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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO**

KOI NATION OF NORTHERN CALIFORNIA,

Petitioner and Appellant,

v.

CITY OF CLEARLAKE, et al.,

Respondents,

Court of Appeal Case No. A169438

Consolidated with Case No. A169805

(Superior Court Case No. CV423786)

On Appeal From the Superior Court of California
County of Lake, Case No. CV423786, Hon. Michael Lunas
Department 1, (707) 263-2374

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] BRIEF OF LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF THE CITY OF CLEARLAKE

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

Case No. A169438

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

This is the initial certificate of interested entities or persons submitted on behalf of Amici Curiae League of California Cities and California State Association of Counties in the case number listed above.

The undersigned certifies that there are no interested entities or persons that must be listed in this certificate under California Rules of Court, rule 8.208.

Dated: July 22, 2024 BEST BEST & KRIEGER LLP

By: */s/ Sarah E. Owsowitz*
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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF THE CITY OF CLEARLAKE

Pursuant to Rule 8.200(c) of the California Rules of Court, the League of California Cities ("Cal Cities") and California State Association of Counties ("CSAC") respectfully applies for permission from the presiding justice to file the Amicus Curiae Brief in support of Defendant and Respondent, the City of Clearlake.

Cal Cities is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide—or nationwide—significance. The Committee has identified this case as being of such significance.

CSAC is a non-profit corporation. Its membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide. The Committee has determined that this case raises important issues that affect all counties.

Cal Cities and CSAC have a direct interest in the legal issues presented in this case because their member cities and counties must regularly, upon request of a Native American Tribes, engage in formal consultation pursuant to Assembly Bill ("AB") 52, as a part of the California Environmental Quality Act (Public Resources Code section

21000 et seq. or “CEQA”) environmental review process. Accordingly, any decision by this Court as to the procedural and substantive requirements of this part of the environmental review process under CEQA will directly and significantly impact all of Cal Cities and CSAC’s member cities and counties. The perspective of Cal Cities and CSAC on this important, statewide issue will assist the Court in deciding the Appeal, as Cal Cities and CSAC are in a unique position to provide the Court with insight on application and compliance with the provisions of AB 52 by cities and counties. They are also able to assist the Court by providing information regarding the likely uncertainty and delay that would result if AB 52’s plain language and legislative intent are given an overly expansive interpretation.

Counsel for Cal Cities and CSAC have examined the briefs on file in this case, are familiar with the issues and the scope of their presentation, and do not seek to duplicate those briefs. Per California Rules of Court, rule 8.200(c)(3)(A), no counsel for any party has authored the Proposed Amicus Brief in whole or in part, and no such counsel, party, or other entity made a monetary contribution intended to fund the preparation or submission of this Brief.

For these reasons, Cal Cities and CSAC respectfully request leave to file the Amicus Curiae Brief contained herein.

Dated: July 22, 2024

BEST BEST & KRIEGER LLP

By: */s/ Sarah E. Owsowitz*

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I.
INTRODUCTION

Amici Curiae League of California Cities ("Cal Cities") and California State Association of Counties ("CSAC") file this amicus brief in support of Defendant and Respondent, the City of Clearlake ("City"). This brief addresses two issues: 1) The procedure for requesting consultation under the Assembly Bill ("AB") 52 component of the California Environmental Quality Act (Public Resources Code section 21000 et seq. or "CEQA"); and 2) The standard of review governing a lead agency's threshold determination as to whether a resource is a tribal cultural resource ("TCR").

Many legislative efforts concerning CEQA have focused on making the CEQA process work more efficiently and reducing litigation, while staying true to the purpose of CEQA, which is to "inform the public and its responsible officials of the environmental consequences of their decisions before they are made." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; see also AR1178[1].)

One such effort, the adoption of AB 52, is intended to "ensure that local and tribal governments, public agencies, and project proponents have information available, early in the [CEQA] environmental review process, for purposes of identifying and addressing potential adverse impacts to tribal cultural resources and to reduce the potential for delay and conflicts in the environmental review process." (Stats. 2014, ch. 532, § 1, subd. (b)(7).) AB 52 added a new category of environmental resource, a "tribal cultural resource" ("TCR") within CEQA, and set express requirements concerning potential consultation by a lead agency with a California Native

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[1] Citations to the Administrative Record are in the following format: ARxxxx.

