

**Case No. S266344
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

STEPHEN K. DAVIS,
Plaintiff and Respondent,

v.

FRESNO UNIFIED SCHOOL DISTRICT, AND
HARRIS CONSTRUCTION CO., INC.,
Defendants and Petitioners.

After a Published Decision by The Court of Appeal
Fifth Appellate District, Case No. F079811
Fresno County Superior Court, Case No. 12CECG03718
The Honorable Kimberly Gaab

**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF
OF CALIFORNIA SCHOOL BOARDS ASSOCIATION’S
EDUCATION LEGAL ALLIANCE IN SUPPORT OF FRESNO
UNIFIED SCHOOL DISTRICT [SUBMITTED CONCURRENTLY
WITH AMICUS BRIEF]**

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EDUCATION LEGAL ALLIANCE IN SUPPORT OF FRESNO
UNIFIED SCHOOL DISTRICT**

I. INTEREST OF AMICUS CURIAE

The California School Boards Association's Education Legal Alliance ("CSBA") respectfully requests leave to file the accompanying brief as amicus curiae in this proceeding in support of Fresno Unified School District ("District").

CSBA, a California non-profit corporation, is a member-driven association composed of the governing boards of nearly 1,000 school districts and county offices of education throughout California. CSBA supports local school boards' governance and advocates on behalf of school districts and county offices of education. It does so by provision of a wide range of services, including policy analysis, legal advocacy, legislative representation, professional development workshops, media, and information services.

As part of CSBA, the Education Legal Alliance ("ELA") helps to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law to make policy and fiscal decisions for their local educational agencies. The ELA represents its members by addressing legal issues of statewide concern to school districts. The ELA's

activities include joining in litigation where the interests of public education are at stake.

No party or counsel for any party in this appeal authored the proposed amicus brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the amicus curiae made a monetary contribution intended to fund the preparation or submission of this brief.

II. ASSISTANCE OFFERED

Amicus curiae believes it can assist the Court by providing analysis and information not raised by the parties. Further, amicus curiae provides a unique perspective on the practical effects this decision will have on the many school districts throughout the State who are not party to this action. For these reasons, amicus curiae respectfully requests leave to file the accompanying brief.

DATED: August 20, 2021 FAGEN FRIEDMAN & FULFROST, LLP

By: /s/ James Traber
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ALLIANCE

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I. INTRODUCTION

This Court granted review on the following issue: “[i]s a lease-leaseback arrangement in which construction is financed through bond proceeds, rather than by or through the builder, a ‘contract’ within the meaning of Government Code section 53511?”

At the outset, we note that schools have struggled with the uncertainty created by *Davis I* and *Davis II*. Many school districts and county offices of education have an ongoing interest in using the lease-leaseback provisions of Education Code section 17406, and doing so in a manner that complies with the law and ensures that their contracts are valid. However, the existence of the aforementioned uncertainty created by *Davis I* and *Davis II* hampers schools’ ability to use lease-leaseback, and their ability to enforce contracts used to complete bond funded projects. Thus, schools would benefit from clarity regarding the type and level of financing required to bring a contract within the purview of the validation statutes.

The challenged agreements should be construed as “contracts” within the meaning of Government Code section 53511, because without a prompt validating procedure, the transactional security created by the site lease, and the parties’ respective rights to use and improve the site, would remain uncertain for an extended time. Without validation, there is uncertainty regarding which party owns and holds title to materials, and improvements made as part of the contract. Absent validation, the District’s ability to obtain

a contractor to complete the work at a fair market price would be impaired. Without validation, the construction contract could be challenged a year or more into the work, and the District's ability to enforce the contract and timely complete the bond financed project would be jeopardized.

Finally, we note that the parties have discussed the applicability of Education Code section 15110. To the extent the Court wishes to address this issue, we attempt to assist the Court by providing relevant information regarding the origins and history of that statute.

