

Supreme Court Case No. 266344
Court of Appeal No. F079811
Superior Court Case No. 12CECG03718

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

**APPLICATION FOR LEAVE TO FILE AMICI
CURIAE BRIEF AND PROPOSED BRIEF OF
COALITION FOR ADEQUATE SCHOOL HOUSING
AND ASSOCIATION OF CALIFORNIA
CONSTRUCTION MANAGERS IN SUPPORT OF
DEFENDANT AND PETITIONER FRESNO UNIFIED
SCHOOL DISTRICT**

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APPLICATION TO FILE *AMICI CURIAE* BRIEF
TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT
OF THE STATE OF CALIFORNIA:

I.

INTRODUCTION

Pursuant to California Rules of Court, rule 8.520(f), the Coalition for Adequate School Housing and the Association of California Construction Managers respectfully request permission to file the accompanying *Amici Curiae* Brief in support of Defendant and Petitioner Fresno Unified School District. *Amici* will address the importance of the lease-leaseback construction delivery method to school districts, the overall use of the lease-leaseback construction delivery method by California public school districts, and the real-world impacts of the Court of Appeal’s ruling. *Amici* also wishes to be heard on whether lease-leaseback agreements, financed through local general obligation bonds, are subject to the validation statutes, Government Code section 860, *et seq.*, as a “contract” under Government Code section 53511.

II.

INTERESTS OF THE *AMICI CURIAE*

The Coalition for Adequate School Housing (“CASH”) is an organization dedicated solely to matters of construction, renovation, and repair of K-12 public schools throughout California, their planning, financing and all matters of law that support and protect the ability of public school districts to preserve public capital funding for schools.

CASH’s membership is comprised of over 1,500 school districts, county offices and private sector businesses including: architects, attorneys, consultants, construction managers, financial institutions, modular building manufacturers, contractors, developers, and others that are in the school facilities industry. Since its founding in 1978, CASH has

sponsored or supported over \$52 billion in statewide school bonds to build, modernize, and maintain thousands of public schools.

CASH has worked closely with the state agencies that have the responsibility of oversight, support and funding of K-12 schools including the Department of General Services' Office of Public School Construction ("OPSC"), which implements and administers the state school facilities construction program and the Division of the State Architect ("DSA"), the agency that oversees construction activities to ensure structurally safe schools. CASH represents its members' interests through advocacy in Sacramento, as well as joining in litigation as amicus curiae where, as here, the interests of school facilities construction are at issue.

The Association of California Construction Managers ("ACCM") is an association of construction managers whose mission is to promote and preserve construction management services in the California public school system. ACCM's role also includes:

- Encouraging the quality and ethical standards of practice for construction managers.
- Educating California school districts about the delivery process, scope, and value of construction management services.
- Providing a forum for discussion of common issues and seeking resolve that benefits both clients and members.

ACCM members work closely with California public school districts to provide students with safe and modernized school facilities. California has over 1,000 public school districts that educate over 6,200,000 students. California public school districts range in size from the largest at over 600,000 students to the smallest with four students. Regardless of size of the school district, each needs to provide safe and modernized facilities to educate their students. The ACCM and its members assist school districts that may not have the staff, expertise, or time to manage their school

construction and modernization projects. ACCM's activities include joining in litigation as amicus curiae where, as here, the delivery of safe and modernized school facilities is at issue.

The question presented in this case is whether a California school district may seek validation of a lease-leaseback agreement, pursuant to Government Code section 53511, when the lease-leaseback agreement is financed through local general obligation bonds.

The trial court granted Defendant's Motion for Judgment on the Pleadings finding that this action was a reverse, in rem, validation action pursuant to Code of Civil Procedure section 863, that invalidating the lease-leaseback agreement was no longer effective relief because the agreement had been fully performed, and that disgorgement was not a remedy in an in rem proceeding. The Court of Appeal reversed finding that the action was both an in rem, reverse validation action, under Code of Civil Procedure section 863, and as an in personum, taxpayer's action, under Code of Civil Procedure section 526a, which disgorgement was a proper remedy. The Court of Appeal continued and found that since it had previously held that the lease-leaseback agreement did not include a "genuine" lease and a contractor financing component for the project, the lease-leaseback agreement did not fall within the ambit of Government Code section 53511 as a contract or other evidences of indebtedness that would be subject to the validation statutes.

