

HON. ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KENNETH ALVAREZ, *et al.*,

Plaintiffs,

v.

GOVERNOR JAY INSLEE, *et al.*,

Defendants.

NO. 3:16-cv-5111-RJB

**DEFENDANT SEIU 775'S
OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT**

NOTE DATE: MARCH 10, 2017

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	FACTUAL BACKGROUND RELATED TO PLAINTIFFS' CLAIMS.....	1
III.	THE COURT SHOULD STRIKE SECTION II.C OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT BECAUSE IT CONTAINS ONLY IRRELEVANT AND INADMISSIBLE MATERIAL.....	2
IV.	PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE THEIR CLAIMS FAIL AS A MATTER OF LAW.....	5
	A. Plaintiffs Lack Article III Standing for the Prospective Relief They Seek.....	5
	B. Plaintiffs Fail to Establish any Prior or Current First Amendment Violation.....	6
V.	CONCLUSION.....	10

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I. INTRODUCTION

Plaintiffs’ motion for summary judgment, Dkt. No. 100, confirms their claims must be dismissed for lack of Article III standing. There is no need to reach the “novel constitutional issue[s],” Dkt. No. 88 at 2, plaintiffs ask this Court to decide. It is undisputed that the four Union presentations the plaintiffs attended were optional. Moreover, plaintiffs understand that listening to future Union presentations is voluntary. The cases upon which plaintiffs rely do not support the creation of a First Amendment right against compelled listening. Perhaps because plaintiffs’ own legal claims have no merit, they devote so much of their over-length motion to Union speech they never heard and other irrelevant matters provided in discovery under a protective order. For the reasons set forth below, the Court should deny plaintiffs’ motion for summary judgment and strike Section II.C of their motion.

II. FACTUAL BACKGROUND RELATED TO PLAINTIFFS’ CLAIMS

This action involves three individual plaintiffs. Plaintiff Alvarez has attended only one Union presentation, in connection with his basic training in 2015. Declaration of Kenneth Alvarez, Dkt. No. 100-2, ¶¶ 19-20. Alvarez’s only complaint about the content of that presentation is that the SEIU 775 representative allegedly told him he needed to re-sign his Union membership card. *Id.* at ¶ 19.

Plaintiff Shetler has also attended only one Union presentation, in connection with a continuing education class. Declaration of Carol Shetler, Dkt. No. 100-4, ¶¶ 12-17. Shetler’s complaints about the content of the presentation are that the SEIU 775 representative asked her and other Individual Providers (“IPs”) to sign or re-sign a membership card and urged them to make political donations. *Id.* at ¶15. She told the class she had opted out of SEIU 775 because of a bad personal experience and she disagreed with the Union politically. *Id.* at ¶ 16.

1 Plaintiff Flores has attended two Union presentations, one attendant to his initial
2 contracting appointment and one in connection with basic training. Declaration of Raul Flores,
3 Dkt. No. 100-3, ¶¶ 8-14, 23-24. The same SEIU 775 representative made both presentations. *Id.*
4 at ¶¶ 8, 23. Both times the Union representative gave “pretty much the same spiel.” *Id.* at ¶ 24.
5 She talked “about the benefits of union membership, all the union’s accomplishments, its
6 political activities, and the health benefits associated with union membership, and the union’s
7 need for dues deductions.” *Id.* Flores objects to hearing this Union spiel. *Id.* at ¶ 29.

8 Plaintiffs present no evidence that the State or Union informed them, in writing or orally,
9 that they were required to listen to any of these four presentations. Plaintiffs concede they have
10 been informed and understand that listening to future presentations is optional.

11 **III. THE COURT SHOULD STRIKE SECTION II.C OF PLAINTIFFS’ MOTION**
12 **FOR SUMMARY JUDGMENT BECAUSE IT CONTAINS ONLY**
IRRELEVANT AND INADMISSIBLE MATERIAL.

