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Chief Justice Tani G. Cantil-Sakauye and Associate Justices
Supreme Court of California
350 McAllister Street
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Re: Davis v. Fresno Unified School District
Fresno County Superior Court
Case No. 12CECG03718
Fifth District Court of Appeal
Case No. F068477
California Supreme Court Case No. S227786

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to rule 8.1125(a) of the California Rules of Court defendant Fresno Unified School District (FUSD) requests that this Court order depublication of the decision in *Davis v. Fresno Unified School District et al.* (2015) 237 Cal.App.4th 261 (*Davis*).

Davis concerns “lease leaseback” school construction contracts. Lease-leaseback is authorized by Education Code section 17406, subdivision (a), which allows a school district to lease land for a minimum of \$1 to a contractor if the instrument by which the property is let requires the contractor to construct a building or buildings on the site for the use of the district during the term of the instrument, and provides that title to the building(s) vests in the district at the end of the term. The contractor is responsible for delivering the project at a fixed, “guaranteed maximum price,” which allows the school district to know in advance and control the actual cost of the project. Section 17406(a) expressly exempts lease-leaseback arrangements from the competitive bidding requirements of Education Code Section 17417.

Defendants FUSD and Harris Construction Company, Inc. (Harris) entered into a lease-leaseback contract in 2012 for the construction of a middle school in Fresno. Their lease-leaseback arrangement was structured exactly the same way as other school districts throughout California have structured their lease-leasebacks for years.

In a published opinion, however, the Fifth District Court of Appeal held that the lease-leaseback agreement between FUSD and Harris was invalid. Under the guise of “interpreting” section 17406(a), the Court of Appeal rewrote the statute to impose additional requirements not found in the plain language of the statute, thus creating a conflict with the opinion of the Fourth Appellate District in *Los Alamitos Unified School District v. Howard Contracting, Inc.* (2014) 229 Cal.App.4th 1222. The court also left unanswered many questions about the additional requirements it imposed, creating confusion and leading to uncertainty for lower courts, school districts, and contractors throughout California.

The Court of Appeal also held that Harris, who had provided consulting services to FUSD, was an “employee” under Government Code section 1090, which prohibits state and municipal officers and employees from being “financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.” This holding conflicts with other interpretations of Government Code section 1090 by the Second District Court of Appeal in *People v. Christiansen* (2013) 216 Cal.App.4th 1181 and *Klistoff v. Superior Court* (2007) 157 Cal.App.4th 469, and with the statutory exception for consultants who provide planning and project management services on state projects in Public Contract Code section 10365.5(c), is contrary to the Legislature’s intent, and violates established rules of statutory construction.

If this Court does not grant review¹, the Court should order *Davis* depublished to restore uniformity and eliminate confusion regarding construction services provided pursuant to Education Code section 17407 and services provided by independent contractors and consultants to state and local governments and agencies.

THE COURT OF APPEAL’S OPINION

In September 2012, FUSD’s board adopted a resolution to approve a lease-leaseback agreement with Harris for construction of a new middle school in Southwest Fresno. (Typed mod. opn., 3.) The guaranteed maximum price of the project was \$36,702,876. (Typed mod. opn., 4.) Completion was to be 595 days from the notice to proceed. (Typed mod. opn., 4.)

¹ FUSD and Harris both filed Petitions for Review in this Court on July 13, 2015.

The lease-leaseback agreement consists of two contracts – a Site Lease and a Facilities Lease. Under the Site Lease, FUSD leased the project site to Harris for \$1 in rent. (Typed mod. opn. 3.) The Site Lease began on September 27, 2012, and terminated the same day as the Facilities Lease. (Typed mod. opn. 3.)

Under the Facilities Lease, Harris agreed to build the project on the site pursuant to the construction provisions attached as an exhibit to the Facilities Lease, and lease the site and the project back to FUSD. (Typed mod. opn. 3.) FUSD agreed to pay Harris lease payments for the use and occupancy of the project and the site, which covered the cost of construction as it was completed. (Typed mod. opn. 4.) The term of the Facilities Lease was from the date of signing to the date of completion. (Typed mod. opn. 4.)

The Facilities Lease gave FUSD the right to use and enjoy the site and to take possession of the new facility as construction was completed during the term of the Facilities Lease. (Typed mod. opn. 4.) The Facilities Lease provided FUSD would obtain title from Harris as construction progressed and corresponding lease payments were made, and upon full payment, title would be transferred to and vest in FUSD without further instrument of transfer. (Typed mod. opn. 5.)

