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 OPENING BRIEF ON THE MERITS

Mark L. Creede (SBN 128418)
mlc@lrplaw.net
Stan D. Blyth (SBN 166938)
sdb@lrplaw.net
LANG RICHERT & PATCH, PC
Post Office Box 40012
Fresno, California 93755-0012
(559)228-6700 • FAX (559)228-6727

Attorneys for Petitioner, FRESNO UNIFIED SCHOOL DISTRICT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

OTHER

ISSUE PRESENTED FOR REVIEW

Review was granted on a single issue, 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?"

INTRODUCTION

The singular issue presented for review, concerning whether certain lease-leaseback arrangements fall within the meaning of the term "contracts" as used in Government Code section 53511,[1] revisits an issue first examined by this Court in *City of Ontario v. Superior Ct.* (1970) 2 Cal.3d 335, and one of paramount importance to school districts throughout California using the lease-leaseback method for constructing and renovating schools, particularly where funding for these projects comes from the sale of tax-exempt bonds.[2] Under the lease-leaseback

---

[1] Gov. Code § 53511 lists the matters subject to validation under Chapter 9, as "bonds, warrants, contracts, obligations or evidences of indebtedness."

[2] "The most common means by which California school districts finance new school construction is the issuance of "general obligation bonds." These bonds serve much the same function as home loans obtained by homeowners to finance the purchase, construction, or improvement of their homes. Bond buyers supply the issuing school district with immediate funds to apply to construction projects, and the district then repays the bonds over time, with interest, 'by an annual levy of an ad valorem tax on real (and certain personal) property located within the area of the district.'" (92 Ops.Cal.Atty.Gen. 1 (2009).)

construction method, a school district typically leases property to a developer, who in turn builds a school facility on the property and leases it back to the school district, with title passing to the school district at the end of the lease term.

In *City of Ontario, supra,* this Court noted that while Government Code section 53511 does not expressly qualify the term "contracts," the legislative history and statutory context indicates that the term does not apply generally to all contracts, but rather should be construed *in pari materia* with the other terms in the statute. In construing the term "contracts," this Court expressed concern over the City of Ontario's sweeping contention that the Validation Statutes[3] should be found to apply to all municipal contracts. This was particularly troubling in the context of what this Court saw as a dramatic expansion of the Validation Statutes in 1963, when Government Code section 53510 extended the availability of the Validation Statutes to any "county, city, city ... public district or any public or municipal corporation, public agency or public authority," and Government Code section 53511 extended the use of validation proceedings to any action to determine the validity of a local agency's "bonds,

---

[3] Code Civ. Proc. §§ 860-870.5 (hereafter the "Validation Statutes")

warrants, contracts, obligations or evidences of indebtedness." In this regard, this Court aptly noted:

> "... since 1963, if the City's construction of the word 'contract' is correct, virtually every taxpayer has become an 'interested person' with regard to virtually every action of a local public agency. It is unreasonable to assume that the members of such a large and amorphous group are likely to have prompt notice of each agency action affecting them. Yet whether such a person has such notice or not, he is given only 60 days in which (1) to discover the existence, scope and effect of the agency's action, (2) to reach a conclusion as to its validity, (3) to determine whether the agency has instituted a validating proceeding or imminently intends to do so, and (4) if not, to prepare and file a proceeding of his own. In an age of increasingly complex government, this seems a heavy burden to impose on the vigilant taxpayer. And it is certainly a far cry from the Judicial Council's original concern for conformity with the Rules on Appeal." (*City of Ontario, supra*, 2 Cal.3d at p. 342.)

With these concerns in mind, this Court indicated the term "contracts," as used in Government Code section 53511, should be read narrowly to involve financial obligations similar to the other terms in the list of matters for which a validation proceeding may be used, but stopped short of definitively adopting this definition. As such, this Court did not hold that section 53511 applies only to direct challenges to "the validity of evidences of indebtedness."

Rather, this Court left the door open to *indirect challenges* that do not directly seek to invalidate bonds.[4]

In November 2001, the voters in the Fresno Unified School District (the "District") approved the Measure K Facilities Bond, a $199 million bond facility specifically earmarked for the construction of new schools in Fresno to reduce overcrowding and to provide funding for technology upgrades and for other school modernization projects.[5]

On September 26, 2012, the District approved a plan to use some funds from the Measure K bond facility to build the Rutherford B. Gaston Sr. Middle School (the "Middle School Project")[6] to serve children in southwest Fresno, a predominantly minority, low-income community where more than 90% of the children are eligible for free school lunches. The "contracts" involved in this case were for construction of the Middle School Project. This new school was needed to replace the old, dilapidated Carver School and to serve some 600 local students

---

[4] (See e.g., *Graydon v. The Pasadena Redevelopment Agency* (1980) 104 Cal.App.3d 631.)

[5] https://facilities.fresnounified.org/measure-q-measure-x-bond/; Measure K Ballot Text.

[6] https://facilities.fresnounified.org/measure-q-measure-x-bond/; 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.

who had been subject to being bussed out of their neighborhood due to the unavailability of adequate facilities.[7]

The Middle School Project was built pursuant to a "lease-leaseback" arrangement, an alternative to competitive bidding requirements, specifically authorized under Education Code sections 17400, et seq., under which the District leased the project site to Harris Construction Co., Inc. ("Harris") for $1 dollar a month (the "Site Lease"). Harris then subleased the property back to the District for monthly payments that would pay for the construction of the school (the "Facilities Lease"). The total price for the Middle School Project was to be $36,702,876, and the school was to be built in 595 days.[8]

Because the bonds used to finance the Middle School Project were issued as *tax-exempt* bonds,[9] interest payments by the District were excludable from a bond purchaser's gross income for federal and state income tax purposes provided that the District

---

[7] See Fresno Unified School District's Facilities Master Plan Fact Sheet, at https://www.fresnounified.org/wp-content/uploads/Facilities-Master-Plan.pdf and "Fresno Unified Picks Site For New Middle School", Fresno Bee, 9/17/10, at https://www.fresnobee.com/news/local/education-lab/article19506669.html

[8] See Facilities Lease, Appellant Davis's Appendix ("AA") at pp.143-158.

[9] An exempt facility bond is any bond issued pursuant to IRC § 142, where at least 95 percent of the net proceeds are used, or are to be used, to finance construction of an exempt facility, including a "qualified public educational facility" such as the Middle School Project.

complied with each of requirements set forth under section 148 of the Internal Revenue Code of 1986, as amended ("IRC") and the accompanying Treasury Regulations, which place limitations on a school district's ability to use arbitrage to enhance the project financing ability of bond sale proceeds.

Because the interest income paid on bonds issued by school districts for capital projects is not generally subject to federal and state taxation, such bonds offer lower interest rates than taxable bonds or other comparable fixed or variable rate investments. As a result of the lower interest rates offered on tax-exempt bonds, arbitrage is often an important additional financing component for a school district's capital projects. An exemption from the yield restrictions otherwise imposed on such arbitrage is allowed if, and only if, 85% of bond proceeds placed in a project fund are expended on a designated capital project within three years of the date of issuance of the bonds.[10]

If the Validation Statutes do not apply a lease-leaseback arrangement in which construction is financed through the proceeds of tax-exempt bonds, a taxpayer like Plaintiff-Respondent Stephen Davis ("Davis") might file suit during the

[10] See Treasury Regulation section 1.148-2(e)(2).

first year of construction or thereafter, leaving insufficient time for the school district to correct any problem found by the court to exist, and reissue the agreement within the designated three-year period. Moreover, even if the court subsequently approves the lease-leaseback arrangement, if a preliminary injunction has significantly delayed construction of the project, it could prevent the necessary percentage of funds from being expended within the mandated three-year time period, thereby causing the bonds to lose their tax-exempt status.

Because of the lower interest rates paid to purchasers of tax-exempt bonds, there would effectively be no market for such bonds should the interest paid on these bonds be *potentially subject to federal and state income taxation*. The possibility of this scenario is likely to have a chilling effect on a school district's ability to sell bonds to underwriters in order to fund the construction and rehabilitation of schools. Or, alternatively, underwriters might only buy the bonds if the interest rates are set significantly higher, to account for this risk of losing the tax exemption. For this reason alone, prompt action under the Validation Statutes is integral to a lease-leaseback arrangement

in which construction is financed through tax-exempt bond proceeds. As the Court of Appeal so aptly noted:

> "A validation action implements important policy considerations. '[A] central theme in the validating procedures is speedy determination of the validity of the public agency's action.' [Citation]... The validating statutes should be construed so as to uphold their purpose, i.e., '*the acting agency's need to settle promptly all questions about the validity of its action.*' [Citation.]
>
> "... *Assurance as to the legality* of the proceedings surrounding the issuance of municipal bonds *is essential before underwriters will purchase bonds for resale to the public.*'" (*Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 842, 73 Cal.Rptr.2d 427 [Emphasis supplied].)

Allowing a taxpayer to challenge a bond-funded lease-leaseback arrangement one or more years after award would defeat the very purpose of the Validation Statutes and is tantamount to allowing a challenge to the tax-exempt status of the bonds which, if successful, would likely result in the dissipation of the market for such bonds.

