No. S266344

In the Supreme Court of California

Stephen K. Davis,
Plaintiff and Appellant

vs.

Fresno Unified School District, and Harris Construction Co., Inc.,
Defendants and Respondents.

After a Published Decision by the Court of Appeal
Fifth Appellate District
Case No. F079811

Reversing a Judgment of Dismissal
Fresno County Superior Court, Case No. 12CECG03718
Honorable Kimberly Gaab, Judge Presiding

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA SPECIAL DISTRICTS ASSOCIATION

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

No entities or persons need be listed in this certificate under California Rules of Court, rule 8.208.

DATED: August 20, 2021

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

To the Honorable Chief Justice Tani Cantil-Sakauye and Associate Justices of the California Supreme Court:

Pursuant to California Rules of Court, rule 8.520(f), the California Special Districts Association ("CSDA") and the League of California Cities ("Cal Cities") respectfully request permission to file the attached amicus curiae brief in support of Petitioners Harris Construction Co. ("Harris") and Fresno Unified School District ("District"). This application is timely made within 30 days of the reply briefs on the merits.

IDENTITY OF AMICUS CURIAE AND STATEMENT OF INTEREST

CSDA is a California non-profit corporation established in 1969 with a membership of over 900 special districts throughout California formed to promote good governance and improved core local services through professional development, advocacy, and other services for all types of independent special districts. Independent special districts provide a wide variety of public services to urban, suburban, and rural communities, including water supply, treatment and distribution; sewage collection and treatment; fire suppression and emergency medical services; recreation and parks; security and police protection; solid waste collection, transfer,

recycling and disposal; library; cemetery; mosquito and vector control; road construction and maintenance; pest control and animal control services; and harbor and port services. CSDA is advised by its Legal Advisory Working Group, composed of 25 attorneys from all regions of the state with an interest in legal issues related to special districts. CSDA monitors litigation of concern to special districts and identifies those cases that are of statewide significance. CSDA has identified this case as having statewide significance for independent special districts.

Cal Cities is an association of 478 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State, which monitors litigation of concern to municipalities and identifies cases of statewide or nationwide significance. The Committee has identified this case as such a case.

Cal Cities, CSDA, and their members have a substantial interest in the outcome of this case because it raises an important question concerning the application of Government Code section 53511 and the Validation Statutes to public construction contracts funded by municipal bonds. In their amicus curiae brief, Cal Cities and CSDA contend that bond-funded lease-leaseback arrangements, and bond-funded construction contracts more generally, are subject

to validation under section 53511 because they are "inextricably intertwined" with the municipal bonds issued to fund them. The amicus brief discusses the potential impact on California cities and special districts should the judgment below be affirmed despite contrary rulings over four decades in *Graydon v. Pasadena Redevelopment Agency* (1980) 104 Cal.App.3d 631, *McLeod v. Vista Unified School Dist.* (2008) 158 Cal.App.4th 1156, *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559 and *McGee v. Torrance Unified School District* (2020) 49 Cal.App.5th 814.

Undersigned counsel have carefully examined the parties' briefs and represent that CSDA's and Cal Cities' brief, while consonant with Petitioners' arguments, highlights points worthy of further analysis. Accordingly, Cal Cities and CSDA respectfully ask the Court grant leave to file this brief. In compliance with subdivision (c)(3) of rule 8.200 of the California Rules of Court, the undersigned counsel represent that they authored Cal Cities' and CSDA's brief in its entirety on a pro bono basis; that their firm is paying for the cost to do so; and that no party to this action, nor any other person, authored the brief or made any monetary contribution to fund its preparation and filing.

DATED: August 20, 2021

COLANTUONO, HIGHSMITH & WHATLEY, PC

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INTRODUCTION

Government Code section 53511 provides a "local agency may bring an action to determine the validity of its bonds, warrants, contracts, obligations or evidences of indebtedness" under Code of Civil Procedure sections 860 to 870 (the "Validation Statutes"). For at least the last 40 years, California courts have understood this statute's reference to "contracts" to include local government contracts to construct bond-financed capital improvements. Validation allows public agencies, and their contractors, to quickly determine the validity of bonds and construction agreements for large-scale public works. This certainty is vital to the cost-effective financing and construction of such projects. Uncertainty means risk and higher borrowing and contracting costs.

