

No. 92912-2

SUPREME COURT OF THE STATE OF WASHINGTON

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MIRANDA THORPE, an Individual Provider of Washington,  
Appellant,

v.

JAY INSLEE, in his official capacity as Governor of Washington,  
Respondent,

and

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES ("DSHS"),  
Respondent,

and

SERVICE EMPLOYEES INTERNATIONAL UNION  
HEALTHCARE 775NW ("SEIU 775"),  
Respondent.

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**APPELLANT MIRANDA THORPE'S  
STATEMENT OF ADDITIONAL AUTHORITY**

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Pursuant to RAP 10.8, Appellant Miranda Thorpe respectfully submits the following attached and excerpted Order of the Honorable U.S. District Judge Marsha J. Pechman as additional relevant authority supporting Appellant Miranda Thorpe’s argument in her Opening Brief at pp. 14-17 and 21-24 and her Reply Brief at 2-10.

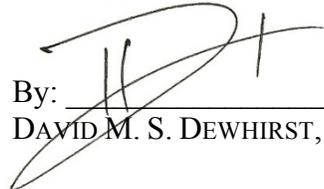
**NEW AUTHORITY**

The attached October 20, 2016 Amended Order on Motions for Summary Judgment, *Hoffman v. Inslee*, No. C14-200-MJP—specifically its reference to RCW 41.56.113(1)(b)(i) on p. 2 (excerpted below)—supports Appellant’s argument that RCW 41.56.113(1)(b)(i) contemplates and authorizes only a union security provision that imposes a mandatory financial obligation on every Individual Provider in the bargaining unit:

Prior to July 2014, the system for payment of these individual providers (IPs) called for the automatic deduction of union membership dues and “agency fees” from their wages; only by affirmatively contacting the union and “opting out” could the IPs exempt themselves from union dues, but the “agency fee” (which represents that portion of the payment which the union calculated was being spent on collective bargaining in the IPs’ behalf) was still deducted. **This system was based on RCW 41.56.113(1)(b)(i).**

RESPECTFULLY SUBMITTED on February 20, 2017

*Attorney for Appellant Thorpe*

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## CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on February 20, 2017, I electronically filed with the Court the foregoing document, attached authority, and this certificate of service and served the same by email upon the following:

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Dated this 20<sup>th</sup> day of February, 2017, at Olympia, Washington.



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Kirsten Nelsen

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MARY HOFFMAN, et al.,  
Plaintiff,

v.

JAY INSLEE, et al.,  
Defendant.

CASE NO. C14-200-MJP  
**AMENDED ORDER ON MOTIONS  
FOR SUMMARY JUDGMENT**

The above-entitled Court, having received and read:

1. Defendant Department of Social and Health Services, et al. Amended Motion for Summary Judgment (Dkt. No. 171), Plaintiffs’ Response (Dkt. No. 182), and Defendants’ Reply (Dkt. No. 184);
2. Defendant SEIU Healthcare 775NW’s Motion for Summary Judgment (Dkt. No. 172), Plaintiffs’ Response (Dkt. No. 182), Defendant’s Reply (Dkt. No. 183), and Defendant’s Notice of Supplemental Authority (Dkt. No. 189); and

1 3. Plaintiffs' Motion for Summary Judgment (Dkt. No. 175), Defendants DSHS et  
2 al. Response (Dkt. No. 177), Defendant SEIU Response (Dkt. No. 179), and  
3 Plaintiffs' Reply (Dkt. No. 185),

4 and all attached declarations and exhibits, rules as follows:

5 IT IS ORDERED that the summary judgment motions of Defendants are GRANTED and  
6 Plaintiffs' claims are dismissed.

7 IT IS FURTHER ORDERED that Plaintiffs' motion for summary judgment is  
8 PARTIALLY STRICKEN (as moot) and PARTIALLY DENIED.

9 **Background**

10 Plaintiffs are in-home health care providers who contract with the State of Washington  
11 (through the Defendant Department of Social and Health Services; "DSHS") to provide personal  
12 health care to disabled persons under a variety of Medicaid programs. Prior to July 2014, the  
13 system for payment of these individual providers (IPs) called for the automatic deduction of  
14 union membership dues and "agency fees" from their wages; only by affirmatively contacting  
15 the union and "opting out" could the IPs exempt themselves from union dues, but the "agency  
16 fee" (which represents that portion of the payment which the union calculated was being spent  
17 on collective bargaining in the IPs' behalf) was still deducted. This system was based on RCW  
18 41.56.113(1)(b)(i).

