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**SUPREME COURT OF THE STATE OF WASHINGTON**

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

*Plaintiff-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*.

**OPPOSITION TO MOTION FOR EMERGENCY STAY**

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## I. INTRODUCTION

The stay sought by the University of Washington (UW) will impose precisely the harm the superior court avoided in granting a preliminary injunction to Respondents Washington State University (WSU) and Oregon State University (OSU): enabling the ten schools leaving the Pac-12 to dismantle the Conference on their way out the door through paralysis and delay. UW seeks—under the wrong standard—to freeze governance while it relitigates the preliminary injunction in a different court, and thereby destroy the Conference by leaving it rudderless. But WSU and OSU must be allowed to steer the Conference in an attempt to save it—now.

Every day that WSU and OSU cannot govern, they are irreparably harmed. The Conference will not survive unless resources are committed to the future. WSU and OSU must be able to make crucial strategic decisions, and explore media and scheduling opportunities, without delay. Significant events for future planning are imminent, including the opening of the

student-athlete transfer portal for football and volleyball and meetings about the structure of the College Football Playoff in upcoming seasons. If the Pac-12 remains paralyzed and its commitment to the future remains in doubt, its ability to navigate these events will be jeopardized. Respondents face the demise of the century-old Pac-12 Conference, to which their futures are tied.

UW and the other departing schools face no irreparable harm and have no incentive to save the Conference. The most they could potentially lose by letting WSU and OSU temporarily run the Conference they are abandoning is money, a harm UW admits is remediable in an ordinary appeal. UW's bare recitations of imagined harm are both speculative and reparable. That should be the end of this motion.

UW asks this Court to stay the superior court's preliminary injunction, but it does not cite or apply the rule for staying a preliminary injunction (RAP 8.1(b)(3)), nor does it mention the proper standard of review (abuse of discretion). Instead, UW

spends 16 of the 19 substantive pages in its motion re-hashing the merits *de novo*. UW does this because the proper test for emergency stay relief—which requires comparing the harm between the moving party seeking a stay and the nonmoving party who received an injunction—vastly favors WSU and OSU. And UW cannot credibly call it an abuse of discretion for the superior court to accept an interpretation of the Pac-12's bylaws that *UW itself* asserted for over a year.

UW fails even to mention the protections for the departing schools built right into the preliminary injunction by the superior court—which make this emergency motion practice unnecessary. OSU and WSU must give the departing members three days' notice of any board meeting and allow them to be present and contribute suggestions. The only thing the departing schools cannot do is vote—a restriction the Conference's bylaws expressly require, because the departing schools are conflicted. And if UW did face some tangible harm in the future, it could

seek relief as to that specific issue—without disabling the Conference's entire governing body, as it asks this Court to do.

UW claims it needs emergency relief. But the only emergency is the one WSU and OSU are facing, which the preliminary injunction was entered to address. The Court should deny the motion.

## II. STATEMENT OF THE CASE

The Pac-12 Conference is an NCAA Division I collegiate athletic association. App. 764. OSU was one of four founding members in 1915. *Id.* WSU joined a year later. *Id.* For over a century, both schools have dedicated themselves to promoting the Conference and its mission. *Id.* Today, the Pac-12 has twelve members: OSU, WSU, Arizona; Arizona State; the University of California Berkeley (Cal); the University of California Los Angeles (UCLA); Colorado; Oregon; the University of Southern California (USC); Stanford; Utah; and UW. *Id.* Next August, that will change.

### A. The Pac-12 Becomes the Pac-2

On June 30, 2022, UCLA and USC gave notice they would be withdrawing from the Pac-12 Conference, effective in 2024, to join the Big Ten. App. 766. The announcement came as a shock; neither USC nor UCLA had shown any sign they were contemplating leaving the Pac-12. *Id.* USC and UCLA will reportedly each receive over $60 million annually from the Big Ten. *Id.* at 15.

More than a year later, and just as the Conference was on the cusp of reaching a new media rights deal with Apple, another wave of Pac-12 members delivered notices of withdrawal. *Id.* On July 27, 2023, Colorado delivered a notice of withdrawal to join the Big 12 in 2024. *Id.* Then—minutes before the deal with Apple was to be finalized—UW and Oregon delivered notice that they, too, were joining the Big Ten for a hefty pay-day. *Id.* Later that day, Arizona, Arizona State, and Utah delivered notices of withdrawal to join the Big 12. *Id.* Finally, on September 1, 2023, Cal and Stanford delivered notices of withdrawal to join the

ACC. *Id.* Just like that, WSU and OSU were the only remaining members of the Pac-12—the Pac-2.

### B. The Pac-12 Bylaws

The Pac-12 has adopted a Constitution and Bylaws (Bylaws) that deal with members who deliver notices of withdrawal. As the withdrawal notices came in, over 13 months, these rules were consistently and uniformly applied—and that uniform course of conduct shows unambiguously that UW's new interpretation of the rules is wrong and contrary to the parties' understanding and intent.

Under the Bylaws, the Conference can act only under the direction of its Board of Directors (Board). App. 41. Each member institution has one representative on the Board. *Id.* The Pac-12 Commissioner is selected by the Board and is "responsible for ensuring that the objectives, policies, and orders of the [Board] are implemented." *Id.*

Once a member delivers notice of withdrawal, it is automatically removed from the Board. The Bylaws are explicit.

"No member shall deliver a notice of withdrawal to the Conference in the period beginning on July 24, 2011, and ending on August 1, 2024." *Id.* at 37. "[I]f a member delivers notice of withdrawal in violation of this chapter, the member's representative to the Pac-12 Board of Directors shall automatically cease to be a member of the Pac-12 Board of Directors and shall cease to have the right to vote on any matter before the Pac-12 Board of Directors." *Id.* at 37–38. This provision disincentives members from departing and protects the Conference from being governed by parties with conflicted loyalties.

For over a year, the Board, led by UW, applied this straightforward reading of the Bylaws. Following USC's and UCLA's notices of withdrawal, the Conference informed them that, pursuant to Chapter 3, Section 2 of the Bylaws, representatives from USC and UCLA would no longer be permitted to attend Board meetings or vote. *Id.* at 766. In fact, the Pac-12 Commissioner attested *under oath* to two separate

courts that USC and UCLA were no longer members of the Board. *Id.* at 11–12. And the other member schools met as the Board repeatedly, *without* USC or UCLA, to decide critical matters for the Conference, including using cash reserves and loans to address budget shortfalls, litigation settlements, a multimillion-dollar real estate lease for the Conference's production facility, NCAA governance issues, and media rights negotiations. *Id.* at 12.

Likewise, after Colorado's notice of withdrawal, the Conference informed Colorado the next day that its "representation on the Pac-12's Board of Directors automatically ceases." *Id.* As the then nine non-departing Pac-12 members continued to meet as a Board concerning various governance matters, Colorado was not invited. *Id.* at 13–14.

Finally, after five more members announced their departure, including UW, the Commissioner texted a reporter: "As of today we have 4 board members." *Id.* at 15.

## C. The Departing Members Stage a Coup

Around when the final two members—Cal and Stanford—announced their departure, the Commissioner suddenly *reversed* his position. On August 29, 2023, the Commissioner wrote to the twelve Conference presidents proposing a "meeting of all Conference CEOs" to discuss "complex issues facing the Conference." App. 16. On August 31, 2023, the Commissioner's office contacted all twelve members' representatives to schedule this "Pac-12 Board Meeting." *Id.* The Commissioner's office explained that it wanted all members to vote "on certain matters including [a proposed employee] retention plan and having a discussion and possible vote on [a] go forward governance approach." *Id.*

## D. WSU and OSU Get Relief

On September 8, 2023, WSU and OSU sued in the superior court and sought to prevent the departing members from holding the unsanctioned Board meeting. App. 17. The court granted WSU and OSU's request and issued a temporary

restraining order on September 11, 2023, to prevent the Board from meeting. *Id.* The TRO precluded the Board from meeting and imposed a requirement of unanimity among the twelve member schools for any action other than the Conference's normal transaction of business. *Id.* at 17–18.

WSU and OSU then moved for a preliminary injunction, asking the court to enjoin the Conference and Commissioner from recognizing any of the departing schools' representatives as members of the Board. *Id.* at 28. On November 14, the superior court granted the preliminary injunction. *Id.* at 1089. Along with requiring the Commissioner and UW to recognize OSU and WSU as the only lawful members of the Board, the injunction requires OSU and WSU to notify the departing members of any Board meeting three days in advance and allow the departing members to "participate, communicate and submit their suggestions to the Board." *Id.*

On November 15, UW filed a notice for discretionary review and an emergency motion for a stay pending review. Mot. 34.

## III. ARGUMENT

### A. UW Has Not Addressed or Met the Correct Test for a Stay Under RAP 8.1(b)(3), and the Motion Should Be Dismissed on That Basis Alone

The Rules of Appellate Procedure set out a specific path for seeking a stay of injunctive relief. In "civil cases, including cases involving equitable relief ordered by the trial court, the appellate court has authority, before or after acceptance of review, to stay enforcement of the trial court decision upon such terms as are just." RAP 8.1(b)(3). And a specific standard applies: "In evaluating whether to stay enforcement of such a decision, the appellate court *will* (i) consider whether the moving party can demonstrate that debatable issues are presented on appeal and (ii) *compare the injury* that would be suffered by the moving party if a stay were not imposed with the injury that would be suffered by the nonmoving party if a stay were

imposed." *Id.* (emphasis added). In other words, the rules create a balancing test.

This is for an important reason. One requirement for obtaining a preliminary injunction is showing that the enjoined action "will result in actual and substantial injury." *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982). Thus, necessarily, *undoing* that same injunction will cause the non-moving party injury. Accordingly, the moving party—seeking to stay the injunction—must show that its harm is even *greater*.

UW has not—and cannot—credibly compare harms with WSU and OSU. UW has agreed to join the Big Ten, where its future is secured. *See* App. 15. WSU and OSU, on the other hand, are clinging to a collapsing Conference they alone must save. Time—and really everything, aside from the law—is on UW's side. What UW characterizes as "[m]aintain[ing] the status quo," Mot. 29, is exactly the opposite; the status quo means automatically removing conflicted members from the Board, as

the Bylaws explicitly require and as UW and the Conference affirmed for 13 months before UW's own notice of withdrawal. The TRO's unanimity requirement was a stopgap measure crafted by the superior court until it could rule on the preliminary injunction.

For this reason, UW omits mention of RAP 8.1(b)(3) and instead moves under RAP 8.3, which applies primarily to parties seeking *affirmative* "injunctive or other relief" pending appeal. Unlike RAP 8.1(b)(3), RAP 8.3 does not require such explicit balancing of the harms between the moving and non-moving parties.

