No. 16-1466

# In The
# Supreme Court of the United States

MARK JANUS,

*Petitioner,*

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## BRIEF OF AMICI CURIAE CHABOT LAS-POSITAS FACULTY ASSOCIATION, COLLEGE OF THE REDWOODS FACULTY ORGANIZATION, UNITED FACULTY OF CONTRA COSTA, FOOTHILL-DE ANZA FACULTY ASSOCIATION, SANTA MONICA FACULTY ASSOCIATION, ALL FACULTY ASSOCIATION OF SANTA ROSA JUNIOR COLLEGE, YOSEMITE FACULTY ASSOCIATION, AND CALIFORNIA COMMUNITY COLLEGES INDEPENDENT ORGANIZATION, IN SUPPORT OF RESPONDENTS

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## IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amici are seven small independent labor unions, who have served for decades as the exclusive bargaining agent for units of academic employees at seven California community college districts, and the California Community Colleges Independents Organization ("CCCI"), a federation whose membership consists of 13 independent faculty unions (including the seven Amici unions).

Amici, with the size of their bargaining units listed in parentheses,[2] are the Chabot-Las Positas Faculty Association (917), United Faculty of the Contra Costa Community College District (1638), Foothill-De Anza Faculty Association (1466), College of the Redwoods Faculty Organization (309), Santa Monica Faculty Association (1517), Santa Rosa All Faculty Association (1545), and Yosemite Faculty Association (733).[3] They are "independent" in that they are not affiliated with large, national labor organizations, such

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than Amici Curiae and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Blanket consent letters on behalf of all the parties are on file with this Court.

[2] This is the most recent approximate unit size, as provided by each organization.

[3] The CCCI's other union members (with their approximate unit membership in parentheses) are Allan Hancock Faculty Association (161), United Faculty of Ohlone (494), Pasadena Community College Faculty Association (1526), Mira Costa (187), Yuba (117), and the Santa Barbara Instructors' Association (776). Source: Union or Cal. Comm. Colleges Chan. Office: http://datamart.cccco.edu/Faculty-Staff/Staff_Demo.aspx

as the American Federation of Teachers or the National Education Association. Though individually small in terms of bargaining unit size, Amici unions play a large role in California's community college governance system. In the aggregate they represent about 8,125 academic employees.[4] Amici depend on the receipt of both membership dues and agency fees to fulfill their numerous responsibilities as bargaining agents.

Amici have depended on income from both membership dues and agency fees to meet their representational obligations. Their long service as an exclusive bargaining agent gives them the experience and knowledge to call into question several arguments and stereotypes advanced by the Petitioner. Amici also wish to bring to the Court's attention the devastating effect reversing *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) would have on small labor unions, their members and agency fee payers, their employers, California's comprehensive labor relations system, and the primary beneficiaries of the community college system, its students and the residents of California.

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[4] Bargaining units are composed primarily of teachers, librarians, counselors and other academic positions. The EERA requires separate units for academic employees, which as a rule must include all academics. §§ 3545.5(b)(1), (3).

The CCCI or its counsel has frequently participated as Amicus before California courts in cases of importance to academic unions and college faculty.[5]

## INTRODUCTION AND SUMMARY OF ARGUMENT

*Abood* should not be overruled. The long-standing principles of *Abood* have assured exclusive bargaining agents in the California community colleges of necessary funding from members and agency fee payers, giving them the resources needed to assume a meaningful and expansive role in a "shared governance" system that was created as an alternative to unilateral managerial rule-making and administration. Since the Legislature enlarged the role of faculty unions with the adoption of A.B. 1725 in 1988 (Stats. 1988, c. 973), this "re-invented" community college system of employer-employee relations has undergone a massive expansion. There can be no question that the role of faculty unions under this system depends on funding that

[5] *Santa Monica College Faculty Ass'n v. Santa Monica Community College District*, 243 Cal.App.4th 538 (2015); *Stryker v. Antelope Valley Community College District*, 100 Cal.App.4th 324 (2002); *Retired Employees Ass'n of Orange Co., Inc. v. County of Orange*, 52 Cal. 4th 1171 (2011); *Retired Employees Ass'n of Orange Co., Inc. v. County of Orange*, 610 F.3d 1099 (9th Cir. 2010); *Butt v. State of California*, 4 Cal. 4th 668 (1992); *San Leandro Teachers Ass'n v. San Leandro Unified School District*, 46 Cal. 4th 822 (2009).

results from the collection of both membership dues and agency fees.

Amici believe that overruling *Abood* would remove the California community colleges' system of employer-employee relations from the purview of the people of the state and their elected representatives, cause significant harm to the State's management of its public employee workforce.

## ARGUMENT

Petitioner paints a grim picture of recognized labor unions forcing unwilling or oblivious public employees to subsidize union speech, which Petitioner argues should be broadly defined as virtually anything a public sector union spends money on. In support of this astounding proposition the Petitioner imagines that this Court, in deciding *Abood*, did not really understand what it was doing, "ignored" that *Abood* is "unworkable," and failed to appreciate a host of imagined difficulties. This picture does not comport with the reality experienced by the Amici unions.