II. ARGUMENT

A. SCHOOLS WOULD BENEFIT FROM CLARITY REGARDING WHAT TYPE AND LEVEL OF FINANCING IS REQUIRED TO BRING A CONTRACT WITHIN THE PURVIEW OF THE VALIDATION STATUTES

Davis v. Fresno Unified School District (2020) 57 Cal.App.5th 911, 916 [271 Cal.Rptr.3d 818, 823, 57 Cal.App.5th 911, 916], *as modified on denial of reh'g* (Dec. 16, 2020) ("*Davis II*") creates uncertainty and risk for the many schools that use the lease-leaseback method. The very presence of this risk hinders the ability of schools to operate and carry out their bond programs using the lease-leaseback method. In 2015, the Court in *Davis v. Fresno Unified School Dist.* (2015) 237 Cal.App.4th 261, 187 Cal.Rptr.3d 798 (*Davis I*), found that the lease-leaseback contract in that case was improper because it did not include a "financing component," was not a

“genuine” lease, and did not allow the school district to use the facility during the term of the lease.

Davis I stated that “Defendants could have avoided the uncertainty and risk associated with completing the project while this taxpayer challenge was pending by bringing a validation action under Code of Civil Procedure section 860 prior to starting construction.” *Id.* at 263, footnote 4. There is a 60- day window for bringing a such an action. Following the ruling in *Davis I*, some schools either delayed their projects until their contracts were validated, or included clauses in their lease-leaseback agreements that allow a contractor and school district to cancel the transaction if a legal challenge were filed within the 60-day statute of limitations provided for by the validation statutes under Code of Civil Procedure section 863.

However, *Davis II* changed course and created another layer of uncertainty about the circumstances under which a lease-leaseback transaction can be validated. Under *Davis II*, a lack of sufficient financing would potentially have the dual effect of rendering the contract void for violation of Education Code section 17406, and prohibiting the school district from obtaining a prompt determination of whether the contract is valid under the validation statutes.

The very existence of this uncertainty has the practical effect of hampering a school district’s ability and willingness to use lease-leaseback, because schools do not want to violate the law, and do not want to have their

bond funded projects embroiled in legal challenges. Further, this uncertainty complicates a school district's practical ability to enforce the contract and complete bond funded projects.

Schools have a significant interest in using lease-leaseback in a legally acceptable manner, and having prompt validation of their contracts. In light of the foregoing, school districts would benefit from clarity regarding what is required to bring their contracts within the purview of the validation statutes.

III. LEASE-LEASEBACK CONTRACTS FINANCED THROUGH BONDS RATHER THAN BY OR THROUGH A BUILDER SHOULD BE SUBJECT TO VALIDATION UNDER SECTION 53511, BECAUSE LACK OF A PROMPT VALIDATING PROCEDURE WOULD IMPAIR A SCHOOL DISTRICT'S ABILITY TO OPERATE AND CARRY OUT THE PURPOSE OF COMPLETING BOND FUNDED PROJECTS

Government Code section 53511 allows agencies to “bring an action to determine the validity of its bonds, warrants, contracts, obligations or evidences of indebtedness...” Courts have understandably read Government Code section 53511's reference to “contracts” so as to not reach *every* contract made by a public agency. Instead, courts have held that section 53511 permits validation of contracts “involving financing and financial obligations” as well as contracts that are “ ‘inextricably bound up’ ” with bond funding and financing. (*McGee v. Torrance Unified School District* (2020) 49 Cal.App.5th 814, 823–824 [263 Cal.Rptr.3d 331, 339, 49 Cal.App.5th 814, 823–824], review denied (Aug. 26, 2020).)

“We perceive the essential difference between those actions which ought and those which ought not to come under chapter 9 to be the extent to which the lack of a prompt validating procedure *will impair the public agency’s ability to operate*. The fact that litigation may be pending or forthcoming drastically affects the marketability of public bonds; it has little effect upon such matters as a contract with a public defender or the purchase of a computer.” (*Walters v. County of Plumas* (1976) 61 Cal.App.3d 460, 468 [132 Cal.Rptr. 174]) (Emphasis added).

