No. S227786
(Court of Appeal No. F068477)
(Fresno County Super. Ct. No. 12CECG03718)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

STEPHEN K. DAVIS,
Plaintiff and Appellant,

v.

FRESNO UNIFIED SCHOOL DISTRICT, ET AL.,
Defendants and Respondents.

After a Decision By the Court of Appeal,
Fifth Appellate District

[CORRECTED] REPLY IN SUPPORT OF PETITION FOR REVIEW

ARNOLD & PORTER LLP
SEAN M. SELEGUE (No. 155249)
sean.selegue@aporter.com
RYAN M. KEATS (No. 296463)
ryan.keats@aporter.com
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111-4024
Telephone: +1 415.471.3100
Facsimile: +1 415.471.3400

Attorneys for Harris Construction Co., Inc.

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I.

REVIEW SHOULD BE GRANTED TO DECIDE WHETHER INDEPENDENT CONTRACTORS AND CONSULTANTS MAY BE DEEMED "EMPLOYEES" SUBJECT TO GOVERNMENT CODE SECTION 1090.

There is a split among the Courts of Appeal as to whether the term "employees" in Government Code Section 1090 encompasses consultants and independent contractors. Davis does not and cannot dispute this. Instead, he notes that *People v. Christiansen*, 216 Cal. App. 4th 1181 (2013), and the Opinion disclaim any such conflict because—under the Opinion's reasoning—one interpretation applies only to civil cases and the other only to criminal cases.

Davis protests too much. The reality is that the cases reach conflicting conclusions about the meaning of the same word ("employees") in a statute and that is a problem. While a contractor might take some comfort in the fact that *Christiansen* forecloses criminal liability for prior conduct, the Opinion's holding (and that of two prior decisions) that a contractor cannot participate in pre-construction work without being disqualified for the construction work means the entire design-build method of delivering schools is in question. Must (or will) contractors agree to perform services school districts need and want when the Opinion and the decisions on which it relies hold that the contractors are subject to civil liability for doing so? And, even worse, if the Opinion's interpretation of Section 1090 is correct, then might another Court of Appeal in a criminal matter conclude that contractors are indeed "employees" subject to Section 1090 and therefore are subject to conviction of a crime for a violation of that section?

The uncertainty and risk the Opinion creates by treating contractors as "employees" under Section 1090 cannot be brushed aside on the basis that the Opinion's interpretation is

limited to civil liability. As amici have pointed out, the uncertainty this conflict has created for school districts and contractors has caused numerous school construction projects to be put on hold. ABC San Diego Amicus Letter at 2; AGC Amicus Letter at 2; CEA Amicus Letter at 1-2; CSBA Amicus Letter at 1. Indeed, the problem is so pressing that representatives of virtually every school district in the State and three contractor associations have come forward to state the urgent need for this conflict to be resolved.

Davis' remaining arguments do not obviate the need for review. He contends that the Opinion was "faithful" to this Court's decision in *Stigall v. City of Taft*, 58 Cal. 2d 565 (1962). By that he seems to mean the Opinion is correct in interpreting "employee" to mean "contractor." But *Stigall* does not speak to what the term "employee" in Section 1090 means. That decision held that Section 1090's reference to a contract being "made" should be interpreted broadly to include pre-formation activities such as negotiation. *Id.* at 570-71 (council member who was financially interested in contract with city who resigned just before the city council formally approved the contract nonetheless participated in "making" the contract by his earlier involvement).

Because the issue here is the meaning of "employee," not what it means to have "made" a contract, *Stigall* is not controlling and does not change the fact that the Courts of Appeal have issued conflicting interpretations of the term "employee" in Section 1090. Whether *Stigall*'s "broad" interpretation of one term in Section 1090 can justify the Opinion's interpretation of another term is an issue for merits briefing, not a reason to deny review.[1]

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[1]Davis seems to refer to *Stigall* again when he contends that Harris seeks "to essentially undue [sic] over a half century of statutory construction." Answer 7 n.3. However, as explained above, Harris' Petition does no such thing. It does
(continued . . .)

