The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LEONARD PELTIER, CHAUNCEY PELTIER,

Plaintiffs,

v.

JOEL SACKS, individually and in his capacity as DIRECTOR OF the WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES; TIMOTHY CHURCH, individually and in his capacity as PUBLIC AFFAIRS MANAGER of the WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES; JAY INSLEE, individually and in his capacity as GOVERNOR of the STATE of WASHINGTON; EDWARD P. WOODS; LARRY LANGBERG; DOES 1-200,

Defendants.

NO. 3:17-cv-05209

REPLY BRIEF IN SUPPORT OF

DEFENDANTS JOEL SACKS, TIMOTHY CHURCH, AND JAY INSLEE MOTION FOR SUMMARY JUDGMENT

Hearing Date: May 25, 2018

I. STATEMENT OF THE CASE

The Department of Labor and Industries (L&I) erected an art exhibit in the lobby of the L&I building during Native American History Month.[1] The exhibit contained privately donated artwork which L&I used for the purpose of educating employees regarding Native American art and culture. One of the donators was Leonard Peltier, through is son Chauncey Peltier, plaintiffs. Leonard Peltier

[1] The named defendants will be collectively called "L&I" for the purpose of this brief.

OFFICE OF THE ATTORNEY GENERAL
1250 Pacific Avenue, Suite 105
P.O. Box 2317
Tacoma, WA 98401
(253) 593-5243

is serving life sentences for murdering two FBI agents on the Pine Ridge Indian Reservation in 1974. After receiving complaints regarding the display of paintings created by Leonard Peltier, plaintiff, because he has been convicted of murdering two FBI agents in 1974, L&I removed his paintings from the Native American art exhibit. The question before this Court is whether in maintaining the art exhibit L&I was engaging in "government speech," or whether plaintiffs were entitled to protection of their free speech under the First Amendment to the U.S. Constitution such that L&I violated those rights by removing plaintiffs' art.

In the opening memo, L&I asserted that in deciding what forms of art and which art to use in its display in the lobby of the L&I building, L&I was "speaking" and as such the plaintiffs are not entitled to First Amendment protection when L&I chose to remove their paintings. Plaintiffs' response is two-fold: First, plaintiffs assert that L&I was incorrect in arguing there is no evidence of "deliberate indifference" because under the decision in *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035, 56 L.Ed.2d 611 (1978), state agencies may be held liable. This argument makes no sense and is incorrect. *Monell* applies to city and counties, but does not alter the well-settled law that a lawsuit against a state employee acting in the course of their business is a lawsuit against the State and therefore not available under §1983.

Second, mainly, the plaintiffs assert their right to free speech was clearly established by relying on cases where the government played a role in the provision of financial benefits to private persons who were exercising their rights to free speech. But here, L&I was not acting in a capacity regarding the provision of financial benefits and therefore the cases cited by the plaintiffs do not apply. Plaintiffs also assert that "government speech" requires that the government own the property through which it is speaking. This is also incorrect.

The case of *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467-68, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009) is on-point and controlling. Summary judgment is appropriate.

OFFICE OF THE ATTORNEY GENERAL
1250 Pacific Avenue, Suite 105
P.O. Box 2317
Tacoma, WA 98401
(253) 593-5243

II. *REPLY* ARGUMENT

A. The Plaintiffs' Constitutional Claims Must Be Dismissed Because There Is No Constitutional Right Implicated and No Showing of Deliberate Indifference.

To prevail on a §1983 claim, a plaintiff must prove that a state actor violated a clearly established constitutional right and that in doing so the state actor acted with deliberate indifference to that clearly established right. *Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833 (2010). The defense of qualified immunity shields government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).[2]

1. The Named Defendants Are Entitled To Qualified Immunity Because There Is No Constitutional Right Implicated By L&I "Speech".