American Tribe ("Tribe") who requests such consultation, as well as a standard to govern a lead agency's consideration as to the potential presence of TCRs. Unfortunately, Appellant Koi Nation of Northern California ("Appellant"), seeks to abrogate these legislative efforts.

First, AB 52 sets forth straightforward statutory requirements to initiate Tribal consultation. Appellant argues these requirements may be broadly interpreted. But Appellant paints with too broad a brush. AB 52 provides a simple process that, as confirmed by its legislative history, establishes certainty for the lead agency, Tribes, applicants seeking discretionary approvals, and the public. Applying any another other interpretation of AB 52 would, as is evident by this very litigation, create confusion and delay, and even potentially lead to the very impacts AB 52 was enacted to avoid.

Second, AB 52 expressly grants a lead agency discretionary authority, supported by substantial evidence, to determine the threshold question as to whether TCRs exist on a project site. Appellant's position that a lead agency's determination as to whether a resource is a TCR should be reviewed under the "fair argument" standard contravenes the plain language of AB 52, the legislative history of AB 52, and well-settled CEQA case law. Indeed, Appellant's interpretation would usurp a lead agency's discretion, which AB 52 expressly grants, leading, again, to uncertainty and delay.

For these reasons, as more fully explained below, Cal Cities and CSAC respectfully request that this Court, so as to avoid any upheaval of its plain statutory language, legislative intent, and CEQA's well-established principles, clarify and affirm the simple procedure under which a Tribe must expressly submit a written request for consultation under AB 52, and confirm that the "substantial evidence" standard of review governs a lead agency's threshold determination as to whether a resource is a TCR.

II.

FACTUAL AND PROCEDURAL BACKGROUND

Amici hereby adopt, and do not repeat, the Statement of the Case and Standard of Review contained at pages 10 through 17 of the City's Brief on the Merits.

III.

LEGAL DISCUSSION

A. This Court should provide clarity to lead agencies, confirming that compliance with AB 52 is governed by the plain language of the statute.

1. AB 52 dictates clear procedural steps for all lead agencies and all Tribes to follow.

AB 52 recognizes that Tribes that are traditionally and culturally affiliated with an area may have special expertise and knowledge they wish to confidentially share with a lead agency conducting environment review under CEQA of a potential project in such an area; thus, it affords Tribes the opportunity to confidentially share this expertise and information with a lead agency during the CEQA process via the following straightforward procedural steps.

> Prior to the release of a negative declaration, mitigated negative declaration, or environmental impact report for a project, the **lead agency shall begin consultation with a California Native American tribe** that is traditionally and culturally affiliated with the geographic area of the proposed project **if**:
>
> (1) the California Native American tribe requested to the lead agency, in writing, to be informed by the lead agency through formal notification of proposed projects in the geographic area that is traditionally and culturally affiliated with the tribe, **and**

> (2) **the California Native American tribe responds, in writing, within 30 days of receipt of the formal notification, and requests the consultation**. When responding to the lead agency, the California Native American tribe shall designate a lead contact person. If the California Native American tribe does not designate a lead contact person, or designates multiple lead contact people, the lead agency shall defer to the individual listed on the contact list maintained by the Native American Heritage Commission for the purposes of Chapter 905 of the Statutes of 2004. For purposes of this section and Section 21080.3.2, "consultation" shall have the same meaning as provided in Section 65352.4 of the Government Code.

(Pub. Resources Code, § 21080.3.1, subd. (b), emphasis added.) Further:

> (d) Within 14 days of determining that an application for a project is complete or a decision by a public agency to undertake a project, **the lead agency shall provide formal notification to the designated contact of, or a tribal representative of, traditionally and culturally affiliated California Native American tribes that have requested notice**, which shall be accomplished by means of at least one written notification that includes a brief description of the proposed project and its location, the lead agency contact information, and a notification that **the California Native American tribe has 30 days to request consultation pursuant to this section**.
>
> (e) The **lead agency shall begin the consultation** process within 30 days of **receiving** a California Native American tribe's **request for consultation**.

