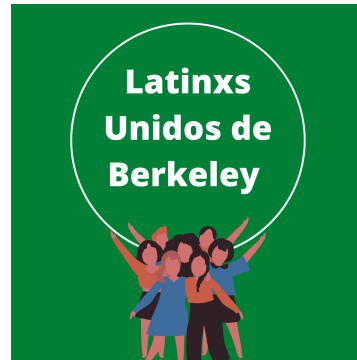




**EAVP**  
*Office of the*  
**External Affairs**  
**Vice President**



**INDIGENOUS PEOPLES DAY**

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**The Network of  
Spiritual Progressives**  
*A Path to a World of Love and Justice*

June 28, 2021

Amicus Letter in Support of Petitioners  
Case No. S269012

Honorable Chief Justice Tani Cantil-Sakauye and Associate  
Justices  
California Supreme Court  
350 McAllister Street, Room 1295  
San Francisco, California 94102-4797

Re: City of Berkeley & Confederated Villages of Lisjan v. Ruegg  
& Ellsworth and Frank Spenger Company, Case No. S269012

**Amicus Letter by the Berkeley Community Safety  
Coalition, Associated Students of the University of  
California's External Affairs Vice President's Office,  
Latinxs Unidos de Berkeley, Network of Spiritual  
Progressives, Network of Spiritual Progressives and  
Indigenous Peoples Day Pow Wow in Support of Petition  
for Review**

Dear Chief Justice and Associate Justices:.

We submit this joint Amicus Letter in support of the Ohlone. We support the petition for review of Petitioners City of Berkeley and Confederated Villages of Lisjan. Our interest in this matter comes from our community values, respect for racial and religious diversity, and the essence of our work- studying, supporting and sharing the rich cultural heritage of the Indigenous people where we reside and/or work.

Our organizations' work in preserving and celebrating our Indigenous community would be undermined if the Court of Appeals Decision is allowed to remain. The thousands of people who participate in gatherings at this sacred location that has

Document received by the CA Supreme Court.

been designated a ‘historic preservation’ site would be barred from engaging in their cultural practices. We are in need of more places to gather in a multicultural space, not less. If the courts narrowly define a “structure” as a ‘building’ it could potentially create a harmful precedent that would further perpetuate the historic discrimination that Indigenous people have faced at the hands of our legal system.

## I. Background

Scientific evidence gathered from this site confirms that Indigenous people began the construction of the West Berkeley Shellmound nearly five thousand years ago. They subsequently occupied and expanded the structure in phases. The village used the area for prayers, ceremonies, gatherings and funerals. The area in question is not historically a parking lot. A thriving culture was here before Europeans occupied the unceded land. In fact, the West Berkeley Shellmound and Village is listed in the California Register of Historical Resources, and is named one of America’s 11 Most Endangered Historic Places. Forbes Magazine, September 24, 2020. It is also eligible for listing on the National Register of Historic Places. A 40 foot oval shaped building at the site is thought to have functioned as a community center, and charmstones and other ritual items have been discovered. Hundreds of human burials have been recorded.

This last 2.2 acres of open land of the large ancestral village, the shellmound area continues to function as an anchoring place of community, and a place where non-Native people acknowledge the oldest place where people ever lived in the Bay area. As author of “The Ohlone Way,” Malcolm Margolin said, “I think this Shellmound is the soul of Berkeley and that if Berkeley loses this, we lose our soul. We lose 5,000 years of history.” See also, Letter by Professor Kent Lightfoot and UC Berkeley, Department of Anthropology, pp. 4-8. The descendants of those whose lives are laid out under the ground now reside in

the East Bay and continue to use this area as a tribal cultural resource (see photos attached). Corinna Gould of the Confederated Villages of Lisjan said, “Taking away our sacred sites is putting that last nail in the coffin. It is wiping away our people.”

The Court of Appeals decision must be reversed: this case is of great importance and is worthy of your review. At stake is the preservation of the rich heritage of the Indigenous people of the area where we work, live and study: Berkeley, California.

