July 15, 2021

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

Re: Supreme Court Case No. S269012; *Ruegg & Ellsworth v. City of Berkeley* *Ruegg & Ellsworth v. City of Berkeley* (2021) 63 Cal.App.5th 277, *reh'g denied (May 19, 2021), review filed (June 1, 2021)*; Amici Curiae Letter in Support of Petition for Review

Honorable Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to Rule 8.500 subdivision (g) of the California Rules of Court, we submit this amici curiae letter in support of the Petition for Review filed in the above-captioned case by Petitioners, City of Berkeley (City) and Confederated Villages of Lisjan (CVL).

I. Statement of Interest of Amici Curiae

Amici teach and write in the areas of federal Indian law and Tribal cultural resources protection and are uniquely positioned to provide a scholarly perspective on the importance of protection of Tribal cultural resources and the ramifications of the Court of Appeal's decision for the sovereign interests of California Native Nations and the relationship between them and the State of California.[1] Amicus Seth Davis is a Professor of Law at the University of California, Berkeley School of Law, and is an expert in administrative law, federal courts law, federal Indian law, and property law. Amicus Nazune Menka is the Policy Fellow with the Tribal Cultural Resources Project at the University of California, Berkeley School of Law, and Of Counsel at a national law firm serving Indian Country. Together,

[1] Amici's titles and institutional affiliation are for identification purposes only. Amici submit this letter solely on their own behalf and not as representatives of the University of California, Berkeley.

Amici have extensive experience and expertise in legal questions raised by this Petition for Review, including questions concerning the procedural mechanisms necessary for the protection of Tribal cultural resources, and the role played by judicial review of local government and agency land use planning that would impact those resources.

II. Background and Summary of Argument

The Legislature enacted SB35 to provide a streamlined ministerial approval process for housing developments that meet certain criteria. (Stats. 2017, ch. 366, § 3 (eff. Sept.29, 2017), codified at Gov. Code § 65913.4.) SB35 does not permit streamlined approval in various scenarios, including for projects that "would require the demolition of a historic structure that was placed on a national, state, or local historic register." (Gov. Code, § 65913.4 (a)(7)(C).)

Petitioners have argued this latter exception to streamlined approval applies to the West Berkeley Shellmound because it is an "historic structure" on a local register and, therefore, that the protection of this Tribal cultural resource must be determined in consultation with CVL. (CVL Pet. 14-17; City Pet. at 9-10; *cf.* Gov. Code, § 65913.4 (b)(1)(B) ("California Native American tribes traditionally and culturally affiliated with a geographic area have knowledge and expertise concerning [Tribal cultural] resources and [consultation] shall take into account the cultural significance of the resource").) The Court of Appeals held, however, that a writ of mandamus should issue to order the City of Berkeley to grant streamlined approval because the Shellmound is not an "historic structure" and is not otherwise protected by California law. (Op. 31, 38, 67.)

Petitioners argue that the Court of Appeals erred in its interpretation of the statutory phrase "historic structure," and also that the Court of Appeals erred in not applying current statutory protections for Tribal cultural resources. (CVL Pet. 21-28, 40-43; City Pet. 15-19, 28-31.) Amici address the latter issue in this letter.

Prior to the Court of Appeals' decision, the Legislature enacted Assembly Bills No. 831 and 168 (collectively, AB831), which amended SB35 to mandate review under the California Environmental Quality Act for projects, like the one at

issue in this case, that would impact "a tribal cultural resource that is on a national, state, tribal, or local historic register list." (Stats. 2020, ch. 194, § 1.5 (eff. Sept. 28, 2020), codified at Gov. Code, § 65913.4 (b)(4)(A).) The applicability of AB831 presents important, recurring questions about the law governing mandamus relief and land use planning that implicate vital protections for the sovereign rights of California Native Nations. Amici submit this letter to provide necessary context for understanding the importance of these questions and why this Court should grant the Petitions for Review.

