Attachment A

Washington State
Office of the Attorney General
Acknowledged Receipt, this 10th day
of February, 2017, Time: 2:25 pm
in Olympia, Washington.
Signature:
Print Name: Jennifer E. Morey
Assistant Attorney General

FILED
FEB - 8 2017
Superior Court
Linda Myhre Enlow
Thurston County Clerk

☐ Expedite
☐ No hearing set
☐ Hearing is set
Date:
Time:
Judge/Calendar:

**SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY**

FREEDOM FOUNDATION, a Washington nonprofit organization, in the name of the STATE OF WASHINGTON,

Plaintiff,

v.

JAY INSLEE, Governor of the State of Washington, STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES, and SERVICE EMPLOYEES INTERNATIONAL UNION 775NW, a Washington labor corporation,

Defendant.

No. 17-2-00417-34

COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF FOR PAST AND ONGOING VIOLATIONS OF RCW 42.17A.

I. INTRODUCTION

1. This is a citizen action brought pursuant to RCW 42.17A.765 to enforce the Washington Fair Campaign Practices Act ("FCPA").

2. Plaintiff issued the written notices required by RCW 42.17A.765(4) and RCW 42.17A.765(4)(a)(ii) on September 30, 2016 and November 18, 2016, respectively.

3. Neither the Washington Attorney General nor any County Prosecuting Attorney has

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1 commenced an action on the violations alleged in this Complaint.

2 4. In brief, the Washington Department of Social and Health Services ("DSHS") has been
3 withholding for and/or diverting money to Service Employees International Union Local 775
4 ("SEIU") from the wage payments DSHS makes to the State's Individual Provider home care aides
5 ("IPs"), as defined by RCW 74.39A.240(3), for use as political contributions. In violation of RCW
6 42.17A.495(3), DSHS has been making the payroll deductions without IPs' written authorization

7 5. Additionally, DSHS has violated RCW 42.17A.495(4) by failing to allow public inspection
8 of IPs' written deduction authorizations and related records.

9 **II. PARTIES**

10 6. Plaintiff Freedom Foundation ("FF" or the "Foundation") is a Washington nonprofit
11 organization.

12 7. Defendant Jay Inslee is Governor of the State of Washington and is sued in his official
13 capacity. As Governor, Defendant Inslee is the IPs' employer "solely for the purposes of collective
14 bargaining." RCW 74.39A.270(1).

15 8. DSHS is the agency which pays IPs and seizes and remits the deductions which are the
16 subject of this action.

17 9. SEIU is a Washington labor corporation and the exclusive bargaining representative for
18 IPs. DSHS forwards the deductions from IPs' wages to SEIU. Plaintiff includes SEIU as a
19 necessary party pursuant to Civil Rule 19, only. Plaintiff does not accuse SEIU of violating the
20 FCPA here.

21 **III. JURISDICTION AND VENUE**

22 10. This Court has jurisdiction pursuant to RCW 42.17A.765(4).

23 11. Venue is proper in this Court pursuant to RCW 4.12.020 because some part of the cause of

24

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action arose in Thurston County. DSHS's primary office is in Thurston County and where DSHS fails to acquire or possess written authorization from IPs before making the deductions relevant in this Complaint. DSHS also fails to maintain these written authorizations in Thurston County (or any other branch office) and fails to allow public inspection of the IPs' written authorizations in Thurston County, in violation of RCW 42.17A.495(4).

IV. STATEMENT OF FACTS

12. The Foundation hereby incorporates the allegations above as if fully set forth herein.

13. RCW 42.17A.495(3) states in relevant part:

> No employer or other person or entity responsible for the disbursement of funds in payment of wages or salaries may withhold or divert a portion of an employee's wages or salaries for contributions to political committees or for use as political contributions except upon the written request of the employee.

14. RCW 42.17A.495(4) states in relevant part:

> Each person or entity who withholds contributions under subsection (3) of this section shall maintain open for public inspection for a period of no less than three years, during normal business hours, documents and books of accounts that shall include a copy of each employee's request, the amounts and dates funds were actually withheld, and the amounts and dates funds were transferred to a political committee.

15. IPs contract with the State of Washington to provide home health care services to state Medicaid beneficiaries that allow them to continue living in their home.

16. RCW 74.39A.270(1) designates the governor as IPs' employer "solely for the purposes of collective bargaining." RCW 74.39A.270(2) establishes that RCW 41.56 governs the collective bargaining relationship between the state and IPs, except as provided by RCW 74.39A.270. RCW 41.56.113(1) conditionally authorizes the state to withhold union dues and make other deductions from IPs' pay, and establishes the requirements for doing so.

17. Before April 1, 2016, DSHS paid its approximately 35,000 IPs through DSHS' Social

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Service Payment System ("SSPS"). After April 1, 2016. DSHS pays IPs through Individual ProviderOne ("IPOne"), a payroll system managed by a contractor, Public Consulting Group, Public Partnerships LLC.

18. Pursuant to RCW 41.56.113(1) and Art. 4.1 of the 2015-2017 collective bargaining agreement between the State and SEIU ("CBA"),[1] DSHS deducts union dues, or dues equivalent fees, from IPs' wages and forwards them to SEIU ("deductions").

19. Some IPs from whom deductions are made may have signed cards which purport to authorize DSHS to make such deductions. Many IPs have not signed any such card. Yet pursuant to CBA art. 4.1, DSHS makes deductions from all IPs regardless of which IPs signed such a card.

20. Neither Governor Inslee nor DSHS view, acquire, or possess the purported authorization cards SEIU may or may not possess.

21. Instead, Governor Inslee and DSHS blindly make the deductions from all IPs' wages unless SEIU instructs them otherwise.

22. The union dues and fees deducted by DSHS from IPs' wages and forwarded to SEIU are regularly used by SEIU as contributions to political action committees and candidates for office. SEIU has regularly made such contributions going back at least two years.

23. Public records indicate that during the last two years SEIU has used millions of dollars of the money deducted from IPs' wages by DSHS for contributions to political committees and candidates for office.

24. Governor Inslee and DSHS have known for at least two years that the deductions from IPs' wages and forwarded to SEIU have been used by SEIU as contributions to political committees and candidates for office.

[1] Available at http://seiu775.org/files/2015/09/State-of-Washington-2015-2017.pdf .

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1 25. On September 14, 2016, Maxford Nelsen, Director of Labor Policy at the Freedom
2 Foundation, mailed certified letters to Governor Jay Inslee, Acting DSHS Secretary Patricia
3 Lashway, and PCG Partnerships, LLC President Marc Fenton making them aware of and
4 documenting that the state is withholding union dues and fees from IPs' wages for SEIU, that SEIU
5 uses such deductions as political contributions, and that DSHS makes such deductions without
6 first obtaining written authorization.

7 26. In this letter, Mr. Nelsen also requested to inspect all IP written deduction authorizations.

8 27. On September 22, 2016, Taylor Wonhoff, Deputy General Counsel of the Office of the
9 Governor, emailed Mr. Nelsen, stating that the Governor's Office does not collect, create, or
10 maintain IPs' written dues deduction authorizations.

11 28. On September 29, 2016, DSHS Assistant Secretary Bill Moss emailed Mr. Nelsen, stating
12 that neither DSHS nor PPL deduct funds from any IPs' wages and directly sends such payments
13 to a political action committee or persons running for office, and that neither DSHS nor PPL
14 possessed IPs' dues deduction authorizations that Mr. Nelsen wished to inspect.

15 29. On September 30, 2016, PCG Partnerships President Marc Fenton responded to Mr. Nelsen
16 by letter informing Mr. Nelsen that PCG Partnerships does not possess IPs' dues deduction
17 authorizations related to Mr. Nelsen's request.

18 30. Neither the Governor nor DSHS have acquired, or currently possess, written authorizations
19 from IPs authorizing the deductions. Neither the Governor nor DSHS make them available for
20 public inspection.

21 31. Plaintiff issued the written notices required by RCW 42.17A.765(4) and RCW
22 42.17A.765(4)(a)(ii) on September 30, 2016 and November 18, 2016, respectively. Both letters
23 were sent to the Washington Attorney General, as well as the Prosecuting Attorneys in Thurston
24

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County, King County, and Spokane County.

a. The Foundation's 45-day notice letter of September 30, 2016, pursuant to RCW 42.17A.765(4), outlined in detail the violations of RCW 42.17A discussed above.

b. The Foundation's 10-day notice letter of November 18, 2016, pursuant to RCW 42.17A.765(4)(a)(ii), included, inter alia, a statement that the Foundation would bring an action against DSHS and Governor Jay Inslee, in his official capacity as Governor, if the Attorney General and/or a Prosecuting Attorney failed to bring an action within 10 days of receipt of the 10-day notice letter.