Davis v. Fresno Unified School District (2020) 57 Cal.App.5th 911, 944 ("*Davis II*"), the decision on review here, departed from precedent to determine that bond-funded lease-leaseback arrangements are contracts subject to validation only if those contracts themselves provide for financing. Ignoring years of case law holding that bond-funded construction contracts are "inextricably intertwined" with local government debt, and therefore subject to validation, *Davis II* invites a deluge of challenges to public projects across the State, defeating the very purpose of Government Code section 53511 to bring certainty to municipal finance. Moreover, *Davis II* elevates form over substance by looking

to how many contracts achieve a transaction (preferring one to the current practice that relies on several) than to its economic substance.

Cities and special districts rely on bond-funded construction and lease-leaseback agreements to finance a variety of projects, and on validation to ensure those projects can be funded at reasonable cost and constructed in reasonable time. Absent validation, litigation may delay necessary improvements for years, and the possibility of disgorgement will have a chilling effect on lenders and contractors. All of which comes at an unnecessary cost to the public. The public integrity objectives of the conflict of interest statutes can be achieved without undermining stability in public finance.

STATEMENTS OF FACTS AND OF THE CASE

Amici adopt the facts and procedural history of Harris' and the District's opening briefs pursuant to California Rules of Court, rule 8.200(a)(5).

ARGUMENT

I. CALIFORNIA'S LOCAL GOVERNMENTS RELY ON VALIDATION OF BOND-FUNDED CONSTRUCTION CONTRACTS TO FINANCE PUBLIC PROJECTS

The Validation Statutes provide "a set of accelerated in rem procedures for determining the validity of certain bonds,

assessments and other agreements entered into by public agencies." (*Planning & Conservation League v. Department of Water Resources* (1998) 17 Cal.4th 264, 266.) The Validation Statutes allow an agency to sue in validation to "determine the validity" of "any matter which under any other law is authorized to be determined" under those statutes. (Code Civ. Proc., § 860.) The Validation Statutes do not specify the matters to which they apply. Rather, "[d]etermining whether the Validation Statutes apply is an exercise in cross-referencing." (*Coachella Valley Water District v. Superior Court of Riverside County* (2021) 61 Cal.App.5th 755, 768, review denied June 23, 2021.)

Local governments commonly rely on the Validation Statutes to validate bonds and contracts to construct public works. (E.g., *Los Alamitos Unified School Dist. v. Howard Contracting, Inc.* (2014) 229 Cal.App.4th 1222, 1225.) However, in *Davis II*, *supra*, 57 Cal.App.5th at p. 944, the Fifth District concluded that a bond-funded lease-leaseback agreement between a contractor and the Fresno Unified School District to build a middle school was not subject to validation. Although Government Code section 53511 declares the Validation Statutes apply to "an action to determine the validity of [a local agency's] bonds, warrants, **contracts**, obligations or evidences of indebtedness" (emphasis added), the Fifth District concluded that only those lease-leaseback agreements with a "financing

component" are "contracts" within the statute. (*Davis II, supra,* 57 Cal.App.5th at p. 944.)

Davis II undermines a financing mechanism public agencies across the State rely on to fund billions of dollars in infrastructure annually. Bond-funded lease-leaseback agreements allow municipalities to fund construction projects while adhering to the Constitutional debt limitation of article XVI, section 18 of the California Constitution. (E.g., 70 Ops.Cal.Atty.Gen. 57 (1987), n. 2.) Lease-leaseback agreements are vitally important for school construction, but also fund public buildings of every kind, including courthouses, administrative offices, city halls, parking structures, student housing, stadiums, and theaters. These projects have included Desert Hot Springs' civic center (*City of Desert Hot Springs v. County of Riverside* (1979) 91 Cal.App.3d 441), the erstwhile Phoenix Field / Fair Oaks Airport in Sacramento County (*Peacock v. Sacramento County* (1969) 271 Cal.App.2d 845, 848),[1] and Los Angeles' new twelve-acre Civic Center Park.[2] Without lease-

[1] The history of this airfield, closed in 1986, appears here: <http://www.airfields-freeman.com/CA/Airfields_CA_SacramentoNE.htm> (as of Aug. 19, 2021).