The 40 years since *Abood* was decided have allowed the compilation of a detailed factual record as to how the agency fee procedures have actually worked. Yet Petitioner deliberately avoided creating such a record, hoping to convince the Court to accept Petitioner's narrow view of labor relations, and on that basis reverse an employer-employee relations system which has worked well and protects the First Amendment

rights of agency fee payers. Petitioner's approach contrasts sharply with the Court's decisions that have focused on the chargeability of specific classes of expenditures, backed with a factual record. *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 447-448 (1984); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991). This approach is dangerous. A decision holding every agency fee system in every public jurisdiction in every state is unconstitutional, would create chaos, and interfere in employer-employee relations systems carefully created by more than 20 states. Given the potential sweep of this case, there is no logical basis for deciding it without a rigorous factual analysis.

Amici focus this brief on three issues. First, recognized bargaining agents in the California community college system have enormous responsibilities. Besides collective bargaining, contract administration and enforcement, they are commissioned by the Legislature to participate in "shared governance," a costly yet productive involvement. Amici outline the scope of this activity. Second, the receipt of membership dues and agency fees is critical to Amici fulfilling their multiple responsibilities. Finally, Petitioner's presentation of this case without an evidentiary record, where its stereotypes and assumptions can be critically de-constructed and examined, sets up a situation where *Abood* could be overruled without any legitimate basis, to the detriment of Amici and everyone they represent.

## I. California's Shared Governance Process Will be Severely Damaged, to the Disadvantage of Union Members, Fee Payers, Colleges, Students and the Public if *Abood* is Overruled

### A. The Labor Relations Structure of the California Community Colleges

The California community college system as it exists today was shaped by the omnibus bill A.B. 1725, which expanded the role of faculty in employee-employer relations. Since A.B. 1725 enacted Education Code section 87610.1, and other provisions which delegated meaningful roles to faculty and their bargaining agents, the Legislature, and the community college system's trustees and administrators, have commissioned more responsibilities.

The system consists of 72 districts, 114 community colleges, and numerous satellite facilities.[6] It is readily apparent why they are an "integral and effective element in the structure of public higher education" in California. Cal. Ed. Code § 70901. The colleges educate 70% of the states nurses, and 80% of firefighters, law enforcement personnel, and emergency medical technicians. Twenty-nine percent of University of California graduates, and 51% of California State University graduates, and nearly half of UC's bachelor's degrees in science, technology, engineering and math come through the community college system. The colleges are the largest provider of workforce training in the

[6] http://foundationccc.org/About-Us/About-the-Colleges

nation, and 42% of all California veterans receiving GI education benefits attend a California community college. Over 67% of the students are people of diverse ethnic backgrounds, and more than half are female.[7] English as a Second Language programs are critical for preparing immigrants to prosper in California's economy.[8] Tuition is either relatively inexpensive or entirely free.[9]

To achieve this level of success, the community colleges employ 11,000 tenured or probationary faculty and 25,000 "temporary" faculty.[10]

The system itself is led by a statewide Chancellor, and Board of Governors which is appointed by the Governor, and includes a tenured faculty member.[11] They provide general supervision of the local districts, establishing minimum academic and operational standards, and ensuring that faculty and other employees have the right to participate effectively in college and district governance. Cal. Ed. Code § 70901. The Board is required to maintain to the maximum degree

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[7] http://californiacommunitycolleges.cccco.edu/PolicyInAction/KeyFacts.aspx

[8] https://www.communitycollegereview.com/blog/support-for-esl-students-in-community-college

[9] AB 19 (Stats. 2017, c. 735, Cal. Ed. Code §§ 76396 *et seq.*), which promises to make the first year free for large categories of students.

[10] Located at State Chancellor's Office website, http://datamart.cccco.edu/Faculty-Staff/Staff_Demo.aspx

[11] Cal. Ed. Code § 71000(c).

permissible, local authority and control in the colleges' administration. *Id*.

State law requires that every California county have a community college. *Id*. § 74000. Local districts have a publicly elected board of trustees, who hire administrators and other employees. *Id*. § 70901. These local districts are the focus of labor relations, recognizing and negotiating with labor unions which obtain exclusive representation rights through the Public Employment Relations Board. Cal. Gov't. Code §§ 3544-3544.9.

### 1. The Collective Bargaining Law for Community Colleges

In the early 1970s, the California Legislature embarked on an ambitious re-invention of its labor-management governance system based on the National Labor Relations Act. This led to the adoption of the EERA in 1975, which governs both public school districts and community college districts.[12] The Legislature explained its rationale:

> It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join

[12] This history is summarized in *California Public Sector Labor Relations*, Lexis-Nexis, June 2017, Kirsten Zerger, ed., §§ 1.01-1.12.

> organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate bargaining unit. Cal. Gov't. Code § 3540.

The EERA led to other statutes which now cover most California's public employees.[13] This comprehensive system includes a single administrative labor law agency, the California PERB, which employs administrative law judges and a General Counsel, and is overseen by a single Board of up to five appointees.[14] The PERB is responsible for administering the union recognition process, deciding unfair labor practice charges filed by employers, unions and employees, and attempting to resolve bargaining impasses through mediators and "fact-finders." Cal. Gov't. Code §§ 3540 *et seq*. The EERA imposes the duty of fair representation on every exclusive representative. *Id*. § 3544.9.