The lineage of appellate cases subsequent to *City of Ontario*, *supra*, have continued to apply the rationale used by this Court and, as such, have continued to confer a narrow scope on the term "contract" when analyzing agreements under section 53511. However, this analysis is not inconsistent with finding the subject lease-leaseback arrangement falls within the meaning of

"contracts" under Government Code section 53511, as subsequent appellate cases have found contracts which are neither "*in the nature of*," nor "*directly related to*"[11] nor "*inextricably intertwined*"[12] with bonds, warrants, or other evidences of a governmental entity's indebtedness not to be "contracts" within the meaning of Gov. Code section 53511. As such, "contracts" for purposes of the Validation Statutes have been held *not to include*: (1) a contract to hire a public defender;[13] (2) a contract to acquire a computer system;[14] or (3) an award of a franchise to operate garbage dumps,[15] as such agreements do not *directly relate to* nor are they *intimately intertwined with* a public agency's bonds warrants, or other evidences of a governmental entity's indebtedness.[16]

However, under this Court's rationale in *City of Ontario,* as applied in the subsequent lineage of appellate cases construing Government Code section 53511, this Court should find the lease-leaseback arrangement between the District and Harris is a

---

[11] (*Kaatz v. City of Seaside* (2006) 143 Cal.App.4th 13, 42.)
[12] (See *Hollywood Park Land Co., LLC v. Golden State Transportation Fin. Corp.* (2009) 178 Cal.App.4th 924, 935.)
[13] (*Phillips v. Seely* (1974) 43 Cal.App.3d 104, 112.)
[14] (*Smith v. Mt. Diablo Unified Sch. Dist.* (1976) 56 Cal.App.3d 412, 420.)
[15] (*Walters v. County of Plumas* (1976) 61 Cal.App.3d 460, 468.)
[16] (See e.g., *Graydon v. Pasadena Redevelopment Agency* (1980) 104 Cal.App.3d 631, 645.)

"contract" within the meaning of Government Code section 53511, as the bonds issued by the District were "*directly related to*" and "*intimately*" and "*inextricably bound up*" with the award and financing of the subject lease-leaseback arrangement.[17]

STATEMENT OF FACTS

To fund construction of the Middle School Project, the District used funds from the Measure K Facilities Bond, a $199 million bond facility that was approved by voters in March 2001,[18] and from the Measure Q Facilities Bond, a $280 million bond facility that was approved by voters in November 2010.[19] On September 28, 2011, the District sold General Obligation Bonds authorized by Measures K and Q, Measure K Series G bonds in the amount of $55,570,914.90, and Measure Q Series B bonds in the amount of $50,434,849.50 (the "Bonds").[20]

The Bonds were issued as "Current Interest and Capital Appreciation Bonds," and were sold to underwriter Piper Jaffrey

---

[17] (*Id.*, at p. 646.)
[18] https://facilities.fresnounified.org/measure-q-measure-x-bond/; Measure K Ballot Text.
[19] https://facilities.fresnounified.org/measure-q-measure-x-bond/; Measure Q Ballot Measure – Full Text.
[20] https://facilities.fresnounified.org/measure-q-measure-x-bond/; Bond Purchase Agreement – Measure K, Series G and Measure Q, Series B, p. 2.

on September 28, 2011 for resale to the public.[21] The bonds were issued for the specific purpose of providing funds for the acquisition and construction of certain public educational facilities. [22]

On September 26, 2012, the District adopted Resolution No. 12-01 (AA at pp. 17-21), authorizing the execution of the Site lease and Facilities Lease whereby the District would lease the project site to Harris, who would build the Middle School Project, and thereafter, lease the improvements and the site back to the District. The lease-leaseback transaction was comprised of two agreements, the Site Lease (AA, pp. 133-141) and the Facilities Lease (AA, pp.143-158) (collectively the "Lease-Leaseback Agreement.")[23]

The Site Lease provides that beginning on September 27, 2012, the District would lease the site to Harris for $1 in rent (AA, p. 135.) Pursuant to the Facilities Lease, the District paid monthly progress payments for construction services up to 95% of

---

[21] https://facilities.fresnounified.org/measure-q-measure-x-bond/; Bond Purchase Agreement – Measure K, Series G and Measure Q, Series B, p. 2.
[22] https://facilities.fresnounified.org/measure-q-measure-x-bond/; Measure K Ballot Text; Measure Q Ballot Measure – Full Text
[23] The two lease-leaseback contracts are considered collectively as one agreement under the Validation Statutes.

the total value of the work performed, with a 5% retention pending acceptance of the Middle School Project and recordation of the Notice of Completion. (AA, p. 171). The Middle School Project was completed on November 13, 2014 (AA, p. 249) and a Notice of Completion was recorded on December 4, 2014 (AA, p. 252).

The Middle School Project was a great success. More than 800 Fresno children currently attend the Gaston Middle School.[24] The school also includes a full-service health center, providing much needed health care to children and adults who cannot otherwise afford it.[25]

Notwithstanding the success of the Middle School Project, on November 20, 2012, Davis filed a "reverse validation" suit against both the District and Harris, claiming that the lease-leaseback arrangement was illegal, in that it did not satisfy the requirements of the Education Code, and that the District had a conflict of interest with Harris and as such, Davis was entitled to a remedy of disgorgement. (AA, pp. 6-14).

---

[24] See "Southwest Fresno Dedicates New Middle School," ABC News, 9/19/14, at https://abc30.com/education/southwest-fresno-dedicates-new-middle-school/316820/

[25] See "School Health Centers Are Big Boost for Fresno," Fresno Bee, 2/12/17, at https://www.fresnobee.com/opinion/editorials/article132083134.html

PROCEDURAL HISTORY

On November 20, 2012, Davis filed his reverse validation action challenging the Lease-Leaseback Agreement, alleging the District improperly used the lease-leaseback procedures under Education Code section 17406 and that the lease-leaseback arrangement between Harris and the District was illegal, void, and unenforceable and seeking disgorgement of all monies paid to Harris (AA, pp. 6-14).

On March 18, 2013, in response to the District's demurrer and motion to strike portions of the complaint, Davis elected to file a first amended complaint (the "FAC") (AA, pp.106-127.)[26] On April 22, 2013, the District filed a second demurrer and motion to strike portions of the FAC on the grounds that the District followed the procedures set forth in the Education Code and that the allegations set forth in the FAC were not supported by the law (District's Appendix ("RA"), pp. 4-6.) The District prevailed on its demurrer (RA, pp. 8-12,) and judgment was entered in favor of the

[26] Davis brought his FAC pursuant to Code Civ. Proc. § 863. No other basis for standing was alleged by Davis in the FAC and the Court of Appeal did not question the use of the Validation Statutes. Moreover, Davis has repeatedly conceded that his action is a reverse validation action, including his concession during oral argument on the subject motion for judgment on the pleadings. Further, the Court of Appeal previously found Davis's FAC to be a timely filed reverse validation action. (*Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, fn. 4 ("*Davis I*".)

District and Harris (RA, pp.14-18.) Davis then appealed (RA, pp. 19-20.)

On June 1, 2015, in its *Davis I* opinion, the Court of Appeal reversed the trial court's ruling as to four causes of action: (1) a claim for conflict of interest between Harris and District; (2)/(3) claims that the lease-leaseback arrangement did not comply with the statutory requirements of the Education Code, and (4) a derivative claim for declaratory relief. In doing so, the court incorrectly opined[27] that the Legislature's main purpose in allowing lease-leaseback arrangements was to provide school districts with a new method of financing school construction, whereby the contractor could use his contract with the school district to obtain third-party financing for a project. (*Davis I*, *supra*, 237 Cal.App.4th at pp. 276–280.) The court found that because the District used its own funds (obtained from the Bond issuance approved by Fresno's voters) instead of third-party financing obtained by Harris, the lease-leaseback arrangement was invalid. (*Id.* at p. 280.) The Court of Appeal also concluded that the Facilities Lease was invalid because it was "not a true lease," as it did not provide for the District's occupancy of the

[27] See discussion infra.

school during the lease term. Therefore, the Facilities Lease violated the competitive bidding provisions of the Education Code. (*Id.* at pp. 287–289.) The case was then sent back to the trial court for a trial on the merits relating to the remaining causes of action. (*Ibid.*)

On, April 6, 2016, the District filed a motion for judgment on the Pleadings (RA, pp. 21-43), which was denied on May 11, 2016 (RA, pp. 45-51.) Thereafter, on August 22, 2016, Davis filed a motion for summary adjudication on the statutory and common law conflict of interest claims against Harris (RA, pp. 52-70.) On February 16, 2017, Davis's summary adjudication motion was heard and denied. (RA, pp. 72-74.)

On March 10, 2017, Davis filed a petition for writ of mandate in the Court of Appeal, Fifth Appellate District, seeking (1) review the order of the Superior Court denying Davis's motion for summary adjudication on the conflict-of-interest cause of action against Harris, and (2) asking the Court of Appeal to direct the trial court to vacate its order denying the motion for summary adjudication and enter a new order granting the motion (RA, pp. 75-103.) On March 30, 2017, Davis's petition for writ of mandate was denied by the Court of Appeal. (RA, p. 104.)

On May 21, 2019, the District filed its motion for judgment on the pleadings on the basis that the Lease-Leaseback Agreement being challenged by Davis was no an longer executory instrument because the work on the Middle School Project had been completed, and, as a consequence, the Lease-Leaseback Agreement and the parties' obligations thereunder had been extinguished thereby rendering moot each of the claims remaining in Davis's FAC (AA, p. 227). The trial court granted the District's motion on July 3, 2019 without leave to amend (AA, pp. 512-513.) On July 19, 2019, the trial court entered judgement dismissing Davis's FAC in its entirety (AA, p. 522-523.) On August 08, 2019, Davis filed his notice of appeal (AA, p. 536.)

On November 24, 2020, in *Davis v. Fresno Unified Sch. Dist.* (2020) 57 Cal.App.5th 911 ("*Davis II,*") the Court of Appeal reversed the trial court directing it to vacate its order granting the motion for judgment on the pleadings, and enter a new order granting the motion as to the reverse validation portion of the lawsuit and denying the motion as to Davis's taxpayer action and its underlying counts. The Court of Appeal found that because the Lease-Leaseback Agreement did not include a "financing element," it was not a "contract" subject to validation, and

therefore it concluded "the contracts do not fall within the ambit of Government Code section 53511 and California's validation action." (*Id.* at p. 917) and it follows that "Davis may pursue a taxpayer's action seeking the remedy of disgorgement." (*Id.* at p. 824; see also *Id.* at pp. 843–844.) The Court held that "[D]isgorgement qualifies as effective relief, and, therefore, the taxpayer's action part of this lawsuit is not moot." (*Id.* at p. 824.) Thus, because in *Davis I* the Court had found that the Lease-Leaseback Agreement was invalid, Davis may now pursue his "taxpayer's" claim that Harris must disgorge the entire $36,702,876 paid for the Middle School Project (minus the $651,501 Harris already returned) to the District, notwithstanding that Harris has already paid the bulk of these monies to subcontractors and employees.