[2] 1st and Broadway Civic Center Park Project, available at <https://eng.lacity.org/1st-and-broadway-civic-center-park-project>, (as of Aug. 15, 2021);
Civic Park Project Lease-Leaseback Approval, available at <http://file.lacounty.gov/SDSInter/bos/supdocs/53361.pdf>, (as of Aug. 15, 2021).

leaseback arrangements, local government will be significantly less able to fund such projects.

For example, the City of Salinas relied on bond funded lease-leaseback financing in 2018 to rebuild and expand a public library and to construct a police station.[3] The current buildings were both over 50 years old and the police station in particular "had significant structural and interior deterioration." Both projects, which together will cost approximately $80 million, are on time and under budget through lease-leaseback agreements. Lease-leaseback agreements fund more essential projects to build and renovate public facilities. Such financing allows adequate public safety resources, such as functional fire and police stations and adequate schools.

Despite their utility bond-funded lease-leaseback agreements— and publicly financed construction projects more generally – also present significant litigation to contractors, lenders, and public agencies. Validation, therefore, "fulfills a second important objective, which is to facilitate a public agency's financial transactions with third parties by quickly affirming their legality." (*Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 843 ("*Friedland*").)

[3] Salinas Finance Department Staff Report, May 18, 2018, <https://salinas.legistar.com/LegislationDetail.aspx?ID=3498081&GUID=6FA51CC1-9654-4CBD-A91D-E3684976E6AD&Options=&Search=>, (as of Aug. 19, 2021.)

Lenders require certainty of repayment, and 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." (*McLeod v. Vista Unified School Dist.* (2008) 158 Cal.App.4th 1156, 1168 ("*McLeod*").) Contractors have similar concerns that they be paid for their services and risk of judicial invalidation and disgorgement will predictably drive up construction costs for municipalities. And cities and districts may ultimately spend millions of dollars to defend an already completed project, as has the Fresno Unified School District here. Local governments therefore consistently use validation to confirm lease-leaseback agreements and other public financing before issuing debt and contracting for construction services or as a condition precedent to the effectiveness of such agreements. (E.g., *Davis v. Fresno Unified School Dist.* (2015) 237 Cal.App.4th 261, 273 ("*Davis I*") ["The record in this case shows that the use of validation actions is a common practice for school construction projects structured as a lease-leaseback arrangement"]; *California Taxpayers Action Network v. Taber Construction, Inc.* (2017) 12 Cal.App.5th 115, 124, fn. 5 ("*Taber*").) Validation allows a local agency to initiate an in rem proceeding to determine the validity of its contracts, or allow the 60-day time for validation to pass, knowing that covered contracts are thereafter unassailable. (*City of Ontario v. Superior Court* (1970) 2 Cal.3d 335, 341–342 ("*City of Ontario*").) Courts have consistently held over the

past four decades that "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." (*Friedland*, 62 Cal.App.4th 835, 842.)

Validation provides the prompt certainty that cities, contractors, and lenders need to embark on public projects. If validation is not plainly available, contractor and lenders will raise their prices to reflect the risk of litigation and disgorgement. Delay will follow, too, which has its own social and financial costs. Absent validation of debt-funded construction agreements, local agency projects will be slower, costlier, and fewer.

Respondent Stephen K. Davis ("Davis") argues without evidence or authority that "[t]axpayer litigation involving projects funded by pre-existing general obligation bonds does not have the ability to meaningfully impair the tax assessed value of properties within an entire school district to such a degree as to impair the school district's ability to operate." (RB at p. 35.) And elsewhere, he asserts, again without evidence or authority, that "[t]axpayer litigation concerning construction contracts funded by general obligation bonds does not interfere with the stream of revenue (ad valorem taxes) used to pay off those bonds and therefore those construction contracts are not subject to validation." (RB at p. 10.) But Davis misses the key utility of validation:

> "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.

(*Friedland, supra*, 62 Cal.App.4th at p. 842, citing *Walters v. County of Plumas* (1976) 61 Cal.App.3d 460, 468.)