This case involves a legal issue of critical statewide importance to all California public school districts faced with aging facilities and limited monies to repair or replace the aging school facilities as to whether validation proceedings are available to expeditiously settle its contract actions. *Amici* respectfully disagrees with the Court of Appeal's opinion and believes that lease-leaseback agreements, financed through local general obligation bonds, are included within the definition of contracts,

obligations and other evidences of indebtedness under Government Code section 53511, and therefore are the proper subject of a validation action under Government Code section 860, *et seq.* As will be discussed in further detail below, the financing of the lease-leaseback project was through the issuance of Fresno Unified School District's local general obligation bonds (Measures K and Q) that was approved by the voters in 2001, and 2010, respectively, and the bond financing is inextricably intertwined with the award and construction of the lease-leaseback agreement that is the subject of this case.

Accordingly, the Court must find that lease-leaseback agreements, finance through local general obligation bonds, fall within the definition of contracts, warrants, and other evidences of indebtedness under Government Code section 53511.

III.

THIS *AMICI CURIAE* BRIEF WILL ASSIST THE COURT

Amici has reviewed the briefs and are familiar with the questions involved in this case and the scope of their presentation. *Amici* believes that its brief will assist the Court by addressing relevant points of law and arguments not discussed in the briefs of the parties and demonstrating that this case is a matter of general statewide importance affecting school districts across the state. Presentation of such legal argument is the very reason for affording amicus curiae status to interested and responsible parties such as CASH and ACCM. (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405 fn. 14.)


IV.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court accept the accompanying *Amici Curiae* Brief for filing in this case, and *Amici* confirms that no party or counsel for any party in the proceeding

authored the attached brief in whole or in part or made any monetary contribution intended to fund its preparation or submission. (Cal. Rules of Court, Rule 8.200(c)(3).)

Dated: August 23, 2021

By: 

Martin A. Hom, SBN 157058

Attorneys for Amici Curiae
Coalition for Adequate School Housing and
Association of California Construction Managers

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CERTIFICATE OF INTERESTED PARTIES

(Cal. Rules of Court, Rule 8.208)

Amici Curiae Coalition for Adequate School Housing and
Association of California Construction Managers knows of no entity or
person that must be listed under subsections (1) or (2) of Rule 8.208(e).
(Cal. Rules of Court, Rule 8.208(e)(3).)

Dated: August 23, 2021

By: 

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Coalition for Adequate School Housing and
Association of California Construction Managers

PROPOSED AMICI CURIAE BRIEF

Coalition for Adequate School Housing and Association of California Construction Managers respectfully submit the following Proposed *Amici Curiae* Brief.

I.

INTRODUCTION

It is no secret that California's school facilities are critically underfunded. A 2015 UC Berkeley study of California's school facility spending found that compared to industry standards, there is an ongoing, structural pattern of inadequate and inequitable spending in many California school districts.¹ This trend signals costly long-term consequences as accumulated facility needs risk becoming health and safety crises. According to the study:

[U]nderfunded school buildings have negative consequences on educational achievement and health, creating risk and cost for the state. Underfunded school buildings will, over time, undermine teacher performance and student achievement, cause or accentuate health problems among children, and have a shortened useful building life. Student morale and effort are weakened by crowded and uncomfortable conditions in schools. In particular, inadequate lighting and climate control, chronic noise, poor indoor air quality, and too little physical space all work against student concentration. The same factors that affect students also negatively affect teacher morale and effectiveness and reduce teacher retention. As these poor conditions cause or exacerbate health problems in children and adults, they lead to increased student and teacher absenteeism, which is linked to lower student achievement. Additionally, building systems and components that are not regularly cleaned and maintained end up having a shorter useful life and

¹ See UC Berkeley Center for Cities + Schools, *Going it Alone: Can California's K-12 School Districts Adequately and Equitably Fund Facilities?* (Nov. 2015) <http://citiesandschools.berkeley.edu/uploads/Vincent_Jain_2015_Going_it_Alone_final.pdf> [Last Accessed August 12, 2021].

need to be replaced sooner than expected—a reality that creates added expenditures down the road on district budgets. Most importantly—as many studies have found—low income and minority students are more likely to attend schools with poor physical conditions, which work to exacerbate educational inequities.²

Underinvestment in school facilities is a problem this State simply cannot continue to ignore. Underfunded school buildings will, over time, cause or accentuate health problems among children, undermine teacher performance and student achievement, and have a shortened useful building life, all of which are bad news for California and our nation at large.

California public schools serve over 6,000,000 students in more than 10,000 schools and 300,000 classrooms, of which 70% are more than 25 years old.³ Another study identified that about 30% of the schools were over 50 years old and 10% were over 70 years old.⁴ A recent estimate determined that California school districts need to spend between \$3,100,000,000 and \$4,100,000,000 annually just to maintain the existing school facilities, and \$117,000,000,000 over the next decade to modernize existing school facilities and construct new schools.⁵

California public school construction is governed under provisions of the Education Code, Government Code, and the Public Contract Code,

² *Id.* at p. 5.

