NO. 102562-9

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE UNIVERSITY et al.,
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 DISCRETIONARY REVIEW

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I. INTRODUCTION

Ten members of the Pac-12 have committed to join competitor conferences next year. These schools no longer have a stake in the Pac-12's future—in fact, as competitors, they profit from its dissolution. Recognizing this inherent conflict, the Bylaws provide that conflicted members who deliver a notice of withdrawal "automatically" cease to be represented on the Board of Directors. The superior court's preliminary injunction gives effect to this provision, and restores governance to the two remaining schools so they may begin the time-sensitive work of rebuilding the Pac-12.

The superior court did not err. The court's ruling correctly applies the Bylaw's plain and unambiguous language, which requires removal from the Board if a member delivers "a notice of withdrawal to the Conference in the period beginning on July 24, 2011, and ending on August 1, 2024." Following the plain terms, it is the *notice* to the conference, not the withdrawal, which triggers removal. Petitioner's contrary interpretation

rewrites the withdrawal provision, renders much of it superfluous, and leads to absurd consequences.

The results of the injunction are neither "extraordinary" nor "absurd." Removing conflicted members from the Board when they decide to leave is common sense, is consistent with the position taken by the Pac-12 and its members (including UW) for more than a year before this litigation began, was undisputedly done in the previous version of the Bylaws, and reflects common practice in the industry.

Because the superior court did not commit probable error, this Court should decline review under RAP 2.3(b)(2).

II. STATEMENT OF THE CASE

A. The Bylaws Remove Conflicted Members from the Board

The Pac-12, an NCAA Division I athletic conference with a storied history and reputation, is governed by a Constitution and Bylaws. Stay App. 36. Chapter 2 of the Bylaws addresses "Membership." *Id.* at 37. Members have a duty to "cooperate in the spirit of mutual trust and confidence … in supporting and

promoting the objectives of the Conference." *Id.* at 38. Presently, there are twelve member schools. *Id.* Section 2-3 restricts notices of withdrawal from those members, and imposes remedies for violations. *See id.*

Section 2-3 states, "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.* Members who violate this prohibition automatically forfeit their seat on the Conference's Board of Directors: "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." *Id.* at 37–38.

Section 2-3 reflects standard practice: virtually every conference places some limit or consequence on notices of withdrawal.[1]

[1] *See, e.g.*, Big 12 Bylaws 3.5, https://perma.cc/QTQ5-C5SX (removal from the Board of Directors); Mountain West Bylaws 1.04,

B. For More than a Year, the Commissioner and the Majority of the Schools Applied Section 2-3 as Written

On June 30, 2022, the University of California Los Angeles (UCLA) and the University of Southern California (USC) delivered notice that they would be withdrawing from the Pac-12 Conference, effective after August 1, 2024, to join the Big Ten. Stay App. 274, 279. The announcement came as a shock; neither school had shown any sign they were contemplating leaving the Pac-12. Opp. App. 2. The Pac-12's General Counsel responded immediately by informing USC and UCLA they would no longer be permitted to attend Board meetings or vote. *Id.* at 10.

In the following months, the Board met at least twenty times, without USC or UCLA, to decide critical matters including using cash reserves and loans to address budget shortfalls, litigation settlements, a multimillion-dollar real estate

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https://perma.cc/P2GJ-UR37 (same); SEC Bylaws 3.2, https://perma.cc/4D3N-UCZ6 ($30-45 million penalty).

lease for the Conference's media production facility, NCAA governance issues, and media rights negotiations, many of which negatively impacted USC and UCLA's distributions. *See id.*; Stay App. 640–83, 709–16. The Pac-12 Commissioner attested under oath to two separate courts—in proceedings unrelated to any disagreement between the remaining and withdrawing members—that USC and UCLA were no longer on the Board. Opp. App. 21, 26.

More than a year later, on July 27, 2023, the University of Colorado delivered a notice of withdrawal, also effective after August 1, 2024, to join the Big 12. Stay App. 291. Like before, the Conference informed Colorado that its "representation on the Pac-12's Board of Directors automatically ceases." Opp. App. 29. The nine remaining members, including UW, continued to meet as a Board, and Colorado was not invited. Opp. App. 35.

