COURTNEY ANN COYLE
ATTORNEY AT LAW

HELD-PALMER HOUSE
1609 SOLEDAD AVENUE
LA JOLLA, CA USA 92037-3817

TELEPHONE: 858-454-8687 E-MAIL: COURTCOYLE@AOL.COM FACSIMILE: 858-454-8493

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

June 28, 2021

Re: *Ruegg & Ellsworth et al. v. City of Berkeley et al.* (S269012)
Date Opinion Filed: May 20, 2021
Amicus Curiae Letter of Support for
Respondents City of Berkeley and Intervenor-Respondents Confederated Villages of Lisjan
Petitions for Review
(Cal. Rules of Court, rule 8.500(g))

Dear Honorable Chief Justice Cantil-Sakauye and Associate Justices,

The United Auburn Indian Community of the Auburn Rancheria (United Auburn or the Tribe) is a federally recognized Native American tribe composed of Maidu and Miwok peoples whose ancestral lands include Amador, El Dorado, Nevada, Placer, Sacramento, Sutter, and Yuba counties and portions of Butte, Plumas, San Joaquin, Sierra, Solano, and Yolo counties. The Tribe supports petitions for review filed by Respondents City of Berkeley and Respondents-Intervenors Confederated Villages of Lisjan in the above captioned case in which Division Two of the First Appellate District held that a specific shellmound listed on the City of Berkeley's historical register is not a historic structure that would be demolished by operation of a streamlined housing/mixed development project under SB 35. Specifically, the Tribe supports review to settle the question regarding the interpretation of the term "historic structures" within the SB 35 streamlining context. Moreover, there is a serious risk that the Court of Appeal's decision could be misused as precedent outside the SB 35 streamlining context to the detriment of California tribes. For these reasons, review should be granted.

STATEMENT OF UNITED AUBURN'S INTEREST

United Auburn's traditional cultural practices include building, using, and maintaining mounds as part of village, ceremonial, and burial practices. Coastal Miwok, like the Ohlone, and inland Miwok, like United Auburn, are both mound builder cultures using similar cultural and ceremonial practices to construct mounds. Each would use available localized resources for

construction materials: generally, shell and rocks for building mounds along the coast and rushes and baked clay for inland mound construction. These construction materials are reflected in the archaeological and ethnographic records. Thus, while the specific mound at issue in this case, the West Berkeley Shellmound, is not United Auburn's cultural site, the language in Section I.B of the court's decision, which draws conclusions about the legal significance of traditional mounds under state law more generally, could negatively impact mounds to which United Auburn is culturally affiliated.

Based on concerns about just such a result, United Auburn submitted an amicus curiae brief in support of Respondent, and Intervenors-Respondents, for which leave to file was granted by the Court of Appeal on December 1, 2020. The court's decision, however, did not reference any amicus brief, much less address the arguments the Tribe raised in its brief. The Tribe maintains a definite, concrete interest in protecting its own cultural resources and ensuring that state laws intended to protect cultural resources are not undermined by overly broad or poorly supported reasoning in a state court decision.[1]

WHY REVIEW SHOULD BE GRANTED

The court's decision should be reviewed because it is wrong on a significant point. As United Auburn articulated in its brief, the Tribe's traditional cultural practices include building, using, and maintaining mounds as part of village, ceremonial, and burial practices (United Auburn amicus brief, pages 28-33). These mounds exhibit many characteristics of structures: intentional location, design within a village district, and location-specific construction and maintenance methods and materials. They were manufactured by tribes to represent durable places of safety, refuge, and residence. As constructed areas of high ground, they were constantly being built up, vertically and horizontally, and maintained in the face of flooding, deflation, land subsidence, bioturbation, depositional forces, and, after colonization, selective demolition which over time placed the foundations for these structures underground – like the bummock of an iceberg below the water surface. (United Auburn amicus brief, pages 42-45).

In United Auburn's view, tribal mounds are historic structures within the meaning of state and federal preservation laws. The court's decision acknowledges that SB 35 could have, but did not, define the term "historic structure." But rather than relying on definitions in the preservation context, from the tribal community, or in other published decisions, the court instead concluded that mounds are not structures. The court's conclusion is unsupported and ignores guidance from the National Park Service, tangible counter-examples referenced in the Tribe's amicus brief, and the documented history of Native Americans in California (United Auburn amicus brief, pages 33-35).

National Register Bulletin 16A, published by the National Park Service as a guide for documenting historic properties for nomination to the National Register of Historic Places, the

[1] Through a letter dated June 18, 2021, and submitted to this court, the Tribe requested the depublication of section I.B of the decision related to mounds as historic structures for many of the same reasons it now urges the court to grant the petitions for review.

official list of historic properties of significance at the national level, explicitly states that mounds and other earthworks can be historic structures (United Auburn amicus brief, page 33). Similarly, remnant adobe structures such as El Cuervo Adobe, City of San Diego Historical Resources Board Designated Site Number 87, qualify for protection in California and elsewhere (United Auburn amicus brief, page 34). Despite these relevant and specific examples, the court adopted the Appellants' argument, which was based on generalized dictionary definitions and personal injury caselaw, holding that the shellmound—and mounds in general—are not structures. The court's reasoning is unpersuasive and on this point, the court's decision is wrong. Review should be granted.

