

No. 17-981

IN THE
Supreme Court of the United States

—————
THERESA RIFFEY, *et al.*,
Petitioners,
v.

BRUCE RAUNER, GOVERNOR OF ILLINOIS, *et al.*,
Respondents.

—————
**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

—————
**BRIEF OF *AMICUS CURIAE*
FREEDOM FOUNDATION
IN SUPPORT OF THE PETITIONERS**

—————
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QUESTIONS PRESENTED

In 2014, the Court held in *Harris v. Quinn*, 134 S. Ct. 2618 (2014) that the First Amendment prohibits states from compelling partial-public employees to pay union agency fees. On remand, the lower courts decided that these Illinois caregivers could not recover the fees illegally seized from them in a class action because they could only establish a First Amendment injury if they had affirmatively objected to the fee deductions when they were occurring. The question presented is whether the government inflicts a First Amendment injury when it compels individuals to subsidize speech without their prior consent.

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Wash. Initiative Measure No. 1501 (March 3, 2016), available at https://www.sos.wa.gov/_assets/elections/initiatives/finaltext_1024.pdf	15, 16

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Wash. Engrossed Substitute Senate Bill 6002 (2018), <i>available at</i> http://lawfiles.ext.leg.wa.gov/biennium/2017-18/Pdf/Bills/Senate%20Bills/6002-S.E.pdf	17
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OTHER AUTHORITIES	
Aaron Withe, <i>SEIU 503 refuses to honor opt-out requests</i> , Freedom Foundation (Jan. 11, 2018), https://www.freedomfoundation.com/labor/seiu-503-refuses-honor-opt-requests/	20
Brody Mullins, <i>Antiunion Campaign Goes Door-to-Door</i> , Wall St. J., Aug. 17, 2016, <i>available at</i> https://www.wsj.com/article/s/antiunion-campaign-goes-door-to-door-1471454218	23
Connie Kline, Memorandum, SEIU and IP contracting questions, Pierce County Human Services (July 27, 2017), <i>available at</i> https://www.freedomfoundation.com/wp-content/uploads/2018/02/SEIU-making-IPs-upset-at-cs.pdf	10

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	Page(s)
David Dewhirst, <i>Freedom Foundation Represents Caregiver Who Seeks to Strike Down Washington’s ‘Opt-Out Scheme</i> , Freedom Foundation (Feb. 23, 2017), available at https://www.freedomfoundation.com/litigation/freedom-foundation-represents-caregiver-who-seeks-to-strike-down-washingtons-opt-out-scheme/ ...	11
Freedom Foundation, <i>Policy Brief: Undue Influence</i> (2014), available at https://www.freedomfoundation.com/sites/default/files/documents/Union%20Funded%20Campaigns.pub2013-GTP.pdf	8
Freedom Foundation, <i>SEIU Lying to Caregivers About Membership</i> (May 28, 2015), https://www.youtube.com/watch?v=xs3PutxeylI&feature=youtu.be	9
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Jeff Rhodes, Managing Editor, Freedom Foundation, <i>Letter: Union Becomes Less Transparent and Accountable</i> (May 6, 2017), <i>The Bulletin</i> , available at http://www.bendbulletin.com/opinion/5263774-151/letter-union-becomes-less-transparent-and-accountable	19

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Letter from David Rolf, President, SEIU 775NW to IPs (December 18, 2014), <i>available at</i> http://www.myfreedomfoundation.com/sites/default/files/documents/SEIU%20775%20membership%20packet%20post-Harris%20-%20reduced.pdf	6
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Maxford Nelsen, <i>DSHS allowing SEIU to continue exploiting caregivers</i> , Freedom Foundation (January 29, 2018), https://www.freedomfoundation.com/labor/dshs-allowing-seiu-continue-exploiting-caregivers/	9
Maxford Nelsen, <i>Thousands of Workers Leave SEIU Due to the Freedom Foundation Out-reach</i> , Freedom Foundation, Oct. 7, 2015, <i>available at</i> https://www.freedomfoundation.com/labor/thousands-of-workers-leave-seiu-due-to-freedom-foundation-outreach/	22
Maxford Nelsen, <i>Video Footage Shows SEIU Lying to Individual Providers in State Mandated Training</i> , Freedom Foundation (July 7, 2015), <i>available at</i> https://www.freedomfoundation.com/labor/video-footage-shows-seiu-lying-to-individual-providers-in-state-mandated-training/	9

TABLE OF AUTHORITIES—Continued

	Page(s)
Oreg. DHS, Letter Request for disclosure of public record (Dec. 17, 2014), <i>available at</i> http://media.oregonlive.com/opinion_impact/other/2015/12/02/request.pdf	18
SEIU 775 Collective Bargaining Agreement, 2017-2019 (July 1, 2017), <i>available at</i> https://www.ofm.wa.gov/sites/default/files/public/legacy/labor/agreements/17-19/nse_homecare.pdf	7, 9, 10
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The Oregonian, <i>How state officials, with guidance from Department of Justice, knee-capped a public records request: Editorial</i> (Updated Dec. 24, 2015), <i>available at</i> http://www.oregonlive.com/opinion/index.ssf/2015/12/government_transparency_oregon.html	18, 19
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	Page(s)
Wash. Secretary of State, Nov. 8, 2016 General Election Results, Initiative Measure No. 1501 concerns seniors and vulnerable individuals (Nov. 30, 2016 8:19AM), <i>available at</i> http://results.vote.wa.gov/results/20161108/State-Measures-Initiative-Measure-No-1501-concerns-seniors-and-vulnerable-individuals.html	16
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IDENTITY AND INTEREST OF AMICI CURIAE¹

The Freedom Foundation (“Foundation”) is a non-profit organization operating in Washington, Oregon, and California. The Foundation’s mission is to advance individual liberty, free enterprise, and limited, accountable government. The Foundation currently focuses on public-sector labor reform. Since 2014, the Foundation has informed tens of thousands of *Harris*-affected workers of their First Amendment right to abstain from paying union dues. The Foundation has conducted this outreach because the unions which represent *Harris*-affected workers, together with their state employers, have both failed to effectively notify workers of their *Harris* rights and actively worked to obfuscate and undermine those rights. Principally through “opt-out” schemes, these unions have consistently deducted dues without workers’ consent and often over their objections. Based on its extensive *Harris*-related work, the Foundation has witnessed and combatted unions’ attempts to prevent workers from learning of and exercising their constitutional rights. The Foundation’s expertise and experiences in this area will assist the Court in determining whether to grant Certiorari and address this critical issue.

