IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

In re DEZI C., Person Coming Under the Juvenile Court Law. LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. A.A. (Mother), Defendant and Appellant.	**Supreme Court No. S275578** Court of Appeal, 2nd District, Division Two Case No. B317935 Los Angeles County Superior Court No. 19CCJP08030A,B

After a Published Decision by the Court of Appeal
of the State of California
Second Appellate District, Division Two

BRIEF OF AMICUS CURIAE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF LOS ANGELES DEPARTMENT OF CHILDREN AND FAMILY SERVICES

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INTRODUCTION

> "In just the last 12 months, [the reversal per se] approach to asserted ICWA error has resulted in, by our count, appellate courts returning more than 100 dependency cases to the juvenile courts with directions to conduct further ICWA inquiries *after* parental rights were terminated." (*In re Ezequiel G.* (2022) 81 Cal.App.5th 984, 1001, italics in original.)

Effective January 1, 2019, the Legislature revised the statutory structure regarding inquiry and notice under the Indian Child Welfare Act (ICWA) via Assembly Bill 3176 (AB 3176). Its aim was to harmonize California's approach to the ICWA with the binding, federal ICWA Regulations of 2016[1]. One of the revised statutes included Welfare and Institutions Code[2] section 224.2, subdivision (b), which notes a child welfare agency's duty to inquire about a child's status as an Indian child if the child is placed in the agency's temporary custody. Under the statute, inquiry includes asking various 'entities' of people, including the child, parents, legal guardian, extended family members, others with an interest in the child, and the reporting party. Inquiry is not limited to these entities, however.

This single statute has led to an influx of juvenile dependency appeals from the dispositional stage through the termination of parental rights, all of which allege violation of the statute's provisions. While reviewing courts have generally agreed that a child welfare

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[1] See 25 Code of Federal Regulations, part 23 (June 14, 2016); Assembly Floor Analysis of Assem. Bill No. 3176 (2017-2018 Reg. Sess.) Aug. 28, 2018.

[2] All future statutory references are to the Welfare and Institutions Code, unless otherwise specified.

agency's failure to conduct inquiry under the statute constitutes error, they disagree about when the error should be rendered prejudicial.

In the case of *In re Dezi C.* (2022) 79 Cal.App.5th 769 (*Dezi C.*), the Second Appellate District, Division Two found such an error to be prejudicial if the record contained information suggesting a reason to believe that the children at issue may be Indian children, such that further inquiry could lead to a different ICWA finding by the juvenile court. The 'record' under *Dezi C.* includes both the appellate record and any further proffer the parent makes on appeal. (*In re Dezi C., supra,* 79 Cal.App.5th 769, 774.) As the parents in *Dezi C.* repeatedly denied they had Indian heritage, were raised by their biological relatives, and nothing in the record suggested the parents' knowledge of their heritage was incorrect or that the children might have heritage, the reviewing court found the failure to inquire of members of the children's extended family harmless. It affirmed the juvenile court's finding and orders. (*Id*. at pp. 774, 779-782, 786.)

The Los Angeles County Department of Children and Family Services (Department) asks this Court to adopt the standard of prejudice set forth in *Dezi C.* It also asks this Court to affirm *Dezi C.*

The California State Association of Counties (CSAC)[3], Amicus Curiae, joins these requests and supports the legal and factual arguments advanced by the Department.

The mother disagrees with the Department and asks this Court to reverse the juvenile court's judgment. She asks that this Court decline to apply *any* harmless error standard to errors alleged under subdivision (b) of section 224.2 because the ICWA inquiry errors could deprive an Indian tribe of notice per the Due Process Clause of the Fourteenth Amendment. As such, she asserts the errors transcend state law and the requirements of the California Constitution, which predicate reversal on a showing of prejudice. She also asks this Court to deem ICWA inquiry errors structural, such that they similarly defy any harmless error analysis.

CSAC submits that a standard of prejudice must be applied to violations of section 224.2, subdivision (b) because they fall squarely under state law. The Legislative history for AB 3176 shows the statute aimed to exceed federal ICWA standards, and the requirements of the statute are not found in the federal ICWA. Thus, the California Constitution governs violations of the statute, which includes the

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[3] The California State Association of Counties (CSAC) is a non-profit corporation. The 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 and has determined that this case is a matter affecting all counties. San Diego County has been designated to write this amicus curiae brief on behalf of CSAC.

requirement that prejudice, or a miscarriage of justice, be shown to overturn the judgment.

This Court should adopt the standard of prejudice set forth in *Dezi C.* because it provides a fair and practical solution to the problem posed by the 'reversal per se' approach, namely the delay of permanence and stability for a myriad of children. The appealing parent is not required to prove the child's actual or potential Indian status under *Dezi C*, as the mother suggests. Rather, the appealing parent can still show prejudice by providing information to suggest the child at issue *may* be an Indian child, which *may* lead to a different ICWA finding by a juvenile court. This could include information parents bring forward on appeal, such as ancestral information learned of after hearing about the ICWA in the juvenile court, or a parent's identification of information already contained in the appellate record.

CSAC provides additional rationale to the Department's position that ICWA inquiry errors do not constitute structural error. Structural error fails to account for the child's best interests and has been applied to criminal cases, not dependency cases. The interests of a criminal defendant are vastly different from those of a dependent child. Regardless, none of the cases on which the mother relies deem ICWA errors structural or of a federal constitutional dimension.

Finally, the plain language of subdivision (b) of section 224.2 does not mandate a child welfare agency to conduct inquiry with each entity listed in the statute or a child's entire extended family. Unlike other provisions of section 224.2, subdivision (b) does not contain mandatory language, and it does not mandate how child welfare agencies discharge their duties under the statute. Thus, CSAC respectfully asks

this Court to interpret the entities in section 224.2, subdivision (b) as recommended sources of information about the child's Indian status. This interpretation is supported by The Department of the Interior Bureau of Indian Affairs (BIA)'s regulations and California's ICWA statutory scheme, as set forth below.

CSAC submits that a reversal per se interpretation leads to absurd results unintended by the Legislature. It also is not enforceable by reviewing courts, since the identities of the reporting party, or individuals with an interest in the child, are often unknown or not included in the record. The approach set forth in *Dezi C.* would provide the best chance for statutory compliance, since parents often have the best information about the child's heritage, as well as which individuals, if any, may have interest in the child or more information about the child's Native American heritage. *As Dezi C.* allows a parent to proffer this information on appeal, it protects the rights of Indian tribes, dependent children, and parents.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

CSAC has not had access to the record on appeal in this case. As such, references to facts or procedural history set forth in this brief will be with citation to the decision as published by the Second District Court of Appeal, Division Two, at 79 Cal.App.5th 775-776. CSAC also joins the combined statement of the case and facts as set forth by the Department.

ARGUMENT

I

INITIAL ICWA INQUIRY ERRORS ARE NOT OF A FEDERAL CONSTITUTIONAL DIMENSION, NOR ARE THEY STRUCTURAL ERROR

The mother argues that ICWA inquiry errors violate the Due Process Clause of the Fourteenth Amendment because they may ultimately result in lack of notice to an Indian tribe. She contends that because the errors transcend state law, a showing of prejudice as required by the California Constitution is inapplicable, requiring a reversal per se approach. Additionally, the mother asks this Court to deem ICWA inquiry errors structural, which has the practical effect of a reversal per se approach. (Mother's Opening Brief [MOB] pp. 41-45.)

CSAC disagrees. The California Constitution governs errors alleged under section 224.2, subdivision (b) because they fall squarely under state law. Thus, a showing of prejudice is required to reverse a judgment based on such error, in that it resulted in a miscarriage of justice. For the reasons set forth below, CSAC asks this Court to adopt the standard of prejudice set forth in *Dezi C.* CSAC also asks that this Court decline to deem ICWA inquiry errors structural for the reasons explained by the Department (Department's Answer Brief [DAB] pp. 64-67), and because it would disregard the child's best interests.