³ See Public Policy Institute of California, *Bonds for K-12 Facilities in California* (May 2017) <<https://www.ppic.org/publication/bonds-for-k-12-school-facilities-in-california>> [Last accessed August 12, 2021]

⁴ See UC Berkeley Center for Cities + Schools, *Financing School Facilities in California: A 10 Year Perspective* (Sept. 2018) <https://www.gettingdowntofacts.com/sites/default/files/2018-09/GDTFII_Brief_Facilities.pdf> [Last Accessed August 12, 2021]

⁵ *Id.*

partly depending on the project delivery method chosen by the school district. The available project delivery methods, as discussed in more detail below, are: design-bid-build, construction manager (agency or multiple prime), lease-leaseback, and design-build. Each of the project delivery methods has its advantages and disadvantages, but the one thing they each have in common is that they provide safe and modernized school facilities for the students and staff. Each school district is faced with the job of determining which project delivery method will allow them to complete their project on time and on budget.

Regardless of the project delivery method chosen for a school project, California school construction is subject to the Field Act⁶ which provides for the Department of General Services to supervise the design and construction of any school building or the reconstruction or alteration of or addition to any school building to ensure that plans and specifications comply with the rules and regulations in Title 24 of the California Code of Regulations, and to ensure that the school construction has been performed in accordance with the approved plans and specifications for the protection of life and property. (Ed. Code § 17280(a)(1).)

⁶ On March 10, 1933, the Long Beach Earthquake, a 6.3 magnitude earthquake, struck and rendered unsafe 120 school buildings in Long Beach alone, and over 200 school buildings throughout Southern California. Luckily, the Long Beach earthquake struck at 5:55pm when school was out and the students and staff had left for the day. Many of the school buildings collapsed completely due to unreinforced masonry construction and shoddy workmanship. Assemblyman John Field sponsored legislation, which became known as the Field Act, that banned unreinforced masonry construction on schools, required that structural design for schools consider earthquake forces, and established the Office of the State Architect (now known as the Division of the State Architect), which developed regulations for the design and construction of school buildings and required that only registered architects and engineers design school buildings.

This case involves one of the project delivery methods known as the lease-leaseback project delivery under Education Code section 17406. Under the lease-leaseback delivery method, the school district leases district owned property to the developer, who agrees to construct the buildings for the school district's use for a guaranteed maximum price and lease the buildings and land back to the school district. (Ed. Code § 17406; see also, *Davis v. Fresno Unified School District, et al.* (2015) 237 CalApp.4th 261, 277.) At the end of the lease term, title to the land and the improvements vests in the school district. (*Id.*)

Here, Defendant and Petitioner Fresno Unified School District ("District") leased the Rutherford B. Gaston, Sr. Middle School site, 1100 E. Church Street, Fresno, California to Defendant and Petitioner Harris Construction Co., Inc., ("Harris"), Harris agreed to construct the middle school for a guaranteed maximum price, and leaseback the site and improvements to the District, wherein title to the site and improvements would vest with the District at the end of the leaseback term ("lease-leaseback agreement"). (See, AA 133-158.)

Plaintiff and Respondent Stephen K. Davis ("Davis") challenged the validity of the lease-leaseback agreement and filed a reverse validation action, pursuant to Code of Civil Procedure section 863. The reverse validation action complaint alleged that the lease-leaseback agreement was invalid because the District failed to get competitive bids, failed to comply with the Education Code, breached its fiduciary duty, and an impermissible conflict of interest existed.

The lease-leaseback project delivery method is a valuable tool available to school districts because the developer/contractor is selected on qualifications and not by price alone like the design-bid-build, and the construction manager-multiple prime contractor delivery methods. Furthermore, the lease-leaseback project delivery method fosters a team

approach in that the contractor is brought on early in the process to work with the architect to identify conflicts and provide input from a contractor's point of view during the design process. This works to eliminate costly change orders and delays during the construction of the project. The design-bid-build delivery method creates an adversarial relationship with the architect defending its design in the plans and specifications and the contractor looking for those conflicts and design errors in order to maximize profits through costly change orders and delays. As discussed in more detail below, a study conducted by the San Diego Taxpayers Association's Educational Foundation⁷ concluded that the lease-leaseback project delivery method has the highest rates of success for delivery school projects on time with the greatest budgetary savings.

For these reasons, and as set forth more fully herein, *Amici* respectfully request that this Court find that a lease-leaseback agreement procured pursuant to Education Code section 17406, financed with local general obligation bonds, is subject to the validation statutes, Government Code section 860 et. seq.

II.