But RAP 8.3 cannot be the right path. After all, if UW only needed to show that a stay was necessary "to prevent destruction of the fruits of a successful appeal," *Wash. Fed'n of State Emps. v. State*, 99 Wn.2d 878, 883, 665 P.2d 1337 (1983), what would happen if a stay would destroy the fruits of an appeal *for the other side*? That is why RAP 8.1(b)(3) imposes a balancing test. UW's

decision to proceed under RAP 8.3 leaves its brief glaringly deficient in its total failure to address the comparison of harms.

Moreover, if parties seeking a stay of an injunction may move under RAP 8.3 as well, then RAP 8.3 must impose a *greater* and not a lesser standard. Otherwise, no party would ever have a reason to move under the more specific RAP 8.1(b)(3). *See Veit v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 113, 249 P.3d 607 (2011) ("[T]he rule against surplusage … requires this court to avoid interpretations of a statute that would render superfluous a provision of the statute."); *In re Dependency of N.G.*, 199 Wn.2d 588, 595, 510 P.3d 335 (2022) (noting that the RAP should be interpreted so one rule would not be "subsumed" by another). RAP 8.3 should apply in this situation only if the "harm is so great that the fruits of a successful appeal would be totally destroyed." *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 291, 716 P.2d 956 (1986). RAP 8.3 should not be an opening ploy to relitigate the merits. *See* Washington Appellate Practice Deskbook § 8.5 (Wash. State Bar Assoc. 4th ed. 2016)

("[T]he existence of a 'debatable issue' alone is not sufficient to justify a stay, particularly when the practical effect of a stay is to reverse or postpone the effect of a time-sensitive trial court decision.").

UW spends 16 pages on the merits, but has only a single paragraph addressing the vague, speculative, and entirely monetary harms that will supposedly befall UW if this motion is denied. That cannot be sufficient under RAP 8.3, when WSU and OSU already went through great lengths to demonstrate their own irreparable harm to the lower court through substantial discovery, multiple rounds of briefings, many hours of oral argument, and pages of questions from the superior court.

UW uses the wrong standard because it loses under the right one. Comparing the harm to the departing schools who (with big pay-days in front of them) will let the Conference collapse with the harm to WSU and OSU who have been left to pick up the pieces is no comparison at all. Because UW clearly

loses in a comparison of the harms, this Court should deny the motion.

### B. The Motion Should Be Denied Under RAP 8.3

The applicable rule is RAP 8.1(b)(3), but the motion should also be dismissed under the RAP 8.3 standard.

Under RAP 8.3 this Court may issue orders that are necessary "to insure effective and equitable review." The moving party has a burden to demonstrate that (1) "debatable issues are presented on appeal," (2) "the stay is necessary to preserve the fruits of the appeal for the movant," (3) "after considering the equities of the situation." *Confederated Tribes of the Chehalis Rsrv. v. Johnson*, 135 Wn.2d 734, 759, 958 P.2d 260 (1998).

The first burden—debatable issue on appeal—does not mean, as UW suggests, that each side has arguments on the merits. Mot. 12. It means it must be debatable that UW will *win* on appeal, and, in the case of a preliminary injunction, that means UW must satisfy an abuse-of-discretion standard. *See San Juan Cty. v. No New Gas Tax*, 160 Wn.2d 141, 153, 157 P.3d 831

(2007). "A judge abuses his or her discretion when a ruling is based on untenable grounds or untenable reasons or on an erroneous view of the law." *Magney v. Truc Pham*, 195 Wn.2d 795, 800, 466 P.3d 1077 (2020).

**1. There is no debatable issue that the lower court abused its discretion**

It was not an abuse of discretion to determine that OSU and WSU are likely to succeed on the merits.[1] As the lower court correctly determined, "[t]he plain language of the Bylaws" requires automatic "removal from the Board of members who have delivered notices of withdrawal." App. 1086. Section 2-3 starts with a definite requirement: "No member shall deliver a notice of withdrawal to the Conference in the period beginning on July 24, 2011, and ending on August 1, 2024." *Id.* at 37. The Bylaws easily could have been written to address only *withdrawal* during the specified period. But they weren't. They address a "notice of withdrawal." *Id.* And, as no one disputes, a

[1] This prong also applies under RAP 8.1(b)(3) and is an additional reason to deny relief.

school may give notice of withdrawal before actually withdrawing. *See id.* at 8.

The Bylaws go on to explain what happens if such a notice of withdrawal is delivered. "[I]f a member delivers notice of withdrawal in violation of this chapter, the member's representative to the Pac-12 Board of Directors shall *automatically cease to be a member of the Pac-12 Board of Directors*." *Id.* at 37 (emphasis added). The lower court determined this language was "unambiguous." *Id.* at 1085. This rule protects the Conference, as the previous Bylaws did,[2] from governance by directors with no loyalty to the Pac-12. A departing school may remain a member of the Conference until it withdraws, but it cannot vote on governance matters.

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[2] The 2011-2012 Bylaws state: "The withdrawing member shall provide written notice at least 90 days before … a two-year withdrawal period. . . . Effective on the date that a member delivers notice of withdrawal, the member's representative to the CEO Group shall automatically cease to be a member of the CEO Group." App. 9. The previous Bylaws, like the current ones, recognize both that a conflict of interest will occur *and* that a notice of withdrawal can be delivered in advance of departure.

UW argues it was an abuse of discretion to find this straightforward interpretation was likely to succeed on the merits for two reasons: (1) "notice of withdrawal" is a term of art that actually just means "withdrawal," *see* Mot. 14–17; and (2) it creates "absurd results," *id.* at 17. Both arguments fail.

It's undisputed that, in the prior version of the Bylaws (quoted in footnote 3), "notice of withdrawal" meant notice that a school will withdraw on some future date. UW provides no evidence—and no reason—that the parties intended to redefine the term without saying so when they carried it forward to the current version. Moreover, as WSU and OSU explained below, UW's interpretation would render the last sentence of Section 2-3 entirely superfluous. *See Advanced Network, Inc. v. Peerless Ins. Co.*, 190 Cal. App. 4th 1054, 1063 (2010) ("[A court] must give significance to every word of a contract, when possible, and avoid an interpretation that renders a word surplusage"). Only ***members*** of the Conference have representatives on the Board, so if "deliver a notice of withdrawal" meant "withdraw," Section

2-3 would not need to state that the (former) member loses its Board seat. For Section 2-3 to make sense, the "delivery of a notice of withdrawal" must occur *prior* to the actual withdrawal—just as UW believed before this litigation.

UW pivots on appeal and claims that, even if a notice of withdrawal may occur before, none was delivered here. Mot. 14–15. But, looking at the entire record, the lower court found that all ten schools "delivered notice of withdrawal" by announcing they were leaving. App. 1086. The Bylaws do not specify how "delivery" must occur—and UW provided no evidence that it must be by some "particular document." *See* Mot. 14.

"Absurdity" is the last hope of a losing interpretive argument, but UW relies on it from the beginning. UW claims that it would be "absurd" to punish members for "publicly announcing" an intent to leave the Conference. *Id.* at 17. But, as WSU and OSU explained below, the Bylaws do not incentivize secrecy; they incentivize schools *not to leave* the Conference. If

members decide to depart, there is nothing absurd about expecting Board members to reveal their conflicts of interest and setting consequences for those conflicts. It would be far more absurd to allow members who have committed to another conference, and will be competing against the Pac-12 on the field and off, to sit on the Pac-12's Board and decide how to spend its resources. It was hardly an abuse of discretion for the lower court to dismiss UW's strained absurdity argument.

Additionally, the lower court relied on a significant course of performance as evidence of the Bylaws' meaning. *Crestview Cemetery Ass'n v. Dieden*, 54 Cal. 2d 744, 753 (1960) (noting the parties' performance is the "best evidence" of the meaning of a contract). The record is replete with evidence that the Conference and Board (again, often chaired by UW) agreed that, once a member announces it will leave the Conference, it is automatically removed from the Board.

When UCLA and USC announced in 2022 they were leaving in 2024, the Conference told them they were

automatically removed from the Board; the remaining schools regularly met on the Board without them for more than a year; the Conference delivered an onboarding manual to new Board members that excluded UCLA and USC; the Board issued a press release stating that there were only "10" members of the Board; and the Commissioner repeatedly attested in *sworn declarations* that UCLA and USC had been removed from the Board. App. 20–21. And, while meeting without USC and UCLA, the Board voted to decrease everyone's distributions. Supp. App. 4; *see also* App. 678. This is just some of the uniform evidence showing that the parties to the Bylaws simply did not interpret them as UW now asks this Court to do.

To obscure this evidence, UW brings an army of strawmen. The Board is not required to impose penalties on departing schools. Mot. 21. Nor was it necessary to take action to remove departing members from the Board, when the Bylaws explain that occurs "automatically," as evidenced by the Board meeting *without those members*. *Id.* at 22. And this course of

performance is clearly relevant and did "precede[] the dispute." *See id.* First, the Conference communicated its interpretation to USC and UCLA before *anyone* disputed it. App. 9–10. And, second, there was no conflict between the Board and the other members (including UW), who applied that interpretation for more than a year, and who relied on that interpretation not for litigation but to run the Conference. *Id.* at 11.

There is no good argument the lower court abused its discretion by determining the course of performance favored WSU and OSU. UW cannot point to any evidence of course of performance that goes the other way—not even a passing objection from UW's president, who was the chair of the Board for much of the period when USC and UCLA were excluded.

On the other preliminary injunction prongs, UW's arguments are even weaker. UW claims that WSU and OSU had no "well-grounded fear" of an immediate invasion of any right because "UW has already assured the Conference that it would not seek to vote on certain matters … such as future media rights

agreements and new Conference member considerations." Mot. 25. But, of course, the governance of the Conference today, or the lack of governance, will affect all those future plans. And if UW and the other departing members drain the Conference of resources now—or simply let it collapse from paralysis—it will have no future.

Additionally, the serious and immediate harm to WSU and OSU is obvious. This is a crucial time for the Conference to rebuild, and the Board must be able to act quickly, decisively, and with the Conference's best interests in mind. It must, for example, be able to recruit new members, address the Conference's liabilities, enter into scheduling arrangements, and negotiate with future sponsors and media partners. These decisions about the Conference's future cannot wait until August 1, 2024.

The lower court looked at the whole record, considered extensive argument, and made a reasonable and thoughtful determination about who was likely to win on the merits. Many

of these determinations, like course of performance and harm, were based on findings of fact. *See* App. 1085–86. UW has pointed to no basis for this Court to second-guess those factual findings in an emergency motion, and hand UW exactly what it wants—a Conference that cannot act to secure its own future and will collapse from paralysis.

**2. Emergency relief is unnecessary to preserve the fruits of UW's appeal**

UW treats the most important element for emergency relief as an afterthought. This Court can grant UW's motion only if it is "*needed*" to insure effective review. RAP 8.3. That means, without this motion, appeal would be meaningless. *See Wash. Fed'n of State Emps.*, 99 Wn.2d at 883. UW does not come close to meeting this burden.

