

**Case No. S266344**

**SUPREME COURT OF THE STATE OF CALIFORNIA**

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STEPHEN K. DAVIS,  
Plaintiff and Respondent,

v.

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

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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

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**MOTION TO STRIKE PORTIONS OF PETITIONERS'  
OPENING BRIEFS**

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STEPHEN K. DAVIS

Respondent Stephen K. Davis objects to and moves this Court to strike portions of Petitioner Fresno Unified School District (“District”)’s Opening Brief on the Merits (cited as “DOB”) and Petitioner Harris Construction Co., Inc., (“Builder”)’s Opening Brief on the Merits (cited as “BOB”). (District and Builder collectively “Petitioners”.)

Portions of Petitioners’ Opening Briefs on the Merits designated below should be stricken because they contain issues and arguments in excess of those specified by the Court’s March 17, 2021 Order Granting review which stated:

The petitions for review are granted. The issues to be briefed and argued are limited to the following (Cal. Rules of Court, rule 8.516(a)):

Is a lease-leaseback arrangement in which construction is financed through bond proceeds rather than by or through the builder a “contract” within the meaning of Government Code section 53511?

## **I. CONTROLLING AUTHORITY**

Cal. Rules of Court, rule 8.516 states in relevant part:

(a) Issues to be briefed and argued:

(1) On or after ordering review, the Supreme Court may specify the issues to be briefed and argued. Unless the court orders otherwise, the parties must limit their briefs and arguments to those issues and any issues fairly included in them.

Cal. Rules of Court, rule 8.520(b) states in relevant part:

- (2) The body of the petitioner's brief on the merits must begin by quoting either:
  - (A) Any order specifying the issues to be briefed; or, if none,
  - (B) The statement of issues in the petition for review and, if any, in the answer.
- (3) Unless the court orders otherwise, briefs on the merits must be limited to the issues stated in (2) and any issues fairly included in them.

**II. SECTION IV ON PAGES 46 TO 72 AND 75 OF BUILDER'S OPENING BRIEF SHOULD BE STRICKEN**

Section IV on pages 46 to 73 and 75 of Builder's Opening Brief contain issues and arguments outside of the Court's March 17, 2021 Order Granting Review because they have nothing to do with whether "a lease-leaseback arrangement in which construction is financed through bond proceeds rather than by or through the builder a 'contract' within the meaning of Government Code section 53511."

Specifically, Builder urges on pages 46-47 as an overall call to action "THIS COURT SHOULD REJECT CERTAIN CHALLENGES TO THE VALIDITY OF LEASE-LEASEBACK CONTRACTS" and then further urges "the Court should now hold that the claims allowed by the Fifth District in *Davis I* and *Davis II* are without merit" before quoting the current version of Education Code § 17406 on pages 47-57.

Further, on page 58 Builder asks the Court to address "[t]he Claims Mistakenly Allowed by the Fifth District" and lists and argues them as follows:

1. The Lease-leaseback Contract Must Be Financed by the Contractor on pages 58-65.
2. The Lease-leaseback Contract Is Invalid If It Fails to Require the School District to Occupy the Property During the Lease on page 65.
3. The Lease-leaseback Contract Must Include Competitive Bidding on page 66.
4. The Challenger May Seek to Invalidate the Lease-Leaseback Contract Even After the School Construction Is Completed on pages 67-73.

None of the foregoing arguments in Section IV of Builder's Opening Brief are related to or fairly included in the Court's designated issue of whether "a lease-leaseback arrangement in which construction is financed through bond proceeds rather than by or through the builder a 'contract' within the meaning of Government Code section 53511" which is the sole issue on which this Court granted review and invited briefing. Consequently, Builder's inclusion of these arguments violates Cal. Rules of Court, rule 8.516 and 8.520 quoted above and therefore these arguments should be stricken from Builder's Opening Brief.

### **III. SECTION II ON PAGES 51 TO 57 OF DISTRICT'S OPENING BRIEF SHOULD BE STRICKEN**

Section II on pages 51 to 57 of District's Opening Brief contain issues and arguments outside of the Court's March 17, 2021 Order Granting Review because they have nothing to do with whether "a lease-leaseback arrangement in which

construction is financed through bond proceeds rather than by or through the builder a 'contract' within the meaning of Government Code section 53511.”

Specifically, at page 56 District summarizes its unrelated issues and argument on page 56 as “[t]he Court of Appeal in Davis I erroneously engrafted additional requirements onto lease-leaseback arrangements, such as the amount and timing of the payments, the duration of the lease, and the financing component, none of which are based on the plain language of Education Code section 17406, notwithstanding that the role of a court is to interpret the language of a statute, not to rewrite it.” District’s analysis and argument in Section III on pages 51-57 all relate to the foregoing issues.

None of the foregoing arguments in Section II of District Opening Brief are related to or fairly included in the Court’s designated issue of whether “a lease-leaseback arrangement in which construction is financed through bond proceeds rather than by or through the builder a ‘contract’ within the meaning of Government Code section 53511” which is the sole issue on which this Court granted review and invited briefing. Consequently, Builder’s inclusion of these arguments violates Cal. Rules of Court, rule 8.516 and 8.520 quoted above and therefore these arguments should be stricken from District’s Opening Brief.

DATED: July 2, 2021

/s/ Kevin R. Carlin  
Kevin R. Carlin  
Attorneys for Respondent  
Stephen K. Davis

Case No. S266344

SUPREME COURT OF THE STATE OF CALIFORNIA

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STEPHEN K. DAVIS,  
Plaintiff and Respondent,

v.

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The Honorable Kimberly Gaab

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ORDER ON  
MOTION TO STRIKE PORTIONS OF PETITIONERS'  
OPENING BRIEFS

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IT IS HEREBY ORDERED that Respondent Stephen K. Davis'  
Motion to Strike:

1. Section IV on Pages 46 to 72 and 75 of Harris  
Construction Co., Inc.'s Opening Brief Is Granted;
2. Section II on Pages 51 to 57 of Fresno Unified School  
District's Opening Brief Is Granted

Dated: \_\_\_\_\_

\_\_\_\_\_  
Presiding Justice

**PROOF OF SERVICE**

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen (18) years and not a party to the within-entitled action. My business address is 4452 Park Boulevard, Suite 310, San Diego, CA 92116. On July 20, 2021, I served the within document( s):

**MOTION TO STRIKE PORTIONS OF  
OPENING BRIEFS**



(BY ELECTRONIC SERVICE) On July 2, 2021, I instituted service of the above-listed document(s) by submitting an electronic version of the document(s) via file transfer protocol (FTP) though the upload feature at [www.tf3.truefiling.com](http://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](mailto:info@truefiling.com) for TrueFiling.

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*Via U.S. Mail*

Honorable Kimberly Gaab  
Fresno County Superior Court  
1130 "O" Street  
Fresno, CA 93721

*Via U.S. Mail*

Fifth District Court of Appeal  
2424 Ventura Street  
Fresno, CA 93721

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 2, 2021, at San Diego, California.



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Duane Besse

STATE OF CALIFORNIA  
Supreme Court of California**PROOF OF SERVICE**STATE OF CALIFORNIA  
Supreme Court of CaliforniaCase 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: **kcarlin@carlinlawgroup.com**
3. I served by email a copy of the following document(s) indicated below:

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BRIEF	Answering Brief on the Merits
MOTION	Motion to Strike
MOTION	Motion to Augment

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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.

7/2/2021

Date

/s/Duane Besse

Signature

Carlin, Kevin (185701)

Last Name, First Name (PNum)