In November 2012, appellant Stephen K. Davis filed his original complaint. The operative pleading is the first amended complaint Davis filed in March 2013. The causes of action in the first amended complaint are (1) violation of the competitive bidding requirements of Public Contract Code section 20110 et seq. by entering into an improper arrangement that did not satisfy the criteria for the statutory exception in section 17406(a); (2) breach of fiduciary duty by FUSD's board; (3) failure to comply with the competitive bidding requirements of section 17417; (4) conflict of interest by Harris based on its participation in the planning and design of the project as a consultant to FUSD before the construction contracts were awarded; (5) improper use of section 17400 et seq. based on the legal theory that lease-leaseback arrangements are allowed only when used for financing school construction; (6) improper delegation of discretion; and (7) declaratory relief. (Typed mod. opn. 5.)

Davis alleged that, although the site was leased by FUSD to Harris while Harris performed the construction, there was no "genuine" leaseback to FUSD because FUSD did not regain the right to use and occupy the property during the leaseback period. Davis also alleged that FUSD made payments that lasted only as long as the duration of construction, varied based on the value of the work performed, and ended with the completion of the construction. In addition, Davis alleged that FUSD did "not have the right or practical ability" to use and occupy the property during the term of the Facilities Lease. (Typed mod. opn. 6)

Davis also sought to invalidate the lease-leaseback agreement under Government Code section 1090, which prohibits public officers and employees from being financially interested in any contract made by them in their official capacity. (Typed mod. opn. 32.) Davis alleged that prior to being awarded the lease-leaseback agreements, Harris had served as a consultant to FUSD and assisted in the design and development of the project plans and specifications, which created a conflict of interest and precluded Harris from being awarded the project. (Typed mod. opn. 32-33.)

FUSD and Harris demurred to the first amended complaint. (Typed mod. opn. 6.) In support of its demurrer, FUSD filed a request for judicial notice that included copies of 22 default judgments entered between December 2010 and July 2012 in validation actions brought by school districts in Los Angeles, Orange, Riverside, San Bernardino, Ventura, and Kern Counties. The default judgments stated that site leases, subleases, and construction services agreements entered into by the school districts pursuant to section 17406 were not subject to the requirement in Public Contract Code section 20111 that construction contracts be awarded to the lowest responsible bidder. (Typed mod. opn. 6, and fn. 5.)

The trial court sustained FUSD's and Harris's demurrers to each of the seven causes of action in Davis's first amended complaint, with 30 days leave to amend. After Davis failed to amend his complaint, the trial court entered judgment for FUSD and Harris, and Davis appealed. (Typed mod. opn. 6.)

The Court of Appeal affirmed the trial court's ruling as to a number of Davis's cause of action but reversed as to others based on two theories. In a published opinion, the court held the section 17406(a) exception to competitive bidding applies only when the following are present:

First, there must be a "genuine" or "true lease" between the school district and contractor, and "more than a document designated a lease by the parties." (Typed mod. opn. 18, 20.) The court found Davis adequately alleged the Facilities Lease functioned more like a traditional construction contract than a "genuine" lease. FUSD's monthly payments to Harris were based on the progress of construction, the final payment was due upon completion and acceptance of the construction, and once the final payment was made, both the Facilities Lease and the Site Lease terminated; whereas under a lease, payments are usually for a set time, such as monthly, during which the lessee occupies and uses the property. (Typed Mod. Opn. 21-22, 27.)

Next, in order to be a "genuine" or "true" lease, the school district must actually use the newly built facilities, as a tenant, during the term of the lease. (Typed mod. opn.

25, 26.) The Court of Appeal expressly declined to discuss how long a district must actually use the premises as a tenant in order to qualify as a “genuine” or “true” lease. (Typed mod. opn. 26, fn. 13.) It found Davis adequately alleged the Facilities Lease did not satisfy this requirement because it did not provide for FUSD to use the newly built facilities during the term of the lease and FUSD acknowledged it did not occupy the school facility until the lease was terminated. (Typed mod. opn. 4, 26 and fn. 13, 27.)

Last, the lease-leaseback arrangement must include a financing component whereby the builder finances some or all of the construction cost. (Typed mod. opn. 20.) The court gave no guidance as to the amount, duration, type, or terms of financing that is required. It found Davis adequately alleged the lease-leaseback arrangement between Harris and FUSD did not include a financing component for the construction of the project. (Typed mod. opn. 27.)

