

The Honorable Robert J. Bryan

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

KENNETH ALVAREZ, CAROL
SHETLER, and RAUL FLORES,
Individual Providers in Washington,

Plaintiffs,

v.

GOVERNOR JAY INSLEE, in His
Official Capacity as Governor of the State
of Washington; PATRICIA LASHWAY
in Her Official Capacity as Secretary of
the Washington Department of Social and
Health Services ("DSHS"), SERVICE
EMPLOYEES INTERNATIONAL
UNION HEALTHCARE 775 NW
("SEIU 775"), a labor organization,

Defendants.

NO. 3:16-cv-5111-RJB

STATE DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:
MARCH 10, 2017

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I. INTRODUCTION AND RELIEF REQUESTED

Plaintiffs are three individual providers (IPs)¹ who contract with the State to provide personal care services to functionally disabled clients in the clients' homes and are paid by the State to do so. Defendant SEIU 775 represents IPs in collective bargaining pursuant to state law, and is required by law to represent and advocate for all IPs with respect to their wages, hours, and working conditions, regardless of membership status. Since IPs work out of their clients' homes, they do not have a central place of employment the way that many other workforces do. Accordingly, to facilitate communication between IPs and their union, the State agreed to include two different provisions in its collective bargaining agreement (CBA) with SEIU 775, which are the target of this lawsuit.

First, the State compensates IPs for a limited amount of their time when they choose to attend union presentations offered at basic and continuing education trainings. Second, the State sets aside up to 15 minutes at its IP initial contracting appointments and safety and orientation trainings so that union representatives and IPs may meet. Both mechanisms place requirements only on the State and the Union; there is no obligation imposed on the IPs to attend or participate in union presentations if they do not wish to do so.

The objective, undisputed evidence establishes that no IP—and, more specifically, none of the three Plaintiffs—has ever been compelled to attend or participate in union presentations. Even more to the point, Plaintiffs concede that they will not be required to attend or participate in the union presentations in the future and that they understand future attendance and participation are voluntary. Plaintiffs do not seek damages in this lawsuit, so there is no justiciable controversy invoking this Court's Article III jurisdiction and, even if there were Article III jurisdiction, Plaintiffs cannot establish a likelihood of the substantial and immediate irreparable injury necessary for injunctive relief. Additionally, even if Plaintiffs could

¹ Former Plaintiff William Vaughn was dismissed with prejudice. Order Granting Stipulated Motion to Dismiss Plaintiff William Vaughn (Dkt. 62).

1 overcome the justiciability and injury hurdles, and even if they could prove that they were
 2 compelled to attend union presentations at some point in time, they still cannot establish a
 3 violation of the First Amendment. For any and all of these reasons, State Defendants
 4 respectfully request that the Court grant summary judgment and dismiss Plaintiffs' remaining
 5 claims.

6 II. FACTS

7 A. Washington's In-Home Long-Term Assistance Programs

8 DSHS administers in-home long-term assistance programs that are funded in part by
 9 the federal government under Title XIX of Social Security—the Medicaid Act—and serve low
 10 income Washingtonians with physical, intellectual, and developmental disabilities. A client
 11 receiving such assistance may either select a homecare agency or employ a qualified IP to
 12 perform personal care services and household tasks as identified in the client's plan of care.
 13 Wash. Admin. Code § 388-106-0040, to -0055(10) (2014); Wash. Admin. Code § 388-71-0500
 14 to -05640 (2014). Both homecare agencies and IPs contract with the State to provide in-home
 15 care services, and the State pays for those services.

