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.

No. 23-2-00273-38

PROPOSED-INTERVENOR-DEFENDANT UNIVERSITY OF WASHINGTON'S MOTION TO INTERVENE

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## I. INTRODUCTION

Washington State University ("WSU") and Oregon State University ("OSU") have filed this lawsuit to oust the University of Washington ("UW") and nine other schools from the Board of Directors of the Pac-12 Conference and assume control of the Conference for themselves. They took this dramatic step without making a meaningful attempt to resolve the dispute (despite a requirement to do so in the Conference rules) and without including UW or the other departing schools in the legal process. As a result, WSU and OSU have been litigating against only the Conference and Commissioner—who have stated expressly that they are neutral and have no position on the appropriate composition of the Board—to secure declaratory and injunctive relief to wield against the ten departing members.

UW has a significant stake in opposing WSU and OSU's claims and preventing the Court from granting the relief requested. True, UW is leaving the Conference after the 2023–24 academic year. But, in the meantime, UW remains a member of the Conference, and board participation and voting power affects the experience of UW's athletics teams and student-athletes for the 2023–24 academic year as well as UW's bargained-for contractual rights and financial interests.

UW also has important arguments to present that will assist the Court in resolving the issues presented. In particular, UW has prepared the attached proposed motion to dismiss raising three threshold arguments that would compel dismissal or stay of this action: (i) the Court should abstain in light of well-established law holding that members of a voluntary association should be left to interpret their own bylaws, (ii) the Court lacks statutory authority to issue the requested declaratory relief without all affected parties present, and (iii) WSU and OSU have not and cannot join all indispensable parties. And even if WSU and OSU could overcome these arguments for dismissal or stay, UW has a strong argument that any motion for preliminary injunction should be denied because WSU and OSU are unlikely to succeed on the merits and cannot show irreparable harm: put simply, the interpretation of the Conference Bylaws that WSU and OSU are relying on is wrong.

The Conference and Commissioner cannot be expected to advance UW's arguments or adequately represent UW's interests. They have made it clear that they view this as a dispute between members and will not take a position in this litigation on how to interpret the Bylaws.

UW therefore should be permitted to intervene as of right under CR 24(a) or, in the alternative, as a matter of the Court's discretion under CR 24(b). Otherwise, WSU and OSU would be free to seek relief that would impair and impede UW's financial, contractual, and institutional interests without UW even having a seat at the table.[1]

## II. BACKGROUND

### A. Factual and Procedural Background

As the Court is aware, ten of the twelve members of the Conference—UW, University of Arizona, Arizona State University, University of California Berkeley, University of California Los Angeles, University of Southern California, Stanford University, University of Colorado Boulder, University of Oregon, and University of Utah—have announced that they plan to join new athletic conferences after August 1, 2024. WSU and OSU, the other two members of the Conference, allege that by making their future plans known publicly, UW and the other departing members have forfeited their current seats on the Conference's Board of Directors. Complaint ("Compl.") ¶¶ 22–29, 52–54. They ask this Court to declare that UW and the other departing members may not serve on the Board and to enjoin the Conference and Commissioner from treating them as Board members. *Id.* at 15. But they have not actually sued UW or any of the other nine departing members.

Instead, the Complaint asserts three claims against the Conference and Commissioner for "[b]reach of [b]ylaws," declaratory judgment, and injunctive relief. *Id.* ¶¶ 41–58. All three claims are based on WSU and OSU's theory that the departing members have submitted "notice[s] of withdrawal prior to August 1, 2024" that immediately strip them of any Board seats

[1] In seeking to intervene, UW does not waive any sovereign immunity that has not already been waived by statute.

and the right to vote. *Id.* ¶¶ 22–29. Based on these allegations, WSU and OSU demand preliminary and permanent injunctive relief prohibiting the departing members from voting on any matter before the Board, prohibiting the Commissioner from calling any Board meeting that includes a vote by any departing member, and prohibiting the Commissioner from executing any transaction "based on" votes cast by departing members in alleged violation of the Bylaws. *Id.* ¶¶ 56–58. Plaintiffs also request a declaration that (1) the departing members have delivered "notice[s] of withdrawal" under the Bylaws, (2) the departing members are "no longer members of the Pac-12 Board of Directors," and (3) the departing members "may not vote on any matter before the Pac-12 Board of Directors." *Id.* at 15.

Plaintiffs have secured a temporary restraining order preventing any Conference Board meeting from occurring before a hearing on Plaintiffs' anticipated motion for a preliminary injunction. Order Granting Plaintiffs' Motion for Temporary Restraining Order at 3–4 (Sept. 11, 2023). In opposition to the request for a temporary restraining order, the Conference and Commissioner expressly stated that they have no "position with respect to the proper composition of the Board." Conference Br. in Opp. to TRO at 14 (Sept. 11, 2023) ("Conference Br."); *see also* Declaration of George Kliavkoff ¶ 49 (Sept. 11, 2023) ("Kliavkoff Decl."). In keeping with that statement, the Conference and Commissioner did not advocate in favor of the departing members' interests in their opposition papers. Conference Br. at 14–17.

All twelve schools, the Conference, and the Commissioner have now begun a mediation process with Hon. Layn Phillips (ret.) in an effort to resolve their issues outside of court. That process has begun and is expected to continue through the month of October. Ex. B, Declaration of Daniel B. Levin ¶¶ 3–4 ("Levin Decl.").

The 2023–24 academic and athletic year is well underway for UW and other Conference members. Ex. A, Declaration of Dr. Ana Mari Cauce ¶¶ 3, 6 ("Cauce Decl."). Complete board participation for UW in issues of Conference oversight and governance are critical to ensure that the Conference has sufficient personnel to operate in compliance with contractual obligations

under media-rights deals, that the members can protect their respective financial interests, and that the members can protect the interests of their student-athletes. *See id.* ¶¶ 3–8.

**B. The Arguments UW Plans to Raise as an Intervenor**

In compliance with CR 24(c), UW has attached a proposed motion to dismiss to this motion to intervene. *See* Ex. C. That motion sets out three arguments for dismissal. First, under well-settled principles of California law (which governs the Pac-12), courts must abstain from wading into the interpretive disputes of voluntary associations. *Oakland Raiders v. Nat'l Football League*, 93 Cal. App. 4th 572, 582 (2001) (citing *California Dental Ass'n v. Am. Dental Ass'n*, 23 Cal. 3d 346, 355 n.3 (1979)); *accord Couie v. Loc. Union No. 1849 United Bhd. of Carpenters & Joiners of Am.*, 51 Wn.2d 108, 115 (1957) (applying same principle under Washington law). This is particularly important here where the members have all agreed to engage in mediation to attempt to resolve their dispute. Levin Decl. ¶¶ 3–4. The Court should abstain and dismiss the complaint under CR 12(b)(1) and allow that process to proceed.