19 In 2014, Harris v. Quinn, 134 S.Ct. 2618 (2014) struck down a system of payment and  
20 payroll deduction involving union dues for Illinois "personal care assistants" on the grounds that  
21 the plaintiffs were not "full-fledged public employees" for whom this First Amendment  
22 infringement was otherwise justified. In response, the State of Washington and Defendant SEIU  
23 Healthcare 775 NW ("the Union") renegotiated the dues deduction provision of the collective  
24 bargaining agreement ("CBA") which governed the IPs' employment. The result was a revised

1 system whereby, as of July 1, 2014, (1) the State ceased making deductions for either dues or  
2 agency fees for any IP who expressed their wish not to pay them (i.e., retaining an opt-out  
3 system) and (2) any dues deducted from July 1, 2014 forward from any objecting IP were  
4 refunded.

### 5 Discussion/Analysis

6 The summary judgment motions raise two main issues for resolution:

- 7 1. Is the current, post-Harris opt-out system unconstitutional?
- 8 2. Are Plaintiffs entitled to monetary damages for unjust enrichment for any dues or agency  
9 fees deducted prior to Harris?

#### 10 The current “opt-out” system is constitutional

11 At the heart of Plaintiffs’ claims is their argument that the system currently in place  
12 regarding the deduction of dues and agency fees is unconstitutional because it requires the IPs to  
13 affirmatively declare that they do not wish to have the money deducted from their wages.

14 Plaintiffs base their argument on two cases: Knox v. SEIU, Local 1000, 132 S.Ct. 2277 (2012)  
15 and Harris v. Quinn. But, despite some very creative advocacy by Plaintiffs’ counsel, these two  
16 cases simply do not stand for the proposition that an opt-out system such as the one in place in  
17 Washington creates an impermissible infringement on the First Amendment rights of the affected  
18 parties.

19 Knox concerned a public-sector union in California which operated under an opt-out  
20 system (“...if a nonunion employee objected within 30 days to payment of the full amount of  
21 union dues, the objecting employee was required to pay only 56.35% of total dues;” 132 S.Ct at  
22 2285.) At issue was a “special assessment” which the union unilaterally imposed (after the  
23 regular objection period for that year had passed) to create a “Political Fight-Back Fund” to  
24

1 | contest two ballot initiatives which it judged to be adverse to its interests. The Supreme Court  
2 | invalidated the assessment as an impermissible infringement on First Amendment rights.

3 |         Plaintiffs attempt to argue that Knox stands for the principle that the Constitution requires  
4 | an opt-in process for union fee deductions to pass First Amendment muster. Although the Court  
5 | did state hypothetically that “[t]o respect the limits of the First Amendment, the union should  
6 | have sent out a new notice allowing nonmembers to opt in to the special fee rather than requiring  
7 | them to opt out” (Id. at 2293), nowhere in the opinion does it state that an opt-out procedure is  
8 | unconstitutional.

9 |         What is apparent from the opinion is that the Knox court considers the opt-out process to  
10 | have barely passed constitutional muster, that its presence in the landscape of union labor  
11 | relations is the result of non-rigorous legal thinking and analysis (“...acceptance of the opt-out  
12 | approach appears to have come about more as a historical accident than through the careful  
13 | application of First Amendment principles;” “[b]y... permitting the use of an opt-out system for  
14 | the collection of fees levied to cover nonchargeable expenses, our prior decisions approach, if  
15 | they do not cross, the limit of what the First Amendment can tolerate;” Id. at 2290, 2291), and  
16 | that its days may be numbered. But nowhere does the Supreme Court say, as Plaintiffs claim,  
17 | that “as [a] ‘general rule’ the First Amendment requires opt-[in] procedures...” (Response at 7.)  
18 | In fact, at one point in the Knox opinion, the Court refers to the opt-out process as “tolerable if  
19 | employees are able at the time in question to make an informed choice.” (132 S.Ct. at 2292;  
20 | emphasis supplied.)

21 |         So, according to the Court’s reading of Knox, the opt-out process is not constitutionally  
22 | impermissible. The other case Plaintiffs rely on is Harris v Quinn, *supra*. The problem with  
23 | relying on Harris is that it has nothing to say about the constitutionality of opt-out processes.  
24 |

1 The case concerns the unconstitutionality of compelling persons who are not “full-fledged public  
2 employees” to support political speech by a third party if they do not wish to do so. The personal  
3 care assistants in Harris could not even “opt out” of paying the agency fee assessed against them,  
4 and it was the compulsory nature of that payment which was invalidated by the Harris court.  
5 The Court agrees with Defendants that Plaintiffs are trying to weave together the Harris and  
6 Knox opinions to create a constitutional principle that neither stands for. As a matter of law,  
7 Plaintiffs cannot prevail on a claim that the opt-out process utilized by the State and the Union is  
8 unconstitutional.