16 B. Individual Providers' Right to Collectively Bargain

17 Beginning in 2002, IPs obtained the right to collectively bargain with the State over
 18 wages, hours, and working conditions. 2002 Wash. Sess. Laws, ch. 3, §§ 6, 12 (Initiative
 19 Measure No. 775, approved November 6, 2001) (codified in Wash. Rev. Code
 20 § 74.39A.270 and Wash. Rev. Code § 41.56.026 (2014)). A requisite majority of IPs across the
 21 State selected SEIU 775 as the exclusive bargaining representative for all IPs of in-home care
 22 services as defined in Wash. Rev. Code § 74.39A.009 and .270 (2014). *See In the Matter of the*
 23 *Petition of: Service Empl. Int'l Union, Local 775 Involving Certain Emp. of: State—Home*
 24 *Care Quality Auth.*, Wash. Public Empl. Relations Comm. Dec. No. 8241 (2003), 2003 WL
 25 23702523. *See also*, Wash. Rev. Code § 41.56.080 (2012) (providing for certification of
 26 bargaining representatives of the entire bargaining unit based on majority selection). As the

1 exclusive bargaining representative, SEIU 775 represents all IPs with respect to mandatory
 2 subjects of bargaining, without regard to their individual membership in SEIU 775. Wash. Rev.
 3 Code § 41.56.080 (2012). A necessary corollary of the right of representation is the duty of the
 4 union to fairly represent all bargaining unit members, regardless of their individual
 5 membership in SEIU 775. Wash. Rev. Code § 41.56.080 (2012), .150 (2012, 1969); *Allen v.*
 6 *Seattle Police Officers' Guild*, 100 Wash. 2d 361, 371-72, 670 P.2d 246, 252, (Wash. 1983).

7 **C. Negotiation of Union Access Provisions**

8 Because the union represents all IPs in the bargaining unit for collective bargaining and
 9 grievances, and IPs can choose whether to become union members and participate in union
 10 activities, the State agreed to provide the union with the opportunity to make presentations to
 11 IPs and communicate with them.

12 With the first CBA governing fiscal years 2002-05, the State agreed to compensate IPs
 13 attending basic training for up to 30 minutes they chose to spend attending a voluntary union
 14 presentation on union issues. Declaration of Diane Lutz (Lutz Decl.) ¶ 7. An arbitrated
 15 agreement later required the State to also compensate IPs for up to 15 minutes each year spent
 16 attending a union presentation in continuing education. *Id.* Although the CBA provided
 17 compensation to IPs who chose to attend union presentations, it did not require them to attend
 18 union presentations. *Id.* Both parties recognized the unique nature of the IP workforce, who do
 19 not work in any centralized location and rarely gather in large groups. *Id.* In recognition of the
 20 union's obligation to communicate with the bargaining unit members it represents, the parties
 21 agreed to facilitate a means for doing so. *Id.* This arrangement has continued through the
 22 present 2015-17 CBA. *Id.*

23 Beginning in 2015, the State also agreed to facilitate SEIU 775's ability to access and
 24 communicate with bargaining unit members at their initial contracting appointments with the
 25 State. Lutz Decl. ¶ 8, Exhibit (Ex.) 1. The agreement provided that the State would consolidate
 26 and preschedule its contracting appointments, where possible, on set dates and times, and set

1 aside time for union representatives to meet with IPs for 15 minutes at those appointments in
 2 order to provide information about union rights and benefits. *Id.* While ultimately starting as a
 3 pilot project at a few specific locations to determine feasibility, the arrangement was ultimately
 4 expanded statewide once the State determined it could facilitate access without significant
 5 burden. Lutz Decl. ¶¶ 8-9, Exs. 1-2.

6 In 2016, the union access provisions were revised to make explicit and unambiguous
 7 that IP attendance at union presentations at both contracting appointments and trainings is
 8 optional. Lutz Decl. ¶¶ 10-11, Ex. 3. The current CBA provides:

9 **2.3 Access to New Individual Providers during the Contracting Process and**
 10 **Safety and Orientation Trainings**

11

12 C. Individual providers will not be required to meet with Union representatives and
 13 will suffer no discrimination or retaliation as a result of their choice to meet or not
 14 to meet. The Employer will remain neutral, and will not either encourage individual
 15 providers to meet or discourage them from meeting with Union representatives.

16 ...

17 **15.13 Access to Training**

18 **A. Union Presentation Compensation**

19

20 Individual providers are not required to attend the Union presentations, and will
 21 suffer no retaliation or discrimination as a result of their choice to attend or not to
 22 attend.

