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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

CALIFORNIA STATEWIDE COMMUNITIES DEVELOPMENT AUTHORITY, Plaintiff and Appellant, v. ALL PERSONS INTERESTED IN THE MATTER OF THE VALIDITY OF A PURCHASE AGREEMENT, Respondents.	C042944, C042947, C042948 (Super. Ct. Nos. 02AS03351, 02AS03353, 02AS04563)

APPEAL from a judgment of the Superior Court of Sacramento County, Loren E. McMaster, J. Affirmed.

Orrick, Herrington & Sutcliffe, Eugene J. Carron, Megan V. Hamilton, Richard I. Hiscocks, Margaret Carew Toledo and Michael C. Weed for Plaintiff and Appellant.

Center for Law & Religious Freedom, Christian Legal Society, Gregory S. Baylor, Samuel B. Casey for amici curiae Council for Christian Colleges and Universities and Christian Legal Society; Sidley Austin Brown & Wood, Jeffrey A. Berman, Mark E. Haddad, Gene C. Schaerr and Nicholas P. Miller for amici curiae Religious Institutions: Loma Linda University, The

PLEASE SEE ATTACHED CONCURRING AND DISSENTING OPINIONS

Association of Independent California Colleges and Universities, Association of Christian Schools International, Seventh-Day Adventist Church State Council, and The Assemblies of God Financial Services Group on behalf of Plaintiff and Appellant.

No appearance by Respondents.

Margaret C. Crosby for American Civil Liberties Union Foundation of Northern California; Peter Eilasberg for ACLU Foundation of Southern California; Jordan Budd for American Civil Liberties Union Foundation of San Diego and Imperial Counties on behalf of Respondents.

Plaintiff California Statewide Communities Development Authority (CSCDA) brought three validation actions under Code of Civil Procedure section 860[1] et sequitur and Government Code section 53510[2] et sequitur, asking the trial court to declare

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[1] Undesignated statutory references are to the Code of Civil Procedure. Section 860 provides: "A public agency may upon the existence of any matter which under any other law is authorized to be determined pursuant to this chapter, and for 60 days thereafter, bring an action in the superior court of the county in which the principal office of the public agency is located to determine the validity of such matter. The action shall be in the nature of a proceeding in rem."

[2] Government Code section 53510 defines "local agency" to include any public authority, and 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 pursuant to Section 860 . . . ."

valid certain "Agreements" pursuant to which CSCDA intended to facilitate "conduit financing" by issuance of tax-exempt bonds for the benefit of religious schools owned and operated by non-profit religious corporations--Oaks Christian School, California Baptist University, and Azusa Pacific University. The trial court determined the Agreements were invalid as violative of California Constitution, article XVI, section 5 (article XVI, section 5), which prohibits "grant[ing] anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help[ing] to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever."[3]

At CSCDA's request, we consolidated its appeals from the three judgments. CSCDA contends the Agreements are constitutional under the federal and state Constitutions.

We shall conclude CSCDA may lawfully pursue this appeal notwithstanding certain limitations on appeals contained in

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[3] California Constitution, article XVI, section 5, provides in full: "Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, *or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever*; nor shall any grant or donation of personal property or real estate ever be made by the state, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of Article XVI [inapplicable to this case]." (Italics added.)

section 870. We shall then conclude the Agreements are unconstitutional under the California Constitution. We shall affirm the judgments on that basis and need not reach the federal constitutional issue.[4]

FACTUAL AND PROCEDURAL BACKGROUND

Between June and August 2002, CSCDA filed three separate but similar complaints for validation, one for each school (each of which is organized as a nonprofit religious corporation). Notice of the actions was published in various newspapers, but no answer to the complaints was filed. CSCDA filed ex parte applications for entry of default judgment, arguing these cases presented no problem with respect to federal and state

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[4] We allowed the filing of amici curiae briefs by the American Civil Liberties Union (ACLU), which supported affirmance of the judgments, and two groups which supported CSCDA: (1) Council for Christian Colleges and Universities and the Christian Legal Society, and (2) "Religious Institutions," comprised of Loma Linda University, the Association of Independent California Colleges and Universities, Association of Christian Schools International, Seventh-Day Adventist Church State Council, and the Assemblies of God Financial Services Group.

CSCDA moved to strike portions of ACLU's brief, in which ACLU cited Internet websites of the three schools which are the subject of these validation actions. ACLU used the websites to show the three schools are "pervasively sectarian." CSCDA argues this material is outside the record and not an appropriate matter for judicial notice. ACLU opposed the motion to strike, arguing an amicus curiae brief may include factual material outside the record. We need not resolve the issue, because the website material is unnecessary, in view of the fact that CSCDA has effectively conceded that the three schools at issue in this case are pervasively sectarian. We therefore deny the motion to strike as moot. We note, however, the Oaks Christian website did not present material outside the record, because the same information was contained in a letter brief ACLU submitted to the trial court.

constitutional restrictions on governmental activity in connection with religious institutions.

CSCDA is a "joint exercise of powers authority" and public entity organized under Government Code section 6500 et sequitur, and a 1988 "Joint Exercise of Powers Agreement." CSCDA is authorized to issue tax-exempt bonds. (Gov. Code, § 6575 [all bonds and the interest thereon or income therefrom are exempt from all taxation in this state, other than gift, inheritance and estate taxes].) CSCDA's purpose is to assist the development of California communities within its boundaries by, among other things, acting as the issuer of tax-exempt bonds in conduit financings for industrial development, residential housing, health care, and educational facilities.

CSCDA described the mechanics of its conduit financing "Program" of educational facilities as follows:

The parties sign a Purchase Agreement, pursuant to which the school transfers to CSCDA interest in real property on the condition that CSCDA will transfer it back to the school and issue nonrecourse bonds under an Installment Sale Agreement. The school uses the proceeds of the bond issue to finance its project. The schools, though they are tax-exempt organizations, cannot issue tax-exempt bonds on their own and therefore need a governmental entity such as CSCDA. The conduit financing allows the schools to finance projects at a lower cost than they could through conventional private financing, because bond investors are willing to accept a lower interest rate as the return on

their investment in exchange for the tax-exemption on the interest.

As described in a declaration from CSCDA Commission member Daniel Harrison:

"9. The Bonds will be special, limited obligations of [CSCDA], payable solely from amounts to be derived from [the school] under the Sale Agreement and other amounts to be held under an Indenture of Trust (the 'Indenture') and specifically pledged therefor. The Bonds will not constitute a charge against the general credit of [CSCDA] and will not be secured by a legal or equitable pledge of, or charge or lien upon, any property of [CSCDA] or any of its income or receipts. Moreover, neither the faith and credit nor the taxing power of the State of California (the 'State') [n]or any public agency will be pledged to the payment of the Bonds. The Bonds will not constitute a debt, liability or obligation of the State or any public agency thereof (other than the special, limited obligation of [CSCDA], as aforesaid).

"10. As security for the payment of the Bonds, [CSCDA] will assign to a trustee (the 'Trustee') certain of its rights, including the right to receive payments from [the school] under the Sale Agreement. In connection with such assignment pursuant to the Sale Agreement, [CSCDA] will also direct [the school] to make payments required thereunder directly to the Trustee.

"11. Pursuant to the assignment and the provisions of the Indenture, upon issuance of the Bonds, the Trustee will perform the administrative duties relating to the Bonds. The

responsibilities of the Trustee will include authenticating the Bonds, establishing and holding the funds and accounts relating to the Bonds, determining that the conditions for the disbursement of Bond proceeds have been met, disbursing funds held under the Indenture, maintaining a list of the names and addresses of all registered owners of the Bonds, recording transfers and exchanges of the Bonds, monitoring compliance with certain covenants and mailing notices to Bondholders.

"12. [CSCDA] will have the right to access and inspect the Project to ensure compliance with [the school's] covenant against religious use."

The covenant against religious use is found in the Installment Sales Agreement, which provides that "no facility, place or building financed or refinanced with a portion of the proceeds of the Bonds will be used (1) for sectarian instruction or as a place for religious worship or in connection with any part of the programs of any school or department of divinity for the useful life of the Project." CSCDA has a right of access to inspect the facilities (upon reasonable advance notice and subject to restriction by the school for safety or security purposes).

CSCDA's conduit financing Program calls for CSCDA to assist any nonprofit educational institution if (1) the school is a "501(c)(3)" (Int. Rev. Code, § 510(c)(3)) tax-exempt organization; (2) which proposes to finance educational facilities; (3) with an objective of promoting intellectual pursuits that lead toward recognized applications in the

community; and (4) the community in which the project is located will realize a public benefit as a result of such financing. Each school must demonstrate a community benefit under CSCDA's written "Policy," which lists neutral, secular criteria. Such benefit may be demonstrated, among other ways, by showing the school offers one of the following: (1) students undertake community outreach programs providing educational, cultural or philanthropic benefits to the community; (2) the curriculum encourages students to undertake service activities in the community; (3) public access is provided to its athletic fields, recreational facilities, or other school facilities; or (4) students receive financial assistance based upon policy guidelines.