Second, WSU and OSU did not join the other nine departing members that are indispensable to this dispute, and those nine schools cannot involuntarily be joined due to a combination of state sovereign immunity and the lack of personal jurisdiction. Like UW, the other departing members claim a significant interest in this litigation based on bargained-for contractual rights, financial interests, and the interest in advocating for their student-athletes. Under CR 19, no court could proceed in equity and good conscience without all Conference members. *Auto. United Trades Org. v. State*, 175 Wn.2d 214, 221–22 (2012); *Matheson v. Gregoire*, 139 Wn. App. 624, 634–35 (2007); *Coastal Bldg. Corp. v. City of Seattle*, 65 Wn. App. 1, 7–9 (1992).

Third, under RCW 7.24.110, the Court lacks the authority necessary to issue the sweeping declaratory relief requested by Plaintiffs without the presence of the other departing members. As a matter of plain statutory text, RCW 7.24.110 requires that, whenever a party seeks declaratory relief, "all persons shall be made parties who have or claim any interest which would be affected by the declaration." The statute further expressly provides that "no

declaration shall prejudice the rights of persons not parties to the proceeding." *Id.* Courts routinely dismiss actions where—as here—declaratory relief would impede the rights of absent persons who were not or cannot be joined. *See, e.g.*, *Bainbridge Citizens United v. Wash. State Dep't of Nat. Res.*, 147 Wn. App. 365, 373–74 (2008); *Mudarri v. State*, 147 Wn. App. 590, 602 (2008); *Treyz v. Pierce Cnty.*, 118 Wn. App. 458, 462 (2003).

In addition to these pleading arguments, UW would plan to oppose any motion for preliminary injunction filed by WSU and OSU. UW would argue that WSU and OSU are not likely to succeed on the merits because their interpretation of the Bylaws is fundamentally wrong. To ensure that all members remain in the Conference through the term of the current media rights agreements, the Bylaws prohibit a member from delivering a notice of a "*withdrawal prior to August 1, 2024*." Kliavkoff Decl., Ex. 1, Pac-12 Conference Handbook ("Bylaws"), Chapter 2-3 (emphasis added). Nothing in the Bylaws prohibits members from leaving the Conference *after* August 1, 2024. Nor do the Bylaws prohibit announcing or giving notice prior to August 1 that the member plans to withdraw after August 1, 2024. WSU and OSU's contrary interpretation makes no sense, as it would allow schools to withdraw on August 2, 2024, so long as they waited until August 1 to tell anyone about it.

## III. ARGUMENT

### A. UW May Intervene as of Right to Protect its Significant Continuing Interests in the Governance of the Pac-12 Conference that Cannot Be Protected by an Existing Party.

The Court should grant UW's motion to intervene as of right under CR 24(a). CR 24(a) has four requirements for intervention as of right: "(1) timely application for intervention; (2) an applicant claims an interest which is the subject of the action; (3) the applicant is so situated that the disposition will impair or impede the applicant's ability to protect the interest; and (4) the applicant's interest is not adequately represented by the existing parties." *Westerman v. Cary*, 125 Wn.2d 277, 303 (1994). Courts liberally construe these requirements in favor of intervention. *Olver v. Fowler*, 161 Wn.2d 655, 664 (2007).

**1. UW moves on a timely basis for intervention.**

This motion is timely. It has "always been the rule" that a motion to intervene is timely when filed before the commencement of trial. *Columbia Gorge Audubon Soc'y v. Klickitat Cnty.*, 98 Wn. App. 618, 623 (1999). These proceedings have not advanced to trial. Indeed, the pleadings have not yet been settled. In any event, the timing of this motion imposes no hardship on any existing party. *See id.* at 626–29.

**2. UW has a significant interest in the subject of this lawsuit.**

UW has a significant interest in its representation on the Conference's Board and being able to vote on Conference issues so long as UW remains in the Conference. For purposes of intervention under CR 24, an "'interest' is to be construed broadly, rather than narrowly." *Vashon Island Comm. for Self-Gov't v. Wash. State Boundary Rev. Bd. for King Cnty.*, 127 Wn.2d 759, 765 (1995). While the "sufficiency of the claimed 'interest'" depends on the case-specific context, "claiming a vested legal interest" is sufficient for purposes of intervention. *Am. Disc. Corp. v. Saratoga W., Inc.*, 81 Wn.2d 34, 42 (1972). Relevant here, courts consistently recognize that "[c]ontract rights are traditionally protectable interests" for purposes of intervention. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001); *N. Cascades Conservation Council v. U.S. Forest Serv.*, 2021 WL 871421, at *3 (W.D. Wash. Mar. 9, 2021) (same); *see Am. Disc.*, 81 Wn.2d at 37 (endorsing reference to federal caselaw on intervention).

UW has a legal right to a board seat and a board vote on the Conference Board of Directors, as reflected in the Conference Bylaws that govern UW and other members. UW also has a significant economic interest in the ongoing affairs and financial decisions to be made in relation to the Conference. Cauce Decl. ¶¶ 7–8. For example, the Conference has substantial assets in the form of its media rights agreements, ownership of archival game footage, and physical real estate, among other things. *Id.* ¶ 9. The Conference also faces prospective liability in litigation, including large antitrust class actions related to student-athlete name, image, and likeness rights. *Id.* ¶ 4. Any decisions regarding these assets and liabilities have a direct impact

and effect on UW. *Id.* ¶ 7. In addition to these contractual and economic interests, UW has an unflagging interest in participating in Conference decisions that affect the health, well-being, and success of its student-athletes. *Id.* ¶ 8. Those rights and interests relate directly to the subject matter of this action initiated by WSU and OSU against the Conference and the Commissioner to take control of the Board. The Conference has substantial control over the games and events that UW student-athletes will play in for the rest of this academic year, including game staff, venues, rules, and officials. *Id.* ¶¶ 5, 8 It is impossible to deny UW's interest in that area so long as UW student-athletes continue to play in the Conference.

**3. The disposition of this action may, as a practical matter, impair or impede UW's interests.**

UW is so situated that disposition of Plaintiffs' action may impair or impede its significant interests. If a significant interest exists, as it does here, a court should have "little difficulty" in finding that disposition of the action may impair or impede the interest. *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) (quoting *California ex rel. Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006)). The analysis for impairment is fact-specific and practical. *Columbia Gorge Audubon Soc'y*, 98 Wn. App. at 629; *see Am. Disc.*, 81 Wn.2d at 37 (citing "practical considerations" emphasized by federal rules advisory committee). For example, while the unsecured creditor intervening in *American Discount* had no "vested legal interest" in the debtor's property subject to foreclosure, disposition of the property in possible sham foreclosure proceedings would have—as a practical matter—impaired the intervenor's "substantial economic interest" in the property as the sole asset of the debtor. *Id.* at 42.

