No. 101409-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ALCOA, INC., a corporation; ARCONIC INC., a corporation; and ALCOA CORP., a corporation,
Petitioners,

v.

BNSF RAILWAY COMPANY, a corporation,
Respondent.

BNSF RAILWAY COMPANY'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Alcoa's[1] petition does not justify review. This case involves the straightforward application of an unambiguous contract provision that guarantees indemnity for Alcoa's undisputed *contractual breach*, not *negligence*. The "differently-designed" provision—Section 5 of a 1978 Industrial Track Agreement ("ITA")—requires that Alcoa maintain adequate track clearance and indemnify BNSF for resulting losses if Alcoa breaches that track-clearance covenant. Op. 10. It is undisputed that Alcoa committed the indemnity-triggering breach. It is further undisputed that BNSF's operations cannot "waive" Alcoa's indemnity obligation. In an unpublished opinion, the court of appeals thus interpreted Section 5 to require exactly what it says: Alcoa must indemnify BNSF because Alcoa breached the track-clearance covenant, creating the very risk and losses that the parties explicitly allocated to Alcoa. This

[1] BNSF Railway Company ("BNSF") refers to Petitioners collectively as "Alcoa."

straightforward interpretation of an unambiguous contract fully accords with Washington law.

Alcoa's petition assumes a different and incorrect premise—that the appellate court required Alcoa to indemnify BNSF for "BNSF's own [alleged] negligence[.]"[2] It did not. The basis for indemnity is Alcoa's *contractual breach*—an indemnity requirement that gives Alcoa clear and unequivocal notice of its indemnity obligations, consistent with *Snohomish County Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc.*, 173 Wn.2d 829, 271 P.3d 850 (2012) and its predecessors. The appellate court's decision enforcing the parties' decades-old bargain does not conflict with those authorities. It honors them by aligning the logic of those "negligence-oriented" cases to the "different,

[2] The parties' negligence, if any, is undetermined. The court of appeals accepted interlocutory review based on the parties' agreement that a trial on negligence is unnecessary if, as the appellate court ruled, indemnity is required for losses resulting from Alcoa's contractual breach.

explicit allocation of a risk approach" that Section 5 requires. Op. 10.

That outcome does not merit this Court's review under RAP 13.4. Differing facts are not the makings of a decisional "conflict," and review of these unique contractual idiosyncrasies adds nothing to the State's jurisprudence. Far from raising an issue of substantial public interest, the unpublished decision interprets an aged contract that was jointly negotiated by two sophisticated companies and is unlike the general, broad, and all-encompassing indemnity contracts commonly executed (and then disputed) between contracting parties. Review should be denied.

II. RESTATEMENT OF THE ISSUE

1. Should discretionary review of the court of appeals' unpublished decision be denied under RAP 13.4 because:

(a) the appellate court correctly applied the clear and unequivocal rule—consistent with this Court's precedent—to hold that Section 5 unambiguously requires Alcoa to indemnify

BNSF for losses resulting from Alcoa's contractual breach;

(b) Alcoa's interpretation creates conflict with this Court's precedent by rendering Section 5 a useless gesture; and

(c) the appellate court's unpublished and contract-bound decision raises no issue of substantial public interest?

III. STATEMENT OF THE CASE

Alcoa provides a "cursory" statement of the case that lacks record support or contradicts the record and the lower courts' decisions in material respects. Pet. 4. BNSF thus provides the following statement:

A. With the ITA, Alcoa agreed to maintain adequate track clearance and to indemnify BNSF for losses resulting from a breach of the track-clearance covenant.

Almost forty-five years ago, two sophisticated parties—BNSF and Alcoa—jointly negotiated and executed the ITA, a contract unique to railroads and their industry customers. Alcoa "[d]esired" BNSF's shipping services, and BNSF required safe passage through Alcoa's premises. (CP 66). In exchange for

BNSF's services, Alcoa thus agreed to keep the tracks at its plant clear of obstructions—a requirement necessary to ensure the safety of BNSF employees and others.