UW argues WSU and OSU might place the departing members on "probation," suspend them, or even "terminate" their membership in the Pac-12. Mot. 30. But no one has suggested any of those things are even on the table, and UW has given no reason to think they are. "Speculative injury does not

constitute irreparable injury sufficient to warrant [equitable relief]." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016). Harm must be more than "possible"—it must be specific and "likely." *Winter v. NRDC, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). A speculative parade of horribles cannot be sufficient.

Moreover, the lower court included in the preliminary injunction *specific* protections for the departing schools which UW fails to mention. WSU and OSU must give the departing members three days' notice before any Board meeting, along with a clear agenda. App. 1089. Then the Board must invite the departing members to participate, communicate, and submit suggestions. *Id.* If some tangible harm were actually on the table, UW could readily seek relief from the superior court as to that particular harm. And the parties could litigate a concrete issue with real facts and real interests at stake. This Court should not prevent WSU and OSU from making *any* decision to steer the

Conference on the sole ground that UW can imagine decisions that could be harmful to it.

UW also argues that it will be denied "a seat at the table, while its student-athletes continue to play." Mot. 30. But UW does not say what harm will come of this. As the record shows, USC and UCLA have been excluded from Board meetings for over a year, and UW does not suggest any harm has befallen their student athletes. UW's representatives have not been excluded from participation in the Conference's student-athlete subcommittees and councils, which actually affect the day-to-day happenings of student-athletes. Nor does UW even acknowledge the harm to Respondents' student athletes if the Conference cannot be saved, which is, of course, a risk the departing schools need not concern themselves with at all.

UW is worried about penalties and reduction of net revenue distributions. Mot. 28. But when monetary damages will provide an adequate remedy, the "extraordinary remedy of injunctive relief" is inappropriate. *Kucera v. DOT*, 140 Wn.2d

200, 210, 995 P.2d 63 (2000); *see also Boeing Co.*, 43 Wn. App. at 292 ("We are equally convinced that a stay of the injunction will adversely affect Boeing but that the adverse effect can be measured in terms of a monetary amount"). The relief UW seeks would still be waiting at the end of a successful appeal.

### 3. The equities do not support a stay

Any balancing test overwhelmingly favors the Respondents. The Pac-12 is rudderless and headed towards an iceberg. If the TRO's unanimity requirements are maintained, the ship will sink. UW has made clear in its briefing that the departing schools do not want Conference resources to be spent on planning for the Conference's future. *See* Supp. App. 12. The Conference will not survive without planning for seasons beyond this one. Employees will leave; WSU and OSU will lose players and transfer prospects; media deals will dry up; and opportunities to find new members will vanish.

Conversely, allowing WSU and OSU to govern would cause the departing schools minimal injury. The Pac-12 will

operate much as it is for the rest of the 2023-2024 academic year. UW will not lose its chance to compete for the College Football Playoff. Arizona and Michigan State will still face off in basketball next week. The empire did not fall when USC and UCLA were automatically removed from the Board, and there is no reason to think it will now that the other departing members are automatically removed as well. And any harm from simple budget cuts is *also* faced by WSU and OSU, and then some, as WSU and OSU do not have hundreds of millions of dollars in television contracts coming down the pike. To put it simply, Respondents have much more to lose than UW.

UW's "modest relief" is like Swift's "Modest Proposal"—it is death by delay and paralysis. The equities do not favor the ten departing schools—with their huge media deals in their new conferences—over the two remaining schools who are still fighting for scraps.

## IV. CONCLUSION

This Court should deny UW's motion for a stay pending review.

## CERTIFICATE OF WORD COUNT

The undersigned counsel hereby certifies that this brief contains 4,951 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated: November 17, 2023

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NO. 102562-9

**SUPREME COURT OF THE STATE OF WASHINGTON**

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

*Plaintiff-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*.

**SUPPLEMENTAL APPENDIX SUPPORTING OPPOSITION TO MOTION FOR EMERGENCY STAY**

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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,

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.

Case No. 23-2-00273-38

**DECLARATION OF JAYATHI MURTHY IN SUPPORT OF PLAINTIFFS' CONSOLIDATED REPLY BRIEF IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION**

Date: November 14, 2023
Time: 2:00 p.m.
Judge: Hon. Gary Libey

Date Filed: September 8, 2023

Trial Date: TBD

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I, Jayathi Murthy, declare:

1. I am the President of Oregon State University ("OSU"), and I have served in this role since September 2022. I make this declaration in support of Plaintiffs' Consolidated Reply Brief in support of the Motion for a Preliminary Injunction. I have personal knowledge of the facts set forth herein, and if called upon to do so, I could and would testify competently thereto.

2. I have reviewed the declaration of Dr. Ana Mari Cauce, President of the University of Washington ("UW"). I submit this reply declaration to respond to several points in President Cauce's declaration regarding the interpretation of the Pac-12 Conference Bylaws.

3. President Cauce states that she believes that "the purpose of Chapter 2-3 of the Conference's Constitution and Bylaws is to ensure that members remain in the Conference through the term of the Conference's media rights agreements, ending in summer 2024." Cauce Decl. ¶ 8. President Cauce fails to acknowledge, however, that Chapter 2-3 also serves another important purpose: ensuring that conflicted directors whose schools have announced their intention to join competing conferences are automatically removed from the Pac-12 Board of Directors.

4. This purpose is embodied in the final sentence of Chapter 2-3, which provides: "Additionally, if a member delivers notice of withdrawal in violation of this chapter, the member's representative to the Pac-12 Board of Directors shall automatically cease to be a member of the Pac-12 Board of Directors and shall cease to have the right to vote on any matter before the Pac-12 Board of Directors." President Cauce's interpretation that Chapter 2-3 only applies if a member withdraws during the current media rights agreement would eviscerate the Bylaws' only protection against Board members serving with conflicts of interest.

5. President Cauce also states that she does not understand "Chapter 2-3 (or any other rule) to prohibit a member school from withdrawing from the Conference after August 1, 2024, and announcing before that date such future intent to withdraw." Cauce Decl. ¶ 9.

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1 President Cauce does not address the actual language in the Bylaws, which explicitly provides:
2 "No member shall deliver a notice of withdrawal to the Conference in the period beginning on
3 July 24, 2011, and ending on August 1, 2024."
4 6. While the Bylaws do not prohibit a Pac-12 member from withdrawing from the
5 Conference after August 1, 2024, the Bylaws make clear that there are consequences for
6 delivering a notice of withdrawal before August 1, 2024. One consequence is that "the
7 member's representative to the Pac-12 Board of Directors shall automatically cease to be a
8 member of the Pac-12 Board of Directors and shall cease to have the right to vote on any
9 matter before the Pac-12 Board of Directors." Again, that language in the Bylaws is critical to
10 ensuring that the Board is comprised of directors that are loyal to the Conference and who have
11 not pledged their allegiance to competitor conferences.
12 7. President Cauce further suggests that "[n]o school's representative on the Board
13 ever expressed [this] interpretation of Chapter 2-3 to [her] until the Presidents of WSU and
14 OSU took that position in their letter of September 6, 2023." Cauce Decl. ¶ 9. I respectfully
15 disagree with President Cauce.
16 8. The Conference and ten Pac-12 members (all except for USC and UCLA)
17 consistently expressed and ratified the interpretation of the Bylaws advanced by Plaintiffs in
18 this case. In fact, President Cauce recognizes in her declaration that the Board did address the
19 removal of USC and UCLA's representatives from the Pac-12 Board of Directors after those
20 schools delivered their notices of withdrawal from the Pac-12 on June 30, 2022. *See id.* ¶ 12.
21 President Cauce recalls "discussions and general agreement about UCLA and USC not
22 participating in discussions related to future media rights agreements…." *Id.*
23 9. Once I started attending Board meetings beginning in September of 2022, the ten-
24 member Board (everyone except USC and UCLA) continued to meet, discuss, and take action
25 on all different types of Conference activities—including modifications to member
26 distributions, litigation settlements, and entering into a multimillion-dollar commercial lease —
27 and not just matters that would take effect after USC and UCLA departed in August 2024.
28

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Some of these Board discussions and decisions directly impacted USC and UCLA.

10. To provide one example, approximately six months ago, the ten-member Board of Directors (without USC and UCLA's representatives) voted to approve a legal settlement that resulted in an approximately $72 million liability to the Conference, affecting the 2023 and 2024 budgets. To account for this unbudgeted liability, the ten-member Board voted to reduce all members' revenue distributions, including USC and UCLA's distributions, even though those two schools' representatives had been automatically removed from the Board almost a year earlier pursuant to the Bylaws. As a result of this vote by the ten-member Board, USC and UCLA's distributions from the Conference were reduced.

11. Between September 2022, when I began attending Board meetings, and July 26, 2023, I believe that the Pac-12 Board of Directors met on at least ten separate occasions. The representatives of USC and UCLA did not participate in any of these ten Board meetings. My clear understanding, which I believe was shared by the other nine members of the Board during this period, was that USC and UCLA had been removed from the Board based on their announcements that they planned to join the Big Ten Conference at the conclusion of the Pac-12's current media rights agreement. President Cauce presided over the majority of these meetings as Chair of the Board, and she was fully aware that USC and UCLA were not in attendance.

12. At no time do I recall any of the ten remaining Board members (including President Cauce) objecting to the removal of USC and UCLA's representatives from these Board meetings. At no time did any of the ten remaining Board members disagree with the Conference's position that USC and UCLA had provided a "notice of withdrawal" and, pursuant to the Bylaws, were automatically removed from the Board. Moreover, at no point in time did any of the ten remaining Board members advance the interpretation of the Bylaws that the departing schools are now arguing in this litigation.

13. As noted in my prior declaration, the University of Colorado, Boulder delivered its notice of withdrawal from the Pac-12 on July 27, 2023. At a Board meeting that same day,

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the Conference confirmed to the Board in writing that "CU has provided formal notice of withdrawal" from the Conference. The Board was also informed that Colorado had provided a "notice of withdrawal" and would therefore have its representative removed from the Board. None of the nine remaining Board members (including President Cauce) objected to this decision or voiced any disagreement with this interpretation of the Bylaws. After Colorado delivered its notice of withdrawal, the Pac-12 Board of Directors met on at least five occasions—on August 1 (two meetings), August 2, August 3, and August 4. The representatives of USC, UCLA, and Colorado did not participate in any of these five Board meetings. At no time do I recall any of the remaining Board members objecting to the automatic removal of USC, UCLA, and Colorado's representatives from these Board meetings.

14. As noted in my prior declaration, on August 4, 2023, Oregon and Washington announced that they would join the Big Ten Conference and Arizona, ASU, and Utah announced that they would join the Big 12 Conference. All of those schools announced that they would join their respective new conferences in August 2024. This left the Pac-12 with only four members who had not announced their departures: OSU, WSU, Berkeley, and Stanford.