INTRODUCTION AND SUMMARY OF ARGUMENT

Throughout the country, many lower courts are errantly relying on an “offhand remark” this Court

¹ Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, amicus affirms that no party’s counsel authored this brief in whole or in part, and no person or entity, other than amicus and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

made in an entirely non-constitutional setting: “dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee.” *Knox v. Serv. Employees Int’l Union, Local 1000*, 567 U.S. 298, 313 (2012) (citing *Machinists v. Street*, 367 U.S. 740, 774 (1961) (construing the Railway Labor Act)). This “historical accident,” *Knox*, 567 U.S. at 313, has been perpetuated in this case and in several others. See *Riffey v. Rauner*, 873 F.3d 558, 566 (7th Cir. 2017); see also *Schlaud v. Snyder*, 785 F.3d 1119 (6th Cir. 2015); *Weaver v. Univ. of Cincinnati*, 970 F.2d 1523, 1532 (6th Cir. 1992); *Mitchell v. Los Angeles Unified Sch. Dist.*, 963 F.2d 258 (9th Cir. 1992).

“Opt-out schemes,” by which unions and employers extract union membership dues or fees from an employee unless she affirmatively establishes her lack of consent violate the First Amendment. Indeed, these schemes merely compel speech in a subtly different manner than the compelled speech this Court held unconstitutional as applied to partial-public employees, see *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014), and “questionable” as applied to all others. *Id.* at 2632. This Court’s decision in *Knox*, see 567 U.S. at 313-14, should have settled the question, but recent experience teaches us it has not.

In Washington, Oregon, and California unions and their government employer counterparts have enacted opt-out schemes to bypass employee consent and ensure maximum dues revenue. These schemes designedly seize dues from employees who have made the affirmative choice *not* to join and support a union. Obviously, schemes designed to undermine the First Amendment cannot survive its scrutiny. After *Harris*,

opt-out schemes entrapped hundreds of thousands of partial-public employees into compulsory union dues payments. If this Court rules in *Janus v. AFSCME, Council 31*, No. 16-1466 (U.S. June 6, 2017), that the First Amendment prohibits exacting compulsory agency fees from full-fledged public employees, the same opt-out ruse will await them.²

The Court should grant Certiorari, declare opt-out schemes unconstitutional, and make the First Amendment's guarantees meaningful for every public servant.

ARGUMENT

I. THE COURT SHOULD HOLD THAT THE FIRST AMENDMENT REQUIRES AFFIRMATIVE CONSENT BEFORE UNION DUES MAY BE SEIZED FROM PUBLIC AND PARTIAL-PUBLIC EMPLOYEES' WAGES.

In *Harris*, this Court held that the First Amendment prohibits states from forcing partial-public employees to financially support a union at all. 134 S. Ct. at 2644. To evade *Harris*' holding, unions rapidly implemented schemes to continue in practice what this Court prohibited in principle: seizing union fees from nonmembers without their consent. These schemes require government employers to seize full union dues from all workers in a bargaining unit automatically. Then, workers are *allowed* to leave the union or "opt-out" by navigating an opaque exit process. The unions have not informed workers of their right to opt-out and have created procedural roadblocks to prevent them from

² This Court could and should address this issue in *Janus*. See Brief of Rebecca Friedrichs et al., *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S.Ct. 54, *set for argument*, No. 16-1466 (Dec. 20, 2017) 2017 WL 6311778.

doing so. These opt-out schemes are crafted and implemented for one purpose – to undermine the choice guaranteed to workers by the First Amendment. These abuses will continue if this Court does not hold that opt-out schemes violate the First Amendment.

This Court's decisions in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), *Knox*, and *Davenport v. Washington Education Ass'n*, 551 U.S. 177 (2007) all discuss the need for procedural safeguards to prevent the seizure of union dues from non-consenting state employees' wages. Opt-out schemes exist to evade those procedural safeguards. Opt-out schemes, therefore, violate *existing* First Amendment precedent. This case presents the Court an opportunity to affirm that legal rule for partial and full-fledged public employees nationwide.

A. The Freedom Foundation's Experiences In Washington, Oregon, And California After *Harris* Demonstrate That Opt-Out Schemes Designedly Perpetuate Compulsory Unionism Even When This Court Forbids Compulsory Unionism Under the First Amendment.

In *Harris*, the Court refused to extend the agency fee framework set forth in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 232 (1977), to partial-public employees. *Harris*, 134 S. Ct. at 2638. These workers now have the right to freely associate with unions, but they may also choose to disassociate and withhold all financial support from unions without losing their jobs.

However, workers cannot exercise a right they do not know exists. Few of these workers read this Court's opinions; unions are financially disincentivized from informing workers of their right to stop paying unions; governments are often muzzled into "neutrality" agreements in which any discussion with workers about their *Harris* rights may give rise to union-initiated unfair labor practice litigation.³ This climate of concealment is exploited by opt-out schemes, which automatically deduct union dues from a worker's wages unless she affirmatively opts out. Countless, unwitting workers who chose not to join a union nevertheless subsidize millions of dollars in union political activity. These union schemes designedly and effectively undermine the First Amendment rights of workers set forth in *Harris*.

After *Harris*, the Foundation launched an ongoing outreach program to inform workers in Washington, Oregon, and California about their newly-acknowledged rights. This outreach includes mailings, emails, television, radio, social media communications, and door-to-door canvassing. When these workers learn of their *Harris* rights, they often choose to withdraw from union membership and dues payments.⁴ Until the Foundation told them, most workers never knew they had a right to cease paying union dues. This abuse of workers' First Amendment rights is only

³. See SEIU 775 Letter Re: Freedom Foundation Request for Information (March 14, 2016), *available at* <https://www.freedomfoundation.com/wp-content/uploads/2018/02/ULP-threat-from-SEIU-to-DSHS.pdf>.

⁴. See, e.g., Hana Kim, *Union leaders furious over door-to-door tactic targeting their members*, Aug. 3, 2016, <http://q13fox.com/2016/08/03/union-leaders-furious-over-door-to-door-tactic-targeting-their-members/>.

possible because unions are allowed to deduct dues without workers' prior, affirmative consent.