Section 5, titled "Clearances," speaks to Alcoa's promise. It imposes on Alcoa the specific contractual duty to maintain adequate "clearances":

> **Clearances Section 5.** [Alcoa] shall not place, or permit to be placed, or to remain, any material structure, pole or other obstruction within 8-1/2 feet laterally of the center … of said track[.]

(CP 66). Because Alcoa owns and controls its premises,[3] Alcoa next agreed in Section 5 to indemnify BNSF for "any and all" losses caused by Alcoa's breach of its track-clearance covenant:

> [Alcoa] agrees to indemnify [BNSF] and save it harmless from and against any and all claims, demands, expenses, costs and judgments arising or growing out of loss or damage to property or injury to or death of persons occurring directly or

[3] Under the ITA, Alcoa owned and operated the tracks within its plant, including the tracks relevant to this proceeding. (CP 66 (§2), 68); Op. 2-3. Alcoa's statement that "BNSF owned and operated the railroad tracks that service Alcoa's facility" is incorrect. Pet. 5.

> indirectly by reason of any breach of the [track-clearance covenant] ….

(*Id.*). Reinforcing Alcoa's duty of adequate clearance, Section 5 then clarifies that BNSF's operations on the track cannot "waive[]" Alcoa's indemnity obligation or BNSF's "right to recover" for damages resulting from Alcoa's breach:

> [BNSF]'s operations over the track with knowledge of an unauthorized reduced clearance shall not be deemed to be a waiver of the foregoing covenants of [Alcoa] contained in this Section 5 or of [BNSF]'s right to recover for such damages to property or injury to or death of persons that may result therefrom.

(CP 67).

A separate portion of the ITA—Section 7—imposes on Alcoa a separate and general duty to indemnify BNSF for other liabilities, whether caused by Alcoa's sole or joint negligence:

> [Alcoa] agrees to indemnify and hold harmless [BNSF] for loss … from any act or omission of [Alcoa], its employees or agents, to the person or property of the parties hereto and their employees … while on or near said track, and if any claim or liability shall arise from the joint or concurring negligence of both parties hereto it shall be borne by them equally. Notwithstanding anything herein contained to the contrary, nothing herein is to be construed as an indemnification against the sole negligence of [BNSF], its officers, employees and agents.

(CP 67).

BNSF and Alcoa operated under the ITA for decades. No evidence, however, discloses the drafting or negotiation history of the 45-year-old document. Thus, the record lacks any basis for Alcoa's claims that (1) it "specifically negotiated" Section 7 and "only" Section 7; (2) BNSF drafted the remainder; and (3) Alcoa had no choice but to accept the ITA's purported remaining "boilerplate" terms.[4]

B. It is undisputed that Alcoa breached the track-clearance covenant, injuring Adam Link.

In 2014, Alcoa breached the track-clearance covenant, "seriously injur[ing] BNSF employee Adam Link." (CP 715). The circumstances leading to Mr. Link's accident began when a BNSF crew parked three pitch cars on Alcoa's "track 6," well

[4] Citing the ITA, Alcoa similarly claims that "BNSF was Alcoa's only option for rail service." Pet. 5. The ITA nowhere supports that claim, and Alcoa long ago dismissed its contract-of-adhesion defense.

clear of the "track 9" on which Mr. Link would later travel. (CP 107, 134, 201).

The next day, Alcoa moved the pitch cars from the safe location at which BNSF had left them. As the courts below noted, Alcoa admits that it breached the track-clearance covenant when it left the cars foul of—or within eight-and-a-half feet of—track 9's center. (CP 075, 683); Op. 4. While Alcoa implies it had some excuse for its admitted breach, Pet. 4, the trial court granted BNSF summary judgment on Alcoa's "just cause" defense because, like here, "Alcoa d[id] not support" it with any evidence. (CP 688).