The pleading regarding Oaks Christian alleged Oaks Christian, a private Christian school for the education of students in the sixth through twelfth grades, wanted to build education facilities at its campus in the City of Westlake Village, including but not limited to classrooms, laboratories, administration offices, dining facilities, athletic facilities, parking facilities, a co-generation facility, and related infrastructure improvements (the Project). Oaks Christian applied to CSCDA to have the costs of the Project financed by CSCDA's issuance of tax-exempt bonds. CSCDA adopted a Resolution approving Oaks Christian's request and approved the execution and delivery of a Purchase Agreement and Installment Sale Agreement. Under the Purchase Agreement, Oaks Christian would transfer its interests in real property to CSCDA on the

condition that CSCDA enter into the Sale Agreement, which called for CSCDA to transfer back the real property, use its best efforts to issue the bonds and deposit the available proceeds of the bonds with a corporate trustee to be applied to the costs of issuance of the bonds and costs of the Project. Oaks Christian agreed to build the Project and pay the principal and premium of the bonds.

In support of the application for a default judgment, CSCDA submitted in the trial court a declaration from Paul Oberhaus, Director of Business Operations for Oaks Christian. He attested Oaks Christian is a nonprofit religious corporation under California law and a nonprofit organization under the federal Internal Revenue Code. Oaks Christian owns and operates the school, a private, Christian school for the education of children in the sixth through twelfth grades, accredited by the Schools Commission of the Western Association of Schools and Colleges. The school "seeks to develop 'each student's mind, body and spirit to their fullest potential through challenging course work, competitive athletic teams and spiritual training by the finest Christian teachers and coaches in the nation.'" The school "seeks to foster an understanding of the sovereignty of God to provide a framework for the application of knowledge; provide a comprehensive college preparatory education through diverse learning experiences; provide a challenging learning environment that fosters critical thinking, personal responsibility and persistent effort; refine the body and character through teamwork and in competition that honors God;

develop an understanding and appreciation of the arts, and encourage good stewardship of artistic abilities; and encourage a passion to love God and others through living lives that reflect justice, wisdom, courage, service, reconciliation, grace and humility." The school's mission statement is "'to grow in knowledge and wisdom through God's grace, and to dedicate [oneself] to the pursuit of academic excellence, athletic distinction and Christian values.'" The school seeks students "without regard to an applicant's religion," but "as part of the application process, students and their parents must agree that if accepted, the student and their parents will support the School's mission, statement of faith and Biblical goals and objectives. During the 2001-2002 academic year, approximately 35% of the student body was not Christian. Students are not required to sign a statement of faith." Oberhaus further attested: "Faculty members must be Christian and are required to sign a statement of faith. However, students are exposed to a broad range of perspectives and opinions relating to any topic or subject being presented in the classroom and the subject matter of courses is presented in an academically open and honest manner."

CSCDA Commission member Harrison's declaration attested CSCDA found a community benefit with respect to Oaks Christian because: "First, the Corporation [Oaks Christian] provides financial aid to 44 percent of its students, offsetting tuition costs by approximately 50 percent. Second, [CSCDA] found that students are provided with opportunities to learn about and

serve in their local community. Students are required to participate in two group and two individual community outreach programs each year, such as organizing food drives and volunteering at local hospitals and convalescent homes. Third, [CSCDA] found that Oaks Christian School opens its campus to many community organizations needing classroom, meeting and athletic field space. [Oaks Christian] has a joint field use agreement with the City of Westlake Village that allows youth sports teams to use its athletic fields." Harrison further declared CSCDA found the Project will promote residential and commercial development with the city, thereby stimulating economic activity and increasing the tax base.

In the similar complaint filed regarding California Baptist University, the complaint described the Project as acquisition, construction, improvement, and equipment of education facilities, including but not limited to residence facilities, parking facilities, classrooms, administration offices, the academic and student center complex, athletic facilities, related infrastructure improvements, and related and appurtenant facilities.

California Baptist University's Director of Financial Services, Calvin Sparkman, submitted a declaration that the University is owned and operated by California Baptist University, a nonprofit religious corporation under California law and a nonprofit organization under the Internal Revenue Code. The school, located in Riverside, is an accredited Christian liberal arts institution offering undergraduate and

graduate study. In order to graduate, students must complete "a certain number of courses" in Christian studies. The school "seeks undergraduate students [who] believe in biblically-based Christian principles and that [*sic*] students are expected to live in accordance with such principles. Once enrolled at the University, students are required to attend a church of their choosing." Of the 457 students who received baccalaureate degrees in the 2000-2001 academic year (a year in which there were 1,936 undergraduates enrolled), 19 majored in Christian studies or fine arts ministry. The school "requires that faculty members be Christian, and at least 51% of the faculty members must be Baptist. Faculty members are not required to sign a statement of faith, but are expected to maintain a theological and philosophical position consistent with the University's principles. However, students are exposed to a broad range of perspectives and opinions relating to any topic or subject being presented in the classroom and the subject matter of courses is presented in an academically open and honest manner." California Baptist University said it would promise not to use any facility financed with the conduit financing bonds for sectarian instruction or as a place for religious worship, and it would, upon written demand, sign a certificate of compliance with this promise.

CSCDA Commission member Harrison attested with respect to California Baptist University, that CSCDA found the following public benefits in connection with the Project (which the declarations did not define): (1) California Baptist University

provides financial aid to 92 percent of its students, offsetting tuition costs by 15.5 percent; (2) students, faculty and staff are actively encouraged to participate in and volunteer for community-based services, including tutoring, conducting sports camps for children, organizing food drives, and allowing high school students to earn college credit; (3) students participate in international outreach programs when they travel to other countries; and (4) the Project will promote residential and commercial development with the City of Riverside, thereby stimulating economic activity and increasing the tax base.

With respect to Azusa Pacific University, the complaint described the project as the acquisition, construction, improvement, and equipment of educational facilities, "including but not limited to a residence facility, a dining facility, a mail center and related infrastructure improvements as well as other related and appurtenant facilities."

Azusa Pacific University's Vice President for finance and administration, Joan Singleton, attested the University is owned and operated by Azusa Pacific University, a nonprofit religious corporation under California law and a nonprofit organization under the Internal Revenue Code. The University is an accredited Christian liberal arts institution offering undergraduate and graduate programs. Singleton declared: "The University's statement of mission and purpose provides that the University 'is an evangelical Christian community of disciples and scholars who seek to advance the work of God in the world through academic excellence in liberal arts and professional

programs of higher education that encourage students to develop a Christian perspective of truth and life.'" Requirements for graduation with a baccalaureate degree include "120 hours of student ministry assignments." Student applicants "must evidence appreciation for the standards and spirit of the University, and exhibit moral character in harmony with its purpose. The University invites applications from students who will contribute to, as well as benefit from, the University experience. In assessing an applicant's potential for success, academic capabilities, as well as involvement in church, school and community activities, are reviewed." In academic year 2001-2002, 3,140 undergraduate students were enrolled, and 616 students received baccalaureate degrees, of which 39 majored in "biblical studies, Christian ministries, theology or religion." Singleton further declared: "The University requires that faculty members be Christian and are expected to maintain a theological and philosophical position consistent with the University's principles. However, students are exposed to a broad range of perspectives and opinions relating to any topic or subject being presented in the classroom and the subject matter of courses is presented in an academically open and honest manner." The declaration further asserted, without explanation, that the University adheres to a 1940 "Statement of Principles" by the American Association of University Professors. Finally, the declaration said Azusa Pacific University would promise not to use the facilities financed through CSCDA for sectarian instruction or religious worship,

and would furnish a certification regarding compliance upon written demand.

CSCDA Commission member Harrison attested CSCDA found a public benefit in that Azusa Pacific University (1) provided financial aid to approximately 88 percent of its students, offsetting tuition costs by approximately 50 percent; (2) actively encouraged students and staff to volunteer in community-based services such as tutoring, mental health services, establishing a Neighborhood Wellness Center, and providing public access to the University's athletic fields, libraries, classrooms, and meeting rooms; and (3) has students participate in international outreach programs when they travel abroad. CSCDA also found the Project would promote residential and commercial development in the city, thereby stimulating economic activity and increasing the tax base.

Notably, in the trial court (as on appeal) CSCDA in effect conceded for purposes of these cases that the three schools at issue are "pervasively sectarian." Thus, CSCDA's memorandum of points and authorities stated: "The main issue involved in this matter is the propriety of the Authority serving as issuer in a conduit financing for the Project when the School may be considered a pervasively sectarian ('Sectarian')[5] educational institution under the Establishment Clause of the First Amendment to the United States Constitution (the 'Establishment

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[5] Thus, CSCDA uses "sectarian" to mean sectarian and "Sectarian" to mean pervasively sectarian.

Clause') and the provisions of the California Constitution restricting governmental activity in support of religious institutions." (Fns. omitted.) CSCDA further stated: "The [United States Supreme Court] has described a Sectarian institution as one in which 'religion is so pervasive that a substantial portion of its functions are subsumed in [its] religious mission.' *Hunt v. McNair*, 413 U.S. 734, 743 (1973) . . . . The [Oaks Christian] School, as a Christian college preparatory school, has certain characteristics, such as a requirement that faculty members be Christians and that students attend an assembly period twice a week during which prayers may be held, such that it might be considered a Sectarian educational institution. However, the School's status as a Sectarian school is not central to this validation action because the government aid contemplated by the Agreements is consistent with the Establishment Clause and the provisions of the California Constitution restricting government aid in support of religious institutions. . . . For purposes of this Memorandum, it will be assumed, without conceding, that the School would be considered a Sectarian school."

CSCDA made similar concessions with the other schools, acknowledging California Baptist University required that faculty be Christians and that students attend church services, and Azusa Pacific University required that students complete ministry assignments and attend chapel.