As in *American Discount*, 81 Wn.2d at 42, it is hardly contestable that the relief requested by Plaintiffs would, as a practical matter, impair and impede UW's significant interest in the affairs and decisions of the Conference's Board. Plaintiffs' requested injunctive relief would compel the Conference to prevent UW from voting on any matter before the Board and compel the Commissioner to not call any meeting that would involve a vote by UW or the other

departing members. Compl. ¶¶ 56–58. Plaintiffs' requested declaratory relief directly targets UW and would declare that UW (and other departing members) "are no longer members" of the Board and "may not vote" on matters before the Board. *Id.* at 15. As a practical matter, UW's interests will be immediately impeded or impaired by Plaintiffs' success in this action. Cauce Decl. ¶¶ 6–8.

**4. Absent intervention, UW's interests will not be adequately represented.**

The Conference and Commissioner cannot adequately represent UW's interests. UW must "make only a minimal showing that its interests may not be adequately represented." *Columbia Gorge Audubon Soc'y*, 98 Wn. App. at 629. The key considerations for adequacy include (i) whether the Conference and Commissioner will "*undoubtedly* make *all* the [absent party's] arguments," (ii) whether the Conference and Commissioner are "able and willing to make those arguments," and (iii) whether UW will "more effectively articulate any aspect of its interest." *Id.* at 630 (emphases in original); *see also Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (requiring only the "minimal" showing that representation "'may be' inadequate").

All three of those considerations support intervention here. It is clear from their opposition to the TRO application that the Conference and Commissioner will *not* make all arguments necessary to protect UW's interests. They have already stated that they have no "position with respect to the proper composition of the Board," which is a key merits issue in the case and would be the focus on UW's opposition to a motion for preliminary injunction. Pac-12 Conference Br. at 14 (Sept. 11, 2023); *see also* Kliavkoff Decl. ¶ 49. In addition to that argument on the merits, as explained above, UW's motion to dismiss would raise three arguments that require dismissing or, at a minimum, staying this litigation. *See* Ex. C, Proposed Motion to Dismiss. The Conference raised one of those arguments—the absence of indispensable parties—in its opposition to the temporary restraining order, but it did not raise the

other two and there is no reason to believe it will. It is unclear whether the Pac-12 will move to dismiss, much less whether it will raise those three arguments.

Regardless, UW will articulate its arguments more effectively than the Conference and Commissioner would, given the Conference and Commissioner's professed neutrality. WSU and OSU can hardly argue otherwise, as they allege explicitly that UW and the departing members have "competing incentives" that "conflict with the interests of the Conference itself." Compl. ¶ 33. These circumstances more than suffice for the "minimal showing" necessary for the demonstration of inadequate representation.

In sum, UW satisfies all four requirements for intervention as of right under CR 24(a) and must be permitted to intervene to protect its interests.

**B. Alternatively, the Court Should Exercise its Discretion to Grant Permissive Intervention.**

In the alternative, the Court should permit permissive intervention under CR 24(b). Courts grant permissive intervention even when intervention as a matter of right may not be justified. *Vashon Island*, 127 Wn.2d at 765. Under CR 24(b), the application for intervention "need only be timely and present a common question of law or fact with the main action, though the court will also consider whether the intervention would unduly delay or prejudice the rights of the original parties." *Ferencak v. Dep't of Labor & Indus.*, 142 Wn. App. 713, 720 (2008); *see In re Dependency of N.G.*, 199 Wn.2d 588, 599 (2022) (requiring trial court to demonstrate consideration of undue delay and prejudice factors).

UW's proposed motion to dismiss and its anticipated opposition to a preliminary injunction motion present common questions of law and fact in the context of Plaintiffs' claims. Intervention would not cause undue delay, as UW has moved promptly to intervene even before any responsive pleading has been filed. Intervention would not prejudice the rights of the original parties, and intervention would provide UW with a say on critical issues that pertain to UW's interests. These considerations—in addition to those identified in support of intervention

as of right under CR 24(a)—weigh strongly in favor of allowing UW to intervene, even if the Court does not allow intervention as of right.

## IV. CONCLUSION

For these reasons, the Court should grant intervention as of right under CR 24(a) or, in the alternative, permissive intervention under CR 24(b).

DATED: October 9, 2023

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the 9th day of October, 2023, the foregoing was delivered to the following persons in the manner indicated:

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*Attorney for Proposed Intervenor-Defendant University of Washington*

# EXHIBIT A

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,<br><br>Plaintiffs,<br>v.<br><br>THE PAC-12 CONFERENCE; and GEORGE KLIAVKOFF, in his official capacity as Commissioner of the Pac-12 Conference,<br><br>Defendants. | No. 23-2-00273-38<br><br>DECLARATION OF DR. ANA MARI CAUCE IN SUPPORT OF UNIVERSITY OF WASHINGTON'S MOTION TO INTERVENE |

Dr. Ana Mari Cauce declares as follows:

1. I make this declaration based on my own personal knowledge and, if called on to do so, could testify competently to the facts stated herein.

2. Since 2015, I have been the President of the University of Washington ("UW").

3. UW is currently a member of the Pac-12 Conference (the "Conference"). During my tenure as President of UW, I have served as UW's representative on the Conference's Board of Directors and participated in the management of the business and affairs of the Conference, including as Chair of the Executive Committee of the Board until June 30, 2023. In my role as UW's representative to the Board, I advocate for the health, wellbeing, and success of UW student-athletes as well as for the economic interests of UW and the Conference as a whole.

4. The Board, as the governing body for the Conference, makes decisions that affect the economic and non-economic interests of its Member Institutions, including UW. For example, the Board establishes the rules by which the Conference distributes revenues to the members of the Conference. The Board also makes decisions regarding the disposition of Conference assets and liabilities, including litigation liabilities. For instance, the Conference faces potential liability in a number of ongoing litigation matters, including pending antitrust actions related to student-athletes' rights to their name, image, and likeness.

5. The Board is authorized to exercise significant control over the athletic affairs of the Conference, including through amendments to the Conference's Constitution and Bylaws, amendments to the Conference's regulations (such as those relating to officiating and scheduling), the designation of committees, discipline of Member Institutions, and the adoption of other policies and resolutions that determine conference championship or post-season participant selection.

6. These powers of the Board are important to UW because UW will remain in the Conference through August 1, 2024 and UW student-athletes are currently competing in the Conference and will continue to do so through the 2023–24 academic and athletic year.

7. UW's continued representation on the Board and voting right on the Board through August 1, 2024, is critical to protecting UW's continued economic interests relating to the Conference's assets, revenue, and potential litigation liabilities.

8. UW's continued representation on the Board and voting right on the Board through August 1, 2024, is also critical to protecting UW's continued interests relating to the governance of the Conference and oversight of athletic competitions involving UW student athletes.

9. Based on information I have received as a member of the Board, I understand that the Pac-12 has substantial media rights agreements with third parties, ownership of archival audio and video footage, interests in real property, and other assets and revenue streams.

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

SIGNED this _6_____ day of October, 2023, at Seattle, Washington.