On August 4, 2023—minutes before a new, groundbreaking media rights deal with Apple was to be finalized—UW and the University of Oregon suddenly delivered

notice that they, too, were joining the Big Ten effective in 2024 for lucrative contracts. *Id.* at 35–36. Then the University of Arizona, Arizona State University (ASU), and the University of Utah also delivered notices of withdrawal to join the Big 12. *Id.* at 36. The Conference Commissioner texted a reporter: "As of today we have 4 board members." Opp. App. 43.

Board representatives for the four remaining members continued to meet to discuss Conference matters. *Id.* at 48. But on September 1, 2023, the University of California, Berkeley (Cal) and Stanford delivered notices of withdrawal to join the ACC, leaving Washington State University (WSU) and Oregon State University (OSU) to pick up the pieces. *See id.* at 36.

At various points, the departing schools asserted that their notices of withdrawal were no such thing. *See* Stay App. 285, 306, 308. But none of the departing schools sought legal action—for example, neither UCLA nor USC sued to return to the Board, even while important Conference business was decided without

them, including reducing payouts to those schools. Stay Supp. App. 4; *see also* Stay App. 678.

C. The Commissioner and Departing Members Suddenly Reversed Position

After the vast majority of members had noticed withdrawal, the Commissioner and the departing members suddenly reversed positions. On August 29, 2023, the Commissioner wrote to the twelve Conference presidents proposing a "meeting of all Conference CEOs." Opp. App. 4. The Commissioner's office explained that he wanted all members to vote "on certain matters including [a proposed employee] retention plan and hav[e] a discussion and possible vote on [a] go forward governance approach." *Id.* at 4. The Commissioner did not explain why UCLA, USC, and Colorado, in particular, were suddenly being invited to Board meetings when they had been excluded for months. *Id.*

WSU and OSU sued in the superior court and sought to prevent the departing members from holding the unsanctioned Board meeting in which a conflicted supermajority would

determine the Conference's future. Stay App. 762–64. The court granted WSU and OSU's request and issued a temporary restraining order on September 11, 2023. *Id.* at 1077. The TRO precluded the Board from meeting and imposed a requirement of unanimity among the twelve member schools for actions other than the Conference's normal transaction of business. *Id.*

With the Conference's future crumbling, WSU and OSU 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. *See id.* at 5–7. On November 14, the superior court granted the preliminary injunction, to let WSU and OSU begin to attempt to rebuild the Pac-12. *Id.* at 1089. The injunction requires WSU and OSU to notify the departing members of any Board meeting three days in advance and allow them to "participate, communicate and submit their suggestions to the Board." *Id.* The court also denied UW's motion to dismiss. *Id.*

Thereafter, UW filed a notice for discretionary review and sought emergency relief in this court. The Commissioner granted UW's motion to stay the injunction. After WSU and OSU's opposition in response to the stay, the Commissioner set an accelerated briefing schedule on UW's motion for discretionary review. [2]

III. ARGUMENT

Interlocutory review is generally disfavored. *See Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 464, 232 P.3d 591 (2010). Under RAP 2.3(b)(2), the petitioner has a burden to show that the superior court "has committed probable error and the decision … substantially alters the status quo or substantially limits the freedom of a party to act."

Here, review is not warranted for the preliminary injunction or the motion to dismiss. The superior court did not

[2] Discretionary review is not warranted, and WSU and OSU do not agree with the arguments presented in UW's Statement of Grounds for Direct Review. However, if discretionary review is granted, WSU and OSU do not oppose direct review in this Court in the interest of swiftly resolving this urgent and time-sensitive dispute.

commit "probable error" much less "obvious error"—it correctly applied the plain language of the Bylaws to give effect to Section 2-3's removal provision. UW's belated, alternative interpretation reads key words (and even entire sentences) out of the Bylaws, conflicts with the parties' course of performance for more than a year prior to this dispute, and leads to absurd results.

The superior court also properly recognized the tangible, irreparable harms that will result to the remaining schools if this provision is not enforced as intended. And the court correctly denied the motion to dismiss because UW adequately represents the departing schools. This Court should deny review.

A. The Superior Court Correctly Granted the Preliminary Injunction

To obtain a preliminary injunction a party must show "(1) that [it] has a clear legal or equitable right, (2) that [it] has a well-grounded fear of immediate invasion of that right, and (3) … actual and substantial injury." *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982) (cleaned up). Each of these factors was, and still is, present.