The Court of Appeals' decision would require the City of Berkeley to grant ministerial approval for a project that would impact a protected "tribal cultural resource," notwithstanding AB831's statutory requirements for Tribal consultation, full consideration of the impacts of proposed developments on Tribal cultural resources, and, if necessary, mitigation. The decision undermines the Legislature's careful balancing of interests, and is inconsistent with the principle that "mandamus must operate in the present'" and the "settled" rule that "'mandamus will not lie to compel the performance of any act which would be void, illegal or contrary to public policy.'" (*Torres v. City of Montebello* (2015) 234 Cal.App.4th 382, 403.)

We submit this letter in order to bring to the Court's attention the importance of the Legislature's decision to protect Tribal cultural resources, and the important questions of law presented in the Petitions for Review. We urge the Court to grant the Petitions to resolve the deepening conflict among the Courts of Appeal concerning the issuance of mandamus relief in cases involving land use planning and the vesting of property rights, and to address the important issue of protection for Tribal cultural resources.

III. The Court Should Grant Review To Resolve The Conflict Among The Courts Of Appeal Concerning The Availability Of Mandamus Relief When Granting Mandamus Would Compel An Unlawful Act

It is undisputed that mandamus relief ordering a ministerial approval of the Respondents' project would not be available under AB831. But, according to the Court of Appeal, AB831 is irrelevant because it does not apply retroactively, and

its application in this case would interfere with a vested property right. (Op. 33-36.) This holding deepens conflicts among the Courts of Appeal concerning the availability of mandamus relief and the vesting of property rights in cases involving land use planning. The significant questions of constitutional law and mandamus relief raised by these conflicts continue to arise across the state of California and are squarely presented by the Petitions for Review.

While mandamus "may lie to compel public officers, boards, and agencies to perform an act which law specifically requires them to perform," it "will not lie to compel the performance of any act which would be void, illegal or contrary to public policy." (*Duff v. City of Gardena* (1980) 108 Cal.App.3d 930, 935–936.) Because AB831 precludes ministerial approval of a project that would impact a protected "tribal cultural resource," a court may not order ministerial approval of the project if AB831 applies in this case. (*See Plum v. City of Healdsburg* (1965) 237 Cal.App.2d 308, 317 ("a ministerial officer cannot be coerced into doing that which his plain duty under the law prohibits him from doing").)

The Court of Appeal's decision to order mandamus relief notwithstanding AB831 deepens a conflict among the courts of appeal concerning the availability of mandamus relief when granting mandamus would compel an act made unlawful by an intervening change in the law. Contrary to the Court of Appeal's decision in this case, the Courts of Appeal have recognized the principle that "mandamus must operate in the present," which means that "an intervening change in law may moot or otherwise make such relief unavailable." (*Torres*, *supra*, 234 Cal.App.4th 382, 403.) In keeping with this principle, the Court of Appeal in *West Coast Advertising Co. v. San Francisco* held that whether a writ of mandamus was available to order the zoning administrator of San Francisco to approve a billboard should be decided "according to the existing law" - that is, not according to an earlier version of the City's planning Code, but instead according to the current version, which prohibited such billboards. ((1967) 256 Cal.App.2d 357, 358.)

The Court of Appeal's decision in this case conflicts with the many decisions applying the principle that mandamus operates under existing law and cannot lie to coerce the performance of a now-illegal act. The Court of Appeal pointed to the presumption against retroactive application of statutes, which may

be overcome if the Legislature expressly states that a statute will apply retroactively or there is clear evidence that the Legislature intended it to apply retroactively. (Op. 33 (citing *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 475.) In the Court of Appeal's view, there is no evidence of legislative intent to apply AB831 to unapproved projects, and denying mandamus in this case "would be manifestly unfair" because it would interfere with "a constitutionally protected property interest." (*Id.*at p. 35-36.)