15. Between August 4 and September 1, 2023, the Conference held several meetings with the four remaining Board members—representatives from OSU, WSU, Berkeley, and Stanford—to discuss the future of the Pac-12. Representatives from the eight schools who had already provided notice of their withdrawal from the Pac-12 were not in attendance at these meetings.

16. At no time between August 4, 2023, and September 1, 2023 (the date that Berkeley and Stanford announced they would join a competitor conference in August 2024), do I recall either of the remaining Board members from Berkeley or Stanford objecting to the automatic removal of the eight departing members from the Pac-12 Board of Directors.

17. During this critical period for the Pac-12, it is essential that OSU and WSU—as the sole remaining members of the Conference that have not provided notices of withdrawal—

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retain their status as the only remaining members of the Board, as the Bylaws require. The Board must be able to make decisions free from conflict in several areas that simply cannot wait until August 1, 2024, to be decided, including but not limited to using its resources to add new members, addressing pending and potential liabilities, entering into scheduling arrangements, and negotiating future media rights and sponsorship agreements. These decisions cannot and should not be made by the departing members who no longer have any allegiance to the Pac-12 and no longer have any interest in seeing the Pac-12 survive.

Executed this 8th day of November 2023 in Corvallis, Oregon.

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

DocuSigned by:
Jayathi Murthy
09B46A813F834CB...

JAYATHI MURTHY

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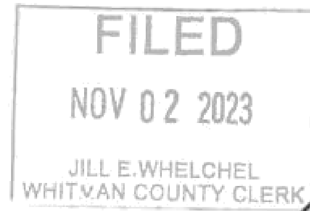


SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF WHITMAN

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

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No. 23-2-00273-38

INTERVENOR-DEFENDANT UNIVERSITY OF WASHINGTON'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Date: November 14, 2023
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## I. INTRODUCTION

Under the guise of preventing harm, Plaintiffs Oregon State University ("OSU") and Washington State University ("WSU") seek to seize control of the Pac-12 Conference and do harm to the University of Washington ("UW") and nine other universities.

A preliminary injunction is an extraordinary remedy appropriate only when needed to preserve the status quo. *Nw. Gas Ass'n v. Washington Utils. & Transp. Comm'n*, 141 Wn. App. 98, 115–16 (2007). If OSU and WSU wanted to preserve the status quo, their request would look exactly like the temporary restraining order this Court entered: pending a final decision on the merits, the Conference could act only by unanimous consent. Instead, OSU and WSU are asking the Court to declare them the only two members of the Board and allow them to take control of all Conference business and assets. There is nothing preliminary about that order—and it is hard to imagine a further departure from the status quo.

That matters because this lawsuit is not just about the Pac-12's future, but also its present. The Pac-12 currently has 12 member schools that are earning hundreds of millions of dollars for the Conference this 2023-24 academic/athletic year. Plaintiffs ignore that entirely. But, if they seize sole control of the Board, they will have control of that revenue earned by all 12 member schools. They have said publicly that they are looking to add schools from conferences that would require the Pac-12 to pay them tens of millions in exit fees. Allowing them to do that with current-year revenues, which the Conference members long-ago agreed would be distributed evenly to all 12 institutions, is not the status quo. Whatever OSU and WSU decide to do with money earned after August 1, 2024, it is fundamentally inequitable to allow them to take current-year revenues and—in the words of the Conference—"confiscate such revenues and assets in contravention of all members' rights to and interest in them." Pac-12 Mot. to Dismiss at 19 n.5.

But OSU and WSU's motion fails before even reaching the equities because their claims rest on a construction of Chapter 2-3 of the Pac-12 Bylaws that is simply wrong. It is undisputed that members are free to leave the Conference *after* August 1, 2024. Chapter 2-3 is designed to ensure that members do not leave before then—that they stay in for the full term of the existing

1 media rights agreements. For that reason, Chapter 2-3 permits the Conference to seek an
2 injunction to prevent a "breach" of the chapter and keep members in the Conference until August
3 1, 2024. And it ensures that the Conference retains members' media rights until then.

4 Plaintiffs' interpretation would mean that if any departing member had kept its post-
5 August 1, 2024 plans secret, it would remain a Board member in good standing while—by
6 Plaintiffs' own view —having an undisclosed conflict of interest. That reading, which creates an
7 incentive for subterfuge, makes no sense. Plaintiffs nonetheless make the remarkable claim that
8 their favored interpretation is "clear and unambiguous." If that were true, Plaintiffs might spend
9 more than one sentence of their motion on the actual text of the Bylaw. *See* Mot. at 15. In
10 reality, the rule that Plaintiffs want *used to exist*, but it was removed from the Bylaw in 2011.

11 Plaintiffs' main focus is a legally irrelevant and selective narrative about statements made
12 by the Commissioner and the Conference office after UCLA and USC announced they were
13 leaving. Plaintiffs' narrative misses two key points, one factual and one legal. First, UCLA and
14 USC strongly objected to the Commissioner's position, and neither the other members nor the
15 Conference's Board of Directors—the governing body of the Conference—ever took action to
16 remove them from the Board or to approve any of the Commissioner's statements. Second, the
17 law is clear that course of conduct evidence is relevant only if it came before a dispute arose as
18 to the meaning of the Bylaw. Once a dispute arises, the evidence is meaningless because it is
19 colored by the parties' views on the dispute rather than solely their views on the language. *See*
20 *Warner Constr. Corp. v. City of Los Angeles*, 2 Cal.3d 285, 296 (1970). In other words, while
21 the communications that Plaintiffs have highlighted may be of interest to the press, they are not
22 relevant to the issues before the Court and they do not mean what Plaintiffs say they do.

23 Plaintiffs' motion should be denied or, if it is granted, the order should be stayed to
24 maintain the status quo while UW takes these issues to the Washington Supreme Court. At a
25 minimum, any preliminary injunction should build in protections for UW and the other schools
26 so that Plaintiffs' effort to disrupt the status quo cannot be used to deprive 10 other schools of
27 their rights during their remaining term as Conference members.
28

## II. RELEVANT FACTS

### A. The Pac-12 Conference.

Twelve member schools make up the Pac-12 Conference: UW, OSU, WSU, and nine schools that are not parties to this action: the University of Arizona ("Arizona"), Arizona State University ("ASU"), University of California–Berkeley ("Cal"), University of California–Los Angeles ("UCLA"), University of Colorado Boulder ("Colorado"), University of Oregon ("Oregon"), University of Southern California ("USC"), Stanford University ("Stanford"), and University of Utah ("Utah"). Declaration of George Kliavkoff in Support of Defendants' Opposition to Temporary Restraining Order ("Kliavkoff TRO Decl.") at 2.[1]

The Conference is governed according to the Pac-12 Constitution and Bylaws ("Bylaws"), as well as written Executive Regulations and a range of other rules, all of which are contained in the Pac-12 Handbook. *See* Declaration of Rebecca Gose in Support of Plaintiffs' Motion for a Preliminary Injunction ("Gose Decl."), Ex. A (Pac-12 Handbook). Among other things, the Bylaws establish a Board of Directors, made up of the President or Chancellor of each member institution, as the Conference's governing body. As with many organizations, the Commissioner and Conference staff serve at the direction of the Board.

The Conference's primary source of funding is revenue from a series of media rights agreements that became effective in 2012 and extend until June 30, 2024. *See* Declaration of Dr. Ana Mari Cauce ("Cauce Decl.") ¶ 6. In the 2023-24 academic/athletic year alone, the Conference expects to earn hundreds of millions of dollars under those agreements. Cauce Decl. ¶ 7. Conference members have assigned their media rights to the Conference, which in turn has entered into agreements with ESPN and FOX to broadcast Conference games. Chapter 3-2; *see* Kliavkoff TRO Decl. ¶¶ 11–12. The Executive Regulations provide for the equal distribution of net revenues to all Conference members, with limited exceptions. *See* Exec. Regs. Chapter 1.

[1] A true and correct copy of the Kliavkoff TRO Declaration is attached to the Declaration of Bryan H. Heckenlively ("Heckenlively Decl.") as Exhibit 13.

The Conference's agreements with its media partners require that all twelve members assign their media rights to the Conference and play in Conference games and events for the full term of the agreements, i.e., through summer 2024. Cauce Decl. ¶¶ 6–10. Chapter 2-3 of the Bylaws therefore bars members from *withdrawing* from the Conference before that date, because such a withdrawal would put the Conference in breach of its commitments to its media partners. Specifically, Chapter 2-3 provides that "[n]o member shall deliver a notice of withdrawal to the Conference in the period beginning on July 24, 2011, and ending on August 1, 2024," one month after the expiration of the media agreements. *Id.* If a member tries to do so, "the Conference shall be entitled to an injunction and other equitable relief to prevent such breach" or to retain that member's media and sponsorship rights, even if the member has already joined another conference. *Id.* Finally, Chapter 2-3 provides that if a member "purport[s] to withdraw" before the current media rights agreements end by "deliver[ing] notice of withdrawal in violation of this Chapter," that member loses their seat on the Board of Directors. *Id.*

The Conference's rules have not always contained this provision. Instead, the previous version of Chapter 2-3 (which predated its current media rights agreements) required members to provide written notice of withdrawal "at least 90 days before the commencement of a two-year withdrawal period which shall begin on the July 1 after the receipt of the written notice." Declaration of Bryan H. Heckenlively in Support of UW's Opposition to Plaintiffs' Motion for Preliminary Injunction ("Heckenlively Decl."), Ex. 7. It also provided that a member immediately lost its Board seat upon providing notice of any future withdrawal. *Id*.

There are no similar provisions in the current Bylaws. And nothing in the Bylaws bars a member from withdrawing after August 1, 2024, or sets any penalty or exit fee for doing so.

**B. 10 Member Schools Announce They Will Withdraw After August 1, 2024.**

On June 30, 2022, UCLA and USC informed the Conference over telephone and Zoom of their intent to join the Big Ten after August 1, 2024, and issued public announcements to that effect the same day. *See* Declaration of Eric MacMichael in Support of Plaintiffs' Motion for a Preliminary Injunction ("MacMichael Decl."), Exs. 2, 3, 6, 7. USC's announcement explained

that both schools would be joining the Big Ten on "August 2, 2024, enabling both schools to remain in the Pac-12 Conference for the duration of the Pac-12's existing media rights agreements." *Id.* Ex. 2. And both schools subsequently explained to the Conference that their informal communications did not constitute formal notices of withdrawal under Chapter 2-3, because neither school intended to withdraw before August 1, 2024. *Id.*, Exs. 8, 9.