The Validation Statutes are intended to allow a forum to test any legal issue associated with public debt and to allow that debt to issue promptly and with certainty. If every capital improvement project is subject to taxpayer litigation years after the project is undertaken, successful projects will be few, slow and expensive and our society the poorer for it. For example, the Centers for Disease Control recommend enhanced ventilation of schools to protect pupils from COVID-19.[4] Under such a scheme, how long must we wait for the enhanced ventilation of schools? *Davis II* prevents the certainty necessary to secure public financing for public works, and to hire contractors who will perform that work at a reasonable rate — certainty Government Code section 53511 and the Validation Statutes were intended to achieve. Nor can *Davis II's* deleterious

[4] <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/ventilation.html> (as of Aug. 19, 2021).

consequences be contained to lease-leaseback arrangements. All public construction contracts financed with bond debt are potentially at risk because local governments typically contract with lenders and contractors separately, especially as both types of contracts are heavily regulated under disparate state and federal statutory regimes. (See, e.g., Pub. Contract Code, § 20100 [Local Agency Public Construction Act]; 28 U.S.C. § 141 et seq.)

II. BOND FINANCED CONSTRUCTION CONTRACTS ARE SUBJECT TO VALIDATION

a. BOND FINANCED CONSTRUCTION CONTRACTS ARE INEXTRICABLY INTERTWINED WITH BOND DEBT

Davis II is wrongly decided. The lease-leaseback arrangement there required construction progress payments, allowing full payment and termination of the lease only when construction is complete. (*Davis II, supra*, 57 Cal.App.5th at p. 916.) The Fifth District had previously concluded in *Davis I, supra*, 237 Cal.App.4th at p. 285 that this agreement was not a true "lease" because it contained no financing component, and therefore failed to satisfy the requirements of Education Code section 17406, subdivision (a)(1), which authorizes lease-leaseback financing. In *Davis II*, the court appeared compelled to maintain that earlier position, and found the lease-leaseback agreement not a contract subject to validation under

Government Code section 53511. (*Davis II, supra,* 57 Cal.App.5th at p. 941, fn. 15.)

Davis II misreads Government Code section 53511. In *City of Ontario,* 2 Cal.3d 335 at pp. 343–344, this Court recognized that although section 53511 uses "contracts" without apparent qualification, legislative history suggested the statute was intended to be limited to contracts involving debt. In the four decades before *Davis II*, courts consistently held that construction contracts financed by debt are "inextricably bound up" with that debt and therefore subject to validation. (*Graydon v. Pasadena Redevelopment Agency* (1980) 104 Cal.App.3d 631, 645–646 ("*Graydon*") [parking garage]; *McLeod, supra,* 158 Cal.App.4th at pp. 1169–1170 [high schools]; *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1567 ("*Wilson*") [retail-cinema development project]; *Taber, supra,* 12 Cal.App.5th at p. 124 [lease-leaseback for HVAC modernization]; *McGee v. Torrance Unified School District* (2020) 49 Cal.App.5th 814, 824 [lease-leaseback for schools].) For example, in *McLeod*, plaintiff taxpayer sued under Code of Civil Procedure section 526a to prevent the construction of two high schools. (*McLeod, supra*,158 Cal.App.4th at pp. 1163–1164.) As here, the construction contracts were financed by general obligation bonds of the defendant district. (*Id.* at pp. 1161–1162.) The Fourth District found that bond-funded construction procurement approach "was an 'integral part of the whole method of financing' the costs

associated with its comprehensive plan to alleviate school overcrowding", and the construction agreements were therefore "contracts" subject to validation under Government Code section 53511. (*Id.* at pp. 1169–1170.) So, too, here. Davis's contrary contention, that a contract must itself be a "financing contract" to qualify for validation under section 53511, is not supported. (RB at p. 22.) It also views local government legislation (for contracts are legislation)[5] with a narrow hostility not typical of the comity between our branches of government. Rather legislative acts are viewed as a whole, in their contexts and in light of the in pari materia rule. Why take a four-corners approach (*Davis II, supra*, 57 Cal.App.5th at p. 916) rather than look to the legislative intent of the various documents which embody this transaction, as is more typical of statutory construction? (E.g., *Kaanaana v. Barrett Business Services, Inc.*, (2021) 11 Cal.5th 158, 175 [applying in pari materia canon to prevailing wage statutes].)

Moreover, *Davis II* is an outlier. *McGee v. Torrance Unified School District* (2020) 49 Cal.App.5th 814 ("*McGee III*") considered facts identical to those presented in *Davis II,* reaching the opposite conclusion. *McGee III* also concerned progressive payments in a lease-leaseback arrangement to construct a school, and a dispute whether the contract was subject to validation under Government

[5] E.g., *Mike Moore's 24-Hour Towing v. City of San Diego* (1996) 45 Cal.App.4th 1294, 1303.