The Court should grant Petitioners review to address whether mandamus relief is appropriate notwithstanding AB831. The Court of Appeal's reliance upon a presumption against retroactive application of statutes deepens a conflict among the Courts of Appeal. In *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, for example, the Second District Court of Appeal held that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . , or upsets expectations based on prior law." (*Hermosa Beach Stop Oil Coalition*, *supra*, 86 Cal.App.4th 534, 550) (discussing the principle that whether legislation is retrospective need only be addressed when a property interest has fully vested).) Rather, as *Hermosa Beach* explained, the question for the Court is "whether the new provision attaches new legal consequences to events *completed* before its enactment." (*Id.* at p. 550.) In that case, the court of appeal determined a project that had not yet received a development permit and had not spent substantial costs on development did not have a vested property interest. (*Id.* at p. 552.) Amici urge the Court to grant review to address the squarely presented question whether a writ of mandamus is appropriate to order a land use planning approval that would violate current law when no development permit has issued.

IV. The Protection Of Tribal Cultural Resources Presents Is An Important Public Policy Of The State That Is Relevant To The Availability Of Mandamus Relief In This Case

The Court of Appeal's analysis does not acknowledge, much less give weight to, the centuries of government sanctioned policies supporting the desecration of California Native Nation sacred sites addressed in Petitioners' briefing. (*See* CVL Pet. 15-16; City Pet. 9-10.) Yet the California Legislature and

Executive Branch have repeatedly reaffirmed that addressing that history, including through the protection of Tribal cultural resources, is an important public policy of the State. As a writ of mandamus "will not lie to compel the performance of any act which would be . . . contrary to public policy," amici encourage the Court to grant the Petitions for Review in order to consider California's public policy on Tribal relations in the era of Tribal self-determination as well as the legislative intent of AB831. (*Duff*, *supra*, 108 Cal.App.3d 930, 935–936.)

The plain text of AB831 confirms that the Legislature considered the protection of Tribal cultural resources to be an important public policy. This text provides that AB831's requirements "shall not apply to any project that has been approved under the streamlined, ministerial approval process . . . before the effective date" of AB831, which was September 28, 2020. (Gov. Code, § 65913.4 (b)(8).) By expressly exempting projects approved before its effective date, the Legislature impliedly indicated that AB831 should apply to any unapproved applications, pending or otherwise, on or after its effective date. (*See Murphy v. City of Alameda* (1992) 11 Cal.App.4th 906, 914 ("By expressly declaring that the section should not apply only to *certain* ordinances adopted by initiative or referendum adopted prior to its effective date, the Legislature impliedly indicated that it should apply to *all* other ordinances . . . .").) Furthermore, the Governor's Office of Planning and Research has affirmed the importance of consultation under AB831 by advising that projects with *pending* applications should engage in Tribal consultation. (State of Cal., Off. of Planning and Rsch., AB 168 Technical Advisory (Nov. 2020) p. 2 (emphasis added).)

The Legislature's decision to protect Tribal cultural resources through AB831 builds upon both federal and state policies that respect Tribal sovereignty and require meaningful consultation with Tribal governments over matters that concern them. Requiring consultation, and affording deference to Tribal knowledge and expertise, are important federal and state policies with a long history. In the 1960s, following the advocacy of the National Congress of American Indians and other Tribally-led organizations, the federal government shifted its policies from cultural assimilation towards supporting Tribal sovereignty and self-determination. Both the Congress and the federal executive have recognized the government-to-government relationship between the United States

and Tribes and have supported Tribal self-determination across a wide range of issue areas, including protecting Tribal cultures.

