Case No. S266344

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.

Fifth Appellate District, Case No. F079811
Fresno County Superior Court Case No. 12CECG03718
The Honorable Kimberly Gaab

APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* CALIFORNIA ASSOCIATION OF SCHOOL BUSINESS OFFICIALS IN SUPPORT OF PETITIONERS FRESNO UNIFIED SCHOOL DISTRICT AND HARRIS CONSTRUCTION CO., INC.

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APPLICATION FOR LEAVE TO FILE AMICUS BRIEF

TO THE HONORABLE TANI GORRE CANTIL-SAKAUYE, PRESIDING JUSTICE, AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Pursuant to Rule 8.520(f) of the California Rules of Court, leave is hereby requested to file the accompanying brief of *amicus curiae* ("Brief") on behalf of the California Association of School Business Officials ("CASBO" or "*Amicus Curiae*") in this action in support of Respondents Harris Construction, Inc. ("Harris") and the Fresno Unified School District ("District"; together "Petitioners").

INTEREST OF *AMICUS CURIAE*

This case concerns the lease-leaseback construction delivery method, and the means of challenging that delivery method. Education Code section 17406 authorizes a school district to lease its property to a third party under the condition that the party construct buildings on that property. The lease-leaseback construction delivery method does not require competitive bidding, and the agreement may include any terms that the school district deems to be in the best interest of the district. School districts throughout the state of California have used lease-leaseback contracts in school construction, and many of CASBO's members laud the lease-leaseback construction delivery method for the flexibility it provides. Case law has held that when challenged in court, a lease-leaseback agreement is subject to the prompt validation procedures of Code of Civil Procedure sections 860, *et seq*. Either the school district may file an action within sixty days of award seeking validation, or a third party may file a "reverse validation" action within sixty days of award that challenges the legality of the lease-leaseback agreement.

CASBO and its members have a substantial interest in the outcome of this lease-leaseback litigation. Since 1928, CASBO has been a premier

statewide resource for California's public school districts, serving more than 24,000 individual school district and county office of education members. CASBO members represent every facet of school business management and operations. CASBO promotes best business practices and advocates for sound policy regarding school business and finance issues. CASBO's members strive to deliver high quality school facilities, educational programs and other services to the students in their communities. They work directly on lease-leaseback construction projects, school district financing arrangements, and a variety of related matters in support of educational agencies. In this endeavor, the flexibility to use a range of different reliable construction delivery methods – including lease-leaseback – is extremely valuable to CASBO's members.

The initial Fifth District appellate court decision between the present parties (*Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261 ["*Davis I*"]) created uncertainty regarding the lease-leaseback construction delivery method because it interpreted Education Code section 17406 to require ambiguous contract terms not mentioned in the statute by the Legislature. This uncertainty was amplified when two other appellate districts (the First and Second Districts) disagreed with *Davis I* and held that additional contract terms were *not* required. (*McGee v. Balfour Beatty Construction, LLC* (2016) 247 Cal.App.4th 235 ["*McGee I*"] and *California Taxpayers Action Network v. Taber Construction, Inc.* (2017) 12 Cal.App.5th 115 ["*Taber*"].) This split of authority sowed confusion in the field of public school construction since it called into question the requirements for use of lease-leaseback, and the use of lease-leaseback by CASBO's members detrimentally declined.

Now, a second appellate decision in the same *Davis* proceedings (*Davis v. Fresno Unified School District* (2020) 57 Cal.App.5th 911["*Davis II*"]) has created more confusion for CASBO's members with another split

of authority. Earlier in 2020, the Second Appellate District held that a reverse validation action against a lease-leaseback contract based on an alleged conflict of interest was moot since the construction was complete. (*McGee v. Torrance Unified School District* (2020) 49 Cal.App.5th 814 ["*McGee II*"], relying on *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559 ["*Wilson*"].) The Court specifically held that the taxpayers' action seeking disgorgement of the contract funds was also moot since the "gravamen" of the taxpayers' action was invalidation of the lease-leaseback contract.

However, the *Davis II* court elected to not follow the clear precedent of *Wilson* and *McGee II*. Instead, *Davis II* held that the taxpayers' action seeking disgorgement was not subject to the validation statutes, and thus was not moot. Consequently, school districts face additional lease-leaseback uncertainty since a taxpayer's action seeking disgorgement could be filed and litigated years after completion of construction.

