Supreme Court No. S227786

In the Supreme Court of the State of California

STEPHEN K. DAVIS,
Plaintiff/Appellant
vs.

FRESNO UNIFIED SCHOOL DISTRICT, et al.
Defendant/Respondent and Petitioner

After the Published Opinion in the Court of Appeal
Fifth District, Civil Case No. F068477

REPLY TO ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Davis's answer does not demonstrate that review by this Court is not warranted. Just the opposite. The answer – together with the several supporting amicus curiae letters that have been filed – highlight all the reasons why this Court should grant review.[1]

For ease of comparison, FUSD responds to Davis's arguments and assertions in the order presented in the answer brief.

II. DISCUSSION

A. *California Taxpayers Action Network v. Taber Construction, Inc. and Mt. Diablo Unified School District*

As shown by the opening brief attached to Davis's request for judicial notice, the very same issues decided by the Fifth District Court of Appeal and presented in FUSD's petition for review are presently being considered by the First District Court of Appeal in *California Taxpayers Action Network v. Taber Construction, Inc. and Mt. Diablo Unified School District*, Appeal No. A145078. Davis suggests the Court should simply wait to see what the First District decides compared to this case and *Los Alamitos Unified School District v. Howard Contracting, Inc.* (2014) 229 Cal.App.4th 1222. (Ans. 4.)

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[1] FUSD also joins in Harris's reply to Davis's answer to Harris's petition for review.

The Court should not wait to take up the issues. The decision of the First District Court of Appeal could well create even more confusion. The First District is not bound by the decisions of the Fifth or Fourth (or any other) Districts, and can decide the issues as it sees fit, utilizing an entirely different analysis than that employed by the Fourth and Fifth Districts. This is precisely why this Court should step in now and provide uniformity of decision and much needed guidance.

Moreover, the fact that the very same issues are on appeal in the First Appellate District confirms the statewide prevalence, importance and recurrence of the issues.

B. Grounds for Supreme Court Review are Present

1. *Davis v. FUSD* Conflicts with *Los Alamitos Unified School District v. Howard Contracting, Inc.*

Davis is correct the Court of Appeal agreed with *Los Alamitos* that section 17406(a) creates an exception to competitive bidding for both the lease and leaseback contracts. (Ans. 4; Mod. Opn. 16.) But Davis is wrong that the two cases are not otherwise at odds with each other, and that FUSD did not "successfully explain[] why or how" there is a conflict. (Ans. 5.)

The reason the *Los Alamitos* decision is "silent on the genuine lease, occupancy during term and contractor financing requirements" analyzed by the Court of Appeal here (Ans. 5) is the very basis of the

conflict between the two decisions. As FUSD explained in the petition, the Fourth District Court of Appeal found the language of section 17406(a) to be plain and unambiguous. (*Los Alamitos*, *supra*, 229 Cal.App.4th at 1228 [citing 56 Ops. Cal. Atty. Gen. (1973) 571, 581].) As this Court has frequently reiterated, when statutory language is plain and unambiguous, there is no need for construction. (*DiCampi-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 992; *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 800.) Thus, the Fourth District applied the plain and unambiguous language of the statute to uphold the lease-leaseback arrangement.

However, the Court of Appeal in this case failed to follow this rule of statutory construction,[2] erroneously applied a strict and narrow construction,[3] and included additional requirements that are not found in the language of the statute. As a result, the Court of Appeal invalidated a lease-leaseback arrangement structured exactly the same way as the arrangement in *Los Alamitos*. No clearer conflict could exist. (Pet. 16.)

Moreover, as explained in the amicus curiae letter from Los Angeles Unified School District (LAUSD), the Fourth District Court of Appeal's decision in *Los Alamitos* includes a discussion of the Legislature's

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[2] Ironically, the Court of Appeal's opinion begins with an *acknowledgment* of the rule. (Mod. Opn. 8.)

[3] This is contrary to the Legislature's mandate in section 2 that the provisions of the Education Code, and all proceedings under it, are to be liberally construed.

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 AB 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 conclusion that a "financing component" is required is thus directly at odds with *Los Alamitos's* analysis of section 17406 and the Legislature's attempt to amend it.

2. Legislative History is Relevant and Shows the Legislature Did Not Intend Government Code Section 1090 to Include Consultants and Independent Contractors

Davis argues that since three courts[4] have interpreted Government Code section 1090 to apply to consultants, "legislative history

[4] *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, *California Housing Financing Agency v.* [continued]

is of no further use." (Ans. 6.) However, as shown in FUSD's and Harris's petitions for review and the amicus curiae letters, *other* courts have interpreted Government Code section 1090 as *not* applying to consultants. (See, *People v. Christiansen* (2013) 216 Cal.App.4th 1181; *Klistoff v. Superior Court* (2007) 157 Cal.App.4th 469; *NBS Imaging Systems, Inc. v. State Board of Control* (1997) 60 Cal.App.4th 328.)