1. WSU and OSU have a clear legal right

a. The Bylaws require removal upon delivery of a "notice of withdrawal"

When interpreting a contract, a court must determine "the intent of the parties as manifested by the words used." *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980). The Bylaws are unambiguous.

Section 2-3 begins with a clear prohibition: "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." Stay App. 37. Notably, the Bylaws prohibit a "notice of withdrawal" not "withdrawal." This choice of language matters; courts must give effect to every term in a contract so as not to render any portion superfluous. *See Kut Suen Lui v. Essex Ins. Co.*, 185 Wn.2d 703, 716, 375 P.3d 596 (2016).

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." Stay App. 37–38.

The removal provision must apply upon *notice* of withdrawal; otherwise it would never apply. A member who has already withdrawn from the Conference obviously cannot remain on the Conference's Board. To conclude that the removal provision applies only when a member formally withdraws would render the entire removal provision meaningless, contrary to fundamental principles of contract interpretation. *See Kut Suen Lui*, 185 Wn.2d at 716.

The removal provision protects the Conference from governance by directors with conflicting loyalties. There is nothing surprising or unusual about this restriction: the prior version of the Conference's Bylaws undisputedly did the same thing, Discretionary Rev. Mot. at 19, as do the rules of many other conferences, *supra* Note 1. And seemingly no conference permits notice of withdrawal without consequence, as UW now reads the Pac-12 Bylaws to do. Discretionary Rev. Mot. at 19.

b. The course of performance further supports the trial court's conclusion

"The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties." *Crystal Rec. v. Seattle Ass'n of Credit Men*, 34 Wn.2d 553, 561, 209 P.2d 358, 363 (1949) (quoting 12 Am. Jur. 745, Contracts, § 227). To ascertain intention, this Court looks "to the wording of the instrument … and consider[s] … the *subsequent acts* of the parties to the instrument." *Id.* (cleaned up) (emphasis added); *see also Jacoby v. Grays Harbor Chair & Mfg. Co.*, 77 Wn.2d 911, 918, 468 P.2d 666 (1970) (same).

The Pac-12 Conference and the vast majority of the departing schools (including UW) endorsed the trial court's interpretation of Section 2-3 for thirteen months, prior to this litigation, which strongly indicates the intent of the parties. This is textbook course-of-performance evidence.

The evidence is stark. As soon as UCLA and USC gave their notice of withdrawal, the Conference and remaining schools determined UCLA and USC had been removed from the Board.

See Opp. App. 10. The remaining members then regularly met for more than a year as a ten-member Board to decide Conference matters like distributions, expansions, and media rights. Stay App. 640–83, 709–16. Conference manuals created in September 2022 and later in April 2023 excluded UCLA and USC from the list of Board members. Opp. App. 57; Stay App. 701–05. In February 2023, the Conference issued a press release titled "Joint statement from the 10 Pac-12 Conference Board Members," which received unanimous support from the ten members, but was not shared with UCLA or USC. Opp. App. at 73; *see also id.* at 77–78. In April and July of 2023, respectively, the Commissioner submitted two separate sworn declarations to courts affirming that UCLA and USC had been removed from the Board. *Id.* at 21, 26.

When Colorado announced its withdrawal, the Conference likewise sent a letter confirming receipt of Colorado's "notice of withdrawal" and informing Colorado that its representative was removed from the Board. *Id.* at 29. A nine-member Board met at

least five times without UCLA, USC, or Colorado. *Id.* at 35. After five more schools noticed withdrawal, the Commissioner sent a text message to a reporter confirming that the Pac-12 had only four remaining Board members, and those four Board members met several times to discuss Conference affairs before the last two schools gave notice. *Id.* at 43.

UW now asks this Court to turn a blind eye to the parties' performance, which it claims "occurred after a dispute arose." Discretionary Rev. Mot. 21. There are two problems with this argument.

First, until three months ago, no dispute existed among WSU, OSU, UW, Cal, Stanford, Arizona, ASU, Oregon, Utah, Colorado, and the Pac-12 Conference about the meaning of Section 2-3. Repeatedly, they interpreted Section 2-3 as the preliminary injunction does. That interpretation was not a made-for-litigation contrivance. *See Hewlett-Packard Co. v. Oracle Corp.*, 65 Cal. App. 5th 506, 544 (2021) (explaining course of performance is a "meaningful and sustained opportunity prior to

the onset of … litigation"). It was how they governed the Pac-12, with real-world consequences. And what UW calls "preserving the peace" and "taking no position" was actually the Conference working out how to govern itself—*prior to litigation*—for months. *See* Discretionary Rev. Mot. 22. UCLA, USC, and Colorado submitted to that interpretation by letting the Board meet and make decisions without them.

