



2130 East Bidwell Street, Suite 2, Folsom, CA 95630 [916]983-8000

DAVID W. McMURCHIE
dcmurchie@mcmurchie.com

VICKI E. HARTIGAN
vhartigan@mcmurchie.com

GARY B. BELL
gbell@mcmurchie.com

May 6, 2013

Via Hand Delivery

The Honorable Tani Cantil-Sakauye, Chief Justice of California
Honorable Associate Justices
The Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

RE: REQUEST FOR DEPUBLICATION
California Special Districts Association (CSDA)
Borikas, et al. v. Alameda Unified School Dist.
Supreme Court Case No.: S209992
Court of Appeal Case No.: A129295

Dear Honorable Chief Justice Tani Cantil-Sakauye and Associate Justices,

Pursuant to California Rules of Court, rule 8.1125, the California Special Districts Association (CSDA) as an interested person respectfully requests depublication of the enclosed decision filed on March 6, 2013, by the Court of Appeal, First Appellate District titled *Borikas, et al. v. Alameda Unified School Dist.*, 214 Cal.App.4th 135 (2013) (First Appellate District, Case No. A129295).¹

I. Introduction and Interest of CSDA

This firm represents the California Special Districts Association (CSDA), a non-profit corporation representing over 1,000 individual special districts statewide. CSDA's members provide a wide range of important government services to rural and suburban communities throughout the state, including water distribution and treatment, fire suppression, park and recreation, sewage collection and treatment, and security and police protection among others. Like other local governments in California, special districts of all types are authorized pursuant to their enabling statutes to impose special

¹ See *Borikas, et al. v. Alameda Unified School Dist.*, 214 Cal.App.4th 135 (2013).

taxes in accordance with mandatory constitutional and statutory provisions.² CSDA has thus determined that this case involves significant issues affecting all of its member districts.

CSDA seeks depublication on the grounds that the court of appeal opinion in *Borikas, et al. v. Alameda Unified School Dist.*, 214 Cal.App.4th 135 (2013) is contrary to: 1) the intent of the California Legislature in enacting Government Code sections 50079(a) et seq., namely to restore pre-existing special tax authority to districts that was called into question by the passage of Proposition 62 in 1986; and 2) the well-established meaning of “uniform” for purposes of taxation law, creating an anomalous definition in statute and having potentially far-reaching impacts to numerous statutes authorizing other local governments to impose special taxes. The court of appeal opinion is contrary to these authorities, frustrates the legislature’s clear intent, and severely restricts the ability of California voters to approve local government special taxes based on rational classifications and distinctions. Depublication of the opinion is therefore warranted.

At issue in *Borikas* was the validity of a “qualified special tax” approved by a direct vote of at least two-thirds of the qualified electors of the Alameda Unified School District,³ which imposed different rates on residential and commercial properties.⁴ The tax was adopted pursuant to the provisions of Government Code sections 50079(a) et seq., which were enacted by A.B. 1440 (1987, Hannigan).⁵ A.B. 1440 (1987, Hannigan) was passed by the California Legislature in the wake of Proposition 62 of 1986, which called into question local government special tax authority under Government Code sections 50075 et seq., and was intended to “restor[e] any taxing authority deleted by Proposition 62.”⁶ Despite the clear legislative intent of A.B. 1440 (1987, Hannigan) to restore pre-existing special tax authority to districts, the court of appeal opinion in *Borikas* held that “uniformly” as used in Government Code section 50079(b)(1) is actually language of limitation,⁷ imposing entirely new restrictions on such tax authority and frustrating the legislative intent of the bill.

II. Background

The right of California voters to have the final say on any proposed local government special tax has been enshrined in our constitution since the passage of Proposition 13 in 1978: “Cities, Counties and special districts, by a two-thirds vote of the qualified electors

² See, e.g., CAL. GOV. CODE § 61121(a) (requiring that special taxes levied by special districts organized under Community Services District Law “appl[ly] uniformly to all taxpayers or all real property within the district”).

³ See *Borikas*, 214 Cal.App.4th at 139.

⁴ *Id.* at 140.

⁵ *Id.*; see also CAL. GOV. CODE §§ 50079(a) et seq.