For the reasons discussed below, the lack of a prompt validating procedure would impair a school district’s ability to utilize the lease-leaseback method and complete bond funded projects.

1. Lack of A Prompt Validating Procedure Would Impair a District’s Ability to Operate By Creating Uncertainty Regarding The Transactional Security Effect of the Site Lease

In some ways, most construction projects are arguably “financed” in the sense that the contractor incurs significant costs of materials and labor and carries those costs until it is paid by the owner. A lease-leaseback transaction may create a form of transactional security for the contractor’s “financing” of construction costs by allowing the contractor to use or re-let the site in the event of an owner’s default. A lease-leaseback transaction may *explicitly* use the site lease as transactional security by allowing the contractor to re-lease the site to a third party in the event of an owner default,

or reletting may simply be permitted under California landlord-tenant law. (See, *Los Angeles County v. Nesvig* (1965) 231 Cal.App.2d 603, 611–612 [41 Cal.Rptr. 918, 923]; See also, *City of San Diego v. Rider* (1996) 47 Cal.App.4th 1473, 1485–1489 [55 Cal.Rptr.2d 422, 430–433].)

If the school district failed to make payments on the construction contract, the contractor might be able to offset its losses by reletting the site or using it for other purposes. This is particularly relevant if the project involved improving existing buildings that could be leased, or involved construction on a desirable site that could be re-let for some rental value, or if the project involved a site that the contractor could use for its own purposes.

Without a prompt validating procedure, uncertainty regarding the security effect of the site lease could linger for years, even beyond project completion (as was the case here). The contractor could not know whether any reletting of the site might offset its transactional risk, and thus the pricing for the project could not account for this risk mitigation. Additionally, if legal challenges are allowed to be filed after the 60-day validation period, the legal effect of the site lease would continue to be uncertain, and if a school district wished to replace an undesirable contractor mid-project, it could face uncertainty about whether it could do so without violating the site leasehold rights of the original contractor.

It is not entirely clear from the decisions in *Davis I* or *Davis II* whether the terms of the site lease in this particular case would permit reletting, or whether reletting may simply be permitted under California landlord-tenant law, or what rights the contractor might have to use the site under the site lease. That being said, if reletting could occur, or even if the contractor might itself use of the site in the event of an owner's default, the site lease would serve as a form of transactional security for the "financing" of the project, and thus, it would be important to have a prompt resolution of any questions regarding the validity of that lease.

2. Lack of A Prompt Validating Procedure Would Impair the District's Ability to Operate By Creating Uncertainty Regarding Title To The Improvements

Education Code section 17406 subdivision (a)(1) states that the lease-leaseback contract must provide that title to the building shall "vest in the school district" at the expiration of the term of the lease. The facilities lease in this case provided that Fresno Unified School District would obtain title from the contractor "as construction progresses and corresponding Lease Payments are made to [Contractor]" and that once Fresno Unified School District paid all of the lease payments, all rights, title, and interest of Contractor in the project and the site would vest in Fresno Unified School District. (*Davis I, supra* 237 Cal.App.4th 261, 272–273.)

However, in the absence of a valid contract, the parties' respective ownership and title to the improvements becomes less certain. Some improvements may be of such a nature that a contractor (or a supplier who has not been paid) would wish to recover them for their monetary value, or for use on other projects. For example, if a large and expensive piece of equipment like a boiler or chiller is installed, and the contract is later challenged and found invalid -and the contractor receives no compensation – it is not clear who would own the improvement and what rights the contractor or suppliers may have to such improvements. The very existence of such a dispute about ownership could embroil the site and the project in litigation, and delay and jeopardize the completion of the projects intended to be funded with the bonds.