## II. Organizations Signing this Letter

Our interests in this case are as follows;

**The Berkeley Community Safety Coalition** is a Black, Brown and Indigenous lead organization dedicated to racial justice in housing, education, health, jobs and police accountability. In many ways, this case is part of the nation’s racial reckoning to ensure inclusion and respect for all lives that matter. Our multigenerational, multiracial organization includes supportive white allies and organizations. We were born out of a groundswell of concern following the murder of George Floyd in 2020. We include in our definition of public safety the protection of our culture and heritage, our language and our distinct histories. The Court of Appeals’ Eurocentric analysis of a historically Indigenous site is inherently flawed. The court’s conclusion is contrary to the stated principles of our country, the United Nations declaration and the importance of cultural protection when making permanent decisions that alter the land without adequate study or mitigation. This historic site would be eliminated and inaccessible to the descendants and allies who support the celebration of the Indigenous community that thrived there for thousands of years. This would be unconscionable and a direct harm to many in our Coalition who attend gatherings at this site. See, attached photos, Attachment “A.”

**The Indigenous People’s Day Pow Wow Committee** was formed in 1992 on the 500th anniversary of Christopher Columbus’ arrival in America. Our Committee led the charge to declare Berkeley as the first city to replace Columbus Day with Indigenous Peoples’ Day. We organize an annual Pow Wow event to celebrate the holiday honoring the First People. The IPDPWC holds a vital interest in this case as most of us are Indigenous people who feel increasingly marginalized and erased in history and in the present. The significance of the West Shellmound, a documented historic and sacred site of the Ohlone for 5,000 years is of the highest value to protect. The decision of the Court of Appeals is factually and legally erroneous and stands to threaten the recognition and value of our ‘structures’ that include in this case a ceremonial gathering place, a fishing village, a cemetery and more. Our committee brings tribes from around the nation to gather once a year in October. We often visit the area of the West Shellmound for prayer and ceremony throughout the year. To not reverse the lower court would be akin to allowing the destruction of our historic place of worship, prayer, and celebration.

**Latinos Unidos de Berkeley** is a community-led advocacy organization serving the Latino, Latina, and Latinx people of Berkeley and abroad. Our work is focused on a wide set of issue areas in which our communities are disproportionately marginalized such as education, healthcare access, policing reform, and housing. Interwoven into our work is a constant uplifting of our people’s voices and our reverence and stewardship of our cultural and ancestral identities. This is why LUB stands in solidarity with the Ohlone people’s plight to preserve the West Shellmound historical and sacred site. It is incumbent upon us as Berkeley residents that we not only acknowledge that our homes have been built on land stolen from the original people of the Bay Area, but that we vehemently oppose the decision of the Court of Appeals since it is a dog whistle for the erasure of cultural

heritage and history which is by definition an act of white supremacy.

**UC Berkeley student government leaders** represent over 30,500 undergraduate students who live, work and study in Berkeley. As student government leaders we strive to maintain a strong connection between local communities and the student body and to protect the rich culture, activism and art that colors our education in Berkeley. Additionally, as academics, we understand the importance of maintaining historic sites and we know that the destruction of the Shellmounds would be a loss mourned by historians across the globe. Moreover, we understand that the United Nations Declaration on the Rights of Indigenous Peoples should protect the Confederated Villages of Lisjan from the destruction of their cultural artifacts and practices. As students we are well aware of the housing crisis in the Bay Area, but we also know that housing development cannot come at the cost of the destruction of history or the evisceration of current cultural practices. We cannot overstate the historical significance of the Shellmound nor it's crucial place in the socio-cultural fabric of our city and we urge the Court to hear this case. Indigenous people have faced countless injustices within the courts of this country, let this not be yet another example of injustice.

**The Network of Spiritual Progressives** began in 1990 to promote a New Bottom Line in our society, one that assesses success of all our institutions and projects not by the values of money and power, but rather by the extent to which they uplift and promote the universal values of all spiritual, faith, and ethical traditions such as love of the other, care for the neighbor, dignity and respect for all life, repairing past harms, and preservation of the life support system of the planet. Protecting heritage sites, respecting and acknowledging culture and tradition, and practicing racial justice by not commuting permanent erasure of this vital land for 5,000 years in the Ohlone

life are part of a world that values love, care, and justice. We have thousands of members and host calls, training, and events to uplift these values in our lives, our workplaces, our social justice movements, our government, and our faith/spiritual communities.