VI. CLAIMS

Claim I: Violation of RCW 42.17A.495(3)

32. The Foundation hereby incorporates the allegations above as if fully set forth herein.

33. Governor Inslee and DSHS have withheld and continue to withhold and/or divert a portion of IPs' wages for use as political contributions without IPs' written authorization.

34. Money deducted from IPs' wages by Governor Inslee and DSHS and forwarded to SEIU has been used by SEIU as contributions to political committees and candidates for office going back at least two years.

35. Governor Inslee and DSHS have notice that a portion of IPs' wages they withhold and/or divert to SEIU are used by SEIU as contributions to political committees and candidates for office.

36. Governor Inslee and DSHS have had this notice going back at least two years or, alternatively, Governor Inslee and DSHS have had this notice going back to at least when Mr. Nelson provided them such notice.

37. By making the aforementioned deductions with the requisite notice, Governor Inslee and DSHS have violated and continue to violate RCW 42.17A.495(3).

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Claim II

38. The Foundation hereby incorporates the allegations above as if fully set forth herein.

39. Governor Inslee and DSHS failed and continue to fail to maintain open for public inspection for a period of no less than three years, during normal business hours, a copy of each IP's written authorization, the amounts and dates funds were actually withheld, and the amounts and dates funds were transferred.

40. Governor Inslee and DSHS have notice that a portion of IPs' wages they withhold and/or divert are used as political contributions.

41. Governor Inslee and DSHS have had this notice going back at least two years or, alternatively, Governor Inslee and DSHS have had this notice going back to at least when Mr. Nelson provided them such notice.

42. Governor Inslee and DSHS have denied the Foundation's Labor Policy Director Maxford Nelsen, the ability to inspect the IPs' written authorizations, and fail to hold the IPs' written authorizations open for public inspection.

43. In doing so, Governor Inslee and DSHS have violated and continue to violate RCW 42.17A.495(4).

VII. REQUESTED RELIEF

WHEREFORE, Plaintiff requests the following forms of relief:

1. For such remedies as the Court deems appropriate under RCW 42.17A.750, including:
    a. a $10,000 (ten thousand dollar) penalty pursuant to RCW 42.17A.750(c) for each of SEIU's violations of RCW 42.17A.495(3) and RCW 42.17A.495(4), amount to be determined;
    b. a $10 (ten dollar) penalty pursuant to RCW 42.17A.750(d) for each day Governor

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Inslee and DSHS have been delinquent in acquiring and possessing the IPs' written requests authorizing the aforementioned deductions from their wages, amount to be determined;

c. a penalty pursuant to RCW 42.17A.750(g) equal to the amount of money deducted from IPs wages in violation of RCW 42.17A.495(3) and RCW 42.17A.495(4), amount to be determined; and

d. a finding that Governor Inslee's and DSHS's violations were intentional and trebling the amount of judgment, which for this purpose shall include costs, as authorized by RCW 42.71A.765(5);

e. any other penalty the Court deems appropriate under RCW 42.17A.750.

2. Preliminary and permanent injunctive relief against Governor Inslee and DSHS prohibiting all of the aforementioned deductions until Governor Inslee and DSHS comply with RCW 42.17A.495(3) and RCW 42.17A.495(4).

3. An order compelling Governor Inslee and DSHS to acquire, maintain, and allow for public inspection all of the aforementioned written authorizations and other information required by RCW 42.17A.495(4).

4. All costs of investigation and trial, including reasonable attorneys' fees, as authorized by RCW 42.17A.765(5).

5. All such other relief the Court deems appropriate.

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Dated this 8th day of February, 2017.

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FREEDOM FOUNDATION

By: ______________________
James G. Abernathy, WSBA #48801
PO Box 552, Olympia, WA 98507
PH: 360.956.3482 | F: 360.352.1874
JAbernathy@freedomfoundation.com

DECLARATION OF SERVICE

I, Kirsten Nelsen, hereby declare under penalty of perjury under the laws of the State of Washington that on February 8, 2017, I caused the foregoing Complaint for Civil Penalties and Injunctive Relief for Past and Ongoing Violations of RCW 42.17A to be filed with the clerk, and caused a true and correct copy of the same to be sent by personal service to the following:

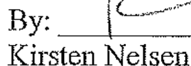
Governor Jay Inslee
Office of the Governor
416 14th Avenue SW
Olympia, WA 98504

Patricia Lashway
Director
Washington State Department of Social & Health Services
1115 Washington Street SE
Olympia, WA 98504

David Rolf
President
Service Employees International Union 775NW
215 Columbia Street
Seattle, WA 98104

Robert Ferguson
Attorney General
Office of the Attorney General
1125 Washington Street SE
Olympia, WA 98501
Attorney for Governor Inslee and DSHS

Dated: February 8th, 2017

By: 
Kirsten Nelsen

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Copy Received

Clerk's Stamp

SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY

	NO. 17-2-00417-34
Plaintiff/Petitioner	**SCHEDULING QUESTIONNAIRE SUBMITTED BY:**
	☐ Plaintiff / Petitioner DUE: June 02, 2017
vs.	☐ Defendent/Respondent DUE: June 07, 2017
	☐ Joint Submission or ☐ Other Party:
Defendant/Respondent.	DUE: June 07, 2017

See Local Court Rule 40 to learn how the court schedules cases.

1. What is the trial scheduling date for this case? ____________________
2. Who is the assigned judge? ____________________
3. What type of case is this (for example, contract, tort)?____________________
4. Will this be a [ ] bench trial or [ ] jury trial? (You must file a jury demand separately.)
5. How long do you estimate the trial will take?: ________ hours **or** ________ days.
6. When do you anticipate this case will be ready for trial? ____________________
7. When are you **unavailable** for trial in the next 24 months?
____________________(attach another sheet if necessary)
8. Is this case subject to mandatory arbitration? [ ] Yes [ ] No [ ] Don't know
9. Is this case subject to mandatory expedited review, was your trial already scheduled and then continued, or does it require special management by the judge? [ ] No [ ] Yes (explain):

____

Date: ____________________

SIGNED/Bar No: ____________________	SIGNED/Bar No: ____________________
Name: ____________________	Name: ____________________
Address: ____________________	Address: ____________________
Telephone No: ____________________	Telephone No: ____________________
E-mail Address: ____________________	E-mail Address: ____________________

Thurston County Superior Court
2000 Lakeridge Drive SW, Building Two
Olympia, Washington 98502
(360) 786-5430

FILED

FEB - 8 2017

Superior Court
Linda Myhre Enlow
Thurston County Clerk

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

Freedom Foundation
Plaintiff/Petitioner,

vs.

Jay Inslee, et al.
Defendant/Respondent.

NO. 17-2-00417-34

NOTICE OF ASSIGNMENT and (NTAS)
NOTICE OF TRIAL SCHEDULING DATE

TO: THURSTON COUNTY CLERK
ATTORNEYS/LITIGANTS

PLEASE TAKE NOTICE:

1. This case is assigned to: **The Honorable John Skinder**
2. The trial scheduling date for this case is: **June 09, 2017.**

> **Do not come to court on the trial scheduling date.** Do not call or e-mail the court. Instead, file a scheduling questionnaire and serve it on the other parties. The questionnaire is attached to this notice. Review Local Court Rule 40 for more information about scheduling.

3. **Plaintiff/Petitioner:** You must serve both this notice and a blank scheduling questionnaire by 5 p.m. on May 26, 2017. If there is no proof of service, the court will not issue a case schedule order. Your deadline for filing and serving a completed scheduling questionnaire is June 02, 2017 at 5 p.m.
4. **All Other Parties:** You must file and serve a completed trial setting questionnaire by June 07, 2017 at noon. Joint submissions by both parties are also accepted on this date.
5. Failure to timely submit a scheduling questionnaire shall not be grounds to delay issuing a case schedule order, and it shall not be grounds to continue the trial unless good cause is demonstrated.
6. The court will not issue a case schedule order unless the case is ready to be scheduled. "Readiness" for scheduling is explained in Local Court Rule 40, which is available on the court's web site and law libraries.
7. Parties can obtain an earlier trial scheduling date by filing and serving a notice of issue form.

Dated this 8th day of February, 2017.

Thurston County Superior Court
2000 Lakeridge Drive SW, Building Two
Olympia, Washington 98502
(360) 786-5430

FILED
FEB - 8 2017
Superior Court
Linda Myhre Enlow
Thurston County Clerk

CIVIL

Thurston COUNTY SUPERIOR COURT

Case Information Cover Sheet (CICS)

Case Number 17-2-00417-34 **Case Title** Freedom Foundation v. Inslee, et al.