1. *After Harris, SEIU redefined union membership, instituted an opt-out scheme, and continued seizing dues from thousands of home healthcare providers without their consent.*

SEIU 775 currently represents approximately 37,500 state-funded in-home caregivers in Washington,⁵ who are virtually identical to the home care aides at issue in *Harris*. These caregivers provide in-home care to Medicaid recipients – usually family members or friends. Prior to *Harris*, SEIU 775 and the State of Washington automatically seized union dues or agency fees from every caregiver's wages. Wash. Rev. Code 41.56.113(b)(i). After *Harris*, SEIU 775 continues to do the same under the guise of an opt-out scheme. After this Court decided *Harris*, SEIU 775 unilaterally re-classified every caregiver who had not specifically objected to paying union dues as a union member. *Thorpe v. Inslee*, 188 Wn.2d 282, 286, 393 P.3d 1231, 1233 (2017), *reconsideration denied* (July 7, 2017) (The current agreement... allows any provider who chooses to not join or financially support the union to opt out. Anyone who does not opt out is treated as a union member[.]”⁶ Overnight, thousands of caregivers who never joined SEIU 775 nor consented to

⁵. See Appendix, Table B.

⁶ Letter from David Rolf, President, SEIU 775NW to IPs (December 18, 2014), at 7 (“SEIU Healthcare 775NW’s Constitution and Bylaws automatically grants you membership... While you need not sign a membership card, we strongly encourage you to do so”) available at <http://www.myfreedomfoundation.com/sites/default/files/documents/SEIU%20775%20membership%20packet%20post-Harris%20-%20reduced.pdf>.

dues payments became full dues-paying SEIU 775 members.

SEIU 775 has a contractual obligation to notify caregivers of their constitutional rights.⁷ The “notice” the union provides is predictably insufficient. Shortly after *Harris*, SEIU sent all caregivers a 6-page letter.⁸ After five pages of pro-union marketing, SEIU 775 provided on page six the “notice” about caregivers’ rights under *Harris*. Couched between warnings against resigning membership, this “notice” explained SEIU’s opt-out scheme, to which caregivers must adhere if they wish to exercise their *Harris* rights.⁹ SEIU’s insufficient “notices” are easy to explain: the union is financially incentivized to obscure *Harris* rights and discourage caregivers from exercising them.

SEIU admits that its opt-out scheme allows it to collect union dues – a staggering 3.2% of wages¹⁰ –

⁷ See Current SEIU 775 Collective Bargaining Agreement 2017-2019, § 4.1(B), (July 1, 2017) (“Current CBA”), available at https://www.ofm.wa.gov/sites/default/files/public/legacy/labor/agreements/17-19/nse_homecare.pdf.

⁸ Letter from SEIU 775NW to IPs (August 2014), available at <http://www.myfreedomfoundation.com/sites/default/files/documents/SEIU%20member%20mailer.pdf>.

⁹ *Id.*

¹⁰ Notably, the average full-fledged public employee in Washington pays 1.5% of her wages in union dues – to a union legally empowered to act as an actual workplace representative. See http://new.optouttoday.com/wp-content/uploads/2016/08/WF_SE_HudsonPacket_2017June.pdf at 3. By contrast, Washington caregivers pay SEIU 3.2% of their wages, used to negotiate a biennial contract with the Governor of Washington and to spend lavishly on politics, largesse which flows back, unsurprisingly, to the Governor of Washington. See SEIU HEALTHCARE 775NW CONSTITUTION AND BYLAWS, available at <http://b.3cdn.net/seiu>

from caregivers who have never consented to paying dues. SEIU 775's leadership has testified that SEIU "does not differentiate among its members based on whether they have filled out a membership application or card."¹¹ Indeed, since *Harris*, "SEIU 775 has treated all caregivers as Union members as long as they are paying full union dues. There is no requirement that a caregiver complete or sign any document to be a Union member if the caregiver is paying monthly union dues."¹² SEIU 775 further admitted that 18% of the bargaining unit had not signed membership cards or consented to dues deductions.¹³ Finally, SEIU acknowledged it exacted money from 43,000 total caregivers over the previous three years who had not consented to membership or dues deductions.¹⁴ In spite of *Harris*, nearly every Washington caregiver continues to pay dues to SEIU because SEIU redefined "membership" and instituted an opt-out scheme.

master/5d63840477355f2f87_h1m6bhvfj.pdf; see also Policy Brief: Undue Influence (2014), available at <https://www.freedomfoundation.com/sites/default/files/documents/Union%20Funded%20Campaigns.pub2013-GTP.pdf>.

¹¹. Declaration of Adam Glickman in Support of SEIU Healthcare 775NW's Opposition to Plaintiffs' Motion for Class Certification, *Hoffman, et al. v. Inslee, et al.*, No. 2:14-cv-00200-MJP (W.D. Wash. Filed Feb. 11, 2014) ("Glickman Decl."), ¶ 13, available at <http://www.myfreedomfoundation.com/sites/default/files/documents/Glickman%20Decl.%20in%20Centeno.pdf>.

¹². *Id.* at ¶ 8.

¹³. *Id.* at ¶ 11.

¹⁴. *Id.* at ¶ 26.

The State also actively assists SEIU in recruiting caregivers to union membership. When caregivers first meet with the State to sign their employment contracts, and begin paid work for their clients, the State apportions fifteen minutes for SEIU representatives to meet with the caregivers as well.¹⁵ Although these fifteen-minute meetings are optional, the state signs IPs up for a meeting without the IPs' consent.¹⁶ SEIU representatives also lie to caregivers at mandatory training sessions by telling them they must pay dues to SEIU.¹⁷ Caregivers must endure these union membership pitches at their contracting appointments with the State, and at their state-mandated training and continuing education sessions.¹⁸ Even government personnel have noted the mistreatment that occurs during the union meetings, including concerns about

^{15.} See note 7, *supra* at § 2.3.

^{16.} See Maxford Nelsen, *DSHS allowing SEIU to continue exploiting caregivers*, *Freedom Foundation* (January 29, 2018), available at <https://www.freedomfoundation.com/labor/dshs-allowing-seiu-continue-exploiting-caregivers/> and Washington State DSHS Memorandum [redacted], DSHS IP Contracting Appointment (August 2, 2017), available at <https://www.freedomfoundation.com/wp-content/uploads/2018/01/DSHS-inaccurate-contracting-appointment-notice.pdf>.

