

## NOTE

### When Must Means May: How the Washington State Supreme Court Undermined the System of Checks and Balances in *SEIU Healthcare 775NW v. Gregoire*

*B. Porter Sesnon\**

“To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?”<sup>1</sup>

#### I. INTRODUCTION

SEIU<sup>2</sup> Healthcare 775NW (SEIU) is a union that represents approximately 25,000 home care workers, also known as individual providers (IPs).<sup>3</sup> The IPs provide care for elderly and disabled individuals who are Medicaid-eligible.<sup>4</sup> In 2001, the IPs and their patients sponsored an initiative,<sup>5</sup> I-775, to be voted on during the November 2001 general election.

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\* J.D. Candidate, Seattle University School of Law, 2012; B.A., Sociology with Honors, Seattle University, 2007.

1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

2. SEIU stands for the Service Employees International Union. SERV. EMPs. INT’L UNION, <http://www.seiu.org> (last visited Sept. 30, 2011).

3. See Agreed Statement of Facts at 1, *SEIU Healthcare 775NW v. Gregoire*, 229 P.3d 774 (Wash. 2010) (No. 82551–3) [hereinafter Agreed Statement of Facts]; *About Us*, SEIU HEALTHCARE 775NW, [http://www.seiu775.org/about\\_us/Default.aspx](http://www.seiu775.org/about_us/Default.aspx) (last visited Nov. 20, 2010) [hereinafter SEIU, *About Us*].

4. WASH. REV. CODE § 74.39A.240(3) (2010) (“‘Individual provider’ means a person, including a personal aide, who has contracted with the department to provide personal care or respite care services to functionally disabled persons under the [M]edicaid personal care . . . program, or to provide respite care or residential services and support to persons with developmental disabilities . . .”).

5. The initiative process allows residents of Washington State to petition to place proposed legislation on the ballot if they are dissatisfied with the current law or feel like new laws are needed. The proposed legislation can also be submitted directly to the legislature for consideration at the regular legislative session. See WASH. SEC’Y OF STATE, FILING INITIATIVES AND REFERENDA IN

I-775 proposed that the IPs be able to form a union for collective-bargaining purposes.<sup>6</sup> Voters approved this initiative by a 2-to-1 margin on November 6, 2001.<sup>7</sup> Following the passage of I-775, the IPs formed a union and chose SEIU to be their exclusive bargaining representative. They named the union SEIU Healthcare 775NW after I-775.<sup>8</sup> I-775 allowed the IPs to collectively bargain with the State of Washington to determine their wages, hours, and working conditions.<sup>9</sup>

In December 2008, SEIU filed an original action in the Washington State Supreme Court, asking the court to issue a writ of mandamus<sup>10</sup> to compel Governor Christine Gregoire to revise her recently submitted budget proposal. SEIU wanted the Governor to include a request for funds necessary to implement the collective-bargaining agreement that the State and SEIU agreed to two months earlier.<sup>11</sup> SEIU disputed Governor Gregoire's failure to include a request to fund the collective-bargaining agreement in her proposed 2009–11 biennial budget.<sup>12</sup> SEIU argued that Governor Gregoire had a mandatory<sup>13</sup> and ministerial<sup>14</sup> duty to submit the request for funding the agreement in her proposed budget.<sup>15</sup> The State countered by arguing that the duty was neither mandatory nor ministerial because the Governor has complete discretion when submit-

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WASHINGTON STATE 2011–2012 6 (2011), available at [http://www.sos.wa.gov/\\_assets/elections/Initiative%20and%20Referenda%20Manual.pdf](http://www.sos.wa.gov/_assets/elections/Initiative%20and%20Referenda%20Manual.pdf).

6. Rebecca Cook, *State to Regulate Home Caregivers*, SPOKESMAN REV., Nov. 7, 2001, <http://www.spokesmanreview.com/news-story.asp?date=110701&ID=s1050349&cat=section.regional>; Angela Galloway, *Home-Care Reform Plan, I-775, is Union-Made*, SEATTLE POST-INTELLIGENCER, Oct. 9, 2001, [http://www.seattlepi.com/local/42137\\_init10.shtml](http://www.seattlepi.com/local/42137_init10.shtml); *Initiative 775 Qualifies to Ballot*, WASH. SEC'Y OF STATE (Aug. 1, 2001), [http://www.sos.wa.gov/office/osos\\_news.aspx?i=Zkqx6fmRQPXp0fPROEXajg%3D%3D](http://www.sos.wa.gov/office/osos_news.aspx?i=Zkqx6fmRQPXp0fPROEXajg%3D%3D).

7. WASH. SEC'Y OF STATE, 2001 GEN. ELECTION RESULTS REP., [http://www.sos.wa.gov/elections/results\\_report.aspx?e=21&c=&c2=&t=&t2=5&p=&p2=&y=](http://www.sos.wa.gov/elections/results_report.aspx?e=21&c=&c2=&t=&t2=5&p=&p2=&y=) (last visited Oct. 11, 2011); see also David Rolf & Kathy Coster, Op-Ed., *Public Wants Home Care Strengthened*, SEATTLE POST-INTELLIGENCER, Dec. 13, 2001, [http://www.seattlepi.com/opinion/50550\\_homeop.shtml](http://www.seattlepi.com/opinion/50550_homeop.shtml).

8. SEIU, *About Us*, *supra* note 3.

9. § 74.39A.240(3); Agreed Statement of Facts, *supra* note 3, at 1.

10. A writ of mandamus is a court order compelling a public agency or governmental body to perform an act required by law when it has neglected or refused to do so. BLACK'S LAW DICTIONARY 961 (6th ed. 1991).

11. See Brief of Petitioner at 2, *SEIU Healthcare 775NW v. Gregoire*, 229 P.3d 774, 777 (Wash. 2010) (No. 82551–3) [hereinafter Brief of Petitioner]; see also Curt Woodward, *Home-Care Union Sues Gregoire*, SEATTLE TIMES, Dec. 30, 2008, [http://seattletimes.nwsourc.com/html/politics/2008571895\\_seiu30.html](http://seattletimes.nwsourc.com/html/politics/2008571895_seiu30.html).

12. See Brief of Petitioner, *supra* note 11, at 2.

13. See discussion *infra* Part IV.A.1.b.

14. See *SEIU Healthcare 775NW*, 229 P.3d at 777 (“[W]here the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial.” (quoting *State v. City of Seattle*, 242 P. 966, 968 (Wash. 1926))); see also discussion *infra* Part IV.A.1.c.

15. See Brief of Petitioner, *supra* note 11, at 2.

ting the proposed budget to the legislature.<sup>16</sup> Further, the State argued that even if the duty were mandatory and ministerial, SEIU had not satisfied the statutory prerequisites because the director of financial management had not certified the collective-bargaining agreement as financially feasible for the state.<sup>17</sup>

Ultimately, the Washington State Supreme Court denied SEIU's petition for a writ of mandamus on three grounds.<sup>18</sup> First, the court held that the duty was not ministerial because the budgetary process requires the Governor's complete discretion, making the case inappropriate for mandamus.<sup>19</sup> Second, even if mandamus were appropriate, the court would have exercised its discretion and denied the writ because of the financial crisis facing the state.<sup>20</sup> Finally, the case was nevertheless moot because the legislature had already passed the budget that SEIU requested to be withdrawn, eliminating SEIU's only requested relief.<sup>21</sup>

Through this flawed reasoning, the Washington State Supreme Court undermined the cornerstones of the system of checks and balances between the branches of government: (1) the judiciary's deference to the legislature on matters of policy; (2) the judiciary's responsibility to check the power of the executive when the executive disregards a validly enacted statute; and (3) the legislature's ability to check the power of the executive through enacting valid statutes.<sup>22</sup>

This Note examines the statutory framework that allows the IPs to collectively bargain with the state, the factual dispute between Governor Gregoire and SEIU, and the legal reasoning used by the Washington State Supreme Court to resolve the dispute. Part II discusses the statutory framework for collective bargaining between SEIU and the state, and how an agreement is funded. Part III examines the facts underlying the dispute in *SEIU Healthcare 775NW v. Gregoire* and the reasoning of the Washington Supreme Court in the case.<sup>23</sup> Part IV explains the flawed reasoning behind the decision and discusses the future consequences of the decision.<sup>24</sup> Finally, Part V offers a brief conclusion.

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16. See Brief of Respondent at 22–23, *SEIU Healthcare 775NW*, 229 P.3d 774 (No. 82551–3) [hereinafter Brief of Respondent].

17. *Id.* at 22.

18. See discussion *infra* Part III.

19. See *SEIU Healthcare 775NW*, 229 P.3d at 777–78.

20. See *id.* at 778–79.

21. See *id.* at 779.

22. *Id.* at 784–85 (Madsen, C.J., dissenting).

23. *Id.*

24. *Id.*

## II. THE STATUTORY FRAMEWORK FOR COLLECTIVE BARGAINING

The statutory framework enacted pursuant to I-775 designates the governor as the public employer of the IPs and requires the governor to negotiate the collective-bargaining agreements with SEIU, the IPs' representative for the purposes of collective bargaining.<sup>25</sup> This Part explains the collective-bargaining process and how the state funds collective-bargaining agreements.

