a phone call  
17 that you plan to leave in ten years. So again, in black and  
18 white, unmistakable terms, adopting our interpretation of  
19 the bylaws and rejecting their interpretation of the bylaws.

20 And this was not a secret to the board. The ten  
21 remaining schools, including University of Washington who's  
22 represented here today, the very next day -- if you go to  
23 the next slide, Your Honor, slide 21. The board met the  
24 very next day, the ten remaining members, including the  
25 University of Washington, and this is the presentation that

1 was made to those ten board members along with everybody  
2 else.

3 And it says under legal and governance action,  
4 there is a notice and preservation letter sent out. That is  
5 a direct reference to the July 4th letter that went out the  
6 day before telling USC and UCLA that they had provided  
7 notice of withdrawal. It then says, board review of  
8 discipline and financial penalties. And again, you could  
9 only talk about disciplining and imposing penalties on those  
10 two if they had breached the bylaws.

11 Then it says, board seat and votes. I'm going to  
12 take a wild guess and say that that was a reference to  
13 should USC and UCLA still be entitled to attend board  
14 meetings and vote. And we know what the outcome of that  
15 discussion was because after this day, USC and UCLA never  
16 attended a single board meeting and never voted on a single  
17 issue, even those issues that directly affected them,  
18 affected their revenue distributions, affected any and all  
19 manner of things that pertain to their existence in this  
20 conference. They were barred.

21 And then it goes on to say, removal of USC and  
22 UCLA from all NC2A committees. They not only took them off  
23 the board, but they took them off every NC2A committee in  
24 which they were on that committee as a representative of the  
25 Pac 12. There are many committees made up of board members

1 from the different conferences, and they said: You're off  
2 of those, too.

3 And it also wasn't a mystery, Your Honor, as to  
4 why they were being taken off of it. If you look at slide  
5 22, this is now nine days later. The conference wrote  
6 another letter to USC and UCLA and told them exactly why  
7 they were being taken off the board and all of these  
8 committees. It was because of their direct conflict of  
9 interest and the fact that their participation on the board  
10 or their participation on these NC2A committees would harm  
11 the Pac 12 because they were conflicted. And they go on to  
12 say that the wide array of potential conflicts is so  
13 entrenched and ever present, that recusal is just not a  
14 workable alternative approach.

15 The words of the Pac 12 nine days after they met  
16 with the board and walked them through this exact issue. So  
17 for them -- and then if you go on, Your Honor, on the next  
18 slide, 23, this just goes on and on and on. On October  
19 30th, the general counsel writes to USC again and says, our  
20 position is that you provided notice of withdrawal, and  
21 you're off the board. Again, adopting our interpretation  
22 and rejecting theirs.

23 And the very next day on slide 24, the board met  
24 again as a ten-member board, knowing full well that USC and  
25 UCLA were gone. So for them to come in here and tell you

1 that this USC/UCLA issue, it was -- it never really, you  
2 know, was a thing, and no one ever really took a definitive  
3 position, and it was a kind of an agree to disagree type of  
4 situation is completely contradicted by all of the documents  
5 in the entire evidentiary record before you.

6 The course of performance is legion, and it shows  
7 that our interpretation was the interpretation that they all  
8 took up until the minute that that interpretation no longer  
9 served them and, in fact, would not benefit them in any way.  
10 And at that point, they did a direct 180. They did a direct  
11 flip-flop on their interpretation, but you don't get to  
12 reverse your interpretation on a contractual provision just  
13 because it no longer suits you.

14 What was good for the goose is good for the  
15 gander. And the fact that they eliminated USC and UCLA and  
16 Colorado from the board, continued to meet and take action,  
17 and then when five more left and then you had four remaining  
18 members and the commissioner said, we have a board of four  
19 now. So each time this happened, it was well understood  
20 what the outcome was. It was the people who were staying  
21 there on the board. People who are leaving, they're off the  
22 board.

23 And the fact that it's now ten against two should  
24 not change the result. It doesn't change what the words  
25 say. It doesn't change what's fair. It doesn't change

1 what's right. It just now happens to be ten against two.  
2 But ten wrong and two right doesn't mean that the ten should  
3 prevail. And that's what we have here is a real clear  
4 situation of ten in the wrong, two in the right, and the  
5 fact that they're ten just frankly shouldn't matter.