Code section 53511 — mooting the case on completion of construction — or if Code of Civil Procedure section 526a and Government Code section 1090 claims survived. (*McGee III, supra*, 49 Cal.App.5th at pp. 824–828.) The Second District found that bond-funded lease-leaseback arrangements "involved the District's financial obligations and were inextricably bound up in the District's bond financing, bringing them within the scope of 'contracts' covered by Government Code section 53511." (*Id.* at p. 824.) *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.)

Davis II's conclusion that a construction project lease-leaseback arrangement may be validated when a financing component appears within the "four corners" of the construction contract, but not when debt financing of that very construction is provided for by separate agreement elevates form over substance. Such a distinction serves no purpose, and merely denies local governments the flexibility to structure capital projects in the manner which will best achieve public goals of lower costs and increased efficiency. It also invites ponderous contracts to house disparate obligations of contractors and lenders within the same "four corners."

Davis's own argument demonstrates his position to be untenable. As he acknowledges, a finding that a contract was void *ab initio* for a conflict of intertest can require the contractor to disgorge all public funds received, here $36 million, and allows the municipality to retain the public improvement free of cost. (RB at pp. 7–9; see *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, 583 ["It is settled law that where a contract is made in violation of section 1090, the public entity involved is entitled to recover any compensation that it has paid under the contract without restoring any of the benefits it has received"].) Davis casts positively, as though the construction industry will not react to such a rule in economically rational ways: "Taxpayer never sought injunctions to stop construction of the Project specifically because he did not want to delay the District's occupancy and use of it … Success on Taxpayer's action would actually improve District's ability to operate financially rather than impair it." (RB at pp. 23–24.) Davis ignores the litigation *Davis II* invites and the very likely reaction of contractors — to decline to work for public agencies, to require judgments to confirm their right to compensation before work begins, or to price their risks into their contract proposals. What reasonable contractor would take on a large-scale public contract when faced with the possibility of having to disgorge, not just profits, but the entire amount of the contract? Years of work and millions of dollars in expenses are not easily recovered, and even if a

contractor could survive such an onslaught, its doubtful many would accept the risk. Simultaneously, there will be no shortage of eager litigants, with the possibility of getting a "free school" or other building for plaintiff and private attorney general fees for plaintiff's counsel. (Code Civ. Proc., § 1021.5.)

The chilling effect of potential disgorgement cannot be overstated. The specter of a lawsuit up to three years after a project commences (Code Civ. Proc., § 338, subd. (a)), rather than within 60 days the Legislature intended, will drive up construction and borrowing costs, scare away competent contractors, and defeat, delay, or make more costly many vital projects across the State.

b. TIMELY COMPLETION OF CAPITAL PROJECTS IS NECESSARY FOR DEBT FINANCING

Davis argues forcefully that Petitioners' briefs raise a red herring to identify the consequences of *Davis II's* rule for compliance with federal tax laws forbidding local governments to arbitrage their tax-favored debt against other financing. (RB at pp. 10-11, 25–33.) But Davis missed the point. He first asserts that the District may simply forego investing nontaxable municipal bond proceeds in higher yield investments under the protection of the three-year temporary period in 26 C.F.R. § 1.148-2(e)(2), or can rebate any arbitrage profits to the federal government. (RB at pp. 28–29.) The argument proves too much. Certainly, the District could suffer a

significant penalty to avoid the worst consequence of arbitrage — having its tax-exempt bonds declared taxable. However, the fact that the District must forgo thousands of dollars to do so demonstrates Petitioners' point — substantial completion of a construction project within three years is vital to efficient debt-financing of public construction projects. By claiming these inefficiencies are bearable, Davis admits they will result from *Davis II*'s rule. Moreover, this potential impact shows bond-funded construction agreements are inextricably bound up with the bonds that pay for them. At least the IRS so concludes.