Dr. Ana Mari Cauce
President of the University of Washington

# EXHIBIT B

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,<br><br>Plaintiffs,<br><br>v.<br><br>THE PAC-12 CONFERENCE; and GEORGE KLIAVKOFF, in his official capacity as Commissioner of the Pac-12 Conference,<br><br>Defendants. | No. 23-2-00273-38<br><br>DECLARATION OF DANIEL B. LEVIN IN SUPPORT OF UNIVERSITY OF WASHINGTON'S MOTION TO INTERVENE |

I, Daniel B. Levin, declare as follows:

1. I am an attorney licensed to practice in the State of California. I am a Partner with the law firm Munger, Tolles & Olson, LLP, counsel for Proposed-Intervenor-Defendant the University of Washington ("UW") in the above-captioned action.

2. I make this Declaration in support of UW's Motion to Intervene and proposed Motion to Dismiss. I have personal knowledge of the facts set forth herein and, if called as a witness, I could and would testify competently thereto.

3. After Plaintiffs Washington State University and Oregon State University filed their complaint in the above-captioned matter in this Court, UW, all twelve Conference members, and the Conference itself agreed to take part in a mediation process.

4. The mediation process has already begun before a neutral, former United States District Judge Layn R. Phillips. The first formal mediation session was held on October 2, 2023, and was attended by all parties. The mediation process is scheduled to continue through the month of October.

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

SIGNED this 8th day of October, 2023, at Los Angeles, California.

Daniel B. Levin

# EXHIBIT C

SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF WHITMAN

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

Plaintiffs,

v.

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

Defendants,

and

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

Intervenor-Defendant.

No. 23-2-00273-38

INTERVENOR-DEFENDANT UNIVERSITY OF WASHINGTON'S [PROPOSED] NOTICE OF MOTION AND MOTION TO DISMISS

JAMES K. BUDER, WSBA #36659
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**[PROPOSED] NOTICE OF MOTION AND MOTION**

PLEASE TAKE NOTICE that on November 14, 2023, at 2:00 p.m., or as soon thereafter as counsel may be heard, in the above-entitled Court, located at 400 N. Main Street, Colfax, WA 99111, Intervenor-Defendant University of Washington will and hereby does move the Court for an order dismissing Plaintiffs Washington State University ("WSU") and Oregon State University's ("OSU") complaint based on well-established abstention and joinder law in Washington and California or, in the alternative, for an order staying the matter until after the Pac-12 Conference members' currently-pending mediation concludes.

This Motion should be granted for either of two independently sufficient reasons: (1) under well-founded principles of abstention, the Court must abstain from disputes concerning interpretation of a voluntary association's bylaws and dismiss the complaint under CR 12(b)(1), and (2) the failure to join all the Conference members compels dismissal under CR 19 and CR 12(b)(7). The Court should also dismiss the declaratory relief claim under RCW 7.24.110 on the separate basis that not all affected parties are present (and cannot be made so).

This Motion is based on the Complaint, this Notice, the Memorandum of Points and Authorities attached hereto, all pleadings and papers on file in this matter, and such further evidence and argument as may be allowed by the Court prior to its decision.

DATED: October 9, 2023

Respectfully submitted,

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SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF WHITMAN

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

Plaintiffs,

v.

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

Defendants,

and

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

Intervenor-Defendant.

No. 23-2-00273-38

INTERVENOR-DEFENDANT UNIVERSITY OF WASHINGTON'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF [PROPOSED] MOTION TO DISMISS

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## I. INTRODUCTION

This lawsuit seeks relief that significantly impairs the financial interests, bargained-for contractual rights, and the experiences of thousands of student-athletes of the ten members of the Pac-12 Conference who were not named as parties to this case: Intervenor-Defendant University of Washington ("UW"), as well as Arizona State University, University of Arizona, University of California–Berkeley, University of California–Los Angeles, University of Colorado Boulder, University of Oregon, University of Southern California, Stanford University, and University of Utah. Plaintiffs Washington State University ("WSU") and Oregon State University ("OSU") sued only the Pac-12 Conference and Commissioner George Kliavkoff to urge their preferred—and incorrect—interpretation of the Conference's Bylaws and, in turn, oust the other ten schools from the Conference's Board of Directors and assume control of the Conference for themselves.

WSU and OSU 's complaint is the wrong way to resolve those schools' complaints and to determine the governance of the Pac-12. The complaint should be dismissed for three reasons.

*First*, because this dispute requires an interpretation of the Conference's Bylaws, this Court must abstain under long-established principles of judicial restraint holding that members of a voluntary association should be left to interpret their own bylaws. The abstention doctrine compels dismissal of the action under CR 12(b)(1) or, at the very least, a stay pending a currently ongoing mediation. Plaintiffs took the dramatic step of filing this lawsuit and seeking a temporary restraining order without making any meaningful attempt to resolve the dispute regarding the interpretation of the Conference Bylaws with the other members of the Conference—even though the ten schools that are leaving the Conference after August 1, 2024 have been willing to engage in mediation and indeed have now started a multi-day mediation with WSU, OSU, and the Pac-12 to try to resolve their bylaw interpretation dispute.

*Second*, the complaint should be dismissed for failure to join indispensable parties. Although UW has now joined the action as an Intervenor-Defendant, the other nine members of the Conference are not parties to the action and cannot be joined for lack of personal jurisdiction and, for seven of the nine schools, because of state sovereign immunity. Because these nine

other Conference members are necessary parties who cannot feasibly be joined in this lawsuit, which seeks relief that would impair their financial, contractual, and institutional interests, the Court should dismiss this case under CR 19 and CR 12(b)(7).

*Third*, without all the affected parties present in this lawsuit, the Court lacks statutory authority to issue the requested declaratory relief under RCW 7.24.110.

Based on well-established joinder and abstention law in Washington and California, the Court should dismiss Plaintiffs' complaint or, in the alternative, stay the action pending the mediation in which the Conference and all twelve member schools are currently engaged.

## II. BACKGROUND

Plaintiffs' complaint against the Conference and Commissioner asserts claims for breach of the Conference's Bylaws, declaratory judgment, and injunctive relief. Although Plaintiffs advance claims for relief that ostensibly target the Conference and Commissioner as defendants, in substance and effect these claims for relief target, and would impact and harm, UW and the other departing members. Indeed, Plaintiffs' action seeks to strip UW and the other nine departing schools of their Board seats and votes because they allegedly submitted "notice[s] of withdrawal prior to August 1, 2024." Complaint ("Compl.") ¶¶ 22–29, 44–46.

Based on this unsupported interpretation of the Bylaws, WSU and OSU demand preliminary and permanent injunctive relief prohibiting the other ten Conference members from voting on any matter before the Board, prohibiting the Commissioner from calling any Board meeting that includes a vote by any of the other ten Conference members, and prohibiting the Commissioner from executing any transaction "based on" votes cast by the other ten Conference members in alleged violation of the Bylaws. *Id.* ¶¶ 56–58. Plaintiffs also request a declaration that (1) the other ten Conference members have delivered "notice[s] of withdrawal" under the Bylaws, (2) the departing members are "no longer members of the Pac-12 Board of Directors," and (3) the departing members "may not vote on any matter before the Pac-12 Board of Directors." *Id.* at 15.