Alcoa's breach created the exact dangerous situation the ITA was designed to avoid. As the trial court put it:

> It must be recognized that [BNSF did not have] knowledge that Alcoa personnel had moved the pitch cars and fouled the track. BNSF was operating on the reasonable assumption that the cars were where they left them.
>
> …
>
> Alcoa personnel were aware that fouling the track created a serious risk.

(CP 688-89).

The "serious risk" that Alcoa's breach created materialized into calamity when BNSF pushed a train down a steep hill into Alcoa's facility. It was raining and nighttime, and the pitch car Alcoa left foul of the track was black. (CP 715-16, 719-20). Due to the conditions, Mr. Link rode on the side of the BNSF train—in accordance with BNSF policy.[5] (*Id.*). The crew did not see the pitch car that Alcoa moved until it was too late. Mr. Link collided with the pitch car and suffered serious injuries.

C. The Links sued BNSF and Alcoa; later, BNSF sued Alcoa for indemnity under Section 5 of the ITA.

The Links sued Alcoa for premises liability and loss of consortium and sued BNSF for negligence under the Federal Employers' Liability Act. (CP 344-57). BNSF and Alcoa jointly settled the Links' claims and stipulated that each reserved the

[5] As the lower courts correctly noted, BNSF's policies allowed Mr. Link to ride "point" when "safe and necessary to do so." (*Id*.); Op. 5.

right to seek indemnity in a later proceeding—this proceeding. (CP 715).

Without finding any ambiguity, the trial court ruled on summary judgment that Section 5's specific indemnity requirement is in all cases "unenforceable" because the breach-focused provision does not "clearly spell out" that it applies to BNSF's potential negligence. (CP 718). By default, the court ruled that Section 7's general indemnity provisions controlled. (*Id.*).

D. The court of appeals ruled that Section 5 "clearly and unequivocally" requires that Alcoa indemnify BNSF for losses resulting from Alcoa's contractual breach.

The court of appeals reversed, ruling that Section 5 "clearly and unequivocally" requires indemnity for the losses Alcoa's undisputed contractual breach caused. Op. 10-18. It recognized, correctly, that Section 5's specific, breach-triggered terms are "unlike all of the Washington decisions cited by Alcoa." Op. 10. The court thus followed the reasoning of those

decisions "rather than … their negligence-oriented discussion of differently-designed indemnification provisions." *Id.*

Applying that reasoning, the court held that Section 5 is enforceable and controls: Section 5 "clearly and unequivocally applies to the Links' lawsuit over the accident with the pitch car that Alcoa placed foul of the track." Op. 14. The court noted that Alcoa's interpretation, in contrast, "effectively writes Alcoa's track-clearing covenant," indemnity obligation, and nonwaiver paragraph "out of the contract," rendering them a "useless gesture" in violation of Washington law. Op. 16–17 (citation omitted). Accordingly—and because Section 5 is "more specific" than Section 7's general terms—the court ruled that Section 5 governs. Op. 17–18.

The court concluded by noting that BNSF and Alcoa are "commercial parties and nothing indicates any overreaching or one-sided bargaining power." Op. 17–18 (citation omitted). It therefore saw "no good reason to relieve [Alcoa] of the contractual liability it assumed." *Id.*

IV. ARGUMENT

A. The court of appeals' decision is consistent with decisions of this Court and the courts of appeals.

1. Section 5 satisfies Washington law because it clearly and unequivocally requires indemnity for losses resulting from Alcoa's contractual breach.