On Davis’s conflict of interest claim, the Court of Appeal held that Government Code section 1090, which applies to “officers or employees” of a school district or other public agency, includes corporate consultants of FUSD. The court found Davis adequately alleged that Harris, who had a prior consultancy contract with FUSD, met the statutory definition of a district “employee” for purposes of Government Code section 1090, and participated in the making of the lease-leaseback agreements. (Typed mod. opn. 40.)

WHY THE COURT SHOULD DEPUBLISH

1. The Court of Appeal’s Opinion Conflicts with the Decision from the Fourth District Court of Appeal

The opinion conflicts with the decision from the Fourth District Court of Appeal upholding a lease-leaseback arrangement that was structured exactly the same as in this case, and utilizing lease-leaseback agreements containing terms and conditions virtually identical to those here – *Los Alamitos Unified School District v. Howard Contracting, Inc.* (2014) 229 Cal.App.4th 1222 (*Los Alamitos*).

Contrary to the Court of Appeal decision here, the Court of Appeal in *Los Alamitos* found the language of section 17406(a) to be “plain, clear and unambiguous,” (*Los Alamitos, supra*, 229 Cal.App.4th at 1228 (citing 56 Ops. Cal. Atty. Gen. 571, 581 [1973].) In upholding the lease-leaseback arrangement in that case, the court relied on the only requirements imposed by the statute – that the school district owns the land and leases it to the contractor, the contractor agrees to construct a building on the land for the

use of the district, and title to the building vests in the district at the end of the term. (*Los Alamitos*, *supra*, 229 Cal.App.4th at 1227.)

2. The Court of Appeal’s Opinion Regarding Education Code Section 17406(a) is Inconsistent with the Plain Language of the Statute

The language in section 17406² is clear and unambiguous. Under the plain language of section 17406(a), a valid lease-leaseback arrangement requires only the following: the school district must own the land to be leased to the builder; the instrument by which the property is let to the builder must require the builder to construct a building or buildings on the land for the school district’s use; and the instrument must provide that title to the buildings shall vest in the school district at the end of the term, although the instrument may provide for the means or method by which title shall vest in the district prior to the expiration of the term. Moreover, the instrument may provide other terms and conditions that are in the district’s best interest.

When the words of a statute are clear and unambiguous, the court’s inquiry ends. (*Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1047.) “[T]here is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature.” (*DiCampi-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 992; *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 800 [“When statutory language is thus clear and unambiguous there is no need for construction, and courts should not indulge in it This rule is deeply rooted in our jurisprudence.”].)

The Court of Appeal violated these fundamental rules. Rather than applying the plain language of section 17406(a) as written, the Court of Appeal “indulged in construction” and rewrote the statute to read as it believed it should.

Specifically, the Court of Appeal rewrote section 17406(a) to require a “financing component,” whereby the builder carries the cost of construction. This requirement finds no support in the plain language of the statute or anywhere else within the statutory scheme.³ If the Legislature intended to restrict the use of lease-leaseback only to

² The Court of Appeal’s opinion is based on section 17406, as amended effective January 1, 2015, not the version of the statute as it read in 2012 when FUSD and Harris entered into the lease-leaseback agreement. (Typed mod. opn. 15.) The word “lease” is not in the 2012 version of the statute.

³ The provisions authorizing school districts to enter into leases and agreements relating to real property are contained in Sections 17400-17429 of the Education Code. (Tit. 1, Div. 1, Pt. 10.5, Ch. 4, Art. 2.) Section 17402 requires a school district to have an available

situations when the builder finances the project, there are plenty of ways it could have made that restriction clear. A court may not “under the guise of interpretation insert qualifying provisions not included in the statute.” (*Estate of Griswold* (2001) 25 Cal.4th 904, 917.) “In the construction of a statute ... the office of the judge is simply to ascertain and declare what is in the terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted” (*Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274.)