The collective-bargaining process determines the wages, hours, working conditions, and grievance procedures of the IPs.<sup>26</sup> When the two sides reach an agreement,<sup>27</sup> it does not become binding on the parties unless the director of financial management has certified the agreement as financially feasible for the state.<sup>28</sup> But if the parties reach an impasse during collective bargaining, they are required to submit the unresolved issues to arbitration.<sup>29</sup> After the issues have been submitted for arbitration, the arbiter must consider two main factors when resolving the impasse.<sup>30</sup> First, the arbiter compares the hours, wages, and working conditions of similar, publicly reimbursed IPs that serve similar clients within the state and nationally.<sup>31</sup> Second, the arbiter considers the state's ability to pay for the compensation and benefits it might award.<sup>32</sup> Unlike the directly negotiated agreement, the arbiter's decision does not need to be certified by the director of financial management for it to become binding on the parties.<sup>33</sup>

Before the governor makes a request to the legislature to fund the agreement, two statutory prerequisites must be satisfied.<sup>34</sup> First, the request for funds necessary to implement the agreement must be "submit-

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25. WASH. REV. CODE § 74.39A.270(1) (2010). The statute also provides that the governor's designee can negotiate the collective-bargaining agreements if the governor so chooses. *Id.*

26. *Id.* § 74.39A.270(6).

27. *Id.* § 74.39A.270(2)(c) ("The mediation and interest arbitration provisions of RCW 41.56.430 through 41.56.470 and 41.56.480 apply . . .").

28. *Id.* § 74.39A.300(2)(b).

29. *Id.* § 74.39A.270(2)(c) (stating that the arbitration provisions contained in sections 41.56.430–470 and 41.56.480 of the Washington Revised Code will apply). The specific process for certification of the issues for arbitration is contained in section 41.56.450.

30. *Id.* § 41.56.465(5)(a). The arbiter also has the discretion to consider four other factors. First, the arbiter can compare the hours, wages, and working conditions of publicly employed IPs serving similar clients across the state and country. Second, the arbiter can consider the state's interest in promoting a stable, long-term care workforce that can provide quality care. Third, the arbiter can consider the state's interest in ensuring access to affordable, quality health care. Fourth, the arbiter can consider the state's fiscal interest in reducing reliance on public welfare programs. *Id.* § 41.56.465(5)(b).

31. *Id.* § 41.56.465(5)(a)(i).

32. *Id.* § 41.56.465(5)(a)(ii).

33. *Id.* § 74.39A.300(2)(b).

34. *Id.* § 74.39A.300(2).

ted to the director of financial management by October 1st prior to the legislative session at which the request is to be considered.”<sup>35</sup> Second, the request must either be “certified by the director of financial management as being feasible financially for the state or reflect the binding decision of an arbitration panel reached under RCW § 74.39A.270(2)(c).”<sup>36</sup> In any event, once the union and governor reach an agreement, it does not take effect unless the legislature funds it.<sup>37</sup>

If the parties submit a valid agreement or award on time, the statute provides that “the governor must submit, as part of the proposed biennial or supplemental operating budget submitted to the legislature . . . a request for funds necessary . . . to implement the compensation and fringe benefits provisions of a collective-bargaining agreement entered into . . . .”<sup>38</sup> Once the governor submits the request for funds to the legislature, the legislature must vote on whether to fund the request in its final budget.<sup>39</sup> If the legislature rejects it or simply fails to act, then the agreement will be reopened for renegotiation.<sup>40</sup> But if the legislature approves the award, the governor still has the ability to strike it from the budget with the governor’s line-item veto power.<sup>41</sup>

The governor or the legislature can also modify an agreement currently in force if the state experiences a significant revenue shortfall.<sup>42</sup> Before an agreement can be modified, the governor or the legislature must issue a proclamation stating that a current and significant revenue shortfall exists and then ask the union to reopen and modify the existing

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35. *Id.* § 74.39A.300(2)(a).

36. *Id.* § 74.39A.300(2)(b).

37. *Id.* § 74.39A.300(3).

38. *Id.* § 74.39A.300(1). To keep the legislature apprised of a collective-bargaining agreement that has been entered into, the governor is also required to periodically consult with the legislature regarding the appropriations necessary to implement the award and any potential legislation needed to fund it. *Id.* § 74.39A.300(5).

39. *See id.* § 74.39A.300(3).

40. *See id.* If the parties cannot come to a new agreement during the renegotiation, the collective-bargaining award from the prior budget will stay in effect. *See id.* § 74.39A.300(6).

41. *See* WASH. CONST. art. III, § 12 (defining the governor’s veto powers); Wash. State Leg. v. Lowry, 931 P.2d 885, 892–93 (Wash. 1997) (upholding the governor’s ability to veto budget provisions).

42. § 74.39A.300(7). This process is currently taking place. Governor Gregoire issued the proclamation asking for eight collective-bargaining agreements to be reopened after the most recent revenue forecast projected another \$385 million shortfall for the budget that ran through June 2011. Needless to say, SEIU Healthcare 775NW is not very happy about this request because their original request for funding was not submitted, and the IPs are operating under the contract entered into for the 2007–2009 biennium. The president of the local SEIU said that “[i]nstead of balancing her budget on the backs of the lowest-paid workers in the state, I think the governor should call the Legislature into a special session tomorrow,” and a union spokesman said that “[t]here isn’t much of anything left to cut.” Rachel La Corte, *Gov. Chris Gregoire Asks Unions to Return to Bargaining Table*, SEATTLE TIMES, Nov. 19, 2010, [http://seattletimes.nwsources.com/html/localnews/2013478141\\_unions20m.html?syndication=rss](http://seattletimes.nwsources.com/html/localnews/2013478141_unions20m.html?syndication=rss).

agreement.<sup>43</sup> But neither the governor nor the legislature can impose unilateral changes, and the union does not have to agree to change the current agreement.<sup>44</sup> Nonetheless, if the proclamation is issued, the parties are required to immediately enter into bargaining to potentially modify the agreement.<sup>45</sup>

### III. GOVERNOR GREGOIRE DOES NOT INCLUDE THE REQUEST FOR FUNDING IN THE PROPOSED BUDGET; SEIU PETITIONS FOR A WRIT OF MANDAMUS

Governor Gregoire did not include a request to fund the collective-bargaining agreement in her proposed biennial budget,<sup>46</sup> which prompted SEIU to file a petition for a writ of mandamus.<sup>47</sup> This Part discusses the collective-bargaining agreement reached between SEIU and Governor Gregoire, the Governor's refusal to include the award in her proposed 2009–2011 budget, and the reasoning behind the Washington State Supreme Court's refusal to grant SEIU's petition for a writ of mandamus.

#### *A. The Collective-Bargaining Agreement Between SEIU and Governor Gregoire*

SEIU and the Labor Relations Office<sup>48</sup> commenced the collective-bargaining process for the 2009–2011 labor agreement on April 4, 2008.<sup>49</sup> During the initial bargaining process, the parties reached a tentative agreement on a few issues; however, the parties reached an impasse on several important issues, including wage and fringe-benefit provisions.<sup>50</sup> The parties decided to certify the remaining issues for arbitration in order to complete the collective-bargaining process, which began in August 2008 and ended in early September 2008.<sup>51</sup>

During the arbitration hearings, the state produced substantial evidence about its rapidly deteriorating financial condition and its likely inability to pay any increases in wages and fringe benefits.<sup>52</sup> Wolfgang Opitz, the deputy director of the Office of Financial Management, testi-

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43. § 74.39A.300(7).

44. *See id.*

45. *Id.*

46. Agreed Statement of Facts, *supra* note 3, at 5.

47. *Id.*

48. Governor Gregoire designated the Labor Relations Office, a division of the State Office of Financial Management, to handle the collective bargaining with SEIU Healthcare 775NW. *Id.* at 1–2.

49. *Id.* at 2.

50. *Id.*

51. *Id.*

52. *Id.* at 2–3.

fied that the estimated shortfall for the 2009–2011 biennial budget was projected to be \$2.7 billion.<sup>53</sup> Further, he expected the budget shortfall to grow in the weeks and months ahead, as the country was in the middle of a historic economic crisis.<sup>54</sup>

While taking into account the state’s financial arguments, the arbitrator ultimately awarded SEIU wage increases of 2.4% and 2.0% to take effect in July 2009 and July 2010, respectively.<sup>55</sup> The total cost of the award to the state, minus matching federal Medicaid funds, would have been \$72.5 million for the 2009–2011 budget.<sup>56</sup> The arbitrator explained that “the award is not a rich one” because of his overriding concern with “the State’s ability to pay for any increased costs” due to its rapidly deteriorating financial condition.<sup>57</sup> Further, he noted that “it would not be professionally responsible for the Arbitrator to be anything other than extremely conservative with regard to the expenditure of [the State’s] funds.”<sup>58</sup>

SEIU submitted the request for funding, along with the arbitration decision itself, to the director of financial management by the statutory deadline of October 1st.<sup>59</sup> After submitting the request for funding, SEIU’s members approved the 2009–2011 labor contract.<sup>60</sup>

### *B. Governor Gregoire Does Not Include the Award in the Proposed Budget*

Governor Gregoire submitted her proposed 2009–2011 budget to the legislature on December 18, 2008. The proposed budget, however, did not contain any funding for the arbitration award for SEIU.<sup>61</sup> Between the time of the arbitration decision and the proposed budget, the Economic and Revenue Forecasting Council released its quarterly report in November 2008.<sup>62</sup> The report stated that the already precarious eco-

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53. *Id.* at 45 Ex. 4.