(Pub. Resources Code, § 21080.3.1, subd. (d)(e), emphasis added.) Once consultation is requested, the requirements for conducting consultation are

set forth in Public Resources Code section 21080.3.2.[2]

2. Appellant's expansive and unfounded interpretation of AB 52's procedural requirements would create confusion.

Appellant asks the Court to find that, contrary to the express provisions of Section 21080.3.1, any of a myriad of activities could trigger a lead agency's obligation to enter into consultation with a Tribe. For example, Appellant asserts that a signature on a sign-in sheet for a consultation held between one Tribe and a lead agency constitutes written request to that lead agency for consultation with a **different** Tribe. (See Respondent's Opposition Brief, p. 23.) Appellant also argues that a post-consultation letter and email to a lead agency from a Tribe triggers the need for consultation between a **different** Tribe and that lead agency. (*Ibid.*) But, neither case law, nor the legislative history of AB 52 support requiring lead agencies (and by extension the public and any applicant for an entitlement leading to a lead agency's issuance of a notice under AB 52) to enter in an apparently never-ending guessing game as to whether a Tribe, and which Tribe, has requested consultation under AB 52.

First, case law does not support departing from AB 52's express statutory language. When interpreting a statute and the language is clear, the plain and commonsense meaning of the statute must be followed. (*Committee to Relocate Marilyn v. City of Palm Springs* (2023) 88 Cal.App.5th 607, 624 [reasoning that courts must follow a statute's express meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend], citing *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616-617 [finding courts must follow the clear language of the statute].)

Section 21080.3.1, subdivision (b) states "the California Native

[2] All further Code references are to sections of the Public Resources Code.

American tribe responds, in writing, within 30 days of receipt of the formal notification, and requests the consultation." The black letter definition of "respond" means "to say something in return." (Miriam-Webster's Dictionary (respond), *https://www.merriam-webster.com/dictionary/respond* (last accessed July 16, 2024).) Further, "in writing" is defined as being "in the form of a letter or a document." (Miriam-Webster's Dictionary (in writing), *https://www.merriam-webster.com/dictionary/in%20writing* (last accessed July 16, 2024).) Lastly, "request" is specified as "the act or an instance of asking for something." (Miriam-Webster's Dictionary (request), *https://www.merriam-webster.com/dictionary/request* (last accessed July 16, 2024).) Thus, Section 21080.3.1, subdivision (b) requires a Tribe to "say something in return" to a lead agency's formal notification by "letter or a document" to "ask" for consultation. This statute does not suggest any other reasonable interpretation or alternative, and certainly does not include the proposed methods of seeking consultation offered by Appellant.

Further, the language of Section 21080.3.1, subdivision (b) should not be read in isolation, "but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment." (*Committee to Relocate Marilyn*, *supra*, 88 Cal.App.5th at p. 624.) Here, Section 21080.3.1, subdivision (b) provides for a **singular** trigger to initiate formal consultation between a lead agency and a Tribe. Nowhere in AB 52 does it provide an alternative method of response, or suggest that the request for consultation of more than one Tribe could ever be encompassed in a timely written request to a lead agency from a singular Tribe. This harmonizes with AB 52's overall straightforward statutory process, such that a lead agency and Tribe can participate in meaningful consultation without confusion or delay. To suggest that AB 52 allows Tribes to request consultation through any other

method, including by implicitly piggy-backing on the request of a **different** Tribe, is contrary to the statute.

Second, review of AB 52's legislative history does not suggest the intent to provide any alternatives to Section 21080.3.1, subdivision (b)'s requirements. Even if the statutory language allowed for more than one reasonable construction (it does not), the legislative history of the statute supports amici's reading. (*Friends of Willow Glen Trestle v. City of San Jose* (2016) 2 Cal.App.5th 457, 466, quoting *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1190 ["[I]f the language allows more than one reasonable construction, we may look to such aids as the legislative history of the measure and maxims of statutory construction."]; *Committee to Relocate Marilyn*, *supra*, 88 Cal.App.5th at p. 624, citing *City of San Jose*, *supra*, 2 Cal.5th at pp. 616-617 ["[T]he fundamental task take is to determine the Legislature's intent so as to effectuate the law's purpose."].)