Moreover, the Fourth District Court of Appeal’s decision in *Los Alamitos* includes a discussion of the Legislature’s attempt to amend section 17406 in 2004, which shows the statute does *not* include a financing component. Assembly Bill 1486 sought to amend section 17406 to read in pertinent part: “(a) In order to enable school districts to let real property *for the purpose of acquiring, financing, or constructing facilities*, and notwithstanding Section 17417, the governing board of a school district, ...” (*Los Alamitos, supra*, 229 Cal.App.4th at 1228, fn. 4, italics added.) The fact that Assembly Bill 1486 (which was vetoed by the governor,) sought to *add* the requirement of financing confirms that the statute, as it reads now, does not require financing. Further, the rejected amendment was stated in the disjunctive (“acquiring, financing, *or* constructing facilities”), which also confirms that financing *of* construction is not required for a valid lease-leaseback arrangement. The Court of Appeal’s holding in *Davis* that a “financing component” is required under section 17406 is directly at odds with the *Los Alamitos* court’s analysis of section 17406 and the Legislature’s attempt to amend it.

Likewise, the Court of Appeal’s requirement that FUSD must actually use the premises, as a tenant, during the term of the instrument finds no support in the plain language of the statute. The statute does not specify *any* particular “use” a school district must make of the premises, much less “in school operations,” as the Court of Appeal found. (Typed mod. opn. 24.) Further, both the 2012 and 2015 versions of section 17406(a) state only that “*the instrument by which such property is let*” must *provide* certain things for the lease-leaseback arrangement to be valid. It is thus the terms and conditions of the lease-leaseback documents that section 17406(a) governs, not the parties’ actual performance under the contracts.

Moreover, the Court of Appeal’s requirement of actual use, “as a tenant,” during the term of the lease ignores the plain language of subdivision (a) that the lease-leaseback agreement may allow for title to vest in the school district *before* the term expires. The final sentence of section 17406(a) states that a lease-leaseback agreement “may provide

site and approved plans and specifications prior to entering into a lease or agreement, but says nothing about financing.

for the means or methods by which title shall vest in the school district prior to the expiration of that term.” Obviously, if title vests in a school district prior to expiration of the term, the district cannot thereafter use and occupy the property *as a tenant*, since it will then be the owner of the property.

The job of the courts is to apply statutes as written. The Court of Appeal’s rewriting of section 17406(a) flies in the face of well-established rules of statutory construction and usurps the role of the Legislature. The court’s interpretation is also contrary to the plain language of the statute. The decision should not be published in the official reports.

3. The Court of Appeal’s Opinion Regarding Education Code Section 17406(a) Ignores the Legislature’s Express Directive to Liberally Construe the Provisions of the Education Code and the Broad Discretion Vested in School Districts

Even if the language of section 17406(a) was not clear and unambiguous, and it became necessary for the court to construe the statute, the Legislature has expressly directed in section 2 that the provisions of the Education Code, and all proceedings under it, are to be *liberally* construed. The Court of Appeal committed clear error by strictly construing section 17406(a). (Typed mod. opn. 8.)⁴

The opinion also ignores the broad discretion that is vested in school districts by the Constitution and the Legislature to conduct their affairs. (Cal Const. art. IX, § 14 [as amended Nov. 7, 1972, operative July 1, 1973]; section 35160, 35160.1.) Section 35160 provides that “the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established.” In enacting section 35160, the Legislature expressly declared its intent “to give school districts ... broad authority,” and that section 35160 shall “be liberally construed to effect this objective.” (Section 35160.1.)

Indeed, Section 17406(a) itself confers broad discretion and flexibility on school districts specifically in connection with the use of lease-leaseback. The last sentence of

⁴ The Court of Appeal relied on *Unite Here Local 30 v. Department of Parks & Recreation* (2011) 194 Cal.App.4th 1200, 1209 as authority for strictly construing exceptions to competitive bidding. (Typed mod. opn. 8.) However, that case and the case it cited as authority, *Marshall v. Pasadena Unified School District* (2004) 119 Cal.App.4th 1241, did not deal with section 17406 or any other provisions of the Education Code.

subdivision (a) provides that “[t]he instrument ... shall contain such other terms and conditions as the governing board may deem to be in the best interest of the school district.”

4. The Opinion’s Unanswered Questions Regarding Education Code Section 17406(a) Create Additional Problems and Confusion

As discussed, the Court of Appeal held that in order to be a “genuine” or “true” lease under section 17406(a), the school district must actually use the newly built facilities, as a tenant, during the term of the lease. (Typed mod. opn. 25, 26.) It construed “use” to mean “the occupation and utilization of the building in school operations.” (Typed mod. opn. 24.)

