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No. 82551-3

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SUPREME COURT OF THE STATE OF WASHINGTON

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SEIU HEALTHCARE 775NW,

Petitioner,

v.

GOVERNOR CHRISTINE GREGOIRE,

Respondent.

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PETITIONER'S BRIEF IN SUPPORT OF ITS  
PETITION FOR A PEREMPTORY WRIT OF MANDAMUS AGAINST  
GOVERNOR CHRISTINE GREGOIRE

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## I. INTRODUCTION

Petitioner SEIU Healthcare 775NW (“SEIU 775NW”) brings this original action in mandamus to compel the Governor to fulfill a mandatory and nondiscretionary duty.

SEIU 775NW is the exclusive bargaining representative for approximately 25,000 “individual providers,” or IPs, who contract with the State Department of Social and Health Services to provide in-home personal care services to Medicaid-eligible clients. Agreed Statement of Facts (“ASF”), ¶ 1. Pursuant to RCW 74.39A.220 *et. seq.*, the IPs are considered public employees solely for the purposes of collective bargaining under RCW 41.56. *Id.*<sup>1</sup>

RCW 74.39A sets forth a statutory framework whereby the wages, hours and working conditions of IPs are to be set via collective bargaining, including the parties submitting irresolvable disputes over mandatory subjects of bargaining to binding interest arbitration. Under this law, once certain prerequisites are met, including the issuance of an interest arbitration award, the Governor has a non-discretionary duty to submit to the Legislature “a request for funds necessary ... to implement the compensation and fringe benefits provisions of a collective bargaining

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<sup>1</sup> See the Declaration of David Rolf, filed with this Court on December 29, 2008, in support of this Petition, at ¶¶ 2-18 for a more in-depth history of the bargaining unit.

agreement entered into under RCW 74.39A.270 or for legislation necessary to implement such agreement.” RCW 74.39A.300(1).

RCW 74.39A.300(1), creates only two preconditions for the mandatory and nondiscretionary submission by the Governor of a request for funds necessary to implement the compensation and fringe benefits provisions of the collective bargaining agreement entered into under RCW 74.39A.270.<sup>2</sup> First, the request must previously have been submitted to the director of the Office of Financial Management (“OFM”) by October 1st prior to the legislative session at which the request is to be considered. Second, the request must either have been certified by OFM as being “feasible financially” for the state, or it must “reflect the binding decision of an arbitration panel reached under RCW 74.39A.270(2)(c).” RCW 74.39A.300(2).

In the instant case, both of these statutory prerequisites were met. A collective bargaining agreement (“the 2009-2011 IP contract”) was entered into pursuant to the second clause – the interest arbitration clause - of RCW 74.39A.270(2)(c). Thus, RCW 74.39A.270(2)(c) was satisfied via an interest arbitration conducted by the parties, which resulted in a

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<sup>2</sup> The satisfaction of these preconditions and the mandatory and nondiscretionary duty that puts on the Governor constitute the gravamen of the parties’ dispute and will be addressed throughout this briefing.

decision issued by Arbitrator Timothy Williams on October 1, 2008.<sup>3</sup> ASF ¶ 8, ASF Ex. 10. Accordingly, and in accordance with the statute, a request to fund the 2009-2011 IP contract was submitted to OFM by October 1, 2008. ASF ¶ 9; ASF Ex. 11. Yet, despite the undisputed satisfaction of both statutory preconditions, the Governor failed to include funding for this agreement in her proposed budget for the 2009-2011 biennium. ASF ¶ 16.

By so acting, the Governor upended the statutory bargaining process, deprived SEIU Healthcare 775NW of its statutory rights, and severely prejudiced the IPs' ability to receive the substantial contract improvements that Arbitrator Williams deemed essential to their livelihoods. RCW 41.56.465.<sup>4</sup>

SEIU 775NW for these reasons hereby petitions for a writ of mandamus ordering the Governor to immediately withdraw her current budget request and submit a revised budget that includes funding for the 2009-2011 IP contract. The Union seeks this extraordinary writ as it has no effective, adequate or speedy remedy at law.