THE BRIEF OF *AMICUS CURIAE* WILL ASSIST THE COURT

Amicus curiae's Brief will assist the Court in three ways. First, the Brief will address the statewide use and prevalence of the lease-leaseback construction delivery method codified by Education Code section 17406 and its importance to school districts for the effective and efficient construction of school facilities for California's transitional kindergarten through twelfth grade (TK-12) students. Second, the Brief will address the application of the validation process to lease-leaseback construction contracts, the importance of promptly determining the reliability of such contracts, and the reasons for reversing *Davis II*. Third, to the extent that the Court may also address the split of authority created by *Davis I*, the Brief will address why that decision's vague mandate of contract terms not required by statute should be disapproved by this Court. These points are

essential in order for the Court to be informed of the impact of its decision on California's public schools.

NO INVOLVEMENT OF A PARTY

No party, or counsel to a party, in this appeal authored the Brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the Brief. No person or entity made a monetary contribution with intent to fund the preparation or submission of the Brief, other than *Amicus Curiae*, its members or its counsel. (Cal. Rule of Court 8.520(f)(4).)

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests that the Court accept the accompanying Brief for filing in this case.

Dated: August 23, 2021

Respectfully submitted,

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[PROPOSED] BRIEF OF *AMICUS CURIAE* CALIFORNIA ASSOCIATION OF SCHOOL BUSINESS OFFICIALS IN SUPPORT OF PETITIONERS FRESNO UNIFIED SCHOOL DISTRICT AND HARRIS CONSTRUCTION CO., INC.

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INTRODUCTION

In *Davis v. Fresno Unified School District* (2020) 57 Cal.App.5th 911 ("*Davis II*"), the Fifth District Court of Appeal compounded errors that it made five years earlier in *Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261 ("*Davis I*"). *Davis II* tortuously avoided a finding that was plainly dictated by precedent, thus creating a split of authority as to whether the mootness doctrine under validation statutes (Code of Civil Procedure §§860, *et seq*.) would apply to a taxpayer's action for disgorgement based on an allegedly invalid lease-leaseback contract. This split of authority has deepened school districts' uncertainty about the use of the statutorily authorized lease-leaseback delivery method for construction projects.

CASBO urges this Court to reverse *Davis II* because, if affirmed, it would negatively impact hundreds of school districts, thousands of school officials, and millions of K-12 students. During the past several decades, the lease-leaseback construction delivery method has been a common vehicle for school districts' construction projects. Many CASBO members have found that it offers significant flexibility and cost security while also reducing costs and construction disputes.

Initially, the *Davis I* decision in 2015 created significant uncertainty about the use of lease-leaseback. This uncertainty was compounded when *McGee I* and *Taber* specifically disagreed with the holding of *Davis I*. Now, the *Davis II* decision, which is not supported by existing law, has thrown the lease-leaseback construction delivery method into further disarray. By reversing *Davis II* and rejecting the flawed reasoning of *Davis I*, this Court would uphold the statute as written by the Legislature, which was intended to help school districts effectively and efficiently construct vitally needed facilities projects.

ARGUMENT

I. LEASE-LEASEBACK CONSTRUCTION CONTRACTS FOR SCHOOL DISTRICTS ARE AN ESSENTIAL ALTERNATIVE TO COMPETITIVELY BID CONSTRUCTION CONTRACTS.

Education Code section 17406 allows a school district, without advertising for bids, to lease property to a third party under the condition that the party constructs a building on that property. This construction delivery method is commonly referred to as "lease-leaseback." (See recitation of the current Education Code section 17406 in Harris' Opening Brief, pp. 47-57.)

The lease-leaseback construction delivery method has been widely utilized by CASBO's members for construction of school facilities due in large part to the significant benefits experienced by many school districts. The primary benefit school districts cite is flexibility in selecting a contractor. Because competitive bidding is not required, districts can seek proposals directly from the most qualified contractors and award the contract to the proposal that presents the best value.

Moreover, many school districts elect to award the lease-leaseback contract prior to completion of facility design so that the lease-leaseback contractor may perform preconstruction design services with the school district and its architect. This teamwork creates a positive approach and allows the district, its architect, and the contractor to begin developing construction schedules and identifying and solving potential problems at the earliest stages of the project, thus leading to more efficient construction with fewer unforeseen issues that cause delay or extra costs. Ultimately, any cost savings that result help to preserve public funds.