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[13] EERA was followed by the Dills Act in 1977, regulating the State of California itself (Cal. Gov't. Code §§ 3512 *et seq.*), then the Higher Education Employer-Employee Act in 1978, covering the University of California, the California State University, and Hastings College of Law (Cal. Gov't. Code §§ 3560 *et seq.*). Several other employee groups were added starting in 1988, with jurisdiction ceded to PERB. *California Public Sector Labor Relations* at §§ 1.08-1.12. The law for cities, counties and special districts, adopted in 1968, was eventually transferred almost entirely to PERB's jurisdiction.

[14] Cal. Gov't. Code § 3541; Cal. Code Regs., tit. 8, § 32055, 32170.

The EERA establishes the "scope of negotiations," and integrates it with the state's Education Code, providing that mandatory provisions of the California Education Code are not negotiable.[15] This integration is apparent when considering subjects such as tenure. Some aspects of the standards and processes for obtaining tenure or appealing tenure denial are left to statutes, while evaluation and ultimate resolution of disputes was merged into the process of collective bargaining and contract enforcement.[16] In accordance with these laws, exclusive bargaining agents and California community college districts have negotiated district-specific procedures to address probationary status and tenure.

### 2. The PERB Regulates the Agency Fee Process

The EERA's agency fee process is but one part of the overall statutory scheme.[17] The PERB has adopted regulations governing agency fee collection and challenges. Cal. Code Regs., tit. 8, §§ 32990-32997. They require that a union charging an agency fee must provide annual written notice of the membership dues and agency fee amount charged to agency fee payers, amount charged objectors, the challenge procedures, a

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[15] Section 3540 of the EERA declares that negotiations are superseded when the language of the Education Code mandates a "specific and unalterable policy." *Jefferson School District* (1980) PERB Dec. No. 133, 4 PERC ¶ 11117, 1980 WL 603174.

[16] Cal. Ed. Code §§ 87604-87611.

[17] PERB has adopted 280 pages of regulations (Cal. Code Regs., tit. 8, §§ 31001 *et seq*.); only 7 (just 4 pages) relate to agency fees.

copy of backup data, including an audited financial report or in limited circumstances a certification from an independent auditor (§ 32992). The regulations dictate the timing for disclosure and challenges, mandate escrow of disputed funds, and specify the challenge procedures. The exclusive representative has the burden of establishing the reasonableness of the chargeable expenditures. *Id.* at §§ 32993-32994. An agency fee challenger need only file an objection in writing to challenge the union's chargeability determinations. It is an unfair labor practice for a union to collect agency fees in violation of PERB's regulations. § 32997. An objector may file an unfair practice charge to challenge the chargeability determination. If the case advances to a hearing before a PERB ALJ, or review by the Board itself, a challenger, or representative (which need not be a lawyer),[18] may represent the charging party. When PERB finds a charge meritorious, PERB itself, at no cost to the challenger, is empowered to enforce final decisions in the state courts. Cal. Gov't. Code §§ 3541.3(j), 3542(d); Cal. Code Regs. tit. 8, § 32980.[19]

Although agency fee provisions have ordinarily been negotiated in union-employer collective agreements, as it became more common for the Legislature to commission exclusive representatives to participate in shared governance, the California Legislature eventually provided, with the adoption of Cal. Gov't. Code § 3645, that an agency fee could be invoked by a labor

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[18] https://www.perb.ca.gov/faq.aspx#UnfairPracticeHearing3

[19] PERB has similar authority under the other statutes it administers.

organization where a sufficient percentage of unit members approved of such a procedure in an election. The statute specifies a process whereby unit members may vote to revoke agency fee. *Id*. § 3546(d)(1).

### 3. California Has Created a Generalized Code of Workplace Governance

Academic employees at each of California's community college districts have selected a labor union to represent them. The Community Colleges Board of Governors, the districts and colleges, and their unions worked over the years to erect a workplace governance system which is "more than a contract" – it is a "generalized code" which covers virtually the entirety of the employer-employee-union relationship.[20] This "generalized code" consists of, *inter alia*, comprehensive collective bargaining agreements, the State Education Code, State regulations found in Title 5 of the California Code of Regulations, district policies and procedures, and often a process for joint union-management review of contractual issues.[21]

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[20] *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960); "A General Theory of the Collective Bargaining Agreement," David Feller, 61 Cal. Law Rev. 663, 689-705 (1973).

[21] To the extent they apply to community college faculty, many of these policies and procedures are the result of collective bargaining negotiations and/or other shared governance mechanisms involving *inter alia*, the exclusive representatives. *Grant Joint Union High School District* (1982) PERB Dec. No. 196, 6 PERC ¶ 13064, 1982 WL 950759.