23 Lutz Decl. Ex. 3.

24 The amendments were not a substantive change in the relevant provisions, as it was
 25 always the parties' intent that IP participation and attendance at union presentations be
 26 voluntary. Lutz Decl. ¶¶ 10-11. However, with the filing of Mr. Alvarez's lawsuit, Defendants
 learned that he was claiming to have been compelled to attend a union presentation.
 Accordingly, the State and SEIU 775 mutually agreed to add explicit language into the contract
 so that IPs like Mr. Alvarez could not possibly misunderstand the voluntary nature of such
 presentations. Lutz Decl. ¶¶ 10-11, Ex. 3. To the State Defendants' knowledge, no IPs have
 ever had their contracts terminated or faced any other negative repercussions from the State for

declining to attend or listen to a union presentation, either before or after the amendment to the collective bargaining agreement. Declaration of Bill Moss (Moss Decl.) ¶ 8; Lutz Decl. ¶ 11.

In addition to amending the CBA, December 5, 2016, the State also sent personal letters to each of the three plaintiffs to inform them that they are not required to attend union presentations and will face no retaliation for exercising their choice to attend or not attend. Moss. Decl. ¶ 7. Exs. 1-4. The letters state:

You are not required to attend union presentations in connection with any type of Individual Provider training, orientation, or contracting meetings, whether these are offered through the Training Partnership, your local DSHS office, or your local Area Agency on Aging...The union presentations are not mandatory. You will suffer no discrimination or retaliation as a result of your choice to meet, or not meet, with SEIU 775 representatives.

Moss Decl. Exs. 1-4.

D. Plaintiffs' Experience with Union Presentations (or Lack Thereof)

As set forth below, Plaintiffs in this lawsuit were never told they were required to attend or participate in union presentations; Plaintiffs suffered no consequences for failing to attend such presentations; and, in any event, each Plaintiff has conceded that he or she understands that future union presentations are voluntary.

1. Kenneth Alvarez

Kenneth Alvarez started as an IP in 2015. Declaration of Alicia Young (Young Decl.) Ex. A (Alvarez Dep.) at 13:2-14:24. He did not attend any kind of union presentation at his contracting appointment, as he did not meet with or listen to a union representative, and no union representative was even in attendance. Young Decl. Ex. A (Alvarez Dep.) at 16:1-16:4, Ex. 2 (Response to Interrogatories 1-2). Mr. Alvarez's complaint about his contracting appointment seems to be that he was given incorrect information from a DSHS representative

1 about whether union membership was mandatory. Young Decl. Ex. A (Alvarez Dep.) at 16:11-
2 20:13.²

3 Mr. Alvarez does claim to have attended a union presentation at his basic training, but
4 he concedes that no one told him he was required to do so. Young Decl. Ex. A (Alvarez Dep.)
5 at 39:5-39:10. Mr. Alvarez does not claim to have ever tried to leave a union presentation, or
6 asked if his attendance was mandatory. Mr. Alvarez admits that he now understands that his
7 attendance at union presentations is not and will not be required. Young Decl. Ex. A (Alvarez
8 Dep.) Ex. 2 (Interrogatory No. 11); Young Decl. Ex. A (Alvarez Dep.) at 62:13-63:11, 71:24-
9 72:12, Ex. 23. Even before DSHS sent each of the plaintiffs a letter confirming the voluntary
10 nature of union presentations, Mr. Alvarez admitted in response to an interrogatory that he
11 understands that he is not required to attend union presentations.³

12 2. Carol Shetler

13 Carol Shetler has been working as an IP since the early 2000s. Young Decl. Ex. B
14 (Shetler Dep.) at 7:25-8:10. Like Mr. Alvarez, Ms. Shetler also did not meet with any union
15 representative at any of her contracting appointments. Young Decl. Ex. B (Shetler Dep.) at
16 24:20-26:17. Ms. Shetler complains that at her most recent contracting appointment, a DSHS