Moreover, the case Davis cites (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232) does not support the proposition that "legislative history is of no further use," and FUSD is aware of no other authority to support such a proposition. To the contrary, legislative history is routinely recognized as an important guide to statutory interpretation. (*People v. $1,930 United States Currency* (1995) 38 Cal.App.4th 834, 843; *Peck's Liquors, Inc. v. Superior Court* (1963) 221 Cal.App.2d 772, 782; 7 Witkin, Sum. Cal. Law, Const. Law §124 (2010).)

As shown in FUSD's petition and the amicus curiae letters from Coalition for Adequate School Housing (CASH) and Associated Builders and Contractors of San Diego, Inc. (ABC San Diego), the legislative histories of Government Code section 1090 and Public Contract Code section 10365.5 show the Legislature did not intend Government Code

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Hanover/California Mgmt. & Accounting Center, Inc. (2007) 148 Cal.App.4th 682, and the instant case.

section 1090 to apply to consultants and independent contractors and the courts' interpretation of section 1090 in this case, and in *Hub City* and *Hanover,* is simply wrong. (Pet. 25-26; CASH amicus curiae letter 5-7; ABC San Diego amicus curiae letter 5-7.)

3. Because Section 1090 Does Not Define the Term "Employee," the Common Law Definition Applies

Davis faults FUSD for "rel[ying] on 'employee' cases not addressing section 1090." (Ans. 7.) Although the cases do not address section 1090 they are nevertheless relevant to the analysis here because they show that the Court of Appeal's construction of Government Code section 1090 violates a fundamental rule of statutory construction; namely, the term "employee" in Government Code section 1090 is to be construed in light of the common law because the Legislature has not clearly and indicated otherwise. (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1087.) And under the common law, the term "employee" does not include consultants and independent contractors. *(People v. Palma* (1995) 40 Cal.App.4th 1559, 1565-1566; 3 Witkin, Summary of Cal. Law (10th ed. 2005 Agency and Employment, § 21, pp. 60-61.)

4. *Davis v. FUSD* Conflicts with *Klistoff v. Superior Court*

Nor is *Klistoff v. Superior Court* (2007) 157 Cal.App.4th 469 irrelevant to the analysis here, as Davis claims. (Ans. 8.) The Second

District Court of Appeal in *Klistoff* narrowly construed the plain language of section 1090 and concluded it applies *only to the persons identified in the statute*. "Section 1090 identifies the persons who can violate it: '[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees.' Because neither Klistoff nor All City Services were such persons, they were *legally incapable of committing a violation of section 1090*." (*Id.* at 479-480; italics added.)

Here, however, and in conflict with the Second District's construction of section 1090, the Court of Appeal ignored the plain language and broadly construed the statute to include "consultants" even though consultants are not identified as persons who can violate in the statute.

5. Public Contract Code Section 10365.5 and its Legislative History Confirm Government Code Section 1090 Does Not Include Consultants

FUSD's reliance on Public Contract Code section 10365.5 is not because it claims the statute "applies," as Davis contends. (Ans. 9-10.) FUSD knows the statute applies only to contracting by state agencies, as stated in the petition for review. (Pet. 24.) However, as discussed in the petition, Public Contract Code section 10365.5 and its legislative history are nevertheless directly relevant to the issues in this case because they confirm

the Legislature did not intend to include consultants in Government Code section 1090.[5]

C. The Court of Appeal's Interpretation of Education Code Section 17406 Merits Review

Under the plain language of Section 17406, subdivision (a),[6] a valid lease-leaseback instrument only requires: (1) the school district own the land to be leased to the builder; (2) 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 district's use; and (3) 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 other means or methods by which title shall vest prior to the expiration of the term.

Davis argues the Court of Appeal's strict construction of section 17406 to include additional requirements was correct because exceptions to competitive bidding requirements should be strictly construed. (Ans. 11, 13.) However, Davis completely ignores FUSD's discussion in

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[5] For the same reason, CASH, ABC San Diego, and Associated General Contractors of California and Associated General Contractors of America, San Diego Chapter (AGC) also rely on Public Contract Code section 10365.5 in their amicus curiae letters in support of the petitions for review.

[6] As explained in the petition, in 2012 when the subject arrangement was entered into between FUSD and Harris, section 17406 did not include the word "lease" anywhere in the statute. 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. (Pet. fn. 3 [p. 2], fn. 12 [p.16].)

the petition on this point. Davis fails to address the mandate in section 2 that all provisions of the Education Code and all proceedings under it are to be liberally construed, and the fact that *Marshall v. Pasadena Unified School District* (2004) 119 Cal.App.4th 1241 did not concern section 17406 or any other provisions of the Education Code.

1. Section 17406 Does Not Require Actual Use

Contrary to Davis's assertion and the Court of Appeal's opinion, nothing in the plain language of section 17406 requires that a school district must *actually use* the premises, *as a tenant*, during the term of the instrument. Section 17406 states only that the instrument by which the property is let to the builder must require the builder to construct, or provide for the construction of a building or buildings, on the leased premises for the use of the school district during the term thereof. The statute does not speak to or require anything with respect to the school district's *actual performance* under the lease-leaseback instruments.