## I. Argument

### A. The Ohlone West Berkeley Shellmound Qualifies as a Protected “Structure”

The Court of Appeals Decision’s narrow definition of a “structure” as a ‘building’ is Eurocentric in that it ignores the documented construction done by the Ohlone people. By limiting the legal definition and analysis so narrowly, it overlooks many structures created by other non-European cultures. In this time, dubbed by many as a racial reckoning, a time when inclusivity, diversity and the eradication of white-centered focus are in the zeitgeist, it is crucial to ensure that non-European structures are given the consideration and legal protection they deserve.

“Structure” is defined as a noun and “the arrangement of and relations between the parts or elements of something complex.” See, Oxford Languages. Merriam Webster also defines “structure” in a manner consistent with the Ohlone’s Shellmound - “something arranged in a definite pattern of organization.” UC Berkeley led two in-depth studies that confirmed the existence of the oldest extant structure in the San Francisco Bay Area. Professor Lightfoot’s team has presented evidence of complex structures in this location in 12 scholarly publications.

The scientific evidence of this site confirms that Indigenous people began the construction of the West Berkeley Shellmound nearly five thousand years ago, and subsequently occupied and expanded the structure in phases. The record includes evidence of

scientific testing confirming that bones and cultural artifacts are shown to exist below in the Shellmound area. The village used the area in question for prayers, ceremonies, gatherings and funerals. See, Amicus Letter by Professor Kent Lightfoot and UC Berkeley, Department of Anthropology, pp. 4-8. Also the descendants of those whose lives are encased under the ground now reside in the East Bay and continue to use this area as a tribal cultural resource (see photos attached).

In the law, definitions and words are important. The definition of a 'structure' as defined in this case is paramount. To fail to reverse the error of the Court of Appeals decision would put many indigenous cultural sites of significance at risk. We agree with petitioner that the West Berkeley Shellmound qualifies as a structure as defined in this case. See also, Amicus Letter by Professor Lightfoot, University of California Berkeley, Department of Anthropology, pp. 4-8, "built for communal activity; a cemetery, a fishing village, a craft production site, and a ceremonial gathering place." The Shellmounds of the Bay Area have been studied by top scientists since 1901.

The scientific and engineering studies confirm the existence of a complex structure here. High-resolution radiocarbon dating confirms that the West Berkeley Shellmound is the oldest extant structure in the San Francisco Bay Area. These documented facts are ignored or misunderstood by the Court of Appeals.

## **B. International Law Requires Protection of this Area**

The United Nations Declaration on the Rights of Indigenous Peoples is a globally recognized document that codified international standards for the treatment of Indigenous people. While the United States was initially one of four nations that voted against the adoption of UNDRIP, all four nations have since reversed their positions and in 2010 the executive branch endorsed the UNDRIP. With said endorsement came the



statement that, “what matters far more than words... are actions to match those words.”<sup>1</sup> It is the court’s duty to the Ohlone people, Californians in general, and the international community as a whole to prevent the courts from flagrantly violating the UNDRIP.

Article 5 of the UNDRIP states that Indigenous people have the right to “maintain and strengthen their... social and cultural institutions.” The Court of Appeals Decision prevents the Ohlone people from maintaining their cultural practices by destroying the physical foundation of their socio-cultural institutions.

Article 8 of the UNDRIP states that “Indigenous people have the right not to be subjected to forced assimilation or destruction of their culture” and that “States shall provide effective mechanisms for prevention of, and redress for... any action which has the aim or effect of dispossessing them of their lands, territories or resources.” The destruction of the Shellmounds would permanently deprive the Ohlone people of the land that they use as a cultural resource, thus violating this article.

Article 11 of the UNDRIP states that “Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs ceremonies, technologies and visual and performing arts and literature.” The Shellmounds are vital historical and archeological sites of documented significance both current and historical. Developing on the Shellmounds would uproot thousands of years of history and would directly violate this

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<sup>1</sup> <https://www.reuters.com/article/idUSTRE6BF3RF20101216>

article as any development would preclude the Ohlone people from maintaining and protecting their culture.

Article 12 states that “Indigenous peoples have the right to manifest, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to use and control of their ceremonial objects; and the right to the repatriation of their human remains.” The Shellmounds are a cultural site on which the Ohlone people develop and teach their traditions, customs and ceremonies. Moreover, the Shellmounds are a historical burial place. Developing the Shellmounds would preclude Ohlone people from practicing their culture as described in Article, thus, the Court of Appeals Decision violates this Article.