Second, even if the evidence did arise after a dispute, it is very relevant. The cases cited by UW apply where the course of conduct becomes a "practical construction" in the absence of textual support which courts are "bound" to enforce. *See, e.g.*, *Carlyle v. Majewski*, 174 Wash. 687, 690, 26 P.2d 79 (1933). Here, WSU and OSU have plenty of textual support, and the parties' presumption that conflicted members would be removed from the Board is additional evidence of the parties' intent. *See Crystal Rec.*, 34 Wn.2d at 56.

If there were any ambiguity in Section 2-3 (there is not), it is resolved by the subsequent acts of the Pac-12 and its members, including UW.

c. UW's theory of Board removal is counter-textual and leads to absurd results

UW's position is that Section 2-3 restricts only *withdrawal* during the specified period, rather than notice of withdrawal. But that is contrary to the plain text: "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." Stay App. 37 (emphasis added). And "if a member delivers notice of withdrawal in violation of this chapter," it "automatically" loses its Board seat. *Id*.

UW's interpretation also produces absurd consequences the parties could not have intended. If notice is a legal instrument that effectuates withdrawal *immediately*, as UW sometimes suggests, the removal provision would never apply because former members who have left to join other conferences obviously cannot serve on the Board.

Alternatively, if notice applies to future withdrawals, UW's position means some conflicted members are immediately removed from the Board but not others with the same conflict. Imagine two members who announce on January 1, 2023 that they have signed deals with competitor conferences. One will leave the Pac-12 on August 1, 2024; the other will do so the following day. UW agrees that the first school is automatically removed from the Board as of January 1, 2023. But as UW reads the removal provision, the second conflicted school remains on the Board for another nineteen months—even though both schools assumed the same conflict on the same day.

UW's interpretation of Section 2-3 would also seemingly make the Pac-12 the only conference to permit withdrawal without *any* consequence. Many conferences remove members from the board upon notice of withdrawal, like the Pac-12. *Supra* Note 1. Some impose financial penalties. *Id.* Few *if any* conferences allow members to switch their loyalties without consequence. Accordingly, it is unsurprising that UW agreed for

over a year that conflicted members are automatically removed from the Board.

d. The separate injunction provision does not change the plain meaning of the rest of Section 2-3

The crux of UW's new interpretative argument is that Section 2-3 applies only to "delivering a notice that *attempts to effect* a pre-August 1, 2024 withdrawal." *See* Discretionary Rev. Mot. 15 (emphasis added). It is telling that UW must rewrite so much text to make its point. Section 2-3 states, "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." Stay App. 37. The most natural reading of this provision, as explained above, is that the time period applies to the *notice* delivered to the Conference, not the withdrawal.

The plain text failing it, UW points to a different clause in Section 2-3—neither the first independent clause (defining the conduct that violates the rule) nor the last sentence (removing violators from the Board). UW argues this injunction clause

refers to withdrawal before August 2024. Discretionary Rev. Mot. 16. And, according to UW, the removal clause must have the same scope. But the removal clause and injunction clause use different language. The removal clause is triggered by *any* "notice of withdrawal in violation of this chapter." Stay App. 37. This Board-removal provision can only apply to future withdrawals—to remove conflicted members.

The injunction clause is triggered by "notice of withdrawal *prior to August 1, 2024*, in violation of this chapter." *Id.* Under UW's interpretation, this language is surplusage, because the next phrase in the clause ("in violation of this chapter") would already exclude any withdrawal effective after August 1. *See Kut Suen Lui*, 185 Wn.2d at 716 (refusing to interpret a contract to render some of its terms superfluous). And under UW's interpretation, some conflicted members would immediately be removed from the Board, while others with the same conflict would remain.

e. The departing members plainly delivered notices of withdrawal

UW also argues the departing members never delivered a "notice of withdrawal," which UW contends must be a "formal document effecting a particular legal result," like a "notice of appeal" or "notice of appearance." Discretionary Rev. Mot. 15. No such requirement appears in the text, in contrast to other places in the Bylaws where the type of notice is specified. *E.g.*, Stay App. 41 ("Notice of a regular meeting shall be given in writing."); *id.* at 44 ("Each such representative shall serve until written notice."); *see also Byrne v. Ackerlund*, 108 Wn.2d 445, 455, 739 P.2d 1138 (1987) ("The court may not add to the terms of the agreement or impose obligations that did not previously exist."). And for good reason: UW would permit conflicted members to avoid any penalty—including members withdrawing before August 2024—simply by declining to deliver a formal notice even while trumpeting the notice to the world. That is plainly not what the parties intended.