On December 9, 2020, the District timely filed a Petition for Rehearing. On December 16, 2020, the Courts of Appeal modified its November 24, 2020, opinion. On December 16, 2020, the Court of Appeal issued its order denying the rehearing petition.

On January 5, 2021, the District filed its Petition for Review. On March 17, 2021, this Court granted the District's

petition, along with the Petition for Review filed by Harris, limiting the issues pursuant to Cal. Rules of Court, rule 8.516(a).

SUMMARY OF ARGUMENT

Code of Civil Procedure section 860 does not specify what matters are covered by a validation proceeding. Rather, section 860 refers only to "the existence of any matter which under any other law is authorized to be determined pursuant to this chapter ...." The "other law" at issue in the decision below is Government Code section 53511, which authorizes a local agency to bring an action under section 860 "to determine the validity of its bonds, warrants, contracts, obligations or evidences of indebtedness."

The term "contracts" under Government Code section 53511 has been given a narrow meaning in light of this Court's decision in *City of Ontario*, *supra*, and other subsequent appellate court decisions following the rationale of this Court. Applying such rationale, the term "contract" as used in Government Code section 53511 has been found to include within its definition those agreements that are *inextricably intertwined* with the financial obligations of a public entity, whether such contracts constituted "pledges of funds from various sources to insure repayment of

bonds...." or are "*directly related*" to the issuance of the bonds or other the financial obligations of a public agency.

Because the Bonds were *inextricably intertwined* with both the award and financing of the Lease-Leaseback Agreement, the Court of Appeal, rather than finding the Lease-Leaseback Agreement was an ordinary construction contract that did not provide the District with any financing, should have found the Lease-Leaseback Agreement to be "*directly related*" to the issuance of the Bonds and a "contract" within the meaning under Government Code section 53511.

The Lease-Leaseback Agreement is *inextricably intertwined* with the Bonds, in several regards. First, the Lease Lease-Leaseback Agreement is "*directly related*" to the issuance of the Bonds, as the proceeds from their sale were specially designated for the construction of school facilities, including the Middle School Project.

Second, the District paid a low interest rate on the Bonds due to their tax-exempt status. However, under Internal Revenue Code section 148 and its interpreting regulations, because the District engaged in limited arbitrage, the exemption from taxation of interest income is allowed only if 85% of the net sale

proceeds from the Bonds were expended within three years of the issuance date of the Bonds.[28]

Additionally, the Bonds were funded with ad valorem taxes levied on real property (and certain personal property) in the District. It is highly likely that many voters in the District supported the ballot measure because of the perception that the value of their property would be enhanced over time by the school construction and improvements generated by the Bond proceeds.

If the Validation Statutes do not apply to lease-leaseback contracts funded with tax-exempt bonds, a taxpayer, like Davis, has carte blanche to file suit to invalidate such a contract years after commencement of construction of the project, thereby jeopardizing the tax-exempt status of the bonds, long after the bonds have been sold to underwriters and the general public. Even a remote possibility of losing this tax-exempt status will discourage third-party investors from purchasing these bonds at the low interest rates offered and could also expose an issuing school district to the possibility of lengthy and expensive litigation

[28] The 3-year period may be extended another 2 years (for a total of 5 years,) if the issuer and a licensed architect or engineer certify that more than 3 years are necessary to complete the capital project. IRS Publication 5271, Complying with Arbitrage Requirements - A Guide for Issuers of Tax-Exempt Bonds. See https://www.irs.gov/pub/irs-pdf/p5271.pdf.

by bondholders who purchased the Bonds based on the school district's representation that the purchased bonds would be exempt from income taxation.

The Lease-Leaseback Agreement is intimately and "*inextricably bound up*" with the District's Bonds. As the Bonds were "*directly related to*" to the award and financing of the Lease-Leaseback Agreement, this Court should find that this agreement is a "contract" within the meaning of Government Code section 53511. Additionally, the language of Education Code section 15100 further affirms that bond-financed contracts for *approved* school improvements, regardless of the delivery method, are subject to the validation process.

ARGUMENTS AND LEGAL AUTHORITIES

I. All Contracts Directly Relating To, Or Intimately and Inextricably Bound-Up with Bond Proceeds, such as the Lease-Leaseback Agreement, Are Contracts within the Meaning of Government Code section 53511 and are Subject to Validation.

Answering yes to the question before this Court would make any challenge to the validity of the Lease-Leaseback Agreement subject to the Validation Statutes' exclusivity under Code of Civil Procedure section 869.[29] At first glance it might appear

[29] Code Civ. Proc. § 869 provides in relevant part: "No contest except by the public agency or its officer or agent of any thing or matter under this chapter shall be made other than within the time and the manner herein specified."

unambiguous and unqualified that the language of Government Code section 53511 is applicable to contracts such as the Lease-Leaseback Agreement, for as this Court has previously explained "... where the meaning of a statute is plain and unambiguous ... there is no need for construction and courts should not indulge in it." (*Caminetti v. Pac. Mutual L. Ins. Co.*, 22 Cal.2d 344, 354.) However, in view of the legislative history of section 53511, as discussed and analyzed by this Court in *City of Ontario, supra,* the issue before the Court is more subtle, for as this Court has previously explained "[T]he literal meaning of the words of a statute may be disregarded . . . to give effect to manifest purposes that, in the light of the statute's legislative history, appear from its provisions considered as a whole." (*County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 849, fn. 6, quoting *Silver v. Brown,* 63 Cal.2d 841, 845.)

In *City of Ontario, supra,* this Court discussed that, while section 53511 does not expressly qualify the term "contract," the legislative history and statutory context indicate that it does not apply universally to all municipal contracts, but rather must be construed *in pari materia* with the other terms in the statute. (*City of Ontario, supra,* 2 Cal.3d at p. 343.) Yet, this Court *did not*

hold that section 53511 applies only to direct challenges to "the validity of evidences of indebtedness" and, even narrowly construed in this sense, the term "contract" as used in section 53511 includes the Lease-Leaseback Agreement because it is *inextricably intertwined* with the financial obligations of the District that were used to finance construction of the Middle School Project.

In *City of Ontario, supra*, 2 Cal.3d 335, the city formed a private nonprofit corporation to issue bonds in the amount of $25 million, without voter approval, to finance the purchase of a site and the construction of an automobile racing stadium. The plan would have given a developer a contract, without competitive bidding, to build the stadium at a cost of $12.5 million. The city planned to lease the stadium to a private business for operation as a private venture. In response, the plaintiffs filed a taxpayer's suit alleging that the city's conduct violated various statutes as well as constitutional prohibitions against making gifts of public funds or lending public credit for private purposes. (*City of Ontario, supra*, 2 Cal.3d at pp. 338-339.) The plaintiffs sought an injunction, restitution, and a declaratory judgment. (*Ibid.*)

On the 64th day after the complaint was filed, the city moved to dismiss the action on the ground that the summons did not conform to the special requirements of Code of Civil Procedure sections 861 to 863, which provide that "the summons be directed to 'all persons interested in the matter" (citation omitted); and if publication is not completed within 60 days, the action must be dismissed 'unless good cause for such failure is shown.'" (citation omitted) (*City of Ontario*, *supra*, 2 Cal.3d at p. 339.) The trial court "impliedly" found that Code of Civil Procedure sections 860 to 870 governed the action, but nonetheless found that plaintiffs had shown good cause for their failure to comply with the notice provisions under Code of Civil Procedure sections 860 and 861.1. The city had sought a writ of prohibition seeking to restrain the trial court from taking further proceedings in the taxpayers' suit. (*Ibid.*)

In considering the decision below, this Court reviewed the history of the Validation Statutes and noted that these statutes were first enacted in 1961 to bring uniformity to numerous statutes "authorizing actions by cities, counties, and public agencies to establish the validity of their bonds or assessments or the legality of their existence and providing special procedures for

appeals in such cases." (*City of Ontario, supra*, 2 Cal.3d at p. 340.) This Court also noted that the Judicial Council recommended "... that general legislation be enacted for determining the legality or validity of these matters, [including] the general provisions found in most of the existing statutes." (*Ibid.*) However, subsequent to the initial adoption of the Validation Statutes, their reach was dramatically extended in 1963, as Government Code section 53510 extended the availability of the Validation Statutes to any "county, city, city ... public district or any public or municipal corporation, public agency or public authority,"[30] and Government Code section 53511 extended the validation proceeding to an action to determine the validity of a local agency's "bonds, warrants, contracts, obligations or evidences of indebtedness."[31]

In the proceedings below, the city argued that the word "contracts" in section 53511 should be taken to mean any contract into which an agency may lawfully enter. (*City of Ontario, supra*, 2 Cal.3d. at p. 341.) In evaluating the city's position, this Court expressed concern over such a far-reaching and sweeping definition, in light of the expansion of the statute, as virtually every taxpayer would have thereby become an "interested person"

---

[30] (*City of Ontario, supra*, 2 Cal.3d at p. 341.)
[31] (*Ibid.*)

with regard to virtually every action of a local public agency, and noted, that in light of 60-day limitation period,[32] "[I]t is unreasonable to assume that the members of such a large and amorphous group are likely to have prompt notice of each agency action affecting them." (*Ibid.*)

This concern gave rise to the Court's inclination to restrict the scope of the term "contracts" as used in section 53511 and this Court went on to identify four factors that it suggested led to its conclusion that the word "contracts" should be construed more narrowly than a reading that would make virtually all public agency contracts subject to the Validation Statutes. These four factors were:

> "... (1) the characterization of the proposed statute in the Legislative Counsel's digest as permitting " 'a local agency to bring an action to determine the validity of evidences of indebtedness' " (*City of Ontario, supra*, 2 Cal.3d. at p. 343); (2) the statute's placement as part of chapter 3 (entitled "Bonds") of part 1, division 2, title 5 of the Government Code (*Ibid.*); (3) the fact that the relevant language of the statute ("bonds, warrants, contracts, obligations, or evidences of indebtedness") was borrowed from section 864 of the validation statutes, requiring that

[32] Code Civ. Proc. § 860 provides: "A public agency may upon the existence of any matter which under any other law is authorized to be determined pursuant to this chapter, and for 60 days thereafter, bring an action in the superior court of the county in which the principal office of the public agency is located to determine the validity of such matter. The action shall be in the nature of a proceeding in rem."