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<sup>3</sup> See the Declaration of David Rolf at ¶¶ 19-24 for a more in-depth history of bargaining for the 2009-2011 contract leading up to the issuance of an award by Arbitrator Williams.

<sup>4</sup> See, e.g., the Declarations of Charlotte "Marie" Rux, Cheryl Johnston-Carr, and Denese Garcia, previously filed in support of this Petition.

## **II. STATEMENT OF ISSUE**

Should this Court issue an immediate writ of mandamus ordering Governor Christine Gregoire to withdraw her current budget request and submit a revised biennial 2009-2011 budget request to the Legislature that includes a request for funds necessary to implement the compensation and benefit provisions of the collective bargaining agreement between SEIU Healthcare 775NW and the State, entered into pursuant to the provisions of RCW 74A.39.270?

## **III. STATEMENT OF CASE**

### **A. Statutory Framework Pertaining to Individual Providers**

The State, as an alternative to institutional care, has developed a program by which qualifying elderly and disabled individuals can receive personal care assistance in a residential setting. This program is highly dependent upon services provided by a cadre of home care workers known as IPs, who provide in-home personal care services to Medicaid-eligible clients. ASF, ¶ 1. The State uses the services of more than 25,000 IPs to help provide this residential care for elderly and disabled persons. *Id.*

RCW 74.39A was passed into law via Initiative 775, after its approval by the voters on November 6, 2001. Pursuant to RCW 74.39A.220 *et. seq.*, the workers covered by this statute, the IPs, are

considered public employees solely for the purposes of collective bargaining under RCW 41.56.

Under the provisions of RCW 74.39A.270, for collective bargaining purposes only, the IPs were combined into a single statewide bargaining unit. The IPs subsequently selected SEIU 775NW as their exclusive bargaining representative. ASF, ¶ 1.

Initiative 775 directed that “the wages, hours, and working conditions of individual providers,” as defined by RCW 74.39A.240(4), be determined through collective bargaining. RCW 74.39A.270(6). RCW 74.39A.270 provides for interest arbitration in the event the parties are unable to successfully negotiate a labor agreement. The mediation and arbitration provisions contained in RCW 41.56.430 through and 41.56.480 apply to this procedure.<sup>5</sup>

RCW 74.39A.300(1) provides that the Governor **must submit**, as part of the proposed biennial operating budget she submits to the legislature, “a request for funds necessary ... to implement the compensation and fringe benefits provisions of a collective bargaining agreement entered into under RCW 74.39A.270 or for legislation necessary to implement such agreement.” The provision reads, in full:

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<sup>5</sup> See Declaration of David Rolf at ¶¶18-19.

(1) Upon meeting the requirements of subsection (2) of this section, the governor must submit, as a part of the proposed biennial or supplemental operating budget submitted to the legislature under RCW 43.88.030, a request for funds necessary to administer chapter 3, Laws of 2002 and to implement the compensation and fringe benefits provisions of a collective bargaining agreement entered into under RCW 74.39A.270 or for legislation necessary to implement such agreement.

Subsection (2) of RCW 74.39A.300, referenced in RCW 74.39A.300(1), identifies only two preconditions for the mandatory submission by the Governor of a request for funds necessary to implement the compensation and fringe benefits provisions of the collective bargaining agreement entered into under RCW 74.39A.270.

First, the request must previously have been submitted to OFM by October 1st prior to the legislative session at which the request is to be considered.

Second, the request must have either been certified by OFM as being feasible financially for the state, or must reflect the binding decision of an arbitration panel reached under RCW 74.39A.270(2)(c). RCW 74.39A.300(2).