Further, as discussed in LAUSD's amicus curiae letter, the Court of Appeal's interpretation of section 17406 "to mean the leaseback must have a term during which the school district uses the new buildings" (Mod. Opn. 26), ignores the equally plausible alternative interpretation that the statute simply requires that the facilities be constructed during the lease term. (LAUSD amicus curiae letter 2-3.)

More important, as discussed in the petition and the amicus curiae letters, it is crucial that this Court provide guidance regarding the new requirement the Court of Appeal imposed. The opinion says nothing about how long a district must actually use the premises as a tenant, or the nature or extent of such use. The fact that FUSD did not use the premises until construction was completed in this case does not make the issue irrelevant, as Davis claims. (Ans. 13, 15.) All of the hundreds of other school districts who utilize lease-leaseback throughout the state, as well as FUSD in the future, are left to guess what is required to satisfy the Court of Appeal's new requirement.

2. Section 17406 Does Not Require Financing

There is no requirement for a "financing component," not even the hint of such a requirement, anywhere in section 17406. If anything, as LAUSD's amicus curiae letter points out, the opposite exists, one that permits the instrument to "contain other terms and conditions as the governing board may deem to be in the best interest of the school district." (Section 17406(a); see also Education Code sections 35160 and 35160.1, which give school districts broad authority to conduct their affairs.)

Moreover, the Court of Appeal fails to explain how this "financing component" is defined, again leaving all of the hundreds of other school districts who utilize lease-leaseback throughout the state, as well as FUSD in the future, to guess what is required to satisfy the new requirement.

As discussed in the petition and amicus curiae letters, there is an urgent need for this Court to step in and provide guidance.

D. Davis's Request for Review on Additional Issues

If the Court grants review, Davis asks for review on two additional issues: (1) What is the duty of care applicable to a Board of Education when awarding contracts paid for with Proposition 39 school bond proceeds; and (2) Whether section 17406 creates an exception to competitive bidding for both the lease and the leaseback portions of the transaction.

Davis acknowledges the duty of care issue is completely new. (Ans. 17.) There is no such theory of recovery pled in the complaint (1 AA 1-21), nor did Davis raise it in the Court of Appeal, either in his opening or reply briefs or in a petition for rehearing. (Cal. Rules Court 8.500(c)(1).) There also appears to be no conflict between districts regarding the duty of care. Davis does not cite, nor is FUSD aware of, any case that has ever even considered this issue. In short, Davis is asking this Court to decide an issue in the first instance with no record, not even allegations in a complaint.

The second issue concerns the same unsuccessful argument Davis made in the Court of Appeal regarding the scope of section 17406. Davis contends that section 17406 exempts only the site lease portion of the lease-leaseback transaction from competitive bidding, and that the sublease/leaseback portion (the Facilities Lease in the instant case) is not

exempt from competitive bidding. (AOB 21-36, ARB 7-34.) This issue was also before the Fourth District in *Los Alamitos*. (*Los Alamitos*, *supra*, 229 Cal.App.4th at 1229-1230.)

Davis states the question was not settled by *Los Alamitos* or the decision in this case (Ans. 20) but he is wrong.[7] The question was not only settled, the Courts of Appeal reached the same conclusion in both cases – section 17406 applies to the site lease agreement and the sublease/leaseback agreement. (Mod. Opn. 15-17; *Los Alamitos*, supra, 229 Cal.App.4th at 1229-1230.) There is thus uniformity of decision on this issue.

III. CONCLUSION

For the reasons discussed above and in Harris's reply, in the petitions for review, and in the amicus curiae letters, FUSD respectfully requests that the Court review the issues presented in the petitions.

Dated: August 7, 2015.

DOWLING AARON INCORPORATED

By: _____
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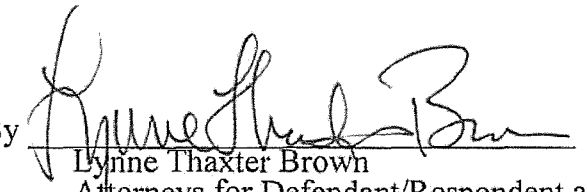
DISTRICT

[7] Indeed, Davis devoted the majority of his reply brief in the Court of Appeal to arguing why the Court of Appeal should not follow *Los Alamitos* on this point. [ARB 7-34.].)

CERTIFICATE OF WORD COUNT

The text in this Petition for Review is proportionally spaced. The typeface is Times New Roman, 13 point. The word count generated by the Microsoft Word© word processing program used to prepare this Opening Brief, for the portions subject to the restrictions of California Rules of Court, Rule 8.204(c), is 2,662.

Dated: August 7, 2015. DOWLING AARON INCORPORATED

By 

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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 August 10, 2015, I served the within document(s):

REPLY TO ANSWER TO PETITION FOR REVIEW

☒ **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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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 10, 2015, at Fresno, California.

Helen Walton

Helen L. Walton