SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of: ROBERT W. COONEY, Respondent, and HILLARY A. BROOKS, Petitioner.	No. 102677-3 PETITIONER'S ANSWER TO RESPONDENT'S REQUEST TO STRIKE STATEMENTS OF ADDITIONAL AUTHORITIES

Petitioner Hillary Brooks filed a first and a second statement of additional authorities under RAP 10.8. Respondent Robert Cooney then filed a response arguing the statements violated RAP 10.8 and RAP 18.17 and urging this Court to disregard the statements. But Brooks's statements comply with RAP 10.8—a conclusion that flows from common sense, from the rule's text, from reputable practice guides, and from federal authorities construing the federal analogue.[1]

[1] Brooks regrets filing this lengthy answer to Cooney's request that her statements be stricken. But those additional authorities are important and warrant the Court's attention as the Court discharges its duty to announce Washington law. *See State*

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Common Sense. The Court's sound consideration of any legal issue depends on the Court apprising itself of all relevant authorities. Were it otherwise, the Court could inadvertently fail to appreciate the issue's gravity—or could decide the issue inconsistently with other principles of Washington law. Indeed, to avoid this possibility, this Court—and the Court of Appeals—have long recognized that this Court may consider an authority even if the parties do not brief it. *See, e.g.*, *Ellis v. City of Seattle*, 142 Wn.2d 450, 460 n.3, 13 P.3d 1065 (2000) ("[A]ny court is entitled to consult the law in its review of an issue, whether or not a party has cited that law."); *State v. Ronquillo*, 190 Wn. App.

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v. Quismundo, 164 Wn.2d 499, 505-06, 192 P.3d 342 (2008); *Ellis v. City of Seattle*, 142 Wn.2d 450, 460 n.3, 13 P.3d 1065 (2000). Also, given the accusations in Cooney's objection, this Court deserves assurances that Brooks filed her statements with a good-faith understanding of what RAP 10.8 does and doesn't allow. Finally, because Cooney's objection functions as a motion, Brooks presents this filing as an answer under RAP 17.4(e). A request for relief like Cooney's must be treated as a motion, otherwise the accused party (here, Brooks) loses the opportunity to respond that RAP 17.4(e) contemplates. Ensconcing a motion to strike within a RAP 10.8(c) response should not prevent the other party from addressing it.

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765, 778, 361 P.3d 779 (2015) (relying on "an analogous case not cited by the parties"); *SAK & Associates, Inc. v. Ferguson Const., Inc.*, 189 Wn. App. 405, 415 n.32, 357 P.3d 671 (2015) (contrasting Washington precedent with a case "not cited by the parties"); *Pasado's Safe Haven v. State*, 162 Wn. App. 746, 760 n.8, 259 P.3d 280 (2011) ("[C]ourts are not restricted to the authority cited by the parties."); *State v. Beals*, 100 Wn. App. 189, 194, 997 P.2d 941 (2000) (finding "instructive" a case "not cited by the parties"). The appellate courts have a duty to correctly ascertain the law. *See, e.g., State v. Quismundo*, 164 Wn.2d 499, 505-06, 192 P.3d 342 (2008) (noting the "court's obligation to follow the law remains the same regardless of the arguments raised by the parties before it"). RAP 10.8 should be a device that assists, not hinders, the Court in fulfilling that responsibility.

Rule's Text. Nothing in RAP 10.8's text limits the parties to citing authorities newly issued after their last brief was filed. By the rule's terms, it allows parties to file statements that cite

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"additional authorities." RAP 10.8(a). The rule does not define this phrase as limiting citations to those cases published after the parties filed their last brief. Rather than say "new authorities" or "newly decided authorities," the rule uses a much broader term, "additional authorities," implying simply that a statement may cite any authority that would add to those included already in the briefs. Indeed, the rule's only limitation is that these "additional authorities must relate to a point made in the briefing or at oral argument." RAP 10.8(a). Cooney himself aligned with this broader understanding of the rule's text when this case was still in the Court of Appeals: after oral argument, Cooney filed a statement of additional authorities citing a case from 1988 that he had already cited in his brief (Br. of Resp't at 31).