Many CASBO members often experience fewer disputes during construction under the lease-leaseback approach. Because of the team approach, lease-leaseback projects can generate fewer change order

requests, including both requests for changes by the school districts or by their contractors because of items missed in the construction plans.

As a result, the lease-leaseback construction delivery method has long provided a reliable, effective, and efficient method to build school facilities for K-12 students. While not all school districts use lease-leaseback, it is a vital alternative provided by the Legislature that gives CASBO members the flexibility to let a contract for a particular construction project in the manner that it believes would most likely lead to successful, timely, and cost-effective completion.

II. PROMPT VALIDATION OF LEASE-LEASEBACK CONSTRUCTION CONTRACTS IS CRITICAL TO SCHOOL DISTRICTS; THE COURT SHOULD HOLD THAT THE PRESENT TAXPAYER'S ACTION SEEKING DISGORGEMENT IS MOOT.

CASBO concurs with Petitioners that a lease-leaseback construction contract financed through bond proceeds, rather than through a builder, is a "contract" for purposes of Government Code section 53511, and thus the validation statutes should apply. (District's Opening Brief, pp. 26-66; Harris's Opening Brief, pp. 21-45.) Courts of Appeal – including *Davis I* – have repeatedly held that lease-leaseback agreements are subject to the validation statutes. (*Davis I, supra*, at 273; *California Taxpayers Action Network v. Taber Construction, Inc.* (2017) 12 Cal.App.5th 115, 123 ["*Taber*"]; and *McGee v. Torrance Unified School District* (2020) 49 Cal.App.5th 814, 824 ["*McGee II*"].) It is true that *Davis I* held that an attempted lease-leaseback contract may be invalid if it did not include a financing component, but that fact does not remove that lease-leaseback contract from the scope of Section 53511 – it is still a lease-leaseback contract under Education Code section 17406 to which validation procedures apply, whether or not the flawed holding of *Davis I* is applied.

Consequently, CASBO concurs with Harris that *Davis II* incorrectly failed to honor applicable precedent under the validation statutes which held that a taxpayer's action seeking disgorgement was moot due to the completion of construction. (Harris' Opening Brief, pp. 67-73; *McGee II, supra,* at 828-829, relying on *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559 ["*Wilson*"].) The Court should reverse *Davis II* and, consistent with the holding of the Second District Court of Appeal in *McGee II,* rule that the "gravamen" of Respondent's taxpayer action is to invalidate the lease-leaseback contract, and consequently the validation statutes – and their doctrine of mootness for completed construction projects – should bar plaintiff's action.

It is important to note the significant similarities between *McGee II* and *Davis II* that demonstrate that *McGee II* should apply to the taxpayer's action in *Davis II*. As with the plaintiff in *McGee II*, Respondent did nothing to try to stop construction of the project, even though he had ample opportunity to do so. Also as in *McGee II*, Respondent asserts that the lease-leaseback contract is invalid due to a conflict of interest.

Indeed, the facts of *Davis II* are even more appropriate than *McGee II* for application of the *Wilson* mootness rule since Respondent asserts a second argument of invalidity of the contract. In addition to claiming invalidity based on a conflict of interest, Respondent's taxpayer action expressly asserts invalidity based on the lack of lease-leaseback contract terms that were required by *Davis I*. (*Davis II*, *supra*, at 933.) This argument further demonstrates that the "gravamen" of Respondent's taxpayer action is to invalidate the lease-leaseback contract. Therefore, the *Wilson* mootness rule for reverse validation actions directly applies.

As emphasized throughout *McGee II,* the Court should enforce the public policy behind the validation statutes, which is to provide quick resolution regarding the validity of public contracts:

> 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. 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. The 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. They fulfill the important objective of facilitat[ing] a public agency's financial transactions with third parties by quickly affirming their legality. In particular, [t]he fact that litigation may be pending of forthcoming drastically affects the marketability of public bonds … .

(*McGee II*, *supra*, at 822 [citations and quote marks omitted].) "Given the public interest in quickly resolving the legality of agency decisions, 'California law has long recognized that the completion of a public works project moots challenges to the validity of the contracts under which the project was carried out.' " (*Id.*, at 822, citing *Wilson, supra*, at 1575.)