> it be given the same meaning that it had in the earlier statute, i.e., the validation statutes were "made applicable only to such matters as the legality of the local entity's existence, the validity of its bonds and assessments, and the validity of joint financing agreements with other agencies" (*Ibid.*; [Emphasis supplied]); and (4) the use of "contracts" surrounded by four limited-topic terms made it "peculiarly inapt for expressing such a general meaning" (*Id.* at p. 344.)

The fourth factor observed by this Court appears to have been the application of the *noscitur a sociis* rule of construction.[33] In other words, the term "contracts" as used in Section 53511 takes its "... meaning from the company it keeps." (See e.g., *People v. Drennan* (2000) 84 Cal.App.4th 1349, 1355.) In accordance with this principle of construction, this Court adopted a narrow meaning of "contracts." Apparently, this Court reasoned a more expansive meaning would make other items listed in section 53511 unnecessary or redundant or would otherwise make the item markedly dissimilar to the other items in the list."[34]

This Court also enumerated various aspects of the legislative history listed among the four factors that it suggested

---

[33] "*Noscitur a sociis* ('it is known by its associates') is the principle that 'the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used....'" (*Texas Commerce Bank v. Garamendi* (1992) 11 Cal.App.4th 460, 471, fn. 3.)

[34] (See e.g., *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 307.)

led to its conclusion that the word "contracts" as used in section 53511 should be construed more narrowly than the City of Ontario contended. However, certain other features of that historical background, not discussed by this Court in *City of Ontario*, *supra*, suggest that a more expansive interpretation of the term "contracts" should apply. While most of the statutes enacted simultaneously with Code of Civil Procedure section 864[35] included language involving bonds and assessments,[36] some, however, referred to the validation of other types of contracts; although most of the latter concerned contracts with other agencies, often federal, some involved contracts of acquisition and construction. For example, Water Code section 43730[37] refers to

---

[35] Code Civ. Proc. § 864 provides: "[F]or purposes of this chapter, bonds, warrants, contracts, obligations, and evidences of indebtedness shall be deemed to be in existence upon their authorization. Bonds and warrants shall be deemed authorized as of the date of adoption by the governing body of the public agency of a resolution or ordinance authorizing their issuance, and contracts shall be deemed authorized as of the date of adoption by the governing body of the public agency of a resolution or ordinance approving the contract and authorizing its execution."

[36] Government Code sections 53510 and 53511 were enacted in 1963, two years after the enactment of the validation statutes. (Stats.1963, ch. 2118, § 1, p. 4404; see also *Kaatz v. City of Seaside* (2006) 143 Cal.App.4th 13, 35.)

[37] Water Code section 43730 provides: "An action to determine the validity of bonds, assessments, contracts, including contracts with the state, the department, any other district, or the United States, the adoption of a project or the taking of any other action by the district or by the board under the provisions of this division may be brought pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure." [Enacted Stats.1961, ch. 1531, p. 3367.]

"contracts . . . or the taking of any other action by the district or by the board and clearly encompasses powers previously granted to enter into contracts of construction or improvement."[38] Likewise, former Streets and Highways Code[39] section 5265, relating to "the validity of any contract," referred to prior sections "dealing with contracts for construction, and for acquisition of materials, supplies and equipment."[40] Similarly, "Streets and Highways Code section 10601[41] relates in part to contracts for construction of improvements."[42] Similar language in the numerous uncodified Water Act provisions enacted simultaneously with Code of Civil Procedure sections 860-870

---

[38] (*Graydon v. The Pasadena Redevelopment Agency*, *supra*, 104 Cal.App.3d at pp. 643-644 (referencing Water Code, §§ 43300-43309).)

[39] Enacted Stats.1961, ch. 1523, p. 3361 [Emphasis supplied.]

[40] (*Graydon v. The Pasadena Redevelopment Agency*, *supra*, 104 Cal.App.3d at pp. 643-644 (referencing Streets & Highways Code §§ 5240, et seq.) [Emphasis supplied].)

[41] Streets and Highways Code section 10601 provides: "An action to determine the validity of the assessment, bonds, contract, improvement or acquisition may be brought by the legislative body or by the contractor pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure. For such purpose an improvement or acquisition shall be deemed to be in existence upon its authorization and an assessment upon its confirmation. Notwithstanding any other provisions of law, the action authorized by this section shall not be brought by any person other than the legislative body or the contractor, nor except when permitted by Section 10400 shall the action be brought after the date fixed for the beginning of work. [As amended by Stats.1961, ch. 1526, p. 3364.]

[42] (*Graydon v. The Pasadena Redevelopment Agency*, *supra*, 104 Cal.App.3d at pp. 643-644 (referencing Streets & Highways Code §§ 10500 et seq.) [Emphasis supplied].)

reaffirms the conclusion that, at least in certain instances, the Legislature understood the word "contracts" in Section 864 to include matters other than "the limited topic of a local agency's financial obligations."[43]

In the end, this Court did not adopt an express definition of the term "contracts" but rather found that "[T]he foregoing considerations point to at least one clear conclusion: the question whether chapter 9 applies to the case at bar presents a complex and debatable" issue,"[44] and for this reason this Court found "[T]hus assuming arguendo that chapter 9 does apply to this case, a mistaken but reasonable decision by plaintiffs' counsel that it did not apply constitutes good cause for the trial court to permit belated compliance with its terms. Counsel are not expected to be omniscient, as the Legislature plainly recognized by writing the 'good cause' exception into section 863." (*Id.* at p. 346.)

In a decision reached subsequent to *City of Ontario, supra*, the Court of Appeal further analyzed the meaning of the term "contracts" as used in Government Code section 53511. *Phillips v. Seely* (1975) 43 Cal.App.3d 104 involved a taxpayers' action challenging the validity of a contract between a county board of

---

[43] (*Id.*, citing this Court in *City of Ontario, supra*, 2 Cal.3d at p. 344.)
[44] (*City of Ontario, supra*, 2 Cal.3d. at p. 345.)

supervisors and a private party for the rendition of legal services. The *Phillips* court unanimously held that in spite of the language of Government Code section 53511 "...the contract for rendition of legal services to the county by Warren was not subject to sections 860 and 863." (*Phillips v. Seely, supra,* 43 Cal.App.3d at pp. 111-112.) The result in *Phillips* rested almost entirely upon this Court's opinion in *City of Ontario,* which led to a conclusion that a contract for legal services was "not the kind of financial obligation contemplated to be automatically validated absent a challenge within the 60 days proscribed in sections 860 and 863 for instruments, such as bonds and assessments ...." (*Id.* at p. 112.) The decision in *Phillips, supra,* is consistent with this Court's decision in *City of Ontario* and its lineage, as clearly, the contract in question *did not directly relate to* a public agency's bonds or financial obligations *nor bear any relationship thereto.*

In *Walters v. County of Plumas* (1976) 61 Cal.App.3d 460, the Court of Appeal concluded that the plaintiff's first two claims challenging the bidding and awarding of franchises for the collection and disposal of solid waste were not subject to the validation statutes. (*Id.* at p. 468.) Relying on *Phillips, supra,* and the opinion in *Smith v. Mt. Diablo Unified Sch. Dist.* (1976) 56

Cal.App.3d 412, 421, where the court found "it was not the intention of the Legislature that the contract between the District and IBM [for the purchase of a computer, after receipt of bids] is the kind of financial obligation contemplated to be automatically validated absent a challenge within the 60 days," the *Walters* Court determined the "franchise contracts here are indistinguishable from the computer contract in *Smith*" and that "chapter 9 does not apply" to such franchises. (*Walters v. County of Plumas, supra,* 61 Cal.App.3d at p. 468.) However, when considering the plaintiff's third cause of action challenging the county's guaranty of the third-party franchisees' respective payment obligations for the purchase of heavy equipment, the *Walters* Court found that Code Civ. Proc. sections 860-870 were applicable because the claim concerned *a direct commitment of public funds for a project* and *the lack of a prompt validating procedure would impair the public agency's ability to operate.* (*Walters v. County of Plumas, supra,* 61 Cal.App.3d at pp. 468–469.) In this context, the Court explained:

> "... the essential difference between those actions which ought and those which ought not to come under chapter 9 to be the extent to which the lack of a 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 ....*" (*Ibid.*; [Emphasis supplied].)

Finally, the court found that the validating statutes did not apply to the plaintiff's fourth cause of action alleging certain ordinances did not comply with former Government Code section 66780, and fifth cause of action alleging a failure to prepare an environmental impact report *because the county's ability to operate was not meaningfully impaired and no third-party financial interests were affected.* (*Walters v. County of Plumas, supra*, 61 Cal.App.3d at p. 469; [Emphasis supplied].)