A. Legal Principles and Background Regarding Harmless Error.

The ICWA allows states to impose higher standards for cases involving Indian children. (25 U.S.C. § 1921.) If a state imposes a higher standard of protection than the rights provided under the ICWA, the higher standard does not become part of the federal ICWA. Rather, it is strictly state law and is reviewed under state standards,

including the harmless error standard. (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1158, 1162; see Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 3176 (2017-2018 Reg. Sess.) as amended Aug. 17, 2018 in Senate, p. 6. [California standards prevail when its standards are higher than federal standards].) California has adopted all of ICWA into state law and imposed several higher standards (see AB 3176 (Stats. 2018, ch. 833), which includes the process to determine if a child *may* be an Indian child. (Assem. Com. on Judiciary, Rep. on Assem. Bill No. 3176 (2017–2018 Reg. Sess.) as amended Apr. 11, 2018, p. 10, original italics.) Under federal law, social workers do not have a duty to ask extended family members about possible tribal membership. (*In re A.C.* (2021) 65 Cal.App.5th 1060, 1069; *In re S.S.* (2022) 75 Cal.App.5th 575, 581.)

A child welfare agency's failure to comply with its duties of initial inquiry under the ICWA, as well as the juvenile court and/or the agency's failure to comply with the requirements of further inquiry, are errors of state law. (*In re Benjamin M.* (2021) 70 Cal.App.5th 735, 741-742; § 224.2, subds. (a)-(c) & (e) [explaining the duties of initial and further inquiry].) The California Constitution prohibits a court from reversing a judgment unless the error resulted in a "miscarriage of justice." (Cal. Const., art. VI, § 13; *In re Celine R.* (2003) 31 Cal.4th 45, 59–60.) This Court "ha[s] interpreted that language as permitting reversal only if the reviewing court finds it reasonably probable the result would have been more favorable to the appealing party but for the error" and "the same test [applies] in dependency matters." (*In re Celine R.*, *supra*, 31 Cal.4th 45, 60.) This is also the harmless error test for statutory errors. (*People v. Watson* (1956) 46 Cal.2d 818, 836

(*Watson*); see, e.g., *In re Meranda P.* (1997) 56 Cal.App.4th 1143 [applying the *Watson* standard to the statutory right to counsel].)

Errors that are deemed structural are not subject to a harmless error analysis. (*In re Christopher L.* (2022) 12 Cal.5th 1063, 1073.) Historically, structural errors have only been applied in the context of a criminal trial. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310, citing *Gideon v. Wainwright* (1963) 372 U.S. 335; *Tumey* v. *Ohio* (1927) 273 U.S. 510; *Vasquez* v. *Hillery* (1986) 474 U.S. 254; *McKaskle v. Wiggins* (1984) 465 U.S. 168, 177-178, fn. 8; *Waller v. Ga.* (1984) 467 U.S. 39, 49, fn. 9.) Such errors involve the basic protections without which a criminal trial cannot reliably serve its function for determining guilt. (*Arizona v. Fulminante*, *supra*, 499 U.S. 279, 310.) These basic protections include the right to counsel at trial, right to an impartial judge, and the right of self-representations. Structural error does not require an analysis of prejudice. (*Ibid.*)

Generally, reviewing courts assessing violations of ICWA inquiry agree that an appealing party must show prejudice, or a miscarriage of justice, to reverse the juvenile court's judgment. However, the approaches reviewing courts use to assess prejudice have varied. (See, e.g., *In re E.V.* (2022) 80 Cal.App.5th 691, 698; *In re J.C.* (2022) 77 Cal.App.5th 70, 80; *In re Benjamin M., supra*, 70 Cal.App.5th 735, 744.) This Court has also recognized that the *Watson* test for prejudice should not be applied to every error under state law. (*In re A.R.* (2021) 11 Cal.5th 234, 252-254.)

Both the mother and the Department have explained the various standards used to assess prejudice for ICWA inquiry error. (MOB pp. 32-40; DAB pp. 29-31.) *In Dezi C.*, the Second Appellate District,

Division Two reasoned such error should be deemed harmless under the following standard:

> "An agency's failure to discharge its statutory duty of initial inquiry is harmless unless the record contains information suggesting a reason to believe that the children at issue may be 'Indian child[ren],' in which case further inquiry may lead to a different ICWA finding by the juvenile court. For these purposes, the 'record' means not only the record of proceedings before the juvenile court but also any further proffer the appealing parent makes on appeal." (*In re Dezi C., supra,* 79 Cal.App.5th 769, 774.)

For the reasons explained below, and by the Department (DAB pp. 31-45), CSAC respectfully asks that this Court adopt the harmless error approach in *Dezi C.*

B. A standard of prejudice must be applied to violations of subdivision (b) of section 224.2, and errors of this provision are not structural.

Here, the mother acknowledges that the California Legislature added section 224.2, subdivision (b) in 2019 via Assembly Bill 3176. (MOB pp. 28-29, 40.) The Legislative analysis of AB 3176 makes it clear this statute aims to exceed the federal standard in determining a child's potential Indian status, as explained *ante*. The provisions found in subdivision (b) of section 224.2 are not found or mirrored in the federal ICWA. Thus, violations of the statute fall squarely under state law. (See Assem. Com. on Judiciary, Rep. on Assem. Bill No. 3176 (2017–2018 Reg. Sess.) as amended Apr. 11, 2018, p. 10, [acknowledgment that the bill has a higher standard for determining if a child may be an Indian child in California, such that further inquiry regarding these children must commence]; (Assem. Com. on Appropriations, Analysis of Assem. Bill No. 3176 (2017-2018 Reg. Sess.)

as amended April 11, 2018, p. 1. [same].) Violations of subdivision (b) of section 224.2 should therefore be subject to an analysis of prejudice, as required by the California Constitution.

The cases relied on by the mother did not find that the ICWA inquiry errors constituted Due Process violations per the United States Constitution. These cases also did not deem ICWA inquiry errors structural. Instead, they found the errors violated state law and adopted standards of prejudice under the California Constitution.

In support of her argument, the mother asks this Court to adopt the standard set forth in *In re A.R.* (2022) 77 Cal.App.5th 197 (*A.R.*), which applied a reversal per se approach to ICWA inquiry error. (MOB pp. 40-41.)

First, CSAC notes that *A.R.* is distinguishable from *Dezi C.* in two important respects. First, no inquiry of any kind was conducted into the children's possible Native American ancestry. Inquiry was not conducted with the mother, who was the children's only living parent. (*In re A.R.*, *supra*, 77 Cal.App.5th 197, 202-203.)

Second, inquiry was also not conducted with the paternal grandparents, with whom the children were placed. (*In re A.R.*, *supra*, 77 Cal.App.5th 197, 203.) The parental grandparents were therefore the best available individuals in the case to provide information about the father's Indian status, which would have provided insight into the children's Indian status. (See *In re Benjamin M.*, *supra*, 70 Cal.App.5th 735, 744-745 [lack of inquiry with father's available relatives was prejudicial because they were most likely to have information about Indian status of father, who was unavailable during the case].)

Contrarily, in *Dezi C.*, inquiry was conducted with both parents, who denied they had Indian heritage. Both parents confirmed this information with the juvenile court and in ICWA-020 forms. Moreover, the parents were raised by their biological relatives, and nothing in the record suggested the parents' knowledge of their heritage was incorrect or that the children might have heritage, as explained *ante*. There was also no deceased or missing parent in *Dezi C.*, unlike *A.R.* or *In re Benjamin M.*, and there was no reason to assume the parents' reports of Indian ancestry could not be trusted. (*In re Dezi C.*, *supra*, 79 Cal.App.5th 769, 776, 784.)