54. *Id.* at 46 Ex. 4.

55. *Id.* at 318–19 Ex. 10.

56. Brief of Respondent, *supra* note 16, at 12.

57. Agreed Statement of Facts, *supra* note 3, at 304 Ex. 10.

58. *Id.*

59. *Id.* at 3–4.

60. *Id.* at 4.

61. *Id.* at 5 (“The Governor’s budget document does not include a request for funding to implement the compensation and fringe benefit increases decided by Arbitrator Williams [the arbitrator], and does not include a request for funding to implement any compensation or money contributions that were agreed to by the parties and not subject to interest arbitration.”).

62. The Washington State Economic and Revenue Forecasting Council is a state agency that “promote[s] state government financial stability by producing an accurate forecast of economic activity and General Fund revenue for the legislature and the governor to be used as the basis of the state budget.” *About Us*, WASH. STATE ECON. & REVENUE FORECAST COUNCIL, <http://www.ercf.wa.gov/about/index.shtml> (last visited Nov. 25, 2010).

conomic conditions of the state had “deteriorated sharply,” and it estimated an even greater budget shortfall than the State predicted during the arbitration proceeding.<sup>63</sup>

On December 17, 2008, the director of the Office of Financial Management advised Governor Gregoire to exclude thirteen collective-bargaining agreements and arbitration awards between the State and various unions, including SEIU, from her proposed budget.<sup>64</sup> The director suggested that the Governor not include the awards in her proposed budget because they were not financially feasible for the state due to the projected and dramatic revenue shortfall,<sup>65</sup> and because the governor is required by state law to propose a balanced budget to the legislature.<sup>66</sup>

The following day, on December 18, the Office of Financial Management informed SEIU that the request for funds was not financially feasible and would be excluded from Governor Gregoire’s proposed budget.<sup>67</sup> On that same day, Governor Gregoire submitted her 2009–2011 proposed biennial budget without the funding request for SEIU’s arbitration award.<sup>68</sup>

### C. SEIU Petitions for a Writ of Mandamus

On December 29, 2008, just eleven days after Governor Gregoire submitted her proposed budget, SEIU filed an original action in the Washington State Supreme Court requesting a writ of mandamus.<sup>69</sup> The petition for mandamus asked the court to compel Governor Gregoire to withdraw her budget proposal and submit a revised budget that would include a funding request for the arbitration award.<sup>70</sup> After hearing oral

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63. Agreed Statement of Facts, *supra* note 3, at 406 Ex. 12 (“The forecast for the 2009–11 biennium is \$30.1 billion, which is \$1.4 billion lower than expected in the September forecast.”).

64. *Id.* at 4–5, 530 Ex. 14.

65. *Id.*

66. WASH. REV. CODE § 43.88.030(2) (2010) (“The total of beginning undesignated fund balance and estimated revenues less working capital and other reserves shall equal or exceed the total of proposed applicable expenditures.”). Contrary to popular belief, there is no constitutional requirement that the state budget be balanced. See Andrew Garber, *State Isn’t Required To Balance Budget, but it’s Still the Goal*, SEATTLE TIMES, Dec. 8, 2008, [http://seattletimes.nwsourc.com/html/politics/2008480910\\_budget08m.html](http://seattletimes.nwsourc.com/html/politics/2008480910_budget08m.html).

67. Agreed Statement of Facts, *supra* note 3, at 535 Ex. 15.

68. *Id.* at 5.

69. SEIU Healthcare 775NW v. Gregoire, 229 P.3d 774, 776–77 (Wash. 2010). The Washington State Supreme Court has nonexclusive and discretionary jurisdiction to issue a writ. See *Brown v. Owen*, 206 P.3d 310, 316 (Wash. 2009). Mandamus is appropriate for determining “the constitutionality of a statute and matters relating to the expenditure of public funds.” *Id.* (quoting *State ex rel. Heavey v. Murphy*, 982 P.2d 611, 613 (Wash. 1999)). One of the primary concerns when directing the writ at a coequal branch of government is to “not infringe upon the historical and constitutional rights of that branch.” *Id.* (quoting *Walker v. Munro*, 879 P.2d 920, 924 (Wash. 1994)).

70. SEIU Healthcare 775NW, 168 229 P.3d at 776–77.

argument on March 10, 2009, the Washington Supreme Court waited thirteen months to issue its decision in *SEIU Healthcare 775NW*.<sup>71</sup> In a 5–4 opinion written by Justice James M. Johnson, the court denied the writ of mandamus for three reasons: a lack of ministerial duty, a need to exercise judicial restraint, and concerns over justiciability.<sup>72</sup> This section examines the three reasons for the court’s denial of SEIU’s petition for mandamus.

Initially, the court had to determine whether the duty in question was appropriate for mandamus.<sup>73</sup> Because mandamus is appropriate only for a ministerial act, the court began with the threshold question of whether submitting the request for funding to the legislature was ministerial in nature.<sup>74</sup> An act is ministerial if it involves no discretion on the part of the public official.<sup>75</sup> The court, however, held that the decision to exclude SEIU’s arbitration award from the budget was not a ministerial act because the statute that required the request did not contain a funding source to implement it.<sup>76</sup> Thus, the decision to exclude the award necessarily involved the governor’s discretion in determining how to fund the award.<sup>77</sup> Because the state had to propose a balanced budget, and because the state itself was in a precarious financial situation, the court reasoned that the governor would have to remove other items from the budget to accommodate the request.<sup>78</sup> Such a removal would necessarily require the governor to exercise discretion in making cuts to the proposed budget.<sup>79</sup> In sum, the court concluded that

[i]t is difficult to imagine an act more essentially a policy decision for the governor than the submission . . . of a budget during an eco-

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71. While thirteen months is generally a standard amount of time between oral argument and a decision, SEIU was seeking immediate relief by having the Governor submit a revised budget. *Id.* at 791 (Sanders, J., concurring in dissent) (“This case deserved swift action to protect the rights of these workers and their union. I have signed the dissent but would have preferred to initially decide this case by order with opinion to follow.”). The court most likely delayed to avoid the case on justiciability grounds. *Id.* at 781 n.1 (Madsen, C.J., dissenting) (“The majority says this case may be moot but proceeds to the merits anyway.”).

72. *See id.* at 780.

73. *See id.* at 777 (“[W]e have placed strict limits on the circumstances under which we will issue the writ [of mandamus] to public officers and held that ‘mandamus may not be used to compel the performance of acts or duties which involve discretion on the part of a public official.’” (quoting *Walker*, 879 P.2d at 925)).

74. *Id.* at 777.

75. *Id.*

76. *Id.* at 777–78.

77. *Id.* at 778.

78. *Id.* at 777–78.

79. *Id.* at 778. In a footnote, the court sua sponte raised the issue that the governor could propose a new tax to fund the labor agreement to avoid future issues. But the court, in dicta, stated such action would also involve discretion, which is “a requirement similarly at odds with the principles of mandamus.” *Id.*

conomic downturn. The creation and submission of a budget proposal is clearly one of those discretionary acts that are “in their nature political, or which are, by the constitution and laws, submitted to the executive . . . .”<sup>80</sup>

The majority also pointed out that any discussion about whether there was a mandatory duty to submit a request to fund the agreement “would be purely academic,” since the court already held that the act was not ministerial.<sup>81</sup>

Even if mandamus was proper, the court said it would “exercise judicial discretion” because of “[t]he recent severe economic difficulties faced by our state present circumstances dictating such judicial restraint.”<sup>82</sup> Because of the high costs to public resources and the likely negative effects to social programs if mandamus was issued, the majority noted that “[e]quity . . . strongly counsels against issuing the writ even were mandamus an appropriate remedy.”<sup>83</sup> During oral argument, Justice James M. Johnson was very concerned at the prospect of Governor Gregoire being forced to cut \$100 million from somewhere else in the budget to accommodate SEIU’s request.<sup>84</sup> Because Governor Gregoire is required by statute to propose a balanced budget, the court felt it was best to also refrain from issuing the writ due to the precarious financial condition of the state.<sup>85</sup>

Finally, at the very end of the majority opinion, the court held that the case was nevertheless moot since the budget in question had been submitted and approved over a year prior to the decision.<sup>86</sup> The majority wanted to “refrain from requiring the performance of useless or vain acts” because compliance with the writ would have zero operative effect on the already submitted budget.<sup>87</sup> Therefore, the court could “no longer provide effective relief” regarding SEIU’s request to have the budget recalled.<sup>88</sup> The majority further felt it was improper to grant any relief on

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80. *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)).

81. *Id.* at 778 n.8.