In *Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, two taxpayers sought a declaration that a dedication of public funds to guarantee a nonprofit corporation's issuance of $130,000,000 in bonds to finance an aquarium was invalid. (*Id.* at p. 838.) The project included pledges of designated funds by two public agencies as security for payment of the debt service on the bonds. (*Id.* at p. 839.) Following the entry of judgment on a validation action brought by the entities to validate (among other

actions) the pledges, the plaintiffs brought suit to invalidate the public actions. (*Ibid.*)

The court found that the pledges of public funds were proper subjects of the prior validation proceeding (*Friedland v. City of Long Beach, supra*, 62 Cal.App.4th at p. 845) and rejected the plaintiffs' contention that, notwithstanding the 60–day statute of limitations under the Validation Statutes, they could still raise constitutional challenges. (*Id.* at pp. 846–847.) Relying specifically on *City of Ontario, supra, Graydon, supra*, and *Meaney v. Sacramento Housing & Redevelopment Agency* (1993) 13 Cal.App.4th 566, 577, the Court of Appeal found "[T]he Fourth Amendment to Third Cooperation Agreement and Resolution No. HD-1775 *were integral components of financing* for the Aquarium. They constituted pledges of funds from various sources to insure repayment of AOP bonds in the event that Aquarium revenues could not repay that debt." (*Friedland v. City of Long Beach, supra*, 62 Cal.App.4th at p. 845 [Emphasis supplied].) Thus, they were proper subjects of the validation procedures.

The primary holdings of other cases following *City of Ontario*, such as *California Commerce Casino, Inc. v. Schwarzenegger* (2007) 146 Cal.App.4th 1406, 1428-1429, and

Kaatz v. City of Seaside (2006) 143 Cal.App.4th 13, 42, further establish that while the scope of the Validation Statutes is limited, it is not limited in such a manner that would place the Lease-Leaseback Agreement outside of meaning of the term "contracts" as used in Government Code section 53511.

In *Kaatz v. City of Seaside* (2006) 143 Cal.App.4th 13, a taxpayer filed an action challenging the city's purchase of residential property on a decommissioned military base and the immediate resale of that property to the developer, allegedly at a fraction of its fair market value, with both transactions being funded by developer. The developer and city moved for dismissal on statute of limitations grounds, arguing that the action was governed by the 60-day limitations period under the Validation Statutes. The trial court entered judgment of dismissal and the taxpayer appealed. On appeal, the Court of Appeal found that, as an issue of first impression, the challenged transactions were not subject to validation statutes, and thus the taxpayer's action was not governed by the 60-day limitations period, explaining as follows:

> It is therefore clear that 'contracts' under Government Code section 53511 should be assigned a restricted meaning. Rather than authorizing proceedings to validate any public agency contract...

> or even any contract constituting a financial obligation of a public agency ... the *'contracts' under Government Code section 53511 are only those that* are in the nature of, or *directly relate to a public agency's bonds*, warrants or other evidences of indebtedness. (*Kaatz v. City of Seaside, supra,* 143 Cal.App.4th at p. 43; footnote omitted [Emphasis supplied].)

The *Kaatz* court further noted that the term "obligations" as used in Section 53511 must also be read narrowly because this term does not encompass all contracts "...constituting an obligation and/or financial obligation of a public agency...." and noting, if so construed, "... [section 53511's] scope would be unrestricted. Such a construction would yield the conclusion that "contracts" under Government Code section 53511 would even include agency contracts previously held to not be subject to the Validation Statutes (*Kaatz v. City of Seaside, supra,* 143 Cal.App.4th at p. 33, referencing *Walters v. County of Plumas, supra,* 61 Cal.App.3d 460 [franchises for collection and disposal of solid waste]; *Smith v. Mt. Diablo Unified Sch. Dist., supra,* 56 Cal.App.3d at p. 421 [school district contract to acquire computer]; and *Phillips v. Seely, supra,* 43 Cal.App.3d at p. 112 [contract to retain attorney to provide legal services to indigents].) Thus, the Court of Appeal reasoned, just as the term "contracts" must be interpreted by reference to the four other terms in Government

Code section 53511 surrounding it, so must the term "obligations" be so construed to give it a more restrictive meaning. (*Kaatz v. City of Seaside*, *supra*, 143 Cal.App.4th at p. 42, fn. 35; see also *California Commerce Casino, Inc. v. Schwarzenegger*, *supra*, 146 Cal.App.4th at p. 1429, quoting *Kaatz*.) Thus, in harmony with this Court's decision in *City of Ontario*, *supra*, and the lineage of subsequent appellate decisions following the rationale of this Court, the Court of Appeal found that the touchstone for determining whether a particular contract falls within the definition of "contacts" under Section 53511 is whether *the contract directly relates to a public agency's indebtedness*. (*Kaatz v. City of Seaside*, *supra*, 143 Cal.App.4th at p. 42.)

In finding the subject transaction was not subject to validation, the Court of Appeal reasoned, as follows:

> The LDA [Land Disposition Agreement] ***bears no relationship to the issuance of bonds. No bonds were issued or contemplated in connection with the proposed transaction under which the City would acquire Hayes Park*** and then resell it to K & B Bakewell. Likewise, the LDA does not relate to warrants. [¶] We conclude further that the LDA ***neither constituted nor related to 'evidence [ ] of [public agency] indebtedness.***' (Gov. Code, § 53511.) In the context of the validation statutes, the LDA ***did not represent a transaction in which the City borrowed funds for a specific purpose*** (i.e., the acquisition of the Property). The LDA did not memorialize or otherwise describe an

> indebtedness incurred by the City. (*Kaatz v. City of Seaside, supra,* 143 Cal.App.4th at pp. 42-43 [Emphasis added].)

In the matter before this Court, the District issued and sold the Bonds with the proceeds therefrom dedicated to financing the construction of *specific school facilities*, including the Middle School Project. As such, the Lease-Leaseback Agreement bears a *direct relationship to the issuance of those Bonds.*

In *Graydon v. The Pasadena Redevelopment Agency, supra,* 104 Cal.App.3d at p. 639, a city's redevelopment agency contracted with a developer to build and own a shopping center in a blighted downtown area. (*Id.* at p. 634.) By a separate agreement, the redevelopment agency contracted with the developer to construct a subterranean parking garage beneath the shopping center to be owned by the agency. (*Ibid.*) To finance the public costs of acquiring the land for the shopping center and constructing the subterranean garage, the agency issued bonds. (*Id.* at pp. 634, 638.) A taxpayer brought suit alleging that the construction contract for the subterranean garage was awarded without competitive bidding and was a misuse of public funds. (*Id.* at pp. 634-635.). In discussing the decision of the trial court, the appellate court noted "[T]he heart of the dispute between appellant and respondent focuses on whether this is a "contract"

of the type intended to be covered by the provisions of [Code Civ. Proc.] sections 860, 863, 864 and 869. (*Graydon v. The Pasadena Redevelopment Agency, supra,* 104 Cal.App.3d at p. 639.)

The *Graydon* court found that the construction contract qualified as a contract covered by the Validation Statutes and that the lawsuit was barred by the 60-day limitation period because *the contract for construction* of the subterranean garage *was linked directly to the agency's method of financing the project.* (*Graydon v. The Pasadena Redevelopment Agency, supra,* 104 Cal.App.3d at pp. 645-646 [Emphasis supplied].) As such, the court reasoned that the agency's bonds *"...were intimately and inextricably bound up with the award of [the] contract."* (*Ibid.*; [Emphasis supplied.])

The decision of the Court of Appeal in *California Com. Casino, Inc. v. Schwarzenegger,* (2007) 146 Cal.App.4th 1406, is similar to that in *Graydon.* Under the facts of *California Com. Casino,* beginning in 2004, then Governor Arnold Schwarzenegger and five tribes amended the compacts governing gaming on Native American lands. The amendments required each of the tribes to make eighteen annual payments to the State with the agreement that it was the "... State's intention to assign these ...

revenue contributions totaling at least $100 million annually to a third party for purposes of securitizing the 18-year revenue stream in the form of bonds that can be issued to investors." (*Id.* at p. 1413.) As in *Graydon*, the issue before the Court of Appeal was whether the compact amendments were "contracts" for purposes of the validation, in this instance under Government Code section 17700.[45] If they were "contracts" under Section 17700, then the plaintiffs' lawsuit was time-barred.

The Court of Appeal reviewed the compact amendments and found:

> "[T]he amended compacts are *inextricably intertwined* with the state's intended use of the income stream created by them and with the bonds to be issued at a later date. Therefore, the ability of the five tribes and the state to accomplish the statutory purpose of AB

[45] The District believes cases interpreting Gov. Code § 17700 are analogous and can also be used to interpret Gov. Code § 53511, the parallel provision applicable to local governments. Government Code §§ 53511 and 17700 use nearly identical language. (See *In re Bay-Delta* etc., 34 Cal.Rptr.3d 696, 798 (Ct. App. 2005), "[E]very statute should be construed with reference to the whole system of law of which it is a part, so that all may be harmonized and have effect. [Citation.] Legislative intent will be determined so far as possible from the language of the statutes, read as a whole." (*County of Fresno v. Clovis Unified School Dist.* (1988) 204 Cal.App.3d 417, 426.) Government Code § 17700 was enacted in 1994, after *City of Ontario* was decided. (See Stats.1994, ch. 242, § 2, p. 1832.) "It is a well-recognized rule of construction that after the courts have construed the meaning of any particular word, or expression, and the legislature subsequently undertakes to use these exact words in the same connection, the presumption is almost irresistible that it used them in the precise and technical sense which had been placed upon them by the courts. [Citation.]" (*City of Long Beach v. Payne* (1935) 3 Cal.2d 184, 191, 44 P.2d 305.)

> 687 '*would be substantially impaired absent a prompt validating procedure as to such contract[s].*' (*Graydon, supra*, 104 Cal.App.3d at p. 645 [Emphasis supplied.] That is because the negotiated amended compacts are an '*integral part of the whole method of financing*' *the state's "transportation programs* and [are needed] to ensure that the revenues available under the amended tribal-state compacts ratified pursuant to [Assembly Bill 687] are made available to the state *as expeditiously as possible....*" (*California Com. Casino, Inc. v. Schwarzenegger, supra*, 146 Cal.App.4th at pp. 1430-1431 [Emphasis supplied].)

The court concluded "[T]he amended compacts are, in the words of *Graydon*, '*inextricably bound up*' with the use of the income stream created by the amended compacts and with the bonds to be issued." (*California Com. Casino, Inc. v. Schwarzenegger, supra*, 146 Cal.App.4th at p. 1430, citing *Graydon* [Emphasis supplied].)