Attorney Name James Abernathy **Bar Membership Number** 48801

Please check one category that best describes this case for indexing purposes. Accurate case indexing not only saves time in docketing new cases, but helps in forecasting needed judicial resources. Cause of action definitions are listed on the back of this form. Thank you for your cooperation.

- ☐ ABJ Abstract of Judgment
- ☐ ALR Administrative Law Review
- ☐ ALRJT Administrative Law Review-Jury Trial (L&I)
- ☐ CHN Non-Confidential Change of Name
- ☐ COL Collection
- ☐ CON Condemnation
- ☐ COM Commercial
- ☐ DOL Appeal Licensing Revocation
- ☐ DVP Domestic Violence
- ☐ EOM Emancipation of Minor
- ☐ FJU Foreign Judgment
- ☐ FOR Foreclosure
- ☐ FPO Foreign Protection Order
- ☐ HAR Unlawful Harassment
- ☒ INJ Injunction
- ☐ INT Interpleader
- ☐ LCA Lower Court Appeal – Civil
- ☐ LCI Lower Court Appeal – Infractions
- ☐ LUPA Land Use Petition Act
- ☐ MAL Other Malpractice
- ☐ MED Medical Malpractice
- ☐ MHA Malicious Harassment
- ☐ MSC2 Miscellaneous – Civil
- ☐ MST2 Minor Settlement – Civil (No Guardianship)
- ☐ PCC Petition for Civil Commitment (Sexual Predator)
- ☐ PFA Property Fairness Act
- ☐ PIN Personal Injury
- ☐ PRA Public Records Act
- ☐ PRG Property Damage – Gangs
- ☐ PRP Property Damages
- ☐ QTI Quiet Title
- ☐ RDR Relief from Duty to Register
- ☐ RFR Restoration of Firearm Rights
- ☐ SDR School District-Required Action Plan
- ☐ SPC Seizure of Property-Commission of Crime
- ☐ SPR Seizure of Property-Resulting from Crime
- ☐ STK Stalking Petition
- ☐ SXP Sexual Assault Protection
- ☐ TAX Employment Security Tax Warrant
- ☐ TAX L & I Tax Warrant
- ☐ TAX Licensing Tax Warrant
- ☐ TAX Revenue Tax Warrant
- ☐ TMV Tort – Motor Vehicle
- ☐ TRJ Transcript of Judgment
- ☐ TTO Tort – Other
- ☐ TXF Tax Foreclosure
- ☐ UND Unlawful Detainer – Commercial
- ☐ UND Unlawful Detainer – Residential
- ☐ VAP Vulnerable Adult Protection Order
- ☐ VVT Victims of Motor Vehicle Theft-Civil Action
- ☐ WDE Wrongful Death
- ☐ WHC Writ of Habeas Corpus
- ☐ WMW Miscellaneous Writs
- ☐ WRM Writ of Mandamus
- ☐ WRR Writ of Restitution
- ☐ WRV Writ of Review

IF YOU CANNOT DETERMINE THE APPROPRIATE CATEGORY, PLEASE DESCRIBE THE CAUSE OF ACTION BELOW.

Please Note: Public information in court files and pleadings may be posted on a public Web site.

Attachment B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

FREEDOM FOUNDATION,)
)
Plaintiff,)
)
vs.) SUPERIOR COURT NO. 17-2-00417-34
)
GOVERNOR JAY INSLEE,)
Governor of the State of)
Washington; WASHINGTON)
DEPARTMENT OF SOCIAL AND)
HEALTH SERVICES and)
SEIU 775NW,)
)
Defendants.)

THE HONORABLE JOHN SKINDER PRESIDING

Motion hearing report of proceedings
May 19, 2017
2000 Lakeridge Drive SW
Olympia, Washington

Court Reporter
Ralph H. Beswick, CCR
Certificate No. 2023
1603 Evergreen Pk Ln SW
Olympia, Washington

APPEARANCES

For the Freedom Foundation: James Abernathy
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PO Box 552
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For the State of Washington: Gina Comeau
Susan Sackett DanPullo
Assistant Attorneys General
PO Box 40145
Olympia, WA 98504-0145

For SEIU Local 775: Dmitri Iglitzin
Schwerin Campbell Barnard
Iglitzin & Lavitt
18 West Mercer St, Ste 400
Seattle, WA 98119

1 ********
2 THE COURT: All right. Thank you for your patience.
3 The parties that are going to be arguing can make their
4 appearances for the record.
5 MR. IGLITZIN: Dimitri Iglitzin, Your Honor,
6 Schwerin Campbell Barnard Iglitzin & Lavitt, for SEIU 775.
7 THE COURT: Thank you. Good morning.
8 MS. COMEAU: Assistant attorney general Gina Comeau
9 for state defendant.
10 MR. ABERNATHY: James Abernathy for Freedom
11 Foundation.
12 MR. NHAN: And I'm Raymond Nhan. I'm in training
13 with the Freedom Foundation, but I'm not barred in
14 Washington. I'm just here to assist Mr. Abernathy.
15 THE COURT: Thank you, Mr. Nhan.
16 So as I indicated, I want to give the parties sufficient
17 time to argue. I'd be curious how much time do all of you
18 believe that you will need?
19 I'll turn first to Mr. Iglitzin.
20 MR. IGLITZIN: I will need less than 15 minutes for
21 my initial presentation. I'm assuming Your Honor has had
22 the opportunity to read the briefs so I just want to
23 highlight a few points.
24 THE COURT: And would you be wanting some time in
25 rebuttal?

1 MR. IGLITZIN: I would.
2 THE COURT: And do you have a --
3 MR. IGLITZIN: No more than ten minutes of rebuttal
4 I would think.
5 THE COURT: Ms. Comeau.
6 MS. COMEAU: Thank you, Your Honor. I think about
7 the same, 15 minutes or so with ten minutes in rebuttal if
8 necessary. I don't anticipate any.
9 THE COURT: Thank you.
10 And Mr. Abernathy.
11 MR. ABERNATHY: Maybe around, as my best guess, 20
12 minutes, +but give or take a few.
13 THE COURT: The reason I asked is because I'm aware
14 that all of you have worked together before, and it seemed
15 from the briefing and everything that while you all felt
16 passionately about your respective positions, it appeared
17 to the court that you had a good working relationship so I
18 wanted to see what you all thought you needed. That's
19 acceptable to the court. The court had a relatively, as it
20 turned out, light calendar.
21 So the court has reviewed all of the briefing, all of
22 the case law that's been cited to as well as the relevant
23 statutes. So Mr. Iglitzin, would you like to start us off.
24 And I will not as a hard figure, but I'll give you 15
25 minutes in this first round.

1 MR. IGLITZIN: Thank you very much, Your Honor.
2 THE COURT: You're welcome.
3 MR. IGLITZIN: Good morning again, Your Honor. As I
4 just mentioned, I know you've looked -- or hopefully had
5 the opportunity to read all the briefs which were not as
6 voluminous as some of the briefing in some of the disputes
7 between these parties have been. It actually seems to SEIU
8 775 that the issue presented is fairly simple. There's
9 only one question you have to decide which is whether RCW
10 42.17A.495(3) applies to the context of the dues or fees
11 that the State is obligated to transmit to SEIU 775 from
12 the individual providers 775 represents. And what it would
13 mean if what I'm going to refer to as dot 495(3) applied is
14 that the particular regulation, WAC 390-17-100 that spells
15 out in great detail what written authorization has to be
16 obtained from employees, it would mean that the State would
17 need to comply with that regulation and couldn't give any
18 money to SEIU 775 from those individual providers unless
19 not just a written authorization, but the specific written
20 authorization prescribed by that regulation applies.
21 It seems to me that there are four things we know for
22 sure that are quite straightforward and beyond dispute.
23 First, we know that the State actually is obligated to
24 transmit the dues or fees from individual providers who
25 have not opted out to SEIU 775, and we know that from the

1 recent State Supreme Court decision in *Thorpe versus State*.
2 That is not discretionary by the State because of the way
3 the statute is written the State is mandatorily obligated
4 to transmit to SEIU 775 the dues or fees that the
5 collective bargaining agreement to which the State is party
6 requires be transmitted to the union. So that's the first
7 thing we know for sure.
8 The second thing we know for sure is that the union is
9 entitled to spend money out of its general funds on
10 electoral political activity including giving money to its
11 own political activity committee or donating money to other
12 electoral political activity. We know that from what we've
13 all called EFF 1, the first Evergreen Freedom Foundation
14 WEA case where the Supreme Court said nothing in the Fair
15 Campaign Practices Act was intended to prevent labor
16 organizations and other entities from spending money from
17 their general funds for electoral political activity.
18 Finally, we know what the regulation -- or not finally.
19 Third, we know what the regulation provides, WAC
20 390-17-100, the regulation interpreting and applying
21 495(3), says that that authorization form prescribed by the
22 regulation and the statute applies where money is being
23 withheld or diverted to a political committee or for use
24 specifically designated by the contributing employee for
25 political contributions to candidates, so two very specific