6 So again, happy to answer any questions that the  
7 court has, but the preliminary injunction that we've asked  
8 for is asking for nothing more than the relief that they  
9 granted themselves when people did what they are now doing.  
10 What we want is a declaration -- or a preliminary injunction  
11 saying that we are likely to prevail and we should act as  
12 the board. That is the relief they granted to themselves  
13 when USC and UCLA said they were leaving and when Colorado  
14 said it was leaving.

15 What they did was they said, you're off the board.  
16 We're the board, and we're going to decide. We're asking  
17 for the exact same thing. It's no different. Thank you,  
18 Your Honor.

19 **THE COURT:** Got it. Thank you, counsel.

20 All right. One more round if Mr. Lambert wants to  
21 add anything to that or subtract anything?

22 **MR. LAMBERT:** Your Honor, the conference and the  
23 commissioner have nothing to add, and we submit on the  
24 papers and what we've had to say today unless Your Honor has  
25 questions for us.

1           **THE COURT:** I don't. Thank you. You've answered  
2 the questions I did have. Thank you, counsel.

3           All right. And Mr. Levin?

4           **MR. LEVIN:** Thank you, Your Honor. I'm going to  
5 work backwards and start with the equities and then talk  
6 about the bylaw itself.

7           Your Honor, let me go back to this question of  
8 what is the purpose of the conference, and is the purpose of  
9 the conference just to exist in perpetuity, and all money  
10 should be spent in service of that? Because that's what I  
11 think I'm hearing, that all of the money should first go to  
12 service of including paying other schools to join the  
13 conference this year.

14           And the fact is there is a statement of purpose in  
15 the bylaws. In the statement of purpose, which I read  
16 earlier, talks about supporting the member institutions and  
17 their athletes. And the way to do that is to make sure that  
18 members have a say in the governance of the conference.

19           That does not mean that Oregon State and  
20 Washington State are going to be precluded from ensuring a  
21 future for themselves and for the conference. And that's  
22 true for two reasons. One, as I said at the outset, the  
23 University of Washington has said all along that it has no  
24 interest in participating in decisions about adding new  
25 members or new media rights agreements.



1 In two, there is in the declaration from President  
2 Cauce from the University of Washington, there is evidence  
3 that's unrefuted that the conference has revenue streams  
4 coming into it next year and the year after. And frankly,  
5 if Oregon State and Washington State want to commit those  
6 revenue streams to paying new members, that's their  
7 prerogative to do that.

8 **THE COURT:** Your president's declaration stated  
9 that she didn't have any knowledge of any of this action  
10 going on, but she was on the board and chairman of the  
11 board.

12 **MR. LEVIN:** Yeah. No, I don't think she meant to  
13 say -- she of course knew that UCLA and USC were not in the  
14 board meetings. I think she says that. Of course she knew  
15 that. She was there.

16 What she says is there was no board vote to make a  
17 formal determination that they shouldn't be there. Simply,  
18 the conference said they weren't going to be there. It's  
19 true that others came to the meetings and went along with  
20 that in the sense that it didn't stand up and insist that  
21 UCLA and USC be brought in. And I believe the record  
22 reflects in President Cauce's declaration that they were  
23 largely speaking about a new media rights deal, with USC and  
24 UCLA themselves had said they understood they weren't going  
25 to participate in those discussions.

1 Now, the idea, though, that because the conference  
2 kicked UCLA and USC to the curb on July 4th after they  
3 announced does not mean that that is the correct  
4 interpretation of the bylaws, and I heard a lot of rhetoric  
5 about good for the goose, good for the gander, and all these  
6 things. But two points, Your Honor. One, they are not  
7 making, and I have not heard them make, an estoppel  
8 argument, different legal argument. That's an argument that  
9 says, you said it before, you said it to the court, right,  
10 you're stuck with it. You can't come into the court and say  
11 X and then come back a week later and say Y because it suits  
12 you.

13 But there's a requirement for estoppel, which is  
14 that you have to have relied on it to your detriment. We  
15 addressed this in a footnote in our brief. They don't  
16 address it. But there is no plausible way that Oregon State  
17 and Washington State could stand up and say the reason we've  
18 decided not to leave and join a new conference, the reason  
19 we've decided to stay in the Pac 12 is because we understood  
20 that we would be the sole board members.