13 Plaintiffs successfully petitioned the Court for leave to file a 40-page motion for
14 summary judgment. Dkt. No. 89. Plaintiffs used that enlargement to spend almost 10 pages
15 discussing (1) the content of SEIU 775 recruiter scripts and internal training documents (Pl. S.J.
16 Mot. at 17-21); (2) the State’s investigation into complaints about SEIU 775 presentations that
17 none of the plaintiffs attended (*id.* at 22-24); and (3) Union grievances and complaints about
18 actions by State employees that had nothing to do with the plaintiffs (*id.* at 25-26). Plaintiffs’
19 counsel received this confidential information in discovery under the protective order. Dkt. No.
20 101. Because Section II.C relies almost entirely on information subject to the protective order,
21 plaintiffs initially redacted nearly all of that section. Dkt. No. 100 at 17-26.

22 This Court should strike Section II.C in its entirety. While motions to strike are
23 disfavored, a court should grant such a motion where the material at issue has “no possible
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1 relation to the controversy and may cause prejudice to one of the parties.” *White v. Homefield*
 2 *Fin., Inc.*, 545 F. Supp. 2d 1159, 1163 (W.D. Wash. 2008) (quoting 5 Charles Alan Wright &
 3 Arthur Miller, *Federal Practice and Procedure*, § 1382, at 807-10 (1969)). Material should be
 4 stricken pursuant to Fed. R. Civ. P. 56(f) where it does not “set out facts that would be
 5 admissible in evidence.” *Id.* (quoting rule). Relevant evidence is admissible; irrelevant evidence
 6 is not admissible. Fed. R. Evid. 402. Evidence is relevant only if “(a) it has a tendency to make a
 7 fact more or less probable than it would be without the evidence; and (b) the fact is of
 8 consequence in determining the action.” Fed. R. Evid. 401.

9 None of the “evidence” plaintiffs rely upon in Section II.C is either relevant or
 10 admissible.¹ Section II.C has no relevance to plaintiffs’ claim that they are being forced to attend
 11 Union presentations in violation of the First Amendment. Section II.C has nothing to do with
 12 plaintiffs or any of the Union presentations they attended. Other individuals’ complaints about
 13 SEIU 775 presentations that plaintiffs did not attend and the Union’s concerns about the conduct
 14 of certain State employees unrelated to plaintiffs are irrelevant to this case. Moreover, nothing in
 15 Section II.C is relevant to plaintiffs’ claim that sections 2.3 and 15.13.A of the 2015-2017
 16 collective bargaining agreement (“CBA”) between the State and SEIU 775 are unconstitutional.

17 Plaintiffs do not need to submit SEIU 775’s confidential talking points and internal
 18 training documents to establish these documents do not direct recruiters to tell IPs that Union
 19 presentations are voluntary. It is undisputed that, apart from the express language in the CBA
 20 stating that presentations are optional, SEIU 775 informs IPs that Union presentations are
 21 optional only if asked. Declaration of Seth Hemond (Feb. 7, 2017), ¶¶ 3-4 (Dkt. No. 96).
 22 Evidence purportedly submitted to prove an admitted fact does not make that fact any more

23 ¹ Section II.C contains numerous misstatements/mischaracterizations and a considerable amount of inadmissible
 24 hearsay. Given that Section II.C is not material to the Court’s consideration of the parties’ dispositive motions, SEIU
 775 will refrain from taking up the Court’s time with responding to the specific errors and inaccuracies.

1 probable than it already is. The Union recruiter scripts and talking points plaintiffs quote and cite
2 in Section II.C are therefore irrelevant under Fed. R. Evid. 401 and inadmissible under Fed. R.
3 Evid. 402. Unsealing the material would also prejudice the Union by revealing confidential
4 information. This Court found good cause under Fed. R. Civ. P. 26(c) for putting the Union
5 talking points and scripts under a protective order. Dkt. Nos. 41, 50.

6 The real reason plaintiffs' attorneys have included Section II.C is because they want to
7 remove the underlying confidential materials from the protective order. Their extensive use of
8 confidential documents and information requires SEIU 775 and/or the State to justify
9 maintaining those documents under seal in accordance with LR 5(g)(3)(B). LR 5(g)(1)(B) gave
10 the State no choice but to redact the documents that referred to non-party complaints about
11 Union presentations and SEIU 775's concerns about the actions of State employees unrelated to
12 plaintiffs and reproduce them without a "confidentiality" designation. Dkt. No. 104. On February
13 27 plaintiffs filed a revised version of their summary judgment motion that reveals most of the
14 previously redacted text within Section II.C.c & d. Dkt. No. 104-1.