**B. History of Collective Bargaining Pursuant to this Statutory Framework**

The first labor agreement between the Governor and SEIU 775NW was completed through collective bargaining without the use of the

arbitration process set forth in RCW 74.39A.270. ASF, ¶ 3. Arbitrator Timothy Williams issued an interest arbitration award in 2004 for the second labor agreement, covering the 2005-07 biennium. *Id.*

The third contract was fully implemented by the Washington State Legislature for the 2007-09 biennium after a decision by Arbitrator Michael Cavanaugh. ASF, ¶ 3.

The parties subsequently engaged in collective bargaining for an agreement which would cover the biennium of July 1, 2009, through June 30, 2011. When that bargaining did not lead to an agreement, the parties proceeded to have that labor agreement contract resolved through interest arbitration. ASF, ¶ 4.

The interest arbitration hearing occurred on August 18, 22, 25, 26, 28, 29, and September 5, 2008, and resulted in a decision from interest arbitrator Timothy Williams on October 1, 2008. ASF, ¶ 6, 8. The arbitrator heard testimony from 28 witnesses and received 142 exhibits into evidence. ASF Ex. 10, JSF775 0288-0294.

At the interest arbitration, the State put on substantial testimony relating to the State's precarious financial situation. Wolfgang Opitz, Deputy Director of OFM, testified that "the Senate Ways and Means staff have said we're \$2.7 billion short going into the 2009/'11 biennium. If we were to spend the entire rainy day fund, we would knock that down to

\$1.956 billion short.” ASF Ex. 4 (pg. 614:9-12). Mr. Opitz went on to say:

Generally speaking, we're not looking forward in time to good times, we're looking forward in time to some very, very difficult budget choices, very difficult prioritizations. We're looking at an outlook by the Senate Way and Means that is likely to get worse within weeks and then get worse again within a couple of months.”

ASF Ex. 4 (pg. 626:2-8).

In reaching his interest arbitration decision, Arbitrator Williams gave overwhelming weight to “[t]he financial ability of the state to pay for the compensation and fringe benefit provisions of a collective bargaining agreement,” which is one of the factors he was obligated to consider under the interest arbitration statute, RCW 41.56.465(5)(a)(ii). His opinion reflects this emphasis, stating, in pertinent part:

[C]learly the most significant problem faced by both the State and the Union with regard to completing the 09-11 collective bargaining agreement is the concern with the State’s ability to pay for any increased costs. The State provided evidence that it is looking at a 2.6 billion dollar shortfall for the 09-11 biennium (Tr. 31). Worse, the Arbitrator takes note of the fact that this award is being written at a time when the front page of every newspaper carries the message that we are in the midst of one of the darkest times in the history of American financial markets. This cannot bode well for the financial well being of the State of Washington or any other State.

To put it bluntly, the award is not a rich one; it would not be professionally responsible for the Arbitrator to be anything other than extremely conservative with regard to the expenditure of funds. The Arbitrator would have liked it to be otherwise because he found merit in many of the

Union's proposals but ultimately he determined not to award the provision solely on the basis of cost. Throughout the award, the Arbitrator's thinking was around limiting the total amount of increased dollars and prioritizing how those dollars were to be spent.

ASF Ex. 10, JSF775 0304.

Notwithstanding Arbitrator Williams' careful consideration of these economic realities, his award, which differed from both parties' proposals, includes certain monetary benefits to IPs, including a 2.5% increase in the hourly wage in July 2009 and a 2.0% increase in July 2010, and an extra 50 cents an hour for individuals certified as Home Care aides or who possess a Certified Nursing Assistant license (or an equivalent or greater medical license). It also included increases in funding for health benefits to keep up with costs and new monies for IP training. *See generally* ASF Ex. 10, JSF775 0371-0386 ("Award Summary").

Subsequent to Arbitrator Williams' decision, that decision was submitted, along with a request for funds necessary to implement the compensation and fringe benefits provisions of his decision, to the director of OFM, by October 1, 2008, prior to the legislative session that commenced on January 12 of 2009. ASF, ¶ 9; ASF Ex. 11.