^{17.} See Maxford Nelsen, *Video Footage Shows SEIU Lying to Individual Providers in State Mandated Training*, *Freedom Foundation* (July 7, 2015), available at <https://www.freedomfoundation.com/labor/video-footage-shows-seiu-lying-to-individual-providers-in-state-mandated-training/> and *Freedom Foundation, SEIU Lying to Caregivers about Membership* (May 28, 2015), <https://www.youtube.com/watch?v=xs3PutxeylI&feature=youtu.be>.

^{18.} See note 7, *supra* at § 2.3; § 15.13(A).

misrepresentations¹⁹ and antagonizing IPs, leading to confusion and frustration for the people who simply want to care for their families.²⁰ As if that were not enough, the current CBA also requires that all state websites which caregivers “might reasonably access” contain a link to SEIU 775’s website; all state orientation materials distributed to caregivers must contain union membership applications; and the online payroll website must include SEIU notifications.²¹

Caregivers face an informational onslaught from SEIU 775, they are powerless to stop. The State discloses the name, address, phone number, email address, birthdate, gender, marital status, and *social security number* of every Washington caregiver to SEIU.²² Armed with that information, SEIU 775 relentlessly barrages caregivers with more pro-union marketing and political messaging. Under law and contract, the State is powerless to notify caregivers of their *Harris* rights.²³ Moreover, the State’s most recent agreements with SEIU dictate that the state can only stop withholding dues from the caregiver’s paycheck with the union’s authorization. This means a worker who never authorized her employer to deduct union dues cannot direct her employer to stop deducting union dues. Only the union can direct the

¹⁹. See *the result of a Foundation Public records request* <https://www.freedomfoundation.com/wp-content/uploads/2018/02/SEIU-lying-to-IP-in-front-of-DSHS.pdf>.

²⁰. See *information resulting from a Foundation public records request* <https://www.freedomfoundation.com/wp-content/uploads/2018/02/SEIU-making-IPs-upset-at-cs.pdf>.

²¹. See note 7 *supra*, at §§ 2.5-2.8.

²². *Id.* at § 5.1.

²³. *Id.* § 4.1(B).

state to stop the deductions.²⁴ To effectively opt out, a caregiver must send a certified letter to the Union. If the letter arrives more than one month after the caregiver began working, the caregiver cannot reclaim the dues money she has already unwillingly paid.

Politically, State officials who are caregivers' employers "[s]olely for the purposes of collective bargaining[,]" Wash. Rev. Code 74.39A.270, directly benefit from the political largesse of SEIU. The conflicts of interests produced by this system benefits every party *except* the caregiver – who is left isolated and uninformed about her constitutional rights.

Opt-out schemes' abuses are not merely hypothetical, as one caregiver's story bears out. Miranda Thorpe became a caregiver to care for her daughter, Sarena. Sarena qualifies for public assistance through the Medicaid program because of a cognitive disability.²⁵ When Miranda chose to start accepting public assistance for the care she provides to Sarena, she signed a contract with the State and met the other various requirements. At that time, Miranda received a union membership card from SEIU 775, but she *chose* not to sign it. Notwithstanding her choice, she soon realized the State was deducting union dues from her wages, anyway. Upset that her choice had not been respected, she filed suit, arguing that the opt-out scheme violated Washington statutory law.²⁶ Ultimately, the Washington Supreme Court rejected her

²⁴. *Id.*

²⁵. See <https://www.freedomfoundation.com/sites/default/files/documents/20151009%20Verified%20COM.pdf>.

²⁶. See David Dewhirst, *Freedom Foundation Represents Caregiver Who Seeks to Strike Down Washington's 'Opt-Out Scheme*, Freedom Foundation (Feb. 23, 2017), available at <https://www.freedomfoundation.com/litigation/freedom-foundation->

argument. *Thorpe v. Inslee*, 188 Wash.2d 282.²⁷ Miranda has now affirmatively opted out of union membership and dues payments, but she should not have had to *affirmatively* do so. Miranda, like thousands of other caregivers, deliberately chose not to join unions but nonetheless was forced to subsidize union political speech because of opt-out schemes. Clearly, opt-out schemes are not “carefully tailored to minimize the infringement’ of free speech rights.” *Knox v. Serv. Employees Int’l Union, Local 1000*, 567 U.S. 298, 313 (2012) (quoting *Hudson*, 475 U.S. at 303).

2. SEIU Engages In Abusive Litigation Tactics To Prevent Caregivers From Learning Of And Exercising Their Harris Rights.

Because neither Washington, Oregon, and California nor the unions have been forthright with caregivers, the Foundation launched an outreach program to inform them of their *Harris* rights. To facilitate this outreach in Washington, the Foundation requested lists of these publicly-funded caregivers pursuant to the State’s Public Records Act.²⁸ These home-based caregivers do not share any common workplaces, so the only way to communicate with them is to obtain their information from the State.

represents-caregiver-who-seeks-to-strike-down-washingtons-opt-out-scheme/.

²⁷. Other Washington caregivers unsuccessfully challenged the constitutionality of SEIU’s opt-out scheme in federal court. Amended Order on Motions for Summary Judgment, *Hoffman v. Inslee*, C14-200-MJP, 2016 WL 6126016 (W.D. Wash. Oct. 20, 2016). Amicus believes that case was wrongly decided.

²⁸. Wash. Rev. Code §§ 42.56 *et seq.*; see *SEIU Healthcare 775 NW. v. Dep’t of Soc. & Health Servs.*, 377 P.3d 214, 218 (2016).

Immediately after *Harris*, the Foundation requested lists of caregivers. Under state law, the State should have produced those records within five business days. The Foundation received the list of caregivers 819 days after its request.²⁹ What caused this 814-day delay? SEIU and the State of Washington. First, the state intentionally delayed disclosing the list to allow SEIU time to file suit and seek an injunction barring release of the caregiver list. Such delay violates state law.³⁰ Second, SEIU embarked on a delay-motivated litigation strategy. SEIU lost at the trial and appellate courts, but obtained procedural stays to prevent disclosure. When the Supreme Court unanimously denied review, the State finally produced the caregiver list to the Foundation.³¹

By the time the State disclosed the list to the Foundation, it was more than two years out-of-date. The caregiver bargaining unit fluctuates by as much as 40% annually.³² Thus, after litigating successfully for over two years, the Foundation was able to communicate with only a small number of caregivers. Immediately after it received this outdated list, the Foundation made a new request to the State for a current list of caregivers.³³ SEIU sued again and again

²⁹. Motion for temporary restraining order at 6, *Boardman v. Inslee*, No. C17-5255 BHS, 2017 WL 1957131 (W.D. Wash. April 5, 2017) (“Mot. for TRO”).