1 circumstances under which money is being withheld from
2 employees for political purposes where the special written
3 authorization is required, and we know that that regulation
4 was upheld. Its validity was upheld as a proper
5 interpretation and application of the statute in EFF I.
6 And fourth, we know that the money that the State has
7 been withholding or diverting from the wages of individual
8 providers has not been diverted by the State or directed by
9 the State to a political committee and has not been
10 diverted to a use specifically designated by the
11 contributing employee for political contributions to
12 candidates. What we know, and it's not disputed, is that
13 the State has withheld that money from wages and diverted
14 it to SEIU 775 which has deposited the money into its
15 general treasury.
16 Subsequently, historically, SEIU 775 has expended some
17 of those funds on electoral political activity. And for at
18 least -- in excess of 20 years it has been understood that
19 these different moving parts fit together seamlessly, that
20 what I'm just going to call dues get transmitted as
21 authorized not only by the particular statue we're talking
22 about here dealing with individual providers, but a whole
23 range of statutes applying to public employees require the
24 public entities to divert the amount designated as dues or
25 fees to the union to the union mandatorily. That money

1 goes to the union's general treasury, and that is not
2 deemed to be a diversion of political money by the
3 employees to a political committee or to a candidate.
4 Separately, many unions, not SEIU 775 as it happens, but
5 many other unions will go to their members and say we would
6 also like you to agree to divert some money from your
7 paycheck to our political committee. In fact, a request is
8 made to individual providers that they have money diverted
9 to a federal political committee, but that's not even
10 governed by state law because it's FEC regulated.
11 So there are two things that if you're an individual
12 provider that the union might say to you. One is unless
13 you opt out, money's going to be taken out of your paycheck
14 and taken out by the State and diverted to the union's
15 general funds, and we're going to do with it whatever we
16 want. If you want to donate money additionally to that to
17 go to a political committee, then here's a form that
18 complies with WAC 390-17-100, and that form has to be given
19 to the State in this case, or the public entity, and the
20 State could not deduct money for that specific political
21 use without having that written authorization. So that's
22 the scheme that -- that's how it's worked in excess of 20
23 years. That's clearly what the regulation prescribes, and
24 the regulation has been upheld.
25 What Freedom Foundation is suggesting is that because

1 the State is on notice based on historic information that
2 the labor organization here in fact spends some money out
3 of its general treasury on electoral political activity,
4 let's say donates some of that money to a political action
5 committee, because the State knows that that has happened
6 in the past and could reasonably infer that it's going to
7 happen in the future, the State has actual notice that this
8 money is going to a political committee and therefore the
9 State has to require the authorization form spelled out in
10 WAC 390-17-100.
11 Now, as the State, I think using fewer words than I did,
12 pointed out in its brief, that simply is inconsistent with
13 what the State Supreme Court has said in *Thorpe versus*
14 *State* because the State is actually statutorily obligated
15 to divert the money from the individual providers to SEIU
16 775 and there's no way that you rationally read the State
17 is simultaneously being obligated under dot 113 of the
18 collective bargaining statute to withhold dues and fees and
19 give them to the union and simultaneously say to the State
20 but you can't withhold money from the paychecks unless this
21 special authorization form is met. It's a contradictory
22 reading. As we pointed out, in fact, if there was a
23 tension between the statutes, the PECBA statutes would
24 prevail because that's what the courts have said. It's a
25 contradiction not only with the statutes that apply which

1 was interpreted in *State v. Thorpe* but in fact all of the
2 collective bargaining statutes in the state of Washington
3 require under various circumstances that dues money be
4 withheld from wages and diverted to unions.
5 So the upshot is that the Freedom Foundation is trying
6 to create a new rule that says not that the signature --
7 the authorization form requirement applies just when money
8 is being taken out of a paycheck and sent to a political
9 committee or sent to a candidate, but also when money is
10 being taken out of a paycheck and sent to a union's general
11 funds. So it flatly contradicts the public employment
12 collective bargaining laws. It is flatly inconsistent with
13 the long-recognized ability of labor unions to spend money
14 out of their general funds, and it's flatly inconsistent
15 with the EFF case. The most that can be said for the
16 argument that Freedom Foundation is making is that there is
17 a fairly fascinating, if this is your idea of interesting,
18 discussion and debate between the majority and some of the
19 concurring and dissenting opinions in EFF 1 about what kind
20 of notice would suffice to put, in this case, the State on
21 notice as to where the money is going.
22 But there's a fundamental misunderstanding I think in
23 the Freedom Foundation's analysis of that. The question
24 about notice goes as follows: Let us say that a union has
25 arranged with its members and the State to have money

1 diverted from the member's paycheck, and the union tells
2 the State send it to the following bank account. And the
3 State thinks, well -- would presume that's the union's
4 general treasury. At what point could someone say to the
5 State, you know, that's actually not the union's general
6 treasury; that's the union's political action committee?
7 You now have actual notice that that money which you were
8 diverting or withholding from wages is going to a political
9 committee. Or we can show you that there are actually
10 forms signed by those members specifically requesting that
11 the union take the money that's being deducted and give it
12 to a particular candidate. At that point arguably the
13 State is on actual notice, but the actual notice isn't the
14 union's ultimate use of the money. The actual-notice-
15 versus-constructive-notice argument is notice that the
16 money is actually being diverted for the purposes
17 identified in the WAC 390-17-100. Those purposes again
18 being to a political committee or specifically designated
19 by the contributing employee for political contributions or
20 candidates.
21 So when one understands that that's what that debate
22 about constructive and actual notice is about, and there's
23 nothing in the Supreme Court's decision inconsistent with
24 what I have just said, then it all sort of falls into a
25 rational organization. There is -- can be a question about

1 what the State knows or doesn't know about where the money
2 is going, but in this case the State knows precisely where
3 the money that it is withholding is going. It's going to
4 SEIU 775's general treasury. There's no dispute that that
5 is what's happening here. Given that that's all that is
6 happening here is that dues are being paid and going to the
7 general treasury and that that is a different phenomenon
8 than wages being withheld and diverted to a PAC or
9 political candidate, we think that it ends up being pretty
10 clear that what is happening here is nothing different than
11 what's been happening for over 20 years and repeatedly been
12 approved by the courts and the PDC. It's not money being
13 diverted for political purpose; it's money being diverted
14 to a union treasury that subsequently may or may not be
15 used in the future by any different given labor
16 organization for electoral political activity.
17 So that's how we analyze the interplay of the collective
18 bargaining statutes and 495(3), and that's why we brought
19 the motion to dismiss count one because this money is not
20 in fact going to a political committee or going to
21 candidates but it is instead going to the union treasury.
22 There is no basis for the lawsuit even given the 12(b)
23 standard, but the essential allegations made by the Freedom
24 Foundation -- which are essentially that because the money
25 might eventually end up in a political committee, it has to

1 be treated as if that's what it's being held or diverted
2 for.
3 Do you have any questions?
4 THE COURT: Not at this time. Thank you,
5 Mr. Iglitzin. You were very true to your estimate, about
6 14 minutes.
7 MR. IGLITZIN: Excellent. Thank you very much.
8 THE COURT: You're very welcome.
9 Ms. Comeau.
10 MS. COMEAU: Good morning. Assistant attorney
11 general on behalf of the state defendants. I think that
12 union counsel has outlined the relevant issues for you to
13 consider, Your Honor, but I'm going to go through and touch
14 on a few points.
15 The Freedom Foundation claims that the State violated
16 RCW 42.17A.495(3) and (4) by deducting general membership
17 dues and fees from wages of individual providers to be used
18 eventually for political committees or for use as political
19 contributions by SEIU 775 without first obtaining written
20 authorization from the individual provider. The State's
21 view is this claim is without merit and should be
22 dismissed. Our intention that we have complied with RCW
23 42.17A.495 both (3) and (4) and we complied with WAC
24 390-17-100 when the State withdrew the general membership
25 dues and fees from payments for services rendered by

1 individual providers consistent with the collective
2 bargaining agreements with individual provider members and
3 the public employee collective bargaining statute, RCW
4 41.56.113. WAC 391-17-100 requires an employer to obtain
5 written authorization from employees for payroll deductions
6 only in two circumstances. The first is when payment for
7 the deduction is made to a political committee. That
8 committee is required to report under 42.17 RCW. And the
9 second instance is when the payment is specifically
10 designated as a contribution to a candidate for state or
11 local office. We see that no funds withheld or diverted by
12 the State from individual provider payments were, one,
13 transmitted to a political committee, nor were they
14 specifically designated as a political contribution to
15 candidates for state or local office. And as the union
16 pointed out, the funds that were deducted were transmitted
17 to SEIU's general treasury, and the intended use of those
18 funds was not known by the State.
19 In the Freedom Foundation 1 case the Supreme Court
20 specifically held that under RCW 42.17 -- (reporter
21 interrupts.)
22 THE COURT: Numbers are particularly challenging for
23 court reporters so when you get to the statute and WAC
24 cites, to try to go slowly.
25 MS. COMEAU: That particular statute does not