CSCDA makes the same concession in its appellate brief, stating: "In general terms, an educational institution is

considered 'pervasively sectarian' when a substantial portion of the school's function is subsumed in its religious mission and it is impossible to separate its religious aspects from its secular aspects. (See, e.g., *Hunt v. McNair*[, *supra*,] 413 U.S. 734, 743 [dicta].) The respective schools assumed for purposes of these validation actions that they would be deemed to be 'pervasively sectarian.' The schools conceded this point because, as demonstrated herein, whether or not the schools are 'pervasively sectarian' is not relevant to the constitutionality of these transactions under either the California or United States Constitution[]. For purposes of this appeal, the schools again do not dispute that they could be characterized as 'pervasively sectarian.'"

The trial court solicited comments from the Attorney General and the Department of Fair Employment and Housing. The latter submitted a response deferring to the Attorney General. The Attorney General submitted a letter, concluding there were questions of federal and state constitutional law under the constitutional prohibitions against state entanglement with religion. The Attorney General expressly stated his analysis was based upon CSCDA's "stated assumption that, for purposes of its validation action, the three schools on whose behalf it proposes to issue bonds are 'pervasively sectarian' institutions." The Attorney General referred to a post-*California Educational Facilities Authority v. Priest* (1974) 12 Cal.3d 593 (*CEFA*) Attorney General Opinion (66 Ops.Cal.Atty.Gen. 50, 51 (1983)), which concluded the validity of conduit

financing by CEFA to the University of Judaism would depend in part on whether the University was pervasively sectarian. ACLU also submitted a letter brief to the trial court, arguing the proposed conduit financing was unconstitutional.

The trial court issued orders denying CSCDA's application for entry of default judgment as to each school. The court concluded the conduit financing violated article XVI, section 5. Although the court's tentative ruling added a conclusion that the financing also violated the United States Constitution, the court subsequently "vacated" that reference as unnecessary. The trial court found each school was "organized primarily or exclusively for religious purposes. It restricts admission of students by religious criteria and discriminates on the basis of religion in hiring faculty. Religion is both mandatory and integral to every aspect of student life. Religion is integrated into classroom instruction.

"Thus [the conduit financing] necessarily involves financing of religious indoctrination."

CSCDA appeals from the ensuing judgments.

DISCUSSION

I. *Scope of Appeal*

On our own motion, we invited supplemental briefing on a point not raised by anyone on appeal, i.e., the effect, if any, of section 870, subdivision (b), which provides in part that "no appeal shall be allowed from any judgment entered pursuant to this chapter unless a notice of appeal is filed within 30 days after the notice of entry of the judgment, or, within 30 days

after the entry of the judgment if there is no answering party. *If there is no answering party, only issues related to the jurisdiction of the court to enter a judgment in the action pursuant to this chapter may be raised on appeal*." (Italics added.)

The question is whether the italicized language of the above-quoted statute prevents CSCDA from challenging the substantive merits of the trial court's decision, because in this case no one filed an answer to CSCDA's validation action (though the Attorney General and ACLU submitted letter briefs after the trial court sought input).[6] We shall conclude the statute does not prevent CSCDA from challenging the substantive merits of the trial court's decision.

On its face, the italicized language of the above-quoted statute would appear to prohibit CSCDA from challenging the merits of the trial court's decision, because no one filed an answer to CSCDA's validation complaint.

However, the rule that a statute needs no judicial interpretation if its language is unambiguous (the plain meaning rule) "'does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or

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[6] CSCDA argues that, although the Attorney General and ACLU did not file answers, they should be considered answering parties because of their participation. We need not decide whether the term "answering parties" extends that far, because we shall conclude CSCDA may challenge the merits of the trial court's adverse decision regardless of whether or not there were any answering parties.

whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context . . . . Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read so to conform to the spirit of the act.'" (*People v. King* (1993) 5 Cal.4th 59, 69.)

"Where . . . the statutory language . . . is shown to have a latent ambiguity such that it does not provide a definitive answer, we may resort to extrinsic sources to determine legislative intent. [Citations.] Under this circumstance, 'the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes.' [Citation.] 'In such cases, a court may consider both the legislative history of the statute and the wider historical circumstances of its enactment to ascertain the legislative intent.' [Citation.]" (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 119-120.)

"Where uncertainty exists [in the interpretation of the plain language of a statute] consideration should be given to the consequences that will flow from a particular interpretation." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.)

Here, section 870, subdivision (b), recognizes the right to appeal from the trial court's decision in a validation action, then removes the right to appeal the substantive merits "if

there is no answering party." To construe this statute as making the scope of a public entity's appeal dependent upon a circumstance outside its control, i.e., whether or not an answer is filed, would in our view constitute a radical change in the rights of public entities. Since its enactment in 1961, section 870 has recognized the right to appeal a judgment in a validation action. (Stats. 1961, ch. 1479, § 1, p. 3332 [judgment shall be binding and conclusive "if no appeal is taken, or if taken and the judgment is affirmed"].) "[C]ourts should not presume the Legislature in the enactment of statutes intends to overthrow long-established principles of law unless that intention is made clearly to appear either by express declaration or by necessary implication." (*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 779 [statute did not evince clear intent to strip appellate courts of long-standing authority to order retrials limited to punitive damages issue].)

Because a literal reading of section 870 would effect such a drastic change in the appellate rights of public entities, we conclude section 870 has a latent ambiguity, and it is appropriate to examine the legislative history and purpose of the enactment. (See *Martin v. Szeto* (Feb. 19, 2004, S103417) ___Cal.4th___, ___ [pp. 3-4]; *Lewis v. County of Sacramento, supra,* 93 Cal.App.4th 107, 119.)

Section 870 makes sense if viewed as a limitation on a *nonanswering party*'s right to appeal, but it makes no sense and would be anomalous for a *plaintiff's* appellate right to depend

on whether or not anyone has filed an answer to the plaintiff's complaint--a matter over which the plaintiff has no control after satisfying the notice requirements for publication of summons in newspapers of general circulation (§ 861). Interested persons may refrain from answering, because they do not want to expose themselves to the possibility of having to pay costs. (§ 868 [court has discretion to tax costs to the losing party].) Yet such persons may file an appeal despite their lack of participation in the trial court proceedings. Thus, in validation actions it is possible for a "nonanswering party" to file an appeal because, although the right to appeal is generally limited to "part[ies]" (§ 902), an exception exists "in cases where a judgment or order has a res judicata effect on a nonparty. 'A person who would be bound by the doctrine of res judicata, whether or not a party of record, is . . . [entitled] to appeal.' [Citations.]" (*Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289, 295.) The nonparty must show that the order is binding on him or her, and that its injurious effect is immediate, pecuniary and substantial. (*Ibid.*)

Validation actions have a res judicata effect on nonparties, as stated in section 870, subdivision (a), which provides: "The judgment, if no appeal is taken, or if taken and the judgment is affirmed, shall, notwithstanding any other provision of law including, without limitation, Sections 473 and 473.5, thereupon become and thereafter be forever binding and conclusive, as to all matters therein adjudicated or which at that time could have been adjudicated, against the agency and

against all other persons, and the judgment shall permanently enjoin the institution by *any person* of any action or proceeding raising any issue as to which the judgment is binding and conclusive." (Italics added.)

Thus, in a validation action it is possible for an appeal to be filed by someone who was not involved in the trial court proceedings.

This presented a problem, as indirectly reflected in the legislative history of the 1994 amendment (Sen. Bill No. 2107) adding to section 870 the above-quoted italicized language that an appeal is limited to jurisdictional issues if there is no answering party.[7] (Stats. 1994, ch. 242, § 1, p. 1832.)

Thus, the legislative history of the 1994 amendment (Sen. Bill No. 2107) contains no express analysis of the meaning of the language limiting appeals where there is no answering party. However, the legislative history does expressly refer to legislation proposed in 1992, but not passed (Assem. Bill No. 3523[8] (1991-1992 Reg. Sess.)), limiting the right to appeal

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[7] We granted in part and denied in part CSCDA's request for judicial notice of legislative history. We granted the request only as to cognizable portions of the legislative history.

[8] Assembly Bill No. 3523 would have amended section 870 to read that no appeal from a validation action was allowed unless a notice of appeal was filed within 60 days after the notice of entry of judgment "by the public agency that brought a proceeding pursuant to Section 860 or by a party who appeared and contested the legality or validity of the matter pursuant to Section 862 or who brought action to determine the validity of the matter pursuant to Section 863. No other entity or person

in validation actions. (Assem. Com. on Judiciary, com. on Sen. Bill No. 2107 (1993-1994 Reg. Sess.) June 15, 1994, p. 2.) The legislative history of the 1994 amendment (Sen. Bill No. 2107) contains an Assembly Judiciary Committee report on the 1992 proposal (Assem. Bill No. 3523), stating: "According [to] the sponsor, . . . current law permits parties that were not involved in the original action in Superior Court to appeal, resulting in tremendous delays and potentially missing advantageous marketing conditions, for the issuing public entity." (Assem. Com. on Judiciary, com. on Assem. Bill No. 3523 (1991-1992 Reg. Sess.) Apr. 8, 1992, p. 2.) The legislative drive was to "[l]imit[] the ability to appeal a judgment entered in a validation proceeding to either the public agency involved or a party who appeared and contested the legality or validity of some action." (*Ibid*.)

