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SUPREME COURT
FOR THE STATE OF WASHINGTON

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PORT OF ANACORTES, a Washington municipal corporation,

*Respondent,*

v.

FRONTIER INDUSTRIES, INC., a Washington corporation; EINO "MIKE" JOHNSON and LORIE A. JOHNSON, a married couple; and ITOCHU INTERNATIONAL, INC., a foreign corporation,

*Petitioners.*

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# RESPONDENT'S REPLY ON MOTION TO STRIKE PETITIONERS' REPLY BRIEFING

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### Statutes, Regulations, and Court Rules


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## I. ARGUMENT

### A. Petitioners' Argument Would Render RAP 13.4(d)'s General Prohibition of Reply Briefs Meaningless.

The Petitioners' Joint Answer to Respondent's Motion to Strike ("Answer") seeks to obfuscate legal issues for review by this Court with legal arguments regarding why an issue should not be reviewed by this Court. A reply on a Petition for Review is only appropriate in this case if the Respondent Port of Anacortes raised new legal issues for review by this Court, which it did not do. See RAP 13.4(d). Accordingly, this Court should grant the pending Motion to Strike.

RAP 13.4(d) reads as follows (emphasis added):

> d) Answer and Reply. A party may file an answer to a petition for review. A party filing an answer to a petition for review must serve the answer on all other parties. If the party wants to seek review **of any issue** that is not raised in the petition for review, including any issues that were raised but not decided in the Court of Appeals, the party **must raise those new issues** in an answer. Any answer should be filed within 30 days after the service on the party of the petition. A party may file a reply to an answer **only if** the answering party seeks review o**f issues not raised in the petition for review**. A reply to an answer should be limited to addressing only the new issues raised in the answer. A party filing any reply to an answer must serve the reply to the answer on all other parties. A reply to an answer should be filed within 15 days after the service on the party of the answer. An answer or reply should be filed in the Supreme Court. The Supreme Court may call for an answer or a reply to an answer.

The fact that "issues" are separate and apart from "arguments" is so axiomatic that the discussion of it is almost non-existent in Washington's case law. This Court did, however, address this reality in *Doe v. Gonzaga University*, 143 Wn.2d 687, 24 P.3d 390 (2001) (reversed on other grounds in *Gonzaga University v. John Doe*, 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002)). In that case, John Doe appealed five primary issues to the Supreme Court, specifically:

> 1. Whether Gonzaga or its employees may be held liable for defamatory statements made only among Gonzaga personnel.
>
> 2. Whether Gonzaga has a duty to exercise reasonable care in collecting information or investigating whether a candidate for certification as a teacher has a history of serious behavioral problems.
>
> 3. Whether a candidate for certification as a teacher waives his or her common law right to privacy.
>
> 4. Whether FERPA creates any right or privilege which can be enforced by individuals under 42 U.S.C. § 1983.
>
> 5. Whether statements in Gonzaga's bulletin and other publications agreeing to provide an opportunity for students to be heard in matters affecting their welfare constitute an enforceable contract with regard to Gonzaga's issuance of an affidavit for teacher certification.

*Id.*, 143 Wn.2d at 700–01, 24 P.3d at 397. The University of Gonzaga filed an answer to Mr. Doe's petition for review, arguing why review should be denied. Mr. Doe submitted a reply, which Gonzaga moved to strike. The Court held as follows:

> As a threshold matter, Gonzaga moves to strike John Doe's reply to Gonzaga's answer to the petition for review. A party may not reply to an answer unless the answer raises a new issue. RAP 13.4(d). **In its answer, Gonzaga presented arguments as to why review should be denied**. However, Gonzaga **did not request that this Court address additional issues**. Therefore, Gonzaga's motion to strike is granted.

*Id.*, 143 Wn.2d at FN 8, 24 P.3d at FN 8 (emphasis added).

The fact that a reply brief is only appropriate where an answer seeks review of an entirely new legal issue, and not merely new arguments about the issue already under review, is evident in other Supreme Court case law as well. For example, see: *Estate of Jordan by Jordan v. Hartford Acc. And Indem. Co.*, 120 Wn.2d 490, 496, 844 P.2d 403, 407 (1993) (Failure to request review of standing argument in an answer to a petition for review bars review of the same.) and *Birchler v. Castello Land Co., Inc.*, 133 Wn.2d 106, 110 and FN3, 942 P.2d 968, 970 and FN3 (1997) (Failure to argue emotional distress damages should be trebled in answer to petition for review bars review of the same.)

If this Court held that every new legal argument regarding why review of the Petitioners' issue should be denied warranted a reply brief, then RAP 13.4(d)'s general prohibition against reply briefs would be rendered meaningless. If Petitioners' argument held true, every time a respondent's answer cited a different rule, statute, or case than petitioner in support of its argument that review of the issue raised by petitioner was

improper, the petitioner would be entitled to file a reply brief. This simply cannot be the case. This Court should follow *Doe* and strike Petitioners' Reply.

**B. A Sur-Reply is Required to Maintain Balance Contemplated by RAP.**

In the event this Court denies this Motion to Strike, then a limited sur-reply is required to maintain the procedural balance contemplated by the RAP. A Respondent should not be required to guess the grounds upon which a Petitioner will seek review. The RAP contemplates this, by requiring the Petitioner to open briefing detailing why it thinks it is entitled to review of a specific issue. The Respondent is then given the opportunity to respond to those specific arguments.

To the extent the Court permits the Reply brief to stand, Respondent is prejudiced as it had to guess what Petitioners' arguments would be under RAP 13.4(b ). A sur-reply brief presents the only opportunity for Respondent to directly respond to Petitioners' arguments under RAP 13.4(b) since they briefed the improper standard in the Petition for Review. The equities, and intended briefing structure adopted in the RAP, require that Petitioner be granted a sur-reply if the Court elects not to strike the Reply brief.

## II. CONCLUSION

The Port respectfully requests that the Court strike or disregard Defendants' improper Reply briefing for the reasons set forth above. If the Court declines to do so, the Port requests an opportunity to file a sur-reply addressing Defendants' new arguments not raised in their Petition.

Respectfully submitted this 18th day of February, 2020.

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## CHMELIK SITKIN & DAVIS P.S.

## February 18, 2020 - 11:16 AM

## Transmittal Information

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| **Filed with Court:** | Supreme Court |
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