ARGUMENT

A. The Lease-Leaseback Project Delivery Method Provides the Greatest Savings, the Least Change Orders, and Delivers Projects on Time

California school districts have a number of project delivery methods that have been authorized by the Legislature to construct school

⁷ San Diego Taxpayers Educational Foundation is the research arm of the San Diego County Taxpayers Association whose mission is “[t]o support the public, civic leaders and policymakers with independent research on economic and quality-of-life issues impacting taxpayers and ratepayers countywide.”

projects. The most common methods are as follows:

PROJECT DELIVERY METHOD	STATUTORY AUTHORITY	COMMENT
Design-bid-build	Pub. Cont. Code § 20111	\$15,000 or greater
Construction manager – agency or multiple prime contractors	Pub. Cont. Code § 20111; Gov. Code § 4525	\$15,000 or greater
Lease-leaseback	Ed. Code § 17406	Best value procurement
Design-Build	Ed. Code §§ 17250.10 – 17250.50	\$1,000,000 or greater

All of these project delivery methods are used extensively by California school districts.

1. Design-Bid-Build

In the Design-bid-build project delivery method, the school district contracts with an architect to prepare plans and specifications. Once those plans and specifications are approved by the Division of the State Architect (Ed. Code § 17297), the school district then advertises for bids that it is seeking sealed bids for its project based on those plans and specifications. (See, Pub. Cont. Code § 20112.) Any contractor who meets the requirements (i.e., proper contractor license, provides bid security) and completes the bid form may submit a bid to the school district. On the appointed date, time, and place, the school district receives and opens the bids. The lowest responsive, responsible bidder that provides the required security is awarded the contract. (Pub. Cont. Code § 20111.) One of the disadvantages of the design-bid-build project delivery method is that it is awarded to the lowest price and anyone could submit a bid regardless if

they qualified to perform the work or not. Under design-bid-build contracts, contractors routinely submit change orders and project completion is delayed, ultimately costing the school districts more money.

2. Construction Manager–Multiple Prime Contractors

In the construction manager–multiple prime contractors delivery method, the project scope is divided into distinct scopes of work, usually based on the different trades (i.e., plumbing, electrical, mechanical, masonry, landscaping, etc.), so that each trade package is bid as a separate contract. Each trade package is bid in the same manner as the design-bid-build. The school district then hires a construction manager under the provisions of Government Code section 4525 to oversee and coordinate all the prime trade contractors on the project. While proponents of this delivery method claim that the school district will receive a lower overall project price because the amount of subcontractor markup will be reduced through the multiple prime contractors, some of the disadvantages of this project delivery method are that the school district may be administering 25-40 contracts, depending on the size of the project, and that it does not have one contractor to hold accountable for issues on the project.

3. Lease-Leaseback

The lease-leaseback provisions are found at Education Code section 17406,⁸ which provides that,

Notwithstanding Section 17417, the governing board of a school district, without advertising for bids, may let, for a minimum rental of one dollar (\$1) a year, to any person, firm, or corporation any real property that belongs to the district if the instrument by which the property is let requires the lessee therein to construct on the demised premises, or provide for the

⁸ AB2316, effective January 1, 2016, substantially modified Education Code section 17406, which now requires that the lease-leaseback contractor be selected through a best value procurement process, and further allows for preconstruction services by the same lease-leaseback contractor.

construction thereon, of a building or buildings for use of the school district during the term thereof, and provides that title to that building shall vest in the school district at the expiration of that term. The instrument may provide for the means and methods by which that title shall vest in the school district prior to the expiration of the term and shall contain such other terms and conditions as the governing board may deem to be in the best interest of the school district.

The Court of Appeal held that the lease-leaseback agreement in this case was not a “genuine” lease and failed to include any contractor financing and partially reversed the trial court’s sustaining of the defendants’ demurrer without leave to amend. (See, *Davis, supra*, 237 Cal.App.4th at 284-85.) In a striking similar case, the Second Appellate District considered these same arguments and resoundingly rejected them stating that, “[p]laintiff’s efforts to engraft additional requirements – such as the timing of the lease payments, the duration of the lease, and the financing – are not based on the plain language of the statute. . . . Even though there may be, as plaintiffs suggest strong reasons to require competitive bidding in all circumstances, our role is to interpret the language of the statute, not to rewrite the statute.” (*McGee v. Torrance Unified School District, et al.* (2016) 247 Cal.App.4th 235, 244.) The lease-leaseback project delivery method is an exception to the competitive bidding requirements for public works projects. (*Los Alamitos Unified School District v. Howard Contracting, Inc.* (2014) 229 Cal.App.4th 1222, 1229-30.)

Regardless, the lease-leaseback project delivery method remains an important and viable project delivery method available to school districts.