AB 52's purpose, as noted in its legislative history, is to provide a clear, formal process for Tribes to be involved in the CEQA process as tribal governments. (AR1162-AR1163.) Previously, CEQA projects that could potentially impact TCRs experienced uncertainty and delays as lead agencies attempted to work with Tribes to address these potential impacts. (*Ibid.*) AB 52's Legislative intent was to "[s]et forth a process and scope that **clarifies** California tribal government involvement in the CEQA process, including **specific requirements** and timing for lead agencies to consult with tribes on avoiding or mitigating impacts to tribal cultural resources." (*Ibid.,* emphasis added.) Thus, the Legislator sought to simplify this process by directing a lead agency to send formal written notification to the Tribe and requiring the Tribe to *respond in writing* with a *request* for consultation. (*Ibid.*) Straying away from AB 52's clear statutory requirements departs from its legislative intent and would force

lead agencies and Tribes back to a pre-AB 52 state of confusion and delay, if not outright increasing confusion and delay. Accordingly, lead agencies should not be compelled to speculate as to what constitutes a written request by a specific Tribe to engage in formal consultation. Cal Cities and CSAC respectfully request this Court to clarify a lead agency's statutory obligations based on the plain meaning and legislative intent of AB 52.

B. This Court should confirm that, per the plain language of AB 52, lead agencies have the discretion to determine, based on substantial evidence, the threshold issue of whether a resource is a TCR.

1. Section 21074 mirrors Section 21084.1, which provides that a lead agency's threshold discretionary evaluations of potential resources are governed by the substantial evidence standard of review.

Prior to adoption of AB 52, CEQA recognized 3 categories of "historical resources" under Section 21084.1: 1) Mandatory (a state listed/eligible resource), 2) presumptive (a locally listed resource), and 3) discretionary. Specifically, Section 21084.1 provides:

> [A]n historical resource is a resource **listed in, or determined to be eligible for listing in**, the **California Register of Historical Resources. Historical resources included in a local register of historical resources, as defined in subdivision (k) of Section 5020.1**, ***<u>or</u>*** **deemed significant pursuant to criteria set forth in subdivision (g) of Section 5024.1,** are presumed to be historically or culturally significant for purposes of this section, unless the preponderance of the evidence demonstrates that the resource is not historically or culturally significant. **The fact that a resource is not listed** in, or determined to be eligible for listing in, the California Register of Historical Resources, not included in a local register of historical resources, or not deemed significant pursuant to criteria set forth in subdivision (g) of Section 5024.1 **shall not preclude a lead**

> **agency from determining whether the resource may be an historical resource for purposes of this section**.

(See also 14 Cal. Code Regs. ("State CEQA Guidelines"), § 15064.5, subd. (a)(4).) CEQA does not limit a lead agency's discretion when making such a determination but a discretionary determination that a structure or object is a historical resource must be "supported by substantial evidence." (State CEQA Guidelines §15064.5, subd. (a)(3).) Prior to 2014, lead agencies conducting environmental review often evaluated impacts to Native American items of potential significance pursuant to CEQA's standards for historical and/or archeological resources. (See, e.g., *Madera Oversight Coalition Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 78-79.)

In 2014, AB 52 was adopted and it too recognized 3 categories of TCRs, closely mirroring the categories set forth in Section 21084.1:

> (1) Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either of the following:
>
> (A) **Included or determined to be eligible for inclusion in the California Register of Historical Resources**.
>
> (B) **Included in a local register of historical resources as defined in subdivision (k) of Section 5020.1.**
>
> (2) **A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant** pursuant to criteria set forth in subdivision (c) of Section 5024.1. In applying the criteria set forth in subdivision (c) of Section 5024.1 for the purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.

(Pub. Resources Code, §21074, subd. (a).)

The express language of AB 52 supports the application of the substantial evidence standard to a lead agency's discretionary determination as to whether a resource is a TCR. Section 21074, subdivision (a)(2) explicitly states that where "[s]ites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe" are not "[i]ncluded or determined to be eligible for inclusion in the California Register of Historical Resources" or "[i]ncluded in a local register of historical resources as defined in subdivision (k) of Section 5020.1.(2)," the lead agency retains the discretion, based on substantial evidence, to determine whether a resource is a significant TCR.

