No. 84704-5

Stephens J. (dissenting)—This case boils down to a dispute over litigation tactics between two independently elected state officers. The question is whether the Washington Supreme Court should referee such a dispute. The majority believes we should, on the premise that the attorney general is no more than retained counsel for the commissioner of public lands, owing a mandatory, nondiscretionary duty to follow the commissioner's wishes. I respectfully dissent because this view of the office of the attorney general fails to appreciate the significant discretion involved in serving as legal counsel for the State and its officers. This dissent focuses on three principal errors in the majority opinion. First, it fundamentally misunderstands the authority and duty of the attorney general under our constitution and the relevant statutes. Second, it vastly expands the circumstances under which this court will grant a writ of mandamus, essentially using the writ to choose sides in a dispute between two officers of the executive branch. Finally, the majority's analysis is inconsistent with our opinion in a companion case, *City of Seattle v.*

McKenna, No. 84483-6 (Wash. Sept. 1, 2011).

1. The Attorney General Exercises Broad Discretion In Representing the Legal Interests of State Officers

The office of attorney general is established under article III, section 21 of the Washington Constitution. That provision states that "[t]he attorney general shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law." Const. art. III, § 21. As an independently elected officer, the attorney general does not serve at the will of other executive officers. Rather, he answers to the people. The attorney general's independence under our constitutional scheme reflects a conscious decision by the framers of the Washington Constitution to counter the accumulation of executive power in any single official. *See State v. Gattavara*, 182 Wash. 325, 332-33, 47 P.2d 18 (1935). This unique constitutional role as "the legal adviser of the state officers" is complemented by statutes prescribing the attorney general's duties in particular circumstances. *See, e.g.*, RCW 43.10.030(2) (stating that the attorney general "shall . . . [i]nstitute and prosecute all actions and proceedings . . . which may be necessary in the execution of the duties of any state officer"), .040 (stating that the attorney general "shall also represent the state . . . in the courts . . . in all legal or quasi legal matters").

The majority declares that this case may be resolved by looking only to "a handful of statutes." Majority at 4. Specifically, the majority finds dispositive that RCW 43.12.075 uses the word "shall" in describing the attorney general's role *vis-a-*

vis the commissioner of public lands. But this interpretation of RCW 43.12.075 ignores our long-held recognition that the attorney general may exercise broad discretion as the state official charged with directing the course of litigation. *Blue Sky Advocates v. State*, 107 Wn.2d 112, 118-19, 727 P.2d 644 (1986); *Boe v. Gorton*, 88 Wn.2d 773, 776, 567 P.2d 197 (1977); *Berge v. Gorton*, 88 Wn.2d 756, 761, 567 P.2d 187 (1977). It defies common sense to suggest that RCW 43.12.075 eliminates the attorney general's discretion to decide whether to pursue an appeal. How can the attorney general adequately fill his constitutional role as "legal adviser of the state officers" yet be utterly powerless to guide litigation?

A long line of cases starting with *State ex rel. Rosbach v. Pratt*, 68 Wash. 157, 122 P. 987 (1912), confirms that the attorney general does, and must, have discretion. *Pratt* involved a mandamus action to compel the attorney general to recover unpaid fees from a company under the industrial insurance act. The statute defining the attorney general's responsibilities, which is nearly identical to RCW 43.12.075, stated, "'The attorney general shall be the legal adviser of the department, and shall represent it in all proceedings, whenever so requested by any of the commissioners [of the Industrial Insurance Commission].'" *Id.* at 158 (quoting Laws of 1911, ch. 74, § 20). We explained that we could find no "requirement [in the statute] of absolute duty on the part of the commission or attorney general to bring actions against each and every delinquent employer." *Id.* Focusing specifically on the language of the statute, we said that "[a]uthority to commence such actions is conferred, but not compelled." *Id.* We held that

"commencement of actions at law to enforce the payment of delinquent assessments, against whom and when they shall be brought, are matters resting wholly within the discretion of the commission and the Attorney General, a discretion which cannot be controlled by mandamus." *Id.*

Since *Pratt*, we have consistently recognized that the duty imposed by statute on the attorney general is to represent state agencies; but the attorney general retains broad discretion in doing so. In other words, the statutes require the attorney general to exercise his discretion. *See Gattavara*, 182 Wash. at 330 (noting that the attorney general "must exercise his judgment" on whether to initiate action to collect industrial insurance premiums); *Berge*, 88 Wn.2d at 761 (explaining that statute stating the attorney general "shall" bring action imposed only a duty to "'exercise discretion'"); *Boe*, 88 Wn.2d at 775 (same); *Young Ams. for Freedom v. Gorton*, 91 Wn.2d 204, 210, 588 P.2d 195 (1978) (recognizing that the attorney general "may exercise broad discretion in the exercise of his duties"); *Blue Sky Advocates*, 107 Wn.2d at 119 (noting that because the attorney general has discretion in performance of duties, his actions are reviewable only for abuse of discretion).

