Case No. S266344

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
Case No. F079811

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

PETITIONER FRESNO UNIFIED SCHOOL DISTRICT'S OPPOSITION TO RESPONDENT'S MOTION TO STRIKE PORTIONS OF PETITIONER'S OPENING BRIEF

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Petitioner Fresno Unified School District ("District") respectfully submits its Opposition to Respondent Stephen K. Davis's ("Davis" or "Respondent") Motion to Strike ("Motion to Strike") Section II, pages 51 to 57 of the District's Opening Brief on the Merits ("Opening Brief").

INTRODUCTION

While the District agrees with the controlling authority cited by Respondent, as Cal. Rules of Court, rules 8.516 and 8.520(b) control this Court's decision on Davis's Motion to Strike, District takes issue with Respondent's conclusory analysis and argument regarding issues that are fairly included within the issue designated by this Court for briefing, to wit:

> "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?"

LEGAL ARGUMENT

I. By Ignoring the Plain Language of Education Code Section 17406 and Engrafting Additional Requirements Thereto, the Court of Appeals in *Davis II*[1] Eliminated from Consideration Contracts that Might Otherwise Fall Within the Ambit of Government Code Section 53511, and as Such, District's Argument in this Regard Constitutes Matter "Fairly Included" Within the Issue Designated by this Court.

In Respondent's Motion to Strike, Davis argues that "[S]ection II on pages 51 to 57 … contain [sic] 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 [sic] a 'contract' within the meaning of Government Code section 53511." Davis's contentions are erroneous and unsupported by the Rules of Court.

[1] *Davis v. Fresno Unified Sch. Dist.* (2020) 57 Cal.App.5th 911, as modified on denial of reh'g (Dec. 16, 2020.) ("*Davis II*")

The District's arguments regarding the Fifth District Court of Appeal's interpretation, which engrafted additional requirements onto those expressly stated for lease-leaseback agreements in Education Code section 17406 by requiring that a court analyze the amount and timing of payments under the agreement, the duration of the lease term, and, perhaps most importantly, whether the agreement itself contains a financing component, are related to the issue designated by this Court for briefing and are fairly included in the District's arguments in its Opening Brief. The District may include in its Opening Brief any "issues fairly included" within the issue designated by this Court for briefing. (Cal. Rules of Court, rules 8.516 and 8.520(b); [see also *People v. Alice* (2007) 41 Cal.4th 668, 677 (the opportunity to brief an issue includes the opportunity to brief any issues that are fairly included within the issue)].)

The Fifth District Court of Appeal found in *Davis II* "...based on our review of the pleadings and attached documents, we determined the purported lease leaseback contracts "did not include a financing component for the construction of the project." (*Davis I, supra*, 237 Cal.App.4th at p. 271, 187 Cal.Rptr.3d 798.) As a result, we conclude the contracts do not fall within the ambit of Government Code section 53511 and California's validation statutes." (*Davis v. Fresno Unified Sch. Dist., supra,* 57 Cal.App.5th at p. 917, as modified on denial of reh'g (Dec. 16, 2020).) Thus, a threshold question before this Court is whether a lease-leaseback agreement that otherwise meets the statutory prerequisites under the plain language of Education Code section 17406[2] should automatically be

[2] Education Code §17406 provides, in pertinent part: "Notwithstanding Section 17417, the governing board of a school district may let, for a minimum rental of one dollar ($1) a year, to a person, firm, or corporation real property that belongs to the school district if the instrument by which this property is let requires the lessee therein to construct on the demised premises, or provide for the construction thereon of, a building or buildings

excluded from the definition of what constitutes a "contract" under Government Code section 53511 because it *does not contain a financing component*, notwithstanding that other Courts of Appeal interpreting Government Code section 53511 have held that contracts *involving financial obligations outside of the agreement itself* that are *directly related* or *inextricably intertwined*[3] with an agency's bonds, warrants, or other evidences of indebtedness fall within the definition of "contracts" under Government Code section 53511. In fact, no California court, other than the Fifth District Court of Appeal, has excluded a lease-leaseback contract from consideration under Government Code section 53511 simply because it does not contain an express financing component. In taking this position, the Fifth District Court of Appeal relied solely on dicta from *Morgan Hill Unified School District v. Amoroso* (1988) 204 Cal.App.3d 1083, 1086, implying that Article 2 of Chapter 4 of Part 10.5 of the Education Code imposed the financing requirement on lease-leaseback agreements.[4]

Further, the interpretation of Education Code section17406 does not turn on the facts of this case, it is a significant issue of widespread

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for the use of the school district during the term of the lease, 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 or methods by which that title shall vest in the school district before the expiration of that term and shall contain other terms and conditions as the governing board of the school district may deem to be in the best interest of the school district."