The heart of this matter is whether the art displayed in the L&I lobby was plaintiffs' private speech subject to First Amendment protection or L&I's government speech in which case the plaintiffs' First Amendment rights are not implicated. Accordingly, the substantial list of issues at page 11 of plaintiffs' brief is inconsequential.

The plaintiffs' response incorrectly relies on cases involving the government playing a role in the provision of financial benefits, either directly through funding projects, or indirectly by being a conduit to funding charitable organization through a Combined Fund Drive (CFD) campaign. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 797, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985), respectively.

In *Cornelius*, the Court addressed the First Amendment implications of a government entity regulating those who could participate in a government lead CFD event. A CFD is a program where a particular government agency serves as a conduit between various charitable organizations and

[2] This Court is well aware of the standards governing qualified immunity and as such they will not be repeated here.

OFFICE OF THE ATTORNEY GENERAL
1250 Pacific Avenue, Suite 105
P.O. Box 2317
Tacoma, WA 98401
(253) 593-5243

employees who wish to provide charitable contributions to those organizations consistent with their beliefs. The CFD allows a variety of participants to submit information to the particular agency regarding the nature of their work and how to make charitable contributions. Accordingly, the brief statements in the solicitation literature directly advanced the charitable organization's speaker's interest, and the employee's contribution in response to request for funds functions as general expression of their support for recipient and its views. The *Cornelius* Court ruled that the information submitted by the various participants was indeed protected by the First Amendment because the literature facilitates dissemination of views and directions on how to submit donations without which the soliciting organization's continuing ability to communicate ideas and goals may be jeopardized. *Cornelius*, 473 U.S. at 797-98.[3]

The plaintiffs also rely on *Rosenberger,* which is also a case cited in L&I's opening memorandum. *Rosenburg*, like *Cornelius*, is readily distinguishable. In *Rosenburg,* the issue was whether the University of Virginia could withhold funds used to provide access to facilities by making payments to outside contractors for printing costs of publications of student groups. A Christian student group challenged the University's denial of funds needed to print materials for their group. The distinction between the issue and holding in *Rosenburg* and this case is obvious and supports L&I's position in this case.

In *Rosenburg*, the University had asserted its right to allocate limited funds relying on a case called *Widmar v. Vincent,* 454 U.S. 263, 276, 102 S.Ct. 269, 277-78, 70 L.Ed.2d 440 (1981). In that case the Supreme Court stated in the course of striking down a public university's exclusion of religious groups from use of school facilities made available to all other student groups: "Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources." *Rosenburg,* 515 U.S. at 833 *citing Widmar,* 454 U.S. at 276.

The *Rosenburg* Court explained:

[3] The *Cornelius* Court then went on to discuss under what circumstances the government can restrict or limit speech. That analysis is not pertinent to this motion since this was government speech, and not the plaintiffs' speech.

> The quoted language in *Widmar* was but a proper recognition of the principle that when the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and *we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message*. In the same vein, in *Rust v. Sullivan, . . .* we upheld the government's prohibition on abortion-related advice applicable to recipients of federal funds for family planning counseling. There, the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. *We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes*. 500 U.S., at 194, 111 S.Ct., at 1773. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee. See *id.*, at 196–200, 111 S.Ct., at 1774–1776.

Rosenburg, 515 U.S. at 833 (emphasis added).

In *Rosenburg*, unlike this case, the *Widmar* rule does not apply "when the University does not itself speak or subsidize transmittal of a message it favors but *instead expends funds to encourage a diversity of views from private speakers*. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles." *Rosenburg*, 515 U.S. at 834. See, *e.g., Bd. of Educ. of Westside Cmty. Sch. (Dist. 66) v. Mergens*, 496 U.S. 226, 250, 110 S.Ct. 2356, 2372, 110 L.Ed.2d 191 (1990); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–272, 108 S.Ct. 562, 569–570, 98 L.Ed.2d 592 (1988). *See, also, Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545-46, 103 S.Ct. 1997, 2001, 76 L.Ed.2d 129 (1983) (in a challenge to Congress' choice to grant tax deductions for contributions made to veterans' groups engaged in lobbying, while denying that favorable status to other charities which pursued lobbying efforts, the Supreme Court reaffirmed the requirement of viewpoint neutrality in the Government's provision of financial benefits . . .)