21 They haven't said that. There's no evidence of  
22 that, and I submit that that's simply inconsistent with the  
23 record that is before the court which shows that they did  
24 explore and attempt to join other conference but so far have  
25 been unsuccessful.

1 So I don't think they have an argument to say,  
2 you're stuck with it because you said it before. So then  
3 you're left with when is evidence of past conduct relevant?  
4 And there's been a lot of talk today, but they haven't  
5 mentioned a single case that says they get the benefit of  
6 course of performance evidence in this circumstance where it  
7 is indisputable that USC and UCLA, party to the contract,  
8 party to the bylaws, absolutely disagreed from day 1 with  
9 the conference's position.

10 And what the California Supreme Court said in  
11 Werner, and this is a California organization -- what the  
12 Supreme Court said is: That is not relevant to the meaning  
13 of a contract. What's relevant is when all of the parties  
14 to the contract act one way in the absence of dispute, and  
15 all of a sudden, a dispute arises, and then they say, no,  
16 the contract means something else.

17 All of this evidence is in the context of a  
18 dispute. And I would submit that it's largely driven by the  
19 conference's position initially to take a very hard line  
20 with USC and UCLA and then to take a hard line with  
21 Colorado, and then to change its position also as a result  
22 of this all being disputed. That is not evidence that  
23 should overcome what the bylaws actually say.

24 And what they actually say is you cannot leave  
25 during this prohibited period up until August 1, 2024. But

1 you can leave after that. Everyone agrees. And you can  
2 tell people about your intentions. Nothing in the bylaws  
3 prohibits that. It's good to tell people about your  
4 intentions. And they do not mean that by doing that, you  
5 have violated the bylaws.

6 Think about that. The provision is you are in  
7 breach of the bylaws if you in good faith tell the members  
8 that you were doing something that is absolutely  
9 permissible; that is, you tell people, you tell the schools  
10 that you've worked with, you have relationships with, that  
11 you are planning to leave the conference after August 1,  
12 2024, and they say, now you are in breach. I heard him say  
13 you are potentially subject to penalties. You can be  
14 punished for this.

15 But that makes no sense. The only way then you  
16 can actually leave, which you have the right and the  
17 permission to do, is to stay utterly silent until August 2,  
18 2024 and then then announce, we're going somewhere else.  
19 That's not practical and it's not reasonable.

20 **THE COURT:** Why wouldn't that be practical?

21 **MR. LEVIN:** Well, it's not practical because now  
22 it puts everyone in a really difficult position, right,  
23 because the conference is at that point trying to negotiate  
24 a new media rights deal, right? This is all tied to a media  
25 rights deal. They're trying to negotiate a new media rights

1 deal leading up to 2024. You have to set schedules, you  
2 know, for the future. You can't set schedules at the last  
3 minute. So lots of things are going on about the future.

4 And if you say one word, you're in breach. But if  
5 you sit there silently and sort of pretend to go along,  
6 you're not in breach? I mean, that is -- that is illogical  
7 because now you have things that are being put in place that  
8 don't apply to you. You're being put on some schedule  
9 that's not part of you, but yet, if you say, by the way,  
10 we're not going to be here starting in 2025 -- or 24/25,  
11 then you're somehow in breach of the bylaws.

12 This is not a provision that says, like the old  
13 provision which said, you must tell us -- the old provision  
14 said, you must tell us, you must tell us in advance, and  
15 effective when you tell us, you're off the board. But the  
16 new provision just doesn't say that. It's not the words on  
17 the page anymore.

18 Your Honor, I would submit there is no evidence in  
19 the record about the why, about why that happened. Maybe  
20 that could be explored, you know, at further hearing on  
21 this, but there is no evidence in the record about why the  
22 change was made in 2011 from the old version to the new  
23 version.

24 But what we have are the words on the page, which  
25 are quite different and which are focused on keeping members

1 in the conference during the term of the media rights  
2 agreement, and that's what the bylaw provision is talking  
3 about. It's not saying, when you tell people about your  
4 future permissible plans, you are kicked off the board and  
5 can then be subject to essentially any actions that the  
6 remaining board members want, including withholding of  
7 revenue that you have contributed to earning as part of the  
8 conference.