In *McGee v. Torrance Unified Sch. Dist.* (2020) 49 Cal.App.5th 814 ("*McGee II*"), just like Davis, McGee brought a "reverse validation" action to invalidate a lease-leaseback contract, together with a separate "taxpayer's claim" based on conflict of interest. Just like Davis, McGee failed to seek an injunction to stop the project. [46] And like Davis, McGee claimed

[46] As Davis had made no effort to seek an injunction stopping the project during the litigation, Harris, who was contractually bound by a "time is of the essence" provision in the Lease-Leaseback Agreement, continued building the middle school.

the right as a taxpayer to seek disgorgement under a related cause of action. Just as in *Davis II*, the project was completed, and the trial court held that the reverse validation action was moot.

Under the facts of *McGee II*, between 2012 and 2015, the Torrance Unified School District and Balfour Beatty Construction entered a series of lease-leaseback agreements for construction projects[47] through Torrance Unified School District Obligation Bond Measure Y and Measure Z. Starting in 2013, plaintiff McGee filed three complaints challenging these projects. Like Davis, McGee contended the lease-leaseback agreements themselves were not subject to validation. McGee argued the lease-leaseback agreements were not "contracts" as the term is used in Government Code section 53511.[48]

---

[47] Interestingly, in *Davis II,* the court contends "[O]ur analysis of the Construction Contracts is distinguishable from that adopted by the court in *McGee II*. There, the court determined financing was a purpose of the lease-leaseback agreements before it and, therefore, the court was "satisfied the lease-leaseback agreement fell within Government Code § 53511, bringing them within the validation statutes." (*Davis II*, 57 Cal.App.5th at fn. 16, citing to *McGee II*, *supra* at p. 825.) However, in *McGee II*, *supra*, the court did not make such a finding. Rather, relying on the opinion in *Davis I*, the plaintiff argued at the trial court that the lease-leaseback agreements "'[a]re [s]ubject to [v]alidation' pursuant to Government Code section 53511 because they 'are for the purpose of financing.'" (*McGee II*, *supra* at p. 825.) So, at best, the *Davis II* court's reasoning is circular in this regard.

[48] Also, like Davis, the centerpiece of McGee's appeal was "... his argument that his conflict-of-interest claims were in personam taxpayer

The Court of Appeal had previously analyzed whether Education Code section 17406 authorized lease-leaseback agreements without competitive bidding, and it had determined *that the use of validation actions was a common practice for school construction projects structured as a lease-leaseback arrangement.* (*McGee II, supra,* 49 Cal.App.5th at p. 824 [Emphasis supplied].) In response to McGee's argument that the lease-leaseback agreements were not "contracts" under Government Code section 53511, the Court of Appeal explained:

> "California courts have read [Government Code] section 53511's reference to 'contracts' 'narrow[ly]' to reach only those contracts that 'are in the nature of, or *directly relate[d] to a public agency's bonds, warrants or other evidences of indebtedness.*'" (citation omitted) But contracts "involving financing *and financial obligations*" fall within this provision (citation omitted), as do contracts that are "'*inextricably bound up*'" *with bond funding and financing* (citation omitted). (*Ibid.* [Emphasis supplied].)

The court further discerned that McGee's taxpayer claim was in reality a claim that the lease-leaseback arrangement was invalid. (*Ibid.*) The court found that the implications of McGee's

---

claims brought pursuant to section 526a falling outside the validation statutes. Section 526a allows a taxpayer to bring "[a]n 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 ... against any officer thereof, or any agent, or other person, acting in its behalf." (*McGee II, supra,* 49 Cal.App.5th at p. 825.)

claim were serious, threatening to undermine the very purpose of the validation process, stating:

> [A]ny judgment ordering disgorgement would *require* a finding the lease-leaseback agreements were void. In other words, the agreements would *necessarily* be invalidated. A judgment in McGee's favor would also undermine the very purpose behind the validation statutes. A cloud has hung over the challenged projects for *years*, destroying any hope in prompt validation of the underlying lease-leaseback agreements. That delay is largely attributable to McGee, who strategically chose not to prevent the projects from moving forward. Beyond the specific projects here, a judgment in McGee's favor would ***threaten future projects with the prospect of lawsuits long after completion. That would undoubtedly inhibit the District's ability to obtain financing for them.*** (citing *Friedland v. City of Long Beach, supra,* 62 Cal.App.4th at p. 843 ["***A key objective of a validation action is to limit the extent to which delay due to litigation may impair a public agency's ability to operate financially.***"].) "'[T]he essential difference between those actions which ought and those which ought not to come under [the validation statutes] **[is]** ***the extent to which the lack of a 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'" and likely would have "'a chilling effect upon potential third party lenders, thus resulting in higher interest rates or even the total denial of credit.***'" (citing *McLeod* [*v. Vista Unified School Dist.*] (2008) 158 Cal.App.4th 1156.) (*McGee II, supra,* 49 Cal.App.5th at p. 828; [Emphasis supplied].)

Consistent with this Court's analysis in *City of Ontario, supra,* the Court of Appeal concluded that the lease-leaseback

agreements challenged by McGee were within the scope of "contracts" covered by Government Code section 53511. (*Ibid.*)

The Court of Appeal went on to further explain:

> As in *Wilson [Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1579], McGee's reverse validation action was rendered moot by the completion of the challenged projects. McGee filed his first lawsuit as far back as 2013, and the trial court did not dismiss the cases until 2019. During those six years, McGee did nothing to stop the projects from moving forward while the validity of the lease-leaseback agreements was litigated. He tries to explain that choice by claiming he did not want to "impair District's ability to operate" and he had an "adequate remedy at law" through disgorgement. Even if true, that does not change the fact that the projects were completed. ***As Wilson recognized, this years-long delay destroyed the very purpose behind the validation statutes— "to settle promptly all questions about the validity of an agency's action***." (citing *Wilson*, *supra*, 191 Cal.App.4th at p. 1580, italics added.) Having sought no stay or injunction, he is in no position "'to complain of the very change in circumstances that [he] might have prevented by seeking such relief.'" (*Id.* at p. 1581.) (*McGee II*, *supra*, 49 Cal.App.5th at p. 823; [Emphasis supplied].)

In funding the construction of the Middle School Project, the District used funds approved by voters under the Bond Measures which authorized the District to issue and sell bonds for construction and renovation of school facilities, including funding construction of the Middle School Project. As such, the Bonds "were intimately and inextricably bound up with the award" of the

Lease-Leaseback Agreement to Harris, as without the bond funds, there would have been no agreement, and the Bonds were "linked directly" to the District's method of financing the construction of Middle School Project, as the Bond proceeds paid for this construction. (See *Graydon, supra,* 104 Cal.App.3d at pp. 645-646.) Moreover, a finding that the Lease-Leaseback Agreement is not subject to validation would "impair District's ability to operate financially," drastically "affect the marketability of the District's bonds" and have "a chilling effect upon potential third party lenders," and would allow delays that would destroy the very purpose behind the validation statutes— "to settle promptly all questions about the validity of an agency's action." As such, this Court should find that the Lease-Leaseback Agreement is a "contract" within the meaning of Government Code section 53511.

II. There is No Legal Requirement That the Lease-Leaseback Agreements Be Financed by the Builder, Rather Than By or Through a School District's Bonds.

Education Code section 17406 provides an exemption from Education Code section 17417's competitive bidding requirements. However, it does not alter the definition of "contracts" under Government Code section 53511 nor change or

alter, in any way, what contracts are subject to the Validation Statutes. Consistent with this Court's reasoning in the *City of Ontario, supra*, and the subsequent appellate decisions examining this issue, a construction contract financed by the District's Bonds would fall within the ambit of Section 53511. Nonetheless, the Court of Appeal in *Davis I*,[49] *supra*, attempted to distinguish what it referred to as "a genuine lease-leaseback contract" from one designed to "avoid the competitive bidding process by subterfuge or sham." (*Davis I, supra*, 237 Cal.App.4th at p. 288.) However, section 53511 makes no distinction between a "true lease" and other contracts that fall within the ambit of the statute. Rather, section 53511 requires only that a contract, such as the Lease-Leaseback Agreement, be "*directly related*"[50] or "*inextricably intertwined*"[51] with an agency's bonds, warrants, or other evidences of indebtedness to fall within the definition of "contracts" under Government Code section 53511.

The *Davis I* court made this faulty distinction notwithstanding that the District complied with all of the express

---

[49] Which distinction is purportedly relied on as law of the case in *Davis II* (57 Cal.App.5th 911, 941.)

[50] (*Kaatz v. City of Seaside* (2006) 143 Cal.App.4th 13, 42.)

[51] (See *Hollywood Park Land Co., LLC v. Golden State Transportation Fin. Corp.* (2009) 178 Cal.App.4th 924, 935.)

requirements set forth in Education Code section 17406,[52] as the District owned the land to be leased to Harris, Harris agreed to construct the Middle School Project for a guaranteed maximum price; and title to the site and all improvements vested in the District at the end of the lease term. (See *Davis I, supra*, 237 Cal.App.4th at pp. 272-273; (see also *Los Alamitos Unified School Dist. v. Howard Contracting, Inc.* (2014) 229 Cal.App.4th 1222, 1227 for a discussion of the requirements under Section 17406.) Yet, the *Davis I* court held, "[O]ur review of the entire legislative scheme, the ostensible objects it seeks to achieve, the evils to be remedied, and the underlying public policies lead us to conclude the word 'lease' refers to the substance of the transaction and means more than a document designated a lease by the parties. Moreover, to fulfill the primary statutory purpose of providing financing for school construction, the arrangement must include a

[52] 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 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."

financing component." (*Davis I, supra,* 237 Cal.App.4th at pp. 291-292.)

In reaching this conclusion, the *Davis I* court relied, in part, 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[53] while wholly ignoring Education Code 17408, which provides.