The court of appeals created no conflict reviewable under Rule 13.4 in determining that Alcoa must indemnify BNSF because Section 5 "clearly and unequivocally" identifies the indemnity-triggering event—Alcoa's breach—and requires Alcoa to bear "all" losses resulting from it. Courts interpret indemnity agreements in "the same way as other contracts." *Snohomish*, 173 Wn.2d at 835. Thus, indemnity agreements "must receive a reasonable construction so as to carry out, rather than defeat, the purpose for which they were executed." *Id.* at 835 (quoting *Union Pac. R. Co. v. Ross Transfer Co.*, 64 Wn.2d 486, 488, 293 P.2d 450 (1964)). No public policy precludes an agreement that requires indemnity for an indemnitee's own negligence or conduct, so long as that intent is clearly and unequivocally stated. *Id.* at 834–35, 852, 854. Rather, "the

highest public policy is found in the enforcement of the contract which was actually made." *Id.* at 852, 854 (quoting *Nw. Airlines v. Hughes Air Corp.*, 104 Wn.2d 152, 155, 702 P.2d 1192 (1985)).

Alcoa disregards these principles. It contends that the "clear and unequivocal rule" always and automatically operates to void an indemnity provision if it does not "unquestionably" reference the indemnitee's negligence—even if the provision is unambiguous and negligence is immaterial. The court of appeals correctly rejected that premise because this Court has "directly held" that a court may not "frustrate a planning device" under the guise of public policy. *Id.* at 835, 852.

Instead, the clear and unequivocal standard is a rule of construction designed to limit an indemnity obligation to its clear terms. The point is to provide a contracting party "fair notice that a large and ruinous award can be assessed against it solely by reason of negligence attributable to the other contracting party." *McDowell v. Austin Co.*, 105 Wn.2d 48, 53-54, 710 P.2d

192 (1985). Thus, as the appellate court noted, a court must "strictly construe the event that triggers the right to indemnity" if the indemnitee's own conduct is the alleged indemnity-triggering event. Op. 11. Here, the appellate correctly noted that BNSF's conduct was *not* the indemnity-triggering event. It instead was Alcoa's undisputed contractual breach. Op. 14.

Alcoa complains of the appellate court's "triggering analysis" but ignores that it is the cornerstone of this Court's precedents. Even the *Snohomish* majority and dissent agreed that it is the *trigger* for indemnity that matters:

- "The indemnitor's overt act or omission was required before *the obligation to indemnify was triggered* because that is what the language of the contract required," *Snohomish*, 173 Wn.2d at 838 (emphasis added);
- The parties "decided to exclude only the indemnitee's sole negligence as a *trigger*," *id.* at 840 (emphasis added);
- "Community Transit's [concurrent] negligence *will trigger the obligation to indemnify*," *id.* (emphasis added);
- The "*sole triggering condition* under the parties' indemnity provision is First Transit's conduct.

> Thus, for the indemnity provision to apply, the losses must have been [caused] by First Transit's [conduct]," *id.* at 862 (Stephens, J., dissenting) (emphasis added); and,
>
> - "We explained … that indemnity was not *triggered* unless there was an 'act or omission' on the part of the indemnitor that contributed to the losses," *id.* at 862-63 (Stephens, J., dissenting) (emphasis added).

It is therefore no surprise that this Court's precedents require indemnity when, strictly construing the provision, the indemnity-triggering event occurred but reject indemnity when it did not.

Beginning with *Ross*, this Court enforced a similar Section 5 to require the indemnitor-contractor to provide full indemnity to the indemnitee-railroad when the parties were "concurrently negligent," even though the provision did not reference the railroad's concurrent negligence.[6] 64 Wn.2d at 487-88. It did so because *the indemnitor's own acts* triggered indemnity and—once triggered—required coverage for the resulting losses. *Id.* at

[6] The *Ross* Section 5 differed in that negligence was a trigger for indemnity, unlike here. This case presents a stronger case for indemnity than *Ross* because BNSF's alleged negligence could not possibly limit Alcoa's breach-triggered indemnity obligation.

487. Any other outcome, this Court reasoned, would render the parties' bargain a "useless gesture":

> [U]nless the indemnity section of the contract before us be construed to encompass situations wherein both the indemnitee and the indemnitor are negligent, the contractual provision is a useless gesture.

