Supreme Court No. S275578

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

In re DEZI C., et al., Persons Coming Under the Juvenile Court Law.	)	2nd Civ. No. B317935
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Petitioner and Respondent, v. ANGELICA A., Defendant and Appellant.	)	Los Angeles County Superior Court Case No. 19CCJP08030A-B

APPELLANT 'S RESPONSE TO AMICUS CURIAE CALIFORNIA STATE ASSOCIATION OF COUNTIES

On Appeal from an Order of the Juvenile Court
State of California, County of Los Angeles

Hon. Robin R. Kesler, Judge Pro Tempore

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INTRODUCTION

Amicus Curiae, California State Association of Counties ("CSAC"), filed a brief supporting Respondent Los Angeles County Department of Children and Family Services ("DCFS"). CSAC requests this Court interpret Welfare and Institutions Code, section 224.2, subdivision (b)[1] as not mandating the child welfare agency conduct an inquiry with "each entity listed in the statute or the child's entire extended family." (AB 12.) It ignores the remedial purpose of the Indian Child Welfare Act ("ICWA") and California law.

CSAC also requests this Court interpret the "entities" as only "recommended sources of information about the child's Indian status." (AB 13.) Appellant disagrees. Congress and the California Legislature presume the best interest of the child includes a relationship with tribal heritage. (25 U.S. C., § 1901, et seq.; Welf. & Inst. Code, § 224 et seq.) CSAC's position would allow the agency to just ignore the mandates of section 224.2, subdivision (b), and make no inquiries of anyone other than the parents, insulating the "failure to inquire" error from review. Under CSAC's theory, in the event the agency fails to make any ICWA inquiries at all, and if the parent appeals the termination of parent rights order, then the burden would be on appointed appellate counsel to investigate the child's potential Indian ancestry and to provide the reviewing court with evidence of the

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

child's Indian ancestry. Although convenient for county counsels, that is not the law.

Additionally, applying the reversal per se standard does not lead to "absurd results." (AB 13.) Remand is necessary to make inquiries of the parents to obtain the names of extended family members who may have knowledge of the child's Indian ancestry. Often the parents will not have the "best information" about the child's Indian ancestry (AB 13) because of mental illness or substance abuse. The parents may not have a relationship with their extended family members so they may be unaware of their Indian heritage. (See *In re T.G.* (2020) 58 Cal.App.5th 275, 294 ["over time, Indian families, particularly those living in major urban center . . . may well have lost the ability to convey accurate information regarding their tribal status"].)

Contrary to CSAC's contention that *Dezi C.* "protects the rights of Indian tribes, dependent children and parents" because it "allows" a parent to proffer Indian ancestry information on appeal (AB 13), *Dezi C.* only protects the agency's failure to fulfill its duty under ICWA and California law. *Dezi C.* imposes a de facto requirement the parent's appointed appellate counsel investigate the child's potential ancestry, or appellate counsel will be seen as ineffective. (See Amicus Curiea Brief of California Appellate Defense Counsel.) CSAC' defense of *Dezi C.* is weak and ill-conceived.

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DISCUSSION

1. Initial ICWA Inquiry Errors Are Tantamount to Federal Constitutional Errors and Are Structural Error.

A. Most Reviewing Court Do Not Agree a Parent Must Show Prejudice in ICWA Inquiry Error Cases.

CSAC's contention that, in these lack of initial ICWA inquiry appeals, "most" reviewing courts agree the appealing party must show prejudice (AB 16) is inaccurate. Only *Dezi C.* and five other published cases have adopted the "reason to believe rule" requiring appellant show prejudice. (*In re A.C.* (2020) 65 Cal.App.5th 1060 [4th Dist., Div. 2]; *In re Q.M.* (2022) 79 Cal.App.5th 1058 [2nd Dist., Div. 3]; *In re M.E.* (2022) 79 Cal.App.5th 73 [3rd Dist.]; *In re J.W.* (2022) 81 Cal.App.5th 384 [2nd Dist., Div. 8]; *In re Ezequiel G.* (2022) 81 Cal.App.5th 984 [2nd Dist. Div. 3].