The incorporation of the prior proposed legislation in the legislative history of the 1994 amendment supports the conclusion that the restriction limiting appeals to jurisdictional issues was meant to apply only to appeals *by* the "nonanswering party," i.e., where someone who did not participate in the trial court proceedings sought to overturn a

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may appeal a judgment entered pursuant to this chapter." (Assem. Bill No. 3523 (1991-1992 Reg. Sess.).)

The Legislative Counsel's Digest to the proposed Assembly Bill No. 3523 stated: "This bill would limit the right of appeal to the public agency bringing the action or a party who appeared and contested the legality or validity of the matter by deleting the authorization for an appeal from a judgment in those actions within 60 days after the entry of the judgment if there is no answering party."

decision validating the government's proposed activity. This conclusion is further supported by a Senate Committee on Judiciary report stating one purpose of the 1994 amendment was to shorten the time to appeal "an action which validates a bond." (Sen. Com. on Judiciary, com. on Sen. Bill No. 2107 (1993-1994 Reg. Sess.) Apr. 4, 1994, p. 2.)

In contrast, where the appellant is the plaintiff in a validation action and there was no answering party, we see no reason why the Legislature might have intended to preclude the plaintiff from challenging the merits of an adverse decision by the trial court. We note an adverse decision is possible, despite the absence of an answering party. "[I]t is possible that the trial court might, on its own initiative, identify the dispositive argument [in opposition to the plaintiff's case], conduct the necessary research, and produce the correct result without assistance. This scenario is at least a factual possibility in validation proceedings since . . . if no one opposed the complaint seeking validation the government entity would be required to prove up its case. (See . . . § 585.)" (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1301 [reversed trial court's denial of attorney's fees to defendant, holding trial court's stated reason--that trial court would have reached the same result (invalidating the city's proposal) on its own--was not the proper test].)

ACLU cites *Planning & Conservation League v. Department of Water Resources* (1998) 17 Cal.4th 264, in support of its argument that the purpose of Senate Bill No. 2107 was to allow

bonds to go to market quickly. ACLU concludes the Legislature intended the trial court's decision to be conclusive if there was no answering party. However, the legislative purpose of expediting these matters was accomplished by reducing the time to appeal, from 60 days to 30 days, and ACLU cites nothing justifying different treatment of a plaintiff's appeal depending on whether or not there was an answering party. The Supreme Court case cited by ACLU merely noted the legislation reduced the time to appeal from 60 to 30 days. (*Id.* at pp. 272-283.) The holding of the Supreme Court case actually supports our decision, because that case identified another latent ambiguity in section 870 necessitating resort to legislative history as an aid to interpretation. There, the Supreme Court held that section 870's shortened time period for appealing from a "judgment" also applied to appealable orders, despite the statute's failure expressly to mention appealable orders. (*Id.* at pp. 267, 270, 273-274 [section 870's shortened time period applied to appeal from order granting motion to quash service of summons].)

We therefore conclude that the limitation on appealable issues contained in section 870 applies only to nonanswering parties who did not appear in the trial court but who have appealed nonetheless. CSCDA is not such a party. Section 870 does not limit the issues that CSCDA can pursue on appeal.

We now turn to the substantive issues tendered by CSCDA.

II. *Standard of Review*

This case presents questions of law, which we review de novo. (*Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 549; *Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1129.)

III. *Article XVI, Section 5*

"Constitutional provisions, like statutes, must be read in conformity with their plain language [citation], and in such a manner as to give effect whenever possible to every word. [Citation.]" (*People v. Harris* (1989) 47 Cal.3d 1047, 1082; accord *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 799; *Pacific Gas & Electric Co. v. City of Oakland* (2002) 103 Cal.App.4th 364, 368-369.)

As indicated, article XVI, section 5 (fn. 3, *ante*), prohibits "grant[ing] anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help[ing] to support or sustain any school, college [or] university . . . controlled by any religious creed, church, or sectarian denomination whatever."

A straightforward application of this constitutional language, used in its ordinary sense, reveals that the bond financing scheme at issue in this case is unlawful.

Thus, the pervasively sectarian colleges involved in this scheme are without doubt "controlled by any religious creed, church, or sectarian denomination" as CSCDA conceded at oral argument.

Nor can there be any doubt that the bond financing scheme "help[s] to support or sustain" the colleges. That is why they are pursuing the scheme and are litigating this case. It was also conceded at oral argument that the bond financing scheme is of substantial financial benefit to the participating colleges.

Thus, if the constitutional text of article XVI, section 5, is given its plain, ordinary meaning, the bond financing scheme is unlawful, as the trial court found.

Nothing in the case law changes this result.

The California Supreme Court has construed the terms of article XVI, section 5, so as to "forbid granting 'anything' to or in aid of sectarian purposes, and prohibit public help to 'support or sustain' a sectarian-controlled school. The section thus forbids more than the appropriation or payment of public funds to support sectarian institutions. It bans any official involvement, whatever its form, which has the direct, immediate, and substantial effect of promoting religious purposes." (*CEFA, supra,* 12 Cal.3d 593, 605, fn. 12.) As reflected in the 1879 constitutional debates on the predecessor provision (former art. XIII, § 24[9]) which contained the same language as article XVI, section 5, the provision "was intended to insure the separation

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[9] The former provision, article XIII, section 24, provided: "Neither the Legislature, nor any county, . . . or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, . . . controlled by any religious creed, church, or sectarian denomination whatever." (See *CEFA, supra*, 12 Cal.3d 593, 604.)

of church and state and to guarantee that the power, authority, and financial resources of the government shall never be devoted to the advancement or support of religious or sectarian purposes. [Citation.] Under this section, the fact that a statute has some identifiable secular objective will not immunize it from further analysis to ascertain whether it also has the direct, immediate, and substantial effect of advancing religion. . . .

"The section has never been interpreted, however, to require governmental hostility to religion, nor to prohibit a religious institution from receiving an indirect, remote, and incidental benefit from a statute which has a secular primary purpose. (See, e.g., *Lundberg v. County of Alameda* (1956) 46 Cal.2d 644, upholding tax exemption for parochial primary and secondary schools.) In *Bowker v. Baker* (1946) . . . 73 Cal.App.2d 653, 666 [upholding bus transportation for Catholic school students], the court recognized that 'many expenditures of public money give indirect and incidental benefit to denominational schools and institutions of higher learning. Sidewalks, streets, roads, highways, sewers are furnished for the use of all citizens regardless of religious belief. . . . Police and fire departments give the same protection to denominational institutions that they give to privately owned property and their expenses are paid from public funds.'" (*CEFA, supra*, 12 Cal.3d 593, 604-605.)

Thus, under article XVI, section 5, it does not matter that no public funds are used in connection with CSCDA's conduit

financing. The conduit financing, which allows schools to finance projects at a lower cost than they could through conventional financing, is a form of aid within the meaning of article XVI, section 5. The bond financing clearly and manifestly "help[s] to support or sustain any . . . college [or] university . . . controlled by any religious . . . church . . . ." (Cal. Const. art. XVI, § 5.) The aid is substantial. For example, bond counsel attested the conduit financing would allow Oaks Christian to save approximately $52,500 per month. Moreover, since the schools at issue in this case are pervasively sectarian, meaning it is impossible to separate their religious aspects from their secular aspects, the conduit financing would have the direct and substantial effect of aiding religion.

CSCDA contends consideration of the nature of the schools as pervasively sectarian is the wrong legal analysis. According to CSCDA, the correct focus under article XVI, section 5, is not the nature of the school, but rather the nature of the benefit being provided to the school.

However, we shall explain the nature of the benefit being provided to the school appropriately takes into consideration the nature of the school.

CSCDA relies on *CEFA, supra*, 12 Cal.3d 593, which held the benefit provided to religious schools by a properly-structured conduit financing was indirect, remote, and incidental to the government's secular purpose of promoting education, and as such, did not violate the California Constitution. CSCDA claims

that, since the conduit financing at issue in the instant appeal is the same as the aid at issue in *CEFA*, the same result must be reached in this case.

However, CSCDA ignores a key distinction in that *CEFA, supra,* 12 Cal.3d 593, dealt with the constitutionality of legislation which by its own terms expressly disqualified from participation any school where religion pervaded the educational aspect of the institution. At issue in *CEFA* was the constitutionality of former Education Code section § 30301 et sequitur, which authorized the Authority to issue tax-exempt revenue bonds for the purpose of providing private institutions of higher education an additional means of financing by which to expand dormitory, academic, and related facilities. (*Id.* at pp. 596-597.) The legislation contained "an explicit limitation that participating colleges may neither restrict entry on racial or religious grounds nor require students gaining admission to receive instruction in the tenets of a particular faith. [Citation.]" (*Id.* at p. 601.)

The procedural posture of *CEFA, supra,* 12 Cal.3d 593, was a mandamus petition by the Authority and University of the Pacific (which is not a religious institution) seeking to compel the state Treasurer to prepare to sell bonds authorized by the Education Code. (*Id.* at p. 596.) The state Treasurer resisted, because questions had been raised about the constitutionality of the legislation. (*Ibid.*) Though the University of the Pacific was not affiliated with any religious organization, the Supreme Court addressed the validity of the legislation under the

constitutional provisions barring state aid to sectarian schools, because a number of religiously-affiliated schools had applied for assistance under the same legislation and had submitted an amicus curiae brief. (*Id.* at p. 598, fn. 5.)