In addition to misreading this line of precedent, the majority wrongly interprets RCW 43.12.075 as establishing a traditional attorney-client relationship between the attorney general and the commissioner. Majority at 15 n.3, 17-18. Yet both Washington's Rules of Professional Conduct and the Model Rules of Professional Conduct recognize that the attorney general's unique responsibilities alter the traditional attorney-client framework:

> Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement *or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general* and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. *These Rules do not abrogate any such authority.*

RPC scope [18] (emphasis added); Model Rules of Prof'l Conduct scope [18] (2011) (emphasis added). As discussed above, under Washington's constitutional and statutory framework, it is the attorney general and not some other state official who is charged with directing the course of litigation. Though the Rules defer to the attorney general's unique responsibility to represent the public interest, the majority eliminates any such deference by casting the attorney general in the role of any other private-sector lawyer.

2. Granting a Writ to Compel the Attorney General to File an Appeal Against His Judgment Vastly Expands Mandamus

Mandamus is an "extraordinary remedy" and we "have placed strict limits on the circumstances under which we will issue the writ to public officers." *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 598-99, 229 P.3d 774 (2010); *Walker v. Munro*, 124 Wn.2d 402, 407, 879 P.2d 920 (1994) (noting that "mandamus is an extraordinary writ"). Mandamus is available only to compel a state officer to undertake a mandatory, nondiscretionary duty. *SEIU Healthcare*,

168 Wn.2d at 599. A duty is nondiscretionary or ministerial when "'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.'" *Id.* (internal quotation marks omitted) (quoting *State ex rel. Clark v. City of Seattle*, 137 Wash. 455, 461, 242 P. 966 (1926)). Thus, while a duty may be mandatory, it is not subject to mandamus unless the duty is also nondiscretionary or ministerial—that is, there is a complete absence of discretion in the officer's performance of the duty. *Id.*; *Brown v. Owen*, 165 Wn.2d 706, 725, 206 P.3d 310 (2009) ("Where we find a mandatory duty, we must further determine whether that duty is ministerial or discretionary in nature.").

The majority sidesteps the "strict limits" that have made mandamus an "extraordinary remedy" by construing the attorney general's authority to direct litigation as entirely nondiscretionary. The majority says that our cases recognizing the attorney general's discretion are distinguishable because they did not involve the situation here—where a state officer, rather than a third party, seeks to command action by the attorney general. But in none of the cases the majority attempts to distinguish did the court conclude the duty was discretionary because the request to act came from a third party. Rather, we have always found the duty discretionary for the simple reason that discretion inheres in the role of attorney general as the state official charged with directing litigation. *See Pratt*, 68 Wash. at 158; *Young Ams. for Freedom*, 91 Wn.2d at 210; *Blue Sky Advocates*, 107 Wn.2d at 118-19. While the majority's distinction may matter to the issue of standing, once standing is

established, the duty to be exercised is either discretionary or it is not. The majority fails to explain how the identity of the party seeking the writ has any bearing on whether the duty to direct litigation in the best interest of the public is nondiscretionary in nature.

If we compel the attorney general to file an appeal on the grounds that it is a mandatory, nondiscretionary duty, there is no limiting principle that would allow us to avoid mandamus where state officers disagree on other steps in litigation. What if the attorney general wants to settle a lawsuit and the commissioner does not? What if the commissioner insists on pursuing a claim that the attorney general believes is unwarranted? In denying the request for mandamus in *Pratt*, we recognized this very problem:

> "[T]o compel [the attorney general], against his will and contrary to his judgment, to merely *commence* an action would be an idle thing in the absence of power to compel him to prosecute it to final determination; and such power is not contended for by appellant. And, indeed, there could be no practicable exercise of such power. The court granting the writ of mandate could not follow the [attorney general] through the case, and see to it that he filed proper pleadings, offered sufficient evidence, made necessary objections to evidence offered by [opposing counsel], used proper arguments and authorities in discussing questions raised before the court or jury, and conducted the trial [and appeal] with reasonable care and diligence."

68 Wash. at 159 (quoting *Boyne v. Ryan*, 100 Cal. 265, 267, 34 P. 707 (1893)).

The majority asserts that the commissioner "is satisfied" by the writ here and will rely on the attorney general thereafter to meet his ethical obligations under the Rules of Professional Conduct. Majority at 17-18. But this again wrongly assumes that the attorney general serves in a capacity that is "typical of any attorney-client

relationship." Majority at 18. The Rules themselves clarify that the attorney general, by virtue of his unique constitutional and statutory role, is anything but a typical private attorney. The majority sees no risk of persistent writ requests every time the attorney general exercises discretion because it obviates that discretion. Under the majority's analysis, the attorney general's role is reduced to asking "how high" when the state officer he represents says "jump."