1 prohibit deductions from payment of union dues when they're
2 not for contributions of one of those two categories. We
3 see the Supreme Court elaborating on a notice obligation.
4 It says when an employer has notice that the funds are
5 deducted for use of a political committee or candidate, the
6 employer may not deduct without written authorization. And
7 that scope of notice was undefined. And we see is all the
8 parties have elaborated that there's some instruction in
9 the dissenting/concurring opinions.
10 If you look at Justice Sanders' dissenting opinion, it
11 appears that there's some implication that notice occurs
12 simply whenever the employer learns or should have learned
13 from some tangential public record or some extended outside
14 third party the destination of the withheld funds, but that
15 view is clearly dispensed with by Justice Alexander's
16 concurring opinion wherein Justice Alexander appears to
17 favor the actual notice from someone within the association
18 or union, someone who might understand the internal
19 workings of the association and ultimately can express
20 where the ultimate intended purpose of the funds are going.
21 That's not the notice that the State has here. The only
22 alleged notice that the State had was similar to the school
23 district's notice in Evergreen Freedom Foundation 1, if not
24 less than the notice that they had in Evergreen Freedom
25 Foundation 1. At the time of the deductions the State

1 didn't know where the money was going, nor were they put on
2 notice of the intended use of the dues and fees made by the
3 union and therefore there was no obligation and no
4 authority to seek the written authorization required under
5 RCW 42.17A.113. As counsel for the union pointed out, we
6 had no knowledge of what portion of the dues and fees were
7 going to political activities, what portion might be going
8 to contract negotiations, what portion might be going to
9 contract grievances or political activity. It was simply
10 going into a general treasury. Therefore, without the
11 notice and the alleged notice that we had here according to
12 the Freedom Foundation, it's our position that notice was
13 insufficient to trigger the State's duty to obtain written
14 authorization prior to the deduction of the union dues and
15 fees.
16 In the Evergreen Freedom Foundation cases the Supreme
17 Court was clear that when the employer's not made aware of
18 the intended use of the funds and the deduction is made
19 pursuant to a collective bargaining agreement and statute,
20 there's no legal obligation to seek annual written
21 authorization. That's what we have here. We have SEIU 775
22 negotiating with a collective bargaining agreement on
23 behalf of individual providers creating a certified
24 bargaining unit for the defendant DSHS, and under that
25 bargaining agreement we have their collective bargaining

1 agreement Article 4.1, the union security provision, that
2 requires the Department as payer but not as employer to
3 make a payroll deduction and withhold those union dues and
4 fees. We see that under the Public Employee Collective
5 Bargaining Act the State is required to enforce the
6 collective bargaining agreement and the union security
7 provision. We're obligated to do so. So not only did the
8 State not have the notice of the ultimate intended use of
9 the funds, but we were required to deduct the money
10 pursuant to statute.
11 If this court determines that there was notice of the
12 intended use of the dues and fees and that we were required
13 to seek the authorization, had authority to seek the
14 authorization under 42.17A.495, then the State agrees that
15 there's a conflict, that there's a tension, and that
16 tension should be resolved in favor of the Public Employees
17 Collective Bargaining Act and the union's security
18 provision Article 4.1. Given what we know if deductions
19 were not being made pursuant to 42.17A.495, there was no
20 obligation to seek authorization and therefore no
21 obligation under subsection (4) of that RCW to maintain
22 documents, records open to the public for inspection, and
23 therefore there's no violation under subsection (4) as
24 well, and for those reasons we'd ask this court to grant
25 our motion to dismiss at this time.

1 THE COURT: Thank you, Ms. Comeau.
2 MS. COMEAU: Thank you.
3 THE COURT: You finished far ahead of your estimated
4 time.
5 Mr. Abernathy.
6 MR. ABERNATHY: Thank you.
7 THE COURT: You're welcome.
8 MR. ABERNATHY: If it's all right I'll shift off to
9 the left here.
10 THE COURT: Totally.
11 MR. ABERNATHY: Your Honor, the question here is
12 what is this court going to do with the notice standard, or
13 more properly what did EFF 1 mean by the notice standard
14 when it imposed such a standard on employers. The
15 plaintiff's argument is simple. The plaintiff's argument
16 is that the notice requirement gives full meaning to
17 section 495(3)'s phrase "for use as political
18 contributions." The WAC is correct, but it's incomplete.
19 The WAC references 495(3)'s application to PACs, which by
20 definition includes candidates as well, and the notice
21 standard references the phrase "for use as political
22 contributions" which applies to something else entirely.
23 Therefore, what EFF 1 upheld was the WAC, and it also
24 acknowledged that the notice requirement applies to
25 something else; namely, when an employer is made aware that

1 the forwarded deductions to a non-PAC are subsequently used
2 for political activities.
3 What is interesting is that the defendants actually
4 adopt the dissenting arguments in EFF 1. All of the
5 conflict arguments and those other arguments were arguments
6 that Justice Madsen made in that case and which were
7 rejected. And I'm still not a hundred percent sure after
8 reading their briefing and listening to their oral
9 arguments when exactly it applies. I'm not sure if they're
10 arguing the WAC is coextensive with section 495 or if
11 there's a situation in 495 that's not covered by the WAC.
12 Now, opposing counsel I think was describing a situation
13 where the notice standard might apply in a situation
14 outside the WAC, but I'm not sure whether the union was
15 secretly telling the State to put money into a fund that
16 was not the general treasury. First it's important to note
17 that no one in EFF 1, none of the justices, mentioned
18 anything about such a scenario. You'd think that such open
19 deception like that would be discussed, and not only would
20 that violate 495, there's other laws that would violate
21 making 495 superfluous. Beyond that, it's easy to get
22 around such a notice if that's what the notice requirement
23 really applied to and that was it because the union could
24 just switch up the account, put it in the general treasury
25 and move it on to something else. Why would the union do

1 that? Because I don't agree that that would trigger 495,
2 495's protections. But that doesn't mean that other
3 situations would not also trigger section 495's
4 protections.
5 Defendants state that nothing in the minority opinions
6 suggests anything other than the view that the WAC is
7 coextensive with section 495, but that is flat wrong.
8 First, Madsen stated plainly that under the majority's
9 notice rule if the employer has notice that some of the
10 dues will ultimately be put to those uses, that's PACs or
11 candidates, then authorization is required. She also
12 affirmed my previous statement that the WAC is correct but
13 it's incomplete when she stated that the majority opinion
14 means that although the WAC correctly states the law, it
15 does not always correctly state the law. And so that
16 situation describes when the WAC might not be satisfied but
17 the notice requirement is independent of the WAC. As
18 Justin Madsen observes, if the notice standard is really
19 coextensive with the WAC, then the notice requirement is
20 completely unnecessary because the employer's already going
21 to know from the act of forwarding itself that the money is
22 going to be spent on politics.
23 Second, Sanders stated that all a future potential
24 plaintiff need do is provide the actual notice to the
25 employer even as the majority sees it. And so I think even

1 though the parties here today are trying to give meaning --
2 the defendants here today are trying to give meaning to
3 that notice requirement, they're giving a meaning to it
4 that no justice, no -- that no opinion in EFF 1 gave to it,
5 and the one opinion that was given to it -- excuse me. I'm
6 about to drop this. There we go -- was rejected, and
7 that's Justice Madsen's view.
8 Justice Alexander indicates this as well, and he adopted
9 the majority's notice standard when he said that withheld
10 union dues being used for politics would either trigger
11 495's protection or at least require 495's -- require an
12 investigation into the ultimate use of the funds. He also
13 stated that 495 would be rendered a nullity if the State
14 could receive information that the union is spending dues
15 on politics and then do nothing.
16 But under the WAC, that's exactly what the employer
17 could do. The employer could be told that, hey, the union
18 is using these union dues on politics, and under the WAC
19 the State would say, well, that's not our problem. We
20 don't have to get written authorization because the WAC
21 only applies in two situations, one, when it's forwarded
22 directly to a political committee, and two, when it's
23 specifically designated by the employee to be spent -- to
24 be given to a candidate. In both those situations the
25 employer already knows and the employee is protected. So