By the 1980s, this process resulted in the State commissioning bargaining agents to participate in collaborative union-management efforts to improve the quality of the community college system. A.B. 1725, *supra*. In order to assure that increased faculty responsibilities would not deprive faculty of their status as employees, the Legislature balanced its decision to "authorize more responsibility for faculty members in duties that are incidental to their primary professional duties" by confirming that "the exercise of this increased responsibility shall not make these faculty members managerial or supervisory employees," specifically referencing this court's decision in *National Labor Relations Board v. Yeshiva University*, 444 U.S. 672 (1980). The Legislature intended to enable faculty members who perform the duties described in Education Code Section 87610.1 to avoid having to choose between collective bargaining and greater participation in these functions by ensuring that increased participation in the tenure system "shall not subject faculty members to losing their status as employees" under the EERA. Stats. 1998, c. 973 § 4(n). These enlarged faculty duties in § 87610.1(e) include, but are not limited to, serving on hiring, selection, promotion, evaluation, budget development, and affirmative action committees, and making effective recommendations in connection with these activities.

The evolution of this system is apparent in the detailed agreements negotiated between Amici unions

and the corresponding college district,[22] which illustrates the scope of this vast college governance structure.[23]

### 4. Comprehensive Collective Agreements Demonstrate that the EERA created a New Governance Structure of which Agency Fees are Merely One Part

The current agreement between the Foothill-De Anza Faculty Association and the Foothill-De Anza Community College District is illustrative of the new shared governance structure.[24] Covering the period of July 1, 2016 to June 30, 2019, the agreement, over 300 pages long, includes 41 articles, 55 appendices, and 12 Memorandums of Understanding ("MOUs"). The subjects include Association Rights, Organizational Security, Grievance Procedure, Evaluation, Probationary Faculty Evaluation, Part-Time Faculty, Personnel Files, Load and Class Size, Hours and Scheduling,

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[22] See the agreements for the unions at Chabot, Redwoods, Contra Costa, Santa Monica, Santa Rosa and Yosemite at: http://www.ccftcabrillo.org/california-locals-and-contracts/.

[23] The agreements negotiated by the local unions affiliated with AFT or NEA illustrate the same breadth and depth. See, e.g., AFT Local 2121 which represents 1,800 faculty in San Francisco, and Los Rios Federation of Teachers, AFT Local 2279, which represents 2,500 faculty at four colleges in the Sacramento area. http://www.ccftcabrillo.org/california-locals-and-contracts/.

[24] http://fafhda.org/agreement-2016-19/2016-2019-FA-Agreement.pdf. Copies of nearly all of the recent agreements covering the entire 72 community college districts, and their faculty unions, are located at: http://www.ccftcabrillo.org/california-locals-and-contracts/.

Class Cancellation, Reassignment, Transfer, Travel Expenses, Reduction in Force, Leaves, Professional Development Leave, Reduced Workload Program, Emeritus Program, Early Notice Incentive, Post-Retirement Employment, Paid Benefits, Paid Benefits for Part-Time Faculty, Paid Benefits for Retired Employees, Paid Benefits for Retired Employees Hired after July 1, 1997, Salaries for Faculty Employees, Special Assignments, Summer Sessions, Calendar, Nondiscrimination, Contract Review and Consultation, Resignation and Retirement, Reprimand of Faculty Employees, Duration, Non-Credit (Adult) Education, Distance Learning, Training/Retraining Stipend, Professional Conference Fund, Contract Education, Professional Achievement Awards, and Intellectual Property.[25] The MOUs elaborate on some of the articles, or deal with other labor-management issues. *Id.*

The Foothill agreement creates a comprehensive regulatory system governing the professional responsibilities of academic employees in the Foothill-De Anza Community College District, which are overseen by the college employer acting within its role as an employer. *Garcetti v. Ceballos*, 57 U.S. 410, 421-423 (2006).

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[25] See http://fafhda.org/agreement_2013-2016/FA-Agreement_2013-2016.pdf, pages iv-v.

### B. The Enormous Variety of Union Activities Funded by Member Dues and Agency Fees in California

Union activities may be roughly categorized within five categories.

#### 1. Collective Bargaining Negotiations

The EERA provides that unions that have been certified by PERB as an exclusive representative have the right to represent a bargaining unit in its employment relations with the public employer. Cal. Gov't. Code § 3543.1. One of the most important rights an exclusive representative has is to negotiate a binding collective bargaining agreement for the bargaining unit. But it is not a singular duty for the union. Under the EERA, as with the NLRA, the union and employer have a reciprocal duty to "meet and negotiate in good faith" to "reach agreement" on matters within the scope of representation, motivates both parties to bargain. §§ 3543.5-3543.7.

The EERA defines the "scope of representation" as being matters related to wages, hours, and terms and conditions of employment, enumerating some of these topics (e.g., leaves, safety conditions, transfer and reassignment rights, procedures for processing grievances, and organization security arrangements pursuant to Section 3546 of the EERA). § 3543.2.

Bargaining for an agreement usually starts with the union and employer presenting their initial

contract proposals at a public meeting of the school board, and thereafter they become matters of public record which the public may comment upon. EERA § 3547; *San Mateo City School Dist. v. PERB*, 33 Cal. 3d 850, 864 (1983). Each party selects its "team" of representatives, which usually includes several negotiators. *Westminster School District* (1982) PERB Dec. No. 277, 7 PERC ¶ 14034, 1982 WL 950986. Amicis' union negotiators are generally faculty members, while the employer team may include managers and/or attorneys.