Id. at 490. Similarly here, Alcoa triggered Section 5 indemnity when it indisputably breached the track-clearance covenant. It is therefore liable for "any and all" losses that result, "even if [BNSF's alleged] negligence was a contributing cause of injury." Op. 10. While *Ross* features prominently in this Court's precedents and the court of appeals' decision, Alcoa does not address it.

Next, in *Jones*, this Court refused indemnity when, strictly construed, the provision required indemnity only for losses arising from the indemnitor-*sub*contractor's "performance"—but the losses arose only from the indemnitee-*contractor*'s acts. *Jones v. Strom Constr. Co.*, 84 Wn.2d 518, 521, 527 P.2d 1115 (1974). As *Snohomish* explained, the subcontractor's "overt act

or omission was required before the obligation to indemnify was triggered because that is what the language of the contract [in *Jones*] required." 173 Wn.2d at 838. The same was true in *Dirk v. Amerco Marketing, Co.*, 88 Wn.2d 607, 565 P.2d 90 (1977), where this Court strictly construed "occasioned by" to reach only *direct* causes of a loss, and the "direct cause" in that case—the indemnitee's driving choices—was not an indemnity-triggering event. *Id.* at 611-14. In contrast to *Dirk* and *Jones*, it is undisputed that the indemnity-triggering event—Alcoa's breach—occurred and caused BNSF's losses. (CP 66).

That logic flowed forward to *Northwest Airlines, McDowell*, and *Snohomish.* In each, this Court determined that indemnity was required because—even under a strict construction—the indemnity-triggering event occurred:

- "The Northwest-Hughes lease clearly spells out an agreement for indemnity even when Northwest is negligent" because, strictly construed, Northwest's negligence was a trigger for indemnity, *Nw. Airlines*, 104 Wn.2d at 158;

- "Clause 8(b) provides by its terms that any liability borne by Austin that was caused—or allegedly caused—by Austin's conduct triggers Canron's duty to indemnify Austin completely," *McDowell*, 105 Wn.2d at 51; and,

- The provision has "meaning" only "if read, as obviously intended, to mean that Community Transit's negligence will trigger the obligation to indemnify but not if it is the sole negligence," *Snohomish*, 173 Wn.2d at 840.

The court of appeals faithfully applied those decisions here. Even under the *strictest* of constructions, Section 5 unambiguously requires that (1) Alcoa maintain adequate track clearance, (2) indemnify BNSF for resulting losses if Alcoa breaches that contractual duty, and (3) do so without any defense that BNSF waived its right to recover damages for the breach. (CP 66). That result was reasoned, correct, and created no decisional conflict. Indeed, it joins the unanimous authority of courts nationwide that have construed identical provisions and ruled that Section 5 is enforceable and controls over Section 7 when the indemnitor's *breach* is the indemnity-triggering event.

See, e.g., *Burlington N. R. Co. v. Stone Container Corp.*, 934 P.2d 902 (Colo. Ct. App. 1997); *Anthony v. La. & Ark. Ry. Co.*, 316 F.2d 858 (8th Cir. 1963).[7]

To this, Alcoa hides behind the distinguishable facts and language of this Court's "negligence-oriented" decisions. But as this Court and the court of appeals agree, the parties were "free to establish liability instead of negligence as the triggering mechanism of [their] indemnity contract." Op. 15-16 (quoting *McDowell*, 105 Wn.2d at 52). Because they chose a contractual breach as the trigger, neither law nor logic requires resort to "negligence-oriented discussion[s] of differently-designed indemnification provisions." Op. 10. Rather, the "*reasoning*" of this Court's decisions is the lodestar. *Id.*

Under that reasoning, Section 5 readily satisfies the "clear and unequivocal" test. This is because, when a *contractual*