In light of Plaintiffs' complaint—in which none of the other ten Conference members were named—the departing ten members proposed a mediation of all Conference member schools to address Conference governance issues. WSU and OSU agreed to mediation within hours of receiving the departing members' request. The mediation process has already begun before a neutral, former United States District Judge Layn R. Phillips, and is scheduled to continue through the month of October. *See* UW's Mot. to Intervene, Ex. B, Declaration of Daniel B. Levin ¶ 4.

## III. ARGUMENT

### A. The Court Must Abstain from Disputes Concerning Interpretation of a Voluntary Association's Bylaws.

Long-established principles of judicial restraint hold that courts should abstain from disputes "concerning the *interpretation* of [associations'] bylaws." *Oakland Raiders v. Nat'l Football League*, 93 Cal. App. 4th 572, 582 (2001) ("*Raiders I*") (internal quotation marks and citation omitted). All of the claims in this case depend on a contested interpretation of Chapter 2-3 of the Conference Bylaws and whether the Commissioner correctly interpreted the Bylaws when he called a full meeting of the Board of Directors, including the Board representatives from the departing schools, and this Court therefore should dismiss WSU and OSU's claims under CR 12(b)(1).

#### 1. Absent plain contravention of an association's bylaws, courts abstain.

Both California law—which governs here[1]—and Washington law require that courts abstain from wading into the interpretive disputes of voluntary associations like the Pac-12

[1] California law applies because the Conference is a "California unincorporated association" headquartered in California. Conference Br. in Opp. to TRO, Declaration of George Kliavkoff ("Kliavkoff Decl.") ¶ 3. Under the Restatement's "internal affairs" doctrine, which uses the "most significant relationship" standard for issues "peculiar to corporations and other associations," Washington courts apply the law of the "state of incorporation." Restatement (Second) of Conflict of Laws § 302 & cmt. a.; *see id.* § 188 (also prescribing the "most significant relationship" test for matters of contract); *see also Bybee Farms, LLC v. Snake River Sugar Co.*, 625 F. Supp. 2d 1073, 1078 (E.D. Wash. 2007) (applying the "internal affairs" rule under Washington law). California's "common law principles that govern disputes within

Conference. The California Supreme Court in *California Dental Association v. American Dental Association*, 23 Cal. 3d 346 (1979), held that courts must decline to exercise jurisdiction to substitute judicial judgment for that of the voluntary association except when the voluntary association "plainly contravenes the terms of its bylaws." *Id.* at 350; *Raiders I*, 93 Cal. App. 4th at 582 ("[T]he initial question in determining whether judicial action is appropriate is whether the challenged action 'plainly contravenes' the association's bylaws."). Similarly, the Washington Supreme Court has held that courts will not "interfere with the interpretation placed upon" an association's constitution by its officers and agents "unless such interpretation is arbitrary and unreasonable." *Couie v. Loc. Union No. 1849 United Bhd. of Carpenters & Joiners of Am.*, 51 Wn.2d 108, 115 (1957). This abstention doctrine reflects a concern that attempts to interpret the rules of private organizations will lead the courts into "the 'dismal swamp'" of internecine disputes and interfere with the autonomy of such organizations. *California Dental*, 23 Cal. 3d at 353 (quoting Zechariah Chafee, Jr., *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1023–26 (1930)).

Courts have applied the abstention doctrine to avoid interceding in numerous disputes over interpretation of a voluntary association's bylaws. For example, in *Raiders I*, the Oakland Raiders sued the NFL and its commissioner based on an interpretation of the NFL bylaws that would have prohibited the association's financial interest in a European football league. 93 Cal. App. 4th at 582. The NFL argued that the "other-team-ownership prohibitions" in the bylaws could be interpreted as "conflict-of-interest prohibitions" with nothing to say about clubs' *collective* ownership of European teams. *Id.* The court explained that the threshold question in such cases is whether the challenged action "plainly contravenes" the association's bylaws. *Id.* "Only then"—that is, only if the bylaws *unambiguously* support a plaintiff's position—should a

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private organizations," *California Dental*, 23 Cal. 3d at 353, clearly apply to an internal governance dispute between members of a California association. *Cf. Int'l Longshore & Warehouse Union v. ICTSI Oregon, Inc.*, 15 F. Supp. 3d 1075, 1098 n.13 (D. Or. 2014), *aff'd*, 863 F.3d 1178 (9th Cir. 2017) (applying Oregon law only because the claims did *not* involve a California nonprofit's "internal affairs," but finding no conflict with California abstention law).

court engage in a balancing test to determine whether to exercise jurisdiction. *Id.* The court grounded its analysis in *California Dental*, in which the California Supreme Court interceded only because the case was "not one in which the [parties] are engaged in a dispute concerning the *interpretation* of [their] bylaws." *Id.* (emphasis in original); *see also Davis v. Pleasant Forest Camping Club*, 171 Wn. App. 1027 (2012) (under longstanding precedent, Washington courts "should not interfere" in intra-association interpretation disputes, unless the association's "interpretation is arbitrary and unreasonable"). Because *Raiders I* concerned a dispute over the interpretation of the NFL bylaws, the court held the abstention doctrine applied. 93 Cal. App. 4th at 583–84; *see also Oakland Raiders v. Nat'l Football League*, 131 Cal. App. 4th 621, 643 (2005) (reaffirming *Raiders I* on this issue); *Berke v. Tri Realtors*, 208 Cal. App. 3d 463, 469 (1989); *California Trial Laws. Ass'n v. Superior Ct.*, 187 Cal. App. 3d 575, 580 (1986); *Scheire v. Int'l Show Car Ass'n (ISCA)*, 717 F.2d 464, 465–66 (9th Cir. 1983).

**2. All of WSU and OSU's claims require the Court to rule on interpretation of Conference Bylaws—and they seek an interpretation of the Bylaws that makes no sense.**

All of Plaintiffs' claims turn on a common allegation and common argument, that each of the ten Conference members not named in this lawsuit delivered a notice of withdrawal prior to August 1, 2024, and thus violated Chapter 2-3 of the Pac-12 Constitution and Bylaws. This is based solely upon Plaintiffs' incorrect interpretation of the Bylaws, which is directly at odds with the Commissioner's interpretation of the Bylaws. *Compare* Compl. ¶¶ 2, 44, 54–56, *with* Kliavkoff Decl. ¶ 47 (stating that WSU/OSU's "suggestion that ten of the Conference's 12 members have 'withdrawn' from the Conference within the meaning of the Bylaws is mistaken. Not one member school has signaled any intention—or actually attempted—to leave Conference play at any time prior to the end of the current fiscal year on July 31, 2024," and that the Conference "simply cannot accept the suggestion that only two members . . . now have the right to determine by themselves all issues affecting the Conference, and determine the course of all revenue coming into the Conference, to the exclusion of the other ten member schools"). The lawsuit therefore asks the Court to do what both California and Washington law cautions courts

to avoid—to intercede in interpreting a voluntary association's bylaws, where there is no showing that the Bylaws unambiguously support Plaintiffs' position or that the Conference's interpretation is arbitrary and unreasonable. *See Raiders I*, 93 Cal. App. 4th at 582.