There is no dispute that the Williams Award, ASF Ex. 10, reflects the "binding decision" of the interest arbitration panel, as described by RCW 74.39A.270(2)(c).

**C. The Governor's Failure to Act**

On December 18, 2008, Governor Gregoire submitted a proposed biennial operating budget to the legislature, pursuant to RCW 43.88.030. ASF, ¶ 15. Governor Gregoire's proposed budget did not contain a request for funds necessary to implement the compensation and fringe benefits provisions of the interest arbitration decision submitted to OFM on October 1, 2008. ASF, ¶ 16.

The rationale provided by the Governor for this failure is found at <http://www.ofm.wa.gov/labor/>, which states:

The Director [of the Office of Financial Management] determined that it was not feasible financially for the state to fund the agreements. Therefore, the requests for funds to implement the 2009-2011 agreements are not included in the Governor's proposed 2009-2011 biennial budgets.<sup>6</sup>

Consistent with this statement, OFM informed SEIU 775NW and other labor organizations in a letter dated December 18, 2008, that OFM "has determined the agreements agreed to by the parties and the interest arbitration awards are not feasible for the state." ASF Ex. 15.

RCW 74.39A.300(2), however, as was noted above, creates only two necessary preconditions to the Governor's mandatory nondiscretionary obligation to submit a request for funds to implement the compensation and fringe benefit provisions of a contract entered into

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<sup>6</sup> Website text is reproduced herein as viewed on January 29, 2009.

under RCW 74.39A.270. The first is that the request must previously have been submitted to OFM by October 1st prior to the legislative session at which the request is to be considered. The second is that the request either was “certified by the director of the office of financial management as being feasible financially for the state or reflects the binding decision of an arbitration panel reached under RCW 74.39A.270(2)(c).” (Emphasis added.)

Because the request for funds necessary to implement the compensation and fringe benefits provisions of Arbitrator Williams’ decision “reflect[ed] the binding decision of an arbitration panel reached under RCW 74.39A.270(2)(c),” as specified in RCW 74.39A.300(2), no certification of financial feasibility from the director of OFM was required. Thus, the Governor was legally mandated to include such a request for funds in her proposed biennial operating budget.

By failing to include a request for funds or the legislation necessary to implement the collective bargaining agreement reached through the statutorily-prescribed interest arbitration process, Governor Gregoire failed to perform an act which the law especially enjoined and enjoins her to perform as a duty resulting from her office.

#### IV. ARGUMENT

**A. THIS COURT SHOULD ISSUE A WRIT OF MANDAMUS SINCE GOVERNOR GREGOIRE IS UNDER A CLEAR DUTY TO ACT, SEIU 775NW HAS NO PLAIN SPEEDY AND ADEQUATE REMEDY AT LAW, AND SEIU 775NW IS BENEFICIALLY INTERESTED.**

The statutory framework set forth in RCW 7.16.150 -.280 requires the applicant for a writ of mandamus to satisfy three elements before the writ will properly issue: 1) the party subject to the writ is under a clear duty to act; 2) the applicant has no plain, speedy and adequate remedy in the ordinary course of law; and 3) the applicant is beneficially interested. RCW 7.16.160-170; *Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741 (2003), *rev. denied*, 151 Wn.2d 1027, 94 P.3d 959; *see also Paxton v. City of Bellingham*, 129 Wn. App. 439, 119 P.3d 373 (2005).

Petitioner respectfully submits that this case clearly illustrates why the writ exists. Mandamus is an appropriate remedy to compel performance if there is a “specific, existing duty which a state officer has violated and continues to violate.” *Eugster*, at 404-05 (quoting *Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994)); *Wash. State Farm Bureau Fed’n v. Reed*, 154 Wn.2d 668, 115 P.3d 301 (2005) (stating that a writ properly issues to compel the performance of an act or duty expressly required by law); *Land Title of Walla Walla, Inc. v. Martin*, 117 Wn. App.

