Case No. S266344

IN THE SUPREME COURT OF CALIFORNIA

STEPHEN K. DAVIS,

Plaintiff and Respondent,

v.

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

Defendants and Petitioners.

After A Published Decision By The Court Of Appeal
Fifth Appellate District
Case No. F079811

From the Superior Court,
County of Fresno,
Case No. 12CECG03718
The Honorable Kimberly Gaab

ANSWER OF PETITIONER FRESNO UNIFIED SCHOOL DISTRICT TO *AMICUS CURIAE* BRIEFS OF CALIFORNIA ASSOCIATION OF BOND OVERSIGHT COMMITTEES AND HOWARD JARVIS TAXPAYERS ASSOCIATION

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Petitioner Fresno Unified School District ("District") respectfully submits its Answer to the *Amicus Curiae* Briefs of the California Association of Bond Oversight Committees ("CABO") and Howard Jarvis Taxpayers Association ("Jarvis"), both filed in support of Plaintiff/ Respondent Stephen K. Davis ("Davis").

I.

INTRODUCTION

Each of the arguments raised by CABO and Jarvis in their *Amicus Curiae* briefs is fundamentally flawed and should be rejected by this Court. Notwithstanding CABO's contrary contentions, citizens oversight committees are tasked with acting as public watchdogs to oversee the expenditure of proceeds from bond measures to ensure these proceeds are expended for the purposes specified in California Constitution Article XIII A, Section 1(b)(3), and with promptly alerting the public to any waste or improper expenditure of school construction bond money detected by the committee, not with monitoring school districts for alleged improprieties in their contracting processes. Moreover, Jarvis misconstrues the lower court's decision in arguing that the District has a duty to recover its "overpayment" from the contractor, and that "[T]here is no justification for Government Code section 53511 to block this remedy."[1] District has never contended that the term "contracts" as used in Section 53511 generally refers to all public agency contracts, as Jarvis alludes.

Jarvis also suggests that, should the Court rule in the District's favor, this would somehow eradicate the liberal application of the standing

[1] Citing *Vasquez v. State of California* (2003) 105 Cal.App.4th 849.

requirements under Code of Civil Procedure section 526a.[2] However, a ruling in the District's favor would have no effect on the standing requirements under Code of Civil Procedure section 526a. Rather, it would only require that taxpayer suits challenging the underlying validity of "contracts" falling within the ambit of Government Code section 53511 be prosecuted under the Validation Statutes.[3]

CABO and Jarvis both incorrectly contend that a ruling in the District's favor would eliminate a taxpayer's ability to challenge governmental actions to restore public funds. However, a 'yes' answer to this Court's question would affect only those taxpayer's suits where the gravamen of the action is to challenge the validity of "contracts" falling within the ambit of Government Code section 53511.[4] Taxpayer claims outside of those challenging the validity of such contracts would not be

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[2] Section 526a provides: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a local agency, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax that funds the defendant local agency, including, but not limited to, the following: [¶] (1) An income tax. [¶] (2) A sales and use tax or transaction and use tax initially paid by a consumer to a retailer. [¶] (3) A property tax, including a property tax paid by a tenant or lessee to a landlord or lessor pursuant to the terms of a written lease. [¶] (4) A business license tax."

[3] The validation statutes are codified at Code of Civil Procedure § 860, et seq. (the "Validation Statutes.")

[4] Jarvis seemingly concedes this point in citing to *California Commerce Casino, Inc. v. Schwarzenegger* (2007) 146 Cal.App.4th 1406, 1424, where the court states its conclusion, as follows: "[G]uided by *Ontario* and its progeny, we conclude contracts subject to validation under Government Code section 17700 are those that are in the nature of, or *directly* relate to the state or a state agency's bonds, warrants, or other evidence of indebtedness." [emphasis in original]

subject to the Validation Statues or the sixty (60) day statute of limitations[5] thereunder.