In a footnote to its discussion concluding the legislation did not violate the *federal* Constitution, the Supreme Court cautioned: "Of course, if the Authority were to exercise its powers in aid of an institution which is pervasively sectarian within the meaning of the [federal] *Hunt* [*v. McNair*, *supra,* 413 U.S. 734] test, a different conclusion might be compelled. 'Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these [disqualifying] characteristics.' [Citation.] We emphasize, however, that the fact an institution of higher education is affiliated with or governed by a religious organization is insufficient, without more, to establish that aid to that institution impermissibly advances religion. [Citations.]" (*CEFA*, *supra*, 12 Cal.3d 593, 602, fn. 8.)

The *CEFA* court then went on to discuss the *California* Constitution, including the predecessor to article XVI, section 5. "The Act here challenged clearly provides a 'benefit' in that it enables sectarian institutions to borrow money through the use of a state instrumentality at a cost below that of the marketplace. Thus the crucial question is not whether the Act provides such a benefit, but whether that benefit is incidental

to a primary public purpose. The framers of the Constitution recognized the importance of education in our social fabric, and imposed a constitutional duty on the Legislature to 'encourage by all suitable means the promotion of intellectual . . . improvement.' [Citation.] . . . The Legislature has expressly determined that the Act, in supporting the maintenance and improvement of facilities for higher education, is in the public interest [citations], and that determination is entitled to great deference. [Citations.] The benefits of the Act are granted to sectarian and nonsectarian colleges on an equal basis; in both cases all aid for religious projects is strictly prohibited; and in no event is a financial burden imposed upon the state. In these circumstances the Act does not have a substantial effect of supporting religious activities." (*CEFA, supra*, 12 Cal.3d 593, 605-606, fn. omitted.)

It is true, as observed by CSCDA, that *CEFA, supra*, 12 Cal.3d 593, did not mention in its discussion of the *California* Constitution the point it made in connection with the *federal* Constitution, that the result might be different if aid was provided to pervasively sectarian schools. From this, CSCDA concludes *CEFA*'s caveat applied only to the *federal* constitutional analysis.)[10] CSCDA concludes *CEFA* stands for the proposition that a *state* constitutional analysis turns only on

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[10] CSCDA further argues the United States Supreme Court has abandoned the "pervasively sectarian" factor as a test under the federal Constitution--a matter we need not address in this case.

the nature of the governmental aid provided, not the nature of the school.

We disagree. The nature of the school is a pertinent consideration under the state constitutional test of ascertaining whether the proposed program "has the direct, immediate, and substantial effect of advancing religion." (*CEFA, supra*, 12 Cal.3d 593, 604.) CSCDA's interpretation of *CEFA* is refuted by the California Supreme Court, which in a later case discussing the *California* Constitution described the nature of the schools as a material factor in the *CEFA* decision. Thus, *California Teachers Association v. Riles* (1981) 29 Cal.3d 794 (*CTA*), held unconstitutional, under the California Constitution, a statute which authorized the Superintendent of Public Instruction to lend public school textbooks, without charge, to students attending nonprofit, nonpublic schools. The Supreme Court held the benefit to religious schools provided by the statute was neither indirect nor remote, and the character of the benefit resulted in support of sectarian schools, even if the books would be used only for secular instruction. (*Id.* at p. 811.)

CTA, supra, 29 Cal.3d 794, is not directly on point with the instant case, because *CTA* concluded the statute was unconstitutional because it violated article XVI, section 5, and another state constitutional provision, by appropriating funds for the support of sectarian schools. (*Id.* at pp. 797, 813.) Here, there is no appropriation of public funds to the schools.

Nevertheless, *CTA, supra,* 29 Cal.3d 794, is of interest to us insofar as it described the *CEFA, supra,* 12 Cal.3d 593, California constitutional analysis by stating, among other things: "[T]he measure [legislation authorizing conduit financing] did not have the effect of supporting religious activity because its benefits were granted to sectarian and nonsectarian colleges on an equal basis; and all aid for religious projects was prohibited. The statute *limited aid to colleges which did not restrict entry on religious grounds or require religious instruction . . . .*" (*CTA, supra*, 29 Cal.3d at p. 806, italics added.) In *CTA*, the Supreme Court also said it need not consider whether *CEFA* was correctly decided, because *CEFA* was distinguishable in that "[t]he statute considered in that case provided assistance to students at the college level [citation], *its benefits were restricted to colleges which did not require students to receive religious instruction*, and it did not involve the expenditure of public funds for the support of sectarian schools." (*CTA, supra*, 29 Cal.3d at p. 813, fn. 16, italics added.)

CSCDA claims *CTA, supra,* 29 Cal.3d 794, said the "pervasively sectarian" question had no significance under article XVI, section 5, because the *CTA* court said: "In any event, it is not the meaning of the First Amendment which is critical to our determination, but [two provisions of the California Constitution, including article XVI, section 5]. Those provisions do not confine their prohibition against financing sectarian schools in whole or in part to support for

their religious teaching function, as distinguished from secular instruction." (*Id.* at p. 812.) We read nothing in this quotation which helps CSCDA's position.

We conclude the nature of the school is an appropriate consideration in ascertaining under article XVI, section 5, whether the proposed program has a "direct, immediate, and substantial effect of advancing religion." (*CEFA, supra*, 12 Cal.3d 593, 604.) *Wilson v. State Board of Education* (1999) 75 Cal.App.4th 1125, held legislation for charter schools did not violate article XVI, section 5, because the legislation required charter petitioners to affirm that their school would be nonsectarian in its programs and operations, and if a petition contained the requisite affirmation but the petitioner nonetheless was controlled by a religious organization, the chartering authority could deny the petition because the petitioners were demonstrably unlikely to successfully implement the program set forth in the petition, i.e., its nonsectarian purpose. (*Id.* at p. 1143.)

We recognize that in this case CSCDA attempted to duplicate the saving clause of the *CEFA* legislation by incorporating in the conduit financing Agreements a covenant that the school would not use the financing for religious purposes, i.e., "no facility, place or building financed or refinanced with a portion of the proceeds of the Bonds will be used (1) for sectarian instruction or as a place for religious worship or in connection with any part of the programs of any school or department of divinity for the useful life of the Project

. . . ." (*CEFA, supra*, 12 Cal.3d 593, 606 ["all aid for religious projects [was] strictly prohibited"].)

However, in church-state cases under article XVI, section 5, we look beyond the technical structure to the substance of the program. (*CTA, supra*, 29 Cal.3d 794, 810 [it would be "'pure fantasy'" to treat textbook loan program merely as a loan to students].) As indicated, CSCDA has conceded for purposes of this case that the three schools at issue in this appeal are "pervasively sectarian" which, as stated by CSCDA, means "a substantial portion of the school's function is subsumed in its religious mission and it is impossible to separate its religious aspects from its secular aspects. (See, e.g., *Hunt v. McNair*[, *supra*,] 413 U.S. 734, 743 [dicta].) The respective schools assumed for purposes of these validation actions that they would be deemed to be 'pervasively sectarian.'"

By conceding for purposes of this case that "it is impossible to separate [the schools'] religious aspects from [their] secular aspects," CSCDA effectively concedes it would be impossible to enforce the Agreements' covenant that projects not be used for religious purposes. Under these circumstances, CSCDA's reliance on the covenant as adequate protection against diversion of public aid for religious purposes is deluded, and the schools' willingness to sign certificates of compliance rings hollow. Even assuming it was possible to monitor the program restriction under the contract provision allowing CSCDA a right of access to inspect the facilities (upon reasonable advance notice and subject to restriction by the school for

safety or security purposes), such monitoring would necessarily require entanglement of government and religion that would raise its own constitutional alarms. We thus reject the argument that our conclusion itself causes impermissible entanglement in violation of the United States Constitution, by requiring CSCDA to inquire into the schools' religious nature before approving their projects.[11] Either way--allowing or disallowing the conduit financing--the nature of the school will be an issue. Moreover, the fact that certain classrooms would not themselves be devoted to religious study is immaterial when the school program, as a whole, pervasively focuses on religious instruction.

In furtherance of its argument that the appropriate focus is on the nature of the benefit, not the nature of the religious institution, CSCDA cites *East Bay Asian Local Development Corp. v. State of California* (2000) 24 Cal.4th 693 at page 720 (*East Bay*), which held an exemption from historic landmark designation for religious organizations did not violate article XVI, section 5, because any benefit received was indirect, remote or incidental to a primarily public purpose. The Supreme Court said with respect to article XVI, section 5, that "permitting a

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[11] The Attorney General issued a formal opinion which discussed the test for pervasive sectarianism. (66 Ops.Cal.Atty.Gen. 50 (1983).) ACLU suggests one easily-determined factor is whether the school has incorporated as a religious corporation rather than a nonprofit public benefit corporation, as is the case with the schools at issue here. We have no need to discuss the matter in this appeal, where pervasive sectarianism is conceded.

religious entity to exempt its noncommercial property from landmark designation status simply leaves the property in the status it otherwise occupied. While there may be a benefit as compared to properties that are subjected to landmark designation, neither the state nor the local governmental entity expends funds, or provides any monetary support, for the exempted property or its owner."[12] (*Id.* at p. 721.) The Supreme Court continued: "The exemption does not give rise to any governmental involvement in the entities or institutions that benefit from the exemption . . . ." (*Ibid.*) Here, in contrast, enforcement of the contractual covenant against religious use of projects financed through the CSCDA program does give rise to governmental involvement in the religious schools. Therefore, *East Bay* does not assist CSCDA in this case.