9 Let me say one more word because a couple times,  
10 this issue of the conference's liabilities have come up.  
11 The conference is a defendant in certain lawsuits, but  
12 again, I would submit, Your Honor, there is no evidence in  
13 the record about any of this. They put in declarations  
14 about lots of things, but they don't put in any evidence  
15 about the liabilities. There's simply no evidence before  
16 the court about anyone's intention with respect to  
17 liabilities.

18 The only thing I will say on that, Your Honor, is  
19 in the past, when liabilities have arisen, the conference  
20 paid them. And frankly, that's -- there's no reason to  
21 think that won't happen in the future, but this is just not  
22 something that's before the court at this time.

23 And the last thing I'd say, Your Honor, is on this  
24 question of dissolution because Mr. MacMichael called it a  
25 novel argument that the members could dissolve the

1 conference if they wanted to. Your Honor, with respect,  
2 it's not novel. It's what the California statute says in  
3 black and white. If the bylaws don't provide a mechanism  
4 for dissolution, then it is up to the voting power of the  
5 association to decide whether to dissolve, and the  
6 California statute goes on to say the voting power of the  
7 association resides in the members.

8           The cases are absolutely clear on this. It's  
9 simply the fact that the members could decide to dissolve if  
10 they wanted. Of course, in all this time during these  
11 proceedings and before, no member has called for such a  
12 vote. No member has tried to dissolve.

13           But this injunction that they're asking for -- and  
14 the reason we put this in our papers is because this  
15 injunction is not going to address that issue -- that issue  
16 is simply a separate issue about should the members choose -  
17 - a majority of the members choose to dissolve the  
18 conference, which I will say no one has attempted to do it  
19 as I stand here today, but it is simply not something that  
20 they need board control to prevent or to make happen. It's  
21 just not a decision that's committed to the board. It's a  
22 totally separate decision.

23           They talk about it in their papers, but they have  
24 no contrary law, and they have no other reading of the  
25 statute.

1 So let me close, Your Honor, by saying the  
2 departing members continue to have an interest in the  
3 conference. They continue to play on the field. They  
4 continue to play on the courts. Their student athletes are  
5 participating in competitions, will continue to participate  
6 in competitions, and they continue to have a say or to want  
7 and need a say in conference governance.

8 The bylaws do not kick them off the board  
9 automatically for telling the conference about their future  
10 plans, and this court should deny the preliminary injunction  
11 or, at a minimum, grant one of the alternative remedies that  
12 we suggested.

13 **THE COURT:** Thank you, counsel.

14 All right. Well, we've -- we're coming to the  
15 decision time and thank you, all counsel, for your very  
16 passionate and well-organized, thorough presentations of  
17 your respective cases.

18 I've read and reread and, like I say, I think I  
19 read three times all the -- all the papers that have been  
20 submitted except I did not read every page of the bylaws.  
21 I'll tell you that much.

22 It just seems -- I grew up where conduct spoke  
23 louder than words. I mean, that's how my parents treated  
24 me, and that's how I treated my children when they were  
25 growing up is that conduct is what counts, and words don't



1 so much. What you do, how you -- what you do and how you do  
2 it is what counts in life, not what you say you're going to  
3 do and not what you say you're not going to do.

4 So with that in mind, this court finds in favor  
5 that the plaintiffs have -- are likely to prevail on their  
6 interpretation of the bylaws. The parties' prior course of  
7 conduct uniformly supports the plaintiffs, and the  
8 plaintiffs will suffer irreparable harm without the  
9 preliminary injunction.

10 Now, with the preliminary injunction in effect --  
11 it will be in effect -- I'm going to order that WSU and  
12 Oregon State will be the only two governing members of the  
13 board. But for any future meetings or conferences between  
14 OSU and WSU, they will notify the other ten schools. They  
15 will put forth an agenda. The other ten schools may  
16 participate in the sense of making comments, suggestions, or  
17 objections, but the ultimate voting will be by the remaining  
18 two board members.

19 But this is not a shutout in the sense of the  
20 preliminary injunction will be modified, or whatever you  
21 want to call it, to make sure that the other ten schools are  
22 still treated in a fair, open manner, and nobody's going to  
23 take advantage of somebody else. And if that starts to  
24 happen, I'll either hear about it here or somebody else will  
25 hear about it down the street, up the highway.