3. Lack of A Prompt Validating Procedure Would Impair The Ability to Procure a Contractor and Obtain Fair Pricing to Complete The Bond-Financed Project

In the lease-leaseback context, the uncertainty regarding whether litigation may be pending or forthcoming can affect a school district's ability to find a contractor and obtain fair pricing. For *traditionally bid* projects, Public Contract Code section 5110 provides contractors and owners with assurance that even if a contract is challenged, the contractor can at least expect to be paid the reasonable cost of the project, excluding profit. Although Education Code section 17406(d)(1) provides some similar

assurance for certain lease-leaseback contracts made prior to July 1, 2015, it provides no such protection for most contracts that are currently being made. In any event, pursuant to Education Code section 17406(e) this protection will expire on July 1, 2022.

As a result, if there is no prompt validating procedure, the contract would carry higher risk than a traditional bid, and would be at risk for a significant time after substantial work had commenced. This increased risk is likely to result in price increases, or contractors refusing to take the project at all. This effect is compounded where, as here, the contractor is permitted to maintain a challenge to the validity of the contract for years even after the project has been completed. Thus, the lack of a prompt validating procedure would impair a school district's ability to carry out its purpose of procuring a responsible contractor and spending the bonds on their intended projects in an efficient manner.

4. Lack of A Prompt Validation Procedure Would Impair The Ability to Enforce The Contract And Ensure Satisfactory Completion of the Bond-Financed Project

The school district making a lease-leaseback contract has an interest in ensuring the public project is completed in a safe and cost effective manner. The contractor's obligation to complete the bond-financed project in such a manner is *contractual*. Construction contracts generally contain provisions to protect owners against project delays, substandard or dangerous

work, and mid-project demands for more bond funds. If the construction contract could be challenged a year or more into the work, the District's ability to enforce the contract and timely complete the bond project would be jeopardized. Schools' rights to ensure timely completion of projects in time for opening schools could be jeopardized, and their rights to enforce insurance and indemnity provisions required by the contract could remain uncertain. Many schools require contractors to procure surety bonds to ensure timely completion of their projects even if the contractor defaults, but the continuing uncertainty regarding the validity of the contract would reduce the effectiveness of this method of risk mitigation.

IV. EDUCATION CODE SECTION 15110 MAKES THE CONTRACTS SUBJECT TO VALIDATION

The parties have discussed the applicability of Education Code section 15110. It would seem that if left unresolved, this issue would continue to create uncertainty, thus, to the extent the Court wishes to consider this issue, CSBA wishes to assist by providing legislative history not provided by the parties. As discussed in Fresno Unified School District's Opening brief at p. 57-61, Education Code section 15110 subjects the challenged contracts to validation because it *conjunctively* states "[a]n action to determine the validity of bonds *and* of the *ordering of the improvement or acquisition* may be brought pursuant to Chapter 9 (commencing with section 860) of Title 10 of Part 2 of the Code of Civil Procedure. In such action, all findings,

conclusions and determinations of the legislative body which conducted the proceedings shall be conclusive in the absence of actual fraud.” (Ed. Code, § 15110, emphasis added.)

Davis’ Answering brief argues in a footnote on p. 24 that “District’s argument that Education Code § 15110 subjects the challenged contracts to the Validation Statutes is wrong. The phrase ‘ordering of the improvement or acquisition’ in Education Code § 15110 *refers to the purpose stated in the bond measure* rather than the award of the future specific contracts that will be funded thereby.” (Emphasis added). This statement is not further explained or supported by citation.

We note that Education Code section 15110 was originally enacted based on other statutes (former Streets and Highways Code § 5265 *et seq.*) that *specifically provided for the validation of construction contracts*. Prior versions of Education Code section 15110 treated the issuance and the sale of bonds and the “ordering of the improvement or acquisition” in the *disjunctive*, and specifically anticipated the validation of *contracts*.

A. As Originally Enacted, Education Code § 15110 Allowed for Validation Of Not Only The Bonds, But Also the “Ordering of the Improvement Or Acquisition,” and Anticipated Validating “Contracts Made or Proposed to Be Made.”