[7] Alcoa claims that these courts did not apply a "clear and unequivocal" standard. They did. Alcoa's argument is rooted in caselaw that predates both opinions.

breach is the trigger, the indemnitor is necessarily on notice that the breach triggers and requires indemnity for *all* resulting damages, irrespective of negligence. Comparative fault is no defense to breach of contract, so it cannot affect or limit the indemnitor's responsibility for losses proximately caused by the breach. Indeed, BNSF could have sued Alcoa only for breaching the track-clearance covenant—with BNSF's settlement losses serving as "actual damages"—and no "clear and unequivocal" veneer would apply. That the parties shortcut Alcoa's responsibility for a breach via an indemnity provision does not change the outcome.

But even if explicit reference to BNSF's conduct were required, Section 5 satisfies it in the appropriate way. Consistent with its contract-based trigger, Section 5 references BNSF's conduct via the contractual defense of waiver and states that BNSF's operations *cannot* waive Alcoa's indemnity obligation. (CP 67). The appellate court appropriately concluded that this suffices and "reinforces Alcoa's contractual duty and BNSF's

associated contractual 'right to recover for such damages to property or injury to or death of persons that may result [from a breach].'" Op. 17 (citing CP 67).

Regardless, Alcoa misapprehends *Snohomish* by reading it to require an express reference to negligence. The *Snohomish* majority *rejected* the "extremely restrictive" or "express negligence" standards that other states (e.g., Texas) require and the *Snohomish dissent* preferred. 173 Wn.2d at 852-53.[8] It thus reaffirmed—consistent with precedent—that "magic language" or an explicit reference to "concurrent negligence" is not required. *Id.* at 836-40, 854. What the "clear and equivocal" rule really means, this Court explained, is that negligence-based triggers coupled with "broad, inclusive language," such as

[8] Alcoa incorrectly argues that the underlying decision "parrots the dissent that was rejected by the majority in Snohomish County." Pet. 17. The dissent advocated for the stricter, policy-laden "express negligence" rule that Alcoa desires—not the straightforward interpretative analysis that the Snohomish majority required and the appellate court followed.

"arising out of, in connection with, or incident to," will not do. *Id.* at 853.

The court of appeals correctly held that Section 5's "specific" breach-triggered indemnity more than satisfies that rule. By triggering indemnity from Alcoa's breach of a contractual obligation—irrespective of BNSF's operations or *any* party's negligence—the provision demonstrates that the parties "considered" the potential impact of BNSF's conduct and Alcoa "intended to indemnify" for it. *Id.* Indeed, this case is devoid of the unfair surprise the clear and unequivocal standard is designed to remedy. The appellate court's careful application of this Court's precedent to the ITA's "different, explicit allocation of a risk approach" does not create a conflict that justifies review. RAP 13.4(b)(1)-(2).

2. Alcoa's interpretation renders Section 5 a "useless gesture," in violation of this Court's precedent.

In contrast, it is *Alcoa's* interpretation that creates conflict with this Court's precedent. From *Ross* to *Snohomish*, this Court has required that a court "carry out, rather than defeat, the

purpose for which the [indemnity agreement]" was executed. *Snohomish*, 173 Wn.2d at 835, 840, 855 (quoting *Ross*, 64 Wn.2d at 488-90). The appellate court followed that command by holding that, "if section 5 does not apply to liability for a claim like the Links' claim, it will never apply." Op. 16-18.