Many more Districts of the Court of Appeal have applied the reversal per se standard, requiring no showing of prejudice. (*In re T.G.*, *supra,* 58 Cal.App.5th 275, 288-289 [2nd Dist, Div. 7; review denied March 24, 2021]; *In re Y.W.* (2021) 70 Cal.App.5th 542, 556 [2nd Dist., Div. 7]; *In re H.V.* (2022) 75 Cal.App.5th 433, 438, fn. 4 [2nd Dist., Div. 5]; *In re Antonio R.* (2022) 76 Cal.App.5th 421, 435 [2nd Dist., Div. 7]; *In re* K.T. (2022) 76 Cal.App.5th 732 [4th Dist., Div. 2]; *In re J.C.* (2022) 77 Cal.App.5th 70, 80 [2nd Dist., Div. 7]; *In re A.R.* (2022) 77 Cal.App.5th 197, 207 [4th Dist., Div. 3]; *In re E.V.* (2022) 80 Cal.App.5th 691 [4th Dist., Div. 3]; *In re M.B.* (2022) 80

Cal.App.5th 617 [2nd Dist., Div. 7]; *In re Rylei* S. (2022) 81 Cal.App.5th 309 [2nd Dist., Div. 7]; *In re E.L.* (2022) 82 Cal.App. 5th 597 [2nd Dist., Div. 6]; *In re Ricky* R. (2022) 82 Cal.App.5th 671 [4th Dist., Div.2]; *In re* J.K. (2022) 83 Cal.App.5th 498 [2nd Dist., Div. 6]*; In re Baby Girl M.* (2022) 83 Cal.App.5th 635 [2nd Dist., Div. 5]; *Adoption of* M.R. (2022) 84 Cal.App.5th 537 [3d Dist.]; *In re K.H.* (2022) 84 Cal.App.5th 123 [5th Dist.]; *In re Oscar* H. (2022) 84 Cal.App.5th 933 [2nd Dist., Div. 8]; *In re E.C.* (2022) 85 Cal.App.5th 123 [5th Dist.]; and *In re A.C.* (2022) 86 Cal.App. 5th 130 [2nd Dist., Div. 5].)

B. CSAC's Contention Structural Error Does Not Apply to Dependency Cases Is Misplaced.

CSAC contends ICWA initial inquiry errors are neither of a federal constitutional dimension, nor structural error, so a showing of prejudice is required. (AB 14.) However, when the agency fails to make initial ICWA inquiries, the agency ensures that showing can never be met, building in structural error.

Contrary to CSAC's assertion that structural errors only have been applied in the context of a criminal trial (AB 16), this Supreme Court rejected that proposition in *In re Christopher L.* (2022) 12 Cal.5th 1063, holding "we have never held that structural errors can arise only in the criminal context." *(Id.* at 1074.) As this Court explained, "several Court of Appeal decisions had found structural error in the dependency context." (*Id.* at p. 1075.) This court noted the following cases:

> failure to provide notice to the parent. (See, e.g., *In re Jasmine G.* (2005) 127 Cal.App.4th 1109, 1116 [26 Cal. Rptr. 3d 394] [failure to give proper notice to a parent

> facing termination of her parental rights]; *Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535, 558 [126 Cal. Rptr. 2d 14] [failure to timely serve report recommending termination of reunification services in advance of a dependency hearing]; *In re Josiah S.* (2002) 102 Cal.App.4th 403, 417–418 [125 Cal. Rptr. 2d 413] [improper denial of a parent's request for a contested hearing in a dependency proceeding]; *In re Kelly D.* (2000) 82 Cal.App.4th 433, 440 [98 Cal. Rptr. 2d 188] [failure to provide notice and a contested hearing on the issue of visitation frequency "resulted in a miscarriage of justice" requiring reversal of the order, with no discussion of prejudice]; *In re James Q.* (2000) 81 Cal.App.4th 255, 268 [96 Cal. Rptr. 2d 595] [conditioning a contested hearing on an offer of proof was a "miscarriage of justice"].)

(*In re Christopher L., supra,* at p. 1075.)

Reviewing courts have found structural errors concerning notice. (See *In re B.G.* (1974) 11 Cal.3d 679, 689-690; *In re Brendan P.* (1986) 184 Cal.App.3d 910, 926; *In re DeJohn B.* (2000) 84 Cal.App.4th 100, 110 ["The county has a constitutional responsibility to use due diligence to notify absent parents before depriving them of that 'most basic of civil rights'--the care, custody, and companionship of their children. [Citation.] Where SSA fails even to make an effort to provide mother the procedural safeguard of notice, reversal is mandated."].) Lack of subject matter jurisdiction is also structural error. (*In re A.C.* (2005) 130 Cal.App.4th 854, 857 ["We conclude California does not have subject matter jurisdiction of this dependency proceeding and reverse with directions to the juvenile court to dismiss the dependency petition."].)