"If the words themselves are not ambiguous, it's presumed the Legislature meant what it said and the statute's plain meaning governs." (*One2One Learning Foundation*, *supra*, 39 Cal.4th at p. 1190 [reasoning that courts will only turn to other aids, such as legislative history, when the statute may have more than on reasonable construction]; *Relocate Marilyn*, *supra*, 88 Cal.App.5th at p. 624 [holding that when interpreting a statute where "the language is clear, courts generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend."].) The language of Section 21074, subdivision (a) permits a lead agency to make a determination as to whether a TCR exists, when the TCR is not already listed on the Historical Register or local register.[3] Further, Section 21074 states that the standard that the lead agency must employ when making its determination is "substantial evidence." To suggest otherwise would directly contradict the statute's plain meaning.

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[3] Nowhere does Section 21074, nor any part of AB 52, grant a Tribe discretionary authority with regard to the determination that a resource is a TCR.

2. Established case law and AB 52's legislative history support the application of the substantial evidence standard to a lead agency's discretionary determination as to whether a resource is a TCR.

First, as established CEQA case law dictates, a determination of such a threshold question as the significance of a TCR resource is not, as Appellant contends, reviewed under the "fair argument" standard. Since AB 52 intended to mirror the process for determination of historical resources, the determination of TCRs must also be conceptualized as a threshold question set forth during preliminary review. The determination of historical resources is considered a threshold question, one that an agency answers before the level of environmental review is determined. (See *Citizens for the Restoration of L. Street v. City of Fresno* (2014) 229 Cal.App.4th 340, 364-365 ["The question whether a building is an 'historical resource' for purposes of CEQA and thus art of the 'environment' can be conceptualized as a threshold question that must be resolved by the lead agency in order to complete its preliminary review."].)

In *Valley Advocates v. City of Fresno*, the court addressed whether the fair argument standard applied to a discretionary determination of historical resources under Section 21084.1. ((2008) 160 Cal.App.4th 1039, 1070-1072.) There, plaintiffs objected to a city's approval to demolish an old apartment building deemed not historic by the city. (*Id*. at p. 1045.) As discussed above, Section 21084.1 provides that a lead agency can determine, in its discretion, that a presumed historical resource is not historically or culturally significant based on a preponderance of evidence. When it adopted Section 21084.1, the Legislature dictated that, if this occurred, neither an environmental impact report nor mitigated negative declaration would be required. (*Id.* at p. 1071.) Based on its statutory construction and legislative intent, the *Valley Advocates* court found "the fair argument standard would be **incompatible** with the concept of a

discretionary historical resources category because the fair argument standard presents a question of law." (*Ibid*., emphasis added.) "As a question of law, the presentation of substantial evidence supporting a fair argument would decide the matter," effectively nullifying the lead agency's discretion during the preliminary review stage. (*Ibid*.) Given this incompatibility and the legislative intent to afford this discretion to a lead agency, the *Valley Advocates* court held that the fair argument standard does not govern a lead agency's application of the definition of a historical resource during the preliminary review stage. (*Ibid*.)

Similarly, in *Citizens for the Restoration of L Street v. City of Fresno*, the court also considered whether the determination of a historic resource under Section 21084.1 should be reviewed under the fair argument standard. (*supra,* 229 Cal.App.4th at pp.367-369.) There, plaintiffs challenged the city's approval of a demolition permit for a building the city found was not to be historic. (*Id*. at p. 346.) The court rejected plaintiff's invitation to depart from the precedent set in *Valley Advocates* and apply the fair argument standard to what the court termed "the threshold question of whether a threatened building or site is a 'historical resources' under section 21084.1." (*Id*. at p. 368.) Turning to its legislative history, the *City of Fresno* court reasoned that there was "a legislative intent to allow a lead agency to make a **discretionary** decision about the historic significance of certain resources – a decision that would preclude the need for an EIR or mitigated negative declaration." (*Id*. at p. 368, emphasis added.) In doing so, it found that the Legislature intended such a threshold question to avoid the delays and expense of an EIR in cases where the lead agency exercises its discretion to find that a resource is not historic. (*Id*. at p. 369.) Thus, it concluded that "the Legislature intended the question of historic significance to be resolved early in the environmental review process" and **the fair argument standard does not apply** to this preliminary stage.