286, 289, 70 P.3d 978 (2003) (finding mandamus appropriate to compel a state official to comply with a law when the claim is clear and a duty to act exists).

**1. Governor Gregoire Has A Clear Duty To Act Because RCW 74.39A.300(1) Uses Unambiguous Mandatory Language To Require The Governor To Put The 2009-2011 IP Contract In Her Proposed Budget So Long as Certain Prerequisites Were Satisfied, Which Occurred.**

**A. RCW 74.39A.300(1) creates a mandatory duty to act if certain prerequisites are satisfied.**

As was explained above, RCW 74.39A.300(1) provides that “[u]pon meeting the requirements of subsection (2) of this section,” RCW 74.39A.300(2), “the governor **must** submit” a request for funds necessary “to implement the compensation and fringe benefits provisions of a collective bargaining agreement entered into under RCW 74.39A.270....” (Emphasis added).

When interpreting a statute, the court first looks to its plain language and, if the plain language is subject to only one interpretation, the inquiry is over. *In re Detention of Martin*, 163 Wn.2d 501, 508, 182 P.3d 951 (2008). If the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *Christensen v. Ellsworth*, 162 Wn.2d 365, 372-73, 173 P.3d 228 (2007). When clear and unequivocal language is at issue, courts must

assume that the legislature meant exactly what it said, apply the statute as written and decline to construe the statute otherwise. *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005); *Burton v. Lehman*, 153 Wn.2d 416, 424, 103 P.2d 1230 (2005); *Diehl v. Western Wash. Growth Mgmt. Hearings Bd.*, 153 Wn.2d 207, 214, 103 P.3d 193 (2004).

Plain meaning is “discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Christensen*, 162 Wn.2d at 373; *see also, Burns v. City of Seattle*, 161 Wn.2d 129, 140, 164 P.3d 475 (2007). The ordinary, everyday meaning should be given to words not particularly defined. *Prison Legal News v. Dep’t of Corrections*, 154 Wn.2d 628, 640, 115 P.3d 316 (2005).

In this case, the “plain meaning” of the statutory language “the governor must submit” is not merely permissive; it creates a mandatory obligation or duty to act. That is because the words “shall” and “must” are generally considered synonyms,<sup>7</sup> and the word “shall” is consistently construed as mandatory and operating to create a duty. *See, e.g.*,

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<sup>7</sup> *See, e.g., Buell v. City of Toppenish*, 174 Wn. 79, 80, 24 P.2d 431 (1933) (using “shall” and “must” to indicate a mandatory duty); *Tranen v. Aziz*, 59 Md. App. 528, 534-35, 476 A.2d 1170 (1984) (finding that, unless the context indicates otherwise, “shall” and “must” will be construed synonymously to foreclose discretion and impose a positive absolute duty).

*Philadelphia II v. Gregoire*, 128 Wn.2d 707, 713, 911 P.2d 389 (1996) (finding “shall” is presumptively imperative unless contrary legislative intent is apparent); *Waste Mgmt. of Seattle, Inc. v. Utilities and Transp. Comm’n*, 123 Wn.2d 621, 869 P.2d 1034 (1994); *Emwright v. King County*, 96 Wn.2d 538, 544, 637 P.2d 656 (1981).

Using the word “must” similarly creates a mandatory statutory requirement, which a court “cannot rewrite or modify...under the guise of statutory interpretation or construction.” *Graham Thrift Group, Inc. v. Pierce County*, 75 Wn. App. 263, 267, 877 P.2d 228 (1994) (referring to a Pierce County Code provision requiring the filing of an appeal notice and fee).