The Bylaws do not unambiguously support Plaintiffs' preferred interpretation. Plaintiffs urge the Court to interpret Chapter 2-3 of the Bylaws as turning on the date a school *delivers* formal notice of withdrawal (and not the date when a school actually withdraws), but both common sense and the Bylaws read as a whole show that Plaintiffs' interpretation is incorrect. Chapter 2-3 addresses the circumstances in which a member leaves the Conference prior to August 1, 2024, which is shortly after the Conference's current media rights deal expires. *See* Kliavkoff Decl., Ex. 1, Pac-12 Conference 2023–24 Handbook ("Bylaws"), Chapter 2-3. It provides that a member's formal "notice" of their "withdrawal prior to August 1, 2024" constitutes a breach of the Bylaws. *Id.* If a member violates that provision, the Conference may seek an injunction "to prevent such [a] breach." *Id.* Further, the Conference retains "all [] media and sponsorship rights [] of the member purporting to withdraw through August 1, 2024, even if the member is then a member of another conference or an independent school for some or all intercollegiate sports competitions." *Id.* These mechanisms serve to keep members in the Conference through the term of the Conference's media rights deal. That agreement makes sense because the value of the media rights deal depends on all members competing within the Conference.

After describing the mechanisms to keep members in the Conference through the term of the media rights deal, the Bylaws go on to say that a member who "delivers notice" of its "withdrawal in violation of this chapter" loses its Board seat. WSU and OSU urge the Court to interpret this final sentence in Chapter 2-3 based on the assumption that merely announcing *before* August 1, 2024, an intent to join a different conference *after* August 1, 2024, amounts to a "notice of withdrawal prior to August 1, 2024" in violation of the Bylaws.

Put simply, WSU and OSU are asking the Court to interpret Chapter 2-3 of the Bylaws and then to enforce the Bylaws based on their mistaken interpretation. However, WSU and

OSU's interpretation does not make sense and is contrary to the Bylaws read as a whole. To be clear, no party has argued that members are barred from leaving the Conference after August 1, 2024, and no member has announced an intention to leave the Conference prior to August 1, 2024. WSU and OSU's argument is that the departing members breached the Bylaws by making that intention known in advance. But if the announcement of a post-August 1, 2024, departure itself constitutes the breach, then the provision that a court may enter an injunction "to prevent such breach" would have no effect. There would be nothing for a court to enjoin—except to order a member to stop talking about their departure. But if, as the departing schools contend, the "breach" contemplated by Chapter 2-3 requires notice of 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 a breach. Otherwise, under WSU and OSU's interpretation, the Bylaws would mean that a member can leave the Conference on August 2, 2024, so long as it keeps its departure a secret until the day it walks out the door. That regime defies common sense and is not what the members agreed to do.

Just like in *Raiders I*, Plaintiffs base their claims on a contested interpretation of a voluntary association's bylaws, which do not unambiguously support Plaintiffs' interpretation, and the abstention doctrine therefore applies. *Raiders I*, 93 Cal. App. 4th at 583–84. Even if Plaintiffs' interpretation were so plain and unambiguous as to be beyond dispute, courts consider "the infringement on the organization's autonomy and the burdens on the courts that will result from judicial attempts to settle such internal disputes," and here, such burdens are substantial and unnecessary. *California Trial Laws. Ass'n.*, 187 Cal. App. 3d at 579 (citation and quotations omitted). Chapter 2-3 contemplates a lawsuit in only one specific circumstance—when the Conference itself (not two individual members) sues a member that has given formal notice it plans to withdraw, with such withdrawal occurring prior to August 1, 2024. In that one circumstance, the members have agreed that the Conference may seek an injunction to stop the early departure, which would interfere with the Conference's compliance with its media rights deals. That hasn't happened here; instead, the Conference and all twelve of its members have

already initiated a mediation to resolve this dispute internally, and it will seriously infringe on the Conference's autonomy and conflict with the Bylaws to allow WSU and OSU to litigate the meaning of the Bylaws in court.

The Court should abstain from deciding the Conference members' dispute over the interpretation of the Conference's own Bylaws and dismiss the lawsuit under CR 12(b)(1) or, at the very least, stay the litigation until after the conclusion of the mediation.

**B. The Failure to Join All Departing Members Compels Dismissal Under CR 19 and CR 12(b)(7).**

WSU and OSU's claims should be dismissed under CR 19 and CR 12(b)(7) because the nine member schools not named in this lawsuit (and not present as an intervenor-defendant, like UW) are all indispensable parties. Washington courts have long recognized that, "[i]n actions involving contractual rights, *all parties* to the contract are indispensable." *Aungst v. Roberts Constr. Co.*, 95 Wn.2d 439, 443 (1981) (emphasis added). That principle compels dismissal here because Plaintiffs' request for relief substantially affects the financial interests, bargained-for contractual rights, and the experiences of the thousands of student-athletes of each of the nine Conference members who are not parties.

The Washington Supreme Court has established a three-step test to determine when dismissal is required for failure to join an indispensable party: (i) first, the court determines "whether absent persons are 'necessary' for a just adjudication;" (ii) if the absentees are necessary, then the court determines "whether it is feasible to order the absentees' joinder," and joinder is not feasible where sovereign immunity applies; and (iii) if an absentee is necessary and joinder is not feasible, then the court determines "whether, 'in equity and good conscience,' the action should still proceed without the absentees under CR 19(b)." *Auto. United Trades Org. v. State* ("*AUTO*"), 175 Wn.2d 214, 221–22 (2012). Each step is satisfied here. If an initial appraisal of the facts indicates that there is "an unjoined indispensable party," then the burden falls on WSU and OSU to "negate this conclusion" of indispensability. *Id.*

**1. The nine schools are necessary parties whose financial interests, bargained-for contractual rights, and student-athletes' experiences will be impaired by the relief Plaintiffs seek here.**

Each of the nine absent schools is necessary for a just adjudication of the appropriate composition of the Conference's Board and appropriate voting authority. WSU and OSU seek a declaration that UW and the nine absent schools "are no longer members of the Pac-12 Board of Directors and may not vote on any matter before the Pac-12 Board of Directors." Compl. at 15. This requested relief puts "at risk" the nine absent schools' "bargained-for contractual interest[s]" and such a risk "is all that is required to make their presence 'necessary'" under CR 19. *AUTO*, 175 Wn.2d at 224; *see also Kescoli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir. 1996) (finding parties "necessary" under analogous federal rule where action "could affect" contractual interests and "the ability to obtain the bargained-for" benefits).