15 The remaining redactions within Section II.C pertain to (1) SEIU 775's talking points,
16 scripts, and other recruiter training materials and (2) the times and locations of IP contracting
17 appointments. The Court specifically found the latter merited inclusion under the protective
18 order. Dkt. No. 60. Plaintiffs are represented by an organization whose stated goal is to destroy
19 SEIU 775. Dkt. No. 54 at 2; Motion for Protective Order at 2-3, Dkt. No. 46. In accordance with
20 LR 5(g)(3), SEIU 775 will be filing a response to plaintiffs' motion to seal, Dkt. No. 106, that
21 specifies the reasons for keeping these categories of documents under seal. Independently,
22 because Section II.C of plaintiffs' summary judgment motion is irrelevant to their legal claims
23 and contravenes Fed. R. Civ. P. 56(f), the Court should grant the Union's motion to strike.

IV. PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE THEIR CLAIMS FAIL AS A MATTER OF LAW.

A. Plaintiffs Lack Article III Standing for the Prospective Relief They Seek.

Article III of the U.S. Constitution requires a plaintiff to demonstrate his or her standing to sue for the relief requested of the court. *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1146 (2013). Plaintiffs have failed to meet that constitutionally mandated burden. Plaintiffs seek only prospective relief. Therefore, they must show they are personally experiencing an on-going First Amendment injury. Union S.J. Mot., Dkt. No. 91, at 12-13. The only current “injuries” plaintiffs assert are that they are purportedly “unsure how to implement and secure” their contractual right not to listen to Union presentations and “are not sure how [they] will be received by State employees or training instructors” from the Training Partnership when they decline to attend Union presentations in the future. Alvarez Dec. ¶ 21; Shetler Dec. ¶ 22; Flores Dec. ¶ 28; Pl. S.J. Mot. at 46. Neither of these asserted uncertainties constitutes an injury of any kind let alone an ongoing First Amendment injury. Plaintiffs’ claims are moot.

Plaintiffs vainly invoke the “voluntary cessation” exception to mootness. Pl. S.J. Mot. at 46. As SEIU 775 explained in its own motion for summary judgment, the voluntary cessation doctrine does not apply here. Union S.J. Mot. at 14. This is not a case where defendants have voluntarily ceased illegal conduct or could resume it later. Plaintiffs’ attendance at the Union presentations was never compulsory. That was true before the State and SEIU 775 modified Articles 2.3 and 15.13.A to expressly state that attendance at Union presentations is voluntary. The parties’ addition of that language to the CBA through the April 2016 Memorandum of Understanding did not make previously mandatory Union presentations voluntary. Their hypothetical removal from the CBA of the language they added in April 2016 would not make optional Union presentations any less voluntary. *Contra* Pl. S.J. Mot. at 45. Moreover, there is no

1 First Amendment requirement that the CBA contain language expressly stating that optional
2 Union presentations are voluntary. Union S.J. Mot. at 16.

3 Plaintiffs concede that they now know that Union presentations are voluntary. They
4 claim, however, that the letters they received from the State “have no effect on First Amendment
5 violations that already occurred.” Pl. S.J. Mot. at 45. As set forth in the next section and in the
6 Union’s summary judgment motion, no violations of the plaintiffs’ First Amendment rights have
7 occurred. But even assuming for the sake of argument plaintiffs could prove a past violation of
8 their First Amendment rights, such a showing is insufficient as a matter of law to provide them
9 with Article III standing with respect to the purely prospective relief they seek in this case. *See*
10 *O’Shea v. Littleton*, 414 U.S. 488, 495–96 (1974) (injunction); *Leu v. Int’l Boundary Comm’n*,
11 605 F.3d 693, 694 (9th Cir. 2010) (citing *Fieger v. Michigan Supreme Court*, 553 F.3d 955, 962
12 (6th Cir. 2009)) (declaratory judgment).

13 In sum, because plaintiffs lack Article III standing to seek any of the relief they request in
14 this action, their legal claims fail as a matter of law. That is reason enough for the Court to deny
15 plaintiffs’ motion for summary judgment.