If the Court affirms *Davis II*, the impact on school districts would be very detrimental. In essence, lease-leaseback would cease to exist except in the pages of the Education Code, where the Legislature's intent would simply gather dust. Not only would the CASBO's members not know what terms are required in their lease-leaseback contracts due to the continuing split of authority between *Davis I* on the one hand, and *McGee v. Balfour Beatty Construction, LLC* (2016) 247 Cal.App.4th 235 ["*McGee I*"] and *Taber* on the other hand (see Section III, below), their lease-leaseback contracts would be subject to the filing of taxpayer challenges seeking disgorgement *for three years* after award of the contract, with litigation extending many years beyond that. (Code Civ. Pro. §338(a); see Harris' Opening Brief, at p. 44.) To avoid this risk, school districts would either have to abandon lease-leaseback as an option, or would have to delay start of construction for three years. However, no contractor would enter a lease-leaseback contract where construction would be delayed three years.

Contractors would obviously not be able to accurately estimate – nor even roughly estimate – the costs of construction so far in advance.

Similarly, a school district would be extremely hesitant to award a lease-leaseback contract where the contract could be challenged up to three years after award. Furthermore, starting construction with such a dark cloud of legal uncertainty hanging overhead would lead to fewer proposing contractors and higher proposed prices due to the contractors' increased risk, thus undermining the benefits of the lease-leaseback delivery method. This unnecessary burden on CASBO's members would limit their ability to take advantage of the statutory scheme otherwise afforded to them.

Perhaps most importantly, contractors would be very unlikely to enter a construction contract with a risk that they may be required to disgorge their payments years after award of the contract and years after they had used that money to pay all of its project expenses and overhead. As an excellent example that proves the absurdity of this potential problem, *the litigation by Respondent is in its ninth year, and there still has not even been a trial*. Under no circumstances would such delay in resolution comport with the public policy supporting the validation statutes.

For these reasons, CASBO urges the Court to reverse *Davis II* and hold – consistent with *McGee II* – that the validation procedures of Code of Civil Procedure sections 860, *et seq.*, apply to Respondent Davis' *in personam* taxpayer action seeking disgorgement.

III. TO THE EXTENT THAT THE COURT ELECTS TO REVIEW THE CONFLICT BETWEEN THE DECISIONS OF *DAVIS I* ON THE ONE HAND, AND *McGEE I* AND *TABER* ON THE OTHER HAND, THE COURT SHOULD HOLD THAT *DAVIS I* IMPROPERLY REQUIRED ADDITIONAL TERMS IN A LEASE-LEASEBACK CONTRACT.

Harris has already briefed the issue of whether *Davis I* properly imposed additional requirements on lease-leaseback contracts despite their

absence in the lease-leaseback statutes (Harris' Opening Brief, pp. 58-65), and whether it is appropriate for the Court to decide this issue (Harris' Reply Brief, pp. 17-18.)

CASBO concurs with Harris in that it would be appropriate for the Court to address the issue, and that the Court should disapprove *Davis I* to the extent that it is inconsistent with *McGee I* and *Taber* as well as with Education Code section 17406.

The Fifth District Court of Appeal's primary basis for concluding in *Davis II* that the lease-leaseback contract was outside the scope of Government Code section 53511 was its previous *Davis I* decision. *Davis II* relied on the holding in *Davis I* to conclude that the lease-leaseback contract did not include a financing component, thus the lease-leaseback contract was not a contract within the meaning of Government Code section 53511 and not subject to the mootness rule of *McGee II* and *Wilson*. (*Davis II, supra,* at 941-942.) Therefore, in order to resolve the validation issue in *Davis II*, the Court should examine whether the *Davis I* decision was correct.

Regarding the merits of *Davis I*, it is clear that for the health of the statutorily planted lease-leaseback tree, the diseased branch of *Davis I* must be pruned. First, the plain language of Education Code section 17406 does not require contractor financing or school district use of the constructed facilities during the lease. (*McGee I, supra*, at 244; and *Taber, supra,* at 127.) This statement was true both when *Davis I* was decided in 2015 and when Section 17406 was revised by the Legislature in 2016. Case law clearly prescribes that if a statute's language is "clear and unambiguous," then "there is nothing for the court to interpret or construe," and the court may not "under the guise of interpretation, insert qualifying provisions not included in the statute." (*MacIsaac v. Waste Management Collection & Recycling, Inc*. (2005) 134 Cal.App.4th 1076, 1083, and *Estate of Griswold*

(2001) 25 Cal.4th 904, 917; see also Code Civ. Proc. §1858 ["In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted …"].) Here, there was no ambiguity in Section 17406 until such ambiguity was injected by *Davis I*.