Alcoa champions a court's duty to accord every provision meaning but then misapplies the rule. Pet. 23-26. Alcoa contends that Section 5 applies to "Alcoa's [sole] acts/negligence," and Section 7 otherwise controls. Pet. 26. But if BNSF requires indemnity under Section 5, it is because someone has sued *BNSF* for negligence; BNSF could owe no other actionable duties.[9] This Court made that exact observation over 50 years ago, when it stated in *Ross* that it could "perceive

[9] For more than a century, injured railroad workers' sole remedy against a railroad is a negligence claim under the FELA. Because an injured worker must allege negligence, a railroad's alleged negligence always is at issue when it seeks indemnity for injuries to its employees. Any non-employee claims against BNSF also would fall under tort theories because Section 5 imposes no contractual covenants on BNSF, and BNSF did not own the premises.

of no other kind of claim for which" a railroad could be indemnified under Section 5 "except one founded in whole or in part upon the Railroad's own negligence." Op. 18 (citing *Ross*, 64 Wn.2d at 490). Other courts agree. Op. 9-10, 17-18 (collecting authorities).

Regardless, Section 7 already requires Alcoa to indemnify BNSF for "any act or omission of Alcoa[,]" making Alcoa's reading of Section 5 entirely superfluous. (CP 67). Alcoa's inability to give Section 5 any meaning establishes that its interpretation is invalid. Each of this Court's indemnity authorities requires that, after the clear and unequivocal rule is applied, *some meaning must remain*. And in each, some meaning *did* remain. Alcoa's interpretation, in contrast, "writes [Section 5] out of the contract." Op. 16-17.

Conversely, the appellate court's interpretation gives Sections 5 *and* 7 meaning, consistent with Washington law. Section 5 applies when losses result from Alcoa's contractual breach, while the "more general" Section 7 governs "when

liability arises from some other act or omission." Op. 18. Alcoa's claim that Section 7 is "meaningless" or in peril under the court of appeals' decision is therefore unsupported. The only "conflict" that exists is the one that Alcoa's incorrect interpretation produces. Review is unwarranted. RAP 13.4(b)(1)-(2).

3. The court of appeals correctly determined that Section 5, not Section 7, controls BNSF's indemnity claim.

The court of appeals' determination that Section 5, not Section 7, governs BNSF's indemnity claim also is consistent with Washington law—not "contrary to" it. Pet. 22-24. "It is a well-known principle of contract interpretation that 'specific and exact terms are given greater weight than general language.'" *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 354-55, 103 P.3d 773 (2004) (citation omitted).

Here, Section 5 "is the more specific." Op. 17. Section 5 requires indemnity for losses resulting from Alcoa's contractual breach—a precise and unique trigger that is unlike Section 7 and

similar "broad and all-encompassing" indemnity provisions found in this Court's precedents. *See Snohomish*, 173 Wn.2d at 836. Alcoa's new argument that Section 7's "any act or omission" language is more specific than Section 5's "explicit, allocation of a risk approach" is unfounded. Op. 10.

Nor does Alcoa gain traction by suggesting that the appellate court erred by applying the specific-over-general rule absent "inconsistency." Pet. 25-26. The court acknowledged the potential inconsistency raised by Alcoa's argument and resolved it by allowing Sections 5 and 7 to operate within their respective spheres. This is precisely what the ITA, this Court's precedent, Alcoa's (earlier-issued, intermediate court) decision, and the Restatement allow. *See Adler*, 153 Wn. 2d at 354 (applying rule to harmonize a general and specific provision, based on an "arguabl[e] conflict[]"); Restatement (Second) of Contracts § 206 (1981). Review is not warranted to reinforce this "well-known principle" that the appellate court acknowledged and applied. RAP 13.4(b)(1)-(2).

4. The court of appeals did not construe the ITA against any drafter because that interpretative maxim is legally and factually irrelevant.

Alcoa finally asks the Court to review the appellate court's alleged failure to construe Section 5 against its purported drafter. This argument does not justify review because it merely advocates a settled legal standard that is inapplicable to this case.