Article 26 states that “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.” Clearly, the dispossession of the Shellmounds alone violates this article, and irreversible development on the Shellmounds will irrevocably violate the Ohlone people’s rights under international law.

Any further development on the Shellmounds will be in contravention of the UNDRIP and as the Court of Appeals Decision currently stands, the Courts are acting in violation of UNDRIP. It is imperative that the Supreme Court correct this misjudgement such that our government is not acting in contravention of international law nor in violation of the Ohlone people’s fundamental rights.

**C. Precedent Supports the Petitioner : The Miami Circle and Mount Taylor Cases Affirmed the Protection of Traditional Cultural Property**

A case that includes similar facts resulted in the preservation of a sacred, traditional Indigenous site at the banks of the Miami River. Similar to the West Berkeley Shellmound and Village, archeologists discovered evidence of a structure built by the Tequesta Indians (ancestors of the Seminole), holes cut into the bedrock in the shape of a large circle. Researchers found stone axe-heads, human teeth and artifacts dating from 1,200-2,000 years old. The underground traditional village was under a parcel desired by an apartment developer, who conceded in 1999 after litigation and community opposition to sell the land to a Preservation Program funded by state funds and donations from various foundations and private citizens. The “Miami Circle” also known as “Brickell Point” is now an educational park for the public and site for Indigenous cultural activities.

In 2014, the New Mexico Supreme Court unanimously upheld a designation of Mount Taylor as traditional cultural property. See, *Rayellen Resources Inc. v. New Mexico Cultural Properties*, 319 P.3d 639 (N.M. 2014). The ruling protects cultural resources on more than 430,000 acres including Mount Taylor and mesas that the Zuni, Hopi, Navajo, Acoma and Laguna consider sacred but uranium miners sought to excavate. The National Trust for Historic Preservation listed Mount Taylor as an endangered historic place.

**D. The Court of Appeals Wrongfully Believes that More Housing Solves the Housing Crisis. However, we have an Affordability Crisis, not an Availability Crisis. In either event, it is irrelevant to the issue of traditional protection of a sacred, cultural site that is 5,000 years old.**

Many of the co-signers are affordable housing advocates, including students in need of affordable housing. A Cal student with financial aid receives a budget of \$900 a month for housing, but the average individual’s rent now in Berkeley is \$1,200 per month.

[https://cdn.offcampusimages.com/public/resource/qmzvvhm8azrsd3lthqvacuhwfjn2qaelp\\_ckpljkxr0.pdf](https://cdn.offcampusimages.com/public/resource/qmzvvhm8azrsd3lthqvacuhwfjn2qaelp_ckpljkxr0.pdf)

Berkeley has over 1,0000 homeless individuals and many families and seniors among them. Our city has retail workers, teachers and others who do not earn the \$80,000 a year income to qualify for the alleged ‘affordable’ units proposed in the project by the Ellsworth group. The 80% of the Average Median Income is \$80,000 per year. At this level of income requirements, many Berkeleyans could not afford to rent the units that are being proposed to permanently bury and conceal this traditional, historic landmark.

UC Berkeley Professor Karen Chappel stated in public meetings, “We can’t build our way out of the housing crisis.” Her Urban Displacement Study confirmed that subsidized housing and protecting affordable housing for very low income persons is necessary to resolve the crisis that the Bay Area faces, not building new buildings as the panacea.

<https://vcresearch.berkeley.edu/news/researchers-stress-role-subsidized-housing-easing-affordability-crisis>

Racial and Economic Disparities are Growing; Not Solved by Building

<https://www.oaklandmagazine.com/grim-future-predicted-for-bay-area-housing/>

Reputable studies have made it clear that the rising rents (24% higher 2000- 2016) and stagnant income (9% increase for the same period) contributes to the housing crisis. Building more units that require \$80,000 per year income is not going to put even a dent in the deeply entrenched and complicated affordability problem. However, building this unnecessary housing will permanently destroy and cover a historic sacred and precious site for everyone to enjoy for generations to come.