Regardless, the Fourth Appellate District, Division Three, did not adopt a reversal per se approach on grounds of structural error in *A.R.* It also did not find that the ICWA inquiry errors were of a federal constitutional dimension. To the contrary, it found that lack of strict compliance with section 224.2, subdivision (b) constituted a miscarriage of justice, as required by the California constitution. (*In re A.R.*, *supra*, 77 Cal.App.5th 197, 202.)

A.R. based this finding on state law. It acknowledged that section 224.2 codified and elaborated on ICWA's notice requirements, and more broadly imposed an agency's duty to inquire of a child's Indian status. Indeed, it found the primary protected party in these statutorily required inquiry and notice procedures were Native American tribes, as it afforded them the opportunity to intervene in appropriate cases. (*In re A.R.*, *supra*, 77 Cal.App.5th 197, 204-205.) The Court in *A.R.* did not discuss what the rule should be in cases where some, but not all, of the available parents and extended family

members have been interviewed about Indian ancestry or tribal affiliation.

In a footnote, the *A.R.* Court noted some benefits to a parent demonstrating prejudice on appeal in an ICWA inquiry case:

> "In many cases, it would be possible for a parent to uncover at least some evidence of Native American heritage, if it exists. Additionally, the scope of a parent's offer of proof might include evidence that the parent's effort to uncover heritage was stymied for some reason." (*In re A.R.*, *supra*, 77 Cal.App.5th 197, 205, fn. 2.)

CSAC submits this is supported by the harmless error standard set forth in *Dezi C.* If parents learn of Indian heritage in their families after a final judgment in juvenile court, or if parents cast doubt on their ancestral knowledge because they were precluded from uncovering it, they could bring such information before a reviewing court on appeal. (*In re Dezi C., supra,* 79 Cal.App.5th 769, 774, 779.)

Another case used by the mother, *In re K.H.* (2022) 84 Cal.App.5th 566 (*K.H.*), found that ICWA inquiry errors must be reversed based on a miscarriage of justice per the California constitution. (MOB pp. 38-39, 45-46, 51; *In re K.H.*, *supra*, 84 Cal.App.5th 566, 606-607.) There, the mother denied heritage on an ICWA-020 form and in testimony. The father submitted an ICWA-020 form stating he believed he had heritage but wrote "'unknown'" for name and location. (*In re K.H.*, *supra*, 84 Cal.App.5th 566, 592.) He did not think any relatives had mentioned Indian ancestry. The Agency did not conduct any additional inquiry despite being in contact with the maternal grandmother and paternal grandmother, and the parents listing other relatives with whom they were in communication. Further, the Agency notified 15 relatives about the case pursuant to

section 309, subdivision (e), but there was no indication in the record they were asked about ICWA. (*Id*. at pp. 591-594.)

The juvenile court later terminated parental rights. The father appealed, raising flawed ICWA inquiry as the sole issue. The Agency conceded ICWA inquiry error but argued that, in part, the error was harmless. (*In re K.H*., *supra*, 84 Cal.App.5th 566, 587-588.)

The *K.H*. court found that reversals had to be based on a showing that a miscarriage of justice occurred. It declined to adopt a 'reversal per se' approach, and disbelieved that ICWA inquiry errors defied a harmless error analysis or were deemed structural. (*In re K.H*., *supra*, 84 Cal.App.5th 566, 588-590, 606-608, fn. 13.) Ultimately, it reversed the order terminating parental rights because the record in the case regarding ICWA inquiry was so underdeveloped. (*Id*. at pp. 590, 602, 617-618.) The Court stated:

> "…undeveloped records often result in prejudicial error necessitating reversal for correction… Ensuring the record is reasonably developed on this matter, in turn, is critical to an accurate determination by the court as to whether further inquiry or notice, which is the means by which the interests of Indian tribes and Indian children are protected in dependency proceedings, is required." (*In re K.H*., *supra*, 84 Cal.App.5th 566, 589-590.)

CSAC submits that the test set forth in *Dezi C*. resolves this concern. By expanding the '"record"' to include any further proffer a parent makes on appeal to suggest that the child(ren) at issue may be '"Indian child[ren]"', the interests of Indian tribes and Indian children are protected while helping maintain stability and finality for dependent children. (*In re Dezi C., supra,* 79 Cal.App.5th 769, 774; *Jones T. v. Superior Court* (1989) 215 Cal.App.3d 240, 251 [finality is particularly important in juvenile dependency cases]; *In re Tiffany Y.*

(1990) 223 Cal.App.3d 298, 304 [children need to have their lives stabilized as quickly as possible].)

CSAC submits that the approach in *Dezi C.* "is not tied to whether the appealing parent can demonstrate to the juvenile court or a reviewing court a likelihood of success on the merits of whether a child is an Indian child", as suggested by *Watson* and the mother. (MOB pp. 43, 45-46, 51; *In re K.H.*, *supra*, 84 Cal.App.5th 566, 590-591.) The appealing parent is not required to prove the child's actual or potential Indian status. Rather, an appealing parent under *Dezi C.* is only required to bring forth information suggesting the child at issue *may* be an Indian child that *may* lead to a different ICWA finding by a juvenile court. (*In re Dezi C., supra,* 79 Cal.App.5th 769, 774, emphasis added; see also *In re A.R.*, *supra*, 11 Cal.5th 234, 252-253 [tethering the showing of prejudice to an outcome on the merits may not always be appropriate].) This could be information that a relative or a Nonrelative Extend Family Member (NREFM) had Indian ancestry, new information the parent learned after hearing about the ICWA during juvenile court proceedings, and so forth.

Indeed, a parent will normally have the best access to ICWA-related information, and the parent's counsel has a duty to help protect the parent's interest, if any, in his or her rights under the ICWA. (*In re Miracle M.* (2008) 160 Cal.App.4th 834, 847; *In re S.B.*, *supra*, 130 Cal.App.4th 1148, 1160.) This is also true if the parent was adopted as a child, as Congress provided authority for the adopted child who is now the parent to obtain tribal information from his or her adoption records. (*In re C.Y.* (2012) 208 Cal.App.4th 34, 41, *quoting* 25 U.S.C.

§ 1917, *and explaining In re J.T.* (2007) 154 Cal. App. 4th 986, 989–991, 994.)

The other cases cited by the mother in support of a reversal per se approach do not deem ICWA inquiry errors structural. They also do not find that errors alleged under subdivision (b) of section 224.2 transcend state law or the requirements of the California constitution. Rather, the cases found the ICWA inquiry errors prejudicial because they violated state law. (MOB pp. 39-40; *In re J.C.*, *supra*, 77 Cal.App.5th 70, 79 [agency's failure to conduct ICWA inquiry of certain extended relatives violated section 224.2, subdivision (b); *In re Antonio R.* (2022) 76 Cal.App.5th 421, 431 [same]; *In re Y.W.* (2021) 70 Cal.App.5th 542, 551-554 [same]; *In re H.V.* (2022) 75 Cal.App.5th 433, 438 [same]; *In re E.V., supra,* 80 Cal.App.5th 691, 698-700 [reversal based on various violations of section 224.2].) Although harmless error was not raised or addressed in the case of *In re T.G.*, the reversal was still based on state law, as well as the juvenile court's failure to make ICWA-related findings. (MOB p. 40; *In re T.G.* (2020) 58 Cal.App.5th 275, 292-299 [reviewing court deeming further inquiry under section 224.2, subdivision (e) inadequate.].)

CSAC submits that, under a *Dezi C.* approach, a reviewing court could still find ICWA inquiry error prejudicial. An appealing parent would only need to show that the appellate record provides a reason to believe the child at issue may be an Indian child, for which further inquiry may lead to a different ICWA finding by the juvenile court. A parent is not required to provide a proffer on appeal to show prejudice. As such, the mother's argument that *Dezi C.* requires a parent's appellate counsel to investigate a parent's Indian ancestry is

misguided. (MOB pp. 48-50; *In re Dezi C., supra,* 79 Cal.App.5th 769, 774, 779.)