Based on these fundamental rules of statutory interpretation, the plain language of the statute must be assigned its proper meaning. So long as the prerequisites set forth in RCW 74.39A.300(1) were met, the Governor was obligated to submit a request to fund the 2009-2011 IP contract as determined by Arbitrator Williams’ interest arbitration award.<sup>8</sup>

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<sup>8</sup> Rules of statutory interpretation apply to RCW 74.39A.300 even though it was enacted into law via the initiative process. “Once an initiative is enacted into law, the same principles of statutory construction apply as apply when the legislature enacts a measure.” *State v. Conte*, 159 Wn.2d 797, 807, 154 P.3d 194, *cert. denied*, 128 S. Ct. 512, 169 L. Ed.2d 342 (2007).

B. The prerequisites set forth in RCW 74.39A.300(1) were satisfied.

As was noted above, RCW 74.39A.300(1) references only two prerequisites for imposition of the duty on the Governor to submit a request for funds necessary to implement a collective bargaining agreement entered into under RCW 74.39A.270. The language of this provision states, in pertinent part, that the request for funds necessary to implement the contract “shall not be submitted” unless the request:

- (a) Has been submitted to the director of financial management by October 1st prior to the legislative session at which the request is to be considered; and
- (b) Has been certified by the director of financial management as being feasible financially for the state or reflects the binding decision of an arbitration panel reached under RCW 74.39A.270(2)(c).

RCW 74.39A.300(2).

First, therefore, the request must previously have been submitted to the OFM by October 1st prior to the legislative session at which the request is to be considered. There is no dispute that this prerequisite to the applicability of RCW 74.39A.300(1) occurred in the instant case. *See* ASF ¶ 9; ASF Ex. 11.

Second, based on the foregoing language, the request must have **either** been certified by OFM as being feasible financially for the state, **or** must reflect the binding decision of an arbitration panel reached under

RCW 74.39A.270(2)(c). As was discussed above, the second of these two alternative means of satisfying the second prerequisites occurred, because Arbitrator Williams issued his interest arbitration decision on October 1, 2008. *See* ASF ¶ 8, ASF Ex. 10.

Thus, both statutory prerequisites referenced in RCW 74.39A.300(1) were satisfied, leaving the Governor no choice but to comply with the mandatory language of that statute.

C. The State's arguments regarding the need for OFM certification of the financial feasibility of an interest arbitration award are without merit.

The State apparently contends that even where an arbitration decision has been issued under RCW 74.39A.270(2)(c), the Governor is not obligated to include a request to fund the collective bargaining agreement absent a finding of financial feasibility from OFM. However, the rules of statutory interpretation noted above, which require that the plain language of a statute be given effect, requires the opposite conclusion. That is because the plain language of this statute, by using the word "or," clearly and unequivocally indicates that the prerequisite set forth in RCW 74.39A.300(2)(b) is satisfied **either** by a certification of financial feasibility by OFM, **or** by a binding decision of an arbitration panel reached under RCW 74.39A.270(2)(c).

As a default rule, the word “or” cannot mean “and” unless legislative intent clearly indicates to the contrary. *Tesoro Refining and Marketing Co. v. Dep’t of Revenue*, 164 Wn.2d 310, 319, 190 P.3d 28 (2008) (Fairhurst, J., with three justices concurring and one justice concurring in result) (finding “or” not susceptible to multiple reasonable interpretations and refusing to strain to read “or” as “and”); *HJS Dev. Inc., v. Pierce County*, 148 Wn.2d 451, 474, n.95, 61 P.3d 1141 (2003). Without clear legislative intent to the contrary, courts logically presume “or” is used disjunctively (i.e. in the alternative) in a statute. *State v. Bolar*, 129 Wn.2d 361, 365-66, 917 P.3d 125 (1996).<sup>9</sup>

Nothing in RCW 74.39A.300(2)(b) indicates any legislative intent that “or” should be read conjunctively to mean “and.” On the contrary, the construction of the statute shows very clearly that when the Legislature wanted multiple items to be read conjunctively it knew how to do so specifically.