CSCDA also cites *Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal.App.3d 130 at page 146, for its statement that article XVI, section 5, is flexible enough to admit passage to religious institutions of indirect, remote, and incidental state benefits which have a primary public purpose. This generality does not assist CSCDA's case, and CSCDA fails to discuss the facts of *Lucas Valley Homeowners Assn.* or apply them to this case.

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[12] This passage is perplexing, since the Supreme Court observed earlier in the same case that article XVI, section 5, prohibits any aid, not just monetary aid. (*East Bay, supra*, 24 Cal.4th 693, 721.)

CSCDA cites cases from other jurisdictions upholding conduit financing of sectarian schools without examination whether the schools were pervasively sectarian, where the financing was restricted to secular projects. (*Cercle v. Illinois Educational Facilities Authority* (1972) 288 N.E.2d 399; *Nohrr v. Brevard County Educational Facilities Authority* (1971) 247 So.2d 304.) Unlike the instant case, however, there was no admission in those cases that the financing was going to schools so pervasively sectarian that it would be impossible to separate secular from sectarian functions. Similarly unhelpful in this appeal are cases from other jurisdictions upholding conduit financing to pervasively sectarian schools under the *federal* Constitution or a state constitutional provision which "parallels" the *federal* Constitution. (*Steele v. Indus. Dev. Bd. of Metro. Gov't. Nashville* (6th Cir. 2002) 301 F.3d 401 (*Steele*), and cases cited therein; *Virginia College Bldg. Auth.* (Va. 2000) 538 S.E.2d 682.) The meaning of the First Amendment is not critical to a determination under article XVI, section 5. (*CTA, supra*, 29 Cal.3d 794, 812.) *Steele* cited cases holding conduit financing was not a form of direct assistance because there was no grant or appropriation of money. (*Steele, supra*, 301 F.3d at p. 406, fn. 4.) However, article XVI, section 5, prohibits more than the expenditure of public funds.

CSCDA argues a conclusion of unconstitutionality in this case cannot be reconciled with *Lundberg v. County of Alameda, supra*, 46 Cal.2d 644, which upheld government aid to pervasively sectarian schools in the form of a property tax exemption which

encompassed religious institutions. However, *Lundberg* said the state constitutional provision prohibiting "'grant[ing] anything to or in aid of any religious sect . . . or help to support or sustain any [religiously-controlled] school'" was superseded by another constitutional provision exempting from taxes property used exclusively for religious worship. (*Id.* at p. 653.) Here, CSCDA cites no other constitutional provision superseding article XVI, section 5.

In a footnote, CSCDA mentions other provisions of the California Constitution which were addressed in *CEFA, supra*, 12 Cal.3d 593. CSCDA says the trial court in this case did not address these other provisions, but "there is no doubt" CSCDA's program complies with them. CSCDA fails to develop any argument concerning these other provisions on appeal, and they are not mentioned under the statement of "Issues Presented" in CSCDA's opening brief on appeal, which mentions only article XVI, section 5, and the United States Constitution. We therefore need not consider them.

Amici curiae "Religious Institutions" contend our conclusion violates the United States Constitution by discriminating against religion. They contend exclusion of pervasively sectarian religious groups from conduit financing discriminates between religious and non-religious groups. However, the distinction being made here is not between religious and non-religious groups, but between aid to religion and aid to secular activities of religious groups. Religious Institutions complain sectarian schools are barred "even though

they meet all the neutral criteria for qualification." However, the point is that the pervasively sectarian schools, as admitted in this case, cannot separate the sectarian from the secular, and therefore by definition they cannot meet all the neutral criteria.

Religious Institutions contend our conclusion calls into question numerous other remote and incidental benefits already provided to all religious groups, such as police, fire, and water services. Not so. The aid in this case is not remote or incidental when the school cannot separate its secular and sectarian activities. Moreover, police and public utility services, "unlike education, have no doctrinal content." (*CTA, supra*, 29 Cal.3d 794, 812.)

Amici curiae Councils for Christian Colleges and Universities and the Christian Legal Society (amici curiae) cite cases rejecting article XVI, section 5, challenges where public entities offered space for lease, and religious organizations were among the lessees. (*Woodland Hills Homeowners Organization v. Los Angeles Community College Dist.* (1990) 218 Cal.App.3d 79 [school district publicly advertised building for lease, and religious congregation was the only bidder]; *Christian Science Reading Room Jointly Maintained v. City and County of San Francisco* (9th Cir. 1986) 784 F.2d 1010 (*Christian Science*) [airport could not evict religious tenant on ground that lease violated state or federal establishment clauses].) Amici curiae argue that, just as a reasonable observer would not conclude a public entity was endorsing religious beliefs by renting space

to a religious group, a reasonable observer would not conclude CSCDA is endorsing the schools' religious beliefs. Even assuming for the sake of argument that the assessment whether there is an "imprimatur of state approval" (*Christian Science, supra,* 784 F.2d 1010, 1014) is a relevant factor under article XVI, section 5, as urged by amici curiae, we disagree with the comparison of this case to the leasehold cases. Although the tenants received a benefit from being able to lease property, they paid for the rental. We see no indication in the instant appeal that the schools pay for the conduit financing. We disagree with amici curiae's view that these and other cases establish that the nature of the institution is irrelevant to article XVI, section 5.

Amici curiae cite *Gordon v. Board of Education* (1947) 78 Cal.App.2d 464, which upheld a law permitting public school students to be released from school in order to participate in religious exercises or instruction. Amici curiae argue it is hard to imagine the religious groups that conducted the exercises and instruction were not pervasively sectarian. However, the fact that laws benefiting pervasively sectarian groups sometimes pass constitutional muster does not mean that the nature of the school is irrelevant to the constitutional analysis. *Gordon* upheld the law because there was no appropriation of public money in support of religion and no teaching of sectarianism in the public schools. (*Id.* at p. 476.)

The same amici curiae cite *Alvarado v. City of San Jose* (9th Cir. 1996) 94 F.3d 1223, as rejecting an article XVI, section 5, challenge to a city's display of an icon of Aztec mythology, in part because the city's conduct would not lead a reasonable observer to infer an endorsement of religion. Amici curiae acknowledge this point was made in the court's discussion of the *federal* Constitution but contend the point was incorporated by the reference "in light of the above" in the court's discussion of the California Constitution. However, the reference "in light of the above" was made in the court's discussion of a different provision of the California Constitution. (*Id.* at p. 1233.) *Alvarado*'s entire discussion of the provision that concerns us (art. XVI, § 5) was as follows: "Nor can it [the City] be said to have used public funds in violation of Art. XVI § 5 of the California Constitution." (*Ibid.*) *Alvarado* does not help CSCDA's case. We disregard cases involving constitutional provisions other than article XVI, section 5.

We conclude CSCDA's proposed Agreements with Oaks Christian School, California Baptist University, and Azusa Pacific University, violate article XVI, section 5, of the California Constitution. Accordingly, the trial court properly entered judgment against CSCDA.

We need not address the parties' arguments regarding the United States Constitution.

DISPOSITION

The three judgments entered December 13, 2002, are affirmed. CSCDA shall bear its own costs on appeal. (Cal. Rules of Court, rule 27(a)(4).)

SIMS, J.

I concur:

BLEASE, Acting P.J.

I agree with the judgment and opinion except for the reason proffered for the existence of the provision that "[i]f there is no answering party, only issues related to the jurisdiction of the court to enter a judgment in the action pursuant to this chapter may be raised on appeal." (Code Civ. Proc., § 870, subd. (b).)[1]

The opinion asserts that in the absence of this provision a "'nonanswering party' [could] file an appeal [on the merits] because . . . an exception exists 'in cases where a judgment or order has a res judicata effect on a nonparty.'" (Maj. opn. at p. 22.) This could not occur in the case of a personal judgment since it is conclusive only between the parties of record to the action. (Rest.2d Judgments, § 17.) In rem cases differ in that jurisdiction to determine the interests in the res is obtained by notice to interested persons. The "res judicata effect" of a judgment in a validation action is rooted in the binding nature of the judgment. (§ 870, subd. (a); Rest.2d Judgments, § 30.)

The opinion reasons that section 870 is necessary because otherwise a nonanswering party could appeal from the judgment on the merits. I agree with the conclusion but not the reason.

This is an in rem proceeding in which jurisdiction is obtained over the res by publication of summons as provided in sections 861 and 861.1. Section 870, subdivision (a) implies

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[1] A reference to an undesignated section is to the Code of Civil Procedure.

that a nonanswering party may challenge the jurisdiction of the court by appeal from the judgment. It does not follow that in its absence an appeal could be had by a nonanswering party on the merits. Rather, it appears that section 870 provides an appellate remedy in lieu of a remedy by extraordinary writ by which a nonanswering person may challenge the "jurisdiction of the court to enter a judgment . . . ." (See *Elliott v. Superior Court* (1904) 144 Cal. 501, 509.)