4. San Diego Taxpayers Association Study

With the passage of Prop. 39⁹ in 2000, the San Diego Taxpayers Association undertook a comprehensive study to analyze the performance of school bond programs in San Diego County.¹⁰ In analyzing overall school bond performance, the study posed this question, “Has the program delivered the projects as promised to voters in a timely and cost effective manner?” The metric used to evaluate the overall bond performance considered three primary areas: change of scope, cost effectiveness, and timeliness. Each of the three primary areas had a number of factors that were evaluated and reported as follows:

OVERALL BOND PERFORMANCE METRICS
<i>Change of Scope</i> <ul style="list-style-type: none">• Percentage of original projects completed or to be completed• Percentage of identified facilities needs fulfilled• Change orders as a percentage of project costs
<i>Cost Effectiveness</i> <ul style="list-style-type: none">• Percentage savings on completed projects• Percentage increase in bond program contingency fund• Percentage of projects completed within budget• Percentage of anticipated state matching funds not received

⁹ Prop. 39, the School Facilities Local Vote Act of 2000, amended Prop. 13 by reducing the supermajority necessary to pass local school general obligation bond measures from 2/3 of all votes cast to 55%.

¹⁰ See San Diego County Taxpayers Association, School Facilities Bond Programs in San Diego County (April 2011) <<https://static1.squarespace.com/static/5af07fd050a54f8fc370c748/t/5b50b86d03ce64be3a1c7e66/1532016752995/FINAL+School+Facilities+Bond+Programs+in+San+Diego+County%2C+4-4-2011.pdf>> [Last accessed August 18, 2021]

<ul style="list-style-type: none"> • Change orders as a percent of project costs
<p><i>Timeliness</i></p> <ul style="list-style-type: none"> • Percent of projects completed within the initial construction timeline • District or ICOC reported construction delays

In applying these metrics, the San Diego Taxpayers Association made several key findings, especially as they related to the use of the lease-leaseback project delivery method.

- The majority of bond program facilities projects in the County are implemented using non-traditional project delivery methods, such as lease-leaseback, design-build, multiple prime, and construction manager at risk.
- Several school districts report favorable results from the use of lease-leaseback on school facilities projects. For example, Oceanside Unified School District used lease-leaseback for modernization projects at Lincoln Middle School and experienced no project delays and savings of 12.4% under the original project budget.
- A review of projects using various types of project delivery methods finds that lease-leaseback projects had the highest average savings and the lowest change order rates. On the other hand, design-bid-build projects resulted in the highest change order rates and most reports of projects delays.

These findings are significant in that they demonstrate that the San Diego County school districts are utilizing the different project delivery methods with great success. Most interesting is that the data demonstrates that the lease-leaseback project delivery method produced the highest level of savings coupled with the lowest change order rates and delivered the

project on time. This is especially important to school districts since the available monies for school construction is scarce and limited.

B. Education Code Section 17406 Includes Lease-Purchase Agreements

In *Davis*, the Court of Appeals’ opinion found that under Education Code section 17406 the lease-leaseback agreement must be a “genuine” lease, that the school district must physically occupy the completed buildings and include a contractor financing component. The Court of Appeal’s opinion is misplaced and contrary to Education Code section 17401, which provides that, “[a]s used in this article ‘lease or agreement’ shall include a lease-purchase agreement.”

The Court of Appeal ignores this statutory definition and concludes that only a “genuine” lease, which the Court believes is a traditional real property landlord–tenant lease. A lease–purchase agreement, also known as a finance lease, is a mechanism whereby a school district leases property, and in consideration for the use of the property, makes payments during the term of the lease. Lease-purchase agreements allow school districts to pay for capital assets over a multi-year period without voter approval or in violation of the Constitutional Debt Limitation found in California Constitution Article XVI, section 18. A lease–purchase agreement does not violate the Constitutional Debt Limitation because monthly lease payments are only considered to be current, and not future debt, because the payments are abated if the property is damaged or destroyed beyond repair, and because it is considered to be a current expense of the District. Finally, for security purposes a covenant of the school district to include the lease payments in its annual budget to appropriate the lease payments. These provisions are not found in a real property, landlord-tenant lease.

Here the lease-leaseback agreement contains the following provisions for required a lease-purchase agreement:

Abatement of Rent in the Event of Substantial Interference With Use and Occupancy of the Project and the Site, The amount of Lease Payments for the Project and the Site shall be abated during any period in which there is substantial interference with the use and occupancy of the Project and the Site by the District, including but not limited to by reason of delay in the completion of the Project beyond the final completion date specified in the Construction Provisions. The amount of such abatement shall be agreed upon by the District and the Sublessor such that the resulting Lease Payments represent fair consideration for the use and occupancy of the portion of the Project and the Site, if any, with respect to which there is no such substantial interference. Such abatement shall continue for the period commencing with such substantial interference and ending with the termination of such interference.

