S266344

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

STEPHEN K. DAVIS,

Plaintiff and Respondent,

vs.

FRESNO UNIFIED SCHOOL DISTRICT and HARRIS CONSTRUCTION CO., INC.

Defendants and Petitioners.

After a Decision From the Court of Appeal of California,
Fifth Appellate District, Case No. F079811
Superior Court of California, Fresno County, Case No. 12CECG03718
Hon. Kimberly Gaab

APPLICATION TO FILE AMICUS CURIAE BRIEF AND PROPOSED BRIEF OF AMICUS CURIAE STATEWIDE EDUCATIONAL WRAP UP PROGRAM (SEWUP) IN SUPPORT OF DEFENDANT/PETITIONER FRESNO UNIFIED SCHOOL DISTRICT

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APPLICATION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT:

Pursuant to California Rule of Court 8.520(f),[1] the Statewide Educational Wrap Up Program ("SEWUP") hereby requests leave to file the attached amicus curiae brief in support of Defendant/Petitioner Fresno Unified School District in this matter. Amicus Curiae is familiar with the issues and scope of its presentation, and believes the attached brief will aid the Court in its consideration of the issues presented in this case.

Identity and Interest of Amicus Curiae

SEWUP is a not-for-profit Joint Powers Authority (JPA) organized pursuant to the California Joint Exercise of Powers Act (Gov't Code, § 6500.1 et seq.) SEWUP was created in 1999 and has a current membership of more than 550 public school districts in California.[2] SEWUP provides Owner Controlled Insurance Programs (OCIP) to its member school districts, which are designed to protect member districts from construction-

[1] Pursuant to California Rule of Court 8.520, Amici Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

[2] Petitioner Fresno Unified School District is not a member of SEWUP.

site activity risks created by general contractors, contractors, and subcontractors at all tiers. The OCIP program provides a comprehensive insurance package on a per-project basis that consists of Builders Risk, Commercial General Liability, Worker's Compensation, Contractor Pollution Liability and an Owners Protective Professional Indemnity excess policy.

Since its inception in 1999, SEWUP has insured over 750 school district facility projects with a total insured value of over $8 Billion. Notably, $400 Million of that amount stems from Lease-Leaseback contracts, which is the construction delivery method at issue in this case.

In providing liability coverage to public school districts stemming from the risks associated with the construction of school facilities, SEWUP is principally tasked with identifying and assessing risks to its member school districts. Once those risks are identified and assessed, Amicus Curiae goes out to the insurance market and obtains the various coverages contained within the OCIP. Based on SEWUP's loss ratio developed over 21 years, 750 school facilities projects and the aforementioned $8B in Total Insured Value, the markets set the rates that its school district members are required to contribute. In identifying and assessing school district risks, Amicus Curiae looks to the language of the statutes enacted by the state and federal Legislatures as well as the case law interpreting those statutes. In addition, Amicus Curiae routinely retains legal counsel not only to defend

actual controversies, but also to provide interpretation and analysis of the laws applicable to public school districts in this state. Put simply, SEWUP has a strong interest in the interpretation of the laws applicable to public school districts in the area of construction because it is those laws that allow SEWUP to identify and assess the risk of public school districts and ultimately to determine how much each member district must contribute to the JPA to cover those risks.

How This Brief Will Assist the Court

The Court has accepted review in this case on the following issue:

Is 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?

The answer to this question will have a significant impact on the public school system in this state. If the answer to this question is "no"—which is what the Fifth District held in this case—any person dissatisfied with the fact that a school district entered into a lease-leaseback contract for the construction of a public school would be able to file a Taxpayer action, tying up the school district in litigation for years and drastically affecting the ability of school districts to obtain financing and complete such projects. In contrast, if the answer to the question is "yes," then a person dissatisfied with the lease-leaseback construction contract would be required to comply with the validation provisions contained in the California Code of Civil Procedure (Code Civ. Proc., § 860, *et seq.*)—

which require persons challenging a public entity's action to file the challenge within 60 days and limits the relief to a declaration from the court as to whether the agency action is question is valid or not. (See Code Civ. Proc., § 860; see also *Ontario v. Superior Court* (1970) 2 Cal.3d 335, 344.)

The purpose of the validation provisions is straightforward—public entities need "to limit the extent to which delay due to litigation may impair a public agency's ability to operate financially" and, "[t]o that end, the validation statutes enable a speedy determination of the validity of the public agency's action." (*McGee v. Torrance Unified Sch. Dist.* (2020) 49 Cal.App.5th 814, 822 [internal quotation marks omitted].)

