

# EXHIBIT A

## Fisk v. Inslee

United States Court of Appeals for the Ninth Circuit

December 3, 2018, Argued and Submitted, Seattle, Washington; December 17, 2018, Filed

No. 17-35957

### Reporter

2018 U.S. App. LEXIS 35317 \*; \_\_\_ Fed. Appx. \_\_\_; 2018 WL 6620080

BECKY FISK, Plaintiff, and LINDA BOWMAN; et al.,  
Plaintiffs-Appellants, v. JAY INSLEE, Governor; et al.,  
Defendants-Appellees.

**Notice:** PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

**Subsequent History:** Modified by [Fisk v. Inslee, 2019 U.S. App. LEXIS 761 \(9th Cir. Wash., Jan. 9, 2019\)](#)

Rehearing denied by, As moot [Fisk v. Inslee, 2019 U.S. App. LEXIS 760 \(9th Cir. Wash., Jan. 9, 2019\)](#)

**Prior History:** [\*1] Appeal from the United States District Court for the Western District of Washington. D.C. No. 3:16-cv-05889-RBL. Ronald B. Leighton, District Judge, Presiding.

[Fisk v. Inslee, 2017 U.S. Dist. LEXIS 170910 \(W.D. Wash., Oct. 16, 2017\)](#)

**Disposition:** AFFIRMED.

**Counsel:** For LINDA BOWMAN, SUSAN NOTT, Individual Providers in Washington, Plaintiff - Appellant: James G. Abernathy, Olympia, WA; Milton L. Chappell, Attorney, National Right to Work Legal Defense Foundation, Inc, Springfield, VA; David M.S. Dewhirst, Litigation Counsel, Olympia, WA.

For NATHANIEL ISRAEL, Plaintiff - Appellant: James G. Abernathy, Olympia, WA; Milton L. Chappell, Attorney, National Right to Work Legal Defense Foundation, Inc, Springfield, VA.

For JAY INSLEE, Governor, CHERYL STRANGE, Secretary of Washington State Department of Social and Health Services, Defendants - Appellees: Kelly Woodward, Assistant Attorney General, Alicia Orlena Young, Assistant Attorney General, AGWA - OFFICE OF THE WASHINGTON ATTORNEY GENERAL (OLYMPIA), Olympia, WA.

For SERVICE EMPLOYEES INTERNATIONAL UNION HEALTHCARE 775 NW, a labor organization, Defendant - Appellee: Scott A. Kronland, Altshuler Berzon LLP, San Francisco, CA; Michael Craig Subit, Attorney, Frank Freed Subit & Thomas LLP, Seattle, WA.

**Judges:** Before: GRABER, McKEOWN, and CHRISTEN, [\*2] Circuit Judges.

## Opinion

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### MEMORANDUM\*

Appellants Linda Bowman, Nathaniel Israel, and Susan Nott appeal the district court's order granting summary judgment to the State of Washington and the Service Employees International Union 775 (or "SEIU"). We have jurisdiction under [28 U.S.C. § 1291](#), and we affirm.

Because the parties are familiar with the facts, we provide only a brief overview here. Appellants are former SEIU members. When they enrolled in the union, they signed membership cards that authorized SEIU to deduct union dues for at least a full year and provided the Appellants could opt out of dues payments only during a 15-day window each year (the "dues irrevocability provision"). Each of the Appellants resigned from the union before their dues authorizations elapsed, and the union continued to deduct dues from their paychecks until the full year had passed or the appropriate 15-day window arrived. Appellants brought a putative class action alleging violations of their [First](#) and [Fourteenth Amendment](#) rights because they were unable to immediately cease dues contributions when they resigned.

1. Appellants' non-damages claims are not moot. Although no class has been certified and SEIU and the

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\* This disposition is not appropriate for publication and is not precedent except as provided by [Ninth Circuit Rule 36-3](#).

State have stopped deducting dues from Appellants, [\*3] Appellants' non-damages claims are the sort of inherently transitory claims for which continued litigation is permissible. See [Gerstein v. Pugh](#), 420 U.S. 103, 111 n.11, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) (deciding case not moot because the plaintiff's claim would not last "long enough for a district judge to certify the class"); see also [County of Riverside v. McLaughlin](#), 500 U.S. 44, 52, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991). Indeed, claims regarding the dues irrevocability provision would last for at most a year, and we have previously explained that even three years is "too short to allow for full judicial review." [Johnson v. Rancho Santiago Cmty. Coll. Dist.](#), 623 F.3d 1011, 1019 (9th Cir. 2010). Accordingly, Appellants' non-damages claims are not moot simply because the union is no longer deducting fees from Appellants.

2. Appellees' deduction of union dues in accordance with the membership cards' dues irrevocability provision does not violate Appellants' [First Amendment](#) rights. Although Appellants resigned their membership in the union and objected to providing continued financial support, the [First Amendment](#) does not preclude the enforcement of "legal obligations" that are bargained-for and "self-imposed" under state contract law. [Cohen v. Cowles Media Co.](#), 501 U.S. 663, 668-71, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991). The provisions authorizing the withholding of dues and making that authorization irrevocable for certain periods were in clear, readable type on a simple one-page form, well within the ken of unrepresented or lay parties. [\*4] Moreover, temporarily irrevocable payment authorizations are common and enforceable in many consumer contracts—e.g., gym memberships or cell phone contracts—and we conclude that under state contract law those provisions should be similarly enforceable here.

Appellants' complaint expressly challenges only the dues irrevocability provision and the continued deduction of dues after Appellants resigned. In the wake of [Janus v. American Federation of State, County, and Municipal Employees, Council 31](#), 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018), Appellants now wish to argue that their consent to the deduction of dues was impermissible from the outset and violated their [First Amendment](#) rights. Resolving this revised claim would require determining whether Appellants' initial agreement with SEIU qualified as a knowing, voluntary,

and intelligent waiver.<sup>1</sup>

Importantly however, this claim is not properly before us and so we need not address the adequacy of Appellants' putative waivers. As Appellants' counsel himself acknowledged at oral argument, this broader claim is a departure from the actual allegations of the complaint, which was never amended. Nowhere in the complaint do Appellants allege that they did not initially consent to the dues deductions, nor did they object to any fees deducted prior to their resignations or [\*5] seek recovery of pre-resignation dues deductions. Appellants are necessarily bound by the allegations and claims in their complaint. See [Ecological Rights Found. v. Pac. Gas & Elec. Co.](#), 713 F.3d 502, 510-11 (9th Cir. 2013) (declining to consider a new argument that would effectively qualify as an attempt to amend the operative complaint on appeal). Because Appellants' complaint impliedly concedes that they initially agreed to pay union dues and only objects to later attempts to escape the terms of that membership card agreement, we need not inquire into whether Appellants' initial decision to enter into the agreement constituted an adequate waiver.

Accordingly, we affirm the district court's order granting summary judgment to Washington state and SEIU.

**AFFIRMED.**

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<sup>1</sup> We have previously explained that [First Amendment](#) rights may be waived only if the waiver is "knowing, voluntary and intelligent." [Leonard v. Clark](#), 12 F.3d 885, 889-90 (9th Cir. 1994). Assuming without deciding that contracts with SEIU, a public sector union, involve enough state action to implicate the [First Amendment](#), every employee has a [First Amendment](#) right not to financially support SEIU. See, e.g., [Janus](#), 138 S. Ct. at 2486.