> "The governing board of a school district shall call and hold an election, pursuant to Section 17409 or 17412, before or after entering a lease or agreement, as the case may be, except that if the lease or agreement does not effect an increase in the existing applicable maximum tax rate of the district, the election requirements of this section shall not apply."

As such, Education Code section 17408 obviously contemplates district taxes as a financing mechanism for school leases.[54]

Again, relying in part, on dicta from *Morgan Hill, supra,* the court in *Davis I* explained how it would determine whether a leaseback is a "true" (or genuine) lease: "[W]e conclude the true legal effect of the leaseback in question is based on all the terms

---

[53] (See *Davis I, supra,* 237 Cal.App.4th at p. 291); citing to the SAB Report attached to Davis's FAC that referenced the dicta in *Morgan Hill, supra.*

[54] (*Morgan Hill Unified Sch. Dist., supra,* 204 Cal.App.3d at pp. 1087–88.) (In fact, the *Morgan Hill* Court finds that "[T]he plain meaning of the introductory provision is that only one lease may be submitted to the voters in one proposition.")

of the document. [Citation.] Provisions in the document that are significant include those that define (1) who holds what property rights and when those rights and interests are transferred between the parties and (2) the amount and timing of the payments. [Citation.] The payment provisions, particularly the length of the period over which payments are made, are important in this context because the primary purpose of the legislation was to provide a source of financing for school construction and the payment provisions will show whether the project is being financed through the contractor or whether the school district is paying for the project by using funds from other source[s]." (*Davis I, supra*, 237 Cal.App.4th at p. 285.) The *Davis I* court further erroneously relies on the report issued by the executive officer of the State Allocation Board ("SAB"), prepared for a board meeting on January 28, 2004, for its conclusion that if no financing exists in the lease lease-back arrangement, the use of Article 2 appears to be inappropriate. Relying on the SAB report and its erroneous interpretation of the "primary purpose" of Education Code section 17406, the *Davis I* court concludes the challenged "Facilities Lease" was "not a true lease that provided

financing for the project" (*Id.* at p. 286,)[55] finding that "the substance of the payment terms in the Facilities Lease is that of compensation for construction, not payment for a period of use of the facilities" and that "[the] Contractor did not provide any financing to [the school district] under the Facilities Lease." (*Ibid.*)

The 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. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 59.) Neither section 17406 nor Government Code section 53511 require that a contract in question contain a financing component. Rather, as the Court of Appeal correctly concluded in *McGee II*, *supra*, consistent with this Court's rationale in *City of Ontario* "the lease-leaseback

[55] In *Davis II*, the Court of appeal stated "[T]he statutory interpretation of Education Code § 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." (57 Cal.App.5th 911, 941.)

agreements involved the District's financial obligations and were inextricably bound up in the District's bond financing,[56] bringing them within the scope of 'contracts' covered under Government Code section 53511." *(McGee II, supra,* 49 Cal.App.5th at p. 824.) Because the Bonds issued and sold by the District financed the Middle School Project, the Lease-Leaseback Agreement which relied on those funds to finance the project is *directly related* to the Bonds and is a contract within the meaning of section 53511.

III. Education Code section 15110 Affirms That Bond Financed Contracts for Approved School Improvements, Regardless of the Delivery Method, Are Subject to Validation.

Education Code section 15110 provides:

> "An action to determine the validity of bonds *and of the ordering of the improvement or acquisition may be brought pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure.* In such action, all findings, conclusions and determinations of the legislative body which conducted the proceedings shall be conclusive in the absence of actual fraud." (Repealed and added by Stats. 1996, Ch. 277, Sec. 2. Effective January 1, 1997. Operative January 1, 1998 [Emphasis supplied].)

[56] As in the present case, the challenged lease-leaseback agreements were "funded through ... General Obligation Bond Measure[s]." (See *McGee I, supra*, 247 Cal.App.4th at p. 240 ["The contracts were awarded to Balfour and were funded through a general obligation bond."].)

Only one reported case, *McLeod v. Vista Unified School Dist.* (2008) 158 Cal.App.4th 1156, has examined the interplay between Education Code section 15110, Government Code section 53511 and Code of Civil Procedure section 860. In *McLeod,* a school district successfully passed a $140 million General Obligation Bond with the express purpose of funding construction for new schools and renovating aging schools. The district's original plans of building two new elementary schools were scrapped after economic conditions and less-than-expected matching funds rendered construction infeasible. The school district formally approved a new plan in April 2004. Two years later, in May 2006, a taxpayer brought suit challenging the decision to delete the two elementary schools from the plan and alleged improper use of funds on other building projects. Specifically, McLeod asserted that by failing to build projects listed in Proposition O and diverting funds earmarked for them to other projects, the District engaged in illegal expenditures. (*McLeod, supra,* 158 Cal.App.4th at p.1170.)

The court found that the Validation Statutes applied to General Obligation Bonds and held that the taxpayer's suit was a reverse validation action that should have been filed within 60

days of the 2004 approval of the district's new plan. The court reasoned that the *suit was a direct challenge to the decision in the 2004 plan to delete the two elementary schools and use the funds on other building projects, and that allowing the suit would impair the school district's ability to operate.* The district had explained at trial that "every single day that this case has not been decided *it impairs the ability of the District to go to the bond markets and get the funding* to complete the [high school] construction," and that McLeod did not dispute this representation. (*McLeod, supra,* 158 Cal.App.4th at p. 1170.) Essentially, the proverbial "train had left the station" "as the District had design and architectural plans in place that would have been hindered." (*Ibid.* [Emphasis Supplied].)

McLeod had contended that Government Code section 53511 and Education Code section 15110 were inapplicable because he did not directly "challenge issuance of any of the bonds or the financing associated with their issuance," and "there is nothing about the bonds or their issuance that is in dispute." The Court of Appeal disagreed, explaining.

> Government Code section 53511, subdivision (a) applies here. Again, it authorizes a local agency to bring a validation action under Code of Civil Procedure section 860 "to determine the validity of its bonds, warrants, contracts,

> obligations or evidences of indebtedness." Additionally, Education Code section 15110 specifically authorizes a school district to bring a validation action under Code of Civil Procedure section 860 *"to determine the validity of bonds and of the ordering of the improvement or acquisition."* [Emphasis supplied].

The *McLeod* court found that "[T]he validation statutes apply because the District's issuance of the entire $140 million in bonds authorized by Proposition O was an "integral part of the whole method of financing" the costs associated with its comprehensive plan to alleviate school overcrowding."[57] (*McLeod, supra*, 158 Cal.App.4th at p. 1169, citing *Graydon, supra*, 104 Cal.App.3d at p. 645.) Further, the court found the remaining bond funds were necessarily "inextricably bound up" with the award of contracts pertaining to the dual magnet high schools. (*Ibid.*, citing *Graydon, supra*, 104 Cal.App.3d p. 646,) and agreed with the trial court which had explained "the District's challenged decisions were 'made in the dynamics of an ever changing construction environment, decisions that, by their nature, had to be reviewed ... as quickly as possible ... to have any practical impact.'" (*Ibid.*)

---

[57] Similarly, the Bond proceeds from Measures K and Q were earmarked, in part, for the construction of new schools in Fresno to reduce overcrowding. https://facilities.fresnounified.org/measure-q-measure-x-bond/; Measure K Ballot Text; Measure Q Ballot Measure – Full Text.

The Court of Appeal found that McLeod's suit, in part, challenged the validity of the bond issuance, and also challenged the District's financing mechanism for the project. Similarly, Davis's challenge to the lease-leaseback transaction should be viewed as a direct challenge to the tax-exempt status of the Bonds as well as a challenge to the District's financing mechanism for the project, which included arbitrage earnings from the project fund into which the Bond proceeds were placed pending construction of the Middle School Project. As such, this Court should find the Lease-Leaseback Agreement subject to validation action under Code of Civil Procedure section 860 pursuant to both Education Code section 15110[58] and Government Code section 53511.

IV. As a Result of Federal Income Tax Regulations that Limit the Arbitrage Yield on Tax Exempt Bonds, The Lease-Leaseback Agreement and the Bonds Are Intimately Intertwined.

Because the Bonds are *tax-exempt*[59] interest payments are excludable from a Bond purchaser's gross income.[60] A public

[58] Education Code sections "are to be liberally construed, with a view to effect its objects and to promote justice." (*Morgan Hill Unified Sch. Dist. v. Amoroso* (1988) 204 Cal.App.3d 1083, 1088.)

[59] https://www.treasurer.ca.gov/cdlac/bonds.asp#:~:text=Municipal%20Bonds&text=The%20funds%20are%20used%20to,government%20agencies%20are%20tax%2Dexempt.

agency may not, in general, borrow money from bond purchasers at a low, tax-exempt, interest rates and then invest the bond proceeds in higher yielding investments. If it does, the bond interest will no longer be tax-exempt. However, there are limited exceptions to a public agency engaging in such arbitrage. Where a public agency issues bonds to build capital projects, normally there will be a period of time before all of the bond proceeds are spent and before final payment to the contractor is made. Because of this lag time, the IRS allows a public agency to invest bond proceeds to earn higher returns without the bonds losing their tax-exempt status. However, this exemption from arbitrage restrictions applies if, and only if, the agency complies with the specific requirements set forth in IRC section 148(c) and its accompanying regulations.

Arbitrage can play an important part in financing public projects. For example, a school district that borrows at six percent (6%) by issuing tax-exempt bonds may be able to invest the proceeds in a taxable instrument and earn eight percent (8%) interest. Here, the school district would make a two percent (2%)

---

[60] An exempt facility bond is any bond issued pursuant to IRC §142, where at least 95 percent of the net proceeds of which are used, or to be used, to finance an exempt facility, including a "qualified public educational facility."

investment profit that would not be subject to taxes because schools are not taxable entities. The arbitrage rules established by the IRS are designed to keep public agencies from making excess arbitrage profits. For this reason, subject to certain exceptions, IRC section 148 limits the yield that a school district can make using arbitrage to enhance the proceeds of a tax-exempt bond offering.