There is no statutory limit to the number or length of bargaining sessions held; such matters are in the parties' hands. Amicis' experience is that negotiations often last months. Bargaining is limited to the two parties, and is held in private absent agreement otherwise. EERA § 3549.1(a). Ordinarily, negotiations involve a sequence of tentative agreements, before a complete agreement is reached. *Charter Oak Unified School District* (1991) PERB Dec. No. 874, 15 PERC ¶ 22067, 1991 WL 11749787. Complete agreements are usually executed by both parties, approved by a district's board, and ratified by the union membership. EERA § 3540.1(h).

Because many agreements provide for periodic "re-openers" during a contract term, which allows either party to address pressing matters, and as the EERA limits collective agreements to a duration of three years, negotiations are a virtually continuous process. § 3540.1(h). Although neither party is required to agree with a proposal made by the other, both

must negotiate in good faith in an effort to reach an agreement. Cal. Gov't. Code § 3540.1(h); *Oakland Unified School District* (1984) PERB Dec. No. 275, 8 PERC ¶ 15095, 1984 WL 967595. As a result of these and other rules, the duration and intensity of collective bargaining is inherently unpredictable. It is through this process that the policies and procedures governing employees in the California community colleges, such as the Foothill-De Anza agreement discussed above, are mutually established.

Merely having a seat at the bargaining table does not assure an agreement will be reached, nor does it determine how long bargaining for an agreement will take. The union invariably will pay for lawyers and others to analyze and prepare contract proposals, research complex issues, survey exemplar agreements, analyze the implications of proposals, survey bargaining unit members on their desires, hire and pay negotiators and note-takers, confer with experts, and incur incidental costs of negotiations. Should negotiations reach impasse, mediation or fact-finding may result, both of which are costly. EERA § 3548, 3548.1.

Some California unions have negotiated to purchase "release time" or "reassigned time" from their employer to compensate unit members who "take leave" from their regular work and serve in union positions, such as members of the bargaining team. Cal. Ed. Code § 87768.5; *San Mateo County Community College District* (1991) 15 PERC ¶ 22174, 1991 WL 11749894, *aff'd in part*, (1993) PERB Dec. No. 1030, 18 PERC ¶ 25027, 1993 WL 13699368.

Petitioner argues that simply winning the "crown" of exclusive representative should be its own reward, obviating the need for agency fees. That is nonsense. Just as management labor lawyers who are hired to represent colleges in bargaining or defend unfair practices charge for their services, charging a fee, so too must unions hire others to assist them.

### 2. Contract Enforcement

Once an agreement is bargained, invariably implementation and unanticipated issues arise, requiring periodic mid-term discussions, negotiations, grievances, or unfair practice charges. This is why some employers and unions agree to participate in regular "contract review" sessions to solve problems.[26]

A principal means of contract enforcement is a grievance. These usually have an "informal," or discussion step, where the parties attempt informal resolution. Because a grievance ordinarily finds its genesis in the collective agreement, any given grievance can affect as few as one employee, or as many as every employee and the union. If not settled at an interim step of the parties' grievance procedure, grievances can result in arbitration. See Foothill Agreement, *supra*, at Article 5, p. 15.

A union cannot refuse to represent a unit member in a grievance simply because s/he is not a union

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[26] Foothill-De Anza Agreement, *supra*, Article 29, p. 137. http://fafhda.org/agreement-2016-19/2016-2019-FA-Agreement.pdf

member. *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 2014 (1944); *California Correctional Peace Officers Ass'n (Pacillas)* (1987) PERB Dec. No. 657-S, 12 PERC ¶ 12097, 1987 WL 1435728. The duty of fair representation arises from the union's statutory role as the exclusive representative for all of its members. "The exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). It is rare that an individual employee represents him or herself. As the agent for everyone, and usually having accumulated considerable expertise, when the union serves in its agent role, it is ordinarily much better positioned to represent employees.

Another important tool for any union is the unfair labor practice charge. There are statements or actions by an employer or union that might result in an unfair labor practice charge. These charges are also governed by an extensive body of case law, and PERB regulations. They typically involve the investigation, preparation and filing of unfair practice charges, research, settlement conferences, trial preparation, hearings (trials), briefing, appeals, and in rare instances, lawsuits. Unions file these charges to enforce rights held by unit members, or the union itself. Often a charge involving one employee may impact more, or all employees. For example, the Foothill-De Anza Faculty Association pursued an unfair practice charge to

guarantee that whenever a unit member was ordered to attend an investigatory interview arising out of a complaint against her/him, the union would receive a copy of the complaint in advance of the interview, so it could prepare for the representation. This case resulted in a trial, after which PERB held that the union had a "reasonable" and "necessary" and right to receive the information before having to represent an accused employee. *Foothill-De Anza Community College District* (2015) 40 PERC ¶ 14, 2015 WL 4186875. The decision benefits of every academic employee of the District, as any could be the recipient of a student or other complaint.

### 3. Contract and Union Administration

Whether it is getting the collective agreement to every unit member, or assuring the union website is up-to-date, contract and union administration takes many forms, including handling the business of the union, holding union meetings, keeping bylaws up to date, obtaining information from unit members, communicating with unit members, overseeing audits, participating in committees, and attending employer-called meetings.