82. *Id.* at 778.

83. *Id.*

84. Oral Argument at 15:02, *SEIU Healthcare 775NW*, 229 P.3d 774 (No. 82551-3) [hereinafter Oral Argument], available at <http://www.tvw.org/media/mediaplayer.cfm?evid=2009030016D&TYPE=V&CFID=1428461&CFTOKEN=45615245&bhcp=1>.

85. See WASH. REV. CODE § 43.88.030(2) (2010) (“The total of beginning undesignated fund balance and estimated revenues less working capital and other reserves shall equal or exceed the total of proposed applicable expenditures.”); *SEIU Healthcare 775NW*, 229 P.3d at 778-79.

86. *SEIU Healthcare 775NW*, 229 P.3d at 779-80.

87. *Id.* at 779 (quoting *Vashon Island Comm. for Self-Gov’t v. Wash. State Boundary Rev. Bd.*, 903 P.2d 953, 956 (Wash. 1995)).

88. *Id.*

its own accord because SEIU did not request any additional or alternative relief in its writ.<sup>89</sup>

#### IV. THE COURT UNDERMINES THE CORNERSTONES OF CHECKS AND BALANCES BETWEEN THE THREE BRANCHES OF GOVERNMENT

Courts have the important duty of keeping the executive and legislative branches from exceeding their constitutional authority.<sup>90</sup> While the Washington State Constitution does not have an express separation of powers clause, the division of government into separate branches has presumed to give rise to one.<sup>91</sup> Evolving alongside the separation of powers doctrine was the concept of checks and balances.<sup>92</sup> This concept gives the judiciary the power to say what the law is, even if it restrains the power or activities of another branch of government.<sup>93</sup>

By denying SEIU's petition for a writ of mandamus, the Washington State Supreme Court dramatically undermined the cornerstone of the balance of powers between the branches of government in three ways. First, by construing the duty prescribed as not ministerial, the court failed to give proper deference to a validly executed statute enacted by the legislature.<sup>94</sup> Second, by allowing Governor Gregoire to completely disregard a statutorily mandated budget inclusion, the court failed to provide a check on the power of the governor.<sup>95</sup> Third, under the guise of judicial restraint, the court exceeded its authority by not issuing the writ due to the financial crisis faced by the state, even if the duty was ministerial.<sup>96</sup> This Part examines the three errors in detail.

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89. *Id.* at 779–80 (“Without a request in the petition for a specific writ . . . we will not, on our own, craft such a remedy . . .” (quoting *Walker v. Munro*, 879 P.2d 920, 924 (Wash. 1994))).

90. *See id.* at 781 (Madsen, C.J., dissenting); *Brown v. Owen*, 206 P.3d 310, 316 (Wash. 2009) (“The doctrine [separation of powers] serves mainly to ensure that the fundamental functions of each branch remain inviolate.” (quoting *Carrick v. Locke*, 882 P.2d 173, 176–77 (Wash. 1994))).

91. *See* WASH. CONST. art. II, § 1; WASH. CONST. art. III, §2; WASH. CONST. art. IV, § 1; *SEIU Healthcare 775NW*, 229 P.3d at 784–85 (Madsen, C.J., dissenting); *Brown*, 206 P.3d at 316 (discussing the purpose of separation of powers); *Carrick*, 882 P.2d at 176–77 (same); *In re Salary of Juvenile Dir.*, 552 P.2d 163, 168–70 (Wash. 1976) (outlining the development of the federal separation of powers doctrine).

92. *See In re Salary of Juvenile Dir.*, 552 P.2d at 168–70 (outlining the evolution of checks and balances at the federal level and applying the outline to Washington State).

93. *Id.* at 168.

94. *SEIU Healthcare 775NW*, 229 P.3d at 777–78.

95. *Id.* at 777 n.6.

96. *Id.* at 778.

### A. The Court Fails to Give Proper Deference to the Legislature

The statute enacted pursuant to I-775 stated that the governor “must submit” a request for funds necessary to implement the collective-bargaining agreement with SEIU in the proposed budget.<sup>97</sup> But the Governor did not request the funds necessary, and the court’s decision in *SEIU Healthcare 775NW* left the legislature powerless to force her to do so in the future.<sup>98</sup> As a result, the court failed to give proper deference to a duly enacted statute by the legislature for two reasons. First, the statute imposed on the governor a mandatory and ministerial duty to include funding requests for collective-bargaining agreements in the proposed budget.<sup>99</sup> Second, the decision leaves the legislature with no power to force the governor to include such items in future proposed budgets.<sup>100</sup>

#### 1. By Its Plain Meaning, the Statute Prescribes a Mandatory and Ministerial Duty

By its plain meaning, the statutory phrase “must submit”<sup>101</sup> created a mandatory and ministerial duty for the governor to submit the request for funds, as long as the two prerequisites in the statute were satisfied.<sup>102</sup> The court first erred by not considering whether a mandatory duty existed before it determined that the duty was not ministerial.<sup>103</sup> By its own admission, the court stated that if a mandatory duty existed, then there must be a further determination of whether that duty is also ministerial.<sup>104</sup> Thus, before a duty can be deemed ministerial, it must first be deemed mandatory.<sup>105</sup> And if that statement is to be accepted—as it was by the

97. WASH. REV. CODE § 74.39A.300(1) (2010).

98. Agreed Statement of Facts, *supra* note 3, at 5.

99. See § 43.88.060 (The governor must submit proposed budget no later than December 20th of the year preceding the year that it will be considered.); *SEIU Healthcare 775NW*, 229 P.3d at 780 (Madsen, C.J., dissenting) (“In this state, the legislature and the governor each has powers and responsibilities with respect to the budget, and neither alone has unlimited discretion as to what *must* be, as opposed to *may* be, included.”).

100. See *SEIU Healthcare 775NW*, 229 P.3d at 787 (Madsen, C.J., dissenting) (“[T]he majority opinion means no less than that any governor may flout any law regarding any mandatory budget requirement and absolutely nothing can be done about it.”).

101. § 74.39A.300(1).

102. *Id.* § 74.39A.300(2).

103. See *SEIU Healthcare 775NW*, 229 P.3d at 778 n.8, which states the following:

Because we hold that the duty identified by the petitioner is not ministerial, we need not reach a decision as to whether it is mandatory. To clarify, even if the duty *is* mandatory as the petitioner contends, its nonministerial nature precludes the application of mandamus, and any inquiry into the degree to which RCW 74.39A.300 obligates the governor to include funding for compensation and fringe benefits in her proposed biennial budget document would be purely academic.

104. *Id.* at 777 (“Where we find a mandatory duty, we must further determine whether that duty is ministerial . . . .”) (quoting *Brown v. Owen*, 206 P.3d 310, 320 (Wash. 2009)).

105. *Id.*

majority—the court should not have reached the question of whether the duty was ministerial until it had first determined whether the duty was mandatory.<sup>106</sup> The court, therefore, should have first determined whether the statute created a mandatory duty, which would have been easily determined if the court considered whether the two statutory prerequisites were satisfied.

*a. The Two Statutory Prerequisites are Satisfied*

The proposed request for funding SEIU's arbitration award satisfied the two statutory prerequisites.<sup>107</sup> The first prerequisite requires that the request for funds be submitted to the director of the Office of Financial Management by October 1st.<sup>108</sup> The second prerequisite requires that the request either be certified as financially feasible by the director of the Office of Financial Management or that it reflect a binding arbitration decision between the parties.<sup>109</sup>

Both sides agreed that the first statutory prerequisite was met because the request for funding was received by the director of the Office of Financial Management by the October 1st deadline.<sup>110</sup> While both sides agreed that the arbitration award was not certified as financially feasible by the director of the Office of Financial Management, the question of whether the arbitration decision was binding between SEIU and the State was hotly contested.<sup>111</sup> The majority, however, did not even reach the question of whether the arbitration decision was binding because it prematurely determined that the duty was not ministerial.<sup>112</sup> Had the court examined the issue, it would have found that the arbitration award was binding and thus satisfied the second statutory prerequisite.<sup>113</sup>

In its brief, the State argued that the arbitration award was not binding on Governor Gregoire because the legislature had not approved funding for the award.<sup>114</sup> The State relied on section 74.39A.270(2) of the Washington Revised Code, which states,

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106. *Id.*

107. § 74.39A.300(2).

108. *See id.* § 74.39A.300(2)(a).

109. *Id.* § 74.39A.300(2)(b).

110. *Id.* § 74.39A.300(2)(a); Agreed Statement of Facts, *supra* note 3, at 3–4.

111. Agreed Statement of Facts, *supra* note 3, at 3–4; Brief of Petitioner, *supra* note 11, at 17–21; Brief of Respondent, *supra* note 16, at 23–38.

112. *See* SEIU Healthcare 775NW v. Gregoire, 229 P.3d 774, 775–76 (Wash. 2010) (no discussion of whether the statutory requirements were satisfied).

113. *See id.* at 786–90 (Madsen, C.J., dissenting).

114. Brief of Respondent, *supra* note 16, at 23–38; *see also* SEIU Healthcare 775NW, 229 P.3d at 786–87 (Madsen, C.J., dissenting).