Simply stated, once we start down this path, we trivialize the writ of mandamus and vastly expand our role in resolving disagreements between independently elected officers in another branch of government. I believe this sets up an ill-advised test of the limits of our authority. It is not only unwise, but potentially destructive to the very system of checks and balances the framers of our constitution created.[1]

3. The Majority's Analysis is Inconsistent with Our Decision in *City of Seattle v. McKenna*

This case was heard on the same day as a similar case, *City of Seattle v. McKenna*, No. 84483-6. There, the City of Seattle sought a writ of mandamus to compel the attorney general to withdraw from federal litigation in Florida. We refused to grant the writ in light of the broad authority of the attorney general as the

[1] This is not to say that the attorney general's actions are never subject to review. A writ may issue if the attorney general fails to make any decision or if the decision constitutes an abuse of discretion—i.e. a "'willful and unreasoning action, [taken] without consideration and in disregard of facts or circumstances.'" *Boe*, 88 Wn.2d at 774-75 (quoting *Lillions v. Gibbs*, 47 Wn.2d 629, 633, 289 P.2d 203 (1955)); *Blue Sky Advocates*, 107 Wn.2d at 117-18 (quoting *Berge*, 88 Wn.2d at 761-62). The commissioner does not allege that the attorney general's refusal to pursue the appeal was an abuse of discretion.

chief legal officer of the state. We traced this authority from its constitutional roots to some of the same statutes defining the attorney general's authority that are at issue in this case. *See McKenna*, slip op. at 10 (noting that RCW 43.10.030 "confers broader authority than the plain text indicates"). Rejecting the argument that the attorney general was required to withdraw Washington from the federal litigation, we stated, "The people of the state of Washington have, by statute, vested the attorney general with broad authority." *Id.* at 15. Moreover, relying on *Boe* and *Berge*, we recognized that "[w]here the attorney general possesses authority to initiate litigation, that authority is generally discretionary." *Id.* at 4.

I find it impossible to reconcile the majority's analysis here with our decision in *McKenna*. First, the majority here reads the statutes defining the attorney general's authority, which speak in terms of what the attorney general "shall" do, as mandatory and nondiscretionary. The *McKenna* decision, by contrast, acknowledges that the term "shall" has been construed to impose "only a discretionary duty." *Id.* at 12 n.3. Recognizing this inconsistency, the *McKenna* decision suggests that while "the term 'shall' generally creates a mandatory duty, case law has established that, in the context of RCW 43.10.030, the use of 'shall' creates only a discretionary duty." *Id.* (citation omitted). This distinction is artificial. If the attorney general truly has discretion as the chief legal officer of the State despite what RCW 43.10.030 says he "shall" do, then the attorney general must likewise have discretion in the face of similar statutes that purport to limit his discretion. Statutes cannot be read in isolation.

Second, while the majority here places the attorney general in a traditional attorney-client relationship with the state officers he represents, the *McKenna* decision rejects this framework. We say in *McKenna* that the attorney general has "discretionary authority to act in any court, state or federal, trial or appellate, on 'a matter of *public* concern,' provided that there is a 'cognizable common law or statutory cause of action.'" *McKenna*, slip op. at 12 (citations omitted) (emphasis added). Moreover, the *McKenna* decision rejects the argument that "where the governor and attorney general disagree, the attorney general may not proceed in the name of the State." *Id.* at 14. This view is at odds with the majority's analysis. Reading the two cases together, it is unclear why a writ of mandamus is appropriate to force the attorney general to follow the commissioner's wishes in this litigation but is inappropriate in *McKenna*.[2]

Consistent with our decision in *McKenna*, I would recognize that the attorney general's duty to represent state officers in litigation is generally not subject to a writ of mandamus. While the attorney general's role to provide legal counsel is mandated by statute, it fundamentally involves discretion and legal judgment entrusted to an independently elected official. The statutory duty is for the attorney

[2] The *McKenna* decision leaves for another day "the issue of what result the Washington Constitution compels where the governor disagrees with the attorney general's discretionary decision to initiate litigation and seeks to preclude the attorney general's action" by becoming a party to a mandamus action. *McKenna*, slip op. at 14-15. Whatever the answer may be under the constitution when the governor is a party to the litigation, at a minimum the Rules of Professional Conduct do not require the attorney general to follow the governor's wishes. If they did, the governor's opposing view by amicus brief in *McKenna* should be enough to control the attorney general's participation in the federal litigation.

general to exercise discretion. This is no mere ministerial task subject to the extraordinary writ of mandamus.

I respectfully dissent.

AUTHOR:
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WE CONCUR:
Richard B. Sanders, Justice Pro Tem.