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

STEPHEN K. DAVIS' CONSOLIDATED ANSWER TO BRIEFS OF AMICI CURIAE

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Respondent Stephen K. Davis ("Taxpayer") respectfully submits the following Consolidated Answer to Briefs of Amici Curiaes League of California Cities and California Special District's Association ("League & Districts"), California Association of School Business Officials ("CASBO"), California School Boards Association's Education Legal Alliance ("CSBA"), Coalition for Adequate School Housing and Association of California Construction Managers ("CASH"), Statewide Educational Wrap Up Program ("SEWUP"), and Torrance Unified School District ("TUSD") (collectively hereinafter "Petitioners' Amici") in support of the positions of Petitioner Fresno Unified School District ("District") and Petitioner Harris Construction Co., Inc., ("Builder").

INTRODUCTION

In sum, the Briefs of Petitioners' Amici ask this Court to destroy the fundamental principal of our democracy that all government entities in the United States are "government of the people, by the people, for the people"[1] by severely restricting to a mere 60 days the time in which the people have to file litigation for redress in the courts for illegal and void contracts involving the expenditure of the people's money and to require such litigation proceed to final judgment before such expenditures are completed.[2] They urge this Court to conclude California's

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[1] Lincoln, Abraham. "The Gettysburg Address." 1863

[2] Even though such contracts can be completed and fully paid in as

governmental entities would be more efficient if they and those who profit from them did not have to bothered by pesky citizen lawsuits objecting that their contracts that are illegal and void. They ask this Court to issue an opinion they and those who profit from the public fisc could use now and forever more to quickly dispatch the attempts of ordinary citizens to compel their government entities and those who do business with them in all their forms to comply with the law. Such an opinion will effectively negate the public's right to petition and redress with regard to illegal and void publicly funded contracts. Worse it will allow public contracting foxes unlimited and unchecked raids on the public fisc henhouse.

To date this Court and its subordinates (with the exception of outliers like *McGee*) have narrowly construed the types of contracts that are subject to the Validation Statutes' 60 day statute of limitations. Now this Court is being asked to broaden the types of contracts subject to the Validation Statutes' limitation period to include any contract funded by general obligation bonds.[3] [4] This is not good law or public policy for

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little as a few weeks or months.

[3] "Over the past 30 years, State and local government entities in California have issued more than $1.5 trillion in debt to build infrastructure, provide services and refinance outstanding debt." https://debtwatch.treasurer.ca.gov/

[4] Since 2001, California public school and community college district voters

California and must be rejected. For to hold otherwise will immunize all manner of illegal and void general obligation bond funded contracts and expenditures. Once this happens government of the people, by the people, for the people is dead because citizens will quickly conclude California government entities can do what ever they want with general obligation bond funds and citizens are powerless to do any meaningful thing to redress the illegal and void expenditures of those funds.

To prevent the foregoing ills and abuses this Court must conclude citizen taxpayer litigation concerning contracts funded by previously issued ad valorem general obligation bonds does not interfere with the stream of revenue used to pay off those bonds and therefore those contracts are not subject to the Validation Statutes.

This Court's order by which District's and Builder's Petitions were granted stated: "[t]he issues to be briefed and argued are limited to the following (Cal. Rules of Court, rule 8.516(a)): Is a lease-leaseback arrangement in which construction is financed through bond proceeds rather than by or through the builder a 'contract' within the meaning of Government Code section 53511?" The answer to the foregoing question posed by this Court is yes when bonds are paid for with revenue derived from the lease-leaseback arrangement (such as with lease revenue bonds or tax increment bonds paid for by the

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have authorized over $162 billion in general obligation bonds. https://www.treasurer.ca.gov/cdiac/publications/k14update-2020.pdf

project; which is not the case here) and no when the contracts are paid for with previously issued ad valorem general obligation bonds that are not paid for with revenue derived from the lease-leaseback arrangement (as is the case here). Here, the only revenue District received from the lease-leaseback arrangement was the $1 per year Builder paid under the Site Lease [5] and that revenue is not used to pay off the bonds that funded the contract. [6]