In addition, Harris notes Davis' point that the Petitions for Review did not expressly seek review of the Opinion's common law conflict of interest holding and his request that publication be maintained as to that holding even if review is granted. Answer to FUSD Petition 1 n.4. There was a good reason the Petitions did not seek review of the common law ruling: it did nothing more than conclude a common law conflict of interest claim had been stated based on the Opinion's interpretation of Section 1090. Obviously that holding should not be published if the Section 1090 holding is under review. If the Court agrees with Petitioners on the merits, then the Court of Appeal on remand can determine what, if anything, remains of the common law conflict of interest claim if this Court does not address that issue in its merits opinion.

II.

THE OPINION CONFLICTS WITH ESTABLISHED LAW PROVIDING THAT THE SAME STATUTORY LANGUAGE MAY NOT BE INTERPRETED DIFFERENTLY IN CIVIL AND CRIMINAL CASES.

Davis devotes most of his discussion of Harris' second issue presented to a confusing and irrelevant discussion of the rule of lenity. As discussed further below, the rule of lenity is not at issue here: the Court of Appeal did not apply it, the case at bench does not call for its application, and Harris' Petition does not rely on it. *See* Part II(B), *infra*. Davis does not get around to addressing the actual question presented—may the same statutory language be applied one way in civil cases and another in criminal cases?—until the last few pages of his

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(. . . continued)
not seek review of the issue *Stigall* decided: how the word "made" in Section 1090 should be interpreted. The decisions in conflict about the term "employee" are of more recent vintage, going back only to 2007.

Answer. Answer 13-15. Because that is the issue, not the rule of lenity, we address Davis' contention on that point first.

A. The Opinion Conflicts With State And Federal Law Providing That Statutory Language Has The Same Meaning In All Cases, Civil And Criminal.

Davis asserts that "there is no categorical prohibition against varying applications of statutes in the civil and criminal contexts." Answer 13. He cites no California authority for that surprising proposition and ignores authority against his position. To begin with, this Court has already expressly held in *Harrott v. County of Kings*, 25 Cal. 4th 1138, 1154 (2001), that a statute with both criminal and civil applications would be interpreted the same in both contexts.

In *Harrott*, this Court held that a statute prohibiting certain assault weapons applied only to weapons included on a list that the statute called upon the Attorney General to prepare. The Court reached that conclusion based on the language and legislative history of the statute. *Id.* at 1151. The interpretation was "reinforced" by the rule that a statute should be interpreted where possible to "eliminate[] doubts as to [its] constitutionality." *Id.* In addition, because violating the statute was a crime, "the related rule of lenity" supported the Court's interpretation. *Id.* at 1154. That rule applied even though *Harrott*, a dispute over whether a particular weapon could be lawfully possessed, was not a criminal prosecution. *Id.* In so ruling, this Court cited to *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992), one of a series of U.S. Supreme Court cases discussed in Harris' Petition (and later in this Reply as well). *See* Petition 6; *infra*, pp.6-7. Other California authorities confirm the rule. *E.g.*, *People ex rel. Mautner v. Quattrone*, 211 Cal. App. 3d 1389, 1395 (1989) ("Although defendant is faced with civil and not criminal penalties, fundamental due process concerns of

notice and fairness require us to interpret the statute in an identical manner").

Witkin states that the same "rules of statutory construction are applicable in both civil and criminal proceedings." 1 B.E. WITKIN, CALIFORNIA CRIMINAL LAW *Introduction to Crimes* §29 (4th ed. 2012) (cited in Harris' Petition at 5). And to interpret a criminal statute in *People v. Arias*, 45 Cal. 4th 169 (2008), this Court *relied on civil cases* to list the applicable canons of statutory construction. *Id.* at 177. The only canon *Arias* identified that is unique to criminal cases was that "[i]f a statute defining a crime or punishment is susceptible of two reasonable interpretations, we ordinarily adopt the interpretation that is more favorable to the defendant." *Id.* That is the rule of lenity, which all agree does not apply to Section 1090's reference to "employees." *See id.* at 189 (citing *People v. Avery*, 27 Cal. 4th 49, 57 (2002) (discussing rule of lenity)); Part II(B), *infra.* Accordingly, the same principles of statutory construction should apply to Section 1090 in civil and criminal cases.