Davis next asserts that an anti-arbitrage certificate ameliorates any negative consequence of failing to complete construction in the three years the IRS allows. (RB at pp. 29–33.) Not so. "The certification is evidence of the issuer's expectations, but does not establish any conclusions of law or any presumptions regarding either the issuer's actual expectations or their reasonableness." (26 C.F.R. § 1.148-2(b)(1).) The certificate has no special evidentiary value. (Arbitrage Restrictions on Tax-Exempt Bonds, 58 Fed.Reg. 33510, 33512 (June 18, 1993).) Certificates notwithstanding, the IRS can, and does, audit municipal governments for compliance with its arbitrage ban. "The United States generally receives arbitrage rebate ' "voluntarily" from State and local governments, but also performs hundreds of bond examinations per year[,] many of which target the arbitrage rebate requirement and result in enforced remittances of

arbitrage rebate.' " (*Strategic Housing Finance Corp. of Travis County v. U.S.* (Fed. Cl. 2009) 86 Fed.Cl. 518, 522–523.)

Davis helpfully cites *Weiss v. S.E.C.* (D.C. Cir. 2006) 468 F.3d 849 ("*Weiss*"). (RB at pp. 26–27.) There, despite an anti-arbitrage certificate, a school board's subsequent failure to satisfy the temporary period rules required it to rebate $150,000 in arbitrage earnings to avoid losing the bonds' tax exempt status. (*Id.* at pp. 854.) Its bond counsel was ultimately sanctioned by the SEC for misrepresenting the risk that interest on the bonds would be taxable. (*Id.* at p. 855.) Nor are the legal fees the district incurred reported here. An anti-arbitrage certificate is simply not the panacea Davis imagines.

Most important, Davis continues to ignore the consequence of *Davis II*'s rule for future transactions, a perspective this Court will not lack. If bond-funded construction agreements may not be validated, litigation risk means an agency issuing debt cannot responsibly predict a project will be substantially completed within three years, as federal tax law requires. (26 C.F.R. § 1.148-2(b)(1).) Nor can bond counsel certify the point in good faith. (26 C.F.R. § 1.148-2(b)(2)(ii).) *Davis II's* rule will make affordable debt financing unavailable California agencies and the public they serve millions of dollars annually in increased financing costs.

III. DAVIS'S CANNOT DISTINGUISH CONTROLLING AUTHORITY

The weight of authority is against *Davis II*, and the Respondent Brief's attempts to distinguish these cases cannot persuade. Davis asserts that *McGee III* is "contrary to 50 years of jurisprudence and sound public policy" (RB at pp. 11, 34), but cites little authority, certainly not the cases Amici note at the outset of this brief. Case law is wholly in the other direction, applying the Validation Statues to construction contracts "inextricably intertwined" with municipal debt over four decades. (E.g., *Graydon, supra*, 104 Cal.App.3d at pp. 645–646; *McLeod, supra*, 158 Cal.App.4th at pp. 1169–1170.) Davis tries to avoid these decisions, arguing "there is no indebtedness at all because District appropriated all funds necessary to pay the costs of the Project construction contracts out of its current fiscal year as of the date of contract award." (RB at p. 22.) Davis ignores that the funds appropriated were only on hand due to the issuance of millions of dollars in bonds to construct these schools. (District Opening Brief at pp. 18–19.)

Davis next argues that *McLeod* "is distinguishable because it involved an action that directly challenged the validity of a planned bond issuance and the lack of a prompt validating procedure would impair the district's ability to issue those bonds." (RB at p. 35.) Not so. In *McLeod*, petitioners repeatedly argued they did not seek to

prevent the issuance of bond debt, only how its proceeds were spent. (*McLeod, supra*, 158 Cal.App.4th at p. 1169.) That court noted:

> [T]he remaining bond funds were necessarily "inextricably bound up" with the award of contracts pertaining to the dual magnet high schools. [Citation] 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 [Citation].

(McLeod, supra, 158 Cal.App.4th at pp. 1169–1170.) So, too, here, as Davis similarly did not seek a stay of construction, and there is no suggestion that alternative funding was available to complete Fresno USD's challenged middle school. How the District spent bond

proceeds, not merely the bonds themselves, was subject to validation here.