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C. CSAC Does Not Accurately Describe the Concept of "Structural Error."

CSAC confuses the concepts of "federal constitutional error" with per se reversal because of "structural error." (AB 24-29.) Although structural errors also are often "constitutional" errors because they involve due process or notice, that is not what is the key factor. The key factor in determining an error to be structural is whether the prejudicial effect can be assessed by looking at the trial record to see whether the outcome may have been different. An error is "structural" if it occurs outside the trial arena and effects the framework at the trial such that the effect of error cannot be evaluated.

Also, CSAC misconstrues appellant's argument concerning structural error. (AB 25.) Appellant did not argue the harmless error test should be eliminated. Appellant's position is that the agency's failure to make the necessary inquiries is not trial error so its effect on the outcome is impossible to measure. (Appellant's Opening Brief on the Merits ("AOBM"), pp. 43-45.) The error here can not be quantitatively assessed. Without an inquiry by the agency, the tribe has no way of ever knowing that there is a child "out there" that may be an Indian child.

In addition to *Christopher L.* and *Weaver v. Massachusetts* (2017) __ U.S. __ [137 S.Ct. 1899, 1907, 198 L.Ed.2d 420] discussed in the AOBM at pp. 41-44, the Supreme Court's precursor decisions are relevant. In his majority opinion as to "Part II" of *Arizona v. Fulminante* (1991) 499 U.S. 279 [111 S.Ct. 1246, 113 L.Ed.2d 302], Chief Justice Rehnquist explained the

harmless error analysis applied when analyzing cases involving "'trial error' – error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of the other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." (*Id.* at pp. 307-308.) Chief Justice Rehnquist went on to explain the types of errors which had been held to be "structural:"

> The admission of an involuntary confession -- a classic "trial error" -- is markedly different from the other two constitutional violations referred to in the *Chapman* footnote as not being subject to harmless-error analysis. One of those violations, involved in *Gideon v. Wainwright*, 372 U.S. 335 (1963), was the total deprivation of the right to counsel at trial. The other violation, involved in *Tumey v. Ohio*, 273 U.S. 510 (1927), was a judge who was not impartial. These are structural defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards. The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial. Since our decision in *Chapman*, other cases have added to the category of constitutional errors which are not subject to harmless error the following: unlawful exclusion of members of the defendant's race from a grand jury, *Vasquez v. Hillery*, 474 U.S. 254 (1986); the right to self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 177-178, n. 8 (1984); and the right to public trial, *Waller v. Georgia*, 467 U.S. 39, 49, n. 9 (1984). Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.

(*Arizona v. Fulminate, supra*, 499 U.S. at pp. 309-310.)

The Supreme Court revisited this question in *United States*

v. Gonzalez-Lopez (2006) 548 U.S. 140 [126 S.Ct. 2557, 165 L.Ed.2d 409], concerning the erroneous deprivation of a defendant's right to retained counsel of his own choosing. (*Id.* at pp. 142-143.) Justice Scalia explained *Fulminante* and the "structural" error question:

> Although it is hard to read that case as doing anything other than dividing constitutional error into two comprehensive categories, our ensuing analysis in fact relies neither upon such comprehensiveness nor upon trial error as the touchstone for the availability of harmless-error review. Rather, here, as we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error.

(*Id.* at p. 148, fn. 4.)

The Supreme Court has restated the principle: "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that is 'affect[s] the framework within which the trial proceeds.' rather than being 'simply an error in the trial process itself." (*Weaver v. Massachusetts, supra,* 137 S.Ct. at p., 1907.) Here, too, the error was not merely "trial error," but was error infecting the framework of the trial, compelling per se reversal.

The point here is that with no inquiry of the parents and extended family members into Indian ancestry, the ICWA finding cannot be evaluated. When the agency fulfills its duty of inquiry, it provides the juvenile court with a more complete picture of the child's potential Indian ancestry and allows the court to make an

ICWA finding based on substantial evidence. (*In re K.H.*, *supra*, 84 Cal.App.5th at p. 590.) The absence of sufficient ICWA inquiry results in unfairness to the Indian tribes and renders the entire proceedings fundamentally unfair because the tribes have no way of knowing that there may be an Indian child in a dependency proceeding in the juvenile court. Without the inquiry, there is way of determining whether ICWA applies or not. The error is structural.