In addition to the other problems with this new requirement, detailed above, the opinion leaves open the important questions of *how long*⁵ a district must actually use the premises as a tenant, as well as the *nature and extent* of the required “school operations,” before a lease can be considered “genuine” or “true.” Are “school operations” considered only classrooms, or would storage or administrative offices qualify? Is use and occupancy for one day enough? One week? One month? And must a school district use and occupy the entire project, or will use and occupancy of a building or two, or portions of one or more buildings, suffice? Under Education Code section 17403, the maximum length of time a school district can be a tenant is 40 years, but at what point between one day and 40 years, and for what purpose, must a district use and occupy the premises in order to satisfy the Court of Appeal’s new requirement?

The same is true for the requirement that the lease-leaseback agreement must include a financing component. The court gave no insight whatsoever as to what methods, terms, or conditions of financing would be sufficient to satisfy this new requirement. Also, must the entire project be financed, or will it suffice if a school district finances only part of the total cost? And if the latter, what percentage of the total cost must be financed in order to meet this new requirement? If there is a payback plan for several years, will an option for the school district to pay it back sooner “negate” the financing component?

The questions the Court of Appeal left unanswered create far more problems than are solved by the opinion, and will negatively impact school districts’ ability to participate in any kind of lease-leaseback agreements in the future. Very few, if any,

⁵ In fact, the court expressly declined to answer the question of how long a district must “use and occupy the project as a tenant before the ‘true character’ of the transaction is a lease and not a traditional construction contract.” (Typed mod. opn. 26, fn. 13.)

contractors would be willing to enter into such agreements knowing they could be forced to return all monies paid to them if their agreement is later deemed to be illegal.

5. The Court of Appeal's Opinion Regarding Government Code Section 1090 is Contrary to the Legislature's Intent

Government Code section 1090, subdivision (a), provides in part:

“Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.”

By its express terms, the statute only applies to “[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees.” The Court of Appeal, however, defined the term “employee” to include corporate consultants hired by a local government. (Typed mod. opn. 38-40.) The court’s construction is contrary to the Legislature’s intent.

After the Legislature enacted Government Code section 1090, it enacted Public Contract Code section 10365.5 in 1990, which applies to contracts with state agencies. (Added Stats 1990 ch 344 § 1 [AB 3285].) Subdivision (a) of Public Contract Code section 10365.5 provides that “[n]o person, firm, or subsidiary thereof who has been awarded a consulting services contract may submit a bid for, nor be awarded a contract for, the provision of services, procurement of goods or supplies, or any other related action which is required, suggested, or otherwise deemed appropriate in the end product of the consulting services contract.” There would have been no reason for the Legislature to enact Public Contract Code section 10365.5 if it had intended Government Code Section 1090 to apply to consultants and independent contractors.

The Legislative History of Public Contract Code section 10365.5 also confirms the Legislature did not intend to include consultants in Government Code section 1090. (Ex. K to FUSD’s Motion for Judicial Notice in support of its Petition for Review.) Specifically, the Legislative Counsel opined in a letter to Assemblyman Steve Clute, the author of AB 3285, that *no provision of state law* prohibited a private firm which contracts with a state agency for consulting services in connection with the development of plans for the construction and operation of a veterans’ home from thereafter contracting with the agency for the construction and operation of the home. (Ex. K to FUSD’s Motion for Judicial Notice in support of its Petition for Review [January 25, 1990 letter from Legislative Counsel of California to Hon. Steve Clute].) Likewise, in requesting coauthors for his bill, Assemblyman Clute stated, “[w]hile current conflict of

interest codes prevent state employees from bidding on contracts they wrote, *private consultants are not covered.*” (Ex. K to FUSD’s Motion for Judicial Notice in support of its Petition for Review [May 16, 1990 Request for Coauthors, AB 3285; italics added].) Similarly, Assemblyman Clute stated in his letter to the Governor, “[e]xisting law does not address ... people who work for the state under consulting services contracts. My measure would ... prohibit, with some exceptions, the recipient of a consulting services contract from bidding for or receiving contracts which are the end product of their consulting services work.” (Ex. K to FUSD’s Motion for Judicial Notice in support of its Petition for Review [July 9, 1990 letter from Assemblyman Steve Clute to Hon. George Deukmejian; italics added].)

Even more to the point, an attempt was recently made during the 2013-2014 legislature session to amend section 1090 itself to include independent contractors. The Legislative Counsel’s Digest for AB 1059⁶ explains:

“Existing law prohibits Members of the Legislature, and state, county, district, judicial district, and city officers or employees from being financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Existing law further prohibits these public officers and employees from being purchasers at any sale, or vendors at any purchase, made by them in their official capacity. A violation of these provisions is a crime.