9 The Court’s understanding of the constitutionality of the opt-out process is confirmed by  
10 the Friedrichs cases. The plaintiffs in Friedrichs argued that “[b]y requiring Plaintiffs to undergo  
11 ‘opt out’ procedures to avoid making financial contributions in support on ‘non-chargeable’  
12 union expenditures, California’s agency-shop arrangement violates their rights to free speech and  
13 association under the First and Fourteenth Amendments to the United States Constitution.”  
14 Friedrichs v. Cal. Teachers Ass’n, 2013 U.S. Dist. LEXIS 188995, \*4 (C.D.Cal., Dec. 5,  
15 2013)(citations omitted).

16 In an interesting procedural move, the Friedrichs plaintiffs conceded to judgment on the  
17 pleadings at the trial court level, acknowledging that their claims were at that time foreclosed by  
18 Ninth Circuit and Supreme Court precedent holding that “the First Amendment did not require  
19 an ‘opt in’ procedure for nonunion members to pay fees... The parties do not dispute that Abood  
20 and Mitchell foreclose Plaintiffs’ claims, and the Court agrees that these decisions are  
21 controlling.” Id. at \*5-6.

22 Upon receiving the appeal of the judgment on the pleadings, the Ninth Circuit summarily  
23 affirmed the result: “...the questions presented in this appeal are so insubstantial as to not require  
24

1 further argument, because they are governed by controlling Supreme Court and Ninth Circuit  
2 precedent.” Friedrichs v. Cal. Teachers Ass’n, 2014 U.S. App. LEXIS 24935 (2014). The  
3 Supreme Court granted certiorari (135 S.Ct. 2933 (2015)), but split evenly, thereby affirming the  
4 lower court result. 136 S.Ct 1083 (2016). Friedrichs is thus still good law and controlling  
5 precedent, and the opt-out process as utilized in the instant case is constitutionally permissible.

6 There is a “sub-issue” raised by Plaintiffs’ summary judgment motion. While the State  
7 of Washington does not weigh in on this question, Plaintiffs and the Union expend quite a bit of  
8 argument attempting to establish whether, as a matter of law and based on the standards  
9 enunciated in Harris, the IPs are or are not “full-fledged public employees” (“FFPEs”) for  
10 purposes of collective bargaining (a distinction which the Harris court found important in  
11 determining that the plaintiffs there could not be compelled – as the true FFPEs were – to  
12 subsidize political speech with which they did not agree).

13 Based on the Court’s ruling concerning the constitutionality of the opt-out process, and  
14 the finding that Harris does not touch upon whether the opt-out process is permissible, Plaintiffs’  
15 “what makes a true FFPE?” question is not relevant to this case. To find that the IPs are not  
16 FFPEs only would only mean they cannot be compelled without recourse to give money to a  
17 union they do not wish to join or support. It does not mean, for the reasons cited above, that the  
18 Union may not employ an opt-out process to determine whether they wish to contribute money.  
19 This portion of Plaintiffs’ summary judgment will be stricken as moot.

20 Resolution of the present constitutionality of the opt-out process leads to dismissal of the  
21 claims for declaratory and injunctive relief: the Court finds that Plaintiffs are not entitled to a  
22 declaratory judgment that Defendants’ process violates the Constitution and, since there is no  
23 likelihood of prevailing on the merits, Plaintiffs are not entitled to injunctive relief. Plaintiffs  
24

1 argue that the *possibility* that the State and the Union could resume making mandatory  
 2 deductions in the future entitles them to a declaration that the Washington system was  
 3 unconstitutional. But the case law requires a “live controversy” – “a substantial controversy,  
 4 between parties having adverse legal interests. Of sufficient immediacy and reality” – before a  
 5 federal court may grant a declaratory judgment. (*citation omitted*) The speculative possibility  
 6 that the State or the Union might attempt to re-introduce the pre-Harris system absent a court  
 7 order finding it constitutional does not satisfy the “live controversy” requirement.

8 Defendants not liable for damages under an “unjust enrichment” theory or for § 1983  
 9 violation

10 The remaining issue concerns the money damages Plaintiffs have requested; they seek an  
 11 order

12 restoring to non-member Individual Providers all fees that they have paid to SEIU  
 13 beginning from three years prior to the filing of this lawsuit [*February 2014*], or  
 14 alternatively, an award of damages in the amount of such fees. Plaintiffs further seek an  
 award of nominal damages for violation of their rights under the First Amendment.

15 Dkt. No. 68, Third Amended Complaint, ¶ 7.4. Their theories of recovery are under § 1983 (id.  
 16 at ¶ 6.2) and “unjust enrichment.” (Id. at ¶ 6.3.)

17 The State Defendants can be dealt with summarily. Plaintiffs have sued them in their  
 18 official capacities (*see case caption, id.* at 1<sup>1</sup>) and the Eleventh Amendment bars claims for  
 19 money damages against state agency officials in their official capacities. Edelman v. Jordan, 415  
 20 U.S. 651, 662-63, 677 (1974). Although both sides go on to argue about whether these  
 21 individuals are also entitled to qualified immunity, Plaintiffs never dispute that (1) they sued the  
 22 State Defendants in their official capacity and (2) those Defendants are thereby immunized from

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23  
 24 <sup>1</sup> Jay Inslee is named “in his capacity as Governor of the State of Washington,” and Kevin Quigley is sued “in his  
 capacity as Secretary of the Department of Social and Health Services.”