Foothill-De Anza Faculty Association demonstrates the need for sufficient union representatives. It has a President, Vice-President, Chief Negotiator, Executive Secretary, Office Manager, an Associate Secretary for Part-time faculty, a Grievance Officer, two

Conciliators (one for each of the District's colleges),[27] and a newsletter Editor. Bargaining teams also typically include several additional members. These services require expenditures, and exemplify why unions rely on both dues and fees to operate.

#### 4. Legislatively Commissioned Activities

One of the more unique aspects of California labor law over the last four decades is the Legislature's practice of commissioning labor unions to perform services, in hand with a public employer, to help manage the State's labor relations policies. The California Legislature has specifically commissioned the community college parties to negotiate and in some cases, reach agreement, over specific subjects.

As mentioned earlier, in 1989, the Legislature assigned significant duties to labor unions, Education Code § 87610.1 providing that: "In those districts where tenure evaluation procedures are collectively bargained pursuant to Section 3543 of the Government Code, the faculty's exclusive representative shall consult with the academic senate prior to engaging in collective bargaining on these procedures." Cal. Ed. Code § 87610.1(a). Despite the statutory origin of the tenure system, the same legislation required that denials of re-employment during the four-year probationary period, or tenure denials, were to be treated as grievances under the union contract. *Id.* In so doing, the

[27] Among other things, conciliators attempt to resolve problems before they become more serious or grievances.

Legislature conserved judicial resources by replacing judicial review of such decisions by writs of mandamus, with arbitration.[28]

This has included implementing legislation creating opportunities for part-time, temporary faculty to earn "reappointment" preference after they are let go each semester.[29] In 2001, the Legislature made negotiations mandatory over this subject. Cal. Ed. Code § 87482.9 (Stats. 2001, c. 850 § 1). When that legislation failed to sufficiently address underlying job insecurity, in 2017 the Legislature adopted section 87482.3, requiring unions and employers to commence negotiations which "shall establish minimum standards" specified in the legislation, for the terms of reemployment preference for part-time, temporary faculty assignments, through a negotiation process between the community college district and the exclusive representative for part-time, temporary faculty. Added by Stats. 2016, c. 877 § 1 and c. 891 § 1.

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[28] Contrast the more recent *San Mateo County Community College District* (2009 Riker) 2009 WL 9412769 with the earlier *Anderson v. San Mateo County Community College District*, 87 Cal.App.3d 441 (1978).

[29] Part-time faculty's employment automatically ceases at the end of each term or year, with future assignments (re-hiring) contingent on enrollment, funding, or program changes, or being "bumped" out of a job by tenured faculty. *Cervisi v. CUIAB*, 208 Cal.App.3d 635 (1989).

### 5. Other Representational Activities, Including Litigation

The scope of union involvement in other aspects of college management has increased in the last 40 years. For instance, in Contra Costa, the United Faculty participate in numerous activities as part of the shared governance process, and to better serve its unit members. Among other things it mediates faculty-department disputes, serves on hiring committees for senior management, prepares handbooks for department chairs and for part-timers, and collaborates with management in preparing faculty forms and procedures, assists in orienting newly-hired faculty, participates on numerous committees including a regular "contract review" committee meeting with management to resolve differences and work through the creation and modification of district policies and procedures, serves on a faculty staffing committee and a district benefits committee that studies proposals and potential changes in health plans (and searches for cost-saving options), and its president serves on the district's "governance council." The other Amici unions engage in similar activities. This level of involvement is common with all of the faculty unions in the community college system, whether independent or affiliated with AFT or NEA, and all of it inures to the benefit of every member of the faculty.

Litigation related to the bargaining unit is not common, but it has its place. For example, the Santa Monica City College faculty union negotiated re-employment preference rights for part-time faculty in a collective agreement, and then defended those rights

at arbitration and then in court when the college district attempted to disregard them.[30] This legal action worked to the benefit of every employee because it required the district to adhere to its agreement, on a subject that could potentially affect every part-time faculty member, regardless of their union membership.

A more common situation arises whenever an employee is under investigation and interviewed, the union often provides representation. Over the last decade, increased regulation by the U.S. Department of Education in areas of alleged discrimination, sexual harassment and other subjects has dramatically increased the number of employer investigations of faculty conduct, another area where unions provide representation and often legal services. Unit members, whether union members or not, are entitled to request union representation in such cases,[31] and unions routinely provide it to members and fee payers alike.

Another matter that is particularly important is assuring due process for bargaining unit members facing formal disciplinary action, including dismissal.

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[30] *Santa Monica College Faculty Ass'n*, *supra*, 243 Cal.App.4th 538 (2015).

[31] *National Labor Relations Board v. Weingarten*, 420 U.S. 251 (1975). The PERB has ruled that the right to representation under ERRA is even broader. *Redwoods Community College District* (1983) PERB Dec. No. 293, 7 PERC ¶ 14098, 1983 WL 862642, *aff'd*, *Redwoods Community College District v. PERB*, 159 Cal.App.3d 617 (1984).