17
18 ²Mr. Alvarez complained at his deposition that a DSHS representative gave him a union membership
19 form (amongst a pile of paperwork) and told him he would have to sign it in order to work as an individual
20 provider. State Defendants dispute Mr. Alvarez's contention that a DSHS representative told him that union
21 membership was required, and the evidence does not support that Mr. Alvarez signed a union membership
22 application on that day. See, e.g., Young Decl. Ex. A (Alvarez Dep.) at 47:20-48:8, Ex. 9 (indicating that
23 Mr. Alvarez did "nothing" with the union membership application that was part of his training packet provided by
24 DSHS). In any event, there is no dispute that if the DSHS representative had told Mr. Alvarez that union
25 membership was required, she would have been incorrect. It is also uncontested that Mr. Alvarez voluntarily
26 signed up for union membership by calling up the union later that same month. Young Decl. Ex. A (Alvarez
27 Dep.) at 24:15-29:8. For purposes of this summary judgment motion, and this case in general, Mr. Alvarez's
28 membership and the State's communications about membership is immaterial. This case is not about compelled
29 union membership or union dues.

³ The relevant interrogatory and response are as follows:

24 **Interrogatory No. 11:** If you contend that, in the future, you will be required, as a condition of working
25 as an individual provider, to receive or listen to SEIU speech unrelated to client-care at contracting appointments,
26 basic training classes and/or continuing education classes, identify all facts that support your contention.

Answer: I do not contend that.

Young Decl. Ex. A (Alvarez Dep.), at Ex. 2 (Interrogatory No. 11).

1 representative erroneously stated that IPs were required to be union members,⁴ but Ms. Shetler
 2 knew this to be false and told the DSHS representative as much. Young Decl. Ex. B (Shetler
 3 Dep.) at 25:18-28:2, Ex. 5 (Interrogatory 2).

4 Ms. Shetler did attend a union presentation at a continuing education course. Young
 5 Decl. Ex. B (Shetler Dep.) at 39:8-39:23, Ex. 2 (Interrogatory 5-6). Ms. Shetler concedes,
 6 however, that no one told her she was required to attend or listen to the union presentation, and
 7 Ms. Shetler, in fact, spoke up when she disagreed with the content of the union representative's
 8 presentation. Young Decl. Ex. B (Shetler Dep.) at 43:8-46:10. Ms. Shetler does not claim to
 9 have ever tried to leave a union presentation, or asked if her attendance was mandatory. Like
 10 Mr. Alvarez, Ms. Shetler understands that she is not required to attend any union presentations
 11 at either training or contracting appointments in the future. Young Decl. Ex. B (Shetler Dep.)
 12 at 50:15-51:6, Ex. 10.

13 3. Raul Flores

14 Raul Flores has worked as an IP since July 2016. Young Decl. Ex. C (Flores Dep.) at
 15 9:1-9:15. Mr. Flores is the only plaintiff to claim that he did attend a union presentation at his
 16 contracting appointment. Young Decl. Ex. C (Flores Dep.) at 22:1-30:2, Ex. 2 (Interrogatories
 17 1-2). However, he does not allege that anyone explicitly told him he was required to attend or
 18 listen to the union representative's presentation. Mr. Flores also attended a union presentation
 19 at basic training. Young Decl. Ex. C (Flores Dep.) at 58:10-59:22, Ex. 2 (Interrogatories 3-4).
 20 Mr. Flores acknowledges that no one told him he was required to attend the union presentation
 21 at training. Young Decl. Ex. C (Flores Dep.) at 59:2-59:22. Mr. Flores also does not claim to
 22 have ever tried to leave a union presentation, or asked if his attendance was mandatory. Like
 23 his co-Plaintiffs, Mr. Flores does not contend that he will be required to attend any union
 24

25 ⁴ Again, while there may be a question of fact as to whether Ms. Shetler was erroneously told she had to
 26 be a member of SEIU, it is immaterial to the claims in this case, and, in any event, Ms. Shetler testified she knew
 the statement was false. Young Decl. Ex. B (Shetler Dep.) at 25:18-28:2, Ex.5 (Interrogatory 2).

presentations at any future contracting appointments or trainings. Young Decl. Ex. C (Flores Dep.) at 68:18-69:6, Ex. 17.