⁶ Senate Rules Committee, *Analysis of AB 1440, Third Reading*, Office of Senate Floor Analyses, Aug. 17, 1987, at 1-2 (*hereinafter Senate Rules Committee Analysis of A.B. 1440 (1987, Hannigan)*).

⁷ See *Borikas*, 214 Cal.App.4th at 157.

of such district, may impose special taxes on such district”⁸ After the passage of Proposition 13, the California Legislature enacted legislation providing broad authority to local governments to impose special taxes in accordance with mandatory constitutional and statutory provisions.⁹ Pursuant to statute, “all cities, counties, and districts . . . [have] the authority to impose special taxes, pursuant to the provisions of Article XIII A of the California Constitution.”¹⁰

Proposition 13 and the initial special tax enabling statutes lack any express requirement of uniformity.¹¹ That is not to say, of course, that such taxes were free of any uniformity requirements; the Equal Protection Clause permits state tax laws to “discriminate[] in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, or difference in state policy, not in conflict with the Federal Constitution.”¹²

A. Proposition 62 of 1986

Partly in response to perceived misinterpretations of local government special tax authority under Article XIII A of the California Constitution,¹³ initiative proponents successfully placed on the ballot and voters approved in 1986 Proposition 62,¹⁴ an initiative statute now codified in the Government Code.¹⁵ The official argument in favor of Proposition 62, contained in the Secretary of State Ballot Pamphlet provided to voters for the November 4, 1986, General Election states:

A YES vote of Proposition 62 gives back your right to vote on any tax increase proposed by your local governments. [¶] Proposition 62 will decide whether government controls the people, or people control the

⁸ CAL. CONST. art. XIII A, § 4.

⁹ See CAL. GOV. CODE § 50075 (stating: “It is the intent of the Legislature to provide cities, counties, and districts with the authority to impose special taxes, pursuant to the provisions of Article XIII A of the California Constitution”).

¹⁰ *Id.*

¹¹ See CAL. CONST. art. XIII A, § 4; CAL. GOV. CODE §§ 50075 et seq.

¹² *Kahn v. Shevin*, 416 U.S. 351, 355 (1974) (internal quotations omitted) (citations omitted); see also *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1994) (stating: “The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike”).

¹³ See *City and County of San Francisco v. Farrell*, 32 Cal.3d 47 (1982); see also California Secretary of State, *California Ballot Pamphlet: November 4, 1986, General Election*, at 42, available at http://librarysource.uchastings.edu/ballot_pdf/1986g.pdf (hereinafter *Official Ballot Pamphlet for Proposition 62 of 1986*) (stating: “[T]he State Supreme Court twisted the language of Proposition 13 in a 1982 decision (*City and County of San Francisco vs. Farrell*) which took away your right to vote on city and county tax increases”).

¹⁴ See *Official Ballot Pamphlet for Proposition 62 of 1986*, *supra* note 13, at 40-43 (providing official voter ballot pamphlet for Proposition 62 of 1986 on November 4 General election ballot).

¹⁵ *Id.*; see also CAL. GOV. CODE §§ 53720 et seq. (providing sections of Government Code codifying Proposition 62 of 1986).

government. [¶] In 1978, Proposition 13 returned the power to control tax increases to the people, where it belongs. However, the State Supreme Court twisted the language of Proposition 13 in a 1982 decision (*City and County of San Francisco vs. Farrell*) which took away your right to vote on city and county tax increases.¹⁶

Proposition 62 defines all taxes as either special taxes or general taxes¹⁷ and contains restrictive language prohibiting any local government or district from “impos[ing] any special tax unless and until such special tax is submitted to the electorate of the local government, or district and approved by a two-thirds vote of the voters voting in an election on the issue.”¹⁸ In addition to other substantive requirements, the initiative contains the following language spurring a flurry of legislative action in the years immediately following the passage of Proposition 62:

Neither this Article, nor Article XIII A of the California Constitution, nor Article 3.5 of Division 1 of Title 5 of the Government Code (commencing with section 50075) shall be construed to authorize any local government or district to impose any general or special tax *which it is not otherwise authorized to impose . . .*¹⁹