Despite this setback for the Conference, the Board, and its then-Chair—UW President Ana Mari Cauce—worked diligently with potential media partners to negotiate media rights agreements to take effect in August 2024 and provide members with the revenue streams needed to keep the Conference together after the current deals end. Cauce Decl. ¶ 6. As has been well chronicled, those efforts were not successful despite the hard work of the Board. *Id.*

On July 27, 2023, the Chancellor of Colorado sent a text message to the Pac-12 Commissioner, Defendant George Kliavkoff, notifying him that Colorado's Board of Regents intended to vote later that day to join the Big 12. Kliavkoff TRO Decl. ¶ 23. In its public announcement, Colorado explained that it had no plans to withdraw from the Conference before August 1, 2024. *See* Heckenlively Decl., Ex. 2. Colorado also explained to the Conference that its communications concerning its post-August 1, 2024, plans did not constitute a formal notice of withdrawal under Chapter 2-3. MacMichael Decl., Ex. 26.

After Colorado's announcement, other schools began notifying the Conference of their intentions to withdraw after the current media rights agreements expired. On August 4, 2023, UW and Oregon both sent letters informing the Conference of their intention to join the Big Ten Conference effective August 2, 2024. Kliavkoff TRO Decl. ¶¶ 26–27. Both schools similarly explained that their letters did not constitute a notice of withdrawal under Chapter 2-3, and Oregon's public announcement explained that it would be joining the Big Ten on "August 2, 2024," and would thus "remain in the Pac-12 Conference for the duration of the Pac-12's existing media rights agreements." MacMichael Decl., Ex. 28; *see also id.*, Exs. 29, 30. That same day, Arizona, ASU, and Utah all publicly announced their plans to join the Big 12 beginning in the 2024-25 academic/athletic year. MacMichael Decl., Exs. 31, 32.

OSU and WSU also explored opportunities in other conferences. Text messages between OSU President Jayathi Murthy and OSU Athletic Director Scott Barnes produced in discovery this week reveal that OSU was looking at other conference options even before UW and six other schools decided to leave. On July 30, President Murthy spoke with University of Virginia's president about potentially joining the ACC. Heckenlively Decl., Ex. 14 In a private message on August 5 produced in discovery, WSU President Kirk Schulz proposed to President Murthy and the leaders of Stanford and Cal that all four schools could join the Big 12. *Id*., Ex. 16. And in public, President Murthy wrote to the OSU community on August 4 that OSU "continues to explore options separate from those of the conference." *Id*., Ex. 3. Likewise, President Schulz wrote on August 7 to the WSU community, "Be patient as we explore our next conference affiliation." *Id*., Ex. 4. The text messages between President Murthy and AD Barnes reveal that OSU was still pursuing membership in the Big 12 in late August 2023 and early September. *Id*., Exs. 18, 19. In early September, Cal and Stanford said that they would join the ACC in August 2024. Kliavkoff TRO Decl. ¶¶ 31–32. OSU and WSU have not yet announced plans to join new conferences.

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

Public statements and messages produced in discovery indicate that OSU and WSU are discussing adding schools to the Pac-12, which would entail paying to cover tens of millions in exit fees for schools leaving the Mountain West Conference or potentially others. *Id*, Exs. 5, 15.

**C. OSU and WSU Attempt to Freeze Out the Departing Members.**

On August 29, 2023, Commissioner Kliavkoff asked WSU President Schulz, who had become Board Chair on July 1, to convene the Board. Kliavkoff TRO Decl. ¶ 42. He declined to call the meeting. *Id*. ¶ 43. So, pursuant to his authority under the Bylaws, the Commissioner

called a Board meeting for September 13 and invited the representatives from all twelve schools. *Id.* ¶ 45. This action and the TRO followed.[2]

## III. LEGAL STANDARD

To obtain a preliminary injunction, a party must show: "(1) that [the party] has a clear legal or equitable right, (2) that [the party] has a well-grounded fear of immediate invasion of that right, and (3) that [the party] acts complained of are either resulting in or will result in actual and substantial injury to [the party]." *Hoggatt v. Flores*, 152 Wn. App. 862, 868 (2009) (internal quotation marks omitted). "Since the object of a preliminary injunction is to preserve the status quo, the court will not grant such an order where its effect would be to change the status." *State ex rel. Pay Less Drug Stores v. Sutton*, 2 Wn.2d 523, 528–29 (1940); *see also Nw. Gas Ass'n*, 141 Wn. App. at 115–16 ("A preliminary injunction serves the same general purpose as a temporary restraining order—to preserve the status quo . . . ."). The "essential elements of the right to injunctive relief are necessity and irreparable injury." *Hollis v. Garwall, Inc.*, 88 Wn. App. 10, 16 (1997).

## IV. ARGUMENT

### A. Plaintiffs Are Not Likely to Succeed on the Merits.

Plaintiffs cannot establish a clear legal or equitable right because they cannot show they are "likely to prevail on the merits" of their interpretation of the Bylaws. *San Juan Cnty. v. No New Gas Tax*, 160 Wn. 2d 141, 154 (2007). Plaintiffs' claims all turn on the same question of contract interpretation: whether announcing *before* August 1, 2024 an intent to withdraw *after* August 1, 2024 constitutes a breach of the Bylaws and removes a member's representative from the Board of Directors. To obtain a preliminary injunction, Plaintiffs must show they are likely to prove that the departing schools' announcements of their future plans breached the Bylaws.

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[2] Although the Court previously found that Plaintiffs' interpretation was likely to succeed on the merits at the TRO stage, neither UW nor any of the other departing schools was a party at that time, and because the Conference itself professes neutrality on the Bylaw interpretation issue, this Court did not have the benefit of robust briefing on both sides of the issue.

Plaintiffs cannot do so because their interpretation of the Bylaws is wrong.[3]

**1. The Departing Members Have Not Breached the Pac-12 Bylaws.**

The final sentence of Chapter 2-3 provides that "if a member delivers notice of withdrawal in violation of this chapter," that member loses its seat on the Board. The question is therefore what constitutes a "violation of this chapter." Plaintiffs' only argument about the text of the Bylaws avoids this key question by altering the Bylaw text to say a member loses its board seat if it "delivers a notice of withdrawal [before August 1, 2024]." Mot. at 15 (alteration in Plaintiffs' brief). Plaintiffs' altered text assumes their preferred result, but the *unaltered* text of Chapter 2-3, read as whole, supports the opposite conclusion—that a "violation of this chapter" occurs only when a member gives notice that it is withdrawing from the Pac-12 before August 1, 2024, such that the Conference would breach its media rights agreements. Plaintiffs' contrary reading is atextual, leads to a series of absurd results, and conflicts with Chapter 2-3's history.

**(a) The Text of Chapter 2-3 Is Designed to Keep Members in the Conference Through the End of its Media Rights Deals.**

In interpreting an organization's bylaws, courts apply contract law with the purpose of "ascertain[ing] the parties' intent." *Save Columbia CU Comm. v. Columbia Cmty. Credit Union*, 134 Wn. App. 175, 181 (2006). "In doing so, [courts] give the bylaws' language a fair, reasonable, and sensible construction." *Id.* Courts should read contracts "as a whole" and harmonize conflicting language "in a manner that gives effect to all of the contract's provisions." *Healy v. Seattle Rugby, LLC*, 15 Wn. App. 2d 539, 544–45 (2020). These ordinary rules of contract interpretation confirm that UW's interpretation of Chapter 2-3 is the right one.[4]

Start with the heart of Chapter 2-3: the "media and sponsorship rights" governed by several high-value media rights agreements that began in 2012 and expire shortly before "August 1, 2024." A member leaving during that term would threaten the Conference's obligations under

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[3] As UW and the Conference each argued in their motions to dismiss, the Court should abstain from deciding how to interpret the Bylaws.

[4] Washington and California law do not conflict on these black-letter rules of interpretation.

those agreements. The current language of Chapter 2-3 was adopted in 2011, shortly after the media rights agreements were finalized, to address that exact problem: a "member purporting to withdraw" before those agreements expire. Chapter 2-3; *see* Cauce Decl. ¶¶ 6–12.

Accordingly, the first sentence of Chapter 2-3 bars withdrawal during the period of the media rights agreements, ending on August 1, 2024: "No member shall deliver a notice of withdrawal to the Conference in the period beginning on July 24, 2011, and ending on August 1, 2024." This makes sense. A "notice of withdrawal"—in the context of voluntary associations like the Pac-12—is a technical term that means not just a written document but one that itself *effects* withdrawal.[5] So Chapter 2-3's textual prohibition is matched to the problem it addresses: a member "purporting to withdraw" before the media agreements expire by delivering its "notice of withdrawal." This is precisely what the departing schools understood Chapter 2-3 to address. As USC, UCLA, and Oregon all clearly explained when announcing their future departures, they chose a departure date of August 2, 2024 for a reason: to "remain in the Pac-12 Conference for the duration of the Pac-12's existing media rights agreements," exactly as the Bylaws require. MacMichael Decl., Exs. 2, 28.

Chapter 2-3 next sets out the consequences if a member breaches the chapter—i.e., purports to withdraw before the media rights deals expire by "deliver[ing] a notice of withdrawal prior to August 1, 2024, in violation of this chapter." First, if any member "does deliver a notice of withdrawal prior to August 1, 2024, in violation of this chapter," the Conference may seek an injunction to "prevent such breach" and keep the member in the Conference. If a court declines to enjoin the withdrawal, there is a backup provision: "the member purporting to withdraw" shall forfeit to the Conference, "through August 1, 2024," "all the media and sponsorship rights" in key media categories, "even if the member is then a member of another conference or an

[5] *See, e.g.*, *Taresh v. California Canning Peach Growers*, 45 P.2d 964, 965 (Cal. 1935) (letter effecting departure described as "notice of withdrawal"); *Beaulaurier v. Wash. State Hop Producers*, 8 Wn.2d 79, 81–82, 85 (1941) (member served "a notice of withdrawal" upon association by "notif[ying] respondent by letter that he withdrew"); *Tapo Citrus Ass'n v. Casey*, 115 P.2d 203, 204 (Cal. Ct. App. 1941) (similar).

independent school for some or all intercollegiate sports competitions." This makes sense: the member, having "purport[ed] to withdraw" from the Conference during the term of the media rights deals, faces either (a) an injunction keeping it in the Conference, or (b) the forfeiture of media rights to the Conference until the deals expire—that is, "through August 1, 2024."

Finally, the last sentence of Chapter 2-3 provides that a member loses its Board seat if it "delivers notice of withdrawal in violation of this chapter." That sentence, which is the fulcrum of Plaintiffs' textual argument, does not define a "violation of this chapter," but the preceding text makes clear that the violation or "breach" occurs if a member attempts to withdraw during the 2011 to August 1, 2024 time period. Read this way, every provision of Chapter 2-3 works together to ensure the Conference can hold up its end of the media deals, even when a member wants out prior to the deals' expiration.