III. ARGUMENT

A. Plaintiffs' Claims Must Be Dismissed Because Plaintiffs Are Not Presently Being Compelled to Receive Union Speech, Nor Will They be Compelled in the Future

Regardless of whether Plaintiffs believe they were *previously* required to receive union speech, their admissions that they are not presently, and will not in the future, be subject to such alleged wrongs means that their claims must be dismissed, both as a matter of justiciability and because they cannot establish a well-grounded fear of irreparable harm, an essential prerequisite for the prospective equitable relief sought in this case.

1. There is No Article III "Case or Controversy"

First, in order to invoke the Court's Article III jurisdiction for relief of any kind, the Constitution requires there to be an actual, live controversy between the parties during all stages of the proceedings. *Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125-26 (2007); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). "Plaintiffs must demonstrate a 'personal stake in the outcome' in order to 'assure that concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution of constitutional questions." *Lyons*, 461 U.S. at 101 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). In other words, Plaintiffs must "show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of" the relief requested in the case. *Medimmune, Inc.*, 549 U.S. at 127. Allegations as to *past* illegal conduct "does not in itself show a present case or controversy" as to equitable relief. *Lyons*, 461 U.S. at 102. *See also id.* at 103 ("[P]ast wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy."). "When subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to

1 recur,” a federal court no longer has a live controversy to review. *Camreta v. Greene*, 563 U.S.
2 692, 708, 131 S. Ct. 2020, 2034 (2011) (internal quotation omitted).

3 Here, the State and the Union never intended for IPs to be required to receive union
4 speech as a condition of their employment. Lutz Decl. ¶¶ 7-10, 12. But to the extent there was
5 any confusion among certain IPs such as Plaintiffs, that confusion has been definitively
6 eliminated. The relevant provisions of the CBA have been rewritten to make crystal clear the
7 voluntary nature of IPs’ participation in union presentations. Lutz Decl. ¶¶ 10-11, Ex. 3.
8 Moreover, and dispositively, each of the Plaintiffs has been specifically advised of the
9 voluntary nature of such presentations, and each Plaintiff confirmed under oath that the
10 Plaintiff understands that he or she will not be required to participate in union presentations in
11 the future. Moss Decl. Ex. 1-4; Young Decl. Ex A (Alvarez Dep.) Ex. 2 (Interrogatory No. 11);
12 Young Decl. Ex. A (Alvarez Dep.) at 62:13-63:11, 71:24-72:12, Ex. 23; Young Decl. Ex. B
13 (Shetler Dep.) at 50:15-51:6, Ex. 10; Young Decl. Ex. C (Flores Dep.) at 68:18-69:6, Ex. 17.

14 2. There is No Likelihood of Substantial and Immediate Irreparable Injury

15 Second, the same considerations relevant to determining whether there is a sufficient
16 case or controversy “obviously shade into those determining whether [there is] a sound basis
17 for equitable relief” at all. *Lyons*, 461 U.S. at 103 (quoting *O’Shea v. Littleton*, 414 U.S. 488,
18 499 (1974)). To be entitled to equitable relief, Plaintiffs must show a “likelihood of substantial
19 and immediate irreparable injury, and the inadequacy of remedies at law.” *Id.* (quoting *O’Shea*,
20 414 U.S. at 489). Again, allegations of past wrongs are insufficient to warrant future equitable
21 relief. *Id.* at 103-04. Even a plaintiff’s assertion that he or she may again be subject to illegal
22 behavior “does not create the actual controversy that must exist for a declaratory judgment [or
23 injunction] to be entered.” *Id.* at 104. Instead, there must be an actual case or controversy of
24 “sufficient immediacy and reality” between the parties to the case. *Id.*

25 For the same reasons that Plaintiffs cannot make out either a case or controversy as
26 required by Article III, they cannot establish a likelihood of substantial and immediate

1 irreparable injury necessary for equitable relief. Accordingly, their claims should be dismissed
2 in their entirety.