As the court of appeal acknowledged in its opinion, “[t]his provision called into question the taxing power of all local districts that looked to the general enabling legislation enacted after Proposition 13 and commencing with *section 50075* [of the Government Code] as the source of their authority.”²⁰ The California Legislature quickly enacted “a host of statutory provisions expressly authorizing local districts . . . [.] to levy special taxes in accordance with the dictates of Propositions 13 and 62.”²¹

B. The Overriding Legislative Intent of A.B. 1440 (1987, Hannigan) Was to Restore Pre-Existing Special Tax Authority

The passage of Proposition 62 in 1986 called into question the taxing authority of all local governments under Government Code sections 50075 et seq.²² In response, the California Legislature passed and the Governor signed among others A.B. 1440 (1987,

¹⁶ *Official Ballot Pamphlet for Proposition 62 of 1986*, supra note 13, at 42; see also *Farrell*, 32 Cal.3d 47.

¹⁷ See CAL. GOV. CODE § 53721 (stating: “All taxes are either special taxes or general taxes”).

¹⁸ CAL. GOV. CODE § 53722; see also *Official Ballot Pamphlet for Proposition 62 of 1986*, supra note 13.

¹⁹ CAL. GOV. CODE § 53727 (emphasis added); see also *Official Ballot Pamphlet for Proposition 62 of 1986*, supra note 13.

²⁰ *Borikas*, 214 Cal.App.4th at 144.

²¹ *Id.*

²² *Id.*; see also *Official Ballot Pamphlet for Proposition 62 of 1986*, supra note 13, at 40-43 (providing official voter ballot pamphlet for Proposition 62 of 1986 on November 4 General election ballot).

Hannigan), authorizing school districts to impose special taxes, as defined, in accordance with: 1) Article XIII A of the California Constitution; 2) the procedures outlined in Government Code sections 50075 et seq.; and 3) any other applicable procedures provided by law.²³

The Senate Rules Committee analysis of A.B. 1440 (1987, Hannigan), implementing Government code sections 50079(a) et seq., provided the following explanation:

Proposition 62, which was approved by voters last November, appears to have deleted school districts' authority to impose special taxes. [. . .] [¶] Because the schools' sole authority to impose special taxes stems from Government code Section 50077, Proposition 62 has been widely interpreted to eliminate districts' special taxing authority. The California Taxpayers Association, which sponsored Proposition 62, indicates that it did not intend the proposition to have this effect. *This bill would clarify that school districts have the authority to impose special taxes . . . [] thereby restoring any taxing authority deleted by Proposition 62.*²⁴

In other words, the overriding legislative intent of A.B. 1440 (1987, Hannigan) was to restore pre-existing special tax authority to districts after a drafting error in Proposition 62 ostensibly removed such authority.²⁵ The authority of districts under Government Code sections 50079(a) et seq. should therefore be read with this overriding legislative intent in mind. The special tax at issue in *Borikas* is well within the pre-existing special tax authority of the district prior to the passage of Proposition 62,²⁶ which the California Legislature intended to restore when it enacted A.B. 1440 (1987, Hannigan).²⁷

C. The Opinion Applies an Unnecessarily Restrictive Interpretation of "Uniformly" found in Government Code Section 50079(b)(1)

When read in the overall context of the California Legislature's response to the passage of Proposition 62, the term "uniformly" as used in Government Code section 50079(b)(1)

²³ See CAL. GOV. CODE § 50079(a); see also A.B. 1440, 1987-1988 Reg. Sess. (Cal. 1987).

²⁴ Senate Rules Committee Analysis of A.B. 1440 (1987, Hannigan), *supra* note 6, at 1-2.

²⁵ *Id.*; see also Official Ballot Pamphlet for Proposition 62 of 1986, *supra* note 13, at 40-43 (providing official voter ballot pamphlet for Proposition 62 of 1986 on November 4 General election ballot).

²⁶ See *Borikas*, 214 Cal.App.4th 135; see also *Kahn*, 416 U.S. at 355; *Nordlinger*, 505 U.S. at 10 (stating: "The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike").

