CALIFORNIA ACADEMY OF APPELLATE LAWYERS

President
Sean M. SeLegue
Arnold & Porter
Three Embarcadero Ctr., 10th Fl.
San Francisco, CA 94111

Vice President
Benjamin G. Shatz
Manatt, Phelps & Phillips, LLP
2049 Century Park East, Suite 1700
Los Angeles, CA 90067

Treasurer
Judith E. Posner
Benedon & Serlin, LLP
22708 Mariano St.
Woodland Hills, CA 91367

Secretary
Nathaniel P. Garrett
Jones Day
555 California St., 26th Floor
San Francisco, CA 94104

EXECUTIVE COMMITTEE

Raymond A. Cardozo
Michael G. Colantuono
Nathaniel P. Garrett
Laurie J. Hepler
Kirk C. Jenkins
Joseph P. Mascovich
Steven L. Mayer
Judith E. Posner
Sean M. SeLegue
Benjamin G. Shatz
John A. Taylor, Jr.

WWW.CALAPPELLATE.ORG

July 3, 2025

The Honorable Chief Justice Patricia Guerrero
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: ***Tillinghast v. Los Angeles Unified School Dist.***
Court of Appeal No. B332299 (2d Dist. Div. 8)
Request for Depublication (Opinion filed May 5, 2024)

Honorable Justices:

Under rule 8.1125 of the California Rules of Court, the California Academy of Appellate Lawyers submits this letter requesting that the Court order depublication of the Court of Appeal's opinion in *Tillinghast v. Los Angeles Unified School District* (2025) 110 Cal.App.5th 1272. If the opinion remains published, it will create confusion regarding California's well-established rule that an appealing party is deemed to have objected to an erroneous jury instruction that it did not propose, and does not forfeit that objection on appeal for failing to object to the instruction during trial.

Interest of the Academy

The Academy's members are more than 130 experienced appellate practitioners whose common goals include promoting and encouraging sound appellate procedures that ensure proper and effective representation of appellate litigants, efficient administration of justice at the appellate level, and improvements in the law affecting appellate litigation.

Reasons for Depublication

While there are no fixed criteria for depublication, this Court considers whether "the opinion is wrong on a significant point." (Eisenberg, Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2021) ¶ 11:180.1.)

Additionally, depublication may be ordered when the Court "believes the opinion's analysis was too broad and could lead to unanticipated misuse as precedent" (Eisenberg, *supra*), or where "the court does not want future courts to be influenced by the decision when addressing the same issue" (5 Moore & Thomas, Cal. Civil Practice Procedure (2d ed. 2022) Depublication of Published Opinion, § 41:76). All these concerns are implicated here.

Code of Civil Procedure section 647 provides that among the matters deemed excepted to at trial are "giving an instruction, refusing to give an instruction, or modifying an instruction requested." Under section 647, jury instructions requested by an adverse party are deemed excepted to even though the complaining party has made no objection. (*Lund v. San Joaquin Valley Railroad* (2003) 31 Cal.4th 1, 7; see *Pugh v. See's Candies, Inc.* (1988) 203 Cal.App.3d 743, 759 [a party "is deemed to have excepted to the instructions he has not requested or agreed to"]; Eisenberg, Cal. Practice Guide: Civil Appeals & Writs, *supra*, ¶ 8:275 [§ 647 "obviates the need to assert any objection to *erroneous* instructions in order to be able to assert the instructional error on appeal"].)

When a trial court gives an instruction that "is an incorrect statement of the law, the party harmed by that instruction need not have objected to the instruction or proposed a correct instruction of his own in order to preserve the right to complain of the erroneous instruction on appeal." (*Suman v. BMW of North America, Inc.* (1994) 23 Cal.App.4th 1, 9; see *Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519, 530; *Huffman v. Interstate Brands Corp.* (2004) 121 Cal.App.4th 679, 705–706.)

The Court of Appeal's opinion throws confusion into this settled legal principle by erroneously holding that the appellant forfeited its objection to a jury instruction by failing to object to it at trial. If the decision remains published, it will potentially mislead litigants and create uncertainty regarding a long-established rule of appellate review.

The case involves the death of Maxwell Tillinghast, who suffered a sudden and fatal cardiac arrest at his middle school. (Typed opn. 1.) Tillinghast's teachers were unaware that a defibrillator was located in the school's main office. (*Ibid.*) The trial focused on whether Tillinghast would have died had the teachers known about the defibrillator. (Typed opn. 2.)

The trial court gave plaintiff's modified version of CACI No. 423, concerning public entity liability for failure to perform a mandatory duty, as relevant to plaintiff's theory that the school district had a legal duty to inform the teachers about the defibrillator's existence and location. (Typed opn. 8.)