Amicus Curiae strongly agree with the petitioner school district in this case that the Court should answer yes to the issue presented for review (i.e., that lease-leaseback contracts that are financed through public bond proceeds are "contracts" within the meaning of Government Code section 53511 and therefore subject to the validation process). It is also important to note at the outset that, in May 2020, before the decision by the Fifth District was issued in this case, the Second District Court of Appeal addressed the exact issue before the Court and held that lease-leaseback contracts are "contracts" within the meaning of Government Code section 53511 and subject to the validation statutes' procedures and remedies. (*McGee v. Torrance Unified Sch. Dist.* (2020) 49 Cal.App.5th 814, 819.) Amicus Curiae believe that the decision by the Second District in *McGee* is

well-reasoned, correct, and that the Court should reach the same decision in this case.

The school district in this case—and the court in *McGee*—both provide the *legal* basis for why lease-leaseback contracts should be considered "contracts" under Government Code section 53511. Amicus Curiae believes the analysis is straightforward and SEWUP has little to add in that regard. The proposed brief of Amicus Curiae, however, will assist the Court by explaining the practical implications that the Fifth District's decision—if adopted—will have on public schools in this state.

In *McGee*, the Second District Court of Appeal predicted that allowing challenges to lease-leaseback contracts through a Taxpayer action—untethered to the validation procedures and remedies—would have a "chilling effect" on the use of lease-leaseback contracts (which are expressly authorized by the Legislature under Education Code section 17406). (*McGee*, *supra*, 49 Cal.App.5th at p. 828 ["The fact that litigation may be pending or forthcoming drastically affects the marketability of public bonds and likely would have a chilling effect upon potential third party lenders…."] [internal quotation marks omitted].)

Amicus Curiae can represent to the Court that, as a practical matter, the prediction in *McGee* is absolutely correct. As the Court knows, this case has been to the Court of Appeal more than once. In the first appeal decision—issued in 2015—the Fifth District allowed the case to proceed as

a Taxpayer action. (See *Davis v. Fresno Unified Sch. Dist.* (2015) 237 Cal.App.4th 261.) Following that decision, Amicus Curiae saw a marked decline in the use of the lease-leaseback delivery method. When questioned as to why school districts were not using the method, the school districts informed Amicus Curiae that they were reluctant to use a delivery method that had the potential of exposing school districts to protracted litigation.

As noted in the legislative history of Education Code section 17406, one of the principal reasons that the Legislature has authorized school districts to utilize the lease-leaseback delivery method is because smaller school districts often do not have the up-front capital to build schools through the traditional design-bid-and-build method. (Senate Appropriations Comm. Fiscal Summary of AB 1486 (2003-2004 Reg. Sess.) Aug. 4, 2004 ["This mechanism allows school districts to build schools when state funding is unavailable or during times that the district may not qualify for funds."].)

If the Fifth District's holding is sustained in this case, the result would undoubtedly have a chilling effect on school districts' use of this delivery method authorized by the Legislature, especially those who do not have the financial wherewithal to fund their facilities protects. In other words, the Fifth District's decision in this case—if sustained—would likely result in the building of fewer public schools—particularly in the districts

where they are needed most (i.e., districts that do not have the capital to utilize the traditional design-bid-build delivery method).

Because Amicus Curiae was created under the Government Code to provide liability coverage and risk management services to public school districts within this state related to the construction of public facilities, SEWUP has an informed and unique perspective on the potential impact of the decision in this matter.

For these reasons, and as set forth in the attached brief, Amicus Curiae respectfully requests that the Court find that lease-leaseback contracts are "contracts" within the meaning of Government Code section 53511 and subject to the validation procedures and remedies in the Code of Civil Procedure.

Dated: August 23, 2021

Respectfully submitted,

LEONE & ALBERTS

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PROPOSED BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER FRESNO UNIFIED SCHOOL DISTRICT

INTRODUCTION

The Court granted Fresno Unified School District's petition for review in this case on the following issue:

> Is 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?

Amicus Curiae agree with Fresno Unified School District's position that the answer to this question is "yes."