16 **B. Plaintiffs Fail to Establish any Prior or Current First Amendment Violation.**

17 Plaintiffs do not assert that SEIU 775 ever told them that listening to Union presentations
18 was required. Plaintiffs mistakenly assumed Union presentations were mandatory because of
19 how the State and Training Partnership schedule them. The fact that plaintiffs previously were
20 under the erroneous impression that their attendance at Union presentations was mandatory does
21 not make it so. Pl. S.J. Mot. at 41-42. There is no evidentiary support for plaintiffs’ contention
22 the Union presentations became optional only after this case was filed. *Id.* at 41. In short,
23 plaintiffs have submitted no evidence the Union presentations they attended were mandatory.

1 There is therefore no need for this Court to reach the novel question whether the First
2 Amendment provides a right against compelled listening. In any event, there is no such right.
3 *West Virginia State Board of Ed. v. Barnette*, 319 U.S. 624 (1943), concerned the constitutional
4 right against compelled speech. The passage plaintiffs quote prohibiting the government from
5 forcing “citizens to confess by word or act” their agreement with a particular political message,
6 *id.* at 642, makes that clear. *Dennis v. United States*, 341 U.S. 494 (1951), also does not suggest
7 the First Amendment prohibits compelled listening. That case upheld convictions for plotting to
8 overthrow the government against a First Amendment challenge. Plaintiffs quote Justice
9 Frankfurter’s recognition that the “mark of a truly civilized [person] is confidence in the strength
10 and security derived from the inquiring mind Without open minds there can be no open
11 society.” *Id.* at 556 (Frankfurter, J., concurring in the judgment). The right against compelled
12 listening plaintiffs ask the Court to create is anathema to those very teachings because it
13 presumes that individuals are harmed merely by hearing a message with which they disagree.

14 None of the other cases plaintiffs cite on pages 36-37 of their motion provide any support
15 the recognition of a constitutional right against compelled listening. They all involve the
16 compelled speech doctrine. As plaintiffs recognize, “[u]nderlying the compelled speech doctrine
17 is a belief that forcing a person *to communicate* a message undermines his ability to think for
18 himself.” Pl. S.J. Mot. at 37 (emphasis supplied). Listening to the speech of another person does
19 not communicate a message of agreement with that speech. *Cf. D’Agostino v. Baker*, 812 F.3d
20 240, 244 (1st Cir.), *cert. denied*, 136 S. Ct. 2473 (2016). Therefore, compelled listening is not the
21 constitutional equivalent of compelled speech.

22 Cases protecting the constitutional right of citizens to receive information do not support
23 this Court’s creation of a First Amendment right *not* to receive information. “[T]he right to
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1 receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of
2 speech” *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853,
3 867 (1982) (emphasis in original) (plurality opinion). The Supreme Court has never suggested
4 that the First Amendment’s guarantee of free speech implies a right not to receive unwanted
5 ideas. Justice Douglas’s individual concurrence in *Lehman v. City of Shaker Heights*, 418 U.S.
6 298, 307 (1974), and the two law review articles plaintiffs cite notwithstanding, there is no First
7 Amendment right against compelled listening. Furthermore, even if there were such a right, it
8 would not be violated by the Union presentations at issue here. Union S.J. Mot. at 20-21.

9 As SEIU 775 anticipated, *id.* at 21-22, plaintiffs erroneously rely on the “captive
10 audience doctrine” in support of their proposed constitutional right against compelled listening.
11 Pl. S.J. Mot. at 39. Plaintiffs concede that courts have applied the captive audience doctrine *only*
12 to justify government restrictions on private speech. *Id.* at 39-40. *Hill v. Colorado* recognized the
13 government has the power to restrict private speech that obstructs an individual’s “right to free
14 passage in going to and from work” or access to a medical facility. 530 U.S. 703, 717 (2000)
15 (citing *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 204 (1921)).
16 *Hill* emphasized that the Court’s captive-audience cases outside the home and its immediate
17 surroundings concerned “confrontational speech.” *Id.* The Court specifically stated it was *not*
18 creating a constitutional right against compelled listening. *Id.* at 718.