Because the same canons of construction apply to Section 1090 when it is interpreted in a criminal case as when it is applied in a civil action, the Opinion's holding that Section 1090 can have different meanings in the two contexts conflicts with existing California law. Application of a single set of interpretive canons cannot lead to differing interpretations of the same statute in different cases—at least not differing *correct* interpretations. The Court of Appeal's contrary holding will no doubt proliferate and cause mischief because it offers parties to criminal and civil cases a new argument never before available in California. That new argument will allow parties to contend that existing interpretations of statutes in one context should not be followed in a different context. Review should be granted to clarify the troublesome conflict that the Opinion has created.

Davis' reliance on federal cases does not aid him either. The United States Supreme Court has specifically rejected the notion that the same statutory language can be interpreted differently in different cases. Davis inexplicably argues that the Court in *Clark v. Martinez*, 543 U.S. 371 (2005), "did not hold that a statutory term *must* be given the same meaning in civil and criminal applications." Answer 14. But the Court held exactly the opposite of what Davis claims: "we *must* interpret [a] statute consistently, whether we encounter its application in a criminal or noncriminal context." 543 U.S. at 380 (internal quotation marks omitted; emphasis added). The holding in *Clark* is the controlling federal law today.

Davis seeks to convince this Court otherwise by citing to Justice Stevens' concurring opinion in *United States v. Santos*, 553 U.S. 507 (2008), which took the position that the same statutory language could be interpreted differently in different contexts. Answer 14 n.7. But, as Harris' petition explained, Justice Stevens' view on that point did not command a vote from any other Justice. And Justice Stevens' assertion that the Court had "previously recognized that the same word can have different meanings in the same statute" (553 U.S. at 525) drew a sharp response from the plurality. They noted that the Court in *Clark* had "forcefully rejected" the idea that "the same word, *in the same statutory provision*" could have "different meanings in different factual contexts." *Id.* at 522 (Scalia, Ginsburg, Souter, JJ.) (emphasis altered). "The lowest common denominator, as it were, must govern." *Id.* at 523 (emphasis and internal quotation marks omitted). Four dissenting Justices likewise stated they could not "agree with Justice Stevens's approach insofar as it holds that the meaning of the term 'proceeds' varies depending on

the nature of the illegal activity." *Id.* at 532 (Roberts, C.J., Alito, Kennedy, Breyer, JJ., dissenting)).[2]

The remaining authorities Davis cites do not call *Clark* into question. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)—commonly known as the "seven dirty words" case—the Supreme Court upheld the FCC's administrative determination that an indecency statute prohibited the radio broadcast of a comedy monologue filled with expletives. After holding that prohibiting broadcast of the monologue in the middle of the day did not violate the First Amendment, the Court stated in a footnote that it had no need to address possible criminal application of the same statute. *Id.* at 739 n.13. This footnote does not suggest that the words in the statute could be interpreted differently in a criminal case but rather that the First Amendment analysis of a criminal conviction arising from speech might be different than administrative regulation of a radio station broadcasting on the public airwaves.