CABO and Jarvis further argue that a ruling in the District's favor would leave taxpayers with too short a time in which to file a lawsuit challenging the validity of a lease-leaseback contract, ignoring the fact that school districts provide the public with information about pending lease-leaseback contracts well before any contract is approved by a district or signed by the parties. Hence, taxpayers such as Respondent Davis receive more than adequate notice of an upcoming lease-leaseback transaction, thereby allowing them to mount a timely legal challenge within the 60-day limitation period under Code of Civil Procedure section 861. Although ignored by CABO and Jarvis, the existence of adequate taxpayer notice has been demonstrated by Davis bringing suit under the Validation Statutes in this action within the 60-day limitations period.

For over three years prior to commencement of construction, the public was apprised that the new Gaston Middle School would be constructed using the lease-leaseback method of project delivery. Such notification began on April 29, 2009, when the District's Board of Education released a Facilities Master Plan,[6] and continued with, among other things, the Measure Q bond issuance;[7] publication of a Request for

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[5] A validation action or reverse validation action must be commenced within 60 days of the act to be challenged. (Code of Civil Procedure §§ 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." (*California Commerce Casino, Inc. v. Schwarzenegger, supra*, 146 Cal.App.4th at p.1420.)

[6] See https://facilities.fresnounified.org/wp-content/uploads/4-23-09_FUSD_MP_Final_Rpt.pdf (See page 64 reference to a "New Southwest Middle School.")

[7] See https://facilities.fresnounified.org/wp-content/uploads/11-2-2010-Measure-Q-Ballot-Full-Text.pdf which stated that the former Carver

Quotation ("RFQ") for lease-leaseback services in the Fresno Bee;[8] adoption of resolutions authorizing the District to issue bonds to fund the construction of the new Gaston Middle School;[9] approval of contracts for demolishing existing structures to make way for the new Gaston Middle School;[10] release of the site plans for the new school,[11] and adoption of Resolution 12-01 approving the award of the subject lease-leaseback contract to Harris Construction Co., Inc.[12]

Both CABO and Jarvis ignore that from a public policy perspective, if a 60-day validation period for the District's lease-leaseback agreements financed through local general obligation bonds does not apply, the threat of litigation will hang over projects such as the Gaston Middle School for years, and the District's ability to sell bonds and complete school projects will be severely hampered. This can result in increased expense to the District through protracted litigation, and increased difficulty in completing projects within the District's bond program.

A holding in the District's favor will not negatively impact taxpayer actions under either Education Code section 15284 or Code of Civil

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Middle School (cite of the new Gaston Middle School) could benefit from the bond proceeds

[8] https://facilities.fresnounified.org/wp-content/uploads/RFQ-No.-110327.pdf

[9] https://facilities.fresnounified.org/wp-content/uploads/August-24-2011-Adopt-Resolution-11-05-Issuance-and-Sale-of-General-Obligation-Bonds-Measure-K-Series-G-Issuance.pdf

[10] https://facilities.fresnounified.org/wp-content/uploads/January-25-2012-Approve-Award-of-Bid-121113-Structural-Demolition-and-Land-Clearance-for-New-Southwest-Middle-School-Phase-1.pdf

[11] https://facilities.fresnounified.org/wp-content/uploads/Gaston-Middle-School-Phase-1.pdf

[12] https://facilities.fresnounified.org/wp-content/uploads/September-26-2012-Adopt-Resolution-12-01-Authorizing-the-Execution-of-Lease-leaseback-Agreements-for-Construction-of-Rutherford-B.-Gaston-Sr.-Middle-School-Phase-II.pdf

Procedure section 526a given that taxpayers are apprised of upcoming lease-leaseback transactions long before the contracts for such projects are approved by a school district or executed by the parties. Given the potential harm to the District's ability to sell bonds and timely complete school projects if a 60-day limitations period is not applied, the arguments against a 'yes' answer to the Court's question made by CABO and Jarvis should be rejected by this Court.

II.