³⁰. *Freedom Foundation v. Washington State Dept. of Social and Services*, 2016 WL 9384078 (Wash.Super.Ct. Dec. 9, 2016).

³¹. *SEIU Healthcare 775 NW*, 377 P.3d at 230, *review denied*, 186 Wash. 2d 1016 (2016). Mot. for TRO, pg. 6.

³². See note 29, *supra*.

³³. Decl. of Maxford Nelsen in Support of Mot. for TRO ¶ 20, *Boardman v. Inslee*, Case 3:17-cv-05255 BHS, 2017 WL 1957131 (W.D. Wash. April 5, 2017) (“TRO Documentation”).

obtained stays from the appellate court, delaying production.³⁴ SEIU's abusive litigation tactics have been applied to all other requests for public records that might result in communication with IPs about their rights. For example, the Foundation regularly requests the year's schedule of caregiver contracting appointments, during which the caregivers face considerable union pressure to sign membership cards.³⁵ SEIU sued again and again lost on the merits, but successfully obtained procedural stays that delayed disclosure long enough for all the appointment dates to pass.³⁶

This tactic is used for other *Harris*-affected workers, like family childcare providers. Even childcare providers who routinely requested lists of their fellow providers were sued, on multiple occasions, to prevent disclosure. *SEIU 925 v. DEL & Shannon Benn*, Thurston Co. Superior Ct. No. 16-2-01416-34 (Apr. 22, 2016); *SEIU 925 v. DEL & Shannon Benn*, Thurston Co. Superior Ct. No. 15-2-00283-7 (Feb. 12, 2015). Since *Harris*, SEIU has fought every attempt to release worker information to any entity but itself. Early in 2017, a U.S. District Court recognized SEIU's tactics. See *Boardman v. Inslee*, No. C17-5255 BHS, 2017 WL 1957131, at *3 (W.D. Wash. April 5, 2017).

³⁴. *SEIU 775 v. Lashway*, No. 16-2-04312-34 (Thurston Cnty. Superior Ct. Oct. 27, 2016).

³⁵. *SEIU 775 v. State Dep't of Soc. & Health Servs.*, 396 P.3d 369 review denied sub nom. *SEIU 775 v. State*, 189 Wash. 2d 1011, 402 P.3d 828 (2017).

³⁶. See note 29, *supra*.

3. Politically Powerful Government Unions Game The System To Keep Workers In The Dark About Their Rights.

Unions in Washington, Oregon, and California use more than litigation to prevent *Harris*-affected workers from learning their rights. In all three states, unions have passed legislation designed to prevent workers from learning about and exercising their First Amendment rights.

a. SEIU bought a statewide ballot initiative in Washington to prevent *Harris*-affected workers from learning of their First Amendment rights.

SEIU knew its litigation strategy would ultimately fail and that the Foundation would eventually obtain current caregiver lists, pursuant to Washington public records law. So, SEIU decided to change the public records law. After aggressive lobbying failed to convince the legislature to amend the records law and conceal caregiver identities, SEIU turned to the statewide ballot initiative process, pouring nearly \$2 million³⁷ into creating and funding Initiative 1501 (“I-1501”).³⁸ According to Washington’s Attorney General, who drafted the ballot title in conformity with SEIU’s wishes, I-1501 was “an act relating to the protection of seniors and vulnerable individuals from financial

³⁷. Of the \$1,883,888.15 received by the pro-1501 political action committee during the 2016 election, all but \$50 came from SEIU 775 and SEIU 925. *See* n. 33 *supra* at 7.

³⁸. *Id.*

crimes and victimization.”³⁹ However, I-1501 did little to prevent predatory financial crimes. Its true purpose was to eliminate the Foundation’s access to worker information, once and for all. This is obvious from the text of the initiative, which prohibited disclosure of *caregivers’* names, not just seniors’ or vulnerable persons’ names – which were already barred from disclosure.⁴⁰ I-1501 contains a broad exception for SEIU, who may continue obtaining caregiver information from the state.⁴¹ The pro-1501 campaign’s chairman was SEIU’s Secretary-Treasurer.⁴² Every Washington newspaper recognized that I-1501 was a special interest concealment measure, designed to stop the Foundation’s outreach to *Harris*-affected workers.⁴³ Unfortunately, Washington voters approved I-1501.⁴⁴

Consequently, SEIU has enshrined in state law its monopoly access to caregiver information and communication. *Boardman*, No. C17-5255 BHS, 2017 WL 1957131, at *1. Two years after *Harris*, Washington caregivers have no reasonable means to learn about or

³⁹. See Wash. Initiative Measure No. 1501 (March 3, 2016), available at https://www.sos.wa.gov/_assets/elections/initiatives/finaltext_1024.pdf.

⁴⁰. *Id.* See also Wash. Rev. Code §§ 42.56.230(1) – (2)(a).

⁴¹. Wash. Rev. Code § 42.56.645(1)(d).

⁴². Decl. of Adam Glickman in Support of Campaign to Prevent Fraud & Protect Seniors Mot. to Intervene ¶ 2, *Boardman*, No. 3:17-cv-05255 (W.D. Wash. April 10, 2017).

⁴³. See n. 33, *supra*, TRO Documentation at Exhibit G.

⁴⁴. See Wash. Secretary of State, Nov. 8, 2016 General Election Results, Initiative Measure No. 1501 concerns seniors and vulnerable individuals (Nov. 30, 2016 8:19am), available at <http://results.vote.wa.gov/results/20161108/State-Measures-Initiative-Measure-No-1501-concerns-seniors-and-vulnerable-individuals.html>.

exercise their right to be free from compelled union speech.