1 495's protections don't do anything if the WAC is
2 coextensive with section 495. 495 has to apply in
3 situations when the WAC does not apply. I'm sorry. The
4 second prong of section 495(3), the phrase "for use as
5 political contributions," must apply when the WAC does not
6 apply.
7 And defendants claim that the notice standard is dicta,
8 but the court didn't believe it was dicta, and the -- none
9 of the minority opinions thought so either. They thought
10 it was something much more than that.
11 But there's four additional reasons I want to give the
12 court for why the plaintiff's interpretation of section 495
13 (3) is the most logical interpretation. First is the
14 FCPA's text. The FCPA defines political committee to
15 include candidates. And so the phrase "for use as
16 political contributions" in 493(3) can't refer to
17 candidates as the defendants contend here and as Justice
18 Madsen contended in her dissenting opinion. It must refer
19 to something else.
20 Second, the WAC's reference to candidates in subsection
21 (b) can't reference 495's phrase "for use as contributions"
22 because candidates don't make contributions; they make
23 expenditures.
24 Third, the notice standard uses the phrase "for use as"
25 while the majority's description of the WAC does not. This

1 implies that the majority at least meant the WAC to apply
2 to something that the -- meant the notice standard to apply
3 to something that the WAC did not apply to.
4 And lastly, of course, you can't make an employer aware
5 of something that the employer already knows is the case.
6 And the employer would already know that's the case simply
7 by forwarding the money to a political committee or a
8 candidate that was specifically designated, and Justice
9 Madsen observed that as well.
10 These -- next to the conflict arguments -- and plaintiff
11 doesn't see these as -- these two provisions as
12 conflicting, and I don't think EFF 1's majority opinion did
13 either. Under RCW 41.56, and when it comes to the
14 Education Employment Act, 41.59, the employer may deduct
15 union dues from the workers and forward them to the union,
16 but section 495 kicks in if the union uses that money on
17 politics. The union need not spend the money on politics,
18 but if they do, the FCPA kicks in.
19 Second, the Legislature is presumed to be aware of prior
20 statutes in their judicial construction, and so absent an
21 express indication otherwise, the new legislation will be
22 presumed to be consistent with prior legislation. And so
23 section 113 in 41.56 became law after section 495 became
24 law, and so we have to presume unless there's an expressed
25 indication otherwise, which there isn't here, that they're

1 consistent.
2 Third, even if there is a conflict, which I don't think
3 there is, the conflict arguments are arguments Justice
4 Madsen made and lost in her dissent. She made the same
5 arguments that the Education Employment Act would prevail
6 over 495(3), and 41.56 would prevail over those, but the
7 majority clearly wasn't concerned with these. And so
8 contrary to what the defendants suggest in their briefing,
9 no court has ever held that 41.56 prevails over every other
10 statute in every situation. 41.56 has a supremacy clause,
11 but so does the FCPA, the Fair Campaign Practices Act. And
12 that's different than what was going on in *Erickson*, *Rose*
13 *v. Erickson* case. In *Rose v. Erickson* only one of the
14 statutes had a supremacy clause. In this case they both
15 do. And secondly, section 495 became law after the
16 supremacy clause was added to 41.56, unlike in *Rose v.*
17 *Erickson*.
18 With regards to EFF 2, SEIU contends that EFF 2 held
19 that dues that are deducted from employees 'wages and
20 forwarded to a union general treasury fund can never be
21 considered political contributions, but A, that's not what
22 EFF 2 found. EFF 2 found that in that particular case a
23 union was not a political committee, but that theoretically
24 those contributions, the union dues, could be considered
25 political contributions. But either way, even if that were

1 the case here, which is not what we're alleging, the law
2 doesn't require that because SEIU conflates receiving
3 contributions for the purposes of defining a political
4 committee with deducting funds for use as political
5 contributions under 495, and they're clearly not the same,
6 and I think I briefed that fairly well, the constitutional
7 reasons, the textual reasons why even if the plaintiff were
8 to prevail in this case, it doesn't mean SEIU is a
9 political committee.
10 And the idea that -- for example in footnote 83 that the
11 PDC regulation does not limit the deduction of union dues
12 that go to a general treasury, that doesn't mean the notice
13 requirement doesn't do that. The WAC, again, is something
14 separate from the notice requirement.
15 THE COURT: Mr. Abernathy, you did address it in
16 your April 17 filed response, but on page 635 of F 1 when
17 there's the discussion of the employer not being made aware
18 of the specific intended use of the funds and you argue
19 against the interpretation that SEIU and the State puts
20 forth, what do you think that phrase means in the context
21 of that holding?
22 MR. ABERNATHY: What do I think it means to make the
23 employer aware of the specific --
24 THE COURT: -- of the specific intended use of the
25 funds.

1 MR. ABERNATHY: That the union intends to use those
2 funds or a portion of those funds for political activities.
3 THE COURT: Thank you.
4 MR. ABERNATHY: I would also like to add that the
5 federal preemption claim is something that SEIU brought up
6 first in its reply and asked the court not to consider it,
7 but even if the court did consider it, the only possible
8 portion of section 495 that could contradict the federal
9 law is a revokability issue, and that's not what this case
10 is about. The plaintiff is not alleging the employer
11 violated section 495(3)'s provision about revocablility,
12 just that written authorization has to be acquired
13 beforehand, which does not violate the federal law. And
14 besides, the federal law applies to private sector anyway
15 and wouldn't apply in this particular case because this
16 involves public workers.
17 And I think it's important to note the policy of the
18 FCPA, and both the majority and Justice Madsen in her
19 dissent note this, that the FCPA was meant to protect the
20 fees from union nonmembers from being spent on politics.
21 And that's exactly what's happening here. We've got
22 individual providers who are not members of the union.
23 Because they have not signed anything, they've not given
24 any indication whatsoever that they want to be union
25 members or that they even want to pay dues, yet their money

1 is being taken anyway, and SEIU spends that money on
2 politics. And so when the majority -- when Justice Madsen
3 states that section -- and I forget the section of the FCPA
4 she refers to, but now it's been re-codified as section
5 42.17A.500. That provision prevents unions from using
6 agency fees from nonmembers for politics. But after *Harris*
7 *v. Quinn* of the US Supreme Court, individual providers
8 don't pay agency fees any more because an agency fee is
9 illegal under the First Amendment.
10 And opposing counsel stated that the foundation made the
11 argument that 41.56.113 doesn't apply because there's no
12 union security provision in the current CBA, but I didn't
13 make that argument. The argument I made was that there's
14 no agency fee provision in the CBA, and I think everyone in
15 this courtroom would agree with that where there's going to
16 be a problem in federal court here pretty soon. There's no
17 agency fee in the CBA. So the agency fee is what justifies
18 the abilities of a labor union to take the money and spend
19 it on collective bargaining responsibilities. But that's
20 not what this case is doing. The providers here are
21 slipping through the cracks. The FCPA has a clear
22 provision that applies to them when the money is being
23 taken without written authorization, and it's being
24 violated here.
25 Thank you, Your Honor.

1 THE COURT: Thank you, Mr. Abernathy.
2 Mr. Iglitzin.
3 MR. IGLITZIN: Thank you, Your Honor. I'm not going
4 to respond to everything Mr. Abernathy said, some of which
5 I had not heard before, some of which I'm not sure I fully
6 understand. But he did say a couple of things that one of
7 which I haven't heard before or understood from his
8 briefing, if indeed he made this argument, that the way the
9 plaintiff gets around the clear language of the regulation,
10 which very clearly explains the circumstances under which
11 the written authorization of 495(3) is required, which I
12 discussed before that the money is going to a PAC or to --
13 specifically designated to a candidate, plaintiff is
14 suggesting, well, the WAC is accurate, but incomplete, and
15 suggesting that there's part of what dot 495(3) requires
16 has never been the subject of a promulgating regulation, I
17 just want to point out that no one has ever made that
18 argument before. It didn't come up in EFF 1 or any other
19 case, and I don't think it even was in the pleadings here.
20 But it is deeply unintuitive and trying to walk a
21 nonexistently fine line to suggest, well, even though that
22 would mean that the agency never actually promulgated a
23 WAC, to tell the State what kind of form it's supposed to
24 have, the State is still under some kind of obligation
25 under what I would call this third scenario -- the first

1 scenario being the money's going to a political committee.
2 The second scenario is the money's being specifically
3 designated to go to a candidate. Freedom Foundation is
4 saying that there's a third scenario where the money is
5 going to the general treasury, but we know based on past
6 experience that some of that money ultimately is spent on
7 electoral political activity. The idea that the Public
8 Disclosure Commission went to the trouble of promulgating a
9 regulation to implement 495(3) specified the first two
10 scenarios but didn't provide any guidance at all to
11 agencies like the State as to what would constitute
12 compliance with 495(3) in this third scenario is I think
13 much, much less plausible than the argument that defendants
14 are making today which is that the regulation precisely
15 implements 495(3) and explains that 495(3) only applies in
16 the two scenarios set forth in the regulation.
17 Freedom Foundation continues to minimize the very real
18 implications of their interpretation of 495(3) in that it
19 places the State in this case in a directly conflicted
20 situation because although Freedom Foundation might want to
21 say that 495(3) somehow carved out an exception to the
22 Public Employee Collective Bargaining Act, requirements
23 such as *Thorpe versus Inslee* explained that the State has
24 to transmit this money to the union. The Freedom
25 Foundation is saying, yeah, except for when 495(3) applies.