ARGUMENT

A. A 'Yes' Answer to This Court's Question Will Not Hamper or Negatively Impact "School Bond Waste Prevention Actions" That Do Not Challenge the Underlying Validity of Contracts Falling Within the Ambit of Government Code Section 53511.

In November of 2000, voters of the State of California approved Proposition 39, which, among other things, reduced the requirement for the percentage of voters needed to approve bonded indebtedness by a school district. (see *Ridgecrest Charter School v. Sierra Sands Unified* School Dist. (2005) 130 Cal.App.4th 986, 993.) "Proposition 39, also known as the 'Smaller Classes, Safer Schools, and Financial Accountability Act,' ... amended the state Constitution to create an exception to the 1 percent limit on ad valorem taxes on real property, and to reduce from two-thirds to 55 percent the number of voters required to approve any bonded indebtedness proposed to be incurred by a school district for the 'construction, reconstruction, rehabilitation, or replacement of school facilities.'" (*Ibid.,* quoting Proposition 39, § 4.) Education Code section 15284 also allows a taxpayer within a school district to bring an action, dubbed a "School Bond Waste Prevention Action" "to obtain an

order restraining and preventing any expenditure of funds received by a school district ... through the sale of bonds authorized by [Proposition 39]. (Education Code, § 15284, subd. (a).)" As with Code of Civil Procedure section 526a, an action brought under Education Code section 15284 takes special precedence over all other civil matters, except those granted equal precedence by law. (Education Code, § 15284, subd. (b).) "The rights, remedies, or penalties established by [Education Code section 15284] are cumulative to the rights, remedies, or penalties established under other laws, including subdivision (a) of Section 526 ... of the Code of Civil Procedure." (Education Code, § 15284, subd. (c).) As with Section 526a, Education Code section 15284 contains no express statute of limitations. (see *McLeod v. Vista Unified School District* (2008) 158 Cal.App.4th 1156, 1171.)

Proposition 39 also placed strict "accountability requirements" on local school districts, including restrictions on district expenditures of the proceeds from bond measures. A school district's bond indebtedness for school facilities may be approved by only 55 percent of the voters if the proposition approved by the voters also *includes a set of four enumerated accountability requirements*. Those requirements are: (1) The proceeds from the sale of the bonds must be used only for the purposes specified in California Constitution Article XIII A, section 1(b)(3) and not for any other purpose, such as teacher salaries or school operating expenses; (2) the proposition must include a list of the specific school facilities to be funded and the school district's certification that it has evaluated certain factors in developing that list; (3) the school district board must conduct an annual, independent performance audit to ensure that the bond measure funds will be expended only on the specific projects listed; and (4) the

school district board must conduct the required annual, independent financial audit of the proceeds from the sale of the bonds until all bond proceeds have been expended. (see *Committee for Responsible School Expansion v. Hermosa Beach City School District* (2006) 142 Cal.App.4th 1178, 1187.)

Taxpayer suits under Education Code section 15284 can be initiated when it appears that an expenditure of bond proceeds is in violation of, or for purposes other than those specified by, the California Constitution, Article XIII A, section 1(b)(3). Such an action was brought in *Taxpayers for Accountable School Bond Spending v. San Diego Unified School District* (2013) 215 Cal.App.4th 1013, after the San Diego Unified School District voters approved a bond measure that was to fund, among other things, renovations and upgrades to the Hoover High School stadium. After issuance of the bonds, San Diego Unified School District approved changes to the Hoover High School stadium, including the addition of new field lights for night games. However, the bond measure did not specifically list or otherwise include field lighting for Hoover's stadium as a specific project that the bond proceeds could be used for as required by the California Constitution for all school facility bonds passed pursuant to Proposition 39.