Specifically, in this case, the Court of Appeal in *Davis v. Fresno Unified School District* (2020) 57 Cal.App.5th 911 as modified on denial of reh'g (Dec. 16, 2020) (*Davis II*) outlined the lease-leaseback arrangement at issue as follows at pp. 918-921:

> Construction Agreements
>
> In September 2012, Fresno Unified's governing board adopted a resolution authorizing the execution of contracts under which Contractor would build the project described as the Rutherford B. Gaston Sr. Middle School, Phase II. The resolution stated the construction would be "a lease-leaseback project" in which (1) Fresno Unified would lease the project site, which it owned, to the Contractor, (2) Contractor would build the project on the site, and (3) Contractor would lease the improvements and the site back to Fresno Unified. The resolution stated it was in the best

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[5] SITE LEASE: "NOW, THEREFORE, in consideration of the promises and mutual agreements and covenants contained herein, including Lessee' payment of the sum of One Dollar ($1.00) to District..." (AA p.23)

[6] In contrast to the projects and cases cited by League & Districts at pp. 15-16.

interest of Fresno Unified to construct the project through a lease and leaseback of the site pursuant to Education Code section 17406, which allows such arrangements without advertising for bids. The contracts between Fresno Unified and Contractor were a site lease (Site Lease) and a facilities lease (Facilities Lease; collectively, the Construction Contracts). FN2. The Site Lease and the Facilities Lease were executed by Ruth F. Quinto, the deputy superintendent and chief financial officer of Fresno Unified, and Timothy J. Marsh, the president of Contractor. FN 3.

> FN 2: In Davis I, we referred to the Site Lease and the Facilities Lease collectively as the "Lease-leaseback Contracts." (Davis I, supra, 237 Cal.App.4th at p. 271, 187 Cal.Rptr.3d 798.) Here, we use the term "Construction Contracts" because it accurately describes the true nature of the arrangement established by the provisions in those documents. (See Park etc. Co. v. White River L. Co. (1894) 101 Cal. 37, 39, 35 P. 442 [calling a paper a lease does not establish it is a lease; "the contents of the paper determine its true character"].) The basic principle that simply calling an instrument a lease does not make it a lease is applied in other areas of the law as well. (See e.g., Cal. U. Com. Code, § 1203, subd. (a) [a transaction in the form of a lease may create either a lease or a security interest; which one was created "is determined by the facts of each case"]; Rice's Toyota World, Inc. v. Commissioner of Internal Revenue (4th Cir. 1985) 752 F.2d 89 [sale and leaseback were, for tax purposes, a sham].)
>
> FN 3: The resolution, Site Lease and Facilities Lease were attached as exhibits A, B, and C, respectively, to Davis's initial complaint and his first amended complaint (FAC), which is the operative pleading in this appeal.

Site Lease

The Site Lease provided Fresno Unified would lease the project site to Contractor for $1.00 in rent for a period coinciding with the term of the Facilities Lease. The Site Lease also stated that title to all improvements made on the site during its term "shall vest subject to the terms of the Facilities Lease." The Site Lease was the "lease" portion of the purported lease-leaseback arrangement. [Emphasis added.]

Facilities Lease

The Facilities Lease identified Contractor as the sublessor and Fresno Unified as the sublessee. The Facilities Lease is the "leaseback" portion of the purported lease-leaseback arrangement. Under the Facilities Lease, Contractor agreed to build the project on the site in accordance with the plans and specifications approved by Fresno Unified and the "Construction Provisions" for the project contained in exhibit D to the Facilities Lease. The Construction Provisions were a detailed, 55-page construction agreement in which Contractor agreed to perform all work and provide and pay for all materials, labor, tools, equipment and utilities necessary for the proper execution and completion of the project. The guaranteed maximum price of the project was $36,702,876. The time allowed for Contractor to complete the project was 595 days from the notice to proceed.