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the Court held that a state was not a "person" subject to liability in a False Claims Act action brought by an individual suing on behalf of the federal government as a relator. Two Justices stated in concurrence that they "read the Court's decision to leave open the question whether the word 'person' encompasses States when the United States itself sues under the False Claims Act." *Id.*

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[2]Justice Stevens' dissenting view goes back at least to 1992, when he dissented in *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 525-26 (1992). As in *Santos*, a majority of the Court in *Thompson* disagreed and, over Justice Stevens' dissent, applied the rule of lenity in a civil tax action because the statute in question "ha[d] criminal applications" and had to be interpreted the same way in a civil case as it would be in a criminal case. *Id.* at 518 n.10 (plurality opinion); *id.* at 523 (opinion of Scalia, J.) (also applying rule of lenity to form a majority of the Court).

at 789 (Breyer & Ginsburg, JJ., concurring). Needless to say, this is not a holding of the Court nor is it even a decisive statement by the two concurring Justices. They merely stated that they considered the issue open. *Clark*, decided five years later, would presumably rule out such a result unless the special issues of federalism presented by imposition of liability on states called for a different result. No such special circumstance exists here. Rather, the Opinion suggests that statutes may *routinely* be interpreted differently in civil and criminal cases.[3]

Accordingly, the Opinion's conclusion that the same statute can be interpreted differently in civil and criminal matters conflicts with both state and federal law. Review should be granted to clarify the conflict the Opinion has created.

B. The Rule of Lenity Is Irrelevant To The Instant Matter.

Davis incorrectly asserts that Harris "invokes the rule of lenity to create a purported conflict of law warranting review." Answer 7. Wrong. Our Petition stated that the rule of lenity was *not* applicable to this case and was *not* at issue in *People v. Christiansen*, 216 Cal. App. 4th 1181 (2013), the case that reversed convictions of a contractor under Section 1090. Petition 6 n.4; *see also* Answer 8 & n.4 (Davis seemingly agrees). The rule of lenity *was* at issue in *Thompson*, the civil tax case in which the U.S. Supreme Court held that the statute at issue was ambiguous and, because it had a

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[3]All of the opinions in *Vermont Agency of Natural Resources* must be read in light of the unique issues presented by the possibility that a federal statute could impose liability on the states. As a matter of statutory construction, a federal statute is read to impose liability on the states only when the Congress "clearly" expresses that intent. 529 U.S. at 779-80, 793 n.5. In addition, imposing liability on a state in an action brought by a relator presented "serious doubt" of an Eleventh Amendment violation. *Id.* at 787.

criminal application, the ambiguity had to be resolved in the taxpayer's favor. 504 U.S. at 518 & n.10.

The parties agree that the rule of lenity is not applicable here for at least one reason. As Harris' Petition noted, the rule applies only when a statute is ambiguous, and Section 1090's use of the word "employee" is not ambiguous. Petition 6 n.4; *see also United States v. Shabani*, 513 U.S. 10, 17 (1994) (rule of lenity applies "only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute"). Davis agrees. Answer 8 n.4.[4]

It is difficult, then, to understand why Davis devotes so much of his Answer to the rule of lenity. His goal seems to be to distinguish or minimize *Harrott*, but his efforts do not persuade. He seems to argue that because the rule of lenity applied in *Harrott*, and does not apply here, that the Opinion cannot be said to conflict with *Harrott*. Answer 9-10. Davis' point is a non-sequitur. The salient holding in *Harrott* is that when a statute must be construed in a particular way because it has a criminal application, then that construction applies equally in civil cases. *See, supra*, pp.4-5; Petition 5-6. That holding in *Harrott* did not turn on *why* the statute must be construed in a particular way and neither did the reasoning in *Thompson* or the other U.S. Supreme Court cases discussed above.

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[4]Davis also argues that lenity applies to an ambiguous statute only when willfulness, *i.e.*, specific intent, is not an element of the offense. Answer 9. Harris takes no position on this issue but will assume Davis' point to be correct for purposes of its Petition for Review only. Davis goes on to contend that willfulness is required for a violation of Section 1090 to be a crime, a point with which Harris can agree. Answer 10-11; GOV'T CODE §1097. Accordingly, if Davis' "willfulness" gloss on the rule of lenity is correct, then he is right that the rule of lenity does not apply to Section 1090 for this second reason.

Here, neither *Christiansen* nor the Opinion identified which particular rule of interpretation required Section 1090 to be interpreted more narrowly in criminal cases than in civil cases. What matters is that *Christiansen* suggested, and the Opinion has held, that the more narrow interpretation applies only in criminal cases while the broader interpretation—under which a corporate contractor can be considered an "employee"—can prevail in civil cases. That holding cannot be reconciled with the governing state or federal decisions, and the resulting conflict should be resolved by this Court.