I. Background on the Lease-Leaseback Delivery Method

The traditional method by which public schools and other public agencies contract for the building of public facilities is known as the "design-bid-build" construction delivery method. This process involves the public entity advertising bids for a project, receipt and review of bids, and then an award of the project to the lowest bidder. There are several well-known shortcomings related to the design-bid-build delivery method. Foremost among these problems is the fact that school districts sometimes simply do not have the up-front funding to pay for such projects at the time they are needed. Similarly, because public agencies are required to accept the lowest responsible bid, the traditional delivery method is often subject to cost overruns, change orders, and, ultimately, delay of the completion of the project. Other problems include the fact there is often no builder

participation in the design process, conflicts between architect and contractor, and little control over the qualifications of sub-contractors.

In recognition of the problems associated with the design-bid-build delivery method, the California Legislature has expressly provided public school districts with an alternative method. Specifically, Education Code section 17406 expressly authorizes school districts to lease land to a construction team for a nominal amount, the construction team then builds the school facility and leases the facility back to the school district. The school district then makes payments over a period of years to acquire title to the facility. This is known as the Lease-Leaseback construction delivery method. According to the legislative history of Education Code section 17406, "[t]his mechanism allows school districts to build schools when state funding is unavailable or during times that the district may not qualify for funds." (Senate Appropriations Comm. Fiscal Summary of AB 1486 (2003-2004 Reg. Sess.) Aug. 4, 2004.)[3]

The lease-leaseback construction delivery method has seen wide use since its authorization by the Legislature through Education Code section 17406. As stated in the application for leave to file this brief, since 1999, of

[3] The Senate Committee Analysis can be found online at https://leginfo.legislature.ca.gov. Because this information is publicly available, a separate motion for judicial notice is not required. (*Sharon S. v. Superior Ct.* (2003) 31 Cal.4th 417, 440 fn. 18; *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 46 fn. 9.)

the 750 school facility projects that Amicus Curiae has insured, $400 million of the total insured value of those projects stemmed from lease-leaseback contracts. The reason this delivery method is attractive is straightforward—the school district need not fund the entire cost of construction during the period of construction and, instead, may extend the payment period over time through the payment of lease payments to the developer (or the developer's lender).

II. Background on Validation Procedures Challenging Public Agency Decisions

The Code of Civil Procedure contains provisions governing what are known as "validation" actions. As noted by the Court of Appeal in this case, "[a] validation action 'is a lawsuit filed and prosecuted for the purpose of securing a judgment determining the validity of a particular … governmental decision or act.'" (*Davis v. Fresno Unified Sch. Dist.* (2020) 57 Cal.App.5th 911, 927 [quoting *Blue v. City of Los Angeles* (2006) 137 Cal.App.4th 1131, 1135, fn. 4].)

Section 860 of the Code of Civil Procedure provides that "[a] public agency may … bring an action in the superior court … to determine the validity of [an agency decision or action]." (Code Civ. Proc., § 860.) Such action must be brought within 60 days of the agency decision at issue. (*Id*.) Public entities, of course, are not required to file suit to substantiate the validity of every action they take. In this regard, the Code of Civil

Procedure provides that "any interested person may bring an action within the time … specified by Section 860 to determine the validity of such matter." (Code of Civ. Proc., § 863.) When the 60-day period passes without an interested person bringing an action under Section 863, the agency's decision becomes immune from attack whether it is legally valid or not. (*City of Ontario*, *supra*, 2 Cal.3d at pp. 341-42.) Finally, the relief available under the validation provisions, as recognized by the Court of Appeal in this case, "is limited to a judgment declaring the subject matter of the action [ ] valid or invalid." (*Davis*, *supra*, 57 Cal.App.5th at p. 929.)

The policies underlying the validation provisions are well-known. "A key objective of a validation action is to limit the extent to which delay due to litigation may impair a public agency's ability to operate financially." (*Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 843.) "To that end, the validation statutes enable a speedy determination of the validity of the public agency's action … plac[ing] great importance on the need for a single dispositive final judgment." (*McGee*, *supra*, 49 Cal.App.5th at p. 822 [internal quotation marks omitted].) Further, the courts have recognized that "[t]he validating statutes should be construed so as to uphold their purpose, i.e., 'the acting agency's need to settle promptly all questions about the validity of its action.'" (*Ibid*. [quoting *Commerce Casino, Inc. v. Schwarzenegger* (2007) 146 Cal.App.4th 1406, 1420-21].) As stated by the Second District in *McGee*, the validation provisions

"'fulfill the important objective of 'facilitat[ing] a public agency's financial transactions with third parties by quickly affirming their legality.'" (*Ibid*.)