Plaintiff Taxpayers for Accountable School Bond Spending sued San Diego Unified School District, bringing a cause of action for waste and misuse of bond funds under Code of Civil Procedure section 526a,[13]

[13] The San Diego Unified School District argued that Plaintiff Taxpayers for Accountable School Bond Spending lacked standing under Education Code section 15284(a) because it did not allege any individual harm. However, as the plaintiff did not allege standing under Education Code section 15284 in its complaint, the Court of Appeal did not address the issue, but instead found that plaintiff had associational standing under

alleging that the planned field lighting could not be funded through the bond measure because the measure did not specifically list field lighting among the schedule of included projects. The trial court dismissed the taxpayers' suit and held in favor of San Diego Unified School District. However, among several issues considered on appeal, the Court of Appeal reversed the trial court's decision regarding the funding of field lighting, explaining that the bond measure did not specifically list field lighting as a project to be funded. Therefore, it could not be funded from the bond proceeds. (*Taxpayers for Accountable School Bond Spending v. San Diego Unified School District*, *supra*, 215 Cal.App.4th at pp. 1030-1031.)

CABO and Jarvis both misguidedly contend that should this Court find for Petitioners District and Harris Construction Co. Inc. ("Harris') (jointly "Petitioners,") and hold that a lease-leaseback arrangement in which construction is financed through bond proceeds, rather than by or through the builder, is a "contract" within the meaning of Government Code section 53511, it would effectively insulate and immunize all public construction contracts from legal challenge and judicial scrutiny beyond the 60-day limitations period to initiate a validation action. Contrary to this contention, the only actions that would be affected by this Court ruling in Petitioners' favor are those where the gravamen of the action is to challenge the validity of "contracts" falling within the ambit of Government Code section 53511. (see *McGee v. Torrance Unified School District* (2020) 49 Cal.App.5th 814, 823, review denied (Aug. 26, 2020); see also, *McLeod v. Vista Unified School District* (2008) 158 Cal.App.4th

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Code of Civil Procedure section 526a. (*Taxpayers for Accountable School Bond Spending v. San Diego Unified School District*, *supra*, 215 Cal.App.4th at p. 1031.)

1156, 1169.) As was the case in *Taxpayers for Accountable School Bond Spending, supra*, taxpayer actions challenging the improper expenditure of bond proceeds would not be impacted, even if those expenditures were made pursuant to contracts falling within the ambit of Government Code section 53511, as claims outside of those challenging the underling validity of such contracts are not subject to the Validation Statues or the sixty (60) day statute of limitations thereunder. As this Court previously explained in *City of Ontario v. Superior Ct.* (1970) 2 Cal.3d 335:

> "City argues that the matters sought to be enjoined are provided for in the Motor Stadium Agreement itself; this may be true in part, but other matters alleged go beyond the requirements of that agreement. To the extent plaintiffs ask for injunctive relief *unrelated to the ... terms of the Motor Stadium Agreement*, no reason appears to deny them their normal and long-standing taxpayers' remedy" [under Code Civ. Proc. Section 526a] notwithstanding that the summons did not conform to the requirements of Code of Civil Procedure sections 861 to 863."[14] [emphasis supplied.]

CABO misguidedly argues that a ruling in favor of Petitioners will negatively impact citizen and taxpayer suits for enforcement under Education Code section 15284(a).[15] Here, CABO contends that if the Validation Statutes are found to apply to contracts falling within the ambit of Government Code section 53511, citizen oversight committees would not be able to inform the public of improprieties in the "contracting or

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[14] *Id.* at p. 345; see also Code of Civil Procedure §§ 861 to 863, which set forth the *in rem procedure* and the requirements for the notice thereunder and for publication of the summons.