The Facilities Lease included a provision describing Fresno Unified's obligation to pay by stating "Lease Payments shall be made for the Site and portions of the Project as construction of the Project is completed. All Lease Payments will be subject to and not exceed the Guaranteed Maximum Price set forth in the Construction Provisions." The "Schedule of Lease Payments" attached to the Facilities Lease referred to the "payments for the Project as set forth in the Construction Provisions." In turn, the Construction Provisions outlined monthly progress payments for construction services rendered each month, up to 95 percent of the total value for the work performed, with a 5

percent retention pending acceptance of the project and recordation of a notice of completion. Final payment for all the work was to be made within 35 days after Fresno Unified recorded the notice of completion.

Despite the fact that the funds paid by Fresno Unified to Contractor under the Facilities Lease were based solely on the construction services performed by Contractor, the Facilities Lease stated the lease payments constituted "the total rent[ ] for the Project" and were paid "for and in consideration of the right to use and occupy the Project during each month ...." FN 4. The Facilities Lease also stated the parties "have agreed and determined that the total Lease Payments ... do not exceed the fair rental value of the Project."

> FN 4: As noted in Davis I, the FAC alleged "that Fresno Unified did not occupy or use the newly constructed facilities during the term of the Facilities Lease." (Davis I, supra, 237 Cal.App.4th at p. 272.) The petitions for rehearing filed by Fresno Unified and Contractor assert this allegation is not true. For purposes of resolving the motion for judgment on the pleadings, we have assumed the allegation is true. The questions of fact about the use and the occupancy of the facilities are open issues on remand.

The Facilities Lease characterized Fresno Unified's obligation to make the lease payments as "a current expense" of Fresno Unified. It stated the lease payment "shall not in any way be construed to be a debt of [Fresno Unified] in contravention of any applicable constitutional or statutory limitation or requirement concerning the creation of indebtedness of [Fresno Unified] .... Lease Payments due hereunder shall be payable only from current funds which are budgeted and appropriated, or otherwise legally available, for the purpose of paying Lease Payments ... as consideration for use of the Site during the fiscal year of [Fresno Unified] for which such funds were budgeted and appropriated ...."

The Facilities Lease addressed Fresno Unified's source of funding in a paragraph labeled "Appropriation." The provision stated Fresno Unified "has appropriated that portion of the Guaranteed Maximum Price to be earned during the current fiscal year from [Fresno Unified's] current fiscal year and/or State funds to be received during [Fresno Unified's] current fiscal year, and has segregated or will segregate such funds in a separate account to be utilized solely for Lease Payments. [Fresno Unified] will do so for each fiscal year during which the Project is to be constructed or Lease Payments are to be made." [Emphasis added.]

During the term of the Facilities Lease, Fresno Unified held title to the land and obtained title to the improvements "as construction progresse[d] and corresponding Lease Payments [we]re made to [Contractor]." The Facilities Lease stated it terminated on the completion of the project and the payment of all lease payments due the Contractor. After the lease payments were made and the lease term ended, all remaining rights, title and interest of the Contractor, if any, to the project and the site were vested in Fresno Unified.

On December 4, 2014, a notice of completion was recorded by the Fresno County Recorder. The notice of completion was executed under penalty of perjury by the purchasing manager of Fresno Unified. It stated the "work of improvement on the property hereinafter described was completed on November 13, 2014" and described the work as the construction of the middle school.

ARGUMENT

I. Amicus League & District's Assertion of Factual Similarity Between *McLeod* and *Davis* is Incorrect

In their brief Amicus League & Districts incorrectly assert the facts of this case are like the facts of *McLeod v. Vista Unified*

School Dist. (2008) 158 Cal.App.4th 1156, and therefore the contracts at issue in this case should be subject to the Validation Statutes. This assertion is incorrect because, unlike here, the *McLeod* Court expressly found the taxpayers during trial argued, as an alternative to requiring the District to build the new K–8 schools and new temporary schools listed in Proposition O, the court should prohibit it from issuing and selling as yet unissued bonds authorized by the measure which is not the case here because no where in Taxpayer's pleading does he seek to interfere with any prior or future bond issuance. Specifically the *McCleod Court* stated at pp. 1169–1170:

> If the District was precluded from issuing the remaining bonds at all, or allowed to issue the bonds only on the condition it build the K–8 and temporary schools, its plan, as amended because of cost overruns and other factors, would be thwarted because it could not complete the dual magnet high schools. This action directly challenged the validity of a planned bond issuance, and the lack of a prompt validating procedure would impair the District's ability to operate. (Walters, supra, 61 Cal.App.3d at p. 468, 132 Cal.Rptr. 174.) The District 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." The McLeods did not dispute the representation.
>
> Additionally, the remaining bond funds were necessarily "inextricably bound up" with the award of contracts pertaining to the dual magnet high schools. (Graydon, supra, 104 Cal.App.3d p. 646, 164 Cal.Rptr. 56.) When the McLeods filed their suit, the District had already purchased the high school site,

> and by the time of trial construction was well under way, meaning, of course, that architectural and structural plans had been drawn and approved. Those activities were based on the District's new implementation plan and reallocation of bond funds, and there is no suggestion that by the time the McLeods sued the District it could have reduced the size or scope of the high schools or obtained additional bond financing for their completion. Contrary to their assertion, this action is not analogous to a challenge to a contract for the purchase of computer equipment, as a challenge to such a contract does not impede an agency's ability to operate (see Smith v. Mt. Diablo Unified School Dist. (1976) 56 Cal.App.3d 412, 420–421, 128 Cal.Rptr. 572). Here, time was of the essence.

Here, Taxpayer's action does not seek to interfere with any prior or future bond issuance. Moreover, Taxpayer's action does not impair District's ability to operate financially. Taxpayer's action is analogous to those cases where California Courts of Appeal have found challenges to public contracts were not subject to the Validation Statutes like a challenge to a contract for the purchase of computer equipment in *Smith v. Mt. Diablo Unified School Dist.* (1976) 56 Cal.App.3d 412, 420–421; a challenge validity of contract entered into by county board of supervisors with attorney for rendition of legal services in *Phillips v. Seely* (1974) 43 Cal.App.3d 104, 111; a city's purchase of residential property on a decommissioned military base for immediate resale to developer where transactions was funded by developer in *Kaatz v. City of Seaside* (2006) 143 Cal.App.4th 13, 31-40; an action challenging award of franchises for collection and disposal

of solid waste in *Walters v. County of Plumas* (1976) 61 Cal.App.3d 460, 468; and a challenge to public water agency's acquisition of all of the stock of a retail water purveyor within its territory in *Santa Clarita Organization for Planning & Environment v. Castaic Lake Water Agency* (2016) 1 Cal.App.5th 1084, 1091.[7]

The Court of Appeal rejected the McLeod's assertion they "do not 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" and concluded "[t]hus, their action did challenge the validity of the bond issuance, in part, and the District's financing mechanism for the project. We conclude that under these circumstances, the entire action was subject to the validation statutes and a 60–day limitations period." *Id.* at 1171.

Davis II is distinguishable from *McLeod* because in this case Taxpayer is not challenging the issuance of any bonds because the bonds had already been issued and District had all of the money on hand from prior general obligation bond issuances to pay for the project. This case is also distinguishable from

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[7] It is important to note *Santa Clarita Organization for Planning & Environment v. Castaic Lake Water Agency* (2016) 1 Cal.App.5th 1084 also held a plaintiff's original invocation of the Validation Statutes in pleadings and publication of summons required thereby did not judicially estop that plaintiff from later arguing the validation statutes did not apply (*Id.* at 1100-1101) which is applicable here to dispose of League & Districts arguments at pp. 31-34.

McLeod because in this case Taxpayer is not challenging District's financing mechanism for the project because the lease leaseback contracts did not provide for any financing of the project. As discussed by the Court of Appeal in *Davis II*:

> "The term "contracts" is narrowly construed to encompass only contracts involving financing and financial obligations. In Davis I, based on our review of the pleadings and attached documents, we determined the purported leaseleaseback contracts "did not include a financing component for the construction of the project." (Davis I, supra, 237 Cal.App.4th at p. 271, 187 Cal.Rptr.3d 798.) As a result, we conclude the contracts do not fall within the ambit of Government Code section 53511 and California's validation statutes. It follows that Davis may pursue a taxpayer's action seeking the remedy of disgorgement."