Second, while both *McGee I* and *Taber* have soundly explained the flawed rationale of *Davis I*, this continuing split of authority has led to confusion and reduced use of lease-leaseback delivery method. CASBO members are uncertain about which legal standard would apply if a challenge were filed against a lease-leaseback contract. As a result, school districts either avoid using lease-leaseback, or they must draft their lease-leaseback contracts to comply with *Davis I* to avoid the risk of a legal challenge despite the fact that *McGee I* and *Taber* have disagreed with it. This result is even truer for school districts outside of the Fifth District Court of Appeal.

Third, the negative impact of *Davis I* on CASBO members is compounded by the "ill-defined" nature of its additional contract terms. (*Taber, supra*, at 129.) *Davis I* provides no guidance as to what contract terms would be sufficient to establish contractor financing or school district use of the facilities during the lease. For those school districts who are still willing to brave the murky waters of lease-leaseback, they have no guidance regarding what terms would meet the requirements of *Davis I*. Would one monthly lease payment after completion of construction be sufficient? Two monthly lease payments? Or would a year of monthly lease payments be required? Similarly, would monthly lease payments have to be the same amount, or could they vary during the lease (especially after completion of the work)?

Due to the "ill-defined" requirements imposed by *Davis I*, school districts cannot be certain whether the payment structure in their lease-

leaseback agreements would pass legal muster, thus further driving school districts away from this construction delivery method specifically created by the Legislature for use by school districts. The fact that after *Davis I* the Legislature substantially revised and expanded Education Code section 17406 in 2016 (effective January 1, 2017) without adding any contractual requirements similar to those imposed by *Davis I* indicates that the Legislature still intends that (a) the lease-leaseback delivery method remains available for use by school districts; and (b) a lease-leaseback agreement need not contain the terms that *Davis I* improperly imposed.

For the above reasons, CASBO urges the Court to disapprove of *Davis I* to the extent that it is inconsistent with *McGee I* and *Taber*.

CONCLUSION

Based on the foregoing, in the best interests of CASBO's members and schoolchildren and taxpayers alike, and for those reasons set forth in Opening and Reply Briefs of Petitioners, this Court should reverse the decision of the Fifth Appellate District in *Davis II*.

Dated: August 23, 2021

Respectfully submitted,

LOZANO SMITH

/s/ Arne B. Sandberg

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) and 8.520 (b)(1) of the California Rules of Court, counsel hereby certifies that the word count of the Microsoft® Office 365 word-processing computer program used to prepare this brief (excluding the cover, tables, and this certificate) is 2,594 words.

Dated: August 23, 2021 Respectfully submitted,

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/s/ Arne B. Sandberg
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PROOF OF SERVICE

I, Kimberly Recupero, am employed in the County of Contra Costa, State of California. I am over the age of eighteen years and not a party to the within entitled cause; my business address is 2001 North Main Street, Suite 500, Walnut Creek, CA 94588.

On August 23, 2021, I served the attached:

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on the interested parties in said cause, by placing a true copy thereof enclosed in a sealed envelope addressed as follows and I caused delivery to be made by the mode of service indicated below:

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[X] (***Regular U.S. Mail***) on Superior Court of California, County of Fresno, in said action in accordance with Code of Civil Procedure Section 1013, by placing a true and correct copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth above, at Lozano Smith, which mail placed in that designated area is given the correct amount of postage and is deposited at the Post Office that same day, in the ordinary course of business, in a United States mailbox in the County of Contra Costa.

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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. Executed on August 23, 2021, at Walnut Creek, California.

/s/ Kimberly Recupero

Kimberly Recupero

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: **hfreiman@lozanosmith.com**

3. I served by email a copy of the following document(s) indicated below:

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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.

8/23/2021

Date

/s/Harold Freiman

Signature

Freiman, Harold (148099)

Last Name, First Name (PNum)

Lozano Smith, LLP

Law Firm