The most straightforward reading of the Bylaws is that a notice of withdrawal triggers Section 2-3 when the Conference has actual notice of a decision to withdraw. Here, that is undisputedly the case. Each departing school signed with a competitor conference and imparted the information to the Conference.

UW claims this interpretation leads to absurd results by encouraging withdrawing members to keep "that intention secret." Discretionary Rev. Mot. 17. That possibility is foreclosed, however, because each member owes a duty of loyalty to the Conference. *See* Stay Supp. App. 76. It is UW's position that produces absurd results—allowing conflicted schools to avoid removal by declining to deliver formal notice.

UW also claims the preliminary injunction places withdrawing members in a catch-22: they are allowed to withdraw after August 1, but are required to report it, which is a violation. Discretionary Rev. Mot. 18. There is no catch-22. The school is not prevented from withdrawing; it simply cannot

govern the Conference while its loyalties lie elsewhere. This is not absurd—it is common sense. And it is the same requirement undisputedly found in the previous version of the Bylaws and in bylaws in other athletic conferences around the country.

UW argues the preliminary injunction reinstates language that was "removed" from the previous bylaws. *Id.* at 19. But in the previous bylaws, noticing withdrawal was not a violation. Stay App. 366. Thus, the bylaws had to clarify that even though notice of withdrawal was allowed, a conflicted member would be removed from the Board *as soon as* the conflict arose. Likewise, in the current Bylaws, a conflict triggers removal, even for permitted withdrawals. UW suggests no reason why the Pac-12 would suddenly start allowing conflicted members to serve on the Board.

Finally, UW claims the results are absurd because in a hypothetical situation the Board would have no members. Discretionary Rev. Mot. 19. But the same possibility existed with

the previous bylaws, which everyone agrees required Board removal immediately upon notice of future withdrawal.

2. WSU and OSU have a well-grounded fear that their rights will be invaded

The preliminary injunction recognizes WSU and OSU's right to control and govern the Pac-12. Before WSU and OSU went to court to get that preliminary injunction, the Conference Commissioner had planned a "Board meeting" with all twelve members to discuss the Conference's future. Opp. App. 4–5. Essentially, the future of the Conference was to be decided by a 10-2 vote, with the conflicted members outnumbering WSU and OSU. That is a well-grounded fear.

UW's argument confuses the right being invaded. First, UW argues that neither WSU nor OSU are at any risk of being removed from the Board. That is true, of course. But WSU and OSU have a right to vote on a Board consisting of *lawful* board members, and not have their vote overpowered.

Second, UW claims there is no evidence the departing schools will act contrary to WSU or OSU's interests. But the

legal right being invaded is the right to control the Board, not the right to have conflicted members choose when to recuse themselves. Anyway, it is farcical to think the departing members have the same interests as WSU and OSU—as this litigation demonstrates.

3. WSU and OSU have demonstrated actual and substantial injury

Denying WSU and OSU their right to govern the Pac-12 as the only loyal members constitutes irreparable harm. Courts have repeatedly held that a member's loss of contractual governance rights constitutes irreparable harm. *See Wisdom Imp. Sales Co. v. Labatt Brewing Co.*, 339 F.3d 101, 114–15 (2d Cir. 2003) (holding the "right to participate in management" has "intrinsic value" that is "irretrievably lost upon breach, and may not be compensable by non-speculative damages"). This is the same harm that UW relied on in seeking a stay.

UW argues, again, that WSU and OSU's loss of governance rights is somehow different. Instead of losing their

Board seats, their votes are diluted. But drastic dilution of voting power—and, here, decisive voting power—is an *actual* injury.

UW also claims that none of the departing members will seek to dissolve the Conference and, anyway, the departing members already have that power. UW is wrong—all the "business and affairs" of the Conference, including dissolution, are handled by the Board, Stay App. 41—but that legal question is not before this Court. Either way, the claim is irrelevant, because there is an equal risk that the departing members will dissolve the Conference through neglect, by refusing to devote the necessary resources to preserve the Conference's future.