(*Ibid*., emphasis added.)

Indeed case law confirms that the threshold question discussed in *Valley Advocates* and *City of Fresno* is governed by the substantial evidence standard. In *Friends of Willow Glen Trestle v. City of San Jose*, the court held the substantial evidence standard should be applied to a lead agency's discretionary determination under Section 21084.1. (*supra,* 2 Cal.App.5th at p. 469.) Considering the statutory construction of Section 21084.1 and its legislative history, the *Willow Glen* court found that the statute's treatment of the standard applicable to "presumed" historical resources (preponderance of the evidence) establishes that such a finding would be reviewed under the substantial evidence standard, not the fair argument standard. (*Id*. at pp. 467-468.) Thus, the *Willow Glen* court reasoned that the Legislature intended for the lead agency to have more, not less, discretion and that it would be illogical to conclude the lead agency's discretionary determination to deem a resource historical be subject to a less deferential review than its decision regarding a resource that is presumed to be historical. (*Id*. at p. 468.) The court inferred, by way of statutory construction, legislative intent, and confirmation with State CEQA Guidelines, that the substantial evidence standard must be applied. (*Ibid*.)

AB 52's Legislative intent to "mirror" the Section 21084.1 process in Section 21074, subdivision (a)(2) is thus subject to the same substantial evidence standard of review described in *Valley Advocates*, *City of Fresno* and *Willow Glen*. Indeed, Section 21074, subdivision (a)(1) is even more precise as it states that a lead agency's determination that a resource is a TCR must be "in its discretion and supported by substantial evidence."

<u>Second</u>, AB 52's legislative history confirms that a lead agency's discretionary determination as to whether a resources is a TCR under Section 21074, subdivision (a)(2) is a threshold question to be considered by the lead agency during its preliminary review under CEQA.

Specifically, the Legislature intended for the determination as to what constitutes a TCR to mirror the determination of historical resources. As noted in the Governor's Office of Planning and Research Enrolled Bill Report, "AB 52 expands the scope of CEQA, but in a very limited way. Resources will only be considered TCRs [sic] if they (1) would otherwise be treated as historic and therefore subject to CEQA's mitigation requirements; or (2) **the lead agency chooses, in its discretion, to treat it as a resource (the same power that a lead agency has to treat objects as historic resources)**." (AR1127, emphasis added; see also AR1169-AA1171 [discretionary determination of TCR "mirrors what already exists in CEQA for historical resources"]; see also AR1127 ["[AB 52] provides a definition of [TCR] that largely matches the definition of historic resources."].)

Since AB 52's Legislators intended to mirror the process for determination of historical resources, the determination of TCRs must also be conceptualized as a threshold question set forth during preliminary review. The determination of historical resources is considered a threshold question, one that an agency answers before the level of environmental review is determined. (See *Citizens for the Restoration of L. Street v. City of Fresno, supra,* 229 Cal.App.4th 340 at pp. 364-365 ["The question whether a building is an 'historical resource' for purposes of CEQA and thus part of the 'environment' can be conceptualized as a threshold question that must be resolved by the lead agency in order to complete its preliminary review."].)

Appellant argues that Section 21074, subdivision (a)(2) can be distinguished from Section 21084.1 because AB 52: 1) provides for a consultation process; and 2) requires a lead agency to consider the significance of a resources to a Tribe. (Appellant's Response Brief, pp. 39-41.) Based on these differences, Appellant contends that Section 21074,

subdivision (a)(2) should not be subject to the same standard of review that applies to potential discretionary resources under Section 21084.1. (*Ibid.*) Appellant asserts that addition of these processes somehow reveals a legislative intent to impose the fair argument standard of review to this threshold question. Appellant's argument fails.