In the current legislative session, government union-backed bills have flooded the Legislature, many designed to undermine *Harris*'s protections for Washington caregivers or preemptively immunize unions from a decision for the Petitioner in *Janus*, No. 16-1466. SB 6199, supported by SEIU, would reclassify all Washington caregivers as private-sector employees (though still entirely funded by Medicaid dollars). This reclassification would allow SEIU to deny caregivers their *Harris* rights and re-subject them to compulsory agency fees.⁴⁵

The same is true for unions who represent full-fledged public employees. For example, SB 6296 would impose the same opt-out scheme upon all public employees that caregivers have been forced to live under since 2014.⁴⁶ Additionally, to thwart the Foundation's forthcoming attempts to educate public-sector employees about any changes to their rights related to the *Janus* case, unions have promoted bills to conceal public employee information from the state's public records law.⁴⁷

SEIU and other government unions have used their overwhelming political power to enact opt-out schemes.

⁴⁵. See Substitute Senate Bill 6199 (2018), available at <http://lawfilesexternal.leg.wa.gov/biennium/2017-18/Pdf/Bills/Senate%20Bills/6199-S.pdf>.

⁴⁶. See Substitute Senate Bill 6296 (2018), available at <http://lawfilesexternal.leg.wa.gov/biennium/2017-18/Pdf/Bills/Senate%20Bills/6296-S.pdf>.

⁴⁷. See Engrossed Substitute Senate Bill 6002 (2018), available at <http://lawfilesexternal.leg.wa.gov/biennium/2017-18/Pdf/Bills/Senate%20Bills/6002-S.E.pdf>.

The Court should do expressly what it has already done implicitly: declare such schemes unconstitutional. This would empower workers, give them a meaningful choice, and compel unions to spend resources serving rather than hoodwinking their members.

b. Oregon amended its public records law after *Harris* to prevent *Harris*-affected workers from learning of their First Amendment rights.

In December of 2014, the Foundation requested a list of Oregon’s *Harris*-affected caregivers, represented by SEIU 503, pursuant to the Oregon Public Records Act, O.R.S. T. 19, Ch. 192.⁴⁸ The State immediately concluded that the law required it to disclose the requested list.⁴⁹ Then it began to delay.⁵⁰ During this delay, the Oregon legislature – at the behest of SEIU 503’s leadership – introduced HB 3037, which prevented disclosure of *Harris*-affected worker lists.⁵¹

HB 3037 was designated an “emergency” action, “necessary for the *immediate* preservation” of the public interests at stake.⁵² Apparently, the emergency was the possibility that Oregon caregivers might learn

⁴⁸. The Oregonian conducted extensive reporting on this case, which included several documents referenced below, *available at* http://media.oregonlive.com/opinion_impact/other/2015/12/02/request.pdf; http://www.oregonlive.com/opinion/index.ssf/2015/12/government_transparency_oregon.html (Hereinafter, “Oregonian article”).

⁴⁹. Oregonian article, *supra*, note 48.

⁵⁰. *Id.*

⁵¹. *Id.*

⁵². *Id.*

about and exercise their *Harris* rights. Indeed, SEIU's Oregon Political Organizer supported HB 3037 by liaising between the legislature and affected state agencies.⁵³ When the State finally responded to the Foundation, it explained it would not produce the list because HB 3037's newly created exemptions barred disclosure. The State even admitted it delayed the Foundation's request to track HB 3037's progress.⁵⁴

In 2017, SEIU 503-represented caregivers requested lists of their fellow caregivers' names and contact information, a list they were entitled to receive under Oregon's nonprofit corporation law. SEIU 503, then organized as a nonprofit corporation, refused to honor its members' requests. Rather, it disincorporated and now takes the form of an Oregon unincorporated association, thus avoiding any disclosure obligations to its members.⁵⁵

In late 2017, the Foundation discovered that even when SEIU 503-represented caregivers manage to discover that they can opt-out and properly submit their documentation, the union continues to deduct dues. The union justifies its refusal to cease deductions by inventing new, arbitrary requirements caregivers must satisfy when submitting their opt-out documentation. These include that caregivers' signatures must be original (not a copied image) and that

⁵³. Affidavit of Anne Marie Gurney, in support of Plaintiff's Complaint, at 9-10, *Gurney v. Oregon Department of Health Services*, (No. 15CV31869) (Or. Cir 2015).

⁵⁴. Oregonian article, *supra*, note 48.

⁵⁵. See Jeff Rhodes, Managing Editor, Freedom Foundation, *Letter: Union Becomes Less Transparent and Accountable* (May 6, 2017), *The Bulletin*, available at <http://www.bendbulletin.com/opinion/5263774-151/letter-union-becomes-less-transparent-and-accountable>.

an IP may not opt out using a third-party form, etc.⁵⁶ These burdens effectively negate caregivers' choices. Several caregivers have filed suit to recover their lost wages and to prevent further deductions.⁵⁷ This blatant violation of *Harris* is occurring almost four years after that landmark decision, showing that affirming caregivers' right to choose whether to fund a union without also requiring prior, affirmative consent leaves caregivers vulnerable to deceitful dues-skimming schemes.

In Oregon as much as Washington, government unions' immense political power grants them legal privileges. Pair that with an opt-out scheme, and most workers will never learn about their rights or how to exercise them. In the Pacific Northwest, it seems even the slightest threatened diminution in union revenue and political clout justifies the wholesale degradation of worker dignity and rights.

c. Before *Harris*, California amended its public records law to exempt all *Harris*-affected caregivers' contact information from disclosure, and in anticipation of *Janus*, it has done the same for all of California's public employees.

Immediately before this Court decided *Harris*, the California Legislature amended its public records law to exempt from disclosure all information related

⁵⁶. See Aaron With, *SEIU 503 refuses to honor opt-out requests*, Freedom Foundation (Jan. 11, 2018), available at <https://www.freedomfoundation.com/labor/seiu-503-refuses-honor-opt-requests/>.

⁵⁷. See Compl., *Entwistle et. al v. Brown et. al*, No. 6:18cv00053 (D. Or. Jan. 10, 2018), available at https://www.freedomfoundation.com/wp-content/uploads/2018/01/complaint_1-10-18.pdf.

to its *Harris*-affected caregivers.⁵⁸ Thus, hundreds of thousands of these affected workers are entirely ununiformed of their First Amendment rights to choose whether they will financially support a union. In advance of *Janus*, the California Legislature enacted A.B. 119,⁵⁹ which exempts public employees' names and contact information from disclosure, but requires that the state provide the unions with access to any new state employees' information. Furthermore, the new law requires all state employers to facilitate face-to-face meetings for all newly hired state employees and the appropriate union. Additionally, the CTA has spent tens of millions of dollars opposing ballot initiatives that would prohibit opt-out schemes.⁶⁰ Aided by opt-out schemes, these unions will continue to seize dues from workers while simultaneously blocking them from receiving any information about their rights related to those dues.