The existence of the validation procedures, the limited remedies for such actions, and the policies underlying the provisions give rise to the core question in this case—is the lease-leaseback contract at issue an agency decision that is covered by the validation process?

That question is seemingly answered by the plain language of Government Code section 53511, which provides that the validation statutes apply to "an action to determine the validity of [a local agency's] bonds, warrants, *contracts*, obligations or evidence of indebtedness." (Gov. Code, § 53511, subd. (a) [emphasis added].) Put simply, the lease-leaseback agreement in this case was unquestionably a "contract" and, for the plaintiff to argue that the validation procedures do not apply, he has to make the somewhat tortured claim that the agreement was not a "contract" within the meaning of Section 53511.

It is true that California Courts have read Section 53511's reference to "contracts" narrowly to reach only those contracts that "are in the nature of, or directly relate[d] to a public agency's bonds, warrants or other evidences of indebtedness." (*Santa Clarita Organization for Planning & the Environment v. Abercrombie* (2015) 240 Cal.App.4th 300, 309.) However, the courts have also made clear that contracts "involving financing and financial obligations" fall within the provision (*Friedland*,

supra, 62 Cal.App.4th at p. 843), as well as contracts that are "inextricably bound up" with bond funding and financing (*McLeod v. Vista Unified Sch. Dist*. (2008) 158 Cal.App.4th 1156, 1169.)

III. The Court should follow the Reasoning and Holding from the Second District's Recent Decision in *McGee*, which Held that Lease-Leaseback Contracts funded through Public Bonds are "Contracts" within the Meaning of Government Code section 53511

The question presently before the Court was recently addressed by the Second District Court of Appeal in *McGee v. Torrance Unified School Dist.* (2020) 49 Cal.App.5th 814. As pointed out by the school district in this case, the attorney for the plaintiff in *McGee* was the same as the attorney for the plaintiff in this action and the facts of the two cases are virtually identical. There, as here, the school district entered into a series of lease-leaseback agreements with a contractor for construction of schools within the district. (*Id*., at p. 820.) There, as here, the contracts were financed through bond measures. (*Ibid*.) And there, as here, the plaintiff challenged the contracts through a taxpayer action seeking relief that is not available under the validation statutes.

Ultimately, looking at Government Code section 53511 and the case law holding that the provision applies to contracts "involving financing and financial obligations" as well as "contracts that are 'inextricably bound up' with bond funding," the Second District held that the lease-leaseback contracts were subject to the validation statutes based on the undisputed

fact that the agreements were to be funded through bond measures. (*McGee*, *supra*, 49 Cal.App.5th at pp. 823-24.)

The court in *McGee* also pointed out significant policy considerations that supported its decision. For instance, the court stated: "A judgment in [the plaintiff's] favor would [ ] undermine the very purpose behind the validation statutes. A cloud has hung over the challenged projects for *years*, destroying any hope in prompt validation of the underlying lease-leaseback agreements." (*McGee*, *supra*, 49 Cal.App.5th at p. 828 [italics in original].) The court continued: "Beyond the specific projects here, a judgment in [the plaintiff's] favor would threaten *future* projects with the prospect of lawsuits long after completion. That would undoubtedly inhibit the District's ability to obtain financing for them." (*Ibid*. [italics in original].) Finally, the court noted that "[t]he fact that litigation may be pending or forthcoming drastically affects the marketability of public bonds and likely would have a chilling effect upon potential third party lenders…." (*Ibid*. [internal quotation marks omitted].)

Amicus Curiae believe the Second District's holding in *McGee* is well-reasoned, follows the plain language of the statutes, and comports with the holdings interpreting Government Code section 53511. As such, Amicus Curiae believe the Court should reach the same result.

IV. The Fifth District's Holding in this Case—if sustained—Will Have a Significant and Detrimental Impact on Public School Districts' Ability to Finance and Build Schools in this State

In *McGee*, the Second District Court of Appeal predicted that allowing challenges to lease-leaseback contracts through a Taxpayer action—untethered to the validation procedures and remedies—would have a "chilling effect" on the use of lease-leaseback contracts (which are expressly authorized by the Legislature under Education Code section 17406). (*McGee*, *supra*, 49 Cal.App.5th at p. 828 ["The fact that litigation may be pending or forthcoming drastically affects the marketability of public bonds and likely would have a chilling effect upon potential third party lenders…."] [internal quotation marks omitted].)