[15] Education Code section 15284, added by Proposition 39, allows a taxpayer within a school district to bring an action, entitled a "School Bond Waste Prevention Action" (see Education Code, § 15284, subd. (e)), "to obtain an order restraining and preventing any expenditure of funds received by a school district ... through the sale of bonds authorized by [Proposition 39]. Legislation implementing Proposition 39 is codified in sections 15264 through 15284 of the Education Code. (See *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, fn. 9.)

construction process within the 60-day time frame" under the Validation Statutes. However, this argument collapses under its own weight, as citizen oversight committees are not tasked with monitoring and/or informing the public regarding improprieties in the contracting or construction processes, whether such alleged improprieties purportedly arise from conflicts of interest or otherwise. Rather, citizen oversight committees are tasked with informing the public *regarding the improper expenditure of bond proceeds*[16] in order to ensure that, among other things, (a) the proceeds from bond measures are expended only for the purposes specified in California Constitution Article XIII A, section 1(b)(3)[17] and (b) that no bond proceeds are used for teacher or administrative salaries or other operating expenses.[18]

Assuming arguendo that citizen oversight committees were tasked with informing the public of improprieties in the contracting process, there would be adequate time for a taxpayer to mount a challenge to an alleged impropriety under the Validation Statutes, as taxpayers are apprised of upcoming lease-leaseback transactions long before the contracts for such projects are approved by a school district or executed by the parties. CABO and Jarvis both conveniently ignore that taxpayers receive more

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[16] In fact, CABO admits that its goal is to help citizens' oversight committees fulfill their purpose of providing effective oversight of ***school district construction-bond spending***.

[17] *Comm. for Responsible Sch. Expansion v. Hermosa Beach City School District* (2006) 142 Cal.App.4th 1178, 1185.

[18] Actions under Education Code § 15284 can be brought by a taxpayer when it appears that an expenditure of bond proceeds is in violation of the California Constitution.[18] (*Comm. for Responsible Sch. Expansion, supra*, 142 Cal.App.4th at p. 1186; Education Code, § 15284, subd. (a).) In bringing such actions, taxpayers largely rely on citizen committees' review of the required annual, independent financial audit prepared by school districts detailing their use of the proceeds from bonds sales that is required of a school district using bond proceeds for the construction of school facilities. (*Ibid.*)

than adequate notice of an upcoming lease-leaseback transaction that would allow them to mount a timely legal challenge within the 60-day limitation period under Code of Civil Procedure section 861. The adequacy of the advance notice to taxpayers has been clearly demonstrated in this case by Respondent Davis.

CABO and Jarvis further argue that contracts funded by bond proceeds are not of the type of "contracts" that Section 53511 was meant to reach. However, CABO and Jarvis again miss the mark, as the lineage of appellate cases subsequent to *City of Ontario*, *supra*, while continuing to apply the rationale used by this Court that confers a narrow scope on the meaning of the term "contract" under Gov. Code section 53511, has, for more than 50 years, found contracts which are "***in the nature of***," "***directly related to***" or "***inextricably intertwined***" with bonds, warrants, or other evidences of a governmental entity's indebtedness to be "contracts" within the meaning of Government Code section 53511. Contrary to the assertion of Jarvis, which relies solely on a dissent[19] by Justice Burke in *City of Ontario*, *supra*, the application of the Validation Statues is not limited to contracts on indebtedness. Nor has this contention been "black letter law" accepting "recent appellate decisions" as argued by Jarvis.

Jarvis's comments in this regard appear to be directed at *McGee v. Torrance Unified School District* (2020) 49 Cal.App.5th 814, where the Court of Appeal held that a lease-leaseback agreement funded through local general obligation bonds that involved the school district's financial obligations was *inextricably bound up* in the school district's bond financing and, therefore, was within the scope of "contracts" under

[19] See *City of Ontario*, *supra*, 2 Cal.3d at p. 348, dissent n. 1.

Government Code section 53511.[20] (*Id.* at p. 824.) Contrary to Jarvis's contention, since the subject lease-leaseback agreement was financed through the District's local bond measure, there should be no question that the lease-leaseback agreement was inextricably bound up with the underlying bond financing.

Furthermore, belying Jarvis's arguments in this regard, the purpose of the Validation Statutes has never been strictly limited to ensuring the marketability of newly issued bonds, nor does Petitioner District contend that the term "contracts" as used in Section 53511 refers generally to all public agency contracts.