Notably, the doctrine of harmless error has historically applied to ICWA inquiry and notice issues. These errors were not deemed structural, nor were they found to be violations of a federal constitutional dimension. (S*ee, e.g.*, *In re I.B.* (2015) 239 Cal.App.4th 367, 377; *In re D.N.* (2013) 218 Cal.App.4th 1246, 1253; *In re A.B.* (2008) 164 Cal.App.4th 832, 843; *In re Cheyanne F.* (2008) 164 Cal.App.4th 571, 576–579; *In re Miracle M.*, *supra*, 160 Cal.App.4th 834, 847; *In re S.B.*, *supra*, 130 Cal.App.4th 1148, 1162; *In re Christopher I.* (2003) 106 Cal.App.4th 533, 563–564, 567; *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1411.) Moreover, "'[i]n general, harmless error analysis applies in juvenile dependency proceedings… .'" (*In re M.R.* (2020) 48 Cal.App.5th 412, 429, quoting *In re M.S.* (2019) 41 Cal.App.5th 568, 59.)

CSAC agrees with the Department that the mother's rationale to support her structural error argument is faulty. (DAB pp. 64-67.) Although the mother and the Department discuss the case of *In re Christopher L., supra,* other cases cited by mother, *Arizona v. Fulminante*, *supra*, 499 U.S. 279 (*Arizona*) and *Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535 (*Judith P.*), do not support her request to deem ICWA inquiry errors structural. (MOB pp. 42-43.)

In *Arizona*, the United States Supreme Court found that the use of a coerced confession in a criminal trial, in violation of the Fourteenth Amendment's due process clause, was subject to a harmless-error analysis beyond a reasonable doubt. It was not structural error. (*Arizona v. Fulminante, supra*, 499 U.S. 279, 306-312.) While the Court

noted the dramatic effect that an involuntary confession could have on a trial, this was not a reason to eliminate the harmless error test. A reviewing court could still find such error prejudicial. (*Id*. at p. 312.)

In *Judith P.,* the reviewing court found the Department's failure to submit the social worker's status review report was a violation of due process and reversible per se. (*Judith P. v. Superior Court*, *supra*, 102 Cal.App.4th 535, 539-540, 558.) First, the Court found the statutory mandate for filing a report 10 days before the hearing was mandatory and obligatory. Second, the Court found an error in filing the report late was a structural error requiring reversal. (*Ibid*.) The *Judith P.* court relied on *Arizona* in holding the tardy delivery of the status report constituted structural error. (*Id*. at pp. 554-557.)

The year after *Judith P.* was decided, this Court criticized case law that analogized criminal cases to dependency cases. This Court observed that such an analogy was inapt. (*In re Celine R.*, *supra*, 31 Cal.4th 45, 58–59.)[4] Subsequently, the reviewing court in *In re Sabrina H.* (2007) 149 Cal.App.4th 1403 questioned whether *Judith P.* was still good case law in light of *In re Celine R.* (*In re Sabrina H., supra,* 149 Cal.App.4th 1403, 1420.)

CSAC submits that *Arizona* does not assist the mother because the *Arizona* Court declined to eliminate the harmless error test.

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[4] The Legislature responded to *Judith P.* by enacting a special statute for Los Angeles County. It did not impose the *Judith P.* requirements on the entire state. (See § 366.05.)

Arizona also involved the rights of a defendant in a criminal case, not the rights of a child or an Indian tribe in a juvenile dependency case.

Moreover, like the Court in *Arizona*, which found that a reviewing court could still find a coerced confession prejudicial, a reviewing court using the *Dezi C.* framework could still find the child welfare agency's lack of ICWA inquiry prejudicial. Such might be the case if a parent did not make a statement about his or her Indian status in the juvenile court, or a parent claimed that a relative informed the parent of Indian heritage in the family on appeal. (*In re Dezi C., supra,* 79 Cal.App.5th 769, 774, 776.)

Although the finding of structural error in *Judith P.* was inappropriate due to its reliance on criminal cases, CSAC notes that the language of the statute at issue, subdivision (c) of section 366.21, was unambiguous and mandatory. It provided, in pertinent part, "'[*a*]*t least* 10 calendar days' prior to the hearing (italics added), the social worker *shall* file with the court *and* provide to the parents or guardians, and to counsel for any dependent minors, a report on [specifics about contents of report] …" (*Judith P. v. Superior Court*, *supra,* 102 Cal.App.4th 535, 547-548, italics in original.) This is unlike subdivision (b) of section 224.2, which has no such mandatory language. As explained in section II, *post*, the language of the statute at issue in this case, section 224.2, subdivision (b), is discretionary. It also does not suggest with whom, at a minimum, inquiry should or must occur.

This Court has generally declined to apply structural error to dependency cases because, unlike criminal cases, the child's best interests are paramount. In the case of *In re James F.* (2008) 42

Cal.4th 901 (*James F.*), this Court clarified that structural error does not apply to an error in the process used to appoint a Guardian Ad Litem (GAL) for a parent. Any error in the process was amenable to the harmless error analysis. (*Id.* at pp. 901, 919.)

Notably, in *James F.*, this Court noted that dependency proceedings are different from criminal proceedings. The ultimate consideration in a dependency proceeding is the welfare of the child. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307.) Errors that can "'be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt'" are generally not structural defects. (*In re James F.*, *supra*, 42 Cal.4th 901, 917, quoting *Arizona v. Fulminante*, *supra*, 499 U.S. 279, 308.)

This Court reasoned, "[w]e cannot agree with the Court of Appeal majority that prejudice is irrelevant in a dependency proceeding when the welfare of the child is at issue and delay in resolution of the proceedings is inherently prejudicial to the child. (*In re James F.*, *supra*, 42 Cal.4th 901, 917.) Moreover, the use of flawed procedures in the appointment of a guardian ad litem for a parent does not inevitably and necessarily render dependency proceedings unfair in any fundamental sense. (*Id.* at p. 901.)

In *In re Celine R.*, *supra*, 31 Cal.4th 45, this Court considered the standard for removing an attorney from joint representation of clients based on a conflict of interest in the context of sibling representation. (*Id.* at pp. 55-62.) This Court found that a juvenile court's failure to appoint separate counsel for separate siblings was subject to a harmless error standard. (*Id.* at p. 59.) While an error in having one

attorney represent multiple defendants in a criminal case was generally not subject to a harmless error analysis, the rights at issue in criminal cases were different from those in dependency cases. (*Ibid*.) This Court reasoned:

> "After reunification efforts have failed, it is not only important to seek an appropriate permanent solution—usually adoption when possible—it is also important to *implement* that solution reasonably promptly to minimize the time during which the child is in legal limbo. … Courts should strive to give the child this stable, permanent placement, and this full emotional commitment, as promptly as reasonably possible consistent with protecting the parties' rights and making a reasoned decision. The delay an appellate reversal causes might be contrary to, rather than in, the child's best interests." (*In re Celine R.*, *supra*, 31 Cal.4th 45, 59.)

The mother's request that this Court deem ICWA inquiry errors structural, or impliedly structural via a reversal per se approach, should be denied because it fails to consider the child's welfare. CSAC asks this Court to apply the harmless error test set forth in *Dezi C*. because it balances the child's welfare with the rights of Indian tribes and parents. The parents are protected because they are able to bring forth any information they learn about the Indian ancestry of themselves or their children on appeal. Tribes are protected because, if the appellate record or the information brought forth by the parent suggests the children at issue may be Indian children, the case may be remanded back to the juvenile court for the child welfare agency to conduct further inquiry.

Children are also protected because the juvenile court's judgment in the dependency case is not automatically undone due to ICWA inquiry deficiencies. This is especially important when a parent claims

ICWA inquiry error on appeal from the termination of parental rights, like the parents in *Dezi C.*, as it can result in delay of a child's adoption. (See *In re M.M.* (2022) 81 Cal.App.5th 61, 71 ["[t]here are serious costs if courts delay finalizing permanency for a child in every case where extended family was not questioned, on the remote chance those relatives might have information which is inconsistent with the parents' disclaimer of Indian ancestry.]".)