The only entity that can rebut Plaintiffs' specific factual allegations and legal arguments related to each of the nine absent schools is that particular school itself. The complaint makes factual allegations relating to the varying conduct, motivations, and interests of UW and the nine absent schools. WSU and OSU allege, for example, that these schools "have no incentive to devote the resources needed" for the Conference to continue forward and instead are "motivated to dissolve the Pac-12" and "distribute its assets." Compl. ¶ 6. Only each of the schools itself can adequately rebut these allegations. The Conference and Commissioner certainly cannot stand in the shoes of specific schools to know, articulate, or defend their motivations or incentives.

The presence of UW—the only departing member subject to the jurisdiction of this Court—as an intervenor does not solve this problem because each school has unique circumstances. For example, WSU and OSU allege and have argued extensively that the Conference adopted a certain interpretation of the Bylaws when UCLA and USC announced their departures in 2022 and when Colorado then announced theirs in 2023. *E.g.*, Compl. ¶¶ 23–29, 50; TRO Br. at 12–13. UW, however, is differently situated from UCLA, USC, and

Colorado with respect to those arguments. This is just one example of the different factual circumstances that exist for each departing member. *Cf.* Kliavkoff Decl. ¶¶ 13–32.

**2. The Court lacks the power to join all nine absent Conference members.**

It is infeasible for the Court to join all indispensable parties due to sovereign immunity and the lack of personal jurisdiction. The law is clear in Arizona, California, Colorado, Oregon, and Utah that the public universities are entities of the state, protected by state sovereign immunity. *See Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. --, 139 S. Ct. 1485, 1492 (2019) (holding that "States retain their sovereign immunity from private suits brought in the courts of other States"); *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429–30, 117 S.Ct. 900 (1997) (classifying state university immunity as question of state law); *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982); *see, e.g.*, *Rutledge v. Ariz. Bd. of Regents*, 660 F.2d 1345, 1349 (9th Cir. 1981), *abrogated on other grounds by Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858 (9th Cir. 2016) (Arizona state sovereign immunity); *Stanley v. Trustees of Cal. State Univ.*, 433 F.3d 1129, 1133–34 (9th Cir. 2006) (California state sovereign immunity); *Sturdevant v. Paulsen*, 218 F.3d 1160, 1170–71 (10th Cir. 2000) (Colorado state sovereign immunity); *Rounds v. Or. State Bd. of Higher Educ.*, 166 F.3d 1032, 1036 (9th Cir. 1999) (Oregon state sovereign immunity); *Watson v. Univ. of Utah Med. Ctr.*, 75 F.3d 569, 575 (10th Cir. 1996) (Utah state sovereign immunity).

The law is equally clear that the schools from outside of Washington are not subject to personal jurisdiction in Washington for this dispute because they lack direct contacts with Washington in connection with the Conference bylaw interpretation questions at issue in this action. *See Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. --, 141 S. Ct. 1017, 1024–25 (2021) (requiring purposeful availment directly related to claims at issue).

In light of those protections from suit, the nine absent schools "cannot be forced to join" the lawsuit, which renders joinder infeasible. *See Mudarri v. State*, 147 Wn. App. 590, 601, 605 n.14 (2008) (affirming dismissal under CR 19 where sovereign tribe was a necessary party and

could not be joined because of sovereign immunity); *N. Quinault Props., LLC v. State*, 197 Wn. App. 1056, 2017 WL 401397, at *1–2 (2017) (unpublished) (affirming dismissal where absent persons "cannot be joined in this action because of sovereign immunity"). Because joinder of indispensable parties is infeasible, the Court must dismiss the complaint.

**3. The Court cannot proceed in equity and good conscience.**

Because the nine absent schools are necessary parties that cannot feasibly be joined, the question under CR 19 is whether the Court can proceed without them in equity and good conscience. The four relevant factors identified in CR 19 confirm that the answer is "no."

Under CR 19, the Court must consider (1) the extent to which a judgment rendered in the nine absent members' absence might prejudice them or the existing parties, (2) the extent to which, by protective provisions in the judgment, by shaping relief, or other measures, the prejudice to the absent members can be lessened or avoided, (3) whether a judgment rendered in the absence of the nine schools will be adequate, and (4) whether WSU and OSU will have an adequate remedy if the action is dismissed for nonjoinder. CR 19; *see also AUTO*, 175 Wn.2d at 229–234.

*First*, the judgment requested by WSU and OSU against the Conference and Commissioner will plainly prejudice the nine absent schools by expelling their representatives from the Conference's Board of Directors, thereby depriving them of voting on matters affecting the nine schools' financial interests, bargained-for contractual rights, and the experience of their student-athletes. This is a significant effect that would "inherently prejudice" the absent schools and weighs in favor of dismissal. *Matheson v. Gregoire*, 139 Wn. App. 624, 635 (2007). In *Matheson*, the requested relief would have caused an agreement to "essentially disintegrate," which would have prejudiced an absent party's "substantial interest in the continued existence of the Agreement." *Id.* Similarly here, Plaintiffs seek to expel the absent members from the Board and strip them of their bargained-for contractual interest in continued Board representation.

*Second*, the relief requested by WSU and OSU cannot be shaped to mitigate the prejudice. In *Matheson*, a Washington court found no possible way to fashion a suitable remedy

where the requested relief focused on restraining enforcement of a contract and the absent party had an interest in the continued, favorable enforcement of the contract. 139 Wn. App. at 628, 635–36. Likewise, here, the effect of accepting WSU and OSU's position would be to eliminate the nine absent schools from participating on the Board. This is not a situation in which a remedy could be shaped that would leave open the question of Board participation rights of the absent members, because the central remedy sought is to *exclude* the absent schools from the Board. *Compare Aungst*, 95 Wn.2d at 444 (identifying possible way to "shape a judgment which would minimize any prejudice"), *with Matheson*, 139 Wn. App. at 636 (identifying no possible way to fashion a suitable remedy without absent persons). Unlike in *Aungst*, Plaintiffs do not seek to advance statutory claims indirectly related to the Conference's Bylaws. Instead, just as in *Matheson*, Plaintiffs' requested relief goes directly to the enforcement of the Conference's Bylaws, seeks to oust the nine absent schools from their contractual positions on the Board, and cannot be reconciled with the absent schools' interests.

*Third*, judgment granted without all schools present will not be adequate because it would not be binding on all parties who are affected by it. A judgment binding on only the Conference, the Commissioner, and UW will prejudice the absent schools and require the Conference to take actions contrary to their interests. *Coastal Bldg. Corp. v. City of Seattle*, 65 Wn. App. 1, 7 (1992) (reasoning that judgment rendered without absent persons "would not be adequate because their rights would be affected without their participation in the action"). On top of that basic inadequacy, the absent schools will not be bound through collateral estoppel and may instead bring a separate suit in another forum, such as California, where the Conference is organized and based, and which has long been the center of Conference governance. A judgment rendered in this action would not adequately terminate this controversy and instead could lead to further litigation and potentially conflicting judicial orders. This third factor, standing alone, can be "dispositive" to compel dismissal, as it should be here. *Mudarri*, 147 Wn. App. at 605.