Similarly unavailable are Davis's attempts to distinguish *Wilson*, *supra*, 191 Cal.App.4th 1559 and *Jennings v. Strathmore Public etc. Dist.* (1951) 102 Cal.App.2d 548, 549–550 as not involving disgorgement claims. (RB at pp. 36–40.) As *McGee III* noted, "[t]he ultimate question is whether the claim 'go[es] beyond the determination of the validity of the challenged matter' or is merely a 'request for invalidation … in other words.' " (49 Cal.App.5th at p. 827, citing *Katz v. Campbell Union High School Dist.* (2006) 144 Cal.App.4th 1024, 1034.) "[R]egardless of how McGee characterizes his conflict of interest claims or the relief he seeks, the gravamen is the invalidity of the lease-leaseback agreements." (*Ibid.*) Here, too, Davis seeks not just disgorgement of some funds related to the middle school project as improvidently spent, but invalidation of the entire project and disgorgement of all sums paid. As the gravamen of his complaint has always been invalidation, the Validation Statutes control.

Moreover, as Davis seeks invalidity of the District's contract with Harris, completion of the project mooted his claim. *Thomson v. Call* (1985) 38 Ca1.3d 633, is not to the contrary. As this Court more recently noted, in *Thomson* "[i]t had already been determined in an earlier suit that the contract violated section 1090" and "the question was 'what remedies are available once a section 1090 violation is

found and the fully performed underlying contract is adjudged void.' " (*San Diegans for Open Government v. Public Facilities Financing Authority of City of San Diego* (2019) 8 Cal.5th 733, 744.) Where, as here, a public project is subject to validation, a judgment of invalidity can be had only by strict adherence to the Validation Statutes. The lease-leaseback arrangement here has never been ruled invalid; thus, *Thompson* is of little aid.

McGee III, *McLeod* and *Wilson* are well reasoned and on point, and together provide the rule of decision the Court should adopt here: A bond-funded lease-leaseback arrangement is a contract subject to validation under Government Code section 53511, and completion of a financed project moots challenge to the arrangement.

IV. THE COURT SHOULD REJECT DAVIS'S JURISDICTIONAL ARGUMENTS

Davis asserts that, even if the Court determines the Validation Statutes apply, his "in personam claims" should proceed because Harris and the District personally appeared. (RB at pp. 44.) First, this argument makes little sense, as Davis filed a "reverse validation" action to which Petitioners responded — the case was in rem when they arrived. (RB at pp. 20–21.) That Davis additionally prayed for disgorgement did not change the nature of his suit.

If Davis argues that either appearing on a concurrently filed in personam claim or failing to raise a personal jurisdiction objection to

a disgorgement remedy, waives the application of the Validation Statutes, he is mistaken. The issue is not one of personal, but subject matter, jurisdiction. *"City of Ontario* allows a traditional taxpayer action to proceed only as to those matters not within the jurisdiction of a validation action." (*Friedland*, *supra*, 62 Cal.App.4th at p. 849.) Absent a timely validation challenge, an action subject to validation is forever immune from attack "whether it is legally valid or not." (*McLeod, supra*, 158 Cal.App.4th at p. 1166.) The running of time for a validation (or reverse validation) action has the preclusive effect of a judgment — the Validation Statutes are statutes of repose as well as limitations. (*Embarcadero Municipal Improvement Dist. v. County of Santa Barbara* (2001) 88 Cal.App.4th 781, 792 ("*EMID*") [no distinction between cases in which validation judgment enters and those in which time for validation runs].) Validation is the exclusive manner for challenging actions subject to it. (Code Civ. Proc., § 869.) Where a government agency's actions are subject to validation in part, the entire enactment is subject to the Validation Statutes. (*McLeod, supra*, 158 Cal.App.4th at p. 1166.)

Davis cites no case, and Amici know none, in which a defense based on the Validation Statues was waived because defendants appeared on a different cause of action or failed to specifically object to personal jurisdiction as to a particular remedy. None of Davis's authorities regarding the disgorgement remedy construe the Validation Statutes. (RB at p. 44; see *Miller v. McKinnon* (1942) 20

Cal.2d 83 [recoupment of compensation to contractor on public works contract]; *Thomson v. Call* (1985) 38 Cal.3d 633 [disgorgement as remedy under Gov. Code, § 1090 as to land use matter]; *Gilbane Building Co. v. Superior Court* (2014) 223 Cal.App.4th 1527 [challenge to school construction contract due to alleged conflicts of interest]; and *Strategic Concepts, LLC v. Beverly Hills Unified School Dist.* (2018) 23 Cal.App.5th 163 [disgorgement as a remedy under Gov Code, § 1090 in professional services contract].)