Once again, Alcoa's objection is not with the appellate court's recognition of the legal rule, but with the court's conclusion. Alcoa concedes that "it is a well-established rule of construction that any ambiguity in the contract is construed against the drafter." Pet. 21. The appellate court did not disagree with that "well-established rule," much less create any conflict with it. It instead held that rule is inapplicable to Section 5's unambiguous text. No jurisprudential benefit is gained by this Court weighing in on a settled rule that is "well-established" in this Court's "longstanding precedent." *Id.*

Nor is Alcoa's error-correction argument valid. As it must, Alcoa admits that the interpretative rule applies only when

a provision is ambiguous and subject to two reasonable constructions, Pet. 20-22, and Section 5 is not. Even in this Court, Alcoa fails to identify *any* ambiguity in Section 5's clear language requiring that (1) Alcoa maintain adequate track clearance and (2) indemnify BNSF for losses resulting from Alcoa's contractual breach. While Alcoa suggests that Section 5 is necessarily ambiguous because the trial court (incorrectly) ruled it "unenforceable," that court did not find any ambiguity either.[10] It simply adopted the *per se* rule that Alcoa advocated but this Court's authority will not allow—that Section 5 is void and meaningless. As the appellate court noted, that outcome cannot survive scrutiny.

The "well-established" maxim is inapplicable for another reason. The rule operates at its peak when the parties' bargaining

[10] Alcoa's premise further withers under this Court's authorities reversing a trial court's ambiguity finding. *See McDowell*, 105 Wn.2d at 51-54. Clearly, judicial disagreement does not evidence ambiguity—especially when, as here, no court identified any ambiguity at all.

power is unequal. Restatement (Second) of Contracts § 206. That is not this case. BNSF and Alcoa are "commercial parties and nothing indicates any overreaching or one-sided bargaining power." Op. 18 (citation omitted).

Nor does any evidence establish the drafting or negotiation history for this 45-year-old document. Instead, Alcoa speculates without evidence that it "specifically negotiated" Section 7 and BNSF "mostly" drafted the remainder. Pet. 5-6. That attorney argument is no evidence of the parties' negotiations, drafting, or intent, and—more importantly—is legally irrelevant. Regardless, when, as here, "the drafter is unknown or … the parties drafted the contract together," the construe-against-the-drafter maxim has no place in the interpretative process. *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 713, 334 P.3d 116 (2014) (citing *Berg v. Hudesman*, 115 Wn.2d 657, 667-68, 801 P.2d 222 (1990)). Review is not warranted. RAP 13.4(b)(1)-(2).

B. The petition does not present any issue of substantial public interest.

Review also is unjustified because Alcoa's petition raises no issue of significant public interest. RAP 13.4(b)(4). The underlying unpublished decision interprets a 45-year-old document and a "differently-designed" indemnity provision that is "unlike [those in] all of the Washington decisions cited by Alcoa." Op. 10. Indeed, BNSF is unaware of *any* Washington decision interpreting a provision that, like Section 5, triggers indemnity from a contractual breach. Nor is there any evidence that a similar provision is likely to be in dispute in the future.

The appellate court's decision is therefore unlikely to "affect[] contracting parties across our State[.]" Pet. 20. If anything, the fact-bound decision reinforces and duplicates the "significant public interest" that this Court has repeatedly announced and long guarded: "[T]he highest public policy is found in the enforcement of the contract which was actually made." *Snohomish*, 173 Wn.2d at 854 (citation omitted).

V. CONCLUSION

The court of appeals interpreted the parties' "differently-designed" indemnity provision to reach an outcome that, while case- and contract-bound, dutifully applies this Court's precedent. Because nothing in that unpublished decision merits review, the Court should deny Alcoa's petition.[11]

We certify that this document contains 4,998 words, in compliance with RAP 18.17.

RESPECTFULLY SUBMITTED this 28th day of November, 2022.

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[11] Because it ruled that Section 5 governs, the appellate court did not reach a separate dispute of whether *Section 7* could require BNSF to indemnify Alcoa for the Links' loss-of-consortium claim against Alcoa. Remand to the court of appeals is necessary to address this issue if the Court grants review and reverses.

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