Davis v. Fresno Unified School District (2020) 57 Cal.App.5th 911, 917; and

> Based on the parties' arguments and cases such as McGee II, Friedland and Ontario, we consider whether the Construction Contracts between Fresno Unified and Contractor constitute "contracts" for purposes of Government Code section 53511, subdivision (a). Our analysis of this issue is short because of our detailed discussions and conclusions in Davis I. In part II.A.2. of that opinion, we addressed the lease-leaseback method of financing for the delivery of new school facilities. (Davis I, supra, 237 Cal.App.4th at pp. 276–280, 187 Cal.Rptr.3d 798.) We concluded the primary purpose of the lease-leaseback provisions in Education Code sections 17400 through 17425 was to authorize a new source of school financing. (Davis, supra, at p. 280, 187 Cal.Rptr.3d 798.) We also considered the variation of the

lease-leaseback arrangement used by Fresno Unified and Contractor in this case—a variation in which "the school district pays for the construction (using local bond funds) as it progresses, with the final payment being made when construction is completed. As a result, the school district does not occupy and use the new facilities as a rent-paying tenant for a set length of time." (Ibid., italics added.) Based on our interpretation of the Construction Contracts, we concluded that "[b]ecause the school district pays for the construction as it is completed, this alternate approach cannot be characterized as a method of financing the construction of new school facilities." (Ibid.)15 In short, we interpreted the Construction Contracts as being ordinary construction contracts with progress payments (not true leases) that did not provide Fresno Unified with any financing—that is, the contracts did not spread Fresno Unified's obligation to pay for the new construction over a significant amount of time. The existence of a standard 5 percent retention does not establish, as a matter of law, that Contractor provided a financing component to Fresno Unified under the Construction Contracts. Furthermore, Fresno Unified's payment of its obligations under the Construction Contracts with proceeds obtained from the sale bonds shows the source of financing was the bonds and Contractor was not a source of financing for the project. The use of bond funds does not support the conclusion that the Construction Contracts are in the nature of, or are directly related to, a public agency's bonds or other evidences of indebtedness. (Kaatz, supra, 143 Cal.App.4th at pp. 40, 42.) In Davis I, we also held Davis had adequately alleged the leased property was not used by the district during any portion of the lease period as required by Education Code section 17406, subdivision (a)(1).

Based on our conclusion that "the [Construction] Contracts did not include a financing component"

> (Davis I, supra, 237 Cal.App.4th at p. 291, 187 Cal.Rptr.3d 798), which is consistent with the terms of the Facilities Lease stating Fresno Unified's obligations must not in any way be construed as debt or creating an indebtedness, it follows that the Construction Contracts are not "in the nature of, or directly relate[d] to a public agency's bonds, warrants or other evidences of indebtedness." (Kaatz, supra, 143 Cal.App.4th at p. 42, 49 Cal.Rptr.3d 95.) Consequently, the Construction Contracts are not "contracts" for purposes of Government Code section 53511, subdivision (a) and, thus, are not subject to the validation statutes. Because the Construction Contracts are not subject to the validation statutes, it is "appropriate" for Davis to challenge their legality in a taxpayer's action under section 526a. (San Diegans, supra, 8 Cal.5th at p. 746, 257 Cal.Rptr.3d 43, 455 P.3d 311.) Stated another way, the gravamen of the FAC and the nature of the rights and obligations being pursued by Davis fall outside the boundaries of the validation statute relied upon by defendants. (See Abercrombie, supra, 240 Cal.App.4th at p. 308, 192 Cal.Rptr.3d 469.)

Davis v. Fresno Unified School District (2020) 57 Cal.App.5th 911, 940–941.

II. Amicus League & District Misquotes *McGee III* and Points Out Its Unsubstantiated Speculation

Amicus League & District argues at p. 23: "*McGee III* also noted the consequences of the suit, delaying the project for years, and that a judgment for the plaintiff would threaten similar delays for future projects, which 'would undoubtedly inhibit the District's ability to obtain financing for them.' (Id. at p. 828.)" This statement misquotes *McGee III* and points to its

unsubstantiated speculation.