Notwithstanding CABO's attempt to muddy the waters, Education Code section 15284(a) concerns taxpayer actions for orders restraining and preventing the expenditure of funds received by a school district through the sale of bonds. Section 15284(a) does not concern actions challenging the underlying validity of "contracts" funded by bond proceeds. A finding by this Court find that the subject lease-leaseback agreement is a "contract" within the meaning of Government Code section 53511 will not hamper or negatively impact enforcement actions under Education Code section 15284(a)[21] nor will remedies available to taxpayer under Code of Civil Procedure section 526a be impaired. Tellingly, CABO itself argues that Education Code section 15284(c)[22] "is strong if not conclusive

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[20] Even considering the "directly related to" or "inextricably intertwined" 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. (see discussion of Prop 39, *supra.*)

[21] See e.g., *Taxpayers for Accountable School Bond Spending, supra,* 215 Cal.App.4th at pp. 1030-1031.

[22] Educ. Code §15284(c) provides, as follows: "The rights, remedies, or penalties established by this section are cumulative to the rights, remedies, or penalties established under other laws, including subdivision (a) of

evidence that the Legislature understood that [Education Code section 15284 and Code of Civil Procedure section 526a] ..... did not intend to supplant or abrogate *the rights of taxpayers to bring an action under Education Code section 15284 (or CCP 526a) to challenge the wasteful spending of bond proceeds* with the more restrictive Validation Statutes." [Emphasis supplied.] However, a ruling in favor of Petitioners by this Court will *not* abrogate a taxpayer's right to challenge the wasteful spending of bond proceeds nor subject such a challenge to a 60-day statute of limitations whether such action is brought under Education Code section 15284 or Code of Civil Procedure section 526a. (see *McGee v. Torrance Unified School District, supra,* 49 Cal.App.5th at p. 823; see also *McLeod v. Vista Unified School District, supra,* 158 Cal.App.4th 1156, 1169.)

B. Taxpayers, Like Respondent Davis, Had More Than Adequate Notice of the Subject Lease-Leaseback Transaction to Timely Challenge It Under the Validation Statutes.

Respondent Davis, whose company is a direct competitor of Petitioner Harris, not only had adequate notice of the subject lease-leaseback agreement to mount his still ongoing legal challenge, but he also had sufficient notice to participate in the application process to be included on the list of pre-approved contractors selected by the District to provide lease-leaseback related services for a 3-year period. Respondent Davis's company was not one of 14 companies selected by the District to provide lease-leaseback related services. Thereafter, he brought the underlying action.

That a taxpayer, like Davis, had ample notice to timely bring suit is shown not only by the filing of this action but also by the history of the

subject lease-leaseback transaction. Beginning on April 29, 2009, at a public meeting with a published agenda, the District's Board of Education released a Facilities Master Plan. This Plan noted that in 2007, the Board had formed a committee consisting of public representatives and District staff, which held over 20 public meetings to develop the plan and recommendations. (see page 2 of the Plan.) At page 64, this Plan refers to a "New Southwest Middle School" (which became the Gaston Middle School), with a preliminary construction cost estimate of $33 million, based on a "Lease/Leaseback" construction contract."[23] On June 16, 2010, the Board of Education approved an update of the Facilities Master Plan, calling for a new Southwest Middle School, with an estimated preliminary cost of $30 million.[24] In November of 2010, Fresno voters were provided with Measure Q, a bond issue that expressly mentions the former "Carver" Middle School as a school that could benefit from the bond proceeds. The new Gaston school was later built on the site of the Carver Middle School.[25]

On March 9, 2011, the District issued RFQ No. 110327 for Lease-Leaseback Services that requested "statements of qualifications" from business entities experienced in the lease-leaseback public project delivery method and from business entities who could demonstrate their competence and ability to complete public works projects using the lease-leaseback delivery method, with all responses to the RFQ due by April 6,