III.

ONLY THIS COURT CAN RESOLVE UNCERTAINTY ABOUT LEASE-LEASEBACK CONTRACTS THAT SCHOOL DISTRICTS EMPLOY TO DECREASE COST AND IMPROVE QUALITY IN SCHOOL CONSTRUCTION.

Davis' attempt to paint the issues presented here as a comic-book battle of good against evil (in which Davis of course plays the superhero) is misguided and ignores the real issue: what policy choice did the Legislature make in permitting lease-leaseback contracts to be awarded without competitive bidding? Competitive bidding is not required for every public contract, as Davis' broad-brush approach would suggest. To the contrary, the Legislature has determined that competitive bidding is the best approach in some situations but not in others, including in lease-leaseback arrangements for school construction and delivery.

The amici letters submitted by numerous school districts and officials demonstrate their strongly held views that the lease-leaseback method of school delivery is in the public interest and permitted by law. They have presented important reasons why that is so. For example, the lease-leaseback method "reduces the level of financial risk from cost overruns for the district . . . because the cost of the project is fixed by a 'guaranteed maximum price." CSBA Amicus

Letter 2. By contrast, "under the traditional bid-build method, it is the district . . . that bears the financial risk from cost overruns by being subject to change orders while the project is being built." *Id.* That is a very important point, because in competitive bidding situations the bidders have a strong economic motive to bid low, win the contract and then submit change orders that increase cost. Lease-leaseback contracts, by contrast, typically place the financial risk of changes on the contractor, thereby aligning the contractor's incentives with the district's.

In addition, lease-leaseback "allows the district . . . to assemble a single project team that includes the architect, project manager, or contractor that is best suited for the unique needs of the project." *Id.* That is not the case with the bid-build method under which the lowest bidder must be accepted. *Id.* The amici letters likewise show that school districts have found value in having contractors provide "value engineering or preconstruction" services prior to finalizing plans and specifications. C.A.S.H. Amicus Letter 7. According to C.A.S.H., an association of school districts and consultants, "it is well established in the industry that such efforts reduce construction costs and project time." *Id.* School districts know from long experience that coordination and planning between architect and builder make costly and disruptive change orders less likely.

And it should be noted that—while not legally required—competitive bidding typically *does* occur within the lease-leaseback delivery method as to subcontractors. While the general contractor is selected in advance of the project as the most qualified contractor to oversee the entire construction process (usually in response to a Request for Proposal), all of the direct work associated with actually building the project is usually competitively bid. In fact, the typical lease-leaseback contract requires the general contractor to obtain

competitive bids for all categories of work from at least three Trade Contractors (Subcontractors). In this case, as an example, the Fresno Unified School District required *five* bids. Davis did not include the portion of the contracting documents that so provide in the otherwise extensive exhibits to his First Amended Complaint. 1 Appellant's Appendix ("AA") 25-112.

The typical requirement to competitively bid subcontracts means that all elements of the project, from site utilities and grading, to structural steel and concrete, to glass and roofing, as well as all interior and exterior finishes are competitively bid. School districts generally monitor the bidding process closely. The only item that is typically not competitively bid are the fees charged by the General Contractor for its services, along with out-of-pocket items such as bonding costs. Accordingly, Davis' contention that the lease-leaseback method of school delivery is inherently more costly is not correct. His reliance on a hearsay report about a different school district *for the first time in this Court* has not been tested in court and obviously cannot be relied upon without proper proceedings. Answer to FUSD Petition 2-3. The amici letters of school districts and their officials submitted to this Court evidence their strongly held opposing view that the lease-leaseback method is less expensive and produces better quality school facilities.