1 There is no legal authority to support that analysis,
2 and frankly, Freedom Foundation is wrong in suggesting that
3 these laws stand on equal footing. The Fair Campaign
4 Practices Act does not have the kind of supremacy language
5 that these courts have given to the Public Employment
6 Collective Bargaining Act. The State has to transmit this
7 money. They are in a deeply, completely conflict situation
8 if they simultaneously cannot transmit the money without
9 the written authorization required by the regulation.
10 Finally, I think it was significant that the answer to
11 your question about what EFF 1 meant by "specific intended
12 use" was an answer which was, well, I mean, that just means
13 that generally it might end up in a political committee.
14 "Specific intended use" is language similar to that in the
15 regulation. It talks about a specific designation, and I
16 think it's worth emphasizing that, you know, this month
17 money is being withheld from IP paychecks and diverted to
18 SEIU 775, and no one knows what 775 is going to spend that
19 money on. It may spend all that money on its legal fees on
20 my firm this month. There is no way for the State to know
21 when it diverts the money that any of it is going to be
22 spent on electoral political activity, and it may be that
23 none of it will be spent on electoral political activity,
24 so to suggest that the State is on notice now that there is
25 a specific intended use of that money for electoral

1 political activity is simply inconsistent with the reality
2 that no party actually disputes.
3 Ultimately, what you have is an effort to conflate the
4 fundamental distinction between money going to the union
5 treasury versus money going to a PAC or a candidate which
6 the law has made clear is a meaningful distinction. And I
7 don't claim that the analysis I shared with you before is
8 the only way to read the concurring -- frankly, it's
9 important to remember Judge Madsen was concurring, not
10 merely disagreeing with the majority decision and the
11 outcome of EFF 1, she concurred.
12 But the distinction that I have suggested is meaningful
13 between when the State has reason to believe that contrary
14 to what it might otherwise have thought, money does in fact
15 have a specific designated use to go to a candidate or
16 money is actually being diverted by the State to a
17 political committee is not a sort of out-of-thin-air idea.
18 It's the one thing that actually makes sense in the
19 concurring and dissenting opinions. We understand the
20 State is obligated to divert money to the union's general
21 treasury. If the State's on actual notice that that's not
22 what's happening, that that money is be either being
23 diverted to a PAC or is being sent to the union general
24 treasury but it's specifically been designated by the
25 employee to go to a candidate, then the State could be on

1 notice that --
2 THE COURT: Wouldn't both of those situations,
3 though, be covered by the WAC, the 390-17-100?
4 MR. IGLITZIN: They would, but I guess what I'm
5 suggesting is what the whole issue of what does the State
6 know -- and the discussion in the concurrence and the
7 dissent about one of the disagreements about, well, is
8 notice something that an employee gives to the State or
9 could notice be something that a third party gives to the
10 State, I think what we're really talking about is is there
11 a reality that is different from what the State thinks is
12 happening? So what the State thinks is happening here is
13 that money is going from employees to the union's general
14 treasury because that's what the State has been told by
15 SEIU 775. If the State was given notice that that's not
16 what's actually happening, that the money is actually going
17 directly to a political committee, or that the money is
18 going to the treasury but has specifically been designated
19 by employees to go to a candidate, then the provision of
20 the regulation would be implicated and then the
21 authorization would be required.
22 And to me that's the one thing that makes sense out of
23 what is otherwise kind of a hash of confusing arguments,
24 that the notice has to do with what is the reality, but if
25 the reality is a circumstance not covered by the

1 regulation, the reality is the money is going from members
2 to the union's general treasury, then the State is on
3 notice of that and that notice does not trigger the
4 42.17A.495 responsibilities.
5 THE COURT: Thank you.
6 MR. IGLITZIN: I hope I've shed some light on that.
7 THE COURT: Thank you.
8 MS. COMEAU: The State doesn't have anything further.
9 THE COURT: Very good. The court's going to take
10 its mid-morning recess. That will be 15 minutes. Then
11 I'll come back at 10:40 and make a ruling. Court's in
12 recess.
13 MR. IGLITZIN: Thank you, Your Honor.
14 (A recess was taken.)
15
16 THE COURT: Please be seated.
17 Well, I appreciate the arguments of counsel. I
18 appreciate the briefing as well. I think all three parties
19 laid out their positions quite well. SEIU had a 12(b)(6)
20 motion regarding count one. The State had a 12(c) motion
21 as they had filed their answer in this matter regarding
22 both counts one and two, but I think somewhat under the
23 theory that if count one was dismissed, then count two had
24 to follow that. And to this court the court is aware of
25 the standard in this case, and both Mr. Abernathy and

1 Mr. Iglitzin both put out that standard in its various
2 forms. But reading from Mr. Abernathy's briefing that the
3 court has to consider the plaintiff's allegations are
4 presumed to be true, and a court may consider hypothetical
5 facts not included in the record, and the court must take
6 the facts alleged in the complaint as well as hypothetical
7 facts in the light most favorable to the nonmoving party.
8 And the court had given quite a bit of thought as to
9 hypothetical facts not included in the briefing, and there
10 hadn't really been much discussion of what those
11 hypothetical facts would be.
12 I guess before I get into things too far, the original
13 case that we all had been referring to as F 1 is properly
14 titled *State ex rel. Evergreen versus WEA*, 140 Wn.2d 615, a
15 2000 case. The holding of that case to this court seems
16 quite clear. The concurrences and dissents are
17 interesting, and I sense from the arguments that the
18 attorneys are trying to be able to give context for why
19 those particularly concurrences and dissents and
20 combination thereof were made in the context of the current
21 case.
22 But looking at this case and looking at the complaint,
23 the court is going to grant the motions to dismiss today,
24 and the reason for that really goes down to that language
25 that both parties talk about on page 635 of F 1. When an

1 employer has notice that the funds deducted are for the use
2 of a political committee or candidate, the employer may not
3 then make that deduction without specific annual
4 authorization. However, when the employer makes deductions
5 under the Education Employment Relations Act, RCW
6 41.59.100, and the Public Employees Collective Bargaining
7 Act, RCW 41.56.110, and the employer is not made aware of
8 the specific intended use of the funds, the employer has no
9 legal obligation or authority to seek annual written
10 authorization.
11 And then as both parties also in their briefing
12 highlighted footnote 83, which is found at the bottom of
13 635, which states in this case Chapters 41.56 and 41.59 RCW
14 are the collective bargaining laws governing school
15 district employees, these statutes require the employer
16 under a collective bargaining agreement to deduct dues from
17 salaries of employees and to transmit those dues to the
18 other party to the agreement, the labor organization. The
19 interpretation by the PDC of RCW 42.17.680(3) does not
20 conflict with the collective bargaining statutes because
21 that interpretation does not restrict the employer in
22 making dues deductions intended for the general treasury of
23 labor organizations.
24 To this court that language controls. To this court
25 there is no allegation that the State was made aware of the

1 specific intended use of the funds that then would go with
2 42.17A.495(3) and WAC 390-17-100. And while the court
3 tried to think of hypothetical situations that would seek
4 to prevent the 12(b)(6) and 12(c) motions from being
5 granted, the court could not find any such hypothetical set
6 of facts based upon the complaint in this case and what all
7 parties had agreed was the record.
8 So do the parties have an order proposed?
9 MR. IGLITZIN: This is an order -- if you guys --
10 Judge, show it to you. All parties have been given a copy
11 of this.
12 MR. ABERNATHY: Your Honor, may I ask a clarifying
13 question?
14 THE COURT: You may.
15 MR. ABERNATHY: Thank you. Are you holding that the
16 WAC -- that 495 is coextensive with the WAC or that there
17 are situations outside of the WAC where the notice standard
18 could apply to? For example, the scenario Mr. Iglitzin
19 gave when regarding if the union were setting aside the
20 union dues internally and not telling somebody, I believe
21 that was his scenario.
22 THE COURT: That was his scenario. I don't think it
23 needs to get to that question. I'm looking solely at
24 whether the complaint as drafted can survive based upon
25 this court's understanding of the holding, specifically in

1 F 1, and that's the basis of the court's dismissal.
2 There have been two proposed orders. I see one from the
3 State and one from SEIU. Mr. Abernathy, do you have any
4 objection to the form of these proposed orders?
5 MR. ABERNATHY: If it please the court, I would need
6 to look at those again.
7 THE COURT: I'm going to hand them both,
8 Mr. Iglitzin, to you, and if the parties can submit --
9 those do appear consistent. While the parties look at that
10 form to try to see if they can reach agreement as to form
11 of the order, we'll return to docket four, Sungeun An
12 versus Nina Shecter. This is 15-2-1893-8. This matter was
13 set for a pretrial conference. The court has called this
14 case previously and it's now 10:50 a.m. Neither party is
15 present, and that matter will be stricken, and likely a
16 show cause order will issue.
17 Docket five, Jacob Romero versus Geerah Baden-Karamally,
18 this matter also having previously been called. The court
19 was made aware that the parties had contacted the court's
20 judicial assistant yesterday stating they were either close
21 or had apparently reached a settlement. The parties were
22 instructed they needed to be present today. Again, it's
23 now 10:51. Neither party is present. That matter will be
24 stricken and likely a show cause order will issue.
25 I believe that concludes the matters on the calendar.