Tribal cultural resource protection has long been a component of the Tribal self-determination policy at the federal level and an important policy of California's political branches. In 1976, the California Legislature created the California Native American Heritage Commission and tasked it with preventing irreparable damage to sacred sites. (Pub. Resources Code, § 5097.9-5097.991 (1976).) In 1990, Congress enacted the Native American Graves Protection and Repatriation Act (NAGPRA) in response to advocacy by Tribes. (25 U.S.C. § 3001 et seq.) NAGPRA, among other things, aims to protect Native American gravesites from desecration by development and requires agencies and museums to repatriate ancestral remains and sacred objects. To reinforce NAGPRA protections as they apply to state agencies and institutions, the California Legislature enacted the California Native American Graves Protection and Repatriation Act (CalNAGPRA) in 2001. (Health & Saf. Code, § 8011-8026 (2001).) Several recent amendments to CalNAGPRA affirm that Tribal knowledge and expertise are vital to decision making concerning Tribal cultural resources. (Health & Saf. Code, § 8014, 8025 (2018); Pub. Resources Code, § 5097.94 (2018); Health & Saf. Code, § 8026 (2019); Act of Sept. 25, 2020, ch. 167, § 1 (2020) Cal. Legis. Serv. 2810.)

Executive orders issued by Governor Brown and reaffirmed by Governor Newsom direct state agencies and departments to communicate and consult with California Tribes in order to provide meaningful input into the development of legislation, regulation, and policymaking on matters that may affect Tribal Peoples. (Cal. Exec. Order B-10-11 (Sept. 19, 2011); Cal. Exec. Order N-15-19 (June 18, 2019).) In SB18 and AB52, moreover, the Legislature has required local governments and planning agencies to consult with Tribes on a government-to-government basis to protect Tribal cultural resources. (Stats. 2004, c. 905 (S.B.18), § 7; Stats. 2014, c. 532 (A.B. 52).) Thus, California's political branches have repeatedly recognized Tribal sovereignty and the government-to-government relationship between the State and Tribes.

AB831 and SB35 must be understood within this context of protection of Tribal cultural resources. In keeping with California's recognition of Tribal

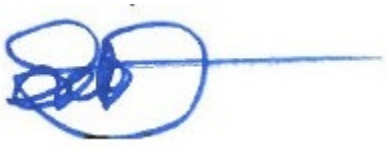
sovereignty, the Legislature has required consultation with Tribes to ensure that affordable housing development proposals are reviewed with all the knowledge and expertise necessary to ensure that they do not destroy Tribal cultural resources.

The City of Berkeley's decision to deny ministerial approval of the Respondents' application is consistent with State's repeated emphasis upon the importance of Tribal sovereignty and Tribal cultural resource protection. Whether AB831 Tribal consultation is required for proposed development of the West Berkeley Shellmound has important implications for California Native Nations and their Tribal cultural resources throughout California.

V. Conclusion

The Court should grant the Petitions for Review and address whether the writ of mandamus is appropriate, whether AB831 applies to Respondent's permit application, and whether Respondent has a vested property right that bears upon the availability of mandamus relief. This case implicates recurring questions of mandamus relief and land use planning in the context of the State of California's ongoing efforts to address wrongs against California Native Nations. The Legislature has considered the importance of protecting Tribal cultural resources in addition to the affordable housing crisis and struck a balance between these interests in the public policy of the State. To grant mandamus relief would contravene that important public policy. Amici urge the Court to grant review and settle the important questions of law raised by the Petitions.

Sincerely,



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PROOF OF SERVICE

I am a citizen of the United States, employed in the County of Alameda, California. My business address is UC Berkeley School of Law 424 North Addition, 225 Bancroft Way, Berkeley CA 94720. My electronic service address is: nazune@berkeley.edu. I am over the age of 18 years and not a party to the above entitled action. On July 15, 2021, I served an Amici Curiae Letter in Support of Petition for Review on the parties either electronically or by mail as designated below:

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[A] By Electronic Service	I caused such document to be served electronically via TrueFiling to the parties designated below.
[B] By Priority Mail	In the ordinary course of business, I caused each such envelope to be placed in the custody of the United States Postal Service, with Priority Mail postage thereon fully prepaid in a sealed envelope to the parties designated below.

On July 15, 2021, I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Nazune Menka

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