But factual issues regarding cost and how contracts are awarded and performed are not up for decision by this Court. The issues presented are ones of pure law involving statutory construction. The Facilities Lease gave FUSD the right to "take possession of the Project . . . as it is completed" (1 AA 46), thereby providing FUSD the right to use the buildings. FUSD apparently did not exercise that right but instead chose to make the payments necessary to regain title before commencing school operations. *See* 1 AA 47. That is

expressly permitted by Section 17406. The statute states that the contract may provide for "means or methods by which . . . title shall vest in the school district prior to the expiration of [the] term." Revesting title in the district would obviously terminate the lease. Section 17406 imposes no restriction on the district's discretion to include terms in the lease that enable it to terminate prior to actual use of the new buildings. But no requirement of "actual use" appears in the statutory language, which looks to what the contract "provides," not how it is performed.

A more sensible interpretation of Section 17406 would recognize that the statute empowers a school district to include lease terms that provides the district with maximum flexibility in performing the contract. Tellingly, neither Davis nor the Opinion describes why the Legislature could have thought it important from a policy standpoint that the district in a lease-leaseback deal actually use the new buildings for school operations during the term of the leaseback. No meaningful purpose would be served by such a requirement, which nullifies a district's right under Section 17406 to enter into a lease that provides for early termination of the lease at any time and on any terms the district in its discretion authorizes.

As the Fresno Unified School District's filings demonstrate, efforts to make lease-leaseback contracts subject to competitive bidding in their entirety through the legislative process have failed, leading the proponents of such change, such as Davis, to seek the same result through litigation throughout the state. Only this Court can provide a definitive resolution to whether, as most school districts have believed, competitive bidding is not legally required on lease-leaseback transactions. This Court's decision is necessary to free school

districts and contractors of the uncertainty that currently clouds critical school construction projects.[5]

CONCLUSION

For the foregoing reasons, and those in the filings of the Fresno Unified School District in which Harris joins, review should be granted.

DATED: August 18, 2015.

Respectfully,

ARNOLD & PORTER LLP
SEAN M. SELEGUE
RYAN M. KEATS

BY: */s/ Sean M. SeLegue*
SEAN M. SELEGUE

Attorneys for Harris Construction Co., Inc.

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[5]Davis' Motion for Judicial Notice includes various news articles about alleged corruption in awarding construction contracts and cases involving the same. His attribution of ill motives and improper conduct to all school district officials throughout California who favor the lease-leaseback method of school delivery, and the contractors with whom those districts deal, is unfortunate (and not very credible). The Court can of course perceive this effort for what it is, an ad hominem attack that seeks to distract from the legal issues presented. It goes without saying that courts may not consider hearsay in news articles or court records for the truth of the matter asserted. *Herrera v. Deutsche Bank Nat'l Trust Co.*, 196 Cal. App. 4th 1366, 1375 (2011).

CERTIFICATE OF COMPLIANCE PURSUANT TO CAL. R. CT. 504(d)(1)

Pursuant to California Rule of Court 8.504(d)(1), and in reliance upon the word count feature of the software used to prepare this document. I certify that the foregoing **[Corrected] Reply to Petition for Review** contains 4,193 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

DATED: August 18, 2015.

/s/ Sean M. SeLegue
SEAN M. SELEGUE

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PROOF OF SERVICE

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Three Embarcadero Center, 10th Floor, San Francisco, California 94111-4024.

On August 18, 2015, I served the following document(s) described as **[CORRECTED] REPLY IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action by enclosing the document(s) in a sealed envelope or package addressed to the persons at the addresses listed below and placed the envelope(s) for collection and mailing, following our firm's ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

Kevin B. Carlin
CARLIN LAW GROUP, A.P.C.
4452 Park Boulevard, Suite 310
San Diego, CA 92116
Telephone: 619.615.5325
Facsimile: 619.615.5326

kcarlin@carlinlawgroup.com

Attorneys for Appellant STEPHEN K. DAVIS

Matthew R. Dildine
Donald R. Fischbach
Lynne Thaxter-Brown
Steven M. Vartabedian
DOWLING AARON INCORPORATED
8080 N. Palm Avenue, Third Floor
Fresno, CA 93711
Telephone: 559.432.4500
Facsimile: 559.432.4590

mdildine@dowlingaaron.com
dfischbach@dowlingaaron.com
lbrown@dowlingaaron.com
svartabedian@dowlingaaron.com