Lease Payments to Constitute Current Expense of the District. The District and the Sublessor understand and intend that the obligation of the District to pay Lease Payments and other payments hereunder constitutes a current expense of the District and shall not in any way be construed to be a debt of the District in contravention of any applicable constitutional or statutory limitation or requirement concerning the creation of indebtedness by the District, nor shall anything contained herein constitute a pledge of the general tax revenues, funds or moneys of the District. Lease Payments due hereunder shall be payable only from current funds which are budgeted and appropriated, or otherwise legally available, for the purpose of paying Lease Payments or other payments due hereunder as consideration for use of the Site during the fiscal year of the District for which such funds were budgeted and appropriated or otherwise made legally available for such purpose. This Facilities Lease shall not create an immediate indebtedness for any aggregate payments which may become due hereunder. The District has not pledged the full faith and credit of the District, the State of California or any agency or department thereof to the payment of the Lease Payments or any other payments due hereunder.

The lease-leaseback agreement in this case is a lease-purchase agreement as discussed above. Much of the Court of Appeals' analysis that

there must be a “genuine” lease in order to comply with Education Code section 17406 is based on the improper assumption that the lease must be a traditional landlord-tenant lease. This is incorrect. The important clause that distinguishes a lease-purchase agreement from a landlord-tenant lease is the presence of an abatement clause so that lease-purchase agreements are not considered debt. The requirement for a “genuine” landlord-tenant lease in *Davis* is simply incorrect and contrary to Education Code section 17401.

C. The Lease-Leaseback Agreement Was Inextricably Bound Up in the District’s Bond Financing.

Code of Civil Procedure sections 860-870 provides public entity with a set of accelerated, in rem, procedures for determining the validity of certain bonds, assessments and other agreements. (*Planning & Conservation League v. Department of Water Resources* (1998) 17 Cal.4th 264, 266.) These are commonly called the validation statutes and allows a public entity an action in the Superior Court to promptly determine the validity of any of its actions that fall within the scope of the validation statutes. (See, Code Civ. Proc. § 860.) Any “interested person” may also bring their own lawsuit challenging the validity of such acts. (*Id.* at § 863.) Those lawsuits are referred to as a “reverse” validation action. (*Kaatz v. City of Seaside* (2006) 143 Cal.App.4th 13, 30 fn. 16.)

A validation complaint or reverse validation complaint must be filed within 60 days of the act to be challenged. (Code Civ. Proc. §§ 860, 863.) If a public entity does nothing and no interested person brings a reverse validation action within 60 days, the action is deemed valid and “become[s] immune from attack.” (*Kaatz, supra*, 143 Cal.App.4th at 30; *California Commerce Casino, Inc. v. Schwarzenegger* (2007) 146 Cal.App.4th 1406, 1420.) As a result, all matters which have been or which could have been adjudicated in a validation action must be raised within the statutory

limitations period in Code of Civil Procedure section 860, *et seq.* or they are waived. (*Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 846-47.) A validation judgment is forever binding and conclusive. (*McLeod v. Vista Unified School District* (2008) 158 Cal.App.4th 1156, 1166; Code Civ. Proc. § 870.)

Although the limitation period for a validation action is 60 days, the courts have concluded that the 60-day period is reasonable given the important purpose of the validation statutes, which include the need to limit the extent to which delay due to litigation may impair a public entity's ability to operate financially. (See, *Commerce Casino, supra*, 146 Cal.App.4th at 1420-21 [the determination of what constitutes a reasonable time is ordinarily left to the Legislature and also noted that the 60-day limitation period is not unique to the validation statutes]; *Friedland, supra*, 62 Cal.App.4th at 846.]

To determine whether the validation statutes apply to any certain public entity action, you must cross-reference other statutes because the validation statutes do not specify the matters to which they apply. The validation statutes state that they apply to "any matter which under any other law is authorized to be determined pursuant to this chapter." (Code Civ. Proc. § 860; *Planning & Conservation League, supra*, 17 Cal.4th at 268-69.) Here, the applicable law is Government Code section 53511, which provides that the validation statutes apply to "an action to determine the validity of [a local agency's] bond, warrants, contractor, obligations or evidences of indebtedness." (Gov. Code § 53511(a).) The Courts have interpreted the term contracts in Government Code section 53511 to only include those contracts in the nature of, or directly related the 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.) Contracts involving financial and

financial obligations also fall within the definition, (*Friedland, supra*, 62 Cal.App.4th at 843), as well as contracts that are inextricably bound up with bond financing and financing. (*McLeod, supra*, 158 Cal.App.4th at 1169.) Finally, and most importantly, in *McGee v. Torrance Unified School District, et al.*, (2020) 49 Cal.App.4th 814, the Court of Appeal held that a lease-leaseback agreement funded through local general obligation bonds involved the District’s financial obligations and were inextricably bound up in the school district’s bond financing and therefore, were within the scope of “contracts” under Government Code section 53511. (*Id.* at 824.)