The statute that became Education Code section 15110 was originally added in 1959 as Former Education Code 21759.¹ When it was originally added as Former Education Code section 21759, the statute stated:

At any time after the certification to the board of supervisors, the issuance and sale of the bonds, **or the ordering of the improvement or acquisition**, the governing board of the school district may bring an action in the superior court of the county whose superintendent has jurisdiction over the district to determine **the validity of the proceedings and bonds**. Such an action shall be in the nature of a proceeding in rem and jurisdiction of all parties interested may be had by publication of summons for at least once a week for three weeks in some newspaper of general circulation published in the county where the action is pending, such paper to be designated by the court having jurisdiction of the action. Jurisdiction shall be complete within 10 days after the publication of summons in the manner provided herein. Anyone interested may at any time before the expiration of said 10 days appear and by proper proceedings contest the validity of such proceedings and bond issue or uphold the same. The action shall be speedily tried and judgment rendered declaring the matter so contested either valid or invalid. Either party shall have the right to appeal to the Supreme Court at any time within 30 days after the rendition of such judgment, which appeal must be heard and determined within three months from the time of taking such appeal. The motion for a new trial of any such action must be heard and determined within 10 days from the filing of the notice of intention to move for a new trial. The court hearing the action, in inquiring into the regularity, legality or

¹ Former Education Code section 21759 was added by Senate Bill No. 6. Senate Bill No. 6 originally numbered the proposed statute as section 7408 of the Education Code but this was eventually renumbered as section 21759.

correctness of the **proceedings and of the contract made or proposed to be made**, must disregard any error, irregularity or omission which does not affect the substantial rights of the parties to said action or proceeding. All rules of pleadings and practice provided by the Code of Civil Procedure are applicable to such action. All costs of such actions may be allowed and apportioned between the parties or taxed to the losing party in the discretion of the court. If the validity of such proceedings or bond issue is sustained, the validity of such proceedings or issue shall not thereafter be contested in any action, suit or proceeding, and the judgment entered in the action herein provided for shall be conclusive evidence of the validity of such bond issue and of all proceedings prior thereto. In such action, all findings, conclusions and determinations of the legislative body which conducted the proceedings shall be conclusive in the absence of actual fraud. (Emphasis added).

The original text of Former Education Code section 21759 is attached as **Exhibit C** to CSBA's Request for Judicial Notice filed concurrently herewith.

Like Education Code section 15110, the opening sentence of former section 21759 addressed the “bonds” and the “ordering of the improvement or acquisition.” Former section 21759 treated these concepts in the disjunctive, and as though both could be validated.

B. Former Education Code section 21759 Was Based On Validation Procedures Within The Streets And Highways Code That Validated Construction Contracts

Former Education Code section 21759 originated with Senate Bill No. 6 (1959 Reg. Sess.). The Legislative Counsel’s Digest for Senate Bill No. 6 (1959 Reg. Sess.) noted that the proposed legislation “[a]uthorizes the governing board of a school district to bring a superior court action to

determine the validity of school bonds, and establishes a procedure for bringing the action which *is based generally on the procedure authorized by Sections 5265 to 5273, inclusive, of the Streets and Highways Code for determining the validity of certain public improvements.*”

The validation language within Former Streets and Highways Code sections 5265 to 5273 strongly resembles the procedures enacted within Former Education Code section 21759.

When Former Education Code section 21759 was enacted in 1959, Former Sections 5265 to 5273 of the Streets and Highways Code dealt extensively with the validation of *construction* contracts. A copy of Former Sections 5265 to 5273 of the Streets and Highways Code are attached as **Exhibit A** to CSBA’s Request for Judicial Notice, concurrently filed herewith.

Former Education Code section 21759 and Former Streets and Highways Code section 5271, both contain the same language that “[t]he court hearing the action, in inquiring into the regularity, legality or correctness of the *proceedings and of the contract made or proposed to be made*, must disregard any error irregularity or omission which does not affect the substantial rights of the parties to said action or proceeding.” (Emphasis added.)