This bill would *extend application of those prohibitions to independent contractors* who perform a public function, and specifically provide when an independent contractor, or owner, officer, employee, or agent of the independent contractor, has a financial interest in a contract. By expanding the scope of a crime, the bill would impose a state-mandated local program.” (Ex. J to Motion for Judicial Notice; italics added.)

Thus, the Legislature clearly understood and believed, before the Court of Appeal’s contrary opinion in this case, that section 1090 *does not* extend to consultants and independent contractors. It is not the Court of Appeal’s job to rewrite the statute.

⁶ AB 1059 died in the Assembly without going to a vote. (Exhibit J to FUSD’s Motion for Judicial Notice in support of its Petition for Review.)

6. **The Court of Appeal’s Opinion Regarding Government Code Section 1090 Violates Established Rules of Statutory Construction and is Inconsistent with Decisions from this Court and other Courts of Appeal**

The Court of Appeal’s opinion also violates fundamental principles of statutory construction and is inconsistent with decisions from this Court.

Specifically, as this Court stated in *Reynolds v. Bement* (2005) 36 Cal.4th 1075, “[a] statute will be construed in light of the common law unless the Legislature clearly and unequivocally indicates otherwise.” (*Id.* at 1086-1087, internal quotes and citation omitted.) In particular, if “a statute refer[s] to employees without defining the term [then] courts have generally applied the common law test of employment.” (*Id.* at 1087, quoting *Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal. 4th 491, 500 [discussing Gov. Code § 20028(b); see also *People v. Palma* (1995) 40 Cal.App.4th 1559, 1565-1566 [“as a general rule, when ‘employee’ is used in a statute without definition, the Legislature intended to adopt the common law definition *and to exclude independent contractors*” (italics added)].) Under the common law test, independent contractors are not employees. (3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 21, pp. 60-61.)

The Court of Appeal’s opinion also conflicts with the Second District Court of Appeal’s interpretation of Government Code section 1090 in *People v. Christiansen* (2013) 216 Cal.App.4th 1181 and *Klistoff v. Superior Court* (2007) 157 Cal.App.4th 469. In *Christiansen*, the Court of Appeal concluded that “an independent contractor is not an employee within the meaning of the statute.” (216 Cal.App.4th at 1190.) The court held in *Klistoff* that defendants, a waste hauling business and its principal, could not violate Government Code section 1090 because the principal was not a board member, officer or employee of the City, and “[t]he prohibition of section 1090 *does not reach beyond these public officials.*” (157 Cal.App.4th. at 479-480, italics added.)

7. **The Court of Appeal’s Opinion Regarding Government Code Section 10365.5, Subdivision (c) Conflicts with Public Contract Code Section 10365.5, Subdivision (c)**

In enacting Public Contract Code section 10365.5, discussed above, the Legislature created an express exception for consultants who provide planning and project management services. Subdivision (c) of section 10365.5 states: “Subdivisions (a) and (b) do not apply to consulting services contracts subject to Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code.” Chapter 10 of Division 5 of Title 1 of the Government Code pertains to contracts with private architects, engineering, land surveying, and construction management firms.

The Court of Appeal's broad expansion of the term "employee" in section 1090 to include corporate consultants and independent contractors would include consultants on state projects who provide planning and project management consultation services. As such, the holding conflicts with subdivision (c) of section 10365.5 of the Public Contract Code.

CONCLUSION

For the foregoing reasons, petitioner Fresno Unified School District respectfully requests that the Fifth District Court of Appeal's decision in *Davis v. Fresno Unified School District* be depublished if its petition for review is not granted.

Very truly yours,

DOWLING AARON INCORPORATED



Lynne Thaxter Brown

LTB:hlw

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) SS
COUNTY OF FRESNO)

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 8080 North Palm Avenue, Third Floor, Fresno, CA 93711. On July 30, 2015, I served the within document(s):

REQUEST FOR DEPUBLICATION OF OPINION

BY MAIL: By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Fresno, California, addressed as set forth below.

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	<p>Court of Appeal Fifth Appellate District</p> <p><i>(via e-service pursuant to California Rules of Court, Rule 8.212, by e-submission to Court of Appeal, Fifth District)</i></p>

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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 July 30, 2015, at Fresno, California.



 Helen L. Walton