<https://www.policylink.org/resources-tools/solving-housing-crisis-bay-area>

## CONCLUSION

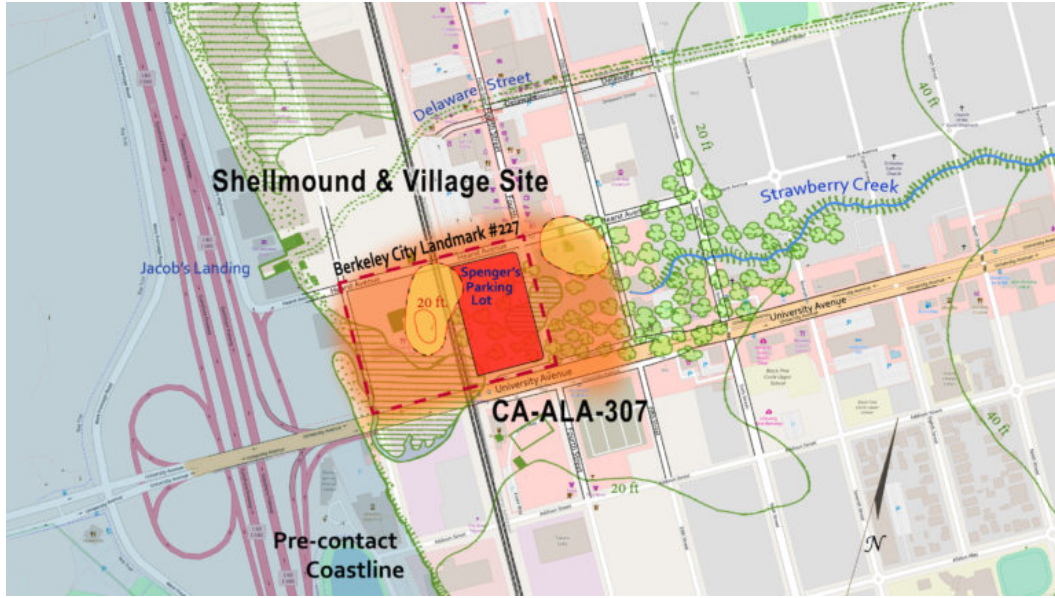
Our five organizations represent a group of Berkeley residents and students who are diverse racially, spiritually and economically. We all concur that a review by the State Supreme Court is imperative to ensure proper application of the law and facts in this case. The initial decision was proper and correct. The Court of Appeals Decision must be reversed. Protect the Historic Landmark, the Ohlone's West Berkeley Shellmound and Village Site.

Respectfully submitted on this 30th day of June, 2021  
On behalf of the above organizations,

Moni T. Law, J.D.  
Chair, Berkeley Community Safety Coalition

### Attachment A: Village Site Map and Modern Day Photos

“Structure” Definition is Clearly Met by Discoveries in 1910, 2010 and 2014. This “Historic Structure” is exempt from SB 35. See, California Register of Historical Resources, City Landmark #227 (encompasses the 1900 4th Street site)



From: SacredLandFilmProject Blog, Website

Finally, the [National Register of Historic Places](#) defines “STRUCTURE” as follows: “The term ‘structure’ is used to distinguish from buildings those functional constructions made usually for purposes other than creating human shelter.” It lists as examples: “bridges, tunnels, gold dredges, fire towers, canals, turbines, dams, power plants, corncribs, silos, roadways, shot towers, windmills, grain elevators, kilns, **mounds**, cairns, palisade fortifications, **earthworks**, railroad grades, **systems of roadways and paths**, boats and ships, railroad locomotives and cars, telescopes, carousels, bandstands, gazebos, and aircraft.” (Emphasis added.)

Additionally, “SITE” is defined as “**the location of a significant event, a prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined, or vanished, where the location itself possesses historic, cultural, or archaeological value regardless of the value of any existing structure,**” with these examples: “**habitation sites, funerary sites, rock shelters, village sites, hunting and fishing sites, ceremonial sites, petroglyphs, rock carvings, gardens, grounds, battlefields, ruins of historic buildings and structures, campsites, sites of treaty signings, trails, areas of land, shipwrecks, cemeteries, designed landscapes, and natural features, such as springs and rock formations, and land areas having cultural significance.**” (Emphasis added.)



Document received by the CA Supreme Court.