II

A REVERSAL PER SE STANDARD IS UNAUTHORIZED BY THE STATUTORY SCHEME

A. Background.

In 1978, the United States Congress enacted ICWA in response to a crisis of abusive child welfare practices that resulted in the removal, often unwarranted, of large numbers of Indian children from their families and tribes for foster care or adoptive placement, usually in non-Indian homes. (25 U.S.C. § 1901(4); *Miss. Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 32; *In re Breanna S.* (2017) 8 Cal.App.5th 636, 649.) Congress determined "that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." (25 U.S.C. § 1901(5).) ICWA seeks to protect the interests of Indian children and promote the stability and security of Indian tribes and families. (*In re H.A.* (2002) 103 Cal.App.4th 1206, 1210.)

The BIA issued the 1979 Guidelines to assist state and tribal courts with interpreting ICWA. At the time, the BIA believed binding federal regulations were "not necessary to carry out the Act[]" and that

"[s]tate and tribal courts are fully capable of carrying out the responsibilities imposed on them by Congress without being under the direct supervision of this Department." (Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings ["1979 Guidelines"] 44 Fed.Reg. 67584 (Nov. 26, 1979).)

In June 2016, the BIA issued binding regulations for the first time since the enactment of ICWA because "a third of a century of experience has confirmed the need for more uniformity in the interpretation and application of this important Federal law." (Indian Child Welfare Act Proceedings, Final Rule, Pt. II, § C ["2016 Regulations"] 81 Fed.Reg. 38782 (June 14, 2016); see 25 C.F.R. § 23.)

The BIA also issued a new set of guidelines corresponding to the 2016 Regulations. (See Bureau of Indian Affairs Guidelines for Implementing the Indian Child Welfare Act ["2016 Guidelines"].) Like the 1979 guidelines, the 2016 Guidelines are nonbinding, but may serve as helpful persuasive authority for interpreting the 2016 Regulations. (See 81 Fed.Reg. 96476 (Dec. 30, 2016).) The 2016 Regulations went into effect on December 12, 2016. (2016 Regulations, 81 Fed.Reg. 38778 (June 14, 2016).)

In 2018, AB 3176 added and amended many ICWA provisions in the Welfare and Institutions Code to conform more closely with the 2016 Regulations. This included a revision of section 224.2, subdivisions (a)-(c) to expand the duties of inquiry under the ICWA. (See AB 3176 (Stats. 2018, ch. 833 § 5).) The statutory changes became effective on January 1, 2019.

B. Legal Principles and Standard of Review.

The term "'Indian child'" for ICWA purposes is a term of art. (25 U.S.C. § 1903(4).) ICWA defines an Indian child as "any unmarried

person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4).) Likewise, the terms "'Indian tribe'" and "'parent'" for ICWA purposes are also terms of art. (25 U.S.C. § 1903(8)-(9).)

The key to determining whether any given dependency case is also an ICWA case lies in determining whether or not the child and parent(s)[5] are members of a federally recognized tribe, or, if at least one biological parent is a tribal member, whether the child is eligible for tribal membership. As a leading treatise on California dependency practice and procedure explains:

> Many Americans, adults and children, have some American Indian ancestry. But only a small percentage of them are members of federally recognized Indian tribes or eligible for membership in such tribes. The [ICWA] does not apply to the many children involved in juvenile dependency proceedings who merely have some vague, distant, or possible Indian heritage. Instead, it only applies to children who are Indian children as defined by federal statute in the ICWA. (Seiser & Kumli on Cal. Juvenile Courts Practice and Procedure (2022 ed.), Dependency Proceedings [Seiser], § 2.125[1].)

In California, child welfare agencies and juvenile courts use a bifurcated process commonly referred to as ICWA inquiry and notice to determine whether a child is an Indian child, as defined by ICWA.

Inquiry under the ICWA includes, but is not limited to, asking the parents, extended family members, individuals who have an

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[5] As defined in 25 U.S.C. § 1903(9).

interest in the child, and others whether the child is or may be an Indian child. (§ 224.2, subd. (b).) "'[E]xtended family member'" is defined as the child's adult grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent. (§ 224.1, subd. (c); 25 U.S.C. § 1903(2).)

The duty to inquire starts at the child welfare department's initial contact with the family. If court intervention occurs, inquiry must again be made by the juvenile court at the first hearing, and the court must order the parties to disclose ICWA-related information if subsequent information becomes known. (§ 224.2, subds. (b) & (c).)

Inquiry and notice in California dependency proceedings occur pursuant to the following continuum:

1. Initial inquiry regarding whether there is "**reason to believe**" the child is an Indian child, **if so then**
2. Further inquiry is required to determine if there is "**reason to know**" the child is an Indian child, **if so[6] then**
3. Formal ICWA notice is sent to the tribes using the ICWA-030 "Notice of Child Custody Proceeding for Indian Child" court form.[7] (§§ 224.2 and 224.3, emphasis added.)

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[6] Once the juvenile court has made a finding of fact that there is "reason to know" the child is an Indian child as described by ICWA, then it must "treat the child as an Indian child" unless and until it determines the child is not an Indian child as defined by ICWA. (§ 224.2, subd. (i)(1).)

[7] That court form is available here: <https://www.courts.ca.gov/documents/icwa030.pdf> [as of Feb. 14, 2022].

CSAC agrees with the parties that an appellate court reviews a juvenile court's ICWA findings for substantial evidence. (DAB p. 18; See MOB pp. 20, 24, 32; *In re D.S.* (2020) 46 Cal.App.5th 1041, 1051.) In doing so, the Court of Appeal determines "'if reasonable, credible evidence of solid value supports the court's order. [Citations].'" (*In re D.F.* (2020) 55 Cal.App.5th 558, 565, citing *In re A.M.* (2020) 47 Cal.App.5th 303, 314; accord, *In re Austin J.* (2020) 47 Cal.App.5th 870, 885.) As with any review for substantial evidence, the appellate court must uphold the juvenile court's findings and orders if any substantial evidence supports them, and must resolve all conflicts in favor of affirming the judgment. (*Ibid*.)

When the facts are undisputed, the Court of Appeal may independently determine whether ICWA's requirements have been satisfied. (*In re D.F.*, *supra,* 55 Cal.App.5th 558, 565, citing *In re D.S., supra,* 46 Cal.App.5th 1041, 1051; accord *In re A.M., supra,* 47 Cal.App.5th 303, 314.) The Court of Appeal first does so by determining whether the Agency or the juvenile court had "'reason to believe'" the children were Indian children as of the challenged hearing. (*In re D.F.*, *supra*, 55 Cal.App.5th 558, 564-566; § 224.2, subd. (e).)

There is "reason to believe" a child is an Indian child if there is information suggesting that either the parent of the child or the child is a member or may be eligible for membership in an Indian tribe. (§ 224.2, subd. (e)(1).) If a Court of Appeal finds there was reason to believe the children were Indian children, however, it reviews the record for substantial evidence the Agency and the juvenile court complied with the requirements of further inquiry. (§ 224.2, subds. (e)(1)-(3).)

When there is a reason to believe the child is an Indian child, further inquiry is needed to determine whether there is reason to know a child is an Indian child. Further inquiry includes, but is not limited to: (1) interviewing the parents and extended family members with information about the child and the child's relatives as described in section 224.3, subdivision (a)(5); (2) contacting the BIA and State Department of Social Services for assistance in identifying the names and contact information of the tribes in which the child may be a member, or eligible for membership in, and contacting the tribes and any other person that may reasonably be expected to have information about the child's membership status or eligibility; and (3) contacting the tribe or tribes and any other individual that may reasonably possess information about the child's membership, citizenship status, or eligibility. Contact with a tribe shall, at minimum, include telephone, facsimile, or electronic mail contact to each tribe's designated agent for receipt of notices under the ICWA. Contact with a tribe includes sharing information the tribe deems necessary in order for the tribe to make a membership or eligibility determination. (§ 224.2, subd. (e).)