The opinion relies on a dictum in *Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289, in which the appeal was taken by a party to a collateral proceeding from an order establishing the rate of expert witness fees. (§ 2034, subd. (i).)[2] *Marsh* relied on a dictum in *Leoke v. County of San Bernardino* (1967) 249 Cal.App.2d 767, 771, that, because the appealing entity, the county, "was a party of record[,] the only question [was] whether it was aggrieved by the judgment." (*Leoke, supra,* at p. 770.)[3] In determining whether the appellant was aggrieved the

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[2] "The procedure for fee determination and the possible sanctions against the expert witness appear to make the expert witness a 'party' to the motion although not a party to the underlying action." (*Marsh v. Mountain Zephyr, Inc., supra,* 43 Cal.App.4th at pp. 296-297.)

[3] These cases ultimately can be traced to authorities in which the assertion is dictim or are based on special statutory authority. Thus, *Leoke* relies on *Estate of Sloan* (1963) 222 Cal.App.2d 283, 291-292, which relies on *Guardianship of Copsey* (1936) 7 Cal.2d 199. *Copsey* is an unusual case in that the right of the appellant, who was not a party of record in the lower court, to appear was based upon a federal statute. the appellant, the federal administrator of veteran's affairs, was

court advanced the dictum that "[a] person who would be bound by the doctrine of res judicata, whether or not a party of record, is a party sufficiently aggrieved to entitle him to appeal." (*Id.* at p. 771.) Accordingly, neither case is authority for the claim an appeal may be taken by an interested person who has not become a party of record pursuant to section 862.

A validation action is an in rem action which adjudicates the validity of the public agency's determination as to any matter subject to a validation proceeding.[4] (§ 860.) A final judgment in a validation action is binding "as to all matters therein adjudicated . . . against the agency and against all other persons . . . ." (§ 870.) Section 862 provides a means by which any interested person may become a party of record in the validation action.[5] The failure to do so bars an appeal on the merits.

Section 902 provides that "[a]ny party aggrieved may appeal" from a judgment in a civil action. "'It has been

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"expressly authorized and directed by the federal statute, for the protection of the ward's interests, to appear in any court having original or appellate jurisdiction over any cause where it appears that the guardian is attempting to pay fees . . . which are inequitable . . . ." (7 Cal.2d at p. 203.)

[4] This case involves subject to the validation law, an action "'to determine the validity of [a state agency's] " . . . contract[] . . . ."'" (*Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 921, fn. 8.)

[5] Section 862 provides in relevant part: "Any party interested may . . . appear and contest the legality or validity of the matter sought to be determined."

settled as a rule of practice . . . that only *a party to the record* [can appeal.]'" (*Braun v. Brown* (1939) 13 Cal.2d 130, 133.) *Braun* involved an analogous in rem proceeding, an action in probate. The nephew of the decedent who died intestate failed to timely intervene in an action against the public administrator. The Supreme Court denied the nephew a right to appeal the administrator's award notwithstanding the judgment was binding as to the nephew's interest in the estate. The court said: "The proposed intervenor has taken none of the appropriate steps necessary to make himself a party to the record . . . ." (*Id.* at p. 133; see also *Eggert v. Pac. States S. & L. Co.* (1942) 20 Cal.2d 199, 201; *Estate of Kent* (1936) 6 Cal.2d 154, 160-161; *Estate of McDougald* (1904) 143 Cal. 476, 479-480.)[6]

County of Alameda v. Carlsen (1971) 5 Cal.3d 730, 736, holds that "one who is legally 'aggrieved' by a judgment may become a party of record and obtain a right to appeal by moving to vacate the judgment pursuant to . . . section 663" and if the

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[6] There are cases which suggest otherwise. However, in each of them the statement was dictum. (See e.g. dictum in *Estate of Sloan, supra,* 222 Cal.App.2d at pp. 291-292, relied on by *Leoke, supra,* [trustee authorized to represent interest of remaindermen on appeal].) *Guardianship of Copsey, supra,* 7 Cal.2d 199, is frequently cited for the proposition that "the appellants' failure to participate in the matter below does not deprive them of this right to appeal." (See *Sloan, supra*, at p. 291.) But in *Copsey* the right to appear in the appellate court for the first time was predicated upon a federal statute which "expressly authorized [the appellant] . . . to appear in any court . . . having . . . appellate jurisdiction . . . ." (7 Cal.2d at p. 203.)

motion is denied may appeal from the order of denial. (*Ibid.*) In that case, of course, the appellant is a party of record to the motion proceeding.

There are cases in which a person is given a right to appeal a judgment in an action in which his interests are affected notwithstanding there are no means by which the person could become a party to the proceeding. A case in point is *Slaughter v. Edwards* (1970) 11 Cal.App.3d 285. The appellant was subject to the automatic loss of his real estate license by a judgment against a state fund for unpaid damages upon a judgment for fraud against the licensee. The court said: "None of the pertinent statutes provided that the licensee should be made a party to the proceeding." (*Id.* at p. 289.) The case stands for no more than that a person may appeal a judgment from an action which he could not be a party of record. (See also *Burrow v. Pike* (1987) 190 Cal.App.3d 384 [employer permitted to appeal from the striking of its lien claim in a personal injury action].)

The purpose of a validation action is to obtain a binding judgment against the world concerning the legal propriety of a public agency action. The Code of Civil Procedure provides the exclusive means by which an interested party may contest a validation action. (§ 869.) Jurisdiction is obtained of "all interested parties . . . by publication of summons" (§ 861) and "[a]ny party interested may . . . appear and contest the legality or validity of the matter sought to be determined." (§ 862.) "The [resulting] judgment, if no appeal is taken, or

if taken and judgment is affirmed, shall, . . . thereupon become . . . forever binding and conclusive, as to all matters therein adjudicated . . . ." (§ 870, subd. (a).)

These provisions provide the exclusive means by which to contest the matters subject to a validation action. It follows that, unless an interested party has utilized the statutory means to become a party of record and "contest" the substantive merits of the validation action, he or she loses the right to challenge the merits and accordingly the right to contest the merits of the judgment on appeal.

BLEASE, Acting P. J.

Concurring and Dissenting Opinion of Nicholson, J.

While I concur with the majority concerning the right of California Statewide Communities Development Authority (CSCDA) to pursue this appeal from the adverse judgment, I dissent from the majority's holding that the conduit financing agreements under consideration violate article XVI, section 5 of the California Constitution (hereafter article XVI, section 5), which denies the government the power to "grant anything to or in aid of any religious sect, church, creed, or sectarian purpose." I also conclude the agreements do not violate the establishment clause of the United States Constitution. Therefore, I would reverse the judgment of the trial court and direct the trial court to enter judgment validating the conduit financing agreements.

I

Since the majority provides appropriate background relating to the statutory provisions and the conduit financing agreements at issue here, I will attempt to go straight to the heart of my disagreement with the majority concerning whether the agreements violate the California Constitution. In my view, the California Supreme Court provided a definitive answer in *California Educational Facilities Authority v. Priest* (1974) 12 Cal.3d 593 (hereafter *Priest*), at pages 604 to 606, which rejected a challenge to the California Educational Facilities Authority Act (hereafter the Act).

The *Priest* court held: "The Act here challenged clearly provides a 'benefit' in that it enables sectarian institutions

to borrow money through the use of a state instrumentality at a cost below that of the marketplace. Thus the crucial question is not whether the Act provides such a benefit, but whether that benefit is incidental to a primary public purpose. The framers of the Constitution recognized the importance of education in our social fabric, and imposed a constitutional duty on the Legislature to 'encourage by all suitable means the promotion of intellectual . . . improvement.' (Art. IX, § 1.) The present law is responsive to that mandate. The Legislature has expressly determined that the Act, in supporting the maintenance and improvement of facilities for higher education, is in the public interest ([former Ed. Code,] §§ 30301, 30324, 30334), and that determination is entitled to great deference. [Citations.] *The benefits of the Act are granted to sectarian and nonsectarian colleges on an equal basis*; in both cases all aid for religious projects is strictly prohibited; and in no event is a financial burden imposed upon the state. *In these circumstances the Act does not have a substantial effect of supporting religious activities.* Rather, its primary purpose is to advance legitimate public ends, and it therefore does not violate [article XVI, section 5]." (*Priest, supra,* 12 Cal.3d at pp. 605-606, fn. omitted, ellipses in original, italics added.)

While the challenge here is to the conduit financing agreements and not to the Act, the agreements considered here conform to the approved requirements of the Act. Under the Act, proceeds of the financing could not be used to fund "'any facility used or to be used for sectarian instruction or as a

place for religious worship or any facility used or to be used primarily in connection with any part of the program of a school or department of divinity.'" (*Priest, supra,* 12 Cal.3d at p. 596, quoting former Ed. Code, § 30303, which is now Ed. Code, § 94110, subd. (e).) The Supreme Court found that the Act sufficiently prohibited aid for religious projects. (*Priest, supra,* at p. 606; see also *Mitchell v. Helms* (2000) 530 U.S. 793, 826-829 [147 L.Ed.2d 660, 686-688] (plur. opn. of Thomas, J.), noting that aid for secular projects not forbidden in establishment clause jurisprudence simply because it would free up money to be spent on sectarian projects.)

Here, the agreements contained limitations on aid for religious projects, using language that is indistinguishable from the language from the Act approved in *Priest*. The agreements provide that "no facility, place or building financed or refinanced with a portion of the proceeds of the Bonds will be used (1) for sectarian instruction or as a place for religious worship or in connection with any part of the programs of any school or department of divinity for the useful life of the Project . . . ." Given the Supreme Court's approval of such language as an appropriate limitation on the use of the proceeds of a conduit financing agreement, the conduit financing agreements at issue here do not violate article XVI, section 5 because the agreements do not "have a substantial effect of supporting religious activities." (*Priest, supra,* 12 Cal.3d at p. 606.)