²⁷ See Senate Rules Committee Analysis of A.B. 1440 (1987, Hannigan), *supra* note 6, at 1-2.

takes on a different meaning than that applied to it by the court of appeal in *Borikas*.²⁸ Indeed, Government Code sections 50079(a) et seq. should be read to “restor[e] any taxing authority deleted by Proposition 62,”²⁹ which, as mentioned above, authorized local governments to impose special taxes based on rational classifications and distinctions.³⁰ Based on the legislative intent of A.B. 1440 (1987, Hannigan), therefore, “uniformly” as used in Government Code section 50079(b)(1) means that all similarly situated taxpayers or properties must be treated alike under the statute.³¹ The California Legislature is presumptively deemed to be aware of existing law at the time it enacts any given statute.³²

At the time Government Code sections 50079(a) et seq. were enacted in 1987, “uniform” had a well established meaning in the context of taxation law.³³ For purposes of state classifications and distinctions in tax laws, “[t]he appropriate standard of review is whether the difference in treatment . . . rationally furthers a legitimate state interest.”³⁴ The Equal Protection Clause, therefore, is satisfied if “the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker”³⁵ Local government special tax authority prior to the passage of Proposition 62 in 1986, therefore, included the power to make rational classifications and distinctions between taxpayers and properties.³⁶

Government Code sections 50079(a) et seq. should be read to restore this taxing authority to districts as intended by the California Legislature when it enacted A.B. 1440 (1987, Hannigan).³⁷ In light of the overriding legislative intent behind the bill, the court of

²⁸ See *Borikas*, 214 Cal.App.4th at 135; *Senate Rules Committee Analysis of A.B. 1440 (1987, Hannigan)*, supra note 6, at 1-2; see also CAL. GOV. CODE § 50079(b)(1); *Official Ballot Pamphlet for Proposition 62 of 1986*, supra note 13, at 40-43 (providing official voter ballot pamphlet for Proposition 62 of 1986 on November 4 General election ballot).

²⁹ *Senate Rules Committee Analysis of A.B. 1440 (1987, Hannigan)*, supra note 6, at 2.

³⁰ *Kahn*, 416 U.S. at 355 (internal quotations omitted) (citations omitted); see also *Nordlinger*, 505 U.S. at 10 (stating: “The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike”).

³¹ *Id.*

³² See *City of San Jose v. Operating Engineers Local Union No. 3*, 49 Cal.4th 597, 606 (2010) (noting “legal presumption that the Legislature is deemed to be aware of existing judicial decisions that have a direct bearing on the particular legislation enacted”).

³³ See, e.g., *Nordlinger*, 505 U.S. at 11-12 (stating: “[The Equal Protection Clause] is especially deferential in the context of classifications made by complex tax laws”); see also *Williams v. Vermont*, 472 U.S. 14, 22 (1985) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973)); *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 547 (1983) (stating: “Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes”).

³⁴ *Nordlinger*, 505 U.S. at 11 (citing *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 174 (1980)).

³⁵ *Id.* (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981)).

³⁶ See, e.g., *Nordlinger*, 505 U.S. at 11-12.

³⁷ See *Senate Rules Committee Analysis of A.B. 1440 (1987, Hannigan)*, supra note 6, at 2; see also A.B. 1440, 1987-1988 Reg. Sess. (Cal. 1987).

appeal opinion in *Borikas* applies an unnecessarily restrictive and pedantic interpretation of “uniformly” found in Government Code section 50079(b)(1).³⁸ After recognizing that Government Code sections 50079(a) et seq. were enacted in response to Proposition 62, the court began its analysis by applying “[t]he basic rules of statutory construction”³⁹ that “[t]he words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context.”⁴⁰ Concluding that “uniformly” as used in Government Code section 50079(b)(1) was “unambiguous,”⁴¹ the court found that further consideration of the legislative history of A.B. 1440 (1987, Hannigan) was unnecessary.⁴² The court nevertheless analyzed the legislative history of the bill concluding that “uniformly” was meant as language of limitation.⁴³