Here, L&I was not seeking to disperse to its employees a range of options to which they could contribute their donation funds, tailored to their own personal interests, as in *Cornelius*. Nor was L&I taking steps to preclude a speaker from delivering *their* message in a manner inconsistent

OFFICE OF THE ATTORNEY GENERAL
1250 Pacific Avenue, Suite 105
P.O. Box 2317
Tacoma, WA 98401
(253) 593-5243

with how it treated others based on the speaker's viewpoint. This is not a case involving spending provisions. L&I did not impact the provision of financial benefits to artists who donated artwork for the exhibit by deciding financial benefits based on an artists' viewpoint. Rather, this was L&I's attempted to bring attention to a particular aspect of our culture, specifically Native American art, and in doing so, L&I's views were being expressed.

The plaintiffs also assert that the cases L&I rely upon stand for the proposition that the government must own the artwork in order to be protected by the government speech doctrine. This is also incorrect.

The case most directly on point is *Pleasant Grove,* 555 U.S. 460, 467-68, and the plaintiffs completely failed to address this case, let alone provide a distinction or argument as to how it is not controlling. In that case, Pleasant Grove City, Utah, denied a request to place a stone monument of "the Seven Aphorisms of SUMMUM" in the City's Pioneer Park alongside other such monuments, including a Ten Commandments monument, because the city decided the proposed monument did not satisfy the City's criteria of being directly related to the City's history. Pleasant Grove City's Pioneer Park had 15 displays, 11 of which were donated by private groups of individuals including, a historic granary, a wishing well, the City's first fire station, a September 11 monument and, as mentioned, a Ten Commandments monument which was donated by the Fraternal Order of Eagles in 1971. *Pleasant Grove,* 555 U.S. at 464-65.

The monuments were donated by private citizens and the City "effectively controlled" their message by exercising "final approval authority". *Id.* at 472-73. The City selected those monuments for the purpose of presenting the image of the City that it wished to project. *Id.* Furthermore, the decision to remove artwork is part of a message or expression by the government and therefore government speech. *See Newton v. LePage*, 700 F.3d 595 (2012) (removal of a large state-owned mural from the lobby in the Maine Department of Labor because it did not convey an evenhanded treatment toward both labor and employers and was not subject to First Amendment scrutiny because it was government speech).

OFFICE OF THE ATTORNEY GENERAL
1250 Pacific Avenue, Suite 105
P.O. Box 2317
Tacoma, WA 98401
(253) 593-5243

Pleasant Grove is on point. Here, L&I decided to erect a display of Native American artwork in its lobby, decided which art would be presented, had control over the art and made the decisions about what art would be displayed, and when it decided that the Peltier art distracted their message regarding the Native American art they displayed to educate, L&I decided to remove the art because the art was conflicting with *L&I's* message. Although the art being displayed were not permanent monuments, the permanent versus temporary aspect is insignificant.

In this case, the speech was that of L&I's expressing their desire to bring awareness to mainly employees of their Tumwater building of the various forms of Native American art during Native American Heritage Month. This was government speech. There is no constitutional right violated by L&I's action, let alone a clearly established constitutional right governing L&I's decision.

2. There is no evidence of deliberate indifference to any potential constitutional right.

Rather than address the requirement to show deliberate indifference, the plaintiffs incorrectly applied *Monell* to this case and simply skipped over demonstrating a "deliberate indifference" to any potential constitutional right. On this ground alone, L&I's motion should be granted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1064 (9th Cir. 2006).

Plaintiffs' reliance on *Monell* is completely incorrect. In *Monell*, the Court held that enacting the Civil Rights Act of 1871, Congress did intend that municipalities and other local government units be included among those "persons" to whom §1983 applies. *Monell*, 436 U.S. at 690.