That is the "fair, reasonable, and sensible construction" of "the bylaws' language." *Save Columbia*, 134 Wn. App. at 181. It renders every clause harmonious; reads the contract "in a manner that gives effect to all of the contract's provisions," *Healy*, 15 Wn. App. 2d at 545; and comports with "common sense," *Leezer v. Fluhart*, 105 Wash. 618, 621–22 (1919). It is also the construction that reflects the parties' intent. *See* Cauce Decl. ¶ 5; MacMichael Decl., Exs. 2, 28.

**(b) Plaintiffs' Interpretation Is Atextual and Wrong.**

Plaintiffs argue that Chapter 2-3 prohibits members from announcing, *before* August 1, 2024, their plans to leave the Conference *after* that date. That interpretation is entirely unrelated to the purpose of Chapter 2-3: protecting the Conference's rights and obligations in media deals that endure through August 1, 2024. Indeed, under Plaintiffs' reading it would not be necessary for August 1, 2024—or any date—to appear in the chapter at all.

There are other problems too. Plaintiffs' position that to deliver a "notice of withdrawal" includes announcing a future withdrawal after August 1, 2024, is clearly wrong. *See supra* at 9 & n.5. Chapter 2-3 does not say that a member that intends to leave the Conference in the future breaches the Bylaws by simply "informing the Commissioner" of that intent, *cf.* Chapter 7-2 (allowing a member to veto a mail vote "by so informing the Commissioner"); or by giving

“telephonic notice,” *cf.* Chapter 8-4 (permitting “telephonic notice” to substitute a representative on the Pac-12 Council); let alone by discussing its intentions with third parties or the press. Instead, a member violates Chapter 2-3 only by “deliver[y]” of a “notice of withdrawal prior to August 1, 2024,” whereupon the Conference may seek an injunction to “prevent such breach.” No member has delivered such a notice to the Conference. Where “the drafter of an agreement employs different terms instead of parallel terminology, the presumption has to be that the change in usage was purposeful and reflects different and not parallel meaning.” *Markel Am. Ins. Co. v. Dagmar’s Marina, L.L.C.*, 139 Wn. App. 469, 480 (2007); *see Alameda Cnty. Flood Control & Water Conservation Dist. v. Dep’t of Water Res.*, 213 Cal. App. 4th 1163, 1186 (2013) (where a contract uses different words in different places, courts give those different words different meanings). That is the case here.

Just as a “notice of appeal” is “the act by which the appeal is perfected” rather than a public announcement that an appeal will later be filed, *see Notice of Appeal*, Black’s Law Dictionary (11th ed. 2019), a “notice of withdrawal” in this context refers to a communication that actually effects withdrawal. *See supra* at 9 & n.5. This is why UCLA and USC have always maintained, correctly, that their public announcements of post-August 1, 2024, withdrawal are not “notice[s] of withdrawal” within the meaning of the Bylaws. *See supra* at 4–5. Rather, as USC clearly explained in its letter to the Conference, “USC does not intend to deliver a notice of withdrawal to the Pac-12 until August 2, 2024”—i.e., the day USC intends actually to withdraw from the Pac-12. MacMichael Decl., Ex. 9. But even if a “notice of withdrawal” can encompass announcements of future withdrawal, Plaintiffs’ reading makes no sense. No party has argued that members are barred from leaving after August 1, 2024, and no member has announced an intent to leave the Conference prior to August 1, 2024. So Plaintiffs are left to argue that Chapter 2-3 prohibits a *pre*-August 1, 2024 announcement of a *post*-August 1, 2024 withdrawal.

That reading cannot be harmonized with the other clauses of Chapter 2-3—particularly the clause entitling the Conference to an injunction “to prevent such breach.” If the pre-August 1, 2024, announcement of a post-August 1, 2024, departure *itself* constitutes the “breach” about

which Plaintiffs complain, then the provision that a court may enter an injunction "to prevent such breach" makes no sense. An injunction prohibiting the departing member from *talking* about its future withdrawal would be ineffective (if not unconstitutional). Tellingly, there has been no suggestion by OSU or WSU that the Conference could obtain such an injunction. If, however—as UW contends—the "breach" contemplated by Chapter 2-3 is a "*withdrawal* prior to August 1, 2024," the provision allowing the Conference to obtain an injunction to stop a pre-August 1, 2024, departure makes perfect sense and addresses the harm caused by "such breach."

Plaintiffs' interpretation of the final sentence of Chapter 2-3 also renders the alternative remedy for a "breach" unintelligible. Chapter 2-3 provides that "the member purporting to withdraw" forfeits its media rights to the Conference through August 1, 2024. As with the injunction remedy, this remedy makes sense only if the Chapter prohibits an actual or attempted withdrawal before August 1, 2024, not the announcement of a post-August 1, 2024, withdrawal.

**(c) Plaintiffs' Interpretation Leads to Absurd Results.**

Contract interpretations generating nonsensical or unlikely results are disfavored. *Leezer,* 105 Wash. at 621–22. But Plaintiffs' interpretation of Chapter 2-3 does just that.

First, under Plaintiffs' interpretation, a member school can leave the Conference in August 2024, but *publicly announcing* that decision (in any form) breaches the Bylaws. A member that keeps its intention to join a new conference secret would retain its seat on the Board of Directors until it surprised its fellow Conference members on the way out the door. Indeed, Plaintiffs' interpretation, if correct, creates an incentive for a departing school to keep its intentions secret as long as possible. This encourages the situation that Plaintiffs now claim is a conflict of interest, where members who are leaving the Conference have Board votes. But under Plaintiffs' interpretation, nobody would even know about the conflict. No reasonable parties would have agreed to such a regime, and the members did not do so here.[6]

[6] Plaintiffs' complaints that the departing members were secretly discussing their departures with other conferences, Mot. at 11, only confirms Plaintiffs' confusion. Plaintiffs are apparently upset

Second, as a practical matter, Plaintiffs' interpretation would make it impossible to withdraw from the Conference without breaching the Bylaws. Suppose a member wishes to leave the Conference *after* the end of the media rights deal, in compliance with Chapter 2-3. As noted, Plaintiffs' interpretation means the member cannot say so in advance. But any new media rights deal would need to be negotiated and finalized before August 1, 2024. Cauce Decl. ¶ 6. A departing member obviously could not sign any such deal, and its refusal would necessarily reveal its intentions in advance of August 1, 2024. Under Plaintiffs' unreasonably broad interpretation of what it means to "deliver a notice of withdrawal," that revelation would breach Chapter 2-3 and even expose the departing member to penalties under Chapter 2-4. It cannot be correct that Chapter 2-3 makes it impossible for members to withdraw from the Conference—even *after* August 1, 2024—without breaching the Bylaws.

Third, as the Conference noted in its motion to dismiss, Plaintiffs' position leads to the bizarre conclusion that—if OSU and WSU had succeeded in finding a new conference in August or September 2023, as discovery confirms they were attempting to do—the Conference would have been left with *no Board members at all*. At that point, the Conference would have been winding down operations with no Board to manage the transition. That is not only implausible; it would violate the cardinal rule that one provision of a contract should not be read to render another provision "superfluous, useless or inexplicable." *Carson v. Mercury Ins. Co.*, 210 Cal. App. 4th 409, 420 (2012) (citation omitted). The Bylaws specifically provide that "[i]n the event of dissolution or final liquidation of the Conference," the Board determines the disposition of assets. Chapter 1-4. But, under Plaintiffs' reading, there would be no Board left to do so.

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that post-August 1, 2024, departures were being talked about secretly, rather than openly. But their view of the Bylaws *requires* that outcome.

**(d) The History of the Bylaws Confirms UW's Reading.**

The history of Chapter 2-3 removes any doubt about its proper and reasonable construction. When Utah and Colorado joined the Conference in 2011 and the current media deals began, the Board amended Chapter 2-3, and that language remains in effect today.

As Plaintiffs note, the prior version in effect before 2011 provided that "[a] withdrawing member shall provide written notice at least 90 days before the commencement of a two-year withdrawal period which shall begin on the July 1 after the receipt of the written notice." Heckenlively Decl., Ex. 7. The former Bylaws further provided, "Effective on the date that a member delivers notice of withdrawal, the member's representative to the CEO Group shall automatically cease to be a member of the CEO Group." *Id.* In other words, the *prior* version of Chapter 2-3 actually said what Plaintiffs wish the current version said: any member, upon noticing some future withdrawal, immediately lost their Board seat.

Plaintiffs say this is evidence of a "longstanding principle." But they have it backwards. The only reasonable conclusion is that the Board knew how to write the principle OSU and WSU wish applied here and decided to abandon it for a different one. "When in the shadow of such clear terminology, the drafter of an agreement employs different terms instead of parallel terminology, the presumption has to be that the change in usage was purposeful and reflects different and not parallel meaning." *Markel Am. Ins.*, 139 Wn. App. at 480; *see Alameda Cnty. Flood Control*, 213 Cal. App. 4th at 1186 (where a contract uses different words in different places, courts give those words different meanings).

The old version of Chapter 2-3 made commercial sense because it did not create a bizarre and harmful incentive to maintain secrecy. It *required* advance notice of a departure. Without a requirement of advance notice, which no party claims exists today, tying the loss of Board membership purely to the date of advance notice makes no sense. Underscoring this conclusion is the amendment's telling omission of prior language that a member loses its Board vote "effective on the date that a member delivers notice of withdrawal." Heckenlively Decl., Ex. 7. Instead, the current Bylaws provide only that this result is "automatic[]" only when a party

delivers "notice of withdrawal *in violation of this chapter*"—i.e., a "breach" that may be "prevent[ed]" by injunction. Bylaw 2-3 (emphasis added). That material difference confirms the parties' intent to alter the conditions of Board membership for withdrawing members.

**2. The Invocation of a Course of Performance After USC and UCLA Announced Their Intent to Leave the Conference Does Not Compel Plaintiffs' Construction.**

Plaintiffs' primary argument is that after USC, UCLA, and later Colorado announced their departures, the Pac-12 Commissioner and staff acted to exclude those schools' representatives from Board meetings. But course of performance evidence is relevant only when it *precedes* a dispute about a contract. As the California Supreme Court explained, this principle "applies only to acts performed under the contract before any dispute has arisen." *Warner Constr. Corp. v. City of Los Angeles*, 2 Cal.3d 285, 296 (1970) (noting importance of "acts and conduct of the parties . . . *before any controversy has arisen as to its meaning*"); *United Cal. Bank v. Maltzman*, 44 Cal. App. 3d 41, 49 (1974) ("Extrinsic evidence is important in interpreting a contract since the practical construction placed upon a contract by the parties before any controversy arises regarding meaning affords one of the most reliable means of determining the intent of the parties."); *see also Carlyle v. Majewski*, 174 Wash. 687, 690 (1933) ("course of conduct over a long period of years, *without protest or dissent on either side*, must be held to be a practical construction of the meaning of the contract by the parties" (emphasis added)).