The mediation and interest arbitration provisions of RCW 41.56.430 through 41.56.470 and 41.56.480 apply, except that: . . . if the legislature does not approve the request for funds necessary to implement the compensation and fringe benefit provisions of the arbitrated collective bargaining agreement, is not binding on . . . the state.<sup>115</sup>

If the court had reached this issue, its analysis would have begun with basic statutory interpretation.<sup>116</sup> The first step of the statutory interpretation analysis is to look at the statute's plain meaning, as well as "the context of the statute in which the provision is found . . . and the statutory scheme as a whole."<sup>117</sup>

The context in which the arbitration and mediation statutes appear highlights the first flaw in the State's argument that the arbitration award was not binding on Governor Gregoire. Section 74.39A.270(2) of the Washington Revised Code unambiguously states, as quoted above, that the mediation and interest arbitration statutes found in the other sections of the code apply.<sup>118</sup> And as sections 41.56.450 and 41.56.480 of the Code explain, an arbitration decision is binding only on the parties to that specific arbitration.<sup>119</sup> In this case, the parties to the arbitration were SEIU and the Labor Relations Office—the governor's designee for purposes of collective bargaining.<sup>120</sup> The governor is party to any agreement reached because, by law, the governor is the employer of record.<sup>121</sup> Thus, the governor is bound to any agreement reached between a designee and SEIU.<sup>122</sup> Being binding on the governor does not require that the award be funded by the legislature; rather, as a contractual matter, only the parties are bound to their specific agreement.<sup>123</sup> Therefore, the State's argu-

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115. § 74.39A.270(2).

116. *SEIU Healthcare 775NW*, 229 P.3d at 787 (Madsen, C.J., dissenting).

117. *See* *Lake v. Woodcreek Homeowners Ass'n*, 243 P.3d 1283, 1287–88 (Wash. 2010) (quoting *State v. Engel*, 210 P.3d 1007, 1009–10 (Wash. 2009)).

118. § 74.39A.270(2).

119. *See id.* § 41.56.450 ("[The] determination [of the arbitration panel] shall be final and binding upon both parties."); *id.* § 41.56.480 ("A decision of the arbitration panel shall be final and binding on the parties, and may be enforced at the insistence of either party.").

120. *Id.* § 74.39A.270(1) ("[T]he governor is the public employer . . . of individual providers, who, solely for the purposes of collective bargaining, are public employees.").

121. *Id.* ("[T]he public employer shall be represented for bargaining purposes by the governor or the governor's designee . . .").

122. *See id.* § 41.56.480 ("A decision of the arbitration panel shall be final and binding on the parties, and may be enforced at the insistence of either party."); *id.* § 41.56.450 ("[The] determination [of the arbitration panel] shall be final and binding upon both parties.").

123. *See SEIU Healthcare 775NW v. Gregoire*, 229 P.3d 774, 781 (Wash. 2010) (Madsen, C.J., dissenting), which states the following:

Finally, an important fact mentioned nowhere in the majority is that the governor was a party to the collective bargaining agreement at the heart of this case, with the Washington

ment that the arbitration agreement between the Labor Relations Office and SEIU was not binding on the Governor was without merit.<sup>124</sup>

The statutory framework as a whole highlights the second flaw of the State's argument.<sup>125</sup> The statutes provide that the governor does not have a duty to request the funds until the statutory prerequisites are met.<sup>126</sup> If the prerequisites are met, the agreement becomes binding as to the governor and SEIU, but it is not binding on the state until submitted and approved by the legislature.<sup>127</sup> As a result, the statutory framework necessarily requires that the governor's request for funding be made at a time when the arbitration decision is not binding on the legislature or the state.<sup>128</sup> If the State's argument is to be believed, the duty to submit the request for funds does not arise until the legislature has already approved the request.<sup>129</sup> But if the legislature has approved the request, there is absolutely no reason for the governor to submit the request at all.<sup>130</sup> Ironically, Justice James M. Johnson, the author of the majority opinion refusing to grant mandamus, posed this very concern to the State during oral argument when he pointed out that the State's argument was circular and then asked when, if ever, an arbitration decision would be binding on the state.<sup>131</sup>

Given the State's extremely strained reading of when an arbitration award becomes binding,<sup>132</sup> if the court reached this issue, it would have likely found that the arbitration award was submitted by the October 1st deadline and was binding on Governor Gregoire, satisfying the two statutory prerequisites.<sup>133</sup>

State Labor Relations Office (LRO) acting on her behalf. It was her contract, and she should not have been allowed to repudiate it in contravention of state law.

124. Brief of Respondent, *supra* note 16, at 23–38; *see also SEIU Healthcare 775NW*, 229 P.3d at 786–87 (Madsen, C.J., dissenting).

125. *See* §§ 74.39A.270, 300.

126. *Id.* § 74.39A.300.

127. *See SEIU Healthcare 775NW*, 229 P.3d at 787–88 (Madsen, C.J., dissenting).

128. *Id.*

129. *Id.*

130. *Id.*

131. Oral Argument, *supra* note 84, at 34:45.

132. *See SEIU Healthcare 775NW*, 229 P.3d at 787–88 (Madsen, C.J., dissenting), which states the following:

[R]ead as the state urges . . . the duty to submit a request to fund arbitrated contracts to the legislature does not arise until the legislature has already approved and funded those very contracts. But once the legislature has determined to fund an arbitrated contract, there would be no reason for the governor to include a request for such funding.

*See also* *Tingey v. Haisch*, 152 P.3d 1020, 1025–26 (Wash. 2007) (holding that courts should avoid reading statutes in a way that brings about unlikely or absurd results because it will not be presumed that the legislature intended absurd results); Brief of Respondent, *supra* note 16, at 23–31.

133. *SEIU Healthcare 775NW*, 229 P.3d at 786–87 (Madsen, C.J., dissenting).

*b. The Statute Creates a Mandatory Duty*

Once the two prerequisites were met, the phrase “must submit”<sup>134</sup> created a mandatory duty for the Governor to submit the funding request in the proposed budget because the phrase is unambiguous and, by its plain meaning, creates a mandatory duty.

When interpreting a statute, the Washington State Supreme Court has consistently said that if a statute is plain and unambiguous, the court is to give effect to that plain meaning as the legislature’s expression of intent.<sup>135</sup> A statute’s meaning is determined by looking at the ordinary meaning of the language at issue, and if there is no ambiguity, the legislature is presumed to have meant exactly what it said.<sup>136</sup>

The court, however, did not even analyze the statute because it first determined that the duty was not ministerial.<sup>137</sup> If the court had analyzed the statute and followed the proper analysis as required by its own precedent, the analysis would have left little doubt that the phrase “must submit” created a mandatory duty. *Merriam-Webster’s Dictionary* defines “must” as “be commanded” or “be obliged to.”<sup>138</sup> It defines “submit” as “to permit oneself to be subjected to something” or “to defer to or consent to abide by the will of another.”<sup>139</sup> Taken together, the statute’s plain meaning—and the legislature’s intent—is to command or oblige the governor to defer to the statute’s requirement that a request for funds necessary to implement the collective-bargaining agreement be included in the proposed budget.<sup>140</sup>

Furthermore, other courts in Washington have consistently interpreted similar statutory language as creating a mandatory duty.<sup>141</sup> In *Graham Thrift Group v. Pierce County*, a Washington appellate court held that a statute stating that the appellant “must file written notice” was a mandatory statutory requirement because the language was plain on its face, and the court could not possibly interpret the language any other

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134. WASH. REV. CODE § 74.39A.300(1) (2010).

135. *SEIU Healthcare 775NW*, 229 P.3d at 786–87 (Madsen, C.J., dissenting); *State v. Mitchell*, 237 P.3d 282, 284–85 (Wash. 2010); *Lake v. Woodcreek Homeowners Ass’n*, 243 P.3d 1283, 1287–88 (Wash. 2010); *Tingey*, 152 P.3d at 1025–26.

136. *Geschwind v. Flanagan*, 854 P.2d 1061, 1065–66 (Wash. 1993).

137. *SEIU Healthcare 775NW*, 229 P.3d at 778 n.8.

138. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 819 (11th ed. 2007).

139. *Id.* at 1244.

140. See Brief of Petitioner, *supra* note 11, at 12–18.

141. See *Graham Thrift Grp. Inc. v. Pierce Cnty., Country Park, Inc.*, 877 P.2d 228, 230 (Wash. 1994) (“The Code uses the terms ‘must file written notice . . . and the appeal fee within ten (10) working days,’ indicating that the filing fee is a mandatory, statutory requirement. We cannot rewrite or modify the language of the statute under the guise of statutory interpretation or construction.” (quoting *State v. McAlpin*, 740 P.2d 824, 827 (Wash. 1987))).

way without rewriting the statute.<sup>142</sup> Moreover, courts have generally considered “must” and “shall” as synonyms,<sup>143</sup> and have consistently interpreted “shall” to create a mandatory duty.<sup>144</sup> Therefore, by its plain language and consistent interpretation by courts, the phrase “must submit” created a mandatory duty for the Governor to submit the request for funding the arbitration award in her proposed budget.