This might include a "*Skelly*" hearing,[32] which occurs before management decides to take serious disciplinary action against a unit member. A union generally seeks to ensure that represented employees receive adequate due process. This might include obtaining copies of derogatory material so one can rebut erroneous information.[33] When serious discipline is issued (e.g., dismissal), unions often defend faculty at full hearings on the merits.[34]

Even when faculty are not dismissed, unions sometimes must go to court to vindicate important policies such as academic freedom or freedom of speech,[35] or to protect faculty from disciplinary action that lacks good cause or proper notice.[36] The potential instances of union legal actions are obviously many.

But if California unions are burdened by the inability to require agency fees, then a union's ability to pursue important cases will be seriously compromised.

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[32] *Skelly v. State Personnel Board*, 15 Cal. 3d 194 (1975); *Kempland v. Regents of the University of California*, 155 Cal.App.3d 64 (1984).

[33] *Miller v. Chico Unified School District*, 24 Cal. 3d 703 (1979).

[34] *Bevli v. Brisco*, 211 Cal.App.3d 986 (1989).

[35] *Adcock v. Board of Education*, 10 Cal.App.3d 60 (1973); *Bauer v. Sampson*, 261 F.3d 775 (9th Cir. 2001).

[36] *Cohen v. San Bernardino Community College District*, 92 F.3d 968 (9th Cir. 1996).

### C. Receipt of Agency Fees Is Essential to Any Union, Especially Unions as Small as Amici

Unions rely on dues and agency fees to perform the numerous duties outlined above, which benefit everyone in a bargaining unit. And because shared governance means sharing the load, it also inures to the benefit of the community college employer. A smooth-running operation shared governance system ultimately benefits everyone in a college, including students and the larger community, by improving decision-making and the entire college operation. When agency fee payers represent a significant percentage of the bargaining unit, agency fees constitute a correspondingly large percentage of the union's annual revenues.

All of the above-described union activities are critically important to a faculty union and the employees it represents, regardless of the number of fee payers, provided the fee payers pay their fair share. Prohibiting unions such as Amici from collecting agency fees by overruling *Abood* will not only create enormous instability and uncertainty, it will place such small unions at an obvious disadvantage by preventing them from engaging in activities that they should be fulfilling. If California unions like Amici are strapped for funds, then commissioned work for the Legislature will likely suffer too. And it could place a union at a competitive disadvantage with the employer, when it comes to protecting employee due process rights, negotiating the agreement, and enforcing it.

It would be manifestly inconsistent if an employer is shielded by *Garcetti v. Ceballos*, *supra*, from constitutional challenges by its employees for actions taken pursuant to their official role as employers under such a system, while labor organizations participating with the employer in creating and operating the underlying employer-employee relations system are denied the agency fees necessary to create and operate the system.

### 1. The Pedestrian Reasons Some Unit Members Elect to be Fee Payers

Petitioner hypothesizes, without offering evidence, that non-member agency fee payers "want nothing to do with the union," and "oppose its advocacy." These and similar dubious claims are steeped in stereotypes that harken back to an earlier time. *Abood* should not be overruled because of suspicion and polemics. There are many rational reasons which explain why some bargaining unit members choose to pay agency fees in lieu of union membership.

### 2. Many Part-time Faculty Have Non-Ideological Reasons for Not Joining Unions

Nearly 70% of the academics in the California community colleges work as part-time, temporary employees. These part-timers account, overall, for the

bulk of agency fee payers within the Amici unions.[37] There are multiple explanations, primarily having to do with work priorities, time, and money. A bit of California community college employment history is needed to understand why this is.

Unlike public schools, part timers do a great deal of the teaching in the California community colleges. The California Education Code has long afforded the California community colleges considerable control and flexibility over the employment of these part-time faculty. The basic rule is that the colleges can employ them on an indefinite temporary basis provided their workload does not exceed 67% of the load of a full-time tenured faculty member. *Kalina v. San Mateo Community College District*, 132 Cal.App.3d 48, 54-55 (1977).[38] As noted earlier, they are ordinarily hired for a term (semester or quarter), and then automatically released when their limited-term contract expired. But many are then immediately rehired for the next term.

This system has long had another feature. The Legislature has mandated that if a part-time faculty member's workload exceeded the statutory ceiling (presently 67% of a full-time load for more than two semesters within three consecutive years) then the District cannot thereafter employ the individual as a temporary faculty member, but *must* employ her/him as a probationary or permanent faculty member.

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[37] Based on employer agency fee report information received by Amici unions.

[38] The limit was 60% until the Code was amended to raise the bar in 2008. §§ 87482, 87482.5 (Stats. 2008, c. 84 § 1 (A.B. 591)).

Education Code §§ 87477, 87482, 87482.5; *Kamin v. Richmond Unified School District*, 72 Cal.App.3d 1014, 1017 (1977); *Holbrook v. Board of Education*, 37 Cal. 2d 316, 334 (1951); *Vittal v. Long Beach Unified School District*, 8 Cal.App.3d 112, 118-119 (1979). The courts recognize that, " . . . the matter of classification of teachers as probationary or permanent is determined by state law." (*Campbell v. Graham-Armstrong*, 9 Cal.3d 482, 487 (1973)). This requirement is not subject to administrative discretion. *Abraham v. Sims*, 2 Cal.2d 698, 709-710 (1935).