If there is substantial evidence the Agency and juvenile court satisfied the duty of further inquiry, then the Court of Appeal determines whether the further inquiry transformed the "*reason to believe*" the children *might* be Indian children into "*reason to know*" the children *are* Indian children. (*In re D.F.*, *supra*, 55 Cal.App.5th 558, 570; see also § 224.2, subd. (d) [defining reason to know].) Section 224.2, subdivision (d) expressly delineates the six circumstances

providing a "reason to know" the child involved in a proceeding is an Indian child. (§ 224.2, subd. (d).)

The federal and state-law duty to send formal ICWA notice is triggered if, and only if, the Court knows or has reason to know the children are Indian children. (25 U.S.C. § 1912(a); § 224.2, subd. (d); § 224.3, subd. (a).) Notice under the ICWA is not required just because a child has or may have some Indian heritage. Rather, the statute is clear that notice under the ICWA is only required if the court "knows or has reason to know that an Indian child is involved... ." (25 U.S.C. § 1912(a); *In re A.M., supra,* 47 Cal.App.5th 303, 323.)

It is the appellants' burden to show the evidence was not sufficient to support the juvenile court's ICWA findings. (*In re D.F.*, *supra*, 55 Cal.App.5th 558, 565; *In re Austin J., supra,* 47 Cal.App.5th 870, 885.)

C. Reversal Per Se is Unsupported by the Plain Language of Section 224.2, subdivision (b).

The mother asks this Court to reverse the juvenile court's judgment terminating parental rights because the Department did not conduct ICWA inquiry with the child's extended family members. She also asks this Court to adopt a "reversal per se" approach if any of the directives of section 224.2, subdivision (b) are violated, which, in essence, asks this Court to reverse the judgment of a juvenile court if a child welfare agency failed to conduct ICWA inquiry with any entity listed in the statute. (MOB pp. 20, 32, 41-45, 52.)

CSAC disagrees. The plain language of the statute does not require the Department to conduct ICWA inquiry with *all* of the children's extended family members. It states, in pertinent part:

> "…the county welfare department… has a duty to inquire whether that child is an Indian child. Inquiry includes, but is not limited to, asking the child, parents, legal guardian, Indian custodian, extended family members, others who have an interest in the child, and the party reporting child abuse or neglect, whether the child is, or may be, an Indian child… ." (§ 224.2, subd. (b).)

Nothing in the statute mandates inquiry with *all* of the entities listed or with specific entities. The language of the statute is directory, not mandatory. There is no use of the term "shall", and there is no penalty for failure to comply with its terms. (*B.B. v. Superior Court* (2016) 6 Cal.App.5th 563, 572.)

Comparatively, several other subdivisions in section 224.2 contain mandatory language via the use of "shall". (§ 224.2, subd. (e) [if there is reason to believe that an Indian child is involved the court and social worker "shall" make further inquiry and "shall" make that inquiry as soon as practicable]; § 224.2, subd. (f) [if there is reason to know the child is an Indian child, the Agency "shall" provide notice]; § 224.2, subd. (g) [the court "shall" confirm if due diligence was used to determine the child's tribal eligibility or membership status]; § 224.2, subd. (h) [an Indian tribe's membership or eligibility determination "shall" be conclusive]; § 224.2, subd. (i)(1) [the court "shall" treat the child as an Indian child when there is reason to know the child is an Indian child unless and until it is shown that the child does not meet the definition of an Indian child under the ICWA and state law; § 224.2, subd. (i)(2) [the court's determination that the ICWA does not apply "shall" be reversed if it receives subsequent information providing a reason to believe the child is an Indian child].)

CSAC submits that, had the Legislature intended to require inquiry with each entity listed in subdivision (b) of section 224.2, it would have used the word "'shall'" as it did in several other subdivisions within the same section. (See *In re Richard E.* (1978) 21 Cal.3d 349, 353-354; see also *Friends of the Library of Monterey Park v. City of Monterey Park* (1989) 211 Cal.App.3d 358, 379 [a reviewing court infers the Legislature intended a mandatory meaning or action in using the word "'shall'"].)

Subdivision (b) of section 224.2 also explains that "[i]nquiry includes, but is not limited to" the prescribed entities. In contrast, subdivision (e)(2) of section 224.2 expressly states that "[f]urther inquiry includes, but is not limited to, ***all of the following***" actions set forth in paragraphs (A) to (C) of that same statute. (§ 224.2, subd. (e)(2), emphasis added.) By omitting similar language in subdivision (b) of section 224.2, the Legislature did not intend to mandate initial inquiry with all of the entities listed. (See *In re Gerald J.* (1991) 1 Cal.App.4th 1180, 1186, quoting *Marsh v. Edwards Theatres Circuits, Inc.* (1976) 64 Cal.App.3d 881, 891 ["[w]here a statute on a particular subject omits a particular provision, the inclusion of such a provision in another statute concerning a related matter indicates an intent that the provision is not applicable to the statute from which it was omitted. [Citation]"].)

This is supported by subsequent action taken by the Legislature. Subsections (1) and (2) of section 224.2, subdivision (e) were added after the amendments found in section 224.2, subdivisions (a)-(c), via the passage of Assembly Bill (AB) 2944 (Stats. 2020, ch. 104), and took effect in 2020. (Assem. Bill No. 2944 (2019–2020 Reg. Sess.) ch. 104, §

15, pp. 23–25.) At that time, the Legislature could have also added the same language from subsection (2) of subdivision (e) to mandate inquiry with "all of the following" entities listed in subdivision (b). (§ 224.2, subd. (e)(2).) It did not do so.[8]

CSAC respectfully asks this Court to interpret the inquiry entities in section 224.2, subdivision (b) as recommended sources of ICWA-related information, as opposed to "never-ending to-do lists," as explained by Justice Baker in his dissent in *In re A.C.* (2022) 86 Cal.App.5th 130 (*A.C.*). There, Justice Baker interpreted these entities as examples of categories with whom a child welfare agency should

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[8] In his concurring opinion in the case of *In re Adrian L.*, Justice Kelley noted that the legislative reports behind AB 3176 did not mention expanding the duty of initial inquiry to include "'extended family members and others who have an interest in the child'" in *every* dependency case. (*In re Adrian L.* (2022) 86 Cal.App.5th 342, 365 (conc. opn. of Kelley, J.), italics in original, citing Assem. Com. on Human Services, Analysis of Assem. Bill No. 3176 (2017–2018 Reg. Sess.) as introduced Feb. 16, 2018; Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3176 (2017–2018 Reg. Sess.) as amended Apr. 11, 2018; Assem. Com. on Appropriations, Analysis of Assem. Bill No. 3176 (2017–2018 Reg. Sess.) as amended Apr. 11, 2018; Assem. Off. of Research, 3d reading analysis of Assem. Bill No. 3176 (2017–2018 Reg. Sess.) as amended May 25, 2018; Sen. Com. on Judiciary, Analysis of Assem. Bill No. 3176 (2017–2018 Reg. Sess.) as amended June 18, 2018; Sen. Com. on Appropriations, Analysis of Assem. Bill No. 3176 (2017–2018 Reg. Sess.) as amended June 18, 2018; Sen. Com. on Appropriations, Analysis of Assem. Bill No. 3176 (2017–2018 Reg. Sess.) as amended June 18, 2018; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 3176 (2017–2018 Reg. Sess.) as amended Aug. 17, 2018; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 3176 (2017–2018 Reg. Sess.) as amended Aug. 22, 2018; Conc. in Sen. Amends., Assem. Bill No. 3176 (2017–2018 Reg. Sess.) as amended Aug. 22, 2018.)

conduct inquiry. This was supported by the language specifying that "[i]nquiry includes, but is not limited to" the listed entities. (§ 224.2, subd. (b), *In re A.C.*, *supra*, 86 Cal.App.5th 130, 142-143 (dis. opn. of Baker, J.).) Per Justice Baker:

> "That is just the sort of language one uses when recommending a course of action while permitting the person who will be undertaking the action to consider other options in light of what is appropriate in any given case. Read in that manner, the various provisions of section 224.2 direct courts to manage an appropriate inquiry and consider all of the enumerated potential sources of ICWA-related information as necessary to arrive at a reasonable conclusion of whether a child is, or may be, an Indian child. (*In re A.C.*, *supra*, 86 Cal.App.5th 130, 142-143 (dis. opn. of Baker, J.; see *Ezequiel G.*, *supra*, 81 Cal.App.5th 984, 1004-1005 ["section 224.2 describes the persons of whom an ICWA inquiry should be made".] *Id.* at p. 1002.)