D. A.B. 1440 (1987, Hannigan) Was Not Meant to Impose New Restrictions on Special Tax Authority

The legislative history of A.B. 1440 (1987, Hannigan) is replete with express statements that the bill was intended to “clarify that . . . districts have the authority to impose special taxes . . . [] thereby restoring any taxing authority deleted by Proposition 62.”⁴⁴ The court of appeal opinion in *Borikas* applies an interpretation of “uniformly” to Government Code section 50079(b)(1) that creates an anomalous definition in statute and frustrates the clear legislative intent of A.B. 1440 (1987, Hannigan), namely to restore pre-existing special tax authority that was called into question by the passage of Proposition 62 in 1986.⁴⁵ Although the court of appeal opinion acknowledges that “statute[s] should be given their ordinary and usual meaning and should be construed in their statutory context,”⁴⁶ it fails to give proper weight to the California Legislature’s clear and unambiguous intent in enacting Government Code sections 50079(a) et seq.⁴⁷

Moreover, the relatively noncontroversial nature of A.B. 1440 (1987, Hannigan) is evidenced by the Senate and Assembly committee and floor votes for the bill, representing not a single no vote throughout the entire legislative process.⁴⁸ One would expect considerably more debate and analysis of the bill if the California Legislature had in fact intended to impose entirely new restrictions on district special tax authority as the court of appeal opinion in *Borikas* held,⁴⁹ representing a significant departure from

³⁸ See *Borikas*, 214 Cal.App.4th at 146-47 (applying dictionary definition of “uniform”).

³⁹ See *Borikas*, 214 Cal.App.4th at 146.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 153.

⁴³ *Id.* at 157.

⁴⁴ *Senate Rules Committee Analysis of A.B. 1440 (1987, Hannigan)*, *supra* note 6, at 1-2.

⁴⁵ *Id.*; see also A.B. 1440, 1987-1988 Reg. Sess. (Cal. 1987).

⁴⁶ See *Borikas*, 214 Cal.App.4th at 146.

⁴⁷ See, e.g., *Senate Rules Committee Analysis of A.B. 1440 (1987, Hannigan)*, *supra* note 6, at 1-2.

⁴⁸ *Id.*

⁴⁹ *Id.*; see also *Borikas*, 214 Cal.App.4th 135.

settled taxation law.⁵⁰ Instead, A.B. 1440 (1987, Hannigan) garnered not a single no vote in either the Senate or Assembly, indicating its noncontroversial nature and reinforcing the California Legislature's intent in enacting the bill to restore pre-existing special tax authority to districts after Proposition 62 ostensible removed such authority.⁵¹

III. Conclusion

After the passage of Proposition 62 in 1986, calling into question the authority of all local governments to impose special taxes pursuant to Article XIII A of the California Constitution and Government Code sections 50075 et seq., the California Legislature enacted a series of bills including A.B. 1440 (1987, Hannigan) intended to restore pre-existing local government special tax authority.⁵² Prior to the passage of Proposition 62, local governments were authorized to impose special taxes based on rational classifications and distinctions "if the discrimination is founded upon a reasonable distinction, or difference in state policy, not in conflict with the Federal Constitution."⁵³ Government Code sections 50079(a) et seq. should therefore be read in the overall context of the California Legislature's response to Proposition 62 to "restor[e] any taxing authority deleted by Proposition 62."⁵⁴

The court of appeal opinion in *Borikas* applies an unnecessarily restrictive interpretation of "uniformly" found in Government Code section 50079(b)(1).⁵⁵ This interpretation implies that the California Legislature intended when it enacted A.B. 1440 (1987, Hannigan) to simultaneously restore all pre-existing special tax authority *and* impose an entirely new restriction on such tax authority, without any express indication that the California Legislature intended to do so when it enacted A.B. 1440 (1987, Hannigan).⁵⁶ One would expect considerably more debate and analysis of the bill if the California Legislature had in fact so intended.

⁵⁰ *Kahn*, 416 U.S. at 355 (internal quotations omitted) (citations omitted); *see also Nordlinger*, 505 U.S. at 10 (stating: "The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike").

⁵¹ *See Senate Rules Committee Analysis of A.B. 1440 (1987, Hannigan)*, *supra* note 6, at 1-2; *see also Official Ballot Pamphlet for Proposition 62 of 1986*, *supra* note 13, at 40-43 (providing official voter ballot pamphlet for Proposition 62 of 1986 on November 4 General election ballot).

⁵² *See Borikas*, 214 Cal.App.4th at 144; A.B. 1440, 1987-1988 Reg. Sess. (Cal. 1987).