In addition, Governor Gregoire, by her own actions, has interpreted the word “must” as creating a mandatory duty in the very statute at issue in this case. In her prior proposed budgets, the Governor, as required by the statute, has submitted a request to fund the past two collective-bargaining agreements with SEIU.<sup>145</sup> When negotiating the labor agreement for the 2005–2007 biennial budget, the parties reached an impasse and entered arbitration.<sup>146</sup> After the arbitration award was given, newly elected Governor Gregoire submitted her first proposed budget, which included a request for funding a prior agreement between SEIU and the state with the following explanation: “The Governor must include the costs to meet the agreement terms and the cost of implementation of the agreement in the Governor’s budget . . . . Funding is needed based on the interest arbitration award as approved by the Legislature.”<sup>147</sup> The parties again went through arbitration for the 2007–2009 biennial budget, and the agreement was fully implemented by the legislature.<sup>148</sup> Governor

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142. *Id.*

143. *See* Buell v. City of Toppenish, 24 P.2d 431, 431 (Wash. 1933).

144. *See* State v. Mollichi, 936 P.2d 408, 411–12 (Wash. 1997); Philadelphia II v. Gregoire, 911 P.2d 389, 392 (Wash. 1996); State v. Krall, 881 P.2d 1040, 1041 (Wash. 1994); Erection Co. v. Dep’t of Labor & Indus., 852 P.2d 288, 289–93 (Wash. 1993); State v. Bartholomew, 710 P.2d 196, 198–99 (Wash. 1985); Crown Cascade, Inc. v. O’Neal, 668 P.2d 585, 587–89 (Wash. 1983); State v. Huntzinger, 594 P.2d 917, 919–20 (Wash. 1979); Spokane Cnty. *ex rel.* Sullivan v. Glover, 97 P.2d 628, 631–32 (Wash. 1940) (“As a general rule, the word ‘shall,’ when used in a statute, is imperative and operates to impose a duty which may be enforced.”). “Shall” has also been interpreted as mandatory by Governor Gregoire with regard to statutorily prescribed across-the-board reductions in state spending following a revenue shortfall. *See* WASH. REV. CODE § 43.88.110(7) (2010) (“[T]he governor shall make across-the-board reductions in allotments for that particular fund or account so as to prevent a cash deficit . . . .”); OFFICE OF THE GOVERNOR, EXEC. ORDER NO. 10–04: ORDERING EXPENDITURE REDUCTIONS IN ALLOTMENTS OF STATE GENERAL FUND APPROPRIATIONS (2010), available at [http://www.governor.wa.gov/execorders/eo\\_10-04.pdf](http://www.governor.wa.gov/execorders/eo_10-04.pdf); Rachel La Corte, *Gregoire Orders State Budget Cuts*, SEATTLE TIMES, Sept. 12, 2010, [http://seattletimes.nwsourc.com/html/localnews/2012889491\\_budgetcuts14.html?syndication=rss](http://seattletimes.nwsourc.com/html/localnews/2012889491_budgetcuts14.html?syndication=rss).

145. Agreed Statement of Facts, *supra* note 3, at 1.

146. *Id.*

147. *See* 2005 WASHINGTON STATE BUDGET 95–96 [hereinafter 2005 BUDGET], available at <http://leap.leg.wa.gov/leap/budget/lbns/2005govop.pdf>; Ralph Thomas, *What Governor Gregoire Said-and Did*, SEATTLE TIMES, May 1, 2005, [http://seattletimes.nwsourc.com/html/localnews/2002259098\\_gregoire01m.html](http://seattletimes.nwsourc.com/html/localnews/2002259098_gregoire01m.html).

148. Agreed Statement of Facts, *supra* note 3, at 1; *see also* 2007–2009 WASHINGTON STATE BIENNIAL BUDGET 154 [hereinafter 2007–2009 BIENNIAL BUDGET], available at <http://leap.leg.wa.gov/leap/budget/lbns/2007lbn.pdf>.

Gregoire's words and actions show that, prior to the 2009–2011 proposed biennial budget, she considered the duty to submit the request for funding as mandatory.<sup>149</sup>

*c. The Duty to Submit the Request for Funding is Ministerial*

In addition to creating a mandatory duty, the submission of the requested funds was also ministerial because it left nothing to the discretion or judgment of Governor Gregoire.<sup>150</sup> For a duty to be considered ministerial, the statute must define the duty “to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.”<sup>151</sup>

The statute at issue here did just that.<sup>152</sup> The duty to be performed is to “submit . . . a request for funds necessary to . . . implement the . . . collective-bargaining agreements entered into” as part of the governor's proposed budget.<sup>153</sup> The amount of funding necessary to implement the agreement had already been determined through the prior collective-bargaining process.<sup>154</sup> Therefore, when the Governor made the request, the dollar amount required to fund the agreement had already been determined, which left nothing to her discretion or judgment because it was akin to the forwarding of information.<sup>155</sup> Yet, the majority still held that the inclusion of the award in the budget required the governor's discretion because there was no funding source for the arbitration award specified in the statute, and the governor had to remove the award in order to propose a balanced budget.<sup>156</sup>

While that argument does have the appeal of simplicity, it does not hold up upon further examination. The majority did not explain why the Governor was allowed to disregard a statute that was duly enacted with-

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149. 2007–2009 BIENNIAL BUDGET, *supra* note 148, at 154; 2005 BUDGET, *supra* note 147, at 95–96; Agreed Statement of Facts, *supra* note 3, at 1.

150. *See* SEIU Healthcare 775NW v. Gregoire, 229 P.3d 774, 777 (Wash. 2010) (“It follows that even a mandatory duty is not subject to mandamus unless it is also ministerial, or nondiscretionary, in nature . . .”); *accord* Brown v. Owen, 206 P.3d 310, 320 (Wash. 2009) (“Where we find a mandatory duty, we must *further* determine whether that duty is ministerial or discretionary in nature.”) (emphasis added); *see also* R. E. Heinselman, Annotation, *Mandamus to Governor*, 105 A.L.R. 1124, 1128 (1936) (“[I]t does not necessarily follow that, because a duty imposed is mandatory, it is also ministerial.”).

151. *SEIU Healthcare 775NW*, 229 P.3d at 777 (quoting *State v. City of Seattle*, 242 P. 966, 968 (Wash. 1926)).

152. WASH. REV. CODE § 74.39A.300(1) (2010).

153. *Id.*

154. *Id.*

155. *See* 2005–2007 WASHINGTON STATE BIENNIAL BUDGET 95–96 (indicating that the amount requested is merely the amount awarded through arbitration), *available at* <http://leap.leg.wa.gov/leap/budget/lbns/2005govop.pdf>.

156. *See SEIU Healthcare 775NW*, 229 P.3d at 777–78.

out holding that the statute was an unconstitutional usurpation of the governor's powers over the budgetary process.<sup>157</sup> The Washington State Constitution does not contain an express separation of powers clause; however, it has been presumed through the state's history that one exists.<sup>158</sup> It is generally understood that the legislative branch has control over appropriations, and the executive branch has ability to veto<sup>159</sup> and propose the state budget.<sup>160</sup> Yet, some overlap does exist in the form of checks and balances between the branches.<sup>161</sup> Even though it alluded to the unconstitutionality of the statute in its brief, when asked at oral argument if it wanted the court to find the statute unconstitutional, the State said, "No."<sup>162</sup> More importantly, because the majority did not hold that the statute was an unconstitutional usurpation of the governor's powers or that the duty prescribed was mandatory and ministerial, it failed to give proper deference to the legislature's duly enacted statute by allowing Governor Gregoire to completely disregard the duty prescribed.<sup>163</sup>

### *B. The Court Fails to Check the Power of the Governor*

The court gave Governor Gregoire, and any future governor, the ability to completely disregard any statutorily mandated budget inclusions.<sup>164</sup> Implicitly assumed by the majority was the fact that granting SEIU's petition for mandamus would have forced the request to actually be funded by the legislature.<sup>165</sup> As a result, the court opened the door to potential abuse by future governors, which the following hypothetical demonstrates is a real possibility.<sup>166</sup>

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157. *Id.* It is beyond the scope of this Note to examine the constitutionality of this statutory scheme; however, there is some debate as to whether the statutorily mandated budgetary inclusions are constitutional. See generally Christopher D. Abbott, *Stealing the Public Purse: Why Washington's Collective Bargaining Law for State Employees Violates the State Constitution*, 81 WASH. L. REV. 159 (2006) (arguing that the collective bargaining statutory scheme for public employees is an unconstitutional usurpation of the governor's powers of the budget).

158. See WASH. CONST. art. II, § 1; WASH. CONST. art. III, § 2; WASH. CONST. art. IV, § 1; *SEIU Healthcare 775NW*, 229 P.3d at 783–84 (Madsen, C.J., dissenting); *Brown v. Owen*, 206 P.3d 310, 316 (Wash. 2009).

159. See WASH. CONST. art. III, § 12; *Wash. State Leg. v. Lowry*, 931 P.2d 885, 896–97 (Wash. 1997) (upholding the constitutionality of the governor's ability to use a line-item veto).