D. CSAC's Attempt to Distinguish *In re A.R.* Is Misplaced.

CSAC attempts to factually distinguish *In re A.R.*, *supra*, 77 Cal.App.5th 197, arguing that, there, the agency failed to ask the mother and the grandparents, with whom the children were placed. (AB 18.) However, *A.R.*'s holding is not limited to situations in which there was no ICWA inquiry of anyone. As *A.R.* explained, section 224.2, subdivision (b), imposes on the agencies and juvenile court, but not the parents, an affirmative and continuing duty to inquire whether the child is an Indian child. (*Id.* at p. 204.) Continuing, *A.R.* held the rule only allowing reversal in cases in which the parent makes an offer of proof concerning Native American heritage amounted to a rule that effectively shifts the agency's unconditional statutory burden to the parents where the agency failed to fulfill their duty. (*Id.* at p. 206.)

CSAC claims *A.R.* provided no guidance concerning what the rule should be in cases where some, but not all, of the available parents and extended family member had been

interviewed about Indian ancestry. (AB 19-20.) In the very next case published by the Fourth District Court of Appeal, Division Three on this same issue, *In re E.V.*, *supra,* 80 Cal.App.5th 691, that Court did provide guidance on CSAC's question. In *E.V.*, the agency asked mother, but not father, because he was incarcerated, about Indian ancestry. (*Id.* at p. 694.) Mother signed an ICWA-020 form, indicating no reason to believe the child was or may be an Indian child. (*Ibid.*) *E.V.* explained that court previously held in *A.R.* a "clear rule of reversal" was required because the ICWA rules were not followed by the agency. (*Id.* at p. 698.) Although *A.R.* and *E.V.* did not find the ICWA errors were of a federal constitutional dimension, the same result occurred.

E. CSAC Requests This Court Rewrite the Statute.

CSAC requests this Court rewrite the statute and switch the burden to appointed appellate counsel to investigate Indian heritage arguing, the parents will have the "best information" about the child's Indian ancestry. (AB 13, 22, 41, 44.) Courts may not insert what the legislature has omitted. (Code Civ. Proc., § 1858, *Tropman v. Valverde* (2007) 40 Cal.4th 1121, 1135, fn. 10.) There is no basis for this assertion. The parents may be homeless, substance abusers or mentally ill, and, therefore, are incapable of providing Indian ancestry information. They may be incarcerated and unable to contact extended family members, who may not want to have any communication with the parent. They are not providing a "misleading" response to the agency's questions about Indian ancestry when they respond there is no

Indian ancestry in their family *that they know of*. (AB 41; 1CT 116.) May be the parents does not know, or it is a subject that has never been discussed. The parents may not have a relationship with their extended family members, so they may be unaware of their Indian heritage. (See *In re T.G.* (2020) 58 Cal.App.5th 275, 294 ["over time, Indian families, particularly those living in major urban center . . . may well have lost the ability to convey accurate information regarding their tribal status"]. Some parents in dependency cases do not know their own ancestry. In *In re S.R.* (2021) 64 Cal.App.5th 303, the parent had no idea the children's great grandmother was a member of the Yaqui tribe. (*Id.* at p. 314.)

As explained in *In re G.H.*,

> Parents or other relatives may have a less than favorable relationship with each other, or may be less interested in or committed to federal and state policies of protecting the continued existence and integrity of tribes—even perhaps viewing potential tribal involvement consciously or unconsciously as a source of competition for custody. (See § 366.26, subd. (b)(1).) But "the right at issue in the ICWA context is as much an Indian tribe's right to 'a determination' of a child's Indian status as it is a right of any sort of favorable outcome for the litigants already in a dependency case." (*Benjamin M., supra*, 70 Cal.App.5th at p. 743.) ICWA and related state law therefore ""recognize[] that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents"" and other relatives. (*Isaiah W., supra*, 1 Cal.5th at p. 9.) That interest is compromised when the social service agency and the juvenile court fail to perform their inquiry duties.

(*In re G.H.* (2022) 84 Cal.App.5th 15, 31.)

Furthermore, the approach set forth in *Dezi C.* puts a

parent's appellate counsel in a precarious ethical dilemma. In some instances, one parent does not appeal. *Dezi C.* requires a parent's appellate counsel to contact the unrepresented parent and discuss substantive issue of the appeal, which may be a violation of California Rules of Professional Conduct, rules 4.2(a) and 4.3(a), (b).[2] Moreover, confidentiality laws in dependency case are to protect the child. Welfare and Institutions Code, section

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[2] "In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer." (Cal. Rules of Prof'l Conduct, Rule 4.2(a).) Rule 4.3 provides:

> (a) In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person incorrectly believes the lawyer is disinterested in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. If the lawyer knows or reasonably should know that the interests of the unrepresented person are in conflict with the interests of the client, the lawyer shall not give legal advice to that person, except that the lawyer may, but is not required to, advise the person to secure counsel.
>
> (b) In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

224.2, subd. (b) allows the social worker to discuss the case with various individuals for the purpose of ICWA inquiry, but the Legislature has not extended that to appointed appellate counsel.