[3] See *McLeod v. Vista Unified Sch. Dist.* (2008) 158 Cal.App.4th 1156,1169 [school district's issuance of $140 million in bonds was an "integral part of the whole method of financing the costs associated with its comprehensive plan to alleviate school overcrowding" and the bond funds were necessarily 'inextricably bound up' with the award of contracts pertaining to the dual magnet high]; See also *Graydon v. Pasadena Redevelopment Agency* (1980) 104 Cal.App.3d 631,649 [court reasoned that the agency's bonds "were intimately and inextricably bound up with the award of [the] contract.")

[4] See *Davis v. Fresno Unified Sch. Dist.* (2015) 237 Cal.App.4th 261, 291-292), as modified (June 19, 2015,) ("*Davis I*") citing to the SAB Report attached to Davis's First Amended Complaint that referenced this dicta in *Morgan Hill, supra.*

importance to school districts across the state, and it is in the public interest to decide the issue at this time. Further, Davis had an opportunity to fully brief this issue and delaying until some future case an analysis of the Fifth District Court of Appeal's interpretation of Education Code section 17406 would be wasteful of the resources of both this Court and future litigants, for other parties would likely litigate similar cases on the assumption that Fifth District's interpretation governs, notwithstanding the conflicting rulings between different Courts of Appeal.[5]

Finally, and most importantly, if this Court were to wholesale adopt the Fifth District Court of Appeal's interpretation of Education Code section 17406 emanating from its decision in *Davis II*, it would preclude this Court from finding 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," as any lease-leaseback agreement that does not include an express builder financing component would, as a matter of law, be excluded from the meaning of "contract" under Government Code section 53511.

Moreover, while the Fifth District Court of Appeal asserts its interpretation of Education Code section 17406 to be law of the case,[6] the

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[5] It should be noted that when this Court denied review of the decision in *Davis I*, that decision then presented no conflict with any other Court of Appeal opinion. Thereafter, the conflict arose, with *California Taxpayers Action Network v. Taber Constr., Inc.* (2017)12 Cal.App.5th 115 and with *McGee v. Torrance Unified Sch. Dist.* (2020) 49 Cal.App.5th 814, review denied (Aug. 26, 2020).

[6] In the Fifth District Court of Appeal's decision in *Davis II*, footnote 15 provides "[T]he statutory interpretation of Education Code section 17406 adopted in *Davis I* is now law of the case, and we decline the invitation in Fresno Unified's petition for rehearing to conclude that interpretation was a material mistake of law. (See generally, *Allen v. California Mutual Bldg. & Loan Assn.* (1943) 22 Cal.2d 474, 481–482.)" In this regard the court previously found "... the leaseback must be a "true lease" with a financing component to satisfy the criteria in section 17406. (*Davis I*, 237 Cal.App.4th at pp. 284-292.)

District disagrees.[7] Assuming arguendo that it is law of the case, as this Court previously found "[W]here there are exceptional circumstances, a court which is looking to a just determination of the rights of the parties to the litigation and not merely to rules of practice, may and should decide the case without regard to what has gone before." (*England v. Hospital of the Good Samaritan* (1939) 14 Cal.2d 791, 795.) Whether or not the Fifth District's interpretation is law of the case, addressing this interpretation is necessary for the Court to decide the issue that the Court instructed the parties to brief.

CONCLUSION

Based on the reasons and analysis set forth above, this Court should deny Davis's Motion to Strike as to the District's Opening Brief, Section II, pages 51 to 57.

Respectfully submitted,

Dated: July 16, 2021

LANG RICHERT & PATCH, PC

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

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[7] For the law of the case doctrine to apply, the point of law involved must have been necessary to the prior decision (*People v. Cooper* (2007) 149 Cal.App.4th 500.) Clearly, in the context of the District's demurrer, the Fifth District Court of Appeal's interpretation was unnecessary to the prior decision in *Davis I*.

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 **PETITIONER FRESNO UNIFIED SCHOOL DISTRICT'S OPPOSITION TO RESPONDENT'S MOTION TO STRIKE PORTIONS OF PETITIONER'S OPENING BRIEF** on the interested parties in this action:

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[X] **(BY ELECTRONIC SERVICE)** On July 16, 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 July 16, 2021, at Fresno, California.

Yvette Coronado

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**

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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.

7/16/2021

Date

/s/Yvette Coronado

Signature

Creede, Mark (128418)

Last Name, First Name (PNum)

Lang, Richert & Patch

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