3 **B. Justiciability Aside, Plaintiffs Cannot Establish a Violation of the First**
4 **Amendment**

5 The Court need not reach the merits of Plaintiffs' First Amendment claim, because, as
6 detailed above, Plaintiffs do not have Article III standing to seek declaratory or injunctive
7 relief, nor can they establish a likelihood of immediate and substantial harm to themselves,
8 presently or in the future. But even if Plaintiffs had standing and a present harm sufficient for
9 equitable relief, Plaintiffs would still not establish a First Amendment violation. First, even
10 viewing the facts in the light most favorable to Plaintiffs, Plaintiffs were simply not compelled
11 to receive union speech. Second, even if Plaintiffs could establish compulsion, they have not
12 established that such compulsion is prohibited by the First Amendment.

13 **1. Plaintiffs Were Not Compelled to Listen to Union Presentations at**
14 **Contracting Appointments or Trainings**

15 First, as a factual matter, Plaintiffs were not forced to sit through union presentations at
16 either their contracting appointments or at trainings. Only Mr. Flores attended a union
17 presentation at his contracting appointment, and there is no evidence that anyone told him he
18 was required to sit through or listen to that presentation. While all three plaintiffs attended
19 union presentations at trainings, again there is no evidence that they were forced to do so. Lutz
20 Decl. ¶ 7, Exs. 1, 3; Moss Decl. ¶ 6. Plaintiffs could have easily stepped out of the room,
21 ignored the presentations, or simply asked if they were required to stay. Yet Plaintiffs never
22 tried or even inquired as to whether it was possible. Young Decl. Ex. A (Alvarez Dep.) at 39:5-
23 39:10; Young Decl. Ex. C (Flores Dep.) at 59:2-59:22; Young Decl. Ex. B (Shetler Dep.) at
24 43:8-46:10.

25 The undisputed facts in this case do not establish compulsion. *Cf. McKune v. Lile*, 536
26 U.S. 24, 41, 122 S. Ct. 2017 (2002) ("Determining what constitutes unconstitutional
compulsion involves a question of judgment: Courts must decide whether the consequences ...

are closer to the physical torture against which the Constitution clearly protects or the *de minimis* harms against which it does not.”). In the First Amendment context, compulsion means coercion. *Bauchman for Bauchman v. W. High Sch.*, 132 F.3d 542, 558 (10th Cir. 1997). Here, Plaintiffs can identify *no* consequence for an IP who declines to listen or even attend a union presentation, let alone an adverse consequence that would rise to the level of compulsion or coercion. To the contrary, the only competent evidence is that no IP has ever faced or been threatened with any consequences for not attending a union presentation. Moss Decl. ¶ 8. At most, Plaintiffs’ evidence may establish that some Plaintiffs erroneously believed that union presentations were mandatory because they never asked. Because Plaintiffs’ version of events, even if true, does not rise to the level of compulsion, they do not implicate the First Amendment, and Plaintiffs’ claims should additionally be dismissed for that reason.

2. Even if They Were Compelled to Listen, Plaintiffs Have Not Established a First Amendment Violation

Finally, although the Court need not reach this question, even if Plaintiffs were compelled to listen to the union presentations, that still would not establish a violation of the First Amendment. U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”).

It is helpful to first define what Plaintiffs’ claim is not in order to understand what it is. Plaintiffs do not claim that they were denied the opportunity to speak or otherwise express themselves. Second Amended Complaint (Dkt. 85). Likewise, they do not claim that they were denied access to forums of speech that were made available to SEIU 775. *Id.*⁵ Nor do Plaintiffs

⁵ There are no parties to this case who claim to have been denied a forum to engage in First Amendment protected expression or speech. In any event, such claims would be without merit because the trainings and contracting appointments are not public forums and the union plays an official role as the IPs exclusive representative. *See generally Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983) (holding school mailboxes and delivery systems are nonpublic forums for which the employer may make distinctions in

1 claim they were compelled to speak, adopt, or support expressive activity they did not agree
 2 with. *Id. See, e.g., Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014) (recognizing First
 3 Amendment implicated by compelled speech and compelled funding of speech).