Amicus League & District's statement misquotes *McGee III* by asserting the litigation "delaying the project for years." There is no evidence or statement in the record that Plaintiff McGee's litigation delayed the project for years. To the contrary, the *McGee III Court* noted "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." *Id.* at 823.

McGee III's unsubstantiated statement referenced by Amicus League & District at p. 23 is: "[b]eyond 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." *Id.* at 828. This statement is unsubstantiated and should be rejected by this Court. This statement is another ground for its disapproval because the lease leaseback contracts in *McGee III*, as in *Davis II* are funded by the sale of previously authorized general obligation bonds funded with ad valorem taxes assessed on all taxable real property (and

certain personal property) within the school district. The sale of general obligation bonds funded with ad valorem taxes assessed on all taxable real property (and certain personal property) within a school district is not affected by the prospect of subsequent and separate litigation involving construction contracts funded by those bonds. Subsequent and separate litigation involving construction contracts funded by those bonds after they are issued are of no consequence to the bond buyers who are guaranteed their promised return by the terms of the bond issuance and related securities. As explained by California State Treasurer Fiona Ma in the article What Are Bonds And Why Are They Used? cited by District in Footnote 59 of its Opening Brief at page 61:"In addition to the tax-exempt status, investors benefit from the taxing authority of the government agencies. That authority strengthens the security of municipal bonds, giving investors greater assurance they will get paid on time and in full." (Supplemental Appendix 0069). Thus there is no risk of default or interruption of payment to bond holders from subsequent and separate litigation involving construction contracts funded by the bonds they hold after they are issued. The foregoing unsubstantiated speculation in *McGee III* is in part why Taxpayer requested *McGee III* be disapproved in its Answering Brief at pp. 34-41. [8]

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[8] For this reason and for the reasons stated in Taxpayer's Answering Brief the Court should reject Amici CASBO's (at pp. 11-14) and SEWUP's (at pp.16-17) argument that this Court

III. Amicus Torrance Is Incorrect About the Impacts of Affirming *Davis II* On the Sale of Local General Obligation Bonds

For instance Amicus Torrance urges at p. 18 "the Court must find that lease-leaseback agreements, financed through local general obligation bonds are contracts within Government Code section 53511" because "[i]f the 60-day validation period for the District's lease-leaseback agreements, financed through local general obligation bonds does not apply and the threat of litigation will hang over the projects for three years or more, the District's ability to sell bonds, and complete its projects will be severely hampered and likely to increase the District's costs making it even more difficult to complete the projects within its bond program." This argument is wrong. Litigation challenging illegal and void contracts paid for with ad valorem general obligation bond funds will not severely hamper the District's ability to sell those bonds because the bond buyers know they will be paid from taxes assessed on taxable property within the district and the flow of that money will continue uninterrupted regardless of whether lease leaseback or any other type of public

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follow the reasoning and holding of *McGee III*. Additionally, the Court should reject Amicus SEWUP's argument at pp.18-19 that the affirmation of *Davis II* will have a detrimental impact on school district's ability to finance and build schools. The issue this Court set to be briefed involves lease-leaseback arrangements financed through bond proceeds rather than by or through the builder such that school districts have the up front capital to build their needed schools using whatever delivery method they choose.

contracts funded by those bonds are later deemed to be illegal and void well after those bonds have been issued. Moreover it will not increase the costs of those projects any more than the costs that are already baked into those projects which are awarded by way of the free bidding market.

IV. Amici Torrance and CASH Arguments Establish The Subject Lease-Leaseback Arrangement is Not a "Contract" Within the Meaning of Government Code § 53511

Amicus Torrance at p.14 and Amicus CASH at p. 17 refer to and quote from the Facilities Lease between District and Contractor. The language they quote establishes this lease-leaseback transaction is not subject to the Validation Statutes because the leaseback contract by which the District is paying money involves no indebtedness or financing by the District. To the contrary the Facilities Lease explicitly specifies District's lease payments are a current expense of the District and not debt as follows:

> Lease Payments to Constitute Current Expense of the District. The District and the Sublessor understand and intend that the obligation of the District to pay Lease Payments and other payments hereunder constitutes a current expense of the District and shall not in any way be construed to be a debt of the District in contravention of any applicable constitutional or statutory limitation or requirement concerning the creation of indebtedness by the District, nor shall anything contained herein constitute a pledge of the general tax revenues, funds or moneys of the District. Lease Payments due hereunder shall be payable only from current funds which are budgeted and appropriated, or otherwise

> legally available, for the purpose of paying Lease Payments or other payments due hereunder as consideration for use of the Site during the fiscal year of the District for which such funds were budgeted and appropriated or otherwise made legally available for such purpose. This Facilities Lease shall not create an immediate indebtedness for any aggregate payments which may become due hereunder. The District has not pledged the full faith and credit of the District, the State of California or any agency or department thereof to the payment of the Lease Payments or any other payments due hereunder. (AA p. 37.)

Because District's lease payments are a current expense and not a debt of the District they do not impair the District's ability to operate financially which California Courts have recognized as the justification for the Validation Statutes short 60 day statute of limitations. "Given the policies underlying the validation statutes, including the need to limit the extent to which delay due to litigation may impair a public agency's ability to operate financially, the 60–day limitations period for filing a validation action (Code Civ. Proc., § 860) is not unreasonable." *California Commerce Casino, Inc. v. Schwarzenegger* (2007) 146 Cal.App.4th 1406, 1420. "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. *(Graydon v. Pasadena Redevelopment Agency* (1980) 104 Cal.App.3d 631, 644–645, 164 Cal.Rptr. 56.) A validation action fulfills a second important objective, which is to facilitate a public agency's financial transactions with third parties by quickly affirming their legality. 'The fact that litigation may be pending or

forthcoming drastically affects the marketability of public bonds[.] ... [T]he 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," which may impair a public agency's ability to fulfill its responsibilities. (*Walters v. County of Plumas* (1976) 61 Cal.App.3d 460, 468, 132 Cal.Rptr. 174.)" *Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 843.

Moreover, District has the ability to satisfy its payment obligations under the Facilities Lease from current funds which are budgeted and appropriated whether those funds come from prior voter authorized ad valorem general obligation bonds or State matching funds for construction. As discussed in Taxpayer's Answering Brief (pp. 25-29) disgorgement actions challenging void public construction contracts will not impair District's ability to issue ad valorem general obligation bonds up to the limits previously authorized by District's voters.

V. Amicus CSBA Posits Several Specious Arguments for Why 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 § 53511

First, CSBA posits "Lack of A Prompt Validating Procedure Would Impair a District's Ability to Operate By Creating Uncertainty Regarding The Transactional Security Effect of the Site Lease" (pp. 12-14). This first argument is specious because it posits numerous hypothetical by way of numerous instances of "if", "may" "in the event of", "might" and "could be" and then

seeks to protect the financial interests of the leaseback contractor rather than the school district. As discussed above, California jurisprudence on Government Code §53511 focuses on impairment of the public entity's ability to operate financially. If, as CSBA posits the statute could be expanded to consider financial impact on those contracting with public entities then every single public contract would be subject to validation which is certainly not what the Legislature or Courts intended.

Second, CSBA posits "Lack of A Prompt Validating Procedure Would Impair the District's Ability to Operate By Creating Uncertainty Regarding Title To The Improvements" (pp. 14-15). This second argument is specious because it posits all manner of payment and improvement ownership questions that could arise in the absence of a valid contract. However, California courts have already answered this question. *Thomson v. Call* (1985) 38 Cal.3d 633, 638 & 646-647: 100% disgorgement is the appropriate remedy "where a fully executed and performed contract has been found to violate section 1090"; *Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1336: disgorgement of benefits received under a void contract is automatic. For over 150 years in California, the rule has been public contracts executed without full compliance with all applicable legal requirements are: (1) void ab initio and unenforceable as being in excess of the agency's power; (2) estoppel to deny their validity cannot be asserted; and (3) quasi-contract recovery is not allowed. See, e.g., *Zottman v. San Francisco* (1862) 20 Cal. 96; *Reams v. Cooley* (1915) 171 Cal. 150;