⁵³ *Kahn*, 416 U.S. at 355 (internal quotations omitted) (citations omitted); *see also Nordlinger*, 505 U.S. at 10 (stating: The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike"); *Williams v. Vermont*, 472 U.S. 14, 22 (1985) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973)); *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 547 (1983) (stating: "Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes").

⁵⁴ *See Senate Rules Committee Analysis of A.B. 1440 (1987, Hannigan)*, *supra* note 6, at 2.

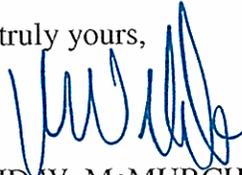
⁵⁵ *See Borikas*, 214 Cal.App.4th at 146-47 (applying dictionary definition of "uniform").

⁵⁶ *See, e.g., Senate Rules Committee Analysis of A.B. 1440 (1987, Hannigan)*, *supra* note 6, at 1-2; *see also Kavanaugh v. West Sonoma County Union High School Dist.*, 29 Cal.4th 911, 923 (2003) (citing *Mountain Lion Foundation v. Fish and Game Com.*, 16 Cal.4th 105, 142 (1997)); A.B. 1440, 1987-1988 Reg. Sess. (Cal. 1987).

The Honorable Tani Cantil-Sakauye, Chief Justice of California
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The right of California voters to have the final say on any proposed local government special tax is enshrined in our constitution and subject to mandatory statutory provisions.⁵⁷ In the wake of Proposition 62 of 1986, the California Legislature sought to restore this pre-existing tax authority by enacting among others A.B. 1440 (1987, Hannigan). Because the court of appeal opinion in *Borikas* is potentially far-reaching, affecting numerous statutes enabling other local governments to impose special taxes, CSDA respectfully requests that the opinion be depublished for the aforementioned reasons.

Very truly yours,



DAVID W. McMURCHIE

DWM:gbb
Enclosure

⁵⁷ See CAL. CONST. art. XIII A, § 4; CAL. GOV. CODE §§ 50075 et seq.

PROOF OF SERVICE

I, the undersigned, declare that I am a citizen of the United States, employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: McMurchie Law, 2130 E. Bidwell Street, Suite 2, Folsom, California 95630.

On May 6, 2013, I served the foregoing document described as: **REQUEST FOR DEPUBLICATION TO THE HONORABLE TANI CANTIL-SAKAUYE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES, SUPREME COURT OF THE STATE OF CALIFORNIA DATED MAY 6, 2013** on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope as follows:

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- (BY U.S. MAIL)** I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing; and that the correspondence shall be deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid at Folsom, California in the ordinary course of business.

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

Executed on May 6, 2013, at Folsom, California.


Saundra J. McPhail

SERVICE LIST

Borikas v. Alameda Unified School District

Case No. S209992

Party	Attorney
George Borikas: Plaintiff & Appellant	David Joseph Brilliant Brillant Law Firm 2540 Camino Diablo, Suite 200 Walnut Creek, CA 94597-3944
Edward Hirshberg: Plaintiff & Appellant	David Joseph Brilliant Brillant Law Firm 2540 Camino Diablo, Suite 200 Walnut Creek, CA 94597-3944
Santa Clara Investors II: Plaintiff & Appellant	David Joseph Brilliant Brillant Law Firm 2540 Camino Diablo, Suite 200 Walnut Creek, CA 94597-3944
Nelco, Inc.: Plaintiff and Appellant	David Joseph Brilliant Brillant Law Firm 2540 Camino Diablo, Suite 200 Walnut Creek, CA 94597-3944
Alameda Unified School District: Defendant and Respondent	Sue Ann Salmon Evans Dannis Woliver Kelley 301 E. Ocean Blvd., Suite 1750 Long Beach, CA 90802-4828 Janet Louise Mueller Dannis Woliver Kelley 301 E. Ocean Blvd., Suite 1750 Long Beach, CA 90802-4828 William Benjamin Tunick Dannis Woliver Kelley 71 Stevenson Street, 19 th Floor San Francisco, CA 94105
Rendering Court:	Clerk California Court of Appeal First Appellate District 350 McAllister Street San Francisco, CA 94102