4 The only thing that Plaintiffs argue in this case is that they were “forced to listen” to
 5 speech that they did not want to hear. *See* Second Amended Complaint (Dkt. 85) ¶ 1 (“This
 6 case seeks to enforce First Amendment protections against compelled receipt of speech.”).
 7 Besides being contrary to the undisputed evidence as set forth above, this is not a cognizable
 8 claim under the First Amendment.⁶ *See* Caroline Mala Corbin, *The First Amendment Right*
 9 *Against Compelled Listening*, 89 Boston Univ. L. Rev. 939 (2009) (arguing for a “new” (but
 10 not yet recognized) “First amendment right: the right against compelled listening,” and
 11 recognizing that “free speech jurisprudence has not yet recognized a ‘right against compelled
 12 listening’”). First Amendment jurisprudence has not been extended to protect individuals from
 13 hearing speech they disagree with. *Id.*⁷

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 15
 16
 17
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 19 ///

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21 ///

22
 23 access on the basis of subject matter and speaker identity, and distinguishing between exclusive bargaining
 representative and other entities is reasonable and constitutional).

24 ⁶ State Defendants recognize that other constitutional provisions may be implicated by “forced listening”
 allegations in other contexts, but such arguments are not at issue in this case.

25 ⁷ The government’s interest in protecting captive audiences from being forced to listen to offensive
 speech has been a *justification* for the government’s prerogative to limit or prohibit private speech that is claimed
 26 to be protected by the First Amendment, but no party asserts that their own speech is being limited or prohibited
 in this case. *Compare Cohen v. California*, 403 U.S. 15, 21, 91 S. Ct. 1780, 1786 (1971).

IV. CONCLUSION

Plaintiffs fail to invoke this Court's Article III jurisdiction and, in any event, do not establish a violation of the First Amendment. State Defendants respectfully request the Court grant summary judgment and dismiss what remains of Plaintiffs' lawsuit.

DATED this 15th day of February, 2017.

ROBERT W. FERGUSON
Attorney General

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PROOF OF SERVICE

I certify that on February 15, 2017, I electronically filed the foregoing with the Clerk of the Court using CM/ECF System which will send notification of such filing to the following:

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DATED this 15th day of February, 2017, at Tumwater, WA.

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The Honorable Robert J .Bryan

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

KENNETH ALVAREZ, CAROL
SHETLER, and RAUL FLORES,
Individual Providers in Washington,

Plaintiffs,

v.

GOVERNOR JAY INSLEE, in His
Official Capacity as Governor of the State
of Washington; PATRICIA LASHWAY
in Her Official Capacity as Secretary of
the Washington Department of Social and
Health Services ("DSHS"), SERVICE
EMPLOYEES INTERNATIONAL
UNION HEALTHCARE 775 NW
("SEIU 775"), a labor organization,

Defendants.

NO. 3:16-cv-05111-RJB

[PROPOSED] ORDER
GRANTING STATE
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

Upon consideration of State Defendants' Motion for Summary Judgment (Dkt.__), the Declaration of Diane Lutz (Dkt. __), the Declaration of Bill Moss (Dkt. __), the Declaration of Alicia O. Young (Dkt. __), Plaintiffs' Response (Dkt. ____), State Defendants' Reply (Dkt. __); and the entire record of this case, it is hereby ORDERED that State Defendants' motion is GRANTED.

1 All remaining claims against the State Defendants are hereby DISMISSED WITH
2 PREJUDICE.

3 DATED this _____ day of February, 2017.

4
5
6 _____
ROBERT J .BRYAN
United States District Judge

7
8 Presented by:

9
10 ROBERT W. FERGUSON
Attorney General

11
12 /s/ Alicia O. Young
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