In contrast, it is settled beyond peradventure that the State, its agencies, *and state officials sued in their official capacities* are not *persons* subject to suit under §1983 for damages or other retrospective relief. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 109 S.Ct. 2304, 2038,

105 L.Ed.2d 45 (1989). State employees can be sued under §1983 only in their individual capacities. *Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 362, 116 L.Ed.2d 301 (1991). In addition, under §1983 litigation, liability cannot be premised on respondeat superior. *Webb v. Sloan*, 330 F.3d 1158, 1163-64 (9th Cir. 2003); *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1560-61 (11th Cir. 1993). In order to successfully maintain a §1983 claim, a plaintiff must demonstrate that the particular defendant has caused or personally participated in causing the deprivation of a particular constitutional right. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981); *Sherman v. Yakahi*, 549 F.2d 1287, 1290 (9th Cir. 1977). To be liable for "causing" the deprivation of a constitutional right, the particular defendant must commit an affirmative act, or omit to perform an act, that he or she is legally required to do, and which causes the plaintiff's deprivation. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). Sweeping conclusory allegations against an official are insufficient to state a claim for relief. Plaintiffs are required to show that the government officials left their official roles behind and instead embarked on a course deliberately indifferent to plaintiffs' constitutional rights. Otherwise, the lawsuit under §1983 is merely a lawsuit against the State.

Monell simply has no application and, accordingly, plaintiffs completely failed to show and articulate that the defendants acted with deliberate indifference toward plaintiffs' constitutional rights.

B. The Washington State Constitution Does Not Create Tort Liability.

Plaintiffs' response to the assertion that the Washington State Constitution, Art. I, §§3, 4, and 5, does not provide a private right of action was to say that those cases turned on the failure to file a tort claim. This is incorrect. *See Systems Amusement, Inc. v. State*, 7 Wn. App 516, 518, 500 P.2d 1253 (1972) ("the clause is protection against arbitrary action by the state; but if a person has his day in court, he has not been deprived of due process.").

OFFICE OF THE ATTORNEY GENERAL
1250 Pacific Avenue, Suite 105
P.O. Box 2317
Tacoma, WA 98401
(253) 593-5243

C. There Is No Evidence That Defendants Acted to Intentionally Inflict Emotional Distress on the Peltiers.

The plaintiffs fail to provide evidence that any person affiliated with this lawsuit acted with the intent to bring about severe emotional distress, knew such distress would occur and proceeded in order to bring about that distress. *See Birklid v. Boeing Co.*, 127 Wn.2d 853, 866-67, 904 P.2d 278 (1995). Summary judgment on this claim is appropriate.

D. There Is No Tort Duty Sounding In Negligence Arising From Constitutional Obligations.

Here, the plaintiffs assert that the State had a duty not to trample the plaintiffs' First Amendment rights. The First Amendment does not provide a source of a tort duty sounding in negligence. *See Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). This was discussed at length in the State's opening brief and simply ignored in response. Summary judgment is appropriate.

III. CONCLUSION

Based on the foregoing, this case should be dismissed in its entirety.

DATED this 24th day of May, 2018.

ROBERT W. FERGUSON
Attorney General

/s/ Peter J. Helmberger
PETER J. HELMBERGER, WSBA No. 23041
Assistant Attorney General
1250 Pacific Avenue, Suite 105
Tacoma, WA 98401
Telephone: (253) 593-5243
FAX: (253) 593-2449
E-mail: PeterH@atg.wa.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2018, I caused to be electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Lawrence A. Hildes
LAW OFFICES OF LAWRENCE A. HILDES
P.O. Box 5405
Bellingham, WA 98227
lhildes@earthlink.net
(360) 715-9788
Attorney for Plaintiffs

/s/ Sharon Jaramillo
Sharon Jaramillo, Legal Assistant