Los Angeles Dredging Co. v. Long Beach (1930) 210 Cal. 348; *Miller v. McKinnon* (1942) 20 Cal.2d 83, 87-88. It is equally well settled that money paid under a void contract may be recovered in a suit filed by a taxpayer on behalf of the governmental agency involved. *Id.* at 96. "It may sometimes seem a hardship upon a contractor that all compensation for work done, etc., should be denied him; but it should be remembered that he, no less than the officers of the corporation, when he deals in a matter expressly provided for in the charter, is bound to see to it that the charter is complied with." *Id.* at 89. Further, contractors like Builder are presumed to know the laws relating to public contracting. Id. The rational for the Court's strict application of this doctrine is that to hold otherwise would create a disincentive for contractors and public entities to follow the law. *Id.* at 96. Fortunately Builder's subcontractors and suppliers would be paid for their project contributions by the payment bond required by the Construction Provisions to Facilities Lease Agreement (AA p. 56).

Third, CSBA posits "Lack of A Prompt Validating Procedure Would Impair The Ability to Procure a Contractor and Obtain Fair Pricing to Complete The Bond-Financed Project" (pp. 15-16). This third argument is specious because for over 100 years before Public Contract Code § 5110 was enacted in 2003 "traditionally bid" public works contractors were at risk of 100% disgorgement under *McKinnon* but yet public entities still seemed to receive bids with acceptable pricing and contractors (presumably after doing their due diligence to confirm the public entity's proposed contract was legal) were submitting bids.

Moreover, CSBA's reference to the Legislature's 2016 enactment of similar retroactive protections (which Taxpayer questions are Constitutional) prior to July 1, 2015 by way of amendments to Education Code § 17406 indicates the Legislature's desire not to provide similar protections for leaseback contracts entered into after July 1, 2015.

Finally, CSBA posits "Lack of A Prompt Validation Procedure Would Impair The Ability to Enforce The Contract And Ensure Satisfactory Completion of the Bond-Financed Project" (pp. 16-17). This fourth argument is specious because, if it were correct, it would encourages public entities to enter into illegal contracts and hope that they were not challenged within 60 days. This is certainly not the policy this Court should be encouraging.

CONCLUSION

California Courts have only imposed the shortened 60 day statute of limitation created by the Validation Statutes and Government Code §53511 on a very small subset of public contracts: those that would impair government entities ability to operate financially if not quickly determined to be valid. A lease-leaseback arrangement in which construction is financed through bond proceeds rather than by or through the builder is not a type of public contract that should be subject to the Validation Statutes because such transactions would not impair government entities ability to operate financially if not quickly determined to be valid. While such actions may impair the finances of private parties who enter into illegal and void public contracts, those are not the parties the Legislature or the Courts

should protect. This has been the interpretation of Government Code §53511 since its enactment as summarized and applied in *City of Ontario v. Superior Court* (1970) 2 Cal.3d 335, 343-345 and its progeny since. For over half a century the Legislature has agreed with this interpretation because it has not amended Government Code §53511 to modify California's jurisprudence limiting the types of contracts subject to the Validation Statutes because the Legislature has not acted to modify in any way Government Code § 53511 to give it a more expansive application than its construction to date by the Supreme Court and Courts of Appeal. *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1155. Public policy and good government demand this Court not conclude a lease-leaseback arrangement in which construction is financed through bond proceeds rather than by or through the builder is a "contract" within the meaning of Government Code § 53511.

DATED: October 22, 2021

/s/ Kevin R. Carlin
Kevin R. Carlin
Attorneys for Respondent,
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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.520(c)(I), the text of this Respondent Stephen K. Davis' Consolidated Answer to Briefs of Amici Curiae, including footnotes and excluding the cover information, table of contents, table of authorities, signature blocks, and certificate, consists of 6,353 words in 13-point Century Schoolbook type. In making this certification, I have relied on the word count of the Corel WordPerfect program used to prepare the brief.

DATED: October 22, 2021

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

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 22, 2021, at San Diego, California.

Duane Besse

STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S266344**
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10/22/2021

Date

/s/Duane Besse

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