Moreover, CSAC's' and *Dezi C.*'s assumption that parents will know their Indian ancestry flies is face of the deplorable history that the ICWA and California law was designed to remedy. Had the Legislature wanted the parents to have the post-judgment burden of investigating Indian ancestry, it would have written that into the statute. It did not do so.

CSAC asserts a parent may bring information before the reviewing court if the parent learns of Indian heritage after a final judgment. (AB 20.) There is no provision in the statutory scheme allowing a parent, who is now unrepresented by trial counsel, to contact the juvenile court or the court of appeal after a final judgment and bring that information to the courts' attention. CSAC has put forth no legal mechanism for a parent to do that if the parents has not timely filed a notice of appeal. Even on appeal, a parent's proffer concerning Indian ancestry is contrary to *In re Zeth S.* (2003) 31 Cal.4th 396, 407. (See AOBM pp. 47-48; CADC AB pp. 12-24.)

Concerning *In re K.H.*, supra, 84 Cal.App.5th 566, CSAC properly stated that *K.H.* reversed, not because of the reversible per se approach but because it found a miscarriage of justice based on an underdeveloped record. (AB 21.) What CSAC ignores is that the appellate record was underdeveloped because the agency failed to make the required inquiries. (*Id.* at pp. 591-594.) CSAC claims *Dezi C.* resolves any problem with an

underdeveloped record, because a parent can make a proffer. (AB 21.)

Again, *Dezi C.*'s proposed procedure switches the burden to the parents to investigate potential Indian ancestry. More importantly, this procedure allows the agency to ignore the mandates of the statute and not ask the parents or extended family during the dependency proceedings about Indian ancestry, and then leave it to a parent's appointed appellate counsel to carry out a belated investigation. As discussed in California Appellate Defense Counsel's Amicus Brief ("CADC"), *Dezi C.*'s solution to correct the agency's failure to comply with the statutes is based on faulty logic and places the parent's appointed appellate counsel in a legally and ethically precarious position. (CADC AB 12-41.)

CSAC then contradicts its argument about parent's counsel's duty to investigate ICWA, arguing a proffer on appeal is not required to show prejudice because a parent is only required to show that the appellate record provides a reason to believe the child may be an Indian child. (AB 23.) CSAC does not explain this. *Dezi C.* requires appellant to provide information suggesting a reason to believe that the children at issue may be "Indian children," in which case further inquiry may lead to a different ICWA finding by the juvenile court." (*In re Dezi C.* (2022) 79 Cal.App.5th 756, 774.) Would it be sufficient to trigger an reversal and remand if appellate counsel files a declaration stating, basically, "I spoke to mother's uncle, Jim, who told me his father was a Cherokee." How much is "enough" to trigger

remand? These factual questions should be resolved in the juvenile court, not in the appellate court.

CSAC provides no information concerning how a parent is to bring forth information they learn about their family's potential Indian ancestry on appeal. (AB 28.) When is appellate counsel to bring forth this information? Before the opening brief is filed? Anytime before the opinion is filed? Anytime before the remitittur? The vagueness of the claim demonstrates its weakness.

CSAC argues the parent's approach of reversal per se fails to consider the child's welfare. (AB 28.) ICWA presumes the child's welfare is advanced by maintaining connections to the tribe. (*In re J.C., supra,* 77 Cal.App. 5the at p.76-77.) It is the agency which does not consider the child's welfare by failing to make a sufficient initial inquiry of the parents and the extended family members, allowing the juvenile court to terminate parental rights, and then when the case is appealed, an ICWA inquiry defect is discovered. This would not be an issue if the agency did it job.

II. The Reversal Per Se Standard Is Authorized by the Statutory Scheme.

CSAC contends the statutory scheme does not authorize the reversal per se standard. CSAC is wrong. (See, ante pp. 9-10.) Appellant has provided numerous cases in which the reversal per se standard has been applied to dependency cases. Presumably, if the counties involved believed the remedy was unauthorized, they would have petitioned this Court for review.