Amicus Curiae can represent to the Court that, as a practical matter, the prediction in *McGee* is correct. As the Court knows, this case has been to the Court of Appeal more than once. In the first Court of Appeal decision—issued in 2015—the Fifth District allowed the case to proceed as a Taxpayer action. (See *Davis v. Fresno Unified Sch. Dist.* (2015) 237 Cal.App.4th 261.) Following that decision, Amicus Curiae saw a marked decline in the use of the lease-leaseback delivery method. When questioned as to why school districts were not using the method, the school districts informed Amicus Curiae that they were reluctant to use a delivery method that had the potential of exposing school districts to protracted litigation.

As noted in the legislative history of Education Code section 17406, one of the principal reasons that the Legislature has authorized school districts to utilize the lease-leaseback delivery method is because smaller school districts often do not have the up-front capital to build schools through the traditional design-bid-build method. (Senate Appropriations Comm. Fiscal Summary of AB 1486 (2003-2004 Reg. Sess.) Aug. 4, 2004 ["This mechanism allows school districts to build schools when state funding is unavailable or during times that the district may not qualify for funds."].)

If the Fifth District's holding is sustained in this case, the result would undoubtedly have a chilling effect on school districts' use of this delivery method authorized by the Legislature, especially those who do not have the financial wherewithal to fund their facilities protects. In other words, the Fifth District's decision in this case—if sustained—would likely result in the building of fewer public schools—particularly in the districts where they are needed most (i.e., districts that do not have the capital to utilize the traditional design-bid delivery method).

Conclusion

For the reasons articulated in this brief, Amicus Curiae respectfully requests that this Court hold that lease-leaseback contracts funded through public bonds are "contracts" within the meaning of Government Code

section 53511 and subject to the validation procedures set forth in the Code of Civil Procedure.

Dated: August 23, 2021

Respectfully submitted,

LEONE & ALBERTS

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STATEWIDE EDUCATIONAL
WRAP UP PROGRAM

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.520(c)(1), the text of this Application To File Amicus Curiae Brief And Proposed Brief Of Amicus Curiae Statewide Educational Wrap Up Program (Sewup) In Support Of Defendant/Petitioner Fresno Unified School District, including footnotes and excluding the cover information, table of contents, table of authorities, signature blocks, and certificate, consists of 3.629 words in 13-point Times New Roman type. In making this certification, I have relied on the word count of the Microsoft Word program used to prepare the brief.

Dated: August 23, 2021

Respectfully submitted,

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PROOF OF SERVICE
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I am employed in the County of Contra Costa; I am over the age of 19 years and not a party to the above-entitled cause; my business address is 1390 Willow Pass Road, Suite 700, Concord, California, 94520; and by business email address is kalexander@leonealberts.com.

I served a true and correct copy of the **APPLICATION TO FILE AMICUS CURIAE BRIEF AND PROPOSED BRIEF OF AMICUS CURIAE STATEWIDE EDUCATIONAL WRAP UP PROGRAM (SEWUP) IN SUPPORT OF DEFENDANT/PETITIONER FRESNO UNIFIED SCHOOL DISTRICT** on the interested parties in this action:

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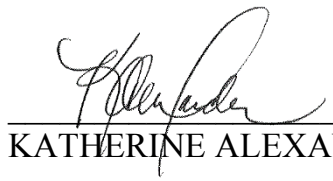
☒ (**BY ELECTRONIC SERVICE**) On August 23, 2021, I instituted service of the above-listed document(s) by submitting an electronic version of the document(s) via file transfer protocol (FTP) through the upload feature at www.tf3.truefiling.com, to the parties who have registered to receive notifications of service of documents in this case as required by the Court. Upon completion of the transmission of said documents, a confirmation of receive issued to the filing/serving party confirming receipt from info@truefiling.com for TrueFiling.

☒ **(BY MAIL)** 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 below. I am readily familiar with Leone & Alberts' business practice for collecting and processing

correspondence for mailing with the United States Postal Service the same day.

Honorable Kimberly Gaab FRESNO COUNTY SUPERIOR COURT 1130 "O" Street Fresno California 93 721	FIFTH DISTRICT COURT OF APPEAL 2424 Ventura Street Fresno, California 93 721

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 23rd day of August, 2021, at Concord, California.



KATHERINE ALEXANDER

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**

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

8/23/2021

Date

/s/Katherine Alexander

Signature

Gordon, Seth (262653)

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