*Finally*, while dismissing under CR 19 would deprive WSU and OSU of a Washington state court forum for their claims, WSU and OSU have other forums for their complaint—including the mediation all Conference members have agreed to and have already begun and the negotiated dispute resolution procedure in the Conference's compliance and enforcement regulations that all Conference members agreed to follow. The availability of a negotiated remedy can be sufficient to mitigate the prejudice of no available judicial forum. *See Coastal Bldg. Corp.*, 65 Wn. App. at 8 (reasoning that the plaintiff "may still have a remedy if it can negotiate a parking arrangement").

In sum, each of the nine absent schools is indispensable to a complete determination of this controversy, and proceeding without all of them present will cause prejudice that cannot be mitigated or avoided. The Court should dismiss the entire action under CR 12(b)(7) and CR 19.

### C. The Court Has No Authority to Issue the Requested Declaratory Relief Under RCW 7.24.110 Because Not All Affected Parties Are Present.

Washington law imposes a specific requirement for declaratory relief actions, requiring participation of all affected parties: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." RCW 7.24.110; *see also Bainbridge Citizens United v. Wash. State Dep't of Nat. Res.*, 147 Wn. App. 365, 373–74 (2008) (court must dismiss declaratory relief action when necessary party has not been joined). Courts routinely dismiss declaratory relief claims for failure to satisfy RCW 7.24.110, regardless of public importance of the claim for declaratory relief. *See, e.g.*, *Nw. Animal Rts. Network v. State*, 158 Wn. App. 237, 244–45 (2010); *Mudarri*, 147 Wn. App. at 602; *Henry v. Town of Oakville*, 30 Wn. App. 240, 246 (1981); *Nw. Greyhound Kennel Ass'n, Inc. v. State*, 8 Wn. App. 314, 319 (1973); *see also N. Quinault Properties*, 2017 WL 401397, at *2. WSU and OSU's failure to join all Conference members requires dismissal of their declaratory judgment claim.

A party is necessary for purposes of RCW 7.24.110 where (1) the trial court cannot make a complete determination of the controversy without that party's presence, (2) the party's ability to protect its interest in the subject matter of the litigation would be impeded by a judgment in the case, and (3) judgment in the case necessarily would affect the party's interest. *Bainbridge Citizens United*, 147 Wn. App. at 372; *see also Branson v. Port of Seattle*, 152 Wn.2d 862, 878 n.9 (2004) (citing *Treyz v. Pierce Cnty.*, 118 Wn. App. 458, 462 (2003)). All three of these factors are satisfied here.

**1. Without every member as a party, the Court cannot make a complete determination of the appropriate composition and voting authority of the Conference's Board of Directors.**

Rendering a complete determination of WSU and OSU's request to expel the departing schools from the Pac-12 Board and strip them of voting rights requires the presence of *all* current members of the Conference. However, as set forth above, it is infeasible for the Court to join all of the members because the departing members other than UW are not subject to personal jurisdiction in this Court—and, in the case of seven of them, have sovereign immunity from suit. Thus, RCW 7.24.110 cannot be satisfied.

Washington courts have dismissed declaratory relief claims when the requested relief would necessarily impact absent parties. For example, in *Treyz*, a part-time judge's position was eliminated by a series of court consolidation ordinances, which led the plaintiff to seek declaratory relief against the county challenging the validity of those ordinances. *Treyz*, 118 Wn. App. at 459–62. The plaintiff failed to join the eight judges who had been elected based on one of the challenged ordinances but nevertheless argued that the ordinances could be invalidated as to the plaintiff but upheld as to the elected judges. *Id.* at 464. Shaping relief in such a manner was "impossible and unreasonable," because the ordinance could not be valid as to some judges and invalid as to other judges. *Id.* Similarly, the Court cannot tailor relief here in a way that affects only WSU and OSU without impairing the rights of the nine absent members.

The absence of nine of the twelve current Pac-12 members also precludes any complete determination of the factual and legal claims underpinning the request for declaratory relief. A

court cannot render a "complete determination of the controversy" when the absent persons are "the only individuals who could rebut [the plaintiffs'] factual allegations" or "present defenses to the claims" challenging the legal propriety of the absent persons' conduct. *Bainbridge Citizens United*, 147 Wn. App. at 373. The nine absent members announced their decisions to join new conferences at different times and are planning to join three different conferences. Nor, as discussed above, can UW stand in for all ten departing members. Plaintiffs are likely to argue that schools that announced their intent to join new conferences later in time (like UW), previously supported an attempt to remove the earlier-announcing schools from the Conference Board. The earliest announcing schools, of course, would not be subject to that argument.

**2. The nine absent schools are each unable to protect their interests in this litigation.**

The current parties to the case cannot protect the nine departing members' interests. WSU and OSU allege that the departing members have "competing incentives" that "conflict with the interests of the Conference itself." Compl. ¶ 33. Neither the Conference nor the Commissioner can rebut those allegations or fully address such an alleged conflict of interest. Given the current state of the Conference, the relationship between the Conference and the departing members does not approach the exceptional circumstances in which a party can adequately represent the interests of absent constitutes or legal beneficiaries. *See, e.g.*, *Treyz*, 118 Wn. App. at 463 (distinguishing circumstance where "municipalities represented the interests of their residents"). Nor, as explained above, can UW alone serve as a representative to speak for all the schools in rebutting factual allegations, disputing legal contentions, and shaping ultimate relief.

**3. The requested declaratory judgment would necessarily affect the nine absent schools' stake in the Conference.**

Granting the declaratory relief requested by WSU and OSU would necessarily affect the interests of the nine absent members. WSU and OSU seek to strip those schools of their Board positions and voting authority, effectively depriving them of any say in ongoing governance of

the Conference for nearly a full academic year in which their teams and student-athletes are competing as Conference members.

The 2023–24 academic and athletic year is well underway for the Conference and its members. Complete Board participation in issues of Conference oversight and governance are critical to ensure that the Conference has sufficient personnel to operate in compliance with contractual obligations under media rights deals, that the members can protect their respective financial interests, and that the members can protect the interests of their student-athletes. *See, e.g.*, Kliavkoff Decl. ¶¶ 36–40, 44–45 (identifying needs for Board decisions); UW's Mot. to Intervene, Ex. A, Declaration of Dr. Ana Mari Cauce ¶¶ 3–8.

WSU and OSU cannot choose to exclude "those parties who have the biggest stake in the outcome of this litigation" and still expect the Court to have the authority to issue such sweeping declaratory relief. *Treyz*, 118 Wn. App. at 464. Indeed, it is clear on the face of the statute that "no declaration shall prejudice the rights of persons not parties to the proceedings." RCW 7.24.110.

## IV. CONCLUSION

For the foregoing reasons, this Court should dismiss Plaintiffs' complaint for breach of the Bylaws, declaratory judgment, and injunctive relief, or, in the alternative, stay the matter in light of the mediation currently underway.

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Respectfully submitted,

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