This makes sense, as the juvenile court's ability to ultimately find that the ICWA does not apply to the proceedings is premised on it finding that the child welfare agency conducted "proper and adequate further inquiry and due diligence... ." (See § 224.2, subd. (i)(2).) Such language authorizes the juvenile court to assess the appropriateness of ICWA inquiry in any given case, instead of requiring child welfare agencies to comply with the ICWA inquiry provision of section 224.2, subdivision (b) mechanically or strictly. (See *In re Ezequiel G.*, *supra*, 81 Cal.App.5th 984, 1007.) This is further supported by the statute's discretionary language, explained *ante*. (*County of Tulare v. Campbell* (1996) 50 Cal.App.4th 847, 853; accord, *In re A.V.* (2017) 11 Cal.App.5th 697, 705 [if a statute does not demand strict compliance with its terms, substantial compliance is the governing test].)

Viewing the entities in the statute as recommended sources for information about the child's Indian status is in line with the 2016 regulations that the ICWA inquiry statutes aimed to follow.

As noted by the regulations:

> "[a] few commenters stated that the regulations should be clear about whom, at a minimum, agencies should ask about the child's ancestry (e.g., parents, custodians, other relatives that have a close relationship with the child), [and] what should be asked (any potential Indian heritage that could indicate citizenship or eligibility)[, etc.] Likewise, commenters asserted that State courts need specificity as to what will satisfy the investigation requirements. . . . Response: ***The final rule directly addresses courts only… [and] requires the court to ask all participants in the case*** whether there is reason to know the child is an Indian child on the record."[9] (Indian Child Welfare Act Proceedings (81 Fed.Reg. 38778, 38804-38805 (June 14, 2016), emphasis added.)

Clearly, those finalizing the Regulations were on notice of concerns regarding unspecific and directory ICWA inquiry requirements. As the Legislature relied on the Regulations, they are indicative of Legislative intent, unlike the ICWA California Compliance Task Force relied on by the mother. (MOB pp. 25-29.)[10] There is nothing in section 224.2, subdivision (b) that directs child welfare

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[9] The Legislature did mirror this Regulation via subdivision (c) of section 224.2, which imposes a duty on the juvenile court to ask each participant at their first appearance in court if "the participant knows or has reason to know that the child is an Indian child." (§ 224.2, subd. (c).)

[10] CSAC agrees with the Department's argument addressing the Task Force report. (DAB pp. 58-61.)

agencies *how* to discharge the duty of inquiry in the statute, nor does the statute specify how many entities an agency must ask about the child's ancestry. (See *In re Ezequiel G.*, *supra*, 81 Cal.App.5th 984, 1007 [statute does not specify the number of extended family members the agency must interview before it has appropriately discharged its duty of inquiry.] see also *In re E.L.* (2022) 82 Cal.App.5th 597, 607 ["[t]o what extent are social workers required to comb the nether reaches of the land to find relatives who may shed light on a child's possible Indian heritage?"].) The statute simply states with whom inquiry should occur in light of the facts and circumstances of the case.

CSAC submits that the parents in *Dezi C.* were the best sources of information about the children's heritage and were certain about their respective ancestral backgrounds. There, the parents repeatedly denied they had Native American heritage. The parents were raised by their biological relatives, which made it unlikely they were unaware of their ancestry or that their knowledge of their heritage was incorrect. There was nothing in the record to suggest that the children or the parents might have Native American heritage. (*In re Dezi C., supra,* 79 Cal.App.5th 769, 774, 779-782, 786; see also *In re Benjamin M., supra*, 70 Cal.App.5th 735, 743, citing *In re J.M.* (2012) 206 Cal.App.4th 375, 382 ["the evidence already uncovered in the initial inquiry [may be] sufficient for a reliable determination."].)

As such, reversing a factual circumstance like the one in *Dezi C.* erroneously presumes that a parent's statement regarding his or her Indian ancestry, or lack thereof, is ill informed or misleading. (See *In re Y.W.*, *supra*, 70 Cal.App.5th 542, 554; *In re Antonio R.*, *supra*, 76 Cal.App.5th 421, 432; *In re Dezi C., supra,* 79 Cal.App.5th 769, 784

[parents presumed knowledgeable of own Indian ancestry in the usual case where the parents were not adopted].) Regardless, if that is or becomes the case, a parent can proffer new or additional information about their Indian ancestry on appeal if this Court adopts the harmless error standard in *Dezi C.* (*In re Dezi C., supra,* 79 Cal.App.5th 769, 774, 779.) Presumably, parents would be motivated to investigate and provide information about Indian ancestry as it may afford them enhanced protection under the ICWA.

If the statute was interpreted to require inquiry with each entity, meaning the child, parents, extended family members, others with an interest in the child, reporting party, and legal guardian and/or Indian custodian, if one or both exist, it would be theoretically or practically impossible for a child welfare agency to discharge its duty of inquiry. (*In re A.C.*, *supra*, 86 Cal.App.5th 130, 142 (dis. opn. of Baker, J.).) Moreover, some children have such large extended families that contacting every extended family member identified in the record would be impracticable or unhelpful. (*In re Ezequiel G.*, *supra*, 81 Cal.App.5th 984, 1006; see *In re Dezi C., supra,* 79 Cal.App.5th 769, 785 [child welfare agencies cannot reasonably ensure "[no] stone is left unturned" in conducting inquiry into a child's Indian status].) CSAC submits that such an interpretation would lead to absurd results unintended by the Legislature. (See *People v. Pieters* (1991) 52 Cal.3d 894, 898-899 [the language of a statute should not be read literally if doing so would result in absurd consequences unintended by the Legislature], see also *In re Christina A.* (2001) 91 Cal.App.4th 1153, 1162 [if a statute can be interpreted in more than one way, the court must adopt the meaning that conforms to the spirit of the statutory

scheme and reject that which would result in absurd consequences].)[11]

When a violation of section 224.2, subdivision (b) has been alleged on appeal, reviewing courts have generally assessed whether ICWA inquiry occurred with the child's extended family members. Much of the case law on the issue did not address whether ICWA inquiry occurred with the child, others who have an interest with the child, the party reporting child abuse or neglect, or the legal guardian and/or Indian custodian, if one existed. (See, *e.g.*, *In re Y.W.*, *supra*, 70 Cal.App.5th 542; *In re Benjamin M.*, *supra*, 70 Cal.App.5th 735; *In re Josiah T.* (2021) 71 Cal.App.5th 388; *In re H.V.*, *supra,* 75 Cal.App.5th 433; *In re Darian R.* (2022) 75 Cal.App.5th 502; *In re S.S.*, *supra,* 75 Cal.App.5th 575; *In re A.C.* (2022) 75 Cal.App.5th 1009; *In re Antonio R.*, *supra*, 76 Cal.App.5th 421; *In re K.T.* (2022) 76 Cal.App.5th 732; *In re J.C.*, *supra*, 77 Cal.App.5th 70; *In re A.R.*, *supra*, 77 Cal.App.5th 197; *In re I.F.* (2022) 77 Cal.App.5th 152; *In re G.H.* (2022) 84 Cal.App.5th 15.) The mother in this case similarly fails to address whether ICWA inquiry occurred with entities in the statute other than the children's extended family members. (MOB pp. 20, 32, 41.)