1 But I just do not believe that the two plaintiffs  
2 left here, the two members of the board that are left, will  
3 do anything directly to harm the other ten members. I just  
4 read too much here. I've read all of what you've got to  
5 say. And with that, that's how I see it.

6 And that's how I guess -- that's where you came to  
7 find out how the court would rule, and so that's what we're  
8 ruling.

9 **MR. LEVIN:** Your Honor, if I may, and I appreciate  
10 the court's ruling, we do intend to seek review at the Court  
11 of Appeals and we'd ask, if you would, if you would stay  
12 your order until the end of the week so we may seek a stay  
13 from the appellate court, you know, if they decide to impose  
14 a stay.

15 **THE COURT:** And then but leave in the TRO?

16 **MR. LEVIN:** Leave the TRO, yes. Leave the TRO but  
17 stay in position of the PI until the end of the week so that  
18 we can seek appellate relief.

19 **THE COURT:** Okay. All right.

20 Any objection to that?

21 **MR. MACMICHAEL:** No, Your Honor, if it's just  
22 until the end of the week, we don't object to that.

23 **THE COURT:** Okay. Fair enough.

24 All right. Let's put together that -- I was  
25 looking for it up here in all my notebooks, and here I think

1 I found it. No, I didn't. You've got a proposed  
2 preliminary injunction that I had that I can't find now.

3 **MR. MACMICHAEL:** I'm happy to hand my copy up.

4 **THE COURT:** Yes, if you would. Then I can make  
5 some -- we need to make some -- yes, sir?

6 **MR. LAMBERT:** One request. I think it's implicit,  
7 but we'd like it explicit that one carry over into the new  
8 order from the TRO, which is a clear -- a clear demarcation  
9 that the conference can continue to conduct its business in  
10 the normal course; in other words, the kind of business that  
11 it conducts without normally seeking consent or at the  
12 direction of the board.

13 **THE COURT:** Sure. I don't think that's an issue.  
14 I'm glad to have that in there.

15 Mr. MacMichael, any problem with that?

16 **MR. MACMICHAEL:** Not in theory, Your Honor. Just  
17 as long as we're all clear that that does not include  
18 decisions about distributing revenue or how the revenue  
19 should be spent.

20 I assume he just means normal course, general day-  
21 to-day activities but not the decisions that the board would  
22 normally be involved in.

23 **THE COURT:** Is that what you mean, Mr. Lambert?

24 **MR. LAMBERT:** Your Honor, another thing that seems  
25 unsaid but clear, I think everybody needs a ruling on the

1 motion to dismiss --

2 **THE CLERK:** I'm sorry, can you use the mic,  
3 please?

4 **THE COURT:** Oh, yes.

5 **MR. LAMBERT:** Yes.

6 **THE COURT:** The court denies the motion to dismiss  
7 -- thank you for bringing that up -- because the court finds  
8 that the nine departing schools are adequately represented  
9 here today by the University of Washington, who has  
10 thoroughly represented their interests.

11 Let's take a look, I'm going through the wording  
12 here of the preliminary injunction and the order granting  
13 plaintiffs' motion for a -- okay. So let's go to the meat  
14 of this order. All right.

15 Okay. So we would add -- I think we're going to  
16 add and then we'll probably need to have you -- might be we  
17 can just add it on the back. I don't know. All right.  
18 We'll say number four. All right. So number four, the  
19 conference shall be able to operate in its normal course of  
20 business.

21 Number five, any future meetings of the board  
22 shall be noticed -- I guess you'd call it that -- three days  
23 to all other ten departing members. The new board shall  
24 invite all departed -- or departing -- I guess departed now  
25 -- departed universities to participate, communicate, and --

1 okay.

2 So here's what I've done. I've added paragraphs  
3 four, five, and six. I'll add one more. This order is  
4 stayed until -- let's just make it the next Monday because  
5 Friday -- I mean, let's make it Monday. Right. Okay --  
6 Monday at noon, November 20th, during which time the TRO of  
7 9/11 will remain in effect pending appeal of this order.

8 Okay. So here's what I've added. The conference  
9 -- number four, the conference shall be able to operate in  
10 its normal course of business. Number five, any future  
11 meetings of the board shall be noticed three days to all  
12 other ten departing members.