⁵⁸. Cal. Gov't Code § 6253.2.

⁵⁹. Available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB119.

⁶⁰. See *California Proposition 32, The "Paycheck Protection" Initiative (2012)*, Ballotpedia.org (CTA spending \$21 million dollars to prevent an opt-in requirement), available at [https://ballotpedia.org/California_Proposition_32,_the_%22Paycheck_Protection%22_Initiative_\(2012\)](https://ballotpedia.org/California_Proposition_32,_the_%22Paycheck_Protection%22_Initiative_(2012)). See also *California Proposition 75, Permission Required to Withhold Dues for Political Purposes (2005)*, Ballotpedia.org (CTA spending \$12 million dollars to prevent an opt-in requirement), available at [https://ballotpedia.org/California_Proposition_75,_Permission_Required_to_Withhold_Dues_for_Political_Purposes_\(2005\)](https://ballotpedia.org/California_Proposition_75,_Permission_Required_to_Withhold_Dues_for_Political_Purposes_(2005)).

d. Many workers choose to opt out of union membership and dues payment obligations when they learn of their right to do so, which demonstrates that opt-out schemes designedly compel workers to subsidize speech against their wishes.

When workers learn of their First Amendment right to opt out of union membership and dues payments, they often do so in overwhelming numbers.⁶¹ *Harris* opened the door for hundreds of thousands of partial-public employees to choose whether they wanted to support a union. But opt-out schemes and unions' accompanying anti-information campaigns have dramatically undermined the rights *Harris* articulated.

After *Harris*, SEIU 925, which represents Washington's family childcare providers, removed the agency shop provision that compelled all childcare providers to pay union dues or fees from its labor contract. Immediately, the State ceased deducting dues from 38.4% of childcare providers who never consented to membership. Additionally, 64.5% of childcare providers who were members have opted out and no longer pay dues to SEIU 925. See Appendix, Table A.

Conversely, after *Harris*, SEIU 775, which represents Washington IPs, removed its agency shop provision and replaced it with an opt-out scheme. Subsequently, SEIU 775 experienced virtually no downturn

⁶¹. Maxford Nelsen, *Thousands of Workers Leave SEIU Due to the Freedom Foundation Outreach*, Freedom Foundation, Oct. 7, 2015, available at <https://www.freedomfoundation.com/labor/thousands-of-workers-leave-seiu-due-to-freedom-foundation-outreach/>.

in membership numbers (a drop from 99.9% to 99.5%). Since 2014, the Foundation has obtained a few partial lists of home healthcare providers and conducted some limited outreach.⁶² Today, only 10.6% of home healthcare providers have been able to opt out. *See* Appendix, Table B.

Only the opt-out scheme can explain the disparity between SEIU 925 and SEIU 775. SEIU 775 places the burden on the worker – the only party with a First Amendment interest at stake. *See Davenport*, 551 U.S. at 185 (“[U]nions have no constitutional entitlement to the fees of nonmember employees.”). This data shows that opt-out schemes are inherently over-inclusive and fall woefully short of even the existing “procedural safeguards” to which unionized workers are entitled. *See Hudson*, 475 U.S. at 303. Opt-out schemes facilitate and encourage compelled speech, the issue at the heart of this case. On the other hand, opt-in schemes do not disadvantage any union that provides services workers are willing to support. To adequately safeguard First Amendment rights, this Court must hold that the First Amendment requires a worker’s affirmative consent before union dues or fees may be extracted from his wages.

⁶². *See* Brody Mullins, *Antiunion Campaign Goes Door-to-Door*, Wall St. J., Aug. 17, 2016, available at <https://www.wsj.com/articles/antiunion-campaign-goes-door-to-door-1471454218>.

B. Only an opt-in system can satisfy the requirements of *Hudson* and *Knox* because opt-out schemes are inherently over-inclusive and therefore not narrowly tailored to minimize the burden on workers' First Amendment rights.

This Court has noted that acceptance of the opt-out approach appears to have come about more as a “historical accident than through the careful application of First Amendment principles.” *Knox*, 567 U.S. at 312. That historical accident springs from *International Association of Machinists v. Street*, a case that this court has critiqued repeatedly.⁶³ Yet many courts, consistently ignore *Knox* and *Hudson* by pointing to *Street*, which was not even a constitutional law case. The Ninth and Sixth Circuits shield opt-out schemes from First Amendment challenges by relying on *Street's* dicta stating that “dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee.” *Street*, 367 U.S. at 774.

In *Mitchell v. Los Angeles Unified Sch. Dist.*, 963 F.2d 258 (9th Cir. 1992), the Circuit Court relied on *Street* in holding that *an opportunity to stop* paying union dues was good enough to protect workers from paying for speech with which they did not agree. That case, combined with the union information blockade, has doomed West Coast caregivers to an ongoing, non-consensual relationship with unions they did not choose and cannot decertify.⁶⁴

^{63.} See *Knox*, 567 U.S. at 312-13.

^{64.} See, e.g. *Hoffman v. Inslee*, No. C14-200-MJP, 2016 WL 6126016 (W.D. Wash. Oct. 20, 2016).

Similarly, in *Weaver v. Univ. of Cincinnati*, 970 F.2d 1523, 1532, 1533 (6th Cir. 1992), the Sixth Circuit pointed to *Street* when it held that “[a]n ‘opt-in’ procedure would greatly burden unions while offering only a modicum of control to nonunion employees whose procedural rights have already been safeguarded by *Hudson*.”⁶⁵ This holding is precisely contrary to *Knox* and *Davenport*, which eliminated any suggestion that unions have a constitutional right to workers’ money. *Knox*, 567 U.S. at 313. Those cases make it quite clear that when balancing a union’s financial convenience against a worker’s right to be free from compelled speech, the worker should prevail every time. *Id.*

These appellate decisions simply do not square with this Court’s holdings in *Knox*, *Davenport*, and *Hudson* or the longstanding principle that courts “do not presume acquiescence in the loss of fundamental rights.” *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (quoting *Ohio Bell Tel. Co. v. Pub. Utilities Comm’n of Ohio*, 301 U.S. 292, 307 (1937)). In *Hudson*, this Court held that “the original Union procedure was inadequate because it **failed to minimize the risk that nonunion employees’ contributions might be used for impermissible purposes.**” *Hudson*, 475 U.S. at 309. Opt-out schemes pose the identical risk. They enable unions to use nonunion employees’ funds for impermissible purposes. As the Court noted in *Knox*, the balancing of workers’ First Amendment rights and

⁶⁵. See also *Schlaud*, 785 F.3d 1119 (holding that class certification was not justified where the entire class had not explicitly objected to union membership based on an unjustifiable narrow reading of *Knox*).