For example, RCW 74.39A.300(2)(a) and (b) are individually lettered and separated by the word “and.” This construction indicates that the governor shall not submit a request for funds to the legislature unless

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<sup>9</sup> In contrast, statutory phrases separated by the word “and” generally should be construed in the conjunctive (i.e. as requiring co-existence). *Bolar*, 129 Wn.2d at 365-366 (quoting *Childers v. Childers*, 89 Wn.2d 592, 596, 575 P.2d 201 (1978)); *HJS Dev. Inc.*, 148 Wn.2d at 474, n.95.

the provisions of both (a) (the October 1 deadline) and (b) (OFM certification or arbitration award) have been met.

In contrast, RCW 74.39A.300(2)(b) set forth two alternative ways that the requirement of subsection (b) may be met: the governor's budget request is certified by OFM as being financially feasible for the state "or" the request reflects the binding decision of an arbitration panel. RCW 74.39A.300(2)(b). Had the legislative intent been to require OFM certification even where the contract reflects the binding decision of an arbitration panel, those two requirements would have been separated by the word "and," not the word "or." The State cannot plausibly argue to the contrary.

In fact, the State, through OFM, has all but conceded that that under RCW 74.39A.300(2)(b), no certification of financial feasibility from the director of OFM is required or authorized with regard to the binding decisions of an arbitration panel. In a letter dated December 18, 2008, OFM stated, *inter alia*, that "[l]egislation will be submitted along with the Governor's 2009-2011 proposed budget that **subjects arbitration awards to be certified as feasible financially** for the state by the director, Office of Financial Management," ASF Ex. 15 (emphasis added). By so stating, OFM acknowledged that absent such legislation, arbitration awards need not be so certified. Why else would such legislation be sought?

The OFM's representative at the interest arbitration hearing in front of Arbitrator Williams, Mr. Opitz, also conceded, in his testimony at that hearing, that the results reached through interest arbitration would **inevitably** be included, as a "legal mandate," in the Governor's 2009-2011 proposed budget. Mr. Opitz testified:

So the policy choice is going to be made in this room to place **a legal mandate in front of the Governor and Legislature** to pay for something that then crowds out something else, and the rest of the policy choices are about what's crowded out.... [I]n balancing our budget in December [2008], we incorporate what the award is, and it goes to the top of the -- top of the list. It -- it -- it's funded as if it were a contractual obligation within our budget deliberations and crowds out something else."

ASF Ex. 4, pg. 626:2-8 (emphasis added).<sup>10</sup>

RCW 74.39A.300(2)(b), in referring to "the binding decision of an arbitration panel reached under RCW 74.39A.270(2)(c)," is referencing the outcome of the interest arbitration process set forth in RCW 41.56.430 through RCW 41.56.480. RCW 74.39A.270(2)(c). The pertinent statutory provision, RCW 41.56.465, which addresses IP bargaining specifically, explicitly requires the interest arbitrator to consider "[t]he financial ability of the state to pay for the compensation and fringe benefit

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<sup>10</sup> Mr. Opitz's statement also reveals that the State fully believed that its ability to pay would be determined by the Arbitrator – that the "policy choice is going to be made in this room." *Id.*

provisions of a collective bargaining agreement.” RCW 41.56.465(5)(ii).<sup>11</sup>

Because the interest arbitrator is legally required to consider the financial feasibility of the arbitration award he or she issues, he or she serves the same role, with regard to agreements that are reached through interest arbitration, as that played by OFM with regard to certifying the financial feasibility of bargained agreements. RCW 74.39A.300(2)(b) therefore creates two methods of ensuring the financial feasibility of contracts – one for bargained agreements, which must be certified by OFM, and one for interest arbitration awards, which must pass muster with the interest arbitrator.

While the State may now wish to change this statutory framework, it cannot plausibly contend that Petitioner’s interpretation is outside the realm of reasonableness so as to require this Court to decide that the words used in the statute cannot mean what they very clearly say, and to deny the writ on that basis.