As one court explained:

> The rationale for the admission of course of performance evidence is a practical one. When a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, *before any controversy has arisen as to its meaning*, is entitled to great weight, and will, when reasonable, be adopted and enforced by the court. The reason underlying the rule is that it is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the contract, and a practical construction placed by the parties upon the instrument is the best evidence of their intention.

*Emps. Reinsurance Co. v. Superior Ct.*, 161 Cal. App. 4th 906, 921 (2008) (emphasis added)

(internal citations and quotations omitted); *see also Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 895 (2001) (evidence of the parties' course of dealings, among other considerations, "leads the courts to discover the intent of the parties based on their real meeting of the minds, as opposed to insufficient written expression of their intent").

All of the course of performance evidence Plaintiffs cite comes after a controversy arose with UCLA and USC. The earliest evidence that Plaintiffs cite comes from letters from the then-Conference General Counsel, who announced to USC and UCLA in letters sent on July 4, 2022, that they had supposedly delivered notices of withdrawal to the Conference when they had told the Conference four days earlier of their intent to join the Big Ten Conference after August 1, 2024. MacMichael Decl., Exs. 6, 7.[7] USC and UCLA responded by disputing the Conference's interpretation and have never wavered from that position. MacMichael Decl., Exs. 8, 9.

As soon as UCLA and USC took the position that the Bylaws did not support removal from the Board, a dispute existed about the meaning of the Bylaws. The list of evidence of the Commissioner and the Conference's statements and actions demonstrate that the Conference—at least initially—sought to exclude USC and UCLA from the Board, but that was never the unanimous view of all members. The most Plaintiffs can say about the eight member schools that announced in 2023 their intent to depart, including UW, is that they attended Board meetings to which USC and UCLA were not invited and that at one point they allowed the Pac-12 to issue a tweet about the Conference's media rights negotiations. Mot. at 16. That is hardly evidence that those eight schools endorsed Plaintiffs' current position, particularly since departing member schools made clear from the outset that they would recuse from Board decisions about future media rights deals. *See* MacMichael Decl., Ex. 9. But even if there were evidence that the eight schools had affirmatively adopted Plaintiffs' bylaw interpretation (and

[7] Like USC and UCLA, when other members have announced their plan to leave the Conference, they too have clearly set forth their disagreement with Plaintiffs' interpretation of the Bylaws and conveyed their expectation that they would retain their Board seats so long as they remained active members of the Conference. *See, e.g.*, MacMichael Decl., Exs. 26, 29, 30.

there is not), that evidence would not be a relevant course of performance evidence because it came after the dispute arose with USC and UCLA.[8]

The fact that the Commissioner's views appear to have changed as more Conference members announced their intent to withdraw says nothing about the correct interpretation of the Bylaws. It might merely reflect a growing understanding of why Plaintiffs' interpretation of the Bylaws is unreasonable and not supported by common sense. This changing of positions demonstrates exactly why this evidence is not reliable to demonstrate course of performance.

In any event, the Commissioner's statements are also irrelevant because they are not evidence of what the Board or its members did. The Board never approved the Commissioner taking the positions he did (especially in declarations he submitted in unrelated litigations). And the Board has never taken any action against UCLA or USC or to concur with a stripping of the departing members' representatives of their Board seats. *See* Cauce Decl. ¶ 14. Notably, the most recent version of the Bylaws—published in December 2022, five months after the interpretation dispute arose—makes no mention of a different status of UCLA or USC or their representation on the Board. Bylaw 2-1 (including UCLA and USC in its list of members).

Finally, OSU and WSU's course of dealing argument completely ignores *their own communications* in August 2023. WSU President Schulz issued a statement on August 7 in which he said that "[t]he Pac-12 Board of Directors is composed of all the sitting presidents and chancellors of the current member institutions." Heckenlively Decl. Ex. 4.

UW learned in documents received in discovery earlier this week that, before this lawsuit was filed, lawyers for OSU and WSU emailed the Conference's general counsel and expressed doubts that any of the departing members were off the Board. In an email from August 5, 2023—the day after four members announced their intentions to leave after the end of the media

[8] Plaintiffs do not claim that UW or other departing members are *estopped* by prior conduct from asserting they retain their Board seats. Nor could they, as there is no evidence to show estoppel. *See Save Columbia,* 134 Wn. App. at 186 ("the party seeking estoppel must have relied on and been misled by the other party's first position, and it must appear unjust to permit the estopped party to change positions").

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rights deals—counsel for WSU emailed Pac-12 General Counsel Scott Petersmeyer to ask if "any school, including USC or UCLA," had "delivered to the conference" something that "could arguably be considered a notice of withdrawal." *Id.*, Ex. 15.

Even more telling, OSU's General Counsel Rebecca Gose exchanged emails with Mr. Petersmeyer on August 23 in which Mr. Petersmeyer expressed his understanding that Ms. Gose was "not taking the position that the notice provision was triggered," meaning that there would be "no argument that schools lose their BOD seat, so all 12 would then essentially be voting on penalties which would never get passed." *Id.*, Ex. 17. Ms. Gose did not correct him. Instead, she asked whether a *different provision* would permit imposing discipline regardless of who is on the Board. *Id.* Evidently, before litigation arose, neither WSU nor OSU understood the course of dealing to be what they now argue it was.

**B. Plaintiffs Do Not Have a Well-Grounded Fear that Any Claimed Right Will Be Immediately Invaded.**

Plaintiffs also fail to show "a well-grounded fear of immediate invasion of [a clear legal or equitable] right." *Hoggatt*, 152 Wn. App. at 868. Instead, Plaintiffs speculate about what might occur if the Pac-12 remains governed by a Board of all members. That is not a sufficient basis for the extraordinary remedy of a preliminary injunction.

Plaintiffs argue that allowing departing members to remain on the Board will interfere with Plaintiffs' ability to govern the Conference. That argument assumes that Plaintiffs have a right to govern the Conference by themselves, which—as explained above—they do not. The argument also ignores that the departing members have a very real interest in "the business and affairs of the Conference [which] shall be managed by or under the direction of the Pac-12 Board of Directors," through August 1, 2024. Bylaw 5-1. The departing members continue to have thousands of student-athletes and approximately 175 teams competing in the Conference through the end of the 2023–2024 year, *see* Amicus Brief at 5–6. These schools have budgeted millions of dollars to support their student-athletes in concrete ways this year. All of that will be at risk if Plaintiffs obtain the injunction they seek.

The answer to Plaintiffs' concerns about departing members having potential conflicts of interest with respect to decisions about the Conference's future plans is not an injunction barring departing schools from Board participation. All of the Board members, including those from OSU and WSU, owe a basic duty of loyalty to the Conference. The way to satisfy that duty is to recuse from decisions that, unlike those involving withholding 2023-2024 revenue distributions, impact only the post-August 1, 2024, future of the Conference. UW has already assured the Conference that it would not seek to vote on certain matters affecting *only* the Plaintiffs, such as future media rights agreements and new Conference member considerations. *See, e.g.*, MacMichael Decl., Ex. 29 (UW expressing an understanding that it "will be excluded from Conference discussions pertaining to matters occurring after August 1, 2024, such as media rights agreements and new Conference member considerations").[9] Notably, Plaintiffs have provided no reciprocal assurance that, if they were able to take control of the Board, they would refrain from handling 2023-24 revenues in a way that would treat departing members unfairly.

### C. Denial Will Not Result in Actual and Substantial Injury to Plaintiffs Because They Cannot Identify Any Irreparable Harm.

Plaintiffs cannot show irreparable harm: Plaintiffs' fears of Conference dissolution are irrelevant to this motion, and their remaining concerns are all redressable by money damages. Washington law is clear that under these circumstances, a preliminary injunction will not issue.

#### 1. Plaintiffs' Concern About Conference Dissolution Is Misplaced.

Plaintiffs repeatedly argue that, without an injunction excluding the departing members from the Board, a full board could vote to dissolve the Conference. *See* Mot. at 22. But an injunction affecting the composition of the Board would not, and could not, prevent Conference dissolution. Under clear California law governing voluntary associations like the Pac-12, dissolution is a decision for a majority of the Conference *membership*—not the Board.

The Pac-12 is a California unincorporated association. *See* Bylaws Admin. Regs. Ch. 7.

[9] Other members have indicated they would recuse too. *Id.*, Ex. 9 (USC); Ex. 30 (Oregon).

Under California law, unless an unincorporated association's bylaws provide for a method of dissolution, the association may be dissolved by a majority vote of the membership. *See* Cal. Corp. Code § 18410(b) (if "the association's governing documents do not provide a method for dissolution," "[a]n unincorporated association may be dissolved . . . by the affirmative vote of a majority of the voting power of the association").[10] The default rule applies here because the Pac-12's "governing documents do not provide a method for dissolution." *Id.*

The Bylaws discuss dissolution only once, in Chapter 1-4. That Chapter specifies what shall happen "[i]n the event of the dissolution or final liquidation of the Conference." Namely, "after paying or making provision for the payment of all of the liabilities [and expenses] . . . all of the remaining assets and property of the Conference" shall be distributed to the members. Bylaw 1-4. The Bylaw gives the Board a role in determining which 501(c)(3) entities will receive Conference assets if Conference members are no longer 501(c)(3) entities, but that is the only mention of the Board. It does not give the Board authority to dissolve or create any rules for how the Conference would decide to dissolve. In *Holt v. Santa Clara County Sheriff's Benefits Association*, 250 Cal. App. 2d 925–26 (1967), the California Court of Appeal addressed the same situation. The bylaws in that case "provided for a specific method of distribution of [the association's] assets upon dissolution," but made "no provision for *dissolution*" other than a general clause allowing dissolution to occur. *Id.* at 930, 932 (emphasis added). Under those circumstances, the court applied California's default dissolution procedure.[11] The same is true

[10] California used to require "unanimous consent" of members to dissolve an association. *Holt*, 250 Cal. App. 2d at 930. But in 2005, California enacted S.B. 702, now codified at Cal. Corp. Code §§ 18300 *et seq.*, which replaced the common-law rule with a default rule providing for dissolution by majority member vote. Cal. Corp. Code § 18410(b); *see also* Heckenlively Decl., Ex. 9 (S.B. 702 Senate Judiciary Committee Analysis) ("<u>Existing case law</u> provides that if the governing documents of an unincorporated association do not provide a procedure for dissolving the association, a decision to dissolve must be made by a unanimous vote of the membership. <u>This bill</u> would provide that . . . the association could be dissolved by a majority vote of the total membership . . . .").

[11] *Holt* was decided when dissolution required "unanimous consent" of members, not a majority.