In addition, review is appropriate because there is a serious risk that the court's conclusion, that mounds cannot be structures and that they lose significance under state law if they are buried or otherwise disturbed, could be misused as precedent in other contexts, causing further harm in contradiction to the intent of numerous other state statutes.

First, it is an unfortunate reality that decisions related to tribes in one area of the law are often expanded to other areas. Here, social and implicit bias still exists, and often works against tribes. This bias results in overapplication of precedent to tribes and tribal issues, which United Auburn described in detail in its brief (United Auburn amicus brief, pages 20-25, 66-68). Tribes are not fungible – one cannot speak on behalf of another. Tribal cultural places, including mounds, are also not fungible – one cannot be sacrificed for another. Furthermore, academic literature has shown that environmental and cultural policies in the United States, even when ostensibly designed to protect Indigenous practices, often fail to protect those practices in the courtroom. All too often, the erroneous notion that tribal cultures and tribal governments are interchangeable often works to the detriment of tribes and their specific environmental and heritage resources. The Tribe is concerned that other courts, permitting agencies, and project applicants may attempt to apply the court's reasoning in Section I.B of the decision to matters outside of the specific facts of this case or even outside of the SB 35 ministerial housing streamlining context of the decision.

Second, to date, there is little state court precedent regarding cultural resources of concern to tribes, including mounds and historic structures. While this may be a good thing to the extent it indicates that many lead agencies and tribes have been working out resource issues without having to resort to the courts, it also has created a lack of examples to guide parties on how to interpret certain statutory terms. More specifically, here, SB 35 itself failed to define "historic structure" or "demolition." In such cases where there is an actual or perceived guidance gap, the Tribe has found that agency decisions are more likely to be influenced by social or implicit bias as decision makers often instinctively fall back on their personal views and backgrounds to inform decisions. Decisions informed in this way generally do not inure to the benefit of tribes, turning statutes intended to protect cultural resources of significance to tribes into potential weapons against those same resources. See, Echo-Hawk, *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided* (2010)(examines how federal Indian law was formed to define Indian rights but then was used, not as a shield to protect those rights, but rather, a sword to stop them). Here, the court applied a very ethnocentric

interpretation of the word "structure," that it has to be a building, uninformed by historic preservation law.

Third, the Tribe is concerned that the decision may further enshrine bias against California tribes and their cultural practices into land use practices contrary to the clearly stated legislative intent of promulgated statues like AB 52. The Tribe anticipated and expressed this concern regarding entrenchment of bias in its brief. Notwithstanding that information, the analysis in Section I.B of the decision instead relies on a disfavored approach to cultural resource management in which tribal perspectives and evidence take a backseat to traditional archaeological interpretations. One such example is where the decision privileges the view of archaeologists as authoritative, citing exclusively to archaeological terms like "primary" or "secondary deposition," "remnants," "fragments," and "midden." (Opinion, pages 5-7, 25-26, 31-32). The decision also ignores the fact that so-called "redeposited" cultural materials, while having little importance to archaeologists, may still have deep cultural value to tribes, which must be fully considered in the land development process particularly when consultation with tribes is required or otherwise occurs. (United Auburn amicus brief, pages 49-52). To refer to mounds as trash dumps or merely the result of things thrown in a heap is inaccurate, deeply offensive, and, again, shows extreme ethnocentrism by ignoring tribal perspectives about mounds as containing cultural soils of continuing cultural value to tribes. (United Auburn amicus brief, pages 40-42).

Another example is where the decision relies on a draft environmental impact report (draft EIR), a document that by its very name is a *draft*. Yet, the court exclusively relies on information from the draft EIR as the underpinning for its analysis in Section I.B. (Opinion, pages 3-4, 8-9). Draft CEQA documents have no authority within the CEQA process as they have not been subject to final agency action and approval: the document's evaluations, analysis, evidence, significance, and mitigation are all subject to change unless and until they have been subject to full public review and are formally approved by the lead agency. Information in draft EIRs therefore cannot be relied upon as substantial evidence or evidence to support the court's decision (United Auburn amicus brief, page 25). See also, *Chaparral Greens v City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1145 (when a species conservation plan is in draft or proposed form, an EIR is not required to evaluate that plan); CEQA Guidelines section 15125(d)(an applicable plan is one that has already been adopted and thus legally applies to a project; draft plans need not be evaluated). Thus, the court's complete reliance on a mere draft document that would have been subject to additional public review and agency revision prior to finalization and approval, had the developer itself not abandoned the CEQA process in 2018 in favor of the SB 35 process, contravenes existing CEQA practice, further weakens the court's decision, and increases the risk of this erroneous point being used as precedent in other contexts. It is a major flaw in the decision.