Appellant's arguments seek to inject more into Section 21074 than the statute actually contains. The plain language of Section 21074 does not state that these additional processes are intended to impose the fair argument standard of review for this threshold, nor does the wording even provide for the inference. (See e.g. *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 265 [If the State wanted to require the "fair argument" standard of review it could use words such as "may" or "reasonable possibility"].) As detailed, a resource is determined by a lead agency to be a TCR only if a lead agency's discretionary finding is supported by substantial evidence. (Pub. Resources Code, § 21074, subd. (a)(2).) Nowhere in this text, or anywhere else in AB 52, does the statute reference directly or indirectly the "fair argument" standard of review. Such an interpretation would, once again, directly contravene the actual language of the statute.

Further, the legislative history of AB 52 does not support Appellant's claim. Again, the legislative history and the Governor's Office of Planning and Research's Enrolled Bill Report confirm that the Legislature intended for the determination of TCRs to **mirror** the determination of historical resources. (See AR1169-AR1171 [discretionary determination of TCR "mirrors what already exists in CEQA for historical resources"]; AR1145 ["The May 30th amendments strike the ability for tribes to have their own 'register of historic resources,' leaving only sites that have been registered with the California Register of Historical

Resources or a local register of historical resources, or sites that a lead agency deems a tribal cultural resource."] AR1127 ["[AB 52] provides a definition of [TCR] that largely matches the definition of historic resources."].) Reflecting Section 21084.1, AB 52's legislative history dictates that "[a]n item is considered a TCR only if it is listed pursuant to the criteria for listing on the California Register . . . If not listed, a lead agency still has the discretion to treat it as a TCR." (*Ibid.*.) The Legislator explicitly stated that this discretion is the same power that a lead agency has to treat objects as historic resources. (*Ibid.*)

The intent to mirror Section 21084.1 is also exemplified in earlier versions of AB 52, which provided that Tribes **were** allowed to designate "sacred sites" as TCRs. (AR1145.) But the Legislature took this draft text **out** of AB 52, deleting a Tribe's "authority to have their own 'register of historic resources,' leaving only sites that have been registered with the California Register of Historical Resources or a local register of historical resources or sites that a lead agency deems a tribal cultural resource." (*Ibid.*) This amendment to AB 52 during the legislative process further demonstrates the intent to narrow the TCR determination process to mirror CEQA's process for the determination of historical resources. If the Legislature wished to depart from such a standard in its intent to mirror Section 21084.1, its legislative history or the express language of the statute would have reflected such a departure.

Given the language of this statute and AB 52's legislative history, a lead agency is intended to have more, not less, discretion in its threshold determination as to whether a resource is a TCR. If, as Appellant contends, the fair argument standard applies then lead agencies would never have the discretionary authority to determine a resource was **not** a TCR, effectively eroding CEQA's well-established principles of deference to a lead agency's threshold determinations.

IV.

CONCLUSION

For the forgoing reasons, amici Cal Cities and CSAC respectfully request this Court find that the plain language and legislative intent of AB 52 requires compliance with its straightforward procedures and a finding that lead agency threshold determination as to whether a resource is a TCR are governed by the substantial evidence standard.

Dated: July 22, 2024 BEST BEST & KRIEGER LLP

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CERTIFICATION OF COMPLIANCE

I certify that the text of this brief consists of 4,746 words as counted by the Microsoft Word word-processing program used to generate this brief.

Dated: July 22, 2024 BEST BEST & KRIEGER LLP

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

CERTIFICATE OF SERVICE

Koi Nation of Northern California v. City of Clearlake, et al.

Case No. A169438

Consolidated with Case No. A169805

Superior Court Case No. CV423786

I, the undersigned, declare that:

I was at least 18 years of age and not a party to the case; I am employed in the County of Contra Costa, California, where the mailing occurs; and, my business address is 1333 N. California Blvd., Suite 220, Walnut Creek, California 94596.

I served the foregoing document:

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND [PROPOSED] BRIEF OF LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF THE CITY OF CLEARLAKE

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I further declare I served the individuals named below by placing a true and correct copy of the documents in a sealed envelope and placed it for collection and mailing with the United States Postal Service this same day, at my address shown above, following ordinary business practices. [CCP § 1013(a).]

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I declare under penalty of perjury and the laws of the State of California that the foregoing is true and correct. Executed on July 22, 2024, at Walnut Creek, California.

/s/ Irene Islas
Irene Islas