160. *SEIU Healthcare 775NW*, 229 P.3d at 784–85 (Madsen, C.J., dissenting).

161. See *id.*; *Brown*, 206 P.3d at 316–17.

162. Oral Argument, *supra* note 84, at 47:40.

163. See *SEIU Healthcare 775NW*, 229 P.3d at 777–80.

164. See *id.* at 777–79, 780.

165. See *id.* at 781 (Madsen, C.J., dissenting) ("This does not mean, contrary to the impression that the majority leaves, that the request to fund an arbitrator's award must or will be funded. There is no statutory requirement that the legislature has to approve the request.").

166. See *id.*

Suppose that the IPs, represented by SEIU, endorse Candidate *A* instead of Candidate *B* during the next gubernatorial election. Since most unions are politically involved, especially SEIU,<sup>167</sup> the union and its members support Candidate *A*'s campaign with money, canvassing, rally attendance, and get-out-the-vote efforts. While not every union member will vote for Candidate *A*, most union members will support the candidate their union endorses.<sup>168</sup>

But despite all the efforts of SEIU and its members, Candidate *B* wins the election. Given general political realities, Candidate *B* might hold a grudge against the union for its opposition and for giving money, time, and energy to support Candidate *A*. When it comes time to prepare the budget, and the unions submit the request for funding of the collective-bargaining agreement (assuming it satisfies the statutory requirements), Governor *B* can now simply exclude the request from the proposed budget, leaving little hope that the legislature will fund the agreement.<sup>169</sup>

While this case could be held to its specific set of facts due to the unforeseen and dramatic revenue shortfall facing the state, the majority's broad holding vested absolute discretion in the governor when proposing

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167. See Fred Lucas, *SEIU PAC Spent \$27 Million Supporting Obama's Election*, *FEC Filing Says*, CNS NEWS (Dec. 17, 2008), <http://www.cnsnews.com/news/article/seiu-pac-spent-27-million-supporting-obama-s-election-fec-filing-says>; Kris Maher, *SEIU Campaign Spending Pays Political Dividends*, WALL STREET J., May 16, 2009, <http://online.wsj.com/article/SB124243785248026055.html>; *SEIU Expected 2010 Political Expenditures*, FACTCHECK.ORG (Aug. 10, 2010), <http://www.factcheck.org/2010/08/service-employees-international-union-seiu/>. See generally T. W. Farnam, *Unions Outspending Corporations on Campaign Ads Despite Court Ruling*, WASH. POST, July 7, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/06/AR2010070602133.html>; Daniel Indiviglio, *Despite Citizens United, Unions Outspend Corporations on Politics*, THE ATLANTIC, July 7, 2010, <http://www.theatlantic.com/business/archive/2010/07/despite-citizens-united-unions-outspend-corporations-on-politics/59281/>.

168. The political research focusing on the impact that union endorsements have on voter behavior has been somewhat mixed. See Monika L. McDermott, *Not for Members Only: Group Endorsements as Electoral Information Cues*, POL. RES. Q. 249, 250 (2006). But most of the research has found a positive correlation between a union's endorsement and its members' voting behavior. See John Thomas Delaney et al., *Union Membership and Voting for COPE-Endorsed Candidates*, INDUS. & LAB. REL. REV. 621, 630-35 (1990); Marie Hojnacki & Lawrence Baum, *'New-Style' Judicial Campaigns and the Voters: Economic Issues and Union Membership in Ohio*, W. POL. Q. 921, 923-24 (1992); Tom Juravich & Peter R. Shergold, *The Impact of Unions on the Voting Behavior of Their Members*, INDUS. & LAB. REL. REV. 374, 381-85 (1988). But see Ronald B. Rapoport et al., *Do Endorsements Matter? Group Influence in the 1984 Democratic Caucuses*, AM. POL. SCI. REV. 199-201 (1991).

169. The only time SEIU Healthcare 775NW's collective-bargaining agreement has gone unfunded was in 2003—the only year a request for funds was not included in the governor's proposed budget. See Mot. for Accelerated Rev. at 4, *SEIU Healthcare 775NW*, 229 P.3d 774 (No. 82551-3) [hereinafter Mot. for Accelerated Rev.]; Oral Argument, *supra* note 84, at 2:30.

the budget.<sup>170</sup> Even if the state were in a better financial position, the language used by the majority indicated that the governor may choose to disregard a statutorily mandated budget inclusion.<sup>171</sup> Based on the majority's holding, whether experiencing a financial crisis or a budget surplus, Governor *B* would be able to exclude a request for funding a collective-bargaining agreement.<sup>172</sup>

*C. The Court Exceeds Its Own Authority by Considering the  
Financial Position of the State*

The court exceeded its own authority by opining that even if mandamus were appropriate, it would still refuse to issue the writ due to the state's economic crisis.<sup>173</sup> Although this statement was dictum, the decision indicated that the court would effectively rewrite this or any other statute in the future if the state were facing financial hardship.<sup>174</sup>

Justice James M. Johnson was concerned about why SEIU members should receive a pay raise, considering the difficult financial position of the state.<sup>175</sup> Although valid, Justice Johnson's concern should not have superseded the law as written.<sup>176</sup> Even if the legislature approved the award and the governor disagreed with it, the governor could use the line-item veto power to strike it from the budget.<sup>177</sup> With a massive budget deficit facing the state, the legislature probably would not have approved such a request at the expense of other social services and programs.<sup>178</sup> The legislature knew that there would be times when the collective-bargaining awards would go unfunded or have to be renegotiated,

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170. *SEIU Healthcare 775NW*, 229 P.3d at 778 (“The inclusion of substantive spending items in the governor’s budget is clearly not a ministerial act . . . [T]he allocation of funds for obligations in the governor’s budget necessarily requires a decision by the governor to remove funding from other priorities.”).

171. *Id.* (“The creation and submission of a budget proposal is clearly one of those discretionary acts that are ‘in their nature political, or which are, by the constitution and laws, submitted to the executive,’ and inappropriate for mandamus.” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803))).

172. *Id.*

173. *See id.*

174. *Id.*

175. Oral Argument, *supra* note 84, at 15:02.

176. *See In re Salary of Juvenile Dir.*, 552 P.2d 163, 169 (Wash. 1976) (“Both history and uncontradicted authority make clear that ‘[i]t is emphatically the province and duty of the judicial department to say what the law is.’” (quoting *United States v. Nixon*, 418 U.S. 683, 703 (1974))).

177. *See Wash. State Leg. v. Lowry*, 931 P.2d 885, 893 (Wash. 1997) (upholding the governor’s ability to veto certain budget provisions).

178. *See Andrew Garber, State Lawmakers Reach Accord on \$4 Billion in Cuts*, SEATTLE TIMES, Apr. 22, 2009, [http://seattletimes.nwsources.com/html/localnews/2009105914\\_web\\_budget22m.html](http://seattletimes.nwsources.com/html/localnews/2009105914_web_budget22m.html) (discussing the deep cuts made to public schools, higher education, health care, and various other state services).

and prescribed two ways of resolving the dispute if that were to happen.<sup>179</sup>

Furthermore, the court made no reference to the constitutionality of the statute in its decision.<sup>180</sup> Absent a finding that the statute was unconstitutional, it is the judiciary's role to enforce the law as written.<sup>181</sup> The court should not have made a judgment call on the likelihood of the legislature funding the request if it was actually submitted by Governor Gregoire in her proposed budget.<sup>182</sup> More importantly, however, the court should not have made a value judgment on the sensibleness of this specific budgetary inclusion<sup>183</sup>—that judgment is reserved for the legislative and executive branches to make between themselves.<sup>184</sup>

#### D. Legal Purgatory

As a consequence of this case, at least twelve statutes currently on the books are rendered potentially meaningless.<sup>185</sup> While alluding to the fact that the creation and submission of the budget by the executive is a constitutional requirement,<sup>186</sup> the majority did not explicitly hold that the statute was unconstitutional.<sup>187</sup> Thus, by not issuing the writ of manda-

179. WASH. REV. CODE § 74.39A.300(3) (2010) (“The legislature must approve or reject the submission of the request for funds as a whole. If the legislature rejects or fails to act on the submission, any such agreement will be reopened solely for the purpose of renegotiating the funds necessary to implement the agreement.”); WASH. REV. CODE § 74.39A.300(7) (2010) (allowing the governor or legislature to issue a proclamation to reopen the collective-bargaining agreements if the state experiences a dramatic revenue shortfall).

180. See *SEIU Healthcare 775NW v. Gregoire*, 229 P.3d 774, 775–80 (Wash. 2010).

181. See *In re Salary of Juvenile Dir.*, 552 P.2d 163, 169 (Wash. 1976) (“Both history and uncontradicted authority make clear that ‘it is emphatically the province and duty of the judicial department to say what the law is.’” (quoting *Nixon*, 418 U.S. at 703)).

182. See *SEIU Healthcare 775NW*, 229 P.3d at 781 (Madsen, C.J., dissenting); *Brown v. Owen*, 206 P.3d 310, 316 (Wash. 2009); *Carrick v. Locke*, 882 P.2d 173, 177 (Wash. 1994); *In re Salary of Juvenile Dir.*, 552 P.2d at 170–71 (“[C]ourts must limit their incursions into the legislative realm in deference to the separation of powers doctrine.”).