The Act under consideration in *Priest* provided that an educational institution could not participate in the financing program if it restricted admission on religious or racial grounds or required its students to receive instruction in the tenets of a particular faith. (12 Cal.3d at p. 596, citing former Ed. Code, § 30303.) The majority places emphasis on this limitation as a "key distinction" between the Act's financing plan approved in *Priest* and the conduit financing agreements here. (Typed maj. opn. at p. 31.) To the contrary, the section of the *Priest* decision dedicated to analyzing whether the Act there violated the constitutional provision also at issue in this case did not so much as mention the Act's prohibition on admission restrictions or required religious instruction. (*Priest, supra,* 12 Cal.3d at pp. 605-606.) Instead, as noted above, the court based its conclusion that the Act did not have a substantial effect of supporting religious activities on three factors: (1) availability of aid to sectarian and nonsectarian institutions on an equal basis, (2) strict prohibition on aid for religious activities, and (3) absence of a financial burden imposed on the state. (*Id.* at p. 606.) The conduit financing agreements conform to each of these requirements.

The majority attempts to bolster its interpretation of *Priest* with comments made about *Priest* in a later decision, *California Teachers Assn. v. Riles* (1981) 29 Cal.3d 794 (hereafter *Riles*). Even though the majority concedes *Riles* is not on point because it involved appropriation of public funds to schools (typed maj. opn. at p. 34), the majority deems

significant the *Riles* court's description of *Priest*: "We reasoned that, although this provision 'bans any official involvement, whatever its form, which has the direct, immediate, and substantial effect of promoting religious purposes. . . .' (12 Cal.3d at p. 605, fn. 12), it does not prohibit a religious institution from receiving an indirect, remote, or incidental benefit from a statute which has a secular primary purpose. The state's interest in promoting education represented such a purpose. Moreover, the measure did not have the effect of supporting religious activity because its benefits were granted to sectarian and nonsectarian colleges on an equal basis; and all aid for religious projects was prohibited. *The statute limited aid to colleges which did not restrict entry on religious grounds or require religious instruction*, and no financial burden was imposed on the state. We concluded with the observation that, although the statute appeared 'in certain subtle respects . . . to approach state involvement with religion [citation], we cannot say that in the abstract it crosses the forbidden line.' (*Id.* at p. 606.)" (*Riles, supra*, at p. 806, italics added.)

Despite this description in *Riles*, the *Priest* court did not rely on the prohibition on admission restrictions or required religious instruction as justification for upholding the Act. (*Priest, supra,* 12 Cal.3d at pp. 604-606.) Nothing in the analysis of article XVI, section 5 in *Priest* gave significance to the pervasiveness of the sectarianism involved. Instead, *Priest* held that the analysis applies to sectarian and

nonsectarian institutions, alike. *Riles* is not on point. *Priest* is on point, viable, and binding.

While criticizing CSCDA for citing cases interpreting the establishment clause as authority for its arguments concerning article XVI, section 5 (typed maj. opn. at p. 40), the majority, to get beyond *Priest* and find that the conduit financing agreements here violate article XVI, section 5, imports, wholesale, a label sometimes applied to institutions in establishment clause jurisprudence. (Typed maj. opn. at p. 30.) This label, "pervasively sectarian," has never been employed in article XVI, section 5 jurisprudence. Neither should it ever be.

Recently, a plurality of the United States Supreme Court discussed the history of the "pervasively sectarian" label and recounted its welcome decline in establishment clause jurisprudence. (*Mitchell v. Helms, supra,* 530 U.S. at pp. 826-829 (plur. opn. of Thomas, J.).) The plurality stated: "One of the dissent's factors deserves special mention: whether a school that receives aid (or whose students receive aid) is pervasively sectarian. The dissent is correct that there was a period when this factor mattered, particularly if the pervasively sectarian school was a primary or secondary school. [Citations.] But that period is one that the Court should regret, and it is thankfully long past." (*Id.* at p. 826.) The plurality noted the "sharp decline" of this factor and opined that "the inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not

only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs. [Citation.]" (*Id.* at pp. 826, 828.) "[H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. [Citation.]" (*Id.* at p. 828.) The plurality concluded that "nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now." (*Id.* at p. 829.)

Although *Priest*, decided in 1974 and applying contemporary federal precedents, recognized the relevance of whether the institution was "pervasively sectarian" in determining whether financing under the Act would violate the federal establishment clause (12 Cal.3d at p. 602, fn. 8), the court notably did not mention that label when discussing what is now article XVI, section 5 (*id.* at pp. 604-606). I find no good reason to import this malignant label into article XVI, section 5 jurisprudence.

The majority's adoption of the "pervasively sectarian" label exhibits the bias against religion engendered in this label. In the installment sales agreements associated with the conduit financing agreements, the schools agreed that "no facility, place or building financed or refinanced with a portion of the proceeds of the Bonds will be used (1) for sectarian instruction or as a place for religious worship or in connection with any part of the programs of any school or

department of divinity for the useful life of the Project . . . ." The schools even agreed to allow the CSCDA access to verify its compliance with this covenant. The majority, however, finds the schools' covenant incredible and unreliable, as a matter of law, because the CSCDA agreed the schools are "pervasively sectarian." The majority chides CSCDA for even suggesting the schools might successfully fulfill their commitment: "Under these circumstances, CSCDA's reliance on the covenant as adequate protection against diversion of public aid for religious purposes is deluded, and the schools' willingness to sign certificates of compliance rings hollow." (Typed maj. opn. at p. 37.)

By the same reasoning, the state should deny these schools fire and police protection, as well as maintenance for contiguous roads and sidewalks and services such as water, electricity, and sewer, because these services might be used for religious purposes. (See typed maj. opn. at p. 37.) Like sewers and sidewalks, however, buildings have no doctrinal content. (See *Riles, supra,* 29 Cal.3d at pp. 811-812 [holding that maintenance of roads and sidewalks do not advance essential objectives of sectarian schools].) A covenant not to use for religious purposes the facilities financed with tax-exempt bonds, therefore, gives adequate assurance that they will not be so used.

At this point, the facilities the schools seek to build with the disputed conduit financing have not been built. Therefore, the argument concerning their use for religious

purposes is academic. With that in mind, it may be helpful to construct a hypothetical, which must be consistent with the principle that no party responded to the complaint and we must, therefore, draw factual inferences in favor of the validity of the conduit financing agreements.

In my hypothetical, the funding obtained by the school is used to construct a building for the math department. The building is used only for math classes. No prayers are given. There is no discussion of religion in the math classes. No worship services are held in the building. The same math curriculum used in secular schools is used to teach math to the students. Consistent with the school's agreement, the building is not used for religious purposes. Under these circumstances, the conduit financing agreements have no direct, immediate, and substantial effect of advancing religion. (*Priest, supra,* 12 Cal.3d at pp. 605-606.)

From this hypothetical, it is apparent that the schools, even though they are sectarian in purpose, can teach math in the same way as a secular school. Regardless of the label applied to the schools, they can choose not to use facilities funded by the conduit financing for religious purposes. Although the American Civil Liberties Union argued in this court that, because these institutions are "pervasively sectarian," they cannot, by definition, separate sectarian from secular teaching, that position does not recognize that these institutions have self-determination. Neither we nor the American Civil Liberties Union determines the nature of these schools. Even if, in the

past, the schools used every facility for religious purposes, they can now decide to refrain from using certain facilities for religious purposes. To deny them that self-determination is nothing less than hostility toward religion, and possibly even more than just hostility.

The American Civil Liberties Union also makes the risible argument that this judgment must be upheld to avoid secularizing these schools. Whether these schools wish to undergo secularization, in part or in whole, is not our decision or concern. The schools, themselves, must decide to what extent they want to construct facilities that can be used only for secular purposes.

The primary public purpose behind the conduit financing is to promote education of our young people. Whether those young people attend a secular school or a sectarian school, the public policy does not change. We, as a society, have as much interest in educating those children who attend a sectarian school in mathematical principles as we do those who attend a secular school.

I find no appropriate reason to engage in judicial hostility toward sectarian institutions. Absent from the majority's opinion is any suggestion that the conduit financing agreements would violate article XVI, section 5 if the schools were to honor their covenant not to use the proceeds of the conduit financing for religious purposes. Contrary to the majority, I allow that the schools may be telling the truth. In my view, the proper application of binding precedent requires us

to conclude the conduit financing agreements do not violate article XVI, section 5.

II

Because it concludes the conduit financing agreements violated the California Constitution, the majority does not decide whether they violate the establishment clause of the United States Constitution. I would conclude the conduit financing agreements do not violate the establishment clause. Although the United States Supreme Court has not yet held that conduit financing arranged to assist a pervasively sectarian educational institution to obtain favorable financing of constructions projects to be used for nonsectarian purposes is permissible under the establishment clause, the weight of authority in lower courts is in favor of such assistance. (See *Steele v. Industrial Development Bd. of Metro.* (6th Cir. 2002) 301 F.3d 401 [conduit financing for pervasively sectarian institutions does not violate establishment clause], and cases cited therein at p. 406, fn. 4.) Suffice it to say, I would follow this line of cases and likewise conclude that the conduit financing agreements at issue here do not violate the establishment clause. (*CERTIFIED FOR PUBLICATION.*)

NICHOLSON, J.