The defendant school district neither agreed to nor objected to this instruction. (Typed opn. 7–8.) The jury awarded Tillinghast's father $15 million for the preventable loss of his child. (Typed opn. 7.) On appeal, the school district contended that the trial court erred as a matter of law by giving CACI No. 423. (*Ibid.*)

The Court of Appeal held that the school district "forfeited its objection to CACI No. 423 by failing to preserve the point in the trial court" because it "*did not object or seek to modify*" the instruction. (Typed opn. 7, 9.) Citing *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1130–1131, the court reasoned: "Where the [trial] court gives an instruction correct in law, but a party complains that it is too general, lacks clarity, or is incomplete, that party must request additional or qualifying language to have the supposed error reviewed. The failure to request different instructions forfeits that argument on appeal." (Typed opn. 8.)

The Court of Appeal should not have applied the *Metcalf* analysis because the school district did not complain that the instruction was too general, lacked clarity, or was incomplete. Rather, the school district argued the instruction was legally incorrect and should not have been given at all, making the *Metcalf* analysis inapplicable. Significantly, the Court of Appeal did not acknowledge section 647, let alone explain why it did not apply to relieve the school district of any obligation to object to CACI No. 423 in the trial court.

The school district's briefing on appeal explained that section 647 relieved it of any obligation to object to CACI No. 423 as a prerequisite for challenging the instruction on appeal. (Appellant's Opening Brief, *Tillinghast v. LAUSD* (Aug. 1, 2024, B332299) 2024 WL 3812553, at p. *31; Appellant's Reply Brief, *Tillinghast v. LAUSD* (Dec. 24, 2024, B332299) 2024 WL 5275293, at pp. *5, *7–*8, *13.) But the Court of Appeal did not analyze that issue in its decision. The opinion risks misleading future courts because it does not address section 647 and states, in conflict with that statute and construing cases, that a party must affirmatively object to an instruction or forfeit any instructional error issue on appeal. By ignoring section 647 altogether and failing to provide sufficient detail to infer why it might not apply, the Court of Appeal's decision will potentially mislead litigants and future courts.

For all these reasons, the Court of Appeal opinion should be ordered depublished.

Respectively submitted,

s/*Benjamin G. Shatz* (SBN 160229)
CALIFORNIA ACADEMY OF
APPELLATE LAWYERS
AMICUS CURIAE COMMITTEE

Robert S. Gerstein, Margaret A. Grignon,
Rex S. Heinke, Scott M. Reddie,
Richard A. Rothschild, Benjamin G. Shatz,
John A. Taylor, Jr.

cc: See attached Proof of Service

PROOF OF SERVICE

Tillinghast v. Los Angeles Unified School District, et al.
Case No. B332299

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 2049 Century Park East, Suite 1700, Los Angeles, CA 90067.

On **July 3, 2025**, I served true copies of the following document(s) described as **REQUEST FOR DEPUBLICATION** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

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

Executed on **July 3, 2025**, at Los Angeles, California.

s/Bess Hubbard
Bess Hubbard

SERVICE LIST
Tillinghast v. Los Angeles Unified School District et al.
Case No. B332299

COUNSEL OF RECORD	PARTY REPRESENTED
Paul V. Carelli, IV (SBN 190773) Artiano Shinoff 3636 Fourth Avenue, Suite 200 San Diego, CA 92103-4237 (619) 232-3122 • Fax: (619) 232-3264 pcarelli@as7law.com	Defendants and Appellants **Los Angeles Unified School District and Derek Moriuchi** *Via TrueFiling*
Thomas C. Hurrell (SBN 119876) Blessing O. Ekpezu (SBN 332308) Hurrell Cantrall LLP 725 South Figueroa Street, Suite 3800 Los Angeles, CA 90017-5438 (213) 426-2000 • Fax: (213) 426-2020 thurrell@hurrellcantrall.com bekpezu@hurrellcantrall.com	Defendants and Appellants **Los Angeles Unified School District and Derek Moriuchi** *Via TrueFiling*
Gary S. Casselman (SBN 81658) Danielle L. Casselman (SBN 170622) Law Offices of Gary Casselman P.O. Box 539 Venice, CA 90294-0539 (310) 314-4444 garyscasselman@gmail.com danicasselman@gmail.com	Plaintiff and Respondent **Mark Tillinghast** *Via TrueFiling*
Haytham Faraj (SBN 291416) Law Office of Haytham Faraj 8605 Santa Monica Blvd., #44953 West Hollywood, CA 90069 (323) 463-9200 haytham@farajlaw.com	Plaintiff and Respondent **Mark Tillinghast** *Via TrueFiling*

COUNSEL OF RECORD	PARTY REPRESENTED
Anne M. Huarte (SBN 158555) Huarte Appeals 20929 Ventura Blvd., Ste. 47-287 Woodland Hills, CA 91364 (213) 373-3349 anne@huarteappeals.com	Plaintiff and Respondent **Mark Tillinghast** *Via TrueFiling*
Clerk of the Court California Court of Appeal Second Appellate District, Division Eight 300 South Spring Street 2nd Floor, North Tower Los Angeles, CA 90013	*Via TrueFiling*

404065967.1