But if statutory requirements are met, a teacher's rights are automatically vested independently of any action by the governing board. *Middaugh v. Board of Trustees*, 45 Cal.App.3d 776, 781 (1975); *Vittal v. Long Beach Unified Sch. Dist.*, *supra*, at 112. Once statutory requisites are met for probationary status, reclassification as probationary or tenured occurs automatically by operation of law and does not require action by an employee or district. *Stryker v. Antelope Valley Community College District*, *supra*, 100 Cal.App.4th at 329-338.

The vast majority of part-time faculty are employed in situations which offer rational reasons for not joining the faculty union, and they have to do with their wages, their time, their focus, and their assignments. Typical reasons why a part-timer might be a fee payer, as opposed to a union member are these:

1. Many part-timers maintain a "full" career by accepting part-time employment at multiple colleges. These dedicated part-time faculty travel from one

college to another every term, to earn a living wage. They may work at one college where they are most closely affiliated and join that union, but they disregard the unions where they are only peripherally affiliated or where they simply do not have the time. After all, many fee payers understand and appreciate that as fee payers they are still represented by the union.

2. Many part-timers work on the periphery of a college, teaching perhaps one specialty class every semester, or every year. Their energies may be focused on their regular "day job," so they do not feel very engaged with college governance, including the work of the union, despite the fact that much of the union's work may be directly on behalf of part-time faculty. Because they are marginally connected to their department and the college, they are not motivated to join or participate in their union and are not that interested in the means through which they can influence union policies and decisions. Quintessential examples are the practicing attorney or judge who teaches business or real estate law, or the respiratory therapist or other medical professional or technician who teach a specific medical course.

3. Wages may always play a role. Part-timers routinely earn a percentage of what full-time faculty earn. Taking advantage of the agency fee rate simply makes good economic sense.

4. At many colleges, newly hired part-time faculty are asked to make a decision about becoming a member or paying an agency fee immediately after being hired. They may well choose what appears to be

less costly since part-timers are paid less than full-timers.

5. It is sometimes not easy for the union to make contact with new or intermittent part-timers to discuss membership. Many districts have multiple worksites, so they may be hard to track down when their time on campus is limited.

These potential explanations indicate why Petitioner's assertion that agency fee payers want "nothing to do" with the union, is pure speculation when it comes to community college faculty in California. While ideology might play a role in some cases, the vast proportion of California's fee-paying community college part-timers are suspected of having far less lofty reasons for deciding not to join a union. Small academic unions in the California community colleges may not present the same factual situation as state employees in Illinois, but Amici are still governed by *Abood*. Hence the Court should be leery of reconsidering *Abood* based on the lack of an evidentiary record, and Petitioner's stereotype-based arguments.

## II. The Absence of an Empirical Record Requires that the Court Rule Against the Petitioner

Amici submit that *Abood* should not be overruled because of the failure of Petitioner to support his claims with evidence. The absence of evidence is perhaps the most significant fact in this case. No evidence was presented to show that, except for Petitioner, the

agency fee payers represented by unions recognized under the Illinois Public Labor Relations Act, "want nothing to do with the union and . . . oppose its advocacy." Petitioner erroneously implies this mindset from every other non-member's status as a fee payer. That is too far a leap. As in the California community college system, one can imagine numerous reasons why an Illinois public employee might choose to remain a fee payer, many of them having nothing to do with ideological or political concerns.

There is also no evidence that it "is difficult for employees to determine whether they are being overcharged," that non-members have "little understanding about what they are being forced to subsidize," or that non-members "bear a heavy burden if they wish to challenge" union fee determinations under state collective bargaining laws across the nation. Nor is there any evidence, since *Hudson* was decided in 1987, that "litigating such cases is expensive." *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986). The Petitioner's citation for the "painful burden" and "expense" of challenging a union's determination of chargeable amounts is, ironically, the extensive factual record in the *Beck* case, which was created starting in the initial trial lasting 28 days (and 2,100 exhibits), begun in 1980 (776 F.2d at 1191), seven years before the *Hudson* decision established the chargeability guidelines.[39] *Abood* has been of critical importance to public

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[39] Petitioner refers to the circuit court decision in *Beck v. Communications' Workers*, 776 F.2d 1187, 1194 (4th Cir. 1985), *aff'd on reh'g*, 800 F.2d 1280 (4th Cir. 1986), *aff'd*, 487 U.S. 735

employees and their public employers for 40 years. A decision to revisit or overrule a precedential case of such widespread influence should not be made without an evidentiary record. Amici's point in filing this brief is that employer-employee labor relations systems which have evolved since *Abood* was decided have critical, distinctive features that should be taken into account when considering the issues raised by Petitioner, and that overruling *Abood* would have dramatic adverse impacts on Amici unions and other bargaining agents across the country.

## CONCLUSION

The Court should find for Respondent and leave *Abood* intact.

Respectfully submitted,

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January 18, 2018

(1988), which commented on the 4,000 pages of testimony and over 3,000 documents.