19 In *Resident Advisory Board v. Rizzo*, the court enjoined, partly on the basis of the captive
20 audience doctrine, a private sound amplification system that was being used “for the sole
21 purpose of harassing, threatening and intimidating the contractors and their employees” 503
22 F. Supp. 383, 401 (E.D. Pa. 1980). Similarly, in *Robinson v. Jacksonville Shipyards Inc.*, 760 F.
23 Supp. 1486, 1535-36 (M.D. Fla. 1991), the court enjoined the private defendants from engaging
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1 in discriminatory speech that constituted sexual harassment in violation of Title VII in part
 2 because the plaintiff employees were a “captive audience.” Those cases have no application here
 3 because they do not involve an *alleged* government mandate to listen to speech and also because
 4 there is no evidence here of behavior that rose to the level of harassment.

5 Nothing in *Doe ex rel. Doe v. Governor of New Jersey*, 783 F.3d 150 (3d Cir. 2015)—
 6 which upheld a New Jersey statute that prohibited state-licensed counselors from treating minors
 7 using “sexual orientation change efforts” counseling against a First Amendment challenge by a
 8 patient who wanted such counseling—supports transmutation of the existing captive audience
 9 doctrine into a new constitutional right against compelled listening. *Doe* is however, relevant to
 10 plaintiffs’ claim of impermissible viewpoint discrimination. Pl. S.J. Mot. at 40. That case shows
 11 the government does not violate a listener’s First Amendment rights by not allowing every
 12 viewpoint to be expressed in a non-public forum. *See also King v. Governor of State of New*
 13 *Jersey*, 767 F.3d 216 (3d Cir. 2014) (upholding same statute).

14 Plaintiffs mention but do not discuss *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*,
 15 460 U.S. 37 (1983). That case forecloses plaintiffs’ claim that the State’s allowance of SEIU 775
 16 alone to communicate with members of the bargaining unit it represents through Union
 17 presentations in non-public fora violates the First Amendment. Union S.J. Mot. at 18-19.

18 Plaintiffs also provide no legal support for their claim that the First Amendment required
 19 SEIU 775 to personally inform them its voluntary presentations are voluntary. Pl. S.J. Mot. at
 20 46.² That’s because there is no legal basis for such a claim. Union S.J. Mot. at 22-23. Indeed, if
 21 this Court were to dictate the content of SEIU 775’s presentations to bargaining unit members,

22
 23 ² Plaintiffs contend that they not only had a constitutional right to be told they did not have to listen to the Union’s
 24 voluntary presentations but also that the First Amendment entitles them to specific instructions on how “to
 implement their Union Time optionality.” Pl. S.J. Mot. at 46. As noted in Section IV.A *supra*, plaintiffs’ professed
 uncertainty about how to leave the room or tune out Union presentations is not a legally cognizable injury.

1 such a mandate could violate the Union's own free speech rights. *See, e.g., Riley v. Nat'l Fed. of*
 2 *the Blind of N.C.*, 487 U.S. 781, 795-801 (1988) (striking down, as a First Amendment violation,
 3 law requiring charities to tell potential donors, before an appeal for funds, the percentage of
 4 charitable contributions during the past 12 months turned over to charity). "Mandating speech
 5 that a speaker would not otherwise make necessarily alters the content of the speech." *Id.* at 795.

6 SEIU 775 has done nothing to violate plaintiffs' First Amendment rights. Sections 2.3
 7 and 15.13.A of the CBA are constitutional. The Union, not the plaintiffs, is entitled to judgment
 8 as a matter of law.

9 V. CONCLUSION

10 This Court should strike Section II.C of plaintiffs' motion for summary judgment and
 11 deny the remainder.

12 RESPECTFULLY SUBMITTED this 6th day of March 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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HON. ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
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NO. 3:16-cv-5111-RJB

**[PROPOSED] ORDER DENYING
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

NOTE DATE: MAR. 10, 2017

Upon consideration of Plaintiffs' Motion for Summary Judgment, the filed Responses thereto, the Reply, and the entire record of this case, it is ORDERED that Plaintiffs' Motion is DENIED.

Dated this ____ day of _____, 2017.

ROBERT J. BRYAN
United States District Judge

Presented by:

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ORDER -1
CASE NO. 3:16-cv-5111-RJB

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