In this case, the Court of Appeal held that since the lease-leaseback agreement did not include a financing component, it followed that the lease-leaseback agreement was not in the nature of or directly related to the public agency’s bonds, warrants or other evidences, and not contracts for purposes of Government Code section 53511 and therefore, not subject to the validation statutes. (*Davis v. Fresno Unified School District*, (2020) 57 Cal.App.5th 911, 941.) First, we believe that the Court of Appeal wrongly included a “financing” requirement into the lease-leaseback statute, Education Code section 17406. To meet the requirements of Education Code section 17406, the statute has three requirements: (1) the real property belongs to the school district, (2) the lease is for the purpose of construction, and (3) title shall vest in the school district at the end of the lease. (*McGee, supra*, 247 Cal.App.4th at 244; *Los Alamitos Unified School District, supra*, 229 Cal.App.4th at 1227; see also, *California Taxpayers Action Network v. Taber Construction, Inc. , et al.*, (2017) 12 Cal.App.5th 115, 127 [Education Code section 17406 has four requirements: (1) the school district owns the property, (2) the school district lets the property to the contractor for a minimum rent, (3) the agreement requires the contractor to provide construction services, and (4) title to the improvements vests with the school district at the expiration of the lease term]) The contractor

financing components is simply not supported by the plain language found in Education Code section 17406. The court's job is to interpret the statute, not rewrite the statute. (See, *McGee, supra*, 247 Cal.App.4th at 244.)

Here, the District leased the Rutherford B. Gaston, Sr. Middle School site to Harris, Harris agreed to construct the middle school for a guaranteed maximum price, and leaseback the site and improvements to the District, wherein title to the site and improvements would vest with the District at the end of the leaseback term. (AA133-158.) The District financed the lease-leaseback project with Measure K and Q bond funds. The District is currently the third largest school district in California and serves more than 74,000 students at 64 elementary schools, 15 middle schools, eight high schools, four alternative schools, and three special education schools. The Gaston Middle School project was one of many projects contemplated by the District's bond program to reduce overcrowding, and upgrade and modernize the aging school facilities through the use of local bond funds and State matching funds. Specifically, the Gaston Middle School project was the first middle school located in Southwest Fresno. Prior to the construction of Gaston Middle School, the Southwest Fresno middle school students were bussed to four different middle schools. Measure K¹¹ was passed by the voters in 2001, in an effort to,

- reduce overcrowding by building new classrooms/schools
- make the District eligible for State matching funds
- acquire school technology and hardware

¹¹ See Fresno Unified School District, Facilities Management & Planning, Measures K, Q, X, and M Bond Information. <mk0facilities8unar19.kinstacdn.com/wp-content/uploads/Measure-K-Ballot-Text.pdf> [Last accessed August 22, 2021]

- repair plumbing, heating and air conditioning systems
- building library/media centers
- upgrade classroom electrical wiring for computers
- repair, rehabilitate, construct and acquire educational facilities and related property

In 2010, the voters passed Measure Q¹² to offset state budget cuts, attract quality teachers, and repair classrooms by,

- upgrading vocational education classrooms/science labs/technology/libraries
- improving security/fire safety/restrooms/plumbing/ventilation systems
- increasing handicap access
- securing state matching funds
- replacing deteriorating portables
- preventing dropouts by improving alternate schools
- acquiring, constructing, repairing campuses/facilities/equipment

Since the lease-leaseback agreement was financed through the District's local bond measures, there is no question that the lease-leaseback agreement was inextricably bound up with the bond financing. First, the validation statutes apply because the District's issuance of the entire Measure K and Q bonds were an integral part of the whole method of financing the costs associated with reducing overcrowding and modernizing its aging school facilities including the Gaston Middle School project that is the subject of the lease-leaseback agreement. Both Measure K and Q stated