Davis's argument that his claim for disgorgement is timely also misses the point. It is not enough for Davis to have filed any action within 60 days. One must — as Davis did — file and maintain a reverse validation action. (Code Civ. Proc., § 863;) "[U]nless an 'interested person' brings an action of his own under section 863 within the 60-day period, the agency's action will become immune from attack … ." (*City of Ontario, supra*, 2 Cal.3d at pp. 341–342.) Absent timely action under the Validation Statutes, an agency's action is deemed valid after 60 days. (*EMID*, *supra*, 88 Cal.App.4th at p. 792.) Otherwise, interested persons seeking to challenge the validity of an agency's actions could avoid the strict procedural requirements applicable to reverse validations, including: publication of summons in a newspaper of general circulation for three successive weeks; unique requirements for the form and content of such a summons; and mandatory dismissal if publication

of summons is not completed within 60 days of filing the complaint. (Code Civ. Proc., §§ 861–863, 869; Gov. Code, § 6063).

For the same reason, Davis's request that he be considered an agent of the District, simply because he claims to have sued on its behalf, is without basis. (RB at pp. 46–50.) Derivative actions in the corporate context have statutory authority. (Corp. Code, § 800.) Davis can cite none in the local government context. Indeed, reflecting abuses by the Southern Pacific Railroad in "the Gilded Age," our Constitution forbids the Legislature to authorize private parties to control municipal functions. (Cal. Const., art. XI, § 11; see, e.g., *Stockton & Visalia Railroad v. City of Stockton* (1876) 51 Cal. 328 [construing statute compelling Stockton to subsidize rail construction].)

In any event, Davis filed a reverse validation action under Code of Civil Procedure section 863. Pretending he was acting as the District's agent and treating this case as if filed by the District would not change the issues before the Court. The question would remain the validity of the District's construction agreement with Harris, and that question would still be moot as construction has long since finished.

CONCLUSION

Four decades of precedent holds that bond-funded public construction contracts are inextricably intertwined with the bonds that fund them, and subject to validation under Government Code

section 53511. Were the rule otherwise, the risk of disgorgement years later would make public construction contracts fewer, slower, and more costly. Absent validation, the cost to hire competent contractors will rise, especially for large projects, if a contractor can be found to take on the risk. And cities and special district will be denied the advantage of the three-year temporary period 26 C.F.R. § 1.148-2(e)(2) affords their pers in the other 49 states, further increasing costs. *Davis II*'s erroneous conclusion would be costly to the public Amici serve, especially students, as bond-funded lease-leaseback agreements are especially useful for schools. The Legislature provided the Validation Statutes to avoid precisely these negative consequences. Amici respectfully pray this Court to reverse and to confirm two rules of long-standing:

- Government Code section 53511 extends to all contracts "entwined with" government debt; and,
- Completion of construction moots challenge to debt-funded public construction.

Our conflict of interest laws can be enforced in all the ways the Legislature has specified and in a timely validation action. We need not sacrifice the very purpose of government construction contracts — efficient provision of needed public services — to ensure their integrity.

DATED: August 20, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(b) and 8.204(c), the foregoing Brief of Amicus Curiae contains 5328 words, including footnotes, but excluding the caption page, tables, Certificate of Interested Entities or Persons, the Application for Leave to File, and this Certificate. This is fewer than the 14,000-word limit set by rules 8.520(b) and 8.204(c). In preparing this certificate, I relied on the word count generated by Microsoft Word 365 MSO.

DATED: August 20, 2021

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PROOF OF SERVICE

I, Christina M. Rothwell, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 790 East Colorado Boulevard, Suite 850, Pasadena, California 91101. My email address is: CRothwell@chwlaw.us.

On August 20, 2021, I served a true and correct copy of the document described as **APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA SPECIAL DISTRICTS ASSOCIATION,** on the interested parties in this action addressed as follows:

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☒ **BY ELECTRONIC SERVICE**: On August 20, 2021, I instituted service of the above listed document by submitting an electronic version of the document via file transfer protocol 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

☒ **BY MAIL**: The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Pasadena, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

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

Executed on August 20, 2021, at Pasadena, California.

Christina M. Rothwell