Unions desire to amass revenue should always, obviously favor the worker. *Knox*, 567 U.S. at 313.

Opt-out schemes “presume acquiescence in the loss of fundamental rights.”⁶⁶ *Coll. Sav. Bank*, 527 U.S. at 682. Amicus respectfully encourages the Court to squarely address the issue and clearly hold that opt-out schemes violate the First Amendment.

CONCLUSION

Opt-out schemes designedly and effectively compel many workers to subsidize political speech they do not support. Thus, the Court should rule that such schemes impermissibly violate workers’ First Amendment rights. The Court can accomplish this task in *Janus*. If not in *Janus*, it should do so here.

Respectfully submitted,

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⁶⁶. The proposition that “dissent is not to be presumed” has never been adopted by this Court in a public employee’s First Amendment challenge to an opt-out scheme. *Knox*, 567 U.S. at 313 (quoting *Street*, 367 U.S. at 774).

APPENDIX

APPENDIX

Table A tabulates the total percentage of SEIU 925's monthly dues payers and non-members between July 2014 and October 2017. Table B tabulates the total percentage of SEIU 775's monthly dues payers and non-members between July 2014 and October 2017. This data was compiled from public records obtained from Washington State.

Table A

**Percentages of Childcare Providers who pay
membership dues to SEIU 925**

Month	Members	Members	Non-Members	Non-Members
Jul-14	6633	100.0%	0	0.0%
Aug-14	4212	61.6%	2629	38.4%
Sep-14	4499	66.9%	2229	33.1%
Oct-14	4275	64.2%	2387	35.8%
Nov-14	4306	63.7%	2453	36.3%
Dec-14	3739	54.7%	3097	45.3%
Jan-15	3675	55.0%	3149	45.0%
Feb-15	3607	54.0%	3074	46.0%
Mar-15	3609	53.4%	3145	46.6%
Apr-15	3622	52.8%	3235	47.2%
May-15	3738	53.2%	3286	46.8%
Jun-15	3567	51.3%	3385	48.7%
Jul-15	3577	50.8%	3463	49.2%
Aug-15	3451	48.6%	3652	51.4%
Sep-15	3367	48.0%	3651	52.0%
Oct-15	3218	46.6%	3687	53.4%
Nov-15	3177	44.8%	3922	55.2%
Dec-15	3088	43.2%	4061	56.8%
Jan-16	3060	43.1%	4034	56.9%
Feb-16	2976	42.5%	4028	57.5%
Mar-16	2926	41.5%	4128	58.5%

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Apr-16	2921	41.8%	4070	58.2%
May-16	2890	40.8%	4189	59.2%
Jun-16	2890	40.7%	4204	59.3%
Jul-16	2897	41.0%	4172	59.0%
Aug-16	2912	40.9%	4213	59.1%
Sep-16	2837	39.8%	4284	60.2%
Oct-16	2817	40.2%	4197	59.8%
Nov-16	2773	38.7%	4401	61.3%
Dec-16	2707	37.8%	4452	62.2%
Jan-17	2638	36.8%	4533	63.2%
Feb-17	2602	36.8%	4464	63.2%
Mar-17	2594	36.8%	4450	63.2%
Apr-17	2576	36.4%	4500	63.6%
May-17	2612	37.7%	4322	62.3%
Jun-17	2574	37.2%	4350	62.8%
Jul-17	2554	36.9%	4372	63.1%
Aug-17	2501	36.5%	4347	63.5%
Sept-17	2457	34.9%	4590	65.1%
Oct-17	2440	35.5%	4427	64.5%

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Table B**Percentages of caregivers who pay dues to
SEIU 775**

Month	Members	Members	Non- Members	Non- Members
Jul-14	33483	99.9%	48	0.1%
Aug-14	33558	99.5%	173	0.5%
Sep-14	33239	98.7%	421	1.3%
Oct-14	33193	98.1%	653	1.9%
Nov-14	33167	98.0%	678	2.0%
Dec-14	33232	97.9%	706	2.1%
Jan-15	33301	97.8%	741	2.2%
Feb-15	33121	97.8%	753	2.2%
Mar-15	33108	97.5%	844	2.5%
Apr-15	33400	97.4%	881	2.6%
May-15	33442	97.5%	862	2.5%
Jun-15	34901	97.5%	909	2.5%
Jul-15	33677	97.0%	1052	3.0%
Aug-15	33725	97.0%	1056	3.0%
Sep-15	33634	96.7%	1134	3.3%
Oct-15	33708	96.7%	1153	3.3%
Nov-15	33659	96.6%	1181	3.4%
Dec-15	33777	96.6%	1195	3.4%
Jan-16	33912	96.5%	1223	3.5%
Feb-16	33761	96.4%	1268	3.6%
Mar-16	33721	96.1%	1368	3.9%
Apr-16	31879	94.2%	1956	5.8%
May-16	32460	94.2%	1984	5.8%
Jun-16	32678	93.9%	2132	6.1%
Jul-16	31144	89.1%	3797	10.9%
Aug-16	30887	89.1%	3764	10.9%
Sep-16	31477	86.2%	5045	13.8%
Oct-16	32061	88.1%	4321	11.9%
Nov-16	31617	89.5%	3729	10.5%

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Dec-16	32307	89.4%	3834	10.6%
Jan-17	32520	89.3%	3891	10.7%
Feb-17	31975	89.0%	3958	11.0%
Mar-17	32211	88.4%	4220	11.6%
Apr-17	32148	88.6%	4131	11.4%
May-17	32854	88.7%	4188	11.3%
Jun-17	32201	88.4%	4223	11.6%
Jul-17	32807	88.8%	4124	11.2%
Aug-17	33532	89.0%	4165	11.0%
Sept-17	33542	89.1%	4098	10.9%
Oct-17	33555	89.4%	3981	10.6%