Attorneys for Respondent FRESNO UNIFIED SCHOOL DISTRICT

Martin A. Hom
Jennifer D. Cantrell
ATKINSON, ANDELSON, LOYA, RUUD & ROMO
16870 W. Bernardo Drive, Suite 330
San Diego, CA 92127
Telephone: 858.485.9526
Facsimile: 858.485.9412

mhom@aalrr.com
jcantrell@aalrr.com

Attorneys for Respondent FRESNO UNIFIED SCHOOL DISTRICT

Fred A. Fenster
GREENBERG GLUSKER FIELDS CLAMAN & MACHTINGER LLP
1900 Avenue of the Stars, 21st Fl.
Los Angeles, CA 90067
Telephone: 310.553.3610
Facsimile: 310.553.0687

ffenster@greenbergglusker.com

Attorneys for Amicus Curiae BEVERLY HILLS UNIFIED SCHOOL DISTRICT

David M. Huff
ORBACH HUFF SUAREZ & HENDERSON LLP
1901 Harrison Street, Suite 1630
Oakland, CA 94612
Telephone: 510.999.7908
Facsimile: 510.999.7918

Attorneys for Amicus Curiae LOS ANGELES UNIFIED SCHOOL DISTRICT

Lawrence H. Kay
7801 Folsom Blvd., Suite 101
Sacramento, CA 95826
Telephone: 916.381.7868
Facsimile: 916.381.7880

Attorneys for Amicus Curiae CONSTRUCTION EMPLOYERS ASSOCIATION

Harold M. Freiman
LOZANO SMITH LLP
2001 N. Main Street, Suite 650
Walnut Creek, CA 94596
Telephone: 925.953.1620
Facsimile: 925.953.1625

hfreiman@lozanosmith.com

Attorneys for Amicus Curiae CALIFORNIA ASSOCIATION OF SCHOOL BUSINESS OFFICIALS

P. Randolph Finch, Jr.
FINCH, THORNTON & BAIRD LLP
4747 Executive Drive, Suite 700
San Diego, CA 92121
Telephone: 858.737.3100
Facsimile: 858.737.3101

pfinch@ftblaw.com

Attorneys for Amicus Curiae ASSOCIATED BUILDERS AND CONTRACTORS OF SAN DIEGO, INC.

Philip J. Henderson ORBACH HUFF SUAREZ & HENDERSON LLP 1901 Harrison Street, Suite 1630 Oakland, CA 94612 Telephone: 510.999.7908 Facsimile: 510.999.7918	*Attorneys for Amicus Curiae COALITION FOR ADEQUATE SCHOOL HOUSING*
Keith J. Bray Joshua R. Daniels CSBA/Education Legal Alliance 3251 Beacon Boulevard West Sacramento, CA 95691	*Attorneys for Amicus Curiae CALIFORNIA SCHOOL BOARDS ASSOCIATION, through its EDUCATION LEGAL ALLIANCE*
Timothy M. Truax LAW OFFICES OF TIMOTHY M. TRUAX 222 N. Sepulveda Blvd., Ste. 2000 El Segundo, CA 90245 Telephone: 310.662.4755 Facsimile: 310.662.4795 tim@truaxlaw.com	*Attorneys for Amicus Curiae ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA and the ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER*
Hon. Donald S. Black Fresno County Superior Court 1130 O Street, Dept. 502 Fresno, CA 93721-2220	
Clerk of the Court Fresno County Superior Court 1130 O Street, Dept. 502 Fresno, CA 93721-2220	
Clerk of the Court Fifth District Court of Appeal 2424 Ventura Street Fresno, CA 93721	*Served via TrueFiling*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California, on August 18, 2015.

Jane Rustice