Another concern relates to the decision's approach to vesting of development "rights" contravening the express wording of AB 168 which amended SB 35. AB 168 expressly provides that the submission of a preliminary SB 35 application does not preclude the listing on a historic registry of a tribal cultural resource on or after the date that application is submitted. Gov't

Code section 65941.1(e). This is because for a variety of reasons many such resources have not been previously listed on historic registries: exclusion of tribes and tribal perspectives from prior evaluations or listings of a historic property, lack of tribal ownership of such properties due to prior dispossession, lack of tribal funding and familiarity with the processes, and the confidential nature of sites to protect them from vandalism. (United Auburn amicus brief, pages 52-55). United Auburn, a co-sponsor of AB 168, was involved in the negotiation of this specific language. Developers tried to achieve an early vesting of development rights through the legislative process for AB 168 but was rebuffed.

Also, for the purposes of the Housing Accountability Act or any other law, AB 168 specifically provides that the formal designation of a tribal cultural site on a register on or after the preliminary application was submitted is not a change to the ordinance, policies, or standards adopted and in effect at the time the application was submitted, and therefore must be allowed. It appears that in trying to promote the developers' wishes to secure early vesting of a development right that they were unable to achieve in the legislative process, the court overlooked these two critical provisions which indicate how seriously the legislature expects tribal concerns regarding historical resources to be considered, including in the streamlined housing process. (United Auburn amicus brief, page 55). The decision therefore undermines the unambiguous wording of the SB 35 statute, as amended. (United Auburn amicus brief, page 63). For all these reasons, review should be granted.

Of further concern is the court's statement that:

> [H]istorical preservation is precisely the kind of subjective discretionary land use decision the Legislature sought to prevent local government from using to defeat affordable housing development (Opinion, page 45 and restated on page 46).

Yet, the court cites to no legislative history in support of its statement regarding the asserted subjectivity of historic preservation, references no academic literature regarding the efficacy of historic preservation standards, and provides no evidence that the California Legislature intended to target and neuter historic preservation or disenfranchise California's tribes when enacting SB 35. Even though SB 35 does not create a new mechanism for challenging historic properties that have already been listed, the court's statement shows that that is precisely what the decision perniciously achieved. (United Auburn amicus brief, pages 38-40). While the court's unsupported statement may be surplusage, its practical effect is nonetheless potentially harmful to California tribes, and others, as it is likely to be further weaponized by powerful private real estate and development interests and their supporters in an effort to expand the ruling beyond the narrow SB 35 statutory context to undermine historic preservation standards and criteria in general, even though these standards have been successfully applied at the local, state, federal, and tribal levels for several decades. This unsubstantiated opinion is further grounds for review.

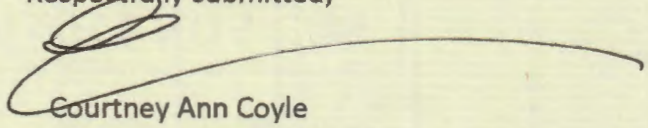
An expansion of the decision into broader land use practices could have the practical effect of undermining examples of progress between California tribes and lead agencies outside of the SB 35 framework. It may also have the undesirable side effect of encouraging bad or marginal actors to revert to pre-AB 52 and pre-AB 168 frameworks, which overtly and covertly discounted tribal input. Then, as in this ruling, traditional archaeologists hired by developers dictated the course of cultural resource analysis instead of tribes having a voice and exercising agency and self-determination regarding the protection of their tribal cultural resources and values for which tribes alone are the experts.

At its heart, the decision may underscore how much work remains to be done to eradicate social and implicit bias in our state, including in our justice system. United Auburn encourages the court to read the Tribe's full brief to more fully understand why we believe the ruling, if not reversed, would risk the negative effects of perpetuating bias in California's land use and judicial processes, thereby causing harm to both California tribes and the resources they rely upon to sustain their cultures, sovereignty, and rights of self-determination. Similarly, the Tribe also respectfully urges the court to explore expanding elimination of bias training for the judicial branch to include recognition of social and implicit bias regarding California's tribes. United Auburn would be happy to work collaboratively with the Judicial Council of California to accomplish this worthy goal.

CONCLUSION

United Auburn respectfully requests that Respondents' and Intervenor-Respondents' requests for review be granted on the grounds that the court's conclusion is wrong on a significant point and that there is a serious risk of the court's conclusion being misused as precedent in other contexts. The Tribe is concerned that the court's broad language will be weaponized to further damage tribal heritage resources throughout the state in contravention of both the SB 35 and CEQA processes, as amended, and further enshrining systemic bias against California tribes and their cultural practices contrary to specific legislative intent. For these reasons, review should be granted.

Respectfully submitted,



Courtney Ann Coyle
State Bar No. 174934
Attorneys for Amicus Curiae United Auburn Indian Community