[23] https://facilities.fresnounified.org/wp-content/uploads/4-23-09_FUSD_MP_Final_Rpt.pdf
[24] https://facilities.fresnounified.org/wp-content/uploads/6-16-10_Bd_App_Updt_Fac_Mstr_Plan.pdf
[25] https://facilities.fresnounified.org/wp-content/uploads/11-2-2010-Measure-Q-Ballot-Full-Text.pdf

2011.[26] The RFQ indicated that the future scope of lease-leaseback related services required may include, but not be limited to, "[D]evelopment of a Guaranteed Maximum Price (GMP) that is acceptable to the District;" and to "[N]egotiate a Lease Leaseback contract with the District with an acceptable [guaranteed maximum price] in order to qualify firms that best meet the needs of the District for future projects."[27]

RFQ No. 110327 for Lease-Leaseback Services was published to the general and contracting public in the Fresno Bee on March 9 and 16, 2011, which publications both included a weblink link that would allow all documents relating to the RFQ to be downloaded by all interested parties, providing notification that a "[P]re-RFQ conference will be held at the FUSD purchasing Office at 9:00 a.m. on March, 2011, and providing that all responses to the RFQ from interested parties were required to be received by the District no later than 2:01 p.m. on April 6, 2011.[28]

On March 23, 2011, the Prebid Conference was held as advertised by the District with Respondent Davis's company, Davis Moreno Construction, Inc., being in attendance at the conference.[29] On April 6, 2011, Davis's company, Davis Moreno Construction, Inc. responded to the RFQ in an attempt to be included in the District's pool of qualified contractors to provide lease-leaseback services to the District. [30]

On May 25, 2011, the Board of Education approved, as recommended, Agenda Item, A-7, the award of Request for Qualifications (RFQ) #110327, to fourteen (14) qualified contractors who responded to the RFQ,

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[26] https://facilities.fresnounified.org/wp-content/uploads/RFQ-No.-110327.pdf
[27] *Ibid.*
[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*

for purposes of providing lease-leaseback services to the District on an as-needed basis for a three (3) year period under the lease-leaseback project delivery method allowed under Education Code Section 17406. Respondent Davis's company, Davis Moreno Construction, Inc., was not one of the fourteen (14) contractors selected by the District to provide lease-leaseback services.[31]

On August 24, 2011, the Board of Education adopted Resolution 11-05, authorizing the District to issue bonds to fund construction of the new Gaston school. [32] On May 23, 2012, the Board of Education considered and adopted Resolution 11-21 "Authorizing the Execution of Lease-leaseback Agreements (Site Lease and Facilities Lease with Construction Provisions) for Construction of Rutherford B. Gaston, Sr. Middle School, Phase I (On-Site/Off-Site Work"). Resolution 11-21 provided in relevant part:

> Phase I of the project consists of on-site/off-site work, construction of the flood control basin, site electrical, site plumbing, off-site landscape, abatement, soil remediation, and demolition of Carver Academy Middle School at the guaranteed maximum price of $5,277,469. The lease-leaseback project delivery method is allowed under Education Code Section 17406. Harris Construction Co., Inc. is on the list of lease-leaseback contractors approved by the Board of Education on May 25, 2011. Upon approval of Resolution 11-21 and execution of the lease-leaseback documents, construction will commence on Phase I of the project. Lease-leaseback documents for Phase II, construction of the school buildings, will be presented to the Board at a later date. The site lease and facilities lease with construction provisions are available for review in the Board Office.[33]

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[31] *Ibid.*

[32] https://facilities.fresnounified.org/wp-content/uploads/August-24-2011-Adopt-Resolution-11-05-Issuance-and-Sale-of-General-Obligation-Bonds-Measure-K-Series-G-Issuance.pdf

[33] https://facilities.fresnounified.org/wp-content/uploads/20120523_Resolution11-21.pdf

On September 26, 2012, the Board of Education considered and adopted "[R]esolution FY12-01, authorizing the execution of the Lease-Leaseback Agreement (Site Lease and Facilities Lease with Construction Provisions) with Petitioner Harris for construction of the Rutherford B. Gaston Sr. Middle School Phase II for a guaranteed maximum price of $36,702,876. (See AA17 – AA103.)[34]

Thus, beginning on April 29, 2009, through the execution of the lease-leaseback contract on May 24, 2012, over three years later, the public was kept well-informed that the District was planning to and would build Gaston Middle School utilizing the lease-leaseback project delivery method. As such, any taxpayer who wished to challenge the subject lease-leaseback transaction had more than adequate notice[35] to bring a timely challenge thereto within the 60-days allowed under the Validation Statutes.