1 money damages by the Eleventh Amendment. The Court declines to address the issue of  
2 “qualified immunity” as unnecessary.

3 In terms of money damages sought against the Union, Plaintiffs seek the moneys  
4 collected under the pre-Harris system (requiring an “opt-out” to avoid paying union dues, with a  
5 mandatory “agency fee” deduction). No one who has opted out since July 1, 2014 has been  
6 charged either union dues or agency fees.

7 The Union asserts a “good faith” defense to the alleged violations of § 1983, citing Ninth  
8 Circuit case law holding that a private party sued under § 1983 is not liable for money damages  
9 if that party was acting in good faith reliance on a facially valid state law. Clement v. City of  
10 Glendale, 518 F.3d 1090, 1097 (9th Cir. 2008). The Union maintains that, prior to Harris, it  
11 operated under the good faith belief that the statutory scheme under which it collected its dues  
12 and fees was constitutionally sound.

13 The Court is unpersuaded by Plaintiffs’ arguments to the contrary. They assert that the  
14 Union bears the burden of establishing that they had the “subjective state of mind” indicating a  
15 good faith belief in their conduct. Their case support for this comes from two California District  
16 Court cases (Ambrose v. Coffey, 696 F.Supp.2d 1119, 1139 (E.D.Cal. 2010), *citing* Robinson v.  
17 City of San Bernardino Police Dept., 992 F.Supp. 1998, 1207 (C.D.Cal. 1998)). Even to the  
18 extent that this is valid precedent, it is a low threshold. The Union states several times in its  
19 briefing that it considered the RCW on which its system relied to be a facially valid statute and  
20 (pre-Harris) had no reason to think to the contrary. The burden then falls on the other party to  
21 demonstrate why the Court should not give credence to that assertion.

22 The strongest argument that Plaintiffs can muster to suggest that the Union’s allegations  
23 of “good faith” lack credence is the observation that the Union sponsored the ballot initiative  
24

1 which (upon passage) later became RCW 41.56.113(1)(b), the state law that permits the  
2 deduction of union dues and/or agency fees from the salaries of the IPs. It is not a persuasive  
3 position. In the first place, the ballot initiative (regardless of who sponsored it) still had to be  
4 approved by a majority of voters in the state and then (a year later) enacted into law by the  
5 Washington State Legislature which the Court will assume was doing its best to create  
6 constitutional legislation. Further, the Court fails to see how the proposition asserted by  
7 Plaintiffs (that the Union somehow did not have a good faith belief in the validity of the statute)  
8 follows from the Union's involvement in the ballot process; one has no bearing on the other.  
9 Nothing presented by Plaintiffs in any way invalidates the Union's claim that in good faith they  
10 relied on (and had a right to rely on) the constitutionality of the RCW . Defendants are entitled  
11 to rely on the defense and entitled to summary judgment on the § 1983 claim.

12 Regarding unjust enrichment, Plaintiffs cannot satisfy all the elements of that common law  
13 tort. Those elements are:

- 14 1. A benefit conferred upon a party
- 15 2. The receiving party being aware of the benefit
- 16 3. An inequity which would result from the receiving party being permitted to retain the  
benefit.

17 Young v. Young, 139 Wn.App. 560, 576 (2007).

18 Challenged to establish what inequity arises from the Union retaining the pre-Harris  
19 funds, Plaintiffs' response is, basically: "A violation of the First Amendment is *per se*  
20 inequitable." But, as demonstrated above, Plaintiffs have failed to establish that the opt-out  
21 system employed by the State and the Union is unconstitutional, therefore their proof fails and  
22 the Union is entitled to summary judgment of dismissal on the unjust enrichment claim.  
23  
24

**Conclusion**

Neither Harris nor Knox declares the opt-out system at issue here unconstitutional and binding Ninth Circuit and Supreme Court precedent uphold its constitutionality. The State Defendants are immune from suit for money damages. The Defendant Union relied in good faith on a statute which it believed to be valid, which immunizes it from a § 1983 claim. Plaintiffs' unjust enrichment claims fail because no inequity results from Defendants being allowed to retain the funds.

The Court grants the summary judgment motions of both Defendants and dismisses the claims of Plaintiffs against them. Plaintiffs' summary judgment is partially stricken as moot and the remainder of the motion is denied.

The clerk is ordered to provide copies of this order to all counsel.

Dated this 19th day of October, 2016.



Marsha J. Pechman  
United States District Judge