4. The trial court properly balanced the equities

UW does not argue the equities fall in its favor. How could it? The future of the departing schools is secured; UW will earn hundreds of millions of dollars from the Big Ten over the next few years. WSU and OSU, on the other hand, must scrape together a future in months.

Instead, UW argues the purpose of a preliminary injunction is to "preserve the status quo," and this preliminary injunction goes further. Discretionary Rev. Mot. 26. UW has a myopic view of status quo. "The purpose of a preliminary injunction is to preserve the status quo of the *subject matter of a suit* until a trial can be had on the merits." *McLean v. Smith*, 4 Wn. App. 394, 399, 482 P.2d 798 (1971) (emphasis added). The subject matter of *this* dispute is the Pac-12 and, specifically, its future. If WSU and OSU cannot act as the Board to make future plans, there will be no more Pac-12 to save at the end of litigation. That is the heartland case for injunctive relief. The trial court did not commit "probable error." *See* RAP 2.3(b)(2).

B. The Court Should Not Review the Motion to Dismiss

The trial court's denial of UW's motion to dismiss does not have an "immediate effect outside the courtroom," unless UW bootstraps the motion to dismiss with the preliminary injunction. *See In re Dependency of N.G.*, 199 Wn.2d 588, 598, 510 P.3d 335 (2022). The Court should decline to recognize such

bootstrapping, as it would lead to interlocutory review of every order that *eventually* leads to an effect outside of the courtroom. By definition, that is not "immediate." *See id.*

UW is also wrong to point to RAP 2.4, which applies to an "order or ruling not designated in the notice." UW did notice the motion to dismiss. Opp. App. 80. Accordingly, the proper standard of review is RAP 2.3(b)(1), which requires the trial court to have committed an "obvious error." The trial court committed no error, however, much less an obvious one.

UW argues the trial court should have abstained from this lawsuit because courts will not interfere with an "interpretation" of an organization's constitution "unless such interpretation is arbitrary and unreasonable." *See Couie v. Loc. Union No.1849 United Bhd. of Carpenters & Joiners of Am.*, 51 Wn.2d 108, 115, 316 P.2d 473 (1957). But which interpretation should the trial court have deferred to? For more than a year, the Conference applied the interpretation reflected in the preliminary injunction, so the trial court *did* defer to the practice of the organization. If,

instead, the court was supposed to defer to the current position of the Conference Commissioner, it could not—the Commissioner expressly disclaims having any position. That leaves only *UW*'s position. But there is no basis in the caselaw for the absurd result of deferring to one party over another in a governance dispute.

The basis for abstaining from intra-associational disputes is to preserve the autonomy of the association. *See Oakland Raiders v. Nat'l Football League*, 131 Cal. App. 4th 621, 644 (2005). But abstaining from this dispute would do exactly the opposite. Without a judicial determination on the proper interpretation of the Bylaws, WSU and OSU will be left at the mercy of ten departing members that have no loyalty to the Conference.

UW also argues the other departing schools were necessary parties under CR 19. But to determine whether a party is necessary, "the court must decide whether the party's absence … would impair that party's interest." *Cordova v. Holwegner*, 93

Wn. App. 955, 961, 971 P.2d 531 (1999). And "an absent party's ability to protect its interest will not be impaired … where its interest will be adequately represented by existing parties to the suit." *Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999).

Here, the departing schools have the same interest as UW and the same exact legal arguments—they are even represented by the same attorneys. UW's sole response is that the other schools have a "fundamentally different history vis-à-vis Plaintiffs' central course-of-performance argument." Discretionary Rev. Mot. 28. A course-of-performance argument, however, can be made by any party. In fact, UW has made just such an argument *in this motion*, pointing out that Arizona and Utah delivered notice of withdrawal only through a public announcement. *Id.* at 14. It was not error to recognize that UW adequately represents the departing members. The Court should decline discretionary review of the motion to dismiss.

IV. CONCLUSION

This Court should deny UW's motion for discretionary review.

CERTIFICATE OF WORD COUNT

The undersigned counsel hereby certifies that this brief contains 4,993 words, excluding the parts of the document exempted under RAP 18.17.

Dated: December 7, 2023

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