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<sup>11</sup> Consistent with this statute, as was noted above, Arbitrator Williams did, in fact, explicitly and strongly consider the financial ability of the state to pay for the compensation and fringe benefit provisions of his interest award, and adjusted his award significantly in light of that consideration. *See* text at pages 8-9, above.

**2. SEIU 775NW has no plain, speedy, and adequate remedy at law**

“The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law.” RCW 7.16.170.

As case law makes clear, “[a] remedy is not inadequate merely because it is attended with delay, expense, annoyance, or even some hardship. There must be something in the nature of the action that makes it apparent that the rights of the litigants will not be protected or full redress will not be afforded without the writ.” *Eugster*, 118 Wn. App. at 414 (quoting *City of Kirkland v. Ellis*, 82 Wn. App. 819, 827, 920 P.2d 206 (1996)). Whether there is a plain, speedy and adequate remedy is a question left to the discretion of the court. *River Park Square, L.L.C. v. Miggins*, 143 Wn.2d 68, 76, 17 P.3d 1178 (2001).

Petitioners have no other remedy in the ordinary course of law. The 2009 regular legislative session will conclude no later than April 26. ASF, ¶ 18. The “ordinary course of law” would not protect petitioners’ rights nor provide full redress given the time sensitive nature of this matter. Absent an immediate writ, Petitioner will be denied its rights under the statute to have the request for funding for the 2009-2011 IP contract meaningfully considered by the Legislature.

### 3. SEIU 775NW is beneficially interested

A party is considered to be beneficially interested and thus has “standing to bring an action for mandamus... if he has an interest in the action beyond that shared in common with other citizens.” *Retired Pub. Employees Council v. Charles*, 148 Wn.2d 602, 616, 62 P.3d 470 (2003); RCW 7.16.170 (“[The writ] must be issued upon affidavit on the application of the party beneficially interested.”).

In *Charles*, the court found that retirees, public employees, teachers, as well as two organizations representing retired state employees and teachers, had “an interest, beyond that of other citizens, in changes made to the retirement system” and thus had standing. *Id.* at 620. The *Charles* petitioners sought a writ of mandamus against the Director of Retirement Systems regarding the collection of employer contributions.

Here there can be no serious dispute that SEIU 775NW is “beneficially interested” in this mandamus action to compel the Governor to request funding for the 2009-2011 IP contract. Pursuant to the law, SEIU 775NW bargained the contract, and took central economic issues to interest arbitration in order to win improvements for its members. This CBA will, if funded by the Legislature, determine the IP’s compensation and working conditions for the 2009-2011 biennium. The Governor’s failure to include funding for the IP contract in her budget deprives

Petitioner and its members of their rights under the law. Moreover, it will likely deny the IPs SEIU 775NW represents the modest but essential benefits set forth in Arbitrator Williams' award.

## V. CONCLUSION

For the foregoing reasons, we respectfully ask this court to issue a writ of mandamus compelling the Governor to immediately withdraw the proposed biennial operating budget she submitted to the legislature on December 18, 2008, and to instead submit a proposed biennial operating budget to the legislature that includes funding for the 2009-2011 IP contract, as specifically required by RCW 74.39A.300(1). Specifically, we ask this Court issue the following writ of mandamus:

Respondent, Governor Gregoire, is hereby ordered to submit within five days of this Order a revised balanced budget to the Legislature that includes funding and the necessary legislative authorization for the 2009-2011 collective bargaining agreement between the State and SEIU Healthcare 775NW.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of January, 2009.

s/ Dmitri Iglitzin  
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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2009, I caused Petitioner's Brief In Support Of Its Petition For A Peremptory Writ Of Mandamus Against Governor Christine Gregoire to be filed with the Washington State Supreme Court via email to Supreme@courts.wa.gov. Per agreement of counsel I caused the same to be served via email and same day US First Class Mail to the following:

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s/ Dmitri Iglitzin  
Dmitri Iglitzin