As for CSAC's assertion concerning the 2016 regulation (AB 40), this case is not about that regulation, but an examination of a California statute, section 224.2, subdivision (b), and particularly, the correct rule of prejudice to apply.

Supporting its argument that the agency is not required to ask the extended relatives about potential Indian ancestry, and should not be held responsible for failing to do so, CSAC claims the statute does not demand strict compliance, only substantial compliance. (CB 39.) What CSAC actually is advocating is "no compliance." Continuing, it argues a juvenile court's "ICWA does not apply finding" is premised on a finding the agency conducted a proper and adequate further inquiry and due diligence, asserting there still is "due diligence" even if the agency did not inquire all the "recommended sources." (AB 39.) That is circular reasoning. The issue here is what to do if the juvenile court's finding is unsupported

CSAC asserts it is impractical and impossible for the agency to inquire each entity named in the statute (AB 42), citing Justice Baker's dissent in *In re A.C.* (2022) 86 Cal.App.5th 130, concerning the statute's language "others who have an interest in the child." That argument should be made to the Legislature if CSAC wants to limit an agency's scope of inquiry.

Importantly, CSAC is trying to get this Court to limit its duty to ask the parents *only* about potential Indian ancestry, and then apply the harmless error standard when the agency fails to ask the parents. This would essentially eliminate the duty of inquiry completely.

Furthermore, DCFS did not petition this Court, requesting it limit its duty of inquiry under the statute, or limit whom it is required to inquire of about the child's potential ancestry which is the gist of CSAC's brief. (AB 43-45.) That question is not before this Court. (Cal. Rules of Court, rule 8.500(a)(2).) The issue here is is what constitutes reversible error when the child welfare agency fails to make the statutorily required inquiry concerning the child's potential Indian ancestry.

CONCLUSION

When a child welfare agency fails to make the statutorily required inquiry concerning the child's potential Indian ancestry, that error is structural, requiring reversal per se. It is the child welfare agency that engages is *gamesmanship* which *delays* the dependent child's permanency. (AB 12, 41.) A lesser standard as set forth in *Dezi C.*, rewrites the statute, shifting the burden of inquiry to the parents to show prejudice. (AB 41-46.) The *Dezi C.* standard does not protect the tribe's rights. (AB 28.) CSAC contends the tribes rights are protected, if, on appeal, "the parent" "suggests the children . . . may be Indian children." (AB 28.) *Dezi C.* makes the enforcement of the *tribe's* right dependent on the diligence of first trial counsel and then appellate counsel. This is contrary to the legislative scheme placing the burden on the juvenile court and the agencies. CSAC's efforts to gut the protections of the ICWA should be rejected.

Respectfully submitted

Dated: April 6, 2023

/s/ Karen J. Dodd
/s/ John L. Dodd
Karen J. Dodd, Esq., & John L. Dodd, Esq.
Counsel for Appellant and Petitioner, A.A.

CERTIFICATE OF WORD COUNT

I, Karen J. Dodd, counsel for appellant, certify that the foregoing brief complies with California Rules of Court and contains 4,529 words, including footnotes, but excluding table and signature lines, according the word count of the computer program used to prepare this brief. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: April 6, 2023 /s/ Karen J. Dodd

Karen J. Dodd, Attorney for Appellant

PROOF OF SERVICE

I am, and was at the time of the service of this declaration, over the age of 18 years and am not a party to this cause. My electronic service address is jdodd@appellate-law.com and my business address is 17621 Irvine Blvd., Ste. 200, Tustin, CA 92780. On April 6, 2023, I served the persons and/or entities listed below by the method checked. For those marked "Served Electronically," I transmitted a PDF version of the **Appellant's Response to Amicus Curiae California State Association of Counties** by TrueFiling Electronic service or by e-mail to the e-mail service address(es) provided below. For those marked "Served by Mail," I enclosed a copy of the document identified above in an envelope or envelopes, addressed as provided below, and placed the envelope(s) for collection and mailing on the date and at the place show below, following the my office's ordinary business practices. I am readily familiar with this business practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in sealed envelope(s) with postage fully prepaid.

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14. A.A. (address omitted)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 6th day of April, 2023, at Tustin, California.

/s/ Karen J. Dodd
Karen J. Dodd

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **IN RE DEZI C.**
Case Number: **S275578**
Lower Court Case Number: **B317935**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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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.

4/6/2023

Date

/s/John Dodd

Signature

Dodd, Karen (146661)

Last Name, First Name (PNum)

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