Several other cases have declined to interpret the statute to mean that inquiry is required with each entity listed, as well as with all of the child's extended family members. (*In re Antonio R.*, *supra*, 76

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[11] *In re Adrian L.*, Justice Kelley also interpreted subdivision (b) of section 224.2 to require ICWA inquiry with all of the listed entities, and/or a child's extended family, only when a child was removed under section 306. CSAC submits that this highlights the confusion and lack of uniformity that has resulted from attempts to interpret the statute. (See *In re Adrian L., supra,* 86 Cal.App.5th 342, 353-375 (conc. opn. of Kelley, J.).)

Cal.App.5th 421, fn. 6 [adequacy of ICWA inquiry limited to relatives identified by the parent on appeal]; *In re J.K.* (2022) 83 Cal.App.5th 498, 508 fn.7 [reasonable and diligent inquiry efforts did *not* include interviewing very young children or "other extended family members who would not be expected to have any information regarding the child's Indian status,"]; *In re T.G.*, *supra*, 58 Cal.App.5th 275, 290 [interpreting the duty to inquire as obligating inquiry with "all relevant involved individuals"]; *In re K.H.*, *supra*, 84 Cal.App.5th 566, 604, 621 [agency's inquiry must extend far enough to reasonably ensure that, if there is information the child is or may be an Indian child, that information is gathered]; *In re D.S.*, *supra*, 46 Cal.App.5th 1041, 1052 [interpreting child welfare agency's initial duty of inquiry to include asking "all involved persons" whether the child may be an Indian child].) CSAC submits that this is likely because, again, such an interpretation would be absurd or unreasonable. The adequacy of ICWA inquiry should be based on the facts and circumstances of each case. This includes whether ICWA inquiry was conducted with the entity or entities most likely to have information about the child's Indian status, like the parents in *Dezi C.*, as explained above.

CSAC further submits that a reviewing court is likely unable to enforce a reversal per se approach to the statute. A child welfare agency cannot disclose any information concerning the identity of a reporting party. The reporting party's name cannot be included in reports disbursed to the parties and filed with the juvenile court. (See Pen. Code § 11167, subd. (d).) Additionally, because "others who have an interest in the child" is not defined by statute, the child welfare

department, juvenile court, and reviewing court are left to speculate whom, if anyone, qualifies. (§ 224.2, subd. (b).)

In *A.C.*, the Second Appellate District, Division Five impliedly found the child's caregiver and NREFM as an individual with an interest in the child under subdivision (b) of section 224.2 because the parties had identified the NREFM as such in a joint stipulation filed with the court. (*In re A.C., supra,* 86 Cal.App.5th 130, 130.) In his dissent, Justice Baker aptly noted:

> "[J]uvenile courts and social services agencies must now also contact and interview nonrelated extended family members presumably because they qualify as 'others who have an interest in the child.' But what does *that* mean? How is a court or social services agency to decide who else has an interest in a child such that ICWA-related questions must be posed? Do family friends qualify? Therapists? Pastors? Teachers? Coaches? Doctors? Dentists? The ambiguity is remarkable." (*In re A.C.*, *supra*, 86 Cal.App.5th 130, 141 (dis. opn. of Baker, J.).)

CSAC submits that the harmless error standard in *Dezi C.* ameliorates this problem. Presumably, a parent would have the best information about who has an interest in his or her child. A parent would also have the best information about which of these individuals were closest to the family, or had a long relationship with the family, such that they may have pertinent information regarding the child's Indian status. *Dezi C.* would allow a parent to bring forth a person with an interest in the child on appeal, who was not made available to the agency or brought before the juvenile court, as a person with information about the child's Indian status. (*In re Dezi C., supra,* 79 Cal.App.5th 769, 774.)

In sum, interpreting subdivision (b) of section 224.2 to require inquiry with each entity listed is impractical, inconsistent with

Legislative intent, and unsupported by the statute's plain language. This Court should view the entities listed in the statute as recommended sources for information about the child's Indian status. This Court should also adopt the approach set forth in *Dezi C.* because it allows parents to identify individuals who may have information about the child's Indian status on appeal, like others with an interest in the child, as parents are the most likely entity to have information about which individuals have such information.

CONCLUSION

CSAC respectfully asks this Court to adopt the standard of prejudice set forth in *Dezi C.* to ICWA inquiry errors. As errors alleged under the statute fall exclusively under the California Constitution, prejudice must be shown to overturn a judgment based on the error. *Dezi C.* allows a parent to show prejudice based on the appellate record *and* any proffer the parent makes on appeal, and does not require that the parent show the child at issue is, in fact, an Indian child. The parent must only show there is information that suggests there is a reason to believe the child is an Indian child, which could cause the juvenile court to render a different ICWA finding.

CSAC further asks that this Court decline to deem ICWA inquiry errors structural. This Court has distinguished dependency cases from criminal cases because, in a dependency case, the child's welfare is paramount. Dependent children have different interests than criminal defendants. Importantly, harmless error has historically applied to inquiry and notice issues under the ICWA.

Finally, this Court should decline to interpret a child welfare agency's duty under subdivision (b) of section 224.2 to require inquiry with every entity listed in the statute and/or with a child's entire

extended family. Such an interpretation is impractical and inconsistent with the plain language of the statute, which does not include mandatory verbiage. CSAC asks this Court to interpret the entities listed in the statute as recommended sources of information about the child's Indian status. This allows child welfare agencies and juvenile courts to determine which individuals under the statute have the best ICWA-related information, and allows the juvenile court to make the appropriate assessment per section 224.2, subdivision (i)(2). Moreover, under *Dezi C.*, a parent can identify these individuals on appeal if inquiry with them did not occur.

CSAC asks this Court to affirm the decision of the Second Appellate District, Division Two.

DATED: March 1, 2023

Respectfully submitted,

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WORD COUNT CERTIFICATION

(Cal. Rules of Court, rule 8.360(b)(1))

The text of this brief consists of 12,707 words as counted by the Microsoft Word 2016 word-processing program used to generate the brief.

DATE: March 1, 2023

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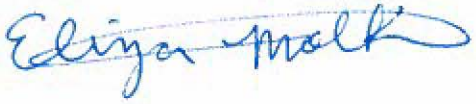

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PROOF OF SERVICE BY ELECTRONIC SERVICE
(CRC Rules 8.71 & 8.77; 2.251; Civ. Code Proc., §§ 1013a & 1010.6)
(Supreme Court Case No. **S275578**; 2nd District, Division Two
Case No. B317935; In re: **DEZI C.**)

I, Arlene Martinez, declare that: I at least 18 years old; I am not a party to the case; and my residence or business address is 5530 Overland Avenue, Suite 170, San Diego CA 92123. I have electronically served this **BRIEF OF AMICUS CURIAE CALIFORNIA STATE ASSOCIATE OF COUNTIES IN SUPPORT OF LOS ANGELES DEPARTMENT OF CHILDREN AND FAMILY SERVICES** from the electronic notification address of SDCCJD.Appeals@sdcounty.ca.gov, on March 1, 2023 at approximately 12:00 p.m., to the following:

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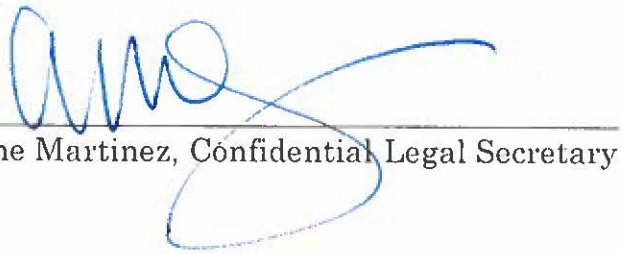
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 1, 2023



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