III.

CONCLUSION

For the reasons and authorities set forth in the Opening and Reply Briefs of the District, and for the additional reasons set forth herein, this Court should find that the subject lease-leaseback agreement is a "contract" that falls within the meaning of Government Code section 53511, thereby providing school districts with the certainty that comes

[34] https://facilities.fresnounified.org/wp-content/uploads/September-26-2012-Adopt-Resolution-12-01-Authorizing-the-Execution-of-Lease-leaseback-Agreements-for-Construction-of-Rutherford-B.-Gaston-Sr.-Middle-School-Phase-II.pdf

[35] Point in fact, the January 24, 2012, draft minutes of the District's Citizen Oversight Committee for Measures K and Q, item 4.a., bullet point #5, also expressly references the new Southwest Middle School (later named the Gaston Middle School.)
See https://operational.fresnounified.org/wp-content/uploads/12Jan24-DRAFT-minutes.pdf

from a 60-day limitations period being the exclusive means to challenge such arrangements. On this basis, this Court should reverse the holding of the Court of Appeal, and hold that a construction contract that is financed through bond proceeds, rather than by or through the builder, is a "contract" within the meaning of Government Code section 53511.

Respectfully submitted,

Dated: September 22, 2021

LANG RICHERT & PATCH, PC

By: */s/ Mark L. Creede*
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Stan D. Blyth
Attorneys for Petitioner, FRESNO UNIFIED SCHOOL DISTRICT

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.520(c)(1), the text of this Petitioner Fresno Unified School District's Answer to the *Amicus Curiae* Briefs of the California Association of Bond Oversight Committees and Howard Jarvis Taxpayers Association, including footnotes and excluding the cover information, table of contents, table of authorities, signature blocks, and certificate, consists of 4,835 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: September 22, 2021

By: */s/ Mark L. Creede*
Mark L. Creede
Attorney for Petitioner,
FRESNO UNIFIED SCHOOL DISTRICT

PROOF OF SERVICE

I am employed in the County of Fresno; I am over the age of 18 years and not a party to the within above-entitled cause; my business address is 5200 North Palm Avenue, Suite 401, Fresno, California 93704; and my business e-mail address is yvette@lrplaw.net.

I served a true and correct copy of the **ANSWER OF PETITIONER FRESNO UNIFIED SCHOOL DISTRICT TO *AMICUS CURIAE* BRIEFS OF CALIFORNIA ASSOCIATION OF BOND OVERSIGHT COMMITTEES AND HOWARD JARVIS TAXPAYERS ASSOCIATION** on the interested parties in this action:

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[X] **(BY ELECTRONIC SERVICE)** On September 22, 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 document, a confirmation of receipt is issued to the filing/serving party confirming receipt from info@truefiling.com for TrueFiling.

Via U.S. Mail Honorable Kimberly Gaab FRESNO COUNTY SUPERIOR COURT 1130 "O" Street Fresno, California 93721	*Via U.S. Mail* FIFTH DISTRICT COURT OF APPEAL 2424 Ventura Street Fresno, California 93721

[X] **(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 above. I am readily familiar with Lang, Richert & Patch'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 September 22, 2021, at Fresno, California.

YVETTE CORONADO

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.

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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.

9/22/2021

Date

/s/Yvette Coronado

Signature

Creede, Mark (128418)

Last Name, First Name (PNum)

Lang, Richert & Patch

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