183. See *SEIU Healthcare 775NW*, 229 P.3d at 781 (Madsen, C.J., dissenting) (“We are not the legislature, and the court has no business upsetting the balance of powers between the executive and the legislative branches, no matter whether the members of this court think a particular budget item is wise or foolish.”).

184. See *In re Salary of Juvenile Dir.*, 552 P.2d at 170–71 (“[C]ourts must limit their incursions into the legislative realm in deference to the separation of powers doctrine.”).

185. WASH. REV. CODE §§ 41.56.028(5), 41.56.029(5), 41.56.473(5); 41.56.510(6), 41.80.010(3), 41.88.030(2)(b)–(c), 43.41.220(1), 43.88.060, 43.88.090(1), 47.64.170(9)(a), 74.39A.300(1) (2010).

186. See *SEIU Healthcare 775NW*, 229 P.3d at 778 (“The creation and submission of the budget proposal is clearly one of those discretionary acts that are ‘in their nature political, or which are, by the constitution and law, submitted to the executive . . .’” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803))).

187. See *id.* at 781 (Madsen, C.J., dissenting) (“Absent a showing that a statute is unconstitutional (a showing that has not been made here) . . .”). See also Oral Argument, *supra* note 84, at 47:40.

mus, this decision puts all statutorily mandated budget requirements in a state of legal purgatory. The first group of effected statutes similarly deals with the funding of collective-bargaining agreements.<sup>188</sup> In addition to the IPs affected in this case, the other statutes cover family childcare providers,<sup>189</sup> adult family home providers,<sup>190</sup> language access providers,<sup>191</sup> Washington state patrol officers,<sup>192</sup> employees of higher education institutions,<sup>193</sup> and public marine employees.<sup>194</sup>

The second group of potentially meaningless statutes concerns various administrative requirements the governor must follow when submitting the proposed budget.<sup>195</sup> The statutorily mandated requirements include the following: a deadline for the submission of the proposed budget to the legislature,<sup>196</sup> the estimated expenditures required by the judiciary and legislative branches,<sup>197</sup> and a deadline for terminating or transferring the duties of a board or commission.<sup>198</sup>

The unfortunate result of this decision is that while the governor may choose to not follow any of the above statutes, any group of public employees subject to collective bargaining with the state is still required to follow the statutory requirements with regard to the collective-bargaining process. Thus, employees that collectively bargain with the state are left at the whim of the legislature. The legislature still could fund the collective-bargaining agreement on its own, but this unilateral action is unlikely.<sup>199</sup> Yet, when the governor includes the request in the

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188. § 41.56.028(5) (family childcare providers); § 41.56.029(5) (adult family home providers); § 41.56.473(5) (Washington state patrol officers); § 41.56.510(6) (language access providers); § 41.80.010(3) (employees of institutions of higher education); § 47.64.170(9)(a) (public marine employees); § 74.39A.300(1) (long-term care providers). Half of the statutes use “must submit,” while half use “shall submit.” Despite the difference in word choice, the word “must” and “shall” are considered synonyms by the courts. *See* *Buell v. City of Toppenish*, 24 P.2d 431, 431 (Wash. 1933). And “shall” has been consistently held to create a mandatory duty. *See* *Philadelphia II v. Gregoire*, 911 P.2d 389, 392 (Wash. 1996); *State v. Krall*, 881 P.2d 1040, 1041 (Wash. 1994); *Erection Co. v. Dep’t. of Labor & Indus.*, 852 P.2d 288, 289 (Wash. 1993).

189. § 41.56.028(5) (governor “must submit”).

190. *Id.* § 41.56.029(5) (governor “must submit”).

191. *Id.* § 41.56.510(6) (governor “must submit”).

192. *Id.* § 41.56.473(5) (governor “shall submit”).

193. *Id.* § 41.80.010(3) (governor “shall submit”).

194. *Id.* § 47.64.170(9)(a) (governor “shall submit”).

195. *Id.* §§ 41.88.030(2)(b)–(c), 43.41.220(1), 43.88.060, 43.88.090(1).

196. *Id.* § 43.88.060 (Governor “shall submit” the budget not later than December 20th in the year preceding the upcoming legislative session.).

197. *Id.* § 43.88.090(1) (“The estimates for the legislature and the judiciary shall be transmitted to the governor and shall be included in the budget without revision.”).

198. *Id.* § 43.41.220(1) (“The governor shall submit an executive request bill by January 8th of every odd-numbered year to implement the recommendations by expressly terminating the appropriate boards and commissions and by providing for the transfer of duties and obligations . . .”).

199. *See* *Mot. for Accelerated Rev.* at 4, *supra* note 169; *Oral Argument*, *supra* note 84, at 2:30.

proposed budget, the odds of receiving funds improve dramatically.<sup>200</sup> The only time SEIU's collective-bargaining agreement has gone unfunded was in 2003—the only year a request for funds was not included in the governor's proposed budget.<sup>201</sup>

Further, a redrafting of the statute may not improve any union's bargaining position. The legislature likely could not have phrased the statute in a way that the court would have agreed that the duty was mandatory. At oral argument, Justice Sanders posed this very question to the State.<sup>202</sup> The State completely avoided the question and responded to Justice Sanders by instead arguing that "must" should be construed as permissive to avoid reaching the constitutionality of the statute.<sup>203</sup> This, however, is the State's attempt to have it both ways: "must" is permissive—allowing the governor to flout the statute in this instance—but the statute is not an unconstitutional usurpation of the governor's powers, making the part of the statute at issue here superfluous because the governor does not have to follow it.

It remains to be seen if Governor Gregoire will ask the legislature to change the process by which collective-bargaining agreements are funded, or if the legislature will amend the statute to further clarify whether the request for funds is mandatory.<sup>204</sup> Although the collective-bargaining statute was recently amended, the language at issue in this case was not modified.<sup>205</sup>

## V. CONCLUSION

The Washington State Supreme Court's decision in *SEIU Healthcare 775NW v. Gregoire* dramatically undermined the cornerstone of the balance of powers between the branches of government. This case was an example of a court simultaneously failing to give deference to a duly enacted statute, failing to check the power of the executive branch, and exceeding its own proper role. The Washington State Supreme Court should not have read "must" as "may."

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200. See Mot. for Accelerated Rev. at 4, *supra* note 169; Oral Argument, *supra* note 84, at 2:30.

201. See Mot. for Accelerated Rev. at 4, *supra* note 169; Oral Argument, *supra* note 84, at 2:30.

202. Oral Argument, *supra* note 84, at 48:23.

203. Oral Argument, *supra* note 84, at 48:23.

204. S.B. 5349, proposed during the 2011 Legislative Session, would have done this very thing. The bill was titled, "Eliminating collective bargaining for state employees and certain other groups"; however, it failed to even make it out of committee after a single hearing. S.B. 5292, 62nd Leg., Reg. Sess. (Wash. 2011).

205. See Act of Apr. 2, 2010, ch. 296, 2010 Wash. Sess. Laws 5.

The Washington State Supreme Court erred in its analysis in three significant ways. First, it failed to give proper deference to the legislature by allowing Governor Gregoire to disregard a statutorily mandated and ministerial duty, even though the statute was not held to be an unconstitutional usurpation of the governor's powers. Second, the court put the enforceability of all statutorily mandated budget inclusions in serious doubt. Based on this holding, statutes using similar language to impose a duty on the governor to include specific spending measures in the proposed budget are potentially meaningless because the mandatory language was morphed into permissive language. The court's decision gives undue deference to the executive's discretion over the budgetary process. Third, the court, in dictum, said that even if it found the duty to be mandatory and ministerial, it would refuse to issue the writ of mandamus because of the financial crisis. Such a refusal would have exceeded the court's own power. Although an admirable goal, the judiciary does not have the power to make legislative or policy judgments on the soundness of certain budgetary measures. Policy judgments are the responsibility of the executive and legislative branches.<sup>206</sup>

While unlikely, if a case presents itself in the future, the Washington State Supreme Court should seriously consider revisiting this issue and correcting its misguided analysis. The financial condition of the state may not improve for the foreseeable future, and it is likely that future governors will face similar situations.<sup>207</sup> This case involved the delicate issue of the proper time for a court to intervene and check the power of another branch of government. Unfortunately, when the time was proper, the court did not do so.

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206. The division of the government into different branches has been presumed to give rise to a separation of powers doctrine. See *SEIU Healthcare 775NW v. Gregoire*, 229 P.3d 774, 777–80 (Wash. 2010); *Brown v. Owen*, 206 P.3d 310, 316 (Wash. 2009) (citing *Carrick v. Locke*, 882 P.2d 173, 176–77 (Wash. 1994)).

207. The current projected budget shortfall for the 2011–2013 biennial budget is \$4.6 billion. See *Transforming Washington's Budget*, OFFICE OF THE GOVERNOR, <http://www.governor.wa.gov/priorities/budget/default.asp> (last visited Nov. 8, 2011).