1 here. Because the Bylaws do not provide a method of dissolution,[12] the Conference membership
2 may dissolve the Conference by majority vote. *See* Cal. Corp. Code § 18410(b).
3 The relevant "vote" is that of the Conference *membership*, not the Board. The statute
4 governing unincorporated associations provides that dissolution is decided by "a majority of the
5 *voting power of the association*." *Id*. (emphasis added). The "voting power of the association"
6 is "the total number of votes that can be cast *by members* on a particular issue at the time the
7 member vote is held." Cal. Corp. Code § 18330(e) (emphasis added).[13]
8 The upshot is clear. An injunction installing OSU and WSU as the only Board members
9 would not change the Conference membership or California law as to who may vote on
10 dissolution. If a majority of Conference members had wished to dissolve the Conference, they
11 could have done so before or after Plaintiffs filed this lawsuit, regardless of the outcome.
12 Because an injunction will not redress Plaintiffs' concern about dissolution, an injunction is
13 plainly not a "necessity," which is an "essential element[]" of a request for an injunction. *Hollis*
14 *v. Garwall*, *Inc*., 88 Wn. App. 10, 16 (1997); *see, e.g.*, *Davis ex rel. Olympia Food Coop. v. Cox*,
15 12 Wn. App. 2d 1022, ¶ 21 (2020) (unpub.) (claim not redressable by injunction against Board
16 members who "have no current say in whether" the association will perform the action "that the
17 plaintiffs seek to enjoin").
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19 [12] Nor is it an answer that Chapter 5-1 makes the Board the "governing body of the Conference"
20 with the power to manage its "business and affairs." Bylaw 5-1. The Code already contemplates that the "Board" is the "governing body" of an association, and yet reserves the power to vote on
21 dissolution to the membership. Cal. Corp. Code §§ 18003, 18410(b). That distinction is no anomaly. The Pac-12 Board's governance powers under Bylaw 5-1 are analogous to the power
22 of a corporate board of directors, see Cal. Corp. Code. § 300, yet shareholders retain the power to vote on dissolution, see Cal. Corp. Code § 1900(a). Authority to manage the "business and
23 affairs" of an entity does not imply power to create or dissolve that entity.
24 [13] If there were any remaining doubt about what § 18410(b) means, the legislative history
25 removes it. It uniformly explains that the law "provides that if an unincorporated association does not have its own procedure for dissolution, the association could be dissolved by a majority
26 vote of the total membership, and if the association has been inactive for three years or more, it could dissolve by a vote of the board of directors or by court order." Heckenlively Decl., Exs. 9–
27 12. The language never changed. *Id*., Exs. 8–12. Dissolution is a membership decision.
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**2. Because Plaintiffs Have a Remedy for Money Damages, They Are Not Entitled to an Injunction.**

Plaintiffs' apparent concern that the Board could misuse Conference assets unless OSU and WSU are declared the only Board members is both speculative and ultimately redressable through money damages. Washington law is clear: "Where the injury complained of can be compensated in damages, injunction is not the proper remedy." *Rockford Watch Co. v. Rumpf*, 12 Wash. 647, 651 (1895); *see Kucera v. State Dep't of Transp.*, 140 Wn. 2d 200, 210 (2000) (same). Plaintiffs have no evidence that the departing members would use their Board votes to misuse any Conference assets. The idea that Plaintiffs would "take all the money with them" when they depart, Mot. at 22, is rank speculation and ignores that the Conference expects more than $100 million in revenue in each of the two years after the ten schools depart. Cauce Decl. ¶ 14. In any event, if the departing schools were to misuse Conference money, that would be redressable by money damages. Because Plaintiffs "have an adequate remedy at law in the form of monetary damages" for their feared losses, "they have not demonstrated they are entitled to the extraordinary remedy of injunctive relief." *Kucera*, 140 Wn. 2d at 210.

**3. Plaintiffs' Proposed Order is Overbroad.**

Washington courts do not allow preliminary injunctions that disrupt, rather than preserve, the pre-dispute status quo. *Pay Less*, 2 Wn.2d at 528–29 ("Since the object of a preliminary injunction is to preserve the status quo, the court will not grant such an order where its effect would be to change the status."). The status quo is "the last actual, peaceable, noncontested condition which preceded the pending controversy." *Id.* "Ordinarily, where the issuance of a preliminary injunction would have the effect of granting all the relief that could be obtained by a final decree and would practically dispose of the whole case, it will not be granted." *Id.* at 532 (collecting authorities).

The preliminary injunction Plaintiffs seek would unquestionably change the status quo by appointing OSU and WSU as the sole Board members of the Conference. The order sought would allow OSU and WSU to immediately control Conference revenue, predominantly earned

through broadcasts of the departing schools' games and the departing schools' participation in bowl games,[14] potentially to the detriment of those schools. Proposed PI Order at 4. That is not the purpose of a preliminary injunction. *See Nw. Gas Ass'n*, 141 Wn. App. at 116. Because the proposed injunction would "have the effect of granting all the relief that could be obtained by a final decree and would practically dispose of the whole case," it should "not be granted." *Pay Less*, 2 Wn.2d at 532.

If this Court deems further interim relief warranted, that order "must be tailored to remedy the specific harms shown," *Kitsap Cnty. v. Kev, Inc.*, 106 Wn.2d 135, 143 (1986), and a "trial court must be careful not to issue a more comprehensive injunction than is necessary to remedy proven abuses," but should instead "consider less drastic remedies." *Whatcom Cnty. v. Kane*, 31 Wn. App. 250, 253 (1981). The TRO currently in place already preserves the status quo and prevents the harms Plaintiffs invoke pending a judgment on the merits.

Plaintiffs might respond that they need to be able to take controversial acts to secure the future of the Conference. *See* Mot. 21. But the purpose of a preliminary injunction is to preserve the status quo, not to empower the Plaintiffs to take control. *Pay Less*, 2 Wn.2d at 528–29 ("[W]here the plaintiff seeks to enjoin the defendant from interfering with acts about to be done by the plaintiff against the objection of the defendant, a preliminary injunction restraining such interference is erroneous."). By specifying that the Board can take action only with the unanimous consent of members, this Court already rebuffed Plaintiffs' efforts to attain overbroad preliminary relief at the TRO stage. Any relief granted should extend no further than the TRO.

At the very least, the Court should limit the order to require that, during the pendency of this litigation, OSU, WSU, and the Conference may not use net revenues from the 2023-24 year already set for equal distribution to the members for any purpose that does not benefit the current twelve members pro rata, such as paying to add new members to the Conference or scheduling games with non-conference opponents after August 1. Otherwise, OSU and WSU will be able to

[14] See, e.g., https://www.sportsmediawatch.com/college-football-tv-ratings/.

1 divert to third parties net revenues that UW and other members are currently earning and which
2 under the Conference rules should be distributed to the current members of the Conference.

3 **4. The Balance of Interests Favors Denial.**

4 An injunction that gives OSU and WSU sole control over the Board will seriously impair
5 *UW*'s interests. UW's Board representative will continue to exercise her Board duties with
6 loyalty to the Conference, as she has always done. But awarding sole Board control to OSU and
7 WSU runs the risk that they will act in their own interests to the detriment of UW and the other
8 departing schools. For example, UW (presumably like all schools) has budgeted for certain
9 Conference distributions this year. Cauce Decl. ¶ 16. While unexpected events could change
10 those budgeting expectations, a decision by OSU and WSU to withhold all distributions this year
11 in order to stockpile money to be spent for their exclusive benefit next year would harm UW.

12 UW and its student-athletes rely on a stable budget. A decision to hoard revenue for the
13 future would seriously impair UW's ability to serve its student-athletes for the rest of this year.
14 For example, UW spends $4 million in its annual athletics budget on health and wellness
15 services, including mental health counseling, for student athletes. Declaration of Michael L.
16 Dillon ¶¶ 3–12. UW is spending $2.6 million this year on academic support services for student
17 athletes, $16.6 million on scholarship support, and $6.24 million on nutrition and meals for
18 student athletes. *See* Declaration of Kim Durand ¶¶ 3–6; Dillon Decl. ¶ 3. These services would
19 be severely impacted by a decision not to distribute funds this year. *See* Dillon Decl. ¶¶ 7, 11;
20 Durand Decl. ¶ 7. And that would be entirely inequitable: UW and the other departing schools
21 granted their media rights to the Conference this year and these services benefit the student-
22 athletes at UW and elsewhere who are playing in the Conference this year.

23 OSU and WSU's analysis of the equities, by contrast, simply recapitulates their legally
24 deficient course-of-performance argument. Mot. at 23. But even though USC and UCLA did
25 not participate in Board meetings over the last year, the Board never withheld money from those
26 schools or otherwise penalized them. Plaintiffs' decision to sue only the Conference and
27 Commissioner does not mean it can ignore the interests of the ten departing members. *See City*
28

1 *of Seattle v. Nazarenus*, 60 Wn.2d 657, 669 (1962) (courts consider "the interest of third parties
2 and of the public" in weighing injunctive relief). Indeed, Plaintiffs' analysis highlights why the
3 other departing schools are indispensable parties to this case. *See* UW's Motion to Dismiss at 8–
4 13. The extraordinary injunction that Plaintiffs seek threatens to rob those schools of the money
5 they earned and that they need to pay for critical services for their student-athletes without those
6 schools even having a seat at the table.

7 Majority rule established by unanimous consent is not a coup, even when schools in the
8 minority disagree with the outcome. But the harmful consequences of Plaintiffs' proposed order
9 are clear and immediate. While being "outvote[ed]," Mot. at 1, is a speculative harm not
10 recognized by the law, the disenfranchisement Plaintiffs seek is concrete. *See Wisdom Imp.*
11 *Sales Co. v. Labatt Brewing Co.*, 339 F.3d 101, 114 (2d Cir. 2003). Plaintiffs would turn the
12 Pac-12 into a two-tier association in which ten out of twelve members generate hundreds of
13 millions of dollars of revenue this year without any say in what happens to that money this year.
14 That result is inequitable, and it would cause significant harm to UW and its student-athletes.

15 **V. CONCLUSION**

16 For these reasons, the Court should deny Plaintiffs' request for a preliminary injunction.
17 If, however, the Court is inclined to grant the motion, UW respectfully requests that the Court
18 take two actions to preserve the status quo and protect the interests of UW and its student-
19 athletes. Specifically, UW requests that the Court (1) stay the order and extend the TRO to
20 maintain the status quo while UW seeks review in the Washington Supreme Court; (2) modify
21 the requested preliminary injunction to clarify that OSU, WSU, and the Conference may not use
22 net revenues from the 2023-24 academic/athletic year to pay for (a) scheduling games with non-
23 conference opponents and/or (b) adding members to the Conference effective after August 1,
24 2024, and/or (c) any other purpose that does not benefit the departing members pro rata.
25 Otherwise, OSU and WSU will be able to divert to third parties net revenues that should be
26 distributed to the current members of the Conference.

27

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DATED: November 2, 2023

Respectfully submitted,

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