Former Education Code section 21759 was not a legislative accident. If the intent was only to validate the bonds, this could have been

accomplished without use of the phrase “ordering of the improvement or acquisition.”

If validation of the bonds was the only purpose of Former section 21759 – there would have been no need to use the identical language that was used to validate construction contracts within Former Streets and Highways Code section 5271, and to have both statutes anticipate an identical inquiry into a “contract made or proposed to be made.” *It is more likely that the legislature provided for the validation of an “ordering of the improvement or acquisition” with the intent that such language would allow for the validation of contracts to expend the bond proceeds in a similar manner to the statute upon which Former section 21759 was based. Such contracts would be reasonably be interpreted as the act that actually “orders” an “improvement or acquisition.”*

Former Education Code section 21759 was streamlined over time as demonstrated by **Exhibits D, E & F** to CSBA’s Request for Judicial Notice, concurrently filed herewith. However, there appears to be no indication of legislative intent to *reduce the scope of the subjects to be validated* from what was intended in Former Education Code section 21759. Education Code section 15110 still retains the ability to validate bonds “and” the “ordering of the improvement or acquisition” as it did when it was originally enacted. Thus, because the contracts were funded with the bonds, the legislative

**CERTIFICATION OF COMPLIANCE WITH CALIFORNIA RULES
OF COURT, RULE 8.204(c)(1)**

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the word count feature on my Microsoft Word software, this brief contains 4,752 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 20th day of August, 2021 in Sacramento, California.

/s/ James Traber

James R. Traber
Attorney for Amicus Curiae

PROOF OF SERVICE

I am employed in the County of Sacramento. I am over the age of 18 years and not a party to the within above-entitled cause. My business address is 520 Capitol Mall, Suite 400 Sacramento, California 95814, and my business e-mail address is jtraber@f3law.com.

I served a true and correct copy of the **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF CALIFORNIA SCHOOL BOARDS ASSOCIATION’S EDUCATION LEGAL ALLIANCE IN SUPPORT OF FRESNO UNIFIED SCHOOL DISTRICT [SUBMITTED CONCURRENTLY WITH AMICUS BRIEF]** on the interested parties in this action:

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[X] **(BY ELECTRONIC SERVICE)** On August 20, 2021, I instituted service of the above-listed document(s) by submitting an electronic version via file transfer protocol (FTP) through the upload feature at www.tf3.truefiling.com, to the parties who have registered to receive notifications of service of documents in this case as required by the Court. Upon completion of the transmission of said document, a confirmation of receipt is issued to the filing/serving party confirming receipt from info@truefiling.com for TrueFiling.

Honorable Kimberly Gaab FRESNO COUNTY SUPERIOR COURT 1130 O Street Fresno, CA 93721	FIFTH DISTRICT COURT OF APPEAL 2424 Ventura Street Fresno, CA 93721 Fresno, CA 93721
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[X] **(BY MAIL)** on August 20, 2021, by placing the sealed envelope with the postage thereon fully prepaid for collection and mailing at our address shown above, on the parties immediately listed above. I am readily familiar with Fagen, Friedman & Fulfrost LLP's business practice for collecting and processing correspondence for mailing with the United States Postal Service the same day.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 20, 2021, at Sacramento, California.

/s/ James Traber

James Traber

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **DAVIS v. FRESNO UNIFIED SCHOOL DISTRICT**

Case Number: **S266344**

Lower Court Case Number: **F079811**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **jtraber@f3law.com**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	8.20.21 Final Davis II Amicus Curiae Brief
REQUEST FOR JUDICIAL NOTICE	8.20.21 Final RJN iso CSBA Amicus

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

8/20/2021

Date

/s/James Traber

Signature

Traber, James (248439)

Last Name, First Name (PNum)

Fagen Friedman & Fulfroost LLC