¹² See Fresno Unified School District, Facilities Management & Planning, Measures K, Q, X, and M Bond Information. <mk0facilities8unar19.kinstacdn.com/wp-content/uploads/11-2-2010-Measure-Q-Ballot-Full-Text.pdf> [Last accessed August 22, 2021]

that their purpose was to acquire and construct school facilities to reduce overcrowding. The Gaston Middle School was a key component of that plan because a middle school did not exist in this area of Fresno and the students had to be bussed to other middle schools in the District for more than 30 years. The purpose of the validation statutes is to allow public entities to promptly settle all questions about the validity of its action. (*McLeod, supra*, 158 Cal.App.4th at 1166.) If the validation statutes do not apply to lease-leaseback agreements finance through local general obligation bonds, then the District's ability to operate would be impacted. Delays to the construction of the District's school facilities, or selling of its general obligation bonds would severely hamper its ability to reduce overcrowding and modernize its aging facilities. In *Walters v. County of Plumas* (1976) 61 Cal.App.3d 460, a taxpayer challenged the county's implementation of a solid waste disposal program. One cause of action sought to set aside a guarantee agreement that would assist franchisees in financing the purchase of heavy equipment for the waste disposal program. The court held that that cause of action was barred by the 60-day validation limitation period. (*Id.* at 468.) The court stated that,

We perceive the essential difference between those action which ought and those which ought not to come under [the validation statutes] to be the extent to which the lack of 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. We feel that the possibility of future litigation is very likely to have a chilling effect upon potential third party lenders, thus resulting in higher interest rates or even the total denial of credit, either of which might well impair the county' ability to maintain an adequate waste disposal program. (Emphasis added.)

(*Id.*)

The Gaston Middle School project was just one of many different bond projects under Measures K and Q to reduce overcrowding and to provide modernized and safe school facilities. Even taking into account the limitations on Government Code section 53511's applicability, there can be little question that the statute authorizes validation actions for acts and contracts related to Proposition 39 bond expenditures, such as the District's lease-leaseback agreement.


Further, the District's Measures K and Q bonds were inextricably bound up with the lease-leaseback agreement that is financed by Measures K and Q. With voter approval, a school district is allowed to sell general obligation bonds for its facilities program. (See, Education Code section 15100, *et seq.*) The amount of bonds is limited by the assessed value of real property located in the District's boundaries. For a unified school district, the bonds shall not exceed 2.5% of the taxable property of the unified school district (Ed. Code § 15106), and 1.25% of the taxable property of an elementary school district or a high school district (Ed. Code § 15268). As discussed in Fresno Unified School District's Reply to Respondent's Answering Brief, the District's bonds are tax-exempt bonds. After issuance of the tax-exempt bonds, the public entity must comply with the following during a three year "temporary period" to maintain the tax-exempt status of the bonds: (1) within 3 years, 85% of the proceeds must be spent on capital projects, (2) within 6 months, a binding obligation must be entered into to expend at least 5% of the proceeds, and (3) the public entity must complete the projects with due diligence. (See 26 U.S.C. § 148.) Clearly, the District's bonds were inextricably bound up with the lease-leaseback agreement in that the District must meet certain requirements to maintain the tax-exempt bond status.

III.

CONCLUSION

Based on the foregoing, *Amici* Coalition for Adequate School Housing and Association of California Construction Managers respectfully requests that this Court find that lease-leaseback agreements, financed through local general obligation bonds, fall within the definition of contracts under Government Code section 53511, and therefore, are subject to the validation statutes.

Dated: August 23, 2021

By: 

Martin A. Hom, SBN 157058

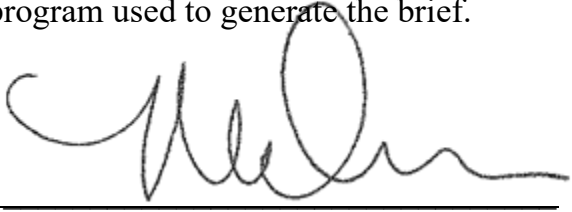
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Dated: August 23, 2021

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AFFIDAVIT OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is: 921 N. Harbor Boulevard, Suite 408, La Habra, CA 90631.


On August 23, 2021, I served the foregoing document described as: **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND PROPOSED BRIEF OF COALITION FOR ADEQUATE SCHOOL HOUSING AND ASSOCIATION OF CALIFORNIA CONSTRUCTION MANAGERS IN SUPPORT OF DEFENDANT AND PETITIONER FRESNO UNIFIED SCHOOL DISTRICT** on the interested parties in this action as follows:

<u>Via U.S. Mail</u> Honorable Kimberly Gaab FRESNO COUNTY SUPERIOR COURT 1130 O Street Fresno, CA 93721	<u>Via U.S. Mail</u> FIFTH DISTRICT COURT OF APPEAL 2424 Ventura Street Fresno, CA 93721
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BY US MAIL: I placed 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 Tao Rossini, APC'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 23, 2021, at La Habra, California.



Cathleen Siler

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/Martin Hom

Signature

Hom, Martin (157058)

Last Name, First Name (PNum)

Tao Rossini, APC

Law Firm