1 Do the parties believe they will have a form that they
2 agree on regarding the court's ruling?
3 MR. ABERNATHY: I'll be about ten seconds.
4 THE COURT: Of course.
5 MR. ABERNATHY: Thank you. If the court's going to
6 sign both these orders, I would prefer, if it's okay with
7 opposing counsel, that we separate the two orders
8 completely and because the State is consistently
9 incorporating the union's motions, and when they do that
10 they reset the 28-day clock. So I have concerns with that,
11 but if we kept that separate -- I would prefer to keep them
12 separate. So just under the documents considered, on the
13 12(c) order, if you would just cross out the union's motion
14 to dismiss.
15 MR. IGLITZIN: So I'm going to hand this up. My
16 understanding is that the union's order you don't have a
17 problem with.
18 MS. DANPULLO: But we did incorporate into our
19 motion to dismiss the union's motions.
20 MR. ABERNATHY: Well, you also incorporated the
21 motion to dismiss in your reply which you can't do. So I'm
22 just not going to agree to it as to the form if you leave
23 that in there. If you take it out, I will.
24 MS. DANPULLO: I think it's inconsistent to say that
25 the court didn't consider that.

1 MR. ABERNATHY: Well, we could ask the court.
2 MR. IGLITZIN: Why don't I hand it up to the court
3 and we'll see what the court thinks, all right?
4 MR. ABERNATHY: Yes.
5 THE COURT: I had signed the order presented by
6 Mr. Iglitzin regarding count one being dismissed pursuant
7 to CR 12(b)(6). The order that has been presented by the
8 State regarding their motion to dismiss under 12(c), the
9 court is aware there is argument regarding the form of the
10 order. I'll hear first from Mr. Abernathy on that issue.
11 MR. ABERNATHY: I have concerns with the
12 incorporation of SEIU -- anything from SEIU's motion to
13 dismiss, one, because the State had already answered and
14 their motion is a different motion than the 12(b)(6), and
15 two, because they incorporated other arguments both in
16 their initial motion for judgment on the pleadings and
17 their reply, and that includes new arguments on reply that
18 were never responded to in writing vis-a-vis the 12(c)
19 motion.
20 THE COURT: And who's going to argue this for the
21 State? Ms. DanPullo.
22 MS. DANPULLO: Susan Sackett-DanPullo for the
23 record. The State's original response and additional
24 motion incorporated by reference the defendant SEIU's
25 original motion, and as the court pointed out, really just

1 to attach the fact that we were also moving to strike count
2 two of the complaint because if count one was stricken,
3 then count two should be stricken. We didn't in our reply
4 to the -- to plaintiff's response to our motion incorporate
5 anything into the -- issued by the codefendant in this
6 case. For that reason we think it's appropriate unless the
7 court determines that you did not consider SEIU's motion or
8 response in granting the State's motion to dismiss.
9 THE COURT: Mr. Abernathy, I understand the
10 objection that you have made. The court, however, is going
11 to sign the order that was proposed by the State as the
12 court did consider both the State defendant's responsive
13 motion as well as the SEIU motion to dismiss. So I will
14 sign that order after it's been signed by the --
15 MS. DANPULLO: Thank you, Your Honor.
16 THE COURT: You're welcome.
17 MS. DANPULLO: Your Honor, the parties were just
18 asked to add in that the court's oral ruling is
19 incorporated into the order.
20 THE COURT: Very good.
21 MS. DANPULLO: Any objection?
22 MR. ABERNATHY: Is your concern with the appellate
23 record?
24 MR. IGLITZIN: It is, but I'm not concerned about it
25 so that's fine because I'm not the one that's going to be

1 trying to appeal.

2 MR. ABERNATHY: Yeah.

3 MR. IGLITZIN: Your Honor, just that little
4 interplay, we have learned from experience that what that
5 means is that this order is not going to be -- at least I
6 believe will not effectively be appealable until we get a
7 transcript and the transcript would then go with the order,
8 that this isn't the matter of the kind of urgency of some
9 of the cases that we have so I don't see a problem with
10 that. That's my understanding of the significance of what
11 that line would do.

12 THE COURT: Very good.

13 The court has signed that order. Thank you all.
14 Court's in recess.

15 (A recess was taken.)

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CERTIFICATE OF REPORTER

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

I, RALPH H. BESWICK, CCR, Official Reporter of the Superior Court of the State of Washington in and for the County of Thurston do hereby certify:

1. I reported the proceedings stenographically;
2. This transcript is a true and correct record of the proceedings to the best of my ability;
3. I am in no way related to or employed by any party in this matter, nor any counsel in the matter; and
4. I have no financial interest in the litigation.

Dated this 23rd day of May, 2017

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Official Court Reporter
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Attachment C

17-2-00417-34
ORDSM
Order of Dismissal
1350450

2

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.
17 MAY 19 AM 11:14
Linda Myhre Enlow
Thurston County Clerk

☐ EXPEDITE
☐ No Hearing Date is Set
☑ Hearing is Set
Date: May 19, 2017
Time: 9:00 am
Judge: Skinder

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

FREEDOM FOUNDATION, a Washington nonprofit organization, in the name of the STATE OF WASHINGTON, Plaintiff, v. JAY INSLEE, Governor of the State of Washington, STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES, and SERVICE EMPLOYEES INTERNATIONAL UNION 775NW, a Washington labor organization, Defendants.	NO. 17-2-00417-34 ORDER GRANTING / ~~DENYING~~ STATE DEFENDANTS' MOTION TO DISMISS

THIS MATTER came before the Court for hearing on State Defendants' Motion to Dismiss under CR 12(c). The Court has heard oral arguments and considered the entire record, including the following:

1. State Defendants' Response and Motion to Dismiss.
2. Defendant SEIU 775's Motion to Dismiss Count I.
3. Plaintiff Freedom Foundation's Reply.

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I. ORDER

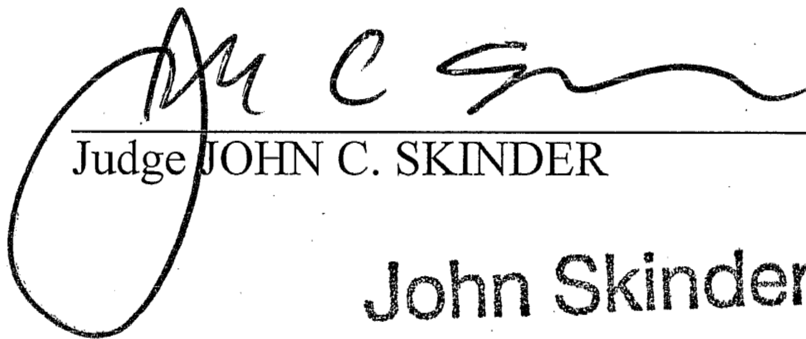
NOW THEREFORE, IT IS HEREBY ORDERED that:

State Defendants Motion to Dismiss is X GRANTED / __DENIED.

The Court also orders the following:

The Courts oral Ruling is incorporated into this order.

DONE IN OPEN COURT this 19th day of May, 2017.



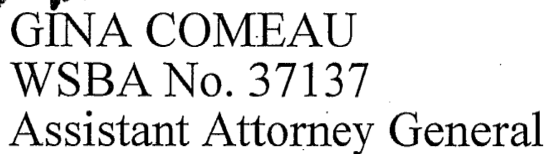
Judge JOHN C. SKINDER

John Skinder

Presented by:

ROBERT W. FERGUSON
Attorney General

SUSAN SACKETT DANPULLO
WSBA No. 24249
Senior Counsel



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