On October 13, 2011, the District executed a "Certificate as to Arbitrage"[61] pursuant to which the Bond proceeds were deposited into a project fund that could be invested *without yield restrictions for a limited three-year period.*[62] However, the Bond proceeds would be exempt from yield restrictions for this three-year period, *only if:*

(1) The proceeds from the sale of the Bonds remained in the project fund and the proceeds of the fund were allocated to construction costs; and

---

[61] The Certificate as to Arbitrage establishes that the District's arbitrage in regard to the project fund met all of the requirements imposed under Section 148. https://facilities.fresnounified.org/measure-q-measure-x-bond/; Arbitrage Certificate – Measure K, Series G and Measure Q, Series B; see Sections 1 and 2(d).

[62] https://facilities.fresnounified.org/measure-q-measure-x-bond/; Arbitrage Certificate – Measure K, Series G and Measure Q, Series B p. 2.

(2) Provided that the District:

(i) Used *not less than 85%* of the Bond's net sale proceeds for expenditures on construction costs *within three years* of the Bond's issue date,[63] and

(ii) Entered into a binding obligation within six months[64] of the issuance date of the Bonds to expend at least five percent (5%) of the Bond's net sale proceeds on the project, and

(iii) Completed the project with due diligence. [65]

If the Validation Statutes are held not to apply a lease-leaseback arrangement in which construction is financed through tax-exempt bonds, a taxpayer like Davis can wait in the wings for years and then file suit to enjoin construction midstream and/or invalidate the lease-leaseback arrangement, which could prevent a school district from complying with the requirements for the exemption from arbitrage yield restrictions, and which could result in otherwise tax-exempt bonds losing their exempt status.[66]

---

[63] The Middle School Project was completed on November 13, 2014 (AA. p. 249); and a Notice of Completion was recorded on December 4, 2014. (AA, p. 252.).

[64] The Pre-Construction Agreement was entered into by the District and Harris on February 10, 2012 well within the required period.

[65] See Treasury Regulation Section 1.148-2(e)(2); see also IRS Publication 5271, Complying with Arbitrage Requirements - A Guide for Issuers of Tax-Exempt Bonds. See p.9, https://www.irs.gov/pub/irs-pdf/p5271.pdf

[66] See e.g., *McLeod v. Vista Unified Sch. Dist.* (2008) 158 Cal.App.4th 1156, 1163 (action brought after validation period under Code of Civil Procedure section 526a, which generally authorizes a taxpayer waste action, and Education Code section 15284.)

Similarly, if the Validation Statutes are found inapplicable to the Lease-Leaseback Agreement, Davis could obtain a disgorgement remedy long after completion of the Middle School Project, exposing the Bonds to loss of their exempt status, as 85% of the net proceeds would not have been used for construction of the project, given the potential return of the entirety of the cost of construction through disgorgement.[67]

Because of the lower interest rates paid to purchasers of tax-exempt bonds, either of these scenarios would likely have a chilling effect on a school district's ability to sell its bonds designated for the construction and rehabilitation of schools. For this reason alone, it is integral that the Court find the Validation Statutes applicable to lease-leaseback arrangements in which school construction is financed through the proceeds of tax-exempt bonds.

Allowing Davis to continue a challenge to the Lease-Leaseback Agreement at this late stage is tantamount allowing

[67] Davis contends that Harris must now disgorge the entire cost of the project, $36,702,876 (minus the $651,501 Harris already returned to the District), even though Harris has already paid the bulk of those funds to subcontractors and employees. In 2016, Education Code § 17406 was amended to provide that any disgorgement is limited to the contractor's profits. In the present case, however, Davis contends that this limitation is not retroactive and does not apply to the District's agreement with Harris.

him to directly challenge the tax-exempt status of the Bonds years after their issuance and more than six years after completion of the Middle School Project, when he took no action to obtain calendar priority or to halt the project in any phase. This would defeat the very purpose of the Validation Statutes *"to settle promptly all questions about the validity of an agency's action"* and, concomitantly, result in the dissipation of the third-party lender market for such tax-exempt bonds.

CONCLUSION

This Court should find that the 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 from a 60-day limitations period being the exclusive means for challenges to such arrangements financed through issuance of tax-exempt bonds. On this basis, this Court should reverse the judgment of the Court of Appeal, finding as the court did in *Wilson*, *supra*, and *McGee II*, *supra,* that application of Government Code section 53511 and the Validation Statutes to the lease-leaseback arrangement, coupled

with project completion, renders moot each of the taxpayer's remaining claims. Finally, this Court should hold that the Lease Leaseback Agreement is valid if it complies with the requirements of Education Code 17406 on its face, without unstated requirements having to be met.

Respectfully submitted,

Dated: May 17, 2021

LANG RICHERT & PATCH, PC

By: */s/ Mark L. Creede*
Mark L. Creede
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 Opening Brief On The Merits, including footnotes and excluding the cover information, table of contents, table of authorities, signature blocks, and certificate, consists of 13,840 words in 13-point Century Schoolbook type. In making this certification, I have relied on the word count of the Microsoft Word program used to prepare the brief.

Dated: May 17, 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 stephanie@lrplaw.net.

I served a true and correct copy of the **PETITIONER FRESNO UNIFIED SCHOOL DISTRICT'S OPENING BRIEF ON THE MERITS** on the interested parties in this action:

Kevin R. Carlin kcarlin@carlinlawgroup.com	Myron Moskovitz myronmoskovitz@gmail.com
Timothy Thompson Mandy Jeffcoach tthompson@wtjlaw.com mjeffcoach@wtjlaw.com	Sean M. SeLegue Sean.selegue@aporter.com

[X] **(BY ELECTRONIC SERVICE)** On May 17, 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
Via U.S. Mail Honorable Kimberly Gaab FRESNO COUNTY SUPERIOR COURT 1130 "O" 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 May 17, 2021, at Fresno, California.

Stephanie Turnmire

STEPHANIE TURNMIRE

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **DAVIS v. FRESNO UNIFIED SCHOOL DISTRICT**
Case Number: **S266344**
Lower Court Case Number: **F079811**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **mlc@lrplaw.net**

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

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	20210517_BRF_FUSD-FINAL

Service Recipients:

Person Served	Email Address	Type	Date / Time
Colleen Bjerknes SEWUP	cbjerknes@keenan.com	e-Serve	5/17/2021 3:40:32 PM
Yasmina Flores Twin Rivers Unified School District	yasmina.flores@twinriversusd.org	e-Serve	5/17/2021 3:40:32 PM
Timothy Thompson Whitney, Thompson & Jeffcoach LLP 133537	tthompson@wtjlaw.com	e-Serve	5/17/2021 3:40:32 PM
Jonathan Klotsche O'Connor Thompson McDonough Klotsche LLP 257992	john@otmklaw.com	e-Serve	5/17/2021 3:40:32 PM
Harold Freiman Lozano Smith, LLP 148099	hfreiman@lozanosmith.com	e-Serve	5/17/2021 3:40:32 PM
Glenn Gould Orbach Huff Suarez & Henderson LLP 141442	ggould@ohshlaw.com	e-Serve	5/17/2021 3:40:32 PM
Mandy Jeffcoach Whitney, Thompson & Jeffcoach LLP 232313	mjeffcoach@wtjlaw.com	e-Serve	5/17/2021 3:40:32 PM
Mark Creede Lang Richert & Patch, PC 128418	mlc@lrplaw.net	e-Serve	5/17/2021 3:40:32 PM
Regina Garza Lozano Smith 250780	rgarza@lozanosmith.com	e-Serve	5/17/2021 3:40:32 PM
Sandon Schwartz Madera Unified School District	SandonSchwartz@maderausd.org	e-Serve	5/17/2021 3:40:32 PM
Kevin Carlin	kcarlin@carlinlawgroup.com	e-	5/17/2021

Carlin Law Group, APC 185701		Serve	3:40:32 PM
James Traber Fagen Friedman & Fulfrost LLC 248439	jtraber@f3law.com	e-Serve	5/17/2021 3:40:32 PM
Matthew Slentz Colantuono, Highsmith & Whatley, PC 285143	mslentz@chwlaw.us	e-Serve	5/17/2021 3:40:32 PM
Myron Moskovitz Moskovitz Appellate Team 36476	myronmoskovitz@gmail.com	e-Serve	5/17/2021 3:40:32 PM
Julie Arthur PSUSD	jarthur@psusd.us	e-Serve	5/17/2021 3:40:32 PM
Monica Silva Paso Robles Joint Unified School District	msilva@pasoschools.org	e-Serve	5/17/2021 3:40:32 PM
Cindy Kaljumagi Dinuba Unified School District	ckaljuma@dinuba.k12.ca.us	e-Serve	5/17/2021 3:40:32 PM
Debra Haney Caruthers Unified School District	dhaney@caruthers.k12.ca.us	e-Serve	5/17/2021 3:40:32 PM
Eduardo Martinez Sanger Unified School District	eduardo_martinez@sangerusd.net	e-Serve	5/17/2021 3:40:32 PM
Terry Bradley Kings Canyon Unified School District	garza-a@kcusd.com	e-Serve	5/17/2021 3:40:32 PM
Yvette Coronado Lang, RIchert & Patch	yvette@lrplaw.net	e-Serve	5/17/2021 3:40:32 PM
Sean Selegue Arnold & Porter LLP 155249	sean.selegue@aporter.com	e-Serve	5/17/2021 3:40:32 PM
Heidi Hughes Coalition for Adequate School Housing	hhughes@m-w-h.com	e-Serve	5/17/2021 3:40:32 PM
Maiya Yang Clovis Unified School District 195970	Maiyayang@clovisusd.k12.ca.us	e-Serve	5/17/2021 3:40:32 PM

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.

5/17/2021

Date

/s/Yvette Coronado

Signature

Creede, Mark (128418)

Last Name, First Name (PNum)

Lang, Richert & Patch

Law Firm