13 The new board shall invite all departed  
14 universities to participate, communicate, and submit their  
15 suggestions to the board. This order is stayed until Monday  
16 at noon, November 20th, 2023 -- yeah -- November 20th, 2023,  
17 during which time the TRO of 9/11/23 will remain in effect  
18 pending appeal of this order.

19 I think I've got everything I wanted to have in  
20 here. So be it.

21 **MR. MACMICHAEL:** Thank you, Your Honor.

22 **MR. LAMBERT:** Thank you.

23 **THE COURT:** Okay. This 14th day of November 2023.

24 Does anybody have a motion denying -- or an order  
25 denying the motion to dismiss? If not, I can add it to the

1 back of it.

2 **MR. MACMICHAEL:** We don't have one prepared on  
3 that, Your Honor, but we're happy to do it, or we can just  
4 say the motions to dismiss are denied. That might be  
5 easier.

6 **THE COURT:** I'll just add that.

7 **MR. MACMICHAEL:** Okay. Thank you.

8 **THE COURT:** So nothing's going to change in the  
9 Pac 12. The athletes will still be competing. The schools  
10 will still be doing business. The Pac 12 will still be  
11 doing business. But it will be governed by the two  
12 universities that have not submitted their notice of intent  
13 to withdraw.

14 **MR. MACMICHAEL:** And Your Honor, may I just seek  
15 one clarification? I think we're all on the same page, but  
16 I think it's better to ask, then, than guess. When you say  
17 normal course of business, I'm assuming -- I think we're all  
18 assuming that does not mean that the conference can decide  
19 whether or not to distribute out all the money --

20 **THE COURT:** That's a board decision.

21 **MR. MACMICHAEL:** Yeah. I mean, that's our  
22 position is that the board would obviously need to be  
23 involved in that. I don't think Mr. Lambert was intending  
24 to suggest that that would include it, but just don't want  
25 there to be any ambiguity what our view is on that.

1           **THE COURT:** Okay. I'll add: But the decision to  
2 make distributions shall be that of the board. Hopefully  
3 you can read my writing. Okay.

4           **MR. LEVIN:** Your Honor?

5           **THE COURT:** Yes, sir?

6           **MR. LEVIN:** Can I just ask for one clarification?  
7 We're fine saying that the decision to actually effectuate a  
8 distribution can't be made by the conference unilaterally,  
9 but distributions and what is distributed to whom is covered  
10 by the bylaws.

11           I just want to make sure that the order isn't  
12 effecting a change in the bylaw executive regulation section  
13 one about the -- so if the point is just the timing and when  
14 money is paid out and so forth can't be unilaterally taken  
15 by the conference, we understand that.

16           We understand that the board could decide the time  
17 cadence and so forth, but I just want to make sure we're not  
18 actually changing what the bylaw says because that wasn't in  
19 the motion. That wasn't part of the --

20           **THE COURT:** All right. That's my understanding,  
21 counsel, that there's no change in the bylaws if the  
22 remaining bylaws are --

23           **MR. LEVIN:** Are what they are.

24           **THE COURT:** -- are -- yeah, will be -- will be  
25 adhered to by the new board members.

1           **MR. LEVIN:** Thank you, Your Honor.

2           **THE COURT:** Or by, I should say, remaining board  
3 members, not new.

4           Well, thank you, everybody, for your hard work in  
5 this case. I've signed the order. We'll have -- the court  
6 will be in recess, and thank you, everybody, for your  
7 participation. And we will let everybody go and thank you,  
8 everybody, for being here today. Okay.

9           **(WHEREUPON, the proceedings concluded at 4:48**  
10 **p.m.)**

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GR35 CERTIFICATE

I, Sheri Schneider, do hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. That I am an AAERT certified transcriber, Certification No. 1069.

2. That the electronic recording was obtained directly from the court and provided to me.

3. This transcript is a true and correct record of the proceedings to the best of my ability.

4. I am in no way related to or employed by any party in this matter, nor any counsel in the matter; and

5. I have no financial interest in the litigation.

IN WITNESS HEREOF, I have hereunto set my hand this 17th day of November, 2023, in Portland, Oregon.



Sheri L. Schneider, CET No. 1069

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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:

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