Brooks's statements abided by the rule's text, contrary to Cooney's objection (at 2). Brooks's statements provided pinpoint citations of the "point[s]" that the additional authorities related to, as RAP 10.8(b) requires. *See* 1st at 1; 2d at 1. The additional authorities she cited in her first statement, *In re*

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Marriage of Kowalewski, 163 Wn.2d 542, 182 P.3d 959 (2008), and *In re Marriage of Soriano*, 44 Wn. App. 420, 722 P.2d 132 (1986), relate to her petition's argument that the term "property" has a broad connotation in dissolution proceedings. These additional authorities will assist the Court in evaluating whether Division I's "enforceable right" test for "property" comports with the equitable nature of dissolution proceedings. Brooks supplied a separate, second statement to cite *926 Ardmore Ave LLC v. County of Los Angeles*, 396 P.3d 1036 (Cal. 2017), because that additional authority relates to a different "point," RAP 10.8(b), which is that Division I's narrow definition of "property" invites unscrupulous spouses to avoid their disclosure obligations to their spouses and to the dissolution court. In short, Brooks complies with the letter of RAP 10.8, not with the extratextual gloss that Cooney urges.

Brooks hasn't tried to exploit RAP 10.8 to file an improper reply or to evade the word limitation for her petition. Indeed, she scrupulously focused her statements' arguments on Division I's

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opinion, not on Cooney's answer. And the recent amendment to RAP 10.8 allowing argument up to 350 words confirms that parties may file statements of additional authorities even if they have exhausted the word limits for their briefing.

To be sure, separate panels of Division I have divided on whether RAP 10.8 permits citation of preexisting authorities. *Compare City of Edmonds v. Edmonds Ebb Tide Ass'n of Apartment Owners*, 27 Wn. App. 2d 936, 945 n.2, 534 P.3d 392 (2023) (rejecting RAP 10.8 statement citing preexisting authorities); *with Ghodsee v. City of Kent*, 21 Wn. App. 2d 762, 782 n.16, 508 P.3d 193 (2022) (allowing one). The better-reasoned view, which aligns with the rule's text, is to allow citation of preexisting authorities that assist the Court. And, of course, counsel should endeavor to do so sparingly and to prefer citing all relevant preexisting authorities in the briefs.

Practice Guides. This view accords also with the guidance in *Washington Practice*. *See* 3 Elizabeth A. Turner, *Washington Practice: Rules Practice* RAP 10.8, at 118 (9th ed. & Aug. 2023

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Update) ("The procedure may also be used when, as happens occasionally, an important authority is simply overlooked while briefing."). Similarly, Washington appellate practitioners' main practice guide doesn't mention any purported limitation to newly decided cases. *See* I *Washington Appellate Practice Deskbook* § 14.12, at 14-49 to -50 (4th ed. 2016) (explaining that a RAP 10.8 statement "is a reference to relevant authorities not otherwise included in the briefs").

Federal Practice. This Court should interpret RAP 10.8 to align with the federal analogue, FRAP 28(j), as RAP 10.8 has drawn heavily on that rule. *See* 3 Elizabeth A. Turner, *Washington Practice: Rules Practice* RAP 10.8 (9th ed. & July 2023 Westlaw Update) (recognizing that the 2022 amendments to RAP 10.8 "'will allow for a degree of consistency between state and federal appellate practice'" (quoting Drafters' Comment)). FRAP 28(j) allows citation of supplemental authorities to support an argument advanced in the briefs, but not to raise a completely new issue. *Valdez v. Mercy Hosp.*, 961 F.2d

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1401, 1404 (8th Cir. 1992). For example, when an appellant's briefing says nothing about the doctrine of *res judicata*, the appellant may not use a FRAP 28(j) statement to raise that issue for the first time. *Siddiqui v. Holder*, 670 F.3d 736, 749 n.6 (7th Cir. 2012). But a federal court will consider a preexisting authority that directly supports an argument raised in the briefing already. *See, e.g.*, *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 431 (2d Cir. 2008) (considering a newly cited case that had been decided the year before). Indeed, federal practice guides recognize that FRAP 28(j) statements may include preexisting authorities "not found in earlier research." Bennett Evan Cooper, "Notices of Supplemental Authority," *Federal Appellate Practice: Ninth Circuit* § 14:36 (2023-2024 ed.); *accord* 16AA Wright & Miller Federal Practice & Procedure § 3974.6 (5th ed. & Apr. 2023 Westlaw Update) ("[A] Rule 28(j) letter can also be used to bring to the court's attention an authority that existed, but was not found by counsel, prior to briefing or argument.").

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For these reasons, this Court should reject Cooney's request for relief and should consider Brooks's statements of additional authorities.

This document contains 1,268 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 8th day of March 2024.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below I electronically served via email a true and accurate copy of the ***Petitioner's Answer to Respondent's Request to Strike Statements of Additional Authorities*** in Supreme Court Cause No. 102677-3 to the following:

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

DATED: March 8, 2024, at Seattle, Washington.

/s/ Matt J. Albers
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Comments:

Petitioner's Answer to Respondent's Request to Strike Statements of Additional Authorities

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